



# Insight from Carlton Fields

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## International Construction Law: Mediation and Conciliation

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### Definitions and Comparisons

Mediation and conciliation are very generally defined as private, usually confidential, informal processes in which disputants are assisted by one or more unbiased, disinterested, neutral third parties to reach a negotiated settlement of the dispute. Although the terms “mediation” and “conciliation” are frequently used interchangeably, conciliation is the term and process most often used in international practice, and some observers have perceived clear differences. For example, Professor Nael Bunni has drawn a distinction between mediation and conciliation as follows:

[T]he difference between mediation and conciliation lies in the role played by the neutral party. In one, he simply performs the task of persuading the parties in dispute to change their respective positions in the hope of reaching a point where those positions coincide, a form of shuttle diplomacy without actively initiating any ideas as to how the dispute might be settled. In the other method, the neutral party takes a more active role probing the strengths and weaknesses of the parties’ case, making suggestions, giving advice, finding persuasive arguments for and against each of the parties’ positions, and creating new ideas which might induce them to settle their dispute. In this latter method, however, if the parties

fail to reach agreement, the neutral party himself is then required to draw up and propose a solution which represents what, in his view, is a fair and reasonable compromise of the parties. This is the fundamental difference between mediation and conciliation.

Most U.S. practitioners would not define the mediation process so narrowly, as U.S. mediators frequently perform a more active role, by “probing the strengths and weaknesses” of each party’s case, as well as making suggestions, giving advice, and attempting to think outside the box in efforts to find creative solutions to problems. Over the last 15 to 20 years, conciliation has been introduced to the international commercial community, and there are a number of published rules by various international institutions for conducting conciliations. Whichever term is used, however, this non-adjudicative process now is a proven process for resolving construction industry disputes. The term “mediation” is hereafter used to refer to both the mediation and conciliation processes.

### Mediation versus Alternative Forms of Dispute Resolution

The most significant difference between mediation and alternative means of resolving disputes is that mediation leaves the decision-making process in the hands of the parties. Unlike litigation and arbitration,

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mediation is designed to bring the parties to a consensual resolution of their differences. This feature is the single most appealing aspect of the process to business clients, who place great value in certainty and predictability. In many cases, the parties will prefer a negotiated solution rather than trusting themselves to an uncertain imposed solution. Negotiated solutions can help preserve valued business relationships and may help promote future collaboration between the disputing parties - a result that is less likely after the strain of an adversarial trial. The parties' control extends not only to the ultimate solution, but also to establishing procedures for arriving at the solution. For example, parties help set their own customized rules when they select a mediator, decide the applicable law, or determine how or if experts should participate in mediation.

Another significant difference involves the time and cost of mediation. Arbitrations of international construction cases tend to be lengthy and extremely expensive, often taking years to conclude. The timing of mediations, by contrast, is largely within the control of the parties. Businesses today are increasingly sensitive to the costs of litigation and insist on faster, more cost effective, and rational means of resolving disputes. Mediation offers an opportunity to settle disputes much faster and more cost-effectively than litigation, arbitration, and, in some cases, even other streamlined methods such as dispute resolution boards.

There are, of course, some disadvantages to mediation. There is no guarantee that mediation will produce a settlement. Parties can devote significant resources to mediating a multi-party dispute and walk away resolving nothing. The process - if used appropriately - also requires the parties to be candid with each other in setting forth the bases for their claims and defenses. To persuade an adverse party that settlement is in its best interest, the other party may

have to share facts and strategies it might otherwise have withheld for use at the hearing. If mediation does not succeed, the parties may lose tactical advantages, including the element of surprise.

In some cases, mediation can actually exacerbate existing antagonisms between the parties. Depending on the personalities involved and the skill of the mediator, face-to-face negotiations can actually cause the parties' decision makers to become more intransigent, making resolution of the dispute less likely.

Still, these disadvantages pale in comparison to the obvious advantages that mediation brings to resolving significant disputes. Even failed mediations often produce partial resolution of disputes and offer many opportunities for adversaries to gain a better understanding of each others' positions. In short, the process has become an invaluable tool in resolving domestic disputes and can be just as useful in settling international disputes.

### **The Agreement to Mediate**

Parties to significant international construction transactions should consider including provisions in their contracts requiring the parties to mediate disputes as a condition precedent to arbitration. Adopting a mediation requirement during contract negotiations is much easier than requesting mediation once the project is under way and a dispute is brewing. Moreover, the parties can take into account the means of resolving future disputes in evaluating price and other key terms of the contract.

