



## Mediation given government boost and court support

Ben Rigby - 10 June, 2014

### UK acceptance of ADR emphasised by courts, state and lawyers alike.

UK Justice Minister, **Lord Faulks QC**, has repeated the government's commitment to delivering a justice system that prevents the unnecessary escalation of disputes and makes more use of out-of-court alternatives like mediation, arbitration and conciliation.

Speaking at the Civil Mediation Council annual conference in Leeds, Lord Faulks called on the mediation community to help people to resolve their disputes effectively, efficiently and fairly.

The conference came following the publication, in May, of the Council's own survey which found that the UK mediation market had grown by an estimated 9% last year.

The survey was based on an estimate of 9500 commercial mediations (at a value of GBP 9 billion) performed in the last 12 months.

In his speech, Lord Faulks said that "going to court should be a last resort; we need to cut down on the amount of unnecessary, expensive and confrontational litigation in our society".

He added: "As a barrister I knew that the best thing for clients was to stay away from court and I believe it just as strongly as a minister."

### OPPORTUNITIES FOR ADR

Faulks said that government was leading by example by resolving issues away from court using alternatives which are usually quicker, cheaper and provide better outcomes.

**Stephen Ralph**, consultant solicitor at **Keystone Law**, said the ministerial statement was "very much in line with the Civil Procedure Rules, which have for some time required that proceedings should only be started as a last resort and that ADR and mediation... should be a pre-requisite".

Recent examples of this include the creation of small claims mediation to help resolve lower value proceedings, a pilot mediation scheme in the Court of Appeal, and looking at online dispute resolution.

The Civil Justice Council appointed legal IT expert, **Professor Richard Susskind**, to examine the scope for such procedures in

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April.

Its chairman, **Lord Dyson**, the Master of the Rolls, said, in a statement: “The CJC is always interested in exploring ways for improving the civil justice system and making it more accessible.”

He noted: “Online dispute resolution certainly offers opportunities for doing this, and we await the report of Richard Susskind's group with great interest.”

Such changes, alongside recent decisions of the courts which have promoted mediation, have highlighted the costs sanctions open to those who refuse to consider it.

Ralph told *CDR* these were seen recently in the Court of Appeal decision in *PGF II SA* [2013] EWCA Civ. 1288, where costs sanctions were imposed on a party for failing to respond to a request to mediate.

**Charles Gordon**, mediator and arbitrator at **JAMS International**, agrees with Ralph, saying “the courts now take a very dim view of parties who refuse to mediate”.

Faulks’s speech follows the Council’s own recent research, carried out in association with the **Centre for Effective Dispute Resolution** (CEDR), which sought opinion from both mediators and lawyers on the subject.

Faulks said “the success of mediation ... in keeping unnecessary litigation out of the courts is a key cornerstone of an efficient and cost effective justice system”.

It seems to be working. The CMC survey, the Mediation Audit, the sixth survey of its kind conducted by CEDR over the last 12 years, found that just over 75% of cases settled on the day of mediation, and another 11% shortly after, a success rate broadly consistent with previous years.

Lawyers also said that the majority of mediators (82%) were performing well (with only 6% inadequate); figures which were again up on 2012’s survey.

Gordon says Faulks cannot claim all the credit; “in commercial disputes it is not so much the government as the courts which have been actively promoting mediation and other forms of ADR”.

Nor is the government the only body to take a more active interest. Encouraged in part by the incentives for settlement encouraged by **Lord Justice Jackson**’s reforms to civil procedure, commercial parties are also keen.

## COMMERCIAL MEDIATION RECONSIDERED

Magic Circle law firm, **Linklaters**, hosted a lively debate between mediators and litigators in April 2014.

Asking what mediators want from advocates, and what advocates, in return, want from a mediator, UK Supreme Court President, **Lord Neuberger**, chaired a panel consisting of mediator **Bill Marsh**, **Sarah Clover** and **Jane Andrewartha** from insurance law firm **Clyde & Co**, **Katie Bradford** - a litigation partner at Linklaters, and barrister **Andrew Goodman**, convenor of the Standing Conference of Mediation Advocates (SCMA).

The event, facilitated by the SCMA, with the Commercial Mediation Group, looked at how mediation should be conducted, and how strength of character and a sense of humour can be useful tools in mediating between parties.

That both those characteristics are valued can be seen by the CEDR survey, which found that lawyers valued personal style and experience very highly when considering the appointment of a mediator, being the second and third most important characteristics, with availability being the first.

Mediators say 71% of lawyers and 62% of clients performed well at mediation, with only 14% and 15% respectively being inadequate. The figures show an improvement on previous years.

Findings like these led Lord Neuberger to tell the audience that “mediation has come of age and this event – and the practical advice we’ve heard – highlights that. I’d like to congratulate mediators for ensuring that mediation has become part of the rule of law”.

## **PROPOSALS FOR CHANGE**

Could more be done? **William Wood QC**, of **Brick Court Chambers**, and JAMS International, says “the challenge for the courts, for government and perhaps above all for the mediation community is to be more creative in supporting mediation”.

He says Faulks, by his speech, “is challenging all of us, mediators and rule-makers, to find new ways of getting the message about the benefits of mediation across”.

That includes ensuring the system is not seen to be rigid, as **Peter Rees QC** has argued.

Gordon says, short of compulsion, such as in the Italian examples, which proved controversial, “there is little appetite for this in the UK”.

There may be limits to what can be expected of the state, he said “it would go against the fundamental premise for all types of ADR – they are voluntary processes”.

Even in the US, “where judges do often require parties to attend mediation, it is frequently the case that parties have no serious intent to settle and simply go through the motions to keep the judge happy,” Gordon counsels.

Confidence, not compulsion, may be better. Bradford, recently elected vice-chair of the Civil Mediation Council, said in a statement that she was “greatly encouraged by the growing use of mediation in commercial litigation and its adoption by clients”.

Evidence for Bradford’s statement can be seen in survey results that suggested the elite group of the most experienced mediators had grown by 30%, whilst companies are increasingly pledging their support.

Bradford said: “Linklaters formed the Commercial Mediation Group to harness the support of mediation by commercial litigators, and it is providing a voice for clients and litigators for debate with the mediation community. Endorsement by the senior judiciary is most welcome.”

She added: “Commercial litigators aim to resolve our clients’ disputes effectively and mediation plays an important part in that.”