

Guided Choice Dispute Resolution Processes: Reducing the Time and Expense to Settlement

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Introduction

Most commercial cases eventually settle and are not litigated to a binding outcome. However, preparing for trial or arbitration can be very expensive, especially in international or complex cases. Those costs expand in direct proportion to the time available to lawyers and experts before the case settles. The Guided Choice process is about reducing the time it takes to settle a case and thus reducing expenses without compromising on quality. Guided Choice allows parties greater control over their expenses and the outcomes they achieve. As it is customised to each individual dispute, Guided Choice is useful in a broad range of cases. Guided Choice is just a new way to summarise and describe practices which are already often used by experienced commercial mediators.

Each dispute has unique characteristics that eventually lead the parties to reconsider their positions and settle. Identifying those characteristics early is critical to reducing the time period to settlement. The earlier they are identified, the easier it is to design a process to avoid impasse. Many users of traditional dispute resolution services do not recognise that the settlement process consists of more than just exchanging legal briefs, participating in preparatory conferences and appearing on a particular date to begin

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negotiations. Many litigators, not trained in mediation advocacy, do not understand that it is the parties, not the mediator, who settle disputes. This requires a new and different approach for each case.

Guided Choice is a mediation process in which a mediator is appointed to initially focus on process issues to help the parties identify and address proactively potential impediments to settlement. Mediation confidentiality is a powerful tool to help the parties safely explore ways of setting up a cheaper, faster and better process to explore and address those impediments. Although this person works essentially as a mediator, in Guided Choice the mediator does not focus initially on settling the case. Instead, the mediator works with the parties to first facilitate a discussion on procedural and potential impasse issues, and help them analyse the causes of the dispute and determine their information needs for settlement. The term 'Facilitator' is used in this article to describe a mediator who is appointed for a Guided Choice process.

Guided Choice processes encourage earlier settlement because they create a cooperative negotiation atmosphere early on. Typically, procedural issues are not contentious if they are approached as a means for triggering cooperative behaviour and allowing the parties to understand the process choices which represents their best interests. The parties often have an immediate mutual interest in retaining more control over the outcome of any dispute resolution process and reducing its costs. The Facilitator can help them to build on these common interests, set common objectives (such as deadlines and budget limits) and pursue a joint problem-solving and solution-oriented approach to resolving the matter as expeditiously and effectively as possible, while also focusing on preserving a good working relationship between the parties. They can agree on how they will agree to resolve any points of disagreement that could be an impediment to settlement.

The Guided Choice process requires only one essential element: an agreement to use a qualified mediator as a Facilitator. The process does not increase costs. It seldom takes more than one day of a Facilitator's time to help the parties to reach an initial diagnosis of why the dispute has not settled to date. The parties and the Facilitator can focus on what is needed by certain deadlines and on how to budget for evidence-taking and the appointment of experts for complicated disputes. Further, the time spent on diagnosis and the resulting settlement process can substantially reduce the time spent later on negotiations. All in all, jointly focusing on process issues early on in the process typically leads to substantial savings. Guided Choice emphasises the efficient use of the time and often reduces the time associated with traditional mediations.

The six core principles of Guided Choice dispute resolution are as follows:

- a commitment to mediate process issues first;
- confidential discussions with the Facilitator and diagnosis;
- process design and option generation based on the diagnosis;
- information exchange in accordance with the agreed process;
- anticipating and overcoming impasses; and
- ongoing role of the Facilitator (even if negotiations are suspended).

A commitment to mediate process issues first

Initiating Guided Choice dispute resolution is easy. It requires only an express commitment by the disputants to agree to mediate. It is this commitment that empowers the parties and the Facilitator to focus on and confidentially explore potential impediments to settling the dispute and how they may be addressed proactively, by mutual consent. Even if the parties agree that a binding evaluative opinion will be needed on certain key issues (eg, findings of fact or law by an arbitral tribunal), the parties can focus on the optimal way of providing information to the experts needed in the most timely and cost-effective manner. This can even be done by including the experts or tribunal in the group of people the Facilitator will work with. Since the Facilitator focuses the parties' attention on their process choices, there is no requirement that the parties include any special contractual language requiring Guided Choice in their mediation agreement. The parties should select a qualified Facilitator who understands the principles of Guided Choice and has a broad range of experience with many forms of dispute resolution systems (including various styles of mediation, conciliation,¹ early neutral evaluation, adjudication, dispute resolution boards, arbitration, hybrids, etc). Guided Choice recognises that in some circumstances, a party's willingness to allow the Facilitator to investigate and recommend a settlement process should not also be an automatic agreement to attend a classic mediation day. Deciding whether and when any negotiations take place is part of the initial phase of the Guided Choice process.

