COMPULSORY MEDIATION & THE BENEFITS OF MEDIATION : Q&A

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1) I am looking at ADR and in particular, whether mediation should be made compulsory in construction disputes, using the Woolf style case management scenario introduced in civil justice cases whereby mediation is not optional and is in fact the only initial route open to both parties, thereby removing the tit for tat battles that seem to plague the Dispute Resolution cases and introducing at the early stages an independent mediator who can assess the dispute and suggest possible commercial remedies prior to the case going into the `pure` law arena.

With the exception of the London Mediation scheme there is no compulsory mediation in the UK. Even the London Scheme could be avoided by a refusing party providing reasons. In the UK the CPR cost penalty is closest we get to compulsion. Even that is a step too far for some people.

Mediation has much to commend it. There is no reason why mediation cannot assist the parties to a construction dispute to achieve a settlement. Commercial construction mediation is common in the US so theoretically it could benefit the UK industry. It should not however be thought that Mediation is provides a sure-fire panacea. Much depends upon the attitudes of the parties towards the process, potential outcomes and upon what they perceive is at stake. Third party interests can make compromise impossible.
Where mediation works it can save time, money and preserve on-going relations. Where it fails, it can result in unwanted delay and additional expense without any benefit. This may not always be the case since even a failed mediation may reduce the number of issues in dispute, lowering the cost of any subsequent trial.

The value of mediation varies with local circumstances and in particular the prevailing legal climate. Thus, apart from the question of whether or not mediation is a useful mechanism for the settlement of construction disputes, there is the separate question of whether it can make a valuable contribution in the UK, particularly because of the availability and indeed the semi-compulsion of HGCRA adjudication.

Would it be better to mediate than to adjudicate? To a great extent both are speedy and relatively inexpensive compared with litigation and mainstream arbitration. One relies on consensus and maximises party control over the settlement whereas the other provides a quick fix. Rather than mandate one over the other, perhaps it is better to allow the parties to jointly choose. At present legislation gives adjudication the edge, over-riding mediation provisions in the contract. However, party autonomy relies on joint-consent. In mediation one can take the horse to water but one cannot make it drink. In adjudication, the process can proceed even if the other party refuses to take part. From a pragmatic standpoint the UK stance at least works. It would be undesirable to have two compulsory and sequential forms of fast track settlement process, and since there is demonstrable support from a large sector of the construction community (albeit not total support) for the adjudication process, displacing adjudication with compulsory mediation is highly unlikely at the present time.

Pre-contractual agreements to mediate however are enforceable in respect of arbitration and litigation, since a stay of action may be granted pending exhaustion of the mediation process. Thus the mediation provision can be respected for non HGCRA construction contracts. Indeed, mediation is often successfully used for domestic construction disputes.

2) What percentage of construction disputes go straight to litigation and what percentage go to ADR?

The statistics on known adjudications are readily available – see http://www.adjudication.gcal.ac.uk/. Current construction litigation statistics are available from the Court Service web site. The various Mediation service providers such as CEDR and Association of Northern Mediators provide a break down of construction based mediation references. It should therefore be a straightforward task to compile a table – though the mediation element cannot be that accurate. The nature of mediation is that it is private so accurate statistics are not easy to come by. Nonetheless, for present purposes it would appear that the lion's share of construction disputes in the UK at present go to adjudication.

3) Is the take up of mediation as a dispute resolution technique as high as it could be in construction disputes and if not what is holding it back?

As outlined above, in the UK competition from adjudication has severely limited the uptake on mediation. However, given that there are major sources of dissatisfaction with adjudication, particularly for final account disputes, there is a possibility that if the industry embraces mediation, parties might chose to mediate in lieu of adjudication. But do not hold your breath. Much of the industry is highly sceptical of mediation. Similarly, DRB processes have not taken off in

the UK either despite the demonstrable benefits that they offer particularly to larger projects. The inclusion of mediation provisions in the JCT suggests that mediation might be taken more seriously in future, but a similar provision in PAM, the standard form of contract in Malaysia has not seen a rush to mediation.

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1. *"There are extreme views about the benefits of using mediation usually based on the experience parties have had of the procedure"* (Laurance Cobb, 2003). It is widely felt that the perception of mediation, more often than not, determines the take-up of mediation as a dispute resolution process. If a party agrees to mediate then they are willing to compromise but at the same time this may also be perceived as a lack of confidence in the strength of the willing party's case.

