CONSTRUCTION LAW LETTER

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GETTING BACK ON TRACK: MID-PROJECT MEDIATION IN THE CONSTRUCTION INDUSTRY

Broadly, a construction project in conflict can proceed in two ways. One approach, which is all too common, is for parties to continue with the status quo, build their respective claims, and conduct themselves as though litigation or arbitration is inevitable. Another approach, however, is for the parties to tackle their disagreements directly, and to do so before attitudes harden and relationships are irreparably damaged.

In this second approach, the use of mid-project mediation can be instrumental. Even in the absence of a full and final monetary settlement, there are a wide variety of positive outcomes that can be achieved through mediation to help the parties move forward together for the benefit of the project.

I have spoken to three leading construction lawyers and mediators, Duncan Glaholt, Stephen Morrison, and Sandra Astolfo, about the benefits of mid-project mediation, the results that can be achieved, and best practices for maximizing the parties' chances at success.

How Can a Lawyer Best Prepare Their Client for a Mid-Project Mediation?

***Stephen Morrison*:**

A mid-project mediation is distinctly different from a post-completion dispute resolution process insofar as the parties have to maintain a positive working relationship for the remaining duration of the project. The clients need to be counselled in this regard. This is generally not a good time for unreasonably aggressive positions or bully tactics. Just as compromise is a hallmark of a mediated outcome in general, it is impera- tive that the clients understand that it is particu- larly important during the course of the project. The client should also understand that, while the outcome of the mediation may resolve any outstanding issues with finality, in the alternative it may be sufficient to simply reach a resolution that allows work to continue and funds to flow, while reserving the parties' rights in respect of a later final determination of the issues.

***Sandra Astolfo*:**

The lawyer and client should meet in advance of agreeing to a mid-project mediation and prior to the mediation to ensure the dispute is "ripe" for mediation, and to ensure both have a clear understanding of what the client hopes to achieve, what is considered a "successful" outcome, partial success and what happens if the dispute cannot be resolved at mediation. The client and lawyer should also have a good understanding of the scope of the dispute and what rights or claims, if any, need to be carved out of a settlement to be dealt with in the future. By spend- ing time going through these issues, the client has a defined goal going into the mediation.

***Duncan Glaholt*:**

A lawyer can best prepare their client for a mid-project mediation three ways: *first*, by credibly managing the client's expectations; *second*, by rigorously testing the client's key factual and legal assumptions in advance of the mediation event; and *third*, by focusing the client, be it owner or contractor, on the long game: completion and turnover.

Managing client expectations is one of the most difficult yet important parts of a mid-project mediation. Not all claims can be resolved mid-project. The parties may have to "agree to disagree" over issues of causation, or future schedule impacts. A more credible expectation, I believe, is that of a relational reset permitting clients to relearn the art of cooperation and collaboration that is necessary to the satisfactory performance of any long-term contract.

Testing key assumptions is another part of the thorough preparation of a client for a mid-project mediation. A member of the legal team familiar enough with the case to be its harshest critic, can play the role of "black hat" in a mock mediation setting, for example, picking away at key assumptions necessary for a high value settlement. If this "black hat" role is taken too seriously, however, or by the wrong team member, a lawyer risks alienating the client. If this role is not taken seriously enough, on the other hand, the lawyer risks embarrassment if at the mediation the mediator, or opposing counsel, effectively challenges these key assumptions and the client wonders why they were getting this kind of a reality check for the first time in mediation.

Finally, focusing the client's attention on completion and turnover, and away from short term thinking is another step in a lawyer's preparation of a client for mid-project mediation. Both parties want

the project off their books as soon as possible. Both parties want the contract performed. This is the common interest that drives parties to mid-pro- ject mediation in the first place. The ember is there, it just has to be fanned a bit.

How Can a Lawyer Best Assist the Mediator and Their Client During the Mediation to Improve the Chances of a Successful Outcome?

***Sandra Astolfo*:**

A lawyer should be fully familiar with the dispute, mediation material and client's goal(s), and be ready to entertain novel approaches to settlement. By being fully prepared, the lawyer can set out the pros and cons of proposals from the other party/parties and can arm the mediator with reasons why a certain proposal or term cannot be accepted. If there are terms that are "deal breakers", a lawyer should clearly communicate those terms to the mediator at the outset.

