

Practice Notes For Construction Managers
PNCM 6: Mediation - First Issue, March 2005

(Index under: Mediation)

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PRACTICE NOTES FOR CONSTRUCTION MANAGERS

PNCM 6: MEDIATION

1. Scope of this Practice Note / Introduction

This PNCM 6 covers the usual good practice of a construction manager in carrying out his/her professional duties as related to “mediation” under normal circumstances. It is not to be used for any other purpose. It covers the practical and essential aspects on which a construction manager may encounter in respect of “mediation” in construction projects.

2. Principles behind Mediation

- Mediation is negotiation with the help of a mediator, a neutral and independent person.
- Mediation is a voluntary, non-binding private dispute resolution process in which a neutral person helps the parties in dispute to reach a negotiated settlement.
- Mediation is a dispute resolution process which aims at building consensus and agreement which is voluntarily reached between the parties where the neutral independent third party does not act as a judge to decide how the parties should resolve their dispute nor give advice or recommendations to tell the parties how to resolve their dispute.
- Mediation is not an adversarial process as court actions could be.

3. Advantages of Mediation

- Mediation has a great deal of advantages over other ways of resolving a dispute for the following reasons: -
 - ✧ Mediation is normally speedy and time-saving.
 - ✧ Mediation is much less expensive.
 - ✧ The parties are free to choose and formulate any rule or procedure for their negotiation and discussion. There are no complicated formalities, procedures, rules or principles. Though the mediation process must proceed on a good faith basis, parties in dispute do not have to disclose everything like that in a court proceeding.

- ✧ Nothing shall be binding upon the parties until they signed the Settlement Agreement. It allows the parties to communicate to each other effectively and comfortably through the mediator on issues which they may be unwilling to talk about by themselves. It encourages the parties to have frank exchange of views.
- ✧ The process is private; sensitive matters or information will not become public. There is a high degree of confidentiality. Reputation is not at risk.
- ✧ The atmosphere in a mediation process is usually friendly and comfortable. The parties in dispute are more likely to upkeep a normal and friendly relationship after mediation than they would be after litigation.
- ✧ Mediation is flexible. It can be used during arbitration and litigation. The parties can determine their own schedule of meeting and decide what they will do during each step in the mediation process. It enables the parties to control the outcome of their disputes.
- ✧ The parties are more likely to be satisfied with and willing to implement the ultimate result, as mediation is not an imposed settlement but a result they voluntarily agreed to.
- ✧ Mediation provides a focused point in time when substantial settlement efforts could be made.
- ✧ Mediation is “freer” than arbitration and court proceedings. Mediation can be conducted anywhere in the world upon the wish of the parties.

4. Suitability of Mediation

- Mediation will be most suitable when:
 - ✧ There is sufficient good faith for effective negotiation.
 - ✧ Parties involved expect to maintain a continuous relationship in the future.
 - ✧ A quick settlement is desired.
 - ✧ Court proceedings will be costly and time-consuming.
 - ✧ There are strong emotion or hostility between the parties involved.
- Mediation may not be suitable when:
 - ✧ A party has no intention at all to settle a case.
 - ✧ There are gross dishonesty, fraud or criminal behaviour.
 - ✧ Urgent court injunction proceedings are necessary.
 - ✧ There is a precedent or constitutional issue involved.

- ✧ One party cannot confer authority to anyone to negotiate for a settlement; for example, sometimes government departments may require a court or an arbitrated decision.

5. Agreement to Use Mediation

- Since mediation is not mandatory, all parties in dispute have to expressly agree to use mediation as a means to resolve the dispute before mediation commences.
- Agreement to use mediation can be expressed by including a mediation clause in a contract, or by consent when differences arose between parties involved.
- Mediation process stops when any of the parties withdraws from a mediation process.
- At the moment, all government-related construction contracts contain a mediation clause. When disputes go for mediation, Construction Mediation Rules of the Government of the Hong Kong Special Administrative Region should be referred. Usually, if the parties do not want to refer the dispute for mediation, any of the involved parties can refer the dispute for arbitration unless the contract specifically stated that the parties should first go through mediation before arbitration.
- In Hong Kong, mediation is currently not mandatory or compulsory in law. Courts cannot order the parties in a court action to compel them to adopt mediation as an attempt to resolve their disputes in construction projects.
- The Hong Kong International Arbitration Centre suggested that a Mediation Clause is: -
“Any dispute or difference arising out of or in connection with this contract shall first be referred to registered mediation organizations in Hong Kong, such as Hong Kong International Arbitration Centre (HKIAC) and in accordance with relevant mediation rules. If the mediation is abandoned by the mediator or is otherwise concluded without the dispute or difference being resolved, then such dispute or difference shall be referred to and determined by arbitration at HKIAC and in accordance with its Domestic Arbitration Rules.”