(a) How true, from your experience and knowledge, do you find this to be?

There is no reason whatsoever why a rationally thinking person involved in a dispute should think that the mere fact of entering into negotiations is a sign of weakness. If that were the case no business negotiations would ever take place.

The willingness to compromise arises out of either a pragmatic decision that there is a benefit in settling for less than a person believes they are entitled to or quite often a realisation that their demands have been pitched somewhat on the high side and may not be entirely realistic.

Participation in mediation is often the consequence of a fear of cost repercussions of failing to do so or as a method of bridge building. It does not provide any indication of willingness to settle – indeed many enter the process without any expectation of success and it is not uncommon for a party to declare after the event that they are amazed at the fact that the process in fact worked.

The principal factor in the non-take up of mediation is the incorporation of some other form of dispute resolution in the contract. In the UK adjudication is a major barrier to construction mediation. Nonetheless mediation is currently benefiting from a degree of dissatisfaction with the adjudication process.

Domestic construction disputes are frequently referred to mediation by the courts

Resolex provides an ever expanding contracted mediation service.

International construction mediation is not uncommon and mediation is frequently used in the US for construction disputes.

(b) How much of an effect does this have on the mediation process?

The main barrier to closure during mediation is a perception by one party that they have a right to something which can be satisfied by litigation and therefore there is no benefit in settling or alternatively the debtor simply wants to either buy time or wear the other party down by attrition hoping the claimant will give up and go away.

2 In his article, 'Blow your rights', Tony Bingham pointed out a common error made by many people and in particular students. He pointed towards the presumption that mediation resolves disputes and makes the comment that mediation does not 'resolve issues', it only works well at getting rid of them. This therefore suggests that in order to 'resolve' a dispute parties have to resort to formal methods of dispute resolution such as litigation and arbitration.

(a) How true do you find this to be?

Tony Bingham is absolutely correct in asserting that mediation does not produce a legal outcome that determines the parties' respective rights and liabilities. As such it is of no value to predict what should be done in similar circumstances. It does not resolve the issues – but it can and does either resolve, dissolve or settle the dispute. He is correct in asserting that it makes the dispute go away.

Care should be taken in reading too much into Tony's article – he is after all an active and successful mediator – and would readily accept that there are situations where mediation provides a very valuable mechanism for bringing about closure.

(b) And what effects, if any, can this 'getting rid' of disputes have on the future of mediation in the construction industry?

- *Where a party requires a definitive answer to an issue which is likely to recur and thus requires a definitive guide for future action mediation will not be suitable, though if adjudication or arbitration is used the guidance will only work for the immediate parties – since the processes remain private most of the time.*

- *However, many disputes are one off events where this factor is of no consequence.*
- *Few parties will seek to establish (and foot the bill for) a precedent for the benefit of the rest of the world. The impact therefore of this is likely to be minimal. I know of no-one who has resisted mediation on this basis.*

3. **Mediators tend to get portrayed as 'magicians', in the construction industry. *Mediators have a unique ability to identify and explore, through the caucusing process, the settlement routes and options, which the parties may not previously have believed to exist* (Martin Roberts, 2004). Philip Naughton QC has expressed the view that this image of mediators is a myth and has gone on to say that while mediators have a role to play and have a certain influence on the process, the important factor, in determining a result, is the enthusiasm of the parties that are participating in the process**

(a) How much influence does a mediator have on an outcome, in your opinion?

Whilst I am aware of mediations that have produced a settlement in spite of rather than because of the mediator, bad mediators can assist in the framing of bad settlements. Inexperienced mediators may fail to establish an environment where settlement might be brokered. An effective and experienced mediator is essential to the success of the process. It is not magic – the process opens up opportunities for the parties to realistically re-evaluate their situation and to act accordingly - it is a highly skilled job.

(b) Should mediators be regulated by professional bodies and be subjected to training standards and codes of practice? Why?

