

Contracted Mediation

Dispute Resolution for Project-based Industries

By Patrick Green and Stephen Woodward

Introduction

1. At the Society of Construction Law's meeting held on 5th June 2001 Patrick Green and Stephen Woodward provided a thought-provoking explanation of a novel approach to mediation for project-based industries.
2. Although the notion of mediation in the construction industry was conceived over ten years ago, there has been periodic evaluation of the idea to meet the changing needs of an ever changing construction industry. A company called Resolex Ltd has formulated a mediation process that attempts to draw together the advantages of mediation as a form of dispute resolution and also the changing demands of the industry. This was a presentation that spelt out the dynamics of Resolex's mediation process.

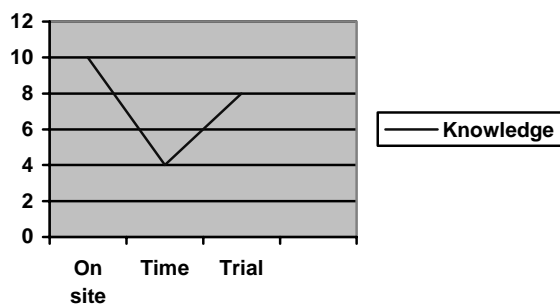
Climate of change

3. Over many years the construction industry has had to change to meet new legal and institutional demands which has resulted (in theory at least) in a greater degree of openness between the participants:
 - (a) The Latham and Egan Reports;
 - (b) Partnering and Supply Chain Management; and
 - (c) Adjudication and reforms of Civil Procedure.
4. According to Green and Woodward, the industry has been leaning towards the mediation model of dispute resolution against the adjudication model because, *inter alia*, mediation is conceptually more akin to partnering and supply chain management: consensual in nature, creates an atmosphere of openness and parties continue to feel as though they are in control. However, the approach which has been created by Resolex (which I will call the "Resolex approach") is novel because rather than parties using mediation as a dispute resolution tool after a dispute has developed they attempt to use mediation before, or at least at the inception stage of any dispute.

Mediation

5. The essences of mediation are well documented. However, for the purposes of the Resolex approach, the key ones include:
- (a) That any mediation is on a “without prejudice” basis;
 - (b) That mediation is voluntary;
 - (c) That it offers imaginative solutions which cannot be given by traditional dispute resolution tools for example the courts;
 - (d) Encourages communication between parties and therefore parties are able to ventilate their concerns and ideas in an open, rather than an adversarial, environment; and
 - (e) In comparison with traditional dispute resolution tools mediation is inexpensive, quick and effective.

“The Knowledge Curve”



6. Hopefully, the above graph will help to demonstrate what is meant by “the knowledge curve” and how the variable nature of knowledge supports the theory that mediation should be considered at the inception of a dispute rather than perhaps two or three years after the event.
7. When a dispute (or potential dispute) is incepted there is a wealth of contemporaneous knowledge by both sides: memos, site instructions, minutes of meetings (this is represented by the “on site” column on the graph). However, as time passes (“time column”) a person’s recollection of events becomes diluted and therefore it becomes necessary to employ legal assistance to resurrect the knowledge that those same people had at the time of the inception of the dispute before that same

