FEATURE

MEDIATE, DON'T LITIGATE

BY **FRASER TENNANT**

In alternative dispute resolution (ADR) circles, mediation is considered to have the edge over litigation due to the tacit understanding that there will be no dirty laundry aired for public consumption. Whatever the veracity of that may be, what is certainly the case is that mediation can be a valuable service – an opportunity to reach an amicable solution without recourse to potentially costly and lengthy litigation. Indeed, the job of the mediator is to move the party from insisting on its 'position' to focusing on its 'interest', advises the Intellectual Property Office (IPO). Mediation, the IPO reasons, can be extremely rewarding in that control is handed back to the parties, but it also has the capacity to be frustrating with a required commitment sometimes above and beyond the call of duty.

Despite this capacity to reward whilst frustrate, the adoption of mediation as an ADR mechanism has increased exponentially in recent years. According to the 2014 Centre for Effective Dispute Resolution (CEDR) Audit, around 9500 civil and commercial mediation cases take place in the UK each year, a little over 75 percent of which are settled on the day, with an additional 11 percent settled shortly thereafter.

Mediation in the US has also skyrocketed, with figures quoted by recognised ADR bodies – such as the International Institute for Conflict Prevention & Resolution (CPR) – showing that success rates

(disputes settled during or shortly after proceedings) fall, in the main, within the 80 to 90 percent range.

In the EU, the Mediation Directive has generated an 'ADR movement' as evidenced by a number of new mediation centres. Professor Giuseppe de Palo's 2014 report, 'Rebooting the Mediation Directive', shows that one country, Italy, has in excess of 200,000 mediations annually, well ahead of other EU countries which reported tens of thousands.

"Mediation is quick, confidential and risk-free," affirms Andrew Hildebrand, a leading mediator who specialises in settling UK and international business disputes. "It avoids the cost, time and stress of litigation and the risk of coming away with an unwelcome decision. Settlement terms remain confidential and can be agreed 'non-precedentially'. You can agree whatever deal suits you. Or use it to re-engineer a deal, for instance, to suit cash flow requirements. And you don't need to wait until a business relationship has been destroyed. You can use it when a dispute flares up to prevent it from escalating and to get the relationship safely back on track." Overall, at its simplest, mediation can

be described as 'rescuing' parties from litigation proceedings and, it could be argued, themselves.

The rise of mediation

The use of mediation as an alternative dispute resolution mechanism has certainly become more prevalent in business disputes over the past decade or so. Although statistics are scarce, anecdotal evidence suggests that the vast majority of cases are settled before trial and that mediated settlements are increasing in frequency.

According to Victoria A. Kummer, an arbitrator and mediator of US domestic and international business disputes, there are two main reasons why mediation has taken off in the way that it has. Firstly, counsel is now more attuned to the viability of mediation as a cost-effective and satisfying mechanism for resolving business disputes. Furthermore, they are increasingly inserting 'step clauses' into their business agreements – mandatory ADR clauses that require the parties to mediate their dispute before turning to litigation. Secondly, courts are increasingly creating mediation panels for their business

disputes, and making use of them. "As a result, parties and counsel are becoming more familiar with the process, and experiencing its benefits first hand," she observes.

Mediation: advantages vs. disadvantages

The advantages that mediation has over litigation as a dispute resolution mechanism are extensive and can be demonstrated swiftly enough. However, the process is not and should not be considered an entirely risk-free endeavour. "Mediation offers parties the opportunity to design and implement their own solution to a conflict, a solution that is bespoke to their particular needs," says Owen Bubbers, a principal resolution consultant at the TCM Group. "This in itself is empowering and demonstrates a high degree of trust that the organisation is willing to place in those employees." A resolution successfully achieved via mediation, believes Mr Bubbers, is based on an adult-adult dynamic in which the parties involved can collaborate to get what they need. In contrast, litigation is usually a zero-sum game, with imposed outcomes that are unlikely to tackle the underlying reasons for why the conflict arose in the first place.

In terms of the disadvantages of the process, mediation is not a panacea and may result in the parties designing informal agreements that significantly differ from what was originally envisaged. Mediation is a creative process, stresses Mr Bubbers, a procedure which must encompass a willingness to 'walk the talk' and lend trust that the parties concerned are the ones best placed to determine how to rebuild a fractured working relationship.

"The most immediate and obvious advantage of mediation is that the parties themselves structure any resolution — it is not left to a disinterested third party," notes Ms Kummer. "Whereas court litigation and often arbitration is a zero-sum game with only one winner and one loser, mediation typically results in an arrangement where everyone gets something. On the other hand, this 'everyone gets something' construct is a disadvantage for a party that has an unimpeachable position."

