In the first of a series looking at the various forms of dispute resolution,
Niall Lawless explains why mediation should always be your first port of call

Mediation – the first resort

Every building services project involves contracts and from time to time issues arise which can become disputes. If the contract is a UK construction contract the parties often use statutory adjudication as an interim process before arbitration or litigation. Whereas adjudication has been effective in freeing the flow of withheld money it is adversarial, frequently involves legal expense and in many cases does not provide a final answer. As mediation almost always offers a viable alternative it should be 'first port of call'.

Mediation is defined in Black's Law Dictionary as "a private, informal dispute resolution process in which a neutral third party, the mediator, helps disputing parties to reach an agreement." The goal of mediation is settlement of disputes through compromise and over 70% of mediated disputes are resolved by the parties. It is little wonder therefore that the courts are not only supportive when the parties wish to use this alternative dispute resolution (ADR) procedure but have actively encouraged parties to mediate by means of the threat or actual use of adverse costs orders against a party that refuse to mediate, even if that party goes on to be successful [Dunnet v Railtrack (2002)].

Mediation can commence when direct negotiations don't seem to be getting anywhere and the parties make an informed choice that they wish to use it. Mediation allows the parties to keep control of their dispute but having decided to use it the first important decision will be their choice of mediator. The mediator can be chosen because he is known to the parties or with the help of a third party such as the Centre for Effective Dispute Resolution (CEDR) or the Chartered Institute of Arbitrators (CIArb).

As the mediator does not have any authority independent of the parties he must be able to gain their mutual confidence and respect from the offset. Mediators do not and must not give the parties advice or make decisions for them. However, competent mediators will have relevant dispute resolution experience and be able to use technical and commercial expertise to engage the parties in early 'reality testing', exploring the strengths and weaknesses of their position.

The mediator should possess good communications and negotiating skills and be able to drive forward and manage the mediation through its different phases; the preparatory phase, the introductory phase, the understanding phase, the negotiation phase, the agreement phase and the concluding phase against the timeline agreed with the parties. With the right skills and process disputes involving multiple issues and sums substantially in excess of £1.0 million are often resolved in one to two days.

Mediation is a confidential process and this operates at two different levels. The first is that the parties agree that the mediation is 'without prejudice' and that nothing is binding upon them unless it is concluded with a signed agreement. Information that is made available that would not normally be discoverable remains confidential if the mediation is unsuccessful.

This enables the parties to be much more open about their real position and to take risks. Also information shared with the mediator during private meetings (caucus) is also confidential unless the party disclosing it gives permission for it to be passed on.

Adjudication, arbitration and litigation are constrained by the principles of natural justice, of which one important aspect is that neither party will have private access to the decision maker. This has no relevance in mediation and through the mediation process the mediator is able to work with the parties privately, having access to confidential information. This is often the only time someone can assess if a zone for compromise and agreement exists and guide the parties towards it. The mediator should help the parties examine interests and needs; negotiate the settlement agreement and define a relationship which is mutually satisfactory and which meets their standards of fairness. His role is not to tell the parties what the answer is.

Mediation is often effective in commercial disputes because in working out the settlement terms the parties can be creative and go beyond the strict terms of any legal contract involved. Compared to other methods of resolving disputes mediation is pragmatic and offers the benefits of speed, privacy, flexibility and cost saving. It's not a formal process and the parties have personal control.

Mediation aims to restore or facilitate communication, obtains solutions to problems, considers the needs of the parties and allows them to reach durable and often long-lasting agreements. Adjudication, arbitration and litigation are not only constrained by the contract between the parties they most usually deal with things that have happened in the past. Of course sometimes the only thing the parties want is to get the money and run, but if they have a shared interest in continuing to work together on one or more projects then it is only mediation that is looking forward in any meaningful sense.

Mediation cannot be a contractual pre-requisite to adjudication because that would undermine the objective of the adjudication process within the construction industry; however it can be made a pre-requisite to arbitration and litigation. I have been involved in several cases where all parts of a dispute could have been agreed by the parties but the mediation failed because they could not agree who should pay the legal and other costs expended before the mediation took place. I say it should be a pre-requisite; mediation should be embarked upon early, don't be foolhardy.

Niall Lawless has acted as mediator on over 50 occasions and is CEDR and CIArb accredited. (www.arbitrari.eu).