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EDITOR'S NOTE

Welcome to 2010 and we wish you all a peaceful and prosperous New Year.

ADR is thought of as the alternative to going to court. Often described as a "common sense" approach to resolving disputes out of court rather than getting caught in a cumbersome, judicial process, ADR is becoming popular among lawyers as well as the masses. We hope that ADR will soon become the commonly accepted way of resolving legal disputes and going to court will be the true alternative. The legal system rarely takes the psychological or emotional factors of either party into account. Litigation is cold, hard, and uncaring. Both parties are instructed not to talk to each other and neither side gets to voice their concerns. Mediation uses the psychological power of empathy to create mutual understanding between parties to address concerns, promote emotional healing, and preserve ongoing relationships.

Inevitably, negotiation and mediation are becoming the most commonly accepted vehicles for the resolution of disputes around the world. Let us hope 2010 would be the start of a new decade to welcome the new world of dispute resolution and to the new alternatives!

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Family Mediation – 'An idea whose time has come'

: TONY WHATLING

Part of the title of this paper is taken from a quotation by Victor Hugo - '*There is nothing more powerful than an idea whose time has come*'.

Family mediation has been developing steadily in the UK since the late 1970's and had been evolving in the USA a decade earlier. Despite this frustratingly slow pace of development, there are signs that mediation is at last becoming 'an idea whose time has come'.

In this paper I intend to explain family mediation by addressing a series of frequently asked questions. The primary purpose of what follows is not to present an academic paper that identifies and quotes from the extensive literature on the subject. Instead I shall describe family mediation in what I hope is an informative and a straightforward style, derived from my direct experience as a practitioner, consultant and trainer over the past 18 years. In doing so I shall inevitably present knowledge that derives from such literature and so would want to acknowledge all the many writers who have taught me what I know today.

Mediation has a very clear structure and process that moves participants from identification of the issues to be resolved; through a deeper analysis and understanding of these issues; to the generation of possible options for resolution; and finally to the drawing up of an outcome agreement.

What is Family Mediation?

Family Mediation is a process by which two or more parties in dispute come together, with the help of an impartial third party, in order to negotiate over the issues that divide them and reach a mutually acceptable settlement. Mediation has a very clear structure and process that moves participants from identification of the issues to be resolved; through a deeper analysis and understanding of these issues; to the generation of possible options for resolution; and finally to the drawing up of an outcome agreement. The primary responsibility of the mediator is to manage this process, to allow the appropriate expression of feelings and acknowledgement of conflict, and to ensure a productive and future focused movement towards a dispute resolution. Family mediation offers a direct 'face-to-face' alternative to negotiations via lawyers or litigation, but is not a substitute for independent legal information and advice. There are a number of important principles that underpin mediation practice and help to distinguish it from other professional interventions.

♦ ***Impartiality*** - Unlike arbitration or litigation it is not the role of the mediator to give either Judgment or opinion, nor to make proposals for settlement. The task of the mediator is to facilitate communication between the parties in dispute, help them to identify common needs and common ground, and empower them to generate options and design their own solutions.

♦ ***Voluntariness*** - Mediation is a voluntary process that requires at least a minimum willingness of all the parties to participate. Participants cannot be forced either to attend mediation or to reach agreement. Agreements are not legally binding and therefore rely on the mutual commitment of the disputants to make them work. The mediator has no power to impose a settlement. The process includes specific steps that are designed to ensure that people are able to make an informed decision to

participate. These steps will include a careful 'screening' process designed to prevent pressure to attend as a result of actual or threats of violence or intimidation.

♦ ***Confidentiality*** – Discussions within mediation are confidential to the parties involved. This is a particularly important principle if participants are to feel able to express their views freely, and to explore a range of possible settlement options in a safe and 'without prejudice' context. The mediator would not expect to report the content of discussions to anyone outside of the meetings. The only exception to this binding principle of confidentiality would be if it became apparent that there was risk of serious harm to anyone, in particular to children.

