2000

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, 15 November 2000
CJ-EJ/ADACS/BULGARIA/DOCS

Stability Pact for South Eastern Europe

Regional Meeting
on
Mediation and other Alternative Means
of Dispute Resolution

Novotel Plovdiv, PLOVDIV, Bulgaria
14-15 December 2000

Mediation of commercial disputes: mediation and market forces - A discussion of how ADR is viewed in the United Kingdom by businesses and their advocates

by

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REPORT

MEDIATION AND MARKET FORCES (PART I)

Attitudes of UK Businesses towards Mediation

In February/March 2000, the independent market research firm MORI conducted a survey for the London-based Centre for Dispute Resolution (CEDR) and the national law firm Pinsent Curtis, which was the first national survey in the UK that explores businesses' attitudes towards and experience of serious business disputes or "difficult negotiations" and the role that mediation currently plays and will play in the future.

This survey indicates that around 60% of companies with a turnover of £10 million or over have been involved in a serious business dispute within the last two years.

The number of disputes experienced in the last two years varies widely but, on average, a quarter had a significant impact on business. Disputes are most likely to be with customers/clients although suppliers and employees suppliers are the next most likely parties. Of the disputes occurring in the last two, the majority has been resolved and satisfactorily so, but 38% are still ongoing – it is not known these are the more recent or complex cases.

Those responsible for the procurement of legal services have, on average, more than 11 years in such a role and are typically men aged in their forties. Decision makers are significantly more likely to have formal legal qualifications which may well have contributed to the generally held view that solicitors are a good source of advice, an effective means of dispute resolution and also respondents' awareness of legal firms who are strong players in the field of business mediation. "Softer methods" have been deployed for business disputes sending letters or holding face-to-face meetings but third parties such as professional advisors appear to play a substantial role.

In just under two-thirds (61%) of cases, external lawyers have played a part in advising on mediation. Just over a third of organisations have, at some point, used mediation as a means of alternative dispute resolution and within the last two years, mediation has clearly played a part in achieving a resolution. Mediation's benefits tend to centre around its perceived cost and time effectiveness but it is currently seen as something to try if the alternative is going to court rather than the first choice or preferred route. While there are those who would not countenance the use of mediation in any circumstances, these skeptics appear to be a minority.

Looking to the future, companies predict that their use of mediation will increase and their spontaneous comments indicate some awareness that mediation is being recognised by the judicial system as a valuable addition to the "tool box". However, this doesn't mean that organisations support the suggestion that mediation should be compulsory rather that it should be better promoted and validated by those involved in

it, perhaps by the use of case studies, or an initial "free consultation" where the procedure is explained.

In conclusion, it appears that the business community is receptive to the concept of mediation as an alternative to litigation although there is, as yet, less willingness to try mediation in the initial stages of a dispute. The barriers to mediation appear to be those that can be addressed through continued and heightened promotion and education.

Background & Sample Profile

Overall, MORI asked the initial questions of 322 respondents to achieve 200 completed interviews with seven respondents being excluded as the company offered legal services, screener a) and 114 at screener b) since the organisation had not experienced a serious dispute or difficult negotiation in the last two years.

The average interview length was 17 minutes and interviews were conducted throughout England, Scotland, Wales and Northern Ireland between 7th February and 3rd March. Interviews were conducted by fully trained and specially briefed executive interviewers at MORI Telephone Surveys (MTS).

Only companies with a turnover of £10 million or more were surveyed, as these companies are considered more likely to have been involved in serious business disputes. While a fifth of the sample have an annual turnover of more than £10 million but less than £20 million, the single largest group (37%) has a turnover of £500 million or more. There are twice as many companies with a turnover of less than £20 million among those excluded on the basis that the company hadn't had a serious business dispute in the last two years (42%). However, a sizeable proportion of these (18%) also appeared to be under the £10 million-entry point.

The whole spectrum of industry is surveyed and broadly speaking it favours service industries - as befits the UK. Financial sectors (finance, insurance and real estate) together with manufacturing sectors are best represented. Similarly, within the excluded companies, these two sectors are most prevalent.

Not surprisingly, most companies in the sample had their headquarters in the South (61%) and analysis indicates that most of the key decision makers are also located in the South – presumably at Head Office.

The annual legal spend on all legal fees (excluding settlement costs) varies but as you might expect, larger companies spend the most.

Respondents are significantly more likely to have a formal legal background (55%) than not (45%) and they have, on average, 11 years experience in purchasing law and are 44 years of age. The vast majority (81%) is male.

Summary of Findings

- While all businesses had been involved in a serious business dispute or difficult negotiation in the last two years, the number of these varies widely

from one (the minimum requirement for the survey) to as many as 2,500 and 5,500 in two cases. Further analysis reveals that one company is involved in union related work and the other is a large financial organisation, both of which could feasibly have volumes of disputes. Overall, the median or mid-point is 3 disputes. Larger companies, who have a turnover of £500 million or more, are significantly more likely to be involved in ten or more disputes than those with a turnover of up to £100 million.

