

## **MEDIATION : Frequently Asked Questions**

### **What is mediation?**

The objective of mediation is for neutral, independent mediators to assist the parties to negotiate a settlement themselves which meets the interests of each party.

Mediation is

- a private and voluntary process of assisted negotiation;
- informal;
- flexible
- a chance for parties to consider the future in addition to past events and present circumstances;
- an opportunity for discussions on a without prejudice and confidential basis;
- an opportunity for more creative solutions than the remedies available in conventional court actions;
- not binding unless and until a settlement has been achieved;
- demanding on the parties and the mediator.

### **Who are mediators and what is their role?**

Catalyst Mediation usually provide two mediators who are experienced business and professional people who have received training and accreditation from one of the bodies promoting the use of mediation.

They:

- are neutral and independent;
- will have no vested interest in the outcome of the matter;
- will not impose a settlement or pass judgment;
- are only interested in helping the parties reach a mutually acceptable solution;
- identify the common ground and help to build on the points on which the parties agree;
- maintain the momentum towards a solution so that, as each side adopts a more positive view, resolution becomes the aim of the parties.

The mediator's skill is to get each side to communicate with the other to:

- clarify the problem and the path toward resolution;
- communicate with each other more effectively;
- identify and acknowledge each other's needs and interests;
- broaden the search for options;
- reduce tension and anxiety;
- move toward improved relationships;
- make informed, considered and balanced decisions;
- formulate and commit to an agreement.

### **Why should I consider using mediation?**

Parties often lose control over a commercial dispute, which can easily become a long drawn out legal battle, sometimes without a good idea of the time and cost implications.

These can involve substantial lawyers' fees, fees for experts, the use of considerable management time and irreparable loss of goodwill between the parties. Parties often find that the final decision is made either by the lawyers involved in a last minute deal or by the courts – so the outcome is usually uncertain and often unsatisfactory. Mediation gives parties much more control over the way their dispute is dealt with and over the outcome.

### **What are the benefits?**

- From the start of the mediation process, resolution can be achieved in days or weeks rather than months or years;
- Mediation can get to the issues which contributed to the creation of the dispute;
- There is greater satisfaction with the results - the parties control the process;
- The costs are lower;
- Management time is better employed;
- Business relationships are preserved;
- Confidentiality is preserved;
- Various options to achieve the resolution can be explored and tested;
- The procedure is flexible and the dispute does not drift;
- It is actively managed by the parties;
- The parties are more likely to abide by the solution since they design and agree to it.

### **When can I use mediation?**

At any time – whether or not court proceedings are in progress - when both parties genuinely want to see an end to the dispute or to ineffective negotiations.

It may not be appropriate where

- the other party has no genuine interest in settlement;
- a party wishes to establish legal precedent or the case to be heard in public;
- an interim interdict to preserve the rights of a party is required;
- legal action is needed to get the other party to the negotiating table.

### **Why should mediation work where negotiation has failed?**

Negotiation can be confrontational. Parties and their representatives seek to do the best they can from their own perspective, often in an emotional environment.

The mediation process:

- is informal and voluntary, so the parties will have arrived wanting to reach a settlement, however sceptical they are about the possibility of doing so, because they know that the alternative could be drawn out and expensive;
- Provides an opportunity to consider the future in addition to past events and present circumstances;
- Provides greater scope for solutions than the remedies available in conventional court proceedings. Often, the result is much more creative than parties would have contemplated.

The mediators:

- can help to introduce objectivity and help the parties to view each other as collaborators in a problem solving exercise;
- are in a unique position to help the parties to find ways in which they can satisfy their needs and help them to devise an agreement to resolve their dispute.

### **How do you convince the person you disagree with to participate?**

Not everyone will immediately agree to participate in a mediation. They may need more information about how the process works and whether it meets their needs. They may also need some time to realize the cost and time involved in taking the dispute to court. Emotions are often highly charged.

People may be angry or so intent on proving the other "wrong" that nothing other than having their day in court will appeal to them.