♦ ***Needs-led negotiation*** – Whereas other forms of dispute resolution will be traditionally determined by an analysis of evidence as to the 'rights' of the parties concerned, mediation focuses on the identification of the needs of each of the parties in dispute. This analysis of individual needs inevitably highlights significant areas of mutual need, from which it becomes possible to establish the common ground on which to build an agreement. Such an agreement inevitably involves compromise on both sides, but should nevertheless be one that is perceived by the parties as 'fair'. Parties to the dispute should feel that everyone has gained from mediation, rather than feeling compromised or that there is a 'winner' and a 'loser'.

Over the years, mediation has clearly emerged as a distinct professional activity in its own right and should be practiced as such.

So who are these mediators?

Most family mediators come from a professional background of work in the social sciences and law, i.e. Social Welfare, Counseling or Legal practice. In the UK they will usually undertake a training programme approved by the UK College of Family Mediators. For example the main not-for-profit organisation in the UK, 'National Family Mediation', [NFM], provides a 15-day training programme. This is delivered in a series of three-day modules spread over six months, during which time trainees undertake co-worked practice under the close supervision of experienced mediators. From my experience over the past 15 years, of training hundreds of family mediators I am very aware of just how difficult it is to make the transition from one existing professional role to that of a mediator. Over the years, mediation has clearly emerged as a distinct professional activity in its own right and should be practiced as such, not for example as 'mediation in the style of marital counseling, family-therapy or law'. One of the key differences that distinguish mediation from other interventions relates of the 'locus of authority' between professional and client. Clearly a major personal relationship dispute that threatens to end a marriage and break up a family is likely to result in a period of disequilibrium affecting parents ability to cope and make necessary and important parental decisions. Nevertheless the task of mediator is not to take away the responsibility for these major family decisions, but to demonstrate respect and support for the parties' capacity to return to a state of mutually responsible parenthood.

So what do family mediators do?

In the UK today, most mediators will see each of the parties separately at what is know as an 'intake' or 'information' appointment, lasting for up to one hour. During this time the mediator will be giving information about mediation; getting information about what has happened to bring the client to mediation; exploring need for additional or alternative services; screening for any history of domestic or child abuse; and generally enabling the client to make an 'informed choice' about whether or not mediation is appropriate.

Assuming each of the parties and the mediator consider that mediation is both a safe and appropriate option, a joint appointment will be made.

The mediator will now start on what for family mediators is a familiar 'five-stage' problem-solving process as follows:

Stage 1 - *'Engaging'* - At the first joint meeting the mediator will start by reminding the parties of the principles of mediation, how it works and the necessary 'ground-rules' that contribute to effective negotiations between the parties. Typically these will include the need to listen to each other without interruption, trying to leave fault and blame out of the negotiations, considering the best interests of the children and the confidentiality and voluntary nature of the process. Commonly the mediator will also be getting agreement from both parents to allow the mediator to end the meeting if conflict reaches the level where communication is no longer constructive.

Stage 2 - *'Identifying the Issues'* - this stage involves finding out from each party what they are bringing for negotiation, i.e. the issues that represent their individual 'positions' in the dispute. For example, one party may want to talk only about re-establishing regular contact with their children, whilst the other may want to discuss ownership of the family home, other assets, and financial support. Alternatively one party may want to discuss the extent to which the relationship is really over, since it is rare to find that both parties are at the same point in working through the process of grief and loss associated with the ending of an intimate relationship. What matters at this stage is that all the issues are identified, the equivalent of 'setting the agenda', and secondly that they are prioritised, in terms of what is most urgent. Often the actual process of negotiation starts right here, with the mediator helping the couple to come to agreement on the content and order of the items on the agenda. The order of the agenda is likely to be determined by the urgency of the issues i.e. where there has been a breakdown of child contact with one parent, or where there is a financial crisis in relation to providing food for the children in the short-term future.

