

The new normal mediation: a user guide

Part I: Introduction

Mediation will play an important role in resolving the many disputes that will follow the Covid-19 triggered recession. The flexibility of solutions that it offers mean that parties can find creative solutions faster, cheaper and wider than just a money judgment. But in the same way that business and society have and will have to adapt further as a consequence of the pandemic so too must mediation. The opportunity for clients is how to adapt to make best use of the mediation that will emerge in to the “new normal”.

Online all the time?

Mediators quickly adapted to offer mediation online. Zoom seems to be the tool of choice with the advantage of breakout rooms for private sessions but Microsoft Teams and other platforms are options: and clients like it. As they have adapted to work online the convenience of mediating from home has undoubtedly been seen as a bonus. There are reservations that a 2D meeting may mean that body language and mood may be harder to pick up and concerns about “screen fatigue” but Pandora’s box has been opened and, whilst there is certainly going to be a return to traditional in-person mediation, online will remain and become an increasingly important part of the mediation process.

It is already clear that being online has changed the nature of mediation. The traditional mediation occurred with parties being present at the same time in the same venue. Online has changed that. Elements of a mediation that took place “on the day” are now starting earlier in the process in pre-mediation engagement with each party or with members of that party’s advisors. There is an element of the “shuttle” mediation that is now taking place in this premediation phase. The mediation therefore progresses without the other party (or parties) having to await the mediator’s knock on the door. Mediation is no longer limited to parties being present at the same time thus can be said to be asynchronous with parties meeting at different times. Additionally, with the exploration phase of the mediation process starting in the pre-mediation meetings it is also asymmetric, no longer taking place at the end of the process.

Asynchronous mediation

The flexibility and convenience offered by online mediation does mean that there are greater opportunities for the mediator to have early engagement with the parties. In part this arises because of a need to ensure that parties develop confidence in the online platform. It is essential that parties feel secure online with no concerns about privacy or confidentiality.

There are a number of benefits to earlier engagement. First, it is much more efficient for a preliminary meeting with a party to take place before any plenary or joint meetings. As well as ensuring that parties have an opportunity to see and use the functionality of the online platform, it also enables the mediator to build rapport with

all the attendees not just the instructed legal team. Second, the process of exploration of the issues may take place at an earlier stage without the other parties having to wait in their private room as now happens in a traditional mediation. Consequently, the mediation process commences earlier and initial feedback from mediators confirms that the mediation itself is shorter.

Asymmetric mediation

With the process of mediation now starting before the mediation “day” there are options for productive contact by the mediator not just with the parties collectively but with different participants. This might include a meeting with the parties’ lawyers to discuss any legal or procedural aspects of the dispute and their respective perceptions of barriers to settlement, an outline agenda should also be discussed and whether experts might be involved in the mediation itself or at a preliminary meeting. Online now means that the mediation process can and will be spread over perhaps a week with preliminary meetings taking place with the parties on separate days before they come together for the joint meeting.

Quicker Mediation

A mediation process that is more flexible in the timing and content of meetings and of participants does mean there is potential to shorten the mediation process. The search for the “available date” for every participant is a major issue even in a two-party mediation but especially in any complex multi-party dispute. An online meeting that avoids extensive travel time will open up options for attendees with busy diaries. The flexibility and time saving that arises from drawing the exploration phase presently conducted on the mediation day in to the preliminary meetings may also mean that fewer participants need to attend the mediation or may only be required to attend remotely. And as mentioned the scheduled mediation may in fact be shorter. All of these factors will open up diaries and result in earlier mediations and resolution.

Hybrid

Leaving lockdown, as the Government is finding, is harder than going in to it. Mediation adapted quickly and has moved online and this will undoubtedly remain as an option. The flexibility of being online and the experience gained by mediators, clients and advisors may even act as a catalyst to bring mediation in to areas and values of dispute where mediation was infrequently used. There will be challenges for mediators and mediation as we emerge in to the new normal. The one certainty is that it will be different – because clients will demand that it is and because the innovative mediators will offer it.

