Fenwick Elliott
The construction & energy law specialists

Issue 10 April 2012

Welcome to the April edition of ***Insight***, Fenwick Elliott's newsletter which provides practical information on topical issues affecting the building, engineering and energy sectors.

In this issue find out some practical tips on navigating the mediation process

Insight

Navigating the mediation process

Statistics show that between 80-90% of mediations result in settlement, either on the day of the mediation itself or shortly afterwards. Mediation is capable of providing a swift and cost effective resolution to any dispute and can provide high levels of satisfaction for the parties, but there are also some costs pitfalls which may trap the unwary.

This eighth issue of Insight provides practical advice to potential parties to mediation on (i) whether mediation is the appropriate forum for their dispute (ii) when to mediate (iii) how to navigate mediation costs and (iv) how to avoid the adverse costs awards that are being awarded with increasing frequency by the courts if parties unreasonably refuse to mediate.

What is mediation?

Before we delve deeper into the practical side of things, what is mediation?

Mediation is a process in which parties identify the issues that are in dispute between them and explore possible means for resolution with a view to achieving full and final settlement of the dispute. A suitably qualified and experienced third party (who will more often than not be a lawyer) presides over the process and it is his or her job to assist the parties in reaching a consensus.

Mediation is voluntary, non-binding, private, and control of the outcome rests with the parties. For these reasons, it is featuring in construction disputes (as well as other forms of dispute) with increasing regularity and is fast becoming an indispensable tool for those seeking to resolve construction disputes.

Should you mediate?

Leaving aside the opportunity afforded by mediation to settle your dispute, there are probably more reasons to mediate than not to mediate.

Pros

Possible preservation of business relationships

Mediation can maintain business relationships as the process is collaborative and the overriding majority of mediations are conducted at the parties' own initiative. The focus is purely on the parties' interests and needs and the parties are guided towards settlement. Because of this, the prospects of maintaining your business relationships are increased.

Cost savings

Where mediation is successful, the costs savings can be considerable. Studies have shown that parties who successfully mediate can expect to save between £25,000 and £300,000 when the likely costs of litigating the same dispute are compared[1]. As a general rule, the costs savings tend to be proportionate to the sum in dispute. The higher the quantum of your claim therefore, the more you stand to save.

Management time savings

The main reason costs savings arise is because less time is spent on the dispute by the parties. The average mediation lasts 1-2 days, whereas it can take years to reach the court room or arbitral tribunal by which stage countless hours of management time will have been spent.

Confidentiality

Mediation proceedings are confidential, whereas litigation is conducted in the public domain and arbitration may become public on any appeal[2]. If privacy is important to you, mediation may be a good option.

Cons

Any barriers that may exist to a party's willingness to mediate tend to result from the parties' perception of how they will be viewed (i) by consenting to mediation and (ii) during the mediation process itself.

Perception of weakness /admission of liability

Some parties are concerned that by agreeing to mediate, their opponent will regard them as having a weak case and/or believe they are admitting liability. This was probably a valid concern in the 1990s but the courts now lean heavily

1 See 'Mediating Construction Disputes: An Evaluation of Existing Practice' by Nicholas Gould, Claire King and Philip Britton (http://www.fenwickelliott.co.uk/mediating-construction-disputes-download)
2 See Coulson J in Fitzroy Robinson Limited –v Mentmore Towers Limited [2009] EWHC 1552 (TCC)

Insight

in favour of mediation. Indeed, parties who refuse to mediate today without a very good reason risk facing the consequences in costs, as will be seen below.

Pressure to settle

Parties are frequently concerned that there will be overbearing pressure on them to settle. Whilst this might be the case as the day goes on (parties may become weary and change their mindset, or discover the merits of their case are not as strong as they once thought), you only settle at mediation if you want to. The mediator cannot and will not coerce you into settlement.

When should you mediate?

So you have decided to mediate. What you should then consider is when to mediate.

Ultimately, you will want your mediation to be successful. The three stages at which mediation is most likely to succeed are: (i) following exchange of pleadings (ii) during (or as a result of) disclosure and (iii) shortly before trial[3].

One good time to mediate is following exchange of expert's reports (unless your expert report is unfavourable in which case you should probably mediate following disclosure or exchange of witness evidence). By this stage, you and your opponent should have a good understanding of the issues in dispute which might serve to increase the prospects of settlement on the day[4].

Alternatively, you might choose to mediate on close of pleadings, which will provide greater scope for savings of legal fees and management time. It is important to note however that a dispute should only be mediated this early if both parties have a good understanding of the issues in dispute. If there is no such understanding, settlement will be difficult to achieve as new issues may emerge on the day which might preclude settlement.

