CAP - An Evaluative Approach to Collaborative ADR

Introduction

There are a number of collaborative Alternative Dispute Resolution ("ADR") approaches, in which (an) independent, third-party neutral(s) assist(s) the parties avoid an incipient, or resolve an actual, construction dispute. The Dispute Avoidance/Adjudication Board ("DAAB"), part of a multi-tiered dispute resolution procedure promoted by the FIDIC 2017 suite of contracts is an example[1].

Mediation

Mediation is perhaps the most commonly recognised form of collaborative ADR. The parties to an incipient or actual dispute agree on or are provided with a neutral to facilitate discussions between them, with the goal of reaching a settlement. The power to settle remains with the parties, but the process is led by the mediator. Mediation has a number of recognisable features. Thus:

1. It is voluntary.
2. It is confidential.
3. It is largely informal.
4. It is not beset by rules.
5. It allows the appointed mediator to set the procedure considered to be appropriate based on the matters in issue.
6. It typically involves some form of position paper/statements from the parties, and responses thereto.
7. It typically involves caucusing between the mediator and one or more (but not all) parties, or plenary meetings with all parties.
8. Whilst it typically involves reality testing by the mediator (usually during caucusing sessions), it does not usually involve examination of the parties or their witnesses (whether factual or expert), whether by way of concurrent evidence (or hot-tubbing), cross-examination by the parties, or inquisitorial questioning by the mediator.
9. The mediator acts as honest broker, seeking to bring the parties together through an understanding of their interests as well as the merits of their positions.

[1] For a short article on this form of ADR, see Mastrandrea, F, "**DAABs: Dos and Don'ts**"...

A few more words are appropriate on caucusing. This is one of the vaunted advantages of mediation. It allows the mediator to receive information from a party providing the mediator with better insight into a party's interests, position, and motivation – all of which can assist the mediator in achieving settlement. These are often matters which the disclosing party may not (at least at that stage in the mediation) want to be shared with the other party(ies).

That introduces two major challenges for the mediator:

- First, to make sure that that which has been disclosed remains undisclosed until (if and when) the disclosing party agrees to its disclosure.
- Second, it can involve information going beyond the ordinary cut and thrust of dealings between commercial parties.[2] No doubt mediators will have their own strategies for avoiding/dealing with these sorts of difficulties,[3] but they can clearly compromise the honest broker role of the mediator, even make the mediator's ability to continue untenable.[4]

The mediation process is very often facilitative, and not evaluative i.e., there is no appraisal by the mediator of the respective merits of the parties' cases whether on the facts or on the law, other than to a limited extent that which may be hinted at by the mediator or discerned by the relevant party during reality testing. Thus, the mediator does not express views on matters:

- legal (such as the interpretation of contractual terms or their application, termination, measure of damages),
- technical (such as design, health and safety issues, defects, the state of completion),
- managerial (such as tendering, planning, procuring, quality assuring or controlling, executing, administering, varying, progressing),
- time (such as delays and causes thereof, extensions of time), or
- quantum (such as the financial value of the parties' claims, damages for delay, prolongation, disruption, acceleration).

Whilst this may mean in practice that a skilful mediator but one without the particular specialist skills needed for an evaluation on the merits set out immediately above can nevertheless manage to facilitate a settlement, many users see this as a significant drawback.

It is sometimes the case with a failed mediation that the mediator is asked to express a view on value at the end of the failed process. In practice this is often at a summary level without any (or any adequate) reasons, and particularly so with a mediator not specialised in matters of evaluation in the particular areas of difference or dispute between the parties.

A related question is whether a mediator can, after a failed mediation, act as an adjudicator or arbitrator of the unresolved differences or disputes. The challenge then is whether the mediator's earlier involvement

---

[2] Ranging from part truths, through deliberate understatements or exaggerations, to (at the extreme) perjury, fraud, and other illegality.

[3] Mediator codes of conduct may or may not assist

[4] Consider, for example, the CEDR Code of Conduct for Third Party Neutrals, 2023 Edition, providing at Clause 7.2:
'The Neutral may withdraw from the Process… if:…
• any of the Parties is acting in an unconscionable or criminal manner…
Cf. in Oregon by reference to the Oregon Statutes Revised - Chapter 36 Mediation and Arbitration, the Formal Opinion NO 2005-167 [Revised 2014] Lawyer as Mediator: Attempted Fraud by One Party, concluding that a Lawyer-Mediator cannot complete a mediation based in whole or in part on the fraud of a mediating party. At a minimum, Lawyer-Mediator must inform Party A that as a result of Party A's nondisclosure, Lawyer-Mediator will be obligated to withdraw from the mediation.
As for Party B, unless the disclosure falls within a statutory exception, the mediator is bound to keep the communication confidential. The exceptions include communications that the mediator or a party reasonably believes must be disclosed "to prevent a party from committing a crime that is likely to result in death or substantial bodily injury to a specific person."

taints his/her ability to provide an enforceable (temporary or permanently binding) decision or award. Unsurprisingly, such law as there is on this topic suggests they can not. Thus, in Glencot Development & Design Ltd. v. Ben Barrett &Son (Contractors) Ltd.[5] , His Honour Judge Humphrey Lloyd QC (as he then was) refused to enforce an adjudicator's subsequent decision on grounds of apparent bias.

