# ADR and MEDIATION in England and Wales

## 1. TYPES OF ADR

ADR (Alternative Dispute Resolution) takes a number of forms in the United Kingdom. These are principally;

(a) Arbitration
(b) Conciliation
(c) Early Neutral Evaluation
(d) Mediation

All the above enable parties to resolve disputes without having to go to trial but there are substantial differences in the practise.

### Arbitration

Arbitration is common in construction and building cases and it involves the parties agreeing to put their dispute before a single arbitrator, sometimes assisted by a lawyer or an expert of some sort and to be bound by the result. That procedure results in the creation of a quasi legal structure with parties being required to produce position papers, arguments etc. It is usually faster than going through the Courts and the proceedings are confidential but it can nevertheless be an expensive and complicated process with many pitfalls for the unwary and is best suited to very complicated and costly disputes.

### Conciliation

Conciliation is a process whereby the parties nominate a conciliator, usually somebody from a professional body such as an architect or an accountant, who tries to resolve issues between the parties. If agreement is reached it forms an enforceable contract.

Early Neutral Evaluation

Early Neutral Evaluation is a recent development and is something between Arbitration and Conciliation. In this procedure the parties agree to submit a jointly prepared case to a single expert (normally a recently retired judge) for his opinion as to the likely outcome if the matter were to proceed to Court. The nominated expert reads the papers and gives an opinion which doesn't bind the parties but can be very persuasive.

### Mediation

Mediation comes in three forms. There is in Court mediation carried out by Judges which has almost exact counterparts in, for instance, the German Judicial system, mediation by non Judges which is the route taken in a number of Courts where the mediators are not necessarily legally qualified but nonetheless help the parties achieve

a resolution and recently mediation carried out by a specially trained court official who will speak to each party and try to secure a compromise agreement (this is a recent innovation started in Manchester with outstanding results but which relies very much on the personality of the mediator) and may not be effective in every case.

Litigation in England and Wales is extremely expensive and can be very lengthy, it is not at all unusual for a non matrimonial civil case to take three or four years to get to trial and unfortunately very often, in cases up to £15,000 the legal costs exceed the amount of the claim by a substantial margin. Settling cases by ADR is therefore an attractive proposition particularly to commercial organisations who want to be able to settle a dispute and then move on.
Perhaps the greatest advantage that mediation has over the court process is that solutions can be agreed between the parties which a court has no power to order but which will satisfy the parties, examples include an apology, and undertaking to remedy a situation or process, a credit note, the carrying out of work other than repairs to work or goods under the contract, vouchers, transfer of goods or property not the subject of the action etc. The list of solutions is endless and may well be influenced by local usages or traditions.

## Judicial Mediation

Mediation by Judges involves what is called an FDR Appointment whereby both parties appear in private before a Judge, the issues are outlined and the Judge then gives a recommendation as to how the case could be settled, very often relying upon his or her legal knowledge and the practice in the Court and explaining to the parties that a certain outcome is likely but at considerable cost in relation to the legal charges involved and then persuading the parties to come to a solution which follows the Judge's recommendation but will probably give some allowance for an early settlement. There is of course a strong measure of compulsion because the mediation is being undertaken by a Judge and particularly in family and land dispute matters, very strong pressure can be applied to both parties. Most matrimonial disputes over money or property are resolved at FDR Appointments. It is estimated that only about 25% of the cases which go to an FDR Appointment will ultimately finish in trial.

## Non Judicial Mediation

Mediation in the form practised in the United Kingdom, with the exception of the Exeter model, came originally from America and is based on the need of big American corporations to resolve their legal differences quickly and comparatively cheaply. Different mediator trainers provide different guidance as to how mediations should be conducted but the training given by some of the American and now most of the English trainer providers, is based upon the premise that most mediations are going to last between one and five days. The mediator is trained for what could be called the clever commercial dispute which would quite often involve a number of parties and the procedures have built up something approaching a litigation type of structure with position papers, interrogatories, schedules etc. which, whilst

appropriate for a complicated commercial dispute, are inappropriate for dealing with minor disputes or disputes where the facts are not particularly complicated.

