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A.D.R

WHAT'S IN IT FOR LAWYERS ?

And in association with

Nationwide Mediation Academy UK Ltd

For the Advancement of Skill and Knowledge in

Dispute Resolution Practice

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WHAT IS ADR AND WHAT HAS IT GOT TO DO WITH LAWYERS ?

ADR is short for alternative dispute resolution. ADR provides a voluntary alternative to the accepted practice of using the courts to settle civil disputes. The principle forms of ADR are adjudication, arbitration, conciliation and mediation.

A significant part of a lawyer's work involves advising and assisting clients to settle disputes. The various forms of ADR involve **either** alternative mechanisms for settling disputes reliant on negotiation as opposed to third party determination **or** alternative forums for third party determination. Since the judicial system is not central to these ADR mechanisms and processes, lawyers do not have exclusive rights of participation. Indeed, ADR mechanisms and processes have developed in response to perceived problems and disadvantages in the judicial process.

It is hardly surprising therefore if some lawyers believe that ADR is not only irrelevant to legal practice but also that the advent of ADR poses a threat to the livelihood of lawyers. Both views are incorrect. ADR is relevant to lawyers because it is attractive to lawyers' clients. Lawyers can beneficially participate in ADR practice provided they are prepared to adapt and embrace new concepts. Above all lawyers have to learn to jettison the litigation mind set and rethink approaches to dispute resolution to provide clients with the type of services which are now being demanded by their more discerning clients.

It is no longer disputed that ADR provides viable mechanisms and systems for dispute settlement. Whilst the growth of ADR globally has not yet matched its development in the United States a small but significant market in ADR is gradually being established internationally. ADR offers significant advantages for commerce and society over judicial dispute settlement and so, in an era where the consumer is king, it is inevitable that there will be further growth in the ADR sector.

Since a significant part of a lawyer's work involves advising and assisting clients to settle disputes, lawyers are faced with a choice. They can embrace ADR and actively engage in it or they can withdraw from the process and surrender the portion of their work that is assigned to ADR to a new breed of ADR practitioners.

Outside the court room much of a lawyer's dispute resolution work involves negotiation, so in reality conciliation and mediation are merely more sophisticated versions of what a lawyer already does. The difference lies in the fact that the negotiation at a mediation is not conducted in the shadow of the courtroom. This alters the dynamic of the negotiation and requires the negotiators to adopt a different mindset from that of the litigation lawyer. Adjudication and arbitration are merely variants on litigation practice which can be easily assimilated by lawyers.

Lawyers can advise clients on and represent them in ADR processes. Lawyers can become adjudicators, arbitrators, conciliators and mediators.

WHAT IS THE ATTRACTION OF ADR FOR CLIENTS ?

Amongst other things, "Going to Law" to settle disputes is often

1 an intimidating experience for the parties
2 expensive – especially in respect of legal costs and fees,
3 time consuming with lengthy meetings between the parties and lawyers and in preparing evidence and discussing strategies'
4 long winded and protracted as correspondence flows back and forth between the parties and their lawyers and in waiting for court hearings. It may take two or more years to get to court.
5 damaging to business interests. Court hearings result in private business being aired in public, jeopardising public confidence in ones business affairs
6 harmful to relationships since the win/lose adversarial aspect of litigation tends to further alienate the parties making it difficult to maintain business relations after the dispute has been brought to a judicial conclusion.
7 considered to result in unfair and illogical outcomes which do not reflect commercial realities. Lawyers and judges are perceived by many as being out of touch and as having little empathy for the concerns and the needs of clients and the people who appear before them in court.

By contrast, to varying degrees, ADR processes are likely to be :-

A Less formal and far more consumer friendly than attending court hearings.
B Less expensive than going to law.
C Less demanding on personal time in respect of preparation for the process.
D Much quicker, enabling parties to get on with business sooner.
E Conducted in private, protecting business confidentiality and reputation.
F Less divisive and assists reconciliation between the parties.
G Conducted by individuals with commercial and industrial experience.

THE IMPLICATIONS OF ADR FOR BILLABLE HOURS

If the response to 2, 3 & 4 above is B, C & D the conclusion might be that ADR will adversely affect a lawyer's income stream. ADR certainly has implications for the way that lawyers conduct their business but it not inevitable that income will be adversely affected, since the billable hours involved in advising clients outside the court are much the same for ADR as they are for litigation. The attractions of ADR highlighted by A, E, F & G to the criticisms of litigation at 1, 5, 6 & 7 above have few adverse implications for lawyers but provide powerful reasons for clients to engage in the ADR process. By embracing ADR lawyers can enhance business opportunities and maximise income.

The potential roles of lawyers within ADR processes are many and varied and must be approached on a process by process basis. Most lawyers are likely to engage in a particular process germane to their own specialised area of practice so the learning curve is likely to be less dramatic than might appear at the outset.

