

FUTURE CITIES SERIES - INFRA DISPUTES TURNING TO MEDIATION

Insight

Legal Briefings - By **Alexander Oddy, Craig Tevendale, Susan Field, Olga Dementyeva and Rutger Metsch**

Mediation is set to become a bigger part of resolving infra disputes in increasingly connected global cities.

It's 2025 and you are Managing Counsel in a large construction company based in a EU country, and you are faced with a potential breach of contract claim from your smart city joint venture partner. The project has not been completed, and your attempts to negotiate the dispute have been unsuccessful.

This article is part of our Future Cities Series where our experts explore the pressures facing our cities in the post-Covid era and map out the key issues and industry themes in re-thinking urban life.

SMART CITY JOINT VENTURES

As many others, following the disruption of the Covid-19 pandemic in 2020, your company sought to enter into a transformative city project joint venture with another contractor based in West Africa. Like the majority of your competitors¹, your company was confident about the future success of the project, which has been aimed at the development of infrastructure with a lesser impact on the environment.

Instead of opting for a purely contractual relationship, the two partners incorporated a new joint venture company in which each of them became a shareholder. The [choice of structure](#) was driven by a number of considerations, including that the partners had intended to cooperate long-term. The partners also entered into a shareholders' agreement, where the dispute resolution clause provided for all disputes to be resolved by arbitration with a seat in London.

A COLLABORATIVE APPROACH?

As was the case with many other smart city projects, your project has faced a multitude of challenges², however it has been flexible and resilient enough to overcome them and embrace new business models.³ Although the project has been developing successfully, it is not yet completed. One of the reasons for the halt in construction is that the parties have fallen out regarding the performance of their obligations under the shareholders' agreement, and your company is facing a potential breach of contract claim from its joint venture partner.

Previously the partners have taken a collaborative approach to solving problems⁴, but this time negotiations have been unsuccessful. In order to avoid the costs and time involved in arbitration proceedings, as well as to save the project, you are now considering mediating your dispute.

MEDIATION IN THE INFRASTRUCTURE SECTOR

It is accepted within your industry that disputes are likely to arise in any long-term collaboration. Most of the entities you cooperate with share your company's objective to resolve these disputes cost-effectively and with minimum damage to the ongoing commercial relationship. As a result, for most long term contracts you and your counterparties will pre-agree a roster of mediators or 'project neutrals' who are suitable to assist. They can be involved at short notice to help prevent conflicts from escalating, to facilitate re-negotiations where external circumstances change, and to stand ready to mediate when called upon. The project neutrals are chosen to have the required technical expertise and facilitation skills. They are kept on retainer throughout the project to help resolve disputes as and when they arise. This approach avoids friction between parties and limits the number of costly delays – such as the situation you are unfortunately facing now.

A mediation is scheduled for an early stage of the dispute, after an initial (unfacilitated) negotiation, but before an expensive document production phase.⁵ It is the norm for parties to attempt to mediate a dispute before it is escalated (if necessary) to arbitration or litigation. In line with this tiered dispute resolution procedure, you invite your joint venture partner to mediate, which the joint venture party quickly accepts. As with other [dispute resolution procedures](#), you don't have to incur the expenses of meeting in a neutral venue for your mediation: it is all conducted online.

In your experience, a high percentage of your mediations ultimately settle, and even when they do not, they provide a learning opportunity for the parties before the dispute escalates further. Whilst you could easily enforce settlement agreements under the Singapore Mediation Convention,⁶ this has thus far not been necessary: both you and your counterparties have to date complied voluntarily with any mediated settlements.

LEVERAGING DATA TO INFORM YOUR STRATEGIC CHOICES

At the start of the dispute, you have used specialist software to create a [decision analysis model](#) to inform your decision-making. You update your model as and when new information becomes available; it helps you quantify your options, estimate the likelihood of specific outcomes, map zones of possible agreement with your counterparty, and identify crunch points in your case through sensitivity analysis.

You have access to myriad data analytics companies that provide you with informed probability assessments of prevailing on certain issues on the basis of findings in previous cases. You use your (and your external advisers') expertise to tailor these prospects to the specific circumstances of your case.

The joint venture party makes a settlement offer just before the start of the mediation. Your model shows that you would beat this offer 90% of the time. You reject and make a counter-offer based on the expected value of the case.

The joint venture party rejects your offer on gut feel. When finally you do arrive at a mediation with the joint venture party, the mediator has similar decision analysis tools available to guide both parties to make a realistic assessment of the likely outcomes of the dispute. You know the strength of your case, and can almost instantly re-run your model to gauge at what point settling will prove to be more beneficial than going to arbitration. You hope that the matter can settle and does not escalate. However, if it does – you'll be ready.

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1. [Herbert Smith Freehills Future of Cities Report](#), page 2, Leaders reveal confidence.
 2. [Herbert Smith Freehills Future of Cities Report](#), page 3, The complex landscape and Top challenges facing city project leaders.
 3. [Herbert Smith Freehills Future of Cities Report](#), page 4, Flexibility and resilience are the keys to success.
 4. [Herbert Smith Freehills Future of Cities Report](#), page 4, Flexibility and resilience are the keys to success.

5. See our blog post on the mediation in arbitration survey [here](#).
 6. See our blog post on the Singapore Mediation Convention [here](#).
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If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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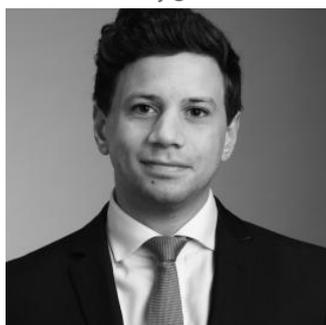
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