The impact of Covid-19, facilitative mediation, early intervention, and the new visual online dispute resolution

Rhys Clift

*Partner and Commercial Mediator, Penningtons Manches Cooper LLP and at SeaMediation Chambers**

The COVID-19 pandemic has had widespread effects, notably on dispute resolution, on mediation practice and on court practice. Much of the change which has occurred has the appearance of permanence. This is the first of two articles on this topic, touching on the pandemic and then looking in some depth at Facilitative Mediation (FM). The second paper, by way of comparison, will address first Early Intervention (EI), a new form of mediation, and then the new visual ODR, that is FM and EI on line. The two articles can be read separately, but are designed as a coherent whole.

Introduction

This first article is published at the point of consolidation of a revolutionary new step in alternative dispute resolution (ADR), at a particularly striking moment.

Facilitative mediation (FM) has progressively become the dominant form of ADR process in the UK and more widely abroad. FM is now probably the dominant form in major international disputes and the principal form of ADR chosen by the International Chamber of Commerce in Paris. The main reason is that it works: cases settle; problems are solved. This first article is principally directed to that process.

Early Intervention (EI) is a new form of mediation. It has evolved from the original concepts that have made facilitative mediation so successful, but with differences that can prove useful in particular cases. It offers a wide range of methods to reach consensus and settlement. The second article sets out some of the essential features of EI.

Online dispute resolution (ODR) has existed from some point after the launch of the internet and widespread use of email, from about 1999 onwards. Software systems now offer the opportunity to conduct both traditional mediation and early intervention remotely, in a manner that broadly replicates the original concept in each case, but in a radical new way, as a new and enhanced form of visual ODR. This change has occurred with staggering rapidity. The new visual ODR will also be dealt with in the second article.

The impact of the Covid-19 pandemic and the stunning shift to 'compulsory' remote working, has catalysed a remarkable change in mediation practice, court practice and in general business practice, the many implications of which are progressively emerging. It may have huge, previously unexpected effects with wide-ranging consequences on town and city planning, office occupancy, commuting, the use and investment of capital (commercial and domestic), international travel,

* MCIArb, Distinguished Neutral at CPR, International Institute for Conflict Prevention and Resolution, New York.

potentially even reversing the effects of decades of rural depopulation. It is reshaping thinking in a manner unseen since the Industrial Revolution and the extraordinary spread of the railways, notably in the UK. Without the parallel revolution in information technology, from the first development of the silicon chip, domestic personal computers, laptops and tablets, and the invention and spread of the internet, none of this would have been possible.

Covid-19 and technology have made online mediation, and online EI, both a necessity and a credible, workable and effective new normal. This is a paradigm shift.

Purely coincidentally, much of this has occurred almost simultaneously with the final phase of the departure of the UK from the EU. That process provided a remarkable and, most unusually, a public example of the process of inter-state negotiation. It was subjected to an unusual degree of scrutiny and comment as it progressed. As information continues to emerge there may be, at some point, in parallel with a better understanding of the theory, a rare opportunity to study how certain types of deal are actually made. In other words, in negotiation, what works and what does not work.

Negotiation and deal-making are of enormous importance, from small domestic disputes to disputes between states. Every deal is susceptible to analysis by parties and largely by those affected, albeit many are subject to obligations of confidentiality and are not therefore open to wider evaluation. As for Brexit, we shall see if it attains a shining, transformative future foreshadowed in a glorious rhetoric or, alternatively, whether it is the trading of an inheritance for a mess of pottage. Whatever, it is a matter of great significance, the consequences of which will be weighed in the fullness of time.

The best way to describe and to analyse something new is often to make a comparison to that which it succeeds, or that which it is not; hence the model of these two articles. Traditional facilitative mediation provides the basis of practical and theoretical thinking for a certain method of managed negotiation. It is the framework or template on which later EI and the new visual ODR are based. For that reason, having touched on the pandemic (in the section below), this article then focuses substantially on facilitative mediation. In the second article, many of the similarities and differences between FM on the one hand and EI and visual ODR on the other will then be addressed.

The main sections or subsections of this article (and the second article) have been written, at least in part, to be self-standing. As such, they can largely be read in isolation, returning to themes in earlier sections for review, comparison and evaluation, internally within each article and between both articles. The two articles are designed to be a coherent whole, where each informs the other.

The Covid-19 pandemic and innovation

ODR has existed for some time, principally conducted by email and otherwise by the written word. It is not to denigrate ODR to express the view that it had been a minority sport, in comparison to traditional facilitative mediation, as an established form of ADR for commercial disputes, the primary focus of this article. What has radically changed the picture is the sudden convergence of two factors that are most frequently the catalyst for change: disaster and innovation.

We see this is in the astonishing impact of the Covid-19 coronavirus pandemic, occurring in conjunction with new online meeting systems or software such as Zoom, Microsoft Teams and Skype for Business. It is not necessarily the case that these systems are newcomers to the ever-changing world of computerisation and information technology. Indeed, they are not. The launch dates were these: Zoom 2013, Skype for Business 2015, Microsoft Teams 2016, although it seems they may have had their roots in earlier products. It is simply that they were newly, apparently quite suddenly, identified as being able to provide a service, to deliver something that had finally become established and efficient, but in a radical new way.

The linking of any article, paper, academic or theoretical treatise to Covid-19 remains at risk of becoming something of a cliché, of becoming trite (the same might well also be true for any reference to Brexit). However, for the present, nothing could be further from the truth. Covid-19, the spread of the virus, the impact of the pandemic, the method or methods chosen by individuals, businesses and countries to seek to suppress or control its spread are all at once shocking, but on

reflection almost inevitable and of obvious importance. Covid-19 may have displaced Silent Cyber and cyber hazard generally as a central preoccupation of individuals, businesses, even states, even if only temporarily, although the latter remains a profound concern.[1] Indeed, it is said that Cyber hazards have proliferated during the pandemic, with the inevitable greater use of online systems. Covid-19 and cyber hazard are the Scylla and Charybdis of modern life.

We may have become complacent in certain aspects of health and medication. The Spanish 'flu pandemic of 1917/1918 was the last great pandemic to cut a swathe through the human population, but its impact is now beyond human memory. It compounded misery and mortality at the end of the First World War. It followed a long history of pandemics (notably recurrent tides of infection caused by Yersinia pestis (the plague)), which human beings were largely unable to resist. The horrors of the plague have flooded literature, notably from the Plague of Justinian in about 540 AD up to the Great Plague in 1664–65 AD (and beyond). The only form of self-protection in the absence of medical protection or treatment was, to the extent possible, lockdown and quarantine.[2]

After the Second World War in particular, we have witnessed the growing miracle of widespread use of vaccination and its control or eradication of disease, for example the elimination of smallpox and the control of diphtheria, tuberculosis, polio and yellow fever. At the same time, commencing with the discovery of penicillin we have witnessed the development of a wide range of antibiotics for the treatments of bacterial infections that might otherwise have been a death sentence, such as sepsis. Separately, we have observed the remarkable development of medication for individuals infected even with the HIV virus. There is now a range of very effective treatment and suppression of HIV, although after nearly 40 years of research there is still no vaccine. Finally, in the 75 years since 1945, even treatment for cancer has become widespread and effective. All this is truly remarkable.

