

The role of the mediator

The generally accepted description of commercial mediation in the UK, and many other territories, is a voluntary, non-binding, private dispute resolution process facilitated by a neutral person (the mediator), and which enables the parties to reach a negotiated settlement. A core principle of mediation is that the parties 'control' the outcome, rather than it being imposed upon them.

Unless required by contract, parties attend mediation voluntarily. Even where it is a contractual requirement, either party can terminate the mediation at any time. That is usually a powerful first step towards settlement, restoring direct communication where it may have broken down previously.

In some jurisdictions the term 'conciliation' is used interchangeably with 'mediation'. However in other jurisdictions conciliation may indicate a similar process to mediation but one where the neutral acts in a more evaluative fashion, giving parties a set of recommendations if they fail to agree an outcome voluntarily.

The role of the mediator is not to resolve the dispute or advise on parties' legal rights and obligations. Rather, it seeks to assist parties to work out their own settlement, on terms they can both live with, and looking at a broad range of issues (not limited to legal rights or the facts of the case). Mediation is used in a wide variety of contexts, from multi-million pound commercial disputes to employment and workplace disputes, through to conflicts in the family and community settings. Mediation is now increasingly encouraged by the courts either prior

to, or during, the litigation process, and an unreasonable refusal to participate in a mediation can lead to the refusing party being penalised on costs.

The first role for the mediator is to provide the best forum for the process which may include everything from choosing the venue and deciding the structure of the day, to making sure that refreshments are available. Next, the mediator has to build a relationship of trust and empathy with everyone in a very short time.

The mediator manages the framework of the day but ensures that the parties retain responsibility for their problem and its resolution. The mediator will help parties avoid, or overcome, deadlock so that they can concentrate their energies on negotiating a deal. The mediator will not decide any issue on behalf of the parties or advise either party as to whether the argument is right or wrong, but will assist the parties in forging a lasting and workable settlement.

A skilled mediator will have received specific training in all aspects of the mediation process and competencies. He or she should therefore be able to mediate whatever the background of the dispute, regardless of the mediator's own underlying technical discipline(s). That said, it is the case that many clients will prefer to have a mediator who also has good subject knowledge of a primary technical area that is relevant to the issues in dispute.

A skilled mediator should be able to:

- Reopen communications between parties
- Engage the parties into taking control of the dispute
- Bring a fresh, neutral pair of eyes to an old problem

- Take a broader perspective and help parties explore a creative solution
- Help parties move toward a realistic, negotiated settlement, in a cost-effective manner.

There is no universally accepted standard or curriculum for mediation training; in England & Wales the Civil Mediation Council (CMC) accredits mediation service providers, and as part of this process, sets minimal standards for the training the mediators affiliated to such providers are expected to have followed.

Parties or their advisers can seek to agree upon an experienced and suitably qualified mediator or can appoint an independent body – such as RICS, through its DRS – to assist by nominating a competent RICS-accredited mediator.

The advantages of mediation

There is one crucial factor that makes mediation different from most other forms of dispute resolution: no one tells the disputing parties who is right and who is wrong. Parties to a dispute will often interpret the same facts and events differently. They see and interpret them through eyes conditioned by education, culture, age, environment and other factors. In other adjudicative dispute resolution processes (e.g. courts, arbitration, adjudication, expert determination) the third party arbiter imposes their interpretation of right and wrong on the subject matter of the dispute, a potentially limiting way of resolving disputes. In mediation, each side will need to make some concession to meet the needs of the other party (who otherwise would not settle). Not only does this create a win-win outcome, it also saves the parties much time,

legal fees and wasted resources in reaching this point. This is what can make mediation so effective in achieving solutions that meet the needs of the disputing parties.

The advantages of mediation can be outlined as follows:

- Mediation is non-binding until the parties sign a settlement agreement (at which point it becomes binding as any contract in law).
- The key to any mediation is the fact that it is private and the process is confidential to the parties, except as they may agree. This enables the parties to talk frankly about the strengths and weaknesses of their arguments, and the other side's 'case', without it prejudicing their position if the case does not settle and goes to court. Negotiations and communications within the process are generally – subject to some narrow exceptions – inadmissible in subsequent legal or other proceedings.
- The mediator is neutral and his/her only interest is in providing the parties with their best chance of achieving a settlement to their dispute.
- One of the key strengths of mediation is that the parties take control of the outcome and negotiate their own settlement, 'owning' the outcome. They can decide to withdraw from the process at any time. Any final settlement may take into account any number of non-financial factors and needs that are impossible in other dispute resolution processes e.g. in an ongoing business relationship opportunities for further work, or the offer of goods or services at an agreed cost, could be features. It may also take into account things that are totally outside of the dispute.

