Resolution of Construction Disputes through Mediation[1]

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."* Unlike negotiation, the key distinction here is the involvement of a neutral third party who helps the disputing parties reach a resolution. Additionally, it is important to note that the mediator does not decide the outcome; the settlement is ultimately determined by the parties involved.
Mediation is no longer a novel approach for resolving construction disputes and is now utilized across a wide range of industry sectors. It can be employed both before and during formal proceedings, or when other forms of dispute resolution, such as arbitration, are being considered or are in progress.

What is Mediation?

Mediation is a type of assisted negotiation in which the parties agree to appoint a trained, impartial third party (the mediator) to help them resolve their dispute. The mediator, agreed upon by all parties, is a neutral third person who aids the parties in reaching an amicable settlement that addresses everyone's needs. The mediator does not impose a decision; rather, the parties themselves make the key decisions.
To mediate means to act as a peacemaker between disputing parties. It is essentially an informal process where one or more neutral third parties assist the parties in their efforts towards settlement. Mediators do not judge or arbitrate the dispute. Instead, they provide impartial advice and consultation to help bring 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."[2]

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"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."[3]

"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."[4]

"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."[5]

There are two common threads. First, the form of third-party intervention. The primary role of the third party is to facilitate decision-making for others. The process builds on negotiation, with the mediator fundamentally supporting and reviewing the situation with the parties. Second, the third party should be independent of the disputing parties. The essence of mediation is that the mediator is impartial. The trust developed during the process allows the mediator to perform a "bridging role" between the parties.
Mediation is a voluntary process. The mediator acts as a facilitator and does not judge or advise during the process. The mediator employs solution-focused techniques to help the parties reach a settlement that satisfies everyone, ensuring an overall desirable outcome. Each party will have the opportunity to present their point of view and listen to the other party.

Negotiations during mediation are confidential and without prejudice, meaning that parties cannot use what is said in mediation outside of it. If a settlement is reached during mediation, it can be enforced as a legally binding contract.
A distinction is often made between *"facilitative"* and *"evaluative"* mediation styles. In facilitative mediation, the mediator aims to reopen communication between the parties and explore settlement options without expressing personal opinions on the issues. In contrast, in evaluative mediation, the mediator may be asked to provide an opinion on specific issues, thereby making an evaluation of those issues.

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.

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[2] Goldberg, S. B. et al, (1992). p103.
[3] Brown, H. and Mariott, A. (1992) ADR Principles and Practice, Sweet and Maxwell, London. p108.

[4] British Academy of Experts (1992).

[5] American Arbitration Association, (1992).

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 begins with the initial inquiry, which may include an explanation of the process and efforts to persuade reluctant parties to participate. A contract to mediate is often used to agree on the terms and ground rules for the mediation. This contract typically covers items such as costs, confidentiality, the without prejudice nature of the mediation, authority to settle, and the timetable.
In most cases, the parties will exchange written summaries of the dispute and sometimes provide 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 a single day, though some may extend over several days, weeks, or even months. Mediations usually take place on neutral territory rather than at the offices of one of the parties. This helps to avoid power imbalances that might arise

from one party operating within familiar surroundings. The mediator's role includes managing the process, greeting and seating the parties, and conducting the necessary introductions. During this initial joint meeting, the mediator will establish the ground rules and invite the parties to make opening statements.
The mediation process is flexible. After the opening statements, the mediator may choose to discuss some issues in the joint meeting or in a "caucus." A caucus is a private meeting between the mediator and one of the parties. The mediator will caucus with each party in turn to explore the issues in dispute and the options for settlement confidentially. In a caucus, the mediator is mediating "indirectly" with the parties. 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

After mediation, the process will either involve the execution of the settlement agreement or continue towards a trial or arbitration hearing. The mediator may still be involved as a settlement supervisor or possibly in further mediation sessions.
If a settlement is not reached, it does not mean the mediation was unsuccessful. The parties may gain a greater understanding of their dispute, which can lead to more efficient future resolution or prompt a settlement shortly 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] CEDR,(1997) Mediator Training Handbook, Centre for Dispute Resolution.