Against the comfort of this background, there were warnings about the threat posed by coronaviruses in the past, notably SARS and MERS. However, zoonosis had hardly entered our lexicon. It was certainly not in common use. There were siren voices, mainly in the scientific community, although in neither case was there a pandemic on the present scale nor, significantly, heavy impact in the West. We had not therefore heard the canary stop singing in the mine. It is noteworthy that no effective vaccine has been developed for SARS or MERS after 18 years of development work, at least none was put into widespread use. One might now wonder, perhaps, if part of the explanation might lie in economics rather than only in the science of virology or immunology.[3]

Now in Covid-19, we have experienced a threat which, at first sight, might have seemed almost invisible and inconsequential but which has become suddenly shocking and obvious, now mutating and an apparent fixture in modern life, with a global impact.

Until just a few months ago, there was no immediate prospect of an effective vaccination or treatment for Covid-19, albeit there was a global effort to find one, cooperative or competitive. However, trade and business must continue, without which there would be economic collapse, as lockdown has so clearly indicated. Individuals, businesses, companies, countries and regions have had to develop effective ways in which to cope. Some have fared better than others; some may have been wiser than others. An important part of such a coping mechanism is the development of an effective way to resolve disputes when they occur, as inevitably they will, but without meeting in person. In that respect, the negotiations over Brexit were an outlier in that discussions continued intermittently face to face, whilst the pandemic continued unabated.[4] It is most significant that even with the threat and inconvenience of Covid-19 infection it was thought important, perhaps essential that these negotiations should be conducted in person, perhaps because they were subject to enormous pressures of time.

[1] As the US Colonial pipeline ransomware attack so clearly illustrates https://www.bbc.co.uk/news/business-57050690.

[2] This is an outline history: https://www.cdc.gov/quarantine/historyquarantine.html.

[3] Study of SARS and MERS may have been invaluable: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7177048/.

[4] Unsurprisingly some of those involved in the Brexit negotiations contracted Covid-19 https://www.bbc.co.uk/news/uk-politics-55005885.

We now have a series of vaccines developed at remarkable speed, but such is the scale of the problem that owing to the sheer number of those who need inoculation (globally) and the new risk presented by multiple mutations it will be many months before life returns to some semblance of normal, if it ever does. It seems highly probable that habits formed in the interim have become fixed patterns of behaviour.[5] This is the context in which this article addresses facilitative mediation as the fundamental background to EI and the new visual ODR.

Facilitative mediation

Outline

What are the principal features of facilitative mediation?

When?

Facilitative mediation, and ADR generally, has come to prominence in England and Wales with the advent of the Civil Procedure Rules (CPR), put in place in the English High Court of Justice and the Commercial Court following the recommendations of the Woolf Committee in 1999.[6] Before then, ADR and mediation, individually or collectively, attracted considerable scepticism, including widely across the legal profession. That scepticism persisted. Without describing the process, it seems clear, however, that both are now part of orthodox (legal) thought, like a heavy metal rock-star subtly absorbed into civilised society with a knighthood.

What and why?

Many of the features of facilitative mediation in the English practice are based on or adapted from practice developed in the United States, driven by dissatisfaction with court process, so-called 'hardball advocacy' and 'excessive motion practice'. Mediation is a voluntary, private and confidential procedure. It is, generally, conducted by reference to a standard form mediation agreement that contains important provisions regulating the process and providing protections and obligations for all parties participating in it, not least the mediator. The involvement of an independent third party, the mediator, is the key defining feature of the process. The importance of the last of these cannot be overstated. Internal processes where, for example, major businesses seek to replicate the main features of mediation in dealing with customers (an emergent new trend) may experience difficulty. This is more like conciliation, with the potential hazard that it may lack independence and objectivity (perceived or real) and might be somewhat undermined by a perceived imbalance of power.

Without prejudice

Mediation is without prejudice in that anything specifically created for the mediation process itself (for example, a written mediation statement or position paper) and anything said on the day of the mediation itself is protected from production in any later formal decision-making process such as litigation or arbitration, if there is no settlement. This is founded on principles of English law. This is almost certainly subject to narrow exceptions in relation to criminal conduct. The analysis of such exceptions is outside the scope of this article.

It is necessary to be careful if the underlying dispute or disputes are not subject to English law.

A single day?

Models may vary, but the original intention in the English version was that the whole process in a standard mediation could be conducted in a single day. With the assistance of a mediator, the parties would organise a fixed date, time and place for all of the parties to the relevant dispute or disputes

[5] There is a wealth of literature that predicts and explains why the business world will not revert to the way it was, eg https://www.mckinsey.com/business-functions/risk/our-insights/covid-19-implications-for-business#.

[6] Here is an assessment of the CPR, which makes an illuminating read. No doubt there are many others. See https://www.judiciary.uk/wp-content/uploads/2019/10/LawSocietyLitigationConference.9thOctober2019.f-1.pdf

to convene, and then ensure that all the component parts were in place. Mediators, in the experience of the writer, have become progressively ever more interventionist in this respect. This rather mirrors the shift to active case management of litigation by the English courts after the implementation of the CPR, rather than leaving matters to the parties alone to regulate matters.

Context, providers and mediators

The original model had been that where the dispute itself was in litigation or arbitration in England and Wales, notably in London, the mediation itself should take place in London or elsewhere in UK, where a small, strong group of mediation service providers (MSPs) have established themselves over the last 30 years. Subsequently, more recently, a small, highly knowledgeable and expert cadre of independent mediators has emerged both in London and otherwise in UK. Some of these had developed the practice of travelling to dispute resolution centres abroad, such as in Singapore or Dubai. One wonders whether they will do so in future, regardless of the positive impact of vaccination against Covid-19. Will it be thought necessary or desirable, or unnecessary and undesirable? Perhaps one should not discount the powerful and subtle interactions that take place when people meet, physically. Many disputes are fundamentally a matter of disagreement about money alone. And yet meeting, in person, does seem to add something to the structure, the conduct and the essence of discussion.

A closing

The mediation itself has (or had) something of the characteristics of the closing of a deal, for example in a banking transaction or the purchase of large assets (such as buildings, ships or aircraft), with tight deadlines and the inevitable dense concentration of effort and expertise that these sorts of closings require.

Authority: an historical stumbling-block

Before the mediation itself takes place, or took place under this established and hitherto traditional model, the legal advisers (who are almost inevitably involved in the handling of such matters) should ensure that their clients have the authority to enter into the mediation process and to conclude a resolution on the day. This is essential. It had been perhaps one of the stumbling blocks over which mediation in its early years had most frequently fallen. This now seems something of a distant memory. Anecdotally, it is now rare, although the writer has still experienced cases where the parties make a deal 'in the room' which one party then needs to take away for approval being in excess of authority.

