

INTRODUCTION TO ALTERNATIVE DISPUTE RESOLUTION:

A Comparison Between Arbitration and Mediation

By

Rhys Clift – Partner

1. Preamble

- 1.1. Historically, legal disputes have been resolved either by litigation or by arbitration. Mediation (a form of ADR) is a new way to settle commercial disputes.
- 1.2. Litigation is quite unlike mediation, but some consider that arbitration is a form of ADR and similar to mediation. In fact the two are fundamentally different. The purpose of this paper is to describe these differences and to set out some supplementary information about mediation, its use and effectiveness.
- 1.3. The main body of this paper has been designed so that you can dip into any section or point of interest, or alternatively read the whole narrative. Arbitration (and litigation) procedures in England and Wales are in many ways excellent and legal process is arguably indispensable. However, and these are broad generalisations, legal process has deficiencies which can be remedied in suitable cases by the use of mediation. Many of the observations in this paper about the shortcomings of arbitration (and litigation) apply equally wherever they are conducted, whether in England and Wales or elsewhere abroad under foreign systems of law.
- 1.4. The main body of this paper is divided into the following sections:-
 - ▶ Introduction.
 - ▶ What is ADR (esp mediation)? – Section 3 page 3.
 - ▶ How does Mediation differ from Arbitration? – Section 4 page 4.
 - ▶ When should Mediation be used? – Section 5 page 9.
 - ▶ Why is Mediation not used? – Section 6 page 10.
 - ▶ Why is Mediation effective? – Section 7 page 10.
 - ▶ Conclusion – Section 8 page 12.
- 1.5. In Annex 1 to this paper, you will find a bullet point comparison between arbitration and mediation on one page. This is deliberately simplified to provide a snapshot comparison between the two processes “at a glance”. It cannot show the subtlety of any commercial dispute. It should be appreciated that it is often necessary, indeed vital, to go through some of the phases of arbitration in order to put a case into the best shape for settlement on advantageous terms.
- 1.6. I hope you find this paper of interest and of use.

2. Introduction

- 2.1. In this introduction, I am touching on a few developments which are part of the backdrop for this comparison.
- 2.2. First, why mediate? Because it works, it is quick, and it saves money.
- 2.3. “*The man with the new idea is a crank until the idea works*” according to Mark Twain. As we all know, new ideas are initially ignored. If they persist they are often treated with hostility and derision. And then, suddenly, they are orthodox and part of mainstream thinking. This is as true of commercial mediation as of any other radical new idea. Is commercial mediation now in the third phase? Is it part of orthodox mainstream thinking? The answer to this must be an emphatic “yes” and mediation passes Mark Twain’s “*crank test*”; it works.
- 2.4. Mediation has a long history, in international diplomacy, in family and labour relations and in Asian jurisdictions. But until recently mediation was something of a minority sport in the resolution of **commercial** disputes. Although there is still perhaps a long way to go, the tide has very clearly turned.
- 2.5. There has been a veritable explosion of interest in mediation and a substantial growth in the number of mediation service providers. In this I am not thinking simply of the United Kingdom (although very significant progress has been made here) but generally internationally. The first place to look is on the Internet. If you tap the words “**Commercial Mediation**” into any of the main search engines you will generate a vast number of hits. Even if you confine the search to particular countries, the result is similar. If you make a Google “book search” you might find 150 books on the subject. These Internet hits denote a huge amount of activity, a huge amount of energy and effort that has been devoted to understanding the process, developing it and using it.
- 2.6. Until recently ADR and mediation (and to some extent ADR has become synonymous with mediation) meant hardly anything to English lawyers. Indeed some had (and have?) a negative attitude to it. Until recently lawyers in England were not trained in negotiation skills or dispute resolution at University or in Law School. This inevitably had an effect on their thinking processes. The emphasis was on the **process** of handling disputes; familiarisation with rules and procedures, knowledge of the rules of arbitration organisations and familiarity with the Commercial Court Guide. The mindset was to identify issues and unearth evidence by way of documents, witness testimony and expert opinion with the objective of putting all that at some point before an arbitrator or a Court. Less emphasis was placed on the **solution**. But in a few short years a whole cultural change has taken place. Law firms now have “Dispute Resolution” departments, not litigation departments. Mediation is a key feature of this change.
- 2.7. In the UK, the ground breaking work on mediation was probably done by the Centre for Dispute Resolution in the early 1990s, but commercial mediation was given an enormous impetus by the new Civil Procedure Rules, implemented at the conclusion of the investigation into the rules of civil procedure by the Woolf Committee in 1999. The fact that the Courts are now able to give “encouragement” to parties through the application of the new Civil Procedure Rules (costs pressures) has meant that mediation has become much more common in litigation; indeed many commercial litigators would accept that there is now a strong possibility or probability that almost all disputes will be referred to mediation at some stage, if not settled before trial.
- 2.8. But this is not true in arbitration; and a comparison between mediation/ADR and arbitration is the primary focus of this paper. Nonetheless, even though arbitration tribunals do not “encourage” or order parties to go off to mediation, mediation is becoming more common in resolving disputes which are otherwise referred to arbitration. This is a response to client

demand. In litigation clients have seen that mediation saves money and cases settle. It works. So they want it in arbitration too.

