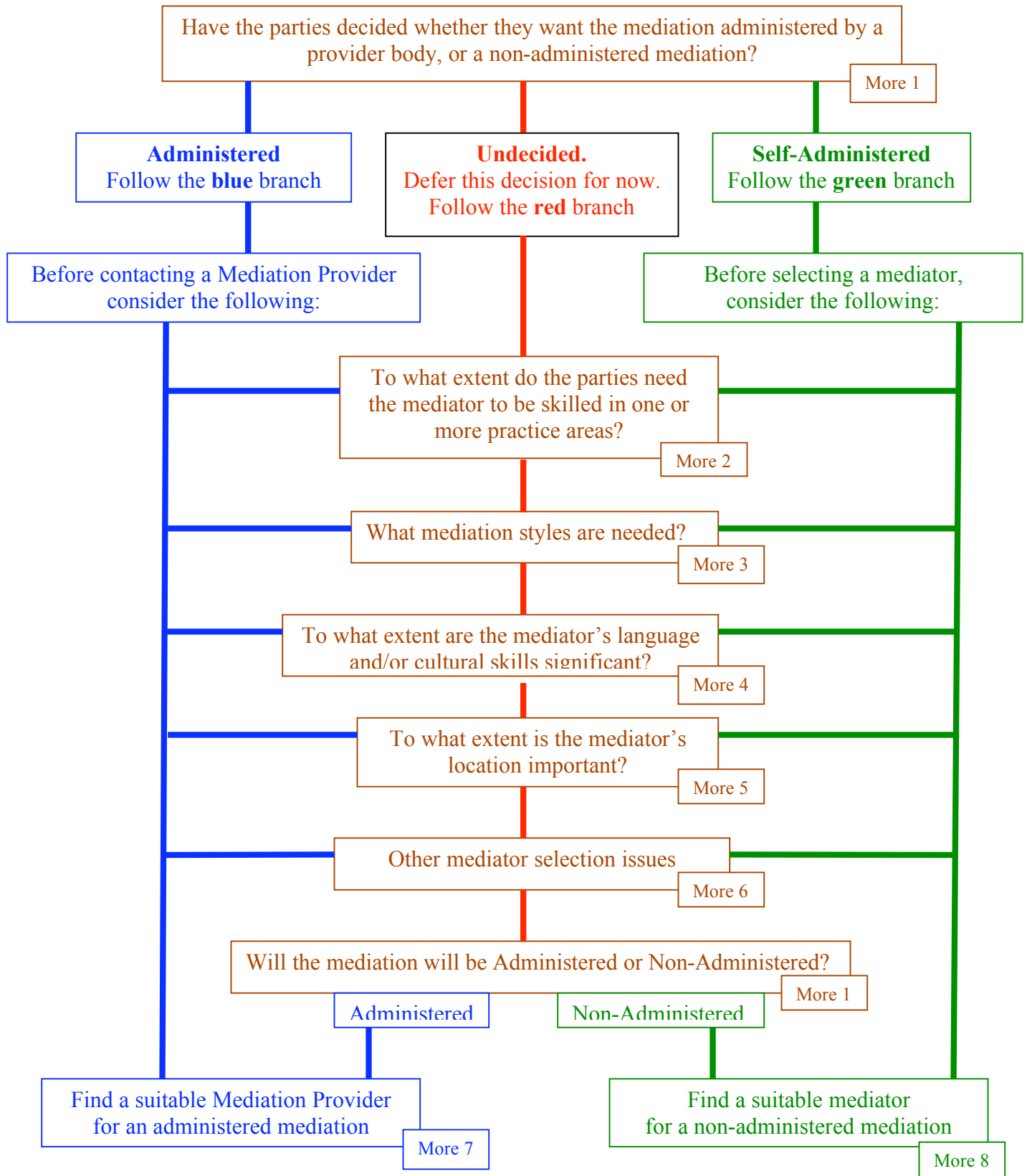




Finding the Right Mediator

Before you start...



Before you start...

About this Decision Tree

Congratulations! You are considering mediation. Statistics throughout the world convincingly establish that mediation has at least an 80% chance of successfully leading the parties to an agreement, including situations where the parties are deadlocked. Few other processes have a success rate that high.

To maximize the chances of a successful outcome – just like anything else – preparation is essential, and that is the purpose of this Decision Tree. It has been designed to provide objective and impartial guidance to users of mediation services on what to bear in mind when appointing a mediator. It has been prepared with the benefit of comments and suggestions from members of the IMI [Independent Standards Commission](#) and others.

Because mediation is a consensual, selecting the right mediator and the right process is often the first thing parties find themselves agreeing on, often after a long history of disagreement. To the maximum extent possible, engage the other party or parties in this process. If all parties apply similar considerations when selecting a mediator a joint choice will be easier to make.

