



## THE SEVEN PRINCIPLES OF GUIDED CHOICE DISPUTE RESOLUTION PROCESSES

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Most commercial cases eventually settle and are not litigated to the end. However, the process of preparing for trial or arbitration can be very expensive, especially in international or complex cases. That cost expands in direct proportion to the time available to lawyers and experts before the case settles. Shortening that period reduces that expense. The Guided Choice process is about using mediation to shorten the period to settlement and thus reduce the expense without compromising on quality, while allowing parties greater control over their expenses and the outcomes they can achieve. Because it is customised based on the circumstances, Guided Choice is a useful process in disputes of any size.

All disputes have unique characteristics that eventually cause parties to reconsider their positions and settle. Identifying those characteristics in a timely manner can be critical to reducing the time period to settlement: the earlier their identification, 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 much more than just exchanging legal briefs and appearing on a date scheduled for negotiations. Lawyers often assume that their job is to convince an ADR neutral of the strength of their client's positions and to convince their opponent to change theirs. The lawyers and their clients often do not understand that a settlement decision involves psychology and social factors, considering the process itself as part of the problem. Guided Choice uses a mediator to make sure these human and structural factors are addressed by the settlement process.

Guided Choice involves appointing a mediator to initially focus on procedural issues only and to identify potential

impediments to settlement. Mediators benefit from mediation confidentiality as a powerful tool to help the parties safely explore ways of setting up a cheaper, faster and better process to address those issues. Although this person works essentially as a mediator, the difference in Guided Choice is that the mediator does not try and focus immediately on settling the case. The mediator works with the parties instead, to facilitate a discussion on procedural and potential impasse issues, helping them to analyse the causes of the dispute and design an optimal process. The term "facilitator" is used herein when referring to a mediator who is appointed for a Guided Choice process.

The seven core principles of Guided Choice dispute resolution are detailed below.

**A COMMITMENT TO MEDIATE PROCESS FIRST**  
Initiating Guided Choice dispute resolution is easy. It requires only an obligation to mediate created by agreement or by operation of law. Simple clauses are contained in many standard form commercial agreements. Together, the parties and an experienced Guided Choice facilitator develop the details of the process, focusing on how it can influence the parties' ability to settle. A simple form agreement to mediate avoids positional negotiations in trying to design a settlement process.

Any model pre-dispute mediation clause should allow an ADR service provider to appoint a qualified mediator if the parties cannot agree on one. This is an inexpensive service, and their rules usually provide for confidentiality of the process. The facilitator is ideally a skilled mediator who is experienced in a broad range of dispute resolution processes. Parties are far more likely to collaborate when they know that their discussions will not be

used in subsequent litigation.

An obligation to mediate is important to gain the power of the mediator to speak confidentially with the parties. However, under Guided Choice, the parties' participation with the facilitator in exploring what processes are needed for settlement does not mean that the parties have also agreed to begin negotiations on substantive issues. There can be a separate agreement before beginning such negotiations.

### CONFIDENTIAL DISCUSSIONS WITH THE FACILITATOR AND DIAGNOSIS

When lawyers become involved in disputes, it is because the parties are deadlocked and unable to reach an agreement. Such a condition is referred to as an "impasse". Disputes are more likely to settle when the facilitator understands the reasons why the dispute remains unresolved even after negotiations have continued during mediation. This knowledge helps the facilitator and the parties customise the mediation process to prevent and overcome impasse.

The most important settlement tool the facilitator has is an ability to investigate these reasons confidentially. Lawyers and their clients can be open and frank with the facilitator without the normal fear of having adversaries gain advantage by disclosures. At the earliest possible time, the facilitator should begin a process to diagnose the causes of the current impasse. To do this, the facilitator should confidentially talk with the parties, their advisers and experts. Verbal communication is important, because it tends to be more candid and spontaneous. Based on what the facilitator learns, he or she can then recommend an impasse avoidance plan to the parties. These discussions should take place under mediation or settlement privilege so that

they are not admissible in subsequent arbitration or litigation.

Proper diagnosis includes more than simply reading legal briefs submitted by the parties' lawyers. The facilitator can work with the parties to make clear the social and emotional drivers of the conflict; the coalitions that may have been created and the key stakeholders involved; the propensity of the conflict to escalate further; any information that is needed to better understand both parties' positions and/or interests; and the financial, timing or legal constraints the parties may be under. This may include reviewing insurance coverage and identifying third parties who should be involved or could be influential in the proceedings. The facilitator can also help the parties to focus on their decision-making processes and any organisational or administrative issues they may need to deal with, such as any biases, coalitions, hostilities, risk aversion, anti-social patterns or other psychological factors that may have contributed to an impasse. For example, how have the parties framed the impasses? 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 their best or likely alternatives? Can possible win/win scenarios be envisaged thinking more broadly about the case?

