Is it time to make Single Joint Experts compulsory in mediation?

Introduction

In recent years, Alternative Dispute Resolution (ADR) has become an increasingly popular pathway for resolving construction disputes without resorting to the courts. The two most popular forms are arbitration (the outcome of which is legally binding) and mediation (the outcome of which is not).

The Civil Procedural Rules provide guidance in England and Wales. Typically, legal representatives for the parties instruct experts to prepare formal reports for use in these hearings. Each party may instruct separate experts, not necessarily working to precisely the same instructions.

Experts are a key part of the dispute resolution process, enabling understanding of the often detailed and complex technical, financial, and contractual issues that underly the construction process. Although experts should seek (and very often do find) common ground, there are many occasions when a lack of agreement on key issues can hamper the process of bringing the parties to an agreement.

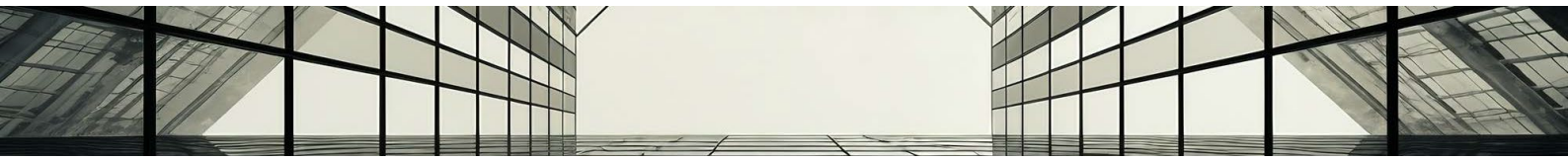
An alternative to separate party-appointed experts is the engagement of a single joint expert (SJE), i.e. an expert appointed jointly by both parties. Although this has become more common in recent years, particularly for mediations, it still remains relatively rare. But is now the time to start making more extensive use of this approach?

There are both advantages and disadvantages of engaging an SJE:

Advantages

True independence – although all experts appointed in disputes should act independently, an SJE will not experience the pressure felt by some party-appointed experts to favour their client's standpoint. The SJE may act with full impartiality in assisting the parties to reach an informed and fair settlement;

Less adversarial – An effective SJE should be able to provide a full understanding of the issues unincumbered by arguments over competing explanations or opinions;



Reduced costs – Fewer experts means reduced costs. Where the value of the matters in dispute is not great, the parties will wish to resolve the matter within a reasonable budget;

Confidence – The true impartiality of an independent expert will increase the parties' confidence in his/her findings, thus improving the prospect of bringing the parties closer to agreement;

Timescales—Cases involving multiple experts are time-consuming. Using an SJE will streamline the process, delivering speedier outcomes.

Disadvantages

Lack of challenge - The SJE does not face the scrutiny of a peer as would be the case with multiple party-appointed experts. Mistakes may go unnoticed, or unconscious biases unchallenged;

Reduced expertise – all experts bring their own differing knowledge and experience to the process. Fewer experts reduce the pool of expertise available to inform the debate. It is perfectly possible for two different experts from varying technical backgrounds to reach opposite opinions based on the same set of facts;

Lack of control – despite the independent role of all experts, the parties may feel that they have less control over the inputs of an expert appointed jointly rather than solely;

Addressing dissatisfaction – there is a risk that, should the SJE favor the arguments of one party over another, bias may be perceived, leading to an increased risk of subsequent challenge, potentially entailing further delay and cost.

Discussion

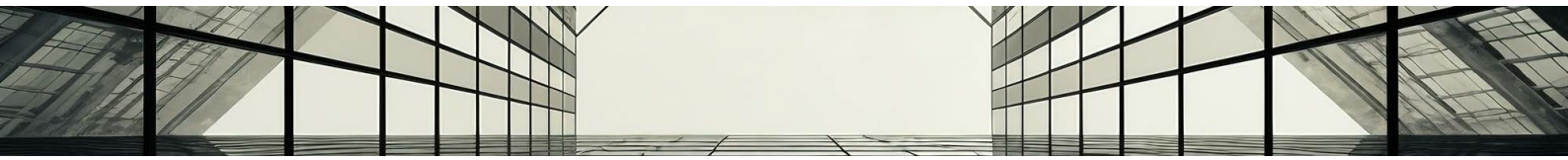
Overall, most parties embarking on the SJE route do so in the expectation of a more streamlined process with reduced costs and timescales, which will still deliver a favourable settlement.

The value of SJEs is probably greatest when the amounts in dispute are small and the technical issues are not too complex. In reality, this probably accounts for the majority of cases.

Perhaps the biggest advantage of deploying an SJE in mediation is that they reduce the adversarial nature of the process thus increasing the likelihood of agreement being attained. Too often, parties enter mediation convinced of the righteousness of their cause, buoyed up by a report from their appointed expert that seems to support their position. In construction disputes, the technical expert's opinion may well be critical to the strength of their claim. Rightly or wrongly, they often view the other side's expert as a 'hired gun', whilst being both comfortable and confident relying on the expressed opinions of their own expert.

