

# **CENTER FOR INTERNATIONAL MEDIATORS AND ARBITRATORS - CIMA**

**PRESENTATION**

**BY**

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**ON**

**COMMERCIAL MEDIATION**

# WHAT IS MEDIATION

The **Singapore Convention** in a very broad manner define mediation as *a process, irrespective of the expression used or the basis upon which the process is carried out, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons lacking the authority to impose a solution upon the parties to the dispute.*

# KEY THINGS TO KNOW IN MEDIATION

- Parties Autonomy
- Issues
- The process
- Voluntariness
- Suitability
- Jurisdiction
- Confidentiality
- Practitioners (trained/untrained)

# CONT'D

- Mandatory
- Court referrals
- Free or not free
- The outcome of mediation
- Enforceability

# WHAT LAW GOVERNS MEDIATION

- IN GHANA
  - ADR 2010 (Act 798)
    - Part two is dedicated for mediation
    - Section 63 to 88

# What is Mediation according to the Ghanaian Law ?

- The act defines mediation a nonbinding process under Part Two in which the parties discuss their dispute with an impartial person who assists them to reach a resolution; (Section 135, Act 798)

# Who is a Mediator? Section 135

- “mediator” includes an impartial person appointed or qualified to be appointed to assist the parties to satisfactorily resolve their dispute and employees and persons hired by that person;

# Initiation of Mediation process

- Section 63:
  - 1. A party to any agreement may with the consent of the other party submit any dispute arising out of that agreement to mediation by an institution or a person agreed on by the parties.
  - 2. This can be done by writing, verbal communication, telephone, email and other forms of communication.
  - 3. Mediation commences when the other party accept the invitation



# Declining to mediation

- Section 63 (7)
- 7. Failure by the other party to accept the invitation to mediation within fourteen days after receipt of the invitation or within the period of time specified in the invitation shall be considered to be a rejection of the invitation to mediation.

# Court Referrals

- Section 64. (1) A court before which an action is pending may at any stage in the proceedings, if it is of the view that mediation will facilitate the resolution of the matter or a part of the matter in dispute, refer the matter or that part of the matter to mediation.

# Qualification of a Mediator

- Section 66. (1)
- The parties to a mediation may appoint any person or institution the parties consider acceptable to serve as a mediator.

# Disclosure of information

- Section 78.
- Except where a party gives information to the mediator subject to a condition of confidentiality, when the mediator receives factual information concerning the dispute from a party, the mediator may disclose the substance of that information to the other party in order that the other party may have the opportunity to present any explanation which that other party considers appropriate.

# Confidentiality of mediation

- Section 79.
- (1) A record, a report, the settlement agreement, except where its disclosure is necessary for the purpose of implementation and enforcement, and other documents required in the course of mediation shall be confidential and shall not be used as evidence or be subject to discovery in any court proceedings.
- (2) A mediator shall not disclose information given in the course of the mediation to a person who is not a party to the mediation without the consent of the parties.
- (3) Without limiting the effect of subsection (1) a party to a mediation shall not rely on
  - (a) the record of the mediation;
  - (b) statement made at the mediation;
  - or (c) any information obtained during the mediation as evidence in court proceedings.

# Status and effect of settlement agreement

- Section 82. Where the parties agree that a settlement is binding, the settlement agreement has the same effect as if it is an arbitral award under section 52.

# Section 52: Effect of award

- Section 52. Subject to the right of a party to set aside an award under section 58 of this Act, an arbitration award is final and binding as between the parties and any person claiming through or under them.

# Resort to arbitral or judicial proceedings

- Section 83.
- The parties shall not initiate, during the mediation proceedings, any arbitral or judicial proceedings in respect of a dispute that is the subject-matter of the mediation proceedings.



# Mediation expenses

- Section 87. Unless the parties agree otherwise, the parties shall equally pay the expenses of the mediation including the fees and expenses of
  - (a) the mediator;
  - (b) any administrative assistance received;
  - (c) experts called; and
  - (d) any expenses incurred in connection with the mediation proceedings and settlement agreement.

# Exclusion of liability

- Section 86.
- (1) A mediator shall not be a party in any court proceedings relating to a mediation under this Act in which the mediator participated.
- (2) A mediator is not liable for any act or omission in the discharge of the functions of a mediator unless the mediator is proven to have acted in bad faith.