- On average, a quarter of these disputes has had a significant impact on the business. However, responses vary widely, with 28% stating that none had any such effect and one in ten feeling that all or almost all had been detrimental.

- Solicitors are thought to be the most effective source of advice, with 86% rating them "very or fairly effective" and relatively few disagreeing with this. Mediation organisations are also fairly well regarded, with over half (52%) considering them effective and they fair better than industry associations. Business consultants are not generally thought to be a good source of advice on disputes.

- The last serious dispute experienced was most commonly with a customer or client (38%), although approximately a fifth (18%) have been in dispute with a supplier or an employee (16%).

- In this case, most chose to send letters to the other party themselves (87%) and many (79%) held face-to-face discussions. A high number (83%) had instructed a professional adviser to act on their behalf, with just under a fifth (18%) using an independent mediator. In contrast, almost half (47%) had ended up in court.

- In the majority of cases (61%), the last serious dispute has been completely resolved and in 85% of cases respondents are satisfied with the outcome. Thirty-eight percent of disputes are still on-going although it is not known if these are the more complex or recent disputes.

- When asked to define their understanding of mediation in relation to business disputes, respondents show a reasonably good understanding of the concept. While a number of definitions are given, the most common involves the use of an independent third party to solve the dispute or problem (52%). Generally mediation is seen as a way of listening, negotiating and sorting out problems - mainly through the use of a third party as this quote illustrates:

  "It involves two parties in front of a professional qualified mediator. This is somebody who is an appropriately qualified mediator. They create a forum where both parties can get a better understanding of the strengths and weaknesses of their particular cases with a view to agreeing settlement of their disputes without litigation."

- While in many cases (61%), external lawyers have advised about mediation as a means of alternative dispute resolution, over a third (37%) of companies

have not been so informed. Companies with a turnover of £500 million or more are significantly more likely to have been advised than their smaller counterparts. If looking for information about mediation, current lawyers would be the first choice of half, although CEDR was spontaneously mentioned by 28% of respondents.

- It is interesting that those aware of CEDR's role as a source of information are significantly more likely to have a legal background. Only a few (4%) would currently use the Internet as an information source.

- Regardless of whether the dispute is with a supplier or a customer/client, attitudes towards the use of mediation are similar. While only a minority would make mediation their preferred method (12% supplier dispute, 17% client dispute), many more would use mediation if the alternative were going to court (46% supplier, 37% client). Only 1 in 20 would never consider mediation as an option.

- Respondents were then given a formal definition of mediation as "inviting an independent, professionally qualified person to chair and guide settlement negotiations" between you and the other party" and asked again if they had used this method to resolve a business dispute. Over a third (36%) say that they had - although it is not known when. This includes 30 of the 35 respondents (18% of the total) who had previously said they had gone to independent mediation.

- Based on the definition supplied, respondents were asked how many of the disputes they had been involved in over the last two years had been resolved using mediation. Answers range widely from none (30%) to 20, 40, 50 or even 70 cases although the latter are isolated instances among large predominantly financial organisations that claim to have handled a high number of disputes in the last two years (at Q1a). Of all the disputes occurring over the last two years, in 37% of cases, one had been resolved through mediation and for a quarter, more than two had been resolved in this way. Whether they have experienced mediation or not, respondents take a pragmatic view of its benefits, considering it to be less expensive (47%) and to offer a quicker outcome (37%) than traditional litigation. Just over a quarter (28%) also feel that mediation preserves relationships.

- In contrast, its perceived drawbacks are that it offers no guarantee of a solution or conclusion (22%) and in some cases could even be a slower process as cited by just under a fifth (18%) of respondents.

- Those individuals who have used mediation as defined (71 respondents) generally consider it to be slightly (35%) or even much more effective (25%) than other methods of resolution. These individuals believe it offers a cost-effective way to quickly resolve problems.

- It is also relevant to note that, overall, the perceived effectiveness of mediation among those who have not used it is lower (if not significantly), than the effectiveness rating from those who have actually used it.

- Those who have never used mediation (128 individuals) tend to say either that they hadn't needed to, or that it was not relevant to the dispute. There appear to be only a minority that rejects the concept outright. This is reinforced by the fact that between 4-10% claim they would either "never consider mediation" (Q11) or are "not at all likely" to increase their use of mediation in the future (Q21).

- The suggestion that mediation should be made compulsory if a business dispute goes to court splits the sample but significantly more disagree (48%) than agree (38%). In addition, the strength of feeling among the opposition is noticeably higher with 28% in strong disagreement compared to 9% in strongly agreement.

MEDIATION AND MARKET FORCES (PART II)

Attitudes of UK Lawyers & Judges towards Mediation

The CEDR Civil Justice Audit conducted in February/March 2000 is an independent assessment of the perceived effectiveness of the new Civil Procedure Rules (CPR) which came into effect on 26 April 1999. These amendments to the court rules of England and Wales are part of an overall effort by the Government to reform both procedural defects in the civil justice system and the economics of litigation in their entirety. Known more commonly as the Woolf Reforms, after their author Lord Woolf, the CPR aim to reduce the excessive delay, cost, complexity, uncertainty and unfairness which were perceived by many to characterise the British justice system.