#### PROCESS DESIGN AND OPTION GENERATION BASED ON THE DIAGNOSIS

Under Guided Choice the design of the settlement process is based on the results of the diagnosis the parties have done with the facilitator and any key stakeholders. Too often in mediation the design of a settlement process takes the form of a narrow positional negotiation, where the mediator is expected to find a compromise between the parties' expressed "bottom lines", going from caucus to caucus, and shepherding financial offers and demands. Often the parties will ask the mediator to provide a final proposal if the parties cannot settle. If this process does not settle the case, the parties will likely abandon mediation and resume an expensive adversarial

process. This leads to further conflict escalation and feelings of frustration, as the other side is perceived to have been unreasonable or as acting in bad faith. Should the case still settle subsequently on the "courthouse steps", the parties will have exhausted themselves, squandering unnecessary time, resources, emotions and money that could have been used in better ways.

Guided Choice avoids this type of positional negotiation process. A diagnosis may show that one or more parties do not have sufficient information to settle, or that there are relationship issues that need to be addressed. The facilitator can catalyse information exchange before the parties begin their substantive negotiations. They can generate new procedural options focusing on pro-social issues taking into account the interests of all the parties and participants in designing the process, looking to the future.

#### INFORMATION EXCHANGE IN ACCORDANCE WITH THE AGREED PROCESS

When a lawyer says that a client is not ready to mediate, the lawyer often means that the client does not have enough information to make a business decision about whether to accept a settlement offer arising during negotiations. Traditionally, this results in expensive and time-consuming "discovery" conducted by the lawyers on an adversarial basis. However, under the guidance of a facilitator, the parties can collaborate to quickly exchange the important information necessary for the client to make its business decision for settlement. Clients often need far less information to make a business decision than their lawyers think is necessary to "try the case".

The parties can also agree on a limited scope of information exchange for the purposes of the mediation process, with a broader scope if the dispute goes to a formal hearing. The parties could agree to postpone expensive discovery while negotiations are in process. Experts could meet with the parties and explain their protocols and opinions before preparing expensive written reports that make

it difficult for them to change their opinions. Sessions with experts, working on a collaborative basis, can make damage claims easier to listen to and help identify issues needing further investigation. Generally, expert sessions should precede settlement negotiations.

#### ANTICIPATING AND OVERCOMING IMPASSES

Once the parties have selected a settlement process and focused on the information exchange needed to make a settlement decision, it is useful for the facilitator to work with the parties to anticipate potential areas of impasse before they occur. This can help the parties focus on what criteria or information may help them overcome such impasses, and avoid feelings of failure or frustration that may develop if a new impasse is reached. Understanding in advance that there is likely to be a wide range of damages claims and different methods of calculating them objectively can sometimes help the parties to 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 best alternative. Discussing the likelihood of an impasse before it occurs lets the parties focus on overcoming it and not on terminating the settlement discussions. Even if impasses are inevitable, focusing on a mutual understanding of their root causes and how to "name them to tame them" can save substantial volumes of time and money, even if the case subsequently proceeds to trial or arbitration (a rare occurrence).

#### ONGOING ROLE OF THE FACILITATOR (EVEN IF NEGOTIATIONS ARE SUSPENDED)

Guided Choice causes the parties to recognise that a settlement process may occasionally involve suspension of negotiations and a resumption of arbitration or court proceedings. The Guided Choice facilitator can continue to play a useful role in such circumstances. Keeping the facilitator at hand does not automatically generate additional expenses. His or her ongoing availability

can serve as a useful reminder to the parties that channels of communication remain open at all times, especially on procedural issues.

Many arbitrators and judges are reluctant to become involved in settlement negotiations, or to warn the parties that they are headed for a negative surprise. They may be more comfortable, however, expressing their concerns to a facilitator who can guide and encourage the parties to settle. The facilitator's ongoing presence allows the parties and even the tribunal to reach out to him or her to explore new settlement possibilities or avoid new procedural pitfalls as matters progress, without compromising on the

quality or enforceability of the legal or arbitration proceedings.

#### HANDLING IMPASSES REQUIRING EXPERTISE (BINDING OR NON-BINDING)

Despite the parties' willingness to find a negotiated settlement, there can be cases where there are key dispositive issues that are so overwhelming that they impair the parties' abilities to think beyond them. In such cases, there may be advantages to having an expert provide a binding or non-binding assessment on these key dispositive issues. Arbitration or conciliation (where an expert can give a non-binding proposal) can be a useful adjunct to mediation (and vice versa).

Customising this evaluative process is an area where the facilitator can play a key role, working together with the evaluative experts and the parties.

Experience with Guided Choice suggests that the best way to achieve customisation in litigation or 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, having been involved in the case's diagnosis and the design of the process. The facilitator can explore customisation issues at any time, even after the tribunal has been constituted.