Parallel workshop session: Balancing power in mediation

James South, Director of Training CEDR:

Like any good mediator I’m going to ask for the beginning of the session, could we have everyone move forward, slightly, to make it a bit more of a nicer feel to the room.

OK. I’m conscious of time and, again, not wanting to take up too much time at the end of the session, let’s make a start. Welcome to this workshop on power in mediation. For those of you that don’t know me, my name is James South, I’m director of training at CEDR and I’m joined today for this next hour by Deborah David who is immediately to my right, by Sean McTernan in the middle there and Heather Allen on the far right who will introduce themselves when they take their particular session throughout this workshop.

Just in terms of what we want to kind of discuss with you in the next hour, really, is to look at in some detail, as far as we can, the concept of power in mediation. And the concept from two perspectives, really. First of all the well known power between the disputants, particularly focussing on imbalances of power in mediation. But we also want to look, for a little bit if we can, at the power that mediators have in the process and how we actually use that power within the process. And looking at that, we want to maybe challenge, or I’d like to challenge, perhaps, some of the more traditional concepts that we have been brought up with as mediators. And Bernie Mayer this morning really said something interesting that touched me. He said that we need to look at some of the fundamental concepts of the process that we operate within and maybe look to move them on and I think talking to mediators and mediating myself, I realise especially the concept of neutrality, the mediator’s neutrality and how that fits with some of the things I do now in mediation is out of step with practice. So I want to explore that.

And I’m going to start by asking you to think about situations in your own practice as mediators, where you’ve thought, ooh, I’ve done that, it was the right thing to do, I think, but I’m not quite sure how that fits with my role as a neutral. Or, conversely, you might think, I really want to do something here and I think I know what I want to do, but I don’t think I can because of my role as a neutral. So that’s why we’re here. I’m not asking you for specifics, I just want you to think about those when we go forward.

So what I’m going to do is talk about power in a theoretical sense and then I’m going to ask my colleagues to talk to you specifically about mediation and power imbalances and give you some more practical sense of how
mediators work with power and mediation. Heather’s going to talk about organisational versus individual dynamics. Sean will talk about big company versus small company and then Deborah’s going to talk to you a little bit about disputes with insurers and the particular power dynamic there.

What I want to do first of all is just take it out of the context of mediation and examine what power is, because we talk about it but, you know, it’s very hard to define. And a guy called Darding tried to define power and he defined it in its broadest sense as outcome power and that’s the ability of an individual to bring about some form of outcome. So the ability for me to pick up this book, for example, is a formulation or expression of power. But for our purposes, that’s probably too wise. What we need to look at is a subset of that which Darding calls social power, or power over, and that’s the ability of an individual to change the behaviour and choices of another individual.

So here, obviously in a mediation context, we’re talking about the ability of individuals, be it the disputants themselves, or the mediator indeed, to change the behaviour of the other parties. Now, what kind of forms does that power take? Well, for mediators it can take a number of different forms and mediators can use their power in a number of different ways, indeed disputants and John Wade sets out ten examples or types of mediator power in operation within the mediation context. Because of time I’m not going to go through them all, they are in your packs and you can have a look at them. But the one I want to pick up, particularly, for further discussion is number seven, the knowledge. Mediators have particular knowledge through our training and our experience about the dynamics of conflict. Our understanding the negotiation dynamics and understanding interpersonal relationships and as mediators we’re privileged that we see both sides of a dispute and that gives us a unique knowledge in helping parties move towards settlement. So that’s a knowledge that I want to come back to in due course.

But as I said, social power, or power rests in the interaction between individuals. Now obviously by negotiation there is the power between the two disputants, and that we know of. And as we also know that as mediators, by putting a mediator into the negotiation between the parties, it changes the mix, it changes the dynamics. But I think the important point to note here is that it also changes the power relationships because there is power relationship exists between A and B there, but with the mediator in there, there are two more power relationships which are present. The first between the mediator and A and the mediator and B. So inherently, just being in the process means that there are relationships of power which exist between those parties. And we have, by the mere fact of being there, we are going to influence the course of the mediation. We’re going to influence
and we’re there to influence the outcome, the actions, the way people are thinking about the dispute. That’s our job and that’s why we’re there.

So, just to reiterate, all power in mediation, I believe, is social power. It comes about through the interaction of individuals involved in the mediation process.

So what? Well, I think it’s important because we need to recognise that power and how we use it and one good example of how we use it is in a classic situation of power imbalance. Now, obviously in mediation if there is no imbalance between the parties, then there is no problem in terms of a mediator being required to balance power. But more often than not, and as we know from our own experience, quite often there is an asymmetrical negotiating power in a negotiation, so that’s obviously when, for whatever reason and my colleagues are going to talk about it shortly, one party has more power than another. And what a mediator has to do, and what we’re told has to do, is to try to use their own power, or their own influence to balance power within the mediation. And this is important because of the reason that Andrew Acton sets out there, because if we don’t then disparities of power existing only serve to heighten conflict but are also an obstacle to the mediation process and settlement. So if we don’t deal with them as mediators, it’s going to exacerbate the conflict level and make the ultimate aim of settlement extremely difficult for the parties to achieve with the assistance of the mediator. So we need to deal with it. I’m not going to deal with how we deal with that, Heather, Sean and Deborah are going to deal with that in some detail shortly. And the way we deal with that, obviously, is by using our own power to help balance out the mediation dynamics within the mediation and help in this circumstance B to balance power with A.

