Presentation to Smith & Williamson Limited's Restructuring and Recovery Services Department Southampton

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And

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Mediation

When third party disputes arise before or in the course of Liquidations/Administrations, MEDIATION should be an increasingly used club in the Insolvency Practitioner's golf bag.

What is mediation?

"Mediation is a flexible process conducted confidentially in which a neutral person actively assists parties in working towards a negotiated agreement of a dispute or difference, with the parties in ultimate control of the decision to settle and the terms of resolution."

Dispute resolution spectrum

Binding

Imposed decision

- Expert determination
- Adjudication
- Arbitration
- Litigation

Non -Binding

Case appraisal

- Early neutral evaluation/judicial appraisal

Structured negotiation

- Mediation
- Executive tribunal/ ”mini trial”
- Conciliation
- Stakeholder dialogue/ consensus building

Comparison between litigation and mediation

Litigation

- Adjudicative
- Compulsory/binding/Rules
- Rights focused
- Retrospective
- Lawyer-centred
- All or nothing
- Maybe years
- High Cost

Mediation

- Consensual
- Voluntary & flexible
- Focused on present and future interests
- Client-centred
- Range of options
- Weeks – not years
- Low cost

Facts, figures and examples

(Statistics from CEDR's Fourth Mediation Audit published May 2010)

- 70.83% rise in civil and commercial mediations between 2003 and 2009.
- For 12 months to November 2009, 65% direct referrals or through service providers e.g. CEDR Solve, ADR Group etc. The balance via Court of Appeal Mediation Scheme and similar.
- 81% of mediating parties came to the mediation by mutual consent, rather than through court intervention
- 94% of mediations lasted just one day
- 75% settled on the day and another 14% shortly afterwards = 89%

Core principles of mediation

- Consensual
- Confidential
- Without prejudice
- Interest-based
- Forward rather than backward looking

Which cases are not suitable for mediation?

- Need an injunction
- Complicated case/need more information
  e.g.- expert's report- timing issue
- Direct negotiations are satisfactory
- Public policy is involved or a precedent is required
- BUT remember there are very few, if any, cases which are plainly not suitable for ADR

Which cases are suitable for mediation?

- Precedent could be dangerous
- Direct negotiations have reached impasse
- A quicker/cheaper conclusion is required
- Publicity is to be avoided
- Reputational issues are involved
- Continuing relationship between the parties
- Litigation should be a matter of last resort

Myths and concerns about mediation (1)

- "It's just horse-trading"
- "….but my client wants his day in court…."
- "I risk revealing too much"
- "It will prevent me using litigation or arbitration"

Myths and concerns about mediation (2)

- "I do it all the time anyway – I'm a good negotiator"
- "It's a sign of weakness to suggest it"
- "It will just waste more time and money"
- "This case is too complex for mediation"

Reasons for encouraging mediation (1)

- Compliance with CPR/Protocols
- Parties can still have "their" guaranteed "day in court"!
- The process is informal and non-technical
- Parties can thus regain control of their own case (even from their lawyers!)
- The process can itself confer inherent benefits e.g. narrowing issues.

Reasons for encouraging mediation (2)

- Outcomes can be negotiated of a type which a Judge could never order

- The process is virtually risk-free in a cards-on-the-table quasi litigation environment

- Relationships can be preserved for the future – e.g. employer/employee, contracting businesses, patient/hospital, accountant/client.

CPR and the Pre-action Protocols

- The CPR (Pre-Action Conduct Direction) requires the parties to:-
  - "Consider whether some form of ADR would be suitable and, if so, to agree which ADR procedure to attempt, and…
  - provide evidence, if required by the Court, that ADR was considered"

- CPR 1.4 – Judges to encourage ADR

- CPR 1.3 – Parties too must help Court further in the overriding objective.

- CPR 26.4 – Stay of proceedings for ADR to take place.

- Form N150 – latest version published September 2010 – see preamble to Section A.