This report consists of three parts: (1) a national telephone poll of 100 lawyers conducted by the MORI research organisation, (2) the testimony of 41 lawyers who attended five separate focus groups in five different cities and (3) a written questionnaire completed by ten judges from six court circuits. In all, 151 people participated. The lawyers were divided into two classifications: external lawyers, working for firms providing legal services and internal (or in-house) lawyers, working on behalf of corporations.

The quantitative answers and unabashed qualitative conclusions presented in this audit were collected during a three week period from 28 February until 17 March 2000 and are meant to serve as a 'snapshot' which captures the mood of the legal community, not as a definitive study.

Overall, the findings show that three out of four respondents' initial reactions to the CPR are positive and that there are high levels of satisfaction. There is a clear recognition that since the new rules came into effect, there has been less litigation and faster case settlement. However, there is a noticeable variation of views as to which parts of the new CPR have had the most impact on litigation, and the effect of the new rules on legal costs.

- The majority (76%) feel that the new CPR have made a positive change on the **culture for settlement.** External lawyers (84%) are more bullish than internal lawyers (68%).

- Overall **levels of satisfaction** towards the new CPR are even higher with a total (80%) either "very" (7%) or "fairly" satisfied (73%). Internal lawyers show an overall higher level of satisfaction with 82% compared to a figure of 78% for external lawyers.

- External and internal lawyers share similar views on whether the new CPR have affected the **levels of involvement in litigation** (16% say it has increased, 47% it has stayed the same and 36% it has decreased), **speed of case settlement** (47% say faster than before while 40% say there is no change); **the outcome of cases** (17% note that outcomes have been fairer under the new rules while 62% say the outcomes were similar to those before CPR); **and whom the new CPR have favoured** (claimants 37% or defendants 9%).

- There are some differences of opinion between external and internal lawyers. Almost twice as many external as internal lawyers feel that **Part 36 offers** have had the most impact on litigation practice (62% and 32% respectively). One-fifth of external lawyers consider **costs** to have affected litigation, compared to only 6% of internal lawyers. In contrast, three times as many internal as external lawyers consider **Fast track** to have affected the speed of litigation (24% and 8% respectively).

- Far more external than internal lawyers feel that **costs** have increased since the introduction of the new CPR, with 44% and 26% respectively. There is not a distinct pattern among the responses given by internal lawyers regarding legal costs.

- Since the new CPR, just over one-third of internal lawyers think their external counterparts are finding that **cost and risk estimates** have remained unchanged.

- The majority of internal lawyers (78%) feel that **mediation** should be required at some stage if a business dispute goes to court. Only half this number (40%) of external lawyers agree with the statement. However, since the new CPR, external lawyers are more likely than internal lawyers to have been involved in mediation, at 54% and 38% respectively.

- Defendants more than claimants appear to initiate the **mediations**, with around one-third of both external and internal lawyers considering this the case. In only a few cases, the claimant or court solely initiated these mediations.

- Over half of all surveyed think that judges should initiate **settlement discussions**. However, over a half of external lawyers and just under one-third of internal lawyers disagree with the statement that "judges are adequately trained for case management under the new CPR". Internal lawyers are far more likely than external lawyers (46% compared to 28%) to feel that cases should not be "stayed" while settlement discussions are under way.

- The clear majority of lawyers (82%) think the court should **award costs** against parties who behave "unreasonably" in an Alternative Dispute Resolution (ADR) procedure. However, internal lawyers are stronger in their support for this than external lawyers (88% and 76% respectively).

- Twice as many internal as external lawyers (56%and 26%) think that the court should **award costs** against parties who refuse to take part in ADR.

- Just under one-third (32%) of internal lawyers are "every time" or "usually" advised by their external lawyers to **use mediation** rather than litigation. The same proportion of organisations use clauses in contracts that require mediation to be an initial course of action.

- The majority of external lawyers (74%) consider that the new Part 36 claimant offer provision has made **case settlement** easier. Penal Interest Rates have little impact on altering the advice given to clients in favour of settlement. Front

loading of litigation costs has affected the willingness to issue proceedings among 38% of external lawyers.

Our survey of judges was not as extensive as our sampling of lawyers. Therefore we cannot make statistically valid comparisons. However, we were able to get consistent responses from which we can draw the following broad conclusions about current judicial thinking:

- Seven out of ten judges find that lawyers have embraced the new CPR well, while three said the **level of understanding** was variable.

- All judges agree that **mediation should not be made mandatory**, while two of the ten judges thought the court had the right to investigate non co-operation by parties engaged in mediations.

- Judges unanimously agree that the **court should not provide personnel as mediators**.

- Seven out of 10 judges would **not penalise with a costs order** a party that refused to take part in a mediation.

- Seven out of 10 judges would **stay a case** when requested by one or both of the parties.

CEDR has played an active role in the public consultation process regarding the reform of the civil justice system which Lord Woolf began five years ago. The information that CEDR has provided, based on its extensive experience of conducting mediation and training mediators, has helped to make ADR a permanent part of the civil justice architecture.

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