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Early Resolution of Disputes - an Expert's Perspective

by H. de Trogoff and R. Harfouche

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Early resolution of disputes – an expert’s perspective

By Hervé de Trogoff and Roula Harfouche¹

Introduction

Given the choice, experts would generally prefer to get involved at the earliest possible stage of a dispute. Why? Because in our experience our early involvement results in both greater personal satisfaction and the best value for the client for the use of our time; it rapidly provides the client with an independent view on the technical merits of its case and its effects on the resulting quantum of loss. This allows the parties to structure and prioritise their dispute resolution strategies before incurring any significant costs, and is likely to result in the most efficient dispute resolution outcome.

Even when a dispute settles quickly, the experts’ early involvement provides them with the best long-term business development opportunity, as demonstrating competence on a specific case is much easier than talking about it at marketing events. It also feels more natural to most experts. When appointed on a case, the experts can demonstrate to the client (and its legal advisers) early on in the process:

- the rigour of their analysis and thought process;
- the skills and responsiveness of their team; and
- the resulting quality of their work.

What does the early involvement of experts involve? Typically the expert is asked to provide preliminary assessments – in our case on matters of time or quantum – so as to prioritise the issues and allow the parties to focus on the largest or most determinative ones. Non-binding expert analyses and opinions increase the likelihood of an early and amicable settlement by narrowing the initial gap between the parties’ perspectives regarding the cause(s) and extent of damages claimed, whether financial or other.

In this article references to early resolution of disputes principally mean informal settlement negotiations and / or formal mediation.² However, we see no reason why the principles discussed in this article, in particular with respect to the early involvement of experts, cannot be applied in other forms of alternative dispute resolution (“ADR”).

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² Mediation is a structured and facilitated settlement process involving a neutral facilitator. It is a commercial, rather than a judicial, process, and is largely progressed (with the guidance of the mediator) by the commercial representatives of the parties rather than by their legal advisors. Source: “Recipe for Success in Construction Mediation” by John P. Madden, Dispute Resolution Journal May / July 2001

This article refers to a case³ in which we have recently been involved to illustrate the potential benefits of the early appointment of independent experts. It explains, from our, the client's in-house counsel, and the mediator's perspectives how our early involvement helped the parties settle the dispute. From the discussion of this case, our collective experience at Accuracy, our research, and the views of an experienced mediator whom we have interviewed recently, we then draw the lessons and key success factors behind the early resolution of a dispute.

Case Study

Synopsis

We were recently appointed by a leading engineering, procurement and construction (EPC) contractor ("Contractor") to look into a dispute that was starting to brew between Contractor and the equally prominent owner ("Owner") of an oil and gas facility. For parties accustomed to dealing with multi-billion pound capital expenditure projects, the amounts potentially in dispute were relatively small. However, the subject matter of the dispute was rather complex in comparison to the sums at stake. More importantly, the amount of information available was vast and the factual issues in dispute numerous, such that the parties, legal advisers and technical experts could easily get lost in the details, thereby reducing the chances of an early settlement being reached.

Energy-related projects are notoriously complex from an engineering and factual point of view. This is mainly because numerous constraints need to be constantly monitored and resolved to ensure that all parts of the project come together on time, budget and quality. Such monitoring requires careful assessments of the numerous cause and effect relationships between the different relevant disciplines, namely, the:

- functional, technical, safety, legal and regulatory requirements that define the asset;
- timely developments of the design;
- procurement and mobilisation of suppliers and contractors;
- manufacturing and transport of parts (for instance: piping or heavy equipment); and
- installation, testing, commissioning and operation of the asset under severe logistical and health and safety constraints.

Generally, when a dispute emerges where both the cost of resolving technical complexities and the long-term interests of the parties are of a similar order of magnitude to the amounts in dispute, there is a significant risk that the net present value of going ahead with the dispute will be negative, even for the party that ultimately "wins", unless a quick settlement is reached. We find this to be true without exception across all industrial sectors.

