Discussion required?

Part two: **Erich Suter** on the move towards enforced mediation

IN BRIEF

- The courts' inclination to uphold mediation agreements has been increased by the success rate of mediation and the increasing emphasis on "CPR mediation."
- The grounds for refusing to enforce mediation agreements are narrower than the grounds on which a party can reasonably refuse CPR mediation.

Increasingly courts are coming to accept that they do have the power to enforce agreements to mediate and it seems that nowadays it is likely that that power will be exercised provided the agreement is sufficiently clear. The only exceptions to this are in those cases where mediation is inappropriate. These are generally cases:

- which require a ruling on points of law;
- where the refusing party believes the applicant to have been guilty of bad faith or sharp practice;
- where injunctive relief or other such remedy is sought;
- where the costs of mediation would be disproportionately high; or
- where there has been unreasonable delay in seeking mediation.

Undoubtedly even in some of these cases mediation will be ordered and in other cases, not covered by these generally "inappropriate" areas, mediation may nonetheless be seen as inappropriate or utterly futile in that particular case.

The merits of the case

A party's reasonable belief that he has a watertight case may make his refusal to undergo "CPR mediation" reasonable. One difficulty facing a party with a watertight case is that by entering into "CPR mediation" he will be expected to move to a position of compromise. Indeed the very fact that he has agreed to mediation signals that he is prepared to pay something to make the case go away (see: Dr M Friston and others "Cost cutting", 156 NLJ 7223, p 737). To a lesser extent a watertight claimant's agreement to attend CPR mediation also suggests that he is prepared to settle for less than full value. Where the mediation is contractual, however, the "watertight party" will be at the mediation because he is contractually bound to be there. This, in the author's view, does not act as an obvious compromise of his watertight position as it might in "CPR mediation". It gives the "watertight party" an opportunity to persuade the other party of the strength of his case and hopefully to achieve a compromise at full, or close to full, value.

Alternative settlements

In *Halsey v Milton Keynes General Trust NHS* [2004] EWCA Civ 576, [2004] 4 All ER 920 Lord Justice Dyson commented: "The fact that settlement offers have already been made, but rejected, is a relevant factor. It may show that one party is making efforts to settle, and that the other party has unrealistic views of the merits of the case. But it is also right to point out that mediation often succeeds where previous attempts to settle have failed." Where the mediation is contractual the failure of other settlement methods would be no reason not to order mediation; if only because "mediation often succeeds where previous attempts to settle have failed".

> "The more horses approach the trough the more will drink from it"

Disproportionate costs

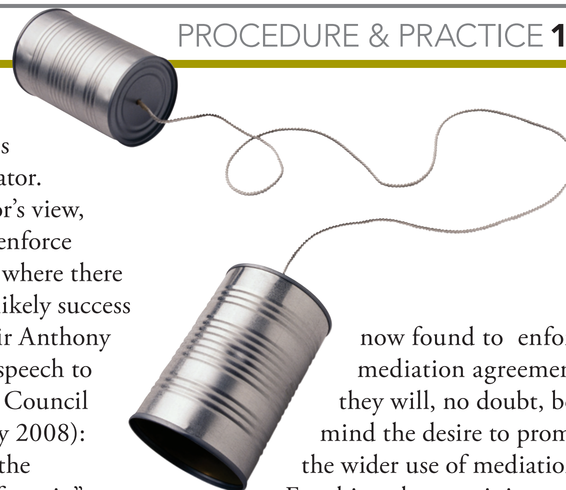
Where the costs of mediation are significantly higher than the amount at stake then the parties would generally agree that that issue should not go to mediation. Alternatively it would be the "rich man" in the contract trying to force the "poor man" to waste money on mediation.

Where damages are an adequate remedy there is no justification for ordering specific performance of a mediation clause. In this type of case damages are, by definition, reasonably ascertainable and hence are adequate; because it is the excess of cost over damage which has led to the concern about the costs of mediation. The "rich man" would also fall foul of the maxim that "he who seeks equity must do equity". Clearly courts should not enforce mediation clauses in such cases.

Delay

A contractual mediation clause would only be enforced if the contracted mediation was agreed to take place within a reasonable time. If it wasn't then the clause would be liable to fall foul of either the "uncertainty" principle or to a claim that it was seeking to oust the jurisdiction of the courts. The only other normal reason for delay is where the delay is caused by the party who does not want the mediation to take place. In such cases clearly mediation clauses should be enforced.

However, there are also cases where it is the applicant who has delayed in applying for a stay of the proceedings. This was the case in *Cable & Wireless plc v IBM UK Ltd* [2002] All ER (D) 277. In that case it was argued that since IBM, the applicant, had delayed in applying for a stay, the court should not enforce the ADR agreement. Mr Justice Colman's view was that: "There may be cases where the applicant has been guilty of such delay that it would be unfair to impose ADR procedure on the opposite party. That is not this case. There will be no material prejudice to C&W if the ADR procedures now go forward." So the impact of delay by the willing party is likely to be judged in the light of any prejudice to the unwilling party, or to the mediation process itself, which would be caused by the delay.



Obviously the best way forward is to ensure that there is no unreasonable delay in applying for a stay. There is a flip-side to the "delay" coin. In at least two recent cases the parties have refused CPR mediation, when mediation has been sought early in the proceedings, because they had not had enough information from the other side to ensure that mediation would be effective (see: *Nigel Witham Ltd v Smith* [2008] EWHC 12 and *Wethered Estate Ltd v Davis* [2005] EWHC 1903).

In both cases the question was whether the refusals were unreasonable and should therefore attract a costs penalty; in both the refusals were held to be reasonable in the circumstances. In light of these cases it is important for mediation agreements to ensure that mediation is held promptly enough so as not to delay litigation; whilst, on the other hand ensuring that the parties will have sufficient information about the other side's case to facilitate effective mediation.

Success prospects

Colman J, in *Cable & Wireless*, observed that what the court is being asked to enforce, in terms of a mediation agreement, is that the parties put their case before a mediator. For this reason, in the author's view, the courts should generally enforce agreements to mediate even where there is a question mark over the likely success of the mediation itself. As Sir Anthony Clarke MR observed in his speech to the Second Civil Mediation Council National Conference (8 May 2008): "The more horses approach the trough the more will drink from it."

For cases that go to voluntary mediation, upwards of 70% to 80% settle: "...Even for mediations that are mandatory, where disputants are required to mediate as part of the litigation process, [eg: in Canada] more than 40% of cases settle at mediation or within ten days of the mediation." (see Allan J Stitt, *Mediation, a Practical Guide*, Cavendish Publishing, London 2004.) So the mere fact that the court considers that mediation might not be successful is, even statistically, not a good reason for refusing to order it except in an extreme case.

Appropriate use

In considering whether the courts should use the power which they have now found to enforce mediation agreements they will, no doubt, bear in mind the desire to promote the wider use of mediation.

For this to happen it is essential that mediation agreements are only enforced where it is likely to be advantageous to do so. To order mediation in inappropriate cases—or where the court genuinely considers that it will be of no value—would not serve to promote mediation. At a time when the imperative seems to be towards resolving disputes without the courts having to be involved, it is important that mediation is used in a considered way which maintains and promotes its credibility. NLJ

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