



FEDERATION INTERNATIONALE DES INGENIEURS-CONSEILS
INTERNATIONAL FEDERATION OF CONSULTING ENGINEERS
INTERNATIONALE VEREINIGUNG BERATENDER INGENIEURE

**MEDIATION
OF
PROFESSIONAL
LIABILITY
CLAIMS**

by

David Hollands & Mark Griffiths

**MEDIATION
Explanation
and
Guidelines**



FIDIC

MEDIATION OF PROFESSIONAL LIABILITY CLAIMS

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1993

FOREWORD

FIDIC would like to acknowledge the time and effort given by:

David E Hollands, Mediator & Arbitrator,
Auckland, New Zealand; Chairman of FIDIC's
Dispute Resolution Task Committee; and

Mark Griffiths, Griffiths & Armour, Consulting
Insurance Brokers, Liverpool, England; Member
of FIDIC's Risk Management Committee.

in the preparation of this report on Mediation of Professional Liability Claims. David was the Chairman of FIDIC's Alternative Dispute Resolution Task Committee (ADRTC) and the Editor of this report.

The assistance of Robert Coulson, Paul Genecki, Gordon Jaynes, Wynand Jonker, Frank Muller and Paul Taylor is also acknowledged.

Thanks are also extended to the Centre for Dispute Resolution (CEDR), England, for permission to include two pages from its publication "ADR Route Map".

This report was approved for publication by FIDIC's Risk Management Committee, then known as its Professional Liability Committee.

FIDIC is producing this report in photocopy format, because it is a report about aspects of ADR at a point in time. Comments are welcome. It is possible that the report will be updated from time to time, depending on events and inputs received.

MEDIATION OF PROFESSIONAL LIABILITY CLAIMS

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INTRODUCTION

This report discusses the use of ADR processes to resolve, by consensus, allegations of professional liability against consulting engineers which give rise to claims on their professional indemnity insurance (PI claims). It should be read in conjunction with the following FIDIC reports:

"Professional Liability Insurance - a primer" (1991)
"Amicable Settlement of Construction Disputes" (1992)
"Mediation - explanation and guidelines" (1993)

Alternative Dispute Resolution (ADR) includes many forms of consensual processes; e.g. mediation, conciliation, mini-trial, etc. These terms are used differently in various parts of the world. Hence, this report uses the term "mediation" in an inclusive way, to refer to processes in which a neutral third party assists the parties to negotiate, and may even express an opinion, but does not have any power to impose a decision. It is for the parties to reach agreement by consensus.

In the USA, the term ADR also includes arbitration. However, binding arbitration culminates in a decision by an arbitrator which may be enforced by the courts. It is therefore a form of private judging and excluded from this discussion, which focuses on consensual processes.

It is important to have the courts as a final recourse in resolving disputes arising from PI claims. Nevertheless, for many such disputes the courts are unsatisfactory. They have limited skills to deal with the technical uncertainties involved, and are unable to promote cost effective and mutually satisfactory outcomes. Also, the legal and technical costs of adversarial processes are usually high. Costs incurred by a successful defendant will be, at best, only partially recoverable from the unsuccessful plaintiff, and in some jurisdictions not at all. Furthermore in some jurisdictions juries rather than judges decide on liability and damages, thus tending to increase the risk of an

unpredictable decision. The degree to which these factors apply has probably influenced local levels of acceptance of ADR.

The win-lose model of adversarial court processes is a strong motivator for attorneys to perform at a high level of professional competence. Beyond monetary compensation, more subtle dividends are associated with the conquest of an adversary, such as increased self-esteem and earning the enhanced respect of professional peers. However, the win-lose contest can polarise the parties and emotionalise the process. It encourages a combative attorney to see his or her role as a soldier of fortune, rather than as a problem solver.

POTENTIAL RISKS OF ADR

ADR has potential advantages, but it will not be applicable in all cases. There are potential risks, which need to be understood and evaluated in choosing an appropriate process.

One of the perceived dangers of ADR is that it can be a "fishing trip", for areas of weakness in the case and possibly even for potential causes of action which had not occurred to the claimant. ADR does lead to the parties "showing their hands". This is unavoidable to some extent, but may be offset by reluctance to reveal the entire case if it could promote an unfavourable outcome. However, the concept that one can conceal one's hand in litigation is outdated. Increasing use of discovery, exchange of briefs of evidence, etc, have all but eliminated the element of surprise in court actions.

Another perceived danger of ADR is that the loss of full discovery of the other parties' documents may prove an impediment to exposing hidden weaknesses in an opponent's case.

Furthermore, ADR can be used as a delaying tactic by a party who has no real intention of accepting its outcome, but merely wishes to postpone litigation.

Finally, because ADR is perceived as relatively quick and cheap and involves pressure to compromise, there is a perceived risk that it may encourage claimants to press a case in circumstances where they would otherwise have been discouraged by the potential costs of litigation.

Whilst one needs to be alive to all these potential risks, the question which remains to be asked is - which process is most efficient and helpful to the parties in fairly resolving a claim?

PROFESSIONAL LIABILITY CLAIMS

A PI insurance policy is one of indemnity, involving payment to third parties by the insurance company and/or the insured in satisfaction of claims for loss arising from an insured consulting engineer's legal liability for negligence. Claims can arise in contract and tort, from clients and from some others adversely

affected by the consulting engineer's negligent work. They are often multi-party; i.e. there may be several claimants and/or respondents.

Some claims are unfounded, but they still need to be responded to and, if necessary, defended. Hence, about 40% of all payments from PI insurers are for legal and experts' costs.

