KEATING
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Keating Mediators for Construction, Engineering, Commercial and other types of dispute

A Guide to Mediation

1. Introduction.

1.1. As recently as the mid-1990s mediation was a little-known process seldom adopted in building, engineering or other commercial dispute resolution. Mediation has developed rapidly since then to become an essential dispute resolution tool. Parties to disputes of all shapes and sizes have come to realise the benefits of amicable resolution of their disputes, including:

1.1.1. For individuals, the inestimable relief of being able to compromise and move on to enjoy life without the prospect of lengthy, stressful and potentially expensive proceedings;

1.1.2. For organisations, the invaluable benefit of not having key personnel tied up for months or years preparing and supporting litigation or arbitration, so that the organisation is freed up to employ its human and capital resources in its core business. It has been estimated that by 2010, civil and commercial cases to the total value of £5.1billion were being mediated each year in the UK, with an estimated annual saving to industry of £1.4billion in management time, productivity and legal costs;

1.1.3. The opportunity to give and receive apologies but also, if appropriate, to settle without admission of liability;

1.1.4. The ability to shape their own agreement rather than take the risk of a third party decision;

1.1.5. The saving of legal costs;

1.1.6. The ability to preserve and/or cement business relationships to the benefit of all parties to the dispute; and

1.1.7. The ability to include within the compromise provisions not obtainable in arbitration or litigation. For example, the structured settlement of a claim for damages arising out of a wine distribution agreement was settled on terms which included an arrangement for monthly wine tasting events.

1.2. Keating Chambers has been at the forefront of this development, advising and representing clients at mediation. Keating Mediators, who are all trained and accredited, regularly conduct mediations of all types.

2. What is Mediation?

2.1. Mediation is a consensual process at which a qualified neutral facilitates the settlement of a dispute by negotiation. The process gives the parties the space and freedom to explore their differences and then to negotiate and shape a settlement that they are content with.

2.2. The safety to negotiate, and to make concessions for the purposes of obtaining a settlement, is provided by the twin safety nets of confidentiality and the without prejudice rule:

2.2.1. Every mediation is confidential (within the limits of the law) so that the process remains private and confidential to the parties themselves. Furthermore the parties have the comfort of knowing that what they tell the Mediator will not be revealed to other the parties without their permission;

2.2.2. The without prejudice nature of mediation means that concessions can be made for the purposes of negotiation. Should the mediation not result in a settlement, no court or other tribunal may be told of the concessions that were made.

2.3. A mediator facilitates negotiation, often by encouraging the parties to make realistic assessments of their prospects of success, but is not there to determine the dispute. The Mediator's role at the mediation does not include giving a ruling or decision. However, the parties to some mediations will prefer an evaluative mediator. In technical fields, such as construction and engineering, a Keating Mediator can call on his/her expertise and experience to guide the parties to a better appreciation of their prospects of success.

2.4. Keating Mediators are able to deploy a blend of facilitative and evaluative techniques to suit the particular dispute. Whether by subtle reality-testing, a semi-formal process of evaluation during the mediation itself, or a binding or non-binding settlement recommendation where settlement has not been achieved on the day, the parties can be assisted to reach a realistic view of the merits, which will enable them to take a commercial view.

3. What type of disputes can be mediated?

3.1. There are virtually no disputes where mediation should not be considered. Keating Mediators have successfully mediated disputes from those of little or no monetary value between next door neighbours up to disputed claims of £100s of millions between 7 or more parties. Mediation is suitable in purely commercial disputes where direct negotiation has failed, and also in disputes with a deeply personal aspect, where an opportunity to vent feelings and emotions may open the way for compromise.

3.2. Keating Chambers is of course known for its traditional core areas of construction and engineering but Keating Mediators are proficient in all related fields in which Keating Chambers is active, including Procurement, PFI, Energy, IT, Infrastructure, Insurance, Party Walls, Professional Negligence and Process Engineering. Disputes are regularly mediated in relation to FIDIC, ICE, JCT, IChem.E and NEC (ECC) forms of contract. All of these fields lend themselves to mediation.