6. Main Phases of the Mediation Process

- For practical purposes, there are normally twelve phases in a mediation process.

- Phase 1: Agreement to Use Mediation
 - ✧ As mediation is not compulsory in law, the parties in dispute must reach an agreement in advance to adopt mediation as the process to resolve the disputes, unless an enforceable obligation is already stated in a contract to bind the parties to participate in mediation to resolve disputes or claims arising out of or relating to the contract.

- Phase 2: Appointment of a Mediator
 - ✧ A mediator is best found by word of mouth from others, who is in the know of or who has experienced the work of a mediator.
 - ✧ From the Hong Kong International Arbitration Centre that maintains a panel of accredited mediators.
 - ✧ Contact a mediator directly to ask for a copy of his/her resume and to enquire about fees and availability.
 - ✧ If the parties cannot agree on the appointment of a mediator, they can seek help from the Hong Kong International Arbitration Centre for the appointment of a mediator.

- Phase 3: Preliminary Matters
 - ✧ In practice, a mediator will arrange a preliminary meeting with the parties in dispute, aiming to understand the problem and to suggest necessary preparation. The mediator will also illustrate the process of the mediation.
 - ✧ The mediator will explore whether mediation is the most appropriate process. S/he will also request a brief summary of the issues and ask questions to clarify the key issues.
 - ✧ Usually, a mediation process agreement is to be signed by the parties before the mediator sets out how the mediation will proceed. It typically covers: -
 - (i) A brief description of the types of dispute;
 - (ii) The scope of disputes to be mediated;
 - (iii) The fact that the mediation will be confidential and no document created for the mediation should be disclosed in any subsequent court proceedings or arbitration;
 - (iv) No statement, admission or offer made in the mediation will become part of any subsequent litigation or arbitration;
 - (v) The date and venue for the mediation;

- (vi) The timetable for the preparation of the submissions, if any, before the mediation. For example, a statement of issues, summary paper, statement of claims or position, etc.;
 - (vii) The fees and costs of the mediation; and who will bear such expenses;
 - (viii) That the mediated parties shall indemnify the mediator against any claim that may arise from the mediation.

- Phase 4: Mediator's Opening Statement
 - ✧ The Mediator will set the tone and the standard for the entire process of the mediation in his/her opening statement.
 - ✧ The Mediator will:
 - (i) Explain his/her role;
 - (ii) Illustrate the procedures or the ground rules to be followed;
 - (iii) Describe the agenda, the timetable, the flow and the steps of the mediation process;
 - (iv) Assure the parties that the process is confidential and that the matters raised in the mediation generally will not be made subjects of any subsequent court action, aiming to build trust and confidence amongst the parties.

- Phase 5: Presentations by the Mediated Parties
 - ✧ The Mediator helps the parties to better understand the issue by asking the parties to provide an opening presentation summarizing their position.
 - ✧ The Mediator asks questions to clarify issues and focuses each side of the parties on key points of concern.

- Phase 6: Defining Issues
 - ✧ The Mediator summarizes key issues and senses needs, interest and objectives of the parties.

- Phase 7: Ordering Issues
 - ✧ The Mediator lists and prioritizes issues.
 - ✧ The Mediator identifies the common ground and interest of the parties, and the areas that the parties have in common. For instance, an interest in keeping their relationship.
 - ✧ The Mediator assists the parties to understand their needs and objectives,

such as getting an early payment, getting future work, protecting reputation or status, etc.

➤ Phase 8: Negotiation & Open Discussion

- ✧ The Mediator will normally allow time for the parties to have general discussions in a joint session and allow time for questions so that the parties can be clear about what each other has said.
- ✧ The parties may identify and explore options for settlement and proceed to preliminary negotiation.

