

MARSH

September 2004

ADR IN THE INSURANCE INDUSTRY

IMIA Conference - Rome

Robert Glynn



Marsh & McLennan Companies

Methods for Resolving Disputes

To date the main methods for resolving disputes have been:

- Litigation
or
- Arbitration

Litigation and Arbitration

Litigation and Arbitration have in many cases been seen to fail in today's global business world because of:

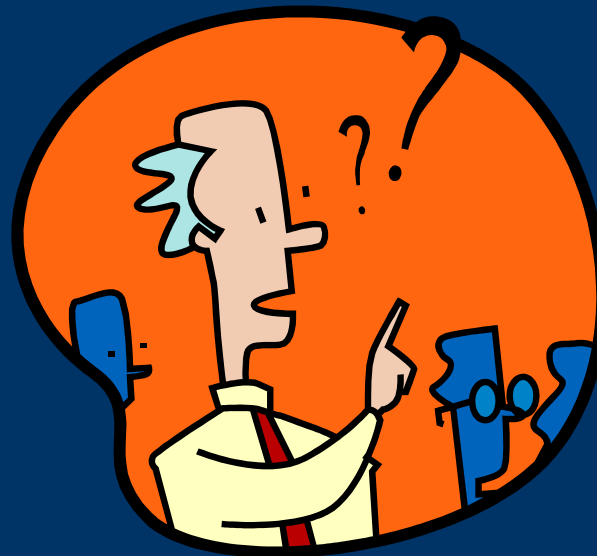
- Cost
- Time taken to reach conclusion
- Rarely considers commercial resolution
- Only real winners are the lawyers

Courts Are Severely Under Strain

- Arbitration attempting to become more user friendly via the UK 1996 Arbitration Act.
- Courts in the UK looking for alternative methods to resolve certain civil disputes especially since the introduction of the Woolf reforms in 1999.
- UK Housing Grants Construction and Regeneration Act introduced Adjudication for UK construction disputes.

Alternative

- Is Alternative Dispute Resolution the answer?
- What is Alternative Dispute Resolution?



Alternative Dispute Resolution

Alternative Dispute Resolution is the resolution of disputes via:

- Expert Witness
- Mini Trial
- Mediation

Trial by Conflict!

Many people feel that Dispute Resolution today resembles a trial of strength



Mediation

- What is Mediation?
- What does it have to offer?



Mediation Is Not!

- A new concept
- A panacea for all ills



Mediation Provides

Mediation provides a framework for conflict resolution

- 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 strives to find common ground between the disputing parties and a resolution to their dispute.

Mediation Provides (Continued)

- Only a final signed agreement is binding upon the parties. Any party may leave the mediation at any time
- Discussions between the Mediator and the individual parties are confidential
- If all parties agree, the Mediator may be asked to provide an independent assessment of each party's case.

Advantages of Mediation

The major advantages of Mediation/ADR are:

- It is much cheaper for all parties to resolve a dispute through mediation rather than arbitration or through the courts
- The process is confidential - (Money Laundering!)
- Discussions occur in an informal environment
- Mediation is a much speedier process than formal litigation or arbitration
- The overall process is more likely to enable business relationships to be retained

Advantages of Mediation (Continued)

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

The Mediator

Who should be selected/act as the Mediator?



The Mediator Needs To:

- Be respected by all parties
- Have a good understanding of the business undertaken by the parties
- Have a good understanding of business environment surrounding the dispute
- Able to look for the deal

The best Mediators are therefore likely to come from the Industry or business from which the dispute arises.

Insurance Industry

Question?

Why has the Insurance Industry, to date, been slow to embrace mediation?