- 2.9. The draft “**Directive of the European Parliament and of the Council on certain aspects of mediation in Civil and Commercial Matters**” prepared by the Commission of the European Union in October 2004 (2004/0251 (COD)) is a significant landmark. A review of that draft Directive and the preparatory work which led up to it is beyond the scope of this paper. But if, or perhaps when, that Directive is finally issued it is almost inevitable that it will lead to a proliferation of mediation in commercial matters throughout the now 25 members of the European Union. Indeed it is inevitable that it will have ramifications well beyond the EU given the extent of trading relationships between European Union nations and other foreign states. The fact that the EU Commission has proposed this Directive is evidence of the widespread support there is for commercial mediation, right across the EU.
- 2.10. More recently, another significant endorsement of mediation was National Mediation Week. National Mediation Week was held in the UK in the week commencing 24th October 2005. The week was launched on Friday 21st October 2005 by a keynote speech given in the name of the Lord Chancellor. The launch day was well attended by solicitors, barristers, mediators, mediation service providers and several members of the judiciary including the Master of the Rolls (a key figure in the English judiciary). It was plain from that launch day that many whose very *raison d’être* is the handling of commercial disputes are persuaded of the merit of mediation. At the highest level, the British Government and the judiciary emphatically support mediation.
- 2.11. How has the market for mediation changed? When I completed my training as a mediator in October 1998, through the CEDR accreditation process, the new Civil Procedure Rules were not yet in force. At that time, it was a fairly common view that any skilled mediator could mediate any dispute. To some degree that is true. But with experience the market has matured. Some would now say that it is important, perhaps vital, that the mediator has specialist expertise in the subject matter of the dispute. The development of the Maritime Solicitors Mediation Service (MSMS – www.msmsg.com) is a significant manifestation of this trend.
- 2.12. This brings me to the key issues.
 - ▶ First, what is ADR (esp. mediation)?
 - ▶ Secondly, how does mediation differ from arbitration?
 - ▶ Thirdly, when should mediation be used/not used?
 - ▶ Fourth, why is mediation not used?
 - ▶ Finally, why is mediation effective?

3. What is ADR?

- 3.1. ADR is Alternative Dispute Resolution. This is a term with a very wide definition and covers any form of dispute resolution, other than through Court process. Strictly speaking the term “alternative” may be something of a misnomer. Most forms of ADR are used hand in glove with either litigation or arbitration. A little later in this paper I will explain why it is wise to use the various forms of dispute resolution carefully together.

Mediation

- 3.2. ADR comes in many forms. First and foremost there is mediation, whether facilitative or evaluative. I will be looking at these in a little more detail below. But before that, I will look very briefly at certain other ADR procedures.

Early Neutral Evaluation

- 3.3. “**Early Neutral Evaluation**” can be organised at any stage in proceedings. The procedure involves a Judge, an arbitrator or an independent third party (for example a solicitor, or a barrister) sitting with the parties for a day and, on the basis of written evidence put before him (for example documents and witness statements) and on the basis of what he hears from the parties, giving a **non-binding** view as to the likely outcome of a legal dispute. If the parties have used a Judge in litigation for early neutral evaluation, then if the case does not settle that Judge will not try the case. He will have no further involvement in the procedural aspects of the case. As far as I am aware, this procedure has not been much used.

Executive Tribunal

- 3.4. Next we come to “**Executive Tribunal**”. This is a procedure akin to mediation where senior management attend before a mediator together with their case handlers. The case handlers then present their respective cases to the mediator and retire. The mediator then meets the senior personnel to discuss how the matter might be resolved. This procedure might be useful where big corporations are involved and where a case has become bogged down at a middle management level. Again, I am not aware that this procedure is much used, certainly in comparison to mediation.

Neutral Fact Finder

- 3.5. What about a “**Neutral Fact Finder**”? As the name suggests, this procedure involves a neutral third party investigating just the facts of a case and reporting to the parties. The fact finder will not address legal issues (neither liability nor quantum) and will make no assessment on the merits of the case. This procedure is analogous to the procedure which is used in some continental jurisdictions, for example in France where a Court surveyor is appointed to make findings of fact.
- 3.6. Yet again I am not aware that this procedure is much used in England, again in comparison to mediation.