THE LAWYER AND ADJUDICATION

To adjudicate means to decide the outcome of a dispute between other people. Hence arbitrators, judges, tribunal panels and ombudsmen are all adjudicators. However, the Housing Grants, Construction and Regeneration Act 1996 (HGCRA) introduced a specific form of adjudication, for the settlement of disputes between commercial parties to construction contracts. From the perspective of the HGCRA adjudication has now started to become a term of art. Since HGCRA adjudication is compulsory, if opted for by a party to a commercial construction dispute, construction lawyers have had no option but to engage in the process. Outside the construction industry few lawyers are likely to have any experience of this form of adjudication. However, because the adjudication process established by the HGCRA has proved to be effective and popular, there is a strong likelihood that the process will be emulated on a voluntary basis by the commercial sector and applied to other industries.

Adjudication is a quick and inexpensive method of dispute resolution resulting in an immediately enforceable, temporarily binding dispute settlement, by a third person, known as the Adjudicator. The Adjudicator is likely to be an expert first and foremost but may also be a qualified lawyer. Most construction adjudicators are qualified builders such as architects, civil engineers and quantity surveyors. This helps the process because the adjudicator will not need to hear or read large quantities of expert evidence to help him understand how the industry operates. This keeps time down to a minimum and avoids much unnecessary expense.

The time scale for adjudication depends either on the 28 day statutory provision in the HGCRA, or on an agreed time frame in an adjudication clause incorporated into a contract. Voluntary adjudication clauses can be inserted into any contract and are not limited to the construction industry. The only difference is that instead of being governed by the statute the adjudication is governed by the contractual provisions and the rules of the ADR provider. Adjudication proceedings may be conducted with or without a hearing.

Paper only Adjudication. The parties submit written claims, defences, counterclaims and legal submissions to the adjudicator along with expert reports and supporting evidence, having engaged in the usual exchanges of documentation. At an appointed time, the adjudicator goes through all the paperwork, makes a decision and publishes it. Whilst there is no opportunity at a paper only adjudication to make oral pleading and to engage in cross-questioning, the low cost of such adjudication proceedings is attractive. It is an ideal process for the settlement of disputes involving technical issues and straight forward differences of opinion between the parties.

Adjudication proceedings with hearings. The process is very similar to a fast track arbitral hearing with strict time limits imposed on submissions and cross questioning.

Immediately binding and enforceable. The adjudicator is given the authority by the parties to a dispute (or by Statute if applicable) to make a determination which is immediately binding and enforceable, subject to the terms of the award. Typically the losing party is ordered to pay the winning party a sum of money within a specific period of time. The settlement of the dispute at an early stage enables the parties to get on with business.

Temporarily binding. The decision is only temporarily binding in that having complied with the order, the losing party is free to commence arbitration or litigation. Judging from the UK experience so far, it is rare for the parties to so dissatisfied with the adjudication decision that they decide to continue the dispute. Assuming that both parties are completely satisfied with the decision the dispute is at an end and in effect the decision is permanently binding and determinative of the dispute. Even if one of the parties is dissatisfied with the decision the parties are able to continue their business relationship, on the basis of the decision, pending arbitration or litigation.

IMPACT OF ADJUDICATION ON LEGAL PRACTICE

The advent of Adjudication means that lawyers are more likely to be involved at an earlier stage than might otherwise have been the case. Adjudication has cut down the number of construction disputes that result in major litigation so it might appear that the lawyers have lost out by its introduction. However, many disputes that would have been settled between the parties without the involvement of lawyers are now more likely to involve the services of a lawyer preparing for and taking part in the adjudication process. The benefits are likely to outweigh the disadvantages and increase the involvement of lawyers in construction contract administration.

Adjudication processes have the potential of providing an attractive, speedy, inexpensive alternative to the Small Claims Court. This could open up avenues for the creation of an entire field of small claims work which whilst not massively remunerative could be consistent and not excessively demanding and ideally suited for junior staff members. The good will that a simple effective process can generate between lawyer and client means that this is an area of practice well worth investing time and effort in.

Few lawyers are likely to become construction adjudicators since the adjudicator needs to have expertise in construction practice. However, there is no reason why solicitors, barristers and judges should not seek to become qualified general adjudicators. Remuneration is likely to reflect the amount at stake. Small claims adjudication will have little attraction for major fee earners but earnings for mid range disputes should be commensurate with the standard hourly rate charged in practice. In this respect the paper only adjudication, which does not involve any displacement in order to participate, can easily be slotted into the working schedule of most practitioners. On-line adjudication will further facilitate participation in adjudication.

LAWYERS AND ARBITRATION

Arbitration represents the principal alternative to the court system and is widely used by the construction industry and international commerce. Arbitration provides an attractive second stage in the event of the break down of negotiated settlement.

