

# ADR NEWS



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For current developments in Arbitration, Adjudication, Dispute Review Boards and Mediation

## EDITORIAL :

If a day is a long time in politics, then a week is assuredly an eternity. The April edition of ADR News reflected upon the, at that time, imminent constitutional changes being introduced by the Minister for Constitutional Affairs and reluctant Lord Chancellor. Within a week of writing that editorial it became apparent that the House of Lords had heeded the call for caution, issued by Lord Woolf, Lord Chief Justice of England and Wales, delivered to Cambridge University, and promptly dispatched the Constitutional Bill into committee stage once more.

This however, does not mean that Constitutional Reform is off the agenda. Simply that the focus has shifted elsewhere for the time being. The latest challenge lies in the ongoing negotiations for the establishment of a new Constitution for a newly expanded European Union, one suitable for the management of the affairs of a supra-national body responsible for the administration of and governance of significant aspects of pan-European policy affecting the 25 member states. A central plank of the new constitution includes centralising aspects of and the harmonisation of the judicial process. This represents a major step towards the creation of an European State and furthermore has implications for the relationship between the private dispute resolution industry and the organs of state managed justice.



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### Editorial Board.

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Already the European Union has issued a green paper on ADR. The potential is on the table for regulation of the mediation industry. If the European Union seeks to harmonise the judicial process this will may well impact upon the procedural laws of the member states, with regulations and directives in respect of court procedures which would affect the role of the courts in the enforcement of both mediated settlements, adjudication decisions and arbitral awards. In particular, in respect of the latter, challenges to arbitral awards are often based on matters of domestic public policy. In the future, such public policy may well be dictated by the requirements, aims and objectives of the European Union.

The mediation movement in the UK moves forward yet again with the introduction of the trial court ordered mediation scheme in the London County Courts. The addition to the practice direction is set out at page 8 below. In addition the role of ADR in public law has been further defined by the courts in the leading case of **Anufrijeva v London Borough of Southwark** in December 2003.

The LINKS section of the NADR Web site now features, under the side headings of ADJUDICATION CASES and MEDIATION CASES, links to the full judgements of a wide range of cases on both topics. The mediation list includes a large number of cases that discuss privileged and without prejudice dispute settlement communications, which are of direct relevance to the mediation process. NADR hopes that this new facility will prove to be a valuable service to members.

G.R.Thomas : Editor

## NATIONWIDE ACADEMY OF DISPUTE RESOLUTION

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### CONFLICT MANAGEMENT OR RESOLUTION? Are the principal objectives of the mediation process mutually exclusive or complementary?

By C.H.Spurin.

**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<sup>1</sup> to find solutions to difficult, even apparently intractable problems.

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

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.<sup>2</sup> 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.

<sup>2</sup> 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.

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.

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

No doubt the reader can add other barriers to this list, but the common factor in bridging the divide between the parties is the art of communication, an essential tool, at all times, for all mediators.<sup>3</sup>

### 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.<sup>4</sup> 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*<sup>5</sup> 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.

Whilst 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

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

<sup>4</sup> 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.

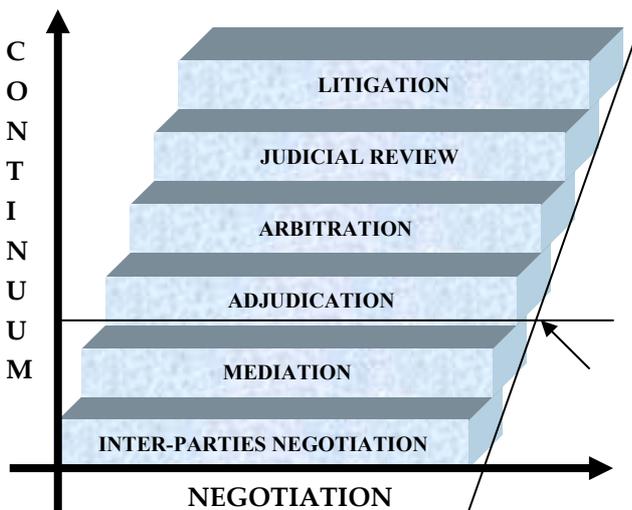
<sup>5</sup> *Glencot v Ben Barrett Ltd* [2001] BLR 207HT 00/401

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.

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**

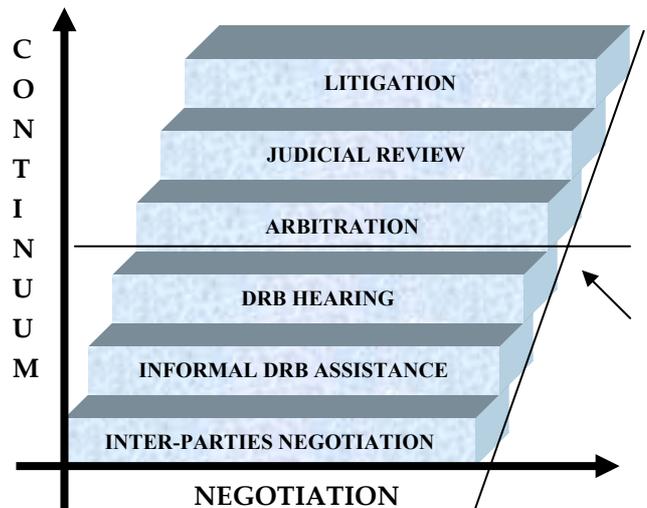


The arrow indicates a crucial turning point where the parties relinquish party autonomy and control over the conduct of and outcome of their dispute.

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.

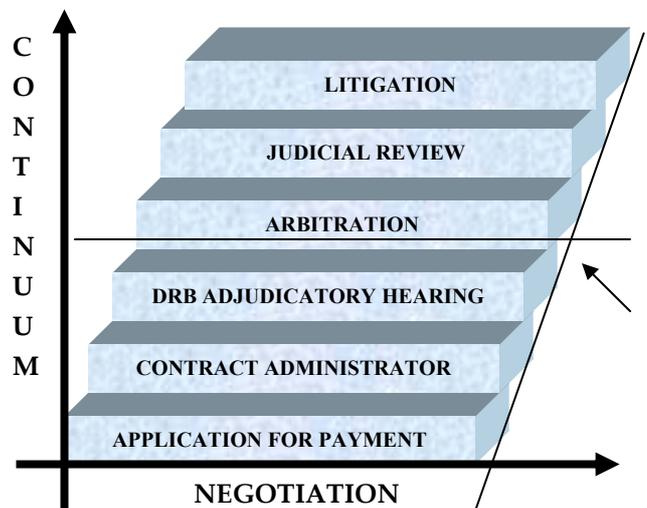
**The US DRB Ladder**



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

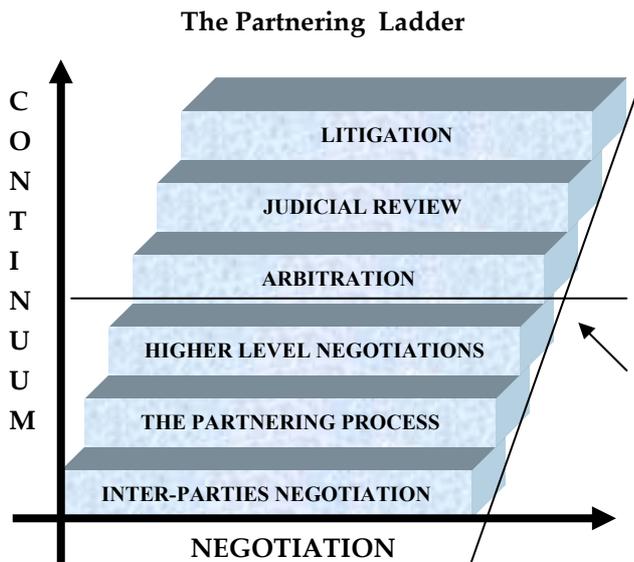
Whilst theoretically the parties have the ability to ignore the board's advice, the support of the courts to date for the recommendations of the board indicates that perhaps autonomy really passes one step below.

**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 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 just how many steps it is desirable to have on the ladder. A fortiori, introducing a contract administrator into the process in addition, 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.<sup>6</sup>

*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.<sup>7</sup> 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.

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

<sup>7</sup> Thanks here are due to John Roche of The Mediation House, for highlighting this issue to the author.

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

Similarly, the degree of impartiality required of the Conflict Resolution Facilitator and the Dispute Resolution Facilitator are likely to be directly proportionate to their respective aims and objectives. As with 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<sup>8</sup> will on the other-hand of necessity directly address both the questions of entitlement and quantum head on.<sup>9</sup> 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.

<sup>8</sup> 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.

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

Thus, whilst a court will not address questions of lost opportunity costs, time, cash flow, energy, convenience and the stresses if litigation these are all relevant factors to be taken into account by both parties as additional reasons to compromise and achieve a pre-trial settlement.

In such mediations it is absolutely essential that the mediator spells out to the parties that he is not acting as a legal adviser to either party and that they alone must make all the decisions. The mediator should not recommend any course of action, though in the closing stages the mediator may well give an assessment of whether or not the other party will go any further. There is a distinction between commending the terms on 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 totally 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 from above. 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, particularly if compliance with the settlement is given begrudgingly without genuine recognition of fault, or, the terms of the settlement are deemed unfair by

one or other of the parties. The dispute may be legally 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 to 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.

**PRACTICE DIRECTION TO SUPPLEMENT CPR PART 26  
PILOT SCHEME FOR MEDIATION IN CENTRAL LONDON COUNTY COURT**

**General**

- 1.1 This practice direction provides for a pilot scheme to operate from 1<sup>st</sup> April 2004 to 31<sup>st</sup> March 2005 in relation to claims in the Central London County Court.
- 1.2 This practice direction enables the Central London County Court to
- (1) require the parties to certain types of claims either to attend a mediation appointment or to give reasons for objecting to doing so; and
  - (2) stay the claim until such an appointment takes place.
- 1.3 Cases in which a notice of referral to mediation has been served under paragraph 3.1 prior to 31<sup>st</sup> March 2005 shall remain subject to this practice direction until either
- (1) a mediation appointment has taken place; or
  - (2) any stay of execution imposed under paragraph 5 has expired or been lifted by the court, whichever shall be the sooner.