The slow and expensive English civil Courts procedures were overhauled in the late 1990s and the desirability of mediation in non matrimonial cases was enshrined in the rules which now govern the operation of the Courts. Parties are required to consider the possibility of mediation and Judges can make recommendations which the parties very often follow. There is however a very strong resistance to mediation in most quarters. People want their day in Court. Mediators fees are frequently £1,000 a day and when a matter is being mediated with legal teams on both sides their fees will probably be similar to those of the mediators and it can be seen that this is an expensive, cumbersome and sometimes quite lengthy procedure but nowhere near as lengthy, cumbersome or expensive as going through the Court.

Mediation per se involves the mediator being completely neutral and not giving advice or commenting on either parties' case or seeking to impose an outcome. The process is a voluntary one, the parties can withdraw at any time, the procedures are absolutely confidential (they are also confidential in the FDR Appointment) and neither party can rely upon anything that was said in the mediation room if the matter does not settle and goes on to trial.

About five years ago the London County Court started a Mediation Scheme for non small claims cases, that is cases where the value of the subject in dispute was over £5,000. This started off reasonably well but now achieves settlement rates of around 30% to 35%. It is run by one of the main mediation providers whose model and general practice is for the lengthy mediations running over several days (whereas the London County Court scheme is based on a three hour module) the parties are simply given three hours at the Court in Court provided accommodation to see if they can resolve their disputes.

The Exeter model is based on time limited mediation only. That means that the Devon & Somerset Law society (formerly the Devon & Exeter Law Society) trained mediators are specifically trained to get all the information that either party needs from the other and to explore all the problems within a time span of three hours. When this was originally started members of the mediator provider associations attended the first meeting with the presiding Judge and said specifically that the Exeter scheme would not work. They have been proved wrong. Exeter was running two schemes, the first for the non small claims scheme and is based on a three hour module. Now that the scheme has settled down the more successful mediator providers who are trained to work within the three hour time limit are achieving settlement rates of between 75% and 80% of cases referred to the mediators by the Court or directed to them by local solicitors. Some of the more conventional mediator providers are having results of less than 40%.

Devon & Exeter Law Society, at the request of the local Judges of the Exeter group of Courts, also ran a time limited mediation scheme for small claims cases. This is on a three quarter of an hour module, the parties are "invited" by the Court to attend a mediation appointment the mediator sees the files just before the mediations start and tries to resolve the issues between the parties during the mediation. Surprisingly the settlement results were in the order of 60%. Devon & Exeter Law Society Mediators

who partook in the Small Claims Scheme were, after a comparatively short period of training, then able to take part in the Main Court Scheme. This model has in fact recently been exported to Poland and there is interest in it from East African and Zimbabwe Courts, and interest has been shown from ex USSR States, it seems therefore that it has some merits which would assist lawyers and parties in other jurisdictions.

The Manchester model requires the mediator to telephone each party probably on a number of occasions and try to find a solution.
Sometimes cases settle over the phone sometimes the parties are invited to the court to complete the process.
It's strength from an administration point of view is that the mediator is under the control of the court, it's weakness is that the mediator knows that his job is dependant on settling a large number of cases and to that extent he cannot be considered independent and as already been discovered in courts other than Manchester the level of settlements depends entirely on the character of the mediator. It has been criticised by a number of academics because of these possible flaws. None-the-less the Ministry of Justice is determined to impose Manchester type schemes on a large number of courts in England some of which had good on-going schemes such as Exeter and against the wishes of the Judiciary.
The Exeter Small Claims scheme ceased to operate on the 31st March 2008 but early results do not seem to show that the in-house mediator is able to achieve the results formerly regularly achieved by the DASLS mediators. It will be interesting to see if the in-house mediator scheme for small claims succeeds in the long term.
In the meantime the continuing of time limited mediations from DASLS trained mediators is gathering pace and results speak for themselves being among the highest settlement rates in the country.

