

Mediation in Business

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To reach the full potential of the market for professional mediation we need, as an industry, to emerge from the shadow of litigation as a process of last resort to become the business tool of first instance.

The value in the mediation process does not lie in the fact that it is slightly less painful than litigation. Dispute resolution by mediation, project mediation and deal mediation provides a conduit for effective communication unrestrained by the normal bounds of secrecy, competitive positioning and the limitations of bi-lateral negotiation. Mediation, by essence, is a commercial process and thus should seek expansion in the commercial world rather than the legal one.

Part of the challenge inherent in developing the mediation market is educating business about the opportunity mediation represents.

For the past two years ResoLex has been working closely with professional bodies to educate their members in dispute avoidance and resolution. By operating mediation schemes for the professional body we have been able to offer fast and cost-effective access to mediation at the start of a dispute and stop it escalating and drawing professionals away from their core activity.

Sue Wakefield, Chief executive for the British Chiropractic Association describes the BCA Members Mediation Scheme:

“Rather like treating patients, we recognised that our members needed access to a process of dealing with disputes be it with an employee, another chiropractor or outside party that did not simply try to alleviate the symptoms, but got to the root of the problem. The Members Mediation Scheme we operate through ResoLex means our members have ready access to professional mediators early in a dispute and achieve good results with less stress.”

Administering Members Mediation Schemes and thereby gaining a view across industry provides an interesting insight to the types of dispute most prevalent in different markets.

Almost all of the disputes that have arisen through the Members Mediation Schemes have been about general business agreements and have had little or no relation to the industry area the professional operates in. The majority have been about differing personal perceptions of a situation or personal expectation which had not previously been discussed.

What many commercial relationships lack is a process of dealing with minor issues which by themselves would not threaten the venture but left unchecked will mount up into a substantial dispute. Mediation is the obvious choice for that process as it respects the value of the continual relationship.

Back in 2000 when ResoLex first launched Contracted Mediation, a process more recently coined by others as “Project Mediation,” it was with the view to provide precisely that process, although at that time specifically with the construction industry in mind. In light of the findings of the Member Mediations Schemes it is obvious that it has a much broader application than initially identified.

CONTRACTED MEDIATION

Contracted Mediation, as a process, puts the dispute resolution framework in place at the beginning of the relationship. But more than that, it puts the process in the parties’ minds at the outset too. It is an accessible process, so that the parties can take an active and effective role in it: in effect, they manage any dispute to a resolution, with expert help. So, it helps to prevent wasting time and money on disputes.

Contracted Mediation applies the mediation process to solve business problems before they become disputes or escalate into conflict. Differences are inevitable in any venture but they can be positive and certainly need not spiral into disputes or conflict. Early commitment to resolving differences more sensibly is key to its success.

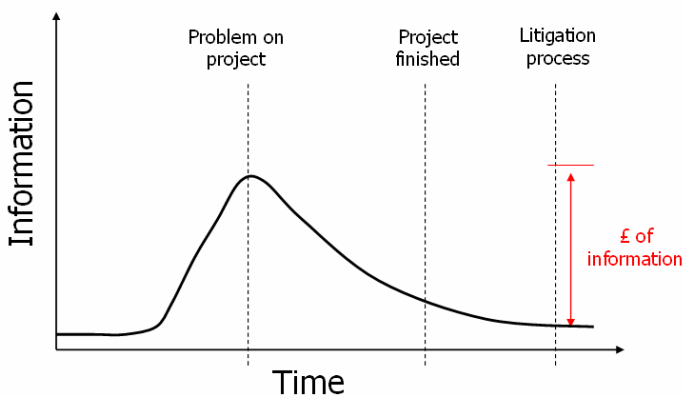
At the beginning of a venture, all parties sign a Contracted Mediation Agreement. The Contracted Mediation Panel is then appointed, the Panel normally consisting of one commercial (or technical) member and one legal member. Both panel members are also accredited mediators. The Panel therefore brings together three strands of expertise: commercial, legal and mediation.

The parties meet the mediators who explain how to use the process. This is important because Contracted Mediation belongs to the parties themselves, not to the mediators and not to the parties’ lawyers, although they often play an important role. It is a process which is designed to be effective rather than mysterious.

