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MEDIATION

My name is Jane Player. I have been a disputes lawyer for over 30 years and am now a senior partner at King & Spalding International LLP in London. I qualified as a mediator in 2000 and have been mediating regularly ever since. I am on the CEDR Faculty, assessing mediators' competencies, am also a member of IMI, In Place of Strife and have recently been made an honorary member of the International Academy of Mediators. I have been undertaking one or two mediations a month over the years whilst still running a busy litigation practice.

The nature of disputes over the past decade hasn't changed much in terms of the types of dispute that have come to the courts or to arbitration but the attitude of the parties has changed quite dramatically. There is a dilemma for global parties who choose the English courts or international arbitration as their preferred methods of dispute resolution. The English court, it's judges and judgments are well respected and an international arbitration award is, at least in theory, easy to enforce worldwide. However both outcomes come at a hefty price.

Further, in-house counsel over the last decade have become increasingly sophisticated in its requirements for Dispute Resolution services. A job in-house is now a coveted position and general counsel are far more aware of the options for dispute resolution and their advantages and disadvantages. Understandably, general counsel are answerable to the Board of their corporate client as to whether they are going to win, how long it will take and what it will cost. It is no longer acceptable to say that you do not know the answer to at least two of those questions. As a consequence, litigation lawyers serving those clients need to be ready to support general counsel in making sensible risk assessments to decide whether to expend precious corporate resources on dispute resolution.

The changes in the CPR have rightly forced firms to give early assessments, properly assessing the evidence up front and to provide detailed budgets. All of this has enabled clients to consider in a more informed way whether mediation might not be a better way to resolve disputes and whether a pragmatic commercial compromise is a better result than a prolonged case in court or arbitration where the outcome is not guaranteed and where it will inevitably be a distraction to the business and to business relationships.

As a consequence of the above, mediation has grown in popularity in recent years. Sadly this is tempered by a degree of cynicism that has risen alongside the increase in mediation by lawyers who have been dragged into mediation and have tried to use it for less than bona fide purposes. Mediation is an excellent tool if both or all parties use it as a genuine attempt to explore commercial solutions to a dispute. However, no matter how well-intentioned one party might be, if the other is simply determined to thwart the process and is unwilling to explore any alternatives then, by the nature of its consensual process, mediation can do little to help. Despite that observation, my enthusiasm for the process remains as I have had sufficient experience of witnessing erstwhile reluctant parties actually change their attitude mid-mediation day when they see the benefits for their client in listening to the other side's version of events and suggestions for compromise. Where you have strong clients and sensible advisors, mediation continues to play a significant role. One change that is part of the evolution of the use of mediation is its use as a way to not resolve a dispute in its entirety but to minimize the issues that remain between the parties for resolution by the courts or arbitration or to pick off non legal parts to the dispute and so reduce the costs of the dispute process going forward. We can also see the use of mediation in stages or tranches whereby you agree to mediate certain issues and then allow the litigation or arbitration to proceed with disclosure and/or witness statements followed by a fuller mediation later to try to resolve the dispute in its entirety before a third party judge or arbitration panel decide it for them.

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I have written about mediation in joint venture and transactional disputes for some time as I believe that those kinds of disputes are particularly well suited to mediation. A joint venture is by its nature a commercial marriage where parties recognize the benefits of being together in a venture at the outset. The same is true of projects and consortia. I have witnessed many a time where clashing personalities or a slight divergence in objectives have led to a joint venture going off track. The use of mediation

to remind the parties of the reasons why their mutual skills complimented each other in the project and how difficult it would be to find new parties at that stage often helps concentrate minds on the positives (in the venture) rather than the negatives that have crept in and which are easily manageable by changes to management or compromises on design and control. This is especially so where you have cross cultural collaborations and where there are insufficient face to face meetings such that differences of opinion arise through poorly worded emails, misinterpreted by partners from different cultures. The ability to be able to mediate mid project and assist the parties to keep the venture on track has, in my experience, saved significant sums of money and led to some notable successes.