PI policies cover legal liability. However, it should not be assumed that legal liability is certain. In many disputes there is a genuine disagreement as to what is the "correct" legal answer, and therefore a risk to the parties as to which version a judge might adopt. Hence, the parties have greater control during mediation than court action. The outcome cannot be imposed - it can only be agreed to by the parties.

Insurers need to retain their traditional control over PI claims. It is therefore desirable that they be present during mediation. There should be no outcome to mediation which the insurers have not agreed to.

The engineer is very rarely "his own best advocate". That is why advice from insurers and their legal or technical-expert advisers is important.

Claimants and insurers handling claims on behalf of consulting engineers are often driven to negotiate a settlement by the potentially high costs of litigation or arbitration. Whilst PI policies only cover legal liability, insurers often negotiate a settlement which takes into account the cost of legal proceedings.

Many claims are settled now between the parties. The records of Griffiths & Armour, Consulting Insurance Brokers, indicate that of claim files closed during the twelve months ended 31 January 1992, only about one percent went to court and only one third of these went the distance through to a legal judgement. The other 99% were either closed without payment, closed after incurring legal costs but without any payment to the other party, or settled without the need for either litigation or arbitration.

It is possible that ADR could have enabled the costs to be further reduced in the 24% of claims where only defence costs were met. It might also have enabled quicker and cheaper settlement to be reached in the 15% of claims where a payment of damages was negotiated. It may not have had much effect on the 1% of cases which reached court, due to some fundamental and irreconcilable differences of view.

These figures put ADR into perspective as a potentially useful addition to the armoury of settlement methods already available, rather than as a radical new approach which will invalidate and sweep away past methods of working.

Whilst consulting engineers wish to maintain an ongoing relationship with clients whose jobs are displaying problems, nearly every engineer wishes to vigorously defend claims. The reasons are professional reputation, policy excess, and the

possible effect of claims on future premiums. The consulting engineer appears to want reliable protection from insurers whose first aim is to defeat any claim against the engineer, and who will only make payment to a claimant who can establish that the consulting engineer was indeed negligent.

A PI claim inevitably carries the implication that the consultant has fallen short of the standards expected of him. The consultant may therefore wish to pursue even a blatantly uneconomic action in order to clear his name. In order to do that he may want to avail himself of all the opportunities for discovery of documents, etc, which formal court proceedings allow.

Insurers would be worried by any suggestion that ADR could lead to an increase in the number of settlements, or that commercial considerations might begin to overrule the necessity to establish legal liability. It is also important that the expectation of compromise does not lead to trumped-up claims, on the assumption that even these will be compromised.

MEDIATION

Mediation is most effective when the parties are genuine in their desire to use it in order to end their dispute quickly.

Mediation is used when the parties are unable to reach agreement by themselves, or when the use of a neutral facilitator can expedite or enhance the settlement process. It overcomes the problem that neither party may be prepared to take an early step towards negotiation, for fear of appearing weak. Also, it is confidential.

Shifting the emphasis to joint problem solving has many attractions, both from the point of establishing better relations between the parties and from the general feeling that perhaps it is "right" that these problems should be solved by a process of seeking the truth rather than by a modern form of trial by battle.

Even without mediation, most claims are settled by negotiation, in which compromise is usually necessary to allow for the risk of technical and legal uncertainty. Provided that the pressures to compromise claims which have no real merit are resisted, the risk that the introduction of mediation will result in more claims, more costs, and higher premiums should be containable.

Preparation and representation are equally important in mediation, but the emphasis is on joint problem solving rather than on adversarial legal and technical processes. Expert legal and technical input is still an essential component of mediation, but because mediation does not need to follow formal court rules the costs should be less than those for litigation.

The appropriate extent of discovery can be incorporated into mediation by agreement and if necessary supported by affidavits between the parties. It could also be pursued through parallel litigation proceedings.

The choice of mediators is also important, as is mediator training and evaluation.

A contractual clause may encourage and provide a mechanism for mediation and help to overcome the reluctance of any party to be seen to be the first to propose negotiation, but still leave any party free to not participate if it has a better alternative.

Mandatory mediation clauses are generally not favoured, because mediation is a voluntary process and a mandatory provision may therefore be unenforceable. However, some encourage their use anyway, as an added incentive to have the parties continue negotiation and be more likely to accept mediation.

If the parties do not reach agreement, whether in terms of the recommendation of a mediator or otherwise, ADR could merely become an additional step which both increases costs and delays settlement of the dispute. However, any potential cost increase would be negligible in most instances. Furthermore, ADR is more likely to focus the real issues and thus relieve any subsequent action of the need to consider a host of irrelevant arguments.

MULTI-PARTY DISPUTES

In multi-party lawsuits, with their myriad of crossclaims and counterclaims, discovery can consume a great deal of lawyer time and expense. So much so that the original objective of resolving the dispute can be lost in a forest of dead trees. Years later, more out of exhaustion than logic, such cases are usually settled on a "pragmatic" basis and cartons of unexamined discovery documents are hauled off to storage.

However, multi-party claims can be a real problem to settle, because of the difficulties which exist over any one defendant settling his share of the liability in isolation from his co-defendants.

Arbitration is usually between two parties, but can by mutual agreement include more parties. Court action can accommodate several parties, but the cost rises exponentially as the number of parties increases.

Mediation is able to include many parties, in a process which can be more cost-effective and satisfactory.

An engineer administering a construction contract has the responsibility to fairly evaluate the contractor's claims for extras, but sometimes with the background threat that if the contractor's claim succeeds the client may seek recovery from the engineer. In such cases, consolidation into a one-tier ADR process may be helpful.

