WHITE & CASE

Sweet talk

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Should warring parties be forced to mediate?

Jon Lang investigates

THE GROWTH of mediation as a dispute resolution mechanism has gathered pace in recent years. There are several reasons for this: recent changes to the Civil Procedure Rules (CPR); judges' increasing intolerance to parties who, in their view, wrongly turn down a proposal to mediate (and the judges' willingness to penalise them in costs); and the parties themselves becoming more aware of the benefits of mediation.

For a variety of entities, however, from multinationals to Government departments, there is nothing 'alternative' about the process. Mediation is regarded as a mainstream dispute resolution technique. And given the unpredictability, cost and duration of litigation, it is something to be thought about sooner rather than later.

Further interest in the process is likely to be generated by the Department for Constitutional Affairs. It has various plans, including the introduction of a pilot 'opt-out' mediation scheme. Brussels has also expressed an interest. Following the European Commission's green paper of April 2002, a draft directive is planned in the field of alternative dispute resolution (ADR). No doubt there will be an attempt to introduce a degree of uniformity of practice among member states.

An art in itself

While few doubt the advantages of mediation, it is worth considering what it is that makes it such an effective dispute resolution tool. It is probably beyond debate that mediation works best when parties enter the process voluntarily. It is also crucial that, whatever happens, it does so behind closed doors and entirely outside the litigation process. It is for this reason that the inter-relationship between the courts and mediation is so important.

> It is not enough for a party who has refused mediation to rely, as a justification for refusal, on the fact that it felt it had a 'watertight case'

The recent case of *Shirayama Shokusan Co Ltd & Ors v Danovo Ltd* (5 December 2003), which involved the Saatchi Gallery, brought that inter-relationship into sharp focus.
The claimant was the leasehold owner of County Hall, the site of the gallery. The defendant was the tenant, the owner of the Saatchi Gallery.
At the core of the dispute was the display of signage and artwork outside the area of the lease's demise. Accusations of dishonesty also added spice to the dispute.

The gallery applied for an ADR-type order, requiring the parties to exchange lists of possible mediators, in an attempt to try to resolve the dispute by mediation. If unsuccessful, the gallery was to inform the court what steps had been taken and, without prejudice to legal privilege, why such steps had failed.

The claimant objected. It appeared to be looking for a knockout blow and had issued an application for summary judgment. Its rights were clear, it argued: either the tenant was trespassing or it was not. What is more, with allegations of dishonesty having been thrown at it, the level of trust necessary for a mediation to succeed was lacking.

The claimant's counsel maintained that, where one party objected to mediation, the court has no jurisdiction to make an order and the judges that had done so previously were wrong. Mr Justice Blackburne disagreed and made the order. He did not agree that his power to encourage ADR (as part of 'active case management' under the CPR) was limited to cases where both parties desired mediation. In support, he noted the observations of Mr Justice Colman in *Cable & Wireless v IBM* (2002), that the making of ADR orders in the Commercial Court was commonplace, even when one party (and occasionally even both) objects.

Costs at issue

So does the *Saatchi* decision signal any general move away from one of the key elements of mediation – that it is entered into on a voluntary basis? The position is not wholly clear. Our civil justice system appears somewhat ambivalent on this important issue. For instance, the professional negligence pre-action protocol states that "no party can or should be forced to mediate or enter into any other form of ADR".

Yet ADR orders are being made even where one party objects. Some will say that there is no real inconsistency here, because ADR

orders do not actually force a party to mediate, the most severe sanction for failing to do so being an adverse costs order.

All well and good, but the ominous comment of Lord Justice Brooke in *Dunnett v Railtrack* (2002) – that parties which turn down a suggestion of ADR by the court "may face uncomfortable consequences" – still rings in the ears of dispute resolution lawyers across the jurisdiction.

But it is not just the suggestion of mediation from the court that, if ignored, can land a mediation refusenik in trouble. Costs sanctions have been imposed simply where one party has failed to take up a proposal of mediation made by the other party or withdrew from mediation without good reason.