**Types of claims to which this practice direction applies**

2. This practice direction applies to a claim if it meets all the following conditions
- (1) the small claims track is not the normal track for the claim;
  - (2) no party to the claim is
    - (a) a child or patient; or
    - (b) exempt from payment of court fees; and
  - (3) the court has not granted an interim injunction in the proceedings.

**Service of mediation notice**

- 3.1 The court may, when it serves the allocation questionnaire under rule 26.3, serve a notice of referral to mediation on each party
- (1) notifying them that the claim is to be referred to mediation; and
  - (2) requiring them, within 14 days after service of the notice on them, to file and serve a reply to the notice in which they must
    - (a) state whether they agree or object to mediation;
    - (b) specify any dates within three months of the date of filing the response on which they would not be able to attend a mediation appointment; and
    - (c) if they object to mediation, set out their reasons for doing so.
- 3.2 The cases where a notice of referral to mediation is served on the parties will be chosen at random from those that meet the criteria set out in paragraph 2.
- 3.3 A party who receives a notice of referral to mediation need not complete and file an allocation questionnaire unless or until directed to do so by the court.

**Objection to mediation**

- 4.1 If one or more of the parties states in his reply that he objects to mediation, the case will be referred to a district judge who may -
- (1) direct the case to be listed for a hearing of the objections to mediation;
  - (2) direct that a mediation appointment should proceed;
  - (3) order the parties to file and serve completed allocation questionnaires; or
  - (4) give such directions as to the management of the case as he considers appropriate.
- 4.2 If a party does not file a reply within the time specified in the notice of referral to mediation, the court and all other parties may proceed as if that party has no objection to the use of mediation in the case.

**Mediation appointment**

- 5.1 If no party objects to mediation, or the court directs that mediation should proceed, the court will direct that the proceedings be stayed for an initial period of two months.
- 5.2 In accordance with the existing Central London County Court Mediation Scheme, the court will fix a date, time and place for the mediation appointment and notify the parties accordingly once all the parties have paid the mediator's charges.

5.3 When the court fixes a mediation appointment it will if necessary extend the stay of proceedings until the date of the appointment.

**Mediator's charges**

- 6.1 A mediator's charge is payable by each party who is to attend a mediation appointment. The court will notify each party of the amount of the charge and request payment of that amount in the notice of referral to mediation.
- 6.2 A party must pay the mediator's charge to the court within 14 days of being requested to do so or such other period as the court may direct. Any request for further time in which to pay the mediator's charge may be made by letter.
- 6.3 If any party fails to pay the mediator's charge the court will refer the case to a district judge for directions.

**Unsuccessful mediation**

- 7. If the mediation does not proceed or does not fully resolve the dispute, the mediator will notify the court and the court will
  - (1) either
    - (a) allocate the claim to a track; or
    - (b) order the parties to file and serve completed allocation questionnaires (if not already filed); and
  - (2) give such directions for the further management of the case as it considers appropriate.

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**DIAC Journal Launch : Review.**

March 2004 saw the launch of a new journal on arbitration by the Dubai International Arbitration Centre. The DIAC centre is located at the DCCI Building, 14<sup>th</sup> Floor. PO Box 1457 Dubai, U.A.E. and is under the Director Generalship of Abdul Rehman G.Al Mutaiwee. The journal goes a long way towards bridging the gap between arbitration practice and understanding in the West and the Middle East, in particular by providing the text in both English and Arabic script. It is very attractively presented in dark blue with gold embossed text on the cover and will sit well on any practitioner's book shelf.

The opening paper entitled Construction Arbitration in the Middle East is presented by none other than Dr.Nael G.Bunni. Nael describes the recent evolution of the FIDIC contract and attributes the joint embracing of this suite of contract and the New York Convention on the enforcement of arbitral awards 1957 as the central features in the evolution of construction arbitration in the region. This is followed by a short but perceptive article by Nigel Truscott on the special considerations that apply to Oil and Gas Arbitrations, in particular the large amounts in dispute and the political parameters within which the industry operates.

Dr Hamza Ahmad Haddad delivers a considered discourse of the form of and the interpretation of arbitration agreements in a range of Middle East jurisdictions. Dr Habib Al Mulia examines some of the challenges that need to be addressed in international arbitration, in particular the high cost involved, choice of law and the speed of enforcement of arbitral awards. The legal lacunae in the U.A.E. arising out of an absence of an arbitration law is examined by Essam Al Tamimi. The role of and legality of arbitration in the Public / Administrative Law area is examined by Dr Abdel Hamid El Ahdab, with particular reference to the Lebanon and the restrictive impact of French Law on administrative arbitration. John Arnold discusses the frequent failure of parties to assess the risk involved in choice of law and arbitration rule procedure provisions in construction contracts and finally Roy Nolan writes about cross border trade arbitration.

Dr Mefleh A. El-Qudah contributes a question and answer session on the aims and objectives of the Advanced Legal and Judicial Studies Institute of Dubai and its warm relationship with the DIAC.

If the quality of submissions to the first edition of the DIAC Journal is anything to go by, the journal is set to make a valuable contribution to knowledge and understanding of arbitral practice in the Middle-East.

**Cases & Materials on the Carriage of Goods By Sea. Martin Dockray.**

This is the 3<sup>rd</sup> edition of a text which from its very outset established itself as a valuable and comprehensive resource for Maritime students. Now attractively packaged in a compact form by Cavendish, coverage has been extended to include many of the latest cases in this rapidly changing and developing area of the law. The selection of items is as ever of the highest standard, enabling the student and practitioner to spend less time searching the library or surfing the net, thereby maximising research time.

### ADR and Public Law by CHSpurin

We now have the benefit of three significant cases on the role of ADR in Public Law matters in the UK., namely **Cowl v Plymouth City Council** [2002] 1 WLR 803: , **Royal Bank of Canada Trust Corporation Ltd v S.S. for Defence** [2003] EWHC 1479 and **Anufrijeva v London Borough of Southwark; R v S of S for Home Department ex parte N & ; R v S of S for Home Department ex parte N M** [2003] EWCA Civ 1406, heard together by the CA in a combined hearing. Public Law litigation is now big business and a significant aspect of legal practice. The advent first of the European Union and secondly of human rights legislation has introduced for the first time the concept of damages for breach of public law duties, though it remains the case that no damages are available outside these limited areas. It is now possible to draw some tentative conclusions about this area of ADR practice, firstly as to what amounts to ADR for the purposes of Public Law and secondly, when damages are permitted, as to how they will be assessed by the court.

**Cowl** makes it clear that there is scope in certain situations for the representatives of public bodies to lawfully enter into settlement negotiations without compromising their statutory duties. **Cowl** however throws little light on the extent to which that is the case. Consequently, it can be anticipated that district auditors may again in the future seek to hold representatives of public bodies personally to account for funds thrown away by a compromise agreement in breach of statutory duty to manage public funds in the public interest. Alternatively, it may be anticipated that a compromise agreement may in some situations be unenforceable due to a lack of authority, which might correspondingly give rise to arguments as to the scope estoppel in public law.

**Royal Bank of Canada** touches on a question common to ADR in respect of civil litigation, namely when is it appropriate to reject ADR overtures? and implications on costs of so doing. It would appear that a mere confidence in the strength of one's claim in law is insufficient reason to refuse to mediate. Whilst the MOD were penalised in costs for failing to mediate, the question is still unanswered however, as to what would have happened if they had engaged in mediation and forfeited the right to repossession or paid compensation for early repossession when, as became clear from the judgement, they had a legal right to repossess and no legal liability for terminating the lease and an auditor had subsequently investigated the circumstances of that compromise settlement. Are public bodies caught in a Catch 22 situation whereby officers may be made to account for bad deals, but the public body will suffer cost penalties for failing to enter into negotiations? What point is there in engaging in negotiations knowing there is nothing you can lawfully put on the table for consideration? Further clarification is needed here.

**Anufrijeva et al** reveals the scope of ADR in Public Law matters, the hurdles to be surmounted in applying for Judicial Review and touches on matters of quantum in damages. In **Cowl**, the CA had already intimated that all forms of negotiation satisfy the overriding requirements of s1 CPR 1998, not simply mediation and further stated that the courts should be satisfied that an applicant had discharged his duties in this respect by pursuing all other practicable methods of resolution before acceding to an application for J.R. In **Anufrijeva** the court made it clear that the good offices of the Parliamentary Commissioner for England and Wales and other ombudsmen are included within the umbrella of ADR for the purposes of Public Law, and that whilst it is not necessary to have "*exhausted*" all other avenues of settlement, the applicant must at least explain why the ombudsman option was not appropriate in the circumstances. A short answer, whilst not canvassed by the court, must surely be that since the application sought to recover damages, these would not have been available from the Ombudsman in this series of applications. Traditionally, the remit of the Ombudsman was to provide a form of redress in respect of mal-administration, where the aggrieved citizen lacked the locus standii, in the absence of breach of a legal interest, to sue either at law, or to apply for judicial review. In normal circumstances therefore it is difficult to see what contribution the ombudsman can make to a public law application which involves a recovery of damages, since all that the ombudsman can do is advise or recommend, with a view to improving administrative services. However, if the Ombudsman is prepared to recommend compensation in deserving situations and local authorities are prepared to follow that advice or recommendation, the ombudsman could perform a useful ADR role. An intriguing question is what the response to the courts would be where mal-administration is established and the advice of the Ombudsman has been disregarded. Would this impact on costs alone or also on the level of damages?

The next question that arises is "How does the court assess damages at public law?" The answer provided by the court, I regret to say is, like the inscrutable sphinx, not too revealing or helpful. The court stated "*The awarding of compensation under the HRA is not to be compared with the approach adopted under a claim for breach of civil law. However, rough guidance as to the level of damages to be awarded may be obtained from the guidelines issued by the Judicial Studies Board, the Criminal Injuries Compensation Board, the Parliamentary Ombudsman and the Local Government Ombudsman. The difficulty, however, is in finding a suitable comparator within these guidelines. In cases of maladministration, where damages are appropriate, awards should be moderate, but not minimal, as this would undermine the respect for Convention rights.*" What exactly amounts to "**moderate but not minimal**" is anyone's guess. Any award however small may however be sufficient to ensure that a case cannot proceed to Strasbourg, and thus enables the UK to remain in control and safeguard the public interest free from outside interference.

