Law Reform Commission Report on
Alternative Dispute Resolution: Mediation and Conciliation and the Benefits of ADR

By Tara Cosgrove and Sean Carr

The Irish Law Reform Commission (“LRC”) recently published a Report entitled “Alternative Dispute Resolution: Mediation and Conciliation”. The LRC is an independent statutory body established in 1975, to keep the law under review and to make recommendations for its reform and it boasts that 70% of their recommendations have resulted in reforming legislation. The LRC, acknowledges the advantages of mediation and conciliation and has recommended that it be placed on a statutory footing to provide a clear framework for mediation and conciliation.

Alternative Dispute Resolution (“ADR”) has evolved and developed in Ireland over the years on the back of a clear recognition that some disputes can be better resolved by agreement between the parties cheaper, quicker, more cost effectively and with less personal and professional stresses including damage to reputation.

While the UK has a well developed ADR system ADR has been slower to take off in Ireland with many practitioners still preferring the steps of the court and/or ambush tactics of old. Importantly in the UK there are potentially serious costs consequences for those who refuse unreasonably to consider ADR including adverse costs orders even if a party is successful in their claim.

In recent years practitioners have become more receptive to the newer forms of ADR with the introduction of procedures in the Commercial Court which allows the Court to adjourn proceedings to allow the parties to attempt ADR. Practitioners have also become more acquainted with mediation and conciliation. In addition there are new rules in both the High Court and the Circuit Court which allow judges to adjourn proceedings to attempt alternative procedures, including mediation and conciliation. The Circuit Court rules came into force on the 1 January 2010 and the High Court rules on 16 November 2010.

The well recognised benefits of ADR include:

- Cost effective solutions in cases where significant savings can be made on brief fees, witness expenses and full trial preparation. Costs can often be disproportionate to the sums in issue so savings are always welcome.
- Speed of determination and certainty. There are significant delays and uncertainties in awaiting a hearing date. Cases can take up to four years and sometimes more to be heard.
- By its nature, the parties in a successful mediation or conciliated agreement will both need to compromise. It is rarely a one way street. As such parties who successfully resolve disputes in this manner may walk away feeling somewhat more satisfied than in a traditional judgment or settlement which can be polarising.
- ADR can have the benefit of maintaining relations between parties who may be involved in further contracts and relationships into the future.
- Commercial and creative solutions can be reached which might not be available to a court such as arrangements for an orderly wind down of a practice or a business in dispute.
- Cases can often be resolved by ADR where other settlement attempts have failed.
- Confidentiality, better privacy and reduced risk of adverse publicity.
- Increased transparency with the parties themselves usually getting to decide the outcome.
- Multiple party conciliation is possible.
- Flexibility in terms of procedures and progression.
- Generally terms of settlement agreed by parties on a voluntary basis are more likely to be implemented speedily and without the need for enforcement than court imposed terms.
- Knowledge of the “real” case being put by the other side will be gained in a properly conducted mediation. In many cases it can be hard to have proper particulars of the claim and damages provided until close to the trial. In a mediation, if nothing else, you gain knowledge as to the other side’s case if ultimately a solution is not reached.
The LRC Report contains a proposed draft Mediation and Conciliation Bill to facilitate the enactment of any legislation which may follow as a result of the Report.

Some of the recommendations of the LRC report include:

- That the principles of impartiality and the neutrality of mediators and conciliators should be placed on a statutory footing and that there should be a duty to disclose any potential conflicts of interest which they may have at the outset.
- Any legislation enacted should place an onus on a solicitor to advise their clients to consider mediation and conciliation and certify that this advice has been given prior to initiating any civil or commercial proceedings. This would be hugely beneficial as in reality many solicitors do not embrace ADR as we feel they should. Having to certify that they have advised on this would be a real cause for them to have focus on this.
- A mediated or conciliated agreement should be enforceable as a contract at law.

There may of course be instances where mediation or conciliation will not be an option or one with realistic prospects of success. It may be for example that parties are at such polar opposites that the chances of any agreement are near impossible.

The provision of uniform processes for mediation and conciliation and full buy-in from legal practitioners will be required before we will see the number of disputes being resolved in this way increasing.

The recent changes to the Courts Rules in the Circuit and High Court which came into effect on 1 January 2010 and 16 November 2010 respectively should have gone some way to increasing the viability of ADR as a realistic and legitimate alternative to traditional litigation. The changes proposed in the LRC Report, if adopted, would be welcome in setting out a definitive framework within which this processes can operate.

_Tara Cosgrove is a partner and Sean Carr is a trainee solicitor in Beale and Company, Dublin._

_For further information contact Tara Cosgrove on + 353 (0)1 775 9505 or T.Cosgrove@beale-law.com_

January 2011