But to me there’s a bit of a conflict between our duties to balance power and our duties of neutrality because our duty to balance power means we have to actively do something to assist the parties, or one party who is seen as weaker for whatever reason. The problem with that is that we have a conflicting duty of neutrality which requires a mediator to act as a neutral third party charged with managing the process and not, in classic mediation theory, interfering with or influencing the party’s control over the substantive outcome of its view. And to me, as a practising mediator, and I’ve always struggled with this, is how can that actually be true? If I’m in there mediating, how can I not by my mere actions affect the outcome of the dispute? Indeed, isn’t that what the parties want us to do? And I want to demonstrate this, what I call a paradox, I think it creates a paradox between the duty of neutrality and the duty to balance power. We have conflicting duties and that’s why sometimes within mediation we feel
uneasy, because we’re not sure, we’d like to do more but we think we can’t because or our neutrality.

So, how do we balance the paradox, how do we square the circle? Well, traditional mediation theory takes the approach that indirect intervention’s OK. It says it’s OK, you can use your power to change the process, but it’s not OK for you to directly intervene in the substantive issues and dispute. And there’s a quote which I think summarises that quite nicely by Sherman.

Now, that sounds fine, OK, I’m allowed to manage the process and do things in process terms but not in a more direct way. The problem with this, I believe, is what it does is merely mask the operation of power, what we’re actually doing as mediators. We tell parties we’re neutral, we’re not affecting the outcome, but the reality is, whatever we do, we have to affect the outcome because of the operation of power. Power is about cause and effect. Let me demonstrate it here. Indirect power, fine, there’s an undesirable behaviour by a party which causes the mediator to use indirect intervention. The effect is to change the process which causes the party to change behaviour. So that’s fine, but it’s the same if you look at the direct use of power. Again, undesirable behaviour by the parties, the mediator is more direct in their intervention and that brings about a change of behaviour. So the whole mask of neutrality I think has hidden actually what mediators do and what we’re expected to do in the process is use our power for the purposes of the process. And I was, when preparing for this last night, I was re-reading Bernie Mayer’s book and he has a very nice quote which I think applies very well here. He says, the problem is that neutrality makes sense only as a statement of intention, not of behaviour. We bring with us a set of beliefs, values and interests to every conflict we enter, no matter how firmly we are committed to neutrality. Every action we take, or choose not to take, reflects this. And the disputants we work with are sensitive to this. So asserting ourselves as neutral may appear to clarify our role, but in reality it can easily serve to obfuscate or distort the real nature of what we have to contribute. So I think the practice really has moved beyond the traditional concept of neutrality and we need to recognise that first of all we have power and we should use it in mediation.

The question then becomes, well, when do we use it? And I’m just going to give you some very quick reasons I think how we should use it and when. And it’s based on legitimate use of power. Power’s always seen as being used legitimately by the person receiving it if they believe the person exercising power has the right to do so. A very good example, a policeman has certain powers within society to exercise and therefore we say that it is legitimate that they do so. On the flip side, the recent war in Iraq is an example, a number of people don’t see that as legitimate because they think that the basis for going to war, for using their power, was not legal. So
that in some people’s perspective is an illegitimate use of power. So to be effective, effective exercise of power must rest on the legitimacy of the power holder using their power.

So, as mediators, on what basis can we argue that we can legitimately exercise power in mediation? Well, I think the first thing to point out is that it’s based on our competent authority. Remember, I referred to the knowledge of mediators earlier on as a form of power. I think this is where our authority to act and use our power rests. We are dispute resolution professionals. We have understanding of the nature of conflict, understand resolution methods and techniques and understand dynamics of interpersonal conflict and negotiation which places us in a unique position to help parties move through this conflict that they find themselves in. So it’s on that basis that we have the right to act and use our powers in the mediation process.

So we have the right to act, well when should we act? That’s the more difficult one and there will be lots of debate about this but I’m going to put through two key situations when we should act. And we should act to advance the objectives of mediation, simple as that. What are the objectives? Tyler sets them out, two key objectives, to resolve the dispute in a fair manner, now that’s not substantively fair, that’s the process itself needs to be fair. So we need to make sure that the process we’re conducting, the mediation process, is fair. So we need to intervene if the process is becoming unfair. And finally, we need to act or intervene or use our power to achieve the outcome that meets the needs of the parties as far as possible. At the end of the day, that’s what they employ us for. They want a resolution that meets their needs. So if our intervention is based on that premise, then I suggest that’s a way forward for using our mediation power.

So a very quick run through there. I hope it wasn’t too theoretical for you. What I’d like to do now is hopefully ask my colleagues to pick up where I’ve left off and explore a little bit more about, in detail, how mediation power operates in the mediation context. I’m going to ask Heather Allen, as head of faculty, to take the floor, thank you.

Heather Allen:

Thanks, James. The first thing I want to ask you is can you hear me? Will you wave at me if you can’t because I know that these were fluctuating a bit this morning and that was a bit of a pity, so wave at me if this changes and you can’t hear me.
I started off by being really pleased to be asked to do this, so I thought, oh yes, thank you very much, I’m really glad, so then when I came to prepare for this, I thought, alright, let me start with a question to myself, what’s power? And I got very little distance because I got such a huge range of answers. I got everything from mildly influential to irresistible and none of them seemed to help me in defining what power is in this context. So then I started from a premise, instead, which was, well pretty much everything I do as a mediator is either the exercise of power or an attempt to exercise power in order to affect, either to maintain or to change what is happening. And I found that a lot easier to live with because it’s self evident and if I’m not doing that, then what on earth am I there for?

