



Arbitration and Dispute Resolution Bulletin

English Focus Mediation: Parties' decision or Court's compulsion?

Mediation has long been a popular and successful dispute resolution method in the United States. It was the widely recognised success of mediation across the pond that led to mediation and Alternative Dispute Resolution (ADR) being generally promoted in the English Civil Procedure Rules, which were revised in 1998. Since the introduction of the CPR, the Courts in England & Wales have been keen to ensure that parties consider ADR prior to and during the course of any litigation. In so doing, they have not only promoted mediation, but have in some cases compelled parties to mediate. This article considers the current position in view of recent case law, and asks the question is the decision to mediate that of the parties or that of the Court?

Dunnett v Railtrack Plc (in railway administration) [2002] EWCA Civ 302

The Courts gave a clear indication in this case of their view of the merits of mediation. A successful litigant was refused its costs in the litigation for failing to mediate. This was despite, what would appear to be a justified view, that they were bound to win the case.

The basis of the decision rested on the premise that a mediator may be able to provide solutions which are beyond the powers of the Court to provide. Although the successful party was convinced of winning the case, a mediation may have allowed the Defendant to appreciate the Claimant's objective in litigating i.e. an apology may have been more important to the Claimant than damages. Had the successful party been aware of this, the matter could have been resolved without the expense and inconvenience of a Court hearing.

This decision sent out the message that the Courts would impose cost penalties where parties do not avail themselves of the advantages of ADR, whatever the merits of the parties' case, and irrespective of the reasons for declining to mediate. As the cost of litigating in this jurisdiction is very high, the threat of being penalised on costs is very real. The effect of this decision was essentially to compel parties to mediate: Where one party proposed mediation, the other could not run the costs risk of declining.

The English Courts soon resiled from this decision in *Hurst v Leeming* [2002] EWHC (Ch). In this case the Court accepted that where mediation can have no prospect of success, a party may refuse to take part.

Halsey v Milton Keynes General NHS Trust and Steel v Joy [2004] EWCA Civ 576

The position has been authoritatively decided in the above case. The Court of Appeal considered whether the Courts could, in principle, compel mediation. It held:

"It is one thing to encourage parties to agree to mediation, even to encourage them in the strongest terms. It is another to order them to do so. It seems to us to oblige truly unwilling parties to refer their disputes to mediation would be to impose unacceptable obstruction on the rights of access to the Court."

This case recognised that mediation can only be successful where both parties are prepared to make them compromise. The Courts set out a number of factors to be taken into consideration when assessing whether a party behaved unreasonably in refusing litigation. These include:

1. The nature of the dispute;
2. The merits of the case;
3. The extent to which settlement methods have been attempted;
4. Whether the costs of the ADR would be disproportionately high;
5. Whether delay for ADR would be prejudicial; and
6. Whether ADR had prospect of success.

Hopefully this decision will now restore the balance: Parties' decision not Court's compulsion. Whilst the merits of mediating remain clear, and the Court will continue to actively encourage mediation, parties who have genuine reasons for not participating in ADR should not feel forced to incur the potentially high costs of ADR in order simply to preserve their rights to recover their costs in the litigation.

Comment

Mediation is very much a growing trend in other European countries, where the merits of mediation are being more widely recognised. It will be interesting to see how quickly it becomes widespread in jurisdictions where, unlike in England & Wales, the Courts are unable to actively encourage (or indeed compel) mediation. All clients together with their legal representatives should consider mediation as a forum to resolve disputes. It may be a more appropriate mechanism than litigating through the Courts, particularly in cross jurisdiction disputes and where commercial relations need to be maintained.

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Mediation: The alternative way to a conflict resolution

I - General Aspects

The insensibility towards the real interests of the parties as well as the moroseness, the onerousness and inefficacy of the judicial decisions has led to a general dissatisfaction with the current Judicial System which overlooked the positive vision of the conflict, concentrating only in the application of the rule “in abstract”.

This discontentment of society for the Judicial System, and the search for a more swift and efficient justice contributed to a general awareness that going to Court must be understood once considered the countless advantages of appealing to the extrajudicial conflict resolution, as a last resource.

It was from this dissatisfaction that mediation emerged as an alternative resolution of conflicts, uniting the characteristics that correspond to the particular needs of society, allowing the establishment of dialogue between the parties and the visualization of the conflict as something inherent to human life, as people are different and expose distinct points of view which must be known and respected.

The success of mediation, in comparison with the traditional methods of conflict resolution, derives not only from its agility, low cost and clearing of the Courts, but mainly from the personal satisfaction of the parties as they solve their conflict and maintain their relationship. This is possibly due to the human techniques that mediation uses to put an end to human conflicts.