When anyone thinks that there is an issue which could usefully be addressed with the Panel's expert help, they know the Panel and can contact them straight away so that the "pressure cooker" effect which is often observed in disputes can be avoided, that is, where nothing is done until a dispute is really boiling. Contracted Mediation operates as an early safety valve.

A related phenomenon, which positively reinforces the pressure cooker effect, is the "ostrich approach", where problems are simply ignored. This springs from a disinclination to "get involved with lawyers or courts" or a delusion that "we'll sort something out". With Contracted Mediation, your lawyers can help you do something really positive and you have a framework specifically designed to help you "sort something out."

KNOWLEDGE AND INFORMATION



There is another dimension to the compelling logic of addressing difficulties early. Many of us will recognise the problems inherent in realistically assessing a case by the time the litigation process starts. This difficulty is often largely due to the degrading of the knowledge base. That is to say that until the knowledge base has been rebuilt from the study of documents and comparison of the imperfect distant recollections of witnesses, it is difficult for experts, lawyers or parties to form a clear view of the merits of their case.

Valuing knowledge or information in this way is new thinking. The Knowledge Curve demonstrates the value of contemporaneous knowledge by identifying the activity necessary to rebuild it and the attendant delays, expense and waste of time. It also highlights the advantage of early resolution of disputes before the knowledge base has degraded.

Contracted Mediation also addresses the structural impediments and inefficiencies in negotiation, such as information inadequacies, asymmetries and down to

the core that negotiation is commonly positional rather than principled or, indeed, creative and that underlying needs often remain hidden.

Contracted Mediation is conducted privately under a mediation agreement, and therefore due to the very nature of the agreement, it is not something that is often possible to publicise. However, the parties on one project were so pleased with the results they achieved using Contracted Mediation, all the parties agreed to a case study being made public.

ALPHA TAXIWAY, JERSEY AIRPORT

James Palmer, a Barrister with Henderson Chambers and a ResoLex Mediator, was one of the Contracted Mediation Panel members and relates his experience of the project:

Jersey Case study

The project originated from the need by the States of Jersey to alter the alignment of the taxiway at Jersey Airport to comply with changing Civil Aviation Authority rules.

The overriding concerns of the client were:

1. Meeting time deadline;
2. Safety: compliance with strict CAA requirements;
3. Customer/residents to suffer minimum noise and disruption;
4. Budget certainty;
5. Environmental impact.

Timing

The contract period was fifteen months and completion within that time was essential or the airport would no longer be fit for commercial airline travel which is crucial to the Jersey tourist industry.

Safety

The critical element of the project was that the delivery team would work around the operational Airport accepting the access limitations that would entail, but not affect, the operational safety of the Airport. All works were required to comply with the requirements of the CAA.

PR

There was concern that the works should not inconvenience local residents or give rise to any environmental concerns.

Budget

The States of Jersey had allocated a fixed sum of approximately £10m they was unable to exceed.

Why ResoLex?

Mike Lanyon, the director of Jersey Airport, was the initial sponsor for the introduction of contracted mediation on the project. Four years earlier, Mr Lanyon had a “very bad experience” with a dispute.

“Matters go to arbitration and eventually one finds oneself staring down a gun-barrel at a huge claim” he said.

Mr Lanyon reckoned having mediators on call should improve the odds of hitting his target, on budget and on time. The contractors, he said, were as keen on the idea as he was.

Prior to the project Mr Lanyon said “Suppose for example severe weather occurs, causing flooding that stops the contractors laying concrete for months. Normally they would just slap down a claim. If we disagreed, we’d be straight off down all the contentious paths. But on this project, the mediation process will kick in the moment issues are identified.”

What happened?

Eight months in to the project clear issues were identified that necessitated the intervention of ResoLex.

Ground conditions:-

A substantial claim for additional earth moving costs had arisen as the location of the dumping area had been moved by the client.

There was a knock on effect in additional time spent and potential for project delay, and the contractor was seeking an extension of time. There was also an issue as to the liability for the additional haulage costs [and delay.]

Subcontractor:-

The subcontractor had commenced laying the concrete runway and apron, but had done so out of proper alignment. The client had indicated that it was considering rejecting all work and require it to be uplifted and laid correctly.

None the less the client was adamant that the project window still needed to be adhered to.

