

Kluwer Mediation Blog

Must We Sign an Agreement Post Mediation?

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Mediation is a reality that has come to stay in the dispute resolution sector. Its advantages have been mouthed by all and its relevance continues to expand in scope and depth. Mediation training courses have become best sellers in most jurisdictions as the lawyers and other professionals scramble for knowledge of the process. However, one part of a mediation process which is often overlooked is the crafting of the mediation agreement. This phase of a mediation process though, usually the last part in the process, is quite key in the final resolution of a dispute. The reason for this is not farfetched as the parties would need to implement the agreement post-mediation and this can result in another dispute where the parties do not buy into the letter and the spirit of the agreement.

While there are similarities between a mediation agreement and a contract document it differs from the contract as there is already a history of default or dispute before the negotiation commenced. Keep in mind, the dispute or default necessitated the assisted negotiation and relationships are likely more on the edge than in a pure commercial transaction. The mediation agreement is also different from the arbitration award as though they present a resolution to a dispute, the arbitral award is a decision outside the control, design and determination of the parties. It is an enforceable decision given by a third party adjudicator as the judgement of court at the end of litigation. It is no wonder therefore that professionals often come into mediation and find they have difficulty in drafting the mediation agreement.

In drafting an effective mediation agreement, several principles have to be considered:

A. CONSISTENCY: The mediation agreement must stem from the process of mediation itself. It is not the opinion, decision or value proposition of the mediator. Each party must look at the agreement and be satisfied that its proposals were reflected but more than that, the agreed points must be spelt out as it was reached by the parties during the mediation process. In order to achieve this, different mediators use various styles. For example, some mediators immediately note down in writing agreements reached and read such out to the parties before drafting the agreement to ensure their proposals and oral agreements are reflected in the agreement. Others ask the parties to write and submit what their understanding of the agreements reached are and this is blended into a single document. Whichever style is chosen by a mediator, the major point made is that the agreement must reflect the spirit of the mediation process;

B. CLARITY: The language used in drafting the mediation agreement is also key to its effectiveness. Where an agreement is such as to require legal interpretation before implementation,

then the draft has failed the test of clarity. The language must be unambiguous and where the parties are from different countries, the agreement must reflect this reality. Ideally, agreements must be in a language elected by the parties but where the mediators observe that the command of the elected language by a party is doubtful it may be important to advise that a translation of the agreement into his mother tongue be made and read to him. Where this is impossible, special explanation and emphasis of the agreement should be made. Whilst the agreement should not be verbose, it must detail the terms of the agreement and who is to do what in a clear and precise manner. The mediator should also ensure that the agreement is final and there are no contingencies or conditions for implementation by a party. This is likely to become the subject of another dispute if not taken care of at the time of agreement;

C. CONSTRUCTION: The language of the mediation agreement must be positive and precise. The agreement should not emphasize what the parties do not agree to, rather what each party agrees to do. It is best that each paragraph reads 'A agrees to'. Furthermore, the agreement usually should tell the story of the dispute in an objective manner and without the emotions or rancor it generated. The wording of the agreement must not be verbose as this may lead to further dispute. The mediation agreement should close with an execution section for the parties. It is important that the parties execute the agreement as that is the sign that both parties assent and take ownership of the document. Furthermore, the act of signing puts some moral cum legal obligation on the parties to keep to the terms of the agreement;

D. COMMUNICATION: Subsequent to the mediation, the parties may need to communicate with one another on the progress made at implementing the mediation agreement. Given that during the course of dispute relations may have strained between the parties, it may be important to include in the mediation agreement how subsequent communication is to be carried out. This is even more when it is considered that in most disputes the underlying cause was a breakdown of communication between the parties;

E. CUSTOM MADE: Finally, it is important that the mediator allows the agreement reflect the parties and their particular style. While there might be guides and templates for drafting mediation agreements, it is of utmost importance that the agreement drafted is drawn from the participation of the parties and that it answers their peculiar needs. This may not be totally achieved in the letter of the agreement particularly where it is to become a consent judgement of court but the spirit of the agreement must reflect uniqueness of the parties' dispute.

There are unending guides to drafting an effective mediation agreement but in my experience some of the tips expressed have been worthwhile. In all, I truly wonder if the lack of signing of an agreement necessarily diminishes the essence of a properly mediated dispute. The decision to sign or not to sign will in my view depend on the nature of the dispute and the type of parties. If any of the parties turn out to be lacking in decency and integrity, all the best worded agreements will amount to very little.

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