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Mediation – Notion and General Principles

Summary

Mediation becomes more and more popular method of conflict resolution throughout the world. It is generally understood as process by which the opposing parties come together and attempt to resolve their differences with the assistance of a neutral third party. As a voluntary, flexible, confidential, informal and non-binding process of dispute resolution mediation has its advantages and disadvantages. Even though not every case is appropriate for mediation, it is generally viewed as more expeditious, inexpensive and procedurally simpler than both litigation and arbitration proceedings. The number of stages in the mediation process has been variously identified by different writers but some specific activities associated with the mediation process are constant such as: screening, introductory remarks by mediator, mediator's assistance in the information exchange and bargaining between the parties and in drafting settlement agreement. The role of a mediator is extremely important during the mediation process. Mediators can use a variety of different styles and approaches, which range from purely facilitative to strongly evaluative. Most disputes require a combination of both styles and approaches. Some writers mention also and a third, de-conflict style.

Key words*: mediation, mediator, the mediation process, confidentiality, flexibility, mediators' styles.*

Introduction

Mediation is not a new phenomenon that characterizes only a modern society. Mediation probably predates the formal creation and enforcement of state law because the society has always a natural instinct to tray to find solutions in settling differences between individuals through guidance of other members of the society.[1)] It has often existed alongside formal legal structures, offering a community based alternative dispute resolutions of disputes and differences.[2)] Ancient Confucian Chinese society, Iranian and African tribal societies are some of many societies in which mediation was favored as a method of conflict resolution between community members. This traditional model of mediation contemplates a voluntary and private setting with individual members of ethnic or religious group. Mediation as we find today is the product of a variety of historical influences and sources.

1. Definition and Characteristics

Mediation is generally understood as the process by which the opposing parties come together and attempt to resolve their differences with the assistance of a neutral third party. Disputing parties work with a neutral third party, the mediator, to reach a mutually acceptable agreement.[3)] The mediator aids the parties themselves in reaching a consensus, he or she does not impose a decision on the parties to a dispute.

The mediation is a voluntary, flexible, confidential, informal and non-binding process of dispute resolution.[4)]

Consent

Those wishing to mediate a dispute should enter into a simple contract. The parties are free to agree whether to mediate, what to mediate, how to mediate, when to mediate, who will conduct the mediation and how mediator will be paid. The consensual nature of mediation is often claimed to promote compliance by the parties with the result. If the parties have been free to formulate their agreement to mediate, they are more willing to abide by it.[5)]

Generally, the parties are free to mediate their dispute whenever they want. Sometimes, mediation is used before the beginning of court or arbitration proceedings, in order to help to resolve disputes before they are litigated but it is also often used to resolve them

1. John S. Murray, Alan Scot Rau & Edward F. Sherman, *Process of Dispute Resolution, The Role of Lawyers*, Second edition, The Foundation Press, Inc, Westbury, New York, 294 (1996)
2. Id.
3. Jacqueline M. Nolan-Haley, *Alternative Dispute Resolution in a Nutshell*, West Group, 56 (1992).
4. Bennett G. Picker, *Mediation Practice Guide*, Second Edition, American Bar Association Section of Dispute Resolution, 2 (2003).
5. *See* John S. Murray and others, supra note 1 at 318.

during the course of litigation or arbitration, before the final court decision or arbitral award is rendered.[6)]

Although consent is one of the fundamental principles of mediation, this principle is not without exceptions. One example of non-voluntary mediation is so-called mandatory mediation. In some US states mediation is mandate by law in cases involving child custody or visitation,[7)] labor disputes[8)] and employment discrimination.[9)]

Similarly, in a growing number of jurisdictions mediation has become a mandatory prerequisite to trial. Court-annexed mediation (also known as "court-mandated mediation) is not voluntary and lacks some aspects of voluntary mediation especially parties' control over procedures and free choice of mediator. Although the ground rules of court-annexed programs are more restrictive, they nonetheless offer opportunities for the mediator to enhance the level of communication between the parties and to help them to find acceptable solution.[10)]

Even where participation in mediation is coerced, this does not mean that a resulting mediation is not voluntary. Even though the degree of cooperativeness of coerced parties may vary considerably from party to party, the coerced participation is not coerced agreement; no party to mediation can be forced to enter an agreement.[11)]

In some US states, almost all suits are required to be mediated before a court will allow them to be put into the trial calendar. Mediation has been found to be effective in resolving approximately 75% of all cases and greatly reduces the trial docket of the US courts.[12)]