### **Rules Governing the Mediation Process**

The first step in determining what rules govern mediation is to determine what law governs the parties or the transaction. In practice, however, parties to a dispute have great latitude in establishing the rules to govern their mediation. While most U.S. states have



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rules governing mediation, there is less statutory guidance in the international context. Many foreign jurisdictions lack any statutory treatment of the subject at all. And, while there are international treaties governing international arbitrations and the enforcement of arbitral awards, there is no international convention for the recognition and enforcement of settlements reached through mediation.

The upshot is that while parties should always consider local law and consult with local counsel, the burden of establishing rules to govern mediation is on the parties. This is a valuable opportunity to anticipate problems and custom design procedures uniquely suited to the parties and the subject matter of the transaction. The best time to take advantage of this opportunity is during contract negotiations.

### **Selecting an Organization to Administer the Mediation**

There are a number of dispute resolution organizations with international reach that facilitate mediations. These organizations have established rules to govern mediations, provide lists of qualified mediators, and/or have the means of administering the process. The following is a list of some of these organizations:

- The International Centre for Dispute Resolution (ICDR) of the American Arbitration Association provides mediation services for international disputes, including construction matters;
- the JAMS International ADR Center has offices in New York and Rome;
- the Quebec National and International Commercial Arbitration Center in Canada provides mediation and conciliation services;
- the British Columbia International Commercial Arbitration Centre in Vancouver, B.C.;
- Arbitration and Mediation Center in Santiago, Chile, which is administered by the Santiago Chamber of Commerce;
- the National Mexican Chamber of Commerce in Mexico City offers mediation services;
- the International Chamber of Commerce (ICC) has offered conciliation services since its formation in 1923;
- the London Court of International Arbitration (LCIA) also offers mediation services;
- the Chamber of Commerce and Industry of the Russian Federation offers mediation services; and
- the Hong Kong International Arbitration Center (HKIAC) offers mediation services.

This list is not exhaustive but illustrates the number of organizations available worldwide that can administer mediations and have model rules in place to govern the mediation process. The procedures established by those organizations, however, are often general, and typically do not address the special concerns that arise in more complex matters. They nevertheless provide an excellent starting point for establishing the procedures to govern mediations in specific cases.

### **Selecting a Mediator**

Selecting the mediator is critical to the success of mediating a complex international construction case. There is simply no substitute for experience. The parties should select a mediator who has successfully handled similar disputes in the past. It goes without saying that experience in handling international disputes, where cultural issues are sometimes as



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important as contractual issues, is a must. Relying on lists provided by ADR organizations does not always assure that the individuals on the list have the requisite experience. Disputing parties should carefully examine the mediator's credentials, and they may wish to check with attorneys who have used the mediator in the past as part of the qualification process.

Although it is not indispensable, it helps a great deal to select a mediator who is familiar with construction law and the construction process. In fact, it is sometimes even more important to have a mediator who understands the construction business and the relationships between the parties than it is to have a mediator who understands construction law. While disputes almost always involve legal issues, it is not always necessary that the mediator be a lawyer. In many cases, resolution of the dispute will turn on technical questions, such as whether a given design was adequate, whether there were workmanship deficiencies, or whether one of the parties was delayed. A non-lawyer construction professional can be effective in helping to resolve such disputes because that individual can bring his or her own expertise to bear. On the other hand, an attorney mediator may have better training on how to probe parties effectively as to the potential weaknesses of their respective positions.

A good mediator is engaged in the process as something more than a go-between. In other words, it is important that the mediator understands the issues in the case and is prepared to challenge the parties' positions as the mediation progresses. A seasoned mediator will not blindly accept the arguments advanced by the parties, but will engage the attorneys and parties in discussions about possible downsides and explore creative options to resolve the dispute.

An equally important consideration is to assure that the parties have confidence in the mediators' neutrality. Nothing is more likely to derail mediation

than one party's belief that the mediator favors an adversary. This is an especially acute concern in international mediation, where one of the parties may be skeptical of any mediator from the home country of the other party. There are several ways to assure the selection of a neutral mediator. If the parties cannot agree on a mediator from a country represented by one of the disputing parties, they can select a mediator from a neutral country. Once the neutral country is identified, the parties can turn to organizations such as the ICC, AAA, or JAMS and obtain lists of pre-qualified mediators from those countries, and then engage in their own investigation of the mediator's qualifications and experience.

