



# Stopping disputes before they start

Contractors and developers serious about avoiding needless confrontation and financial strife have a new option: 'contracted mediation'. The innovative facility is offered by ResoLex, a joint venture launched in October by 2 Harcourt Buildings and international project management and engineering consultancy Symonds Group. Jersey Airport's £15 million Alpha taxiway project is the site for the first trial of contracted mediation. As we shall see, the managers have high hopes for the concept.

What is 'contracted mediation'? In essence, it is a means of providing parties to construction contracts with ready access to impartial, expert advice and mediation in a secure, pre-determined structure, in order to damp down any smouldering disagreements before they combust into expensive, disruptive disputes.

All the parties to a contract – devel-

oper, contractor, sub-contractors, suppliers and funders – agree at the outset to manage and resolve any differences that may arise with the assistance of an impartial two-person 'contracted mediation panel' provided by ResoLex. One member is a barrister, the other a commercial expert. Both are trained in mediation skills. Prior to the project's start, the parties to the contract involved attend a ResoLex 'partnering workshop'.

The panel members have access to the contract documents and the parties involved. They shadow the project from start to finish, making periodic site visits – depending on the service level desired – and oiling the wheels to minimise friction. All the while, a mediation framework is in place, ready to be activated on demand.

Mediators do not make decisions, of course, but try to bring parties to a mutually-acceptable agreement. Since

the mediation – and any documents generated by it – are confidential and without prejudice, there is no deterrent to open communication.

Some prominent figures have thrown their weight behind 'contracted mediation'. Lord Browne-Wilkinson, the former Law Lord, described the initiative as "bringing a new dimension to mediation", adding that anything capable of keeping construction litigation out of his court would have been most welcome.

"Contracted mediation is a fantastic idea," says Corinna King, legal practice manager at the Chartered Institute of Building (CIOB). Putting mediation in place in the contract, she says, would benefit everybody in construction management. "With the best will in the world, differences will always arise. But put people together, get them to talk and often they will find a solution. This doesn't prevent people going on to adjudication, arbitration or even litigation if necessary, but it could help them avoid having to."

ResoLex's initial focus will be on the construction industry. But managing director Stephen Woodward, Symonds Group's head of contracts and dispute resolution, thinks contracted mediation could be just as useful in other project-type relationships, such as shipbuilding and IT contracts and PFI deals.

## Jersey Airport

Mike Lanyon, director of Jersey Airport, is the first taker for ResoLex's contracted mediation package. Work on the airport's Alpha taxiway project commenced in February. Completion is scheduled for April 2002. Mr Lanyon reckons having mediators on call should improve the odds on hitting that target, on budget and to a good quality. And the contractors, he says, were as keen on the idea as he was.

"Suppose for example severe weather occurs, causing flooding that stops the contractors laying concrete for months. Normally they would just slap down a claim," says Mr Lanyon. "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."

Four years ago, 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.” Anything that will help to avoid a repetition of that, he says, has to be worth trying. I hope we won’t need make use of the mediation facility,” he says. “But if we do, it will be a great deal better than going to adjudication, arbitration or court.”

‘After the fact’ mediation has been around for years. But most parties still consider mediation only as a last-minute escape route from arbitration or litigation, when contractors have downed tools and time and money have already been wasted. By then, personal anger, stubbornness and pride makes the mediation process more difficult. While one convert is a start, however, it seems there is a long way to go. “The industry has always been so

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adversarial,” says the CIOB’s Miss King. “Re-educating the contractors and clients who could benefit from mediation can be very difficult.” Since Miss King joined the GLOB in June 2000 she has received just two requests to provide a mediator. “There is still a need to convince the market of what mediation can do.

“I think the ResoLex concept will sell,” says Miss King. “The initial difficulty will be getting it off the ground. People don’t like change and what ResoLex is trying to do is quite radical.”

In the end, contractors and developers may find the decision being made for them. Market research indicates that the ResoLex concept has a strong appeal to finance groups responsible for funding and insuring major projects. Many, it seems, are sick of having to finance over-runs caused by breakdowns in contracting relationships and are keen to take a more active role. Roger Henderson QC, head of chambers at 2 Harcourt Buildings and co-Chairman of ResoLex, says he is confident that contracted mediation will soon become a vital component of property funding agreements.