The European Union Law element also has an impact upon the assessment of damages, which is not canvassed by these cases, since the matter did not arise. The assessment of damages for breach of European Union law is un-problematical where civil action is involved. However, where a public law breach of European Union law occurs, Factortame and related cases have made it clear that a real and substantial remedy must be available and that no rule of English Law that bars damages can override this requirement. Hence the Spanish fishermen were entitled to and indeed received compensation. The level of compensation reflected their commercial losses and was neither "**moderate nor minimal.**"

**Anufrijeva** throws some light on the availability of damages at Public Law. The court stated in respect of Human Rights issues that "*There are a number of features that distinguish damages under the HRA from damages in contract or tort law. Damages under the HRA are not recoverable as of right. When choosing whether or not to award damages, the court must have due regard to ECtHR principles and must balance the need of the individual against that of the State. The approach adopted to awarding damages should be no less liberal than that applied by the ECtHR. The critical message is that damages should only be awarded when it is 'just and appropriate' and 'necessary' to achieve 'just satisfaction'*" (paragraph 63). *They should be awarded on an equitable basis having due regard to the seriousness of the violation, the conduct of the parties and the "degree of loss" suffered.*"

The only problem with this dicta is that if a claimant can demonstrate a likelihood that if the case were to go to Strasbourg, the court there would award damages, presumably this would give rise to a "**right**" to recover damages from a UK court.

A difficult area of Public Law practice also not touched upon in this series of cases, where there may be a role to play for ADR, relates to the inter-relationships between Public Bodies. Where one public body receives public funding from another and an allegation that the money has been used for ultra-vires purposes or has not been used at all, a dispute is likely to arise where the funding body may seek to recover funds. Clearly, where a high level of wrong-doing is involved, individuals may be surcharged by the district auditor. However, where public funds are simply used for the wrong public purpose, so that something the funding body did not wish to fund has reaped a benefit, is restitution available, or alternatively set-off against future funding? Traditionally, these are civil law remedies, though the latter involves a degree of self help. Now that Public Law has embraced the concept of damages, could an award of damages be made? It may be that in order to protect itself from liability, in respect of set off from subsequent funding, taking into account the previous over-payment, a public body might seek a declaration from the High Court that there has been an over-payment or ultra vires use of funds. Whichever course of action is followed, it is submitted that recourse to ADR would be a useful way of ensuring that public funds are not dissipated on unnecessary litigation. The one problem that might arise is, that until a court has made a declaration there may be a lack of incentive to settle.

It is clear that the explosion in Judicial Review cases in the public sector is a cause of concern for the Lord Chancellor, the Department of Constitutional Affairs and the Lord Chief Justice. The Government has made concerted efforts to introduce and encourage the use of alternative dispute settlement processes such as central and local ombudsmen. In addition, it would now appear that there is a concerted effort to encourage the use of ADR. The guiding principles however are not yet finalised, so watch this space.

**ACCREDITING MEDIATORS : PART II****Independence : A prerequisite of appointment?**

How important is it that a mediator be an independent, impartial outsider? The answer, in respect of adjudicators is well established. In order for justice not only to be done, but also "*to be seen to be done*," the adjudicator should be independent, since no man should be the judge in his own cause.<sup>10</sup> Nonetheless, the bar, where it exists, is against secret conflicts of interest. Where a conflict is well known to and accepted by both parties the arbitrator is entitled to serve. The circumstances in which it is inappropriate for someone to serve as an arbitrator is complex, but it should be noted that the mere fact that an individual is known to the parties should not be a bar to office. However, on times, the erecting of Chinese Walls may be needed, in order for a close colleague within a chamber or practice to serve on a dispute if a party to a dispute, is represented by a colleague.

In the public sector, the mere fact that a quasi-judicial decision maker is a civil servant working for and in the relevant, affected government department is not a bar to office in state tribunals. In the private sector, it is not deemed unacceptable for contract administrators, who have been appointed by and are remunerated by the employer, to decide quality and completion matters, which affect the interests of both the employer and contractor.

So where does all this leave mediators and conciliators? Should they be totally independent or is it permissible for the mediator to be known to, work for or be in some other way related to either of the parties? In house dispute settlement processes, amongst others, are very likely to breach such a requirement.

The absence of legal authority on the matter indicates that the matter has not caused concern to date. Most mediation service providers require their mediators to confirm an absence of conflicts of interest before accepting an appointment or otherwise declare their interest and leave it to the parties to decide whether or not to proceed with the appointment. It is submitted that this is a sensible precaution, but is it a legal requirement, and if not should it be? If it is made a legal requirement, what consequences should the law ascribe to a breach and what impact would a breach have on the enforceability of a settlement?

<sup>10</sup> *Dimes v Grand Junction Canal* [1852] 3 HLC 759.

**Association of Welsh Mediators****Founding president**

His Honour Judge Graham Jones

**Standing committee**

Elected officers of the standing committee:

- i. Chairman: Phillip Howell-Richardson,
- ii. Secretary: Mair Coombes Davies.
- iii. Treasurer: Richard Francis

Elected members of the standing committee:

- i. Paul Hopkins
- ii. Andrew Lewis
- iii. David Milliken
- iv. Paul Newman
- v. John Roche

Members co-opted to the standing committee:

- i. William Jeremy
- ii. Jacky Smith
- iii. Corbett H. Spurin
- iv. Gareth Thomas
- v. Anthony Vines

**Principal objects**

for which the Association is established:

- 1 To promote the concept of mediation and other alternative dispute procedures in Wales and beyond.
- 2 To further the interests of mediation in Wales by liaising and supporting the courts, mediation organisations and any other relevant organisation.
- 3 To assist in the maintenance of high standards in training and practice of mediators in Wales and furtherance of common accredited standards.
- 4 To maintain and distribute a list of mediators and mediation organisations in Wales including a specific category of civil and commercial mediators.
- 5 To provide opportunities and facilities for members to meet and exchange views and ideas.
- 6 To do anything that may support the above.

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### **Regulating the conduct of mediators – what should the rules stipulate?**

**Bias - Impartiality** : Continuing the previous theme, what if the mediator subsequently becomes aware of a conflict of interest after appointment? Should the conflict of interest be declared? If not, what implications arise for the validity and enforceability of the settlement agreement, if any, from a failure to declare that interest to the parties?

**External Confidentiality**: In common with most professional callings and in line with a central feature of private ADR, namely that the parties are able to ensure the privacy and confidentiality of their private affairs, away from the glare of the press and the public scrutiny, the mediator and the parties alike<sup>11</sup> are traditionally bound to preserve confidentiality and are not permitted to benefit from or trade on confidential information disclosed during the mediation process. This is a standard provision of most mediation process agreements, a breach of which has direct and enforceable legal consequences.

Apart from reinforcing the law, it is difficult to know what else might be usefully added to an already complicated area of law. Any attempt at codification could, unless it went far beyond the scope of mediation and applied to general practice, result in different standards for mediation than for other instances of privilege.

**Balance – fairness - equal opportunity** : Clearly, each of these are desirable and objectives mediators should strive to achieve. The greatest problem however is in establishing what standard of due process should apply to the myriad of different circumstances served by the mediation process. Certainly, a single standard to fit all is not possible or desirable, without seriously limiting the scope of coverage of the process. If on the other hand the lowest possible standard is set, then it would achieve nothing worthwhile. However, to establish a range of standards for different forms of process would be both complicated and difficult to enforce. To start with it is far from clear that the list of categories is established and thus closed. The market is continually finding and establishing new applications for the process, with the new providers making up rules that they deem appropriate, as they proceed. It is difficult to perceive how else this might be achieved.

**Fair outcomes** : To what extent, if at all, should the mediator concern himself with the fairness of the outcome of a mediation and if so, what is the consequence of a failure to do so? Assuming there is a duty, as discussed below for the mediator to abstain from providing advice particularly in respect of offers on the table (a fortiori providing advice advocating unfair terms) it is difficult to see what a mediator can do to guard against unfair outcomes. Where the parties are represented then the mediator should be able to rely on the representative performing his duty to the client. What, if anything at all should a Mediator do if it becomes apparent that one of the party representatives is incompetent and the party is likely to suffer in consequence? Is this simply the party's problem for choosing an incompetent advisor? The mediator is not there to judge the professionalism of advisors. Perhaps inviting the party to consider the implications of relevant factors and how the party would address those factors is the best way forward, without directly exposing the perceived deficiencies of the representative, might be appropriate.

It is difficult however to see how the mediator might be held accountable for failing to adopt such a precaution. Furthermore, a danger for the mediator in getting involved is that the representative may have very good reason for the advice given to his client, which the mediator is unaware of.

**Internal Confidentiality** : Are there any circumstances where a mediator should break the covenant against revealing confidential information disclosed in a private session to the other party without consent? Since confidence in the discretion of the mediator is central to the success or mediation, the answer must be a firm no. However, a mediator may find himself in a dilemma once apprised of information that indicates wrongdoing by one party, which is prejudicial to the other, who is unaware of that wrongdoing. Lawyers owe an overriding duty to the court and justice, which requires disclosure in extreme situations and provides an exception to the rules on legal privilege. These do not extend to the mediator, so it is advised that a mediator should either seek consent to disclose, or resign, though the problem is that resignation sends a warning signal to the others party that there is a significant problem that they are unaware of.

<sup>11</sup> See Mediation Corner, ADR NEWS Vol 4 No2 2004 for commentaries on privileged without prejudice agreements.

**Advice :** To what extent, if at all, should a mediator abstain from providing a party(ies) with advice, whether legal or practical, and if so what is the consequence of wrongfully offering advice or worse, bad advice? Many mediators will not have professional indemnity cover for advice giving. Furthermore, the mediator will need to ensure that he does not cross over the professional boundary into legal practice, particularly if not a member of the legal profession.

It is standard practice for the mediator to tell the parties that he is not there to provide legal advice to either or both of the parties. Most mediation rule-books require the mediator to abstain from providing legal advice. Where as discussed above (*Fair outcomes*) the parties are represented there should be no need for the mediator to provide advice. However, where a party represents himself the temptation to provide advice may arise, particularly where a party is evidently at sea and does not recognise let alone understand the position they have placed themselves in.

The distinction between asking a party to consider whether or not a particular course of action is tenable as opposed to intimating that you are of the opinion that a proposed course of action is not tenable (or alternatively inviting a party to consider a course of action and recommending a course of action) is significant, albeit that the change in wording is slight. Whilst such advice may move the resolution process forward to the mutual benefit of both parties, on other occasions it might befit one party, potentially to the detriment of the other, affecting the balance of fairness in the process.

