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Mediation and settlement—2015 in review

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Dispute Resolution analysis: As part of our end of year review series on dispute resolution, Jon Lang, commercial mediator, takes a look at the area of mediation and settlement.

What mediation related developments have been most noticeable during 2015?

Clients are becoming much more mediation savvy. This is likely to reflect a combination of fuller briefings from their advisors, more intense preparation sessions and a greater awareness, generally, of what mediation is all about. Asked if they have been involved in a mediation before, parties are more likely these days to reply in the affirmative. This makes preparatory discussions with the parties (as opposed to their lawyers) much more meaningful--they have thought carefully about how they wish to work with me, (the mediator), what they want out of the day and how they might go about getting it.

Has the actual process of mediation changed at all?

Mediation practice has not evolved all that much in recent years, but I am asked more often these day whether I plan on having a plenary session, ie an initial joint meeting. Sometimes I am told that one or all parties are of the view that there should not be a plenary. To my mind, this signals a slight but emerging degree of ambivalence towards the plenary. Given the limitless flexibility in terms of how parties 'play' the plenary, there often isn't an alignment of approaches. Sadly, this can sometimes make for an unhappy session. That said, there is also wider recognition, clear from the fuller, more productive, client-centric plenary sessions that I see becoming the norm, that it (the plenary) affords a golden opportunity that needs to be exploited for all it is worth. What that opportunity looks like varies from party to party, but the prospect of using the plenary to sow the seeds of doubt in the minds of one's opponents, to persuade them to think again, to consider what, hitherto, had been unthinkable etc, is some of what will occur to the well-prepared party.

In some places however, (in far away lands, thankfully), the plenary is being abandoned. While I have no doubt that this is a regressive step, I think we do need to recognise and respond to concerns of parties when expressed, and be smarter in the design of the plenary. This has long been the case for the more substantial, complex or sensitive disputes which, as a matter of course, demand a more bespoke process design. Perhaps we will begin to see a move away from the one-size-fits-all plenary in the coming years.

What about timing?

The recent hike in court fees, the more harmonised approach of judges to the encouragement of mediation, the greater general awareness of ADR on the part of clients and the more frequent use of mediation clauses in contracts, either free-standing or as part of a dispute escalation clause, has led to mediation taking place earlier in the life cycle of a dispute. Given that high legal costs rarely make life easier at mediation, this is generally good news. But timing is everything!

And sometimes disputes mediate just too early. If the parties or those advising them don't yet have a feel for their case such that they know, broadly, what the spectrum of optimal solutions looks like, they are going to be reluctant to close off their options by entering into a settlement.

What is an interesting case this year on mediation and its significance for practitioners?

Over the past few years there have been many cases on the imposition of sanctions for a refusal to mediate. *Laporte and another v Commissioner of Police of the Metropolis* [2015] EWHC 371 (QB), [2015] All ER (D) 232 (Feb) was one such case, but its real interest lies in what the judge had to say on pre-mediation positioning. The losing claimants argued that there should be no order for costs because of a refusal to engage in ADR. The claimants had been keen but the defendant was concerned that they (the claimants) would only settle if they got some money. As that was unlikely, a view was formed by the defendant that ADR was not appropriate. The judge disagreed. He was satisfied that the defendant's

failure 'fully and adequately to engage in the ADR process should be reflected in [a] costs order...' and went on to award the defendant only two thirds of its costs.

Importantly, the judge noted that the claimants had not insisted that the making of a money offer be a formal pre-condition to ADR. As to what they (the claimants) did say, he commented:

> 'It is always likely that those representing any given party...will seek to lower the expectations of the other side. Simply because one side makes a prediction of what it might take...does not entitle the other side to treat such a prediction, without more, as a formal pre-condition. Tactical positioning should not too readily be labelled as intransigence'.

This case perhaps illustrates the dangers in reading too much into what is said when considering relying on it as a justification for not mediating.

What sort of ADR-related legislative developments can we expect in 2016?

A Directive on alternative dispute resolution for consumer disputes (Directive 2013/11/EU) and a Regulation on online dispute resolution for consumer disputes (Regulation (EU) 524/2013) were published in July 2013. The UK had to transpose the requirements of the ADR Directive into national law by 9 July 2015. The Online Dispute Resolution Regulation will come into force automatically six months later, on 9 January 2016. These measures are designed to encourage consumers in cross-border purchases within the European Union, recognising that they can be put off by concerns about resolving disputes with traders based abroad. The objective of the ADR Directive will be achieved by requiring Member States to ensure quality ADR is available for all contractual disputes between consumers and businesses. General awareness of ADR will be achieved by ensuring businesses provide information to consumers about ADR schemes. The Online Dispute Resolution Regulation will enhance the Digital Single Market by establishing an EU-wide portal, which will direct consumers to ADR providers able to resolve online, cross-border and domestic disputes.

PSL practical point: *Following the launch of a consultation in September this year, the European Commission is due to report by 21 May 2016 on the application of Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters (the Mediation Directive). The results of that consultation, as well any proposals for adapting the Mediation Directive in order to better promote the use of cross-border mediation, are awaited with interest. For more information on the consultation, see News Analysis:* EC launches Mediation Directive consultation.

Jon Lang *has been listed for a number of years in the first tier of mediator rankings in both the Chambers & Partners and Legal 500 directories. CEDR accredited, Jon became a full-time mediator in May 2005, having spent almost 20 years as a solicitor in private practice, the last six as a partner in the disputes group of White & Case in London.*

Interviewed by Alex Heshmaty.

The views expressed by our Legal Analysis interviewees are not necessarily those of the proprietor