# International Laws signed by Ghana on Mediation

- United Nations Commission  
on International Trade Law (UNCITRAL)
  - 7<sup>th</sup> August, 2019
- Singapore Convention on Mediation
  - 22<sup>nd</sup> July, 2020

# COMMERCIAL MEDIATION

- Introduction;

Commercial Mediation is a private and confidential dispute resolution process in which an independent and neutral third party, the Mediator, seeks to help parties in business or commercial relationship to reach a mutually acceptable negotiated agreement to avoid litigation or Court.

# Introduction cont'd

- The Commercial Mediation is attended by a 'decision maker' for each party as well as their legal advisors and relevant subject experts.
- The process is voluntary and either party can withdraw at any time.
- However, if a settlement is reached it is legally binding.

# When is commercial Mediation not advisable?

- Mediation should be considered as the first option for resolving all commercial disputes.
- This is because Mediation is legally permissible in every commercial dispute.
- However, there are two obvious instances where Court intervention may be necessary, namely;
- when a question of jurisdiction arises. For instance interpretation of a statute, a clause in a contract, urgent Court relief such an injunction to stop a particular event occurring or preservation of goods.

# Key Advantages of Commercial Mediation

## 1. Control

- Mediation is based on both parties taking control. 'Ownership' of the dispute and the outcome remains with the parties. They are actively involved and can express their own points of view throughout the entire process.
- By taking control and finding a solution that works for them, both parties avoid the risk of having a less satisfactory solution imposed on them by the Court.

## 2. Confidentiality

- The process is confidential and without prejudice to any proceedings.
- Information and documentation shared privately with the Mediator cannot be passed to the other party during the Mediation without express permission.
- The outcome of the Mediation is only publicized if the parties so agree.
- Section 78 & 79 of ADR Act 2010 ( Act 798 ) ref.



# 3. Flexibility & Commerciality

- Mediation concentrates on commercially based settlements and focuses party's minds on the realistic resolution of problems. Parties are encouraged to make concessions and to propose their own formulae for resolving the dispute.
- Mediation provides parties with an opportunity to negotiate a tailored solution that will suit their mutual needs; often the solution will deliver more for both parties than any Court judgment could.
- It is a particularly valuable process where there is an ongoing commercial relationship, which parties wish to preserve.

## 4. Time saving

- Commercial Mediation offers a speedy alternative to litigation.
- Typically the Mediation will take place within four to six weeks of the Mediation Agreement being signed and in urgent situations even more quicker.
- While the lead time to get a case to hearing in the courts varies, it usually takes between 1 and 2 months and between 2 and 5 years to finish.

## 5. Financial Saving

- Commercial Mediation provides a very economic alternative to litigation.
- Given the speed of the process it enables parties to move on with their businesses more quickly and the resulting savings in terms time management can be very significant.
- Equally the legal costs and expenses associated with the process are significantly less than the costs of litigating a dispute to trial.

## 5. Financial Saving Cont'd

- It has been estimated that the cost of mediation is approximately 20% of the cost of going to court.
- In Commercial Court cases and in personal injury cases respectively, mediation may be suggested or imposed by a Court during the course of proceedings and refusal to participate or do so in good faith may have negative cost consequences in certain jurisdiction.

# Commercial Mediation Process

- Commercial Mediation typically involves five phases, one in Pre-Mediation and the others on the day of the Mediation.
- Note: Pre-Mediation can be held separately or together with the parties.
- Mediation Conference can also be held after separate pre-mediation to harmonize discussions and the way forward.

# The process are as follows:

## **(1) The Pre-mediation Phase**

- This involves confirmation of the appointment of Mediator and agreeing the terms of the Mediation, which are set out in a mediation agreement.
- The terms will include time and venue for the Mediation, details of the Mediator's fees, the nature of information or documentation (such as short case summaries) to be exchanged by the parties in advance of the Mediation, details of who will attend the Mediation on each side, role of the Mediator as facilitator rather than decision maker and confirmation that the process is confidential and without prejudice.