So then I thought about, well what am I affecting, what am I seeking either to maintain, if it’s positive, or to change if it’s not positive, if it’s negative? I thought, well, behaviours, quality of communication, quality of negotiations, the choices people make and those are the choices people make within the mediation about some of the other things that I’ve already mentioned, how they behave, how they negotiate, what they negotiate with in terms of tactics, we have quite a lot of influence I think, as mediators, over a whole range of activities that the parties engage in during the course of the day. And the overall answer to my question to myself of why am I doing that, what am I trying to affect, is that I’m trying to give the parties the very best chance of settlement, if that’s what they want and on terms that they choose.

And all of that, then, seemed quite obvious, so then I went on to think about, well, I then gave myself a bit of a worrying moment about rebalancing power, because I know I do that, especially where I’m working with parties who have a perceived or a real imbalance of power and I think perception and reality are the same thing in this case, in this situation, then I thought to myself, well, I’m supposed to be neutral, does that matter, does that affect it? And I came out with a very clear thought that neutrality is not an end in itself. I am not there in order to be neutral, that’s not the purpose of me being there, the purpose of me being there is to assist these parties to move this negotiation forward and if possible to get it resolved. So then what impact does neutrality have at all? And again, for me, the answer was really clear, that my neutrality is only challenged if I have a stake in the outcome. And that, then, raises a big question for if there are any, I’m sure there are not any out here, but out there, who use the don’t spoil my 100% record tack. Because I think that really is a big challenge to how then can you operate as a mediator. You can work very flexibly with what we might perceive as neutrality so long as you have no stake in the outcome.
So then I began to think, well, OK, so now I’m not going to, neutrality is not treating everyone the same. So I’m going to treat the parties differently in order to make this work. So what does that mean? What if one party needs, or seems to need more from me than another? What’s it OK to give them more of and still retain this sense that I’m not there for one party or the other, that I’m there with no stake in the outcome, having a joint role to assist these parties to negotiate? So what can I offer more of to a party that I perceive or that perceives themselves as having an imbalance of power? A lesser ability to join in this process than the other party or parties, let’s keep it simple and keep two parties for the examples. Because in any negotiation and everyone will know this who’s ever been in a negotiation. If you don’t feel part of the negotiation, you’re really unlikely to work at it and therefore you, as two parties, are much less likely to come out with a result. You’re much more likely as a party in a negotiation, never mind a mediation, to back off and back out if you don’t feel part of it. So part of my job is to make everyone have an opportunity to participate as fully as they need to in order to negotiate effectively.

So what can I offer more of? I can offer more time to one party than another, I can offer more encouragement, I can offer more coaching, I can offer more help with the negotiations, both in terms of tactics, timing, actual working on what format or what formulation are you going to present, when are you going to begin these negotiations, are you going to start, are you going to demand that the others start? I can work with a party and give them more assistance with that and a number of other, what I regard as, practical help, and I give them more of that. So that’s not balanced and if you see neutral as operating in the same way, offering people the same thing in both rooms, then you won’t be satisfied with that, but I think as an effective mediator we all do that and I think it’s really quite refreshing and enabling and it allows me to be more effective, I think, if I recognise that I’m doing that and that I need to do it.

So then I ask myself, well what can’t I offer more of, to a party that I perceive as having less power? And actually the answer came up very loud and clear for me. I can’t offer more empathy. At a personal, human level I might have sympathy - that isn’t the same thing. And sympathy doesn’t come into it because then I begin to have a stake in this outcome, if I care, so actually I need to leave sympathy out of this altogether, whether I have sympathy or I don’t, but I can’t offer more empathy and the reason is that in order to be more effective in this context, I need to understand just as much about this party as I do about this party. I need to understand as much as I can about both parties, so often is not going to be effective. I can’t offer this party more commitment to their case or their cause. And I can’t offer this party more approval. So there’s three things I’m very clear that I can’t offer and they may well be looking for all three of those and I know
that there’s a line that I need to draw. I can’t offer more of any of these three things to this party or to that party, but there’s an awful lot I can offer to this party in order to enable them to join in. And it’s more by way of, if you like, I can’t offer closer alignment but I can offer a lot of practical help.

OK, so a couple of examples. James, how am I doing for time?

James South:

You’re alright, you’ve got five or so minutes.

Heather Allen:

Have I really? OK, so I’ll give you two examples in that case. I’ve chosen, because my brief is individual against organisation, I’ve chosen one clinical negligence example and one employment example which was a sex discrimination, predominantly a sex discrimination claim although with breach of contract and other things that went with it. Which shall I talk about first?

OK, I’ll talk about the clinical negligence. We had present, I’m not going to make this a shaggy dog story, so my apologies for leaving out lots of this, but I’m just going to pick out the key aspects. There was, amongst others in each team, there was the wife of a patient who had suffered as they, she, he perceived it and on the other team was a consultant who because the consultant who had been directly involved had retired was not the consultant who had been directly involved, but was taking responsibility for the department and they had advised us and so forth on both teams. But it was really the relationship between the wife who was the primary spokesperson and the primary disputant in a practical sense on the day, and the consultant. And the first thing that happened in the hospital’s room, I went into the room and the consultant said to me, I’ve got to go by four o’clock. An exercise of power, an attempt to exercise power. So I told him he had committed to be there at least until six o’clock in terms of the number of hours that had been set aside for this mediation and that I was available later than that and I hoped that if necessary he would be but certainly it would be, in my view, make the day very difficult if he were to convey to the other party that he needed to be gone by four o’clock. He stayed till six o’clock. In fact matters were settled earlier than six o’clock but I needed to say to him that he couldn’t leave at four.