ADR inevitably saves money for most disputes. However, some mediations are now becoming much more sophisticated and require multiple days meetings as well as significant preparation. Therefore not all mediations are cheap. However, another benefit for corporate clients of choosing ADR is the ability to retain control of how the dispute is resolved. Some public bodies would prefer not to have that control but in my experience most commercial entities recognize that they are in the best position to understand what is a workable compromise and what isn't. That is often a better option than a win/lose situation that is all a court or an arbitration panel can award based on the contractual terms. A further benefit is that ADR brings creativity to the solution process. Often I have seen a settlement include incentives that extend to other companies in the group who may have opportunities with the other side in projects elsewhere in the world or where compensation in the form of free consultation, delayed payments and additional work can be offered, where immediate payments of debt are not available. The willingness to look widely at how a problem can be resolved and where any and all options are worth considering, means that mediation has far more to offer clients.

Historically mediation was perceived by many countries as a dispute resolution mechanism more suited to family, domestic and neighbourhood disputes. In fact with the increasingly sophisticated choice of mediators, working alongside established arbitration and court processes, mediation has proved itself to be a very effective method of resolving serious financial and corporate disputes. Increasingly we are seeing share warranty disputes, minority shareholder disputes, banking disputes looking to mediation as a method of early compromise beyond the glare of public condemnation. This does not mean that these settlements do not then require public statements, as often they do, but they are managed to the benefit of all parties. Some disputes will never be suitable for mediation because they involve regulatory or public policy scrutiny. Some have a criminal element to them which properly remains the domain of the courts but even the regulatory regimes in the UK are recognizing the benefits of a mediated solution. All disputes can benefit from a mediated process whereby pragmatic decisions can be taken to ensure that the role of the court is properly used only for the key decisions. Today there are few disputes that do not benefit in some shape or form from a mediated process. You should not go to a mediation unless you are fully prepared. In the past, I have received pleadings only and even those are only received on the day before the mediation and then the parties turn up and hope for the best. Whilst this is still possible as there are no rules as to how the mediation is conducted, in my experience the best mediated outcomes are obtained when the parties have prepared properly, are willing to have pre mediation calls at least with the mediator, if not pre mediation meetings, and have thought through the negotiation that might be required on the day. The more the parties are encouraged to put themselves at least half in the shoes of their opponent or opponents, the more likely they are to look for a resolution which meets the needs of all involved. If you cannot think through what the other side might need, you are unlikely to find a compromise that will stick. If both parties or all parties are willing to do that at the outset and to think creatively then the mediator's role in guiding the parties towards a solution is the "magic" ingredient on the day. Parties who enter the mediation process with the right attitude coupled with a creative neutral skilled in the art of guidance and coaching inevitably leads to effective results. Further, spending time before the mediation, ensuring you have the right team attending, not too many but ensuring the decision makers are in the room is also key.

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I am often asked to mediate either multi party cases where a degree of management is required or where you have strong personalities who want their "day in court". This can still be achieved before you get down to the business of compromise and negotiation. A recent joint venture dispute between Asian and Western parties led to a particularly effective resolution and not only resolved the current project but opened up the opportunity for a further project following on. This was quite remarkable as, at the beginning, one quote was "over my dead body will I work with these fools again". In another example, a public body had to be seen to be taking the right decision by the creditors but at the same time work to have a practical solution to an insolvency position where there was a limited window for maximizing assets and taking control of key potential opportunities. I witnessed superb negotiators sympathetic to the position of the debtor but who then created a greater return for the creditors than would otherwise have been achieved in any other process. Finally, in a recent three party mediation I was lucky enough to mediate sensitive handling of fraud allegations were necessary which threatened to upset any compromise. Family run businesses where individuals are both key directors of the business but also believe they have "created the baby" which is the business itself means that allegations of mis-doing are often met with indignation and anger. Getting beyond the rhetoric and bringing parties back to the available solutions on the table can lead to an extremely satisfying outcome. Parties can draw a line over the past and look forward to building separate ventures in the future having got closure on a painful period of distraction from the business. Allowing people to vent their anger, explain both the business and individuals' feelings whilst then coaching them to look beyond the current position to the horizon of waking up without needing to reopen those wounds ever again, allows parties to create opportunities for future success. Mediation can achieve all of this with the right people involved and the right attitudes on display. **LM**

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