# Pre-mediation phase cont'd

- Preparation is the key to successful mediation and the intensity of preparation will usually be no less than that which is put in immediately before a trial.
- For both parties a risk analysis is crucial and the best and worst case outcomes ought to be identified in advance of the Mediation.
- The Mediator will use this preparation stage to build the confidence of all parties in the mediation process and in him/her.

## (2) OPENING STATEMENT/ PREPARATION

- The opening statement serves as an orientation for parties to the process in which they are about to participate. They should have a good idea of the process before coming into mediation.
- This is most likely the first time that all participants will get the same orientation, at the same time. The opening statement is very important because it sets the tone for the rest of the session.



# Opening Statement cont'd

- The mediator needs to put all parties at ease and attempt to develop an atmosphere of trust and confidence in both the mediator and the mediation process. In addition, with your manner, let the parties know that you are in charge of the process and they are responsible for the outcome.
- In addition, the opening statement serves to take first steps toward eventual closure through the series of procedural agreements that will be negotiated at this time.

# Opening Statement cont'd

- The opening statement will help to set and enforce a positive, resolution-seeking tone. Finally, the opening statement is a reminder for the participants that they are capable and have the responsibility of resolving the dispute themselves.
- This is their opportunity to be heard and to deal with the issues that have remain unresolved, which they would like to have resolved in order to move on with their lives.
- The opening statement establishes the openness and credibility of the process.

The elements to include in the opening statement are the following:

- Introduction of all present (verify how everyone wishes to be called during the mediation)
- Mediator qualifications- who you are.....
- The voluntariness of the process
- The role of each person in the room
- Mediators are impartial facilitators, not a judge or jury.
- Mediators have no power to decide the case, determine right or wrong, assess guilt/innocence. The mediator's role is to facilitate productive communication so the parties can come up with their own mutually agreeable resolution.

# Cont'd

- Disclaim any bias: the mediator is not professionally or socially acquainted with any party, and is totally impartial. If the mediator knows or has met one of the parties, the parties should be given the opportunity to accept or reject the mediator.
- The mediator does not give any legal or professional advice to any kind, at any time.
- Flexibility and communication are key to mediation. The parties must honestly express their needs and truly listen to what others say. 'if you focus on blaming or on revenge, it forces the other person to fight back and stop listening to you, which lessens the chance for resolution.
- The goal of the session is to create understanding and build agreement

# Cont'd

- Communication guidelines.
  - ❖ Every one listens openly and honestly
  - ❖ Each participant will treat the other with respect: no put-down, no interruption.
  - ❖ Everyone will be given ample opportunity to speak and it is expected that neither party will interrupt the other, or disrupt the mediation session.
  - ❖ 'It may be difficult to listen to statements you don't agree with but it is important to hold your thoughts until it's your turn'. The parties may take note to remember the important points (have paper/pen available).

# Cont'd

- The mediator's job is to keep the playing field level and to give everyone a chance to say what they need to say. This is impossible if the parties interrupt each other.
- Do the parties present have authority to settle the case?
- All parties are required to sign the confidentiality agreement or else the mediation session cannot proceed. (Allow parties to read along as you explain confidentiality and then everyone signs one form, start with your own). Note will be destroyed at the end of the mediation unless a subsequent session is scheduled.
- Explain the Caucus to parties.

# What is Caucus?

- A “caucus” is a private meeting between the mediator and just one of the parties that’s held out of earshot of the other side.
- In some mediations there are no caucuses at all, while in others the mediator may caucus with each side once or multiple times, depending on the situation.
- It is always up to the parties to decide if they want to use private meetings.

# The reasons for caucusing is to:

- Create a productive pause in the process (relief from tension)
- Engage in mediative reference point or "what if" process
- Permit party movement without losing face
- Offer negotiating advice
- Assess alternatives to negotiated settlement
- Test whether a party's proposals are realistic
- Act as a sounding board
- Work to develop settlement proposals
- As means of gathering information that will not otherwise come out



# Sample opening statement

## Preliminaries – welcome and introductions

- Welcome to the mediation, my name is Isaac Asare and thank you for appointing me to serve as your mediator.
- Can you tell me your name and how you want to be called in this process.....
- You both know each other, but you may not know each other's solicitors.
- Joe, this is Lawyer Kezia, who is assisting Solomon, Solomon, this is Layer Thomas, who is Joe's solicitor.
- Please call me Isaac.
- Are you also comfortable with first names?