Stage 3 - *'Exploring the Issues'* - Once agreement is reached on the issues and order of the agenda, the mediation process moves to an exploration of each of the issues in more detail. For example, if re-establishing contact between a parent and the children is the matter for negotiation, the mediator is likely to be finding out what has happened since the parents separated; what the children understand is happening and have or have not been told; when and how contact had been organised up to the arrangements breaking down, and what each parent thinks should happen next. Clearly opinions as to each of these factors is likely to differ strongly at this stage, with each parent having their own story to tell about the dispute. What is crucial at this point is for the mediator to hear, understand and respect each of the diverse historical accounts, without judgment and, despite the differences, honouring each of the stories as representing the 'truth' for each individual. At this stage, the parties are likely to be hoping for a judgment from the mediator, as to who is telling the 'truth', which of them is 'right' or 'wrong' and therefore the good, trustworthy and honest parent. However, any move in this direction by the mediator is likely to please one party and alienate the other, so the mediator must work in a way that demonstrates even-handedness and an impartial attitude to the positions. By the time they come to mediation, it is common for people in dispute to no longer be able to listen to, hear or understand each other. The relationship has usually reached the point where each is trying to out-talk the other and may be making threats and counter-threats in their attempts to change the others point of view. The way that the mediator demonstrates the all important listening and understanding is by making regular summaries to the speaker, both in terms of the factual and the emotional content of what is being said. In doing so they not only build up a memory of the detail, but through these accurate and neutral summaries, enable each party to hear and understand the other, perhaps for the first time in weeks, months, or in some cases years.

Stage 4 - *'Identifying the Options'* - Having established a good level of understanding, the mediator will encourage a move to this next stage, and attempt to facilitate a process of 'creative option development', in which the parties explore a range of ways to resolve the issues in dispute. It is important that the mediator encourage the parties to identify a range of possibilities, since at this point any proposal by one side is inevitably likely to be unacceptable to the other. If contact between the children and a parent is to be re-established, the mediator will be asking when, how and where, this could take place. The higher the conflict and lower the threshold of trust between the parents the greater the need for detail in the arrangements. The less the chance of something going wrong at this stage the better and hence the need for careful attention to detail about time, place, transport, and most importantly what will happen if something goes wrong with the plans, e.g. illness, a car breakdown or traffic hold-up. High conflict and low trust may also lead to reluctance to make agreements so early in the process. This is particularly likely where more complex issues such as financial and property matters have still to be addressed. In this case the mediator may encourage 'interim' or short-term arrangements, to be tried out for a few weeks and reviewed at a further meeting.

Stage 5 - *'Reaching Agreement'* - The final stage in this process involves recording the details of the arrangements negotiated by the parents. The details are often written on flip-chart paper so as to ensure maximum joint participation by the couple. The arrangements are then typed up in the form of a 'Statement of Outcome' for the meeting. Carefully arranged interim agreements are often very reassuring to high conflict couples, i.e. that they have achieved a positive start in negotiations. Where the short-term arrangement is successful, it invariably increases the prospects of a growth in trust for future meetings and consequently a reduction in overt conflict. Subsequent appointments are likely to deal with a wide range of other issues, for example exploring in detail financial matters such as family income, estimated expenditure, assets, liabilities and future needs of both parents and their children. This process requires a commitment from each party to make 'full and frank disclosure' of all financial facts, usually in the form of a signed

'Agreement to Mediate' document. As the agreement begins to take shape and near completion, the mediator will often encourage each party to seek independent opinion and advice from their respective legal advisors on the proposed settlement. The results of this process are then recorded in detail in a document known as a 'Memorandum of Understanding'. The wording here, as with the 'Statement of Outcome', previously referred to, are terms chosen to demonstrate that these documents are not regarded as legal contracts and are not at this stage legally binding. They are regarded as confidential to the parties, 'Without Prejudice' and 'Legally Privileged', as are the discussions that took place during mediation. If the parties wish for documents to form the basis of legal agreements they will be advised to ask one or other of their legal advisors to create the necessary legal documents, for example a Divorce Consent Order.

How long does the mediation process take?

This will depend on such factors as how many issues are brought for negotiation and also what level of conflict and argument exists between the couple. A dispute over child contact may be resolved in one or two meetings whereas including finance and property, known as 'All Issues Mediation', may need four to six meetings and these may vary in timing from one to three hours.

Are children ever involved in mediation?

