

Project Mediation - dealing with disputes early

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"Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser - in fees, expenses, and waste of time..."

Abraham Lincoln, "Notes for a Law Lecture" July 1, 1850

Introduction: Why is there a place for Project Mediation in the Construction Industry?

The construction industry has historically been plagued with conflict and disputes often resulting in costly legal proceedings. Even the process of Construction Adjudication introduced in the UK in May 1998, which was introduced to facilitate swift and cost-effective resolution of disputes during the course of a project, has been subject to the criticism that it has been hijacked by lawyers who have assisted in turning it into an overly legalistic process which most commentators would say was contrary to the original purposes for which it was introduced.

Let me provide you with an example i.e. the effect of a minor dispute escalating to ridiculous proportions. I refer to the UK case of Burchell -v- Bullard & Ors [2005] EWCA Civ 358.

The background to this case concerned a dispute, relating to the roof on the simple house extension, between the builder Mr Burchell and the occupants/house owners being the Bullards. The Bullards refused to pay what is described as the third interim payment on grounds of poor quality of work, Mr Burchell having claimed in the region of £18,000. This is where the fun begins as the Bullards counter claimed for a sum in excess of £100,000. The judge found this sum to be greatly exaggerated and eventually found the value of the counterclaim to be £14,000. As a result of the judgement handed down less than £5,000 changed hands. It is reported that the legal costs were £160,000. The Court of Appeal, can you believe that a matter such as

this could find its way to the Court of Appeal, decided that the Bullards would be responsible for their own costs as well as 60% of Mr Burchell with the significant factor being that they had, on the advice of their building surveyor refused to attempt mediation. It was estimated that the Bullards' total bill including consultant fees would run to £250,000 and as Mrs Bullard put it, 'all our money has gone to lawyers'¹.

The message emanating from this situation appears to me to be quite simple – come to an amicable settlement and you will save yourself time, money and a considerable amount of stress.

Project Mediation

In Burchell -v- Bullard, Lord Justice Ward stated;

*"Mediation has established its importance as a track to a just result running parallel with that of the court system. Both have a proper part to play in the administration of justice. The court has given its stamp of approval to mediation and it is now the legal profession which must become fully aware of and acknowledge its value. The profession can no longer with impunity shrug aside reasonable requests to mediate. The parties cannot ignore a proper request to mediate simply because it was made before the claim was issued. With court fees escalating it may be folly to do so."*²

¹ Reported in *The Guardian* 5 July 2005

² Reported at *ADR Now*

http://adrnow.org.uk/go/SubPage_89.html

Mediation therefore in my view is to be valued as an important, cost effective dispute resolution process and should be ignored at one's peril. But what exactly do we mean by the term mediation? The Centre for Effective Dispute Resolution (CEDR) defines mediation as follows;

“Mediation is a flexible process conducted confidentially in which a neutral person actively assists parties in working towards a negotiated agreement of a dispute or difference, with the parties in ultimate control of the decision to settle and the terms of resolution.”³

Taking this process a stage further project mediation our topic this evening is a dispute prevention mechanism where a mediator is appointed at the outset of a medium to long term project or major business relationship, to act as the point of contact when communication problems are anticipated or arise.

Project Mediation is a structured way of managing interaction and communication within a project team more effectively and has been developed with the aim of supporting the successful delivery of a project by identifying and addressing problems before they turn into disputes about time and money. More particularly project mediation enables conflict management and dispute avoidance and resolution techniques to be integrated into a contract as part of a collaborative contracting approach. It can be used for almost any project but may be particularly appropriate for:

- PPP or long term contracts
- technically complex contracts
- contracts involving many contractors/sub-contractors/suppliers
- contracts sensitive to a history of poor contract performance and/or adversarial relationships.

The benefits of project mediation are that it:

- offers a robust conflict management approach with a focus on dispute prevention
- shows that parties are taking collaborative working seriously
- is more flexible and cost effective than other conflict management mechanisms adopted at the outset of a project (such as a dispute resolution board)
- can be budgeted for in advance.

As project mediation is integrated into the contract, it will be included as part of the contract procurement documentation. However, if it has not been included, the parties can still adopt project mediation.

