

# NEWSLETTER

# MEDIATION



the global voice of  
the legal profession

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## FROM THE CHAIR

# Maintaining the momentum

**John M Townsend**

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**A**s the Mediation Committee completes its second year, we find ourselves the youngest but also one of the largest committees of the IBA, with more than 1,200 members. The wide range of interests and concerns of our members is reflected in this excellent newsletter, and also in the variety and excellence of the committee's programmes at the IBA Annual Conference in Chicago in September of this year.

Leading off in Chicago, the Dispute Resolution Section of the IBA (of which the Mediation Committee forms a part) presented a programme on 'The state of dispute resolution in today's world'. The programme, for which the Mediation Committee's liaison was Petria McDonnell, invited non-lawyers to comment on how disputes are resolved.

The mediation-specific programmes in Chicago began with one co-sponsored with the Litigation Committee on 'Mediation in the court process', for which the Mediation Committee's liaison was Babak Barin. The programme focused on how courts are using and might better use mediation to resolve disputes pending in the courts.

The Mediation Committee's first all-day programme was on the subject of 'Mediation as a management tool', co-sponsored by the Corporate

*Continued overleaf*

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Counsel Forum. The programme explored the various ways that mediation can be useful to the lawyer managing business disputes. The first segment concentrated on mediation as a means of managing long-term relationships, beginning with a lively role play organised by Helena de Backer, followed by a commentary chaired by Thierry Garby. The afternoon session led off with a discussion of 'Mediation as a cost-containment device' chaired by Siegfried Elsing, followed by an innovative exploration of 'Mediation as good corporate governance', chaired by David Burt.

The week in Chicago closed with a programme on 'Dispute resolution mechanisms for IP-related disputes', co-sponsored with the Intellectual Property and Entertainment Law and Arbitration Committees. The programme, for which Jon Lang was our liaison, discussed various mechanisms available to help resolve disputes over intellectual property.

Looking ahead to our third year, it is already clear that the Mediation Committee will maintain the momentum we have achieved. In addition to our programmes and newsletter, our Clearing House Initiative, which seeks to match the need for help with mediation regulation with expertise on that subject, is off to a promising start with a project in Turkey organised by Siegfried Elsing. And the process of identifying country chairs to keep us informed about mediation developments in their respective countries is well under way.

Our next opportunity to get together will be on IBA Arbitration Day, which next year will be on Friday, 2 March 2007 in Madrid. Before the Arbitration Committee's programme commences that day, the Mediation Committee will again organise a Mediation Breakfast, at which we will have the privilege of being addressed by Fernando Pombo, the incoming President of the IBA, on the subject of 'Mediation in Spain'.

Dushyant Dave and Siegfried Elsing are currently exploring the possibility of a programme on mediation in India, possibly as early as this coming spring. Watch this space for developments, and let either of them know of your interest.

Looking ahead to next year's IBA Annual Conference in Singapore from 14-19 October 2007, the new officers of the Mediation Committee are already at work to organise a series of programmes. The early contenders are 'Mediation as a face-saving

device', to be co-sponsored by the Asia Pacific Forum; 'Deal mediation: the use of mediation in the course of M&A transactions', to be co-sponsored by the Business Organisations Committee and the Corporate Counsel Forum, and 'Pursuing and resolving discrimination claims in the workplace', to be co-sponsored by the Discrimination and Gender Equality Committee.

A full list of the officers who will take over the direction of the committee on 1 January 2007 is published on page 4 of this newsletter. You will see from that list that Siegfried Elsing will take over as Chair of the Mediation Committee after two years of distinguished service as Vice-Chair of the committee.

As I approach the end of my term, I want to thank all of the members of the Mediation Committee for their support and enthusiasm in launching this new committee. I also want to thank the IBA staff, particularly Kerri Deegan and Kath Farrell, for their tireless help. Special thanks go to my fellow officers for their invaluable assistance and friendship, especially Vice-Chairs Siegfried Elsing, Thierry Garby and Petria McDonnell, Secretary Dushyant Dave and Treasurer Helena de Backer, Babak Barin, who has chaired the Model Law Subcommittee, Corporate Counsel Forum Liaison David Burt, and Jim Boykin, who has coordinated our outreach to young lawyers. Perhaps the greatest thanks are due to Publications Officer Jon Lang, who has been responsible for the remarkable success of this newsletter, which has contributed more than any other single factor to the visibility and success of this committee.

I look forward to seeing all of you in Madrid in March, in Singapore in October, and at many meetings of the Mediation Committee for years to come.

This Newsletter is intended for lawyers interested in, or involved in, laws and regulations as they apply to mediation. Views expressed are not necessarily those of the International Bar Association or its officers.

# Mediation: an ever-changing world

Jon Lang

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**T**his is my last Mediation Newsletter! In January, my good friend and fellow Committee Officer Babak Barin takes over as Publications Officer, as my inaugural two-year stint comes to an end.

So I am very pleased that this issue carries so many informative and insightful articles. We have reports of recent developments and initiatives in Germany (Gerhard Wegen and Christine Gack), Pakistan (James South), Switzerland (Birgit Sambeth Glasner), Canada (Paul Jacobs QC), Portugal (Manuel Barrocas and Claudia Santos Cruz) and Ireland (Petria McDonnell and Ronan Feehily), as well as an update on the progress of the draft EU Mediation Directive (also by Petria McDonnell).

We also have a number of articles illustrating the versatility and effectiveness of the mediation process in a variety of contexts – Ed Moore looks at ‘project mediation’, Peter Phillips looks at ADR as a tool for management and corporate governance, Frank Carr and Brian Polkinghorn look at mediation in the context of ‘partnering’ and Mike Lind takes a look at online dispute resolution and an exciting new project. But that’s not all!

Hilton Mervis gives us some tips on ‘getting the right result’ at mediation, Frances Maynard looks at the dynamics of mediator–party relationships and David Jacoby, in a paper entitled ‘Mediation of disputes in long-term relationships’, gives us a comprehensive overview of one of the many Mediation Committee sessions at the recent IBA Annual Conference in Chicago. What an issue this is!

Finally, and on a personal note, I would just like to say how thoroughly I have enjoyed my involvement with the newsletter. It has been a real privilege. I would also like to thank all those at the IBA in London for their help in putting together successive issues of the newsletter since its launch in early 2005, particularly Kath Farrell, and of course all those who have contributed such excellent articles.

Last but certainly not least, I would like to thank our founding Chairman, John Townsend, who got the whole Mediation Committee off the ground and gave me the opportunity to take on the challenge of a new newsletter on a subject of immense and growing importance. It has been a pleasure working with you all!

Thank you.

Best regards,

Jon Lang

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## CANADA

### Ontario on the crest of change

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Ten years ago the final report of Civil Justice Review in Ontario was issued. One year earlier the first report set out a 'blue print' for a civil justice system intended to meet certain criteria which had been established. Those were fairness, affordability, accessibility, timeliness, accountability, efficiency and cost effectiveness and a streamlined process and administration.

Extrapolating from that report, there was reference to three procedures which were to assist in meeting the seven goals set out above. These three procedures were pre-trials, settlement conferences and trial management conferences.

The pre-trial was to consider the possibility of settlement and of obtaining admissions, of simplifying issues and addressing liability, of quantifying damages, and then estimating trial times, advisability of using experts, fixing dates and so on. The pre-trial, of course, was conducted by the judge with counsel, and sometimes clients, present.

By comparison, settlement conferences were held with judge and counsel with a view to attempting to resolve the dispute or parts of it. The intention was that interest-based mediation, and rights-based pre-trial directions, might come from the judge. Of course, the extent of the mixture would depend on the skill, training and experience of the judge and the counsel involved. The settlement conference was necessary before a case was put on a trial list. Mediations became mandatory and would be conducted by private mediators.

The trial management conference was a new concept in Ontario and was focused on exchange of witness lists, agreed statements, chronologies, admissions, and document briefs. These were conducted by judges.

Civil Justice Review in the 1990s reported that it was necessary for judges alone to perform these functions and that judicial support officers with proper training might be able to participate in some settlement conferences and trial management conferences.

That system was implemented but it was tied to a system of case management by the courts. Inevitably, this kept control of matters with the courts. Procedural difficulties arose and always had to be resolved by motions and court orders. The system slowed down just

as it had before Civil Justice Review. By 2004, the system was in considerable difficulty and in Toronto, where the largest number of cases in Ontario occur, the Regional Senior Judge decided the system had broken down. After considerable input, His Honour made the decision to divorce case management from mandatory mediation.

It should be said that during the mandatory mediation programme, while tied to case management, there was a settlement rate of approximately 40 per cent of all cases. It should also be emphasised that mediations during that time were obliged by rule to occur within 90 days of the first defence delivered. In many cases, of course, that was too early for all practical purposes.

In January 2005, the system was changed to allow mandatory mediations to occur before pre-trial when counsel thought they would be most effective. In the course of the last two years, this change has led to an 80 per cent settlement rate at mediation. While there have been fewer mediations during the last two years than there were in comparable years prior to the change, the results are startling. By putting control of the timing of mediation back in the hands of counsel conducting the cases, and through the use of private mediators not tied to case management, the success rate of mediations doubled. In the scheme of things, that doubling was almost overnight.

There was another factor which might have had some effect on the change. During the first seven years of the mandatory mediation programme, mediators were assigned from a panel in cases where counsel did not choose the mediator. In the last two years, it is fair to say that most mediations have been conducted by mediators of choice, selected by counsel and not assigned.

In Ontario, much has been learned over the last ten years. In particular, counsels' selection of mediator and selection of timing for the mediation have had dramatic results by way of doubling the success rate of settlement at private mediations.

But this degree of success apparently, is only the beginning. There is currently a Civil Justice Reform Project underway, being conducted by a former judge of the Ontario Court of Appeal. The mandate of this project is to propose options to make the civil justice system more accessible and affordable to Ontarians.

Apparently, despite the success rate of settlement recently enjoyed in the three cities where mandatory mediation exists in Ontario, the system is still most accessible to those with the financial ability to pay legal costs, or to those who have literally no resources and whose expenses are paid through the Legal Aid system. It is often joked that most lawyers couldn't afford their own fees if they had to pay them.

A study has been made of the Civil Justice Council which operates in England. This body was established as a result of the Access to Justice Report by Lord Woolf in 1996 in England. It is a voluntary body established to oversee and coordinate the implementation of proposals by Lord Woolf. As many will know, this has led to a system of pre-action protocols including mediation before a claim is issued.

Although it is early in the current Ontario project, it is not expected that the English approach will be used.

The task force of the Ontario Bar Association has made certain recommendations to the Civil Justice Reform Project. These include expanding the Ontario Mandatory Mediation Programme throughout the Province from those three cities which are now served, introducing mandatory mediation into Small Claims Court, and introducing mandatory mediation into the Family Law system.

The submission also included reference to pre-action protocols, proportionality (connecting costs of the proceeding to the amount in dispute), expanding Collaborative Law (agreeing not to go to litigation) and the use of a Notice to Mediate as an alternative manner to commence proceedings.

The ADR Professionals Committee also made reference to an article which had been written as a speech by the Associate Chief Justice of the Court of Appeal for Ontario, delivered at the Canadian Forum on Civil Justice Conference in May 2006. In that speech there was a study of lessons that the public civil justice system could learn from the private system. The lessons may be summarised as follows:

- (1) The market is demonstrating that Canadians wish to select dispute resolvers with expertise in the type of matter at issue. While the public system does not necessarily provide judges with expertise in a particular area, in the private system counsel are able to choose a mediator with such expertise.
- (2) Timing, in particular the avoidance of delay, is crucial. Unlike adjournments that happen frequently in the public system, when a mediation is arranged, the date is fixed and it is the only matter on the mediator's list. Mediations virtually always proceed when scheduled.
- (3) The public system has too few resources for too many cases and long list cases consume a great quantity of court time still. The time and expense of private dispute resolution is far more effective and efficient.

- (4) Complexities need reduction and flexibility needs to be increased in the public system. In the private system, the methodology is simpler and faster largely because the rules are simpler.
- (5) Multi-jurisdictional disputes can be more simply resolved through a private system than a public civil justice system given the complexities of a growing global economy.
- (6) The private system is informal and user-friendly. Unlike formal litigation procedures, the informal system whether mandatory or voluntary, offers an option – an option which, as it turns out, has a proven success rate.

If these lessons learned are considered in the Civil Justice Reform Project, then the road to this point will have been wisely travelled.

Interestingly, the current project seems to be addressing the issues from the perspective of the party involved in the dispute. Among many other considerations, it appears to be looking at the benefits of mediation, including mandatory mediation, the differences between rights-based and interest-based approaches, the costs of the process, the manner in which self-represented litigants are dealt with, the use of mediation in different types of litigation, and the question of added value to the parties in settlement outcomes by the use of a mediator.

It is certainly appropriate that we all remember that the system of civil justice is here for the use of the parties in the litigation and not just for counsel or the courts.

It would appear that Ontario is on the right track. It is looking at recent history and learning from it. It is looking forward from the perspective of the ultimate user of the system of administration of justice. From where I stand, the future for mediation in Ontario looks even brighter still.

## EUROPE

# Draft Directive on Mediation on Civil and Commercial Matters

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Many readers will be familiar with this draft directive which was proposed by the European Commission in 2004 to secure better access to justice by promoting alternative dispute resolution processes and in particular mediation. The proposal, embodied in the draft Directive, seeks to promote the use of mediation by putting in place a regime which supports the courts of the Member States in promoting mediation by actively encouraging parties to mediate. The draft Directive contains provisions whereby parties can be required by the courts of Member States to attend an information session on mediation. It also contains provisions regarding the enforcement of settlement agreements, the confidentiality of mediation and the suspension of limitation periods to facilitate mediation. The most controversial aspect of the draft Directive is its scope and whether it should apply, as envisaged by the European Commission, to both cross-border and domestic disputes or should be confined to cross-border disputes only.

The European Parliament has been less enthusiastic about the draft Directive. The Parliament's Legal Affairs Committee were not keen on a legislative proposal on the basis that recommendations and guidelines for best practice are more appropriate mechanisms for encouraging mediation and fostering a culture of alternative dispute resolution.

In order to try and resolve these opposing positions, a number of experts were invited to attend the Legal Affairs Committee of the European Parliament in April 2006. The experts included Michel Kallipetis QC whom many of you will have heard speak on the Directive at the (rather crowded) IBA meeting in Prague in September 2005. Much of the debate at the Parliament has focused on the scope of the draft Directive as mentioned above and whether it should be limited to cross-border situations or not. Other issues debated were the questions of whether the Commission's code of conduct should be incorporated into the Directive and whether mediation should be voluntary or compulsory. The experts agreed that it should be voluntary and all agreed on the subject of confidentiality.

Following that consultation process, a draft report was prepared and was scheduled for discussion by the parliamentary committee for 21 November. However, certain amendments have been proposed seeking to

limit the scope of the Directive to cross-border situations only. These, if accepted, will mean that the successful implementation of the draft Directive as intended by the Commission is uncertain. The matter will come before the plenary session of the Parliament in December 2006 and its decision will be critical. By the next issue of this newsletter the fate of the Directive will have been determined – so watch this space!

## GERMANY

# Mediation in pending civil proceedings in Germany: practical experiences to strengthen mediatory elements in pending court proceedings

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Mediatory or conciliatory elements have played a part in the German law on civil proceedings for a long time. Already in 1976, the German Code of Civil Proceedings (ZPO) contained a provision<sup>1</sup> requiring the court to consider an amicable settlement of disputes at every stage of civil proceedings.<sup>2</sup> However, following international trends promoting amicable resolution of disputes, the German legislator in recent years has taken further steps to strengthen mediation or at least mediatory elements in litigious proceedings in German courts.

## Mediatory elements in the German law on civil procedure

First, the new section 15a of the German Introductory Act of the Code of Civil Procedure (EGZPO),<sup>3</sup> introduced by the German legislator in 1999, gives the German federal states the option to introduce an obligatory mediation procedure as a prerequisite before certain claims may even be filed with the court.<sup>4</sup>

Secondly, in the wake of the extensive reform of the German Code of Civil Procedure in 2001,<sup>5</sup> the law also strengthened the (already existing) mediatory elements in court proceedings which are already pending. In order to encourage parties and courts to make use of these latter mediatory elements, some German states in the last couple of years have introduced model projects to promote alternative ways of dispute resolution in pending court proceedings.

## Legislative framework for mediation in pending court proceedings and the practice

The German Code of Civil Procedure expressly stipulates in section 278(I) that the court shall, at every stage of civil proceedings, be concerned that an amicable settlement of the dispute or of individual points in dispute be reached.<sup>6</sup> This requirement was already found in the law prior to the reform of the

German Code of Civil Procedure in 2001<sup>7</sup> but has now been extended and supplemented by further requirements and possibilities.

For example, the new section 278(II) German Code of Civil Procedure now requires the court always to perform a conciliation hearing (*Güteverhandlung*)<sup>8</sup> before an oral hearing on the dispute.<sup>9</sup> Moreover, the new section 278(V) German Code of Civil Procedure extends the possibilities for alternative resolution of disputes by allowing the court to, in suitable cases, refer<sup>10</sup> the parties to a (different) commissioned or requested judge<sup>11</sup> for the conciliation hearing.<sup>12</sup>

In practice, the obligatory conciliation hearing required by the law will generally take place directly before the oral hearing. If it is unsuccessful, the law stipulates in section 279(I) of the German Code of Civil Procedure that the oral hearing shall be held immediately thereafter. The conciliation hearing will be conducted by the judge deciding the dispute, who, as he or she will be prepared for an oral hearing, will already have evaluated and formed an opinion about the issues in dispute. In practice, he or she will often share his or her views on the issue in question with the parties by pointing out procedural or legal risks in each party's case. Hence, he or she might not be, or at least not perceived to be, as open-minded to the issues in dispute as a judge-mediator who was not previously involved with the case (and whose role is also not to decide the dispute but to support the parties in finding a consensual solution). Further, parties expecting the judge assigned to the case to decide the same if the obligatory conciliation hearing does not lead to an amicable settlement might also not be as open with their concerns as they would be with a judge-mediator who will not be involved in the decision of the dispute.

