**MEDIATORS – WHAT SHOULD WE EXPECT FROM THEM?**

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My first introduction to mediation was probably at the same time as many others in Hong Kong – in the late 80s when Government decided to introduce it in construction disputes by issuing a technical memorandum encouraging its various departments to use the process in attempting to resolve disputes.

I suppose they had decided arbitration was outrageously expensive and time consuming – like everybody else, and were persuaded that mediation was worth a try – in any event, it was perceived as the "Chinese" way.

In those early days, it was a struggle to get the process adopted by Government engineers and architects, and it did not really start to get off the ground until mediation was incorporated in the various disputes clauses, in its construction contracts in the 1990 editions, and some measure of training was instituted by the Government and others.

From then on, it must be said that mediation has made great progress in Hong Kong, and the Government, in particular, is to be acknowledged in its far seeing approach in this regard. However, the path has been something of a struggle.

The early approach was to seek a "view" from the mediator – rather like a dummy run on arbitration. Indeed, the original HKIAC rules provided for an opinion, either upon request, or in the event of failure of the mediation – and this is very much what the parties were interested in. They had not realised that the process was based upon on acceptance by the parties of the need to compromise.

One of my earliest recollections of trying to persuade a Government engineer to agree to mediation before it was incorporated in the contract conditions was his steadfast refusal, because he felt my client had no arguable case – a circular argument if ever I heard one, and one which I subsequently encountered several times. However, one should not smirk at such views in these days of enlightenment – on another occasion, when I was the appointed mediator, I arrived at the first meeting and was advised by a very well known and committed mediator, who on that dispute happened to be representing one of the parties, that I may as well go home immediately since this was not a dispute which was amenable to settlement by mediation. Arbitration was the only route according to him with a definitive award being essential – needless to say it did settle later, albeit within the framework of arbitration.

We have indeed made considerable progress since the early 90s. I rather suspect this has much to do with the recognition, at least by Government departments, that mediation offers a heaven-sent opportunity to wrap up all manner of festering disputes under a process ostensibly established to deal with only specific issues arising under the disputes clause of the contract.

Mediation is notably little used in private construction contracts or subcontracts, and I think it is no accident that the vast majority of mediations take place on disputes on Government contracts, or quasi Government (eg Housing Authority) contracts. These are organisations, which are fraught with problems in making the necessary decisions, which might allow the settlement of disputes. Truth to tell, if decisions could be made by appropriate Government officers to make payments into court in an offer to settle, their experience in arbitration may have been far more satisfactory, but, they invariably and surprisingly seem to allow the whole process to run its course without ever making an offer – with the inevitable outcome as to costs. After all, most claimants have some merit to their claim, and are bound to succeed to some extent.

Hence the popularity of mediation – it allows for settlement without individuals having to make decisions on specific points – even better it allows the resolution of entire final accounts in major construction projects – something which would otherwise take years.

But to return to the theme, what in these circumstances should we expect from the mediator?

Of course it is essential that the mediator is able to properly explain the process to the parties, and to bring out its flexibility and how matters of confidentiality are dealt with. My experience suggests that a good mediator, at least in construction, must be able to bring in the right level of individual on either side, so as to remove the log-jams which arise where personal interests are at stake. To do this, he must have the seniority and presence to impose his will. More importantly, he must see the necessity where it exists. He must be able to "read" the individuals at the meetings (joint or private), to see who is standing in the way of progress and who will assist it.

Technically, and here I differ from the "received" view, he must understand the issues. When dealing with a room full of construction professionals, the mediator loses respect rapidly if he cannot stay ahead of the game. He must have a clear grasp of the technical and legal issues, and must immerse himself in them.

The "received" view is that a mediator can use his expertise in any form of dispute – he does not need to know about the issues. Sorry, that is not so. If he cannot understand the issues thoroughly, he cannot see the opportunities to settle.

It may be, of course, that one is dealing with complete amateurs (as perhaps in a marital dispute), but in general, construction companies and employers are almost certainly experts in negotiation – or should be. They do not need assistance at a common sense level in negotiating their dispute.

It is always impressive if a mediator shows himself to be ahead of the game in terms of the dispute, but not a very common situation in my experience. The parties are lucky if he is able to offer anything significant in terms of settlement ideas. My clients – usually contracting organisations, invariably have a clear view of what they want and where they are going and what their bottom line is. They have already taken advice on the merits and know the level of evidence which is available to them and what the down side is. Government may be entrenched, but have usually taken legal and technical advice, have done their risk analysis and have their own ideas.

So is the process worthwhile? – certainly. In my experience, settlement is very likely between parties willing to compromise. Is this dependent upon the mediator? - yes but perhaps to a smaller extent than might be expected. He is an essential person in bringing the parties together (a convenor of meetings), and in conveying the thoughts of the parties – a shuttle diplomat. It is unlikely he can offer more unless he is a real expert, perhaps in law or technically, and can indicate whether he thinks a party is right or wrong – again not the "received" view, but in fact one of the most useful things he can do, if he does it diplomatically, at the right time, and if his view is respected. If he does it with a lack of sensitivity, then he is lost.

On this point, the hoary old formula of rubbishing both parties' positions in order to undermine their confidence and get them to come together and compromise, in a state of apprehension about what will otherwise happen, is unlikely to work with the experienced player and in construction, most players are experienced these days.

My conclusion – it is the song, not the singer, that matters. The process is fine. The choice of mediator is of course important, provided he can bring the parties together, move the process along and has their respect in his views, but equally important, he must know when to stand back. Once the parties are talking the rest should be up to them – leave them to it, only too often a mediator fails to appreciate when he has done his job!

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