



About Mediation

A Guide for Parties Considering and Preparing for Mediation

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Introduction to Mediation

Purpose

The objective of mediation is to enable the parties involved to find a solution to their dispute or at least a way forward in a difficult situation, so that further expense and use of time can be minimised, while achieving the certainty of resolution wherever possible. It is often very useful in cases where there are a variety of issues or difficult personal concerns, or legal or other complexities, which make straightforward negotiation between parties (or their professional advisers) more difficult.

The presence of the mediator can serve to direct parties' energies towards practical outcomes which may be beyond the more limited remedies available in a court, arbitration, tribunal or adjudication - or which are more difficult to achieve because conventional negotiations have become prolonged or stuck.

Mediation can be especially useful if there are a number of people or organisations involved.

Roles

Mediation gives parties (and wherever appropriate, their advisers) the opportunity to work with a skilled independent facilitator (the mediator). The mediator's role is to assist the parties in a dispute to find ways to address and resolve whatever differences they have.

A mediator helps the parties to communicate with each other, identify the key issues, discuss concerns and problems which have arisen and look at the options for moving forward and finding constructive solutions. He or she does not make a decision or issue any sort of judgment.

The parties are given the fullest opportunity to take part and to be involved in all aspects of the process. The role of lawyers and other advisers who may be involved is to support the process and assist their clients to make the best use of mediation.

How it Works

Meetings

Very often, mediation will take place on an agreed day with all parties meeting for negotiations in one venue, often an independent setting. The mediator may meet jointly with all concerned and will also conduct a series of private meetings with the parties, exploring the issues, concerns, objectives and various options and encouraging a frank assessment of strengths, weaknesses and alternative courses of action. This enables people to make an assessment of risks and to begin to work out possible solutions.

Generally, mediation does not involve a detailed forensic analysis of past events although learning from what has occurred may be an important element in moving forward. However, it may still be necessary to explain the details of any claimed losses for example, or steps which need to be taken to address perceived wrongs in the past. That is why good preparation is very important – see below.

Outcomes

Mediation usually produces a satisfactory outcome within one day. On some occasions a second day is helpful. Overall, the success rate is in the region of 80%. Even if a full resolution is not achieved, the issues are narrowed and parties will have a far better appreciation of the realities of their own and the other parties' positions. Usually satisfactory solutions can be found without admissions of legal liability or other findings which might make achieving a practical outcome difficult.

Flexibility

All mediation situations require an element of specific shaping for the particular circumstances of the matter in hand. Some benefit from a different approach to that described above. In these, rather than having one set-piece series of meetings on a single day, meetings can be held over a period of time in order to build the necessary understanding and framework for addressing the problem. This can often be beneficial when there is a need for further information to be gathered and perhaps external input on some crucial issues. This may also be useful when several parties are involved or when there is a need for reflection.

Big Picture

Nevertheless, it is important to bear in mind that the primary purpose of mediation is to find speedy solutions and ways forward which are, overall, in the personal, commercial and/or organisational interests of all concerned.

Some Key Points

- Mediation does not affect the parties' legal rights and whatever is discussed is entirely confidential unless the parties agree otherwise.
- The parties retain control over what information is conveyed to the other parties and the mediator will work with each party to find the best way to ensure clear communication about the main issues and concerns.
- Nothing said or done is binding on the parties unless they reach agreement. The parties are not bound to enter into any agreement or do anything they do not want to do. If parties are not happy with progress they can leave the mediation and proceed with other avenues. This is very rare.
- If a satisfactory outcome is achieved (and usually that is the result), that is usually expressed in a formal agreement which has the same effect as any other contract.

Prior to the Mediation Day

- Preparation is key. Core will help the parties to identify a suitable mediator and will discuss the mediator's terms of engagement, including fees, and help to identify a convenient date or dates and an appropriate venue.
- Very often, a meeting or telephone conversation will be held by the mediator with any professional advisers who are going to be involved in the mediation, or with the parties themselves. This will enable discussion of appropriate preparation, including summaries and other documents and identification of those who should participate. This, combined with regular contact with all concerned in the period before the mediation day, can significantly enhance the prospects of success.
- The parties (or their advisers) will be invited to provide a short written summary covering the main issues in the case as they see them, and attaching any particularly relevant other documents.
- The parties will sign a formal agreement which covers the confidentiality of the process and other matters (this may be done at the start of the mediation day). In less formal situations the parties may be asked to sign a letter covering these matters. Parties agree to proceed in good faith and to use their best endeavours to reach a solution.
- Advance preparation is a vital part of making best use of the day itself (see the questions contained in the Appendix).

- It is important that to ensure that the key decision-makers are present on the mediation day or, at least, that a clear line of communication to them is available.

On the Mediation Day

Meetings

Each party (and their advisers if present) have their own private room to which they will be shown on arrival. The mediator will usually meet privately with the parties and advisers in these rooms, for a short period. After these meetings, and if all agree, all those involved will usually gather in the mediator's room and the mediator will ensure that there is common understanding on how the day will proceed.

If appropriate, each party (and/or their advisers) will have the opportunity if they wish to make a short presentation on how they see things. The mediator will discuss this in advance and sometimes people elect not to do this, or not to meet jointly at this stage.

Usually, the mediator will then spend time with each party (and their advisers) in private meetings. What is discussed in these meetings remains private throughout unless parties specifically agree otherwise. This enables the mediator to explore the issues and concerns with the parties in a confidential setting.

Thereafter, the mediator will seek to help the parties to look towards possible solutions. It is possible (and often desirable and useful) for the parties (and/ or their advisers) to meet together jointly at any time, usually with the mediator present. The process is entirely flexible.

