
THE INTERNATIONAL CONSTRUCTION LAW REVIEW

CONTENTS

Introduction	1
<hr/>	
Articles	
The Four Criteria of Risk Allocation in Construction Contracts	4
Relationship between FIDIC Conditions and Public Procurement Law —Reliability of Tender Documents	00
Can Prevention be Cured by Time Bars?	00
Concurrent Causation in Construction Claims	00
The Development of a Case Law in Construction Disputes relating to FIDIC Contracts	00
<hr/>	
Correspondents' Reports	
European Union: The New European Directive on Mediation—Its Impact on Construction Disputes	000
England & Wales:	
<i>Stocznia Gdynia SA v. Gearbulk Holdings Ltd</i> : Case Note	000
MARTIN BRIDGEWATER AND JAMES WILLIAMS	000
The Construction Contracts Bill	000
Australia: <i>Clough Engineering Ltd v. Oil & Natural Gas Corporation Ltd</i>	000
ANDREW STEPHENSON	000

The International Construction Law Review

EDITORS-IN-CHIEF:

His Honour Humphrey LLOYD, QC
Formerly a Judge of the Technology and Construction Court
High Court of Justice
England and Wales

Professor Douglas S Jones, AM
Partner, Clayton Utz, Sydney, Australia

All Editorial Correspondence to:

His Honour Humphrey LLOYD, QC
1 Atkin Building
Gray's Inn
London WC1R 5AT
Fax: 00 44 20 7405 7456

or Douglas S Jones
Clayton Utz
1 O'Connell Street
Sydney, 2000
NSW
Australia
Fax: 00 61 2 8220 6700

Views expressed by contributors and correspondents are not necessarily those of the Editors or the Publishers of *The International Construction Law Review*. This issue of *The International Construction Law Review* should be cited as: [2009] ICLR. All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, electronic, mechanical, photocopying, recording and/or otherwise, without the prior written permission of Informa Law. Whilst every effort has been made to ensure that the information contained in this journal is correct, neither the editors and contributors nor Informa Law can accept any responsibility for any errors or omissions or for any consequences resulting therefrom.

© 2009. Informa UK Limited

Published by Informa Law

Telephone House
69–77 Paul Street
London EC2A 4LQ
(an Informa Business)

ISSN 0265–1416

Contact details

All written queries to Informa Law, Informa House, 30–32 Mortimer Street, London, W1W 7RE.

Editorial queries: Jessica Westwood, Tel: 020 7017 6762,

Email: jessica.westwood@informa.com

Subscriber Helpdesk: Tel: +44 (0)20 7017 5532, Fax: +44 (0)20 7017 5048

Email: law.enquiries@informa.com

Subscriptions for Asia Pacific should be addressed to Grant Rowles, Tel: +65 6835 5151,
Email: grant.rowles@informa.com.au

Computertypeset by Interactive Sciences, Gloucester
Printed in Great Britain by MPG Books, Bodmin, Cornwall
Printed on paper sourced from sustainable sources.

Editorial Advisory Board

MAX W ABRAHAMSON
MR JUSTICE BYRNE
JOHN D CARTER
DR PHILIP CHAN
DR MONIKA CHAO-DUIVIS
DR JOACHIM GOEDEL
JESSE B GROVE, III
GORDON L JAYNES

JAMES J MYERS
PROFESSOR FRITZ NICKLISCH
MICHAEL E SCHNEIDER
CHRISTOPHER R SEPPÄLÄ
PROFESSOR THOMAS J
STIPANOWICH
PROFESSOR JUSTIN SWEET
CHRISTOPHER WADE