Generally speaking children are not directly involved in 'out of court' mediation. As a result of research findings, we know that it is important that children have an opportunity to talk about their feelings, worries and concerns, when their parent's relationship is breaking up. Most mediators believe that the best people to do that are the parents, so will explore with them how they are talking with and listening to their children. This may take the form of helping parents decide what the children should be told, as well as when, where and how that will happen. In certain circumstances mediators may agree to see the children in what is know as 'Direct Consultation'. This would only happen where both parents and the mediator believe this to be beneficial, for example where this might provide information to the parents that is not available through other forms of consultation. Whatever happens it is important to not put the children in a position of making major decisions that are the proper responsibility of their parents, e.g. choosing which parent they should live with.

How successful is family mediation?

The answer to this question depends on what is meant by 'success'. For example to only consider results on the basis of whether or not an agreement was reached may not account for improvements in a reduction in hostility, overt conflict, or parents ability to communicate more effectively. However, providers in the UK, not for profit sector report that where both parties are willing to try mediation, agreement on some or all of the issues is achieving around 70 - 75% agreement.

So what is the future for family mediation?

Whilst take up of mediation and results may not have achieved the speed or levels hoped for it is clearly here to stay. It seems that the inclination to turn first to lawyers when the marriage is in trouble, is part of a very deeply rooted historical culture. Consequently over the past decade it is the judiciary and the legal profession who have to be the main focus of information and education about the potential benefits of mediation, since it is they who are in a prime position to recommend it to clients, [recent statistics on publicly funded mediation show that 70% of referrals were from solicitors and 12% were from the courts]. Despite initial strong resistance by the legal profession, very many lawyers have now recognised the inevitability of its development and had the wisdom to undertake training and now offer mediation alongside their legal practice.

Mediators are now finding that numbers of self-referral are rising, and that clients increasingly come to mediation because a friend or member of their family has tried it and found it beneficial. When that begins to happen it really does look as though family mediation may be the 'idea whose time has come'.

(Author: Tony Whatling is a leading UK trainer in family mediation and director of 'TW Training Works', Training and Management Consultancy - First published in in Portuguese in 'NEWSLETTERDGAE Ministerio Da Justica' Directorate General of Extrajudicial Administration - May 2003.)

There are two types of people,
those who come into a room and say,
"Well, here I am!"
and those who come in and say,
"Ah, there you are."

Think ... Most Important Question?

During my second month of grad school, our Professor gave us a pop quiz. I was a conscientious student and had breezed through the questions, until I read the last one:

"What is the first name of the woman who cleans the school?"

Surely this was some kind of joke. I had seen the cleaning woman several times. She was tall, dark-haired and in her 50s, but how would I know her name? I handed in my paper, leaving the last question blank.

Just before class ended, one student asked if the last question would count toward our quiz grade.

Absolutely," said the professor. "In your careers, you will meet many people. All are significant. They deserve your attention and care, even if all you do is smile and say 'hello'."

I've never forgotten that lesson. I also learned her name was Dorothy.

What's your grade on that question?

Interested to contribute Articles?

We would like to have your contributions, provided they are not published else where. Articles should be in English. Please take care that quotations, references and footnotes are accurate and complete. Submissions may be made to the Journals Division, Indian Institute of Arbitration & Mediation, G-209, Main Avenue, Panampilly Nagar, Cochin - 682 036 or editor@arbitrationindia.com.

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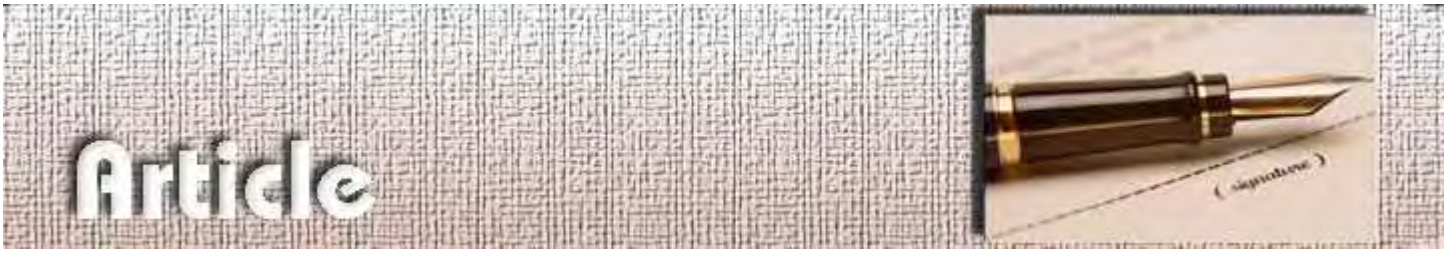
The Lighter Side

Sam was driving down the street in a sweat because he had an important meeting and couldn't find a parking spot.

