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MEDIATION AND ITS USES BEYOND THE OBVIOUS

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Mediation has a cost/benefit ratio like no other dispute resolution process and is now firmly embedded in the dispute resolution world. But given mediators' skills and success rates, we should be doing so much more than simply providing a process by which parties can exit the adversarial legal system.

There are certainly less obvious ways in which mediators can provide a service to the commercial world and my recent experiences, coupled with anecdotal evidence, suggests that mediators are beginning to work in areas far beyond their traditional offering.

So, let's have a look at few cases that I think provide ample support for the proposition that it is high time for mediators to extend their services, backwards – in other words, earlier in the timeline of a dispute and in fact right back to the beginning, pre-dispute!

The versatility of mediation

A few months ago I mediated an outsourcing dispute. I needn't bore you with the detail, for the detail was irrelevant. The dispute was merely symptomatic of a commercial relationship gone wrong. Yet I was retained only to resolve the dispute at hand, the facts of which were encapsulated in well drafted letters from opposing counsel, letters which didn't even hint at the broader relational and contextual problems. But it wasn't long into the mediation before we all appreciated what needed to be done – an overhaul of the entire outsourcing relationship. In fact a rejigging of a

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number of separate agreements dating back nearly fifteen years. Fees, discounts, bonuses, service level agreements, the term of agreements, geographical boundaries etc were all discussed and, by and large, altered to reflect a changing world. Wage inflation in countries to which many services had been outsourced, increased personnel, upgraded/faltering IT systems, mergers etc, had all conspired to challenge what had once been an extremely good relationship. Clearly not something for the 'one-day wonder' type mediation, but rather a structured remedial programme with constructive rather than negative dialogue pervading, with true interests rather than absolute or extreme positions addressed. A series of mediator managed meetings later, interspersed with a number of meetings that were not attended by me, and all was resolved. Although this case was resolved on the basis that the parties continued their relationship, albeit on a revised basis, it may well have gone the other way – the parties could have drawn a line under their relationship. However, had that been the outcome of the process, we would have seen an orderly unravelling. No 'terminations for cause' (and associated reputational issues) or diversionary drawn out disputes. A 'clean break', a managed exit with the minimum of fuss.

So why was my brief confined to one specific dispute, the metaphorical tip of the iceberg, when it was as plain as a pike staff that a resolution so confined would be no more than scratching an itch, momentary relief from a symptom, not a cure for the underlying cause of the irritation. I suggest it is because of the assumption that mediators only appear when parties are ready to exit a fully fledged dispute, their role, as the one or two day mediation perhaps indicates, confined to resolution of a few well defined issues.

Another dispute I mediated recently was described as a licensing dispute. And, at one level, it most certainly was. It was between two companies – one a minority shareholder in the other and the issue I was asked to resolve related to a series of technology licences dating back several years. Yet that wasn't really the problem at all. The problem was how the minority shareholder felt they were being treated and how they perceived the company in which they had a valuable minority stake was being run. The two companies were doing business in very different jurisdictions and there were cultural and all sorts of other differences between them. These were the real issues. Again, the headlined dispute took a back seat and the mediation took on the characteristics of a commercial 'kick-off' meeting at which a road map was worked out for the establishment of a joint venture. Was that an expected mediation outcome? No! But the mediation was the catalyst for discussing the wider and more important

issues which resulted in a new, better structured and more profitable relationship.

Pushing back the boundaries

Both these cases were referred to mediation because of a dispute symptomatic of a commercial relationship gone or going wrong. Could a mediator have been used to address the underlying relational issues before the disputes arose? Of course! The costs of the disputes could have been saved or significantly reduced as could the management time spent instructing lawyers, there would have been less polarisation in terms of positions and willingness to 'talk', and the relationships put back on track far earlier.

It seems clear to me, as it does to many others, that mediators need to sell their services more broadly. Not easy given that mediators have become so associated with the quick exit from proceedings, that their employment elsewhere in the lifecycle of a faltering relationship simply doesn't occur to many. But mediators must come out from the shadows of the adversarial system under which they typically work and apply their skills in a wider context. Why not bring them in when parties know there is something wrong, albeit at a time when a dispute has not yet crystallised? The advantage to businesses - it would cost them a fraction of what they spend resolving disputes, preventing them in the first place.

But what are our chances of expanding the use of mediation techniques beyond the obvious 'quick fix'? Well, those businesses that do use neutrals to address issues before anyone has thought of reaching for their nearest litigation lawyer, report favourable results. Indeed, there is a growing recognition that mediation is essentially a commercial process and one that should be seen as an invaluable business tool, not just to manage problems but enhance commercial relationships.

