CHAPTER TWO

THE SUBSTATIVE LAW AND MEDIATION

This chapter examines aspects of substantive law that impact upon and / or govern both the mediation process and the negotiation phenomena which is central to the mediated settlement process.

LEGAL ASPECTS OF NEGOTIATION AND NEGOTIATION TECHNIQUES

Mediation is a third party facilitated negotiated dispute settlement process. The aim here is to examine the phenomena of negotiation from a legal perspective, with the objectives ***firstly*** of identifying the ways that law impacts upon different categories of negotiation process and ***secondly,*** by raising an awareness of negotiation techniques, to enable the reader, with specific reference to lawyers and ADR practitioners, to enhance their negotiation skills and negotiation outcomes.

Surprisingly perhaps, for many people negotiation is something that others, such as salesmen, business executives and government diplomats, engage in but has little to do with them. Nothing could be further from the truth. We all negotiate on a daily basis. Even where there is recognition of this fact there is a tendency to assume that one knows exactly what negotiation is and how to do it. Thus, most people are able to recall an instance when they negotiated a very good deal, leading them to conclude that they are good at it. Little thought is given to the mechanics of the process. The bad deals they have been involved in are brushed aside and quickly forgotten. Despite the concept of learning from mistakes there is frequently a failure to examine why some deals went well and others went badly. Bad luck is often blamed for a failure to negotiate effectively: either that, or it is concluded that the other person was smarter or deceitful in some unspecified way. Often however, the real reason is an unstructured approach to the negotiation coupled with a lack of assertiveness, driven by a conscious or unconscious desire to please or at least not to appear to be an "***awkward customer***". Many people become embarrassed with themselves if they adopt an openly assertive persona. This is often because, by experience, they know that once they adopt a confrontational attitude they are unable to keep it under control. They may subconsciously fear that they might lose their temper particularly if the other person does not quickly give ground, which prevents them from taking a more robust negotiation stance.

Frequently the potential for negotiation is not recognised and the opportunity to broker a deal on more advantageous terms is passed up. Whilst it would be very tiresome to negotiate everything we do an awareness of the potential to negotiate in appropriate circumstances can lead to significant economies. Negotiation potential can be enhanced by an understanding of the negotiation process. Preparation is vital to successful negotiation. Developing and applying negotiation strategies and tactics can lead to better deals. The ability to recognise and counter what the other party is directly or indirectly attempting to achieve is key to maximising outcomes.

Some legal aspects of negotiation.

Agreements to agree : The concept of the unenforceability of "*agreements to agree*" is clearly established in law.[1] However, this does not prevent commercial people from engaging in such agreements on a regular basis. Letters of intent are common in the construction industry[2] and the prevalence of good faith negotiation provisions is if anything increasing despite uncertainty about their legal enforceability.[3]

[1] See ***May & Butcher v R*** *[1934] 2 KB 17* and ***Walford v Miles*** *[1992] 2 A.C. 128*

[2] The courts are gradually developing a jurisprudence in relation to the extent that letters of intent can lead to legally enforceable agreements. See eg ***Emcor Drake & Scull Ltd v Sir Robert McAlpine Ltd*** *[2004] EWCA Civ 1733.*

[3] ***Little v Courage*** *[1994] 70 P & C.R. 469*. See also ***White Point Co v Paul B.Herrington*** *268, Cal App. 2d. 458 at 468* : ***Lahaina-Maui Corp v Tau Tet Hew****, 362 F 2d 419;* ***Transamericana Equipment Leasing Corp v Union Bank****, 426 F 2d 273;* ***Joseph Martin Jr. Delicatessen v Schumacher****, 52 NY 2d 105* and ***Magna Dev Co v Reed****, 228 Call. App. 230.*

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Advertising and negotiation : The boundaries between advertising hype which has no legal consequences,[4] inducement to contract and contractual terms which do have legal consequences, is highly technical. What is said during negotiations can have legal repercussions, particularly if inaccurate. Misrepresentations which are fraudulent give rise to actions in tort. Damages for the adverse consequences of negligent misstatements which induce a party to contract are provided by the **Misrepresentation Act 1967**. Even innocent misrepresentation is not entirely without redress.

That said, the ethics of negotiation practice continues to be a very grey area. The conduct of negotiations and of advertising which prepares the ground for negotiations is prescribed by law for protected categories of purchaser. The law of trusts,[5] common law concepts of duress[6] and equitable principles of undue influence[7] apply directly to the negotiating process. A frequent source of litigation is the judicial determination of the meaning and scope of and the legal implications of the terms of agreements and settlements.[8]

Intention to create legal relationships and quasi-business dealings : Negotiations may lead to legal relations in some but not all negotiation situations. The distinction between social and commercial relations and the intention to create legal relations is well known[9] but frequently ignored as the boundary between social and commercial relations becomes blurred.

The modes of and opportunities for social trading[10] within the family, the neighbourhood, through car boot sales and now through the internet[11] are constantly changing and increasing. The law is often playing catch-up in this evolving environment and consequently uncertainty can exist in respect of the legal consequences of such quasi-business practices, particularly with respect to the extent, if at all, that the law applicable to commercial dealings applies to these various forms of social dealing. Where it does apply, supervision is problematic. Whilst the courts have the legal power to enforce regulatory rights, identifying the individuals involved may not always be possible.[12]

Negotiated dispute settlement and privilege : Dispute resolution negotiations are subject to confidentiality and privilege,[13] so it is important not to disclose details of settlement negotiations to unauthorised third parties and the material is not admissible in court. On the contrary, mere contractual negotiations are not privileged.[14] Pre-trail negotiations are common place. Many cases settle and do not proceed to trial. It is clear therefore that negotiation skills are as important for lawyers as they are for businessmen.

ADR and negotiation.

Mediation and conciliation are essentially third party assisted or facilitated negotiated dispute settlement processes. To be effective the facilitator (*mediator)* needs to be an effective negotiator, but with a difference. Whilst the mediator does not negotiate either for him/herself or on behalf of the parties, the mediator can and will develop avenues for potential settlement based on the parties negotiable interests.

The mediator's role is not limited to dispute resolution. The go-between agreement facilitator, in social, commercial and public relations (*both domestic and international*) are long standing. However, a recent phenomena is the emergence of contract / project mediation, whereby an independent third party assists the parties to put the detailed flesh on the bones of a broad brush stroke commitment to a project. The objective is to cut down the lead in time to a project and to mobilize financing at an earlier stage than would otherwise be possible but the concept is heavily reliant upon trust, good faith and the ability / willingness to subsequently

4 ***Carlill v Carbolic Smoke Ball Co.*** *(1893) 1 Q.B. 256*

5 See ***Bennington v Baxter*** *[1886] 12 CA*

6 See ***North Ocean S.S. v Hyundai Construction Ltd (Atlantic Baron)*** *(1979) Q.B. 705 :* ***Pao On v Lau Yiu Long*** *[1980] AC 614, :* ***Williams v Roffey Bros & Nicholls (Contractors) Ltd*** *[1990] 1 All ER 512*

7 See ***Alicard v Skinner*** *(I887) 36 Ch D 145 :* ***Lloyds Bank v Bundy*** *[1975] QB 326 :* ***CIBC Mortgages v Pitt*** *[1993] 4 A11 ER 433* etc

8 See for instance ***Haines v Carter*** *[2002] UKPC 49*

9 At least to any student who has studied foundation elements of the law of contract. See ***Balfour v Balfour*** *[1919] 2 K.B. 571:* ***Rose and Frank v Crompton*** *[1925] A.C. 445 :* ***Snelling v John G Snelling Ltd.*** *[1972] 2 W.L.R. 588* etc.

10 Catalogue sales often involve social agents both in the home and the office e.g. the Tupperware party and the Avon Lady.

11 The latest phenomena is the E-bay type of online facility for private individual to private individual trading.

12 The law has long grappled with the problems of rogue traders and mistaken identity. See e.g. ***Lewis v Averay*** *[1972] 1 Q.B. 198.*

13 E.g ***Berry Trade Ltd v. Moussavi*** *[2003] EWCA Civ 715* where dispute resolution negotiation privilege was upheld.

14 See ***Prudential Insurance Co America v Prudential Assurance Co Ltd*** *[2002] EWCA 1154*

negotiate detail without prejudice to the interests of the parties. This is typified by *"Letters of Intent"* which envisage subsequent negotiations to finalise terms, but is there a contract to enforce and at what stage?

Negotiated problem solving, with or without the assistance of a mediator is also increasingly being used on large commercial projects and particularly complex construction projects. Two of the latest buzz words are ***"Teamworking"*** both within organisations and between organisations and ***"Partnering"*** which are founded on the concept of joint ownership of and mutual interest in the project. A key ingredient of these is the team and or partnering meeting to identify / pre-empt problems and negotiate solutions. In conclusion, the scope for the application of negotiation expertise is on the rise. A thorough understanding of both the skills and techniques of negotiation and an understanding of the legal aspects of negotiation are central elements of that expertise.

WHAT IS NEGOTIATION ?

Negotiation is any form of dialogue between two of more individuals or groups of individuals or organisations, aimed at producing an agreement about future conduct or relations between the parties to the negotiation. Negotiation is a bargaining process.

The nature of, and the conduct of negotiations, inevitably reflect the bargaining power of the parties. These in turn dictate which tactics and strategies may be effectively employed by the negotiators. The extent to which the subject matter of negotiation involves legal rights and interests impacts upon whether or not there is a legal necessity to arrive at a settlement and thus whether or not a risk analysis of potential litigations outcomes contributes to the negotiation dynamic.

General introduction to Negotiation Strategies and Tactics.

Together strategies and tactics involve the art or skill of employing available means to accomplish an end. Strategies are broader and involve the general planning required to achieve an end such as marketing campaigns and the like. A strategy will often involve the devising of a number of tactics which whilst of the same nature as strategies seek to achieve more limited steps towards the achievement of the overall objective. Thus, salesmen will often have a strategic negotiation plan or prepared sales pitch. However, within the general plan they will have a number of tactics which can be used in appropriate circumstances to break down different types of resistance or bridge over an impasse. Strategies and tactics can be used by both parties to a negotiation. Flattery and capitalising on greed are common tactics.

Classification of negotiation instances by reference to legal status of interests involved

A **Pre-contractual negotiations :** (no legal interest).

1) Mutual but different interests : For example seller and buyer wishing to trade where both are prepared to compromise.
2) Unilateral difference : For example buyer looking for a reduction in price but seller indifferent to sale and not interested in compromise or alternatively seller looking to interest a potential but currently indifferent buyer. The first task for the seller is to get buyer interested. Standard form contracts inhibit negotiation and have ethical and legal implications.

B **Negotiations to amend pre-existing contracts** (no legal interest).

1) Mutual but different interests : Both parties know that the existing contract is no longer satisfactory or sustainable – but each wants different things out of the new agreement and both are prepared to compromise to get some of what they want.
2) Unilateral difference : Where one party finds that the pre-existing arrangement is no longer satisfactory but where the other party is happy to stick with the status quo and sees no reason to compromise.

C **Negotiations to allocate responsibility for breach of contract or tort** (legal interest).

1) Mutual but different interests : Both parties know that the dispute must be settled and that both parties have some legal rights which must be met but there is a disagreement as to how to move forward and both are prepared to compromise to reach a settlement.
2) Unilateral difference : Where one party claims a legal right but the other party denies all liability and feels there is no reason to compromise.

D **Negotiations to manage ongoing relationships** (reciprocal rights/duties/interests).
The parties share mutual interests but these may be outweighed by unilateral objectives :-

1) Workplace negotiations : Job satisfaction & career development v Productivity & creativity.
2) Landlord & tenant : Quiet enjoyment & maintenance v Respect of property & community.
3) Project management contract negotiations : Internal association negotiations.

E **Multi-Party Negotiations concerning any of the above** (legal and non legal interests).
The problem with the mutual / unilateral interest distinction here is that it is unlikely that all partners will have a mutual interest, though two of them may have shared interests.

1) Triangular contractual relationships of mutual inter-dependence eg guarantees and trusts.
2) Chain Contracts

F **Negotiating with Public Authorities** (Public Law and Judicial Review).

1) Discretionary benefits. Proving worthiness.
2) Public benefits available to all who fulfil criteria – sometimes as of right and sometimes subject to administrative discretion.

G **Social Negotiating** (mostly non legal interests). Mutual interests & social responsibility.

1) Shared services, social activities & relationships between family, friends and the community.
2) Ongoing post separation relationship issues, e.g. sharing offspring.

A PRE-CONTRACTUAL NEGOTIATIONS.

The significant factor about pre-contractual negotiations is that there is no necessity for an agreement beyond the personal needs and interests of the parties. In the absence of legal interests there is no role for third party determination before the courts or other non-judicial quasi judicial mechanisms such as expert determination or quasi-judicial mechanisms such as arbitration or adjudication. Such negotiations amount to bargaining or haggling. There is however scope for assistance from intermediaries, including mediators.

Such negotiations are self interest based. Accordingly, the strategies and tactics adopted by the respective players depend on bargaining strength. The outcome will reflect a balance between the interests of both parties and to that extent should be seen to be a fair mirror of those interests but the outcome, if any, does not have to be just. The art of negotiating in these circumstances involves each party seeking to down play their own needs whilst emphasising the needs of the other.

1) Mutual but different interests.

The obvious example is the seller and buyer of goods and/or services where both are prepared to compromise. Here a) the seller wants or needs the business and b) the buyer strongly desires or better still, because of a commitment to a project, needs the product or a comparable product.

Central issues for the seller to emphasise will be the quality, effectiveness, efficiency, value for money etc of the product / services and its benefits to the client, maximising greed, envy and status. Flattery works whether as to the standing of the product or to the keenness of the deal. Pressure is often asserted by implying deadlines and cut off points for deals, e.g. *"Unrepeatable bargain - sale ends 5pm."*

By contract, the client will play on restrictions in scope for negotiation, such as budgetary constraints particularly if exceeding the budget will require that one has to defer to a higher authority, the availability of cheaper alternatives and the seller's need for sales or business. Sale's persons are often operating on commission. Flattery (e.g. "*You drive a hard bargain*") can produce effective results.

Who makes the opening gambit is not significant except that the attitude conveyed in the first 15 –30 seconds is often crucial to the final outcome.

2) Unilateral differences

a) ***The Stubborn Sales Person*** (characterised by the mainstream retail outlet).
The buyer is looking for a reduction in price but the seller is indifferent to whether or not there is a sale and certainly not interested in compromise. The sales person is unlikely to be in a habit of bargaining, resulting in a take it or leave it attitude. The salespersons most common refuge is the assertion that they have no authority to make a reduction. A strong weapon in the hands of the salesperson is the standard

form contract which acts as a barrier and deterrent to negotiation. Thus, the first hurdle to overcome is the mindset of the vendor since many shops can be persuaded to bargain or haggle. The key to success often lies in seeking out the person with authority, for example by asking to speak with the manager.[15]

Ironically, the second hurdle to successful negotiation in the high street lies with the client, not the vendor. The take it or leave it attitude within the High Street has generally been taken for granted by High Street clients. Thus it is the mindset of the client that has to be altered. There is a lack of public awareness of the scope to bargain in such circumstances. Contrary to this perception however, many things are possible if one has the "***cheek***" to ask. The saying "***if you don't ask you don't get***" comes to mind. Financial services, airline tickets, electrical products and household furniture for instance are all highly negotiable, but few consumers bother to negotiate. By contrast, many people are prepared to attempt to negotiate a car purchase since there is a common perception that it is possible to do so.

b) ***The Reluctant Client*** (characterised by the seller looking to interest a potential but currently indifferent buyer). The first task is for the seller to persuade the buyer that the product is needed and desirable – the classic stock in trade of the salesperson / advertiser.