Authority to settle means 100 per cent authority to settle, that is anywhere between 0 per cent and 100 per cent of the matters in dispute, sometimes a heavy burden for those who attend mediations to carry. Those who attend mediation, not least as the practice has become more established, better and more widely understood, are not uniformly the ultimate decision-makers, if indeed they ever were. The general pattern now is that those who attend have authority to settle but that authority is circumscribed in some way. The important thing to establish is that those who attend do have full authority to settle within a range of outcomes and, in the event they do not, that they have immediate, fail-safe access to the individuals, the board, the group, the managing committee or what or whoever it may be that holds that authority. Mediators have become firm and necessarily intolerant of those who might drift into mediation without putting this particular building block in place, and (wisely) rather demanding about proof in advance. Mediators have exercised active management, because it works. This is not a process that is likely to work if any of the participants are casual about it. It has some of the features of an examination. The parties must prepare, they must know what they are doing. Cramming the day before is unwise.

The programme of the day

The typical day of a mediation would constitute introductions (generally by the mediator) and thereafter joint meetings of all parties including the mediator, as well as separate meetings. These separate meetings might take multiple different forms, for example meetings between the parties,

their advisers, their experts and whomsoever else and the mediator, meetings between the individual commercial parties, meetings between their legal advisers only, the insurers only and any number of other possible variants.

Double confidentiality

A magical component of mediation, in addition to the involvement of a highly skilled independent mediator whose function is to guide the parties to negotiate their own resolution, has been the development of an unusual form of confidentiality. Everything that is prepared for the mediation, for example mediation statements or position papers and everything set out at the mediation in the presence of all parties is treated as confidential to all of those who attend. This includes the mediator, his assistant and observer, if any. However, separate meetings are subject to a rather different second rule of confidentiality. Anything discussed between those present at the second form of private meeting (sometimes called caucuses), internally within the mediation itself, is subject to a rule of double confidentiality. Where the mediator attends such a meeting, the parties can reveal to him literally anything that bears upon their interests and needs in the resolution of a dispute. He is obliged not to reveal it to anyone outside that group without their permission, although even with their permission he is not obliged to reveal it, whilst he would be obliged to convey any offers made.

Interests and needs, not rights and wants?

This is a crucial concept to understand. Parties are routinely directed by mediators (and by their own advisers) to understand their own interests and needs (even now an alien concept to some), rather than coming equipped to recite a set of bare assertions or an arid list of rights, wants or even demands.

The clash of rights and wants is often the factor that precipitates, entrenches and widens disputes. Rights can be an endless cause of contention. There is a vast archive of disputes over rights and wants that fill the law reports. Indeed, this is the essence of litigation (and arbitration), where formal resolution is contingent on the (necessary) establishment of rights. Wants may be related or wholly unrelated to rights and if so a greater cause of contention. The problem with both may be compounded by the use of ultimata and (theatrical) walk-out, whether physical or metaphorical.

Interests and needs are quite different. They may be closely related to rights and even wants. Conversely, they may sharply diverge or even run counter to them (in reality or perception).

When seeking authority to settle, it is essential for the parties to understand their own interests and needs. In complex matters, the best way to do this may be by careful evaluation criteria.. although the parties should perhaps be wary of seeking to assimilate too much information and of devising complex decision-making 'trees'. It is possible to be overwhelmed by detail. It is, however, of particular importance to understand the interests and needs of any counterparty or counterparties, in order to identify that territory where all interests and needs may intersect, wholly or partially. Mediators are skilled in assisting the parties to identify that common territory. Once that is identified, mediators can then assist the parties to stitch together a consensus enabling them to reach a resolution, even if they retain matters over which they fundamentally disagree (in other words, if their rights and wants remain unreconciled, but their interests and needs converge). This is the essence of deal-making.

One might ponder the prospects of success when seeking authority to settle founded only on an isolated analysis of one party's rights and wants; and the durability of any agreement made. Will it stick? Will it work? Or will it unravel at the first moment when the deal is subjected to stress because of the tensions that remain? There is the hazard of a cacophony of crossed purposes.

The whole purpose of double confidentiality is to provide the mediator with information that should enable him or her to engineer or to assist the parties to engineer just such a consensus, partly in this way. It is perhaps not immediately obvious when described in a written form. However, to watch it unfold in practice is to witness the curious and powerful alchemy of mediation.

These are some of the factors that make mediation (in particular facilitative mediation) such a compelling and effective process.

Contrast with decision-making processes[7]

The discussion above in part distinguishes facilitative mediation from evaluative mediation. Some might say that there is little difference between them, or even that the difference is illusory. There is, however, a fundamental difference.

In facilitative mediation, the mediator is seeking to facilitate something, to enable the parties to engage in negotiation to reach a resolution in circumstances where they, their experts and their lawyers have been unable to do so. Without crossing the Rubicon and expressing clear views, most mediators can push the parties very hard to assess whether their positions really do have merit; some by so-called reality testing. You might want it, you might think you are entitled to it, but is it really in your best interests? What will be the effect if you insist on it? Do you really need it? There is a wealth of written thinking on this, and no doubt a catalogue of sayings and popular wisdom for guidance (such as 'not losing the ship for a halfpenny of tar'). There is a distinction between being determined and principled on the one hand rather than stubborn and obdurate on the other.

Some mediators can be shrewd and focused. Some can seem harsh and pointed. In this, as in much of the process, the respect in which the mediator is held, his independence and objectivity, are crucial to the conduct of the mediation and its outcome. They need to 'hold the room', potentially for many hours.

Evaluative mediation (EM)

Evaluative mediation, by contrast, is quite different. This is where a mediator (together with an assistant or co-mediator perhaps) has heard the interests and needs (and no doubt the rights and wants) of the parties, reviewed their respective position statements and read the documentation provided. If the mediator is unable to manage the parties and the process in a way that can engender a negotiated conclusion, she can, whether at the instigation of one of the parties or at her own suggestion, put forward what she might consider to be a fair and equitable resolution, based on all this. This can only be done with the consent in advance of all of the parties, and it may or may not be successful. Trust and respect are again essential, but there is one thing to appreciate: having taken this step and expressed a view it is very difficult for a mediator to step back into a facilitating path of conduct. Her views now known, she has effectively drawn a line in the sand, and stepped over it.

In this, evaluative mediation steps, ultimately, into a wholly different category of dispute resolution procedures namely the decision-making processes.

The parties should be wary of acquiescing to an early proposal to shift to EM. There is hard work to be done in FM. Unusual movement does occur even in the positional bargaining of seemingly implacable minds, sometimes when the parties are tired, sometimes when positions seem hopelessly divergent, sometimes when a position adopted as a tactical device has been seen to have failed. This may be the expression and achievement of 'reality testing', unlikely to be seen in any other forum.

