Awkward Disputant Relents

By Corbett Haselgrove-Spurin

AIMS, OBJECTIVES AND OUTCOMES

This paper examines the various mechanisms available for the settlement of commercial disputes outside the courts and considers the principal factors that influence the parties ultimate decisions to settle or litigate. The objective is to enable the reader to make considered choices as to the most effective way to resolve commercial disputes that they might become embroiled in and to provide a dispute settlement road map that might be advantageously incorporated into future contract documents to govern their commercial ventures

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

PRE-RAMBLE

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

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

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

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

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

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

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

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

INTRODUCTION

Born in the Southern States of the US, the ADR / Mediation Movement[1] came of age in the late 1980's and set out to conquer the world in the early 1990's. The global commercial and legal community has been exposed to ADR for over twelve years. The global pioneers of ADR have done a superb job of expounding the benefits and virtues of ADR to government, relevant sectors of the commercial community and to legal practitioners. Despite all this, the take up of mediation outside the US has been poor.

Certainly mediation is settling commercial disputes, but not in anywhere near the numbers required to be able to assert that the process is making a significant contribution. The proclaimed benefits of mediation are not in doubt. Where the process works well the benefits are plain to see. It has the ability to provide party autonomy and control over the shaping of a settlement. It can indeed result in the desired "WIN/WIN" outcome avoiding the inevitable adverse consequences of "WIN/LOSE" awards that flow from third party settlement processes. It is a private, informal, non-legalistic process and maximises the potential for the preservation of on-going relationships between the disputing parties. It can be cost effective and timely.

If the aims and philosophies of ADR are indeed well founded, why has the movement up to date failed to make the progress that it should have made, given its significant advantages over traditional third party dispute settlement processes?

DOES MEDIATION NEED MORE TIME TO BECOME ESTABLISHED GLOBALLY?

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

How much time however is needed for the process to become established?

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

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

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

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

[1] In this paper, ADR is used as a synonym for Mediation, rather than as a cipher for all forms of private dispute resolution outside the courts. It differentiates between 3rd party dispute settlement processes such as arbitration, litigation and mediator assisted negotiation processes.

IS MEDIATION AN UNWANTED ALTERNATIVE?

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

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

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

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

1 Superior US Mediation Practice

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

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

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

The model only works on the premise that such wider and more valuable benefits exist and are desirable. If one or other of the parties is implacably opposed to a future relationship or does not value the preservation of the relationship

or any other asserted wider interest, then the method becomes unviable. It is impossible to list all the forms of wider interest that can impact upon a dispute. Much depends upon the facts of each individual case. Such wider interest includes for instance the need by the parties for privacy and the maintenance of commercial/trade secrets that could be prejudiced by a public trial.

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

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

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

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

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

I am reminded of the mediator who over a period of months took it upon himself to act as an investigator for both parties in dispute over a design and build contract. Under his advice and guidance a settlement was eventually concluded. For an adjudicator or arbitrator this would have amounted to improper conduct. He developed the legal and evidential case for both parties, filling in the gaps on their behalves. The role was less mediator and more independent consultant, minus the power of expert determination.

What the process highlights is the value of an independent third party recommendation, which enables the parties to sell the outcome to interested parties and stakeholders. A litigant may have a problem justifying the terms of a pre-trial settlement to superiors, shareholders and in the case of a public office holder, the electorate. The mediator can provide a shield to hide behind and the recommendation of the pseudo-judicial mediator provides the most secure of shields.

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

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

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

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

There are some highly impressive mediators in the global community that have the ability and flexibility to call on each of the above mentioned techniques as and when required. The relatively small uptake of commercial mediation has inhibited the creation of a broad panel of experienced mediators on the global scene. In the US mediation is a major industry, which has consequently produced a large number of highly

skilled practitioners. The chicken and egg question is whether global commercial mediation can take off thereby stimulating the growth of a sufficiently large cohort of high calibre mediators, or whether the mediators need to be in place first to promote confidence and growth in the market.

