Mediation: Dispute Resolution - Naturally.

A simple search will quickly highlight how mediation is an activity that has been practised for centuries. Some cultures regarded the mediator as a sacred figure, worthy of particular respect for their peaceful means of dispute resolution. Depending upon which source you land upon, you will have the choice of determination as to whether it was first developed in China, ancient Greece or in Roman times. Suffice it to say we have been seeking and benefitting from the intercession of neutral mediators for a very long time.

However, it is the more traditional and formal deliberations of our court system that has been the most familiar route to which we would be consistently directed in seeking to resolve our differences. But now, as waiting lists and costs have grown and the value and importance of privacy and confidentiality has become sacrosanct, it has been to alternative means of resolution that we have significantly turned our attention and none more so than that of mediation.

In researching this article I have read various expert practitioners' current comments which, despite the fact that oceans separate them, are in full agreement in tone and issue at concern. They all signal a change in support from many legal representatives to clients who are not comprehensively appraised of the process of mediation and its benefits. They even go so far as to recommend these clients to reject the consideration of mediation.

This, at a time when Ireland is poised to introduce the Mediation Bill, indicates how much demanding work is ahead in creating a positive, supportive and enlightening awareness amongst consumers for what I would suggest is a most natural dispute resolution process.

Natural Reaction

One of the very first words we speak is a plain, simple and, impressively for such a young mind, a usually very determined – No! As our life progresses in stages of growth, knowledge and experience, the value of 'no' and its impact becomes quite effective and powerful – especially when 'yes' would have been the expected or preferred response.

What then follows is generally determined by the circumstances and context within which the negativity is expressed, to whom it is directed and what is our intention or preferred alternative. At a young age our parents would have referred to this as a tantrum, quickly resolved and more quickly forgotten and forgiven. As we age though and, debateably, should, with continued constructive adult education and guidance, know better, our disagreements can be viewed by us as being more serious in nature and significance, we can allow them to fester and grow often seeking and needing support from family, friends, colleagues and, yes, again, despite our stature, our parents, not necessarily to resolve them but rather to actually prolong them.

This progression to third party intervention is for validation, assistance and degrees of support in determining what is it that we are demanding. Is it fair and realistic or is it perhaps a misunderstanding or misinterpretation of what was intended? Or, has it been stated with no good reason and solely as a human reaction under difficult circumstances that now seems difficult to remember in terms of reasonableness? One thing is certain, our view is determined by example and, importantly, our experiences. But, not just our own experiences but those of our family, friends and colleagues which we process and integrate into what becomes our value base and ethical standpoint.

As we age and become more inquisitive, as well as experienced, it can prompt us to be significantly more challenging, open to debate and, interestingly, more inclined toward open, exciting and positively intended confrontation.

confrontation.
As we progress and grow, as consumers we contract daily with providers that we pay for goods and services; as employees we contract with our employers to provide our work and skills in return for their payment; in business we contract with other third party businesses to build and improve our surroundings and lifestyles.

In all of these personal and commercial contractual engagements there are terms and conditions that apply, obligations and undertakings that are relied upon and an overarching prevailing expectation that trust and goodwill will bring these contracts to a successful and beneficial completion.
Of course, while commonly referred to as unnecessary and almost discourteous insertions intended really for other people, penalty clauses - increasingly with significant, detailed, specific and damaging consequences – are provided in the event that one party believes it is necessary to call a halt to proceedings. Arguably, we rely upon systems, rules and legal provisions to determine our rights and entitlements. Confrontation is much less the chosen option.

The thread for both action and response is therefore seen to be determined through personal experience, trusted relationships, ethic values and a conviction that it is right to stop and say no – but argued through the proper channels and especially the tried, tested and long established facilities of the courts. The recommendation for continued personal engagement would be therefore not to do so.

To Whom Now Do We Turn

The pattern throughout dispute would be similar in the majority of cases in that personal interaction and intervention occurs in increasing levels of ranking from e.g. a consumer to a builder, through to the architect, to the supplier and, depending upon the progress or lack of it, up the ranking until someone, frustrated at the lack of any party's acceptance of responsibility, decides to seek legal advice. This is mirrored in cases of individuals and families in contention with the actions of nurses, carers, doctors, consultants and inevitably hospitals and nursing homes where the care for a loved one becomes a matter of intense division and entrenched and determined opposition.

Throughout the process the reality of life is that cost will, generally, intervene with varying levels of significance. When this point is reached a number of possibilities arise.
It may be the case that the cost of fighting what has become a matter of principle as opposed to a significant matter of financial loss brings the reality that other available options need to be explored.

I have had many consumers advise me that what was initially an issue of money had now progressed beyond that to that of principle and fairness.

Again, this prompted a suggestion for a review of options - alternatives - that could alter the approach to remedy.

The pattern I referred to above takes a toll on the quality of personal interaction upon which the contract was originally based. It has moved far away from the individuals involved and their level of engagement is frequently replaced, and determined, by legal advisors who, acting upon our direction and often despite their advice to the contrary, must say, definitively and robustly, no!

This is why mediation, I do believe, has the potential to revisit what was a positive personal interaction, provide better clarity and understanding of the issues and restore a level of trust that can be built upon to mutual current and possible future benefit.

With this in mind it is important to note certain of the findings (released March 2013) from what was the first joint survey by CEDR Ireland, together with the Irish Commercial Mediation Association, of the attitudes of civil and commercial mediators and commercial lawyers.

"Emphasis remains on client stories with little consideration for the feelings which are driving and influencing the conflict"

'There is a trend for mediations to become somewhat more legalistic and consequently more adversarial. This has the effect of moving the process away from the principals with an increasing emphasis on submissions'.