Ethical Issues involved in pre-contractual negotiations:

These include a) the legal authority or lack of authority of the negotiator, particularly agents b) taking advantage of potentially vulnerable / gullible clients, in particular children and the insane c) high pressure sales tactics, particularly with regard to hire purchase finance and credit for consumer products.

The law may intrude at a later stage, for example by virtue of consumer protection legislation which provides cooling off periods in respect of Hire Purchase agreements particularly those negotiated in the consumer's home, whilst **The Unfair Contract Terms Act 1977** and the **EC Unfair Terms in Consumer Regulations** can invalidate or negate unfair standard terms in contracts.

Because of the Battle of the Forms rules regarding offer, counter offer and acceptance in the formation of a contract, vigilance is required lest a party ends up passively agreeing through conduct, something very different to that originally intended. The timing of the introduction of terms is essential since the notion of past consideration will prevent subsequent additions to the contract terms.

Not everything that occurs or is said during negotiations will become terms of the contract, though of course they may well be deemed to be representations which if false fall foul of **The Misrepresentations Act 1967**, the common law tort of misrepresentation[16] and the tort of deceit.[17]

If subsequently there is a dispute about the existence or otherwise of a contract that will fall into the category of dispute settlement negotiations, which is discussed later. What has been said and done during pre-contractual relations will be relevant to whether or not a contract has in fact been formed, and will raise issues of the formation of a contract such as offer, counter offer, mere negotiations and opening gambits, acceptance and communication along with other essentials of an enforceable contract such as consideration, intention to create legal relations, legality and authority/capacity to contract.

Care must be taken in negotiating contract terms and conditions. The law will not protect the bargain hunter who subsequently discovers the truth of the age old adage that "*one only get what one pays for".* It is not the job of the courts to remake bad contracts. For the advertiser on the other hand there is a fine line to be drawn between the salesman's puff and misrepresentation.[18]

Preparation for pre-contractual negotiations.

One of the principal keys to getting the best out of negotiations is thorough preparation. This is true both for the buyer and, though it would appeal to be obvious and taken for granted, for the seller. Salesmen present selected information in the best light and may bombard the potential purchaser with information and dazzle

[15] The art of haggling has recently become a common theme of television reality shows which specialise in investigative reporters exploring the opportunities to haggle even in the High Street, to demonstrate what bargains are available and how to achieve them.

[16] ***Hedley, Byrne & Co Ltd v Heller & Partners Ltd*** *[1964] AC 465.*

[17] ***Derry v Peek*** *(1889) 14 App. Cas 337*

[18] See ***Carlill v Carbolic Smokeball Co*** *[1893] 1 QB 256*

them. Commercial salesmen should have prior knowledge of new clients business operations and needs. The impulse buyer is particularly susceptible to bad bargains which are ill thought out and badly conceived.

Vendor / purchaser negotiation strategies and tactics.

The Limited Authority Tactic. The seller may insinuate that there is no authority to sell below a certain price whilst a buyer may suggest that there is a limit to the amount of capital available for a purchase or project. Often this can be easily countered by asking for someone in authority to deal with the matter or asking the other person to seek the necessary authority.

Time as a tactic to wear down the opponent. A seller can hold out for a higher price if the buyer needs goods urgently. A buyer should with hold information about the time constraints on delivery until after the price is settled. Equally a buyer can often gain an advantageous price by offering to pay cash in hand in return.

The turning a deaf ear / too busy for details tactic. The apparently busy salesperson can often avoid answering difficult questions either by seeming not to hear them, since people are often reluctant to repeat themselves, by dividing attention between two or more customers or by multi-tasking. The salesperson may give the impression of being irritated by too many questions, making the buyer feel guilty and so lose the edge in the bargaining process. It is not by accident or oversight that there often appear to be too few salespersons in a showroom. Customers are intentionally forced to compete for the attention of the server, so that once that attention is attracted, the client will endeavour to seize the moment and complete a purchase before the server goes off to "*assist some other deserving soul*". The seemingly harassed server can milk client sympathy.

The false reality check, appeals to reasonableness and sympathy tactics. Salesmen will often declare that the product costs more than the buyer is offering. This may or may not be true. Cash flow requirements often result in goods being sold at a loss so there may be ways of breaking this apparent impasse. Being sympathetic to the seller's problem will not help the client. Reasonableness for the purchaser is buying at the best available price, not at a price that gets the seller out of a jam. Equally, however the apparently needy client of limited means is not the seller's problem. The seller will rather encourage the client to compromise alternative budgetary commitments. The ability to offer hire purchase facilities is a strong weapon for the salesperson and if taken up increase profitability.

Creating the appearance of competition may work for either party. The salesperson will advise that other clients have expressed an interest in the product whilst the client will advise that they have been considering an alternative source of supply. However, it is clients are most susceptible to the competitive bug, which can result in the seller's dream scenario if the client decides they have to get the product at any cost to outdo the competition. Often bidders at auction pay far too much for the product.

What else can be negotiated ?

For the consumer purchaser price, delivery time / cost, service and guarantees are obvious targets for bargaining. For the long term potential repeat commercial buyer all the added extras plus the commercial advertising potential of a large client, if applicable, may also be negotiated and often have more impact on profit than the actual sale price of the product. Loyalty agreements are desirable for sellers but usually come at a cost since they provide security.

Factors to be taken into account in vendor / purchaser negotiations include inter alia :-

i) Knowledge of target product specifications and suitable alternatives.
ii) What is wanted, liked or preferred – including colour. (Best choice of product).
iii) Knowledge of minimum specification needed (Worst alternative choice of product).
iv) Fitness for purpose.
v) Budgeting. How much one is able and willing to pay (Highest & lowest).
vi) Knowledge of the market – alternative suppliers and comparative products.
vii) Product availability – delivery schedules.
viii) Ease of use and practicality.
ix) Available space and size of product.
x) Adaptability of product – bolt on accessories and updateability.
xi) Range of and availability of compatible products e.g. CD, Video, VCD, DVD, software etc.

xii) Replaceability of product – if to become integral part of other process – will it still be in production subsequently – or old technology with a limited life span.

xiii) Hidden costs : delivery – insurance – guarantee – connections – running costs of fuel mpg, petrol / diesel, oil, ink cartridges, paper etc – taxation if any – training in order to be able to use – number of persons to operate – programs required – maintenance and reliability – spares including availability and time factor for obtaining replacements.

B POST-CONTRACTUAL NEGOTIATIONS TO AMEND LONG TERM CONTRACTS.

As with pre-contractual negotiations there is no legal interest involved in post-contractual negotiations to change the terms of a pre-existing contract. Essentially the parties are in a pre-contractual situation. The major difference is that they do have a pre-existing contractual relationship which has to be taken into consideration. Whereas withdrawal is the default position in pre-contract, here the status quo is the contract.

It is important to draw the distinction between a dispute about the terms of a contract where the parties have a legal interest in the performance of the contract in accordance with their interpretation of the meaning of the terms of the contract and post-contractual negotiations to broker a new or revised contract, where there is no actual dispute about the meaning of the existing terms or of what each party must do, but there is a realisation by one or both of the parties that the original terms and conditions no longer satisfy their needs.

Distinguish also negotiations between contracting parties and ex-parte applications to court in order to rectify inaccuracies in the written terms of a contract, which do not correctly record what the parties had agreed orally or in correspondence. The outcome of such negotiations and court orders is to rectify the original contract. A new contract does not come into being. If there is a dispute about what was agreed this is a dispute about the terms of the contract.

It is essential, from a legal perspective that any new or revised agreement amounts to an ***"accord or satisfaction"*** containing benefits for both parties.[19] A failure to do so exposes the new agreement to challenge on the grounds that the new contract is defective due to an absence of consideration. Equity provides some protection by virtue of the doctrine of equitable estoppel, established in ***High Trees House***[20] and reinforced by ***Williams v Roffey***,[21] but application of the doctrine is both legalistic and technical and being founded in equity it should be noted that it is only available at the discretion of the court and not ***"as of right".*** Unlike the original agreement, which may be oral or merely recorded in writing, the only way to guarantee that the new agreement will not open up a litigation mine field is to sign, seal and deliver it, which places it beyond the vagaries of the doctrine of consideration. Unfortunately, this seldom happens since frequently the parties do not realise that it is necessary.[22]

The need or desire to recast the terms of a contract may be the result of a bad deal by one of the parties or because changes in technology or the market place render the original terms unsatisfactory which is often the case in long term contracts.

The law has little to offer the bad businessmen and the courts will do nothing to assist or redress, in the absence of mistake, duress or undue influence, the short-comings of a careless businessman. In English Law, the courts will not seek to rewrite contracts to create a "fairer" contract. The assumption is that it is for business persons to assess the risks involved and contract accordingly. [23] Whilst this represents a realistic and pragmatic approach in respect of simple one off contracts, it creates problems for complex contracts and in particular in respect of long term contracts. Businessmen frequently attempt to make provision for changing circumstances. Variation terms in contracts provide a degree of flexibility to take account of changes within the market. Attempts to provide for the future make contracts very long and complicated and with the best will in the world it is impossible to predict the impact that future market changes and technical developments will have. Sometimes revaluation is put in the hands of an impartial "***expert.***"

[19] ***Pinnel's Case*** *((1602) 5 Co. Rep 117a*

[20] ***Central London Property Trust Ltd v. High Trees House Ltd*** *[1947] K.B. 130*

[21] ***Williams v Roffey Bros & Nicholls (Contractors) Ltd*** *[1990] 1 All ER 512*

[22] See further below under the heading "Compromise and Consideration."

[23] The concept is based on "laissez faire" viz Let Do, epitomised by the phrase "Caveat emptor" viz Let the buyer beware.

In order to address this issue, some contracts require the parties to negotiate in good faith to realign the terms of contracts when market conditions change. Such terms in a contract are treated under English Law as agreements to agree and unenforceable before a court of law.[24] If the parties do subsequently renegotiate and then place the new contract under seal or alternatively provide mutual benefits under the new contract there is no problem. However, if negotiations break down then the English Law has little to offer in terms of mechanisms to enable the relationship to be maintained beyond a requirement that the parties continue to adhere to the pre-existing but unsatisfactory agreement.

This is not an esoteric, academic problem. It affects many business relationships and the problem is likely to grow rather than diminish. The amount of investment involved in many commercial ventures often cannot be justified unless rewarded by a long-term contract guaranteeing assured supply and distribution of product and services, but inflation will force changes in price and product will have to adapt to changing fashion and technology. Property investment, be it commercial or domestic is often long term but the property market is in continual flux. Plant hire involves massive capital investment and a need for security within hire contracts for both parties but is vulnerable to rapidly changing technology. Short-term contracts are possible for mobile plant such as cranes and ships but the hire of fixed installations such as power stations and industrial processes require long-term contracts. Natural contract breaks coupled with options to renew provide a partial answer only. The central issue returns to the terms of the renewed contract. Partnerships and corporate structures have to balance a degree of permanency with the flexibility to adapt to inevitable changes inherent in retirement, death, mergers and acquisitions.

1) **Mutual but different interests**

   Since both parties know the existing contract is no longer satisfactory there is a strong likelihood that a new agreement can be reached. Each party inevitably wants different things out of the new agreement but a preparedness to compromise is inherent in the mutual need for a new deal.

   There is a direct correlation between the respective amounts of investment made by the parties and the preparedness to compromise. Investment embraces the financial, product dependence, inter-personal and organisational. A natural reluctance to change means that the greater the number of facets involved in the relationship the more likely it is that a new deal will be brokered. Bargaining power will reflect the significance of each of these facets to the parties. Each will accord different degrees of importance to these facets.

2) **Unilateral difference :** Where one party finds that the pre-existing arrangement is no longer satisfactory but where the other party is happy to stick with the status quo and sees no reason to compromise.

   The party wishing to effect change is at a distinct disadvantage here, but not entirely without resource. The other party may well need to maintain mutual commitment to the project. This is particularly so in respect of the employer / employee relationship and re-negotiations of the terms of employment contracts.[25] The other party may well have a vested interest in ensuring that their business partners continue to be financially sound. Where the terms of the contract could lead to insolvency, enhancing contract terms may be a way of staving off disruption to the supply chain. However, to threaten to enter into voluntary insolvency is only viable if that is a potential / pending reality.

Ethical Issues in Renegotiating Contracts.

The party with the least to lose from remaining with the status quo, that is to say the original contract, clearly has the upper hand in such negotiations. It is a small step from profiting from this position of strength to ruthless exploitation, which may amount to duress, undue influence or the abusing of a special trust or

[24] ***May & Butcher v R*** *[1934] 2 KB 17:* ***Walford v Miles*** *[1992] 2 AC 128* : see also ***Altstom v Jarvis*** *[2004] EWHC 1232* **:** ***Beta Investment SA v Transmedia Europe*** *[2003] Ch.D. HC-02-C01840 :* ***Abballe (T/A G.F.A) v. Alstom Uk Ltd*** *[2000] EWHC Technology 122 :* ***Bernhard Schulte GmbH v Nile Holdings Ltd*** *[2004] EWHC 977 (Comm) :* ***Courtney & Fairbairn v Tolaini Bros.(Hotels) Ltd*** *(1975) 1 WLR 397 :* ***Halifax Financial Services v Intuitive Systems*** *[1999] 1 All ER 664* **:** ***Donwins Production Ltd v EMI Films Ltd*** *[1984] Times 9th March 1984 :* ***Agricultural Profiles Ltd v Performance & Deck Roofing Ltd*** *[2005] EWHC 65* : but see for a potential widow of opportunity to reap some benefit from an agreement to agree ***Petromec Inc v Petroleo Brasileiro SA Petrobras*** *[2005] EWCA Civ 891.*

[25] See further below regarding employment dispute settlement under Negotiating in the Workplace..

relationship. There is a very fine balance between hard bargaining and unlawful activity which may require the intermediary of the courts to determine on which side of the line the conduct falls.[26]

Preparation for post-contractual negotiations.

As with any commercial negotiation one should be aware of what one wants, what one needs and what is actually achievable. However, the most important factor is to know what the other side needs and to be aware of whether or not they can source that need elsewhere and at what price. Simply because a party is locked into a bad deal does not mean that the other party could achieve the same terms elsewhere. That is often not the case where the current deal is the consequence of old standing arrangements. If you are in a position to continue satisfy the other party's needs at the most competitive rate then you have something with which you can work. If your product is not available elsewhere and it is essential to your business partner then you may even have a winning hand, assuming they are committed to the product in question. This is the sort of negotiation edge enjoyed by brand leaders and specialist work forces.

Post contractual negotiation strategies and tactics.

The party that wishes to stick with the status quo is likely to adopt a simple strategy of stonewalling on the basis that they have the other party over a barrel. The key strategy to overcome such an impasse is to get the other party to focus on the value of the relationship – the importance of maintaining good relationships and commitment to the project.

A common tactic in furtherance of this strategy is to target concepts of joint ownership in the product, the significance of mutual interests and the importance of joint-cooperation – whilst highlighting the ways in which an obdurate approach to solving the problem could jeopardise the other's long term interests. This has to be done in a subtle manner, since a direct onslaught could give the appearance of unlawful threats and lead to hostility and the raising of further of barriers to progress. Traditionally, the door opener is to identify and build up what is going well, to emphasise both current benefits and the potential for further development before identifying barriers to progress that need to be addressed. This softening up approach before going for the kill however also entails risks, since it may be dismissed out of hand as so much padding unless carried through with high levels of enthusiasm. It cannot be achieved by simply going through the negotiation motions. Any indication of frustration at lack of commitment or enthusiasm on the part of the other party is fatal to the process. Whilst it sends a message out that patience with the stonewalling strategy is running thin, it is just as likely to convey the impression that the strategy is starting to bear fruit.

