



Mediation: making a difference?

Diana Bentley

The profile of mediation as a means of dispute resolution has grown steadily in the last decade. But how have firms and clients really taken to it?

When the London-based Centre for Effective Dispute Resolution (CEDR) surveyed the top 30 law firms of England and Wales three years ago it found that 75 per cent of them had rebranded their litigation departments as 'dispute resolution' departments. 'It's a sign that they're staying abreast of the changing landscape', says CEDR's chief executive, Dr Karl Mackie. The altered terrain includes a hefty increase in mediation volumes too as CEDR's most recent audit shows that mediation has grown 30 per cent over the last three years. Such is the rising popularity of mediation that those who are not taken with its attributes are in increasing danger of being out of step with the times.

A sea change

Several factors have driven the sea change in attitudes to mediation. Changes to court rules, for one, have been transforming. 'In England's Commercial Court, parties must attempt mediation before proceeding to court, so people are getting used to it. About 20 per cent of mediations here now come via court schemes', Mackie comments. In the United States and elsewhere, too, court rules now direct parties to early pre-trial evaluations and mediation.

Alongside the courts, organisations such as CEDR and the New York-based International Institute for Conflict Prevention & Resolution (CPR) have worked hard to promote mediation. Then there are the clients themselves who are increasingly wary of litigation and who are

drawn to mediation's benefits. 'We've seen a huge change in client attitudes to mediation', reports Alexander Oddy, head of the alternative dispute resolution (ADR) practice of the London-based international firm, Herbert Smith. 'Ten years ago, many didn't know what mediation was. Now, they know it's a process that can save time and money, and preserve their business relationships.'

In-house counsel attest to the change. International construction giant, Balfour Beatty, is a keen exponent of mediation, reports Frank McCormack, its head of legal services. 'About 70 to 80 per cent of our work comes from repeat business so we want to avoid the waste of dealing with litigation and the acrimony it involves', he says. 'Litigation is long-winded, hugely expensive and frustrating. In the end, everyone is disturbed by it and it's not a great way to do business. The modern business model is also less contentious', he insists. 'We've found mediation very successful for large projects.'

Progressive firms

But progressively minded firms too have helped refashion the ADR culture. Firms keen to become known for solving disputes effectively see mediation as a crucial part of their practice. 'Mediation can save clients untold money and do them a real service', says Mitch Lathrop, a partner of US-based, international firm Duane Morris. 'If you help clients successfully mediate disputes, it helps cement your relationship with them.' Herbert Smith's Alexander Oddy

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agrees. 'We actively promoted mediation for a long time. Happy clients and good outcomes are good for our practice – they ensure repeat business and referrals.' The firm keeps tallies on how mediators perform and monitors trends in the process to aid its ADR practice.

Smaller firms have embraced mediation too. John Abbott, head of litigation of the eight-partner City of London firm, Silverman Sherliker, says: 'We're very keen on mediation as a cost-effective, time-efficient means of dispute resolution for clients.' Lawyers, he points out, are duty bound to raise it and clients can complain later if it hasn't been discussed seriously. 'More clients are now aware of mediation and less suspicious of it. They've often been scared by litigation and see mediation as a part of their dispute resolution strategy. They can come out of mediation with more innovative solutions than judges can provide, including repairing the relationship with the other side', says Abbott.

A robust approach

Successful mediators come from different backgrounds – from attorneys to former judges, surveyors and engineers. Since they represent disputing parties, many private practitioners are not mediators themselves but rather find mediators for their warring clients. Some, however, act as mediators for others, particularly if they have a speciality such as patent or insurance law and some, like former White & Case partner Jon Lang (see 'Profile') opt to become full-time mediators – although combining work as a mediator and a role in a firm may be difficult to juggle. Lawyers who become full-time mediators, however, appear to relish their role. Dennis Muirhead, a commercial dispute mediator in London with ADR Chambers, was formerly a partner with London firm Simons Muirhead & Burton. 'Mediation works by not applying the law', Muirhead says. 'Mediators don't decide anything – they help bring parties together and see what's preventing a settlement of their dispute. It's more interesting and freewheeling than being a magistrate or judge and it's a useful role to play.'

With mediation rates running – in England and Wales at least – at about £300 to £500 an hour, it's economical compared with litigation and is time efficient. 'In many of our mediations we get a result in one to three days', reports Frank McCormack of Balfour Beatty. 'If many parties are involved they could last a little longer but even if they are not completed swiftly they can be cathartic', he says.

