Sedgwick Chudleigh

What Is Mediation, and Should It Be Made Compulsory for Civil and Commercial Disputes in Bermuda?

By Alex Potts

What Is Mediation?

Mediation is now universally recognised to be an effective way of resolving a wide range of domestic and international disputes, on a consensual basis, without the need for the parties to go to a final Court or arbitration hearing.

Lord Neuberger, the President of the Supreme Court of the United Kingdom and the Judicial Committee of the Privy Council (Bermuda's final appellate court), has recently identified five potential advantages of mediation over litigation (assuming that a mediation is successful, as many mediations tend to be in practice)[1]:

1. Mediation can be quicker, cheaper, less stressful, and less time-consuming than litigation or arbitration;

2. Mediation can be more flexible than litigation or arbitration in terms of potential outcomes;

3. Mediation is less likely to be harmful to the long term relationship between the parties;

4. Mediation is conducted privately, under less pressure and in less artificial circumstances than a Court hearing; and

5. It is more likely that all parties will emerge from a mediation with the feeling that they have each achieved a satisfactory outcome.

The mediation process involves an independent third party mediator, appointed by the parties, who helps both sides reach a negotiated settlement agreement (with the assistance of the parties' own lawyers and other expert advisors, as may be appropriate).

The role of the mediator is to help the parties to reach a solution to their problems, and to arrive at an outcome that both parties are happy to accept, without the ongoing costs and risks of litigation or arbitration.

Although there are a variety of mediation styles and techniques, mediators generally avoid taking sides or making judgments. They are mainly responsible for developing effective communications, and building consensus, between the parties.

The focus of a mediation meeting is to reach a common sense and commercial settlement agreement that is satisfactory to all parties involved in a case. Mediation is generally a voluntary process, since it will only result in a binding settlement agreement if all the parties agree.

If the parties are unable to reach agreement, they can still go to Court or to arbitration. Mediation is also a confidential process, where the terms of discussion are not disclosed to any party outside the mediation hearing. Details about what went on at the mediation will not be disclosed or used at a Court hearing, save in the most exceptional of circumstances (such as fraud).

Generally, both parties share the cost of mediation, subject to agreement. The costs of mediation are typically modest when compared to the costs of litigation or arbitration, if contested all the way to a final hearing or an appeal.

The Use of Mediation for the Resolution of Bermuda Disputes

Mediation is occasionally used on a voluntary basis for the resolution of certain types of civil disputes in Bermuda, although (save for the family law context) whether or not a mediation takes place depends entirely on the appetite of the parties and their lawyers, in the circumstances of any particular case.

Both the reported case law and anecdotal experience suggest, however, that there is still considerable scope for the active promotion of the increased use of mediation in a larger number and a wider range of cases. There are still many reported cases where, for one reason or another, the parties and their lawyers have either ignored or rejected the possibility of a mediation, without an objectively good reason for doing so.

Mediation of Family Law Disputes

In the family law context, mediation has effectively become quasi-mandatory in Bermuda, as a result of recent amendments to Bermuda's Children Act 1998, pursuant to the Children Amendment Act 2014, which took effect from December 2014.

Similar legislation designed to make mediation a quasi-mandatory legal requirement had previously been introduced in the UK, under the Children and Families Act 2014.

The Judicial Training Institute of Bermuda has recently offered training programmes for Bermuda judges and Bermuda lawyers in the use of mediation for the resolution of family disputes.

The Bermuda Judiciary's enthusiasm for mediation in family cases is illustrated by the fact that Mrs Justice Norma Wade-Miller, a Supreme Court judge and chair of the Family Law Reform Sub-Committee, has recently been quoted as saying that "*Mediation is the centerpiece of the new Integrated Family Court*".

There has also been a recent reported case in which Bermuda's Family Court was reported to have ordered the parties to submit to mediation on a quasi-mandatory basis: see *Re C (Variation of Access Order)* [2015] Bda LR 20.

Mediation of Commercial, Civil, Corporate and Trusts Disputes?