To move from expecting mediators to exercise common sense and good judgement over such matters to the drawing up of an express "Advice Rule" is likely to prove to be a challenging task for the draftsman and if it places too tight a straight jacket over mediation conduct could limit the flexibility of the process and do more harm than good. It should not be forgotten for instance that in social mediation the parties may both expect and rely on the mediator providing advice, particularly in respect of what is considered to be acceptable social codes of conduct. Hence, the dividing line between conflict management and dispute resolution comes once more to the fore. Another hazy distinction, namely that between conciliation and mediation is also relevant here.

**Decision making :** To what extent, if at all should a mediator be allowed to make and impose decisions? Is this a matter for the parties to agree in advance or subsequently, during the process? If, in the absence of agreement, a mediator, faced with an impasse, proposes a decision (or more subtly strongly suggests a solution) and the parties concur, can either party subsequently disown the decision/suggestion on the grounds of undue pressure? It would appear to be unlikely, in that the acceptance amounts to voluntary adoption so that the solution becomes the property of the parties.

If a mediator is empowered to make decisions, does it cease to be a mediation and become an adjudicatory forum or alternatively a conciliation process?<sup>12</sup> If the latter, will separate and distinct rules need to be drafted in respect of conciliation and mediation, to include for the first time a definitive definition of both processes that distinguishes between them in a meaningful and workable manner? It is submitted that achieving a consensus on this alone may be no mean feat.

A central problem here is that the mediation industry has grown and expanded into new applications, all the time maintaining the word mediation as a central descriptor, whilst at the same time defining the rules for that specific area of activity. A modern development that exemplifies this is "Victim /offender mediation." A local so called "Victim/Offender Mediation Scheme" in operation in South Wales appears to concern the offender rather than the victim. The pressure on the offender to participate is strong, since the alternative is a court sentence. The objective appears to be to mediate the offender's attitude towards their offending conduct, central to which is an acknowledgement of wrongdoing and an expression of regret. The mediator lets the offender know in no uncertain terms what is expected of the offender. The penalty for failing to play the game is a return to court for sentencing. How such a model would fit into any regulatory mediation mechanism is anyone's guess. Perhaps specific regulations are needed for victim/offender mediation, assuming these would be acceptable to the operators of such schemes.

<sup>12</sup> Distinctions between mediation and conciliation and the relevant rules of due process that apply see "The Role of the Mediator" for Society of Expert Witnesses, October 2002 by C.H.Spurin.

**Pressure – undue influence :** How much pressure, if any, should a mediator be allowed to apply in order to achieve a settlement, and what is the consequence of overstepping the mark? Is a party to a mediated settlement able, on the grounds of undue influence able to get a settlement set aside and if so is this more likely to be the case where a party is self represented, since presumably a central part of the role of a party representative will be to support the client and ensure that sufficient advice is provided to enable the client to resist any undue pressure to settle on disadvantageous terms.

Exerting pressure is encouraged under the rules of some mediation service providers and frowned upon by others. There is little or no consensus on this issue at the present time. In particular the providers of conciliation type mediation services will view the exertion of pressure by the mediator as an essential part of the closure process.

Given the popularity of the mini-trial type mediation process, regulation here is again likely to prove difficult to draft to accommodate the various models of mediation, without resorting to sub-categorisation of forms of mediation. Otherwise, if regulation outlaws some forms of mediation practice this is likely to prove extremely controversial and unacceptable to those practitioners displaced by the new rules.

**Control and Authority :** To what extent, if at all, is there a duty (over and above the fact that it is probably desirable and necessary in order for the mediation to be effective) for the mediator to establish control and authority over the process, and what implications are there for the enforceability of a settlement arising out of a mediation where the mediator has failed to establish his authority?

This question is most likely to arise where a mediation fails to produce an agreement and one or other of the parties seeks to recover the cost of the failed process on the grounds of mediator incompetence.

The problem however is that respect and authority are derived from many sources and cannot be imposed. Rather it has to be earned. Where a mediator assumes that respect is automatically due a rude awakening is often in order. An unbridled, belligerent, rude party can rapidly derail a mediation forcing the other party to withdraw.

The mediation process is strewn with pitfalls for the unwary mediator who is unlikely to know of

sensitive factors private to the parties. The problem is greatest for the enthusiastic hands on mediator, generally a major plus in a communications led process, but one with the drawback that rushing in can lead to regrettable gaffs which might be hard to subsequently undo. It is easy to say that listening carefully to the parties and quietly observing, with the use of circumspect language can avoid such gaffs occurring, but too much caution can lead to a failure to generate momentum, confidence and enthusiasm.

Place that then in the context of the obstructive party, full of their own beliefs and self importance, but yet capable of changing their own mind (and recollection of events) when the occasion calls for it. Whilst singularly responsible for the failure of a mediation, it falls quite easily to such a party to refuse to accept their own role in the failure and to seek to apportion responsibility to the mediator. At that stage the slightest gaffs become exaggerated and any sense of proportion is lost.

However, any attempt to hold the mediator to account for a failed mediation, whether the allegation is justified or not, is problematical since the mediation process is bound by rules of privacy.

A final twist to this question regards the allocation of court costs. Where a party has obstructed and thwarted the mediation process this may be a reasons for the courts awarding costs under the CPR for subsequent litigation in respect of the dispute. Under some jurisdictions the mediator is called upon to issue of certificate of co-operation/non-cooperation with the process, which may go beyond a bland declaration that the parties attended. It is not hard to imagine the day arriving when the obstructive party denies non-cooperation and attributes responsibility for the failure to the mediator, all in the cause of preserving costs.

**Representation :** To what extent, if at all, should the parties be required to be legally or otherwise professionally represented at a mediation? If a party is not represented, should the mediator proceed with, defer or abandon the mediation? The SPIDR mediation rules for instance require that the parties are represented. If that is the case, should they be legally represented or is any representation sufficient? In some US states such as California legal representation at mediation is mandatory. This does however raise the difficult question of how to react to a court ordered mediation when a party wishes to

appear pro-se at the mediation and has likewise presented themselves pro-se before the court.

In contrast to the above, many social mediation providers explicitly exclude lawyers. For example, in the US the DRBF advises against legal representation. If lawyers attend, they are denied a right of audience and are only permitted to advise their clients from the wings. However, where legal rights are at stake, the pressure on the mediator to ensure fairness is increased if a party appears pro-se, since the mediator cannot play the client off against their representative and has to supply the reality check directly and perhaps even to provide some form of evaluation or advice, a practice frowned upon by some mediation service provider organisations.

This, it is clear, is yet another matter on which there is an absence of consensus. Can there be a single rule on this issue or should there be different rules for different types of mediation? Or alternatively should it be a matter for the discretion of the mediator and/or the parties?

**Mediation and counselling** : To what extent, if at all, should a mediator act as a counsellor to the parties and what is the interrelationship between counselling and advising? This is an issue which inevitably arises in relation to social and family mediation, but has little relevance to commercial mediation. Nonetheless, there are occasions where the mediator may be faced with mediating viewpoints on normative behaviour, particularly where questions of entitlement and the “reasonable man” are at issue. The dividing line between counselling and advising is likely to be very thin on times.

**Mediation Fees** : What is a reasonable mediation rate? Is there a standard rate or is the rate dependent upon the standing of the mediator and what the market will bear? Should court mediation scheme rates act as a benchmark? Should the cost of mediation be in anyway proportionate to the dispute at hand? Complex matters can be involved with small sums at stake but where reputation is thrust to the fore, whereas a dispute over large sums of money may in fact be quite straightforward to deal with. Rates currently range from pro-bono/token fees upwards.

**Duration of Mediation** : How long should a mediation take? This is related to the last issue, since the longer a mediation lasts, where an hourly rate is

applied the more it will cost. The problem is that this is like asking how long is a piece of string. If it is remembered that a mediation is not about establishing facts and liability but rather about canvassing viewpoints, it is possible to mediate large disputes with many facets in a relatively short period of time. The longer a mediation lasts, particularly in terms of days, the harder it is to achieve a settlement. However, apart from the parties withdrawing in frustration, what liability, if any can attach to a mediator who makes an unnecessary meal out of a mediation? Perhaps the only practical answer is that this may ultimately impact upon his reputation and acceptability as a mediator by the industry.

**Joint or private sessions?** Some mediators refuse to engage in private sessions insisting that all communication should be open and fully disclosed, whereas for others the caucus is standard practice and deemed essential in order to explore options without prejudice to the bargaining position of the parties. Should this be regulated or be left to the discretion of the mediator? Joint sessions have the advantage of relieving the mediator of any responsibility for internal confidentiality. However, they increase the burden of the mediator to maintain control of the process and require very high levels of diplomatic skill.

#### **What is the measure of competence?**

**Reputation / confidence** : What makes a good mediator? The following is not an uncommon response : “I don’t know but I can recognise one when I see one, or at least, I know the names of the famous mediators who must therefore be good.” Whilst this does not assist very much, it points out the problems of introducing regulations that might cut out recognised mediators who do not fulfil the regulatory criteria but who will continue to be in demand whatever the regulations say. Frequently high-profile mediations are put in the hands of respected members of the community who have no mediation experience, but are respected for their political / managerial skill. This is particularly so in the case of public international disputes. US Presidents and Senators it would appear are naturals at the art of mediation and diplomacy!

Reputation and confidence cannot be formally measured. A regulation is likely therefore to be based on formal qualifications. What should be specified as a minimum training standard? What

should the benchmark contain and how would it be measured / assessed? Whilst there are extensive bench marks for legal practice there is no independent universal bench mark for arbitration practice.

**Criminal records** : Should those with criminal records, un-discharged bankrupts and individuals with other relevant stains on their character be barred from mediation practice? Or do such experiences add to the knowledge and understanding of the practitioner in specialised areas of practice? Can the poacher turn gamekeeper?

**Training / Examinations** : In the US the bench-mark is attendance for 40 hours under the guidance of a certified mediation training organisation. In the UK the Law Society has set out a core curriculum for solicitors to practice as mediators. A wide range of community mediation organisations and private mediation service providers also offer training programs of differing lengths and with varying content, some concentrating on hands on practical skills whilst others concentrate on theory. Yet others depend on varying periods of mentoring or pupillage. A further requirement of some providers is either a minimum number of appointments or continuing professional development.

