



Mediation guide - the basics

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Introduction

Mediation is a "private, informal process in which the parties are assisted by one or more neutral third parties in their efforts towards settlement." By comparison to negotiation, the new and distinguishing feature here is the addition of a neutral third party who aids those in dispute towards settlement. A further important factor is that the mediator does not decide the outcome; settlement lies ultimately with the parties.

Mediation can no longer be said to be a new phenomenon for the resolution of construction disputes and is now used for the resolution of disputes across a wide range of industry sectors. Mediation can be used both before the commencement of and during formal proceedings or when other forms of dispute resolution, such as arbitration, are contemplated or progressing.

What is Mediation?

Mediation is a form of assisted negotiation whereby parties agree to appoint a trained, impartial third party (the mediator) to assist them to resolve their dispute. The mediator is agreed upon by all parties and is a neutral third person who helps the parties to reach an amicable settlement which is responsive to everyone's needs. The mediator does not impose a decision on the parties. Rather, the key decisions are made by the parties themselves.

To mediate means to act as a peacemaker between those in disputes. It is essentially an informal process in which the parties are assisted by one or more neutral third parties in their efforts towards settlement. Mediators do not judge or arbitrate the dispute. They advise and consult impartially with the parties to assist in bringing about a mutually agreeable solution to the problem. Some definitions in circulation include:

*"Mediation is negotiation carried out with the assistance of a third party. The mediator, in contrast to the arbitrator or judge, has no power to impose an outcome on disputing parties."*¹

*"Mediation is a facilitative process in which disputing parties engage the assistance of a neutral third party who acts as a mediator in their dispute."*²

*"Where two or more people or companies are unable to resolve a particular problem they invite a neutral person to help them arrive at a solution. The neutral person, or Mediator, will work hard with each side and help them to understand better their own and the other person's position, and explore alternative solutions."*³

*"Mediation consists of the effort of an individual, or several individuals, to assist the parties in reaching the settlement of a controversy or claim by direct negotiations between or among themselves. The mediator participates impartially in the negotiations, advising and consulting the various parties involved."*⁴

1. Goldberg, S. B. et al, (1992). p103.
2. Brown, H. and Mariott, A. (1992) ADR Principles and Practice, Sweet and Maxwell, London. p108.
3. British Academy of Experts (1992).
4. American Arbitration Association, (1992).

There are two common threads. First, the form of the third party intervention. The primary role of the third party is to facilitate other people's decision making. The process builds on negotiation, and the mediator fundamentally sustains and reviews the situation with the parties. Second, the third party should be independent of the parties in dispute. The essence of mediation that the mediator is impartial. The trust which develops during the process allows the mediator to perform "a bridging role" between the parties.

It is a voluntary process. The mediator is a facilitator and during the process will not judge or advise. The mediator will employ solution focussed techniques in order to assist parties to come to a settlement which all the parties are satisfied with, thus ensuring an overall desirable outcome. Each party will have a chance to put forward their point of view as well as listen to what the other party has to say.

Negotiations that take place in the mediation will be confidential and without prejudice which means parties cannot rely on what is said in the mediation outside of the mediation.⁵ If a settlement is agreed at the mediation it can be enforced as a legally binding contract.

A distinction is often made between styles of mediation which are "facilitative" and those that are "evaluative". During a facilitative mediation, the mediator is trying to re-open communication between the parties and explore the options for settlement. The mediator does not openly express his/or her opinions on the issues. If, on the other hand, the mediator is called upon to state his opinion on any particular issue then he/she is clearly making an evaluation of that issue.

In summary, the main elements of mediation are:

- 1 That it is voluntary in the sense that the parties participate of their own free will.
- 2 A neutral third party assists the parties towards a settlement.
- 3 The process is non-binding unless an agreement is reached.
- 4 The process is private, confidential and conducted without prejudice to any legal proceedings.

