

The Future of Mediation : Random Thoughts

By GEOFF SHARP

I think my overriding thought for the future of alternative dispute resolution, in particular mediation, is that we will see over the next ten years a definite “institutionalising” of mediation.

By that I mean, mediation will progressively become more embedded in our official, dispute resolution institutions, such as the courts.

That of course has already started with mediation available in the Employment Tribunal, Environment and Family Courts and the Tenancy Tribunal. It remains however on the periphery of those courts.

This institutionalising of mediation, I think, will occur in a couple of primary areas.

CASE MANAGEMENT PROGRAMME

The first is of course, our High Court. A very exciting development, as of 1 January 2000, is the new case management programme that applies to all cases issued in the High Court of New Zealand.

The case management programme gives ADR, in particular mediation, a very high profile indeed. Essentially, practitioners are required to address the wisdom of resolution outside the court system with both their clients and the judge at various predetermined stages of a proceeding as it journeys towards a hearing.

Under the case management system, every case is called before a judge for what are termed “conferences”. At at-least two of these conferences (typically there might be three or four) counsel involved in the proceeding must advise the court what they have done about attempting to resolve the matter by way of mediation or similar process.

We can expect to see the judges, in particular some judges, leaning heavily on the parties to go away and mediate the claim before they get judge hearing time paid for by the State.

Obviously, this development is driven by the back log in the court however its more than that. There appears to be a genuine push by those involved in the administration of our justice system to encourage mediation because it is seen as the preferred forum to resolve disputes.

My view is that the case management programme will take at least 12 months to fully kick in, however by mid next year I think we can expect a significant rise in the number of high court cases being resolved by mediation outside the court system.

COMMERCIAL AND OTHER CONTRACTS

The other main area where mediation is being institutionalised, at least in the area that I specialise in, is the increasingly common practice of including dispute resolution clauses in commercial contracts.

A significant part of my practice is now advising parties on the drafting of these clauses in contracts, in particular computer supply contracts or international trades contracts.

Usually these clauses require the parties to attempt to negotiate any dispute under the contract directly between themselves. If that is not successful the next step is to refer the matter to mediation and only after that is unsuccessful are the parties able to proceed to litigation.

Related to this, is the developing practice of negotiating a new charter when starting up a new business.

Although most people do not tackle partnership problems before they arise, many people now understand the value in negotiating a protocol or charter, agreeing ways to handle conflict within a business partnership before it arises.

Mediators are now getting involved in leading discussion between potential business partners (often from different countries) so that they fully understand each others' expectations, values, ways of communicating etc etc.

ORGANISATIONS

Increasingly, organisations, including large New Zealand organisations, are looking to deal with any internal conflict (for instance employment disputes) quickly and privately through the use of a private mediator.

There are now a number of New Zealand companies who have written in to their collective contracts, a dispute resolution clause that requires any personal grievances to be referred to a private mediator rather than the employment tribunal.

These organisations maintain a small panel of mediators to whom they refer employment matters when they arise. Increasingly I am seeing not only personal grievances/dismissal type conflicts but also interpersonal conflicts between sometimes very senior members of the organisation which simply require some frank communication.

DISPUTE RESOLUTION MANAGEMENT

Whilst I do think that mediation is about to enter a growth spurt over the next 5-10 years, it will plateau. Once it has plateaued I think that people like us will need to develop slightly different skills in order to make a living in the dispute resolution industry.

I believe that in the medium to long term, there will be a decline in third party intervention in business disputes and commercial organisations will take more responsibly themselves in dealing with their own conflicts. They will learn to take a more direct role in managing their conflicts and thus reduce the intervention of judges, arbitrators and mediators.

This responsibility will be driven not only by cost savings but more importantly because this is the way that conflict is dealt with in the business community.

Increasingly business sees the folly of lawyers focusing on rights and not interests; seeking victories over “enemies” and not on ongoing relationships. Increasingly they say this is not the way business operates and this is not the way they want their conflicts resolved. No longer will they be prepared have lawyers take them to 5 week hearings at the cost of many hundreds of thousands of dollars at the end of which the business relationship is inevitably sacrificed.

We can already see some (American) companies moving to this type of systemic change, for instance by actively managing conflict with purchases or suppliers by having an early dispute evaluation capability to deal with conflict early on before lawyers judges and others become involved.

I see that law schools have a huge role to play in this systemic change. They must teach graduates to not only identify a clients strict legal rights but also to understand that the legal position is only one factor that a business will consider when deciding what to do next in the face of a conflict.

The new breed of lawyers will be “bottom line thinkers” and pragmatic in the way they approach problems. They will not be process lawyers with only litigation as their weapon of choice. They will identify where the client wants to go and then explore the way t get there by use of a number of different process.

To finish with I would like to touch on where we might see growth in the mediation area over the next ten years.

ETHNIC DISPUTES

There is no doubt that, as the cold war concluded and we saw the break up of the communist state, we have also seen a marked increase in ethnic conflict these conflicts are not just confined to the old Soviet block but we have also seen Genocidal killings in Rwanda, the Asian sub continent and closer to home in Indonesia.

These conflicts are not only found in war torn areas but are also found in places like south Africa, America and here at home.

I believe that there is and will increasingly be a desperate need for law “aggressive consensus” in these areas. Effective use of mediation, especially when combined with procedures to establish and build relationships, offers the promise of helping entrenched parties to deal with and manage disputes that include ethnic differences.

PUBLIC GOVERNANCE

I think the other area that strikes me as a very fertile field for mediation is in the area of public disputes. In New Zealand we have only scratched the surface of public consensus however in the states the mediation of public disputes has a long tradition of success.

It seems to me that there is a growing level of dissatisfaction both with the forms of participation’s that are prescribed or allowed (for instance in the environment court) and with the adversarial an often ineffective nature of decision making processes. I believe citizens and government officials are increasingly seeing the means to build consensus agreements that a broad spectrums of people can support and to move beyond adversary democracy.

After all, many public disputes are simply not amenable to litigation because of the number of interested parties and the resolutions required to satisfy the parties interests are simply not available through a forum like a court.

I include in this area of public dispute resolution, the global environment. Again, issues that arise as between nations, particularly environmental ones, are simply not amenable to litigation. Assuming that war is not an option a dialogue, often formalised, will be the only really effective way of addressing each parties legitimate concerns and mediation will be highly appropriate because no one international player has either the authority or the power to impose a unilateral decision on the others.