CHAPTER FIVE

THE ECONOMICS OF MEDIATION FOR COMMERCE AND THE LEGAL PROFESSION

Introduction.

In this chapter two distinct factors are considered, first the economic value of mediation as a dispute resolution process for clients and in particular the commercial sector and second the relevance to and impact of mediation upon the legal community.

Legal Economics

Litigation is a commercial enterprise and in common with all commercial businesses needs to be carried out as efficiently as possible for the best economic return.

Litigation unlike most business enterprises has a great disadvantage in that in the UK the losing side has to pay the taxed costs of the winning side, unless agreed amongst the parties (subject to the new provisions under s44.3 CPR 1998). This in reality means that the prospect of litigation and failure to achieve the desired result can result in one part having to pay the costs of both parties. This is thus a tremendous disadvantage to litigation.

The fear of paying the opponents costs in a legal suit where the costs can run to substantial amounts can deter claimants from pursuing their legal rights. Alternatively, a defendant may choose to settle the claim, not because the legitimacy of a claim is recognised, but rather because the potential cost of defending the claim makes it more attractive to settle. There are however, cases where it is in the interests of the defendant to defend a claim whilst the economics of such a defence may not justify the time and effort put in, but where the principles of the claim are such that they need to be defended to deter future claims or to clarify the parameters of future commercial practice.

Mediation has advantages for both claimants and defendants in litigation cases where the claims and the principles are such that the claims whilst small may impinge on principles which are important. Mediation allows the claims to be "settled" whilst the principles are not impinged upon. The reality of the economics of mediation is such that it is not necessary to run up costs at the expensive of clients when it is possible to undergo a mediation session from the very inception of the case if the parties are so willing.

No client whether claimant or defendant wishes to see costs rise to such an extent that they outweigh the potential value of the claim. Claimants whether legally aided, paying for themselves or under one of the myriad of contingency fee agreements, have no wish to see costs increased to such an extent that the value of any compensation will be greatly reduced by the need of the legal representatives to "claw-back" additional costs which have been spent on their behalf. Defendants equally have no wish to see costs whether their own or those of the claimant unnecessarily increase at their potential expense if it is possible to settle such claims quickly, efficiently and economically to the advantage of both parties.

Mediation can give a win-win situation even where the defendant has to make compensatory payments to the claimant. The financial advantages to the defendant, come from the reduction in his own and his opponent's costs by settlement of the case at an early stage without the traditional additional costs of litigation being imposed upon the claim such as those incurred by the use of expert witnesses. The time spent by solicitors to prepare their clients case is also considerably reduced. Likewise the attendance time of

clients at pre-trial conferences and at the trial itself are greatly reduced as demonstrated by the XEROX Study, resulting in considerable economies for the parties.

The costs of solicitors, whether they are taxed costs or those which are charged by defendant solicitors to the defendants are such, that a typical legal case can quickly run up legal costs to the value of thousands of pounds, where the value of the claim may only be of the same notional amount.

The economics of litigation are such that any potential reduction in the costs has to be of value to both claimants and defendants. The situation is such that it is possible, through the use of mediation, for claimants to receive greater monetary compensation than they would through the legal system at trial and at the same time the defendant's outlay may be many thousands of pounds less than would have been the case under conventional litigation processes. The claimants additional monies coming through the savings the defendant would have made in his own litigation costs and those of his opponent.

Mediation in contrast to litigation is settlement driven where compromises and negotiations can be facilitated through a mediator to the benefit of both parties. The experience of the United States is such that mediation is fast becoming the first choice for settling litigation disputes rather than through the court system.

This is enhanced by the adoption of mediation dispute settlement clauses in contracts. In the US this has now become an integral part of commercial activity. Apart from the large number of companies which incorporate mediation clauses into contracts of employment, every one of the top 500 companies in the USA, which are commonly referred to as **"The Fortune 500,"** are part of a reciprocal mediation pact whereby if a dispute arises between any of the 500 companies, be it contractual or tortious, the first port of call is mediation. There is no reason why a similar state of affairs cannot be brought about in the U.K.

Indeed, in the new international climate prevailing in commerce as a result of the creation of the Single European Market the potential for expensive cross border litigation is immense. International mediation offers an opportunity for the parties to reach a settlement without becoming involved in the intricacies of European Community Law and the complexities of the Conflicts of Law epitomised by The Brussels, The Lugano and The Rome Conventions. Where trade with the People's Republic of China is concerned, Mediation and Arbitration through C.I.E.T.A.C. represent the only practical ways of settling import / export disputes.

General comments on statistics available in the UK.

There are few readily available statistics for the success or otherwise of mediation as a major dispute resolution procedure in the United Kingdom. There have been a number of pilot mediation schemes undertaken in the jurisdiction of England and Wales. These have included medical as well as family mediation processes.

These trial procedures as a rule have not always been effective in settling disputes. Organisations offering mediation services claim a high settlement rate in the UK and the Central London County Court Mediation Scheme appears to have been very successful at achieving settlements. The major problem to date appears to be a failure to encourage wider use of the schemes. The reasons for the failure of these pilot schemes are outside the scope of this course and will not be discussed further. One of the aims of this course is to show how effective mediation can be if correctly undertaken by people trained in mediation methods. The failure of many mediation procedures in the UK to date is down to a lack of training on the part of not just the parties to the dispute but also on the part of the mediator.

The most active mediation organisation in the UK is the Centre for Dispute Resolution, established in 1990 and some statistics are gradually starting to appear. The number of cases registered in the Commercial Court is gradually declining as negotiated settlement rates start to rise. Thus 1,878 cases were registered on 1998 but only 1,567 in 1999. Similarly arbitrator appointments to the LMAA declined from 3,144 in 1998 to 2,574 in 1999. There was a 40% decline in High Court actions commenced between April 1999 and April 2000. From 1998/99 the Commercial Court referred 30 cases to mediation. In 1999/2000 90 cases were referred. CEDR conducted 462 commercial mediations in 1999/2000 with an excess claim value of almost £2B. International references to mediation rose by 66%. Cargill report that 6% of their cases charterparty cases are currently

being settled by mediation, 40% settle out of court, with the remaining 60% being settled by arbitration/litigation.

The following statistics and comment on mediation services available in Singapore are provided by the Singapore Mediation Centre :-

"As of 1 April 2006, more than 1,000 cases have been referred to the SMC. Of those mediated, about 75% were settled. The types of cases include (but are not limited to) banking disputes, construction disputes, contractual disputes, corporate disputes, contested divorces and divorce ancillary matters, employment disputes, family disputes, information technology disputes, insurance disputes, negligence claims, partnership disputes, personal injury claims, shipping disputes and tenancy disputes.

The SMC's institutional partners and supporters have benefited from its services in the form of tremendous savings in costs and time. For example, the Supreme Court alone recorded savings of more than $18 million and 2,832 court days as at 1 April 2006. Individual disputants benefit extensively as well. The figures provided by the Supreme Court show that the savings in legal costs for the parties are substantial. In a High Court case involving 2 parties, it is not uncommon for parties to save as much as $80,000 in total.

In a study conducted at the end of 2002, 1,044 disputants who mediated at the SMC and provided feedback, 84% reported costs savings, 88% reported time savings and 94% would recommend the process to other persons in the same conflict situation. The feedback from 900 lawyers who represented their clients and provided feedback was similar - 84% reported savings in costs, 83% reported savings in time and 97% of the lawyers indicated that they would recommend the process to others in a similar situation. These numbers were consistent with the informal feedback the SMC had been receiving from lawyers that mediation at the SMC was a useful process and had the support of the bar

The statistics from the United States whether they are the American Arbitration Association's or those of other bodies such as National Association for Dispute Resolution are such that over eighty per cent of cases settle when they go to mediation. The NADR claims a success rate for mediation of the order of eighty-four per cent. Even with clinical negligence cases which present they own difficulties there is a success rate of the order of seventy per cent plus.

These statistics bare out the fact that in a litigation conscious society such as the United States, mediation has been a resounding success. This is a success which can be and is gradually being replicated in England and Wales to the benefit of all parties concerned. Thus, according to HMCS they have witnesses a 1,200 percent rise in court mediation since the introduction of the mediation help line.

US STATISTICS ON MEDIATION

The following US study provides clear evidence of the commercial advantages for clients of engaging in ADR in preference to arbitration / litigation.

THE 1987 CONNETICUTT STUDY AND ADR. The ADR Project Study is commonly known as the Conneticutt Study and was an in-depth examination of the success rates or otherwise of ADR procedures compared to those of traditional litigation in the United States. The United States, or some of the individual states, from various press reports and other sources has been identified as a litigation conscious society with "ambulance chasers" receiving particularly poor press. The results of this approach has been various insurance crises where some members of society and / or the professions were unable to receive insurance cover whilst those who were covered were placing an intolerable burden on the insurance companies.

In order to find a solution to these crises The Conneticutt Study was commissioned to examine the effectiveness of alternative means of settling disputes. A summary of the results of the Study are included below. This summary is not intended to provide a comprehensive report on the study, but is provided to demonstrate how effective ADR procedures can be even in a litigation conscious society such as the United States. Whilst the benefits are more apparent to defence / respondent lawyers than they are to claimants, the savings and benefits which are made in administration can be used to settle claims, as made clear earlier.