Arbitration and litigation

Evaluative mediation is more like litigation in which, ultimately, a third party having been provided with documentation, witness testimony and experts' reports (if any) makes a decision and where there are winners and are necessarily losers, leaving only narrow channels for appeal.

Precisely the same thing occurs in arbitration,[8] albeit the parties might be able to choose an arbitrator with specialist expertise in their respective fields (whereas they cannot choose the judge, other than

[7] See eg https://www.penningtonslaw.com/media/1553389/topological-diagram-of-dispute-resolution.pdf.

[8] See also Rhys Clift 'Introduction to alternative dispute resolution: a comparison between arbitration and mediation' https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1647627.

perhaps in a limited way by forum shopping). The avenues of appeal or challenge to any award made may be narrower than in litigation. There may be no appeal at all. The parties might have some comfort in the knowledge that arbitration proceedings are, at least in the first instance, intended to be private and confidential, although that confidentiality may be limited or illusory. In arbitration, it may not hold, for obvious reasons, in an appeal, an indemnity claim or an enforcement action. In this, one sees a main point of contrast between arbitration and litigation. The latter is for the most part, save in exceptional cases, fought out in the public eye, when litigation reaches a public hearing or final trial. Further, litigation is also subject to limited pre-trial transparency in that the court file/docket is open to public scrutiny, within certain defined limits. Certain materials filed in the course of an action can be reviewed (but not all) as a matter of standard practice. The courts in England can on application restrict access, although this is exceptional.[9]

At least with arbitration and litigation the result is binding and can be enforced (in theory if not always in practice).

Early neutral evaluation (ENE)

Evaluative mediation is like early neutral evaluation where a competent and respected third party (for example a lawyer, arbitrator, expert, underwriter, engineer, naval architect or surveyor) is engaged to express a written view, early on in a process, perhaps well before disputes have become entrenched. The idea is that such an early neutral evaluation might nip a dispute in the bud. It might, but then again it might not.

The ENE report itself might satisfy everyone, someone or no one. For that reason, this may not have become a widely established practice. In the experience of the writer this is a minority sport precisely because it does not offer the most attractive feature of facilitative mediation; it may be too much to say that it does not work, but it does not have a well-known, well-established track record of success, of settling disputes, protecting relationships and protecting reputations.

Adjudication

Also amongst the family of decision-making processes there are other mechanisms such as adjudication, well established in the field of construction. It is a sort of binding early neutral evaluation. Adjudication offers a very rapid process of making decisions on construction disputes such that construction projects can proceed quickly, without one part in a critical path of construction being disabled by what might be an entrenched but (in the scheme of a whole project) potentially insignificant difference of opinion. Speed and finality may be key requirements.

By contrast to all this, facilitative mediation is in the family of consensual processes that notably includes negotiation. Indeed, facilitative mediation is negotiation, but with an unusual procedure, structure and dynamics that 'ordinary' negotiation lacks.

Compulsion and consent

One criterion at or near the top of a list of evaluation criteria when comparing formal legal process on the one hand (arbitration or litigation) and mediation on the other is that at some point *participation* in formal legal process is compulsory, whereas *participation* in mediation is essentially a matter of consent. A measure of compulsion is a general characteristic of formal legal process, whereas willingness to participate is a general characteristic of many forms of alternative dispute resolution, of which facilitative mediation and negotiation form part.

Hence, if problems emerge and a dispute cannot be resolved promptly, a claimant can commence an action in court or commence arbitration by nomination of an arbitrator or arbitration tribunal. From that point onwards, the recalcitrant opponent simply has to deal with the problem, to defend it, to resolve it or otherwise face the risk of a decision being made against him with attendant

[9] https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part05#5.4C.

consequences, including generally consequences in terms of the incurring of own costs and of liability to a claimant's recoverable costs. This may include the cost and inconvenience of satellite disputes over jurisdiction or competence of the court or tribunal, much deprecated as an additional burden in disputes (although where one fights and on the basis of what rules can have serious implications; forum shopping is not necessarily a (costly) folly). In litigation and arbitration generally, the claimant has some measure of assurance that the process can at least be started at the claimant's instigation and will be concluded at some point by some means, albeit with no certainty as to outcome.

In this context, evaluative mediation and early neutral evaluation are hybrids. They might require consent to commence but thereafter have more in common with the decision-making family group of dispute resolution procedures. The problem is delivered to some third party on some agreed terms of reference as to facts and evidence, at which point the disputants effectively lose control of the terms of resolution itself. The third party (the evaluating mediator or the party invested with authority to make an early neutral evaluation) will reach a decision. These processes may then part company from traditional decision-making processes once more since the parties to the dispute may choose not to accede to the decision or guidance offered by the mediator or party engaged in early neutral evaluation.

Adjudication, most commonly used in construction, falls squarely into the decision-making family, albeit thought by some to be in the nature of alternative dispute resolution. A third party makes a decision and in that case the disputants generally must abide by it; double compulsion as it were, to take part and to comply with the result.

In negotiation and in facilitative mediation, *participation* is a matter of consent. As a matter of English procedure at least, parties cannot be compelled formally to participate in facilitative mediation (still less a negotiation process such as a round table meeting). Nor can they be compelled to negotiate as and when they attend. Least of all, they cannot be compelled to reach a settlement and comply with it. There simply is no effective means by which to compel parties, whether in advance at the time of making agreements or subsequently when disputes emerge, to negotiate and settle. This is a central conundrum of negotiation, however it is conducted.

This will never change. One can certainly think of recent contexts in which one party laments, and even expresses bafflement, that the other will not negotiate (sometimes with reference to some nebulous concept of equity or fairness), whereas the other may consider this to be wholly disingenuous, to see the terms of negotiation as a demand for capitulation; rarely successful. Demands, like ultimata, are anathema in effective negotiation, especially in seeking agreements that will stick and do not store up hidden resistance and resentment.

Of course, if a final settlement is concluded in writing in mediation that settlement agreement can be made enforceable (generally by court order). At that point, it becomes binding. It might then be enforceable like a judgment or arbitration award, although the prospects of voluntary compliance may be (distinctly) better with a negotiated deal.

Mandatory mediation?

Periodically, the topic of compulsory or mandatory mediation is raised. It has been raised again recently in the context of revolutionary change imposed by the advent of the Covid-19 pandemic, the abrupt change to widespread adoption of remote working and working from home. Is this the moment to make participation in mediation mandatory?

A careful consideration of the countervailing arguments in what may be the polemical debate over mandatory mediation is beyond the scope of this article. It is likely to bubble away in the background and repeatedly be brought to the forefront at times of crisis, such as this. A statistical analysis could and probably should be done on this. Is there any real difference in the settlement rate between mediations that are purely consensual in comparison to those which are effectively imposed on the parties? Mandatory mediation is a feature of civil justice in some states in the United States and, by

all accounts, is very effective at resolving matters. But even then, parties and their lawyers might demonstrate remarkable ingenuity even in seeking to avoid being obliged to speak to one another at all, let alone negotiate, but rather seek to disable the process. In one famous Florida case, the judge in exasperation finally ordered the parties and their lawyers to retreat to the steps of the court and to resolve their differences as to the location of deposition by one binding game of rock, paper, scissors.[10] It is extraordinary how something of such simplicity could bring parties to their senses; a metaphorical gun to the head, a guillotine that concentrates the mind.

