

Is mediation the way forward for your commercial disputes?

After a debate held at the last meeting of the UAE branch of the Society of Construction Law, where the issue of whether the UAE is ready for mediation was put on the table, **Antonios Dimitracopoulos**, partner, Bin Shabib & Associates, discusses how having legal input can make or break a commercial resolution to a construction dispute sought through mediation.



In mediation, disputes are firstly sought to be 'resolved', i.e. somehow made to simply disappear. This is in direct contrast with the goal of arbitration and litigation where disputes are not resolved as such, but rather, decided on in a final indisputable and enforceable manner.

The emphasis with mediation is also on a commercial resolution, where money plays a pivotal role in one way or another. In construction disputes, a commercial resolution may involve the desire of a contractor to be seen as co-operative and therefore as a likely candidate for future projects by the same or related employers or project developers. It could also involve a calculation of the costs and human resources required to pursue a claim more aggressively when compared with either the value of the claim or that of future project awards to be had.

Neither litigation nor arbitration is concerned with commercialities. Arbitration, and particularly litigation, instead focuses solely on the application of justice and the apportionment of right and wrong, being oblivious, as blind justice should be, to what the commercial consequences of doing so would be.

As an objective, applying justice is a far superior endeavour than set-

ting a dispute on a commercial basis – there can be little doubt on this.

Mediation is not generally concerned with applying justice as such, and certainly has no teeth with which to arm a mediator as a distributor of right and wrong and as an enforceable decision-maker. So is there really any purpose to this soft method of tackling parties' differences, or is it a complete waste of time?

The answer would have to address the following distinction: is legal input involved in the process or not? The usual presumptions made of lawyers unnecessarily complicating every issue and them – instead of their clients – ending up as the only winners, are no more than folkloric misconceptions. If adhered to as beliefs, they can actually stand in the way of a successful dispute resolution – even one attempted on a purely commercial basis.

In a scenario where no legal input is involved, mediation is no better or worse than any

other method – be it structured or unorthodox, local or international, conventional or even radical – that parties may choose to settle their differences: if they succeed, then mediation was a wise choice, if they do not, it was a waste of their time.

But mediation with legal input can become a mechanism of a less fortuitous outcome. The reason is that very little can be achieved by way of a balanced decision on how to resolve a dispute without knowledge of where one stands against the law. It may be that with full knowledge of one's rights one may willingly disregard those and prioritise a current commercial relationship.

It may also be that knowing what the legal position in a dispute is, and being able to articulate it clearly and unequivocally can bring a dispute to a head; acting as virtual leverage that has not yet taken the form of court summons or notice of arbitration – something like a pre-trial dry run.

As an objective, applying justice is a far superior endeavour than simply settling a dispute on a commercial basis

Even if a dispute is not resolved and litigation and arbitration are the only options, having made a legal assessment of the strengths and weaknesses of a dispute could amount to a constructive turning point: was a dispute not resolved because of a strong-headed difference of opinion or a blatant disregard of a fair and equitable view, crudely provoking a legal battle?

For mediation to be a meaningful mode of dispute resolution, it has to amount to something more than uninformed trade talk under the cloak of a loosely structured procedure.

The best solution to most problems is usually found halfway between two extremes. In the context of construction-related dispute resolution, litigation and arbitration apply justice but create animosities and damage commercial relationships. Mediation devoid of legal awareness may mis-apply justice and create a jungle rule of commerce where the party with greater commercial leverage always wins. By contrast, mediation with legal guidance can aid towards a just resolution whilst keeping the pulse of a commercial relationship at a healthy pace.