ADR FOR INSURANCE DISPUTES

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For: IMIA Conference, September 2004

INTRODUCTION

Over the last few years there has been much talk about utilising Alternative Dispute Resolution (ADR) or Mediation to resolve commercial disputes. The Mediation of disputes is nothing new in the business world as practitioners of all disciplines have been resolving conflicts, to a lesser or greater degree, through negotiation for years.

The English legal system breeds conflict due to the culture of "Win/Lose" which leads to disputing parties becoming polarised very quickly. Once this occurs it is generally very difficult to try to reach a resolution without the intervention of a disinterested third party.

Traditionally, the disinterested third party has been a Judge where the case proceeds to court, or an Arbitrator when arbitration has been agreed upon. Adjudication is also now becoming more commonplace where a third party (the Adjudicator) provides a binding resolution to a dispute. The independent third party in ADR however is normally a Mediator or possibly an Expert Witness. For more complicated disputes a mediation may involve more than one mediator.

To date, mediation between parties has been voluntary. However, recent directions from the English courts (which were reinforced by the implementation of the Woolf reforms in 1999) have indicated that they are looking to require parties to attempt resolution of their dispute by alternative means prior to being given a court date. The extent to which courts will penalise parties for either not attempting mediation or not entering into mediation in good faith is still being worked upon. However, recent court cases have shown that judges are prepared to make a stand in the awarding of costs where they feel that alternative methods of dispute resolution have not been properly tried. In light of this many more formal mediations are being undertaken.

WHAT IS ADR? HOW DOES IT WORK?

Mediation, Mini Trial or the utilisation of an Expert Witness are all types of ADR. ADR provides a framework for conflict resolution. The most popular form of ADR is Mediation.

The general format of a mediation can be summarised as follows:-

- A disinterested third party (The Mediator) is appointed by mutual consent of the disputing parties.
- The Mediator is provided with the position papers of the various parties.
- The Mediator tries to find common ground between the disputing parties and/or assist in finding a resolution to the dispute.
- Only a final signed agreement is binding upon the parties. Prior to the signing of any agreement a party may leave the mediation at any time.

- Discussions between the Mediator and the individual parties are confidential. It is agreed by all of the parties, prior to commencement of the mediation, that the Mediator cannot become part of any legal proceedings that may occur at a later date.
- If all parties agree, the Mediator may be asked to provide an independent assessment of each party's case.
- The costs of the Mediator(s) are shared equally amongst the parties.

Note: It is important that before a mediation commences the parties have
(i) the legal authority to agree to a settlement and
(ii) fully understood/resolved any reinsurance issues, agreements or requirements.

ADVANTAGES OF ADR

The major advantages of ADR solutions are:

1. It is much cheaper for all parties to resolve a dispute through mediation rather than arbitration or through the courts.

2. The process is confidential. (Although recently it has been suggested that confidentiality may need to be breached if the Mediator believes that one or more of the parties may be involved in money laundering.)

3. Discussions occur in an informal environment.

4. Mediation is a much speedier process than formal litigation or arbitration.

5. The overall process is more likely to enable business relationships to be retained.

6. The parties are not restrained by the pure legal rights and wrongs of the case (as in litigation or arbitration) but are striving to find a commercial solution to their dispute.

7. A successful conclusion of a dispute by ADR will enhance the lawyers' position with their clients who will see that there is a cheaper, more efficient and practical way of resolving conflicts other than by litigation or arbitration.
Conversely, the lawyers' position/relationship with a major client may be greatly affected if costs orders go against the client because mediation/ADR was not initially proposed/entered into/followed up by the lawyers, especially if recommended by a judge's ADR "Order".

8. Parties generally negotiate via the Mediator, not face to face, so there is much less scope for confrontation.

THE MEDIATOR

The choice of mediator in a dispute is very important as it can a significant effect on the outcome.

As most commercial disputes are not simple, it is either best to utilise a person from the specific industry or field or another businessman/woman to act as mediator. A mediator who understands the business, including any specific colloquial language, is far more likely to quickly understand the issues involved in the dispute, see any wider ramifications, gain the trust of the individual parties and thus find a way to resolve the conflict.

An experienced industry practitioner is, in many cases, likely to have either previously experienced similar types of conflicts or have some practical ideas of how to resolve the dispute in question.

Lawyers obviously have an important part to play in the mediation process by preparing the cases for their clients, assisting them in understanding the process and the legal position of their cases, presenting their cases and, if the mediation fails, continuing to support their clients through the litigation process.

The writer, however, believes that an industry practitioner and/or businessman is the best person to mediate commercial disputes rather than a lawyer. Although many lawyers have successfully acted as mediators, a Mediator who has a good understanding of the insurance/reinsurance business and the insurance/reinsurance markets will, in the majority of cases, be in a better position to assist in finding a solution than someone who does not have these abilities.

However, the most important quality required of a Mediator is to be respected by the parties. The Mediator is likely to gain this respect if they are able to show that he/she has a good understanding of the dispute and is able to run the proceedings professionally.

WHEN SHOULD ADR BE UTILISED FOR RESOLVING DISPUTES?