Benefits of mediation

Many consider that mediation offers a range of benefits when compared to the traditional formal adjudicative processes such as litigation and arbitration. These benefits include:

- 1 Reductions in the time taken to resolve disputes;
- 2 Reductions in the costs of resolving disputes;
- 3 Providing a more satisfactory outcome to the dispute;
- 4 Minimizing further disputes;
- 5 Opening channels of communication;
- 6 Preserving or enhancing relationships; and
- 7 Savings in time and money;
- 8 Empowering the parties.

The mediation process

There are three main phases to mediation:

- 1 Pre-mediation – agreeing to mediate and preparation;
- 2 The mediation – direct and indirect mediation; and
- 3 Post-mediation – complying with the outcome.

Pre-mediation

The preparation phase of mediation develops from the initial inquiry, which may involve an explanation of the process, and an attempt to persuade reluctant parties to participate. A contract to mediate is frequently used in order to agree the terms and the ground rules for the mediation. This will include items such as costs, confidentiality, the without prejudice nature of the mediation, authority to settle and timetable.

In most instances the parties will exchange written summaries of the dispute, and occasionally furnish copies of supporting documents. During this process, the mediator will be identified, and will become a party to the mediation contract.

From the mediator's perspective, the pre-mediation objective is merely to get the parties to the mediation. The strategy of the parties is less clear. Are they preparing their best case, do they consider innovative ways to settle, do they really calculate their "*best alternative to a negotiated agreement*" (BATNAS)?

The mediation

Most commercial mediations are conducted over the course of one day, although some may extend over several days, weeks, or even months. Mediations are usually conducted on neutral territory, rather than the offices of one of the parties. This is an attempt to avoid the power imbalances which may occur as a result of one of the parties operating within familiar territory. The mediator's role involves managing the process, and so will receive and seat the parties, before carrying out the necessary introductions. During this first joint meeting, the mediator will establish the ground rules and invite the parties to make an opening statement.

The mediation process is flexible, and once the parties have made their opening statements, the mediator may decide to discuss some issues in the joint meeting or a "*caucus*". A caucus is a private meeting between the mediator and one of the parties. The mediator will caucus with the parties in turn, in order to explore in confidence the issues in the dispute and the options for settlement. In a caucus, the mediator is mediating "indirectly" with the parties, and this exploration phase of mediation serves to:

- 1 Build a relationship between the parties and the mediator;
- 2 Clarify the main issues;
- 3 Identify the parties' interests or needs;
- 4 Allow the parties to vent their emotions;
- 5 Attempt to uncover hidden agendas; and
- 6 Identify potential settlement options.

While the mediator is caucusing with one party, it may be possible for the other party to work on a specific task set by the mediator. The mediator may also utilise further joint meetings in order to narrow the issues, allow experts to meet, or broker the final settlement. The aim of mediation is to develop a commercially acceptable, workable agreement which can be written into a binding settlement contract.

Post mediation

Post mediation will either involve execution of the settlement agreement, or a continuation towards the trial or arbitration hearing. The mediator may still be involved as a settlement supervisor, or perhaps further mediations.

If a settlement is not reached this does not mean that the mediation was not successful. The parties may have a greater understanding of their dispute, which may lead to future efficiencies in the resolution of the dispute, or the parties may settle soon after the mediation.

The mediator's role

The mediator is the manager of the process. He or she should take control of the process, and aid the parties to settlement. The Centre for Effective Dispute Resolution (CEDR) states that the mediator fulfils several important roles during the mediation and should:⁶

- 1 Manage the process firmly but sensitively;
- 2 Facilitate the parties towards settlement by overcoming deadlock;
- 3 Gather information in order to identify common goals;
- 4 Be a reality tester, helping the parties to take a realistic view of the dispute;
- 5 Act as a problem solver, thinking creatively in order to help the parties construct an outcome that best meets their needs;
- 6 Soak up the parties feelings and frustrations, re-channelling the parties' energy into positive approaches to the issues;
- 7 Act as a scribe who assists in the writing of the agreement;
- 8 Be a settlement supervisor, checking that the settlement agreement has worked and being available to help with further problems that may occur; and
- 9 Prompt the parties towards settlement and keep the momentum towards settlement.

