

MEDIATION: TIME FOR SOMETHING NEW



The International Cotton Association (ICA) has announced that it will soon offer a mediation service. It is hoped that this new offering will help ICA members reach amicable settlements of their claims. Ultimately, the ICA hopes that this will not only lead to fewer unfulfilled awards but will also, in the long run, reduce the number of claims resorting to arbitration.

So, what is mediation?

Mediation is commonly referred to as form of alternative dispute resolution – that is alternative to traditional court litigation. It is also, however, an alternative to arbitration.

In summary:

1. Unlike a judge or arbitrator, a mediator will not decide the matter, but will instead work with the parties to facilitate an amicable settlement of the claim.
2. A dispute will not be resolved by a court judgment or arbitration award, but by a contractual settlement agreement.
3. Whilst court and arbitration litigation is in its nature adversarial, mediation is a voluntary and confidential process, designed to move the parties towards common ground and compromise.

4. Mediation can be pursued as a “break-out” from arbitration, to help narrow issues and potentially resolve a dispute before costs escalate.
5. Mediation will often take place at a neutral venue and will involve a combination of meetings between the parties and meetings between one party and the mediator.
6. An amicable resolution of a claim can help preserve and maintain commercial relationships in the face of dispute.
7. Mediation is a confidential process.

Points to remember

1. A settlement agreement formed as a result of mediation (generally speaking) is contractual in nature, and does not have the same status as an arbitration award. A party can apply to the English courts for recognition of an arbitration award, after which (assuming leave is granted) the award can be enforced in the same manner as a judgment or court order to the same effect. Similarly, the New York Convention facilitates



enforcement of arbitration awards in a myriad of foreign jurisdictions. In contrast, if a mediation settlement agreement is breached (depending on the terms) the aggrieved party would usually need to commence a new action for breach of contract. In this regard, we understand that the ICA will encourage members to recorded or perhaps convert a mediation settlement agreement into an arbitration award.

2. A whole string of cases coming out of the English courts emphasise that a request to engage in mediation should be given serious consideration and should only be refused in exceptional circumstances. Parties refusing to attempt mediation may find themselves being penalised in costs.
3. The costs of the mediation will often be split equally between the parties and will not usually be recoverable (either in arbitration or court).

The role of the lawyer

Whilst mediation is a process for the parties – and the parties will almost always be in attendance – your lawyer still has an important role to play.

1. As a precursor to the mediation, the parties will usually exchange mediation position papers. These will set out each the party's position and a summary of their claim. A well drafted document will start you on the right foot.
2. Lawyers will often attend mediations to provide support and legal advice.

3. Lawyers will usually be required to draft any necessary settlement agreement. In particular, your lawyer will ensure that the product of mediation is enforceable.

What can HFW do for cotton traders?

HFW are well versed in mediation – the cotton team led by Brian Perrott and Richard Merrylees having attended in excess of 50 mediations. We can assist you in all aspects of mediation with experience and expertise and can offer you unique and commercially sensitive support. Examples of the support and services we offer include:

1. Full mediation support, including drafting mediation agreements, position papers and settlement agreements.
2. Mediation workshops, including a mock mediation and take-away reference packs.
3. CEDR and CIETAC trained mediators.

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