³ The case and parties involved have been anonymised so as not to compromise our confidentiality agreements and duties

Development

We were appointed on this case as what is referred to as a delay and quantum independent expert. In simpler terms, our role was to understand why the project had completed later than agreed, and what this meant for the quantum of damages claimed by the parties. We were given two weeks to analyse the information provided and conduct detailed interviews of the relevant Contractor staff.

Our analysis provided the client with two elements, each of which we believe is essential if an early settlement through negotiations or mediation is to be reached:

Firstly, our analysis was structured in a way that allowed the claims of **each** of the parties to be heard in a negotiation context. Too often in our experience each party structures its views on a dispute by “heads of claim” whereby each event allegedly caused by the other party is described, and the value of the associated damage quantified.

If the parties are unable to reconcile these often contradictory claims, or if they disagree on which events are relevant, it appears difficult to approach negotiations other than by discussing the dispute as a whole or at best proceeding in “horse trading” fashion.

In this case, the majority of the financial claims made by both parties flowed from the actual delays that occurred on the project. We therefore broke down our independent project review into narrow time windows. For each of the time windows, we assessed the incremental period of delay suffered by reference to facts that were agreed between the parties.

Let us take a practical example; in the first year of the project:

- Contractor’s view was that Owner had radically changed the technical requirements for the plant, preventing Contractor from progressing its design and resulting in delays and cost overruns; while
- Owner claimed that the changes in technical requirements were minor and that any problem Contractor had experienced during the design phase resulted from an insufficient number of engineers and inexperienced design engineers.

The questions to answer are: “Whose claim is right?” and “What does this mean for the overall resolution of the case?”. Structuring the analysis appropriately is what will allow the parties to either answer both questions or to conclude: “It does not matter who is right on this point”.

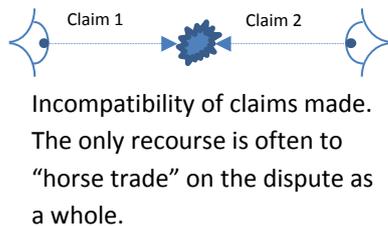
Indeed in our case: (i) the engineering cost overruns were minimal in comparison with the total size of the sums in dispute; and (ii) the late completion of the design had had no effect on the actual commencement or progress of the construction works. It was therefore important that the structure of the analysis allowed the parties: i) to decide whether the problems in the first year mattered at all for the purpose of resolving the dispute; and ii) if they did, how to measure the relative importance of the resource insufficiency versus changes in technical requirements.

Secondly, and for each of the material consequences that we measured – whether time or cost-related – we assessed the strengths and weaknesses of the causes put forward by each party to explain why that particular consequence had been observed. In simpler terms, it is easier to make progress in negotiations by looking jointly at, and agreeing or compromising on, what the true consequences of the issues in dispute were. If this part of the negotiation is successful, the parties are then able to focus on the particular events that relate to a particular set of issues that arose in a specific period of time.

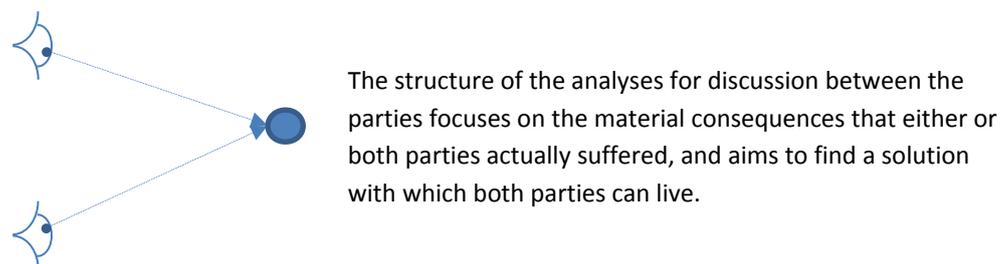
In our view, this is one of the essential ingredients for a successful early settlement, as it provides a structured framework to move step by step towards an acceptable outcome. The risk otherwise is that the parties will not find a common language for discussion, and that the parties’ perceptions and emotions will lead to arguments rather than sound rationales for negotiations.