C AFTER THE EVENT LEGAL DISPUTE SETTLEMENT NEGOTIATIONS

This concerns situations where the parties negotiate in respect of alleged breaches of contractual duties and in respect of alleged liability founded in tort, such as negligence actions and nuisance claims. This is familiar territory for the legal profession which routinely negotiates on behalf of clients, right up to the court house door. It is the primary focus of civil litigation and likewise of civil mediation.

1) **Mutual but different interests** : Both parties know that the dispute must be settled and that both parties have some legal rights which must be met but there is a disagreement as to how to move forward and both are prepared to compromise to reach a settlement.

2) **Unilateral differences :** Where one party claims a legal right but the other party denies all liability and feels there is no reason to compromise.

3) **Common interests** : Where it would appear that both parties have the same interests but the way they approach the issue and ways to solve the problems are different.

The key factor in each of these situations is that what is in dispute is legal entitlement. The dispute is a legal dispute. It is a dispute which, unless a party chooses to withdraw, to give up due to attrition or due to disinterest / lack of commitment to the cause, will if not settled find itself before the courts. The choice therefore for the parties is whether to retain some measure of control / autonomy over the outcome or to put the outcome

[26] In ***Multiplex v CBUK*** *[2006] TCC. 6th June*. Mr Jackson J held that whilst Multiplex had acted ruthlessly, they had nonetheless acted within the law. The court held that a £36M payment had been in the form of a loan that could be recalled and was not part of the terms of a final account. Multiplex had priced at the very lowest possible levels and certified work at rates which were barely tenable, but all this was, even if practice deemed to be abhorrent and to be despised, none the less legitimate.

into the hands of an independent third party determinator (be that arbitrator or judge) and to trust to the advocacy skills of one's representative to persuade the judge of one's legal entitlement.

Apart from informal inter-parties pre-trial negotiation, contracts frequently include dispute resolution mechanisms ranging from good faith clauses, mediation, expert determination or arbitration. Alternatively, the parties may initiate formal third party assisted mediation and the courts often encourage mediation.

Preparation for "after the event dispute settlement negotiations".

Apart from knowing one's wants, needs and what is achievable, it is essential to evaluate the potential outcomes of the default process, i.e. what a court is likely to do. Litigation is rarely cut and dried. It contains potential pitfalls. It is essential to be aware of the strengths and weaknesses of both your case and the case of your opponent and of one's ability to present that case in an effective manner. Whether or not one's witnesses of fact are available and can withstand courtroom examination and still come across as convincing is a very relevant consideration. The same applies to expert witnesses.

There is much that the parties can do to ensure that the mediation is a success, though much of the essential ground work may have already been done if a case has progressed through the case management stage in a court action. The objective is to broker a settlement, not to achieve an outright win. There should be no barriers to the provision of all relevant information that you have in your possession about your position to both the mediator and the other side. The more that is known, the less time is needed in the initial joint meeting stage where the parties set out their stall and the more time is left for the mediator to facilitate a settlement and for him to develop of plan of action in advance for the conduct of the mediation. Information ambushes do not help to maximise outcomes, they simply jeopardise the process. It is important to exchange structured outlines of what the parties wish to achieve and the justification / grounds for those demands in advance, if at all possible, rather than to swamp the others with paperwork. This will enable each party to plan for the mediation and most particularly to identify and address relevant issues.

Simply because the law is with you is no guarantee of success. Legal success may secure an empirical victory particularly where the other party is a man of straw. It may be necessary to take measures to secure / preserve the assets of the other side, all the time pursuing settlement, but with a view to the end game and the ultimate outcome of litigation. The other party (especially small private companies and businesses) may give the appearance of engaging in dispute settlement negotiation whilst asset stripping (lawfully or otherwise) in preparation for voluntary liquidation.

It should also be remembered that in the absence of legal action, statutory and contractual limitation periods continue to run. Where the exhaustion of a limitation period is imminent it is important to file an action just in case the negotiations are not successful.

Whilst confidence in one's position and/or financial considerations (particularly where the actions of the other party have adversely impacted upon cash flow) often tempt parties to self represent themselves in litigation and mediation, this can be a false economy since the benefit of outsider objectivity is lost. A party who is too close to, and attached to, a view point is not best placed to evaluate his own weaknesses or to appreciate the strengths of the other party's position.

After the event negotiation strategies and tactics.

Strategies and tactics in this classic area of dispute resolution have been subject to much analysis. [27] Clearly the starting point is to evaluate the likelihood of success and the probable outcome. The greater the likelihood of success the stronger a party's position is. The objective will be to get as close as possible to that position in a settlement. The greater the number of variables, the greater will be the incentive to compromise on the basis that a bird in the hand is worth more than two in the bush, thereby removing the risk factor.

In as much as no party to litigation ever recovers all their actual costs of the litigation, a compromise that factors in the hidden costs of litigation that will in any event be thrown away involves no financial loss. It is in effect a management cost that can be avoided by early settlement. Furthermore, there is a financial benefit to solving cash flow at an early stage which may provide an incentive to settlement. Similarly, the opportunity to

[27] See Chapter 6 Risk Analysis and Chapter 7 Successful Party Representative Negotiation Strategies.

put a matter to rest and divert emotion and energy to more profitable endeavours can be a valid reason to strive for a settlement. This can be summed up by making the best of a bad job and moving on. Closure is a very powerful and important feature of dispute resolution.

Where there is value in preserving a relationship there is also the opportunity to explore ways of working together profitably in the future which could potentially outweigh whatever is currently at stake. This is not however possible if there is no mutual trust or confidence.

Where the defending party is a man of straw, the repercussions of insolvency are not necessarily attractive and it may be possible to broker ways of spreading payments over a longer period of time or to engage in collaboration where the creditor takes a stake in the business interests of the debtor. This assumes that the debtor has a will to remain solvent and there is mutual confidence in engaging in future collaboration.

Much is made in mediation circles of the value of expressing concern and appreciation of the situation of the other party (as opposed to accepting responsibility which is an admission of liability). This is of less significance in commercial dispute resolution but may be an important factor where one of the parties is an individual. It is by contrast often the central factor in social dispute resolution.

Separating the individual from the dispute is a tactic embraced by many mediators. The aim is to move away from *"I said …. He said"* to *"Where do we go next?"* In the commercial setting, moving up the chain of responsibility, away from the employee(s) involved in the event who may have internal issues of authority to deal with, to senior management who can take a broader view of events is often a way of securing closure.

It is amazing how competitive the parties to a negotiation can be. Whilst the objective is to reach a consensus, there is often an overwhelming pursuit of success, of putting one over the other side. A key factor for the mediator is to make the focus of the mediation quantifiable and achievable benefits for each side, where the parties pay more attention to what they are getting out of the mediation rather than the value to the other side of what they are giving. Often a party can provide something of value to the other side which entails little or no cost to them and their bottom line, such as references and promotional opportunities. Where the other party mounts a promotion which involves your project, they are promoting you at the same time, even though you are not the intended focus of the promotion. Free advertising has on economic value. Conversely, negative reporting has an adverse economic impact and is best avoided. The cost of combating it can outweigh the price for avoiding it.

This leads on to a key component of private dispute resolution, namely privacy. If the dispute progresses to court the entire world may get to know of your problems. Even where a party is ultimately successful in litigation, the interim period can create uncertainty in the market place. Even success does not necessarily prevent the rumour mill from speculating that where there is smoke there is fire and even unsubstantiated and un-sustained allegations can have adverse effects in the market place. In addition, there is a chance that business information, which one would prefer to keep private, is exposed to the scrutiny of the media and becomes public knowledge through the trial. It may be worth paying a price for that privacy.

Ethical issues in after the event dispute settlement negotiations

Exploitation

It is a moot point as to which is the best attitude to adopt when entering into negotiations in order to maximise outcome opportunities. The hardball approach of pitching high to leave room to negotiate may work but alternatively it may bring the negotiation to a rapid and unsuccessful conclusion. Accommodating, compromising and problem solving approaches each have values particularly to help kick start the process, but if used as an opening gambit against a hardball negotiator one is likely to be wrong footed from the start. Accordingly the win/lose, get/give approach is often the starting point of a mediation process but runs the risk that neither party is prepared to make the first move. One reason for this is a common perception that to display a readiness to compromise may be taken as a sign of weakness. If a party gives the appearance of really wanting the problem to go away a hardball negotiator's resolve to hang out for the best possible terms (even if unreasonable in the circumstances) is likely to be reinforced. This may to some degree be avoided at the outset by a mediator who gets both parties to commit themselves to resolving the dispute and to consider reasonable offers and follows this up with mutual assurances by the parties that they have full authority to

settle on the day. A danger however is that a mediator who rates his track record for closure may be tempted to zone in on the most amenable party to the exclusion of the less rewarding hardball negotiator. Whilst it is important to be even handed, disproportionate effort must otherwise be expended on the hard case, which might give the impression of imbalance, which is not in reality the case.

Evaluative Mediation

The peculiarities of legal systems provide opportunities for the canny litigant. The exploitation of the legal system may well be seen as unethical or unreasonable by some (which explains why some mediators prefer to bypass legal concepts altogether in the pursuit of a settlement and some mediation providers, particularly in the social sector do not even allow legal representation), but as Jackson J pointed out, it can be rewarding, providing one stays inside the law.[28] Accordingly, evaluative mediation is not founded upon concepts of fairness (that is to say in respect of outcomes as opposed to procedure where even-handedness and fair play should be the cornerstone), but rather on what a court of law is likely, however justly in the eyes of the litigant, to do. The reality check is aimed at removing the "rose coloured glasses" and forcing both parties confront the odds from an objective perspective. A very contentious issue is ***"Who should make the evaluation, the parties of the mediator?"***

It is clear that if the evaluation is made by the mediator and imposed upon the parties who are obliged under the rules of the process to accept that evaluation, the process is not a genuine form of mediation, in that the acceptance is not voluntary at that stage. It is rather some form of third party determination process, be it expert determination, binding conciliation, mini-trial or preliminary opinion. The latter is slightly different but, where a judge expresses a preliminary view it is likely to have a very salutary effect on both parties concerning whether or not it is work continuing with the trial.

The question rather concerns the standard mediation process whether the parties are in a position to walk away from the mediation at any time. There are three different view points on the issue.

On the one hand there are those who consider that the mediator should never express any view whatsoever on what constitutes a good deal, acting as a communications corridor between the parties, inviting them to consider the other party's position at any given point during the process. Some will not even go this far, avoiding the private caucus entirely, leaving it to the parties to put their developing view points over the table to each other. However, whilst avoiding evaluation of legal aspects, the very same mediators will often see no contradiction whatsoever in brainstorming added value matters.

The opposite extreme is that the mediator can make an evaluation and put it to the parties for acceptance or rejection. This is a common approach adopted by judicial mediators[29]. Indeed, it is not unknown for the parties to deliberately chose this form of mediation, or alternatively to invite the mediator to make such an evaluation. The problem here is where one party would welcome such an intervention, but the other party would not. Where the mediator is held in high esteem, the evaluation will be highly persuasive.

The middle way involves the mediator canvassing potential avenues for settlement in private caucus. The mediator will play devil's advocate, putting the views of the other party forward and inviting the party to put that view under the microscope. The mediator will also invite the party to consider novel aspects not necessarily developed by the other side that could lead to a resolution, inviting the party to make his own evaluation. The mediator can make effective use the lawyer / advisor (if there is one present) to act as a reasoned evaluator, to provide the client with a risk assessment and to explain why that it the case. Attorneys generally welcome this type of intervention, particularly where the client has up to date only tuned into good news and blithely ignored all the warnings and caveats issued by counsel. An additional ethical issue in this model of risk analysis mediation is whether or not the model works on an even handed basis when one of the

[28] See ***Multiplex v CBUK*** *[2006] TCC. 6th June.*, fn 26 supra.

[29] The TCC established a judicial mediation panel in June 2006. Which model of mediation is adopted by this panel only time will tell. The TCC panel judges have received CEDR training, which might indicate that they will in fact avoid judicial evaluation, since that model is not approved of by CEDR.. On the other hand, evaluation is one of the instinctive tools of judiciary, and whilst the mediator judge is under the TCC mediation rules prevented from communicating with any subsequent trial judge and will not play any judicial role in any trial, there are clients who would appreciate a judicial prediction of what that judges colleagues might make of the case, albeit that information might well change in the event of disclosures, cross examination and argumentation.

clients is not represented. Whilst the classic stance is that the mediator is not there to give legal advice, unrepresented parties frequently appeal to the mediator to provide an advice or opinion. The unrepresented party is at a clear disadvantage but the failure to seek representation is down to the party. That failure may however may have been dictated by circumstances which were brought about by the actions of the opponent. Even so, it not the job of the mediator to compensate for the power imbalance.

Whilst the mediator generally operates under the in-house ethical code of conduct of the appointing body, the extent to which such codes make clear the modus operandi of the mediator is variable to non existent. Such codes tend to be very general, though they do cover many of the core ethical issues such as absence of bias etc, but at the same time they also reinforce the message of confidentiality. To the extent that the conduct of the mediation is confidential and no records of proceedings are kept, it is difficult to maintain a challenge against to the conduct of the mediation process. Many rules provide immunity for the mediator and attempt to shield the mediator from any duty to give evidence in court, stating that such evidence is inadmissible. Whilst nothing can oust the jurisdiction of the court and prevent it from examining allegations of bad faith, deceit, fraud and undue influence, anything below that threshold is virtually exempt from judicial examination.

Confidentiality and Privilege.[30]

A common theme in western jurisprudence is for the courts to regard themselves as a last resort in civil litigation. Consequently the courts actively encourage the parties to civil disputes to settle their differences amicably wherever possible. One barrier to private resolution is the fear that any potential admission of liability or even a hint of recognition that a party might bear some legal responsibility for a situation will be used as evidence in the event of litigation. To counter this risk the courts have developed a concept of inadmissibility in respect of inter-party dispute settlement communications.[31] Such communications are treated as confidential and privileged against disclosure in legal proceedings.[32] One way of flagging up that communications are privileged is to state that the contents of a message are ***"Without prejudice"*** to any legal rights and without admission of liability.[33] Privilege will not attach to communications which are not concerned with dispute resolution even if labelled without prejudice.[34] Equally however, the failure to label a document "Without prejudice" is no bar to privilege where the subject matter is dispute resolution.

The mediation process is covered by confidentiality and privilege.[35] It is common practice for this to be formally reaffirmed prior to the mediation process by standard rules of practice and procedure for the conduct of the mediation and again within the mediation process by the mediator. Such affirmations are not strictly necessary but they help to build up confidence in the process.

