

## MEDIATION

### 1. Dispute Resolution

Dispute resolution is self evidently about resolving disputes, i.e. bringing to a conclusion differences between parties. They can be commercial, domestic, organisational, national, and international. The dispute is often resolved between the parties, but frequently they need assistance.

### 2. Traditional Resolution

There are well established means of resolving disputes. First and most frequently used in all disputes and at all times irrespective of the procedure adopted is **negotiation** (but which itself is a procedure).

The common feature of court proceedings and arbitration is that they are adversarial – a boxing match between the parties with one side stating its case, the other rebutting that case and stating its case, exchange of evidence and arguments. (This is also the usual procedure in negotiation). And then, fundamentally, you have a hearing (be it trial or arbitration) at which an independent third party, having heard what is said, produces a binding determination (subject only to possibilities of appeal).

It is important to keep in mind that the majority of disputes are resolved before litigation or arbitration and that most of the disputes which enter either forum are resolved before the hearing.

### 3. Why have an Alternative?

The simple answer is speed and cost. Those overriding reasons derive from a number of other factors - a successful litigant rarely objects to the costs! The factors to keep in mind are:

- a) For every dispute resolved at trial or arbitration one party loses. Often even the winner has lost on a number of points. That is unsatisfactory for at least 50% of the participants.
- b) The imposition of a judicial determination based upon facts presented at a hearing addresses the issue in isolation. It does not look at the wider commercial issues and parties may find their case resolved by old authority. If they think the authority is wrong, changing it can be very expensive.
- c) The parties are unable to predict the outcome of a hearing. Although they can present their arguments the result can still be a lottery (as you will all learn), making it difficult to plan ahead commercially.
- d) Formal proceedings are extremely slow. Arbitration or litigation more often takes years than weeks.
- e) The costs of both arbitration and litigation can be phenomenal. For example in England, the cost of a day in court (after the first day) is likely to be (1) leading Counsel £3,500, (2) Junior Counsel £1,750, (3) Solicitors (partner and assistants) £5,000, (4) witnesses etc. (i.e. \$20,000 + per party per day).
- f) A judgment is a public document and even if successful it is likely to disclose

failings/embarrassments, mediation can be confidential

g) Securing a judgement does not guarantee ease of enforcement.

#### 4. History of Dispute Mediation

The activity of mediation in itself appeared in very ancient times. Historians presume early cases in Phoenician commerce (but suppose its use in Babylon, too). The practice developed in Ancient Greece (which knew the non-marital mediator as a proxenetas), then in Roman civilization, (Roman law (starting from Justinian's Digest of 530-533 CE) recognized mediation. The Romans called mediators by a variety of names, including internuncius, medium intercessor, philanthropus, interpolator, conciliator, interlocutor, interpres, and finally mediator.

The Middle Ages regarded mediation differently, sometimes forbidding the practice or restricting its use to centralized authorities. Some cultures regarded the mediator as a sacred figure worthy of particular respect; and the role partly overlapped with that of traditional wise men or chieftain.

#### 5. The Process of Mediation

Mediation is a facilitated negotiation between the parties with the assistance of a mediator i.e. a facilitator of their negotiations. The mediator does not (and should not) impose a decision but works with the parties in order to reach accord. The mediation is throughout without prejudice and confidential. It is also non binding until agreement is reached. If accord is reached, an agreement must be produced and then that agreement is binding upon the parties.

#### 6. How does it Work?

(a) The mediation itself.

Ordinarily a group session with all participants around a table. General introductions are followed by position statements. Those statements may be tested by the mediator prior to the end of the session or when in private with the parties alone. After the group session follow several private sessions between the mediator and one of the parties. This is "shuttle diplomacy". It may lead to accord in which case sensible mediators will require the parties to draw up an agreement which will become binding; this point is dealt with in more detail in paragraph 7 below.

(b) The preparation.

Preparing for a mediation is not dissimilar to preparing for trial. Often many of the same issues will have to be traversed albeit in a different context. Detailed preparation is important to represent the clients interests and also to ensure the mediator understands the process at the beginning not only to demonstrate that you are on top of matters but to save time.

