

Mediation is a natural for the NEC

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The NEC suite of contracts has a common aim of offering frameworks of agreements for contracted parties that are not simply non-adversarial, but actively encourage project delivery and actively discourage differences.

Among the many kinds of obstacles to project success it is differences – which easily escalate into disputes and end in conflict – that are by far the most common, the most disruptive and yet the most directly controlled by the parties to a contract. Such differences are typically characterised by loss of co-operation, the parties acting to a dispute agenda rather than the project agenda, and delay and expense.

Currently the NEC family offers for the ultimate means of dispute resolution a choice of litigation or arbitration, with adjudication as the primary method. Yet these remedies, as traditionally applied to the resolution of project disputes and conflict, have several common disadvantages

- they are compulsory upon the parties to the contract
- there is a loss of control by the parties once a dispute has arisen and the procedures of the contractually prescribed remedies have commenced
- the procedures by their very nature discourage communication
- relationships are invariably damaged
- judgments are made and imposed by a third party
- solutions available to the third party making 'the judgments as remedies for the parties in dispute are limited
- the results of the judgments are usually unsatisfactory for the parties, especially when full account is taken of the costs involved.

The NEC documentation acknowledges that arbitration or litigation can be time-consuming and expensive. Most of us hardly need to be told.

The advantages of mediation

Mediation on the other hand has important intrinsic benefits.

By its nature mediation is voluntary. The process encourages communication between the parties.

It is without prejudice to the parties' contractual rights and remedies.

- The process focuses on the parties' needs rather than contractual rights.

Imaginative solutions are generated and become available to the parties.

Mediation is relatively inexpensive, quick and effective.

The problems with mediation are that it is the legal profession's last choice, is used late in the day and its use is not enforceable.

Sir John Egan's partnering, the Wolf Reforms and the new Civil Procedure Rules have together created a climate crying out for mediation. The excellent work by CEDR in promoting mediation and establishing the gold standard for both the mediation process and mediator training can be built upon. It creates an opportunity for the NEC to consider dispute resolution management as part of contractual arrangements, thus breaking the mould of traditional positional dispute resolution which has been the scourge of the construction industry's contracts for decades.

Using a contracted mediation panel

Contracted mediation provides something more. As its name suggests, the project participants contract to use mediation as the primary means of dispute resolution for a project.

A contracted mediation panel of two professionals (a commercial project manager and a barrister) is put in place at the start of the project, not just when a

dispute occurs. This generates three strands of expertise – commercial, legal and mediation.

Differences are referred to the panel before they have escalated into disagreements. The panel actively seeks to help avoid or resolve differences quickly and efficiently as the project runs its course. Disputes are thus prevented from becoming conflicts. The very existence of the panel discourages an adversarial mind-set.

The panel acts as a neutral referral point for the duration of the project and by its nature has contemporary knowledge of the project. The panel acts as an extra set of eyes and by being in place provides another level of risk control.

Contracted mediation has been welcomed by funders and insurers as a genuine project-based dispute resolution system that actively seeks to avoid disputes, is focused on the needs of the parties and supports project delivery.

A natural addition to the NEC

The NEC form of contract has been heralded as the way forward for contractual arrangements that reflect the circumstances of the project. Mediation is gaining wide recognition as the preferred method of alternative dispute resolution.

Why not include mediation, which can be both primary and ultimate, as one of the options reflecting project circumstances and the optimisation of choice that are already a feature of the NEC system of agreements?

The option of a neutral contracted mediation panel, with the availability of an expert determiner, meeting the criteria of a voluntary, early, effective and economical dispute resolution system, could be a natural addition to the NEC. And its draft partnering supplement, currently circulating for comment, could provide its first adoption.

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