A typical Project Mediation Agreement included into a Contract will incorporate a Mediation Procedure which can be tailored to suit the specific circumstances of its use.

The Procedure sets out the terms and conditions under which the Employer and Contractor (referred to as the Parties) and any identified consultants, sub-contractors or specialist suppliers (referred to as Sub-contractors) and the Project Mediators will follow. It provides a framework in which the Project Mediators can function to aid the early identification of actual or potential differences, disputes and claims and facilitate their resolution. The Procedure also makes reference to a more formal Mediation Procedure in the event that the Parties require a Formal Mediation.

Appointment of Project Mediators

Once the Parties have decided that they want to adopt project mediation for their project, they need to identify their Project Mediator(s) and prepare the necessary appointment documentation.

Project Mediators should be chosen on the basis of skills and professional backgrounds that the parties think

³ CEDR November 2004

will be most appropriate for the project (for example, a construction lawyer, a commercial manager, an engineer and perhaps an architect).

Key components

Project mediation consists of three components:

(1) Access to a mediator(s) for the duration of the project- At regular intervals the mediators will attend the project site to discuss progress and identify with the parties any actual or potential communication problems. Normally, the visit will coincide with project or site meetings. The mediator(s) may have discussions with the Parties or Sub-contractor(s) together or separately to assist in the prevention of disputes or clarify the information requirements they need to address in a dispute prior to settlement discussions. Outside of the visits the mediators also receive core documentation for review during the course of the works.

At all times, it is for the Parties to keep the mediators informed about any issues that might affect contract performance and the parties may call the mediator at any time to discuss concerns and seek advice.

(2) Project mediation workshop - Prior to contract commencement the Project Mediator will arrange a project mediation workshop (typically a full day) attended by all project decision-makers including:

- Project managers/leaders, consultants and designers
- Sub contractors/suppliers.
- Government agencies/organisations (if involved)
- Any other organisations/people upon whom the project will impact and whom the project decision-makers wish to invite.

The project mediator will set out the format of the workshop, which shall generally include:

- The roles and responsibilities of the project

members

- Understanding how others function
- Project mediation review: principles, process and the role of the Project Mediator
- Identifying communication lines.
- Identifying project pressure points

(3) Formal mediation (if required). Where the parties are unable to resolve their conflict through discussions and interventions by the Project Mediator, the parties may enter into a formal mediation conducted by the Project Mediator

Getting started: following the procedure.

Agreement; the Parties, Sub-contractors and the Project Mediator(s) will enter into an agreement which will include a Mediation Procedure. The Procedure will be incorporated into, form part of, and may be varied by, the Project Mediation Agreement.

The Project Mediators; Key to the whole process is to get your Mediator appointed early. The Project Mediator can comprise either one or two mediators, that is entirely a matter for the Parties to decide. The Parties therefore in consultation with the Sub-contractors shall, unless the Project Mediators have already been nominated in the head contract, nominate either one or two Project Mediators by agreement within typically 21 days of the date on the Mediation Agreement.

Something dear to the heart of all Mediators is their terms of remuneration. This is to be mutually agreed by the Parties when agreeing the terms of the Project Mediator's appointment. It is common that the Parties shall be jointly and severally responsible for paying the Project Mediator's remuneration with the split being on a 50/50 basis unless otherwise stated.

By way of control the Parties retain the right to terminate the employment of the Mediator acting together, no Party having the unilateral right to invoke a

termination. Should it prove necessary the appointment of a Project Mediator shall be terminated if:

- He/she declines to act or is unable to act due to death, disability or resignation;
- The last payment is made between the Parties in respect of the Project; or at such other time as the Parties may mutually agree.

If a Project Mediator's appointment is terminated and should the need arise the Parties may, in consultation with the Sub-contractors, appoint an appropriately qualified replacement.

Referring a dispute; what I term getting the show on the road i.e. the reason why you have made provision in your contract for Project Mediation. Any Party and any Sub-contractor may at any time refer any dispute, difference and/or concern to the Project Mediators who shall proceed in accordance with the agreed procedure.

The referral of any dispute under an agreed procedure, unless expressly stated to the contrary, shall not affect any Parties' right to refer at any time a dispute to any other applicable dispute resolution process arising under the agreement between the applicable Parties, including but not limited to adjudication, arbitration or court proceedings as appropriate.