Looking up toward heaven, he said, "Lord, take pity on me. If you find me a parking spot, I will go to Mass every Sunday for the rest of my life and give up drinking."

Miraculously, a parking spot appeared.

Sam looked up again and said, "Never mind. I found one."



Are you maximizing the Benefits of your Arbitration Agreements?

: JEFFREY G. WEIL AND JOHN V. DONNELLY III

In appropriate circumstances, arbitration can enable a company to resolve disputes more efficiently, in both time and money, than it otherwise would through litigation. But arbitration is not without risks. This article identifies some of the myriad issues a company should consider to maximize the benefits of its arbitration agreements.

"Get it and forget it." That is how many companies approach arbitration clauses. That is a mistake for two reasons. First, an arbitration agreement enables a company to structure the dispute resolution process to meet its needs. A company should not waste that unique opportunity through inattention or lack of preparation. Second, the law relating to arbitration agreements continues to evolve. For example, the Supreme Court issued two decisions relating to arbitration this past term.[1] And it has agreed to hear another arbitration-related case next term.[2] Furthermore, Congress continues to scrutinize pre-dispute arbitration agreements. Both houses of Congress have proposed amendments to the Federal Arbitration Act, which, if enacted in their current form, would significantly alter the legal landscape.[3]

By periodically reviewing its standard arbitration clauses, a company can adjust those provisions in response to the evolving law and ensure it is maximizing the potential benefits of its pre-dispute arbitration program. Moreover, companies should consider, on a transaction-by-transaction basis, whether they want an arbitration clause at all and if so, whether they should use their standard clause or some modification thereof.

In appropriate circumstances, arbitration can enable a company to resolve disputes more efficiently, in both time and money, than it otherwise would through litigation. But arbitration is not without risks. For example, there is essentially no right of appeal should the arbitrator reach the wrong conclusion. While it is theoretically possible for a court to overturn an

(Footnotes)

[1] 14 Penn Plaza LLC v. Pyett, 129 S.Ct. 1456 (2009) (holding that a provision in a collective bargaining agreement requiring union members to arbitrate statutory claims arising under the Age Discrimination in Employment Act was enforceable), rev'g, 490 F.3d 88 (2d Cir.); Arthur Andersen v. Carlisle, 129 S.Ct. 1896 (2009) (holding that a non-party to the arbitration agreement can invoke the agreement to compel arbitration if the relevant state law allows enforcement of contracts by (or against) a third-party, for example, under a third party beneficiary theory).

[2] Stolt-Nielson, S.A. v. AnimalFeeds International Corp., 129 S.Ct. 2793 (2009), granting cert., 548 F.3d 85 (2d Cir. 2008) (finding that arbitration panel did not "manifestly disregard" law in construing arbitration clauses that were silent as to permissibility of class arbitration to allow class arbitration).

[3] H.R. 1020, 111th Cong. (1st Sess. 2009); S. 931, 111th Cong. (1st Sess. 2009).

arbitrator's decision, the grounds upon which it can do so are very limited.[4] As a result, in all but the most extreme cases, the arbitrator's decision will be final. A company that thoughtfully considers its views on arbitration is more likely to avoid the potential pitfalls of arbitration, while maximizing its potential benefits.

This article identifies some of the myriad issues a company should consider to maximize the benefits of its arbitration agreements.

What Types Of Disputes Do You Want To Arbitrate?

Arbitration is a matter of contract between the parties. In evaluating an arbitration agreement, courts generally "apply ordinary state-law principles that govern the formation of contracts."[5] As with any contract, a company with sufficient bargaining power should tailor the agreement to fit its needs.