SOME EXAMPLES**United States of America**

The National Construction Dispute Resolution Committee was an early advocate of ADR in the construction industry, going back to 1965.

The Association of Engineering Firms Practising in the Geosciences (ASFE) first became involved in ADR in the early 1970s, as a means to relieve the professional liability problems then confronting geotechnical engineers. It introduced its mediation/arbitration concept in 1974. Its book "ADR - Alternative Dispute Resolution for the Construction Industry", published in 1988, claimed that "most insurers actively encourage the use of mediation and other 'new' ADR procedures".

The Design Professionals Insurance Company (DPIC, now a subsidiary of the Orion Group) began to mediate construction-related disputes in 1985. Up to December 1989, DPIC reported over 1000 referrals of cases to mediation, with 73% of cases heard successfully concluded. Policy-holders are offered a 50% reduction in their deductibles for claims that are successfully mediated.

A comprehensive study of ADR was undertaken by some 27 insurance companies in Connecticut, during the period 1986-87. The project was initially intended to handle only automobile accident claims valued at \$50,000 or less, but was expanded to include general liability, construction and multi-party claims. Amounts in dispute ranged from a few hundred dollars to over \$100,000, with one case settled for over \$1 million. A total of 1037 cases were handled, 916 submitted by insurers and the balance by claimants. Some 93% were settled, many before the case actually went into an ADR proceeding (which includes both arbitration or mediation in this particular project). Explanations given for the high settlement rate were:

- (a) ADR allowed the insurer to meet the claimant, giving the claims representative the chance to evaluate the claimant in person and judge how the claimant would appear in court.
- (b) ADR provided "reality training" in respect of claimant's unreasonable expectations.
- (c) ADR enabled claimants to vent frustration, by telling their story to a neutral third party.
- (d) ADR was considered a fresh approach, that could overcome hostility built up by party posturing and lack of communication.

Maryland Casualty Company began using ADR for its insurance disputes early in 1986, preferring mediation for settling claims. It has a policy that cases be referred to ADR if negotiation has continued for 45 days and an impasse has resulted. ADR is not used in cases thought to involve fraud and/or concealment. Cases submitted to ADR in 1990 totalled 3474, representing a net savings estimated at \$2 million. Resistance to ADR still persists, both

from within the company's staff and from other parties in dispute. The outset of a case was often marked by fear of confrontation, as a large percentage of technical staff had not been trained in the "eyeball to eyeball" confrontations which are encountered in mediation and arbitration.

The American Arbitration Association facilitates the use of ADR for insurance claims. One of its publications, "The Claims Forum - an insurance dispute resolution quarterly", reports on this topic. The AAA initiated in 1983 a programme of dispute resolution procedures for claimants, their counsel, insurers and self-insured to settle insurance claims quickly and fairly. This voluntary programme invites insurers and claiming parties to submit to non-binding mediation or binding arbitration. The AAA then acts as an intermediary, explaining the programme to the other party and if there is agreement appointing either a mediator or arbitrator and scheduling the matter. Further information and rules are contained in the AAA publication "Dispute Resolution Procedures for Insurance Claims (amended January 1, 1989)".

Canada

The insurance industry in Canada has for a number of years been a strong supporter of the concept of ADR, perceiving it as a less costly means of resolving disputes.

ENCON Insurance Managers Inc is probably the largest professional liability insurer of engineers and architects in Canada. Since 1981, ENCON has been utilizing investigation, conciliation and mediation processes to resolve disputes and settle claims involving design professionals. In 1990 ENCON prepared an information leaflet on ADR, noting that it is working with the Association of Consulting Engineers of Canada (ACEC), CCPE and RAIC to establish a Canada-wide programme of ADR.

International Specialized Risk Management Ltd (ISRM), which is a member of the Simcoe & Erie Group of Companies, provides ADR services as part of its overall services in risk management.

Sweden

Organisations representing the three main groups, clients, consultants and insurers, have formed the Consultant Liability Board. The initiative in founding the Board was taken by the Swedish Association of Consulting Engineers (SKIF), whose office is responsible for administering the work of the Board. The principal aim of the Board is to provide the parties involved in a consultant liability claim with a professional and authoritative decision, complete with detailed reasons, at reasonable cost. In order for the Board to be able to deal with a case, both parties must agree to its involvement. When sitting, the Board consists of four members, three appointed by each of the groups mentioned and the fourth, the chairman, an experienced judge appointed jointly by the groups. The Board's decisions are not binding, which means that any party dissatisfied with its findings is still able to have the matter settled in a court of law or by arbitration. The decisions are made public, but not the names of

the parties involved. Since it was established in 1978, the Board has made decisions on 25 cases, all of them by unanimous agreement of the Board members. A number of other cases were withdrawn before a final decision was made. Examination of a case is based on written submissions, which may include reports by experts. The need for supplementary reports from the parties may be identified. In many cases the Board has held meetings with representatives of the parties, either on the Board's own initiative or at the request of one or both parties. Such meetings have generally been extremely informative and have given a much clearer picture of the problem than it was possible to arrive at through the documents. Sometimes the Board has consulted experts in order to gain clarification on a particular point.

England

A note in the Lloyd's list on 20 March 1992 stated that:

"ADR will continue to stimulate a settlement culture, that is, an interest among lawyers and parties in reaching amicable resolution without litigation, which should only be a weapon of last resort."

