

MEDIATION SUCCESS STORIES: FROM THE CONTRACTORS' PERSPECTIVE

Introduction

Mediation is a voluntary and confidential process through which disputants seek a practical solution to their dispute. The disputants are guided in their decision-making process by a neutral third party – the mediator, who assists them in finding a solution to which both assent with regard to their different concerns.

The features of mediation are voluntary, consensual, confidential, listening, understanding problem identification, resolving dispute, will and the mediator facilitates the ways to reach a sustainable outcome.

Mediation legislation in Singapore

There has been adhoc mediation settings in Singapore until the late nineties, when institutionalised mediation settings were introduced by the enactment of several mediation-related legislations.

Singapore has the following mediation legislations in place:

- a. Community Mediation Centres Act 1998
- b. Community Disputes Resolution Act 2015
- c. Mediation Act 2017
- d. Singapore Convention on Mediation Act 2020

However, there are other legislations with the requirements of mediation stipulated in those legislations.

The bulk of the disputes mediated in Singapore have been handled by the Singapore Mediation Centre (SMC) and Community Mediation Centre (CMC) since 1998.

Motivation towards a successful resolution

In the construction industry, potential disputants could be employers (usually the developer of the development), main contractors, sub-contractors, various tiers of sub-contractors, suppliers and parties affected by the development (third party).

As a starting point to prepare for mediation, it is essential to have on hand useful documents and information – which will serve the purpose of fact determination related to the dispute, rather than as evidence.

Yet, disputants are often hesitant about embarking on mediation for fear of an unsuccessful outcome. Disputants worry resorting to mediation would bring up the problem of not having the know-how to reach a settlement live-able by the disputants although the mediation is facilitated by mediator.

In this section, let us take a look at a few mediation cases that were settled illustrating the motivation factors leading to their successful outcomes and instil confidence in potential participants considering mediation.

Key motivational factors towards successful mediation are as follows:



a. Interest vs. Position

Interest is what matters to the disputant per se to move on with his / her life, businesses and dealings be it the case considering any underlying reasons behind why he / she wants it. Position is what the disputant strongly desires to get from the other party or what the disputant would give to the other party. In short, Interest reflects the big picture while Position reflects the narrow picture the disputant desires.



b. Concerns / Issues

Concern is what worries the disputant in the aspects of conflict or dispute, but it won't affect his / her interest. The issue, however, if not addressed and resolved, will affect the interest of the disputant.



c. Communication

Communication is crucial in mediation with the assistance of the Mediator enabling disputants to make their respective statements, conversations, discussions and negotiations of the issues effectively between or among disputants.



d. Understanding

Understanding is unique during mediation session whereby the disputants and Mediator have the opportunity to listen to relevant parties communicate and understand the subject-matter of each issue of the dispute from the parties face-to-face, aided with documents provided for the mediation. Such understanding of issues by disputants is usually hampered before mediation session is convened whereby each disputant holds their uncompromised position tightly.



e. Options / Solutions

An alternative solution, is having the options of ideas, suggestions and / or proposals generated by the respective disputant with regard to each issue for the other party to consider.



f. Alternatives

Alternative is the choice the disputant would choose for the resolution of each issue with regard to option(s) generated by himself / herself or option(s) from the other party for his / her acceptance. It is a reality test for the disputants to choose and accept the ALTERNATIVE that is BATNA

(best alternative to negotiated agreement), WATNA (worst alternative to negotiated agreement), or MLATNA (most likely alternative to negotiated agreement) so as to reach a settlement.



g. Criteria

Criteria is the legitimacy, standards, yardsticks, basis or condition to objectively consider and accept the option corresponding to each issue.



h. Relationship

Relationship is the revisiting, rekindling and preserving of personal, working, business and any other connections between or among the disputants, over the issues building on the interests and concerns of the disputants.



i. Commitment / Intention

Commitment is undertaking the disputant's willingness to accept the option(s) for each issue, whereas Intention is the expectation each disputant's desire to reach settlement of each issue. Intention sets out the extent and limit of the disputant to resolve each issue while Commitment sets out disputants' resolution bottom-line of each issue.



j. Face Aspect

Face aspect recognises the dignity of the disputants during the mediation without forgetting to save and give face (respect) to the disputants during the mediation process, and considers options tabled by all parties in the mediation.

Case Studies

Case No. #1

Parties: Subcon vs 1st level Subcon

No. of Parties: 2

Project: High-rise Commercial

Issues: 1. Outstanding works
2. Defect rectification
3. Payment

Motivation to settle

- On motivation factors of relationship and communication, parties agreed on an adjournment of the mediation session on account of the missing authorised person.
- On forging a business relationship
- On face aspects
- On realistic interest
- On relationship and understanding, indeed mediation succeeded after both parties' authorised persons were present for the 2nd mediation session.

Case No. #2

Parties: Maincon vs Subcon

No. of Parties: 2

Project: High-rise Condo

Issues: 1. Back charges
2. Overcharging
3. Counter-claim on loss of profit

Other: Mediation was carried out partially in Hokkien & Mandarin

Motivation to settle

- On motivation factors of alternatives and criteria with many on-going disputes from one party, it was advantageous to quickly settle the dispute so as to be paid earlier while the other party still has financial muscle to pay up.

Note:

The extracts of the cases are based on memories, as such, there might be some inaccuracies of fact, if any.

A substantial portion of this article was presented by me on 12 March 2019, to Singapore Contractors Association Limited, during Contracts & Practices Seminar, and on 10 July 2019, to Master Builders Association of Malaysia Conference.

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Case No. #3

Parties: Labour Subcon vs Maincon

No. of Parties: 2

Project: Various Job Sites

Issues: 1. Job cards
2. Labour logistics
3. Payment

Motivation to settle

- Parties could not resolve the dispute by themselves until they concurred with the Mediator to accommodate each other on the motivation factors of mediator, communication, understanding and face aspects.

Case No. #4

Parties: Subcon vs Supplier (Foreigner)

No. of Parties: 2

Project: Low-rise Apartments

Issues: 1. Wrong material supplied
2. Replacement costs
3. Payment

Other: Mediation was carried out in Hokkien & Mandarin

Motivation to settle

- On motivation factors of communication, understanding and mediator in the parties' familiar language or dialects helped.
- On interest, parties accommodated each other and achieved a win-win outcome.

Case No. #5

Parties: Level 2 Subcon vs Level 1 Subcon

No. of Parties: 2

Project: MRT Station

Issues: 1. Termination
2. Certification of WO
3. Rates

Motivation to settle

- On motivation factors of relationship, communication and understanding, mediation built-up environment for 1-to-1 talk, which worked.
- On face aspects