

Project Mediation

Recognising and managing conflict with the projects' best interests at heart

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“... parties cannot contract to oust the ordinary courts from their jurisdiction. They can of course agree to leave questions of law, as well as fact to the decision of the domestic tribunal. They can, indeed, make the tribunal the final arbiter on questions of law. They cannot prevent its decision being examined by the courts. If parties should seek by agreement to take the law out of the hands of the courts and put it in the hands of a private tribunal, without recourse at all to the courts in case of error, then the agreement is to that extent contrary to public policy and void.”

Lord Denning in *Lee v Showman's Guild of Great Britain* [1959] 1 All ER 1175

Introduction

The above quote from Lord Denning may be an accurate statement of the common law, however, it looks strange in the context of ADR.

In the construction industry, it appears as much of an anachronism as a judicial statement can be. While reassuring to lawyers that the courts reserve the right to correct errors of law, for the main protagonists in construction disputes, owners and contractors and all those standing behind them, the frequently subtle distinctions we try to draw between questions of law and fact wear the patience and strengthen a growing suspicion that these legal niceties are being established at their expense.

Ultimately, the parties want a successful project. With a few notable exceptions, in large construction projects, this can be hard to achieve without disagreements arising. Sadly, the traditional method of competitively tendering projects with maximum certainty for owners makes some level of disagreement an inevitability.

What is frequently missing is any focus on avoiding disputes from arising in the first place. It is the aim of project mediation to identify potential disputes as early as possible, and deal with them before the parties' positions become hopelessly entrenched.

Laying the ground work for disputes

During the design and consent phase of major projects, the owner relies heavily on the technical expertise of the design consultant (the architect or engineer) to provide definition for the project. Much of the certainty which the contractor could provide on construction methodology, use of construction equipment, timing and

pricing is generally not available to the owner, unless some of the more imaginative or flexible contracting processes are used.

Once the consents are more or less a certainty, the design consultant will usually produce technical documents of sufficient detail to invite a shortlist of contractors to provide formal priced offers to carry out the project. In order to achieve the best outcome for the owners, the traditional perception is that the offers must remove, or at least reduce as much uncertainty from the project as possible. This is frequently achieved by promoting competition between the tendering parties to accept more risk than they would like, and by bringing downward pressure on prices.

Not surprisingly, during the tender phase, the contractor is keen to give the impression to owners that anything is possible, and all they would like to do is to be on board with them in a successful project. However, tendering for large projects is an expensive exercise, and only one of three or four bidders is going to win the job. Contractors like to do the best job they can at identifying and reducing risk, but they also have to be realistic in what they price.

While contract terms are commonly set by industry standard, the opportunities for claim are limited, and price and time for completion fixed, so far as they can be. Most design consultants and legal advisers will have standard amendments they will make to the standard forms to correct perceived shortcomings, or to address issues they have struck in the past, or to simply provide further detail on matters of particular importance.

The underlying allocation of risk in most projects is that design responsibility rests with the owner, and buildability and pricing risks rest with the contractor. The genuinely unforeseen is something paid for by the owner, but managed by the contractor.

The benefits of tendering can lead owners and their advisers to be opportunistic, and to the mistaken belief that there is a free lunch to be had by shovelling additional risk onto contractors without really considering if it is sensible, or in the best interests of the project. It is here that the ground work for most construction dispute is laid.

Following award, there will frequently be a subtle, but significant change in attitude by the successful contractor. Leaving aside a lingering concern that too much money may have been left on the table, most contractors will turn their attentions to resourcing the project, and putting detail onto their draft programmes and method statements.

Most will also put a lot of effort into their risk registers for the project, and if the tender process has been particularly brutal, some will already be looking for potential areas to reinstate a bit of balance into the project by identifying potential areas for claims. Token claims may be made at this stage to test the water, and to perhaps establish a precedent for future, larger claims.

Traditional Alternative Dispute Resolution

In the traditional model, our design consultant then puts aside its own liabilities and professional interests, and fills a dual role of owner's agent and technical adviser, and independent professional. In this latter role, he or she will also be the first port of call for determining disputes.