Arbitration offers the concept of party autonomy. This means that the parties have the right and power to decide many of the procedures that will govern the conduct of their arbitration. Default systems for the conduct of arbitrations are provided by arbitral organisations and by international and domestic arbitration codes. However, the parties can chose to derogate from the default provisions. The parties can decide on the degree of formality they desire, how much time will be allocated to various aspects of the process and how documentation, discovery and the taking of evidence will be handled. Arbitration therefore offers the possibility of informality, speed, cost savings and privacy for the client. Speed and informality are encouraged by the Arbitration Act 1996. However, whilst arbitration is often less expensive than litigation it can be more expensive on times especially if the parties engage in protracted hearings and chose to adopt cumbersome procedures

Arbitration emulates the courts in some respects and has been described as a private court dispute settlement system. It is therefore a more formal procedure than mediation. There are significant differences between arbitration and litigation. Arbitration in the UK under the auspices of NADR, The Chartered Institute of Arbitrators and the London Court of International Arbitration offers disputing parties considerable benefits especially since the Arbitration Act 1996 became law.

The courts support the arbitral process in a number of ways, in particular in respect of orders for disclosure of information and in the preservation of funds that may be needed to finance an arbitral award. The courts are less likely to interfere with the arbitral process than was the case before the 1996 Act was passed.

The New York Convention on Enforcement of Arbitral Awards allows for international enforcement of awards. This is a major advantage for international clients compared to the court system.

Adjudication/Arbitration or Litigation. The arbitrator / judge will be aware that an adjudication has taken place and inevitably will be aware that the claimant / plaintiff was not satisfied with the outcome of the adjudication. The arbitrator / judge will not know the details of the adjudication decision until he has made his final award or ruling and turns his attention to the award of costs. The reason for the adjudicator's decision therefore has no impact on the subsequent decision and from this perspective the subsequent hearings differ significantly from an appeal from a previous finding of an arbitrator or lower court.

If the claimant wins the arbitration or court case he will recover the monies paid out complying with the adjudication decision and the costs of the claim. If he fails the adjudication decision is undisturbed and the claimant covers the cost of the failed claim. If the arbitration award or court judgement is less than the adjudication decision the claimant will have to pay the costs of the action. There is therefore considerable risk involved in deciding to take the claim to arbitration or to court. In the two years since adjudication came into being there have been very few subsequent challenges. To all intents and purposes therefore for most people adjudication ends up being the final stage of the dispute resolution process.

The great value of adjudication is that the parties quickly get a decision which enables them to get on with business and put the dispute behind them. Even if one of the parties decides to proceed further the parties have a firm basis upon which to proceed in the interim period. Prior to the introduction of construction adjudication it was common for building sites to grind to a halt until a dispute was settled. This is no longer the case. Projects are completed quickly and the industry has saved a great deal of money by avoiding unnecessary disruption. The same benefits can be enjoyed by parties to contractual, as opposed to statutory based, adjudication processes

It is hardly surprising therefore that many people and organisations choose to settle their disputes by private arbitration or adjudication, bypassing the judicial system. Arbitration has been used in the United Kingdom and internationally for going on for 400 years. Adjudication is now a significant part of the dispute resolution process in the United Kingdom.

IMPACT OF ARBITRATION ON LEGAL PRACTICE

For lawyers specialising in construction and maritime law arbitration is a central feature of practice. However, arbitration has had little impact on general practice to date. Modern forms of arbitration and adjudication have much to offer e-commerce particularly since the net provides an ideal method for the transmission of claims and evidence. Furthermore, the globalisation of trade is likely to result in far more commercial arbitration in the future. The reforms introduced by the Arbitration Act 1996 will do much to ensure that a reasonable proportion of future arbitration work comes to the United Kingdom.

Lawyers will be comfortable with the role that they can play in court in support of the arbitral process, such as applications for discoveries, security and stay of action but are likely to be less familiar with the arbitral hearing process itself. In the past lawyers have tended to drift into Arbitration practice without any formal training in the differences between litigation and arbitration practice. There is no reason why lawyers cannot quickly adapt to arbitration practice. There are striking similarities today between the case management powers and duties of judges and arbitrators. In the light of the wide ranging discretion available to arbitrators in terms of the arbitral process some training for the uninitiated is recommended.

LAWYERS AS ARBITRATORS

In recent times arbitration practice has been viewed in some quarters as a "retirement home" for judges. Arbitrators and Judges are in common parlance adjudicators. Judges might appear at first sight to be ideal arbitrators. This is not necessarily so. Many is the judge who, on becoming an arbitrator, conducts hearings as if he were in court. The obvious disadvantage of so doing is that if an arbitration hearing is nothing more than a private court, with all the formality of the court and subject to the same strict procedures and cost structures, minus the powers of the court to make orders for attendance, security and discovery, the process has little that is alternative or worthwhile to commend it.