As neatly put by the mediator whom we interviewed following the resolution of the case, and illustrated below, *“The structure I adopt to conduct my mediations needs to take the parties’ gazes away from each other and onto each of the problems that they need to resolve together to reach a settlement that is reasoned and with which each party can live”*.

Starting point: the parties face each other with claims that are incompatible.



Objective of early resolution discussions: look into the actual consequences for a solution with which both parties can live.



Of course, Contractor did not agree with the entirety of the conclusions that we presented following our uncompromising analysis. This is to be expected, as in this instance we were asked to provide our **independent** assessment rather than act as a consultant to, and present the facts and figures in the most favourable light for, Contractor.

We value our role as independent experts because, in our experience, one-sided claims prepared internally or with the assistance of consultants are expensive, time consuming to construct, and tend to fail. They are of limited use both in amicable negotiation or early resolution settings (other than to provide a starting position) and – if pursued – in arbitration or litigation because they lack credibility and are seen as pieces of advocacy.

The value of independent advice, beyond that of safeguarding the arbitration and litigation processes, is essentially to allow the client to form an unbiased view of its true position, and the position of the opposing party, so that the client and external counsel can best prepare for any form of dispute resolution. With that in mind, the disagreements we have with some of the stakeholders at our clients' organisations are not only frequent, they are necessary. They are a healthy and fundamental part of the process, as they allow a party to move beyond corporate consensus (or even "Groupthink"⁴) to the harsher reality of the strengths and weaknesses of the arguments presented in its claims. In turn, they go a long way towards preparing our clients for the demanding settings of informal or formal dispute resolution processes.

Resolution

Our formal role as independent experts on this case ended at this point. We continued to discuss regularly and informally the development of the case with our client, and recommended a number of mediators who could be suitable, one of which was appointed by the parties. We were delighted to find out that the case settled, after a very short mediation, a few months after we provided our findings on the factual and technical merits of the case, and our views on the resulting quantum of loss.

Later on, we managed to gain further insights into what worked well on this case and why it settled, through interviews with Contractor and the mediator who facilitated the successful resolution of the dispute. Their testimonies are set out below.

Testimony of Contractor's in-house counsel

"When we engaged your firm, our options were essentially: 1) to instruct a law firm to put together a memo on the strength of our case; or 2) to engage a technical expert, such as your firm, to analyse the available data and come to a view on the causes of the different delays and their financial consequences. Hiring both an expert and a law firm would have been more difficult because of the costs involved.

The traditional approach would have been to hire a law firm first to obtain legal advice on the strength of the case and conduct the negotiations and, if the case did not settle, get an expert on board for the litigation or arbitration proceedings.

⁴ Groupthink occurs within a group of people when the desire for harmony overrides the ability of the group to make rational decisions. The initial studies on Groupthink were conducted by Yale psychologist Irving Janis who explored the chain of events involved in the failed Bay of Pigs invasion of 1961
<http://www.psychologytoday.com/blog/credit-and-blame-work/201104/preventing-groupthink>

In this case, we decided to engage a technical expert first. My sense is that this allowed us to develop a much better understanding of the relevant facts, risks, and opportunities. We were much more prepared for the negotiations with the other side, which ultimately paid off in the final settlement. Another way of putting it is that getting the facts right is much more important than having a brilliant legal memo. Ultimately, I think our case is a real success story in how mediation helped both parties resolve the dispute and avoid costly and protracted litigation.”

Testimony of the mediator

“I first requested and received both parties’ position papers and supporting documentations. My knowledge of the industry and past experience allowed me to ramp up my understanding of the dispute quickly and prepare a framework for discussion with the parties.