There is little cross accreditation in the industry which means that it is difficult to establish any degree of accepted practice or standards in mediation training in the UK.

Should a mediator be merely an expert mediator or in addition an expert in a given area of practice? Some providers consider that mediation itself is sufficient of a skill and art to enable the mediator to handle any dispute, whatever professional discipline or commercial field happens to be involved. Others consider that expertise in a field relevant to the dispute is essential to being able to mediate effectively. Should any prior knowledge include relevant legal understanding? This is deemed unnecessary by many supporters of interests based mediation but would be strongly commended by risks analysis/reality check/evaluative mediators.

#### **Accountability of nomination bodies**

**Accountability to the parties** : To what extent could and should a MNB be accountable to a dissatisfied party, for nominating a mediator who commits mal-practice? Would accountability depend on whether or not the mediator had a bad track record or was

unqualified in some way? The problem with track records is that they are rarely made public. Perhaps a public record would be needed to make such accountability meaningful. In the meantime, insurance cover is likely to become the norm "just in case" liability is ever imposed.

**Accountability to an overarching body** : Might an overarching body have disciplinary powers over MNB's? If so, what would the nature of these powers be? Financial or regulatory, with or without supervision and inspections? And if so who will pay for all this?

Perhaps MNB's will be required to monitor mediation provision, but from experience the client response to feed back forms is poor. Should feed back forms be the property of the mediator or should they be logged into a register of complaints? Could an MNB be required to submit an audit to the overarching body, perhaps with copies of feed back forms? If an MNB gets a negative feed back return from a client what should it do next?

#### **Determining who is at fault : without prejudice and confidentiality.**

Establishing bias or other wrongdoing by a mediator in the course of a mediation is likely to prove to be problematical given the confidentiality of the process. Most mediation appointment agreements include a statement that the mediator will not testify in court, establishing an immunity for the mediator and privileged status. Legal authorities on the issue of mal-practice are few and far between. The famous California judgement against a group of insurance claims mediators is the exception rather than the rule. The mediators concerned were single party appointed and regular players, each time for the same insurance underwriters. The court was able to conclude that there was overwhelming evidence of a pattern of bias in favour of the carriers and against the interests of the assured claimants. However, in the absence of a track record it is likely to be virtually impossible to establish wrong doing.

If an MNB is to operate a professional standards tribunal, who will have the right and or duty to give evidence, the complainant, the other party and the mediator? It is likely that the other party may not wish to attend, give evidence or bear any of the costs and expenses involved, particularly if the hearing will have no impact upon the settlement agreement.

Could and should charges include "Bringing the MNB into disrepute" and what does this entail ?

Once a tribunal process is initiated, what impact does that have on the enforceability of a mediation settlement agreement?

What are the disciplinary options available to the MNB tribunal – a warning, a fine, suspension? Are the tribunal proceedings subject to judicial review and does the mediator have the right to a full hearing? Should there be an appeals process? The answer to all three is likely to be YES. That being the case, who pays for all of this?

Once an individual has been de-listed by an MNB should other MNB's take note and follow suit? Is there a duty to inform other bodies or should there be a central register?

### CONCLUSION

This review has raised far more questions than answers. Mediation is a clearly a business. It is less clear to what extent mediation is a profession. More so than adjudication or arbitration, the inter-personnel skills of the mediator are paramount, followed closely by the degree of authority that the mediator can exert, by virtue of reputation and

standing and by establishing and maintaining a presence during the process. These are quite different qualities to those measured to establish and maintain professional standards for lawyers and arbitrators. Measuring and monitoring these is likely to prove difficult, if not impossible.

Is it therefore unreasonable to consider whether or not regulation of the mediation business should best be left to the market place, based on the reputation and standing of nominating bodies, service providers and their self-regulatory mechanisms, and to the reputation of the individual mediation practitioner? In many other walks of life, it is perfectly reasonable to advise that the "*buyer beware*" and make necessary inquiries before making an investment.

The jury at present is out – we will have to wait and see what the verdict of the industry and consumer pressure groups is in due course. This is an issue, which is due to run and run.

By CHSpurin

## MEDIATION CASE CORNER

### **Asiansky Television PLC v Bayer-Rosin [2001] EWCA Civ 1792**

A seller failed to advise the purchaser of land of the significance of a note from the local council in respect of access over the purchased land by motorway contractors. There was a collateral contract to furnish a letter of comfort from the council, assuring that the council no longer sought to acquire the land which had at one time been targeted for compulsory purchase, but which was ultimately not required for the construction of a motorway. The contractors exercised the right of access to store plant and equipment, preventing construction of a Cinema complex on the land by the purchaser. The claimants took a long time to procure expert evidence on quantum. The defendant's failed to respond once a quantum report was issued. The claimant was overseas at the time and thus unable to provide instructions for mediation. The defendant also failed to follow up suggestions about mediation because the gap between the parties was £200,000 - £6/10M. The reason for the gap was that the defendant denied there had been any reliance on the letter of comfort by the claimant. He asserted that the claimant would have merely negotiated a price reduction if he had been aware of the problem, whereas the claimant asserted he would not have bought if he had appreciated the implications. The Master struck the claim out for delay and prejudice. The CA held that whilst there had technically been a delay in pursuing the claim, there had been no prejudice to the trial which was essentially based on available paperwork. Furthermore, since neither party was solely at fault for not pursuing ADR, no cost implications arose from the failure. A trial was ordered overturning the Master's strike out.

### **Bates v Microstar Ltd 2000/0069/A3 04-07-2000**

An accountant and an entrepreneur went into business. A series of off shore companies were established. The accountant provided accounting and tax avoidance services to the ventures. The accountant by an original agreement which was subsequently varied on disputed terms, contained in a signed memo concluded in a hotel, was to receive a monthly salary, bonuses based on tax savings, company shares and expenses. The accountant was paid regularly until he fell out with the entrepreneur, apparently over an allegedly negligently prepared estimate for fitting out work to company premises. The accountant sued for

wages. The entrepreneur counter claimed for damages for negligent advice. The first instance judge found on all counts for the accountant. On appeal the CA found for the accountant in respect of wages and some initial expenses, but reversed the summary decision in respect of shares, termination period wages and dismissal of the counter-claim.

Whilst doubting the validity of the counter-claim the CA held that a full trial would be required to determine the terms of the varied agreement and the validity if any of the counter-claim. The judge considered that the cost of the trial and legal representation was ill-advised and commended the parties to mediation, stating he would be amenable to an approach for a stay of 4-6 weeks to allow a mediation to take place. The court was encouraging the accountant to engage in non-adversarial negotiations and hinting to the entrepreneur that more money was due to the accountant and advising that there was therefore room for compromise. The judge remarked that making lawyers rich did not make good business sense, but observed that if that was how the parties chose to spend their money they were entitled to do so.

#### **Brawley v Marczynski [2002] EWCA Civ 756**

A student invented a safety device for lorry wheels. He entered into an agreement with the defendant company to develop and market the device in exchange for 50% of the profit. The student put up a share of the development capital. The device was a runaway success. The manufacturer/distributor made 90% profits on the production and sale of the device but reneged on the deal and did not pay the student. The student sued for lost earnings. A stop start litigation process got underway. At one stage mediation was attempted but failed, though subsequently the company apparently agreed to pay out £300,000 as a 50% share of profit. The student sued for enforcement of the agreement and costs and won on both counts, defeating a counter claim that the student did not have a valid patent.

The company appealed alleging that in the absence of a valid patent the student was entitled to nothing and that the figure of £300,000 was coerced by threatened litigation by a penniless legally aided but unworthy claimant, and further that since the litigation was abandoned no order of costs should be made.

The CA disagreed. The £300,000 was not an off the wall figure but pitched at a mid point between the bargaining points of the parties. The company had clearly made money out of the device, so the lack of patent, even if proved – which it had not been to date, had little impact upon the profits made before some other party exploited the same concept, so the ruling against set off was confirmed.

On the issue of costs, the court agreed with the trial judge. Essentially, whether under a negotiated / mediated settlement or by judgement, the student had won. If the case had gone all the way the student would have won in any case. On that basis, he was entitled to the costs thrown away by the ending of the litigation. Appeal dismissed, with costs.

Conclusion : When parties to litigation go to mediation, they should take into account litigation costs as part of the settlement agreement. The sooner the parties mediate before incurring too many costs the better. However, the risk of incurring costs could encourage a defendant to litigate and be damned if a mid range WIN/WIN settlement cannot be brokered since it may not be possible to factor in a saved legal costs element into the bargain as an inducement to settle. Alternatively, an agreement on legal cost sharing (not simply sharing of the mediation costs) should be made part of the settlement proposal in order to induce agreement.

#### **Cape & Dagleish v Fitzgerald [2002] UKHL 16**

The crux of this case concerns the impact of settlement agreements on subsequent litigation. Firstly, where a settlement agreement is in discharge of all claims etc then there can be no further litigation. However, this may not be sufficient to prevent a third party being sued in relation to the same subject matter unless the settlement is stated to represent a full recovery for losses in respect of that subject matter thereby rendering a subsequent action impossible as a breach of the double recovery rule.

A share-holder director was sued by the company. He handed over his shares in the company as consideration for ending the action. The company then sued the accountants who in turn sued the ex-director. The court valued the total loss at £700K – the value of the shares at £450K and thus found the accountants liable for £250K, which they then sought to recover from the ex-director. He asserted that he had had a full release and was not liable. The court held the settlement agreement did not clearly and

unequivocally release him from subsequent action should new information come to light or if he was later found to have more funds than previously thought. Nor did the agreement purport to be a full settlement of the companies losses, since at the time replacement accountants had only just got to work and the true amount of losses were clearly not at that time established. Finally, no settlement agreement could be to the benefit of third parties who were not party to the settlement agreement. See also **Heaton v AXA**.

This case highlights the problems of settlement agreements where third party interests, in particular insurance carriers, are involved. It is a reminder of the importance of engaging in multi party mediations in such circumstances or alternatively of securing authority to settle from such interested third parties. If that is not possible, potential liability to interested third parties should be borne in mind when negotiating the terms of the settlement, lest an apparently good deal turns out to be not so good after all.

