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Recent developments in ADR: welcome changes for commercial dispute resolution

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Recent developments in ADR: welcome changes for commercial dispute resolution

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IRELAND WAS INITIALLY SLOW TO REALISE the potential of alternative dispute resolution (ADR) to deliver meaningful and cost-effective outcomes for commercial enterprises involved in disputes. Things changed dramatically with the inception of the Commercial List of the High Court (known colloquially as the Commercial Court) in 2004, which built into its procedural rules a facility to adjourn Commercial Court proceedings, allowing the parties time to consider whether the issues in dispute ought to be referred to a process of mediation, conciliation or arbitration.

Mediation, in particular, has shone through as the alternative to Commercial Court proceedings. This is due in large part to the work of the judge in charge of the list, Mr Justice Peter Kelly. Until this year the utilisation of mediation was largely confined to big business disputes of the Commercial Court. However, 2010 has seen the enactment of not one but two significant pieces of legislation designed to encourage, facilitate and prescribe for the use of ADR for commercial disputes elsewhere, alongside the existing traditional court framework. This article explores the role that ADR has played in resolving commercial disputes in Ireland and the exciting legislative developments that have taken place this year.

ROLE OF ADR IN COMMERCIAL DISPUTES

The core principles of mediation and arbitration typically suit commercial disputes, in that a less public forum for dispute resolution is provided, and as such can avoid media coverage that may potentially have a great impact on the profitability and reputation of businesses. Companies prefer to avoid disputes to prevent alarming investors and diverting resources. It is unsurprising that many commercial disputes have been settled outside the courtroom and companies are increasingly favouring ADR.

Disputes inevitably arise and when they do, commercial clients will want them resolved and finalised in a manner that is expeditious and as cost-effective as possible. The speedy resolution of disputes is a huge incentive for commercial clients – never more acutely than in recent times – and mediation in particular has proven useful in the vast majority of commercial disputes, irrespective of how complex a case may seem or how many parties are involved. In addition to privacy and speed, mediation offers the following attractions.

Flexibility and control
No ultimate outcome has to be imposed on the parties. Instead, the control of the process and the outcome achieved, with the assistance of the mediator, lies in the hands of the parties themselves at all times.

Knowledge
Mediation is carried out on a without prejudice basis unless a binding settlement agreement is executed. It therefore has the practical advantage of assisting the parties in clarifying and streamlining the issues, and gaining a greater understanding of the nature of the dispute, even if no settlement is reached.

Fallback
Businesses always have the fallback of pursuing litigation, and choosing mediation does not deprive them of the option of bringing or continuing with traditional litigation should the mediation fail.

Commercial solutions
In essence, litigation is a two-horse race. There can only be one winner and one loser. One side always goes away disappointed. Most successful mediations involve lateral thinking and commercial solutions that encompass matters beyond the legal issues in dispute. Mediation can potentially offer far more than any order a judge can make and can involve both parties perceiving that they have come away with a result.

Expertise
Being able to choose a mediator skilled in a particular area, who can readily understand the issues in dispute, can greatly assist in facilitating a settlement between the parties.

Cost
It is also much more cost-effective to pursue mediation. Mediators typically charges in the region of €5,000 to €7,000 for all preparation work and attendance at a day's mediation, which is in stark contrast to the potential costs that a case before the High Court can incur.

In contrast to ADR mechanisms, High Court cases currently take approximately 12-18

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months to be heard. Furthermore, while the waiting period in the Commercial Court is an impressive 11-12 weeks, even for large complex disputes, this efficiency is being undermined by the delay in getting a Supreme Court appeal to hearing, which, other than in cases where urgency can be established, takes appropriately two and a half years! This is a justifiable concern for any party involved in High Court and Commercial Court proceedings where there is often a commercial incentive for a losing party to lodge an appeal if it is confident that it can get a stay on the first instance order.

COMMERCIAL COURT: PUTTING MEDIATION TO THE FORE

Kelly J has been a key figure in actively promoting ADR (mediation in particular) in the Commercial Court since its inception in 2004. The Commercial Court was established in response to general dissatisfaction with the way in which commercial litigation was handled in Ireland. There was no differentiation made between commercial litigation and any other form of litigation.

The Commercial Court rules were designed to get the parties to narrow their focus on the real issues in dispute and to ensure that cases were heard quickly. In addition to the other changes in procedure, a provision was built into the rules enabling the Commercial Court to adjourn, either of its own motion or on application by either of the parties to the court, the proceedings for up to 28 days to facilitate a reference of the dispute to mediation, conciliation or arbitration (Order 63A rule 6(1)(xiii) of the Superior Court Rules). This power represented the first Irish legislative recognition of the use of mediation in the resolution of commercial disputes, and has encouraged and supported it as a resolution mechanism.

In terms of the overall affect of mediation on Commercial Court proceedings, the adjacent table summarises the most up-to-date specific statistics from the Commercial Court, which speak for themselves.

This table shows that a higher success rate of settlements occurs where the parties agree to mediate themselves rather than allowing the case to be adjourned by the court to allow mediation to take place. In light of this, Kelly J has somewhat altered his practice in recent times. He will now rarely make the order contemplated under Rule 6(1)(xiii). Instead, he suggests to the parties that they discuss the possibility of mediation.

