

# MEDIATION TACTICS AND EFFECTIVENESS IN DISPUTE RESOLUTION

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Dispute occurrence on construction projects is almost inevitable. If not addressed adequately, disputes can cause contract termination and loss of benefits for all parties involved. Among various dispute resolution methods, mediation is gaining popularity in the construction industry as it satisfies the desired degree of control of both parties among other factors (e.g., time, cost). Mediation is a cooperative problem-solving method that benefits from the expertise of a neutral third party known as the mediator. Well-defined tactics such as creating trust atmosphere, tackling the core of dispute, and using advanced integrative approach for solution determination are essential to reduce the gap between disputants and ensure effective discussions. The aim of this paper is two-fold. First, it investigates common mediator tactics and relates them to the likelihood of having a successful mediation. The San-Ramos Channel case study is used to illustrate the efficiency of mediator tactics. Second, this paper takes a closer look into the use of mediation in Lebanon as an example of a country with minimal regulations on mediation. Barriers for an effective implementation of mediation such as the role and the influence of the engineer on the construction process and the mediator's lack of technical expertise are discussed and recommendations are derived.

*Keywords:* ADR, Construction, Disputants, Informal settlement, Lebanon, Mediator.

## 1 INTRODUCTION

Construction projects are recognized for their considerable costs and long duration spans. Even the most elaborate planning often fails to capture all eventualities in a project, thus leading to disputes among various project stakeholders. Contract incompleteness along with technical and human related factors are at the root of these construction disputes. These factor groups encompass uncertainty and risk, collaborative conflict, deficiency, ambiguity and inconsistency of contracts along with affective conflicts and opportunistic behavior (Cheung and Pang 2013). When a similar incident triggers a claim, the concerned party submits a written notice in accordance with relevant contractual clauses and within stated time frames. If all contractual and administrative processes for filing a notice are met, the engineer (i.e., the contract administrator) turns to set a determination on the issue. The disagreement escalates to a dispute when any party is dissatisfied with the engineer's judgment and the parties fail to solve the issue in a practical, well-timed, and mutually acceptable manner (Love *et al.* 2010).

Taking the case to court is the norm for conflict resolution and is known as litigation. Increased costs and the required time periods added to the reckoning of relationships encouraged parties to seek amicable settlements (Haugen and Singh 2015). These approaches provide an alternative to the adversarial pattern sensed in court and are referred to as Alternative Dispute

Resolution (ADR) techniques. Mediation stands out as a quick technique that aims to solve the dispute amicably through fruitful discussions managed by a neutral third party known as the mediator. Reducing the gap between the parties and ensuring effective communication are dependent on the strategies and tactics used by the mediator, which vary according to the complexities of the cases faced. This paper identifies the common tactics used by mediators to help disputants reach a sustainable agreement. It also discusses the current status-quo of mediation in solving disputes in the Lebanese construction sector.

## **2 METHODOLOGY**

Mediation is distinguished by the presence of a neutral third party whose tactics are essential for the settlement's success. The first goal of this paper is to identify the common strategies used to ensure a sustainable settlement. A literature review combined with an analysis of a case study published by the U.S. Army Corps' of Engineers are used to highlight the strategies used by mediators.

The second objective of this paper is to evaluate the status-quo of dispute settlements in the Lebanese construction sector. To serve this purpose, a senior mediation consultant at the Lebanese Center for Mediation and Arbitration (LAMC) with four years of experience and a contract administrator with 20 years of experience were interviewed. The former is an accredited mediator and the latter is a chartered arbitrator. The interviews focused on the choice of ADR in the Lebanese construction industry, along with the perceived barriers to the implementation of mediation. The interview questions are attached in the Appendix.

## **3 MEDIATOR TACTICS**

The ability to read and evaluate evidence and claim particulars is a key characteristic of the engineer, expert, or judge who issues a fair and binding decision. Likewise, the skills and attributes of the mediator are piers to a successful and efficient mediation.

Codes of conducts and scholars require mediators to be impartial and neutral. Although used interchangeably, neutrality implies not taking sides whereas impartiality requires treating all sides equally. Other norms include mainly competence, disclosure of any conflict of interests with the parties, and ensuring party self-determination (Shapira 2016). Mediator competence implies a thorough comprehension of conflicts, negotiation, and communications principles along with an understanding of the mediation process and regulations. Disclosure of conflict of interests proves the intentions of the mediator not to favor or diminish the interests of a party with whom they might have a personal or past/existing/future business relationship. The intensity, duration, and frequency of such relationships are critical factors to determining whether the neutral party must withdraw or continue with the mediation (Kovach 2014). These attributes qualify the mediator to commence with the mediation sessions to help the parties, using useful tactics, build their own agreement and determine what is acceptable to them.

### **3.1 Key Mediator Tactics**

The presence of a qualified mediator as neutral party is essential if the parties in dispute are not able to reach an agreement themselves. The mediator, who's responsible for controlling the session, maintaining a friendly atmosphere, and reducing the gap between the two parties, uses various tactics to reach an amicable settlement. The mediator aims in the session to create a trust atmosphere between the parties and tackle the core of the dispute in order to solve the problem using an advanced integrative approach.