I didn’t actually, well actually a little bit of me did want to say, look, guy, you can’t leave at four, OK, but of course I couldn’t do it in that way, I’d
only just met the chap and so forth, so I put it in pretty firm terms, but not quite those terms.

One of his advisers after the mediation said to me, you have no idea how much better that was coming from you than from me. And of course we need to exercise our power because we need to work with people in ways that challenge their usual behaviours. He joined in the day in an extremely productive way for the most part and I think that he did that partly because of what I challenged him with at the beginning.

Now then, later on in the day, and one of the things that I want to do with both these examples, is to say it’s not quite as simple as this party has power and this party doesn’t and therefore I need to work more with this party to raise their power or to equal that out, than I do with the other party because I think things change and one of the things that I think you and I keep an eye on, perhaps without even having labelled it as keeping an eye on the power balance, is the point at which we recognise that actually the work I’ve done, the practical help I’ve given is actually now, I need to give this team something back. So what happened was, we had a joint meeting, we had a lot of this, unusually for a clinical negligence dispute, a lot of this took place in a joint meeting and about half way through the mediation, the consultant who had been very confident, a very good participant but nevertheless very definitely used to being in control and in charge said that he would like to use the flip chart and said that he would like the pen and that he would like to use the flip chart.

How many of you would have given him the pen? OK, a few. It’s not a fair question, you weren’t there, you don’t know what had happened up to there. I felt I had to give him the pen. It was his turn to have a bit of centre stage, to have a bit of power, to have a bit of choice about how he operated. I felt that the way that he’d agreed to operate with the other party during the course of the day, that he’d given quite a lot in terms of giving up his power, his control and I gave him the pen. But of course there’s a real danger, as those of you who didn’t put your hand up, would have recognised in giving him the pen in circumstances like that and I think we are of course making judgements all the time and we are making assessments about where the power lies, what risks I can take in terms of redressing that power. There are risks to perceived neutrality, there are risks to behaviours, there was a serious risk that he would behave in a way that wasn’t productive, even though he’d done pretty well up to that moment and so what I did was to do something, that was direct, by giving him the pen, I gave him some power, I then did something indirect, because I think the way we exercise power is both direct and indirect, it’s both blatant and it’s subtle and what I did was to move chairs. So, if this is me and this is the consultant, which it wasn’t because he was a way up the
table with his team, but nevertheless, and this is the wife, the woman who was the focus for the day on the other team. I moved over here and I asked him to sit here. And I didn’t do that so he would have the head of the table, I did it so that he would be sitting next to this person so that anything he addressed to her needed to be face to face. And it worked really well, and when he stood up at the flip chart, you know the old trick of the trainee, stay at the flip chart because nobody then interrupts so much, what I asked him to do every so often, just quite quietly, was, why don’t you have a seat. And I invited, why don’t you have a seat, and I asked him to sit down and he took the lead because I did it quietly and it wasn’t, and he sat down because he was chatting to her, and it made a very big difference. So what I was doing was working with, I don’t want to use the work manipulating, but I was working with the power balance all the time.

Manipulating’s only a dirty word if you’re doing it for yourself as a mediator. Manipulating is perfectly OK if you’re doing it for the benefit of the parties to see whether you can help them communicate more effectively, give themselves a better chance of settlement.

OK, that’s one example. One more quick example. Oh actually I’ve realised that this is another defendant who’s brash at the beginning of the day. Alright, shall I use that example, no I’ll use a different example. OK, this is a disability discrimination case and I’d already negotiated with the defendants that they would give a lot more time to this person to have his say than they would necessarily take for themselves. They said, we’ll only need five minutes, well we know that’s ten or fifteen but even so the likelihood is from having spoken with him, having prepared with him, he was going to be half an hour or more and I talked to them about the benefits of allowing that to happen at the beginning of the day.

So, and it raises a quick point which is that we are not the only people who understand the dynamics of power and often parties or individuals within parties will have a very clear idea that they need to give over a bit of the power to somebody who perceives themselves as being weaker or less advantaged and so we can actually use the knowledge in the room and in individual teams about power. We’re not the only ones with this knowledge, although as James said, we get to a point of being expert with it, we hope.

So what happened was, having negotiated this, he took his 35 minutes or so and he told us how it was, not only in terms of this dispute, but also in terms of his profession that had not supported him in all of this, the wider global industry, the government policy and indeed the world as a whole that was not designed for the benefit of somebody who was a wheelchair user, and actually who needed a carer present in order to cope with the length of day we were engaged in.
Now, I have a real problem here because I’m a mediator. I was very struck by Bernie Mayer’s observation this morning that we’re there to work in a much wider way. I’d been engaged to help them sort out this dispute which was going to be in court in about two and half month’s time if they didn’t get it sorted. So I’m not there to help him change government policy, or change the world or even, you know, give his profession a few home truths. I’m actually there to focus on this dispute and see whether these people can reach an agreement which means they don’t have to go to court. In another world, next year the year after I might be brought in to deal with the wider difficulties but I wasn’t. So I have to help him to change his choices about what the conversation is going to be about today. Otherwise it’s impossible to reach settlement. It’s impossible to reach settlement partly because the right people are not at the table and partly because there is no, in the current context, and within the foreseeable future, there is no reasonable outcome to most of his dissatisfaction.

