

## **GUIDANCE NOTES FOR PARTIES ENGAGING IN MEDIATION**

### **WHAT IS MEDIATION?**

- Mediation is a voluntary process in which parties to a dispute seek to resolve it with the assistance of an independent and impartial mediator.
- This may be done by means of the parties and the mediator meeting or communicating ‘remotely’, e.g. by phone.
- If the parties reach a resolution, it is usually set out in a written settlement agreement which is almost always legally binding in commercial disputes, but is sometimes just a voluntary record in personal disputes.
- The process is confidential and “without prejudice”, which means that nothing said or written at or in connection with the mediation can be used later in court (or arbitration), with the exception of a binding settlement agreement.

### **THE MEDIATOR’S ROLE**

- The mediator is not a judge (or arbitrator). He/she cannot make a binding decision on the dispute or impose a solution on the parties.
- Mediators’ approaches differ. Common threads, where there is a meeting, are:
  - Before the mediation, the mediator will often ask for written briefings from both parties about the dispute, so that he/she can start to understand it. Those briefings are often, by agreement, exchanged between the parties. Instead, or in addition, the mediator may speak with the parties prior to the mediation.
  - On the day of the mediation, the mediator will meet each party in private several times. What is discussed will remain confidential unless the party concerned asks or agrees that the other party be told of it, or parts of it.
  - If the parties are willing, the mediator may meet them together, at the beginning of the mediation and/or during the course of it.
  - The mediator will assist the parties to try to find common ground and, if possible, a resolution acceptable to them both.
  - If a resolution cannot be arrived at on the day of the mediation, the mediator may offer to contact the parties over the next few days to see if a resolution is possible.

## TIPS AND SUGGESTIONS

- First, congratulate yourself for having agreed to mediate. It shows that you and the other party have already been able to agree on something. It is a first step towards a resolution.
- It's your mediation. Having incurred mediation fees and set aside time to attend it, make the most of it. It could be the only opportunity you will have to resolve the dispute without going to court (or arbitration).
- Turn phones and other devices off during the private sessions with the mediator and any joint sessions with the other party.
- There will be gaps when the mediator is meeting the other party. Rather than using these times to catch up on emails etc., keep focussed on the mediation, thinking about what has been discussed and what you would like to say in the next session. If you have a lawyer representing you, this will be a time when he/she will review progress with you.
- Make sure that there are no outside distractions to worry you, such as deadlines in your private or professional life.
- Bring your own food, rather than relying on any provided. Most venues will have hot drinks and water, but if you like a particular type of tea or coffee, bring your own supplies. Getting hungry or thirsty may affect your outlook and decision making.
- You may well feel different emotions during the mediation: e.g. anxiety, irritation, anger, impatience and, hopefully, relief. The mediator is trained in working with such feelings. Even disputes that seem to be 'only' about money often involve emotional reactions.
- If there is a joint session between the mediator and the parties, each party will have the chance to speak. Try not to interrupt the other party whilst he/she is speaking. If at any point you feel you need a break, tell the mediator and the session will be suspended.
- If you are legally represented, you and your lawyer will decide how to conduct the joint session. However, it is helpful for the mediator to hear from the parties themselves and not just from their lawyers. The other party can also find that productive. It is all confidential.
- If a resolution is agreed in principle, it will usually need to be put in writing. If at all possible, the parties should agree and sign the settlement document before they leave the mediation venue. Parties who are not legally represented may ask the mediator for assistance in the drafting process. The mediator is not able to advise them, as he/she does not act for either of them, but may be willing to offer suggestions to them jointly.