However, the opportunity to refer additionally or alternatively disputes for the conciliation hearing to a judge-mediator under section 278(V) of the German Code of Civil Procedure so far has rarely been used in practice.

### Model project in Bavaria

In order to address these issues, Bavaria, as well as some other German states,<sup>13</sup> decided to take the opportunity given by the new section 278(V) of the German Code of Civil Procedure to introduce in January 2005 a new model project<sup>14</sup> to promote the acceptance of the conciliatory or mediatory elements stipulated by the reformed German law on civil procedure.

In eight Bavarian civil courts,<sup>15</sup> conciliation hearings with judge-mediators were specifically introduced into the courts' scheduling for the allocation of cases. Judges who had volunteered for the project were trained in managing settlement negotiations and mediation. To ensure a 'round table' and to avoid a courtroom atmosphere for the conciliation hearings, the courts also made available special rooms for the conciliation hearings.

In terms of procedure, the extent to which the judge-mediator acts neutrally or shares his view on the matter is up to the participants of the conciliation hearing. Parties' counsel are encouraged to take part in the conciliation hearing.

Should the parties come to a solution, the judge-mediator may certify a court settlement.<sup>16</sup> If the negotiations are unsuccessful, the dispute will be referred back to the judge it was initially assigned to. However, the contents of the conciliation hearing are not admissible as evidence in the further proceedings.

Lastly, the judge-mediators may hand the case back to the referring judge without holding a conciliation hearing if they consider the dispute unsuitable for the mediation.

The project was initially scheduled to run from January 2005 to December 2006. The first findings for the year 2005 have now been published.<sup>17</sup>

### Results

First of all, it is notable that judges often seemed rather reluctant to take the opportunity under section 278(V) of the German Code of Civil Procedure and refer 'their' disputes to their colleagues trained in the context of the model project. However, after the first positive results of the conciliation hearings showed that even complex and difficult disputes could be amicably settled, there was a considerable increase in referrals to the judge-mediators.<sup>18</sup>

In terms of volume, the judge-mediators completed the conciliation proceedings in a total of 602 cases referred to them.<sup>19</sup> About 70 per cent of these cases were referred to the judge-mediators at a very early stage, that is, before the obligatory conciliation hearing pursuant to section 278(II) of the German Code of Civil Procedure before the judge assigned to the case had been completed. In 26 per cent of the remaining 30 per cent of referred cases, evidence had already been heard.<sup>20</sup>

Accordingly, the majority of cases had not been pending for very long. Most were referred to the judge-mediators within the first year after court proceedings were initiated.<sup>21</sup> After the referral, the majority of cases were handled by the judge-mediators within three months.

However, in about half of the referred cases, a conciliation hearing did not take place as one or both of the parties refused to participate.<sup>22</sup>

The issues in dispute related to various areas of law, including corporate law, construction law and law on the sale of goods, but also to the law of succession, family law and the law on disputes between neighbours.

Where the conciliation hearing with the judge-mediators took place, a considerable number, ie 70 per cent, of the disputes could be solved. Mostly, it also only required one hearing for the parties to reach a solution.<sup>23</sup> In this context it is worth noting that in about one-third of the cases the solution reached in the conciliation hearing included the settlement of further issues which had not been part of the initial court proceedings.

Lastly, the feedback received from parties, judge-mediators and counsel following a conciliation hearing in the context of the model project was largely positive. Of parties who gave their feedback 88 per cent were happy with the mediatory approach.<sup>24</sup> The main reasons for this were a relatively quick resolution of the dispute (stated by 70 per cent), the avoidance of wearisome proceedings (stated by 53 per cent) and agreement with the solution reached (stated by 41 per cent). Moreover, almost half of the polled parties (48 per cent) were of the opinion that an amicable resolution of their dispute would not have been reached without the mediatory procedure.

Similarly, the vast majority (94 per cent) of parties' counsel considered the mediatory approach taken in the model project positive. Like the parties, most of them (53 per cent), as well as most of the judge-mediators (77 per cent), were of the opinion that an amicable settlement would not have been reached in regular court proceedings.

### Conclusion

The model project in Bavaria, as well as similar model projects in other German states,<sup>25</sup> has shown promising results. Where parties in principle are prepared to seek alternative ways to solve their disputes, a mediatory approach often seems to lead to good results. Even if parties refused to participate in the mediation procedure in a considerable number of cases, the model projects in Bavaria and other German states show the benefits and the chances of success of mediation even in cases where parties have already taken the matter to court.

The introduction of defined structures within the courts to encourage (and market) the possibilities of

mediation in such proceedings has proved to be a successful method in strengthening the conciliatory or mediatory elements in litigation proceedings. Where such structures exist and are communicated, judges as well as counsel and parties will be much more aware of the possibilities of mediation and are likely to be encouraged to make use of them.

Further, judges trained as judge-mediators might approach the solution of disputes by also looking beyond the actual legal issues in dispute and thus by addressing conflicts on a broader scale. Thus, where the conciliation hearing with the judge-mediators is successful, it may well lead to a broader, all-encompassing solution, which would often be much more beneficial to the parties than the decision by a judge on one specific point,<sup>26</sup> which is often only reached after lengthy and expensive evidentiary proceedings.

The integration of mediatory elements into the judicial system thus benefits not only the parties involved but also provides support for the judicial system itself.

Certainly the Bavarian Ministry of Justice came to this conclusion before it announced in October 2006 that the model project in Bavaria will run for a further year, at least until the end of the year 2007.<sup>27</sup>

#### Notes

- 1 Section 279 German Code of Civil Procedure, in force until 2001 and now amended and replaced by sections 278 and 279 German Code of Civil Procedure.
- 2 The concept of such elements of conciliation in German civil procedure is even older than this. As early as 1915, the German law on civil procedure provided for conciliatory elements in litigious proceedings in German courts.
- 3 In force since 1 January 2000.
- 4 For further details see G Wegen and C Gack, 'Obligatory Mediation as Precondition for Court Proceedings in Germany', *IBA Mediation Committee Newsletter*, September 2005, p29 and G Wegen and S Wilske, 'Non-Compliance with Obligatory Mediation Procedures Makes Court Action Inadmissible', *IBA Mediation Committee Newsletter*, April 2005, p19.
- 5 The reformed German Code of Civil Procedure entered into force on 1 January 2002.
- 6 For details on the German law of civil procedure, including translations of the relevant statutes, see S Rützel, G Wegen and S Wilske, *Commercial Dispute Resolution in Germany: Litigation, Arbitration, Mediation* (Munich, C H Beck, 2005).
- 7 Section 279 (I), German Code of Civil Procedure.
- 8 The term 'conciliation hearing' reflects the wording of section 278(II), German Code of Civil Procedure which refers to a 'Güteverhandlung'. Its purpose is to facilitate and encourage an amicable resolution of the dispute and as such it would be regarded as a mediatory procedure.
- 9 An exemption from this requirement is made if an attempt for a settlement has already taken place before an out-of-court conciliation board (*Gütestelle*) or if a conciliation hearing appears evidently to have no chances of success.
- 10 Additionally to or instead of the conciliatory hearing pursuant to section 278(II), German Code of Civil Procedure.
- 11 So called 'Güterichter', referred to in this article as 'judge-mediators'.
- 12 Additionally, under section 278(V) second sentence, the court may, in suitable cases, also propose out-of-court mediation proceedings.
- 13 For example, a similar model project on court-annexed mediation has been implemented in civil courts in Lower Saxony from 2002 to 2005 and in Mecklenburg-Western Pomerania since 2004. Other German states, such as Berlin and Hesse, have also implemented similar projects for mediation in administrative courts. Court-annexed mediation is also offered, in the case of Lower Saxony and very recently Bavaria, in one of their social courts. Very recently, in summer 2006, the German state of Hamburg also introduced court-annexed mediation in the labour court.
- 14 So-called 'Modellprojekt "Güterichter"' (Model Project 'Judge-Mediators').
- 15 District courts (*Landgerichte*) of Aschaffenburg, Augsburg, Bamberg, Landshut, Munich I, Nürnberg-Fürth, Weiden and Würzburg.
- 16 Which, just like a judgment, would be enforceable.
- 17 The interim report of the evaluation of the project can be found on [www.jura.uni-erlangen.de/aber/zwischenberlicht.pdf](http://www.jura.uni-erlangen.de/aber/zwischenberlicht.pdf)
- 18 Participation in the model project was further promoted by extensive provision of information to judges as well as counsel.
- 19 This number refers only to the completed cases. Cases referred to the judge-mediators in 2005 but not yet completed are not included.
- 20 Under German procedural law a judge may hold a first hearing before ordering the taking of evidence.
- 21 In one case, the dispute was referred to the judge-mediator within a day of the claim being filed. However, the 'oldest' case referred to the judge-mediator had been pending for over ten years.
- 22 Plaintiffs and defendants refused to participate in roughly equal numbers. Further, only 18 cases were handed back to the referring judges for not being suitable for the mediation. In 11 cases the parties had settled the dispute out of court.
- 23 Only in few cases, more than one (and up to a maximum of five) hearings were held. Most of the hearings lasted for three to four hours in total.
- 24 After completion of the mediation procedure, the participants were handed a feedback form. The feedback form was returned by about 75 per cent of the parties and about 80 per cent of parties' counsel.
- 25 The model project, for example, in Lower Saxony showed similar findings to the model project in Bavaria. The final communiqué for the project in Lower Saxony is published (in English) on [www.mediation-in-niedersachsen.com/dl/Abschlu%DFbericht%20englisch.pdf](http://www.mediation-in-niedersachsen.com/dl/Abschlu%DFbericht%20englisch.pdf)
- 26 Based on law and statute only.
- 27 Press release of the Bavarian Ministry of Justice dated 6 October 2006, [www.justiz.bayern.de/ministerium/presse/archiv/2006/detail/74.php](http://www.justiz.bayern.de/ministerium/presse/archiv/2006/detail/74.php)

## INTERNATIONAL

# Mediation on disputes in long-term relationships

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**‘Mediation is the Swiss Army knife  
in the toolbox of solutions.’**

*(Professor Thomas J Stipanowich)*

The Mediation Committee, in conjunction with the Corporate Counsel Forum, conducted a day-long programme on Thursday, 21 September at the 2006 Annual Conference in Chicago entitled ‘Mediation as a management tool’. The programme, chaired by John M Townsend, Chair, Mediation Committee, of Hughes Hubbard & Reed, Washington, DC, had three topical segments: mediation of disputes in long-term relationships; mediation as a cost-containment device; and mediation as an element of good corporate governance. This article focuses on the first aspect, mediation as part of a long-term relationship.

Because many lawyers are relatively unfamiliar with mediation, how it works, and particularly the important role which counsel can play in the process, the session began with a mock mediation, using a role-play scenario developed by the International Centre for Dispute Resolution on the basis of a negotiation role-play developed by Phillip Capper. The scenario appropriately involved a construction project, a field in which mediation is well developed. Presentations followed which described the use of ‘partnering’ in long-term business relationships.

## Mock mediation scenario

At issue in the mock mediation was the construction of a tunnel and rail line in a fictive east European state, Nostravia, funded by a multinational development bank. The bank had suggested that a prominent French engineering firm, Blusell, lead project design and management, and after following the bank’s low-bid procurement process, an up-and-coming Turkish contractor, Takmor, had been selected to do the work. The government official in charge of the project was a politically ambitious transportation minister, Julietta Bureaucradic. Midway through construction, the tunnel suffered a localised roof collapse, which was attributed to excessive use of explosives. Minister Bureaucradic intervened with the contractor, insisting on the quick

completion of the project. Additional steps were taken to stabilise the structure and construction proceeded without further incident.

A high-powered development bank/EU delegation boards a train on 1 September to celebrate completion of the project. But a further roof collapse damages the train and injures some of the guests. After an inquiry, the collapse is attributed to a major geological fault not found in the prior investigation but which probably was also the cause of the earlier roof fall. The inquiry also determines that installation of some 40 per cent of the rockbolts used as stabilisers after the first collapse is incorrect. The opposition party newspaper is having a field day with the story, the scheduled opening date is only three months off and Minister Bureaucradic is furious.

The key provisions of the project documents were also included in the scenario. At the suggestion of the French engineering firm’s senior in-house lawyer, mediation is undertaken.

Helena De Backer, Treasurer, Mediation Committee, of De Backer & Bastin, Brussels, played the role of the mediator, dealing with a party representative and outside counsel for each of three parties to the dispute. Salli Swartz, Newsletter Editor of the International Sales Committee, of Phillips Giraud Naud & Swartz, Paris, played Minister Bureaucradic to an award-winning hilt. Jorge Verissimo, BFV Sociedade de Advogados, Lisbon, played her counsel. Andreas Reiner of Andreas Reiner & Partner, Vienna, played Eric Vouvray, the Blusell senior lawyer who suggested the mediation and David Jacoby, Senior Vice-Chair, Litigation Committee, Schiff Hardin LLP, New York, played its outside counsel. Jose Antonio Rodriguez Marquez, Bufete Rodriguez Marquez, Mexico City, played the contractor Takmor’s principal, and Steven K Andersen, of the International Centre for Dispute Resolution, played its lawyer.

## Digging out the hidden interests

In addition to the facts shared with the audience, and presented in capsulated form above, the participants were given additional information about the parties’ interests and positions. The purpose of this was to provide the ‘back story’, as it were, which a skilful

mediator would develop through her inquiry and discussion with the parties. Illustratively, the mediator might probe the Nostravian Government's insistence on a specific completion date to unravel the real interests underlying it and to see whether they, rather than the specific date, could be reconciled with the other parties' needs.

Some of the other issues 'buried' for discovery during the session included:

- the availability to the contractor of a nearby crew able to expedite completion of the project;
  - technical differences between the engineer and the contractor on what steps are required to make the tunnel safe;
  - the host government's need to explain what happened without being seen to be taking or excusing blame; and
  - the interest of all parties to satisfy the world that the project has been safely and appropriately completed.
- Given the limited time, a highly compressed model of a mediation was shown. In a first meeting among all the parties, the mediator heard each party's initial position and asked questions. The mediator then met with each party separately for further discussion. Then a final plenary session of all parties and the mediator was held.

### Successful mediation techniques

Seasoned readers of IBA committee newsletters will be unsurprised to learn that the mediation was successful. Of greater note are some of the techniques employed to get there.

For example, during the individual party caucuses, the issue of what steps needed to be taken to complete the tunnel was addressed. Blusell and Takmor had disagreed on this, but agreed on the designation of a third specialist entity to prescribe what would be done. This concept was then expanded to something like a dispute resolution board, which would furnish a certification of the project to the government. This gives the government further assurance; it also protects the engineer and the contractor to some extent; and it provides the basis for restricting further intervention by over-eager government officials.

For another example, the availability of the extra crew allows the contractor to speed the work, and also justifies a further payment by the government, which had held up Takmor's bills. The engineer would forgo a bonus it sought, but while not denominated as such, would receive additional compensation for additional work.

One point brought out in discussion after the role-play was the critical role counsel can play in mediation. In the mock case, the concept was proposed by an in-house lawyer; outside counsel used the risk and cost of litigation to promote a mediated result; lawyers explained and explored strengths and weaknesses in the various parties' positions to facilitate resolution and guide remedies; and counsel provided insight into how to accomplish goals.

### 'Partnering'

The second half of the session was chaired by Thierry Garby, Vice-Chair, Mediation Committee, of Garby Vialars Dupas, Paris, and was entitled 'Conflict prevention in long-term contracts and strategic alliances'. The speakers were Frank Carr, Carr Swanson & Randolph LLC, Ellicott, Maryland, and Thomas J Stipanowich, Professor of Law and Academic Director of the Straus Institute, Pepperdine University School of Law, Malibu, California.<sup>1</sup>

Thierry introduced the discussion by noting the critical role of real-time resolution in certain projects, failing which there would be cascading adverse consequences. In such a situation, the parties are in peril of being left worse off than if they had had no contract at all. To avoid that, steps need to be taken to keep the relationship going.

Professor Stipanowich described relational 'partnering' as a concept, borrowed from Japan, which had been pioneered by the US Army Corps of Engineers, for which Frank Carr previously was chief attorney. Typically, it involves a third party with special authority or credibility to support the relationship. The third party can resolve issues quickly, minimising financial and personal costs which can arise from them. The concept is premised in part on the view that adversarial counsel are part of the problem. Three basic approaches exist: mediator/conciliator; summary adjudicator/evaluator, such as a dispute resolution board; and the ombud model from Sweden.

The summary adjudicator/evaluator usually involves early intervention; her decisions can be binding or merely persuasive. An early precursor was the medieval English 'court of piepoudre', which would decide merchant disputes at international fairs in a single day. A more contemporary parallel would be the Court of Arbitration for Sport, which provides decisions on disputes during the Olympics within 24 hours.

A dispute resolution board was used for the multibillion-dollar Boston Central Artery Tunnel project (aka 'The Big Dig'). Board members typically are not attorneys; the board focuses on inquiry by an expert panel, and arose in part in response to perceived shortcomings in attorney-dominated processes. Such a board typically meets monthly during the project. Professor Stipanowich said that the Dispute Resolution Board Foundation asserts that 98 per cent of disputes are resolved through the boards, without subsequent litigation or arbitration. The World Bank now requires such boards for projects it funds that exceed US\$10 million in value. The International Chamber of Commerce also has developed variants on the concept.

