

Contracted mediation a new form of dispute resolution

Patrick Green, barrister in the chambers of Roger Henderson QC and Stephen Woodward, head of contracts and dispute resolution at the Symonds Group, are directors of ResoLex Ltd, which provides an innovative project delivery service, contracted-mediation, which aims to resolve disputes while projects are still in progress.

Opportunity and change

Over the last four years, there have been plenty of developments in dispute resolution. The Woolf Reforms of civil procedure and the introduction of adjudication in construction contracts are two examples. But the biggest change has been a change of mindset: it doesn't have to be this way.

The Woolf Reforms represented a recognition of two things. First, that litigation was totally unsatisfactory – expense and delay compounded other inherent disadvantages of litigating (such as loss of control and uncertainty). Second, that something should and could be done.

Equally, adjudication under the Housing Grants, Construction and Regeneration Act 1996 represented the culmination of a good deal of soul-searching in the construction industry and an attempt to reduce the incidence of the catastrophic consequences of conflict.

Both the Civil Procedure Rules implementing the Woolf Reforms and adjudication were identified as sound principles for improving things. Whether they have succeeded is still an open question. However, it is the underlying principles of these two thrusts at reform which set the scene for the introduction of Contracted Mediation.

What is Contracted Mediation? In a nutshell, it is project-based mediation. A Contracted Mediation Panel is appointed at the beginning of a project and actively seeks to facilitate the avoidance and resolution of a contract difference throughout the project, before differences crystallise into disagreements or escalates into

conflict – certainly, long before the parties have started spending money on litigation and often before they have sustained any losses at all.

Just as Lord Woolf's Reforms were aimed at speedier and more cost-efficient dispute resolution, so Contracted Mediation is designed to deliver it. Equally, whereas adjudication's *raison d'être* was resolving disputes quickly while the project continued, so Contracted Mediation provides an on-site framework for the speedy resolution of disputes. But it goes further than that, by providing a resource designed to help *avoid* as well as resolve disputes.

Contracted Mediation is new. It is immediate. And it is continuous.

It is a new service designed particularly for project-based industries, initially focusing on the construction and IT sectors. It is designed for clients, not lawyers. It is designed to give clients a choice about how they resolve their disputes, and to provide that choice while they are still involved in a project. The service has been designed and pioneered by ResoLex, a company launched on October 3, 2000. ResoLex itself is novel, because it represents a joint venture between two very different but complementary founder organisations: the international project management consultancy, Symonds Group, based in Holborn, and barristers in the Chambers of Roger Henderson OC at 2 Harcourt Buildings, Temple.

Contracted Mediation is immediate because the Panel is appointed and in place from the outset of the project. It can therefore respond and help quickly and efficiently, whenever needed. Good communication between the project participants and the Panel is encouraged and, at the beginning of the project, the Panel facilitates the partnering workshop, so that all the project participants understand how to use the Panel and how early identification of potential problems can prevent them escalating into disputes. From the very start, the Panel is in place to help avoid and resolve disputes.

Spirit of Egan

The advantages are obvious: instead of trying to slam the stable door after the horse has bolted, as is so often the case in litigation, the Panel can be on site helping the project participants to plan their way through difficulties as they arise and before they cause significant loss. Instead of arguing for years over who is responsible for what losses, there is a real chance that a Contracted Mediation Panel can bring the spirit of Egan into the dispute arena and help the parties to avoid or deal with problems by agreement.

Where a dispute is resolved during the course of a project, the Panel is of course still in place afterwards to help facilitate implementation of the agreement, as well as to help avoid, manage or resolve other disputes. In this sense it is continuous in its operation. This continuity is important.

Contracted mediation...

Furthermore the Panel will normally comprise the same two members throughout the project, who will not be coming to the project cold each time there is a dispute, but rather will build up their knowledge of the project as it progresses.

The changing climate in the courts land in the industry has created a growing demand for more enlightened and constructive ways of dealing with disputes, and mediation generally is becoming much more popular. To some extent of course Contracted

Mediation is standing on the shoulders of

The Centre for Dispute Resolution (CEDR) has done excellent work over the 10 years in setting the gold standard

For mediation training and processes: CEDR reports an 82% success rate. However, too often disputes are only referred to mediation too late, long after proceedings have been issued and frequently under the shadow of a forth-

coming trial.

By this stage, the parties have usually left site, sustained losses, spent large amounts of money on legal and other professional fees and irretrievably damaged whatever business relationship they may once have had. Frankly, although this is too late, it is often better than the alternatives, as CEDR's success rates powerfully demonstrate

Focus on project goal

So the logic is compelling, that whilst mediation will never be a panacea, it makes sense to apply such an effective process earlier, to the mutual benefit of all project participants. For too long the dispute resolution landscape has been arid and parties have had no real choice but to litigate or arbitrate.

Mediation, Particularly Contracted Mediation, is different in addressing needs rather than rights and, in the case of Contracted Mediation, focusing on the successful project outcome. Unforeseen

Flood or fuel strike, they may be nobody's fault. They may seriously affect the progress of a project. However, they need not sow the seeds of conflict. Some disputes may still need to be resolved in court or by arbitration. Some parties may even insist on litigating, but from now on this will be a positive choice rather than an inevitability

Undeniably, the dispute resolution landscape has changed dramatically and for the better. The construction industry has much to gain from this opportunity to reduce the incidence of Conflict within it – currently, the industry funds the legal services sector to the tune of hundreds of millions of pounds every year.

The Industry has not always been characterised as forward-looking, but the enthusiasm for Contracted Mediation demonstrates that this time the opportunity may not be missed. *Image Courtesy of: www.FreeFoto.com*