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Mediation and ADR

An Introduction to Mediation as a
Alternative Method of Resolving
Disputes



Ireland

- No Irish Legislation governing Mediation
- Law Reform Commission Report and Draft Bill

Europe

- No devoted European Legislation governing Mediation
- EU Code of Conduct for Mediators
- Draft Directive
- Green Paper on ADR in Civil and Commercial Disputes

Contracts

- Mediation Clauses in Contracts
- Law Society Contract for Sale
- RIAI
- Engineers Ireland
- CIF
- All types of Contracts



Courts' recognition of Mediation

New Circuit Court Rules, SI 539 2009

- From 1st January 2010 these rules allow a Circuit Court Judge or County Registrar at a case progression hearing, on the application of either party, to adjourn certain civil proceedings for a period not exceeding 28 days to allow the parties to go to Mediation, Conciliation, Arbitration or any other process of dispute resolution to settle or determine the proceedings at issue.
- Applies *inter alia* to “equity proceedings... **a claim for specific performance or for damages for breach of contract in respect of the construction, extension, alteration or repair of a building or other structure...**”
- Default in compliance with any such order may lead to an order for costs against the defaulting party.

Commercial Court

- High Court Judge can order the parties to engage in Mediation

Section 15, Civil Liability and Courts Act, 2004

- Either party in a Personal Injuries Action may apply to the Court for direction to attend Mediation to settle the case



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Types of Disputes where Mediation can be used

- Construction Disputes
- Civil and Commercial Disputes
- Family Law - Family Support Service
- Employment Disputes
- Continually being used more and more



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How can parties go to Mediation?

- If their Contract has a Mediation Clause
- If a Judge or County Registrar requires it
- If they Agree To Mediate



What is Mediation?

- ❖ There is no definition of Mediation in Irish law at present
- ❖ Law Reform Commission Report will propose a definition of Mediation

Mediation is a voluntary process where the parties in dispute work with the assistance of an independent neutral facilitator to identify and discuss the issues in dispute, create and consider options for resolution and reach mutually acceptable agreement.



Key Aspects of Mediation

- Parties work with an Independent Neutral Facilitator
- Identify the Issues in dispute
- Discuss the Issues
- Create Options for resolution
- Facilitates negotiation
- Create a Mutually Acceptable Agreement



Role of the Mediator

- Remain Neutral at all times
- Must be Independent
- To facilitate discussion between the parties
- Assist the parties to identify the issues
- Identify options for resolution together with the parties
- Assist parties to negotiate
- Help parties to reach agreement

The Mediator DOES NOT

- Take sides
- Tell the parties what the outcome should be
- Force the parties to accept an outcome
- Give a judgment



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Mediation v Litigation and Arbitration



Typical High Court Case

- Appoint Solicitors
- Retain Barrister – Juniors and Seniors
- Draft Pleadings and set out cause of action
- Issue Plenary Summons
- Entry of Appearance OR
- Motion for Judgment in Default of Appearance
- Wait for Appearance
- Prepare Claim and have it settled by Senior Counsel
- Serve Statement of Claim
- Await Defence
- Motion for Judgment in Default of Defence
- Interrogatories
- The Discovery Process
- The Masters Court
- Applications for Further and Better Discovery
- Entry onto the List to Fix Dates
- Co-ordination of proofs, witnesses and fixing date for hearing
- Pre-trial preparation – books of pleadings, discovery and other documents
- Attendance for Trial
- No guarantee case will be reached on the list
- Pressure on parties to negotiate settlement
- Wait for Trial



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Outcome of Litigation & Arbitration Process

- Agreement negotiated/settled under pressure on the steps of the Court
- Judge's Order imposed on the parties
- One Winner and One Loser
- No possibility of an interest-based party-orientated outcome



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Litigation can be :

- ✓ Expensive
 - ✓ Uncertain
 - ✓ Protracted
 - ✓ Time consuming
 - ✓ Contentious
 - ✓ Undignified
 - ✓ Destructive
 - ✓ Unnecessary
 - ✓ Limiting
-
- ✓ Litigation is Adversarial rather than Inquisitorial



Mediation Processes

Steps in a Mediation

1. Gather the Information
2. Identify the Issues
3. Create Options
4. Discuss the Options
5. Reach Agreement

Process Options

- ❖ **Round Table Mediation**
- ❖ **Shuttle Mediation**



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If parties agree to Mediate a dispute they will usually :

- Sign a Mediation Agreement which will include the following :
 - Sets out the Terms of the Mediation
 - Time, venue, fees, who will attend
 - Confirmation that the mediator will act as facilitator not judge
 - Confirmation re confidentiality of the process
 - Without Prejudice
 - Nature of information and documentation to be exchanged by the parties in advance

- Sign a Confidentiality Agreement



Round Table Mediation

What types of disputes?

- Low conflict Employment disputes
- Family law
- Some civil disputes

When to use?

- When there the possibility for good direct communication between the parties

Who will attend?

- Parties only
- Parties and Non-Legal Advisors



How does Round Table Mediation work?

- Mediator helps identify the issues
- Break the issues into manageable pieces
- Deal with different issues in each meeting
- Discuss, resolve, agree and record agreement on one issue at a time
- With each meeting the issues are agreed and recorded
- Parties sign a recorded agreement – Memorandum of Understanding/Mediated Agreement

How many sessions?