A related procedure is expedited binding arbitration. Abbott Labs, a global healthcare development company, for example, concluded after study that the most critical component it required from a dispute resolution programme was finality, so its procedure resolves matters

in a few days. The new 100-day requirement for resolution of construction disputes in the United Kingdom operates similarly. While such a process is likely to lead to final resolution, and can provide 'cover' for participants, it may not be flexible enough to address relational issues of which specific claims may be symptomatic.

Real-time mediation and conciliation also has become more common. Examples include 'Square Trade On-Line Mediation' on eBay and in construction work at job meetings during the course of a contract. China operates 'Chinese People's Conciliation Centers'. Professor Stipanowich and Sally Harpole will be teaching a course at Pepperdine School of Law on Confucian precepts on harmony and stability in the community.

The ombuds concept arose in organisational settings as a way to address issues between individuals and the organisation. It first appeared in Sweden in 1809. It can be found within corporations, to resolve employment issues, and at university, for student problems. US health plan organisation Kaiser Permanente runs a programme for patient-caregiver disputes, established after litigation over whether the health plan had defrauded the public with a 60-day result arbitration process. It developed point-of-care intervention as a supplement to binding arbitration. Professor Stipanowich said the concept has the potential to be very useful in information technology relationships.

All these developments raise important issues about the role of lawyers in the dispute resolution process for long-term relationships which need to be addressed.

### Partnering with mediation

Partnering is a management methodology based on trust, teamwork and shared goals. It functions through improved communication, using team-building and collaborative problem-solving. Joint problem-solving by the parties expedites dispute resolution, maintains good business relationships, and avoids litigation.

Frank Carr noted that, at the time he was chief attorney at the US Army Corps of Engineers,<sup>2</sup> it had US\$1 billion in pending claims. He wondered then whether it was possible to prevent, rather than just respond to, such claims. By the time he retired, and partnering had been implemented, the value of pending claims had been reduced by 87 per cent. Similarly, the Maryland State Highway Administration has used partnering in connection with its construction projects for 15 years and now has almost no pending litigation. Senior management encourages it; if a contract is involved, provision will be made for it in the award documents.

Initially, stakeholders in the project (not merely the client or the end-user) should be identified. The focus should be on problem-solving and not that of a traditional arbitration. The dispute resolution processes might be discussed at the first meeting. This should be

followed by periodic partnering meetings. With a dispute resolution action plan in place, you have everything ready to resolve problems which arise.

The paper by Frank Carr and Dr Polkinghorn identifies a number of other 'best practices', including starting with a partnering business plan, developing management support and providing appropriate training, using an experienced facilitator, developing partnering metrics and materials; and considering a conflict resolution action plan, even though disputes have not yet arisen.

Apart from tangible benefits, such as bringing projects in on time and on budget and avoiding litigation, there are intangible gains as well. Conflict is minimised because issues are approached from a problem-solving perspective. Among other things, there are greater opportunities for innovation and creativity and working together is more enjoyable. Attorney resources can be channelled to those matters requiring a litigation resolution.

A brief question period followed. An audience member asked if ombuds have testimonial immunity. Professor Stipanowich said one could try to write that into a governing contract. Frank Carr also noted he has just completed a book for the American Bar Association on ombuds in the US federal sector.

### Conclusion

Ongoing, long-term business relationships need care and nurture. Whether on an ad hoc basis, in the face of a particular dispute, as in the mock presentation, or as part of a systemic 'partnering' management approach, mediation can help to keep the relationship positive and productive. Although designed in part to avoid costs and problems which adversarial litigation and/or arbitration can present, mediation is a field in which lawyers have important contributions to make.

### Notes

1 Thierry Garby prepared a Power Point presentation entitled 'Conflict prevention in long-term contracts and strategic alliances'. With Dr Brian D Polkinghorn, Associate Professor, University of Salisbury, United States, and Director of the Conflict Analysis and Dispute Resolution Program and Executive Director of the Center for Conflict Resolution, Frank Carr prepared a paper, 'Partnering with mediation: a management best practices tool' (see p14. Both documents are available through the IBA website, [www.ibanet.org/chicago06/index.htm](http://www.ibanet.org/chicago06/index.htm))

2 The Corps of Engineers performs a broad range of both civil works programmes and construction work for the US military. Its annual budget for these purposes now exceeds US\$12 billion a year, see [www.usace.army.mil/commander](http://www.usace.army.mil/commander) (accessed on 9 November 2006).

**INTERNATIONAL**

# Partnering with mediation: 'a management best practices tool'

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**Introduction**

This article introduces the partnering process with mediation as a management best practices tool for conflict prevention and resolution. It is intended as a practical blueprint for any organisation, corporation, or government agency that wants to enhance its management of strategic business relationships to achieve its expectations. The best practices presented here are derived from the results of an exhaustive research study, conducted by the authors, of the Maryland State Highway Administration's (SHA) highly successful construction partnering programme. The study covers the entire history of the Maryland SHA programme dating back more than ten years. The discussion of the best practices also includes the insights of the authors who are experienced construction partnering programme designers, trainers, and facilitators and professional mediators.

**Philosophy of partnering and its relationship to mediation**

Partnering is management methodology for achieving success in business relationships. It is a continuous multiparty process of aligning organisations to reach a joint mission and vision, build quality teams, reap economic benefits, improve working relationships, and prevent litigation.

The philosophy behind the partnering process is rather straight forward. It is designed to promote an environment that encourages risk-sharing, teamwork, and collaborative problem-solving to attain common goals. In partnering the parties come together to create a new synergistic relationship for mutual success. The partnering process starts early and continues throughout the life of the project. In partnering, the major parties, often referred to as stakeholders, involved in the project are committed to establishing trust through effective communications and team-building.

In the construction industry, partnering has a proven success record of achieving realistic and quantifiable benefits for all stakeholders. The most highly touted benefits of partnering are that projects are completed on time and within budget. Other direct and measurable benefits of partnering are a reduction in claims, the expeditious resolution of disputes, improved safety, increased productivity, and almost no litigation. In addition, there are certain intangible benefits that are frequently expressed by stakeholders as being just as important to them as the direct benefits. These intangible benefits include: accounts of more innovative and creative solutions to problems; improved quality performance; increased customer satisfaction; enhanced business reputation; improved individual relationships and an increased sense of appreciation, recognition and respect; and a great working atmosphere.

The combination of tangible and intangible benefits can also be viewed from both a contractual and non-contractual perspective. Tangible measurements are often linked to contract elements (eg time, funds, quality, and safety) and non-contractual elements are often tied to human interaction (eg trust, respect, recognition, integrity, and communication). The increased emphasis on the non-contractual and intangible parts of working relationships is the key element that has revolutionised the construction industry. Taking these benefits into account, it is easy to understand why the transfer application of the partnering process into other arenas of public and private decision-making should also work.

**Partnering origins**

Partnering in construction has its roots in the 1980s, when the total quality management (TQM) movement was changing the nature of conducting business in the United States and the legal and business communities

were concerned about the rapid rise of unresolved claims and litigation in commercial construction cases. At this time, new strategies were being examined to change the traditional adversarial environment that plagued the construction community.

Under the TQM movement, the business community started to focus on moving from adversarial business relationships to a new paradigm of initiating continuous improvement in process and services, ensuring quality workmanship, and addressing customer satisfaction and needs. At the same time, the business and legal communities were experiencing the destructive impact of the rising numbers and economic costs associated with litigation and were experimenting with alternative dispute resolution (ADR) methods such as mediation, arbitration, dispute review boards, and mini-trials to reduce court case loads. In ADR, especially mediation, disputing parties discovered that resolution was possible without the destructive impact of litigation on their business relationships.

Partnering borrowed both of these two successful concepts and combined them with collaborative problem-solving techniques and team-building initiatives to create a new process for management of business relationships. The organisations with the earliest partnering programmes were the US Army Corps of Engineers in the Federal Government and the Maryland SHA and the Arizona Department of Transportation at the state level. Additionally, early proponents and leaders in the partnering movement in construction included the Construction Industry Institute (CII) at Texas A&M University and the Associated General Contractors of America (AGC).

### **The partnering process**

The partnering process begins after two or more organisations reach an agreement or sign a contract to work together on a project. The best time to initiate the partnering process is immediately after the award is made. The benefit to an early start in partnering is to create a set of expectations that instil good communications, teamwork and collaborative problem-solving from the start of the relationship to the completion of the project.

The partnering process can be separated into several distinct steps for clarity and understanding. These five steps, as described below, are: Contract Award, Post-Award Partnering Planning, Kick-Off Workshop, Periodic Partnering Meetings, and Project Completion.

#### *Contract award*

The contract between the two parties may contain a provision that encourages or requires partnering. If the contract does not have a partnering provision, then the parties can orally initiate partnering.

#### *Post-award partnering planning*

The facilitator is selected during the planning phase in order to begin working closely with the major stakeholders to plan the content and agenda for the kick-off workshop. Together they need to identify all stakeholders impacted by the project and invite them to the workshop. These may include among others the design firms, subcontractors, suppliers, public utilities, and the end-user of the project. The final planning activity is to pick a date, time and place for the kick-off workshop that is acceptable and convenient to the stakeholders. The location is often at a neutral site such as a hotel.

#### *Kick-off workshop*

At the kick-off workshop the stakeholders have the chance to meet each other in an informal setting, communicate directly with their counterparts, work on team-building, and learn from others their goals, needs, and interests. Also, the participants may identify issues for resolution and engage in joint problem-solving and action-planning. This often includes a discussion on the use of mediation or other ADR processes in the event disputes are not resolved through negotiations. A final workshop activity is to create an implementation plan for meeting the partnering mission, vision and goals reached during the workshop that will be undertaken during contract performance. This plan usually includes scheduling periodic partnering meetings to follow up on the workshop and having the stakeholders evaluate in written or oral forms how well the relationship is working. At the end of the workshop, the stakeholders prepare a written Charter as a visual reminder of their mutual commitment to the partnering vision, goals, and relationship. It is usually a one-page document signed by all the participants at the close of the workshop.

#### *Periodic partnering meetings*

A core action at the periodic meetings is to check on the issues that are still pending and to address new issues that may become problems. As a result, action plans developed at the kick-off workshop may be reviewed and, if necessary, modified and new action plans for problems just arising may be developed. At times during contract performance there is a need to check on whether the stakeholders are meeting the partnering goals and other objectives specified in the Charter. This evaluation is usually accomplished by the use of a printed evaluation form. It is completed by each stakeholder participant. This feedback allows the group to make adjustments to the project (tangible) and the working relationships (intangible). A final item on the meeting agenda is to discuss upcoming activities.

*Project completion*

When the project is complete, the stakeholders can use final evaluation forms to measure whether the project goals were met and what was accomplished by the partnering process. These evaluation forms can also be used to suggest partnering programme changes. Finally, to bring closure to the partnering effort on a positive note, the stakeholders may want to schedule an activity for all the participants. The activity is often a lunch, dinner or family picnic.

**Top 15 best partnering practices**

The following best practices are based on direct feedback from participants in the Maryland SHA study and on the authors' personal experiences of facilitating partnering processes.

*1 Best practice: start with a partnering business plan*

Partnering is a management methodology that can greatly benefit any organisation. In order to maximise the benefits of partnering an organisation should institutionalise the practice with a business plan. In any organisation that wants to change its business practice, a detailed plan is required as the vehicle for change. Planning starts with a clear mission and vision of the partnering concept, an understanding of the process changes that are required, and the people involved in the transition. Often the planning process for the partnering programme begins with a carefully selected design team assisted by an experienced partnering facilitator. In some organisations, the use of mediation or a dispute review board is also part of the plan for large or complex construction projects.

*2 Best practice: secure top management support*

Top management support from the highest level down is essential to establishing an effective partnering programme. Individuals within any organisation need to know that the partnering concept is fully supported by top management prior to the individuals making any changes in their relationships with other organisations. Since change involves some degree of risk for individuals and the organisation it becomes imperative that management clearly conveys its support for the process. Also, when management supports risk-taking, bold organisational moves, such as the incorporation of partnering, can occur.

*3 Best practice: conduct internal partnering training*

A corporation or government agency that wants to establish a partnering programme should conduct training programmes within the organisation at the start of the programme. Training should promote awareness of the partnering concept and process; clarify the

organisation's interests in the use of partnering, demonstrate management support, and facilitate acceptance at all strategic levels within the organisation. The training should include a mix of operational and management employees from all impacted levels within the organisation. The trainer should have a good grasp of the partnering concept, be experienced in the partnering process, understand the organisation's partnering programme and be able to communicate effectively with the participants.

*4 Best practice: hold an early partnering kick-off workshop*

As soon as two or more organisations agree to work together under a contract, the partnering process should start by holding a kick-off workshop. When partnering is delayed, too often the parties engage in old adversarial habits that reinforce competitive relationships thus making the partnering initiative not only more difficult to undertake but also less likely to have a constructive impact on the participants or the project. By starting early, the team will likely reinforce, through its own interaction, the maximum benefits that the partnering process has to offer, such as: developing better means and channels of communication; planning for issue resolution; reinforcing collaborative solving of problems as the key means of decision-making; and the achievement of common goals.

*5 Best practice: use an experienced partnering facilitator*

The kick-off workshop is likely to be more effective when the facilitator has an expert understanding of: (1) the partnering concept/process; (2) knowledge of the particular industry in which the process is being used; and (3) experience in collaborative problem-solving and/or conflict intervention. Facilitators need to recognise that their role in the partnering process is not just the facilitation of another team-building meeting but also the design of a joint creative problem-solving process and the establishment of an implementation plan for the relationship. Finally, the facilitator must be perceived as neutral by all stakeholders.

*6 Best practice: identify the key internal and external stakeholders*

The partnering process can only work if the right people get to the table for the kick-off workshop. This applies to both internal and external stakeholders. The partnering facilitator should also assist in identifying the internal and external participants and ensure that the participants are from similar management levels within each organisation. This balance is important and substantially assists in building direct and appropriate organisational communication by bringing participants 'face-to-face' with their counterparts.

*7 Best practice: establish effective communications*

Partnering requires effective communications among all the stakeholders to manage conflict and achieve mutual project goals. It begins by bringing the stakeholders together at the kick-off workshop to identify and address their expectations, issues (existing or potential), and goals in a collaborative non-confrontational atmosphere. Developing formal and informal communication channels further, reinforces trust among the stakeholders.

*8 Best practice: draft a simple partnering 'charter'*

The charter is a written document adopted by the stakeholders at the kick-off workshop that creates a visual symbolic reminder of their commitment to the partnering process and their mutual vision for the project. It is usually a one-page document that is signed by all the participants at the close of the workshop. The content of the charter will vary from project to project but generally it contains the stakeholders' mutual vision, their set of common goals, and the behaviours that the stakeholders will adhere to during the project.

*9 Best practice: hold informal periodic partnering progress meetings*

Partnering progress meetings are held periodically after the kick-off workshop to implement, monitor and evaluate the partnering process as well as to address continuously changes to the project or programme. These meetings are a good place to get the right stakeholders to the table to focus on resolving current or forthcoming issues and to review their continued commitment to the vision and goals underlying the relationship. Attention to project monitoring is the first line of conflict prevention.

*10 Best practice: develop meaningful partnering measurements*

Precise measurement tools are necessary to obtain meaningful objective and subjective feedback on the effectiveness of the partnering process both during and at the end of the project. Partnering is a continuous process for improving the working relationship among the stakeholders. Periodically during performance and at the completion of the project, the stakeholders need to know how well partnering is working and whether an adjustment or intervention may be necessary to increase the overall effectiveness of the process. This can be accomplished by the use of standardised measurement tools that rate certain aspects of partnering such as communication, cooperation and respect, issue resolution, teamwork, safety and job progress. Qualitative measures could include such things as indicators of cooperation, trust, recognition, respect and appreciation of others.

*11 Best practice: develop partnering materials*

The publication of partnering materials is necessary to establish an effective partnering programme. These materials should be clear and concise, and provide a complete explanation of the partnering process, the organisation's procedures, and the possible benefits. The materials can be placed in pamphlets, field guides, training manuals and websites.

*12 Best practice: conduct outreach to external stakeholders*

In most projects, participation in partnering is voluntary. Thus, the organisation that promotes the partnering process needs to present a clear description of partnering in order to educate and promote the process effectively. Outreach through trade association meetings or trade conferences allows stakeholders to develop an understanding of how partnering can be beneficial and of value to them. Publishing in trade journals is also an effective means of educating future users of the process.

*13 Best practice: discuss problem-solving and issue resolution*

When it comes to effective partnering, a balance must be struck between substance and process. Participants at the kick-off workshop often come with the desire to discuss project issues. Participants should be able to discuss these issues and develop action plans to resolve the most critical of them. This is both highly productive and builds trust among the stakeholders. The development of an 'issue resolution ladder' with the names of responsible individuals at each level within an organisation and the specific time allowed attempting to resolve an issue at each level ensures that issues move quickly to resolution. Focusing on issues as they arise is an excellent conflict prevention tool. Finally, in more complex and costly projects, if the contract does not require mediation or some other form of ADR prior to initiating litigation, the parties need to discuss it.