A less desirable option is to have co-mediators, with each party selecting a mediator from its own country. While this may assuage the concern of favoring one party's nationality, having multiple mediators can make the process much more cumbersome and costly. It can also give rise to an entirely new set of issues, such as reconciling different mediation styles and philosophies and deciding whether one mediator takes the lead. While mediations with co-mediators from different legal systems can work, the likelihood of success is substantially lower and, for that reason, this approach should be discouraged. Because the mediator has no authority to force any party into a settlement, both parties should focus on selecting the best qualified and most experienced mediator who can maximize the prospects of resolving the case.

It is often useful to clarify the parties' expectations as to the style of mediation to be used in an international dispute. The traditional role of mediator or conciliator can vary from country to country, so the parties should discuss what style is more likely to produce a settlement before selecting the mediator. In the United States, mediations tend to be loosely structured, dynamic processes in which the mediator plays the multiple roles of devil's advocate, empathetic



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listener, legal analyst, and somber business advisor in the effort to bring the parties together. A mediator is not typically called upon to give opinions on the final outcome.

In some countries, mediation is much more structured. The conciliator may be called upon to independently investigate the facts, research the law, and share views on the potential outcome. In some cases, the conciliator is expected to issue a written report containing recommendations for settling the case. Another mediation approach, uncommon in the United States, is for the parties to each select a mediator. The mediators then meet with each other to arrive at a joint recommendation for settlement. In considering such alternative approaches, the emphasis should not be on which style is more comfortable for the lawyers, but which style is more likely to result in a mutually acceptable settlement.

If the dispute is in litigation, the parties may want to have the mediator approved by the court, although this may prove difficult in many foreign jurisdictions. Local counsel should be consulted to assist in having the mediator duly authorized by a court. Court approval brings with it significant advantages. By seeking the court's intervention in approving the mediator, the parties can also invoke the court's authority to enforce the mediation process. A court order can give the mediator authority to set a time for mediation and to prevent parties from walking out before the process is completed. Additionally, such an order may require the parties to participate through principals with authority to settle and require confidentiality, which, in turn, promotes the free exchange of information. Most importantly, the order should allow for enforcement of any agreements reached at mediation.

### **Language and Use of Translators**

The success of mediation depends in large part on whether the parties have confidence in the process. It is not uncommon for parties to an international transaction to speak different languages. Differences in language can breed anxiety and distrust. It is therefore important to reach a suitable agreement regarding the language to be used in the mediation. There are a number of ways to resolve this problem.

One way is to prescribe the language in the original contract, and select a language that is consistent with the choice of governing law. In other words, having agreed on the law that will govern their relationship, the parties can agree to use the language of that jurisdiction for mediation or other ADR. However, there are some advantages to deferring the decision on what language should be used to conduct ADR proceedings. The parties cannot foresee during contract negotiations what disputes will arise, and they usually do not know which mediator will be selected to help resolve their dispute. Because the mediator is such a vital part of the process, his involvement in deciding which language to use for the proceeding is desirable.

Another alternative is to use the mediator's native language to conduct the proceedings, because the mediator is the one individual who will communicate with all participants and must gain a thorough understanding of each party's position in order to facilitate settlement. Another variation is simply to allow the mediator to decide which language should be used. If the parties have selected a mediator whom they trust, this delegation of responsibility should not be too controversial.

Even after the parties agree on the language of the mediation, the inability of at least some principals to understand that language remains a serious problem.



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The most practical solution is to employ interpreters, although it remains important that the mediator has at least a basic reading fluency in the language(s) of key project documents. The selection of interpreters should not be taken lightly, as they play a vital role in the process by ensuring that the participants accurately communicate with one another.

Interpreters suited for complex commercial disputes are highly skilled individuals who have a solid understanding of two or more languages. They must understand the nuances of the spoken word and the underlying cultures. Even countries that share a common language often give vastly different meanings to the same words, so interpreters should have a keen understanding of local idioms and dialects. Additionally, interpreters must understand the technical language of the law and construction terminology, and must also be prepared for the stressful demands of interpreting. Unlike translators of documents who can take their time to use dictionaries and check their work, interpreters of the spoken word must make on-the-spot translations on which other parties will rely in making important decisions.