There are however a number of exceptions where the privilege may be removed, which are embraced by the concept of unambiguous impropriety.[36] The concept covers admissions of wrong doing and unlawful intent, e.g. perjury, fraud,[37] blackmail, unlawful coercion[38] and threats and recognition of legal rights and interest.[39] However, lawful threats such as a threat to take legal action, is a legitimate bargaining tool.[40] Thus the terms of a settlement, even if made without prejudice may be opened up by the court to establish whether or not the agreement was the reached by unfair means.[41] Once a party waives the privilege the other party is free to rely on that material in court as well.[42] As mediation practice grows in the UK there is an ever expanding list of

30 This topic is considered in its own right below under the heading "ADR Privilege and Confidentiality."

31 ***Rush & Tomkins Ltd. v Greater London Council*** *[1989] AC 1280*

32 ***Cutts v Head*** *[1984] Ch 290 :* ***Muller v Linsley & Mortimer*** *[1996] PNLR 74*

33 ***Unilever plc v Procter & Gamble Co****. [2000] 1 WLR 2436*

34 ***Schering Corp v CIPLA Ltd*** *[2004] EWHC 2587 (Ch) Lawtel*

35 ***MT v DT*** *[2000] Scots CS 283* ***United Building & Plumbing Contractors v Malkit Singh Kajla*** *[2002] EWCA 628 :* ***Venture Investment Placement Ltd v Hall*** *(2005) ChD :*

36 ***Forster v Friedland*** *10 November 1992 (unreported),* but referred to in ***Unilever v Friendland*** fn32 above.

37 ***Vedatech Corp v Crystal Decision UK Ltd & Crystal Decisions (Japan) KK*** *[2003] EWCA Civ 1066*

38 ***Carillion Construction Ltd v Felix UK Ltd*** *[2000] HT/00/223 & 232 :* ***Hall v Pertemps Group Ltd*** *[2005] EWHC 3110 (Ch)*

39 ***Buckinghamshire County Council v Moran*** *(1990) 1 Ch.623 :* ***Munt v Beasley*** ***[2006] EWCA Civ 370***

40 ***Unilever plc v Proctor & Gamble*** *[2000] FSR 344*

41 ***Muller v Linsley & Mortimer*** *(1994) CA.*

42 ***Somatra Ltd v Sinclair Roche & Temperley*** *[2002] EWHC Com 1627*

cases where the courts have examined the conduct of mediation and in certain cases struck down the agreement.[43] However, very strong evidence is needed before the court will intervene.[44]

NEGOTIATIONS BETWEEN THE SUBJECTS OF MULTIPARTY RELATIONSHIPS

The common law contractual matrix of reciprocal rights and duties is predicated on the simple notion of agreement between two individuals, exemplified by the related doctrines of "***Privity of Contract***" and ***"Consideration"***. The common law will only enforce agreements between the parties to a contract which involve a mutual exchange of promises. This simple model fails to address the needs of a diverse wide range of multiparty relationships and has consequently led to a plethora of statutory, common law and equitable exceptions. Accordingly the law in this area is complex with distinct rules to govern special circumstances and relationships.[45] As an attempt to simplify this area of law, the **Contract (Third Party Rights) Act 1999**, which provides a statutory mechanism to bypass the common law rule of "***Privity of Contract***," is only partially successful since it excludes certain types of activity and is subject to express exclusion provisions in the contract and further does not apply where the potential third party beneficiary is not referred to in any way whatsoever in the contract. It is common practice in standard form contracts to expressly exclude application of the Act. Commerce has certainly not rushed to embrace the Act.

It is rare for all the parties involved in multiparty relationships to negotiate together at the same time. During the formative stage of multi-party relationships the identity of all the parties may not even be known. Beneficiaries for instance are often unaware of the fact that a benefit is about to be bestowed upon them. The practical problem that arises here is that where there are a number of separate agreements, for the matrix of arrangements as a whole to work smoothly, each agreement needs to take account of the contents of the other agreements, to ensure compatibility. However, the negotiating dynamic in each instance will be focussed on immediate rather than interrelated interests. The needs that arise out of the related agreements act as constraints on the freedom to negotiate of the party involved in the other relationship. The first agreement to be brokered has to attempt to predict what is achievable in subsequent relationships but otherwise enjoys the least constraint by comparison with subsequent contracts. Thus a main contractor who under values the work will have difficulty attracting sub-contractors at a price within budget. The content of a documentary credit agreement will necessarily stipulate terms of the prior sales contract. A shipping contract will be predicated in part by the terms of the contract of sale.

Arrangements are not in reality that ad-hoc. Multiparty relationships have been around for a very long time and industry experience, particularly that gained through litigation, has resulted in a wide range of specialist standard form contracts which attempt to provide for all the predictable circumstances that might arise and to allocate risk and responsibility for these variables to one or other of the parties. By their very nature these contracts are highly complex. In consequence disputes as to the meaning of such contracts is common, particularly where novel circumstances arise which do not exactly mirror the terms of the contracts.

As the size and technical specifications of major projects increases year by year the traditional business models have been found wanting, first in respect of both risk allocation and second in respect of financing[46] and management structures, as demonstrated by the Wembley Stadium fiasco. Most of the traditional construction contracts have been subject to major redrafting in recent times, coupled with the introduction of new contracting models ushering in partnering and project management contracts. Public sector contracts are making increasing use of Public/Private Finance Initiatives and in the private sector a number of large projects have been undertaken by consortiums to spread the costs. The courts have accordingly been very busy interpreting the terms of these innovations. Despite the fact that such contracts incorporate dispute resolution procedures, ADR tends to take a back seat, since it is only the courts that can provide binding interpretations of

[43] ***B v O*** *[2004] EWHC 2064 (Fam) :* ***John Amorifer Usoamaka v Conflict & Change Ltd*** *[1999] CCRTF 98/0709/2 :*

[44] ***Alizadeh (Dr Youssef Fazl) v Nikbin*** *[1993] LAWTEL AC 1605019* where the court upheld the privilege rule. In ***Venture Investment Placement Ltd v Hall*** *(2005) ChD* the court issued an injunction against a party threatening to disclose information covered by mediation privilege. : see also ***W H Smith Ltd v Peter Colman*** *(2000) FSR 9*

[45] See for a general overview ***The Law of International Trade & Carriage of Goods***. Spurin.C.H. NADR.Press. 2nd Ed. 2004. Chapter 2.

[46] Statutory stage payments under Part II of the Housing Grants Construction & Regeneration Act 996 and the prohibition on ***"Pay When Paid"*** provisions in construction contracts have put cash flow pressure on both the employer and the main contractor, since it is no longer possible to offload ongoing finance costs onto sub-contractors, pending completion of the project..

the contract, something needed in order to continue using the contracts in the future. However, in due course it is likely that the focus will return to ADR once the contracts have bedded down.

Multiparty relationships can involve contractual, tortious and trust issues. Three types of multi-party relationship, most of which are governed by special statutory regimes to address the privity/consideration question, are considered below.

1) ***Triangular contractual relationships of mutual inter-dependence.*** *Agency, sub-contracting (employer/contractor/subcontractor and sub-contract delivery of goods), management contracting etc.*

In the absence of legal devices that create a legally enforceable nexus between the otherwise non-contracting members of a triangular relationship, legal dispute resolution proceedings will involve distinct two stages. Frequently the allocation of rights and duties in the respective contracts are quite different so that one party may have to bear the legal consequences of a contracting partner. In other cases it is possible to pass the costs on. Where this is the case multi-party ADR has an advantage over litigation which has great difficulty dealing with multi-party disputes in a single forum.

Whilst multi-party mediation is far more cost effective and less time consuming than litigation there are dangers in the process. A great deal of skill and care is demanded of the mediator to ensure that the proceedings provide equal opportunities for all the participants. The duration of joint meetings and the frequency and order of private caucus is crucial if a "fair" resolution is to be achieved which is acceptable to all the parties, not only on the day, but subsequently in the cold light of a new day. Each of the parties is likely to resort to variations of the strategies and tactics discussed above but because the mediation involves at least two, if not three, sets of mediation taking place simultaneously, keeping track of progress is a challenge for all concerned and particularly for the mediator. However, there are opportunities as well, since sticking points in a simple mediation where the solution lies with a party who is not part of the proceedings are not a problem where that third party is part of the proceedings.

2) ***Chain Contracts.*** *Property sales and goods supply chain.*

Frequently the root cause of a problem occurs at an early stage, but the problem does not come to light until very much later. Thus it may only be when the ultimate user of a product finally goes to use it that the problem, which may have occurred during production, comes to light. The goods however will have passed through a very extended chain of intermediaries before reaching its final destination. Because there is no contractual relationship between the first and last link in chain contract it is not possible for the victim to proceed against the originator of the problem in contract. The only way to proceed in contract actions is for each party in the chain to pursue a legal action against the next link in the chain. Unless it is possible to bring other links in the chain into the action as co-defenders or to consolidate proceedings a single incident can result in multiple but separate and distinct proceedings, each of which concern very similar fact, but which may have quite different outcomes depending upon the terms of each individual contract, the effectiveness of counsel putting their case and the relevant jurisdiction of the court and applicable law where there is an international element.

Providing all the ingredients of tort are in place it may be possible for the final link to recover directly from the first link in tort, but by enlarge this is restricted to claims in respect of loss arising out of the use of the defective product.

Thus, whilst it might appear logical for the action to centre on the first and last links in a chain, to avoid interim legal costs, the variables provide a great incentive for the first link to decline. However, from the point of view of cost effectiveness and time/effort efficiency direct ADR between the two parties would be very attractive.

3) ***Assurance / Insurance*** *(particularly third party liability)*

Insurance is a relevant factor in many disputes since the one of more of the parties may well have off set risk by taking out insurance cover. Whilst not immediately apparent from the case citation, much litigation features underwriters, having paid out to an assured under an insurance policy, seeking to recover part of the pay out from the person responsible for the loss. In effect these are simply examples of Category C dispute resolution, where the underwriter acts in subrogation of the assured.

The focus rather is upon the situation where a defendant seeks to off-set his liability against insurance cover. Follow the liability clauses in insurance policies ensure that such legal liabilities arising out of litigation are recoverable but the rub comes in respect of negotiated settlements since in order to recover the assured must establish that the settlement related to a legal liability, that no more than was legally due was paid out.[47] One way of ensuring that there are no problems is to get the underwriter to take part settlement negotiations / mediation and to sign off the settlement agreement. However, this will involve costs for the underwriter who may not be willing to participate unless a prior mediation costs arrangement is made. Where the policy includes cover for legal representation this is unlikely to be an issue.

NEGOTIATIONS IN THE WORKPLACE

The instant topic relates to negotiations in respect of working operations as opposed to actual employment disputes, which again fall clearly within the remit of Category C above. Another distinct and separate category of negotiation is the workplace class action between employer and union, which has its own very special dynamic and is a topic in its own right.[48]

Whilst we are not directly concerned with contract of employment issues, the boundary between internal working relations and contractual matters is difficult to draw and mere negotiations which go wrong can lead to employment contract disputes. From the employer's perspective good working relations and a contented workforce are important since the effectiveness and commitment of personnel impacts upon productivity and profit. Since much of our lives is spent at work, quality of life benefits from a situation where we can enjoy job satisfaction, but this goes further in that the efforts of a contented effective employee can put that employee in line for promotion and enhanced benefits. Providing opportunities for negotiation in the work place can empower the employee to reach his or her full potential and for the employer to reap consequent benefits.

This is one area of negotiation which is widely discussed an commented upon. There is no shortage of literature advising on how to get ahead in the work place and how to successfully apply for promotions and work place benefits. It is a regular topic in newspaper and magazine agony aunt columns. Despite all this, what is most surprising is the fact that so little negotiation takes place. There is a tendency for many to simply get on with the job and only apply for promotion if and when advertised rather than to go and seek it out. Many people are confrontation adverse. Ironically, whilst many workers resent annual evaluation sessions, seeing them as mere paperwork exercises, they often provide the mechanism for staff to explore staff development opportunities and to open up avenues to discuss promotion.

Traditionally the employer / worker interface has been very badly served, with a clear ***US and THEM*** divide between management and the work force, which consequently provided few opportunities for negotiation. Many larger organisations, both in the public and private sector now provide sophisticated mechanisms for consultation, job evaluation, team working and stepped grievance procedures culminating in mediation facilities for dispute resolution or appeal mechanisms to quasi-independent decision makers. Human resource management is an integral part of the work place today. However the facilities and amenities available in small business organisations is often very limited to non-existent.

Some observations on strategies and tactics in workplace negotiations.

Perhaps the starting point is first to ask, to instigate negotiations. The opportunities may not naturally present themselves and the employee needs to be pro-active in seeking opportunities for advancement. Frequently, such negotiations are instigated by a crisis, and are viewed as a reaction to it. The superior's attention is divided between the application and the other matter and the negotiation may be doomed to failure if to accede at that point in time would involve loss of face for the superior. It is best therefore to self select the most appropriate time to pursue such negotiations.

The promotion gatekeeper is likely to be preoccupied with other concerns. Problems and additional concerns are generally unwelcome intrusions into an otherwise busy work schedule. A key to successful negotiations

[47] ***Assicurazioni Generali SPA v CGU International Insurance Plc*** *[2004] EWCA Civ 429*

[48] See the seminal work of Atkinson.G.M. ***The Effective Negotiator.*** Quest Publishing. This book considers exhaustively the strategies and tactics of union/management negotiation, written by a very experienced negotiator.

therefore is not to present the superior with problems but rather with opportunities, highlighting areas that need attention and solutions, without giving the appearance of blackmail.

It is difficult to take advantage of developments in the workplace if one is not aware of them. Management has and controls access to information. Management is not necessarily good at sharing information with the workforce or engaging in consultation. Management / staff meetings are often used as a one way communications method cascading information downwards and presenting staff with ***"fait accompli"*** even where the meeting is flagged up as consultation. In reality it is too late for that. This is compounded by the fact that in many organisations the staff resent being dragged into management/staff meetings which end up discussing trivia endlessly and provide a platform for outspoken individuals to grandstand. Drawing up the agenda is key to the success of such meetings and staff are often invited to submit suggestions for agenda items. A two stage approach to promotion negotiations can be adopted here. By putting an area of activity into the agenda opportunities for new posts and initiatives can be instigated which can be subsequently pursued in private.

Two related factors that act as barriers to promotion are the degree of clarity in job descriptors (if any) and the equality of wok loads. It is difficult to establish one's position within the hierarchy if it is unclear what is and is not expected of you. The employee needs to know whether or not he is performing beyond expectations if he is to ask for recognition of that additional work. Whilst all employees are entitled within 13 weeks of taking up a job to receive the terms of their contract of employment and a job description, as time passes the nature of and extent of the work is likely to change as the job evolves. By securing regular updating of one's job description, the opportunities to negotiate enhancement are increased. If the new job descriptor contains additional items this in itself provides an immediate focus for discussion. It also enables the overburdened employee to point out to others that something is not within their remit and to decline to do it with an invitation to clarify with the boss whose job it is. If one's job descriptor is too full, once committed to paper the task of pointing out to a superior that it is not possible to do all that work is made much easier.

NEGOTIATING WITH PUBLIC AUTHORITIES.[49]

Public authorities are responsible for delivering a wide range of public amenity, health and safety services to the public. In addition public authorities regulate much of the activities of the private sector. The concept of the public negotiation with public authorities over public law matters is a relatively recent phenomena, particularly in the UK. It was a live issue in the 1970'ies as to whether or not a public authority could be held liable in any way for the consequences of reliance upon the statements of public officials. On the one hand it was argued that estoppel did not apply top public officials since they did not enjoy authority to bind the crown. On the other, land mark cases such a ***Murphy v Brentwood***[50] established that where the statutory function of a public official was aimed at protection of the public in general, it did not give rise to a cause of action for the private citizen. Similarly, public interest policy has shielded office holders from liability in tort in many situations.[51]

However, despite the above, in 2001 the government publicly announced that it would embrace the use of ADR for the settlement of public law disputes, though traditional mechanisms such as the entire range of specific statutory tribunals and the various forms of ombudsmen and regulators have not been abandoned.[52] Since then a number of cases have reinforced this policy, imposing cost penalties under the CPR to public authorities who have failed to engage in ADR where the court deemed ADR was appropriate.[53] Note that in

[49] We are not concerned here with commercial relationships between public bodies and the private sector. Since 1947 the Crown Proceedings Act has put the public sector in the same position as any other trading entity in respect of contractual and tortuous liability. Therefore commercial disputes with public entities fall within Category C above.

