Understanding Mediation: Two sides to every story
by Murray Armes

The construction industry is often said to be confrontational and litigious. It is certainly a fertile breeding ground for disputes and these can arise from uncertainties in the inception, design, procurement and construction of projects.

The cost of resolving such disputes could arguably be put to better use in the projects themselves, or improving margins which, of itself; might help reduce disputes.

Unfortunately, the nature of construction means that the industry will probably never be entirely dispute free thus the next best thing is to try to minimise their impact. One way to do so is to adopt methods of dispute avoidance. Despite its increasing popularity, and the favourable testimonials from those that have used such methods, unfortunately they are still not widely used.

In the UK, and in other places around the world, statutory adjudication has been introduced as means to provide access to quick and cost-effective dispute resolution. In the UK at least, the process has become more and more legalised and consequently more protracted. It is therefore less economical and arguably more like arbitration without the benefits.

That means that most domestic construction disputes will probably end up with court proceedings or, in the case of international projects, in arbitration. Both of these legal processes take time and can cost disproportionally large sums of money. To mitigate against this (and if the dispute is in the UK courts) the judge may suggest, or even order, that the parties take part in ADR (Alternative Dispute Resolution). ADR generally means mediation. Indeed, the UK courts are so concerned about the costs of litigation and potential benefits of mediation, they may impose a cost penalty on parties who refuse to take part in it, even if they eventually win in court[1].

What is Mediation?

Mediation is a process by which parties engage in negotiation and resolution of their disputes with the assistance of a third party neutral: a mediator. The mediator is jointly appointed and paid for by the parties. The mediator does not decide the dispute but instead assists the parties in finding their own solutions. This is done through a number of meetings, possibly with the parties together and/or in private. A mediation is normally carried out in a day, which makes it quick and cost effective, although very complex mediations may take two or even three days. The process is (normally) voluntary, non-binding and without prejudice to future proceedings if the mediation fails. It has the benefit of being private and confidential and all the participants are generally asked to sign a confidentiality agreement before the mediation starts. This means the parties can explore possible solutions that they will not be held to unless and until a settlement agreement is signed at the end of the mediation. It means the parties are free to explore creative solutions and those that might lie outside the strict terms of their contractual relationship.

How does it work?

Mediation is very flexible and each one is slightly different (although some may be governed by institutional rules[2]). If possible, the mediator will assemble both parties together in one room for an initial plenary session where each party has an opportunity to make a short statement about its position and attitude to the mediation. In most cases the parties will return to their own private rooms after the plenary session. However, for construction related disputes; I have found it helpful to keep both parties in one room to have an extended joint meeting, not unlike a site meeting, where issues can be aired and discussed. Notwithstanding that, most parties will want to get back to their own rooms to discuss the issues between themselves and the mediator.

The mediator clearly cannot be with both parties at the same time, so he or she will shuttle between private rooms and have discussions with each of them. Those discussions with the mediator are private and he or she will not disclose anything said in the private meetings, to the other party, unless expressly instructed to do so.

The mediation is likely to go through at least three phases. The first, is exploration; where the parties communicate their positions to the mediator and develop discussion between themselves and where the parties can communicate their questions and positons via the mediator. Sometimes, and especially where experts are engaged, the mediator might suggest meetings between individuals or smaller groups from each party, to facilitate discussions about particular aspects of the dispute. The second is where reality is tested and risks assessed. For instance the mediator can assist in assessing the strengths or weaknesses of the case or an individual issue and in so doing can help in determining the financial risks in going forward to litigation or arbitration if the mediation fails. Most disputes in construction concern money and so the third part is negotiation where financial offers are made and considered and followed (normally) by counter offers. This part of the mediation can sometimes be long, tiring and frustrating. In fact a common feature of many commercial mediations is their length: they often take a day and that is usually quite a long day often not concluding until well into the evening.

Who is involved?

The parties will of course attend, however, it is important the representatives have authority to agree settlement on the day itself, or have direct access to the person who can give such authority (e.g. an insurer), who might not attend the mediation in person. The parties normally bring along a legal representative and as mentioned above may also bring along experts so that technical discussions can be had about particular aspects of the dispute with a view to narrowing the issue, or if not that, then at least getting a better understanding of the other party's views. Last but not least the mediator will attend. Sometimes in the case of a multi-party mediation it may also help for the mediator to be assisted by a co-mediator working in tandem, which can prevent one party having to wait a long time between visits from the mediator.

What to expect?

One characteristic of mediation is that you should expect the unexpected. One thing both parties must be in a position to do is to compromise. If either are intent on insisting what they consider to be their legal rights, then the mediation is unlikely to succeed. In this way mediation reflects normal life where in an argument there are always two sides to the story. Where compromise can bring about a solution, intransigence rarely does. One other thing parties should be prepared for is to have a degree of control over the outcome of their dispute – after all, it is the parties and not the mediator that makes the decisions. If the dispute progresses beyond mediation to be decided by a judge or tribunal, the parties will lose any control over the outcome. Mediation, therefore, is often the last stage of a dispute were the parties have any real control over the outcome.

Mediation as Dispute Avoidance?

Mediation is sometimes mistaken for dispute avoidance. However, mediations only take place after a dispute has crystallised and the parties have taken up positions, which enables them to negotiate as part of the process. Normally mediation should not be mixed with some other forms of dispute resolution. For example, it has been shown to be unwise to start an adjudication, then mediate part way through and then re-commence the adjudication with the same person acting as both adjudicator and mediator.

A subsequent court or tribunal may construe there to be a breach of natural justice[3].

However, a form of mediation that was tried a few years ago, came quite close to being a form of dispute avoidance and that was Contracted Mediation[4]. This required a mediator (or mediators) to be available to mediate disputes as they arose, in real time, on the project. Although not quite dispute avoidance it nonetheless allowed disputes to be dealt with during the project and before they escalated into something more serious. Although effective, the process has not been widely adopted. Mediation can be used if dispute avoidance fails and after, for instance, a dispute board decision has been rendered. In that case the FIDIC contracts[5] for example, anticipate a process of amicable settlement between the time the decision is rendered and the commencement of arbitration proceedings. FIDIC does not specify what method should be used for amicable settlement but mediation would appear to be highly suitable for that purpose.

Conclusion

Often, potential participants in mediation ask how successful it is? The fact is it can be very successful and many disputes do settle in mediation, If not on the day itself; possibly a few days or weeks later, after the parties have had time to take stock. An alternative answer to this question is that ALL mediations are successful, because even if the dispute is not settled, it has provided an opportunity for both parties to obtain a better understanding of both the other party's case and also that of their own.

Whatever the benefits mediation offers, it does remain a quick and relatively cost-effective way to resolve disputes – after all, there are always two sides to every story.

Murray Armes

__1__ Golden Eagle International (Group) Limited v. GR Investment Holdings Limited HCA 2032/2007, 25 June 2010; Halsey v Milton Keynes General NHS Trust, [2004] 1 WLR 3002; Hak Tung Alfred Tang v Bloomberg L.P. (a firm) and Another, HCA 198 2010, 16 July 2010 __2__ Examples include CEDR, the ICC, CIArb, LCIA, TecSA, etc __3__ Glencot Development & Design Co Ltd v Ben Barrett & Son (Contractors) Ltd, [2001] EWHC Technology 15 __4__ Developed by Resolex and used, or example, on the new Jersey Airport project __5__ Sub Clause 21.5 FIDIC Red Book, 2017