

NEWSLETTER

MEDIATION

INTERNATIONAL BAR ASSOCIATION LEGAL PRACTICE DIVISION



the global voice of
the legal profession

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FROM THE CHAIR

Become involved!

Siegfried H Elsing

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With more than 1,200 members, the Mediation Committee is the premier forum in which international mediation is discussed among lawyers. Our interest and work focuses on laws, practices and procedures relating to the mediation, conciliation and negotiation of transnational disputes as well as other alternative dispute resolution (ADR) processes.

This is an appeal to all of you to participate even more actively in the various activities of the Mediation Committee.

The opportunities to participate are manifold:

The UNCITRAL Model Law Subcommittee chaired by Birgit Sambeth Glasner and John Michael Richardson has compiled a questionnaire on the UNCITRAL Model Law which is reproduced in this newsletter and is available to our members with an invitation to study it, fill in the answer sheet and return it. This will permit the subcommittee members to prepare a short commentary on the UNCITRAL Model Law based on your comments, observations and experiences to be presented at the IBA Annual Conference in Singapore in October of this year. Needless to say, the invitation to participate is not restricted to the return of the answer sheet; volunteers are welcome also to take an active part in the preparation and drafting of the report. Please contact either Birgit Sambeth Glasner or John Michael Richardson (sambeth.glasner@altenburger.ch or lawsome@gmail.com).

Continued overleaf

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Our Vice-Chair, Jon Lang, is in the process of completing our list of national representatives to act as liaisons between the Committee and those interested in mediation in the individual countries. Other responsibilities of a National Representative would be to identify statutes and other legal materials from his or her country that should be cited on the Committee's website. If you are interested in serving as national representative for your country, please contact Jon Lang (jl@jonlang.com). The Committee will make an effort to rotate these positions for countries where a number of members express interest, so please be patient if someone else is designated initially for your country.

David Burt continues to serve as the Mediation Committee's corporate counsel liaison, responsible for coordination with the IBA's Corporate Counsel Forum and for encouraging a corporate counsel to participate in the work of the Committee.

The Committee will continue to establish relationships with organisations around the world that provide mediation administration, services, education and resources, and to make information about those providers available to our members. The Committee does not intend to endorse or rate these organisations but providers interested in participating in this relationship are encouraged to contact Senior Vice-Chair, Thierry Garby (t.garby@garby.com).

Moreover, the Mediation Committee has designated James Boykin as its liaison with the IBA's Young Lawyers Committee. Members interested in working with Jim to encourage participation in the Committee's work by young lawyers are invited to contact him. Most recently, John Townsend and Margrete Stevens took the initiative of starting a new subcommittee to explore the idea of mediation of disputes to which a state is a party (State Mediation Committee).

Furthermore, we have a record number of five sessions slated for the IBA meeting in Singapore in October 2007. The main programme will consist of two half-day sessions for which the Committee has the principal organisational responsibility. The first programme, entitled 'Mediation as a face-saving device', is a joint session with the Asia Pacific Forum which will be chaired by current Committee Senior Vice-Chair, Petria McDonnell. The second programme, called 'Deal mediation – the use of mediation in the course of M&A transactions', is jointly organised with the Business Organisations Committee and the Corporate Counsel Forum and

will be chaired by Thierry Garby. Speaker slots are still available and interested members are invited to contact the respective session chairs (petria.mcdonnell@mccannfitzgerald.ie and t.garby@garby.com).

There will also be a joint dispute resolution programme on 'Enforcement of dispute resolution clauses'. This joint programme by the constituent committees of the dispute resolution section will focus on the interpretation of these clauses, exploring their pitfalls and strengths. Particular focus will be on med/arb clauses.

Moreover, there will be two sessions in which the Mediation Committee participates in a supporting function, one entitled 'Pursuing and defending discrimination claims in the workplace' together with the Discrimination and Gender Equality Committee and the other on 'Mediation in aircraft accidents' together with the Aviation Committee.

See page 5 for more details on all of these sessions.

Recent events include the Fordham Conference on International Arbitration and Mediation, co-sponsored by our Committee, which took place on 18–19 June 2007 in New York.

I am also glad to report that the Mediation Breakfast held on the occasion of the 10th Annual Arbitration Day in Madrid on 2 March 2007, was attended by 70 participants. Fernando Pombo, the incumbent IBA President, honoured us with his presence and gave a very inspiring talk on the use of mediation in Spain.

I hope you will enjoy this issue of our Committee's Newsletter which was so successfully launched by Jon Lang, who is now followed by Babak Barin as editor. Please support Babak by sending articles and contributions for the next issue (bbarin@bcf.ca), which will appear in December.

Contributions to this Newsletter are always welcome and should be sent to the Publications Officer, **Babak Barin**, at the address below:
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Participate . . .

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I am delighted to have been given the opportunity to oversee the growth of this newsletter for the next two years. Mediation, more than any other type of dispute resolution, is experiencing growth internationally among practitioners, in-house counsel and businesspeople. This issue of the Mediation Committee Newsletter is demonstrative of that growth. Like in all aspects of life, growth comes with discovery of new facts and interesting challenges. But as the English novelist George Eliot put it, ‘the strongest principle of growth lies in human choice’. This issue of the newsletter exemplifies how the world of mediation, or conciliation, as some may refer to it, offers its users news, facts, interesting challenges and best of all, choice.

The reader’s journey in this issue begins under the helm of a new Chair, Siegfried Elsing, who brings with him a fresh approach to navigating this Committee. The title of Siegfried’s note from the chair is very telling of what he considers to be important during his mandate – helping this already very active and large committee to grow by enlisting the help and input of those who have an interest in the subject. ‘Become involved’, Siegfried Elsing writes; please do participate in this most interesting endeavour.

The first of the contributions in line in this issue is Tom Stipanowich’s instructive piece entitled “‘Real time’ strategies for relational conflict’. In a very artful and eloquent manner, Tom explains how today, ‘more and more disputants and counsel are recognising that less is usually more – especially when the emphasis is on maintaining relationships or relational systems’ and how the search for the ‘short but sweet’ is as old as conflict. Tom’s contribution looks at real time disputes in the employment context, point-of-service intervention in the health care system and innovative dispute resolution in the construction field. Tom concludes by noting that doing things the same old way may no longer do.

The following three contributions highlight the reasons for the rising popularity of mediation (described by Michael Barbee as offering ‘confidentiality’ and ‘party control’), the rise and rise of ‘mediation as it was then and now’ (where Paul Jacobs observes that ‘if it has taken 500 years for our legal rules of law to develop through the judicial systems, it has probably taken only 500 weeks for the legal community to accept and build upon mediation as an interest-based dispute resolution

process’) and finally how ‘assisted deal making’ can help untangle some of the very complex relationships parties have to live with in today’s fast-paced world (Edward Moore and Charles Middleton-Smith). To close this portion of the newsletter, Sebastián Rodrigo offers an intriguing perspective on mediation in Argentina.

The reader then is offered five fascinating contributions from Europe. The first, Ron Bradbeer’s examination of the draft European Union Directive on Mediation, opens the door for Andrew Cooke to look again at the landmark judgment in *Halsey v Milton Keynes General NHS Trust*. Andrew explains how a recent English decision (*P4 Limited v Unite Integrated Solutions plc*) ‘represents another step forward in judicial support for ADR (and particularly mediation)’ and how it adds yet another ‘nail in the coffin of “hardball” litigation tactics’. The report from Portugal is also promising. In a focused narrative of ‘Employment mediation trends in Portugal’, Manuel Barrocas and Claudia Santos Cruz describe how the Employment Mediation System (EMS) Protocol signed by the Portuguese Justice Department and a number of entities representing private industry sectors, including the General Union of Employees, is intended to bolster the use of mediation in employment disputes in that country. Carlo Mosca then offers a contribution from Italy, a ‘solitary violins’ piece which is most telling about mediation in Italy. In an era fuelled by electronics, our European Union tour ends with eBay, where Justin Patten looks at one of the most innovative of dispute resolution mechanisms on line. Justin’s informative (and for the consumers among us, very relevant) piece defies the 30-year versus 17-year strategy referred to in Ron’s draft EU Directive analysis. Justin’s short article exemplifies that in the world of electronics and online commerce, time and speed are yesterday’s news.

The next three contributions look at multi-step dispute resolution procedures and how a professional’s previous involvement as a mediator does not necessarily (according to Gerhard Wegen and Christine Gack) disqualify that person from acting later as a judge or arbitrator in that very case. Indeed, Gerhard and Christine’s position is endorsed by Article 12 of the UNCITRAL Model Law on International Commercial Conciliation which states that, ‘unless otherwise agreed by the parties’, the conciliator shall not act as arbitrator

in respect of a dispute that was or is the subject of conciliation proceedings or in respect of another dispute that has arisen from the same or related contractual or legal relationship. Finally, Jason File's examination of the enforceability of 'multi-step dispute resolution clauses' in the United States is a useful centrepiece for a more balanced perspective on what works and doesn't in the mediation realm.

The last editorial part of this issue is called 'Amanda's corner'. This corner is created for those who enjoy debate on topics out of the ordinary. For example, in this issue, Amanda Bucklow (the pioneer and the first author of Amanda's corner) has chosen to write about

'Mindfulness: expanding the use of mediation in public law and policy making'. Amanda's interesting piece was then presented to Alan Limbury in Australia for comments. I invite you to read these contributions and offer your thoughts for publication in the next issue. In the meantime, Amanda is hard at work looking for another subject for debate.

This first 2007 issue of the Mediation Committee Newsletter closes with a questionnaire that every reader should peruse. The questionnaire and the directions given in it give the reader an excellent opportunity to 'Become involved' and an easy path to 'Participate...'

I hope you will enjoy this issue.

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Singapore 2007

The Mediation Committee is planning to hold the following sessions at Singapore, 14-19 October 2007

Dispute Resolution Section

Dispute resolution clauses

At the time they are drafted, dispute resolution clauses usually receive little attention. Someone just decides that it would be a good idea to refer to arbitration or mediation or a particular forum without having much sense of either. This joint programme by the constituent committees of the Dispute Resolution Section will focus on the interpretation of these clauses, exploring their pitfalls and strengths. International experts will examine techniques to attack and defend dispute resolution clauses. Topics will include:

- What does mandatory mediation really mean? How can it be enforced as a matter of practicality?
- What, if any, are the differences between exclusive and non-exclusive clauses?
- How do you enforce one option over another where the dispute resolution clause gives the parties a choice between different dispute resolution mechanisms?
- Can you avoid attornment clauses, particularly those in favour of 'unfair' jurisdictions?

0930 – 1230 MONDAY

Committee sessions

Pursuing and defending discrimination claims in the workplace

Joint session with Discrimination and Gender Equality.

Despite efforts by organisations in many jurisdictions to embrace diversity and multiculturalism, discrimination claims by employees remain prevalent. This programme will consider how companies can take effective measures to prevent and resolve such claims before they result in costly litigation and adverse publicity. A panel of judges, in-house counsel and private practitioners will consider the steps to prevent the rise of disputes and will discuss how to respond to media and press enquiries with the use of public relations consultants. The panel will also consider pre-action protocols in different jurisdictions prior to commencement of proceedings disclosure and evidential issues such as the EU Burden of Proof Directive in facilitating claims. Consideration will also be given to mediation of workplace discrimination claims by HR departments during the employment relationship and how mediation is increasingly the subject of advice from private practitioners.

0930 – 1730 TUESDAY

Mediation in aircraft accidents

Joint session with Aviation Law.

This session will address the role of mediation in aircraft accidents for quick disposal of cases bereft of the intricacies of a civil trial. In the next 20 years, air travel is estimated to be double what it is now. As a result, the need for cost-effective and time-efficient resolution of disputes has gained momentum, particularly as various parties are involved in a dispute arising out of an aircraft accident. The speakers represent these parties, which include the victims, the carrier, the manufacturer and the insurer, and will deliberate on a variety of liability issues such as strict liability, damages, tortious liability, indemnities, warranties and limitation of liability clauses.

0930 – 1230 TUESDAY

Mediation as a face-saving device

Joint session with the Asia Pacific Forum.

It is not uncommon that in the course of arbitrations or state court proceedings, the relationship between the parties deteriorates solely due to the fact that one of the parties completely or partially prevails, which in the view of the defeated party is connected with a loss of face. This might also be one of the reasons why in some legal cultures the out-of-court settlement is highly preferred over arbitrating or litigating the dispute. This session will highlight how mediation can assist parties in resolving their disputes without any of them losing face. The session is held in cooperation with the Asia Pacific Forum, which will contribute to the elaboration of face-saving devices in the area of dispute resolution.

0930 – 1230 THURSDAY

Deal mediation – the use of mediation in the course of M&A transactions

Joint session with Business Organisations and the Corporate Counsel Forum.

Almost everyone operating in the area of M&A will have experienced the situation: the parties are in deep disagreement over one or several issues so that the negotiations are stuck. This situation might be handled by retaining a mediator who assists the parties in finding their way out of the deadlock, and it should be noted that there are additional scenarios in which a mediator might be helpful. This session is intended to identify situations in the course of M&A transactions in which the parties should consider the services of a mediator. It will also discuss how the respective mediation proceedings should be structured in order to lead to favourable results.

1430 – 1730 THURSDAY

'Real time' strategies for relational conflict

Thomas J Stipanowich

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A recent bestseller explores 'thin-slicing' – the ability of the human subconscious to identify patterns in situations and to make responses based on very quick or short 'slices of experience'.¹ The brain develops such shortcuts as a means of enabling us to live a normal life; at the same time, 'thin-slicing' has significant implications for the analysis and resolution of conflict. Summaries of psychological studies demonstrate, among other things, that too much information may actually cloud judgment and undermine the accuracy of conclusions.² The point is that by developing a facility to make relatively quick judgments based on selective key data one may avoid considerable unnecessary effort and perhaps even achieve a better outcome.³

The emergence of mediation and other informal approaches for the efficient, effective resolution of conflict represent opportunities for 'thin-slicing' that are revolutionising public and private dispute resolution. They are also challenging the primacy of litigation and arbitration with their emphasis on extensive information exchange and weighty procedure. Today, more and more disputants and counsel are recognising that less is usually more – especially when the emphasis is on maintaining relationships or relational systems.

The search for the 'short but sweet' is as old as conflict. Chronicles of commercial trade tell of the famed medieval merchant courts of 'pie powder' – so-called in the English vernacular because justice there was 'done as speedily as dust can fall from the foot'. In order to accommodate the needs of travelling tradesmen, injuries had to be 'complained of, heard, and determined, within the compass of one and the same day'.⁴

Today, the need for speedy and effective intervention has promoted the evolution of a wide range of strategies in very different relational settings, from integrated conflict systems in the workplace to point-of-service ombudspersons (ombuds) in hospitals to expedited dispute resolution on construction projects. Although different in various ways, these strategies are all aimed at resolution of conflict within the relationship, in 'real time'.

The impetus for 'real time' approaches

Unresolved conflict takes time and energy from other pursuits. It often escalates, with parties resorting to heavier, more contentious tactics as they become more committed to the struggle.⁵ Unresolved conflict also tends to divert attention from business or personal pursuits and even cause physical or psychological harm. It can undermine relationships or frustrate their central aims.⁶ These realities underlie efforts to nip conflict in the bud in different relational contexts.

'Real Time' strategies for relationships involve active intervention to address issues or resolve conflict in its early stages. The 'intervener' is a person – often but not always independent of those in the relationship – with appropriate authority and skills to bring things to a successful and early resolution. The intervener's authority derives from his or her personal reputation or notability, position, experience in a profession or field, or proven skills as a facilitator or problem solver.⁷

Successful Real Time approaches may accomplish a variety of objectives, including addressing specific issues or concerns raised by a party, avoiding conflict, improving communications, or resolving disputes quickly and cost-effectively. They may also avoid lengthy adjudication and related costs. By accomplishing these objectives, Real Time intervention helps to support or reinforce contractual relationships, or 'relational systems' such as trade and professional associations. One way or another, such strategies are designed to work in harmony with the pace and rhythm of the relationship, and to meet the ongoing needs of parties for an early decision, guidance or facilitation. In this way, Real Time approaches differ dramatically from litigation, 'mainstream' binding arbitration, or even some lawyer-driven mediation processes that ignore relational concerns and work against relationships.

Forms of real time intervention

Real Time strategies embrace a spectrum of approaches focused on rights or interests. Rights-based (or 'justice') approaches involve an abbreviated adversarial or inquisitorial process aimed at producing a third-party decision or determination. They include summary adjudication (such as expedited binding arbitration); 'preliminarily binding' adjudication; and 'strong

evaluation' in which the intervener's determination is not legally binding but may be highly persuasive to the parties.

'Strong evaluation' may also include forms of conciliation or mediation in which parties receive authoritative guidance from a 'wise elder' or other third party, like the age-old systems of community conciliation that prevail to this day in China. Of course, conciliation may also focus on personal, organisational or mutual interests, like mediation (and the terms are often, but not always, used interchangeably). For this reason and because they subsume a broad array of styles and techniques to facilitate greater customisation and control, mediation and conciliation seem especially well suited to Real Time applications supporting relationships. Interest-based or 'problem-solving' intervention may take a variety of forms besides mediation, including listening, providing or receiving information, making referrals to other resources and giving other forms of assistance.⁸

Ombuds represent a third form of intervention, distinguished by a flexible, multi-faceted and specialised role within companies, universities and other relational systems. Working within organisational settings, ombuds serve primarily to address issues between individuals and the organisation, or between those within the organisation. Acting outside the normal management hierarchy, they may give voice to the concerns of the individual, serve as advocates for a fair process or for the resolution of issues and seek to vindicate rights.

Real Time intervention may be preceded by direct discussions or negotiations between parties. It may be combined with a facilitated partnering approach, or an alliancing arrangement. It may be followed, if need be, by more formal or elaborate dispute resolution, including arbitration, litigation, or 'legalised' mediation after extensive information exchange.

'Real Time' in employment: the evolution of integrated systems

In the United States, Real Time approaches are most fully developed in the non-unionised employment arena. A variety of factors including a more mobile and educated workforce, increasing emphasis on individual rights and greater expectations for fairness and happiness, corporate emphasis on cost control, improved employee relations, organisational health and equal opportunity imperatives played a part in the evolution of a spectrum of internal and external 'appropriate dispute resolution' approaches.⁹

A number of large organisations have developed multi-pronged, integrated conflict management systems, sometimes with input from the employee 'stakeholders'. Although they vary considerably in detail, these systems typically include both 'problem-solving' approaches that focus on the interests of disputants as well as 'justice' options that address rights

and obligations.¹⁰ The former afford employees avenues outside the formal grievance process in which problems and concerns may be addressed constructively. Although it may be appropriate for an aggrieved employee or manager to resort to multiple processes *seriatim*, some systems provide flexibility in the choice of processes and the order in which they are used. The more sophisticated programmes tend to offer 'access points' for people of varied ethnicity and gender. An organisational ombudsperson may be employed to serve in a neutral capacity outside the usual management structures to address any workplace concern.¹¹ Ideally, conflict management is centred not in the department of human resources and the legal department, but 'embedded' in the corporate culture through line managers who understand it is their job to avoid unnecessary problems through effective communication and active listening.¹²

One of the first integrated workplace programmes was developed by Brown & Root in the early 1990s. That programme, which began with input from corporate employees and managers, is a flexible system founded on principles of fairness, due process and freedom from retaliation. Four 'levels' of process options begin with parallel interest-based approaches (an open door policy involving communications with supervisors trained in listening skills, contact with the personnel office or corporate employee relations, or off-the-record calls to a hotline). Level two includes informal mediation by internal neutrals; levels three and four involve resort to external mediation or arbitration for legally protected rights (with corporate financial support for legal consultation by the complainant).¹³

Brown & Root and other companies employing integrated programmes tend to report that the great majority of workplace issues and disputes are resolved by informal means; relatively few matters reach adjudication.¹⁴ For example, of 800 internal workplace complaints filed by employees in one Maryland-based corporation in 2002, only twenty resulted in formal complaints. Of the latter, all but two were resolved short of litigation or arbitration.¹⁵

A 2002 survey of workplace conflict management practices among large organisations by the CPR Institute reveals the wide diversity and richness of extant programmes.¹⁶ Although the goals of these initiatives vary, one corporate ombudsperson explained that his company developed its programme to move from a 'conflict-averse' culture to one in which people would be encouraged to 'bring forth not only salary issues or where their office was, but challenges they encountered in their work' in order to encourage active problem solving in the workplace.¹⁷

Integrated workplace systems exemplify the varied benefits of programmes aimed at managing conflict in relational settings. A recent study of Maryland businesses suggests, however, that most organisations have yet to develop sophisticated conflict management programmes in the workplace.¹⁸

Point-of-service intervention in the health care arena

Most US residents would probably agree that the modern health care industry, with which most individuals must sooner or later form relationships, often lacks the 'bedside manner' of the old family physician. The modern medical 'business' is often portrayed as caring more about self-protection than the well-being of patients.

This was the message some heard when one of the largest health management organisations (HMOs) found itself on the losing end of a high profile decision by the California Supreme Court in *Engalla v Permanente Medical Group*.¹⁹ The decision denied enforcement to a pre-dispute agreement requiring patients to submit medical malpractice claims against Kaiser Permanente to binding arbitration. *Engalla* painted a particularly troubling picture: the HMO appeared to be manipulating a proprietary private dispute resolution system, including an internal arbitrator selection process, to delay resolution of grievances. What was portrayed as a quick and efficient path to a remedy became a tale of justice denied. In the wake of *Engalla*, a blue ribbon commission set up by Kaiser recommended a wholesale revamping of the company's arbitration programme with independent administration.

Kaiser now operates with a modified arbitration system. Of much greater significance, however, is Kaiser's new HealthCare Ombudsman/Mediator (HCOM) programme, a flexible and informal approach aimed at early, straightforward and informal resolution of conflicts and challenging circumstances in the healthcare setting. The HCOM programme may represent the cutting edge of conflict management in the medical arena, aiming at the communication barriers that get in the way of quality care and patient safety.²⁰

The Kaiser HCOM system is based on a prototype developed at the National Naval Medical Center in Bethesda, Maryland in 2001. The system designer had originally proposed a programme for mediating patients' legal claims against the Center, but when the idea was rejected she moved the concept 'upstream'. The resulting programme centres upon the person of an ombudsman/mediator positioned to hear patient concerns and complaints in a confidential setting, prior to the onset of litigation. Like many other kinds of institutional ombuds, the HCOM serves as an 'advocate for fair process' who facilitates earlier, more open communications between patients, their families and the health care system – opening the door not just for monetary settlements, but for apologies and systemic improvements that may mean as much or more than money. At the Naval Medical Center, the presence of a trained, experienced HCOM produced extraordinary result: according to the designer, hundreds of problems were successfully resolved with virtually no lawsuits and more than 80 per cent required no more than ten hours of effort by ombuds.

The Kaiser HCOM system was initiated in 2003 and has been implemented nationwide with a cadre of trained HealthCare Ombudsmen/Mediators providing services. It appears that several thousand cases have been managed by the HCOMs, producing early settlements, reduced claims and greater levels of satisfaction for patients and medical care providers. Although the HCOM programme has proven very successful at Kaiser, it remains exceptional among health care organisations. Because HCOM programmes require greater transparency, more rigorous monitoring, open reporting, and a commitment to systems improvement, they are incompatible with the culture of defensiveness and the litigation mindset prevailing in many companies. The programme's byword is 'do the right thing' and represents a cultural shift from 'deny and defend' to a more compassionate and honest response when unexpected adverse outcomes occur, including making apologies for mistakes by caregivers. This allows for open communication between patients and providers, acknowledgment of what happened and enhancement of patient safety through an organisational commitment to quality improvements in healthcare delivery.

As with any provider-sponsored system, it is reasonable to enquire whether the rights and interests of patients (including impartial and independent intervention, appropriate confidentiality and informed consent) are and will be effectively served. On its face, however, the HCOM programme appears to be a highly desirable template for engendering straightforward integrative solutions to problems in the patient/provider relationship.

Innovation in the crucible of conflict: real time strategies for construction

Delay in resolving conflict on the construction site can divert attention from the project, adversely affect relationships, delay or disrupt the job, lead to escalation and protraction of conflict and increase stress.²¹ Motivated by these realities, the global construction industry has long served as a laboratory for the development of processes aimed at early, effective resolution of conflict.²²

Two important developments in the management of construction conflicts are the dispute review board, or DRB,²³ and the English procedure of 'statutory adjudication'.²⁴ Both entail submission of construction project disputes at the earliest practicable time to an authoritative third party for a nonbinding preliminary decision. The idea is that the standing and expertise of the decision maker will motivate a quick resolution of the dispute, avoid prolonged conflict and obviate the need for traditional binding arbitration or litigation.

DRBs are apparently highly successful in settling disputes without further arbitration or litigation. According to the Dispute Review Board Foundation, the

leading advocacy group for the process, DRBs have achieved an extraordinary level of success, with more than ninety-six per cent of cases submitted to boards resulting in settlement and avoiding arbitration or litigation.²⁵ It is often explained, moreover, that the very presence of a DRB on a project acts as a prophylactic with respect to controversies, leading parties to think carefully before putting forward claims. Although there is little quantitative evidence linking DRBs to lower project costs and fewer delays and disruptions, industry perceptions of the DRBs tend to be very positive;²⁶ a number of public contracting authorities are convinced of their value and committed to their use.

As of 2006, DRBs had been employed on more than 1,300 projects, including many major infrastructure projects, and were credited with directly resolving almost 1,600 disputes.²⁷ In developing dispute resolution programmes for the nation's largest construction project, the Boston Central Artery/Tunnel Project, authorities believed DRBs were clearly more suitable than binding arbitration, which was viewed as too lengthy and cumbersome. They chose instead to establish standing DRB panels for all projects over \$20 million. Appointed at the beginning of the project, each panel made regular visits to the project site to conduct periodic reviews of potential problems, claims or disputes and to check the status of outstanding claims. Upon request, they provided nonbinding advisory decisions on the claims.²⁸ DRBs are being used on major projects around the globe; and international financial institutions are now mandating the process use on large infrastructure projects.²⁹ The International Chamber of Commerce (ICC) recently published its own Dispute Review Board documents.³⁰

The potential impact of an abbreviated, preliminary expert decision making process on the landscape of conflict resolution is revealed in the extraordinary growth of 'statutory adjudication' in Britain.³¹ The procedure, which was established as a required method for resolving various project payment disputes by the Housing Grants, Construction and Regeneration Act 1996,³² consists of a very short review and decision making process. Given the temporal limitations, adjudication is necessarily 'rough' justice – as one English QC puts it, it may be 'little more than a gut reaction' to the dispute.³³ Moreover, under the law the adjudicator's determination is only preliminary and may be taken to binding arbitration or litigation. Nevertheless, the 'vast majority' of adjudication decisions are accepted by the losing parties.³⁴ One authority reports that 'well over 80% of the adjudication decisions are simply accepted, with the losing party content that it has had a fair chance to put its case to an independent tribunal'.³⁵ Explains one judge, 'The clear message appears to be that in broad terms the industry is content with adjudication'.³⁶

Looking ahead: lessons for lawyers

The advent of Real Time strategies of intervention in relational conflict presents challenges for legal counsellors and advocates. For example, statutory adjudication is reported to be among the primary reasons for the dramatic reduction in construction litigation and arbitration in the UK.³⁷ What began as a 'quick, enforceable, interim decision . . . subject [to] arbitration or litigation . . . is now a mainstream post-contractual method of dispute resolution',³⁸ with one QC estimating the decrease in arbitrations over the last decade as 'something in excess of one third'.³⁹ Its success has led the Government to find ways to encourage even greater use of the process, further reducing the amount of arbitration and litigation.⁴⁰ Today, British lawyers are finding that even their broader roles as advisers and counsellors have been effected by adjudication's impact on construction project dynamics.⁴¹

What are legal counsellors and advocates to do? One possibility is to find new roles as participants in Real Time processes: lawyers in the UK are increasingly employed as 'adjudicators'⁴² and as experts in adjudication.⁴³ In the United States, the process skills of lawyers are being recognised as valuable assets for DRBs.

