

Mediation: It's Good to Talk

March 2009



Jonathan Forrester, Associate at Belfast law firm Cleaver Fulton Rankin, explores the alternatives to costly litigation and advises companies to think beyond litigation when it comes to disputes.

There are times when the only appropriate course of action for a company embroiled in a dispute is litigation but more often than not there are other, less costly ways of achieving a satisfactory outcome.

What is Alternative Dispute Resolution (ADR)?

ADR encompasses many different procedures but the most popular is mediation. Mediation can be used to resolve a range of disputes from family disputes to multi-party construction litigation. It is a flexible, non binding method of resolving disputes which usually involves the appointment of a trained mediator, operating under agreed terms and in accordance with a code of practice.

The advantages of mediation

Mediation is confidential and can be quicker and more cost efficient than litigation. Businesses can be too eager to head straight to the courts to resolve a dispute. In Northern Ireland, we tend to have a very entrenched view when it comes to disputes – people are very reluctant to talk for fear of jeopardising their case.

Mediation, on the other hand, is about putting your cards on the table from the outset. That appears to conflict with our natural instinct. A good mediator, however, will be able to identify the strengths and weaknesses of each side's case and communicate with them in a professional manner. This allows the parties to gain an objective perspective on the pros and cons of their positions.

In certain cases mediation can allow parties to continue a commercial relationship which litigation would inevitably damage. The parties to the dispute usually participate fully in the mediation discussions together with their lawyers, often enabling a much clearer understanding of each side's position and improving the scope for settlement. If settlement is achieved, it can be much more flexible and commercially orientated than a Court Order.

Mediation has the added benefit of being entirely private. It avoids unwelcome publicity. Confidentiality provisions can be included in any settlement agreement signed by both parties, preventing either party from disclosing matters referred to in the mediation to a Court, or to any other third party.

Even if mediation is pursued relatively close to a trial date, resolving the dispute by mediation is likely to be quicker than traditional litigation. Mediation can be a one-day process, held after a relatively short period of preparation, often involving limited disclosure of key documents by each party.

Is mediation mandatory?

You cannot be compelled to mediate but there is a growing body of case law which suggests that refusal to mediate is a high risk strategy. If a party unreasonably refuses mediation, adverse costs consequences are likely to arise.

Please note: The content of this article is for information purposes only and further advice should be sought from a professional advisor before any action is taken.

The Judiciary in Northern Ireland have certainly demonstrated that they wish to encourage mediation. The pre-action protocol in the Chancery Division for the resolution of Family Provision claims, which became effective on 1 September 2005, endorsed mediation as an alternative to litigation and commended its' use in appropriate cases both before and after proceedings have been issued.

Furthermore, the Commercial List Judge has directed that, in appropriate cases, he may require parties to justify their decision not to resort to an appropriate form of ADR.

Guidance on the factors a court might take into account when determining whether or not a party has unreasonably refused ADR was provided by the English Court of Appeal in the 2004 case of *Halsey v Milton Keynes NHS Trust*. They include the nature of the dispute, the merits of the case, attempts to settle by other means and the prospects of success. The Court of Appeal made it clear that it would not compel parties to mediate but the Judgment has certainly made it more difficult for parties to flatly refuse to do so.

The future of ADR

Undoubtedly, as the Northern Ireland economy progresses and there is increased investment from global companies, we will see greater recourse to resolution methods other than litigation.

I am confident that our attitude to ADR, particularly mediation, will gradually change. We will see a growing recognition from companies, large and small, that it makes commercial sense.

The Dispute Resolution Service in NI

The Law Society of Northern Ireland provides a Dispute Resolution Service. Trained mediators are appointed by the Law Society and are subject to a mediation agreement and code of practice. Mediators' fees are agreed with the parties in accordance with a Law Society scale and registration with the service currently costs £120.00 plus VAT.

Please note: The content of this article is for information purposes only and further advice should be sought from a professional advisor before any action is taken.