What, then, is the Bermuda Court's current position regarding mediation for commercial, civil, corporate, and trusts disputes, whether on a voluntary or a mandatory basis?

Unreasonable Failure to Mediate: The Court's Power to Impose Costs Sanctions

Plainly, the Bermuda Court has the power to encourage litigating parties to mediate at least indirectly, given the fact that the Court has a broad discretion as to the costs of litigation, including the power to make an adverse costs order at the conclusion of Court proceedings.

An example of such an adverse costs order would be one that deprives an otherwise successful party of its entitlement to costs, if it has unreasonably refused an offer to mediate during the course of the proceedings; or one which requires an unsuccessful party to pay indemnity costs, if it has unreasonably refused an offer to mediate.

In *Knight v Warren* [2010] Bda LR 73, the Court of Appeal for Bermuda allowed an appeal against the first instance decision of Kawaley J (as he then was) whereby Kawaley J had deprived the successful Plaintiff of any award of interest on his damages claim, on the grounds that the Plaintiff had refused the Defendant's offer of a mediation.

Although the Court of Appeal held that interest should have been awarded in any event on the damages award, the Court of Appeal expressly acknowledged, by Sir Anthony Evans' judgment at paragraph 37, that *"**a party's willingness to attempt mediation, or his refusal to do so, may be a relevant matter affecting the Court's order as to the parties' costs**"*.

The Court of Appeal went on to lament the disproportionate costs incurred by both the parties in that case (which was a low value, but acrimonious, construction dispute): *"**the enormous costs of these proceedings are a sad reflection on the way in which they have been conducted and on the apparent inability of the Courts to restrain litigation on such a wasteful and unnecessary scale**. Cases occur where the parties, particularly perhaps when they are individuals, not corporations, are so antagonistic towards each other that not even the wisest counselling by their legal advisers can prevent their cases, even unmeritorious cases, coming to the Courts. When that does happen, **it is all the more important for the Courts themselves to take some measure of control, in the interests of efficient case management and to make best use of the limited resources of the Courts themselves**"*.

Regrettably, however, the reported case law since 2010, and anecdotal experience, suggest that the threat of cost sanctions has provided insufficient incentive for many litigants and their legal advisors to agree to participate in a mediation (or, to put matters another way, insufficient deterrent to stop them from unreasonably refusing to do so).

Are there other more proactive ways, therefore, by which the Supreme Court of Bermuda might direct the parties and their lawyers to engage in a mediation before a trial?

Can the Court Order the Parties to Mediate, or Otherwise Direct a Stay of Court Proceedings Pending the Conclusion of a Mediation?

Outside the family law context, there is, as yet, no reported example of the Bermuda Court making an order that the parties to a business dispute must engage in a mediation prior to litigation or a trial.

There is a reasonable argument, however, that the Bermuda Court does have an inherent power to order the parties to engage in a mediation, or at least to stay Court proceedings pending the conclusion of a mediation, and that this is a power which the Court should consider exercising in an appropriate case, whatever the professed wishes of the parties.

An example of a situation in which the Bermuda Court might consider compulsory mediation might be one where the sum in dispute is relatively small in amount (i.e. between $25,000

Sedgwick Chudleigh

and $1,000,000); where the legal and factual issues are not only complicated but finely balanced on the merits (i.e. inappropriate for striking out or summary judgment); and where, as a result, the case will be disproportionately expensive, complicated, and time consuming for the parties to contest all the way to a trial (and then, conceivably, by way of appeal).

Other kinds of situation which might benefit from the Court's consideration of their suitability for compulsory mediation are high-value, complex, and multi-party disputes of the sort often encountered in company/shareholder disputes, trust disputes, insolvency disputes, and professional negligence disputes, particularly where a majority of parties may favour mediation, but there is one particular party that is stubbornly holding out against the idea, for whatever reason.