## 2. QUALIFICATION OF THE MEDIATOR

There is in fact no overarching authority in England and Wales although several organisations claim to be the only acceptable mediation providers. Recently a self elected organisation calling itself the Civil Mediators Association has been formed where the main mediation providers are represented on the governing panel. Devon & Exeter Law Society IS a member of that organisation. It is however perfectly legal for anyone to put up a board saying they are a mediator and inviting people to attend mediation, although hopefully that situation will change. Shortly put mediators will normally be trained by a mediation provider such as CEDR, ADR and DASLS etc. and will then look to that mediation provider for work. A great many people were trained in the 1990s but have never done any work because there are insufficient cases to occupy the number of mediators. The usual conditions are that after an initial training session which may last between one (DASLS) and four (CEDR) days, the trainee mediator is then required to sit in on mediations, then to undertake mediations possibly supported by a member of the training organisation and then be a mediator on his or her own. Normally mediators are not regarded as being fully trained until they have done about thirty five hours of mediation.

## 3. FEES

Normally a mediator is paid by the parties in whatever proportions the parties agree. The usual fee for a three hour time limited mediation is between £450 and £650, a days mediation about £1,500. In the case of the DASLS Small Claims Scheme however the mediators are paid by the State, that is by the Department of Constitutional Affairs, on a short term basis (the DCA having operated a pilot scheme for a couple of years now). The DCA has researched the training, supervision and control systems which have been put in place by DELS making observations where necessary and refining the process generally. The Judges favoured the Small Claims Scheme because it takes out of the system a lot of cases which otherwise involve a great deal of judicial time (because the parties are usually unrepresented) and the DCA calculate that it is as cost effective to employ a mediator as it is to employ a Judge at the lowest level. Unfortunately when the DCA support withdrawn and despite an offer from a number of small claims mediators to undertake free mediations at the request of the judges the Mininstry of Justice (the successor to the DCA) refused to agree. Certainly until recently it was thought likely that the Exeter model would continue indefinitely and it remains possible that in time the Exeter model will be re-adopted by the Courts. Legal Aid is available to deal with matrimonial mediations and it is likely that it may be extended to cover civil cases where legal aid is provided but the legal aid system in England and Wales is in chaos and the number of cases available for civil legal aid is dropping fast.

In matrimonial cases the regulations require that anyone wishing to have a legal aid certificate should have been to mediation, or at least attended a mediation information session, thus the Government is applying pressure on couples going through divorces to attend a mediator. The last research on the situation showed that forcing people into mediation does not improve the mediation success rate.

## 4. THE PROCESS

The mediator has complete control over the process of mediation and he or she can, if they think it is helpful, invite the parties to provide a summary of their case, take part in the mediation and will often suggest that parties who are unrepresented should contact their lawyers to get advice during the course of the mediation. Parties are entitled to be accompanied by the advocate of their choice, the advocate however is under the control of the mediator and the mediator will usually prevent the advocate from intervening publicly and trying to express a party's point of view and will insist that the advocate limits himself or herself to assisting the mediation process and give their client's advice when required. The mediator has the power to exclude advocates from the mediation process and in those circumstances the mediator will make it plain that the parties should not reach a concluded agreement without having the opportunity of taking advice from their respective lawyers. In family mediation it is normal for the mediators to prepare a memorandum of any agreement which has been arrived at (usually without the help of mediators) and take the agreement to their respective lawyers to get advice. In the Exeter scheme the mediator with or without the parties will report to the mediation Judge at the conclusion of the mediation. If the Judge takes the view that the settlement, although agreed between the parties, is not a fair one he or she can actually refuse to make the order based on that agreement

and the matter will have to continue to trial. This is unusual but it has been known to happen. If the Judge approves the terms of settlement he or she will make an order of the court in those terms.

