NEGOTIATION LAW AND PRACTICE

LEGAL ASPECTS OF NEGOTIATION AND NEGOTIATION TECHNIQUES

INTRODUCTION.

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

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

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

Some legal aspects of negotiation.

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

Advertising and negotiation : The boundaries between advertising hype which has no legal consequences,[4] inducement to contract and contractual terms which do have legal consequences, is highly technical. What is said during negotiations can have legal repercussions, particularly if inaccurate. Misrepresentations which are fraudulent give rise to actions in tort. Damages for the adverse consequences of negligent misstatements which induce a party to contract are provided by the Misrepresentation Act 1969. Even innocent misrepresentation is not entirely without redress.

That said, the ethics of negotiation practice continues to be a very grey area. The conduct of negotiations and of advertising which prepares the ground for negotiations is prescribed by law for protected categories of purchaser. The law of trusts,[5] common law concepts of duress[6] and equitable principles of undue influence[7]

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

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

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

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

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

apply directly to the negotiating process. A frequent source of litigation is the judicial determination of the meaning and scope of and the legal implications of the terms of agreements and settlements.[8]

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

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

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

ADR and negotiation.

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

The mediator's role is not limited to dispute resolution. The go-between agreement facilitator, in social, commercial and public relations (both domestic and international) are long standing. However, a recent phenomena is the emergence of contract / project mediation, whereby an independent third party assists the parties to put the detailed flesh on the bones of a broad brush stroke commitment to a project. The objective is to cut down the lead in time to a project and to mobilize financing at an earlier stage than would otherwise be possible but the concept is heavily reliant upon trust, good faith and the ability / willingness to subsequently negotiate detail without prejudice to the interests of the parties.

Negotiated problem solving, with or without the assistance of a mediator is also increasingly being used on large commercial projects and particularly complex construction projects. Two of the latest buzz words are ***"Teamworking"*** both within organisations and between organisations and **"Partnering"** which are founded on the concept of joint ownership of and mutual interest in the project. A key ingredient of these is the team and or partnering meeting to identify / pre-empt problems and negotiate solutions.

In conclusion, the scope for the application of negotiation expertise is on the rise. A thorough understanding of both the skills and techniques of negotiation and an understanding of the legal aspects of negotiation are central elements of that expertise.

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

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

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

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

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

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

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

13 See for instance ***Berry Trade Ltd v. Moussavi*** *[2003] EWCA Civ 715* for a recent case where dispute resolution negotiation privilege was upheld.

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

NEGOTIATION LAW AND PRACTICE

WHAT IS NEGOTIATION ?

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

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

General introduction to Negotiation Strategies and Tactics.

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

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

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

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

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

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

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

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

D **Negotiations to manage ongoing relationships** (reciprocal rights/duties/interests).

The parties share mutual interests but these may be outweighed by unilateral objectives :-

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

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

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

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

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

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

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

A PRE-CONTRACTUAL NEGOTIATIONS.

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

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

1) Mutual but different interests.

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

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

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

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

2) Unilateral differences

a) ***The Stubborn Sales Person*** (characterised by the mainstream retail outlet).

The buyer is looking for a reduction in price but the seller is indifferent to whether or not there is a sale and certainly not interested in compromise. The sales person is unlikely to be in a habit of bargaining, resulting in a take it or leave it attitude. The salespersons most common refuge is the assertion that they have no authority to make a reduction. A strong weapon in the hands of the salesperson is the standard form contract which acts as a barrier and deterrent to negotiation. Thus, the first hurdle to overcome is the mindset of the vendor since many shops can be persuaded to bargain or haggle. The key to success often lies in seeking out the person with authority, for example by asking to speak with the manager.[15]

Ironically, the second hurdle to successful negotiation in the high street lies with the client, not the vendor. The take it or leave it attitude within the High Street has generally been taken for granted by High Street clients. Thus it is the mindset of the client that has to be altered. There is a lack of public

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

awareness of the scope to bargain in such circumstances. Contrary to this perception however, many things are possible if one has the ***"cheek"*** to ask. The saying "***if you don't ask you don't get***" comes to mind. Financial services, airline tickets, electrical products and household furniture for instance are all highly negotiable, but few consumers bother to negotiate. By contrast, many people are prepared to attempt to negotiate a car purchase since there is a common perception that it is possible to do so.

