
FINE FIX MEDIATION

Teaching Note

Fine Fix is based on an entirely real case mediated forever ago. In essence, it's a two-party contract dispute over language interpretation, facts, and damages. Of course, emotions and communication foibles are involved. I have used it extensively in professional mediation workshops and in class.¹ Professor Dwight Golann and I created a mediation advocacy video using Fine Fix available on adrvideo.org, with two different mediators and sets of Boston lawyers.

During the pandemic, Professors Art Hinshaw (Arizona State), Sharon Press (Mitchell-Hamline) and I collaborated on a remote cross-law school mediation, in the context of my mediation class. Prof Hinshaw's and Prof Press's students were teaching smaller mediation courses or clinics. Their students played the mediators, and my negotiation students represented clients in the mediation. We all recruited students outside of the class to take on client roles. The negotiation students were required to meet with their clients to prepare for the mediation. The student mediators and lawyers were instructed to take whatever communication was necessary before a real mediation. The exercise was a smash hit and we replayed it the following year, even though remote teaching was no longer required. This simulation site includes some of the instruction memos we sent to students and clients so that you will not have to reinvent them. They are all in MsWord format to enable easy changes to adapt for your course contexts.

While I've always used it for mediation, there's no reason Fine Fix couldn't also be used as a straight negotiation simulation.

Plotline

Culture Bubble, Inc. ("CB") is a newly formed subsidiary of the multi-national entertainment company Club Jed. The CB concept was to be a blend of arts and learning, with a museum center, Lego Land, sports and recreation, a technology learning center, and multiple stages for opera, dance, theater, and concerts. Swimming pools, rafting and canoeing, tennis, volleyball, etc., would be available to all. It is in the Berkshire mountains, on the New York/Connecticut/Massachusetts border. Its president, J. Bassin, aimed at a June opening with many of the attractions completed by then. In the spring, the construction rush was on, particularly for the center entrance building, Culture Portal, and the Opulent Opera House.

For the opening, CB needed four custom mechanical lifts, and fast. They selected a bid by

¹ To teach specific mediator strategies and skills, we have also created vignettes of moments that might arise in a Fine Fix mediation and call for mediator responses. If these are of interest, please feel free to contact me at Marjorie.aaron@gmail.com



Fine Arts Fabricator's ("FAF") to design and fabricate the lifts.

Because the Culture Portal's and the Opulent Opera House's construction had been delayed, there was very little time between the execution of the contract and CB's target completion date. FAF's President, Fran Finley explained to CB's Operations Manager, Ian Marcu, that they required 12 weeks between contract execution and delivery. Contract discussions occurred on or about March 10, but the contract was not finally executed until April 13, 10 weeks before the CB's scheduled opening on June 22. The contract contains handwritten language indicating that FAF would use "best efforts, to deliver the lifts by June 7" (8 weeks later). Still, it references delivery being due 12 weeks after the "commencement of the contract" (which would have been July 5). Each party has a different version of the negotiations regarding delivery, the intended consequences of failure to meet the target date, and thus the meaning of the contract language. The relevant paragraphs of the contract are attached as Exhibit A.

Each of the four lifts was priced at \$60,000, for a total contract price of \$240,000. CB paid a \$80,000 deposit upon the execution of the contract.

The CB people anticipated the arrival of the lifts on or before June 7, to allow two weeks for installation and for everyone to become familiar with the equipment and decorate it appropriately.

Within 3 weeks after the contract execution, FAF had completed their design, based upon performance specs and architectural plans CB provided. FAF sent a design drawing and the attached Exhibit B, which provided the anticipated dimensions (weights and measures) of the four lifts. CB's operations manager faxed back his approval.

When the lifts failed to arrive on June 7, Marcu became concerned and called Finley. Finley explained that there had been some last-minute glitches and promised delivery the next day. Finally, on June 15, after daily phone calls and promises, the lifts were delivered to CB's loading dock. Marcu took one look and was horrified. The base width of two lifts looked nearly as wide as the floor space in the Culture Portal, and larger than the trap door opening in the Opulent Opera House. These were larger than the dimensions stated in the FAF's "weights and measures" document. According to Marcu, they could not have met the staging requirements of the creative illusion at the Culture Portal or for the Magic Flute at the Opulent Opera House and could not be slid down the back ramps of other CB buildings, for use in future performances or events.

Marcu called Finley and left an angry voicemail. He then called his lawyer to get his advice on how best to handle the problem. The lawyer advised him not to accept delivery, so the lifts were promptly returned to FAF.

