

Mediation panel beats disputes

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Day one of a construction project and the common view among project participants is that this is the one that will be completed on time, within budget, without changes and above all without disputes. This one is going to be different.

Dreaming is something we all do, of course. Even the most intelligent, experienced or battle-scarred will embark on a new project with real optimism. Yet, as often as not, reality bites, and the waste, expense and delay caused by disputes seem every bit as real as the optimism that put them out of mind when the project began.

If all projects were suddenly to be dispute-free, it would sound the death knell for the whole industry now devoted to disputes, an army of forensic quantity surveyors, experts, adjudicators, arbitrators, litigation lawyers and all manner of dispute specialists including the courts themselves. However, there is no sign yet of any of them winding down their dispute practices.

'This one will be different' has become part of the engine driving the ambitions of the UK construction industry and while these good intentions may be vibrant and laudable, they represent a triumph of hope over experience.

In the real, wide awake world, the circumstances of project delivery are inevitably complicated and variable, with many unknowns. Perhaps achieving the optimum project outcome is unrealistic, but it is not made any more likely by ignoring the likelihood of difficulties and disputes, that is 'We do not have disputes on our projects'.

Another excuse for not planning for

contingencies with professional help is, 'We are different from other industries, a special case and others do not understand us'. Tragically, this is often shouted just as loud as parties walk out of court at the end of a long and expensive case.

Opting out of litigation

So what avenues are there already in place to help resolve these difficulties and disputes? Apart from those using mediation, all roads lead to conflict and, frequently, damaged relationships and delayed project progress. Adjudication has its construction champions, albeit few. Yet, elsewhere in industry, it is mediation to which parties in dispute are gradually migrating in ever greater numbers as a more practical and enlightened way of dispute resolution. The more thoughtful sections of the construction community are following. Longstanding dissatisfaction with the expense and delays of litigation, and developing widespread mistrust of adjudication are fuelling that migration.

Euphemistically called 'rough justice', the adjudication procedure flowing from the Construction Act 1996 gives short-term quick fix solutions and provides 'provisional finality' — an obvious paradox — with, unsurprisingly, mixed results.

In spite of a continuing movement towards putting its own house in order, the construction industry — few within it would deny — suffers from entrenched attitudes to conflict that have largely resisted attempts at reform.

Some might even admit in an unguarded moment to the pursuit of the power game. It is one we all know how to play. We learned it in the school playground. Unless there is a decisive power

advantage, numerous negative dynamics are engaged, including threats, coercion, resistance, counter-attack, anger, stubbornness and pride. The power paradox described by William Ury in *Getting Past No* (Harvard, 1988) then comes into play: the harder you make it for him to say no, the harder you make it for him to say yes.

In pursuing a legal remedy a great deal of time, money, blood, sweat and tears is expended. The result is frequently a lose-lose outcome even on its face; almost invariably so when the wider picture is considered. Conflict generates delays, expense and project failure. It adds another name to our 'Never work with' list. And it does nothing for reputation, both vital and vulnerable in a highly competitive industry.

The case for mediation

By contrast, the success rates reported for mediation by the Centre for Dispute Resolution (CEDR) — consistently in excess of 80% speak volumes.

The current interest in alternative dispute resolution systems stems from dissatisfaction with the time, cost and results of conventional judicial dispute resolution, but as yet these have not been forces capable of reshaping and redefining the way the construction industry negotiates and resolves its differences. The posturing and stone-throwing mentalities are deep-rooted — and a shift in the collective culture is needed.

Here, it could be useful to acknowledge the influential insight of William Ury again, in *Getting to Yes* (1991) co-authored by Roger Fisher: the basic problem in a negotiation lies not in conflicting positions, but in the conflict between each side's needs, desires, concerns and fears.

The benefits of better dispute resolution are clear: a contractual environment in which honesty and goodwill can flourish; where recognition is given to the relationship between risk and reward; where unplanned events are taken in the project's stride; where successful project outcomes are more common and measured in the maintenance and growth of reputation and relationships leading to repeat business as well as by short-term profit.

By now most of us have some idea

of what but facilitated and supported by one or more independent and neutral third parties (mediators). Mediation focuses primarily on the needs of the participants, rather than on the rights that a court, arbitrator or adjudicator might find the parties to have. Dissatisfaction with the expense, delay and outcome of litigation only serves to underline the attractions of mediation. However, its virtues are not dependent on the disadvantages of the alternatives. The opportunity for parties to retain control of the resolution of their differences or disputes at a time when they can better be resolved is advantageous to all. Mediators impose no decision on the parties. Resolution is achieved by agreement. It has already been shown to have exceptional rates of success.

