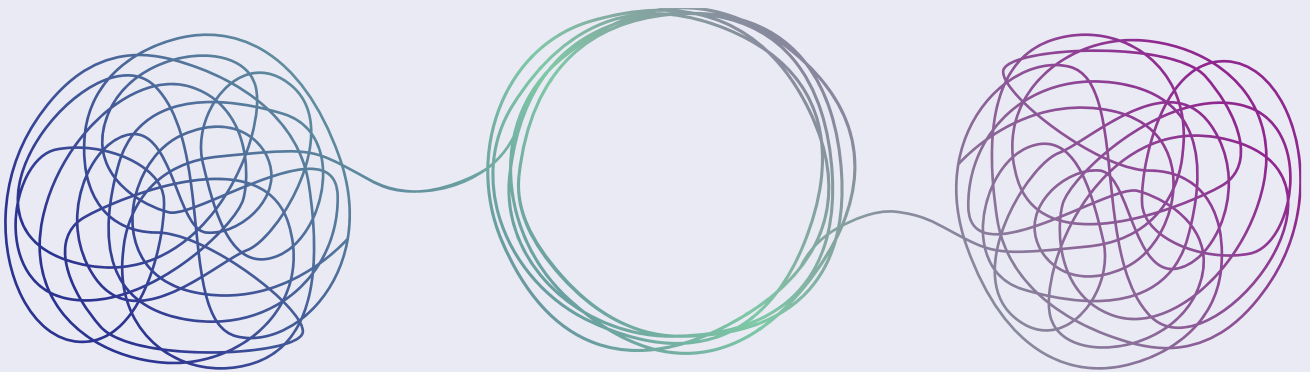


ENGAGING A TRUSTED AND EFFECTIVE MEDIATOR

CONFLICT RESOLUTION SERIES



March 2021

مجلس الشركات
العائلية الخليجية
FAMILY BUSINESS COUNCIL-GULF
عضو في FBN



Disclaimer

This document is strictly private, confidential and personal to its recipient and should not be copied, distributed or reproduced in whole or in part, nor passed to any third party or used for any other purpose without the express written permission of Family Business Council Gulf ("FBCG"). FBCG is not responsible for any errors or omissions, or for the results obtained from the use of this information. All information in this document is provided "as is", with no guarantee of completeness, accuracy, timeliness, or the results obtained from the use of this information. The information contained in this document is not intended to be a source of professional advice with respect to the material presented, and the information and/or documents does not constitute investment advice.

