Deal Mediation: The future of Alternative Dispute Resolution

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The practice of mediation or settling disputes through dialogue has existed for thousands of years, dating back to 1800 BC when mediation was used by the Mari Kingdom (modern day Syria) in settling disputes with other kingdoms (Barrett, 2009). Mediation as a concept can also be traced back to the bible and the Talmud whose tenants include-among others-accepting compromise in order to avoid conflict. In fact, the concept of mediation is deeply rooted in the Jewish tradition as evidenced by the constant strive for peace (*Shalom)* and the call for leaders to seek and pursue peace-*Bakesh shalom v'rodfehu* (Steinberg, 2000). Despite mediation's deep historical roots, it has existed in its current form for a much shorter time and can be dated back to the late 1900s (in terms of the currently existing analytical framework). It has since become an integral and more commonly used branch of Alternative Dispute Resolution (ADR), particularly since its initiation into the US legal system in the 1960s and 1970s. The goal of the movement promoting ADR was in part to help reduce the costs and time spent in legal proceedings-to unburden the courts so to speak-as well as devising creative solutions that would otherwise not emerge from a court proceeding (Menkel-Meadow 2016). Since the first publication of Fisher and Ury's Getting to Yes in the 1980s, the practice of negotiation and mediation have been widely accepted and used in resolving disputes. Unfortunately, many persons familiar with the practice of mediation today hold the archaic view that its usefulness lies exclusively within the category of dispute

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resolution. Even mediators themselves are often trained to think of mediation solely in terms of disputes (IMI). The underlying assumption resulting from this viewpoint is that it is first necessary for a dispute to be present in order for mediation to be considered as an option. In actuality, that is not always the case. While mediation is indeed an excellent method for resolving on-going disputes, one can argue that mediation may prove just as useful, if not more so, in preventing conflicts before they arise. Although it is not yet widely used in this manner, a strong case can be made for the use of mediation not merely as an alternative to resolving current disputes, but also as a pre-cursor or preventative measure in the art of deal making. This paper aims to highlight the benefits of mediation in non-conventional areas such as deal-making and deal-management in order to encourage its further development and widespread use.

Mediators in the realm of ADR can "help disputing parties overcome information asymmetries, optimize their settlements, manage psychological barriers to negotiation, and cope with emotional and relational issues" (Peppet 2004, 287). Negotiations are quite different from mediations. Negotiations typically occur directly between the parties without the intervention of a third-party neutral. During a negotiation, several issues may arise that could significantly hinder the successful resolution of a dispute. Parties often come into the negotiation with their own perceptions of the facts and each side automatically assumes that their view of the situation is 'fact' and is the only truth. Therefore, the other side is undoubtedly 'wrong'. Additionally, as each side wishes to maintain the upper hand, they are often reluctant to share information-either about their true interests or about the true alternative options available to them- for fear of giving up their hand. There is also the human factor which contributes to egoism and thus the inability to forget past offenses. This can lead to getting caught up in the details of the past and result in an inability to move beyond those offenses. For these reasons, Fisher and Ury warn against such issues and urge those engaging in negotiation to 'separate the people from the problem'. In legal cases, it can be difficult to know for certain what the courts will ultimately decide and in whose favour the decision will be, especially when each side truly believes that their case is stronger. As a result of the aforementioned issues, mediation and the addition of a neutral third-party has grown in acceptance.

The usefulness of mediators in avoiding litigation by helping parties to reach mutually beneficial solutions has been well-documented in the last few decades. Mediators are able to assist in overcoming certain bargaining failures mentioned by Priest and Klein which arise

due to lack of information sharing, inaccurate assumptions about the other side's alternative options, or inaccurate estimates regarding the true value of settling a case. When such situations arise, the mediator can act as a third-party neutral or as Schelling (1960) describes in his work on bargaining theory, a mediator can help to process complete information collected from both sides and compare offers and counter-offers from several parties without giving away any secret information to either side. In this way, the mediator is able to make a well-informed analysis/synthesis using all the collected facts which the parties themselves may not have access to. This allows the mediator to have a bigger picture of the issues at stake, which he can use to guide the mediation accordingly. Using this bigger picture, the mediator can assist the parties to create value-added solutions to their disputes.

Many of the problems encountered in negotiation are equally present in deal-making as well considering it is also a type of negotiation involving different parties and different interests. It should then naturally follow that mediation could be very useful in such practices. So why is that not the case? Why is mediation not frequently employed in the process of deal-making?

