Mediation is evolving and flourishing. It is not a panacea, but a process which is apt both to resolve disputes and to prevent them. This article looks at innovations in the application of mediation and related tools to prevent the escalation of inevitable differences into unnecessary conflict. I hope that readers will forgive a brief tour d’horizon through some preliminary observations against the background of which some recent innovations may make more sense.

What Is Mediation?

When people confuse mediation and arbitration, my heart sinks. This is not because of some messianic devotion to mediation or some false comparison between two essential dispute resolution processes; rather, it is for the lack of understanding of mediation and its potential. As a process, mediation is uniquely solutions focused, as opposed to rights limited. Through the integration of interests (as opposed to the determination of rights), it also offers the possibility of creating value in the making of deals and the resolution of differences or disputes.

This, however, is not universally understood. I recently heard a respected arbitrator describing what he had done in an arbitration (recommending that a settlement of claims be considered), as mediation. Whilst the recommendation may have been wise or insightful, it was certainly not the product of a process which would be recognised as mediation, nor could it have harnessed the opportunities presented by the without prejudice arena of mediation, in which an expert third party facilitates the design of a creative solution. It betrayed a striking poverty of understanding of the process of mediation. It is difficult to convey, to those who have not seen it for themselves, the power of a solution designed from information or options which would fall well outside the field of enquiry in litigation or arbitration, and which, in some cases, the parties may not have previously acknowledged even to themselves.

Fans and Foes

Among fans of mediation, litigation and arbitration are often used as totems of expense, delay and bitterness. This is simply not fair. ‘Vanilla’ mediation (resolving mature disputes before trial) relies heavily, for its teeth, on developed systems of litigation or arbitration, by which the parties can properly assess their alternative to a mediated settlement.

Among the foes of mediation, there is the old joke, tellingly made by lawyers not clients, that ADR stands for Alarming Drop in Revenue. Behind every joke, however, there is a kernel of truth. For lawyers, a mediation which prevents a case going to trial does result in a huge drop in revenue, from that case—but maybe not, in the medium term or longer term, from that client.

Contracted Mediation

Contracted Mediation was born of work which began in 2000, when Stephen Woodward, a project manager, and I began trying to design a process to prevent contract differences escalating into disputes in the first place. The process had to work both in theory and on the ground and it had to make sense to users.

If prevention of escalation could be achieved by using mediation much earlier, that ought to be welcomed. We thought that where there was an ongoing commercial relationship, the benefits of this approach would be even more important. An obvious testing ground was the field of construction projects (frequently late, over budget and plagued with disputes). The idea was to support project delivery and reduce project risk. This process became Contracted Mediation, by which a commitment to the use of mediation was made by those on the ground, in the contract, in the culture on the project and through the confidence of those people (not their lawyers) in the safety and sense of the mediation process. Instead of mediation being a process of last resort to resolve cases in the lead-up to trial, it becomes a business tool, as to the use of which the parties look to their lawyers for advice, but nonetheless feel that they retain some control (unlike litigation). Businesses like this. And they like their lawyers for putting it in place and helping them to use it effectively.

Jersey Airport was one of the early adopters of Contracted Mediation and allowed the experience there to be used as a case study. In short, Contracted Mediation worked. After a dispute arose in the middle of the project, mediation was used quickly to resolve the dispute and a host of other issues, in one day of face-to-face meetings. The parties went on to finish this publicly funded project one day early; £850,000 under budget; and with no claims. The parties went on to finish this publicly funded project one day early; £850,000 under budget; and with no claims. As Mike Lanyon, Director, Jersey Airport, said: “I always had faith in this process. It introduces a team approach to resolving differences for the common good of the project and enables the parties to continue to work in the spirit of partnership… it’s much quicker and less costly and allows all parties to stay in control...it should be standard practice.”

In parallel, Dispute Review Boards (and developments from them) were also being used successfully on projects around the world, which clearly reflected common thinking that there was a real demand for more efficient and effective dispute resolution options. Initially, many DRBs in the US proposed non-binding recommendations to resolve disputes. In 2004, the ICC created the Combined Dispute Board (CDB), which is a hybrid of Dispute Review Boards and Dispute Adjudication Boards and may make either a recommendation or a decision, depending on party wishes and the circumstances. Some Dispute Board processes were designed with tiered stages of mediation and adjudication.
The valley of the Knowledge Curve shows the area where the potential for resolution is significantly impeded by the uncertainties which result from the decay of the knowledge base. From an economic perspective, there is a perfectly reasonable case for arguing that, if it costs $500,000 to rebuild the knowledge base towards trial and it would only have cost $100,000 to analyse and complete it at the time, the knowledge base at the time is worth $400,000.

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**Wider Application**

This technology has now been further developed for new applications, such as employee and community engagement, and consultation for the engagement of large numbers of diverse stakeholders in the community context, for example, in the context of planning and development. These and other applications are, of course, free-standing tools; but they have been designed to allow the use of the process of mediation, to best advantage, early and in a way which is tailored to the particular context in which they are deployed. It is absolutely central to understanding the link between these applications and mediation to appreciate the advantage of the open range of enquiry which is at the core of these processes—modelled on the unlimited but structured enquiry and exploration which takes place in a really good mediation, uncovering pieces of the puzzle, from which the ultimate resolution takes its shape. For lawyers, innovations such as these provide an opportunity to integrate the provision of valuable advice to clients more directly and effectively into the client’s business and, often, at a much earlier stage.

Ghandi said, “Honest disagreement is often a good sign of progress.” The intelligent and creative use of mediation offers us the chance to prevent the unnecessary escalation of differences and to welcome honest disagreement, without inviting its sometime but unwelcome bedfellow, bitter conflict.

**Endnotes**

1. For a mediation organisation called ResoLex, based at the International Dispute Resolution Centre in London.

2. The X-Tracker™ system was originally designed for construction projects but has since been adapted and applied more widely, in other ongoing commercial joint ventures.

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