

NEWSLETTER

MEDIATION



the global voice of
the legal profession

INTERNATIONAL BAR ASSOCIATION LEGAL PRACTICE DIVISION

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FROM THE CHAIR

Wind-up for the Windy City

John M Townsend

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I am pleased to inform all of the members of the Mediation Committee that the level of interest in the committee remains high. For 2006, the first full year for which a separate charge has been made by the IBA for Mediation Committee membership, over 1,000 IBA members joined the committee, making this one of the largest committees in the IBA in what is only our second year. All of the officers of the Mediation Committee join me in thanking our members for your confidence and support.

You will be interested to know that the Mediation Committee is planning an ambitious programme for the second annual meeting of the IBA in which we will take part as a committee. That meeting will take place in Chicago, Illinois, from Sunday, 17 September to Friday, 22 September 2006.

First, on Monday morning, 18 September, the Dispute Resolution Section of the IBA (of which the Mediation Committee forms a part) will be presenting a section programme on 'The state of dispute resolution in today's world'. The programme, for which the Mediation Committee's liaison is Vice-Chair Petria McDonnell, will undertake the adventurous enterprise of inviting non-lawyers to comment on how disputes are resolved, while providing some opportunity for lawyers either to defend the various systems of dispute resolution or to join in the attack.

On Monday afternoon, the Mediation Committee will co-sponsor a programme with the Litigation Committee on 'Mediation in the court

Continued overleaf

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process'. The programme, for which the Mediation Committee's liaison is Babak Barin, will focus on how courts are using and might better use mediation to resolve disputes pending in the courts, and on whether parties to such disputes should be compelled or merely invited to try mediation.

On Thursday, 21 September, the Mediation Committee will present its first all-day programme on the subject of 'Mediation as a management tool', co-sponsored by the Corporate Counsel Forum. The programme will explore the various ways that mediation can be useful to the lawyer managing business disputes. The first segment, occupying the morning portion of the programme, will concentrate on mediation as a means of managing long-term relationships. It will commence with a role play to illustrate the mediation of a joint venture dispute, organised by Mediation Committee Treasurer Helena de Backer and including distinguished European and American practitioners and mediation service providers. The role play will be followed by a commentary on the joint venture mediation chaired by Vice-Chair Thierry Garby, including a leading mediator and a well-known academic expert in the field.

The afternoon session of 'Mediation as a management tool' will lead off with a discussion of Mediation as a cost-containment device, chaired by Vice-Chair Siegfried Elsing, with participation from distinguished company counsel, European advocates, and a leading mediator. That panel will be followed by an innovative exploration of Mediation as good corporate governance, chaired by our Corporate Forum Liaison David Burt, in which a leading mediation service provider will discuss with eminent American and European company counsel how and why mediation can be integrated into a corporate culture.

Before the all-day session on Thursday, the Mediation Committee's Subcommittee on the UNCITRAL Model Law on International Commercial Conciliation, chaired by Babak Barin, is planning an 0830 meeting of the subcommittee to discuss the status and progress of that model law.

Closing out a busy Thursday, the Mediation Committee is planning an informal gathering of young lawyers on Thursday evening. Young lawyers interested in becoming involved with the committee and in meeting other aspiring mediation practitioners are invited to come to the Bella Lounge (directions and other details available at www.bellalounge.com/home.html) at 2200 hours); no proof that you are young enough to attend will be required. Please contact Jim Boykin, the Mediation Committee's liaison to the Young Lawyers' Committee (boykin@hugheshubbard.com) if you have any questions about this event.

The week will close 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 our liaison is Publications Officer Jon Lang, will use a hypothetical patent licence dispute to illustrate the various mechanisms available to help resolve disputes over intellectual property.

In addition to programme planning, the Mediation Committee has been participating in the Dispute Resolution Section's Scholarship Programme, which is intended to fund two scholars to attend the IBA Annual conference by making a contribution towards travel and accommodation expenses, a waived registration for the Conference, two years' free membership of the IBA, and the waiver of a registration fee to either the next IBA Annual Conference or one of the Section's committee specialist conferences held the following year. Mediation Committee Secretary Dushyant Dave has led the committee's participation in that programme and the judging of the papers submitted.

Finally, I wish once again to thank Publications Officer Jon Lang for his continuing efforts to produce this newsletter, which is now widely recognised as the best publication in existence devoted to international mediation. The committee owes much of its public recognition and membership support to the success of this newsletter, which is entirely Jon Lang's work.

On behalf of all of the officers of the Mediation Committee, we thank all of you for your participation in the committee's work and hope to see you in Chicago.

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 – pushing the boundaries

Jon Lang

Publications Officer, Mediation Committee; Independent Commercial Mediator, London

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We have a tremendous variety of topics covered in this edition of the Mediation Committee Newsletter. In the past we have had articles that look at the hybrid process of Arb–Med or Med–Arb and also ‘deal’ mediation. In this issue we publish a fascinating account of an actual Arb–Med process, contributed by Michael Leathes of BAT, which was used to great effect to accelerate and conclude a commercial negotiation, rather than to resolve a dispute.

Use of mediation in the highly specialised world of investment treaty arbitration is examined by Barton Legum (who served as lead counsel for the US Government’s defence of international arbitration claims under the investment chapter of NAFTA), and Antony Dutton and Daniel Perera look at mediation as a cost-containment device in litigation, concluding that perhaps it’s time to think about promoting the use of ADR in international arbitration as well.

In December 2005, the UK’s ADR Group invited young legal professionals under the age of 36 to enter their inaugural ADR writing competition. The objective of the competition was to promote greater interest in, and understanding of the field of dispute resolution, and mediation in particular. Tristan Jones, who is currently undertaking the Bar Vocational Course in London and who will be joining Blackstone Chambers next year won first prize – a trip to attend the ABA Spring Conference in Atlanta, Georgia for his essay entitled, ‘Using costs to encourage mediation: cautionary tales on the limits of good intentions’. The essay explores developments in the USA where certain States have some form of legal requirement that parties attend mediation, contrasting the position to that which exists in England. It is an excellent piece of work and I am pleased to say that we have been given permission to publish it in this edition of the newsletter.

Paul Jacobs QC looks at a recent Canadian appeal court decision on confidentiality. The decision, overturning the court below which ordered a mediator to give evidence, is an important re-statement of the importance of confidentiality as a crucial cornerstone of mediation. Also from Canada we have an article by Barry Leon and Dale Barrett who describe the new British Columbia Apology Act which took effect earlier this year and which provides a safe harbour for apologies.

Also, we have a useful introduction to mediation in Bermuda from Michelle St Jane and a mediation update from Germany by Gerhard Wegen and Christine Gack who look at recent developments on the issue of obligatory mediation in the German court system.

Sebastian Rodrigo describes the new extension of the mediation regime in Argentina and Amanda Bucklow gives a personal view on what she sees as some worrying trends in the English mediation sector; the article beginning with the building of the city of Rome by the Etruscans 2,700 years ago! There is also published in this edition of the newsletter a paper presented by me at the Third Annual Asian IP Law & Policy day, which took place in New York in April of this year.

We are now preparing for Chicago and John Townsend’s Message from the Chair describes the huge contribution the Mediation Committee is making during this year’s annual meeting. We hope you will all join us there. For those that are attending and who are interested in mediator skills training, the ICDR are hosting a three-day training symposium (on mediation) immediately prior to the start of the annual meeting. Full details of this event appear on page 40.

Finally, I am once again soliciting contributions for the next issue of the newsletter to be published in December. I will send a formal ‘call for articles’ shortly but of course if in the meantime parties wish to send contributions they should, as usual, be directed to me, in editable form, at jl@jonlang.com.

Many thanks for your continued support and we look forward to seeing you in Chicago.

Jon Lang



CHICAGO 2006

International Bar Association Conference 17-22 September



The Mediation Committee is planning to hold the following sessions at Chicago, 17-22 September 2006.

Mediation in the court process

Joint session with Litigation.

Session Co-Chairs

Babak Barin *Woods LLP, Montreal, Quebec, Canada; Chair, Model Law*

Richard Johnston *Wilmer Cutler Pickering Hale and Dorr LLP, Boston, Massachusetts, USA*

Barry Leon *Torys LLP, Toronto, Ontario, Canada*

Disputes being litigated in court will be mediated more often in the future. An increasing number of jurisdictions encourage or require mediation. This programme will survey how courts are involved in mediation and will consider best practices and key issues:

Should mediation be mandatory in all or some cases? At what stage of litigation? What is most cost-effective? Who should be the mediator? Is mediation useful at the appellate stage? What types of judicial 'encouragement' to mediate are appropriate and effective? Are there inherent differences between common and civil law systems? What are the views and experiences of the participants – in-house counsel, advocates, judges, mediators and policy-makers?

This session will comprise two presentations outlining the range of issues in relation to mediation in the court process, followed by a moderated panel discussion among 'commentators' about mediation in courts around the world.

Speakers

Marezbán Bharucha *Amarchand Mangaldas Advocates & Solicitors, Mumbai, India*

Ronald Bradbeer *Eversheds LLP, Newcastle, England*

Sally A Harpole *Sally Harpole & Co, Hong Kong SAR; Senior Vice-Chair, Arbitration*

Robert Hunt *Garfield Barwick Chambers, Sydney, New South Wales, Australia*

Karl Mackie *Centre for Effective Dispute Resolution, London, England*

Oswaldo Marzorati *Allende & Brea Abogados, Buenos Aires, Argentina; LPD Council Member*

The Honourable Sidney I Schenkier *Magistrate Judge, US District Court, Chicago, Illinois, USA*

Rolf Trittman *Freshfields Bruckhaus Deringer, Frankfurt am Main, Germany*

Eric E Van Loon *JAMS, Boston, Massachusetts, USA*

The Honourable Justice Warren Winkler *Ontario Superior Court of Justice, Toronto, Ontario, Canada*

Aleš Zalar *District Court Judge, Ljubljana, Slovenia*

1400 – 1700 MONDAY

Mediation as a management tool

Joint session with the Corporate Counsel Forum.

Session Chair

John M Townsend

This programme will explore how businesses can use the mediation process:

- to manage disputes arising in the context of long-term relationships;
- to contain and manage the costs of litigation and arbitration; and
- as part of an integrated approach to dispute management and as part of good corporate governance.

Mediation of disputes in long-term relationships

Co-Moderators

Thierry Garby *Garby Vialars Dupas, Paris, France; Vice-Chair, Mediation*

Helena de Backer *De Backer & Bastin, Brussels, Belgium; Treasurer, Mediation*

The first part of this session will use a role play to illustrate how mediation can be used to manage disputes arising within a joint venture relationship.

Participants

Helena de Backer

Mark Appel *International Centre for Dispute Resolution, Dublin, Ireland*

Jose Antonio Rodríguez Márquez *Bufete Rodríguez Márquez, Mexico City, Mexico*

Jorge Verissimo *BFV Sociedade de Advogados, Lisbon, Portugal*

Andreas Reiner *Andreas Reiner & Partner, Vienna, Austria*

Salli Swartz *Phillips Giraud Naud & Swartz, Paris, France; Newsletter Editor, International Sales*

David Jacoby *Schiff Hardin LLP, New York, USA; Senior Vice-Chair, Litigation*

The second part of the session will be a panel discussion among the following:

Thierry Garby

Frank Carr *Carr Swanson & Randolph LLC, Ellicott, Maryland, USA*

Thomas J Stipanowich *Pepperdine University School of Law, Malibu, California, USA*

Mediation as a cost-containment device

Moderator

Siegfried H Elsing *Hölters & Elsing, Düsseldorf, Germany; Vice-Chair, Mediation*

This session will focus on how mediation can be used as part of a corporation's dispute management planning to contain the costs associated with either full-scale litigation or full-scale arbitration of business disputes.

Participants

Siegfried H Elsing

Christian Duve *Freshfields Bruckhaus Deringer, Frankfurt am Main, Germany*

Michel Kallipetis QC *Littleton Chambers, London, England*

Richard L Krzyzanowski *Crown Cork & Seal Company Inc, Philadelphia, Pennsylvania, USA*

Dana G Nahlen *Electronic Data Systems Corporation, Plano, Texas, USA*

Mediation as an element of good corporate governance

Moderator

David H Burt *E I du Pont de Nemours and Company, Wilmington, Delaware, USA; Corporate Counsel Liaison Officer, Mediation*

This session will focus on how the objectives of good corporate governance can be furthered by integrating the concept of mediation into how a corporation is structured and how its disputes are managed.

Speakers

David H Burt

P D Villarreal *Schering Plough Corporation, Kenilworth, New Jersey, USA*

Roland Schröder *General Electric Company, Fairfield, Connecticut, USA*

Jean-Claude Najjar *GE Commercial Finance EMEA, Paris, France; Co-Chair, Corporate Counsel Forum*

F Peter Phillips *The International Institute for Conflict Prevention and Resolution, New York, USA*

0930 – 1700 THURSDAY

Dispute resolution mechanisms for IP-related disputes

Joint session with Arbitration, Intellectual Property and Entertainment Law and the InterAmerican Association of Industrial Property (ASIPI).

Session Co-Chairs

Eric van Ginkel *Los Angeles, California, USA; Senior Vice-Chair;*

Intellectual Property and Entertainment Law

Philipp Habegger *Walder Wyss & Partners, Zurich, Switzerland; Vice-Chair, Arbitration*

The use of mediation, arbitration and other forms of alternative dispute resolution to resolve disputes involving intellectual property issues has been increasing in recent years. In this session, a panel of experts will examine the use of mediation and arbitration in IP-

related disputes, how specialised rules (such as the rules adopted by WIPO and the American Arbitration Association) and legislation (such as the US laws promoting arbitration of patent-related disputes) can benefit the resolution of such disputes, and what pitfalls to watch for when drafting a dispute resolution clause in a patent, trademark or copyright licence agreement.

Using a hypothetical case involving the alleged breach of a patent licence agreement, the panel will explore, debate and role-play the possible handling of such a dispute, both in a mediation and in an arbitral proceeding. The session will examine particular issues IP lawyers are concerned about, such as challenging the validity of the patent in ADR, the use of experts in mediation and arbitration and discovery issues.

Speakers and Panellists

Jon Lang *London, England; Publications Officer, Mediation; Independent Commercial Mediator, London*

Ulrich Lohmann *Von Boetticher Hasse Lohmann, Munich, Germany*

Luis Martinez *International Centre for Dispute Resolution (ICDR), New York, USA*

Johannes Christian Wichard *World Intellectual Property Organisation (WIPO), Geneva, Switzerland*

Christopher Gibson *Suffolk University Law School, Boston, Massachusetts, USA*

Fernando Triana *Triana Uribe & Michelsen LTDA, Bogota, Colombia*

Andrea Mondini *Schellenberg Wittmer, Zurich, Switzerland*

Arif Hyder Ali *Fulbright & Jaworski LLP, Washington DC, USA*

Luis C Schmidt *Olivares & Cia, Mexico City, Mexico*

0930 – 1230 FRIDAY

Dispute Resolution Section

The state of dispute resolution in today's world

Session Chair

Klaus Reichert *Law Library, Dublin, Ireland; Vice-Chair, Litigation*

Civil litigation is still something any sensible person should look at with horror at the possibility of being involved in.

Lord Phillips, Lord Chief Justice of England and Wales

This session will involve a robust debate on civil dispute resolution – the approach of lawyers, judges, legal systems and clients will be critically examined and appraised.

Speakers

Katherine Gurun *JAMS, New York, USA*

Jan Paulsson *Freshfields Bruckhaus Deringer, Paris, France*

Jacques Buhart *Herbert Smith, Paris, France*

Adrian Winstanley *London Court of International Arbitration, London, England*

Jonathan Schiller *Boies Schiller & Flexner LLP, Washington DC, USA*

Dan K Webb *Winston & Strawn LLP, Chicago, Illinois, USA*

0930 – 1230 MONDAY

ARGENTINA

New extension of the mediation regime: a necessary decision

Sebastián C Rodrigo

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On 16 May 2006 the National Congress enacted Law 26,094 extending the application of the mediation process in the city of Buenos Aires for another two years.

To understand the importance of this resolution, it would be convenient to refer to the background of this legal tool in Argentina.

The mediation process as an alternative dispute resolution method was introduced in our legal system by Law 24,573 enacted on 4 October 1995. However, mediation was almost unknown by many litigators, and there were many uncertainties regarding the success of this new process.

The Law provided that civil and commercial disputes arising within the jurisdiction of the city of Buenos Aires (exclusively) shall undergo an out-of-court proceeding as a necessary prior stage before judicial proceedings. This prior proceeding became mandatory for almost any claim brought before a court except in the following cases:

- criminal law matters;
- divorce, marital separation or nullity, and other family law matters (excepting those related economic matters);
- precautionary measures/injunctions;
- preliminary measures for evidence purposes;
- estates; and
- labour matters.

