



Mike Spencer, EC Harris



Tim Tapper, Cyril Sweett



Nick Gould, Fenwick Elliott

# 'It's like partnering with teeth'

**Brief encounter** A new form of project mediation was launched this week to nip problems in the bud. We brought together its inventors and industry experts to discuss the pros and cons

**Chloë McCulloch** Let's discuss this week's launch of a dispute resolution technique: project mediation. The idea, most recently developed by Fenwick Elliott and the Centre for Effective Dispute Resolution (CEDR), is that an impartial project mediation panel is appointed at the outset of the project. It visits the site periodically and may conduct workshops. The panel consists of one lawyer and one commercial expert who are trained mediators.

It seems the main argument in favour of this process, rather than dispute review boards, is that it is cheaper and can be used on projects around the £10m mark instead of only being suitable for £100m-plus schemes.

**Nick Gould** In terms of cost, it's much cheaper than a dispute board. If a dispute arises, a dispute board requires detailed statements of case, evidence, experts' reports and a hearing. If a dispute arises on a project with project mediation, the parties exchange position statements and supporting documents. There would then usually be a one-day mediation with a high chance of resolving the dispute. The mediators already have valuable knowledge of the project and of the individuals working on the project.

**Chloë** So, Nick, given the industry already has a range of dispute resolution techniques, as well as partnering, is this just a variation on what's gone before?

**Nick** It builds on what has gone on before, but is tailored to the needs of the industry. It is more about dispute avoidance than resolution. The mediators assist with problem-solving during the project. They can't make decisions, so the power to deal with issues remains with the parties. But they can inject some reality that might otherwise be overlooked. It's like partnering with teeth.

**Chloë** Project mediation is already used by some parties, so what's new about this form?

**Nick** The new aspect is that the CEDR now provides guidance on how to set up project mediation on a scheme. They also can provide parties with a project mediation agreement and appoint mediators. The launch was on 7 December and, after that date, anyone will be able to download for free the guidance and agreement from the CEDR's website.

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NICHOLAS GOULD

**Chloë** Andy, the CEDR will provide the project mediators for an appointment fee. How much cheaper will the process be than dispute review boards?

**Andy Grossman** The appointment fee is one component of the cost. A monthly retainer and hourly rate is agreed for each project mediator with the parties. If a formal mediation is required, where the parties are unable to resolve their conflict through discussions and interventions by the project mediators, a separate daily rate is agreed. We estimate project mediation will be at least 30% cheaper than dispute review boards.

**Tim Tapper** I understand that FIDIC and the World Bank encourage one-person dispute boards for smaller projects, which means these boards can be suitable for projects worth less than £100m. Are you saying the saving with a dispute board is at the dispute resolution stage?

**Mike Spencer** Savings between project mediation and adjudication at dispute resolution stage must surely be minimal.

**Simon** Agreed, but the time wasted is still likely to be less than with dispute boards. Project mediation is great at heading off things, so parties can focus on the build not the fight.



**Andy Grossman, Centre for Effective Dispute Resolution**

## My concern is that project mediation is straying into 'soft' areas such as collaborative working. Is it trying to do too much?

TIM TAPPER, CYRIL SWEETT

**Mike** In my view, the benefit of project mediation lies with encouragement of collaborative working and the use of an effective early warning system. Such a process would encourage parties to look ahead together and eliminate financial and programme risks.

**Andy** Savings are being achieved in the improved management of supplier relations and driving the collaborative effort. Nick used the term "partnering with teeth" and this lies at the heart of project mediation. In most cases, collaborative working needs to be driven.

**Mike** The challenge is to change the attitudes of the contracting parties and to encourage project controls, records management and an early notification process so parties can work together to resolve any problems, which the mediation panel can facilitate. I foresee two key challenges: the attitudes of the parties and the way in which they work and the fact that the NEC encourages a similar method of contracting.

**Nick** I think it would work well with the NEC approach. It's a front-end dispute avoidance technique. The benefit is the interaction of mediators that are removed from day-to-day dealings of individuals.

**Simon** The challenge, as Mike says, is changing attitudes. I am in a major project



**Simon Tolson, Fenwick Elliott**

battle at present where more exchange and effective project controls might have made the difference, but they were not embraced. A project mediator would now be a welcome third party to the scene.

**Andy** Just going back to the cost. As an indication, the cost of project mediation on a £35m contract lasting 24 months would be in the region of 0.3% of the contract value.

**Tim** Dispute boards have generally been 0.05-0.3% for a three-man board. This is on major projects, admittedly, so does the process really win on smaller projects or is it also suitable for the big ones?

**Nick** Dispute boards are too expensive for smaller projects, but project mediation isn't.

**Tim** My concern is that project mediation is straying into "soft" areas such as the promotion of collaborative working and the softer side of risk management. Is it trying to do too much?

**Nick** It is just trying to focus on the part where a difference can be made. It focuses on the people and getting the job done. The project mediators can test whether the participants are really collaborating or just going through the motions.

**Tim** Project mediation seems to be partly intended to promote partnering. We have found that partnering only works when there is someone there to train the parties, bring them together with workshops and team building exercises and then to reinforce this throughout the project. Will the mediator be taking on this role?

**Andy** Project mediation is suited to the big ones as well – even the 2012 Olympics! Nick's point is that PM is not out of the reach of smaller projects. The smaller projects might



**Chloë McCulloch, legal editor of Building**

be highly complex ones where the use of project mediation would be an advantage. Whether we use the term partnering or collaborative working, project mediation takes on the training role.

**Chloë** We're out of time. Any final comments about the main selling points or challenges of this method of dispute resolution?

**Simon** The main selling point for will be its ability to fuse team building, dispute avoidance and dispute resolution in one procedure.

**Tim** Taking the ethos of dispute boards and refining the process makes good sense. However, for me, it appears to be attempting to be all things to all men and strays too far into specialist areas such as risk management and the role of partnering adviser. This may dilute its effectiveness.

**Andy** Project mediation provides a better response to project finance and risk management. Banks and funders are increasingly having to look at operational risk and having effective measures available to deal with conflicts.

**Mike** The main challenge is changing the attitudes and encouraging good project controls and records. The introduction of a project mediator, extended to all contracting parties, may encourage all parties to address the issues on their project before they arise in the form of a dispute. An independent project mediation panel will also assist the parties in managing their expectations at an early stage and avoid a costly and protracted dispute.

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