Judicial pressure; pressure of process

However, it is, strictly speaking, not entirely true that participation in mediation is *wholly* a matter of consent in English civil procedure. For quite some time it has been the case that the courts have had jurisdiction to impose penalties on parties who have *unreasonably* declined to participate in mediation at all. There are criteria to assess reasonability. There is in this a measure of coercion. The penalties are generally in the exercise of the court's discretion in costs, in a legal system where otherwise costs follow the event. The allocation of costs can be important in civil actions where costs can be high, which is one reason why Part 36 offers,[11] one of the great innovations of the CPR, are so effective in fomenting settlement.

The question is, however, whether the demand or the necessity for parties to do something more has now been reached, and whether we have reached the tipping-point where mandatory mediation is now thought more desirable than not. The Civil Justice Council in its major review of ADR published in 2017/2018[12] (an excellent piece of work) did not consider that mandatory mediation was the right route to take. In the face of the comprehensive CJC analysis it had been thought unlikely that this would change, but we live in interesting times. Will it?

A new trend?

Three recent cases in a short string in 2020 seem to indicate that the English courts are taking a harder line with parties who fail to follow directions at least to try alternative dispute resolution to seek settlement.[13] A careful review of the detail of these cases is beyond the scope of this article. The writer observes, however, that in the course of one of them, Justice Griffiths observed that: 'no defence, however strong, by itself justifies a failure to engage in any kind of alternative dispute resolution'.[14] Read in isolation, this is a stunning observation (at least in the eyes of 'traditionalists'). This should give pause for thought.

Even then, when the parties are metaphorically dragged to mediation, we again have the central conundrum of any negotiation process: parties simply cannot be compelled to negotiate whether in good faith or not, nor to settle (although if they are obliged to try, the chances may be improved). In mediation agreements, the courts are generally exceedingly unlikely ever to open up the conduct of mediation itself for judicial scrutiny at some later time to see whether there has been negotiation in good faith or not, to adjudicate an obligation to negotiate, save in the most extreme circumstances, such as risk of commission of criminal offences. Mediators (and MSPs) are vigilant to ensure that mediators are protected from participation in such process, within the limits of the law.

Access to justice?

To conclude this part, it is perhaps worth mentioning in passing that those who oppose mandatory mediation would routinely refer to the right of access to justice. This is thought to be an essential entitlement for citizens living in a state governed by the rule of law (which finds its expression in

[10] https://www.lawsitesblog.com/2006/06/judges-order-rock-paper-scissors.html.

[11] This sets out the relevant rules on Part 36 offers in CPR. Part 36 offers are a matter of considerable comment and a fair amount of litigation. See https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part36.

[12] See: https://www.judiciary.uk/wp-content/uploads/2017/10/interim-report-future-role-of-adr-in-civil-justice-20171017.pdf and https://www.judiciary.uk/wp-content/uploads/2018/12/CJC-ADR-Report-FINAL-Dec-2018.pdf.

[13] A short note on the topic is here: https://civilmediation.org/latest-news/forced-to-mediate/.

[14] *DSN v Blackpool Football Club Ltd* [2020] EWHC 670 (QB).

Article 6 of the European Convention on Human Rights), but access to justice must be 'practical and effective' and not 'theoretical and illusory'.[15] Where the terms of access to justice are prohibitive, whether in terms of sheer cost or otherwise, or the delays are excessive (a concern with the advent of the Covid-19 pandemic) can it be said that there is access to justice for all, or indeed at all?

The phases and shape of mediation

All mediations can be divided essentially into three phases. These might be interchangeable and reversible in the sense that they do not necessarily proceed sequentially on the day. These are exploration, negotiation and settlement.

Extended exploration

In the early days (from, say, the advent of CPR in 1999 onwards) mediations might have been heavily weighted in the first instance in exploration. The parties might have created a mediation statement or position statement, some of which were rather long, and some produced simply too late, the day before or even the night before the mediation itself. The practical consequence of that was that the mediator and the parties frequently had to scramble to understand the nature of the dispute or disputes, what was really at issue, what had to be resolved, what could be solved, what could not be solved. Exploration might therefore simply have taken too much time, before the whole process of shifting from exploration to negotiation could begin. This undermined the prospects of success.

The impact of pre-mediation

In more recent experience, the whole process of exploration on the day (or main day) has become more truncated. In part, this may have been because mediators, alert from their experience over a number of years, have observed that time simply must be spent on so-called pre-mediation. That is setting out to achieve much of what necessarily had to be done on the morning of traditional mediations well before the mediation day itself. Introductions to the parties, often on a first name basis (but with care for cultural sensibilities[16]), could be achieved a month or more in advance. There might then be a substantial discussion of the matters in issue, even well before writing any position paper. It might even provide the framework for the drafting of that paper. Logically, this might be well before any of the parties had decided what documents and information they wanted the mediator to see (confidentially or otherwise) and what was to be exchanged and therefore given by way of common access to all other participants. This sort of pre-mediation obviously has a bearing on the way that traditional mediations were priced. They had originally been priced as a sort of turn-key project, with a view to conducting a sort of closing in a single day, whereas perhaps a more modern form is that the parties and the mediator have to spend a great deal more time and effort by way of reading, discussion and communication over some time, at some cost before the main day (or days). This might perhaps shift the balance of charging. One great advantage of the fixed price deal (with necessary adjuncts) is its simplicity, and hence the ability to eliminate one more potential topic for disagreement.

The specialist skill of mediators: innate or trained?

This is a matter of interest. There is an aphorism for almost all wisdom: the more practised mediators become, the better they get at it (even if not perfect).[17] Many mediators are very different in their character, but all share lively minds and an enquiring intelligence. Speed of understanding and a probing, thoughtful mind are essential characteristics, as, it seems (one observes), is steely self-confidence. All mediators, however, share that rare, special skill of managing a disparate group of parties who may be distant, hostile and uncommunicative in a way that enables them to speak to

[15] This provides quite detailed analysis: https://www.echr.coe.int/documents/guide_art_6_eng.pdf.

[16] A fascinating topic in itself: see David Lewis *When Cultures Collide: Leading Across Cultures* (4th edn Nicholas Brealey International 2018). See also Rhys Clift *International Mediation: A Few Cultural Pointers* (in talk and presentation format only).

