EARLY RESOLUTION – Jonathan Lux

EXECUTIVE SUMMARY

"Early Resolution" provides answers to what were thought to be insoluble problems in two main arenas: –

– How can you decide whether to mediate or proceed straight to arbitration before each party knows what the other will say and has seen the evidence to back the case (or defence) put forward?
– How can disputes be resolved proportionately where there are multiple parties under chain contracts with or without the added complication of differing law and jurisdiction clauses?
    - "Early Resolution" addresses these and other problems enabling parties to resolve their disputes at the earliest possible stage and get on with their

Background

It is axiomatic that business disputes are a drain on resources, divert senior management time and risk destroying the important business relationships which have perhaps taken years and substantial resources to build up.

The Dispute Resolution menu

Traditionally the choice has been litigation or arbitration with mediation as the new entrant.

The costs, delays and damage to business relationships which can result from hard fought court or arbitration proceedings are well known and I will say nothing further about that for now.

Mediation is a force for good and is strongly encouraged by the English courts. Indeed, I have suggested that arbitrators have the same powers as judges to stay proceedings and impose costs sanctions where one party unreasonably declines to mediate (see http://stonechambers.com/news-pages/09.03.16--plc-arbitration-blog--london-calling--where-and-how-to-resolve-disputes---jonathan-lux.aspx).

So, it may be thought, there are the meat, fish and vegetarian options – what more is needed?

The Mediation Conundrum

Mediation is indeed highly effective. Reliable data suggests that approaching 90% of mediations are successful and result in a settlement.

The problem is that many mediations take place late in the day – after considerable costs and delays have already occurred.

Why is this? Well, disputes put parties on opposite sides of the table and locking horns. Disputes tend to breed mutual distrust and therefore parties focus on their stated positions, rather than collaborating to find shared interests. In short, each party will focus on building his Claim or Defence, as the case may be, and the Court or Arbitration setting can make it very difficult for parties to communicate with each other.

If mediation takes place late in the day (after pleadings/submissions, disclosure and perhaps exchange of witness statements) then two of the key advantages of mediation – speed and cost – have been squandered. It has been said that in some cases the parties spend 20% of the overall costs to gather 80% of the evidence and then the balance of 80% is spent dredging up the final 20% of the

evidence which rarely makes a substantial difference to the outcome! Added to this is the fact that most commercial disputes are resolved before final court judgement or award.

If mediation is attempted to early, before each party has a sufficient understanding of its own and its opponents case, then the mediation may well fail.

How is it that the Early Resolution Neutral can enable mediation to happen earlier and yet retain its high success rate?

The 'Early Resolution' (ER) offering

The Early Resolution Neutral (ERN), working together with the parties appointed lawyers &/or claims handlers can enable costly paralysis to be overcome. In the adversarial setting of Court or Arbitration proceedings a proposal from one side is often viewed with distrust by the other side. However, ERN can explore with each party in strict confidence possibilities to move matters forward in the best interests of all parties to the dispute. These possibilities can include direct negotiation, mediation and indeed arbitration.

It is important to stress that ERN will not disclose what he learns from one party without the express authorisation of that party. This therefore creates a safe setting in which ERN can explore the overlapping interests which may unite the parties and enable them to collaborate to resolve the dispute.

When and how is the neutral resolver to be appointed? The answer to "when" is as soon as dialogue has dried up and the parties feel locked into the treadmill of formal proceedings. The answer to "how" is by agreement of the parties or just by one party with the initial mandate to seek 'buy-in' from the other party or parties.

[The latter can be especially useful in a multi-party or chain contract scenario where there may be 'limping' jurisdiction and/or proper law clauses – for example, each contract in the chain providing for either arbitration or litigation in perhaps different countries and governed by different laws.

That said, the possibility to have ERN 'broke' the process can be invaluable even in a two-party dispute.]

The resolver will:-

– Explore with each party its case and the indispensable minimum further information and/or documentation which may need to be collected to enable constructive discussions to occur

[bearing in mind in this context that business people are content to hold serious discussions with far less documentation than most lawyers would want to carry in to a court or arbitration hearing.]

– Work out a mutually agreed "shopping list" or a clear "road map" which will enable the parties to identify their options for resolving or, alternatively, for contesting such issues as remain. Those options will of course include direct negotiation, mediation and also arbitration.

The outcome of the resolver's intervention may well be a mediation hearing – but that mediation hearing will take place at a much earlier time in the life cycle of the dispute than would otherwise be the case.