



CONSTRUCTION

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USING THE GUIDED CHOICE PROCESS TO REDUCE THE COST OF RESOLVING CONSTRUCTION DISPUTES

THE CURRENT SITUATION IS UNACCEPTABLE TO BUSINESS

Existing methods of resolving construction industry disputes using courts and arbitration are often regarded as too expensive and too time consuming. This excessive expense affects profits of project participants and increases the risk of higher insurance premiums and the self-insured expense for companies with large deductibles and retentions. The same problems exist both in the United States and in other international arenas.

While most commercial cases settle before judgment or award, these settlements often occur late in the litigation or arbitration process. Earlier settlements that avoid excessive delay and expense are the best way to achieve acceptable results and reduce the cost of dispute resolution in the construction industry. However, traditional mediation and arbitration do not focus on the cost and aggravation-saving advantages of early settlements. Arbitrators often do not encourage settlement in a meaningful way. Traditional mediation often terminates over impasse issues, and the involvement of the mediator ends.

The Guided Choice system recognises that not all disputes can be settled without some formal or informal information exchange process. When a party believes it lacks outcome determinative information, this situation often results in a rejection of mediation as being 'too early'. Under Guided Choice, when it is apparent that information is necessary for position change, but not voluntarily available to break impasse, the Guided Choice mediator facilitates the customisation of an arbitration, litigation or dispute review board processes focused on the impasse issues which require more information or even decisions. Unlike traditional mediation, the Guided Choice mediator continues to be involved only in settlement discussions, even while the parties engage in these other processes.

SOME PROBLEMS WITH ARBITRATION

As Professor Thomas J. Stipanowich has noted in his many writings, arbitration has the potential to achieve quicker and less expensive binding results than court-based legal systems.¹ But recently arbitration has acceded to the desire of litigators for expensive adversarial discovery and motion practice, including e-discovery issues. Because of this expense, standard one-size-fits-all arbitration, based on well-known rules of procedure, has started to fall out of favour with respected critics in the United States and internationally.²

The legal profession generally sees arbitration as an alternative to a court proceeding. They do not see customized arbitration as a method to develop information which can affect settlement positions and break impasses.

SOME PROBLEMS WITH TRADITIONAL MEDIATION

Mediation has the potential to significantly reduce the cost and time for settling construction disputes. Most commercial disputes are settled and do not go to judgment or arbitration award, and many of the widely-used published standard construction industry contracts require mediation as a precondition to litigation or arbitration.³ Also, procedural court rules increasingly require mediation. Still, the concept of mediation as a flexible process is often misunderstood. John Bickerman, former chair of the ADR Section of the American Bar Association (ABA), recently wrote: 'There is no clarity in what mediators do, and so [mediation users] have no idea what style of mediation they are buying and whether it is what they want for their dispute. In the past, some in the field have tried to define mediation as one style and ban the rest. All of the models of mediation have merit in the right circumstances.'⁴

As presently used, the mediation process does not realise its potential to promote early settlements that reduce costs and delay. Instead, mediation is frequently seen as a tool to be used close to trial or an arbitration hearing as a hedge against an unfavourable judgment or award.

WHY DOESN'T MEDIATION ACHIEVE EARLIER SETTLEMENTS?

Failure to consider non-legal factors in a settlement

The negotiations during a traditional mediation process focus on the risk of winning or losing and the related costs. Many users and mediators view 'mediation' as the date on which the parties meet to attempt a negotiated settlement (which is referred to here as the 'negotiation event'). The reasons that mediations fail to produce settlements at the time of a negotiation event, especially if it occurs early in a dispute, are more complicated than just doing a probability analysis of winning and losing issues. Besides legal and factual disputes, the factors include issues of personality, risk tolerance and corporate culture. They also include the parties' wish to avoid a perception that they lost based on their acceptance of a settlement proposal. That perception of loss is often based on erroneous predictions of outcomes by lawyers and experts.⁵ Traditionally, these obstacles to settlement are not identified until after settlement negotiations begin, and they can result in an impasse that may be fatal to the process. The Guided Choice process confidentially identifies these factors pre-negotiation, so that a mediation process can be designed to overcome potential impasses.