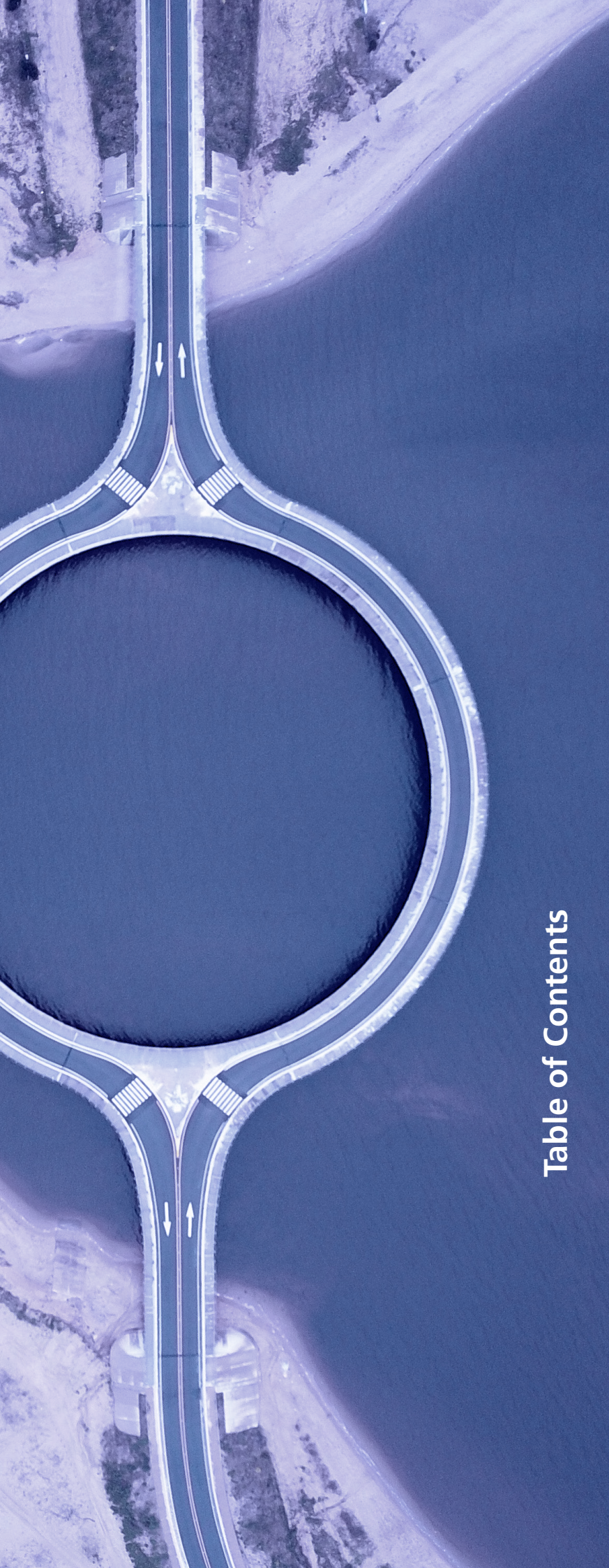


Table of Contents

Chairman Message	1
Introduction	2
Timing	4
Scope of Engagement	7
Stakeholders	9
Choosing a Mediator	10
Engaging a Mediator	14
Evaluating Impact	16
Mediation roadmap milestones	17
Conclusion	18
Acknowledgements	19

Chairman Message



Conflict is a key reason why family businesses fail to succeed to the next generation.

Some of the largest family-owned companies have experienced a public exposé of their disputes and ultimately their demise. The Lacoste Company faced ownership conflict between father, Michel Lacoste, and daughter, Sophie Lacoste-Dournel, regarding the succession of power. The Indian billionaire brothers, Mukesh and Anil Ambani battled in a power struggle over managerial control and ownership of Reliance Industries Ltd. The Gucci family, after years of financial scandal and family infighting, sold their business, losing ownership and managerial control.

However, conflict is not inherently bad. It is when the process and outcome of conflict is mismanaged that makes it detrimental to both families and their businesses. With good governance, transparency and open communication, family businesses can reduce the disruptive consequences of conflict. When properly managed, conflict can in fact strengthen the family business. It can stimulate change, spur creativity, encourage fresh ideas; and when resolved, even build family cohesion.

One of the ways to manage and resolve conflict is through mediation. I strongly believe that mediation is a very powerful tool for conflict in the family business. With mediation, a family takes the most effective and peaceful path to find an amicable, win-win resolution for all family stakeholders, which is less taxing on their finances, time and emotions.

At FBCG, we want to equip our members with all the insights and knowledge they need to pursue the mediation path. One of the key success factors for this path is engaging an effective and trusted mediator.

This was the impetus for this edition of our Conflict Resolution Series. Drawing on global and regional experts and families, we have synthesized the key factors a family must consider when engaging a mediator. We have featured detailed, practical tips for adopting mediation, proactively in the early stage of designing your family governance and reactively, when a dispute escalates to a conflict.

As custodians of your family business, I hope that you benefit from reading our findings and always opt for mediation as the go-to solution to surpass one of the biggest threats to our sustainability – conflict among family.