The mediation procedure was optional for the plaintiff in the following cases:

- summary proceedings; and
- eviction.

The Law also introduced a very important amendment in the civil and commercial process, since it set forth a new step between the filing of the claim and response by the defendant, and the discovery period. Pursuant to the new legislation, the court shall call a conciliation hearing before discovery is commenced, for the purposes of meeting with the parties and their legal counsel. The attendance at such hearing is mandatory and is, in principle, conducted directly before the judge who is responsible for the case (although sometimes it is before a court clerk and not the judge). The parties briefly explain their position in the case, indicate the facts and

law in support of their position, and propose a solution to the dispute. If the case is not settled, the judge will then continue with the proceeding, admitting or rejecting the evidence proposed by the parties. Therefore, the proceeding will continue in the same manner as it would have done before the amendment to the Law.

The original version of the mediation process provided only for mediators to be appointed by the Court of Appeals, and thus excluded the possibility of appointing private mediators. However, for purposes of expediting the process of mediation, since Decree 91/98 of the Executive Power ruling Law 24,573 1998 private mediators (not appointed to the case by the Courts of Appeals) were entitled to mediate for parties, and such participation is allowed in the same manner as it would be for any judicial mediator.

In relation to professional fees, mediators have always been entitled to fixed fees set by law. In all cases the amount was determined having regard to the amount of the claim. Notwithstanding successive increases in the amount of the fees, they are still below what in our opinion would be a fair reward for the activity conducted within a mediation process. This is a pending matter that should be resolved by Congress for the purposes of ensuring the success of this process.

After the enactment of Law 24,573 in 1995, the mediation process – only applicable to cases in the city of Buenos Aires and for civil and commercial matters – also began to be applied to other legal proceedings (ie labour law cases), and the expectation of the legal community in Argentina was that the rest of the jurisdictions (other than the city of Buenos Aires) would also introduce this useful tool into their own procedural legislation. Unfortunately, after more than ten years (from the enactment of the Law 24,573) almost no provincial judicial system provides for mandatory mediation prior to the judicial stage.

The reason for this is not really clear. At this point it is beyond question that mediation improved and definitively expedited the resolution of disputes that would otherwise have faced years in court. And it should be mentioned that the particular characteristics of a

dispute, such as the amount of the claim, number of parties involved etc appear to be irrelevant to the success or otherwise of mediation. When the parties are willing to conclude the case, mediation will usually work.

Mediation represents a valid alternative to avoid the judicial process given the problems that any party might face litigating before Argentine courts: timing, bureaucracy, expenses, etc (which in fact are common obstacles in judicial process in almost all South American jurisdictions). That is why the decision of the Congress to extend the applicability of the mandatory mediation process before the judicial stage should be seen as a wise decision, consistent with the necessity of our legal system to expedite the resolution of disputes.

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ASIA / UNITED KINGDOM

Resolution of IPR disputes in Asia: litigation, arbitration or mediation?*

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In an increasingly competitive world, the ability of businesses to realise, protect and exploit their intellectual property (IP) is crucial. A vulnerable IP portfolio can undermine the growth and value of a business whereas a well-protected IP portfolio is likely to have a positive effect on its market valuation. IP, or more particularly the way it is managed and protected, is becoming more and more important in the world of corporate finance. Patent protection for core products of a target company is a crucial consideration for an acquirer of its business. So too might be the IP licensing strategy of a business whose income is dependent on future royalty streams and which hopes to go public, or perhaps raise low-cost secured debt on the basis of those future royalty streams.

There is now a huge global focus on IP and no more so than in Asia, one of the world's most dynamic regions with its increasing intra-regional economic activity and huge consumer and industrial markets. Indeed strong IPR regimes are increasingly recognised around the world as important factors for economic development and growth, promotion of investment and encouragement of innovation. But a strong IPR regime requires effective dispute resolution procedures and this paper looks at the role of mediation in that context.

Whilst the title of the session for which this paper has been prepared asks whether 'Litigation, Arbitration or Mediation' is appropriate for the resolution of IP disputes, as an independent mediator with a practice focused on IP disputes, the more interesting and, it seems to me, important question is this – do parties, when it comes to the resolution of their IP disputes, prefer an adjudicative procedure ie a third party to determine the dispute, be it by way of a private tribunal (arbitration) or state-run courts (litigation), or do they prefer to try and resolve their dispute themselves by way of an assisted negotiation (mediation)?

Mediation – second-class justice?

Sceptics often refer disparagingly to mediation as second-class justice or compromised justice, or worse! But I think they are missing the point, gratifying as it might be to have the process of mediation elevated to such lofty heights that it can be compared, unfavourably or otherwise, to 'justice'. For the process of mediation

couldn't be further removed from 'justice'. Yes, it often takes place under the eye of the law or in the shadow of the law, but nothing much of the process resembles anything like the procedures that categorise a justice system at work. For one thing I, as a mediator, do not make a decision. I have no power to 'order' parties to do anything at all. And, significantly in terms of differentiators, I work for much of the time in secret. Parties share information with me, not just about their own position but that of their adversary, that will never see the light of day. An adjudicative process simply doesn't work in this way. Each party must hear and be given an opportunity to respond to submissions made by their opponents to a judge or arbitrator.

So, mediation is fundamentally different to the adjudicative processes of litigation and arbitration but there is no reason why mediation shouldn't work in parallel with an adjudicative procedure; until final adjudication, they are not mutually exclusive. In fact in the majority of IP cases that I mediate, litigation has already been commenced and the process of mediation is used as an adjunct to that litigation. I say litigation, because in many of the IP cases in which I am appointed, there is no contractual relationship between the parties. Therefore there can be no question of an arbitration agreement requiring the parties to arbitrate rather than litigate. Of course, once a dispute has arisen parties can enter into an agreement to arbitrate, but in infringement cases this is rare, particularly if immediate injunctive relief is sought, other parties may need to be joined or questions of validity are likely to arise. Even if there is a pre-existing contractual relationship between the parties, such as between licensor and licensee, or between competitors setting up a joint venture to exploit their respective IP portfolios, it does not follow that the parties will have agreed to arbitrate, as opposed to litigate, future disputes. However, where confidentiality is important as in know-how related agreements it is indeed usual for the parties to provide for arbitration in place of litigation. In fact when it comes to legislating in contractual arrangements for future conflict, it is becoming more and more common to find mediation clauses, followed by, in the hierarchy of contractual dispute escalation provisions (absent a resolution of course), either arbitration or litigation.

Adjudication or mediation?

The answer to this question depends on what it is you are trying to achieve. I would suggest that in the vast majority of IP cases, claimants can get what they need through mediation, and without running the risks of an adverse final determination by a judge or arbitrator.

Generally, a claimant will want the infringement stopped. Yes, it may well be in the public interest for there to be a judicial decision on the validity or scope of a particular IP right. Yes, a thorough examination of the merits of a dispute followed by a reasoned decision (in the claimant's favour of course) may be a welcome outcome. But usually a claimant just wants the infringement to stop, or a payment to be made in return for allowing the defendant to continue what would otherwise be an infringement. And a claimant usually wants to achieve this outcome speedily, inexpensively, with as little waste of management time as possible and, importantly, with the minimum of risk to either itself or its IP in terms of uncertainty of outcome. For these reasons, I believe that IP disputes are eminently suitable for mediation.

High stakes, limited outcomes

Usually IPR owners who pursue alleged infringers through litigation to final judgment, face one of two results – they prove infringement and the defendant is prevented, permanently, from carrying on the infringing activity. Or, because the defendant has, in response to being sued, challenged the validity of the IP right in question and succeeded, the claimant's rights are invalidated or narrowed thus enabling the defendant and, importantly, anyone else, to carry on the activity sought to be prohibited. Yet, so often, there is a whole spectrum of other outcomes that can be achieved by a negotiated settlement, either by simple negotiation or mediation, which are far beyond the outcomes achievable in an adjudicatory process and which achieve the primary aim of the IPR owner, (and perhaps more).

For instance, could a judge order a licence to be granted in return for a market rate royalty? Could a judge order that a coexistence agreement be entered into between owners of similar marks specifying, for instance, the kind of material or manufacturing process each is permitted to use on goods bearing the marks in question? Could an order be made providing for a cross-licensing arrangement between the disputants? Or for products of the defendant to be changed slightly in return for some small payment by the claimant? Or, in return for contractual undertakings not to carry on the allegedly infringing activity, that a defendant assists a claimant in some way, perhaps by the continued running of an allegedly infringing (but successful) website to the mutual benefit of both parties. The answer is 'No' to all of the above, yet these are the kinds of solutions that are negotiated every day in IP-related mediation, solutions

that are reached quicker and less expensively than any judgment from a court could be obtained, and which avoid the risks inherent in any adjudicative procedure.

Another advantage a mediated solution enjoys over an adjudication is in terms of the scope of matters resolved. Frequently competitors bump into one another in more than one jurisdiction and often IP litigation becomes multijurisdictional. I have mediated disputes where there have been trademark registry opposition and validity proceedings as well as court proceedings in several jurisdictions. In one dispute, we drew up a frighteningly long schedule of all the various proceedings ongoing in relation to the same mark. I only had to ask how much it would cost to fight on all these diverse fronts and gently enquire as to the risks of inconsistent findings, for the parties to embrace the process of mediation and work hard towards finding a negotiated solution. As it did in this case, mediation can resolve, in one global agreement, all extant proceedings, something a judge simply couldn't do. In short, the parties can achieve, by working together and keeping control of their own dispute, a much higher quality outcome than would be available from the courts.

So why not just negotiate?

If, in the majority of cases, it is preferable for the parties to do something other than ask a third party to decide their case, why don't they just negotiate rather than appoint a mediator? Well, not surprisingly, there are several good reasons.

First, a mediator can help break down the barriers that have been built up and which continue to increase in height and number as a result of adversarial proceedings. Legal proceedings tend to encourage parties to put their respective cases at their highest; there are no shades of grey. Claims are made and are met with absolute denial. The parties become more and more polarised with each letter seeking to advance one party's case, whilst seeking to destroy the opposing case. Often, in simple negotiation, a party will hear just enough of what the other side says about its own case to be able to shoot it down in flames. The skilled mediator can urge parties to actively listen, not just 'hear'. A mediator can encourage effective dialogue, courageous conversations and help understanding. This does not mean 'splitting the difference', 'carving it up', doing a deal regardless of cost or the parties losing control. Quite the contrary. It means helping the parties to effectively communicate with one another. If that means helping a defendant understand that there is little room for a claimant to compromise, so be it. There is not always a win – win outcome. But usually those on the 'lose' side of the equation will begin to appreciate during a mediation that a mediated solution is likely to be far less destructive than an adverse judgment from the courts.

Secondly, in a mediation, ideas can be floated by the

mediator that a party might not want to raise itself. This might be out of fear of ridicule, fear of giving rise to a perception of weakness, or fear of being unnecessarily inflammatory. For instance, in a recent breach of confidence case I mediated, the key to resolution lay in the resignation of a board member. That in fact suited all parties but it was not an idea that would have easily, if ever, seen the light of day had it not been for the process of mediation. Moreover, it is sometimes the case that an idea explained by a mediator has a greater chance of survival than if the very same idea was articulated by an opposing party. An alleged infringer wanting to enter into a manufacturing arrangement with a claimant IPR owner may be something best explored by the mediator first, in private, with the claimant!

Thirdly, and closely aligned with the preceding point, mediators can help with option generation. Licence arrangements, revenue sharing, payment for stock to be destroyed, face-saving climb-downs, press releases etc. When parties are in litigation, they tend to think about rights-based remedies. Often they dismiss other ideas they might have on the basis that the other side would never go for it. They are often wrong!

Fourthly, often in bilateral negotiation, given the sometimes high level of distrust and animosity that can exist between parties, as soon as a sticky patch is reached, the parties pack up and fall back on the process of litigation. A mediator can build traction, trust in the process and, ultimately, trust between the parties such that they both work through the difficult times. Often, when discussions on one element of a deal have stalled, I will suggest work on other elements. A breakthrough in one area often leads to a breakthrough on previously insoluble issues. A mediator can help mould the process of negotiation so as to give the parties the best possible chance of reaching an overall settlement.

There are several other advantages mediation enjoys over simple negotiation but one that I think is becoming more and more important lies in the efficiency of the process and, therefore, its relative cost. Mediation is a highly efficient form of negotiation. Principals, their negotiating teams, advisers and experts can spend a day or two together, brainstorming. Everyone is present that is needed for a decision to be made. Offers can be made, dismissed, counter-offers put forward, deals struck and the fine detail worked out all in the space of 24 or 48 hours. I have had parties tell me that the ground covered in a mediation could have taken months in traditional negotiation. And if a settlement isn't going to be possible, it is probably better to find that out sooner (at a mediation) rather than later.

Mediation and its limitations

There are very few situations where mediation would not be appropriate. If a claimant knows that any settlement simply won't be adhered to there is little point in bothering to mediate. If it is important to establish a

legal precedent or pursue a defendant to judgment by way of a deterrent, then again mediation may not be the right way to proceed. But the overwhelming majority of disputes, particularly IP disputes, are well suited to mediation, offering less expensive, speedier and more creative solutions than the alternatives.

Note

* Paper presented at the Third Annual Asian IP Law & Policy Day presented by Fordham University School of Law and the IP Academy of Singapore in New York on 19 April 2006.

BERMUDA**Mediation in Bermuda****Michelle St Jane***Barrister and Notary Public, KAIROS Philanthropy, Southampton, Bermuda*

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Britain's old colony, Bermuda celebrated its quinqucentennial in 2005 under the British flag. Bermuda is located in the mid-Atlantic and, contrary to popular opinion; the island is not part of the Caribbean chain of islands. Instead, Bermuda is an isolated archipelago of approximately 21 square miles with few natural resources, and is largely surrounded by reefs. Blown off course by storms, ill-fated mariners often found the reefs to be lethal impediments. Beleaguered mariners who survived the reefs, however, found Bermuda to be a sometimes necessary, even welcome, safe haven in their transatlantic travels over the centuries.

Until 2005, there were two statutes governing alternative dispute resolution in Bermuda: The Arbitration Act 1986, applicable to domestic arbitrations and following UK legislation, and the Bermuda International Conciliation and Arbitration Act 1993 which adopts the UNCITRAL Model law and applies to international arbitrations. Bermuda's judicial system is based on English common law and an independent judiciary.

Supreme Court

With the turn of the century there has been a move towards mediation and this has been reflected in the updates to the civil procedure rules by Chief Justice Ground.

The Supreme Court Amendment Rules 2005 came into effect on 1 January 2006 with the focus moving towards placing the parties on an equal footing, and managing the costs of litigation with a view to balancing expense in proportion to the amount of any potential award or outcome.

As with most courts there have been challenges that have resulted in a backlog of cases to be heard and ongoing delays. The judicial landscape now supports encouraging parties to access alternative dispute resolution and mediation to resolve disputes.

Use of mediation is not new to Bermuda courts

Bermuda has a Commercial Court to address both business and major international concerns. The commercial environment hosts 13,592 international companies and 2,961 local companies that include four international banks demonstrating the attractiveness of

Bermuda's political stability and excellent reputation as a business centre. Facilitating disputes through an alternative resolution route such as mediation will be appealing given the opportunity for the parties to the dispute to enter into a non-binding process that allows them the chance to craft a mutual solution that will be quicker and less expensive than litigation.

Magistrates' court

The Family Court has over 4,000 files and a very heavy schedule. The population of the island in 2000 was 62,059. The family court panel has been actively ordering parties to enter into mediation, where appropriate, to resolve issues and come to some consensus.

Human rights

The Human Rights Commission piloted a voluntary mediation programme in 2005 that has just completed its first year. Mediators were given training specialising in human rights.

Bermuda Government – inter-ministry initiatives

The Bermuda Government announced in the 2005 Throne Speech that the Ministry of Health and Family Services, in order to aid families during the difficult period of separation and divorce, will provide additional options such as family counselling and mediation, to be instituted through amendments to the Matrimonial Causes Act 1974. A proposal is being submitted by the Family Council to the Minister of Health in the near future.

Current trends

The local branch of the UK Chartered Institute of Arbitrators is hosting training in an effort to certify mediators locally to meet the needs of court-ordered mediation. There is a debate locally about the need to certify mediators and the pros and cons of this.

The views and opinions expressed in this article are those of the author and do not necessarily reflect those of the organisations for which the author works.