“Online” is at the very least going to be a part of the process because it does add value – for the mediator and therefore the client and its advisors. Where the balance lies will be determined by the case: some will remain entirely online but others will be a mixture of online for some meetings with a trimmed down “mediation day” happening sooner with fewer attendees – and perhaps as a half day. There will be cost saving opportunities as well but the benefits will arise from taking advantage of

some of the points discussed. It will be different and it will be better, offering a creative resolution for clients at an earlier stage with savings in time and cost.

Part II: Pre-mediation

In part 1 of this article we considered the issues and opportunities that arose from the move to online mediation demanded by social distancing and the impact that has and will have on the mediation process. We introduced the concepts of asynchronous and asymmetric mediation. In part 2 we turn to the operations side and the practical issues to be considered before a mediation.

Mediation is above all what the parties want it to be. There is no procedure (save that the parties will be required to sign the mediation agreement before commencing), rules (save one exception below), order of events with which the parties need to comply. It is up to the mediator and the parties to decide. The mediator has a lot of discretion about the process and would lay out a proposed procedure to the parties but it is they who should finally determine how it is to be run.

A traditional mediation would involve agreement on exchange of notes on each side(s) position(s), exchange of relevant documents, pre-meetings between the parties and the mediator, “on the day” opening joint meeting, meetings between the party(s) and the mediator including further possible joint meetings, agreement (if possible), written and signed settlement agreement and completion.

All of this may still be part of an online mediation. One of the biggest differences between a physical and an online mediation is that from the completion of the first (joint) meeting, the process can be staggered over a longer period than one day with the consequences that the parties do not have to gather and then remain in one place for the mediation for one full business day or longer.

Indeed, it may also mean the parties need not have to all be present when the mediation commences. Ideally, it is better for all participants to be present for the opening. After that is completed, an online mediation gives the parties so much more flexibility, not to mention costs savings, since they no longer need to wait and physically gather for their “turn” to meet the mediator and consequently can get on with their “day jobs” when they are not needed for meetings.

There are important implications for the process once one appreciates what this flexibility means – the parties no longer need to clear their diaries for travel and a full day or more attendance at the mediation and can slot in meetings with the mediator in much the same way as they fix other meetings.

Once this physical straight jacket is removed, mediations maybe arranged to take place at short notice – because not only do the parties not need to travel, to set aside a full day for attendance but they may arrange further meetings (including joint meetings) as and when they are needed by the mediator and when it suits their diaries.

Pre-mediation: Planning, preparation and papers

Planning is very important with online mediations. The opportunity for a party to disengage or for momentum to be lost is perhaps greater. The “off switch” is easier to click metaphorically and maybe more challenging for the online mediator to re-engage where one can’t physically enter the room and require attention.

Pre-mediation discussions

By far the most important step in the pre-mediation process is for the mediator to speak with the parties or their representatives. If this process is conducted proactively by the mediator a lot of progress may be made towards a solution even before the parties have met. The mediator will want to ascertain what the parties hope to achieve by the process and will want to test the practicalities of this against each party’s case and evidence.

The outcome of these discussions should be that the mediator has a clear idea of the party’s expectations, the strengths and weaknesses of each sides’ position and above all how, if at all, it may be possible to assist the parties to reach an agreement. These contacts will be used to agree the timetable as well.

One element to be aware of about the online process and which remains to be evaluated is what if anything is lost by the fact that parties will not be meeting in a physical setting? How does one form a rapport with someone, over say Zoom, and will this prevent any positive chemistry developing between the mediator and the parties and in particular the protagonists? The mediator’s role includes helping the parties to present their offers to the other side. Will a virtual setting hamper this? One can certainly see the parties “up close” but is this the same as the atmosphere in a room full of people where the interaction may change the dynamic? All participants should be aware of this and work positively in their engagement with each other and the mediator to address this. Body language, active listening and patience will still be necessary in an online setting and perhaps more so. This is another reason the parties including the mediator must put a lot of time and thought into pre-mediation discussions.

