

MEDIATION IN ISRAEL - Summary

By Shiri Kasher-Hitin

In Israel, the path that leads one to mediation usually passes through the courts. Sadly, there is almost no developed practice of approaching mediation *before* the conflict is escalated and gets to court.

It seems, of course, flawed, because in theory the mediation could have made the legal process redundant, but the practice shows that while party is in the pre-legal stage of the conflict she feels hurt and so wants *justice* to take its due course. As a result, court becomes a necessary station on the way to mediation.

The role of the courts as the necessary stop on the way to mediation is very burdensome for the Israeli court system. Israel's court system is one of the world's busiest judicial systems: hundreds of cases per judge every year, including Supreme Court judges. However, there are a few advantages to this necessary stop in the court on your way to mediation:

First, when arriving at court, the applicable law urges the court to refer the parties to mediation and the parties will be very inclined to respond to the referral;

Second, in many cases, when arriving at court the parties are better ready for mediation, because both statements of both sides claims have been filed and so now the chances and risks of the proceedings are clearer to parties.

I shall now present the applicable law while reviewing the legislation and conclude by presenting a few practices that in my experience were very effective.

While considering the applicable law we can count these three: Courts Law, Mediation Regulations and the Civil Procedure Regulations.

The Courts Law determines that a court is authorized to refer the parties, plaintiff and defendant, to a mediation procedure, subject to the parties' consent at any stage of the hearing¹.

The law sets forth a list of specific terms that apply to every such mediation process, distinguishing mediation from every ordinary legal proceeding and further emphasizing its advantages:

- 1) The right to discuss with each party separately²;
- 2) The right to discuss separately with a third party who is involved in the conflict³;
- 3) The possibility to handle party-mediator discussion without that party's attorney, if the party agreed to have such a discussion⁴;

¹ Courts Law § 79C(b), Mediation Regulations § 3.

² Courts Law § 79C.

³ Ibid.

⁴ Ibid.

- 4) Broad confidentiality protection: statements made in the mediation shall not serve as evidence in any civil proceeding in court⁵;
- 5) Decision of the Parties not to turn to mediation *or* termination of mediation will *not* affect the outcome of the court hearing⁶;
- 6) Hearing shall be delayed for a certain period that can also be extended⁷.
- 7) Court can grant the mediation settlement a validity of a judgement⁸.

The Mediation Regulations add incentives and define the broad neutrality obligation of the mediator:

- 1) The regulations provide a default Mediation agreement.

This full text mediation agreement details all the necessary terms for the mediation. It can of course be overridden by other terms preferred by the parties: plaintiff and defendant on one hand and mediator on the other, but this agreement is a good service for the parties as it saves considerable time and costs.

- 2) The state encourages the termination of disputes in mediation by waving certain amount of court fees, in case mediation led to conclusion of the dispute before actual trial begun⁹.
- 3) Regarding, neutrality of the Mediator, the Regulations determine that mediator ought to refrain from giving any *professional advice or opinion* regarding the dispute. In addition, mediator's fee shall NOT depend upon or be connected with the results of the mediation. Specific attention is drawn to the risk that the mediator may be in conflict of interests. To avoid that, the mediator must notify the parties immediately if she is affected by a conflict of interests or is even likely to reach a situation of conflict of interest or if she has represented one of the litigants in the past.

Pre-Trial

The Civil Procedure Regulations define a certain period for Mediation in the preliminary stage of the hearing, following a pre-trial.

The court has the authority to determine that prior to the commencement of the trial, a preliminary hearing shall take place. In this preliminary hearing, court shall examine the subject of the dispute and the ways to discuss the matter¹⁰, for example, the validity of the statements, the inclusion of potential litigants, the provision of temporary relief and the validity of a certain evidence.

This preliminary hearing is, of course, the ultimate stage to recommend to the litigants to examine mediation as an alternative for resolution of their dispute and court can apply this recommendation.

⁵ Mediation Regulations § 3(b).

⁶ Ibid.

⁷ Amendment No. 4 to the Mediation Regulations.

⁸ Courts Law § 79(g).

⁹ Court Regulations (Fees) § 6(b).

¹⁰ Regulations of Civil Procedure § 140.

As mentioned in the beginning, this stage is the most effective stage to give a chance to mediation, because statements (claim and defence) have already been submitted and the litigants can therefore better assess their chances and risks in continuing the trial.

IAC MEETING

In addition to the pre-trial, there is another path to mediation which is *binding*. I refer to mediation as result of IAC meeting.

The IAC meeting stands for these: **I**nformation, **A**cquaintanceship and **C**ooperation.

The IAC is an obligatory procedure that has been applied during the last decade in the Magistrate's Courts in the districts of Tel Aviv, Centre and Jerusalem¹¹. According to this procedure, after the stage of submission of the statements, the court will begin the trial only if a preliminary meeting outside court is held, and that is: the IAC meeting. The purpose of this preliminary meeting is to exchange information, try to find a way for the parties to coordinate - all to examine if there is an opportunity to end the dispute through mediation. The parties themselves must attend the meeting, the invitation to which is regarded as an invitation to a court hearing¹². The meeting is held according to all terms of mediation, including also the authorization to hold separate discussions with each side, the confidentiality of things given in the meeting etc. Naturally, the person that manages the meeting also ought to be a mediator.

The meeting should fulfil its three roles by introducing to the parties the nature of mediation process and its advantages, try to create a common ground for understanding and examine the differences and the chances to settle through mediation.

Within 10 days after the meeting, the parties should inform the court whether they wish to transfer the dispute to mediation or continue a hearing before the court.

Almost *all* civil proceedings brought before those Magistrate's Courts in all claims for over NIS 75,000 are subject to the IAC procedure (the exceptions are claims that must be heard immediately, certain debt claims).

National Mediation Institute at the Israel Bar:

The Institute has a system for classifying mediators by their expertise and scope of experience. It can assist the parties in their effort to find the most suitable mediator for their dispute, and it also provides service of checking availability of mediators and verifying mediator fee.

After describing the applicable law, I would like to turn now to just a few recommendations that in my experience proved to be effective:

- 1) Immediately at the beginning of the mediation meeting, devote a significant effort to describe and detail the advantages of mediation, even if the parties are represented and their lawyers most probably presented that information. Emphasize the confidentiality, the chance to end the

¹¹ Civil Procedure Regulations § 99B, 99C.

¹² Ibid, at 99C.

dispute, the possibility to file the mediation settlement in court and ask the court to validate it as a judgment, the freedom to abandon the procedure at any time and the power to control the results. It is not very likely that the lawyer has presented to her client the advantages of mediation in so and so details...

- 2) Describe in detail the stages of the process: a joint meeting for presenting positions, private meetings with each of the parties, and back again to a joint meeting. Provision of this information in advance establishes trust and brings comfort to everyone who participates in mediation for the first time.
- 3) When a party finishes presenting the sequence of events from her point of view, *briefly* reflect the sequence of events as she chose to present and repeat *keywords* she used. Keywords for this matter are the words she used to describe what she felt during escalation of the dispute or words that relate to the character of the other party. This RESONANCE leads the party that first expressed those words to re-examine her position and better understand it from a more objective point of view.