Insurance Industry (Continued)

Answer:

1. Present Climate

- Extensive pressure on underwriters to achieve positive results
- Underwriters more likely to refer to their lawyers and/or loss adjusters

2. Markets

- Certain types of businesses (Marine and/or Aviation) - Used to legal conventions

Insurance Industry

2. Markets cont...

- Lack of knowledge, experience or understanding
- Insureds and Insurers not keen to directly negotiate with each other
- Brokers resolve many disputes
- Underwriters may not be in the position to settle claims promptly

Insurance Industry

3. Insurance Lawyers

- Could be perceived that their case is weak if they suggest Mediation
- Mediation perceived to negatively effect their fee income

However this is presently changing due mainly to the effect of the Woolf reforms and continuing court actions! - e.g. ADR notices

When Is Mediation 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 Mediation 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 (Fraud, Intentional Non-Disclosure or Misrepresentation)
- Where the case may set an important legal precedent
- Where the parties do not wish to settle the dispute themselves
- Where publicity is important
- Where power is too concentrated in one party's hands

What Is The Future For Mediation In The Insurance Industry?

- Mediation of insurance disputes will become more commonplace. (This will be 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
- Market Agreements like "Market ADR Commitment" likely to evolve

Dispute Resolution

In the dispute resolution business are we going to continue to resolve disputes like this?



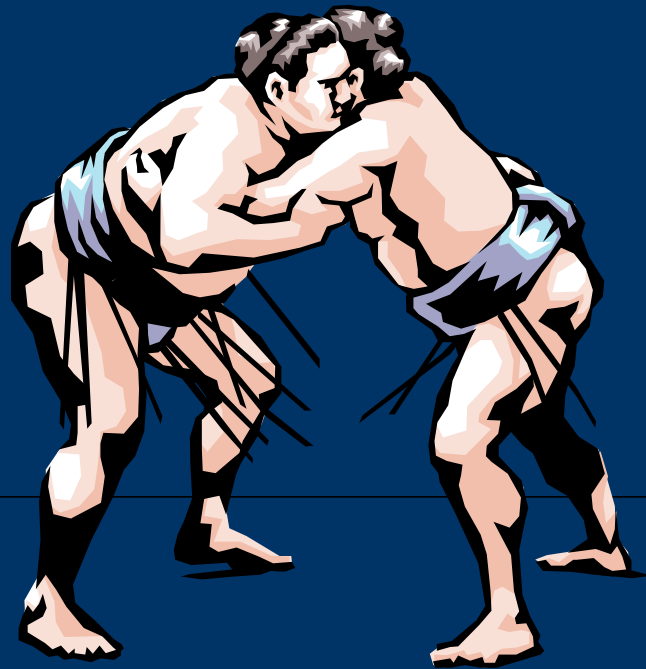
Dispute Resolution

Or like this?



Dispute Resolution

Can any of us afford to continue to resolve disputes by force?



The Future

If clients do not obtain better, cheaper and faster Dispute Resolution in the near future, there is a danger that people will, where possible, **"Do Their Own Thing"** and bypass the Legal Profession completely.

Summary

Where possible:

- Mediate do not litigate
- Attempt peaceful resolution
- Use Lawyers to advise rather than control disputes

Create a deal rather than a conflict!!



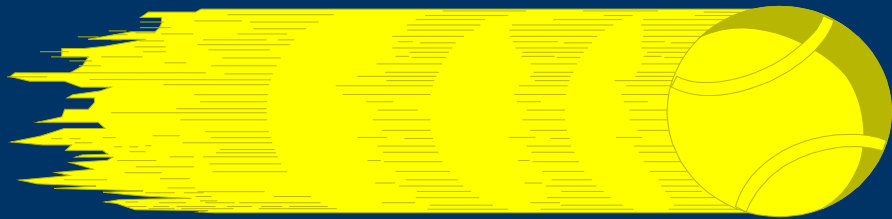
Legal Profession

Lawyers' argue that:

Everyone should have direct access to the Courts
- anything else impinges on one's Human Rights

However, if mediation is deemed to be a way forward then lawyers want to be in control of the process.

Who will however protect us from the Lawyers?



**.....The Ball is in
your court!!!**

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