CANADA

Confidentiality in mediation according to the Divisional Court of Appeal

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Last year I wrote an article entitled 'Confidentiality in Mediation – Right or Risk'. That article examined some cases which had been decided in Ontario over the two years preceding the article. At that time I directed attention among other cases to the case of *Rudd v Trossacs Investments Inc.* In an interlocutory decision, the judge on a motion ordered the mediator to give evidence related to the mediation despite a mediation agreement containing a confidentiality clause and a non-compellability clause respecting the mediator's recollection and notes.

At that time, I was Chair of the Ontario Bar Association Section on Alternative Dispute Resolution and my Executive and I were sufficiently disturbed by the decision compelling a mediator to testify, that we took steps to have the Ontario Bar Association (OBA) seek intervenor status on an appeal which was filed.

In interlocutory matters in Ontario, the rules provide for an appeal to the Divisional Court. This court is composed of three judges of the Superior Court of Justice and is to all intents and purposes a Court of Appeal. It was necessary first, therefore, to seek leave for an order granting the OBA intervenor status and that motion was brought at the same time as the motion for leave to appeal to the Divisional Court.

Because of the importance of this issue, in the absence of statute or rule of practice at the time in Ontario, it was essential to have case law preserving the right of the parties to confidentiality in mediation. For that reason, I am setting out below the decision of Justice Howden granting leave to appeal and granting intervenor status to the OBA. His Honour notes that this is the first case dealing with the exception to mediation confidentiality.

7 March 2005

1) On motion by Ontario Bar Association, order to go in terms of para (p 2) of Notice of Motion for leave to intervene. The OBA is an organisation of lawyers, law students and judges with a genuine and substantial interest in the confidentiality and exceptions to confidentiality issues raised in this proposed appeal. This organisation, several hundreds of whose members are in the ADR section and all of whose members will or may be affected by

the outcome of this appeal, can make a useful and distinct contribution.

2) As to the Motion for Leave to Appeal, I find that the decision of Lederman J conflicts in the principles not applied where a confidentiality agreement is in effect and in the reasoning process and conclusions in *Porter v Porter* (1983), 40 OR (2d) 417 (UFC); *Davidson v Richman* [2003] OJ No 519 (SCJ); *Bard v Longevity Acrylics Inc* [2002] OJ No 1373 (SCJ) and *Pearson v Pearson* [1992] YJ No 106 (SCYTerr).

The principle applied by Lederman J derives from the 'without prejudice' rule and not from the strict analysis required by *Wigmore's* four fundamental conditions for confidentiality privilege, despite the sessions of mandatory mediation being subject to the confidentiality agreement.

It is desirable that leave be granted because any added exceptions to the confidentiality principle in mediation will arise again, and as compelling testimony by order is *per se* an interlocutory matter there is no other way for the issue to be determined.

In addition, I find that subrule (b) of 62.04 is also met. I do not necessarily believe that the decision in question is wrong but I have doubt in its correctness because it requires a mediator to in effect cast a tie-breaking vote in a case where he wrote the agreement during the latter stages of the mediation session with input from counsel. (See O V Gray, 'Protecting the Confidentiality of Communications in Mediation' (1998) 36 *Osgoode Hall LJ* 667; G Adams, *Mediating Justice* (2003) pp 299-300.)

The public importance of this (as the first decision re: exception to mediation confidentiality known to counsel who appeared before me) issue in respect of the expectation and significance of confidentiality in mandatory mediation is, I think, self evident.

As to Mr Pitch's undertaking not to question the mediator beyond one question – was Kaiser a party to the agreement? – the order appears to allow more and whoever 'loses' when the mediator answers, will have to insist on the full extent of the order.

Beyond these findings, where counsel and a legally-trained mediator draw an agreement and it is signed by or on behalf of all parties, and that was easily determinable at the session, it seems to detract from the

the Minutes of Settlement. Mr Kaiser's name is included, as he is one of the named defendants in the action.

[9] The terms of the settlement are handwritten and state:

The Plaintiffs William Crysedale, Peter Edwards, Martin Rudd & Gordon Sawa (the 'Plaintiffs') and the Defendants signing below agree to settle the within action and counterclaim on the following terms:

- 1.) Each of the Plaintiffs shall pay to the Defendants the amount of \$32,000.00 all inclusive of all claims, interest, costs, GST & disbursements payable to Paul Dollak in trust.
- 2.) The Plaintiffs and the Defendants shall execute mutual releases in a form satisfactory to counsel.
- 3.) The action & counterclaim respecting the Plaintiffs herein shall be dismissed without costs.

This was dated 28 January 2004, and the names of the plaintiffs were written in, and they signed.

[10] The names of the following defendants were in typed form, cut from another document by counsel for the defendants, Mr Dollak, and inserted: Trossacs Investments Inc, Fanlon Services Inc, Trossacs Associates, Kaimor Management Ltd, Trossa Holdings Inc and 645262 Ontario Limited. Mr Dollak then signed as counsel on their behalf. Mr Kaiser's name is not included among the signatories.

[11] A 'Settlement and Mutual Release' was executed separately by each of Mr Low's clients, including Ms DiCecco. For example, Mr Rudd signed on 12 February 2004, while Mr Crysedale signed on 16 February 2004. Both signatures were witnessed by Mr Low. The parties of the second part were the defendants named in the Minutes of Settlement. Mr Kaiser's name does not appear, although he signed each Settlement and Mutual Release on behalf of the named defendants.

[12] An order was obtained from the Superior Court of Justice dismissing the action against these same named defendants on 19 February 2004.

[13] On 5 March 2004, Himel J released her amended costs order from the summary judgment motion. In it, she reduced the costs payable to Mr Kaiser to just over US\$21,000.

[14] When counsel for Mr Kaiser sought to enforce the revised costs order, Mr Low alleged that he had made a mistake and never noticed that Mr Kaiser had not signed the settlement documents in his personal capacity. Mr Low then brought a motion seeking an order to compel the mediator to testify about communications at the mediation, for rectification of the Minutes of Settlement and for enforcement of the settlement.

[15] The motions judge, Lederman J, gave his decision on 8 July 2004, ordering that the mediator could be examined as a witness on the pending motion. At para 23 of his reasons, he stated:

Accordingly, an order will go permitting the examination of the mediator as a witness on the pending motion with the questions being limited to his knowledge and understanding, if any, as to

whether Kaiser was or was not a party to the settlement agreement that was arrived at in the mediation.

[16] The motions judge discussed the common law principle that settlement discussions are privileged. He also made reference to the parties' confidentiality agreement. He then went on to say that once a settlement has been reached and its interpretation is in question, it may be necessary to disclose mediation discussions to ensure substantive justice. However, he stated that privilege and confidentiality should not be lightly disturbed and continued at paras 20-22:

Some evidence must be adduced on the motion to demonstrate that the mediator's evidence is likely to be probative to the issue and that the benefit to be gained by the disclosure for the correct disposal of the litigation will be greater than any injury to the mediation process by the disclosure of discussions that took place.

In the instant case, there is evidence that the mediator himself drafted the minutes of settlement in his own handwriting with input from counsel and, therefore, is in a position to provide important information as to whether the minutes of settlement as executed are inconsistent with any prior oral agreement of settlement among the parties.

If, indeed, the omission of Kaiser's name from the minutes of settlement was mere inadvertence, as the plaintiffs contend, it would be of benefit to the court to have the evidence of the mediator on this issue in order to prevent a possible miscarriage of justice.

Any impairment to the mediation process would be minimal in this case.

[17] Leave to appeal this decision was granted by Howden J on 7 March 2005. He also made an order granting intervenor status to the Ontario Bar Association.

The issues

[18] The Appellants argued that the motions judge erred by dealing only with settlement privilege and failing to consider whether there is a general mediation privilege or a privilege protecting mediators from testifying based on the *Wigmore* principles. In addition, they argued that the confidentiality agreement between the parties bars the testimony of the mediator. Finally, they argued that the evidence was neither relevant nor admissible, because of the parole evidence rule and because a settlement at mediation is enforceable only if in writing.

[19] The Intervenor supported the Appellants' position that discussions with the mediator are privileged at common law, and the motions judge was in error in ordering the mediator to testify.

[20] The Respondents took the position that the motions judge correctly concluded that the mediator's evidence was necessary to prevent a miscarriage of justice.

Analysis

[21] Rule 24.1 of the Rules of Civil Procedure deals with mandatory mediation in civil matters. The purpose of the rule is set out in rule 24.1.01:

This Rule provides for mandatory mediation in case managed actions, in order to reduce the cost and delay in litigation and facilitate the early and fair resolution of disputes.

The nature of mediation is described in rule 24.1.02 as a situation in which ‘a neutral third party facilitates communication among the parties to a dispute, to assist them in reaching a mutually acceptable solution’.

[22] Rule 24.1.14 of the Rules of Civil Procedure states that all communications at a mediation session and the mediator’s notes and records are deemed to be without prejudice settlement discussions. In *Rogacki v Belz* 2003 CanLII 12584 (ON CA), (2003), 67 OR (3d) 330 (CA), Borins JA (Armstrong JA concurring) concluded that the rule codified the common law principle that communications made in an attempt to settle a dispute are inadmissible in evidence ‘unless they result in a concluded resolution of the dispute’ (at para 18).

[23] The issue in that case was the availability of a contempt order against a party who had published the content of confidential discussions during mediation. The Court of Appeal held that such an order was not available.

[24] The motions judge interpreted the words of Borins JA to mean that mediation privilege is not absolute. He then went on to say that if settlement discussions result in an agreement, communications are admissible evidence if the existence or interpretation of the agreement is in issue (at para 14).

[25] The Court of Appeal in *Rogacki* did not deal exhaustively with the issue of privilege for communications in mediation, as the issue before it was the availability of a contempt order. While the majority discussed rule 24.1.14, they never addressed the common law principles relating to privilege.

[26] Common law principles have recognised a privilege for confidential communications in certain important societal relationships. In *Slavutych v Baker* (1975), 55 DLR (3d) 224, the Supreme Court of Canada held that the four conditions from *Wigmore on Evidence* should be applied to determine whether communications are privileged (at 228):

- (1) The communications must originate in a confidence that they will not be disclosed.
- (2) The element of confidentiality must be essential to the maintenance of the relationship in which the communications arose.
- (3) The relationship must be one which, in the opinion, of the community ought to be ‘sedulously fostered’.
- (4) The injury caused to the relationship by disclosure of the communications must be greater than the benefit gained for the correct disposal of the litigation.

[27] In *Slavutych*, the Court held that a document submitted in a university tenure process was privileged – in part because the document was labelled ‘confidential’, and in part because of the importance of confidentiality in the tenure process, where individuals are asked to give their frank opinion of colleagues.

[28] In *M(A) v Ryan* 1997 CanLII 403 (SCC), (1997), 143 DLR (4th) 1 (SCC), the Supreme Court reaffirmed the approach in *Slavutych*, making it clear that privilege is to be determined on a case-by-case basis (at para 20). In addition, McLachlin CJC, writing for the majority, stated that there could be circumstances of partial privilege (at para 37):

My conclusion is that it is open to a judge to conclude that psychiatrist-patient records are privileged in certain circumstances. Once the first three requirements are met and a compelling *prima facie* case for protection is established, the focus will be on the balancing under the fourth head. A document relevant to a defence or claim may be required to be disclosed, notwithstanding the high interest of the plaintiff in keeping it confidential. On the other hand, documents of questionable relevance or which contain information available from other sources may be declared privileged. The result depends on the balance of the competing interests of disclosure and privacy in each case.

[29] A number of courts have applied the *Wigmore* conditions to determine whether communications during mediation are privileged: *Porter v Porter* (1983), 40 OR (2d) 417 (UFCC) at 421; *Sinclair v Roy* [*] 1 In-line.WMF (1985), 20 DLR (4th) 748 (BCSC) at 755; *Pearson v Pearson*, [1992] YJ No 106 (SCYT) at 2 (1988), 73 Sask R 230 (CA) at 231; *AH v JTH*, [2005] BCJ No 321 (BCSC) at paras 31-33). The communications at mediation have been held to be privileged unless there were overarching interests in disclosure – for example, to protect children at risk from criminal activity (*Pearson, supra*).

[30] In this case, the motions judge failed to conduct an analysis based on the *Wigmore* conditions. Instead, he focused solely on without prejudice settlement privilege. In so doing, he erred.

[31] In this case, it is clear that the communications to the mediator originated in confidence and, therefore, the first *Wigmore* condition has been satisfied. The parties to this mediation signed a confidentiality agreement, which expressly stated that the communications at the mediation were to be confidential. More importantly, the parties agreed that the mediator’s notes and recollections could not be subpoenaed in this litigation.

[32] The second condition requires a determination that confidentiality of communications during the mediation is essential to the functioning of the mediation process in which the parties were engaged. In order for mediation to succeed, parties must be assured of confidentiality, so that discussions can be free and

frank. The following quotation from Owen V Gray provides a useful summary of the reasons that confidentiality is vital to the operation of the mediation process (from 'Protecting the Confidentiality of Communications in Mediation' (1998), 36 Osgoode Hall LJ 667 at 671):

The mediator encourages the parties to be candid with the mediator and each other, not just about their willingness to compromise, but also and especially about the needs and interests that underlie their positions. As those needs and interests surface, the possibility of finding a satisfactory resolution increases. The parties will be wary and guarded in their communications if they think that the information they reveal may later be used outside of the mediation process to their possible disadvantage. When they have resorted to mediation in an attempt to settle pending or threatened litigation, they will be particularly alert to the possibility that information they reveal to others in mediation may later be used against them by those others in that, or other, litigation. The parties may also be concerned that their communications might be used by other adversaries or potential adversaries, including public authorities, in other present or future conflicts. The possibility of prejudice to legal rights, or of exposure to legal liability or prosecution, may not be a party's only concern. Parties may also be concerned that disclosure of information they reveal in the mediation process may prejudice them in commercial dealings or embarrass them in their personal lives. Accordingly, mediation works best if the parties are assured that their discussions with each other and with the mediator will be kept confidential.

[33] The third *Wigmore* condition requires a determination whether the relationship in which the communication is given is one which should be 'sedulously fostered'. The Rules of Civil Procedure require mandatory mediation of many civil disputes in order to assist the parties in arriving at settlement and thus reduce the costs of litigation. There is clearly a significant public interest in protecting the confidentiality of discussions at mediation in order to make the process as effective as possible.

[34] That brings me to the fourth stage of the *Wigmore* test, where it is necessary to balance the public interest in disclosure against the interest in preserving the confidentiality of communications during the mediation process. In this case, the Respondents seek to examine the mediator as a witness on a pending motion in which they seek rectification of the written settlement agreement. The remedy of rectification rests on proof of a common intention to agree to terms different from those in the signed document (Stephen Waddams, *The Law of Contract*, 5th ed (Aurora: Canada Law Book Ltd, 2005) at 232-4). While evidence relevant to the issue of mistake and the parties' intention is available from the parties themselves, the mediator is being asked to give evidence as, in effect, a tiebreaker.

[35] The motions judge was of the view that the disclosure of the settlement discussions would not undermine the mediation process, since the disclosure is 'sought not as an admission against a party's interest, but solely for the purpose of determining the specific terms of an agreement that both parties have arrived at' (at para 19).

[36] It is true that the mediator's evidence might be of some assistance in determining the terms of the settlement. However, it is not the only evidence available on the scope of the parties' agreement. Both the parties and their counsel can give evidence of what the agreement was. Indeed, it is the intention of the parties that is key to the resolution of the motion for rectification.

[37] Weighing against disclosure is the fact that the parties entered into a confidentiality agreement in which they agreed not to make the mediator a witness. This is not a case where the parties, by their confidentiality agreement, seek to block a third party's access to information that is important for the resolution of a case. Here, the parties agreed on the rules for the mediation, which included confidentiality and non-compellability of the mediator. Absent an overriding public interest in disclosure, their agreement should be respected.

[38] The motions judge concluded that the potential harm from disclosure was minimal because the parties had reached a settlement. In doing so, he assumed that the reason for the privilege was to protect parties from disclosure of admissions against interest during the mediation process. However, as set out in the earlier quotation from Mr Gray's article, confidentiality is important not only because parties may make admissions against interest. Parties may also reveal information to a mediator which they wish to keep confidential even after a settlement is reached, perhaps because the information is private, or because it may injure a relationship with others.

[39] The ability of parties to engage in full and frank disclosure is fundamental to the mediation process and to the likelihood that it will lead to resolution of a dispute. There is a danger that they will be less candid if the parties are not assured that their discussions will remain confidential, absent overarching considerations such as the revelation of criminal activity.