Arbitration

- 3.7. Finally, some say that **Arbitration** falls within the broad umbrella of ADR. But, in reality, arbitration has more in common with litigation (Court process). Comparing litigation and arbitration the similarities are obvious: there are two (and perhaps more) adversaries, there is generally a formal process for the exchange of pleadings, disclosure of documents, service of witness reports and expert reports. If necessary, parties can be compelled to comply. In each case the process culminates with one or more hearings. At the conclusion of the hearing or hearings there will be some form of determination on the issues, which remain live between the parties. Generally there will be one winner and one (or perhaps more) losers. A number of consequences will flow from that determination, notably in terms of who bears the costs or a large part of the costs of the whole process.
- 3.8. In many respects these features of arbitration and litigation differ substantially from mediation.

Mediation

- 3.9. This brings me back to mediation.
- 3.10. There are essentially two types of mediation; **facilitative** and **evaluative**. Facilitative mediation is by far the most common model used in England and Wales for the resolution of

commercial disputes. Evaluative mediation is a rather different animal. Although the lines of distinction between the two may appear to blur, in reality the difference between them is profound.

- 3.11. In evaluative mediation at some point the mediator will express a view, (probably simultaneously to all parties) on the strengths and weaknesses of their respective cases. He or she might indicate which arguments might succeed and which might fail. The mediator might even express a view on what might constitute a fair and reasonable settlement.
- 3.12. This will not happen in facilitative mediation.

Facilitative Mediation

- 3.13. Throughout the rest of this paper I am referring to the dominant form of ADR and that is facilitative mediation.
- 3.14. In facilitative mediation a neutral third party, the mediator, assists the parties to settle their disputes. The mediator is the catalyst. The presence of an independent third party is the key distinguishing feature of the process. Facilitative mediation is a process of managed negotiation.
- 3.15. So what do mediators do? They all work in different ways, partly through their character and partly through their training and expertise. Certainly there is no set formula but there are certain common threads. The mediator must be entirely neutral and independent. The mediator brings a fresh and trusted mind to what is often an old problem. Trust and integrity are key watch words. His role is to aid communication between the parties, to assist them to overcome emotional blockages, to focus their attention and effort on the problems and moreover their solutions. He can help each side to understand the other side's case or even their own case (and its weaknesses, which they and sometimes their advisors have been unable or unwilling to look at). Mediators can suggest new avenues to explore, to identify and work to overcome deadlock, to unlock and release any of the entrenched positions and in some cases the ill feeling that can accumulate in the course of a dispute.

4. How does Mediation differ from Arbitration?

- 4.1. Arbitration is a form of **compulsory** process. An arbitration agreement can be made in one of two ways. First, the parties to a contract may have agreed in advance that in the event that a dispute arises between them, that dispute should be referred to arbitration according to a particular system of law and a particular procedure. Secondly, there may be an ad hoc reference to arbitration after a dispute has arisen. If there is a binding agreement the parties can be compelled to participate, on risk of penalty.

Control of process - orders

- 4.2. My comparison is largely made on the basis that English law applies. Under English law, notably the Arbitration Act 1996, and under most arbitration procedural rules, the arbitration tribunal will be the master of the process and will have authority over the parties in certain respects (supported by the English Court where necessary). This will generally permit the arbitration tribunal to make orders, like setting down the timetable for the arbitration process and compelling the parties to comply with that timetable. Another example; the arbitration tribunal may, generally on the application of one of the parties, order that certain categories of document should be disclosed in the proceedings. In the event that they are not, the arbitrators may be at liberty to impose penalties. As you will see, this is quite unlike mediation.

Privacy

- 4.3. Arbitration is private and this is one reason why many commercial bodies prefer that their disputes are always referred to arbitration. There is then less risk that any element of the arbitration will find its way into the public domain. The names of the parties, the issues at stake, the pleadings, the underlying documents, any witness statements, any experts reports and moreover the Arbitration Award itself; few of these are ever likely to see the light of day. In this respect arbitration and mediation are similar, but certainly not identical. The key difference is that there is no **guarantee** that arbitration proceedings will remain private. If an Award can be appealed, then the trial of that appeal will, save in the most unusual circumstances, be public and the names of the parties and perhaps all of the issues between them will then find their way into the public domain. An Award may equally become public through an enforcement process or through pursuit of an indemnity claim.

