 Centre for Effective Dispute Resolution

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AS Law Conference – an introduction to Mediation

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 Leeper's Lady





Old Lady/Young lady





What you see...

In any situation, what you see and what someone else sees, even while looking at exactly the same thing, can be completely different.



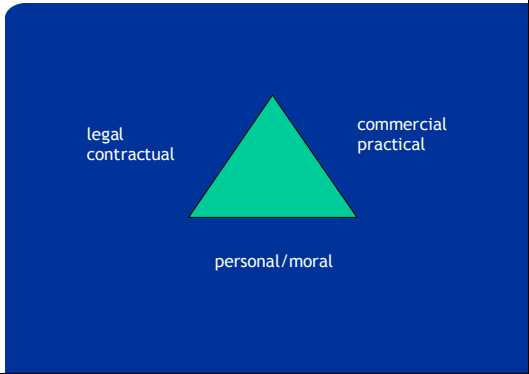
In relation to the law?

Civil law suits are often in the context of a contracted relationship between the parties.

Therefore the dispute is not necessarily about the legal "rights" and "wrongs", unlike the position in criminal matters.

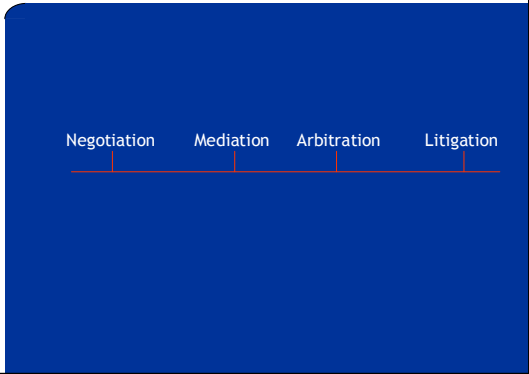


Elements to consider if attempting to resolve disputes





Dispute resolution spectrum





What is mediation?

Mediation is.....

a flexible process conducted confidentially in which a neutral person actively assists parties in working towards a negotiated agreement of a dispute or difference, with the parties in ultimate control of the decision to settle and the terms of resolution.



Litigation v Mediation

| Litigation | Mediation |
|------------------------|---------------------------|
| • adjudicative | • consensual |
| • compulsory / binding | • voluntary / non-binding |
| • rules | • models |
| • rights | • interests |
| • retrospective | • present / future |
| • lawyer-centred | • client-centred |
| • all or nothing | • range of options |
| • years | • weeks |



Legal basis of mediation

- May be court ordered
- May be contractually obligated
- Governed by the mediation agreement
- Confidential
- Without prejudice
- Binding settlement
 - contract
 - consent order



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The Civil Procedure Rules 1999

Part 26 - Rule 26.4(2)

- “Where
- all parties request a stay.....or
 - the Court, of its own initiative, considers that such a stay would be appropriate,the Court will direct that the proceedings be stayed for one month [to allow ADR to take place]”



CPR

The sting in the tail: costs

When deciding the amount of costs:

“The Court must have regard to -

- the conduct of all parties, including in particular -
 - the efforts made, if any, before and during the proceedings in order to try to resolve the dispute.”

Part 44 Rule 44.5 (3)(a)(ii)



CEDR

CEDR is an independent non-profit organisation:

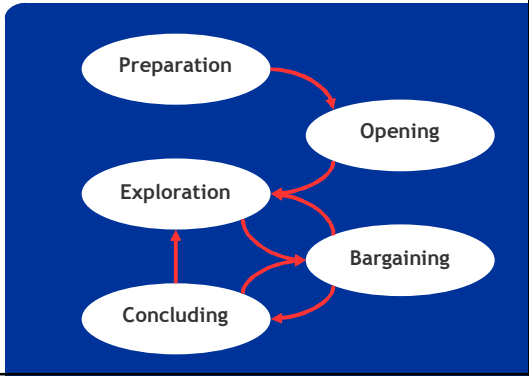
- founded in 1990
- developing effective dispute resolution
- training and mediator accreditation
- dispute resolution services
 - mediation
 - independent intervention
 - consultancy
- members, legal, professional, corporate



Phases of Mediation



Phases of a mediation





Opening

- Introductions
- Ground rules
 - confidentiality
 - without prejudice
 - authority to settle
- Parties' statements
 - often first time to present case face to face
- Agree agenda of issues



Exploration phase

- confidentiality
- mediator builds trust
- wider perspective
- what do you really want / need?
- flexible
- patient



Bargaining phase

- confidentiality
- avoid early commitment to solutions
- think of ways of adding value
- flexible / creative / take risks
- possibly focus on part of problem
- risk analysis / reality testing



Concluding phase of mediation

- The best settlement is the parties' not the mediator's
- The settlement should be viable and workable
- Put settlement in writing
- The settlement agreement should be complete in itself



Settlement agreement

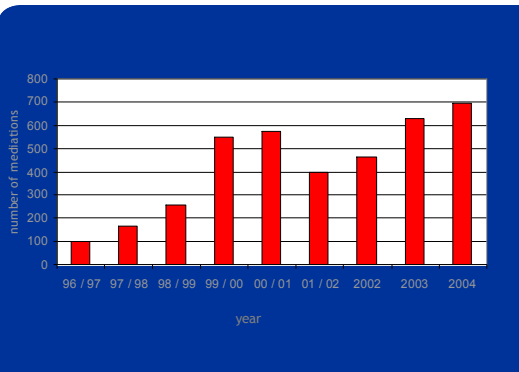
- usually drawn up by lawyers
- settlement agreement should be complete in itself
- may need Tomlin Order / Court Order
- binding once documented and signed
- if no settlement free to continue to negotiate, arbitrate or litigate.

Current use

Position in England and Wales today

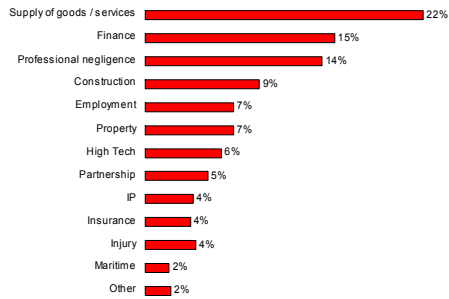
- family disputes - largest and longest standing user of mediation in UK
- commercial mediation probably 3000+ a year
- main providers - CEDR Solve, ADR Group, independents
- increasing use of ADR clauses in contracts
- fastest growing sector - employment and workplace

CEDR Solve mediations 1996 - 2004





Breakdown of caseload by sector





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Conclusion



Why mediate?

- ADR, particularly mediation, is becoming part of legal mainstream
- Process is informal, flexible, non-technical
- Parties have control of their own case
- Can deal with legal, commercial and personal matters
- Will gain understanding of other sides' case
- Will probably gain better understanding of your own case
- Mediator ensures balance between potentially unequal parties
- Almost always cheaper and faster than litigation



Why mediate?

From business perspective mediation can be a risk management tool

- legal position/litigation risk
- cost of litigation
- commercial reality
- personal imperatives
- management time
- reputational risk
- cost-effectiveness



Why mediate?

- Wide range of outcomes can be negotiated which the court would never reach
- Virtually risk free, a voluntary process
- No decision is forced on you
- Relationships can be preserved for the future
- Confidentiality preserves commercial knowledge
- Confidentiality preserves reputation



Why mediate?

- Around 75-80% of cases settle



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