



# **ALTERNATIVE MEDIATION OPERABILITY MECHANISMS UNDER STANDARD CONSTRUCTION CONTRACT CONDITIONS**

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The use of alternative dispute resolution (ADR) techniques has been on the rise, particularly as part of the contemporary, staged-type mechanisms forming part of the pertinent conditions of the construction contract. Among the several ADR methods in use, mediation is the method widely found to be explicitly or implicitly incorporated in any such mechanisms, with its use being often stipulated as condition precedent to ultimately resorting to arbitration. This paper investigates the varying statuses of mediation as prescribed under three American-based standard contract conditions, in comparison with its implied status under international such conditions. The within and in-between comparative analyses revealed distinct differences and some resemblances in respect of several concerned attributes including: (1) the staging (sequence step) of the mediation process within the involved claim/dispute resolution timelines, (2) the condition(s) for triggering such a process, (3) the provisions governing its length, and (4) the manner with which it may be ended. The paper concludes with inferences as to the characteristics that may be hypothetically viewed as more conducive to the effective employment of such an ADR technique in resolving disputes.

*Keywords:* AIA, ConsensusDocs, EJCDC, FIDIC, Claims, Disputes, ADR, Resolution.

## **1 INTRODUCTION**

Claims and disputes are almost inevitable in construction projects, and they must be dealt with according to the mechanisms prescribed within the adopted contract conditions. Construction claims may escalate into disputes between the contracting parties, potentially impacting their performances and the successful delivery of the construction project. To avoid such consequences, most standardized forms of contract conditions enforce, or make room for, an alternative dispute resolution (ADR) technique to afford the parties the chance to reach agreement prior to, alternatively, referring the matter to arbitration. Mediation outweighs other ADR techniques, in that it is a well-structured process that the parties may use in endeavoring to reach agreement in respect of the matter being in dispute (Zlatanska and Fawehimni 2016). However, mediation is not always the end result (Goodkind 1988). That is; the mediator is not in charge of the outcome, and his responsibility is merely to administer a process intended for seeking a resolution (Sgubini *et al.* 2004). The mediation process has proven to reduce the cost of resolving disputes as compared to resorting to arbitration (Goodkind 1988). In addition, it serves maintaining a good relationship between the parties, conducive of establishing future business collaborations (Goodkind 1988). Although mediation is a commonly stipulated ADR process,

even the different standard forms of contract conditions reveal operational variations as to how the mediation mechanism is to be administered.

## 2 SCOPE AND METHODOLOGY

This research work sheds light on “mediation” as an ADR mechanism that may be prescribed as part of the claim/dispute progression timeline. The aim is to identify the attributes corresponding to the administration of such a process. The adopted methodology involved: (1) reviewing the clauses that prescribe the mediation mechanism under four different standard conditions of contracts, namely those by the American Institute of Architects (AIA), ConsensusDocs, the Engineers Joint Contract Documents Committee (EJCDC), and the International Federation of Consulting Engineers (FIDIC); (2) extracting its staging sequence, triggering conditions, governing time bars, and manners with which it may be ended; and (3) conducting an in-depth comparative analysis to highlight the potential differences and similarities among the examined mediation mechanisms.

## 3 MEDIATION SEQUENCES

The aforementioned standardized conditions were examined to check the sequencing of the mediation stage within the corresponding claims/disputes timelines. The extracted timelines are as illustrated in Figure 1.