[17] There is an interesting philosophical parallel to the debate: how many hours does it take to make a genius? Some say about 10,000 hours. See Malcolm Gladwell *Outliers: The Story of Success* (Hachette Audio ISBN 978-0-141-03620-0).

one another. Some of this may be trained, but in the writer's observation, in training mediators and in watching mediators in practice (acting for parties), much of this may be innate.[18] In other words, it may be as much in their character, that is, the way they are made, as much as in their intellect.

Explosions of anger are not unknown in mediation, and those who are genuinely enraged can generally hardly think. There is a risk that unwise things can be said when disinhibited by anger. Equally, theatrics are also not unknown. Shouting may be cathartic but might leave damage in its wake. Such things need to be managed so that they do not derail the process. It requires training and practice to develop the necessary expertise. Parties need to be encouraged to give thought to the process and what it is intended to achieve. Mediators have a role in this.

Mediators can focus the minds of parties on the problem at hand, explore that which needs to be explored and understood, and then be able to move parties from what might otherwise have been an arid process of grumbling, stonewalling or interrogation into a more lively and subtle process of negotiation. This can be visible in the demeanour of the parties. It is done by identifying precisely what it is that the parties need to get out of the process, and what is in their interest to achieve. The identification of that shared ground is the particular expertise of all successful mediators. It is also a particular skill of the best mediators that they are able to direct the minds of the parties. This is so that they can forego those matters that might be a focus of their ambitions, but which in the bigger scheme may be of little importance, even to them. This is one of the curious paradoxes of negotiation. All this is done with the objective of securing a resolution and an ultimate end to costly and time-consuming hostilities, the essence of compromise. In this, one can observe that mediation has much in common with diplomacy. An enduring peace may best be achieved by a negotiated resolution, rather than forcing capitulation by hostilities.

Efficacy and consequences

Of course, it does not always work, but the reason facilitative mediation has become so widespread, even if it has been a slow burning revolution, is that it is successful; it works, cases settle, reputations are protected, business relationships may be preserved. This is the reason why it is said, anecdotally, that about 75 per cent (some say 85 per cent) of all matters referred to facilitative mediation are ultimately settled on the day or thereafter. This necessarily means, of course, that 15 per cent to 25 per cent (or perhaps more) do not settle, whether on the day or thereafter. Those that have failed, in this sense, must revert to resolution by some other means. This might be by a decision-making process finally expressed in the form of a judgment or an arbitration award, with winners and losers and often serious consequences in terms of costs, one's own costs and in the recoverable costs of a successful opponent. And even for the victors there will be some residual pain in unrecoverable costs. Alternatively, the matter might ultimately loop back into another formal mediation at a later date (or remote negotiation through the mediator). This is one reason why mediation references are rarely terminated formally, even if they appear to have 'failed' on the day or in the immediate subsequent exchanges. The door is generally left ajar.

Use of time and the necessity of written agreements

The traditional model of a mediation as a sort of closing necessarily meant that the entire focus of effort and convergence was on meeting on a single day at a single time and place. The early practice of late preparation and long exploration would mean that that single day would sometimes be a very long day. That long day could sometimes threaten to stretch into another day or several successive days. This could cause problems because parties to disputes, meeting in London and coming from multiple destinations, often abroad, simply might not have the time and would find

[18] There is a substantial literature and profound science in the analysis of human behaviour, notably on human expression. Some people seem to have an innate ability to absorb and react to such information. Some of it can clearly be learned. See Paul Ekman, Wallace V Friesen and Phoebe Ellesworth *Emotion in the Human Face: Guidelines for Research and an Integration of Findings* (Pergamon 1972) https://www.sciencedirect.com/book/9780080166438/emotion-in-the-human-face. An outline is set out in Malcolm Gladwell *Blink: The Power of Thinking Without Thinking* (Little Brown 2005) ch 6.

themselves obliged to leave to turn their minds back to other priorities, to catch pre-booked flights and to attend to other concerns. Early progress could then wither away. This hazard could be (and in some measure has been) dealt with by more effective pre-mediation and avoiding fixing premature departure.

On other occasions, where the process of exploration, negotiation and settlement had been effective between, say, a commencement at about 9.30 am and conclusion on what might be regarded as heads of terms by say 7.00 pm (written or unwritten), the process could then move into yet another phase. In this, the parties and their legal advisers could sometimes descend into a somewhat monotonous process of nagging and hostility in the finalisation of settlement contract terms, where sometimes parties can become proprietorial, even about the words used in expressing the deal. A destination is often marked by a point of departure; hence the desire to set the initial structure of written terms. The more complicated the dispute, the more numerous the parties attending, the more representatives for each party, generally the longer the process of drafting and finalisation of a deal, the more costly, the more uncertain, the greater the risk of a complete renegotiation. The smaller the drafting team the better.

These are amongst the reasons why some mediators spend time early in the mediation (perhaps before much discussion as taken place) sketching out the essential terms of what seems to be a likely or viable deal or the bare bones or structure of a settlement. This is also done subtly to direct those involved to a deal-making mind-set, so it has more than one function. It may appear casual, relaxed and easy. It is not. It is one observable expression of a high degree of skill, and practice, often a matter of fine judgment. This is the essence of expertise. At the conclusion of some mediations, parties can sometimes be startled that it all seemed easy, if not wholly painless. It hardly ever is. Again, such outcomes are testimony to the skill of the mediator.

It is indicative of the mood of the room to watch the eyes of the participants when lifted from their own papers and preoccupations to look at a common focus on a screen or a white board. Whilst most parties will have their attention fixed on the screen, the eyes of the mediator may be alert to those who do not look up, for obvious reasons. They may be identified as particular individuals on whom attention needs to be focused during the course of the day. Identifying 'blocking' and disengagement, and resolving it, is a particular skill.

It is surprising just how simple a settlement agreement can be; names of parties, who pays, how much, when, confidentiality (or publicity) with regulatory savings and liberties, effect on proceedings, identity of signatories, warranties of authority and the like. Some obviously have to be much more complex. This is one good reason for parties to bring with them an outline agreement or even the outline text of certain important provisions. This might include, for example, detailed clauses as to intellectual property rights in a dispute over music or literary authorship and plagiarism, or detailed clauses to protect not just corporate parties but those who are shareholders, employees, lawyers, accountants and other professional advisers where there might otherwise be unknown personal exposure in foreign systems of law where the principal dispute is between corporate parties, say.

The fundamental importance of attaining closure is why those wise in the ways of mediation have always insisted that there should be no settlement by mere verbal exchange (heads of terms or otherwise) but that settlement could only be concluded by written contract terms, signed by all parties with authority. This would in any event be essential under English law for any agreement on the disposition of real property rights (land, access, rights of way and the like). A verbal agreement may not be worth the paper it is written on. This is because, even with the enormous time and effort that might be devoted to a mediation, there was the ever-present hazard of buyer's or seller's regret where those who attended only reached agreement in principle or heads of terms. They would then take them back to ultimate decision-makers at a board or committee somewhere abroad who, not having participated in the process and having no real understanding of the detail of the matter, might seek one amendment here or there which would also very soon proliferate into a wholesale rewriting and thus renegotiation of the whole deal. By this means, any settlement in principle can collapse.