***Duncan Glaholt*:**

A mid-project mediation is successful if it allows parties to a transactional contract to perform it as if it were a relational or collaborative contract. If commercial issues are settled in the process (as they often are) so much the better. A mid-project mediation is also successful to the extent that it prevents dysfunctional behaviours from becoming normalized. The two seem to go hand in hand.

With that in mind, some might say that a lawyer's greatest service in mediation is in being able to distinguish between legal questions essential to settlement, which require legal input, and commercial issues that do not.

Stephen Morrison:

To the greatest extent possible, focus on the factual matrix and do not get too caught up in legal arguments or reliance on technical defences. Presenting a clear factual position on what has occurred and which party is responsible will be more persuasive than focusing on non-compliance with notice provisions and other technical legal issues. If you are acting for a contractor, help the mediator understand why your client needs relief in order to get the project finished. If you are acting for an owner, keep the focus on its need to keep the work moving towards completion and occupancy. While advocating your client's position responsibly, pick up on the signals that the mediator may be giving to your client and, unless you think they are completely unreasonable, help your client see the merits of those suggestions.

Another way that lawyers can sometimes assist the mediator is to stay out of the process com- pletely. An experienced construction mediator may be able to assist the parties in reaching a compromise resolution of the issues, either final or interim, without the intervention of legal counsel, by keeping the focus on the interests of the parties in reaching a pragmatic business solu- tion, rather than a legally correct outcome. Should they wish to do so, each party may con- sult with their own lawyers after the fact, but be- fore finalizing minutes of settlement.

Aside From a Full and Final Monetary Settlement of the Issues, what are Some other Effective Results that Parties Can Achieve During a Mid-Project Mediation?

***Duncan Glaholt*:**

The process of legal position-taking, and subsequent positional bargaining is a process that either intentionally or implicitly discredits the opposition. It is as if each party says to the other "*if only the other side could see how weak their position is, and how dire the course they have set us on, they'd just settle this and walk away!*". This kind of a logical stalemate often leads to a deeply dysfunctional

relationship and a very unhealthy project. Disputes compound. Moderate voices are not heard. Confirmation bias replaces logical discourse.

If a project is to succeed, all of those positional dynamics have to be reversed, and in a permanent way. The parties must leave their mid-project mediation at the very least crediting operational groups on the other side with rationality. This can often be achieved by replacing one or two "conflict saturated" disputants with more neutral participants in a committee or "working group" setting. Only the confidentiality of the mediation process allows the kind of dialogue and information exchange necessary to make this kind of an outcome possible.

***Stephen Morrison*:**

Good mediators are, ultimately, dispute resolution design specialists. A mid-project mediation can be used not only to address issues that are currently on the table but, as well, to help the parties develop mechanisms for resolving future disputes as they arise, with or without the assistance of a neutral. For example, if the parties anticipate that there will be ongoing problems, and the project consultant is not proving to be effective at maintaining the necessary neutrality, it may be appropriate to set up a monthly session with the mediator to review and resolve any issues that have arisen in the previous 30 days that the par- ties have not been able to deal with on their own. Knowing that there will be a regular periodic op- portunity to address issues with the benefit of a facilitator may keep the parties working coopera- tively. Similarly, if schedule delay is a matter of particular concern, a mediator may assist the par- ties in jointly retaining a delay claim consultant who will monitor progress and be in a position to analyse responsibility fairly and neutrally in re- spect of any potential existing or future claim.

***Sandra Astolfo*:**

There are a number of "successes" that can follow a mediation that does not result in a financial payment. For example, the parties can agree upon an interim extension of time; a partial resolution of key subtrade claims to ensure those subtrades continue to provide services and materials to the project; a partial payment for long-lead time equipment to avoid supply chain issues and price escalation; and a post-mediation meeting of senior personnel with or without the mediator. You need not adopt an "all or nothing" approach for a mid-project mediation.

What are Some of the Characteristics of Projects That Would Benefit from a Mid-Project Mediation?