There are, however, broader lessons to be drawn. The most fundamental is that clients have a wide variety of interests, needs and goals that lawyers should not ignore in favour of legal issues. Within the context of relationships – whether in the workplace, an arrangement for personal services, or a business venture – clients are usually less concerned with being vindicated through extended, costly legal process than other things: being heard, getting information, exploring options, solving problems, settling claims or controversies, or getting a relationship on a better footing. From a relational point of view, a legalised process dominated by lawyers and legal concerns may be the last thing they need. As counsellors and advocates, lawyers need to be attuned to these concerns and seek opportunities to strike an appropriate balance between legal issues and other interests.

To be sure, Real Time approaches will not be appropriate or sufficient in all cases and are sometimes abused. British judges and practitioners, for example, have expressed concerns that statutory adjudication is simply too 'quick and dirty' to resolve final project issues or manage complex claims, and presents opportunities for 'ambush'.⁴⁴ In some cases only traditional rights-oriented processes like court trial or binding arbitration will do. But even then, the lessons of current Real Time programmes may be of value. One major corporation, Abbott Labs, has successfully implemented an expedited binding arbitration process in conjunction with a stepped dispute resolution system in its long-term distributorship contracts.⁴⁵ It includes (a) a very short pre-hearing period, (b) a prohibition on discovery, (c) a requirement that each party have no more than five hours to present its case in the arbitration hearing and

(d) a baseball arbitration-type format in which the arbitrator's award must be based upon the proposal of one or the other of the disputants – in other words, the arbitrator must choose the more 'just' proposal and incorporate it in his or her decision, which will be legally binding. The entire process is to be concluded in a matter of months with a binding award. The Abbott Labs programme is aimed at 'thin-slicing' by limiting adjudication largely to the information at hand. As such, it was a dramatic departure from the instinct of many advocates in our professional legal culture to seek 'perfect information' before deciding how to dispose of the case. The emphasis is on charting the course for the ongoing business relationship, and getting a quick decision is paramount.

The impact of Real Time strategies on practice is really a facet of larger questions about the future of the legal profession. Such developments exemplify the fact that efficiency, low cost, and other relational and individual interests are often the most important things to clients. They also illustrate the value of tailoring programmes for management of conflict to specific contexts and particular problems rather than trying to force every dispute into pre-determined and extremely limited legal process templates. Where practical, lawyers should help clients explore and develop customised, systematic and multi-faceted approaches to managing relational conflict – including programmes that involve appropriate training for business managers. Even in the absence of tailored systems, lawyers should assist clients in examining emergent disputes at the earliest possible stage, and systematically explore the costs and benefits of different options for resolution. Over and over again, we are being told that doing everything the same old way just won't do.

Notes

- 1 Malcolm Gladwell, *Blink: The Power of Thinking without Thinking*, 22 (2005).
- 2 See *ibid.* at 125-45.
- 3 *Ibid.* at 52.
- 4 *Blackstone's Commentaries on the Laws of England, Book the Third, Chapter the Fourth, Of the Public Courts of Common Law and Equity*, p 32, at www.yale.edu/lawweb/avalon/blackstone/bk3ch4.htm, (last visited 29 March 2007).
- 5 Dean G Pruitt, Jeffrey Z Rubin and Sung Hee Kim, *Social Conflict: Escalation, Stalemate and Settlement* Ch. 2 (3rd edn, 2004).
- 6 Kathleen Harmon, 'Construction Conflicts and Dispute Review Boards: Attitudes and Opinions of Construction Industry Members', 58 *Disp Res J*, 66 (January 2004).
- 7 Interveners may include what Harvard psychologist Howard Gardner calls 'trustees'. Howard Gardner, *Changing Minds: The Art and Science of Changing Our Own and Other People's Minds* (2004), xiv.
- 8 See Mary Rowe, 'Dispute Resolution in the Nonunion Environment: An Evolution Toward Integrated Systems for Conflict Management?', in Sandra Gleason, ed, *Workplace Dispute Resolution* (1997), at 90 (discussing functions performed in employment systems).
- 9 See generally *ibid.*
- 10 *Ibid.* at 84.
- 11 *Ibid.* at 88.
- 12 *Ibid.* at 87.
- 13 *Ibid.* at 96-97.

- 14 *Ibid.* at 97 (summarising case data from Brown & Root Dispute Resolution Program).
- 15 The Use of Alternative Dispute Resolution (ADR) in Maryland Business: A Benchmarking Study (Maryland Mediation and Conflict Resolution Office, 2004) at 16-17 (describing Giant Foods experience).
- 16 CPR Institute for Dispute Resolution, *How Companies Manage Employment Disputes – A Compendium of Leading Corporate Employment Programs* (2002).
- 17 *Ibid.* at 67 (interview with Wilbur Hicks of Shell Oil Company).
- 18 *Ibid.* at 24-26.
- 19 938 P.2d 903 (Cal 1997).
- 20 See Carole Houk, 'The HealthCare Ombuds: A Better Prescription for Medical Malpractice Complaints', in *The Price of Conflict – The Power of Collaboration: Achieving Ethical Conduct by Encouraging Conflict Competent Corporations*, 2006 NASBA Center for the Public Trust Conference, Pepperdine University Straus Institute, 14 July 2006.
- 21 See Harmon, *supra* n 5.
- 22 See Thomas J Stipanowich, 'The Multi-Door Contract and other Possibilities', 13 *Ohio St J on Dispute Resolution*, 303 (1998).
- 23 See *ibid.* at 360-64.
- 24 Robert Gaitskell, *Trends in Construction Dispute Resolution*, Society of Construction Law Papers No 129, 7-9 (December 2005).
- 25 Dr Finiosky Pena Mora and Carol Menassa, *Conflicts Claims & Dispute Framework: A Study of DRB Process & Cost Savings From an Owner's Perspective* 9 (2006), (unpublished paper). See also R M Matyas, A A Matthews, R J Smith and P E Sperry, *Construction Dispute Review Board Manual* (1996).
- 26 See generally, Harmon, *supra* n 5.
- 27 Data published by the Dispute Review Board Foundation. See www.drb.org/manual/Summary_of_DRBs_2005.xls (last visited 19 February 2007).
- 28 Kurt L Dettman and Martin J Harty, *The Use of Alternative Dispute Resolution to Resolve Mega Project Claims: Lessons from Boston's 'Big Dig'* (unpublished draft).
- 29 *The MDB (Multilateral Development Bank) Harmonised Edition of the 1999 FIDIC Construction Contract (CONSI)* requires the use of a disputes board of some kind.
- 30 See generally, Nicholas Gould, *Establishing Dispute Boards – Selecting, Nominating and Appointing Board Members*, Society of Construction Law Papers No 135 (December 2006).
- 31 See Gaitskell, *supra* n 24, at 1, 5, 10-13.
- 32 United Kingdom Statute 1996 c 53 Pt II, s 108.
- 33 John Tackaberry, *Flexing the Knotted Oak: English Arbitration's Task and Opportunity in the First Decade of the New Century*, Society of Construction Law Papers, 3 (May 2002).
- 34 Gaitskell, *supra* n 24, at 11 ('Figures given anecdotally are that there have been about 15,000 adjudications thus far...Of this enormous number only about 300 have reached the courts, and of these about 200 reported decisions have resulted.').
- 35 *Ibid.*
- 36 Frances Kirkham, *The Future of Adjudication*, Society of Construction Law Papers 1-2 (September 2004).
- 37 Gaitskell, *supra* n 24, at 11.
- 38 Kirkham, *supra* n 36, at 2.
- 39 Gaitskell, *supra* note 24, at 5.
- 40 *Ibid.* at 12. See also John Tackaberry, *Flexing the Knotted Oak: English Arbitration's Task and Opportunity in the First Decade of the New Century*, Society of Construction Law Papers, 1 (May 2002).
- 41 See generally, John Uff, *Are We All in the Wrong Job?: Reflections on Construction Dispute Resolution*, Society of Construction Law Papers (July 2001).
- 42 *Ibid.* at 2.
- 43 *Ibid.* at 14.
- 44 Kirkham, *supra* n 36, at 2-3.
- 45 Jose Rivera, *Abbott Labs Arbitration Procedure*, Presentation to Chief Litigation Counsel Association Fall Meeting, Seattle, Washington, 11 October 2006.

Reasons for the rising popularity of mediation

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Mediation has increasingly become the choice of first resort for international dispute resolution. See for example, *US Federal News*, 18 December 2006. (The European Commission recently committed to use mediation and other forms of alternative dispute resolution in disputes with contractors, many of whom have complained to the Commission Ombudsman) and *South China Morning Post* (9 January and 6 February 2007). (At the eighth anniversary of the Hong Kong Mediation Centre, Chinese Minister of Justice Wong Yan-lung said the Justice Department would promote mediation throughout the government and set up a task force to help develop consistent policies and regulations.)

Experience has shown that mediation in many instances is less expensive, speedier and less disruptive to the parties' business relationship than either litigation or arbitration. As recently reported in *The Connecticut Law Tribune* (12 March 2007): While mediation and arbitration were both accepted decades ago as alternatives to litigation, over the years arbitration has moved much closer to litigation in terms of formality and costs, in the eyes of many corporate counsel. As a result, corporate counsel are increasingly requesting that contracts include clauses requiring mediation prior to litigation or arbitration. Corporate counsel appreciate much more than the speed and lower cost of mediation. They also appreciate many other advantages of mediation such as confidentiality and party control. Both of these factors promote focus on the real issues between the parties and preservation of the business relationship.

Confidentiality

Unlike mediation, litigation in many jurisdictions is a very public process. In the United States for example, it is becoming increasingly difficult to seal court proceedings even where highly sensitive personal and business information is involved. Recent court opinions in the United States preserve the public's 'right to know' (*In re Marriage of Burkle*, 135 Cal App 4h 1045 (2006)) and some court rules even require notification of the press whenever a party to litigation requests that a court seal certain evidence or testimony from the public. In contrast, maintaining the confidentiality of mediation proceedings requires no such contentious procedural steps. (Cal Ct 243, *et seq.*) A network of statutes and

rules intended to maintain the confidentiality of such proceedings already exists. For example, *JAMS International Mediation Rules*; *AAA Commercial Mediation Rules*; *Cal Ev Code §1118–1127*. When handled carefully, mediation provides the parties with the possibility of preserving the privacy of sensitive competitive or personal information and can likewise avoid unwanted publicity that could harm the reputation of one or more parties

The inviolability of mediation confidentiality should not be taken for granted, as demonstrated by recent cases. The vigour of courts in upholding mediation confidentiality varies. Sometimes courts vigorously uphold mediation confidentiality. For example, *Irwin Seating Co. v International Business Machines Corp., et al.*, No 1:04-CV-568 (W D Mich, 29 November 2006). A Michigan federal court, emphasising the importance of mediation confidentiality and the settlement privilege, prevented plaintiff's experts from testifying at trial because plaintiff's counsel gave the experts defendants' confidential mediation statements to read in preparing their reports. At other times, courts have been less vigorous. For example, *NYP Holdings, Inc. v McCluer Corp.*, No 601404/04, 2007 WL 519272 (NYSup, 10 January 2007). (Following a successful mediation and US\$25 million settlement over the construction of a printing plant for the New York Post, the defendant sought indemnity from its subcontractors. The subcontractors sought discovery of detailed information about apportionment of liability and whether the mediated settlement was reasonable. The defendant refused to provide the information asserting a mediation privilege. While acknowledging the importance of maintaining mediation confidentiality, a New York court ordered the creation of a privilege log listing the documents and drafts prepared for mediation. As of the writing of this article, the court has not yet required that the log be turned over, even for review by the court.)

Unfortunately, there also are times when a court does not uphold mediation confidentiality to the extent one of the parties would have liked or expected. For example, *Aird v Prime Meridian Ltd* [2006] EWCA Civ 1866 (Court of Appeal) (21 December 2006): (A joint statement used in mediation by the parties' experts in a construction dispute was held not to be privileged by the UK's England and Wales Court of Appeal. The appellate court focused on the fact that the lower court mandated the creation of the joint expert statement using a

litigation form and that the experts had agreed to remove the 'without prejudice' designation on the form. The appellate court held that a joint expert statement could only be ordered for litigation under the court's rules and thus was not privileged even though used in mediation.)

A recent case involved the question of whether a settlement had been reached at a mediation. One party to the mediation contended that a document created during the mediation was a final settlement agreement, while the other party contended that the document was just a paper used to record a non-final proposal for settlement. In *Fair v Bahktari*, S129220 (Cal, 14 December 2006), the California Supreme Court reversed a lower court decision that had deemed a document a non-confidential final settlement agreement, stating 'clear drafting guidelines' for final mediation settlement agreements. For a purported settlement agreement to be treated as binding, the settlement agreement must itself say so by using words to the effect that it is 'enforceable' or 'binding'. Absent such a clearly-stated intent, the California confidentiality statute bars disclosure of any document created in mediation, including a document that might otherwise qualify as an enforceable settlement agreement.

Party control

Since mediation is voluntary, the parties have substantial control over the process. Party control is especially important in the context of international commerce. A company reluctant to do business in certain foreign countries can obtain reassurance by negotiating a fair dispute resolution process in advance of any dispute. Not surprisingly, the parties to international commercial contracts often select a neutral place for mediation and arbitration in order to alleviate the fear that, in the event of a dispute, one side may be subject to possible bias against foreigners in the courts of the other side's home jurisdiction. Without some form of dispute resolution process drafted into the contract, there can be an incentive to be the first to file a lawsuit so that the dispute will be litigated in one's home forum. A clause calling for mandatory mediation before the filing of a lawsuit can slow down the urge to be the first to file a lawsuit that might otherwise lead to an unnecessary break in the business relationship.

Other areas the parties control in a voluntary process such as mediation are the procedure for choosing the mediator, the rules that will apply to the mediation process, the venue of the mediation, the law the mediator will apply to analyse the dispute, the means for ensuring confidentiality of the mediation, the settlement authority of the persons who participate in the mediation, and the means for enforcement of any agreements reached in mediation. While each of these areas of control is significant, the choice of the mediator may be among the most critical to a successful

mediation. In addition to having a reputation for expertise in the subject matter and fairness, the mediator should have the energy to help press the parties to reach an agreement when the going gets tough and the hour late. Retired US Supreme Court Justice Sandra Day O'Connor recently entered the ranks as a mediator. The *Lexington Herald-Leader* (16 February 2007) reports that Justice O'Connor will mediate a decade-old dispute between the US Government and over 1,000 heirs of former landowners of 36,000 acres in western Kentucky.

Do the parties to mediation expect more than expertise, fairness and persistence from their mediator? Apparently, yes. In response to a survey of users of mediation services, the Task Force on Improving Mediation Quality of the American Bar Association (ABA) Dispute Resolution Section is working on new guidelines for mediators and mediation. See *Just Resolutions* E-newsletter (ABA Section of Dispute Resolution, February 2007). Users interviewed by the Task Force reported wanting mediators to do more than shuttle between parties to get to a settlement figure; they wanted their clients' emotional needs addressed by creative and intuitive mediators, along with reaching settlement. The users interviewed by the Task Force split on whether it was helpful for mediators to express opinions or render evaluations about the merits of the case in dispute. Many users wanted vigorous reality testing and suggestions of ideas for resolution. Many also wanted mediators to prepare thoroughly by talking with counsel in advance of the mediation about substantive issues relating to key interests, the parties' backgrounds, the 'real issues,' and what might stand in the way of settlement, as well as the procedural matters of who should attend, memos, timing and process. The Task Force is gathering this information for eventual incorporation into practice guides in order to improve mediation quality, build users' confidence, and increase use of mediation in commercial disputes.

An often ignored area of party control concerns negotiation in advance for the presence of the key decision-makers at any subsequent mediation. If there are key executives involved in the negotiation of the agreement, they should be present at the mediation – not just their proxies. Where insurance coverage for the dispute is a possibility, the insurers should be involved in the mediation process, as their resources and focus on avoiding unnecessary litigation expenses may help resolve the dispute. One court went out of its way to force the parties to bring someone with settlement authority to a court-mandated mediation. See *Kearson v Schick-Wilkenson Sword*, No 3:05-CV-1422, 2007 WL 25499 (D Conn, 3 January 2007): Annoyed at a litigant that sent a company representative with only limited authority to a settlement conference, a US federal magistrate ordered the CEO of a billion dollar company to attend the rescheduled settlement conference in Connecticut. The company's initial representative had

needed to call her boss to exceed US\$10,000 in a civil rights case that the plaintiff was willing to settle for US\$45,000. The magistrate refused requests for the senior attorney handling the case or even the company's general counsel to appear in place of the CEO.

Conclusion

For all its power and flexibility, mediation is not necessarily the right procedure for all disputes. The *Portland Press Herald* (11 March 2007) recently reported on unhappiness with mediation in Maine: With fewer cases going to trial in Maine (only 1.9 per cent last year), and even state judges championing mediation, some attorneys and judges worry that parties may effectively lose their constitutional right to a jury trial and that the justice system will not generate sufficient precedents

to guide future disputes. Mirroring the US national trend toward 'private justice', Maine has been on a fast-track since 2002 when the state instituted mandatory alternative dispute resolution for almost all cases. Civil litigants in Maine must pay for private mediation or arbitration before being permitted to proceed to trial, but Maine's trial judges continue to face one of the heaviest caseloads in the US. Another concern of critics is that fewer lawyers are obtaining trial experience, which has resulted in proposals in Maine to streamline the trial process for claims under US\$75,000 and a mentoring programme for new attorneys. However, Superior Court Judge, Robert Crowley, who pushes for settlements, responds that lobotomists are also probably losing their skills, but that if more lobotomies are needed in the future the skills will return.

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Mediation then and now

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Fifteen or 20 years ago, when one looked at the spectrum of processes available in the nature of alternative dispute resolution, mediation formed only one of several different alternatives. Most of the alternatives related more to the nature of a quasi-judicial proceeding; for example, mini trials, pre-trials, arbitration and neutral evaluation type proceedings. By their nature, those proceedings were typically adversarial and rights-based.

When I wrote articles or gave lectures on alternative dispute resolution in the late 1980s and early 1990s, I had to define mediation and explain the process to lawyers who were largely unfamiliar with it. I explained that unlike those adversarial type proceedings, mediation was really a form of negotiation assisted by an individual who would bring both facilitation and process to the negotiation. The parties would not be sworn, but would be expected to tell the truth. The framework of the process would be confidential and therefore, if unsuccessful, could not be discussed at a later time in any court proceeding. The magic of the process was that the parties had an opportunity to speak face to face probably for the first time since their dispute arose. In a controlled but relaxed environment, with a facilitator who understood the issues and was trained in the process, significant settlement rates could be achieved.

Back in those days, mediation was just coming into the legal vocabulary. Many were still making mockery of it as a form of meditation. Others were criticising it as a wimp mentality as opposed to a warrior mentality involved in litigation proceedings. In many parts of the world in common law jurisdictions and in particular, in civil law jurisdictions, mediation was virtually unknown. The global legal community was familiar with arbitration on both a domestic and an international basis. Arbitration had been created as a creature of statute in the late 19th century. There was significant familiarity with the process and parties in legal disputes tended to understand it. How times have changed!

Even ten or 15 years ago I had to check with the lawyers privately in advance of a mediation to find out if they had ever attended one before and to learn what they had explained to their clients about the process. This was not a step I took lightly because I did not want to insult, but at the same time it was more than apparent that many lawyers had never been to a mediation and really did not understand how it worked. Many were wary of embarking on a process that they were unfamiliar with. In those days, when I lectured on the topic, I told lawyers they could compare the process in

some ways with sex. Before anyone tried it, they had heard lots about it, knew that they wanted to try it, but were a little intimidated and embarrassed before their first time. On the other hand, once they had experienced it, they were converts and wanted more of it. Today that might be a politically incorrect way of describing the situation, but it certainly opened eyes and made people listen in those days.

Mediation is now widely used in North America. There are jurisdictions in which mediation is prescribed by statute, by rule of practice, by judicial direction, or by judicial order. Of course, there is voluntary mediation in any type of situation when the parties choose to access the process.

There are both mandatory and voluntary forms of mediation in litigation matters. The experience in my jurisdiction of Ontario, Canada is that mandatory mediations achieve a level of approximately 45 per cent success and voluntary mediations achieve settlement rates with over 80 per cent success. I believe these results are fairly widespread based on anecdotal information for mediators in many jurisdictions.

Moreover, mediation has become an accepted process available to deal with almost any type of dispute. It has particular attraction in cases where parties have a dispute, but really need to continue doing business together. For example, this would be the case in construction projects, supply agreements, corporate workplaces, shareholder and partnership disputes and so on. But even in one-off relationships such as personal injury, sexual harassment, or even estate matters, mediation has proven itself to be the process of choice.

Why has mediation achieved such levels of success in such a relatively short time? There are certain aspects to this process that make it highly attractive. First, it is very quick. Secondly, the parties agree on a mediator and fix a date. Thirdly the matter proceeds on that date on a fairly simplified brief. Mediators do not double book or have long lists as is so common in court matters. As a result of the timing expediency, costs are cut drastically by comparison with other legal proceedings. For example, even by comparison with arbitration, there is first, no arbitrator to pay. Secondly, there is no lengthy hearing and calling of evidence, witnesses and other such formalities. Thirdly, mediations can be conducted without lawyers by the parties with the mediator alone, or with counsel or other assistance. For the most part in my experience, mediations involve the principals in the dispute along with their lawyers. Fourthly, while there are both rights-based and interest-based mediations, one

of the really novel aspects of mediation is to look at the interests of the parties rather than their legal rights. By cutting through the legal rights formalities and the remedies mentality, the parties are focused on their interests and what really matters is finding a resolution. Fifthly, the parties are the authors of their settlement and as a result, enforcement is virtually never a problem. Compare this with the difficulties which often arise after arbitral awards are made and have to be enforced in a court. This is a particularly serious problem in international arbitration and much law has developed at the judicial level internationally just dealing with issues of enforcement of arbitral awards. Where the parties have a direct hand in reaching the agreement and not having it imposed upon them, they are keen to perform its terms as quickly as possible in order to implement the settlement.

For all of these reasons and many others, the acceptability level of mediation has grown rapidly in North America. It is used widely in various forms throughout Canada and the United States and has a continuing growth throughout Europe, South America and other parts of the world.

Indeed now when we look at alternative forms of dispute resolution, we find a substantially increased list. This list includes terms such as facilitation, conciliation, med-arb, arb-med, deal mediation, collaborative law and circle process.

In my submission, all of these processes are really processes which involve mediation in one fashion or another. Some argue that facilitation and conciliation are really just other terms for mediation, sometimes in the international setting. The concepts of med-arb and arb-med, have developed substantially over the last ten years and when carried out properly, are really separate processes which have in common the fact that one person may be involved as the neutral in both processes.

In deal mediation, there is no existing litigation between the parties and there may or may not be counsel involved. Typically, the parties are connected through some commercial agreement in which there is a dispute, or they may recognise the need to negotiate a new agreement. A typical case would involve 50-50 shareholders in a company who have reached a deadlock on an important issue and need assistance to overcome the problem while they continue to operate the company.

In collaborative law, the parties and their lawyers sign an agreement that they will negotiate in good faith and not undertake legal proceedings in any case. What really exists here is a mediation where the two lawyers are essentially the mediators and their clients are the negotiating parties.

Circle process originated with the aboriginal peoples of North America. In this type of process, typically, an elder was the neutral who led the discussion. Because often more than two persons were involved, the parties actually sat around in a circle. Many mediations also take

place around a circular table. The reason for this is to establish equality amongst all participants with no one at the head of the table or in a position of power one over the other. This process has now found its way into criminal sentencing matters and various forms of civil dispute resolution which may involve estate disputes, corporate workplace disputes, or ratepayer municipal disputes.

It is my observation and my submission, that mediation has been one of the most rapidly growing processes known in the evolution of legal history and more particularly, settlement of legal disputes. These numerous variations, in my submission, are evidence of successful spin-offs from the fundamental concept of interest-based mediation.

If it has taken 500 years for our legal rules of law to develop through the judicial systems, it has probably taken only 500 weeks for the legal community to accept and build upon mediation as an interest-based dispute resolution process.

It is said that the law moves slowly, but it has also been recognised in recent times that lawyers are a fast read. Indeed, how swiftly we have moved to accept and promote mediation, both domestically and internationally.

Assisted deal making

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Assisted deal making, sometimes also known as deal mediation, may easily be distinguished, from the point of view of structure, from mediation of a commercial dispute. However, a number of the techniques which are required to be used are common to both. This would indicate that there is a lot of assisted deal making out there waiting to happen. Our researches indicate that whilst there is some development of this topic in the academic literature of North America and Australia, there is little that is traceable in our main jurisdiction of practice, namely the United Kingdom.

Typically, one would think that suitable subject matter would include joint ventures, franchise agreements, commercial agreements, mergers and acquisitions. A US survey reported 14 commercial sectors in which assisted deal making had been employed by the appointment of a mediator. These included, for example, the formation of a partnership, the sale of a dealership, the sale of cable television access rights, the creation of a joint venture to produce software, etc.

The example narrative which follows draws on our experience and expands it in a hypothetical way to illustrate the potential benefits in as wide a manner as possible.

First, of course, there is no overt dispute which either is or threatens needing to be resolved in court. There has been no external legal analysis of rights and obligations. People are seeing the commercial advantages, indeed in many cases a need, to make a deal to maximise commercial outcome, but are finding difficulties in managing profit share, risk, and interpersonal dynamics – both in relation to the negotiation, and also going forward into the period of the hoped-for agreement. Taking an enlightened approach, they both opt to appoint a mediator.