The Centre for Dispute Resolution (CEDR) is a non-profit making organisation, supported by industry and professional advisers to promote and encourage the use of ADR. Founded in 1990, its members include insurance companies and professional firms. The Association of Consulting Engineers (ACE) is an associate member. Referrals to mediation are increasing and a 90%+ success rate is claimed. An insurance example involved settlement of a breach of 'duty of care' insurance claim which had already been the subject of heavy litigation. Some £5 million was involved. Multi-party appeal cases were cancelled, saving £500,000. Its publication "ADR Route Map" contains useful information about ADR, including the two final pages of this report.

IDR Europe, the London-based arm of International Dispute Resolution Ltd (an offshoot of US Arbitration and Mediation) has formed an alliance with the Frizzell Insurance Group (an English insurance brokerage and financial services firm). In return for 26% of IDR equity, Frizzell will refer many of its claims to IDR-sponsored mediation.

Republic of South Africa

Legal and other costs related to a claim are covered in terms of the PI insurance policy issued to members of the South African Association of Consulting Engineers. Such costs however form part of the limit of indemnity.

Mediation does not form part of the general *modus operandi* of insurance companies in the RSA and is, to a certain extent, opposed by their claims managers. However, the South African Association of Consulting Engineers and its advisers believe that ADR can play a useful role in the settling of claims and disputes and are currently marketing the idea of ADR to various insurance companies.

Which cases should I send to ADR ?

Some of the common 'triggers' which should indicate a case is appropriate for ADR are:-

- ▶ We want to preserve a business relationship or reputation.
- ▶ We want to try a 'rapid-track' or 'final-shot' approach to resolving a dispute or negotiating problem.
- ▶ We want to peel the onion and get at the core of the dispute.
- ▶ We are concerned about the costs/risks/stress of litigation/arbitration.
- ▶ The dispute is too complex to manage in straight negotiations or adjudication e.g. too many parties, locations, delicate issues or relationships, technical judgments, evidential uncertainties.
- ▶ We would rather keep the dispute a private matter than see it blazed over the public/industry press.
- ▶ We cannot seem to communicate effectively with the other parties.
- ▶ The problem really needs a fresh mind or some creative thinking.
- ▶ We would like an independent appraisal of the merits of our case at an earlier stage than in the courtroom.
- ▶ We are throwing away our reputation or large sums of money in disputes.
- ▶ We believe our relations with our business partners/suppliers should be based on fairness, not power.
- ▶ We want to pursue business interests rather than defend legal positions.
- ▶ What this negotiation/dispute needs is for someone to really get a grip on it. Complexities of law, fact or evidence mean a legal ruling will only be a very crude instrument in this case.
- ▶ A legal ruling won't really get at the basic problem.
- ▶ We need to find a way out of a deadlock.

i.e. in any negotiating or dispute situation where you find yourself saying: "There must be a better way"

When *not* to use ADR

The advantages of ADR mean that you should consider ADR first in most cases. It is not always appropriate, however. You might want to reject it as a first approach if you fall into one of the following cases. (Bear it in mind however for later use if circumstances change.)

- * The other party/parties have no genuine interest in settlement (This category requires special care - in many disputes, both parties claim that it is the other party which does not wish to settle. A neutral helps bridge this gulf)
- * We want a legal precedent out of this case
- * We want the case to be heard in public
- * We need an injunction quickly to preserve rights/property
- * Direct negotiations can be handled with reasonable efficiency and effectiveness
- * We need to start/continue legal action to get the other side to the negotiating table

(In all these cases, ADR can sometimes be used to narrow the issues in dispute or when circumstances change.)

MYTHS ABOUT LITIGATION vs ADR

(Or what your lawyer forgot to tell you)

MYTH

'You will have your day in court.'

FACT

80-90% of civil cases settle before trial but on-the-steps of the court. Settlements are often driven by worries over risks and costs rather than because of good solutions or 'justice'. ADR can speed this process up and still give you a chance to present your case to an independent third party rather than settle on the basis of an endurance test.

MYTH

'You have to choose ADR or litigation.'

FACT

ADR techniques are usually equivalent to 'without prejudice' settlement negotiations. They can be used at the same time as litigation procedures or can replace litigation. So you can litigate to show you are serious but negotiate with ADR to get a better result.

MYTH

'We need to be cautious about the risks of ADR.'

FACT

Because ADR is non-binding, you do not have to settle at any time unless you have an agreement you can live with. Confidentiality is assured by a mediation agreement issued by CEDR. The greatest risks you run are (a) you will have a better understanding of each side's case, and (b) you might settle. 80% settlement rates are commonly reported after mediation. If you are really worried about revealing information or positions, ADR is flexible enough to work with separate meetings between the mediator and the parties ('shuttle diplomacy')

MYTH

'ADR is just horse-trading. We don't want to compromise.'

FACT

Most disputes end up in out-of-court compromises by parties who finally settle rather than risk further costs and the uncertainty of handing control over to a judge. In ADR you stay in control. If ADR is horse-trading, it's likely to be sophisticated horse-trading compared to direct negotiations. Finally ADR settlements are not only about horse-trading - a third party can help develop more 'win-win' options than any litigation, or can better persuade one party to adopt a more realistic stance in the face of the other party's rights.

MYTH

'Lawyers and managers already practise ADR in settlement discussions.'

FACT

This comment indicates a lack of understanding of the powerful influence of a skilled third party neutral. ADR ensures that the settlement process is truly managed rather than an endurance process dependent on court timetables, legal uncertainty and costs or on the erratic and cautious progress of rival lawyers' litigation file management systems and the taxi meter billing principle. ADR helps all parties and their advisers to focus on the problem and get the benefit of an impartial overview of the case.

MYTH

'We need to proceed further into the litigation before trying ADR.'