So, I think I’m going to wind this up by, I’m not going to, actually Lisa’s kindly provided me with a flip chart. What I did was to draw outgoing circles on a flip chart with the dispute in the centre and some of the wider issues going out to the world at large which isn’t fair to people like you. And then I asked them how much of that they’re going to talk about today. And that’s another power issue, because if I’d told them it would have been less effective. If I’d kept the power and made the choice and said, look we’re here to talk about the middle circle and maybe a bit of the next one, that would not have been nearly as impressive in terms of the power that they have. They felt that they had chosen their conversation for the day and he said well obviously it’s the middle circle and the other party said, there’s a bit more in the next circle we’re going to talk about. He said yes and I didn’t have to do anything more, the day was set for them. Later in the day he began to abuse that power and so then there was a choice I had, as with the consultant, about how much do I give back to him, how much do I take, where do I draw some lines now for people and help them to draw lines for themselves so that this can take a step forward. So I think what we’re doing quite often is we’re using power and we’re deciding whether the power that other people use is being used positively or negatively. And we are trying to change the dynamics of power only where it’s negative. People often use their power in a positive way in mediation and that’s good news for us, we don’t have to do all the work.

So I just want to finish with three words, and that is, I tried to summarise this for myself, really, to say, OK, what are the three main ways in which I exercise power and I exercise it, I think, by modelling and that’s quite indirect. I behave in ways that I hope people will follow so I model in good listening, good communication, respect and so forth, by coaching, by
helping a party actually to do a better job on expressing themselves or on negotiating, devising a figure that’s going to work maybe something beginning with a three is going to be more effective than something beginning with a four. And by challenging. So I think those three things are the primary ways that I think I exercise power, by modelling, which is indirect, by coaching, which is direct and by challenging, which is direct.

James South:

Thank you Heather. There will be, I hope there will be some time at the end for people to ask questions but I’m going to, because of time, move swiftly through and invite Sean to take the lectern to talk about power in format recognition disputes. Sean.

Sean McTernan:

Can I have, there are some slides, James. There they are, fantastic. Press the button, sorry, when I got here. Can I first of all say Karl Mackie is a great bloke. There was a great imbalance this morning, comments about Karl, so let’s get that out of the way.

Like Heather I was delighted to be invited to join this session, I realised immediately I would get into this congress for free, which is an old fashioned win-win situation. But more seriously I realised that although format rights and television is an old hobby horse of mine, I’d never really looked solely at the issue of inequality which jumps out at you and particularly not in this context when I’m asking 50 or 60 of you to take a view and maybe come up with some suggestions because as you’ll see I don’t really have very many on how we redress these imbalances. So I’m going to try and rattle through in great speed here, there we go.

There’s three ways that inequality rears its head in the television format business. The first is a simple economic one, that some companies are bigger than others. The second is a market related on, that there’s very few players, and the third, I’ve forgotten but I’ll come back to it in a minute.

But let’s have a quick look at the market place. Over all growth this year for the first time, we had a serious study of the television format business, that is the sale and purchase and licensing of formats from which you can make a programme and also the sale of the programmes themselves. But it’s a huge business, over two billion Euros a year, which makes it bigger than the UK car industry, and small for a hedge fund, but it’s a significant subsection of the media business. So it’s taken very seriously, it’s protected vigorously. In terms of sector growth, certain types of format have dominated more of the market. What we call technically quizzes are very big and legally they are
one of the more diffuse formats to fight over. Distribution patterns show inequalities, there are only three net exporters in the format world, that’s the UK, the US and the Netherlands. Everybody else is buying stuff in. Distribution patterns, this is where we find that it is ten companies, basically, selling from three countries to the world, so things are pushed out and necessarily policed in those other jurisdictions. Dispute patterns are interesting because it’s not very legalistic. In that report, it only presented six key court decisions and the participants at the conference where we discussed this report talked mostly about negotiated settlements and the existence of mediation. So that’s a quick overview of the industry I’m talking about.

Definitely repeating myself now, but three of the things that appealed to me at the outset in mediation and it was the thing that brought me into mediation was that these three elements are always present in format disputes. Legal uncertainty, because a format is not just copyright, it’s often other things that are not legally capable of being pinned down, that given what I’ve said about the small market and the small number of players, continuing relationships is often absolutely essential between the disputants, the people saying, you’ve nicked my idea, and the defendants, and the ephemeral nature of this particular intellectual property, if indeed it is one, in that fashions come and go. You don’t want to waste time fighting over something you should be selling in Venezuela. Those pro-mediation indicators are very strong.