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

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

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

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

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

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

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

Preparation for pre-contractual negotiations.
One of the principal keys to getting the best out of negotiations is thorough preparation. This is true both for the buyer and, though it would appeal to be obvious and taken for granted, for the seller. Salesmen present selected information in the best light and may bombard the potential purchaser with information and dazzle them. Commercial salesmen should have prior knowledge of new clients business operations and needs. The impulse buyer is particularly susceptible to bad bargains which are ill thought out and badly conceived.

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

[16] ***Hedley, Byrne & Co Ltd v Heller & Partners Ltd*** *[1964] AC 465.*
[17] ***Derry v Peek*** *(1889) 14 App. Cas 337*
[18] See ***Carlill v Carbolic Smokeball Co*** [*1893] 1 QB 256*

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

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

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

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

What else can be negotiated ?

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

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

i) Knowledge of target product specifications and suitable alternatives.
ii) What is wanted, liked or preferred – including colour. (Best choice of product).
iii) Knowledge of minimum specification needed (Worst alternative choice of product).
iv) Fitness for purpose.
v) Budgeting. How much one is able and willing to pay (Highest & lowest).
vi) Knowledge of the market – alternative suppliers and comparative products.
vii) Product availability – delivery schedules.
viii) Ease of use and practicality.
ix) Available space and size of product.
x) Adaptability of product – bolt on accessories and updateability.
xi) Range of and availability of compatible products e.g. CD, Video, VCD, DVD, software etc.
xii) Replaceability of product – if to become integral part of other process – will it still be in production subsequently – or old technology with a limited life span.
xiii) Hidden costs : delivery – insurance – guarantee – connections – running costs of fuel mpg, petrol / diesel, oil, ink cartridges, paper etc – taxation if any – training in order to be able to use – number of persons to operate – programs required – maintenance and reliability – spares including availability and time factor for obtaining replacements.

B POST-CONTRACTUAL NEGOTIATIONS TO AMEND LONG TERM CONTRACTS.

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

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

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

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

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

The law has little to offer the bad businessmen and the courts will do nothing to assist or redress, in the absence of mistake, duress or undue influence, the short-comings of a careless businessman. In English Law, the courts will not seek to rewrite contracts to create a "fairer" contract. The assumption is that it is for business persons to assess the risks involved and contract accordingly. [22] Whilst this represents a realistic and pragmatic approach in respect of simple one off contracts, it creates problems for complex contracts and in particular in respect of long term contracts. Businessmen frequently attempt to make provision for changing circumstances. Variation terms in contracts provide a degree of flexibility to take account of changes within the market. Attempts to provide for the future make contracts very long and complicated and with the best will in the world it is impossible to predict the impact that future market changes and technical developments will have. Sometimes revaluation is put in the hands of an impartial "***expert.***"

In order to address this issue, some contracts require the parties to negotiate in good faith to realign the terms of contracts when market conditions change. Such terms in a contract are treated under English Law as agreements to agree and unenforceable before a court of law.[23] If the parties do subsequently renegotiate

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

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

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

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

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

and then place the new contract under seal or alternatively provide mutual benefits under the new contract there is no problem. However, if negotiations break down then the English Law has little to offer in terms of mechanisms to enable the relationship to be maintained beyond a requirement that the parties continue to adhere to the pre-existing but unsatisfactory agreement.

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

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

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

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

   The party wishing to effect change is at a distinct disadvantage here, but not entirely without resource. The other party may well need to maintain mutual commitment to the project. This is particularly so in respect of the employer / employee relationship and re-negotiations of the terms of employment contracts.[24] The other party may well have a vested interest in ensuring that their business partners continue to be financially sound. Where the terms of the contract could lead to insolvency, enhancing contract terms may be a way of staving off disruption to the supply chain. However, to threaten to enter into voluntary insolvency is only viable if that is a potential / pending reality.

Ethical Issues in Renegotiating Contracts.

The party with the least to lose from remaining with the status quo, that is to say the original contract, clearly has the upper hand in such negotiations. It is a small step from profiting from this position of strength to ruthless exploitation, which may amount to duress, undue influence or the abusing of a special trust or relationship. There is a very fine balance between hard bargaining and unlawful activity which may require the intermediary of the courts to determine on which side of the line the conduct falls.[25]

opportunity to reap some benefit from an agreement to agree ***Petromec Inc v Petroleo Brasileiro SA Petrobras*** *[2005] EWCA Civ 891.*

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

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

Preparation for post-contractual negotiations.

