

# CHAPTER ONE

## WHAT IS MEDIATION?

### **Introduction to mediation.**

Mediation is a process used to negotiate the settlement of disputes. It differs from face to face negotiations in that the negotiation is facilitated by an independent third person, the mediator. Mediation may be used as a stand alone process or it may form part of the settlement negotiation process that precedes and continues in the background throughout the litigation process. In the latter situation, mediation is used when the traditional inter-party negotiation process has stalled as a method of breaking the impasse and getting negotiations back on track. A mediated settlement is dependent upon the parties reaching an agreement. The mediator does not act as a judge or arbitrator and cannot impose a resolution on the parties.

Mediation is a voluntary, non-binding, without prejudice process in which the mediator attempts through negotiation techniques to bring the parties to a dispute together in a settlement agreement. If the mediation process succeeds and ends with a binding agreement between the parties, that agreement can be enforced cheaply and quickly in the courts in the event of default by one of the parties. Thus the process is voluntary but enforcement of the binding agreement receives the full support of the law. If any of the parties to the mediation process, including the mediator, is dissatisfied with the process at any time then that party can terminate the process prior to a final agreement being reached. The claimant may then proceed to assert his / her legal rights through the court system. Mediation is regarded as being the most flexible and potentially the speediest of the ADR techniques, as well as being the most cost effective.

Mediation is just one of a number of dispute resolution processes, which are encompassed by the term Alternative Dispute Resolution (ADR). Mediation provides an alternative to the accepted practice of using the courts to settle disputes between parties. The principle forms of ADR are mediation, arbitration,<sup>1</sup> conciliation and adjudication.<sup>2</sup> The most commonly used form of ADR in the UK today, outside the specialist field of construction dispute settlement is mediation and is the technique developed by in this text. ADR should not be seen as adding additional layers to the dispute settlement process rendering it more long winded and more expensive. Quite the contrary, mediation has an eighty-three per cent settlement rate and ninety-seven percent of arbitration awards and adjudication decisions are not challenged. The most common reason for recourse to the courts is to enforce agreements, awards and decisions. Enforcement is generally speedy and relatively inexpensive. Most challenges fail.

Mediation shares many of the benefits of arbitration in that it is private, quick and relatively inexpensive. However, the parties themselves maintain control over the decision making process rather than handing it over to a third party. There is an obligation to participate in the process but no obligation to reach a settlement. If no settlement is achieved the parties are free to proceed to arbitration or litigation. However, having canvassed the issues thoroughly in advance during the mediation process pre-trial preparation will be at an advanced stage and many side issues will have been resolved resulting in a quicker and more efficient trial.

<sup>1</sup> Arbitration is the longstanding alternative to the courts. Recent reforms introduced by the **Arbitration Act, 1996** have speeded up the arbitration process and have done much to reduce the costs of the process. Nonetheless, arbitration is more formal, more expensive and slower than mediation. Arbitration does however, provide an attractive second stage for dispute resolution in the event of a failure to successfully reach an agreement via mediation.

<sup>2</sup> Construction adjudication, pursuant to the **Housing Grants Construction and Regeneration Act 1996** also offers a new mid-way method of settling disputes rapidly and at minimum expense. As a long stop in the event of a failure to settle a dispute by mediation or arbitration the parties are still entitled to resort to the courts. The courts are always available post adjudication if the parties wish to question the decision but compliance is essential in the interim period.

## CHAPTER ONE

The mediator acts as a go-between, exploring issues with each of the parties in turn, facilitating them to find a way to broker a settlement. The process is effective where the parties realise that a settlement is inevitable and are prepared to compromise. Many court cases settle on the steps of the court. Mediation achieves a similar result but involves the parties directly and leads to far more satisfactory settlements than are brokered by the hands off approach of settlement through the auspices of lawyers. Mediation settlements frequently include agreements for the future conduct of business rather than a mere settlement of the dispute at hand.

Mediation has less to offer, apart from a reality check on the parties, in situations where one party adamantly refuses to recognise any liability whatsoever and refuses to pay or perform a service or put something right. Even here, participation in the process can result in the recalcitrant party realising that their stance is unrealistic, paving the way for a settlement. Apart from being relatively inexpensive mediation is a valuable tool for repairing damage to commercial relations. The mediation process has a proven track record and has been successfully used to settle disputes involving very large sums of money. A great advantage of mediation is that it lends itself to multi-party dispute settlement and can therefore replace an entire series of arbitrations or court actions. Mediation agreements are readily and easily enforceable before the courts if the mediation agreement is breached.

Mediation is not a magic “*cure all*”. It does not render litigation and arbitration redundant. Each dispute resolution process has advantages and disadvantages. Ideally disputants should use the process most appropriate for the resolution of a given dispute.

### THE NATURE OF THE MEDIATION PROCESS

The role of the mediator is to help the parties to find a “*mutually acceptable*” solution to their dispute. The parties maintain control of the process. No solution is possible without their consent and cooperation. As such mediation is the most “*consensual*” of all the available alternatives to litigation.

Business is the art and practice of the negotiated purchase or supply of goods and/or services. Business practice is about cost effective management and delivery. The “*art*” of business lies in striking the right balance between profitability and the risks inherent in any given ventures. It is usual for the sales and service contract to identify a number of different foreseeable factors that could go wrong during the course of the venture and allocate the risks of those factors occurring to one or other of the parties. Sometimes this risk allocation is keenly negotiated between the parties, indicating that the parties are competent and experienced negotiators themselves. However, frequently the allocation is based on pre-established pro-forma contracts where the parties merely adopt established business practice reflecting the market price for the product.

Business disputes tend to arise because one party perceives that some loss causing event has occurred, which in his opinion is contractually the responsibility of the other party, whereas the other party refuses to accept that the problem is his responsibility or, even if he does accept responsibility, is not prepared to do everything that the complainant demands to put the problem right. Alternatively disputes often arise as to how to deal with an unusual problem that subsequently arises which is not governed by or anticipated by the terms of the contract. It is the failure by the parties, despite their negotiating experience and expertise, to find or negotiate an agreeable solution to such problems that gives rise to the disputes.

The question that has to be answered is “*How can mediation, which relies on mutual consent and cooperation, solve a dispute when negotiations between the parties has already failed to do so?*” Put another way “*If experienced negotiators have already failed to solve the problem between themselves why might a mediator succeed where they have failed?*” The answer lies in the fact that frequently the parties to a dispute develop tunnel vision. The longer a dispute goes on the harder it becomes for the parties to separate themselves from their view as to who is responsible, what the contract requires them to do and most significantly of all, what will happen if a solution is not found. As an independent outside observer the mediator is able to take a fresh, objective view of the situation and help the parties to re-evaluate the risks that they will be exposed to. The mediator is not a magician or miracle worker. A mediator cannot make the parties agree and cannot impose a solution. The mediator’s skill lies in the art of communication and to help the parties to explore solutions which are in their best commercial interests. Disputes generate a climate of animosity where parties will frequently chose to take a course of action which is commercially detrimental to their organisation simply to prevent the other party gaining an advantage. If a party can prove that the chances of success at litigation are high and that

## MEDIATION METHODS FOR MEDIATORS & PARTY REPRESENTATIVES

it will produce the greatest advantage to their organisation, mediation is unlikely to succeed. However, where the chances of success are evenly spread between the parties and the likely outcome is less advantageous than settlement, an experienced mediator should be able to guide the parties towards a settlement.

There is an added value to mediation, in that mediated settlements are frequently more evenly balanced than party negotiated settlements. One often hears business people stating that they do not have disputes. Either they have simply been lucky up to date or their trading partners are very reasonable and sensible. Hence they have managed to negotiated solutions to trading problems. A more likely explanation is that frequently the stronger of the parties is able to force the weaker party to compromise without any genuine negotiation taking place and without a meaningful evaluation of their respective commercial rights and duties. Mediation can address this problem and correct imbalances in negotiation power.

### SOME OF THE PROCLAIMED ADVANTAGES OF MEDIATION

- Speed – days to weeks rather than months to years to commence the proceedings.
- Short hearings – one day is often sufficient – witnesses and experts are rarely called.
- Private – no press reports or adverse publicity – proceedings are privileged / not admissible in subsequent court proceedings and not recorded : all records and evidence are destroyed or returned to the parties apart from the written settlement agreement.
- Cost - relatively inexpensive – due to short hearings and absence of discovery processes and cross questioning.
- Convenient location- two rooms in a hotel or offices are all that is needed – in the country of choice of the parties and the mediator.
- Informal – no judges, robes, official recorders or court procedure.
- Lawyers are optional – though expert advice is very desirable. Self representation is permitted.
- The parties remain in control – there is no judge and no enforceable judicial award – so there is little to lose from taking part but potentially everything to gain.
- Works domestically and internationally – ideal for international trade and maritime disputes - and more sympathetic to multi-cultural issues.
- Linguistically flexible – can be conducted in the language of choice of the mediator and the parties.
- Not restricted to legal solutions and thus more flexible than going to law.
- Not restricted to the law of one country – so truly international solutions possible.
- More amenable to the preservation of business relations – less likely to result in outright winners and losers – enables the parties to retain “face” and where possible to continue trading after ending the dispute
- Mediators are experts drawn from the industry and understand the issues and the business – whereas few judges have worked in commerce of in the maritime industry.
- Multi-party mediations are possible and can include interested parties such as banks, financiers and insurers and inter-related business partners – particularly useful in international chain sales involving transportation

### A Typical Commercial Mediation Process

**Where will the mediation take place ?** A mediation can normally be convened at a location mutually acceptable to the parties and the mediator. Local mediation, avoiding expensive foreign travel and the engagement of foreign advisors is both easily attainable and desirable.

**Arrival and Registration.** The parties will normally register their arrival at a reception desk and be directed to a private waiting room. Once everyone is assembled the parties will be escorted to the main mediation conference room. The mediator will invite everyone present to take a place at the mediation table, introduce himself and invite everyone else present to introduce themselves.

**The Opening Joint Session.** The first joint session will then commence. Whilst each mediator will have his own particular style, the mediation will then proceed as follows, though not necessarily in the order described below.

## CHAPTER ONE

The mediator will invite each of the parties and their representatives (if any) in turn to briefly set out their position and how they view the events leading up to the mediation. This provided parties with an opportunity to exchange documents and provides the mediator with a copy of anything disclosed or exchanged at that time which he has not already received. It is essential at this stage that the parties accord due respect to each of those present, listen to what is said and do not interrupt. There are plenty of opportunities later for comment on anything said during the opening joint session.

The mediator may choose to briefly summarise each party's submissions at this stage, following which he will explain how the mediation will proceed, establishing ground rules for the conduct of the mediation and providing the parties with any information about the facilities available, such as smoking areas, use of mobile phones and refreshments.

**Witnesses** (if any). If the parties have chosen to call witnesses this is likely to the time when they will be invited to give evidence and an opportunity provided for the other party to ask the witness questions.

**Private Sessions / Caucus.** At the end of the opening joint session the mediator will usually invite one of the parties to accompany him to a second private mediation conference room. The mediator will then meet each of the parties in turn for private sessions or what is known as a caucus. (If the mediator considers that the best way to proceed is by round table discussions between the parties everyone will remain in the same room and the joint session will continue.) The mediator will use his discretion to decide which party to commence the private session with. There is likely to be a series of these private sessions with the mediator commuting between the parties.

The mediator will exercise his discretion and judgement to decide how much time is needed in any particular session to take the negotiations forward and at the end of each session with you he will try to give you an indication of how long he is likely to spend with the other party at the next session.

The purpose of private sessions is to afford the parties the opportunity to explore the situation freely with the mediator without prejudice to your position. The mediator will discuss with each party in turn the reasonableness of their position and as and when appropriate, in the light of information he/she has gathered from the other party, give the parties an indication of whether or not their position is acceptable to the other party. The mediator may well suggest potential avenues for settlement that the parties might wish to explore. Private sessions are confidential. The mediator will convey information and documentary evidence to the other party that he has been authorised to disclose. The mediator will not disclose anything to the other party without consent and is likely to summarise what has been offered in a session and confirm that he has authority to disclose / convey that information to the other party at the end of a private session. The mediator will use his discretion to decide if as and when to disclose such information to the other party and may well chose not to do so if an offer, for instance, is likely to be regarded as totally unacceptable by the other party and disclosure at that stage might harm the mediation process.

**Final Joint Session.** If, as and when the mediator considers that an agreement can be concluded he will reconvene the joint session for a final time so that the parties can finalise and sign the agreement. The mediator will draft the agreement with the assistance of the parties and have it reproduced in a presentable form for the parties to sign and witness.

**Interim Joint Sessions.** On occasions, the mediator may decide that it is necessary to interrupt the private sessions and convene one or more joint sessions in order to either conclude agreements on particular aspects of the dispute or to break stalemate situations, following which, private sessions will resume. The mediation will normally continue in session for as long as it takes to broker a settlement. A settlement can usually be reached in a day. If it becomes apparent to the mediator that a settlement is not possible the mediation will end. Either party may chose to end the mediation session at any time without concluding an agreement. Attendance at and participation in the mediation process is entirely voluntary. There is no obligation to conclude an agreement and particularly, no obligation to conclude an unacceptable agreement.

**Continuation Sessions.** Often, even when the parties fail to reach an agreement, the parties having had time to reflect on the process, agree to return some time later and continue the mediation at which time a settlement is usually reached.

## MEDIATION METHODS FOR MEDIATORS & PARTY REPRESENTATIVES

**Time Scales** : It is often possible to conclude a commercial mediation in a half or full day session. Tight deadlines tend to concentrate the mind and produce better and speedier results. It is often a mistake to schedule a commercial mediation over several days, since it allows the parties to harden their positions and makes it more difficult to broker a settlement.

**Contrast Conciliation and Social Mediation.** The social mediation is likely to keep private sessions to a minimum. Furthermore, because the parties often have to reconcile themselves to new social arrangements, time may be an important healing process. Social mediation may therefore advantageously be spread over a number of short sessions, spaced out to give the parties time to come to terms with how they must conduct their affairs in the future.

**Caveat.** It is important to know which method of mediation (i.e. socially or commercially orientated) is appropriate for any given dispute. This poses problems where a mediation service provider holds itself out as being in a position to handle diverse forms of dispute. Provided the body nominates a type of mediator and a type of process appropriate to the dispute this is not a problem. However, it is submitted that it is a mistake to imagine that the skills of a mediator are adaptable to all forms of dispute. A highly skilled commercial mediator may make a total hash of a social dispute and likewise, a family and social dispute mediator could find him or herself urging parties to compromise legal rights in a commercial dispute without laying the groundwork to justify the need for such a compromise. Whilst ending a dispute is always a worthwhile objective, it is essential to carry the parties with you. If, in the cold light of day, a party re-evaluates the outcome and regrets being "forced" into a corner and badgered into a settlement, there is a likelihood that the agreement will not be fulfilled and the mediator might even find him or herself exposed to legal action on the basis of misrepresentation, duress or undue influence. At the very least the mediation process is brought into disrepute.

**What then, does a mediator do?** A mediator helps the parties to a dispute to :

- 1 re-examine their differences (*distinguish between wants / needs and common ground*)
- 2 re-evaluate their respective risks and opportunities, (*refine and affirm what is on offer*)
- 3 work towards, and if successful draft, a mutually acceptable resolution.

The mediator steers one party towards increasing the anti (what he is prepared to bring to the settlement table), the other towards lowered expectations. The justification for expending further cost, time and energy on litigation is inversely proportionate to the degree of convergence between these two figures. The objective thus of the mediator is first to narrow the gap between the parties to a point where neither party is able to justify continuing the dispute. and then to fashion a settlement. Even if that second stage proves to be an elusive step too far, the final figures on offer can serve as excellent indicators of the level at which to pitch a s36 CPR payment in or alternatively a s36 CPR counter-settlement offer. The prospect of this increases what is at stake from continued litigation in the light of potential s44 CPR cost penalties, making it even more likely that closure can in fact be achieved..

Mediation offers the parties the opportunity :-

- to come face to face in a protected environment,
- to confront the realities of their situation,
- to re-evaluate their risks and opportunities,
- to develop solutions which are not available at law.
- to temporarily re-establish direct control over the settlement process by freely engaging in immediate without prejudice negotiations

Case management generated mediation provides a special/final opportunity for the parties to re-hear the cautionary advice (if any) of counsel which may previously have been given less attention than it merited.

Mediation provides a private forum for pragmatic compromise in lieu of the litigation lottery, a chance to procure a bird in the hand in preference to those in the bush.

Mediation does not enable the parties to gain what is due to them under the law, since that is never established. Rather they seek to achieve a settlement which they deem is "*fair enough*" in the circumstances and with which they are able to live.

## CHAPTER ONE

**Subject Expertise and the Role of the Mediator.** Whilst it is commonly accepted that mediation expertise is essential the same cannot be said of the need for the mediator to have expertise about the issue in dispute. If no such expertise is required, a skilled mediator should be able to tackle any dispute he or she is presented with. If however expertise is required, the mediator is logically limited to dealing with disputes within the scope of that given expertise. The common issue raised by the above is *“What are the skills of a mediator ?”* If there is a need for a mediator to be an expert in a given subject, *“How does the mediator make use of his or her subject expertise within the mediation process?”*

The role of a mediator does not differ in any significant manner, simply because the mediator is an expert, though the ability of a mediator to carry out his or her functions may well be affected by the fact that the mediator is an expert, though that may depend on whether or not the mediator is an expert on the issue in dispute. Whilst is desirable, if not essential, for all mediators to possess high degrees of mediating expertise, a mediator will have little opportunity to act as an expert during the mediation process but can use expertise to explore the perceptions of the parties.

**Terminology and definitions.** There is no universal understanding of what mediation is, apart from the fact that it is a form of third party **“assisted negotiation process.”** Highly respected organisations and individuals hold to widely differing views as to what mediation is and what mediation should achieve. Consequently there are a wide range of views as to how the process should be conducted, the role of the mediator within the process and the required attributes of a mediator. It will therefore be necessary to categorise types of **“assisted negotiation”** process and to further categories the different types of **“assistant”**.

The negotiation process seeks to bring disputes to an end. Unlike expert determination, adjudication, arbitration and litigation however, the various forms of assisted negotiation processes are considered to be consensual, involving the disputing parties directly in the shaping of the terms of the resolution, as opposed to having the terms of the resolution imposed by a third party. However, depending upon the model of assisted negotiation process adopted, what the parties retain control over varies considerably, ranging from the terms of the settlement to the enforceability of the settlement.

The terms **“Mediation”** and **“Conciliation”** are often used interchangeably. It is proposed for present purposes, to ascribe distinct meanings to each of the terms, as follows :-

- **Mediation** is the process whereby an independent third party acts as a facilitator to bring about an agreement between the disputing parties as to the terms of a settlement of the dispute. The parties negotiate the terms of a settlement agreement between themselves, with the assistance and guidance of the mediator.
- **Conciliation** is the process whereby an independent third party acts as an expert chairperson, with the objective of devising the terms of a settlement in the light of the views expressed by the parties. The parties seek to negotiate the terms of the settlement with the conciliator. However, at the end of the day, it is the conciliator who drafts the terms of the settlement and imposes it upon the parties, with or without their joint agreement. In some respects it is the equivalent of a recommendation or advice especially if the parties are at liberty to accept or reject it, but it can go further than this in some forms of conciliation.