With the mediation method, the traditional dichotomy “winner – loser” was substituted by the maxima “winner – winner”, as the solution that was found for the conflict is satisfactory for both parties and covers all their real interests.

2 - Familial Mediation

Nowadays, we are verifying a subsidiary and supplementary intervention of the State in the resolution of familial conflicts.

The familial mediation appeared for the first time in the USA, and today it is already a reality in several countries.

In Portugal, the Familial Mediation Cabinet intervenes in conflicts related to child custody, providing the parents in the stage of separation or divorce, a context adequate to negotiation.

The familial mediation aims for the consensual resolution of conflicts and might occur before or during the judicial process, however the obtained agreement must be submitted to judicial homologation.

The familial mediation process includes the identification and negotiation of the real interests at stake, and it might culminate in a satisfactory agreement for both



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parties. The mediator assists the parties in the attainment of this agreement and acts with confidentiality, impartiality, neutrality and independence.

Considering the current historical context, which cultivates the autonomy of will, the familial mediation reveals itself as a quick, economic and efficient solution that lessens the Courts' overload and the psychological wearing of the parties involved.

3 - Mediation in the “Julgados de Paz” (Peace Courts)

The Julgados de Paz appeared as a concrete solution to the crisis of justice because they offer citizens an alternative way to solve conflicts - “mediation”.

Through mediation it is intended to reach the fair composition of the conflict by agreement of the parties, confronting the interests involved.

The mediation practised at the Julgados de Paz is a private, informal, confidential and voluntary process, in which a mediator assists the parties.

In the Julgados de Paz the process develops as follows: a pre-mediation session takes place if none of the parties rejects it, and in this phase the mediator explains the objectives of mediation and evaluates the predisposition of the parties to reach an agreement. If the parties accept the terms, the real mediation phase begins, and both the parties must be present in order to avoid an unjustified absence, which might be understood as a desistance of mediation. If a total agreement is reached it is submitted to homologation by the judge of the Julgados de Paz, however if there is only a partial agreement or no agreement at all, the process goes on to a judicial phase.

Although mediation is inserted in the Julgados de Paz context, it is important to refer that it aims for the extrajudicial resolution of the conflicts, that being the reason why it must be proposed before the decision of the one who judges.

4 - Conclusion

It was in this phase of profound modification of the Portuguese justice that mediation appeared, an alternative method to solving conflicts that faces situations as interactions and not as purely objective facts.

As a matter of fact, mediation gave room to the interpretative construction of reality through communication.

With mediation, the conflict situation might be analyzed through different points of view: the judicial, the sociological, the economical, the psychological and others, all legitimate to construct the fault situation.

In fact, the purely judicial analysis of the conflict practiced by the traditional justice might be insufficient for the fulfilment of justice.

In the mediation method the parties look for a third person to assist them in the resolution of a conflict they could not solve on their own.

The mediator, oppositely to the judge who imposes to the parties the resolution of the conflict, is a third neutral and impartial person who will attempt to re-establish the dialogue between the parties, identifying and setting aside something that has obstructed communication, so that the parties can understand each of their points of view.

In this sense, mediation aims to provide to both parties an adequate environment to the resolution of the conflict, which must attend to both their interests. This is the reason why it is said that the solution presented has a semantics dimension (a montage of the different constructions of meaning) and a pragmatic dimension (constructed by the parties involved).

Finally, it is important to mention that with mediation the conflict is analysed positively, like something that is common to human life. This happens because the parties express their distinct points of view relating to the same subject without presuming that their position is the right one. In mediation, judgements of value are not created, it is simply provided a natural respect for differences between individuals.

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English Focus: The importance of considering alternative dispute resolution (ADR) before choosing to litigate

From a legal standpoint, the tactics employed in civil litigation have changed dramatically during the past five years. The current political interest in the economics of litigation is likely to have further, far-reaching implications for practitioners and ultimately their clients. Meanwhile, a number of recent decisions have provided valuable lessons in the importance of considering ADR during any litigious dispute or having to face the consequences.

ADR is defined in the Civil Procedure Rules (CPR) as a “collective description of methods of resolving disputes, other than through the normal trial process.” The most common form of ADR is mediation. This is where an agreed independent mediator will liaise between the parties, helping them to come to an agreement and resolve the dispute. The CPR encourages ADR as part of its overriding objective. If a party refuses to consider mediation from the outset and chooses to litigate in the Courts, the Judge may penalise the winning party in costs for an unreasonable failure to mediate at first instance.

When a dispute arises, litigation may initially appear to offer an obvious solution. This is what most clients want. Both sides usually want to take what is perceived as a “tough” and “aggressive” stance. Although this may have advantages, there is a risk that other options available that could have ended the dispute quickly and perhaps more economically, are not explored.