However, the availability of a neutral and impartial opinion would encourage the parties towards a more considered review of the strength of their case. Too many mediations end without settlement, not because the gap was too wide to bridge, but because both parties are so convinced of their strength of case that they are unwilling to make concessions sufficient to span the gap. They are willing to risk arbitration, confident in the veracity of their case, the likelihood of winning, and their chances of recovering the additional costs. In such cases, the measured opinions of an independent and impartial SJE may help temper such strongly held positions.

Although the advantages generally outweigh the disadvantages, the fear of lack of control is probably the single greatest reason why SJEs are not more widely utilised in mediation.



Lord Woolf's Report

Lord Wolff, in his report "Access to Justice", published in 1996, strongly encouraged the use of ADR, including mediation, to resolve disputes more amicably and efficiently. On the subject of SJEs, Lord Woolf commented that:

"A single expert is much more likely to be impartial than a party's expert can be. Appointing a single expert is likely to save time and money, and to increase the prospects of settlement. It may also be an effective way of levelling the playing field between parties of unequal resources. These are significant advantages, and there would need to be compelling reasons for not taking them up."

The introduction of the Civil Procedural Rules (in England & Wales) was a direct result of Lord Woolf's report. Although they principally govern court proceedings, they positively encourage the use of alternative dispute resolution techniques and the use of SJEs for resolving disputes.

Should SJEs be mandatory?

Currently, using a SJE in a construction dispute is not obligatory, although courts and tribunals can direct their use in particular situations.

So should SJEs be a compulsory requirement in the mediation process? In smaller, more straightforward cases, the advantages of the use of an SJE are clear. However, compulsion is controversial as every individual case has its own unique circumstances. Furthermore, agreeing the SJE's brief may not always be straightforward and the perceived risk of lack of control is probably the biggest negative factor for many. However, there are clear advantages in delivering faster and fairer outcomes, and the current trend towards increased appointments of SJEs is likely to continue.

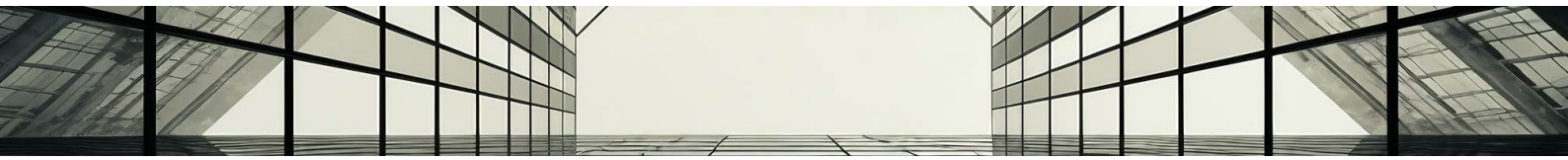
In mediation, the mediator's role is to assist the parties toward a negotiated settlement, not to act as a judge or arbiter. The mediator helps facilitate communication and compromise. As such, perhaps a climate of cooperation and understanding may be better supported through the agreed-upon use of an SJE rather than through one that is imposed.

Furthermore, mediation is often just the first step in the dispute-resolution process. If unsuccessful, it may develop into full arbitration and potentially lead to court. Typically, costs escalate significantly at each stage, so there is a strong incentive to resolve matters at the earliest stage possible. Imposing an SJE may not engender the spirit of trust and cooperation that is essential for early settlement.

As the initial step, mediation is intended to be a relatively informal and collaborative process in which the parties work together. The use of a jointly appointed SJE increases the confidence that each party has in the appointee they themselves choose. It also reduces any tendency of the SJE to favour a single party, and it reduces the time that is sometimes spent attempting to refute the evidence of the other side's expert. In short, the process becomes less confrontational and encourages the parties to focus on their commonly held desire to find a solution rather than defending their bottom line at all costs.

Conclusion

There remains a lack of evidence to conclusively demonstrate whether mediations employing an SJE have produced better outcomes than those utilising separate party-appointed experts. This is, in part, because the outcomes of mediations are seldom published, with the parties often reluctant to acknowledge that they are in dispute at all! However, the increasing use of SJEs is indicative of their potential to guide the dispute resolution process towards better, more amicable, outcomes.



A key factor in successful mediations is that both parties are open to finding solutions and willing to compromise. They should understand their own positions' strengths and weaknesses and be willing to compromise accordingly.

If an SJE has the parties' trust, his or her opinion will carry greater weight, enhancing the parties' understanding of their position and their willingness to seek common ground.

However, there remain good reasons why the use of SJEs should not be mandatory—in many situations, their engagement is simply not appropriate. Equally, there are many smaller and more straightforward cases where the parties could save themselves considerable time and expense should they follow this route. Perhaps a trial period might demonstrate the worth.

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