Errors in translation, even minor ones, can cause the negotiating process to break down. Examples of how simple mistakes in translation can completely alter the essence of a communication are legendary. For example, General Motors once translated an ad for "Body by Fisher" into Flemish as "Corpses by Fisher." Not to be outdone, Pepsi Cola translated the slogan "Come Alive with Pepsi" into Chinese as "Pepsi brings your ancestors back from the grave." A Brazilian airline butchered an ad for "rendezvous lounges" on its planes by using language suggesting that their planes had rooms for sexual liaisons. In short, interpreters should be selected with as much care as mediators. Disputing parties should seek only experienced interpreters, carefully verify their credentials, and check references.

It is strongly recommended that each party hire its own interpreter, even if the parties agree on a principal interpreter. Accurate communications are vital, and each party needs to have confidence that messages are correctly translated. Having a trusted interpreter with undivided loyalty who can participate in the private caucuses with the attorney, client, and mediator will assure that the interpreter obtains a proper understanding of the issues and dynamics of the mediation. That, in turn, will help to assure that nothing important is lost in translation.

Now, some practical recommendations:

- When speaking, look directly at the other party, not at the interpreter. Focusing on the interpreter may cause the other party to feel left out of the process, and that will reduce the negotiator's effectiveness.
- Listen carefully when the neutral interpreter speaks to the other party and have your own interpreter confirm that the translation is accurate.
- Speak in simple sentences and avoid slang, idioms, or language unique to your culture that is difficult to translate.
- Speak slowly and pause often to allow the interpreter adequate time to translate.

Remember, interpreters can be key members of the negotiating team. They should be carefully selected and made a meaningful part of the entire mediation process.

### **Cultural Differences**

Cultural differences can create insurmountable obstacles to settling disputes. Understanding the impact that cultural differences can have in negotiations is almost as important as understanding the law and



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substance of a dispute. Each individual brings to the table a lifetime of conditioning and learned behavior derived from personal experiences in one or more countries. These experiences vary significantly and can result in vastly different approaches to problem solving.

What can attorneys do to account for cultural differences? The most important thing is to approach the process with an open mind. Just because a settlement strategy was effective in a domestic mediation does not mean it will be effective in an international setting. Similarly, just because an approach suggested by a foreign party is unusual does not mean it will be ineffective. It is vital for all of the attorneys to develop cultural sensitivity.

One of the seminal studies on cultural attitudes towards work was authored by Geert Hofstede. Hofstede identified four cultural dimensions that can affect negotiations. The first dimension is referred to as “power distance.” A culture with low power distance values equalization of power and competence over seniority. A culture with high power distance values status, formality, and hierarchy. A mediation in a high-power culture, for instance, would likely be more successful if the parties were represented by senior members of the company, even if those individuals were not personally involved in the day-to-day affairs of the project. In a low-power culture, it would make more sense for the parties to be represented by authorized individuals with the most knowledge of the subject matter involved in the mediation.

The second dimension involves risk taking. Cultures that avoid risks are averse to ambiguous situations and approaches. In such a culture, all details of a settlement may need to be resolved, leaving little or nothing to chance. Risk takers are more focused on the big picture and more open to innovative ap-

proaches that may leave some issues open for future resolution.

The third dimension focuses on whether the culture prefers individualism or collectivism. Individualistic cultures tend to value the individual’s needs and independence over that of the community. By contrast, collectivist cultures emphasize interdependence and the importance of cooperation. In such cultures, decisions are more likely to be made by committee than by a single individual.

Hofstede refers to his fourth dimension as cultural “gender.” This dimension distinguishes between cultures that value assertiveness, competition, and independence as opposed to those that value nurturing, cooperation, and relationships.

These four dimensions illustrate many of the cultural factors that can affect the outcome of mediation. The trick, of course, is to accurately identify these factors. Among the best sources for identifying the important cultural factors are a qualified and experienced mediator, local counsel, and the clients.

### **Who Should Attend the Mediation?**

Because mediation is a consensual process, it is absolutely vital that the decision makers personally attend the mediation. The case cannot settle without the consent of the individuals who have the authority to make compromises. ‘Accordingly, principals of the parties with authority to compromise the claim and bind their companies must be present. Additionally, if insurance is involved, it is important that the adjuster with adequate authority to settle the case also participates in the mediation. In fact, in cases where the mediation is supervised by a court, it is very common for the court to order that persons with authority to make binding decisions personally appear for each party at mediation.



