DEVELOPING THE MEDIATION MARKET I

WHAT SHOULD THE PROFESSION BE DOING?

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WHAT ARE THE ISSUES IN DEVELOPING THE MARKET FOR MEDIATION

This paper has been prepared to stimulate the debate and discussion on the subject of this session, which is "Developing the Mediation Market". It seeks to identify the issues and to stimulate debate during the course of the session at the Symposium. The paper is presented by experienced mediators from three different jurisdictions, the US, Italy and the UK.

The paper seeks to pose questions; some of these may not be comfortable ones to answer. But that should not be seen as unfair. Mediation can be compared to yoga, plenty of stretch and then perhaps some pain, followed by a sense of wellbeing.

IMPROVING THE IMAGE - IT IS BRISK, IT IS COST-EFFECTIVE, IT IS COOL

Whether in a mature market or in a developing one, the image of mediation often suffers an ambiguous positioning. Usually and synthetically defined as "facilitated negotiation", by itself a correct definition, it is often shrugged off, mainly by lawyers, as actually creating no added value. They may say "I have been negotiating all my professional life; what do I need a mediator for".

In short, a mediation may be perceived as being worthy and even successful but quite boring. This contrasts with the excitement and danger of the litigation process, where there is always a winner and a loser and where the outcome is dictated by a trial, in other words a fight, rather than facilitated negotiation.

Mediation, participating in it and contributing to it should, on the contrary, be introduced as something revolutionary, modern and even trendy. The mediation process is able to provide a platform for enhancing the supposedly often already excellent but also often overrated negotiating abilities and skills of the parties and their advisors; it allows them to obtain better results and it gives an opportunity for lawyers to impress their clients with their wisdom in proposing it and their ability to conduct it. Mediation is a much more modern way of approaching business conflict and conflicts in other areas and is in line with the spirit of the time ("*zeitgeist*" for the amateur philosopher) and should be the hallmark of sophisticated and forward-looking professionals and their business and individual clients.

IMPROVING THE MARKET

What may have to be improved is the perception of mediation by the market, i.e. by the potential end users. The question we ask ourselves today is what can be done by us, the mediators, to that end. It would be surprising and disappointing if the answer were to be "nothing".

· This article should be cited as: G. De Berti and others, 'Developing the mediation market I: What should the profession be doing?' in A. Hudson-Tyreman and others (ed.), *CIArb's Mediation Compendium* (London, 2009).

So, the presenters look forward to the opportunity to debate what is actually happening on the ground in various jurisdictions and what we can all do in developing this even further. This paper suggests that mediators should take a more active, even aggressive attitude in this. It is not sufficient to get accredited and then wait for customers. We must inform the ignorant, convince the dubious and convert the sceptics.

In the meantime, it appears that, in the UK, there are probably around 4,000 civil and commercial mediations per year. The latest figures from CEDR for 2008 show a relatively flat number of 500 commercial mediations per year undertaken by them. This is, however, against the background of a move away from institutional providers and towards the instruction of individual mediators direct or through sets of mediation chambers, such as In Place of Strife and Independent Mediators Limited.

In Italy, including the Chamber of Commerce of Milan, applications for mediation appear to have grown from some 14,000 in 2007 to 20,000 in 2008 (actual mediation proceedings are approximately one fifth of the applications). In the Netherlands, it appears that there are currently around 3,000 mediations a year and it is hoped to further develop this to 5,000 a year, with an absolute maximum potential of the market of 10,000 mediations per year.

The situation in family mediation in the UK is a further interesting contrast, with perhaps 40,000 publicly-funded mediations per year (there are around 130,000 divorces per year in the UK), leading to the conclusion that there must be at least as many again that are privately funded, relating as they will do both to not only divorce but also other breakups of cohabitees.

It is surely axiomatic that the reduction in and resolution of conflict in society is of general, social and economic benefit. Mediation has demonstrated its ability to settle disputes at more or less any stage and also to facilitate settlement of transactions and issues which may not even be described as disputes.

For example, the involvement of mediators in deal or transactional mediation may have nothing to do with resolving anything like a dispute. The same is also true of family mediation, where it may come down to agreeing on contact with the children, where everyone is going to live and the finances. None of these things may be in dispute going into the mediation but that does not mean that the parties involved do not need to agree these matters and get closure.

