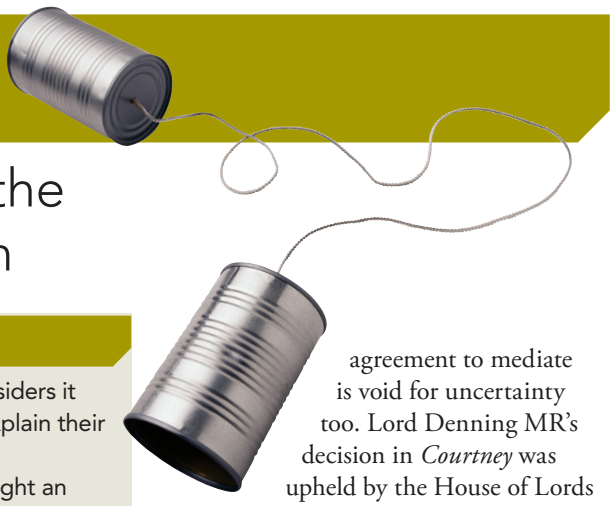
Discussion required?



Part one: **Erich Suter** reports on the move towards enforced mediation

IN BRIEF

- Under section A of the new allocation questionnaire, a party which considers it inappropriate to try and settle or mediate at this stage is required to explain their reasons.
- Since mediation is simply negotiation assisted by a third party; at first sight an agreement to mediate is void for uncertainty, as upheld in *Courtney and Fairbairn Ltd v Tolaini Bros (Hotels) Ltd*. But recently Sir Anthony Clarke MR suggested courts have jurisdiction to order mediation under the CPR.
- In *Cable & Wireless plc v IBM UK Ltd* Mr Justice Colman held that a contractual mediation clause should be enforced by the court.

In *Shirayama Shokusan Co Ltd v Danovo Ltd* [2004] 1 WLR 2985 Mr Justice Blackburne held that the court had jurisdiction to order mediation; even where one party was unwilling. The Court of Appeal in *Halsey v Milton Keynes General Trust NHS* [2004] EWCA Civ 576, [2004] 4 All ER 920, however, held that to do so would be in breach of Art 6 of the European Convention on Human Rights (the right to a fair trial). It was held that courts should "explore the reasons for any resistance to ADR [alternative dispute resolution] procedures but where a party remains intransigently opposed to ADR...it would be wrong for the court to compel them to embrace it".

But the attitude of the courts to mediation is evolving rapidly. From April 2008 the new-style allocation questionnaire has a larger section A dealing with settlement and mediation: "Parties should make every effort to settle their case before the hearing…by discussion…negotiation…or by a more formal process such as mediation. The court will want to know what steps have been taken. Settling the case early can save costs, including court hearing fees."

So it is made clear, from the outset, that failure to mediate may well sound in costs. Under the new section A, a party which considers it inappropriate to try and settle at this stage is required to explain that view. The duty to seek settlement is further reinforced by the legal representative's question which requires confirmation that the legal representative has explained to the client the need to try and settle.

In May 2008 Sir Anthony Clarke MR, in a speech given to the Second Civil Mediation Council National Conference, doubted the correctness of the *Halsey* decision insofar as it suggested compulsory court ordered mediation would be a breach of Art 6. He suggested that the courts do have power to order compulsory mediation. He also considered that this part of the *Halsey* decision was obiter— leaving the door ajar for judges to make compulsory mediation orders.

> **"Since mediation is simply negotiation assisted by a third party, at first sight an agreement to mediate is void for uncertainty too"**

What about contractual mediation agreements?

Contractual mediation agreements are, on the face of it, void. Lord Denning MR in *Courtney and Fairbairn Ltd v Tolaini Bros (Hotels) Ltd* [1975] 1 WLR 297, at 301–302 said: "If the law does not recognise a contract to enter into a contract (where there is a fundamental term yet to be agreed) it seems to me it cannot recognise a contract to negotiate. The reason is because it is too uncertain to have any binding force...It seems to me that a contract to negotiate, like a contract to enter into a contract, is not a contract known to the law."

Since mediation is simply negotiation assisted by a third party, at first sight an agreement to mediate is void for uncertainty too. Lord Denning MR's decision in *Courtney* was upheld by the House of Lords in *Walford v Miles* [1992] 2 AC 128, [1992] 1 All ER 453. And although there was an apparent slight relaxation of the position by the House of Lords in *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334, [1993] 1 All ER 664, in relation to a contract which provided for a binding decision to be made by an independent expert; as far as agreements for non-binding mediation were concerned the *Courtney* position persisted. In 1999, for example, Mr Justice McKinnon, distinguishing the *Channel Tunnel* case, held in *Halifax Financial Services Ltd v Intuitive Systems Ltd* [1999] 1 All ER (Comm) 303 that an apparently precisely drafted mediation agreement was still void for uncertainty.