[40] Moreover, there is a danger that a mediator will lose the appearance of neutrality if required to testify in proceedings between the parties. In her concurring judgment in *Rogacki, supra*, at para 37, Abella JA discussed the importance of confidentiality, quoting from Jonnette Watson Hamilton, 'Protecting Confidentiality in Mandatory Mediation: Lessons from Ontario and Saskatchewan' (1999) 24 Queen's LJ 561 at 574:

In any process forced upon parties, they must have confidence in the integrity of the process and those who have a major role in it. One of the results of

requiring mediators to testify or produce documents may be a perception that the mediator, the program or the process itself does not keep confidences. While such a perception might normally cause parties to avoid mediation, they cannot do so where it is mandatory. They might, however, treat mediation as a mere formality.

[41] The motions judge found that any impairment to the mediation process would be minimal since the mediator would only be asked about the terms of the agreement. However, it is unlikely that the questions to the mediator could be restricted to a narrow question of who the parties were meant to be in the Minutes of Settlement. Indeed, it is likely that the questions to the mediator would open up discussion of the course of negotiations in order to determine the scope of Mr Kaiser's role.

[42] The fourth condition of the *Wigmore* test requires a balancing of the public interest in disclosure against the public interest in preserving the confidentiality of the relationship at issue. In this case, there is an important public interest in maintaining the confidentiality of the mediation process that, in all the circumstances of this case, outweighs the interest in compelling the evidence of the mediator.

Conclusion

[43] The appeal is allowed, and the order of the motions judge is set aside. If the parties cannot agree on costs of the appeal and leave to appeal motion, the Appellants may make written submissions within 21 days of the release of this decision, with the Respondents making

submissions within 14 days thereafter.

[44] At the end of the hearing, the Intervenor indicated that it would not be seeking costs and asked that costs not be awarded against it. Given the assistance provided to the Court by the Intervenor, no costs are awarded against it.

Released: 9 March 2006

The court leaves no doubt as to the importance of confidentiality in the mediation process. Subject to matters such as fraud or other criminal situations, it is clear that the court emphasises that confidentiality is necessary in order for mediation to be successful.

It is worth noting that this was a case where the mediator drafted the Minutes of Settlement and I think that after reading this case, everyone would agree that it is best to leave the drafting of Minutes of Settlement to counsel. The mediator may review the Minutes of Settlement and make some suggestions, but should never be the draftsman. Equally, it is important to have a mediation agreement between the parties which includes a confidentiality clause. There was nothing wrong with the clause in this case; it was just that the first judge did not consider it as important as the public interest in substantive justice. Clearly, the court on appeal disagreed.

For jurisdictions which have no statute and no rules governing confidentiality in mediation, it will be necessary to look to case law. In an area as relatively new as mediation, there is likely to be little case law available. For those jurisdictions particularly, it was thought to be worthwhile to reprint the body of the decision in this important case in Canadian jurisprudence.

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CANADA

Safe to apologise: new law in British Columbia

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The province of British Columbia is the first Canadian jurisdiction to introduce a law providing a safe harbour for apologising. The BC Apology Act¹ took effect on 18 May 2006.

The Act protects apologies made in connection with any matter, other than in a criminal context, and deems them inadmissible as evidence regarding the fault or liability of a person in any British Columbia court, arbitration or other tribunal proceeding. The Act states that an apology does not constitute an admission of fault or liability and must not be taken into account in the determination of fault or liability in connection with the matter to which it relates.

'Apology laws' have existed only since the late 1980s. They have been implemented in more than 20 US states² as well as in Australia. There is growing evidence that apology laws lead to a reduction in both the number of lawsuits and the time required to settle lawsuits in which apologies are made. In contexts outside formal apology legislation, such as the pilot project in Illinois – the 'Sorry Works'³ programme, results have been impressive,⁴ demonstrating that providing a safe harbour for apologising is a pragmatic approach to dispute resolution. The BC Apology Act takes the more aggressive form of apology legislation, as seen in jurisdictions such as Arizona,⁵ Colorado,⁶ Oregon⁷ and New South Wales,⁸ where not only expressions of sympathy and benevolence are protected but also fault-admitting apologies. This distinction between apologies that admit fault and those that do not is the major difference between the various apology laws. To date, only British Columbia and jurisdictions such as those mentioned above have gone so far as to protect apologies that admit fault.

Perhaps the first way that people learn to resolve disputes, at least in many Western cultures, is through apology. Children are told by their parents and teachers to apologise for something they have done wrong. However, as adults, and especially in business dealings, people tend not to apologise when a conflict arises. Rather, they tend to engage in adversarial dialogue – often through lawyers. First and foremost, people are taught to protect themselves. As lawyers, we counsel our clients not to do or say anything that could be argued to be an admission of liability. Insurance companies tell

their insureds not to apologise or take responsibility after an accident. Risk managers at hospitals advise doctors not to apologise after making a medical error. The tendency is to deny responsibility whenever possible. Research shows that this leads to disputes being litigated when they may have been resolved or mitigated through an apology. Daniel W Shuman states, 'Tort plaintiffs often claim that what they really wanted was an apology and brought suit only when it was not forthcoming ...'⁹ But many remorseful people and organisations simply cannot apologise without the risk of admitting legal liability. As a result, lawsuits routinely end in settlements with no party accepting responsibility.

In various contexts, apologies have been shown to help prevent or mitigate lawsuits, rather than create a liability problem, and to decrease transaction costs associated with settlements and speed up the settlement of disputes. For example, in Japan, where lawsuits are much less common than in North America, in 1982 a Japanese airline president completely avoided lawsuits by apologising personally to the families of victims involved in a plane crash resulting from a psychologically-troubled pilot.¹⁰

In the public arena, groups that have been harmed by government action, or inaction, frequently have an apology on their shortlist of demands. This phenomenon can also be seen in cases of institutional abuse, such as that described in 2000 by the Law Commission of Canada in 'Restoring Dignity: Responding to Child Abuse in Canadian Institutions'.¹¹ In this situation, the victims wanted an apology to help repair the damage that had been done. The Ombudsman of Tasmania, in interviewing adults who complained that as children they had been abused while in state facilities, found that most were seeking an apology in addition to information, counselling and an acknowledgment of the abuse.¹² The Truth and Reconciliation Commission in South Africa demonstrated the power of an apology. Public figures, such as former US president Bill Clinton after the Lewinski affair, have also utilised the power of an apology to regain the trust of constituents.

Apologies are particularly opportune in disputes that have a personal element. They can go a long way to changing the dynamic between the parties and to

helping a person feel whole again, and are thus well suited to employment disputes, personal injury claims, medical malpractice and other comparable disputes. In fact, it is specifically in the arena of medical malpractice that many apology laws have been introduced.

Steven Keeva, a Chicago litigator who has suggested that apologies help avoid trials, cites US research that indicates that about one-third of medical malpractice lawsuits could have been prevented if doctors had apologised to their patients.¹³ This was similar to the finding of a 1994 study in Britain that demonstrated the effect of a complete explanation and apology by doctors in possibly preventing medical malpractice suits.¹⁴ In addition, a study of malpractice suits arising from pre-natal injuries showed that 24 per cent of claimants in Florida commenced lawsuits when 'they realised that physicians had failed to be completely honest with them about what happened, allowed them to believe things that were not true, or intentionally misled them'.¹⁵ According to Susan Healey, president of the Ontario Association for Family Mediation, 'An apology is a pretty powerful thing', and can substantially reduce the time taken to reach a settlement.¹⁶ This is illustrated by the practice at the Veterans Affairs Medical Center in Lexington, Kentucky. In 1987 the medical centre adopted a policy to be open and honest with patients after the commission of medical errors, and to provide a swift apology and settlement offer. The programme, which fosters settlement, 'reduced [the VA Medical Center's] claims payments from among the highest in the 178-hospital VA system to one of the lowest', even though the rate of malpractice did not decline.¹⁷ Said the hospital's chief of staff, 'If everybody did this nationwide, every patient who was injured would get fair compensation, the lawyers would get nothing, and you wouldn't see \$12 million verdicts.'¹⁸

Even in commercial disputes, it is common for the people involved to have an emotional reaction to the other party's conduct. They may feel angry, disappointed, betrayed or cheated. They often continue to engage in the management of the dispute and to make decisions that are influenced by their personal emotions. In these disputes, especially in the context of relational contracts (though even in transactional contracts), apologies may mitigate – even if alone they do not resolve – the dispute.

'The apology as object of exchange may have a value equal to the apologiser's savings of damage payments and/or transaction costs.'¹⁹ Apart from their possible value as objects of exchange, apologies may accomplish the desired result by shifting the 'power and shame balance', whereby the victim feels empowered by being put in a position to accept an apology and the wrongdoer takes on the victim's 'shame' in the process. It appears that often what victims want in addition to, or even instead of, financial compensation are apologies. As Hiroshi Wagatsuma and Arthur Rosett express it, 'while there are some injuries that cannot be repaired

just by saying you are sorry, there are others that can *only* be repaired by an apology'.²⁰ And they point out that apology 'is a social lubricant used every day in ongoing human relationships'.²¹ Susan Alter, in her 1999 report for the Law Commission of Canada, said, 'For a victim, an apology is often considered to be the key that will unlock the door to healing.'²² Victims particularly want an apology where the real harm is non-pecuniary and thus difficult to measure in monetary terms. In the defamation context, apologies are often sought and are a key component of many settlements.

In situations in which a corporation's conduct has resulted in highly-publicised and widespread harm – for example, product defects and environmental damage – crisis management experts counsel early apologies. When the potential harm to a corporation's reputation and brand is significant, the potential liability-admission consequences will be pushed aside in favour of a speedy, decisive and public apology, often given by the CEO. Particularly in jurisdictions with juries and punitive damages, the decision to apologise may also be a wise tactical decision for future lawsuits that are inevitable.

Apologies have historically played a key role in repairing relationships and have occupied a central role in dispute resolution. In the context of mediation, in which apologies are not uncommon, Shuman says, 'Mediators report that apologies often help to resolve disputes; parties who receive apologies are often more willing to settle than those who do not.'²³ Mediation provides a safe forum for apologies in many jurisdictions because what occurs in a mediation is protected through several means: as an extension of the concept of 'without prejudice', through statutes such as the Uniform Mediation Act in the United States, through confidentiality and subsequent non-use agreements and through common law privilege as delineated by the application in Canada of the *Wigmore* rules of evidence.²⁴

As has been remarked, 'An apology may be just a brief moment in mediation. Yet it is often the margin of difference, however slight, that allows parties to settle. At heart, many mediations are dealing with damaged relationships. When offered with integrity and timing, an apology can indeed be a critically important moment in mediation.'²⁵

It must be remembered that the purpose of laws that exclude from evidence statements made in mediation is, as Jonathan Cohen says, 'to facilitate a conversation between the parties, a conversation that can help them transform the dynamic between them, which could help them resolve the dispute'.²⁶ Deborah Levi notes, 'According to some advocates of mediation, the emphasis on communication and voluntariness renders mediation more likely to resolve disputes than adversarial-style litigation.'²⁷

If made outside mediation, or some other 'without prejudice' context, apologies will be admitted into evidence (assuming they are uncoerced utterances).²⁸ As a result, if litigation is a possibility, a prospective

defendant will be concerned about the repercussions and will be reluctant to apologise. The defendant is thus deprived of the opportunity to use an apology to mitigate or resolve the dispute at an early stage. Once most lawsuits get to the point of mediation, the opportunity for an effective apology has often been lost, underlining the importance of using the apology as a tool at the earliest stage possible in the resolution of the dispute. A strategic benefit of the apology, according to Cohen, is that 'if the injured party receives the apology early enough, she may decide not to sue'.²⁹

Legislation that protects apologies by making them privileged and not susceptible to being used subsequently in court enables defendants and potential defendants to do what they otherwise could only do safely in mediation – that is, attempt to resolve the dispute by apologising. By protecting apologies, legislation facilitates early apologies, which in turn facilitates dispute resolution. Without a privilege being applied to apologies, they seldom will be made outside mediation.

The British Columbia Apology Act sets the stage for persons and companies being sued in British Columbia to take advantage of the benefits of an apology without the risk that it will be regarded as an admission of liability.

Notes

- 1 SBC 2006, c 19.
- 2 Catherine A G Sparkman, 'Legislating Apology in the Context of Medical Mistakes' (2005) 82:2 *AORN Journal* August, 263.
- 3 'The Sorry Works! Coalition believes and advocates that apologies and upfront compensation for medical errors reduce lawsuits and liability costs while providing swift justice for more victims and reducing medical errors' www.sorryworks.net (accessed 18 May 2006).
- 4 As a result of the success of the Sorry Works! programme, the US government introduced, on 29 June 2005, federal bi-partisan legislation (Bill S 1337 – A bill to restore fairness and reliability to the medical justice system and promote patient safety by fostering alternatives to current medical tort litigation, and for other purposes) that will provide grants for similar pilot programmes at the state level. The bill was referred to the Committee on Health, Education, Labor, and Pensions, where it remains, as of this writing date.
- 5 Arizona S1036, available at www.azleg.state.az.us/legtext/47leg/1r/bills/sb1036h.pdf (accessed 18 May 2006).
- 6 Colorado CRS 12-25-135, available at <http://198.187.128.12/colorado/lpext.dll?f=templates&fn=fs-main.htm&2.0> (accessed 18 May 2006).
- 7 Oregon ORS Sec 677.082, available at www.leg.state.or.us/ors/677.html (accessed 18 May 2006).
- 8 New South Wales Civil Liability Act (2002).
- 9 Daniel W Shuman, 'The Role of Apology in Tort Law' (2000) 83 *Judicature* 180.
- 10 Hiroshi Wagatsuma & Arthur Rosett, 'The Implications of Apology: Law and Culture in Japan and the United States' (1986) 20 *Law & Society Review* 461.
- 11 Ottawa: Law Commission of Canada, 2000.
- 12 Ombudsman of British Columbia, *The Power of an Apology: Removing the Legal Barriers*, Special Report No 27 to the Legislative Assembly of British Columbia (Victoria: BC Office of the Ombudsman, February 2006) at 10.
- 13 *Ibid* at 13.
- 14 Charles Vincent, Magi Young and Angela Phillips, 'Why Do People Sue Doctors? A Study of Patients and Relatives Taking Legal Action' (1994) 343 *Lancet* 1609.
- 15 Jonathan R Cohen, 'Advising Clients to Apologize' (1999) 72 *Southern California Law Review* 1009, citing Gerald B Hickson et al, 'Factors That Prompted Families to File Medical Malpractice Claims Following Perinatal Injuries' (1992) 267 *Journal of the American Medical Association* at 1361.
- 16 Richard Blackwell, 'Safe to say "sorry" with new B.C. bill' *The Globe and Mail* (29 March 2006).
- 17 Jonathan R Cohen, 'Apology and Organizations: Exploring an Example from Medical Practice' (2000) 27 *Fordham Urban Law Journal* 1447 at 1449.
- 18 *Ibid* at 1451.
- 19 Deborah L Levi, 'The Role of Apology in Mediation' (1997) 72 *NYU Law Review* 1165 at 1176.
- 20 *Supra* n 9 at 487 (emphasis in original).
- 21 *Ibid*.
- 22 Susan Alter, *Apologising for Serious Wrongdoing: Social, Psychological and Legal Considerations*, Ottawa: Law Commission of Canada, 1999.
- 23 *Supra* n 8 at 183.
- 24 As reported by Catherine Morris in 'Legal Consequences of Apologies in Canada' (draft working paper presented at a workshop entitled 'Apologies, Non-Apologies, and Conflict Resolution', University of Victoria, 3 October 2003). The *Wigmore* Rules for finding a legal privilege were affirmed by the Supreme Court of Canada in *Alavutych v Baker* (1975) and *R v Gruenke* (1991), and were used to exclude evidence in *Marchand v Public General Hospital of Chatham*, a civil mediation case.
- 25 'What It Means to Be Sorry: The Power of Apology in Mediation', *Mediation Matters* (17 July 2004), online: DivorceNet www.divorcenet.com/states/maryland/mdart_14.
- 26 Jonathan R Cohen, 'Legislating Apology: The Pros and Cons' (2002) 70 *University of Cincinnati Law Review* 819 at 849.
- 27 See *supra* n 18 at 1171.
- 28 *Ibid*.
- 29 See *supra* n 14 at 1022.

EUROPE

Arb-Med Einstein's Theory of Relativity really works!*

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Einstein once explained his greatest theory in terms all of us can understand: 'When you are out with a nice girl, an hour seems like a second; when you are standing on a red-hot coal, a second seems like an hour – that's relativity.' Many relativities are connected to opposites. Too often we reject things that are opposite to traditional beliefs and practices as being unsuitable, contradictory, oxymorons, and un-doable. It is human nature to hate oxymorons. Their relativities are out of balance.

