The Go-Between: resolving disputes in uncertain times
A mediator's perspective

David Owen QC and Angharad Parry

In this fifth edition of *Arbitration Classics*, **Angharad Parry** interviews seasoned mediator and arbitrator, **David Owen QC**, to discuss current advantages and challenges with mediation for dispute resolution.

1. **The disruptive event of our times is, of course, the COVID-19 pandemic. Do you predict that the pandemic crisis will see a large upswing in the use of mediation to resolve disputes?**

The key point at the moment is that parties need their commercial disputes resolved as effectively as possible to help them get through the crisis. Some disputes will be resolved by direct negotiation. Some will be pursued through arbitration or litigation (with an increased emphasis on virtual hearings).

But mediation is likely to have a crucial role in the months and years ahead. There will be many cases where direct negotiations fail, or where parties are unable to spend time and money battling through to a judgment or an award, and where mediation is an obvious route to take in order to get a dispute resolved reasonably rapidly. Against the background of the pandemic, the flexibility of mediation and its relative speed should make it a highly attractive option.

L.P. Hartley's novel "The Go Between", which provided the title for this interview, has the wonderful opening line: "*The past is a foreign country; they do things differently there*". We already know that much will be different following the pandemic. It is likely that increased, and more creative, use of mediation will be one of those differences.

(Incidentally, for those looking for lockdown reading matter, "The Go Between" is highly recommended. In dealing with characters trying to make sense of the past, and with their imperfect understanding of events unfolding around them, it would be a thought-provoking read for anyone dealing with disputes.)

2. **Remote mediation is being hailed as a solution to the current litigation/arbitration logjam. How does remote mediation work?**

Remote mediation uses video conferencing software to simulate face-to-face mediation, with the parties, their lawyers and the mediator being in different locations.

It works well with virtual meeting programmes like Zoom. Interestingly, specialised remote mediation hearing software has been developed recently; it remains to be seen if its use will take off in commercial mediations.

Remote mediations are structured to be similar to a face-to-face mediations. Parties see and hear each other in virtual plenary sessions chaired by the mediator. They have separate meetings in virtual breakout rooms, to discuss issues confidentially between themselves, and with the mediator. The mediator manages the process through the video conferencing software and can convene virtual meetings throughout the day with different participants.

Remote mediation, of a sort, was already happening, prior to the current crisis. Over the last few years, I have been increasingly spending time on calls with lawyers and parties, before or after a mediation hearing, as an integral part of the process, and I have conducted mediations with a party attending by video conference link. However, fully fledged remote mediation has taken off following lockdown, mirroring the increased use of virtual hearings in arbitration and court proceedings.

As a member of the London Maritime Arbitrators' Association working group on virtual hearings, I have been astonished at how quickly virtual meeting technology has been adopted by lawyers, arbitrators, mediators and judges. It is too early to say what will happen in the future, but this feels like a paradigm shift of sorts. The past is already looking like a somewhat foreign country.

3. **How different is remote mediation from a face-to-face mediation?**

It can be very similar to the face-to-face experience. Moreover, so long as lockdowns, distancing measures and travel restrictions apply, it may be the closest one will get to a face-to face mediation, and effectively the only mediation game in town.

There are some differences between remote mediation and a normal face-

to-face mediation conducted on a single day.

- The parties do not need to gather in one place, so there is potential for some savings in time and costs (and for benefitting the environment).
- Mediation "downtime" will be a different experience. Parties and legal teams can more easily get on with other tasks, in their homes or offices, when not needed in the mediation.
- It is easier, in appropriate cases, to run the mediation as a series of meetings with different participants, on different days, with an opportunity to reflect in between sessions. This flexibility can be particularly useful with large multi-party disputes, for example joint venture disputes in the energy sector with numerous different parties in different jurisdictions.

There are some potential challenges with mediating remotely.

- The effectiveness of face-to-face mediation can depend on the intensity of a physical gathering, where all the participants have made a significant effort to gather for one day to "crack" their dispute. It may be more difficult to generate the same engagement when parties are sitting at their screens in different locations, possibly in different time zones.
- It is hard work to concentrate during long video conference sessions, and so remote mediation may be all the more demanding for everyone involved.
- Being totally dependent on technology brings the inevitable risk of time being wasted sorting out technical glitches.

None of these points should deter parties from engaging in remote mediation, but all need to be thought about carefully in advance.

4. **What guidance would you give to parties and lawyers preparing for remote mediation?**

I have already mentioned some points to consider about the distinctive characteristics of remote mediation. So far as practical tips are concerned, the internet is awash with materials about how to prepare for, and conduct, virtual arbitration and court hearings. Much of that guidance can be applied to mediation.