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A recent, high-profile example of the merits of negotiating or mediating a solution before a

business dispute reaches the courts is the discord between Apple and Samsung. After several years of repeatedly accusing each other of copying the appearance and functions of their smartphones and tablet devices, the dispute went to court twice (via a short-lived mediation) and ultimately resulted in a $409m win for Apple as well as huge reputational damage for both.

According to C. Edward Dobbs, a partner at Parker Hudson Rainer & Dobbs LLP, mediation induces parties to reassess the strengths and weaknesses of their positions and, with the aid of an experienced neutral, view aspects of their position through a more objective lens. Through mediation, he stresses, the parties involved can fashion their own result, often involving terms that cannot be imposed upon or awarded to either party by a court. The terms of mediated settlements can be confidential, except in those instances where judicial approval of the settlement is legally required, as would be the case in most bankruptcy related settlements or settlements of class actions. "Mediated settlements enable the parties to control their litigation costs, reduce the risks and uncertainty of an adverse judgment, and repair and preserve ongoing business relationships. I can think of no disadvantages for a business in engaging in mediation, other than a potential waste of time if the mediated dispute is one that is a poor candidate for settlement," he says.

Protecting the tenets of mediation

With mediation becoming much more complex, international and specialised, exponents of the art are working hard to protect the key tenets of the process. "Some of the key principles of mediation include confidentiality of all mediation communications, the voluntariness of the process, and the right of party self-determination," highlights Mr Dobbs. "These principles should pervade all mediations conducted in the United States, in many instances, are required by local court rules or procedures and are incorporated into the Uniform Mediation Act. Despite the size or complexity of mediated disputes, these principles are rarely compromised."

For all the increasing complexity, mediation is still about defusing the situation and turning the tide. Or to put it another way, it remains a matter of moving parties from arguing about 'how they got there' to 'where they go from here'. "Understanding the business implications and the legal issues is vital. But so is having the ability to separate the people from the problems and take the parties with you, while moving the prospect of settling from the unthinkable to the inevitable," says Mr Hildebrand.

Developments and trends

With mediation growing in popularity as a business dispute resolution tool, no one can truly say for sure how the landscape will develop or even if it will continue to grow as rapidly in future. What can

be said, however, is that the mediation process is less popular in a number of Central and Eastern European markets, with Hungary and several other countries bucking the trend due to the passing of legislation to cap the costs of litigation.

Ms Kummer expects the trend toward mediation to increase in the coming years, as more parties, counsel and judges become accustomed to it and experience its rewards. "The crowded court dockets, expense of litigation and arbitration, and the motivation of businesses in a tight market to resolve disputes quickly, all factor into an increasing use of mediation in the business arena," she says.

As far as mediation in the UK is concerned, Mr Hildebrand expects to see two key developments. The first is an exponential growth in the number of businesses using mediation, driven initially by the lure of potential cost savings. However, as 'familiarity breeds attempt', this will be used more often to prevent dispute escalation, leaving litigation as a last resort. The second is that the courts will continue to manoeuvre parties towards mediation. With Whitehall needing to plan for 40 percent cuts, some mandatory form of the procedure would come as no surprise.

However, Mr Dobbs notes the tendency for many litigators to bemoan what they perceive to be the adverse consequences of increased settlement rates (attributed in part to the growing use of mediation) and a resulting reduction in civil trials. This adversity includes the loss of jury trial experience for litigation attorneys, the absence of public trials involving issues of public significance, and a reduction in published post-trial appellate opinions to provide guidance on legal issues to the public and the bar. "An American Bar Association Litigation Section study has reported that, despite a five-fold increase in civil filings in federal courts between 1962 and 2002, the number of civil trials has actually declined from approximately 5800 to 4570," points out Mr Dobbs.

For those plying their trade within the ADR arena, mediation is much more than just the flavour of the month. Rather, it is an increasingly prevalent process for addressing often difficult and sensitive matters in a structured and composed manner. "In light of the increased number of civil lawsuits filed, the ever growing size and complexity of many business disputes, and the trend toward internationalisation of disputes as commerce becomes increasingly internationalised, mediated settlements will continue to be the preferred route for resolving conflicts," maintains Mr Dobbs.

A demonstrably multi-faceted and confidential process in which a mutually-selected, impartial mediator helps parties involved in a dispute to reach an amicable outcome, mediation is now recognised as having the broadest application and possessing the greatest potential for resolving disputes and reconciling conflicts – truly, an integral component of the ADR repertoire. CD