#### **Dearling v Foregate Developments [2003] EWCA 913**

A dispute arose about a house building contract. Under the contract disputes as to completion and orders for remedial work were to be settled by an architect. The duly retained architect found there 5 Class A defects which prevented completion and a range of Class B defects that required remedial work. The builder carried out the Class A work and completion went ahead but failed to carry out the Class B remedial work. Costs were shared by the parties, with the exception of overstated Class A claims which had wasted time.

The purchaser sued alleging further house not fit for occupation and so completion order invalid and for damages for failure to complete class B remedial work, adding in further claims not admitted by the architect. The court adjourned pending negotiations – a settlement was reached mid-way between offer and claim. A separate action was then commenced in respect of costs. The judge awarded costs against the defendant, ostensibly because he was in the wrong in failing to complete the Class B remediation work.

On appeal it was held that the settlement figure was plucked out of the air and did not reflect what might have occurred if the case went to trial on quantum. Since there was no clear winner, the appropriate course of action for the court was to refuse to make an order of costs in respect of the latter stages of the trial which principally concerned a counter-claim, though costs preceding a payment in were awarded to the claimant.

The guidelines set out in **Brawley v Marczynski [2003] 1 WLR 813** per Longmore LJ following Scott Baker J in **R (Boxall) v Waltham Forest London Borough Council** (unreported) 21 December 2000 applied.

#### **Excelsior Comm. & Industrial Holdings v Salisbury Hammer Aspden & Johnson [2003] EWCA Civ 879**

The claimants purchased a company whose principal asset had been damaged by fire and hence became the beneficiaries of an insurance claim. As it transpired the level of cover was less than advised by their solicitors and consequently the company recovered £1M less than the anticipated. The claimants sued the solicitors – but failed to establish reliance. The solicitors were in breach of duty but the deal was so good that the purchasers would have gone ahead even if they had known the true level of cover. The sum recovered in fact more than covered their development costs and the £1M therefore represented a potential windfall.

The defendants made a Part 36 CPR payment in : This was rejected by the claimants who subsequently recovered a mere £2 nominal damages for breach of duty to advise on the extent of insurance cover. The judge awarded costs on the Standard Basis up to the Payment In and on an Indemnity Basis thereafter. The claimants appealed the order for indemnity costs. The CA referred to **Reid v Gordon Taylor et al**<sup>13</sup> before concluding that whilst there are many grounds for departing from the CPR norm of standard costs and awarding indemnity, including wrong doing and gross unreasonableness in refusing to accept a reasonable offer, the test as per the CPR requires Special Circumstances. What amounts to special circumstances is to be determined at the discretion of the trial judge, who should ideally provide reasons for his decision. However, the CA should not fetter the discretion of lower courts by introducing more layers of criteria for the exercise of that discretion beyond that stated in the CPR. In the circumstances, whilst not clearly enunciated by the trial judge there were sufficient grounds for the judge to have determined that there were special circumstances justifying the award of indemnity costs and hence the appeal failed.

<sup>13</sup> **Reid v Gordon Taylor** [2002] 2 All ER 150; **Kim v MGN Ltd (No 2)** [2002] 2 All ER 242; **AEI Rediffusion Music Ltd v Phonographic Performance TA** [1999] 1 WLR 1507; **McPhilemy v Times Newspapers Ltd (No 2)**[2002] 1 WLR 934 : **M c P h i l e m y** [2001] 4 All ER 361; **Petrotrade Inc v Texaco Ltd** [2002] 1 WLR 947; **Reid Minty v Taylor** [2002] All ER 150;

**Halifax Financial Services v Intuitive Systems** [1999] 1 All ER 664

Intuitive contracted to develop and supply Halifax with software. Halifax alleged that Intuitive had committed an anticipatory repudiatory breach of contract and were unable to deliver within the contractual time frame. Halifax purported to accept the repudiation, asserted that the contract was at an end and sued for damages for breach of contract. Intuitive denied any anticipatory repudiator conduct and thus asserted that it was Halifax who had unlawfully repudiated the contract – though a potential counter claim for £2-3M had not yet been pursued.

The contract contained a good faith ADR provision, with stepped consensual progression to non-binding conciliation and thereafter to arbitration. Intuitive applied for a stay of action on the basis that the ADR clause deprived the court of jurisdiction. The trial judge refused the application and on appeal the CA stated that the court always has jurisdiction, but had the power under the Arbitration Acts to issue a stay in appropriate circumstances and under common law may do likewise for other non-arbitral determinative processes – and can also if so minded encourage ADR. In the circumstances the CA confirmed the court had jurisdiction. A stay would not issue in respect of non-binding settlement processes.<sup>14</sup>

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

The Court of Appeal refused to award costs against successful defendants who had refused mediation. The court first considered whether or not the court has the power to order mediation as opposed to strongly recommend it, and concluded it does not, and then review the factors which may be relevant to the question whether a party has unreasonably refused ADR, stating that they will include (but are not limited to) the following: (a) the nature of the dispute; (b) the merits of the case; (c) the extent to which other settlement methods have been attempted; (d) whether the costs of the ADR would be disproportionately high; (e) whether any delay in setting up and attending the ADR would have been prejudicial; and (f) whether the ADR had a reasonable prospect of success. The court made it clear that in many cases no single factor will be decisive, and that these factors should not be regarded as an exhaustive check-list. The court also considered the causation issue and liability in respect of successive accidents contributing to a claimant's injury/losses and reaffirmed that **Performance Cars** is still good law.

**Heaton v AXA Equity and Law Assurance Society PLC** [2002] UKHL 15

Inter-city insurance brokers made contracts with Target (subsequently Abbey Life) and Equity & Law. Target repudiated its contract alleging that Inter-city had engaged in "churning" that is to say paying bonuses to operatives to persuade policy holders to switch policies to another company in circumstances where they would receive no bonus if the policy holder remained with the existing carrier. Equity & Law subsequently also repudiated its contract on the basis of alleged churning. Inter-city's business effectively came to an end – the allegations prevented it procuring clients for alternative carriers. Inter-city went into voluntary liquidation. Inter-city sued Target who counterclaimed. Ten days into the trial Target withdrew all allegations and published a public withdrawal of all allegations, following which a settlement agreement was brokered.

Inter-city still could not trade because the Equity & Law allegations of churning were still alive. Inter-city sued Equity & Law. Equity & Law successfully applied for dismissal of the claim on the grounds that the Target Settlement, as per **Jameson v CEGB** [2000] was a full and final payment for the alleged loss. Inter-city appealed. The CA granted the appeal. Equity & Law appealed to the HL. The HL refused the appeal.

The mere fact that a settlement has taken place with one party does not necessarily relieve a third party of liability. It may be that where there is an element of double recovery certain sums may be discounted, a factor that Inter-city accepted, but unless the settlement clearly states that all losses are encompassed in and covered by the settlement, it will not preclude a claim against others, particularly where as in the present

<sup>14</sup> **Note** : Post CPR 1998 the court now has the power to order a stay and recommend ADR – and in the new trial London Mediation Scheme has the power to not merely recommend by further to mandate Mediation. The CA's observations on the role of the court in relation to a stay in respect of Arbitration Agreements is correct but misleading – referring to Public Policy. The court does not specifically refer to the text of s9(4) Arbitration Act 1996 – which states that the court **SHALL** grant a stay unless the agreement is null and void, inoperative or incapable of being performed, which means the court has no discretion in the matter and whilst the court always retains jurisdiction as the CA indicated, what the court can in fact do is severely limited by the Act. It is submitted that the court retains full and effective Judicial Review jurisdiction under public policy but no more under the current regime.

case there were separate and distinct claims for additional loss against Equity & Law and the issue of whether or not Inter-city and the personalities involved would be able to resume practice. The action was reinstated and ordered to precede to trial.<sup>15</sup>

**Kinetics Technology v Cross Seas Shipping** [1998] F1530

Goods lost overboard on a voyage from Italy to Kuwait. Claimant lost claims in relation to currency, interest rate including an inflation discount, date from which interest to run and on limitation of liability under the Hague Visby Rules. The defendant made a Part 36 payment in : The claimant made a massively inflated Part 36 Offer : Final judgement, which allowed a 5<sup>th</sup> claim for surveyor's fees marginally exceeded the Payment in. The court held that the claimant should recover costs pre-payment in but ordered to the claimant to pay the defendant 66% of his costs thereafter.

**Kinstreet Ltd v Balmargo Corporation Ltd** Ch 1994 G2999

Mr Guinle, a clothes trader, faced with insolvency but wishing to continue trading struck up an arrangement with Mr Kirreh. Kirreh formed a new company- Kinstreet - and Guinle transferred his order book to the new company. Kirreh had legal title to all the shares in Kinstreet. Guinle alleged that Kirreh held 50% of the shares on trust to him. The two subsequently fell out. Guinle claimed his 50% shareholding – Kirreh alleged misconduct and conspiracy by Guinle. A large number of co-defendants, some of whom had become competitors of Kinstreet were involved in the action – incurring over £800,000 in legal costs at the time of the current hearing between them. The matter was set for trial in 8 months time. All matters had been hotly contested in court. Kirreh had allegedly engaged in some underhand practices. Guinle had covered his tracks by investing in off shore companies and had to all intents and purposes no visible assets.

The company had liquid assets of £1/2 M : and could only realistically pay out a maximum of £350,000 in legal costs to the defendant's if the action failed, without going into liquidation. Further costs were estimated at between £800,000 for the claimants and £600,000 for the defendants. Neither party could in reality afford the litigation. The court strongly advised mediation in the interim 8 month period pending trial. The costs were low and the potential benefits considerable. An independent third party might be able to break the communications deadlock, and overcome the high levels of suspicion and distrust between the parties.

**Malkins Nominees v Societe Finance** [2002] EWHC 1221 Ch

Judgement on costs – no facts disclosed. The court discounted 15% of the winning claimant's costs for declining to mediate. The Master felt ADR inappropriate but the judge disagreed. The offer of ADR was only made on the Friday preceding Monday's trial, where C had complied with discovery but D has not.