It is essential therefore that the lawyer who turns to arbitration practice, must, apart from acquiring a thorough knowledge and understanding of those rules specific to arbitration, adopt a different mind set. In particular, under the provisions of The Arbitration Act 1996, the arbitrator must adopt speedy inexpensive procedures that balance the requirements of due process with the needs of the parties and in particular the degree of complexity of the case and the amount of money that is at stake. It is desirable that an arbitrator have specialist knowledge and understanding in order to hear certain types of dispute, particularly where construction and maritime issues are being heard. That apart, arbitration practice is commended to lawyers prepared to adopt the correct mind set. Arbitration is a valuable adjunct to legal practice. The financial rewards tend to be modest but the personal satisfaction to be derived from engaging in the process should not be under estimated.

Training for construction adjudication practice is available for construction lawyers from the University of Glamorgan, the Academy for Construction Adjudicators, the Royal Institution for Chartered Surveyors and the Institution of Civil Engineers.

Training for general arbitration practice is readily available from, amongst others, the University of Glamorgan, the Chartered Institute of Arbitrators, the Nationwide Mediation Academy UK Ltd and the Nationwide Academy for Dispute Resolution UK Ltd. Extensive training is required to become an arbitrator. Examinations are rigorous and on par with the Legal Practice Course. Training is both time consuming and relatively expensive in the private sector. Pupilage is a prerequisite to panel listing.

Arbitration practice at present is a small select field and it is not easy to break into it. It is recommended that lawyers wishing to enter into this field first engage in as much client representation work as possible to establish a reputation within the industry. This is likely to be less of an issue if and when fast track internet paper only style arbitration hearings gain a foothold in the market. If, as is widely anticipated in some quarters, the demand for arbitration services expands rapidly, it will be far easier to penetrate into the market in the future than it has been in recent years. The global market has the potential to support far more arbitrators than are currently in practice.

LAWYERS AND MEDIATION

Mediation is regarded as being the most flexible and fastest of the ADR techniques as well as being the most cost-effective. It is a proven means of dispute resolution which can generate a settlement equitable to both parties at an affordable price.

Mediation is a voluntary, non-binding, without prejudice process. Trained third party mediators attempt through negotiation techniques to bring the parties to a dispute together in a binding or non-binding settlement agreement. Where the mediation process ends with a binding agreement between the parties, that agreement can be enforced, simply and quickly, by the courts should the need arise.

If any of the parties to the mediation process, including the mediator, are dissatisfied with the process at any time, that party can terminate the process. The claimant may then proceed to assert his legal rights through the court system or through arbitration.

The problem with the court system is that it is adversarial and leads to a ***winner takes all*** outcome. Often the court's decision is the result of a very fine distinction drawn on the basis of a mere ***balance of probabilities.*** There is little room for compromise and the parties may be left with a feeling that justice has not been done. The system guarantees that at least one of the parties may be disgruntled with the judicial decision. ***Mediation avoids these problems.*** In mediation the parties are in charge of the dispute resolution process.

WHY MEDIATION WORKS AND ADVANTAGES OF MEDIATION

Mediation allows the parties to a dispute to air their views in an informal setting. The mediator explores potential ways of settling the dispute with each party, guiding the parties to a more realistic view of their situation by highlighting the strengths and weaknesses of their case the risks inherent in failing to reach a settlement. The parties are in control of the process and the outcome. Even where a mediation fails the parties often narrow down the scope of the dispute to a single issue which can then be dispensed with quickly by the court.

The advantages of mediation are said to be :-

1. speed of dispute resolution (usually 3-4 weeks with a 1 day mediation)
2. cost savings – both for the process and in respect of the extent of legal fees
3. improvement in communication between the parties
4. a flexible informal procedure
5. addresses unreasonable claims and expectations. Should produce a fair outcome.

IMPACT OF MEDIATION ON LEGAL PRACTICE

A view commonly held by many in the legal profession is that mediation is at best some sort of "touchy feely", "namby pamby" process , developed by social workers and the like and best avoided by lawyers at all costs. At worst mediation is a cut price process that deprives lawyers of work and forces the participants to compromise their interests. As such mediation has little to commend it. Is this view justified ?

The truth is that such criticisms are not entirely without foundation. However, before the legal profession rushes to dismiss mediation, it should be remembered that mediation is making sizeable inroads into commercial dispute resolution. Clearly, this being the case, lawyers need to take a closer look at what is involved in mediation to find out why commerce finds it attractive and then to consider its implications for their practice.

Mediation is a catch all description for a variety of third party assisted negotiation processes. Over 28 apparently distinct forms or models of mediation process have been identified by academics studying the phenomena in the United States. Mediation is used amongst others by organisations involved in social work, commercial organisations and by international organisations and governments to assist in the resolution of disputes. It is hardly surprising given the diverse demands on mediation that different models of mediation practice have developed. As stated earlier, mediation is nothing more-nor-less than a form of assisted negotiation. Negotiation is a tool used by lawyers. Lawyers do not reject negotiation simply because non-lawyers also negotiate. Rather lawyers have developed codes of practice for legal negotiation. Equally therefore, lawyers should not reject the use of mediation as a useful tool in their practice armoury but rather need to develop codes of practice for engagement in mediation by members of the profession.