HOW MIGHT THE MARKET HAVE REACTED TO POSSIBLE OVERSELLING OF MEDIATION IN THE PAST

It is possible that, on occasions and in certain countries, mediation has been oversold. This is certainly not in the sense that mediation is too widespread. Rather, it may have happened that institutions and private businesses started by forming mediation providers, supposedly to prepare for the unfailingly booming demand of mediation that was expected. As such, demand has not materialised; the training of mediators has gradually become an end in itself. More and more mediators are being trained, accredited and thrown lemming-like onto a market that does not necessarily need them.

That in itself would not be a bad thing or so the thinking would go. The more mediators that would be trained, the more they themselves would become drivers of mediation, inserting mediation clauses in every document they would come across in their professional lives and promoting and extolling mediation to colleagues, clients and others, so that the market would be created or enlarged.

However, there is a risk of and sometimes a result of a backlash. People would go and train, often at hefty cost, to become mediators; they would go back to their offices full of enthusiasm for the prospect of becoming professional dispute resolvers and they would sit back (or exert themselves) and wait to be appointed mediators and nothing would happen.

The result could be despondency and the bitter conclusion that mediation is a tantalising *fata morgana* or mirage to beat all mirages, at best strictly reserved to the happy few, who have long before positioned themselves as experts in a very selective market in top-end business disputes.

Hence, the education and growing of the market is of huge importance and, if the mediators do not do this, who will? The sole responsibility should not rest solely with the mediators. The "mediation diaspora" has a vital role to play in this as well. This diaspora is made up of academic institutions, lawyers, professional institutions, such as the Chartered Institute of Arbitrators, the Judges and Government.

How will the mediators' participation in this be perceived? It may well be that it will be seen as self-serving but, frankly, so what. This is all part of the education of the market. Provided that the mediation community practices what it preaches, that is not being selfish but being proactive, there should be no objection.

Going beyond this, maybe mediation needs to become a "brand". What might make up its brand personality?

This might include giving each party the opportunity to have its emotional, legal and business concerns and points aired in front of someone who is chosen by and valued by the parties. It probably does not include "alternative", as in alternative dispute resolution, nor "non", as in non-court-based dispute resolution.

LEARNING FROM OTHER MEDIATION AREAS: CIVIL AND COMMERCIAL; FAMILY

Whilst there are undoubtedly lessons to be learned from community mediation, this paper focuses on the lessons that could be learned across civil and commercial mediation and family mediation. This is written from the perspective of one of the presenters being accredited both as a civil and commercial and family mediator. As such, it looks at the general situation in family law, principally, if not solely, from the English law perspective.

Except where it is absolutely necessary to adopt a different approach, there appears to be a general consensus that there should be a non-adversarial way of doing things permeating the conduct of family law matters in England and Wales. Collaborative law has a toehold; there is a widespread consensus amongst the politicians, the lawyers and the judges on this. Mediation is effectively compulsory in publicly-funded cases and there is a very serious discussion beginning about whether it should be compulsory in privately-funded cases as well.

Up until very recently, the classic model of family mediation involved a series of relatively short, typically one and a half hour, meetings spread over several weeks and no caucusing (and no lawyers). This is now moving to the use of caucusing and perhaps one or two preliminary meetings without the lawyers, with a final day or half day, perhaps with the lawyers, to work towards a final memorandum of

understanding. There is of course still the constraint of a Court Order to give final effect to any settlement.

Here, there are at least two key points. The first is the inherent flexibility of the process – involving or not involving the lawyers, mixing and matching plenary and confidential caucus meetings and even compulsion. It appears that there is such a degree of consensus about the human, social and economic benefits of reducing the adversarial element in family matters that there is no mention of the access to justice argument, which is often trotted out by those that oppose compulsory mediation in civil and commercial disputes.

COMMUNICATION WITH THE USERS

Inserting mediation clauses in contracts

A very simple but often forgotten device to enlarge the mediation market is to take the trouble of inserting, or causing to be inserted, a mediation clause in every possible agreement, when it comes to the dispute resolution clauses. It is surprising to note how many would be mediators (that is professionals who have attended the mediation training courses and even been accredited as mediators) forget or refrain from currently insisting that such clauses be inserted. This is comparable to the answer that, said clause being missing, a party proposing mediation often hears "my learned friend, I know and appreciate mediation and I am normally quite in favour of it but not in this case".