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

Post contractual negotiation strategies and tactics.

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

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

C AFTER THE EVENT LEGAL DISPUTE SETTLEMENT NEGOTIATIONS

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

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

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

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

The key factor in each of these situations is that what is in dispute is legal entitlement. The dispute is a legal dispute. It is a dispute which, unless a party chooses to withdraw, to give up due to attrition or due to disinterest / lack of commitment to the cause, will if not settled find itself before the courts. The choice therefore for the parties is whether to retain some measure of control / autonomy over the outcome or to put the outcome into the hands of an independent third party determinator (be that arbitrator or judge) and to trust to the advocacy skills of one's representative to persuade the judge of one's legal entitlement.

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

Preparation for "after the event dispute settlement negotiations".

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

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

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

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

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

After the event negotiation strategies and tactics.

Strategies and tactics in this classic area of dispute resolution have been subject to much analysis. [26] Clearly the starting point is to evaluate the likelihood of success and the probable outcome. The greater the likelihood of success the stronger a party's position is. The objective will be to get as close as possible to that position in a settlement. The greater the number of variables, the greater will be the incentive to compromise on the basis that a bird in the hand is worth more than two in the bush, thereby removing the risk factor.

In as much as no party to litigation ever recovers all their actual costs of the litigation, a compromise that factors in the hidden costs of litigation that will in any event be thrown away involves no financial loss. It is in effect a management cost that can be avoided by early settlement.

Furthermore, there is a financial benefit to solving cash flow at an early stage which may provide an incentive to settlement.

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

[26] See ***"Mediation Methods for Party Representatives."*** Faulkner.R. Spurin.C.H.,Thomas.G.R. NADR UK Ltd. 4th ed. 2004. Chapter 6 Risk Analysis : Chapter 7 Successful Party Representative Negotiation Strategies. Etc.

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

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

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

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

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

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

Ethical issues in after the event dispute settlement negotiations

Exploitation

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

negotiator. Whilst it is important to be even handed, disproportionate effort must otherwise be expended on the hard case, which might give the impression of imbalance, which is not in reality the case.

Evaluative Mediation

The peculiarities of legal systems provide opportunities for the canny litigant. The exploitation of the legal system may well be seen as unethical or unreasonable by some (which explains why some mediators prefer to bypass legal concepts altogether in the pursuit of a settlement and some mediation providers, particularly in the social sector do not even allow legal representation), but as Jackson J pointed out, it can be rewarding, providing one stays inside the law.[27] Accordingly, evaluative mediation is not founded upon concepts of fairness (that is to say in respect of outcomes as opposed to procedure where even-handedness and fair play should be the cornerstone), but rather on what a court of law is likely, however justly in the eyes of the litigant, to do. The reality check is aimed at removing the "rose coloured glasses" and forcing both parties confront the odds from an objective perspective. A very contentious issue is ***"Who should make the evaluation, the parties of the mediator?"***

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

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

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

The opposite extreme is that the mediator can make an evaluation and put it to the parties for acceptance or rejection. This is a common approach adopted by judicial mediators[28]. Indeed, it is not unknown for the parties to deliberately chose this form of mediation, or alternatively to invite the mediator to make such an evaluation. The problem here is where one party would welcome such an intervention, but the other party would not. Where the mediator is held in high esteem, the evaluation will be highly persuasive.

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

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

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

The unrepresented party is at a clear disadvantage but the failure to seek representation is down to the party. That failure may however may have been dictated by circumstances which were brought about by the actions of the opponent. Even so, it not the job of the mediator to compensate for the power imbalance.

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

Confidentiality and Privilege.

A common theme in western jurisprudence is for the courts to regard themselves as a last resort in civil litigation. Consequently the courts actively encourage the parties to civil disputes to settle their differences amicably wherever possible. One barrier to private resolution is the fear that any potential admission of liability or even a hint of recognition that a party might bear some legal responsibility for a situation will be used as evidence in the event of litigation. To counter this risk the courts have developed a concept of inadmissibility in respect of inter-party dispute settlement communications.[29] Such communications are treated as confidential and privileged against disclosure in legal proceedings.[30] One way of flagging up that communications are privileged is to state that the contents of a message are ***"Without prejudice"*** to any legal rights and without admission of liability.[31] Privilege will not attach to communications which are not concerned with dispute resolution even if labelled without prejudice.[32] Equally however, the failure to label a document "Without prejudice" is no bar to privilege where the subject matter is dispute resolution.