RICS Conflict Avoidance Process (CAP)

The RICS Conflict Avoidance Process ("CAP")[6] is promoted as a cost saving mechanism to prevent lengthy and damaging disputes between parties. Its stated aim is to help parties address emerging issues early, avoiding costly and confrontational proceedings like adjudication, arbitration, or litigation.

CAP involves the appointment of a panel of one or three impartial professional(s) who is/are expert(s) in the relevant field. The panel is intended to collaborate with parties to provide pragmatic recommendations to resolve the issue(s) in dispute. CAP is a flexible process, meaning that the CAP facilitator can adapt the procedure to suit the needs of the parties.

Thus, speed, economy, expertise, and flexibility are its vaunted advantages.

CAP thus displays most of the nine characteristics set out above for mediation.

One particular feature, namely caucusing, should I suggest be treated with great care. Whilst caucusing is possible, my experience is that this feature should be used with a light touch and with caution. The ability to act as honest broker demands that the CAP facilitator be trusted. That something learned in caucus may, however subliminally, influence the CAP facilitator's recommendation(s) cannot be dismissed. My preference therefore is that each party should, before the facilitator's recommendations are finalised, know everything about the other party's position as shared with the CAP facilitator. This removes also the potential blight exposed in Glencot.

The process also typically involves:

a. early on, an identification of the key issues,

b. some form of consultation typically a mixture of inquisitorial, caucus (subject to the caution already identified set) and plenary sessions.

The distinctive feature, unlike in classic mediation, is that CAP does not limit itself to a facilitative process but includes evaluative components, potentially at all stages by a facilitator with the relevant skills, culminating in a recommendation by the CAP facilitator to resolve the whole.

An anonymised case study

I set out in summary hereafter details of a CAP process which the author recently completed. This involved 3 separate contracts, between the same parties, each let on the same amended NEC form of contract. The main issues were variations and project delays:

1. at my instigation as the facilitator, the parties were able to agree on:
    - the extent of delays on each contract, and when those delays occurred, and
    - a list of variations on each contract

[5] 2001] EWHC Technology 15.
[6] See RICS Conflict Avoidance Process (CAP) – Summary, January 2021, last modified 21/11/2023.

2. in response to my indications of what an arbitrator or the courts would regard as the appropriate approach to the valuation of each, given the contract terms, I encouraged the parties to work together on a valuation of each matter having regard to which (1) variations were stand-alone variations having no impact on the project duration, or (2) variations that lay on the project's critical path
3. the parties were thereafter encouraged to, and did, agree that
    - the preliminaries component of the prolongation claim was to be valued at actual cost,
    - overheads were to be valued as a choice between a tendered or an actual overheads percentage,
    - the resolved overheads percentage was to be added to the additional preliminaries component of the prolongation claim,
    - the profit claim was to be considered on a loss of alternative opportunity time-sensitive basis (perhaps on a formula), and
    - duplication was to be addressed in relation to variations by identifying the variations lying on the critical path for an agreed period. For that period no preliminaries, overheads or profit were to be allowed, as the variations were to be valued on a rates basis.

The final stage, bearing in mind the desire for speed and economy was something that I fashioned in the form of a pendulum procedure. This was based, should the parties fail to agree everything, on their producing a Scott Schedule which identified:

1. items agreed, with agreed values against each, and
2. items not agreed, with each party's value issued by way of exchange (i.e. unsighted and uninfluenced by the other) for me thereafter to make a pendulum recommendation against each, given the principles set down and agreed earlier in the process.

It seemed to me very likely that this final stage

- not only saved the significant time and cost that would likely have been involved for an independent and detailed review by me of significant amounts of factual, pricing, and cost, data, but also
- acted as a temper to extremes of valuation by each, given the risk that the pendulum recommendation by me would not adopt excessively high or low valuations that either of the parties might proffer.

Contact details

Dr. Franco Mastrandrea LLB(Hons), MSc(Distinction), PhD, FRICS, FCIArb, Barrister at Law
Partner
francomastrandrea@hka.com
Ph: T: +44 (0) 7884 436 537
Expert Profile