Sincerely yours,

Omar Alghanim
Chairman, Family Business Council Gulf

Introduction

In 2019, FBCG conducted a seminal study on the availability and effectiveness of alternative dispute resolution (ADR) across the six GCC countries. A key finding of the report "[Dispute Resolution for Family Businesses in the GCC: Keeping the family united](#)" was that mediation is an effective way to resolve conflict amongst families.

However, there were three key issues identified:

1. There are limited mediation options in the GCC
2. There is a shortage of experienced and professional mediators equipped to understand the unique circumstances of GCC family businesses
3. Mediation is not currently planned and embedded in the family governance

“ Mediation is when an impartial third party helps a family (or a set of individuals) in its communications and negotiations. ”

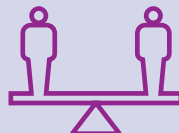
The mediation process has five distinct principles that set it apart from other mechanisms:



Third-party impartiality



Parties control the outcome



Equal treatment of parties



Confidentiality



Solutions via consensus building

This was the impetus for this edition of our Conflict Resolution Series. We highlight the key considerations for a family business who chooses to pursue mediation as a first point of call when working to resolve conflict.



Mediation is a useful tool for early intervention which aims to prevent relationships from breaking down and matters being escalated to litigation. It may also be used as a tool towards reaching amiable solutions, speedily diffusing ongoing disputes. The principles underpinning mediation are control, certainty and creativity. This allows the parties to have full control over how they choose to resolve their issues, which is the primary unassailable strength of mediation.

An effective mediator will help a family describe the issues, identify and align interests and create an opportunity for an understanding of the emotions involved. They will provide necessary information to create multiple solutions and then **enable the parties to reach an agreement between themselves.**

Mediation is successful when the stakeholders involved feel heard, arrive at a consensual decision and understand the “why” behind it. Parties should feel that they have found a solution that they are not only willing to comply with but that they regard as suitable for constructive relations. Importantly, it is the family that should find the solution, the mediator should guide and facilitate the family through the process.

It is important to note that mediators do not make decisions for the family, nor do they have the power to enforce agreements made. The agreements created during mediation must be incorporated into contracts, operating agreements, or negotiated settlement agreements.

Timing

When to engage a mediator

A key question for a family business is whether to pursue mediation as a conflict resolution mechanism. If yes, the next question is when is the right time to engage a mediator? Specifically, should this be when a need arises, or should a family explore mediation proactively?



When should a family business use mediation as a conflict resolution mechanism?

- When the first point of call for conflict management, as defined in the family governance, fails. In the case of mature families this can include a governing body or appointed representatives.
- When there is an in-principle interest and commitment to reach an amicable solution, rather than pursuing an adversarial approach.
- When the family business is approaching a difficult decision and there is a need for a third party to help clarify issues, guide the conversation, recognize agreements, and coach the group to an alignment.
- When the family business has reached deadlock on a key decision despite efforts from professional advisors and there is no clear path forward.
- When disagreements have escalated into conflict and the family members are unable to engage in constructive communication.



When is the right time to engage a mediator?

Many experts advise families to consider mediation when disagreements arise but before they escalate into full-fledged conflict. The great advantage of doing so is the ability to head off problems before they escalate and help family members identify who needs to change to preserve, and even enhance, family relationships. This becomes much harder once positions have solidified or when there is a crisis to deal with.

Having a plan for eventual conflict helps normalize the event, can help to decrease anxiety and gives a roadmap to resolution. If there is already alignment and buy-in from the family that mediation is the appropriate route for resolving internal conflicts, then the family will not waste time and energy having to convince family members of the efficacy of mediation. It can simply get on and start sorting issues out.

The key benefits of proactive mediation:



Protecting (family) relations and respect



Confidentiality and discretion



Reducing costs associated with litigation or arbitration



Ensuring a focus on solutions rather than problems



Speed to resolve conflict

This can be done in two ways combined or separately. One way is to integrate, and even necessitate, mediation in your family governance and agreements (e.g. charters, constitutions, protocols, shareholder agreements). The integrated approach can result in combinations of internal and external stakeholders. Second way is to meet and vet mediators and mediation advisors so that a family has a pre-approved

list at hand, should an issue arise, or at least an agreed approach of how to find a mediator.