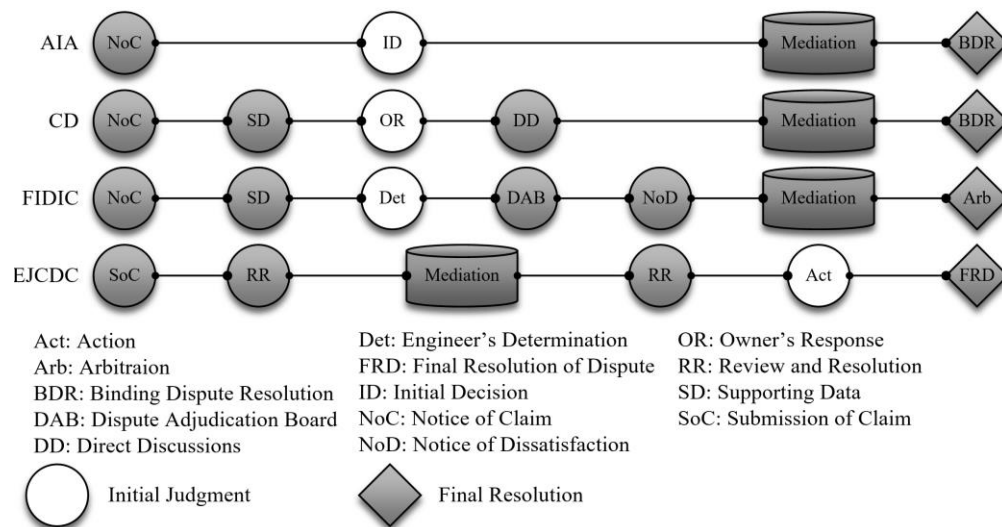


Figure 1. Mediation sequencing.

It can be seen that the mediation process is specified under EJCDC as an option nested as part of the “review and response” step, and prior to the issuing of an (initial) action by the other party (owner). Unlike the case of EJCDC, the mediation processes under AIA, ConsensusDocs, and FIDIC are found to be staged at the end of the claim/dispute timeline. That is, the mediation process is interjected with after the rendering of an initial judgement in respect of the matter in demand, and just prior to the initiation of arbitration. This sequence step of the mediation process gives the contracting parties the chance to endeavor to amicably resolve the matter in dispute prior to alternatively proceeding to arbitration. It is to be also noted that only FIDIC has two possible actions preceding the triggering of the amicable settlement stage, during which

mediation can normally be entertained. More peculiar observations for each of the examined standards are further deduced in the following section.

#### 4 OPERATIONAL VARIATIONS OF MEDIATION MECHANISMS

Different standard forms of contract conditions are found to incorporate dissimilar attributes that govern how the mediation process, when opted for, can be operated. These attributes have been analyzed for each examined standard and deductions made as discussed below.

##### 4.1 AIA Attributes

According to “Sub-article 15.2 Mediation”, the parties must refer claims to mediation, which is viewed as a condition precedent to being eligible to resort to arbitration afterwards (AIA 2017). The underlying mediation process is presented in Figure 2.

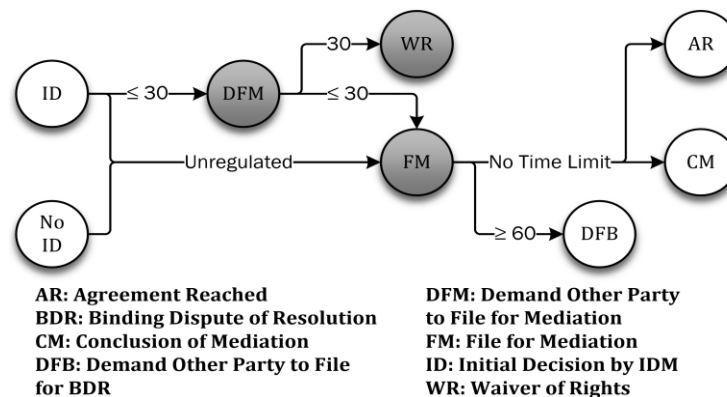


Figure 2. AIA mediation's mechanism.

Initially, claims must be submitted to the other party and to the initial decision maker (IDM), whereby the latter must render an initial decision specifying whether: (a) the claim is accepted or rejected – whether fully or partially –, or (b) the IDM is unable to resolve it. The initial decision acts as a condition precedent to mediation unless it is not rendered within 30 days from the day the IDM receives the notice of claim. In the case of rendering an initial decision, the owner or the contractor is able, within 30 days, to demand the other party to file for mediation. If the demanded party fails to file for mediation within this time bar, both parties then waive their rights to pursue mediation and binding dispute resolution in regard to the rendered initial decision. On the other hand, either party may file for mediation at any time if: (1) neither party filed a demand for the other party to file for mediation, or (2) if mediation was triggered upon the lack of an initial decision. Once mediation is filed, the parties shall endeavor to reach agreement, which could take place at any point in time. If mediation is deemed not successful, the mediator has the option to conclude it at any time. However, the option of reaching agreement or concluding mediation, after 60 days of mediation initiation, is contingent upon mediation not having been already terminated. In other words, either party may, after 60 days, issue a demand for the other party to file for binding dispute resolution, which automatically terminates the mediation process. On the other hand, the binding dispute resolution provision allows either party to file for arbitration at any time within the mediation process, but no earlier than concurrently with filing for mediation. In that case, arbitration would automatically be initiated unless agreement is reached prior to the expiry of the 60-day period of mediation.