Legal work and mediation. When deciding whether or not to embrace mediation as part of legal practice lawyers need first to identify those areas of lawyer assisted dispute resolution that can benefit from mediation techniques and secondly to identify an appropriate mediation model for the settlement of such disputes. Regarding the first task, it is important to distinguish between areas of practice amenable to mediation from classes of dispute within a selected area which cannot benefit from mediation. Furthermore, different mediation models work better for some classes of dispute than for others, so there is no single answer to the second task.

Non-legal Dispute Resolution. Identifying appropriate areas of practice for lawyers to engage in mediation goes a long way towards addressing the concerns regarding the view that mediation is an anti-lawyer, "touchy feely", "namby pamby" process. There is nothing to prevent the lawyer who is so inclined from assisting those with domestic and other social problems, either professionally or in a personal capacity. Indeed where legal rights and duties are central to a client's domestic of social problems the services of a lawyer may be highly desirable to protect the clients interests. However, people often sort out social and domestic problems without the services of lawyers. Bringing the law into play can exacerbate such problems and be less of a help than a hindrance. Friends, colleagues at work or in the "church" and social workers often play a valuable role, acting as third party facilitators in the settlement of social disputes. The lawyer engaging in this type of activity should adopt the mantle of a conciliator or peace maker. This type of mediation is not "legal work", it is social work and social norms prevail over legal rights and duties.

Concurrent legal and non-legal mediation. Where clients choose to assert rights and duties in order to settle disputes it is appropriate for lawyers to assist in the process. It is not unusual for the parties to social disputes to engage a lawyer and at the same time to avail themselves of social facilitators. Indeed, in such situations lawyers will often advise clients to seek counselling and support. Separating responsibility for social and legal issues protects the lawyer from subsequent allegations of misconduct particularly where a client subsequently regrets the course of action they have chosen to take. Both sets of advisors may well use mediation techniques to assist in the resolution process but it is likely that they will adopt quite different mediation models. There are 4 basic mediation models.

The Rescuer : The Rescuer believes and states that, 'court is the worst place for people to be'. He tries to keep parties out of court and away from lawyers at all costs. The rescuer is often found in "community mediation centres". The rescuer usually follows a style that does not allow or severely restricts the use of private sessions with the parties. This greatly reduces their effectiveness. The Rescuer Model is commonly adopted by social workers, psychologists, counsellors or other people without legal or claims training. The Rescuer rarely has the knowledge, education, mediation training or expertise to mediate serious commercial, personal injury or insurance cases. Often times the Rescuer Model is excellent for small cases such as neighbourhood disputes involving for instance a dispute about a dog barking and for juvenile restitution matters. The Rescuer is frequently very critical of the courts, lawyers and insurance companies and often engages in "court bashing" or "lawyer bashing".

The Third Party Negotiator : The Third Party Negotiator is the original "shuttle diplomat". After the first joint session, this mediator separates the parties and keeps them apart. He carries the parties' positions back and forth, filtering and interpreting them the way he thinks best to achieve a settlement. This is an older style of mediation. This style has a problem with parties' perceptions of his neutrality. Parties often begin to mistrust this type of mediator because he is constantly presenting or arguing the other side's position to them. This model of mediation is popular in International Disputes and was used in the Camp David Negotiations.

The Deal Maker : The Deal Maker also follows a "shuttle diplomat" style and intentionally keeps the parties apart. The Deal Maker is extremely manipulative and may even deceive one or all parties in order to achieve a settlement. He will formulate his own solution to the dispute and then pushes very hard to sell it to the parties. He may attempt to browbeat, intimidate, or coerce a party into accepting that deal. The Deal Maker believes that he knows what is best for the parties. This is the oldest form of mediation and is commonly used in labour disputes. This type of mediator has the greatest problem with the parties' perception of him. He is usually mistrusted by all the parties. The Deal Maker operates on the basis that the "end justifies the means". This type of mediator confuses mediation with arbitration or acts as a settlement judge. Regretfully, it is popular with lawyers and ex-judges turned mediators.

The Orchestrator : This is the most modern mediation style. The orchestrator asks many questions about the facts, evidence and jurisprudence in the case, using his questions to probe the parties' positions and perceptions. The orchestrator will allempt to conciliate between the parties, focusing primarily on the mediation process. The orchestrator gets the parties talk about liability, damages, costs, verdicts in the area, risks, high-low-average values for the case and the perceptions of the community. The orchestrator tends to employ multiple joint sessions and assists and encourages the parties to communicate directly! The orchestrator does NOT use coercion or "arm twisting" to force settlements. He is the "Guardian of the Process". If he cannot mediate a settlement, he will mediate the process so the parties nearly always obtain some results from the mediation.