A very lengthy, carefully drafted (with legal advice) commercial agreement has expired. That agreement was intended to regulate the parties' commercial interactions over several years by careful definition of terms, by careful formulae as to pricing, and with real attempts being made to manage risk. However, over the period of the agreement it has emerged that there were certain eventualities for which the parties had not bargained, particularly in relation to the underlying/developing commercial strategies of each corporation and, of course, in several important respects, the marketplace had moved on. Therefore, the agreement expired in a state of uncertainty. A lengthy period of negotiation ensued without resolving the various

difficulties which emerged and which, as distrust grew, multiplied. The conversation took place on many levels, with specialists in particular areas engaging with each other, with perceptions as to the other's motives, in which patience decreased as risk and exposure increased. In particular, the people involved began to recognise after a while that there were some difficulties in their abilities to communicate the one with the other.

Mediators will have observed in their practice that there is a tendency amongst the participants to assume intention or strategy on the part of the other when in fact the action or statement is the result of unrelated circumstance. We hold others to a high standard and can be less demanding upon ourselves. Thus each side in a commercial negotiation which is intended to bring mutual benefit and managed risk could, through such perceptions, be drawn into thinking that it is the one defending itself against an aggressor, and this can provoke anger, which militates against interest-based solutions and may result in increased distrust and accusations of opportunism. So the deal mediator here is addressing issues of 'fairness and also what has been described very helpfully as 'reactive devaluation' of the other side's position. It will immediately be seen that such difficulties are as often encountered in dispute mediation as in assisted deal making. Just as parties can easily fail to settle litigation on sensible terms if they don't think it's fair to do so, parties can equally fail to do an eminently sensible deal in the first place. Some of the elements of human nature, for want of a better word, are going to be common to each process and one is reminded of having heard a weary corporate lawyer after a gruelling business transaction sighing with words to the effect of 'That's a court case waiting to happen'. What the deal mediator can do in such a negotiation is to try by using tested techniques to encourage the parties to focus on the interests of the deal rather than their own individual interests.

Crucially however, what the deal mediator can bring to a commercial negotiation of whatever kind is the imposition of structure and timetable. Against the background of that structure a mediator will work to facilitate an agreement that will stick. In a complex deal there will be many specialists in connection with the commercial subject matter of the business who will need to have their input included. There may be outside consultants, there will undoubtedly be business managers at varying levels. There will be perceptions of how balanced the teams are with each other and the

mediator can work to remove any difficulties in this respect. The mediator will engage at each level separately to establish relevance, contribution and best opposite number with whom to deal. He will have carefully discovered through private conversation where interpersonal relationships will either help or hinder the process and will assist in creating core negotiating teams on each side, who could meet at length with the mediator in order to thrash out an agenda and the timetable. Specialists could then be tasked over the course of an adjourned period to do the work necessary to continue the conversation. A process of this kind could easily take a period of months as one by one, each side's individual concerns are worked upon and addressed. Then a balance can be found, which includes what each side considers to be a fair apportionment of risk and reward. Particularly, through this process, a positive momentum can be created, so that a far higher percentage of the relevant overall energy is directed towards a positive future rather than agonising over distrust.

From the point of view of structure, assisted deal making is far more likely to involve round table meetings rather than diplomatic 'shuttling', or caucusing. Once the structure and tone have been established, the mediator may be more in the role of a chairman of a meeting, tasking, directing, timetabling. The mediator may in these circumstances judge that it is appropriate to ask for and obtain permission to be challenging in open meeting where he felt that discussions were leading nowhere, or getting stuck in negativity or unreality. The dynamic that develops here is of a unique kind, which effectively sidelines the standard evaluative/facilitative debate.

This process can lead people to an increase of trust with the resulting reciprocity, which itself leads to flexibility, creativity and increased value, interest-based outcomes. As mediators maybe what we need to be thinking about is how we can communicate the benefits of this process to the culture which tends to subsist amongst the commercial community, particularly in the UK where the biggest challenge we face is to increase awareness of what mediation can deliver.

Controversial introduction of the mediation regime in Argentina

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After more than a decade since the mandatory mediation proceeding was introduced in Argentina (specifically in the city of Buenos Aires) now the Province of Buenos Aires – a different jurisdiction with covers the extensive Province of Buenos Aires – is following the trench.

During recent years, academics, judges and litigators in general have insisted on the important role that mediation has played in the judicial scenario, permitting judges to rely on mediators to solve disputes that otherwise would be brought before the already overloaded courts of the city of Buenos Aires.

And the experience has been definitively positive. During these years, thousands of cases have commenced and terminated within this out-of-court process, disregarding the nature of the dispute and without any intervention of judges.

Personally, I have participated as counsel in several mediation processes in relation to disputes concerning

a wide range of commercial or civil conflicts (from credit card complaints of consumers against banks through intellectual property claims of inheritors against media publishers), and I have realised the importance of mediators to resolve conflicts within a mediation environment: flexibility in the proceedings, reduced costs, and definitively, timing. In many circumstances with seemingly no amicable solution possible, mediators were capable of meeting the parties and convincing them on the benefits of a proposed solution.

Under this scenario, it was not surprising that the legal doctrine claimed for a similar institute for the province of Buenos Aires. It is important to mention that the province of Buenos Aires is a jurisdiction that surrounds the city of Buenos Aires, and thus many practitioners litigate simultaneously in both jurisdictions. In fact, the procedural codes are very similar with the exception of certain specific terms.

Finally, in 2006 provincial congressmen presented different alternatives to introduce mediation within the judicial procedure. Almost all of them proposed the mediation as a mandatory step before the dispute is brought to court, following the experience of more than a decade in the city of Buenos Aires.

One of these Bills has been recently approved by the provincial Chamber of Representatives (Camara de Diputados) on 21 March for civil and commercial cases.

However, this Bill contains certain provisions that have raised severe criticism from the legal community. Pursuant to the Bill, any candidate to be appointed as mediator shall have obtained a university degree, evidence of at least three years of professional experience, and must have passed a mandatory training course required in accordance to the decree obtained. The candidate shall be then listed as mediator in a registry also created by the Bill, with indication of both a domicile located in the jurisdiction of the province of Buenos Aires, and an office located in the judicial department where the mediator conducts its activity, among other requirements.

Therefore, according to the Bill mediators do not require a law degree to mediate in disputes between parties. It seems that the legal knowledge and experience of lawyers is not necessary to solve disputes in which parties are on the threshold of a judicial litigation. It is hard to believe that professionals without a legal background can bring appropriate solutions that will not violate the law, or affect third party rights, that do not contravene basic principles of law, or even that will not be afterwards rejected in court.

The Bar Association of the Province of Buenos Aires criticised the Bill by stating that it will bring an irreparable damage to the service of justice. This body stressed the convenience of having lawyers conducting the mediation process as better prepared than any other professional to bring appropriate solutions. Law schools provide legal education in dispute resolution; that cannot be replaced by any other profession.

The Bill provides that the alternative dispute resolution process will be applied exclusively to matters that, pursuant to the law, can be settled by parties. The most common examples are cases related to damages, breach of contracts, etc. The scope of the Bill excludes claims related to family law (ie divorce, marital nullity), *habeas data* and *habeas corpus* motions, preliminary measures, bankruptcy, estates, labour law claims, and cases where the provincial government is involved.

Another controversial provision of the Bill indicates that legal counsellors to parties are not required within the mediation process. Thus, parties will be entitled to attend mediation hearings without legal advice.

This provision seems completely inconsistent with the procedural code applicable to judicial disputes in the Province of Buenos Aires, that provides in section 56 the mandatory legal assistance for parties to civil and commercial disputes. And there is a general

understanding that no rationale follows such exception to the mediation process that, as mentioned before, this Bill provides as a mandatory step before bringing a claim in court.

Notwithstanding that a new debate is expected in the provincial Senate, the Bill is supported by many senators of the official party, and thus has a good chance of prevailing. But scholastics and litigators in general conclude that it is really disappointing that after so many years of insistence on the importance of introducing the mediation process as a useful out-of-court resolution alternative, the proposed Bill contains so many failures. Definitely the easiest way was to reproduce the structure and requirements set forth a decade ago in the city of Buenos Aires. This Bill only brings concerns and uncertainties, and if finally passed, courts would probably be reluctant to rely on mediators with no legal skills to reach valid solutions in accordance with the law.

Mediation in the EU - does the draft Directive achieve its purpose?

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The experienced mediation user in North America is accustomed to working in ADR both inter State and internationally. The creation of what now comprises the United States of America took place more than 200 years ago and includes 50 states. The European Union (the Treaty of Rome 1957) took 50 years to develop by 2007 into a union of 27 countries. Against those temporal backcloths, it is worth reflecting on the comparable growth of mediation in the US and the EU. History tells us that it was in the mid-1970s that mediation set down its modern roots in California and it was not until 1990 that mediation emerged in the EU, in the UK. In effect, the US took 30 years to develop its ADR strategy after a political life of some 200 years, whereas the EU has (almost) reached its own strategy in 17 years within a life span of 50 years. Perhaps meaningless details on their own but worth bearing in mind as to how and why the EU has got to its current position.

Globalisation is a much used and often abused word but in the context of mediation, it is a term which is completely relevant to the world of dispute resolution. The language of mediation is itself international as could be so readily heard and seen by those who attended the ADR session of the IBA Conference in Chicago in 2006. The speakers and panellists came from eight different jurisdictions ranging from the Americas to the EU and the Balkans and to the Far East. Each representative knew intuitively what the others were saying, how they worked in the field of mediation and spoke with unrehearsed unanimity on a wide variety of ADR topics. So, is it any wonder that the growth of mediation should transcend national boundaries and become the language and process of non adversarial dispute resolution worldwide? None but the most case hardened 'Luddite'¹ litigators are likely to hold up their hands in opposition to ADR if they seek to work cooperatively with clients in trouble in business.

The President of the Tampere Council of the European Council in October 1999, said that ADR procedures should be created by Member States, and in 2004 a draft Directive^{2a} was issued which generated considerable debate in legal and mediation circles. The numerous and varied comments and suggestions were taken back to the European Parliament for debate and the current position is that a report from Parliament

dated 11 March 2007^{2b} has been sent to the Commission recommending a number of important amendments to the first draft Directive. In this short article it is not possible to comment in detail on either the first draft and its perceived shortcomings or the parliamentary proposals for adjustment. What the reader may find interesting is to read the Explanatory Statement in the Report which follows the proposed 34 amendments and in particular some selected parts of it, thus:

'... The rapporteur initially questioned the need for a directive at a time when mediation systems across the EU are still in an embryonic phase in some Member States ... however, as a result of her [the rapporteur] on-line consultation and the evidence presented by the experts invited to the committee's hearing, the rapporteur recognises that there is overwhelming support for the principle of having a directive ...

Her objective therefore has been to create a workable, light-touch directive, which reflects existing guidelines and best practice and can serve to encourage the wider use of mediation across the EU.'

The text goes on to say that whilst there has been and continues to be a concern about the application of Article 65 of the EC Treaty (addressing cross-border disputes), there is an equal and non competing regard to the internal market.

'The compromise which the rapporteur has put forward is designed to take in to account Member States' concerns about the application of Article 65, while giving consumers and citizens in the internal market practical and user-friendly options to have access to a high standard of mediation across the EU. It is hoped the Council will take a commonsense view of the benefits of mediation and that the directive can also be applied to domestic cases in Member States.'

A quick review of the headings to the amended draft Directive shows that consideration has now been given to subjects such as quality of mediation, its voluntary nature, enforceability of settlement agreements, confidentiality, prescription and limitation issues and other adjustments which were either lacking or inadequately expressed in the first draft.

It is probably a meaningless exercise at this stage to review the new draft in any further detail in this forum

but the omens are looking much better for an effective and purposeful mediation strategy on a pan-European scale. For the technically minded, the process has reached the codecision procedure: first reading stage. Having been three years in the drafting, it is anticipated that it will be a matter of months rather than years before the Directive is in place.

Thus far in the EU, the spread of mediation has been sporadic and in most countries, it has been the work of committed individuals, often lone voices in the wilderness of their own national jurisdictions, which has caused the development of national mediation schemes. By talking, by meeting others in different jurisdictions who talk the same ‘language’, by using ADR processes and by slowly, oh so slowly, overcoming the ADR inertia by their Sisyphean commitment,³ the target is within reach. The new proposals for the Directive appear to

have come a long way towards recognising not just one country’s approach to the application and delivery of mediation but a gathering together of the various strands of perceived mediation wisdom whilst not appearing to strangle the whole issue with over-regulation.

Notes

- 1 Luddite – one who is opposed to technological change, from English handcraft specialists in the early 19th century who feared the encroachment of the Industrial Revolution.
- 2a EU reference to First draft Directive and European Parliamentary Report: COM (2004) – 0718, C6-0154/200F, 2004/0251(COD).
- 2b EU reference to First draft Directive and European Parliamentary Report: A6 – 007 – 2007.
- 3 Sisyphus – an ancient mythical Greek king who was condemned by the gods to roll a large rock up a steep hill in eternity but the rock always escaped his grasp before he reached the top of the hill and he had to start at the bottom again each time.

The overriding objective and the *Halsey* guidelines: a cautionary tale

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At the beginning of his landmark judgment in *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576, Dyson LJ posed the following question: when should the court impose a costs sanction against a successful litigant on the grounds that he has refused to take part in ADR? As readers may know, Dyson LJ answered his question by reference to six guiding principles:

- (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.

A litigation practitioner, having read *Halsey*, will understand that the English Courts recognise there are circumstances in which it is reasonable to refuse a

request to mediate without cost sanctions being applied. That practitioner will recognise *Halsey* as a sensible development from *Dunnett v Railtrack* [2002] 2 All ER 850, itself a seminal decision of the Court of Appeal, which appeared to advocate a position whereby *any* refusal to mediate would have costs consequences. Accordingly, that practitioner might feel reasonably assured that a negative response to a request to mediate, framed in accordance with the *Halsey* guidelines, should mean that a costs penalty will not follow. According to a recent decision of the High Court of England and Wales, that practitioner would be wrong.

P4 Limited v Unite Integrated Solutions plc

Two companies were in a protracted dispute. They engaged in pre-action correspondence in which widely positioned offers to settle were made by both sides. At the foot of a letter setting out a revised offer, the solicitors for the claimant, P4 stated that their client was ‘prepared to submit to mediation...to resolve this matter.’

The defendant, Unite, responded to this suggestion by implicitly rejecting this offer of mediation: they said they felt that the matter was ‘now at an end’.

Subsequently, P4 launched a claim against Unite for £70,000. After it launched the claim, P4 wrote again to Unite asking whether its client was ‘prepared to enter [into] mediation’. Unite responded with an offer of £10,000 in full and final settlement of the dispute. It contended that P4’s offer of mediation was ‘a cynical attempt to belatedly seek protection from the costs sanctions outlined in *Halsey*’. It also went on to set out in detail, using as paragraph headings the guiding principles set out in *Halsey*, why it felt mediation was inappropriate: for example, it felt it had a complete defence, it did not consider that the cost of mediation would be proportionate to the sums in dispute and the parties’ dispute was centred on an issue of law rather than conduct. In setting out its case in these terms, it appears that Unite understood that doing so would improve its chances of avoiding cost sanctions for its ongoing refusal to mediate.

At trial, Ramsey J awarded P4 the grand total of £384 – somewhat less than the value of the claim and Unite’s offers to settle.

At this stage, the reader is invited to consider what happened next. The pre-action correspondence and submissions of Counsel for the defendant in *Halsey* appear to closely mirror those entered into and made by Unite: most obviously, in both cases the defendant’s solicitors indicated that their refusal to mediate was informed by their view that they had a complete defence to the claimant’s case and that mediation would not be cost-effective. Unite took the *Halsey* approach one stage further by ordering their correspondence utilising the six *Halsey* guideline considerations. Furthermore, in both cases it was alleged that the claimant’s requests to mediate were tactical rather than a genuine expression of a desire to resolve the dispute in question.

Taking these similarities into account, it may seem unusual that the claimant was awarded its costs up to the making of its final settlement offer (when the standard position is that a losing claimant pays some, or in certain circumstances all, of a defendant’s costs): however, that was the outcome of Ramsey J’s deliberations. What is the difference between the two cases?

Another step forward

Court procedure in England and Wales is governed by the Civil Procedure Rules. The Rules are themselves underpinned by the ‘overriding objective’ (set out in Part 1 of the Civil Procedure Rules), which is to deal with cases justly. The court must further the overriding objective by actively managing cases: the Rules state explicitly that active case management includes helping the parties to settle the whole or part of a case and encouraging the use of ADR. *P4 v Unite* confirms that

judges in England and Wales understand the utility of mediation to the maintenance of the ‘overriding objective’. In broad terms, in making his judgment Ramsey J appears to accept that facilitated negotiation represents the best chance parties to litigation have of settling disputes before they reach court.

Ramsey J reviewed Unite’s conduct using the *Halsey* principles in order to assess whether Unite’s rejection of P4’s request to mediate was objectively reasonable. The three key elements of this assessment are as follows:

- (a) First, Ramsey J felt that, at the time mediation was first proposed by P4, Unite could not have thought reasonably that their case was watertight. Unite did not have sufficient information regarding the facts at issue to make such a definitive judgment. It is an interesting nuance of this case that Ramsey J felt that if Unite had entered into mediation it would have gathered evidence which would have proved that its case was watertight;
- (b) Secondly, considering the extent to which other settlement methods had been attempted, Ramsey J stated that he did not consider that letters from one solicitor to another making offers to settle were a proper substitute for a process of ADR involving a third party such as mediation. Particularly, the judge noted that early mediation would have unearthed a key fact in the litigation which did not come to light until shortly before trial and which ultimately proved determinative of the trial’s outcome;
- (c) Finally, on the question of whether or not the cost of ADR would be disproportionately high, Ramsey J intimated that the proper comparison is not the cost of mediating against the sum in issue, but rather the cost of mediating against the cost of proceeding to trial. He also specifically identified management time as a cost factor which should be brought into the balance.

Lessons learned

P4 v Unite cannot be described as a ‘landmark’ in the same way as *Dunnell* or *Halsey*. However, it represents another step forward in judicial support for ADR (and particularly mediation) in the courts of England and Wales, and another nail in the coffin of ‘hardball’ litigation tactics. This progressive approach is entirely consistent with the aims of the overriding objective: saving costs, aiding cooperation between the parties and promoting settlement. It is on these things that the *Halsey* judgment is based, and the *Halsey* judgment cannot be separated from them. Our hypothetical practitioner must bear in mind both the overriding objective and the *Halsey* guidelines next time he or she is offered the chance to mediate: as *P4 v Unite* shows us, to do otherwise is to risk the displeasure of a firmly ADR-friendly UK judiciary.

Employment mediation trends in Portugal

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Private employers, generally for economic and resource efficiency reasons, are increasingly subjecting disputes to mediation rather than having these resolved through employment tribunals. Governments for their part focus on protecting the public interest by regulating improper workplace conduct and practice. Together, although for different reasons, both sectors are realising the benefits of employment mediation.

The significant volume of cases as well as the associated costs and delays of the state courts have in practice led to a concerted effort by both private parties and the Portuguese Government to promote mediation procedures and practice in the area of employment disputes. In May 2006, the Employment Mediation System (EMS) Protocol was signed by the Portuguese State Justice Department and a number of entities representing private industry sectors as well as the General Union of Employees. Recent judicial statistics in Portugal demonstrate that approximately 60 per cent of employment court proceedings result in a settlement. Given this, the Government has set a clear objective in the promotion of the EMS which is to maximise the use and benefits of mediation in employment in order to reduce by at least 30 per cent current labour disputes in the judicial system.

Since Portuguese private employers do not normally have their own internal mediation mechanisms, the introduction of independent mediation centres is intended to promote the early identification of disputes to determine whether these can be resolved amicably. In addition, while it is not the mediator's function it can at times assist to have a neutral third party hear the employment grievance so that even if a settlement cannot be reached perhaps an early discussion or evaluation of the dispute may at least make the parties more realistic about their expectations. It also helps determine whether there is any future in the relationship.

The main objective of the EMS is to help employers and employees resolve labour related disputes quickly, effectively and less expensively and to promote mediation as the tool to achieve this, which until now, had not been used extensively in employment disputes in Portugal. The EMS covers all employment related disputes, excluding, for example, matters such as accidents in the work place. The first EMS centres

opened in Lisbon and elsewhere in Portugal at the end of 2006.

It is important for any mediation programme to induce both participation and settlement. In addition, it is generally understood and recognised that not only is the existence of actual and perceived fairness important in any mediation programme, but also that fairness requires adequate information, assistance, voluntary participation, neutrality, confidentiality, and enforceability. The EMS programme was intended to be developed according to these principles of fairness and its main features include:

- the consensual referral of a dispute to EMS by both the employer and employee;
 - selection by the Justice Department of a mediator from an approved list held by the former;
 - scheduling of the mediation sessions with a view to reaching an amicable settlement;
 - this agreement should be reached within three months of the mediator's appointment, although the period may be extended if the parties agree;
 - either party may withdraw at any time and refer the dispute to a court for determination;
 - the costs involved are nominal and in theory, borne equally;
 - if the parties reach an amicable sentence this is subsequently recorded in writing and signed by the parties and the mediator thereafter, it will be confirmed by what is referred to as a Justice of the Peace (*Julgado de Paz*) and is equivalent to and enforceable as a judgment of a first instance court.
- The last feature of the mediation scheme is significant given that the effect of the mediation decision is that it is binding on all the parties. In other words, in the event that the decision is breached or not complied with, the innocent party may apply for enforcement through the judicial courts.

Past evidence has shown that Portugal like many other jurisdictions is suffering from two main practical difficulties making the introduction of employment mediation vital. Apart from the obvious issues of delay and court backlog mentioned above, low-wage employees are at an immediate disadvantage since they have neither the time nor money to pursue a court case. Secondly, the traditional litigation system is dominated by ex-employees, rather than by employees seeking to redress complaints while continuing in their

employment. Since mediation attempts to focus on the relationship of the parties, rather than on legal arguments it is an important tool for those parties wishing to preserve an employment relationship, which is likely to be destroyed or damaged by litigation. Even when the mediation does not end in a settlement, it has the chance to further the communication between the parties since it brings the parties together.

Whilst the EMS may not resolve all difficulties which both employees and employers currently face, and some time will be needed before any perceivable results can be analysed, it is intended to be a step towards facilitating agreements. Much will depend on the quality of the mediators and willingness of both employees and employers to participate in what is still quite a novel dispute resolution mechanism in Portugal.

Solitary violins: commercial mediation in Italy

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Give the Italians an opportunity to introduce new rules and they will make a meal of it and a messy one at that! And yet, however ineffective Italian rule-making might be, it nonetheless contains some craftiness. This may owe something to the fact that laws are generally made by (frequently) incompetent MPs, and the rule-making process constantly operates within an uncertain political situation where commitments to principles and technical knowledge of the subject matter are replaced by bargaining.

Sadly, this is the story of recent attempts to regulate commercial mediation in this country.

If we consider that mediation is a tool for social control when it is used in an authoritative/administrative environment (as described by Christopher W Moore in his book *The Mediation Process*, Jossey-Boss, 1996, 2nd edn, p 47).¹

First of all, let's take the court process. For a long time mediation was something written about in books but seldom employed in court as an effective way of resolving disputes. Judges and court-appointed experts in civil and commercial cases have had many opportunities to direct parties to conciliate. However, they have tended to avoid this, with some notable exceptions and when they did direct parties the leverage was the usual one: threats disguised in exhortations which are seldom effective, as we all know.

There have been some recent changes too. New procedure rules have been introduced materially transforming the process at least in some sectors. Disputes amongst shareholders or commercial partners as well as disputes relating to financial and banking services are now governed by special procedural rules (legislative decree no 5 of 2003), which introduced a brand new American-style pre-trial exchange of briefs

between the parties. When the matter is 'ripe' enough, a hearing before a three-justice court is convened. The president of the court is required to suggest an amicable solution 'if circumstances so allow' (s 16 of decree no 5, 2003) and, inevitably any president's word is carefully considered by counsel because it may indicate a view on the final outcome of the dispute should the parties insist on having a judgement. Nothing really innovative, granted. However, the result is that conciliation rates have rocketed.

The interesting thing is that this option was always in the court's gift but it is the first time that the positions of the parties are more clearly defined in advance so that the court may suggest a solution with appropriate knowledge of the case. The fact that knowledge gives impetus to the conciliation process is echoed by similar results in employment cases. Here the parties are forced to appear before a sole judge only after having filed all their defences and fact-finding requests (law no 533 of 1973).

State or public agencies offer a second interesting scenario. Traditionally, there was a plethora of mediation-like processes and mediation 'bodies'. One of the most significant was and still is the mediation mandated in employment disputes before a local trilateral commission, composed in an authentic Marxist tradition by a representative from the trade unions, one of an entrepreneurial association and, as a president, an official from the Ministry of Labour. A typical mediation takes an average of *ten minutes* per case and settlements are, not surprisingly, very low.

It might be surprising to learn that some years ago mediation became a compulsory part of almost all legislative reforms and consequently the reformers in Italy were motivated to enlarge the number and the

scope of activity of state and public agencies. Thanks to intense lobbying, the chambers of commerce have been the knights in shining armour and have stemmed the flow away from independent providers.

This is undoubtedly an interesting example of a social experiment in introducing mediation. At a first glance, chambers of commerce were in a privileged position. In Italy the chamber of commerce is a quasi-public body which supports and promotes activities where public and private interests interrelate. A heavily-funded programme was put in place in the mid-1990s (following law no 580 of 1993) in order to create a mediation centre in every chamber. Since then many disputes have been referred to the conciliation services of the chambers, mainly on a voluntary basis by the parties in dispute (consumer *v* professionals under decree 206 of 2005; consumer *v* travel agents under law no 135 of 2001; franchisees *v* franchisors under law no 129 of 2004; etc) but in some cases it has been a mandatory step before going to court (as in the case of disputes by subcontractors *v* principals under law no 192 of 1998).

Inevitably, there have been some very positive outcomes resulting in the facilitative approach gaining a foothold. However, it takes a very long time to win out over red tape in this environment and the experiment has led to bureaucracy where formality frequently stifles common sense.

Mediators, for instance, are selected by rotation (that's transparency!) and the training required in order to be on the list is minimal. The idea prevails that lawyers and professors of law will automatically be great mediators because they know the law!

The initiative has had some success in commercial disputes. Unioncamere, the coordinating body of the Italian chambers of commerce (www.retecamere.it/area_clienti/Conciliazione/Newsletter/sapere06.htm) claims that over 3,500 cases settled in the period 2003–2005 with an average quantum of €20,000. This is a disappointing result because it needs to be considered in the light of a corresponding number of 12,800 consumer cases dealt with during the same period. This, together with the average claim value (€20,000), definitely confines mediation conducted under the banner of the chambers of commerce to the small claims' arena and there is no sign of this trend changing. In the first quarter of 2006, consumer disputes counted for 80 per cent of the total number of cases.