CHAPTER FIVE

THE A.D.R. PROJECT STUDY

In the United States, the following insurance companies strongly support A. D. R. and funded the A. D. R. Project study:

- Aetna Life & Casualty
- Amica Mutual
- Chubb & Son
- CAN
- Covenant Mutual
- GEICO
- The Hartford Group
- Kemper Insurance
- Metropolitan Insurance
- Nationwide Insurance
- Sentry Insurance
- Travelers Insurance
- USF&G

Allstate Insurance
Atlantic Companies
CIGNA
Colonial Penn
General Accident
Great American
The Home Insurance Company
Liberty Mutual
Middlesex Mutual
Peerless Insurance
State Farm Insurance
USAA
Utica Mutual Insurance

STUDY SUMMARY

The study results in summary were that 92% of the participants said they saved defense costs; 58% indicated that they also saved file maintenance costs; 8% indicated they saved indemnity costs; 65% chose mediation over arbitration and 90% expressed a higher degree of satisfaction with the ADR process compared to litigation.

RESULTS

The major result of this study is that almost all of these insurers now have some type of internal ADR program. Many of them even have quotas of cases that they require their staff to send into ADR every quarter!

EVALUATION OF A.D.R.

92%	Settled the cases they submitted to A. D. R.
92%	Stated that they saved defense costs.
58%	Stated that they saved file maintenance costs.
8%	Stated that they saved indemnity costs.
66%	Stated that they saved OVER 12 MONTHS of time in getting to settlement.

SOURCES OF SAVINGS

80%	Used ONLY Adjusters for cases valued under $25,000.
80%	Would use ONLY Adjusters if liability not at issue.
50%	Would use ONLY Adjusters for cases between $25,000-$50,000.

MAJOR BENEFITS TO INSURANCE COMPANIES

92%	Stated that they valued the "Opportunity to settle case after a short hearing".
58%	Stated that they valued the "Voluntary Nature of A. D. R. compared to a jury trial."
50%	Stated that they valued the "Ability to have the adjuster value the case AFTER seeing and hearing the plaintiff."
50%	Stated that they valued the "speed and timeliness of the process."

SUBSEQUENT GOVERNMENT ACTIONS

The ADR movement in the States has now reached the point where the Congress recently enacted three new ADR statutes to enable the federal courts and government agencies to begin using ADR. Most of the United States District Courts for the Northern District of Texas, Dallas Division, have begun referring large numbers of cases to mediation. In a recent interview the Chief Judge indicated that 70% of those cases were being settled. These percentages are similar to the experience of the Texas State District Courts in Dallas County. Over 2,000 cases have been ordered into mediation by the state courts in the last year. Approximately 70% of those cases have also settled.

MEDIATOR CERTIFICATION IN THE USA

Texas and the Southern States have been in the vanguard of the development of new ADR processes, apart from arbitration, in the USA. Initially mediation developed as a response to the needs of business and society and was a purely business / commercial development unregulated by either state or federal legislation. Gradually the professional bodies and in particular the AAA adopted mediation and codes of practice started to develop. Eventually the State of Texas established legislative guidelines to the conduct of mediations and the certification and training of mediators, enshrined in s154.052 of the Texas Civil Practices and Remedies Code. Neighbouring states adopted similar codes with a reciprocal recognition of Court Registered mediators and party neutrals. Federal legislation now applies the same criteria to all 52 states of the USA.

In consequence of these developments, all the Texas State certified mediation trainers including the AAA and the NMA are recognised as certified mediation trainers for the whole of the USA. All Texas trained and certified mediators and party neutrals are qualified to practice mediation in every state of the union, both for private and court referred mediation. Under Federal Legislation certification is dependant on the successful completion of a 40 hour advanced level mediation training course, following which such certified mediators can be registered on the court lists. There is no bar on overseas mediators being so registered. Registered mediators do not have to be practicing attorneys and indeed the majority are not. A peculiarity of practice in the US is that some States have asserted the right to prevent attorneys from other States, from legal practice in that State, unless they have acquired a State Practice certificate and it may be that this prohibition extends to mediation, though the extent of the prohibition is unclear and could well vary from State to State. Thus earlier this year [1999] the Florida State Court ruled that representing a client at a mediation is legal practice and thus requires Florida State registration for a lawyer from another state, in this instance New York State. The irony of this is that there is no bar on lay representation. Thus any lay party representative and any lawyer party representative from overseas would not be subject to these restrictions for the purpose of mediation practice, provided they had not qualified as a lawyer in any of the states of the Union. There does not appear to be any problem with practicing as an arbitrator or mediator in any State.

How Mediation Facilitates Closure Rapidly and Inexpensively

The Value of Mediation.

Arguably mediation meets all the requirements of a fast, efficient, effective dispute settlement procedure. No one dispute resolution procedure, whether it is through the courts or one of the alternative dispute resolution procedures, can give a one hundred per cent guarantee of success one hundred per cent of the time. Whilst it is true to say that litigation guarantees that a dispute will, from a legal point of view be brought to an end (*sooner or later depending on the scope for appeal*) mediation cannot guarantee that a settlement will be reached. However, whilst litigation invariably produces winners and losers, mediation has the potential of achieving an outcome where both parties can consider themselves to be winners. Consequently, client satisfaction in the mediation process is far greater than that for litigation.

It is difficult for parties to litigation to maintain commercial relationships after litigation has ended. The conciliatory nature of the mediation process means that the process does not invariably damage commercial relationships in the way that litigation does.

CHAPTER FIVE

Mediation provides a method whereby many cases can be removed from the court procedure at an early stage of any dispute with a consequential reduction in the associated costs run up by the parties to the dispute.

Even where the mediation process fails to result in a settlement of the dispute it can still be advantageous to the parties. The process can help to narrow down the areas of dispute so that a subsequent arbitration or trial will involve less issues than would have been the case if mediation had not taken place.

Mediation as a method of dispute resolution is generally very cost effective for the parties. The hidden costs to the parties involved in the labour costs of preparing for trial can be reduced significantly by using the mediation process. The XEROX Study conducted by Rand indicated that in the US it cost companies an average of $288 per hour for every member of the management team who had to liaise with lawyers acting on behalf of the company in disputes. See **Mining Group Gold**, 2nd Ed. Thomas A.Kayser for a discussion of the study first published as **"The 3M Meeting Management Team : How to run better business meetings"** N.Y. The McGraw Hill Publishing Co 1987 and "Better Business meetings" a follow up paper on the same study. The Rand Analysis reported significant savings on corporate staff time where mediation was adopted in preference to trial.

Mediation and arbitration offer the parties to a dispute a high degree of privacy whereas the court process is open to the public. Whether the parties are private or commercial the ability to keep one's affairs out of the glare of the media is attractive. For commerce there is the added bonus of avoiding adverse publicity and the safeguarding of commercial secrets.

The last vestige of guaranteed private hearings for judicial proceedings was removed by the case of ***Scarth v the UK*** and the introduction of the new CPR 1998. Prior to 26th April 1999 by virtue of Order 119, rule 3(1) and rule 7 County Court Rules 1981 a small claim could be referred to judicial "arbitration".[1] In the ordinary course of things such hearings would be in private, though a party could ask for a public hearing. The presiding judge had the power to order that the hearing be public or private. The **Scarth** Case ruled that this was a breach of Article 6.1 of the European Convention on Human Rights. This ruling was preceded by an opinion of the Commission stating that the UK was in breach of the Article. Consequently the new CPR had already amended the rules making public hearings the norm even before **Scarth** came before the European Court of Human Rights at Strasbourg. Whilst the court still has a discretion to hold a private hearing the criteria are highly prescriptive and there is no guarantee that the judge "arbitrator" will accept an application even by both parties for a private hearing. Since mediation and private arbitration are voluntary process conducted in a manner consented to by the parties the fact that they are conducted in private will not amount to a breach of Article 6.1. of the European Convention on Human Rights.

In addition, the latest rules on the availability of court documents to the media, introduced on the 2nd October 2006 mean that journalists will, on payment of the appropriate copying charges, be given access to any documents available to the court, unless a party has been successful in applying to the court for specific documents to be kept confidential. In the past the media had to apply to the court for access to witness statements, expert reports and documents attached to statements of case. Permission was rarely granted. All this has now changed and it may well be that the privacy offered by ADR will take on even greater importance for litigants who do not welcome the attentions of the press.

Benefits of mediation over litigation

The problem with the court system is that it is adversarial and leads to a "winner takes all" outcome. Often the court's decision is the result of a very fine distinction drawn on the basis of a mere "balance of probabilities". There is little room for compromise and the parties may not be left with the feeling that justice has been done. The court system virtually guarantees that at least one of the parties will be dissatisfied, and where there has been a successful counter claim both parties may be disgruntled with the judicial decision(s). Mediation avoids these problems.