Expanding cost versus ultimate information

In order for parties to change their settlement positions, they need information to evaluate their chances of success or failure and change their perceptions of fairness before a court or arbitrator. Lawyers generally assume that the best way to gather that information is to prepare their cases for trial or hearing rather than for settlement. 'We start off knowing 80-90% of the facts; we then spend 80-90% of the costs trying to find the other 10-20% - and then learn nothing really important.'⁶ The Guided Choice mediator convinces the parties and their lawyers that information gathering for settlement should be different than information gathering for trial or arbitration.⁷

As US District Court Judge Patrick J. Walsh recently said in the ABA Litigation Journal:⁸

‘Lawyers still conduct pre-trial as if their cases are going to trial; I think that is a mistake... Less than one percent of the civil cases that could go to trial actually do.’... [T]he scorched-earth practice many lawyers employ, attempting to discover “everything” without regard to cost and aggressively litigating when production is not forthcoming, seems inconsistent with the goals of the civil rules – the just, speedy, and inexpensive resolution of the case – and what one assumes is the client’s goal: obtaining the best possible result for the least amount of money.’

While lawyers seek ‘perfect knowledge’ with legal discovery, in the world of commerce, people make decisions about business matters, including settlements, with much less information than would make a trial lawyer comfortable. As Malcolm Gladwell wrote in his book *Blink*,⁹ ‘[I]f we are to learn to improve the quality of the decisions we make, we need to accept the mysterious nature of our snap judgments. We need to respect the fact that it is possible to know without knowing why we know and accept that – sometimes – we’re better off that way.’¹⁰

The different ways the human brain makes decisions have been summarized in the important work of Daniel Kahneman in his book, “Thinking Fast & Slow.”¹¹ Kahneman’s work should be required reading for every mediator and advocate.

The Guided Choice process recognises that previously unknown or understood information is critical to settlement positions. Guided Choice mediators must convince the parties that a cooperative method of information exchange is better than the use of a court or arbitration-based adversarial system. Guided Choice mediators know how to show the parties that they have a common interest in an efficient and timely exchange of outcome-determinative information that is perceived as truly reliable. These objectives can be achieved in a Guided Choice mediation even if the parties prefer to use the formality of pre-hearing arbitration or court procedure to ‘make a record’.

HOW GUIDED CHOICE WORKS TO ACHIEVE EARLY SETTLEMENT

Before encouraging direct negotiations, the Guided Choice mediator investigates and diagnoses the reasons that the parties have been unable to settle. Mediators have the unique ability to investigate because of their use of a confidentiality privilege.¹² Many traditional mediators ask for pre-mediation briefs that discuss legal and factual issues. The Guided Choice mediator also analyzes at the psychological and social science factors affecting the decision makers. The Guided Choice mediator’s most important tool is the ability to ask questions and look at documents confidentially. Based on this diagnosis, the mediator then suggests a process designed to overcome the impediments to settlement of the dispute.

At the early stages of litigation, lawyers and their experts may give clients unrealistic evaluations of the cost, time and probable outcome of the litigation. Some decision makers may fear how settlement is perceived within their organisation. Other decision makers may have cultural elements in play. For example, face saving may be culturally important. Some positions are based on experts’ evaluations. Business and governmental units have formal or informal rules about how their representatives should negotiate. This is especially true for insurance companies. Further, some negotiators have more ‘clout’ or are more sophisticated and experienced than others.

The Guided Choice mediator investigates these factors and develops a diagnosis as to why the dispute has not yet settled. The diagnosis then becomes the basis for the treatment plan or design process. Too often in traditional mediation practice, the mediator discovers the factors influencing settlement during the negotiation process, when it is difficult to overcome them.

How the mediation process is designed may be the most important predictor of a successful settlement.¹³ The process must be perceived as useful to both parties’ interests; otherwise the process will be terminated. But frequently mediators give little thought to process design, beyond scheduling a negotiation event, preceded by the parties exchanging legal-style briefs.

