BRICK COURT CHAMBERS

BARRISTERS

Mediation

Our mediators have established themselves as leaders in the rapidly developing world of commercial mediation both in the United Kingdom and internationally. They have conducted some 250 mediations in the last twelve months and have assisted in settling claims worth over five billion pounds.

The dedication of Tony Willis, William Wood QC, Stephen Ruttle QC and John Sturrock QC to mediation is reflected by their rankings in Band 1 of Chambers & Partners, and the presence of all four, together with Geoff Sharp, in the top ten of the International Who's Who of Commercial Mediation. 50% of the UK ranked mediators in the Who's Who Legal 2016 are from Brick Court. Tony Willis is the sole holder of the title Who's Who Legal Global Commercial Mediator of the Year being awarded the title, based on votes by peers and clients as well as feedback and research, in the five consecutive years since its inception.

In addition to conducting mediations in London, our mediators often work elsewhere in the UK and have worked in New York, Hong Kong, Dubai, Singapore, New Zealand, Trinidad, the Bahamas, Romania, Greece, Ireland, Belgium, Jersey and Guernsey.

Contact Kate Trott with any enquiries on 020 7520 9813 or email kate.trott@brickcourt.co.uk.

Stay up to date with the latest mediation news and tips by visiting the **Brick Court Chambers Mediation Blog.**

Further information about our mediators can be downloaded here,

A guide to mediation

Mediation is a process whereby a neutral third party spends, typically, a day with the parties to a dispute and tries to facilitate a settlement. The process is confidential. The mediator does not act as a judge or arbitrator. He expresses no views of his own as to the rights and wrongs of the dispute or the likely outcome of any litigation.

The mediators at Brick Court Chambers have undertaken thousands of mediations and have long experience of helping parties design and plan the process for maximum effectiveness.

These notes are for general guidance only. Do not hesitate to speak to Kate Trott in Chambers (tel. 020 7520 9813 or email kate.trott@brickcourt.co.uk) or to your Mediator for any comment or clarification you might need.

It is of the essence of Mediation that it is a flexible and adaptable process. The parties can design what they need in the particular circumstances of their dispute.

Please see the menu below for further information on the mediation process.

AGREEING A TIMETABLE

At the outset it is sensible to agree a mediation date and the timing and logistics for production of a core bundle and position papers. In this way everyone can work to an agreed timetable. Mediation should not usually interfere with or delay the underlying litigation or arbitration and parties often mediate while trial preparations continue.

One important consequence of fixing a mediation date is that the parties will thereafter be liable for a cancellation fee if the date is not used. The cancellation fee is set as a percentage of the mediator's daily fee, the percentage increasing as the date approaches.

CORE BUNDLE

The parties should try to agree the content of a bundle of core documents guided by the general principle that "less is more". So the bundle may contain Case Management Conference Case Memoranda, Statements of Case in the litigation or arbitration, protocol or other letters before action and the most important contemporaneous documents. If there have been Part 36 or similar offers, the Mediator should see these.

The Core Bundle is usually prepared by one party after the index has been agreed with the others and should ideally be forwarded to the Mediator even before the mediation position papers are exchanged. The Mediator would usually expect to have this bundle at least a week before the day of the mediation, longer in a more complex case.

INFORMATION REQUESTS

If there is any material a party needs to see before the Mediation (perhaps arising from an existing disclosure request) specific request should be made as soon as possible and the Mediator informed at that time. The Mediator has no power to order disclosure but may be able to assist in obtaining disclosure by agreement. It is as well to remember that excessive requests for information can be as damaging to a negotiation as unexplained reluctance to provide information.

MEDIATION POSITION PAPERS

The Parties should prepare short mediation position papers or summaries (ideally not exceeding 10 A4 pages). These should be in skeleton form and set out what each party regards as the critical issues of fact and law. They should not be confined to a party's adversarial position but should cover any matters that are relevant to the negotiation likely to take place in the mediation including the amount of costs already expended, an estimate of costs likely to be incurred going forward and some account of any previous negotiations.

These position papers should be exchanged between the parties and copied to the Mediator ideally around seven days before the mediation - longer in very complex matters. The papers may be accompanied by separate confidential submissions that a party wishes the mediator alone to see.