Of course, this statistic appears somewhat encouraging. However, the disturbing thing is that this public-funded system is (unfairly) competing with private ADR providers which are developing much too slowly due to the absence of a supporting legal framework. In fact, Italy still lacks any decent mediation law that could include independent services (ie provided by professional neutrals independent of, or at least not associated to any public scheme). Something, indeed, has been done: above cited decree no 5/03 introduced a special mediation called '*conciliazione*

stragiudiziale' (ie extra-judicial mediation) for disputes falling within its scope. When the act was adopted the time seemed ripe for enthusiastic support of mediation. And that was possibly the intention of those who wrote the bill. However, they are actually more familiar with traditional civil procedure rules than independent mediation best practices and so the outcome has been largely disappointing.

A heavily state-controlled system has been introduced, mediations under decree no 5 (the only practical advantage here is to generate an enforceable title should a settlement agreement be reached) must be conducted by accredited mediators enrolled in an accredited mediation centre. Accreditation, sadly, relies far more on formal qualification than on the mediator's personal or the centre's process management skills. For instance, each centre must list – who knows why – at least seven mediators acting for that centre only; a mediator must not be enrolled in more than three centres; any lawyer practising for more than 15 years may enrol without any training; the absence of any party at the mediation may be taken into account in court for assessing the legal costs and fees, as is the behaviour of a party during a mediation.

So, the best opportunity for preparing the ground for 'good' mediation practice in Italy has gone. Indeed, a counter-productive precedent has been established.

Fortunately, independent mediation has not been banned but its development may have been severely hampered and its attraction to potential customers much reduced due to the unhelpful practices laid down by the law. A valuable example of how public intervention undermines private initiative when good intentions are implemented without any actual knowledge of the matter in hand.

Note

1 The second broad category of mediator is a person who has an *authoritative* relationship to the parties in that he or she is in a superior or more powerful position and has potential or actual capacity to influence the outcome of a dispute.

eBay - resolution of disputes online

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For those who believe in mediation, it may not actually be our own advocacy that will bring mediation to the people and business but rather the work of one of the great technology companies of recent times namely eBay, the online auction provider.

This is introducing the concept of dispute resolution to the public.

For those who do not know, eBay uses the company, SquareTrade as its preferred third-party dispute resolution provider.

How does the system work in reality?

Step 1: File a case

On the SquareTrade website, a buyer or seller clicks 'File a Case' and fills out a short online form designed to identify the problem and its possible resolutions. This process takes less than five minutes.

Step 2: SquareTrade notifies the other party

SquareTrade contacts the other party via an automatically generated email and provides instruction on responding to the case. The case and all related responses appear on a password-protected case page on the SquareTrade website.

Step 3: The parties discuss their issues directly in direct negotiation

Once each party is aware of the issues, they first try to reach an agreement using SquareTrade's Direct Negotiation tool. This initial phase of the service is a completely automated web-based communications tool and is currently free of charge to all users. Using SquareTrade's secure Case Page, the parties try to reach an agreement by communicating directly with each other.

The other option is to have a SquareTrade Mediator guide the process. If the parties cannot resolve the case through direct negotiation, they can request the assistance of the mediator in developing a fair, mutually agreeable solution. The mediator's role is to facilitate positive, solution-oriented discussion between the parties. He or she does not act as a judge or arbitrator.

Step 4: The case will be apparently resolved

The parties may either reach a settlement agreement independently during direct negotiation, or with the assistance of a SquareTrade mediator. Problems are typically resolved within 10–14 days and the cost is for the party who files the case will be charged US\$20 to involve a SquareTrade Mediator.

My observations on the process are as follows

- (1) The eBay process is heavily geared towards mediation or resolving disputes directly. If you look at the English legal system there is no compulsory requirement geared towards the mediation process despite all the emphasis coming from the courts about how important mediation is.
- (2) It is user-friendly. Individuals are encouraged to resolve disputes themselves without recourse to lawyers. My experience of the English legal system is that even for matters that are low-cost and uncomplicated, it is often difficult for a layperson to navigate the court system. The process is often (unnecessarily) shrouded in legalese.
- (3) It is inexpensive. It is free to file a claim and US\$20 dollars to use a mediator! Please compare to the court fees we have to pay to start a claim. If you need to instruct a lawyer which frankly, most people still need, the cost can be US\$300 an hour or even more. On cost this represents a significant contrast to the pricing of the legal system.
- (4) It uses cutting-edge technology. Whilst there is growing use of online forms, you could hardly associate the English court system with being efficient and utilising leading technology.
- (5) It is speedy. Compare a 10–14 day timescale in resolving a dispute to the way our court system works. Again, it is unfair to make direct comparisons as the eBay process does not factor in for complex trials but the chance to resolve a dispute within 14 days is not really on the agenda for the English legal system (my legal system).

Nevertheless there are perhaps two possible limitations of the SquareTrade process which are worth examining:

- (1) One of the weaknesses of an online tool is that you are not dealing with a party in person. As a mediator it is good to have the parties in person so that you can see the body language and how they react to

each other. Therefore, I do not believe that the role of the mediator is going to die but rather this will be a tool which will complement what we are doing as mediators. On the other hand, whilst SquareTrade do not use video, video is increasingly going to play a role in the online field which is going to add another dimension to the dispute resolution field.

- (2) As barrister, Jeremy Barnett recently pointed out in the British *Law Society Gazette*, one of the key mediation challenges is to put on multi-party complex hearings or meetings in remote locations. These hearings are document heavy often requiring access to data stored on various mainframe computer systems around the world. This means that the SquareTrade tool does have some limitations in what it can do. According to Barnett, the answer is to use the computing for virtual organisations, rather than building monolithic computer systems.

Overall, the trend is towards online dispute resolution (ODR) and to rapidly growing services like SquareTrade and it is critical that mediators should not only be aware of what is going on in the ODR field but also should actively embrace these tools.

As mediator Colin Rule observed in a recent article for Mediate.com, technology has moved at rapid pace and ODR is going to be one of the biggest beneficiaries of the new technologies such as audio, video and mobile technologies as they are focused on ODR's core functional areas: communication, collaboration and interactivity. He concludes:

'For our clients, customers, and partners to truly realize the benefits of these technological advancements we need to commit ourselves to ongoing experimentation and development so that we can ride the curve of this advancement. If we do not, we risk having the next chapter of ODR written by those who do not understand the ethical underpinnings of quality dispute resolution practice and who may co-opt the legitimacy of ODR systems for their own purposes. By staying on top of this curve ourselves we can best ensure that ODR delivers on the promise it has offered and help to resolve the greatest number of disputes possible.'¹

Note

1 www.mediate.com/articles/rule4.cfm.

Med-arb – a fresh look

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Introduction

Mediation-arbitration ('med-arb') is a controversial dispute resolution process. In the process, a neutral attempt to mediate a dispute on the understanding that if the mediation does not result in a settlement, the neutral will deliver an award that finally decides the issues between the parties. Although the culture and tradition in many countries accept this dual role and assume that an arbitrator will be seeking to mediate any dispute in the course of the proceeding, the practice has not been widely adopted in North America. In this article, I propose to:

- provide a brief history of med-arb in its modern context;
- analyse the advantages and disadvantages of mediation and arbitration;
- examine the statutory provisions and legal constraints that impact a med-arb process in Canada;
- consider the advantages and disadvantages of med-arb as it has functioned in North America; and
- propose alternative formats and situations that are appropriate for the enhanced use of med-arb to resolve commercial disputes.

The history of med-arb

It is now widely accepted within both national and international business communities that the prompt and efficient resolution of conflict plays a key role in ensuring an efficient and competitive marketplace. An unnecessarily long and expensive dispute resolution process will imperil existing business relationships and future business prospects and add an unnecessary cost to carrying on business. In consequence, businesses often attempt to avoid the regular litigation and arbitration process by pursuing alternative forms of dispute resolution that are more closely tailored to the specific interests of their business.

The objective is to find a process that is cost efficient and as prompt as possible, that produces savings in cost and aggravation, allows the parties to maintain as much control over the dispute resolution as possible, and encourages and supports the preservation of existing and future business relationships. Parties now have before them a wide variety of dispute resolution processes, including litigation, negotiation, mediation, arbitration and various hybrid forms of ADR that combine features of various models to attempt to secure the benefits of each.

Med-arb: the traditional model

Med-arb has traditionally been recognised as a hybrid form of ADR. It combines mediation and arbitration, which are generally regarded as independent forms of ADR, into a single two-step process. In the traditional form, a neutral brings the parties together and encourages them to settle through mediation; if the mediation does not resolve the dispute, the same neutral commences a fresh arbitration hearing. A successful mediation results in a final binding agreement between the parties. A decision by the neutral following a mediation that does not result in settlement produces an enforceable award.

Med-arb is seen as a process that attempts to capture the independent strengths of both mediation and arbitration while limiting their perceived weaknesses.

The advantages of mediation are well known. They include its consensual and confidential nature, lower costs if successful, greater flexibility and a process that can be managed by the parties. The perceived weakness is that the mediator cannot render a binding decision if the mediation does not result in a settlement. The main strengths of arbitration are that the arbitrator's decision is final and binding on the parties, that rights of appeal can be limited, that the process and the decision can be more confidential than public litigation in the courts, and that its process, including the choice of the neutral, is under the control of the parties. Weaknesses include the fact that the parties are dependent on the efficiency and fairness of an arbitrator, the process can be slow and expensive, the parties may have little control over the process, and in the end a decision may be imposed upon the parties that is not desired by either.

Med-arb emerged as an attempt to combine the consensual nature of mediation with the finality of arbitration. We will now examine the advantages and disadvantages of med-arb and seek to determine why it has not become a more popular form of alternative dispute resolution.

The advantages of med-arb

The most compelling reason to engage in med-arb is the prospect of achieving a prompt resolution to a dispute at a minimum of expense, aggravation and inconvenience to the parties. Most of the literature suggests that med-arb produces a final result far more efficiently than do the traditional options of litigation and arbitration. It is expected that the parties will not have to suffer the costs

and delays associated with two reviews of the evidence, one by a mediator and one by an arbitrator or judge. Moreover, the hope and expectation is that a settlement will result so that the parties will have resolved the dispute themselves.

It is argued that med-arb gives the parties greater control over the management of their dispute. During the mediation phase, the parties are in complete control of any settlement that is reached. If mediation does not result in a settlement, the parties can devise a subsequent arbitration process that suits their business interests and ongoing relationships.

A controversial feature of med-arb, but one that can be seen to be an advantage to the parties, is the fact that during the mediation process the parties are likely to be highly motivated to settle in order to avoid losing control over the dispute. This is particularly true as the mediation proceeds and the neutral appears to encourage a settlement of an issue on a particular basis. The parties will be well aware that their mediator may ultimately take on the hat of arbitrator and decide the issue that is then being discussed. Of course, the parties will recognise the obvious advantage in that even if the mediation phase is not successful, finality is ensured because a neutral will deliver a final and binding award.

The disadvantages of med-arb

Many experienced and highly ethical neutrals remain convinced that mediation and arbitration by the same person are inherently incompatible. A mediator focuses on the interests of the parties and encourages the parties to settle their dispute according to their best interests, not necessarily in a manner that respects their legal rights and obligations. In contrast, an arbitrator is expected to decide according to the law and the evidence by delivering an award that finally determines the legal rights of the parties. The issues that dominated the mediation may be irrelevant in the arbitration but nevertheless are part of the record that has been collected by the neutral.

Critics of the process point out that a neutral may not necessarily have the skills to function effectively as both a mediator and arbitrator. Moreover, if one or more of the parties is not confident that the neutral has that special skill, the trust that is so important to the mediation process will be undermined.

It is pointed out that the traditional form of med-arb can provide a party with an opportunity and perhaps an incentive to undermine the bargaining and mediation process. There is a risk that a party may take advantage of this process by focusing on persuading the mediator with a view to influencing a final award when the mediation inevitably will not result in settlement. There is also a legitimate concern that parties may be disinclined to make the usual disclosures that are common in mediation if they fear that a disclosure will prejudice the arbitration process.

Critics strongly object to a med-arb process that allows a neutral to use coercive tactics to achieve an early settlement rather than risk an apparently adverse award. Such tactics can cause the parties to lose control over their process. Interesting questions arise about the acceptance by the neutral of confidential information during the mediation process. It is said that the med-arb process necessarily violates the rules of natural justice. A neutral acting as mediator is given sensitive information because of the assurance of confidentiality. Once the mediation fails, the neutral is required to either attempt to ignore information that may be highly prejudicial to one party or make a disclosure that violates the assurance of confidentiality. A process in which the neutral meets with the parties only in the presence of one another denies the neutral and the parties the opportunity to achieve a mediated settlement through private meetings with the parties. Such private meetings are usually considered very desirable in mediation processes.

Laws that regulate mediation by arbitrators

Canadian provinces and territories have statutes that govern international commercial arbitrations. Those statutes have sections similar to s. 3 of the Ontario Act which provides:

‘For the purpose of encouraging settlement of a dispute, an arbitral tribunal may, with the agreement of the parties, use mediation, conciliation or other procedures at any time during the arbitration proceedings and, with the agreement of the parties, the members of the arbitral tribunal are not disqualified from resuming their roles as arbitrators by reason of the mediation, conciliation or other procedure.’

That section seems to allow a med-arb process with the consent of the parties. Notwithstanding the qualified endorsement of med-arb in statutes governing international commercial arbitrations, the provinces and territories have enacted statutes to regulate domestic arbitrations that contain a direction that ‘the members of an arbitral tribunal shall not conduct any part of the arbitration as a mediation that may compromise or appear to compromise an arbitral tribunal’s ability to decide the dispute impartially’. Although this section does not necessarily prohibit med-arb, it clearly directs that a tribunal once established as an arbitral tribunal is not entitled to take on a traditional mediator’s role. Of course, it must be recognised that the parties can expressly opt out of this provision if they choose.

One can ask why the two Ontario statutes deal with the mediation role differently. The Ontario statute governing international arbitration adopts the Model Law, which more closely conforms to international practice. The question remains in a domestic arbitration as to whether Ontario public policy would prohibit fully

informed parties from agreeing to a mediation role by an appointed arbitrator.

The Labour Relations Act of Ontario, s 50(1) confers on the parties the right to refer a grievance under a collective agreement to a single mediator/arbitrator for resolution. Although this is given within the context of labour relations, the section appears to represent a strong legislative endorsement of med-arb in Ontario.

In many parts of the world negotiation, conciliation and mediation have historically been the dispute resolution processes of choice. Arbitrators have been encouraged to facilitate settlement before resorting to a determination of legal rights. The arbitration process often becomes an informal med-arb in which the neutral resolves the dispute after settlement efforts have failed.

The following are examples of statutory schemes that encourage mediation by arbitrators with the consent of the parties.

The Commercial Arbitration Act 1990 of Queensland, Australia, allows parties to an arbitration agreement to authorise an arbitrator to act as mediator before or after proceeding to arbitration and whether or not the arbitration will continue.

The Commercial Arbitration Act 1984 of New South Wales, Australia, similarly provides that parties to an arbitration agreement may authorise an arbitrator to act as mediator whether before or after proceeding to arbitration and whether or not the arbitration will continue.

The law in Brazil that regulates arbitration provides that the arbitrator shall at the beginning of the procedure try to mediate the issues between the parties with the hope of achieving a settlement that may become the basis for an arbitral award.

The laws of the People's Republic of China provide that an arbitral tribunal with the consent of the parties may attempt mediation prior to making a ruling and, if the mediation fails, will deliver a ruling promptly.

The arbitral rules of the China International Economic and Trade Arbitration Commission (CIETAC) provide that an arbitral tribunal may conciliate cases in a manner that it considers appropriate and, if conciliation fails, will proceed with the arbitration.

The International Arbitration Act of Singapore provides that an arbitrator, with the consent of the parties, may act as a conciliator and will disclose such information as he has received in mediation as he considers material to the arbitral proceedings.

The rules of the World Intellectual Property Organization (WIPO) encourage a mediator to promote settlement of the dispute and, if unsuccessful, to propose procedures including arbitration by the mediator.

The law of Hong Kong allows an arbitrator to conduct mediation if both parties are in agreement.

Summary

Parties to domestic and international commercial disputes would be attracted to a fresh process that is likely to significantly minimise the time, expense, aggravation, and inconvenience that the parties will experience in the standard and prevalent dispute resolution processes.

The greatest obstacle to the acceptance of med-arb as a fresh, alternative procedure is the cultural aversion that infects the point of view of many traditional ADR practitioners.

Med-arb has earned legislative respect in a number of western countries, including Canada and is practised in a number of countries.

There are legitimate concerns about the possible abuse of med-arb and safeguards should be sought. The fully informed consent of the parties may resolve legal concerns about jurisdiction.

Suggestion for med-arb in a commercial contract

Standard clause

Any dispute arising out of or relating to this contract, including the breach, termination or validity thereof, shall be finally resolved by mediation/arbitration facilitated by the chosen neutral in accordance with the following procedure, which is intended to be confidential, cost-efficient and timely.

- (a) The parties select _____ to be their neutral to mediate and, if the dispute is not settled, to determine the dispute by issuing an arbitral award that will be final and binding on the parties and will not be subject to an appeal to the court.
- (b) If the person selected by the parties in this agreement to act as neutral is unable or unwilling to serve, the parties will attempt to select a neutral that is acceptable to both. If the parties cannot agree on the choice of a neutral, the med-arb proceeding will be terminated and the parties will be left to resolve their dispute through such other procedures as are available to them.
- (c) The neutral will preside fairly and attempt to achieve a just resolution of the dispute in a confidential process. The parties recognise that the neutral will receive relevant information while acting as mediator during private caucuses and otherwise and agree that these activities will not impair the ability, status, or jurisdiction of the neutral to decide as arbitrator if the dispute is not settled.
- (d) The mediation phase will terminate if the parties reach a settlement of all outstanding issues or if the neutral determines that the mediation process should be terminated and that the neutral should prepare to decide the issues.
- (e) If the mediation is terminated, the arbitration process will begin. If the parties have agreed to an oral hearing, a date and arrangements for the

hearing will be established. The neutral, after hearing from the parties, will decide what, if any, information that was received in the mediation process should be accepted and relied on in the arbitration.

Comments

The above format recognises that a neutral selected to facilitate a med-arb must have the complete trust of both parties. It is inappropriate that an appointing authority should impose a neutral on a party in this format.

This format assumes that in an appropriate case the neutral can allow the mediation and arbitration to proceed quickly and at relatively little cost. The neutral can decide at an early stage whether it is necessary for the parties to be ready to produce witnesses, documents, and arguments at an arbitral hearing that might follow upon a failed mediation. The process is dependent upon a trusted, fair and efficient neutral who can shorten or eliminate much of the formality in an arbitration process.

Paragraph (b) above assumes that the parties will not agree to have an appointing authority select a neutral to manage a med-arb because of the special qualifications required. Perhaps this is unduly pessimistic.

Med-arb opt-out: a possible option

Parties who fear that the selected neutral may act unfairly or coercively during the mediation process may retain an option to withdraw from the process at any time during the mediation. The comfort from such a reservation has to be weighed against the likelihood that the flexibility, insight and persuasiveness of the neutral will be impaired by the prospect of the opt-out clause lurking in the background. If a party believes that an opt-out clause is required, med-arb should probably be rejected.

Med-arb and final offer selection

Experience shows that some disputes are ideal for settlement by a process of final-offer selection. The parties are encouraged to be reasonable because the neutral must select between the two last offers that have been presented. This process is most useful when the issues are narrow, primarily monetary in nature and when a private, prompt and fair solution is required. If an appropriate neutral can be found to manage a med-arb process the parties may be able to achieve a settlement without the necessity of an arbitral hearing and an award that can be embarrassing to the losing party. Another possible option is to allow either party to opt out of the process after final offers have been exchanged but before they have been presented to the neutral for consideration. Both parties are then in a position to decide whether an award against them will be within a range that they can tolerate.

Prohibition of private contact and caucuses

Many, but not all, mediators believe that private contact with the parties and their advisers in the form of caucuses or otherwise, better allows the neutral to understand the interests and expectation of the parties in order to model suitable suggestions for settlement. The mediator in this format will receive information on a confidential basis that is relevant and that might be prejudicial to the position of an opposing party. A legitimate challenge to the med-arb process often centres on the effect of such private contacts either consciously or otherwise on the neutrality and appearance of neutrality of the neutral. The following clause has been suggested to address this issue:

‘If caucusing (meetings separately with each party) is used during the mediation process, any statements in caucusing which might influence the decision of the Mediator/Arbitrator will be revealed to the other side prior to the decision of the Mediator/Arbitrator (this will not apply if the parties reach an agreement).’

This issue is difficult. Some neutrals make extensive use of private communications and caucuses and will find it difficult to know what to reveal that might influence their decision. Some believe that an impairment of private communications and caucuses will prejudice the prospects of achieving settlement to the satisfaction of the parties.

The obvious purpose of the med-arb proceeding is to resolve the dispute in as cost-efficient a way as possible. Accordingly, it should be possible for the parties to agree to a med-arb proceeding where the neutral may begin as mediator, become arbitrator and resume a mediator’s role as the matter proceeds. This unusual procedure might be attractive in some circumstances.

Conclusion

Med-arb will be a very attractive dispute resolution process when administered by a neutral who has excellent mediation and arbitration skills and is trusted by the parties. With the informed consent of the parties, no issue of independence or partiality will arise. It would be understood and agreed that information would not be accepted or relied on unless it was disclosed to the other party in the arbitration process. Concerns about the possible contamination of the neutral by receiving information or arguments in private meetings are overstated. Judges regularly rule on the admissibility of evidence and if that evidence is rejected, the judge disregards the information that has been tendered. In my view, an experienced neutral should and will be given the same respect. The challenge is to persuade parties and experienced neutrals in the western world to take a fresh look at med-arb in the light of modern pressures for a prompt resolution of commercial disputes at a minimum of expense, aggravation and inconvenience to the parties.

Note

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Annotated bibliography

S Allred, 'Med-Arb and the Resolution of the SSA-AFGE Bargaining Impasse: A Case Study', (June 1984) 39:2 *The Arbitration Journal*, 46.
 This article illustrates the origins and history of med-arb in the United States. The Wisconsin Model of final offer arbitration is evaluated and its shortcomings highlighted. Specifically, the author argues that the model failed because it was statutorily imposed and not a voluntary choice of the parties.

B Bartel, 'Med-Arb as a Distinct Method of Dispute Resolution: History, Analysis, and Potential', (Summer 1991) 27:3 *Willamette L Rev*, 661.
 Bartel analyses the different variations of med-arb in the context of the generally accepted disadvantages of the hybrid. A contingent form of med-arb and a final offer arbitration model, referred to as the Wisconsin Model, are both explained to the reader. The article also sets out the conceptual debate as to whether or not mediation and arbitration are incompatible as a hybrid form of ADR.

T Brewer and L Mills, 'Combining Mediation and Arbitration', (November 1999) 54:4 *Dispute Resolution J*, 32.
 Brewer reviews the advantages and disadvantages of med-arb, concluding that the process can be very valuable to large corporate clients. Sophisticated parties that have long-term relationships with each other appear to be the best fit for med-arb.

J Brienza, 'ADR: Doing Two Things At Once Can Be Problematic', (1998) 34:5 *Trial*, 19.
 This article recommends that med-arb be the exception rather than the rule in ADR. The key danger posed by med-arb is that the parties may lose confidence in the med-arbiter as a direct result of that neutral's dual role. However, Brienza still indicates that med-arb can work if the parties are fully informed of the process ahead of time and if they are sophisticated enough to understand the implications of the process.

G Chornenki, *The Corporate Counsel Guide to Dispute Resolution* (Aurora, Ontario: Canada Law Book Inc, 1999).
 Chornenki identifies those features of med-arb that make it advantageous to certain parties. Several examples include the availability of finality, the increased facilitation of settlement and the economical resolution of the dispute. The article does warn the reader, however, that the mediation phase and arbitration phase of the dispute are best kept distinct.

C Chvala and M. Fox, 'Comments: Final Offer Mediation-Arbitration and the Limited Right to Strike: Wisconsin's New Municipal Employment Bargaining Law', (1979) *Wisconsin L Rev*, 167.
 This article discusses the Wisconsin Model specifically and final offer arbitration generally and their pros and cons. In the Wisconsin Model, however, the parties have less control over the process. For example, the parties cannot decide to opt out of the process.

D Elliott, 'Med/Arb: Fraught with Danger or Ripe with Opportunity', (1995–1996) 34 *Alta L Rev*, 163.
 Elliott discusses the attractions of med-arb and the different variations of the process, with some emphasis on the existing statutory examples both in Canada and abroad. The ability of the parties to maintain control over the dispute and to design parts of the ADR process themselves are cited as attractive features of med-arb. Several case studies on med-arb are also identified.

L Faber, 'Med/Arb as an Appropriate Dispute Resolution Method', (March 1998) Number 15 *The Canadian Journal of Dispute Resolution*, 1.
 In this article the reasons for developing an alternative model of med-arb are identified and several alternative models are set out. One particular model allows the parties to opt out of the process before the mediation phase shifts into the arbitration phase. A second model requires the parties to submit their final offers after mediation, from which the med-arbiter would select the one which most resembles his or her own decision.

S Goldberg, F Sander and N Rogers, *Dispute Resolution: Negotiation, Mediation and Other Processes*, 2nd edn (Toronto: Little Brown and Company, 1992).
 The authors argue that the main problem with med-arb is keeping the parties focused on seeking accommodation during mediation rather than attempting to influence the final decision. A related problem for the med-arbiter is to avoid any actual or perceived tainting of his or her

role as mediator, a factor that is heavily dependant upon each party's confidence in the neutral.

J Goss, 'An Introduction to Alternative Dispute Resolution', (1995–1996) 34 *Alta L Rev*, 1.
 Goss discusses the advantages and disadvantages of med-arb, with a focus on those characteristics of mediation and arbitration that are incompatible with each other. The article also cites a legislative example of med-arb: s 35 of the Alberta Arbitration Act permits an arbitrator to, prior to making an award, facilitate negotiations between the parties.

K Henry, 'Med-Arb: An Alternative to Interest Arbitration in the Resolution of Contract Negotiation Disputes', (1987–1988) 3 *Ohio St J on Dispute Resolution*, 385.
 Henry describes med-arb as a process that combines the hospitable environment of mediation with the finality of arbitration. This article identifies med-arb's perceived advantages over both mediation and arbitration. To function effectively, med-arb requires the process to be voluntary and the med-arbiter to be given considerable authority over the process. Although the author admits that some academics doubt the neutral's ability to keep the two roles separate, this potential problem is seen as a practical obstacle that can be overcome by an appropriately skilled neutral.

