



Putting mediation on the global platform

The International Bar Association is launching a new mediation committee from the 1st January 2005. Jon Lang, solicitor, mediator and publications director for the committee talks to Grania Langdon-Down about its aim...

International Bar Association is setting up a new mediation committee from 1 January to help contribute to improved practices and ethical standards. Solicitor and mediator Jon Lang, publications director for the committee, says the move has been prompted by the growth internationally in the use of mediation, which can now justify its place as a mainstream dispute resolution technique alongside litigation and arbitration.

The committee has been spun out of the IBA's arbitration and litigation committees and will be chaired by Washington DC-based lawyer John Townsend, of US law firm Hughes Hubbard & Reed. Its brief is to raise the profile of mediation among the international legal community and highlight related legal developments and problems.

Lang, a dispute resolution partner at White & Case in London, specialises in contentious intellectual property and technology work and regularly sits as a mediator. He says: "Until relatively recently the practice of mediation was often met with a degree of scepticism amongst legal practitioners. But things have changed. We have new procedural rules encouraging mediation but probably the single biggest factor in the rapid growth of mediation is the simple fact that clients like the process; its less expensive than most other forms of dispute resolution and it works. Indeed it is now being used in some of the very biggest commercial disputes with roughly 80% settling as a result. The growth in mediation is one of the reasons why High Court claims have dropped to roughly 20 per cent of the number issued five years ago."

He points to two major film finance disputes where the trials were expected to last between 20 and 30 weeks each and run up millions of pounds in legal fees but which settled last month. Lang says: "You have to get the timing right with mediation. Too soon and it might not work because there is a nervousness on the part of lawyers to support any settlement if they don't really feel they have a grasp of the case and aren't sure if there is a smoking gun still to be found. It is better to run with it for a while before going to mediation so clients and their lawyers better understand their case, and, most importantly, the risks involved. The parties are then better placed to make the decision whether to 'buy' certainty (ie that things won't go wrong at trial) by agreeing commercial terms."

He says judicial attitudes towards mediation are still very mixed. "Some think it is a waste of time but the tide is changing. The Court of Appeal decision in *Halsey v Milton Keynes General NHS Trust* and *Steel v Joy and Another* (CA) BLD

1205042053that mediation was to be encouraged but not made compulsory has had a significant effect. The Court took the view that making mediation compulsory could breach a person's Human Rights Convention Article 6 right to a fair trial. The Court, however, made it clear that there was a duty on every lawyer to advise clients on mediation. Another important feature of the judgment is that if the winning side had refused to mediate, the onus is on the losing side to prove that the refusniks had acted unreasonably if they are to avoid paying the winner's costs.

"I think the Court made the right decision not to make mediation compulsory because people react badly if they are compelled to do something. The Government is also strongly supportive of mediation. The Department of Constitutional Affairs said in November 2003 that they planned to have mediation schemes in 40 courts around the country. We are not there yet but there are schemes in a number of county courts, including an innovative pilot scheme in the Central London County Court, the thrust of which is that most cases should go to mediation unless there is a good reason why not. There is also a successful scheme in the Court of Appeal."

He says Europe is taking a twin track approach to mediation with a proposed directive aimed at establishing some harmony between member states on issues such as confidentiality, limitation periods and enforceability of settlement agreements, and a voluntary code of conduct to ensure independence, neutrality and fairness of the process.

Lang says: "There is still some ignorance about mediation but important decisions such as Halsey have raised its profile. It is also increasingly being used in fields other than commercial disputes - in restorative justice where victim/offender mediation is gaining favour among criminal judges, in neighbourhood and educational disputes." (24/12/04)

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