

A large, vibrant blue ocean wave crashing, with white foam at the base, serving as the background for the left half of the page. A large, light gray triangle is overlaid on the right side of the page, pointing towards the top left.

# **MEDIATION AND ALTERNATIVE DISPUTE RESOLUTION**



## Mediation

Mediation is a well-established form of dispute resolution. A properly managed mediation process will be guided by an experienced and neutral mediator, selected by the parties to the dispute. This can often result in a solution that makes commercial sense and preserves the relationship between the Parties. Mediation can also often be conducted much faster than conventional dispute resolution proceedings, which saves the cost and time of protracted litigation or arbitration proceedings.

Mediation is aimed at establishing a safe and constructive environment for the parties to critically analyse the issues in dispute with the purpose of facilitating an agreed resolution to that dispute, a resolution from which both parties ultimately benefit. The process is also non-binding unless a settlement is reached. These elements to mediation allow for the exchange of information, thoughts and views with the mediator without a party jeopardising their legal or commercial position if the mediation is not successful and litigation or arbitration ensues.

***"40% of respondents to a 2022 SOAS survey believed that mediation was the most appropriate forum to resolve intra-Africa disputes"***

Parties are free to agree and apply an appropriate set of mediation rules to add structure and clarity to the process. Many African dispute resolution centres such as the Arbitration Foundation of Southern Africa and the Nairobi Centre for International Arbitration (NCIA), already publish their own mediation rules. There may be greater promotion and revision of such rules in the future as mediation becomes better known and possibly more attractive to parties.

Obtaining a compromise or agreement that is acceptable to both parties relies on the participants having trust in the process, which is facilitated by the skill and acumen of the mediator who guides the parties in finding a resolution.

The parties' legal advisors are encouraged to assist the parties during the process to facilitate the viability and terms of settlement reached.

In many jurisdictions, including South Africa, courts are increasingly encouraging adverse parties to consider voluntary mediation. In some jurisdictions mediation has become mandatory and parties will have to prove that they have attempted mediation before they can proceed to trial. The aim is to reduce burdens on the court and to allow for the expeditious and cost-effective resolution of disputes which could benefit from mediation.



## Alternative Dispute Resolution

In addition to mediation, there are other mechanisms available for the alternative resolution of disputes without recourse to formal litigation or arbitration proceedings. These include:

- Formal negotiations between senior representatives of the adverse parties.
- Expert negotiation or adjudication where an expert third party with specialised knowledge in the field related to the dispute makes a decision.
- Conciliation whereby a conciliator plays an active and directive role to facilitate agreement, such as advising on appropriate settlement terms.





## OUR APPROACH

Recognising that disputes can be costly and divert valuable resources and time from your business, we are experienced in proactively managing and progressing mediations and other alternative forms of dispute resolution in a dynamic and cost-efficient way.

Mediation is about communication between the parties facilitated by an independent and neutral mediator. Having an experienced mediator to assist at such a time can smooth the process to settlement, saving time and money.

Many of our lawyers are also trained and qualified mediators, allowing them to bring a unique perspective to help facilitate commercial compromise and resolution of disputes. Our mediators are trained in facilitating effective communication and guiding parties to a commercial and practical resolution not necessarily open to a judge or arbitrator to award.

***Mediation is a preferred option where parties have an ongoing commercial relationship to preserve. Many commercial contracts require mandatory mediation prior to commencing formal proceedings.***

***South Africa, Lesotho, Namibia, Zambia, Kenya, Uganda, Tanzania and Rwanda have implemented court-annexed mediation.***



## OUR SERVICES



We offer our clients the advantage of one law firm with the depth of resources, capabilities and experience to offer a full range of services which include:



Drafting dispute resolution clauses which incorporate mediation or ADR



Drafting mediation agreements



Agreeing the procedures terms and parameters of a referral to mediation



Selecting and appointing a suitable neutral mediator



Preparing for and conducting the mediation



Advising on, and drafting, enforceable and final settlement terms



Advising on next steps to secure and protect your legal position if the mediation does not successfully resolve the dispute



## OUR EXPERIENCE

*"The firm has the in-depth knowledge, skills and expertise to handle complex and sophisticated matters."*

CHAMBERS GLOBAL 2025

**In advising clients we are able to draw on a wide variety of experience and expertise. Examples of our team's mediation and alternative dispute resolution experience includes:**

- Representing one of the world's largest mining companies in a mediation regarding the sale of shares and a disputed supply agreement.
- Representing a South African utility company in a series of related adjudications in relation to claims by an international contractor.
- Advising an engineering company in a mediation against an Australian mining company regarding a project in Malawi.
- Representing a South African insurance company in a mediation in Australia concerning underwriting claims.
- Representing a state-owned entity in multiple adjudications under the NEC 3 form of contract relating to a pipeline project for the supply of liquid fuel products.
- Representing the infrastructure development arm of a major local municipality in an adjudication relating to disputes arising in relation to construction projects.
- Representing a state-owned entity in dispute adjudication proceedings under the NEC 3 form of contract relating to infrastructure projects at a harbour.
- Representing a Contractor in mediation proceedings agreed to in accordance with the JBCC Principal Building Agreement for the payment of outstanding payments certificates and retention monies.
- Acting in a mediation between the Department of Mineral Resources and Energy and local community forums.
- Advising a European property developer in a court-ordered mediation in relation to a claim for misrepresentation and fraud, and advising on the drafting of comprehensive and binding settlement terms

## MARKET RECOGNITION

Many of our directors are recognised as leading lawyers in their fields.

**Clive Rumsey** is the Head of our Construction & Engineering sector, and a director in our Dispute Resolution practice. *Chambers Global 2019–2025* ranked him in Band 1 for construction. *Chambers Global 2025* ranked Clive in Band 5 for dispute resolution and in Band 4 from 2021–2024. *The Legal 500 EMEA 2020–2025* recognised Clive as a 'Leading Individual' for construction. *The Legal 500 EMEA 2022–2024* recommended Clive for dispute resolution.

*The Legal 500 EMEA 2025* recommended **Sentebale Makara** for dispute resolution.

*The Legal 500 EMEA 2025* recommended **Desmond Odhiambo** for employment. *The Legal 500 EMEA 2022–2024* recommended him for dispute resolution.



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**BBBEE STATUS: LEVEL ONE CONTRIBUTOR**

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

**PLEASE NOTE**

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

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