The mediation process is covered by confidentiality and privilege.[33] It is common practice for this to be formally reaffirmed prior to the mediation process by standard rules of practice and procedure for the conduct of the mediation and again within the mediation process by the mediator. Such affirmations are not strictly necessary but they help to build up confidence in the process.

There are however a number of exceptions where the privilege may be removed, which are embraced by the concept of unambiguous impropriety.[34] The concept covers admissions of wrong doing and unlawful intent, e.g. perjury, fraud,[35] blackmail, unlawful coercion[36] and threats and recognition of legal rights and interest.[37] However, lawful threats such as a threat to take legal action, is a legitimate bargaining tool.[38] Thus the terms of a settlement, even if made without prejudice may be opened up by the court to establish whether or not the agreement was the reached by unfair means.[39] Once a party waives the privilege the other party is free to rely on that material in court as well.[40] As mediation practice grows in the UK there is an ever expanding list of cases where the courts have examined the conduct of mediation and in certain cases struck down the agreement.[41] However, very strong evidence is needed before the court will intervene.[42]

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

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

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

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

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

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

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

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

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

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

[39] ***Muller v Linsley & Mortimer*** *(1994) CA.*

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

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

NEGOTIATIONS BETWEEN THE SUBJECTS OF MULTIPARTY RELATIONSHIPS

The common law contractual matrix of reciprocal rights and duties is predicated on the simple notion of agreement between two individuals, exemplified by the related doctrines of "***Privity of Contract***" and **"*Consideration*"**. The common law will only enforce agreements between the parties to a contract which involve a mutual exchange of promises. This simple model fails to address the needs of a diverse wide range of multiparty relationships and has consequently led to a plethora of statutory, common law and equitable exceptions. Accordingly the law in this area is complex with distinct rules to govern special circumstances and relationships.[43] As an attempt to simplify this area of law, the **Contract (Third Party Rights) Act 1999**, which provides a statutory mechanism to bypass the common law rule of "***Privity of Contract***," is only partially successful since it excludes certain types of activity and is subject to express exclusion provisions in the contract and further does not apply where the potential third party beneficiary is not referred to in any way whatsoever in the contract. It is common practice in standard form contracts to expressly exclude application of the Act. Commerce has certainly not rushed to embrace the Act.

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

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

As the size and technical specifications of major projects increases year by year the traditional business models have been found wanting, first in respect of both risk allocation and second in respect of financing[44] and management structures, as demonstrated by the Wembley Stadium fiasco. Most of the traditional construction contracts have been subject to major redrafting in recent times, coupled with the introduction of new contracting models ushering in partnering and project management contracts. Public sector contracts are making increasing use of Public/Private Finance Initiatives and in the private sector a number of large projects have been undertaken by consortiums to spread the costs. The courts have accordingly been very busy interpreting the terms of these innovations. Despite the fact that such contracts incorporate dispute resolution procedures, ADR tends to take a back seat, since it is only the courts that can provide binding interpretations of the contract, something needed in order to continue using the contracts in the future. However, in due course it is likely that the focus will return to ADR once the contracts have bedded down.

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

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

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

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

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

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

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

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

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

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

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

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

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

The focus rather is upon the situation where a defendant seeks to off-set his liability against insurance cover. Follow the liability clauses in insurance policies ensure that such legal liabilities arising out of litigation are

recoverable but the rub comes in respect of negotiated settlements since in order to recover the assured must establish that the settlement related to a legal liability, that no more than was legally due was paid out.[45] One way of ensuring that there are no problems is to get the underwriter to take part settlement negotiations / mediation and to sign off the settlement agreement. However, this will involve costs for the underwriter who may not be willing to participate unless a prior mediation costs arrangement is made. Where the policy includes cover for legal representation this is unlikely to be an issue.

NEGOTIATIONS IN THE WORKPLACE

The instant topic relates to negotiations in respect of working operations as opposed to actual employment disputes, which again fall clearly within the remit of Category C above. Another distinct and separate category of negotiation is the workplace class action between employer and union, which has its own very special dynamic and is a topic in its own right.[46]

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

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

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

Some observations on strategies and tactics in workplace negotiations.