Part of the problem is due to public perceptions of mediation and its modern-day use. There are two very common misconceptions regarding the use of deal mediation, which render its usage limited. The first of these misconceptions is that only lawyers practice mediation. While that may seem true due to the high visibility of lawyers within the field of Alternative Dispute Resolution, the fact remains that mediators emerge from a variety of different backgrounds including law, politics, health care, and the arts. The main criterion which unites them all is that they have obtained some kind of certification allowing them to practice mediation in whatever capacity they choose. It must be noted however that certification programmes also vary greatly depending on the instructors and their overall ideologies.

The second common misconception is that mediation exists purely as an alternative. To this day, mediation in the commercial sense is primarily linked to the field of ADR as one of several options alongside arbitration, litigation, and others. That linkage has significantly constricted the otherwise wide range of possibilities that exists for the use of deal mediation. Perhaps it is time for us to realize that 'the best conflict management technique is conflict prevention' which essentially embodies the aim of deal mediation. According to Armes (2011) with regards to the construction industry, approximately 50% of all legal costs are somehow linked with disputes. That is an incredibly high percentage of costs that could

perhaps have been saved and redirected towards other uses. This statistic alone demonstrates the importance of preventing a conflict before it ever arises.

While Armes makes a strong case for taking preventative measures in the construction sector, the same principle can be applied to other sectors as well such as the health industry for example. According to an article by Massie of the CEDR, in recent years the NHS (National Health System) hospitals in the UK have been under such financial constraints that they have struggled with the issue of providing quality healthcare with limited funds. This has led to the increased use of deal mediation otherwise known as contract management in order to save both time and money. The NHS has found that in cases where direct negotiations have failed or led to unsatisfactory outcomes, the use of deal mediation is preferable. Another example of the model of preventative mediation could be found in the establishment of the Independent Dispute Avoidance Panel (IDAP) by London's 2012 Olympic Organizing Committee. Such was the importance of dealing with disputes either prior to or immediately upon their emergence; such was the urgency in maintaining the strict deadlines already set in place for the games thereby warranting the creation of this panel for preventative measures.

Unfortunately, many people fail to realize that future problems could be avoided if a mediator were present during the drafting of a deal from the very beginning stages. In this manner, the mediator would act as a deal-facilitator as suggested by Schonewille and Fox. According to Stearn (2008), deal mediation is 'facilitated negotiation, with the involvement of a neutral third party, of business transactions in which no dispute has arisen'. Usually the currently existing process of closing a business deal is more akin to a negotiation involving positional bargaining than it is a "win-win" optimal deal which benefits all involved parties in the best possible way. This is where a deal mediator or a deal-facilitator can prove useful.
Schonewille and Fox's (2011) research has shown that parties directly involved in a commercial negotiation can easily fall into many traps and pitfalls which could lead to a 'suboptimal' deal. These pitfalls include dividing value rather than creating value and parties sticking to their own bargaining positions rather than exploring options for mutual gain. As parties involved in such negotiations are often very inexperienced in proper negotiation techniques, they often end at an impasse or in cases where a deal is reached, opportunities for greater value-creation are missed. While such a deal may be just fine and seemingly satisfy the multiple parties involved, it is highly likely that the resulting deal is not the optimal deal that the parties could have reached. The job of the deal mediator in such cases is two-fold: their first aim is to ensure that a deal is reached (although this is not a guarantee) and the

second aim is to ensure that whatever deal is reached carries the highest possible value for each party meaning that each party receives the maximum possible benefits from the deal to which they agreed (Neiman 2012). The key takeaway from these aims is the idea of the maximum-possible benefit for each side. The parties could of course choose to negotiate a deal on their own, with the assistance of their counsels, and could end up successfully closing a deal in which they are all seemingly satisfied. The main difference, however, in using a Deal Mediator or deal-facilitator is that their main goal is not merely in closing *a* deal, but rather in creating the *best* possible deal for all parties and ensuring that all involved parties have satisfied as many of their underlying interests as possible. In other words, the deal mediator's objective is to create the best possible deal whereas parties' councils aim to maximize the individual value for their client. The latter situation can sometimes lead to hard bargaining tactics and a distributive result representing parties' bargaining power.

Why is a Mediator Important in Deal-Making?

As noted by Salacuse (2002), due to the modern-day climate, deals are becoming increasingly international, thereby involving parties from around the world who come from a variety of cultures and backgrounds and who approach each deal with varying negotiation styles. This cultural richness carries with it the propensity for cultural misunderstandings which can easily hamper the closing of a deal. A deal-facilitator or a Deal Mediator could be useful in avoiding any such misunderstandings and of clarifying any differing viewpoints that arise from a difference in backgrounds.

