Mediation: assessing a little-used tool

Early neutral evaluation can be a useful option for those considering mediation. Ian Pease outlines the pros and cons

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It has certainly been a marketing success. Ask any practitioner what first occurs to them when they hear the words alternative dispute resolution (ADR) and, without doubt, they'll tell you it's mediation. The Centre for Effective Dispute Resolution (CEDR) has been its propagandist for the last 18 years and mediation has now won the imprimatur of the civil court system, as I discussed in my article last month.

Achilles heel

The process does, however, have one major flaw: it is consensual – you settle the dispute if you want to settle it. True, the mediator is there to use their skill to explore the possibilities as to how that may happen, but nevertheless the horses, though they may be brought to water, might not drink.

Mediation calls for both sides to have a realistic appreciation of the objective merits of their cases, and that, very often, is just not the case, leading to a failure to settle. Why that should be so was brought home to me by a recent conversation I had with the manager of a company that had supplied me with a new fitted bedroom. To cut a long story short, it was not as it appeared in either the showroom or the catalogue, and in the end we negotiated (without mediation, I should add) a reduction in the price as compensation. However, what surprised me somewhat was how the manager indicated he'd deal with the 'refund'. It was to be dealt with surreptitiously, so that the detailed facts should not reach his area manager.

As a manager you get no kudos at all for revealing why a contract may have gone wrong, particularly if you have been involved in it and may, to a greater or lesser extent, have caused the problems in the first place. Of course, this situation need not be a conscious deception, each side may only have partial information and that may skew its viewpoint. Also, it may simply be that subjectively the manager, putting the best on a bad situation, chooses to emphasise certain facts to their seniors over others, all of which leads to a failure to objectively analyse the pros and cons of the dispute. Hence when they choose (or are nudged by the courts) to enter into mediation, it turns out not to be a success.

Mediation's little-used helper

All forms of ADR divide into one of two sorts: those where some third party makes a decision for the protagonists (eg arbitration, mini-trial, expert determination), and those where the parties ultimately make their own settlement (mediation, for example). There is, however, a form of ADR that is written into both the Commercial Court's and the Technology and Construction Court's (TCC) guides that is capable of aiding the chances that a subsequent mediation (or commercial settlement) will be successful. It is called early neutral evaluation (ENE) and, as the name suggests, involves an experienced independent third party (often a High Court judge) considering the parties' cases and giving their non-binding view of the merits. The basis of the process is to inform the parties rather than to act as a form of evidence in future proceedings; to that end the process is conducted on a without-prejudice basis and the evaluator has no further contact with the case, as either judge or witness.

As to the procedures followed by the evaluator, much depends upon what they and the parties decide is appropriate. However, where the evaluator is a

CJP Builders Ltd v William Verry Ltd [2008] EWHC 2025 (TCC)

judge (as, for example, where there is an existing TCC or Commercial Court case) the procedure is likely to involve the submission of evidence and argument to them (probably in written form) followed sometimes by a short oral hearing. A balance obviously has to be struck as to the extent of the preparation and costs involved in this process. However, given that the processes followed are less formal than a trial, the evaluation can be more wide-ranging than a court judgment would be. Hence whereas a judge is limited to deciding purely on the basis of the submissions made to them, the evaluator can use their initiative more (particularly on matters of law). The evaluation may be given without or (more often and usefully) with reasons, depending on what the parties decide.

It will often happen that ENE will come up in the context of an existing case. However, that need not invariably be so. Indeed, the ADR Group offers an ENE service for a fixed fee, thereby making it quite a cost-effective form of stand-alone dispute resolution process, particularly for medium- and larger-scale commercial issues.

The procedure sounds, on the face of it, both cost-effective and a good precursor to a mediated settlement, so why does the anecdotal evidence suggest that it is very little used?

Perhaps one reason is that, despite being written into the above court guides, it has stood for too long in mediation's shade. Or perhaps it is the legal profession's innate conservatism that has failed as yet to fully recognise the power of this procedure, particularly when combined with mediation. In fact, they are complementary companions, the horse and the carriage.

ENE is particularly suited to advising the parties upon liability, leaving them free to negotiate on how that will play out in terms of the settlement sum. They may be able to reach that decision themselves in a commercial negotiation or, if not, be aided by a mediator. Either way, a guiding independent hand will have informed them of what a court's decision is likely to be, based on the merits of the case.

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Of course some will say that ENE is too risky, that necessarily the depth of evidence and (possibly) analysis is not the same as one would get for a full judgment and that once evaluation is obtained that will drive the parties' positions from there on. That may be the case – ENE plus mediation is not Rolls-Royce justice. But who can afford a Rolls-Royce these days? ■

Adjudication: justice with a roughish edge…

It is often said that adjudication is (quick) rough justice. The timescales for decisions are tight (the whole process is supposed to be over in 28 days) and there is particular pressure upon the responding party as it is invariably on the back foot anyway, and extensions of time to the overall programme are (under the Housing Grants Act 1996) under the claimant's control.

CJP Builders Ltd v William Verry Ltd [2008] is an instance, however, where, yet again, the courts have ensured that this process should not transgress the long-held principles of natural justice and in particular that neither party should have its right to be heard curtailed in the absence of very clear words.

Verry was late in serving its pleading (the response). It asked the adjudicator to give it an extension of time, but he concluded that the contractual code gave him no power to do so, and hence eventually gave his decision against Verry, not having taken its pleading into account. As usual in such cases, there were then cross-claims in the TCC for enforcement of that decision and, by Verry, various declarations so as to prevent that.

Verry's contentions as to the correct adjudication procedures did not find favour with the Court. However, the effective ignoring of its response fell on more fertile ground, the Court concluding that the wording of the adjudication clause did not prevent the adjudicator from giving appropriate extensions of time to either party for the service of documents, responses and evidence (hence the adjudicator could have granted Verry an extension of time to cover its late service). There was no express prescriptive language used in the clause. On the contrary, the adjudicator could 'set his own procedure' and he was given an 'absolute discretion' in taking the initiative in ascertaining the facts and the law. Overall, the clause had to be read with some 'business common sense'. In a key passage Akenhead J noted:

> 'There is thus a reasonable expectation of parties to an adjudication that, within reason and within the constraints of the overall requirement to secure the giving of a decision within the requisite time period, each party's submissions and evidence will be considered by the Adjudicator. It is a draconian arrangement (which the parties are of course free expressly to agree) that a party is denied its right to be heard unless it has been given a fair and clear opportunity to put its case. Very clear wording would be required to ensure that such a right was to be denied.'

He then set out the key factors to be taken into account in reaching a decision:

(1) It must be established whether the adjudicator failed to apply the rules of natural justice.

(2) Were the breaches of the rules material (more than peripheral)? Breaches will be material if the adjudicator has failed to bring to the attention of the parties a point that they ought to be given the opportunity to comment upon and if it is one that is either decisive or of considerable potential importance to the case. This is a question of assessment by the court.