(c) The key to this may be your statement of case; it should provide arguments on the evidence and evaluation of law both of your case and the opponents. You should also consider other factors which may have a bearing on dispute resolution. These can be mentioned to the mediator in confidence and may prove determinative. You should also consider all of your costs consequences and scenarios. Be prepared!

(d) Selection of the mediator. This selection is probably the most important aspect of the mediation preparation as the mediator is key to the process. The mediator is not a

judge, he is not expected or required to give opinions or to apportion blame or to produce a binding agreement. He is intended to be neutral to define and analyse the issues and look at the interests of the parties rather than their positions. Ultimately, you require a quick witted individual who may be a professional or an experienced man or woman of business. Current research suggests the most important factor in choosing a mediator is the expertise in the law of the subject matter of dispute and this is certainly preferable. Experience suggests that the most important factors are persistence and patience and excellent communication – particularly listening – skills.

A number of organisations provide mediators or provide access to them. Increasingly a number of individuals generate their own practice as mediators. Retiring professionals find the position attractive due to the lack of liabilities, continued work, and short nature of the retainer.

- (e) Timing. Mediation is about resolution. As with all negotiation there is no point negotiating a deal prematurely. If further information will come to light it is as well to wait until it is received before concluding views and a deal on insufficient information.
- (f) Venue. Mediations can be long and tiring. A comfortable venue appropriately provisioned is useful.
- (g) Participants. It is almost unheard of for a mediation to proceed without a client in attendance. Clients like mediation (see above) as they have control. Unusually they undertake the negotiations. They attend. Their lawyers also attend. If a witness or an expert may be useful he can attend as well. The only factor which is fundamental is that whoever attends has an appropriate authority to resolve the dispute.
- (h) Confidentiality. One of the hallmarks of mediation is that the process is strictly confidential. The mediator must inform the parties that communications between them during the intake discussions and the mediation process are to be private and confidential. In general, the information discussed can never be used as evidence in the event that the matter does not settle at mediation and proceeds to a court hearing. It is common for parties entering into mediation to sign a mediation agreement document with a mediator ( PLEASE SEE SPECIMEN MEDIATION AGREEMENT ATTACHED AS APPENDIX A). The parties therefore agree that it's a condition of being present or participating in the mediation and the document if necessary may be deemed confidential by virtue of the common law.

Confidentiality is central to mediation. It is imperative for parties to trust the process. Very few mediations will ever succeed unless the parties can communicate fully and openly without fear of compromising their case before the courts. Mediation confidentiality is seen as one of the key ingredients to encourage disputing parties to negotiate with each other in order to achieve a settlement of their dispute.

Organisations have often seen confidentiality as a reason to use mediation ahead of litigation, particularly when disputes arise in sensitive areas of their operation, or to avoid their affairs becoming publicised among businesses competitors, acquaintances or friends. Steps put in place during mediation to help insure this privacy include:

- I. The mediation meeting is conducted behind closed doors.

- II. Outsiders can only observe proceedings with both parties consent.
- III. No records of the transcript is kept; and
- IV. There is no external publicity on what transpired at the mediation.

There is no doubt confidentiality contributes to the success and integrity of the mediation process. However it will be difficult for a mediator to guarantee full confidentiality protection between the parties.

(i) The Day

It will be a long day.

Statisticians tell you that most mediations settle on the day or afterwards. Always remember that is true of all disputes. Mediation, while a valuable tool is nothing more than a further means of negotiation.

## 7. Competence of the Mediator

Numerous schools of thought exist on identifying the “competence” of a mediator. Where parties retain mediators to provide an evaluation of the relative strengths and weaknesses of the parties’ positions, subject-matter expertise of the issues in dispute becomes a primary aspect in determining competence.

Some would argue, however, that an individual who gives an opinion about the merits or value of a case does not practice “true” mediation, and that to do so fatally compromises the alleged mediator’s neutrality.

