A signpost change in the role of the litigator?

Stephen Barker argues that, although disputes may increase in an economic downturn, the way we deal with them will be very different this time with mediation increasing in importance

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In this article I question the widely held view that the predicted economic downturn will trigger a surge in litigation akin to the post-recession litigation boom of the mid 1990s. As a profession, commercial litigators should learn the lessons of the last 15 or so years and work constructively to resolve our clients' business disputes by front-loading case analysis and mediating as a matter of course.

Cutting costs

The global cash shortage has squeezed all sections of industry and, to keep hitting performance expectations, successful and less successful businesses alike are working hard to cut their costs. However, cutting costs out of a business is rarely pain free. Companies and organisations that choose to cut costs by seeking to avoid liabilities or to terminate unprofitable projects are rarely served well by lawyers who choose to fight to the death.

During the recent economic boom time, litigation appeared to be in decline. Now that purse strings are tightening, with budgets being cut in both the private and public sector, to many businesses litigation to trial may at first blush appear the cheaper option than settling costly contractual liabilities.

As the economic forecasts worsen, more and more organisations in both sectors will be trying to get out of expensive non-core projects, but without paying the price of exit. They will try to take advantage of circumstances that might be argued to justify immediate termination. These 'circumstances' are rarely seen in the same way by both sides and so litigation can be seen as a necessary by-product of a legitimate business strategy. Banks will not hang around before calling in assets of troubled debtors. Guarantees will be scrutinised and warranties looked at as potential revenue streams. All in all, a downturn in the economy has all the ingredients to bring businesses into commercial and legal conflict.

The changing role of litigation

Is this good news for litigators? Yes, but not for the reasons some might think. As the credit crisis bites deeper, many law firms are predicting turbulent waters ahead, relying on their commercial litigation departments to see them through the predicted slow down in corporate and property transactions. No doubt they are relying on past experience. The recession of the early 1990s spawned a wave of expensive drawn out litigation. In those days, even mortgage repossession work, now a low-cost commodity, could still turn a profit.

Almost every firm with a decent commercial litigation department enjoyed a bonanza harvest of major disputes. Many of these cases ran on for years at a time, punctuated by weekly, hotly contested, interlocutory applications, culminating in month-long trials and the inevitable appeals that followed. Many of the problems of 1991 and 1992 kept firms busy (and the books in the black) well into the mid-to-late nineties.

However, times have changed. Litigation does not work like that these days. Yes, we can expect businesses to look for wriggle room in contracts that they no longer see as core to their business. We can expect the 'can't pay, won't pays' to search for excuses to avoid paying legitimate business expenses. It is

also a reasonable prediction that major procurement expenses, such as construction and IT development projects, will be put under the spotlight by finance directors and, as ever, all those variations and delays will lead to disputes that get passed to their (un)friendly litigator.

But where did the litigation boom of the 1990s lead us? Lord Woolf chewed up and spat out the old RSC White Book, replacing it with the much more politically correct, case-management focused CPR White Book. Also, in 1991, how many UK litigators had ever considered ADR, let alone presented a case in mediation?

Increased co-operation

This week my team and I asked an opponent for an extension of time to serve a defence. If this had been 15 years ago, the same opponent would have forced us to make an application to court, which we would have fought hammer and tongs. I would have got my extension. There would have been an order that 'the defendant do pay the plaintiff's costs of the application' that would have been rolled over and lost in an eventual taxation, three or four years down the line. Of course, the opponent in this case is no fool, and he granted the extension of time. He had no choice, which is just what Lord Woolf wanted and just what clients want, if truth be told.

The most significant change is that the court now manages our clients' cases. I confidently predict that if litigators try to go back to the glory days of the early nineties; if we advise our clients to fight to the death irrespective of the risks involved, it should be expected that judges will start to bare their teeth.

On 8 May 2008 Sir Anthony Clarke, Master of the Rolls, argued, in a speech to the Civil Mediation Council's National Conference, that judges have the power under the existing CPR to require parties to mediate disputes without infringing the human right to a fair trial, stating that:

> ... compulsory ADR does not in and of itself give rise to a violation of Article 6 or of the equivalent US constitutional right of due process.