- *It is highly desirable that mediators are well trained and that they operate in a professional manner. That said, informal mediation has occurred since time immemorial and to criminalise such conduct simply because a volunteer mediator is not professionally qualified and a member of some organisation would be undesirable.*
- *Who would the professional body be? Construction only or generic to all mediation? The concept sounds good but is difficult to put into practice. There are a wide range of mediation methodologies and a vast range of trainers of different techniques. Who should be IN and who should be OUT? The EC is looking into the matter and has a directive – weak without much detail – but to go further would be to open up a can of worms. There is sufficient common law control of deceit and undue influence / duress / mistake to deal with wrong-doing and the incompetent will quickly be isolated by the industry. Parties are usually legally represented which should provide sufficient safeguard.*
- *A complaint to most mediation provider organisations (who will have their own codes of conduct) will lead to an investigation and de-listing of rogue mediators.*

4. **Mediation is an alternative to formal dispute resolution methods such as litigation and arbitration, where decisions are imposed on the parties, and allows disputing parties to make their own decisions. The Civil Procedure Rules encourage the courts to promote mediation and have given the courts the powers to impose mediation onto disputing parties. Some are of the opinion that by courts imposing mediation on parties and by introducing severe penalties to those parties who refuse to mediate, the courts are infringing Article 6 of the European Convention on Human Rights – 'a party's entitlement to a fair trial' and the Human Rights Act 1998.**

(a) What is your view on this?

- *The courts refer dispute to mediation where they perceive that litigation is not ideal – and where a settlement would be better for the parties.*
- *They merely delay litigation – they do not remove a party's entitlement to their day in court. Article 6 arguments are not a real runner.*
- *There is little to be lost in attempting mediation – though the process in the London Central Court is frequently too short to be successful and could thus result in an additional waste of monies.*

5. **Parties are often frogmarched, by the courts, to mediation. It is believed that the outcome from a mediation process is largely dependant on the parties and hence their attitudes towards mediation. Imposing mediation on parties may result in parties going into the process half-heartedly and therefore may influence the process and its outcome negatively. Mark Roe (2002) said, "*Parties used to mediate because they thought it was a good idea. Now they are obliged to mediate, the contract or the court tell them they have to…but, forcing people to mediate raises its own problems. Mediation, by***

***its very nature is a consensual process…there is a danger in forcing people…parties may go through the motions – making the process ineffective.*"**

(a) What do you think are the implications of this on mediation?

- *If the parties have contracted for mediation they can hardly complain if asked to participate. This is consensus – and does not cease to be so simply because a party changes its mind – the same is true of arbitration – one cannot undo the initial choice.*
- *As for court recommended mediation, judges do not advise it without good reason. It is only done where the circumstances lend themselves to the process. Frogmarching is somewhat too strong. Parties who genuinely feel the process cannot succeed can opt out. An outright winning litigant is unlikely to be penalised for costs today (the savage early cost decisions have now been overruled) but where a party only makes a marginal recovery that outcome confirms that mediation would have been appropriate and compromise would have been the better part of valour.*

6. Mediation is perceived by some as a more formal method of negotiation with the help of an independent mediator who guides the parties to an outcome but the implications of the Woolf report, introduced by the Civil Procedure Rules 1999, have given mediation a new importance and as a result disputing parties are spending more and more time and money preparing for mediations. "*In many cases, the costs of this exercise can be expensive…parties insist on deploying lawyers and experts. Professional expenses of £50,000 to £100,000 per party and mediator fees of £20,000 are not uncommon*" (Robert Akenhead, 2005).

(a) In your opinion, will mediation remain the cheap and quick process with few rules, if any, that it initially was?

