CONFLICT MANAGEMENT AND/OR DISPUTE RESOLUTION?

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[1] 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.[2] 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 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.

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

2 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.

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 client's spokesperson.

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.[3]

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.[4] 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***[5] 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 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.

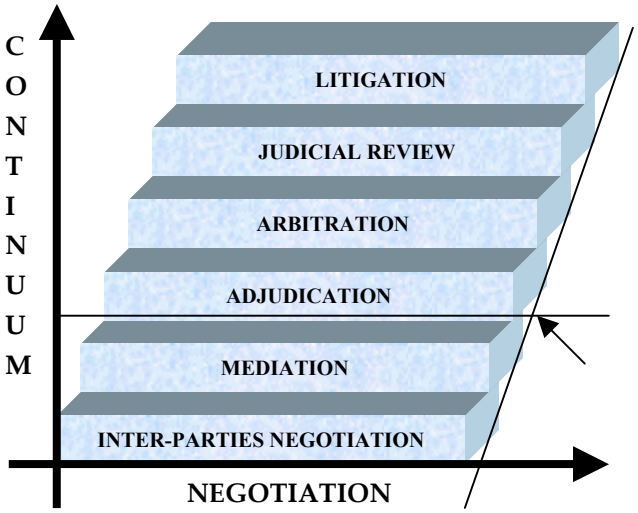
3 See further on the art of communication, the article entitled "***Mediator Skills***," by G.R.Thomas in ADR News Vol.4. No.1. 2004

4 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.

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

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 Traditional Ladder

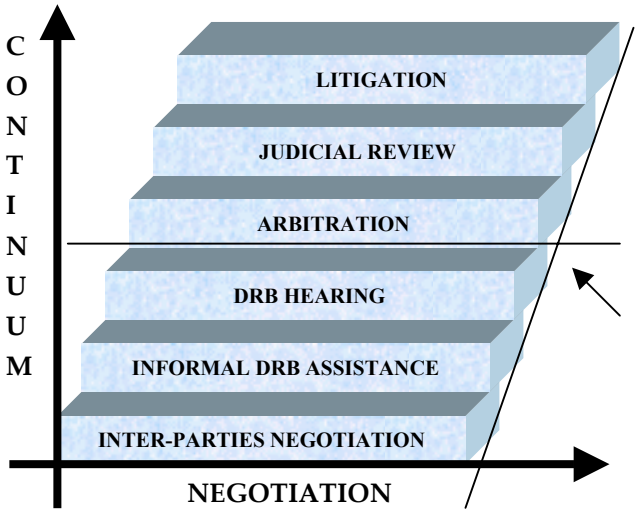


The arrow indicates a crucial turning point where the parties relinquish party autonomy and control over the conduct of and outcome of their dispute.

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.

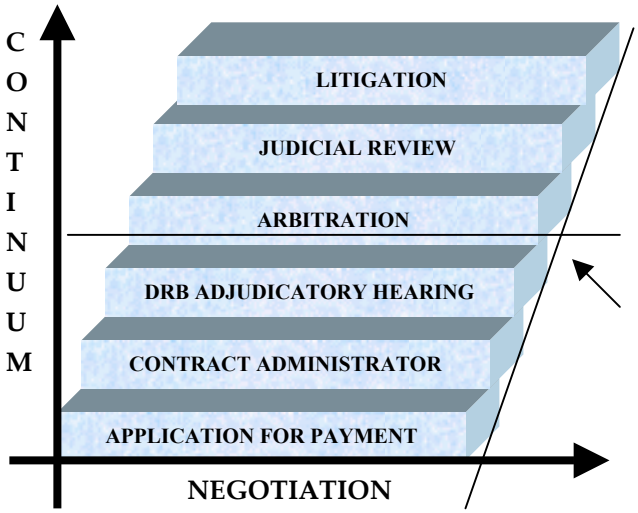
The US DRB Ladder



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

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.

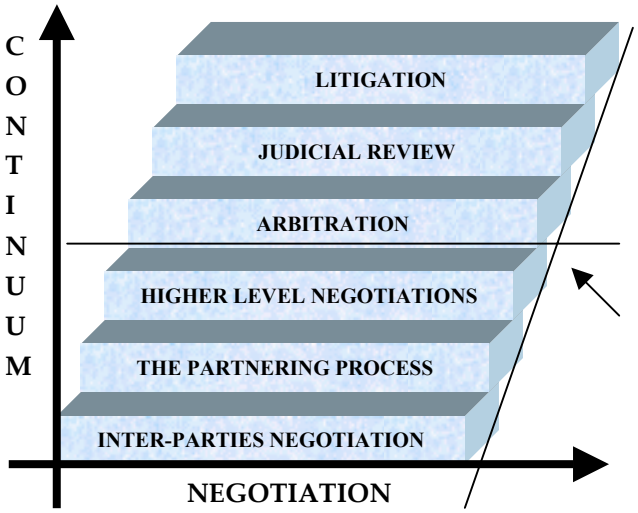
The International DRB Ladder



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

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 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.[6]

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.[7] 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.

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

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

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 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[8] will on the other-hand of necessity directly address both the questions of entitlement and quantum head on.[9] 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

[8] 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.

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

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 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.

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