2 Is US culture uniquely suited to Mediation?

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

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

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

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

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

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

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

The US is considered to be a highly litigious. The reason for this is that the consumer plaintiff plays for very high and often achievable stakes. The judicial system favours the consumer against the corporate defendant. By contrast, there is little to indicate that US corporations are litigious. In reality the Corporate Boardroom is likely to be the exact opposite and litigation adverse. This is where the human factor, if permitted, can impact upon the decision to litigate or settle. In the larger

organisation therefore, the decision may well depend upon the level within the corporate hierarchy that the decision is taken. Two distinct factors are at play here. Firstly, what degree of influence does the central character in the dispute exercise and secondly, is the decision made on a strategic corporate basis or is down to an individual to call the shots?

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

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

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

Conclusion : By whatever means the parties get to mediation, once there the incentive to settle depends to a great extent on the personality of the parties. The parties may be open to persuasion, or settlement adverse, because their principal objective is attrition, because they are gamblers or because they have total faith in themselves and seek justice. Since settlement requires two parties who are open to persuasion, the chances of getting the parties to mediation and through to closure are limited as demonstrated in the following chart. Assuming the four categories apply equally to both claimants and defendants, there is only a 1 in 16 change of getting the appropriate combination of parties who are amenable to settlement as demonstrated in the following chart.

Claimant		Defendant
Open to persuasion		Justice
Attrition		Gambler
Gambler		Attrition
Justice		Open to persuasion

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

In the construction industry, particularly with respect to disputes between contractor and sub-contractor, attrition is quite common. The

contractor uses the sub-contractor's need both to continue trading with him and on the characteristic cash flow problems of sub-contractors, frequently brought about by the disputed failure of the contractor to pay promptly, to wear the subcontractor down. [2]

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

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

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

Civil Jury trials and quantum : This is the one factor which is quite distinct from other jurisdictions and which impacts strongly on the way defendants conduct mediation and provides the greatest incentive to claimants to litigate. In the UK quantum is dealt with by the judge. Whilst it is down to the claimant to establish breach, causation and loss, The Judicial Studies Review Board provides clear and predictable guidelines for the quantification of loss in a wide variety of circumstances. The jury in the US has a far wider degree of discretion. Coupled with this, the US jury is often able to award punitive damages and frequently these far exceed the proven losses. Jury awards involving private citizens claiming against corporations generally bear little relationship to the actual losses sustained by the claimant. The award represents a "Glittering Prize" and a way for the individual to reap great rewards denied the ordinary citizen through toil and endeavour. It is hardly surprising that in such suits the corporation would prefer to negotiate a settlement. The risk of trial is extreme. This situation may not be sustained for very much longer however, for there is a significant movement in the US to limit the power of juries to award punitive damages.[3] It is quite possible that a level playing field for mediation is close by and this extraordinary advantage for mediation in the US may soon come to an end.

Conclusion **:** Whilst court ordered mediation coupled with a duty placed on the judiciary to use it to cut down trial listings is a recipe for guaranteeing increased participation in mediation, there is a danger that mediation could be ordered for the wrong reasons, i.e. limiting the judicial docket rather than by selecting cases where a settlement is potentially achievable. The result is merely to increase the ultimate costs of settlement unnecessarily and to even put access to justice out of financial reach of deserving parties. Used judiciously, the current CPR 1998 model could prove to be more than adequate. The jury trial incentive no doubt did much to promote mediation in the US and to enable it to become firmly established. It will be interesting to see how well mediation fares in the US if this potent abuse of justice is removed. Now that mediation is entrenched as a significant part of the US dispute settlement machinery, this writer anticipates that the process will continue to thrive, though volume may be adversely affected. Globally, if mediation is to succeed, it will have to do so on its merits and not off the back of this artificial incentive, since thankfully it is unlikely that the discredited

[2] Similarly, the poor financial situation of sub-contractors is regularly used to resist otherwise enforceable adjudication decisions, providing proof positive that a settlement would never be on the cards.

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

jury awards process will ever be emulated outside the US. Since the mediation industry in the US grew apace with the development of the mediation profession the same pattern could be recycled globally. Mediation developed in the US through trial and error and gradually models of best practice have started to emerge. Provided these examples of best practice are universal, global mediation should be in position to benefit from the US experience, though there is much to be said in a domestic context, for learning by one's own mistakes, as opposed to the mistakes of others.