**McMillan Williams v Range** [2004] EWCA Civ.294

The Court of Appeal held first that an advance on wages is not a credit agreement that has to be in statutory form. Therefore a junior solicitor who received advance wages in excess of earnings had to repay the excess to the law firm on her departure. Appeal allowed. At 1st instance mediation was advised. Both parties contributed equally to the failure so court ordered each party to bear their own costs

**Muman v Nagasena** [2000] WLR 299. CCRTF 199/0142/2

A dispute arose between the resident patron monk of a Buddhist Temple in London and the governing council and trustees. £90,000 was spent by the charity's trustees trying to deselect the patron and evict him. The matter of whether he was effectively deselected or whether a replacement council had been elected – and whether the council was entitled to possession were committed to trial, overruling the trial judge's rejection of the claim for possession. First however consent of the Charity Commissioners to the action involving interpretation of the charities constitution was required and secondly, mediation through the Charity Mediation Process was mandated by the court, both to prevent the dissipation of charity funds through needless litigation. Only if the mediation failed could the matter proceed to trial.

**Neal v Jones Motors** [2002] EWCA Civ 1730/1731/1759

Mr Neal ran a motorbike repair and supply business. He operated with the assistance Miss Jones. They lived together and she invested monies in the business. Neal was injured by a bus which severely affected his

<sup>15</sup> See also **Cape & Dalglish v Fitzgerald** [2002] UKHL 16 and the implications for mediated settlement agreements and the leading case of **Jameson v CEGB** [2000].

ability to work and expand the business. He was awarded compensation by the trial judge and the defendants/appellants challenged quantum, mainly on the grounds that business losses should have been assessed on the basis of a partnership, not as a sole trader. The appeal was partly successful. In the event the CA awarded a little short of £1,000 less than the appellants had offered to settle the dispute, but clearly on the basis that costs follow the event, Neal became liable for costs. However, at case management the court had advised mediation. Neal agreed to the proposal. The appellants refused, resulting in a two-day hearing before the C.A. The court reduced the recovery of costs by £5,000 to reflect the impact of refusing to mediate.

**Paul Thomas Construction Ltd v Hyland** 08.03.2000 CILL 6/0 /1743

A domestic builder issued s24/25 CPR applications for payment, but had failed to issue a final account to the house-owner clients. Case straddled the introduction of the CPR. The client repeatedly asked for a final account and details. Claimant's solicitors aggressively pursued payment ignoring requests for details and without waiting for the report of the defendant's Quantity Surveyor, merely noting that the QS was not RICS registered and doubting his credentials. The court dismissed the applications and at a costs hearing ordered indemnity costs, not standard costs, but with an allowance to cover the Q.S.'s fees.

**Rickards v Jones** [2002] EWCA Civ 260

The claimant's arranged to buy a house, specifying NHBC Cover which was also a mortgage requirement. The purchaser's solicitor received copies of NHBC documentation with the builder's name and registration and an offer for cover, subject to builder remaining registered with the NHBC. Some time after completion the solicitor returned the completed offer to the NHBC who rejected it because the builder was no longer on their register. The solicitor did not inform the home owners. They failed to recover for major defects from NHBC and an action was commenced against the solicitor for negligence by failing to ensure NHBC cover before completion. At first instance the action failed, the trial judge finding that since the offer was sent in after completion, it made no difference and even if the solicitor had acted negligently it had no consequence for the buyers. They appealed. The solicitor countered during appeal, but not earlier, that the offer was an open offer available for acceptance and cover therefore came into being once received by NHBC.

The C.A. stayed the action, pending the outcome of ADR which it ordered for the parties, with a non-binding recommendation that the NHBC participate in order to establish whether or not cover actually existed. Only if the ADR failed to produce a settlement would hearings be reconvened.

**Shirayama Shokusan Co Ltd v Danovo Ltd** [2003] EWHC 3006 (Ch)

Sub-lessees of the ex-London County Hall, operators of the Saatchi Galery were accused by their landlord of abuse of the lease and trespass to other areas of the Hall, to advertise their business. Danovo counterclaimed for access to disabled toilets and a corridor. Claimants applied for a Part 24 CPR Order and a s146 LPA order. Court doubted the potential of success of the s146 application since Danovo had a 20 year lease and had spent a great deal converting the premises. Danovo had however accused associates of the claimant with dishonesty. Nonetheless Danovo requested that the court stay action and order mediation. Blackburne J reviewed four cases where such orders had been made on basis of s1(4) CPR, namely **Guinle v. Kirreh**, **Kinstreet v Balmargo**, **Muman v. Nagasena**, **Tarajan v D.L. Kaye** and **Cable & Wireless v IBM**. He considered the dicta of Mr Justice Lightman in **Hurst v. Leeming** and concluded that the court had not limited ADR orders to consensual situations, and accordingly concluded that he had the power to order mediation.

The court considered the respective advantages, namely costs, time and the need for the parties to bury their differences and work together for the next 20 year against the disadvantage that the claimants did not trust Danovo after the allegations of dishonesty and their assertion that they were confident of asserting their rights (doubted by the judge) and promptly ordered mediation, stating that the mediation settlement should take costs of the mediation into account.

**SITA v Watson and Wyatt: Maxwell Batley Pt 20 Defendants** [2002] EWHC 2401 / 2025 (Ch)

Watson & Wyatt were in contract with SITA. Maxwell Batley were commissioned to do work for W&A in relation to the project. It appears that the work W&W did for SITA caused SITA significant losses which they sought to recover from W&W. W&W engaged in 2 mediations with SITA and tried to coerce MB to take part, with a view to MB making a contribution to the settlement. MB refused to take part. W&W made a \$35M settlement with SITA and commenced Part 20 CPR action against MB for a contribution, inviting MB to a

mediation shortly before trial, which MB refuses. MB in the meantime made a Part 36 payment in of £1,000 with an offer to cover W&W's costs of the Part 20 action up to the time of the payment in. W&W refused and pressed ahead with the trial. W&W lost the Part 20 action 100%, and accordingly it fell to the court to consider costs, either as standard costs or on an indemnity basis and to consider what implications rose from MB's refusal to mediate.

The court held that mediations 1 and 2 had nothing to do with W&W. They had nothing to gain and everything to lose from participating and the threatening language used to try and coerce them into attending merely exacerbated matters. Mediation 3 was far too late in the day. Therefore nothing turned on the refusals to mediate and no costs were to be deducted for the refusal.

The court then reviewed all the principal authorities on the distinction between standard and indemnity costs. The court asserted adverse conduct, beyond merely pursuing a case aggressively and persistently is required to justify indemnity costs. No adverse conduct was identified so costs at the standard rate were awarded. The payment in did nothing to alter this fact. The case of **Excelsior** followed and applied.

Finally, the court rejected an application to appeal, leaving it to the claimant to apply to the House of Lords.

#### **Thakrar v Thakrar** [2002] EWHC 1304 Civ

Kirit, one of four family members who owned Ciro Citerrio Menswear fell out with the rest of the family. He invited the others to buy him out in 1999. They initially agreed but then tried to shift the agreement to the company in 2000, which is problematical since in the absence of special circumstances, severely restricted by statute, a company cannot buy its own shares. Kirit's problems increased when it became clear the company was about to go into liquidation. In order to come out of this in funds he needed either to establish that he had preferential rights over property, which he succeeded in doing in respect of one property, or alternatively that he was a secured creditor. This was achieved by a mediated compromise involving Kirit and the administrators which was approved by a creditor's committee. The CA enforced the first claim but left the mediation agreement issue open for determination by the Insolvency Court.

#### **Walsh v Misseldine** CCRT11 99/0999/2

Walsh, the appellant claimant was injured by a car accident in 1989. Fault was admitted. It has taken 11 years for Walsh to secure a trial in respect of damages for loss of earning. The CA noted that this was a simple matter that could have been sorted out in 1993 by mediation, for which it was eminently suited. In the event, between court mistakes (two incorrect notices confirming the case was still alive) three successive claimant's solicitors, who was inept and responsible for inordinate delay, the second who did nothing at all and was ultimately struck off for malpractice, inordinate delay by the defendant's solicitor and a pace dictated by busy medical experts, the case dragged on. By the time the final solicitor took charge for the claimant the defendants were seeking to strike the case out for inordinate delay and lack of prosecution. The trial judge and an appeals judge tried to mix and match between pre and post CPR rules and eventually the case found its way to the C.A. The court, following and applying the judgement of Lord Woolf in *Biguzzi v Rank Leisure plc* [1999] 1 WLR 1926, reinstated the action and ordered it to be scheduled for trial, mainly because it would be unjust to let the defendant off scot-free, and secondly because there was no prejudice and the matter of lost earning was as easily triable then as it would have been in 1995 when it should have been tried. Surprisingly, given the previous reference to mediation, the court did not.

### **THE NATIONWIDE ACADEMY OF DISPUTE RESOLUTION**

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## CONSTRUCTION CASE CORNER

### **AWG Construction Services Ltd v Rockingham Motor Speedway Ltd [2004] EWCH 888**

When attempts to negotiate claims in respect of alleged problems with the Rockingham Speedway Race circuit and infrastructure reached an impasse, Rockingham referred three distinct claims to adjudication, the parties agreeing that all three issues be dealt with at the same time. As the adjudication progressed the basis of the claim in respect of water-holding defects to the surface of the speedway shifted, from an assertion that the foundation strata was impermeable, lacking drainage and the entire track needed to be rebuilt because it was not fit for purpose, to an assertion that drainage should be introduced between layers of specific areas of the track. The adjudicator awarded damages to cover this restatement work and damages in respect of the other claims. AWG resisted enforcement on the grounds that this was not the dispute referred to adjudication and was thus outside the adjudicator's jurisdiction, asserting that the entire decision should fail. The CA agreed that this was not the dispute as referred and should thus fail, but nonetheless, held that the other decisions could stand, since that aspect did not go to the basis of the other two decisions. This is an important case because the court provides a review of all the previous decisions regarding "What is a dispute in respect of adjudication?" and reconsiders the "cherry picking" issue yet again.

### **McAlpine PPS v Transco [2004] HT04 66**

An application for enforcement of an adjudicator's decision under Part 24 in respect of a dispute concerning an NEC Engineering and Construction Contract for the laying of gas pipes, incorporating Option 1, was refused on the grounds that there was real prospect of the defendant defeating enforcement proceeding. The application would only be finally determined by a full enforcement hearing. The defendant asserted 1) the dispute as adjudicated was narrower than that referred to the adjudicator 2) the adjudicator considered matters not put to him and 3) the defendant was prejudiced by the late submission of evidence which he did not have time to fully respond to.