Assisted Negotiated Dispute Settlement may be further categorised as **“Binding Mediation”**, **“Non-binding Mediation”**, **“Binding Conciliation”** and **“Non-binding Conciliation”**.

- **Binding :** The word **“binding”** refers to the agreement itself and not to the negotiation process. The parties cannot be forced to actively participate in the process and are free to withdraw at any time, at which point settlement becomes impossible. By contrast expert determinators, adjudicators, arbitrators and judges can proceed to a decision, award or judgement even if one of the parties attempts to withdraw from the process.

Once the parties have signed a *“binding agreement”*, that agreement is enforceable by the courts as a simple contract.. It is a settlement agreement which brings the dispute to an end.

- **Non-binding :** A **“non-binding agreement”** by contrast, is binding in honour only and thus cannot be enforced by the courts. There is no intention between the parties to create legal relations, even though the terms of the unenforceable agreement may well be signed by the parties. The signature merely indicates the parties approval of the terms of the agreement but without any enforceable commitment to seeing those terms fulfilled.

## MEDIATION METHODS FOR MEDIATORS & PARTY REPRESENTATIVES

**Binding and non binding mediation contrasted.** The degree of control exercised by the parties is thus quite different in mediation to conciliation. The only difference between binding and non-binding mediation lies in the enforceability or otherwise of any negotiated settlement. In both cases the process and the settlement itself are entirely consensual.

- Binding mediation is the norm in commercial dispute resolution, since the parties seek certainty and the nature of the settlement is normally amenable to enforcement proceedings, usually involving the payment of monies by one party to the other.
- However, non-binding mediation is the norm in domestic and neighbour disputes. The aim is to re-establish social relations between the disputing parties. The nature of the settlement is unlikely in many cases to be amenable to enforcement proceedings since the courts would be unable to supervise the future conduct of the parties. Where it is possible for the parties to agree on a settlement the chances of them subsequently sticking to the agreement is very high, so there is value in the process.

The common factor in both forms of mediation is that the outcome is entirely consensual. The agreement of the parties is subject to some legal constraints in that where a new agreement lacks new consideration, that is to say an element of reciprocal bargain, it might be unenforceable in the absence of a device to give it the force of law.

The agreement may be made under seal to ensure its enforceability. Alternatively, if the parties had initially commenced legal action then it can be lodged as a settlement agreement with the courts.

Beyond that, the only possible way of challenging the enforceability of the agreement is on the basis of misrepresentation, by either of the parties or the mediator, or on the basis of the unlawful exercise of duress and undue influence on one of the parties by the mediator, perhaps demonstrated by proof that the mediator withheld relevant information or very forcefully expressed the opinion that the terms of the agreement were fair and satisfactory for both parties even though the mediator was aware that the agreement was unbalanced and extremely one sided. It is difficult to prove misrepresentation, duress and undue influence but not impossible as demonstrated by the US experience where the settlement agreements brokered by a number of insurance claims mediators were set aside because all the agreements unjustly favoured the underwriters.

Against this however, is the fact that the party's legal representative should be fit enough to protect his or her client's interests during the negotiation and the mediator and the other party should not bear responsibility for incompetent counsel. The mediation rules of some organisations require the parties to be represented whilst others do not. Where representation is required the rules may or may not mandate legal representation. There is no statutory requirement for legal representation. The mediator should be aware that there is a potentially higher standard placed upon him or her to ensure equality of bargaining information in respect of a party who is not professionally represented, and particularly where the issues at stake concern significant legal interests, rights and duties.

**Binding and non binding conciliation contrasted :** The difference between binding and non-binding conciliation is potentially considerable.

- **Non-binding conciliation :** Whilst the parties retain control over implementation of the non-binding settlement they merely exercise influence over the shaping of terms of the settlement. A possible variation of this is where the conciliation does not end until the parties agree to sign up to the recommended terms of the conciliator, or the parties withdraw from the process. In such a case the signed agreement of course remains non-binding and legally unenforceable. The impact of the non-binding conciliation process differs little from that of non-binding mediation. Whilst the fact that the terms of the settlement may be imposed on the parties and might result in regret and subsequent changes of heart, it has the advantage of producing an outcome in situations where the parties are simply not able to broker an agreement. If the parties respect the conciliator there is a high possibility that they will subsequently stick to the terms of the settlement.
- **Binding conciliation :** In the binding conciliation process the parties merely exercise influence over the shaping of the terms of the settlement but exercise no control whatsoever over implementation. A possible variation of the binding conciliation process involves the parties reserving the right to reject the terms. In such a situation the conciliation would become binding if the parties signed up to a binding agreement on those terms. In the light of the potential total lack of party autonomy where the parties have not reserved

## CHAPTER ONE

the right to reject the proposed settlement, it is questionable whether this form of conciliation can be truly considered to be anything other than a form of third party determination process.

- i) If the enforced settlement is based on decisions of fact it appears on the face of it to resemble expert determination, which is subject to judicial review and the supervision of the courts.
- ii) If the enforced settlement is based on mixed decisions of fact and law it bears a striking resemblance to arbitration and the process could arguably be subject to the Arbitration Act 1996 in England and Wales, judicial review and the supervision of the courts.

Whether or not either of these is the case is far from clear under English Law. The binding conciliation process is rarely used and the question has not been subject to direct judicial consideration. Whilst binding conciliation bears a striking resemblance to either expert determination or to adjudication and arbitration, it is quite distinct from both, since the range of options open to the conciliator in the shaping of the terms of the settlement are not necessarily limited to a decision based strictly on fact and law. Depending upon the way that the conciliation rules governing the process are drafted, the conciliator may be able to produce an “equitable” or “ex aequo bono” settlement, with a view to producing a “fair” outcome based on the interests of the parties rather on their respective legal rights and duties. Presumably however, under the *Wednesbury Rules*, judicial review would require that the settlement would have to be one which, in the circumstances of the case, a reasonable conciliator could have reached.

Expert determination and arbitration produce winners and losers whereas the ADR concept of “WIN/WIN” outcomes is available to the conciliator. None the less the settlement would have to be one that a reasonable conciliator could have arrived at in the circumstances of the case. Binding conciliation has the advantage over non-binding conciliation of producing certainty for the parties, though unlike binding mediation, there is no guarantee that both parties will be happy with the outcome and regard it as a “WIN/WIN” result.

Whilst the four way categorisation clarifies the degree of party control in each model, with consequent implications for the way the ADR practitioner conducts him or herself within the process, what is and what is not appropriate behaviour for the ADR practitioner is less apparent when a mixed process is involved. The dangers inherent in a mixed process of negotiated dispute settlement and third party determination were subject to judicial consideration by Judge Humphrey Lloyd QC at the TCC in the case of *Glencot v Ben Barrett* [2001].<sup>3</sup> In *Glencot* an adjudicator switched roles and attempted a mediated settlement of the dispute but then reverted to the role of adjudicator when the mediation failed to produce a settlement. The court had to decide whether or not information acquired by the adjudicator about one of the parties during the mediation process prevented the adjudicator from finally reaching a fair and just decision in the resumed adjudication.

Third party determination processes are essentially judicial processes and thus a high standard of impartiality and due process is required to ensure that justice is not only done, but also seen to be done. As discussed above, the lower standard of an absence of misrepresentation, duress and undue influence applies to assisted negotiation processes. There is the possibility that during the assisted negotiation process the assistant becomes privy to information which would not be available to the third party determinator, or if it became available it would only be after the other party had the opportunity to challenge it and comment upon it and to tender alternative views as to the relevance and import of the information. This is not to say that the third party determinator will necessarily deliberately misuse the information. The question arises firstly as to whether or not the third party determinator is able to sub-consciously as opposed to consciously avoid being influenced by that information when he or she makes the decision. Opinions on this matter are divided.

That apart, a second question arises as to whether or not the parties have willingly and knowingly undertaken the risk of the third party determinator being subconsciously influenced by such information and have decided to nonetheless rely on the integrity of the decision maker to reach a fair and unbiased decision. It was this second question that Humphrey Lloyd addressed. He made it clear that it is essential that the risks are spelt out in advance to the parties and that they have then made a choice to take that risk. In *Glencot* this had not happened and the court refused to enforce the adjudicator’s decision.

<sup>3</sup> *Glencot Development & Design Co Ltd v Ben Barrett & Son (Contractors) Ltd*,

## **MEDIATION METHODS FOR MEDIATORS & PARTY REPRESENTATIVES**

In *Glencot* the mediation and adjudication processes were clearly identifiable. The standards of care for each process remained distinct. Where a process merges elements of both it is far more difficult to determine precisely what standard of care is required of the dispute resolution practitioner. Whilst flexibility of process is one of the central attractions of ADR, it is important that the parties to the process understand fully what is involved in the process they engage in and the implications of so doing. A lack of uniform definition of what the processes involve is not necessarily detrimental provided a clear set of rules for a chosen process are provided to the parties at the outset. Unfortunately, this is not always the case. Institutional ADR processes are likely to be supported by guidance notes for the parties, rules for the conduct of the process and by ethical rules of conduct and practice for the ADR practitioner. Ad hoc appointments to private ADR practitioners for a mediation or conciliation process do not always provide the same degree of protection or clarity.

### **TYPES OF MEDIATOR AND TYPES OF DISPUTE**

The four way categorisation of negotiated dispute settlement processes outlined above is not universally recognised or adhered to. Mediators often adopt approaches which contain elements of both mediation and conciliation. There are a wide range of categories of mediator, in terms of the way the mediator conducts the process and the factors that the mediator will seek to address in order to broker a settlement. These will often reflect the nature of the dispute that is being dealt with and it is submitted that whilst each of the mediation methods represents a valid process, each model is best suited to different types of dispute.

#### **Types of Dispute :**

The range of disputed civil matters that can be dealt with by way of mediation are considerable. Commercial disputes formed the initial wave of ADR settlement in the US, partly because such disputes are traditionally settled by the courts. ADR rapidly expanded in the US between 1980 and the nineteen-nineties to enable the parties to retain some control over the outcome, to reduce settlement costs and because of the speed of the process, particularly since the courts overburdened with commercial claims and it could take as long as one time as six years to get a court hearing. As the success of ADR became apparent it has been adapted to social and domestic disputes and Government / Individual disputes about the allocation of state resources on social policy issues and environmental and planning issues. The ability of ADR to deal effectively with multi-party disputes has proved attractive. However, different categories of dispute need to be handled in different ways.

Whilst commercial disputes are best approached from a legal rights, duties and interests perspective, since the spectre of the court hangs over the process and will be invoked if the mediation fails, disputes with social and personal aspects are best approached from the perspective of the best social interests of all concerned. Rights based mediations will involve a high degree of risk analysis with particular reference to the costs of litigation and the likely outcome of litigation. The mediator will attempt to provide the parties with reality checks and invite the parties to consider what the court might do in given circumstances. The mediator can rely on the legal expertise of party representatives to explore such matters with both parties and is likely to do this in private sessions. By contrast, in social disputes, few if any private sessions are likely to be used. The mediator will seek to get the parties to take a look at the situation of the other party and identify matters on which it is in their best interests to cooperate in the future.

Whilst continuing business relationships may be a relevant factor for commercial disputes, ongoing relationships and public image are central to the settling of social and policy disputes.

The concepts of "a day in court" and "getting things off one's chest" are likewise very important in social disputes but play a much lesser role in commercial disputes.

The structure of a mediation will therefore reflect these differences and the communication skills of the mediator have to adapted to take account of the type of outcome that is desired and the degree to which personality factors will impact upon the conduct of the process.

It is further submitted that commercial disputes are best mediated by experts in the relevant field. However, this is not sufficient. The rights based mediator needs to have a working understanding of the law applicable to the dispute and of how the courts would approach the matter. Finally, the mediator must be skilled in the practice of mediation. The skill is acquirable but it is specialist and must be acquired.

## CHAPTER ONE

A model of how such a mediation process might be conducted and what each part of the process seeks to achieve is set out later in this paper. The model is not prescriptive. Different ADR service providing organisations propose variations on the theme and it may be necessary to vary the process in the light of the needs and expectations of the parties to a given dispute.

**Disputes not amenable to mediation** : Mediation cannot be used as a substitute for the settlement of issues in which the state has an interest and for which settlement is the sole preserve of the courts as instruments of the state. Thus mediation cannot be a substitute for a criminal trial or a divorce petition in England and Wales. Mediation is thus reserved for civil disputes which the parties have the right to settle privately.

Since mediation is essentially a refined and assisted form of negotiation, it is essential, as with all negotiations that the parties are both willing and able to engage in the process and have something to negotiate, which in crude terms means they are prepared to compromise their initial negotiating positions or to search for an alternative solution to their problem. It is preferable, but not strictly necessary, that a degree of compromise also be in both parties interests.

Where a party to a dispute has a clear cut right, or at least expectation, whether realistic or not, that they have a clearly enforceable right, there may be no willingness to compromise and no obvious interest for them in so doing. The most obvious example is where there is no dispute about the quality of goods or services provided by one party to another and the problem revolves around a mere failure by one party to pay the other. It is questionable whether an action for the enforcement of a debt is in fact a dispute at all. This poses difficulties for the mediator. Where the debtor is willing but unable to pay, perhaps due to cash flow problems, there may be scope to facilitate a settlement based on rescheduling the debt and perhaps finding alternative consideration for the creditor. If the debtor has the means to pay but is simply unwilling to do so, there is no reason why the creditor should compromise. Enforcement of a debt before the courts, assuming the debtor has the means to pay, is relatively quick and straightforward in England and Wales. It is unlikely that in such a case a creditor would be prepared to engage in the mediation process let alone compromise his or her legal rights to full recovery.

However, if the relationship between the parties is governed by a mediation agreement and non-payment of debt is considered to be a dispute, there would be a contractual requirement to engage in the mediation process. This is a problem because if the courts advise mediation in fulfilment of the agreement and stay legal action pending engagement in the legal process, it merely forces the parties to waste time and energy on a process doomed to failure. Hopefully, in such circumstances the courts will recognise that mediation has little to offer and will not order a stay of action. Likewise, whilst the courts of England and Wales have the power under the Civil Procedure Rules 1998 to recommend mediation, they would not do so in respect of actions for recovery of debts.

### **Types of Mediator :**

Academics have identified in excess of twenty eight models of mediation but these can be grouped into four basic 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. 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, attorneys and insurance companies and often engages in "court bashing" or "lawyer bashing".

#### **The Third Party Negotiator :**

Sometimes used in the UK. 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

## MEDIATION METHODS FOR MEDIATORS & PARTY REPRESENTATIVES

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 Public Mediations and was employed in the Camp David Israeli / Palestinian Negotiations.

### **The Deal Maker :**

Often used in the UK. 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 and most appropriate for the parties. This is the oldest form of mediation and originates out of the labour field. This type of mediator has the greatest problem with the parties' perception of him. He is usually mistrusted by all the parties. Many parties will only use him once. 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. 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 : Uses his questions to probe the parties' positions and perceptions : Tries to conciliate : Focuses primarily on the process : Gets the parties talking about liability, damages, costs, verdicts in the area, risks, high-low-average values for the case, perceptions of the community, e.g. motorcycles and alcohol use : Employs *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 can not mediate a settlement, he will mediate the process so you always obtain some results from the mediation.

<p><b>The Rescuer</b></p> <p>Social disputes Anti-lawyer : Anti-law : Anti-courts Anti-representation Rarely professionally trained or qualified as a mediator – though local training common</p>
---

<p><b>The Deal Maker</b></p> <p>Information conduit Shuttle Diplomat Keeps parties apart Devises a solution and sells it to the parties Often adopted by retired judge mediators</p>
--

<p><b>The Third Party Negotiator</b></p> <p>Information conduit Shuttle Diplomat Keeps parties apart Specialises in interests based mediation</p>
---

<p><b>The Orchestrator</b></p> <p>Combination of joint and private sessions Uses process participation as self empowering Combination of interests based mediation, &amp; Reality check evaluation</p>
--

**Caveat :** Care needs to be taken by contracting parties who incorporate mediation agreements into contracts to ensure that they will get the type of mediator that they want. This requires that the market has an awareness of the nature of services on offer and an understanding of the differences between the various forms of service on offer. Whether or not there is such an awareness of such matters in the business community is another matter. The problem is compounded whether the appointment is made by an umbrella group nominator, as is the case at present in respect of mediators appointed by the Mediation Hot Line under the auspices of Her Majesties Court Service (HMCS) which operates a rotating appointment system involving a range of certified mediation service providers. Equally, some providers classify their mediators by expertise and will appointment a mediator with relevant subject expertise, whilst others do not.

## Rights and Interests in Mediation : Measuring Success.

Alternative dispute resolution processes and especially mediation have been trumpeted as the mechanisms that ensure that disputes are settled amicably and to the satisfaction of all parties. Mediation in particular is a dispute resolution process that aims to achieve a *win-win* result for the parties to a dispute. This is one of its major selling points. Successes and failures at mediation are classified not by the attitudes of the parties post mediation, but rather by whether or not the parties have settled at mediation.

However, for many ADR practitioners, *“getting a result”* takes precedence over every other consideration and accordingly the whole mediation process is orchestrated by the mediator to achieve this desired state of Nirvana. There is little thought given to the post settlement consequences as long as the dispute is settled at mediation and the mediator can *“chalk up”* another success. Settlement implies that the parties are happy with the end result. This however, may not be the actual position. Many parties post settlement on reflection believe that they could have achieved a *“better result”* through one of the judgemental processes than that achieved at mediation where they feel that they have been *“ground down”* by the mediator to settle the dispute on terms that are not favourable to them. This approach to mediation can and does bring the whole process into disrepute and works against parties repeating the process in future if they have another dispute.

If the ADR industry is going to make the great strides that have been anticipated for it, then practitioners need to appreciate that their responsibilities do not end at the termination of the mediation but still exist when the settlement is implemented. There are various bodies and organisations that train mediators and other alternative dispute resolution practitioners as well as the fact that anyone can call himself an adjudicator, mediator or arbitrator, as these are not protected terms. The potential for growth is great for practitioners, but so is the potential for disillusionment amongst clients and potential users of ADR processes who rightly or wrongly believe that they will not have a *“fair hearing”* if they use one of the ADR processes.

There is the potential for major growth in mediation both in the United Kingdom and world wide, but the scope can be limited by people’s confidence in the system, the practitioners and the training that practitioners have to do. There is disquiet with some of the approaches to mediation and mediation training with organisations *“jumping on the bandwagon”* and providing training and services, but there is no minimum standard or uniform approach to training. This vacuum is one that Europe is prepared to step in to rectify, but will rectification bring its own problems in that a standard approach may produce a system where the process is more important than the people who have to use the system? Time will tell! The debate on the future training of mediators needs to be expanded to take into consideration people’s experiences of mediation training and using mediation and what they consider to be successes or failures not whether there has been completion of a training course or settlement of a dispute. It is only through learning from experience that mediation can be driven forward as a settlement process that the public will have confidence in using.

