

MEDIATION PRACTICES



RENOVATION AND CONSTRUCTION OF LUXURY RESORT

- Dispute begins at end of construction
- Earthquake occurred during construction
- Delays to completion and opening
- Economic and Property Damage Claims
- Sub-Trades with contract, surety & bonds
- Waiver of Subrogation in Prime Contract
- Acceptance of Defense by CGL and All Risk Insurer
- Resolution to be by ADR



GET THE PARTIES TO A CONSENSUAL RESOLUTION

- Burden On Mediator And Parties In Complex Mediation To Organize Process, Efficiently Lead To Resolution Of All Points In Dispute And To Carefully Document Intent To Settle At The Earliest Possible Date In A Manner Which Will Be Respected By The Court



DEPARTURE POINTS/ CHALLENGES OF CONVENING

- Work With Parties To Understand Whether Case Is Predominately A Closeout Case Or A Mixture Of A Closeout/Construction Defect Case
- Get The Business People/Claims Professionals To The Point Of Being Able To Make Decisions To Resolve Case



DEPARTURE POINTS/CHALLENGES OF CONVENING

- Effectively Blend The Culture Of CD And The World Of Pure Construction
- Facilitate Effective Case Management Leading To Resolution



MAKING THE MEDIATION WORK

- Getting Right Parties And Necessary Information To Table
- Timing And Structuring Mediation To Greatest Efficiency And Effect
- Facilitate Step By Step Decision-Making Leading To Either A Series Of Mini Settlements Or A Global Settlement
- Determine The Direction And Nature Of The Money Flow



MAKING THE MEDIATION WORK

- Will Some Or All Contractors Walk Away From Contract Balance/Delay Claims?
- Packaging And Directing The Available Resources (Time And Money) To Resolve Claims
- Utilizing Surety/Indemnity Agreements To Motivate Contractors



MAKING THE MEDIATION WORK

- Walk The Sureties, Efficiently Use Insurance Resources To Resolve First And Third Party Claims
- Muster The Available Money To Pay Those Who Have Effectively Demanded It

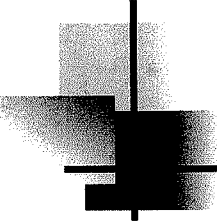


GET THE PARTIES TO A CONSENSUAL RESOLUTION

- Jeld-Wen v. Superior Court -- Trial Courts And Mediators May Try To Persuade Or Cajole The Parties In Complex Actions Into Stipulating To Private Mediation But No One Can Be Ordered To Participate And Pay For It
- Essence Is Consensual Resolution Of Disputes

GET THE PARTIES TO A CONSENSUAL RESOLUTION

- The California Supreme Court Has Recently Required In Fair v. Bakhtiari That California Settlement Agreements Will Need To Include A Statement That They Are "Enforceable" Or "Binding", Or A Declaration In Other Terms With The Same Meaning
- Under The Fair Case, Supreme Court Ruled That A Settlement Terms Memo Can Be Admitted Into Evidence Only If It Is A Writing Which Directly Expresses The Parties' Agreement To Be Bound By The Document They Signed



MAKING THE MEDIATION WORK/ ORGANIZING THE CATS, TREES AND PAPER

- What exactly are you mediating?
- What direction is the money to flow after you close out the project and pay for defective workmanship?
- How much of the underlying close-out/defect dispute can you offload to first party insurance and not have it backup on you?



HAVING ALL PARTIES SPEAKING THE SAME LANGUAGE OF RESOLUTION

- Make sure decision-makers are present without violating anybody's rights
- Efficiently get to the parties the information they need to make effective risk evaluations and timely decisions
- Squeeze those who are vulnerable and willing to give up their contract balances (e.g., most subcontractors)



HAVING ALL PARTIES SPEAKING THE SAME LANGUAGE OF RESOLUTION

- Maximize the available insurance and quickly determine how many primary policies apply and whether there is available excess insurance
- Leverage the non-participating carriers and discipline aggressive subcontractor management
- Make effective use of “homework assignments” and develop an effective flow of caucuses whereby parties are given things to think about



HAVING ALL PARTIES SPEAKING THE SAME LANGUAGE OF RESOLUTION

- Develop an effective flow of documentation and facts that facilitate decision-making
- Identify the motivations of the parties and put same to work
- Facilitate timely and effective information exchange
- Effectively use evaluation techniques to test assumptions and reward the well-prepared



HAVING ALL PARTIES SPEAKING THE SAME LANGUAGE OF RESOLUTION

- Find the pathway to settlement and always be aware of the potential for consensus
- Develop a schedule that enables the parties to take advantage of every opportunity for settlement



HAVING ALL PARTIES SPEAKING THE SAME LANGUAGE OF RESOLUTION

- Find a way to pay those who need to be paid and find a way to get everybody out
- Facilities putting the settlement on the record and documenting the final deal
- Ask hard questions and help find answers
- Make the “money date” happen