HOW MEDIATION HAS DEVELOPED IN THE UK, MORE PARTICULARLY ENGLAND, WITHOUT BEING COURT-ANNEXED AND IN A TIME OF AUSTERITY.

Commercial mediation services started in England and Wales in the early 1990s, and since then the use of mediation has grown to the extent that the recent Centre for Effective Dispute Resolution (CEDR) mediator survey established that there were over 10 000 commercial mediations in 2015 alone. To this number must be added the many thousands of small claims mediations through the Courts and Tribunal Service's own Small Claim Mediation Service, and mediation by Advisory, Conciliation and Arbitration Service of employment disputes on their way to Employment Tribunals.

So how has mediation taken root? It has not been through making mediation mandatory, or by having court-annexed or court administered mediation, nor has it been by spending a lot of money. The uptake of mediation in England was slow until shortly after 1999, when changes were made to civil procedure rules and pre-action protocols to strongly encourage the use of mediation. Access to mediation has become increasingly easier through the use of technology, private mediator providers and public-private partnerships. Finally, and perhaps most importantly, the approach of Government, business and lawyers to dispute resolution has started to change.

Changes to the civil procedure rules and pre-action protocols

In 2014 my colleague Tony Allen presented a paper at the South African Association of Mediators' entitled *"Efficiency in Civil Justice and the Right Place for Mediation"*. In that paper he described what an unsatisfactory civil justice system looks like, with reference to the civil justice system in England thirty years ago. He then proceeded to tell us what had been done to achieve greater efficiency in the civil justice system, including the use of mediation. Tony's paper is available on the Conflict Dynamics website. I am drawing on aspects of his paper in this paper.

The most significant change to civil justice in England occurred following the *Access to Justice* reports written by Lord Woolf in 1998, with the introduction of the new Civil Procedure Rules (CPR). These were bolstered more recently by the *Jackson Costs Review Recommendations,* embodied in the Civil Procedure (Amendment) Rules 2013.

The CPR describes the overriding objective of the civil justice system as "enabling the courts to deal with cases justly and at proportionate cost". By this is meant:

a. Ensuring that the parties are on an equal footing;
b. Saving expense;
c. Dealing with cases in ways which are proportionate to the amount involved, the importance, complexity and the financial position of each party;
d. Ensuring that it is dealt with expeditiously and fairly; and
e. Allotting to it an appropriate share of the Court's resources;
f. Enforcing compliance with rules, practice directions and orders.

Responsibility for ensuring delivery of these objectives rests both with the Court and the parties together with their representatives.

The courts have exercised these responsibilities in a number of key ways. Firstly, by active case management, in particular by

- Transferring case management and thus responsibility for the speed at which litigation is conducted, from lawyers to judges;
- Requiring legal costs recoverable as between parties, depending on outcome, to be proportionate to the issues at stake;
- Making the Court's own resources a proper consideration in case management, thereby limiting the time spent on vexatious claims;
- Encouraging judges to undertake a very active and demanding role in managing the way in which an action is to be heard, in consultation with lawyers who are themselves bound by the same objectives as officers of the Court;
- Encouraging a cooperative atmosphere in litigation, including encouraging and facilitating settlements and the use of alternative dispute resolution;
- Greater enforcement of compliance rules, practice directions and orders by judges in their case management role.

Some mediation occurs because courts make an 'ADR Order' or actively give directions to parties, such as directing that:

> "At all stages the parties must consider settling this litigation by any means of ADR (including [round table conferences, early neutral evaluation] mediation [and arbitration]) and in any event no later than [date] : any party not engaging in any such means proposed by another must serve a witness statement giving reasons within 21 days of that proposal; such witness statement must not be shown to the judge until questions of costs arise."

While not amounting to mandating mediation, such interventions amount to a robust judicial recommendation to mediate, which, if ignored, can of itself justify a costs sanction even against a winning party. Judges therefore do not wait for parties or their representatives to suggest mediation. Instead, they might propose it and matters are often stayed for mediation to take place.

In addition, the CPR has:

- granted new discretions to Judges as to the award of costs between litigants; and
- given to Judges the power to assess and penalise unreasonable litigation conduct by a party even if they are the winner of the litigation, and whether or not the unreasonable conduct occurred before or after the issue of proceedings.

This means that a party who conducted its claim in an unreasonable way, whether before or after issue of proceedings, might well not get all the costs they would have expected to be awarded even if they win a case. A party who fails to respond to an offer to mediate, fails to agree to a request to mediate or conducts itself unreasonably in the mediation process may attract costs sanctions.

In line with the overarching objectives of the civil justice system, courts expect parties to co-operate over the possibility of using settlement processes as well as over agreeing court directions, only turning to the court to resolve serious differences of opinion.

The CPR has had a profound effect on the conduct of litigation in England and has laid the foundation for the use of mediation in the settlement of commercial disputes. Mediation has not simply been bolted onto the civil justice system as a nice to have. Instead, it is an integral aspect of the delivery of justice. As Tony Allen says in his paper, '(M)ediation truly

operates in the shadow of the law, in a complementary and symbiotic relationship with the civil courts'.

Access to mediation has become easier

For a while in the early 2000s larger English County Courts set up mediation schemes, usually using local panels of mediators or one of the larger providers. Typically, mediations took place on court premises outside sitting hours. However, even the relatively low cost administration of these arrangements proved too much for overburdened and under-trained court staff, and the National Mediation Helpline (NMH) emerged, administered by a private provider who tendered for the contract. The NMH promoted mediation services around the country and parties could choose mediators in their region. This also, however, ran into funding difficulties, and closed. So court-annexed mediation in England has not been successful because even in a well-resourced economy like the UK funding is very limited.