M Hoellering, 'Mediation and Arbitration: A Growing Interaction', (Spring 1997) *Dispute Resolution Journal*, 23.
 This article discusses med-arb's potential for resolving international commercial disputes. The commercial client's interest in finality is cited as the primary reason for using med-arb. But several problems with med-arb, such as the threat to confidentiality and the danger that the parties will lose control, lead the author to the conclusion that mediation and arbitration are best used as separate processes.

S Kagel and B Roth, 'Med-Arb' in B Roth, F Wulff and C Cooper, eds, *The Alternative Dispute Resolution Practice Guide* (Danvers, Mass: Thomson West, 2003) 37-1.
 This article provides a basic description of the med-arb process. The issue as to whether or not the med-arbiter will be able to maintain the confidence of the parties throughout the process is considered in some detail. The added authority held by a med-arbiter is cited as a possible advantage for the settlement of the issues.

S Kim, 'The Provisional Director Remedy for Corporate Deadlock: A Proposed Model Statute', (2003) 60 *Washington & Lee L Rev*, 111.
 Kim argues that med-arb allows the parties to benefit from the cooperative aspects of mediation as well as the finality of arbitration. In particular, Kim asserts that med-arb provides an incentive for parties to make honest demands and offers rather than extreme ones. The Pruitt, McGillicuddy Study is cited as support for the proposition that parties engaging in med-arb are more conciliatory and less hostile than disputants using other forms of dispute resolution.

B Krugler, 'ADR Update: Are You Maximizing All ADR Has to Offer?' (December 1998), 61 *Texas Bar J*, 1120.
 This article sets out several practical steps for conducting med-arb successfully. For example, establishing early ground rules, insisting on a med-arb contract and choosing a neutral with experience in both fields are all positive steps towards a successful med-arb process.

S Landry, 'Med-Arb: Mediation with a Bit and an Effective ADR Model', (1996) 63 *Defence Counsel Journal*, 263.
 Landry analyses med-arb and its perceived advantages and disadvantages. The article focuses on the overriding disadvantages of med-arb, including the perceived incompatibility of the two roles, the loss of trust in the med-arbiter, the possible absence of voluntary participation and the difficulty in finding a qualified neutral. Landry also identifies and evaluates several alternative med-arb models, including med-arb with different neutrals, non-binding med-arb and mediation and last offer arbitration. In her conclusion, the author argues that med-arb works best when the parties are of relatively equal bargaining power and when the efficiency of a combined procedure outweighs the concerns associated with the neutral's role change.

K Lemley, 'I'll Make Him An Offer He Can't Refuse: A Proposed Model of Alternative Dispute Resolution in Intellectual Property Disputes', (2004) 37 *Akron L Rev*, 287.
 Lemley argues that there is one fatal flaw in med-arb. The author claims that med-arb does not foster communication between the parties, as is the case with mediation. The result will be uncooperative parties that hold back important information in an attempt to influence the final decision.

R McLaren and J Sanderson, *Innovative Dispute Resolution: The Alternative* (Toronto: Thomson Canada Ltd, 2003).

The authors discuss numerous advantages and disadvantages of med-arb, while pointing out several dilemmas that could undermine a med-arb session. Particularly, the article points out that the parties may use coercive tactics during the mediation session and waste their time by attempting to persuade the neutral of their position. Examples of mediated final offer selection are also set out.

S Menack, 'Mediation/Arbitration: The Hybrid ADR Device', (14 August 1995) *New Jersey Law Journal*, 21.

Menack identifies numerous advantages in the med-arb process, including a heightened incentive to settle and an increased prospect of finality. In this way, the process provides parties with an opportunity to benefit from the most sought after features of both mediation and arbitration. Menack does warn the reader, however, that some contentious issues on how the med-arb session will operate must be resolved in advance of the session.

A Marriott, 'Arbitrators and Settlement', (2004) *70 Arb*, 4.

This is an excellent overview of international mediation and is a challenge to traditional arbitration.

E Newman, 'Med/Arb Grievance Resolution: The Case for Clarity' in the *Labour Arbitration Yearbook* (Toronto: Lancaster House, 2000), 237.

This article is written in the context of labour arbitration. With respect to med-arb, the author explains that it would be very difficult for the neutral to move between the two roles without compromising the integrity of either role.

H Oghigian, 'The Mediation/Arbitration Hybrid', (2003) 20:1 *Journal of International Arbitration*, 75.

Oghigian explains that med-arb can work in certain situations, but still suffers from a number of problems, including the med-arbiter's ability to gain the trust of the parties and their legal counsel. The role switch by the neutral is only feasible if issues of natural justice are addressed in the structure of the process.

E Onyema, 'Current Development: The Use of Med-Arb in International Commercial Dispute Resolution', 12 *The American Review of International Arbitration*, 411.

This article suggests ways in which the traditional form of med-arb can be adjusted to better resolve international disputes. Several examples of foreign statutes are provided to illustrate the use of med-arb internationally. The author then explains how med-arb can be tailored to minimise the danger of violating principles of judicial transparency and natural justice. Onyema argues that these principles can be protected if the med-arbiter avoids caucusing.

J Peter, 'Note and Comment: Med-Arb in Int. Arbitration', (1997) 8 *The American Rev of International Arbitration*, 83.

Peter argues that med-arb, in its pure form, is not appropriate for international disputes. The author reviews the main problems with the process, including issues of partiality, breaches of confidentiality, violations of due process, excessive coercion and the neutral's level of experience. Alternative models of med-arb, including mediation and last offer acceptance, are also reviewed in the article. Peter finishes the article by highlighting examples of med-arb in several foreign statutes.

T Peugh, 'Alternative Dispute Resolution: A Study of the History and Functions of ADR Techniques as Mechanisms for International Peacekeeping', (1999–2000) 25 *T Marshall L Rev* 139.

This article briefly addresses the issue of confidentiality in med-arb. Critics of med-arb argue that the process endangers the principle of fairness, as med-arbiters may allow confidential information provided during mediation to impact upon the final decision.

B Reich, 'Attorney v. Client: Creating a Mechanism to Address Competing Process Interests in Lawyer-Driven Mediation', (2001–2002) 26 *S Ill ULJ*, 183.

This article poses several alternative models of the med-arb hybrid. In particular, the author argues that mediation should be followed by a recommendation by the neutral rather than a final decision after arbitration.

J Stern, 'The Mediation of Interest Disputes by Arbitrators under the Wisconsin Med-Arb Law for Local Government Employees', (June 1984) 39 *Arbitration Journal*, 141.

This article gives a comprehensive review of the former med-arb law in Wisconsin. The content, history and effectiveness of the law is discussed in some detail. The law had two particularly relevant attributes. First, either party could opt out of the process after mediation instead of proceeding to arbitration. Secondly, if mediation failed, final offers were

submitted to the med-arbiter who then selected the one that most closely resembled his or her own decision.

T Stipanowich, 'Contract and Conflict Management', (2001) *Wisconsin L Rev*, 831.

This article identifies the disadvantages in mixing mediation and arbitration.

A J Stitt, *Alternative Dispute Resolution Practice Manual*, looseleaf (North York, Ont: CCH Canadian Limited, 1998).

This looseleaf is one of Canada's leading texts on ADR. Stitt has brought together a wide variety of essays, including an essay on med-arb by Louis Faber. A basic description of med-arb, its advantages, its disadvantages and the alternative forms of the hybrid are discussed in detail.

J Stulberg, 'Questions', (2001–2002) 17 *Ohio State J of Dispute Resolution*, 531.

This article does not support med-arb as a form of ADR. On a conceptual level, the author explains that the neutral cannot possibly assume two roles that are so fundamentally incompatible with each other. On a practical level, it is argued that the parties would be less likely to support an attempt to mediate if they knew that they would be subject to a final decision by the same neutral.

M E Telford, *Med-Arb: A Viable Dispute Resolution Alternative* (Kingston: Industrial Relations Centre Press, 2000).

In this article med-arb is described as a conceptually sound form of ADR that is only limited by the abilities and skills of the med-arbiters. The author identifies the main obstacles to its effective implementation, including the use of coercion and the risk to confidentiality.

D Van Duch, 'Do Hybrids Compromise ADR Benefits', (March 1998) *The National Law Journal*, 1.

This article illustrates several problems that could emerge from the perceived incompatibility of mediation and arbitration. For example, parties may focus their efforts during mediation on attempting to influence the view of the neutral in an attempt to affect the final decision during arbitration. The article also suggests that the med-arbiter may prove to be unable to skilfully function as both a mediator and an arbitrator. Several practical counter-arguments are posed to address these problems.

United States: multi-step dispute resolution clauses

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So-called ‘multi-step’ dispute resolution clauses have become popular additions to domestic and international commercial contracts in the United States and elsewhere.¹ These clauses typically prescribe tiered procedures in the event of a dispute.

Such procedures often begin with the notification and description of a dispute by the aggrieved party followed by a period of consultation, negotiation and/or mediation.² In the event that the parties cannot agree on a way to resolve the dispute, in whole or in part, multi-step dispute resolution clauses typically provide for litigation, or, more commonly, arbitration under specified rules. Under certain conditions, these clauses have the potential to encourage early resolution of disputes with minimum acrimony by facilitating initial discussions in less adversarial settings.

With the onset of a dispute, however, disagreements may arise regarding the proper application of such dispute resolution clauses. Depending on the circumstances, one party may believe that recourse to the first step of the dispute resolution clause would be futile or would unnecessarily delay proceedings in a time-sensitive situation and would thus prefer to advance proceedings directly to a subsequent step in the clause such as arbitration. The other party may insist on negotiation or mediation first, either out of a good faith belief that common ground can be found through such procedures, or perhaps more opportunistically as a dilatory tactic. Or, both parties may wish to avoid negotiation or mediation for one of the above reasons, but one may seek to avoid the application of the dispute resolution clause altogether in an attempt to litigate the dispute in court, while the other may seek to enforce the arbitration component of the clause if there is one.

Such cases can raise important questions regarding whether and in what contexts, the negotiation or mediation component of a multi-step dispute resolution clause can be enforced against an unwilling party. As the discussion below illustrates, the negotiation or mediation component of a multi-step dispute resolution clause can be enforced under United States law, but only if the clause is sufficiently definite so as to provide objective standards by which compliance can be measured. Yet this rule can be a double-edged sword. As shown below, a specific and strongly-written requirement for negotiation or mediation as a precondition to arbitration, for example, has led some courts in the United States to retain jurisdiction over arbitrable

disputes over the objection of one party on the basis that neither party sought to mediate and therefore, that the entire dispute resolution clause had not been ‘triggered’. The potential for such results highlights the importance of careful drafting of such multi-step dispute resolution clauses in order to emphasise the parties’ selection of arbitration even when neither party elects to avail itself of the mediation or negotiation component of the clause’s procedure.

Enforceability of the negotiation, mediation or other non-binding component

Courts in the United States do not concur on whether an agreement to negotiate in *any* context is enforceable.³ Consequently, courts in the same federal district have held both that an agreement ‘to use best efforts to reach an agreement’, constituted an enforceable agreement,⁴ and that ‘[a]n agreement to negotiate in good faith’ is unenforceable because it is ‘even more vague than an agreement to agree’.⁵

Ultimately, a court’s decision whether to enforce an agreement to negotiate appears to hinge, on a case-by-case basis, on the definiteness of the contractual terms. As one New York court observed, it is possible to enforce a definite and certain duty to negotiate in good faith, but ‘even when called upon to construe a clause in a contract expressly providing that a party is to apply his best efforts, a clear set of guidelines against which to measure a party’s best efforts is essential to the enforcement of such a clause’.⁶

In the context of contractual clauses requiring negotiation or mediation of disputes (or, for that matter, other non-binding procedures), courts focus on the definiteness of the negotiation or mediation procedures designated by the contract. Where such clauses contain *indicia* of definiteness, such as a limited duration of negotiation or mediation,⁷ a specified number of negotiation sessions,⁸ specified negotiation participants,⁹ or mediation pursuant to specified rules or under the auspices of a particular dispute resolution institution,¹⁰ courts appear more likely to enforce them.

The possible futility of seeking in good faith to enforce a non-binding component of a multi-step dispute resolution clause against an unwilling party is not necessarily a reason for denying enforcement of that component. At least one federal court of appeals has held in the context of a ‘non-binding’ arbitration

procedure that, despite the fact that one party believed the procedure would be futile, the possibility existed that the procedure could generate an advisory result that the resistant party would find 'favourable'.¹¹ In that context, the court enforced the dispute resolution clause, finding that it was 'unable to conclude' that the procedure 'would be futile'.¹²

The context of multi-step dispute resolution clauses, however, leads courts to emphasise a further key factor affecting whether an agreement to negotiate or mediate is sufficiently definite to be enforced: whether or not the clause clearly makes resort to those less adversarial procedures a mandatory precondition to escalating the dispute. Where multi-step dispute resolution clauses do not state that negotiation or mediation is a condition precedent to the pursuit of more adversarial procedures, courts in the United States tend to view negotiation or mediation provisions more flexibly – ranging from a reluctance to strictly enforce notice provisions or time limits surrounding the negotiation provisions to a refusal to enforce those provisions at all.¹³

By contrast, where multi-step dispute resolution clauses contain condition precedent language associated with negotiation or mediation provisions, courts will be more likely to enforce those provisions strictly according to their terms. Thus, where a contract contained a 'mandatory negotiation' clause¹⁴ and the plaintiff commenced an arbitration before any negotiations could take place, the court vacated the eventual arbitration award that was favourable to the plaintiff. Because the defendant had objected during the arbitration that no negotiation had taken place in advance of the arbitration and 'the parties were required to participate in the mandatory negotiation sessions prior to arbitration[,]...the trial court was correct in vacating the arbitration award'.¹⁵

Likewise, where a defendant's attempt to enforce a mediation clause was resisted by the plaintiffs on the grounds that the plaintiffs had 'substantially complied' with the provision by writing letters detailing the nature of their grievances, the court held: 'The mediation clause here states that it is a condition precedent to any litigation....Because the mediation clause demands strict compliance with its requirement[s]...before the parties can litigate, plaintiffs' substantial performance arguments must fail'.¹⁶

It should be noted, however, that courts in the United States have not always unquestioningly enforced negotiation or mediation portions of multi-step dispute resolution clauses even where they were conditions precedent to arbitration or litigation. Where it is evident that a party is attempting to delay arbitration or litigation by insisting on enforcement of a negotiation or mediation requirement, courts may decline to assist that party in its delay. Thus, even where the contract at issue included 'a term requiring mediation...as a condition precedent to arbitration', and the defendant had requested a stay from a federal district court where the

plaintiff had instead filed suit in order to pursue mediation,¹⁷ the court observed that 'surely a party may not be allowed to prolong resolution of a dispute by insisting on a term of the agreement that, reasonably construed, can only lead to further delay'.¹⁸

Ultimately, the negotiation or mediation components of a multi-step dispute resolution clause can be enforced in the United States, but enforceability depends on a variety of factors. Whether the clauses are definite in terms of time, place and procedures, for example, can play an important role in determining whether such clauses are legally cognisable agreements. Similarly, whether the clauses describe negotiation or mediation as a mandatory condition precedent to further, more adversarial, procedures will also enhance the likelihood of enforcement. Enforcement can be obtained even where a party is unwilling to participate, as some courts hold out the possibility that a settlement could accrue from non-adversarial or non-binding procedures. Nevertheless, courts retain the prerogative to deny enforcement if it appears that it is sought for illegitimate, tactical reasons.

Interaction between the negotiation or mediation component and the arbitration component

Parties seeking to create enforceable duties to negotiate or mediate as part of a multi-step dispute resolution clause may be surprised, however, by the ways some United States courts have addressed the interaction between those non-adversarial components and the arbitration component of such clauses. Many parties might, for various reasons, prefer to use negotiation or mediation as a condition precedent to arbitration. They might assume that even if they decided not to pursue negotiation or mediation in a particular dispute, their intent at the time of contracting to arbitrate all disputes arising out of their contract would be respected. In many jurisdictions in the United States, under prevailing law, they would be wrong.

For example, the First Circuit Court of Appeals considered a construction contract with a multi-step dispute resolution clause that provided, among other things, that disputes 'shall...be subject to mediation as a condition precedent to arbitration'.¹⁹ Neither party attempted to mediate the ensuing dispute and after the plaintiff filed suit, it subsequently moved to compel arbitration based on the arbitration component of the contract's multi-step dispute resolution clause. When the defendant resisted this motion, the court held that '[u]nder the plain language of the contract, the arbitration provision is not triggered until one of the parties requests mediation'.²⁰ Consequently, because neither party 'ever attempted to mediate this dispute, neither party can be compelled to submit to arbitration'.²¹

Indeed, the Eleventh Circuit Court of Appeals considered a contract that did not even state explicitly

that mediation was a condition precedent to arbitration, but rather stated that ‘[i]n the event that a dispute cannot be settled between the parties, the matter shall be mediated within fifteen (15) days after receipt of notice by either party that the other party requests the mediation of a dispute pursuant to this paragraph’.²² The dispute resolution clause went on to say that ‘[i]n the event that the dispute cannot be settled through mediation, the parties shall submit the matter to arbitration within ten (10) days after receipt of notice by either party’.²³ The court nevertheless read this clause to create conditions precedent to arbitration, which in turn suggested to the court that ‘the parties clearly intended to make arbitration a dispute resolution mechanism of last resort’.²⁴ When a dispute arose and the plaintiff filed suit in federal court, the defendant attempted to stay the action pending arbitration. But because neither party had met the notice requirements for the mediation component of the dispute resolution clause, the court concluded that ‘the arbitration provision has not been activated’ and that the suit should not be stayed.²⁵

These cases raise the interesting possibility that where both parties wish to avoid negotiation or mediation, a party that seeks to avoid the application of the dispute resolution clause altogether may find success litigating in court on the basis that the remainder of the dispute resolution clause has not been ‘triggered’ or ‘activated’. Although other courts have followed similar paths of analysis,²⁶ such an approach is not without criticism.²⁷ Other courts have observed the irony of compelling a party or parties to litigate a dispute in court simply because they determined that the first step in their multi-step dispute resolution clause was not appropriate under the circumstances.

For example, where a party sued to enforce the negotiation component of a multi-step dispute resolution clause, one court noted that it would be inappropriate for judicial resolution where the entire point of the clause was to avoid courts:

‘The good-faith-negotiation provision, when considered in its entirety and in context, was intended basically as the first step of a more comprehensive procedural scheme and obligation – imposed upon both parties – “to seek prompt and expeditious non-judicial resolution of disputes between them.” The highly detailed nonjudicial dispute resolution procedures...begin with management review, progressing to a stipulation as to the facts and issues in dispute, moving to third-party resolution and, finally, to binding arbitration. Those procedures and their sequence, make it evident that litigation was intended as a last resort, and not...the beginning point, of the dispute resolution process.’²⁸

Likewise, other courts have observed that ‘a party cannot avoid arbitration because of the other party’s failure to comply with the negotiation steps of a grievance procedure as long as that other party acted in

good faith to preserve its right to arbitration’.²⁹ Indeed, the purpose of multi-step dispute resolution clauses that culminate in binding arbitration ‘is undoubtedly to encourage successful negotiations so that neither litigation nor arbitration will be necessary, not to prefer the courts to an arbitrator if informal discussions break down’.³⁰

Dispute resolution clause drafting considerations

The discussion above highlights the importance of focusing on the interaction between the non-adversarial components of a multi-step dispute resolution clause and the arbitration component of the clause, if applicable, where the selected forum for arbitration is the United States. Particularly where parties seek to draft strong clauses to encourage negotiation or mediation at the earliest possible point in a dispute, they should remember that there may be circumstances where such negotiation or mediation is inappropriate. Given this possibility, if parties are interested in ensuring that their disputes are arbitrable, and that they are not haled into the courts of an opposing party, for example, they may wish to consider explicit language indicating that arbitrators shall be empowered to hear all disputes arising out of or relating to the contract, *including* disputes as to whether the conditions precedent for arbitration have been met. Such language would preserve the greatest likelihood that negotiation or mediation provisions can be enforced, while reducing the risk of short-circuiting the multi-step dispute resolution clause in the event that circumstances arise where neither party desires to negotiate or mediate a dispute according to the contractual terms.

More fundamentally, parties should think carefully and seek expert guidance where appropriate, regarding whether they should require such negotiation or mediation components in a dispute resolution clause in the first place. Although they may be appropriate for some contracts, sophisticated parties often know when and how, it is appropriate to negotiate without needing a contractual mandate to do so. The foregoing analysis shows that these clauses can decrease predictability and certainty regarding who will decide a dispute and when and where it will be decided. Particularly in disputes presenting an acute need to preserve the status quo with equitable or injunctive relief, such uncertainty could be costly. Contemplating such possibilities is essential to ensuring that parties’ dispute resolution clauses are tailored to their circumstances and ultimately meet their needs.

Notes

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- 1 See, eg PriceWaterhouseCoopers, 'International Arbitration: Corporate Attitudes and Practices', at 11 (2006), available at www.pwc.com/arbitrationstudy. These clauses are also known as 'escalation clauses', 'multi-tier' clauses, or multi-step alternative dispute resolution (ADR) clauses.
- 2 Although this article analyses negotiation and mediation primarily, these preliminary procedures can also include conciliation, facilitation, 'early neutral evaluation' and other forms of non-binding, non-adjudicative procedures. For a more comprehensive catalogue of such procedures, see, eg Paul Mitchard, 'Alternative Dispute Resolution', Introduction to Martindale-Hubbell International Arbitration and Dispute Resolution Directory (2001).
- 3 See, eg *Vestar Development II LLC v General Dynamics Corp*, 249 F 3d 958, 961 (9th Cir 2001) (describing California law on this question as 'unsettled'). This confusion appears to stem from the empirical difficulty of distinguishing between 'agreements to agree' and 'contracts to negotiate', see *Copeland v Baskin Robbins USA*, 96 Cal App 4th 1251, 1257 (Cal Ct App 1992), as well as the theoretical difficulties of determining what, if any, damages would flow from the breach of a contract to negotiate and whether contractual duties of good faith can properly be imported into the context of a contract to negotiate. See *ibid.* at 1260–61.
- 4 *Thompson v Liquichimica of America Inc*, 481 F Supp 365, 366 (SDNY 1979).
- 5 *Candid Productions, Inc v Int'l Skating Union*, 530 F Supp 1330, 1337 (SDNY 1982). The court went on to state: 'An agreement to negotiate in good faith is amorphous and nebulous, since it implicates so many factors that are themselves indefinite and uncertain that the intent of the parties can only be fathomed by conjecture and surmise.'
- 6 *Mocca Lounge, Inc v Misak*, 94 AD 2d 761, 763 (2d Dep't 1983). See also *Fluor Enters Inc v Solutia Inc*, 147 F Supp 2d 648, 651 (SD Tex. 2001) (observing that the mediation provision met the test '[u]nder both Missouri and Texas law' that the contract be 'so worded that it can be given certain or definite legal meaning'); *Jilly Film Enters v Home Box Office Inc*, 593 F Supp 515, 520–21 (SDNY 1984).
- 7 See *Fluor Enters*, 147 F Supp 2d at 649 and n 1 (enforcing contractual negotiation and mediation procedure described by the court as requiring: 'that if a controversy or claim should arise', the project managers for each party would 'meet at least once'. Either party's project manager could request that this meeting take place within fourteen (14) days. If a problem could not be resolved at the project manager level 'within twenty (20) days of [the project managers'] first meeting...the project managers shall refer the matter to senior executives.' The executives must then meet within fourteen (14) days of the referral to attempt to settle the dispute. The executives thereafter have thirty (30) days to resolve the dispute before the next resolution effort may begin." In the event this step was unsuccessful, the contract required the parties to 'attempt in good faith to resolve the controversy or claim in accordance with the Center for Public Resources Model Procedure for Mediation of Business Disputes', but that '[i]f the matter has not been resolved pursuant to the aforesaid mediation procedure within thirty (30) days of the commencement of such procedure...either party may initiate litigation.')
- 8 See *White v Kampner*, 641 A.2d 1381, 1382 (Conn. 1994) (enforcing 'mandatory negotiation' clause that stated '[t]he parties shall negotiate in good faith at not less than two negotiation sessions prior to seeking any resolution of any dispute' under the contract's arbitration provision).
- 9 See *Fluor Enters*, 147 F Supp 2d at 649 n 1.
- 10 See *HIM Portland LLC v DeVito Builders Inc*, 317 F 3d 41, 42 (1st Cir 2003) (enforcing clause providing for mediation in accordance with the Construction Industry Mediation Rules of the American Arbitration Association). See also *AMF, Inc v Brunswick Corp*, 621 F Supp 456, 462 (SDNY 1985) (enforcing contractual non-binding arbitration clause because, among other things, it was under the auspices of the National Advertising Division of the Council of Better Business Bureaus, which 'has developed its own process of reviewing complaints of deceptiveness, coupling relative informality with and confidentiality with safeguards to ensure procedural fairness').
- 11 *US v Bankers Ins Co*, 245 F 3d 315, 323 (4th Cir 2001). Some may view the phrase 'non-binding arbitration' as a contradiction in terms – ultimately, this phrase refers to procedures which resemble an arbitration but lead to a purely advisory opinion or finding by a decision-maker.
- 12 *Ibid.* The court also observed that the decision 'need not be binding as long as there are reasonable commercial expectations that the dispute will be settled by this arbitration'. *Ibid.* at 322 (quoting *AMF*, 621 F Supp at 460–61). Thus, '[a]lthough non-binding arbitration may turn out to be a futile exercise[...]...this fact does not, as a legal matter, preclude a non-binding arbitration agreement from being enforced.' *Ibid.* Likewise, courts have declined to hold that ordering 'specific performance' in the context of a non-binding dispute resolution procedure with an unwilling party would be a 'vain order', because such a holding would reduce the parties' agreement to 'a nullity'. *AMF*, 621 F Supp at 462.
- 13 For example, where a defendant complained in a summary judgment motion that the plaintiff did not comply with what the defendant alleged were conditions precedent to litigation, including a requirement of written notice of withdrawal from mediation and a failure to discuss other dispute resolution alternatives, the court rejected the notion that such requirements were conditions precedent to litigation. Although the dispute resolution clause had multiple steps, nowhere did the clause expressly state that all of the requirements of one step had to be fulfilled to advance to the next step. Thus, as the court stated, '[t]he point Defendant misses is that Plaintiff could have permissibly filed suit while continuing to pursue mediation.' *Fluor Enters*, 147 F Supp 2d at 653. In this way, the notice and other requirements were not enforceable and could not form the basis for granting the defendant's summary judgment motion. *Ibid.*
- 14 See *supra* n 7.
- 15 *White*, 641 A.2d at 1387. See also *Bill Call Ford Inc v Ford Motor Co*, 830 F Supp 1045, 1048, 1053 (ND Ohio 1993) (finding in defendant's favour where plaintiffs filed suit against a defendant without having first sought to mediate the dispute pursuant to the condition precedent to litigation in the parties' contract). Such decisions can be viewed as vacating arbitration awards on the ground that the arbitrator or tribunal did not have jurisdiction to determine the question of arbitrability or otherwise proceed with the arbitration due to the existence of the condition precedent language. See, eg *White*, 641 A.2d at 1385–86.
- 16 *DeValk Lincoln Mercury Inc v Ford Motor Co*, 811 F 2d 326, 336 (7th Cir 1987).
- 17 *Cumberland and York Distributors v Coors Brewing Co* No 01-244-P-H, 2002 WL 193323, at *4 (D Me 7 February 2002). The court also observed that the mediation provision had 'no time limit for completion of such mediation'. *Ibid.*
- 18 *Ibid.* at *4 n 5 (citing *Southland Corp v Keating*, 465 US 1, 7 (1984)). Courts will seek to ensure that contractual dispute resolution mechanisms are not abused or used for improper purposes. See, eg *Cosmotek Mumessillik ve Ticaret Ltd Sirkketi v Cosmotek USA Inc*, 942 F Supp 757, 761 (D Conn 1996); *Abex Inc v Koll Real Estate Group, Inc*, Civ A. No 13462, 1994 WL 728827, at *19 (Del Ch 22 December 1994).
- 19 *HIM Portland LLC v DeVito Builders Inc*, 317 F 3d 41, 42 (1st Cir 2003).
- 20 *Ibid.* at 44.
- 21 *Ibid.*
- 22 *Kemiron Atlantic, Inc v Aguakem Int'l Inc*, 290 F 3d 1287, 1289 (11th Cir 2002).
- 23 *Ibid.*
- 24 *Ibid.* at 1291.
- 25 *Ibid.*
- 26 See, eg *Weekley Homes, Inc v Jennings*, 936 SW 2d 16, 19 (Tex. App. 1996); *White*, 641 A.2d at 1385 ('The trial court correctly interpreted the contractual language to require satisfaction of the provisions of the mandatory negotiation clause as a condition precedent to arbitration, and correctly determined that this arbitrability issue was one for the courts to determine, not the arbitrator. Although the arbitration clause begins with broad language that generally grants jurisdiction to the arbitrator to determine the issue of arbitrability, express language in the contract restricts the breadth of that clause. The arbitration provision that makes arbitrable 'any dispute or question arising under the provisions of this agreement' is qualified by the clause 'which has not been resolved under the mandatory negotiation provision.').