Conduct of Project Mediation and the powers of the Project Mediators; I mentioned earlier in this paper that at the commencement of the project the Project Mediators shall organise a project mediation workshop to provide an overview of the project mediation process to representatives of the Parties and Sub-contractors.

At the heart of the process it is necessary for the Project Mediators to visit the Project site at intervals of not more than 56 days, and they may visit more frequently during key phases of the project at the request of the Parties. In the absence of agreement between the

Project Mediators and the Parties, the Project Mediators shall determine the frequency of their site visits.

The time and agenda of each site visit has to be agreed between the Parties and the Project Mediators. In the absence of an agreement, the Project Mediators shall decide the timing and agenda. The purpose of the Project Mediators visiting the Project is to enable them to become and remain acquainted with the nature and progress of the works at the Project and of any dispute.

Project visits shall be attended by the Project Mediators, the Parties and the Sub-contractors with visits being co-ordinated by the Employer in co-operation with the Contractor. The Employer shall ensure that adequate and appropriate meeting facilities are available at the Project for the visits. The Parties and/or Sub-contractors shall furnish the Project Mediators with a copy of all documents requested. This is likely to include documentation pertinent to the works or the performance of the contract between the Parties. The Project Mediators may discuss matters with any Party in private at any time in order to consider the nature and progress of the Project or any matter relating to a dispute, whether referred to the Project Mediators or not. Any and all written communications between one party and the Project Mediators shall be copied to all Parties unless the party sending the written communication states in writing on the communication that it is to be seen only by the Project Mediators.

The Project Mediators may adopt any reasonable procedure to progress the resolution of any dispute referred to them by any of the Parties. This may include meeting with any of the parties together or as noted above meeting any party privately. The Project Mediators will attempt to agree a procedure, timetable and agenda for taking any matter forward, including the exchange of information, telephone discussions, meetings or site visits and in the absence of prompt agreement by the parties the Project Mediators shall



decide the procedure. The Project Mediators may request short summaries or position papers from any party to be provided before a meeting takes place.

In my experience and to assist with the smooth and effective running of the process it is appropriate that the parties shall:

- a. attend all discussions, meetings and correspondence in good faith and trust with the aim of reaching an agreement for the resolution of any dispute; and
- b. promptly provide within a timetable established by the Project Mediators such short summaries, position papers, further explanation or clarification and documentation as may be requested by the Project Mediators. i.e. a willingness to co-operate

To get to the heart of the quarrel it may be necessary for the Project Mediators to adopt an inquisitorial procedure in respect of the facts of any dispute. They may in their absolute discretion decide who shall attend any particular meeting. Amongst other things the Project Mediators may:

- a. establish the procedures to be used during the course of the Project in attempting to facilitate the resolution of any dispute;
- b. conduct any further site visits, meetings or discussions as they think fit;
- c. take the initiative in ascertaining the facts relating to any dispute;
- d. make use of their own specialist knowledge, if any;
- e. request any party to supply the Project Mediators with such documents as the Project Mediators may reasonably require in connection with any dispute;
- f. question any of the parties and their representatives, agents, or employees; and
- g. give other directions that they consider

reasonably necessary in an attempt to resolve any dispute.

Hopefully upon completion of these various steps a resolution can be found which the Parties are prepared to accept.

The resolution of any dispute must be recorded in a settlement agreement formally encapsulating the agreement reached between the applicable parties. Should the matter under review have the potential to recur the Project Mediators may, during the process, make notes for their own use to remind them of the content of discussions for later reference.

Where a dispute has not been capable of resolution through interventions by the Project Mediators, then the parties may agree to a Formal Mediation conducted by the Project Mediators.

Termination; A Project Mediation agreement may be terminated by the Parties acting together giving 28 days written notice of termination. The agreement shall then terminate on the expiry of the period of 28 days from the date of issue of the written notice.

Stay of proceedings; Any litigation, arbitration or adjudication in relation to any dispute may be commenced or continued notwithstanding the project mediation process or Formal Mediation referred to herein unless the applicable parties agree otherwise or a court so orders.