A Guided Choice mediator would investigate factors such as the following:

- What information must be exchanged?
- Is there a requirement for the parties' executives to meet before mediation? If so, what role should the mediator play in preparing the parties for the meeting so that it is productive for settlement purposes?
- Is there a contractual requirement for a Dispute Review Board? If so, how should it be used for settlement purposes?
- Is there a requirement in place for an 'adjudicator?' If so, what role should that person play in a settlement process?
- What are the legal issues and the state of the law on these?
 - How will the lawyers inform each other and their clients about the legal issues that need to be resolved in court or arbitration?
 - Do the parties wish to certify questions for binding or non-binding decisions by a specially selected arbitrator?
 - Who will be involved in the negotiations for each party? Who would the parties like to see represent the opposition? Why? Will those people be physically present at the negotiations? If not, how should they participate?
 - Are insurers involved in any settlement and if so how? Are there coverage issues? Is there separate coverage counsel for the parties? Should the mediator independently 'visit' with the insurance representative?
 - Are there 'authority problems' that the attending party decision maker may have? If so, how will those problems be addressed?
 - What are the important entities that are not formally represented in the mediation? How will they participate in the negotiations? Examples could include subcontractors, vendors, governmental entities, citizens' groups or other aggrieved parties.
 - Should multiple parties be broken into groups and meet independently with the mediator? When should those meetings take place?
- Can customised arbitration be a useful settlement tool?
 - If impasse cannot be overcome at a particular point in the negotiations, are the parties willing to begin a customised arbitration to resolve legal or factual issues? Can this subject be addressed during the planning of the process design without indicating a lack of faith in the mediation process?¹⁴ Would the parties prefer to start the dispute resolution process with a customised arbitration process that assures that a final award is given by a date certain? Are the parties willing to commit to continue the mediation notwithstanding the parallel arbitration?
- Where should the negotiations take place? In an office or in a more relaxed setting?
- What is the form of the negotiation event?
 - Where should any meetings occur?
 - Should there be public opening statements? Should they be positional or invite conversation?
 - Is it likely that 'nothing will happen until 4 o'clock'? How can that be avoided?
 - What are the roles of the lawyers, the client representatives and the experts in making public presentations?
 - Will negotiation be conducted by the mediator shuttling between parties in separate rooms, or will negotiations be in public?
 - Can the parties meet with or without their lawyers during the negotiation?
- How can we anticipate and overcome an impasse?
 - What is the best setting for the negotiation?
 - What are likely areas of impasse during the negotiations? What are effective methods for overcoming any impasse?
 - Are apologies appropriate?
 - Is disagreement among experts a potential cause of impasse? If so, how can differences between the experts be identified so that they can be factored into a settlement choice? Should the experts meet before negotiations, under the confidentiality privilege, to discuss ways to narrow their differences?
 - Is a Dispute Review Board (DRB) in place and active? If so, under what circumstances would questions be referred to a DRB either on a binding or non-binding basis?
 - Are the parties committed to a continued facilitated negotiation even if they are also pursuing arbitration or litigation?

HOW IS THE GUIDED CHOICE PROCESS IMPLEMENTED?

The only basic requirement for the Guided Choice process is an agreement to mediate since this empowers the mediator to conduct a confidential investigation of a broad range of issues. Mediation is already in a standard form construction contract if those were used. Mediation may be suggested by a judge or arbitrator. It may also be suggested by an agency case administrator. Any agreement to mediate opens the opportunity for discussion of why mediation in general and the Guided Choice process in particular, makes sense. Confidential conversations with a neutral should be valuable, even if the parties determine that the case is not then ready for mediated settlement negotiations.

If the parties agree to use the Guided Choice process for the mediation, they can simply incorporate by reference to the procedure set out in the ConsensusDocs Guidebook, available free on the internet.¹⁵ The underlying contracts do not have to be based on ConsensusDocs forms.

When the AAA/ICDR is administering a mediation,¹⁶ it has agreed to help the parties implement the Guided Choice process if the parties ask. AAA/ICDR mediation clauses are included in the contracts published by the major US trade associations, including the American Institute of Architects, ConsensusDocs, Design Build Association of America and EJCDC.¹⁷ The parties may also agree to mediation by referring to the AAA/ICDR in their agreement without having the case administered by AAA/ICDR. The parties can also place a detailed requirement to use the principles of Guided Choice into their pre-dispute agreement. An example of such a clause is contained in the author's earlier article on Guided Choice.¹⁸

CONCLUSION

The best mediators can achieve earlier, acceptable settlements and reduce the cost and time of dispute resolution using widely-available techniques. The Guided Choice process summarises the available tools. To achieve widespread use of these tools, lawyers must re-focus their practices to increase client value and satisfaction by reaching the earliest possible dispute resolution.

