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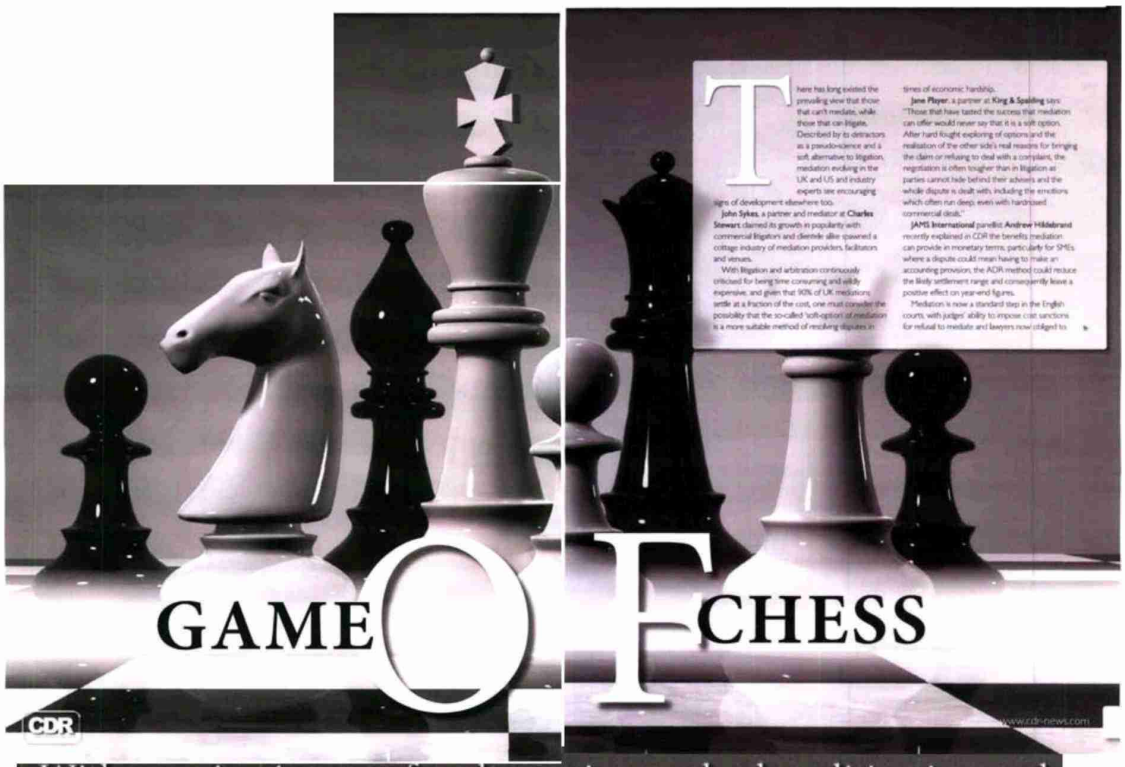

With growing interest for alternative methods to litigation and with legislative developments in mediation enabling easier access to dispute resolution, the so-called 'soft-option' of the ADR movement is gaining steady popularity. **Sarah Downey** hears from practitioners about the latest thinking on strategies and tactics