The mediation process

Most mediations last one day, some more complex (especially multi-party) disputes may take longer but it is rare to exceed three days. This really challenges the parties to focus on key issues in dispute and to set aside the finer detail that often diverts their energies and leads to deadlock.

Parties attending the mediation may do so alone, or with professional advisers (lawyers or others). Normally, there will be some pre-mediation contact by the mediator with the parties or their lawyers, mainly to ensure that parties understand the process and to set up logistical details. In commercial mediations, the parties will generally share a 'mediation bundle' or position statement with the other side and the mediator before the date of the mediation, to set out their respective positions.

It is important that those attending a mediation have authority to settle the dispute, or at least that they have access and lines of communication open to those with such authority. The day will start with an open meeting where everyone will present their position on the issues to be resolved and that will lead to questions and discussion.

There will then normally be a series of private meetings between the mediator and each party and the day will continue with combinations of private and open meetings until a resolution is achieved. In mediations where no settlement is reached, it is often the case that differences are considerably narrowed and frequently parties will come to a resolution within a few weeks of the mediation – mediation is here often seen as helping break deadlock even if a settlement was not reached on the day of the mediation.

Project Mediation

Project mediation is a relatively new process that attempts to meld team building, dispute avoidance and dispute resolution into one procedure. A project mediation panel is appointed at the start of a project. It usually comprises a lawyer and a commercial expert who are additionally trained as mediators. There is an initial meeting at the start of the project to familiarise the project team with the procedures.

The panel visits the project during the course of the project, becoming familiar with the project and the individuals working on it. The project mediators are then available to resolve any differences, hopefully before they escalate. Project mediation is, therefore, very much a dispute avoidance technique although it has the ability to feature informal or formal one-day mediations during the project to resolve any issue that might arise.

Its advantages:

- Economy – It is far more economic than a DRB (Dispute Resolution Board) or DAB (Dispute Advisory Board), and is therefore available for use on many small- and medium-sized contracts. A single project mediator could be used on a smaller project
- Avoidance – Many in the construction industry now place great emphasis on dispute avoidance. Project mediation allows such players in the industry to avoid and resolve disputes more economically
- Confidential – It is confidential and private to the parties.

Further reference

RICS Dispute Resolution Service (DRS)

Surveyor Court
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e drs@rics.org
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The DRS offer a complete range of methods for resolving disputes including arbitration, expert determination, mediation, adjudication, enabling people to resolve property disputes quickly and effectively, without going to court. They produce a detailed information pack for potential users of mediation, including a sample mediation agreement. Application forms for a range of services are available via the RICS website.

RICS Scotland Dispute Resolution Service (DRS Scotland)

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t + 44 (0) 131 240 0832
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w www.rics.org/site/scripts/documents_info.aspx?categoryID=253&documentID=439

The DRS Scotland offers a range of methods for resolving disputes enabling people to resolve property disputes quickly and effectively in Scotland, without going to court. Application forms for a range of services are available via the RICS website.

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Mediation is a commonly used form of dispute resolution in Hong Kong. The option for parties to resolve their disputes by reference to mediation is incorporated into both government and private forms of construction and engineering contracts.

There is a wide choice of qualified mediators available to assist parties in resolving disputes and many are RICS members.

There are a number of organisations in Hong Kong which maintain lists of practising mediators including those who are RICS members and these organisations include the Hong Kong Mediation Council which is part of the Hong Kong International Arbitration Centre.

Hong Kong International Arbitration Centre:
w www.hkiac.org/HKIAC/HKIAC_English/main.html

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w www.ricsdrs.com.au/index.php

The DRS Oceania offers a range of dispute resolution training and appointment services. Application forms for a range of services are available via the website. For more information, please contact the office.

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Civil Mediation Council (CMC), England & Wales –
<http://www.civilmediation.org>

Scottish Mediation Network, Scotland –
<http://www.scottishmediation.org.uk>

National Mediation Helpline (UK) -
<http://www.nationalmediationhelpline.com>

EU Code of Conduct for Mediators: available at
http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.htm

Mediation of construction disputes – by David Richbell (Wiley Blackwell, 2008)

Mediation: Principles, Process, Practice – by Miryana Nestic & Laurence Boule (Butterworths Tolley, 2000)

Mediation Law and Practice – by David Spencer & Michael Brogan (CUP 2007)

RICS Books

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Stocks a wide range of titles in the dispute resolution arena.

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