### **3.1.1 *Creating an atmosphere of trust***

The mediator, from the beginning of the mediation, works on creating an atmosphere of trust with both sides in order to help them reach an agreement. In his opening statement, the mediator explains to the audience the importance of mediation as a technique where parties can collaborate to find common grounds rather than have a solution imposed on them by an arbitrator or judge.

The mediator also uses his opening statement as a chance to gain the trust of the parties by detailing her/his experience in mediation and the success rate reached in mediations. Furthermore, the mediator is ethically required to disclose any past professional or personal relationships with any of the parties, if they exist. In this case, continuing the mediation is subject to obtaining the parties' consent. Disclosing relationships prior to mediation is important to gain parties' trust and guarantee a stable progress and a permanent solution.

In addition, the parties and/or the mediator can ask for a caucus meeting. A caucus meeting is a private meeting between the mediator (or assistant mediator) and a party. The goal of this meeting is to learn privately the concerns, objectives, and other relevant information (e.g., hidden interests, walk-away points), reduce the level of tension, and allow room for option generation (Twomey 2006). The trust established between the mediator and the parties due to the level of openness and transparency is fundamental to better guide the discussions and reduce the gap between the parties in dispute.

### **3.1.2 *Tackling the core of dispute***

The mediator's goal is to assist the parties in reaching a solution that will be abided by and therefore is considered sustainable. Thus, the mediator should determine the hidden interests, fears, and agendas of the parties in the opening statements, questions phase, and in caucus meetings. This process begins immediately after the opening statements of the parties. The mediator checks all the available and relevant contractual clauses and any other reachable data about the parties' firms. Based on a clear understanding of this data, the mediator prepares a list of open-ended questions that urges the party to explain its position for both the mediator and the other party. Any shown evidence or revealed information in the mediation sessions should remain confidential and cannot be referred to in court (Twomey 2006). The core of the dispute is then made clear paving the way for the mediator to start the problem resolving phase.

### **3.1.3 *Using advanced integrative approach***

Tension is often present in disputes. An experienced mediator transforms a tense debate into a joint problem-solving discussion which pushes the parties towards proposing new thoughts rather than splitting the pie. This technique allows for a quiet discussion to take place taking into consideration the objectives, insecurities, and interests of each party. Hence, the process of finding a solution is made easier since each party finds itself proposing what it finds acceptable while observing the reaction and ideas of the other party. While being in control of the discussion, the mediator examines the progress reached compared to the beginning of the mediation session, as s/he allows the parties to propose options and ideas that will later be crafted into an agreement.

This joint problem-resolving discussion is controlled by the mediator who pitches in every now and then in order to ensure that a friendly atmosphere remains while the discussion continues on the right track. The mediator may also intervene to show the progress reached by recapitulating what has been agreed on. The main goal of the mediation session is to reach an

acceptable agreement. However, the mediator may also look for improving the parties' ability to reach solutions together for future challenges through these joint problem-solving discussions.

### **3.2 The San Ramos Bypass Channel Case Study**

The San Ramos Bypass Channel is a case study published by the U.S. Army Corps' of Engineers. It illustrates how the ADR techniques can be used to resolve disputes between a public entity and private corporations.

The project dates back to 1986 when the Corps' decided to build a 5-mile long channel that runs through Walnut Creek city. The contractor, Brutoco, excavated a portion of the channel and stockpiled the material above high-pressured petroleum pipelines which raised concerns that the area may collapse, rupturing thus the pipeline. Additionally, the Corps' believed that slopes were cut steeper than what was designed and ordered Brutoco to build an earthen buttress.

The dispute was on assigning the responsibility for the added costs and delays of building the buttress. The Corps' put the full responsibility on Brutoco for choosing an inadequate area to place extra material. Brutoco defended itself by claiming that the Corps' authorized using that area for backfilling.

Brutoco filed a \$3.1million total cost claim when no agreement was reached in negotiations on the modification order sum. The Corps' resorted to mediation in order to solve the dispute quickly and at a reduced cost. Brutoco accepted mediation with similar hopes for securing faster payments.

The mediator used the opening statements of both parties as a chance to discover the major issues in dispute according to each party since Brutoco did not submit a brief. The parties' trust in the mediator's capabilities and possibility of reaching a settlement increased when he recapped and tackled the core issue of the dispute and the points both parties agree to as well. However, the mediator was aware of the high level of tension between the parties that resulted from improper communication during project lifecycle. Hence, he had no option other than having separate "caucus" meetings with the parties to investigate further about their own risk analysis, interests, and possible settlement packages. The mediator was able, through the established trust, to discuss the weaknesses and strengths of each party's case and reduce the gap. He also motivated both parties to reach a solution not only through explaining thoroughly the implications of taking the case to litigation on cost and time, but also through proposing a deadline to reach an agreement.