# Time constraints and settlement authority

- Before we get going I would like to check with you about timing matters.
- We originally agreed to meet today for up to four hours, can you all recommit to that ...?
- Do you have any parking limits, or other time constraints ...?
- Do you both have authority to resolve this matter today?

# Extent of prior contact with the parties

- By way of background, Joe you approached me about having a mediation and I spent some time talking to you on the phone and sent you some written information about mediation, and Solomon I did the same with you.
- You both know that I have spoken to your solicitors by telephone and have received the papers which you prepared for me.
- That is all the contact I have had about this matter, and I have had about the same access to both of you.
- Are there any queries about that?

# MEDIATION GROUND RULES

For the process to work, we need your cooperation and ask that you agree to follow these ground rules:

- ❖ During the first part of the session, we ask that you speak directly to me. Later you will be able to directly talk to each other.
- ❖ Be decorous and do not interrupt each other. Everyone will have an opportunity to speak. Let us resolve to treat each other with respect.
- ❖ Do you agree to abide by these rules?
- ❖ The mediation is confidential. I will not voluntarily reveal any information or turn over any record to anyone outside the mediation. Any notes taken during the mediation will be destroyed. Does anyone have any questions or time limitations? If not then we will begin.

# TALK ABOUT GHOST IN MEDIATION

- That is, Be;
- Gentle
- Honest
- Open
- Specific/Sincere
- Talk

# The Role/Powers of Mediator;

- Section 74 of ADR Act 798
- “1. a mediator shall in an independent manner do everything necessary to help the parties to satisfactorily resolve their dispute.
- 2. a mediator may conduct joint or separate meetings with the parties and make suggestions to facilitate settlement.
- 3. a mediator may where necessary and if the parties agree to pay the expenses, obtain expert advice on a technical aspect of the dispute.

# The Role/Powers of Mediator cont'd

- 4. a request for the services of an expert may be made by the mediator or by one party with the consent of the other party.
- 5. a mediator shall be guided by principles of objectives, fairness and justice, and shall give consideration to, among other things, the rights and obligation of parties, the usage of the trade concerned and the circumstances surrounding the dispute, including any previous business practices between the parties

# The Role/Powers of Mediator cont'd

- 6. a mediator may conduct the mediation proceedings in a manner that the mediator considers appropriate, but shall take into account the wishes of the parties including any request by a party that the mediator hear oral statements, and the need for a speedy settlement of the dispute.
- 7. a mediator may end the mediation whenever the mediator is of the opinion that further mediation between the parties will not help to resolve the dispute between the parties”.



# Representation in Mediation

- Section 71 of ADR Act 798
- “1. a party to a mediation may be represented by a lawyer, an expert or any other person chosen by the party.
- 2. a party shall communicate in writing to the mediator and the other parties the name, address, and the extent of authority of any representative within seven days of the representative’s appointment.

# (3) The Exploration Phase

- Private meetings take place between each party and the Mediator.
- The Mediator will seek to explore the nature of each party's case, their aims and objectives and engage in 'shuttle diplomacy'.

## (3) The Exploration Phase cont'd

- Mediation often needs to deal with the challenge of parties' desire for revenge or vindication of their position.
- The Mediator will tackle this challenge by exploring what each side's true motivation is and will use this exploratory phase to build trust and help each party to hear what the other is really saying.
- In this way the ground is prepared for settlement negotiations between the parties by clarification of their respective issues and agendas

## (4) The Negotiation Phase

- Direct and indirect negotiations begin with the assistance of the Mediator who challenges each party, in order to explore the strengths and weaknesses of their position.
- The Mediator will use his/her skills to present, re-frame and help settlement possibilities.
- Parties can confer with their lawyers where necessary.

# (5) The Concluding Phase

- Lawyers representing both sides draw up the agreement recording the settlement, the parties or the mediator.
- The mediator will seek to ensure that a Settlement Agreement is both viable and sustainable.
- The objectives are that the Settlement Agreement satisfies the parties, deals with all the issues, is workable and practical and minimizes the possibility of future dispute.
- Once the settlement is reached, it becomes legally binding after signing.
- see;...Sect. 80 of Act 798

# The End

- Thanks for your attention.
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