Both parties had put together claims with technical and financial substantiations which were of good quality. This allowed me to become familiar with the issues and conduct the overall mediation in less than 50 working hours in the space of a few weeks.

In particular, it was clear to me that one of the parties had been provided with expert technical support, which had allowed it to break down the issues in manageable chunks. In particular, the overall project delay had been allocated to specific time periods, to which alleged causes (i.e. specific events) and financial damages could be attached. This was a very useful starting point for me to prepare a framework based on which I would facilitate the mediation discussions with the parties.

It became apparent in my initial joint discussions with the parties that previous attempts at negotiations had failed. It seemed to me that these negotiations had been at managing director level with limited input from the people who had knowledge – even high-level knowledge – of the project or dispute. Such horse trading negotiations are old fashioned and not very effective in my view, especially on a complicated technical and factual case, in which perceptions and emotions are likely to lead to a deadlock.

What allowed this mediation to succeed was the level of preparation of the teams involved, and in particular the growing awareness by each party, as the mediation progressed, of the strengths and weaknesses of their relative cases.”

Lessons learned and key success factors in reaching an early dispute settlement

A number of lessons can be learned from the case we described above. We have also drawn on our collective experience at Accuracy and researched externally the key success factors that are often cited as essential to reaching an early resolution of disputes. Finally, we have interviewed an experienced arbitrator and mediator in the energy, oil, and gas sectors. He has a very high success rate in reaching settlements in the mediations he has conducted and

provided the “golden rules” which, in his view, allow a complex technical dispute to reach an early settlement that is satisfactory for both parties.

We summarise below those key success factors from the point of view (or under the control) of the parties and the key success factors that are under the control of the mediator. Their relative importance may vary depending on the case, so they are shown in no particular order below.

Key success factors from the point of view of the parties and their advisors

Factor 1. The types of disputes that are best suited to early settlement negotiations / mediation

In principle, any dispute could be suited to early settlement negotiations / mediation, as there is little risk to participating in mediation. The process brings together (ideally) informed party representatives who are ready to explore the strengths and weaknesses of their case, and takes a shorter time when compared to most other dispute resolution alternatives. Mediation can also save not only the high direct costs of arbitration / litigation, but also the indirect and less obvious costs of these dispute processes: the emotional toll and disruption of corporate operations,⁵ and the opportunity costs of diverting company resources, in particular middle to high level staff, from their normal functions.

In a number of cases and jurisdictions, mediation is simply a mandatory step that the parties have to (at least) consider entering into, as a prerequisite to resorting to litigation or arbitration. It could also be the case that the relevant contracts include a clause stating that mediation must be attempted before official claims are filed.⁶

More generally, early settlement negotiations / mediation can be an effective way for parties and their advisors to assess the risks attached to their claims, should the dispute proceed to arbitration or litigation. This can be achieved through the exchange of relevant documents, including preliminary expert reports where suitable. This will allow each party to understand the other side’s legal and factual analysis and to better assess the relative strengths and weaknesses of its own case.⁷

However, parties may consider that the amounts at stake are such that they will not be able to settle, or that their relationship is irreparably damaged, or that mediation will reveal prematurely certain information or weaknesses in their case. The latter risk has to be balanced against the improved risk-assessment benefits of early settlement negotiations that we described above.

⁵ “Recipe for Success in Construction Mediation” by John P. Madden, Dispute Resolution Journal May / July 2001

⁶ “Technical Mediation: A new tool for resolving complex construction disputes” by Robert S. Peckar, Dispute Resolution Journal May / July 2005

⁷ “Ten Ways to Use Mediation to Assess Risk More Effectively” by Nancy Lesser, Dispute Resolution Journal August / October 2011

Parties may also consider that mediation is not an option because they are too far apart, which can happen when they have relied on their own internal, and therefore often one-sided, assessments. This possibility can be avoided or the chances of a party reaching this position can be minimised, by the instruction early on of an external technical, quantum, or subject-matter expert to provide an **independent** assessment.