*14 Best practice: identify partnering champions*

Too often stakeholders assume that once a successful kick-off workshop is over the partnering relationship will continue to flourish on its own with no further nurturing. This is a false sense of comfort and a plan for disaster. Partnering at this time needs someone to step forward and be responsible for the guidance and implementation of the process. This is a role for a champion who thoroughly understands the practical utility of partnering and believes in its value. Before partnering begins to falter, the champion needs to keep the momentum of the process going and be prepared to get it back on track. In this role the champion should always be monitoring the process indicators as well as the pulse of the stakeholders' relationship and should work closely on the agenda for all periodic meetings. Ideally, the champion will be a person who is also well known and respected by other stakeholders.

*15 Best practice: provide for recognition*

All partnering programmes should acknowledge both the efforts of individuals that made the process work and the quality projects that partnering has contributed to creating. Sincere and meaningful recognition for past deeds and hard work is always appreciated and also provides motivation for future cooperation. Recognition can take various and diverse forms. It can be as simple as a public 'thank you' and a sincere handshake or a formal award ceremony with the presentation of a plaque or other memento. Simply match the type of recognition to the intrinsic value you place on the contribution of others.

**Summary**

The best way to summarise this article is to examine consistent themes from our study that are also documented by research results from federal, state, and private organisations using partnering. The general consensus is that partnering has produced a series of consistent and substantial tangible and intangible benefits.

*Tangible*

The most commonly referenced benefit of partnering is that it brings projects in on time and within budget. Other frequently quoted tangible benefits of partnering are: safety, with no lost time due to accidents; reduction in paperwork, improving efficiency and cost-effectiveness; continuous improvement of quality products and services; a more pleasant working environment; substantial value in engineering savings; expedited issue resolution; and often no litigation.

*Intangible*

Additionally, partnering is reported to produce many intangible benefits for the stakeholders. These include: increasing opportunities for innovation and creativity; nurturing a team-building and cooperative environment; building trust; encouraging open communications; helping eliminate surprise; empowering the parties to anticipate and resolve problems; getting requests for equitable adjustments resolved at the project level; preventing disputes; sustaining relationships; preventing litigation; and having 'fun' working together.

Partnering is, in essence, common sense in action. By getting the right people (all stakeholders) in the right place (the kick-off workshop) at the right time (at the start of the project prior to disputes arising) doing the right thing (working on communications, team-building, problem-solving, and visionary planning) great things can happen (the achievement of common goals and expectations). However, even when the partnering process does not prevent disputes from arising, the parties can use mediation to resolve their disputes without destructive litigation.

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## INTERNATIONAL

# ADR as a tool for management and for corporate governance

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'ADR' enjoys such growth and development internationally that the term itself begs for redefinition. One of those redefinitions must be the felicitous phrase chosen for the title of a full day of speakers at the 2006 IBA Annual Conference in Chicago: 'ADR as a management tool'.

In Europe, commercial mediation is on the rise, but many parts of the business community are still largely unaware of its benefits or even its attributes. In the United Kingdom, civil commercial mediation has experienced substantial growth since the Woolf Reforms, but it is still more often referred to than practised, and only a handful of practitioners are able to support themselves exclusively by service as mediators.

In both markets, the practice is more often looked upon as a means of resolving individual disputes than as a method of adding value to a business relationship or a technique to manage outside legal costs. And of course in Eastern Europe, the Middle East, Africa and (to a lesser extent) Latin America commercial mediation is an object of study more than of practice.

In the United States, the take-up is broader and the application less narrow. Most corporate legal departments understand the process of commercial mediation and many companies are responding to competitive pressure to reduce their legal budgets by looking to the principles of ADR to guide them in creating dispute management systems, rather than merely using mediation as an alternative to litigating or arbitrating particular cases. ADR systems have proven to be a highly reliable method of managing streams of cases in employment and other contexts. Entire platoons of consultants have realised a tidy business assisting corporations to set up 'Early Case Assessment' systems.

If at its heart ADR is, in fact, a tool for management, then what does it manage? Commercial conflicts, yes, but commercial *relationships* also. Any serious student of mediation readily appreciates that the process results in the reformation and clarification of business dealings, at least as much as it does the issuance of an award of damages. It is useful in the management of critical business partners such as IT professionals, vendors, customers and employees. This article questions whether ADR may have even further ramifications in the realm of corporate governance itself.

There are two aspects of corporate governance that imply a role for ADR skills. One is in facilitating the work of the board itself, and the other is in creating shareholder value. As to the first, there are few examples. A voluntary German corporate regulation (Deutscher Corporate Governance Kodex) calls for a 'Mediation Committee' to assist in the naming of employee representatives to the management board in the event that a two-thirds majority of employee votes needed to appoint such a member to the supervisory board is not met (see, eg, [www.bayer.com/about-bayer/corporate-governance](http://www.bayer.com/about-bayer/corporate-governance)). The American Bar Association has recently published two useful pamphlets on the topic: *Improving Board Effectiveness: Bringing the Best of ADR into the Boardroom*, by Jon J Masters and Alan A Rudnick, and *Corporate Governance: A Practical Guide for Dispute Resolution Professionals*, by Richard C Reuben (both available upon request at [www.abanet.org/dispute](http://www.abanet.org/dispute)). But neither of these valuable publications cites actual instances where boards availed themselves of facilitative mediators to assist them in their work of overseeing the management of the enterprise.

The influential and activist investment entity CalPERS (California Public Employees' Retirement System) has promulgated global corporate governance principles that provide, in part, that 'corporate governance issues between shareholders, the board and management should be pursued by dialogue and, where appropriate, with government and regulatory representatives as well as other concerned bodies, so as to resolve disputes, if possible, through negotiation, mediation or arbitration' ([www.calpers-governance.org/principles/international/global/page06.asp](http://www.calpers-governance.org/principles/international/global/page06.asp)). But the principle seems not to have been applied in real cases of managing internal or external board conflict.

It is in the second role of the board – ensuring the creation of shareholder value – that the most intriguing possibilities lie for application of the core principles of interest-based facilitated negotiation. No one would seriously contend that the management of particular disputes by the legal department is a matter rising to the board level – not, that is, unless something has gone very seriously wrong, in which case it is too late. But is not the management of critical business relationships clearly a board matter? Of course it is. The Ford Board should

know the status of relationships with Firestone, and the Intel Board should know the status of its relationship with Dell. And it may be entirely prudent for *any* board to ask senior management these questions, and be satisfied with the answers:

- Does the company have a system of early case assessment, and a method of establishing reserves against contingencies that the auditor approves? If not, why not?
- Does the company have a rigorously designed method of identifying and addressing streams of employee disputes? What is the track record of that system, and what trends have been uncovered? How many claims of racial or gender discrimination have been voiced, and is there any indication of mismanagement that might give rise to a class action that would have serious reputational consequences to the company? What percentage of employee disputes have remained unresolved and risen to the level of the filing of arbitration or lawsuits? What impact has the system had on rates of employee turnover and outside counsel costs?
- Does the company have an early dispute detection and resolution system with respect to its critical procurement functions such as IT vendors? If not, why not?
- What systems does the company have in place to manage disputes involving its patents and trademarks? What are the trends of outside counsel costs in the area of protecting intellectual property rights? What percentage of such claims result in licences, and what transaction costs are incurred between the onset of the claim and the licence agreement?

- Does the company have a policy that its transactional attorneys and businesspeople draft dispute management clauses in critical contracts, that are designed to protect the value of the deal? What resources are expended to provide such training for the professionals who negotiate and draft these critical deals?

The concept of 'shareholder value' takes on many forms, including measuring return on financial investment; managing the conflicting but cognisable interests of such stakeholders as employees, shareholders, communities, regulators, and NGOs; setting and enforcing ethical business practices; setting and enforcing sustainable business practices; and ensuring the continued value of the brand by protection of the company's reputation and goodwill. In this age of global corporate operations, these concerns are not easily identified or easily resolved as companies do business in regions with whose customs and expectations the senior management and the board may be unfamiliar. And it seems to many observers that these are matters that can very easily rise to the 'board level'.

If that is so, then it is highly likely that the set of skills that we know as 'ADR' will be of increasing importance as a tool, not only for management, but for corporate governance.

**Note**

\* This article is derived from remarks made at the Annual Conference of the International Bar Association on 21 September 2006.

## INTERNATIONAL

# Dispute resolution – can technology assist?

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The origins of dispute resolution stretch back many centuries. Over time, many academic and theoretical definitions have been formulated for the strict interpretation for what is meant by dispute resolution. The purpose of this article is not to revisit these debates, but to focus on the term in the general sense, namely, a process involving a third-party neutral who assists in the resolution of a dispute. This general definition has three components: process, third-party neutral and resolution. How can technology assist in this context?

There is no escaping the fact that technology has grown at a phenomenally fast rate and now touches virtually every aspect of our existence. However when mention is made of how technology can assist in the resolution of disputes, it is often met with a stony wall of resistance and scepticism. Why is this so? It is probably down to a number of factors including fear of technology and uncertainty of application. If, however, we revert to my simple definition above, I hope to be able to shed some light on this issue.

## Process

In most countries around the world mediation is now accepted as one of the most common forms of dispute resolution. It is a process. It involves a third-party neutral who assists the parties to find their own solution. Technology can assist this process in a number of different ways:

- it can be used to enhance the process in the preparation phase of a mediation. Through the creation of a secure webfile all parties and the mediator can upload mediation position papers, documents and general introductory communications, thus speeding up the preparatory and initial phases of the mediation process;
- it can enable effective communication between the mediator, the parties and their instructed legal representatives through a secure webfile. This is particularly relevant where the parties are geographically apart or where the parties are not able to justify the cost or time of a face-to-face meeting. Proportionality is the key word; and

- it can be used as an awareness tool to reach a wide audience and inform about the progress made in the resolution of a dispute (class action and workplace disputes).

## Third-party neutral

Technology enables the application of mediators' highly valued skills to reach a much wider audience. The availability of technology to mediators should be seen as an additional tool available to expand their mediation practice. Communication strategies do need to be tailored as some of the non-verbal clues of face-to-face mediation do not surface. This should be seen as a challenge and not a criticism of the process. Advantages include the following:

- communication is asynchronous – you respond to all comments in a structured manner;
- mediations can be conducted at any time of the day and can be done on the move on one's laptop when travelling, at home or between meetings; and
- it can generate an additional source of income.

## Resolution

Technology assists the dispute resolution process by presenting parties with an opportunity to communicate with one another and the mediator from the comfort of their office or home, at any time of the day or night. Depending on the nature of dispute and the specific dispute resolution service required, the neutral can use the technology to conduct a purely facilitative process or provide a determination.

This use of technology is often described as online dispute resolution or ODR. In the United States there are some notable success stories connected with ODR such as Square Trade. In Europe the ADR Group has been leading the development of ODR together with The Mediation Room ([www.themediationroom.com](http://www.themediationroom.com)). The last four years have been dedicated to the design and development of a Mediation Platform. These two companies are now conducting the first European ODR pilot with PayPal, an eBay company. The same software is also being used by two US Government agencies for workplace disputes and, as from February 2007, by the

Law Council of Australia.

The United Kingdom has also been successful in securing the fifth International Forum on Online Dispute Resolution scheduled to take place in Liverpool on 19 and 20 April 2007. This is presented in collaboration with The United Nations Commission on International Trade Law. Further details can be found

on [www.odr.info/liverpool](http://www.odr.info/liverpool).

The influence of technology is here to stay. It is important that all key stakeholders in the dispute resolution arena work together to ensure the most appropriate and effective application of technology to take dispute resolution to the next level.

## IRELAND

# Mediation developments in Ireland

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Mediation in Ireland is emerging as a viable and cost-effective alternative to traditional methods of dispute resolution. Until recently mediation tended to appear in various pieces of legislation on a somewhat random basis. However, recognition of the merits of mediation among a growing number of practitioners, coupled with judicial endorsement of the process, has prompted legislative activity in the area in recent times. Mediation is now a feature of both the new commercial court and the new personal injuries procedure while draft legislation dealing specifically with mediation is at consultative stage. Below I will outline briefly the general legislative background in respect of mediation before discussing recent developments, most notably the proposal for an Arbitration and Mediation Act in 2007.

#### Public initiatives generally

In the area of family law, mediation is provided for in the Judicial Separation and Family Law Reform Act 1989, the Family Law (Divorce) Act 1996 and the Children Act 1997. Each Act imposes a legal obligation on solicitors to discuss with their clients the possibility of engaging in mediation as an alternative to contentious family law proceedings.

The Labour Relations Commission offers a voluntary mediation process where an external professional mediator assists employers and their employees to resolve disputes when they are unable to reach agreement between them.<sup>1</sup> In the area of equality, the

Director of Equality Investigations offers a voluntary mediation service in disputes under the Employment Equality Act 1998<sup>2</sup> and the Equal Status Act 2000.<sup>3</sup>

In the area of social inclusion, provision has also been made for resolving disputes by informal means including mediation.<sup>4</sup>

In October 2001, the Department of the Environment established a Private Residential Tenancies Board to deal with landlord and tenant disputes. The Board deals with disputes to conclusion, with appeals to the courts only on points of law. The Board's dispute resolution process includes a voluntary mediation service.<sup>5</sup>

A form of mandatory mediation has also been imposed by law in respect of all personal injury litigation in Ireland. The procedure is directed exclusively at quantum and essentially allows for a non-partisan assessment of the potential value of a claim assuming 100 per cent liability.<sup>6</sup>

#### Mediation in the commercial court

The thrust of the rules governing the commercial court are similar to those governing the procedure in the admiralty and commercial courts in London and have features in common, including:

- assignment of judges with established commercial expertise;
- pleadings to be less formal;
- preliminary directions as to pleadings;
- regular case management by the court;
- pre-trial conference with the parties;

- statements of evidence to be signed and dated by the parties in advance;
- powers to award costs against a party who has been responsible for delaying proceedings; and
- power to stay proceedings for one month to allow parties to attempt mediation, conciliation or arbitration.

Ireland's new commercial court opened its doors to the first cases on 12 January 2004. It is designed to be an express forum whereby certain types of cases<sup>7</sup> can be brought to a conclusion more quickly than under the prevailing High Court regime. It is designed to be a quick, straightforward and 'fast-track' procedure.

Under the rules governing the commercial court, a judge has the power to adjourn the proceedings in order to allow the parties to consider whether the dispute ought to be referred to mediation. This option can be exercised at a very early stage at the Initial Directions Hearing, where the commercial court judge first considers the nature of the case and gives directions as to the exchange of pleadings, to define the issues and to direct expert witnesses to consult with each other. At that stage, it is open to the judge to adjourn the proceedings for 28 days in order to allow the parties to consider whether the matter could be satisfactorily resolved in mediation, conciliation or arbitration.

Even if the parties to the dispute themselves do not raise the possibility of mediation, the commercial court possesses the power to direct the parties to consider mediation.<sup>8</sup> Where proceedings are adjourned to permit mediation to proceed, the judge may extend the time for compliance by them with any provision of the rules or order of the court. An important distinction to be noted is that, while the court possesses the power to direct that parties consider mediation; it does not have the power to *compel* mediation.

The commercial court has proved effective in dealing with high-value commercial disputes more efficiently. From 12 January 2004 to 1 October 2006, 225 cases were admitted by the court into its list, of which 141 were disposed of and 84 remained outstanding. Once admitted, the average waiting period between the date of admission and the trial date allocated by the court is eight weeks. The average waiting period from being admitted until the conclusion of the action is 14 weeks.

#### **Civil Liability and Courts Act 2004**

The Civil Liability and Courts Act (which deals primarily with personal injuries litigation) provides that at the request of one or other party a court may at any time before trial direct that the parties meet to discuss and attempt to settle the action in what is described by the Act as a 'mediation conference'.<sup>9</sup>

When such a direction is made, the parties must comply with it in order to avoid a potential costs sanction.<sup>10</sup> The conference is chaired by a person

appointed by agreement of the parties or, in default, by the court (in practice, a lawyer of at least five years' standing).

One interesting provision is that the chair must submit a report following a judge's direction that a mediation conference take place. If the conference did not actually occur, the report must state the reason why this was so. At the conclusion of the action, where a court is satisfied that a party failed to comply with the direction ordering a mediation conference, the court may make an order directing that party to pay the costs of the action or a proportion of them.

Where a mediation did take place, the chair must state whether settlement has or has not been reached and, where it has, provide a copy of the terms of the settlement. The Act provides that the notes of a chairman of a mediation conference and all communications during a mediation conference or any records or other evidence relating to it will be confidential.<sup>11</sup>

#### **Arbitration and Mediation Act 2007**

The draft legislation is currently at consultative stage. While the likelihood that it will become law depends upon ratification by the Irish Parliament, the hope at this stage is that it will be enacted in 2007. The intention of the draft legislation is, first, to update the domestic arbitration law by extending the UNCITRAL Model Law into that sphere, secondly, to make some small changes to the international arbitration regime, thirdly, to consolidate in one Act all Irish arbitration law, and, fourthly, to introduce a law on mediation. The mediation part draws heavily upon the UNCITRAL Model Law on Conciliation. The motivation to reform the law on arbitration and introduce a law on mediation stems from the fact that Dublin will be the venue for the ICCA conference in 2008.

