rapproche
empowering resolutions

Introduction to Dispute Mediation

WHAT IS MEDIATION?

Mediation is a process during which the parties to a dispute seek to settle it with the support, assistance and guidance of a neutral mediator. Experience suggests that the presence and skills of a mediator enable the participants to explore the strengths and weaknesses of their case as well as, even more importantly, their interests and needs. From this exploration participants can compare the costs and risks of continuing the dispute with the costs and risks of settling it once and for all.

Frequently the participants decide that the certainty of settlement, even if it is less favourable than what might be won in litigation, is preferable to the costs and risks of continuing. Above all, it frees those engaged in the dispute to concentrate their energies on what they would prefer to be doing - developing their business, continuing their lives - rather than being held back by the past. Mediation can rid you of your dispute much more quickly than waiting for litigation to run its course.

WHY USE MEDIATION?

Mediation is a great way of settling differences. Mediation gives power to the people really affected by the dispute – the parties to it. You can join with the other participants, recognise that you have a problem and design the settlement that best helps you all get out of it.

In contrast, litigation gives power to someone else, the judge, to decide just the narrow issues in the claim and any counterclaim in a stylised confrontation under rules that do not always seem aimed at getting a fair or just result. The judge can then make one of a very limited number of possible awards – typically that one party should pay some money to another.

KEYS TO MEDIATION

At Rapproche we believe there are several key elements that make mediation such a highly successful way of resolving disputes.

Confidentiality

Mediation is a confidential process carried out in private. The participants control the extent, if at all, that any information concerning the mediation or its outcome becomes public.

Even within the mediation there is confidentiality between each participant and the mediator. The fact that a participant can say things to the mediator that are confidential and not revealed to the other participants is critical to the process. It allows frank discussions to take place where the mediator can safely challenge the thinking of each participant. It also enables the mediator to nudge discussions in profitable directions so making it easier to find the settlement.

Without Prejudice

In addition, nothing said in a mediation can be relied on later between the parties in court if the mediation does not lead to a settlement.

Voluntary

You are not forced to come to a mediation. If you do so it is of your own free will and out of an intention to settle the dispute. And the same is true of the other participants – if they are there they also hope to settle the dispute.

Also you will not emerge from the mediation with a settlement that you cannot live with. There is no settlement if you do not agree to it. Of course this is also true for the other participants so you do need to understand that you may not reach a settlement – mediation is not a way of conclusively reaching a decision. The aim of mediation is to reach a settlement that all can live with. In contrast, litigation does eventually lead to a final decision – the problems are when, at what cost, is it predictable and will you be able to live with it?

Decision makers

While mediation is not a way of definitively reaching a decision, in order to maximise the chances of an agreement being reached another essential element is that decision makers come to mediation meetings. Rapproche will seek to ensure that someone represents each party at the mediation meeting who can personally sign off on whatever settlement is reached.

WHAT HAPPENS?

Mediations centre on a mediation meeting, usually lasting one day (but sometimes less or more), attended by all parties whose agreement is necessary to reach a settlement. Before the meeting Rapproche will make the logistical arrangements for the mediation and circulate the mediation agreement. The participants will prepare for the meeting and circulate documentation they would like the other participants, or just the mediator, to see. This does not need to be comprehensive – just enough so everyone, particularly the mediator, understands what you see the dispute as about. If it could also contain thoughts about how the dispute might be resolved, so much the better.

The meeting will take place at a venue that gives all parties room to meet privately as well as with the other participants.

Initially the mediator will meet with each party separately to hear their thoughts on the case and the process. Thereafter, if the mediator decides it would be appropriate and the parties agree, there is often a meeting at which each party has an opportunity to make a presentation on the strengths of their case. This presentation can also deal with what they feel about the situation and what they would like to get out of the mediation.

Remember mediators are not judges; you have no need to try to persuade them of the strength of your case. The real audience is the other participants. Show them how strongly you believe in your case and what a convincing witness you would make in court and you will make progress to a settlement.

Whether or not there is an all-party meting, participants would then often separate into private meetings to reflect on what they feel about what they have heard and seen. In any event the mediator will recommend how the mediation should proceed thereafter. Almost anything is possible, from renewed full meetings, to continued private meetings or, possibly, lawyer or client only meetings, depending on what the mediator and the participants feel would be most productive.

The final outcome is, we hope, a settlement agreement, first agreed in principle and then written up and signed before the end of the meeting. While some mediations do break off at the stage of in principle agreement, experience suggests that it is much better to document and sign the agreement while all decision makers are still available.

Even where in principle agreement is not reached, disputes can often settle after the end of the formal mediation meeting and our standard mediation agreement envisages the benefits of confidentiality and 'without prejudice' continuing until it is clear no agreement will be reached.

PREPARATION

It is essential to be well prepared to get the most out of the mediation meeting. This is a great chance to settle the dispute. Make sure you are ready for what proposals may emerge. Have ideas about what you are prepared to agree to and what you are not. Spend some time wondering what the other participants may be seeking to get out of the dispute and whether you have something they want which is more valuable to them than to you.

In particular think carefully about what your alternatives to agreeing a settlement at the mediation are. What are all the possible outcomes of the litigation – you win completely, they win completely and all possible mixes of win and loss on claim and counterclaim? What are the percentage likelihoods of these outcomes? From these evaluations you can look dispassionately at your true valuation of your position and weigh this against what you might agree at the mediation. And do not forget costs. Be aware of your costs to date, estimate, or ask your lawyer to estimate, your further costs up to trial. Wonder about the other party's costs and about what costs might be awarded to or against you in the case of the outcomes you looked at. Depending on the complexity of the legal issues raised you may feel the need to contemplate an appeal against the judge's decision

Above all come to the mediation with an open mind – you are in control and will almost certainly learn things that help you find a settlement.