

In defence of mediation



Sir David Edward QC

It is vital to ensure that the mediation process does not become too formalised and lose the very characteristics that make it attractive, says accredited mediator and former European Court judge

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It is not uncommon to hear that mediation is just another fad to get rid of lawyers, save costs and cut court lists. Even if this were partly true, it would be odd if it were entirely so. The idea of bringing in a disinterested third party to help resolve a dispute is a very old one and, in a sense, it lies in the origins of the judicial process itself. Some of the most enthusiastic and successful mediators are lawyers, and experienced mediators say that their greatest allies in achieving a successful outcome are often the lawyers for the parties.

If mediation is not just another fad, why is it only recently that its advantages have been recognised? What has changed? I would identify three agents of change, two fairly obvious, one less obvious.

First, there has been a change in attitude. The general distrust of adversarial politics is reflected in public attitudes to traditional forms of litigation. People are no longer prepared to entrust themselves to a system in which they feel that they have no say and their fate is entirely in the hands of others. After all, courtroom dramas on television are usually more engaging than the real thing. Few judges would nowadays regard their role as being that of the boxing referee, seeing that the rules are kept and counting the points at the end. Their function is rather to see that disputes are resolved in the best way possible and, for many of them, if this be through mediation rather than litigation, so much the better.

Second, the nature and techniques of mediation have been studied and are now being learned in a systematic way. Mediation services are available from a range of providers, adapted to the needs of the user and the nature of the subject matter.

Third, an important agent of change

has been the relative ease of copying and transmitting documents. When I began work in a solicitor's office 45 years ago, documents for use in court had to be copied when they were created (six copies at most on a normal typewriter) or copied on photographic paper in a darkroom. Lawyers had to be very selective when deciding which documents they would rely on.

The photocopier has overcome that problem but it has enormously increased the volume of paper with which lawyers and courts have to deal. There is constant pressure for completeness rather than selection, and there is always the risk of professional liability if a relevant document has not been produced, or the inferences to be drawn from it have not been explored and dealt with. This has had a major effect on the cost and time involved in litigation and e-mail has only aggravated the problem. Arbitration and other forms of alternative dispute resolution that involve adjudication are no different in this respect.

Paradoxically, while it has complicated the process of adjudication, the ready availability of documents and ease of transmission helps the process of mediation. The mediator can be provided simply and cheaply with enough material to understand the issues and identify the strengths and weaknesses that will weigh in the parties' risk assessment. Since the mediator is not an adjudicator, it is not necessary to produce every document that might conceivably be relevant, and further documents can be made available and discussed as the need arises.

Mediation is informal and confidential, so that it is easier for parties to maintain (or even restore) commercial and personal relationships. But they can still walk away from it at any time and they are not bound unless and until they reach agreement. At worst, they will

have disclosed some of their hand to their opponent, but this will be true for the opponent too. At least, if litigation is inevitable, the issues will be better focused and less time and money will be spent.

There are, however, two dangers to be guarded against. First, it is important that mediation should not become formalised so that it loses those very characteristics that give it its value. It is encouraging that the European Commission, in its proposed Directive on mediation (COM (2004) 718 final) has abandoned proposals for legislation affecting the process of mediation and the appointment or accreditation of mediators. Some degree of regulation may prove to be unavoidable but it will be better to rely as far as possible on the (voluntary) European Code of Conduct and other well-developed techniques of self-regulation.

Second, while the purpose of mediation is to enable the parties to achieve settlement, their agreement must not be illegal. In most cases, any potential illegality will be obvious, but there is a risk that a commercially attractive settlement will fall foul of the rules on competition and financial regulation, many of which are highly technical. Bearing in mind that the mediator may not be a lawyer, it will be important to ensure that the mediation process is not tainted by the illegality of the outcome, and to stress the professional responsibility of lawyers who take part in it. ■

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