



Above Jersey Airport - the parties here were early users of Contracted Mediation

New ways of resolving business disputes now mean better solutions more of the time, at far less cost.

Mediation and Contracted Mediation offer real benefits to business and have introduced choice about what to do when a dispute looms. In a recent survey for the Institute of Directors, 79% of those interviewed would prefer to use alternative dispute resolution rather than going to court to resolve a dispute. Nonetheless, knowledge about mediation and Contracted Mediation is still patchy across commerce and industry in the U.K. This article explains mediation and how it works, and particularly focuses on the benefits of Contracted Mediation, a service which presses home the advantages of mediation. London continues to be a centre of excellence in resolving commercial disputes and so it is no surprise that the term “Contracted Mediation” was coined in London when ResoLex Ltd launched its Contracted Mediation service at the Bank of England in October 2000.

Disputes are a real problem for business. The harm that they do to business relationships and businesses themselves is legendary, as are the notorious costs and uncertainties of litigation. The premise of mediation and Contracted Mediation is that

commerce and industry deserve to have a choice in how they resolve their disputes. At least one of those choices should directly address business needs (as opposed to legal rights alone). That is what mediation and Contracted Mediation aim to do.

MEDIATION: First, what is mediation? Mediation means resolving a dispute by an agreement made with the help of a professionally trained “honest broker” or mediator. The process is fairly informal and focused on the needs and concerns underlying the dispute rather than only on strict legal rights — after all, the mediator is only helping the parties to reach agreement, rather than imposing a judgement or decision on them.

There are three things you need to know about mediation. First, it is voluntary - if you don't like how it is going, you can walk away. Second, it is without prejudice - you can still sue, if you don't reach any agreement. Third, in focusing on needs, rather than legal rights, the parties are able to reach solutions not available in litigation and difficult to achieve in old-fashioned bilateral negotiation.

One other point: mediation is relatively cheap, quick and effective.

So, is mediation really different from lit-

igating through the courts or before an arbitrator? Yes, radically. Litigation is about enforcing rights. Whether the results match anyone's needs is almost a matter of chance.

The judge or arbitrator imposes a decision on the parties based on his or her assessment of legal rights. Subject to appeal, the parties are then stuck with it. This imposition is not welcomed by at least one party, if not both! The delay, expense and negative publicity of litigation can often make a “win” in court less of a triumph.

In litigation, parties do of course try to influence the outcome, albeit indirectly, by the way they present their case and the resources that they devote to it. But in the end, litigation means a result chosen by the judge from limited choices, normally without regard to underlying commercial interests of the parties before the court. Nonetheless, the courts are a vital back-stop. No one will suggest that mediation is a panacea or that all litigation will cease. It won't. But for too long the courts have been an unsatisfactory first port of call. A new cheap and effective process is a welcome development. Mediation is not so new. Evidence of it

can be found in ancient Egyptian administrative records but, rather more recently, the Centre for Effective Dispute Resolution (CEDR) has successfully worked for over 10 years to promote mediation to commerce, industry and particularly, the City. Perhaps CEDR's greatest achievement has been the setting of a gold standard qualification for would-be mediators, with its award-winning training course designed by David Richbell, formerly Director of Training at CEDR. Professor Karl Mackie has also spearheaded an awareness-raising programme across Europe and beyond, to EU institutions, other international organisations, national governments and commerce worldwide. For many, mediation is now the process of choice, although it is still not used as widely in the UK as it is in the US and Australasia. CEDR reports an 70-80% success rate in its mediations. There can be no doubt that the effectiveness of the process is proved; the question now is how best to use it. One of the problems for mediation has been that it is often used late in the day. The damage is already done: to the relationship and the bottom line. It is unfortunate, to say the least, to deploy such an effective process so late. ResoLex and others believe that it is not only unfortunate but also unnecessary. Hence, Contracted Mediation.