Decision making - Award

- 4.4. Arbitration (like litigation) is a decision making process. At the end of the process, at the conclusion of the arbitration hearing, the arbitration tribunal will make findings of fact and conclusions of law and thereby reach an adjudication on the issues between the parties.
- 4.5. In the dim and distant past many disputes were resolved in trial by battle: one lived, one died. There are similarities between litigation and arbitration on the one hand and trial by battle on the other. Legal proceedings are a fine set of rules to allow parties to obtain an adjudication to resolve disputes, even quite ferocious disputes, in a disciplined and effective manner, but without the need for bloodshed. Legal process may save bloodshed, but there is still generally one winner and one loser.

Enforcement

- 4.6. Finally, looking at this brief list of comparison or evaluation criteria, there is the issue of enforcement. Obtaining an Arbitration Award, or even a judgment, is not necessarily the end of the story. In some respects it is almost the beginning of the story. If the successful litigant does not have in his hands security to cover his claim (for example a bank guarantee, a letter of undertaking, or an injunction freezing assets or property) that litigant may then be forced to pursue his adversary at significant cost and in some cases for considerable time seeking to obtain satisfaction through enforcement.
- 4.7. Arbitration Awards can be readily enforced in England and Wales as a judgement and abroad under the 1958 New York Convention. 136 nations are at the last count (I believe) now parties to that Convention, Pakistan an original signatory, having just joined (acceded) in July 2005.
- 4.8. But despite the many advantages of arbitration, it suffers from certain shortcomings. Indeed, these are the very factors both in litigation and arbitration which prompted the original development and latterly the growth in the use of commercial mediation.
- 4.9. This is certainly not to denigrate litigation or arbitration which are in many respects excellent (and probably indispensable). And these are certainly generalisations, but arbitration is:-
- 4.9.1. Slow
 - 4.9.2. Costly
 - 4.9.3. Adversarial; and
 - 4.9.4. Risky

- 4.10. Many of these failings are equally applicable to litigation and arbitration whether in the UK or abroad.

Slow

- 4.11. Arbitration is **slow** to get a result, in other words to bring a case to a final hearing. Although expedited hearings can be held, as a general rule it can take months and in some cases years. Thereafter, there may be further delay following the conclusion of the hearing waiting for the Arbitration Award to be published. Depending on the complexity of the matter, this can take months. There may then be yet further delay in seeking to enforce the Final Award (or perhaps dealing with any appeal before launching into the process of enforcement).

Costly

- 4.12. As a broad generalisation, Arbitration (or litigation) is costly in most legal systems. It is generally necessary to make an initial review of a claim, to gather some initial papers and request an early legal assessment. Once the issues have been identified and evidence gathered, statements may be taken and then it may be necessary to prepare a formal experts' report. Running through this whole process there will (often) be the fees of Counsel (in the settlement of pleadings, giving advice on evidence and merits and appearances at hearings). There will be the arbitrators' fees (for interlocutory and final hearings) and all costs associated with the hearings (rooms etc). Under some arbitration procedures substantial fees are also payable to the body administering the arbitration at certain stages. It should not be overlooked, however, that it may be necessary to go through some of these procedures to put a case into the best shape to negotiate a settlement.

Adversarial

- 4.13. The whole process of arbitration, like litigation, is **adversarial**. The very character of the process can in some ways entrench disputes and exacerbate tensions between the parties which in turn then can make disputes difficult to settle.

Risky

- 4.14. There is always **risk** in litigation or arbitration. The prospects of success or failure in any particular case can be assessed (in some measure) at various stages, but new documents and information often emerge during the course of the dispute and one can never predict with certainty how an expert or a factual witness might perform at a final trial nor what final Award (or Judgment) will be given. A significant amount of time and cost can be devoted to a dispute before surprises emerge.

Mediation - Voluntary

- 4.15. By contrast, mediation is **voluntary**. In Court process the Court can "encourage" the parties to refer their dispute to mediation with the threat of costs penalties. This does not apply with arbitration.
- 4.16. Since the whole process is voluntary parties can walk out of mediation whenever they wish and, although it is rare, sometimes they do just that. This would be unthinkable in arbitration.

Without Prejudice

- 4.17. Mediation is **without prejudice**. Anything created solely for the purpose of the mediation and anything said on the day is without prejudice. In the event that no settlement is reached neither party can rely on any documents created for the mediation nor on anything said on

the day in the course of the formal mediation “event”. This is of course only the case under English law (and the laws of the various Common Law nations). Care has to be exercised in conducting mediations where the underlying dispute is subject to a foreign system of law and procedure.