The integration method would include the requirement to work through disagreements through mediation or arbitration before litigation. Documents that include how facilitators, mediators, and coaches are selected will endure time better than prescriptive documents that name a specific person or agency.



Many documents include language like the following:



Our family and business will encounter issues where we will struggle to find alignment on a decision.

When we encounter such an issue, we will meet with a trusted advisor to facilitate an initial conversation between the stakeholders. In this initial meeting, we will attempt to gain alignment on the outstanding issue, the information needed to create solutions and who should assist us with communication and/or mediation. This trusted person will be (insert name often is a family business advisor, lawyer, accountant) or (this process will be followed describing how a mediator/coach is appointed).

We will work with this trusted advisor to appoint a selection committee (if required) and draw up a shortlist of potential mediators. We will work to agree upon a mediator and if we cannot agree upon a mediator, we will select from those listed at (insert organization). We may need co-mediators to the complexity of the issue, or it is recommended by the mediator.

Payment of fees: Families will predetermine the payment of the fees ahead of the appointment of the process.

Another way families can articulate the need for mediation is to stipulate that no one will initiate litigation or arbitration on any dispute involving the family business (or other family members) until they have first spent a specified period of time attempting to resolve it together with everyone else involved in good faith through mediation.

A family in crisis



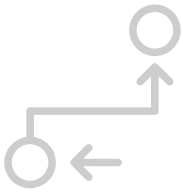
There may come a time when a family is in crisis mode. Where there is destructive communication. At this point, engaging a mediator is crucial but also extremely difficult. What are the key steps to start the process for a family in crisis?

- Ensure transparent internal communication and be clear that the intent is to deescalate and find a joint solution between family members
- Seek support from the family business' general counsel
- Involve an elder from the community or a trusted family friend to host a family gathering
- Personally seek the advice of a mediator to start facilitating the process
- Consider using a conflict coach or therapist to assist family members struggling the most to get him/her in a better position to participate in the mediation process

Scope of Engagement

Defining the scope of engagement

The scope of engagement for a mediator is worked out in discussions between prospective mediators and appointed family members in the screening committee. While there is no one-size-fits-all approach to the scope of mediation for family business issues, a typical mediator will include:



Understanding root causes

One specific mandate that should be in any mediation scope is to **invest time in understanding and investigating the root causes** of the conflict. The root causes may well be different things for different family members and understanding the different needs, perceptions and fears can be key. To work with a family successfully, a mediator needs to understand the people involved and the family dynamics.



Refine into a workable solution

The mediator will then work with the parties to refine this 'big picture' solution into a **workable consensus-based solution**. The mediator will work with the family until they are able to facilitate buy-in. They will also help the parties put down on paper the intended arrangements.



Explore motivations and identify areas of agreement

When a mediator becomes engaged, his or her next task is to **understand the stakeholder issues, motivations and desired outcome**. A family can assist in this process by having the issues the stakeholders are expressing outlined, even if they are not all agreed upon. The mediator can then conduct their interviews to support this. The mediator will motivate parties to build on joint interest to arrive at a 'big picture' solution.



Next steps

The mediator will ensure all parties fully **understand the final settlement** so that there are no misunderstandings that become the root cause of the next round of conflict.

Beyond this standard scope, each engagement needs to be adapted to the nature of the issues and the personalities of family members and other key participants.



Determining the number of mediators

Usually, one mediator will be sufficient to help a family resolve the dispute. However, in some cases, more than one mediator, or co-mediation, is required. Co-mediation has additional benefits as it allows for the generation of more ideas, differing skill sets and additional observations.

When should a family business explore co-mediation?

