

Mediation: the new European Directive

Mediation has received new impetus from the new European Union Mediation Directive. This should standardize the practice and greatly encourage the development of mediation throughout the EU, and probably beyond.

The use of mediation to resolve commercial disputes has completed the established path for the acceptance of new ideas. First they may be ignored. If they persist, they may be treated with derision and even hostility. And then suddenly they are pure orthodoxy, part of mainstream thinking. One can think of parallel examples in science (heliocentricity) and social justice (universal suffrage). But this does not mean that mediation is yet deeply engrained nor yet an integral part of the civil justice system in England and Wales, although plainly that is its destination. This much is clear from recent keynote speeches by two of the most senior members of the English judiciary. And the enactment of the new European Union Mediation Directive will hasten that process.

The Directive (IP/08/628: Brussels, 23rd April 2008) follows the European Green Paper issued by the Commission in 2002 and the European Code of Conduct for Mediators launched in July 2004. EU Member States have until June 2011 to give effect to the Directive, in respect of cross-border disputes. The key elements are:

- Formal recognition of the importance of mediation as part of access to justice;
- Powers for the Courts of all EU states to "invite" parties to mediate;
- Protection as regards limitation periods (prescription) where mediation is used;
- Direct Court enforceability of settlement agreements made in mediation.
- Protection for mediators/mediation providers from being called as witnesses, save in very limited circumstances.

What does the British Government think? In a bulletin issued on 18th June 2008, Bridget Prentice, Parliamentary Under Secretary of State at the Ministry of Justice said:

"The Government believes that Courts should be the last resort for people involved in civil or family disputes and has supported this proposal as a means of encouraging the use of mediation in cross-border disputes throughout the European Union. The UK gave priority to this initiative in the early stages of its negotiation during our Presidency of the EU in 2005 and I welcome its agreement."

This is not to say, of course, that mediation should be used in all cases, but its enormous potential is recognised at the very highest level by the English judiciary. For example, in a speech on 29th March 2008, the Lord Chief Justice (Lord Phillips) made his views clear:

"... Let me end by nailing my colours firmly to the mast. I number myself with Sir Anthony Colman and Sir Gavin Lightman as an enthusiastic supporter of ADR...It is madness to incur the considerable expense of litigation ... without making a determined attempt to reach an amicable settlement. The idea that there is only one just result of every dispute, which only the court can deliver is, I believe, often illusory.... Parties should be given strong encouragement to attempt mediation before resorting to litigation. And if they commence litigation, there should be built into the process a stage at which the Court can require them to attempt mediation – perhaps with the assistance of a mediator supplied by the Court.. I believe that we are moving in that direction in England.."

Cases that are referred to mediation will often need thorough investigation, preparation and consideration before the parties can be ready to mediate. This can be before, but currently it is more usual during and in parallel to litigation (or arbitration). Preparation is often the key.

There has been a significant increase in the use of mediation in England and Wales in recent years. Perhaps it has not spread more quickly because, even now, nearly ten years after the reform of the rules of civil justice (the Woolf Reforms), there remain misconceptions. There is an enduring need to explain what mediation is and how it works. But the way ahead seems clear. As Sir Anthony Clarke, the Master of the Rolls, observed in his address to the Second National Conference of the Civil Mediation Council on 8th May 2008:

“Experience .. shows even now that far too many people know far too little about mediation. I think we can all agree that this has to change. ADR [Alternative Dispute Resolution] in general and mediation in particular, where it is the appropriate ADR mechanism, must become an integral part of our litigation culture. It must become such a well established part of it that when considering the proper management of litigation it forms as intrinsic and as instinctive a part of our lexicon and of our thought processes, as standard considerations like what, if any, expert evidence is required.... This will require education; education on the part of litigants, lawyers and the judiciary. Lawyers and Judges will need educating so that mediation becomes part of the culture; so that it becomes second nature to us all.”

Will mediation eventually become compulsory here, as in some US jurisdictions? We think not, or perhaps not yet, but the Directive does not preclude compulsory mediation. Indeed, it expressly contemplates that national legislation can provide for compulsory mediation (or even make a refusal to mediate subject to sanctions). Some say that compulsory mediation would amount to a denial of access to the Courts and thus a breach of Article 6 of the Human Rights Convention. But there is a world of difference between **deferring** trial or the continuation of proceedings pending mediation, and an **absolute refusal** to permit access to a Court and a compulsion to mediate, to the exclusion of judicial determination. Perhaps, instead of direct and enforceable measures, we will see (much) greater pressure applied by the Courts in EU Member States, and by our judiciary, to “encourage” parties to mediate.

The (greater) use of mediation fits well with London market initiatives in insurance and reinsurance designed to speed up and make processes more efficient, to provide better customer service and to preserve vital business relationships. In marine the Maritime Solicitors Mediation Services (www.msmsg.com) has been playing its part in this for almost five years. The use of mediation clauses in commercial contracts generally would undoubtedly facilitate greater use.

Mediation is a process of managed negotiation where the parties negotiate their own deal, but it has a timetable, a structure and dynamics which “simple” negotiation lacks. It is a process in which hard issues are confronted and difficult things are said. It is not a soft compromise, not an inevitable 50/50. It is private and confidential. It is effective in resolving intractable cases, even those involving allegations of fraud or dishonesty. It is quick and comparatively inexpensive, and can preserve not only relationships but reputations. It works; cases settle.

At the right time, it pays to talk.

(We publish an At a Glance Guide for users, Mediation FAQs (in numerous languages) and A Comparison Paper (Arbitration/Mediation) providing guidance on mediation, its use and effectiveness. These are available, at no charge, on line on our website (see Services, Insurance, ADR.)

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