So, not surprisingly, this was one of the industries that started to take things into its own hands. FRAPA is an organisation that offers a pay per registry for format and a mediation scheme. It’s funded by some of the bigger players in the format industry. So, conspiracy theorists among you immediately start to think, ah ha, is that necessarily a good idea? I don’t know but it’s there. Secondly and more recently, the Format Rights Lawyers Association sprang up. Now these are a group of lawyers representing mostly the larger players who want to increase legal protection around the world so that they can go from place to place getting injunctions to prevent people copying their ideas, and enforcing the licences they’ve granted. So that’s a relevant power within the overall balance. Thirdly a trend, currently the precedents that there are, are keeping the status quo, i.e. a format right doesn’t really exist, if you complain about your idea being stolen you will probably lose in court and so you must look elsewhere, a big German case last year that just threw out the whole notion of a format right, and just before that in a dispute between I’m a Celebrity, Get Me Out of Here, and Survivor, an American case that said nearly everything you see on television is a hotchpotch of old ideas. As viewers you decide that for yourself, but that was the basis, essentially, of the legal decision denying the claim. So those are the trends.
What would happen if the format right lawyers get their way and a format becomes something more copyright-able, something more rights based, that a judge will say, yes, that must not be infringed? Well, a big danger is it could reinforce potential monopolies that some might say are already in there in a non-legal kind of scenario. If there are stronger rights it may not effect those disputes which are between the major players. They may still, as they do now, seem prepared to go to mediation because it’s better than the alternative and the uncertainty, so major players against major players seem to use the FRAPA scheme, or sometimes, but more rarely, mediate outside of it. What about a major against a minor? Now this is nearly always the minor player, the smaller company is saying that the major player has stolen the idea. The evidence there is at the moment the major player often declines mediation and calls the bluff, or the legal bluff, of the minor player. If rights were improved, strengthened, those in the game and I’m talking about the people at FRAPA and the Format Rights Lawyers Association, think that the smaller player would be in a stronger position, that stronger legal rights would be one redress of inequalities that would bring big players to the bargaining table. My view is it may not work like that at all, it may simply enable the major players to police the format world better, but it is one of the variables inherent in talking about inequality in this area. So that really covers the tendency to seek adjudication and empowering minor players and as I say I don’t come here with answers, but really questions. And one of the attractions of the format business as a hobby horse, which it is for me, is it is changing as we go through these particular years, it’s an industry that didn’t really exist 20 years ago, although of course there were formats and it is still expanding quickly.

Talk briefly about the effect of inequality. As I’ve said here, there are indications and it’s purely anecdotal and too small to ever measure and too confidential to really get good detail out of, indication the big players will mediate with each other, small against big, we won’t have that so often. But beyond that, what happens when you do get a small player mediating with a big one, is the outcome forced? And that’s a question I raise and also a question as to whether it is ever something you can offer a redress of because the pressures are so great on a small player in this type of cartel-like market.

So with that pessimistic slide, let’s try and say something about what effects might be relevant in mediation. Thinking back over specific cases, I just came up with two positively, possibly positive hypotheses and scenarios. Sometimes in a major versus minor mediation, if you apply the right pressures and you’ve got a senior member of the major player present, you might find that the distortion is slightly eradicated in that the senior
player may begin to see that mishaps or misdemeanours within his corporation which might be exposed by disclosure in a court case are better kept under wraps or referring to the ethical principles talked of this morning in China, sometimes the senior executives think that maybe their juniors, who they would have to defend in a litigation situation, perhaps, have done enough to warrant them doing a deal. So sometimes there is inequality but the senior player eradicates that blemish, that flaw in their own system.

A second hypothesis that works, again if it’s played rightly and if the sometimes equal artistic power of the parties is brought to the fore, the minor player complaining can avoid being stigmatised as a whinger. Naturally within any small or confined and gossip-ridden industry, people acquire a reputation for complaining about ideas being stolen. In mediation sometimes, the weaker player can come saying to the bigger player, I’m not trying to sue you, I’m not talking about you in all the green rooms and parties, I want to debate what’s happened to my idea, and in that situation, with the right mediator touches, the artistic balance is restored and they speak almost as equals. So that’s a couple of hypotheses.

Practical points. Things like the spectre of the cases we have had, Survivor and Celebrity for one, can be brought to play in reality testing. In that case, there was over 30,000 documents to be examined on an interlocketry hearing, there were numerous experts to be commissioned, and paid for, a huge potential early burden on a major player. That’s common in all mediations but it’s relevant here. More esoteric, sometimes, is almost a cult of personality. Again if you have a senior major player faced with a younger aspiring player, you can sometimes appeal to their sense of career, their sense of they were once in those shoes. Again, the other shoes is a cliché of mediation but it’s one that’s useful to bear in mind when you have got that kind of structure between the disputants in a mediation. The speed of market moves and the things I mentioned earlier, the pro-mediation features, always are relevant to discussing with the more powerful player why it might be in their interests to do a deal. But as I’ve said, there’s no big answers here and there certainly is an inequality generated by the three kinds of factors I’ve relied upon.

So, conclusions, bracket, provisional. Conclusions. The extent of mediation. I think it’s reasonably well developed within the industry, but looking at it from the outside you might question just how structured or forced it might be given the things I’ve said. There’s evidence it will grow, as will the level of disputes, but not in any logical way because it may well be dependent upon how the argument on the rights threshold goes, who knows?

The model of a mediator role in this sub-sector of a sub-sector, and I’m very big on sector specific analyses, it is one where, from what I’ve seen, I do
think the expert mediator may have a slight advantage in addressing inequalities. I do believe in generalist mediators for many things, and I'm sure it could work here, but there is an advantage in being able to pinpoint the weaknesses of a major corporate player, knowing their history, knowing their role and position in the market, and perhaps to some extent, although I agree and I like this broader idea of what you can do as a mediator and not being hemmed in by a neutrality that can look like a disinterest, by pressing them on the reality of the industry and the industry’s needs as opposed to their own economic needs or their own fear of having been exposed as having done something wrong. So that’s my provisional views, I’m sure if I get a chance to talk to anybody next year on the same topic, they may have moved on, but that’s it.

James South:

Thank you, Sean. So moving swiftly on to Deborah David who is going to talk to you a little bit about mediation and power in cases where there are insurers involved and explore that a little bit with you. Deborah.

Deborah David:

Thank you, James. I just had a mini-mediation with myself about whether I would feel more empowered standing here or remaining in my chair, and I decided I needed a change of venue, so I moved over here.