➤ Phase 9: Caucusing

- ✧ The Mediator may choose to have a separate or a caucus session with each side to see if there are other issues or if a party appears to be unclear about its needs and objectives.
- ✧ In a separate session the mediator may have access to certain information of one party which the party may not wish to disclose to the other party. The Mediator should assure the parties that s/he would not disclose such information obtained during the caucus to the other party unless the informing party so consents.
- ✧ Through caucusing, it
 - (i) Allows confidential issues to be raised;
 - (ii) Gives the parties time to think;
 - (iii) Allows the parties to discuss the progress with the mediator;
 - (iv) Ensures all issues have been identified;
 - (v) Creates the atmosphere for a party to be more honest with themselves and the mediator;
 - (vi) Accommodates proposed offers to be discussed in confidence with the mediator.
- ✧ If necessary, the mediator may arrange a further joint session to check on the progress or to deal with matters that could not be resolved.

➤ Phase 10: Final Discussion

- ✧ After caucusing, the mediator will
 - (i) Clear up misunderstandings or misperceptions of the parties;
 - (ii) Help the parties to see the strength and weakness of both sides;
 - (iii) Recap the options raised before;
 - (iv) Encourage the parties to generate options;

- (v) Undertake a cost/risk analysis of what would happen in a court action;
 - (vi) Check which option carries the most important interest;
 - (vii) Check if objectives meet needs;
 - (viii) Draw the parties to further discuss the options and move them toward an option they can both accept.
- Phase 11: Recording Decisions
- ✧ The parties may reach an agreement and finalize a settlement after discussion and negotiation.
 - ✧ The Mediator helps the parties to test the viability of an agreement.
 - ✧ The Mediator may assist the parties to draft an agreement or to prepare a summary of the agreements, and suggest the parties to obtain legal or other advises in relation to the agreements reached.
 - ✧ The Settlement Agreement should summarize all the terms of the agreements reached, which must be recorded clearly in writing and shall be signed by all parties.
- Phase 12: Closing Statement & Termination
- ✧ Where the parties cannot reach agreement, the mediator may suggest an adjournment and encourage the parties to contact him/her again at a later date to explore further settlement attempts.
 - ✧ The mediator may help the parties to design a different process for all the disputes or just for resolving the outstanding issues.
 - ✧ Mediation process terminates when any of the parties withdraws from a mediation process.

7. Role of a Mediator in conducting a Mediation

- A Mediator does not advise or direct the parties on how to resolve the parties' dispute.
- A Mediator organizes and plans a process that will facilitate the parties in dispute to discuss, to understand, and to define the problem; explores options to solve the disputes and makes attempts to conclude their agreement.
- A Mediator employs a mixture of facilitative, evaluative and solution-focused techniques to help the parties generate options and achieve a "win-win" solution.

8. Confidentiality in Mediation

- Verbal statements, materials and documents disclosed in the mediation process are all confidential. It shall not be used by anyone for any purpose in any court hearing.
- Before mediation takes place, all parties and the mediator(s) shall sign and abide by an undertaking of confidentiality.
- To ensure confidentiality, the undertaking of confidentiality should be expressed in the mediation process agreement and the documents prepared for mediation should be marked “Confidential and prepared for the sole purpose of mediation”.

9. Selection of a Mediator

- The procedures in the selection and appointment of a mediator should follow that stated in the Mediation Rules.
- In appointing a suitable person to be the mediator, the following factors should be considered: -
 - ✧ The nature of the dispute;
 - ✧ The availability of the mediator or mediators;
 - ✧ The relevant specialist knowledge and experience of the mediator or mediators;
 - ✧ The identity of the parties;
 - ✧ The independence and impartiality of the mediator or mediators;
 - ✧ The stipulation of an appointment of a mediator in the relevant agreement, if any; and,
 - ✧ The suggestion made by the parties themselves, if any.
- Where the parties failed to agree between themselves on the appointment of a mediator or mediators, they may ask the HKIAC to assist them.
- HKIAC has set up a list of accredited mediators to help the public select a suitable mediator. The system is designed to safeguard the minimum professional standard of mediation practices in Hong Kong and to help the public make the best use of the existing mediation expertise.

10. Enforceability of a Settlement Agreement

- After a successful mediation, the parties will sign an agreement called a Settlement Agreement.

- There is no difference between a contract and a Settlement Agreement in terms of legal enforceability.
- The Settlement Agreement should identify and be signed by those with requisite authority to bind the parties to the Settlement Agreement in order to ensure its enforceability.
- Either party of a Settlement Agreement can institute legal proceedings against the other party in a court for damages for breach of contract or for performance of the contract if the terms of the Settlement Agreement were not complied with.
- With a clear and precise Settlement Agreement professionally drafted by a mediator, the court will focus on the interpretation of the terms of the Settlement Agreement instead of going through thoroughly the background and the nature of the original dispute, and thus time and legal costs will be much saved.