The first step in implementing a business-useful arbitration philosophy is to be sure that the arbitration agreement includes those claims the company wants to arbitrate, and excludes claims that it would prefer not to arbitrate.

The first step in implementing a business-useful arbitration philosophy is to be sure that the arbitration agreement includes those claims the company wants to arbitrate, and excludes claims that it would prefer not to arbitrate. There could be some circumstances where a company would prefer to litigate rather than arbitrate a dispute. Considerations of both privacy (which arbitration affords) and size of claim (arbitration is generally cheaper than litigation) may influence this decision. For example, a company may wish to arbitrate consumer and employee disputes, but not disputes with suppliers. Even within certain categories of disputes, a company may want to arbitrate smaller claims, but not larger ones. The "right" answer will necessarily depend on the circumstances and needs of the individual company.

How Do You Want To Structure The Arbitration?

For those claims it wants to resolve through arbitration, the company should decide on the structure of the arbitration and delineate that structure in its arbitration clause. Many companies fail to give serious consideration to this issue and either adopt the standard procedures of certain arbitration entities or leave these issues for future resolution or to the discretion of the arbitrator. While common, that approach is not desirable. Rather than pick a process off the rack or leave it unsettled, a company should seize the opportunity to customize the process to meet its needs. In structuring the arbitration, a company should consider the following issues:

1. Discovery And Schedule

A company often requires arbitration because it wants to resolve disputes more quickly and with less expense than through conventional litigation. To help ensure that the company realizes the anticipated benefits of arbitration, while still providing for a meaningful process that enables each party to present its case effectively, a company should include a schedule for the proceedings and identify what discovery is permissible.

The schedule and scope of discovery can be tailored to reflect the type and magnitude of the case. For example, in cases where the amount at issue does not exceed a certain threshold, a company may want to provide that no depositions will be allowed, but the parties will be available to testify at the hearing, whereas, in cases involving more substantial sums, the company may want to provide for depositions and more extensive discovery.

A company concerned about implementing rules that may one day be to its detriment should some unanticipated scenario occur can hedge its rules by granting the arbitrator authority to deviate from the general rule in certain narrowly defined circumstances. For example, an arbitration agreement may prohibit depositions in smaller arbitration disputes, but grant the arbitrator authority to permit a deposition where necessary to preserve testimony due to anticipated unavailability of an important witness.

Although there is no one right plan, to the extent allowed by the company's bargaining power and the relevant law, a company should make these choices itself, rather than have them made for it.

(Footnotes)

[4] See, e.g., *9 U.S.C. § 10 (A court may set aside an arbitration award procured by corruption, fraud, or undue means, or where the arbitrator exceeded his powers).*

[5] First Options of Chicago, Inc. v. Kaplan, *514 U.S. 938, 944 (1995).*

2. Power of the Arbitrators

This issue has come up recently in several cases and surprised parties to their detriment. Because arbitration is a matter of contract, parties can limit the arbitrator's powers, but they should do so clearly in the pre-dispute arbitration agreement.

For example, the parties can agree that the arbitrator, and not a court, decides in the first instance whether a particular dispute is subject to arbitration under the agreement. If they intend that to be the case (which usually makes sense), it is best if the agreement explicitly so provides. If the agreement is silent on this issue, courts will infer that the parties did not agree to submit the "arbitrability" issue to arbitration.

Likewise, if a company intends that each party shall bear its own attorney's fees under any and all circumstances, it should say so explicitly. Recently, the United States Court of Appeals for the Second Circuit held that because an arbitration agreement lacked clear language to the contrary, an arbitrator to a dispute between sophisticated insurance companies had the power to sanction one party for arbitrating in bad faith by awarding attorney's fees to the other party.[6]

Finally, the number of arbitrators may be outcome determinative. Having a three-person panel decreases the risk of an aberrant outcome; but it increases the chances of a compromise result. The company should, therefore, give careful consideration to the number of arbitrators it wants to decide disputes.