Where parties expect mediators to be process experts only (i.e. employed to use their skills to work through the mediation process without offering evaluations as to the parties’ claims) competence is usually demonstrated by the ability to remain neutral and to move parties through various impasse points in a dispute. International professional organisations continue to debate what competency means.

## 8. Legal Implications of Mediated Agreements

Parties who enter into mediation do not forfeit any legal rights or remedies. If there is no settlement during the mediation, each side can continue to enforce their rights through appropriate court or tribunal procedures. However, if a settlement has been reached through mediation, legal rights and obligations are affected in differing degrees. Mediated agreements may be registered with a court to make it legally binding, if the mediation has taken place before the commencement of legal proceedings. In such case the registered agreement will carry the same weight as a court order and can be enforced in the same way as a court order. Similarly, if the mediation agreement is reached after the issuance of proceedings the parties will normally execute a formal settlement agreement which can be filed at the court in which the proceedings have already been commenced and can be enforced against any party who defaults on the terms of that agreement.

## 9. Recent Cases Pronouncements

The drive towards mediation has been driven by certain recent cases as well as the Overriding Objective of the civil procedure rule incorporating the concept of proportionality etc.

- (a) Dunnett v Railtrack (February 2002). This was an unfortunate and emotional case involving the death of three horses on a railway track. Railtrack successfully resisted a claim for damages at

first instance on the basis that they had no liability. The distressed claimant appealed and the judge, giving leave to appeal, suggested the parties consider mediation. Railtrack, advised by Simmons & Simmons, declined on the basis that the costs of mediation would exceed the cost of an appeal which was doomed to failure in any event. The appeal took place and railtrack won. They requested their costs but were refused. The gist of the case was

*“Skilled mediators could achieve results that went far beyond the court’s powers, and lawyers who dismissed the opportunity for... mediation out of hand would suffer uncomfortable consequences.... It has to be emphasised that it was a lawyers duty to further the overriding objective... if parties turned down ADR out of hand then they would suffer the consequences when costs came to be decided.”*

- (b) *Hurst v Leeming* (May 2002) This is a first instance case before Lightman J in the Chancery Division. It was a professional negligence action and mediation had been refused. There was an argument about costs (bearing in mind the decisions referred to above) and whether the costs were reasonable and therefore recoverable after the refusal to mediate. The court accepted that costs were recoverable, but put down a very firm marker:

*“If mediation can have no real prospect of success, a party may, with impunity, refuse to proceed to mediation on this ground. But... the hurdle in the way of a party refusing to proceed to mediation on this ground is high for in making this objective assessment of the prospect of mediation, the starting point must surely be the fact that the mediation process itself can and does often bring about a more sensible and more conciliatory attitude on the part of the parties than might otherwise be expected to prevail before the mediation, and may produce a recognition of the strengths and weaknesses by each party of its own case and that of its opponent and a willingness to accept the give and take essential to a successful mediation. What appears incapable of mediation before the process begins often proves capable of satisfactory resolution later.”*

- (c) *SITA v. Watson Wyatt* (November 2002). This is another first instance decision which appeared to redress the balanced for traditional litigation – the end of mediation?

Watson Wyatt, defending a significant accounting/actuarial negligence action, tried more than once to pressure a third party, Maxwell Batley, to join mediation. Maxwell Batley refused and the question was whether this refusal was reasonable or should give rise to costs consequences. Park J. decided that Maxwell Batley had behaved reasonably and they were not criticised for refusing to mediate. He even described the first attempt to get Maxwell Batley to join the mediation as “a most inconvenient and unwelcome distraction”! However, the message remains the same, refuse to mediate at your (costs) peril and Maxwell Batley were lucky; essentially they refused because of timing, and like Railtrack, because they thought they would win. This decision, like many others, turned on judicial perception. Park J. disliked Wyatt Watson’s approach: they bullied. (They used the arrangements to distract, they suggested the mediators thought Maxwell Batley liable, and, crucially, they only wanted Maxwell Batley to contribute to the Claimant, leaving the claim between Watson Wyatt and Maxwell Batley open.)