FACT

More litigation time means more costs, more management time used in preparation for hearings that may never take place, more documents exchanged, applications to court and replies, adversarial aggravation, etc. ADR does not do away with the need for preparation or the identification of key documents, but an agreement to use ADR allows the third party to manage this process more efficiently for the benefit of all parties.

MYTH

'If we try ADR and it fails, we've only wasted more time and money.'

FACT

Even where it fails, ADR has more benefits than risks. ADR can be tried fast and at little extra cost. Parties are free to leave the process if it is unproductive. At the same time, using ADR helps clarify the issues, helps with preparation for trial or further negotiations, and encourages a realistic assessment of the case more rapidly than the adversarial process. Many disputes settle soon after a failed mediation.

MYTH

'ADR shows weakness'

FACT

ADR shows commercial acumen. Businessmen want to get on with their business not run a litigation limited company. This is especially true if they are members of CEDR and therefore show that they support ADR in principle anyway, quite apart from specific disputes.

MYTH

'ADR is a soft option'

FACT

Just try it! It is a continuous process of structured, condensed, guided and intense negotiation requiring quickness of mind, flexibility and imaginative thinking, namely hard but rewarding work.

MYTH

'the facts cannot be condensed effectively'

FACT

Not true. Anyone can write a long paper. It really concentrates the mind and the issues to write a short one.

MYTH

'ADR discloses my hand even if it is 'without prejudice.'

FACT

The other side will also disclose their hand. Joint disclosure assists settlement.

Most mediations work because mediation helps:

- make the parties focus on the case
- make the parties look properly at the other parties' case
- separate the people from the problem
- overcome an awkward negotiating impasse
- redefine the issues to meet the parties' underlying interests
- increase the options available for solution
- provide an independent viewpoint
- instill a sense of realism



MEDIATION

Explanation and Guidelines

A Report of FIDIC's

ALTERNATIVE DISPUTE RESOLUTION

TASK COMMITTEE

1993

Task Committee Chairman & Publication Editor

David E. Hollands

FICE, FIPENZ, FArbINZ, MNZIS, MSPIDR, FMedINZ

Professional Engineer in Dispute Resolution and Multi-Party Problem
Solving - Mediator, Facilitator, Arbitrator, ADR Neutral

Foreword:

"Mediation: Explanation and Guidelines" was produced by FIDIC's Alternative Dispute Resolution Task Committee (ADRTC), chaired by David Hollands of New Zealand. Again, as for "Amicable Settlement of Construction Disputes"(1992) and "Mediation of Professional Liability Claims (1993), David assumed the major responsibility for writing this document, drawing on the inputs and comments of ADRTC corresponding members, and in particular, for this document:

Eric Brier, Australia
Jim Doyle, Australia
Geoffrey Hawker, England
Gordon Jaynes, England and USA
Frank Muller, United States of America
Michael Palmer, New Zealand
Colin Spence, South Africa
Brian Totterdill, UK

FIDIC is very appreciative of the effort again offered by David and his ADRTC colleagues. Through such generous voluntary help, FIDIC is able to publish documents on topics of interest to the consulting engineering profession, to its clients, and to society at large.

FIDIC is producing this publication in photocopy format. Comments are welcomed. It is possible that it may be updated, depending on events and comments received.

MEDIATION - EXPLANATION AND GUIDELINES

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MEDIATION - EXPLANATION AND GUIDELINES

A PUBLICATION OF FIDIC'S ADR TASK COMMITTEE

INTRODUCTION

This publication aims to explain:

MEDIATION .. a process in which the parties are helped to agree a mutually-acceptable outcome for their dispute, rather than leaving it to the imposed decision of an arbitrator or judge.

The mediator is an impartial third party who helps them to negotiate and settle the issues in dispute. Any opinion of the mediator is not binding on the parties, except to the extent that they eventually incorporate it into a settlement agreement. The role of the mediator and procedural details are described.

Advantages of mediation

The main advantages of mediation are:

- the parties remain in control of the process
- better relationships between the parties
- less disruption of current work
- other parties (e.g. subcontractors) may be included
- confidentiality is maintained
- savings of time and cost can be achieved
- the parties decide the outcome

Guidelines for mediation

Included in this publication are "FIDIC's Mediation Guidelines", which may be incorporated by reference into a contract and therefore be available when needed to govern the process. Even if not incorporated, the guidelines may be used by agreement as and when a dispute arises.

Many bodies in various countries around the world have produced rules and guidelines for conciliation and mediation. These include the United Nations International Trade Law Branch (UNCITRAL), International Chamber of Commerce, American

Arbitration Association, Institution of Civil Engineers (UK), Chartered Institute of Arbitrators (UK), Hong Kong Government, Institute of Arbitrators Australia, Japan Commercial Arbitration Association, and South African Association of Consulting Engineers (just to mention those organisations whose rules or guidelines are included in FIDIC's "Amicable Settlement of Construction Disputes" publication).

It was thought desirable however that FIDIC should publish its own explanation and guidelines for mediation, for use with the dispute resolution provisions of its General Conditions of Contract, which are used for construction projects in many countries, and for other technical and commercial disputes related to the work of consulting engineers.

Parties seeking mediation should define the responsibilities of the parties and the mediator. FIDIC's Mediation Guidelines provide a basis for this, but they may need to be varied from country to country, and reviewed according to the circumstances.

Also included in this publication is FIDIC's Mediation Agreement, which provides a format for the additional detail required for a specific mediation and for incorporating FIDIC's Mediation Guidelines.

The term 'mediation'

The words 'mediation' and 'conciliation' are used in different ways in different parts of the world. However, whether the process is called mediation or conciliation, existing rules used for construction disputes generally provide for the mediator or conciliator to be able to offer an assessment of the merit of claims. Hence, it does not seem necessary to distinguish between the words mediation and conciliation. In this publication the term mediator is used to describe the neutral person who facilitates an amicable settlement process called mediation.