Simple mediation clauses are contained in many standard form commercial agreements and are useful because they avoid the negotiations involved in trying to customise dispute resolution clauses in pre-dispute

1 The words 'conciliation' and 'mediation' are often used interchangeably in English by common law practitioners. For most civil and international lawyers, they are quite different processes. However, 'conciliation' is a norms-based evaluative process, similar to early neutral evaluation, whereas 'mediation' is a subjective interests-based process. These terms will be used as distinctive processes throughout this article. For more discussion on the difference between them, please see www.neuroawareness.com/app/download/7078292904/article.pdf, 60–64.

agreements. Any pre-dispute mediation clause should allow a dispute resolution institution to appoint a qualified mediator as a Facilitator if the parties cannot agree on one. This is an inexpensive service, and the rules of most institutions provide for confidentiality. Parties are far more likely to collaborate when they know that their discussions cannot be used in subsequent litigation.

Confidential discussions with the Facilitator and diagnosis

When lawyers become involved in disputes, it is often because the parties are deadlocked and unable to reach an agreement. That situation is referred to as an 'impasse'. Disputes are more likely to settle when the parties understand the reasons for their impasse and why the dispute remains unresolved, despite any prior negotiations or mediations that might have occurred. By exploring the general background to the dispute privately with the Facilitator, the key protagonists and the stakeholders can take a step back and gain a better mutual understanding of what underlies their past impasses, and how to adjust the settlement process to prevent and overcome further impediments to settlement.

The Facilitator's most important settlement tool is his/her ability to explore the reasons for any impasses under the umbrella of mediation confidentiality. In most jurisdictions, settlement discussions between the parties are confidential and inadmissible in subsequent arbitrations or trials. Many states have also enacted legislation conferring confidentiality on discussions with a mediator, or as between the participants in a mediation process. Further, the rules of almost all dispute resolution organisations that administer mediation proceedings include strict confidentiality provisions. These confidentiality rules can be supplemented to include communications with non-parties who have agreed to participate in the settlement discussions as part of a Guided Choice process.

Initially focusing on procedural issues under mediation confidentiality allows the lawyers and their clients to be more open and frank with the Facilitator without fearing that their adversaries may gain an advantage from their disclosures. These discussions are not admissible in subsequent arbitration or litigation proceedings. At the earliest possible time, the Facilitator can begin to diagnose the causes of any impasses they have identified with the parties and their counsel. The Facilitator can speak confidentially with the parties, their advisors and experts. Early verbal communication is important because it tends to be more candid and spontaneous than formal written communications. Based on what the Facilitator learns, they can also suggest an impasse avoidance plan to the parties.

The Facilitator does more than just read the parties' legal briefs and speak to their lawyers to effectively diagnose the reasons for any impasses. The Facilitator works with the parties directly to understand: (i) the possible social and emotional drivers of the conflict; (ii) the coalitions that may have been created and the identities of the key stakeholders or individuals involved; (iii) the propensity of the conflict to escalate further; (iv) what information both the parties require to better understand one-another's future interests and not only the positions taken to date; and (v) the financial, timing, legal, social or other constraints the parties may face. The Facilitator's work may include reviewing insurance coverage issues and identifying third parties who may be involved or influential in the proceedings, but who may not be willing to participate as a party in a conflict resolution process. The Facilitator can also work with the parties to understand their decision-making processes² and any organisational or administrative issues they may need to address, and to identify any biases, heuristics, coalitions, hostilities, risk aversion, pro-social and anti-social behaviour patterns, or other psychological factors that may have contributed to the impasse. For example, how have the parties framed the impasse? Are they relational, structural, temporal, social, emotional, data-driven or something else? What are the best, worst and likely alternatives the parties have to a settlement? Can they improve on these alternatives? Are there possible win/win scenarios available, based on a broader view of the case, taking into account future, subjective interests, such as social or unrelated business considerations?