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Court intervention is less likely in international mediations. Accordingly, it is recommended that the mediation clause in the construction contract address this issue. The contract should require that if mediation becomes necessary, parties should be represented by persons with adequate authority, including appropriate insurance company representatives. In a properly structured mediation, the parties spend a significant amount of time explaining the merits of their positions. There is simply no substitute for having each decision maker hear the adversary's case directly from the adversary or at least from the mediator. In many cases, this will be the first opportunity a party has to understand the opposing position explained by someone outside the party's own employees and advisors. Hearing the other side's case directly from an adverse party can often have an impact on a party's willingness to compromise claims or defenses.

### **Use of Consultants**

Depending on the complexity of the case, the parties may consider using experts during the mediation. Complex construction cases often turn on highly technical issues beyond the knowledge and understanding of most attorneys and their clients. In those cases, it is usually effective to have consultants available to help explain a client's position and, just as importantly, to sort through the responses made by the adversary.

Consultants can be used in several ways during mediation. One way is to have the consultant participate in an opening statement. If a particularly technical matter is at issue, the consultant can handle the portion of the presentation devoted to that issue. The consultant can additionally answer questions from the mediator or the other parties. One risk is that the consultant is thereby effectively made available for a "free deposition." However, mediation proceedings

are generally confidential, and opinions or positions offered in those proceedings may not be used against the party in a later arbitration or court proceeding. Besides, the risk can be mitigated by simply assuring that the consultant is prepared. Just as a litigant would prepare the consultant before trial, he can and should prepare the consultant in advance of the mediation.

A second effective use of consultants at mediation is to have them available in order to answer arguments raised by the adversaries. If an adversary is expected to present a technical argument at mediation for the first time, it is important to have a consultant present who can evaluate the argument and assist the attorney in preparing a response. Additionally, an exchange of pre-mediation papers in which each party sets forth its position in a document that may not later be introduced in legal proceedings helps mitigate the risk of surprises.

The third and probably most constructive use of a consultant at mediation is to evaluate a settlement proposal that includes in-kind services. It is not unusual for settlement of construction cases to have an in-kind component. There are times when an adversary proposes a specific remedial measure and offers to have it implemented. Rarely is an attorney or principal qualified to fully evaluate whether that remedial measure is adequate. Without the consultant, a party may be unable to respond to a proposed technical solution, and this can delay resolution of the dispute. By being available in mediation, a consultant can evaluate technical proposals and at least give a preliminary opinion as to its likely efficacy. Thus, while it is not always necessary that consultants be present at all mediations, complex construction cases often benefit from having a consultant at least readily available. The attorney and client should evaluate each case individually and assess the need for a consultant before the mediation.



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### **Preparing a Client for Mediation**

While mediations in the United States have become routine the practice is much less widely used to resolve international disputes. Foreign lawyers are less familiar with mediation, and as a result, may be reluctant to utilize it in significant cases. Lack of a common language can pose another obstacle. As a practical matter, unless the procedure is specifically called for in the contract between the parties, there is little any one party can do to force an unwilling party into mediation.

Assuming that the parties agree to mediate, the key to success lies in fairly and comprehensively identifying the issues involved in the dispute, then taking the necessary steps to reach a resolution that all parties can respect. Parties should approach the mediation much as they would approach a trial prepared to explain their theories and their supporting facts, including a review of available evidence and the law on which claims or defenses are based. This is to assure that the decision makers (the principals) understand the bases of the claims and defenses and appreciate the significant risks that lie ahead if the dispute does not settle.

Most sophisticated construction companies in the United States have some working knowledge of mediation and understand its advantages, but international clients are less likely to have such experience. In order to enhance the likelihood of success, it is important to help the client understand how mediation works.

The most important aspect of mediation is that control of the outcome rests with the parties, not with the mediator. Mediation does not seek to adjudicate disputes, but to compromise them through conciliatory negotiation. The parties' control of the proceeding should give them comfort in entering into the process,

even if it is unfamiliar, because no party can be forced to accept an outcome to which it is opposed.

Second, it is important to understand that the process is designed to reconcile adverse positions. It should not be approached as a "win-lose" proposition. Rather, the objective is to work towards terms that are mutually satisfactory to the parties. While the process will inevitably involve discussions about each party's alleged breaches, because both sides need to understand the risks involved if the case is litigated, the focus is on finding a middle ground that serves the interests of both parties. Mediation is a problem-solving exercise.