Confidentiality; Every person involved in the project mediation process or Formal Mediation will keep confidential and not use for any collateral or ulterior purpose any information (whether given orally, in writing or otherwise) arising out of, or in connection with, the project mediation process or Formal Mediation, including the fact of any settlement and its terms, save for the fact that project mediation or a Formal Mediation is to take place or has taken place.



All information (whether oral, in writing or otherwise) arising out of, or in connection with, the project mediation process or Formal Mediation will be without prejudice, privileged and not admissible as evidence or disclosable in any current or subsequent litigation, arbitration, adjudication or other proceedings. This does not apply to any information, which would in any event have been admissible or disclosable in any such proceedings.

The Project Mediators will not disclose to any other party any information given to him by a party in confidence without the consent of that party. This shall not apply if, and to the extent that:

- a. all parties consent to the disclosure; or
- b. the Project Mediators are required under the general law to make disclosure; or
- c. the Project Mediators reasonably consider that there is a serious risk of significant harm to the life or safety of any person if the information in question is not disclosed; or
- d. the Project Mediators reasonably consider that there is a serious risk of their being subject to criminal proceedings unless the information in question is disclosed.

None of the parties to the Project Mediation Agreement will call the Project Mediators as a witness, consultant, arbitrator or expert in any litigation, arbitration, adjudication or other proceedings arising from, or in connection with, the matters in issue in the project mediation process or a formal Mediation. The Project Mediators will not voluntarily act in any such capacity without the written agreement of all the parties.

Exclusion of liability: the Project Mediators shall not be liable to the Parties or Sub-contractors for any act or omission in connection with the services provided by them in, or in relation to, the project mediation process or any Formal Mediation, unless the act or omission is shown to have been in bad faith.

Summary

Project Mediation is a mediation service that changes the culture of confrontation that threatens successful project delivery. The name Project Mediation reflects the fact that the mediation framework is in place throughout the lifecycle of a project. The parties agree at the outset to manage and resolve any differences that may arise with the assistance of a Project Mediator who follows the project through from start to finish.

It has been my experience that in the majority of cases mediation is not the first port of call to be considered to resolve disputes that may arise and is often only considered as a last minute alternative after costly and time consuming forays into adjudication, arbitration or litigation.

By contrast, Project Mediation provides the project team with a much better chance to resolve differences as they arise, before they become disagreements and ultimately disputes. The mediator is in place and actively helping to prevent or avoid disputes from the beginning. The disincentives to open communication inherent in other forms of dispute resolution are absent in this process. It offers all parties access to immediate mediation in a safe and pre-determined structure using expert help.

Benefits of Project Mediation; Project Mediation builds into projects a skilled independent overseer (or overseers) to manage communications, rather than leave them to chance or hope. By underpinning effective relationship management, Project Mediation's project risk management develops partnering with teeth by assisting with:

- Improving productivity
- Enhancing collaborative working
- Eliciting better responses to project finance and risk management pressures
- Enhancing project risk management

- Improving client/project manager information flow
- Preventing problems from escalating

Compare and Contrast How Disputes Are Managed In Typical Forms of Contract.

Both Standard form and bespoke contracts now tend to include a tiered approach to dispute avoidance and resolution. The dispute resolution processes within a selection of standard form and bespoke contracts are summarised in the attached tables and it is to be noted that;

- Mediation is becoming more prominent in the evolution of the mainly UK based JCT contracts, whereas it appeared as a mere footnote in JCT 1998 contracts, the 2005 suite of contracts recognise it as a contractual means of dispute resolution.
- It is apparent throughout the various forms of contract that amicable settlement is promoted wherever possible.

Also in the UK litigation is governed by the Civil Procedure Rules which introduced a Pre-Action Protocol for Construction & Engineering Disputes. The objectives of the Protocol are as set out in the Practice Direction namely:

- to encourage the exchange of early and full information about the prospective legal claim;

- to enable parties to avoid litigation by agreeing a settlement of the claim before commencement of proceedings; and
- to support the efficient management of proceedings where litigation cannot be avoided.

