

EARLY INTERVENTION - an earlier and better informed solution

What is Early Intervention?

Early Intervention is a highly flexible process developed by SeaMediation Chambers that seeks to take the key ingredients that make mediation so effective, but to introduce them earlier and in a more dynamic and fluid way to help the parties achieve an informed solution much sooner. Despite its name, it is a process that can be used at any time in the course of a dispute, sometimes as late as the final stages of preparation for a hearing.

Like mediation, Early Intervention introduces a neutral mediator to provide a trusted and independent third party with whom each party can discuss the case on a 'without prejudice' and confidential basis. However, unlike mediation, those discussions tend, certainly initially, to take place over the telephone which may avoid the costs associated with gathering all the parties in one location for a formal mediation day.

What are the benefits of using EI?

- It saves time
- Saves unnecessary expense
- It 'nips in the bud' potentially damaging misunderstandings or assumptions that can lead to protracted and costly disputes
- Promotes constructive understanding and trust
- Facilitates more positive outcomes
- It gives good creative lawyers another option to use for their clients

Why does EI work?

All parties to a dispute want an outcome that suits them. Once there is a genuine dispute, therefore, the parties are best served by getting on with resolving it in a measured and planned way rather than commencing protracted litigation warfare. Without a sensible dialogue, full-on litigation may be the parties' only option. EI provides a Mediator who will help the parties focus on the realities of the dispute and help them identify where in the range of outcomes they might sit. Also, importantly, the Mediator can assist the parties clarify how their interests might best be served by doing something now.

To reach a solution on an informed basis, each party may need additional information or a better understanding of what the other side thinks and knows and might be able to prove. The Mediator can help to provide a safe conduit for that information (a shopping list), or help plan a way forward (a roadmap) to a more measured process; or simply facilitate an earlier exchange of 'positions' and enhance understanding of why the dispute has got to where it is.

No other dispute resolution process provides this. Parties will not and cannot confide in a judge or arbitrator, nor will they expose their true positions to each other. They will do both with a Mediator, often enabling mutually advantageous outcomes to be identified and explored.

Neither SeaMediation nor SeaMediation Chambers has any legal identity of any kind. Each is simply a brand utilised by a number of mediators who work independently of each other and are not in partnership or any other form of collective legal arrangement. Any mediation services are provided by each mediator on their own account and upon their own terms and conditions of service.

It is worth considering the following questions:

What happens when a dispute starts?

- The parties distrust each other
- The parties adopt postures which signal complete confidence - (though not always with foundation)
- The parties protect rather than share their information - (but ultimately they will probably be compelled to share it by the litigation process).

What conventionally happens when a dispute settles?

Usually it will be because:

- Costs and interest have increased; the cost of losing is much higher; settlement becomes an imperative
- Information has been acquired to enable a more informed decision - but often the information has been acquired at considerable cost through the litigation process
- Experts and lawyers have analysed this information - although the change between their initial and final opinions based on the expensively obtained information may only be a few percentage points
- Reality has started to set in

What happens when the matter settles sooner with the assistance of a Mediator?

In addition to the above, there are other important outcomes:

- Distrust has been neutralised
- Posturing is neutralised
- Information may have been exchanged more readily and on a 'safer' platform

The significance of these last three ingredients should not be underestimated. Their presence – and that of the Mediator - will always make settlement more likely, sooner and at less expense. When a case settles in mediation in one day, after many months and years of litigation, it is these three ingredients which are at work. EI seeks to inject these at a much earlier stage in the process, thus reaping the rewards for clients and their legal representatives much sooner too.

What is the process?

EI is a very flexible process. The Mediator works with each party and their lawyers to explore all options including:

- Identifying key issues and concerns for each party
- Working out what each party needs to do to better inform the other of its position
- Working out a mutually agreed 'shopping list' or an improved 'roadmap' to take the dispute forward
- Identifying options for resolving the issues, or agreeing how to contest them most cost-efficiently.

The Mediator may include some or all of the following in the process:

- Exploring issues and options by phone, shuttle meeting or email
- Chaired settlement meetings
- Solution and process planning if no settlement is reached
- Agreeing a timetable to a more formal mediation process

Where do the lawyers fit in to this?