Parties need confidence that they will have *justice* if they submit themselves to mediation. The responsibility is on mediators to ensure that this is the case in practice. Mediators need to appreciate that this is an onerous task as they are the *“guardians of the process”* and should never forget this in their rush to *“successfully settle the dispute”* and keep their settlement figures high to prove that they are *“masters of the process”*. The mediator needs to appreciate that sometimes *“getting a result”*; that is, a settlement may not be as important as dealing with the parties’ rights and failing to reach settlement if mediation is to become a recognised mainstream respected dispute resolution process in the United Kingdom.

Mediation can only work when the parties have confidence in the process and this confidence can only come from the mediators and how they conduct the process. Settlement of a dispute is not the ultimate seal of approval of the process or a guarantee that the parties are satisfied with the outcome. Parties have rights that need to be respected irrespective of the outcome and mediators must never forget this fact.

The importance of the concept of rights in the development of the ADR cannot be overstated. Parties need to have confidence in the process if they are going to agree to use the concept and genuinely take part if so ordered by a court. There are two recognised approaches to mediation, the interests based approach and the rights based concept of dispute settlement. These two approaches to the mediation process can and do merge into one in many cases, but in others the rights of the parties can be fundamental. Failure to explore rights and

## MEDIATION METHODS FOR MEDIATORS & PARTY REPRESENTATIVES

parties concepts of rights may at the time not appear important to the mediator, but the long term consequences of failing to identify the needs of the parties can and does bring the concept of mediation into disrepute. Parties not only want “justice, but they want justice to be seen to be done” in their particular case.

The differences in approach adopted by mediators and whether they adopt an interests based or a rights based approach to dispute settlement can have a profound effect on how disputes are settled. In one, the interests based approach settlement of the dispute become paramount. In the other, the rights based approach the rights of the parties are the most important consideration rather than “obtaining a result”. These two approaches have fundamental differences for the mediation process and the results that may occur by mediators adopting the approaches.

The interests based approach has many proponents who argue strongly that they bring a new robust approach to settling the dispute by ensuring that the parties realise what their “best interests are” and getting them to settle along those lines. There are criticisms of this approach that are difficult to ignore when comparisons are drawn between the two types of approach to mediation. It is accepted that mediation is a facilitated negotiation process whether an interests based or rights based approach is adopted. The question must be asked, “Why do parties settle at mediation when experienced lawyers and negotiators have failed to reach settlement prior to the mediation?”

The usual answer is that the mediator has introduced a reality check and that the parties now better understand their dispute. Given the fact that the dispute may have been in existence for a good number of years and that the lawyers and the parties have been intimately involved for that length of time then this explanation may only be part of the answer not the whole answer. It is possible that the parties do become entrenched in their respective positions, but the “reality check” may introduce a new factor, the fear factor!

Once parties appreciate that they can lose the fear factor can take over. This is especially true when parties are not used to litigation and do not fully appreciate the nuances. The parties or one party may become afraid of the consequences of going to court and make concessions in a mediation that would not be contemplated in direct negotiations between the parties. The reality check has worked to produce a result because the concentration has been on the interests of the parties not the rights.

Once a settlement has been agreed and the parties have time to consider their position, they may well find that their rights have been subrogated. In many cases this may not be important, but in some situations it may well be the reason why the case was brought in the first place. Thus even though the case has been settled and the parties have agreed to the terms of the settlement, one of the parties has realised that it has made a “bad deal” and would have been better served by another method of dispute resolution.

The onus is on the mediator to guide and lead the mediation process. He is “*guardian of the process*” rather than “*master of the process*”. This differentiation is important as it is incumbent on the mediator to perform his duties to the best of his abilities for the benefit of the parties rather than to maintain his high success rate.

Settlement of a dispute should not come at the expense of the rights of a party or parties. Initially their short-term interests may have been better served by settlement. However, their rights both long term and short term would have been better protected by not settling.

The ultimate goal of a mediation is not to settle, however desirable this may be, but to produce a win-win situation if at all possible for the parties. It needs to be recognised that it is not always possible to achieve this goal in a mediation. There is no shame in not settling at a mediation if the parties have honestly applied themselves and an agreement cannot be reached. This is not a failure of mediation or the mediator, but namely that the parties are so far apart that it is not possible to reach a voluntary agreement that satisfies the parties and third party resolution of the dispute may be the best option. Coercion of the parties by the mediator is undesirable if the only goal is to reach a settlement so that the mediator can maintain his “*strike rate*”.

We all have a duty to respect the clients and the processes and this duty should take precedence over the need to “*achieve a result*” so that we are a “*successful ADR practitioner*”. There is no point in having a high success rate when nobody has confidence in the systems and do not wish to use them even if ordered to do so by the courts. This is a responsibility that all ADR practitioners need to take seriously!

## CHAPTER ONE

### EVALUATIVE MEDIATION

#### **Does evaluative mediation risk causing friction between disputing parties and damage to relationships?**

Much here depends upon one's interpretation of the term "evaluative" mediation. The question assumes that facilitation and evaluation are mutually exclusive, whereas in reality that need not be the case. A mediator may drift backwards and forwards between approaches in response to feedback by the parties, as appropriate.

- a) If by evaluative one means judgemental, providing the parties with a preferred, advised or mandated outcome as in conciliation then the parties can hardly complain if that is what they wanted and contracted for. It must be a matter of choice for them whether or not such a process would be valuable to them. On the other hand, it might be disconcerting for the parties to discover that this is what the mediator offers, without prior warning. Such mediation techniques have value in respect of social disputes and may be more useful for final account disputes than for the early stages of construction projects, since by taking the matter out of the hands of the parties, a dissatisfied party may find it difficult to subsequently maintain relationships with the other party. However, such an approach can be useful for those who sense that they are in the wrong to justify making concessions to their superiors.
- b) If by evaluative one means inviting the parties to engage in a reality check, brainstorming potential liability and judicial outcomes and factoring those considerations into their negotiations there is no reason why this should risk damaging relations. The parties remain in control at all times of the terms of the settlement. However, it may equally be beneficial to explore what the perceived cause of the problem is and potential solutions. If the parties can arrive at an agreed solution and a negotiated share of costs / responsibilities there may be no need to go down the line of evaluating litigation risks.
- c) Whether facilitative or evaluative techniques are most appropriate depends very much on how and why the parties have arrived at mediation. Cooperation may well be the basic starting point for on-going partnership negotiations but if relations are already strained a more robust approach may be needed.

#### **Is evaluative mediation more appropriate than facilitative mediation for end of project payment disputes?**

To the extent that facilitative approaches, as propounded by Fisher et al, concentrate on wider on-going commercial interests and relationships, the validity of such an approach is dependent upon whether or not there is likely to be a future on-going relationship. This is closely linked to the concept of fairness in mediation and equality of bargaining power. The danger is that where one party needs the other but not vice-versa, the facilitative approach emphasises the need for one sided compromise. If the mediator highlights the fact that one party has the other over a barrel, this is likely to fuel antagonisms. Whether the evaluative or facilitative approach is adopted, much of the skill of the mediator is in creating the correct climate for negotiation, taking the temperature out of dialogue and opening up minds to avenues of discussion that might lead to settlement. Where neither party wants or needs an on-going relationship, personal interests rise to the fore, leaving evaluative techniques as the primary tool for the mediator. This is particularly so where one party is in or close to receivership or where much of the burden of settlement will be borne by a third party insurer or investor.

#### **Should evaluative mediators have subject expertise and are non-expert facilitative mediators less effective?**

The question as to whether or not a mediator needs to be an expert begs the question as to expertise in what? Firstly the mediator should be experienced and skilled at mediation. Further than that there may be expertise in the industry and or expertise in the settlement of and legal aspects of settlement in that industry. These are not one and the same. Which might be called for depends upon whether the disputed underlying issues are technical or legal/contractual or a bit of both. Often evaluative problem is reliant on the mediator having the necessary level of understanding to prompt discussion and evaluation in the first place. However, the big danger is of the so-called expert who thinks he knows the answer and is hell bent upon imposing it upon the parties and letting them know that he is the superior force in the equation.

The problem for a mediator who does not know much about the underlying industry and relevant legal issues is that he will be unable to direct the parties towards relevant factors they need to explore. Any efforts he makes to gaining an insight into issues will be reliant on the persuasive talents of the parties, which may not be equally effective, resulting in lopsided negotiations and will what ever else, use up valuable time that could better be used to develop a momentum towards settlement. Loss of momentum can be fatal to negotiations.

## MEDIATION METHODS FOR MEDIATORS & PARTY REPRESENTATIVES

### Is mediation dependent on the parties being reasonable?

*“If mediation is the civilised way for reasonable folk to settle disputes, why have the English failed to enthusiastically embrace it?”*

- Is mediation all about persuading the parties to a dispute to be reasonable?
- If so, what is so unreasonable about falling out with someone? and
- What is so unreasonable about refusing to compromise?
- What, if anything, can mediation offer faced with a refusenik?

The decision to go to law to settle a dispute is a major step, not to be taken lightly. Litigation is an expensive business. It involves entering into the arcane world of the lawyer, a daunting journey of ritual and formality, guaranteed to sever all social ties between the erstwhile protagonists and for all these reasons best avoided at all costs. The journey is taken, however reluctantly, by those who having adopted (wholly reasonably from their individual perspectives) diametrically opposed and irreconcilable views, about the extent to which one or other of them should bear legal/financial responsibility for the consequences of an event or course of conduct. The task of fairly allocating responsibility between the parties is handed over to an impartial referee, for justice to be done.

At the end of the trial a victor will emerge. One party's view will be vindicated and he will have proved his point. The other's views will be shown however understandably or reasonably held to have been misconceived. A high price will have been paid, financially and emotionally for this enlightenment, but it is the time honoured and proper way of resolving such matters. The vanquished will have to abide by the outcome, irrespective of whether or not he acknowledges any wrongdoing. None of that will make any difference, since whatever else the matter will have been resolved and brought to an end.

Much is likely to have gone before. A problem having reared its ugly head, the claimant will have approached his adversary pointing out what concerned him. Only after failing to receive a response, or what he considered to be a satisfactory reaction, will the claimant have turned to his lawyers for assistance. The lawyer in turn will have taken steps to ensure that a dispute had indeed crystallized and will afford the other party one further opportunity to make amends. Only then will a timetable be put in place for the final show-down when battle will be joined in the judicial arena.

Between filing of writ and donning of gloves, a warm up bout between sparing lawyers, (under the watchful eye of the CPR 1998 case managing judge, bare-knuckle fighting and Queensbury Rules being displaced) will set the scene for what is to come. Whilst absent the knock-out blow, this is no mere shadow boxing show; with a sharp left to the payment into court and a solar-plexis crushing counter offer, delivered under the shadow of costs following the event, the lawyers play to the client gallery with such intimidating force that only the bravest of the brave do not succumb to a tempting pre-trial settlement. The commitment of both parties to the reasonableness of their respective cases is tested to the full.

By the time the dour portals of the court room are breached by the valiant few that brave the pre-trial rituals, the protagonists will have completely reinforced their views and self beliefs in the righteousness of their stands. To flinch in the line of fire and concede defeat would be outrageous cowardice: to waiver now and compromise a major loss of face: to the victor the spoils, to the loser the honour of going down fighting. Such was the way of our adversarial civil trial process, befitting of all true-blooded Anglo-Saxon.

A new day dawns. The moon waxes dim on the long since faded Empire where the sun once never set. The brave new world of the shining new European liberal elite rises high over the mid-day sky, heralding in an era of consensus and reasonableness, banishing mediaeval trials of strength and country-side like sports, to the unhallowed halls of history, the psychological scars and humiliation of defeat in battle an unacceptable price, too high to pay for the sophisticates of our modern age.

And so there was mediation, the all-conquering dispute settlement process of the age of reasonableness and consent. No more lawyers and bewigged judges - robes and ermine cast to the closet, our learned friends embraced honest livings at last and so we all lived happily ever after, guided to the light of fair and reasonable settlements by facilitators who helped us to become more pragmatic in outlook and to identify and value “significant” wider mutual interests.

## CHAPTER ONE

### INTRODUCTION

Born in the Southern States of the US, the ADR / Mediation Movement<sup>4</sup> came of age in the late 1980's and set out to conquer the world in the early 1990's. The global commercial and legal community has been exposed to ADR for over twelve years. The global pioneers of ADR have done a superb job of expounding the benefits and virtues of ADR to government, relevant sectors of the commercial community and to legal practitioners. Despite all this, the take up of mediation outside the US has been poor.

Certainly mediation is settling commercial disputes, but not in anywhere near the numbers required to be able to assert that the process is making a significant contribution. The proclaimed benefits of mediation are not in doubt. Where the process works well the benefits are plain to see. It has the ability to provide party autonomy and control over the shaping of a settlement. It can indeed result in the desired "WIN/WIN" outcome avoiding the inevitable adverse consequences of "WIN/LOSE" awards that flow from third party settlement processes. It is a private, informal, non-legalistic process and maximises the potential for the preservation of on-going relationships between the disputing parties. It can be cost effective and timely. If the aims and philosophies of ADR are indeed well founded, why has the movement up to date failed to make the progress that it should have made, given its significant advantages over traditional third party dispute settlement processes?

### DOES MEDIATION NEED MORE TIME TO BECOME ESTABLISHED GLOBALLY?

It is commonly thought that because mediation involves such a major change in mind set for both disputants and the legal community, that it will take time to become established. Certainly in the early days no one expected instant results and the early pioneers accepted that any career investment in mediation training and provision was essentially a long-term project. How much time however is needed for the process to become established?

There is now a widespread general knowledge of the existence of and the benefits of Mediation, not only in the legal profession but also beyond in commerce and industry. Innumerable seminars, workshops and demonstrations have been held for industry and the legal profession. In addition many University graduates have been exposed to the benefits of the mediation process. After twelve years of such exposure mediation might be expected to have made a major break through, particularly in the UK where it has attracted a large number of adherents.

During the same period of time, the Dispute Review Board (DRB) process has acquired critical mass, making a significant contribution to the settlement of construction disputes, viewed in terms of capital investment programs subject to the DRB process globally. The DRB process is entirely voluntary and has not benefited in any way from statutory intervention as it has made its progress onto the world stage. Why has the DRB process made more progress outside the US than mediation? The DRB experience indicates that it is not necessarily due to a lack of time for the process to mature, or because there has been an absence of positive statutory or judicial intervention. If this is indeed the case it would appear that the answer to mediation's lack of penetration of the market must lie elsewhere.

In the UK in an even smaller time frame, construction adjudication has been established as the primary method of settling disputes in the industry. Clearly the statutory support for adjudication has had much to do with this, but the 1998 Civil Procedures Rules have also lent considerable support to mediation in the UK. Increasingly mediation is being advised by judges, as part of the new case management process. Does mediation need even more legislative support, along the US lines of court ordered mediation? If so, where does this leave the international community, which is less likely to benefit from supportive legislation?

Let us not detract from the successes of the mediation process. At a social level, pioneer community mediation programs appear to be producing interesting results. Family mediation has an important role to play. The insurance industry is making progress in developing mediation processes for the settlement of multi-party disputes where both claimant and defendant are insured with separate carriers who have an interest in the outcome. The focus here is rather on the basic commercial/contractual civil dispute.

<sup>4</sup> In the present context, ADR is used as a synonym for Mediation, rather than as a cipher for all forms of private dispute resolution outside the courts. It differentiates between 3<sup>rd</sup> party dispute settlement processes such as arbitration, litigation and mediator assisted negotiation processes.

## MEDIATION METHODS FOR MEDIATORS & PARTY REPRESENTATIVES

### IS MEDIATION AN UNWANTED ALTERNATIVE?

Mediation provides an alternative to third party settlement processes such as adjudication, arbitration, expert determination and litigation. The parties agree the terms of a settlement rather than have a settlement decision imposed upon them by a third party. Given mediation's relatively poor performance globally, is it an unwanted alternative? If this is the case, why is it not wanted?

- 1) Is it that US Mediators are superior, that is to say, that there is something about the way mediation is practiced globally that makes it unattractive to commerce and industry?
- 2) Is it that the US culture is uniquely suited to mediation, that is to say, that there is something distinct about the American psyche, which renders them more open to the benefits of mediation than foreigners?
- 3) Or, are the benefits of mediation peculiar to the US judicial system, that is to say, that an essential jurisprudential factor which makes mediation viable in the US is lacking on the global scene, depriving it of effectiveness?

Let us be clear about what is being evaluated. An essential role of the legal advisor is to weed out unmeritorious claims. Many meritorious claims will be rapidly settled by the other side upon receipt of the "solicitor's letter" warning of legal action if satisfaction is not forthcoming. Failing that, the mere issue of a writ is not an assured prelude to trial. Pre-trial settlement is the norm for commercial disputes. Only a small percentage of disputes proceed to trial. What impact, if any, does mediation have in such circumstances? Are some of the successes accredited to mediation false attributions, since settlement would in the past have been achieved by direct negotiations between the lawyers? If this is the case it is arguable that mediation has simply increased the cost of settlement. Such increase could be justified however if it can be shown that the mediation produces better and fairer settlements.

For present purposes, any analysis of the contribution of mediation to dispute settlement has to focus on the extent to which mediation reduces the percentage of disputes going to final judicial/arbitral determination rather than on the role of mediation as a variant on traditional pre-trial settlement. None-the-less, some of the following observations about why disputes do or do not settle will apply equally to pre-trial negotiation settlements and to mediated settlements.

### 1 Superior US Mediation Practice

The question here is not whether US mediators are superior as individuals, but rather as to whether US mediation methodology is superior to the techniques applied outside the US. Is there a right way to mediate, and if so what is it?

The styles and modus operandi of mediators are legion, but for present purposes let us consider three broad general categories, namely the "*Interests Based Mediator*", the "*Evaluative Mediator*" and the "*Pseudo-judicial Mediator*". The principal form of mediation currently used in the UK is interests based. It is submitted that whilst this form of mediation has an essential and valuable role to play in community and social mediation, particularly if there is nothing concrete to litigate effectively making it "the only game in town", it is not the most appropriate vehicle for commercial mediation. It is further submitted that the inappropriate use of this form of mediation has done much to inhibit the use of mediation in the UK for the settlement of commercial disputes.

*The Interests Based Mediator* invites the parties to look beyond the immediate disputed issues to consider other reasons for settling the dispute that could produce long-term benefits. In particular, the detrimental impact of the dispute on continuing relationships often plays a central role. By healing rifts in their relationship the parties are then able to participate in mutually beneficial projects, which rapidly offset any short-term sacrifices necessary to achieve a settlement. In the context of a family break up, the need to cooperate with ex-partners in post separation child-care arrangements is compelling. Whilst counselling may heal rifts in relationships, the objective of family mediation is not to repair what is lost but rather to act as a communications vehicle for the redistribution of shared assets and the sharing of ongoing mutual obligations. It is often the case that the original cause of social feuding is petty and insignificant. The feud is fuelled and deepens because of the antagonistic behaviour of the parties. Social rifts between people who share a close space, be it family or neighbourhood can be highly detrimental to the well being of their local society. Mediation facilitated inter-partes communication can break the demonising cycle and promote toleration.