Private & Confidential

- 4.18. Mediation is **private and confidential**. Nothing which is said in the course of the mediation can be discussed outside the mediation nor revealed to any third party. This stipulation of confidentiality is generally embodied in the Mediation Agreement which is signed (usually on the day) to regulate the mediation process. Facilitative mediation is generally conducted by a series of meetings. Usually the mediation opens with a joint meeting attended by the mediator and all the parties. When that joint meeting is concluded, the parties break up into separate private rooms and the mediator effectively conducts shuttle diplomacy between them.
- 4.19. Anything which is said at the joint session is confidential. Furthermore, there is a sort of double confidentiality. Anything which is discussed in the private sessions is also confidential and cannot be revealed by the mediator to the other party or parties unless and until he is authorised by the revealing party to do so. This is one of the most unusual and effective features of the process. By contrast, would you reveal to a judge or arbitrator your weaknesses or details of any commercial or financial pressures you face? Obviously not. Under this cloak of confidentiality the parties often reveal to mediators the most extraordinary things, which the mediators can then use (with their authority) to fashion a bargain between the parties.
- 4.20. But again I must sound a note of caution here. There are two points.
- 4.21. First, again if foreign systems of law may apply, beware that the duty of confidentiality may not exist or alternatively may not be enforceable.
- 4.22. Secondly, and in some senses perhaps more importantly, once something is said or revealed it cannot be unsaid. If a case does not settle anything which is revealed at the mediation even if it cannot be used in the formal arbitration might then influence the conduct of that arbitration. Indeed it might influence the conduct of the parties generally in their commercial dealings from that point onwards. As a matter of strict proof or evidence, parties may be then alerted to things they did not previously know. They may be prompted to hunt down alternative sources of evidence to assist them in proving their case later at a final hearing. This is one illustration of the care that is needed in participating in mediation. Mediation is not merely a matter of common sense. It is a skill.

No orders

- 4.23. The mediator has control over the process but not over the resolution of the dispute. So he can decide who should take part in joint meetings, who should take part in private meetings (just solicitors or just the parties or just the experts). He can require the parties to prepare summaries of their best points or schedules of claims.
- 4.24. But he cannot make any orders as such. A mediator unlike an arbitrator cannot order the production of documents. So if there are crucial documents that you must have in handling a dispute, do not go to a mediation until you have got them. Whether documents ever are crucial of course is a matter of judgement. Arbitration and litigation is not physics; it is not a discipline of perfection.

No Judgment/No Award

- 4.25. Against this background, perhaps it is obvious that the mediator has no power to make a final determination of issues between the parties. He will not issue an Award or the equivalent of a judgment; nor will he express any view on the merits of each party's case (cf: evaluative mediation). Either the parties reach a settlement between them or the mediation will break up without a resolution. The parties will be left either to pursue formal legal process, perhaps to negotiate or to reconvene a mediation on a later day.

Enforcement?

- 4.26. When a settlement agreement is signed it is probable that the parties will comply with its terms. Indeed, I am not sure that I have ever heard of anyone reneging on a settlement made by a mediation. Nonetheless, it may be possible to set out the terms of settlement in an Arbitration Award by consent. This would facilitate enforcement. Alternatively it might be necessary to sue on the settlement agreement, but this should be far more straightforward than arbitrating the original claims and counterclaims.

Advantages

- 4.27. Mediation is certainly not a universal panacea. Broadly, however, by comparison to the four core criticisms of arbitration (and litigation) mediation is:-
- 4.27.1. Quick (slow).
 - 4.27.2. "Cheap" (costly).
 - 4.27.3. Collaborative (adversarial); and
 - 4.27.4. Reduces risk to a minimum (risky).

Quick

- 4.28. However long or short the preparation for a mediation (which can be weeks or months) in the usual model of facilitative mediation in the UK the final mediation "event" takes up just one day; although it can be a very long day. Many mediations are projected to start at about 10.00 am and provisionally to conclude at 6.00 pm. Often this is the way they are priced. However it is frequently the case that they run on later, sometimes into the small hours.
- 4.29. There are a number of Court schemes which provide for a much tighter timetable. For example the Central London County Court has a scheme which provides for a mediation of three hours concluding at 7.30 pm. When it gets to 7.30 pm the cleaner comes in and throws everybody out. I have done several of these mediations and this tight timetable can work remarkably well. Sometimes a deal in principle has been concluded by 7.30 pm but it lacks structure and there is nothing in writing. These provisional deals can often be thrashed out on a piece of paper at a hotel which is about 15 minutes walk away. The hotel must be used to seeing small crowds of litigants and solicitors (sometimes barristers). But, even if it is 4 or 5 hours, or 12 or 14 hours it is much faster than a trial or a hearing.