I would highlight three points:

- **Logistics**. It is vital to sort out how the mediation will be managed, both between members of each team, and between the legal teams and the mediator. This needs to happen well before the mediation. Adequate computers and decent internet connections are essential. There must be a contingency plan to deal with technical glitches. If it is a large case, it may be worth having dedicated technical support. Dealing with different time zones may be a complication.
- "**Testing, testing, testing.**" It is essential to test everyone's technology, and to have rehearsals with it, well before the mediation.
- **Documents**. E-bundles take time to prepare, with the process being complicated by lockdown. The contents and format of an e-bundle need to be agreed well in advance, with the bundle circulated in good time before the mediation. It will also be necessary to think about how documents will be shared with the mediator or other parties during the mediation, and about how a settlement agreement can best be prepared and discussed.

5. **Part of the problem with the litigation logjam is that different cases will be at different points in the litigation life cycles. Different strategies may be pursued at these various different stages. In your experience, what is the best timing for mediation?**

My view is that there is no single best time to mediate. Parties should go to mediation when they have sufficient information to be able to make an agreement which they can live with.

The nature of the mediation will, however, be affected by when it happens in the life cycle of a dispute.

- In early stage mediations, issues may not be fully defined, and some or all of the evidence may not yet have been obtained. There may be less detailed risk analysis at this stage, and more focus on broad issues and commercial factors.
- If parties mediate mid-way through a dispute, it may be possible to embark on more detailed risk analysis, but the parties may have become more committed to their positions and to pursuing the proceedings.
- If the parties decide to mediate at a late stage, a looming hearing may work wonders in focusing minds. However, the parties may be firmly dug into their bunkers, and there will be little scope for negotiating by reference to a saving of costs.

6. **Parties – and sometimes their legal teams – may be resistant to the idea of mediation. How can this hurdle be overcome? How can mediation be promoted to parties (both under normal circumstances and in the current crisis)?**

My perception is that resistance to mediation has significantly decreased in recent years. Lawyers increasingly see it as an integral part of dispute resolution, and clients are increasingly interested in it.

The use of costs sanctions by the courts for an unreasonable failure to mediate has undoubtedly encouraged parties to take the idea of mediation seriously. If arbitration tribunals more frequently applied such sanctions when dealing with costs, that would provide further encouragement. The Singapore Convention on mediation settlement agreements has also helped stimulate global enthusiasm for the process.

I would be cautious about immediately treating a reluctance to mediate as unreasonable. Commercial clients and their lawyers are well-placed to weigh up their dispute resolution options, and there may be good reasons, from their perspective, for not going ahead. However, it is always worth probing resistance to mediation, to see how valid it is.

Often such resistance is founded on an explicit or implicit assumption that "*in this particular case, the other side will never come to a reasonable settlement*". However, one of the key features of mediation is that it regularly involves dealing with difficult, apparently intractable, disputes which have proved impossible to settle by direct negotiation.

In the climate of uncertainty and disruption arising from the pandemic and its aftermath, it should be all the easier to encourage commercial parties to mediate since the process: (a) has a reasonably high success rate; (b) can save significant time and costs; (c) achieves negotiated results which could never be obtained from an arbitrator or judge, and (d) (where parties reach a settlement) is unlikely to give rise to enforcement problems.

7. How should a party pick the "right" mediator for their dispute?

There are so many variables as to what constitutes the "right" mediator in the eyes of different parties and lawyers that it is impossible to give a definitive answer.

I would suggest, though, that one should start by thinking about two points: (a) should the mediator be someone from a commercial or a legal background? and (b) does the mediator need specialised sector knowledge? Detailed sector knowledge is often not required in order to mediate effectively, but there are some areas where familiarity with the commercial context and jargon is important (e.g. energy and maritime disputes).

It can be difficult for lawyers and clients to get a feel for what it would be like working with a particular mediator. In the world of arbitration, parties sometimes interview potential arbitrators before appointment. Perhaps this practice could be used more in mediation, where the size or nature of the dispute warranted it. (Such interviews would be likely to be less potentially problematic in mediation than in arbitration, but it would still be important to consider how issues such as confidentiality would be addressed.)

One important point to bear in mind is that it can take longer than expected to set up a mediation, and mediators' diaries can fill up, so it is worth starting the search well before the mediation is anticipated to take place.

The views and opinions expressed in this article are those of the authors and do not necessarily reflect the position of other members of Twenty Essex.

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David is a full-time arbitrator and mediator, with a practice covering a wide range of international commercial disputes. The cases which he mediates are often international, and frequently factually or legally complex. His experience as an arbitrator and barrister means that he can provide robust reality testing where appropriate. He is listed in *The Legal* 500 Hall of Fame for mediation, which highlights individuals who have received ongoing praise from clients for their continued excellence.

Read his online bio ›

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Angharad regularly undertakes advocacy and advisory work in a wide range of commercial disputes concerning litigation and arbitration. Angharad has acted in numerous arbitrations under different rules: LCIA, ICC, CIArb, LMAA and various trade bodies. She regularly undertakes court work ancillary to arbitration, such as challenges under s67 to s69 Arbitration Act and s44 applications.

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