Technical

What is Mediation?

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Introduction

1. Disputes in construction are a common occurrence and people's experience of litigation, arbitration and adjudication is that they are time-consuming and expensive. The outcomes from these methods of dispute resolution are often considered to be unjust, as one party wins outright and the other party loses outright. Disputes are rarely black and white, especially in the construction industry where there are too many variables.
2. The adjudicative process of arbitration/litigation/adjudication is one person's view of who is right or wrong and cannot come to a win-win solution for all parties. A possible alternative to these processes is mediation. In this Article, I consider what the mediation process is and how it can be used to resolve disputes.

What is Mediation?

3. Firstly, a definition of mediation is as follows:

   "Mediation is an opportunity to resolve a dispute without resorting to formal procedures such as court. The process is usually voluntary and is facilitated by an independent third party, whose role is to help the parties develop solutions in a confidential environment." (Mantle, M 2011, p.3)

4. Mediation can be facilitative, where the Mediator tries to aid the parties in reaching a settlement, or evaluative, where the third party comments on the matters in dispute or makes recommendations as to the outcome. In the UK, the facilitative style is referred to as mediation and the term *"conciliation"* is reserved for the evaluative process.
5. Mediation usually starts off as purely facilitative but may become evaluative when trying to reach a settlement. The boundary between the two terms is clear in theory, but not necessarily in practice.
6. The Technology and Construction Court (TCC) encourages parties to use alternative dispute resolution procedures and, where appropriate, facilitates such procedures. The Pre-Action Protocol for Construction and Engineering Disputes applies to all construction and engineering disputes and actively encourages parties to meet without prejudice at least once before the proceedings are commenced[1].

1 Section 2.4.3, TCC Guide and paragraph 9.1, Protocol.

What are the Key Principles of Mediation?

7. There is no definitive number of principles or benefits to mediation and commentators often differ on the sanctity of some of them.
   The following are principles I believe should be considered:

   - Voluntary (1).
   - Confidential (2).
   - Impartial (3).
   - Interest Focused (4).
   - Mutual Gain (5).

Voluntary (1).

8. The parties can leave mediation at any time and it is up to them to decide the terms of any agreement reached. In the United Kingdom, the courts do not have the power to insist on mediation, although the courts in England can penalise a party for failing to mediate through cost awards. This was confirmed in the case of *Halsey v Milton Keynes General NHS Trust (2004)*, which laid down the following two key principles:

"The first was that while the court has a duty to encourage the use of ADR, any attempt to make it compulsory would be in violation of Art 6 of the European Convention on Human Rights.

The second principle established that if parties have refused to consider ADR, the court may award costs against them. However, this came with the proviso that it is up to the losing party to show that the refusal to mediate by the winner was unreasonable." (Mantle, M 2011, p.15)

9. In 2011 the position was that a Contractor who wanted to claim loss and expense *"may make an application"* to the Employer for loss and expense. This has been changed so a Contractor who wants to claim loss and expense *"shall notify"* the Employer under JCT 2016 (JCT DB 4.19.2).

"A party who refuses even to consider whether a case is suitable for ADR is always at risk of an adverse finding at the costs stage of litigation, and particularly so where the court has made an order requiring the parties to consider ADR." (Halsey v Milton Keynes General NHS Trust (2004) para 33)

Confidential (2)

10. Mediation is confidential and parties usually sign an agreement that confirms this confidentiality. The principle of confidentiality allows all parties to openly discuss what has gone wrong and to try to resolve the dispute. Often in arbitrations, a party's position will become entrenched and hence often refuses to deviate due to a fear of being seen as weak. Some parties are concerned that revealing information in a mediation, which is not ultimately successful, will lead to the other party using it at a later date. In response to this, the parties firstly choose what they want to discuss in the mediation. Secondly everything they say to the Mediator in the private sessions remains confidential, unless either party authorises the Mediator to pass information to the other party.
11. It should also be noted that:

"As confidentiality is integral to the mediation process, a confidentiality clause is likely to be implied in the absence of an express confidentiality clause (Farm Assist Ltd v Secretary of State for Environment, Food and Rural Affairs (2009)..." (Practical Law, 2017)

Impartial (3)

12. Impartiality of the Mediator is a cornerstone of the mediation process. The Mediator acts as a facilitator to the parties in dispute and he does not take sides or give advice. Neither party has to prove anything to the Mediator, as he does not decide who is right or wrong. Compare this to an Adjudicator or Arbitrator, who has to decide who wins on the evidence before him.