Marcu was unable to locate satisfactory lifts for that summer season (the largest revenue season at CB). He obtained a rather rickety lift from an old theatre for Culture Portal. The entrance illusion had to be dramatically "downscaled."



CB did obtain four new lifts the next winter, at a cost of \$90,000 each, \$360,000 total, fabricated by the highest of the original bidders. Each lift's base area was considerably smaller, and CB somewhat reduced the lift performance specs for live loads.

CB sued FAF, seeking a return of the \$80,000 deposit paid, the \$120,000 difference between the contract price and the price of replacements, \$680,000 in lost revenues, and \$1,000,000 in damages for loss of reputation at CB – a total of \$1,880,000.

FAF counterclaimed \$100,000 in lost profits – the full contract price of \$240,000 less \$140,000 in materials and labor. FAF maintains that CB terminated the contract prematurely, because FAF was not in breach for delay, and under the terms of the contract, should have been given 14 days to cure any defect. They also maintain that the contract language precludes delay damages, in any event.

Analysis

Without delving into the details, an overview analysis is that FAF's defense – protestation – that they weren't allowed a chance to cure is not strong. Truth be told, they wouldn't have been able to alter the design sufficiently to make it fit, and certainly not within a short time frame. At some level, the proof is in the replacement lifts, which were designed to be small enough only because the performance specs were lessened.

FAF had sent the lifts' anticipated dimensions to CB, and they were approved. However, when they realized the bases would have to be larger to meet the performance specs, FAF failed to send the new dimensions to CB.

CB does bear some responsibility, in that the "as-builts" were somewhat smaller than the architectural plans they sent to FAF. But it doesn't seem the lifts would have worked well even with the original stage dimensions.

In the end, however, liability for outsized and thus unacceptable lifts seems to rest with FAF.

On the other hand, the facts favor setting the contract due date – after which damages would accrue – at a later date, July 5. The simulation's author has made it so that easily provable damages fall within the first few weeks when tickets have been sold and some performances were canceled. But of course, that's during the period when CB's legal claims are weak. After that, CB's damages claims are mostly speculative. They seek to attribute lower-than-expected revenues for the entire venture to the lifts and have rather inflated reputational loss claims.

Design for teaching purposes

For teaching mediation, if negotiations stall because of divergent legal analysis (or clients who prefer not to hear their lawyer's forthright analysis) this creates opportunities for a



mediator to “reality test”, ask probing questions, or if necessary, and helpful (in my view) provide evaluative input.

The parties’ roles also contain a strong emotional component. This is especially true for Fran Finley, who feels insulted at the way he was treated. (The real Fran Finley was a character, and he was indeed emotional; he felt insulted; and his pride was wounded. He sought recognition of his business’ high quality and commitment to clients.) Bassin, the CB CEO, felt pressured and wanted to be understood. If these issues are not addressed, the mediation is not likely to be successful. I’ve also thrown in a lawyer who is instructed to be difficult.

Lastly, a dinosaur-sized goal of this mediation is to teach mediators (and lawyers) to be broadly curious about the parties’ needs, interests, capacities, priorities, and constraints – to look and ask beyond a narrow legal lens. To that end, the confidential facts for FAF’S Finley explain that the reason is that they had spent heavily to design and fabricate a large order of mechanical dinosaurs for a park in Argentina when its government defaulted. FAF now has a warehouse full of mechanical dinosaurs, complete except for their final “skins.” Not surprisingly, a bit of inquiry into CB’s plans suggests that it might be able to use those dinosaurs. Once the dinosaurs are discovered, the case opens up. Negotiations ensue as to whether they will be provided gratis or at a discount, how to cover the skins (wordplay intended), and an opportunity to inspect them. People should understand that, if this were real, there might be a pause to consider the dinosaur question. Either way, those dinosaurs make it easy to bridge a gap in settlement dollars.

If a group or its mediator are at all creative, they should see other opportunities to create value. For example, FAF could lend engineers for educational programs. If the dinosaurs were found, they might be part of a museum exhibit explaining how they were made. CB is likely to need additional fabrication – more lifts, and other custom items. They may be open to future work, if they believe in FAF’s commitment to quality work (blame this one on the subcontractor using a metric system, and the unfortunate health issues of the in-house engineer). On the happy endings theme, this will salve Fran Finley’s wounded pride.

I want to emphasize that this simulation was designed so that it can be settled on dollars alone, but it won’t be easy. However, “finding the dinosaurs” or other hidden options open it up. The point is for mediators to seek to learn the parties’ circumstances, and how these might lead to better solutions.

I see no reason these lessons would not hold true if using this as a direct negotiation simulation.