PRE-MEDIATION CONTACT AND MEETINGS

The Mediator will usually make contact with the advisors to discuss privately the best use of the day or days set aside for the mediation. In some cases it will be advantageous to arrange a preliminary meeting with the mediator prior to the mediation, sometimes before there is even agreement on a timetable. In complex or multi-party cases, and particularly if the mediation is to take place at an early stage of the Court/Arbitration process, such a meeting or telephone conference with the Mediator attended by all the legal representatives (and very occasionally the clients) is usually a vital part of the process. To make the most of such a meeting it usually needs to take place at least six weeks (and often more) in advance of the mediation. In simpler cases telephone contact will be sufficient. Time spent in this way is seldom wasted and is usually extremely helpful.

VENUES

Each party needs a room for its private meetings and in addition there needs to be a room large enough for all of the teams to meet together. Often the parties will hold the mediation at the offices of one of the law firms involved. Alternatively there are a number of purpose-built hearing venues available such as the International Dispute Resolution Centre at 70 Fleet Street, London (tel. 020 7936 7000) and the Chartered Institute of Arbitrators in Bloomsbury Square (tel. 020 7421 7444). Kate Trott holds details of these and other possible venues.

ATTENDANCE

Deciding who will attend is very important. A senior decision maker will be needed with authority to negotiate and settle and it may be important to have some of the individuals who were involved in the original dispute. If experts are engaged, an early decision needs to be made as to whether or not they should be present or available on the end of a telephone on the day.

If third parties have an actual or contingent interest in the outcome, the parties should consider informing the mediator in advance - if necessary in confidence.

There are no hard and fast rules as to whether lawyers should attend or as to whether, if they do, both counsel and solicitors should attend. The legal representation should be proportionate to the scale and complexity of the case, bearing in mind always that the purpose of the mediation day is to settle the case not to try it. Above all, the client needs to feel confident in the team's ability to respond to any new arguments that are raised and to advise him or her on any proposals for settlement that may be made.

TIMING OF THE DAY

Mediations can go on into the late afternoon and sometimes into the evening and later. Progress is of course limited by the speed of the slowest decision maker. The Mediator needs to be informed very early on if any individual attending has any deadlines, other engagements or travelling arrangements which need to be respected.

THE OPENING PLENARY MEETING

Every mediation is different and the Mediator will welcome the suggestions of the parties on how to make best use of the day. The Mediator will visit each party for a short private meeting at the outset. Subject to any overriding reason to the contrary mediations usually then proceed with an opening plenary meeting attended by all parties. This begins with an introduction from the Mediator, signature of the Mediation Agreement (if not signed earlier) and then an opportunity for each party to make submissions to the others on how the dispute looks to them and what are the most important matters of fact and law involved.

This opening statement is a unique opportunity for each party to speak directly to the decision makers and their advisors from the other parties and to undertake some persuasion. It is important for each party to take full advantage of this opportunity. The opportunity is often missed by a repetition of a party's adversarial position, something that has presumably been fully understood already from the underlying pleadings - or by an attack ad hominem (something that should only be undertaken with care and after careful consideration of the effect sought to be created in the mind of the listeners).

Above all talk to the mediator in advance about the approach you propose to take to the opening meeting.

SUBSEQUENT STAGES

The next stage is usually separate confidential meetings with each of the parties or groups of parties. This can and generally does lead to the Mediator shuttling between the parties for some time before there is any further plenary meeting (if one takes place at all). Nonetheless, it is always open to the parties to raise any issues they wish to re-address and to re-convene in plenary meeting for that or any other purpose.

Face-to-face meetings between the main decision makers commonly take place a little later, after there has been a full exploration of each party's negotiating position. This type of meeting often makes significant progress after negotiations have been going on for some time.

DOCUMENTING A SETTLEMENT

If agreement is reached then the primary responsibility for drafting the written terms lies with the parties. The Mediator will give such assistance as is appropriate and may even provide the parties with a first draft agreement. The Mediation Agreement requires that any settlement is recorded in writing.

THE MEDIATION AGREEMENT

Kate Trott can provide copies of the usual Mediation Agreement used in Chambers. This can be adapted to deal with any particular circumstances and we welcome comments on the draft.