Correspondents

- Australia:* ANDREW STEPHENSON, Clayton Utz, Melbourne, Victoria
Austria: DR ALFONS HUBER, Österreichische Gesellschaft für Baurecht, Vienna
DR WERNER HUBER, Rechtsanwalt, Vienna
Canada: DONALD L MARSTON, The Osler ADR Centre, Toronto, Ontario
China: RICO CHAN, Baker & McKenzie, Beijing
Denmark: IRENE WITTRUP, Bech-Bruun, Copenhagen
EU: HUBERT ANDRÉ-DUMONT, McGuire Woods LLP, Brussels
Egypt: SAID HANAFAI, Mena Associates, Cairo
Finland: TIMO KORPIOLA, Attorney-at-Law, Fennica, Attorneys-at-Law Ltd, Helsinki
France: CHRISTOPHER R SEPPÄLÄ, White & Case LLP, Paris
Germany: DR FRANK KEHLENBACH, European International Contractors, Berlin
DR MARKUS BEAUMART, DLA Piper Ruduick Gray Cary UK LLP, Köln
Holland: ARENT VAN WASSENAER, Norton Rose, Amsterdam
Hong Kong: DAVID BATESON, Solicitor, Mallensons Stephen Jaques, Hong Kong
New Zealand: TÓMAS KENNEDY-GRANT, Auckland, New Zealand
Pakistan: MAHOMED J JAFFER, Orr, Dignam & Co, Karachi
Singapore: DR PHILIP CHAN, Associate Professor, Department of Building, National University of Singapore
South Africa: PATRICK M M LANE, SC, Sandton, South Africa
Spain: DR CHANTAL MOLL DE ALBA LACUVE, Faculty of Civil Law, University of Barcelona
PROFESSOR PABLO SALVADOR, Cuatrecasas Abogados, Barcelona
Sweden: TORE WIWEN-NILSSON, Malmö
Switzerland: PROFESSOR DR IUR. HUBERT STOECKLI, Professor Institut für Baurecht, Universität Freiburg
MICHAEL E SCHNEIDER, Lalive Attorneys-at-Law, Geneva
United Arab Emirates: M A K AFRIDI, Afridi & Angell, Dubai
United Kingdom: MARTIN BRIDGEWATER, Herbert Smith LLP, London
United States: M S PERLMAN, Arent, Fox, Kintner, Plotkin & Kahn, Washington DC

CORRESPONDENTS' REPORTS

EUROPEAN UNION

HUBERT ANDRÉ-DUMONT¹

Avocat

THE NEW EUROPEAN DIRECTIVE ON MEDIATION—ITS IMPACT ON CONSTRUCTION DISPUTES

Introduction

On 21 May 2008, the European Commission adopted Directive 2008/52/EC of the European Parliament and of the Council on Certain Aspects of Mediation in Civil and Commercial Matters (hereafter the “Mediation Directive” or the “Directive”).

The Mediation Directive results from the broad consultation on the measures to be taken to promote alternative dispute resolution (ADR) launched by the European Commission in 2002 with its Green Paper on Alternative Dispute Resolution in Civil and Commercial Law² (the “Green Paper on ADR”). ADR refers to the variety of methods, such as conciliation, arbitration or mediation, by which conflicts and disputes are resolved other than through court litigation. The consultation initiated by the Green Paper concerned in particular the guarantees necessary to ensure that out-of-court settlements offer the same guarantee of certainty as court settlements.

Also prior to the Mediation Directive, on 2 July 2004, the European Commission had supported the launching of the European Code of Conduct for Mediators (the “Code of Conduct”), which sets out a number of principles to which individual mediators can voluntarily decide to commit to. It covers all areas of mediation including competence, advertising, impartiality and fees, and is intended to be applicable to all kinds of mediation in civil and commercial matters.

Mediation is currently receiving a lot of attention from the supporters of ADR and is gradually being introduced in legislative instruments as a legally recognised method of resolving disputes.

This paper reviews the Mediation Directive and its possible impact on construction disputes.

¹ Hubert André-Dumont, Lic Jur, LL M, is a member of the Brussels Bar, and a partner of McGuireWoods, LLP, Brussels.

² COM (2002) 196 final.

Definitions of mediation and mediator

The objective of the Mediation Directive is to facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings.

In doing so, the Directive defines “mediation” as a “structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an amicable agreement on the settlement of their dispute with the assistance of a mediator” (Article 3 (a)) and the mediator as “any third person who is asked to conduct the mediation in an effective, impartial and competent way, regardless of the denomination or profession of that third person in the Member State concerned and of the way in which the third person has been appointed or requested to conduct the mediation” (Article 3 (b)).

These definitions convey the essential characteristic of mediation which is that the parties are *themselves* in charge of the process, and may organise it as they wish and terminate it at any time, the mediator having as a sole role to conduct and facilitate this process. Mediation is indeed a non-adversarial ADR method that relies entirely on the parties’ good faith and willingness to reach an amicable solution.

