ADR in business disputes.

It has been noted by the Law Reform Commission in its Report on *ADR: Mediation and Conciliation* published in November 2010 [LRC 98-2010] that '*the way commercial disputes are handled can have a profound impact on the profitability and viability of business; that poorly managed conflict costs money, creates uncertainty and degrades decision quality*.'

It is the opportunity presented by ADR, mediation in particular, for parties in dispute to address and resolve all aspects of their dispute, including legal issues, which can make the process so appropriate for business disputes. A court may only consider and determine conflicting legal rights and obligations by reference to the factual matrix of the case and the evidence before it and all subject to public scrutiny save in specific instances. Parties in mediation may however address and resolve all aspects, including underlying causes of their dispute, issues of personality etc and above all, their respective commercial interests in achieving resolution by agreement, which discussions and/or agreement remain confidential between them and the mediator.

Other features of mediation which make it appropriate for business disputes are its ability to salvage valuable commercial relationships damaged by conflict, its facilitation of resolution very quickly and at the earliest possible stage in a dispute and the very significant saving on the costs of litigation or arbitration consequent upon early resolution by agreement.

Mediation is by definition, a voluntary process which does not bind the parties unless and until they reach a settlement agreement. In order for mediation to work well therefore, the process requires the parties' full commitment to working, with the assistance of the mediator towards finding a solution that works for them. To be successful, the process also necessarily requires a suitably qualified and experienced mediator appointed by the parties.

Most solicitors in Ireland now have some knowledge of or familiarity with the mediation process in business disputes, even if not all have yet been directly involved as a representative or adviser of one of the parties in the successful resolution of a business dispute through mediation. As suggested by Ms Justice Fidelma Macken at the recent launch

of a training film by ICMA, the Irish Commercial Mediation Association, any lingering reticence on the part of legal practitioners to the use of mediation for business disputes may be attributable to their unfamiliarity with the process or even to their perception that its traditional application is in matrimonial disputes but that in fact it is difficult to imagine any commercial dispute in which it could not be used, except perhaps in the limited number of cases in which a judicial declaration of the law is absolutely required by the parties. Patrick Manley, CEO Europe, Zurich General Insurance, while not speaking for the insurance industry, expressed his view at the launch that lack of understanding of the process may be the main reason why it has not been more widely used to date in disputes involving insurance companies here but that he is personally convinced of the value of the process for resolving commercial disputes and believes that his industry has nothing to lose and much to gain by using mediation more often.

For those who are familiar with mediation and have being using it for some time to good effect, they need no persuasion. Mediation for them is just another tool in the bag when it comes to assisting clients to achieve a successful resolution of business disputes, which before had always needed litigation or arbitration. If one asks a commercial litigator in a London City or indeed a large Dublin firm whether they recommend litigation or mediation for commercial disputes, they will not understand the question for two reasons. One is because they do not distinguish between litigation and mediation as an end in itself and second, they have been practising in mediation for up to 8-10 years longer than most Irish solicitors. They will say that the priority for them is to provide the best possible service to their clients. If the clients demand early, efficient and cost-effective resolution of business disputes, then mediation will be on the agenda for discussion from the outset of the retainer. Whether mediation is ultimately used and the point in the dispute at which it is used will largely depend on the nature of the dispute and the clients' requirements and expectations. A client who does not however receive an early and comprehensive explanation from its legal adviser of the process and how it might be used to achieve resolution at the earliest possible opportunity, will be asking questions of them.

There are signs that the pace of development of commercial mediation in Ireland is increasing. Mediation has been and will continue to be an important part of practice in the Commercial List of the High Court, there is no doubt. The current Minister for Justice and

Defence, Alan Shatter TD published the general scheme of the Mediation Bill 2012 on 1 March 2012. The proposed Bill introduces an obligation on solicitors and barristers to advise clients to consider mediation as a means of resolving disputes and where court proceedings have issued, requires parties to confirm to the court that they have been so advised and have considered using mediation as a means of resolving their dispute. It provides that a court may, on its own initiative or on the initiative of the parties, and following the commencement of proceedings, invite the parties to consider mediation as a means of resolving the dispute. It provides for the suspension of proceedings in such cases to facilitate the mediation process. It contains general principles for the conduct of mediation by qualified mediators, including an obligation on mediators to provide information on their training and experience to parties to the mediation. It provides that communications between parties during mediation shall be confidential. It provides that the parties to the mediation shall determine among themselves the enforceability of any agreement reached during the mediation process. It provides that the costs of mediation must be reasonable and proportionate and not linked to the outcome of the process. It makes specific provision for the involvement of children in mediation in family law disputes and it provides for the introduction of codes of practice for the conduct of mediation by qualified mediators.

The recent trend has been for the introduction of more active judicial case management into the rules of court. This trend continues in the Mediation Bill 2012 and new court rules are likely to continue to feature reference to the mediation process. The Courts Service is working on comprehensive courts consolidation legislation, again following upon the work done by the Law Reform Commission, concluding with its draft Bill published in November 2010, which when enacted is likely to consolidate the role of ADR processes generally, including mediation, in the civil justice system.

Evidence of the increasing importance of mediation in business dispute resolution may also be seen in the recent establishment by CEDR, the Centre for Effective Dispute Resolution of its CEDR Ireland Mediator Practice Group to service the market in Ireland and Northern Ireland.

Key questions for solicitors when considering mediation will continue to be 1) the timing of mediation and 2) the choice of mediator. It is never too early to propose mediation but it

may be too early to mediate. An offer to mediate should be made at the earliest possible opportunity but the mediation meetings should not precede until all parties are fully prepared. The mediator may be the best judge of whether a dispute is ready for mediation.

A solicitor who's client is considering the appointment of a mediator should, at a minimum be satisfied as to the following:

a) that the proposed mediator holds a current accreditation by a reputable mediation training body;

b) that he has current professional indemnity insurance to practice as a mediator;

c) that he practises in accordance with the EU Code of Ethics for Mediators;

d) that he has a track-record as a successful mediator, demonstrated by an up-to-date mediation CV, regardless of his professional background and status;

e) that he will administer the mediation including the completion and execution of a mediation agreement;

f) that he will quote a fee;

g) that once appointed, he will devote his complete attention to the mediation in accordance with the terms of the mediation agreement, including being prepared to continue the mediation meetings late into the evening on the mediation day, if so required by the parties.

The selection of a suitable mediator does not guarantee a successful outcome but the appointment of an unsuitable mediator will ensure that a successful outcome through mediation is unlikely, if not impossible.

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