***Stephen Morrison*:**

Complex projects of long duration (i.e., two to three years from start to finish) are obvious candidates for this kind of intervention. Many sophisticated projects of this type use dispute resolution boards to function in this capacity but, where that mechanism is not being utilized, the early appointment of a project mediator can be a very effective substitute. Generally, resolving disputes at the earliest possible time while the facts are still fresh in people's minds and the reference documents are readily available is optimal. Construction disputes can be like open wounds; the longer they are exposed, the greater the chance they will become infected, and that the infection will spread, potentially with fatal consequences to the project.

***Sandra Astolfo*:**

A mid-project mediation might be helpful when there has been a demobilization, the threat of demobilization, or a slow down in the progress of the work because of interim project disputes; an interim call upon the performance bond; where a party has placed a construction lien early on in the

project; when the parties do not agree upon a con- tract term or terms or application of the law; and where the parties are at a stalemate and the dispute resolution process in the contract is not working or will not achieve a timely resolution.

***Duncan Glaholt*:**

If this question could be reduced to a scoring system, I might suggest the following as a start (in no particular order):

1. Increasingly hostile inter-party written communications: 10 points
2. Credible threats of termination or abandonment: 10 points
3. Many abortive or inflammatory job site meetings: 10 points
4. Runaway escalation claims, contractor and subcontractors: 10 points
5. Chronic failure to agree on basic schedule issues: 10 points
6. High number of Requests for Information and Change Directives early in a project: 10 points
7. Claims of Consultant incompetency or complicity: 10 points
8. High number of lawyer-authored client letters: 10 points
9. Communication to non-parties (sureties, government, etc.): 10 points
10. Resistance to the suggestion of mid-project mediation: 10 points

This list could be expanded. I would say that at 20 – 30 points, the project might survive without mid-project mediation, but at 50 points or over, the project is likely to end up a legal and financial train wreck without mid-project mediation.

When is the Right Time During a Project for Parties to Mediate? When is the Wrong Time?

***Sandra Astolfo*:**

Mediation may be helpful when the parties have been unable to resolve a dispute on their own and a neutral third party is needed to help resolve the issue to enable work to continue. Mediation may not work when the dispute has not yet crystalized and neither party is prepared to assume the risk of a full and final settlement.

***Duncan Glaholt*:**

You are asking the wrong person, because I am a firm believer in the efficacy of mid-project mediation, either *ad hoc*, or through the use of combined dispute boards, in all substantial public and private construction projects outside of the residential construction industry. Thus, I would answer this question directly by saying “early and often”. Never too early, never too often.

I may be the wrong person to ask this question for another reason. I am a firm believer in the principle that repeat, high-value interactions generate cooperation. Mid-project mediation, done right, creates just the kind of repeat, high-value interactions that are necessary to restore a functioning collaborative commercial relationship within the confines of an existing, partly performed transactional contract.

I realize that by advocating for mid-project mediation early and often I am whistling in the wind. Parties will shy away from a process that costs 20 or 30 thousand dollars mid-project in preference for a process that will cost ten or a hundred times that amount at the end of a project. Parties will choose future regret over present expense.

Stephen Morrison:

As already noted, earlier is better than later. Post-completion mediations, in some cases occurring years after the events under consideration, are often characterized by contrasting narratives as to what took place leading to the dispute. This is far less likely to be the case when the events have occurred only weeks or perhaps months earlier. Having said that, most issues that arise on a construction project are regularly resolved through unmediated negotiations between the parties. In other cases, the project consultant/contract administrator is called upon to impartially evaluate claims. Ideally, project mediation should not become a routine replacement for those ordinary mechanisms, such that the parties routinely threatened to call in a project mediator every time an issue arises. All reasonable efforts should be made to resolve the disputes without neutral intervention, but project mediation should be invoked when those efforts prove unsuccessful and before the project schedule is seriously impacted or the parties' relationship is allowed to become toxic.

Conclusion: A Valuable Tool

Construction projects depend on cooperation and goodwill between the parties. If there is an issue, especially an issue that will repeat itself, it is far better for the parties to deal with it head-on early, rather than defer until the end of the project when problems have compounded. Lawyers and clients should consider, throughout the project, how mediation can be used to help steer the project towards a successful outcome.