The Role of the Lawyer in Judicial and Mediated Dispute Resolution : When a client seeks legal advise in relation to a dispute the lawyer will first try and establish as many of the relevant facts as possible and then advise the client on relevant legal rights and duties, offering some evaluation on the likelihood of success or failure in asserting those rights, drawing attention to variable factors such as the burden of proof and the clarity of the law at issue. Setting to one side any administrative tasks the lawyer may perform for the client, the lawyer will then invite the client to instruct him, thus leaving the final decision as to whether or not to go ahead with a claim or to resist a claim to the client. Even after the client has instructed the lawyer to go to court the lawyer will often engage in negotiation with the other side and it is not unusual for a case to settle at this stage without going to court. Mediation can assist in this negotiation process. The appropriate model for such negotiations is the orchestrator model. The difference between mediated settlement and third party settlement is that the parties agree the terms of the settlement rather than having the terms dictated to them by an adjudicator, arbitrator or judge.

When is mediation preferable to third party settlement ? Where there is the potential of rebuilding relationships and even engaging in new joint ventures mediation is able to offer clients something that is not available through third party settlement. Furthermore, **i**f the cost of seeking third party settlement outweighs or restricts the potential benefits, or, the risks of seeking third party settlement are uncertain, a party may well prefer to broker a settlement. Whilst this is often achieved by negotiation between the lawyers, mediation is preferable since it allows the parties to play a far more active role in the negotiation process.

Is mediation an alternative to third party settlement ? In as much as some cases are amenable to third party or mediated settlement clearly the answer is "Yes it can be" but this is not always the case since many disputes are not suitable for mediation. If there is no justifiable reason for a party to broker a settlement mediation is not a viable alternative to third party settlement. Where a party requires a default judgement there is arguably no dispute in the first place, simply a refusal by one party to fulfil legal duties. The court is the most appropriate forum for enforcing rights.

Does mediation involve unjustifiable compromise ? A legitimate mediation process should not involve undue compromise. If the mediated settlement is to measure up to standards of fairness and due process, it should involve no more than an elucidation of the relevant facts as the parties view them and provide the parties with the chance to evaluate the risks and available opportunities. The mediator can explore and even suggest potential avenues for settlement and may provide an assessment of the chances of improving on offers during the process. Thus a mediator may tell a party "This is their final offer, take it or leave it." This however falls far short of recommending a course of action. This is the job of the party's representative. The legal representative may indicate that an offer is reasonable and will certainly provide an evaluation of the chances of improving on the offer in court. Neither a mediator nor a lawyer (particularly if contingency fees are involved) is likely to force a party to settle the dispute on particular terms. Coercion, duress and undue influence breach the ethical codes of conduct of both mediators and lawyers.

Mediated versus third party settlement and justice : Does the compromising of a claim result in unfairness ? Can fairness only be achieved by judicial enforcement of rights ? Understandably many lawyers view the judicial system and the font of justice. Even so, there can be few lawyers who are not confronted with examples of "hard" justice. A trial is like a boxing match. The winner takes all. There is no reward for the looser and however close the result, at the end of the day a miss is as good as a mile. The lawyer still gets paid (contingency fees excepted) and a well fought match can still bring the lawyer a good reputation but the client not only looses but gets to foot the opponent's legal costs as well. It is true that upon times the court can lessen the blow through the assessment of damages taking into account contributory negligence and any failure to mitigate loss. Nonetheless many an "undeserving" claimant has been awarded what is lawfully claimed and conversely many a "deserving" claimant has had a claim dismissed due to a legal technicality. To the extent that justice is "a lottery" a mediated settlement, far from being an unfair compromise, can often get far closer to what would, in general rather than strictly legal terms, be regarded as a fair and just settlement. In such situations it is far more likely that following a mediated settlement the parties may be able to rebuild bridges and maintain an ongoing relationship than would be the case if one of the parties ends up being embittered by the outcome and consequences of a trial. The adversarial nature of the trial exacerbates the situation since, in order to prevail, it may have been necessary to go public with views that would otherwise best be left unsaid.

Time Benefits of Mediation : The mediation process takes only about a month to conclude from start to finish. It is not unusual for it to take up to a year or more for a major case to be heard by the courts. It is attractive for commerce to settle disputes quickly and put an end to uncertainty about future financial commitments. This enables business men to settle their affairs and get on with business without having to ring fence funds to meet potential liabilities.

Payments into court and guarantees for security of costs during the course of a dispute can also have adverse effects on cash flow. The interest that may accrue over a two year period between the commission of a wrong and the court decision can far exceed the cost of the mediation process. The losing party in third party settlement is likely to be ordered to repay this interest to the winning party. If interest is taken into account it may in reality cost nothing at all to settle a dispute using mediation particularly since the interest that accrues over a short period is relatively little.

Legal representation at mediation : Some mediation service and systems providers, particularly those involved in local and social dispute settlement, strongly discourage legal representation. Other providers, especially those involved in commercial dispute settlement, either mandate or at least strongly recommend representation. Lawyers will normally charge at the standard rate for advice leading up to the mediation and for attendance at the mediation. The key to successful client representation at mediation is thorough preparation both for the negotiation process and in briefing the client on the process. It is essential that the client understands what is required of him during the process, what the lawyer will be doing and furthermore that the lawyer has a clear understanding of the authority accorded him by the client. In consequence, there may be little difference between the pre-mediation and pre-trial workload. The downside for lawyers is that with less time committed to the process than might be the case for a trial there is a potential for less revenue. However, the increased client satisfaction factor can result in more return work and client recommendations may well attract more business in the long term.