Bearing these caveats in mind, disputes that are particularly well-suited to early settlement negotiations / mediation are typically:

- complex / highly technical disputes but with a relatively small quantum of loss, such as the case study we discussed above. The higher the relative quantum of loss, the higher the incentives for the parties to resort to litigation / arbitration because the likely pay-outs will exceed the costs;
- disputes where the parties want to preserve their relationship or where the parties have to continue working together, so that it is in their best interest to avoid protracted arbitration or litigation processes;
- cases where the matter in dispute took place recently, such that access to the facts, documents and witnesses is readily available to the parties;⁸
- cases where the parties would like to keep the fact of their dispute or details of their dispute confidential, as confidentiality can be difficult to preserve even under arbitration settings;
- cases where, should the dispute not settle, a number of parties would be in separate but related lawsuits, adding to the complexity and multiplying the costs of the disputes because a number of law firms and potentially a number of experts would be involved; and
- cases where the dispute is holding up an on-going project or payments to a party or parties.

Factor 2. The choice of the mediator

Obviously, the mediator has to be neutral, independent and fair, and be of good reputation and standing. The parties are also more likely to trust an experienced, credible mediator, so “grey hair” may reassure the parties. In addition, the type of mediator the parties choose is important, and varies depending on the characteristics of the dispute. There are essentially two types of mediators:

- (i) the “facilitator-mediator”, who does not point out the strengths and weaknesses of the parties’ claims, but is able to mediate successfully in any type of dispute across most industries through her ability to animate the process and bring human beings together; and
- (ii) the “subject matter mediator” or “evaluator-mediator”, who has an in depth understanding and hands-on experience of the type of problem and / or the sector involved. This type of

⁸ “Evolution of ADR techniques for major construction projects in the nineties and beyond: a United States perspective”, by John W. Hinchey, Construction Law Journal, dated 1996

mediator will point out the strengths and weaknesses of the parties' claims, so the reputation of the mediator and her technical / industry expertise are more important factors than for the facilitator-mediator.⁹

If the subject matter of a dispute is technically challenging – for instance, in the oil and gas, nuclear, IT, aerospace, defence, rolling stock manufacturing and other technical industries – it is essential to select a mediator who has substantial experience in the field,¹⁰ which will allow her quickly to understand the technical concepts and the relevance of different factual issues to the claims.

It is best that both parties request that the mediator provide a view and act as “evaluator-mediator”. When done properly, the evaluator-mediator gives an unbiased analysis of the strengths and weaknesses of both sides' cases, thereby giving them a reality check. This can be especially helpful when an impasse in the negotiations is looming.¹¹ Often, unless the parties have already engaged independent technical or quantum experts, mediation offers them the first opportunity to confer with an informed and unbiased individual regarding the strengths and weaknesses of their case.¹²

Irrespective of whether the mediator evaluates the merits of the claims or not, it is important that the mediator has experience in the type of dispute she will be mediating, and that she is respected by both sides, as once a mediator has “lost” the room, she becomes ineffective.¹³ In addition, studies have shown a direct correlation between a mediator's actual case experience and higher settlement rates.¹⁴

Factor 3. Understanding one's wider interests

The objective of initial joint discussions is to identify the different views of the parties on the merits of their own claims and the other party's claims. This is a necessary step if compromises are to be reached, but it will not lead to a settlement by itself.

