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Mediation

Construction Law Terms: A to Z

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M is for Mediation

What is mediation?

Mediation is a form of assisted negotiation. It is a private, informal process in which a neutral third party (the mediator) assists parties in negotiations aimed at resolving their dispute.

The framework

From 22 May 2024, a new pilot scheme introduced mandatory mediation as a standard procedural step in civil claims for a quantified sum allocated to the County Court's Small Claims track (generally, claims of less than £10,000).[1] A later stage will extend the requirement to the remaining types of Part 7 Small Claims. There is no broader statutory framework for mediation in England and Wales, but if the pilot is considered a success, it might, in time, be extended further.

In the meantime, more and more contracts are including multi-tiered dispute resolution processes which include mediation. By way of example, clause 9 of the JCT Design and Build Contract 2024[2] includes such a multi-tiered process and provides, at clause 9.2, that "*[s]ubject to Article 8 [which entitles a party to refer a dispute to adjudication], if a dispute or difference arises under this Contract which cannot be resolved by direct negotiations, each Party shall give serious consideration to any request by the other to refer the matter to mediation*".

The Technology and Construction Court ("**TCC**") Guide[3] also notes (at paragraph 7.1.1) that the court will "*provide encouragement*" to parties to use alternative dispute resolution ("**ADR**") and states (at paragraph 7.3.1) that "*[i]n an appropriate case, the court may indicate the type of ADR that it considers suitable, but the decision in this regard must be made by the parties. In most cases, the appropriate ADR procedure will be mediation*". If a party unreasonably refuses to participate in a mediation (or indeed any other form of ADR), the court can impose sanctions.[4]

In *Halsey -v- Milton Keynes General NHS Trust*,[5] the Court of Appeal held that it was inappropriate for the courts to compel unwilling parties to submit a dispute to ADR (such as mediation). It said that to do so would be a breach of a party's right to a fair trial.[6] But it did identify the following factors which may be relevant to the question of whether a party has unreasonably refused ADR (and ought therefore to be penalised in costs):

- the nature of the dispute;
- the merits of the case;
- the extent to which other settlement methods have been attempted;
- whether the costs of the ADR would be disproportionately high;

- whether any delay in setting up and attending the ADR would have been prejudicial; and
- whether the ADR had a reasonable prospect of success.

In a subsequent decision, in 2017,[7] the Court of Appeal noted that "*[t]he regime of sanctions and rewards has been introduced to incentivise parties to behave reasonably, and if they do not, the court's powers can be expected to be used to their disadvantage*". The Court went on to decide that "*[a] blank refusal to engage in any negotiating or mediation process, and the use of a vast asset base to seek to frustrate a claimant's attempts to reach a compromise solution should be marked by the use of the court's powers to discourage such conduct*".

More recently, at the end of 2023, the Court of Appeal was required to reconsider the question of whether the Court can order a stay of proceedings to allow parties to explore ADR.[8] The Court of Appeal decided that the Court could, in principle, make an order for parties to mediate (or explore other forms of ADR). However, the Court's decision does ***not*** make mediation (or any other form of ADR) compulsory in every case and whether such an order is appropriate will need to be considered on a case-by-case basis. However, the Court of Appeal declined to set out a fixed set of principles for lower courts to follow, stating "*it would be undesirable to provide a checklist or a score sheet for judges to operate*".

The Court of Appeal's judgment in *Northamber plc -v- Genee World Limited & Others*[9] provided helpful confirmation that (in accordance with previous caselaw): (i) a party's silence in the face of an offer to mediate was itself unreasonable;[10] and (ii) an unreasonable refusal to mediate (or silence in response to an offer to mediate) does not automatically attract a cost sanction, but it is a factor to take into account.

The mediators

There are two styles of mediation: evaluative and facilitative.

- In evaluative mediation, the mediator is asked to focus on the strengths and weaknesses of the parties' cases and to take a more proactive approach to narrow the issues. An evaluative mediator can also be asked to provide a non-binding opinion on the strengths of the case (although this is rare in practice).
- In facilitative mediation, rather than giving his own views on the strengths and weaknesses of the parties' cases, the mediator facilitates the parties to explore the issues between themselves.

In practice, parties typically prefer to choose a mediator experienced in their sector so they can take advantage of their expertise; they may ask the mediator to challenge the parties on the strengths and weaknesses of their respective cases to encourage them to narrow the issues.

Why mediate?

Mediation is essentially voluntary (either the parties agree to it through a contractual provision or will agree to a mediation on an ad hoc basis once the dispute has arisen). Consequently, it is a very flexible process. Parties can, for example, decide:

- who the mediator will be;
- when the mediation will take place (i.e. at what stage in proceedings);
- what format it will take;
- who will attend on their behalf (seniority of client representative(s) / solicitors / counsel / experts); and
- whether there will be multiple mediations (for example, if a mediation doesn't result in settlement before litigation/arbitration is started, the parties might agree to have a second mediation once the pleadings and exchange of evidence has been concluded).

The mediator is not a decision-maker. Rather, they are there to facilitate a settlement. As an independent third party, the mediator can challenge parties' positions but also assist in ensuring that relations between party representatives remain cordial on the day. In addition, because of

the voluntary nature of mediation, the parties retain control of the process and can consider more 'interesting' means of resolving the dispute, including remedies that a Tribunal couldn't award – for example, that any payment is made in agreed instalments, or permitting a contractor to carry out works instead of paying a monetary sum or giving the contractor the opportunity to tender for future projects.

