

MEDIATION IN A MULTI-TIERED WORLD

ROSEMARY JACKSON QC AND ELIZABETH REPPER – KEATING CHAMBERS

Once upon a time, dispute resolution was a straightforward game. You looked at the contract to see if there was an arbitration clause, and moved straight to litigation or arbitration without passing Go. Then came adjudication, introduced into the construction industry in 1996 as a game-changer allowing quick and easy resolution of problems in 28 or 42 days. As adjudication was hijacked by the lawyers to become an expensive game of ambush (those referrals always come just as you are about to depart on Christmas or summer holidays), followed by a trip to court for a disputed enforcement to hear the lawyers argue about the number of angels that can dance on the head of a pin, along came mediation.

It is perhaps not surprising, given the huge legal costs involved in the resolution of complex construction disputes, that the construction industry has been an early and enthusiastic adopter of mediation.

Why should we go to mediation?

Mediation can bring early resolution to a dispute. Where relationships have broken down to such an extent that completion of a project is threatened, a mediator can be brought in to assist the parties in agreeing a mutually acceptable plan – which may include varying terms of an existing contract or relinquishing existing claims – so that the job can be finished.

Early resolution of a dispute can also bring other benefits. Parties may be able to repair or maintain their existing business or personal relationship or ensure that, as an outstanding claim has been put to bed, they can concentrate their human and financial resources on moving their business forward.

Other benefits of mediation include maintaining the confidentiality of the fact of the dispute (which may attract bad publicity for both parties) and its outcome (which may assist if a party has completed a number of similar projects). Mediation also allows parties to agree practical solutions to problems, such as an agreement to remediate defects, which a court or arbitrator would not have the power to order.

In construction cases, parties often welcome the opportunity to have a multi-party mediation with the aim of resolving a number of connected disputes at once. Getting the Employer, Contractor, Sub-contractor, professionals and insurers together creates a cost-effective environment for thrashing out and resolving disputes.

Finally, and perhaps most importantly, costs. The authors have recently conducted several mediations where the legal and expert witness costs of taking complex disputes all the way to trial/arbitration hearing have been estimated at £40m between the parties. Pursuing a claim to trial is likely to leave a successful party with a bill for irrecoverable costs. The loser may face wipe out.

What if we don't want to mediate?

The courts have added a further financial incentive to consider using mediation, in the form of a costs sanction. It is a long established principle that even if a party is successful, it can be deprived of all or part of its costs if it has unreasonably refused to participate in alternative dispute resolution (“ADR”).¹ In a recent case, the principle was extended so that a defendant's silence in failing to respond to two invitations to mediate was held to be unreasonable and lead to the imposition of a severe costs penalty.²

The approach of the courts is to support the use of mediation. It has been emphasised that parties should engage with each other in considering the suitability of mediation, rather than waiting for encouragement from the court to do so, and should be pragmatic when they receive an offer to participate in mediation. The message is that litigants must engage with a serious invitation to participate in mediation (even if they have reasons which might justify a refusal); adopt some other form of ADR or participate in ADR at some other time in the litigation.³

In early 2014, a defendant was ordered to pay the claimant's costs on an indemnity basis because it ignored and refused the claimant's repeated offers to mediate. The court made clear that it is no excuse that the claim does not naturally provide any middle ground or that a party believes it has a watertight case.⁴ Further, in October 2014, the TCC held that – overall – a party had unreasonably refused to mediate, even though it reasonably held the view that it had a strong case (although for other reasons no costs sanction was imposed)⁵.

What if my contract includes a mediation clause?

Many construction contracts, both standard form and bespoke, now include multi-tiered dispute resolution clauses, often escalating from discussions at one or two managerial levels, followed by mediation, then on to arbitration or litigation, with adjudication as an option at any stage.

¹ *Halsey v Milton Keynes General* [2004] EWCA Civ 576.

² *PGF II SA v OMFS Company 1 Ltd* [2013] EWCA Civ 1288

³ *ibid*

⁴ *Garritt-Critchley v Ronnan* [2014] EWHC 1774 (Ch)

⁵ *Northrop Grumman Mission Systems Europe Limited v BAE Systems (Al Diriyah C4) Limited* [2014] EWHC 3148

The JCT standard form contracts contain mediation clauses.

The majority of the JCT mediation clauses say (subject to the Article of the contract that says either party may refer a dispute to adjudication) that if a dispute or difference arises under the 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. Clause 9.1 of the IC 2011 and clause 7.1 of the MW 11 are examples of such clauses.

The JCT Major Project Forms contain mediation clauses which are more prescriptive. For example, clause 41.1 of MP11 says that should any dispute or difference arise between the parties in relation to the project, where the parties agree to do so, the dispute or difference may be submitted to mediation in accordance with the provisions of clause 42. Clause 42 permits either party to identify to the other a dispute or difference as being a matter he considers to be capable of resolution by mediation and, upon being requested to do so, the other party has 7 days to indicate whether or not he consents to participate in a mediation with a view to resolving the dispute. Clause 42 goes on to say that the objective is “to reach a binding agreement in resolution of the dispute” and further that the mediator, or selection method for the mediator, shall be determined by agreement between the parties. Clauses 44 and 45 of MPSub 11 contain the same wording.