Mediation well suited to construction disputes

Fair dealing and the avoidance of adversary positions can help to facilitate the timely and cost-effective completion of construction projects. The parties simply cannot wait for delayed resolution of disputes without harming the project. Differences must therefore be resolved when they arise, and this can be achieved through mediation.

Mediation can be particularly helpful in resolving multi-party disputes; e.g. where there are several contracts and subcontracts, some or all of them with separate agreements for arbitration but with no provision for consolidating disputes involving the same issues into the one hearing.

The complexity of managerial problems, the technical aspects, and various allegations among the parties involved in the project, are other factors which favour the use of mediation.

Law still involved

Mediation still involves consideration of the law. The emphasis however is on minimising the need for formal legal procedures, by involving the parties and their advisers as joint problem-solvers to develop acceptable outcomes and enhance their long-term relationships.

In the unlikely event of a dispute still requiring arbitration or litigation, the time and effort put into mediation will not have been wasted. The parties and their advisers will be better prepared and better able to assist the arbitrator or judge in achieving an efficient and final decision on the outstanding issues.

ROLE OF THE MEDIATOR

Mediator qualifications

The mediator must be completely impartial and not have any financial or personal interest in the outcome. Any circumstance likely to create an appearance of bias, including any dealings or acquaintance with either of the parties, should be disclosed by the mediator before accepting appointment. He or she must also be a person of tact and integrity, whom the parties can trust. Interpersonal, communication, negotiation and mediation-process skills are all important attributes of a good mediator.

A mediator must also understand the subject matter of the dispute, and be able to indicate the likely outcome of any arbitration or litigation. Note however that the person who makes a good arbitrator does not necessarily make a good mediator - different skills are needed.

Choosing a mediator

The mediator should be chosen by agreement of the parties. Hence it is not appropriate to name a mediator in tender documents prepared for the employer. However, valuable time may be lost after a dispute arises in identifying a suitable person and agreeing to an appointment. One solution is for the parties to agree on the choice of mediator soon after the contract begins. Alternatively, a designated institution may be appointed to handle requests for mediation and appoint the mediator.

Mediator guides dispute resolution process

The mediator must be able to guide proceedings, so that the issues are defined and relevant information is produced without undue delay or legalistic procedures.

When disputants are hostile or overly emotional, the mediator needs to deal with these feelings. When the problem seems intractable, the mediator helps with its analysis. When the parties make progress, the mediator builds on it. When the

parties are stuck on matters of principle, the mediator splits up or re-defines the issues. When the parties are stuck on positions, the mediator shifts their attention to their respective interests.

Confidentiality maintained

Any assessment by the mediator and the attitudes of the parties to any settlement proposals should be kept confidential. Similarly, if the matter is not settled, the mediator should not have any involvement in any subsequent arbitration or litigation proceedings, except with the agreement of the parties obtained after termination of the mediation.

PROCEDURAL DETAILS OF MEDIATION

Need for flexibility

Unlike arbitration or litigation, there is no set procedure for conducting mediation. It is important to adopt a flexible approach. The mediator should have the widest possible authority, and use it to develop and implement procedures which are appropriate to the specific circumstances of the dispute and the wishes of the parties. The process should be informal and non-confrontational.

The initiative for mediation can come from either party.

Written material and meetings

Before the start of a mediation session, the parties should provide background information. Each party should produce all the information which the mediator could reasonably be expected to need to understand the issues and evaluate how to proceed.

Face-to-face meetings are desirable to defuse any personal antagonism and promote the communication and understanding which can achieve settlement.

There may be joint sessions with the mediator and all the parties, and separate sessions between the mediator and one or more of the parties. The objective is to continuously narrow the issues that separate the parties. With complex disputes, a series of meetings may be necessary.

The mediator chairs the joint meetings, at which each party should have a management-level representative. The management representative should preferably have authority to agree to a settlement, although this is not always possible.

Mediator takes the lead

It is often useful for the mediator to carry forward a joint report summarising the relevant issues, facts and opinions,

progressively editing it in response to comments and further information from the parties.

The mediator should take positive action to help the parties reconcile their interests and concerns and try to find a mutually acceptable outcome, which is not limited to a "correct" answer.

Mediator may provide an assessment, but not too soon

The mediator may be tempted to just form an independent opinion and try to convince the parties to agree with it. However, if the mediator merely tells the parties that one of them is right, the "losing" party may resent it and lose interest in negotiating a settlement.

Hence, it is usually preferable that the mediator not offer the parties an assessment at too early a stage. Indeed, it may be more effective to indicate the strengths and weaknesses of their cases to each party separately, at private meetings, and encourage them to reach settlement. An assessment is used as a last resort.

Nevertheless, the mediator may ask questions at any stage and, after hearing from both parties and when the time is right, may give a preliminary opinion on some or all of the issues. The parties can still bring forward any further information which they then perceive as being important, or attempt to correct any misunderstanding if they think the mediator has gone astray.

The mediator may also comment on the possibility of getting a different decision from an arbitrator or judge, due to the legal and technical uncertainties involved.

Even after providing a preliminary opinion, the mediator should still encourage and provide opportunities for the parties to continue their discussions, either with or without the mediator.

Agreement to record settlement

At the conclusion of the process, a written agreement is needed to define the proposed settlement.

A draft settlement agreement can be used to clarify what needs to be resolved and narrow the issues in dispute. The mediator, with the help of the parties, can progressively draft and edit the required terms.