Because mediation is not just consensual but also flexible, the process can be moulded to the parties needs. Choices that the parties need to make include all the branches on the Decision Tree.

One point of clarification before you start. The Tree refers to “Mediation Providers”. These are organizations and institutions that provide a mediation service to users. That service can vary widely in scope and contact but generally includes helping with the selection of a mediator and often case management support. IMI is not a provider – IMI does not have a panel of mediators, nor does it offer case management support. What it does do is run an open portal that enables users to find competent mediators, review their Profiles with feedback from prior Users in the form of a Feedback Digest, and provide impartial information about mediation. But IMI does not compete in the market for mediation services, and is not a “Provider”.

Like any tree, this is a living thing. Feedback, ideas and proposals for improving the Decision Tree are welcomed from users, professional advisers, mediators, providers, educators and others. Just click [contact us](#)

More 1

Have the parties decided whether they want the mediation administered by a provider, or a self-administered mediation?

This is a useful first question, but it does not necessarily have to be decided immediately. In both administered and non-administered mediations, part of the service you should expect is that the process will be flexible and adapted to the parties' specific needs. The provider institution or the mediator should be able to assist you in this.

If the dispute relates to a contract, there may be a mediation clause in it that specifies how a mediator will be chosen and specify a particular Mediation Provider that may offer a list of suitable mediators, recommend a mediator, or help to make the choice for the parties. The mediation clause may also provide that the mediation will be administered by, and under a mediation agreement and code of conduct of a Mediation Provider. However, mediation is a flexible and consensual process - if the parties think these contractual rules are inappropriate, they are usually at liberty to agree to approach mediation differently.

Alternatively, a referral body, like a Court or other authority, may direct or suggest how a mediator can or will be chosen. This may be important if the parties need a settlement to be formally recognized by the Court.

Or there may be no contract with a mediation clause, and no referral body. The choice of mediator, and whether to use a Mediation Provider, may be entirely up to the parties. Some parties and professional advisers have developed internal mechanisms for mediator selection based in past experience and other criteria. Or there may be no guidance at all.

Administered and Non-Administered mediations

In administered mediations:

- * A professional Mediation Provider manages all or part of the administration and case management aspects so that these can be separated from the dispute.
- * Often the provider body operates under a set of rules or offers a mediation agreement that governs how the mediation is set up and conducted, confidentiality issues, impartiality of the mediator, the application of time/cost constraints, etc.
- * The provider can select or recommend a suitable mediator to the parties, which can avoid the risk of the parties not agreeing in the choice of a mediator.
- * A Provider usually charges an administration fee and may set the mediator's fee and specify how these costs will be paid (eg shared equally by the parties).
- * Parties can usually discuss case management issues/choice of mediator with the Mediation Provider either together or independently. While providers (but this also applies to mediators in self-administered mediations) can not force parties to agree to anything, their neutrality can help ease communication between the parties and ensure all participants understand the process constructively.

Administered mediations can be particularly valuable where there are strong communication barriers between the parties, or where one or more of the parties is reluctant to mediate or to co-operate in a mediation, though these issues can also be overcome by mediators in non-administered processes.

In non-administered mediations:

- * No provider or third party case management is involved, or if involved, merely helps the parties choose a suitable mediator but does not provide other case management services.
- * The parties select the mediator themselves and agree with the mediator what rules, agreement to mediate and process will apply. Many mediators have model mediation agreements and rules that can apply or be adapted to the parties' needs.
- * The mediator performs case management tasks or shares them with the parties.
- * Administration costs, if any, are usually part of the mediator's fee.
- * The parties have more control, and also more issues that need to be addressed.

One factor that may affect this issue is whether any deadlines apply. Must the parties try to arrive at a settlement within a given time frame, or are there any financial constraints on how or when the mediation should take place? In some situations, there may be a requirement that a mediation must occur in a certain manner, or using only mediators from a named panel or Provider, otherwise the settlement may not be legally enforceable. Identifying whether deadlines, budgetary constraints, and any legal requirements apply can impact on the selection and engagement of a mediator and whether an administered or non-administered process can or should be chosen.

More 2

To what extent do the parties need the mediator to be skilled in one or more practice areas?

It is said that *No dispute is ever about what it's about*. Very often, the drivers of a dispute are several issues or motives, and sometimes the formalities of the dispute are merely superficial, while the real dispute (and therefore the key to a true resolution) may be centred in something not captured in the legal framing or technical complexities.

Mediators are not empowered to judge the merits of a dispute – they are not judges or arbitrators. Their role is to help the parties come to an agreement, usually by getting to the roots of their problems. So two of the key questions in selecting a mediator are:

Will we benefit from having a mediator who is familiar with the substantive issues that are most likely to arise in the settlement negotiation?

Or will others at the table supply such specific expertise as is needed?