Lawyers massively increase the prospect of success in any mediated settlement. Good lawyers (and P&I and Defence Clubs or other insurers, where involved) are a key part of the process – they see the good points and the bad points and they know the risks. EI depends on the parties seeking and receiving sound advice. EI gives lawyers another tool in their dispute resolutions ‘toolbox’ to use when more options are needed.

What are the fees?

It costs nothing to explore!

Where the Mediator has been asked to approach another party to the dispute to invite them to take part in an EI process (EIP), the initial exploration with each of the parties as to whether they will participate is free of charge (not exceeding a total of 1 hour per party and up to a maximum of 3 hours where there are more than two parties).

If, after such initial exploration, one or more of the parties declines to agree to the EI Terms and/or if the Mediator is of the opinion that the process is unlikely to be of benefit to the parties, then the Mediator will terminate the process.

If the parties agree to participate in an EIP under the SeaMediation Standard Early Intervention Terms (available to download at www.SeaMediation.com), the Mediator will charge the parties £400 per hour (to be divided equally between the parties irrespective of how much time the Mediator spends in discussion with each party).

It is the standard practice of SeaMediation Mediators to set an initial budget for their fees at the outset of each EIP so the parties are informed as to a limit on the Mediator’s fees (which, if reached, would trigger a discussion with the Mediator as to whether the EIP should proceed further).

If I have one of these cases, how do I make Early Intervention happen?

It is very easy to start an EIP. You can do either of the following:

- Discuss the option of an EIP with the other parties. If they wish to proceed, agree verbally or by exchange of email to proceed on the SeaMediation Standard Early Intervention Terms (available to download at www.SeaMediation.com). No formal signed agreement is necessary. Call or email SeaMediation Chambers to ask either (a) that the Mediator chosen by all the parties accepts the appointment, or (b) that the Senior Clerk nominates a Mediator to accept the appointment. The Mediator will then start the process.

- Alternatively, if circumstances are such that you would prefer not to discuss the possibility of an EIP with the other parties directly, you can approach SeaMediation Chambers on a unilateral basis to indicate that your side agrees to the SeaMediation Standard Early Intervention Terms and ask to appoint a Mediator of your choice or to ask the Senior Clerk to nominate a Mediator. The Mediator will then contact the other parties to undertake an Initial Exploration – in effect, to invite them to agree to participate in an EIP. The outcome of the Initial Exploration will either be that all the parties, or (occasionally) at least sufficient of them to make it worthwhile, agree to proceed on the Standard EI Terms or, alternatively that an insufficient number of them agree in which case the Mediator will terminate the process.

SeaMediation Standard Early Intervention Terms

SeaMediation Chambers has developed a set of standard terms to simplify the whole process of Early Intervention. The standard terms are available to download at www.SeaMediation.com. In order to proceed, the parties simply have to agree to be bound by them – there is no need for a formal signed contract.

Parties will clearly want to read the standard terms in full. It is however worth highlighting just a few of the key terms. If you agree to be bound by the SeaMediation Standard Early Intervention Terms you are agreeing:

- That you will treat all exchanges with SeaMediation Chambers and any appointed Mediator, and between the parties pursuant to the EIP, as being without prejudice to any litigation, whether current or future, and whether anticipated or not.
- That the Mediator is entitled to treat all exchanges with other parties as strictly confidential to those parties and that he is not under any obligation to disclose all or any part of such conversations to you unless authorised by that party to do so.
- To pay the Mediator in accordance with the fee schedule (outlined above).

The standard terms also specify that the Mediator will require that any parties with whom he makes contact to conduct an Initial Exploration agree to be bound by the standard terms before the Mediator discloses any information which you have provided (save, of course, for the fact of your initiating an EIP and any other information you have specifically consented be disclosed).

For FAQs please see the next page, or to find out more or discuss if your case might be suitable, call any of our Mediators or our Senior Clerk, Rachel Sharman, who will arrange for you to speak to one of them. The initial discussion is purely exploratory, is confidential and will cost you nothing.

SeaMediation Chambers

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Early Intervention - FAQs

In one sentence, what is early intervention?