What truly facilitates settlements is the realisation by each of the parties that reaching an early settlement, in and of itself, will bring significant benefits to them and / or avoid significant costs and additional difficulties, such as:

⁹ “Selecting a Mediator in International Disputes: Dare we Speak of Mediation as ‘Winnable’?” by Claudia T. Salomon and Peter D. Sharp, *Dispute Resolution Journal* May / July 2006

¹⁰ “Selecting a Mediator in International Disputes: Dare we Speak of Mediation as ‘Winnable’?” by Claudia T. Salomon and Peter D. Sharp, *Dispute Resolution Journal* May / July 2006

¹¹ “Ten Ways to Use Mediation to Assess Risk More Effectively” by Nancy Lesser, *Dispute Resolution Journal* August / October 2011

¹² “Recipe for Success in Construction Mediation” by John P. Madden, *Dispute Resolution Journal* May / July 2001

¹³ “Large, complex construction disputes: the dynamics of multi-party mediation” by Albert Bates Jr and L. Tyrone Holt, *Dispute Resolution Journal* May / July 2007

¹⁴ “ALTERNATIVE DISPUTE RESOLUTION; Progress on the N.J. Mediation Front; Maximising the benefits to the judiciary, litigants and attorneys”, by Laura A. Kaster and N. Janine Dickey, *New Jersey Law Journal*, dated 18 March 2013

- the erosion of long-term relationships with a client / supplier / business partner that might be costly in the long run;
- the opportunity cost of running long disputes, which divert the focus of middle and top management resources away from the functions they are employed to fill;
- the lack of sophistication of courts in dealing with complex technical, financial and factual disputes in certain jurisdictions, which can lead to seemingly random decisions;
- the risk of reputational damage due to public proceedings,¹⁵ or where proceedings could lead to the public disclosure of confidential or embarrassing information;¹⁶
- the longer a dispute lasts, the more costly and difficult it is to access all the relevant witnesses, and the more difficult it is for them to recollect the relevant facts; and
- the ever increasing duration and costs of arbitration and litigation proceedings.

By investing time in understanding and assessing what the wider interests of each of the parties are, the mediator is more likely to obtain significant concessions and to narrow the gap between the parties.

Factor 4. The early involvement of experts

Complex cases may rely substantially on expert evidence, such as construction disputes, as in the case study above, or in patent infringement cases. The expert can help the client to better articulate its case and present it in a clearer and more helpful way to facilitate negotiations, as shown in the case study. An independent expert will also ensure that the client has a clearer view of the strengths and weaknesses of its case, which may lead it to re-evaluate its own case. At the very least, an independent expert will provide a more balanced view of the client's claims, and thereby allow it to make a more realistic assessment of their prospects.

Seeing the other side's expert report can also provide a reality check to a party as to the strength and weaknesses of its case and the opponent's case. It can also help a party evaluate the other side's expert witness, in particular if the expert participates in the early resolution process.¹⁷ In our experience, this has worked well when, for example, we found errors in the opposing expert's preliminary report and calculations, and were able to speak to the opposing expert so that he quickly acknowledged and corrected the errors, and arrived at a loss assessment that was closer to ours. This also worked well in a case where we were able to show the opposing expert that some of the assumptions he made were inconsistent with the facts. As a result, he revised his loss assessment to come closer to ours.

In addition, experts instructed at this early stage could assist their instructing party in real time with assessing strengths and weaknesses at each stage of the negotiations. Such advice

¹⁵ "Large, complex construction disputes: the dynamics of multi-party mediation" by Albert Bates Jr and L. Tyrone Holt, *Dispute Resolution Journal* May / July 2007

¹⁶ "To Mediate Or Not To Mediate: That Is NOT The Question", by Robert. L Holzberg, *The Connecticut Law Tribune*, dated 3 March 2014

¹⁷ "Ten Ways to Use Mediation to Assess Risk More Effectively" by Nancy Lesser, *Dispute Resolution Journal* August / October 2011

could afford the instructing party valuable insight on the effect any negotiated term would have on the dispute as a whole, from monetary to logistical aspects.

Factor 5. The ideal structure of the teams attending

Each party ought to bring a manager who has sufficient authority to make decisions for her firm, as well as a core team of internal experts who have sufficient knowledge of the facts and figures to answer the majority of the mediator and the other party's questions.

