Preparation for Mediation in a Multiparty Construction Dispute

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The players at the casino gaming table bring to mind those that appear at a mediation room. There are the rich and urbane, the wild-eyed, the loud-speaking, the secretive silent players who make notes of every throw of the dice, and the backers who do not play and have appointed others to play for them. Different languages are spoken, many dialects are heard and a wide range of morals is usually found among the players. These factors pose a difficult job to the boxman who oversees the gambling table, as well as the mediator.

All good boxmen and all good mediators must possess the following attributes:

• *Respect*: Respect is essential. If it is lost, the game can degenerate into a chaotic state. The mediator’s impartiality and reputation must not be diminished by his or her actions at any time in the mediation process. So too with the boxman.

• *Concentration*: The boxman must keep total concentration at every moment of the game and know where each player at the table stands at all times. He or she must make split-second decisions which may decide the entire direction of the game and although outwardly appearing detached, the boxman must be constantly vigilant. So too the mediator.

• *Knowing the game*: The boxman must know the game most thoroughly and should be familiar with any and every combination of problems that might arise that would impair the game’s smooth flow. The mediator should also know the “game” of construction.

• *Knowing the players*: The casino usually knows the high rollers and the undesirable players. If they are not known when the game begins the boxman sizes them up as play proceeds and anticipates the way they will play. So too the mediator.

• *When to intervene*: Watch a boxman closely and you will see that he or she will not intervene unless it is absolutely necessary. The players must believe that it is their game and no referee is going to constantly blow his or her
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whistle to interrupt. When an interruption comes it must be an important one, and if there are too many interruptions the players will drift to another table and a different game. So too with the mediator, the parties will drift to arbitration or court.

- **Patience:** The boxman must possess a mandarin’s patience, listening closely to the pleas and comments of the players however wrong or outrageous, then make a decision which will keep the game moving smoothly. So too the mediator. Listening is the most important skill for the mediator and the boxman.

**The Players**

The construction industry is made up of gamblers. They gamble on weather, strikes, financing, and on the competence and ability of all the other members of the construction group. They gamble on the construction project, and in the boardrooms. One author suggests that construction contracts are in fact one long negotiation from beginning to end. Theses gamblers, however, are the people that built everything meaningful despite the enormous risks. They come to mediation with this background, and the mediator should recognize the fact that people in this industry are a breed apart.

**The Game**

There are a number of root causes of construction disputes and the mediator must be skilled in recognizing and dealing with them. They include: unfair/unclear risk allocation; unrealistic time/cost/quality targets by clients; uncontrollable external events; adversarial industry culture; inappropriate contract forms; unrealistic tender pricing; clients’ lack of information or decisiveness.

There are also a number of proximate causes of construction disputes, such as: poor communications; personality clashes; vested interests; variations or changes by client; exaggerated claims; errors in estimating; inadequate contract administration; inadequate contract documentation or inadequate design information or inappropriate payment modalities.

The mediator’s job involves recognizing at an early stage which, if any, of the above factors applies to the dispute on the table. The system of preparing for the multiparty mediation is designed to help the mediator to identify those factors early in the game in order to accelerate the process toward resolution.