3. Qualifications and Selection of Arbitrators

A company should consider what type of experience an arbitrator hearing a certain type of dispute should have. Would a retired judge who has extensive legal training and decision-making ability but limited technical expertise be preferable to a non-judge or even non-lawyer who is an expert in a particular field? And for three-person panels, how is the third person selected? Do the parties agree, or do the other two panelists pick the third member? As with all these issues, there is no one answer for every company or for every type of arbitration that a company may confront. Each approach has its benefits and potential drawbacks, and it is incumbent on the company and its counsel to weigh the potential benefits and risks and decide on a course of action.

(Footnotes)

[6] Reliastar Life Ins. Co. v. EMC Nat'l Life Co., *564 F.3d 81 (2d Cir. 2009).*

[7] Id. *at 389 (citing* Turney v. Marion County Bd. of Educ., *481 So.2d 770, 774 (Miss. 1985) (quoting 17 C.J.S. Contracts § 62 (1963)).*

Is Your Agreement Enforceable?

The Supreme Court has made clear that in interpreting arbitration agreements, federal courts will apply the relevant state law. Each state has its own approach, and a company should pay careful attention to the state laws where disputes might arise. While choice of law and choice of venue provisions will generally be enforceable provided that they are not unfair, a company should make sure that it wrote its arbitration agreement to be enforceable.

Likewise, a company must attend to the details of its agreements. A recent decision from the Mississippi Supreme Court illustrates that inattention to detail can result in an arbitration agreement not being enforced. In Byrd v. Simmons , 5 So.3d 384 (Miss. 2009), the son of a nursing home patient who died while under the nursing home's care filed a claim in state court alleging breach of contract and tort claims. The nursing home moved to compel arbitration because the son had signed an arbitration agreement on behalf of his mother when she was admitted to the nursing home. The son responded that the arbitration agreement was not binding. He argued that there was no mutual assent to the contract, because no representative of the nursing home ever signed the agreement, and, further, that he revoked his offer to enter into that agreement via letter and by filing the lawsuit. The Mississippi Supreme Court found that there was no agreement to arbitrate. In reaching that conclusion, the court emphasized that where parties to the contract intend that each shall execute the contract, the agreement does not take effect until signed by all relevant parties.[7]

Conclusion

Like any business decision, a company should weigh the costs and benefits of implementing arbitration plans to maximize the benefit to the company. Those companies who realize significant benefits by arbitrating disputes should seriously consider investing the time and money to ensure that their arbitration program is tailored to fit their needs. The best way to avoid the potential pitfalls of arbitration is to plan ahead and then follow the plan.

(Authors: Jeffrey G. Weil is Chair, and John V. Donnelly III is a Member, of the commercial litigation department at Cozen O'Connor. Both have extensive experience handling a variety of complex litigation matters. Please email the authors at jweil@cozen.com or jdonnelly@cozen.com with questions about this article.)

We rarely think people have good sense unless they agree with us.

International Mediation Institute completes One Year

After almost two years of planning, consultation and preparation following its incorporation in The Hague, 2009 was the year IMI began to implement its mission. By December, IMI's Certification Scheme had been successfully introduced and had attracted over 1,000 experienced professional mediators, the Assessment Route to Certification had begun, and IMI's Wider Mission was being actively implemented.

The following is the Introduction of the IMI Annual Report by Mr. Michael McIlwrath, 2009/10 Chairman of IMI, who is the Senior Counsel – Litigation, GE Oil & Gas, Florence.

"For those of us whose profession or personal life presents the need to manage conflict, the constant challenge is to find ways to optimize our outcomes. We achieve this by assessing the risks and costs of a dispute that will be litigated or arbitrated. This does not mean that we always prefer arbitration or litigation. In fact, this will rarely be the case, especially when there are better means of achieving the desired outcomes.

Regardless of the place or type of dispute, mediation will often be the best tool for helping parties obtain what they expect from the circumstances that gave rise to their conflict, and avoiding the negative consequences of failing to settle it. Anyone who has experienced mediation sees its potential to flourish as a critical part of functioning societies and economies.

Mediation remains under-utilized in most countries. Even where adopted, access to qualified mediators and information about them and the process is uneven. Mediation is growing slower than its potential offers. Where mediators are plentiful, they tend to be in chronic over-supply.