Occasionally, the parties do not wish to meet together at any stage and this can be accommodated with the mediator effectively shuttling between the parties throughout.

Agreement

When agreement is reached, a written contract is usually drawn up (this will be done by the parties' legal advisers, if present) and signed. In many mediations, this is done on the day and may be signed by all concerned, if parties are happy to proceed that way. In some situations, heads of agreement may be drafted and a full agreement finalised after time for reflection and for legal or other issues to be formalised. This may take a few days.

These contracts nearly always contain provisions maintaining the confidentiality of what has been agreed, subject if appropriate to any agreed exceptions.

Sometimes, it is not necessary to have such a formal agreement. An exchange of emails or letters may suffice.

If agreement is not reached, the mediator may summarise progress, adjourn the process and invite parties to consider what the next steps should be. This may involve a further mediation meeting or further negotiations. Very often a resolution is achieved after such time for reflection and further discussion.

Appendix

The mediator may often ask parties to prepare in advance or at the beginning of the mediation day by addressing some specific questions. These may include the following:

What are our overall objectives? What in particular are we seeking to achieve?

What do we have in common?

What is really in dispute?

What are our needs? What are our concerns?

What might the other side's needs be? Their concerns?

What do we think the other side need to hear from us? What might we say to the other side?

What are our strengths? What are our weaknesses? How do we support what we say?

If we do not reach agreement, what are the alternatives?

What costs have we incurred to date? If we do not reach agreement, what costs will we incur in future?

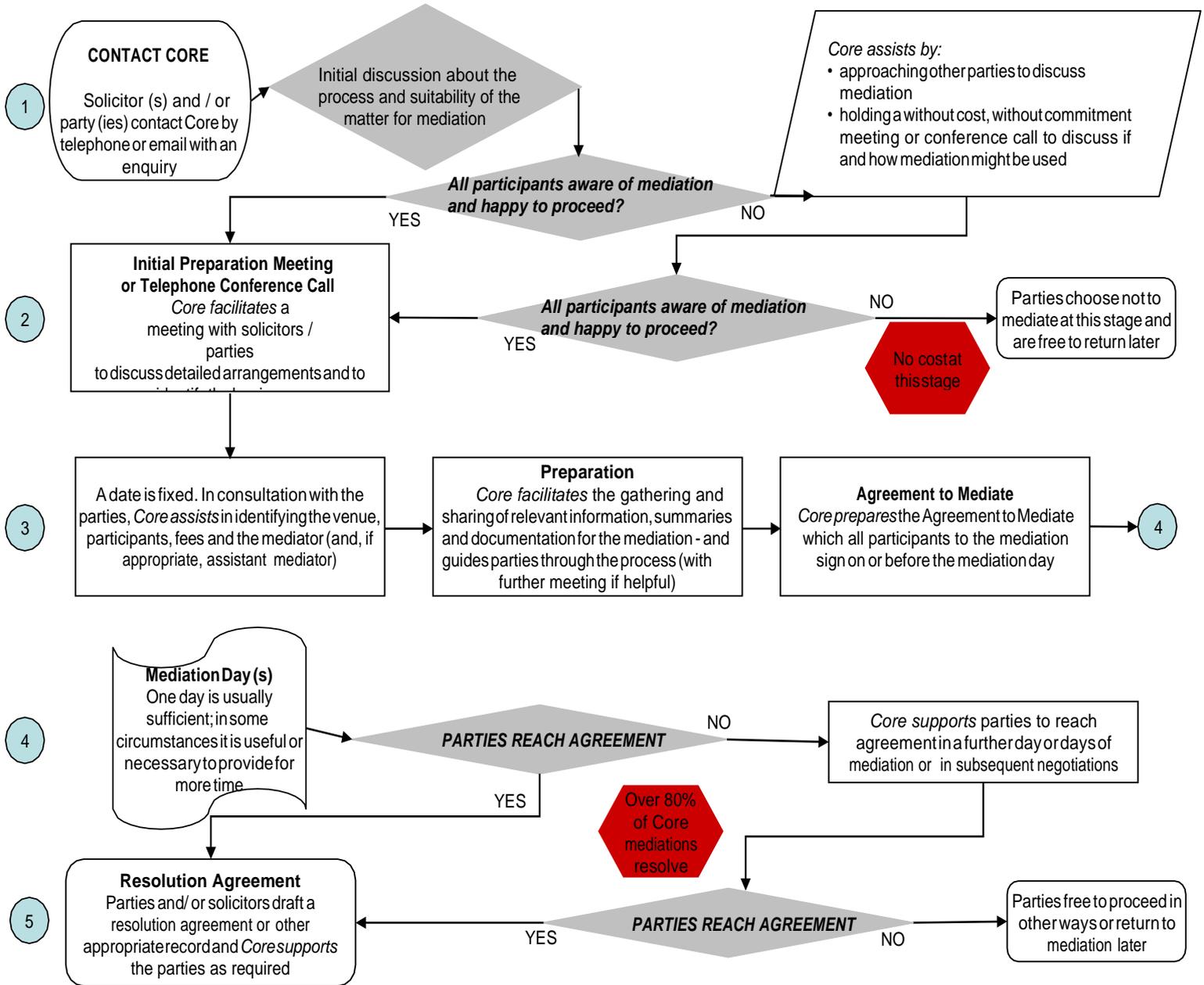
If we do not reach agreement, what other consequences will there be?

What are the realistic options for resolving this matter?

How will we assess any proposals put by the other side?

What proposals might we make? How?

How to Get Started





For a without commitment discussion or to begin the mediation process, contact our Business and Mediation Manager, Miriam Kennedy:

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