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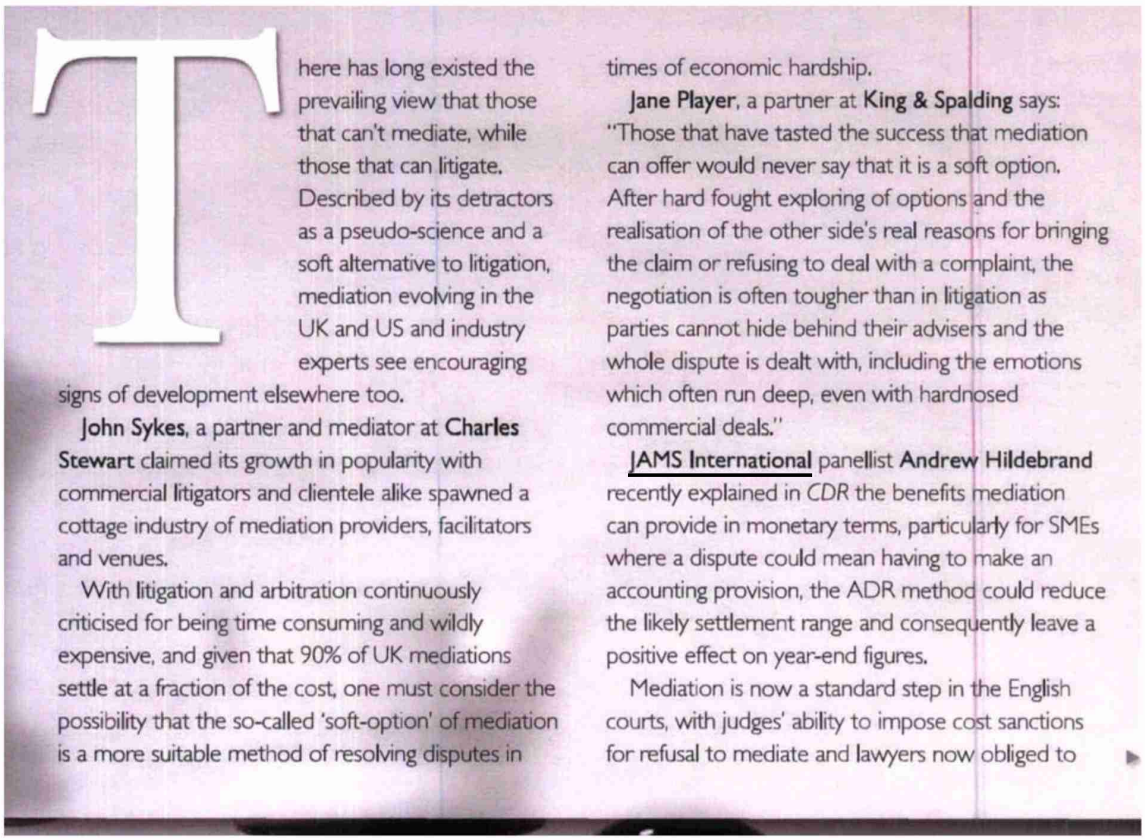

There has long existed the prevailing view that those that can't mediate, while those that can litigate. Described by its detractors as a pseudo-science and a soft alternative to litigation, mediation evolving in the UK and US and industry experts see encouraging signs of development elsewhere too.

John Sykes, a partner and mediator at **Charles Stewart** claimed its growth in popularity with commercial litigators and clientele alike spawned a cottage industry of mediation providers, facilitators and venues.

With litigation and arbitration continuously criticised for being time consuming and wildly expensive, and given that 90% of UK mediations settle at a fraction of the cost, one must consider the possibility that the so-called 'soft-option' of mediation is a more suitable method of resolving disputes in times of economic hardship.

Jane Player, a partner at **King & Spalding** says: "Those that have tasted the success that mediation can offer would never say that it is a soft option. After hard fought exploring of options and the realisation of the other side's real reasons for bringing the claim or refusing to deal with a complaint, the negotiation is often tougher than in litigation as parties cannot hide behind their advisers and the whole dispute is dealt with, including the emotions which often run deep, even with hardnosed commercial deals."

JAMS International panellist **Andrew Hildebrand** recently explained in *CDR* the benefits mediation can provide in monetary terms, particularly for SMEs where a dispute could mean having to make an accounting provision, the ADR method could reduce the likely settlement range and consequently leave a positive effect on year-end figures.

Mediation is now a standard step in the English courts, with judges' ability to impose cost sanctions for refusal to mediate and lawyers now obliged to

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inform clients about ADR. In some US states, meanwhile, mediation is compulsory and well-used. So in terms of giving a reasonable of certainty, speed and flexibility, not so mention simple relief from litigation fatigue, why wouldn't one choose to mediate?

Many in Europe however still believe otherwise. Legislatively, mediation has been slow to develop there, even when compulsory under local legislation as seen in Germany, Italy and the Czech Republic. In the former, the new Mediation Code went back and forth between the Bundestag's two chambers for nearly eighteen months before finally entering into force on 22 July, while the Czech's Mediation Directive – required to be implemented in April 2011 – finally became law in September 2012.

Both sets of legislation relate to the enforceability of agreements as well as ensuring the credibility of certified mediators. Nevertheless **Peter Bert**, a dispute resolution partner in **Taylor Wessing's** Frankfurt office, told *CDR* in August that "litigation in [Germany] is far cheaper than the UK or US, which of course impacts on the use of mediation."

Even worse, the appetite for mediation in Austria is low due to its court system already being a model of cost-efficiency, with fees at 1.2% of the figure in dispute. Mediation is widely seen there by commercial entities and their advisors as a soft option in comparison to the adversarial style they are used to.