Conclusion

Therefore in conclusion Project Mediation is a serious alternative and can offer a range of benefits when compared to the traditional formal adversarial processes such as litigation and arbitration. These benefits include:

- Reduction in the time taken to resolve disputes
- Reduction in the costs of resolving disputes
- Providing a more satisfactory outcome to the dispute
- Minimising further disputes
- Opening channels of communication
- Preserving or enhancing existing business and/or personal relationships
- Empowering the parties, and giving them greater flexibility

The success of mediation as a method for dispute avoidance and resolution depends on the Parties willingness to fully engage with (i) the process as a whole, (ii) the mediator and (iii) compliance with any settlement agreement but the benefits to the parties in terms of cost, time and overall project progress should be obvious.



Form of Contract	Dispute Resolution Procedure	Reference	Comments
JCT 2005 Suite	Mediation	Clause 9.1	Now formalised clause in contract rather than as a footnote in 1998. Still optional [verify] but now can be contractual if so chosen
	Adjudication	[9.2]	
	Arbitration	[9.3]	
	Legal Proceedings	[9.4]	
JCT 1998 Suite			Notes refer to JCT 1998 Private Without Quantities – But principles will apply to JCT suite generally.
	Mediation	Part 4 Footnote [uu]	It is open to the Employer and the Contractor to resolve disputes by the process of Mediation: see Practice Note 28 ‘Mediation on a Building Contract or Sub-Contract Dispute.
	Adjudication	Part 4 Clause 41A	<ul style="list-style-type: none"> Adjudication provisions set out at Part 4 Clause 41A [compliant with Housing Grants Construction and Regeneration Act 1996] Either party can refer a dispute at any time to adjudication Adjudicator’s Decision binding on Parties until the dispute or difference is finally determined by arbitration or by legal proceedings or by agreement in writing between the parties.
	Arbitration	Part 4 Clause 41B	<ul style="list-style-type: none"> Arbitration provisions set out at Part 4 Clause 41B A reference in clause 41B to a Rule or Rules is a reference to the JCT 1998 edition of the Construction Industry Model Arbitration Rules (CIMAR) current at the base date. Provisions of Arbitration Act 1996 apply [clause 41B.5]
	Legal Proceedings	Part 4 Clause 41C	<ul style="list-style-type: none"> Where article 7B applies, any dispute or difference shall be determined by legal proceedings pursuant to article 7B Article 7B - where the entry in the Appendix stating that Clause 41B applies has been deleted then subject to article 5 (adjudication) any dispute or difference shall be determined by legal proceedings Therefore legal proceedings alternative to arbitration



<u>NEC 3</u>	Adjudication	Option W1/W2	<ul style="list-style-type: none"> • Prescribed method of DRP (nature of contract as a project management tool therefore to enable project to progress). • Adjudicator's Decision binding unless or until revised by Tribunal [Parties free to agree what 'Tribunal' is to be – e.g. arbitration, legal proceedings - this is to be stated in contract] • Party cannot refer any dispute to tribunal unless first been referred to adjudication
		Option X -Partnering	<ul style="list-style-type: none"> • Core Group, comprising Schedule of Partners set up to work together in a spirit of mutual trust and co-operation – this ideal extends to dispute resolution
<u>ICE Suite</u>			Notes refer to ICE 7 th (Measurement Version) & ICE Design & Construct 2nd Clause 66 – but principles will apply to ICE suite generally
	Termed 'avoidance and settlement of disputes'	Clause 66	Procedure laid down as below:
	Matters of Dissatisfaction – Either Contractor or Employer can refer to Engineer	[66(2)]	Engineer shall notify his written decision within one month of referral
	Disputes	[66(3)]	no matter shall give rise to a dispute unless time for giving a decision by Engineer has passed/not implemented or adjudicator has given decision and not implemented by Employer or Contractor and the other has served a Notice of Dispute
	Conciliation	[66(5)]	Any time before service of Notice to refer to arbitration, either party may seek agreement of the other for the dispute to be considered under The ICE Conciliation Procedure 1999 or any amendment thereof. If party agrees, any recommendation deemed to have been accepted as finally determining dispute by agreement – unless a Notice of Adjudication / Refer to Arbitration has been served not later than a month after receipt of the recommendation
	Adjudication	[66(6)]	HGCR Act compliant provisions
	Arbitration	[66(9)]	All disputes arising under / in connection with the contract (other than failure to give effect to adjudicators decision) shall be finally determined by reference to arbitration – Where adjudicator has given decision dispute must be referred to arbitration within 3 months of the giving of that decision, unless it becomes final and binding.
			See also Guidance Notes on resolution of disputes.
<u>FIDIC Conditions of</u>	Claims Disputes and	Clause [20]	