"Cheap"

- 4.30. Cheap is a relative term. The standard price for a mediator for a commercial mediation in London is about £4,000 for one day's preparation and for a mediation taking up one business day. Add to that the cost of rooms and refreshments. Add to that the cost of each party getting their solicitors (and/or barristers) to prepare the case.

- 4.31. There is some careful work to be done just for the mediation which may well be a cost which would not otherwise be incurred in the running of an arbitration. In this I have in mind a Mediation Summary, distilling the essential points to no more than about ten pages, and putting together a bundle of open (and perhaps confidential) materials for the common use of the mediator and the parties.
- 4.32. Certainly all these individual items of costs will pale into insignificance against the cost of running a formal arbitration through the standard process of pleadings, disclosure, witness statements, experts reports, a final hearing and any appeal and enforcement. But bear in mind it may be necessary to go through at least some of these formal stages in order to put the case into the best state to negotiate an advantageous settlement. Although mediation can be conducted before any form of legal process is started generally mediation does not take place in isolation.

Collaborative

- 4.33. I will come to this again a little later, but there is a common sense of shared purpose in much mediation. Often both or all parties really want a deal (the more so if the dispute has been long running) and they are often keen to use the mediation day to achieve just that. Mediations may start with a joint meeting at which some very harsh things are said; there may be a certain degree of posturing and positional bargaining, but later in the day the serious work starts and true agendas start to emerge. Most parties turn up to a mediation because they want to settle, and it is rarely a process of soft compromise.

Risk Management:

- 4.34. Settlement through mediation eliminates the risk of failure at a final hearing or a final appeal.

5. When should Mediation be used?

- 5.1. Some say the proper approach to any dispute is to negotiate, if that fails mediate and if that fails arbitrate (or litigate). But for reasons I will explain in a moment, that may be an ideal but is not always appropriate.
- 5.2. As a generalisation mediation should only be used when the case is “ripe”; that is when both or all sides to the dispute recognise that they have an incentive to settle. When this should be is a matter of fine judgement and will differ from case to case. In this respect every case is unique.
- 5.3. Should it be after exchange of letters before action, when an outline of the claim is set out?
- 5.4. Should it be after an exchange of pleadings, when the issues have been narrowed?
- 5.5. Should it be after disclosure of documents when the evidence to evaluate those pleadings has been disclosed?
- 5.6. Should it be after exchange of witness statements when the evidence on both sides should be that much clearer?
- 5.7. Should it be finally after exchange of experts’ reports?
- 5.8. What is obvious is that most (say 99%) of all disputes settle, whether they are subject to litigation or arbitration. Many of these cases settle at the 11th hour just before trial or a final hearing. Even though its not trial by battle, at this point much the pain has already been

suffered and there is blood on the floor. If there is to be a saving in cost, and if the many other benefits of mediation are to be accessed, it is wise to engage in mediation at the earliest possible stage.

When should mediation not be used?

- 5.9. There are some key things that mediation cannot achieve. Mediation cannot interrupt a time bar. So there is no point embarking on the process of the preparation for and attendance at a mediation without ensuring that a time bar has been protected. Mediators have no powers over the parties (other than the limited authority I have described) and certainly have no power over third parties, like banks. Mediators cannot grant protective orders, for example freezing orders (injunctions) and search and seizure orders designed to preserve money or assets for the purpose of enforcement, or alternatively to locate and preserve evidence for the fair resolution of a dispute.
- 5.10. Logically, therefore, one should make an evaluation, take any protective steps that are necessary (and available) and then embark on a mediation (perhaps in parallel to an arbitration process designed to flush out documents and other evidence).
- 5.11. In what other circumstances should mediation not be used? Obviously because of its essentially private nature there is no point in using mediation if one of the key objectives in any dispute is to obtain a precedent. But this is hardly likely to be a consideration in a dispute which is subject to a binding arbitration agreement. Arbitration Awards, in the absence of an appeal, are private and are not the vehicle by which precedents are created.
- 5.12. Again, there is no purpose in using mediation to resolve a dispute if a key objective is publicity. The whole mediation process is wrapped in a blanket of confidentiality and any final resolution, in the form of a signed settlement agreement, will never see the light of day. Most Mediation Agreements require there to be an agreement in writing for a settlement to be concluded. Those settlement agreements are subject to the same duties of confidentiality which apply to the rest of the mediation process.