Litigators are frequently reminded of the potential benefits of alternative methods of dispute resolution. However, a lot have been slow to react. It is not uncommon for some practitioners to shy away from considering ADR in the first instance as it is not within their expertise. However, the reality is that it can not be avoided. Clients need to be aware of other forums to settle disputes other than the Courts and serious thought should be placed at the very beginning.

ADR is often speedier and more cost-effective than a full-blown trial. This is in part due to the more informal nature of the proceedings. The procedure for mediation is flexible, and the parties do not have to comply with a rigid set of statutes or Court rules. Very importantly for large corporations is the fact that mediation can also be conducted in private, avoiding the publicity of a trial.

A further benefit of ADR is the possibility of preserving the business relationship between the parties. This will be particularly pertinent where a dispute arises between a supplier and a good customer. Important relationships such as these are unlikely to survive a lengthy trial. Early mediation, however, may enable the parties to resolve their differences and continue trading. Occasionally, the terms of settlement can dictate that the business between the parties is to remain as if the dispute had never arisen.

On the flip side, ADR may be an ineffective tool in some disputes, and litigation will be the only forum available to a party who requires resolution of a dispute. For example, if urgent injunctive relief is required then litigation is the only option available to the parties. In such an instance time is of the essence and one cannot avoid obtaining a Court Order protecting the client's interests. Mediation may also be inappropriate in cases of alleged fraud or disreputable commercial conduct, although judicial attitudes towards this vary. In *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576 Dyson LJ provided guidelines as to when a refusal to mediate would be unreasonable, and described cases of alleged fraud as "inherently unsuitable for ADR." However in *Couwenbergh v Valkov* [2004] EWCA Civ 676, the Court of Appeal encouraged mediation despite allegations of fraud. It largely depends on the circumstances.

Moreover, ADR will not be suitable where judicial clarification on a point of law is required.

It may sometimes be clear that mediation is unlikely to be successful. This may be the case where one party's bargaining power is much greater than the other's, as was the case in *Reed Executive plc v Reed Business Information* [2004] EWCA Civ 887. The Court of Appeal considered the guidelines laid down in *Halsey* and held that in such a situation, refusal to mediate might not be unreasonable.

Finally, there has been a growing tendency to include Mediation Clauses in standard terms and conditions. A contract may have a clause in it indicating that if a dispute arises the parties must mediate in the first instance to resolve the dispute and only if that fails, may they bring the matter to the Court.

In conclusion, some form of ADR will be appropriate in some dispute situations, and parties should consider carefully all their options before choosing litigation as the desired forum. A failure to explore alternative methods of resolving disputes may not only be uneconomical and unnecessarily lengthy but can also lead to the Court refusing the winning party's costs.

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Transfer of arbitration clauses

Keeping in line with the position it adopted thirty years ago in order to ensure the validity and efficiency of arbitration clauses, especially holding that said clauses were autonomous vis-à-vis the agreement and its proper law, the *Cour de Cassation* has recently tried to set up a system aiming at making the transfer of arbitration clauses to third parties that did not enter into the original agreement easier.

The modus operandi the *Cour de Cassation* has been following to set up such a system is quite clear. However, even if the *Cour de Cassation* keeps leaning toward furthering the transfer of arbitration clauses to third parties that did not sign the agreement it is part of, the content of this rule that directly derives from case law has fluctuated over these last years. This evolution is clearly fully in line with the Zanzi decision (*Cour de Cassation*, 1st Civil Chamber, 5 January 1999) according to which the Court laid down the principle of the validity of international arbitration clauses.

First of all in order to ensure the efficiency of such transfer system, the *Cour de Cassation* has decided to

lay down French substantive rules directly concerning international arbitration. As a result, it is not necessary to have recourse to conflict of laws. Setting up such substantive rules enables French Courts to apply directly the solution(s) laid down by the *Cour de Cassation* without having to determine which law is applicable to the arbitration clause or to the transfer thereof.

In 1999, the *Cour de Cassation* (1st Civil Chamber, 5 January 1999, case Banque Worms) stated that international arbitration clauses should be transferred to the transferee together with the claim so that the claim exists between the transferor and the transferred debtor and further specified that this arbitration clause is valid as the sole result of the will of the contracting parties. For the first time, the *Cour de Cassation* decided on the validity of the transfer of an arbitration clause within the specific framework of the transfer of a commercial claim (according to French law, simplified way of transfer known as *Bordereau Dailly*). In this particular case, the transferred debtor that had sued the bank, i.e. the transferee of the claim, before French Courts had claimed that the commercial agreement entered into with the transferor contained an arbitration clause. The *Cour de Cassation* has considered that even though the bank had not formally accepted this arbitration clause, it was enforceable towards the transferee of the claim. This solution was all the more noteworthy that the *Cour de Cassation* completely avoided searching the law applicable to this particular technique of claim transfer although it should have been required to.