27 As an initial matter, it is not clear that these decisions correctly reflect US courts' general presumption that parties intended to arbitrate questions of procedural arbitrability in cases of broadly-worded, valid arbitration clauses. For example, the US Supreme Court has held that 'procedural' questions which grow out of the dispute and bear on its final disposition are presumptively *not* for the judge, but for an arbitrator, to decide', *Howsam v Dean Witter Reynolds Inc*, 537 US 79, 84 (2002), and in that context has quoted with approval the comments to the Revised Uniform Arbitration Act of 2000, noting that 'in the absence of an agreement to the contrary, ... issues of procedural arbitrability, *i.e.* whether prerequisites such as ... conditions precedent to an obligation to arbitrate have been met, are for the arbitrators to decide.' *Ibid.* at 85 (quoting RUA § 6, comment 2). See also *New Avex, Inc v Socata Aircraft, Inc*, No 02 Civ 6519, 2002 WL 1998193, at *5 (SDNY 29 August 2002); *Unis Group, Inc v Compagnie Financière de CIC et de L'Union Européenne*, No 00 Civ 1563, 2001 WL 487427, at *2 (SDNY 7

May 2001) (finding that 'the parties' dispute relating to the satisfaction of a condition precedent is within the scope of the Clause and that the arbitrators should determine whether [the defendant] satisfied such a condition'); *US Titan, Inc v Guangzhou Zhen Hua Shipping Co Ltd*, 182 FRD 97, 102 (SDNY 1998) (observing that 'it has been repeatedly held that even a dispute regarding the satisfaction of a condition precedent to a contract will be referred to arbitration if it may reasonably be said to come within the scope of an arbitration clause'); *Town Cove Jersey City Urban Renewal, Inc v Procida Construction Corp*, No 96 Civ 2551, 1996 WL 337293, at *2 (SDNY 19 June 1996) ('Whether or not a condition precedent to arbitration has been satisfied is a procedural matter for the arbitrator to decide.').
 28 *Dave Greystak Enters, Inc v Mazda Motors of America, Inc*, 622 A. 2d 14, 23-24 (Del Ch 1992).
 29 *Welborn Clinic v Medquist Inc* 301 3d 634, 638 (7th Cir. 2002).
 30 *Ibid.*

Previous mediator as later judge or arbitrator

Involvement of a judge as mediator does not necessarily prevent him from later deciding the case

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There are various different reasons for parties to take their dispute to mediation. Mediation may be required by law,¹ be agreed in advance by some form of a multi-tier clause in a contract, or be independently agreed between parties seeking to settle a particular dispute. In Germany, mediation can also be court-annexed, which means that the court concerned with a particular dispute may, subject to the agreement of both parties, refer the parties to a commissioned or requested judge for a conciliation hearing.²

Although parties in larger commercial disputes will likely more often than not choose to individually and independently agree on mediation (hoping to avoid having to initiate litigious or arbitral proceedings altogether),³ court-annexed mediation is becoming increasingly recognised. It also is subject to a number of model projects in different German courts,⁴ which were implemented with the express intention to promote the amicable solution of disputes already pending in court.⁵

Importance of neutrality of the mediator

Regardless of whether parties decide to find their own mediator or whether they follow a referral to a requested or commissioned judge in a court-annexed

mediation, one of their main concerns will be that the mediator is neutral. Moreover, as mediation ideally allows, if not requires, the parties to openly discuss their respective interests, confidentiality of the mediation will be important to them.⁶ If parties are concerned that issues disclosed in a mediation could be used to their disadvantage in later court or arbitral proceedings,⁷ they likely will not be as open about their motivations or positions as would be desirable from the viewpoint of the mediation proceedings.

The same concern would similarly extend to the person of the mediator. If parties have to expect the mediator to have an influence on the decision in later litigation or arbitral proceedings, they will likely try to avoid bringing anything to the attention of the mediator which could weaken their position in such later proceedings.

In principle, the intention of mediation thus requires that there be a strict distinction between the mediator and the deciding body.

Advantages of a mediator becoming judge or arbitrator

This 'principle' however, is not universal. Whilst parties should not have to be concerned about the mediator becoming (part of) a deciding body in later proceedings

when conducting a mediation, they might actually be content to agree to this after a mediation failed. The mediator already has relevant knowledge of the case, has ideally gained the trust of the parties, and convinced them of his ability to fairly and competently deal with the particularities of the dispute. In fact, one of the authors recently was appointed as sole arbitrator⁸ in a dispute in which he had already acted as conciliator before arbitral proceedings were initiated. The parties were convinced from the way the conciliation was conducted that their former conciliator would be their ideal, neutral, and impartial, arbitrator.⁹

Decision of the German Regional Social Court of Lower Saxony

Obviously, the situation is more difficult in court-annexed mediation. Under the system of the allocation of cases (*Geschäftsverteilungsplan*) to individual judges in German courts, parties have near to no influence on the person who will decide their dispute.¹⁰ Therefore, it will be important to them when considering court-annexed mediation that their case will later not be assigned to the commissioned or requested judge if the mediation fails. Consequently, the model projects are set up in a way that, under normal circumstances, the requested judge will not be allocated the case under the court's allocation system. As, however, judges may change their position within a court, move to a different court, or the allocation itself system may change, it is in principle still possible that a former commissioned or requested judge might have a case assigned to him as deciding judge. It was a situation like this on which the regional social court (*Landessozialgericht*) of Lower Saxony had to decide in 2004.

In that case, a judge had acted as requested judge in a certain dispute within the framework of a court-annexed mediation in the social courts of Lower Saxony.¹¹ The mediation had failed and the parties proceeded with ordinary court proceedings. Incidentally, the case was assigned to the same judge who had previously acted as a requested judge in the same case.

The judge then asked to excuse himself from the case because of his prior involvement as requested judge. He based his request on the consideration that there might be concerns as to his neutrality or impartiality (*Besorgnis der Befangenheit*).¹² Notably though, the parties had neither objected to him nor did they comment in the proceedings following the judge's request to excuse himself. The case went to the regional social court (*Landessozialgericht*)¹³ which ruled, at first glance maybe surprisingly, that the sole fact that the judge had acted as mediator did not justify him excusing himself.¹⁴

The court held that it was one of the main functions of the mediator to be neutral and independent, just as a judge had to be neutral and independent. A mediator having acted as such neutral and independent person

could thus not be considered partial as a judge. The court also opined that the subject of the mediation was not a legal assessment and that the judge therefore would not have become predisposed to a certain decision. It did, however, recognise that it is an aim of a mediation to allow parties to disclose information they would not necessarily introduce into court proceedings and that they might be hindered from doing so if they had to be concerned that the disclosure of such information would be disadvantageous to them in later court proceedings. The court held in this respect that there may be situations in which information was disclosed in a mediation that would raise concern as to the neutrality of a judge¹⁵ and justify a challenge. This, however, could only be determined on an individual basis for each case.¹⁶

Therefore, whilst the fact that a judge had acted as a mediator does not alone make him impartial, the information to which he became privy in the mediation might.

Conclusion

At first glance, it seems contrary to any intention to facilitate mediation (as, for example, intended by the model projects) that a judge should be allowed to decide a case in which he previously acted as a mediator. However, a distinction must be drawn, as done in the ruling by the regional social court of Lower Saxony, between the sole fact that a judge or arbitrator acted as mediator, and between the legitimate interest of the parties to avoid any influence of the content of mediation proceedings on a later decision of the dispute. Whilst the latter must be protected, the former should not necessarily give grounds for much concern.

Obviously, the issue is relatively easily dealt with in a situation where the parties have an influence on who finally decides their dispute, and where they can weigh the advantages and disadvantages of choosing their mediator as the deciding person (as long as the participation of the deciding person in the mediation is sufficiently addressed and disclosed beforehand). Where court-annexed mediation is concerned, although it might not be an ideal situation for parties to have to challenge their judge, they have the right to do so if they feel that the contents of their mediation proceedings need to be protected.

Thus, albeit it certainly is not ideal for parties to a court-annexed mediation to be faced with their case unexpectedly being allocated to the former requested or commissioned judge, this does not inevitably mean that their interest in excluding any information revealed in the mediation from court proceedings could not be protected. After all, parties may, just like in circumstances where they can choose their deciding body, actually be quite content to have their mediator decide the case.

Notes

- 1 In some German states mediation is mandatory for certain small claims. Non-compliance with such a requirement for mandatory mediation renders a claim inadmissible in court. For further details see G Wegen and C Gack, 'Obligatory Mediation as Precondition for Court Proceedings in Germany', *IBA Mediation Committee Newsletter* of 29 September 2005, and G Wegen and S Wilske, 'Non-Compliance with Obligatory Mediation Procedures Makes Court Action Inadmissible', *IBA Mediation Committee Newsletter* of April 2005, 19.
- 2 Section 278 (V) German Code of Civil Procedure (*Zivilprozessordnung*). For a full English translation of the Code, see S Rützel, G Wegen and S Wilske, *Commercial Dispute Resolution in Germany: Litigation, Arbitration, Mediation* (Munich, C H Beck 2005).
- 3 However, it sometimes is surprising how much this approach can 'backfire'. In a recent case in the authors' practice, the rather straightforward alternatives always seemed to either go to mediation or to take the dispute to arbitration. However, the mediation actually resulted in making the case much more complicated because it brought issues to light that necessitated considering legal action well beyond just taking the dispute to arbitration.
- 4 For example, in civil courts in Bavaria, Lower Saxony or in Mecklenburg-Western Pomerania. Model projects were also implemented in some administrative courts, for example in Berlin and Hesse. Court-annexed mediation is even offered in some social courts in Lower Saxony in Bavaria. Very recently, in summer 2006, the State of Hamburg also introduced a project for court-annexed mediation in the labour court.
- 5 On practical experiences with these projects, see G Wegen and C Gack, 'Mediation in pending civil proceedings in Germany', *IBA Mediation Committee Newsletter*, December 2006, 8.
- 6 Although mediation agreements will usually contain a confidentiality clause, the issue is still salient as there is no prevailing case law in Germany on whether a confidentiality agreement actually binds the court to disregard information a party presents in breach of such confidentiality agreement.
- 7 There is no general requirement for 'pre-trial discovery' or full disclosure under German procedural law. Each party has to establish the facts on which it relies but is generally not obliged to disclose all information, even if it is relevant to the case. For further details see S Rützel, G Wegen and S Wilske, *Commercial Dispute Resolution in Germany: Litigation, Arbitration, Mediation* (Munich, C H Beck 2005), 1.
- 8 In an arbitration conducted under the arbitration rules of the German Institution for Arbitration (DIS).
- 9 Obviously, the position of having been a conciliator was disclosed before the appointment as sole arbitrator was accepted. The parties had also expressly waived a clause in the conciliation agreement stipulating that the conciliator was not to work as a lawyer in any further (legal) disputes relating to the subject of the conciliation.
- 10 The system of how cases are allocated to individual judges within one court vary. Often, cases are allocated by alphabet, with a case being allocated to a particular judge based on, for example, the letter with which the name of the plaintiff or of the defendant commences.
- 11 Detailed information on this particular model project can be found at www.mediation-in-niedersachsen.com/9220.html, including an evaluation of the project at <http://www.mediation-in-niedersachsen.com/dl/Abschlu%DFbericht%20englisch.pdf>.
- 12 Pursuant to s 60 German Code of Proceedings in Social Courts (*Sozialgerichtsgesetz*) in connection with s 48 German Code of Civil Procedure, a judge may be challenged on the ground of suspected bias.
- 13 Which is competent for such decisions pursuant to section 60 German Code on Proceedings in Social Courts.
- 14 Regional Social Court Lower-Saxony, Decision of 16 April 2004, Docket No L 9 B 14/04 U.
- 15 Such concern could arise from the fact that a judge, under his duty to decide according to the law, could be unable to disregard certain information known to him from the mediation but not submitted in court. It could, however, also arise from 'just' a resentment of the mediator resulting from the mediation.
- 16 In this case, the court saw no grounds for such concerns. The fact that the parties had not objected to this judge may also indicate that they themselves did not consider anything addressed in the mediation to be of concern for the court proceedings.

Corporate Social Responsibility

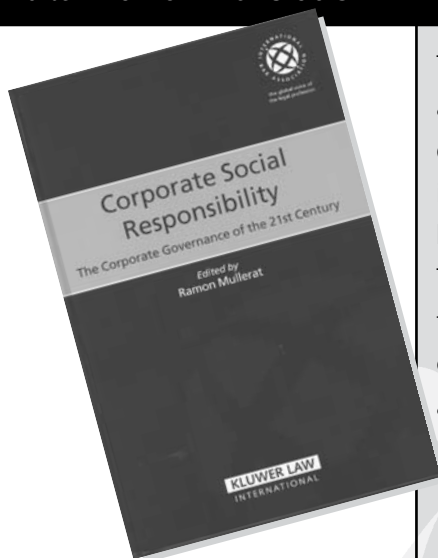
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The current theory of corporate social responsibility (CSR) is developing along three interwoven lines – moral, social, and environmental. Although everybody recognises that CSR is of growing concern in a globalised economy, it being at the top of the board of directors' agenda and also good for business, there is no sign of consensus on its rules, structures or procedures. This collection of essays by leading jurists, businesspeople and academics takes a giant step towards a more cohesive and durable set of principles that can contribute to a cleaner environment and a better society while respecting and protecting the interests of all stakeholders.

The authors approach this complex but critical subject from a variety of perspectives, including the following:

- the role of CSR in corporate governance;
- the legal enforceability of CSR rules;
- the impact of international human rights standards;
- CSR as part of 'corporate DNA';
- choice of CSR strategy – defensive or offensive;
- the need for fair competition between developing country exporters;
- the prospects for international social protection for workers;
- enforcement of minimal standards in remote locations;
- the active search for eco-efficient solutions;
- corporate assumption of human rights responsibilities;
- the legal weight of codes of conduct; and
- the role of the lawyer in CSR.

This book will be of immeasurable value to all professionals and academics in relevant fields of law, policy and business.

Amanda's corner:

Mindfulness: expanding the use of mediation in public law and policy making

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Mediation is an established part of the dispute resolution landscape but it has taken a surprisingly long time to catch on for something which has so many champions and such consistently good results. When viewed as a significant culture change then perhaps it is not surprising that mediation continues to experience resistance and lack of understanding. These challenges are likely to be equally important for expanding the use of mediation into other areas, particularly in the public sector and most especially in designing more effective policies and other instruments aimed at delivering 'good governance'.

In this article, I identify some of the key reasons for resistance and lack of understanding and what needs to happen to assist the wider use of mediation. This is a real challenge for those in the public sector, in government, and those responsible for public spending, because it means reconciling some subtle but powerful conflicts around the understanding of 'value'. What do we value and how do we demonstrate the values we hold? To do this requires a change in culture in order to establish a different balance between proven results and potential benefit, the value we can measure and the value we can't - well not yet! I invite those with influence and authority to use mediation more widely and much earlier to develop policies, design contracts and to reconcile conflicts in areas previously seen as not 'appropriate for mediation' or unmediable.

Using mediation is a change in culture

The growth of mediation in the UK has required a real change in culture and it has flexed under the many challenges generally experienced when culture change is actively sought. The outward expression of a culture is *behaviour* and behaviour is informed by underlying values, beliefs and assumptions. So, if you believe that mediation is an effective way to resolve disputes then you will choose to mediate. The pace of culture change is generally moderated by the interests of those with influence and authority. Mediation is no exception even though it has many influential and committed supporters. Are we missing the 'authority' element or is it just waiting to be activated? Perhaps more tangible evidence is needed to convince?

The process of culture change almost always encounters this kind of *resistance*: it takes much longer than anyone ever imagines (or dares admit) for people to really understand the balance of benefits and risks associated with a proposed change. The evaluation of benefits and risks is very individual and happens through the medium of interpretation which is also very closely aligned with personal interests. We hear what we want to hear...

Additionally, there are tangible and intangible benefits and risks associated with any culture change and these are frequently *polarised* or separated. Tangible benefits acquire a greater weight and emphasis in the process of persuading early adoption because they provide the evidence for success and a marker for progress. Tangible benefits might be lower cost, faster turnaround, robust process, compliance etc and intangible benefits might be better relationships, increased trust, shared responsibility, involvement and community, compassion and acceptance all of which are a lot more fuzzy or perhaps more accurately 'hopeful'.

When culture change is to bring benefits for the community it frequently *politicised*. By becoming 'policy', adoption ceases to be a personal choice based on individual assessment of the benefits and risks or even reconciliation with individual values. It becomes, instead, an issue of compliance and with that comes control through regulation and associated penalties for non-compliance. When a state (or organisation) adopts a value based initiative for political purposes there are significant risks that the balance between the tangible and the intangible values will shift in order to evidence compliance. In essence instead of having a 'colourful wardrobe' we focus on a capsule wardrobe of black and white (tangible, clear and simple). The intangibles become 'nice to have' if we can afford them.

Mark Kurlansky in *Non-Violence: The History of a Dangerous Idea* (Jonathan Cape, London, 2006) writes of how the adoption by the state of religion resulted in core values being radically changed or completely ignored specifically the values of peace and non-violence:

'One of history's greatest lessons is that once the state embraces a religion, the nature of that religion changes radically. It loses its non-violent component and becomes a force for war rather than peace.'

Kurlansky's comments relate to religions and they are fairly uncompromising but the meaning is relevant to any initiative based on important values. When the state adopts a value based policy then the balance of benefits, risks and values will be shaped to suit its own political purposes. 'Political purposes' might or might not be honourable, but in shifting the focus onto primarily tangible benefits, there is a risk of chopping out or marginalising essential elements which actually make it work. Imagine if you take the chocolate out of the chocolate cake and replace it with chocolate flavouring. Do you still have a chocolate cake? Those who want proper chocolate cake will say *no* and those who want cake will say *yes* and some won't care because they don't like cake. What happens if the decision is made by the people who don't like cake?

Mediation is a values based initiative. In the early days, the 'voluntary' nature of mediation was very important in the mediation advocate's portfolio. In order to encourage take up, directing people to mediate or even mandating mediation have become more common place. Now, the voluntary nature of mediation is taken to be the 'willing participation' on the day or the 'voluntary signing' of the final agreement. I can live with that but I would be unhappy to see much more 'reframing' around 'voluntary'.

There are similar discussions around confidentiality and some argue that the confidential nature of mediation undermines the development of law:

'...litigation is essential to maintenance of the rule of law and to achievement of justice for the mass of people who are never, themselves, involved in actual proceedings.'

Professor Jolowicz in 'On the Nature and Purpose of Civil Procedure Law' Scott (ed) *International Perspectives on Civil Justice* (1990) p 27.

I am not convinced that the voluntary agreement between consenting adults in terms that meet their individual and joint needs in any way undermines the development of the law but then I see litigation as the last resort: rules for those who will not or cannot craft their own agreements. The law is separate from mediation. They are two distinct professional practices which have much to offer each other but they are not the same.

There are some important features in the development of mediation in the UK and they are relevant to developing policy, rules, regulations and laws.

- (1) *The focus on cost savings has marginalised intangible benefits* – the promotion or adoption of mediation has relied for the most part on the availability of tangible results. Many of the benefits of mediation cannot be *counted* or compared. They have value only in relation to the individuals concerned.
- (2) *Mediation looks easy* – The accreditation process is easily accessible. In many cases it takes just 6 days to complete the accreditation process. And by way of

example, one 'user' said that in his practice doing a mediation (as a mediator) was like 'having a day off'! Many others view being a mediator as 'nice work if you can get it' or useful in topping up the pension when you retire. The skills of a mediator are actually very subtle and deployed almost invisibly. That takes skill and many years of work, investment and development to do *effectively*. However, if you can't see it, I guess it must 'look' very easy.

- (3) *Implementation based on cost savings promotes the use of less experienced mediators, potentially resulting in lower success rates and therefore the availability of tangible evidence* – The adoption of mediation by the courts has resulted in time-limited mediations (three hours) frequently serviced by relatively inexperienced mediators who are prepared to accept low fees in exchange for the opportunity to practice. Time-limited mediation needs more skill and experience, not less.

We have a culture of 'keep it simple'. In the end everything gets reduced to simple bullet points and at the risk of over simplifying they tend to be around the value you can count. In the end are they all that counts?

In the UK, the Woolf Reforms (2000) gave many corporate and public bodies incentive to include mediation in policies and procedures at a micro level in order to address and therefore benefit from cost savings. To be fair I am sure that the reforms were prompted by expectations of some of the intangible benefits. I am equally certain that the Lord Chancellor's Pledge (2001) in which he states 'Government Departments will put in place performance measures to monitor the effectiveness of this undertaking,' gave significant momentum to actually doing something.

I offer by way of example, the incorporation of dispute resolution procedures into employment legislation (The Employment Act 2002 (Dispute Resolution) Regulations 2004). In the rush to comply, impressive policies and procedures were drafted, published (and occasionally communicated) but the policies and procedures have in many cases created more problems than they have solved. They have raised expectations in terms of culture change but the supporting culture change has not always been as robust as the procedures. I expect the revisions¹ currently under way in many organisations will reflect better the balance needed between the words and the behaviours needed to engender trust in the words.

The use of mediation in employment matters has increased over the last two years. The cost of mediation has been in keeping with the cost base of the organisations involved – keen. And keen is possibly a good word to describe the pool of mediators: keen to mediate and those are frequently 'keen' entrants into the mediation profession with a lean base of experience.

When the choice of mediation is cost driven then the provision of mediation is likely to follow suit which in turn will be furnished by those who are happy and able

to accept more modest fees in order to gain experience. This is a commercial reality and I can't offer a silver bullet for this. What I do say is that the reality has a profound effect on the quality of the tangible results and therefore on the evidence which subsequently supports the overall use of mediation in areas where it could bring the most benefit – the public sector and policy making. Commercial realities aside, until the profession of mediator is more highly valued and for that you need amongst other things an understanding of what a professional mediator brings, people will continue to go for the lowest cost if they feel that they are getting the same for less.

Other public sector or regulated bodies have adopted mediation in their dispute resolution policies. The National Health Service, Financial Services, Housing, are three. There are others. The market has exploded (relatively speaking). Rather cynically I see cost cutting (an honourable intention) as a common factor. However, dispute resolution policies are frequently introduced without joining them up to other policies and they end up being a source of conflict in the very organisations they were designed to serve.

One criticism of the use of mediation in the National Health Service is that cases that should be in the public domain in the interests of transparency are kept *under the radar*. As a mediator who has mediated many disputes in this area, I would say that the benefits to the parties of using mediation are very, very significant but I also appreciate the counter argument. I do wonder if both needs couldn't be reconciled more effectively than they are at the moment. As a matter of policy.

Mediability of cases² – no progress on the 'inconclusive evidence' for the use of mediation in matters of public law.

Although mediation has been considered and used in some areas it is still viewed as being useful in a limited number of case types. Many areas are being discounted as *unmediable*.

Over the last five years or so I have frequently worked with the Treasury Solicitors Office (TSol) and at the beginning of the training we have asked in which areas of their practice the participants feel mediation can be used. That list is initially short. By the end of the training when we ask the question again it is a different and much expanded list. David Pearson, Director General at TSol has been a long time supporter of using mediation *and* the necessary culture change required to support its use. He has advocated a simple shift in emphasis from 'why use mediation?' to 'why not use mediation?' which creates a better analysis even if it produces very sound reasons for not using it. I would go one step further and ask the question 'where can we effectively use mediation?' because where the principle might not be suitable for mediation there may be attendant issues that should be mediated and which could benefit the

overall case management for the individuals and 'the public good'.

For example: using mediation within a regulatory framework. Where regulation is intended to manage accountability and standards then mediation is an excellent process for achieving that. It has the potential to endorse and promote a culture of personal and shared responsibility, something which is I feel a most compelling 'intangible benefit' of mediation. Mediation does not exclude the enforcement of sanctions; it offers unique opportunities for a balanced approach to encouragement, sanction, responsibility and learning. There are also opportunities to deal with matters that are wrapped up in the dispute but not directly related to the principal issue.

Discouraging examples and ambiguous outcomes where mediation has played a role in policy making

Mediation arrived here in the UK from the United States but has broadly developed in a different way to reflect the differences in our cultures. In effect, we seek both to harmonise *and* retain the differences across jurisdictions. We continue to look to the US for information and leadership on developments (and I am happy to say that the UK can offer the same in some regards). We might be a little selective in our listening though, hearing only the things that support our own view of the world.

So in an attempt to balance the arguments, I refer you to a chapter in Bernard S Mayer, *Beyond Neutrality: Confronting the Crisis in Conflict Resolution*, (Jossey-Bass, 2004) called 'Environmental and Public Policy' at pp 60–66.