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

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

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

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

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

Mediator expertise. Should the mediator be qualified and if so what level of qualification is required and in what should the mediator be qualified, mediation practice, the relevant area specialism under consideration or both? Mediation training courses range from a couple of hours theoretical introduction to extended courses with varying degrees of hands on practice sessions, assessed workshops, examinations and pupilage. Competence examinations provide perhaps the best measure of quality assurance, given that how much training is required depends a great deal on the prior abilities of the erstwhile

mediator. Professional communicators such as lawyers and professional advisers are likely to need less training since their persuasive skills are already highly developed.

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

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

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

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

The dispute cycle : There is a well established school of thought that there is a natural cycle to the life span of a dispute. Eventually a dispute will burn itself out by dint of attrition or changing circumstances. However, this has little to do with justice or fairness and the notion that things should be left to run their natural course has nothing to contribute to the dispute settlement process. On the other-hand, in human relations there is an appropriate time and place for dealing with matters and in social disputes inter-partes communication may well be impossible whilst emotions are too raw. Whether or not time heals wounds, some space between the hurt and negotiations can be valuable. The danger is that too much time can have the opposite effect in that the parties attitudes can harden. The parties become so attached to their viewpoint that settlement becomes impossible and litigation/arbitration then provides the only possible way of achieving closure. The latter poses more of a problem than the former in commercial disputes, since emotion is unlikely to be a significant factor in commercial disputes. Therefore, for such disputes the sooner the mediation is convened the better thereby increasing the likelihood of settlement. Besides, there is no delicacy about the timing of a court or arbitral hearing, which is a purely administrative matter.

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

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

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

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

The Role of the Court as Mediator : A disconcerting US inspired concept doing the international circuit at present is case management mediation by the trial judge. This proffers the benefits of mediation and the CPR 1998 case management reforms in a tempting single package. Only time will tell how well this variant on mediation works but it augurs badly for the private mediation market. Already there are those that have expressed disapproval of mediation/third party determination processes where the mediator becomes a judge in the event of a failure to broker a settlement. The dangers inherent in pre-trial mediation where the judge and the other party become aware during the joint mediation stage (caucuses are in the circumstances strictly taboo) which would not be disclosed during a trial, are highlighted in **Glencot v Barrett.**[4]

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

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

CONCLUSIONS

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

IS ARBITRATION PREFERABLE?

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

Despite all the advantages of mediation, a further incentive is often needed to secure a settlement. Whilst a court judgement may be needed to make financially secure debtors pay up[5], the mere existence of an enforcement mechanism can act as the necessary incentive for both litigation and arbitration. But, this alone is not enough, since if scope for attrition remains, there are defendants who will avail themselves of the strategy. The key lies in putting in place a sufficiently timely private process, which prevents the strategy from working. Adjudication and fast tract arbitration could therefore be used as a catalyst for settlement.

Adjudication : The ICE pre-arbitral process is a generic form of adjudication. However, the most common application of adjudication has been in the UK construction industry, both as a voluntary process and subsequently under the Housing Grants Construction and Regeneration Act 1996 (HGCRA). The temporarily final decision of the adjudicator is immediately enforceable and binding. Absent final determination by a court or arbitrator, the decision will produce closure. Adjudication works within a tight timeframe.

Fast Track Arbitration : Whilst governed by relevant arbitration law rather than the HGCRA 1996, fast tract arbitration is otherwise remarkably similar to adjudication, with one exception. A fail-safe mechanism is built into adjudication to guard against off the wall decisions whilst the arbitral award is final. The choice therefore, as to which process to chose depends upon whether or not the parties are prepared to place complete faith in the decision maker in the interests of finality.

Dispute Review Boards : Alternatively, the DRB process and variants on it can be used to minimise the advent of disputes in the first place. The Dispute Review Board process has the ability to identify problems and promote solutions before an actual dispute crystallises. It incorporates a similar combination of persuasion plus enforceability. It is the nature of firstly the persuasion mechanism and secondly the form of enforceability that varies depending upon the exact format selected.

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

[5] Little can be done about the debtor who would rather file for bankruptcy than pay his dues.