Anecdotal evidence is an oxymoron. So is truthful propaganda. Groucho Marx claimed that military intelligence is also one, though Napoleon would have disagreed; we even buy oxymorons – ever seen a label that says 'pure 100 per cent orange juice from concentrate'? Einstein himself famously claimed that it was not possible simultaneously to prevent, and to prepare for, war, only to be proved wrong by the advent of nuclear weapons. Life is full of oxymorons. But strip away the superficial reaction and maybe they are not so self-contradictory in reality. So let's pose another oxymoron – can you have an arbitration–mediation, an Arb–Med? Not a printing error this – an arbitration followed by a mediation.

People who train as facilitative mediators learn that arbitrators are judges – they make decisions on behalf of argumentative parties who then have to live with the result imposed upon them. Mediators, however, never get judgmental, they merely aid the parties, and any decisions are taken by the parties, not by the mediator. Based on those archetypal characterisations, it appears contradictory for an arbitrator to act as a mediator, and many would claim that it is an oxymoron for a mediator to arbitrate.

Therefore, they don't do it. Neutrals get asked to act as one, or as the other, but not as both! How can you trust a neutral person with your deepest secrets, your real bottom line, your hidden agendas, if that person can impose a decision? It makes no sense.

Another of Einstein's remarks was: 'If at first an idea is

not absurd, there is no hope for it.' So, let's not be so hasty and dismissive of the idea of a single neutral being both an arbitrator and a mediator on the same day with the same parties.

Mediators are taught to hypothesise, to search for options for mutual gain. They often ask questions beginning 'What if...' as a means to provoke the listener into thinking outside the box.

Einstein would urge us to ask:

'What if the neutral was asked to wear two hats, to be an arbitrator and a mediator, but not at the same time? First to be an arbitrator, make a decision, seal the decision in an envelope without telling the result to the parties, and then become a mediator? What if the parties agreed in advance that they would open the envelope, and be bound by its contents, only if the mediation were to fail to result in an agreed outcome?'

An actual case scenario

PMEC is a small, independent, successful business selling upmarket casual clothing and accessories for men originally themed on 1950s aviator gear – the kind of wardrobe you would expect to catch the eye of the new breed of Hollywood actors.

BAT is a tobacco company that for decades had owned a series of clothing trademarks that were licensed to PMECC. BAT had no interest in continuing to own the trademarks, and was happy to sell them to PMECC, who preferred to own their own brand names rather than operate under a licence agreement. It was a common situation – a willing buyer, a willing seller, and a simple deal.

Negotiations went well until the discussion, inevitably, turned to value. PMECC had one idea about what they were willing to spend to buy the brand rights, and BAT had another idea about what they were willing to accept in order to sell those brand rights. The two figures were dramatically different. So it was agreed that each would

instruct an independent professional firm expert in valuing brands to arrive at a fair price. It was also agreed that the parties would then exchange their valuation reports and meet again to finalise the value.

The parties did not have a dispute about anything. Nor was either even contemplating a conflict with the other. Both just wanted to do a deal but couldn't agree on the key issue – money.

When the valuation reports arrived, and were exchanged, it emerged that the expectations of each party were very different. Two prominent professional firms had arrived at very different valuation results based on the same facts.

Bob Bulder comments

I run my own business and own a high percentage of the shares. We are in the fashion business – it is cyclical, decisions have to be made many months ahead, it is risky, we have to be highly entrepreneurial and for me control is everything. Although we have never had a problem with BAT owning many of the brand names we use on our clothing lines, nevertheless we have always been uncomfortable not actually owning them ourselves. It's rather like the difference between owning the freehold of your home and owning the leasehold. I would rather own the freehold.

For me, buying these trademarks was about the cost of feeling comfortable. BAT was not threatening to take the rights away, or anything like that, and although I was prepared to pay something for the rights, I had my limits. I also had options. I could have rebranded over time. Or I could have merged with another company and used their brand rights. Or I could have put up with the discomfort and continued to license the rights from BAT. We don't have a lot of capital, and are nowhere near as cash-rich as BAT. Because I had options, I had worked out the upsides and downsides of each one. I knew exactly how much I could spend to buy these trademarks, but obviously, if I could get them for less than I would.

Michael Leathes comments

My company had gradually sold off its non-core rights and focused on what it knows best: being a tobacco business. Owning and maintaining these clothing brands was a throw-back to the past. We wanted to divest them, but not to give them away. There was really only one buyer – P MEC. They had built a business using these brands and it would have been irresponsible of a company like BAT to threaten to sell the brand rights to a third party just to intimidate P MEC into paying more. So I didn't do it.

On the other hand, the trademarks in question were certainly not worthless, and the company's shareholders had the right to expect that I would sell them for a fair value. I had an independent valuation in my hands, and I had shared with Bob, but it was far above the valuation he had in his hands.

At a lunch to try and bridge the gap, the two parties discussed the valuation reports each had commissioned. P MEC viewed the BAT valuation report as completely unacceptable and, worse, unaffordable. BAT viewed the P MEC valuation report as equally unacceptable, almost as

a give-away. They discussed a principle – was BAT willing to accept a price below its valuation, and was P MEC willing and able to pay a price above that indicated in its valuation? With affirmative responses on both sides, the next question was: is it possible to agree high and low parameters – a range within which the agreed valuation would fall? Further discussion resulted in BAT conceding that, despite its independent valuation, it would accept a price of no more than €x and P MEC conceded that despite its independent valuation, it was willing to pay at least €y. Although this was progress, the parties now had a narrower range within which to find the right number, but there was still a large, apparently unbridgeable, gap.

Options

The most obvious way forward was to arbitrate the valuation issue and both parties would then live by that result. However, both rejected the idea. BAT feared that it would lead to an unacceptably low result and P MEC feared that it would lead to an impossibly high outcome.

Baseball (or 'final offer') arbitration was an alternative, and it was considered. A neutral person would be invited to read each side's valuations, hear the parties' representations, and then each party would make an offer at which to close the deal. The neutral could then decide which offer was more reasonable, and that would be the offer that closed the deal. The neutral would have no power to suggest or determine any other solution. This was how the salaries of major league baseball players were settled. It might have worked here because the technique automatically encourages each party to put forward its best offer to encourage that offer to be the one chosen by the neutral. So the process automatically encourages gap-closing.

A variation on the theme was night baseball, so called because it operates like baseball arbitration with the difference that the parties do not disclose their offers to the neutral but seal them in envelopes; the neutral then makes a decision which is disclosed to the parties, the envelopes are opened, and whichever party's offer is closest to the neutral's decision is the one that prevails.

Mediation was also considered. However, the risk remained that maybe no deal would have emerged, and one party felt this could have wasted time and cost.

The way forward eventually chosen was a blend of arbitration and mediation – an Arb-Med. The parties agreed that they would ask a neutral person to wear two hats, but not simultaneously. The process chosen was simple – the neutral would spend a morning acting as an arbitrator, would arrive at a fair and appropriate valuation over lunch but would not disclose that amount to the parties. Instead, the neutral would place the decision in an envelope, place the envelope on the meeting room table, then become a mediator. If, by the end of the afternoon, the parties, with the neutral mediator's help, could not arrive at an agreed outcome, the envelope would be opened and the parties would

accept the valuation figure that it contained.

This would not have worked the other way around – as Med-Arb – where the neutral begins as a mediator, then if the parties fail to agree an outcome, becomes an arbitrator and renders a decision which binds the parties. Neither of the parties would have revealed their own private circumstances to a mediator who later might metamorphose into an arbitrator with the power to impose a decision on the parties.

The merit in the Arb-Med process over the other options was that an outcome was always guaranteed at the end of the day, but the parties had ample opportunity to control that outcome themselves by arriving at an amicable arrangement.

Selecting a neutral

Having agreed on the process for determining the valuation of the intellectual property assets, the next vital ingredient was to identify the neutral. It had to be someone able to act as both an arbitrator on valuations, and also as a mediator. It had to be someone in the Netherlands as the Arb-Med would take place in Amsterdam. The parties agreed to ask ACBMediation, a member of the MEDAL* alliance, to propose three suitable neutrals. Both parties trusted ACBMediation to narrow down the choice to neutrals with the right skills and quality. On receipt of a list of three people proposed by ACB, BAT invited P MEC to choose whichever one they liked and that choice would be acceptable to BAT.

Manon Schonewille comments

Mediation bodies can play a vital role in convening the parties in a common frame of mind – even if they disagree on matters of substance. After consulting with P MEC and BAT regarding the process to be followed and the profile of the mediator, I considered who, among my excellent panel of neutrals, was specifically suitable to guide this Arb-Med situation. They wanted a neutral with skills as an arbitrator and as a mediator who was flexible enough to play both roles in one day. The requested profile was for a business-wise, hands-on mediator. I have a number of professionals on my panel who have such skills. And they needed a neutral who could quickly get to grips with the esoteric area of intellectual property valuation principles relating to the fashion industry.

I put forward three members of my panel. All could have done an excellent job in this situation. BAT had sufficient confidence in my ability to select the right neutrals, none of whom they knew personally by the way, that they were able to let P MEC choose from the three resumé I sent to the parties.

This incredibly important convening role of mediation bodies is often underestimated. A provider like ACBMediation can speed up a negotiation process tremendously by helping the parties to narrow down the selection based on their own requirements, checking to ensure there are no conflicts of interest or scheduling constraints and, if necessary, being there to 'inter-mediate' if the parties need help agreeing on a choice of mediator. It can usually all be done on the phone and by e-mail. I merely set the stage for the performance to begin.

The Arb-Med process

As in all mediations, the parties need to sign a mediation agreement which deals with such matters as the sharing of the costs, confidentiality, privileged nature of the discussions and so on. In an Arb – Med, the mediation agreement also needs an 'envelope clause'. This is a provision which explains that the result of the arbitration phase of the process will not be disclosed immediately to the parties but placed in a sealed envelope, to be opened and to bind the parties only if the mediation phase fails to produce a negotiated agreement or, even if the mediation does result in an agreement, if the parties all agree that the envelope should be opened.

Willem Kervers comments

This was the first time I had conducted an Arb-Med. The arbitration phase went smoothly enough. Prior to the day chosen for the mediation, I had read the valuation reports prepared for both P MEC and BAT. Although I was broadly familiar with valuation methodologies, I had also asked the parties in advance if they would share the cost of allowing me access to a valuation expert, someone who had the expertise to answer my questions on valuation technicalities on an objective and impartial basis.

I was aided in this case by the fact that the parties had already agreed parameters within which any valuation for these assets would fall. But the gulf between the two was considerable, and the task before me was challenging. However, with the help of the expert, whom I consulted while the parties took a lunch break (leaving me with sandwiches, which in Holland are excellent!), I did arrive at a valuation based on the parties' presentations during the morning session and the facts explained to me.

After lunch the parties returned to the meeting room to see a sealed envelope placed prominently on the table. It was a bright day, but even the rays of the afternoon sunshine striking the table did not enable anyone to see what was inside. Curiosity pervaded the atmosphere.

Willem Kervers

I began the afternoon session by emphasising that I had removed my arbitrator hat. I had done my evaluative job. The output of my arbitrator mode was in that envelope. I explained that my role had now changed radically; my goal in the afternoon was to help the parties arrive at a negotiated agreement to avoid opening the envelope – an act which would most likely have pleased one party but not both. I deemed it vital that the parties considered me differently, even subconsciously. Because of my role in the morning session as an arbitrator, I had to ensure they grasped the distinction. It was a bit easier than I expected, because it was the parties, not ACB or myself, that had suggested an Arb-Med, but all the same, the effort had to be expended.

The mediator held several private sessions with each party, and after two hours had moved them both onto common ground. The gap closed by exchanging terms which represented value as well as by understanding

what each needed to reach a mutual agreement. Heads of agreement were signed and initialled. The deal was done.

Bob Bulder

At the end of this experience, after we shook hands and celebrated the conclusion of the terms on which the brand rights would be transferred to us, I was curious to know what was inside the envelope. Had I negotiated a better deal than would have been possible if I had let someone else decide? So I asked Michael whether he would agree to open the envelope. But he declined. That was fine with me – I suppose it was just my entrepreneurialism and inquisitiveness coming to the surface!

Michael Leathes

I could understand why Bob wanted to know what the envelope contained. So did I, actually, and for similar reasons. But I declined for a further reason. We had shaken hands. Both of us were happy with the outcome. If we opened the envelope, that situation would most likely change. One of us would suddenly have become unhappy. If the number in the envelope was higher than what we had agreed, then obviously I would be unhappy. If the number was lower, Bob would have been unhappy. To come away from that negotiation with Bob unhappy would also have made me unhappy, despite being better off, because he's a friend. I explained this to Bob. He understood my rationale. It's not about turning a blind eye. Some things are just better not known.

And so this deal concluded satisfactorily. The parties never opened the envelope. A huge gap in perceptions of value had been bridged by the mediator finding non-monetary issues which could be thrown into the pot of consideration and which enabled both parties to get what they needed. The arbitration could not have achieved this because judicial decisions are purely one-dimensional.

Manon Schonewille

In any negotiation, whether in a dispute context or a straightforward deal, there are dynamics and undercurrents that 'seal the deal'. In this case, the deal sealer was the power of the envelope. Here we had two parties who wanted to do a deal but had different ideas about its value. Because Willem had made a decision, the parties knew they would end the day with a result. But would it have been palatable to both? The envelope represented the potential worst alternative to a negotiated agreement. It served as a constant reminder, a permanent reality check. It influenced both parties to listen more carefully to the other, to be more inventive in seeking solutions, because opening that envelope could leave them worse off. It was psychology at work. The relativity between best and worse case scenarios, and the relative position of the unknown realistic outcome contained in the envelope, all played a vital role. Einstein would have been proud of those who took part.

The last word should rest with the Arb-Mediator. Let's ask him the big question: Was the result in that envelope very different from what the parties ended up agreeing?

Willem Kervers

Maybe. Maybe not. It may be a big question, but it is also the wrong question. The right question is: did the parties do a deal? The answer here was YES. It was also a multifaceted deal and they worked it out together. It was much better for them than whatever one-dimensional number I had written in the envelope. This deal pleased them both. Outcomes don't come better than that.

Note

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GERMANY

Obligatory mediation for court proceedings: promotion of alternative dispute resolution and attempts to avoid it

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In 1999 the German legislature decided to encourage amicable settlement of disputes. By introducing the new Section 15a of the German Introductory Act of the Code of Civil Procedure (EGZPO),¹ the German federal states were allowed to introduce an obligatory mediation procedure for certain disputes. German states may now demand that parties entering into court proceedings for debt actions up to a value of €750, for disputes concerning the respective interests of neighbours, and defamation must first try mediation procedure.² Failure to comply with the obligatory mediation procedure renders court proceedings inadmissible.³

So far, eight of the 16 German states have made use of this law.⁴

Avoiding obligatory mediation

The law seems straightforward enough and was, at least partly, received with great expectations. Following the growing international trend for alternative forms of dispute resolution, many hoped that obligatory mediation would lead to quicker and cheaper resolution of disputes and would unburden the courts.

However, it seems that claimants, maybe considering mediation as a delay in the resolution of their dispute and an additional financial burden, increasingly seek to avoid the obligatory mediation procedure.

There are a number of strategies the 'mediation-averse' claimant might consider pursuing. For example, claimants, having initiated court proceedings without going through an obligatory mediation procedure first, might try to avoid a dismissal of the claim by extending their pending claim with a further claim. Such further claim might, for example, bring the total of the amount claimed above the threshold sum below which mediation would have been obligatory. Claimants might also join their claim with another claim not subject to obligatory mediation.⁵ Conversely, a claimant could initiate a claim above the threshold amount for obligatory mediation and then reduce the pending claim to an amount which would normally render the claim subject to obligatory mediation.

As not all German states have decided to introduce obligatory mediation, a claimant could initiate proceedings in a court which is actually not locally competent, but in a German state that has not introduced obligatory mediation.⁶

Lastly, claimants might simply attempt to forego the mediation procedure altogether.

Scant settled case law

At least on the latter scenario the German Federal Court (*Bundesgerichtshof*) has ruled clearly.⁷ Where mediation is obligatory under the law, filing a claim without preceding mediation renders the claim inadmissible. Failure to comply with the requirement of obligatory mediation also cannot be rectified once the claim is pending. However, in a more recent decision the Regional Court (*Landgericht*) of Marburg held in an appellate judgment that failure to perform the obligatory mediation procedure does not render the claim inadmissible once the court of first instance has rendered a decision on the dispute.⁸ The court held that, even though the court of first instance incorrectly did not dismiss the claim as inadmissible due to lack of the obligatory mediation procedure, it was not for the appellate court to deny the first judgment in substance. The court ruled that this would be procedurally uneconomical as it would lead to the court of first instance having to decide on the same dispute again after the parties had performed the obligatory mediation procedure.