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2010 AD(R)

The relatively high profile of the Commercial Court, involving claims in excess of €1m, has done much to put ADR, and mediation in particular, into the consciousness of the business community as an effective means of resolving disputes. Until this year the use of mediation was largely confined to that forum. Given the €1m jurisdictional threshold involved, many commercial disputes do not qualify for inclusion in the Commercial Court, and considering the proven success of mediation in the Commercial Court, there is an increasing awareness and a greater need for the promotion of ADR as a mechanism to resolve lower value commercial disputes. In this regard, 2010 has seen the enactment of two pieces of legislation (with a third one imminent) designed to integrate ADR into the existing traditional court framework.

Circuit Court Rules (Case Progression (General)) SI 539 of 2009

New rules were promulgated in 2009, which came into force on 1 January 2010, with respect to Circuit Court proceedings. The civil jurisdiction of the Circuit Court is limited unless all parties to an action consent, in which event the jurisdiction is unlimited. The limit of the court's jurisdiction relates mainly to actions where the claim does not exceed €38,092.14 and the ratable valuation of land does not exceed €252.95.

Alongside rules providing for management of Circuit Court cases, the new rules include one permitting a Circuit Court judge or county registrar at a case progression hearing to adjourn certain civil proceedings for up to 28 days to allow the parties to use mediation, conciliation and arbitration, or any other form of dispute resolution to settle or determine the proceedings issue (Order 19A, Rule 7(1) of the new Circuit Court Rules). These rules contain very similar language to the successful formula used in the Commercial Court rules.

Arbitration Act 2010 (the 2010 Act)

The 2010 Act came into effect on 8 June 2010 and repeals all existing domestic arbitration acts in their entirety, replacing them with a single, unified regime that includes the entire text of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (the Model Law) – a worldwide consensus on the principles and

SUMMARY OF COMMERCIAL COURT PROCEEDINGS	
Total ajournment of orders made	**20**
Number successfully settled at that stage	9
Number returned to Commercial Court for further directions	11
Total number of cases where parties agreed to mediation	**20**
Number successfully settled	16
Number returned to Commercial List for further directions	4

important issues of international arbitration practice adopted by more than 50 countries. Ireland adopted the Model Law in 1998 to govern international arbitrations taking place in the country and the 2010 Act now applies the Model law to domestic arbitration. This is significant as it will enable Irish businesses to have an arbitration award in their favour easily enforced against a foreign counterparty where that counterparty's country has adopted the Model Law.

The key revisions of the 2010 Act are as follows:

- Court proceedings: the Irish High Court and Circuit Court possess a new power to adjourn any civil case, on consent of the parties, to enable the parties to consider whether all or any of the matters in dispute should be arbitrated. This places arbitration in the mainstream of Irish litigation procedure.

- Costs: where costs are not agreed between the parties, the arbitrator will now have discretion to award costs 'as it sees fit'. Previously, it was unwise for an arbitrator to depart without good reason from the long-established principle that costs are expected 'to follow the event'.

- Challenge: previously, an award could either be set aside (ie rendered null and void) or referred back to the arbitrator for consideration, and such an application was on limited grounds. Now the only method of challenging an award will be to have it set aside, and the grounds for challenge are far more limited than those that existed under the previous legislation. These include, for example, where the award is in conflict with public policy, the award deals with a dispute not contemplated between the parties and the party making the application was not given proper notice of the appointment of an arbitrator. Other jurisdictions have interpreted the grounds of challenge narrowly and it is thought that Ireland is likely to follow suit.

- Reasons: the arbitrator is required to give reasons for the award unless the parties have agreed otherwise.

Rules of the Superior Courts (Mediation and Conciliation) 2010

In addition to the Circuit Court Rules, the Rules of the Superior Courts are due to be promulgated over the coming months and will commence in October. Little detail is currently known about these rules. However, it is thought that the latest rules will see a similar provision to Order 63A, rule 6(1)(xiii) being rolled out to mainstream High Court proceedings that are not capable of entry into the Commerical Court, for any reason. This marks another significant step in the facilitation of the use of ADR and will see ADR getting a point of reference in all civil jurisdictions (excluding the District Court, which deals with relatively minor civil matters where the claim or award does not exceed €6,348.69).

However, its effectiveness in mainstream High Court proceedings will largely depend on:

a) the degree to which the High Court judiciary take proactive steps by readily making enquiries of the parties, at the appropriate juncture, to gently nudge them towards considering mediation, as Kelly J has done in the Commercial Court; and

b) the readiness of dispute resolution practitioners to address mediation and ADR, where appropriate, in the litigation – the fact that a party proposing mediation will soon be able to apply to the High Court for an adjournment will make a recalcitrant counterparty think twice about unreasonably refusing to mediate.

CONCLUSION

In light of the recent legislative developments in ADR, in-house lawyers involved in advising on commercial disputes in Ireland ought to consider and regard ADR, and in particular mediation, as an integrated element of resolving all disputes, no matter how straightforward or complex.

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