It is important to note that Mediation or other alternative methods of dispute resolution are not really new and certainly are not the panacea of all ills. Care should therefore be taken when choosing a particular method for attempting to resolve a dispute.

When is ADR a sensible option in the insurance industry?

* When there is no clear legal answer.
  (Dispute is a "Mess".)

* When parties wish to try to continue a good working relationship.

* When confidentiality is important.

* When costs are important.

* When time is important.

* Final deal is supportable by all parties.

When is ADR unlikely to be a sensible option in the insurance industry?

* When the legal position of the parties is very clear.

* When the legal point being raised is fundamental to the contract and therefore requires a legal ruling (e.g. Fraud, Intentional Nondisclosure or Misrepresentation). However, it may still be possible to mediate where allegations of this type exist.

* Where the case may set an important legal precedent.

* Where the parties do not wish to settle the dispute themselves. (Although legal reforms since the introduction of the Woolf reforms would seem to be changing this.)

* Where publicity is important.

* Where power is too concentrated in the hands of one of the parties.

HOW HAS THE INSURANCE INDUSTRY RESPONDED TO DATE?

In the major business areas underwriters have been slow to respond to mediation. Various mediation bodies such as ARIAS, InterMediation, The Institute of Arbitrators and the Centre for Effective Dispute Resolution (CEDR) have approached insurance companies to explain the situation, however, to date the take up still seems to be relatively low (especially with regard to large commercial business disputes). The reasons for this would seem to be:

- Lack of knowledge/understanding as to how mediation works.
- Parties like to rely upon trusted methods (Litigation/Arbitration).
- Insurance personnel are put in the position where, once a dispute has arisen, they are required to more directly negotiate with the Party(ies) rather than simply via a third party (e.g. broker, loss adjuster or lawyer).
- Underwriters may not wish to settle a dispute promptly.
- To date there has been no forced acceptance of mediation (although it seems that present movements in the legal system are putting more pressures on parties to look to/try ADR first before going to court).
- The brokers resolve a significant majority of all insurance disputes.
- Lawyers have been slow to suggest mediation to their clients as a way of resolving disputes, although this is now certainly changing.
- Underwriters results are under ever increasing pressures whether simply due to pricing and breadth of coverage issues or the level of stock market returns. This has meant that underwriters are more likely to contest claims.
- Reinsurance considerations.

Over recent years various, new initiatives have been undertaken like the "Market ADR Commitment" which is a non-binding agreement for signature companies to attempt reconciliation via mediation as a first option. Sadly these good intentions seem to have received very limited support to date. Other bodies like the Chartered Insurance Institute (C.I.I.) and the Association of British Insurers (A.B.I.) have been registering practicing mediators within the insurance market place. For mediation to become successful in the insurance marketplace, dispute resolution needs to become better coordinated so that this issue can be addressed in a more orderly fashion. It is easy to sign up to "market non-binding agreements" however there needs to be greater commitment behind the intent. Even now, relatively few people in the industry can be considered as professional market mediators and few understand the process. The insurance industry needs to do a great deal more to help itself when it comes to resolving disputes.

HOW HAS THE LEGAL PROFESSION RESPONDED TO DATE?

Many lawyers have in the past been slow to either recommend or adopt mediation as a way of resolving disputes, although this would seem to have changed in the last few years. The most likely reasons for this have been:

* Lawyers suggest that their position in a case could be perceived by the other party(ies) to the dispute to be weak if they suggest mediation. (In light of the Woolf reforms, this is now no longer a valid excuse.)

* Lawyers feel that mediation will negatively affect their fee income.

Many legal firms have now set up 'ADR' departments and/or have obtained mediator training so that they can offer their services as Mediators and/or make their clients aware of the benefits of mediation.

THE FUTURE

It is likely that the following will occur:

- Mediation of insurance disputes will become more commonplace. This is being forced upon the industry either by client pressure or by the courts (Woolf reforms).

- Commercial pressures will force far greater co-operation between all of the various insurance and legal entities operating in the insurance market place.

- Lawyers will push mediation as a means of dispute resolution in the first instance

- Since the introduction of the Woolf reforms in 1999, Industry awareness has now been greatly enhanced and thus acceptance of ADR will become part of market custom.

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Professional Qualifications:
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Present Position:
Managing Director, Energy Division, Marsh Ltd.

Since becoming accredited as a mediator by CEDR in 1993, Robert has successfully mediated various insurance disputes; these have included medical, travel, property, engineering, treaty reinsurance and legal insurances. Robert successfully mediated the first Lloyd's dispute to be settled by mediation.

Robert is adamant that mediation is the best course for settling disputes in the first instance and has been actively promoting this within the City.

Robert has spent more than twenty two years as an insurance broker in the City and is presently a Managing Director of Marsh Ltd. where he is the Practice Leader for the Onshore Energy Construction.

Robert has been involved in resolving many extremely large and complex claims and policy disputes. He has lectured extensively to the insurance, banking, energy and legal communities. He also co-authored the C.I.I. Advanced Study Group textbook on Insuring Industrial and Process Machinery which was published in 2000.