### 4.2 ConsensusDocs Attributes

Claims arising on projects that adopt the ConsensusDocs contract conditions must be submitted to the owner (ConsensusDocs 2017). Subsequently, the owner shall render a response, which, if not satisfied with, can cause the contractor to initiate discussions. The discussions are triggered upon the mutual agreement of both parties in order to seek a resolution. If agreement is not reached through discussions, then the claim must either be referred to mitigation or mediation. If mediation is chosen, then the claim proceeds according to the mechanism set forth in “Sub-article 12.4 Mediation”, which is depicted in Figure 3.

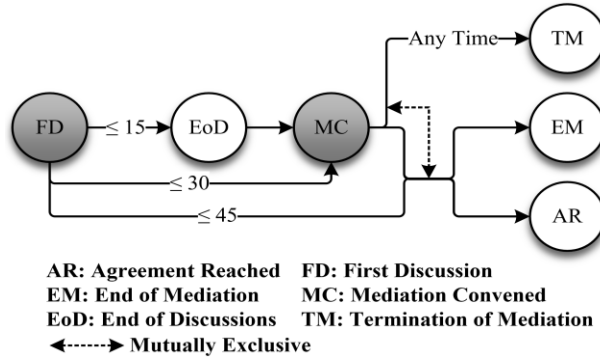


Figure 3. ConsensusDocs mediation's mechanism.

Upon the end of discussions, which can last up to a maximum of 15 days, mediation shall be convened within thirty days from the date of first discussions. Mediation shall end within 45 days from the date of first discussions, with or without agreement being reached. To be noted is that either of parties, the owner or contractor, may directly terminate mediation after the first session.

### 4.3 EJCDC Attributes

Another widely endorsed standard form of contract conditions is that by EJCDC. Under these conditions, parties may mutually agree to refer matters in disputes to mediation, as stated in “Provision 12.01.D Mediation” (EJCDC 2013). The mediation mechanism can be triggered at any time within the ninety-day period allotted for the review and resolution stage, which is triggered upon the submission of a claim and its supporting documents. The corresponding mediation mechanism can be summarized as shown in Figure 4.

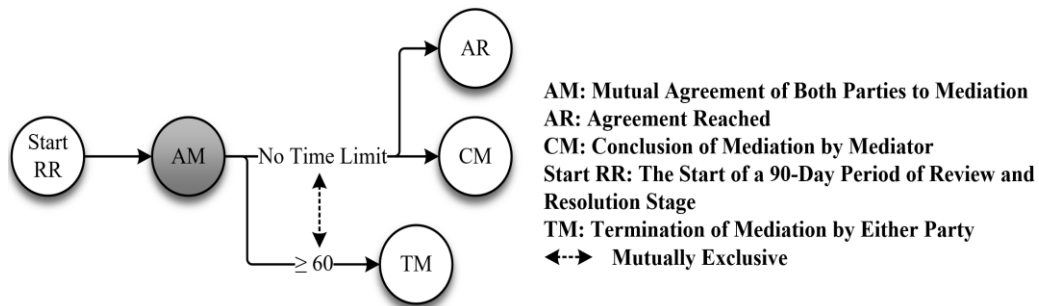


Figure 4. EJCDC mediation's mechanism.

Once mediation is initiated, the claim review and response process shall be stayed, while the parties endeavor to reach agreement. However, the mediator can conclude the mediation at any time if the process is deemed unsuccessful. The options of reaching agreement and concluding mediation are the only ones available within the first 60 days. Beyond this period, a third option avails, where either party may unilaterally terminate mediation at any time.