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

The promotion gatekeeper is likely to be preoccupied with other concerns. Problems and additional concerns are generally unwelcome intrusions into an otherwise busy work schedule. A key to successful negotiations therefore is not to present the superior with problems but rather with opportunities, highlighting areas that need attention and solutions, without giving the appearance of blackmail.

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

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

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

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

NEGOTIATING WITH PUBLIC AUTHORITIES.[47]

Public authorities are responsible for delivering a wide range of public amenity, health and safety services to the public. In addition public authorities regulate much of the activities of the private sector. The concept of the public negotiation with public authorities over public law matters is a relatively recent phenomena, particularly in the UK. It was a live issue in the 1970'ies as to whether or not a public authority could be held liable in any way for the consequences of reliance upon the statements of public officials. On the one hand it was argued that estoppel did not apply top public officials since they did not enjoy authority to bind the crown. On the other, land mark cases such a ***Murphy v Brentwood***[48] established that where the statutory function of a public official was aimed at protection of the public in general, it did not give rise to a cause of action for the private citizen. Similarly, public interest policy has shielded office holders from liability in tort in many situations.[49]

However, despite the above, in 2001 the government publicly announced that it would embrace the use of ADR for the settlement of public law disputes, though traditional mechanisms such as the entire range of specific statutory tribunals and the various forms of ombudsmen and regulators have not been abandoned.[50] Since then a number of cases have reinforced this policy, imposing cost penalties under the CPR to public authorities who have failed to engage in ADR where the court deemed ADR was appropriate.[51] Note that in

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

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

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

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

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

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

It should further be noted that under the traditional mechanism of judicial review for challenging the exercise of discretion for public authorities and the procedures adopted during the decision making process, the scope for damages and compensation is very restricted with implications for the extent to which evaluative mediation techniques apply to public law mediation.[52]

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

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

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

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

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

SOCIAL NEGOTIATIONS

For the most part no legal interest will be involved in such negotiations but there may be legal interests in special circumstances. There is a particularly important and vibrant sector today in social mediation. Many local authorities operate voluntary community mediation schemes[53] and there are a number of regional voluntary mediation organisations.[54] Whilst the focus in neighbourhood disputes is not legal, there is frequently the potential for nuisance actions and a role for the courts if the mediation is unsuccessful though the cost of going to court is often beyond the means of the parties, which re-emphasises the value of such mediation services.

Mediation within the Family Court is a highly developed, regulated, specialist field.[55] It is a subject in its own right and accordingly no attempt will be made to generalise on this aspect of dispute resolution here.

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

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

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

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

Negotiations for ***"mere"*** social arrangements leading to agreements which are not legally enforceable because they lack the intention to create legal relations are very similar in nature and legal outcome to pre-contractual negotiations. The crucial difference however is that because the interests of the parties are based on social interdependence, the maintaining of relationships assumes great significance, whether it is within the immediate family, the extended family or the community. Even though litigation may not follow on from unsuccessful negotiations, there is nonetheless a need for resolution because of the social disruption that would follow such a failure. The problem for such ventures however is that they do not offer a career structure for the dispute resolution practitioner, though they do provide opportunities to gain experience for those whose ultimate objective is family or commercial mediation. Many volunteers enter into community mediation full of enthusiasm at the start but fail to maintain the momentum and commitment. A rapid turn over in mediators is a common feature of such providers, and whilst training may be quite rigorous, expertise is not maintained, developed or retained over extended periods of time.[56] Funding for community mediation is a major issue. Without it such facilities may atrophy. However, funding might bring with it new questions in respect of regulation and professionalism, particularly if the activities are rewarded financially and it turns into a public sector industry.

Ethical issues in social negotiations

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

CONCLUSIONS

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

Finally, dispute resolution practitioners and lawyers occupy very special positions in the dispute resolution process. It would be a mistake to assume that they share the same aims and objectives as the parties to disputes, though the process provides a common focal point. Whilst the dispute resolution practitioner will be focussed on producing an outcome, he will have a weather eye to his professional reputation for impartiality and to his track record as an effective persuader. The representative may or may not have a vested interest in success. The rewards of further litigation may outweigh any desire to settle prematurely. He also has a reputation to protect, and in the light of ***Halsey***[57] cost penalties, a potential professional liability in the event that he incorrectly advises a client to reject ADR advances from the other side.[58]

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

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

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