Typically, this initial determination is binding on the parties, and many potential disputes will go no further. This will depend, however, on the commercial sophistication of the parties, and on just how aggressive the tender process has been.

The standard forms then have an escalation provision, with mediation preceding arbitration, which is usually the last port of call. Perhaps unusually, mediation is frequently compulsory, in that no further steps can be taken in the dispute process until there has at least been a referral, and the most frequently used standard also allows for the mediator to make a "report". This comes as a considerable surprise to most mediators, bearing in mind the voluntary and facilitative models that prevail.

Few contracts modify the standard arbitration rules in the second schedule to the Arbitration Act 1996, and most parties would be unaware of the rights of appeal to the court, or the appeal tribunal recently established by the Arbitrators' and Mediators' Institute of New Zealand.

There has been a considerable shift away from this model of dispute resolution internationally. The accepted standard in international construction projects is to appoint a sitting disputes review board, appointed at the outset to monitor progress and advise on potential issues as they arise, rather than letting a formal dispute develop.

Locally there has been a growing demand for formal alliances and collaborative working arrangements, which do away with the traditional confrontational award and management methods. The parties agree, under these arrangements, to work together in the best interests of the project, and they contract not to take any disputes to court or arbitration. It is not at all clear how this fits with Lord Denning's public policy statements quoted above, but this does not dull the enthusiasm of the protagonists for these methods.

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The international experience seems to be that while disputes review boards of some form or other are included in most standard forms, and are compulsory for many publicly funded projects, they are expensive and they remain focussed on dispute management. The attraction of alliancing, for all its other problems, has been its cooperative approach to problem solving.

This has led the largest dispute resolution body in Europe, the Centre for Effective Dispute Resolution, to promote a new approach to dispute avoidance and conflict management called *project mediation*.

Project mediation is designed to promote successful project delivery by identifying potential problems early, and addressing them before they impact on payment,

delay the work or otherwise have an adverse effect on the relationships of the parties.

Under the model protocol, typically two project mediators are appointed for the project – one technical and one legal. The project mediators are not facilitative or transformative mediators, but genuine experts bringing their experience and professional judgment with them to the project.

There are then three distinct elements to project mediation.

The first is a risk workshop, convened by the project mediators, and attended by all interested parties. This will usually be the owners and their representatives, contractors, key subcontractors and may extend to financiers and insurers. The risk workshop is ostensibly for the parties to establish lines of communication and levels of authority, and to discuss risks for the project, and potential areas of conflict going forward. For high risk projects, like major tunnelling, it is also an opportunity to establish and work through the risk register for the project.

The second element focuses on dispute avoidance, by allowing access to the project mediators during the project. This will involve attendance on site from time to time to discuss progress and to identify potential problems, and direct discussion between mediators and the parties to prevent disputes arising, or to clarify information requirements which need to be addressed before settlement discussions take place. In this role, the project mediators are more proactive and more involved than traditional disputes boards, however this reduced level of formality and more flexible approach to dispute avoidance allows the mediators to bring their respective skills to bear.

The final element of project mediation is to formally mediate any disputes which then arise, before they are referred for final determination, whether in court or in arbitration. Again, the mediators will assist the parties in the context of a voluntary and confidential mediation. The mediators will inevitably provide more guidance to the parties on the relative strengths of their positions than many facilitative or transformative mediators would feel comfortable with. However, it is the mediators' experience and judgment which they bring to the process, rather than a theoretically neutral forum for airing grievances.

The attraction of project mediation is that its focus is on identifying areas for disagreement early and the avoiding disputes developing, while preserving party autonomy and confidentiality. That it can do so in parallel with most dispute resolution provisions and with statutory adjudication only adds to its appeal.

The critical elements for the success of project mediation here will be that project mediators take on board their revised roles as dispute avoiders and conflict managers, and that owners and contractors perceive project mediation as a further tool to reduce conflict, rather than as a further layer of cost for their projects. Project mediation moves the focus of ADR away from establishing processes for dealing with disputes to addressing the differences in expectation and difficulties with communication which give rise to the conflict in the first place.

In this context, Lord Denning's concerns with the sanctity of the courts looks completely irrelevant, as it should be.