Process design and option generation based on the diagnosis

Any ensuing substantive mediation process should be designed around the results of the Facilitator's multi-faceted diagnosis with the parties. Too often in mediation, however, the mediator gets caught up in a process that takes the form of mediating a narrow positional negotiation, like a settlement conference, where a 'judge' applies a court's 'family cook book' or list of instructions for disposing of the matter. These sorts of mediations usually have a narrow, evaluative focus, which can be described as including the following five steps:

2 Mediators and advocates need to understand that settlement decisions are made for reasons other than the law and admissible facts. See Daniel Kahneman, *Thinking Fast and Slow* (Farrar, Straus and Giroux, New York 2011); also see the review of J Robbenolt and J Sternlight, *Psychology for Lawyers: Understanding the Human Factors in Negotiation* (ABA Publishing, 2012).

- STEP 1: exchange legal briefs ('position papers');
- STEP 2: appoint persons with authority to settle and their advocates;
- STEP 3: make an 'opening statement' and disclose at some point each party's 'bottom line';
- STEP 4: use the mediator to facilitate a positional negotiation, shuttling from caucus to caucus, doing reality testing and shepherding financial offers and demands for settlement in the hopes of narrowing or 'bracketing' the gap within a zone of possible agreement (ZOPA); and
- STEP 5: ask the mediator to provide a proposal (whether binding or non-binding) when the parties run out of time and the gap within the ZOPA seems to be too great for a compromise.

Such mediations often reach a settlement if the mediator is respected as an expert on substantive issues, and/or their settlement proposal is sufficiently attractive. If this process does not settle the case, however, the mediator is usually discharged and the parties resume expensive adversarial proceedings entailing discovery and motion practice, with the conflict usually having escalated due to feelings of frustration and perceptions of bad faith or intransigence of the other side for mediation's failure to settle. The parties may view the other side of unfair tactics in creating a coalition with the mediator, and lose faith in the mediator on in mediation as a process altogether. Although the case may still settle later on – on the 'courthouse steps' – this is only after the parties have exhausted themselves further, squandering unnecessary time, resources, emotions and money that could have been spent in better ways.

Guided Choice avoids the common trap of falling into such a five-step mediated positional negotiation. It promotes an earlier, less expensive and often more satisfactory outcome, as it can factor in what is needed for a genuine interest-based negotiation to occur, including an option-generation phase, as opposed to a purely distributive or positional negotiation. For example, the Guided Choice diagnosis may show that one or more parties do not have sufficient information to settle at that point in time, or that there are relationship issues that can be solved by involving additional participants. The Facilitator can encourage collaborative information exchange before the parties begin negotiations for the first time, suggesting an exchange of 'interest papers' and not just 'position papers', taking into account the parties' future needs and including information that would be useful to focus on from a procedural perspective, taking into account subjective interests and perspectives of not only the parties, but other key participants as well. The parties, their counsel and the Facilitator can generate new procedural options focusing on maintaining or strengthening key relationships, taking into account pro-social procedural issues, such as venues, meals, seating arrangements, breaks, social programmes, etc.

An impasse may also be based on the fact that the people who have been negotiating are not the real decision-makers or those ultimately concerned by risk/reward ratios. Sometimes there can be invisible financial, insurance or status interests that have not been properly considered or engaged in the process. These interests can often be uncovered by involving stakeholders who are not already 'at the table'. There may also be strong emotions or feelings of anger between the parties and sometimes even their lawyers. A party may feel that the 'other side' is not dealing in good faith, or that they have not been treated fairly or professionally. Parties often feel cheated or lied to. When these feelings are involved, a traditional evaluative mediation, where the mediator brackets and tries to narrow down the gaps in the parties' numbers, may be doomed. These sorts of mediations can be avoided by exploring with the Facilitator the social and emotional factors involved in generating such impasses.