Although an argument in favour of compulsory mediation will inevitably require re-consideration of various assumptions regarding the scope of the Bermuda Court's powers of compulsion, the argument might potentially rely on some of the following propositions and authorities:

1. The Rules of the Supreme Court of Bermuda 1985 provide, by RSC Order 1A, rule 1, that the rules shall have the "*overriding objective of enabling the Court to deal with cases justly*" ('the Overriding Objective'). That includes, so far as practicable, "*ensuring that the parties are on an equal footing*", "*saving expense*", "*dealing with the case in ways which are proportionate*", "*ensuring that [a case] is dealt with expeditiously and fairly*", and "*allotting to [a case] an appropriate share of the Court's resources, while taking into account the need to allot resources to other cases*". The Overriding Objective, it should be noted, has now been part of Bermuda's Court rules for over 10 years (since 1 January 2006).

2. RSC Order 1A goes on to provide that the Court must seek to give effect to the Overriding Objective when it exercises any power under the rules or interprets any rule; that the parties each have a duty to help the Court to further the overriding objective; and that the Court must further the overriding objective by actively managing cases, including "*encouraging the parties to co-operate with each other in the conduct of the proceedings*", "*encouraging the parties to use an alternative dispute resolution procedure if the Court considers that appropriate, and facilitating the use of such procedure*", and "*helping the parties to settle the whole or part of the case*".

3. The importance of the Overriding Objective to the conduct of commercial litigation in Bermuda is recognised by the Commercial Court Practice Direction, Circular No. 8 of 2006.

4. The Court has recognised that it has an inherent power to stay Court proceedings that amount to an abuse of its process (including abuses that can be perpetrated through disproportionately expensive and long drawn-out litigation campaigns): see, for example, *Phoenix Global Fund Limited at al v Citigroup et al* [2007] Bda LR 61.

5. Bermuda's Barristers' Code of Professional Conduct 1981, provides, by section 10, that "*a barrister should advise and encourage a client to settle a dispute whenever such a course appears to be advantageous for the client*".

6. The Court's general but abstract duties and powers to encourage and facilitate co-operation and the use of ADR (and to help parties and their lawyers to settle their disputes) need to be given some implementation tools, in practice, if such duties and powers are to be deployed effectively in a jurisdiction such as Bermuda, which has still not introduced pre-action protocols, fast-track litigation schemes, rules for the instruction of single joint experts, litigation funding reforms, or statutory adjudication mechanisms for construction payment disputes, and where there often appears to be limited financial incentive for parties (or their legal advisors) to negotiate reasonably and in good faith, rather than to litigate (occasionally unreasonably and in bad faith).

7. As the English Court of Appeal recognised in *Halsey v Milton Keynes General NHS Trust* [2004] 1 WLR 3002, robust judicial encouragement of mediation is often appropriate and

Sedgwick Chudleigh

necessary[2], even though the English Court of Appeal, when deciding that case in 2004, doubted the availability of a power of compulsion.

8. There is a credible argument available that while *Halsey* was correct in its promotion of the benefits of mediation and the availability of costs sanctions, the English Court of Appeal was wrong to rule out the possibility of the Court's power of compulsion. Such an argument finds at least superficial support, for example, in *Wright v Michael Wright Supplies Ltd & Anor* [2013] EWCA Civ 234, in which Ward LJ made the following observations:

> *"Perhaps, therefore, it is time to review the rule in Halsey v Milton Keynes General NMS Trust [2004] 1 WLR 3002, for which I am partly responsible, where at [9] in the judgment of the Court (Laws and Dyson LJJ and myself), Dyson LJ said: "It seems to us that to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to the court".*
>
> *Was this observation obiter? Some have argued that it was. Was it wrong for us to have been persuaded by the silky eloquence of the éminence grise for the ECHR, Lord Lester of Herne Hill QC, to place reliance on Deweer v Belgium (1980) 2 EHRR 439? See some extra-judicial observations of Sir Anthony Clarke, The Future of Civil Mediations, (2008) 74 Arbitration 4 which suggests that we were wrong. Does CPR 26.4(2)(b) allow the court of its own initiative at any time, not just at the time of allocation, to direct a stay for mediation to be attempted, with the warning of the costs consequences, which Halsey did spell out and which should be rigorously applied, for unreasonably refusing to agree to ADR? Is a stay really "an unacceptable obstruction" to the parties right of access to the court if they have to wait a while before being allowed across the court's threshold? Perhaps some bold judge will accede to an invitation to rule on these questions so that the court can have another look at Halsey in the light of the past 10 years of developments in this field".*

