Arbitration / Mediation case study

Dispute resolution continues to evolve at a rapid pace and Niall Lawless explains how the parties in a dispute recently combined both arbitration and mediation (arb / med).

Mediation is a private, informal dispute resolution process that can commence when direct negotiations don't seem to be getting anywhere. The goal of mediation is settlement of disputes through compromise and about 70% of mediated disputes are resolved by the parties. However that also means that about 30% of mediated disputes are not resolved by the parties and that leaves them with the alternative of arbitration or litigation which is usually much more expensive and time consuming.

Recently I was approached by the commercial director of one of the UK's leading building services contractors who explained his company was in dispute with a top tier manufacturer of air handling equipment. Whereas he was keen to mediate the dispute he also wanted a process which gave certainty that if the parties could not reach agreement some one else would make a decision for them. The matter involved the supply and installation of about £500,000 of air handling equipment with just over 25% of the contract sum in dispute.

The corporate ethos of both companies was of co-operation and partnership and when they found themselves in dispute they wanted to protect their longer term and profitable relationship and settle the dispute through the informal process of mediation. Because their disagreement was getting in the way of working together on other projects the parties wanted certainty that on the day that if they were not able to reach a compromise that they would receive a binding decision in line with the contract and allow them both to move on.

To provide the parties with certainty that when they came together their dispute would be determined I offered the hybrid process : arbitration / mediation. Arbitration results in a written reasoned award which is binding upon the parties and which may if required be enforced through an application for summary judgment. In the arbitration / mediation process I was to sit as arbitrator in the morning (or on day one) and after I have completed a reasoned award assist the parties as mediator in the afternoon (or on day two). If the mediation was successful, the decision would not be given to the parties. The advantages of arbitration / mediation are low cost and certainty that on the day their dispute will either be agreed by them or decided by me.

Arbitration is usually more expensive than mediation and when you look objectively at the different processes it seems sensible to conduct the mediation first (70% chance of success) before conducting the arbitration (30% chance of success).

However, this is not possible in the UK because arbitration is constrained by the principles of natural justice, of which one important aspect is that neither party will have private access to the decision maker. In Glencot -v- Barrett [2001] in the matter of adjudication it was decided that a process whereby the decision maker has lengthy private discussions would lead to the real possibility of bias and be enough to give the losing party reasonable ground to suppose loss of impartiality. Therefore for the same person to act as both arbitrator and mediator the arbitration must precede the mediation.

If the parties in dispute want to use arbitration / mediation their first and perhaps most important decision is going to be choosing the person they want to work with. This can be difficult because although arbitrators and mediators often share skills and qualities such as self awareness, neutrality, patience, process management and being good communicators : not all arbitrators are trained or able to work as mediators and even fewer mediators are trained or able to work as arbitrators. My view is that it is most helpful if the arbitrator / mediator understands the subject matter of the dispute, indeed in this dispute it was a prerequisite as neither party was willing to work with a non engineer. They also believed it would be a great benefit to them to have the same person as both arbitrator and mediator

For example arbitrators need to have knowledge of the laws of contract, tort and evidence. They must understand and be able to use the applicable procedural law. They must be able to evaluate the arguments and evidence which seemingly supports conflicting points of view and determine the award. In arbitration / mediation they must not only be able to set out for the parties and manage the process but also do this in a way which does not move the parties further away from each other.

Mediators on the other hand often possess interpersonal skills many arbitrators do not, for example the ability to deal positively with destructive emotions and which present psychological obstacles to compromising the dispute.

Good arbitration / mediation requires that although there is to be arbitration (which is adversarial) that the proceedings are conducted in a way that minimise the conflict. The starting point for this is to present the parties with a clear contract for each the arbitration and the mediation and which co-exist together. In this dispute as neither party was being represented by lawyers one of my duties to the parties was to road map the process with its requirements and set clear expectations as to what was required from each party and when. However, rather that issue instructions I tried to create a story for them.