I also predict that if clients are advised to pay lip service only, and to attempt mediation with fingers crossed behind their backs, the judges will start asking mediators to file reports at court commenting on the co-operation of the parties, which would be bad news for mediation. When the facilitator turns prefect, one of the key benefits of mediation – a confidential and privileged retreat from the field of battle – will be lost. So it is to be hoped that we do not risk the huge benefits of neutral confidential mediation for the lure of a few more fee receipts before the year's end.

Litigation as a last resort?

Since the Woolf reforms came into effect, commercial litigators have educated their clients in the benefit of making an early case assessment. They have been advised only to fight the cases that are worth fighting and to settle the ones that should be settled. We have introduced our clients to mediation and they rather like it. Furthermore, commercial litigators have been telling their commercial colleagues to draft 'escalator' dispute resolution clauses in their commercial contracts, requiring manager-to-manager meetings, then CEO-to-CEO negotiations and mediation before they are allowed to litigate. Litigators have sold clients on the benefits of ADR to help them settle disputes outside court. We cannot really go back now.

Indeed, if firms weather the storm, standing by the lessons they have learnt post-Woolf, they might have a stronger, more loyal corporate client base. If done correctly, judges might just trust litigators to manage their own cases again. The new 'touchy feely' world of mediation and ADR is, in reality, a world in which commercial litigators are required to give their very best advice, to get to grips with all of the key facts and the key issues of law, at the very early stages of cases. It is also a world in which the best commercial litigators are able to build high-value, lasting relationships with their firm's corporate clients.

The advantages of mediation

I am pleased to say that as a commercial mediator, I have a pretty good record of settling cases. There are a few that do not settle, but generally there are good reasons for this. I am also pleased to say that the vast majority of lawyers who represent their clients in mediations in which I am appointed, do a very good job indeed. I have the privilege of sitting in private caucus meetings with parties and their lawyers and witnessing very good legal and commercial advice being listened to intently by their corporate clients.

The lawyers involved also seem to enjoy the process. The lawyers in my mediations work for their money. They explain their cases to me. I quiz them on their evidence. They tell their clients what will really happen if they do not strike a deal. I sense that the lawyers enjoy the process too. They seem to pull out all the stops and work at the very top of their game. At the end of a long day's hard mediation, the clients always seem to hold their commercial litigators in that little bit higher regard than when they started the day. Sometimes for the first time, clients may end up with no doubt that their legal team really is on their side.

If you have killer points to make, it is of little advantage to keep them a secret until the opening plenary session in a mediation. There are few occasions when trying to humiliate the opposing lawyers will bring them closer to your point of view.

It will be bad news for commercial litigators, and our reputation with businesses and the courts, if they attempt to turn the anticipated downturn into a gravy train. However, the good news is that, approached professionally, there is significant high-quality work that commercial litigators should carry out pre-mediation to improve their clients' eventual outcomes.

There is a vocal school of thought that it is never too early to mediate a dispute. There is also a belief that the commercial litigator's efforts will not change the settlement reached. That may be the case for straightforward matters involving limited facts and small sums. However, to give your client the best chance of getting the right deal in mediation, there is work to be done.

Despite what parties may tell each other in correspondence, in their pleadings and in lawyer-to-lawyer

negotiations, most good lawyers can understand the strengths and weaknesses of their own and their opponents' cases. One benefit of mediation is that the parties can argue every fact and point of law to support their case and undermine their opponent. However, in the privacy of their own mediation rooms and in caucus with the mediator a more analytical and balanced approach can be adopted.

If the parties are represented by well-prepared legal teams who do their jobs properly and advise their clients on the most likely outcome, any settlement achieved should reflect the justice of the parties' positions. Settlement might be represented by factors, such as future business or deferred or structured payment that a court simply would not have the power to deliver. In times of financial hardship, truly creative thinkers will structure deals that are not as simplistic as 'A pays B £X within Y days,' but will explore more adventurous avenues such as perhaps swapping debt for equity or something else more creative.