If you need a more evaluative mediator (see 3) the importance of familiarity with the specific legal and/or substantive issues governing the dispute may be more important than if the outcome is likely to require the generation of new options or improving relationships for the future.

Remember, when you engage a mediator you are buying that person's skill to mediate. Not every mediator necessarily has substantive experience in all the practice areas your dispute presents. So, you may need to weigh (a) the mediator's process skills, against (b) the legal and substantive experience of the mediator in the issues in dispute.

Where both process and substantive expertise are needed, one option may be to consider co-mediation. For example, where a dispute arises over the future of a construction joint venture, and the need arises to change key elements of the venture, you may consider that you need a construction mediator and also an accountant. Or, if the matter involves intellectual property, patent litigation, or technical or arcane subject matter, you may want an intellectual property/patent/software specialist **as well as** a skilled mediator. Selecting co-mediators that work well together may have an additional cost impact but may greatly streamline the negotiation and help the parties reach a more rounded outcome more quickly. Another option may be to engage a neutral expert with competency in specific technical areas even if that person is not a mediator.

More 3

What mediation style do you need? Facilitative, Evaluative, Transformative

Often too little thought is given to the mediation styles that mediators practice. It is important for users of mediation services to select a mediator with a style or number of styles that meet the needs of their specific case – right both for all the parties involved and for the situation that needs to be resolved. But, as in the choice of any professional service, you first need to identify your likely needs and then ensure your choice of a professional meets those needs.

Essentially, there are three main – and rather different – mediation styles: Facilitative, Evaluative and Transformative. For a concise review of what practice styles and skills are involved in each style, see: [www.mediate.com/articles/zumeta.cfm]

Although a facilitative style is commonly regarded as the most mainstream form of mediation, it is not unusual in a mediated dispute that evaluative and/or transformative competencies are applied by the mediator at different moments and in differing measures. Many mediators shift easily from one style to another according to the needs of the situation. But some facilitative mediators prefer not to be evaluative unless they are specifically asked by the parties.

If the most important tasks are to overcome communication blockages, identify hidden obstacles, and develop options for mutual gain to help the parties think creatively and enable an agreement to be reached, the parties probably need a facilitative mediator.

If the parties perceive that there will be a need for the mediator to break deadlocks by giving non-binding opinions, asking hard questions, making comments about the facts and the law of the case, guiding the parties in other more directive ways, or helping set guidelines for a settlement based on objective norms (such as Industry standards, law, etc), they will need a mediator who is able to be evaluative.

If the goal is not to resolve a specific dispute but rather improve the parties' relationship, and if that relationship is important for the future, then a transformative mediator will focus more on helping the parties communicate and work together than on resolving short term conflicts. Among other applications for transformative mediation in business contexts are relations among: competitors or members of an Industry, joint venture partners and the regulated and regulators/government agencies.

It helps if the parties discuss these issues before narrowing the search for a mediator or a Mediation Provider and then discuss the styles needed with short-listed mediators. Agreements to mediate can also reflect style issues – for example the inclusion of a paragraph confirming the parties' expectation that the mediator will be asked to give a non-binding view or evaluation if a deadlock is reached.

More 4

To what extent are the mediator's language or cultural skills significant?

There may be more to this question than is initially apparent.

Clearly, a mediator needs to communicate effectively with all parties and their representatives. Where the parties do not share the same mother tongue, it may be useful consider a mediator who can mediate successfully in the parties' natural languages.

It is most important to ensure, however, that the parties can effectively communicate with one-another and with the mediator, and that understanding is facilitated. Using co-mediators, each with different language and cultural skills, may be one way forward. Another approach is use of interpreters; if they are independent of the parties they can be considered aides to the mediator, and therefore have an important neutral role.

In addition to language capability, consider the mediator's cultural acceptability to all the parties, including the mediator's ability to engage effectively with the parties. Where there are language issues, there are also likely to be cultural issues, but there can be strong cultural differences among parties having the same mother tongue.

Where there is a diversity of cultural backgrounds among the parties, a mediator or Mediation Provider that shares only one party's cultural values and credentials may not be trusted or accepted by the other party. Consider expressing a willingness to select a mediator or Provider perceived as sharing the other party's cultural background, or a mediator very familiar with both cultures, or propose using one from a third culture who is skilled in negotiating cross-culturally, or an international institution or provider. Again, co-mediators can be a solution. In situations where the other party shows reluctance to engage in mediation, these approaches can be a way to help them feel more comfortable with the process.

Above all, ensure that the mediator is sensitive to cultural diversity and has the capacity to understand the differences involved and implied by cultural dynamics.

Mediation relies for its effectiveness on all parties trusting the mediator. It is part of the mediator's job to earn that trust.

More 5

To what extent is the mediator's location important?

The mediator's location may be important, but often not as critical as many assume.

