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Briefing Note

To mediate, or not to mediate, that is the question

When is it reasonable to refuse mediation?

Mediation is a form of Alternative Dispute Resolution (ADR) which is available to parties to a commercial dispute. The purpose of ADR is to endeavour to settle a dispute in order to avoid incurring substantial legal costs, wasting the valuable time of the parties which can be dedicated to more commercially beneficial endeavours and, where appropriate, assist parties to maintain (and indeed build upon) a positive business relationship notwithstanding a dispute has arisen.

Mediation relies on the assistance of a neutral third party (the **Mediator**) to assist in identifying the true issues in dispute between the parties, explore all potential options of resolution and attempt to reach settlement. It is not the role of the Mediator to decide the merits of each party's case but instead to facilitate a negotiated settlement between the parties if one can be reached.

Importantly for parties, mediation is a non-binding and private form of negotiation which can be arranged relatively quickly and cheaply (particularly when compared to litigating the dispute). It also allows for a more creative and flexible approach to settlement in comparison to the outcomes prescribed by the courts. Further, the parties can mediate on issues much wider than those disputed in any underlying court proceedings.

The mediation process as a whole is confidential which includes information given to the Mediator during the process. This means that neither party can disclose any information arising out of, or in connection with, the mediation without the express consent of the other party. Mediation agreements (which are signed by the parties) will usually contain express provisions pertaining to confidentiality.

There may be cases where mediation is considered inappropriate for example where there has been a complete breakdown in the relationship between the parties, where there is a clear indication that there will be no realistic prospect of successfully settling the matter or where a point of law requires resolving. However, as a part of any commercial litigation process, ADR should be considered in accordance with the duties owed by the parties to the Court pursuant to the Overriding Objective (Rule 1 of *The Royal Court Civil Rules, 2007*). In so doing, the parties will be assisting the Court's duty to deal with cases justly, expeditiously and fairly whilst endeavouring to save expense.

Recent persuasive judicial statements on the appropriateness and usefulness of ADR in commercial disputes include: '*all members of the legal profession who conduct litigation should now routinely consider with their clients whether their disputes are suitable for ADR*' and "*in making the objective assessment of the prospects of mediation, the starting point must surely be the fact that the mediation process itself can and does often bring about a more sensible and more conciliatory attitude on the part of the parties than might otherwise be expected to prevail before the mediation*".

The courts have reinforced their support for ADR by exercising their discretion to impose punitive cost sanctions on parties who unreasonably refuse to engage in ADR. In some instances, even against parties who were ultimately successful in the litigation before the court.

The English Court of Appeal (which in this area would be persuasive in Guernsey law) has identified a number of factors which may be considered as proper justification for refusing mediation including where costs of the mediation are disproportionately

high (this would be rare in a commercial dispute), where mediation will create a delay to the fixed trial date or where one party reasonably believes it has a strong case.

Given the benefits of a commercial settlement at an early stage in any dispute, it is prudent to consider ADR as early as possible and even before the commencement of court proceedings (as may be appropriate). Even if ADR is unsuccessful, it may

assist the parties in narrowing the issues in dispute which will be helpful and will reduce costs going forwards. Moreover and given the clear judicial support for such, engaging in ADR may assist a party in avoiding the wrath of the court and adverse costs sanctions.

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