Parties should think carefully about how active or vocal they want their legal counsel to be during the mediation proceedings. The mediator's only power is that of managing the process and so any interference by the parties or their legal advisers on the timing and organisation of the mediation might compromise two of the essential success factors of mediation:

- the credibility of the mediator; and
- the smooth and rapid progress of the discussions.

Therefore, unless the event at the heart of the dispute is highly dependent on matters of law or contract, it might be preferable for parties to ask their legal advisers to be discreet in joint mediation sessions.

Key success factors in the hands of the mediator

Factor 6. The need for early interviews of the parties by the mediator?

Often, mediators are advised to or asked by the parties to conduct separate preliminary interviews or meetings with each party. The objective is to establish a rapport with each party and start understanding the positions they are putting forward.

However, this can prove to be counter-productive. Shifting the parties' attitude from confrontation to moving towards a settlement requires the maximum level of transparency and credibility from the mediator, so that the parties can trust her. It might therefore be preferable for the first meeting to occur at the opening joint session with representatives from both parties present. It will also enable the evaluator-mediator to focus her time and attention on familiarising herself with the issues, facts and positions put forward to her in structured written form by the parties at the start of the process.

Factor 7. The importance of the mediator's note explaining the conduct of the mediation

Most mediators do not appreciate how unfamiliar parties are with dispute resolution processes that go beyond informal settlement negotiations. The new ICC rules ask that each mediator prepare a note covering practical, timing and logistical aspects of the mediation.¹⁸ If the parties understand the process, and know very clearly what to expect from the mediator

¹⁸ Article 7(2) of the ICC Mediation Rules <http://www.iccwbo.org/products-and-services/arbitration-and-adr/mediation/rules/>

and the other party, and what will happen when the discussions start, they are more likely to focus on finding solutions to resolve the dispute rather than questioning the process.

Factor 8. Documenting the progress made in the mediation

The final rule is for the mediator to obtain and the parties to make concessions which are reciprocal and based on clear rationales. If the framework adopted to break down the dispute in manageable chunks is successful, each party will be able to:

- understand the relative value of each concession made or received in the context of the overall dispute; and
- in the event of interrupted negotiations or mediation proceedings, restart the discussions with a clear understanding of the positions reached by each party when the negotiations were interrupted, thus avoiding backward steps and further lengthening the process.

Conclusion

The main lessons we have drawn from the case study discussion, our collective experience at Accuracy, our research, and the views of the mediator we interviewed are:

Firstly, it is important to bear in mind that some cases are more suited to early resolution than others. The prime two categories of disputes that parties should aim at resolving early are:

- (i) highly technically or financially complex disputes with a relatively small quantum of loss; or
- (ii) disputes where the wider interests of the parties (including preserving long-term relationships) outweigh the possible gains and losses of pursuing litigation / arbitration proceedings.

Secondly, the choice of the mediator is key, in particular whether the most suitable mediator should be a facilitator-mediator or an evaluator-mediator. The latter is likely to be needed in complex disputes in industries that require specialist knowledge.

Thirdly, each party needs to invest time, care and energy in understanding its wider interests and assessing what the wider interests of the opposing party are.

Fourthly, involving external, independent subject-matter experts early on in the process increases the chance of reaching an early settlement that is satisfactory to both parties.

Fifthly, the parties should make sure they bring a manager who has sufficient authority to make decisions for them, as well as a core team of internal experts who have sufficient knowledge of the facts and figures to address the mediator and other party's queries. These points are vital and simply common sense, yet rarely met by parties in our experience.

Finally, it is crucial that the mediator: 1) carefully times and prepares for the first meeting with the parties to maintain her credibility; 2) drafts a clear and helpful note to the parties

setting out the plan for the mediation; and 3) documents the progress made and reciprocal compromises reached during the mediation.