Costs of the mediation

Costs are usually shared but, as with all aspects of mediation, the parties can agree otherwise. For example, the initiator of mediation may feel that the only way to bring the other party into the process is to offer to pay more than half of the costs of the mediation. Such an initiative can be cost effective if it resolves the dispute.

Further detail on procedure

The possible role of the mediator is detailed in the attached Appendix - Summary of Functions of a Mediator. Further detail is also contained in FIDIC's Mediation Guidelines.

PREPARATION REQUIRED BY PARTIES

Careful preparation will be needed by the parties and their advisers. This should include putting together a dossier containing:

- (a) a summary of the issues in dispute;
- (b) a factual narrative, which references the significant documents (e.g. contract provisions, minutes, instructions, claims, substantiation, correspondence, etc);
- (c) relevant drawings, photographs, investigation results, expert opinion, etc;
- (d) a discussion of the applicable contract provisions and legal principles;
- (e) details of the payments, extensions of time, damages, etc, being sought; and
- (f) a discussion of any other interests or concerns that need to be taken into account in reaching an amicable solution.

However, preparation need not be complete. Indeed, there are advantages in proceeding with mediation before the detailed preparation required for an arbitration hearing polarises the parties and hardens them in their respective positions.

FURTHER READING

1. "The Mediation Process - practical strategies for resolving conflict", Christopher Moore, Jossey-Bass Publishers, 1987
2. "Amicable Settlement of Construction Disputes", David E Hollands, ADRTC Publication of FIDIC, 1992.
3. "Getting to Yes - negotiating without giving in", Roger Fisher & William Ury, Hutchinson Business, 1982.
4. "Getting Together - building relationships as we negotiate", Roger Fisher & Scott Brown, Penguin Books, 1988.
5. "Getting Past No - negotiating with difficult people", William Ury, Business Books Ltd, 1991.

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APPENDIX - SUMMARY OF FUNCTIONS OF A MEDIATOR

According to the circumstances, the functions of a mediator may include some or all of the following:

- (1) educate the parties on the process and procedures involved
- (2) assist with setting up guidelines and with the convening, agenda setting, logistics and moderating of meetings
- (3) bring about a change in the behaviour of the parties, by being involved and present at meetings
- (4) assist in bringing any reluctant parties into the negotiations
- (5) encourage and manage effective face-to-face communication and understanding between the parties themselves (i.e. not just between their legal or technical advisers)
- (6) keep discussions going, without jeopardising either party's bargaining position
- (7) accumulate information from each party in a balanced way
- (8) probe to uncover additional facts
- (9) organise any joint fact-finding studies
- (10) provide analytical and problem-solving skills
- (11) attempt to clarify information and its interpretation
- (12) provide an opportunity for each party to state its case, to the other party and to the mediator, with an assurance of confidentiality
- (13) clarify the meaning or intention of relevant contract provisions
- (14) assist each party to identify its real interests and concerns and to review unrealistic expectations
- (15) create a positive tone and maintain a discernible progress of the process
- (16) communicate interests, concerns, and proposals in understandable and palatable terms
- (17) help each party better understand the other party's views and evaluation of particular issues, without violating any confidences
- (18) offer an impartial appraisal of each party's case

- (19) put forward options that a party wants considered, but does not wish to suggest
- (20) open discussions into areas not previously considered or inadequately developed
- (21) help the parties to narrow the issues and develop objective criteria
- (22) allow a party to retreat gracefully from a previously-stated position
- (23) maintain each party's self-respect and satisfaction with the process
- (24) help the parties to devise creative alternative outcomes, and negotiate their own mutually-acceptable settlement
- (25) structure and prepare the preliminary draft of a settlement agreement
- (26) assist in binding the parties to their agreement
- (27) if requested, assist with any future re-negotiation required, to deal with mistakes, unexpected changes or new factors

FIDIC'S MEDIATION AGREEMENT

1. The undersigned parties agree to refer the following dispute to mediation in accordance with FIDIC's Mediation Guidelines. The dispute is described as (e.g. insert contract name and sufficient detail to identify dispute):

2. The parties agree to appoint _____ of _____, as sole mediator.

3. The parties and the mediator agree to abide by FIDIC's Mediation Guidelines.

4. The mediator's fees shall be charged at the rate of _____ per hour in _____ currency.

NAME OF PARTY (print): _____

Signed for and on behalf of party: _____

Name of signatory: _____ Date: _____

Representative's name: _____ Phone: _____

Address for communications: _____

_____ Fax: _____

NAME OF PARTY (print): _____

Signed for and on behalf of party: _____

Name of signatory: _____ Date: _____

Representative's name: _____ Phone: _____

Address for communications: _____

_____ Fax: _____

NAME OF PARTY (print): _____

Signed for and on behalf of party: _____

Name of signatory: _____ Date: _____

Representative's name: _____ Phone: _____

Address for communications: _____

_____ Fax: _____

NAME OF MEDIATOR (print): _____ Phone: _____

Accepted (signed): _____ Date: _____

Address for communications: _____

_____ Fax: _____

FIDIC'S MEDIATION GUIDELINES

Preamble

The objective of mediation is to attempt to resolve a dispute fairly and promptly by agreement, without legal proceedings. It is often helpful if a mediator can be appointed soon after the contract has been awarded, before any dispute arises. Alternatively, a designated institution may be appointed to handle requests for mediation and appoint the mediator.

