Sheena Sood There have been recent moves towards making ADR compulsory in construction disputes

MEDIATION – A MANDATORY STEP?

Earlier this year, on the 25th anniversary of Lord Woolf's landmark Access to Justice report, the Ministry of Justice issued a call for evidence seeking views from the judiciary, the legal profession, mediators and court users, and anyone who has experience of dispute resolution both within and outside the court system on how mediation can be more fully integrated into the court system. The consultation follows the recent Civil Justice Council (CJC) report on compulsory mediation, which found that mandatory mediation would be compatible with UK law and be desirable in suitable areas of the justice system.

The CJC report concluded mandatory ADR (alternative dispute resolution) is compatible with Article 6 of the European Convention on Human Rights and thus lawful. The report is a significant departure from current legal precedent, which confirms that parties cannot be compelled to engage in mediation. The CJC report makes clear the view that mandatory mediation would be desirable in the right circumstances. Justice minister Lord Wolfson has said: "Too often the courts aren't the best means for reaching such outcomes. That is why we want to improve the range of options available to people to resolve their issues, ensuring less adversarial routes are considered the norm rather than the alternative."

The UK construction industry is not only one of the most contentious sectors in the country but also among the most contentious construction industries in Europe. While ADR has for some time been an option in the majority of construction contracts, traditionally most disputes were commenced by litigation or arbitration, with adjudication increasingly becoming the preferred option for smaller or less complex disputes. However, mediation has increasingly been used as an alternative.

Recent government-cited research suggests that 70% of parties using mediation services will resolve their issues outside a courtroom and that only 3% of the two million civil proceedings issued went to trial in 2019. This shows the vast majority of claims can be resolved without the need for a court judgment and that mediation, a procedure in which the parties discuss their disputes with the assistance of a trained impartial third person who then assists them in reaching a settlement, is an effective alternative.

WHILE ADR HAS FOR SOME TIME BEEN AN OPTION IN THE MAJORITY OF CONSTRUCTION CONTRACTS, TRADITIONALLY MOST DISPUTES WERE COMMENCED BY LITIGATION OR ARBITRATION

The most cited drivers for engaging in mediation, in my experience, are to reduce or save costs in pursuing or defending a dispute and to expedite results. Additional drivers are:

- The desire for parties to participate in a dispute, which would include being able to decide the outcome
- Confidentiality, particularly where parties wish to preserve anonymity and thereby reputations
- Preferable outcomes, such as the ability to preserve a professional relationship or avoid a court decision that can be relied upon by others and thereby encourage further litigation
- Availability of alternatives to a court decision, such as the provision of further services or discounting fees as an alternative to damages.

These drivers are particularly prevalent in the construction industry. In certain circumstances it should therefore be acknowledged that mediation can provide better outcomes than litigation, arbitration or adjudication. However, equally, in certain circumstances it may not, particularly when embarked upon too early in the dispute resolution process, for example before key information is disclosed which would inform settlement discussions. And of course unless all parties are willing to fully engage in the process, the outcome of mediation could be worse than for a judicial process.

The main drivers for engaging in mediation or other forms of ADR are the financial and economic savings accrued by resolving matters without going through a full judicial process. These will of course vary depending on when ADR is used, as well as which type of ADR it is.

While construction contracts often provide for an individual to be nominated from a particular body, such as the RICS, for an arbitration or an adjudication, it is rare for a contract to name a mediator. This may change if mediation becomes mandatory but is surprising bearing in mind the number of construction disputes being resolved by mediation. Trusted mediators are rather few in number, and most law firms use the same ones repeatedly. However, this can lead to "mediation fatigue" among some mediators. There is no doubt also a lack of diversity among mediators.

All this can lead to an approach of going through the motions, rather than the creative thinking we need from mediators. Mediation is intended to provide a creative alternative to the judicial process, and a wider range of mediators from more diverse backgrounds may well encourage a broader range of parties, both domestic and international, to be willing to engage in mediation and may lead to solutions that truly reflect sensible dispute resolution.

The Ministry of Justice call for evidence closed on 30 September. We now await the results and to find out whether we are moving closer to mediation becoming a mandatory step in all forms of dispute resolution.

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