Interest Focused (4)

13. Parties often become entrenched in their positions. Mediation helps parties to reconsider what the real issues are and what their real interests are; what they really want to achieve and not just what they have said they want to achieve.

Mutual Gain (5)

14. One of the most satisfying things about mediation is that it allows the possibility of both parties' interests being met and maybe even enhanced. It is not like arbitration where there is a winner and a loser.

What are the Advantages of Mediation?

15. The table below gives a summary of the further advantages:

(Based on Chapter 4, Mantle, M. 2011 and Chapter 3 Richbell, D. 2008)

Time:	• Organised in a short period of time. • Length of mediation is usually only one day. • When people know they have, say, one day to resolve matters, they usually do.
Cost:	• Costs are known in advance and more certain. • Costs in most cases are less than those for arbitration and other formal processes. • Lost opportunity costs are minimised.
Control:	• Control over when the mediation takes place. • The parties retain control of the outcome. • The terms of the Settlement Agreement can be ones which no Arbitrator or court could dictate.
Ongoing Relationship:	• Mediation offers the opportunity for broken relationships to start to be restored and for ongoing relationships to be strengthened.
"Day in Court":	• Arbitration and court proceedings often ask closed questions with *"yes"* and *"no"* answers. • Mediation is an opportunity for both parties to have their say.
Commercial v Legal:	• In arbitration, disputes are turned into legal disputes and not commercial disputes. • Mediation allows a dispute to remain commercial.

What are the Disadvantages?

16. The table below gives a summary of the disadvantages:

(Based on Chapter 3 Richbell, D. 2008)

Another Layer of Cost:	It is sometimes said that mediation causes *"yet another layer of cost"* and this is a reason to avoid it.
Fear that Mediation will expose the Client's Hand or Strategy:	Clients often fear that mediation will put them at a disadvantage later on. Mediation is without prejudice and most key information is discussed in private sessions.
The Mediator cannot Order Disclosure:	The extent of disclosure can be agreed between the parties.

When is Mediation Suitable?

17. In short, mediation is suitable for resolving most disputes. Mediation can take all the factors into account and settlements can be reached anywhere along the spectrum, from total win to total loss.
18. Mediation can also enable settlements that go far beyond the limited powers of an Arbitrator, which is usually the awarding of money. The deal is whatever the parties agree, as long as it is legal.

When is Mediation Not Suitable?

19. There are times when mediation is not suitable. In *Halsey v Milton Keynes General NHS Trust*, the Court of Appeal considered disputes where mediation would be unsuitable, these being when:

    - A point of law needs to be resolved.
    - Injunctive relief is necessary.
    - Allegations of fraud or other commercial disreputable conduct is suspected.

20. Other examples of disputes where mediation may be unsuitable are when:

- There are effective ongoing negotiations or attempts to settle.
- There is a need for a precedent.
- A Court Order is required.
- There is a clear indication that mediation has no realistic prospect of success (these cases are rare).

Summary

21. Mediation is a voluntary Alternative Dispute Resolution method that allows parties to resolve their disputes in a confidential manner, which is interest focused, and allows mutual gain with an impartial Mediator facilitating an agreement. There are numerous advantages to mediation such as time, cost and control etc. but disadvantages include another layer of cost, fear that mediation exposes a Client's hand or strategy and no disclosure. Mediation is not suitable in every dispute, especially where a point of law needs to be resolved or injunctive relief is necessary.
22. My next Article will look at the mediation process.

Note: This article is based on the author's own research.

Bibliography

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Cases

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