When an additional expert is required for the nature of the conflict e.g. expertise in psychology, a legal expert or a specific industry expertise



When the screening committee is unable to find consensus in the choice of mediator so more than one should be appointed



When different family members may feel more comfortable to have different genders or age groups represented as mediators



When language, cultural nuances and/or local laws require different skill sets

When involving more than one mediator, parties should be careful of real or perceived partiality, with each of the multiple mediators “representing” a perspective. Therefore, the lead mediator must have the full perspective of the conflict and must work to bring all the pieces together.

Ensuring privacy and confidentiality

Confidentiality begins with the first contact with a mediator. In some jurisdictions, this is due to statutory regulation, but privacy is a professional and ethical standard in the industry internationally. Mediators will sign confidentiality agreements to ensure full confidentiality is maintained throughout. In the GCC, local mediator centres or neutral centres can support families with this. They have clear guidelines, rules and agreements in place that ensure privacy and confidentiality with mediators.

Stakeholders

Which stakeholders to involve and how

Sourcing a mediator is often the first agreement a family reaches when it is dealing with conflict, so it is important that every family member feels represented. An effective way that some families adopt to ensure that all stakeholders have a voice is to establish a screening committee.

A screening committee is a group of individuals (up to 5) which represent each perspective of the issue at hand and each branch of the family. Best practice recommends an odd number of individuals on screening committee to prevent a tie vote and each branch may nominate 1-2 representatives (depending on the number of branches). A trusted family adviser may help coordinate this.

To ensure the mediator is independent, nominators must disclose any prior dealing with prospective mediators and be required to disclose any conflicts of interest.

An important note is to agree on the power of the screening committee. Do they select or recommend to the entire group? Is the final selection based upon majority rule? Does the Chairman of the family business have input? It is important to be as transparent as possible with all family members.



Steps to establishing a screening committee:

- Family adviser calls for nominations
- Each branch nominates 1-2 representatives (maximum of 5 in total)
- The screening committee is appointed
- The process for appointing the mediator is agreed upon
- Screening committee develop longlist of mediator names
- Screening committee conduct mediator interviews
- Screening committee shortlist candidates and explore scopes of engagement in more detail
- Screening committee make the decision, engage mediator contractually and inform family members of the selection

Family businesses in the GCC may find this approach too drawn out when faced with a dispute. For a more streamlined approach, a family may involve legal counsel or a trusted family adviser to help nominate and appoint a mediator quickly and efficiently.

Choosing a Mediator

Where to source mediators

Disputing parties in the GCC can find it difficult to identify and agree on suitable mediators once a family decides to opt for mediation. Therefore, sourcing mediators within the region is a matter that needs to be carefully considered.

Key characteristics to look for when sourcing mediators as a GCC family business:



Local knowledge and sensitivity

The chosen mediator must have a basic awareness of the local laws and culture, to ensure that the dispute will be appropriately mediated. Families should research the mediator's understanding of e.g. Shari'a and/or other cultural and traditional principles.

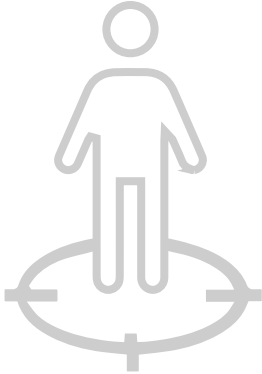


Impartiality and independence

The chosen mediator would also need to be impartial to and independent of the local community to reduce the fear of private affairs being leaked into the community.



Finding a Mediator



There are several ways that a family may then locate reliable mediators including through:

- **TRUSTED ADVISOR(S) OF THE FAMILY BUSINESS**

Many family business clients are commonly referred to mediators by their trusted advisors who can be lawyers, family counsellors, strategic consultants, financial advisors who are familiar with the family, business, and/or management of the business.

- **ESTABLISHED INTERNATIONAL ASSOCIATIONS**

Internationally, there are several professional associations that mediators are members of, that family businesses can use to research their options.

- **REGIONAL ADR AND MEDIATION CENTRES**

There are several established mediation centres or similar institutions in the region that can support families to identify mediators. They have clear guidelines, rules, and agreements in place, based on best practice which family businesses can draw on.