## CHAPTER ONE

The model only works on the premise that such wider and more valuable benefits exist and are desirable. If one or other of the parties is implacably opposed to a future relationship or does not value the preservation of the relationship or any other asserted wider interest, then the method becomes unviable. It is impossible to list all the forms of wider interest that can impact upon a dispute. Much depends upon the facts of each individual case. Such wider interest includes for instance the need by the parties for privacy and the maintenance of commercial/trade secrets that could be prejudiced by a public trial.

Primary importance is accorded to the need to reach a settlement. Settlement becomes the holy-grail. Frequently the parties are made to feel that they have in some way failed and have acted in an unreasonable manner if a settlement is not reached. Avoiding the formality of a trial and the stress and disruption inherent in the lengthy litigation process all figure large in the persuasive tool kit of the interests based mediator. It is in the interests of both parties to reach closure at the earliest possible stage so that they can get back to normality and concentrate on running their lives and business without having to factor in the unpredictable consequences of the trial.

For the stout hearted none of this may be sufficient to justify making unwarranted concessions to the undeserving, simply to make the matter go away. I am mindful of a meeting I had with a senior partner of a local practice who had days previously travelled up to London for his first and self-avowedly last mediation. It had he asserted been a waste of his time and his client's money. Thirty minutes into the mediation it had become apparent that the central purpose of the mediation was to brow-beat the parties into a settlement based on splitting the difference. His client would have none of it. They promptly terminated the mediation. My mission to espouse the benefits of mediation fell on deaf ears. Having set himself firmly against the mediation process, no amount of assurance that not all mediations are like that would ever persuade him to take a chance on the process again in the future.

*The Evaluative Mediator* concentrates on the potential judicial outcomes and invites the parties to consider the risks inherent in proceeding to trial. The process is at its least effective when social issues and relationships alone lie at the heart of a dispute, since there is little tangible to evaluate and the matter may well not be justiciable in the first place. It is at its most effective where commercial issues are involved and the consequence of a failure to mediate will be litigation. Indeed, it is towards this type of dispute that this article is directed. Mediation cannot in the strictest of senses aspire to delivering up justice, since the outcome is a settlement agreement, not a handed down judgement. The aim is to facilitate a fair settlement, but what is meant by the word "fair"? The mere agreement of the parties to a settlement cannot be a measure of fairness. It merely demonstrates an absence of coercion. Fair must be measured by other means.

At the outset of a mediation the parties will inevitably be poles apart in expectations. The task of the mediator is to narrow that gap until a point is reached where the expectations of the parties are brought into close proximity. The Evaluative Toolkit involves evaluating or "guesstimating" the likely outcome of a trial. Both parties are invited to consider the highest and lowest potential awards that might arise out of litigation and the likelihood of achieving them. The strength of both parties legal argumentation, the reliability of witnesses and the difficulty of discharging the burden of proof all play a part in the equation. A little generosity can be squeezed out of both parties on the basis that a settlement now will avoid further legal costs. Thereafter negotiations commence in earnest with "do-able" concessions being made by both sides to broker a settlement on terms that the parties can live with. In the final analysis the parties have to choose whether or not to settle for the guaranteed "bird in the hand" or whether to gamble, go for broke and litigate in the hope of securing the "two in the bush."

*The Pseudo-judicial Mediator* takes the initiative in proposing and imposing a solution (or at the very least uses his status and prestige etc) on the parties. This model owes much to the conciliation process or alternatively to expert determination and whilst it no doubt suits the type of disputants who essentially want to be told what to do, relieving them of the onerous burden of making a decision, one wonders whether or not the parties should rather make an overt choice to submit the dispute to adjudication, arbitration or expert determination in the first place.

I am reminded of the mediator who over a period of months took it upon himself to act as an investigator for both parties in dispute over a design and build contract. Under his advice and guidance a settlement was

## **MEDIATION METHODS FOR MEDIATORS & PARTY REPRESENTATIVES**

eventually concluded. For an adjudicator or arbitrator this would have amounted to improper conduct. He developed the legal and evidential case for both parties, filling in the gaps on their behalves. The role was less mediator and more independent consultant, minus the power of expert determination. What the process highlights is the value of an independent third party recommendation, which enables the parties to sell the outcome to interested parties and stakeholders. A litigant may have a problem justifying the terms of a pre-trial settlement to superiors, shareholders and in the case of a public office holder, the electorate. The mediator can provide a shield to hide behind and the recommendation of the pseudo-judicial mediator provides the most secure of shields.

All three forms of mediation are practiced both in the US and beyond and have supporters and detractors. It is possible to point to both the successes and failures of each method. The global mediation community has engaged in a destructive debate about which method is correct. Thus, at a recent ADR Forum, the writer was informed by an esteemed colleague that he "had no truck with these evaluative mediators." It is submitted that it is a mistake to demonise a particular approach to mediation. In appropriate circumstances, all three forms of mediation are perfectly valid methodologies. The point is, that each method lends itself to particular types of dispute. The successful application by a family or community mediator of interests based methods does not prove that interests based mediation is the best form of mediation. It merely shows that it is the most appropriate model for that form of dispute. If that is the only form of dispute that the mediator handles then that is the only form of mediation he or she needs to become skilled at.

However, if a mediator operates a multi-disciplinary practice, there is a need to be skilled in all three variants and to apply the appropriate methodology to the dispute at hand. Some mediators successfully do this, but it is submitted that dogma and a commitment to a particular brand of mediation has inhibited the growth of mediation on the global scene, resulting in dissatisfaction with the process by dissatisfied parties to mediations who have been subjected to an inappropriate methodology for the conduct of their dispute. Using all three methods during a single process enriches the process, increasing the number of persuasive tools available to the mediator and thus increasing the potential to reach a successful conclusion to the dispute. Wider interests are relevant to the evaluative process, since they provide additional benefits to be put into the equation, though they might well be insufficient in themselves. Combined with a realistic but perhaps rather tight compensation package, they could be sufficient to tip the balance towards settlement.

A recent "successful" community mediation that has been brought to my attention illustrates quite dramatically the dangers of settling for the sake of closure. Members of a community that had allegedly suffered from health threatening pollution commenced legal action to recover compensation for ailments attributed to the pollution. Rather than mount over a hundred individual tort actions before the court, mediation offered a useful mechanism for dealing with this class action. Some individuals had apparently suffered a great deal whilst others had only suffered minor inconvenience. The larger group was thus split into a number of distinct groups, each of which chose a representative to attend the mediation. At the mediation these representatives were persuaded by the mediator to select one of them to act as negotiator for the whole and to grant the representative authority to that spokesperson to settle for the whole. It was further agreed that to simplify proceedings the settlement sum would be divided equally between all the claimants, irrespective of the extent to which they had suffered from the pollution. The representative, whilst an outspoken and forceful character, came from a group that had suffered minor inconvenience. Contrary to the advice of the group's solicitor, when the going got tough during the negotiations, the representative spokesperson made major concessions. The global settlement sum was heralded as a significant victory. Those that had suffered minor harm received a fair to generous settlement but disturbingly, the rest received grossly insufficient compensation to enable them to cope with the consequences of the pollution.

The result is a community where mediation is now considered to be a dirty word. The polluter got off lightly and had much to celebrate. It is submitted that the mediator's persuasive toolkit was somewhat lightly packed and that a more studied approach would have produced a genuine WIN/WIN situation for all concerned. It should finally be noted that since the settlement included a finality clause and a confidentiality clause, there is no way back for the disgruntled claimants.

## CHAPTER ONE

There are some highly impressive mediators in the global community that have the ability and flexibility to call on each of the above mentioned techniques as and when required. The relatively small uptake of commercial mediation has inhibited the creation of a broad panel of experienced mediators on the global scene. In the US mediation is a major industry, which has consequently produced a large number of highly skilled practitioners. The chicken and egg question is whether global commercial mediation can take off thereby stimulating the growth of a sufficiently large cohort of high calibre mediators, or whether the mediators need to be in place first to promote confidence and growth in the market.

### **2 Is US culture uniquely suited to Mediation?**

In order to answer this question it is necessary first to determine what it might be about mediation that could be so uniquely accommodated by US culture. Mediation attempts to get the parties to step back and by separating the personalities from the issues, adopt an objective view, thereby facilitating a reasonable, pragmatic settlement of the dispute. If the Americans are more open to persuasion by mediators, is it because the great mixing bowl had produced folk who are more reasonable & pragmatic than the rest of us?

**Reasonableness :** Assuming the ordinary fellow on the Clapham Omnibus was indeed an Englishman and not a visiting American, the assertion that the English unlike our cross-Atlantic cousins, lack phlegm and are neither reasonable nor pragmatic, runs contrary to the stereotype. The assertion also seems to imply that whilst it is the time honoured way of settling disputes, third party dispute settlement is now the preserve of unreasonable disputants, all other disputes having been reasonably settled by negotiation. Is it in fact fair to categorise one or other of the litigants as acting unreasonably?

It is submitted that whilst we can all point to parties who have acted in a clearly unreasonable and unrealistic manner, the majority of disputants are not unreasonable, even though a court may ultimately rule against them. However, the reason a dispute has arisen in the first place is because the two parties become attached to their viewpoint. From their own perspective it is reasonable for them to hold that opinion. As time passes they are likely to become more and more attached to that opinion and less prepared to view the situation from the other party's point of view.

The vital moment that needs to be seized in order to end a dispute before it really gets a head of steam occurs very early on. Once legal advisors have been appointed by the parties the time will have passed and since mediation tends to come on the scene at an even later stage, it is likely to be far too late to prevent a hardening of attitudes. The case for ensuring that, where mediation is viewed as a viable method of resolving disputes, that it is mandated at the earliest possible stage by a contract provision is compelling. In the US the prevalence of mediation clauses is widespread. By comparison, the device is rarely used in the UK. Whilst the legal profession is very aware of mediation, the process has, with a few exceptions, hardly penetrated the consciousness of global commerce and industry.

Where a dispute has developed and had been referred to a legal advisor, if the opinion of a client is very misplaced, it is likely that their legal advisor will quickly point out to them that they have a problem. Otherwise, far from being patently unreasonable, the reasonableness of the party's view is reinforced by the support of the legal advisor. The barriers to settlement have by this time been firmly established and to dismantle them will require some form of catalyst.

Most commercial disputes are about who must shoulder the financial burden for the consequences of an unforeseen event, asserted wrongful act or omission. From a business stand point, dispute attrition makes business sense and is in that sense perfectly reasonable even though it may be viewed as socially unreasonable behaviour, which is altogether another matter. It may be unfair on the deserving claimant to duck one's financial responsibilities. Although an abrogation of social responsibility, there are strong commercial benefits to be gained from playing the system to one's advantage. If a cash strapped claimant cannot afford to take the matter to trial there is little incentive for the defendant to mediate a settlement.

**Pragmatism :** Americans are renowned for their hard nosed, non-sentimental approach to business. Does this have an impact upon their susceptibility to persuasion by mediators? Whilst the absence of sentimentality in business is probably a universal phenomenon, the extent to which commerce in the US takes into account the interests of shareholders and stakeholders may result in corporate defendants in particular being more circumspect about litigation risks that could impact upon stock values and dividends.

## MEDIATION METHODS FOR MEDIATORS & PARTY REPRESENTATIVES

The US is considered to be a highly litigious. The reason for this is that the consumer plaintiff plays for very high and often achievable stakes. The judicial system favours the consumer against the corporate defendant. By contrast, there is little to indicate that US corporations are litigious. In reality the Corporate Boardroom is likely to be the exact opposite and litigation adverse. This is where the human factor, if permitted, can impact upon the decision to litigate or settle. In the larger organisation therefore, the decision may well depend upon the level within the corporate hierarchy that the decision is taken. Two distinct factors are at play here. Firstly, what degree of influence does the central character in the dispute exercise and secondly, is the decision made on a strategic corporate basis or is down to an individual to call the shots?

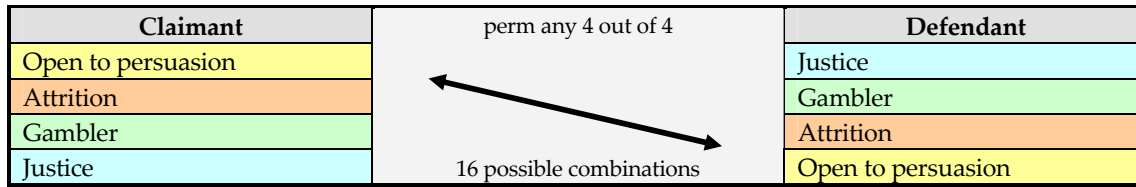
Who is financially responsible will depend upon a decision of facts and law. Independent advice is available from legal advisors. Advice about best industry practice and information about the facts surrounding the dispute are often provided by a character involved in the incident such as the site manager. Since that individual's professional standing is at stake, he is likely to be defensive and construct a self-supporting factual case. Whilst it might not stand up in court, the legal advisors will have difficulty testing it thoroughly. On the factual basis as presented to them the lawyers will provide a favourable prognosis for litigation. When it comes to negotiations, the very same character, as the person with best local knowledge and understanding of the issues, is often assigned to accompany the legal representative. The result is a disaster for the negotiation. Self denial takes centre stage as the manager strives to maintain face. Whilst most commercial negotiations avoid emotional factors, this is one instance when they play a central role. Ideally an independent internal inquiry should be conducted to get an objective take on the facts of the matter but this rarely occurs, particularly since senior management in many organisations automatically provides mutual support and solidarity to its own kind. The legal team will of course ask searching questions of its clients but too often they cannot penetrate the factual barrier constructed by the manager until it is too late.

Business is about competition and taking calculated risks. The choice to negotiate or litigate is likewise a calculated risk that panders to the competitive spirit. However, when deciding whether or not to litigate the businessman is playing outside his field of expertise. If the gambler instinct takes hold, there is the danger that the player will resort to bluff and brinkmanship in the litigation poker game, where the cards are drawn from circumstance, the lawyers act as banker and witnesses play the role of joker. Like a casino the odds are unfavourable and as with Russian Roulette the consequences of failure extreme, but once the game is afoot, drawn like a moth to a candle the game of "chicken" must be followed through. However, the pot is not provided by the player. It comes from the shareholders and other stakeholders, such as the employees and support industries that may potentially be ruined by an adverse ruling. It is remarkable how often clients only hear the positive messages from their legal advisors and turn a deaf ear to warnings with the result that many suits are pursued against the best advice of counsel, bolstered by false optimism and unrealistic expectations.

For some litigants the trial becomes a pursuit for "justice" which cannot fail to reward the unrighteous. The possibility of being proved wrong does not even enter the litigant's mind. The trial becomes a test of self-faith in the infallibility of the litigant, though strangely enough, the loser often appears to have the ability to subsequently quietly forget about that fact once judgement is made. Negotiated settlement is simply not an option for such a person. A Board of Directors is less likely to fall into this category. There is a case for depersonalising matters by ensuring that all decisions to litigate are taken at a board level.

**Conclusion** : By whatever means the parties get to mediation, once there the incentive to settle depends to a great extent on the personality of the parties. The parties may be open to persuasion, or to a greater or lesser extent settlement adverse, because on a sliding scale their principal objective is *attrition*, because they are *gamblers* or because they have total faith in themselves and seek *justice*. The latter are the toughest nuts to crack. Since settlement requires two parties who are open to persuasion, the chances of getting the parties to mediation and through to closure are limited as demonstrated in the following chart. Assuming the four categories apply equally to both claimants and defendants, there is only a 1 in 16 chance of getting the appropriate combination of parties who are amenable to settlement. Different combinations will result in quite distinct and different mediation dynamics, which are more amenable to one style of mediation to another.

## CHAPTER ONE



The model assumes that the four categories exist in equal measure, which is not likely to be the case. If the percentage of disputants falling into the un-persuadable category rises, the scope for successfully using mediation decreases.

In the construction industry, particularly with respect to disputes between contractor and sub-contractor, attrition is quite common. The contractor uses the sub-contractor's need both to continue trading with him and on the characteristic cash flow problems of sub-contractors, frequently brought about by the disputed failure of the contractor to pay promptly, to wear the subcontractor down.<sup>5</sup>

### 3 Are the benefits of mediation peculiar to the US Judicial System?

The principal distinctions between the US and most other jurisdictions is firstly that the many US States have court ordered mediation and secondly that the quantum of damages is set by the jury, rather than by the judge. What impact do these factors have on US mediation success rates?

**Court Ordered Mediation** : The Southern US States, recognising the potential for mediation to reduce the burden on the courts, were the first to introduce Court Ordered Mediation. The effect is to stay court proceedings until the parties have attempted a mediated settlement. If no settlement is achieved the case can be listed for trial. Whilst this has done much to bolster the US mediation industry, the legislation was introduced after voluntary mediation, both contractual and ad-hoc, had already become firmly established. It merely built upon and maximised the successes of the process. Voluntary mediation has been less successful in establishing its presence outside the US. The UK has sought, under the Civil Procedure Rules 1998, to augment the process by way of judicial recommendation, as part of the case management process. Whilst it is still early days, the courts are increasingly making use of this new power. It is submitted that there is little difference between a court order and a court recommendation. It takes a brave and arguably foolish counsel to risk upsetting the judge by declining to take up the recommendation. Both processes have little impact on the defendant, beyond the risk of a cost penalty following judgement. The primary target is the claimant, who may not be able to proceed to court and judgement until mediation has been attempted, or the period of the stay of action has passed.

**Civil Jury trials and quantum** : This is the one factor which is quite distinct from other jurisdictions and which impacts strongly on the way defendants conduct mediation and provides the greatest incentive to claimants to litigate. In the UK quantum is dealt with by the judge. Whilst it is down to the claimant to establish breach, causation and loss, The Judicial Studies Review Board provides clear and predictable guidelines for the quantification of loss in a wide variety of circumstances. The jury in the US has a far wider degree of discretion. Coupled with this, the US jury is often able to award punitive damages and frequently these far exceed the proven losses. Jury awards involving private citizens claiming against corporations generally bear little relationship to the actual losses sustained by the claimant. The award represents a "Glittering Prize" and a way for the individual to reap great rewards denied the ordinary citizen through toil and endeavour. It is hardly surprising that in such suits the corporation would prefer to negotiate a settlement. The risk of trial is extreme. This situation may not be sustained for very much longer however, for there is a significant movement in the US to limit the power of juries to award punitive damages.<sup>6</sup> It is quite possible that a level playing field for mediation is close by and this extraordinary advantage for mediation in the US may soon come to an end.

<sup>5</sup> Similarly, the poor financial situation of sub-contractors is regularly used to resist otherwise enforceable adjudication decisions, providing proof positive that a settlement would never be on the cards.

<sup>6</sup> See the BMW Case and now the State Farm Mutual Automobile Case 2003 where the Supreme Court overruled excessive punitive damage awards made by juries in Alabama and Utah respectively. Despite resistance from the plaintiff bar, reform is proposed on a regular basis to remove or restrict punitive damages.

