Legal problems and opportunities for ADR in the European Union

"Alternative Dispute Resolution" - ADR

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Alternative to what? – Litigation/Arbitration

What are the problems with litigation and arbitration –

- Cost,
- delay,
- inefficiency,
- publicity

Both litigation and arbitration can be effective and efficient. However such methods of dispute resolution are increasingly complex and lengthy - with a result that legal (and expert) costs can rapidly increase so as to become disproportionate in relation to the sums in dispute. ADR (and in particular mediation) is seen as a relatively speedy and time-limited opportunity for parties to reach their own settlement. It is a process which concentrates the minds and the energies of the parties and their professional advisers.

What are the forms of ADR that are in general use:

There is not just mediation (although it is probably the most well known form of ADR) but also negotiation, conciliation, early neutral evaluation, expert determination, adjudication and others.

Why ADR and what does it contribute to justice within the context of the European Union?

- It is a means of securing greater access to justice
- Governments seem to like it
- It is a political priority

As to access to justice – this is a fundamental right as provided for by Article 6 of the European Convention on Human Rights and Fundamental Freedoms and the right to valid remedies has been decided as being a general principle of community law (Case 222/84 Johnston [1986] ECR 1651) and this is entrenched in Article 47 of the Charter of Fundamental Rights of the European Union.

Unfortunately with litigation and arbitration, access to justice is sometimes restricted due to the inability of a party to pay the costs involved and by reason of the restrictions of legal aid (not available at all in arbitration and frequently not granted or not adequate in civil litigation in the UK). So it has long been said with a certain irony that ***"Justice like the Ritz Hotel is open to all!"*** Perhaps ADR is an effective means of addressing that sorry state of affairs.

It is evident that the European Union is taking positive initiatives to facilitate access to justice through ADR. These initiatives are highlighted in the Green Paper on alternative dispute resolution in civil and commercial law presented by the Commission of the European Communities on 19th February 2002. That paper states that ADR is an "integral part of the policies aimed at improving access to justice".
The Green Paper talks of certain non-determinative forms of ADR helping to achieve social harmony in that ***"the parties do not engage in confrontation but rather a process of rapprochement"***. Well that is fine in my experience but, in reality, many mediations involve

parties who have a considerable enmity towards one another. They may be engaging in the process for a whole variety of reasons - but the desire for non-confrontation and the achievement of rapprochement is often not at the forefront of their minds! They may be engaged in the ADR process because they are adopting a commercial "common sense" approach to the dispute. The dispute may already be subject to litigation with large costs already incurred and perhaps is approaching a lengthy and costly trial. Parties may be there because they have been advised to give the process a chance. They may be there to elicit information. They may be there to give the impression of being reasonable. Whatever the reason or motivation for parties attending mediations or engaging in other forms of ADR, there is no doubt that it is becoming increasingly popular.

In some Countries there is State funding for forms of ADR – for instance in France the justice conciliators are not paid by the parties and in Ireland the family mediation service's operating costs are funded by the Government. In Sweden the office for damage attributable to road traffic has its operating costs covered by motor insurance companies and in the UK the costs of mediation may properly be claimed against the Legal Services Commission on the part of a legally aid party.

In seeking to harmonise legislation in Member States the Council of the EU in a draft directive (COM (2001) 13 final) has said "Legal aid shall be granted in cases where disputes are settled via extra-judicial procedures, if the law makes provision for such procedures or if the parties are ordered by the court to have recourse to them." (Art 16).

ADR and its increasing deployment is a political priority within the European Union, particularly in relation to the resolution of disputes involving electronic commerce (note for instance the March 2000 Lisbon European Council).

Forms of ADR have also been adopted by other influential bodies such as UNCITRAL, by the Council of Europe and the OECD.

Different member states not surprisingly approach ADR differently. Finland makes conciliation a pre-requisite to court action. In Germany judges are asked to support an amicable resolution through court proceedings. In France Article 21 of the Civil Code states that it is the duty of judges to reconcile the parties. In England the Civil Procedure Rules expressly encourage the use of ADR. Various member states have been testing different ADR procedures.

The European Commission has established to ADR related organisations:

The European Extra Judicial Network ("EEJ-Net") and the Financial Services Complaints Network ("FIN-NET").

The Commission's Green Paper says: ***"All political and legislative endeavours, initiatives and debates to date at national, Community and international level have been aimed at preserving the quality of ADRs in terms of accessibility, effectiveness and guarantees of good justice while maintaining their flexibility."***

It suggests that it may be sensible to promote legislation extending the limitation periods to account for the period of mediation. The downside is that sometimes ADR fails to achieve a resolution and occasionally (though it is felt rarely) they fail because one party has not been acting in good faith in the process and may simply have been "buying time". That represents a not insignificant risk and it might be considered that the automatic extension of limitation periods would be unfair in such circumstances. Furthermore the existence of time pressure is sometimes a positive benefit in ensuring that the ADR process reacts flexibly and speedily to the situation at hand and the very existence of time may occasionally be a real disincentive to settlement being achieved.

Confidentiality is a key to the success of ADR procedures whereas the trend with litigation is for openness (including public hearings). In a commercial context confidentiality as such has its benefits and its downsides. It allows parties to settle matters outside the glare of publicity which may have adverse consequences on their reputations, goodwill, and even share prices. In fact mediation may take advantage of the leverage of publicity in litigation in the sense that parties will know that if the ADR process fails, it may mean that everything in the dispute will come out into the open – that itself may be an incentive for the parties to make sure that the ADR process succeeds. On the other hand the existence of confidentiality sometimes encourages parties to take unrealistic positions, which they perhaps would be less willing to expose in a public arena.

Non-determinative ADR, such as mediation, is probably the ultimate expression of "party autonomy" – as mediators often say to parties: "It will be your own agreement". It is surely the most mature approach to dispute resolution that parties reach an agreement which they consider suitable rather than having a third party determine the dispute for them, possibly followed by recourse to an expensive judicial appeal process if one or other (or both) parties are dissatisfied with the result.

The bottom line is that ADR is succeeding in the UK and deserves to succeed across Europe but the word needs to be spread. Plainly there is a very favourable climate for ADR and mediation in particular within the European Union. Member States are taking their own initiatives. The commercial community once it has a sufficient experience of the ADR processes will naturally warm to them and at least see ADR as a sensible option for use before an costly "battle" takes place in litigation or arbitration (or at suitable times during the course of litigation or arbitration but before judgment is delivered). In England there is even a mediation scheme in respect of cases going to the Court of Appeal which have already been determined in the High Court or County Court. A body such as "EuroExpert" are especially well placed to promote the judicious and sensible use of ADR in its members' home territories and also in cross-border disputes - and I for one encourage such an approach by EuroExpert and the members of its constituent member organisations.