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When progress can't wait mediate: Handshake

# When progress can’t wait mediate

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In public private partnerships (PPPs), it’s easy to forget that third “P,” but it’s this concept of a partnership that ensures the health and sustainability of the public-private relationship. Conflict can undermine the PPP relationship, or be used to strengthen it – and that’s why mediation is an important option for PPPs.

Mediation is simply a facilitated negotiation. It is a very flexible format for resolving differences in international infrastructure projects, as each mediator can structure the process in the manner most appropriate to the situation. Resolution achieved by mediation is not limited to remedies provided by law, allowing for bespoke settlements that satisfy both parties.

The mediator’s job is straightforward, despite how complicated a situation may be: he or she discusses with the interested parties the issue at hand, drawing out their interests and exploring alternative solutions. It’s an especially effective solution for infrastructure projects, which, due to their scope, the number of different organizations involved, and the varied backgrounds and experiences of the people staffing those organizations, are particularly vulnerable to conflict. Through mediation, that conflict can be used to build (or re-build) a relationship, and sustain the partnership.

**Culture, culture everywhere**

Mediation is particularly effective at managing cultural differences; these cultural considerations are not limited to issues of national origin. Different technical orientations and different commercial experiences can create cultural differences. For example, an Independent Power Project may involve several construction contractors from different industries, an operator from a utility, a coal or gas supplier, a separate utility purchasing the power (or possibly the national grid), and finally financial institutions providing funding. The interests of these commercial players will vary significantly, and so there is ample room for cultural conflict.

The parties will be best served by a procedure for resolution that takes these interests into consideration – a procedure that reinforces their relationship, rather than tears it down. The mediator can assist the parties to understand the other's cultural background and assist in finding a mutually satisfactory negotiated solution. Each of these considerations will need to be addressed in the project documentation and the method of management of a project.

**The many faces of mediation in PPP**

Mediation is already used in PPP, though principally limited to layered dispute resolution mechanisms. There are several additional ways mediation can be used to support PPP projects:

**“Consultation” mediation**

During project preparation, Governments need to get much better at consulting stakeholders (community groups, labor unions, land owners, government staff, etc). During these processes there may be the

opportunity for a mediator to help facilitate dialogue and open processes for sharing of issues while managing stress and frustrations.

**“Negotiation” mediation**

During negotiation, there might be an opportunity for a mediator to help resolve deadlock on specific issues, or more generally to help bridge cultural divides between the parties in order to finalize the deal.

**“Initiation” mediation**

At the very beginning of a project, once the ink dries on the contracts and the difficult work of implementation begins, it would be useful to bring the parties together. At this point the mediator could walk them through the practical process of implementation, setting out or affirming implementation plans, teasing out details of how things will be done in practice, and clarifying who is responsible for what and when. Ideally, this is done through the negotiation of the contract, but in practice these issues are often overlooked or swept under the carpet in order to get the deal done (“don’t worry, the implementation team will figure this out”). The mediator can bring a fresh pair of eyes, a practical query, and assistance to bridge any gaps in understanding or agreement. These challenges will come to light eventually, so it’s best to resolve them in the beginning before money is spent unnecessarily. This process reflects concepts of partnering that are increasingly used in the construction industry, such as in the UK.

**“Dispute Review Board/Adjudication” mediation**

Some form of conflict management mechanism is generally included in an infrastructure deal -- for example, a dispute review board, independent expert, or adjudicator. This mechanism can be reinforced with a mediator (e.g., as the independent member of the Board or panel) or mediation may be made available where the mechanism is encountering challenges.

**“Deal” mediation**

There are a number of changes, conflicts, and challenges that arise in a project. These may not amount to a “dispute” and therefore might not be caught by the above mechanisms. For example, where there is an opportunity for refinancing, there may be disagreements about timing, currency, or tenor that a mediator could help resolve, but that no one will want to bring up to the formal dispute resolution mechanism. Variation requests can also be mediated before they become contentious, and this can help bring together relevant stakeholders who may not otherwise be part of variation discussions.

**“Dispute” mediation**

Where there is a full-blown dispute, whether or not the parties have included mediation in the contract, access to mediation can help avoid costs and delay.

Mediation can be adopted as an ad hoc dispute resolution procedure at the time a need arises, or drafted into the project agreements. It can be mandatory for the parties when a conflict arises, or made available to the parties as and when they desire.

Mediation is particularly appropriate for international infrastructure projects, but the benefits will be realized only when parties, governments, lending institutions, and others understand the process and gains it offers.

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