Of course, not all parties that have refused to mediate are penalised in costs. As always, each case will turn on its facts. However, what is clear is that if a judge is inclined to impose a costs penalty, there is plenty of judicial support for them to do so. As Mr Justice Lightman's decision in *Hurst v Leeming* (May 2002) made clear, it is not enough for a successful party that has refused mediation to rely simply on, for instance, the fact that it felt it had a 'watertight case', or that serious questions were being raised about a party's professional abilities. The test is: can the party which refused mediation and which is at risk on costs persuade a judge, who is being asked by the other party to impose costs sanctions, that a mediation had no reasonable prospect of success?

This can be a fairly high hurdle. A judge does not need to go so far as to assume that the mediation would have succeeded before imposing costs sanctions. As Lord Justice Judge said in *Leicester Circuits Ltd v Coates Brothers* (March 2003): "We do not for one moment assume that the mediation process would have succeeded, but certainly there is a prospect that it would have done if it had been allowed to proceed. This, therefore, bears on the issue of costs".

The reality is that the costs risks of ignoring a suggestion of mediation by the courts, in whatever manner it might be made, are often too great to bear. So does this not in itself move us into the realms of mandatory mediation?

Whatever the answer, everybody knows that it is human nature to reject any form of compulsion. Indeed, recent evidence from a Dutch pilot mediation scheme demonstrated that the lower the coercion, the higher the success rate. If it becomes regular practice to force reluctant parties to mediate, we may well end up with a process characterised by stage-managed and doomed mediations, rather than the high success rates we have seen over the last 10 years.

If the courts start to enquire why a settlement was not achieved, there must exist the possibility that the veils of privilege and confidentiality that cloak mediation will begin to be lifted

Of course, many reluctant parties that have been coerced into mediation will engage in the process. However, there must be some recognition for parties which feel that they need a binding decision of the court. For instance, a licensor who is being subjected to challenge of a clause in a licence agreement by one of several licensees may well want a judgment to wave at other licensees who might take issue with the same clause. If an entity is, as a matter of course, on the receiving end of claims because of its deep pockets, it may well want to let it be known that spurious claims will be fought all the way, to deter the purely opportunistic claimant.

Should parties in these circumstances really be put so much at risk as to costs that they feel compelled to go through the solemn farce of attending what will in all likelihood turn out to be a failed mediation, for the sole purpose of avoiding a costs sanction further down the road? While these cases may be in a minority, they nevertheless illustrate how dangerous the liberal use of costs sanctions and ADR orders can become.

Veil of privilege

There is another observation that can be made from the *Saatchi* decision.

Judge Blackburne, in making his order, was of the view that the court could deal easily enough with distinguishing between privileged and non-privileged material if it became necessary to consider why the mediation failed. This may be easier said than done, but in any event another crucial hallmark of mediation is its confidentiality.

If an enquiry is made by a judge into why a mediation has failed and costs are riding on it, there will be allegation and counter allegation from each side – "he was deliberately obstructive", "she was rude", "he took the last sandwich" etc. If the courts start to enquire why a settlement was not achieved, there must exist the possibility that the veils of privilege and confidentiality that cloak mediation will begin to be lifted. Conscious of this, participants in a mediation will begin to 'play to the gallery', as they do in litigation, rather than focusing on what is important – ie resolving the real dispute between them.

A gloomy prognosis perhaps, but the combination of parties being forced to mediate against their will by the liberal use of costs sanctions and ADR orders, and the prospect of the courts looking over their shoulders to examine why a mediation failed, may well begin to reduce the effectiveness of the process. Litigants may then come to see it as no more than just another step in the action, such as the exchange of witness statements or disclosure, which has to be undertaken to protect one's position on costs on the way to trial.

Encouragement of mediation within the civil justice system can take many forms. The spectrum is wide. Those charged with monitoring progress in this area must be alive to the possibility that 'encouragement', if in the form of frequently made ADR orders and regularly-applied costs sanctions, could well prove counterproductive. If mediation is to flourish, its crucially important characteristics – that parties turn up on the day not under a feeling of compulsion, but on a voluntary basis and comfortable that whatever is said or done will go no further – must be preserved.

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