THE ASSOCIATION OF ARBITRATORS

GUIDELINES FOR MEDIATION UNDER CONSTRUCTION CONTRACTS
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1. INTRODUCTION

"Mediation" is a term that means different things to different people. In the construction industry in South Africa it generally denotes a procedure in which a neutral third party seeks to resolve a dispute by conducting an enquiry, similar to but less formal than an arbitration hearing, and giving a non-binding opinion. But almost universally elsewhere it denotes a process in which a neutral third party attempts to bring about a reconciliation between disputing parties, in which he seldom, if ever, presents his own opinion.

The procedure recommended here, whilst devised to suit the requirements of the standard form contracts used in the construction industry, recognises the other nature of mediation and proposes a process in which initially the mediation corresponds to the more universally recognised concept, and in which the mediator is the negotiator of a settlement between the parties, and only where the parties fail to reach agreement does he assume the rôle that has become traditional for mediators in the construction industry.

It is hoped that this procedure will not only diminish the difference between the two types of mediation but will also improve the quality of this manner of resolving construction industry disputes.

2. OBJECTIVE OF MEDIATION

2.1 Mediation is a process that seeks, by means of the intervention of a neutral third party, to bring about the resolution of disputes between parties who are unable to resolve these disputes unaided.

2.2 In mediation the resolution of the dispute is voluntarily accepted by the parties, and is not imposed upon them as is the case with litigation or arbitration. By agreeing to mediation provisions incorporated in standard form contracts, the parties can be deemed to have willingly agreed to mediation.

3. ADVANTAGES OF MEDIATION OVER LITIGATION OR ARBITRATION

3.1 Mediation is quick. If the parties are co-operative, disputes may be resolved by mediation in a matter of hours, days or weeks, whereas arbitration has been known to take months and litigation often several years.

3.2 Mediation is private. Like arbitration, but unlike litigation, mediation is always conducted in private. There is no unwelcome publicity in newspapers and other media, and trade secrets and reputations may be preserved.

3.3 In mediation the parties make peace, not war. The success of a mediation depends upon the ability of each party to see the other's point of view and to accommodate it, whereas in litigation or arbitration each party endeavours to demolish the other's case before the judge or arbitrator.

3.4 Mediation preserves and enhances the relationship between the parties. As each must understand and respect the other's point of view, their relationship is fortified, which is particularly important where the parties must continue to work together in the future. Litigation and arbitration, on the other hand, are confrontational and can be destructive of relationships.

3.5 Mediation produces a "win-win" situation; in a successful mediation each party considers that he has won the best possible deal from the situation commensurate with the costs involved. Litigation and arbitration usually yield a "win-lose" situation and sometimes, when each party feels he has received less than he deserved, a "lose-lose" situation.

3.6 Mediation is usually a comparatively inexpensive way of resolving disputes.

4. QUALITIES OF A MEDIATOR

4.1 The mediator must enjoy the confidence and respect of the parties.

4.2 He should be a good listener and able to understand and appreciate the attitudes of the parties.

4.3 He should be tactful and diplomatic, and able to defuse heated and potentially explosive situations.

4.4 He should be patient and uncritical.

4.5 Whilst he may not necessarily be an expert in the subject matter of the dispute, such expertise may be conducive to an equitable solution.

5. MEDIATION IS NOT AN EXPEDITED ARBITRATION

5.1 Mediation is not a "no frills" type of arbitration from which lawyers are excluded and in which any time-wasting procedures are avoided, but is an entirely different way of resolving disputes, with its own particular procedures.

5.2 It does not seek to establish the legal rights of the parties, as do arbitration and litigation, but seeks rather a dispensation that is acceptable to both parties, which will probably require each to compromise on its legal rights.

5.3 Any mediation in which the parties require the mediator to formulate a resolution of the dispute which will be final and binding upon them will not, strictly speaking, be a mediation but a *de facto* arbitration, and the mediator/arbitrator may have to modify procedures to suit the wishes of the parties and the requirements of the Arbitration Act.

6. AGREEMENT TO SUBMIT TO MEDIATION

6.1 Mediation is a consensual method of resolving disputes, and may be initiated at any time by parties in dispute who mutually agree to avail themselves of this procedure. Parties who are unable to resolve their dispute unaided, and are contemplating litigation or arbitration, are strongly advised to attempt mediation prior to embarking upon litigation or arbitration.