6. Soak up the parties feelings and frustrations, re-channeling 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 not only question and investigate the issues in dispute but also the underlying conflict. Mediators have little chance of guiding the parties to a settlement without understanding their hidden objectives. While mediators should avoid showing sympathy towards either party, a degree of empathy is necessary to build trust with them.

Persuasion is essential to drive the mediation forward, along with a degree of inventiveness and the ability to provide distractions. In this context, distractions refer to the mediator's ability to shift the discussion to another related subject to explore settlement possibilities from a different angle. This technique can help avoid the polarization of positions often adopted 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

For resolving construction disputes internationally, mediation is indeed a widely used method. Here's how it applies specifically to construction disputes:

1. **Complexity of International Projects**: Construction projects often involve parties from different countries, each governed by its own legal and regulatory frameworks. Disputes can arise due to cultural differences, contractual interpretations, project delays, and quality issues.
2. **Benefits of Mediation**

    - **Flexibility**: Mediation allows parties to tailor solutions that consider international legal complexities and cultural differences.
    - **Cost-Effectiveness**: Resolving disputes through mediation can be more cost-effective than litigation, especially when considering the expenses associated with navigating different legal systems.
    - **Speed**: Mediation can often resolve disputes more quickly than traditional litigation or arbitration processes, which is beneficial for ongoing construction projects.

3. **Enforcement of Agreements**: Mediated agreements can often be enforced internationally through mechanisms like the New York Convention, providing assurance that agreements reached in mediation are legally binding and enforceable across borders.

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

4. **Expertise and Mediators**: International construction disputes often benefit from mediators who have expertise in construction law, international arbitration, and cross-border negotiations. These mediators can facilitate discussions effectively and help parties reach mutually acceptable solutions.
5. **Industry Standards and Practices**: There are international bodies and institutions that provide guidelines and standards for resolving construction disputes through mediation, ensuring consistency and reliability in the process.

In essence, mediation offers a practical and effective means of resolving construction disputes on an international scale, addressing the unique challenges posed by cross-border projects while promoting cooperation and preserving commercial relationships.

History of Mediation in Construction Disputes

- **Emergence**: Mediation as a formal method for resolving construction disputes began gaining traction in the late 20th century. It emerged partly due to the complexities and costs associated with traditional litigation and arbitration processes.
- **Industry Adoption**: Construction industry stakeholders recognized the benefits of mediation, such as cost-effectiveness, efficiency, and the preservation of business relationships, leading to its widespread adoption.
- **Legal Recognition**: Many jurisdictions incorporated mediation into their legal systems, offering it as a viable alternative to litigation and arbitration for resolving disputes in construction projects.

Recent Developments and Updates

- **International Context**: There's been a growing emphasis on using mediation to resolve international construction disputes. This trend is supported by organizations promoting alternative dispute resolution methods across borders.
- **Technological Advancements**: The use of technology has facilitated online mediation platforms, making it more accessible and feasible to conduct mediations remotely, especially important in international cases.
- **Increased Specialization**: Mediators specializing in construction law and international disputes have become more prevalent, offering tailored expertise to parties involved in complex construction projects.
- **Regulatory Support**: Many jurisdictions have continued to refine their legal frameworks to support mediation, enhancing enforceability and providing clearer guidelines for parties seeking to resolve disputes through this method.

Resolution of Construction Disputes through Mediation

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]

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

Apparently the Army Corps of Engineers pioneered the process in order to reduce the high costs of litigation.
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] Overall, mediation in construction disputes has evolved significantly, with continued efforts to improve accessibility, efficiency, and enforceability, making it a preferred choice for many in the construction industry globally.

[9] http://uk.practicallaw.com/2-382-9500