I was very happy, obviously, to be approached by James to talk about this subject and one of the reasons that I was pleased to be asked to speak about insurance companies and their involvement in mediation is that I’ve spent a career as a litigator in the United States being involved in cases in which I represented insurance companies, represented insureds against insurance companies and represented claimants in third party cases who were seeking to recover from defendants who were insured, and in representing defendants who were insured. So I’ve had a broad exposure to insurance companies and I’ve mediated many cases in which insurance companies were involved. And I think there’s perhaps a tendency to assume where the power is in a dispute which involves an insurance company. It’s a sort of Cartesian assumption that the insurance company has the money, therefore the insurance company has the power, but I think the reality is that matters involving insurance companies are complex, generally, they’re nuanced and they’re multi-layered. There are lots of layers involved when you have an insurer involved, so it’s not always so obvious where the power might lie.

For instance, if you have a third party claim where an injured party is making a claim against a defendant that is insured for the loss, you might
assume that this claimant who is not in the litigation business and this may be their only exposure to a claim or a lawsuit in a lifetime is at a disadvantage, that perhaps they don't have the power that the insurance company has in the mediation. But that's not necessarily the case and Heather just talked about a situation, a clinical negligence situation, consider a case in which the claimant is, perhaps, a brain damaged child suing an insurance company. And in that case, perhaps it is the claimant who has the power merely by virtue of the sympathy that the condition of the child is naturally going to engender, no matter how neutral people try to be. There is going to be a huge element of sympathy that will shift the balance of power in that room. The claimant may also, depending on the case, have a better lawyer. They may have better representation than the insurance company has and that may shift what you would expect in terms of power.

The insured in a third party case may be an important source of income for the insurer so that if you have, for instance, in the aviation sector, if the defendant is an airline, if the defendant is Macdonald Douglas, or Boeing, you're going to have a different influence on the power in the room because the insurer has to worry about the insured and what impact that insured might have to their business future.

Re-insurers may not even be in the room, but they may be important. There may be a ceiling at the level of the insurer in the room and it may be that the claim far exceeds that ceiling so that there's a re-insurer out there that the insurer has to think about. In first party cases where the insured is being sued for coverage, again the insured may have the power in the room, merely by virtue of the premiums that the insured has paid in the past and hopefully as far as the insurer is concerned, will continue to pay in the future.

In cases in America, that involve claims made in America, the power of the insurer may be diminished by the spectre of a bad faith claim and punitive damages down the road for alleged wrongful handling of the claim. So I think what that all illustrated as I reflected back on it, is that one can never, in an insurance case, involving an insurer assume where the power imbalance is and one can never assume either that the parties have correctly assessed where the power imbalance is. And I think that part of the job of the mediator in these cases is to separate the parties from their sense of power and get them to re-evaluate where the power is. So having identified the power imbalance, where it is or where it's perceived to be, I think it is incumbent on the mediator at that point to begin the process of readjusting the expectations and assumptions about the power balance and by that, just as some examples, for instance, let's take the situation where the insurer may think that they have the power because they have the
money and it’s just a claimant who has no ongoing relationship to the system, and is weak merely by virtue of not being well represented and by having a claim that in the greater scheme of the insurer’s life is just simply not that important. I think that in those kinds of cases, the mediator, for instance, might want to refocus the insurer on the future. What happens if down the road this claimant comes in with better representation, what if they get to trial and they are simply better represented? What might happen at trial if this claimant were well represented. What might happen at trial, for instance, if the judge sees the arguments and begins to make the arguments that the claimants lawyers should be making? And these things happen as we know all the time at trial. So the insurer has to think about how the power balance might shift between the time of mediation and the time of trial and during trial because those are all risks that the insurer has to consider.

Re-insurers, I mentioned a moment ago that they may not even be present. I think that once the mediator has identified that perhaps there is a re-insurer out there with an interest, then the question becomes, for the insurer, obviously, what might be the impact of the insurer’s conduct at the mediation on the re-insurer. What might be the interests of the re-insurer? Should perhaps the re-insurer be in the room? Is there a reason to call the re-insurer and to have the re-insurer in the room and these are issues that you might even want to be exploring, obviously, before the day of mediation during a pre-mediation conference with the representatives of the insurer.

For the insured in a first party case, for instance, in terms of risk assessment and analysis and reality testing in terms of the balance of power. What might be the implications for the insured, the insured’s conduct in a mediation or in connection with a piece of litigation on future insurability? How important, obviously, is future insurability and what might happen if the matter is resolved in certain ways to the insured’s ability to get insurance elsewhere? What might be the impact on other business? For the insurer what are the risks of losing this insured if the case isn’t handled the way the insured wants it handled? In cases in which you have the potential for multiple claims against an insured, what is the impact of how this particular piece of litigation or dispute is handled on future claims that might be brought against the insured and how does that impact the insurer and how might it impact the insured? I think these are all questions that are raised by the balance of power paradigm in a case involving insurance and what I was hoping to suggest in this talk to you is that the balance of power in insurance cases, or in cases involving insurance companies is important to the process of reality testing and risk analysis and I think it’s a very important issue for mediators to consider as they prepare for a case involving an insurer and as they have these pre-mediation telephone conferences, particularly with the insurer’s representative, to think about
how can I use the assumptions about the power in the room and how can I change those assumptions and separate the parties including the insurer’s representatives, including the insured’s representatives, from their assumptions in a positive way so that they are able to look at and assess the risks in a realistic and meaningful manner that progresses them towards a resolution with which they can all live? Thank you.

James South:

Thank you Deborah. I think we’ve got a few minutes left, just in case people have some questions for the panel. Are there any questions out there that people want to put to any of us? Anthony...