Mediation costs

If your dispute proceeds to trial, you will not generally be able to recover the costs of any mediation convened prior to the issue of proceedings, even if you are successful at trial. This is because such costs are not usually regarded as "costs incidental to the proceedings" for the purposes of section 51 of the Supreme Court Act 1951 ("the Act").

There are however a couple of exceptions.

The first is costs incurred during the Pre-Action Protocol for Construction and Engineering Disputes ("the Protocol"). If mediation is treated by the parties as being an integral part of the without prejudice meeting required by the Protocol then these costs might be regarded as being "incidental to the proceedings" under the Act.

The second is work carried out in relation to the Protocol which is subsequently used when the dispute is litigated. For example, if you incur the costs of an expert's report provided for the purposes of mediation which you later use in court proceedings.

A word of warning: as a standard, mediation agreements contain a clause which requires each party to bear their own costs of the mediation. So be careful not to agree to such a clause if you think there might be scope for you to raise an argument at a later date that some of your mediation costs are "incidental to proceedings" under the Act.

Possible costs consequences if you refuse to mediate

As an exception to the general rule that costs should follow the event, if you decline to mediate and succeed at trial you may nevertheless be deprived of your costs if the court considers your refusal to mediate was unreasonable.

The reason for this is because the court wholeheartedly endorses mediation and it will usually expect commercial parties, especially those who retain experienced lawyers to reach an accommodation at mediation.

If you seek to argue that any mediation would not be successful because, for example, expert evidence was not available or the stance taken by your opponent (often in light of experience gained during an unconnected dispute) would prevent a successful mediation, you may find you are penalised in costs as the courts tend to have little sympathy for such arguments.

The most likely circumstance under which you might reasonably refuse mediation is if information essential to the mediation is (i) requested by you and not provided by your opponent and (ii) the absence of that information might affect your view of the merits of your opponent's case.

Alternatively, you might gain the sympathy of the court if you refused to mediate in circumstances where

3 See (http://www.fenwickelliott.co.uk/mediating-construction-disputes-download).
4 See (http://www.fenwickelliott.co.uk/mediating-construction-disputes-download).

Insight

you were joined to the proceedings late in the day and you were invited by your opponent to mediate at very short notice leaving you with little or no time to prepare properly.

The key point if you do refuse mediation is that when deciding on any adverse costs award, the court will examine the reasonableness of that stance at the time the hypothetical mediation would have taken place. You should therefore ensure that if any information essential to the mediation is not available, you request it immediately. If the information is subsequently provided, you should be prepared to mediate at reasonably short notice provided of course that doing so would not place you at a material disadvantage.

If you consider you have a valid reason to object to mediation, you should record it in writing as soon as possible after the mediation request. The longer you delay in providing any reasons for refusal, the less persuasive your refusal will become.

The mediation process

Unless the dispute is particularly complex, the mediation will typically take place on a single day and the process is as follows:

- A date is set for the mediation and brief summaries of each parties' positions are exchanged.
- At the mediation, the mediator starts by making a brief opening statement.
- The parties then make oral opening statements.
- The parties split and go into break out rooms. The mediator spends his time talking to each party individually with a view to guiding the parties towards a mutually acceptable agreement.
- The parties representatives and / or experts might meet (if deemed appropriate by the mediator and parties) face to face.
- If agreement is reached, the parties come together to draft and sign a settlement agreement.
- If no agreement is reached, the parties can request the mediator makes a recommendation as to settlement, either on the day of the mediation or subsequently. This recommendation may advise further steps which should be taken by the parties with a view to reaching agreement.

Conclusion

Some parties seek to avoid mediation for tactical reasons but the courts generally take a dim view of such tactics and may penalise any refusal they consider to be unreasonable in costs. Even if there appear to be obstacles to mediation, the courts expect the parties to try and overcome them, any dispute which has a reasonable prospect of succeeding is expected to be mediated.

Whilst appearing to be slightly draconian at times, the courts' approach to mediation is borne out by the fact that it is the mediator's job to draw out seemingly intractable positions. This is something that mediators seem to be good at given that between 80 – 90% of mediations result in settlement.

Even if settlement is not achieved at mediation, the mediation should provide the parties with a greater insight into the real issues that separate them and / or the mediation might serve as a gateway to productive commercial dialogue. This may, for example, result in work on site being completed earlier than might have otherwise been the case.

Should you wish to receive further information in relation to this briefing note or the source material referred to, then please contact Lisa Kingston.
lkingston@fenwickelliott.com.
Tel +44 (0) 207 421 1986

Fenwick Elliott LLP
Aldwych House
71-91 Aldwych
London WC2B 4HN
www.fenwickelliott.com