If the mediation fails to settle the dispute the client is still faced with the cost and time involved in going to trial. However, frequently many side issues are cleared up during the mediation so that the work involved in going to trial is much less and the trial itself may be considerably shortened. However, it should be remembered that because the mediation process is without prejudice, some of the information revealed during a mediation and above all any without prejudice offers put on the mediation table, may not be used in subsequent litigation.

A lawyer faced with the task of representing a client at a mediation for the first time is strongly advised to do some homework and re-evaluate his role. The lawyer's role as a party representative at mediation differs significantly from that undertaken in pre-trial negotiation. The lawyer should be prepared to advise on broader issues that transcend the legal rights involved in the dispute. The lawyer is likely to learn of issues and interests which would not be relevant in a trial but which are important for the client and which may well be accommodated in a mediation. The pre-trial lawyer will understandably frequently minimise such factors since they cloud the issue where a trial is concerned. However, a mediation advisor cannot afford to push them to one side since striking a balance between these issues and strict legal rights may well be central to the brokering of a successful settlement. Training for client representation at mediation is available and is commended for first time representatives.

LAWYERS AS MEDIATORS

Do lawyers make good mediators ? Some lawyers are natural mediators, particularly those who have engaged in a considerable amount of negotiation as part of their legal practice before turning to mediation. The key to being a good mediator is the ability to think laterally and to communicate in a constructive, facilitative, non-judgemental manner. Good communication skills are essential for lawyers. However, whereas lawyers tend to listen for and tune into information directly related to a client's rights and interests mediators need to be able to identify other broader interests of both parties and develop a sixth sense for the "bottom line". Not all lawyers can successfully make the cross over, particularly litigation lawyers. Many lawyers and particularly ex-judges seek to control not just the process but also the outcome and use their authority in an over bearing manner. It should be remembered that a good mediated settlement is not only one which is achieved on the day, but one which neither of the parties subsequently comes to regret due to a feeling that they have been unduly pressurised into making it. The parties need to be convinced that the settlement is satisfactory before they sign it, a compromise which whilst it does not give them all they might hope for is, all things considered, the best that they could hope to achieve on the day.

Mediation Service Providers : There are a large number of mediation service providers who list and provide mediators. They range from small local mediation schemes to national and international providers. Increasingly in the US and Canada statutory regulation and minimum standards for training and practice are being established. Elsewhere standards and quality control are down to the individual service provider. Training and qualification therefore may range from a few hours introductory advice through to comprehensive training, examination and pupilage. A lawyer wishing to engage in mediation practice must evaluate which service providers have established standards of and codes of practice compatible with the standards and codes of the legal profession.

Is mediation practice a viable career option for lawyers ? There are lawyers in the US who specialise in both representing clients at mediation and in conducting mediations. For others mediation work makes up as much as 45% of their work load. It has taken nearly 20 years for the US mediation market to develop. The US model provides an example of what may be achieved elsewhere. Already in the UK there are family lawyers who specialise in mediation work. For the time being however mediation work is likely to be a small but potentially increasingly significant part of legal practice.

Can lawyer's avoid mediation work ? Clearly a lawyer who is asked to represent a client at a mediation has the option to decline the work. However, despite the fact that mediation is a voluntary process, if a mediation clause is incorporated into a contract it becomes a prerequisite to court action so the client cannot opt out.

ENGAGING IN THE ADR PROCESS

ADR service providers have standard forms to enable parties to a dispute to refer that dispute to ADR. The forms can often be downloaded from the net. Many lawyers' offices hold copies. ADR service providers will supply forms upon request.

1 TERMS IN A CONTRACT PROVIDING FOR ADR IF NEEDED.

An ADR provision may be built into an agreement. The Construction and Maritime Industries frequently make use of ADR clauses. It is wise when concluding an international agreement to provide for the law of the state that applies to the contract. Once the parties have put their minds to this matter they often go one step further and provide for ADR at the same time, eg English Law and London Arbitration. It is even better if the clause specifies the ADR service provider and the rules governing the ADR process. This ensures that there is no need to agree these details later. Frequently the parties to an open agreement fail to agree on the details after a dispute arises and are forced to go to court to ask a judge to decide for them.

If an ADR provision is built into a contract the parties are obliged to exhaust that process before attempting to go to law. Submission to the ADR process then becomes a mandatory pre-requisite of court action. It is too late, once a dispute arises, to change one's mind and decide to go to court instead. The voluntary aspect of ADR lies in that the parties choose to adopt the ADR clause in the first place. However, even after a dispute has arisen, the parties can reach a mutual agreement to dispense with ADR and go to court instead.