Nevertheless, the definition of mediation could have underlined another characteristic of mediation which is the aim of *restoring or re-defining the parties’ relationship*. Thus, in a recent monograph on the law and practice of mediation, the authors suggest to define mediation simply as “a framework put at the disposal of parties faced with a conflict situation and intended to allow them to re-define their relationship”.³

Moreover, the definition of mediator could also have set forth, as does the Code of Conduct, two other crucial characteristics required of a mediator, besides impartiality, namely neutrality and independence.

In the context of mediation, *neutrality* means that the mediator should not influence the parties by giving his personal opinion or providing recommendations to the parties as to the possible terms of the settlement of their dispute. This is why the advocates of traditional mediation prefer mediators who are not specialists in the subject-matter of the dispute in order not to incur any risk of affecting the negotiations.

Independence traditionally refers to the absence of personal or business relationship of the mediator with a party, the absence of external or internal influence, or of conflict of interest.

The Directive further adds that the Member States will encourage the development of, and adherence to codes of conduct for mediators and organisations providing mediation services, as a well as other means of quality control. The Member States are also expected to favour the training

³ Cf. J. Cruyplants, M. Gonda and M. Wagemans, *Droit et pratique de la médiation* (Brussels: Bruylant Ed, 2008).

of mediators to make sure that the mediation is conducted in an effective, impartial and competent way (Article 4).

Mediation and conciliation

Mediation and conciliation are often mistaken for one another. For instance, the phraseology used by the International Chamber of Commerce for ADR evolved from “conciliation” (ICC Rules of Optional Conciliation of 1988) to “mediation” (ICC ADR Rules of 2001).

The difference between mediation and conciliation, albeit subtle, is not confined to a purely terminological evolution.

First, while the role of the mediator is restricted to that of a “facilitator” to assist the parties in finding themselves an amicable agreement on the settlement of their dispute, the role of the conciliator is more proactive and interventionist on the merits as he will recommend a solution if the parties cannot find one. Indeed, the role of the mediator, governed by the principle of neutrality, is restricted to that of a “facilitator” to assist the parties in finding their own solution. For instance, as defined by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID), the role of the conciliator is to “to clarify the issues in dispute between the parties and to endeavour to bring about agreement between them upon mutually acceptable terms” and “to recommend terms of settlement” (Article 34 (1)); “to make—orally or in writing—recommendations to the parties”; to “recommend that the parties accept specific terms of settlement or that they refrain, while [seeking] to bring about agreement between them, from specific acts that might aggravate the disputes”, and pointing out “to the parties the arguments in favour of its recommendations” (Rule 22 (2), ICSID Conciliation Rules).

Secondly, mediation is focused on the relations between the parties as a means to redefine their relationship in view of ceasing a conflict situation, while conciliation is focused on reaching a settlement and is more exclusively rational than relational.

Mediation and arbitration

Mediation differs fundamentally from arbitration. As mentioned already, mediation is a voluntary ADR process totally controlled by the parties with the assistance of a neutral mediator which, if brought to the end and successful, leads to a settlement agreement. On the contrary, arbitration—which is also a voluntary ADR process—is a procedure in which the parties to a dispute refer it to one or more arbitrators, who lead the process and render a binding decision (arbitration award).

Emerging legislation and entities for mediation in civil and commercial matters

While mediation is not a new institution, as it was originally developed and has been used since the eighties in common law countries, and mainly in the US, it has, however, become in recent years increasingly common worldwide and has been the object of various public or private initiatives at international, national and local levels.

International legislation

Besides the Mediation Directive, the only international instrument on mediation is the Recommendation of the Committee of Ministers to Member States on mediation in civil matters,⁴ adopted by the Council of Europe in 2002, which also recommends that the governments of Member States facilitate mediation in civil matters whenever appropriate, and take or reinforce, as the case may be, all measures that they consider necessary with a view to the progressive implementation of guiding principles concerning mediation in civil matters established by the Council of Europe.