3.3. The expertise of a qualified mediator transfers to all fields (matrimonial law excepted, where particular skills and training are generally needed). Keating Mediators regularly mediate all kinds of commercial and banking disputes as well as a varied range of disputes as diverse as:

3.3.1. Boundary disputes;

3.3.2. Solicitor's negligence in failing to issue proceedings within the limitation period;

3.3.3. Breach of copyright and confidentiality;

3.3.4. Competition and cartels.

3.4. New fields are opening up in which mediation might previously have been thought inappropriate, but is becoming seen as an invaluable process, such as:

3.4.1. Tax. The UK HMRC Litigation and Settlement Strategy now encourages agreement of disputes and states that in certain cases Alternative Dispute Resolution can help support the resolution of disputes either by facilitating agreement between the parties or by helping the parties to prepare for litigation

3.4.2. Insolvency. In the UK and in Europe, mediation is seen increasingly as a tool for resolution of disputes. In the UK, the Chancery Court Guide 2009, which sets out rules by which insolvency cases before it are managed, provides for the general use of alternative dispute resolution (ADR), including, in particular, mediation, making it clear that the Court will refer cases to mediation where appropriate and that the parties' lawyers should consider the use of ADR in all cases.

3.5. As a result of the UK Government's 2011 Dispute Resolution Commitment, mediation will play a more dominant role in disputes with the state. Government departments and their agencies have committed to the following, amongst others;

3.5.1. engaging in a process of appropriate dispute resolution, as an alternative to litigation;

3.5.2. adopting appropriate dispute resolution clauses in their contracts with other parties;

3.5.3. choosing processes appropriate in style and proportionate in costs to the issues that need to be resolved; and

3.5.4. recognising that the use of appropriate dispute resolution processes can often avoid the high cost in time and resources of going to court.

3.6. The UK Government has also demonstrated a commitment to mediation in private disputes in its consideration of the circumstances in which parties to litigation should be encouraged or required to consider mediation.

4. Who should be appointed as Mediator?

4.1. The majority of mediations are conducted by a sole Mediator. It may be helpful in selecting a Mediator to consider the type of process most likely to assist the parties. It is worth considering whether a facilitative or evaluative Mediator is needed, or whether a blend of the two and matching the Mediator to those needs.

4.2. Although a Mediator's skill lies in his/her ability to reality test the parties and to assist them in evaluating the merits of their case against the commercial imperative of achieving settlement, highly technical disputes will often call for a Mediator with expertise in that field. Keating Mediators are valued for their experience in the technical field and their familiarity with many standard forms of contract, such as JCT, NEC, FIDIC and many others.

4.3. On occasion it may be appropriate to appoint co-mediators, either because they can bring different skills to the mediation or to facilitate engagement with a large number of parties.

5. How does one appoint a Mediator?

5.1. Keating Mediators are all available for direct appointment by the parties to a dispute. Terms and Conditions of Appointment will be agreed. Fixed Fee Mediation Packages are available for low value mediations. For higher value disputes, bespoke packages or individual fee arrangements may be discussed by contacting the clerks (clerks@keatingchambers.com or telephone +44 207 544 2600).

5.2. Many Keating Mediators also appear on the panels of mediator nominating bodies.

6. Is a Mediation Agreement needed?

6.1. Yes. A blank template can be made available to the parties to alter and adapt to fit the dispute. The Mediation Agreement sets out vital provisions and binds the parties into the confidentiality of the process. It must be signed by all parties and the Mediator before

commencing the mediation. It also affords an opportunity for the parties to agree, for example, that the costs of the mediation will be treated as costs in the case or in the arbitration should the matter not be settled.

7. What will happen at the Mediation?

7.1. There is no set procedure for a Mediation. The Mediator will determine the process to suit the dispute and the circumstances, taking into account the views of the parties.

7.2. Typically a mediation may commence with the Mediator meeting the parties privately in their room. There will follow a plenary session at which introductory comments may be made by the Mediator, and the parties will make presentations to each other. Debate may continue across the table, or the parties may return to their break-out rooms to speak separately to the Mediator.

7.3. The procedure is infinitely adaptable. If a plenary session is likely to be counter-productive, it may be dispensed with. Sub-groups of attendees may be put together to discuss issues or to negotiate on a one-to-one basis. The parties may be brought back together for further plenary sessions. The parties may wish to explore and debate the issues or may wish to move quickly into a negotiation.

8. Settlement

8.1. Mediation is all about compromise. Ultimately the parties must consider the best settlement achievable at the mediation as judged against the risks of continuing on to litigation or arbitration. The decision to settle is a decision freely made by well-informed parties.

8.2. Typically in cases mediated by Keating Mediators, settlement is achieved (on the day itself or shortly afterwards as a result of the mediation) in more than 80% of cases.

8.3. The final step is to record the settlement in a signed agreement. Simple pro forma settlement agreements can be made available to parties, to be used and adapted as appropriate. In complex disputes it is helpful for legal advisers to have drafted as much of the Settlement Agreement as possible in advance, so that details of the settlement can be inserted once

agreement is reached. Where mediations are held in Keating Chambers, printing facilities can be made available.

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