It is vital that the mediator gains the trust and confidence of the parties so that a full and frank discussion can be encouraged. A full exploration of the problems will help to generate settlement options.

Mediators may employ a variety of strategies to achieve a settlement. The literature suggests that there are five main activities which mediators should employ:

- 1 Investigation- questioning to (1) obtain information and (2) to point out the holes in a particular party's point of view;
- 2 Empathy;
- 3 Persuasion;
- 4 Invention - creating solutions; and
- 5 Distraction - to avoid parties from assuming a set position.

The mediator should question and investigate not just the issues in dispute, but the underlying conflict. Apparently mediators have little chance of "*steering*" the parties to a settlement without understanding the hidden objectives of the parties. Mediators should avoid sympathy with either party. Nonetheless, a degree of empathy is required in order to build trust with the parties.

6. CEDR,(1997) Mediator Training Handbook, Centre for Dispute Resolution.

Persuasion is required in order to drive the mediation forward, as is a degree of inventiveness and the ability to provide distraction. In this context, distractions refers to the ability to take the parties onto another related subject in order to explore settlement possibilities from another angle. This techniques may be used to avoid the polarisation of positions which is frequently adopted by many during conflict.

Liability of Mediators

Most mediation agreement state that mediator shall be liable to the parties for any act or omission whatsoever in connection with the services to be provided by them. Such a clause is an attempt at a complete exclusion of liability and may be contrast to the immunity of arbitrators. Arbitrators are immune under most legislation unless the act or omission is shown to have been in "*bad faith*".

It is arguable that the mediator, if acting purely in a facilitative capacity, should never find him or herself in circumstances which may give rise to any liability. Nonetheless it is clearly common practice to include an immunity clause in a mediation agreement.

The qualities of a mediator

A good deal of the literature focuses on the function, role and skills of mediators. A mediator is qualified not by the virtue of his or her expertise in a particular area, but rather by the individual's ability to aid the parties to a settlement.

In this respect the mediator must manage the mediation process, gather information from the parties before evaluating and testing that information in order to facilitate the exchange of information which should hopefully then lead to a settlement. These processes can be described as the role or function of the mediator.

Why mediation

Research has shown that mediation facilitates settlement in the majority of cases and even where mediation has not resulted in a settlement it was not always viewed in a negative light.⁷ Some advantages of mediation include:

- 1 Allowing parties to express how they feel about a dispute and how they wish to resolve it;
- 2 Parties can consider solutions that a court may not be able to order;
- 3 Practical solutions can be agreed as between the parties;
- 4 Underlying issues like the desire for an apology or admittance of wrong doing can be dealt with;
- 5 Continued and working relationships can be maintained between the parties;
- 6 Settlement terms can be kept private and confidential; and
- 7 Time and money can be saved out of court and the process is more flexible.

Mediation in Construction disputes

Since the mid 1980s there has been a growing international awareness of the benefits of mediation as a dispute resolution technique. In the US, research by Stipanowich has documented the rise of mediation, which was first taken seriously by the US construction industry.⁸ Apparently the Army Corps of Engineers pioneered the process in order to reduce the high costs of litigation.

7. The Mediation of Construction Disputes: Recent Research by Nicholas Gould. Par 31.

8. Stipanowich, T. (1994) What's hot and what's not. DART conference proceedings, Lexington, Kentucky, USA.

Many construction disputes can include complex issues and numerous claims by separate parties. Mediation is well suited to and widely used by the construction industry to resolve these types of disputes.⁹

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9. <http://uk.practicallaw.com/2-382-9500>.