Duty to advise on ADR

- Burchell - v- Bullard [2005] EWCA CW 358 and
  Cowl - v- Plymouth City Council [2002] 1 WLR 803

- Rule 2.02 (1) (b) (Client Care) of the Solicitors Code of Conduct 2007

- Form N150

"ADR Orders" and not "Orders to Mediate"

- Halsey -v- Milton Keynes NHS Trust [2004] EWCA Civ 576: decided that courts should not order parties to mediate

- Kinstreet Ltd -v- Balmaryo Corporation and others; Shirayama Shokusan -v- Danovo Ltd [2003] EWHC (ch): approved "ADR orders" requiring the parties to take such steps as they may be advised to settle the dispute by ADR – see CPR1.1

- Clinical negligence – " A Master Ungley Order" – this requires the parties to consider ADR before trial, and to file their reasons for objections to mediate with the court, which can be considered in relation to costs after judgment.

Unreasonable refusal to mediate = adverse costs orders

- Dunnett -v- Railtrack Plc [2002] EWCA Civ 302
- Dyson and Field -v- Leeds City Council [1999] WL 1142459
- Cowl -v- Plymouth City Council [2002] IWLR 803
- Neal -v- Jones (t/a Jones Motors) [2002] EWCA Civ 1731
- Leicester County -v- Coates Brothers plc [2003] EWCA Civ 290
- Virani -v- Manuel Reventy Cia SA [2002] EWCA Civ 107
- Burchell -v- Bullard & others [2005] EWCA Civ 358

Reasonable refusal to mediate = no adverse costs orders

- Halsey -v- Milton Keynes NHS Trust [2004] EWCA Civ 576
- Hurst -v- Leeming [2002] EWHC 1051 (ch)
- SITA -v- Watson Wyatt: Maxwell Batley [2002] EWHL (ch) 2025
- Valentine -v- Allen & Others [2003] EWCA. Civ 915
- Corenso (UK) Ltd -v- Burnden Grange Plc [2003] EWHC Civ 1805
- Steel -v- Joy & Halliday
- The Wethered Estate Ltd -v- Davis & Others [2005] EWHL 1903
- Allen -v- Jones [2004] EWHC 1189

Other Cases

- Conduct during mediation – Earl of Malmesbury -v- Strutt & Parkerm & others [2008] EWHC 424 (QB)
- Enforceability of Mediation clause in a commercial contract – Cable & Wireless -v- IBM UK Ltd [2002] EWHC 2059 (Comm)
- Government party failing to mediate despite "H.M.Government's pledge" to do so – Royal Bank of Canada Trust Corporation Ltd -v- The Secretary of State for Defence [2003] EWHC 1841

The Role of the Mediator

- Manages the process (and if needs be tightly!)
- Create the right environment for constructive negotiations
- Not judgmental: nor evaluative
- Facilitative
- "Must not build the proverbial bridge…
- …Instead identify and offer the parties the bricks to build it"

The Mediator's Skills (1)

- Assimilation of facts
- Identify key issues
- Identify key deal breakers
- Identify potential deal makers
- Authority
- Manager
- Listener
- Reality Tester

The Mediator's Skills (2)

- Summariser
- Honest Broker - must command respect and trust
- Deal Facilitator (not Deal Maker!)
- Energy
- Ability to instil:
  - Realism
  - Optimism
  - Energy into the process

Mediation: The Process

- Finding a mediator
- Preparing for the mediation day
- The day itself
- The Compromise Agreement - recording the settlement on a contractual basis.

Use of Mediation by Insolvency Practitioners (1)

- Commercial litigation
- Property litigation
- Agricultural disputes
- Insurance disputes
- Banking Disputes
- Employment – ET/HC/CC

Use of Mediation by Insolvency Practitioners (2)

- Employment – workplace mediation
- Product liability
- Professional negligence
- Directors, partners and shareholder disputes
- Acquisition facilitation
- Liquidator's/Administrator's remuneration
- Public Bodies

Case Study 1

- Landlord's dilapidations claim: onerous lease is disclaimed in respect of future liabilities only.
- £100,000 claim for doing works and loss of rent.
- s18 LTA 1927 – how does this apply?
  - Repair
  - Decoration
  - Alterations
- Is the guarantor liable?
- Would mediation be advisable?

Case Study 2

- Director's wrongful and unfair dismissal claims against A Ltd arising prior to an Administration. Quantum £250,000.
- Strong possibility, albeit surprisingly, that following commencement of Administration £700,000 might be clawed back by the Administrator in respect of a pre-Administration contractual dispute.
- HC orders that WD claim to be determined at trial before the UD claim heard at final hearing by the ET.
- HC trial not before July 2012 and ET final hearing thereafter may be not until late 2013.
- What are the options for the Administrator?