Who should attend – clients and decision makers, legal representatives, other parties – counsel, experts.

One immutable rule of mediation is the decision maker (usually the client) must attend with the requisite authority on settlement and both the mediator and the other party(s) would be rightly reluctant to spend time in a negotiation when the person with authority to settle the matter is not present.

Not only will the decision maker be required to approve any agreement but often it is the decision maker who provides the impetus for the agreement by expressing a desire to cut through objections, legal issues and focus on the big picture. *(Many a lawyer has watched aghast as their carefully crafted case has been swept aside by a client who can see the finishing line and wants to get there even if it means abandoning claims or defences, part of the claim sum etc.)*

However, given the mediation is taking place remotely and everyone is attending online, the decision makers will only need to attend joint meetings (certainly the opening one) and when the mediator is meeting their side's participants. This can afford flexibility on meeting dates and timings.

In many, but not all cases, the client will want their legal adviser (in house or otherwise) to attend as well. It is ultimately for the client to decide who and how many should attend, though the fewer who do, the easier it is to fix the mediation and the subsequent meetings. Whilst lawyers can on occasion be hard to move from arguing their client's positions, pre-mediation meetings with the party's lawyers can help to understand the issues and the barriers to resolution and who may need to attend. Legal advisors will bring an insight to the dispute and they should actively engage with the mediator.

Too many participants could mean delays in fixing the mediation because of the need to coordinate diaries but the use of remote mediations means a party can schedule a third-party adviser – say an expert or counsel – to attend a particular meeting of the group and mediator and then not to have to attend again. Whether such third parties have a role in mediation is a matter upon which there is much debate and the parties must decide what they consider is best for their case.

Since mediation is confidential and those attending should all sign the mediation agreement there should be provision for the mediator to be satisfied as to who is in each session and that there is no-one attending "off screen". One suggestion is for the party's legal representative to state who is attending and to provide the mediator with details of who is attendance at each meeting and that no one else is "present".

Submissions and Documents

There is no right approach but a light touch on submissions and documents is recommended. This may not work for larger more complicated cases but by and large many mediations are around key issues and it ought to be possible to give the mediator the full picture without too many documents.

The position paper is as important online as in traditional mediations. Parties should remember that position papers are not pleadings of their case nor skeleton arguments. A succinct document explaining the key facts, important evidence, stage of the litigation, offers and a party's perceptions of barriers to settlement is of huge assistance to the mediator and often conveys the message that the party is embarking on the mediation in "good faith". Parties should also provide a document outlining the legal costs incurred to date and the likely costs to be incurred if mediation is unsuccessful.

This is not the place for a review of the role that legal costs can play in encouraging settlement but it should not be overlooked that the reason for mediating is often to stop costs being incurred or that one of the parties to the dispute is likely to suffer a very large exposure to costs if their claim or defence fails. Parties often down play the costs they have incurred or will incur to avoid giving away too much information on their exposure and or what work they have done. Mediators should try and ascertain the true costs position as it may play a part in encouraging settlement.

There is a tendency for parties to give the mediator and the other party a lot of paper (often rarely referred to in the mediation setting) in the form of notes and documents. In a remote setting, if the parties want to move quickly and where everyone is likely to be viewing documents on line (at least in these lockdown times) the less that is exchanged the better.

Technology (understanding the use of this and agreeing the platform for the remote service) and managing the mediation

A lot has been written about technology in a remote setting. (CEDR has produced some very helpful guidance – CEDR.Com.) Much of the popular software including Zoom and software from Google, Microsoft etc is fit for purpose in most cases.

It is recommended also that parties consider using a third-party service to manage the back end of the process where larger and or multi party meetings are envisaged. In straight forward matters, with one joint meeting, followed by separate meetings with the parties, the mediator maybe sufficiently competent and happy to operate the process.

It is important that everyone knows how the mediation is going to “work” (joint meetings followed by separate meetings etc), agrees which software will be used and has tested this to be satisfied they know how to undertake the necessary functions at their end. A pre-mediation demonstration to participants of the functionality of the platform will help to build confidence in the platform and the mediator.

