
Mediation

David Brown, director at Currie & Brown's Dubai office, examines mediation and its advantages in dealing with contractual disputes in the construction industry.

Contracts within the construction sector are by their very nature dense, lengthy and complex. But they are also the crucial keystones of any project. They lay out expectations and responsibilities for all involved, bringing certainty and order.

But, despite the clarity and precision these documents are designed to provide, things sometimes can and do go wrong. Different interpretations of contract clauses can become full-blown disputes. If these cases end up in court, then the whole process of finding a resolution can become wearing, time-consuming and expensive for all involved.

If at all possible, it makes sense to find a way of dealing with the problem in less formal and confrontational ways through alternative dispute resolution (ADR). One increasingly popular way of doing this is by mediation, which allows for an imaginative and creative approach to problem solving.

Mediation also encourages dialogue, can speed procedures up, brings costs down and avoids the complexity of having to resort to court action in a possible different and perhaps unfamiliar jurisdiction.

It is often used, quite sensibly, as a first-pass solution to finding a remedy that is acceptable to both sides. If it fails, then more formal procedures such as arbitration or the courts system can be employed.

The use of mediation has grown significantly in the UK following the introduction of new civil procedure rules (CPR) in 1999, a move that made this approach an integral part of the pre-trial process. It is increasingly recommended by the courts as a method of resolution and both the UK government and the European Union recognise its value and believe it should be embraced more.

In general, mediation is voluntary and can only take place after the parties concerned have agreed they will enter the process. It is also non-binding (to the point of agreement), carried out without prejudice in the UK, and as confidential as it legally can be.

Of course, the mediator's role is critical. His or her task is to work in a non-judgmental way, coaxing the different sides along in their negotiations with each other and steering them towards a mutually acceptable outcome.

How does mediation work in practice? In general, all parties will meet for an opening plenary session chaired by the mediator, who will explain what will happen and then invite formal opening statements from each side to be given without interruption.

The parties then move into private sessions, sometimes called caucuses, with the mediator moving between them carrying requests for information and finally, it is hoped, an offer of settlement that can be agreed.

The aim is to achieve an outcome that provides a win-win solution for both sides. Parties should not be steered, or steer themselves, towards a result that one of them cannot live with. That will not sustain a workable solution.

The process should also not be too costly. One of the main reasons for using mediation is to avoid the high fees associated with court judgments and other more formal methods of dispute resolution.

This is not to say that the process can always be carried out without using lawyers and conventional methodologies. Sometimes parties feel more comfortable bringing legal advisors into the discussions, though doing this can create additional formalities and reduce speed and flexibility.

There are a number of different models for seeking an agreed outcome, each with its own advantages and drawbacks. The one most often found in the construction sector is facilitative mediation, the method imparted by the Royal Institution of Chartered Surveyors (RICS) in training seminars.

This facilitative approach involves the mediator using tools rather than personally suggesting practical ways of coming to a resolution. Instead, he or she will encourage the different sides to come up with their own ideas. The extra costs of taking a different and more formal approach may be highlighted, so helping to concentrate minds on reaching a settlement quickly.

Facilitative mediation also allows the different parties to be innovative. This might mean trying to renew the relationship, for example, or offering future work in return for payment of the amounts due.

Allowing those involved to work out their own solutions also de-dramatises the conflict element of a dispute and helps them to feel they have gained something from the exercise.

One of the biggest advantages offered by mediation is that it encourages each party to hear and appreciate the other's point of view. The great Scottish poet Robert Burns summed this up brilliantly as "to see ourselves as others see us."

That is, to paraphrase Burns further, the gift mediation gives us. It can even save a commercial relationship rather than destroying it. And for many in the construction business, that might be the most important outcome of all.