

Chapter 8

Mediation: Principles and Procedures, Expert witness Requirement. Opinion: Principles and Procedures.



Mediation

- Mediation describes the process of a neutral & disinterested person helping disputing parties to negotiate a resolution to their dispute.
- Mediation is simply a facilitated or assisted negotiation. To agree or not to agree is left to the decision of the parties.
- The mediator helps disputing parties to understand the dispute in a way that will maximize their chances to reach a mutually acceptable & lasting solution.
- A mediator facilitates the discussion or negotiation. He will never propose a solution for the settlement of the dispute. He is a mere facilitator.
- He simply performs the task of persuading the parties in dispute to change their respective positions in the hope of reaching a point where those positions coincide, without actively initiating any ideas as to how the dispute might be settled.
- The advantages of mediation include informality, speed & economy, but more importantly perhaps, it often leads to an agreed settlement between the parties rather than an imposed award or judgment.

Process...

- The process of mediation is described as follows.
 - Setting the Table;
 - Story Telling;
 - Determining Interests;
 - Setting out the Issues;
 - Brainstorming Options;
 - Selecting the Durable Options; and
 - Closure;
- Setting the Table
- Setting the Table is the first step in mediation.
- Under this step the following actions are undertaken by the mediator.
- The mediator shall:-

- introduce himself to the parties (if not done previously);
- introduce to the parties about the process of the mediation;
- explains his role as mediator;
- reminds the parties as to their decisive role in resolving their disputes, that the parties shall endeavor to persuade each other not the mediator;

Process...

- explain their right to use their own advisor (ex. Legal advisor);
- explain to the parties to follow certain procedures during the mediation;
- explain that the process is confidential;
- explain that he can not appear as a witness nor the documentation kept by the mediator be admitted as evidence in the possible next(arbitral or judicial) proceeding;
- explain to the parties as to the possibility of holding discussions separately (caucusing);
- explain the right of the parties to walk out from the mediation process at any stage of the mediation;
- explain the objective of the mediation being to save time & cost by reaching settlement by their own, and the role of the mediator being assisting the parties to reach such settlement;
 - Story Telling
 - At this stage the parties are encouraged directly to tell to the mediator about the background & contents of the dispute. The mediator is advised not to interrupt the parties about the telling of their story. In construction mediation a written summary of the dispute shall be sent to the mediator, before the mediator meets the parties

Process...

- Determining Interest,
- At this stage the mediator asks the parties more about the contents of their dispute to determine their interests.
- Without determining their interests the mediator can not frame the issues nor seek legitimate & durable solutions.
- Setting out the Issue,
- After the interests of the parties have been figured out, issues shall be framed to deliberate on.
- The role of the mediator is carefully framing the very issues to the dispute.
- The issues so framed help parties to conduct a purposeful discussion & to recommend solution in respect thereof.
- Brainstorming Options,
- At this stage of the mediation process the parties to the dispute brainstorming possible options to resolve the dispute.
- The mediator may, according to the circumstances, assist the parties by suggesting some possible solution either by discussing with the parties jointly or separately.
- Selecting the Durable Solution (s),
- At this stage the mediator, on the basis of the brainstormed potential solutions, help the parties by indicating which solution is legitimate & durable to resolve the dispute under consideration.

Process...

- Construction Mediation

- The construction sector/industry fully shares the basic framework of the mediation process.
- The construction mediation has its own peculiarities, however.
- The peculiarity may emerge due to:-
 - multitude of stakeholders;
 - the multi-dimensionality of the issues involved;
 - the specificity of the legal & contractual framework
- & the industry practice & norms being unique;
- that the contractual relationship between the
- Contracting parties to the construction contract being a
- long term, complex, involving high financial stake &
- risky;