Early Intervention takes the ingredients that make mediation so successful (over 80% of mediated cases usually settle) and uses them in a more fluid and less formal way to seek an earlier and more informed solution.

My dispute is not in its early stages - so will EI help?

When EI was first conceived the expectation was that it would be used in the early stages of a dispute. In the event its application and appeal has proven to be much wider and on a number of occasions parties have turned to it as late as the final stages of preparation for trial or arbitration. Its flexibility enables the parties to explore final solutions at all stages.

Why has it been thought of?

To address the question we are often asked – “I have just settled - why has it cost me a million dollars to get here?” The deal was always there to be done but getting there was expensive.

So it's about lawyers charging too much?

No – most lawyers want to resolve disputes as cost effectively as possible but often have to get a long way down the litigation route before they are in a position to do so. It is the litigation system within which they work which leads to expense, not the lawyers themselves. If good lawyers can get greater access to facts and opposing arguments earlier - through the unique early involvement of a neutral mediator - the sooner they will be able to give their clients informed guidance on settlement.

So lawyers are part of the process?

Almost always the answer will be "Yes". EI only really works if the parties have good lawyers. The mediator will understand and challenge the arguments but a good lawyer will almost certainly be needed to give the client a real perspective. The idea is to give lawyers more tools to use for the benefit of their clients, and to spread the word that costs are best reduced by involving the lawyers, not by trying to curtail their involvement or to suppress their charging rates - which is a common knee-jerk response to high litigation costs.

What makes it different?

No other dispute resolution process, other than mediation, provides a genuine neutral to assist the parties and to understand all aspects of each case (on a strictly confidential basis) so be able to see ways ahead which may be of mutual benefit. No judge or arbitrator is ever in a position to do this.

How do I approach the other side?

If the parties are in deadlock, one of the parties may ask the mediator to make the first approach to the other side. This is another unique feature of Early Intervention.

Doesn't starting the process make me look weak?

The better view is that starting a process shows confidence and a willingness to grapple with a problem. The time to be strong is in the negotiation itself.

Is it suitable for all cases?

Probably not. Many cases can be resolved by negotiation or involve legal issues which require a court's guidance. Similarly debt collection offers little scope for compromise. Early intervention is better suited to disputes which are intractable or complicated by particular issues, the volume of evidence or the number of parties/jurisdictions involved.

Does it cost a lot?

Less than litigation as it has no formal procedures, no court fees, and can readily cross jurisdictions and systems of law. Even if it cannot resolve the dispute, it will almost certainly help it on its way to a structured resolution. Further, it can be stopped at any time without penalty or cost. An overall cap on the mediator's fees is usually suggested at the outset, which may be adjusted later by consent if this seems appropriate.

Can it only work for an English law dispute?

No. All of the strengths and weaknesses of the issues under all relevant laws and jurisdictions can be brought into consideration when options are explored. Indeed Early Intervention is particularly suited to multi-party/multi jurisdiction disputes. But good legal advice may be essential for the parties to assess their positions.

Is it just another form of mediation?

It uses the key ingredients of mediation – namely that the mediator deals with position-taking, distrust, the sensible exchange of key information and arguments, and mapping a route towards resolution; but it is not the traditional one-day mediation.

But will I inevitably end up in mediation if I do this?

No. The mediator may achieve settlement through the early informed route; or he may guide the parties to a more formal mediation. The mediator can support a more efficient approach in whichever process is most suitable by assisting the parties in a sensible exchange of evidence and legal argument (which they will have to do at some stage any way).

What if I want to do something more forceful e.g. seek security for my claim?

You are free to do whatever best protects your position. This may create tensions but those are for the mediator to deal with. The only rule of the process – which you will be required to agree to – is that all exchanges with the mediator are confidential to the EI process and are without prejudice to any formal court or arbitration proceedings.

Recent feedback from solicitors regarding EI:

"I have nothing but praise for your assistance and the procedure in general"

"Many thanks for your help. I found the Early Intervention process a good one and will use it again"

You can start the process (or simply find out more) by calling SeaMediation Chambers on +44 (0)7824 879427 or emailing clerks@SeaMediation.com