



# Commercial Mediation



## COMMERCIAL MEDIATION

Contracting is becoming increasingly complex and litigious. Along with more complex contracts comes increased opportunities for contractual disputes. Most construction contracts today contain some form of Alternative Dispute Resolution (**ADR**): a contractual means to resolve disputes without going into the classic courtroom setting. By far, the most common form of ADR is arbitration.

While arbitration is a valuable contract dispute resolution method, it is not a panacea. Contrary to common belief, arbitration is not always less costly than litigation; and, there are serious drawbacks for this form of dispute resolution. For one, it does not necessarily eliminate discovery (the costly procedure whereby the disputants must make all of their documentation available for review and copy). Additionally, under arbitration, there is no provision to appeal a "bad decision" and the process can be very expensive.

Given the less than perfect arbitration ADR process, owners and contractors are looking for something better -- a process where the disputants (rather than the lawyers) maintain control of the process, the costs and the outcome. **Mediation, as an alternative dispute resolution technique is growing in popularity.**

Mediation has shown some impressive results, yet, few people fully understand the process.

## WHAT IS MEDIATION?

Mediation is a facilitative and confidential process in which a mediator assists parties to a dispute to attempt on a voluntary basis to reach a mutually acceptable agreement.

Mediation is a *voluntary process* in which all parties to a dispute work with an impartial mediator who *assists them* in finding ways to resolve *their dispute*. Different than litigation or arbitration, mediation is not a win/lose determination.

## WHAT IS A MEDIATOR?

A Mediator is one who assists parties to reach a voluntary agreement to resolve their dispute whilst acting at all times in accordance with *the principles of impartiality, integrity, fairness and confidentiality*.

*A skilled mediator facilitates a solution to the problem which best fits the needs of both parties*; the mediator does not decide who is right and who is wrong. Because mediation is similar to negotiation (except that there is a neutral party guiding the process), it is often referred to as facilitated negotiations.

## MEDIATION V ARBITRATION/LITIGATION

Arbitration is almost akin to litigation as both involve full legal discovery, witness cross examination and senior legal representation resulting in a lengthy process which is expensive, confrontational and adversarial. The arbitrator or the judge will decide who wins and who loses.

In Mediation the parties remain in control. It is non adversarial. It is speedy. It is Confidential.

Everything which is discussed during the mediation, and any documents prepared especially for the mediation cannot be used by any party outside of the mediation process. The purpose of confidentiality is to provide a setting in which the parties can discuss the facts and issues openly, without fear that what has been said may be used against them outside of the mediation. The ability to speak openly often leads to solutions.

## WHAT KINDS OF ISSUES ARE RIGHT FOR MEDIATION?

Mediation is an excellent forum for resolution of construction disputes, contract disagreements, and equity claims. Simply put, *any situation that would otherwise be arbitrated can be mediated*. In fact, in most contract disputes the parties could benefit from mediation. Even if the issues are so complex and emotional that arbitration or litigation is inevitable, the issues can be narrowed by first submitting the dispute to mediation.

And, it is a little known fact that mediation may be appropriate within a larger litigated matter. Often, parts of a bigger problem in litigation can be separated and more effectively settled through facilitated negotiations.

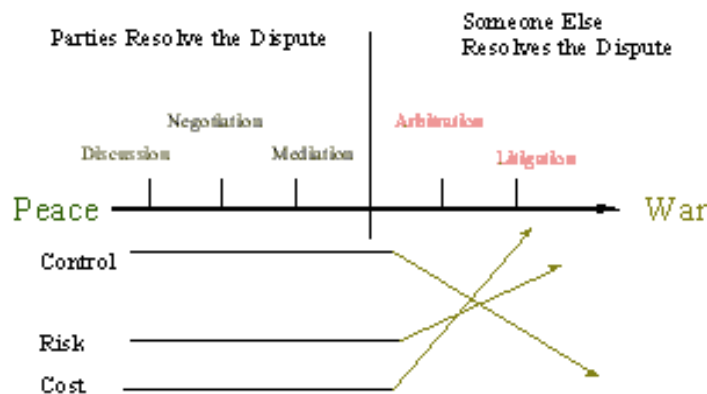
Mediation is not appropriate for points of law or criminal actions or where one of the parties is compelled to 'send a message' to a larger audience. But, in construction disputes the vast majority of disagreements are not over legal issues. More often, the questions at hand are matters of fairness or equity. For example, a delay claim (whether made by the owner or the contractor) is usually not a legal matter. These kinds of claims are characterised as "Requests for *Equitable* Adjustment" and the actual disagreement is usually over what is *equitable* (not what is legally correct) for a given situation.