Under the draft legislation, a mediator does not have authority to impose a settlement on the parties<sup>12</sup> and it specifically excludes circumstances where a judge or arbitrator attempts to facilitate settlement of a dispute.<sup>13</sup> The legislation will apply regardless of how the parties agreed to mediate their dispute<sup>14</sup> and will be applicable to all existing and future legislation that provides for mediation.<sup>15</sup>

Unless there is agreement to the contrary, an offer to mediate is treated as rejected if not accepted within 30 days of being made.<sup>16</sup> Where there is a court time limit relevant to the dispute, the parties can agree to suspend the running of the limitation period for the duration of the mediation.<sup>17</sup> The mediator may make proposals at any stage to resolve the issues<sup>18</sup> and can meet with each of the parties separately.<sup>19</sup>

The provisions regarding confidentiality are quite extensive. All information and documentation relating to the mediation is confidential, unless the parties agree otherwise, if it is used to implement or enforce a settlement agreement or if a court or arbitral tribunal

orders that the mediator provides a report. If a report is required, it will be limited to whether a mediation occurred or was terminated, whether a settlement was reached or in order to identify those who attended the mediation.<sup>20</sup>

There are numerous stated exceptions to confidentiality of communications. These provisions represent the most significant departure from the model law contained in the draft legislation. The exceptions are quite specific. For example, communications regarding plans to inflict bodily injury or commit a crime fall outside the protection.<sup>21</sup> The view has been expressed that restricting a disclosure to such specific circumstances could be covering many matters with a veil of privilege that may prove difficult to circumvent where necessary. It may be better to provide that communications in the course of the mediation are privileged to the same extent and on the same basis as without-prejudice negotiations between the parties. Similarly documents produced by a party for the purposes of a mediation would be privileged to the same extent that documents produced for the purposes of actual or contemplated litigation are privileged. Such wording would give clear protection to virtually all mediation communications. On the occasional circumstance when the veil of privilege needs to be pierced, it would allow the court greater latitude than the prescriptive circumstances detailed in the current draft.

There is a prohibition on anyone involved in the mediation disclosing in arbitral, judicial or similar proceedings views, admissions, statements, suggestions or documents either prepared solely for the purposes of the mediation or exchanged by the parties in the course of the mediation. However, documents that would ordinarily be discoverable are not protected solely because of their use or disclosure in a mediation.<sup>22</sup>

A mediation is terminated where there is a settlement agreement, where further efforts at mediation are no longer justified or where one or all parties agree.<sup>23</sup> Unless there is a written agreement to the contrary, the mediator won't act as an arbitrator, consultant, adviser or expert in respect of the dispute where they acted as mediator or a related dispute.<sup>24</sup> Where there is an agreement to mediate it must be given effect except to the extent necessary for a party to preserve its rights.<sup>25</sup>

The draft legislation also provides for mediator immunity. A mediator, an employee, agent or adviser of a mediator, a mediation body or other institution or person requested by the parties to appoint or nominate a mediator will not be liable for anything done or omitted unless the act or omission is shown to have been in bad faith.<sup>26</sup>

The draft legislation is currently at a preliminary discussion stage and is consequently subject to change. The prospect of its becoming law depends upon the political will to see it through.

The legislative developments outlined above are indicative of a gradual acceptance on the part of the legislature that litigation is not always the appropriate way to resolve contentious matters. The provision for mediation in both the commercial court rules and the proposed Arbitration and Mediation Act can only serve to heighten awareness of the process among practitioners, the judiciary and clients. While recourse to mediation is not yet widespread, such increased awareness and recognition should result in the continued growth of commercial mediation in Ireland.

#### Notes

- 1 See website at [www.lrc.ie/](http://www.lrc.ie/)
- 2 Section 78.
- 3 Section 24(1).
- 4 Disability Act 2005 and Health and Social Care Professionals Act 2005.
- 5 Residential Tenancies Act 2004.
- 6 Personal Injuries Assessment Board Act 2003.
- 7 Including business transactions of a very wide variety where the value of the claim is €1m or more. The list may also deal with intellectual property cases and commercial 'passing-off' claims. Also included are judicial review cases which relate to major commercial matters.
- 8 Section 6(XIII), Rules of the Superior Courts (Commercial Proceedings) 2004.
- 9 Section 15.
- 10 Section 16.
- 11 Section 15(5).
- 12 Section 1(3).
- 13 Section 1(5).
- 14 Section 1(4).
- 15 Section 1(5)(b).
- 16 Section 3(2).
- 17 Section 5.
- 18 Section 6(4).
- 19 Section 7.
- 20 Section 8.
- 21 Section 8(a).
- 22 Section 9(1).
- 23 Section 10.
- 24 Section 11.
- 25 Section 12.
- 26 Section 13.

## PAKISTAN

# A case study from CEDR on the genesis of mediation in Pakistan: a new commercial approach to the region

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Traditionally the legal climate for businesses in Pakistan, in common with much of the region, has been far from favourable. Contract enforcement in Pakistan normally requires a five- to ten-year litigation process, and commonly an average of 35 per cent of a company's assets are caught up in the litigation.<sup>1</sup> Commercial dispute settlement processes are generally seen as slow, inadequate, and inefficient, as well as unable to support market-based growth or encourage domestic and foreign investment.

Small and medium enterprises constitute 90 per cent of the local business in Pakistan,<sup>2</sup> and companies have few alternatives in the event of a contract breach. This situation discourages foreign and local investments in the country. This concerns the International Finance Corporation (IFC), the private sector arm of the World Bank Group, as it finances private sector investments, facilitates trade, helps clients improve social and environmental sustainability, and provides technical assistance to businesses and governments. To that end its technical assistance facility, PEP-MENA (Private Enterprise Partnership-Middle East and North Africa) focuses on improving the business enabling and regulatory environment, strengthening the financial sector while promoting the growth of small and medium enterprises and their support services.

### Problem-solving

PEP-MENA launched the first mediation project in Pakistan in November 2005 in cooperation with the country's government and the High Court of Sindh Province.

In 2006 CEDR was engaged as the technical expert working with the IFC on the project to establish a pilot court-referred mediation centre in Karachi, the major commercial hub of the country, to help release assets caught up in legal disputes and assist small and medium enterprises in handling expensive and lengthy legal procedures. The centre will act as a mediation and training institute providing both high-quality mediators and training for mediators in Karachi and further afield.

The substantive work under this project, which is now well under way, includes training and development initiatives. With guidance on the establishment of a financially viable and sustainable mediation centre, the training of the country's first mediators (and training of their first mediator trainers!) and in-depth awareness raising for judiciary, lawyers and local business, the project is on track to meet its objectives.

The key to meeting these objectives was for CEDR, working with the IFC, to understand the legal, governmental and economic topography of the region.

### Sizing the whole

The attitudes of the Government, High Court, district court, legal profession, current legal training and the business community were integral to the mediation pilot.

### *Small and medium enterprises*

The views of small and medium enterprises (as the predominant types of business in the country) were accessed through discussions with the Karachi Chamber of Commerce and other associations. These groups were enthusiastic about the potential of this pilot to enable them to resolve disputes effectively and expeditiously. There was a clear sense from them that having recourse to the courts to resolve disputes incurred numerous expenses in both financial and management terms.

In fact, these business groups indicated that they would welcome the extension of mediation to disputes that were pre-litigation and not filed in the courts. The point was made that of the many disputes in the business community only a small percentage of them end up within the court system.

Many smaller businesses are not attracted to the court system to resolve their disputes because of lack of financial resource, knowledge of the inherent delay in court resolution, geographical distance and a feeling of disenfranchisement from the court-based system. Because of this lack of access, many small businesses are

left without remedy through dispute resolution processes and therefore developing mediation services for these cases would provide some means of redress. Although currently the referral of pre-litigation cases is outside the scope of this pilot, it is consistent with the overall objective of the pilot to enable small and medium enterprises to thrive in the whole region.

#### *Local and national government*

Government has been very supportive of the development of mediation as an alternative form of dispute resolution to resolve civil suits. The signing of a Memorandum of Understanding between the IFC and the Ministry of Law in relation to amendment of relevant sections of the Civil Procedure Code (CPC) (proposed amendment to Section 89A which is still before Parliament) was a crucial foundation upon which the mediation pilot in Karachi will be built. The federal government's commitment to amend the code sent a clear signal of its support for the development of a coherent and effective court-referred system.

Similarly, in the province of Sindh, home to one fifth of the population and the city of Karachi, support from key senior government figures in the development of the pilot was crucial. This support was particularly important in establishing the credentials of the Mediation Centre as a focal point for ADR development within Karachi.

#### *Judiciary*

In discussing the perspective of the Judiciary in Karachi it is necessary to examine the High Court and district court separately.

##### THE HIGH COURT

Support for this pilot project has come from the Chief Justice of Sindh and the progress on this project in terms of the signing of the Memorandum of Understanding and the cooperation showed by all courts in Karachi is attributable to the Chief Justice's approval of the broad direction of this project. Other judges of the High Court were similarly open to the concept of court-referred mediation and indicated they would cooperate with the pilot. These judges appeared to appreciate the prospective benefits mediation could confer on the Judiciary in terms of reduction of backlog. There are currently 26 judges of the High Court in Karachi, from a full complement of 28 judges. Currently there are 6,700 civil cases pending in the High Court. Given this backlog the prospect of being able to refer cases for settlement through mediation has to be attractive to the judges.

Amendment of the relevant section of the CPC was viewed by most members of the Judiciary as an important preliminary step in the development of mediation in Pakistan Civil Justice. The suggested amendments to section 89A of the Civil Procedure,

currently before the Pakistan Parliament, reads:

All courts shall, in cases of civil or commercial nature, preferably at the initial stage, require the parties to have resort to one of the alternative dispute resolution methods, such as mediation or conciliation.

The scope of the amendments allows the Judiciary to play a more active role in referring cases to mediation. Given the scope for possible action by judges under this provision, the IFC project staff have worked closely with the Judiciary at the pilot stage to ensure the interpretation and implementation of the section facilitates the effective and efficient referral of cases to the pilot Centre and the settlement of those cases by the Centre's mediators.

CEDR's experience of establishing mediation pilots shows that initial expressions of support are often not matched by actual referrals to the pilot. This can be addressed by ensuring that the development of the pilot has the confidence of the Judiciary in terms of its independence, integrity, quality assurance and ability to deliver. To this end the IFC project team has worked closely with the Chief Justice and other senior members of the Judiciary, Government, professions and business in formulating the legal structure and constitution of the Centre. To this end the first Board of Governors of the Centre includes eminent figures in Pakistan, the former Chief Justice of Pakistan Justice Saeeudzama Siddiqui, the Chief Justice of High Court of Sindh, the Advocate General of Sindh and President of Karachi Chamber of Commerce among others.

##### DISTRICT COURT

It is intended that some of the cases for the mediation pilot will be drawn from the High Court, given the SME focus of the project and the lower limit of the High Court at US\$50,000. There are four district courts in Karachi (North, South, East and West), each with approximately 30 judges. By way of illustration, District Court East, the most sophisticated in terms of computerisation and case management, has 12,000 cases pending of which 4,500 are commercial cases<sup>3</sup> as of March 2006. The average life of a case is estimated at three years.

One key factor in the district court Judiciary being able to refer cases effectively to the mediation pilot is the ability of judges to manage their case load and assess suitability through accurate categorising of cases by dispute types.

#### *Legal profession*

The experience of CEDR in setting up other pilots shows that the stakeholder groups most sceptical of the inclusion of ADR into Civil Justice are the legal community. Historically lawyers are the most difficult to engage and most resistant to change. Largely this can be put down to fears about a decrease in personal or firm income (fears which are normally unfounded).

However, because lawyers are the gatekeepers in disputes before the court, they play a key role in advising their clients on whether to accept mediation or not. It is resistance by lawyers and their role as gatekeepers which has often led to poor acceptance of mediation and other court-referred mediation programmes.

Pleasingly the overall perspective of lawyers was of openness to the concept of mediation within Pakistan Civil Justice. Although some lawyers were resistant, the majority clearly saw the need to reduce backlog and allow speedier redress of disputes for business. They appreciated how an effective court referred mediation programme could address those needs.

Part of the reason for less resistance may be due to the fee structure for litigating cases in the courts of Sindh. As lawyers are paid a lump sum, up-front fee by the client for litigating the case from instigation of proceedings through to judgment or settlement, there may be more incentive for lawyers to settle cases, through mediation early in the life of a dispute as it will attract the same fee and will dispose of the case more quickly, thereby allowing lawyers to take on more new business.

#### *Academic institutions*

As elsewhere, where mediation's use has taken off, the development of national ADR curricula in academic institutions is an integral part of the project's success. Accordingly, the views of relevant academic institutions in Karachi were sought. These institutions included both law faculties and business schools, private and public institutions. All institutions were supportive of the concept of development of ADR within Pakistan Civil Justice. All believed it was an initiative that had the potential to assist in relieving the systemic backlog of cases and provide better access to resolution of disputes for business.

Of the law faculties visited, all agreed that the teaching of negotiation and ADR should be introduced into legal education at the earliest opportunity and were open to exploring the possibility of developing curricula either as a stand-alone course or a module as part of an existing course. All schools suggested that ADR could be included as an optional course in the later years of legal education.

#### **Conclusion**

Globally there is an increasing importance placed on ADR and effective dispute resolution within the global economic agenda – improving routes to justice in less developed countries can remove barriers to trade, for SMEs in particular, thus encouraging increased economic activity, reducing unemployment and alleviating poverty. IFC's PEP–MENA has embarked on this substantial project to introduce ADR into the Pakistan civil justice system in order to tackle the massive backlog of over a million civil cases waiting to be heard.

Everyone we have spoken to has been very impressed by the scale of the IFC's ambitions in Pakistan, and by the progress already achieved. The project has laid a firm and impressive foundation for the practical introduction of a professional and structured mediation regime in the judicial system of Pakistan. Equally importantly, it has confirmed the role that ADR can play as a key tool in the wider economic development agenda.

#### **Notes**

- 1 Figures taken from the IFC MENA website: [www.ifc.org/ifcext/mena.nsf/content/home](http://www.ifc.org/ifcext/mena.nsf/content/home)
- 2 Figures taken from the IFC MENA website.
- 3 Figures provided for CEDR by the District Court East, Karachi.

## PORTUGAL

# Insurance mediation: the Directive and the resolution

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This article provides a brief overview of the Insurance Mediation Directive (Directive 2002/92/EC)<sup>1</sup> implemented in Portugal through Decree-Law No 144/2006 dated 31 July 2006 and leads into a consideration of the framework for settling disputes arising from insurance and other matters by mediation in Portugal.

The Directive lays down rules for harmonising the regulation of insurance and reinsurance intermediaries throughout the European Union, which from 14 January 2005 have been able to provide services throughout the European Union on the basis of home state control. The main aim of the Directive was to develop a truly integrated retail market in which the interests of consumers and service providers are properly protected by adopting a legal framework which ensures professionalism among insurance intermediaries while simultaneously guaranteeing the protection of customers' interests.

The Directive requires the regulation of activities in relation to all contracts of insurance with certain exemptions, however, for insurance sold as part of a package. Member States are required to ensure that insurers use the insurance and reinsurance services of only registered insurance intermediaries (see Article 3.6 of the Directive).

In Portugal Decree-Law No 144/2006, *inter alia*:

- Establishes the legal regime applying to access to and exercising of insurance and reinsurance activities;
- Defines those activities deemed to be incompatible with insurance and reinsurance activities;
- Makes provision for the statutory sanctions applicable to minor breaches of this legislation as well as sanctions for serious breaches and cases of negligence;
- Provides that without prejudice to the right of consumers to bring disputes arising from insurance activities before the Portuguese courts, including cross-border disputes, relating to insurance intermediaries registered in other Member States but conducting their activities in Portugal, consumers may have recourse to existing out-of-court dispute resolution mechanisms.

Portuguese legislation is therefore in line with the Insurance Mediation Directive's objective that Member

States should encourage public or private bodies established with a view to settling disputes out of court, to cooperate in resolving cross-border disputes.

FIN-NET was launched by the European Commission on 1 February 2001 as an out-of-court complaints network for financial services, including insurance, to help businesses and consumers resolve disputes in the EU Market rapidly and efficiently by avoiding, where possible, lengthy and expensive legal action. The network has been designed particularly to facilitate the out-of-court resolution of consumer disputes when the service provider is established in an EU Member State other than that where the consumer lives.

The network brings together more than 35 different national schemes that either cover financial services in particular (eg banking and insurance ombudsmen schemes) or handle consumer disputes in general (eg consumer complaint boards). The difficulty of obtaining out-of-court redress is seen as a barrier to the development of cross-border services, particularly in the financial sector and in e-commerce.

In Portugal the respective FIN-NET scheme which deals with insurance-related disputes which are not referred to court is the Consumer Disputes Arbitration Centre (Centro de Arbitragem de Conflitos de Consumo) of which there are several in different geographic parts of the country. Despite the centre's name it also covers all forms of ADR including the mediation of insurance disputes.

The centres are private law, non-profit-making associations, recognised as providing public utility services (in the case of the Lisbon Centre). They were established jointly by consumer associations, municipalities and trade associations. The service is free of charge for both parties. Arbitration is carried out on a voluntary basis, and both parties must explicitly agree to refer a matter for arbitration. However, the dispute may also be submitted to the centre's legal department and settled by mediation without having recourse to arbitration.

The main features of the mediation scheme can be summarised as follows:

- Mediations may be conducted in the Portuguese, French or English languages.

- There is no financial limit to claims which are referred to settlement by mediation, unlike arbitration claims at these centres which are limited to €5,000.
- The usual characteristics required of the mediator exist, in other words, he must be an independent and impartial third party.
- Both companies and individuals may refer and participate in the mediation process.
- The parties are required to keep all oral and written declarations confidential.
- If the parties reach an amicable agreement this is subsequently recorded in writing and signed by all the parties and the mediator, whereafter 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 particularly important 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.<sup>2</sup> This gives added weight to a mediation agreement once it has been recognised since in theory it could have a real impact on cross-border disputes.