Another advantage of a Deal Mediator lies in their thorough comprehension of a deal. If for instance the Deal Mediator were present from the very early stages of the drafting of the deal, they would possess a deep and thorough understanding of the negotiated agreement and would therefore be familiar with the intricacies of the deal. This would allow them to anticipate or handle any future disputes much more easily than a mediator who was not present during the initial stages. A deal mediator who has been involved in the opening stages will be better able to help the parties brainstorm and anticipate all potential areas of disputes. The deal mediator may also have a specific expertise in an industry and can assist the parties to anticipate areas of potential dispute. An example of this is the Disputes Potential Index in the construction industry (Construction Industry Institute). In referring to international Deal Mediators in the construction industry, Salacuse (2002) posits that their continuous contact with the parties and the projects leads to an 'intimate familiarity with the transaction'. Additionally, the deal mediator can assist parties in tailoring specific dispute resolution processes to deal with each potential area of disputes pre-identified by the parties, this can include establishing clear lines of communication, standing neutrals, etc. With his expertise in dispute resolution processes, the deal mediator can help the parties to tailor processes to their specific needs and situation.

A third advantage lies in the mediator's ability to identify each party's interests and to assist each party in devising solutions to fulfil those interests. Too often, parties enter a negotiation situation such as deal-making with very strong positions. These positions are stated in such a way that there is little room for manoeuvring and parties tend to hold tightly to these positions. The mediator's job is to avoid positional bargaining by focusing on the interests or the underlying needs associated with the positional stance (Fisher and Ury). In a simulated negotiation case concerning the pharmaceutical industry, Company A says 'I need coconuts to find a cure for a disease which is ravaging the population'. Company B says

‘Well I need the coconuts which are in limited supply in order to feed the population of my country without which there will be a famine’. What each party failed to say was that they needed only a specific part of the coconut; Company A needs the coconut water to make their pharmaceutical drug and Company B only needs the coconut meat in order to feed the population. Because both parties came into the negotiation with very strong positions from which they refused to budge, they failed to realize that their needs were compatible with each other and that there was definitely room for collaboration. This is where the mediator comes in. The mediator is able to dig beyond the positions laid out by each party and in doing so he/she is able to open up the ZOPA (zone of possible agreement) and get the parties thinking about collaborative and amicable solutions. I used this example to illustrate the importance of identifying interests and to emphasize that when parties are left alone to negotiate a deal of any kind, they will not be as successful in identifying the true interests behind the other parties’ positions as they could be with the use of a neutral third-party.

A fourth advantage is the ability of the deal mediator to help the parties make a realistic allocation of risks. Although this is one of the most critical steps in preventing future disputes and avoiding unnecessary costs, many parties and their counsels prefer to focus on ‘winning’ the bargaining game while shifting as much risk to the other side as possible. As advanced by CPR International Institute for Dispute Prevention & Resolution (2010), this method of risk allocation can lead to great mistrust and even resentment between parties and lead to far more damaging consequences than originally envisioned. For these reasons, a rational allocation of risks between the parties is essential; it can help prevent and control disputes between contracting parties while leading to a longer-lasting deal and business relationship.

Disadvantages of Deal Mediation?

We have discussed above many of the advantages to using a deal mediator but there are nevertheless a few potential disadvantages which must also be addressed. Lack of information often leads to fear, a fear of the unknown, as has certainly been the case in terms of deal mediation. The disadvantages are very few but because very little is known about the process and written reports regarding the successes of deal mediation are still rather scarce, many people dismiss it as a waste of money and/or time. There may be a small grain of truth to this viewpoint. Perhaps the main disadvantage of employing a deal mediator is that it does

not necessarily guarantee that there will be a deal. If no deal is produced, then each party will be out the cost of the mediator's time and efforts, divided by the number of parties involved. But while this may seem like a disadvantage in terms of cost, there is a significant advantage attached which must be acknowledged. Despite the lack of a deal, the parties will have spent ample time discussing the many intricate details of their project and will thus leave with a better understanding of the other side's needs and interests. This could be useful in 'laying the groundwork for a future deal if the parties so choose' (Neiman 2012, 4). As was mentioned earlier, some people may worry that engaging in such a process leads only to them exposing their 'upper-hand' so to speak and as a result they feel that they are weakening their negotiating position. This is a common misconception about the process of mediation which must be challenged.

In reality, engaging in this process can lead to an increasing array of otherwise unthinkable options and helps to widen the ZOPA through transparency. It helps to ensure that each party's interests are being met in the best possible manner. With an expertise in problem solving and integrative negotiation, the deal mediator can also help the parties to brainstorm to find creative ways to create added value. Such ways can include adding more negotiation topics at the table to allow for trade-offs, creating contingencies (e.g. based on market price or annual profits), prioritising interests, exchanging priorities and conceding on secondary interests, assisting the parties to a complex brainstorming process.