[50] ***Murphy v Brentwood District Council*** *[1991] 1 A.C. 398*. cf ***Anns v London Borough of Merton*** *[1978] A.C. 752.* and note ***Dutton v Bognor Regis UDC*** *[1972] 1 Q.B. 373*

[51] ***Home Office v Dorset Yacht Co*** *[1970] A.C. 1004*

[52] Public Statement by Lord Irvine, March 2001. *"The government wants to lead the way in demonstrating that legal disputes do not have to end up in court. Very often, there will be alternative ways of settling the issues at stake which are simpler, cheaper, quicker and less stressful to all concerned than an adversarial court case."*

[53] ***Cowl (Frank) v Plymouth C.C*** *[2001] EWCA Civ 1935 : [2001] EWHC Admin 734.* ***Dudley, R (on the application of) v East Sussex County Council*** *[2003] EWHC 1093* **:** ***Royal Bank of Canada Trust Corporation Ltd v Secretary of State for Defence*** *[2003] EWHC 1479 (Ch) cf* ***Rye v Sheffield City Council*** *[1997] EWCA Civ 2257.*

Cowl v Plymouth the definition of ADR was drawn very wide by the courts to cover any mechanism outside the courts designed to produce a settlement. ***Cowl*** introduced an additional barrier to judicial review in that the court should take into account whether or not ADR has been attempted when considering applications for judicial review, invoking the CPR mediation stay procedure, so that the court could stay consideration of an application for Judicial Review until ADR had been exhausted.

It should further be noted that under the traditional mechanism of judicial review for challenging the exercise of discretion for public authorities and the procedures adopted during the decision making process, the scope for damages and compensation is very restricted with implications for the extent to which evaluative mediation techniques apply to public law mediation.[54]

Negotiations with public authorities are likely to centre around two distinct forms of interest.

1) ***Negotiating for benefits subject to the grantor's discretion.*** The objective here is to establish in the mind of the decision maker that you are a worthy recipient of the benefit and perhaps but more problematical to demonstrate that your application is more deserving than competing demands chasing limited resources. The problem here is that the applicant has a right to be considered but only an expectation of being treated fairly. The applicant has no legal rights to assert.

2) ***Negotiating for entitlements.*** The objective here is to prove that you fulfil the legal criteria and are therefore legally entitled to whatever is being claimed. The scope here for judicial review is much greater than in the first example.

The major problem with negotiating with public authorities is getting an audience with the decision maker in the first place. There are likely to be an entire phalanx of gatekeepers ranged between the applicant and the decisive decision maker. Frequently mechanisms will be in place to submit applications which disappear mysteriously into the machinery or to be interviewed by officials who will make initial decisions on the basis of what is said or written, applying standard criteria. Anything which falls even marginally outside the guidelines is likely to fall at the first hurdle, which in the absence of persistence, will turn into the final decision. It may be necessary to make a lot of noise and a nuisance of yourself in order to get things moving and or to make a concerted effort to find out who you should be talking to and how to contact them.

Any public law challenge to the decision will be subject to a three month time bar so prompt persistence is crucial to success. As noted above, there are a wide range of specific for a for public law challenges and despite the optimism of the Lord Chancellor the opportunities for negotiation may be very limited to situations where one is dealing with section managers or where there is a consultation mechanism or meetings to make alternative arrangements. Perhaps one way of gaining an audience is to engage the attention of the press, which might in turn result an official making contact, thus paving the way to negotiations. Lobbying one's MP can also open up avenues for negotiation.

SOCIAL NEGOTIATIONS

For the most part no legal interest will be involved in such negotiations but there may be legal interests in special circumstances. There is a particularly important and vibrant sector today in social mediation. Many local authorities operate voluntary community mediation schemes[55] and there are a number of regional voluntary mediation organisations.[56] Whilst the focus in neighbourhood disputes is not legal, there is frequently the potential for nuisance actions and a role for the courts if the mediation is unsuccessful though the cost of going to court is often beyond the means of the parties, which re-emphasises the value of such mediation services.

Mediation within the Family Court is a highly developed, regulated, specialist field.[57] It is a subject in its own right and accordingly no attempt will be made to generalise on this aspect of dispute resolution here.

[54] ***Anufrijeva v L.B. Southwark; R v SS for H.D. ex parte N & M*** *[2003] EWCA Civ 1406.*

[55] Within my own locale, Rhondda Cynon Taff operates a community mediation scheme. See also Newport Mediation and Powys Mediation. For further examples in Wales alone.

[56] For example Mediation UK, Mediation Wales, Scottish Mediation Network to mention but a few.

[57] See further ***The Children and Family Court Advisory and Support Service (CAFCASS)*** : Legal Services Commission : RCM Mediation

Negotiations for ***"mere"*** social arrangements leading to agreements which are not legally enforceable because they lack the intention to create legal relations are very similar in nature and legal outcome to pre-contractual negotiations. The crucial difference however is that because the interests of the parties are based on social interdependence, the maintaining of relationships assumes great significance, whether it is within the immediate family, the extended family or the community. Even though litigation may not follow on from unsuccessful negotiations, there is nonetheless a need for resolution because of the social disruption that would follow such a failure. The problem for such ventures however is that they do not offer a career structure for the dispute resolution practitioner, though they do provide opportunities to gain experience for those whose ultimate objective is family or commercial mediation. Many volunteers enter into community mediation full of enthusiasm at the start but fail to maintain the momentum and commitment. A rapid turn over in mediators is a common feature of such providers, and whilst training may be quite rigorous, expertise is not maintained, developed or retained over extended periods of time.[58] Funding for community mediation is a major issue. Without it such facilities may atrophy. However, funding might bring with it new questions in respect of regulation and professionalism, particularly if the activities are rewarded financially and it turns into a public sector industry.

Ethical issues in social negotiations

The very nature of and the informality of social negotiations, with or without the assistance of facilitators and the absence of definable social goals means that representation is not the norm in social negotiating though it is not uncommon for friends to accompany a party in community mediation to offer advice and moral support. However, the absence of representation places a great deal of responsibility on the mediator and correspondingly a great deal of authority and power. The fact that legal proceedings are unlikely to be pending means that the evaluative / reality check strategies and tactics do not apply. The tools of the mediator lie in inter-communication skills, in seeking out opportunities for future collaboration between the parties, emphasising the importance of maintaining social relations and the consequences of failure. The mediator will provide the parties with an opportunity to get things off their chest and into the open and an opportunity for a party to apologise without losing face. In many cases the process is about social education in the etiquette of living together (social values) and about getting the parties to realign their priorities, to lower their expectations of what is due to them and to take cognisance of what can be reasonably expected from them by their peers.

CONCLUSIONS

It is dangerous to draw too many broad conclusions and to generalise about the dispute resolution process, since the types of circumstance that give rise to disputes and the nature of consequent settlement procedures is very subject specific. Nonetheless, there are a range of strategies and tactics that can be usefully employed to maximise the outcomes of the settlement process. The above has sought to provide some insight into the circumstances when such techniques can be effectively employed, with reference to the surrounding legal environment.

Finally, dispute resolution practitioners and lawyers occupy very special positions in the dispute resolution process. It would be a mistake to assume that they share the same aims and objectives as the parties to disputes, though the process provides a common focal point. Whilst the dispute resolution practitioner will be focused on producing an outcome, he will have a weather eye to his professional reputation for impartiality and to his track record as an effective persuader. The representative may or may not have a vested interest in success. The rewards of further litigation may outweigh any desire to settle prematurely. He also has a reputation to protect, and in the light of ***Halsey***[59] cost penalties, a potential professional liability in the event that he incorrectly advises a client to reject ADR advances from the other side.[60]

[58] For further reading see Miles.R. ***"Mediation - a fledgling profession"*** 2004. An evaluation of the progress to date of the professionalisation of mediation, with particular reference to community mediation in South Wales.

[59] ***Halsey v Milton Keynes General NHS Trust : Steel v Joy & Halliday*** *[2004] EWCA (Civ) 576*

[60] For further reading on various aspects of mediation see under Mediation in the publications section of the Nationwide Academy of Dispute Resolution web site, at http://www.nadr.co.uk.

CHAPTER TWO

COMPROMISE & CONSIDERATION

Whilst there are exceptions to the doctrine, a basic premise of common law is that an agreement will not be enforced by a court of law unless supported by valuable consideration.[61] The aim here is to examine when the courts will treat a compromise agreement as lawfully binding and when the courts will strike down an agreement to pay a lesser sum in satisfaction of a larger sum for lack of consideration.[62] Such agreements can come about in the absence of a dispute but the most common form is a settlement agreement, brokered prior to and thus pre-empting litigation or post issue of claim bringing the dispute and the litigation to an end.

This issue relates directly to civil mediation and the settlement of contract disputes. The reach of the doctrine of consideration goes beyond part payment of debt in that a failure to establish valuable consideration can also be fatal to the enforcement of an agreement to amend the terms of a pre-existing contract. [63] The reshaping of contracts is central to the concept of interest based mediation as an alternative to compromise.

The simplest way to avoid any question as to valid and sufficient consideration and to ensure the legal enforceability of a contract[64] is to issue it in the form of a deed.[65] However, recourse to deeds tends to be restricted to specialist areas where their value and significance is recognised in the trade. To what extent, if at all, is it either necessary or desirable that mediation settlements be issued in the form of settlement deeds? The drafting of a deed provides an appearance of an additional level of gravity which may inhibit the negotiation / settlement process. If not needed it is probably best avoided. The deciding factor is whether or not the mediation pre-empts litigation or displaces it after the action has commenced, since regarding the latter, a party can apply to the court for a ***"Consent"*** or ***"Tomlin Order"*** turning the agreement into an enforceable settlement judgement, under rule 40.6. CPR.

The Civil Courts in the UK[66] have traditionally supported any attempt made by disputants to resolve their differences though negotiation, thereby avoiding litigation or arbitration.[67] Thus abandoning a bona fide claim (i.e. an honest belief that the claim is viable)[68] or defence[69] is deemed good consideration for the settlement of the case, evidenced by the abandonment of the action. There is no need to commence an action before settlement in order for it to amount to good consideration.[70] Equally the courts will endorse a settlement brokered during the course of proceedings, at any time prior to issue of judgement, though leaving it very late in the day to inform the court may have adverse cost consequences.[71] Frequently a time arises during the course of a trial when a party realises the case is hopeless and a settlement is brokered to avoid further expense. The CPR 1998 goes further and actively encourages settlement as an integral part of the overriding objectives of the rules.

The consent element of a Consent Order refers to the parties consenting to ending the action. The application for the Order will include the terms of the settlement. The concept was initiated by Judge Tomlin, hence the original name for the order. The settlement must be both unconditional and enforceable.[72] A draft will be drawn up in the following form :- *"And the parties having agreed to the terms set out in the attached schedule.*

61 ***Thomas v Thomas*** *(1842) 2 QB 851.*

62 ***Foakes v Beer*** *(1884) 9 App Cas 605.*

63 ***North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd, The Atlantic Baron*** [1979] QB 705

64 Recourse to a deed can have the additional benefit of establishing the intention to create legal relations between individuals in social relationships, but will not cure any defects arising out of illegality.

65 Note that like any other contract, a contract by deed is subject to the doctrines of mistake, frustration, fraud, duress and undue influence and thus does not provide an absolute guarantee of enforceability.

66 Compare for instance the Lebanon where the courts pay no regard whatsoever to negotiated settlements and reserve the right to determine a matter once referred to them.

67 ***Callisher v Bischoffsheim*** *(1870) LR 5 QB 449*

68 ***Miles v New Zealand Alford Estate Co*** *(1885) 32 Ch D 266*

69 ***Banque de 1'Indochine v J H Rayner (Mincing Lane) Ltd*** *[1983] QB 711 ;* ***Allied Marine Transport Ltd v Vale do Rio Doce Navegacao SA (The Leonidas D)*** *[1985] 1 WLR 925, 933*

70 ***Wade v Simeon*** *(1846) 2 CB 548, 565, 567*

71 ***Brawley v Marczynski*** *[2002] EWCA Civ 756.* Where a dispute settles out of court the substantial winner is entitled to costs, but ***Yell Ltd v Garton*** ***[2004] EWCA Civ 87*** shows that where an appeal is pending the parties have a duty to notify the court if settlement negotiations are taking place, to avoid costs being thrown away.

72 ***Thakrar v Ciro Citterio Menswear PLC (in administration)*** [2002] EWHC 1975 (Ch). Per Sir Andrew Morritt VC. *"The purpose of a Tomlin order is to enable the enforcement of the terms of settlement of an existing action by summary process in that action."*

IT IS BY CONSENT ORDERED *That all further proceedings in this claim be stayed except for the purpose of carrying such terms into effect* ***AND*** *for that purpose the parties have permission to apply".*

The same principle applies to arbitration. An arbitrator can issue a settlement award drafted by the parties. Thus section 51 Arbitration Act 1996 provides :-

(1) If during arbitral proceedings the parties settle the dispute, the following provisions apply unless otherwise agreed by the parties.

(2) The tribunal shall terminate the substantive proceedings and, if so requested by the parties and not objected to by the tribunal, shall record the settlement in the form of an agreed award.

(3) An agreed award shall state that it is an award of the tribunal and shall have the same status and effect as any other award on the merits of the case. ……

(5)Unless the parties have also settled the matter of the payment of the costs of the arbitration, the provisions of this Part relating to costs (sections 59 to 65) continue to apply.

In lieu of a consent order, the parties can instead draft a full settlement contract, which can then be enforced by an action for specific performance.[73] Where the action has not yet commenced this is the principal way forward where a party fails to honour the agreement and pay. Alternatively, if the other party then pursued an action, the settlement would provide a defence to that claim on the grounds that no extant dispute exists between the parties. This would apply both to litigation and to arbitration. In both situations a settlement deed prevents further arguments about the existence of valid consideration.

This is standard procedure at the end of the mediation process. It is vital that the mediator ensures that the settlement agreement is reduced to writing if it is to be enforceable since the courts are reluctant to enforced oral mediation settlement agreements, partly because of the inherent uncertainty in determining the meaning and scope of the settlement.[74] Thus the scope for oral provisions to override the written terms of a contract have always been very restricted by the law.[75] Oral evidence is admissible to add to but not to contradict the written terms of a contract[76] and will be also admissible in order to complete an otherwise incomplete contract.[77] Exceptions to the admissibility rule are limited to situations where a party has explained the meaning of the contract and is estopped from relying on asserting the strict wording of the contract.[78] However, too much should not be read into this since the courts will consider oral evidence of waiver of the terms of a contract.[79] Thus, without going so far as to state that the courts would never enforce an oral mediated settlement, the conclusion must be that it would be unwise to rely on an oral settlement. Accordingly, best practice would dictate that the settlement is reduced to writing.

It is important to ensure that settlement terms are clear, since otherwise the way is opened up for a challenge in respect of the interpretation of the terms of the settlement, thus defeating the objective of finality and closure.[80] The same applies to the terms of a consent order. The court will not issue an order if it finds that the draft terms are not ***"unconditional and unequivocal."*** The courts are nonetheless reluctant to strike down agreements to settlements on the grounds of uncertainty where the settlement was intended to have legal effect. [81] In complex relationships, where there are many potential causes of action, a settlement which resolves the current dispute but introduces a mechanisms for settling related issues, may none the less be treated as binding.[82]

[73] ***Horizon Technologies Ltd v Lucky Wealth Consultants Ltd.*** [1982] 1 WLR 24.

