Mediation (Scotland) Bill

Pinsent Masons LLP consultation response

Introduction

On 28 May, Margaret Mitchell MSP lodged her draft proposal for a Bill "to increase the use and consistency of mediation services for certain civil cases by establishing a new process of court-initiated mediation that includes an initial mandatory process involving a statutory duty mediator" ("the draft proposal"). The draft proposal was accompanied by an associated consultation, "Mediation working for you" ("the consultation"). Rather than respond to the questionnaire attached to the consultation, we intend instead to give our views on the draft proposal more generally.

Pinsent Masons is a leading global commercial law firm conducting litigation in many countries in the world (including all parts of the UK). We are very familiar with the concept of mediation (as well as other forms of alternative dispute resolution) and have mediators in our partnership.

General

Whilst we appreciate that the draft proposal contains few details of the actual Bill to be put before Parliament, nor of how it will actually work in practice, we would urge caution in going down a route which may lead to unintended consequences.

In her foreword to the consultation, Ms Mitchell states that the aim of her bill is to "increase the use and consistency of mediation services in Scotland, which will, in turn, increase people's awareness of what mediation is and what it can do for them", acknowledging, however, that to be effective it must be undertaken voluntarily. That said, the draft proposal suggests a mandatory process in terms of which litigants would have to consider and speak with a mediator as a precursor to proceeding with court action.

Increased availability of voluntary mediation services, especially in small scale cases and disputes such as family matters (which are rarely blessed with a simple, coherent answer and are therefore ideal for a negotiated solution), are obviously to be encouraged. However, we suggest a cautious approach beyond that – it should be an option, but should neither become compulsory nor, importantly, be perceived as compulsory, via expenses awards for example, should mediation not be attempted or should mediation fail.

Access to justice

One of the critical functions of a civilised state is the provision of an accessible, efficient and effective dispute resolution service by way of a court structure which can be invoked by its citizens when required. Experience in jurisdictions where a court structure for one reason or another is corrupted or ceases to operate effectively can show how important that can be. Any step which tends to suggest that - for instance, for financial reasons - a state is keen to water down that obligation, can be a slippery slope. There is no doubt that the dispute resolution services offered can and should include mediation; clearly it can have a range of positive outcomes from cost to flexibility, convenience to control, but recent evidence from the Scottish Government's Mediation in civil justice: international evidence review suggests that these strong procedural justice outcomes are twinned with rather less positive substantive justice outcomes, concluding that:

> "Settlement may not always be the best measure of success in mediation therefore, any other outcomes should be considered equally significant. Access to justice should be of the highest significance to the justice system and careful consideration given to what kind of justice mediation offers and when it is appropriate. Mediation is not a panacea, and may do better for some cases than others, bearing in mind power dynamics, the privacy and confidentiality requirements, cost, and speed. On top of this there are important concerns in the literature about the role of legal representation, which can add to costs, but may be important to justice as parties have the advice and guidance needed to make good decisions and create useful, fair settlements. Though lawyers may not always be on board with mediation, their role in ensuring quality justice is important, therefore finding a balance between representation and

costs, and ensuring education and information about mediation to all stakeholders, is important. Finally, the quality of mediators is significant to outcomes of all kinds, so there should be a sustainable system that allows for good and ongoing training, and the availability of services that are resourced and adequate to need.

Mediation needs to be flexible in meeting the demands of jurisdictional context, with a structure in place that allows space for this flexible response, potentially on a case-by-case basis."

We support these findings. A useful example – although we accept, not directly analogous – is the furore which arose over the increase in Employment Tribunal fees. Ultimately, that reached the Supreme Court, where the court ruled, in effect, that it had had a deterrent effect on claims, whatever the intention, and that this was contrary to the interests of justice.

The proposed aim of the Bill is to increase the use and consistency of mediation services in Scotland. We have looked briefly, above, at the difficulties with why this should be desirable, but detailed consideration must also be given to how that will be achieved, and indeed monitored.

Committing to a mediation process can bring an enormous amount of pressure, in and of itself, on the participants to reach an agreement (even one which may not be the legally correct one, or one with which they are, in reality, not happy). Nevertheless, it is said, they have entered the process so surely they are committed to reaching a deal? That can leave participants disgruntled, disenchanted with the legal system, and so forth.

That is of course not the case in every mediation, but it is a factor which we suggest should be borne in mind if the direction of travel is thought to be towards increasing a mediator's role.

Encouragement can become compulsion

It will often be said that many systems do not make mediation compulsory, it is simply 'encouraged'. The lines between encouragement and compulsion can all too easily become blurred, however, especially where court litigation ensues and expenses awards are fought over. To have a situation where further court time and expense is taken up discussing whether or not a party did, or should have, engaged, or indeed the quality of any engagement, is to be discouraged and could in fact be viewed as a barrier to justice which a participant, under pressure to enter a process which they are reluctant to enter, feels is in the way of resolving their claim or dispute.

Experience elsewhere

We have not been able to devote the time and resource necessary to carry out exhaustive research into the experience of mediation held within the firm in all jurisdictions. Undoubtedly, some mediations are regarded as successful, especially where parties wish to negotiate a settlement but for some reason - often personalities - there appears to be an immovable obstacle. In that event, the intervention of the independent party may often be extremely constructive.

However, experience in other jurisdictions, such as England and Wales, where mediation is pressed very strongly as an option, and may give rise to consequences in adverse expenses awards, is that at least some mediations are gone through as a 'tick box' exercise. Neither party actually wishes to mediate, but neither party is prepared to say 'no' given the possible consequences should the Court take an adverse view. What is then imposed is simply an additional layer of often very considerable expense, to no real effect.

A variation on that theme is that some parties, again with no real wish to mediate to achieve a settlement, will regard a mediation as an opportunity of extracting information from their opponent which would not readily be available - or not readily available at that stage - to use to their advantage in preparation for the real court battle to come. Although mediation is a confidential process, once something has been said or revealed, that cannot be unsaid or forgotten.

Cost

Mediation may in some cases be successful in avoiding legal cost. However that is not always the case. Much current advice on the conduct of mediation (in anything beyond the smallest dispute) will focus on extensive preparation and assistance from legal and other advisors (often specialists or experts) in order to seek to achieve the best result from the mediation. Combined with the time involved and the materials which require to be gathered for it, the ultimate cost can be substantial.

Conclusion

In conclusion, we fully support and encourage all forms of Alternative Dispute Resolution (ADR) in appropriate cases. However, we urge caution before an approach is adopted which may fall foul of any of the issues we raise above. We are also reminded of informal discussions with leading judges in the Commercial Court of the Court of Session – an institution with very considerable positive credentials in the legal world. Judges there have consistently taken the line:-

- that they are available to and keen to provide a service to the business community; and

- that they do not favour compulsory mediation, or anything approaching it (other than in commercial cases which may appear commercial on the surface, but in reality are driven by other factors e.g. family disputes).

The consultation alludes to the fact that the Scottish Government is supporting a civil justice mediation project being undertaken by Scottish Mediation. The project is considering changes to legislation, as well as to legal aid, court rules, training and CPD and dedicated judicial resource. The "Mediation in civil justice review" mentioned above will support that work.

Whilst we appreciate the overall aims of the proposed Bill, we believe that if a world-leading mediation service is to be achieved, which is fully thought out and without unintended consequences, the results of the wide-ranging review alluded to above should be awaited and its conclusions scrutinised before progressing further.