Questioner:

A question for Heather about the use of sympathy. I sometimes feel that one can use sympathy actually to equalise the balance in the sense that you may feel a lot of sympathy for a party in a mediation which may not be in a particularly strong legal position [inaudible] some way to show as it were [inaudible] listening to the party and can actually help towards the resolution of mediation, but you seem to be suggesting, well, were suggesting [inaudible] an improper use of power.

Heather Allen:

I think without wanting to spend any time on semantics, I wonder if I need just to explain what I mean by sympathy. If I come and talk to you, Anthony, when, I don’t know, in days gone by some of your partners were less than pleasant in a particular context, and I say, oh the bastards, you know, why did they...

Heather Allen:

You know, it’s so unreasonable, why do people behave like that, I’m sympathising with you, I’m, to some extent, joining you in your emotions of disappointment, anger, dissatisfaction and what I think I’m saying when I say as a mediator, I think I, we, need to put aside issues of sympathy, it becomes part of my, I become too involved if I sympathise. If I begin to feel the emotions that the people are feeling and join them with those, then I have at some level a stake in the outcome. I care more about the outcome for them than I do about the outcome for others. Your point, though, about understanding and about conveying that understanding, well then if you call that sympathy then I agree with you. I happen to call that empathy, it doesn’t really matter, you’re absolutely right, some people will need more explanation, more reassurance, some more acknowledgement of what it is
that they’ve told me so that they aren’t certain that I’ve listened, that I’ve understood and that I’ve got it and so if that’s what you’re saying then I think you’re right. I think the other way that sympathy can be used is I might encourage the other party to sympathise. That’s rather different from me sympathising because if I sympathise I think I step over a line in terms of joining the person in their feelings. If I get the other party to join them in their feelings that might be very productive.

James South:

Thank you. The gentleman here...

Questioner:

I just wondered whether it’s always necessarily a position that an imbalance in power is an obstruction to reaching a settlement. I mean you could quite easily make the argument that, in certain situations, because one party feels less powerful, they’re much more likely to come to a quick settlement than if the position were otherwise. And is it really our function to take a subjective view as to what a fair outcome might be by stiffening up the sinews, as it were, of the less powerful party and redressing that imbalance at the cost possibly of her reaching the settlement with which the parties, for whatever reason, might have been quite happy?

James South:

Can I pick that point up, I think referring back to what Tony Willis said earlier this morning, if mediation does involve elements of positional bargaining which I think inherently it does, sometimes you’re right. The mere fact that parties do have an imbalance of power may actually in and of itself using positioning bargaining techniques help the parties move towards settlement. So I think in some circumstances a power imbalance may be OK, but I think coming back to your point about fairness, when we refer to fairness it’s not about the outcome of the dispute but ensuring that the process is fair and I think there, we very much do, as mediators, have a responsibility to balance the power to make sure the process is fair, so that whatever outcome the parties reach, they can find acceptable and buy into. I don’t know if anyone else wanted to comment on that.

Sean McTernan:

I was only going to say that in many respects anything I’ve said could be refitted into a conventional analysis. It’s a lot to do with reality checking and I think it is relevant to put the whole range of consequences before the bigger player, not batting for the little guy, but just there are non-
economic, there are non-financial, non-legal reasons in an industry to get a settlement, so I don’t think there is necessarily a pressure we’re applying and I agree with you, sometimes there are pressures that are inherent and inevitable. I think it’s a matter of just expanding the process as much as anything. But it’s a difficult thorny question as I think this shows, it’s hard to focus on what inequality is and what we should do to redress it.

James South:

OK, thanks. A question and I think it might have to be the last one because I see people are trickling back in.

Questioner:

The point I was going to make is that I personally find it a problem in [inaudible] balancing as soon as you come across a [inaudible] person and a commercial client. And with commercial clients in general, all you seem to talk about, you come across at some stage [inaudible] provided it’s equal pressure that you put on each other, and I [inaudible] that’s OK, but the litigating person can see your doing that necessary pressure an abuse of your power.

Deborah David:

I’m not sure I heard, are you saying that the litigant in person might see your exercise as an abuse of power, you’re putting pressure on...

Questioner:

I think to achieve a result you risk going and being misunderstood by the litigating person much easier than by the commercial party.

Deborah David:

I think that being a mediator in a case with a litigant representing himself is probably one of the most difficult things that we do. It’s very difficult, especially if you have any kind of legal background to avoid slipping into giving advice which is an enormously problematic thing to do in those circumstances. I think it’s hard to develop a formula for dealing with litigants who represent themselves. The one thing I try to do is keep them aware by constantly reminding them that I am not there to give them legal advice except to suggest that they might want to seek legal advice from someone else and then I try to treat them as I would anyone else in a mediation process. But I find it a very difficult place to be as a mediator.
Heather Allen:

Can I add just one thing to that and I would say that all the things that I was saying earlier on about the exercise of power, I would be exceedingly cautious if there was somebody there that was unrepresented and I think one of the ways of making sure that that person has appropriate power is actually not to press for final settlement on the day and I think that a number of colleagues now are looking at giving a cooling off period, actually quite deliberately talking to the party who is represented about the advantages of that from their point of view as well as the, from the point of view of the individual concerned.

James South:

Speaking of power, the person that holds the power here today is Lisa Watson who’s been controlling the, I see her over there in the corner of her eye telling me to wind things up. So thank you, ladies and gentlemen for listening and contributing. I hope we have sparked some thoughts in terms of the operation of power by the mediator and the parties and how that might be dealt with in the mediation process. Thank you and enjoy the rest of the conference.

[End of session]