The presence of the mediation clause prevents this type of objections and the parties and their advisers are then likely to accept mediation as a matter of course and, furthermore, the clause is likely to be enforced by the courts.

Advising the advisors; gatekeepers other than lawyers

Rightly or wrongly, private practice lawyers are generally the gatekeepers so far as mediation is concerned. It is they who will make the call on whether to request the other side to agree to mediation and it is they who will be involved in the drawing up of the shortlist and ultimately the selection of the mediator. It is thus vitally important that private practice lawyers are kept on board.

However, we perhaps have to go further and work with not only in-house lawyers and business people but also with the politicians. The next incoming Government in the United Kingdom is likely to have even less money at its disposal than the current one for the purposes of the civil justice system. We have to be terribly careful to avoid mediation being or being seen as simply a cut price method of dispute resolution. Nonetheless, it can offer significant savings, to society, the economy and the public purse.

The judges are critical in all this. If we return to the Netherlands experience, we see that the judges are critical in recognising cases that are suitable for mediation. The system apparently works by judges being trained to recognise the most suitable means to resolve any particular dispute. This could be face-to-face negotiations between the parties and their lawyers, adjudication, in the sense of a trial and a judgment, where this is absolutely necessary, or mediation. This did not work properly until the judges had been trained in this essential recognition exercise. This clearly has public expenditure implications in any jurisdiction, against a background of very difficult decisions being faced everywhere in relation to public expenditure in every single country. With the proper investment, the output is very like the multi-door

courthouse, as originally envisaged by the great Frank Sander. This is probably where they have got to in Nigeria.

However, there must be significant public expenditure savings to be made and resulting social benefits to be gained in reducing conflict. Here we bump into arguments about access to justice. But, we are confusing access to justice with access to the law, the latter being a sterile and empty concept. Should not the debate be about access to fair and cost-effective dispute and conflict resolution, against the background and within the framework of the Rule of Law. Perhaps the law should be seen as a tool and even our servant in the quest for access to justice and fair resolution of disputes.

Compulsion may not sit easily within this framework. It continues to cause human rights issues for those who fail to recognise that compulsory mediation or court-ordered mediation does not mean compulsory or court-ordered settlement agreements.

Approaching business and professional associations

Another important section of the public to approach in order to promote mediation and create a market for it is that of associations of businessman and of professionals. This approach has been tried with success with regard to consumer associations. In their case, mediation is a way of allowing consumers to obtain some form of redress in cases of petty claims vis-à-vis business. These so called "C2B" (consumer to business) mediations, where litigation or arbitration were not cost-effective possibilities, can work well.

The politicians should not be ignored in all this. John Sturrock's work in Scotland in communicating with both the business and political community is to be commended in this regard, particularly his programme with William Ury this summer 2009.

Communicating with the lawyers

There is much work to be done in communicating with lawyers who represent parties at mediations to show them the way to improve their negotiation skills. It is not just mediation that is an under-taught subject in the world of academia, at least in the UK. Negotiation is itself an under-taught subject, with very little to compare to the work that is going on at Harvard in the US.

In improving their negotiation skills, the lawyers do not necessarily need to be accredited as mediators. There is much work to be done on educating and communicating with the lawyers in this area. Lawyers need to understand the mediation process but the most important thing is for them to be skilled negotiators, so that they can represent their clients to the fullest extent and to the best possible level. Perhaps some lawyers are natural negotiators; for the rest of us, this is a skill that can be learned, practiced and further refined.

Communicating with the judges: converting the sceptics – the European experience

In European civil law jurisdictions, the attitude of the Courts was traditionally to reserve to themselves the task of deciding the disputes. At most, judges should attempt to conciliate the parties.

This attitude has been slowly changing. Court-referred mediation is beginning to be known and applied. In some jurisdictions, this was introduced by law; in others, it has taken the form of voluntary projects sponsored by individual courts.

Among the first examples, France enacted in 1995 the possibility that a judge, after having obtained the consent of the parties, may appoint a third person as mediator in order to assist the parties to try and settle their dispute.

Belgium enacted court-annexed mediation in 2005. The judge is entitled at any time, including during summary proceedings, to order a mediation, either upon a joint request by the parties or by the judge's own initiative, provided that the parties consent.