- **ADVICE FROM A SPECIALISED, NEUTRAL INSTITUTE**

There are many organizations available to families who don't conduct mediation themselves but work with parties to explore the initial dispute and help to select the right type of mediator. They are strictly neutral and incentivized to help families find the best possible match of mediator.

- **FBCG RESOURCES**

FBCG's report "Dispute Resolution for Family Businesses in the GCC: Keeping the family united" features a directory of alternative dispute resolution bodies in the GCC that can help a family source a mediator. FBCG Members may use the Mediators Directory to help identify reputable sources. In addition, Members can draw on the network to seek other member references of mediators (where appropriate).

Evaluating mediators

There are no international minimum standards of training or universal evaluation criteria for mediators. However, a family business and their screening committee should consider the below factors to help evaluate their shortlist of mediators.



01 Fit for the dispute and family

To evaluate whether a mediator would be a fit, careful consideration should be placed on the type of mediator the family requires. Is the family looking for a proactive mediator or a classical facilitator? Is a specific subject matter expertise required? Will the family respond well to the mediator and are they the right 'family fit'?

02 Level of training

A family business should consider a mediator who has at least the basic mediation training.¹ Most mediators have 40 hours of professional training on top of their basic training and experienced mediators up to 70+ hours of additional training in mediation skills.

03 Professional reputation and experience

A recent survey² completed by both mediators and lawyers in the UK showed that the most important factor when evaluating mediators was the 'Professional Reputation – experience/status' of a mediator. This can be challenging to establish as mediators are not allowed to give a list of prior clients because it violates confidentiality. However, the screening committee should always ask for references to evaluate their experience and reputation. References may be other professionals that have referred their clients to the mediator.

¹ In the United States this is stipulated as 12-16 hours

² The Seventh Mediation Audit, Centre for Effective Dispute Resolution (CEDR) 2016



Best practice for interviewing a mediator

When a screening committee is interviewing a mediator, consider using the following questions as a guide:

- Do you belong to any professional associations? If so, in what capacity?
- Do you have any publications, videos, webinar or teaching references you can share?
- What is your experience mediating (sometimes complex) family business disputes?
- How much of your practice is litigation versus mediation? (if a practising lawyer)
- Are you able to meet the deadlines we have set for the resolution? How would you approach this?
- What is the style of your mediation?
- Are you able to share any references?
- What is your level of training in mediation?

One of the most important points is to speak first with the mediator to get a sense of whether they would want to work with him or her and whether they feel the mediator will help the family.



Engaging a Mediator

Understanding fee structures

There are no standard rates for mediation, and it varies from mediator to mediator. Typically, there are two options available to the family business:



Hourly rate

Mediator charges a fixed fee per hour. Rates can range from \$250 to \$1,000 or more per hour depending on the region and the complexity of the work.



Project approach

An agreed fee agreed from the outset. This may be a more desirable option for families within the GCC, as it prevents any surprise costs especially when a family must also consider the travel expenses if seeking mediators from abroad.

A family should consider which fee system works best for them, but in no instance should there be a success fee. Ethically, this type of arrangement would be prohibited as it impairs the mediator's ability to remain neutral.

When the family has agreed which fee system is most appropriate, they should ensure that the **financial arrangements are clear and predictable** upfront. A system that works well could be to allow the mediator to do an initial exploration (paid for) and then come up with an estimate of what they think is required. In addition, a family can build in an "early warning" when 70-80% of the agreed fee is reached and then once again when 90% is reached. In this way, surprises are avoided. Mediation centres in the region can support families with this and will consider the resources of the family when exploring the fee range.



Questions for family businesses to consider when budgeting for mediation:

How and from where will mediation be funded? Who is responsible for the payment?

What is the cost involved if the issue is not resolved? (Emotional cost, family relationship costs, as well as financial cost)

What is the estimated cost of protracted litigation versus the estimated range of funds for the mediation process?