[74] In ***Oil & Mineral Development Corp v Mahdi Sajjad*** *[2002] EWHC Com 1258* the court declined to enforce an oral mediation settlement, partly because the mediator was subject to privilege restrictions and could not give evidence. Compare ***United Building & Plumbing Contractors v Kajla*** *[2001] EWCA Civ 1740* where the court was prepared to hear evidence in support of assertions that there had been an oral settlement to a dispute.

[75] ***Jacobs v Batavia & General Plantations Trust Ltd.*** *[1924] 1 Ch 287.*

[76] ***Hillas v Arcos.*** *(1932) 147 LT 503 (HL)*

[77] ***Walker Properties Inc. v Walker*** *[1947] 127 L.T. 204 ;* ***Couchman v Hill*** *[1947] K.B. 554*

[78] ***Curtis v Chemical Cleaning*** *and Dyeing* ***Co*** *Ltd [1951] 1 KB 805.*

[79] A waiver may be express ***Bruner v Moore*** [1904] 1 Ch 305; but equally can be implied from conduct. ***Charles Rickards Ltd v Oppenheim*** [1950] 1 All ER 420, CA. In the case of a concession (as opposed to a failure to repudiate a contract for breach), there must have been an awareness, express or implied that it would be relied upon and an intention for it to be relied upon. ***Watson v Healy Lands Ltd*** *[1965] NZLR 511*

[80] ***Haines v Carter*** **[***2002] UKPC 49*

[81] ***Brown v Gould*** *[1972] Ch 53, 57-58,* ***Foley v Classique Coaches Ltd*** *[1934] 2 KB 1.*

[82] ***Cable and Wireless PLC v IBM UK*** *[2002] EWHC 2059 (Comm); [2002] 2 All ER (Comm) 1041*

CHAPTER TWO

ADR PRIVILEGE AND CONFIDENTIALITY

The importance of privacy and the securing of keeping confidential information our of the public arena is a primary reason for potential litigants to chose one form or another of ADR for the private settlement of disputes. The question for consideration here is to what extent the courts will respect the privacy of mediation discourse and disclosure? Whilst privilege generally attaches to the mediation process, there are exceptional circumstances where the protective veil of privilege can be pierced. What then is the rationale underpinning privilege in the mediation process and when might the privilege be compromised?

State interest in supporting ADR. Whilst the courts stand ready to act as final arbiters in civil disputes between citizens in the interests of keeping the peace, justice does not come cheap be it for the parties who have to fund legal advice or for the State which subsidizes much of the costs of civil litigation. Unlike arbitration, the parties do not bear the full costs of the litigation process. They do no pay an economic price for the court amenities or the services of the judge. It is therefore in the public interest for the State to encourage the private settlement of disputes. Such encouragement goes beyond support of adjudication, arbitration, conciliation and expert determination, to negotiated settlement, with or without the assistance of a go-between such as a mediator.

Legal Privilege. The parties to litigation proceedings, including arbitration, benefit from legal privilege[83] which guarantees and protects freedom of speech during the trial process.[84] If this were not the case a party might be put in terror of saying something in court which might lead to a libel action.

There are limits on this freedom and to exceed the boundaries of court etiquette could amount to contempt of court, but the objective here is control of the process not to place restrictions on the parties' freedom to pursue a particular cause of action[85] or to present evidence. It is for the judge to determine what is admissible, oft-times after the event when counsel has let the cat out of the bag, resulting in an order to strike offending material from the record, accompanied perhaps by a judicial reprimand. Where privilege information is disclosed the judge or arbitrator has a duty to ignore that information.[86]

Legal privilege extends to expert witness meetings to establish a common opinion to be presented to a court or arbitral tribunal but does not extend to the contents of the report.[87] The objective here is that the integrity of the joint report is protected in that agreement is reached without fear or prejudice.[88]

Privacy and the public interest. The principal distinction here between the public courts and the private tribunal lies in that privacy attaches to private proceedings, so that absent recourse to the courts in support of the arbitral process, whatever is said and done during the course of arbitral proceedings remains confidential as between the parties. The courts can and will, to the extent that that is compatible with the court proceedings, preserve that privacy.[89] Much of factual information what is evident in a law report in respect of litigation is likely to be absent from a judgment about aspects of an arbitration, with the report restricting itself to the principles at state and directly related facts. The courts can restrict the public reporting of arbitral awards.[90] This aspect of confidentiality applies equally to the mediation process.[91] The courts will injunct a party to a mediation to prevent disclosure to third parties of mediation what took place within the mediation.[92]

[83] Privilege extends to legal representative's communications, their servants and agents and interpreters etc. ***Imam Bozkurt v Thames Magistrates Court*** *[2001] LAWTEL AC8001922.*

[84] ***Rush & Tomkins v Greater London Council*** *1988] 3 All ER* ***737:*** application for discovery of terms of a settlement between employer and main contractor denied to a sub-contractor in dispute with the main contractor. See also ***Alizadeh v Nikbin*** *[1993] LAWTEL AC 1605019* and ***South Shropshire District Council v Amos*** *[1985] S3275 CA*

[85] N.B. A litigant may nonetheless suffer penalties for pursuing a frivolous action and be held accountable for costs thrown away.

[86] ***Contac (800) Ltd & Phonenames Ltd v Iris Online Ltd*** *[2004] DRS 1404*

[87] ***Robin Ellis Ltd v. Malwright Ltd*** *[1999] EWHC TCC 256*

[88] Evidence of fact eg witness reports contained in an expert report is not privileged. Indeed it is something that should be disclosed in advance of a trial. ***Malcolm Electropainting Group v West Midlands Passenger Transport Executive*** *[2003] ACQ 59*

[89] ***Glidepath BV v Thompson*** *[2005] EWHC 818 (Comm)*

[90] ***Dept. Economic Policy & Dev. City of Moscow v Bankers Trust*** ***[2004] EWCA Civ 314***

[91] ***Percy v. Church of Scotland Board of National Mission (Scotland)*** *[2005] UKHL 73*

[92] ***Venture Investment Placement Ltd v Hall*** *(2005) ChD.*

By contrast, in support of public confidence justice should be seen to be done and hence the full machinery of justice is both open to the public and the press. Where a case contains an issue of public importance, proceedings will find themselves in the Law Reports. This is a necessary adjunct of the concept of binding precedent at common law, since the law of the land must be accessible. Arbitral awards are rarely published and only then with the consent of the parties. The absence of State authority apart, the privacy that attaches to arbitral awards acts as an immutable barrier to arbitral precedent.

Rationale underpinning Negotiation Privilege. The admission of fault or liability is likely to prove fatal to the maintenance of a claim or to the defense of an action at law. The litigation process can be likened to a cautious dance between two lethal adversaries. One false move and the game is over. Thus, the classic footprint of civil litigation will have followed the pattern of claim and outright denial of liability. Either that or the respondent maintains silence and does not even give the other side the benefit of a response, not due to a lack of courtesy but rather on the basis that unless one can afford to say something positive, it is best to say nothing, at least until one has consulted with one's lawyers.

As with the coin which has two sides, the same is likely to be true of litigation. Little in life is absolutely clean cut and crystal clear, a fact borne out time and again by litigation. Most times there are rights and wrongs of greater or lesser degree on both sides. The claimant rarely gets everything he asks for, particularly since many claims are inflated at the outset, on the basis that whilst it is possible to reduce the sum claimed, once quantified it is difficult, if not impossible, to increase thereafter. The prevailing defendant may avoid most but not necessarily all liability. No more is this so than when a case features claim and counterclaim. Clearly in such situations there will have been scope for negotiation, compromise and settlement.

Nonetheless, the only basis upon which the parties to pending litigation will be prepared to discuss the dispute will be subject to the caveat that any concessions offered amount to nothing more than ***"friendly gestures."*** It is a tentative offer to compromise a claim / counterclaim in the interests of closure or alternatively an "***ex gratia payment,***" to placate the other side and make the problem go away. Whichever of the above applies, it will be absent admission of fault or liability. The common terminology hence is that the compromise is made ***"without prejudice"*** to the concessionaire's legal position. Without such caveats negotiation would not take place at all. The courts acknowledge this and in order to encourage settlement negotiations at all stages, both pre and post commencement of legal action, accord negotiation privilege to settlement communications, be they written or oral.[93] In consequence, nothing said or written during settlement negotiations is admissible in evidence during court proceedings.[94] Negotiation in front of a judge or arbitrator are privileged.[95] The fact that negotiations have taken place is not privileged, only the contents of the negotiations.[96] The assertion of a claim, prior to negotiations is not privileged.[97]

The privilege rule applies whether or not the parties expressly state that the communications are privileged,[98] but it is common practice to make that fact clear by heading documents ***"without prejudice."***[99] Any move towards open offers removing an express reservation of privilege must be clearly indicated.[100]

As noted, there are exceptions to the privilege rule. These are set out below.

Mere contractual negotiations. The existence of a dispute (be it founded in contract or tort etc) is central to negotiation privilege.[101] Whilst privacy is something valued by commerce, particularly in respect of competitive contractual negotiations, negotiation privilege is not the way to secure privacy, since pre-contract

93 ***Grace v Baynton*** (1877) 21 Sol Jo 631; ***Kitcat v Sharp*** (1882) 48 LT 64; ***Re Daintrey, ex p Holt*** *[1893] 2 QB 116.*

94 ***Noga D'Importation v Australia & New Zealand Banking Group Ltd*** *[1999] LAWTEL AC9500508,* privilege extends to subsequent related litigation. It is less clear whether or not third parties can seek disclosure in unrelated litigation., see ***La Roche v Armstrong*** [1922] 1 KB 485. but contrast ***Rabin v Mendoza & Co*** *[1954] 1 All ER 247, [1954] 1 WLR 271, CA.* where an application for disclosure was refused.

95 ***Stotesbury v Turner*** *[1943] KB 370*

96 ***Specialist Ceiling Contractors v. ZVI Construction*** *[2004] EWHC 4T-0006 1 (TCC)***:**

97 ***Kooltrade Ltd v XTS LTD*** ***[2001] ChD.***. *Lawtel AC9900018*

98 ***Belt v Basildon & Thurrocks NHS Trust*** *[2004] EWHC 783*

99 ***Paddock v Forrester*** **(***1842) 3 Scott NR 715;* ***Re Harris*** *(1875) 44 LJ Bcy 33;* ***Peacock v Harper*** **(***1877) 26 WR 109.*

100 ***Cheddar Valley Engineering Ltd v Chaddlewood Homes Ltd*** *[1992] ADR.L.R. 02/28*

101 ***Prudential Insurance Co America v Prudential Assurance Co Ltd*** *[2002] EWCA 1154;* ***Norwich Union Life Insurance Society v Tony Waller Ltd*** *[1984] LAWTEL AC2747471* ***Standrin v Yenton Minster Homes Ltd*** *(1991) Times, 22 July, CA.*

communications are admissible in court to establish the meaning of the terms of contracts.[102] Rather commerce must rely on the general rules of confidentiality,[103] albeit that they may be subject to anti-trust rules to prevent anti-competition agreements which prescribe the conduct of secret negotiations. The scope for negotiation is restricted when prospective partners know in advance of what has been offered to their competitors and whilst competitive tendering has its advantages it precludes negotiation. Commerce therefore is forced to rely on the fact that it is not in the best interests of their business partners to disclose the terms of contracts to their competitors. Post settlement negotiations are not privileged, a fact easily overlooked. Thus it is necessary to have recourse to privacy strategies at this stage.[104]

The contract documents that gave rise to a dispute which was settled are not privileged and similarly whilst insurance settlement negotiations are privileged the insurance policy itself is not.[105] Whilst the content of negotiations may be privileged, any record including that of a lawyer recording that a conversation took place is not,[106] paving the way for application for disclosure. The fact that negotiations have taken place is admissible evidence to defeat a defence of ***laches*** (failure to prosecute a claim with due diligence).[107]

Contract interpretation. If there is a dispute as to whether or not there has been a settlement, it may be necessary to look to the detail of the negotiations to determine the terms[108] of that settlement, a fortiori where the court has to determine whether or not there has been a repudiatory breach of the agreement.[109] If the terms are clear and unambiguous this should not be necessary, and thus disclosure will be a last resort by the court, not the first port of call.[110]

Evidence of legal rights. Where settlement negotiation communications disclose evidence of legal entitlement,[111] that information is admissible as evidence both as between the parties[112] and as between a party and a third party.[113] Thus where a landlord conceded during a mediation that a tenancy included use of a loft, even though not expressly included in the lease, that evidence was admissible as a defense to an action by the landlord to deprive the tenant of use of the loft. [114] This does not extend to evidence of waiver of a right, being restricted to proof of existing rights, so that the veil remained intact in respect of an alleged reaffirmation of liability that was otherwise statute barred.[115] Evidence of a fact, for instance that someone had written and signed a document, not related to the terms of the settlement are admissible.[116]

Waiver . If a party refers to negotiation communications in the course of a trial Pandora's Box is opened and cannot subsequently be closed.[117] This is deemed to be a waiver of the privilege and assuming the other party has not objected on the grounds of privilege to admissibility they can in their own turn rely on any thing in the communications which is in their favour.[118] A reference in satellite litigation to information privileged in the principal forum amounts to a waiver for the purposes of the satellite proceedings.[119] However, whatever the

[102] ***Schering Corp v CIPLA Ltd*** *[2004] EWHC 2587 (Ch)* attaching the words "without prejudice" to communications has no effect whatsoever unless a clear intention to negotiate a settlement is demonstrated.

[103] An express confidentiality agreement between the parties is enforceable, subject to public policy limitations. ***Prudential Assurance Co Ltd v Prudential Insurance Co of America*** *[2003] EWCA 1154 (CA)*

[104] ***Dixons Stores Group Ltd v Thames Television plc*** *[1992] LAWTEL AC0010428.* ***Holdsworth v Dimsdale*** *(1871) 19 WR 798;* ***Re River Steamer Co*** *(1871) 6 Ch App 822*

[105] ***Standrin Phillip & Patricia v Yenton Minster Homes Ltd & NHBC*** *[1991] LAWTEL AC1602201*

[106] ***Parry Deborah Jayne & Whelan Michael Timothy v News Group Newspapers Ltd*** ***[1990]*** *LAWTEL AC1912031*

[107] **Walker v Wilsher** (1889) 23 QBD 335, CA

[108] ***Tomlin v Standard Telephones & Cables*** *[1969] 3 All ER 201*

[109] ***FAL Oil Trading Co Ltd v Petronas Trading Co*** *[2002] EWHC 1825 (QB):*

[110] ***Assicurazioni Generali SPA v CGU International Insurance Plc*** *[2004] EWCA Civ 429:*

[111] E.g. severance of a joint tenancy, ***McDowall v Hirschfield Lipson & Rumney*** (1992) Times, 13 February.

[112] ***Bath & N.E.Somerset DC v Nicholson*** *(2002) 10 EG 156 (CS)*

[113] ***Gnitrow Ltd v Cape Plc*** *[2000] 3 All.E.R. 763 CA*. Evidence of the terms of a settlement to be disclosed to underwriters to establish the extent of contribution due under a policy.

[114] ***Munt v Beasley*** *[2006] EWCA Civ 370*

[115] ***Bradford & Bingley Plc v Mohammed*** *Rashid [2005] EWCA 2005. see also* ***Cory v Bretton*** (1830) 4 C & P 462; ***Re River Steamer Co, Mitchell's Claim*** (1871) 6 Ch App 822, but compare ***Froysell v Lewelyn*** (1821) 9 Price 122.