In Switzerland, under the new code of Civil Procedure that will come into force in 2011 for the whole of that country, the court may suggest to the parties to attempt mediation; similarly, the parties may attempt mediation on their own at any stage of court proceedings.

Similar laws are on the statute book of other countries. However, it is doubtful how much these provisions are applied by the judges and the general feeling is that they remain largely written on paper with very little practical results.

More interesting – and successful – appear on the other hand the projects of court-referred mediation initiated by individual courts and then spread to the whole jurisdiction.

Early cases of this experience are to be found in so diverse places as the Netherlands, Slovenia, Lithuania and Italy.

In the Netherlands, in a period from March 2000 to April 2005, a pilot Project involving referral to mediation was carried out in five courts. The project was so successful that, since April 2005, all courts in the Netherlands have a Faculty entrusted with referral to mediation. The Faculty structure consists of a mediator officer, a judge, responsible for ensuring support among the judges, and a mediation secretary, for the clerical aspects.

In Slovenia, until the year 2000 there was no tradition of mediation. In 2002, the Civil Procedure Act included provisions that the Court could suspend proceedings to allow the parties to attempt mediation. This would also suspend the running of the limitation period. At the end of mediation, the parties may agree about a binding solution in the form of either court or out-of-court settlement. The Civil Procedural Act included provisions to the effect that there is a duty on the courts to assist parties to settle their dispute at all times during the trial, as well as a duty on the courts to implement programs to reduce backlogs. Some district courts took these rules to mean that they could set up court-referred mediation schemes. The initiative spread to other courts and, by 2005, all Slovenian courts had put in place such schemes and were inviting parties to make recourse to mediation.

In Lithuania, judicial mediation and conciliation was promoted by the Vilnius City Second District Court in 2005, in a project on judicial conciliation, in-court mediation and private mediation. The project has since expanded to other courts in Lithuania.

In Italy, the Court of Appeal of Milan launched in 2008 a project called "*Conciliamo*" (Let's mediate), with the support of the Bar Council, other professional associations and the Chamber of Arbitration of Milan. Under this project, judges would invite parties to attempt mediation with one of the mediation institutions accredited with the project. It is hoped that, as in other countries, the project will be adopted by more and more courts.

The projects mentioned before have actually been promoted and then advertised by a group of forward-looking judges, reunited in an association called GEMME (the acronym for European Grouping of Judges for Mediation).

A further boost towards court-referred mediation will come from the implementation by the European countries of the EU Mediation Directive (2008/52/EC). Article 5 of the Directive provides that *"a court before which an action is brought may, when appropriate and having regard to all the circumstances of the case, invite the parties to use mediation in order to settle the dispute"*. Whilst the Directive is only considering cross-border disputes, it is expected that Member States will enact legislation to cover domestic mediations as well.

HELPING OURSELVES

Less trainers, more practitioners, more mediations, a less fragmented market.

As seen above, training too many mediators could actually backfire. Rather, the impetus should be on training lawyers for mediation.

In the same way as future litigators are trained in court or arbitration advocacy by participating in moots, future lawyers in mediation should be trained in mediation advocacy. At international level, the ICC has already shown the way by organizing in Paris the International Commercial Mediation Competition, already at its fifth edition.

Embedding mediation as a subject in every University Law faculty; how can successful mediators contribute to this

Mediation may need to up its academic game. There are relatively few courses or modules on mediation. The one that will start next year at London Metropolitan University is a shining exception; perhaps there needs to be a mediation equivalent of the Diploma in International Commercial Arbitration run by Keble College, Oxford and with which the Chartered Institute of Arbitrators is involved.

Successful mediators will have to contribute to all this.

CONCLUSION

In conclusion, our aim as practising mediators should not be further to inflate the market by creating more mediators; there are already too many. Rather than training new mediators, we should help give rise to more end users, more mediation advocates and more delegating Judges. A positive outlook for present and future mediators requires the enlarging of mediation demand, not simply of the number of mediators on offer.

We have already seen the initiative of the ICC to organise the International Commercial Mediation Competition, an exhilarating experience of mediation advocacy for young students (as the Vienna Moot is for arbitration advocacy). We should try and encourage law faculty courses on mediation advocacy and contribute to them with our skills and experience, as some of us already do.