A back up to the chosen conferencing system is recommended so at least the mediation can continue by voice, if wireless is lost by some of the parties. (It is advisable that parties exchange telephone numbers in case the mediation has to switch to “voice”.) Internally, as the parties will be across various locations they should also agree how they will communicate intra party e.g. by video, group text or email or voice.

Everyone should be careful to ensure that they first check the other party is not on line before they commence any meetings.

Timetable for asynchronous mediation

This is key to a cost-effective speedy process. Since the parties are not gathering at one venue, the only date that must be agreed by all parties is the day the mediation is to commence and if this will be by a joint meeting of all parties.

All further meetings will be by agreement with the parties and all diary scheduling can follow logically from the mediator’s proposals for the process. This is again the advantage of an online mediation – with no need for physical attendance there is maximum flexibility on the scheduling of meetings.

It would be sensible for the parties to assume meetings with the mediator will follow the joint meeting and keep their diaries reasonably open or other appointment flexible to accommodate such meetings.

Mediation agreement

The mediator will require the parties to sign the agreement before commencement – on the day is no longer appropriate. The agreement will depart from those relevant to the traditional mediation as it will be providing for the online process.

The mediation in fact commences when the pre-mediation discussions take place and may complete on a different day. The mediator may wish to make arrangements for their fees to reflect the different split in the time involved in asymmetric mediation as opposed to their fees being split equally as is usually the case.

Part III – the mediation

In part 1 of this article we considered the issues and opportunities that arose from the move to online mediation demanded by social distancing and the impact that has and will have on the mediation process. We introduced the concepts of asynchronous and asymmetric mediation. In part 2 we considered the practical issues to be considered before a mediation and now turn to the mediation itself.

The online mediation

The opening of a mediation would involve an introduction from the mediator explaining the role they perform, identifying who is attending both the joint meeting and any subsequent meetings, the timetable as agreed in the pre-mediation meetings and most importantly the confidentiality of the process and what this means. (This will also have been set out in the mediation agreement.)

Once the joint meeting is concluded the mediator will commence the process of “meeting” the parties remotely. It is at this stage that the value of the online process will kick in with the mediator arranging meetings to suit the parties but always with a view to keeping the process moving steadily forward - although perhaps not with the same urgency (as the imperative to try and complete on the day is not there). The mediator will need to be careful that this lack of urgency doesn't result in the parties losing interest or failing to prioritise further engagement with the mediator.

The nature of remote meetings will also mean these will probably be quite brief and to the point, enabling constructive progress to be made without imposing too much on the parties “day jobs”. The fact the mediation is being conducted in this manner means it may be extended over a number of days or even weeks. Nothing stops the parties managing the period say because they are in a hurry to see if a deal can be done.

Consideration should be given to the length of time the parties will be expected to be in meetings on online to avoid fatigue, loss of concentration and eye strain. It is recommended that the mediator proposes a cut off of say 60-80 minutes per meeting

maximum, although most meetings maybe shorter than this. Parties should also consider agreeing similar limitations (when they are meeting alone).

A possible timetable could even involve a joint meeting and then a gap of a day or more for the first party-mediator meeting and so on. This may allow more time for the parties to discuss the matter internally and to decide if they want to change their pre-mediation position. But there is nothing to prevent the parties following a timetable of a traditional mediation with meetings following immediately after the opening joint meeting.

Where, after one or more meetings between each party and the mediator, it appears that that an early agreement is not going to be possible, the consultations may still continue for as long as the parties are in agreement to do so. These consultations may on occasions involve smaller groups. (After a while, it is possible that only the party's legal representative will be present in much same way as a would happen in a traditional mediation where a solution was not found on the day).

At a certain stage the parties may jointly or singly indicate that they believe agreement is not possible and at that stage (in a two-party mediation) the mediator may reach the view that further discussions are unlikely to give rise to an agreement. The mediator may also conclude that the best course, rather than termination, is to await further feedback from one or more of the parties and see if the process can be rescued by this approach. The mediator may prod the parties on the issues dividing them to see if a way can be found to break the logjam(s).

