The Better Way

Pre-litigation mediation of construction disputes

By Stephen Morrison

Over the past two decades, dispute resolution mechanisms—such as partnering, adjudication, and review boards—have gained traction as ways to resolve disputes that arise during the course of a construction project.

While each of these methods has certain advantages and some appeal, mediation continues to be the ideal means for resolving disputes both during the life of a project, and after it has been completed. Especially when the parties take the trouble to select a standby project mediator at the outset, it remains the most timely, cost-effective, and constructive method of settling disputes. Even after substantial performance has occurred, mediation should be considered as a prerequisite to the commencement of litigation, rather than merely as a step on the path to the courtroom door.

Reasons for mediation

From quite an early point in human history, people have appreciated the benefit of involving neutral third parties to help them resolve their disputes. This appreciation ultimately resulted in the development of a system of courts, where people could go to assert their legal rights and remedies. Over time, procedures and rules of evidence were developed to ensure a degree of fairness and reliability in the process. The result was a system of dispute resolution that lawyers refer to as 'litigation.'

In this sense, taking someone to court was an early form of alternative dispute resolution—an alternative, that is, to pistols at dawn. However, many now view litigation as something to be avoided. The fear of long delays, high costs, and unpredictable or unsatisfactory results has caused people to look more carefully at other methods for managing and resolving conflict.

In most situations, parties favour timely solutions. Disputes not resolved quickly tend to fester and become more difficult to settle in the future. As individuals invest more time and money in their conflict, they tend to become more entrenched and less flexible in their positions. The expression 'justice delayed is justice denied' reflects the reality that both sides suffer when a conflict cannot be resolved relatively quickly. As time passes, memories may fade, important witnesses may die or move away, and critical documents may go missing.

Of course, while disputes are outstanding, substantial amounts of cash may not flow. In extreme cases, the money may be tied up

in court proceedings for so many years that, by the time a judgment is obtained, the accumulated interest may approach the amount originally in dispute. For these reasons, sometimes a quick result is to be preferred over a more perfect, but slower and far more expensive, outcome.

All this is especially the case with a construction project where work is carried out over, at minimum, many months (and, often, over several years). There is an unfortunate tendency, in many cases, for owners and contractors to agree to push all unresolved disputes involving claims for extra work, defective or incomplete work, deficiencies, and delay claims out to the end of the project. This is generally a very bad idea.

A construction dispute can be like a splinter in the finger—it begins as a minor irritant, but, left untreated, it can quickly become seriously infected and spread to other parts of the body. In rare cases, serious illness and even death can result. Early resolution of a construction dispute can prevent the issue from festering and causing further ill will between the parties.

In many cases, with the help of a mediator, the parties can work out a permanent or interim solution that either solves the problem completely or keeps the project running while, at the same time, preserving each side's rights and interests in the ultimate resolution of the dispute. Like negotiations, mediations are conducted in private and are "without prejudice." This means if the mediation fails to bring about a settlement, nothing said to the other side or to the mediator can be used in subsequent proceedings.

The mediator

There is generally a direct correlation between time and cost. It is inevitably more expensive to attempt to resolve disputes long after the triggering event has occurred. With the passage of time, memories fade, documents get lost, work gets covered over, and it becomes more difficult, time-consuming, and expensive to reconstruct the factual matrix underlying the legal dispute. Confronting and settling construction disputes immediately or shortly after they arise will almost always be a more cost-effective approach.

To facilitate this result, parties are well advised to appoint a neutral project mediator at the outset. This individual would remain on standby throughout the project, ready to step in to assist the parties in resolving disputes in a timely fashion. Having been appointed at the outset, the project mediator will have a general familiarity with the project and the players; he or she will be better able to assist when the need arises.

Mediation enjoys a very high success rate. Anecdotal evidence suggests skilled mediators are generally able to achieve settlement more than 85 per cent of the time, when the parties come willingly to the mediation session. Mediation involves structured settlement negotiations led by a neutral third party selected by agreement of the parties. The mediator's job is to skilfully guide and facilitate the negotiation process, but, unlike a judge in a courtroom, there is no decision-making power.

This means while a solution—known as a mediator's proposal—may be suggested, a resolution is never imposed on the parties. The mediator's only power is that of persuasion. To exercise this power, the trust and confidence of both parties must be gained and kept, even while delivering what may sometimes be unpalatable messages.

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With the help of a mediator, parties can work out an interim solution to keep the project running while preserving each side's rights and interests in the ultimate resolution of the dispute.