6. Why is mediation not used?

- 6.1. You may have seen that a survey conducted by CEDR was published in Lloyd's List on 18th January 2006. The conclusions of that survey, on the reasons for lack of use of mediation include these:-
 - 6.1.1. First, a lack of knowledge (or perhaps familiarity with) the process at a senior management level (coupled with an unfounded fear that mediation is a sign of weakness).
 - 6.1.2. Secondly, that mediation was not mentioned by clients' legal advisors(!)
 - 6.1.3. Thirdly, only 7% of businesses have a dispute resolution policy.
 - 6.1.4. Fourthly, only 2.45% of industries have a collective dispute resolution policy. Many industries lack a standard clause or clauses and a standard Mediation Agreement and Mediation Procedure to which all can subscribe with confidence.
- 6.2. A corollary of the lack of industry standard procedure means that there is a lack of "compulsion" to mediate in any business sector where arbitration is common. Legal proceedings which are brought in the English High Court of Justice will almost inevitably find their way at some point to mediation, if they are not settled before trial. This is not true of

arbitration. The insertion of an appropriate Mediation Clause into standard contracts would change this over night.

- 6.3. Meanwhile, the survey shows concern about the high cost of legal budgets (in litigation) and the same is almost certainly true for arbitration.
- 6.4. The survey also shows that there is a huge hidden cost of management time devoted to running legal disputes which might perhaps be better devoted to other work within a business.

7. Why is Mediation effective?

- 7.1. First, there is no doubt that mediation is an extremely effective way to settle commercial disputes. There is a very large number of mediation service providers but no central body in England and Wales recording mediation statistics. However, anecdotal evidence from solicitors, barristers, mediators, and mediation service providers broadly confirms that between 75% and 80% of disputes which are referred to mediation settle either on the day or very shortly thereafter.
- 7.2. In some respects it is an astonishingly effective process. I have seen some of the most intractable cases settle, even those involving colourful allegations of fraud or dishonesty, the type of disputes which are generally considered the most problematic to resolve.
- 7.3. So just why is it effective? I would identify four main reasons.

Independent Third Party

- 7.4. First, it involves an independent third party. Mediation has its roots in international diplomacy and this can be seen in how the mediator after the usual opening session when all the parties are together operates as a trusted diplomat shuttling between two or more sides and drawing together the threads of the deal. The parties are encouraged by mediators to look at their interests and needs, instead of their rights and wants (as they might perceive them) and most particularly to focus on the alternative if a dispute is not settle. It is often far easier for a third party to do this than it is to hear this message from one's own advisor or indeed from one's opponent.

Decision makers

- 7.5. Secondly, mediation involves decision makers, rather than just lawyers. It is essential that a person with full authority to settle the dispute attends on the day. Strictly speaking full authority means the authority to settle anywhere on the full spectrum from 0% to 100%. It is understood that those who attend often do not have wholly unlimited authority but generally they do have authority to make any deal within sensible parameters. The fact that they are there and participating in the process is crucial.

Timetable, structure, dynamic

- 7.6. Thirdly, I would point to the timetable, the structure and the dynamic of the process. There is a dense concentration and rush of adrenaline with the speed and clarity of thought that this often brings. Many people say if parties can negotiate to settle their disputes they should do so and isn't mediation after all just a process of managed negotiation? Absolutely; but often parties cannot negotiate for one reason or another. Some lawyers are highly skilled in identifying risk in litigation at an early stage and seeking resolution by negotiation, but it takes two to tango. To strike a deal all parties must engage in negotiation and shrug off personal

struggles and even vendettas. Even then the best efforts may be frustrated. The more complex the case and the more parties are involved the more difficult it is to tango. You cannot dance with six people.

- 7.7. By contrast, negotiations can drag. They have no timetable (other than the cold chill of an approaching hearing or a deadline to produce documents or statements). There might be six parties involved and negotiations can break down at the whim of one. When all attend a mediation, prepare for it in advance in accordance with a set timetable and then participate actively on the day, all are drawn in.

Shared sense of purpose

- 7.8. And this brings me to my fourth point. Of course, it is accepted that some parties go into mediation with absolutely no intention of settling. Their only purpose in attending (if they have not been compelled by a Court to do so) is to find out as much as they can about the other side's case while giving away as little as possible about their own. But I suspect, looking at the statistics of settlement, that these are the minority. Most cases reach a point where all parties want to settle and facilitative mediation makes best use of that shared sense of purpose.

Unusual deals

- 7.9. There are other reasons.
- 7.10. Through mediation disputes can be resolved by deals which go way beyond any kind of apportionment of the issues between the parties or any sort of adjudication of who is right and who is wrong. The classic tale told about unusual deals is this:-

"There was an argument between two junior chefs over an orange. They came to blows in the kitchen. The head chef intervened. Both men insisted they wanted the orange, it was the last one in stock, and they had to have it to prepare lunch that day. Neither could be satisfied if the other was given the whole orange. The chef thought about it for two minutes, picked up a meat cleaver chopped the orange in two and gave half to each sous chef. Simple.