Completely different situation is in Europe. In certain European countries the most of court-mandated mediations are empty *pro-forma* exercises during which at least one party makes no effort to reach an agreement. Under the rules of most European jurisdiction, parties need not attend the mediation session, and their lawyers during the session only re-state parties' position, which could not be considered as mediation in the modern context of alternative dispute resolution.[13)]

Flexibility

Mediation is a flexible process, and it is impossible to describe specific "procedures" for its conduct. Participants in mediation have control of not only the outcome, but also the process which can be designed in the manner best suited to achieve the parties' goals and objectives. Therefore, there are many forms of mediation. Nevertheless, some steps and

6. Richard Hill, *Non-Adversarial Mediation*, J.Int.Arb 12 (4): 136, 1995.
7. *See* West's Ann. Cal. Civ. Code § 4607; Me. Rev. Stat. Ann. title 19, § 752 (4).
8. *See* Ohio Rev. Code § 4117.14; West's A.I.C. 20 - 7.5 – 1 - 12, 20 – 7.5 – 1 - 13.
9. *See* 42 U.S.C.A. § 2000e – 4 (g).
10. Bennett G. Picker, supra note 4 at 11.
11. *See* John S. Murray and others, supra note 1 at 318.
12. *See* Leonard P. Reina, *Mediation vs. Arbitration vs. Litigation: What's the Difference?* Available at http://library.lp.findlaw.com/alternativedisputeresolution(adr)_1_52_1.html.
13. Richard Hill, supra note 6 at 138.

techniques involved – such as having the parties begin by each stating the problem, allowing for ventilation of feelings and emotions, and encouraging joint problem-solvin g- are applicable to all forms of mediation.[14)]

Confidentiality

Confidentiality is a cornerstone of the mediation process. Third parties are not allowed to attend the mediation process and information presented during mediation is generally held in confidence by all participants and cannot be discovered during subsequent litigation or arbitration proceedings.[15)] In order to safeguard the confidentiality, parties, their counsels, mediators as well as the ADR providers often include provisions on confidentiality in their agreement or in mediation Rules.[16)]

Confidentiality is considered as critical to the success of the mediation process. Parties will not speak freely if confidentiality is not guaranteed and the independence of the mediator would be undermined if he or she could be required to testify about the mediation at some future time.[17)] Confidentiality also helps the mediator to build trust between the parties making it safe for them to give information. It creates a safe space where parties can share their needs and interests without fear of reprisals.[18)]

14. John S. Murray and others, supra note 1 at 301.
15. Bennett G. Picker, supra note 4 at 87.
16. The American Arbitration Association Commercial Mediation Rules for Financial Planning Disputes, amended and effective July 1, 2003, contains three very important standard provisions aimed to protect confidentiality of mediation process.
"**11. Privacy**
Mediation sessions are private. The parties and their representatives may attend mediation sessions. Other persons may attend only with the permission of the parties and with the consent of the mediator.
12. Confidentiality
Confidential information disclosed to a mediator by the parties or by witnesses in the course of the mediation shall not be divulged by the mediator. All records, reports, or other documents received by a mediator while serving in that capacity shall be confidential. The mediator shall not be compelled to divulge such records or to testify in regard to the mediation in any adversary proceeding or judicial forum.
The parties shall maintain the confidentiality of the mediation and shall not rely on, or introduce as evidence in any arbitral, judicial, or other proceeding
(a) views expressed or suggestions made by another party with respect to a possible settlement of the dispute;
(b) admissions made by another party in the course of the mediation proceedings;
(c) proposals made or views expressed by the mediator; or
(d) the fact that another party had or had not indicated willingness to accept a proposal for settlement made by the mediator.
13. No Stenographic Record
There shall be no stenographic record of the mediation process."
17. John S. Murray and others, supra note 1 at 379.
18. Jacqueline M. Nolan- Halley, supra note 3 at 61.

Informality

Litigation proceedings is bounded by using strict rules that are perceived to be procedurally fair and a framework for deciding cases based on the law and legal precedent (in common law countries). Arbitration also offers a procedurally fair process, but much more informal. However, mediation is largely unstructured, relying on the mediator to determine how the session will proceed.[19] Mediation also allows the parties to play a key role in structuring a resolution of their own dispute.[20] Joint and individual caucus meeting are informal and participants have flexibility to determine ground rules. Participants also retain control over the outcome of the dispute during all mediation proceedings.