This probably explains why signings on large financial transactions, or the purchase of major assets would be closed definitively on a single day, at the end of a tax year or before capital markets reopen. This might be achieved by the curtailment of time, by some sort of guillotine, by whatever means and however many people would necessarily be involved, such that the deal was done, the contract was written, the matter was finalised, a line could be drawn. The transaction would be concluded.

Logistics, planning and cost

This traditional model of mediation would require planning, the more so if the parties were numerous and scattered abroad. There would be logistics, travel, flights, hotels, venue, a whole range of planning. This would necessarily require the time and effort of commercial parties themselves and of their legal advisers. An objection raised on more than one occasion in the early stages of development of mediation was that this was a costly, time-consuming process and an unnecessary additional expense, added to the already costly process of the management of any dispute in litigation and arbitration. In reality, this observation had little substance, since even the cost of a thoroughly prepared mediation with multiple parties over a period of months would be far less costly than the more profound and detailed exercise of preparation for and the conduct of a court trial or commercial arbitration; at least in large cases. The latter would require pleadings to set out the matters in issue and disclosure with the ever-growing burden of electronic disclosure (whatever procedural changes are put in place[19]). It would require exchange of witness statements (time-consuming and costly to obtain), the identification of experts with relevant expertise and 'court skill', the extraction of their views and the elaboration of experts' reports. It would necessitate the exchange of such reports, the management of meetings between experts for the purpose of identification of matters in common and matters in conflict and, finally, the enormously detailed and thorough process of work in which counsel would be engaged when briefed to appear at the final hearing or trial. A well-run mediation is almost always far more economical than a well-run trial or arbitration, especially large or significant cases, where mediation has not surprisingly been most successful (as the CJC Report of 2017/2018 attests).

Working on a pre-planned project

Looking at these characteristics of the traditional facilitative mediation process, one can observe that parties generally work to something of a pre-planned arrangement. They ascertain the facts as best they can and work on what they have established. They read documents produced by clients. They might interview witnesses and experts. They might obtain preliminary or well-advanced experts' reports. In matters of novelty or complexity, or simply matters involving significant sums of money, advice sometimes very detailed is obtained from counsel on evidence and merits, both as to liability and as to quantum. There is enormous pressure to prepare thoroughly in advance. Some or all of these tasks are dealt with (well) before appearing at the mediation on the day. This would mean that some mediations might necessarily be conducted late in time, perhaps not long before trial when much of the expense had been incurred, a not infrequent focus of criticism, practical and academic. If that were to become a fixed pattern then some change would inevitably be needed.

Court orders and timing, contemporaneous evidence

That said, however, as ADR and mediation have become progressively ingrained into the structure of litigation in England and Wales, a standard form of ADR order has traditionally been considered for inclusion into the timetable of proceedings heard by the court at a case management conference.[20] Mediation is inserted into the timetable after the exchange of pleadings (which articulate the matters in issue) and after disclosure of documents, but before any other step. This is

[19] The latest expression of which is to be found in the Disclosure Pilot Project: https://www.justice.gov.uk/courts/procedure-rules/civil/rules/practice-direction-51u-disclosure-pilot-for-the-business-and-property-courts.

[20] A draft order is annexed to the Commercial Court guide, for example. See https://www.gov.uk/government/publications/admiralty-and-commercial-courts-guide.

in order that the parties should have available to them the contemporaneous documentary evidence regarding matters in issue. This contemporaneous evidence is treated as being the most compelling. It has not been adapted, revisited, reconstrued, amended or even distorted in the baffling kaleidoscope of human memory, or even wish-fulfilment. There is something very compelling about documents written contemporaneously immediately before and when problems emerge.

At that point in the legal process, the parties have access to the pleadings and to disclosure but may not have access to the additional clarity that might (or might not) be afforded by statements of fact, expert evidence (except their own) and even counsel's opinion (although more information can sometimes be more confusing than less). To that extent, the archetypal mediation order and timetabling for mediation might be designed to occur at a point at which the parties do not know everything, as a compromise between knowledge and cost. Is this the right time to mediate? One might ask rhetorically; when do parties feel that they know *everything* about a problem that becomes a dispute, to be ready to deal with it, to solve it? Ever? Conversely, when do parties know *everything* before they enter into a contract in the first place? Ever?

The writer has heard on occasion, after application or after trial where an extended judgment has been handed down, that parties consider that the court has simply not seen, and therefore not appreciated or applied relevant considerations, or simply come to the wrong conclusions. The matter of underlying contention remains somehow submerged, concealed, unresolved. This might be true for losing parties, perhaps, but even winners are not immune from such perceptions. Mere winning may not be everything, especially when judgments are public documents and issues of principle were at stake and where precedent is of importance. One might ask: is a perfect legal process needed to do justice? Indeed, does such a perfect process exist or is it the unicorn of litigation? Commerce must function in an environment of uncertainty, accommodation and compromise, for speed, efficiency and economy. These are some amongst many reasons why more than 90 per cent of cases settle and never get to court, a settled statistic for decades.[21]

Who should attend?

Mediators do not require the presence and assistance of lawyers or other skilled advisers. It is for the parties to decide who attends and who does not. However, almost any established mediator will say that his or her participation is strongly recommended, if not essential. It might not matter whether those advisers are in-house counsel in a small or large business or senior claims personnel within a business operation such as within the claims operation of an underwriter. The reality is that it is far better that the parties in dispute delegate these functions. Those to whom they delegate should be those with specialist expertise to deal with them, that is, individuals who are at least one step removed from the dispute, somewhat disinterested (not uninterested) in order that they can bring to the process a measure of objectivity and calm.

The typical attendees at a mediation are, therefore, generally lawyers/advisers and their clients, often decision-makers but somewhat rarely ultimate decision-makers. It is not generally advisable (in the view of the writer) that those who attend come equipped to engage in 'hardball' rhetoric, a talent rarely of much use in the complex and subtle art of persuasion.

Solicitors and barristers?

It is unusual but by no means unknown that, in the English process, where there are solicitors and barristers, that parties decide to take both their solicitors and their barristers to the mediation itself. It is not a necessary requirement, although some parties sometimes feel that it is something they should do, even though it entails more cost. It is the preference of the writer that the parties and their solicitors or their in-house legal advisers or senior claims personnel should obtain such specialist legal advice as they believe they need from counsel before attending. One hazard is that counsel

[21] See eg the view of Lord Clarke touched on in Rhys Clift 'The phenomenon of mediation: judicial perspectives and an eye on the future' https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1599420.

might see their role in any mediation, with a typical structure of barrister, solicitor and client, as being one of providing advice, focusing on rights, conducting advocacy, conducting what might in another forum be considered to be probing questioning or even cross-examination of other participants.