## MEDIATION METHODS FOR MEDIATORS & PARTY REPRESENTATIVES

**Conclusion :** Whilst court ordered mediation coupled with a duty placed on the judiciary to use it to cut down trial listings is a recipe for guaranteeing increased participation in mediation, there is a danger that mediation could be ordered for the wrong reasons, i.e. limiting the judicial docket rather than by selecting cases where a settlement is potentially achievable. The result is merely to increase the ultimate costs of settlement unnecessarily and to even put access to justice out of financial reach of deserving parties. Used judiciously, the current CPR 1998 model could prove to be more than adequate. The jury trial incentive no doubt did much to promote mediation in the US and to enable it to become firmly established. It will be interesting to see how well mediation fares in the US if this potent abuse of justice is removed. Now that mediation is entrenched as a significant part of the US dispute settlement machinery, this writer anticipates that the process will continue to thrive, though volume may be adversely affected. Globally, if mediation is to succeed it will have to do so on its merits, and not off the back of this artificial incentive, since thankfully it is unlikely that the discredited jury awards process will ever be emulated outside the US. Since the mediation industry in the US grew apace with the development of the mediation profession the same pattern could be recycled globally. Mediation developed in the US through trial and error and gradually models of best practice have started to emerge. Provided these examples of best practice are universal, global mediation should be in position to benefit from the US experience, though there is much to be said in a domestic context, for learning by one's own mistakes, as opposed to the mistakes of others.

However, Mediation is not a defined process or an exact science. It has many variations so it is difficult for the clients to know exactly what it is they are buying into. There are a number of questions about best mediation practice that have yet to be finally resolved.

**Mediate-able disputes :** The problem that arises here is not about the types of dispute that cannot be mediated because they fall within the sole preserve of the judiciary. Rather the problem is about which lawfully settle-able disputes are in fact amenable to mediation. Both parties have to be prepared to mediate and willing to give ground. Mere doubts about the value of mediation by one of the parties can often be overcome by a skilful mediator during the course of the mediation. However, there is little that a mediator can do about a party who attends simply to see what, if anything at all, can be gained out of the process or to give an appearance of playing the game, but with absolutely no intention of conceding anything at all. The objective is essentially attrition, to wear the other party down and to encourage withdrawal. The party will either win or the mediation will fail. The interests based mediator, by placing great significance on the importance of reaching a settlement, becomes the unwitting ally of such a obstructive party, since the only opportunity for movement arises from encouraging the other party to make further concessions. By contrast the evaluative mediator is more likely to declare the mediation frustrated and terminate it.

**Joint and private sessions.** Some mediators favour only using joint sessions whilst others use a mixture of joint and private sessions or caucuses. The advantage of private sessions is that they afford an opportunity for the mediator to freely explore the strengths and weaknesses of both parties assertions, alternative grounds for settlement and the possible terms of a settlement without prejudicing the interests of either party. The disadvantage is that the mediator has to take great care to avoid any indication that he is acting as a mere delivery man or worse, as a spokesperson of the other-side. Why bother with a go-between when the parties could deliver the message directly themselves? Any sense of partisanship destroys trust in the mediator. Private sessions are an essential vehicle for dialogue in situations where the parties who cannot bring themselves to communicate directly with each other. However, frequently the only way to break an impasse is to bring the parties together. A party who may well debate ad infinitum with a mediator cannot, when faced with a directly delivered ultimatum, prolong a discussion with the other-side. A joint session can often speed up the negotiation end-game considerably, once a settlement is in sight.

**Client representation.** There is little consensus on whether or not lawyers and or party representatives should be encouraged to take part in mediation or not. For some legal representation is considered to be absolutely essential, whilst others consider that the presence of lawyers at the mediation represents a barrier to settlement. Mediation consultants are now a common alternative to legal representation in countries where legal representations at mediation has not been made the sole preserve of the legal profession, thereby denying non-legally qualified consultants a right of audience in the process.

## CHAPTER ONE

**Legally qualified mediators.** Again, as above, there are jurisdictions where only lawyers are permitted to act as arbitrators and or mediators. Despite the proclaimed ADR benefit of peer assistance and judgement, there is a school of thought that considers that the services of a lawyer are essential to ensure that justice and the interests of the parties are not prejudiced by lay participation.

**Mediator expertise.** Should the mediator be qualified and if so what level of qualification is required and in what should the mediator be qualified, mediation practice, the relevant area specialism under consideration or both? Mediation training courses range from a couple of hours theoretical introduction to extended courses with varying degrees of hands on practice sessions, assessed workshops, examinations and pupillage. Competence examinations provide perhaps the best measure of quality assurance, given that how much training is required depends a great deal on the prior abilities of the erstwhile mediator. Professional communicators such as lawyers and professional advisers are likely to need less training since their persuasive skills are already highly developed.

One school of thought maintains that the mediator is a highly skilled inter-personnel guru who can handle any dispute whatever the subject matter. From the interests based perspective this may well be so, but the same cannot be said of the evaluative mediator who needs to have a firm grasp both of the law and the industry context of the dispute. Equally, the pseudo-judicial mediator who coerces the parties into an unsound settlement may well expose himself to liability for duress and undue influence from a dissatisfied client. In 1998 a mediator who guided parties to a \$30,000 settlement was sued by the "successful" claimant, when subsequent claimants on identical facts were awarded six figure sums against the same defendant.

I once witnessed a mock mediation concerning a shipping dispute where it was evident that the mediator knew nothing of the shipping industry or of maritime law. Eventually a settlement was achieved, simply because everyone wanted to be seen to be playing the game. No charterer would ever have agreed to the terms. In reality the mediation would have failed. Anyone using that demonstration as a role model for mediation practice would quickly bring the process into disrepute, however well meaning or otherwise professionally qualified they might be,

**Length of mediation sessions.** There appears to be a miss-understanding of what goes on in the mediation process and what is required to enable it to work. The process is not a quick instant fix which can be achieved in an hour or so. The process is relatively quick but cannot be successfully conducted in prescribed quick-silver time. Whilst mediation frequently results in settlements in a mere hour or so, it is a mistake to schedule a very tight two or three hour slot for a mediation. During case management sessions, parties are often encouraged by the presiding judge to attempt a mediated settlement. Neither lawyer is likely to want to provoke the judge by disagreeing with the suggestion that mediation would be in their client's best interest. So, the parties rush off to a rapidly convened two or three hour late afternoon or evening mediation. The mediations invariably fail and the parties meet again in court a short time later. Why has the process failed? It is submitted that the short time scale is a significant factor. A short mediation session rather than a full scale mediation is proposed to keep the costs down and thus to sweeten the pill. The standard short slot mediation is run at a low fixed cost and the professional costs of advisors is kept to a minimum. However, if the process is to work, sufficient time needs to be accorded the process, so that the brain storming that goes on in the private session / caucus can take effect. If the parties, of their own accord, quickly reach a settlement, all well and good, but it is not possible to rush the process.

This also begs the question as to whether or not court advised mediation, which comes some time after the dispute has matured and the parties have become thoroughly attached to their viewpoints is not in fact too late for effective mediation. US Court Ordered Mediation comes very early on in the judicial process, shortly after filing of writ, and most typically within four weeks. Even better is the contractual mediation which can take place at a very early stage before a writ is served. The sooner the mediation the less attached will the parties be to their positions and thus more open to an invitation to reassess their position.

**The dispute cycle :** There is a well established school of thought that there is a natural cycle to the life span of a dispute. Eventually a dispute will burn itself out by dint of attrition or changing circumstances. However, this has little to do with justice or fairness and the notion that things should be left to run their natural course has nothing to contribute to the dispute settlement process. On the other-hand, in human relations there is an

## MEDIATION METHODS FOR MEDIATORS & PARTY REPRESENTATIVES

appropriate time and place for dealing with matters and in social disputes inter-partes communication may well be impossible whilst emotions are too raw. Whether or not time heals wounds, some space between the hurt and negotiations can be valuable. The danger is that too much time can have the opposite effect in that the parties attitudes can harden. The parties become so attached to their viewpoint that settlement becomes impossible and litigation/arbitration then provides the only possible way of achieving closure. The latter poses more of a problem than the former in commercial disputes, since emotion is unlikely to be a significant factor in commercial disputes. Therefore, for such disputes the sooner the mediation is convened the better thereby increasing the likelihood of settlement. Besides, there is no delicacy about the timing of a court or arbitral hearing, which is a purely administrative matter.

Dispute cycle mediators concentrate on shortening the cycle. The mediation enables the parties to address matters earlier than they would otherwise have done. The mediator allows the parties to thrash out the various aspects of the dispute at length, relying on attrition to wear down resistance. There is some merit in this approach, particularly where the parties have to carry third parties along with them and lacking authority to settle at the outset, have to take the various offers back to their wider constituency before returning to the table for further negotiations and hopefully towards final settlement. This is perhaps the only way to settle disputes where neither party is willing or compelled to submit to litigation, as epitomised by the mediated international peace agreements, industrial disputes and community disputes about planning and the environment with a strong political, as opposed to legal element to them. They are not however speedy affairs. They are likely to be expensive and very time consuming for all concerned.

It is submitted that a cost effective timely commercial mediation process should incorporate relatively tight time-frames for the mediation session, preferably one day, albeit a potentially long day may be needed, and that both parties should have full authority to settle from the outset. It is remarkable how deadlines can concentrate the mind. This accounts for the remarkable number of litigation suits that settle at the court house door, though it also conveniently ensures that the lawyers have been gainfully retained for a significant period of time. Set too early a deadline can cause a mediation to fail, but if scheduled to follow on closely behind a full evaluation and exploration of the risks and issues, as opposed to a prolonged debate between the parties about fault and liability which is most appropriately dealt with by a court and a judge who can deliver a decision, a deadline can be very effective. Once the parties have had their alternative to "a day in court" and got things off their chest, a window of opportunity arises to broker closure. If the opportunity is not seized upon then the negotiation enters a long haul stage and the whole value of mediation is lost. To continue with the mediation after that will at best be very expensive and at worst futile.

This is significant because it is commonly thought that mediation is a relatively inexpensive process. It is submitted that this is not necessarily the case. Certainly fixed price mediation schemes, particularly those subsidised by the local community and Universities are very good value for money for the parties. Great strides have been made with the development of electronic ADR. A number of organisations now provide electronic forms for the rapid submission of disputes and for inter-partes communications. Coupled with a rapid settlement process the development is welcomed, since otherwise the adage "justice delayed is justice denied" comes to mind. E-mediation in particular facilitates long distance mediation at minimal cost. However, because the process lacks the immediacy of face to face negotiations, there is a danger that the sessions can be spread out over an extended period of time. It is vital to preserve the momentum of the mediation process and set a tight schedule that prevents the dispute entering into the long haul syndrome, since otherwise, the initial savings on expenditure can be lost as the mediator/s fees mount up, hour by hour and day by day.

The time frame for successful mediation differs little from case to case, with a day generally proving sufficient for even complex commercial disputes. The cost of a mediation, if factored on a time rather than a value basis, is likely to vary little. Mediation therefore offers best value for the settlement of complex, multi-issue high value disputes. Contrary therefore to the common view that mediation is relatively inexpensive, it does not offer best value for lower and mid-range value commercial disputes. Whilst it may be justifiable to speculate a grand or so on mediation to head off a six figure law suit, fixed price arbitration or adjudication offers better value for a mere £20,000 dispute and an assured outcome.

## CHAPTER ONE

**The Role of the Court as Mediator :** A disconcerting US inspired concept doing the international circuit at present is case management mediation by the trial judge. This proffers the benefits of mediation and the CPR 1998 case management reforms in a tempting single package. Only time will tell how well this variant on mediation works but it augurs badly for the private mediation market. Already there are those that have expressed disapproval of mediation/third party determination processes where the mediator becomes a judge in the event of a failure to broker a settlement. The dangers inherent in pre-trial mediation where the judge and the other party become aware during the joint mediation stage (caucuses are in the circumstances strictly taboo) which would not be disclosed during a trial, are highlighted in *Glencot v Barrett*.<sup>7</sup>

It would appear however, that the judge does not actually attempt a full-blown mediation. Rather, having had the benefit of perusing all the pre-trial submissions, the judge provides the parties with an indication of where he thinks the case is going, and invites the parties to negotiate on that basis. There is some logic in this approach, since the parties are provided with a very realistic reality check. It takes a large amount of the guesswork out of the evaluative process. The downside is that in order to do so the judge may give an appearance of having prejudged the case even before the trial has taken place. This is quite distinct from the Interim Arbitral Award, which is a full mini-trial of a single issue such as jurisdiction or security for costs and from the practice of construction adjudicators to request more information about an aspect of the dispute from both parties, whilst confirming that other issues have already been settled, since in both instances there is no issue of pre-judgement. From this writer's perspective the jury is still out on this novel mediation model. It will be instructive to find out how those jurisdictions currently trailing the process get on with it.

### CONCLUSIONS

We have examined a wide range of mediation practices here. Each of the variations examined has something to commend it, particularly if applied in appropriate circumstances. The problem is firstly that many mediation practitioners prefer certain variations to the exclusion of others, rather than utilizing the most appropriate technique in any given situation and secondly that with the exception of the repeat player returning to a known quantity, it may be impossible for the parties to know what form of mediation awaits them when they commit to mediation in a contract and/or ultimately submit to the process.

That said, over a period of time the reputation of the leading mediators in a particular field will get to be well known. Leading commercial mediators are often jointly invited by the parties to act as mediator. Thus as with arbitration, there is an emerging clique of, for instance, Insurance Mediators that are the preferred choice of the insurance industry and P&I Clubs.

Mediation is an extra-ordinarily adaptable concept. New methods of mediation are continually being developed, meeting with greater or lesser success in the field. A recent experiment in med/arb with a difference involves the mediator taking time out after the initial, albeit extended joint session to draft an arbitral award, which is then placed in a sealed envelope. If the parties fail to broker a settlement within a specified time the mediator / arbitrator delivers the award. This puts pressure on the parties to fashion a settlement on their own terms and isolates the arbitrator from allegations that the award was influenced by things heard in private session that were not aired by the tribunal. On the other-hand, the award will be the result of a very quick sniff at the underlying facts and arguments during a short and necessarily limited hearing process. This may not be as bad as it at first sight appears, provided that the parties have made extensive paperwork submissions and exchanges, and from this perspective differs little from a paper only arbitration.

It would also appear that the fears expressed by the court in *Glencot v Barrett* do not appear to excise the commercial world to the same extent as it has the judiciary. It is not uncommon today for the parties to commercial mediation to invite the mediator to turn arbitrator / expert determinator and pronounce a winner where the mediation has failed to deliver a settlement. Closure is on times more attractive than the prospect of the dispute rumbling on into litigation and the parties are frequently prepared to take the risk and deal with the consequences when dispute fatigue sets in. They are essentially saying to the mediator "*We can't decide, so you decide for us.*" Given the prospective costs, time and energy involved in continuing the dispute it is a perfectly logical commercial option.

<sup>7</sup> *Glencot Dev & Design Co. Ltd v Ben Barrett & Son (Contractors) Ltd* [2001]BLR 207. TCC

## MEDIATION METHODS FOR MEDIATORS & PARTY REPRESENTATIVES

### MEDIATION AND LITIGATION OUTCOMES CONTRASTED

Mediation has been described as a “WIN/WIN” process, whereas litigation is considered to be a “WIN/LOSE” process. What does this mean and why ?

In litigation a third party arbiter, that is to say a judge or arbitrator, is asked to decide a specific question, namely which of the parties is responsible for a loss causing event. Once this is determined the arbiter will proceed to assess how much money, if any at all, is due to be paid by the person responsible to the other party. Frequently the loser will also be required to pay the costs of the trial and the legal expenses of the other party. In effect litigation results in a “WINNER” and a “LOSER”. There is no middle ground. Whilst there are legal mechanisms that can reduce the award, perhaps because the winner has in some way contributed to his own losses by for instance failing to take steps to mitigate or limit the amount of harm suffered after the event or by failing to take precautionary self protective measures which resulted in more harm being suffered than would otherwise have been the case, these factors apart there is no scope for the arbiter to share the costs of the problem between the parties. Put bluntly, it is not the job of the arbiter to cut the cake. One party gets the whole cake. The other party gets nothing. There is no requirement that the decision be either “fair” or “just”. It has been famously stated by a judge in session that “This is not a court of justice. It is a court of law.”

The arbiter makes a determination of fact, applies the applicable law to the facts and circumstances of the case, as proved before him in the court or tribunal and thereby produces a decision or ruling. The scope for decision making by the arbiter are limited by the law. If the law is just and fair then there is a chance that the decision will be but that is not always the case and where it is not it is unlikely to be the arbiter’s fault. Why might it be that the law cannot guarantee a fair or just outcome ? A number of examples will suffice to show how this can occur.

**Wining on a technicality** : As discussed above, the circumstances when an arbiter can apportion responsibility under the law are severely limited and restricted. However, frequently neither party has acted in a particularly irresponsible manner and the loss causing event is simply the result of a combination of unfortunate circumstances. In the absence of a clear contractual allocation of risk for the loss neither party is likely to be prepared to shoulder responsibility and frequently comes to believe that the loss must be due to some form of failure or wrong doing by the other party, often fuelled by hindsight. In effect the allegation becomes “If he had done X the problem would have been avoided, so it is his fault.” Foreseeing the need to do X at the time may not have appeared prudent, though clearly after the event it is easy to see why it would have been a good thing to do. The decision of the arbiter in such circumstances is likely to appear to be an arbitrary decision based on legal technicalities. Whilst a fair result might be to share the responsibility evenly between the parties, as discussed above, this option is not available to the arbiter.

**The unhelpful trading partner** : Many loss causing events are the result of a combination of actions and events which both parties have to a greater or lesser extent contributed to. Often one party could have done something to assist the other party but had no legal duty to do so. The failure to assist may have been due to an oversight, self protection or because it would have involved financial loss or inconvenience, albeit perhaps relatively minor compared to the problem it would cause the other party. Whilst perhaps harsh or callous it may well have been perfectly lawful to fail to provide assistance. In the absence of wrong doing the law cannot apportion loss between the parties to take account for such harsh or careless conduct. The law will limit itself to apportioning loss on the basis of proven wrong doing alone.

**Proving facts** : The ability to establish in court what actually occurred is fraught with difficulties. The tribunal decides on the basis of what is presented to it what in the opinion of the court occurred. There is no guarantee that this will be what actually occurred. The tribunal draws a conclusion on the basis of the credibility of the witnesses and their ability to recall and describe the events. A witness with a poor reputation for reliability may not be believed by the tribunal even if telling the truth. Witnesses frequently have a distorted view of events which they portray to the tribunal in a very convincing and compelling manner. Time has a tendency to play tricks on memory. The party who has kept the best records or events and perhaps engaged in the most written communication has a distinct advantage in court.

## CHAPTER ONE

**Quantifying loss :** Establishing the amount of loss that has been sustained as a result of the wrong doing of the other party is a question of fact for the tribunal. Evaluating the loss is more of an art than a science and the outcome is often far from predictable. The failure to recover sufficient damages in court to cover the winning party's perceived losses because of problems in proving the losses often leads to dissatisfaction with the judicial process.

**Interpretation of contracts :** The precise meaning of the terms of contract is a question of fact for the tribunal. Both parties may be convinced that they know what the contract meant and assert that the contract provides in their favour. However, the contract can only have one meaning and hence, even though the decision may appear arbitrary and based on a technicality, one party will inevitably lose. The loser is unlikely to derive a sense of justice or fairness out of the decision.