In 2000, the *Cour de Cassation* further developed the system of transfer of arbitration clauses (1st Civil Chamber, 8 February 2000, case Taurus Films) as it stated that international arbitration clauses were enforceable towards all parties entering into the rights of one of the contracting parties. The wording of this decision is so general that it should lead to applying this solution to any type of contracts and to any type of transfer of rights. As a matter of fact, the *Cour de Cassation* decided that the arbitration clause at hand, set forth in an agency agreement, shall be enforceable not only towards the agent that had signed the contract but also to all agents that may subsequently replace the original agent.

In 2001, possibly considering that it was important to refine the conditions for the transfer of arbitration clauses to third parties, the *Cour de Cassation* (1st Civil Chamber, 6 February 2001, case Peavy Company) decided that international arbitration clauses were to be transferred with the rights attached to the claim, unless the party against which it would be enforced could reasonably ignore that such clause had been entered into. This solution seemed to be limited to the hypothesis of chains of sale contracts, as French law authorizes the subsequent (or final) purchaser of a product to sue directly the original seller. This direct third-party course of action is grounded on the contractual relationship and not on tort. Thus, it was quite logical to consider that the arbitration clause was transferred with the guarantee attached to the product sold. This solution might have been totally classic in the specific context of chains of successive sale contracts but the limit laid down by the *Cour de Cassation* is quite odd and creates some legal insecurity as it forces third parties to bring (negative) evidence that it – reasonably – ignored the existence of such clause. As regards international arbitration clauses it seems logical to consider that a professional in the field of international business will almost never be able to prove that it reasonably ignored the existence of the clause. This takes away all the utility (and further creates some insecurity) of this reserve, except for the agreements signed by and between non-professionals or consumers that may be able to claim that they are lay persons in the business field considered.

In 2002, the *Cour de Cassation* again wished to develop the system of transfer of arbitration clauses as it stated that these clauses were to be transferred together with the main agreement regardless of the validity of the transfer of the agreement, except when having been entered into on an *intuitu personae* basis, i.e. considering the person of the transferor (1st Civil Chamber, 28 May 2002, case Cimati). This solution is all the more noteworthy that in the case at hand the validity of the transfer of the agreement itself had been challenged by the transferred. The *Cour de Cassation* decided that the sole existence of an

arbitration clause in the agreement in issue should force the transferee and the transferred to refer their matter to the relevant arbitration Court, thus including the dispute arising from the validity of the transfer of the agreement. In other words, the parties agreeing upon the transfer of the agreement, i.e. the transferor and the transferee, just have to agree with each other for the arbitration clause to be considered valid, as the initial commercial agreement between the transferor and the transferred is irrelevant, except as a result of the reserve made by the *Cour de Cassation*, namely the possible *intuitu personae* basis of the arbitration clause itself. However, not only seems this exception based on theory (as it is quite rare to base the principle of an arbitration clause on the persons of the parties) but it is also quite difficult to implement (as the conditions for *intuitu personae* shall be considered as regards the law applicable to the clause, whereas the *Cour de Cassation* strictly dismissed the system of conflict of laws).

The solutions found by the *Cour de Cassation* show that (i) it attaches little importance to the third-party to the transfer of the main agreement (exceptions laid down by the *Cour de Cassation* are more theoretical than really practical) and that (ii) it wants to reach its aim: ensuring the greatest possible efficiency to arbitration clauses in order to ensure the efficiency of arbitration proceedings in France.

To conclude, persons involved in international business shall be aware of the fact that French Courts have a very liberal way of applying the principle of privacy of arbitration clauses which normally leads to limiting their effects to the parties that formally agreed thereto, to the benefit of the principle of efficiency of arbitration clauses which extend their effects to parties that are indirectly affected by the performance of the agreement or the implementation of the rights thereto.

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TO OUR READERS

This Newsletter is intended to introduce and explain on a regular basis new areas of law relating to arbitration and dispute resolution which is of general interest to all of our clients. It is jointly written and produced by PLG's Litigation Network which includes legal practitioners in several PLG firms and their contacts worldwide. We always welcome comments and questions on any matters raised in PLG Arbitration and Dispute Resolution Bulletin. Further information is available on all topics but nothing in PLG Arbitration and Dispute Resolution Bulletin is to be regarded as a definitive statement of the law or as specific legal advice and reliance should only be placed on particular advice obtained from the relevant practitioners in the light of all relevant facts and circumstances. Readers are requested to direct their enquiries to the author of the relevant article.

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