None of these clauses are worded so as to force anyone to mediate, and no penalties are provided for a failure to engage. The clauses nudge the parties in the direction of mediation in a spirit of good faith and co-operation. The inclusion of a mediation clause may help to infuse the entire project with a partnering philosophy in which problem-solving is preferred over combat. Frequently, however, standard form JCT wording is amended to incorporate different and more complicated multi-tier clauses, or to incorporate a project-wide ADR scheme. It is essential to look carefully at the wording, to see whether, by accident or design, it makes compulsory mediation a pre-requisite to formal resolution procedures, and provides a means by which an uncooperative party can delay or challenge the commencement of litigation or arbitration.

What are the courts saying about contractual obligations to mediate?

No JCT, or other, mediation clause can prevent a party asserting any statutory right it has to refer a dispute to adjudication. Even if a party does adjudicate, however, they can still agree to mediate before, concurrently or afterwards.

Often a question arises about whether, as a result of a mediation clause, a party must mediate before litigating or arbitrating. Although the answer depends on the wording of each contract, two recent cases on this point are of general interest.

In the first case the contract said that the parties “undertook”, prior to a reference to arbitration, to seek to have a dispute resolved amicably by mediation. The court agreed that this was intended to create an enforceable obligation to mediate, as an essential precondition to commencing arbitration. However, for the clause to be enforceable, the parties’ rights had to be defined with sufficient certainty. Although the clause contained an undertaking to seek to have the dispute resolved amicably, no provision was made for how that was to be done – there was no defined mediation process and no reference to the services of a specific mediation provider. The clause was “not apt to create an enforceable obligation to commence or participate in a mediation process”.⁶ The limited obligation on one party merely to invite the other to join in an ad hoc mediation, was held to be “so uncertain so as to render it impossible of enforcement in the absence of some defined mediation process.”

The second case concerned a clause that said that if there is a dispute, the parties “shall first seek to resolve the dispute or claim by friendly discussion...If no solution can be arrived at...for a continuous period of 4 (four) weeks then the non-defaulting party can invoke the arbitration clause...”. The question was whether this was condition precedent to a reference to arbitration.⁷

It might be thought that, if nothing else, the uncertainty as to whether the discussions had to go on day and night until the continuous period was exhausted (along with the participants!) would be enough to render the clause unenforceable. On the contrary, this clause was enforceable because the agreement was neither incomplete nor uncertain: the obligation to resolve a dispute by friendly discussion in good faith had an identifiable standard, namely fair, honest and genuine discussions aimed at resolving the dispute. Furthermore, enforcement was in the public interest since commercial parties expected enforcement of the obligations they had freely undertaken and because the object of the agreement was to avoid what otherwise might be an expensive and time consuming arbitration.

Where does this leave the JCT mediation clauses?

The JCT mediation clauses requiring each party to give “serious consideration” to any request by the other to refer the matter to mediation are not prescriptive enough to create a binding obligation to mediate either before litigating or arbitrating or at all. The parties only agree

⁶ *Sul America v Enesa Engenharia* [2012] EWCA Civ 638

⁷ *Emirates Trading Agency LLC v Prime Mineral Exports Private Limited* [2014] EWHC 2104 (Comm)



JCTNEWS

8

to give “serious consideration” to a request to mediate. They do not actually agree to mediate and, even if they did, no procedure for mediating is set out at all.

Whilst the mediation clauses in the Major Projects Forms referred to above are more detailed, further agreement between the parties is still needed before there is an agreement to mediate. The additional detail only deals with the process for obtaining consent to participate in a mediation. Also, again, there is no procedure set out for mediating. Instead, further agreement is required about the selection of a mediator.

However, although this means that a party is contractually free to refuse mediation under these JCT mediation clauses, in doing so it must firmly have in mind both the attitude of the courts as discussed above and the significant risk that such a refusal may, in any proceedings,

result in it being penalised in costs. Similarly, it must follow that a party may be at risk of a costs sanction if its contract says it must give “serious consideration” to a request to mediate, but it fails to do so.

It is suggested that any amendments to the JCT wording, or bespoke multi-tier contract wording, be considered very carefully before entering into contracts. If it is intended to, and clearly does, incorporate an enforceable obligation to engage in a mediation before litigation or arbitration can be commenced, then everyone knows where they stand. What must be avoided is a situation in which nobody knows whether they are permitted to escalate their dispute. A trip to court to force a party to mediate will almost certainly damage relations further, such that a subsequent mediation would be far from the consensual, co-operative process intended by the contract.