Mediation is separate from the judicial process and it is only recently that the Court has included mediation as part of the process. Traditionally mediations always took place away from the Court but it is believed that mediations taking place at the Court building and with the encouragement of the Judges probably have a better chance of success. Mediation is of course always confidential and the consequences of mediation are that if there has been a settlement the Court will be advised as to the terms of the settlement and invited by both parties to make an order in those terms. If however the case is not settled the parties are specifically prevented from referring to anything that was said during the mediation when the matter comes to trial and the Judge will reject any attempt to involve either the mediator or to refer to what was said in the mediation room. The delay caused by the parties going to mediation will not ultimately affect the length of the case because cases in England usually take a long time. The normal time allowed for mediation would be no more than two months after which the case would automatically resume. There will therefore be a small delay but in the scale of things not one which is particularly relevant. There is no overall code of conduct of mediators nor are there specific rules which govern either the conduct of the mediator or the conduct of the mediation itself, different providers have different models. One model which is not generally acceptable however is an interventionist mediator who seeks to impose his or her will on one or other party (acting as an FDR Judge does in the FDR Appointments in family matters) but it is not unknown for mediators who are very anxious to secure results to apply pressure although this is something which mediators should never do. Mediators are forbidden, certainly in the way that Devon & Exeter Law Society train their mediators, from expressing an opinion or expressing any views on the law surrounding the case although it is possible for a mediator to give general guidance to both parties as to the law and as to the requirements of the Court. The Law Society of England and Wales have formed a Mediation Committee and are seeking to set out rules governing the conduct and accreditation of mediators and the Civil Justice Counsel are doing the same, neither of them, in the writer's opinion, has any precedence over the other or any right to say that their type of mediation is best. Ultimately there will have to be some control if there is to be uniformity of practice amongst mediators but it is not said that any particular form of mediation is the right form.
The Manchester type of mediator not being a lawyer is unable to give unrepresented parties guidance on procedures or the requirements of the court and is therefore of less help to the court where cases fail to settle.

## 5. POWERS AND DUTIES OF THE PARTIES AND MEDIATORS

Either party or the mediator can bring the mediation to a halt immediately if they wish to do so, mediation is completely voluntary and if during the course of a mediation either party decides they do not want to go on with the mediation then the mediation has to stop. Likewise if something occurs to the mediator which he or she feels is so serious that the mediation cannot continue the mediator may bring the mediation to an end without giving any explanation.

A mediator cannot also act as an advocate for either party if the case goes on to trial. Also if anything occurs during the mediation of which the mediator is deemed to have notice, e.g. if the mediator finds that his firm has acted for one party or another the mediator must immediately withdraw.

It is believed that England and Wales will implement the E.C directive COM 2004/718. It is understood that further directives are expected on mediation. Unfortunately the English and Welsh authorities are usually slow to adopt directives which they think would cost the Exchequer money.

There are community mediators who try and resolve disputes between neighbours, they are trained differently to normal mediators but with the same underlying rules. Funding is presently being sought by the Devon & Exeter Law Society for an experiment in mediation between people who would otherwise be prosecuted for unruly conduct etc. but this is only a proposal at the moment and although it has the support of the Police Forces for the South West it is not known whether this will in fact be tried.

## CONCLUSION

It will be seen from the above that ADR is practiced in England and Wales (although it is mistrusted by the Legal Profession) and due to Government and Judicial pressure is likely to increase.

It has been shown that some models translate well to other jurisdictions but although the American model based on 8 hours works well for some complicated and multi-party disputes the shorter time-limited model adopted by Devon & Exeter Law Society is a lot more appropriate in most disputes and the Small Claims techniques are particularly useful in most 2 party cases or cases where one or both party is unrepresented.

It is understood that before choosing the Exeter model the Polish Mediators Association reviewed all the models and selected the Exeter one as appropriate for their needs. The first batch of trained mediators are now in place in the south of that country and a request for training a second tranche of mediators in the north has been received and training will take place in the autumn.

Initial training in Zimbabwe Kenya Uganda and Tanzania shows that the techniques are appropriate to their jurisdictions and pilot schemes are likely to take place there with the support of their judiciary.

There is great interest in the scheme from Azerbaijan, Georgia and other former USSR states and from Moscow (which has already investigated the more conventional schemes and found them not to meet the needs of their jurisdiction).

Devon & Somerset Law Society can provide training for would-be mediators, assist in setting up schemes and ongoing advice where necessary.

We do not claim our scheme is perfect, indeed it has been developing over the past 6 years and will continue to do so, but it does provide a good starting point, for locally based schemes to be piloted, adapted where necessary and implemented where they can be shown to be effective.

Finally in countries where mediation becomes accepted the lawyers who learn the rules and techniques are more likely to be able to represent their clients effectively

and thus add to their expertise and attraction to prospective new clients as well as the existing ones.