For the purposes of certainty, an EU Directive including a provision that any and all settlement agreements rendered enforceable under national law in one Member State shall be enforceable, *ipso facto*, in all the other EU Member States would greatly assist in this regard. In due course one could foresee that the Brussels Regulation<sup>3</sup> might also be modified to incorporate such a provision.

Other practical considerations include the fact that insurance-related disputes and claims must be brought before the Portuguese mediation centres within 30 days of arising. Statistics produced by the centres suggest that the average time taken to resolve a dispute is between 30 and 40 days and that of the disputes referred to mediation approximately 70 per cent<sup>4</sup> have successfully been resolved by way of an amicable settlement.

These are optimistic results and support the Portuguese Government's recent drive to encourage parties to settle disputes by mediation or arbitration wherever possible. Efforts are continuing to promote mediation as an alternative as it is seen to facilitate more balanced settlements than litigation does and to aid the continuation of relationships.

Substantial cost and time reductions are also natural consequences of the mediation process. However, much still needs to be done in Portugal to address questions on funding, regulation, training for mediators and non-mediators (ie mediation representatives) in the justice system, quality assurance and ethics.

#### Notes

1 Adopted on 9 December 2002.

2 Decree Law No 31/86.

3 Council Regulation (EC) No 44/2001 of 22 December 2000 (on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters).

4 Statistics provided by the Consumer Disputes Arbitration Centre (Centro de Arbitragem de Conflitos de Consumo) as at 31 December 2005.

## SWITZERLAND

# Mediation in Switzerland: or the 'Swiss Army knife tool'<sup>1</sup>

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## Overview of the legal framework

Switzerland is certainly the mediator's state *per se*. Indeed, its independence and impartiality, the neutrality of the Swiss cantons recognised since 1648,<sup>2</sup> and its well-known confidentiality rules together with its specific role towards conflict resolution within the international framework<sup>3</sup> have naturally led Switzerland to play an important part in the alternative dispute resolution (ADR) field.

In Switzerland, civil and particularly commercial disputes are subject to a framework of dispute resolution tools (DRT), including negotiation, mediation, ombudsman,<sup>4</sup> conciliation, arbitration, as well as ordinary legal proceedings. In these matters, subject to public order and to some mandatory rules, the parties are free to choose their DRT, and even to navigate between the diverse systems<sup>5</sup> offered.

With respect to legal proceedings, Switzerland is currently a federal system of 26 cantons, operating with 26 cantonal laws of civil and criminal procedure as well as 26 laws of judicial organisation in addition to the federal laws.

In 2010, it is expected that all civil procedures will be unified in one Swiss civil procedural law<sup>6</sup> and it is intended that the new uniform civil procedure will to some extent provide mediation as an official alternative to pre-trial conciliation. It is also currently under discussion as to whether and to what extent the draft bill of Swiss criminal procedural law<sup>7</sup> (general federal law) should also contain some articles on mediation as does the Swiss criminal procedural law for minors, which will come into effect on 1 January 2007.<sup>8</sup>

At the present stage, not all the cantonal civil procedure laws contain provisions on ADR. Whereas judicial conciliation has been known in Switzerland for at least two centuries and arbitration<sup>9</sup> for one century, mediation has existed only for a decade and not in each canton.

Actually, it is only in Geneva that civil and criminal mediation is institutionalised in the judicial system.<sup>10</sup> It can, however, be found outside the judicial system in the cantons of Aargau, Basel, Fribourg, Neuchâtel, St Gallen, Solothurn, Ticino, Vaud and Zurich.

To some extent, mediation has been codified in the

following cantonal laws:

- Aargau: penal code for minors<sup>11</sup>
- Basel: intercultural mediation
- Fribourg: penal code for minors<sup>12</sup> and collective conflicts in labour law<sup>13</sup>
- Glaris: family matters
- Neuchâtel: penal code for minors and family matters<sup>14</sup>
- Ticino: family matters<sup>15</sup>
- Zurich: family matters (a further 'draft pilot programme' allows the judges to act as mediators)

Some cantons are currently experimenting with mediation within certain fields of law in view of the future codification of the process.<sup>16</sup>

### *Geneva rules on civil/commercial mediation*

In Geneva, the new rules on civil and commercial mediation entered into force on 1 January 2005.<sup>17</sup> The new law can be found at: [www.skwm.ch/wDeutsch/dokumente/Dokumente\\_franz/mediation\\_civile.pdf](http://www.skwm.ch/wDeutsch/dokumente/Dokumente_franz/mediation_civile.pdf)

Mediation can be initiated prior to any court proceeding or after a lawsuit has been filed with a court.

There is no assignment of mediations by the judge, who only proposes mediation to the parties. Thus, there is neither judicial control of the mediation process as such, nor of the substance, nor of the formal aspects (rules, duration, costs, co-mediation, etc).

However, there is a clear codification of the rules of ethical conduct:

- confidentiality of the mediation proceedings and independence, neutrality and impartiality of the mediator.
- The Geneva rules specifically oblige the mediator, who affirms on oath, to keep the mediation process, as well as all the facts learned, secret, without time limitation. Any infringement can lead to disciplinary as well as penal sanctions.<sup>18</sup>
- In the other cantons, the duty of confidentiality is usually mentioned in the mediation agreement. However, the validity and enforceability of such a commitment has not yet been decided by any court.

To some extent, financial legal assistance is available for mediation in Geneva.

*Statute of limitations and suspension of legal proceedings*

At the present time, the starting of a mediation proceeding is not considered a suspension or interruption of the statute of limitations.<sup>19</sup> However, the parties usually mutually agree on the suspension of the legal proceedings up to the end of the mediation process.

*Acknowledgement and enforcement of mediation (settlement) agreements*

If requested, notably for enforcement purposes, an official ratification of the settlement agreement reached through mediation (out of or during court proceedings<sup>20</sup>) can be achieved through a quite simple and rapid procedure in the form of either *a court decision or an arbitration award*.

The judge/arbitrator cannot modify the content of the concluded settlement agreement that has been reached, unless there is an infringement of public order or a Swiss mandatory rule.

A 'practical guide for civil mediation' has been drafted by the Geneva authorities; this can be found at [www.geneve.ch/tribunaux/pouvoir-judiciaire/mediation.html](http://www.geneve.ch/tribunaux/pouvoir-judiciaire/mediation.html). Also at this address is an official list of court-accredited mediators as well as mediation institutions.

The Geneva rules are Euro-compatible.<sup>21</sup>

*Mediation procedures*

Mediation procedure is not regulated by law in Switzerland. Several mediation organisations have adopted procedural rules that the parties may incorporate into their mediation agreements.<sup>22</sup> Furthermore, the parties often mediate under the rules of national or international organisations such as the Swiss Chamber of Commercial Mediation Rules, WIPO Rules, ICC ADR Rules, CEDR Model Mediation Procedure and Agreement, etc.

Mediators' fees are not regulated in Switzerland and fees in commercial mediations are often based upon hourly fees of lawyers.

Taking the well-known 'Swiss Rules on International Arbitration'<sup>23</sup> as a model, the Swiss Chambers of Commerce is currently in the process of drafting the 'Swiss Rules on Mediation' which are intended to come into effect in 2007.

*Enforceability of a mediation clause in Switzerland*

Some legal scholars and the current Swiss case law consider a mediation clause to be of a purely contractual nature without any procedural consequences. As a result, a party's breach of its contractual obligation to mediate before submitting a dispute to the courts does not constitute an impediment to that court's jurisdiction.<sup>24</sup>

However, this situation might change as legal scholars seem to be following the position taken in the neighbouring state of France. A French court recently held that courts must give effect to a mediation clause if one party relies on it and therefore stay court proceedings in breach of such a clause.<sup>25</sup>

Thus, in order to avoid any problem, the parties should clearly define whether they have (or do not have) an obligation to mediate prior to the commencement of arbitration or court proceedings and, if necessary, provide for some penalty in case of violation of said obligation.

**Mediation in Switzerland**

Apart from international organisations and NGOs which provide for ADR rules including mediation, many various private associations offer mediation in Switzerland in various sectors: family, commercial, governmental agencies, labour, schools, environment, etc.

*Description of the main ADR providers with links to their websites*

- Swiss Chamber for Commercial Mediation (SCCM/ CSMC/SKWM)  
[www.skwm.ch](http://www.skwm.ch) or [www.csmc.ch](http://www.csmc.ch)  
Four sections: German-speaking Switzerland (Zurich region and central Switzerland), French-speaking Switzerland and Italian-speaking Switzerland.
- Federation of the Swiss Mediation Associations (FSM/SDV)  
[www.infomediation.ch](http://www.infomediation.ch)  
This organisation groups some of the most important mediation associations of Switzerland.
- Swiss Lawyers Association (FSA/SAV) – Mediation Commission  
[www.swisslawyers.com](http://www.swisslawyers.com)  
This association includes the main Bar Associations of Switzerland. All of them have adopted guidelines and ethical codes of conduct for conventional mediation. In addition, it offers training for lawyers and qualifies participants with the title of 'Mediator of the Swiss Bar Association'.<sup>26</sup>
- Cantonal Mediation Associations:
  - (1) Groupement Pro Mediation (five Cantons)  
[www.mediations.ch](http://www.mediations.ch)
  - (2) Maison Genevoise des Médiations (Genève)  
[www.mgem.ch](http://www.mgem.ch)
  - (3) Maison Neuchâteloise de la Médiation (Neuchâtel) [www.medialogue.ch](http://www.medialogue.ch)
  - (4) Verein Mediation Region Basel (Basel)  
[www.mediation-basel.ch](http://www.mediation-basel.ch)

(5) Maison Fribourgeoise des médiations (Fribourg)  
[www.fribourg-mediation.ch](http://www.fribourg-mediation.ch)

(6) Associazione Ticinese per la Mediazione (Ticino)  
[www.mediazione.ch](http://www.mediazione.ch)

(7) Verein Mediation im Strafverfahren (Aargau)  
[www.medistaargau.ch](http://www.medistaargau.ch)

*Mediation rules of specific international institutions in Switzerland*

- Court of Arbitration for Sport (CAS)  
Avenue de l'Elysée 28, CH – 1006 Lausanne  
[www.tas-cas.org](http://www.tas-cas.org)
- World Intellectual Property Organisation (WIPO)  
Arbitration and Mediation Center  
34 Chemin des Colombettes  
PO Box 18 CH-1211, CH - Geneve 20  
[www.arbiter.wipo.int](http://www.arbiter.wipo.int)

*International Mediation Training in Switzerland*

- Institut Universitaire Kurt Bösch, IUKB, Sion  
[www.iukb.ch](http://www.iukb.ch)  
Masters degree in International Mediation
- WIPO Arbitration and Mediation Center  
[www.arbiter.wipo.int](http://www.arbiter.wipo.int)
- World Mediation Forum  
[www.mediate.com](http://www.mediate.com)

**Notes**

- 1 Tom Stipanowich, IBA Annual Conference, Chicago, September 2006. In his speech, he likened the mediation process to a Swiss Army knife – a dispute resolution tool with various applications.
- 2 Treaty of Westphalien.
- 3 International Red Cross, UN, WTO, etc.
- 4 Notably in insurance, banking and travel matters.
- 5 ie legal proceedings with mandatory conciliation suspended pending a mediation agreement being reached.
- 6 Articles 210ss Projet Code de procédure civile federal/Schweizerische Zivilprozessordnung: a project has already been drafted and will be discussed by the Swiss Parliament soon. All cantonal civil procedural laws on mediation will then be superseded by the federal civil procedural law ([www.bj.admin.ch/bj/fr/home/themen/staat\\_und\\_buerger/gesetzgebung/zivilprozessrecht.html](http://www.bj.admin.ch/bj/fr/home/themen/staat_und_buerger/gesetzgebung/zivilprozessrecht.html)).
- 7 Article 317, Projet Code de procédure pénale suisse/Schweizerische Strafprozessordnung.
- 8 Article 18, Code de procédure pénale applicable aux mineurs/Schweizerische Strafprozessordnung für Jugendliche.
- 9 Arbitration is enclosed in all cantonal laws of civil procedure in Switzerland and the 'Swiss Rules for international arbitration' enacted by the chambers of commerce are very often used in commercial dispute resolution.
- 10 The Geneva law on criminal procedure covers mediation in criminal matters, since January 2001, and the Geneva laws on civil procedure as well as on judicial organisation cover mediation in all civil and, notably, commercial matters since January 2005.
- 11 Articles 3 and 8, Jugendstrafgesetz Aarau.
- 12 Ordonnance du 16 décembre 2003 sur la médiation dans la juridiction pénale des mineurs (OMJPM) (RSFR 132.62).
- 13 Loi du 30 septembre 1988 instituant un Office de conciliation en matière de conflits collectifs de travail (RSFR 862.2) et Règlement du 5 février 1990 d'exécution (RSF 862.21).
- 14 Article 365 of the Code de procédure civile NE and article 12, LICC Loi d'introduction du code civil NE.
- 15 Articles 107 and 352 of the Codice di procedura civile ticinese.
- 16 Fribourg, Neuchâtel, Vaud and Zurich: in divorce cases, commercial disputes and criminal proceedings involving minors.
- 17 Loi sur la médiation civile de la République et Canton de Genève du 28 octobre 2004.
- 18 Article 161 H, Loi sur l'organisation judiciaire genevoise and article 38 all, ch 54, Loi pénale genevoise. In family mediation, the Federal civil law already prevents the mediator from testifying (article 139, Swiss Civil Code).
- 19 Article 134 Swiss Code of Obligations.
- 20 So-called 'homologation judiciaire': articles 71d and 71f, Loi de Procédure civile genevoise.
- 21 Recommendation no R (98)1 of the Committee of the Ministers of States of the Council of Europe on family mediation and Recommendation no Rec (2002)10 on mediation in civil matters.
- 22 ie the mediation rules of the Swiss Chamber for Commercial Mediation ([csmc.ch](http://csmc.ch)).
- 23 [www.swissarbitration.ch](http://www.swissarbitration.ch)
- 24 Swiss Federal Court decision of 23 August 1999 in (2000) 99 ZR 29.
- 25 *Poiré v Tripiet*, Decision of 14 February 2003 of the French Court de Cassation in (2003) Rev Arb 403.
- 26 Médiateur FSA or SAV Mediator. For instance, special training is available on the role of lawyers acting as mediators.

## UNITED KINGDOM

# Mediation in business

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To reach the full potential of the market for professional mediation we need, as an industry, to emerge from the shadow of litigation as a process of last resort to become the business tool of first instance.

The value in the mediation process does not lie in the fact that it is slightly less painful than litigation. Dispute resolution by mediation, project mediation and deal mediation provides a conduit for effective communication unrestrained by the normal bounds of secrecy, competitive positioning and the limitations of bilateral negotiation. Mediation, by essence, is a commercial process and thus should seek expansion in the commercial world rather than the legal one.

Part of the challenge inherent in developing the mediation market is educating business about the opportunity which mediation represents.

For the past two years ResoLex has been working closely with professional bodies to educate its members in dispute avoidance and resolution. By operating mediation schemes for the professional body we have been able to offer fast and cost-effective access to mediation at the start of a dispute and stop it escalating and drawing professionals away from their core activity.

Sue Wakefield, Chief Executive for the British Chiropractic Association, describes the BCA Members Mediation Scheme as:

‘Rather like treating patients, we recognised that our members needed access to a process of dealing with disputes be it with an employee, another chiropractor or outside party that did not simply try to alleviate the symptoms, but got to the root of the problem. The Members Mediation Scheme we operate through ResoLex means our members have ready access to professional mediators early in a dispute and achieve good results with less stress.’

Administering Members Mediation Schemes and thereby gaining a view across industry provides an interesting insight to the types of dispute most prevalent in different markets.

Almost all of the disputes that have arisen through the Members Mediation Schemes have been about general business agreements and have had little or no relation to the industry area the professional operates in. The majority have been about differing personal perceptions of a situation or personal expectation which had not previously been discussed.

What many commercial relationships lack is a process of dealing with minor issues which by themselves would

not threaten the venture but left unchecked will mount up into a substantial dispute. Mediation is the obvious choice for that process as it respects the value of the continual relationship.

Back in 2000 when ResoLex first launched Contracted Mediation, a process more recently coined by others as ‘Project Mediation’, it was with the view to providing precisely that process, although at that time specifically with the construction industry in mind. In light of the findings of the Members Mediation Schemes it is obvious that it has a much broader application than initially identified.

## Contracted mediation

Contracted mediation, as a process, puts the dispute resolution framework in place at the beginning of the relationship. But more than that, it puts *the process* in the parties’ minds at the outset too. It is an accessible process, so that the parties can take an active and effective role in it: in effect, they manage any dispute to a resolution, with expert help. So, it helps to prevent wasting time and money on disputes.

Contracted mediation applies the mediation process to solve business problems before they become disputes or escalate into conflict. Differences are inevitable in any venture but they can be positive and certainly need not spiral into disputes or conflict. Early commitment to resolving differences more sensibly is the key to its success.

At the beginning of a venture, all parties sign a Contracted Mediation Agreement. The Contracted Mediation Panel is then appointed, the Panel normally consisting of one commercial (or technical) member and one legal member. Both panel members are also accredited mediators. The Panel therefore brings together three strands of expertise: commercial, legal and mediation.