9. *Halsey v Milton Keynes General NHS Trust* [2004] 1 WLR 3002 is not technically binding on a Bermuda Court (or any other offshore Court), pending its express adoption by the Privy Council or by the Court of Appeal for Bermuda. Although its reasoning (whether it is characterised as part of the *ratio decidendi*, or *obiter dicta*) is likely to be treated as a useful and persuasive starting point, for the purpose of any further argument and analysis, there are a number of arguments to the contrary, which have been identified by various academics and senior judges, such as Lord Neuberger, Lord Dyson, Lord Clarke, and Lord Phillips, whether speaking or writing extra-judicially.

10. Since 2004, there have been a number of developments internationally that support recognition of the possibility of mandatory mediation, including an EU Mediation Directive, the ECJ judgment in *Alassani v Telecom Italia (*Joined Cases C-317/108 & C-320/08), in which the ECJ held that a compulsory mediation scheme under Italian law did not breach Article 6(1) of the ECHR[3], mandatory mediation programmes in various jurisdictions in the USA, Canada, Australia and New Zealand, or which support enhanced levels of judicial activism in the robust encouragement of mediation: see, for example, the Hong Kong decision of *Golden Eagle International (Group) Ltd v GR Investment Holdings Ltd* [2010] HKCFI 569.

11. There are also a growing number of pieces of domestic legislation in Bermuda that recognize the benefits of mediation (or conciliation) in appropriate cases, including the Children Act 1998, referred to above; the Human Rights Act 1981 (section 14J); the Ombudsman Act 2004 (section 10); the Police Act 1974 (section 29B); the Labour Relations Act 1975 (section 5M); the Police Complaints Authority Act 1998 (section 10); the Telecommunications Act 1986 (section 22); the Public Access to Information Act 2010 (section 46); the Regulatory Authority Act 2011 (section 93); the Casino Gaming Act 2014 (section 151); and the Bermuda International Conciliation and Arbitration Act 1993 (section 3).

12. There are also a growing number of authorities from other offshore jurisdictions, similar to Bermuda, that recognize that "*mediation is often a cost-effective and appropriate way to resolve disputes. It is the duty of legal advisers to consider routinely whether or not mediation may be a suitable means of brokering disputes between persons in dispute*"[4].

13. There are many international businesses based in Bermuda, particularly insurance and reinsurance companies, that have very substantial experience of participating in mediations in many different jurisdictions, and there are also a number of qualified mediators and mediation counsel resident in Bermuda, or that are otherwise readily accessible (whether based in the US, Canada, or the UK).

14. For the Court to order a stay of Court proceedings for compulsory mediation is not so very different to the Court ordering a stay of Court proceedings for compulsory arbitration (since by the time that a stay application is determined, even a party that may have signed up to an arbitration agreement (directly or by operation of law) is no longer a truly willing participant to an arbitration). Furthermore, mediation

Sedgwick Chudleigh

or conciliation in the context of an international arbitration is by no means unusual or uncommon, and many contracts and arbitration clauses governed by Bermuda law contain two-tiered or multi-tiered ADR provisions (e.g. providing for mediation first, to be followed by arbitration if mediation is unsuccessful), which are generally enforceable under Bermuda law provided that they are sufficiently certain[5]. There are, of course, numerous examples of the Bermuda Court staying or restraining Court proceedings in favour of arbitration, in circumstances where the parties have previously agreed to an arbitration taking place, whether under the Arbitration Act 1986 (generally chosen for domestic arbitration) or under the Bermuda International Conciliation and Arbitration Act 1993 (generally chosen for international arbitration). As for mediation or conciliation in aid of international arbitration, section 2 of the Bermuda International Conciliation and Arbitration Act 1993 specifically defines "*conciliation*" to include "*mediation*", and section 3 of the 1993 Act provides that "*parties to an international arbitration agreement are hereby encouraged to resolve any disputes between them through conciliation*". Section 9 recognises, of course, that "*no party may be required to accept any settlement proposed by the conciliator*". Section 11 provides for an automatic stay of Court proceedings or arbitration proceedings, pending conciliation (if agreed between the parties): *"unless the parties otherwise agree in writing, the written agreement of the parties to submit a dispute to conciliation shall be an agreement between or among those parties to stay all judicial or arbitral proceedings from the commencement of conciliation until the termination of conciliation proceedings".*

