International Institute of Conflict Prevention and Resolution (CPR)

Is Mediation Moving Out of the Shadows and Into the U.K. Practice Mainstream?

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Being a mediator in the United Kingdom can feel like being a homeopath. Most of the general public is oblivious to what you do, and traditional practitioners— in this case, judges and litigators—are occasionally skeptical, but people who try your treatment usually find that it works.

Mediation may not yet feel like a mainstream option, but 70% of commercial and business cases in the High Court of Justice—with a collective case value of £7.5 billion per year—are mediated. Settlement rates remain very high.

The government has temporarily stalled an extension of mediation use to the county courts. But given its staunch commitment to mediation and ADR, and in light of the raft of initiatives initiated over the past 18 months alone, it seems less a question of whether the government will revive the extension, and more a question of when and how it will do so.

Still, despite the many changes in the works, or potentially in the works, it is too soon to suggest that litigation will come to be regarded as the U.K. dispute method of last resort.

THE MEDIATION PARADOX

The mediation field in England and Wales continues to confront a perplexing paradox. Reports of impressive success rates in settling disputes appear regularly. According to the London- based Centre for Effective Dispute Resolution (best known as CEDR) 2012 audit report, 90% of commercial mediations settle. More than 70% settle either on the day or shortly after, and at a fraction of the cost that litigation or arbitration would have been likely to entail.

Yet mediation is used relatively infrequently. In fact, only 8,000 commercial and civil cases are mediated annually.

What makes the U.K. mediation situation even more puzzling is that litigation costs tend to be considerably higher than in other EU jurisdictions, and legal costs are generally awarded at trial on a "loser pays" basis, making litigation even more of a financial lottery than it is elsewhere.

A recent European study for England and Wales that compared the relative costs and time of mediation and litigation concluded that a dispute worth €200,000 takes around 333 days to resolve via the courts and costs an average of €51,000, while resolution through mediation only takes around 87 days and costs roughly €9,000. See Phillip Hesketh, "Arlene McCarthy MEP on the European Mediation Directive" (Nov. 28, 2011)(available at www.heskethmediation.com/mediation/european-mediation-directive).

The study also calculated, in percentage terms, how low success rates could be for mediations, and yet still yield time and cost savings as compared to litigation. The study predicted that, across the EU, in terms of time savings, only a 19% success rate would be needed, and, in terms of cost savings, only a 24% success rate.

CIVIL JUSTICE REFORMS

Since the 1997 introduction of mediation into the civil justice system, civil justice reforms have continually stimulated the use of mediation and other forms of ADR as a way of providing alternatives to litigation that are quicker and cost-effective for both the parties and the courts.

Mediation is now a standard step in High Court litigation. The civil procedure rules require the courts to encourage parties to use ADR, if appropriate, and require lawyers to inform clients about ADR at an early stage in proceedings. Judges also can impose cost sanctions on a party who is unwilling to mediate, but they remain relatively reluctant to do so.

Ministry of Justice Consultation Process: Even with the changes, too many cases enter the court system unnecessarily. This situation prompted the Ministry of Justice to issue a consultation paper last May proposing "the most radical overhaul of civil justice" to ensure "that mediation is at the centre of our system, not the margins."

As part of the consultation process, the MOJ considered whether mediation or ADR should be made mandatory for monetary claims under £100,000 in the county courts. In the face of strong adverse reactions from the judiciary, this proposal was speedily dropped.

Serious thought was given to the alternative of implementing an automatic referral system to require parties in such cases to consider whether mediation might be suitable for their case, without either compelling them to mediate the case or settle it through mediation. This idea follows a similar measure

successfully introduced last May in the family courts: parties to contested family disputes are required to attend mediation information and assessment sessions.

Eventually though, and somewhat disappointingly in light of the MOJ's initial pronouncements, the government decided not to introduce an automatic referral system for county court monetary claims below £100,000. It did, at least, adopt automatic referrals to mediation for cases below the small claims limit—currently £5,000, but about to be increased, initially to £10,000.