Clients who want to achieve earliest possible settlements should ask their lawyers and mediators to use processes like Guided Choice. In addition, mediators should be trained to recognise the concepts of Guided Choice. Web-based training programmes are being developed by the Guided Choice Dispute Resolution Interest Group. For the latest developments in the Guided Choice process, see the blog www.gcdisputeresolution.wordpress.com.

ABOUT THE AUTHOR

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ENDNOTES

1. Thomas J Stipanowich, 'Beyond Arbitration: Innovation and Evolution in the United States Construction Industry' (1996) 31 Wake Forest LR R 65.
2. Steven Seidenberg, 'International Arbitration Loses Its Grip' ABA Journal (1 April 2010).
3. The forms of the American Institute of Architects, ConsensusDocs, EJCDC and the Design Build Institute of America all include the mediation clause of the American Arbitration Association (AAA).
4. John Bickerman, 'Adapting Mediation to What Users Want' Maryland Bar Journal (March 2012), 55 et seq.
5. The seminal work substantiating lawyers as poor predictors of outcome is Jane Goodman-Delahunty, Par Granhag, Maria Hartwig and Elizabeth Loftus, 'Insightful or Wishful: Lawyers' Ability to Predict Case Outcomes', (2010) 16(2) Psychology, Public Policy, and Law 133-57.
6. Unknown source quote in an IBA Listserv email received by the author.
7. This role of the mediator to convince the parties of the best settlement process can be described as being a 'nudge'. This is a different role than the traditional role of helping the parties reach a substantive settlement. See Richard H. Thaler and Cass R. Sunstein (Yale University Press 2008).
8. 'Rethinking Civil Litigation in Federal District Court' Litigation (Fall, 2013), 6.
9. Malcolm Gladwell, Blink: The Power of Thinking without Thinking (Back Bay Books, Little, Brown 2005).
10. Gladwell, see n 9 above.
11. Kahneman, Kahneman, Thinking Fast and Slow (Farrar, Straus and Giroux, New York 2011).
12. Christian Bühring-Uhle, Lars Kirchhoff and Gabriele Scherer, Arbitration and Mediation in International Business (Wolters Kluwer 2006), 175 et seq; Uniform Mediation Act (US) (UMA s 4(b)).
13. Paul M. Lurie, 'The Importance of Process Design to a Successful Mediation' in AAA Handbook on Construction Arbitration and ADR (2nd ed, Juris Publications 2010), Chapter 18. This work cites the research showing that process design is the most important factor in successful outcomes.
14. Compare the construction partnering process, which anticipates that pre-construction, the parties will meet to discuss the identification of problems likely to occur during the construction process and how they will be resolved so as not to slow the completion of the project or cause unnecessary expense. See AGC website www.agc.org/cs/industry_topics/additional_industry_topics/partnering.
15. The Guided Choice process is described beginning at p 10 in the ConsensusDocs Guidebook, www.consensusdocs.org/Resource_/FileManager/All_Associations_Guidebook_08_12_13.pdf.
16. Also, under the new AAA/ICDR Construction Rules, effective in 2014, parties that submit an arbitration demand will be required to opt out of mediation, even if there were no mediation requirement in the pre-dispute commercial agreement. This process is already in effect for the AAA/ICDR Commercial Rules.
17. American Institute of Architects General Conditions, Form A-201 (2007). Sec 15.3 incorporates the American Arbitration Association Construction Rules. Other AIA documents also include mediation. See, for example, AIA B-101 2007. Sec 8.2. ConsensusDocs agreements also incorporate the AAA Rules. For examples, see ConsensusDocs form 240 Standard Agreement Between Owner and Design Professional (2011) Sec 9.4 and ConsensusDocs form 200 Standard Agreement and General Conditions Between Owner and Contractor (2011) Sec 12.4.
18. Paul M. Lurie, Guided Choice: Early Mediated Settlements and/or Customized Arbitrations, American College of Construction Lawyers Journal (Summer 2013) available on Westlaw.

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