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Dispute Resolution Guide

mediation and ADR

Alternative Dispute Resolution, or "ADR", is a way of resolving a dispute without recourse to litigation or arbitration. ADR, and in particular mediation, has developed significantly in the past 10 years. This is due in part to the efforts of bodies such as the Centre for Effective Dispute Resolution (CEDR) and the ADR Group who seek to heighten awareness of ADR. In addition, the civil justice system itself, through the Civil Procedure Rules, encourages mediation at an early stage in the litigation process.

Organisations such as CEDR have seen a significant increase in the number of commercial disputes being resolved by mediation with one in four cases reaching the courts now being referred. In a commercial matter, after the statements of case are served, the court will offer the opportunity of a stay of proceedings to facilitate mediation. The commercial court has been known to order the parties to try mediation. A failure to accept an offer to mediate without good reason may mean that a party risks being penalised in costs by the court, irrespective of whether the case is eventually lost or won.

Recent cases highlight the importance of the following issues:

- if the unsuccessful party can establish that the successful party acted unreasonably in not agreeing to ADR, he may be awarded some or all of his costs and the successful party may be deprived of some or all of his costs despite having won the action [Halsey v Milton Keynes NHS Trust];
- the courts take a dim view and impose hefty costs consequences if one of the parties reneges on an agreement to mediate [Leicester Circuits Ltd v Coates Brothers PLC];
- a party should make their offer to mediate in open correspondence or in a letter marked "without prejudice save as to costs" if they wish this evidence to be adduced in court [Reed Executive Plc and Reed Solutions Plc v Reed Business Information Ltd].

Whether or not ADR is appropriate for you is largely fact dependent but ADR does need to be considered seriously in all cases.

Litigation and mediation are not mutually exclusive methods of resolving a dispute. At any stage of litigation the parties may seek to mediate, having obtained such information as they need through the litigation process. The nature of your claim may warrant that an approach be made to the other side to mediate even before proceedings are issued, or you may receive such an offer to mediate or resolve your dispute by some other form of ADR.

This note explains the various forms of ADR that are generally available. As mediation is the most popular form of ADR we concentrate on that process, setting out:

- the structure of a mediation session.
- how to approach it.
- the advantages and disadvantages of mediation.

The ADR process is an elaborate but well used one for which there is a huge amount of information. You will find the following useful sources of information:
www.cedr.co.uk
www.nationalmediationhelpline.com
www.adrgroup.co.uk
www.dca.gov.uk
www.citydisputespanel.org
www.adrchambers.com

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Forms of ADR

There are a number of methods which have become popular.

- **Conciliation**
  Used mostly in the employment field, this process uses an independent third party to encourage negotiations between disputing parties.

- **Executive Tribunal**
  This is a voluntary procedure allowing both parties to a dispute to present their case before senior representatives or executives from each party, together with a neutral chairman who may be a mediator or an expert. Thereafter, the tribunal meets to negotiate settlement on a realistic basis. It is sometimes referred to as the "mini trial".

- **Early Neutral Evaluation**
  A neutral person is instructed by both sides to evaluate the dispute and offer an opinion. The opinion will be a non-binding view of the merits of each side's case, which is used to advance settlement negotiations.

- **Adjudication/Expert Determination**
  Submissions are made to a chosen expert in the field for a decision, which binds both parties. This is commonly used in the construction field, adjudication clauses now being compulsory in construction contracts. Under the Housing Grants, Construction and Regeneration Act 1996, parties to a construction contract entered into after 1 May 1998 may submit a dispute to an adjudicator who can make a quick decision which is binding on the parties until overturned by a court or arbitrator.

- **Mediation**
  This is a voluntary, private and non-binding process in which a neutral person (the mediator) assists the parties to reach a negotiated settlement. The mediator's role is more pro active than that of a conciliator but a mediator does not have power to make any decision or award.

Benefits of mediation

- **Control**
  Resolving a dispute in this way means that parties always control the outcome. A mediator cannot impose a decision unless agreement is reached and signed off at the conclusion of the mediation.

- **Management Tool**
  Being informal, flexible and providing the possibility of an early resolution, mediation is much more suitable in situations where the parties want to preserve a commercial relationship.

- **Flexibility.**
  A mediation can be set up quickly and in any location of the parties' choosing. Discussions need not only relate to the matters in dispute, but can encompass any aspect of the business relationship between the parties. A mediator is able to recognise and promote common interests beyond the immediate issues of the dispute, to the mutual advantage of the parties. It thereby preserves commercial relationships and business confidentiality.

- **Confidentiality**
  The mediation agreement generally provides that the process is confidential and discussions are conducted on a without prejudice basis. Conversely, litigation can often attract unwelcome publicity.

In short, a mediator can help craft a settlement based on principled negotiations using multiple options and objective criteria, avoiding any previous history of distrust or positional bargaining.

Costs of mediation

The mediator's fees are generally charged on a sliding scale depending on the sum in dispute. For claims up to £1 million, the mediation charges are approximately £1,800 per day which includes the mediator's preparation time. For more complex claims mediators tend to charge an hourly rate which can be anything between £250-400. There are no fixed rules, but generally these fees are shared equally between the parties.