A mediation is held on a without prejudice basis. Furthermore, mediation agreements will usually include express provisions about confidentiality. In the case of *Farm Assist Limited -v- The Secretary of State for the Environment, Food and Rural Affairs (no.2)*,[11] the court held that even if the agreement did not include an express confidentiality provision, a similar implied confidentiality would arise. However, in that case the court also decided that even if the parties agree express provisions about confidentiality, the court can override those provisions if it is in the interests of justice to do so.

The mediation process in practice

Once parties agree to mediate, they will first look to agree and appoint a mediator (or agree a nominating body, such as CEDR, to do so). When choosing a mediator, parties should bear in mind:

- Mediators have then own personalities and methods for performing their role. It is therefore inevitable that the choice of mediator will affect how the mediation progresses.
- The role of a (facilitative) mediator is very different to that of a decision-maker, such as an adjudicato. Therefore, a mediator needs a different skillset. Consequently, whilst many adjudicators also practice as mediators, it is not always the case that a good adjudicator will be a good mediator.

The mediator will then contact the parties to conclude a written mediation agreement setting out such things as when and where the mediation will take place, the procedure to be followed, rules about confidentiality, and responsibility for the mediator's fees.

The parties will usually exchange written 'position papers' setting out their respective positions on the issues in dispute. The parties will also agree (or at least try to agree) a joint bundle of documents for the mediator. In advance of the mediation, the mediator will usually call each of the parties to get a feel for each party's views, approach and attitude to the dispute (and what they hope to achieve at the mediation).

The mediation itself will typically start with a plenary session where all parties come together in the same room with the mediator. The mediator sets out the process for the day, which usually starts with a representative of each party presenting their case.[12] Thereafter, each party returns to its own private room. The mediator is then a go-between, holding private discussions with each party to try and narrow the issues and bring the dispute to a settlement. The mediator may also bring particular individuals from each side together for discussions on particular issues – for example, the parties' experts on that issue. If a settlement is reached, it will need to be recorded in writing and signed by the parties.

Some practical considerations

There is clearly a place for mediation in virtually any dispute. Mediation can be suitable for a wide range of disputes: whether they include 2 or 10 parties and whether low value or big multi-party disputes. However, to have the best chance of reaching an agreement the following factors should be considered:

1. ***Timing***: in each case there may be certain stages in the litigation when a mediation might prove more successful. Common examples are (i) at the close of pleadings, when parties (should) have a good understanding of each other's cases, but before they have incurred significant legal costs; or (ii) after the conclusion of evidential stages such as disclosure or expert reports, when the parties have more information available to them, but before they begin final preparations for, and incur the costs of, a final hearing.

2. ***Attendees***: typically solicitors and clients will attend. It is important that a member (or members) of the client team with understanding of the issues and authority to discuss and conclude a deal attend. It can sometimes, depending on the nature of the dispute, be helpful for factual and/or expert witnesses to attend or at least be on the end of the phone.
3. ***The mediator***: having the right mediator can make or break a mediation. It is important when choosing a mediator to gather as much information as you can about those you propose (or who are proposed by your opponent) so that you can make an informed decision.
4. ***Venue***: throughout the pandemic, mediations were held virtually. Some mediations continue to be held online (particularly if the dispute is smaller in scale) rather than in-person. However, an "in-person" mediation might be more likely to lead to a successful outcome, because it can enable the parties to meet, explain their frustrations, explore solutions and repair damaged relationships in way that is not easily replicated by virtual mediation.
5. ***Multiple mediations***: It is not uncommon (particularly in complex disputes, multi-party disputes or disputes where parties have particularly entrenched positions) for a first mediation to end without settlement. But all is not necessarily lost. If the mediation has nevertheless narrowed the issues, or revealed a willingness on both sides to continue discussions, then it might have been a useful exercise and further discussion, or a second (or third) mediation at an appropriate time might bring about a settlement.

Conclusion

The flexible nature of mediation means it can be a very effective process for parties looking to resolve a dispute without a trial. Indeed, a mediation will often be of at least some assistance, even if it doesn't finally resolve the dispute there and then (by narrowing the gap between the parties and leading to a further mediation or negotiation.

Parties to a dispute will need to make their own assessment about how useful a mediation might be. But, in doing so, will need to bear in mind the recent decisions, including *Churchill* and *Northamber* indicating the judiciary's support for mediation and the court's approach to a party it considers has acted ***unreasonably*** in refusing to participate in a mediation.

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**Content in this article is not legal advice.*

Footnotes

[1] *https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part51/practice-direction-51ze-small-claims-track-automatic-referral-to-mediation-pilot-scheme*

[2] This replicates the wording in the 2016 edition.

[3] "The Technology and Construction Court Guide", *https://www.judiciary.uk/wp-content/uploads/2022/10/14.128_The_Technology_and_Construction_Court_Guide_WEB.pdf.*

[4] Clause 7.4.1 of the TCC Guide.

[5] [2004] EWCA Civ 576.

[6] Article 6 of the European Convention of Human Rights.

[7] *OMV Petrom SA -v- Glencore International AG* [2017] EWCA Civ 195.

[8] *James Churchill -v- Merthyr Tydfil County Borough Council* [2023] EWCA Civ 1416.

[9] [2024] EWCA Civ 428.

[10] That party in fact compounded matters by refusing (in breach of a court order) to explain its refusal to mediate.

[11] [2009] EWHC 1102 (TCC).

[12] Consideration should be given as to who is most suitable to give such a presentation. It can be, but doesn't have to be, a party's legal representative. It could, instead, be the party's project or commercial manager responsible for the project who has been involved from the outset, or a member of senior management who has become involved only when the dispute has reached a particular stage.