[116] ***Waldridge v Kennison*** *(1794) 1 Esp 143*

[117] ***Somatra Ltd v Sinclair Roche & Temperley*** *[2000] 1 WLR 2453*

[118] ***Turner v Fenton*** **[***1982] 1 All.E.R.* ***Somatra Ltd v Sinclair Roche & Temperley*** *[2002] EWHC Com 1627*

[119] ***In the matter of a company*** *(2005) Lawtel No. AC9100809*

circumstances, the reference must be intentional. A mere accidental reference or oversight may not be sufficient to pierce the veil.[120] Both parties can expressly consent to waive privilege.[121]

Privilege and Costs. Once the substantive issues are settled there is no longer a justification for asserting privilege in respect of risk assessment documents and allied documents upon which a costs claim are based,[122] ***a fortiori*** where a party relies on such documents for cost purposes, the waiver discharges the privilege.[123] By contrast, since the substantive matters have not yet been dealt with, the veil cannot be pierced in support of a defence to an application for security of costs.[124] Where an offer is made ***"without prejudice save as to costs"*** the veil is pierced for the purposes of taxation.[125]

Bad Faith. Where a settlement has been induced by bad faith,[126] blackmail,[127] duress,[128] undue influence or fraud[129] the veil of privilege may be pierced. Disclosure will be restricted to evidence related to bad faith. Other aspects of mediation proceedings would remain privileged.[130] The test is unambiguous impropriety.[131] Thus evidence of an intention to dispose of assets by a party who had entered into insolvency was held to be admissible.[132] Where the threat is perfectly lawful the veil remains intact.[133] Evidence of perjury is admissible, but not evidence of a future intention.[134]

Impartiality : Misconduct of mediator. Where there is an allegation that a mediator has acted in a manner prejudicial to the interests of the parties the court will hear evidence as to that misconduct. [135]

Med/Arb and Mini-trial. Where a judge, adjudicator or arbitrator acts at some stage during the proceedings as a mediator he will perforce be privy to confidential information disclosed during the mediation. Whilst once out of the bag the cat cannot be returned, thus preventing the application of the mediation privilege in such circumstances, it is generally considered best that the mediator and judge are not one and the same. Where they are the same individual the adjudication may be struck down in the absence of clear advice on the potential risk and hence informed consent to taking that risk.[136]

Conclusion. The above are exceptions to the rule that correspondence related to dispute settlement negotiations is privileged. It is not easy to pierce the veil. The first hurdle to overcome is to demonstrate to the court that there is a need to do so. This requires independent evidence, so that the privileged information alone is insufficient to render it admissible.[137] Finally, information disclosed in a failed mediation whilst inadmissible as evidence in court can provide the other party with sufficient inside information to be able to successfully apply for discovery of documents, the existence of which they might not otherwise have been aware of.[138]

120 ***Smith Group Plc v Weiss*** *(2002) Ch.D* **:**

121 ***McTaggart v McTaggart****, [1948] 2 All ER 754, CA;* ***Blow v Norfolk C.C.*** *[1966] 3 All ER 579, [1967] 1 WLR 1280, CA.*

122 ***Donald McCrerry v Massey Plastic Fabrications Ltd*** *[2003] LAWTEL AC0104769 :* ***RBG Resources Plc (In Liquidation) v Rastogi*** *[2005] EWHC 994* (Ch) where evidence regarding a insistence on an apology which in the circumstances was not possible resulted in a failed mediation, leading to cost penalties.

123 ***Goldman v Hesper*** *[1988] LAWTEL AC1266056*

124 ***Chocoladefabriken Lindt & Sprungli AG v Nestlé Co Ltd*** *[1978] RPC 287. QBD;* ***Simaan General Contracting Co v Pilkington Glass Ltd*** *[1987] APP.L.R. 07/31 .*

125 ***Cutts v Head*** *[1984] 1 All ER 597*

126 ***Muller v Linsley & Mortimer*** *(1994) CA.*

127 ***Kristjansson v R Verney & Co Ltd*** *[1998] EWCA Civ 1029*

128 ***Carillion Construction Ltd v Felix UK Ltd*** *[2000] HT/00/223 & 232*

129 ***Vedatech Corp v Crystal Decision UK Ltd & Crystal Decisions (Japan) KK*** *[2003] EWCA Civ 1066*

130 ***Hall v Pertemps Group*** *Ltd [2005] EWHC 3110 (Ch) LAWTEL AC9900805*

131 ***Forster v Friedland*** (CA, 10th November 1992), ***Unilever Plc v The Procter & Gamble Co*** [*2000] 1 WLR 2436* : ***Savings & Investment Bank v Fincken*** *[2003] EWCA Civ 1630*

132 ***Optimum Solution Ltd v Yorkshire Electricity Group Plc*** *[2001] ChD Lawtel AC0101855 :* see also ***Re Daintrey, ex p Holt*** *[1893] 2 QB 116* regarding an admission of bankruptcy.

133 ***Unilever plc v Proctor & Gamble*** *[2000] FSR 344.* A threat to pursue a copyright action made during settlement negotiations was lawful and not admissible in evidence in separate proceedings.

134 ***Berry Trade Ltd v. Moussavi*** *[2003] EWCA Civ 715*

135 See ***B v O*** [2004] EWHC 2064 (Fam) regarding allegations of mediator bias and ***John Amorifer Usoamaka v Conflict & Change Ltd*** *[1999] CCRTF 98/0709/2* regarding an incompetent mediator.

136 ***Glencot Dev. & Design Co Ltd v Ben Barrett & Son (Contractors) Ltd*** *[2001] BLR 207:*

137 ***Wilkinson v West Coast Capital*** *[2005] EWHC 1606 (Ch)*

138 ***Re Anglo American Insurance Co Ltd*** ***[2000] ChD****. Lawtel AC0100565*

CHAPTER TWO

HUMAN RIGHTS AND ADR

The question here relates to the extent to which, if at all, an agreement to engage in alternative dispute resolution acts as a bar to justice and the right to a fair trial embodied in Article 6 of the European Convention on Human Rights, incorporated into English Law by the Human Rights Act 1999. The issue might arise in one of two ways. Either there may be a challenge to the enforceability of a mediated settlement on the grounds of infringement of Article 6 rights, or alternatively a party to a mediation agreement may apply to the court for a stay to mediation, which is challenged as a partial bar on access to Article 6 rights.

ARTICLE 6 : RIGHT TO A FAIR TRIAL

> 1. In the determination of his civil rights and obligations ……., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. (*ss 2&3 omitted*)

Is mediation fair? [139] In the context of the criminal trial specific aspects of a trial are highlighted regarding what amount to a fair hearing by Article 6(3), but this is not the case regarding civil trials beyond the "***entitlement***" set out by Article 6(1) mandating adjudication within the public domain, by an impartial tribunal, all with a view to the ***"determination"*** if rights and obligations.

Firstly, whilst mediation is a dispute resolution process, it is less clear that mediation results in a third party determination of rights and obligations as opposed to a self determination of rights, i.e. a compromised settlement of disputed rights and obligations. Therefore the extent to which, if at all, Article 6 applies to mediation will depend upon what is involved in the settlement process. If it is merely a negotiated settlement then arguably it does not apply, since mediation is not about achieving a "fair" outcome but rather a compromised settlement of disputed legal rights and interests that the parties can live with. This of course is not to say that the process should not be conducted in a fair manner.

If on the other hand the mediator acts as a conciliator to determine rights, then potentially, Article 6 could apply. In as much as conciliation is about the determination of legal rights and obligations this might be the case, but what impact, if any, does the fact that the basis of settlement in conciliation is either ex-aequo-bono, not being based on legal rules and more akin to a fair or equitable outcome, or alternatively is an expert determination based on facts alone, have on the application of Article 6? The Article heading addresses the ***"Right to a fair trial".*** Is the conciliation process on par with a trial? There is no doubt that the basic rules of natural justice regarding an absence of bias apply to expert determination. Again, the expert must honestly adhere to his opinion, but the thought process underpinning that honest belief may be quite arbitrary and thus not amenable to a reasonableness test pursuant to the ***Wednesbury*** rules. The distinction between conciliation and trial is evident in the adversarial tradition but less so with regard to inquisitorial processes.

What amounts to a ***"fair trial"*** is a variable concept. What is fair is subject to proportionality between the extent of the process that might be expected and the importance and complexity of the matters at stake. This is clear from the overriding objectives of the Civil Procedure Rules regarding litigation and similarly from s1 Arbitration Act 1996 regarding arbitration. Thus, in ***Amalgamated Roofing v Wilkie*** the Scottish Court held that enforcement by summary judgement of a statutory demand is not contrary to a defendant's human right to a fair trial.[140]

The right to a public process. The courts have accepted that it is perfectly legitimate for parties to contract out of Article 6 rights to a public trial in favour of the privacy of a private adjudicatory process such as

[139] See Chapter One above on the nature of the mediation process.

[140] ***Amalgamated Roofing & Building Co v. Wilkie [2003] Scot CS 309***

arbitration. If this were not the case, all forms of ADR would be unlawful, which can hardly have been the aim or objective of Article 6, which was to protect against secret trials against the wishes of the parties. Privacy is often the main reason why parties opt for mediation. Without the protective cover of confidentiality the scope of the parties to explore potential avenues of settlement would be severely restricted.

Can parties opt out of Article 6 rights? Secondly, assuming an agreement to mediate, arguably there is no negation of the entitlement, simply an election by the parties not to insist on enforcing that entitlement. Effectively the parties waive their rights to a trial in favour of a negotiated settlement process. If the mediation fails, recourse to trial remains open to the parties. If a settlement is brokered then there is no dispute outstanding between the parties and hence no need for a trial. The same applies to a straightforward compromise negotiated directly between the parties or by their lawyers.[141]

In as much as a trial may be stayed pending the outcome of a mediation, this will result in delay to the trial, but since the parties have at some stage chosen to engage in the mediation process, an assertion that the time to trial is not within a reasonable time-scale is, assuming the time scale to mediation is reasonably prompt, somewhat less than convincing. Morison J considered whether or not a party could justify not proceeding with mediation pursuant to a mediation clause within a contract in ***Sunrock v Sacandinavian Airlines*** on the grounds that the parties cannot oust the jurisdiction of the courts and that it is for the courts to decide matters of law such as the proper interpretation of a contract.[142] Rejecting this contention Morison J stated :-

> 56. *….. The jurisdiction of the court is not ousted. On the contrary, the courts approve and welcome parties' efforts to resolve their disputes through the* ***mediation*** *of third parties, be they experts or arbitrators: see the decision of the Court of Appeal in* ***Brown v GIO Insurance Ltd*** *[1998] Lloyd's Rep IR page 201, at 208. The remit of the consultants could not be wider ["any dispute" and "regarding any matter"] and are apt to include questions of interpretation. The consultants would have been quite able to decide whether the patches were scab patches and how much compensation should be paid; and also whether engine LLPs were included within clause 19.9. This clause shows that the parties intended their disputes to be determined quickly, without the need for court proceedings. The same conclusions follow in relation to the Redelivery Agreement.*

Similarly, the delay inherent in construction adjudication has been held not to amount to a denial of a right to a fair trial, since ultimately there will be either a public enforcement hearing and or a follow on final determination by litigation or arbitration.[143] To the extent that a court might impose a stay for policy reasons unrelated to party autonomy, this might amount to a restriction on a right to a trial but not otherwise.[144]

If a contract is not a consequence of genuine agreement on terms, as is likely to be the case in standard form consumer contracts, then the mediation agreement may be susceptible to a challenge under consumer protection legislation such as the Unfair Contract Terms Act 1977 and Unfair Contract Regulations. However, providing the mediation facility is optional in the standard form contract, once a consumer takes up that option, the waiver will thereafter be effective. Nothing however can deny a consumer the initial right to a trial over disputed consumer rights. The carrot that convinces consumers to engage in mediation is usually related to low to no cost ADR services for the consumer. Having chosen such an option, be it mediation or fast track arbitration, the courts will not then allow the consumer to renege on the choice simply because they do not like the end-result.

However, what amounts to unfairness in contracting power between commercial business partners as opposed to commercial/consumer relationships is subject to a far higher test under Annex 1 UCTA 1977 and particularly where such terms are usual in the trade and the standard form contracts are well known, it would be virtually impossible to establish to the satisfaction of a court that a mediation or other ADR provision was unfair.

141 See further Compromise and Consideration above.

142 ***Sunrock Aircraft Corp Ltd v Scandanavian Airlines System Denmark-Norway-Sweden*** [2006] EWHC 2834 (Comm)

143 ***Fab-Tek Engineering Ltd v Carillion Construction Ltd [2002] Dunfermline Sheriff Court ; Karl Construction (Scotland) Ltd v Palisade Properties plc [2002] GWD 7-212; 2002 SLT 312; Austin Hall v Buckland Securities Ltd [2001] BLR 272.***

144 See further Chapter 4 regarding court annexed mediation and the implications of Article 6.

CHAPTER TWO

LIABILITY OF THE MEDIATOR

Introduction

Whilst the parties to a third party assisted dispute resolution process retain control over the decision making process, nonetheless they rely on the mediator to help them in a competent, impartial and objective manner to shape the settlement agreement. To what extent, if at all, does the law hold the mediator to account for a failure to provide the requisite level of service? The number of judgments dealing with the accountability of mediators is somewhat limited, not necessarily because of an absence legal duty but rather because establishing any breach of duty may be very difficult given the fact that the mediation process is subject to privilege and confidentiality.[145] It is only where both parties have brought privileged information before the court that it can be considered. There are exceptions to the privilege rule but they are limited in scope.

Contractual liability

Whether or not the mediator is remunerated, the mediator is likely to be retained on written terms of engagement, which, if adequately drafted, will most likely address the question of the liability of the mediator to the parties. Where the appointment is institutional, this would be dealt with by reference to the practice rules of the institution. Standard terms include exclusion of liability of the mediator for anything said or done during the course of proceedings, including pre-proceedings correspondence and some form of words to prevent either party requiring the mediator to give evidence in court or otherwise make any disclosures that would prejudice the privileged status of the mediation process.

In the absence of such provisions, as a contractual provider of a service, there is no logical reason why a mediator should not be held legally to the agreement to mediate. The implied scope of the contractual duty may be harder to determine where there are no express terms of engagement, though it may well be considered to require competence, impartiality and objectivity. The degree of effort to be expended would be difficult to quantify, particularly since the mediator has to work with, and depends upon the co-operation of, the clients. It cannot be an open ended commitment, but what is considered to be an appropriate cut off point? Is it a duty to make best efforts and if so what amounts to best, or is it something lesser such as due diligence?

Immunity :

How effective, it at all, is an immunity from liability clause? Judicial immunity is rooted in due process and public policy, to ensure the judge is not held "*in terrorem*" from the threat of being held liable for mistakes (*perceived or otherwise*) by dissatisfied litigations after the event and thus is not coerced into backing away from making difficult (fine) decisions. Similarly, s29 Arbitration Act 1966 extends immunity to an arbitrator, unless the act or omission complained of is shown to have been in bad faith. The same immunity applies to construction adjudicators by virtue of **s108(4) Housing Grants, Construction and Regeneration Act 1996**, which requires a relevant construction contract to incorporate adjudicator immunity. S108(4) provides that "*The contract shall also provide that the adjudicator is not liable for anything done or omitted in the discharge or purported discharge of his functions as adjudicator* ***unless the act or omission is in bad faith****, and that any employee or agent of the adjudicator is similarly protected from liability."*

There is no statutory immunity for mediators, but a similar logic could be applied to mediators, in that it would appear to be beneficial to protect mediators from the threat of litigation if that could lead to them being coerced into conducting proceedings in a manner that favoured one party against another. The barriers to alleging that an immunity provision is unfair appear to be rather difficult to surmount. However it is equally logical to assume that any such immunity accorded by the contract should be subject to an implied rider that the mediator act in good faith. The following however, might amount to bad faith :-

Absence of asserted knowledge and experience. Whilst it is possible that a mediator is appointed without any reference to competence, it is most likely that the mediator will be selected either by the parties or by an appointing body on the basis of prior qualifications in mediation practice and / or on the basis of subject specialist qualifications. Could a mediator be held to account for a misleading or false curriculum vitae?