Mediation is often perceived as a substitute for a day in court, without the attendant risk and cost. Maybe so, but it is not a mini trial. This sort of focus, like intellectual arrogance and a conviction about 'rightness' (which can be found anywhere) is unlikely to engender the sort of subtle adaptations of behaviour likely to facilitate negotiation and settlement. There can be hardened minds, certainly, but there remains the need to be susceptible to reason and compromise. Pragmatism is an important component of deal-making. It has a considerable value. Conversely, matters considered to be of principle can prove problematic to solve. Some issues genuinely are matters of importance, such as calm concessions, or even tactful apologies, to remove what otherwise would be an indelible stain on a reputation, casually traduced. Used more widely without justification, the deathless phrase 'it is a matter of principle', can sometimes mark the point at which disputes become entrenched, a difficulty from which they may take a great deal of time (and cost) to extract. There is a real need to take care and give thought to the use of words, one reason for the value attached to tact in social or business engagement, quite apart from the management of disputes.

Witnesses of fact

It is in the experience of the writer unusual, perhaps exceptionally unusual, that witnesses of fact should attend. It is probably unwise to take witnesses of fact, most particularly before witness statements have been exchanged in litigation or arbitration, since the consequence of this may be that the whole process can turn from one of exploration, negotiation and settlement into a process of interrogation or even harassment. This is not productive and is unlikely to engender a consensual resolution. It is yet another conundrum of mediation, however, that witnesses of fact may be the ultimate decision-makers (or in some cases the only available decision-maker). There is no hard and fast rule, of course, but in such circumstances, it is probably best that the ultimate decision-makers do not participate at the mediation itself, but should delegate that function to senior personnel with authority to handle the matter and conclude a resolution. This may well be so even if in the last analysis that person should be obliged to refer to the ultimate decision-maker outside the process for ultimate authority and final approval.

Experts

It is not unknown that experts attend. Sometimes they can be very useful. As a general rule it is probably better that parties obtain such expert advice as they need before they attend, if they can. Again, the objective of this is to ensure that the mediation itself is a negotiating forum not a substitute for an expert meeting, especially if the mediation itself takes place before statements of fact and experts' reports have been exchanged. The very last thing that the parties seeking a resolution should wish to see is that a mediation might descend into a battle between experts over matters which might be of real technical importance (or interest) but ultimately of little commercial importance in the broad scheme of deal-making. This is especially so if there is any risk that the experts might see themselves in this context, as distinct from their role in formal process constrained by court rules, as being an advocate for a cause. Some of this can be purely emotional and instinctive, not rational and dispassionate.

Ancillary issues

The importance of language

It will be seen from all this that there is something of a standard template or structure, but few firm rules and every mediation is different. Those matters which turn on matters of legal difficulty or complexity might be thought to necessitate the presence of counsel learned in the law. However, even highly complex problems can be solved without descending into a technical analysis of sentences and the meaning of words retrospectively after a dispute has emerged, and which might

have been the subject of little thought at the time when a contract was originally made (the parsing of sentences is generally well outside the frame of reference in resolving disputes). Such problems can be compounded in a world where English has become the *lingua franca* of business[22] but where the overwhelming majority of users may be functioning in their second or third language. The elucidation of meaning or what is important (but moreover the identification of interests and needs) might need far more than a minute scrutiny of words on a page. Such a quest for meaning might be hardly necessary.

Simplicity and complexity

A dispute on the construction of a nuclear power plant is unlikely to require an advanced knowledge of theoretical physics, nuclear fission nor of the operation of the equipment in which fission is conducted. Nor is a full knowledge of the arcane vocabulary or terminology, nor the multiple layers of meaning in words chosen for the operating manuals of nuclear plant, a requirement. We all know that the solar system works by heliocentricity. We do not need to know how exactly nor even be able to explain it. Clarity of thinking is needed to identify what is it that is important, and whether it is inevitable that it needs a complex resolution. Such cases might be very rare.

Advantages and disadvantages, careful evaluation and choice

There are many reasons why facilitative mediation following this sort of traditional model has been proved to be effective and therefore has become so widely adopted, now being the preferred method of alternative dispute resolution, for example, of the International Chamber of Commerce (and magnificently showcased in the ICC Annual Mediation Competition[23]). The idea of a mediation replicating a closing at a single date, time and place is to bring to it a focused attention and concentration which ordinary negotiation might otherwise lack. That said, there is once the parties converge with the mediator little or no opportunity to investigate contested facts and little opportunity to access counsel for specialist advice on particular points. Equally, there may be little opportunity to get expert input on any new expert issue that might arise and little scope for advice as to issues of coverage which might arise unanticipated during the course of the day. There might be little scope to bring in other decision-makers whose participation might become important, even essential, when in the original planning it had been thought unnecessary.

The implications of pressure and the need to understand the concept

Mediation on a single day by convergence has pressure of time, it has a pressure of process and it has an impetus to settle. This accumulation of pressures is one of its major advantages, although some might feel, unless thoroughly prepared in advance to understand what to expect, that they are pressured to proceed into something which they would not otherwise wish to do (which they are not). If that were so, it would be a disadvantage. It is always well to understand what the purpose of the process is, what to expect and what it might achieve. Be prepared.

Pressure can be exercised by mediators on the parties individually or as a whole and on their legal advisers. Mediators can also exercise pressure on the principals themselves in a way in which the commercial parties may be unable to do (especially if they are all present in person). Certainly, mediators can act perfectly properly in a way in which the lawyers for opponents would never be able to do because, as a matter of ethics, the lawyers should not be engaged in direct private exchanges with an opposing party who has retained legal advisers. For mediators, this can be thought to be a major advantage in the sense that this is one means by which things get to the heart of problems, to the people that really matter and get things done. Conversely depending on perspective, it can be seen as a disadvantage, an undesirable exposure to hidden weakness and yet a further cause of a potential buyer's regret.

[22] A subject of considerable literature in itself. See eg https://hbr.org/2012/05/global-business-speaks-english.

[23] See eg https://iccwbo.org/dispute-resolution-services/professional-development/international-commercial-mediation-competition/.

Clarity and finality

This sort of closing type mediation generally has a lack of time to ponder. In that sense it is the culmination of a process and even if requiring a hardworking day can be a short sharp shock process to reach finality to conclude and to move to closure.

Finally, it is as well to recognise that there is no right answer to any dispute, the less so the more complex the dispute and furthermore there is no certainty in the law. Even in a so-called 'perfect case', unusual documents can emerge. There may be unsatisfactory witnesses whose evidence does not come up to proof (in an interview, or worse in the witness box). There might be unsatisfactory experts who might seem willing to articulate a view pleasing to their client but be unwilling to reiterate that same view when asked to give advice to a court (the primary duty of an expert). Last, there can be unsatisfactory judgments and final arbitration awards. All this poses risk that can be eliminated by a deal.

Facilitative mediation is a subtle and highly effective way to make deals. It has over many years brought about a profound cultural change in the management of disputes. It is a fixture in the firmament, and now lies right at the heart of modern commercial life.