**Causation :** Many of the follow on consequences of loss making events are not legally recoverable. The law only allows a party to recover losses directly arising out of an event. Indirect losses can however frequently be far more significant for one or even both path parties and can outweigh the costs to either party of solving the problem quickly at minimal cost at the outset.

**Conclusion :** There are rarely any real winners in conflict. No one ever recovers all their costs and expenses from litigation, which is also emotionally draining and time consuming. Furthermore, litigation is disruptive and detracts from the real business of making money. Where it is clear that a party is in the wrong and cannot win, all that litigation achieves is to postpone the time when they will have to account for their wrong doing. An early settlement, even at full cost will save on legal expenses. The other party may well be prepared to accept a lesser sum in order to avoid the costs and risks of litigation and view the discount as beneficial particularly where it maximises cash flow at an early date. The mediator, by outlining the advantages of settlement to both parties, can often bring about a settlement in the most difficult cases and unlikely circumstances.

This is not to say that litigation is never necessary. Where the rights and wrongs of a situation are not clear the parties may only be prepared to accept the decision of a judge, particularly if the decision will help establish guidelines for future relationships. A loss resulting from a court judgment may be easier to justify to stake/shareholders or to superiors than a negotiated settlement on terms that might otherwise be open to criticism, and so a judgement is needed. Finally, where a wrongdoer is totally unwilling to take responsibility for their actions the other party may be left with no option but to go to court.

### **THE ROLE OF SUBSTANTIVE LAW IN MEDIATION AND LITIGATION CONTRASTED.**

With the exception of the rare "*Ex Aequo Bono*" equitable arbitration process where parties agree to an arbitrator settling a dispute on the basis of fairness without reference to law, courts and tribunals apply the law governing a dispute to the settlement of the dispute. Much time will be spent proving facts to the satisfaction of the court or tribunal. International trade and maritime law is complex. Legal advisors in such areas tend to be experts and charge a great deal for their services and judicial proceedings often involve protracted legal argument about the law. Going to law for the settlement of trade and maritime disputes is by common agreement an expensive business.

In a mediation the parties do not have to prove any facts to the mediator. Nor do the parties have to prove what the law says they are entitled to. The reason for this is because the mediator does not make a decision. A mediation settlement is based on what each party is prepared to agree. Often a party will pay more than he believes he is strictly required to pay under the law or agrees to settle for less than he believes he is legally entitled to. Unlike a court judgement, a mediated settlement represents what each party considers is fair, just or practicable and amounts to what they consider to be the best deal that can be achieved in the circumstances. Where the wrong doer is in severe financial difficulties and is not in a position to pay any award made against him there is a strong likelihood that an award will drive the wrong doer into bankruptcy. Apart from some sense of justice, the winner will reap little or no commercial benefit from the judgement. A settlement agreement however could include joint financial measures or even the terms of a take over, of mutual benefit to both parties. Courts and arbitrators cannot achieve such results.

The fact that mediation is not a judicial process does not mean that law has no role to play in the negotiation settlement. In fact law is crucial to the effectiveness of the process. The legal alternative to mediated

## MEDIATION METHODS FOR MEDIATORS & PARTY REPRESENTATIVES

settlement is the principal reason for reaching a settlement and the legal requirements that would be enforced at law set the framework for shaping the actual settlement itself. The courts are essential for the enforcement of mediation settlements.

Any mediated settlement, whilst inevitably not a mirror or what a court would award, is likely to be shaped by the legal rights and obligations of the parties, subject to concessions financed out of the avoided cost of litigation, rapid cash flow benefits and uncertainty as to exactly how much might be recovered from a court or tribunal. The primary instrument of persuasion for the commercial mediator is the “*REALITY CHECK*”.

### **The reality check and claimants :**

**Risk Assessment :** The starting point is the potential recovery sum through litigation. The mediator will invite the claimant to evaluate both the strengths and weaknesses of the claim or claims based upon both the legal ground or grounds that would be relied upon and the ability to discharge the burden of proving relevant facts. The assessment might reveal that in the claimant’s view the claim has a 75% chance of success overall, but that whilst the claim is for \$100,000, even if the claim succeeds \$80,000 is a more realistic assessment of what the court would be likely to award.

**Cash Flow :** If the mediation fails the claimant will have to proceed to litigation which could take from between 6 months to several years. During this time the claimant will be deprived of any money that might be available as a settlement sum and will have to finance the trial. Even if successful claimants rarely recover all their legal costs and it is likely that the claimant will incur lost opportunity costs in allocating time and energy to a trial that could be better used in commercial endeavour.

**Enforcement :** Whilst court orders are readily enforceable, recourse to the courts may be needed to enforce an arbitration award. The claimant needs to consider whether the defendant will have any money at all at the time of enforcement and most particularly whether that money would be available to the enforcing court.

**Assessing an offer to settle :** If the defendant were to offer immediate payment of a sum of between \$60-70,000 in full settlement of the claim the 25% risk of losing would be negated, cash flow would receive an immediate boost without any need for additional finance to prosecute the claim and immediate payment would avoid enforcement problems.

### **The reality check and defendants :**

**Risk Assessment :** The mediator will invite the defendant to evaluate both the strengths and weaknesses of the defence based upon both the legal ground or grounds that would be relied upon and the ability to discharge the burden of proving relevant facts. The assessment might reveal that in the defendant’s view he has a 60% chance of successfully defending the claim. Furthermore, the defendant feels the claim, should it succeed, is worth only about \$70,000. However, if the claimant succeeds, the defendant will have to bear both parties legal costs and the cost of the court / tribunal, all of which could cost an additional \$50,000.

**Cash Flow :** Whilst putting off payment produces a short term cash flow benefit, it might be necessary to set aside a contingency fund to cover the risk of losing, so cash flow may not benefit as much as it would at first sight appear to do.

**Enforcement :** If litigation goes against the defendant, resisting payment would only increase legal costs and would probably not be economic where the defendant intends to remain in business and has no intention of liquidating the business.

**Assessing an offer to settle :** If the claimant were to indicate a preparedness to settle for a sum of between \$60-70,000 in full settlement of the claim the 40% risk of losing would be negated, the accountants could immediately set up a financial plan to move forward and an outside risk of having to pay out in excess of \$120,000 would be avoided. The defendant could therefore potentially save \$50-60,000 and maximise opportunity costs immediately.

**Conclusion :** It is only by having an understanding of relevant law, practice and procedure that the parties can assess the legal implications of the claim and defence. Whilst the degree of legal expertise required to litigate is far higher than to mediate, a lack of legal understanding during the mediation process can result in undue optimism or excessive pessimism, leading either to a failure to make realistic concessions or alternatively to uncalled for generosity.

## PRIVATE ADJUDICATORY PROCESSES & MEDIATION

All private dispute resolution processes are voluntary. By enlarge, it does not matter what method of dispute resolution is stipulated by a contract since if both parties agree to use an alternative form of resolution they are free to do so. The governing factor is “If the parties agree”. Note this is not if “One party wishes to do something else” since that wish is not achievable in the absence of agreement. Thus, if both parties chose to mediate before moving on to contractual arbitration they can do so, but in the absence of agreement, the dispute will proceed to arbitration.

### **Arbitration – Inter-relationship with mediation.**

Given that the majority of disputants who resist all opportunities to broker a negotiated settlement at an early stage are likely to be “settlement adverse”, third party determination (*adjudication, arbitration, expert determination, litigation*) has a defining role to play in private dispute settlement. The problem for mediation is that whilst it is most effective when mandated by contract, contracting parties may prefer, wisely perhaps, to choose an alternative fall back form of third party settlement such as arbitration or adjudication to ensure that closure will be achieved (e.g. Med/Arb). Whilst understandable, is it necessary to completely eschew mediation? It is submitted that mediation/3<sup>rd</sup> party settlement has much to commend it.

Despite all the advantages of mediation, a further incentive is often needed to secure a settlement. Whilst a court judgement may be needed to make financially secure debtors pay up<sup>8</sup>, the mere existence of an enforcement mechanism can act as the necessary incentive for both litigation and arbitration. But, this alone is not enough, since if scope for attrition remains, there are defendants who will avail themselves of the strategy. The key lies in putting in place a sufficiently timely private process, which prevents the attrition strategy from working. Adjudication and fast tract arbitration could therefore be used as a catalyst for settlement.

### **Adjudication - Inter-relationship with Mediation.**

Adjudication takes a number of different forms. The most common application of adjudication has been in the UK construction industry, both as a voluntary process and subsequently under the **Housing Grants Construction and Regeneration Act 1996** (HGCRA). The temporarily final decision of the adjudicator is immediately enforceable and binding. Absent final determination by a court or arbitrator, the decision will produce closure, as conformed by Mr Justice Dyson in *Macob v Morrison*.<sup>9</sup>

Adjudication predated the HGCRA and continues to operate internationally quite independently of the Act. Thus the ICE pre-arbitral process is an example of a generic form of adjudication. *Macob v Morrison* reaffirms previous decisions in relation to the validity of private adjudication provisions in contracts such as the old DOM/1 construction contract, so that it is now evident that participation in contractually agreed ADR processes, at least until such time as the process is exhausted in now a prerequisite to litigation. Furthermore, the rationale behind the HGCRA making a private dispute settlement mechanism compulsory, has been accepted and endorsed by the courts. There have been successful challenges to the jurisdiction of adjudicators who have acted ultra vires. However, the intention of the government to encourage ADR in lieu of judicial proceedings is powerfully evidenced by the Act.

Any judicial process can be interrupted by and rendered unnecessary by a negotiated or mediated settlement. Indeed up to 93% of all commercial cases commenced in the courts settle before the court house door. Once a settlement is made there is no longer a dispute for settlement by the courts, arbitration or adjudication.

It is clear that the statutory nature of Construction Adjudication under the HGCRA and the Scheme is distinct from private adjudication agreements. *Carter v Edmund Nuttal* [2000] held that a term in a contract making mediation a pre-requisite to adjudication undermines the statutory right of either party to refer a dispute to adjudication.<sup>10</sup> This meant that the contract terms did not comply with the Scheme and thus the Scheme displaces the terms of the contract. The result is that it is not possible to make participation in a mediation process a precondition to adjudication. Similarly, attempts to distinguish differences from disputes or to claim that no dispute arises until an attempt to settle a difference by negotiation has failed, undermine the statutory

<sup>8</sup> Little can be done about the debtor who would rather file for bankruptcy than pay his dues.

<sup>9</sup> *Macob Civil Engineering Ltd v. Morrison Construction Ltd* [1999] EWHC TCC 254

<sup>10</sup> *Carter v Edmund Nuttal* [2000]

## MEDIATION METHODS FOR MEDIATORS & PARTY REPRESENTATIVES

right according to *John Mowlem v Hydra-Tight Ltd.*<sup>11</sup> *Herschel Engineering Ltd v Breen Properties Ltd.*<sup>12</sup> makes it clear that the commencement of a court action does not prevent a submission to adjudication. However, there is no reason why, like arbitration and litigation, participation in a mediation process cannot be made a prerequisite to non-statutory adjudication.

Can mediators adjudicate or arbitrate under English Law? Given the rising popularity of various dispute review board processes and med-arb agreements the recent case of *Glencot v Barrett*<sup>13</sup> [is of some concern. The court found that an adjudicator, who accepted the parties invitation to switch roles and adopt the role of mediator before returning to the role of adjudicator, was in the circumstances of the case, unable to fulfil the adjudication process because there was a possibility of bias because he had been exposed to bad behaviour by one of the parties during the mediation.

Apart from the fact that opinions differ widely as to whether or not a mediator is capable of acting in a judicial capacity, has *Glencot v Barrett* closed the door for such mixed processes in England and Wales? It is submitted that Glencot has left the door open for the use of med/arb and med/adjudication and even arb/med/arb and adjudication/med/adjudication options in England and Wales, provided they are agreed to by the parties and that the parties fully appreciate the implications. The problem in *Glencot* was that the adjudicator did not spell this out clearly and no firm arrangements were made for post mediation conduct. Indeed the degree of enforcement of the Adjudication decision by the court was, despite the adverse ruling about the impact of the mediation role on that particular adjudication, quite significant and the conduct of the adjudicator was not adversely commented on. The court even commented upon the desirability of settlement processes.

### **Fast Track Arbitration : Inter-relationship with Mediation.**

Whilst governed by relevant arbitration law rather than the HGCRA 1996, fast track arbitration is otherwise remarkably similar to adjudication, with one exception. A fail-safe mechanism is built into adjudication to guard against off the wall decisions whilst the arbitral award is final. The choice therefore, as to which process to chose depends upon whether or not the parties are prepared to place complete faith in the decision maker in the interests of finality. Fast track arbitration and paper only arbitration present real competition to the mediation process in that they can be as inexpensive as, if not more economical than mediation and offer speedy resolution as well. They offer finality but this is in exchange for party autonomy over outcomes. Whilst conciliation can offer a similar product, with a tantalizing prospect of party autonomy, this evaporates if the parties cannot agree but at a heavy price, the loss of legally principled decision making.

### **Dispute Review Boards : Inter-relationship with Mediation.**

The DRB process and variants on it can be used to minimise the advent of disputes in the first place. The Dispute Review Board process has the ability to identify problems and promote solutions before an actual dispute crystallises. It incorporates a similar combination of persuasion plus enforceability. It is the nature of firstly the persuasion mechanism and secondly the form of enforceability that varies depending upon the exact format selected. The idea that a Review Board might engage in a sequential med/arb process has been firmly rejected by the main DRB providers., though Dispute Mediation Boards have been experimented with. Nonetheless, the identification process that DRB's engage in during site visits, and the invitation to explain/consider the implications of problems identifies during visits achieves much the same outcome as that achieved during reality check sessions. It is difficult conceptually to determine what differs between the mediation process and the informal advisory sessions common in US style DRBs. It is to be noted that these informal sessions are not part of the FIDIC rainbow suite contract DRB processes, clearly because these boards deliver decisions, not mere recommendations, and since a higher standard of natural justice applies to these boards the integrity of the board would be compromised by such informal advice sessions.

**Conclusions :** A mediation / third party determination combination is potentially an expensive option that may well not be suitable for small value disputes. Nonetheless, it offers a way of injecting new life into the mediation process at a critical time in its global development.

<sup>11</sup> *John Mowlem v Hydra-Tight Ltd* [2000] CILL 1650

<sup>12</sup> *Herschel Engineering Ltd v Breen Properties Ltd.* [2000] CIL 1616

<sup>13</sup> *Glencot v Barrett* [2001] WL 239771

## CHAPTER ONE

# JUDICIAL CASE MANAGEMENT AND MEDIATION

The question that arises here for consideration is whether or not the case management role of the judge subsumes ADR, ie. *Is Case Management Resolution greater than, equal to or less than ADR?*

### INTRODUCTION

The South and West Wales Court mediation service was launched in Cardiff in November 2003 by Lord Falconer of Thoroton, the Lord Chancellor. Almost three years hence and despite the fact that in excess of 100 disputes have been channelled towards mediation by the local bench, it would appear that some District Judges on the South Wales circuit are of the opinion that, with regard to lower value civil claims in particular,<sup>14</sup> court based mediation is superfluous, particularly since the reforms brought about by the Civil Procedure reforms have produced an efficient, cost effective civil court system that in their view provides its clients with a first class “one stop shop” dispute resolution service.<sup>15</sup>

There is a degree of impatience amongst members of the bench with the number of judicial training courses that have focused on mediation. There is a feeling that ADR has been done to death by Her Majesties Court Service and the Department of Constitutional Affairs. Any assumption that the judges do not possess sufficient knowledge of and or fully understand the importance and value of mediation is resented. Some go further and assert that District Judges routinely “mediate” between the parties during case management, often successfully, leading to the resolution of disputes through inter-party settlement agreements. Accordingly, they are of the view that outside mediation offers little or no added value for the court’s clients and worse, that recourse to mediation invariably leads to increased costs and potential delay. Many legal practitioners concur with these views. The track record for court based mediation in South Wales does little to dispel these views. It would appear from information available to the court mediation steering committee that in excess of 25% of the disputes were settled by mediation. Whilst some cases were discontinued, a number of others settled before or after mediation. Nonetheless, a sizable number in the region of 40-50% were returned to the court listing.<sup>16</sup> Care should be taken not to read too much into such figures. Whilst at first sight it would appear that the statistics raise questions about the effectiveness of the court mediation service, they reveal nothing about the nature of the disputes referred and whether or not mediation was the most appropriate vehicle for their resolution in the first place, which is not likely to have been the case at least in respect of those cases that were ultimately withdrawn.

Whilst some support for pro-bono mediation was evident from the bench, there was little evidence of confidence that the mediation community could or would provide such a service. The mini half hour mediation concept operated elsewhere outside the Principality did not appeal either, being dismissed by one senior member of the bench as a “denial of justice,” on the basis that the time scale was too short to lead to a consensual settlement of the dispute, the implication being that the mediator shaped the settlement and coerced the parties to accede to the proposed solution. This was perceived of as a poor substitute for the “high quality” adjudicatory service that the District Judges consider they provide to the court’s clients.

### The issues :

There are two distinct and separate, albeit interrelated, issues here. The first concerns whether or not case management and mediation are interchangeable. The second relates to the question whether or not mediation has anything of value to contribute towards the settlement of low value civil disputes.

<sup>14</sup> We are not concerned herewith Family Mediation, about which the concerns expressed by some members of the judiciary were or a quite different order and nature. Contrary to the views gleaned from meetings with District Judges in South Wales about small civil claim mediation, the same judges expressed approval of community and social mediation in respect of disputes that do not fall naturally or easily within the remit and jurisdiction of the civil courts. Indeed, mediation was perceived of as a useful vehicle to get rid of what were considered to be “nuisance” cases. Equally, the same District Judges expressed the view that mediation has a valuable role to play in respect of higher value / complex disputes, offering the potential for timely settlement of disputes, cost savings and the avoidance of protracted civil trials.

<sup>15</sup> Similarly, in respect of the view that the TCC now represents the ideal forum for the settlement of construction disputes see the comments of Mr Justice Jackson in *Machenair Ltd v Gill & Wilkinson Ltd* [2005] EWHC 445 (TCC) at paras 56-61.

<sup>16</sup> The brief records maintained by the Civil Justice Centre, which are not generally available, are not complete and it is not possible to produce from them a statistical analysis of the success or otherwise of the South and West Wales court mediation service.

## MEDIATION METHODS FOR MEDIATORS & PARTY REPRESENTATIVES

### ISSUE 1 : DOES CASE MANAGEMENT SUBSUME MEDIATION?

The courts ascribe legal meaning to words. They have the authority to do so. We have to accept their definitions since the courts then apply those meanings during the course of judicial proceedings. Paraphrasing Humpty Dumpty, 'When the court uses a word .... it means just what the court chooses it to mean -- neither more nor less.' Here however, the assimilation of case management and mediation is taking place outside the court room, not during proceedings, leaving us happily free to challenge the assertion.

Are we being presented with an upside down Alice in Wonderland World, one where adjudication and mediation are indistinguishable and where the judge vacillates between his true magisterial being and an intermediary alter-ego? How could this possibly be the case? After all, did not the TCC in *Glencot v Barrett*<sup>17</sup> make it clear that it was of the view that there is a strong potential of prejudice within the adjudicator cum mediator arrangement, to the extent that outcomes would be considered unsafe by the courts in the absence of informed consent to exposure to risk of prejudice. With that warning in mind, the TCC mediation panel<sup>18</sup> has taken clear steps to construct a Chinese wall between the trial judge and the mediating TCC judge.

