



myerson

Myerson **Dispute Resolution**

Why it pays to mediate

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Welcome

We understand the complexities of modern life and the importance of taking care of your business interests. So it's a deep source of satisfaction that so many Commercial Agents choose Myerson as their trusted adviser

Why Myerson?

At Myerson, we are the leading legal Commercial Agency firm outside of London, and we have years of experience in advising agents and principles.

The firm are proud to be ranked as '**Top Tier**' in the prestigious international directory **The Legal 500**, and commended by The Times '**Best Law Firms 2023**'. This means you can be certain that you will be receiving the highest quality legal advice and that we can advise you on complex disputes.

Myerson is retained as an expert adviser to the members of **Agentbase** and the Association of Professional Sales Agents. Our litigation team has acted in agency disputes against companies based in Ireland, Germany, the Netherlands, Spain, France, Belgium, Italy and the USA, and are experienced in complex disputes.



Why it pays to mediate

This article provides a brief overview of the mediation process in the context of commercial agency claims, and highlights some of the advantages of choosing mediation as a form of alternative dispute resolution for this type of claim.

Commercial agency claims

Commercial agency claims frequently arise when a principal terminates a commercial agent. That termination event triggers the agent's statutory termination entitlement under the Commercial Agents (Council Directive) Regulations 1993 ("the Regulations"). Ordinarily the agent will be entitled to receive compensation or an indemnity, which is designed to compensate for the loss of the agency.

What happens following termination of an agency?

After termination, the agent's claim is assessed by ascribing a value to its entitlement pursuant to the Regulations. In the case of compensation, that involves a detailed analysis of the agent's income and, expenditure. The agent may also be entitled to 'pipeline' commissions on future orders.

The agent will set out its claim in a court compliant letter of claim and send this to the principal. The principal may dispute the agent's claim and will set out the reasons why in a formal letter of response. If the parties cannot reach an agreement to resolve the dispute, the next step is for the agent to issue a claim in the Courts.



Costs of court proceedings

Court proceedings are generally very expensive. There are various procedural steps before a claim gets to trial, and parties should not expect the trial to take place for at least 12 months. The significant costs incurred by both parties are just one of the reasons why agents and principals are encouraged to mediate in an attempt to reach an early settlement.

What is mediation?

Mediation is a flexible, voluntary, and confidential form of alternative dispute resolution, in which a neutral third-party mediator assists parties to work towards a negotiated settlement of their dispute. The parties retain control of the decision to settle, and on what terms.

The purpose of mediation?

The purpose of the mediation is to achieve a settlement which both parties can live with. That means both parties are required to compromise, and it is often said that a good, mediated settlement is one which neither party particularly likes. It is all about risk and certainty. A negotiated settlement enables a principal to 'buy off' the risk of losing on everything and paying more to an agent, and the agent 'buys off' the risk of losing and paying the principal's costs.

The choice of a mediator

The parties are free to appoint the person they consider most appropriate to mediate the claim. The mediator may be a lawyer or someone with technical expertise or experience in a particular sector. In the context of commercial agency claims a mediator that has experience and knowledge of the Regulations (usually a lawyer) is extremely helpful.

The mediator remains impartial throughout. The mediator's neutrality provides them with credibility in the process.



Where does the mediation take place?

The parties choose a neutral venue to meet face-to-face with lawyers present, although in the face of the current pandemic, mediations are usually facilitated remotely with the parties attending via video link. This works equally well.

Before the mediation

The mediator usually has discussions with the lawyers in advance of the mediation. This ensures formalities have been complied with and assists in identifying the key issues.

This helps to ensure that time is not wasted at the mediation. The parties will generally agree on a core bundle of documents for use at the mediation. Their lawyers will also prepare position statements providing a summary of the facts of the dispute, points of agreement and points of dispute.

Expert valuation evidence

When mediating commercial agency cases, it is particularly useful for the parties to obtain expert valuation reports for the purposes of the mediation only. These are not formal court compliant expert reports but do provide a reference point during negotiations.

At the mediation

A mediation usually begins with a joint session attended by all parties and their lawyers. During this session, the mediator will provide an overview of the process and his role in that process. That is often followed by an opening statement from each party.

The opening session is then followed by private discussions between the mediator and each party, and hopefully the exchange of settlement proposals.



Potential advantages of mediation in commercial agency cases

Mediation offers several advantages including:

- **Saving time and costs.** More than 90% of court cases settle before trial, and agency cases are no exception.
- **Achieving resolution quickly.** Mediation can be attempted at any time. It can be effective to mediate early before costs escalate.
- **Party autonomy.** The parties negotiate their own settlement in mediation, and therefore maintain control over the outcome of the dispute.
- **Objectivity.** It can be difficult for parties to be objective about the strengths and weaknesses of their case. The mediator, as a neutral third party, can reality test each party's understanding of the strengths and weaknesses of their position. He will also get parties to think about the potential for loss, expense, time, distractions and uncertain court outcomes.
- **Confidentiality.** Court actions are matters of public record, but what takes place during mediation is confidential. Whether mediation occurs before or after court proceedings are commenced, the entire mediation process is "without prejudice".
- **Preserving relationships.** Mediation is flexible enough to address all parties' interests. There is no prescribed form. This can make it easier to preserve relationships between the parties. It can also make the termination of relationships more amicable.
- **Creative settlement.** A court giving judgment will focus on the legal position and decide the case on the merits. Settlements achieved in mediation can consider much wider issues and take account of personal and commercial interests.
- **High success rate/satisfaction levels.** Mediation has a high success rate. Mediators who responded to CEDR's eighth mediation audit in 2018 reported that the overall success rate of mediation remains high with an aggregate settlement rate of 89%; 74% achieving settlement on the day of mediation and 15% shortly after mediation.



You're in safe hands!

If you would like further information about how we can help you, or if you have any questions, please don't hesitate to contact a member of our **Dispute Resolution Team** today.

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