11. Mediation Costs

- There is no rule governing which party is to pay the mediation costs as mediation provides the greatest flexibility for the parties to formulate any ground rule by themselves.
- Usually, the parties agree to share costs equally. Nevertheless, the parties are free to agree that only one party shall solely bear the costs.
- A mediator has no power to make any order as to costs, but s/he can recover all or part of his/her mediation fees and costs from any of the parties in a mediation process when any party fails to pay him/her.

12. Mediation Rules

- If the parties have entered into a contract that provides a clause for mediation, then it is usual for the clause in question to provide details of the procedures to be adopted in commencing and conducting that mediation. For example, in government contracts, it refers to the Construction Mediation Rules of the Government of Hong Kong Special Administrative Region.
- In instances where the procedures are not defined, reference can be made to registered mediation organizations in Hong Kong, such as the Hong Kong International Arbitration Centre (HKIAC), and relevant mediation rules may be referred.
- If no mediation rules or procedures are adopted in the mediation clause, the

mediator may suggest and obtain the parties' agreement to the suggested mediation rules and they are free to agree/disagree to the details of the procedures.

13. Representing Clients in Mediation

- The followings should be noted when representing clients in mediation in preparatory stages and during the mediation meeting:-
 - ✧ In preparatory stages
 - (i) Properly seek client's instructions;
 - (ii) Understand the dispute thoroughly and identify clearly all the issues in dispute;
 - (iii) Identify client's overall interest and objectives in the context of the dispute;
 - (iv) Identify the case and interest of the other party;
 - (v) Identify all possible options that may meet the client's interest;
 - (vi) Identify client's bottom line in seeking a settlement;
 - (vii) Provide a summary of the issues and agreed facts to the other party and the mediator(s);
 - (viii) Seek all relevant documents and ensure their availability;
 - (ix) Meet with the mediator(s) to gain full understanding of the mediation process.
 - ✧ During the Mediation Meeting
 - (i) Present client's case fully at the beginning;
 - (ii) Consult client adequately to take client's instructions and understand their wishes and interest, and advise accordingly;
 - (iii) Suggest options for a settlement that meet both sides' objectives;
 - (iv) Draft the settlement contract or check over the agreement in consultation with client(s) and other legal adviser(s);
 - (v) Ensure the agreement included all the terms of offer and all legal obligations have been considered.

14. Settlement Agreement

- If the parties reached a settlement, it is important to put down their agreement in writing.

- It is vital to clearly summarize all the terms of the agreement and ensure there are neither errors in nor omissions from the agreement.
- The agreement should contain:
 - (i) The terms of the settlement;
 - (ii) A clause which stipulates that the terms of the settlement are confidential;
 - (iii) Mutual releases from any further claim or demand;
 - (iv) A clause providing for how a future dispute or disputes over the interpretation of the agreement will be dealt with;
 - (v) A clause providing for a review of the progress of implementation of the agreement at a specified time.

15. Ethical Issues and Guidelines

- There is no compulsory standard regulating a mediator's ethics.
- For members of the Panel of Accredited Mediators of the HKIAC, they should comply with the General Ethical Code ("the Code") set out by the HKIAC.
- A serious breach of the Code amounts to an improper conduct may result in being removed from the Panel of Accredited Mediators.
- According to the Code, the general responsibilities of a mediator include:
 - (i) Acting fairly in dealing with mediation participants;
 - (ii) Avoid any personal interest in terms of any Settlement Agreement;
 - (iii) Showing no bias toward individuals or institutions involved in the mediation;
 - (iv) Being reasonably available as requested by mediated parties; and
 - (v) Be certain that the parties are informed about the mediation process in which they are involved.

16. The Trend of "Mediation-Arbitration" Development ("Med-Arb")

- In some countries, it is getting more and more common to carry out the arbitration and mediation processes at the same time.
- Med-Arb is a dispute resolution process that brings together the elements of both mediation and arbitration.
- In Med-Arb, the parties will first attempt to resolve their disputes by mediation. Where mediation does not result in a settlement, the parties will

then proceed to arbitration.

- Med-Arb can be efficient in the way that the disputes will likely be substantially narrowed after the mediation process, leaving only a few tough and complex issues to be arbitrated.

17. Flow Chart showing the Mediation Process