The explanation lies in contextual uses of terminology and mixed metaphors which lead to conclusions which, reinforced by grains of truth, act as a barrier to the development of effective strategies for dealing effectively with low value disputes. Firstly ADR is here equated with mediation and secondly ADR is used in two distinct and separate ways. The Civil Procedure Rules refer in section 1 to recourse to "*An ADR*", which confusingly is not the same thing as *ADR* as in Alternative Dispute Resolution.

First, mediation is one of the alternative processes used to bring a dispute to an end. It is however only one of many alternatives. It is not the only game in town, even when ADR is limited to negotiated settlement processes as opposed to all alternatives to the judicial process. It is not satisfactory to assimilate mediation and ADR since this gets in the way of drawing distinctions between mediation and the other dispute resolution processes embraced by the term ADR such as conciliation and early / expert evaluation.

Second, ADR is commonly used as an alternative to the judicial process whereas "*An ADR*" is used in the context of the Civil Procedure Rules as any "*alternative dispute resolution procedure*" that the court feels is appropriate to the task of case management. Thus the overriding objective of the Civil Procedure Rules is stated to be to enable the court to deal with cases justly. This is to be achieved by case management. Section 1.4(2) of the Rules goes on to specify [*with emphasis on (e) and (f)*] that active case management includes -

- (a) *encouraging the parties to co-operate with each other in the conduct of the proceedings;*
- (b) *identifying the issues at an early stage;*
- (c) *deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others;*
- (d) *deciding the order in which issues are to be resolved;*
- (e) *encouraging the parties to use an alternative dispute resolution (GL) procedure if the court considers that appropriate and facilitating the use of such procedure;*
- (f) *helping the parties to settle the whole or part of the case;*
- (g) *fixing timetables or otherwise controlling the progress of the case;*
- (h) *considering whether the likely benefits of taking a particular step justify the cost of taking it;*
- (i) *dealing with as many aspects of the case as it can on the same occasion;*
- (j) *dealing with the case without the parties needing to attend at court;*
- (k) *making use of technology; and*
- (l) *giving directions to ensure that the trial of a case proceeds quickly and efficiently.*

<sup>17</sup> *Glencot Development & Design Ltd v. Ben Barrett & Son Ltd* [2001] EWHC TCC 15 per HHJ Humphrey Lloyd. The court considered that the impartiality of the adjudicatory process could be prejudiced by any exposure to unproven assertions of the type common in mediation, much of which might be inadmissible at trial. Further, whilst it is possible for an individual to possess the necessary skills to serve either as a judge or a mediator in respect of distinct and separate disputes, to attempt to make the necessary switch in mindset in mid-stream is considered by some commentators to be fraught with difficulties, in that it requires the mediator cum adjudicator to seamlessly move from one set of objectives to another without confusing the means involved in achieving either objective.

<sup>18</sup> See [www.hmcourts-service.gov.uk/docs/tcc\\_court\\_settlement\\_process.pdf](http://www.hmcourts-service.gov.uk/docs/tcc_court_settlement_process.pdf)

## CHAPTER ONE

The courts have further developed the concept of case management beyond the overriding objective of dealing with a case justly, to embrace efficiency in achieving closure. In *Cowl v Plymouth*<sup>19</sup> Lord Woolf stated that “*The courts should ... make appropriate use of their ample powers under the CPR to ensure that ... parties try to resolve the dispute with the minimum involvement of the courts. .... the parties should be asked why a complaints procedure or some other form of ADR has not been used or adapted to resolve or reduce the issues which are in dispute.*” Note that the scope of the ADR procedures the parties should have recourse to is widely drawn embracing even complaints procedures, and secondly the objective is stated to be to resolve or reduce disputes, in order to achieve the minimum involvement of the courts. It is not surprising therefore that District Judges, with regard to the other specified matters, namely (a)-(f) and (j)-(l) see part of their management role as helping the parties to broker closure and not simply as preparing for and managing the trial process. Rather, if carried out successfully there is every chance that a trial might be avoided, if the parties can be persuaded or guided towards a settlement.

The similarities between the objectives of case management and mediation are striking, namely persuading or guiding disputing parties to a negotiated settlement. Further, if one looks at the case management “tool kit” and compare it with the mediator “tool kit” further striking similarities are evident. Both encourage co-operation between the parties; identify issues; priorities issues; establish the running order etc. There is virtually nothing between (a)-(l) that any mediator would not identify with. The mediator, just like the judge, will seek to case manage from referral all the way through to the end of the mediation, drafting and signing of the settlement agreement. It only takes a short but fatally flawed leap in logic to conclude that case management and mediation are one and the same.

### **Distinguishing features between judicial case management and mediation.**

#### **Hearings :**

An important difference, though one that on paper is not immediately apparent, is that the mediation process “*involves the parties*” and a “*hearing*” (even if it is a virtual hearing in the case of on-line mediation) whereas whilst District Court case management may involve a meeting of the parties, their solicitors and the judge in chambers, this is not the norm. It is more likely that only the solicitors would attend a meeting in chambers (or take part in a telephone-conference) and more often than not the management process will be conducted entirely as a paper process. The similarities between case management and mediation immediately start to evaporate. The general and specific pre-trial protocols set the scene for subsequent case management. Where for instance the construction protocol applies (*in general construction disputes involve higher value claims*), attendance of both parties and representatives is mandated but this is not a requirement in respect of the general protocol most applicable to lower value claims.

The general protocol encourages communication between the parties and then by contrast to construction, 4.7 specifies as follows : - *The parties should consider whether some form of alternative dispute resolution procedure would be more suitable than litigation, and if so, endeavour to agree which form to adopt. Both the Claimant and Defendant may be required by the Court to provide evidence that alternative means of resolving their dispute were considered. The Courts take the view that litigation should be a last resort, and that claims should not be issued prematurely when a settlement is still actively being explored. Parties are warned that if the protocol is not followed (including this paragraph) then the Court must have regard to such conduct when determining costs.*

It concludes by directing the reader to *The Legal Services Commission* booklet, ‘*Alternatives to Court*’, CLD Direct Information Leaflet 23, which lists a number of organizations that provide alternative dispute resolution services. Clearly the protocol envisages ADR as something quite distinct and separate from the case management role performed by the judge.

#### **Authority versus respect :**

The judge is by virtue of his standing automatically accorded authority and respect. At the end of the day, the judge will settle the matter if the parties fail to do so themselves. The parties are well advised to pay close attention to anything the judge says, particularly regarding any indication of likely outcomes and prospects. These will give an indicator of what the parties should pay most attention to as potential roads to success and correspondingly factors which are likely to be a lost cause. The only time counsel might chose to flog an

<sup>19</sup> *Cowl (Frank) v Plymouth City Council* [2001] EWCA Civ 1935

## MEDIATION METHODS FOR MEDIATORS & PARTY REPRESENTATIVES

apparently “*dead horse*” is if that is the only game in town and to do so could pave the way for an appeal which would be pre-empted if one conceded by default.

By contrast, the mediator has no inherent authority and has to earn the respect of the parties, though prior reputation will assist. The mediator has no power to impose outcomes on the parties. The extent to which a mediator will venture an opinion varies from those who will never do so, via those who will if both parties agree, to those who see it as their job to provide a considered evaluation of each party’s prospects or even to second guess what the court would do if the case proceeded to trial. How much attention the parties will pay to any evaluation depends on the degree of respect and belief they have in the opinions of the mediator.

To sum this up, the judge is essentially inviting the parties to consider whether or not they think they can persuade the judge to alter his initial opinion based on their statements of case and skeleton arguments, whereas the mediator is inviting the parties to consider whether or not they think they could successfully persuade the court to reach a different outcome to that which the mediator deems to be likely. It would not be unreasonable to imagine that a party might fancy its chances far more with the second than the first.

### *Private and shared communications :*

Anything an adjudicator says to one party must be communicated to the other. All parties must have an opportunity to consider and respond to anything that is said and done before a tribunal. A failure to do so opens up any decision to a charge of breach of due process. By contrast, the private session/caucus is a standard feature of commercial mediation. The mediator is constrained from communicating anything learnt in a private session to the other party in the absence of express authority to do so. The rationale here is that this enables the mediator to brainstorm options with each of the parties without either prejudicing their position. Any idea, however absurd can be floated like a trial balloon and rejected out of hand if it does not find favour. The mediator can play devil’s advocate without putting either party’s head on the line, since they only have to respond to the mediator and not to the other party. Nor do they have to respond to the satisfaction of the mediator since the mediator does not have to be persuaded.

The mediator acts as a diplomatic communications corridor between the parties, but does not act as an advocate for either party. In so doing the mediator may temper a message, putting it in a less confrontational manner than a party might if communicating directly, but a mediator does not have to be convinced of a message in order to convey it. It is dangerous for a mediator to omit to communicate a message sent by one party to the other, even if the mediator feels the message is unhelpful, since the sender will act on the assumption that the message has been delivered and if no rebuttal is forth-coming is likely to assume that the message has been taken on board. The problem will then come back into focus when drafting the settlement order if crux of the message is to be included in the settlement terms, since for one party it is now a done deal, whereas for the other it is at best unfinished business or worse is something which had not even been put on the table.

There is a fuzzy edge between the expressing of an opinion and communicating the other party’s bottom line. There is little difference between “*the best you can expect today is £x*” and “*£x is their final offer – take it or leave it*”, but there is no requirement to opine that “*£x is a good (or bad) deal*” or even to express a personal opinion as to whether or not the mediator considers that it might be worthwhile to take the risk of hanging out for more. This is the time when a party has to put his hand up and be counted, to decide whether to go for what is in hand or to hang out for the glittering but potentially illusive prize that litigation offers. If a mediator commends an offer at an early stage, or where the mediation has made little or no progress in narrowing down differences, there may be a perception of bias. However, if the offer is the end result of compromise on both sides after extended mutual hard bargaining the mediator may well form a balanced view of what is on offer. There is a danger however that the mediator’s view is coloured by a sense of progress towards the settlement goal rather than on the value to the respective parties of the offer. Even if it is the best that might be hoped for on the day does not mean it represents a “*Win/Win*” situation. Contrary to the jargon commonly promoted about mediation, mediation can and does produce “*Win/Lose*” outcomes.

To sum up, any brainstorming before a judge has to be done by hypothesis since everything is conducted in an open forum. This is a delicate if not tedious process, but to concretize would run the risk of concessions which would become final and hence impossible to row back from. The judge is limited in case management to

## CHAPTER ONE

encouragement of the parties to settle, based on what the parties have proposed to put to the court. By contrast the mediator can canvass with ease avenues for settlement that are beyond the scope of the judicial case management forum.

### *Barter-bank :*

A court will oft times act as a reservoir for payments in, Part 36 CPR settlement offers from either party, whilst open offers, *Calderbank* offers, with or without prejudice to costs, lurk in the fore or back ground. Open offers apart, whilst the judge may well be aware that settlement offers have been made, detail will remained concealed from view until judgment is passed and attention is turned to costs. For the judge during case management, all will remain to play for. By contrast, since the parties will be privy to all offers and counter offers, the mediator will be fully aware of the current state of play, which will thus define the differences between the parties that the mediation seeks to bridge. The “*cost card*” impacts upon both case management and mediation but in different ways. It is only in mediation that it is addressed head on.

### CONCLUSION TO FIRST ISSUE.

Whilst case management and mediation share some common objectives, whatever else is involved in case management, it is not mediation. Its remit and modus operandi are quite distinct and different. The mediator’s authority is less than that of the judge, but the mediator’s scope and range is more extensive. Case management is not a substitute for mediation. Case management is free standing. Mediation may complement and assist it. As exemplified by the many recommendations of the Court of Appeal, where following a successful appeal the court sends a case back to the court of first instance for re-trial before another judge, with a recommendation that the parties first attempt to mediate a settlement, mediation can if successful pre-empt a retrial and hence obviate the need for case management.<sup>20</sup> Similarly, despite granting leave to appeal, the Court of Appeal frequently invites the parties to first attempt mediation.<sup>21</sup> Again, it is evident that the Court of Appeal considers that mediation is a distinct and separate process to case management.

### ISSUE TWO : THE VALUE OF MEDIATION IN THE SETTLEMENT OF LOW VALUE DISPUTES.

#### A). Introduction : Background to Court based mediation.

The court based / promoted mediation cause is well advanced in the UK. Her Majesties Court Service has thrown all its might and support (if not its cash) at promoting mediation as an additional service available to its clients. The objective is that mediation will be available to every litigant in every civil court throughout the land, whether the claim be small, modest or large.

#### The appointment process under the HMCS court mediation scheme.

Driven forward initially by a small band of mediation enthusiasts, with different schemes in different courts, Her Majesties Court Service is gradually homogenizing the process, with the assistance of the Civil Mediation Council. The only obvious exception to the model is the Manchester Scheme presided over by a member of the court staff.<sup>22</sup> Otherwise, where mediation is advised or requested, from the 1<sup>st</sup> October 2006 appointments will be channelled through the Mediation Helpline, which will then pass applications onwards to mediation nominating bodies registered with HMCS.

HMCS has established 43 mediation centres to cover the whole county. CEDR, the ADR Group and the Chartered Institute of Arbitrators are registered in all 43 centres. Other providers (there are 15 other registered providers at the present time) operate at a more local level, ranging from a single to 8 regional centres. It is notable that a number of the most prestigious international mediation service providers in the City of London have not yet registered, which is an indicator that these organizations do not perceive court based mediation as being central to their business. In order to be listed by HMCS the mediator nominating body must first successfully apply for accreditation with the Civil Mediation Council and then demonstrate local capacity to HMCS.

<sup>20</sup> Eg. *Burne v A* [2006] EWCA Civ 24.

<sup>21</sup> Eg. *Crowther v Brownsword* [1998] EWCA Civ 1040.

<sup>22</sup> The Courts Service is planning a major expansion of in-court mediation by April 2007 as part of a drive to cut the number of defended small claims. The service is to set up nine more pilot court-funded mediators – probably located in the larger courts – on the same lines as that operated at Manchester County Court. The mediation will be free to the parties involved, meaning the only costs for parties would be the initial court fees. The Law Gazette. 14<sup>th</sup> September 2006.

## MEDIATION METHODS FOR MEDIATORS & PARTY REPRESENTATIVES

### Current CMC accreditation requirements *(note these are in the process of being amended)*

7. The characteristics to be examined by the CMC in the pilot scheme when assessing a candidate provider are broadly:
  - (a) **Adequate mediator training** - the method by which the candidate has and will continue to admit mediators to membership of its panel, list or group: this includes the minimum training requirement it sets for candidate members, the means by which it assesses whether that training is sufficient and whether the candidate has a sufficient understanding of role and duties of a mediator to be appropriate for admission. The CMC has based its initial criteria on practice within the civil mediation community in the UK and abroad but will refine and may revise its requirements in due course following research work to be conducted in parallel to this pilot scheme on the effectiveness of mediator training, performance and outcomes.
  - (b) **Code of Conduct** – whether the provider has instituted or adopted, and implements, an appropriate Code of Conduct for its members to follow: the CMC endorsed and adopted the EU Model Code of Conduct for Mediators in 2004 and expects that the Code should be embraced by an accredited mediation provider.
  - (c) **Supervision and Monitoring** – the means by which the provider provides adequate and appropriate supervision, mentoring, monitoring and pupillage for its mediators; the provider’s CPD policy and programme or requirements; the scheme the provider adopts for handling complaints and feedback; and the opportunity for peer review.
  - (d) **Insurance** – whether the provider can demonstrate that it has adequate insurance in place for the activities it and its members undertake.
  - (e) **Efficient administration** – whether the provider can demonstrate that it has a suitable and sufficient efficient administration proportionate to and for the work and workload it undertakes, including the handling of enquiries, the recording of calls, the accurate accounting for fees and the proper rendering of bills to the consumer.
  - (f) **Allocation of mediators** – the method by which the provider can demonstrate that it ensures (save where the parties decide their own choice of mediator) that an appropriately trained, experienced and skilled mediator is allocated to each case with which it deals.
8. In order to be qualified at the inception of this programme a provider must meet the following minimum requirements:
  - A. Mediator Training**
    - (1) An Accredited Mediation Provider’s mediators must have successfully completed an assessed training course.
    - (2) That course must include training in ethics, mediation theory, mediation practice, negotiation, and role play exercises.
    - (3) If the mediator is not professionally qualified in a discipline which includes law, the mediator must demonstrate a grasp of basic contract law.
    - (4) Performance during or on completion of training must be assessed.
    - (5) The training course will include not less than 24 hours of tuition and role-play followed by a formal assessment.
    - (6) An Accredited Mediation Provider will also be expected to require its mediators will be required to have attended at least two mediations as an observer before acting as the appointed mediator.
  - B. Code of Conduct**
    - (1) An Accredited Mediation Provider must have an appropriate written Code of Conduct for its members to follow.
    - (2) That written code must be no less rigorous than EU Model Code of Conduct for Mediators published in 2004.
  - C. Complaints Handling and Feedback**
    - (1) An Accredited Mediation Provider must have in place a written complaints handling procedure and keep written records of any complaints.

## CHAPTER ONE

- (2) An Accredited Mediation Provider must have a feedback system under which it invites, receives, assesses and reviews, internally and with the mediator, comments by the parties and their lawyers in respect of mediations.

### D. Insurance

- (1) An Accredited Mediation Provider must either provide or require mediators to obtain and provide evidence of professional liability insurance cover of not less than £1,000,000.
- (2) Where mediators are doing work involving sums exceeding this amount, an Accredited Mediation Provider must have appropriate insurance cover in place and be able to provide evidence of the same.

In April 2006 HMCS issued National Mediation Helpline Provider criteria, but has subsequently withdrawn them. HMCS also revised its "Mediation Toolkit" but again this is not currently in the public domain. Nonetheless, the stated strategy appears to be to encourage local provision, but with a limit of 4-5 providers at each centre up to a maximum of 8 in London. It is thus envisaged that each area will have a localized nomination provider approved by the CMC. It is less clear how the Court of Appeal mediation service fits into this scheme, but presumably it does so through the registered London providers.

### Does court based mediation offer value for money in respect of low value disputes?

The current rates for mediation through the Mediation Helpline are as follows :-

<i>"Dispute</i>	<i>Fees</i>	<i>Time allowed</i>
<i>Claim under £5,000</i>	<i>£250 (each party to pay £125) + VAT</i>	<i>2 hours</i>
<i>Claim between £5,000 and £15,000</i>	<i>£500 (each party to pay £250) + VAT</i>	<i>3 hours</i>
<i>Claim between £15,000 and £50,000</i>	<i>£750 (each party to pay £375) + VAT</i>	<i>4 hours</i>

*For claims above £50,000, the fee would have to be agreed with the mediation provider.*

*Additional Costs : Parties should try, where possible to provide a suitable venue for the mediation. If a venue has to be hired, the costs of the same are to be paid by the parties."* Note that whilst some court centres provide free accommodation this is not always the case.