- *Whilst the procedural rules adopted by the parties in private dispute settlement processes may set time and cost limits, in general the parties retain autonomy over the process and by mutual consent they can expend as much time and energy as they deem fit upon the process. It is not uncommon for the costs of arbitration to spiral out of control. The same can occur in mediation. This is not to say that it is wise but it is a recognised phenomena. Common sense dictates that such behaviour is not desirable and is counter-productive. Evidence and proof are of limited value in mediation. Most parties to mediation processes would prefer to hold back evidence as and until needed at a trial. Its only purpose in mediation is to convince the other party of the strength of one's case. There is no judge to rule upon it.*
- *In my experience the longer a mediation goes on, after the main issues have been set out and considered by the parties, the harder it is to achieve a resolution. A day to a day and a half usually suffices to pave the way for a settlement, if one is to be brokered. Often an apparently failed mediation at the end of the first day, reconvenes a short time later and the parties having slept on the issue are able to settle. Slogging it out day after day is likely to be counter-productive.*
- *Note however that often mediations are really a series of mediations, each of sizeable proportions, where a day may be needed for each sub-mediation. Sometimes settlement can be achieved for a number of sub-topics leaving others for litigation at considerably reduced expense. However, there are times where the sub-mediation settlements are subject to agreement on all issues – so that one stumbles all – resulting in large costs thrown away.*
- *In a complex mega-million pound dispute it may be perfectly reasonable and even cost effective to incur professional expenses of £50,000 to £100,000 per party and mediator fees of £20,000 in order to settle a dispute. However, a mediator can by keeping the opening joint session short and to the point, minimise the need for expensive disclosures or oral presentation of expert evidence. I would advise against cross-examination of experts in joint sessions, though if both parties asked for it, their confidence in the process would be lost if a mediator refused to permit it. If only one day is scheduled for a mediation the parties are unlikely to ask for it – since a continuance would have to be scheduled some time in the future and parties will normally seek to keep within the time limits of the process and order their priorities accordingly. There is no reason why expert reports cannot be exchanged in advance as can other supporting documentation. The problem here is likely to stem from lawyers and lawyer mediators who seek to emulate the trial scene.*

- *The scope for management of the process by a skilled mediator can eliminate most of the problems highlighted by Akenhead, so escalating costs is not an inevitable development. It has not proved to be a major problem in the US, but only time will tell how mediation practice evolves in the UK.*

(b) While an increasing number of people are becoming aware of mediation, to what extent do you think the take up of mediation is influenced by such changes and why?

- *Court ordered mediation does not rely on awareness – though no solicitor should be unaware of the process given the duties imposed on the profession by the CPR to advise clients of mediation.*
- *It is obvious that knowledge of a process is a necessary part of voluntary adoption outside the court schemes. However, more important is appreciation of and perceptions of benefit. (Mediation was mentioned during my English Legal Systems course more than 20 years ago – but it was never explained). Whilst lawyers should know about mediation, there is still a very low level of knowledge and understanding of the process within commerce and industry in the UK. It is well known and used in the US, Canada and China. It is well known but little used in Malaysia.*

7. There have been many mixed reviews as to whether or not mediation as a form of ADR had fulfilled the requirements of proposals made by Lord Woolf in his 'Access to Justice' report published in 1996.

(a) Do you think mediation has been effective in fulfilling the requirements of the Civil Procedure Rules and has helped to improve the civil justice systems management of construction disputes?

- *Only 8 of the civil court centres is currently offering mediation – results are mixed – there is no uniform provision – some centres outperform others. The London Central Court statistics are not that encouraging. The South Wales Court mediation scheme is performing quite well – but is dragged down by one mediator who has had 8 appointments and failed to settle any of them. The administration of the scheme is basic but getting better. By 2006 there should be 40 centres. Once they have bedded in we will be in a better position to answer your question. It is currently too early to tell.*
- *However, I doubt that court ordered mediation will have much impact upon commercial construction disputes. Litigation and arbitration rates have been decimated by adjudication. There is little scope for mediation. Furthermore, complex construction disputes do not lend themselves to court ordered mediation. On the other hand, it is an ideal process for home-owner disputes. I have been involved in three in the last year – each of which was resolved in a timely and cost effective manner.*

(b) What do you think is the future of mediation as an ADR process in the construction industry?

- *Internationally, I believe commercial construction mediation will grow apace, but in the UK its future is limited. For me it is too early to call on the prospects of Contracted Mediation. Resolex might say otherwise.*
- *There is a growing practice of Dispute Mediation Boards in the US to complement Dispute Resolution Boards and if successful they may spread. Certainly the DRB process has been adopted by the World Bank, FIDIC and the ICC in the mutated form of Dispute Adjudication and Arbitration Boards but in the Middle East a number of Dispute Mediation Boards have already been instituted in favour of the DAB.*
- *Note that the US Dispute Resolution Board is a form of advisory mediation – in that the board makes a recommendation – which the parties can accept or reject. This is not pure facilitative mediation – but is close to the Californian style of judicial mediation. As ever with mediation, the devil lies in defining what one understands by the mediation process. It means many different things to many people.*