- It depends on the nature of the dispute
- A number of hours
- 4-6 one and a half hour sessions



Shuttle Mediation

What types of disputes?

- Construction
- Civil and Commercial
- Employment – bullying/workplace disputes

When to use?

- When the parties representatives are not familiar with each other
- When there is not good communication between the parties
- Where the issues in dispute are complex & require teams

Who will attend?

- Parties and Legal Advisors
- Parties and Legal Advisors, relevant Experts and Insurers (if necessary)
- Parties usually send a “decision-maker” to Mediation



How does Shuttle Mediation work?

Stage 1 - Preparatory Stage

- Mediation Agreement
- Exchange of Documents and Information in advance
- Possible submission of Documents and Information to the Mediator in advance
- Risk Analysis by the Parties - Best Outcome v Worst Outcome

Stage 2 - Opening Stage

- Joint Plenary Session
- Parties will then move to bases in different rooms



Stage 3 - Investigation Stage

- The Mediator will meet each side separately
- Any information or document given or shown to the Mediator is provided “without prejudice” - cannot be shown to the other side without consent of party
- Exploration of parties positions and motivations
- Why is the other side holding its position - what is important to it

Stage 4 - Negotiation Stage

- Direct and Indirect Negotiations



Stage 5 - Conclusion Stage

- Lawyers representing both side will draw up the Agreement
- The Mediator will test the Agreement
- ie future focus/reality test

How many sessions in Shuttle Mediation?

- Usually a number of hours to one day
- Possible to continue into another day



Benefits of Mediation for the parties

- ✓ Mediator can think outside the box
- ✓ Parties don't need to be limited by law or contract
- ✓ Mediator can help parties to identify the issues in dispute
- ✓ No need for posturing
- ✓ Mediator is not bound by procedure
- ✓ Mediator can help parties to create options

- ✓ Allows for Interest-Based Bargaining
- ✓ Possibility to Create Value
- ✓ Possibility for Win-Win Solutions
- ✓ Parties craft the Agreement themselves



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Is Mediation Binding?

- If the parties agree that it will be binding
- When can the parties agree that it will be binding?
 - Before
 - During
 - In advance of conclusion



When to choose Mediation?

- If the parties need to preserve their relationship
- Non-adversarial
- Privacy
- Confidentiality is key
- To minimise Cost
- Swift conclusion
- If there are many issues in dispute
- Where a Contract/Term of a Contract is unclear or ambiguous
- Where the parties want Control of the Process
- Where the parties want Control of the Outcome



Dispute Resolution Spectrum





Skills of the Mediator

- Empathy
- Independence
- Neutrality
- Objectivity
- Listening
- Questioning
- Logic
- Creativity
- Pragmatism
- Ability to see parties holding positions
- Ability to discern parties' reasons for holding positions
- Ability to see the parties interests/values
- Ability to see the parties' "bigger picture"
- Reframing
- Dealing with balance of power
- Mediator may be experienced in the area in dispute – not necessary



The Mediator's Qualifications

- No specific Qualifications set out in Statute
- No legislative requirements in Ireland
- Mediators Institute of Ireland
Guidelines & Certification
- EU Code of Conduct for Mediators



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Organisations which represent Mediation

- ❖ Mediators Institute of Ireland - no statutory basis
- ❖ Irish Commercial Mediators Association

Organisations which recognise Mediation & provide Mediation Services

- ❖ MII
- ❖ Law Society of Ireland
- ❖ Bar Council of Ireland
- ❖ Engineers Ireland
- ❖ RIAI
- ❖ Chartered Institute of Arbitrators



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Success Rate of Mediation

Commercial Court

- Parties choose Mediation in approx 60% of cases

CIF Survey



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- **In September 2010 Mr Justice John Murray** told the 30th anniversary conference of the Legal Aid Board that THE GOVERNMENT should foster and promote a professional mediation service and alter the perception of the courts as the first and only resort for dispute resolution.
- He said it was particularly appropriate in family law given that litigation can exacerbate the existing difficulties arising from a breakdown in family relationships.
- “Given the State’s recognition of the family as a social unit of fundamental importance in society, it is essential that it ensures that there are systems and resources in place to address and resolve the serious issues to which family breakdowns so often give rise,” he said. “Mediation in particular is a vital tool in addressing family disputes, particularly where the welfare and future of children is at stake.”



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Collaborative Practice

- Control over Communication
 - Control over Process
 - Control over Outcome



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- New way for parties to **work together** to resolve disputes
- Recognises that the **parties know their relationship and the dispute best**
- The parties commit to **civil communication**
- Commitment to **full and complete disclosure**
- The process is conducted through a series of **four-way meetings**
- The **parties and their solicitors** are present at the four-way meetings
- The meetings are carefully choreographed with **Agendas and Minutes**
- The **parties identify the issues of importance**
- **Discussion** of positions, reasons for positions and interests
- Discussion of **options for resolution**
- **Negotiation** of resolution of each issue – **interest-based bargaining**
- **Recording the agreement**
- The **parties craft their own agreement**
- **Team Model**



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Thank you