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Mediating Constructing Disputes: An Evaluation of Existing Practice

Key Points

by Nicholas Gould and Claire King

"Mediating Construction Disputes: An Evaluation of Existing Practice" is the full report by King's College London of its 2006-2008 research conducted into the use of mediation in the Technology and Construction Court. The report was written by Nicholas Gould and Claire King of Fenwick Elliott LLP and Philip Britton, a professor at the Centre of Construction Law and Dispute Resolution at King's College London.

Much more has been written about the theory of mediation, and its proper place in the avoidance and resolution of disputes in construction, than about its actual use; this report combines hard detail about its practice within UK construction litigation with a summary of the existing knowledge about mediation in the common law world and about its relation to other formal and informal methods of dealing with construction disputes.

The key points that can be drawn from the report, and the TCC survey in particular, are as follows:

Where mediation is successful the cost savings attributed to the mediation were significant, providing a real incentive for the parties to consider mediation. Only 15% of response reported savings of less than £25,000; 76% reported savings in excess of £25,000; and the top 9% saved over £300,000. The cost savings are generally proportional to the cost of the mediation suggesting higher value claims spend more money on mediation, presumably because they realise that the potential savings resulting from mediation will be greater.
Mediation was undertaken on the parties own initiative in the vast majority of cases. Out of the successful mediations only 22% were taken as a result of the Court suggesting it or due to an Order of the Court. Even where unsuccessful, 91% of mediations occurred as a result of the parties own initiative. This suggests that the incentive to consider mediation provided by the Civil Procedure Rules (namely, cost sanctions) are effective and that advisors to parties to construction disputes now routinely consider mediation to try and bring about resolution of the dispute.

The parties themselves generally decided to mediate their dispute at 3 key stages: as a result of exchanging pleadings; during or a result of disclosure; and shortly before Trial. Of successful mediations, a higher percentage of respondents whose mediations had taken place during exchange of pleadings and shortly before trial believed that the dispute would have progressed to judgment if mediation had not taken place. This potentially suggests that mediation was comparatively more successful at these stages.
The vast majority of mediators were legally qualified. Only 16% were construction professionals. This perhaps diminishes the strength of any argument for greater regulation of mediation and supports the market based approach adopted by the recent EC Mediation Directive for 2008/52/EC.

In the vast majority of mediations, the parties were able to agree between them on the mediator to appoint; appointing bodies were only used by 20% of Respondents. There was also a tendency to use the same mediators again and again, suggesting a comparatively mature market with parties' advisors suggesting well known mediators within the construction disputes field.

Taken as a whole, the data derived from the various surveys charting the use of mediation over the years, show how mediation has transformed from a novel idea to its current position as an indispensable tool for those seeking to resolve construction disputes.