"EVALUATIVE" MEDIATION OF COMPLEX CONSTRUCTION DISPUTES
by Philip L. Bruner

Singapore's desire to become one of the world's leading international mediation centers received impetus recently when the Working Group appointed by The Honourable Chief Justice Sundaresh Menon and the Ministry of Law In April 2013 submitted its recommendations in late 2013 on how best to achieve that objective. Those recommendations, among other things, call for the establishment of a Singapore Centre for International Commercial Mediation to serve as a provider of mediation services, and a Singapore International Mediation Institute to oversee training and certification of mediator competency. Such training and certification of construction industry mediators might well become the province of members of SCL(S).

For Singapore and the international construction industry, Singapore's construction mediators ought to be "evaluative" rather than merely "facilitative". A "facilitative" mediator is understood generally to be one who, for lack of expertise regarding the substantive issues in dispute, practices "shuttle diplomacy" by facilitating communications between the parties and by seeking monetary and other concessions from the parties without questioning each party's respective analyses of the factual and legal merits of its position. An "evaluative" mediator, on the other hand, is one who enhances the prospect of settlement by leading the parties themselves toward narrowing their differences in perception of the critical technical facts and legal issues in dispute. Leading the parties to settlement by evaluative mediation typically is accomplished (1) through the mediator's initial requirement that the parties exchange detailed position papers with supporting documents regarding their perceptions of the disputed technical facts and legal issues prior to the mediation, and then (2) through the mediator's astute probing questions during the mediation about what happened factually, what the contract and law provide regarding allocation of risks and responsibilities, and what litigation risks are inherent in proceeding to trial. Only after each party has carefully evaluated its position after mediator questioning, and has performed some "decision tree" risk analyses in front of the mediator, should bargaining of monetary and other concessions begin. And only rarely should the mediator express definitive views on the likely outcome of the dispute in subsequent litigation, and then usually only when specifically requested by both parties near the end of the mediation. Evaluative mediation does not envision formal recommendations for settlement such as occurs under other early dispute resolution processes such as "Early Neutral Evaluation", "Expert Determination" or "Adjudication". Evaluative mediation attempts to help the parties resolve their disputes themselves, not decide the disputes for them. Thus, only those mediators who have expertise in (1) probative questioning, (2) industry experience in and knowledge of construction industry customs, methods, practices,

problems, (3) relevant cultural differences, (4) interpretation and application of construction contract provisions and governing principles of local and international law, and (5) the different industry outlooks and perspectives of the mediating participants, can be truly effective evaluative mediators.

As important as cultural differences are, the differences in personal and psychological outlooks among mediating construction industry participants can be even more important to prospects of settlement. Construction industry participants – owners, contractors, and design professionals -- long have been recognised as having characteristic differences in group outlooks and attitudes that have contributed to the construction industry's penchant for generating disputes and litigation. Contractors characteristically are viewed as practical, independent, and hardheaded personalities who enjoy getting their hands dirty. Architects frequently are perceived as ethereal "right brain" visionaries in search of aesthetic beauty in architectural design, uncomfortable with the contentiousness of the construction process and willing, in the face of modern complexities and risks of liability, to abdicate their ancient role as "master builder." In contrast to architects, engineers typically are perceived as viewing the world from the "left brain," think of problem solving as a mathematical exercise, and have a perceived literal outlook. Owners, usually less experienced in the construction process than the other participants, can be assertive and inflexible in demanding "perfection" and "strict compliance", because they bear the project's substantial financial risks and rely on others to complete a project conforming to their desires. Such personality differences, long commonly recognised, more recently have become subjects of academic interest, See Hynds, *Personality Type Profiling of a Commercial Construction Company and its Companion Architecture Firm,* 26 The Professional Constructor 18 (April 2002); Eberhard*, Architect and the Brain* (2007), and of participant efforts to soften differences by educating their employees, See Dvorak, *Construction Firm Rebuilds Managers to Make Them Softer,* Wall Street Journal 1 (May 16, 2006).