CAMS (Court of Appeal Mediation Scheme Pilot): A mediation scheme has existed since 2003 for cases on appeal from a court judgment, but the scheme has fallen into decline. The judiciary is currently piloting a new scheme, run through CEDR, to cover cases, other than family cases, of up to £100,000 in value.

Under the pilot, where a judge has given a party leave to appeal and the principal issue is contractual, the case will now automatically be referred to mediation unless the judge considers the case unsuitable for mediation. The parties will not be compelled to mediate, but where a party is unwilling to do so, the appeal judge may take that factor into account when the appeal is heard.

Government initiatives: The government also has demonstrated its strong commitment to mediation and ADR by spearheading a large group of initiatives throughout 2011 and 2012. These initiatives affect businesses, government departments and public bodies, local governments, charities, tax authorities, and employment tribunals. The government has also initiated various schemes in individual business sectors, like intellectual property.

Aside from promoting London as a worldclass commercial center for litigation and all forms of ADR, the "Dispute Resolution Commitment," signed in June 2011, has been one of the government's major initiatives.

The commitment requires all government departments and agencies to use ADR procedures wherever possible when dealing with third-party claims or before taking disputes to court. It also recommends using appropriate ADR contractual clauses in preparation for potential contractual goods and services disputes.

The commitment reinforces the government's earlier "ADR Pledge," which reportedly saved taxpayers more £360 million.

The government is currently working on extending this commitment to ADR throughout local government. The government's keenness to promote "efficiency savings" is also motivated by a dire need to cut public spending, with the Ministry of Justice alone being tasked to find more than £2.4 billion in savings by 2015.

Implementation of the EU Cross-Border Directive: These various government activities have coincided with the implementation in England and Wales (and separately in Scotland and in Northern Ireland, where slightly different laws apply) of the European Commission Cross-Border Mediation Directive of 2008.

Currently, the implementation only affects civil and commercial cross-border disputes and not civil, commercial or family cases that are purely domestic.

This limited implementation has led to various legal inconsistencies. Some rules regarding confidentiality or limitation periods now differ depending on whether a case is a purely U.K. domestic or cross-border dispute. (These rules are covered below in greater detail.)

While the influence of the EU Directive may well eventually extend into the domestic civil and commercial justice system, the government intends to undertake a domestic law review before deciding whether to introduce such changes. In the meantime, it is fair to say that the directive's implementation has been less extensive than in many other EU jurisdictions, which have extended the cross-border implementation to their own court systems in some cases.

CURRENT MEDIATION RULES AND PRACTICES

Enforceability: One major change that should boost U.K. mediation use is that, since 2011, agreements reached following a mediation can be enforced in much the same way as a judicial order, enabling parties to apply for judgment on an expedited basis if the other party breaches the settlement terms.

Mediation clauses in contracts: Such clauses are becoming more prevalent, including multitier clauses requiring engagement in mediation as a condition precedent to arbitration or litigation. Care needs to be taken when drafting these, since bare agreements to agree—or to agree to negotiate, or to settle a dispute in good faith—are generally unenforceable under English law.

If an agreement to engage in an ADR process is sufficiently identified and defined by objective criteria enabling a court to determine whether either party is in breach, however, a court will generally stay or adjourn proceedings.

An effective clause should contain formal institutional-type provisions indicating the mediation process to be followed. It should reference relevant rules, including when the process will have come to an end. And the mediation clause should clarify how a mediator is to be selected and remunerated.

Mediators' requirements and duties: While mediators do not have to be legally qualified, the profession remains heavily populated by solicitors and barristers, and particularly lawyers who had previously been litigators. Relatively few have solid transactional experience, or even a background in business.

This lack of experience is surprising considering how critical it is for a commercial mediator to help parties reach a solution, and how often, when choosing a mediator, the parties express a preference for someone with relevant specialist sector expertise.

Two other points for international practitioners to note are that, in England and Wales:

a. a mediator, unlike a judge or arbitrator, does not make a decision, finding, or formal conciliation proposal as part of a mediation, and

b. a mediator does not operate on a contingency fee basis, the logic being that the mediator's impartiality and objectivity might be compromised if the mediator has, or appears to have, a vested interest in securing a settlement.