Preparation for mediation

In my experience the most important pre-mediation steps for the commercial litigator should include the following points. There is much more that a commercial litigator can usefully do in preparing for an effective mediation, but in my experience these are the bare essentials:

Understand your client's position

This may seem trite, but it can take a considerable amount of work to understand a complex dispute arising from a complex set of facts. One should consider taking proofs from key witnesses and inspecting the core documents. If you are making legal assumptions, be prepared to back them up with authorities.

If your client's losses are in dispute, make sure you have the supporting papers, interest calculations and schedules that justify the position you are taking. If you intend to plead poverty, be up front and prepare evidence of financial constraints, such as accounts, asset statements and bank statements.

Understand your opponent's position

It never ceases to amaze how many lawyers spend so much time on saying how great their own case is and how it is bound to win at court, that they miss the chance to explain to their opponent why they will lose. This is a vital step in getting to a settlement. The team needs to be well enough prepared to give the mediator the ammunition to challenge your opponent's case. It is all very well for a mediator to ask a party: 'Do you really expect to win?' to which the answer is invariably 'yes'. But it is of far greater value for the mediator to be able to ask: 'Your opponent says x, y and z. What have you got to say about that?'

Enable your opponent to understand your client's position

It is of limited benefit if you understand why your client is bound to win if you are not prepared to invest the time in providing the necessary information to allow your opponent to reach the same conclusion. It always makes us doubt our opponents' conviction in the strength of their case if they refuse to answer requests for further information.

In a mediation environment, if you are to persuade your opponents that you are right, you will need to allow them to satisfy themselves that your case is well considered and supported by the facts and, even better, a bit of law. Sometimes we consider our opponents to be unnecessarily obstructive if they serve detailed requests for information, but consider the advantage to your client's case if you can answer all the questions asked of you easily and quickly.

Enable your opponents to understand their own case

If you believe your opponent is bound to lose, help them to understand the strength of your position. If you have killer points to make, it is of little advantage to keep them a secret until the opening plenary session in a mediation. Indeed, there are few occasions when trying to humiliate the opposing lawyers in front of their clients will bring them closer to your point of view.

Prepare for settlement

While discussion of bottom lines is rarely informative – your client will know a deal when he cannot walk away from it – the more preparation for the deal itself, the better. A party can significantly influence a settlement by coming to mediation well equipped with a number of creative solutions. Even if a deal comes down to payment of cash, there are many ways to sweeten the cup and these should be thought about with your client up front.

Prepare your next steps

All mediators will want to know the costs that the parties will incur if the matter does not settle. The mediator is simply trying to create a neutral settlement pot that is not dependent on the success of either party. It makes good sense to invest the time in preparing a realistic costs estimate to trial before turning up at the mediation.

It is still very rare for parties to mediate disputes during the currency of an agreement. Unfortunately, most commercial litigators are not consulted until matters have gone too far to be rescued. However, this is the time when it is in the best interests of all clients to engage with commercial litigators to review contractual remedies as early as possible and to seek advice on dispute resolution when their litigation team still has the opportunity to be truly creative and use mediation during a contract to keep the contract alive.

Conclusion

So the current credit crunch should not necessarily be relied on as a gravy train for litigators. But there will be more business disputes to resolve and resolving them will help clients to survive the downturn. If a law firm does this properly, its corporate and commercial clients will have a much stronger and deeper long-term relationship with the firm as a result. ■

Key issues

- The UK may be on the verge of recession, but litigators are mistaken if they think it will be a repeat of the post-recession litigation boom of the 1990s.
- Mediation offers litigators the opportunity for them to prove their skills face-to-face, and in so doing, strengthen advisory relationships with their clients that often leads to repeat business.
- The Master of the Rolls made it clear that judges have the power under the existing CPR to require parties to mediate disputes without infringing their human rights to a fair trial.
- Provided you prepare your case, it is never too early to mediate a dispute and save clients money rather than keeping an eye on the end of case fees.