At the same time I emphasised to the parties that it was their arbitration and mediation and they had the right to agree how we moved forward together. While setting out a formal procedure for the exchange of information I also left things for the parties to decide themselves and to tell me. I felt that if they owned what was happening and had the opportunity to agree smaller things that would ease their journey to deciding the big thing. I tried to manage the arbitration with a light touch and where possible used language which emphasised how much mutual respect and the high esteem the parties regarded the other with. In terms of directions the parties agreed that my award on costs would be limited. They agreed to equally bear their own costs and to share the arbitrator's costs and the costs of hiring the rooms for the hearing.

However, I also made them confront reality in that they each risked an unfavourable decision. This risk can be an important ingredient in ensuring that the parties mediate with commitment and create a 'win win' result. As part of the mediation process I sent the parties information notes on 'what is mediation' and a 'checklist for preparing for mediation'.

How did I plan for the arbitration / mediation day? Good mediators know how important approach is and as mediation is informal I considered wearing a business suit for the arbitration in the morning but dressing down for the mediation in the afternoon; in that way to physically reinforce the fact that two different processes were involved. Although I did bring a change of clothes in the event I just removed my jacket and tie.

I reworked my mediation opening statement to take account of arbitration / mediation and its logistics. After the arbitration in the morning, rather than ask each party to come back to the mediation in the afternoon and to use their opening address to set out their own case, I asked them to come back and set out what was the position of the other party. This innovation did not work as while the first party did this rather well the second party completely failed to embrace this approach and was only able to once again set out its own position.

I tried to envisage any ethical or procedural difficulties that might arise. For example during mediation it is quite common for the parties to reach apparent deadlock and a good mediator will destabilise the parties to move them away from entrenched positions. I sometimes challenge assertions by letting one of the parties know that if I was sitting as arbitrator I might interpret the information differently and arrive at a completely contrary and different conclusion. A mediated agreement cannot be coerced and because in arbitration / mediation I would have already reached a binding conclusion I found it necessary to be mindful of the ethics of this.

In this arbitration / mediation one of the parties was rejecting a possible compromise which I knew to very much in their best interests to explore (having already made a binding decision). You must be able to put your award out of your mind and continue the mediation as you would without this privileged information. You have to be an experienced mediator to be able to do this. The parties will want to know what your decision is and as any disclosure is inappropriate you need to guard against making any.

In mediation and in the confidence of caucus, to help move the parties from entrenched positions, I often use expert knowledge to outline a view of the facts different from that offered and may even introduce or raise matters which the parties have not provided as evidence. There is a risk that the losing parties (not supported by lawyers) may feel disappointed that any adverse award lacks such pro-activity, not understanding that the arbitrator's function is not to supply evidence for the parties but to adjudicate upon the evidence given before him. Fox -v- P G Wellfair [1981].

A good mediator will be able to get the parties in confidence to disclose information which may undermine their public argument, by doing this he can assess if a zone for compromise and agreement exists. I prepared myself for the dilemma that I would discover things during the mediation in the afternoon that lead me to a conclusion that the binding award that I have made was plainly wrong and unjust. Indeed in this dispute new information was introduced but which fortunately confirmed the decision in the award and did not undermine it.

I had hoped to act as arbitrator in the morning and act as mediator in the afternoon, concluding a written award between 12.00 noon and 2.00 pm. These was simply not time to do this and I had to get the parties to agree that if they were unable to reach a mutually satisfactory agreement in accordance with their standards of fairness I would hand down my award stating my reasons orally and two days later send another copy with the reasons incorporated.

I was able to switch my mindset from arbitration to mediation, but the parties were not and one of them remained locked into the adversarial process. When other parties ask me to act as arbitrator / mediator I will insist that there is more time between the two strands; no faster than arbitration on the morning of the first day and mediation on the afternoon of the second.

Niall Lawless is a Chartered Mechanical Engineer, Building Services Engineer, Information Systems Practitioner, Builder, Arbitrator, Mediator and Adjudicator. (www.arbitrari.eu). Email : nlawless@arbitrari.eu