**CONTRACTED MEDIATION:**

Contracted Mediation puts the dispute resolution framework in place at the beginning. But more than that, it puts the process in the parties' minds at the outset too. It is an accessible process, so that the parties can take an active and effective role in it: in effect, they manage the dispute to a resolution, with expert help. So, it helps to prevent wasting time and money on disputes. Contracted Mediation applies the mediation process to solve business problems before they become disputes or escalate into conflict. Some differences are inevitable in any venture, but they need not escalate into disputes or conflict. Early

commitment to resolving differences more sensibly is key to success.

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

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

When anyone thinks that there is an issue which could usefully be addressed with the Panel's expert help, they know the Panel and can contact them straight away so that the pressure cooker effect which is often observed in disputes can be avoided. The pressure cooker effect is where nothing is done until a dispute is really boiling. Contracted Mediation operates as an early safety valve.

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

John Fordham, head of litigation and dispute resolution at Stephenson Harwood, recognises the benefits of mediation. "It has a very valuable part to play in the dispute resolution process", he says. In his experience, "mediation is useful at all stages of disputes and an early

contractual commitment to it makes good business sense?"

In a recent survey for *Legal Director*, more than three in four (77%) of companies had experienced some sort of serious dispute over the previous 2 years. (In a similar survey the previous year the figure was "only" 64%.) In a way it is extraordinary that the UK has not embraced mediation sooner. A competitive business, market or economy must be competitive in how it resolves its disputes, as well as where it hosts its data, insures its risk or markets its services. A solution is now available off the shelf.

Contracted Mediation has wide application. One example is project finance. PPP and PFI projects, though politically controversial at the moment, are classic examples of London's internationally recognised expertise, as well as the increasingly hybrid nature of commercial ventures. Part finance, part construction, part facilities management, these projects are characterised by their complexity, the length of the commercial relationship (often 25 or 30 years) and their sensitivity to project failure. They are natural candidates for contracted mediation. As in many contracts, the participants in PPP and PFI projects have some community of interest in the venture's success. This reinforces the benefits of contracted mediation.

**KNOWLEDGE AND INFORMATION:**

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

this way is new thinking. The Knowledge Curve demonstrates the value of contemporary knowledge by identifying the activity necessary to rebuild it and the attendant delays, expense and waste of time. It also highlights the advantage of early resolution of disputes before the knowledge base has degraded. Mediation also addresses the structural impediments and inefficiencies in negotiation, such as information inadequacies and asymmetries. But these are not the only problems in negotiation. Negotiation is commonly bilateral (even in multi-party negotiations) and positional rather than principled or, indeed, creative. Underlying needs often remain hidden for parties to stay "strong". A powerful illustration of the latter is a study in which experienced negotiators (in an MBA programme) were divided into two teams. Both teams were given a list of eight items that they should try to agree. There were two common issues, -which both teams were briefed to achieve! 39% failed to reach agreement on these

two issues! (Even where they did agree both, neither party tended to appreciate that the other had also benefited). Another critical structural shortcoming in negotiation is the creative-distributive tension identified by Professor Moonkin of Harvard Law School. This tension reflects the wish to share information openly to create value in the deal on the one hand and the giving away nothing to stay "strong" on the other. Mediation directly addresses this tension by providing a third party confidential repository for information that can create value for both sides, without requiring either side to disclose that information to the other. However, as we have seen, mediation is often used late, when the dispute is already mature, business and relationships have been damaged and substantial legal fees incurred. All these factors then act as impediments to settlement, which have to be overcome. This is often unnecessary and could have been avoided if the parties had had a mechanism to address the issues earlier.

Contracted Mediation provides such a mechanism. It addresses differences as they arise in a commercial relationship. A stitch in time saves nine. By providing a resource from the outset, Contracted Mediation supports business relationships and gives all participants in commercial ventures an effective and professional framework to allow difficulties that inevitably arise to be managed early, rather than allowing them to escalate into disputes or conflicts.

Just as IFSLs LOTIS Group seeks to open up the international market in financial and related services by liberalisation and removal of systemic barriers to free trade, so Contracted Mediation aims to liberalise the dispute resolution market and oil the wheels of the United Kingdom's economic success.

Better late than never. But even better early..

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