As part of the standard risk management for a project a dispute resolution procedure should be considered and included in each agreement made in relation to the project, recognising that taking no action, ignoring the issue, means taking the unprotected risk of later conflict. The seeds of this compelling argument will almost certainly fall on fertile ground if cast upon the fields of insurance and banking. Those sectors often see the true cost of a dispute without having been directly involved in its cause.

Contracted Mediation is a pre-planned contractual dispute resolution system established at the beginning of a project which provides a safe and professional framework for the avoidance and the resolution of disputes throughout a contract. The parties agree to manage and resolve any differences that may arise during the course of the project with the assistance of a Contracted Mediation Panel familiar with the project. As the Panel is appointed at the beginning of the project, it is functioning actively to prevent or avoid differences from becoming disputes even before they have arisen.

The purpose of the Panel is to provide a resource for the avoidance and resolution of differences and disputes, continuously available throughout the project. Its aim is to avoid unnecessary and expensive conflict. It gives all parties a further and better choice as to how to resolve any dispute. The Panel provides a structured approach to the mediation and resolution of any difference

or dispute and encourages transparency and openness, with importance being placed on facilitation, teamwork and communication. The needs of the parties are the Panel's primary concern.

Contracted Mediation has evolved by combining the advantages of mediation and the third party disputes referral system used on international projects such as Hong Kong airport and others backed by the World Bank.

Often, parties only consider mediation when they have already expended time, energy and expense on other more confrontational alternatives, such as adjudication, litigation or arbitration. The disincentive to open communication inherent in adjudication, litigation and arbitration is absent in this process — indeed, all the incentives are to be open — and all parties benefit from the opportunity to explore the possibility of resolution or agreement in the safe and pre-agreed framework and with the benefit of the expert help of the Panel.

Drawing on vital skills

The Panel on a project will normally comprise two members with mediation expertise, one legal, and one commercial. If appropriate, and with the consent of the participating parties, a third member may be co-opted to provide an additional specialist expertise or function.

The Panel is neutral and acts fairly, independently and impartially, providing each of the parties with an opportunity to explain its needs and concerns, whilst avoiding any unnecessary delay or expense.

The procedure is confidential and without prejudice. Unless otherwise agreed by all parties, no information regarding the mediation and its outcome or settlement terms is disclosed outside the mediation.

The Panel agreement has been specially designed to collapse the different phases of settlement negotiations that might occur over years of litigation into a matter of a few days, so as to encourage efficient and reasonable compromise and the Panel procedures are flexible and versatile. At the start of the project the Panel undertakes a high level review of the documentation and preDares a Project Plan which includes the anticipated work

and price structure, an outline milestone programme and other key information. This is regularly reviewed and updated, particularly if a dispute arises and the Panel arranges to be provided with all contract documents, progress reports, variation instructions, certificates and other documents pertinent to the performance of the project.

All open communications between the Panel and the parties to a particular contract are copied to the other parties to the contract. The parties are at all times free to consult or correspond with the Panel privately and in confidence.

The Panel, the parties, representatives of the main contracting parties and the contract administrator jointly agree any site visits. The purpose of site visits is to enable the Panel to become and remain acquainted with the progress of the project and any actual or potential problems or disputes. At the conclusion of each site visit and before leaving the site the Panel prepares and distributes a report to all attendees.

The Panel can visit the site at prescribed intervals during the course of the project or at the request of any of the parties. The Panel's whole focus is on facilitating a successful project outcome for all parties.

The construction industry turns over £67 billion per annum in the United Kingdom. Within the industry there is an appetite among funders, insurers and end user clients to avoid the waste, expense and delay of disputes. The hard professional costs alone amount to hundreds of millions of pounds each year. The unpredictability of litigation, adjudication and arbitration reinforces the advantages of mediation.

Market testing has indicated that Contracted Mediation addresses the needs of developers, contractors, funders and insurers alike. They all have a need to manage risk and understand the problems, and can see the value of a demonstrably creative and effective system for solutions.

Contracted Mediation offers a genuine attempt at moving away from the confrontational lose-lose methods of dispute resolution, accepting Mahatma Gandhi's philosophy 'An eye for an eye and we all go blind'. We hope you can see its advantages.