[1] ***Scarth v the UK*** Application No33745/96

Professor Hazel Genn, who monitored the Central London County Court Mediation Scheme set up in 1996, concluded that mediation *"is capable of promoting settlement in a wide range of civil cases (including personal injury claims when both liability and quantum are at issue and offers a process that parties to civil disputes on the whole find satisfying, promotes and speeds up settlement, reduces conflicts and leads to settlements that the parties find acceptable."*

When a dispute arises the parties may chose to, or may be able to :-

1 Walk away / let it go / give up *(e.g. when the pot is empty)*
2 Resort to self help (take matters into their own hands)
3 Pass the buck *(make it someone else's problem).*

If not, the remaining options available to them are to either :-

4 Sort it out between themselves through discussions and / or negotiation, or
5 Let someone else decide (third party determination).

Litigation is the consequence of the parties to a dispute

a) failing to sort out their differences between themselves and
b) one of them insisting on an answer.

If common sense dictates that given the available facts and circumstances :-

i the parties should have been able to sort it out together and
ii there is a reasonable prospect that a mediator could break the IMPASSE, then
iii providing the time/cost differential between mediation and litigation is significant

mediation may be worth attempting and accordingly a stay to mediation justified.

WHEN IS MEDIATION UNLIKELY TO SUCCEED ?

1 The parties cannot or will not sort it out together
2 The parties need an answer as a guide for the future
3 The parties need an answer for third parties *(e.g. insurance or to justify actions to superiors or some other wider community with an interest in the outcome)*
4 It would not be in a party's best interests or cost/time effective to put off litigation.

WHEN IS MEDIATION LIKELY TO SUCCEED ?

1) Where the court perceives
   a) an appearance of an unreasonable expectation(s) on the part of one or both parties and
   b) considers that a mediator facilitated reality check could/should result in either
      i) an abandonment of the unreasonable expectation or
      ii) the adoption of a more reasonable position,

   it is likely that mediation would be worthwhile/successful.
2) Where the court feels that further effort and focus could achieve an accommodation of reciprocal rights and wrongs *(i.e. a negotiated settlement).*
3) Where the court is of the view that either :-
   a) fear and suspicion, or
   b) the absence of any acknowledgement of suffering/injustice

   has created a barrier to settlement that could be overcome by mediation.
4) Where the court senses that a party simply wants an opportunity to be heard by the other party which mediation would fulfil, paving the way to a settlement.

The conclusion that should be drawn here is that litigation should be the last resort, not the first port of call.

Benefits of Mediation : The broad conclusions are that mediation in particular :-

Avoids Unnecessary Discovery Costs : The discovery process is a fundamental part of the litigation process and one which can cause great difficulty for both parties to a dispute. The costs involved in the discovery process can outweigh the quality of the material which can be produced. There are also difficulties with the infamous "trawl" of claimant / respondent's paper work. Parties to a dispute can be and are loathe to release

papers which can be of a commercially sensitive nature especially if they are in litigation with people who are perceived to be their rivals. This can lead to unnecessary delay and blocking tactics by both respondent and claimant if there are counter claims involved.

Mediation has the great advantage that it is entirely at the discretion of the parties to a mediation what is disclosed and what is not disclosed to the other side. If there is material of a sensitive nature the party which has possession of it knows that if mediation is unsuccessful then it is within the realms of discovery for the other side to obtain this information. This should always be borne in mind in a mediation if one party to a mediation is obstructive in the release of materials which could enable settlement to be reached.

Eliminates Unnecessary Fees for Legal Representation. Any dispute obviously requires a claimant and a respondent. In many cases it is possible for a dispute to be settled swiftly, economically and without adverse publicity to the respondent. The traditional English system unfortunately has the disadvantage of permitting respondents / defendants, in the legitimate exercise of their duties and the tactics employed, to run up large legal fees in defending the case.

Mediation can eliminate many of the costs which defendants have to pay in defending a claim. These can range from solicitors' fees to experts' fees. In many cases defence costs outweigh any settlement which the claimant has obtained. To this must be added the claimant's own legal fees. Mediation can eliminate many of these costs especially if the case proceeds as far as trial. Anyone is allowed to represent a client at mediation so firms can provide legal executives with appropriate mediation training. The representative does not have to be a fully qualified practising solicitor.

Eliminates Listing Delays : Listing delays are a major source of delay in any litigation process. Even following the Woolf reforms the time delay is such that unnecessary costs can accumulate whilst waiting for the trial date to arrive. The difficulties of ensuring that all the experts and counsel are available at the time of the trial can be such that it is possible for many months to lapse between the time when the case is set down for trial and when it is actually heard.

This applies throughout the legal system and even with fast track procedures as well as the extension on the arbitration procedures under the Woolf reforms the delays are inevitable given the limited resources available to meet the needs of the legal profession.

In contrast, once the parties to a dispute settle for mediation, the sole requirements are to have a time when the parties to the dispute and their legal representatives (if so required) can meet at a predetermined venue with a mediator (who need not necessarily be a lawyer but usually is). The mediator will have expert knowledge of the field in which the dispute has arisen.

This can allow for a quicker settlement of the case without the time delays imposed by the courts by virtue of their operating procedures. Mediation can thus overcome listing delays to the benefit of the parties to the dispute.

Is useful where a claimant is not yet represented : It is possible for disputes to be settled without lawyers being present. This may seem a little strange when this course is aimed at lawyers, but in many cases many claimants only resort to lawyers when they are unable to obtain what they regard as satisfaction through their own efforts. Mediation can allow these people to meet the person they regard as causing their problems face to face and putting their case to them. This can lead to a rapid settlement of what to the defendant may be a minor claim, but which to the claimant might be a major "insult".

A face to face meeting through the auspices of a mediator may result in swift settlement of a case which if the lawyers become involved could drag out and result in an unsatisfactory settlement for both parties to the claim. Representation however is often desirable but lawyers need to adapt to the new process in order to facilitate it.

Breaks logjams : Mediation has the benefit that it gets both parties to the table. It is possible in a litigation case for the parties to conduct themselves in accord with good legal practice, but fail to get to the crux of the matter which would result in a rapid settlement of the case. When the parties come to a mediation they may well find that both themselves and their respective lawyers have been arguing and disputing points which

do not directly effect the outcome of the case. The mediation might well bring about a satisfactory outcome for the parties which through the adoption of conventional procedures could have resulted in the case proceeding as far as trial.

Breaking the "logjam" is one of the great advantages of mediation as it brings into focus the points which the parties themselves are most concerned with and can be put trough the mediator to the other side. Mediation is not a "win-lose" procedure it is designed to be a "win-win" procedure and breaking the logjam can result in both parties having the benefit of a "win- win" situation.

Is useful in settling Multi-Party Cases : The term multi-party can have two meanings: firstly many claimants claming for the same incident an example being a train crash; and secondly where the claim is made against more than one party. Asbestosis cases are good examples of this where people suffering from the disease may have been exposed throughout their working lives to asbestos. They may well have changed jobs many times where each change of employment has resulted in exposure to asbestos.

Mediation provides an alternative to the "class action". Mediation can also bring the defendant parties to the table in a process where they can all agree the value of the claim and also their apportionment, if any, of the value of the claim if met.

This also has the advantage for the claimant in that instead of dealing with a number of defendants, the defendants act together as one whilst sub-dividing their own responsibilities amongst themselves. This can lead to a far more rapid settlement of a justifiable claim than can be achieved through the courts where experts called by the defendants can result in considerable time delay due to the difficulties in getting all the experts to the court on the same day. (See above point on time delays.)

Eliminates or Reduces Client Control Problems : Many clients whether claimant or defendant (respondent) wish to conduct the litigation process themselves. They may well use solicitors but they wish to conduct the case themselves through their solicitors. This can often lead to problems for solicitors in that they may be asked to act in ways which can be construed to be unethical and / or undertake on behalf of their clients procedures which whilst legally acceptable may not be good practice in the conduct of that particular case. Mediation eliminates the risk to practising solicitors of clients acting in a manner by which they wish to control the legal procedure without accepting the responsibility for the outcome. At a mediation the clients have to accept responsibility for their own actions as they are present (or they should be present). Thus eliminating any potential client control problems.

Expedites Settlement of Claims : The above all clearly demonstrate that mediation can lead to the swift settlement of claims in an economical manner to the benefit of claimants and respondents alike. It can produce "win-win" situations. These benefits of swift settlement can outweigh any potential criticisms of not following standard legal procedures through to trial.

The settlement figures from the United States show that mediation is an effective dispute resolution procedure and one which if applied in a standard dispute resolution manner can lead to development of a reputation for efficient management of cases whether claimant or defendant.

KEY POINTS TO REMEMBER:

Mediation is not arbitration. Mediation is a non-binding settlement discussion and no one is giving up their right to an arbitration / trial.

The mediation will be convenient – set up at a date, time, and place that fits everyone's schedule.

The mediator will be a dispute resolution expert, and someone all parties will be comfortable with.

Mediation is effective – while we can't guarantee a specific result, private mediation settles 91% of the cases submitted.

CHAPTER FIVE

Are the principal objectives of the mediation process mutually exclusive or complementary?