The German Federal Court is also clear on the situation in which obligatory mediation had been performed, but the claimant had then (permissibly) extended his claim. The Federal Court held in this case that the claim as a whole was admissible also after the extension without the necessity of re-submitting the extended claim to obligatory mediation.⁹ Beyond these decisions, case law is sparse.

In situations where a claimant extends his originally inadmissible claim during the court proceedings, regional courts have held this to be admissible without the need to re-submit the claim to obligatory

mediation.¹⁰

This seems sensible because a claimant whose (extended) claim was dismissed due to failure to perform the obligatory mediation procedure prior to initiating court proceedings with the original claim, could now initiate court proceedings for his extended claim and hence would not have to perform obligatory mediation.

Similarly, regional courts have held claims subject to obligatory mediation brought before the court jointly with claims not subject to obligatory mediation as admissible without the obligatory mediation having been performed.¹¹ The Regional Court of Aachen held that obligatory mediation was intended to promote amicable settlement of disputes of a certain type and gravity (personally or financially). If the case, however, showed that the dispute was more grave (as documented by the joint claim not subject to obligatory mediation), this intention of the law was no longer fulfilled. Further, subjecting the one claim to obligatory mediation, but not the other, would force the parties to enter into two proceedings or hold back the claim not subject to obligatory mediation until mediation for the other claim had been performed. The court appeared to consider these reasons to outweigh the benefits of obligatory mediation and hence held the joint claims admissible.

Higher courts have yet to rule on further strategies for avoiding obligatory mediation. As yet, none of these issues has been ruled on by the Federal Court.

Limit to restrict the scope of obligatory mediation in abuse of rights

Whilst at least some regional courts seem to attempt to limit the scope of obligatory mediation, a line should be drawn where claimants use (generally permissible) procedural methods (such as extending or reducing their pending claims) solely in order to avoid obligatory mediation. For example, it should not be accepted that a claimant initiates court proceedings in a locally incompetent court only because it is in a German state which has not introduced obligatory mediation.

Increasing number of summary proceedings for an order to pay debt

In practice, claimants often choose another way to avoid the obligatory mediation before taking their claim to court.¹² Under German procedural law, debt actions may be subject to summary proceedings for an order to pay instead of being filed with the court straight away. Those claims will become subject to court proceedings if the party liable objects to the order to pay or to a subsequent enforcement order issued by the court performing the summary proceedings. By law, the obligatory mediation does not apply to those claims.¹³ This tendency is so noticeable that German legal academic writing has invented a term for it – the so-

called '*Flucht ins Mahnverfahren*' (abscondence into summary proceedings).

The fact that summary proceedings for an order to pay debt were not made subject to obligatory mediation was hardly intended to allow claimants an option to avoid obligatory mediation. The reasons for this 'gap' in the law are of a rather practical nature. The legislature wanted to maintain the possibility of quickly obtaining an order to pay debt. It was also considered that it would overburden the new instrument of obligatory mediation if the vast numbers of such summary proceedings all had to go through mediation before going to court.

Conclusion

In summary it seems that, whilst internationally there is a growing awareness of the benefits of alternative dispute resolution, its promotion in Germany meets with concerns and doubts. It remains to be seen if the courts, when increasingly faced with strategies to avoid obligatory mediation, will lend weight to the concept of obligatory mediation in the future – or (like the Regional Courts of Aachen and Marburg) further restrict its scope.

Notes

- 1 In force since 1 January 2000.
- 2 For details and further background see S Rützel, G Wegen and S Wilske, *Commercial Dispute Resolution in Germany: Litigation, Arbitration, Mediation* (Munich: C H Beck, 2005).
- 3 *Bundesgerichtshof*, Judgment of 23 November 2004, Docket No IV ZR 336/03; cf G Wegen and S Wilske, 'Non-Compliance with Obligatory Mediation Procedures Makes Court Action Inadmissible' (April 2005) *IBA Mediation Committee Newsletter* 19.
- 4 In this chronological order: Bavaria, North Rhine-Westphalia, Baden-Wuerttemberg, Brandenburg, Saarland, Saxony-Anhalt, Hesse and Schleswig-Holstein.
- 5 For example, the Regional Court of Aachen had to deal with a case where the claimant sued for defamation (this claim on its own being subject to obligatory mediation) jointly with an action for possession: Regional Court of Aachen, Decision of 11 March 2002, Docket No 6 T 6/02.
- 6 Generally, filing a claim with a court locally not competent will not render initiating the claim void. Rather, upon complaint by the defendant, the court would refer the claim to the locally competent court.
- 7 *Bundesgerichtshof*, Judgment of 23 November 2004, Docket No VI ZR 336/03.
- 8 Regional Court of Marburg, Judgment of 13 April 2005, Docket No 5 S 81/04.
- 9 *Bundesgerichtshof*, Judgment of 22 October 2004, Docket No V ZR 47/04.
- 10 Regional Court of Munich I, Judgment of 9 July 2003, Docket No 15 S 2004/03; Regional Court of Kassel, Judgment of 18 April 2002, Docket No 1 S 640/01.
- 11 Regional Court of Aachen, Decision of 11 March 2002, Docket No 6 T 6/02; c. f. Local Court (*Amtsgericht*) of Halle, Judgment of 3 April 2001, Docket No 7 C 538/00.
- 12 For example, evaluations in Bavaria have shown a significant increase in the number of summary proceedings from 63 per cent in 2000 (ie when obligatory mediation was introduced in Bavaria) to 78.8 per cent in 2003; cf G Wegen and C Gack, 'Obligatory Mediation as a Precondition for Court Proceedings in Germany' (September 2005) *IBA Mediation Newsletter* 29.
- 13 Section 15a, subsection 2, No 5 EGZPO.

INTERNATIONAL

The difficulties of mediation in investment treaty cases

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Mediation is or should be an essential part of any litigator's toolkit. There are, however, particular difficulties associated with mediation in the investment treaty arbitration context, as is admirably demonstrated in a recent and scholarly article by Professor Jack J Coe, Jr.¹ I argue that mediation's promise in the investment treaty context may be greatest in one set of circumstances: what I refer to as the 'one ministry scenario'.

Obstacles and challenges

In Part V of his article, Professor Jack J Coe catalogues in a comprehensive fashion the concerns, obstacles and challenges for mediation particular to investment treaty arbitration. He notes, among others, the need for particularly skilled and respected mediators, public expectations of transparency, and questions of whether mediation would reduce the corrective effect of treaty enforcement or encourage claims. To his already comprehensive list I would note only a few additions. These observations are based on my experience within one particular agency (the Department of State) charged with defending investment treaty claims for one particular government (the US Government). I expect, however, that these observations largely apply to any state with a republican form of government.

First, the agency charged with defending investment treaty disputes is typically not the agency at the origin of the dispute. Two consequences follow from this observation. The first is that the act of submitting an investment dispute to arbitration under a treaty can decrease the chances of amicable resolution of the dispute – because settlement of a treaty claim requires approval of additional decision-makers in the government and therefore complicates any resolution.

Example: investor has a problem with the Ministry of Transportation. That ministry, before submission of an investment treaty claim, would ordinarily have the authority by itself to resolve the dispute. After the investor makes an international case out of the dispute, however, the Ministries of Foreign Affairs, Justice and/or Finance become interested in the dispute. One or all of these agencies may have to sign off on any settlement. These agencies have different policy interests, different chains of command to be briefed, and staff with

different personalities than those of the Ministry of Transportation. The complexity of the original equation for settlement has just increased by several orders of magnitude.² This scenario – what I will call the multiple agency scenario – generally becomes the norm as soon as notice of a claim under an investment treaty is received by the government.

The second consequence of this observation is that the prospects for early resolution of a dispute when multiple agencies are involved are dim. This is because, as Professor Coe notes, 'at an early stage the [newly engaged agencies] ha[ve] too little information with which responsibly to assess the merits'.³ The flow of information at the beginning of a case is slow in most governments. Requests for information from one agency to another must, at least in the first instance, go through official channels. It can take weeks (even months) for officials of the agency charged with defending the treaty case to identify and contact the officials of the agency responsible for the programme or acts that are at issue in the case. It takes longer for officials of the defending agency to conduct an investigation of the facts and the law sufficient to make a preliminary assessment of the strength of the claim.

This consequence is significant because the benefits of a mediated resolution of a dispute are generally greatest early on – before the parties have invested substantial costs in preparing the case for arbitration and entrenched their positions. Early resolution, for these reasons, is not likely in the multiple agency scenario.

Secondly, government officials face requirements for agreeing to a settlement that are less flexible than those for company officers. In most republics, an agency cannot disburse funds from the treasury merely because a mediator (a private person) thinks that paying a monetary settlement to a foreign investor is a good idea, even if the minister happens to share that view. Some form of statutory or specific budgetary authorisation is required before officials can reach into the public coffers.

While statutory authorisation generally exists for paying adverse court judgments against the state, the same is not always true for payments in settlement of claims made outside domestic justice systems. The absence of authorisation can mean that specific

authorisation from the legislature is required before the proposed settlement can be paid. Even mere uncertainty as to whether existing statutes authorise payments in settlement of investment treaty claims can discourage government officials defending the case from seriously considering mediation.

A related issue is uncertainty as to the agency budget against which any settlement will be charged. Because of the novelty of investment treaty claims for most governments, it may be unclear whether a settlement or adverse award will be charged to the budget of the agency responsible for the underlying acts, the agency responsible for the country's investment treaty programme, the agency defending the claim or to some other account within the government's books. These are not technical questions. A significant payment can require that an agency cut essential programmes for the year in which the budget impact is felt. Uncertainty as to which agency's budget is at risk will make it difficult for the officials involved to authorise a settlement. Few governments in the world today, I would venture, have clearly allocated budgetary responsibility within the government for investment treaty claims, awards and settlements.

Finally, governments generally require a clear record showing the facts and the law that justify a settlement and a range of judgments or amounts paid in comparable cases that justify the settlement amount being proposed. These requirements are a corollary to the exemplary concern of most governments with acting consistently, so that all citizens and subjects are treated as fairly and equally as possible. Because of the novelty and complexity of investment treaty arbitration, neither the clear record nor the comparables are typically available.

Most fertile ground for investment mediation: the one ministry scenario

The above observations do not mean that a mediated resolution is impossible in, or ill-suited to, the multiple ministry scenario. Mediation, in the appropriate case, can serve a useful purpose even when a multiplicity of government decision-makers is involved. These observations lead me to believe, however, that a mediated resolution in the initial three- or six-month periods contemplated by most investment treaties is highly unlikely in the multiple ministry scenario, and that a mediated resolution under this scenario at any time will be highly complex.

The obstacles and challenges noted above, however, do not generally hold for the scenario where only one government agency is interested and involved in the mediation. To return to my example of the investor who has a problem with the Ministry of Transportation, there is no question, before other agencies are brought into the dispute, that any resolution will impact only the Ministry of Transportation's budget. Because there is an

ongoing relationship between the investor and the Ministry, the Ministry officials will usually already have sufficient knowledge of the issues in dispute to make an informed, early decision on how to resolve it. And it may be possible for the Ministry to resolve the dispute without making any payment to the investor or by making a payment within existing budgetary constraints and authority (for example by modifying the terms of a concession agreement or permit).

In short, the best chance to resolve a dispute between a foreign investor and a government agency is likely *before* the investment dispute becomes a dispute under an investment treaty. The most fertile ground for mediation is the one ministry scenario.

The challenge that Professor Coe and other proponents of mediation in the investor-state context will face is providing an international mechanism that encourages mediation at a stage before the international arbitration mechanism is engaged. This is a challenge that, I am sure, these proponents will successfully meet.

Notes

- * Counsel, Debevoise & Plimpton LLP, Paris, France. From 2000-2004, Mr Legum served as Chief, NAFTA Arbitration Division, Office of the Legal Adviser, US Department of State. In that capacity, he served as lead counsel for the US Government's defence of international arbitration claims under the investment chapter of the North American Free Trade Agreement. The United States prevailed in every case decided under Mr Legum's tenure.
- 1 Jack J Coe, Jr, 'Toward a Complementary Use of Conciliation in Investor-State Disputes – A Preliminary Sketch' (2005) 12 UC Davis J of Int'l L & Pol'y 7. A version of this comment originally appeared, with a reprint of Professor Coe's article and other comments, in 21 LexisNexis Mealey's International Arbitration Report (Issue No 4, April 2006).
- 2 The example significantly understates the number of agencies involved in decision-making in investment treaty disputes in some governments. In the US Government, for example, decisions in such disputes are made by an interagency group led by the Office of the Legal Adviser of the Department of State and including representatives of the Office of the United States Trade Representative, the Department of the Treasury, the Department of Commerce, the Department of Justice, the Environmental Protection Agency, the Department of the Interior and the Economics and Business Bureau of the Department of State – as well as representatives of the state, local or federal agency or agencies the acts of which are at issue.
- 3 Part VIII(B), text paragraph accompanying n 138.

United Kingdom

The law of unintended consequences. Or repeating patterns?

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About 2,700 years ago the Etruscans started building the city of Rome. Originally emigrants due to famine in their homelands, they brought with them a wide range of skills in engineering, medicine, divining and the plastic arts. Their understanding of medicine and health prompted their ingenuity in designing drainage and water delivery solutions. They favoured team work, collaboration and strong alliances and they were keen therapists and haruspices. For a time the Etruscans and Romans coexisted with the Romans adopting many of the Etruscan skills but not the beliefs or understanding that underpinned them which the Romans considered superstitious nonsense. The Etruscans were finally absorbed by their Roman neighbours and their art and beliefs were promptly discarded; their practical skills however, were adopted and for a long time considered Roman and not Etruscan.

You might be forgiven for thinking that I am about to relate this story to the potential waning of litigation in favour of mediation but in fact the last thing I hope for is the decline of effective litigation. It is an important part of a democratic society. I wish to propose something else: that the intangible strengths, the artistry and magic of mediation, the very strengths that are at the heart of its success, are at risk of being discarded or marginalised in favour of pragmatic, practical and 'measurable' strengths.

Ten years ago when I did my training the legal profession was cynical about mediation. Today mediation is viewed, for the most part, as an important dispute resolution skill for lawyers. We are probably at the coexistence part of the cycle.

For those of us who spent many hours providing awareness seminars to demonstrate the benefits of mediation, this is our finest hour! We focused on tangible benefits such as cost and time savings. In our marketing we talked about an alternative, not a complementary, process and we didn't mention psychology for fear of perpetuating the labels 'therapy' or 'touchy-feely'; we promoted faster, cheaper, more efficient and successful resolution of commercial disputes which were, after all, a fact of life.

Amongst those practical and measureable benefits we 'slipped in' our observations about the extraordinary power of an apology and the excitement of people taking charge of their own problems and designing their

own solutions which were very often better than they could have imagined. Despite the extraordinarily consistent statistic of eight out of ten mediations settling on the day or shortly afterwards it took hard work and skill to bring people to the mediation table.

As you can imagine, having spent six years in litigation the relief was enormous and hopefully we can now all move forward with our lives and businesses.

Those mediation statistics were achieved by people who believed that the final decision lay with the parties, that a mediator was non-judgmental and impartial and that mediation had a potential to transform the business lives and working relationships of the parties with lasting and positive consequences.

For the most part the current enthusiasm and acceptance of mediation is very good news indeed: support from the courts, many more lawyers talking with their clients about using mediation much earlier in a dispute and the uncertainty of cost consequences where mediation is not properly considered as an option. I am however, reminded of the ancient proverb 'be careful what you wish for, lest you get it!' or alternatively the Law of Unintended Consequences!

I say this because I sense most strongly that the pendulum is about to swing past the point of balance. I wonder if others have noticed that? I hear my colleagues debate the virtues of Arb-Med, describing how the parties want mediators to be evaluative, the challenges for mediators on deciding if they should direct the parties towards a settlement figure, placing settlements in envelopes because the parties want a decision having paid £x thousands to hold the mediation. All these developments are apparently in response to the market and the consumer. I cannot deny that when these versions of mediation are practised by very experienced mediators in certain circumstances they can be appropriate and effective. However, the practice requires great subtlety and skill. I have seen it done atrociously. Parties have told me that they have experience of it being done very badly.

The trend raises important questions about the underlying beliefs:

- Why would you want to swap one kind of judgment for another?
- Is it simply that you get to choose the 'judge', rather than have one imposed on you?

- More certainty, more control, perhaps?
- Who is the consumer in these assessments?

When I asked my colleagues they told me 'parties are asking for mediators to be more evaluative'. Are they? Since most parties are first timers how would they know to ask for that?

