

first choice or last resort?

What is mediation and when would you use a mediator? Jeffrey Rosenthal looks at the process of mediation and answers some frequently asked questions.

what is mediation?

Mediation is a confidential process whereby parties to a dispute invite a neutral individual to facilitate negotiations between them with a view to achieving a resolution.

It is a voluntary process that helps the parties to reach a binding agreement more effectively than by direct negotiation or by litigation and with less costs, less disruption to management time and often with better solutions.

why should I mediate?

If your negotiation leads to a conclusion with which you are happy then you do not need to mediate. However, negotiation sometimes end in deadlock. A mediation session can break that deadlock.

why should mediation work where negotiation has failed?

Negotiation tends to be confrontational but a mediator will try to shift the dynamics of the negotiations away from positional bargaining towards principled negotiation where the parties view each other as collaborators in a problem solving exercise. Also, negotiations are done through a mediator, introducing objectivity.

The discussions with the mediator are private meaning that the parties can share confidences with the mediator, revealing their true interests. The mediator, in this way, achieves a unique overview of the dispute and can help identify ways in which the parties can satisfy their needs.

is it a sign of weakness?

No, it is simply common sense. You're saying: 'let's see if we can resolve the dispute in a way

that satisfies our respective needs' and avoids the delay, expense and aggravation associated with traditional methods such as litigation and arbitration.

In mediation you have nothing to lose. If anyone is unhappy with the way it is going they can walk out. Nothing has to be revealed to the other side unless you want it to be. If mediation fails then you can turn, or return, to litigation or arbitration. The preparations that you or your professional advisers have done for the mediation will still be useful, although what happens during the mediation cannot be used in any subsequent court proceedings should the mediation not result in a settlement.

is mediation non-binding and, if so, what is the point of it?

Mediation is non-binding in the sense that entering into the process is voluntary, it involves no commitment to settle and the mediator has no power to impose a solution.

However, when a mediated agreement is reached, it is normal for the mediator to set down the terms of the agreement in writing. The parties then sign the written agreement with the intention that it becomes a legally binding contract.

do I need a professional adviser?

You can represent yourself, although many parties do employ a professional adviser, for example an expert and or a solicitor or barrister. However, if there is a relatively small sum in dispute the costs can be prohibitive, as they are not likely to be recovered from the other party.



what cases are suitable for mediation?

Any dispute is suitable for mediation provided the parties to it are willing to try. Experience shows that multi-party disputes are particularly suitable for mediation, perhaps because they are often complex and the cost of sorting them out through more traditional techniques can be fairly high. The process is also especially well suited to a dispute between parties that have a long-term relationship to protect. Some international and cross-border disputes have been found to be appropriate cases for mediation.



'negotiation sometimes end in deadlock. A mediation session can break that deadlock'

is that mediation can be conducted on a confidential basis, away from the glare of publicity.

when to mediate?

You will need to provide a short summary of the dispute and details of who is involved. You will be asked to prepare a brief written statement setting out the facts annexing any important documents. You will be asked to sign a mediation agreement that everything in the mediation is confidential.

The parties and their representatives sit together with the mediator who explains more about the process and how they intend to proceed. Each party or their representative will then explain their case, limited usually to a brief introduction. The mediator then talks privately with each party in separate rooms. The mediator continues to meet privately with each party or in further joint meetings until a settlement is reached.

Mediators will not tell you what to do, but will question entrenched negotiating positions, and may offer some guidance from their own experience. The case will only settle when and if the parties are satisfied that they have reached an acceptable settlement. Once the details of the settlement agreement are written down and signed by both parties in the presence of the mediator, it becomes a fully enforceable contract. ■

Jeffrey Rosenthal, accredited mediator

why does mediation work?

It is estimated that the mediation success rate exceeds 90%. It works because, unlike traditional methods, mediation provides an opportunity for the parties to work together constructively towards a settlement. It also offers the chance to bring into discussion elements quite outside the original dispute that can frequently lead to a resolution where both parties gain from the agreement.

Unlike litigation, business relationships are preserved or even strengthened. A further attractive feature of the procedure

ACCA CONCILIATION SERVICE

ACCA's Professional Conduct Department offers a Conciliation Service to help resolve complaints which are unlikely to lead to disciplinary action. There are three separate aspects of the service:

• Conciliation

ACCA's Conciliation Officer helps find a solution to the dispute which is acceptable to both parties. Conciliation is conducted mainly by telephone and is particularly useful where the complaint is urgent.

• Mediation and Arbitration

While fee disputes can often be resolved by ACCA's Conciliation Officer, most legal disputes are not suitable for conciliation. However, resolving them through the courts can be a costly and time-consuming process. Members and clients are therefore encouraged to explore alternatives.

The ACCA Mediation Scheme

Mediation is a more formal method of conciliation, whereby the mediator brokers a settlement during the course of a session attended by both parties. The parties are not obliged to accept the mediator's suggestions and can pull out of the process at any time.

The ACCA Arbitration Scheme

An arbitration is akin to a court procedure, in which the arbitrator's decision is legally binding upon the parties. A documents-only arbitration is the most cost-effective, but an arbitration can also be conducted by meetings or hearings. Both The ACCA Mediation Scheme and The ACCA Arbitration Scheme are administered independently by the Chartered Institute of Arbitrators.

How do I find out more?

The Guide to ACCA's Conciliation Service and the mediation and arbitration scheme documents can be downloaded from ACCA's website: www.accaglobal.com/members/professionalstandards/complaints/conciliationservice or obtained by calling 020 7059 5993.

If you would like ACCA to conciliate a dispute involving an ACCA member write to:

Conciliation Service
Professional Conduct Department
ACCA
29 Lincoln's Inn Fields
London WC2A 3EE