Sometimes, merely waiting a few days or weeks can make a difference and parties may be more willing to discuss the options more calmly and openly.

If you need help to contact the other party to explain the advantages of using mediation, consider consulting Catalyst Mediation. We are trained to act as an impartial outsider to assist you. We can make a presentation on the benefits of mediation and answer any questions about the process. Remember, even if the other party insists on going to court, mediation can be used at any time - even after a court action is under way.

### **Does the suggestion of mediation to the other side display negotiating weakness?**

No. It is simply a common sense way of saying to the other party "let's talk about this and see if we can resolve the dispute in a way that meets our respective needs and avoids the delay, expense and aggravation associated with traditional methods".

Indeed, it can be interpreted as a sign of strength, where the party proposing it is seen as being prepared to discuss the case (albeit in confidence) with a view to conducting professional negotiations in the presence of a neutral third party.

### **Is a Mediation Settlement binding?**

During the final stage of the Mediation, the parties are encouraged to come to agreement on the way forward and to formulate a plan of action. If and when a settlement is agreed, the parties will sign a settlement document detailing the agreed solution. Only when this document is signed is the mediation binding.

If the case does not settle, the mediator may continue to be involved in any further discussions, if the parties wish.

### **How long does the mediation process take?**

A mediation normally takes a few weeks to set up and a day to complete. However the length and number of meetings in the Mediation process can vary according to the needs of the parties.

### **Can I leave a mediation at any time?**

Either party can walk away at any time if the process of mediation is not working. Nonetheless, even if an attempt at mediation fails initially, it can be retained as an option at any stage of a dispute. Often, mediation unlocks the dispute and enables the parties to proceed to their own settlement.

### **Does mediation preclude any other form of dispute resolution if it is not successful?**

Mediation does not preclude any other form of dispute resolution taking place if it is not successful.

### **What does "without prejudice" mean?**

It means the parties can put forward written or verbal proposals without fear they could be used in the future, especially if the mediation fails and there is a subsequent legal action.

### **Who pays?**

Unless the parties agree between themselves otherwise, the costs of the mediation are payable equally between the parties.

### **Do I need a solicitor present?**

Most parties do employ a solicitor, although this is not necessary. If you do bring your solicitor, they are there as part of your negotiating team and to give you legal advice on any resolution terms that are discussed. They should not view a mediation as a court hearing.

## **What happens during the mediation process?**

### **Before the mediation day**

A Catalyst Mediation executive will contact each of the parties. This gives them the opportunity to:

- talk about their respective experience of the conflict situation;
- learn about the Mediation process;
- Discuss the Agreement to Mediate that governs aspects such as time and place of the mediation, confidentiality, the authority of those present to settle, how the final agreement is to be written up on the day.

The parties then will need to prepare, focussing on their interests and needs (rather than their rights and wants) and have written down the key elements of the dispute, with any documents supporting their case. These written documents should be exchanged between the parties. Remember they are confidential.

### **On the mediation day**

At the start of the day the mediators will:

- explain the process and ground rules regarding confidentiality and respectful behaviour;
- ask all present to sign the Agreement to Mediate;
- establish their role in the process as a facilitator;
- answer any questions about the Mediation process.

Then the parties will each have the opportunity to explain to each other about their respective points of view and reactions to the conflict.

If this leads to a positive discussion, the mediator may decide that there is benefit to be gained from maintaining the joint meeting either throughout the day or at certain stages.

Alternatively, the mediator may suggest a number of meetings in private with each of the parties. The mediator is thus able to explore, in confidence, the issues and assist each party to re-assess its prospects in the case in the light of a greater understanding of each party's position.

During these private or combined discussions, the mediators:

- facilitate communication and bring a sharper focus to the real issues and needs of the parties;
- help the parties to clarify the underlying issues and to brainstorm and identify possible solutions.

The closer the parties are to agreeing issues, the more likely the mediators will be to encourage joint meetings to make communication between them easier.

## **Any other questions?**

If you have any other questions please contact Jeremy Scuse or David Semple by phone, email or letter at the address below.

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