But does all this mean that lawyers have little to do in mediations? Apparently not.

Although companies such as Balfour Beatty conduct mediations themselves, many use law firms when the disputes are complex or to alleviate time pressures. 'It's not like the slow burn of litigation but intensive preparation is still needed for the mediation of large cases', says Mackie. Alexander Oddy too dismisses the concern that mediation will mean that firms lose valuable litigation work. 'That point of view is a constant refrain', says Oddy. 'Some firms may even still view it that way. We believe that in championing mediation we're acting in the client's best interest. Using mediation is always the client's decision anyway and we still have big litigation matters as some organisations have large, intractable problems.'

There is also much more to mediation for the lawyers of clients undergoing the process than is imagined. 'The nature of the work is very different to litigation', Oddy remarks. 'Mediation isn't based on rights and wrongs but on common motivators and understanding broader interests. You must ensure that clients are engaged and prepared. We work hard to educate clients and establish a good rapport with mediators who must be properly equipped to do the mediation and know the issues involved and how the parties perceive them.'

Varied commitment

Firms still vary in their commitment to mediation and their knowledge of it however, according to Mackie, and surveys conducted by Herbert Smith and also Grant Thornton's Forensic and Investigation Services confirm his views. A range of FTSE 100 companies were canvassed by Herbert Smith on their use of, and attitudes to, mediation. While some companies reported that they'd had good guidance on mediation from their law firms, others felt they'd not been pushed hard enough, early enough. Oddy says: 'The idea that to offer or accept mediation indicates weakness doesn't hold much water now. It's not so much a debate on whether to mediate, but when it's best to. In most sophisticated organisations, they're constantly pushing it to lawyers.' Grant Thornton's research provided similar results revealing that clients are increasingly wanting

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advice on ADR. Though many firms claimed that they did their best to suggest ADR to clients, in-house counsel rated their efforts less positively.

Duane Morris's Mitch Lathrop confirms too that although mediation has gained much in popularity and credibility in the last decade in the United States, some lawyers are still fighters and want to litigate. 'They may think, "I'm a trial lawyer and I've got a great case here".' But such views often run counter to their ethical obligations. 'In persuading clients to try mediation you're doing what you should be doing', he insists. But firms too may have other reasons to take a greater interest in mediation.

Mediation is not always embraced by some kinds of organisations either. 'Mediation isn't so well used in the civil service either in the US or in the UK, although there's a desire to avoid expensive litigation', reports McCormack. 'Some government lawyers are reluctant to recognise contractors' entitlements without going through a formal process like arbitration or court proceedings, although now in the US, government bodies will accept properly managed mediation as a proper outcome. Here, not enough government lawyers are buying into it.'

In continental Europe too, commentators say, mediation is lesser known, often because the conditions that prompted its acceptance elsewhere are lacking. Oddy remarks: 'Litigation may not be as expensive in some civil law countries although the length of court cases in places like Italy can be a spur to mediation.' But the Netherlands is now embracing mediation and Germany too. Dr Siegfried Elsing, Chair of the IBA's Mediation Committee and a partner of the Düsseldorf-based German-wide firm Hölter & Elsing says: 'Mediation in Germany isn't as common as it is in places like the US, the UK and India but it's growing in importance here. German courts are quite efficient and under the Civil Code, judges must try to find ways to settle disputes so some sceptics say you don't need mediation. But you don't know when judges will take the initiative and litigation can still

be quite expensive. Larger companies are now interested in mediation and some have made corporate pledges to use it.'

Greater involvement

Anyone wanting to get more involved in mediation should meet others who champion the process and undertake training, Oddy insists. 'You have to understand the process to help persuade clients to do it', he says. 'Building a good mediation team is a long-term commitment. We've upgraded our internal training in the last few years. You also need someone in your firm to be the ADR "champion".'

Oddy's firm has produced an ADR toolkit based on its research with leading in-house lawyers and for clients wanting to embed ADR into their organisations. 'What's important is the attitudes and skills of the in-house legal team combined with the organisation's culture. Even if they think mediation is great, in-house lawyers need the ability to implement cultural change', says Oddy. 'But these ideas can be used in law firms too.' Oddy predicts that there will be greater international awareness and acceptance of mediation in time. 'Organisations in countries where it is little known will learn more about it through their trading partners', he comments. ☉

Further information

IBA Mediation Committee
www.ibanet.org/legalpractice/Mediation.cfm