Non-binding process

The ultimate goal of mediation is not to "win" but to find solutions satisfactory to all sides. Parties mediate voluntarily and need no agree to a settlement that they considered unacceptable. This is a fundamental principle of every mediation, even when the parties are required to mediate by contract or referred to mediation by court.[21] The search for justice is not goal of mediation – the goal is an acceptable outcome. If the parties cannot agree, they are free to withdraw from mediation in any stage of the mediation proceedings.[22]

2. Advantages and Disadvantages of Mediation

Advantages

Mediation can be used for literally any kind of dispute and therefore is no need to wait until a dispute results in a lawsuit and go into court – mandated mediation.[23] The mediation process is generally viewed as more expeditious, inexpensive, and procedurally simple than adversarial problem solving. Mediation proceeding typically lasst only a few days, and costs are very small compared to the costs of litigation or arbitration. Even it fails, mediation does not increase the costs of settling a dispute.

Mediation helps the parties to re-adjust their conflicting perspectives and view their concerns in a much broader framework than simply "legal" issue in a legal system.[24]

Finally, parties view the outcomes of mediations as being fairer than the outcomes of trials: the compliance with mediated settlements is higher than compliance with judgments. [25]

Mediations is eminently sensible in the following cases:[26]

19. Richard Fullerton, *Searching for Balance in Conflict Management, The Contractors Perspective*, Dispute Resolution Journal, 54, February-April 2005.
20. Id.
21. Id.
22. Id.
23. Leonard P. Reina, supra note 12.
24. Jacqueline M. Nolan – Haley, supra note 3 at 58.

- when parties want to preserve and continue their relationship after the dispute is resolved;
- when there is a need for speedy resolution by avoiding delay;
- when parties need to avoid publicity in order to maintain or to enhance its public reputation;
- when parties need to reduce high costs of litigation or arbitration;
- when there is a dispute about complex factual issue;
- when neither party requires a determination of legal issue.

Disadvantages

Mediation is not "one size fits all" and not every case is appropriate for mediation. Mediation is a process independent of the judicial system and therefore lacks of the procedural and constitutional protections that offers a trial.[27)] The question who is right and who is wrong in mediation proceedings is less important that the question of how the problem can be resolved in order to give opportunity to parties to resume their cooperation or relationship. Finally, whether a settlement can be reached depends on parties' willingness to come to the bargaining table in good faith.[28)]

Factors weighing against mediation include:

- when a plaintiff wishes to pass a message to any potential defendant.[29)] The classic example is the owner of an intellectual property right who by prosecuting an infringer, try to discourage any potential future infringers;[30)]
- when a defendant wishes to pass a message to any potential plaintiff. The classical examples are product liability cases in which a plaintiff seeks to develop a new theory of liability while defendant, usually a big corporation defends in order to discourage future claims;[31)]
- when there is a need to establish a legal precedent (in common law countries);
- when plaintiff claims are frivolous;
- when entire case is likely to be decided without trial;
- when parties are reluctant to reach a settlement;

25. *See* Stephen B. Goldberg, Frank E.A. Sander and Nancy Roger, *Dispute Resolution: Negotiation, Mediation, and Other Process,* Little Brown, 1992.
26. See Judith Meyer, *Mediation Works*, Dispute Resolution Journal, April 1995.
27. Jacqueline M. Nolan – Haley, supra note 3 at 59.
28. Id.
29. Richard Hill, supra note 6 at 136.
30. Id.
31. Id.

3. Mediation vs. Litigation vs. Arbitration

Mediation vs. Litigation

Litigation is said to be merely one tool to resolve a dispute, which may be achieved more efficiently by ADR methods of dispute resolution.[32)] Financial cost of litigation along with its time consuming character are perhaps the most frequently raised arguments favoring mediation. Litigation absorbs so much time that many businessman complain for not having enough time to pursue the new business development.[33)] Moreover, litigation often results in strong personal animosities between the parties which directly impact existing and future relationship. Judicial process is usually very frustrating for both parties, renders a winner and a loser, a result that usually extinguishes the parties' future relationship while mediation tries to satisfy the aspiration of the both parties by coming up with "win-win settlement.[34)] Being open to public, litigation can sometimes have an adverse effect on a person's as well as company's reputation among members of community, partners, potential investors, consumers and company's own employees.[35)] Finally, the outcome of litigation, especially considering the financial and emotional burden, is always too unpredictable.

Mediation vs. Arbitration

Arbitration and mediation are similar because they are both dispute resolution methods alternative to litigation. Both arbitration and mediation employ a neutral third party. But it is customary to employ mediation as a non- binding procedure and arbitration as a binding procedure.[36)] Arbitrator acts similarly like judge by making arbitral award, binding upon the parties, while mediator assists the parties to find a solution by themselves. Contemporary arbitration increasingly resembles litigation.[37)] It seems to be less a friendly forum where parties look to their peers for an answer to their differences, but more and more an expensive and time consuming way of private adjudication.