Introduction :

Mediation is a flexible process which enables it to be applied to a diverse range of circumstances. This flexibility is widely celebrated and promoted as a distinct and primary advantage of mediation over arbitration. However, the implications for mediation practitioners of ranging freely from one technique to another to fulfil the different aims and objectives of the process, that is to say conflict management and/or dispute resolution, deserves further analysis.

It is submitted that it is essential for the mediator be fully aware at all times of the parameters within which he must operate at any given time during the mediation process. A failure to do so by the profession as a whole may not only bring the process into disrepute, but also, may severely damage the reputation of the individual practitioner, and perhaps, though this is far from certain, have legal consequences for both the practitioner (in spite of immunity provisions in ADR documentation) and for the enforceability of any settlement brokered by a mediator tainted by undue influence or other alleged mal-practice.

Mediation is widely viewed as, and is regularly used as, a tool for conflict management. Indeed, for many, conflict management is seen as the principal function and purpose of mediation, whereby a neutral third party helps partners[2] to find solutions to difficult, even apparently intractable problems.

For others, the primary function of mediation is as a dispute or difference resolution process, whereby a neutral third party facilitates the brokering of a contractually binding settlement.

Whilst not all problems inevitably develop into disputes, many, if not resolved in a timely fashion, will automatically transform in due course into a dispute that requires settlement.[3] Problems encountered by those attempting to forge relationships, be they social or commercial can be overcome with the assistance of a third party facilitator. A failure to overcome the problem will not lead to a dispute that calls for "closure."

Is there any difference between the role of the mediator as conflict management facilitator and as dispute resolution facilitator? If so, what is the difference and how does the mediator recognise the point at which a problem matures into a dispute? In what way, if at all, does the mediator have to adjust the way he operates at this stage?

In both cases facilitation is a common factor. The principal modus operandi of the mediator is not therefore likely to differ in any significant way whichever objective he is seeking to fulfil, be it conflict management or dispute resolution.

The barriers to the solving of problems and the resolution of disputes, whilst individual to each case, are commonly rooted in the same inter-personnel factors. These represent significant factors that divide the parties and have to be bridged, with the assistance of the mediator, in order to bring about rapprochement.

Barriers :

The attitude of the parties to the matter which separates them is likely to hinge upon their respective viewpoints, informed by personal morality and beliefs of what it is right and proper to do and how they expect others to behave, or by credence/understanding (misunderstanding?) of the relevant facts as to what has occurred.

Protagonists commonly suffer from a lack of trust (justifiably so in some cases) in their adversaries, frequently imbued with an undue degree of enmity. Often visions of glass-houses and stone throwers or planks in the eyes of critics may come to the mind of the impartial ring side observer.

The authority / ability to settle (and the lack of it) is a common barrier to settlement. Whilst it is usual practice for the mediator to seek an assurance from the parties that they have presented themselves at a

[2] Partner is used here as an all-embracing term to cover family and social relationships, community relationships and commercial relationships.

[3] Note that in as much as the parties to a dispute may prefer to do nothing and allow a dispute to dissolve in the fullness of time, not all disputes demand settlement.

mediation endowed with authority from superiors to settle the dispute, such safeguards are impracticable in many social disputes where one or more of the disputants purports to speak for a wider audience and where any proposed solution will have to be subsequently sold to them. The terms of any proposal will likely be limited by what the negotiating party feels is a saleable proposition, though much will depend on his standing in that community and his salesmanship skills. At a more basic level, a cash strapped party may lack the ability to finance a settlement.

Admissions of fault and thus of liability are frequently barriers to settlement negotiations. Whilst an organisation may have no problem once fault is established, where the individual attending the mediation is part of the problem, overcoming this barrier may not only be difficult but on times may be impossible, particularly if that individual has something to lose by admitting fault or will simply lose face by doing so. One potential solution is to suggest that the organisation brings in an alternative negotiator, perhaps someone more superior. It is best, in such situations to let a representative, if there is one, take such proposals forward, rather than the mediator.

No doubt the reader can add other barriers to this list, but the common factor in bridging the divide between the parties is the art of communication, an essential tool, at all times, for all mediators.[4]

What is a dispute?

A further difficulty lies in the definition of "disputes and differences." From the legal perspective disputes and differences are related to legal rights and where a breach of a legal duty is involved, to the inter-related questions of legal entitlement to a remedy and assessment of quantum.. These give rise to justiciable disputes.

However, disputes frequently involve areas where the law has not recognised a legal right and hence no legal duties either to do something or equally to abstain from pursuing a course of conduct, exist. Many so called "social rights" fall into this legal vacuum.[5] Thus, until very recently, English Law appeared to have little to offer those who felt that their "privacy" had been invaded, even though such matters have given rise to protracted disputes between so called friends and neighbours. Should such a fracas be regarded therefore as merely a problem, simply because the law offers no solution? Such fracas are nonetheless eminently mediateable.

Inter-relationship between mediation and conflict avoidance / management mechanisms :

In the U.K. Resolex has made a name for itself as a dispute avoidance service provider to the construction industry, employing what it calls "***Contracted Mediation***." It would appear that the Resolex services are similar to the modus operandi of the DRB in the US as commended by the Dispute Review Board Foundation.

The DRBF distances itself from mediation however, whilst encouraging its practitioners to engage in informal facilitation which falls short (ways and means must not be discussed by the board, who merely encourage the parties to engage in negotiations) of mediation. The DRBF takes pains to ensure that board members do not provide advice since that might prejudice any subsequent role they might have to play as a dispute advisory board. A fortiori, where the board acts, as it does in the international field as an adjudicatory/arbitrary board, the potential bias highlighted by ***Glencot***[6] acts as a constraint on the facilitation role of the members of the board at a pre-hearing stage.

Partnering and the Conflict Ladder :

There is a difficult relationship between Partnering Processes, designed to avoid conflict and to provide solutions to potential problems and dispute resolution, be it by way of mediation or third party settlement., particularly in terms of the hurdles that a partnership agreement may require to be overcome before a dispute is referred onwards and upwards. Whereas a dispute is often best dealt with at the lowest possible

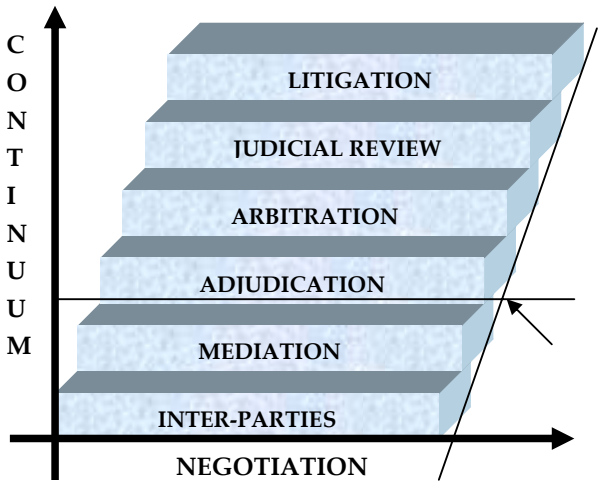
4 See further on the art of communication, the article entitled "***Mediator Skills***," by G.R.Thomas in ADR News Vol.4. No.1. 2004

5 Whilst the relentless pursuit of rights by the legal profession ensures that this vacuum steadily shrinks with the passage of time as a legal system matures, the audacity of the US defendant who asserted in 2003 that his "right to procreate" was inhibited by the prescription against rape is a cause for both wonderment and concern as to establishment of the correct balancing point between rights and duties.

6 **Glencot v Ben Barrett Ltd** [2001] BLR 207HT 00/401

level before it escalates into something far more serious, partnering processes frequently stipulate that a ladder of consultation has to be climbed with the issue being first canvassed by the partnering team, and thereafter submitted to negotiations between senior management and only failing that being referred to dispute settlement. All of this of course takes time, effort and manpower. Whilst the objectives are admirable in seeking to prevent a dispute arising, the converse may be true in that the dispute inevitably gets worse as it rises up the hierarchy through layers of personnel who are not prepared to put their necks on the block and propose settlement terms. Thus the central problem is that the ladder prevents the problem being presented to those with the authority and willingness to settle at an early stage.

The Traditional Ladder



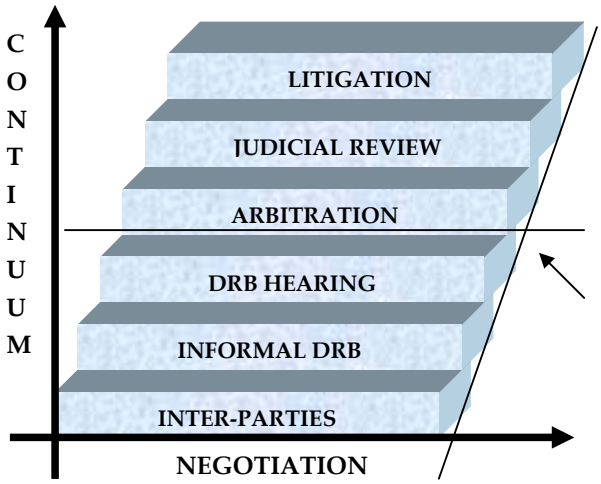
Whilst there is some value in the traditional conflict ladder concept, which assumes that the lower down the level a dispute is settled the better, accommodating either partnering or the DRB or both into the ladder is problematical.