<u>Contract for Construction 1st Edn 1999</u>	Arbitration		
(Same as for Plant Design Build & Turnkey Contracts)	Dispute Adjudication Board (DAB)		One or three suitably qualified persons
	Amicable Settlement (see below methods)	[20.5]	Where notice of dissatisfaction given under clause 20.4, parties shall attempt to settle the dispute amicably before the commencement of arbitration. However, unless both parties agree otherwise arbitration may be commenced on or after the 56 th day after the day on which notice of dissatisfaction was given, even if no attempt at amicable settlement has been made. The methods of achieving 'Amicable Settlement' are generally found as part of the subject of 'Alternative Dispute Resolution' – the most practical in relation to construction disputes being as stated:
			Direct Negotiation
			Mediation
			Conciliation
			Mini – Trial procedure
			Claims Review Board (CRB)
			Pre-Arbitral Referee procedure
	Arbitration	[20.6]	Unless settled amicably any dispute in respect of which the DAB's decision (if any) has not become final and binding shall be finally settled by International Arbitration
<u>CRINE Network General Conditions of Contract for Offshore Services [1997]</u>			Contracts for the offshore oil & gas industry
	Initial referral to Company Representative and Contractor Representative	General Conditions [Clause 28]	a) Dispute initially referred to Company Representative and Contractor Representative who shall discuss the matter in dispute and make all reasonable efforts to reach an agreement
	Referral to nominated parties		b) If no agreement is reached under a) the dispute shall be referred to the two persons named in Appendix 1.1 to section I – Form of Agreement. Such persons are nominated one by the Company and one by the Contractor. Such persons may be replaced by the party which nominated them by notice to the other party
	Referral to Managing Directors		c) If no agreement is reached under b) above the dispute shall be referred to the Managing Directors of the Company & Contractor [28.1]



	Legal Proceedings	[28.2]	In the absence of any agreement being reached on a particular dispute either party may take appropriate action in the courts to resolve the dispute at any time. Whilst any matter or matters are in dispute, the Contractor shall proceed with the execution of the work and both the Contractor and the Company shall comply with all the provisions of the Contract.
<u>LOGIC Marine Offshore</u> <u>[2004]</u>			Generally as above but with the additional requirement to explore an agreed ADR before going to Court Proceedings and set out clear summary of facts, basis of claim, nature of relief claimed etc. [reflects Civil Procedure Rules – Pre-Action Protocol for Construction & Engineering Disputes]
<u>BESPOKE PFI PROJECT AGREEMENTS</u> (N Middlesex – Typical & Current)	Liaison Committee Referral		1. One party serves notice of dispute to the other. This is discussed by the Liaison Committee (the decision makers are drawn equally from the respective parties) meets as soon as reasonable practicable. Liaison Committee has 5 days in which to settle the dispute and if successful a further 2 days to document the agreement reached in writing.
	Mediation		2. If the Liaison Committee fails to secure resolution then the matter moves to mediation. The mediation is required to be conducted in accordance with the CEDR procedures in force at the relevant date. The mediation in all cases should take no longer than 30 days.
	Adjudication		3. Adjudication applies where 1 and 2 above have failed to resolve. On the one hand the fact that a PA is not a 'construction contract' within the meaning of the Act is used at PA level (this does not apply under the construction sub-contract as the Act applies to this) to insist on compliance with 1 and 2 above prior to adjudication. On the other hand the provisions of the Act are observed in all other regards.
	Court Proceedings		4. Court proceedings apply save where the parties have agreed that the decision reached by Liaison Committee, mediation or adjudication is final and binding.
	Fast Track DRP		5. Fast track DRP excuses compliance with 1 and 2 above but only applies to an expressly defined set of disputed matters, usually those aspects of the deal with a critical connection to the project timeline such as agreement of RDD and variations.
			6. Generally, although court proceedings must be excepted, the SPV can submit information provided by sub-contractors in support of a dispute but they may not joinder the sub-contractor into the resolution process.



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