**WHAT IS THE BEST TIMING FOR MEDIATION?**

The best timing for mediation is as early in the dispute as possible after the parties and lawyers have a very good handle on all of the factual and legal issues. Preferably the mediation should take place before expensive discovery. However Mediation is always an option even if court proceedings have commenced.

**WHY MEDIATE?**

The primary benefit of mediation is risk and cost control. Because the parties arrive at the solution (rather than a judge or an arbitration panel making a ruling) the parties maintain control of the entire process. The chart below illustrates what happens to cost, risks and process control as disagreements escalate from discussion to negotiation to mediation to arbitration to litigation. Some describe this migration as moving from Peace to all out War. As depicted in the chart, the best solution in terms of cost management and overall control by both parties is discussion. This method of settlement is followed by negotiation and then, historically, with arbitration and/or litigation. The opportunity to mediate has often been overlooked.



With mediation, a third party neutral is brought in to keep the parties working together rather than turning the problem over to the legal departments. The mediator, acting in a neutral capacity, facilitates continued negotiations by pointing out the benefits of a cooperative settlement vs. a ruling by less informed arbitrators or the courts. The cost of the mediation is usually shared and is nominal by comparison to the classic forms of dispute resolution -- arbitration or litigation. Cost and risk for each party increases exponentially when the dispute crosses the line from a situation where the parties resolve the dispute themselves to a situation where someone else resolves the dispute.

Different from arbitration or litigation, in mediation neither party has to lose. Mediation is the method of handling disputes which provides the greatest opportunity for win/win solutions. And because the parties arrive at the solution, there is a very high probability that the solution will be carried out as agreed. (It is a well-known fact that even with a court-rendered judgments, the losing party may not comply. Its lawyers may file for an appeal which can drag out the final settlement for years.) Historically, disputes that are submitted to voluntary mediation are settled in an acceptable manner and carried out as agreed in the mediation.



## THE MEDIATION PROCESS

*A typical mediation has several distinct phases.*

Most commercial mediations last one, or at most, two, days. The Practitioner will make appropriate arrangements for the mediation meeting(s). The Practitioner will also ask each Party to prepare and provide to every other Party and to the Practitioner, a concise summary of its position ('Position Statement') together with any supporting documents in advance of the mediation.

The Practitioner is a completely neutral and independent third party, who is responsible for managing the process, facilitating discussions and assisting the Parties to resolve their dispute. The Practitioner does not give advice or tell people what to do.

The Practitioner meets separately with each Party, to ensure that s/he has a proper understanding of each Party's issues and their position. The Practitioner then brings all Parties together in a joint meeting at a neutral venue. There must be at least one representative from each Party present at the mediation who has authority to settle the dispute. Parties may be accompanied by their supporter and/or a legal advisor.

On the day of mediation the first phase involves a joint or plenary session, all parties and the mediator are present. The parties may choose to have additional persons present, such as legal advisors. The parties present their view of the facts. It is critical for the parties to personally tell their stories and be heard by the opposing party and advisors.

If the parties listen carefully, they are likely to learn that the opposition's perceptions are starkly different from their own. Becoming aware of these major differences in perceptions of the events which led to the dispute can be extremely beneficial.

Typically the parties will then break into separate rooms for a caucus session where the Mediator will visit each party in turn and listen and understand their views.

In some disputes emotional issues are a major and divisive component. Unless the emotional issues are addressed during the joint session and explored during the caucus sessions, the dispute may not settle.