The arrow indicates a crucial turning point where the parties relinquish party autonomy and control over the conduct of and outcome of their dispute.

The advent of court ordered mediation however, turns the model upside down, since even after control of the process has been passed to the court, autonomy may be returned to the parties. It is questionable, in the light of the number of claims that settle outside the court-house door, to what extent the parties ever relinquish control. That being the case, does the level up the ladder at which resolution is achieved tell us very much at all? It may be that it is the threat of a higher authority that induces the settlement in the first place and the closer the case gets to trial the greater the incentive to settle compelled by a sense of urgency.

Rather than a vertical one way ladder, analogies to snakes and ladders may be more accurate. Furthermore, the temporary finality that attaches to adjudication decisions also questions whether or not the autonomy of the parties is not in fact completely relinquished until one further step up the ladder has been climbed. Indeed, it is not uncommon for the parties, with an adjudication decision acting as a bench mark to engage in further negotiations or mediation, to determine how they will then move forward with an on-going project.

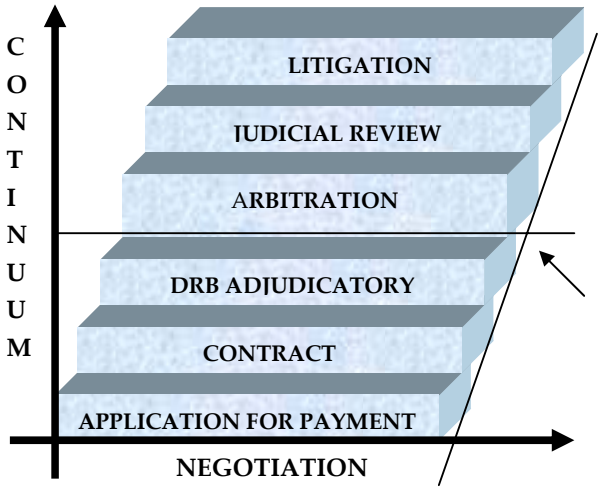
The US DRB Ladder



Whilst theoretically the parties have the ability to ignore the board's advice, the support of the courts to date for the recommendations of the board indicates that perhaps autonomy really passes one step below.

The arrow indicates the turning point where the parties relinquish control over the outcome of their dispute.

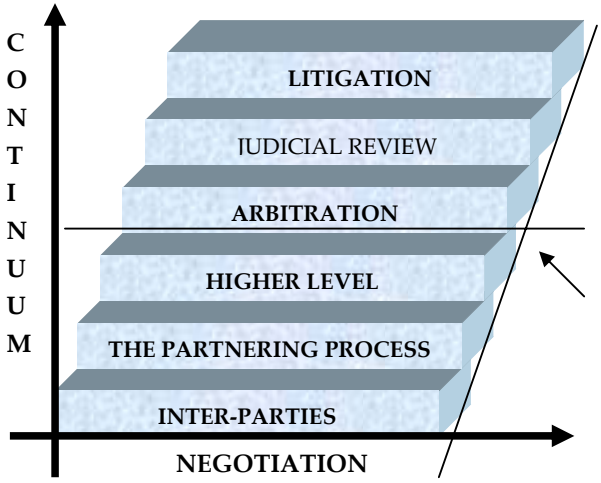
The International DRB Ladder



It is less easy to determine where the arrow should go in the FIDIC 1999 style DRB process. To the extent that it might be possible for the contractor to discuss matters with the contract administrator, the more appropriate point may be before the DRB adjudicatory step. Since a failure to protest within a specified period turns the adjudicator's decision into a final arbitral award, autonomy is very limited and has to be jealously and pro-actively safeguarded if it is to mean anything at all.

The arrow indicates the turning point where the parties finally relinquish total control over the outcome of their dispute.

The Partnering Ladder



The arrow indicates the turning point where the parties relinquish control over the outcome of their dispute.

Whilst it is possible to insert another step in the ladder, to accommodate a DRB, between higher level negotiation and arbitration, it is too late for the early pre-emptive work of the DRB to take place, so that the only function of the DRB is to deliver a recommendation under the US style DRB process, or an adjudicatory decision under the International DRB Model.

The question arises as to how many steps it is desirable to have on the ladder. A fortiori, introducing a contract administrator into the process would result in a mountain to climb before a dispute could eventually be put to rest.

Conflicts of Interest – experts – agents – lawyers.

Expert determination : Contract administrators and expert determinators are frequently used in the construction industry and in the art / auction world. Whilst professionalism was at one time viewed as a guarantor of impartiality, the fact that one party usually appoints the decision maker has resulted in fears that the decision maker may be biased in that by virtue of appointment, and often of employer remuneration, the decision maker is beholden to one party. Dual appointment and fee sharing mechanisms can go a long way towards eliminating any potential allegations of bias. The great virtue of the process is that it produces decisions quickly and inexpensively, the majority of which are uncontroversial and are accepted and respected by both parties. As such it is a valuable mechanism for filtering out many issues that might otherwise escalate into major disputes.

Agents : Many contracts particularly in commerce are brokered and administered by agents. Where an administering agent is a party to dispute resolution processes on behalf of the principal, a conflict of interest arises in that the agent's fee may be compromised by settlement, whereas dispute resolution process costs are borne by the principal.[7]

Lawyers : Party representatives, in particular but not exclusively lawyers, especially where private ADR is concerned are open to the charge that it is not always in their best interests to settle too early and that the more they make out of a dispute the more they earn. The general public tends these days to view the legal profession as a necessary evil and thus with some degree of suspicion, rather than as respected professionals. The extent to which there is a conflict of interest that is not restrained by professional codes of conduct is difficult to measure, but it should be noted that client's frequently instruct their counsel to proceed, against professional advice and it does not then become the instructor to complain at the extent of legal fees.

Where the lawyer is also an ADR practitioner the initial interview stage is a worrying time, where the interviewer perceives mediation has something useful to offer the client. This is particularly the case in the family/matrimonial field. Once the interview stage has progressed beyond a certain stage the interviewer becomes involved in the client's case and cannot act as a mediator, thereby necessitating cross referral system to an independent mediators.[8] This is fine when there are sufficient qualified and experienced mediators at hand in the locale. The advisor also has to consider how much legal advice is given and the impact that such advice might have on racking up the level of the dispute, thereby prejudicing the potential for success at mediation.

Duties.

The Public law distinction between the expectation of fair treatment of licence applicants and the higher standard due process rights of citizens with regard to dealings with public authorities is well established. The right to due process extends to private adjudicatory processes. However, even here the degree of judiciality expected of the adjudicator is subject to a proportionality test as demonstrated by Sections 1 and 33 of the Arbitration Act 1996. This is particularly relevant in respect of the fast track arbitrator and non-statutory/Housing Grants Construction and Regeneration Act 1996 construction adjudicators. The Arbitration Act 1996 test is reflected equally in the over-riding objective established for the judicial process by Section s1(4) Civil Procedure Rules 1998.

Similarly, the degree of impartiality required of the Conflict Resolution Facilitator and the Dispute Resolution Facilitator are likely to be directly proportionate to their respective aims and objectives. As with

[7] Multi-party / interest mediation, for instance those involving insurance assessors involve a similar conflict of interest.

[8] Thanks here are due to John Roche of The Mediation House, for highlighting this issue to the author.

the expectation/due process divide, the dispute resolution facilitator is dealing with legal rights whereas the Conflict Resolution Facilitator is not. Care needs to be taken by the dispute resolution facilitator to avoid advising a party, thereby exposing himself to liability for misrepresentation or to allegations of mal-practice for exerting undue pressure on a party to settle on disadvantageous terms.

Can an adjudicator/arbitrator/mediator settle or facilitate settlement of an entitlement issue and then take a step backwards and become a conflict management facilitator in respect of quantum? Frequently jurisdiction over quantum is withheld from the ADR practitioner by the parties to a dispute. This is particularly the case with regard to the US style DRB. Essentially his remit is to establish whether any money is due, after which the parties will sort out how much is due between themselves and particularly, how that liability will be met, be it by payment or by the establishment of a joint venture and the sharing of profits.

The rub comes if and when the mediator/adjudicator is invited to facilitate negotiations on quantum and methods of reimbursement. Whilst this might be acceptable, nonetheless, if the facilitation fails it is advisable that where the quantum issue falls to be determined by a third party, a new independent practitioner is appointed.

Determining entitlement and quantum.

Interest based mediation does not necessarily concern itself with either questions of entitlement or quantum. Where it does, the settlement figure, in an interests based mediation, is likely to have a close correlation to the value that the parties put on settlement. This is frequently the achievable value put on it by the party (if any) that most wants and or needs a settlement. The less the other party needs or wants settlement, the greater their bargaining power. The skill of the mediator is in encouraging the both parties to recognise and value any potential other wider interests. A degree of pressure, exerted by the mediator, particularly in the closing sessions is common practice. The "fairness" of the outcome is dependent on both parties taking on board such interests, but it is doubtful that a mediator could be held to account for failing to ensure a "correct" balance is achieved.