Initiation of Mediation

1. Any party to a dispute may initiate mediation by written request to another party or any designated institution. These guidelines will apply if the other party agrees in writing to the request.
2. The party requesting mediation shall state exactly what dispute is being referred to mediation.
3. Others affected by the outcome of the dispute, such as subcontractors, insurers, etc, may also be involved in the mediation, if they are invited by any party and agree in writing to abide by these guidelines.
4. All those who agree to participate in the mediation are subsequently called "participants" in these guidelines.

Appointment of Mediator

5. Unless otherwise provided for, the participants shall jointly select a suitable person to act as sole mediator.
6. The proposed mediator shall have no personal interest in the matters in dispute and, prior to accepting the appointment, shall disclose any other dealings or acquaintance with any of the participants.
7. The appointment shall not be complete until agreed to in writing by the participants and accepted by the mediator.

Role of Mediator

8. The mediator is a neutral intermediary, and not an advocate for either party. The mediator shall act impartially, independently, fairly and objectively.
9. The mediator shall start and try to conclude the mediation as promptly as possible.

Representation and Attendance

10. Any participant may be represented by one or more persons of its choice. The names and addresses of such persons shall be communicated in writing to the mediator and to the other participants.
11. The participant personally, or a representative able to answer questions and co-operate in developing and agreeing to an acceptable solution to the dispute, should be present at each meeting.
12. Advisers to the participants, whether legal, managerial or technical, may also be present at a meeting.

Submissions and Documents

13. Any participant may send to the mediator, with copies to the other participants, written submissions stating its version of the dispute, the relevant facts, and its resulting interests and concerns.
14. Copies of all documents relied on should be attached to any written submission, which may also be accompanied by written statements of evidence.

Conduct of Mediation

15. The mediator may conduct the mediation in such manner as he or she thinks fit, having regard to the nature and circumstances of the dispute, and arrange a timetable and meeting places to suit the convenience of the participants.
16. The participants shall co-operate in good faith with the mediator and with each other in attempting to settle the dispute. They will comply with the mediator's reasonable directions to attend meetings and to provide documents, information, evidence and legal submissions.
17. The mediator shall not be bound by any formal procedures or rules of evidence, and may become informed in relation to any matter in such manner as he or she thinks fit.
18. The mediator may conduct joint and separate meetings with any one or more of the participants.
19. The mediator may at any time comment on any aspect of the submissions and evidence, make oral and written recommendations for settlement, and provide oral and written assessments of matters in dispute (i.e. of any factual or legal questions or the likely outcome of any aspect of the dispute if referred to arbitration). Such comments or recommendations may be made to all participants or to any

one or more of the participants, at the discretion of the mediator.

Settlement

20. The mediator does not have the authority to impose a settlement on the participants, but will try to help them reach a mutually acceptable resolution of their dispute. Hence, notwithstanding the terms of any contract from which the dispute arises, any comment or recommendation or assessment of the mediator shall not be binding upon the participants, unless subsequently agreed.
21. The scope and terms of settlement which the participants may develop are not necessarily limited by the subject matter of the dispute, by any contract, by any rights or obligations of the participants, or by any recommendation of the mediator. The results may therefore differ substantially from the outcome of arbitration or litigation.
22. Each participant is advised to have the settlement agreement independently reviewed by their legal adviser before executing the agreement.
23. Being involved in mediation shall not prejudice any existing legal right of a participant. However, any settlement agreement may change legal rights and be legally enforceable as a contract.

Confidentiality

24. Mediation is a private procedure. The participants and the mediator shall maintain the confidentiality of the process, and refrain from discussing the dispute with the media or others who are not involved.
25. At a separate meeting with a participant, the mediator may hear information which is requested to be kept confidential from other participants. If so, provided there is no apparent danger or criminality involved, the mediator shall keep the information confidential and may exclude consideration of it from any assessment subsequently provided to other participants on the matters in dispute.
26. The mediation shall be without prejudice and shall not be referred to or relied upon in any other proceedings.
27. To the extent allowable in law, the mediator shall not be compelled to divulge any aspect of the mediation in any other proceedings.
28. The mediator shall not accept appointment as arbitrator or advocate or expert witness or otherwise provide assistance to any of the participants in connection with any related proceedings.

Costs, Fees & Payments

29. Each participant shall meet the costs of its participation.
30. The mediator's fees shall be charged on a time basis, at an hourly rate to be agreed in writing with the participants prior to commencing the mediation, plus expenses and any taxes imposed over and above company and/or personal income taxes in the mediator's country of residence.
31. The mediator may from time to time invoice the participants for fees and expenses already incurred and for reasonable amounts by way of security for future fees and expenses. Such invoices shall be paid within 14 days.
32. The participants undertake to pay the mediator's invoices in equal shares. Alternatively, with the prior consent of the mediator, one or more participants may agree to pay any invoices in such unequal shares as to achieve payment in full. Failure to pay an invoice shall suspend the mediator's obligations until payment in full is made.

Exclusion of Liability

33. Neither the mediator nor any designated institution appointing or nominating a mediator shall be liable to any person, including the participants, for any act or omission including negligence or breach of confidentiality or for any advice associated with the mediation. Each of the participants agrees to indemnify and to release the mediator and the designated institution from any such claims.

Termination

34. Any participant may withdraw at any time, but such withdrawal shall not affect the continued participation of any other participant. If the withdrawal of one or more participants effectively terminates the mediation, the mediator may, if considered appropriate by the mediator in the circumstances and at the request and cost of one or more of the other participants, continue to provide to all participants a written preliminary assessment on any matter in dispute.
35. The mediation may be terminated at any time by the mutual agreement of the participants or by the mediator.
36. The mediation shall be terminated automatically upon execution of a settlement agreement in respect of the dispute referred to mediation.
37. Termination shall not relieve the participants from their obligation to pay the mediator's invoices.