Player however says that often the perception of mediation as a less rocky road is far from the reality. "Clients often comment that at the end they feel as if they have been through the wringer," she points out. "The often quoted outcome of 'win-win' in mediation is far from the truth. It is more a sharing of pain to be rid of a festering dispute that is hurting the business in many more ways than money, in terms of management time and disruption to the business. The parties in mediation remain in control of the dispute and so the chosen and agreed solution, but that comes at a cost in terms of effort and pain."

It's not all negative though, Player adds. "The result though is often a more creative thought process and a better crafted settlement for the business, and therefore the result is better received the next day when the conclusion reached is reviewed by those not there and compared by the business as a whole against the alternatives it was facing."

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In the zone

Other reasons to mediate include long-standing aspects of negotiation that experts in the field use to attain settlement quickly while also avoiding the pain associated with litigious proceedings. Mediation is, according to those that practice it, not perceived as weakness. JAMS mediator **Deborah David** notes the US position: "A combination of legislative, judicial and client pressure has made mediation the norm in the Federal courts and most state courts. In California, for instance, the courts will not assign a trial date until a mediation has occurred."

The creativity Player emphasises in crafting a settlement along with increased respect for the ADR movement can also be found in the form of a notable technique used predominantly by US mediators and some in the UK: bracketing, a term coined in the US and what David simply describes as "re-bracketing the numbers" in order to reach a settlement.

In order to avoid the lengthy process where one party starts a mediation at say USD 100,000 and the other is at USD 1 million, the difference in positions can be "so large that it is difficult to see how they might bridge this," Player explains. "So you approach each party and suggest that if they move up significantly you will try to get the other to decrease their expectations in a similarly significant way."

Player notes the issue of 'salami slicing' where incremental increases or

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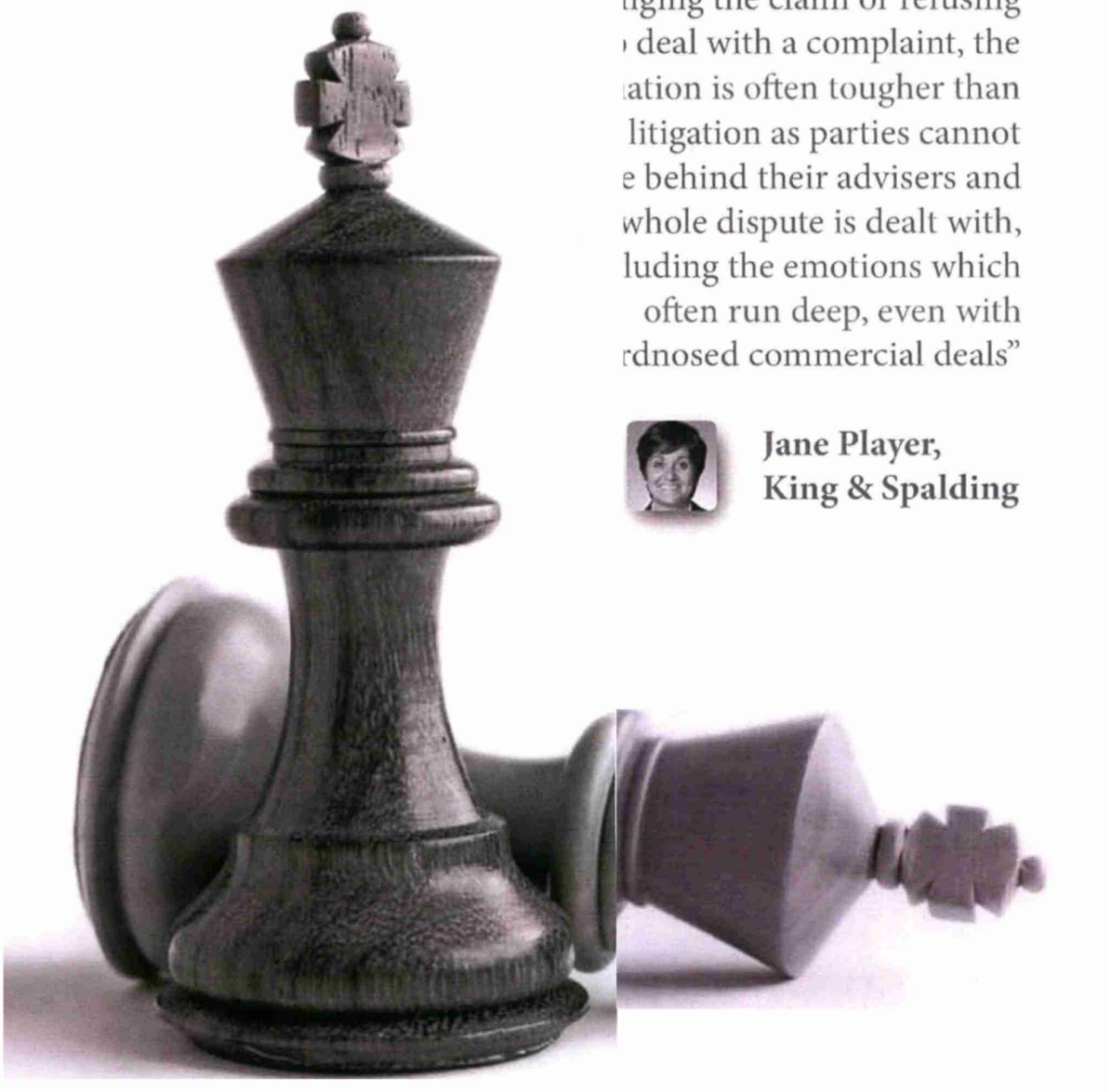