Risk assessment or evaluative mediation[9] will on the other-hand of necessity directly address both the questions of entitlement and quantum head on.[10] It is logical to deal with entitlement first before moving on to quantum. The mediator will first therefore encourage the parties to consider the likelihood or otherwise of entitlement being established before a court or arbitrator, in the light of the relevant facts and the law, followed by which in a similar vein the parties will be encouraged to base their negotiations on their considered view of how much a third party might or might not award.

The key tool for the mediator is at all stages to ensure that the parties themselves make a realistic assessment of potential outcomes, acting as a devil's advocate to induce consideration of alternative outcomes. Where the parties are legally represented the mediator can put the representative on the spot, encouraging a move from qualitative to quantitative assessment for the benefit and consideration of the client/party during private sessions.

This is not to say that interests based factors are not relevant. They are and provide an additional tool, particularly for closing the gap between the parties in order to establish an acceptable settlement figure. Thus, whilst a court will not address questions of lost opportunity costs, time, cash flow, energy, convenience and the stresses if litigation these are all relevant factors to be taken into account by both parties as additional reasons to compromise and achieve a pre-trial settlement.

In such mediations it is absolutely essential that the mediator spells out to the parties that he is not acting as a legal adviser to either party and that they alone must make all the decisions. The mediator should not recommend any course of action, though in the closing stages the mediator may well give an assessment of whether or not the other party will go any further. There is a distinction between commending the terms on

[9] Evaluations and or risk assessments are made by the parties, often prompted by the mediator, but without the mediator imposing an evaluation, which would turn the process into a conciliatory process or mini-trial.

[10] Since neither of these factors figure in many social fracas / disputes it is clear that risk analysis/evaluative mediation is not appropriate.

offer and providing an assessment of what more, if anything, may in the circumstances be achievable from the other party.

Limitations on risk assessment mediation. A willingness or ability to bargain is necessary to all forms of mediation. Where a party is unmoveable and convinced that their view on entitlement is 100% correct and equally convinced that their quantum expectations are spot on, the only room for manoeuvre for the mediator is based on interests, which might account for a small degree of movement or compromise but little more.

Where a party has liquidity problems and cannot pay at that point in time, even though entitlement and quantum are accepted, wider interests can be beneficially taken into account. This is a classic pressure tactic used in negotiations since there is little value in suing a man of straw. Spreading payment over a period of time offers a potential solution where a party can demonstrate that their financial problems are temporary. Alternatively, there is sometimes scope to establish joint ventures. However, where a party simply won't pay, litigation is the only practicable way forward.

Closure.

Does settlement imply closure, and what amounts to closure? The ability and indeed the requirement to move on from a situation are closely linked to the settlement of a dispute, be it consensual or imposed. However, in other respects, mere closure and the fact of moving on in the practical sense does not necessarily imply acceptance, forgiving or forgetting. Relationships are often permanently damaged if settlement terms are brokered begrudgingly without genuine acknowledgement of fault. Where a party deems the terms to be unfair, the dispute may be at an end, but the relationship conflict is not.

The role of conflict management in dispute resolution may therefore differ from conflict management of problems. How so? The distinction lies in that in respect of problems the objective is the make the problem go away, thereby resolving relationship difficulties completely, whereas in dispute settlement, the objective is to rebuild sufficient trust between the parties for a settlement to be brokered, but no more.

Arguably, it is not the job of the mediator to ensure that a settlement is fair as between the parties. That is for the parties to judge when considering whether or not to accept the terms on the table at any given time during the mediation process. All that is required of the mediator is to be scrupulously fair and unbiased in his dealings/communications with and between the parties. However, once a deal is within reach, the mediator at the very least is likely to advise the parties of that fact. Such advice may be seen as a commendation of the terms by one or other of the parties, whereas the mediator is merely informing each of the parties of the fact that he is of a view that with a little more effort terms acceptable to the other party are within reach. Once those terms are on the table, the mediator may well advise that in his opinion it may be difficult or indeed impossible to improve upon those terms and that in the absence of acceptance of those terms the mediation will fail. Indeed, it is incumbent on a mediator to give such advice where he is of the opinion that there would otherwise be no value in continuing the mediation.

Does such advice amount to undue pressure/influence? The answer is "Probably not" but the mediator must be very careful about the way that he conveys such opinions. Whilst, a party looking for justification for the terms of a settlement will be best served by a judgement which leaves no option but compliance, a paying party will frequently justify the payment to superiors/other interested parties by attributing responsibility to the mediator. It is only a short step for that other party to retort that the mediator has given bad advice. What then, if any at all, is the extent of the fiduciary duty owed by the mediator based on the "special relationship" with the party? Can the benefit of that duty be extended to interested third parties? That is the danger a mediator must guard against.

Advantages of Using Mediation for Lawyers & Clients

Personal Evaluation of the Claimant / Defendant :

Conventional litigation procedures are such that solicitors have little if any opportunity of assessing the reliability and competence of their opponent. In this context opponent does not mean the opposing solicitor, but the claimant or defendant. In many litigation claims the first opportunity that the other side has to investigate fully the reliability of the claimant / defendant is at trial or when he / she is in the witness box. Prior to trial the only assessment of the claimant / defendant is usually through the auspices of expert witnesses and their reports. This is an unsatisfactory method of analysing the reliability of the claimant / defendant.

Up to and indeed including trial the assessment is of the competence and efficiency of preparation of the claimant / defendant's solicitors. This at first reading is a bold statement to make, but with no direct communication between the parties this is a true statement. The inter parties communications are through the solicitors or other legal representatives. It is the solicitors on either side who are conducting the case and it is the impression that they make which is acted upon by the other side not the claimant nor defendant.

A mediation session allows the opposition to see how the claimant /defendant acts and whether they are in a position to rely on their evidence to the detriment of the other side or that the claimant / defendant would make a better witness than their own client in the witness box. The assessment of the opposition is not the assessment of the quality of the lawyers, but the quality of the claimant / defendant. If the opponent is a reliable and believable person whereas your own client is not the advantages of settling at mediation quickly become apparent. If your own client is potentially not a good witness then the expedient action would be to mediate to a settlement to obtain the best possible deal for your client.

Mediation is not a "winner takes all", but a facilitated negotiation process where it is possible to salvage something out of a situation which if it had proceeded to trial would have resulted in a disastrous judgement against you !

Establishes Your Presence : This is important because it is in most situations the first opportunity for the other side to see that there is a real person opposite them rather than a letter writer or someone who answers the telephone. This equally applies to your own client who after the initial interviews may well not have any further face to face contact with their representative until the final preparations for trial. At a mediation caucus the opponent is not a faceless piece of paper. He or she is an actual person who should if correctly advised attend with a legal representative or other person who can adequately advise them on the merits of the mediation process as the session progresses.

There is little doubt that once the reality of there being real people on the other side becomes apparent then the process of settlement is well under way. This can lead quickly to a settlement which without a mediation process could drag on for a substantial period of time. This is simply because neither side has accepted the fact that there are "real people" involved in the case, but it has become a litigation process where the legal representatives of the parties follow the accepted and substantial processes of litigation through all the appropriate and accepted measures to trial. Even where the parties had substantial personal relationships before the dispute arose the litigation process can depersonalise the parties. The consequences are such that any early opportunities to settle are lost in the traditional processes of legal practice. Mediation can and does avoid these pitfalls if correctly used.

Emotional Discharge : The emotional discharge applies primarily to the plaintiff who "tells his own story". This is a very important part of the mediation process because it is an accepted fact that many people wish to have "their day in court" and will allow the litigation process to develop until trial so that they literally can have their say. This is not the most efficient use of time or economic resources.

Mediation allows claimants literally to have their say and tell their opponent what they think of them in no uncertain terms. This is a "clear the air" opportunity, the potential of which should not be overlooked. Once the claimant has had his say it is possible then to begin the mediation process and achieve a settlement which is satisfactory to both parties.

Failure to clear the air by allowing the claimant to have his say can result in the process dragging on and on until the claimant actually has his say in court. The emotional relief of the claimant once he has said his piece removes any obstacle to settlement of the claim. This is of particular importance when the claimant believes he has suffered a personal slight and has not been treated in a satisfactory manner following this slight.

Defendants, whilst they might not appreciate the emotional outburst, should be able to appreciate that once the emotion has been removed from the case it is then possible "to get down to business" in a rational manner. This enables them to bring the mediation proceedings to a satisfactory close both for themselves and their opponent who once his initial need for emotional discharge has been met (or should be met) will act in a more reasonable manner to facilitate a settlement.

Introduces the Claimant to the Realities and Expenses of Litigation : Defendants are far more litigation cost aware than claimants. This is because many defendants are represented by insurance companies and their solicitors. These people are *au fait* with the costs of litigation and good client practice determines that they act in such a manner to limit the expenses incurred by their client.

In contrast claimants can be "a one off" who are financed by a variety of sources including themselves. There is much anecdotal evidence that claimants fail to realise, even when informed in writing as well as verbally of the expenses of litigation, that these expenses can all fall back on the claimant if unsuccessful or even if successful. The costs of running the claim may be high and such are the terms and conditions of the claimant's contract with his solicitors that the settlement is swallowed up in legal fees which will not be met by the other side and are disallowed at a taxation hearing.

