Kluwer Mediation Blog

Resolving – and avoiding – construction disputes: notes from the ICC-FIDIC conference

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On 25th and 26th June, the ICC and FIDIC (International Federation of Consulting Engineers: http://fidic.org/) hosted their annual conference in Paris. While most of the discussion was, understandably, concerned with either arbitration or adjudication – the latter involving primarily Disputes Boards (http://www.dbfederation.org/) acting under FIDIC contracts – mediation made an appearance at a number of points. The principal issues concerning arbitrators, contractors, and lawyers include, at least: the international and cross-border relevance of contractual forms that are primarily "Anglo Saxon", the assurance of due process or procedural fairness standards, the recognition and enforcement of DB decisions (which do not amount to arbitral awards but have contractual enforceability, though some uncertainties remain about that), the enduring impact of culture and local politics notwithstanding the clarity and uniformity of contractual forms under ICC and FIDIC standards, and the management of highly complex, multi-party and typically enormously expensive projects.

Woven through this discussion was the sentiment that mediation is likely to make sense, even if only seek to resolve partial issues – let alone to avoid the complexity, delays and costs of adjudication and arbitration. At the same time, the avowed aim of the DB process, typically involving the appointment of a Dispute Board to "accompany" the whole of a complex construction project, is to avoid disputes, and to allow projects to keep running while settlement is sought. There was also an intriguing discussion, echoing some of the earliest commentaries on disputes and dispute management, concerning the very practical question as to when a "dispute" arises. In terms of the formal requirements of notice that will serve to invoke arbitral procedures, there's a practical question as to whether a claim is a dispute . . . recalling those sociologies of disputing about naming, blaming and claiming. Here, the more conceptual discussion actually turns into a very practical concern, especially where formal proceedings are time-constrained and where the commencement of arbitral preceding a depends on notice of a dispute.

For our mediation purposes, I'll draw on just two key themes that can be taken from an otherwise arbitration- and mediation-oriented discussion. First, while our field is primarily described and defined in terms of dispute resolution, a very practical concern is with dispute avoidance. Here, avoidance is understood not as a personal or cultural preference for denying that conflict exists; rather, it is understood as a preference for detecting emerging, bubbling disputes and having procedures and personnel on hand to help mitigate the risks. There's clear practical reason for this in the construction industry: disputes delay work, and delays have a domino effect in costs and

dispute escalation. The DB process, involving industry specialists closely linked to projects, allows expressly for preventive intervention; but mediators typically get called in once the dispute has, in Zartman's terms, ripened. There are exceptions to this, and one that I'm aware is under the current employment mediation provisions in New Zealand that allow for early assistance: employers may, for example, call on the Department of Labour mediators to assist in managing emerging disputes (http://www.dol.govt.nz/er/solvingproblems/resolving/mediation.asp). Given the capacity building role that mediation has, at least as a subtext to its conventional resolution role, it's worth exploring ways in which we mediators might respond to what is, sotto voce, a call for help in the prevention of dispute escalation.

Second, conversations about mediation tend often to reinforce Lon Fuller's early perception that mediation is all process and no substance. The definition, legitimacy and distinction of mediation seem to lie in attributes of process – the impartiality of intervention, the primacy of participation and dialogue, and the ethos of choice and volition (though this tends to be challenged in those jurisdictions where the judiciary seek to "incentivise" the parties to go to mediation, typically through the prospect of costs penalties). However, as the discussion of "amicable" dispute resolution develops, and especially as the "alternative" processes become more mainstream and moved closer to the legal processes, it seems clear that we cannot avoid dealing with those questions that have been more conventionally jurisprudential and law-related. For the moment, I'll suggest just three questions or issues, perhaps to pick up in later blog entries:

1. First, enforceability: typically, mediated settlements do not have the standing of arbitral awards and enforcements has depended on pursuing conventional breach of contract actions, suing on the a mediated agreement. We do see changes in this, especially in the requirements of the EU Directive on Mediation (http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:En:PDF) and the requirement that empowering legislation in member states should provide for the enforceability of mediated agreements. If, however, this becomes part of a pattern of change in mediation, we're likely also to see changes reflecting a more "official" status of mediation and mediators.

2. Second, a persistent theme of the conference discussion on arbitration and DB processes concerned due process or procedural fairness. Lack of such procedural fairness might undermine arbitral proceedings; but the privacy and inviolability of mediation have – so far – kept these issues at bay for mediators. Mediation may not invoke the usual norms of procedural justice or the rule of law, and we may rely in practice on the conventions and practice of mediation to provide those protections on an informal basis. We cannot, however, count on this honeymoon continuing.

3. Third, substantive justice in mediation has been typically been seen to derive from the other normative characteristics of mediation – that is, the autonomy and choices of the disputants. There has, however, been a persistent parallel discussion about mediation and substantive justice, in the work that most readers of this blog will be familiar with – not least in the critiques of Owen Fiss, David Luban, and Hazel Genn. I suggest only here – for further conversation – that it may no longer suffice to say that "justice" is what the parties say it is, all the more so where there is a public interest in the outcome (e.g. environmental mediation).

So, an irony in the conversation in these last couple of days is that, on the one hand, procedural complexity and associated costs make mediation look like a far more appealing option in a wider range of cases but, on the other hand, it seem likely that this "mainstreaming" of mediation will see mediation take on more of the attributes of formal processes.

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