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decreases made in offers by parties equates to an unrealistic and slower process thus bringing in bracketing to shift the dispute to a new phase in mediation.

The widely known concept is an attempt to incentivise parties to move their respective settlement sums towards each other when tensions are high, parties are at a standstill and the ball needs to get rolling again. A psychological analysis by David provides some insight into understanding the technique: "If you have two people negotiating in zones of relative insult, you're never going to get a resolution. The measure of real movement in any negotiation is the rate at which the parties get into a reasonable, realistic zone and how they progress within that zone."

"The bracketing discussion is a negotiation of what that zone might be; it is intended to re-anchor the bargaining zone."

Bracketing, in what David describes as advancing productive discussion, is however a technique parties do not always respond to, as "no one likes to appear weak by agreeing to re-bracket the numbers."

She explains: "A ridiculously high offer from the claimant invites an equally ridiculous low offer from the defence. Participants justify these positions by their desire to communicate firm resolve and avoid the appearance of weakness, but other, more effective means of sending that message exist. The amount of movement in the offers as the mediation unfolds communicates the degree to which a party is committed to a position without derailing the mediation at the outset."

Phillip Howell-Richardson, a leading UK mediator, suggests approaching the technique with care: "I would be very cautious because the mediator could easily be perceived as a judge. One or more of the parties may say 'that's where he's coming from.' I have used the option but personally I would see deadlock as just another stage to use whatever is necessary to move forward."

Nevertheless, the strategy proposed in order to achieve effective communication when parties hit a wall does not generally apply to major international or high-profile disputes, or even those where the monetary value at stake is extremely costly – thus the weakness associated with mediation.

David says: "No one wants to appear that they're caving. No one wants to appear afraid of trial because they perceive that will affect their negotiating position – and they're no doubt right."

She concludes however that "as far as the parties are concerned, trials come with large monetary and emotional price tags; they are unpredictable, they offer limited remedies, and they are not an entirely effective way of resolving disputes – particularly for the losing party."

Scoping the landscape

So in terms of strategy, mediation can be more tempting and appropriate for resolving disputes and certainly contribute to reducing the backlog of litigious cases while rendering an effective settlement speedily through the art of tactful negotiation styles – bracketing being one such feature.

Perhaps due to an increasing recognition of these potential benefits, parts of the world not normally known for their use of mediation are showing signs of greater adoption. A delegation from the **Centre for Effective Dispute Resolution** (CEDR) has begun operations in Pakistan to establish a commercial mediation centre for local lawyers and businessmen as part of the **International Finance Corporation's** two-year Middle East and North Africa program that targeted Pakistan as a potential jurisdiction for enhanced ADR services.

In Ireland, meanwhile, CEDR has developed a model for ADR contract clauses in which a three-tiered approach to dispute avoidance or resolution can be utilised by contracting parties at no expense.

Focusing on the deal

Howell-Richardson goes back to basics on why mediation can be successful and his preference for it as an alternative to litigation, noting tactfully: "When you start off in the mediation world, it's important to get people away from rigid positional bargaining but the more you do, the more you realise, it's about people's attitude to disputes, how they approach it and what they want and what they need. Mediation opens up the possibilities of settlement and enables the parties in negotiation to really focus on getting a deal."

He adds: "Self-aware negotiators by and large know what's possible to be achieved. It's not just splitting down the middle. It's the informed clients and lawyers negotiating an effective deal they can live with." ■

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