However, it was not until *Cable & Wireless plc v IBM UK Ltd* [2002] All ER (D) 277 that Mr Justice Colman finally held that a contractual mediation clause should be enforced by the court. Although he upheld the clause on a number of grounds the primary one seems to have been that: "For the courts now to decline to enforce contractual references to ADR on the grounds of intrinsic uncertainty would be to fly in the face of public policy as expressed in the CPR and as reflected in the judgment of the Court of Appeal in *Dunnett v Railtrack* [2002] All ER (D) 314 (Feb)]."

The door was open for contractual mediation agreements to be enforced as a logical extension of the Civil Procedure Rules' imperative towards dealing with disputes through mediation.

Since mediation clauses can now be enforced by the courts, the next question is should contractual mediation agreements always be enforced? In this author's view the answer is "no"; there are situations in which mediation is inappropriate.

In *Halsey* Lord Justice Dyson, giving the judgment of the Court of Appeal, considered the matters to be taken into account by a court in deciding whether a party had acted unreasonably in refusing to mediate. Examination of these provides a basis from which to examine the extent to which contractual mediation clauses should be enforced.

The nature of the dispute

"Even the most ardent supporters of ADR acknowledge that the subject matter of some disputes renders them intrinsically unsuitable for ADR." [*Halsey*]

Points of law

The *Second Report of Commercial Court Committee Working Party on ADR* (1999) believed: "…that there are many cases within the range of Commercial Court work which do not lend themselves to ADR procedures. The most obvious kind is where the parties wish the court to determine issues of law or construction which may be essential to the future trading relations of the parties, as under an ongoing long-term contract, or where the issues are generally important for those participating in a particular trade or market."

To this Dyson LJ in *Halsey* added cases involving "general points of law" which a party may require to have considered from time to time.

In such cases mediation is not generally appropriate because a mediator cannot provide a binding decision on the legal issues in the case. If it is inappropriate for the court to criticise a party's refusal to mediate in such circumstances, it would appear to be inappropriate to enforce a contract to mediate in such cases.

In *Cable & Wireless*, however, the dispute involved an issue of construction in a long-term contract between the parties. It was argued that it was important that the parties be allowed to have this issue resolved by the courts as early as possible. Colman J, however, held: "Whereas, this would probably be a highly relevant consideration if it arose in…a case management conference in the absence of an agreement to refer, it must carry very much less weight in the face of an agreement to refer to ADR...[P]arties who enter into an ADR agreement…must be taken to appreciate that mediation as a tool for dispute resolution is not designed to achieve solutions which reflect the precise legal rights and obligations of the parties, but rather solutions which are mutually commercially acceptable at the time of the mediation. If therefore they agree to a reference to ADR which…is wide enough to cover pure issues of construction, they have at best a weak basis for inviting the court to withhold enforcement, even...where on the face of it resolution by the courts would be likely to be beneficial to the parties' future operation of their contract."

Colman J went on to observe that "IBM disputes the fundamental validity of the Compass Benchmarking Report. If they are right, the issue of construction which C&W now wish this court to resolve will not arise…There are therefore extremely strong case management grounds for allowing the reference to ADR to proceed". He ordered mediation. Where there is a "pure" point of law at issue, with no factual dispute surrounding it, however in the author's view it would be inappropriate to enforce a mediation clause; simply because the issue could not be determined by a mediator.

> **"Since mediation clauses can now be enforced by the courts...should contractual mediation agreements always be enforced?"**

Allegations of fraud

The Commercial Court Working Party in its report also opined: "There may also be issues which involve allegations of fraud or other commercially disreputable conduct against an individual or group which most probably could not be successfully mediated."

Where one of the parties to the contract has been guilty of fraud or other "commercially disreputable conduct" it is likely that the trust and confidence between the parties will have broken down. In such cases it is difficult to imagine that there would be sufficient trust between them to enable mediation to take place effectively. In cases where the court is being asked to enforce a mediation clause the application is made because one of the parties is refusing to mediate. Where the "refusing party" believes it has been subjected to fraud or sharp practice a court of equity would and should be unwilling to provide relief by enforcing a mediation clause. He who comes to equity must come with clean hands.

Relief

Where injunctive or similar relief is being sought mediation might be inappropriate. This is not always true, however, and such cases can sometimes be suitable for mediation. In some cases an equivalent type of "protection" to an injunction can be obtained by undertakings being given. But since court enforcement of mediation is only relevant where one party is unwilling to mediate, the court is likely to be asked to order mediation in such cases:

- where the unwilling party has unsuccessfully sought undertakings from the applicant; or
- where the alternatives to formal court orders could not provide the relief which the unwilling party seeks.

In either event, bearing in mind that equity should not act in vain, the court should not enforce mediation agreements in such cases.

A final situation is where the case could be dealt with by undertakings which the applicant has refused to give. The court, following the maxim that he who comes to equity must do equity, clearly should not order mediation in such circumstances.

Erich Suter of Park Chambers, Weybridge, Surrey is a public access barrister and accredited mediator. E-mail: *ES@ParkChambers.co.uk*

In the second of his articles Erich Suter looks at the remaining classes of cases in which Dyson LJ in Halsey considered a party might not act unreasonably in refusing mediation, and considers the extent to which those circumstances might impact on a court's decision to enforce contractual mediation clauses. NLJ