The parties will need to agree on a definition of the dispute for insertion in the agreement (para. 1) and state who will be attending (para. 5). In many cases in active litigation or arbitration, the following generic formula is likely to be sufficient:

"The dispute" means all issues of fact and law arising out of or in any way in connection with the ..... Court Litigation between the parties proceeding under Claim Number.....

The definition is needed simply to ensure that there is no doubt that discussion and negotiation in the matter is covered by without prejudice privilege and the obligations of confidentiality in the Mediation Agreement. In most cases, a simple but broad description (for example of the kind set out above) is sufficient.

The agreement contains important provisions concerning the authority of those representing the parties and confidentiality.

One clause provides for the Mediator to make a non-binding recommendation of settlement terms where the parties agree to seek one and he consents to provide one. This procedure is only resorted to once the approach of neutral facilitation has failed and is in truth very rarely used.

GENERALLY

These notes can only provide general guidance. If anything is unclear or further help is needed, do not hesitate to contact Kate Trott or one of the Mediators in Chambers. They will be delighted to discuss any points that arise - either in the context of an actual dispute or more generally.

Med / Arb

Our mediators are happy to assist in designing the right dispute resolution procedure for your dispute.

This may involve combining elements of mediation and other more traditional evaluative techniques such as arbitration.

We have recent experience of a major and very complex reinsurance dispute being resolved by means of a mediation in which individual points of difference (notably aggregation issues) were referred out to a separate arbitrator for rapid resolution as and when they arose as sticking points in the negotiation. With the points resolved, the mediation resumed.

"Med/arb" is a term used to describe an even closer combination of the two elements, sometimes with the mediator switching roles halfway through to render an arbitration award in the event that a settlement cannot be reached by agreement. The advantage for the parties is that they know their dispute will be resolved one way or another by the end of the process.

Difficulties can arise in relation to confidential information however. Parties may be more reticent than usual about being frank with the mediator when he/she may be about to rule on the issues. The mediation part of the process can be chilled and become less effective. The parties and the mediator also need to be very clear as to what use the mediator can make of any confidential material received when subsequently arbitrating.

One solution can be to have both a mediator and an arbitrator present for an opening hearing in which both listen to the parties setting out their case. The arbitrator does not then attend any private discussions between the mediator and the parties. The arbitrator only becomes involved again when called upon to render an award in the event that the mediator fails to broker a settlement.

Our mediators and arbitrators are happy to look at all and any of these options in appropriate cases.

Booking / Cancellation

WHO IS LIABLE AND WHY?

When a mediation date is booked in the mediator's diary, he or she is then committed to that date and also to reserving a proper period of preparation time in advance of it. Where parties cancel or postpone a mediation it is rarely possible to make use of the slot reserved and virtually impossible to do so where this occurs close to the date fixed.

Our cancellation policy is designed to cope fairly with this situation.

Once a date in the diary has been fixed, all parties who then participate in the preparations for that day do so on the basis that they accept liability in equal shares for any cancellation fees that may be incurred. The cancellation fee is calculated as set out below on the basis of the daily rate quoted when the booking is made. *Please note: This liability is not dependent on a mediation agreement being entered into between the parties; this often will not be signed until the day of the mediation.*

If you or your clients have difficulty with this policy or wish your booking to remain provisional, then please contact Chambers and we can discuss alternative arrangements.

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CANCELLATION POLICY

Period prior to mediation when cancellation occurs	Percentage of fee payable
4-6 weeks	30%
3-4 weeks	50%
3 weeks - 2 working days	75%
1 working day or on day of mediation	100%

a) Where a two-day mediation is booked and the second day is not ultimately used, that constitutes a cancellation of the second day for these purposes.

b) Where a mediator reasonably incurs expenses in respect of travel or accommodation prior to a mediation and these cannot be recouped after cancellation then the parties will additionally be liable for these in full.

Mediation Agreement

Please click here to download a copy of a typical Mediation Agreement.

Mediators

Tony Willis

William Wood QC

Stephen Ruttle QC

Geoff Sharp

John Sturrock QC

Hilary Heilbron QC

Richard Lord QC

HH Nicholas Chambers QC

Sir Oliver Popplewell

Klaus Reichert SC

Richard Gordon QC

Simon Thorley QC

Peter Irvin