In the view of many Users of dispute resolution services, this is not the fault of mediation but how it is presented - as an informal, "alternative" system based mainly on personal, first-hand experiences rather than as a true profession in its own right.

To emerge as a profession, mediation must be globally understood and accepted; where competent mediators apply transparent high standards, and are instinctively regarded as professionals regardless of their background; where users see mediation as an opportunity and are more inclined to accept than reject a proposal to engage a mediator; where there are enough competent mediators from all cultures and technical fields that the most suitable mediator can easily be identified.

The creation of IMI is an opportunity for mediation to leave behind its status quo as a local niche activity and become a truly global profession. But can the leading players drive the necessary changes to the current environment to make it happen?

For these reasons, I accepted an invitation to be IMI's Chair. Because IMI has purely public service goals and is not a service provider in any sense, it does not compete with any mediator, provider, trainer or any other. Its role is to promote excellence and set consistent high standards - and to inspire the use of mediation in all forms worldwide. IMI's mission is to convene, enable, encourage, celebrate, explain, simplify, and above all to inspire. To succeed properly, it requires everyone in the field, and those who care about it, to work more proactively together and aim for that common goal.

If experienced mediators become IMI Certified, and as Users leverage the IMI portal to send more disputes to mediation (and way from litigation), significant positive change is within reach.

IMI advanced hugely and became a practical reality in 2009, as this Annual Review explains. For 2010, we can only expect greater awareness and use of IMI as a public resource so that mediation will expand more quickly into a global profession."

Report says Lawyers are unaware of ADR

Australia: LAWYERS are largely unaware of the process of dispute resolution, and are foiling appropriate resolution of cases as they push them through the court system. A new report launched by the federal Attorney General Robert McClelland has found that alternative dispute resolution remains significantly under-utilised and that a key barrier is a lack of understanding and knowledge among the legal profession, litigants and the general public.

The report, The Resolve to Resolve: Embracing ADR to Improve Access to Justice in the Federal Jurisdiction, makes 39 recommendations aimed at improving the ADR system.

Woman sues former employer for failing to participate in mediation process

USA: Phyllis Hancock, a woman employed with "Assisted Living Concepts" filed a lawsuit in Jefferson County District Court against the employers who refused to mediate or arbitrate a case she filed against it for wrongful termination. Since her termination, Hancock claims she has repeatedly attempted to engage Assisted Living Concepts in its own dispute resolution process. However, Assisted Living Concepts has refused to comply with its own obligation to mediate and, if necessary, arbitrate Hancock's case. Hancock alleges breach of contract and promissory estoppels against Assisted Living Concepts. Hancock wants the court to enter a judgment requiring Assisted Living Concepts to submit to arbitration and to award her damages consisting of attorney's fees, costs and other relief to which she may be entitled.

A Colloquium on Arbitration & Mediation

IIAM conducts a training program on Arbitration & Mediation on Saturday, 6th February, 2010 at IIAM, Cochin. Training program offers the participants to know the underlying theory of arbitration law and practice, with emphasis on drafting of arbitration clauses and agreements, awards, procedure of arbitration and the basic procedure of mediation & conciliation under the Arbitration & Conciliation Act, 1996. Law students and Law graduates are admitted. The program will include lecture, group discussions and visual presentations. Participation Certificate will be awarded to the attendees. For more details mail to training@arbitrationindia.com

Certificate in Dispute Management (CDM)

CDM is a distance learning course valid for six months from the date of enrolment. You can enroll at any time of year and you study entirely at your own pace, submitting your assignments when you are ready. Your tutor will be available to mark your assignments and give feedback on your progress for a period of six months from the date of enrolment.

You will be sent four 'reading and study assignments' with your course materials, and these form an essential part of your distance learning course. They are designed to help you to work through the course manual and understand the concepts. The course will provide a good basic knowledge of ADR – Negotiation, Mediation & Arbitration – in theory and practice. On successfully completing the assignments included in the course a certificate will be awarded.

For more details on CDM, mail to training @arbitrationindia.com