[145] See ADR Privilege and Confidentiality supra

It is a criminal offence to lay claim to professional letters and degree qualifications. Where such conduct leads to remuneration it would also constitute the offence of Gaining a pecuniary advantage contrary to s15 Theft Act. A mediator cannot contract out of criminal liability. Even false assertions of industry expertise could lay a mediator open to charges of fraud, which is both a criminal offence and would give rise to a tort action for deceit. More difficult to hold to account however, would be a situation where a mediator exaggerates his experience rather than inventing non-existent experience or qualifications, especially where the question is one of degree.

A contract to mediate procured on false pretences would be void ab initio and could be set aside by the court. Any remuneration paid would have to be returned if paid in advance; if not, no remuneration would be recoverable by the mediator in such circumstances.

If however a mediator is appointed on the basis of reputation, the fact that the mediator does not live up to a vaunted reputation would not fall into the above since it is not the mediator that has held himself out inappropriately as being experienced but rather it is his reputation in the eyes of others that has induced the appointment.

Professional Negligence during the conduct of the process. Negligence, whilst reprehensible, falls far short of the requirement of bad faith that might deprive a mediator of contractual immunity and thus would not afford a basis for holding the mediator to account, since negligence lacks intention or culpable "mens rea."

In the absence of such a clause, arguably it might be possible for hold a mediator to account if he negligently loses the plot in the middle of the process, resulting in one party gaining an unfair advantage. It would amount to a failure to deliver the quality and standard of service contracted for and thus afford a ground for an action for breach of contract.[146] What then might be the remedy for breach? The recovery of fees should present little problem, but the integrity of a settlement would not be affected. Could a party recover the economic loss arising out of a bad settlement? In principle this would appear to be possible. However, at a practical level, the burden of proving negligence is likely to be a virtually insurmountable barrier to mounting a successful action in most cases. It would require a blatantly obvious failure, which would probably result in a failed mediation rather than a one-sided settlement.

Absence of commitment to the process. This can occur in two ways, either where there has been a failure by the mediator to diligently prepare for mediation or alternatively where a mediator fails to actively pursue a settlement.

The first is easier to establish than the second. Preparation is essential for a complex mediation and it is usual for the parties to supply the mediator with detailed submissions and documentary support prior to the mediation, with the expectation that the mediator will have assimilated that information before the process commences. If a mediator has not done so, this may well become evident at an early stage (*though not necessarily since a mediator may chose to let the parties review the back-ground as part of his resolution methodology*). Where this occurs, the parties are put into a difficult position. Should they withdraw from the process or soldier on? The problem is exacerbated by the absence of communications and cooperation between the parties which is why they have resorted to mediation in the first place. Where one party alone complains, this might be viewed as a disruptive tactic rather than a legitimate complaint. Thus it is more likely that in the event that a mediation fails, a party might subsequently complain that the mediator was not fully prepared for the session and thus the chance to conclude a settlement was damaged by that failure. The problem here would be in establishing that that failure to prepare was the primary reason why no settlement was brokered, rather than other causes.

There are often many potential avenues to settlement that can be explored in a mediation process. The mediator will use his skill and expertise to identify those that offer the greatest potential and pursue them. No doubt different mediators would identify different avenues with greater or lesser degrees of success. Avenues open up by dint of interaction between the mediator and the parties. Whilst a mediator will try to impose a structure on the process, it is impossible to predict and control every aspect of the process. There may indeed be an element of luck or chance that leads to a settlement. It is likely to be difficult, if not impossible, to hold a

[146] See ***John Amorifer Usoamaka v Conflict & Change Ltd [1999] CCRTF 98/0709/2*** where the mediator acted in an incompetent manner, contrary to the rules of the appointing body.

mediator to account for a failure to function in an effective manner during the mediation process. The real control factor here is reputation and market forces, not the law.

Unethical behaviour. This may occur in a number of ways:-

Conflicts of Interest : In common with adjudicators, arbitrators, expert determinators and judges, a mediator who has a conflict of interests should declare that interest prior to appointment, if known, and decline the appointment or alternatively leave it to the parties to decide whether or not to continue with the appointment. If the conflict of interest becomes apparent after appointment the mediator should declare that conflict to the parties who can again decide whether or not to continue with the process. A failure to declare such an interest can lead to a motion for vacation and the basis of bias.

The Arbitration Act 1996 specifically provides for conflicts of interest, but there is no statutory regulation of mediator interest conflicts which are therefore dealt with only by the rules of appointing bodies. There is a great deal of case law on actual and apparent bias with regard to arbitrators and judges but none to date on mediators in the UK. The problem here is that the best known mediators are often well known to the parties to disputes and who may well be repeat players who have confidence in the mediator or the appointing body. Mediators will frequently have acted either as representatives in mediation or litigation or otherwise have worked as specialist consultants. All of this enhances their reputation as mediators but equally increases the chances at the least of potential assertions of apparent bias in that the mediator may have had some form of link, however tenuous, to one or other of the parties. At the very least, a party who has appeared before the same mediator on a number of occasions will have a better idea of how to get the most out of the mediation process, being familiar with the mediator's methodology. However, how applicable the rules regarding conflicts that have been developed with regard to arbitration and the judiciary are to mediation is questionable, since the mediator does not determine the dispute, but merely facilitates settlement. It is submitted that the rules on apparent, as opposed to actual bias, are less applicable to mediation.

Betrayal of Confidences : The question here is what sanction, if any, should apply where a mediator betrays the confidence vested in him by the process and breaches the rules of privilege, by disclosing information to third parties? The duties owed by a mediator to the court with respect to knowledge of criminality apart, the mediator is not allowed to disclose information regarding the proceedings to the court, let alone to third parties and to do so could lead to a tort action for breach of confidences. However, there may be situations where the mediator is torn between conflicting moral, social and legal duties. This occurred in the case of ***MacCaba v Lichtenstein,*** [147] which concerned an action for slander. The defendant, a mediator disclosed confidential information, received during mediation, to third parties. The mediator heard allegations of sexual misconduct by an employer against young and potentially vulnerable employees (the parties to the mediation) and passed information on to religious leaders and to family members of the alleged victims. The court considered whether public interest policy overrode the duty of confidentiality. The scope of negotiation privilege is examined together with the concept of qualified privilege in this fascinating judgement on mediation ethics. The defendant asserted that under Jewish law he was under a duty to disclose to vulnerable individuals the information that he has received. His Honour Judge Gray held the mediator liable for breach of confidence regarding some but not all of the disclosures. Slander could not be established where the claimant had boasted about behaviour that he subsequently wished to keep quiet.

Where a mediator is a solicitor or barrister they would also come under the professional rules of conduct of the Law Society or the Bar, though the impact of these rules may differs where the lawyer is acting as a mediator as opposed to being engaged in litigation. In ***Diamond v Mansfield*** the court investigated allegations of disclosure of privileged information by a barrister during the course of ongoing litigation.[148] The claimant, a practicing barrister, was instructed as junior counsel in a case concerning an evangelical Christian charged with a public order offence under the Public Order Act 1986. The preacher had displayed a placard with the words 'stop immorality', 'stop homosexuality' and 'stop lesbianism' on it in a public place. A crowd gathered and the preacher was assaulted. The police asked him to move on. He refused to do so and was arrested. He was

[147] ***MacCaba v Lichtenstein [2004] ADR.L.R. 07/02***
[148] ***Diamond v Mansfield*** [2006] EWHC 3290 (QB)

convicted by a magistrates court. The Divisional Court upheld the conviction. An application to the European Court of Human Rights followed. While still instructed in the matter, the barrister wrote an article the case for the Evangelical Alliance which was published in "PQ", an alliance magazine and on the alliance's website. Para 709 of the Code of Conduct of the Bar of England and Wales provides that a barrister might not express a personal opinion to the press or other media or in any other public statement upon the facts or issues arising in proceedings anticipated or current in which he was briefed. However, he had not thought it necessary to apply to the Bar Council for an exemption because he thought that the article was for private sue by selected members of the organisation. Subsequently, he applied for an exemption to write an article for an American journal. This led to a complaint being referred against the barrister by a member of the Professional Conduct and Complaints Committee (PCC) of the Bar Council for the publication of the website article. The bar proposed a summary hearing. The barrister having issued an unreserved apology insisted on a full disciplinary hearing. ., drew attention to the PQ article, which he had discovered on the internet. The complaint was eventually withdrawn in July 2005. The barrister then issued proceedings against the Bar Council and individual members for breach of contract, negligence and breaches of his right to a fair trial under the European Convention on Human Rights. The Bar Council successfully applied to strike out the claim. The individual actions were dismissed since there was no contractual relationship. There had been a prima facie case for the barrister to answer to. There was no evidence of bad faith, malice, improper motive or any conspiracy by the Bar Council, the PCC or any investigating officer in mounting the action. .A summary hearing would not have been unfair or unreasonable but a full hearing would have been more appropriate in the circumstances. The barrister's action was dismissed but he was entitled to recover the costs of the withdrawn prosecution.

Presumably, a mediator might likewise be subject to disciplinary proceedings for a breach of the rules of an appointing body for unauthorised disclosures of privileged information.

The other side of the coin concerns whether or not a mediator is under a duty to convey confidential information prejudicial to the other side, acquired during the course of private sessions to the other party or rather whether the appropriate course of action is to resign? For instance :-

Should a mediator passively observe a party to a wrongful dismissal action settle for a paltry sum in exchange for a non-competition agreement, where the employer knows, but the employee does not know, that a competitor has asked the employer for a reference with a view to offering the employee a lucrative contract?

Should a mediator remain silent, if he discovers that one side privately acknowledges its liability but publicly denies it, where the claimant is on the verge of signing away substantial rights?

What impact, if any, does the absence of legal representation have in such situations? Is an absence of representation an invitation to soften the rules on disclosure, or is it simply hard luck that a party is not represented. If the absence of representation is brought about by the failure of the other party to pay monies apparently due, leading to an inability to fund representation, the answer does not seem to be quite so obvious, particularly where the courts view mediation as a method of achieving "justice" of a sort for the impecunious but worthy claimant.

It is submitted that the appropriate course of action in each of these situations would be to resign, but this is likely to send a signal to the other side that there is something to fight for and strengthen their resolve during subsequent litigation. It also leaves open the question as to whether or not the mediator should retain his fees.

Bias : Mediators have a personal / profession interest in establishing and maintaining a reputation as a successful mediator which can lead to a mediator seeking to broker a settlement at all costs, without regard to the best interests of the parties and as to whether or not the settlement is fair or achieved in a fair manner. However, what is fair is difficult to assess on times, particularly since one party is likely to have a weaker bargaining position than the other, irrespective of the rights and wrongs of the situation. The mediator will push both parties towards a settlement. In what circumstances, if any at all, might it be viewed as unfair where a mediator pushes one party more successfully than another? It is unlikely that a mediator owes a duty to push parties on an equal basis, and even if that occurs, one party is likely to be more susceptible to pressure than the other. However there are more evident forms of bias that may give rise to liability :-

Partiality : This can occur where the mediator deals more favourable with one party than another.[149]

Intentional : This may be a deliberate tactic and if proven could give rise to liability.

Unintentional : Much more likely is that it is unintentional, arising out of social prejudices, perhaps reflecting the background of the mediator. This is sometimes referred to as institutional bias, whereby certain groups are accorded unwarranted credence. Thus for example a mediator could be of a mindset that insurance claimants have a tendency to exaggerate losses and to be less honest and open about their own responsibility for accidents; similarly, a mediator may tend towards more or less sympathy for patients or health care professional in professional negligence claims; the individual may be preferred or disadvantaged when claiming against public institutions etc.

Discrimination on the basis of race, sex and age attract legal sanction in the employment sphere and in the public arena, but proving that a party is disadvantage during mediation on such a basis would be difficult to proves.

Professional Indemnity Cover. Assuming that a mediator is held legally to account for mis-conduct, to what extent, if at all, could the mediator be held liable for a breach of any contractual requirement to carry professional indemnity cover? Again this could give rise to disciplinary action by an appointing body, but otherwise, it is unlikely to give rise to yet another layer of liability to the client. Even if insured, cover would not extend to deliberate wrongdoing, since insurance does not exist to underwrite criminality and deliberate conduct is not fortuitous.

RIGHTS OF THE MEDIATOR

DUTIES OF THE PARTIES TO THE MEDIATOR AND EACH OTHER

Remuneration : The principle right of the mediator is to be remunerated for his services and allied costs and expenses. Traditionally the mediator will be paid in advance, avoiding problems with the primary sums involved. However, it is not unusual for a mediator to extend the session and to bill after the event for the additional time. It is usual to do so on a joint and several basis, so that provided one party pays, the mediator has no problem, leaving it to the paying party to recover the half balance from the other side. If necessary, a mediator can commence an action to recover unpaid fees. Any defense to such an action may well arise out of the discussions above on mediator misconduct.

Cooperation : To what extent, if at all, is there a duty on the parties to co-operate with the mediator and to actively engage in the mediation process and further what duty is owed to the mediator for such a failure? The answer is probably none. The remedy, if any probably lies in a costs order against the obstructing party at the end of any subsequent litigation.

Deceit : What liability, if any attaches to the parties for deceiving the mediator? The mediator has nothing to gain or lose so the answer is probably none. The duty and liability will vest with the deceived party and may give rise to an action to set aside the settlement. Note that unlike arbitration and litigation perjury does not apply to the mediation process, but it would apply if false assertions were repeated in subsequent litigation.

Similarly any liability for false statement and non-disclosures by third parties and or expert witnesses would pertain to the other party, not to the mediator. The mediator has no power to compel third parties to co-operate in the process.

Confidentiality : What liability, if any, attaches to a party for breach of confidentiality? Again, in as much as the mediator has nothing at stake, probably none. Any liability would be to the other party.

[149] See ***B v O [2004] EWHC 2064 (Fam)*** *where a the court determined that a m*ediator acted in a clearly uneven handed manner.

Self Assessment Exercise No 2

1. Distinguish between disagreements and legal disputes.
2. Consider the enforceability, if any, of an agreement to mediate.
3. Consider the extent, if any, to which a settlement agreement can be enforced and relevant mechanisms for so doing.
4. In what circumstances may a letter of intent give rise to an enforceable agreement and how, if at all, does it differ from an agreement to agree?
5. Consider the negotiation dynamic involved in renegotiating pre-existing contractual arrangements.
6. Consider the benefits, if any, of mediation as a settlement process for multi-party disputes and chain contract dispute settlement.
7. Consider the implications of the Doctrine of Consideration on the mediated settlement of debts.
8. To what extent, if at all, is it correct to assert that the mediation process is subject to the rules of confidentiality and privilege against public disclosure and disclosure to the courts of what occurred during the mediation process?
9. To what extent, if at all, is the mediation process compliant with the requirements of Article 6 Human Rights Act 1999?
10. To what extent, if at all, might a mediator be held accountable for wrong doing and incompetence?

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CHAPTER TWO

Negotiated Settlement

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