Mediation - Some Basic Principles

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Mediation now seems firmly accepted in Hong Kong as the first stage of dispute resolution proceedings. Provisions for mediation are contained in the Government, KCRC and MTRC forms of contract, and also the soon to be issued new HKIS/HKIA private form.

Further, whilst mediation has for the last ten years been popular in civil engineering disputes, it is being used more and more for building disputes as well.

So it seemed an appropriate time to set down some basic principles regarding mediation so that surveyors will be prepared when they become involved in disputes that are referred to mediation.

What is Mediation?

Mediation is defined in the Government Mediation Rules as being:

A confidential, voluntary, non-binding and private dispute resolutions process in which a neutral person (the mediator) helps the parties to reach a negotiated settlement.

Mediation is therefore a negotiation process where the negotiations are conducted in a structured manner, and where the negotiations are assisted by a neutral third party. It combines the flexibility of negotiation with the discipline of formal dispute resolution process.

It is described in many books as being a process, which extends the negotiation process when negotiations between the parties have broken down. However, in Hong Kong, mediation is often the first (and only) chance for the parties to sit down and talk about the dispute.

This is, in my opinion, one of the most significant advantages of mediation. In the Government, KCRC and (to a lesser extent) MTRC contracts, when a dispute arises it is discussed and argued between the Contract Administrator (the Engineer, Architect or Surveyor), who may be private consultants, and the Contractor. If the dispute cannot be resolved between them the Contractor will request a decision of the Contract Administrator under the appropriate clause in the contract. The decision will be given, and if the Contractor or the Employer does not accept the decision then traditionally the matter will be referred to arbitration.

Once referred to arbitration, with solicitors appointed on either side, the parties generally move further apart with their positions being continually being reinforced until the arbitrator, what may be years later, makes his award.

In all of this traditional procedure there is no real opportunity for the Employer and the Contractor to sit down and discuss the dispute themselves without the Contract Administrator present, and attempt to resolve the differences.

This is where mediation comes in and which is why mediation is so successful. Very often neither the Contractor nor the Employer will fully agree with the Contract Administrator's decision, and mediation gives them the opportunity to explore the dispute together.

The definition confirms two other important features of mediation.

Firstly, it is confidential. This is often of great importance to the parties who do not wish either the dispute or the negotiations regarding its settlement to become known to others.

Secondly, it is voluntary, or at least in the Government forms of contract it is. I consider this most important because mediation relies on both parties entering into the negotiations with open minds and a wish to settle the dispute. This is why I do not consider that the mandatory mediation provisions in the KCRC and MTRC contracts are really a good idea. There seems to me little point in forcing the parties to mediate if they don't want to - it is like putting a clause in a contract that the parties must agree something. You can never force two parties to agree anything and similarly you can never force two parties to mediate successfully if one (or both) don't want to.

Differences between Mediation and Normal Negotiations

- Mediation employs a neutral third party, the mediator. He takes an active role to bring parties together by looking for and concentrating on areas of common ground rather than differences.

- The mediator can assist in the communications. Very often parties to a dispute may be at the stage when they will not speak to each other. The mediator can fulfil this role by being a diplomat who moves between the parties passing on their thoughts and positions.

- The mediator can act as a sounding board for the parties to make their arguments. The mediator will generally be a senior professional respected by both parties. It can help both parties if he gives general opinion (in private sessions) on their position. Some mediators consider that giving opinions is not a good idea because it can compromise impartiality. However, I have found it is not only useful to do so in construction disputes but that the parties want and expect the mediator to give impartial opinion on their respective positions.

- Mediation has rules, which is essential to make the process work and avoid abuses.

Differences between Mediation and Arbitration or Litigation

- Mediation is not binding; it can be concluded without any agreement being reached or anything binding the parties. Both litigation and arbitration produce a binding result. Mediation only produces a binding agreement if parties agree a settlement that they are both happy with.

- The third party, i.e. the mediator, is neutral and not a decision-maker. Unlike an arbitrator or a judge, a mediator does not make a decision, publish an award or make a judgment. The mediator is the facilitator of a settlement, but it is the parties themselves that make the settlement, not the mediator.

- The mediator has freedom to communicate with the parties in dispute alone or together. He can therefore find out the parties' true wishes and desires and their bottom lines for settlement. It is for this reason that a mediator should never be asked to make a decision by way of a written report and why he is expressly not permitted to act as arbitrator in subsequent proceedings should the mediation fail.

- There is complete flexibility as to how the dispute is resolved and what is included within the settlement. Unlike arbitration, where only the dispute referred is within the arbitrator's jurisdiction, the parties can bring in any matter they wish to use as a means to achieve settlement.

- Mediation focuses on parties' interests instead of only establishing their contractual rights. It therefore looks at

getting a settlement of a dispute; not a decision on it.

- The costs of the mediator are split and the parties bear their own costs. There is therefore 'no winner takes all, approach.

Why use Mediation

- Mediation provides a chance for the parties to discuss the dispute, very often the first and only chance.

- Relative to arbitration the costs of mediation are very small, and it is far quicker than arbitration, taking at most, months rather than years.

- It can produce a 'win-win' situation with the perfect settlement being one neither party likes but both can accept.

- The parties stay in control in mediation. If no settlement is possible they can walk away.

- Mediation is very flexible; it encourages creativity in a settlement.

- Mediation is non-adversarial, thus maintaining relationships.

The above sets out a strong case for mediation, and in my opinion and experience this is rightly so. I would always advise a client to try mediation before arbitration. It is cheap, quick and can often produce a settlement that both parties can live with to save the time and expense of arbitration. In fact, my experience would suggest that very few mediations fail leaving the parties no choice but to carry on to arbitration. So give mediation a try - it works.

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