The parties will usually then meet in plenary session again and agree certain matters and also agree on the issues that require resolution. Further discussion will take place on these issues and the process can be repeated several times until agreement is reached on all matters.

An agreement will then be drawn up which is signed by the parties.

## THE BENEFITS OF MEDIATION

Whilst mediation cannot guarantee specific results, there are trends that are characteristic of mediation:

### Significantly Reduced Costs

Costs incurred in Mediation are a fraction of those involved in litigation. Compared to proceeding to a court hearing Mediation is very inexpensive, both in monetary and personal terms.

### Significantly Shorter Time Frame

When parties want to get on with business or their lives, mediation may be desirable as a means of producing rapid results. Mediation can be scheduled within a very short timeframe. It can be soon after a commercial

dispute arises or at any time throughout an on-going commercial dispute. Following the pre-mediation processes and agreements, it can often be concluded within one to two days.

### **Save Time**

The time it takes to participate in Mediation and to reach an agreement is completely within the control of the parties and the mediator's schedule. Time is used efficiently because no one else is involved and the sessions are scheduled at your convenience.

### **Save Resources**

Mediation is not only cost-effective and efficient. It focuses the parties on the problem and how to resolve it. It is designed to neutralise escalated emotions and mitigate against misconceptions about the facts and about each of the parties. Simply, it saves you the stress of coping with a protracted conflict, litigation or even negotiation. Either Mediation resolves the dispute or you end the process.

### **Non-Adversarial**

Mediation helps the parties to communicate with each other. Mediation is an interest-driven process based on consensus and collaborative agreement. Mediation helps the parties to explore the issues which are of real importance to them. The parties are encouraged to find ways to address their present and future needs, rather than dwell upon who may have been right or wrong in the past.

### **Non-Judgemental**

As the process of mediation is based on mutual agreement, the mediator does not impose a decision, nor make any kind of judgment – unlike court or arbitration, the mediator helps the parties to find their own, mutually acceptable solution.

### **Personal Empowerment**

Mediation belongs to the Parties. The parties to a dispute remain in control of the outcome and of any potential resolutions as well as having the right to end the mediation at any time should the process reach stalemate.

### **Helps to Preserve Relationships**

Mediation works towards long-term solutions for the Parties in dispute, and where there is an ongoing relationship places significant emphasis on how they will interact in the future.

### **Totally Confidential**

The confidential nature of mediation allows the Parties to negotiate freely and productively without fear of publicity. All those participating in a mediation are protected by a confidentiality agreement which is signed by all parties and witnesses before the mediation begins. No transcript or other recording of the Mediation is made, other than the Memorandum of Agreement.

All notes and documents that are in the possession of the mediator are destroyed at the end of the mediation.

### **Save Your Reputation**

As mediation is a confidential process, only the parties and the mediator, typically are privy to the information discussed and all agree to keep everything said confidential. Resolving conflict in the workplace or a business to business dispute in a process that is designed for privacy and problem-solving, will ensure both parties feel comfortable in making compromises.

### **Saves Your Business Relationships.**

Because you and the other side are open to resolving your dispute through Mediation, the dispute becomes an opportunity to improve and enhance your business relationship rather than destroy it.

**Mediation is “Without prejudice”**

The mediation process is ‘without prejudice’ so that on the rare occasion that a settlement is not reached litigation may continue without the parties needing to worry about having given away anything that the other could use against them or in court. As part of the mediation agreement it is agreed that the mediator cannot appear as a witness for either party in the event of any future court proceedings.

**Promotes use of Creative Solutions**

Mediation allows for creative solutions which may not be available in other court based approaches.

**High Settlement Potential**

Settlement potential is high and there are benefits to participating in the process for all.

**Always Leaves Other Options Open**

Engagement in a mediated intervention does not preclude participation in a different dispute resolution process. If an agreement is reached, parties should be made aware that the agreement can be made legally binding. If the mediation fails to result in a comprehensive solution on the day, the process of mediation invariably provides insights and understandings – even partial agreements – which may encourage and support continued negotiation after the mediation.

Please do not hesitate to contact us if you want to discuss our Commercial Mediation services.