Add to this personality mix lawyers and judges, and the resulting brew can be downright volatile in creating potential misunderstanding and resulting mistrust. Those in the law and judiciary rarely view disputes as all black and white, inevitably identify different shades of gray in their search for fairness and equity, and ponder amid the shifting sands of construction industry practice and customs whether circumstances warrant enforcement of or excuse from contractual obligations willingly assumed. To overcome such risk of mistrust and misunderstanding was the objective of the celebrated 1954 speech of lawyer Max Greenberg, one of the mid-20th century "deans" of the American construction Bar, to the Municipal Engineers of the City of New York:

"*There is a basic difference in the training and thinking of lawyers and engineers. It is a difference which you must understand, if you want to comprehend how and why lawyers*

– which include judges—arrive at conclusions which may appear to you to be entirely contrary to the clear and express provisions of a contract. Engineers deal basically with the immutable laws of nature. You are taught to look a fact in the face and to accept it without equivocation. Steel has certain qualities. It has certain defined stresses and strains, and while you may devise means to employ its qualities for your purposes, you can't change it. You accept it for what it is. It is a fact.

Lawyers [and judges], however, deal with vagaries of the human mind. We seek an indefinable, illusive something, called Justice. Justice depends merely on our sense of fairness. It may mean different things in different ages, or different things in the same age under different circumstances; it may mean different things to different people in the same age and circumstances.

Now when you, as engineers, read a contract which in plain understandable English states that the [public owner] shall not be liable for damages for delays, resulting from any cause whatsoever and that the sole remedy of the contractor shall be an extension of time, that, to you, with your type of background and training is a fact; it means what it says. To us, as lawyers, "It ain't necessarily so."

The effectiveness of a contract provision excusing the owner from liability for damage for delays…must yield when it conflicts with a basic, though perhaps not express, rule of law which implies that the owner will do its share toward getting the contract completed within the time specified. Every contract imposes obligations on both sides.

- Max Greenberg, *It Ain't Necessarily So!*, 40 Muni. Eng. J. Paper 263 (2d Quarterly Issue 1954).

When there are significant differences in factual and legal perceptions and in cultural outlooks among disputing construction participants, it becomes clear that an experienced "evaluative" construction mediator has the best chance of leading disputing parties to settlement. Key criteria for selection of a mediator most likely to settle a complex construction dispute are the mediator's experience and expertise in dealing with the international construction industry's customs, practices, personality types, cultural differences and complex factual and legal issues. Such mediator qualities can make a significant difference in the parties achieving settlement of the dispute through evaluative mediation.

Philip L. Bruner, Esq. is one of the world's leading full-time arbitrators, mediators and resolvers of engineering and construction disputes as head of JAMS Global Engineering and Construction Panel of Neutrals. He is a Fellow and Chartered Arbitrator of the Chartered Institute of Arbitrators (London), Fellow of the College of Commercial Arbitrators, Overseas Member of Britain's Society of Construction Arbitrators, Fellow of the National Contract Management Association, Life Fellow of the American Bar Foundation and Member of the National Academy of Distinguished Neutrals. He has been vetted by The International Who's Who of Business Lawyers as one of the world's highly regarded construction lawyers and outstanding arbitrators and mediators. In 2005 he was honored by the American Bar Association's Forum on the Construction Industry with its highest award presented annually to one person for "exceptional service to the construction industry, to the public and to the legal profession."

He is co-author with Patrick J.; O'Connor Jr. of Bruner & O'Connor on Construction Law, the 9 volume, 9000 page treatise on American law governing construction. He earned his bachelor's degree from Princeton University, law degree from the University of Michigan Law School and MBA degree from Syracuse University. He is Director of the JAMS Global Engineering and Construction Group, the world's largest private dispute resolution firm.

For more information, see Mr. Bruner's bios at www.jamsadr.com, www.jamsinternational.com and www.philbruner.com.