

Hindsight and 'Forward Guidance' on disputes

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Few economists foresaw the financial crisis of 2008. And of those who did, all certainly found themselves unable to change the course of history, before the damage was done. There were even efforts to rationalise this failure by claiming that forward-thinking is inherently limited. If we have never seen a surprise 'black swan' event before, ran the argument, why would we expect to be alert to potential discovery, or risk?

Yet the fact is, with hindsight, often none of us are surprised. Of course we sensed the house price bubble emerging in certain countries around the world. Of course the financial press knew that mortgage debt was spiralling. Of course every second taxi driver was telling you he had purchased a third apartment or holiday flat. But the warning bells that sound so loud and clear now were, at the time, strangely muffled.

Bringing this down to the level of commercial disputes, are we surprised so many government projects see costs spiralling out of control? Yet engage the initiators of these projects in discussions about investing at an early stage and with the right resources in conflict or negotiation design, to prevent these future costs, and they regularly shy away from the assumptions of the problems to come. If it costs money, or invites an active third party into proceedings, many people seem to prefer to ignore potential conflicts and hope for the best. The message seems to be, "If something goes wrong, we can afford to pay".

I see the same psychology regularly even where there are appropriate dispute escalation clauses in contracts: these clauses require parties to try mediation before arbitration or litigation and can help put a brake on runaway disputes. Even in these cases, managers often delay triggering the clause until absolutely forced to. They ignore the potential for conflict cost escalation, which – with hindsight – becomes all too obvious later, certainly to us as mediators. In mediations, it's sadly common to hear parties comment along the lines of "I didn't realise there would be so many impacts of going to court".

Funnily enough, this lack of hindsight thinking also relates to another topic close to CEDR: how to create more productive inquiry processes. The "average" major Public Inquiry costs somewhere around £5million, but as CEDR has discovered investment does not necessarily guarantee that real change and progress will be made. All of these examples point to a core question for those working in

conflict prevention design. How do we make real to people the potential cost of the future, and persuade them to invest much earlier in alternatives? How do we make the hindsight perspective a compelling factor?

If we were to say to the government, "It is likely this project will cost an extra £50m or extra £500k, would you government offer an advance of 'value' added 'tax' of 20% of that anticipated total, to pay to conflict designers who would help avoid the outcome?" Would they believe us? And it's not just the standard cases – if we can guess that because the Bloody Sunday Inquiry would be politically complicated, it may cost a lot more, how much should we the public have authorised by way of payment to process designers who could have avoided better the risk of the inquiry coming in at just under 13 years' investigation, and £200m in costs?

So would we listen if economists gave us the ability to make the risks of the future more real, in order to prepare for the future? Probably not. So let's not just do our work on conflict prevention, but also encourage communication to come up with some solid theory that will let us justify the investment cost needed each time.

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