The above of course does not represent the full costs of the mediation, since the parties will also have to fund the costs of representation. Assuming that there is the facility to extend the time allocated for mediation (which might not be the case, particularly where the court centre provides accommodation), the costs would also rise pro-rata for any additional time unless waived by the mediator. It is not uncommon for a mediation to resume at a subsequent date, allowing the parties time to sleep on the matter. This can happen where the mediation runs out of time or alternatively, where having had time to reflect on their position, an obdurate party subsequently seeks to return to the mediation table, having initially rejected what was on offer.

### What does mediation bring to the dispute resolution table?

There is something satisfying about parties co-operating together to resolve their differences. It speaks of maturity and mutual respect which is conducive to future cooperation and the maintenance of relationships, which is desirable both socially and commercially. By contrast, in adjudication respect is accorded to a third party who imposes outcomes that are more likely to drive the parties further apart, leading to distrust and resentment. It is easier to blame the referee than one's own team for its shortcomings. All of this is all very well and good but is based on the assumption that relationships are worth preserving. Where this is not the case, it needs to be demonstrated that the other potential benefits of mediation over litigation are sufficient to justify resort to it in lieu of litigation.

An important commercial driver of mediation is the potential of cost savings. Examples abound of the cost savings of mediation compared to the costs of a major, extended trial. Indeed, the costs issue tends to play a central role in settlement negotiations, since potential litigation costs that are not recoverable can be set off against real loss or gain. Such irrecoverable loss may be substantial, particularly in terms of manpower, lost opportunities and cash flow. This leads into the other important driver, namely prompt and timely settlement. A mediation can frequently be put in place long before a case is scheduled for a hearing. The mediation is likely to be concluded in a relatively short period of time. A single day will often suffice.

## MEDIATION METHODS FOR MEDIATORS & PARTY REPRESENTATIVES

However, when viewed from the perspective of low value dispute resolution, the bread and butter of the District Court, the cost/time saving benefit of mediation is much less apparent. First, once a party has paid the filing fee (see chart below) for a dispute below the small claims track threshold, there is nothing more to pay and nothing to be saved by settling out of court as opposed to going through the trial process and final determination by the judge whereas mediation will cost each party an additional £125 plus VAT. Whether or not the National Helpline Service can deliver a more timely mediation is another matter, but at best when the District Courts are regularly hitting their 11 week target and frequently beating it, any time saving is likely to be modest. Nor is the duration of the mediation likely to be shorter than a court hearing since it would appear that 1 hour 45 minutes is the average trial time before the District Court. Thus there are virtually no savings to be made on representative costs if the case settles. By contrast, if it does not settle the client's bill could virtually double, especially if the clients have to pay for the venue.

### High Court and County Court Fees: Includes Small Claims Court : As From 10th January 2006

Money Only Claim or Counterclaim		
Claim	Fee	Money Claim Online
Amount claimed is up to £300	£30	£20
Amount claimed is between £300 and £500	£50	£40
Amount claimed is over £500 but not over £1,000	£80	£70
Amount claimed is over £1,000 but not over £5,000	£120	£110
Amount claimed is over £5,000 but not over £15,000	£250	£240
Amount claimed is over £15,000 but not over £50,000	£400	£390
Amount claimed is over £50,000 but not over £100,000	£700	£690
Amount claimed is over £100,000 but not over £150,000	£900	
Amount claimed is over £150,000 but not over £200,000	£1,100	
Amount claimed is over £200,000 but not over £250,000	£1,300	
Amount claimed is over £250,000 but not over £300,000	£1,500	
Amount claimed is over £300,000 or not limited	£1,700	
Application for Summary Judgment	£60	
Claim other than money	£400	
Allocation Questionnaire Fee	£100 County Court £200 High Court	
Application Notice	£65 County Court £100 High Court	
Without Notice Application	£35 County Court £50 High Court	
Filing Proceedings against party not named in original proceedings	£50	

**Judges' Fees :** For every day or part of a day (after the first day) of the hearing before:

- a) A judge of the commercial court - £1,800
- b) A judge of the technology and construction court appointed as an arbitrator or umpire - £1,400

Two things are evident from the above. Firstly, that the potential savings from mediation are directly proportionate to the value of the dispute and secondly, that the Court Service has introduced a paper only internet dispute resolution service<sup>23</sup> which involves cost savings both in terms of the filing costs, and in terms

<sup>23</sup> <https://www.moneyclaim.gov.uk/csmco2/index.jsp>

## CHAPTER ONE

of representation since the parties can complete all the paperwork themselves, though no doubt there are times when clients may seek legal assistance. Whilst limited to money claims, it is submitted that mediation has little to offer someone who can avail themselves of this service.

**Other and further costs that a party contemplating mediation in lieu of litigation are set out below.**

### Trial Fee

Listing Questionnaire	£600 High Court
Multi-Track Cases	£500 County Court
Fast-Track and other cases (excluding small claims track cases)	£275 County Court
County Court Application for permission to appeal	£100 County Court £200 High Court
Appeal Notice	£120 County Court £200 High Court
Appeal Questionnaire (Appellant)	£400
Witness Summons	£35 County Court £50 High Court

Where any of the above might be needed in furtherance of a trial costs continue to spiral. In such circumstances, the prospect of avoiding such costs where there is a realistic chance of brokering a mediated settlement, make the process increasingly attractive.

### Enforcement

Attachment of Earnings	£65
Application for Charging Order	£55 County Court £100 High Court
Warrant for Recovery of Land / Property	£95
Warrant of Execution / Possession / Delivery	where the amount less than £125 - fee is £35 where the amount is over £125 - fee is £55
Application for 3rd party debt order	£55
Application for order that debtor attend court for questioning	£45 County Court £50 High Court
Warrant of Delivery	£95
Reissue Warrants of Execution, Delivery or Possession	£25
Judgment Summons	£95
Debtors Bankruptcy Petition	£150
Creditors Bankruptcy Petition	£190
Petition to wind up a company	£190
Certificate of discharge from bankruptcy	£60
Further copies of discharge cost per copy	£1
Appeals	£100 £200 (Court of Appeal)
Application to register a judgment or summons	£50
Certificate of Satisfaction	£15

## MEDIATION METHODS FOR MEDIATORS & PARTY REPRESENTATIVES

### **Mediation : Structured settlement and insolvency.**

The costs involved in bankruptcy proceedings represent but one factor that needs to be taken into account. The other is the potential recovery that might follow from such a petition. Evidently, a creditor has little option where administration is instigated by the debtor. However, where administration is threatened by a debtor or is the likely consequence of litigation, any victory enjoyed by a creditor may well prove to be empiric. Administration is not something that should be taken lightly and is best avoided by any debtor if an alternative strategy can be developed. Mediation has much to offer in the situation where a debtor would like to pay but is not currently in a position to do so, particularly if the premature demise of a business before the realization of prospective windfalls. Whilst a court award might not be immediately available or realizable by a successful litigant, it may be possible through mediation to broker structured payments over a period of time, or even for the creditor to take a stake in the business of the debtor, turning the debt into an investment. Whilst it is not possible to get "*blood out of a stone*" it may be possible to turn seemingly difficult if not impossible situations to one's advantage.

### **B). Independent / pre-filing Mediation :**

It should not be forgotten that mediation may also be free standing. It does not have to operate in the shadow of case management. Mediation is quite possible without the filing of suit. Indeed, the same District Judges who have serious misgivings about court based mediation are of the view that mediation should take place before suit is filed. Two questions arise. Firstly, is independent mediation value for money for low value disputes? and secondly, how can a market in mediation independent of the court be established?

#### **1. The value of self standing mediation for low value disputes.**

It is unlikely that mediation can compete with fast-track litigation on price alone, as noted above. Furthermore, if the mediation fails and the dispute then goes to court, the recourse to unsuccessful mediation will have resulted in additional expenditure. The value of self standing mediation lies therefore not in cost, but in added value. First, the parties remain in control of the outcomes, taking an active part in shaping them, leading to a sense of fairness that is shared by both parties. The same cannot be said of litigation where hard and harsh outcomes are not uncommon. Second, the earlier a mediation takes place the better, since a negotiated settlement is far more likely to be brokered at a stage when the parties positions have not yet hardened. It is possible to arrange a mediation at a very early stage as a substitute for the extended period of time of exchange of letters between solicitors in the run up to litigation. In such circumstances mediation can result in very timely and prompt resolution. Third, where the prospective protagonists have continuing relationships, as in landlord and tenant, utility provider and client, employer and employee etc, a mediation which minimizes antagonism between the parties is beneficial to the maintenance of long term relationships.

The advantages of mediation in clarifying issues and resolving satellite disputes even where the main dispute is not resolved, which lead to cost savings in the subsequent trial are well known. However, the value of this aspect of mediation grows proportionately with the value and complexity of a dispute and has little relevance to low value disputes.

The conclusion is that whilst mediation has distinct advantages over litigation, it is not clear that all low value disputes would benefit from mediation. Where one of the parties needs to a legal precedent to guide future commercial conduct mediation is not ideal. Where one of the parties is not prepared to contemplate compromise mediation is unlikely to work. Where both parties want "*an answer*" litigation is ideal. Mediation should be used where both parties will benefit from the "*added value*" set out above.

#### **2. Establishing a mediation market independent of the court.**

The problem here is working out how to inform potential litigation partners of the existence and or value of mediation and persuading them to exhaust that avenue of settlement first. In most cases this would require the intervention of solicitors in the absence of an ADR provision governing the relationship between the parties, a route paved with more good intentions than reality at the present time.

Mediation facilities are advertised in many court buildings. Where a court sends out an information pack to potential clients, the parties can be averted to the value of mediation before filing. There is a chance that the applicant might then invite the other to mediate and that the other might accept the invitation. However, if the

## CHAPTER ONE

first introduction to mediation for a client is a brochure in the court house, collected on the way to file a claim, it is unlikely that the applicant will change course at that late stage.

If a solicitor is handling a case, mediation is likely to depend on whether or not the solicitor commends that course of action to the client, as opposed to merely inviting the client to consider mediation to ensure that the client can reassure a judge, if asked pursuant to 4.7 of the General Practice Direction to provide evidence that alternative means of resolving their dispute were considered. The low level of mediation referrals pre-filing is indicative of an absence of enthusiasm for civil mediation (with the exception of Family Mediation) within the broader ranks of the legal profession. This cannot be because solicitors are not aware of the existence of or the asserted benefits of mediation. Mediation has been widely promoted to the profession over the last 15 years and most solicitors will have taken part in at least one CPD mediation program. The conclusion must be that solicitors in general do not value mediation as a beneficial service for their clients or perceive mediation as not being in their own best interests. Whether or not this should be the case however, is a matter for consideration at another time.

If self standing mediation is the way forward, the key to expanded take up must lie in client awareness campaigns. If clients made it clear to their solicitors that they wished to engage in mediation in lieu of litigation, the profession would quickly embrace the process and fulfil the role of client representative / advisor. Equally, if ADR became a common feature of general contract documentation, self standing mediation would become the norm. Whilst various of the ADR service providers have targeted specific industries and activities (e.g. pet care, travel and landlord & tenant etc) there is no obvious candidate to provide the pump-priming finance for such an advertising campaign. The ADR providers have not sought to reach out to the general public. The potential returns on such an investment are far too uncertain to commend such a course of action. It appears highly unlikely that the legal profession would mount such a campaign given its evident antipathy to the process. Perhaps what is needed is a government sponsored TV advertising program to promote mediation to the general public as a viable alternative to litigation. As will be demonstrated below this does not appear to form part of the current ADR development strategy being pursued by the government through Her Majesties Court Service. Indirect public exposure to the mediation concept through TV documentaries and mediation based story lines in popular sitcoms and soaps such as Coronation Street and East Enders could do much to promote general public awareness of the process.

In the UK mediation is wedded to the main stream mediation service providers, who act both as a quality assurance and regulatory mechanism and as mediator nominating body. By contrast, whilst court appointed mediation and mediation service providers are common features, there is also a vibrant market in private mediation practice, whereby specialist mediators advertise their services and parties who have agreed to mediation approach the mediator of their choice directly. Alternatively, if approached by one party, a mediator will approach the other party, often successfully, with an invitation to mediate. Since overheads are less and the costs of a mediation service provider are avoided such services tend to be cost effective in this competitive market and speedy. This market is only possible because there is a high degree of awareness and understanding in the general public about the value of mediation and the advantages that it offers over litigation. Whether or not such a market could be realized in the UK is another matter.

The drivers behind mediation in the US are quite distinct and it would be a mistake to imagine that mediation can achieve the same degree of take up in the UK since the reasons for its success are not replicated here. "*Doing a deal*" is part and parcel of the US psyche, which means that the public is more susceptible to the mediation concept. The US citizen has far less expectations of the state in terms of education, health care and social services. Thus the concept of self help and getting on with things and making the best of a situation is far stronger. All of this has contributed to the development of the mediation market in the US. Furthermore, the civil trial is a far more elaborate affair in the US, involving juries. The process is potentially intimidating for litigants, making informal alternatives much more attractive. Mediation if it is to grow in the UK it will be necessary to identify and promote its unique selling points over and above what is provided by the UK courts. Rather than reaching out to the general public, it is likely that future growth will come out of the further development of niche markets.

## MEDIATION METHODS FOR MEDIATORS & PARTY REPRESENTATIVES

### CONCLUSIONS.

Mediation provides a viable method of dispute resolution. In appropriate circumstances mediation can be very cost effective. It also has many additional attributes over and above those offered by litigation. It is particularly suited for the resolution of larger scale domestic disputes and even more so for international disputes, since it can overcome many of the conflicts of laws barriers. Mediation is very useful for class actions and multi-party disputes. It also has a useful role to play in Family, domestic and social dispute resolution. All that apart however, it is far from evident that mediation is either efficient or cost effective for the resolution of low value disputes that can be dealt with quickly and efficiently by fast tract procedures, particularly where the mediation is conducted at the behest of a District Judge post filing of fees. If the commercial mediation community and HMCS consider that there is a valuable role for mediation to play in respect of such disputes, it is submitted that there is the need for a major rethink about how to realize that objective.

One pointer towards the way forward lies in the on-line adjudicatory service provided by HMCS noted above. It may be possible to develop on-line small claims mediation facilities which could be promoted by HMCS in addition to the current Mediation Helpline services currently on offer, provided the main-stream mediation providers such as CEDR, The ADR Group and the CI Arb were willing to take the initiative and set up such a service. The advantages lie in that such a service could be very cost effective. No accommodation is required. The parties could participate from their own computer terminals. Organisations such as *The Mediation-Room*<sup>24</sup> provide the soft ware for on line mediation, so the means of providing such a service exist. Such a mediation may be conducted in real time or over an extended period of time as messages are sent back and for between the parties. Such a facility could prove to be very attractive for the parties since it would not impact adversely on work commitments. One further advantage for such a scheme would be that it would provide an opportunity for newly qualified mediators to gain invaluable experience, which at the present time is not readily available, given the small numbers of low value disputes that are currently dealt with by mediation.

### ADDITIONAL READING

- Bevan, A. H.** (1992) *Alternative Dispute Resolution*, London: Waterlow Publishers.
- Brown, H. & Marriot, A.** (1999) *ADR Principles and Practice*, London: Sweet and Maxwell.
- Deutsch, M. & Coleman, P. T.** (2000) *The Handbook of Conflict Resolution: Theory and Practice*, San Francisco: Jossey-Bass Publishers.
- Fisher R. Ury W. et al**, *Getting to Yes*, Random House Business Books
- Goldberg W**, *Dispute Resolution*, Aspen Law & Business
- Hocker, J. & Wilmot, W.** (2001) *Interpersonal Conflict*: McGraw-Hill Publishing.
- Mackie, K. J.** (Ed.) (1991) *A Handbook of Dispute Resolution: ADR in Action*, London & New York: Routledge & Sweet and Maxwell.
- Moore, C. W.** (1996) *The Mediation Process: Practical Strategies for Resolving Conflict*, San Francisco: Jossey-Bass.
- Murray, J., Rau, A. & Sherman, E.** (1989) *Processes of Dispute Resolution - The Role of Lawyers*, New York: Foundation Press.
- Noone, M.** (1996) *Mediation*, London: Cavendish.
- Palmer, M. & Roberts, S.** (1998) *Dispute Processes: ADR and the Primary Forms of Decision Making*, London: Butterworths.
- Roberts, M.** (1997) *Mediation in Family Disputes: Principles of Practice*, Aldershot: Arena Ashgate Publishing
- Rogers, N. H. & Mcewen, C.** (1989) *Mediation: Law, Policy and Practice*, New York: Lawyers Cooperative.
- Rogers, N. H. & Salem, R. A.** (1987) *A Student's Guide to Mediation and Law*, New York: Matthew Bender.
- Steward, S.** (1998) *Conflict Resolution: A Foundation Guide*, Winchester: Waterside Press.
- Tackaberry, J. & Anglade, L.** (Eds.) (2004) *International Dispute Resolution Vol 1: Materials, Vol. 2: Cases*, London: Sweet and Maxwell.
- Wilkinson, J. H.** (Ed.) (1990) *Donovan Leisure Newton and Irvine: ADR Practice Book*, New York: Wiley Law Publications.
- York, S.** (1999) *Practical ADR Handbook*, London: Sweet & Maxwell.
- Ury W.,** *Getting Past No*, Random House, Business Books.

<sup>24</sup> www.TheMediationRoom.com.

## CHAPTER ONE

### WEB SITES

**ADR Resources** edited by Steven Marsh. <http://adrr.com>. Influential writer on mediation practice.

**Mediate.Com.** <http://www.mediate.com> Monthly articles on mediation. Archived.

**CEDR – Centre for Effective Dispute Resolution.** <http://www.cedr.co.uk> Primary charitable mediation service provider in the UK. Provides training courses, accreditation, nomination and publishes a manual on mediation.

**CEDRS.Com.** Centres for Excellence in Dispute Resolution at

<http://www.cedrs.com/Articles/articles.html> Charles B. Parselle is an influential writer on mediation practice and procedure.

**Mediation Newsletters from Keith L. Seat.** <http://www.keithseat.com/publications.htm>

**International Academy of Mediators.** <http://www.iamed.org/publication.cfm>

## Self Assessment Exercise No 1

1. What is mediation? – Distinguish mediation from other forms of private dispute resolution including
  - a) Arbitration
  - b) Adjudication
  - c) Conciliation
  - d) Expert Determination
2. What are the benefits, if any, of using mediation?
3. What are the disadvantages, if any, of using mediation?
4. Compare and contrast the various models of mediation, namely
  - a) The Rescuer :
  - b) The Third Party Negotiator :
  - c) The Deal Maker :
  - d) The Orchestrator.
5. Outline the mediation basic process.
6. What disputes are not suitable for mediation and which types of dispute are appropriate for mediation?
7. How does one measure the success or otherwise of a mediation and how does one rate mediators?
8. Compare and contrast facilitative and evaluative mediation.
9. To what extent, if at all, is the mediation process reliant on clients to co-operate with the process?
10. Compare and contrast the role of the judge and the mediator.
11. Consider the contribution, if any, that mediation can make to the settlement of low value civil claims.
12. Compare and contrast the role and contribution of mediation for the settlement of social dispute and civil claims.