6.2 The agreement to submit a dispute to mediation may be oral but should preferably be in writing; the question of proving or enforcing a mediation agreement cannot arise; the enforcement of a mediation agreement against an unwilling party will be counterproductive, and the reluctant party cannot be expected to co-operate in the mediation proceedings to enable them to succeed.

6.3 The agreement could provide that, if the dispute had not been resolved within an agreed period of time, efforts at mediation would be abandoned and the dispute would be referred to litigation or arbitration. Notwithstanding any such provision, a mediation agreement would terminate as soon as one of the parties decided to withdraw from the proceedings.

7. APPOINTMENT OF THE MEDIATOR

7.1 Ideally the mediator should be appointed by the parties by mutual agreement. If the parties are unable, within a reasonable time, to agree on the appointment of a mediator, it is unlikely that they will be able to agree to any compromise of the dispute under his guidance, and any attempt at mediation should be abandoned.

7.2 Certain standard-form contracts contain provision for mediation in which the mediator is required to be appointed by some designated third party. Notwithstanding any such provision, the parties should endeavour to agree between themselves to appoint a mutually known and respected mediator.

7.3 Where the parties are unable to agree on the appointment of a mediator because they are not acquainted with suitable candidates, the Association of Arbitrators may be consulted for names of possible candidates for selection.

7.4 The appointment of the mediator should be confirmed in writing, possibly by the exchange of letters, and the basis of and liability for his fees should be recorded. It is usual for his fees to be settled equally by the parties, although this arrangement might subsequently be varied in any agreement that resolves the dispute.

7.5 The appointment of a mediator is a personal appointment, and the associated duties must be discharged by the him personally and may not be delegated except with the consent of the parties, nor may he withdraw from his appointment until either or both of the parties agree to release him.

7.6 In theory, a mediator may be liable to the parties for any loss they may sustain due to his negligence or failure to discharge his duties in a proper manner. In practice, it would probably be very difficult to establish the necessary *causal nexus* between any action or inaction on the part of the mediator and the loss alleged by the party.

8. BARS TO MEDIATION

8.1 At the outset the mediator should establish if either party is relying upon a circumstance that would extinguish the other's claim, i.e. that the other's claim has become prescribed, or that the other failed to formulate his claim in the manner prescribed by a contract or agreement, or that the claim was legally unenforceable.

8.2 Where a party alleges that the other's claim has been extinguished or is legally unenforceable, the mediator should require the party making the allegation to confront the other party with the allegation, either orally or in writing, and require the other party to respond. On the basis of the allegation and response, supplemented if necessary by any further evidence or comment that either party may wish to make, and any independent investigation that he himself may wish to make, the mediator should determine whether or not the allegation is valid.

8.3 Where the mediator is of the opinion that the claim has been extinguished, or is unenforceable, he should advise the parties accordingly and terminate the proceedings.

9. DEFINITION OF THE DISPUTE

9.1 The mediator should require each party to make a statement of his particular perception of the dispute, the facts that give rise to the dispute, the attitude of the other party and the relief that he is seeking. Such statement may be oral or in writing. If oral, it should be made in the presence of the other party; if in writing, a copy should be furnished to the other party.

9.2 Each party should then be requested to respond to the other's statement, either orally or in writing, in which response he may draw attention to different versions of fact or different attitudes based on the facts. If such statements are oral, they should be made in the presence of the other party; if they are in writing, a copy should be furnished to the other party.

10. ESTABLISHMENT OF FACTS

10.1 Where the statements produced in terms of defining the dispute reveal factual discrepancies, and where such facts are relevant to the resolution of the dispute, the mediator should attempt to establish the true factual position.

10.2 He should, if he deems it necessary, convene an informal hearing for the purpose of taking evidence from the parties. Such hearings can become confrontational and are apt to be counterproductive of a settlement, so that the mediator will have to exercise patience and skill in controlling such meeting. The mediator is not bound by the rules of natural justice and the laws of evidence, and

may make whatever investigations he feels are necessary in whatever manner he considers appropriate.

10.3 When he is satisfied that he is in possession of the correct version of the facts, the mediator should endeavour to persuade the party whose version is different to accept the correct situation. The mediator is more likely to succeed if he does this with the party in private; there is no need for the other party to be present.