Drafting a service agreement

When the family is ready to appoint the chosen mediator, a contract should be drawn up that **outlines the duties of the parties and the mediator as well as the scope of the work**. Often there is a stipulation that all parties can withdraw at any time, including the mediator. Most contracts require a minimum retainer with agreed payment deadlines.

In the GCC, mediation centres or neutral selection agents can support families with this as they have clear guidelines, rules, and agreements in place, based on best practice.

Mediation rules

A key aspect of successful mediation process are the set of mediation rules that the mediator and parties involved need to follow. Mediation centres in the region are able to support families with identifying these. Some examples include:

[DIFC-LCIA Mediation Rules](#) (2012)

[ICC Mediation Rules](#) (2014)

Evaluating Impact

Evaluating the impact of mediation



The ultimate intended impact of mediation is, of course, to **gain consensus from family members** and resolve the dispute. Or if mediation is being used to address a challenging topic or decision within the family business, then there is a clear roadmap for family members and their advisers to follow.

In addition to resolving a specific dispute, another impact of mediation can be to lay the foundation for positive collaboration going forward. Instead of “burning bridges” (as is often the case in litigation and arbitration), **successful mediation actually strengthens relationships**, by jointly overcoming adversity in a constructive way.

However, it is also important after the mediation is completed to evaluate the impact of the process. As part of this, the family leaders **should seek feedback** from the family members involved, debrief on the experience, and consider what learnings could be implemented in the family business.

Questions to help evaluate the impact of mediation:

Were the goals met? Even if the final resolution of all issues were not gained?

Were cost guidelines followed and if not, was the cost discussed?

Have those involved outlined the lessons learned from the process? Have these been agreed in principle? Is everyone clear on next steps?

What skills did the individuals gain and what skills were or can be adopted by the family moving forward?

Did family members find it a positive and productive experience? Were mindsets regarding mediation changed?

Have family relationships been protected and/or even strengthened?



Mediation roadmap milestones

BEFORE MEDIATION IS REQUIRED

- Proactive buy-in from family members
- First point for conflict resolution in family governance

WHEN A NEED FOR MEDIATION EMERGES

- Attention paid to type of conflict and what mediation approach is required
- Screening committee (if required) represents all sides of the conflict
- Agreement on choice of mediator from family members (where possible)
- Root cause identified and understood
- Mediator is vetted and screened
- Scope is pre-agreed

DURING MEDIATION

- Communication is transparent
- Fee structure agreed from the start
- Privacy and confidentiality committed to from the outset
- Mediator sensitive to local culture but independent and impartial
- Mediator has no conflict of interest

AFTER MEDIATION

- Family members feel heard and included in the decision-making process
- The agreement is SMART
- Mediation is evaluated after consensus is reached



Conclusion

Mediation is a process that is highly beneficial to both the families and businesses, when the selection of the mediator is approached with careful and systematic planning. A family business may use the tools and tips in this publication to assist in engaging a trusted and effective mediator. An engaged and trusted mediator can be instrumental in diffusing tensions, facilitating constructive communication and productive outcomes in a cost-effective manner. **We strongly urge families to consider mediation** as a first point of call to ensure the legacy of the family enterprise is safeguarded for the now, as well as for the next generation of leaders.

Acknowledgements

We would like to thank several individuals and organizations for their contributions in thought-leadership, editorial content, review, and research support.

Collaborator

Amy Wirtz CEPA, Consultant, The Family Business Consulting Group

wirtz@thefbcg.com

Contributors

Dr. Andreas Baumgartner, Co-founder & CEO, The Metis Institute

Andrew Hildebrand, Commercial Mediator, Hildebrand Mediation

Mihaela Cornelia Moldoveanu, Head of Advisory, The Metis Institute

مجلس الشركات
العائلية الخليجية
FAMILY BUSINESS COUNCIL-GULF
عضو في FBN Member of