Some 18 months ago I became very curious about this emerging trend. My provisional research revealed a very interesting phenomenon. I found about 40 adjectives that parties use to describe their positive experiences of mediation in their feedback. Mediators very helpfully post a lot of feedback on their websites! Of those 40 words only four are concerned with cost, speed or expert knowledge and none refer to anything like adjudication or evaluation. The skills and qualities that are valued by parties who have experienced mediation are essentially the intangible human qualities of, dare I say it, compassionate people. For example, trustworthiness, gravitas, patience, confidence, even-handedness, impartiality, optimism, persistence, understanding, imagination, empathy and, most interestingly, 'quick on the uptake' and instinctive. And the greatest of these is optimism

I was surprised and my surprise raised more questions. Would mediators and parties corroborate the stories and perceptions that were becoming common currency? Did they value the intangible strengths identified in the preliminary research? Did anyone still value the potential therapeutic benefits we talked about in the early days, albeit *sotto voce*?

For those who might be a little uncomfortable with the idea of mediation being therapeutic your comfort level might be further challenged by the following description of the therapeutic process from R D Laing, a psychiatrist specialising in the study of psychosis and schizophrenia. He was regarded as anti-psychiatry for most of his career although he denied it. In *Dialogue with R.D. Laing* by R Evans (New York: Praeger, 1976) at pp 80 and 141, Evans writes:

Laing noted that the term therapist is derived from *theraps*, a Greek word meaning 'attendant'. Rather than intervene, dispute the individual's claims or numb the fears with medication, Laing observed and provided... empathy so that he could eventually reconstruct the individual's situation and understand the fears being defended against. No matter how meaningless, odd, or even destructive the schizophrenic's behaviors may be, their aim is to save what is left of his/her being. Although often misguided, they are attempts at self-survival.

Does anyone else hear echos of the early principles of mediation?

I am well known for my advocacy of the therapeutic effect of mediation so you may call me biased. However, the potential for bias makes me even more critical of my observations and try as I may I do not see therapeutic potential as incompatible with a good process and a

pragmatic outcome. Nor with speed, reduced costs or efficiency. On the contrary. When the underlying belief that the role of a mediator was to be 'attendant' to the issues, it worked rather well.

I do believe that there is a vital interdependence to be nurtured between the legal process and the mediation process and that neither should become the other. They have much to offer in making each more effective in meeting society's needs. I am, however, deeply uncomfortable with mediators offering 'judgments' notwithstanding the parties don't have to agree to abide by them. That for me is a rather weak salve because it dismisses the incredible influence a mediator can have whether they know it or not, especially if that mediator is a well-known barrister or judge. You simply do not lose your past life when you take on a new title. And to offer judgments requires a different skillset and competency. I see the change as an indicator or symptom of a more significant shift in the way mediators practise mediation which will eventually change the profile of practising mediators and reduce the breadth and variety of the profession.

Over the last 12 months I have interviewed a significant number of mediators and 'serial' mediation users. I will be publishing the full results in September this year. In the meantime, I can share with you that I am constantly surprised by the data. The evidence, which is indeed qualitative, would suggest that someone may have offered an observation that started a rumour which became myth and will become 'truth' if we do not take the opportunity to try and understand the value of attributes and behaviours which are hard to measure, and then actively protect them until we understand why they work.

If the trend continues towards an even greater degree of adjudication then the very things that make mediation work well will be filtered out and the people who do it well will either be 'shaped up' into competent mediators which appeal to a structured and risk-averse culture where skills are counted and boxes ticked or they will be excluded. Someone in authority will become nervous (and perhaps this has already happened) that some mediators are making judgments with no supervision or proven ability. It is then only a short step to regulating the profession in the belief that it will control the risks and protect the consumer. I am convinced that it will do neither because I do not believe we have the appropriate capabilities to deal with regulation of a profession where most of the skillset cannot be measured. In my experience 'if you can't measure it, it doesn't count'. My research indicates that just ten per cent of what makes an excellent and effective mediator can be measured. The balance of 90 per cent, the qualities and attributes, is highly valued by the parties and their advisers.

When it comes down to a simple assessment of why disputes happen there are three key features:

- someone's behaviour was unacceptable to someone else;

- someone broke their word either unintentionally or because it no longer suited them to keep it;
- someone is unwilling or unable to take their share of responsibility or continue with their undertakings.

The underlying emotion is survival or fear of not surviving and the antidote to fear is not certainty but courage. Mediation is a people process and people are messy and unpredictable and frequently 'schizophrenic'. The things that parties seem to value most about mediation are the flexibility and informality of the process. And perhaps encouragement?

What I see is a really exciting opportunity to continue in the same pioneering spirit that has ensured the development of mediation over the last 15 years. To do something differently. My preferred route would be to resist regulation and focus on selection and training of mediators which includes acknowledgment of the 'therapeutic' element, for that read 'people skills'.

I am motivated to propose this because of two important factors in my own work. First, I am a vocational mediator and extremely interested in maintaining the quality and variety of practising mediators within the profession. Secondly, a great part of my professional life has been spent dealing with competency-related issues and the way we value people. At the foundation of almost every employment mediation or workplace dispute, professional or clinical negligence claim I have mediated there have been issues of competency, the appraisal system and not feeling valued or a focus on performance indicators. After all what are discrimination and harassment but the symptoms of not being valued and respected? The way we measure, monitor and motivate people at the moment and the focus on performance makes far too many ill as the rise in stress-related cases might confirm. There are more doctors, lawyers and other professionals in 'therapy' or 'retreatment' at London's private clinics than you might imagine. On the other hand every mediator colleague I know loves their work. When I asked each of my interviewees what motivated them to become a mediator, all but one said a version of 'I just saw it as a better way'. And for other types of disputes, what is breach of trust if not a people issue?

I would like to see the profession rise to the challenge of AIR (Alternative to Imposed Regulation) and do something differently once again. The opportunity is to design a form of regulation or management with a 'lightness of touch' which is more about selecting and training people with a strong suit in intangible strengths. These are the ingredients for excellent and effective mediators.

Our success in meeting this challenge would be a triumph not just for the mediation profession but in leading the way for professions generally. I have gathered some of the pieces of the jigsaw and we need to develop others.

When mediation was less established those who chose to do the training did so because of personal motivations

and very often they had to pay for it themselves. There was an inbuilt self-selection process which worked very well. Now that mediation is a desirable skill for the CV, many more are doing the training without the same analysis or personal investment. I am delighted that more are training. I believe that it is a unique and valuable life skill but I do see more and more who perhaps shouldn't practise. So can we aspire to a form of regulation that reflects the spirit of the profession and keeps it focused on human skills even if our measurement systems aren't quite perfect yet? Or will we watch the pendulum swing and hope that when something is imposed on us it won't affect us personally? If we don't pay attention to the symptoms then I sense we might repeat the mistakes of the past.

I imagine the Etruscans might have an interesting point of view with the benefit of hindsight.

Note

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United Kingdom

Mediation as a cost-containment device in the English courts: litigation becomes the 'last resort' in dispute resolution

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Anyone who has been involved in a dispute will be quick to point out that costs are a major issue. This is true whether in litigation or arbitration and irrespective of jurisdiction. Consequently, parties are looking to alternative forms of dispute resolution, in particular mediation, as a means of resolving their disputes in a cost-effective manner. However, unless both parties are willing to engage in the process, ADR will not achieve that objective. It is often in a defendant's interests to be as obstructive as possible, resulting in higher costs and prolonged litigation.

It is in these circumstances that assistance is required from the relevant court or tribunal. They need to have the powers and authority to use mediation and ADR as a costs-containment device in order to bring, often reluctant and unwilling, parties together.

Much has been done by the English courts in the past few years, and in the last year in particular, to encourage the use of mediation and other forms of ADR. This article aims to review the latest cases and resultant changes in the court's procedural rules (the CPR), together with recent trends in ADR, to illustrate how the courts are taking effective steps to contain the ever-rising costs of dispute resolution.

Recent cases

The efforts of the courts to use ADR as a means of containing costs are clear from recent cases on the issue. The leading decision in this area is *Halsey v Milton Keynes General NHS Trust*¹ which has been supported and developed in subsequent cases.

Halsey v Milton Keynes General NHS Trust

In the English courts, the general rule is that 'costs follow the event', ie the successful party will recover their legal expenses (subject to a requirement of reasonableness). The decision of the Court of Appeal in *Halsey* clarified the factors that a court will take into account in deciding whether a party's refusal to mediate is unreasonable and, as such, the circumstances in which a successful party could be penalised as to costs for unreasonably refusing ADR.

Halsey confirmed that the burden of proof will lie with the unsuccessful litigant to demonstrate that the successful party's refusal to mediate was unreasonable. The question of whether a party acted unreasonably will be decided with reference to the particular circumstances of the individual case. Regard may be paid to certain key factors, such as: the merits of the case; prospects of successfully resolving the dispute by ADR; the potential costs of ADR; the point in time during the dispute at which ADR was suggested; and whether this would have resulted in a delay to a potential trial. Another factor which would be highly persuasive would be whether a court had encouraged the use of ADR in respect of a particular dispute, and that encouragement was subsequently ignored.

Halsey was initially criticised for not going far enough in encouraging parties to mediate. It was thought that as a result of *Halsey*, courts would be less reluctant to impose costs sanctions. Subsequent cases have proven otherwise.

Couwenbergh v Valkova²

The reasoning adopted in *Halsey* was strongly upheld and further developed by the courts in the case of *Couwenbergh v Valkova*. This case, a dispute relating to the validity of a will, involved allegations of fraud. It was held by the Court of Appeal that this should not preclude the dispute from being suitable for settlement at mediation.

The Court of Appeal was clear in stating that this was 'a case crying out for alternative dispute resolution'. The issue of potential cost implications of ignoring a court's strong suggestion to mediate was similarly directly addressed by Ward LJ:

When costs do finally have to be allocated, we hope these observations will be borne in mind when the court comes to apply the guidelines in *Halsey v Milton Keynes General NHS Trust* on how to deal with failures to mediate despite the encouragement to do so.

This is a good example of the court taking active steps to control the costs of dispute resolution. Cases in which there is a genuine prospect of an early, cost-effective settlement should be given every opportunity to be resolved prior to litigation. A party refusing to cooperate

without good reason will be dealt with accordingly when the issue of costs comes to be decided.

Burchell v Bullard and others³

This case involved a small-scale building dispute, with an initial claim in the value of £18,318. A counterclaim of £100,815 was made. The Court of Appeal finally awarded the claimant its full claim, and the defendants were awarded £14,373. However, costs of £185,000, described as 'horrific' by Ward LJ, were incurred by the parties in the process.

In this case, the Court considered *Halsey* in the context of the defendants' refusal to consider mediation at an early stage in the dispute, pre-action, and considerably before the vast majority of costs were incurred. While Ward LJ accepted that this refusal to mediate was unreasonable, certain factors meant that it would have been unjust to penalise the defendants for such conduct in this particular case.

Ward LJ was, however, clearly unimpressed with the defendants' stance towards ADR:

The defendants behaved unreasonably in believing, if they did, that their case was so watertight that they need not engage in attempts to settle... The stated reason for refusing mediation, that the matter was too complex for mediation, is plain nonsense.

Of greatest significance was the warning shot fired to future parties engaging in such conduct:

The profession can no longer with impunity shrug aside reasonable requests to mediate. The parties cannot ignore a proper request to mediate simply because it was made before the claim was issued... These defendants have escaped the imposition of a costs sanction in this case but defendants in a like position in the future can expect little sympathy if they blithely battle on regardless of the alternatives.

Changes to the CPR

This judicial attitude was carried over to the CPR itself when the Rules were revised in April 2006. The CPR outlines certain steps that parties should, except in exceptional circumstances, take pre-action. These steps are set out in detail in the specific Pre-action Protocols and the general Pre-action Practice Direction. Although they had previously provided for ADR, the wording was revised to make it clear that the courts expected parties to seriously consider ADR pre-action. Paragraph 4.7 of the general Practice Direction now reads as follows (emphasis added):

The parties *should* consider whether some form of alternative dispute resolution procedure would be more suitable than litigation, and if so, endeavour to agree which form to adopt. Both the Claimant and Defendant may be required by the Court to provide evidence that alternative means of resolving

their dispute were considered. *The Courts take the view that litigation should be a last resort*, and that claims should not be issued prematurely when a settlement is still actively being explored. *Parties are warned that if the protocol is not followed (including this paragraph) then the Court must have regard to such conduct when determining costs.*

It is not practicable in this protocol to address in detail how the parties might decide which method to adopt to resolve their particular dispute. However, summarised below are some of the options for resolving disputes without litigation:

- Discussion and negotiation.
- Early neutral evaluation by an independent third party (for example, a lawyer experienced in that field or an individual experienced in the subject matter of the claim).

- Mediation – a form of facilitated negotiation assisted by an independent neutral party.
...It is expressly recognised that no party can or should be forced to mediate or enter into any form of ADR. The other Protocols adopt similar wording.

The revised wording and, in particular the warning given, make it clear that parties now have to consider ADR pre-action. If the matter continues and proceedings are commenced, the CPR provides for further consideration of ADR at the case management stage – once the parties have submitted their statements of case and the court considers how best to proceed.

Growth of mediation

It is clear that the stance adopted by the courts is influencing many more potential litigants to turn to ADR for the first time. This is evident by the clear continued growth in the ADR sector. A report entitled, 'The Future of Dispute Resolution', prepared by Grant Thornton's Forensic and Investigations Services division in February 2006, brought to attention some interesting findings:

- The vast majority of both in-house and external lawyers believe that an increased number of cases will be resolved by way of ADR over the next three years.
- In excess of 20 per cent of all disputes are now being settled by way of mediation and another 19 per cent are being resolved by other methods of ADR excluding litigation and arbitration.
- Increased awareness of ADR and the potential benefits of an early settlement to disputes are driving its growing popularity. Key to this growth is ADR's potential for retaining mutually-beneficial commercial relationships, reducing the amount of management time spent on dealing with disputes, and the need for certainty in future budgeting making the thought of spiralling litigation costs unattractive.

Judgments such as those referred to above and the recent amendments to the CPR are sure to have the effect of continuing to fuel the growth of ADR as an

alternative first step in dispute resolution.

In summary

Mediation, and ADR in general, is being used effectively as a costs-containment device in the courts. This is evident from the growth in the use of ADR – for which much of the credit should be given to the English judiciary and court system. Mediation will not always be appropriate – and the decision in *Halsey* reflects that.

Courts have the authority and flexibility to exercise their powers as they see fit – and the cases indicate that they are using those powers effectively.

Now that the English courts have addressed the use of ADR as a means of keeping costs in check, is it time to focus on arbitration? As the nature of international arbitration has changed over the years, and is now perceived as having lost its advantages of speed and cost, it may be appropriate to consider promoting the use of ADR more effectively as part of the arbitration process.

Notes

- 1 [2004] CILL 2119 CA.
- 2 [2005] All ER (D) 98.
- 3 [2005] BLR 330 CA.

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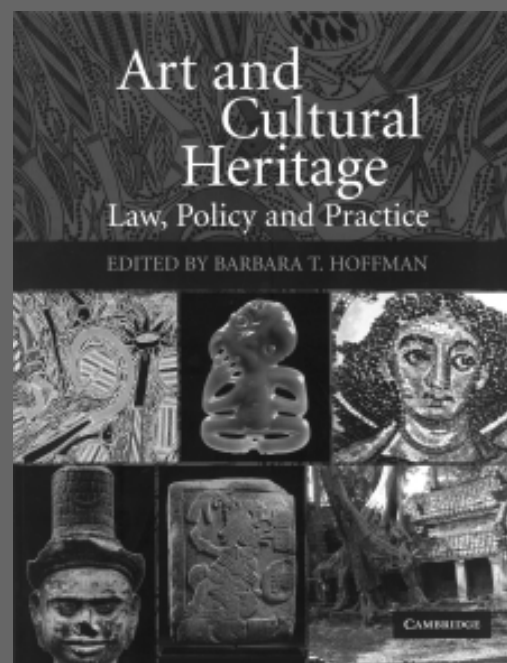
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In December 2005, ADR Group invited young legal professionals (under the age of 36) to enter our inaugural ADR writing competition. The objective of the competition was to promote greater interest in and understanding of the field of dispute resolution (mediation in particular) and collaborative decision-making among the younger generation of ADR Net member firms or students enrolled in an ADR module at any UK university.

We received entries of an exceptional standard and after much deliberation we were delighted to award Tristan Jones, who is currently undertaking the Bar Vocational Course in London and will be joining Blackstone Chambers next year, with the first prize. Tristan was presented with a trip to attend the ABA Spring Resolution conference in Atlanta, Georgia, in reward for his outstanding entry titled, 'Using costs to encourage mediation: cautionary tales on the limits of

good intentions'. The essay explored developments in the United States where certain states have some form of legal requirement that parties to mediation conduct themselves in 'good faith' and suggests ways in which their longer experimentation in this area could inform our own legal development.