11. COMPROMISING OF ISSUES

11.1 Having established with the parties the true version of the facts, the mediator should attempt to reconcile opposing views. While this is most expeditiously achieved by getting the parties together, conflicting attitudes may make this procedure inadvisable.

11.2 Whether he has the parties together in the same room or must keep them apart and move from one to the other, the mediator should offer each party the attitude of the other and seek to establish whether each party would accept any part of the other's attitude, either in its original form or adjusted to make it more acceptable. He should also indicate to each party the concession which, if made by that party, might be accepted by the other. In this way, by the making of a series of small concessions and small acceptances, the gap between the attitudes of the parties may be narrowed, or even closed.

11.3 The mediator should not be insistent that the parties meet together if they are reluctant to do so; "arm's length" mediations, although slow, may be very effective and may avoid confrontations. It is likely that, as the differences are eliminated, the parties will be more ready to meet together and expedite the resolution process.

11.4 The mediator should be very slow to express his own opinion on the merits of the dispute, particularly in the early stages of the proceedings. His own opinion, except in special circumstances, is irrelevant. What is relevant are those aspects of the opinion of each of the parties which the other is prepared to accept, and which will become the ingredients for an ultimate compromise and settlement.

11.5 In certain circumstances, where on a particular issue neither party is able to accept the other's point of view or to make a concession that the other may accept, the mediator may make a proposal which he considers might be acceptable to both. The proposal that he makes should be formulated to conform not with what he himself may consider correct in the circumstances but with what he thinks may have the best chance of acceptance by both parties. The mediator should be prepared to modify any proposal if so doing would increase its chance of mutual acceptance.

12. THE MEDIATOR'S PERSONAL OPINION

12.1 In certain circumstances parties appoint a mediator because they desire his advice and guidance; they are prepared to bow to his superior knowledge and experience. In such circumstances the mediator is free, in fact obliged, to express his own opinion. In doing so, he should express his opinion clearly and argue and motivate it fully, so that a party who finds it hard to accept may be persuaded of its logic. The mediator should be prepared to adjust and modify his opinion if doing so would make it easier for both parties to accept it; his concern should be to express an opinion which both parties can accept rather than one which he himself considers is most correct.

12.2 Mediation provisions in some construction contracts lay down that the mediator's opinion shall become final and binding upon the parties unless either of them, by writing to the mediator within a stipulated period, rejects the opinion. As the lapse of a party's right to reject a mediator's opinion may have serious consequences for him, it is important that the mediator accurately records the date when he delivers his opinion to each party.

13. RECORDING OF AGREEMENT

13.1 Any agreement between the parties, even if it does not dispose of all the matters in dispute, should be reduced to writing and signed by the parties.

13.2 Care must be taken in drafting the agreement to ensure that it is clear, that it accurately reflects the agreement between the parties and that it is free of any uncertainty or ambiguity. Unless the parties, or the mediator, are experienced in legal drafting, it will usually be worthwhile to engage an attorney for the purpose.

13.3 Once an agreement has been reduced to writing and signed, it would, if necessary, be comparatively easy for a party to enforce the agreement against a defaulting party by application proceedings in the Supreme Court.

14. CONFIDENTIALITY OF MEDIATION PROCEEDINGS

14.1 If settlement negotiations in a mediation are to have any chance of success, the parties must feel free to make admissions and concessions which, if the negotiations fail, cannot be used against them to their prejudice in any subsequent proceedings.

14.2 The mediation proceedings must therefore be held to be confidential and without prejudice, so that no party, mediator, witness, representative or any other participant in the mediation proceedings may be called upon, or compelled, to give evidence of anything said or done in such proceedings in any subsequent related arbitration or litigation, nor may any such person disclose anything so said or done in such mediation proceedings to any third person who is interested in or connected with the dispute.

14.3 Where any settlement has been reached by the parties, or where a mediator's opinion has become binding upon them, the terms of such settlement or binding opinion shall not be privileged and shall be with prejudice, but all proceedings leading up to such settlement or binding opinion shall remain privileged except for the purpose of enforcing it in any legal proceedings.

14.4 No mediator who has acted in a mediation, nor any partner, co-director or spouse of such mediator, may thereafter act as arbitrator, advocate, representative or witness in any subsequent arbitration or litigation proceedings concerning the matters in dispute.

14.5 The parties may jointly consent in writing that anything which is prohibited by this section may be done.