When and if a deal is done the mediator will want to ensure that the agreement covers all issues which have been agreed and will assist in dealing with new issues which arise when parties consider some of the finer points of drafting. It is recommended that the mediator insists (as is the case in a traditional mediation) on the agreement being signed before the mediation is brought to an end so as to ensure this key milestone is not left to "drift" and to facilitate, where possible, enforcement of the agreement.

Much of these later stage negotiations and events would be similar to a traditional mediation. However, as the mediation now has no fixed period, online meetings can continue as long as the parties agree to do so.

Audit

The case for online mediations is strong.

These are:

- (i) speed and ease of set up as one can largely eliminate endless searching for a day when around 5-10 people are free, which should mean it will be easier to agree a date for at least the opening of the mediation,
- (ii) avoidance of costly travel and hotel expenses (which may also delay also the date of a mediation),

(iii) elimination of blocking out a full day for the mediation and less time being taken out of any days involving the mediation,

(iv) opportunity to continue the mediation without detaining the parties at a physical venue,

(v) lower costs of the actual mediation as there is no need for the use of venues and attendant costs.

But are they actually going to be cheaper than physical mediations and will they result in better outcomes than physical mediations? Using as a benchmark a traditional mediation of one day: this will involve a day's attendance by:

(a) the two (at least) decision maker(s) (with a consequent loss of management time for other roles);

(b) the legal representative(s) and possibly experts and counsel. Such a group could be required for 10 plus hours. If one assumes a team of say 3 that is at least 30 hours (60 hours in a two-party mediation) – of which some time (half?) will be spent waiting for the mediator.

An online event may involve an initial joint meeting of about an hour and then numerous separate meetings of anything from a few minutes to say an hour. While it is impossible to put a number on such meetings or their duration it can be seen that the benefits listed above at (i) – (v) could quite likely result in costs savings and possibly significant ones.

Is settlement easier to achieve using online mediation? Taking a view one way or another would not be appropriate but what one can say is that bearing in mind the benefits discussed above, there is a strong case for using online mediation as a means to find a solution.

Even if its effectiveness is no better than a traditional mediation the process has the attraction of enabling a party to terminate the mediation at very short notice with little of the cost consequences (travel, one day for 5-10 people, venue hire all avoided) one would face in a traditional mediation.

Looking ahead (to the time when human contact is again normalised) will online mediation survive and if so for what purpose?

Clients will continue to like it, if only because of the savings.

Settlement rates are at least as high – though it is of course early days.

The flexibility and cost savings mean that the use of online mediation should continue for lower value matters and or where travel is not possible or justified.

Online mediations will come to be seen as a proportionate response to the resolution of many disputes. It is this proportionality which will contribute to its attraction and ensure its longevity and popularity.

The flexibility also lends itself to “early intervention” mediations which are popular in maritime disputes. This is used where a mediator is asked to try and assist the parties often to break the logjam of an ongoing dispute.

Online mediations may still play a role in matters where the parties want to see if mediation is worthwhile or want to explore the ground rules and are more comfortable do this with the mediator, albeit in an online setting, thereby offering continuity in case the matter progresses to full mediation.

Checklist

Online mediation brings many advantages for the parties who nevertheless do need to guard against screen fatigue. There will be more pre-mediation preparation to ensure that parties make the most of the cost and logistical efficiencies that will follow. This checklist is designed to help parties achieve those efficiencies and should be read with our Articles published on LinkedIn on 10th, 16th and 18th June 2020.