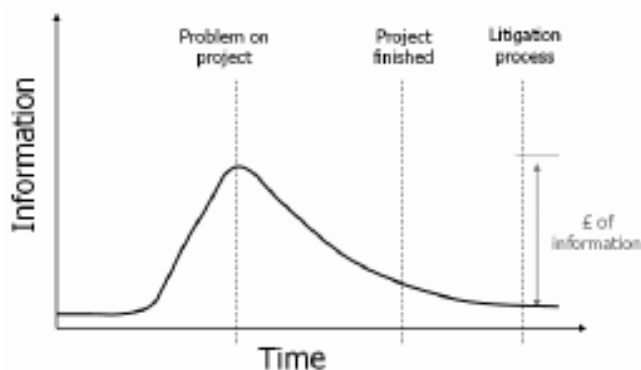
The parties meet the mediators who explain how to use the process. This is important because contracted mediation belongs to the parties themselves, not to the mediators and not to the parties’ lawyers, although they often play an important role. It is a process which is designed to be effective rather than mysterious.

When anyone thinks that there is an issue which could usefully be addressed with the Panel’s expert help, they know the Panel and can contact them straight away so

that the 'pressure cooker' effect which is often observed in disputes can be avoided, that is, where nothing is done until a dispute is really boiling. Contracted mediation operates as an early safety valve.

A related phenomenon, which positively reinforces the pressure cooker effect, is the 'ostrich approach', where problems are simply ignored. This springs from a disinclination to 'get involved with lawyers or courts' or a delusion that 'we'll sort something out'. With contracted mediation, your lawyers can help you do something really positive and you have a framework specifically designed to help you 'sort something out'.

### Knowledge and information



There is another dimension to the compelling logic of addressing difficulties early. Many of us will recognise the problems inherent in realistically assessing a case by the time litigation starts. This difficulty is often largely due to the degrading of the knowledge base. That is to say that until the knowledge base has been rebuilt from the study of documents and comparison of the imperfect distant recollections of witnesses, it is difficult for experts, lawyers or parties to form a clear view of the merits of their case.

Valuing knowledge or information in this way is new thinking. The Knowledge Curve demonstrates the value of contemporaneous knowledge by identifying the activity necessary to rebuild it and the attendant delays, expense and waste of time. It also highlights the advantage of early resolution of disputes before the knowledge base has degraded.

Contracted mediation also addresses the structural impediments and inefficiencies in negotiation, such as information inadequacies/asymmetries and that, at the core, negotiation is commonly positional rather than principled or, indeed, creative and that underlying needs often remain hidden.

Contracted mediation is conducted privately under a mediation agreement, and therefore due to the very nature of the agreement it is not something that is often possible to publicise. However, the parties on one project were so pleased with the results they achieved using contracted mediation, all the parties agreed to a case study being made public.

### Alpha taxiway, Jersey Airport

James Palmer, a Barrister with Henderson Chambers and a ResoLex Mediator, was one of the Contracted Mediation Panel members and relates his experience of the project:

#### *Jersey case study outline*

The project originated from the need by the States of Jersey to alter the alignment of the taxiway at Jersey Airport to comply with changing Civil Aviation Authority rules.

The overriding concerns of the client were:

- (1) meeting time deadline;
- (2) safety: compliance with strict CAA requirements;
- (3) customer/residents to suffer minimum noise and disruption;
- (4) budget certainty; and
- (5) environmental impact.

#### *Timing*

The contract period was 15 months and completion within that time was essential or the airport would no longer be fit for commercial airline travel which is crucial to the Jersey tourist industry.

#### *Safety*

The critical element of the project was that the delivery team would work around the operational airport accepting the access limitations that would entail, but not affect the operational safety of the airport. All works were required to comply with the requirements of the CAA.

#### *PR*

There was concern that the works should not inconvenience local residents or give rise to any environmental concerns.

#### *Budget*

The States of Jersey had allocated a fixed sum of approximately £10m and was unable to exceed this.

#### *Why ResoLex?*

Mike Lanyon, the director of Jersey Airport, was the initial sponsor for the introduction of contracted mediation on the project. Four years earlier, Mr Lanyon had a 'very bad experience' with a dispute. 'Matters go to arbitration and eventually one finds oneself staring down a gun-barrel at a huge claim', he said. Mr Lanyon reckoned having mediators on call should improve the odds of hitting his target, on budget and on time. The contractors, he said, were as keen on the idea as he was.

Prior to the project Mr Lanyon said, 'Suppose for example severe weather occurs, causing flooding that stops the contractors laying concrete for months. Normally they would just slap down a claim. If we disagreed, we'd be straight off down all the contentious paths. But on this project, the mediation process will kick in the moment issues are identified.'

#### *What happened?*

Eight months into the project clear issues were identified that necessitated the intervention of ResoLex.

*Ground conditions:* a substantial claim for additional earth moving costs had arisen as the location of the dumping area had been moved by the client.

There was a knock-on effect in additional time spent and potential for project delay, and the contractor was seeking an extension of time. There was also an issue as to the liability for the additional haulage costs and delay.

*Subcontractor:* the subcontractor had commenced laying the concrete runway and apron, but had done so out of proper alignment. The client had indicated that it was considering rejecting all work and requiring it to be uplifted and laid correctly.

Nonetheless the client was adamant that the project window still needed to be adhered to.

#### *What ResoLex did*

The mediators on the panel agreed with the parties that a two-day mediation would take place. Working together, the mediators spoke in advance to all parties and sought from them a written schedule of issues and asked them to consider the cost implications of each. This schedule was then disclosed to all parties in advance of the mediation.

In addition to the main claim, the schedule revealed issues which had, as yet, not become areas of real concern or discussion between the parties as they were 'below the horizon'.

The total value of these additional issues was estimated to be in excess of £300,000 (in addition to the main claim that had not been priced) and had potential for further delay of project completion if they were not resolved or became the subject of disputes.

By the end of the mediation the parties had been able to resolve all matters that at that time remained outstanding. All parties also agreed that the mediators should return in six months (ie one month before the project completion date) in order to conduct a further mediation in respect of any issues that had then arisen.

#### *Project outcome*

Parties had learned from their earlier experience and bought into the collaborative environment with such success that in fact no further mediation was necessary at

the end of the contract. Based on the experience of the mediation, the parties managed to resolve all other matters that had arisen during the rest of the contract delivery.

More importantly, as a result of the mediation and collaborative environment, the project, despite being in jeopardy after just eight months, was completed:

- 1) three days early;
- 2) with all disputes resolved;
- 3) final bill agreed; and
- 4) £800,000 *under budget*.

#### *Parties' comments*

Not altogether surprisingly the parties were happy:

'We were gobsmacked and amazed at how quickly and simply ResoLex helped us all reach a satisfactory agreement.'

The key success factor in contracted mediation has remained the fast access to a 'safe environment' in which to address concerns and the availability of expert help. This has meant that the whole energy of all parties has been able to remain focused on successful project delivery.

Following a mediation on another project, one of the parties said that a weight had literally been lifted from his shoulders and he could now concentrate on delivering the project.

#### **Where do we go from here?**

Having proved its value on construction projects, contracted mediation now has wide application, IT, project finance and business process outsourcing being a few of the most obvious.

According to Forrester Research, the European business process outsourcing (BPO) market has a growth rate of 11.5 per cent and will grow from the current €11.0bn for 2006 to €18.9bn by the end of 2011.<sup>1</sup> If the build-up to the 2012 Olympic Games does not give adequate scope for the growth of all types of dispute resolution, then I suggest the BPO market offers particularly good potential for mediation.

Almost as soon as a long-term outsourcing agreement is finalised, the parties' interests begin to clash. While there are many reasons for a company deciding to outsource, the obvious rationale for the decision is to maximise the value of the service provided whilst minimising spend. On the other hand, the outsourcing provider is trying to maximise revenue and minimise expenditure, having often been through a brutal tendering process.

To compound that natural tension, there is argument that outsourcing contracts are out of date the moment they are signed, and they become more and more out of date as time goes on. During the drafting process it is impossible for either party to anticipate every possible situation and equally they cannot determine in advance

how to deal with them or agree suitable remedies should the situation be unfavourable to one or other of the parties. As entering into such a relationship without a contract is equally unacceptable, the contracts have to be sufficiently broad to cover a multitude of possible scenarios.

The dynamics of the relationship may also alter over time, not just in response to technical and project issues but also due to overarching management decisions, varying perceptions of 'value' and the fact that often large sums of money are being exchanged over long periods.

These background factors can lead to a very precarious situation for the resolution of initially minor issues as they arise. Parties can quite easily find themselves in the position that 'natural' clashes develop into intractable performance obstacles because of the difficulties in enforcing broad contractual rights and obligations throughout the delivery stage of the outsourcing engagement. Litigation is wholly inappropriate to use in an ongoing relationship and is slow, expensive and unpredictable. Many issues that arise will not necessitate the complete collapse of the relationship, but as discussed earlier will affect the service level obtained due to the distribution tension

between resources being employed in escalating the issues and resources employed in effectively delivering the service.

The use of contracted mediation provides a safety net over which outsourcing agreements can operate providing an agreed process for dealing with issues as they arise. It provides a commercial process to answer a commercial need for solving minor issues within an environment where the overriding relationship remains crucial.

Jane Player, Head of Dispute Resolution, Bird and Bird comments on the practical nature of contracted mediation:

'There is an effective role to be played by commercially minded mediators, brought in early to assist parties, in a neutral role, to deal with points of dispute as they arise in relationships, and thus avoid the costly delays to project timetables which are inherent in other dispute resolution techniques.'

ResoLex remains committed to the innovative application of mediation in business where I'm sure, as yet, we have barely scraped the surface.

**Note**

1 Sonoko Takahashi, Forrester Research, 2006.

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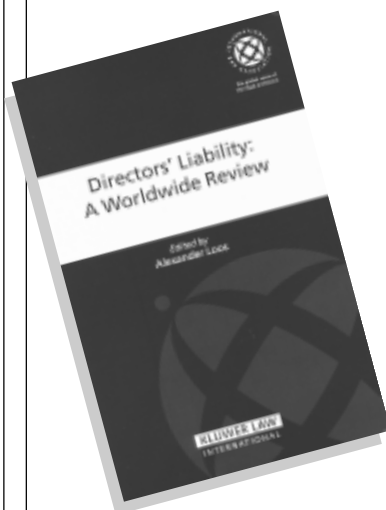
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## UNITED KINGDOM

# A mediator's look at the dynamics of mediator-party relationships

Frances Maynard

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When considering this topic I came across a delightful verse in Christopher Fry's play, *The Lady's Not for Burning*:

The best thing that we can do  
Is to make whatever we're lost in  
Look as much like home as we can.

For me, the starting point for considering the dynamics between mediators and parties came from a brainstorm teaching session on mediation which I led at the University of Copenhagen in September this year. Here we identified 33 key words and phrases that together go in a small way to sum up what a mediator should be.

## Qualities and attributes of a mediator

<i>Likes people</i>	<i>Confidence in self</i>
<i>Trusts the process</i>	<i>Curious</i>
<i>Is him-/herself</i>	<i>Flexible/adaptable</i>
<i>Respects parties</i>	<i>Humility</i>
<i>Compassion</i>	<i>Optimistic</i>
<i>Self-aware</i>	<i>Calm</i>
Patience	Stamina
Humour	Empathy
Good listener	Integrity
Information manager	Well-prepared
Unafraid of emotions	Has no need to get a
Trustworthy and builds trust	settlement
Creative	Analytical
Non-judgmental	Impartial
Courageous	Energy
Process manager	Works with team
Coach	dynamics
Understands commercial issues	

In terms of rapport building, all these 33 elements need to be taken for granted, in addition to many others. The relationship between mediator and the parties is such a big topic that I'm only going to focus on a few aspects – those in italics, above.

## Being present

The topic of handling nerves takes me back a number of years – to a mediation years ago where a CEDR colleague came along, theoretically as my assistant but in reality as a co-mediator. Before the parties arrived I wanted some

time to be quiet, to have some space for myself before swinging into the day. Time to centre myself, to locate that 'still small voice of calm' that I know I'll need to call on during the coming hours. My colleague suddenly broke the silence by asking how I managed my nerves at a time like this – and I was momentarily thrown into a panic of trying to work out what was out there that I'd missed and that I should be afraid of. Like a child being told there's 'nothing to be afraid of' out of the window at night, which always raises the spectre of there really being something out there of which they should have good reason to be fearful. *I see nothing to be afraid of in meeting other people, only potential gain – be it in learning I take, pleasure or pain experienced, insights about self and others.*

I also feel it is OK today to talk about this as it's about who I am rather than skills I might/might not have, which would be far more uncomfortable and really for others to do. I was at first very hesitant about this subject – felt self-conscious about focusing potentially on the 'effective mediator' aspects. So I am not writing about how effective/ineffective I am as a mediator but about the person that I am and the impact that that has on the relationships between me, as mediator, and the parties – legal teams and clients. *For me it's about being present.*

## One mediator's credo

I have my own kind of credo:

I am optimistic, I like people and believe in people – that most people do the best they can most of the time and have the resources within themselves to resolve disputes. I have faith in the process. I am also fundamentally communist – believe that I am of equal value to any/everyone and that anyone/everyone is of equal value to me until something happens to dislodge that belief.

Interestingly, reflecting on this, I think both humility and respect for all parties are carried on the coat-tails of equality. Both are key to relationship building.

What does that mean in practice?

*First:* that I view mediations as extraordinary, wonderful opportunities to meet and work with people, to spend time with them and, amazingly, to be allowed into their lives in a quite humbling way. I've been doing

this for 12 years and in that time have gone to extraordinary places, dealt with a huge variety of issues and met people from all walks of life whom I would never have come across otherwise. I have much for which to be grateful.

*Secondly:* it means that I am not fearful of only 'surviving' but am interested, curious and expect to build a working relationship with both legal teams and with their clients in the mediation. Maybe, somehow, that very expectation actually enables it to happen. The curiosity is invaluable – not the 'nosey' sort, but that which brings open-mindedness, increases the capacity of all one's senses to full alert so that mediating is about working with the all of me. When I lose touch with myself, become distracted, that's when mediating becomes a task, that's when the water in the pool actually seems to be too deep.

*Thirdly:* it means that I'm not intimidated by either status or behaviour. There is no hierarchy in my eyes. We are all there, performing our different roles to the best of our ability, in the process for better or worse. Here are two examples of that:

- (a) One was a case for one of the large trade unions. Two senior officials came along to the venue, which had not been cleaned and where I'd been shown the kettle and plastic cups. These two made it clear that there had to be tea and therefore there had to be a tea lady – of course, I was she! Making the tea was easy – a 'pace and lead' action (to use a training phase: a leading by example) that enabled them then to move forward and begin the process of acknowledging my other, professional role, as it no longer appeared to threaten theirs.
- (b) I've also had experiences of senior members of the Bar who seem to have a need to establish the pecking order at the start of the day – no prizes for guessing where they, and I, sit. Without exception that has melted away during the day and I think that is at least in part because of my simply plugging away and not being thrown into some sort of subservient role.

### Other special ingredients

*Flexibility.* I've roamed through life and had a wide variety of circumstances and have found an innate 'adaptability' which I suppose in mediation shows itself through flexibility. For example, adaptability with venues includes first aid cupboards full of overflowing ashtrays used as private meeting rooms; a back patient in a personal injury case where private meetings were conducted on the floor and a senior woman, from a large international company, was emotionally in shreds unable to stay in any room. In that case, we were asked to adapt the process in such a manner that she was able to participate fully and achieve both settlement and closure.

*Openness and being myself.* I see this as a kind of 'pace and lead'. If I am hoping that the parties will be open with me then I must be open with them. It cannot be

otherwise. I am who I am. It's taken me 62 years of becoming me to say 'I am' – a continuous process – and I think self-awareness is really important for anyone who, as a mediator does, has to build relationships with others in order to carry out their work. I see nothing to be gained by papering over my cracks and was at ease recently explaining to parties that the pages and pages of printouts on pension fund information made me 'glaze over'! You could almost hear the audible sigh of relief from everyone present – free now to be able to agree that they too struggled to make sense of the tables of dates and figures.

### Legal teams

*I need to make special reference to legal teams.* When I started mediating I was fearful of not being up to the task, of being found wanting, because of my lack of legal background. It made me very wary until I realised that it was not something to try to disguise but actually something to celebrate. I now think it's a huge advantage being a non-lawyer. I can ask the 'idiot/difficult' questions of both clients in front of their lawyers, and of lawyers in front of their clients, without causing the kind of offence that might happen should one lawyer be challenged by another. I don't have any hierarchy within the legal world; a senior QC or senior partner in a city law firm has no 'place' in my mind either 'above' or 'below' me.

I can help the parties to evaluate and re-evaluate their cases using the legal teams, and my own experience built up over the years working in the field, to help me. A recent example of this happening is mediating for a law firm for the first time and it being the partner's first experience of a non-lawyer mediator. Afterwards I asked how it had been for them and got an interesting answer – that it was very interesting because, as a non-lawyer, I hadn't taken sides! Another example is when I float a settlement figure in a mediation; it is not seen as my view of legal merits, whereas coming from a lawyer it would be hard to disentangle totally the legal merits from the establishment of any figure.

I have come to appreciate working with lawyers now that I have the confidence and experience to do so. I thank those who actively seek to use non-lawyer mediators like myself – it must have taken something of a leap of faith in the early days.

### Mediators' beliefs

*Confidence in myself is something I have.* That is, a confidence to cope with anything that might happen, which is built on a track record of surviving life thus far. We teach people on the Mediator Training course to expect those wonderful unanticipated 'googlies', because in real life you can have the client who literally cannot sit down because they are so wound up, the claimant who discloses yet another pregnancy at 3.05 after negotiating for three hours over a return to work

that would now clash with the next maternity leave, and so on. The confidence I'm referring to is that which enables a calm – *being in touch with a calm inner centre*.