A mediation caucus has the advantage of concentrating the minds of claimants on the advantages of early settlement and the reduction of expenses. In many cases it is only at this stage that the claimant realises the full impact of the process which he has initiated and of the expenses involved in this process. Expenses which may fall back upon him.

It is possible for the claimant to be the only non-professional litigation person in a mediation session. The potential of the costs involved can be dramatically revealed to him especially when it is brought to his attention that a mediation session with the people present is only "a minor" proceeding compared to a full blown trial where he would be represented by counsel.

Mediation has the advantage of not being a winner take all scenario and given the realities which the claimant may have been totally exposed to a settlement may be reached in a manner which under the conventional court system and litigation processes could not have been achieved.

Section 7(e)-(k) below provides illustrations of risk analysis techniques that can be used effectively by party representatives and mediators to provide a reality check for the client of the financial risks of litigation and arbitration respectively, both in respect of the winner takes all aspect of litigation and the problems associated with the award of costs in litigation.

Provides an Opportunity to probe the Claimant/Defendant for hidden needs. The opportunity to probe the opposition is important. The litigation processes involved may be such that the claimant / defendant whilst acting in a thoroughly ethical manner may also have additional requirements; that is, a hidden agenda. The hidden agenda or needs may be known to the solicitor or conversely the legal representatives may have no inkling of the claimant / defendant's needs or hidden agenda.

A mediation session will allow these to be brought out and if there are hidden agendas it is possible that these can be dealt with in a satisfactory manner facilitating a quick settlement of the claim. The litigation process does not allow the identification and the acceptance of hidden agendas into the program of dispute settlement.

Mediation permits and actively encourages people to talk and develop their needs and agendas whether hidden or open. If the hidden agendas can be resolved in a satisfactory manner then this may remove the obstacles to settlement. This removal of the sub-plot can allow what was initially the litigation process to be concluded with all needs met.

The litigation process cannot and does not deal with hidden agendas unless specifically brought to attention of the parties. Hidden agendas can and do have dramatic influence upon litigation processes. One does not know what the needs and wants of a client and / or their legal representatives are until discussed "face to face". It is possible for people to desperately want to settle their claims, but to be unable or unwilling to settle until the requirements of the hidden agendas are addressed.

Mediation allows the hidden agendas to be dealt with in a manner that will result in no publicity for them. The hidden agendas may be such that they would not or could not come to light even at trial. This is particularly so where a party would not be prepared for the information to enter into the public arena. Such reluctance to allow the public access to certain types of information can be for social or commercial reasons which have no unethical overtones whatsoever. Failure to bring these factors to light can be such that a judgement can and will be given which, whilst satisfactory on the evidence which has been heard in open court, may not be a satisfactory judgement when the hidden agendas are taken into consideration.

Indeed there are situations where a claimant will pull out of a court action once he or she realises that certain information will have to be revealed in court. Such a person however might have nothing to fear from revealing the same information in a mediation. The mediator would need to ensure that the other party does not become aware of the fact that the need to reveal this information would result in a withdrawal from trial.

Mediation permits these hidden agendas to be aired and dealt with as part of the dispute resolution process giving a result that may be far more satisfactory than that which would be obtained under conventional litigation processes.

WHAT HAS ADR GOT TO DO WITH LAWYERS ?

A significant part of a lawyer's work involves advising and assisting clients to settle disputes. The various forms of ADR involve **either** alternative mechanisms for settling disputes reliant on negotiation as opposed to third party determination **or** alternative forums for third party determination. Since the judicial system is not central to these ADR mechanisms and processes, lawyers do not have exclusive rights of participation. Indeed, ADR mechanisms and processes have developed in response to perceived problems and disadvantages in the judicial process. It is hardly surprising therefore if some lawyers believe that ADR is not only irrelevant to legal practice but also that the advent of ADR poses a threat to the livelihood of lawyers. Both views are incorrect. ADR is relevant to lawyers because it is attractive to lawyers' clients. Lawyers can beneficially participate in ADR practice provided they are prepared to adapt and embrace new concepts. Above all lawyers have to learn to jettison the litigation mind set and rethink approaches to dispute resolution to provide clients with the type of services which are now being demanded by their more discerning clients.

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

Since a significant part of a lawyer's work involves advising and assisting clients to settle disputes, lawyers are faced with a choice. They can embrace ADR and actively engage in it or they can withdraw from the process and surrender the portion of their work that is assigned to ADR to a new breed of ADR practitioners. Outside the court room much of a lawyer's dispute resolution work involves negotiation, so in reality conciliation and mediation are merely more sophisticated versions of what a lawyer already does. The difference lies in the fact that the negotiation at a mediation is not conducted in the shadow of the courtroom. This alters the dynamic of the negotiation and requires the negotiators to adopt a different mindset from that of the litigation lawyer. Adjudication and arbitration are merely variants on litigation practice which can be easily assimilated by lawyers. Lawyers can advise clients on and represent them in ADR processes. Lawyers can become adjudicators, arbitrators, conciliators and mediators.

CHAPTER FIVE

What is the attraction of ADR for Clients ?

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

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

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

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

The Implications of ADR for Lawyers and Billable Hours

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

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

The Lawyer and Adjudication

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

Adjudication is a quick and inexpensive method of dispute resolution resulting in an immediately enforceable, temporarily binding dispute settlement, by a third person, known as the Adjudicator. The Adjudicator is likely to be an expert first and foremost but may also be a qualified lawyer. Most construction adjudicators are qualified builders such as architects, civil engineers and quantity surveyors. This helps the

process because the adjudicator will not need to hear or read large quantities of expert evidence to help him understand how the industry operates. This keeps time down to a minimum and avoids much unnecessary expense.

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

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

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

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

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

Impact of Adjudication on Legal Practice

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

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

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

CHAPTER FIVE

Lawyers and Arbitration

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

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

Arbitration emulates the courts in some respects and has been described as a private court dispute settlement system. It is therefore a more formal procedure than mediation. There are significant differences between arbitration and litigation. Arbitration in Malaysia under the auspices of NADR and The Chartered Institute of Arbitrators offers disputing parties considerable benefits.

The courts support the arbitral process in a number of ways, in particular in respect of orders for disclosure of information and in the preservation of funds that may be needed to finance an arbitral award. The courts in the UK are less likely to interfere with the arbitral process than was the case before the 1996 Act was passed and it is hoped that in the not too distant future Malaysia will also update the Arbitration Act 1952 to bring like benefits for arbitral clients.

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

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

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

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

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

resolution process in the United Kingdom and Australia, with proposals pending for its introduction into US Federal Law. Adjudication is a valuable mechanism for dispute resolution which it is hoped will be adopted voluntarily by the construction industry in Malaysia but legislation to facilitate its use would also be welcomed.

Impact of Arbitration on Legal Practice

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

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

Lawyers as Arbitrators

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

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

Training for construction adjudication practice is available for construction lawyers from the Academy for Construction Adjudicators, the Royal Institution for Chartered Surveyors and the Institution of Civil Engineers. Training for general arbitration practice is readily available from, amongst others, the Chartered Institute of Arbitrators, the Nationwide Mediation Academy UK Ltd and NADR International. Extensive training is required to become an arbitrator. Examinations are rigorous and on par with the Legal Practice Course. Training is both time consuming and relatively expensive in the private sector. Pupilage is a prerequisite to panel listing.

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

market in the future than it has been in recent years. The global market has the potential to support far more arbitrators than are currently in practice.

Lawyers and Mediation

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

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

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

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

Why Mediation works and advantages of Mediation

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

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

Impact of Mediation on Legal Practice

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

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

Mediation is a catch all description for a variety of third party assisted negotiation processes. Over 28 apparently distinct forms or models of mediation process have been identified by academics studying the phenomena in the United States. Mediation is used amongst others by organisations involved in social work, commercial organisations and by international organisations and governments to assist in the resolution of disputes. It is hardly surprising given the diverse demands on mediation that different models of mediation practice have developed. As stated earlier, mediation is nothing more-nor-less than a form of assisted negotiation. Negotiation is a tool used by lawyers. Lawyers do not reject negotiation simply

because non-lawyers also negotiate. Rather lawyers have developed codes of practice for legal negotiation. Equally therefore, lawyers should not reject the use of mediation as a useful tool in their practice armoury but rather need to develop codes of practice for engagement in mediation by members of the profession.

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

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

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

The Role of the Lawyer in Judicial and Mediated Dispute Resolution :

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

When is mediation preferable to third party settlement ?

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

CHAPTER FIVE

Is mediation an alternative to third party settlement ?

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

Does mediation involve unjustifiable compromise ?

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

Mediated versus third party settlement and justice :

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

Time Benefits of Mediation :

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

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

Legal representation at mediation :

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

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

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

Lawyers as mediators : Do they make good mediators ?

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

Mediation Service Providers :

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

have established standards of and codes of practice compatible with the standards and codes of the legal profession.

Is mediation practice a viable career option for lawyers ?