What ResoLex did

The mediators on the panel agreed with the parties that a two day mediation would take place. Working together the mediators spoke in advance to all parties and sought from them a written schedule of issues and asked them to consider the cost implications of each. This schedule was then disclosed to all parties in advance of the mediation.

In addition to the main claim, the schedule revealed issues which had, as yet, not become areas of real concern or discussion between the parties as they were “below the horizon.”

The total value of these additional issues was estimated to be in excess of £300,000 (in addition to the main claim that had not been priced) and had potential for further delay of project completion if they were not resolved, or became disputes.

By the end of the mediation the parties had been able to resolve all matters that at that time remained outstanding. All parties also agreed that the mediators should return in six months (i.e. one month before the project completion date) in order to conduct a further mediation in respect of any issues that had then arisen.

Project Outcome

Parties had learned from their earlier experience and bought into the collaborative environment with such success that in fact no further mediation was necessary at the end of the contract. Based on the experience of the mediation, the parties managed to resolve all other matters that had arisen during the rest of the contract delivery.

More importantly, as a result of the mediation and collaborative environment the project, despite being in jeopardy after just eight months was completed;

- i) three days early
- ii) with all disputes resolved
- iii) final bill agreed
- iv) **£800,000 under budget**

Parties comments

Not altogether surprisingly the parties were happy:

“We were gobsmacked and amazed at how quickly and simply ResoLex helped us all reach a satisfactory agreement.”

The key success factor in Contracted Mediation has remained the fast access to a “safe environment” in which to address concerns and the availability of expert help. This has meant that the whole energy of all parties has been able to remain focused on successful project delivery.

Following a mediation on another project, one of the parties said that “a weight had literally been lifted from his shoulders and he could now concentrate on delivering the project.”

WHERE DO WE GO FROM HERE?

Having proved its value on construction projects, Contracted Mediation now has wide application: IT, Project Finance and Business Process Outsourcing being a few of the most obvious.

According to Forrester Research, the European Business Process Outsourcing (BPO) market has a growth rate of 11.5% and will grow from the current 11.0bn for 2006 to 18.9bn by the end of 2011. If the build up to the 2012 Olympic Games that might give adequate scope for the growth of all types of dispute resolution, I suggest the BPO market offers particularly good potential for mediation. -

Almost as soon as a long term outsourcing agreement is finalised, the parties’ interests begin to clash. Whilst there are many reasons for a company deciding to outsource, the obvious rationale for the decision is to maximise the value of the service provided whilst minimising spend. On the other hand, the outsourcing provider is trying to maximise revenue and minimise expenditure, having often been through a brutal tender process.

To compound that natural tension, there is argument that outsourcing contracts are out-of-date the moment they are signed, and they become more and more out-of-date as time goes on. During the drafting process it is impossible for either party to anticipate every possible situation and equally they can not determine in advance how to deal with them or agree suitable remedies. As entering into such a relationship without a contract is equally unacceptable, the contracts have to be sufficiently broad to cover a multitude of possible scenarios.

The dynamics of the relationship may also alter over time, not just in response to technical and project issues but also due to overarching management decisions, varying perceptions of ‘value’ and the fact that often large sums of money are being exchanged over long periods.

These background factors can lead to a very precarious situation for the resolution of initially minor issues as they arise. Parties can quite easily find themselves in the position that “natural” clashes develop into intractable performance obstacles because of the difficulties in enforcing the broad contractual rights and obligations throughout the outsourcing engagement. Litigation is wholly inappropriate to use in an ongoing relationship and is slow, expensive and unpredictable. Many issues that arise will not necessitate the complete collapse of the relationship, but as discussed earlier will affect the service level obtained due to the distribution tension between resources being employed in escalating the issues and resources employed in effectively delivering the service.

The use of Contracted Mediation provides a safety net over which outsourcing agreements can operate, providing an agreed process for dealing with issues as they arise. It provides a commercial process to answer a commercial need for solving minor issues within an environment where the overriding relationship remains crucial.

Jane Player, Head of Dispute Resolution, Bird and Bird comments on the practical nature of Contracted Mediation:

“ There is an effective role to be played by commercially minded mediators, brought in early to assist parties, in a neutral role, to deal with points of dispute as they arise in relationships, and thus avoid the costly delays to project timetables which are inherent in other dispute resolution techniques.”

ResoLex remains committed to the innovative application of mediation in business where I’m sure, as yet, we have barely scraped the surface.