The claimant sought to recover interest on non-certified compensation events. The reference contained no details of the many asserted compensation events. The respondent asserted that the reference was based on an assertion of automatic entitlement to interest and that having advised that this was not the case, the adjudicator had invited the claimant to prove the entitlements, which was different to the dispute referred and further that there had subsequently been insufficient time to respond to the evidence thereafter provided. The court agreed with the respondent and declined to order enforcement.

### **Specialist Ceiling Contractors v. ZVI Construction [2004] 4T-0006 1 Leeds**

The claimant disclosed the existence of, but not details of, a rejected without prejudice offer. The defendant resisted enforcement of the adjudicator's decision alleging that knowledge of the existence of settlement negotiations prejudiced the mind of the adjudicator and influenced his decision. The adjudicator had made it clear that he had paid no attention to the matter and that he assumed that settlement negotiations are par the course in most adjudications but that no inference in respect of admissions of liability could be drawn from the fact that they had taken place. The court approved the approach of the adjudicator and held that in this instance there had been no bias and the decision should be enforced. However, as a decision based on its facts, a similar revelation could result in a decision being set aside if the adjudicator does not similarly spell out how he has dealt with the disclosure.

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### LINKS AND COMMENTARY ON LATEST CASES

The next edition of ADR news will carry commentary on the following recent construction adjudication cases. In the meantime, a short bullet point commentary and links to the full judgements are available under Adjudication Cases on the links page of the NADR Web Site.

**Alston v Jarvis (No1 & No2** [2004] EWHC 1232; [2004] EWHC 1285

**Amec Capital Project Ltd v White Friars City Estate Ltd** [2003] EWHC 2443 : [2004] EWHC 393

**Barnes & Elliot Ltd v Taylor Woodrow Holdings Ltd.** [2004] CILL 2057 ; [2003] TCC

**Bath and North East Somerset District Council v Mowlem Plc .** [2004] EWCA Civ 115

**Branlow Ltd v Dem-Master Demolition Ltd.** [2004] A904/03 Lothian

**Buxton Building Contractors Limited v Governors of Durand Primary School .** [2004] EWHC 733

**Citex Professional Services Ltd v Kenmore Developments Ltd.** [2004] A1195/02

**Conor Engineering Ltd v Les Constructions Industrielles de la Méditerranée (CNIM).** [2004] EWHC 899

**Delta Electrical Ltd v P.O'Neil Electrical Ltd.** [2004] Adj.Soc.News March

**Dinkha Latchin v General Mediterranean Holdings** [2003] EWCA Civ 1786 : [2004] EWCA Civ 52

**Earls Terrace Properties Limited v Nilsson Design Ltd.** [2004] EWHC 136

**Highland Council** [2003] ScotCS 221 : [2004] P11 28/03

**IDE v R.J.Carter.** [2004] HT 03 454

**Ritchie Brothers (PWC) Ltd v David Philp.** [2004] ScotCS 94

**Stephen Donald Architects v Christopher King** [2003] EWHC 1867 : [2004] EWCA Civ 52

**Westminster Building Company Ltd. v Beckingham .** [2004] EWHC 138

### ADR FOR CONSUMER CREDIT

The new CIVIL JUSTICE COUNCIL web site, url, <http://www.adr.civiljusticecouncil.gov.uk/Home.go> contains the text of a consultation document on ADR for Consumer Credit. It is interesting first to note that none of the principal ADR service providers is listed amongst the consultees. Secondly, it would appear that the favoured option is to introduce some form of adjudicatory process, subject to an appeals process, which otherwise produces binding decisions. Two contradictory aims are predicated, namely that the process should be adversarial but at the same time poor presentation should not jeopardise the outcome, particularly for unsophisticated claimants of limited means. How can the process be adversarial and inquisitorial at the same time. The draftsmen of these proposals would do well to take a close look at the way that the courts have remodelled construction adjudication and ask themselves how the courts will deal with outcomes of this proposed process. It is submitted the answer is likely to be *"WITH GREAT DIFFICULTY"* if the decision maker leans over backwards to protect the small man who has not discharged the burden of proof and has thus failed to make his case.

Whilst the governing body would be independent it would nonetheless be a government body. It is clear that new forms of tribunal are being introduced by the Government under the guise of ADR. There is a danger that any concept of ADR as an alternative to State controlled processes is swept away by this form of branding and that ADR is being used as a way of referring to alternatives to the main stream courts. The disadvantages of this are obvious. Rather than introduce specialist tribunals which fall under the remit of the Council of Tribunals a wide range of unregulated bodies could spring up, controlled by committees which do not reflect the experience, knowledge and understanding of the traditional ADR community but which trades off its reputation for peer review, impartiality and expertise. In addition, such bodies may well introduce their own training and accreditation procedures and exclude main stream ADR practitioners completely.



## LLM/Postgraduate Diploma/Postgraduate Certificate *Commercial Dispute Resolution*

### About the Course

The primary aim of the course is to provide a stimulating and challenging intellectual environment where legal education crosses new frontiers, exposing students to innovative methods of resolving commercial disputes, as well as understanding the philosophy behind the human desire to dispute, so equipping them to increase their personal and professional development.

The course aims to prepare students for professional practice in commercial dispute resolution through a 'learning and doing' approach, and in particular to represent clients in Arbitrations, Adjudications, Conciliations and Mediations. Students can expect to be faced with simulations of the types of dispute in which they could be involved.

### Course content (*Credits in Brackets*)

#### Core Modules:

- Substantive and Procedural Law of Arbitration (20)
- Dispute Resolution (15)
- Ethics in ADR Practice (15)
- Private International Law (10)
- Research Skills (10)
- Obligations (10) (ICE 1)\*
- Dissertation (60)

#### How will you study

The scheme will be taught via a combination of lectures and small group activities with the emphasis on the latter. Students will be expected to have prepared thoroughly and to participate fully in all teaching and learning activities. Much of the assessment during the scheme is continuous, practical and skills based. Great importance is placed on modern methods of teaching and the use of technical facilities, in particular video recording is used extensively in advocacy, mediation and conciliation training and skills teaching generally.

#### Optional Modules:

- Public International Law (10)
- Litigation Strategies (10)
- Admiralty Law (10)
- Carriage of Goods (10)
- Commercial Law (10)
- Construction Practice (10) - (ICE 2/3)\*
- Construction Law (10) (ICE 2/3)\*
- Employment Law (10)
- Environmental Law (10)
- Family Law (10)
- Finance Law (10)
- Health Law (10)
- Trade Law (10)
- Marine Insurance (10)

\* ICE 1,2 and 3 can be studied alone or as part of the LLM

#### What will I get for completing the course : An LLM Degree plus :-

The LLM is fully validated by the Chartered Institute of Arbitrators, enabling successful graduates to apply for membership status of the CIArb. By successfully completing an additional Arbitration Award writing course and examination, graduates will have fulfilled all *academic* requirements for fellowship status (fellowship is also subject to fulfilment of the pupillage requirements of the CIArb).

Graduates will receive practice certification for mediation practice. Adjudication practice certificates apply to the relevant construction modules. Whilst the course covers the ICE syllabus and the University of Glamorgan is an examination centre for ICE, the external ICE examinations must be successfully completed in addition to the LLM in order to satisfy the requirements of the ICE.

The course may be studied full time over one year, or part time over two years.

#### Full Time Mode

Semester 1:	January 2005 –	June 2005	60 Credits
Semester 2:	October 2005 –	January 2006	60 Credits
Semester 3	January 2006 -	June 2006	60 Credits

Applications to study individual modules are welcomed. In appropriate circumstances Accreditation for Prior Learning (APL) is available.

#### Part Time Mode

Semester 1:	January 2005 –	June 2005	30 Credits	Semester 2:	October 2005 –	January 2006	30 Credits
Semester 3:	January 2006 –	June 2006	30 Credits	Semester 4:	October 2006 –	January 2007	30 Credits
Semester 5	January 2007 -	June 2007	60 Credits				

For further information or to receive an application form telephone ++44 (0)1443 483006.



# UNIVERSITY OF GLAMORGAN

## C.I.Arb Fellowship ARBITRATION AWARD WRITING COURSE / EXAMINATION



London

In association with the

School of Law

### CHARTERED INSTITUTE OF ARBITRATORS FOR GRADUATES OF THE UNIVERSITY OF GLAMORGAN LL.M IN COMMERCIAL DISPUTE RESOLUTION

#### Dates

Monday 6<sup>th</sup> September to Friday 10<sup>th</sup> September 2004

Classes will take place Monday to Thursday 9:00 – 5:00 with the award writing exercise taking place 12:00 – 4:30 on Friday.

#### Fees

The fees for the course are £600 inclusive of course materials, morning and afternoon beverages and mid-day finger buffet, and an evening meal on Friday after the course.

#### Course Text

*Berger Claus Peter – Arbitration Interactive.* -available from Peter Lang AG over the net at [www.peterlang.com](http://www.peterlang.com)

#### Applications and Administration

Helen Merchant, University of Glamorgan Commercial Services.

[HLMercha@glam.ac.uk](mailto:HLMercha@glam.ac.uk).

#### GRADUAND NOTICE

Mr Gareth Rowland Thomas, Mr Paul Lynch, Mr Steve John, Mr Nick Turner and Mr Keith Perry successfully completed the course and award writing examination in September 2003

STOP PRESS :  
COUWENBERG V VALKOVA [2004] EWCA Civ 676

During the course of an appeal in respect of an action challenging the validity of a will, the Court of Appeal whilst remitting the case back for trial strongly recommended that the parties resort to mediation. The Court made it clear that contrary to academic comment on the Halsey decision that allegations of fraud and deceit are not a bar to mediation and felt that by contrast the instant dispute was crying out for mediation. Furthermore, the court was highly critical of the Legal Services Commission for failing to support the process, advising that in appropriate circumstances the LSC could limit legal aid to mediation costs leaving a claimant to fund the difference if they refused to mediate. If the LSC adopts this recommendation, the number of civil cases which are referred to mediation should rise dramatically, since if the party could afford to fund a trial legal aid they would not be eligible for legal aid in the first place.

THIS NEWS LETTER IS AVAILABLE AS A FREE DOWNLOAD AT

<http://www.nadr.co.uk>

PLEASE FEEL FREE TO PASS THE URL ON TO INTERESTED FRIENDS AND COLLEAGUES

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