Structure of a mediation session

A mediation does not involve a series of ad hoc negotiations. It is a structured process. Notwithstanding the best efforts of solicitors acting on behalf of disputants in an adversarial system, they never have the opportunity to evaluate the problem in the same way as a third party neutral.

The mediator will control the negotiations by a series of meetings with the parties both jointly and individually, at his discretion.

- **Case summaries**
  These are prepared by each party and are sent to the mediator before the mediation. He may also make contact with the parties' solicitors for clarification so that he is fully aware of the issues.

- **Opening Session**
  The mediation will begin with an open session with both parties present. The mediator gives an introductory talk explaining the process and his role. The parties then have an opportunity to make a statement presenting the main elements of their case. This opening statement may be made by one of the parties to the dispute or his/her solicitor.

- **Shuttle Diplomacy**
  The parties retire to separate rooms and are seen by the mediator in a series of private meetings with a view to clarifying the issues and identifying options for settlement.

- **Private Meetings**
  All meetings held in private with a mediator are entirely confidential. No information is passed on without the specific consent of the party providing it.

- **Joint Sessions**
  From time to time the mediator may bring the parties together if appropriate, either to expedite negotiations and allow the parties to deal directly with each other or to finalise a possible settlement.

Getting the best out of mediation

Mediation does not involve any cross-examination or presentation of evidence so preparation is less time consuming and expensive. However, each party needs to have a clear idea of what it wants to achieve during the course of the mediation. Mediations begin slowly, generally with the parties putting their case at its best and impressing the mediator with their legal position. However, the private sessions generally become less formal and more productive as the day wears on. To be properly prepared and get the best out of the mediation you should:

- Gather all the information that you need, including all expert evidence, and counsel's opinions.

- Make sure you have full authority to settle.

- Make sure all the facts of the case are known and all the witnesses have been seen and assessed as to how well they will perform in giving evidence.

- Make a list of the strengths and weaknesses of your case.

- Identify any legal issues and obtain such analysis as you need before the mediation.

- Send the mediator a sufficient amount of information in advance so that he is clear on the issues. Arange to meet the mediator beforehand if you think it necessary.

- Work out your tactics. Consider what information you will not want to disclose to the other side.

- Set out a list of the difficult questions that you may want the mediator to ask the other side.

- How can you use the mediator to your advantage? He can be a devil's advocate, a problem solver or a source of new ideas and approaches.

- Prepare an evaluation of the best possible outcome of a trial, as compare to the worst possible outcome. This will help you to be realistic about what you want to achieve. Just as importantly, you will need to decide how you can persuade the other side that you are being realistic. To do this, avoid emotive language unless you sincerely have a problem on any particular issue.

- Avoid being too specific in your

demands especially early on in the process. Keep an open mind and be ready to explore new ideas.

- Prepare your opening statement with these matters in mind. Be clear about what you want to achieve and who is going to make the statement. Often it may be beneficial for the client to have an active participation in the mediation and to make the opening statement. It may be the first opportunity that the parties have to meet face to face. Getting to know the personalities involved is part of the educative process and may be useful if the mediation fails to achieve a settlement on the day.

- Arrive on time so that you are focussed and sending the right signals to the other side and be prepared to stay late as mediations often go on into the night.

- Avoid brinkmanship and be persistent. Many mediations go through low points but often a turning point can be achieved.

- Mediation can be used alongside litigation. Consider at what stage mediation should be attempted.

If a mediation does not lead to a settlement, do not despair. Often the mediation can be re-convened at a later date if both parties agree, or the parties are able to negotiate a settlement soon after.

The disadvantages of mediation

Not all cases are suitable for mediation. For example, mediation is not suitable:-

- Where there are no substanital issues in dispute, such as a straightforward debt claim where the debtor may have no genuine interest in settlement.

- Where one of the parties seeks to obtain publicity or a legal precedent.

- Where a protective court order is required.

- Where one of the parties is seeking to apply leverage.

We can help you assess what type of claim is suitable for mediation and what is not. Some parties may use mediation to delay the issue of proceedings and buy time. Others may seek to obtain information during the course of a mediation without any real desire to settle.

Who to Contact

Head of Dispute Resolution and Litigation (London Office) John Magnin

Specialist Groups

Arbitration	Ian Meredith	imeredith@klng.com
Banking & Pensions Disputes	Anne McCarthy	amccarthy@klng.com
Construction Disputes	James Hudson	jhudson@klng.com
Commercial Disputes	John Magnin	jmagnin@klng.com
Elections	Piers Coleman	pcoleman@klng.com
Employment Disputes	Paul Callegari	pcallegari@klng.com
Insolvency Disputes	Antony Griffiths	agriffiths@klng.com
Insurance Coverage Disputes	Jane Harte-Lovelace	jharte-lovelace@klng.com
Intellectual Property Disputes	Dominic Bray	dbray@klng.com
Property Disputes	Jane Harte-Lovelace	jharte-lovelace@klng.com
Securities Enforcement	Robert Hadley	rhadley@klng.com
Travel Disputes	Cynthia Barbor	cbarbor@klng.com
Sports Disputes	John Magnin	jmagnin@klng.com

Kirkpatrick & Lockhart Nicholson Graham LLP

110 Cannon Street
London EC4N 6AR
www.klng.com

T: +44 (0)20 7648 9000
F: +44 (0)20 7648 9001

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