Travel costs may be involved, but these are often small in relation to the amount in dispute and the sums that will be spent if there is no settlement. The other party may be suspicious if you select a mediator in your locality (unless the other party is also in the same locality).

It is generally wise to consider the location of the mediator as a practical issue when reviewing a shortlist of mediators, some of whom are local and some not, rather than as a prevailing consideration at the outset. If the parties want a mediator to join them in their locale, or in some other place, keep in mind that some mediators charge travel expenses and travel time. This may, or may not, be a factor in choosing a mediator.

A neutral venue can be an important consideration, reflecting the neutrality of the process. Selecting an outside mediator and/or a neutral venue can be particularly helpful where parties are from different locations or where there is a high level of hostility, or where an obvious power imbalance exists.

In online mediations, location of the mediator is far less relevant, but other considerations may then apply – such as availability (eg in light of time zones) and their skills in mediating online.

More 6

Other key mediator selection issues

Mediator Profiles

Study mediator Profiles and compare them. Focus on impartial feedback from prior users and peers. Follow up on links they offer. Use search engines for more information.

Costs

Costs of mediating are invariably a fraction of litigating. Nevertheless, the costs need to be understood and accepted. Mediation Providers often quote costs on a scale of charges which may include the costs charged by their mediators. In larger cases, the costs may be negotiable. Some mediators charge hourly rates, some charge day rates, and some charge for preparation and traveling time while others do not. In international disputes, travel costs can be significant, but can also be estimated in advance.

The total costs of a mediation are usually split equally between the parties. Some parties (such as repeat users of mediation like insurers) may agree to pay more than an equal split. Any legal fees are usually carried by each party. These arrangements can be confirmed before the mediation (eg in an agreement to mediate), or varied afterwards, in a settlement agreement.

Code of Conduct

Trust underpins the mediation process. If the parties do not trust a mediator's integrity in terms of competence, diligence, neutrality, independence, impartiality, fairness and the ability to respect confidences, mediation is unlikely to succeed. When choosing mediators, confirm from the providing organizations (or if you are choosing the mediator directly, confirm with the mediators) whether they adhere to a Code of Professional Conduct and ask to see copies.

References

Follow up any references. Do not probe for answers than may entail party-confidential information but general questions are usually regarded as perfectly proper.

Research

Conduct further research, perhaps jointly with the other party. Not all competent mediators have chosen to be IMI Certified, so consider the complete panels of Mediation Providers and professional organizations. If the mediator or provider cannot give you access to prior user feedback in an anonymous form, you need to find other ways to know more about the mediator's actual performance in prior cases and other indicators of the mediator's competency and suitability.

More 7

Find an appropriate Mediation Provider

First, identify exactly which services the parties need from a Mediation Provider. This will help compare various provider bodies to determine what services each offers and whether they coincide with the parties' needs. Feel free to discuss these needs, and the respective costs involved, with Providers – they will help you make the necessary decisions.

If you have already identified one or more potentially suitable mediators, and if they are on a Provider's panel, consider using that provider to administer your mediation.

IMI is impartial, and does not recommend any providers. Many are not exactly comparable because of variations in the services they provide, their geographic reach and the distinctive needs of different cases. Links to a number of Mediation Providers are given on the IMI web portal as an informational aid to users. Providers and other panels having members who are IMI Certified may be linked on the IMI web portal, as may certain international institutions and professional organizations.

More 8

Find a Suitable Mediator

The IMI search engine is a useful place to start your search for a mediator – whether the parties decide to use a provider body or not. IMI has no financial stake in the decision. Neither the mediator nor any provider body pay a case fee to IMI. Only mediators who have established their competency in the opinion of prior users and peers are able to be IMI Certified – the parties' focus in selecting a mediator is therefore likely to be less related to competency and more directed to the suitability of the mediator for the issues facing the parties.

On the suitability level, you may narrow your search, as appropriate, by practice area, location, language skills and mediation style. Save, print and read the full Profiles of your selection. Modify the selection criteria to capture details on other mediators.

Read the Feedback Digest embedded in each IMI Certified Mediator's Profile. It is an independently-prepared summary of feedback provided by prior users on each mediator's performance. Consider speaking to some of those listed as referees.

Once you have made a shortlist, consider involving the other party in the selection process. Choice of mediator/provider should be a joint choice. Invite them to go through the same process in case they find other suitable mediators that should be considered. Refer them to this Decision Tree and express interest in their choices.

The parties should feel free to contact individual mediators remaining in their selection. That direct contact should help you come to a final selection.

Where more than two parties are involved in the dispute, consider asking the shortlist of mediators whether they have experience of mediating with multiple parties, and whether a provider body was involved in those cases. The administrative and case management issues can be more challenging in multi-party mediations.

Although mediators work hard, control over the negotiation remains firmly with the parties and the outcome is theirs, not the mediator's. In any mediation, choosing the most suitable mediator is vital.