Result: Neither sous chef was happy. The first only wanted the skin for the zest in a sauce. The second needed all of the fruit to pulp for a juice. Neither could make the dessert of his choice with half an orange and both went home unhappy".

Mediation could have solved this dispute. Adjudication could not.

- 7.11. But obviously there are commercial examples. There might be a dispute over an insurance policy; are the insurers compelled to pay or not? If that was referred to a Court or an arbitration tribunal there would be findings of fact and conclusions of law. Is the policy binding? Are the Underwriters entitled to avoid it? Is there a breach of warranty, does the policy cover the circumstances of loss? Was the property lost by an insured peril? If it goes to a hearing both will take the risk of losing. However through a mediation they might negotiate the settlement of that claim and perhaps a deal about future business, the payment of premiums by instalments, the adjustments of sums insured over say a fleet of ships and all these as concessions as part of a global deal.

Substitute day in Court

- 7.12. Another factor is that mediation is a substitute for a day in Court, without the risk and cost of a trial. The parties can say exactly what they think about the other side directly to the other

side. That is never going to happen in Court nor in an arbitration tribunal where there is a fine structure for the running of the case. The parties have an opportunity to vent their feelings, again without the risk or the cost of going to a final hearing. This can be cathartic; it can release pent up tension that would otherwise preclude negotiation.

Relationships and reputations

- 7.13. Mediation minimises the risk of damage to relationships and to reputations. Instead of being evermore deeply entrenched in an adversarial process the senior parties, the decision makers, can be engaged in constructive discussion with their counterparts in a manner that simply cannot and will not be achieved through traditional dispute handling. Their relationship may even be enhanced.
- 7.14. And as to reputations we can all think of examples where individuals have adopted a particular stance in handling a particular problem and chosen to stick by that stance even when evidence emerges to suggest that it is unwise. The ultimate damage to reputation is to those who feel then compelled to go into the witness box to give evidence only to find that their evidence has been treated as unsatisfactory by an arbitration tribunal.

8. Conclusion

- 8.1. I hope you have found these observations about mediation useful.
- 8.2. Mediation works and cases settle.
- 8.3. Mediation process is a skill and it repays understanding and preparation. It is a process that is here to stay.
- 8.4. A standard clause(s) and procedure for particular industries would expand the use of mediation.
- 8.5. Mediation may not be for all cases but it has enormous scope.

The contents of this paper are not intended to be a substitute for specific legal advice on individual matters. This paper has been prepared to complement our At a Glance Guide on Mediation (which provides certain further detailed information). It also complements our Mediation FAQs (bullet point guides) currently available in 14 languages: Arabic, Chinese, English, French, German, Greek, Italian, Japanese, Korean, Norwegian, Portuguese, Russian, Spanish and Swedish. All of these materials are available free of charge at www.hilldickinson.com.

If you wish to discuss any issues raised in this bulletin, or for further information please contact:

Rhys Clift

Tel: +44 (0)20 7280 9199

Email: rhys.clift@hilldickinson.com

Rhys Clift is a partner in Hill Dickinson and a co-founder of the Maritime Solicitors Mediation Service (www.msmsg.com).

Annex 1

BULLET POINT COMPARISON BETWEEN ARBITRATION AND MEDIATION: AN ENGLISH PERSPECTIVE

	Arbitration	Mediation
1.	Compulsory	Voluntary
2.	Protects time bar	Does not protect time bar
3.	Power to grant orders <ul style="list-style-type: none"> ▶ Over the parties ▶ <u>Not</u> over third parties* (*Use Courts' powers, if necessary).	No power to grant orders <ul style="list-style-type: none"> ▶ Over the parties ▶ Over third parties
4.	Private (but beware foreign law, appeal and enforcement)	Private & confidential (but beware foreign law).
5.	"With prejudice"	Without prejudice – (but beware foreign law).
6.	Slow	Quick.
7.	Costly	"Cheap".
8.	Adversarial	Collaborative.
9.	Risky <ul style="list-style-type: none"> ▶ On merits ▶ On relationships 	Reduces risk. <ul style="list-style-type: none"> ▶ On merits. ▶ On relationships
10.	Costs recoverable and generally "follow the event"	Costs of mediation itself usually shared 50/50.
11.	Creates no precedent.	Creates no precedent.
12.	Appeal on point of law.	No appeal.
13.	Final Award enforceable as Judgment (and 1958 New York Convention).	Final Agreement readily enforceable.

NOTE: This table should be read in conjunction with the paper to which it is annexed.