4. Mediation Process

Mediation is a process by which a neutral third party assists the disputing parties in order to "attempt to systematically isolate points of agreement and disagreement, explore alternative solutions, and consider compromises for the purpose of reaching a consensual settlement of the issues relating to their conflict".[38)] The essence of the mediation process

32. Brit T. Brown, *Common Sense Tips For Avoiding Litigation*, Available at http://library.lp.findlaw.com/alternativedisputeresolution(adr)_1_52_1.html.
33. Richard Fullerton, supra note 18 at 51.
34. Id.
35. Brit T. Brown, supra note 31.
36. Leonard P. Reina, supra note 12.
37. Fali S. Nariman, *The Spirit of Arbitration*, 16 Arb. Int'l. 261, 263 (2000).

is the philosophy that any agreement should be voluntarily reached by the parties. It is believed that the parties will be more satisfied and more likely to abide by the agreement, if it is their own creation. [39)]

Although there are many forms of mediation, more or less formal or informal, and the number of stages in the mediation process has been variously identified by different writers, some specific activities associated with the mediation process are constant. Activities during the mediation process may be described generally as fallows:[40)]

Screening

Before beginning any mediation the mediator should conduct two preliminary inquiries: a) Is this an issue appropriate to be settled by mediation? b) Are these parties ready for the mediation process?

Depending on circumstances of every conflict, mediator may or may not conduct the initial screening. Some types of disputes by virtue of public policy are not appropriate to be settled by mediation like cases involving domestic violence, antitrust violations and criminal matters. On the other side, mediator may encounter resistant parties.In this situation, mediation is less likely to be ineffective if a good faith desire to settle is missing.

Introductory Remarks by Mediator

The purpose of this stage is to describe the mediation process to the parties, state the ground rules and mechanics, insure that the parties have no problem with a mediator (i.e., any prior relationship or conflict of interest) and mediation outcomes (how an agreement reached in mediation is enforceable, what will happen if agreement is not reached). Although both parties may understand the principles of mediation, it is better to explain them the process at joint session and give opportunity to share the same information.

c) Mediator Assists Parties with Information Exchange and Bargaining

The main activities in mediation process are the information exchange and bargaining and these activities may be carried out in joint meetings or in private sessions known as caucuses or both. Mediator usually begins the mediation process by asking the parties to tell the problem as they see it. After this initial discussion the mediator may break-out into private caucus sessions. In this stage parties explore all possible options for settlement. Suggestions should come from the parties, although the mediator may have to use various techniques to help them to achieve a feasible situation.

38. Chang, *Nonadversarial Representation: Rule 2.2 and Divorce Mediation* in *A Study of Barriers to the Use of Alternative Methods of Dispute Resolution*, Vermont Law School Dispute Resolution Project 112 (1984).
39. *See* McEwen & Maiman, *Mediation in Small Claims Court: Achieving Compliance Through Consent*, 18 Law & Society Rev. 11, 40-47 (1984). Authors found that a higher percentage of parties comply with a mediation settlement than with a court-ordered judgment.
40. This description is taken from Jacqueline M. Nolan-Haley, *Alternative Dispute Resolution in a Nutshell*, West Group, 60 – 67 (1992).

d) Mediator Assists Parties in Drafting Agreement

If agreement is reached during the mediation process, the mediator will assist parties in drafting it. Mediator must be sure that each party fully understands what the terms of their agreement are by making the terms as concrete as possible. Although the mediation settlement agreement may be oral or in writing, the main purpose of drafting writing settlement agreement is to prevent a new dispute from arising over the terms of the settlement.

5. The Role of the Mediator

Mediators have a variety of different styles and approaches. When we talk about mediation, we often think about "non-adversarial mediation" which is distinct from so-called "non-binding arbitration", a form of mediation that is frequently practiced in Europe (without practical success) and often referred as conciliation. A conciliator comes up with a compromise proposal and then tries to convince the parties to accept it while a mediator tries to help the parties themselves to find the solution for their conflict.

Generally, mediators' styles range from purely facilitative to strongly evaluative. Most disputes require a combination of the both styles and approaches. Some writers mention also and a third – de-conflict style.[41)]

Facilitative Style

In using a facilitative style, "a mediator assists the parties in identifying and exploring interests, concerns, motivation, goals, common ground and possible resolutions".[42)]A mediator does not offer to the parties his or her conclusion or opinions as to the value, legal position, rights, merits of the case or potential litigation outcomes. It is up to the parties to make all decisions. [43)]

Mediators usually use a technique of caucus sessions – private meetings with the parties - to develop the parties' understanding of the problem and explore and identify potential solutions. But although looks like "shuttle diplomacy" caucusing is much more than merely transfer of one party's negotiation standpoint to the other party. Joint sessions are also often used when parties during negotiation develop a new agreement or want to restructure an old one.[44)]

Evaluative Style

In using evaluative style a mediator offers his or her opinion on the case and suggests to the parties proposals for settlement.[45)] This style could be very useful when the mediator has a technical or legal knowledge and the parties need a help to move negotiation along.