Many contracts do not make any provision for dispute settlement mechanisms because it is not something that the parties think about at the time. No one stops to consider what will happen if something goes wrong, how the dispute might be settled, how much time and money it might take to settle the dispute or what adverse effects a protracted dispute might have on their businesses and their relationship.

2 AGREEMENTS TO SUBMIT A DISPUTE TO ADR.

Even if there is no ADR provision in a contract, once a dispute arises, the parties are free to agree to refer the dispute to an ADR process rather than go to law. Disputes which have nothing to do with contracts, such as accidents, can likewise be referred to an ADR process if the parties wish. However, in these circumstances both parties have to agree to the reference. If only one party wishes to use an ADR process the other party can ignore that wish and go to law instead.

Legislation encouraging the use of ADR : Under the new Civil Procedure Rules 1998 lawyers must advise clients of the benefits of ADR and where a judge thinks ADR is advantageous the court may recommend that the parties try out ADR first. A party can ask the court to give them time to go to ADR. The court has the power to adjourn court hearings pending an attempt at settlement using ADR. There is no requirement to advise a client to incorporate an ADR clause in a contract.

HOW TO INCORPORATE NADR ADR CLAUSES INTO CONTRACTS

ADJUDICATION CLAUSE

Any dispute hereafter arising between the contracting parties / any dispute hereafter arising out of or in respect of this agreement (delete as required) to be referred to the National Association for Dispute Resolution Inc, US / Nationwide Academy for Dispute Resolution UK Ltd / (M) Sdn Bhd / Middle East♦ for adjudication, subject to the relevant Adjudication Rules, Regulations and Codes of Practice of NADR applicable at the time of referral. Unless the parties otherwise agree, adjudication to take place within ..... days (insert the required figure) of referral of the dispute to adjudication. The Adjudication decision to be immediately enforceable and binding. The main agreement, and this adjudication clause are governed by ..... Law (insert the governing law). The adjudication process is a pre-requisite to arbitration and / or judicial settlement. This adjudication clause is independent of and severable from the main agreement and will remain in force irrespective of whether or not the main agreement is lawfully enforceable. The adjudicator to have full jurisdiction to decide matters in relation to the scope of this adjudication agreement and in relation to the enforceability of the main agreement. The main agreement and this adjudication clause are subject to the jurisdiction of the courts of ..... (insert required jurisdiction). In the event that any provision of this Agreement is invalid, the parties agree that all remaining provisions shall be deemed to be in full force and effect.

ARBITRATION CLAUSE

Any dispute hereafter arising between the contracting parties / any dispute hereafter arising out of or in respect of this agreement (delete as required) to be referred to the National Association for Dispute Resolution Inc, US / Nationwide Academy for Dispute Resolution UK Ltd / (M) Sdn Bhd / Middle East♦ for arbitration, subject to the relevant Arbitration Rules, Regulations and Codes of Practice of NADR applicable at the time of referral. Unless the parties otherwise agree, arbitration to take place within ..... days (insert the required figure) of referral of dispute to arbitration. The arbitration award to be immediately enforceable and binding. The main agreement, and this arbitration clause are governed by ..... Law (insert the governing law). The arbitration process is a pre-requisite to judicial settlement. This arbitration clause is independent of and severable from the main agreement and will remain in force irrespective of whether or not the main agreement is lawfully enforceable. The arbitrator to have full jurisdiction to decide matters in relation to the scope of this arbitration agreement and in relation to the enforceability of the main agreement. The main agreement and this arbitration clause are subject to the jurisdiction of the courts of ..... (insert required jurisdiction). In the event that any provision of this Agreement is invalid, the parties agree that all remaining provisions shall be deemed to be in full force and effect.

♦ Delete as required

MEDIATION CLAUSE

Any dispute hereafter arising between the contracting parties / any dispute hereafter arising out of or in respect of this agreement (delete as required) to be referred to the National Association for Dispute Resolution Inc, US / Nationwide Academy for Dispute Resolution UK Ltd / (M) Sdn Bhd / Middle East♦ for mediation, subject to the relevant Mediation Rules, Regulations and Codes of Practice of NADR applicable at the time of referral. Unless the parties otherwise agree, mediation to take place within ..... days (insert the required figure) of referral of the dispute to mediation. Any agreement arising out of the mediation to be immediately enforceable before any court of law. The main agreement, and this mediation clause are governed by ..... Law (insert the governing law). The mediation process is a pre-requisite to adjudication, arbitration and or judicial settlement. This mediation clause is independent of and severable from the main agreement and will remain in force irrespective of whether or not the main agreement is lawfully enforceable. The main agreement and this mediation clause are subject to the jurisdiction of the courts of ..... (insert required jurisdiction). In the event that any provision of this Agreement is invalid, the parties agree that all remaining provisions shall be deemed to be in full force and effect.

Hybrid ADR Clauses and Schemes available on request.

♦ Delete as required