National legislation

Outside Europe, the US has a long and rich experience of ADR in various forms and most US states have adopted Mediation Acts in different areas. The plethora of such Acts adopted by the states prompted the National Conference of Commissioners on Uniform State laws to draw up a uniform Mediation Act on 16 August 2001.

In Europe, besides the initiatives discussed above, many Member States have already enacted legislation regulating judicial and/or conventional mediation in different areas such as family issues, criminal issues, civil and commercial matters, etc., or taken initiatives to promote mediation.

Following the adoption of and pursuant to the Mediation Directive, the Member States of the European Union (except Denmark, which is not bound by it) must enact new legislation or amend their existing legislation to comply with the Directive before 21 May 2011 (Article 12).

The scope of the Directive

As explained, the Directive is part of the effort made at the European level to regulate and promote the development of mediation. Its scope however is limited.

The Directive is limited to *civil and commercial matters* (thus including construction issues), however, with the express exclusion of rights and

⁴ Rec (2002) 10.

obligations that are not at the parties' disposal under the relevant applicable law (Article 1 (2)). This means that it does not extend to matters relating to, e.g., tax or customs issues.

The scope of the Directive is also limited to *cross-border disputes*, defined as those in which a least one of the parties is domiciled or habitually resident in a Member State of the EU other than that of any other party (Article 2). Obviously, as provided in the Preamble to the Directive (Recital 8), this does not prevent Member States from applying the provisions of the Directive to internal mediation processes also.

The content of the Directive

The Directive's main objective is to provide structure and quality standards for mediation. It is relatively short and not detailed, but it contains, in addition to the broad definitions described above, the following key provisions:

Information for the general public (Article 9)

Member States must encourage the availability to the general public, in particular on the Internet, of information on how to contact mediators and organisations providing mediation services.

Ensuring the quality of mediation (Article 4)

Member States must encourage the development of, and adherence to, voluntary codes of conduct by mediators and organisations providing mediation services, as well as other effective quality control mechanisms concerning the provision of mediation services. They must also encourage training of mediators in order to ensure that the mediation is conducted in an effective, impartial and competent way.

Enforceability of agreements resulting from mediation (Article 6)

Member States must ensure that it is possible for the parties to request that the content of a written agreement resulting from mediation be made enforceable by a court or other competent authority.

Confidentiality of mediation (Article 7)

Member States must ensure that, unless the parties agree otherwise, neither mediators nor those involved in the administration of the mediation process shall be compelled to give evidence in judicial proceedings or arbitration regarding information arising out of or in connection with a mediation process.

A derogation from this confidentiality principle is possible only if this is necessary for overriding considerations of public policy of the Member State concerned or if disclosure of the content of the agreement resulting from mediation is necessary in order to implement or enforce that agreement.

Effect of mediation on limitation and prescription periods (Article 8)

Member States must ensure that parties who choose mediation in an attempt to settle a dispute are not subsequently prevented from initiating judicial proceedings or arbitration in relation to that dispute by the expiry of limitation or prescription periods during the mediation process.

Court ordered mediation (Article 5)

The Directive provides for the possibility of a court to inviting the parties to use mediation or to attend an information session on mediation. Somehow inconsistent with the *voluntary* nature of mediation, the Directive further adds that it is without prejudice to national legislation making the use of mediation compulsory or subject to incentives or sanctions.

Mediation in construction-related disputes

As mentioned in the Green Paper on ADR, the main areas of private law where mediation has been applied and has proven efficient are generally in matters of consumer protection, family law and labour law. The Green Paper and the preamble to the Directive do not mention construction law.

Increasingly popular

Mediation in construction disputes is relatively recent and as is shown by joint research conducted in 2006 by the Royal Institution of Chartered Surveyors, the Bartlett School and University College London, it is developing, particularly in the US following the implementation of court schemes, while in the UK it is more limited, but is still growing activity.⁵ In Hong Kong, it became popular starting in the mid-eighties.⁶ It is believed to have become the most popular form of ADR in the construction industry and a number of specialised mediation institutions have emerged.⁷

⁵ P Brooker, *Construction Mediation: Analysis of Evaluative and Facilitative Models of Mediation in the UK and US industries* (COBRA, 2006).

⁶ Sai on Cheung *et al.*, "Third Party Interventions in Construction Dispute Negotiation" [2005] ICLR 503.