Information exchange in accordance with the agreed process

Often parties will agree to mediate, but 'not now'. When a lawyer says that their client is not ready to mediate, the lawyer means that the client does not have enough information to make a business decision about whether to make or accept a settlement offer. The best or likely alternatives to a negotiated outcome (the 'BATNAs') are unknown. The lawyer typically makes this representation because the lawyer feels that they would be able to better estimate his/her client's case following the exchange of detailed pleadings and taking of evidence. The truth is that even in the best-prepared cases, the gathering of evidence frequently does not help to accurately predict an outcome. Although more information exchange may help the parties better understand the strengths and weaknesses of the parties' arguments, clarifying these strengths and weaknesses often only escalates an impasse, as each side props up its strengths in the hope that doing so will overcome its weaknesses. Traditionally, this results in expensive and time-consuming discovery conducted on an adversarial basis. However, with a Facilitator's guidance, the parties can collaborate to quickly exchange the important information necessary for the client to make its business decision about settlement. Clients often need far less information to make a business decision than their lawyers think is necessary to 'try the case'.

Focusing primarily on bolstering the strengths of the parties' positions results in overconfidence bias, expensive and time-consuming evidence-gathering measures, and aggressive discovery, often conducted by lawyers who drive anti-social or adversarial behaviour between the parties. The conflict escalates, the parties are 'at war', and the 'window of opportunity' for

a mediation has passed. Under the guidance of a Guided Choice Facilitator, however, the parties can first understand whether or not they need evaluative input, on what issues, and how they may collaborate more effectively to quickly exchange key information that could meaningfully impact a business decision to settle. Clients often need far less information to make a business decision than their lawyers think is necessary to 'win the case'.

The parties can agree to a limited information exchange for the purposes of settlement, with the possibility of reverting to a broader scope of discovery if the dispute later reaches a formal evaluative and binding hearing. The parties can agree on hypothetical extremes and postpone expensive e-discovery while initial negotiations progress on the basis of these hypotheses. Experts can meet with the parties and explain their protocols and opinions before preparing expensive written reports that will make it difficult or problematic for them to later change their opinions. Sessions with experts, working collaboratively to understand the ranges of possible options and outcomes, can make damages claims more realistic and help identify issues needing further investigation, including what payment plans may be possible if one of the parties may be facing insolvency issues if they were to lose the case.

The parties working with the Facilitator may also determine early on in the diagnosis phase that they have been using different methods of determining settlement values, which may have caused them to be far apart in dollar terms. If so, an understanding of the range of valuation methods possible, and how they may be reconciled or combined can be discussed with the Facilitator. The Facilitator can explore developing a consensus methodology with experts, and the parties and the experts can meet privately with the Facilitator to work through any prediction theories or key variables that may be key components in the basis for the valuation.

Generally, expert sessions should precede settlement negotiations. Early information sessions with experts make it possible for the experts to report jointly to a Facilitator a range of possible outcomes and provide 'aggressive' as well as 'conservative' estimates, rather than have each party provide its own expert report and then proceed to a battle of the experts. This information exchange can also be conducted under the cloak of mediation confidentiality and settlement privilege. Knowing that concessions will not be admissible in binding proceedings can dramatically change the atmosphere of these expert meetings.

Anticipating and overcoming impasses

After the parties have selected a settlement process and focused on the type and quality of information needed to make a settlement decision, it is useful for the Facilitator to help the parties anticipate new potential areas of impasse before they occur. The parties can then focus on what criteria or information may help them overcome any new impasses before they arise, and avoid the feelings of failure or frustration that may develop if a new impasse is reached. Understanding in advance that there will likely be a wide range of damages claims and different methods of calculating them can sometimes help the parties realise that having a number is not a reason to compromise, but an opportunity for both parties to brainstorm on possible outcomes that would be better than each party's estimated BATNA. Discussing the likelihood of an impasse before it occurs lets the parties focus on overcoming it and reduces the likelihood that the settlement discussions will be terminated.

Despite the parties' willingness to reach a negotiated settlement, sometimes there are key dispositive issues that are so overwhelming that they impair the parties' abilities to think beyond them. They 'hijack' the possibility of settlement as everything seems to depend on 'objective' issues that the parties cannot assess on their own. In these cases, there may be advantages to having the parties carve out certain issues and refer them to an expert for a binding or non-binding assessment of these key dispositive issues, so that they may continue to have productive settlement discussions.