Third, mediation offers a broader range of possible solutions than are typically available in a court or arbitration. In most construction-related disputes, final judgments take the form of monetary awards between the parties. In a mediated settlement, however, parties may design their own solutions, and may incorporate such remedies as extended warranties, design modifications, or changes in work scope that are not typically available in an award or judgment.

A successful mediation requires compromise, but it offers the benefits of certainty, terminating what can otherwise be a painful drain of money and time associated with litigation.

### **The Mediation Conference**

Although in larger, multi-party cases it is almost always advisable to have a pre-mediation conference either face-to-face or by telephone to address logistical and other matters, mediations typically begin with a joint conference at which each party has an opportunity to present at least an outline of its case. This is often the only chance the parties will have during the process to tell their story directly to the adverse party.



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Some parties prefer to hold back information in order to make tactical use of it later. While this is a valid consideration, it is important to remember that the vast majority of disputes settle, so holding back information may result in avoiding the best opportunity to use it to advantage. Moreover, a careful adversary may already have uncovered the key information, so the perceived value of withholding key evidence may well be illusory. Finally, the party representatives who decide to accept less than what they want or pay more than they expected need good reasons for doing so. Few people part with their money unless they see no reasonable alternative. By the same token, no one will settle a case for substantially less than expected unless the alternative is worse. Making a thorough presentation, which gives the other side a full understanding of its downside risks - even if it means showing your entire deck of cards - is worth the effort if it gets the case settled.

The most effective presentations are those that clearly lay out a party's case and rely on provable fact, rather than on unsupportable opinions of counsel or experts. The primary audience for a presentation in joint session is not the mediator, but the decision makers on the other side. These individuals are predisposed to discount arguments that are not clearly supportable. Thus, to the extent a party can support contentions by reference to specific testimony, documents, codes, etc., it should usually do so at the mediation. Effective means of doing so include the use of demonstrative aids, such as PowerPoint presentations and the like. It is one thing to contend that a given condition is a code violation; it is another thing altogether to show the copy of the code or a letter from a building official confirming that the condition is a code violation.

Just as important as relying on provable facts to establish the case is the need to explain the legal theories underlying the claim. Bear in mind that the

presentation is directed to the adverse party's decision maker, who is usually not a lawyer. The joint opening conference is almost always followed by private caucuses with the mediator. This part of the process allows the parties to speak freely with the mediator and share information they might have withheld in the opening statements. Additionally, the private caucuses occur after all of the parties make their opening statements, so the first caucus following the joint session is a good opportunity to rebut or explain any unanticipated arguments made by the adversary.

Also, the first private caucus is usually a good opportunity for the client to vent. During the opening statements, all of the talking is usually done by the attorneys or consultants while the client must sit quietly through the adverse party's opening statements, which very often cast the client in a negative light. At the private caucus, the client has an opportunity to respond to what he may perceive as attacks from the other side. Until the client representatives have had an opportunity to vent their frustration, they may not be willing to compromise.

In advance of the mediation, clients should be cautioned that the mediator does not represent either side and will not take the side of either party in the private caucuses. More often, the mediator will assume the role of devil's advocate to point out the weaknesses in the parties' positions, in order to show why compromise is appropriate. Clients often perceive this as partisanship on the part of the mediator. That is why it is important - especially in international mediations - to educate the client as to the mediator's role in advance so that the client does not become distrustful of the mediator and the mediation process.

After the initial private caucus, parties should generally defer to the judgment of the mediator as to



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whether additional joint conferences are necessary. Each dispute is different, and depending on the number of parties involved it may be very useful to have further joint sessions between all or some of the parties. For example, in cases involving multiple defendants where there are issues of insurance coverage, it is often useful to separate the insureds from the insurers. It may be helpful to separate parties from their subconsultants or subcontractors. It may also be useful to have joint sessions with each of these groups before separating them into private caucuses. The mediator is the only person who has continuous and direct dialogue with every party, and so is in the best position to determine whether private or joint caucuses are necessary. Unless there is a compelling reason to disagree, the parties should defer to the judgment of the mediator.

Unless there is another joint session, the mediator will engage in “shuttle diplomacy” between the parties - that is, he will travel between the parties to convey settlement offers or new facts that were brought to light in the private caucuses that bear on the parties’ ability or willingness to settle. Throughout the process, the mediator will continue to work with the parties.

