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The growing trend of ADR

By Anayat Durrani

The practice of mediation outside the courthouse is a growing trend in England and the United States. Simply known as ADR, Alternative Dispute Resolution refers to any means of settling disputes outside of litigation, the most common being arbitration and mediation. Though often seen as productive and efficient, ADR does not always yield immediate results but, rather, when used well, facilitates better results.



Mediators are trained in negotiation and bring together opposing sides to create some type of settlement or agreement to both sides. Mediation is used for a wide range of cases and is considered a viable alternative to expensive litigation and long delays. Even if

a settlement is not reached during the mediation, the process often helps narrow issues and shorten future litigation time.

Suzanne J. Schmitz, Associate Clinical Professor at Southern Illinois University School of Law, specializes in alternative dispute resolution, particularly mediation. She supervises the school's Alternative Dispute Resolution Clinic. Ms. Schmitz said that in general, mediation as practiced in the U.S. has been successful overall but that it depends on how one defines success. "It [can] mean reaching an agreement, sowing the seeds of reaching an agreement, educating the parties about each other even if no agreement is reached, or improving respect or understanding even if no agreement [is reached]."

She said success can be measured in terms of agreement rate. Community or neighborhood programs report settlement rates in the range of 50-70%, she explained, and so do mediation programs focused on major civil cases already in the court system. "Family programs have similar rates. Some programs, mainly major civil cases and family, also report increased savings in time to resolution and in cost of resolution. These savings are another way to measure success."

Gregory Hunt, Head of Business Relationships at the London-based Chartered Institute of Arbitrators (CIArb), which promotes and facilitates the resolution of disputes by arbitration and alternative dispute resolution, says there are many differences between the U.S. and U.K. approaches to ADR. "In the U.S., it is a much more mature market, and many more people know what ADR is and how it can be used to resolve disputes than in the U.K.," Mr. Hunt said. "In the

U.S., ADR includes arbitration, whilst in the U.K., arbitration is often placed next to litigation in the dispute-resolution mix, whilst ADR consists of the other settlement and determinative dispute-resolution techniques, excluding arbitration and litigation, for example, mediation, conciliation, expert determination, early neutral evaluation, and so on."

Mr. Hunt also pointed out that arbitration clauses can be entered into with consumers in the U.S. more freely than in the U.K. "For example, if a consumer buys a product from a U.S. retailer, then the contract can automatically include a mandatory arbitration clause, but if a similar purchase is made in the EC, then the clause would be non-binding on the consumer up to a limited value; for example, in the U.K. this is £5,000, the small claims court limit."

Mr. Hunt said in this type of situation, arbitration can only be used as an alternative to litigation but that the consumer can reject the offer to use arbitration and go through small claims court instead. He said in commercial disputes, however, ADR is becoming much more widely used and promoted where mediation is often considered by a business prior to litigation.

While U.K. courts can encourage mediation, U.S. courts can require it. Mandatory mediation has been a practice in use for some time in the U.S. One of the reasons courts may encourage mandatory mediation is increasing the percentage of cases that settle; this means fewer that go to trial, which in turn means judges are able to devote more time to other cases, according to Stephen J. Ware, Professor of Law at the University of Kansas (Alternative Dispute Resolution section 259-61 West Group 2001). Mr. Ware explained that another rationale for requiring mediation is that mediation can bring about not more settlements, rather better settlements and earlier settlements. He said earlier settlements are better settlements because they can benefit the parties in terms of saving time, money, and aggravation. He said courts have these reasons to encourage or require mediation because by doing so it can "produce a slightly higher settlement rate and



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seems to produce settlements that are faster and better than they would otherwise be.”

Mr. Hunt said that according to their research in their own panel of mediators, close to 80% of mediations held were settled on the day of the mediation or within three days. He said this demonstrates how mediation can result in “quicker, less expensive, and more amicable resolution of disputes.” He noted, however, that in the Central London County Court, the success rate is much lower—around 40%. Some of the reasons for this deviation were due to the fact that the mediator was often only allowed to mediate often complex disputes, many of which have been going through the court system for years, and could only mediate for a maximum of three hours, at which time the court is closed and the parties and the mediator must leave the premises.

“Another reason why success rates in the courts are lower is that the parties have either been pressured into mediation when they don’t want to mediate, or they have entered into mediation without really knowing what it is,” said Mr. Hunt. “These issues are being addressed by the many courts in the U.K. now using the CI Arb and others to mediate disputes. This does show, however, that there is a higher likelihood that a dispute will settle if the parties have volunteered to go to mediation.”

Ms. Schmitz said that mandatory mediation has raised many issues in the U.S. too. She said cost is a factor...more

specifically, who pays for the mediation when the court and not the parties require it. She said it raises the question of should it be free; and, if not free, who should pay and how to provide it for those who cannot afford it. “Another is quality of services. If courts require or push mediation, should the courts have responsibility for ensuring the quality of the mediators and the process?” Ms. Schmitz said. “If so, how to do this? In most U.S. states, mediators are not licensed. What standards are there to ensure quality?”

She said a third issue is the “subtle pressure” to settle when courts mandate mediation, which she says is supposed to be a voluntary process made by the parties involved. “When courts require or push mediation, parties may perceive that they are required to settle.”

Ms. Schmitz said that another important issue to be considered is how to select cases and parties that belong in mediation from those that do not. In a case where there is a strong imbalance of power because of threats or violence, she said a party perhaps should not belong in mediation, which brings the question of how the court goes about screening cases before sending them to mediation. The final point, she said, is the need to educate judges about all of the above-mentioned points, adding, “And even more so, that they [judges] make intelligent choices as to when and how to push mediation and to educate attorneys as to how to behave in mediation and how to prepare their clients for mediation.”

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