Michael Lind, Managing Director of ADR Group said: 'ADR Group believes it important to focus on the next generation of mediators. We have seen some excellent young mediators progress through our training programmes and become competent mediators. We hope over the next few years to nurture the next generation of leading mediators currently at university or serving articles in one of our ADR Net member law firms.'

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Using costs to encourage mediation: cautionary tales on the limits of good intentions

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One of the main innovations of the Woolf reforms has been to use the threat of costs sanctions to encourage parties to settle. Whilst these changes have been widely credited with increasing the popularity of alternative dispute resolution, they raise the question of how far the courts should go when examining parties' conduct. Is it right to consider only superficial behaviour, or should the courts lift the curtain on mediations to determine whether a litigant has behaved productively? This essay first outlines the current status of the law in England and Wales. It then looks to the United States, where at least 22 states have some form of legal requirement that parties to mediation conduct themselves in 'good faith'.¹ I ask what we could learn from the American experience, and suggest ways in which their longer experimentation in this area could inform our own legal development.

The English position was outlined in *Halsey v Milton Keynes General NHS Trust*.² The Court of Appeal held that parties should never be compelled to mediate, and that a party should face costs sanctions for refusing to mediate only if the refusal could be shown to be unreasonable. Factors relevant to the question of reasonableness include:

(a) the nature of the dispute;

- (b) the merits of the case;
- (c) the extent to which other settlement methods have been attempted;
- (d) whether the costs of the ADR would be disproportionately high;
- (e) whether any delay in setting up and attending the ADR would have been prejudicial; and
- (f) whether the ADR had a reasonable prospect of success.³

Dyson LJ, giving the judgment of the court, also stressed *obiter* that although a court could not order mediation, ignoring a strong recommendation would raise a presumption of unreasonableness.

However, the English courts have indicated that they will not look inside a mediation to determine whether a party's conduct was reasonable. In *Reed Executive plc v Reed Business Information Ltd*,⁴ the Court of Appeal refused to consider 'without prejudice' negotiations which the claimant said would have shown the defendant's refusal to mediate to be unreasonable. In *Halsey* itself, the court commented:

'We make it clear at the outset that it was common ground before us (and we accept) that parties are entitled in an ADR to adopt whatever position they wish, and if as a result the dispute is not settled, that

is not a matter for the court. As is submitted by the Law Society, if the integrity and confidentiality of the process is to be respected, the court should not know, and therefore should not investigate, why the process did not result in agreement.⁵

Whether the courts will hold this line when faced with a difficult case – say, where one party has manipulated the CPR so as to claim costs consequences whilst hiding its manifestly unreasonable conduct behind the curtain of confidentiality – is a moot point. The main case on negotiation confidentiality, *Walford v Miles*,⁶ pre-dates the CPR. It also adopts a view of negotiation – encapsulated by Lord Ackner's comment that a duty of good faith would be 'inherently repugnant to the adversarial position of the parties' – which might be argued to be incompatible with the spirit of our 'new procedural code'.⁷ For these reasons, the question of good faith is unlikely to be closed in English courts, and I turn next to the American experience of this issue.

There is no commonly-accepted definition of what constitutes 'good faith' conduct in a mediation, and various rules have been suggested. I divide these rules into two categories – 'narrow' and 'broad' – and discuss the difficulties raised by each.

Narrow rules insist on simple behaviours. Examples include the requirement that:

- a party actually attend the mediation;
- they remain there for a fixed period of time⁸;
- they submit a position paper prior to the mediation;
- the parties make an offer of settlement; or
- they have sufficient settlement authority to reach agreement.

What these narrow rules have in common is that it is easy for the court to establish whether they have been broken. The mediator simply hands a checklist to the court with no further comment.

US courts have encountered two main difficulties with narrow rules. The first is that the behaviour they insist on is not necessarily always appropriate. This can be demonstrated by contrasting two cases. In *Nick v Morgan's Foods, Inc*⁹ a Missouri court had ordered parties to participate in mediation, specifying that they must send a representative with authority to settle the case. This the defendant deliberately failed to do, instead insisting that any settlement above \$500 would need to be confirmed over the telephone. Emphasising the importance of the settlement authority requirement, the court said for ADR to work effectively, parties must be capable of being persuaded to change their views.¹⁰

There are clearly many other equally good reasons why it might make sense to send a representative with adequate settlement authority.¹¹ However, that is not always the best solution. This was accepted in *Re: United States*,¹² in which the Fifth Circuit Court of Appeals specifically recommended that courts should always consider ordering that someone with authority should be available by telephone during the mediation – in other words, precisely that which was decried as bad faith in *Nick*!

A common way of addressing this problem is to craft a narrow rule and then say that parties can refuse to obey it if it is reasonable to do so. Thus, although the Court of Appeals in *Hunt v Woods*¹³ said that one of the four hallmarks of 'making a good faith offer to settle' under Ohio law was to make a settlement offer or counter-offer, it went on to hold that the defendant's failure to make a counter-offer was attributable to advice given by the mediator, and was therefore reasonable. A similar approach has been taken in the English courts in relation to the rule that parties can be sanctioned for an unreasonable failure to attend the mediation. This simply puts the problem back to a familiar dilemma: If one cannot prove whether a person's belief is 'objectively reasonable' or whether their behaviour was 'unreasonable', what purpose is served by the rule?

The second difficulty with the narrow rules is that it is relatively easy to comply with the letter of the law without paying any attention to its spirit. A line of Texan cases neatly illustrates how even the most basic requirement – that the parties must attend the mediation – may thereby be rendered of very limited assistance.

The position in Texas is that parties can be required to attend the mediation but they cannot be forced to make good faith efforts at the mediation.¹⁴ Canny litigants will of course find holes in this rule. How long do you need to stay to 'attend' a mediation?¹⁵ Or, what happens when a party attends but refuses to participate – which is what the claimant did in *Texas Department of Transportation v Pirtle*,¹⁶ on the grounds that for policy reasons it did not settle cases when liability was contested. The court held that since the Department had not objected to the mediation order, it was obliged to participate in the mediation. What, then, is meant by participation? In *Texas Parks and Wildlife Dept v Davis*¹⁷ the court commented – albeit apparently *obiter*¹⁸ – that attending and making any offer would constitute participation. This takes us back to square one, since making any offer, however unrealistic, is no more use than making none. It is small wonder that the Texas Court of Appeals has more recently refused to elaborate on the basic attendance rule.¹⁹

It is because of the inadequacies of focusing on a party's compliance with narrow rules that some commentators, and some courts, have preferred to adopt 'broad' rules. Broad rules focus on a party's general course of conduct, and the court is invited to look beyond superficial behaviour in search of motivation. Examples of broad rules include insisting that parties prepare adequately for the mediation²⁰; that they participate in meaningful discussions²¹; that they rationally evaluate their case²²; that they do not unnecessarily delay proceedings²³; or even simply that they act in good faith in all the circumstances.²⁴

There are several problems with these broad rules, many of which stem from the underlying evidential challenge. Given that mediations are typically conducted in confidence, how is evidence of supposed bad faith to be obtained?

For a brief period, the Californian courts favoured breaking that confidence. In *Foxgate Homeowners' Association v Bramalea California Inc*, the mediator had filed a report to the court stating that the defence attorney had 'spent the vast majority of his time trying to derail the mediations' – in particular by failing to bring his experts to a mediation session specifically designed for them – and recommended that he be sanctioned for his conduct. The Court of Appeals²⁵ concluded that such sanction was allowed,²⁶ stressing the need for good faith participation and concluding that a party which intentionally thwarted the mediation process should not then be allowed to hide behind the veil of confidentiality. That decision was overturned the following year by California's Supreme Court,²⁷ quoting with approval a report which stated that the purpose of mediation confidentiality was to promote:

'... a candid and informal exchange regarding events in the past ... This frank exchange is achieved only if the participants know that what is said in the mediation will not be used to their detriment through later court proceedings and other adjudicatory process.'²⁸

Since then, the Californian Court of Appeals has further recognised the importance of confidentiality in mediations by extending legal privilege to documents prepared for mediation, if they disclose any of the substance of the mediation.²⁹

It is largely to protect confidentiality that the tide has turned against broad rules. Under the Uniform Mediation Act, recommended by the National Conference of Commissioners for Uniform State Laws in 2001, mediators are prohibited from reporting on anything other than whether a party actually attended the mediation. In a recent policy statement, the American Bar Association said that broad rules were too difficult to define and that sanctions should only be used to enforce narrow rules.³⁰

The courts have also tended not to enforce broad rules. In a recent study of US cases, Professor John Lande found that bad-faith allegations were upheld in all of those cases dealing with failure to attend the mediation (two cases) and failure to provide a pre-mediation memorandum (two cases), that the courts were split on the cases dealing with settlement authority (seven cases), and that almost all of the rest (20 out of 22) – which I would categorise as broad rule cases – were rejected.³¹

Surveying this legal landscape, it is tempting to conclude that US good faith rules have proved variously unenforceable or useless, and that the lesson for English courts and legislators is to avoid them entirely. That, however, would be too harsh a judgment. For despite all the problems, there is still a real appetite in America for narrow rules. To understand this, one must look to how those rules have helped make mediation such a central mechanism of the American justice system.

The speed of the cultural change in American legal

circles in favour of mediation has been breathtaking – and all the more so when it is considered that American attorneys have been trailblazers in this area, and could not benefit from picking over the successes and failures of other countries' experiences. Texas mediator Jeffrey S Abrams describes how in 1987, when courts were given the power to order mediation, most Texan attorneys saw mediation as something confined to community organisations and occasionally used in family or PI cases.³² Many thought that participating in mediation would be a waste of their clients' time or money since the case simply could not be settled, or that agreeing to mediation was a sign of weakness.

Mandatory mediation, Abrams argues, has changed those views. By gaining exposure to the benefits of mediation, the Texan legal culture has come to embrace it as a vital alternative to litigation. This has also been the attitude of the judiciary,³³ which has taken the view that parties sometimes need to be told what's best for them. In *re Atlantic Pipe Corp*³⁴ the Court of Appeals for the First Circuit said that:

'When mediation is forced upon unwilling litigants, it stands to reason that the likelihood of settlement is diminished ... The fact remains, however, that none of these considerations establishes that mandatory mediation is always inappropriate ... This is particularly true in complex cases involving multiple claims and parties. The fair and expeditious resolution of such cases often is helped along by creative solutions – solutions that simply are not available in the binary framework of traditional adversarial litigation.'³⁵

This approach should be contrasted with that adopted by the English courts. In *Halsey*, Dyson LJ warned that:

'If the court were to compel parties to enter into a mediation to which they objected, that would achieve nothing except to add to the costs to be borne by the parties, possibly postpone the time when the court determines the dispute and damage the perceived effectiveness of the ADR process ... if the parties (or at least one of them) remain intransigently opposed to ADR, then it would be wrong for the court to compel them to embrace it.'³⁶

One problem with asking *post facto* whether a refusal to attend was reasonable, as the English courts do, is that it introduces a further layer of complexity. Moreover, given the evidential limits of what can be considered, such a caveat provides only very limited protection. Better, in my submission, would be to require a party invited to mediation by the court or by the other side to attend, but to give the court a power to excuse them if they can show beforehand that mediation would be unreasonable in the circumstances. Such a rule would give some assistance to parties who have a genuine reason to avoid ADR – for example, those who need to have a legal point decided, or who can show oppressive behaviour by the other side – but would otherwise establish a firm culture in its favour.

I therefore conclude that if we were to change any aspect of our mediation laws in the light of the American experience, it should be to insist on attending mediation except in exceptional circumstances and with prior excusal of the court. It is clear from the American experience that anything other than the narrowest of requirements fails to strike a workable balance, and the

Notes

- * Tristan Jones is Adjunct Professor at Georgetown University, where he teaches legal negotiation. From September he is a Pupil Barrister at Blackstone Chambers in London.
- 1 Lande J, 'Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs' (2002) 50 UCLA Law Review 69 at78.
- 2 [2004] EWCA (Civ) 576.
- 3 Dyson LJ at para 16.
- 4 [2004] EWCA (Civ) 887.
- 5 Dyson LJ at para 14.
- 6 [1992] 2 AC 128.
- 7 CPR 1.1(1): 'These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly.'
- 8 Mentioned by Lande J, 'Why a Good-Faith Requirement is a Bad Idea for Mediation' (2005) 23 *Alternatives to High Cost Litigation* 1.
- 9 99 F Supp.2d 1056.
- 10 At [10].
- 11 Several of those reasons are outlined in Van Winkle, JR, 'The Solution to Ensuring Good Faith in Court Connected Mediation: Self Interest' (2004), located at www.mediate.com/articles/vanwinklej.cfm?nl=67
- 12 149 F 3d 332.
- 13 74 F 3d 1240. The court cited in support *Kalain v Smith* 25 Ohio St 3d 157.
- 14 *Decker v Lindsay*, 824 SW 2d 247.
- 15 In *In re Daley*, 29 SW 3d 915 the Texas Court of Appeals allowed a lower court to investigate whether one of the participants to a mediation had left at 1445 in order to catch a flight, leaving behind other representatives with authority to settle. The court did not challenge the underlying assumption that if the participant did leave at that time, it would constitute a violation of the requirement not to leave before the mediator drew the mediation to a close.
- 16 977 SW2d 657.
- 17 988 SW 2d 370.
- 18 The court distinguished the rule in *Pirtle* on the grounds that in *Davis* the department had in fact filed a written objection to mediation, but was nevertheless ordered to mediate. The implication appears to be that the requirement that parties actually participate in a mediation, rather than simply attend, was confined only to situations factually very close to *Pirtle*.

line drawn in *Halsey* against looking inside a mediation is therefore the correct one. On the other hand, the policy of insisting on a minimal attendance requirement has proved so effective in building a culture of mediation that it should be more firmly embraced by the English courts.

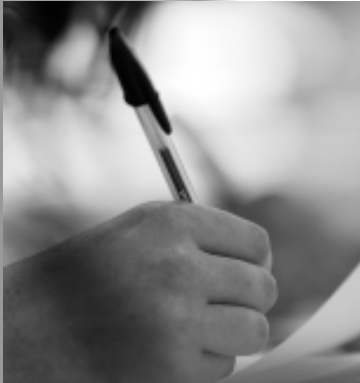
- 19 For example: *In re Acceptance Insurance Co*, 33 SW 3d 443 (the court can ask whether a party attended but not if they were prepared); see also the limited scope of *Pirtle* discussed at n 18 *supra*.
- 20 Mentioned by Lande J (2005) at n 7 *supra*.
- 21 This, for example, is one of a fairly comprehensive list of good faith rules suggested in Kovach, K 'Good Faith in Mediation – Requested, Recommended or Required? A New Ethic' (1997) 38 S Tex Law Review 575.
- 22 One of the four rules preferred by the court in *Hunt v Woods*, n 11 *supra*.
- 23 Another of the rules in *Hunt v Woods*, n 11 *supra*.
- 24 A broad 'Totality-of-the-Circumstances Test' is outlined in Weston, M, 'Checks on Participant Conduct in Compulsory ADR: Reconciling the Tension in the Need for Good-Faith Participation, Autonomy and Confidentiality' (2001) *Indiana Law Journal* 76:591.
- 25 92 Cal Rptr 2d 916.
- 26 Although the court reversed the order on other grounds.
- 27 26 Cal 4th 1.
- 28 Quoted *verbatim* in the *Foxgate* judgment, attributed to: National Conference of Commissioners on Uniform State Laws, Uniform Mediation Act (May 2001) § 2, Reporter's working notes.
- 29 In *Rojas v Superior Court of Los Angeles* 126 Cal Rptr 2d 97.
- 30 ABA Section of Dispute Resolution, 'Resolution on good faith requirements for mediators and mediation advocated in court-mandated mediation programs.' Approved by Section Council on 7 August 2004.
- 31 Lande J (2002), at n 1 *supra*.
- 32 Abrams, J, 'Compulsory Mediation: The Texas Experience', located at www.internationalmediator.com/TexasExperience.shtml.
- 33 This attitude has also been praised by some academic observers. See, for example, Blankley, KM (2004) 'Confidentiality or Control: Which will Prevail as Confidentiality and "Good Faith" Negotiation Statutes Collide in Court-Annexed Mediations?' located at www.abanet.org/dispute/essay/confidentialitycontrol.pdf.
- 34 304 F 3d 135.
- 35 Circuit Judge Selya, at 144-145.
- 36 Dyson LJ at para 10.



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