

A NEW REALITY EMERGING IN CORPORATE COUNSEL DISPUTE MANAGEMENT?

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After the consultation, the substance of the Jackson Reforms has finally started coming into effect. Since April of this year, changes to the Civil Procedure rules with regard to case funding mean that now more than ever, issues such as proportionality of costs and settlement offers carry real consequence for any legal counsel thinking of taking a dispute to court. The increased focus on the cost of justice has also, necessarily, revived interest in alternative dispute resolution practices such as mediation and arbitration, and in particular how current practice is evolving to meet the needs of an increasingly diverse client base.

This year CEDR undertook a survey of 50 legal specialists responsible for dispute resolution within companies, and while this is not a fully statistically significant sample it does provide us with useful

information and insight into how mediation is currently being used in-house. The clear message is that organisations are happy to use mediation and other forms of ADR. However, the practicalities of usage are currently in a state of change. Historically, organisations would rely almost exclusively on external counsel as the 'gatekeepers' to mediation as a means of resolving a dispute, but this appears no longer to be the case. Increasingly, corporate counsel are choosing to approach mediation bodies themselves without external assistance – for simple disputes at least.

A new status

The change in how corporate counsel use mediation is in part a reflection of how contracts are now put together: most contracts include an ADR



clause directing signatories to mediation or other non-litigious processes before seeking redress in the courtroom or at arbitration. Around four-fifths of respondents said they used ADR clauses in contracts. The most popular clause was mediation, cited by 62 percent of respondents, followed by arbitration clauses used by 50 percent. Responses to our survey identified that after direct negotiation, settlement by mediation is the next most popular way of resolving disputes; with only 13 percent of respondents saying they had never used mediation. Those with experience of mediation ranged from a handful of cases to those who had been involved in well in excess of 100 cases, in a couple of instances.

Respondents who claimed to never have used mediation are in danger of being left behind: nearly three-quarters of respondents to our survey said that over the next three years they expected use of mediation to grow, with nearly one-fifth reporting that they expected to see 'significant' growth. When

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asked why, respondents cited speed, knowledge and cost pressures as the main drivers of interest. One respondent said that "court delays are increasing, and more court litigation needs a swift outcome"; another simply gave us the word "recession".

New approaches

The reasons for corporate counsel approaching ADR providers directly are along very similar lines – direct approaches are quicker, cheaper and can give a more satisfactory settlement than ones obtained through the courts. Interestingly, direct approaches from corporate counsel to mediators also provide a unique opportunity to involve what might be termed 'internal clients' actively – executives and board members.

Examples of the benefits of mediation arranged internally were numerous. Firstly, it gives key decision makers direct access and involvement with disputes, unlike in disputes going through the legal system. Second, according to one in-house counsel "Mediation creates a direct link between the parties. Court procedures place litigation at the centre of all the cases, rather than placing the parties' interest at the centre of such attention". And third, when arranged internally, cases (that did not contain complex legal arguments) were felt to be simpler to handle and cheaper to organise.

Most respondents said that when arranged by the in-house team, outcomes were either no different to using external counsel or in fact better. However,


for complex cases, using external advisers was still highly valued by in-house counsel. There is clearly now a level of sophistication emerging in-house regarding the use of mediation, understanding its benefits and when to bring in additional support to run the process.

We asked those taking the survey to identify with one of four statements relating to dispute handling. Almost half (46 percent) opted for the statement "We approach disputes from a commercial perspective as a first principle and will consider our stance based on this position". The second most popular statement was taking a collaborative approach and finding a mutually beneficial solution (37 percent). No one selected the statement purporting an automatically robust and non-conciliatory response, and only a few said they normally just try to be conciliatory (16 percent).

Where next?

The findings from our survey form the start of an ongoing discussion which needs to be continued with in-house corporate counsel and senior management about their needs and wants from the field of alternative dispute resolution. This initial insight into the pressures of dispute resolution and in-house legal teams shows how they regularly choose to use mediation to help meet the demands of their organisation. Whilst negotiation is by far the most popular method for early dispute resolution, mediation is consciously being used by in-house

teams as a key management tool. We should also deduce that whilst in-house teams are happy to involve external advisers when appropriate, there is substantial and growing confidence for mediations to be set up internally. When looking at attitudes to dispute resolution, when control of process costs, as well as collaboration, are favoured over fighting all challenges, it is not surprising that in-house contracts regularly include ADR clauses to ensure that preferred methods of dispute resolution are used. It follows too that the use of mediation is expected to continue to grow in the next three years.

Greater experience with direct use of mediation should also increase confidence to adopt it for a broader range of difficult conversations, including consumer class actions or boardroom disputes. Also, given growing global awareness, mediation will become increasingly common for cross-border matters. A number of corporate counsel were very much part of the first wave of campaigning for lawyers and businesses to recognise ADR. Clearly this survey indicates most are now gearing up to be an integral part of its practice in the post-Jackson world. 



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