A skilled mediator thoroughly understands the negotiating process. A good mediator can assist the parties in evaluating the strengths and weaknesses of their own and their opponent's case, understand their opponent's perspective, develop creative solutions, and deliver difficult messages to the other side more effectively than they can sometimes be conveyed directly.

When a party exhibits overconfidence in its position, the mediator can often administer a much-needed reality check. Skilled mediators use their understanding of human nature, together with various techniques, including humour and highly nuanced and selective communications, to gradually bring disputing parties around to a consensus.

Mediation can allow for the crafting of creative, mutually acceptable, win-win solutions. The mediation process minimizes the atmosphere of conflict and creates a better chance the relationship between the parties will be preserved. Mediation is also very cost- and time-efficient. When parties co-operate, mediation can be organized on relatively short notice and is usually conducted in as little as half a day and rarely more than three days.

The parties typically split the mediator's fees. Even accounting for this and the cost for their own lawyers, successful mediation is less expensive than even the preliminary stages of litigation. The involvement of lawyers in mediation is not a requirement, but, in the case of most serious legal disputes, it is highly advisable.

Critical to the success of this approach, however, is the selection of the right mediator. Parties sometimes select mediators who are also knowledgeable about the business or field in which the dispute has arisen. This is especially helpful in the case of construction disputes. It is important to choose an individual who has, first and foremost, a mastery of mediation skills, but who also has an in-depth understanding of how a construction project runs.

The mediator need not be an expert in every area of construction technology. However, to be in a better position to win essential confidence and trust from the parties, he or she should:

- be able to read plans and specifications;
- know the difference between a change order and a change directive;

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While disputes are ongoing, construction can stop. Use of a skilled mediator helps keep the various project players on the same side to help pave the way for success.

- understand the role of the consultant; and
- have a solid grasp of the terms and conditions of the standard industry contracts.

Road to litigation

This article has thus far centred on using mediation to end disputes during the life of the construction project. Those that are not resolved during the life of the project (or shortly after completion) end up in litigation. Since mediation is now a mandatory step in the litigation process, the parties will eventually come together before a mediator at least once, and sometimes more often, before a case gets to trial.

The vast majority of construction litigation is eventually resolved through settlement before trial, often with the assistance of a mediator. Unfortunately, by the time this occurs, each side has often spent a small fortune in legal costs related to:

- preparation of pleadings;
- documentary disclosure;
- examinations for discovery;
- answering of undertakings;
- motions to compel answers to refusals; and
- preparation of expert reports.

This is in addition to the enormous dedication of personnel to a process that will generally drag on for many years. Due to the substantial investment of time, money, and emotional capital each side has poured into the dispute, the job of the mediator at this stage is all the more difficult.

In theory, this burdensome process is designed to inform each side with respect to the evidence relied on by the other party and the strengths and weaknesses of the opponent's case. However, the benefits are often illusory. Generally speaking, parties that have lived together through a two- or three-year construction project and have staked out their positions in numerous pieces of correspondence surrounding the issues in dispute know what each other's case is about. While the above-noted procedural steps are essential to their respective lawyer's understanding of the case, clients generally find the process to be more frustrating than illuminating—lots of heat, but little light.

Perhaps worst of all, the very adversarial, competitive, and acrimonious nature of the process inevitably drives a deeper and deeper wedge between the parties, raising the emotional stakes and making amicable resolution more and more unlikely. While billed as a 'path to justice,' litigation is often abused as a means for inflicting pain on one's enemy. When parties are unequally matched in terms of financial or other resources, it can become a war of attrition. Unsurprisingly, parties that litigate against each other rarely do business with one other again in the future.

The opposite is often true for parties that mediate their disputes at a very early stage, before the wounds produced by the litigation process become greater than the injury arising from the original dispute. While the mediation may begin with a degree of acrimony, a capable mediator is usually able to help the parties see the dispute from the eyes of their opponent and identify the benefits of looking for constructive, mutually beneficial solutions to the problem.

Although parties rarely walk away from the mediation table with everything they want, the same can usually be said of the courtroom. Through mediation, however, the parties can craft their own solution, rather than having one imposed on them, and with an infinitely smaller drain on their time and emotional and financial resources.

Conclusion

Given this reality, there is much to be said for engaging the services of a mediator before—not after—commencing the litigation process. In comparison with the amounts usually in dispute and the crushing legal costs otherwise spent by following along the traditional path, the costs of engaging a mediator are trifling, especially when divided equally between the parties.

Moreover, in financial disputes, the money that would otherwise be spent initiating and pursuing the litigation process is available to facilitate a settlement. As the process is completely confidential and without prejudice, there is little chance the parties will harm their positions by attempting this pre-emptive process. In other words, there is everything to gain, and little or nothing to lose.

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