#### 4.4 FIDIC Attributes

Moving to the international type of standard contract conditions, the contracting parties on a project, where the FIDIC conditions of contract are adopted, have the option of amicably resolving an arisen dispute prior to referring it to arbitration. According to “Sub-clause 20.5 Amicable Settlement” and upon the issue of a notice of dissatisfaction by either party in respect of a rendered adjudication decision, the parties are afforded a period of 55 days, during which the reaching of an amicable settlement may be attempted (FIDIC 2000). To this end, mediation is the ADR technique likely to be adopted at such an advanced stage of the claim/dispute progression. The corresponding mechanism can be illustrated as presented in Figure 5.

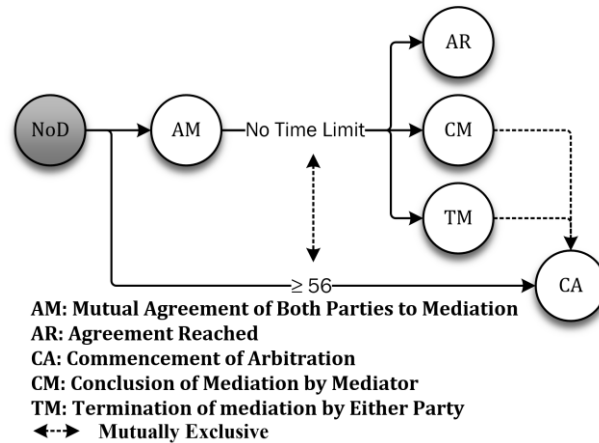


Figure 5. FIDIC mediation's mechanism.

As it can be inferred, the amicable settlement period is triggered upon the issuing of a notice of dissatisfaction by either party. Subsequently, the parties may mutually agree to mediation. Once the mediation process is initiated, agreement could be reached at any time. However, this option is contingent upon the mediation process not having already been concluded by the mediator or terminated by either party at any time. Either party may commence arbitration on or after the 56<sup>th</sup> day from the start of the amicable settlement period, unless the parties otherwise agree to an extension of the said period.

## 5 DISCUSSION

Although each of the discussed standard forms of contract conditions either integrates or allows for the adoption of a mediation mechanism within its corresponding claim/dispute progression timeline, each mechanism is found to possess unique properties. Firstly, the mediation process under the AIA and ConsensusDocs forms is found to be a condition precedent to the binding dispute resolution stage. Secondly, mediation is stated to be optional under the EJCDC conditions, where the parties need to mutually agree to its adoption. Thirdly, the mediation

process is not explicitly referred to under the FIDIC conditions. However, parties adopting this standard may, if mutually agreed, resort to any one or more of the available ADR techniques, including, but not limited to, facilitation, conciliation, and/or mediation. Fourthly, all prescribed mediation stages have similar ending mechanisms. That is, the mediator can conclude the mediation process at any time if deemed unsuccessful, or either party has the discretion of alternatively terminating the process. For the latter option, parties adopting the AIA or EJCDC conditions may terminate mediation after the expiry of a 60-day period, whereas under the FIDIC and ConsensusDocs standards, either party may terminate mediation at any time. Finally, the specified mediation steps are found to be assigned varying time periods. Under the AIA and EJCDC conditions, mediation has a time limit of 60 days, which is extendable provided that neither party exercises termination of the process. Similarly, mediation has a duration figure of 55 days under the FIDIC standard, which is extendable upon mutual agreement of both parties. As for the ConsensusDocs, the duration of the mediation process could range between a minimum of 15 days and a theoretical maximum of 45 days.

## 6 CONCLUSION

The claim/dispute progression timelines of the four examined standard conditions are found to involve mediation mechanisms that have different attributes, in regard to the stage's location, initiation and ending triggers, and assigned time limits. The paper examined these mechanisms and highlighted their corresponding similarities and differences. The performed comparative analysis revealed that the ConsensusDocs standard lies on one end of the scale, where it implements mediation as a condition precedent to arbitration and enforces it automatically without the need to be filed for or mutually agreed upon. On the other end comes the FIDIC conditions, which do not explicitly refer to mediation; rather, make room for this and/or other ADR techniques to be employed as part of the stipulated amicable settlement period. In-between, the mediation process under the AIA standard comes right after that of ConsensusDocs, wherein mediation is considered as a condition precedent to the binding dispute resolution stage, but requiring that it be initiated by one of the parties. Finally, the mechanism of mediation under EJCDC is believed to be falling in the third place, prior to that of FIDIC, with mediation specified as an option whose employment is contingent upon the mutual agreement of the contracting parties.

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