41. Richard Hill, supra note 6 at 139.
42. Bennett G. Picker, supra note 4 at 40.
43. Id.
44. Id at 41.
45. Id.

Since evaluative style focuses more on the merits of the dispute, the process could resemble to the non-binding arbitration (conciliation). Some mediators determine in their mind what would be a fair settlement, and then attempt to convince the parties to accept that settlement. Although this approach could work well for some mediation and in some situations, it is not characteristic for "non-adversarial mediation", where mediator only proposes to the parties possible solutions rather than suggests them certain settlement agreement.[46)] Such suggestions can be made in private caucuses or, if appropriate in joint session of all parties.[47)]

De-conflict style

Parties in a mediation session often start by engaging in an aggressive adversarial attitude towards each other. In using de-conflict style a mediator facilitates the transition from "I win, you lose" bargaining to "I win, you win negotiation". [48)]

In some cases, parties are engaged in a conflict for years, without any communication about settlement, as well as the hostility often prevents parties from being able to jointly negotiate a resolution. "A skilled mediator can provide a forum in which it is easier to facilitate communication, which permits the parties to vent, overcome anger and recognize the need for closure."[49)]

Combined Style

Most disputes require a combination of styles and approaches. During the mediation process, the mediator is free to chose or alter the style, in order to accommodate it to parties' needs, interests or expectations.

6. Enforceability

There are two questions raised with the issue of enforceability in mediation:

a) whether the agreement to mediate is enforceable and b) whether a settlement agreement reached in mediation is enforceable.

Agreement to mediate

The question of enforceability of a mediation agreement is still open because the little case law exists concerning this question.[50)] Mediation is voluntary process even it is coerced by the court or law. Even though the court may rule in favor of enforceability of an mediation agreement nobody can really coerce a reluctant party to participate in a mediation process.

46. Richard Hill, supra note 6 at 140.
47. Id.
48. Id at 142.
49. Bennett G. Picker, supra note 4 at 60.
50. *See* Jacqueline M. Nolan – Haley, supra note 3 at 1011.

Settlement Agreements Reached in Mediation

Settlement agreements, like court judgments and arbitral awards are not always complied with. When that happens a party can seek judicial assistance to enforce the agreement reached in mediation. In many jurisdictions, the settlement agreement is considered to be a contract and is enforced under the general principles of contract law.[51)]

7. Conclusion

Mediation becomes more and more popular method of conflict resolution throughout the world. Only a decade ago, mediation was described as a "sleeping giant of ADR". In only a decade, we have witnessed this giant awake - many countries enacted mediation acts to promote this method of ADR. Mediation is widely used not only by the parties as a means of resolving their disputes but also by the courts as a tool to diminish costly and time-consuming litigation.

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МЕДИЈАЦИЈА – ПОЈАМ И ОСНОВНИ ПРИНЦИПИ

Резиме

Медијација постаје широм света све популарнији метод решавања спорова. Она се најшире дефинише као поступак у коме странке покушавају да саме постигну решење спора уз помоћ трећег, неутралног лица. Главне карактеристике медијације су да је она добровољан, флексибилан, нејаван, неформалан и необавезујући поступак и као таква има своје предности и недостатке. Иако се сваки спор не може решити кроз поступак медијације ипак се сматра да је медијација ефикаснија, јефтинија и једноставнија у поређењу било са судским било са арбитражним поступком. Сам поступак медијације пролази кроз више фаза које могу бити различито дефинисане од стране различитих аутора. Ипак, неке активности кроз које пролази поступак медијације су константне и то су: општа анализа спора од стране медијатора, уводне напомене, помоћ медијатора у размени информација и преговорима између странака и у писању уговора о поравна-

51. *See* John S. Murray and others, supra note 1 at 419 - 423.

њу. Улога медијатора је од изузетне важности за поступак медијације. Медијатор том приликом може користити разне начине и приступе медијацији, почев од олакшавања комуникације странака у спору до изношења својих ставова и предлога како би требало да гласи поравнање. Већина спорова захтева комбинацију начина и приступа. Неки аутори као посебан начин медијације наводе и тзв.ослобађање од непријатељстава.

***Кључне речи**: медијација, медијатор, поступак медијације, поверљивост, флексибилност, начини медијације.*