Naturally, there are a number of significant arguments (and authorities) to the contrary, most obviously those discussed by the English Court of Appeal in *Halsey v Milton Keynes General NHS Trust* [2004] 1 WLR 3002 itself. The determination of any particular set of proceedings will inevitably turn on the specific facts of the case, and the manner in which the various arguments and authorities are investigated, deployed and tested, whether for or against the principles of mandatory, quasi-mandatory, or voluntary mediation.

It might also be argued that the extent of the Court's power to rely upon its inherent jurisdiction to force recalcitrant litigants to mediate involuntarily needs to be the subject of significant consideration, debate and definition (whether by Parliament, through primary legislation, or by way of a consultation exercise conducted by the Chief Justice, the Bar Council, and/or a Rules Committee, through secondary legislation), rather than determined on an *ad hoc* basis on the basis of adversarial argument alone.

Conclusion

Whether the matter is better decided by the Court or by Bermuda's Parliament, however, the time has surely come for compulsory mediation to force its way onto the agenda for discussion in the context of civil and commercial litigation in Bermuda.

If mediation has become the "*centerpiece*" of the Family Court, how much longer before it becomes the "*centerpiece*" of the Commercial Court as well?

1. Lord Neuberger's Keynote Address to the Civil Mediation Conference 2015, 12 May 2015: available at https://www.supremecourt.uk/news/speeches.html.

2. The English position has been further discussed and fortified in the English Court of Appeal decision in *PGF II SA v OMFS Co 1 Ltd* [2014] 1 WLR 1386.

3. Provided that it does not result in a binding decision, does not cause a substantial delay to litigation, does not oust the Court's jurisdiction due to limitation periods, and is not excessively costly.

4. See, for example, the Jersey cases of *Bespoke Investments Limited v Lincoln Nominees Limited* [2005] JRC 098, *Café de Lecq Limited v R A Rossborough* [2012] JRC 154, and *Jersey Sports v Barclays Private Clients* [2013] JRC 059.

5. See, by analogy, *Cable & Wireless v IBM UK* [2002] 2 All ER Comm 1041, *Wah v Grant Thornton* [2012] EWHC 3198 (Ch), *Emirates Trading Agency LLC v Prime Mineral Exports Private Limited* [2014] EWHC 2104 (Comm), *International Research Corp. PLC v Lufthansa Systems Asia Pacific Pte Ltd.* [2012] SGHC 226, and *HSBC Institutional Trust Service v Toshin Development Singapore Pte Ltd.* [2012] 4 SLR 378.

For more information, please contact:

Alex Potts
Partner
Sedgwick Chudleigh
441.296.9276
alex.potts@sedgwicklaw.com

Mark Chudleigh
Office Managing Partner
Sedgwick Chudleigh
441.278.7160
mark.chudleigh@sedgwicklaw.com

ABOUT SEDGWICK CHUDLEIGH Sedgwick Chudleigh Ltd.'s team of barristers and attorneys have considerable experience of resolving international and domestic disputes both through litigation and by Alternative Dispute Resolution, including acting as arbitrators, mediators, arbitration counsel, and mediation counsel. Members of Sedgwick Chudleigh Ltd.'s team are also able to provide independent advisory opinions, or early neutral evaluations, with a view to facilitating early negotiation and settlement of disputes.