These days, when an individual or organisation, whether represented or not, contemplates initiating legal action, one of the first suggestions it encounters on Government websites and directions questionnaires, is that it consider mediation. If parties are exploring the Ministry of Justice website a page referring them to the on-line directory of mediator providers will soon appear. Providers are listed by region and each is registered and regulated by the Civil Mediation Council (the equivalent of DiSAC). The site explains that 'this service provides members of the public and businesses with a simple low-cost method of resolving a wide range of civil disputes out of court.' Fees are set based on the total value of the dispute (claim plus any counter-claim), and the time the mediation is expected to take.

There have also been a number of important public – private partnerships to promote the use of mediation in the civil justice system and in the economy more generally.

In 2003 the Court of Appeal initiated a mediation scheme, which has since developed into a larger pilot project managed by CEDR. The scheme was designed to encourage the use of mediation in the Court of Appeal, the more recent pilot project applies to eligible cases for which permission to appeal is sought and obtained (or adjourned) via the Court of Appeal. Eligible cases are:

- All contractual claims up to a value of £250,000
- Personal injury claims up to the value of £250,000
- Inheritance claims where the estate value is below £500,000
- Boundary disputes of any value

Unless a judge exceptionally directs otherwise, the parties in such cases will be notified by the Court that case papers have been automatically referred to CEDR for the appointment of a mediator. Mediation under the pilot is voluntary but parties may be required to justify to the Court of Appeal their decision not to attempt mediation at subsequent court hearings.

Lord Justice Rix recently said of the scheme:

> *"Judges regularly see cases in the Court of Appeal which could easily have been resolved at an earlier stage though the use of mediation. Parties may not be poles apart, but litigation can have a corrosive effect for which mediation can provide a balm. Mediation in the Court of Appeal can save a great deal of money and anxiety".*

In 2014 the NHS Litigation Authority (NHSLA) announced the launch of a pilot scheme to provide mediation as a means of resolving patient disputes. The pilot was again developed in partnership with CEDR. The service has been designed to support patients, families and NHS staff to work together to resolve claims where the patients and their families believe that NHS care was below standard. The NHSLA offers mediation under the pilot for all suitable claims involving a fatality (infant or elderly) or the care of the elderly.

Chief Executive of the NHSLA at the time, Catherine Dixon, said:

> *"Our new mediation service has been designed to support patients, families and NHS staff to work together to resolve claims for below standard NHS care. We hope that it will help patients, their families and NHS staff resolve concerns quickly and cost effectively whilst also enabling all the parties to meet to have their say without the need to go to court. We are excited about this important new service and hope that it be embraced by the NHS, patients and their families as a truly effective way of resolving claims in the NHS."*

Besides CEDR there are a number of other private mediator providers, many of which provide mediators to local government and other public sector organisations as well as to the private sector.

The delivery of mediation services in England is thus almost entirely in the hands of private providers.

Changes in attitude

In addition to these changes government, business and the legal profession have started to change their approach to dispute resolution.

This was first signalled in 2001 when Government made an Alternative Dispute Resolution Pledge. The concept of an "ADR Pledge" has been known for some time. Most often it is a public statement in which those who sign it (corporations, law firms, governmental agencies etc.) declare to adopt a systemic approach to dispute resolution with more focus on mediation and ADR.

The 2001 ADR Pledge in the UK was strengthened in 2011 when Government signed the Dispute Resolution Commitment, requiring its departments to consider mediation, arbitration and conciliation instead of litigation. The move was part of Government's drive to use better, quicker and more efficient ways of resolving legal disputes.

Then in 2014 at the Civil Mediation Council conference, Lord Faulks, the then Minister of State for Justice, with responsibility for mediation in civil justice, reviewing how Government and the mediation community can best work together, said:

> *"We all accept, I think, that mediation is not a panacea. Government will always have a role in providing a court system to enable people to access justice. But the success of mediation and other dispute resolution methods in keeping unnecessary litigation out of the courts is a key cornerstone of an efficient and cost effective justice system."*

He made reference to a number of Government initiatives, including those of the Department for Business, Innovation and Skills, who are reviewing the potential for innovation in mediation via online dispute resolution. He also encouraged the mediation community to

work collaboratively to continue to engage with Government on standards of training, accreditation of mediators, codes of conduct and so forth.

Many law firms and large companies have also signed ADR pledges, including the 21st Century Corporate ADR Pledge, drawn up by CEDR and the International Institute for Conflict Prevention and Resolution (CPR). Pledge signatories agree to commit their resources to managing and resolving disputes through negotiation, mediation and other ADR processes, with a view to establishing and practicing 'global, sustainable dispute management and resolution processes'.

Mention needs to be made about how mediation clauses are these days increasingly found in contracts. Modern risk avoidance and preventive lawyering practices dictate the need for dispute resolution clauses that embrace negotiation and mediation prior to and during any legal action. The International Mediation Institute (IMI) website sets out many good precedents which can be included in a variety of different types of contracts.

Finally, a great deal of training has taken place in the UK that has raised the level of awareness of mediation and changed attitudes and mindsets. Not only have many mediators from a very wide range of organizations and backgrounds been trained, but many lawyers and advocates have also been trained in an appreciation of mediation and how to make the best use of both the process and the associated skills and techniques in their work with clients.

Conclusion

I set out to share with you how mediation has developed in the UK – and in England specifically - without being court annexed and in times of austerity. I have described how Government and the judiciary have used mediation to achieve the overriding objective of the civil justice system of "enabling the courts to deal with cases justly and at proportionate cost". I have also considered what business and mediator provider organizations have done to support these initiatives. Of course with more resources more can be done, but in the UK we have learned that you can do much with limited resources to achieve these noble goals and that mediation can assist enormously in the process.

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