So, the landscape is changing and one example of this is the 'institutionalisation' of mediation in long term projects in the form of 'project mediation'.

Project Mediation

'Project Mediation' is a term that is gaining recognition in the UK. Put shortly, project mediation is the real-time resolution of disputes or differences by experienced dispute resolvers familiar with the industry concerned and the contractual relationship in question. It is a collaborative

problem solving process which encourages creativity and enhances working relationships.

Project mediation puts the process very much in the forefront of the hearts and minds of contracting parties, but at the outset of a relationship, as opposed to sometime after the crystallisation of a dispute. Typically, the mediator or mediators (there can be more than one – legal, technical expert etc) will meet with the contracting parties and discuss what form of dispute resolution framework should be put in place. Thus, if and when an issue does arise, the parties have immediate access to expert dispute resolvers that they know and who have respect for the value of a continuing commercial relationship that they are familiar with.

More generally, dealing with issues as they arise is the best way to manage a relationship and avoids needless escalation of what is often a minor and easily solvable problem into a dispute. Perhaps more importantly, having a bespoke and trusted process in place that parties have 'bought in to' at the outset, is likely to deter parties from immediately taking a totally positional approach to differences, or perhaps the more dangerous step of simply doing nothing until the entire relationship is put at risk by a cataclysmic explosion of built up anger and frustration at issues left to fester. Having a process in place also avoids any embarrassment or sense of failure over referring an issue to mediation – issues were expected to arise and that is why there is a process in place, a process by which issues can be resolved speedily by readily accessible experts who are known to the parties and who are up to speed with the context in which such issues have arisen.

And the results? The evidence so far suggests that project mediation helps bring in projects on time and within budget!

But it is not just in the context of a relationship under strain (as opposed to a crystallised dispute) that mediation can be used. 'Deal mediation' is also coming to the fore, another less obvious use of the process.

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Deal mediation

Business partners or prospective partners sometimes employ mediators, not to resolve a dispute (because there isn't one) but to facilitate stalled or difficult negotiations.

A wonderful example of a deal mediation was the subject of an article published in the IBA Mediation Newsletter which I used to edit.[2] The facts were these. Company A owned a trade mark portfolio which they licensed to Company B. Company A had no interest in continuing to own the portfolio and Company B preferred to own the portfolio rather than be a licensee. Willing buyer, willing seller. All well and good. But they couldn't agree price and each party had very different figures in mind. It was agreed that they would each commission a report on the value of the marks from brand valuation experts. The reports came back and, guess what? They were very different. Company A's report contained a figure unacceptable to Company B and vice versa. The parties talked. It was established as a matter of principle that both would move from the figures stated in their respective expert's report. Further proposals were made but still there was a gap. The parties were sophisticated however. Rather than simply give up the commercial outcome both sought because of what appeared to be an unbridgeable gap, they considered the options.

Arbitration was rejected – neither wanted to risk an extreme outcome. 'Baseball arbitration' was considered where the arbitrator has to decide between 'best' offers from each party. The arbitrator can do nothing else. The process encourages reasonable rather than extreme proposals as the arbitrator can only choose the proposal he or she considers the most realistic. Other options were looked at but eventually the parties plumped for an 'Arb-Med'. The 'two-hatted' neutral spent a morning as arbitrator and arrived at a figure for the value of the trade mark portfolio. He did not disclose the valuation but put his finding in an envelope. He then became a mediator on the understanding that if a deal could not be agreed in the mediation process, the envelope would be opened and his valuation would become binding. The advantage of such a process to the parties was that there would be a certain outcome one way or the other. Needless to say, a deal was done at the mediation and the envelope was never opened. The mediator had bridged the gap!

[2] Arb-Med Einstein's Theory of Relativity really works! – Vol 2 No 2, September 2006

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This was a situation in which there was no dispute, just two parties trying to conclude a commercial transaction but who needed a bit of help from a mediator to finalise matters. What a superb use of a mediator's skills!

Conclusion

Mediators have, for far too long, been pigeon-holed as dispute resolvers to be called up when parties decide, as they usually do, that enough is enough in the adversarial ring. But it is high time we were thought of as so much more, as deal-makers in situations where a bit of oil on the wheels is needed, as enhancers of commercial relationships in long term and other arrangements and as an expert resource in getting the best out of commercial interactions of all kinds.

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