Mayer makes a few key points about using mediation in the design of public policy: decisions arrived at through consensus at a local level can be overturned by decisions at national level or even ignored; the processes for arriving at those decisions are time consuming and expensive; they often intensify the power imbalance (part-time, unpaid enthusiasts versus well paid professionals); structurally the process supports the status quo; there is a question mark over the neutrality of the mediators/facilitators because they 'are in some way accountable for our time and for the outcome to the agency in a way that was different from how we were accountable to the stakeholders.' He concludes 'Our challenge is to work with the entire dimension of the policymaking process if we really want to have an impact on how conflict is conducted in crucial areas.'

In commercial mediation we rarely do mediations that are longer than two days in the UK. Most are completed in one day. There are examples of very complex cases that do extend beyond that but they are comparatively rare and, for reasons of cost, they involve parties where at least one has significant resources. Much longer processes are usually called consultation which is not the

same thing at all. But if changing culture takes time then we need to be open to the idea that much longer mediations will be necessary to give proper attention to important issues. Until the financial resources are committed to such an approach it will rest with the enthusiast to maintain momentum. There are inherent risks here too. If we leave the sponsorship of important developments to the enthusiasts without proper support they may become lost in their own agenda. And yet we depend on enthusiasts. Mediation in the UK became a reality because of people like this.

Culture change is so frequently down to the personal qualities and attributes of the 'sponsor'. Patience, persistence, optimism, creativity, tenacity, courage, personal risk taking, trust... all very difficult to measure! All essential attributes of an effective mediator. (A Bucklow, "The Everywhen' mediator", 73 *The International Journal of Arbitration, Mediation and Dispute Management*, February 2007, The Chartered Institute of Arbitrators (www.amandabucklow.co.uk/Resources/Bucklow_CIArb_Journal_Feb_2007.pdf)).

Mediation has huge potential for success in matters of public law and policy making

There are a number of real benefits in broadening the use of mediation. They include:

- (1) narrowing the issues;
- (2) focusing on 'how?';
- (3) creating a culture of responsibility;
- (4) better management of disputes which are not always about what the parties say they are about and therefore the opportunity to use resources more appropriately in the 'what can be mediated and what cannot be mediated' conversation; and
- (5) informing authorities on areas that need 'attention' because they are consistently generating disputes that never seem to be resolved satisfactorily through established processes.

These are not part of the normal suite of pros and cons. They are towards the intangible end of the scale and they need wider sponsorship.

How can we speed up the process of development?

Culture change requires a change in mind set to nurture success and at the same time culture change also succeeds in nurturing a new mind set. They are mutual processes but they may not happen at the same pace. Those with responsibility and influence in areas that could benefit from a wider use of mediation and especially from the intangible benefits, need a new perspective on the possibilities which are less *spotlight* and more *floodlight*. I also mean to say that it is not either or, but **and**: *Spotlight and floodlight*. The conflict of 'individual' and 'other', personal benefit and greater good can not simply be a choice between extremes if we are to reconcile some of the conflicts that exist at

whatever level – local, national or international. We require 3D vision at the very least!

To develop a new perspective we need to practise a new way of thinking. We need to build capacity to include both spotlight and floodlight at the same time and to move fluidly from the centre which is a place where neither is more important than the other. This is an uncomfortable place for many people who are trained and encouraged to think in terms of black and white. Who really wants to sit in 'boring grey' all the time? In the developed world we have a rational emphasis in many areas of our working lives and hierarchical views overlaid with choices, risk assessments all of which take so much mental energy to exercise.



To illustrate: imagine a ladder of choices/priorities. In order to go from the bottom rung to the top rung takes energy (especially if you take into account gravity!) Multiply the number of ladders you have to negotiate by the number of separate issues to consider and then imagine the energy it takes to get from one to the other and up and down. This is how we compartmentalise and organise. This is how we separate out the issues, home in, make decisions and success often relies on expertise arising out of intensive practice.

Mental gymnastics.

Now imagine a circle or a wheel with the 'rungs' radiating out from the centre. From the centre of that wheel you have access to exactly the same choices and degrees of choice as the ladder scenario (including the black and the white) but you are always in the centre therefore to move 'along the rungs' is more frequently a much shorter journey wherever you need to be...or indeed you can stay where you are! This does not exclude the 'extremes' if appropriate. This is not a proposal for abandoning reason, argument or decisiveness. On the contrary: It is a way of accessing 'all areas' in the shortest possible time and with increased effectiveness and appropriateness. It is the way we can be in apparently conflicting states at the same time without appearing to be inconsistent. It is a route to inclusiveness which allows us to value intangible qualities and benefits as much as the tangible.

Some benefits will always remain intangible because they relate to how people 'feel' about the matter whether that be the mediation process or the policy. Their instincts and their experiences inform those feelings and feelings underpin behaviour. The vehicle for developing this perspective is very close to (but not precisely the same as) the practice of '*mindfulness*': Mindfulness is the practice of observing 'thoughts' without judgment and noting the feelings associated with those thoughts: emotional and physical. Mindfulness deserves more space than there is available here so I invite you to find out more if it interests you.

For the purposes of this article it is both a useful metaphor to explain how to expand the use of mediation in public policy making by supporting culture change and in its intended form it is a very effective practice for slowing down, observing accepting, and seeing connections rather than judging and filtering out.

Finally, I am encouraged by a very recent event: The publication of a new document produced by the Department of International Development which was published on 14 March 2007, *Preventing Violent Conflict*, www.dfid.gov.uk/pubs/files/preventing-conflict.pdf.

This is a landmark document setting out the policy for addressing the underlying causes in order to solve long-term problems that lead to international violent conflict. The policy was developed in consultation with other UK Government departments, principally the Foreign and Commonwealth Office, the Ministry of Defence, the Treasury and perhaps most importantly, the Cabinet Office. It sets out DFID's contribution to that collective effort.

The involvement of the Cabinet Office is significant because this department is responsible for setting and regulating standards for services across the public sector and in supporting other departments in meeting their standards and recognising quality in public services.

There are 'cost considerations' that motivate the policy not least how the Treasury is going to budget for international conflicts over the next 30 years – but it strikes a balance which better reflects what I am talking about. First, the consultation was not just based on questionnaires. I know that it included many meetings and changes were made following the input. Not quite mediated but getting closer. It is much longer-term thinking; it is agreed by the most influential departments (parties with authority) and the outcome can be waved under the noses of many who have up to now, resisted change.

It is also a small step in the direction of harmonising approaches internationally with all the challenges therein.

Notes

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1 Since the completion of this article the DTI have published Better Dispute Resolution: A review of employment dispute resolution in Great Britain which fully articulates the shortcomings noted in this article, www.dti.gov.uk/files/file38516.pdf.

2 'Mediability' is a word coined by Babak Barin, editor of the IBA's Mediation Newsletter. It is phonetically more attractive than mediateability.

Reaction to Amanda's corner

Mindfulness: expanding the use of mediation in public law and policy making

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The field of ADR is bedevilled with definitional difficulties. Mediation is generally regarded as a process whereby disputants are helped by a neutral person to reach agreement. Public law and policy making involve decisions being imposed, often with no clearly defined dispute and without any agreement having been reached. What counts is whether the decision-maker can remain in power despite the decision.

'Community consultation', however hollow in practice, is probably a more accurate term to describe a process whereby those likely to be affected by a proposed decision are given an opportunity to express their concerns, often through the intervention of a third party neutral, but where a decision is nevertheless ultimately imposed. Australian experiences with such processes often leave the community even more cynical, feeling that the decision had been made even before the community was 'consulted' and that the process was more about pacifying the masses than about tailoring the outcome to meet community needs. The abandonment of the most recent proposal for the siting of a second international airport for Sydney had more to do with the potential loss of Government-held parliamentary seats than with the merits of the proposal. Not only was there a lengthy process of community consultation conducted by independent consultants but that process was audited by other independent consultants (whose report was never tabled in Parliament because it was critical of the Government). Had the electoral demographics been different, there is no doubt the proposal would have been implemented despite overwhelming community opposition.

Mediation as a threat to the development of the law? Gimme a break!

No-one would deny Professor Jolowicz's proposition that litigation is essential to the maintenance of the rule of law and to the achievement of justice for the masses. Amanda notes the argument that the confidential nature of mediation diminishes the development of the rule of law and might undermine the proper development of legislation. The suggestion is made that the answer might be to publish [settlement] agreements.

The argument overlooks the fact that before the advent of 'modern' mediation in civil proceedings, around 90 per cent of all cases settled before trial through bilateral, unassisted negotiation, often 'at the door of the court'. Mediation helps to settle those cases earlier, greatly saving costs, time and stress to the parties. This 'threat to the rule of law' argument wasn't heard when those cases were settled bilaterally, so what's new? Only that there is now a neutral assistant who seems to be quite effective!

The logic of the argument leads to the proposition that where there is a need to clarify the law, in order to achieve that clarification cases should be tried rather than settled through mediation. It follows that mediators should be required to refuse to officiate in such cases. How might this be achieved? If the issues are clear before the mediator or the dispute resolution provider which engages the mediator, enter into the agreement to mediate, there is an opportunity to decline to act. But in most mediations, the true issues and true character of the dispute do not become apparent to the mediator until later, when it may be too late to pull out without breaching the mediation agreement.

In any event, who would decide that the nature of the issues rules out mediation in any particular case? Should all disputants seek the permission of the court before they may mediate? And if such cases may not be mediated, why allow them to be settled through bilateral negotiation? Imagine how crowded the court lists would be if all the cases the judges find interesting had to go to trial. And imagine how the parties would feel if they were told they are not allowed to settle but must continue to pay until their case has produced or clarified some legal principle.

There will always be plenty of work for courts to do in developing legal principle out of the ten per cent of cases that go to trial, few of which raise novel issues of legal principle anyway. Mediation is no greater threat to the development of the rule of law than settlement generally and should be allowed to find its place on the dispute resolution palette without unwarranted interference of the kind to which the 'threat to the rule of law' argument necessarily leads.

As to publishing settlement agreements, the freedom of parties to agree to treat mediated settlements as confidential is one of the attractions of mediation, 'the

very part that works well'. Unlike mediated outcomes, arbitrated outcomes are supposed to accord with applicable legal principle, yet arbitrated awards are generally agreed by the parties to be kept confidential unless there is a need for enforcement or an attempt to set it aside. So far as I am aware, there is no outcry that arbitrated awards be made public lest the development of the rule of law be diminished. If confidential mediated settlements are a threat to the development of the rule of law, how much more of a threat are confidential arbitrated outcomes?

Transparency of outcomes in the public interest

Amanda cites mediation in the National Health Service as giving rise to a concern that cases that should be in the public domain in the interests of transparency are kept *under the radar*. Putting that in general terms, the proposition is that where there is a significant 'public interest' element in a dispute, that element should be exposed.

This proposition raises some of the issues already canvassed in relation to settling cases requiring elucidation of legal principle. However, it may be appropriate to distinguish between those public interest cases in which the parties engage the mediator directly and those in which the mediator is on a panel. In the former, the mediator is always at liberty, as a matter of conscience, to accept or to decline appointment. Once appointed however, the mediator is bound by the contract's terms as to confidentiality, whether public interest issues arise or not. In the latter, the operator of the panel may, as a matter of policy, require its mediators to decline to act in such cases (assuming in both instances that the public interest element is apparent at the appointment stage).

Public interest issues often arise in cases in which a government instrumentality is itself a party as custodian of the public interest. In such cases the government agency will often insist, as a condition of its participation in mediation, that any settlement be made public. For example, when the Australian Competition and Consumer Commission, often through mediation, agrees upon terms for the settlement of cases of alleged contravention of competition law, those terms must be placed before a judge for approval of consent orders or must be entered on a public register of enforceable undertakings. Further, the ACCC insists on making its own media statements as to the outcome. Parties, including public listed companies, nevertheless choose to mediate with the ACCC in such cases because they can better manage the adverse publicity and the consequential impact on their share price in the day or two following a brief court appearance for consent orders to be made than the months of adverse publicity and erosion of their share price attendant upon contested litigation.

Voluntary v mandatory mediation¹

Amanda raises the question whether moves to introduce mandatory mediation risk fundamentally compromising its voluntary nature, 'the very part that works well'. It is true that 'early' (circa late 1980s) teaching was that mediation is quintessentially a voluntary process, hence compulsory mediation is a contradiction in terms. This appears to be the prevailing view in the UK, where the Court of Appeal in *Halsey*² adopted a description of ADR procedures as 'processes voluntarily entered into by the parties in dispute'.³ This overlooks that 'What is enforced is not cooperation and consent but participation in a process from which consent might come'⁴ and that 'There is a difference between coercion into mediation and coercion in mediation.'⁵

Because 'There is a category of disputants who are reluctant starters, but who become willing participants',⁶ most Australian courts have statutory power to refer cases to mediation and other forms of ADR, in some instances with the consent of the parties and in others with or without consent. Some legislation requires ADR before a claim is filed.⁷ Research has shown that settlement rates and degrees of satisfaction are similar, whether participation be voluntary or compelled.⁸ In retail tenancy disputes in New South Wales, which are required by statute to be mediated before they can be heard, the settlement rate before, at or shortly after mediation was 80.15 per cent over the 12 months to the end of March 2007.⁹ Even when not wholly successful, mediation (whether voluntary or compelled) often narrows the issues to be litigated.

The existence of the power in the court to order parties into mediation often persuades parties to agree to mediate when otherwise they would not. In giving reasons for the exercise or refusal to exercise the power, courts assist parties and their lawyers in deciding whether to agree to mediate. The reasoning process also helps educate judges into seeing mediation as having inherent value rather than merely as a way to shorten the court waiting list (always a false premise, since success will attract newcomers to the court system and the list will lengthen again).

The downside of the Woolf reforms

Amanda points out that when the focus is primarily on the tangible benefits of mediation, such as cost saving, some of the essential intangible benefits are muted or sacrificed and sometimes even their potential is irrevocably damaged. I would like to think this is a transitory phase and that eventually the intangible benefits to the disputants will be appreciated, even by lawyers who, as 'wholesalers' of disputes, play an extremely influential role in choosing the process for resolving their clients' disputes, tempered, to some extent, by the rise of clued-up corporate counsel and the enthusiasm for mediation of the judges.

As an English born and educated lawyer having emigrated to Australia, I found it disconcerting over 35

years ago to be told by a London law firm I instructed for an Australian client suing in the English courts that 'it would be a sign of weakness to raise the question of settlement before the pleadings are closed'. Sydney lawyers do this (and did so even then) every day of the week. It was therefore both heartening and depressing to find a line in Lord Woolf's initial report encouraging lawyers that ADR may be attempted 'even before the pleadings are closed'. Encouraging because that is clearly a sensible way to go and depressing because it indicated to me that nothing had changed in England over the intervening years!

Nevertheless, I hope eventually it will be generally appreciated that creative solutions may be achieved by means of mediation (facilitative, as distinct from evaluative, the model apparently favoured in England at present and worthy of an entire paper) beyond anything a court may order, so that cost and time savings will be seen as incidental advantages of mediation rather than as principal advantages.

'Mediation isn't appropriate in our case'

This was the refrain adopted by lawyers in Australia in the late 1980s as the second line of defence against the perceived threat constituted by mediation. The first line of defence was to treat mediation as a passing fancy and to hunker down until it had passed. When that failed, due in large measure to the espousal of mediation by the former Chief Justice of New South Wales, Sir Laurence Street, it became fashionable to pay lip service to mediation but to identify supposed features of particular disputes that rendered them unsuitable for mediation. This can be a difficult objection to overcome, particularly in an environment, as I perceive exists presently in the UK, in which mediation is often seen as confined to an evaluation of the dispute as pleaded, rather than an examination of the interests of the parties and of ways to meet them without determining who is right and who is wrong.

In my view, the legal profession is (gradually) changing for the better in appreciating that clients, particularly business clients, generally need workable solutions that enable them to move on rather than to spend time and huge amounts of money demonstrating that they were right or that they were robbed!

If you have any comments on or reactions to Amanda's Corner, please send them to bbarin@bcf.ca.

Notes

- 1 The points made in this section are elaborated in my article "Why judges shouldn't be mediators" and "mandatory mediation" an Australian perspective' in *The Expert and Dispute Resolver, Journal of the Academy of Experts*, Summer 2006, Vol 11 No 1, 19-23.
- 2 *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576 (11 May 2004).
- 3 White Book (2003), Volume 1, para 1.4.11.
- 4 *Hooper Bailie Associated Ltd v Natcon Group Pty Ltd* (1992) 28 NSWLR 194 at 206, per Giles J.
- 5 Harvard Professor Frank EA Sander, 'The Future of ADR', 2000, J Disp Res 1, 7-8
- 6 Address by Spigelman CJ, Chief Justice of New South Wales, to LEADR Dinner, University and Schools' Club Sydney, 9 November 2000, cited with approval by Einstein J in *Idoport Pty Ltd v National Australia Bank Ltd* (No 21) [2001] NSWSC 427.
- 7 See for example *Retail Leases Act 1994* (NSW) s 68(1): 'A retail tenancy dispute ... may not be the subject of proceedings before any court unless and until the Registrar has certified in writing that mediation under this Part has failed to resolve the dispute...or the court is otherwise satisfied that mediation under this Part is unlikely to resolve the dispute...'
- 8 Professor Kathy Mack, 'Court Referral to ADR: Criteria and Research', NADRAC, 2003.
- 9 Communication to the writer from the Deputy Registrar of the NSW Retail Tenancy Unit within the Department of Business and Consumer Affairs, 27 March 2007.

International Mediation Institute created to offer competency certification to mediators

Thierry Garby

Senior Vice-Chair of the Mediation Committee; Lerins Avocats, Paris

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The International Mediation Institute (IMI) (www.IMImediation.org) was created in The Hague, The Netherlands on 1 May 2007 as the first global non-profit non-governmental organisation that will enable certifications of the competency of mediators worldwide and under ISO 17,024. IMI has begun with a Consultation Period, running until October 2007, to gather views from throughout the world.

IMI was created through a joint initiative of three leading dispute resolution bodies:

- Netherlands Mediation Institute;
- Singapore Mediation Centre/Singapore International Arbitration Centre; and
- American Arbitration Association/International Center for Dispute Resolution.

IMI will also be an international resource and connectivity centre for Certified Mediators and leading mediation bodies around the world. IMI does not intend to make referrals to individual mediators, nor provide any dispute resolution services.

William K Slate II, President and CEO of the American Arbitration Association observed:

‘The establishment of the IMI will directly respond to the growing business need for qualified, competent mediators on a global scale. We are pleased to collaborate with the additional founding organisations in its launch and support its public service mission.’

Annette van Riemsdijk, Board Member of the Netherlands Mediation Institute NMI and Chair of the NMI International Affairs Committee commented:

‘NMI successfully pioneered mediator certifications in The Netherlands and remains the only body doing so nationally. We offer our experience to support IMI globally.’

Lawrence Boo, Deputy Chair of Singapore International Arbitration Centre (SIAC) welcomed the move as:

‘A giant step forward in enabling international businesses to have confidence in mediation by having confidence in mediators, in Asia and beyond.’

Loong Seng Onn, Executive Director of Singapore Mediation Centre (SMC) said:

‘As the leading mediation centre providing training, consultancy and mediation services in Singapore and the region, we feel that this initiative has come about at the right time. We believe that this initiative will enhance the professionalism of mediators and raise the profile of mediation in Asia. As a result, we hope that mediation will become the preferred means of dispute resolution in Asia.’

Michael Leathes, executive director of IMI, believes that mediator certification is badly needed:

‘Between now and when IMI is launched in October 2007, we will consult widely with constituencies all over the world who have already given this subject much thought. We need to establish competency standards at the right levels and stimulate a strong degree of understanding, trust and confidence in the minds of disputants and their advisers. Proper consultation with mediation bodies, mediators and others will ensure that this initiative gets off to a flying start later in the year.’

For more information, and to contribute material, see the following article and visit: www.IMImediation.org.

Mediator certification – consultation paper*

International Mediation Institute

The Hague

Mediation is highly successful in a few places, but sporadically used or virtually unknown in most. During the past 25 years, many people have been trained as mediators. Many mediators are accorded a formal certificate or ‘accreditation’ by their training or services body. There is little or no consistency in terms of quality, content, and criteria between the trainings and the accreditation criteria. Mediation rules and codes of ethics also vary. Few accrediting bodies or service providers have defined disciplinary processes.

From the disputants’ perspective, the mediation landscape can be fragmented and confusing. The majority of disputants and their advisers are insufficiently informed about how and why mediation works, and unsure about the competency of many mediators. Consequently they are hesitant to use mediation. These factors inhibit the development and progress of mediation.

Disputants also often have trouble identifying truly competent mediators acceptable to the other side. Whether national or trans-national, disputants need a simple way to identify competent mediators suitable for their disputes, located throughout the world. Where they require administered mediations, they need to know which are the best bodies providing that service. If they wish to go direct to a mediator, they need to review the alternative mediators meeting their needs.

All experienced, competent mediators would benefit from an expansion of the field and from greater communication in order to share best practices, as well as playing a part in leading improved skills development by establishing mentoring and shadowing opportunities for the less experienced. Mediators whose competency is certified in one country, need the ability to practice as mediators in other countries.

As a truly non-profit, public benefit initiative, IMI will exist to address these needs.

Why now?

In recent years there have been increasing demands for competency certification for mediators. This has largely been driven by the needs of users, the lack of homogeneity in the uptake of mediation, varying delivery standards among individual mediators and a widespread perception that mediation had not progressed into a true profession in its own right. Indeed, at best, mediation is still a vicarious profession, reliant for its standards and integrity on the range

of professional qualifications held by mediation practitioners.

The Netherlands Mediation Institute, created in 1995, pioneered and operates a highly successful voluntary scheme to certify mediators to defined competency standards in The Netherlands. In Australia, where mediation is well-established with many experienced mediators, the discussion for a voluntary National Mediation Scheme is well advanced. Austria, as well as a number of South and East European nations plan to introduce national accreditation schemes for mediators, in line with the 2003 Council of Europe Recommendation on Mediation in Civil Matters. In the UK, the Civil Mediation Council is piloting a voluntary scheme for accrediting mediation providers. A strong call for competency standards was made in March 2007 by the European Parliament in its First Reading Amendments to the EU Mediation Directive. The issue has also been discussed in the US and is attracting increased interest. These and other initiatives around the world illustrate that mediator certification is coming.

In an address in July 2006, one of the UK’s leading practising mediators recognised the growing need for mediators to organise if true professional status is to be achieved by mediators, to strive for ever-greater excellence and to play a true part in public policy issues, such as the setting of standards. These remarks can be read at: <http://www.rics.org/Management/Disputeavoidancemanagementandresolution/Disputemanagementandresolution/Alternativedisputeresolution/willis001.htm>

As mediators have an increasing role to play in cross border disputes, there is a risk either that different voluntary or mandatory standards may develop or be imposed in different countries, which will add to user confusion. Most mediators would accept the contention that if standards could be established internationally, on a voluntary basis, applicable to all mediators, based on the input of all constituencies, the need for government-imposed competency criteria can be avoided.

The genesis of IMI and how IMI will be organised

In 2005, three non-profit dispute resolution institutions, recognising the need for mediator competency standards, agreed to form IMI and consult worldwide to initiate competency standards which would be valid and applicable everywhere. Those institutions are:

- Netherlands Mediation Institute <http://www.nmi-mediation.nl/>
- Singapore Mediation Centre/Singapore International Arbitration Centre <http://www.mediation.com.sg/> and <http://www.siac.org.sg/>
- International Centre for Dispute Resolution/American Arbitration Association <http://www.adr.org/>

It should be emphasised that the creation of IMI by these leading dispute resolution institutions is considered a public policy initiative, designed to benefit all users worldwide, and also to benefit all competent mediators and mediation providers. Other organisations wishing to become involved will be welcomed. To underscore its public policy character, IMI's initial executive director, who brings a demand-side perspective to the arena, is contributing his time to the initiative on a *pro bono* basis.

IMI has been incorporated in The Netherlands as a not-for-profit Foundation (under Dutch Law, a *Stichting*), and the Board of IMI will initially be drawn from the Boards of its Founders and a number of other dispute resolution leaders in different countries.

During 2007, an IMI Advisory Council will be created comprising a number of prominent people drawn from the constituencies with a major interest in this field. The role of the Advisory Council will be to provide IMI with thought leadership and to advise IMI's Board on competency standards.

IMI's value

IMI's main remit is to establish international criteria for the certification of mediators under ISO 17024 which will enable mutual recognition of mediator competency. The value IMI sets out to deliver to various constituencies is summarised in **Annex 1**.

ISO 17024

The International Standards Organization published ISO Standard 17024 in 2003 to lay down the requirements for a body operating a certification scheme for persons and the standards of competence and attributes required of persons being certified. This is a general standard, applicable to other professions as much as to mediators.

The NMI is the only body currently arranging for the national certification of mediators to ISO 17024 standards, which it does in collaboration with one of the world's largest certification/verification organisations DNV. DNV holds a certificate from the Dutch Raad voor Accreditatie, one of the members of the International Accreditation Forum, and DNV Certifications are recognised worldwide under a Multilateral Recognition Agreement.

Structure and certification mechanics

Inspired by the success of the NMI Mediator Quality Assurance Scheme in The Netherlands under ISO 17024, the Founders of IMI have determined that, with appropriate adaptations, a similar global scheme can be developed successfully.

Rather than attempt to grant IMI Certifications itself, which would require a costly overhead, IMI will, like NMI, collaborate on competency testing with DNV. The proposed structure of the Certification Scheme is set out in **Annex 2**.

Certification criteria

It is important that IMI's certification criteria are set at levels that (a) enable users to have full confidence in the competency of IMI Certified mediators while (b) encouraging mediators worldwide to improve their skills and abilities and apply for Certification. IMI Certification will complement, and not replace, accreditation offered by mediation training bodies. IMI Certification levels will be determined by DNV based on the advice and guidance of IMI and the Quality Assurance Commissions which IMI will establish around the world together with national mediation councils, NGOs and leading mediation providers and trainers. Subject to consultation, it is proposed that there will be two types of IMI Certification, the distinction between them being primarily related to experience levels.

Continuing Professional Development will also feature prominently – including time taken in the development and mentoring of non-Certified Mediators in order to expand the field. This aspect might best be implemented, and verified, by the leading provider/trainer bodies, and this will be explored in the consultation process.

Between May and October 2007, IMI will consult widely with leaders in the mediation field on the issues raised by mediator certification, in particular:

- Where and how to set the competency standards
- Various levels of competency, and how to differentiate between them
- Admission to Certification
- Renewal terms for Certification
- Continuing Professional Development
- The need for an international mentoring and experience scheme
- Grandparenting of current experienced mediators
- Fees for certification
- IMI funding alternatives
- The value of a Certified Mediators space on the IMI website
- Desirability of users searching the resumés of Certified Mediators
- Whether a user feedback forum should be incorporated
- The introduction of a common global ethical code for Certified Mediators

- Terms of an IMI disciplinary process
- Terms for using an 'IMI Certified' logo
- Relationship between Accreditation by providers and IMI Certification

The consultation process on these, and other, issues are being prompted by a Feedback Generator (Annex 3).