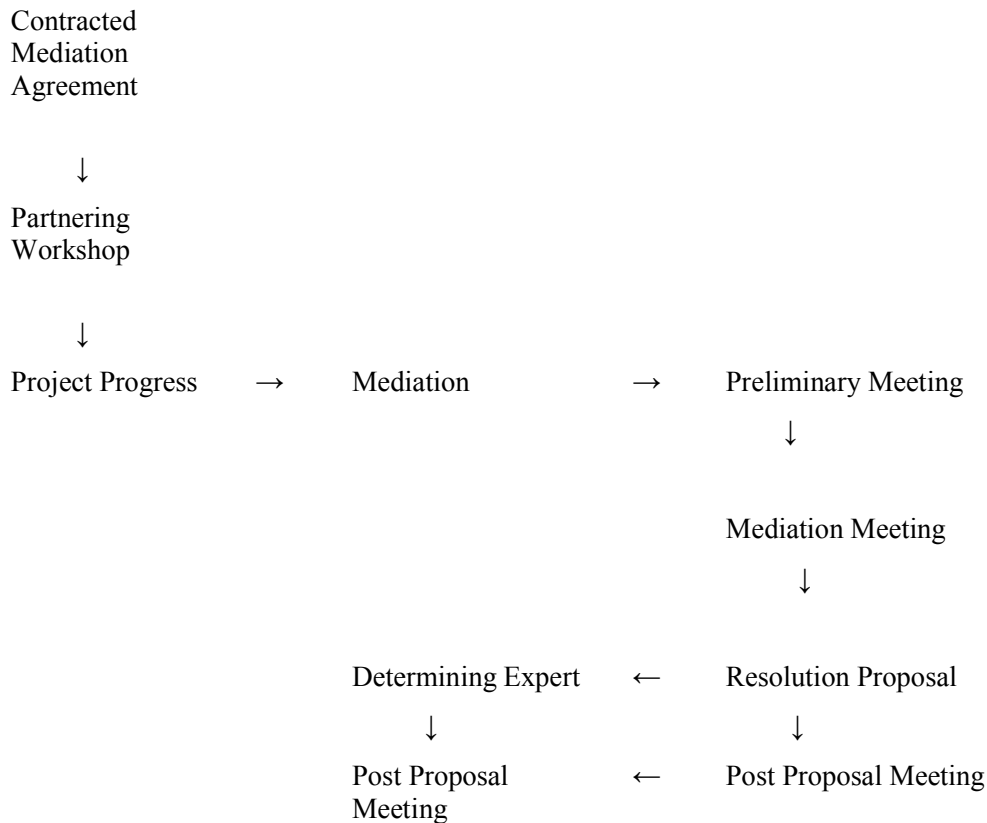
dispute goes to trial, during which time money is being spent and a persons knowledge will not be as when the dispute first arose. Therefore, it is more advantageous for the parties to have any dispute resolved at inception rather than two or three years later.

8. Therefore, the present problems of mediation are:
 - (a) It is often used too late;
 - (b) Lawyers are of last choice;
 - (c) There is no compulsion between the parties to mediate; and
 - (d) “The Knowledge Curve”

“The Resolex approach”

9. The “Resolex approach” seeks to find an equilibrium between the advantages of mediation as a dispute resolution tool whilst improving the chances of settlement at an affordable cost. Therefore three principles have been adopted:
 - (a) The mechanism is contracted and therefore compulsory;
 - (b) The mechanism commences early and is immediate and therefore counters “the knowledge curve difficulties”; and
 - (c) It is continuous and therefore provides continuity of knowledge for the mediation panel.
10. After a series of market tests (principally with funders on site and insurers) there has been enthusiasm about the potential of the approach. Indeed, the approach has been operated in a construction project in Jersey.
11. At the beginning of any project a Panel is put in place which consists of commercial, legal and mediators and this Panel will provide a continuous resource of mediation. The Panel will then facilitate the partnering workshop and anticipate any problems which may arise between the parties, then will attempt to mediate between the parties.

Operational procedure



The above diagram is intended to offer an illustration of the process that the parties will enter into if and when there is a dispute. One section of the process which was highlighted by the speakers was the “Resolution Proposal”. The whole contracted mediation process is on a without prejudice basis, except the Resolution Proposal. The purpose of the Resolution Proposal, which can be described as “an iron first in a velvet glove” is somewhat like a “Part 36” offer to settle. A party writes a Resolution Proposal in an attempt to settle the dispute. If the other party agrees to the Proposal then the dispute is resolved. In the event that the Proposal is rejected and the whole dispute is referred to adjudication then the Court (or arbitrator) can evaluate the Proposal in relation to the reasonableness of the parties conduct. Therefore, the Resolution Proposal is a mechanism to ensure that the parties focus on settlement.

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