Mediation providers are not regulated by statute and no government registration scheme exists for providers. Instead, providers are selfregulated. An estimated 6,000 mediators are registered with the Civil Mediation Council (CMC), although such registration is not mandatory, nor is it a legal requirement for a mediator to be a member of a CMC-accredited panel.

Accredited CMC providers must have a code of conduct for members to follow, no less rigorous than the 2004 European Code of Conduct for Mediators. Both providers and their members are required to carry appropriate insurance coverage.

Confidentiality: Confidentiality is regarded as key to the English mediation process. Courts are generally unwilling to pierce mediation's veil of confidentiality. Since implementing the EU Mediation Directive, however, vital distinctions have emerged between purely domestic disputes and cross-border disputes.

In domestic disputes, judges can require evidence from a mediator where they consider it to be "in the interests of justice." Allegations regarding serious misconduct, like duress or fraud, are exceptions to the rule that participation in mediation is subject to a "without prejudice" privilege (i.e., the privilege enjoyed by the parties).

In cross-border cases, however, the relevant test (i.e., as to whether a mediator can be ordered to disclose mediation evidence) is now whether it is "necessary for overriding reasons of serious public policy," which cover matters like child protection, or prevention of harm. Also, in cross-border disputes, for the "without prejudice" privilege to be waived, consent has to be obtained from all of the parties, while in purely domestic disputes it is unclear what the legal position is should one of the parties object to waiving its privilege.

Statutes of limitation: Cross-border disputes introduce the concept, recommended by Mediation Directive Article 8, that the expiration date be postponed until after the mediation has ended to ensure that parties who choose to mediate are not subsequently prevented from initiating proceedings by virtue of the expiration of limitation periods. While the precise "end date" will depend on the relevant statute in question, in principle, if a limitation period would otherwise expire after the date on which a mediation starts, the expiration will now be postponed until eight weeks after the mediation has ended.

Similar stays in limitation periods for purely domestic U.K. civil disputes have not yet been adopted, though this idea is likely to be considered as part of the government's domestic law review.

WHAT'S NEXT?

If mediation is to step out of the shadows, the general lack of awareness must be addressed. This won't be easy. This is, after all, a country where people instinctively believe the legal process to be, by definition, combative, and where leading divorce lawyers, rather than marriage guidance counselors, appear to be gaining recognition.

The mediation profession could take greater responsibility for publicizing the benefits of mediation. Clearly, mediators are hampered by the requirement to ensure that mediations, even successfully concluded mediations, remain confidential. But that restriction doesn't excuse a general reticence to discuss the topic.

Mediation may somehow enter the public consciousness through a television drama, or a celebrated case or development. In the aftermath of the U.K.'s phone-hacking scandal inquiries, for instance, the possibility has been raised of requiring the new Press Standards regulator to operate as a "Mediation Commission."

It seems more likely, though, that mediation will only become mainstream when the government introduces a system of automatic referral beyond small claims cases and requires parties in commercial cases to at least consider whether mediation or ADR may be suitable.

General education is also needed—not only for the public, but also for the legal profession and the judiciary. Lawyers need to be trained differently so that all legal professionals fully appreciate what mediation's benefits can be, and to enable them to provide proper information to prospective parties at the earliest opportunity. Also, given how few judges have ever attended a mediation, the government at least ought to ensure that judges can do so. Sadly, this seems unlikely to happen soon.

The implementation of the Mediation Directive should benefit transnational businesses, especially those based on distribution, licensing, franchising, royalty, or import/export. In the arts and entertainment industries, including film, television, music, and sport, which are all heavily dependent on international rights, a plethora of cross-border disputes appropriate for mediation is likely. Practitioners in these areas must become more familiar with mediation and its relative speed and cost-effectiveness, as compared with arbitration and litigation.

Given how successful mediations tend to be, maybe greater emphasis should be placed on explaining what it is and getting people to try it. National Mediation Week, anyone?