Sources of funds

The three Founder organisations, and the initial executive director, are contributing seeding loans and/or uncharged time and expertise to get IMI established during 2007. Thereafter, working capital will have to be derived from alternative sources. This is a subject on which IMI will consult.

Launch and consultation period

A public announcement about the IMI initiative will be made on 30 April 2007. The Consultation Period of 5-6 months will then take place during which details of the IMI Competency Certification Scheme will be discussed and finalised.

Annex 1 - What Value does IMI add to...?

Disputants and their advisers

- (1) Being able to trust the competency of an unknown mediator
- (2) Expanding the choice of appropriate mediators
- (3) Using IMI's search criteria, find Certified Mediators having specific skills/characteristics [if activated]
- (4) Access by click to the world's top mediation bodies and providers
- (5) Speed, efficiency, no-cost information in a demand-led initiative
- (6) Common mediation rules and ethics code worldwide

Mediators

- (1) Being distinguishable from a competency perspective at the highest level
- (2) Greater likelihood of being selected to mediate
- (3) Access to IMI's Mediator-Only website tools, best practice, news and information
- (4) Participating in a global thought leadership among the world's leading mediators
- (5) Having experience and competency profile accessible to all via the IMI website
- (6) Entitlement to use the IMI Certified logo
- (7) An international professional code of ethics and a disciplinary process.
- (8) Engagement in an International Continuing Professional Development programme offering mentoring and experience opportunities to others
- (9) Playing key part in helping make mediation a recognised profession globally

- (10) Being recognised from a competency perspective worldwide under the ISO MLA and thereby being able to practise internationally
- (11) Avoids national regulations mandating competency standards

Trainers

- (1) Being authorised to train mediators taking the IMI Certification test
- (2) Collaborating in IMI's continuing professional development opportunities
- (3) Premium training income from IMI Certification training
- (4) Entitlement to use the IMI Certified Trainer logo
- (5) Ability to use training tools developed specifically for IMI Certification
- (6) Adds professional credibility – certifying body is separate from the trainer

Judges and Arbitrators

- (1) Facilitates ability to refer disputants to mediators by specifying IMI Certification
- (2) Avoids difficulty in recommending only certain named mediators/providers
- (3) Expands referral options

Governments and NGOs

- (1) Increases the national understanding and acceptance of, mediation
- (2) Provides an international competency standard to underpin government-sponsored, court-annexed mediation programmes
- (3) Provides a substantial low-cost complement to existing justice systems
- (4) Increases international investors' confidence in state justice systems
- (5) Establishes a higher standard of mediation competency for disputes between nations
- (6) Avoids the need to introduce/police national mediator competency standards

Academics and Educationalists

- (1) Ability to engage in thought leadership directly with other relevant constituents
- (2) Participation in new tools/best practice creation developed by the IMI community

Annex 2 – How certification will work

The International Accreditation Forum (IAF) is the global association of Conformity Assessment Accreditation Bodies. The purpose of the IAF is to ensure that its members only accredit competent bodies, and to ensure that, through its Multilateral Recognition Arrangement (MLA), IAF's members

recognise certifications granted by other IAF members. The Netherlands Council for Accreditation (Raad voor Accreditatie – RvA) is a member of the IAF, and as such is authorised to empower appropriately qualified bodies to certify the competency of persons pursuant to ISO Standard 17024. RvA has authorised DNV Certification BV (<http://www.dnv.com>) to certify the competency of persons, and as a result of the MLA such certifications are recognised internationally. For further information, including a full list of IAF’s worldwide members, see <http://www.iaf.nu/>.

DNV, who have operated NMI’s Mediator Certification scheme from the outset, is collaborating with IMI to develop a similar system for certifying mediators worldwide.

DNV will contract with national/regional institutions (eg universities) to perform the required mediator competency skills tests. The Examination Institutes will carry out competency testing to defined DNV quality standards under DNV supervision.

In each country (or, in some cases, regions) the Examination Institute will be formally advised by a national (or regional) IMI Mediator Quality Assurance Commission, comprising providers and trainers invited to participate by IMI, and including representation by relevant government mediation schemes and public organisations and NGOs having a role in the mediation field. IMI will be represented in each Mediator Quality Assurance Commission to help enable best practices to be shared. The Commissions will define methodologies for enabling mediators to progress to Certification, ensure Continuing Professional Development (CPD) opportunities are made available, and provide advice and support to the Examination Institutes.

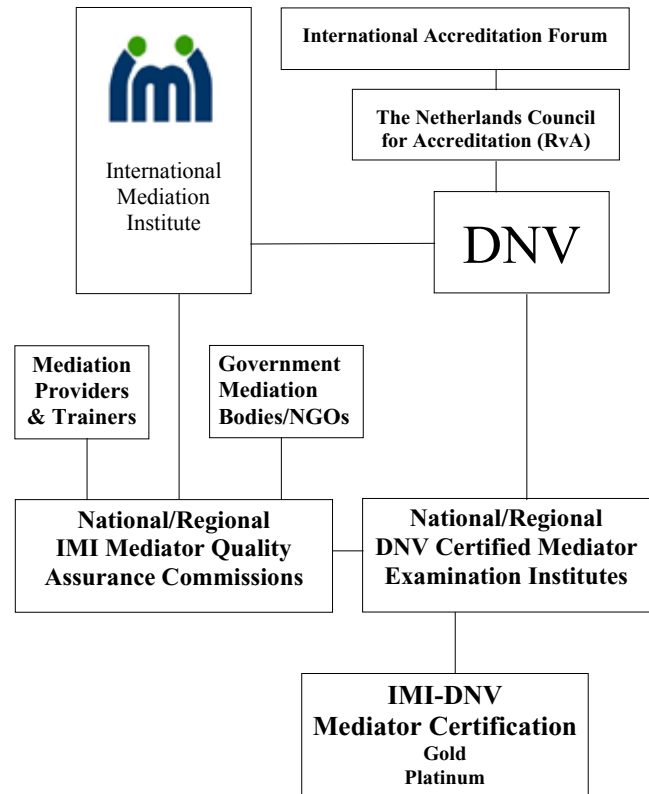
To secure a DNV-IMI Mediator Certification, candidates will be asked to:

- (1) pass the formal assessment conducted by a DNV-appointed Examination Institute
- (2) self-certify a minimum annual participation in CPD
- (3) provide an affidavit establishing set minimum levels of experience as a mediator
- (4) contribute their resumé to IMI for searching in the IMI website, and
- (5) pay the initial assessment fee to DNV and annual dues to IMI to fund the system.

Two types of Mediator Certification will be offered – Gold Certification and Platinum Certification, the difference being defined by levels of practical mediation experience.

Certification will be valid for three years and renewed if the maintenance requirements are met.

Existing experienced mediators may be offered ‘grandparenting’ – ie the opportunity, for a limited period, to be certified without undergoing the formal assessment, provided all the other four conditions are met.



ANNEX 3 – Feedback generator

Please use the following questions to prompt comments and suggestions.

This is not an exhaustive list.

If other issues occur to you, please do not hesitate to address them.

It is not necessary to respond on all these questions.

This list, with space for answers, can be accessed at http://imimmediation.org/?cID=feedback_generator.

- (1) Should IMI Certification be restricted to experienced practising mediators? (ie should there be a level of IMI Certification which requires passing a test, but does not require practical experience as a mediator?)
- (2) Should there be different levels of IMI Certification (eg Silver/Gold/Platinum) depending on experience or other criteria?
- (3) At what level(s) should IMI Certification be set? (eg high/low, best practice, minimum standard)
- (4) How long should Certification last (eg. indefinite, five years, three years) before renewal?
- (5) What should be the renewal criteria? (eg demonstrate a minimum number of mediations, CPD requirements, evidence of mentoring/shadowing.) Should renewal involve an active re-application by Certified Mediators (administratively burdensome), or be passive/automatic subject to notification by the mediator that criteria had been met?

- (6) Should Certification and renewal criteria differ according to number of mediations in a particular country/region?
- (7) Should IMI Certified mediators be asked for annual or other periodic professional dues in order to fund the scheme, and if not, what alternative funding should be arranged? Should those dues be adjusted according to a cost-of-living index?
- (8) Should the Certification test be at a common standard(s) worldwide? (Local advisory commissions would reflect the fact that good mediation practice covers a wide range of skills, approaches and techniques with significant cultural variations)
- (9) Should the Certification test make allowances for different mediation styles? (eg facilitative/ evaluative)
- (10) Should Certification be available for mediators in all fields (eg commercial, family, community, inter-governmental, international) or should it be limited?
- (11) Should IMI Certification be phased in gradually on a national, regional or other basis? (For example, IMI could be initially established to address the needs of international business and inter-governmental disputants, and then be gradually extended as an international certification for all mediators.)
- (12) Should there be forms of Certification for Mediation Provider Organisations and Mediator Trainers, and if so what should be the criteria?
- (13) Should IMI recommend trainers for preparing mediators to take the Certification Test, and if so, what should be the criteria?
- (14) Should IMI Certified mediators be searchable by users on the IMI website? If not, why?
- (15) Should IMI address mediator competence or also mediator suitability? (Suitability can, to a degree, be aided by searching criteria – eg language capability, cultural background, location, etc)
- (16) Should disputants be invited to contribute brief feedback on their experiences of using named Certified Mediators? If so, should this feedback be viewable?
- (17) Should the IMI website explain and promote mediation?
- (18) Should the IMI website inspire with new learning and where to find out more?
- (19) In which languages should the IMI be presented?
- (20) Is the list of IMI values (Why IMI?) complete/ accurate?
- (21) What kind/quality of CPD should be required and how should its different forms be measured given the wide diversity in some countries (ranging from attending lectures to advanced skills courses) and the almost complete absence of CPR opportunities in others?
- (22) Should IMI facilitate mentoring, coaching, shadowing or similar opportunities?
- (23) Should competency assessment extend to knowledge, skills and ethics?
- (24) To avoid bureaucracy, experience levels and grandparenting may need to be taken on trust. Should there be a verification procedure, spot audits or other basis for determining accuracy?
- (25) Should IMI arrange for Certified Mediators to benefit from globally-applicable professional indemnity insurance?
- (26) What are the alternatives to Competency Certification if not organised internationally? Would those alternatives forestall governmental regulation?

Please contribute comments and suggestions to:
 IMIconsultation@imi-mediation.org **By doing so, you will automatically be sent future IMI Consultation Papers and be able to participate in the ongoing development in this field.**

Note

* Paper published on 23 April 2007 by the International Mediation Institute, Lange Vijverberg 12, 2513 AC The Hague, The Netherlands, reproduced with the Institute's permission.

IBA Mediation Subcommittee on the UNCITRAL Model Law on International Commercial Conciliation ('MLICC')

INTRODUCTION TO QUESTIONNAIRE

An ad hoc sub-committee was created at the IBA meeting in Chicago in September 2006 for the purpose of starting work on a short and 'ready to use' guideline on the adoption of the MLICC.

The accompanying questionnaire is designed to find out from as many different country respondents as possible how the MLICC compares with existing mediation or conciliation practice in certain key areas namely: statute of limitations, confidentiality and/or privilege, and enforcement of settlements – is it a floor, a ceiling, or somewhere in between?

No distinction is made at this stage between facilitative or evaluative models of mediation.

To the extent the MLICC provides more, less, or the same as existing rules and law, we will have a better idea from jurisdiction to jurisdiction as to whether legislation may be desirable or necessary, or what special care or caution might be advisable.

Finally, since we are dealing with international mediation (and downstream enforcement of any settlement), the extent to which the parties are free to create their own legal framework or are regulated by local laws, may affect the length of the answers.

The input of readers of the newsletter would be most welcome, by 15 August at the latest, so that we can prepare for the Annual Conference in Singapore in October.

Guidance notes on the questionnaire may be found on the following pages and online at <http://www.ibanet.org/images/downloads/lpd/Questionnaire.doc>

The response sheet may be found on the following pages and online at <http://www.ibanet.org/images/downloads/lpd/AnswerSheet.doc>

Please respond to Anurag Bana, by 15 August: anurag.bana@int-bar.org

John Michael Richardson
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Sambeth.Glasner@altenburger.ch

Questionnaire

1. Statute of limitations

(MLICC Article 4, footnote 3)

The MLICC includes a footnote 3 to Article 4 containing text 'suggested' for states that might wish to adopt a provision on the suspension of the statute of limitations (typically from the commencement of conciliation proceedings until they end without a settlement agreement).

The Guide to Enactment and Use of the UNCITRAL Model Law 2002 ('Guide'), paragraph 48 at p 31, has a lengthy commentary on the pre-enactment debate for and against a provision in the MLICC on the suspension of the statute of limitations.

The premise of these questions is that, first and foremost, parties and mediators should be aware of, and understand, the impact that the statute of limitations might have in a particular case. Also, it is vitally important, where possible, not to burden conciliation with concerns about procedural consequences or loss of rights but rather to make the parties fully comfortable and confident in undertaking mediation.

The questions assume that an international conciliation or mediation is to take place in your country between a party resident in your country and a party resident in another country and the issue of the applicable statute of limitations has not been otherwise resolved, for example, by a permissible agreement between the parties or by the commencement of a timely action which has led to voluntary or court mandated mediation in an attempt to settle a pending lawsuit.

(a) *In international commercial conciliation or mediation in your country how easy or difficult is it to determine the applicable statute of limitations?*

Notes:

- (1) Include if relevant the impact of choice of law provisions on the statute of limitations which is applicable:
 - as to a cause of action arising in your country?
 - as to a cause of action arising in another country?
- (2) If relevant in determining which statute of limitations to apply to an international mediation in your country, what distinctions will be made between the procedural law and rules of the forum on the one hand and the substantive law applicable to a cause of action on the other (such as, eg an underlying agreement as to governing law or as to conditions for notifying and resolving disputes)?

(b) *What should the mediator and the parties be aware of as regards relevant law and rules as to permitted shortening, tolling (suspending), or extending the applicable statute of limitations in general, or, if relevant, with particular reference to international commercial conciliation (including any special requirements or formalities as to dates of commencement and ending and/or positive or negative results of the process)?*

Notes:

- (1) The Guide, at paragraph 48 on p 31, summarises an evidently intense debate which reflects widely differing national regimes including, for example, whether the impact of any special rules for conciliation on existing procedural rules is or would be overly technical, whether extensions (or waivers?) are possible at all, whether interruptions or suspensions set the clock back to zero at the end of an unsuccessful conciliation and started the running all over again, whether anything more was needed than the right to start an action in court or in arbitration as provided in MLICC Article 13, whether dates of commencement and ending of permitted interruptions or suspensions could be readily determined without formalities such as a specific writing

(c) *If relevant, irrespective of the law and rules as to the statute of limitations as such, is there a way of eliminating any statute of limitations issue by simple waiver, for example, can the parties make a written promise not to plead the statute of limitations?*

Notes

- (1) In New York there is such a statute as to a written promise but only in respect of a pre-existing, contractual claim (General Obligations Law, §17-103, Agreements Waiving the Statute of Limitations).

(d) *Does your country make a distinction between a statute of limitations as such and a condition precedent attaching to a right, which provides a shorter time, without reference to the statute of limitations, in which to commence an action?*

Notes:

- (1) Some causes of action are created with a built-in deadline for having or exercising the right at all. For example, government agencies in limited waivers of sovereign immunity may grant a right of action only if a proceeding is commenced or some formal notice given within (say) one year of an event with the result that conciliation before commencement of an action may be difficult.

2. Confidentiality, admissibility and privilege

(MLICC Articles 8–10)

The MLICC provides for confidentiality between one or other of the parties and mediator as to what is disclosed to the mediator *ex parte* during the conciliation [Article 8], for confidentiality *vis-à-vis* third parties as to all information relating to the conciliation proceedings [Article 9], for the non-admissibility of evidence or testimony as to enumerated categories of information (invitations, facts, views, statements, admissions, proposals, and documents) from a conciliation and which are not independently admissible without reference to the conciliation [Article 10].

However such protections are qualified if disclosure is required 'under the law' or for the purposes of implementation or enforcement of a settlement agreement

The questions are designed to determine if there is sufficient assurance in your country that confidential subject matter related to an international conciliation or mediation will be protected and that what was said or disclosed in a mediation will not be evidence in any subsequent proceeding. In the alternative, it may be that a special law or regime will be necessary in your country to achieve the purposes of the MLICC.

In particular, the questions are designed to highlight any perceived differences between common law and civil law jurisdictions in the matter of confidentiality and admissibility, both as to terminology and substance, in the expectation that, by clear articulation and analysis, a fair amount of misunderstanding may be revealed and corrected.

- (a) *Are there statutory or common law provisions of general application as to confidentiality with respect to an international commercial conciliation which are sufficient to safeguard the desired degree of legal protection against unwanted disclosure expressed in MLICC Article 9, or is it necessary to refer to, or to await, some special legislation or rules of procedure?*
- (b) *Are there nevertheless statutory requirements or rules of court which would oblige a party or mediator or witness to disclose confidential information in certain situations with the result that MLICC Article 9 offers only a relative protection?*
- (c) *Does your country follow the rule in MLICC Article 8 as to the need for a party to specify that information being given ex parte to a mediator is confidential?*
- (d) *Is the very fact that a mediation has commenced or ended, with or without a resolution, confidential per se or is an agreement necessary between parties, mediator, and/or a service provider such as ICC or AAA?*
- (e) *To what extent may the parties agree upon consequences in the event of a breach of confidentiality, for example, liquidated damages, contractual penalties, or contempt proceedings, or, for example, in anticipation of a disclosure, provide for an expedited injunction proceeding, the right to intervene in an action or other requirements such as the posting of a bond?*

Notes:

- (1) Balancing the need for the truth against the prejudice that might be suffered by a particular disclosure is a constant source of tension in resolving disputes. We need to understand how the practice in your country deals with this tension.
- (2) For example, are there laws or rules in the nature of public policy or 'ordre public' which can require disclosure of confidential information to a court or government authority, or are there rules of procedure in litigation, such as discovery, that may require, without resolving issues as to later admissibility, disclosure of confidential information subject only to a protective order or, as may be necessary, subject to various hierarchies of restricted access to confidential subject matter, such as to the judge only, to a specified level of a party's management, for 'attorneys' eyes only', or for 'outside experts' eyes only'?
- (3) May claims as to confidentiality be avoided by showing, for example, a waiver, or a pre-existing or prospective public availability without a breach of any relevant agreement?
- (4) Would the identity of a prospective witness be something that could be kept confidential if learned of in an international mediation in your country and/or could such a witness be made to testify in a subsequent proceeding (for example, there is a saying common in Anglo-American practice that 'nobody owns a witness'?)

- (f) *Are there laws or rules of general application, sufficient to satisfy MLICC Article 10, as to the admissibility or use in a court or in an arbitration of information obtained in a conciliation, including any specific 'privileged' communications in the nature of or conceptually similar to attorney-client privilege, or is a special law or regime necessary?*
- (g) *In view of the answer to (f) above, what can a party, mediator, witness or other relevant third party testify to or introduce in a later proceeding, whether the conciliation was successful or unsuccessful?*
- (h) *Is there any rule that arguments as to admissibility and/or privilege are waived if a document or communication is relied on in litigation and does it make any difference if such a reliance was made in the context of a prior conciliation solely to facilitate a possible settlement?*
- (i) *To what extent does the answer to (e) above as to a penalty or injunction for a breach in respect of confidential information protected by MLICC Article 8 apply to use or admission of the categories of information protected by MLICC Article 10 in a court proceeding or an arbitration?*

Notes:

- (1) In Anglo-American law the attorney-client privilege is essentially absolute but narrowly construed as being limited to communications and documents made strictly in the course of a client seeking legal advice from an attorney. It doesn't matter that the truth would be helpful to a court or litigant, a 'privileged' communication is privileged absolutely (unless vitiated by some inherent illegality) and may be waived only by the client. It may be deemed waived in litigation, if it is necessary to be fair to an adversary, when a party relies on an opinion of counsel to protect itself from claims which cannot be properly evaluated without examining the opinion – for example in claims for enhanced damages due to wilful conduct where an attorney has opined that an adversary's right is not infringed or not valid.
 - (2) US courts routinely distinguish in international litigations between civil law professional secrecy obligations and attorney-client privilege, which may or may not be a useful distinction. As a practical matter, discovery is available in respect of civil law professional secrecy documents but not in respect of attorney-client privileged documents on the theory that a civil law court can in certain circumstance override the professional secrecy obligation with the result that it is not an absolute 'privilege'.
- (j) *To the extent not otherwise addressed above, if a settlement agreement is made following an international conciliation, can a court or arbitrator or subsequent mediator hear witnesses or receive documents which are otherwise subject to a restriction arising out of the prior conciliation as being non-admissible and/or confidential, and in particular in order to (i) understand what the parties intended, (ii) implement the agreement, or (iii) enforce the agreement*
 - (k) *How would an 'offer of settlement' be treated in the context of an unsuccessful conciliation when a party obtains less in a litigation or arbitration than it was offered by its adversary during the conciliation?*

3. Enforcement of settlement agreement

(MLICC Article 14)

The MLICC Article 14 provides that an eventual settlement agreement is binding and enforceable – leaving it to enacting states to set out a description of any particular method or governing provisions of law.

There is room for discussion as to whether the attractiveness of conciliation would be increased if an eventual settlement would enjoy a regime of expedited enforcement or would, for the purpose of enforcement, be treated as or similar to an arbitral award (Guide, paragraph 87 at p 55)

- (a) How are settlement agreements generally arrived at and enforced following an international conciliation in your country – such as by ordinary contract or agreement and/or by some exceptional regime including specialised courts and procedures?*
- (b) In addition, are there special agreements, procedures or tactics which can enhance recognition and enforcement – such as by bonds, letters or credit or security agreements, deeds, summary proceedings, incorporation in a judgment or as an arbitral award made with the consent of the parties, or is there some other sui generis system of expedited enforcement?*
- (c) Are there any defences ordinarily or exceptionally available against enforcement of post-conciliation settlement agreements?*
- (d) What law or rules apply as to such items as costs, interest and attorney fees in the enforcement of a settlement agreement?*

Responses to questionnaire for MLICC project

This response sheet can be found online at
<http://www.ibanet.org/images/downloads/lpd/answersheet.doc>

1. Statute of limitations

(a) In international commercial conciliation or mediation in your country how easy or difficult is it to determine the applicable statute of limitations?

(b) What should the mediator and the parties be aware of as regards relevant law and rules as to permitted shortening, tolling (suspending), or extending the applicable statute of limitations in general, or, if relevant, with particular reference to international commercial conciliation (including any special requirements or formalities as to dates of commencement and ending and/or positive or negative results of the process)?

(c) If relevant, irrespective of the law and rules as to the statute of limitations as such, is there a way of eliminating any statute of limitations issue by simple waiver, for example, can the parties make a written promise not to plead the statute of limitations?

(d) Does your country make a distinction between a statute of limitations as such and a condition precedent attaching to a right, which provides a shorter time, without reference to the statute of limitations, in which to commence an action?

2. Confidentiality, admissibility and privilege

(a) Are there statutory or common law provisions of general application as to confidentiality with respect to an international commercial conciliation which are sufficient to safeguard the desired degree of legal protection against unwanted disclosure expressed in MLICC Article 9, or is it necessary to refer to, or to await, some special legislation or rules of procedure?

(b) Are there nevertheless statutory requirements or rules of court which would oblige a party or mediator or witness to disclose confidential information in certain situations with the result that MLICC Article 9 offers only a relative protection?

(c) Does your country follow the rule in MLICC Article 8 as to the need for a party to specify that information being given *ex parte* to a mediator is confidential?

(d) Is the very fact that a mediation has commenced or ended, with or without a resolution, confidential *per se* or is an agreement necessary between parties, mediator, and/or a service provider such as ICC or AAA?

(e) To what extent may the parties agree upon consequences in the event of a breach of confidentiality, for example, liquidated damages, contractual penalties, or contempt proceedings, or, for example, in anticipation of a disclosure, provide for an expedited injunction proceeding, the right to intervene in an action or other requirements such as the posting of a bond?

(f) Are there laws or rules of general application, sufficient to satisfy MLICC Article 10, as to the admissibility or use in a court or in an arbitration of information obtained in a conciliation, including any specific 'privileged' communications in the nature of or conceptually similar to attorney-client privilege, or is a special law or regime necessary?

(g) In view of the answer to (f) above, what can a party, mediator, witness or other relevant third party testify to or introduce in a later proceeding, whether the conciliation was successful or unsuccessful?

(h) Is there any rule that arguments as to admissibility and/or privilege are waived if a document or communication is relied on in litigation and does it make any difference if such a reliance was made in the context of a prior conciliation solely to facilitate a possible settlement?

(i) To what extent does the answer to (e) above as to a penalty or injunction for a breach in respect of confidential information protected by MLICC Article 8 apply to use or admission of the categories of information protected by MLICC Article 10 in a court proceeding or an arbitration?

(j) To the extent not otherwise addressed above, if a settlement agreement is made following an international conciliation, can a court or arbitrator or subsequent mediator hear witnesses or receive documents which are otherwise subject to a restriction arising out of the prior conciliation as being non-admissible and/or confidential, and in particular in order to (i) understand what the parties intended, (ii) implement the agreement, or (iii) enforce the agreement

(k) How would an 'offer of settlement' be treated in the context of an unsuccessful conciliation when a party obtains less in a litigation or arbitration than it was offered by its adversary during the conciliation?

3. Enforcement of settlement agreement

(a) How are settlement agreements generally arrived at and enforced following an international conciliation in your country – such as by ordinary contract or agreement and/or by some exceptional regime including specialised courts and procedures?

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(c) Are there any defences ordinarily or exceptionally available against enforcement of post-conciliation settlement agreements?

(d) What law or rules apply as to such items as costs, interest and attorney fees in the enforcement of a settlement agreement?

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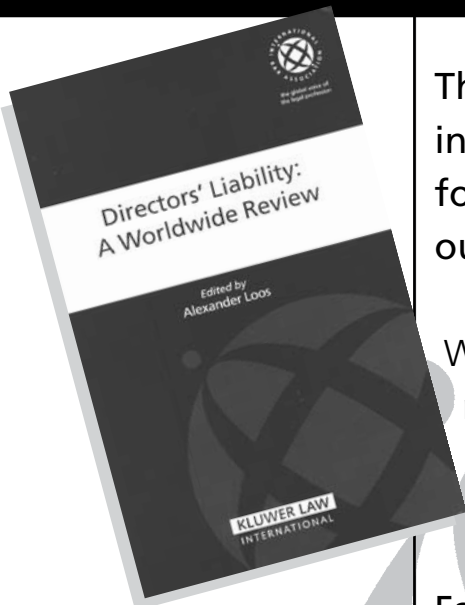


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