Now that we have established the advantages and disadvantages of the use of a Deal Mediator, let us discuss the qualities they embody.

Qualities of a Deal Mediator

Deal Mediators embody several important qualities that set them apart from a typical negotiator.

1. They are impartial.

This signifies that they are not allowed to take sides or to demonstrate any partiality, whatever the situation may bring. As a neutral and impartial third-party the mediator is there to hear each side's concerns and to ensure that those concerns are heard and acknowledged by all involved parties *without* demonstrating favouritism for one side over the other. They are not swayed to one side or the other and are truly in the middle. This does not mean that they are inhuman and lack any emotion, it simply signifies that they learn to control their emotions, acknowledge any bias tendencies, and prevent those biases from manifesting in favouritism

for one side or the other. personal interests do not hinge on the outcome of the mediation process.

2. They are independent.

The neutral has no ties to either one party or the other, nor is he interested in the outcome. To put it differently, the mediator's personal interests are in no way tied to the outcome of the mediation process. His/her sole purpose is to assist the parties in engaging in a better transaction than would have been possible without their assistance. The mediator's ultimate goal remains that of assisting the parties in reaching the best mutually-beneficial deal possible. Their independence certifies that they are remunerated for the hours they put in regardless of the outcome. They are not paid more for leading you to a solution or a signed agreement and this ensures that they will not force parties to sign a deal merely to increase their financial reward.

3. They are able to uncover the interests of all involved parties.

As mentioned earlier, there is a difference between interests and positions. Fisher and Ury emphasized this point strongly in suggesting that parties in a negotiation learn to separate positions from interests. The mediator as a third-party neutral can go beyond asking the 'What' question to asking the 'Why' and 'How' questions: What do you want? Why do you want it? How can this need be met? The mediator is able in asking these questions to uncover the true necessities facing each party and to open up a wider zone of agreement which otherwise would have remained closed. This allows for more creative solutions to be proposed and for increased collaboration amongst parties.

4. The Deal Mediator has no opinion.

The Deal Mediator is also known as a deal-facilitator because their primary task is to *facilitate* the closing of a deal but they are not there to offer their opinions. That is what the counsels are for. Each party may bring whomever they wish to assist them in the mediation be it an expert, a broker, their attorney, or any other party they may deem useful. Those persons are able to offer whatever advice and opinions they like but as a neutral, the mediator's job is not to offer opinions. The mediator is there to ensure that each side has all of the necessary information to allow them to create their own, well-informed opinions.

5. The Deal Mediator defers the decision-making to the mediating parties.

While the Deal Mediator is there to assist the parties in finalizing a transaction and walking away with a deal, he/she is not allowed to pressure or force either party into signing a deal against their will. The mediator is not allowed to make decisions for either side as that is the job of the mediating parties. What the mediator *will* do is to directly address to all parties

questions and concerns that they themselves will either fail or not dare to ask each other. As an observing third-party the mediator has the ability to bring up very difficult yet critical issues that are key to closing a good deal but that may have been left untouched by the parties for fear of jeopardizing a potential deal. The mediator has the power and ability to suggest creative solutions (without mandating that they be accepted) which the parties may have overlooked; they are able to give the parties a chance to consider options that they may not have generated alone. In this way, the ZOPA opens up, as the pie may be enlarged, and the likelihood of a successful deal increases. The main point here is that throughout the process, the power to resolve the dispute remains entirely in the hands of the parties. As the mediator cannot make final decisions for the parties, it is ultimately their responsibility to devise a solution and to agree to said solution.

Some of the tasks of a Deal Mediator, as outlined by Schonewille and Fox include:

– Managing the negotiation process;
– Ensuring that the deal is realized and on terms to which all parties involved can agree;
– Preventing and, if necessary, resolving, disputes during the negotiation process and at a later stage during the implementation of the negotiated outcome.

It is imperative to remember that while a Deal Mediator's tasks may sometimes be evaluative in nature, they are not to be involved in terms of substance. That must be left to the parties and their counsels. Furthermore, mediators can add value to a negotiation in which significant power differentials exist. In these cases, the mediator helps to neutralize the effects and to level the field for all involved parties. By helping the parties to identify their needs and interests rather than stall on their positions, the parties will be able to leave the room with a more beneficial, balanced and sustainable transaction.