Conciliation

- Similar to mediation, conciliation is a voluntary form of dispute resolution where a neutral party, the Conciliator, is appointed to facilitate negotiation between the parties in dispute & to act as a catalyst for them to reach a resolution of their dispute.
- Unlike the mediator, the conciliator under the conciliation process, takes a more active role probing the strengths & weaknesses of the parties' case,
- Making suggestions;
- Giving advice;
- Finding persuasive arguments for & against each of the parties' positions; and
- Creating new ideas which might induce them to settle their dispute;
 - This is the difference between mediation & conciliation
 - Under the mediation method of dispute resolution, if the parties to the dispute fail to reach agreement, the neutral party himself is then required to draw up & propose a solution which represents what, in his view, is a fair & reasonable compromise of the dispute.
 - The conciliator can not decide the dispute for the parties. This is the difference between conciliation & arbitration.
 - Conciliation is sometimes called evaluative mediation.

Process...

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- Conciliation is sometimes called evaluative mediation.
- Conciliation is a more formal process than mediation & it generally involves the engagement of legal representatives, thus making it a more expensive process than mediation.
- The conciliation process may contain the following:
 - During the conciliation process, it is necessary for each party carefully to prepare a document containing the following material.

• The Facts:

- The facts mean the factual narrative of the events leading to the issues in the conciliation.
- One of the parties, usually the party initiating the process, should prepare a bundle containing documents which can be submitted jointly, such as
 - The contract document;
 - The Technical Specification;
 - any drawings necessary for understanding the issues involved,
 - And other relevant documentation;

The Issues:

- It is necessary to identify the issues between the parties as clearly as possible.
 - The possible issues could be:-
 - Technical issues; and
 - Legal issues;
 - The Legal Principle:
 - The legal basis supporting the case made by each of the parties should be set out in as clear a language as possible.
 - The Remedy or Remedies
 - What to demand from the other party at the end of the process.
 - The Time Frame:
 - That is within which the conciliation process may or should be conducted.
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- **There are internationally recognized specific Conciliation Rules. Like**
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- **International Chamber of Commerce (ICC) Conciliation Rules;**
 - **The UNCITRAL Conciliation Rules;**
 - **The ICE Conciliation Procedure;**
 - **Others;**
 - **The conciliation service is regulated by specific contract agreement signed between the parties in dispute & the conciliator.**
 - **There is also a fee to be paid by the parties to the Conciliator.**

Judgmental Dimension

- The very feature of judgmental form of dispute resolution is that the third party known as the court judge, the arbitrator or the adjudicator decides the case before him for the parties.
- The parties to the dispute shall have no control over the process (especially in case of the court system) and/or the outcome of same in all the three cases.
- Under the judgmental forms of dispute resolution the following are recognized.
 - Adjudication ;
 - Arbitration; and
 - Litigation;
 - Adjudication can be defined as a process whereby an appointed neutral & impartial party is entrusted to take the initiative in ascertaining the facts & the law relating to a dispute & to reach a

Adjudication...

- Dispute Board can, according to ICC, be of three types, namely,
 - Dispute Review Board (DRB);
 - Dispute Adjudication Board (DAB);
 - Combined Dispute Board(CDB);
- Dispute Review Board (DRB)
 - The DRB issues 'Recommendations' with respect to any dispute referred to it & constitutes a relatively consensual approach to dispute resolution.
 - If no party expresses dissatisfaction with a recommendation within a stated time period, the parties contractually agree to comply with the Recommendation.

Adjudication...

- If a party expresses dissatisfaction with the Recommendation within such time period, that party may submit the dispute to arbitration, if the parties have so agreed, or the courts. Pending a ruling by the arbitral tribunal or the court, the parties may voluntarily comply with the Recommendation but are not bound to do so.

Adjudication...

- Dispute Adjudication Board (DAB)
- The DAB issues 'Decisions' with respect to any dispute referred to it & constitutes a less consensual approach to dispute resolution.
- By contractual agreement, the parties must comply with a Decision without delay as soon as they receive it.

Adjudication...