The mediator's integrative approach, coupled with the intention of both Brutoco and the Corps' to reach an agreement, resulted in innovative solutions proposed by both parties. Those solutions helped in settling the main dispute in addition to other minor disputes. The mediator led the discussion through transferring those possible settlement packages while shuttling back and forth between the parties. These indirect fruitful discussions between the parties resulted in an agreement on a \$1.15 million figure.

The agreement allowed the mediator to bring the parties together to draft and sign the agreement. In their evaluation, the Corps' and Brutoco praised the mediator's skills and tactics that made reaching the settlement and avoiding litigation possible (Susskind *et al.* 1992).

## **4 DISPUTE RESOLUTION IN LEBANON**

To understand the applicability of mediation to countries with minimal regulations governing ADR, the case of Lebanon was considered. The Lebanese Arbitration and Mediation Center (LAMC), founded in 1995, is specialized in resolving disputes. Mediation has been integrated within LAMC since 2012 through a cooperation agreement signed between the Chamber of

Commerce, Industry, and Agriculture of Beirut and Mount Lebanon and the International Finance Corporation, a member of the World Bank Group.

As such, it can be inferred that mediation is a newly-introduced ADR to the Lebanese market and is not widely used yet. According to the interviewed mediation consultant, only one case has been directed to mediation and ended being resolved using arbitration. In 2014, the center passed a law to the Lebanese Parliament to incorporate mediation into the local legal system and create a statutory framework governing mediation procedures. To date, the law has not been adopted.

#### **4.1 Barriers to Mediation Implementation in Lebanon**

Recognizing common norms and practices in Lebanon is essential to understand the dispute resolution landscape. According to the interviewed contract administrator, FIDIC 1989 and 1992-reprinted contracts are the most widely used standard forms of contracts in Lebanon. Clause 67 of these contracts encourages the engineer to issue a decision should a dispute arise. Amicable settlement and arbitration can then follow if the issue is not resolved. Unfortunately, many project owners who use FIDIC contracts remove the clauses relating to new methods for clash resolution such as the dispute adjudication board, and rely on the traditional method for dispute resolution through engineer's determination and arbitration.

This strong attachment to traditional clash settlement methods is attributed by the interviewees to the grandiose role of the engineer, inherited before contracts were introduced to the Lebanese construction sector. The engineer, who is often the designer and the client representative, must authorize all changes even those coming from technical consultants. In the early 1990s, a megaproject called "Solidere" aiming at reconstructing the capital city's central business district was the first project to introduce international contracts in Lebanon. Contractors, who were used to a well-defined relationship with the designer, failed to detect initially the importance of these contract documents. Soon after, competition increased with the appearance of new contracting companies and profit margins began to drop. As a result, contractors were no longer able to blindly commit to every decision requested by the engineer. At this stage, contractors realized the value of the documents signed early on in the project and got a clearer understanding of their rights and duties as displayed in the contract.

Despite this progress, innovative approaches such as mediation and other forms of ADR techniques are still not implemented in Lebanon for several reasons, according to the mediation consultant. First, engineers remain the "rulers" of the projects and the point of reference for every major decision. As such, they prevent mediators from entering the construction industry by enhancing informal settlements on and off the site, thereby refuting a need for another third neutral party. Contractors, on the other hand, needed to conform to this decision as they wanted to maintain positive relationships with the engineer to avoid designers lobbying. Black-listed contractors endured great losses as they were no longer able to attain important projects. Furthermore, mediators in Lebanon are typically lawyers who do not possess the technical expertise needed and thus could not satisfy the needs of the parties. In contrast, designers such as the firm for which the interviewed contract administrator works developed a new contract administration department, composed of technical experts knowledgeable with dispute resolution methods and tactics. As such, mediation did not seem to offer any added benefits.

## **5 CONCLUSIONS AND RECOMMENDATIONS**

Mediation is gaining popularity as a non-binding process that allows the disputants to collaborate and craft their own solutions. This amicable settlement is made possible thanks to the assistance

of a mediator, a neutral third party who seeks to create an atmosphere of trust and to tackle the core of disputes with an integrative approach for dispute resolution.

Settling disputes through mediation is uncommon in developing countries like Lebanon despite the launch of a mediation center. Enhancing mediation in Lebanon requires several steps. First, mediation must be better introduced and advertised to decision makers. The engineers drafting contracts have to be convinced to add a clause on resolution through mediation as a final resort before arbitration. Second, the panel of accredited mediators must be limited to reputable persons in the construction industry, known for their technical expertise and impartiality throughout the years. This is an essential step for earning the trust of the stakeholders in the process. These mediators should be familiar with substantive laws, procedural requirements as well as drafting a correct and a binding settlement agreement.

### **Appendix: Interview Questions**

1. What methods of dispute resolution are common in the contracts adopted in Lebanon?
2. What is the process commonly used for informal settlements?
3. How familiar are you with the Lebanese mediation center?
4. What are the main barriers for choosing mediation in Lebanon?
5. What are the main causes for mediation failure in Lebanon?
6. How can mediation be enhanced in the local construction market?
7. What qualifications does a person need to be assigned as a mediator?

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