PRE - MEDIATION

Mediation agreement

- Mediator to circulate mediation agreement
- All attendees to sign the mediation agreement ideally before pre-mediation meetings (PMMs) commence
- Mediator to circulate signed agreement to party’s representatives
- Online confidentiality issues to be drawn to party’s attention by mediator
- Parties to be aware of mediator’s fees and any need for payment of any fees in advance

Pre - mediation meetings (PMMs)

Preparation for PMM

- Mediator to receive outline position papers and supporting documents in advance of PMMs
- Date and time of PMMs with each party to be fixed by the mediator
- Attendance at PMMs – clients, representatives, counsel, experts, anyone else to be decided by parties and communicated to mediator
- Parties to agree technology to be used and/or involvement of third-party services (see Technology below)
- Date for testing technology to be agreed

PMM with each party

- Do parties want a joint meeting or only separate meetings
- Have parties considered outcomes they want to achieve
- Do parties have a negotiation strategy

- Parties to agree who will draft a skeleton settlement agreement with possible “boiler plate” clauses (eg NDA / confidentiality agreement – where appropriate)
- Parties to agree mechanism to sign any agreement (eg Adobe documents / DocuSign)
- Consider whether a further PMM may be necessary
- Date for exchange of position papers and documents

Submissions and documents to be exchanged on agreed date

- Final position paper (maximum length to be agreed)

Other documents:

- Pleadings, if any
- Main supporting documents
- Relevant expert evidence
- Without Prejudice negotiations to date, Part 36 offers
- Details of costs incurred to date of mediation and to trial / adjudication
- Agreement on destruction of papers after mediation – if papers in pdf; if papers in hard copy

Agenda (to be circulated by mediator after completion of PMMs)

- Date and time for commencement of mediation by joint meeting or initial separate meeting (if no joint meeting required)
- Schedule for further meetings or at least the first mediator – party meeting
- All contact details of those attending the mediation to be included with agenda
- Agree screen breaks / limit length of meeting(s)

Who is attending joint meetings and separate meetings with mediator

Identifying individuals on each side

- Clients (is this person(s) the decision maker)
- Legal advisers

Third parties:

- Counsel
- Experts

NOTE: the decision maker must attend

Which meetings will each individual attend

- Who will attend joint meeting
- Who will attend subsequent meetings

- Mediator always to be informed who is in attendance, at each meeting
- Mediator to ensure that everyone attending the mediation has signed the mediation agreement

Technology

- Parties and mediator to agree on use of the third-party service to support mediation
- Parties and mediator to agree which platform (Zoom etc) to be used
- Technology to be tested before PMMs
- Feedback from each party that technology is working
- Back-up plan if video fails (use of contact details circulated with agenda)
- Communications within group to be agreed by each party
- Third party involved in providing technology to be notified to all those involved along with contact details

MEDIATION DAY

Joint meeting (if agreed)

- Parties to identify the issues upon which they are divided
- Are the parties considering how they can compromise on these issues
- Have the parties set out the legal costs position – what has been incurred, what will be incurred before trial, what liability would the parties have to each other in the event the claim or defence failed or partly failed
- Agreement on how the mediation will proceed: are the mediator – party meetings scheduled
- Have the parties considered who should attend these meetings

Mediator – party meetings

- Have all issues in dispute been disclosed
- Have the parties desired outcomes been discussed
- Have other factors relevant to any settlement been discussed
- Do the parties concur with the mediator's conclusions as to the main issues in dispute
- Is the mediator authorised to raise these issues or any of these with the other party
- Are the parties offering solutions to the issues in dispute
- Has Best / Worst Alternative to no agreement been discussed.
- Is the mediator reminding the parties of their cost's exposure
- Is the mediator being authorised to make any proposals

Skeleton of settlement terms

Settlement or termination of mediation

In the event of agreement

- Who is delegated to draft the final agreement
- Circulation of agreement for comments to parties
- Disclosure of final draft agreement to mediator
- Arrangements for signature of agreement and distribution to all parties
- Mediator to send any invoices to parties

In the event of failure to agree

- Mediator to ask parties if they wish contact to continue
- If affirmative, mediator to continue online contact with parties
- If negative, mediator to formally terminate mediation reminding everyone of position as regards confidentiality and what was agreed in relation to destruction of documents
- Mediator to send any invoices to parties

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