Inevitably the question remains: Why do we need this person? Why should we pay this "third-party neutral" for a dispute that does not even exist? To these questions the answer according to Mr. Armes is quite simple: think of this person as your insurance policy. In his words, 'the single best way to resolve conflict is to prevent it' and that is exactly the purpose of the deal mediator. The costs associated with conflict resolution and any other alternatives are far higher than the cost of employing a deal mediator at the beginning stages. As the saying goes, 'time is money' therefore the less time spent in cleaning up a conflict, the more money is saved. Additionally, a good deal mediator will encourage open dialogue and help foster increased communication between the parties, thus leading to a stronger working relationship that will hopefully carry through the entire project. Therefore, although deal

mediation is not as widely-used as it perhaps could be, there is a strong case for its future usage in a variety of industries from construction to sports to healthcare and pharmaceuticals. Deal mediation is about more than merely closing a business deal- it is about making better deals that last longer and satisfy all of the parties' interests and let's face it, who can say no to that?

Bibliography

Armes, Murray. “The Concept of Dispute Avoidance”, article originally written for the King’s College Annual Conference 2011 and published by the DRBF in December 2011
Armes, Murray. "Cost Benefits of Using Dispute Boards." Proc. of 14th DRBF International Conference, Singapore. N.p.: n.p., 2014. N. pag. Print.

Barrett, Jerome T., and Joseph P. Barrett. *A history of alternative dispute resolution: the story of a political, cultural, and social movement.* San Francisco, CA: Jossey-Bass, 2004. *Alternative Dispute Resolution*. Web.
https://www.adr.gov/events/2009/may7-2009-materials-history.pdf

Construction Industry Institute. *SP23-3 Dispute Potential Index* . Web.
https://www.construction-institute.org/scriptcontent/more/sp23_3_more.cfm

CPR International Institute for Conflict Prevention & Resolution, *CPR Prevention Practice Materials.* 23 November 2010. Web. https://www.cpradr.org/news-publications/articles/2010-11-23-cpr-prevention-practice-materials

Fisher, Roger, William Ury, and Bruce Patton. *Getting to yes: negotiating an agreement without giving in*. London: RandomHouse Business , 2012. Print.

Hager L. Michael and Robert Pritchard.
Deal Mediation: How ADR Techniques Can Help Achieve Durable Agreements in the Global Markets.
http://www.atmos.be/files/How ADR techniques .... durable agreements in global markets.pdf

Massie, Graham. "Deal mediation – Neutral chairing for contract negotiation." *CEDR says...* N.p., 04 July 2016. Web. 24 Mar. 2017.
https://www.cedr.com/blog/deal mediation/

Menkel-Meadow, Carrie. "The History and Development of." *Völkerrechtsblog.* N.p., 01 July 2016. Web. 24 Mar. 2017.
http://voelkerrechtsblog.org/the-history-and-development-of-a-dr-alternativeappropriate-dispute-resolution/

Neiman, Phil. (2012). Guide to Deal Mediation. http://www.neimanmediation.com/wp-content/uploads/2012/05/Deal mediation-Guide-PDF1.pdf

Peppet, Scott R. (2004) Contract Formation in Imperfect Markets: Should We Use Mediators in Deals? Ohio State journal on Dispute Resolution.
http://lawweb.colorado.edu/profiles/pubpdfs/peppet/ohio.pdf

Salacuse, Jeswald W. “Mediation in International Business.” *Studies in International Mediation*. By Jacob Bercovitch. Palgrave Macmillan, 2002. 213-27. *International Mediation Institute*. Web.
https://imimediation.org/jeswald-salacuse-article

Schonewille, Manon and Fox, Kenneth H., "Chapter 5. Moving Beyond 'Just' a Deal, a Bad Deal or No Deal: How a Deal-Facilitator Engaged by the Parties as a 'Counsel to the Deal' Can Help Them Improve the Quality and Sustainability of the Outcome." In Arnold Ingen-Housz (ed.), *ADR in Business: Practice and Issues Across Countries and Cultures*, Vol. 2, (Wolters Kluwer, 2011) 81. Web: https://ssrn.com/abstract=2291102

Skivington, Dean. "Dispute Resolution Provisions: With A View To The 2012 London Olympic Games." Thesis. University of Westminster, 2010. Web. https://deanskivington.wordpress.com/2012/03/14/dispute-resolution-provisions-with-a-view-to-the-2012-london-olympic-games/

Steinberg, Gerald M. "Conflict Prevention and Mediation in the Jewish Tradition." *Jewish Political Studies Review* 12.3-4 (2000): n. pag. *Jerusalem Center for Public Affairs*. Web. http://jcpa.org/wp-content/uploads/2000/10/conflict-prevention.pdf