- If a party expresses dissatisfaction with a Decision within a stated time period, it may submit the dispute to final resolution by arbitration, if the parties have so agreed, or the courts, but the parties meanwhile remain contractually bound to comply with the Decision unless & until the arbitral tribunal or the court rules otherwise.
- If no party expresses dissatisfaction with a Decision within the stated time period, the parties contractually agree to remain bound by.
- If a party expresses dissatisfaction with a Decision within a stated time period, it may submit the dispute to final resolution by arbitration, if the parties have so agreed, or the courts, but the parties meanwhile remain contractually bound to comply with the Decision unless & until the arbitral tribunal or the court rules otherwise.
- If no party expresses dissatisfaction with a Decision within the stated time period,

Adjudication...

- Combined Dispute Board (CDB)
- The CDB normally issues Recommendations with respect to any dispute referred to it but may issue a Decision if a party so requests & no other party objects.
- In the event of an objection, the CDB will decide whether to issue a Recommendation or a Decision on the basis of the criteria set forth in the Dispute Board Rules.
- The CDB thus offers an intermediate approach between the DRB & the DAB.

Adjudication...

- The essential difference between a Decision & a Recommendation is that the parties are required to comply with the former without delay as soon as they receive it, whereas a Recommendation must be complied with only if no party expresses dissatisfaction within a stated time limit.
- The DB's determination (Recommendation or Decision) is admissible in any such further proceedings, arbitral or judicial.

- Types of Adjudication
- Adjudication could be:-

Adjudication...

- permanent adjudication; or
- ad hoc adjudication;
 - The permanent one is normally set up at the course of the contract & remains in place & the members are remunerated throughout its duration.
 - An ad hoc one only established after the dispute has been arisen & its existence comes to an end after it gives its determination, Recommendation or Decision.
 - The Adjudication could also be composed of:-
- sole member; or
- three members;
 - In case of single or sole member DB, the member may be called a Dispute Review Expert. Such member only gives Recommendation & not a Decision.
 - The parties to the dispute & the member(s) of the DB shall jointly sign a common contract document, called Three Party Agreement.

Adjudication...

- The professional fee & the costs of the members of the DB shall be shared & paid equally by the parties to the dispute, i.e. the employer & the contractor.

Adjudication...

- Features

- The key distinguishing features of the DB are as follows:

- Formation of a review panel before the construction process begins, usually shortly after contract award;
- Selection of board members highly qualified in the particular type of construction;
- The board's ability to monitor construction as it progresses, including periodic site visit;
- The board's awareness of & readiness to review a dispute at the time it arises, when witnesses are present & memories are fresh, rather than months or years latter;
- A keen awareness by all parties that a highly qualified DRB is monitoring their actions closely & that serious claims or deliberate delays will be both unsuccessful & potentially embarrassing;
- Information submittals to the board that are mostly documentary with only a short "meeting" for oral presentation of claims & questions by the panel, in lieu of such traditional but protracted processes as witness examination & cross-examination.

Adjudication...

- Procedure
- Each DB shall have its own rules of procedure for submittal of claims & conduct of claims presentations at the meetings.
- It is important that these ground rules expedite the process but remain flexible enough to be responsive to changing circumstances that characterize most construction projects.

Adjudication...

- The following is the general procedure of a DB.
- Notice of intention to submit a claim & the manner & form of submission.
- All participants at DB meetings should be identified in advance with notification sent to all parties.
- Discussions during DB meetings should be informal & focus on the issues in dispute.
- Participants in DB meetings should be limited to individuals directly involved in the dispute or their immediate supervisors.

Adjudication...

- During a meeting, each party should be given a fair opportunity to explain its claim or defense without interruption by the opposing party.
- If a construction site review is determined to be beneficial by the DB, it should be conducted with advance notice & with all parties present.
- Stenographic transcription of proceedings does not occur but meeting minutes are kept by the DB chairperson, in writing, and distributed to the parties promptly following each meeting.

Adjudication...

The DB shall always inform itself about every development of the project in terms of :

- Contract documentation;
- Correspondences;
- Progress project reports;
- Project site visit;
- Periodic meetings;