### **Confidentiality**

Assuring confidentiality is vital to the success of mediation. Parties must be willing to openly discuss their positions, possible risks, and alternative solutions without fear that what they say will be used against them if the dispute does not settle. In domestic mediations, there are rules of evidence and state statutes that require confidentiality and afford a means by which to enforce confidentiality requirements. Confidentiality is much less secure in international mediations. Unless the local jurisdiction has rules providing for confidentiality of settlement discussions - something that should always be addressed

with local counsel - the parties must use other means to help assure confidentiality. One is to use international organizations that administer mediations and have their own rules of confidentiality. For example, the International Chamber of Commerce model rules governing international conciliations include confidentiality provisions. Similarly, the United Nations Commission on International Trade Law has confidentiality rules that are commonly used in international mediations. Article 14 of those rules provides:

The conciliator and the parties must keep confidential all matters relating to the conciliation proceedings. Confidentiality extends also [to] the settlement agreement, except where its disclosure is necessary for purposes of implementation and enforcement.

Another means is for the mediation agreement to require confidentiality. The problem with this approach is that only signatories to the agreement are bound by its terms. Because mediations often involve third parties, including the mediator, attorneys, interpreters, and consultants, there are many opportunities for gaps in the confidentiality obligation. Accordingly, all participants in the process should be asked to sign a confidentiality agreement at the start of the process.

Even if all parties sign the agreement, there may be problems with enforcement, as there may not be a meaningful way to enforce confidentiality or impose sanctions if a confidentiality promise is breached. The parties should take this into account when drafting the confidentiality agreement and when designating the forum and law applicable to any breaches of that agreement.

Ultimately, there are always risks that disclosures made in mediation may be divulged to others. Attorneys must weigh the risks of disclosure against



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the advantages of using otherwise confidential information that may bring the other side to settlement.

### **Mediation Settlement Agreements and Their Enforceability**

If the mediation is successful, the agreement between the parties should be set forth in writing. Most mediators will insist that the parties enter into some form of written settlement agreement before concluding the mediation process. While it is desirable to confirm the settlement in writing as soon as possible, care should be taken to assure that the settlement agreement is complete and correctly reflects the understanding of the parties. Undertaking an effort to document a complex settlement agreement involving multiple parties at the conclusion of a two- or three-day mediation can be very tricky business, but is certainly worth the effort to ensure that one of the parties does not change its mind the next day.

One commonly used approach is for the parties to draft a summary of the settlement agreement that sets forth the parties' agreements on the principal issues, subject to drafting formal settlement documents and releases. While this does not resolve the case with finality at the conclusion of the mediation, it avoids the possibility that the parties, in a rush to draft a written agreement, may miss critical issues. This is especially useful if the settlement includes in-kind consideration that may require input from technical persons such as consultants.

One way to avoid having a verbal settlement fall apart because the parties cannot agree on written settlement terms is for parties to agree on having the mediator remain involved in the process until the parties have agreed on final language. This keeps the neutral participant available to help resolve disputes regarding whether proposed language accurately reflects the agreement of the parties.

In an international mediation, the language of the settlement agreement may become an issue. The same principles discussed above regarding selection of the language for the mediation proceedings apply to the language of the settlement agreement. The parties most often use the same language used in the underlying construction contract. Presumably, if the parties agreed on that language to document their initial contract, they should not object to using the same language to document settlement of a related dispute. Needless to say, trusted and well-qualified interpreters or translators should be used to assure that the settlement documents accurately reflect the agreement of the parties.

Enforceability of international settlements is more complicated than in the case of domestic settlements. Relying on foreign courts is less reliable because the rules allowing for enforcement can vary significantly from jurisdiction to jurisdiction. Local counsel should always be consulted when considering whether to rely on foreign courts for enforcement. One possible solution is to select a mutually acceptable choice of law and forum for enforcement purposes in the written mediation settlement. A more desirable option is to agree that enforcement disputes should be resolved through international arbitration. The parties can select one of several arbitral organizations for that purpose and incorporate the requirement into the settlement agreement itself. This option is contemplated by most domestic and international arbitration rules. The judgment of an arbitral panel ruling on such an enforcement issue would then be enforceable as a "consent" award in many foreign jurisdictions under the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards.



## *International Construction Law: Mediation and Conciliation*

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