

Mediation

“A dispute resolution process in which the parties freely choose to participate and any agreements reached to settle disputes is done solely by the parties, without interference.”

Mediation is an ADR method where a neutral and impartial third party, the mediator, facilitates dialogue in a structured multi-stage process to help parties reach a conclusive and mutually satisfactory agreement. A mediator assists the parties in identifying and articulating their own interests, priorities, needs and wishes to each other. Mediation is a “peaceful” dispute resolution tool that is complementary to the existing court system and the practice of arbitration.

Arbitration and mediation both promote the same ideals, such as access to justice, a prompt hearing, fair outcomes and reduced congestion in the courts. Mediation, however, is a voluntary and non-binding process - it is a creative alternative to the court system.

Mediation often is successful because it offers parties the rare opportunity to directly express their own interests and anxieties relevant to the dispute. In addition, mediation provides parties with the opportunity to develop a mutually satisfying outcome by creating solutions that are uniquely tailored to meet the needs of the particular parties.

A mediator is a neutral and impartial person; mediators do not decide or judge, but instead becomes an active driver during the negotiation between the parties. A mediator uses specialized communication techniques and negotiation techniques to assist the parties in reaching optimal solutions.

Mediation is a structured process with a number of procedural stages in which the mediator assists the parties in resolving their disputes. The mediator and the parties follow a specific set of protocols that require everyone involved to be working together. This process permits the mediator and disputants to focus on the real problems and actual difficulties between the parties. Moreover, the parties are free to express their own interests and needs through an open dialogue in a less adversarial setting than a courtroom. The main aim of mediation is to assist people in dedicating more time and attention to the creation of a voluntary, functional and durable agreement. The parties themselves possess the power to control the process- they reserve the right to determine the parameters of the agreement. In mediation, the parties also reserve the right to stop anytime and refer a dispute to the court system or perhaps arbitration.

In addition to economic and legal skills, mediators are professionals who possess specialized technical training in the resolution of disputes. A mediator plays a dual role during the mediation process- as a facilitator of the parties' positive relationship, and as an evaluator adept at examining the different aspects of the dispute. After analyzing a dispute, a mediator can help parties to articulate a final agreement and resolve their dispute. The agreement at the end of the mediation process is product of the parties' discussions and decisions. The aim of mediation is to find a mutually satisfactory agreement that all parties believe is beneficial. Their agreement serves as a landmark and reminds parties of their historical, confrontational period, and ultimately helps them anticipate the potential for future disputes.

Generally, an agreement reached through mediation specifies time periods for performance and is customarily specific, measurable, achievable, and realistic. It is advisable for the parties to put their agreement in writing to create tangible evidence that they accomplished something together. The written agreement reminds the parties of their newly achieved common ground and helps to prevent arguments and misunderstandings afterward. Most importantly, a written agreement provides a clear ending point to the mediation process. The agreement binds the parties contractually. In case of disputes concerning compliance with the mediated agreement (e.g., whether a party carries out an agreement) or implementation of a mediated agreement (e.g., disputes concerning the precise terms for carrying out an agreement), the agreement is enforceable as a contract, as it would be in cases of the non-fulfilment of any ordinary contractual provision.

Enforceability is necessary for mediation, as an ADR process, to possess any legal strength or to impose any liability on the parties. It should be noted that, in the United States, compliance with mediated settlement agreements is high because the parties, themselves, create the terms of the settlement agreement. Thus, enforcement proceedings are relatively rare because the parties voluntarily carry out their own agreements.

The mediation process is both informal and confidential. In contrast to arbitration and its relatively formal rules of evidence and procedure, mediation is flexible in terms of evidence, procedure, and formality. Both procedures are confidential as the parties allow a neutral third- party to discuss or decide the dispute without the exposing the parties' dealings to public scrutiny or judgment. Specifically, the statements of a party during mediation are confidential and may not be disclosed without written consent. Generally, confidentiality in mediation also extends to documents specifically prepared for mediation, such as mediation briefs. Confidentiality is paramount to the

effectiveness of the mediation process--it creates an atmosphere where all parties are increasingly comfortable to discuss their dispute without fear that their words will be used against them at a later date. Confidentiality promotes open communication about the issues involved between the parties.

One unique feature of mediation is that any party, unilaterally, can decide to stop the mediation at anytime if they believe the process is not productive, as opposed to an arbitration proceeding, which needs a common approval to discontinue. To be effective, mediation must be considered by the parties as a tool or instrument that the parties can use to manage directly the resolution of their disputes between one another. The focus is their direct, active participation as opposed to the increasingly detached role the parties play in an arbitration proceeding “run” by an arbitrator. In Italy, because mediation is new and generally unregulated by legislators, the parties will sign a confidentiality agreement prior to the commencement of a mediation session. The pre-mediation confidentiality agreement will have the force and effect of a contract acknowledging confidentiality as an integral element of the mediation process.