'The number one reason mediators provided when asked what was in their view... the greatest obstacle to preventing the use of mediation to settle commercial disputes was the reluctance on the part of lawyers to advise their clients to submit to mediation. "

"Indeed, one of the lawyers that completed the survey stated that "There are too many practitioners who do not understand the process, and this may undermine it critically".

Mediation

The points made within the survey goes to the heart of the matter.

Mediation is described within the proposed Mediation Bill as:

'A facilitative and confidential process in which a mediator assists parties to a dispute to attempt by themselves, on a voluntary basis, to reach mutually acceptable and voluntary agreement to resolve their dispute'.

This presents the possibility to and potential for both sides to engage and interact, likely after a lengthy period of complete and legally counseled separation, together, and revisit and discuss the breakdown within that agreement they previously, together, happily put into action.

It is, of course, a great personal achievement, on each of their parts, that they have agreed to do so. So, does this not highlight and better reflect the reality of the growth in experience that I refer to earlier in our lifetime learning? They have been locked into third party documented detail of what is their disagreement and have lost a significant degree of personal engagement and life-learned maturity through third party encouraged distance. Is it not therefore the most realistic and natural of steps to be advised of the benefits of mediation at this stage?

Now, I am not naively suggesting that all parties to all disputes will even wish to consider the mediation process but I do believe that the choice must be offered but also, importantly, encouraged and outlined in positive terms.

However, having said that, I would consider that it is at this point that such a seismic change of approach requires the application of great preparation to assist in its potential for success. This, again in respect of the indicated survey finding, clearly indicates how a trained, accredited and registered mediator is essential to the facilitation of a voluntary and personally achieved agreement by the parties.

This is where we come to the serious nub of the problem. In the United States, there is a reflected difficulty emerging with regard to legal advice and understanding for the parties of what place mediation really holds in their particular dispute.

Mark Baer is a distinguished and respected family law practitioner and a great advocate for mediation who, in May of 2013, questioned how '*... those involved in the legal system have created confusion in the marketplace regarding the concept of mediation itself. If those involved in the legal system don't know what mediation is supposed to be, how can we expect the general public to grasp the concept?'*

Those concerns and evaluations are highlighted within the CEDR Survey which refers to:

- *'Misperceptions about mediation which include that it is the same as a settlement meeting';*
- *'It is 'soft law";*
- *It is a sign of weakness to suggest mediation';*
- *'Public lack of knowledge of the process and the benefits of the process'.*

It becomes clear how engagement with the public could feed into and facilitate a wider level of appreciation within the business sector as to the benefits of mediation. However, it will be the means through which the very specific distinction of how mediation is a confidential and personal facilitation that will be key. Why? Because for one thing this is not a situation where the mediator will offer a possible solution or steer a preferred solution of one party for support from the other. This is not a friend's input but the assistance of an experienced individual completely disconnected and unknown to the parties who will allow them to privately outline their position, without interruption, in a private space – and help them find their solution to their problem.

The joint survey concludes how:

'With the expected enactment of the Mediation Bill this year, it will be interesting to see whether that will act as a catalyst for the growth of mediation in Ireland in the future.'

And notably 'In the interim, it seems that the main catalyst for change will be through educating the public and professions as to the benefits of mediation'.

The Alternative in ADR

Public perception of the term 'alternative' requires some consideration at this point.

Perception of the term 'alternative' can act as a barrier to initial consideration, never mind actual acceptance of mediation, as it may be mistakenly and poorly outlined as being a poor and substandard substitute to the real and established route of legal action through the court system.

What is suggested throughout my specific research here is that there is a growth in the number of consumers who are so advised and with the additional context that it can be agreed to accept and agree to mediate as a delaying measure. Regrettably, this is advanced through the absence of unbiased advice for consideration of the reality that mediation could hold real value and realistic potential for resolution of the dispute.

Alternative Dispute Resolution (ADR)

Mediation, when an explanation of its meaning or function is requested, is almost immediately described simply as a system for alternative dispute resolution. You would have to determine for yourself which structure is most offended by this most basic of interpretation Alternative Dispute Resolution (ADR) in general or Mediation in particular.

Its supreme confidentiality is omitted and the enormous value of the voluntary commitment from both parties is too. However, what is entirely ignored is the relevance of Mediation in context. By this I mean that the well reasoned explanation of how 'One goes to court for an interpretation of the law' rings loud and true here. Mediation facilitates the just resolution of the issue with mutual consent. In terms of value, equitable resolution and healing that is, simply, immeasurable.

Mediation has existed for thousands of years and its origin lies in the manner for resolving personal disputes privately by means of valuing compromise and respecting the fact that the parties acknowledged this to be important.

This is precisely the point. It restores our consideration to the point where we question our position of declared loss and, in context, whether or not a personal element has affected the volatility of our refusal to settle the matter under dispute. We come to consider or reconsider the true cause of our dispute and the potential – or otherwise – for recognition of their being another element to the issue that could provide for mutual reconciliation, agreement or acknowledged difference in part or in whole.

It particularly and often, essentially, provides for the opportunity simply to be face to face with the individual refusing to settle and also to settle and clarify, in plain language, precisely what is their reason not to do so.

My experience has shown me how, on many occasions, it was the third party heavily, albeit naturally, legalistic engagement that had closed out all personal interfacing and that had actually acted to exasperate those concerned, escalate the level and intensity of determined opposition and prolong the dispute and its attending and growing costs.

The key to mediation is that the process assists and requires us to restore and utilise the very capable powers of reasoning and fairness that we have acquired and improved through our life. It restores our person-to-person capabilities and consideration for agreement that is natural dispute resolution or, if you prefer, NDR.

Essentially, it moves us beyond no and gets us, at least, to possibly.

Dermott Jewell