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

Can lawyer's avoid mediation work ?

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

ENGAGING IN THE ADR PROCESS

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

1 TERMS IN A CONTRACT PROVIDING FOR ADR IF NEEDED.

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

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

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

2 AGREEMENTS TO SUBMIT A DISPUTE TO ADR.

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

COMMON QUESTIONS ABOUT MEDIATION

Richard Faulkner's responses to commonly asked questions on mediation

What am I required to do in a mediation?

The only requirement is that you and your client meet with the mediator and the other side(s) to try good faith to settle your case. The mediation rules of The Nationwide Academy for Dispute Resolution U.K.Ltd. prohibit the mediator from rendering a decision. The mediator is there to help you settle the case. Approximately 80% of the cases referred to mediation settle at the mediation. If the case does not settle, you still have the right to go to arbitration / trial.

What can a mediation do for the parties that legal representatives cannot already do?

- Mediation aids negotiation in several ways:
- Mediation helps educate everyone, especially the clients. A mediation involves a discussion of all facets of the case, what is involved in preparing the case for trial as well as trying it if cannot be settled. Many lawyers have stated that their clients would not have accepted a reasonable settlement offer if they had not participated in a mediation.
- Mediation offers all parties the ability to try out settlement offers without necessarily having to disclose them. In ordinary negotiations, no party wants to give the other side their best settlement numbers too early. They always fear the other side will take advantage of them.. Mediation reduces negotiation posturing. It helps the parties work out a fair settlement as rapidly and inexpensively as possible.
- Mediation brings the negotiations "to a head". Often cases acquire a life of their own and drag on indefinitely. They usually then settle on the eve of trial. A mediation has everyone sit down in the same room and work to settle the case without incurring unnecessary expenses.

How successful is mediation in settling cases?

Approximately 91% of the cases privately referred to mediation settle.

What do I (the party representative) need to do to prepare my case for mediation?

Mediation works best when you are prepared. You can bring and present just about anything or anyone important to your case. However, neither the rules of evidence nor the rules of civil procedure appear in a mediation. Mediation is basically a moderated discussion of each party's evidence and argument. Mediation (as a process) is non-binding and informal, unlike arbitration or a court trial.

Where and when will the mediation occur?

The mediator will work with everyone to set up a convenient date, time, and location. A mediation can be held at any place the parties wish.

Who will be the mediator?

Mediators are experienced attorneys, judges, and professional mediators who have received extensive special training in mediation techniques.

How much will mediation cost?

The parties in the suit usually split the cost of the mediation equally between them. Most insurance companies, however, will agree to pay the entire cost. Since mediation rarely results in outright winners and losers it is not practicable to arrange for the looser to pay the winner's costs. Basic cost of a standard mediation is £750 per party for an 8 hour day or £375 per party for a 4 hour half day mediation. (Where applicable applicants to special mediations may be requested to see attached fee schedule).

Why should I use mediation instead of other forms of ADR?

Those programs can be effective, but mediation has certain advantages. Mediation sessions are very effective in educating the parties, which may not take place in judicial settlement conference. Mediation's ability to confidentially "float" settlement offers is a unique and very important tool achieving settlements.

CHAPTER FIVE

How long does it take to set up a mediation?

Most court orders require the mediation to be completed within 30 days. The average time from the case transmittal to a private mediation session is 2-3 weeks. Multi-party cases are harder to co-ordinate everyone's schedule and may take longer.

What if we don't agree with the mediator's decision?

The Rules of the Nationwide Academy for Dispute Resolution do NOT allow a mediator to render a decision or impose his opinion on the parties. Therefore there is nothing for the parties to disagree with. It is the parties who must reach an agreement.

Is there any discovery in mediation?

There is no formal discovery. However, part of our job is to help all sides obtain the information they need to make intelligent settlement decisions. Therefore, we will arrange informal exchanges of information that help facilitate a settlement. A form is provided for the submission of information to the mediator.

When should a case be sent to mediation?

As soon as the parties have sufficient information to settle the case. This is often before the negotiations have "hardened" the positions of the parties. Even so, mediation is frequently successful when all sides were sure no one would move any farther in the negotiations.

Will the mediator be an expert in the particular area of law?

Very probably. However, mediation experts will tell you that a good mediator can mediate most cases without being an expert in that particular area of law. It is more important that he be an experienced mediator.

How long will the mediation session last?

The average mediation session lasts 3-5 hours. The mediator may also call or meet with parties before the mediation. Sometimes a mediator also works with the parties after the mediation.

Are mediated settlements better than those reached on the courthouse steps?

Yes! A mediated settlement is far faster and less expensive. A mediated settlement usually saves the parties discovery expenses and the time and intellectual expense of preparing to go to court.

Who will attend the mediation session?

The parties, their representative(s), and the mediator. Mediations are private and confidential by law.

The opposing party has not negotiated in good faith before, why should they now?

Everyone negotiates differently. However, when everyone agrees to meet and discuss the case in mediation, cases thought to be impossible to settle are settled.

What if mediation is unsuccessful?

Since mediation settles over 91% of the privately referred cases mediated, this is not a major concern. However, even in that event, you can still move to arbitration or trial (and you will know it really did have to be arbitrated or tried).

Note that different Mediation appointing bodies might provide very different responses to some of these questions.

CONCLUSIONS

BENEFITS OF MEDIATION TO TRIAL LAWYERS

Mediation provides lawyers with an informal, off-the-record forum in which to discuss settlement. The client and the adjuster or other persons with actual authority to settle the case must be present. Private mediation providers often require this in their rules, while most court orders specifically mandate such persons' attendance. Consequently, everyone necessary to settle the case is present in this informal, comfortable setting with no artificial time limits. Their attention is devoted solely to efforts to settle the case. Finally, they have present a skilled third party neutral, the mediator. The mediator's purpose is to act as a catalyst, keep the negotiations proceeding as smoothly as possible, and help guide the parties to a settlement.

MEDIATION METHODS FOR MEDIATORS & PARTY REPRESENTATIVES

The mediator provides the special skills and tactics of a neutral to maintain the focus of the negotiations of the case. You provide the talent, skills, knowledge of the file, and negotiating ability necessary to resolve the case. The best way to approach the task is to view the mediation as a guided settlement conference in which you maintain control of your case. Mediation thereby provides you a number of benefits:

- It opens communication and decreases misunderstandings and hostility.
- It allows you to avoid the risks of trial and to realistically educate your client, with the assistance of the mediator.
- It breaks impasses and allows the parties to explore a variety of settlement options.
- It permits the parties to discuss in private options they cannot publicly explore.
- It helps the parties develop a variety of alternative potential settlements by analyzing their real interests.
- It develops solutions to the dispute and reduces "fault" to only one of several factors to be considered in crafting a solution.
- It provides the parties an opportunity to objectively evaluate all positions without being sidetracked by negotiation posturing.
- It allows clients to participate directly in the settlement process. This permits them to know wand understand what you are doing on their behalf. It also permits you to obtain immediate informed decisions from your client – e.g. approving a settlement offer.
- The speed and versatility of mediation and the client's participation increase client satisfaction.
- In cases that do not settle in mediation – fewer than 20 percent – the parties are assured that a trial was really necessary.

Mediation is not always successful in settling all aspects of a case. Nevertheless, almost every properly conducted mediation will result in a number of benefits:

- It may eliminate superfluous discovery.
- It may reduce the number of issues.
- It may eliminate some issues entirely.
- It will clarify the issues that remain.
- It may reduce the number of parties.
- It will reduce the emotional intensity of the dispute, and the parties will analyze their cases more rationally.
- The parties may reach agreements on the extent of the discovery to be conducted in the case.
- The parties may reach agreements on the use of experts and the informal exchange of the experts' reports.
- The parties may reach agreements on at least the ranges of a potential settlement.
- It may lay the groundwork for future settlement discussions.

THE CLIENT'S ADVANTAGES IN MEDIATION

The key advantage of mediation to clients is their participation in the process. They can assist their lawyer in crafting a settlement that truly meets their needs and desires. It is also much faster and far less expensive than litigation. This reduces both the costs and delays the client may experience. It will eliminate the need for trial in at least 80 percent of the cases mediated. The major benefits of mediation to a client are:

- It is much faster than litigation.
- It is less expensive than litigation, in which the case can be won and the client can still lose.
- The client has greater influence on the settlement process.
- It may eliminate the need for and expense of much discovery and final trial preparation, as well as the expense and uncertainty of trial.

- All parties know and understand the other side's best offer and the basic rationale for that party's position.
- The client is empowered to conclude the case at the earliest reasonable point and knows that without you it would not have happened.
- A neutral third party is present to help generate or maintain the negotiation momentum, create and explore a variety of options for settlement, and provide an informal confidential forum to discuss settlement.

Self Assessment Exercise No 5

1. Consider the benefits of and the disadvantages of mediated compared to adjudicatory dispute resolution processes for commerce.
2. Consider the opportunities and threats that mediation presents to the legal profession.

ADDITIONAL READING

WEB-LINKS

Mediation Essays. http://adrr.com Steven Marsh
Mediate.Com : www.mediate .com