Suggesting referral of specific legal or factual issues to another neutral (eg, an adjudicator, neutral evaluator, initial decision maker, dispute review board) or submitting it to another process (eg, a mini-trial process) could be an option as well as referral on a binding basis to an arbitrator or even a judge for a declaratory ruling. A referral can be for an interim or limited decision, or without prejudice if the matter does not settle. The parties can agree about whether any information exchanged should be admissible in a subsequent trial or arbitration hearing.

Ongoing role of the facilitator (even if negotiations are suspended)

Guided Choice recognises that sometimes a settlement process is not linear and may require the suspension of negotiations and the initiation or resumption of an arbitration or court proceeding. In these circumstances, the Guided Choice Facilitator can continue to have a useful role in the settlement process until the matter is finally resolved. Keeping the Facilitator on board need not generate any additional expenses. The Facilitator's

ongoing availability alone can serve as a useful reminder to the parties that all channels of communication remain open at all times, especially on procedural issues. The ongoing involvement of the Facilitator can also be extremely helpful in subsequent discussions between the parties regarding arbitration or litigation issues that they are not comfortable discussing openly in front of the tribunal. A Facilitator may, however, synthesise any points of mutual dissatisfaction (eg, a perception of bias) and raise them directly with the tribunal, without the tribunal knowing which party the complaint may have originated from.

Many arbitrators and judges are reluctant to become involved in settlement negotiations, or to warn the parties that they are headed for an unanticipated loss or Pyrrhic victory. They may be more comfortable, however, expressing their concerns to a Facilitator confidentially and have him/her exhort the parties to settle. The Facilitator's ongoing presence allows the parties and even the tribunal to reach out to explore new settlement possibilities and avoid new procedural pitfalls as matters progress, without compromising the quality or enforceability of the legal or arbitration proceedings. Even if other neutrals have been appointed (eg, a co-mediator or a conciliator), the Facilitator can still add value to the process working as a process-focused co-mediator, or as a shadow mediator, alongside evaluative experts, including arbitrators, conciliators or adjudicators who may have been appointed to focus on specific issues requiring evaluative analysis. The Facilitator's ongoing involvement reminds the other neutrals to pay attention to the parties' procedural needs and constraints, and to revisit their future needs and interests after having received evaluative input from an expert or judge.

A frequent reason parties claim they do not want an arbitration provision in a pre-dispute contract is that they cannot anticipate the type of dispute that may arise, and that 'one-size does not fit all'. It can indeed be the case that a traditional institutional arbitration will take on a procedural life of its own. For arbitrations to be successful, however, the process often needs to be customised to meet the parties' ongoing procedural needs. They also need to account for the parties' budgets and deadlines. This means minimising expenses, especially the management of discovery, reducing the length of the process, and preserving business relationships without compromising the integrity of the process or the enforceability of the final award. Traditionally, customisation, if any, is imposed by the arbitrators, rather than agreed to by the parties. The parties are also often nervous about raising customisation issues with the tribunal, for fear of offending its members or risking the other party's reaction.

Experience with the Guided Choice process suggests that the best way to customise arbitration is by using a mediator as a process facilitator who can

work independently and confidentially with the parties and the tribunal. The Facilitator understands the parties' procedural needs because he or she was involved in diagnosing the reasons the case had not settled, and in designing the dispute resolution process. The Facilitator can thus explore issues of arbitration customisation at any time, even after the tribunal has been constituted. The Facilitator can continuously review whether the process is in danger of generating disproportionate expenses or delays that the parties cannot afford, or creating coalitions and conflict escalation problems at a social or relational level. If no pre-dispute obligation to arbitrate exists and the case involves multiple complex issues of international law, the Facilitator may also discuss with a judge and the parties the possibility of transferring all or part of the proceedings to arbitration and customising it, to gain in time or benefit from easier enforceability worldwide (eg, to benefit from the New York Convention in the case of an international dispute, where recognition and enforcement of arbitral awards are easier to obtain than for judgments by national court judgments).

Mediation, conciliation, litigation and arbitration, when taken on their own, may create certain problems. By using Guided Choice, the parties can safely explore how to make the best use of each of the dispute resolution options available to them, and possibly combine them, to reach faster, cheaper and better outcomes. Experience with Guided Choice suggests that the best way to customise arbitration is by using a Facilitator as a process mediator who can work independently and confidentially with the parties and the tribunal.