*Confidence in the mediation process is something that I have.* Trusting the process itself is something that has grown strong over the years. I've seen it work in circumstances where a betting man wouldn't have placed a farthing. I've seen it work where parties start so far apart that they can't see each other, let alone talk. It has worked where neither of the two sides has entered the process with even a glimmer of hope and where one or other party has been determined that it won't work. I've seen it work where I know, looking back over the years to the early/mid 1990s, that I did a pretty 'novice' performance. Despite the issues, despite the clients, despite the legal teams and despite my input, it still works in the vast majority of cases. *Trusting it and conveying that trust to the parties is fundamental to giving the parties the best shot they can have at finding a resolution.*

These two, confidence in myself and confidence in the process, combine to give the parties a sense of being in 'safe hands'. I believe that that sense of safety contributes a great deal to the foundations and formation of a good working relationship with all parties in the mediation process.

### Overcoming blocks to build relationships

What happens when the relationship either really doesn't get off the ground or fails to survive through the process? I certainly wouldn't claim to have had perfect working relationships throughout the many mediations I've done. To examine those briefly and what they looked like, two things leap to mind.

The first is a phenomenon that I'm glad to say I've only come across twice – that of the solicitors actually taking 'in' the emotions of their clients. The impact of this has been that on the first occasion I was baffled because I didn't grasp what had happened. I found myself trying and failing to build a relationship with, on the one hand, the client and, on the other, their lawyer, each of them very much in those roles, and finding that the relationship with the client was roughly speaking 'as expected' but that with the lawyer was way off beam. The problem was that to all intents and purposes the client and the lawyer were one and the same – both as bitter and vengeful as the other. Neither was playing the one-step-back 'professional adviser' role. On the first occasion this happened, the process staggered on for a while and eventually hit the dust – I look back on it with sadness at my inability to recognise what was happening at the time and to deal with it. With hindsight I believe that confronting the issue head-on would have been the only possible way forward.

A second issue for me at times is that however careful I am about language and timing, the really tough messages that have to be got across in terms of expectation management, potential outcome, etc, cause

a chasm that I can only describe as remaining there for the rest of the process and across which the relationship then has to be carried on – in what feels like a 'dislocated' form.

I can think of a case with a litigant in person for whom I had to spell out the realities of his situation with the help of the lawyer on the other side and my assistant (also a lawyer). We did an exercise of 'taking a punt' about timing, range of potential outcomes and percentage chances. It had to be done and was done as carefully as could be and yet, maybe because this was the very first time that his expectations of a 'just' outcome being achieved through litigation were challenged, he didn't 'recover' during the rest of the day to any real engagement with the process or, by extension, with me as mediator. Interestingly it was later, through a continued e-mail dialogue, that we were able to rebuild a better rapport, despite my not managing to get him past his 'magic' or 'just' number and to a point where he could move on.

A second, memorable, case had something of the same reaction but this time happened in technicolour. It was a claim for several millions, involving a claimant with a reputation for aggression and for recording telephone conversations. He started with a serious 'charm' offensive, followed by tapping 'keys on the table' with a recording device attached. He raised threats to the defendants – both to firm and individuals – but he found they were not going to work and that his options, as we worked through them, were limited in both scope and monetary value. He spent time in the loo, time walking the streets, time berating his lawyer and myself and finally time with his ipod plugged into both ears. There was no settlement that night. A formal complaint to CEDR and a week more of contact, placing just one foot in front of the other, trusting the process and finally, via calls about options, God and several other topics, a settlement was reached at a fraction of what he had set out to achieve through bullying and intimidation of first the other side, and second me.

There are also mediations where I come away, after a settlement, feeling somehow that I've missed the mark in rapport terms despite the parties getting to a resolution. Does it matter? I don't know. I'm left with a slight taste in my mouth – only each party can know if it is the same for them.

### Compassion and mindfulness

*Compassion also seems fundamental.* I have lived through amazing personal mistakes and have managed to make peace with myself. It's taken a long time but I have learned to forgive myself too, and I think it is that self-acceptance and forgiveness that enables access to compassion. People we meet in mediations are usually in difficulties and the way they are at that time is not always easy to deal with. *Compassion makes the intolerable tolerable, the seemingly impossible possible.*

I'd like to mention something here that has helped me, I believe, in doing what I do as mediator in regard to both the relationships within the process and the content – the issues at stake. In spring this year I joined a group meeting at Serle Court Chambers to spend some time with a teacher of meditation. The subject was *mindfulness*. I should mention that Harvard now runs courses on Mindfulness and the Law. Maybe one day CEDR will field a course on Mindfulness and Mediation. There is enough in the topic to work for days and practise for years. Key things that have rung bells for me are ways of getting 'out of my head' – ways of not getting distracted by a thousand thoughts and an overload of information. The analogy is that of a cup of muddy water. The longer you stir it the cloudier it remains. The longer you keep it still, leave it undisturbed, the more the mud settles down and the water can be seen clearly.

Taking time out between meetings to allow the mind to clear often clarifies the next move, how to tackle the next stage, how to respond to a particular party or what is important to them at this moment without that stemming from conscious, wrestling, decision-making. It is just clear. Taking that 'mindfulness' into the active engagement in the mediation process too creates some real freedom from the '*musturbation*' of '*I must get a settlement/I must find a way for these parties to settle*'. It really does enable the mediator to give responsibility for

achieving an outcome to the parties.

Mindfulness is impartial watchfulness. It does not take sides. It does not get hung up on what is perceived. It just perceives. It is present-moment awareness. It takes place in the here and now. It is the observance of what is happening, right now, in the present. *Mindfulness is non-conceptual awareness*. It is not thinking. It is non-egotistic alertness. What more could one ask of a mediator?

When I delivered the thoughts in this article at Herbert Smith in September this year at a CEDR Exchange Forum, I worried whether some of this would be seen as a bit too whacky. So in Herbert Smith's reception I was delighted to read in their brochure that they already have a 'contemplation room' available – so, just maybe, I'm on the right track!

#### To summarise

I believe the relationship between the mediator and the parties – both legal teams and clients – rests to a large extent on the mediator being present at all times in the process. For me that means being at home in myself, undistracted, and being able to call on the all of me to work with and among my fellow men and women within a process that I trust.

# Corporate Social Responsibility

## The Corporate Governance of the 21st Century



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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 director's 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 toward 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.

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

## UNITED KINGDOM

**Getting the right result\*****Hilton Mervis***Partner, S J Berwin, London**hilton.mervis@sjberwin.com*

Hilton Mervis gives some practical tips for succeeding at mediations and explores the importance of appreciating the role of the mediator in practice

It is somewhat ironic that mediations today are reminiscent of the days when preparedness and outstanding advocacy could alter the outcome of a trial to a much greater degree than is now possible. The heavily regulated CPR environment in which trials operate contrasts with the far more relaxed approach practitioners take, at their peril, in preparing for mediations. Yet to draw false comfort from the fact that it is a voluntary process is to ignore the powerful and often (to the lay observer) inexplicable capacity mediation has to achieve settlement even in the face of unwilling participants.

At trial, a case is being judged by someone experienced in balancing the impact of good advocacy and preparation. By contrast, while mediation has no third-party judge deciding the outcome, the role of the mediator is wider than the traditional descriptions suggest. The mediation training providers go to great lengths to emphasise that it is a non-judgmental process, yet in practice all effective mediators either directly (albeit in diplomatic terms) or indirectly (through body language and the nature of the questions asked) let their views on the merits be known. How can such mild (and, as some would argue, untraceable) indications produce such a powerful outcome? The analogy with homeopathy perhaps comes to mind – a mild and diplomatic dose can often be more effective in helping a party realise the problems they face than traditional methods.

Given that the power to decide settlement is often in the hands of a lay client (and often a cautious lawyer being made to account for advice given during the process) rather than a trained judge, there is enormous scope for proper preparation and effective techniques to produce an improved outcome. Perhaps, with the increasing paperwork in High Court proceedings, we can, in fact, celebrate the return of the advocate – the mediation advocate – albeit that the skills and approach is different.

**Theoretical thoughts**

Essentially, the mediation community is generally united (in the United Kingdom at least) in taking the view that

it is a non-judgmental process – the mediator is not there to tell the parties if their case is strong or weak, but to assist them in facilitating a settlement which they are prepared to accept and/or in reaching their own view on the legal and moral merits. In practice, however, the skilled and effective mediator will be direct in making it clear that there may be serious problems with a legal argument or approach. In doing so the effective mediator will try not to be seen to be judgmental or partisan. It is because of this ‘packaging’ that the mediator retains the trust which results in such observations being more effective.

The emphasis in mediation is on the mediator looking at the causes of the conflict rather than the symptoms. Christopher Moore, in his book *The Mediation Process: Practical Strategies for Resolving Conflict* (second edition, 1996), sets out a lucid theory of how different conflicts arise at different levels. In essence, the process of mediation assists the parties in identifying and reducing these different conflicts. At one level there are ‘data’ conflicts – one side not understanding the facts or not having access to them.

At the other extreme one might have value conflicts with each party having its own view on good and bad conduct. There are a variety of ways in which a skilled mediator can help the parties overcome or reduce these conflicts – or, indeed, give them adequate weight in terms of coming to a resolution of the dispute. Another classic way of seeking the resolution of conflicts is to look at the positional demands of each side and try to move the parties away from their irreconcilable stances by having them focus on their interest (or their needs).

In order to be a successful mediator or mediation advocate one must be conscious of all these different strands that make up disputes and cause them to escalate, and the psychology of bringing about a state in which the parties are prepared to end conflict. Dean Pruitt and Jeffrey Rubin, in *Social Conflict: Escalation, Stalemate and Settlement* (1986), viewed a number of factors which made parties less likely to turn their problems into disputes. These included the extent to which a party is prepared to take risks and endure conflict, and the extent to which they value conduct

which is relevant to the outcome (ie doing the right thing). This must be taken together with a 'perceived feasibility perspective' – most people tend to have a keen eye on whether their designated course of action is likely to succeed and the costs of taking that action.

What these theories demonstrate (and there are many more) is that almost every facet of human interaction could have some bearing on two parties agreeing to start taking steps to settle. This includes the presence and perceived view that the non-evaluative mediator has on the case, and against this background it is all the more important for successful mediation advocates to enhance their prospects of winning over the mediator and also not neglecting the strict legal merits.

### **Practical tips for success**

Against this background some salutary lessons may be drawn from mediations which the author has participated in. The facts have been modified to protect the identity of the parties.

### **Is it just a question of trusting the mediator?**

There are many theories which abound on negotiation strategy (ranging from those who start off with a high number and then move rapidly down, to the theory of making incrementally higher offers if rejected) and on evaluating rational settlements based on risk analysis. Among all these interesting theories, it is sometimes forgotten in the heat of the mediation that, on the assumption that both sides are willing to settle, each is, in fact, seeking to ascertain rationally at what level the other side ought to settle and at what level it is actually willing to do so.

When one adds to this the concept of a mediator whose primary objective (although many mediators would deny this) is, in practice, to achieve settlement, it does become very important to read the body language of the mediator. If relaying in confidence to the mediator that you are prepared to accept an undisclosed low sum as your bottom line, this will obviously not be relayed to the other side. But many mediators will factor that in to their approach to the mediation, and one does risk the mediator, in quite legitimately carrying out their function, adjusting their approach to the other side.

The question which arises is whether it is always in the interest of your client to disclose its ultimate bottom line in confidence to the mediator, given that it may subliminally impact on their (ie the mediator's) approach. By the same token, it is often important to discount what the mediator relays in terms of the other side's approach and reaction to proposals. This strategy has been evidenced in a number of mediations.

### **Isolation**

There might be many mediations where it is necessary to keep the parties apart in order to facilitate settlement.

There is, however, a tendency of mediators to minimise contact, and for mediation advocates not to appreciate that it may be in their clients' interest to persuade the mediator to enable face-to-face meetings. In one particular fraud case it proved very effective to make the claimant face the defendant across the table together with the professional advisers he would need to implicate in the fraud.

In practice, the mediator kept the parties apart far too long so that the mediation was in danger of becoming a series of exchanges relayed by human carrier rather than written form. It should also be borne in mind that while it is helpful to the mediation process for you the mediator to be with your clients, generally when they are with the other side they will be increasing your clients' chances of settlement.

### **Authority to settle**

Current practice is that a party does not need to have unlimited authority, particularly where there is a representative of a company present. This is sometimes combined with the option of obtaining further authority by telephone. One of the biggest dangers to a level playing field is the absence of the ultimate decision-makers. The magic of mediation can work – but not telepathically – and it is extremely important to be conscious of when a party is negotiating against a pre-set limit.

In a recent example it was ironic that a government department effectively reneged on a settlement by stating that the settlement reached by the representatives at the mediation was not adequate to fulfil their objective criteria.

### **What is in a room with a view?**

In a recent mediation the parties representing one side were placed in a very small room. Over the course of the all-night mediation, this proved a factor in leading to the party getting to their bottom line quicker as fatigue and the uncomfortable surroundings played their part.

It is important to ensure that it is agreed that the rooms will be suitable or of equal size or that the party hosting will allow the other side to choose the room.

### **Should you try to insist on the mediator?**

*A battle over mediators – one side insisting it wants its particular mediator*

Given that it is a process where the mediators do not determine the outcome in a legally binding way, it is possible that it is an advantage to mediate with the other side's choice. If it has respect for the mediator, it will no doubt be more likely to be influenced towards compromise (which may be the mediator's primary objective to engender) and also to take account of any unintended relaying of advice on the legal and moral

merits by the mediator. Conversely, knowing your mediator can, on occasion, be as important as knowing your judge in ensuring a successful outcome for your client.

### **Body language in open sessions**

Mediation is often about the best deal on the day, sometimes shortly thereafter. In one example, after a heavy private session at which the mediator had informed the parties that the other side had no prospect of moving away from what had been described as a deadlock, the other side came into the joint session in good spirits (in-house lawyer, commercial client and external law firm). Such external antics must be treated with caution. However, in this case, unless one took the view that the other side did not care whether settlement was to be reached (which was not the impression they were seeking to relay), it would be correct to suspect that they were prepared to improve their offer significantly. It is therefore important that demeanour and negotiating position are not at odds – generally, no one is happy at a failed mediation and if that is the true position, be careful about looking too joyous. The case went on to settle for a much higher figure than otherwise suggested by the mediator.

### **Accepting too quickly**

In open forum the mediator suggested that both sides might wish to consider how they would feel if they settled halfway between each side's offers. Without further reverting, the client on one side blurted out that this would be acceptable. This conduct ought to have signified desperation on the part of the client and simply moved the negotiation to a different starting level.

In fact, it so startled the other side that settlement took place at this level, also signifying that either they would have paid more or they perceived they could hold a deal obviously not approved by the lawyers. It is generally a good idea for clients not to indicate acceptance or otherwise of proposals without considering in private session how the proposal would appear to the other side in the context of the mediation.

### **Dangers of detailed risk analysis charts**

The mediator favoured a detailed risk analysis flow chart. All parties bought into the logic – after all, it was an entirely logical chart. The problem was that, from a negotiating perspective, such flow charts can have the effect of weakening the perceived merits of a claimant who needs to prove more than one element of the case. The logic is that if you perceive you have a 60 per cent chance of proving ground one and then a 60 per cent chance of proving a second ground your overall prospect of success is 36 per cent.

In reality the two risks may not be linked in that once

one has been established, it is likely that the judge is travelling in your direction. Even if they are not linked, the reality is that a better negotiating stance is to keep the generalised position that your client has the better of the case no matter how many separate hurdles there are to overcome. The practical advice is that one should not buy into or accept the weight of such analyses unless they suit your client's position.

### **Do not be hesitant to get a legal sticking point resolved**

It became clear in a case that the parties were genuinely taking a fundamentally different view over a critical legal issue. There was no point negotiating against such an obstacle: adopt a flexible approach and call in the barrister whose opinion the party concerned was quoting and relying on. Through a combination of private and joint sessions it emerged (to the clients on both sides) that the advice was not as robust as considered, and indeed was mistaken. Alternatively, offer an issue to be determined by an independent counsel of their choice. Do not consider that if the other side genuinely has a demonstrably mistaken view of the law you should not take steps to get it addressed even if it is not seen as a fashionable approach to take.

### **Follow through with any threatened action**

Finally, and most importantly, one ought never to make threats that cannot be carried out, nor should one allow clients to do so. The mediation advocate's ability to establish trust with the mediator, and indeed the other side, is the paramount catalyst for settlement.

### **The inexplicable desire to settle**

The most fascinating aspect of mediation for many practitioners is how it is that parties can genuinely be set against settlement and yet at mediation suddenly change their approach. The reasons can be varied and are no doubt complex. The party could be deluding itself or, alternatively, misleading its own lawyers as to its intentions. Or it could be the process working its magic – enabling parties to find solutions that save face and empathise with the other side.

When one considers the combination of a party having its faith in the legal basis of its case challenged combined with the cocktail of non-legal factors mediation brings into play, it is, in fact, unsurprising that settlements are reached in unexpected circumstances. Against this backdrop it is clear that preparing for a mediation in a manner reminiscent of trial (but, crucially, conducting the mediation advocacy with the values of mediation at the forefront – constructiveness, creativeness, empathy and a willingness to listen and work towards a sensible resolution in the circumstances) maximises the chances of success.

It is the role of the good mediation advocate to ensure

not only that the client is satisfied, but also that the mediation has been conducted in such a way as to maximise its chances of getting an objectively good result. In order to achieve this, the mediation advocate should not underestimate the importance of developing the trust and respect of the mediator. In addition, preparation and the ability to deal with points of law and issues of detail can reap greater rewards than the same

effort at a trial – the reduction of animosity and other barriers to settlement combined with fresh doubts on the strength of a party’s case can increase the desire to compromise exponentially.

**Note**

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