

Modern mediation: much more than meeting in the middle



Iain Drummond

iain.drummond@shepwedd.co.uk

The whys and wherefores of modern mediation in the construction industry.

What is mediation?

In a nutshell, mediation is a facilitated negotiation; hardly a new concept. Mediation tended at one time to be perceived as the soft option or simply as a horse trade without reference to rights and remedies. In our experience, these preconceptions are misconceived and out of date.

Why should I mediate?

Mediation allows parties to retain control over the outcome of a dispute rather than relinquishing the decision making responsibility to a third party judge, arbitrator or adjudicator. Far from a “split the difference approach”, mediation is an opportunity to present your (well thought out) position and to realistically analyse the position of the other side. Commonly the party who realises their position is weaker during the mediation process will give more ground so if you are sure your case is strong, mediation can be a good forum to demonstrate that and potentially settle in your favour. That said, resolution will be impossible unless both parties are prepared to offer reasonable compromises, reflecting the relative strength of their bargaining positions.

Being in control of the decision, and the flexibility that affords, means parties are more likely to get a result which delivers what they need to conclude the dispute. For example, there are situations where an explanation or apology from the other side can go a long way to unlocking a disagreement (usually alongside some cold hard cash). Alternatively, settlement at mediation may include agreement that one party undertake repair works (with a fall back payment if repairs are not done to a satisfactory standard within the agreed timescale), or include the

promise of future work (subject to procurement rules), or information and document provision for example. Those sorts of options are not available via more traditional dispute resolution processes.

Mediation compares favourably in terms of costs and the length of time that the process takes, particularly as compared with litigation or arbitration. Another advantage of mediation is that it is a confidential process. Mediations are conducted under confidentiality agreements meaning that discussions are on an entirely without-prejudice basis. If the mediation does not conclude with a settlement, both parties can leave without having impacted their position in any parallel formal process. If settlement is reached, the terms of settlement will also be confidential.

When should I propose mediation?

Mediation is most effective at a stage when the dispute has properly crystallised and parties have reached at least a preliminary view on the likely level of their exposure. This is because too many unknown factors are likely to cause a difficulty at mediation with parties being unable to effectively quantify the risks and having difficulty securing board approval for settlement at an appropriate level without detailed consideration of the risks and likely claim outcomes. It is also advisable to propose mediation at a point when both parties are prepared to be realistic about the commercial realities of resolving their differences. Both sides will need to offer compromises to achieve resolution and if one party is not prepared to budge then the likelihood of achieving a settlement at mediation is slim.



Who should be involved?

Identifying the right mediator is key and may be the first thing, other than being willing to mediate, that parties have reached agreement on for a long time. An effective mediator will make the process run smoothly and ultimately make it more likely that a settlement is achieved. It is often the case that one side or the other will have experience of a good mediator and make a recommendation. If you are on the receiving end of such a recommendation, don't automatically discount it simply because it is being offered by the other side. The priority should be appointing a suitable and experienced mediator, whether proposed by the other side or not.

It is unnecessary for the mediator to have an in depth knowledge of the construction industry, but a demonstrable understanding is beneficial if you are dealing with a highly complex area. There are a number of solicitors, advocates and barristers, for example, with a solid grounding in construction disputes who have also built up strong mediation practices and they can be a good option. Another important point to consider is whether an assistant mediator would be helpful. Some mediators bring along an assistant as a matter of course although that is not strictly necessary in a two party dispute. Where you are dealing with a multi-party dispute we would recommend the mediator has an assistant to help keep up good communication throughout the day and to herd the parties into any joint sessions without wasting time.

Parties should give careful thought to who should attend the mediation. It is usually helpful to have those at the heart of the dispute involved and also relevant experts available either in person or by telephone. All attendees must be prepared to engage in the process. A single aggressive and unengaged character can change the whole mood of the mediation. Everyone needs to be prepared to listen to the other side, which can be hard for those at the centre of the dispute who may not like what they hear from the other side.

Mediation can be used even where parties' relationship is strained. Use of staggered arrival times and avoiding a plenary session can keep parties separate at the outset but as the day progresses, hopefully the mediator will deliver some helpful messages and parties may agree to come together. Coming together face to face can be a powerful step forward (or it may backfire spectacularly if the warning about an aggressive or unengaged individual is not heeded!).

It is vital that both sides come to the mediation with someone who has authority to settle. Experienced mediators will check appropriate authority is in place prior to mediating. As part of the preparations for mediation, parties ought to give serious consideration to the range of possible outcomes and settlements and seek advance

authority within their organisation to settle within that range.

Where should mediation take place?

Sometimes parties will want a neutral venue to avoid the perception of one side being on "home turf", but that will cost each party more. Does hosting the mediation in one or the other party's solicitor's office actually confer any real advantage, or is it just a good way of keeping the costs down? Timing is important - some venues may have a limit on how late the accommodation is available which is no use bearing in mind that many mediations continue late into the night. When making mediation arrangements, don't underestimate how important it is to keep everyone well fed with frequent injections of caffeine to keep physical and mental energy levels up.

How should I approach mediation?

Preliminary matters typically include a conference call with the other parties and the mediator, as well as the preparation and exchange of position papers and the mediation bundle. These are predominantly for the benefit of the mediator as parties will be familiar with the issues by this stage. Ideally statements should be brief and identify broadly what parties are seeking to achieve but without revealing your negotiating position.

On the day of mediation:

- Arrive on time.
- Make the most of the opening statements: focus on delivering your key messages in a non-aggressive manner.
- During the mediation, focus on your side's desired outcomes, rather than on simply restating and defending your position to the death.
- Do not lose sight of any non-financial elements during the mediation to avoid any deal breakers in the details emerging later on.
- At the end of the mediation, the settlement, if achieved, will need to be documented. Parties should have prepared a draft outline agreement in advance, to be finalised and signed following agreement.

Mediation is not appropriate for every dispute and we do not recommend mediation simply as a matter of course, but we do always consider it as an option. In our experience, mediation can be a very successful option for resolving construction disputes.

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