⁷ O Nisja, "The Engineer in International Construction: Agent? Mediator? Adjudicator?" [2004] ICLR 230.

Valuable advantages in terms of speed, costs and efficiency

Depending on the nature of the issue at stake and subject to the effective guarantee of enforceability of mediation agreements and of confidentiality of the process, mediation can offer valuable advantages over court litigation and even arbitration or conciliation, in some respects, for the resolution of disputes in civil and commercial matters, and especially construction-related disputes. Indeed, construction disputes imply generally multiple parties, involving, in addition to owners and contractors, architects, developers, engineers, project managers and other consultants, subcontractors and suppliers, neighbours, occupants, public authorities, insurers, etc. Complex litigation involving all such parties is often a disaster in terms of speed, costs and efficiency. The advantages of mediation are also therefore obvious, because the negotiations often result in creative and alternative outcomes.

Maintaining the relationship

The parties to a construction-related dispute often have an interest, besides resolving their actual conflict, in maintaining their relationship with each other for the sake of the project, given the costs entailed by a termination. As stated in the preamble to the Directive (Recital 6), this is also why settlements resulting from mediation, truly achieved jointly by the parties having redefined their relationship, are more likely to be complied with voluntarily and are more likely to preserve an amicable and sustainable relationship between the parties.

Evaluative mediation

In the construction sector, there has been a growing interest in so-called *evaluative mediation*, in which the mediator is expected—in derogation to the principle of neutrality of the traditional (*facilitative*) mediation—to make suggestions and recommendations.

This is particularly true in the US, where mediation in construction is developing most and where practice reveals that the most effective mediation uses a mediator having expertise in construction and construction claims and experience in litigation and arbitration and assumes a non-traditional role by making suggestions and judgments on the parties' proposals, therefore using "evaluative" interventions.⁸ This is certainly critical when technical matters are at issue. Probably, when the issue concerns only delays or payments, there is less of a need for evaluative mediation and for mediation at all. The downside of evaluative mediation

⁸ G Morgerman, *Anatomy of a Construction Mediation* (Construction Mediation Inc, 2008); P Brooker, *op. cit.* n. 5.

is that it is more lawyer-driven and adversarial, particularly in the construction industry, while the upside is that, statistically, evaluative mediation produces higher settlement rates.⁹

In reality, because of the active role played by the mediator, this so-called *evaluative mediation* is closer to conciliation than to mediation.

The engineer under the FIDIC contract

Pursuant to clause 3.5 of the FIDIC Red Book 1999, the parties to a construction contract may request the engineer to agree or determine certain matters. One may wonder whether the engineer is then acting as a mediator in the sense of the Directive.

The answer is clearly negative because the determination is a decision taken by the engineer and not by the parties themselves. Furthermore, contrary to a genuine mediator, the engineer must be “fair”, but not impartial (and neutral and independent as mentioned above on the definitions of “Mediation” and “Mediator”), and the process under the FIDIC rules is not structured as a mediation process would need to be. This role of the engineer under FIDIC to make determinations raised many comments.¹⁰

Conclusion

As a way to encourage the parties, with the assistance of a mediator, to negotiate for themselves and work together to reach a settlement and hence redefine their relationship, mediation is a non-adversarial and non-aggressive way to get the parties out of their conflict situation and save their future contractual relations. Surveys have shown that mediation is becoming increasingly popular and the Directive comes at a good time either to provide a legal framework for those EU Member States that do not yet have one, or to modernise their existing ones.

For ongoing construction contracts, mediation is probably the best ADR method in terms of speed and cost to save the construction project. No doubt that the Directive will lead to an increase of mediation structures and the conclusion of amicable resolutions of commercial disputes, and in particular of construction disputes.

The Directive provides for a flexible approach as it is subject to a review based on a report on its application to be submitted by the Commission by 21 May 2016, taking into account the development of mediation throughout the European Union and the impact of the Directive in the Member States. The report may include proposals to amend the Directive.

⁹ P Brooker, *op. cit.* n. 5.

¹⁰ For recent comments see M Bell, “Will the Silver Book Become the World Bank’s New Gold Standard?” [2004] ICLR 164; O Nisja, *op. cit.* n. 7.