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ALTERNATIVE DISPUTE RESOLUTION: A GIFT TO CHARITIES

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Methods used to settle disputes have been the subject of as rapid a transformation as can have happened to any subject in recent times, and, as a subject, it is certainly one of the most difficult areas in which to keep up-to-date. This is not surprising, as the settlement of disputes presents one of the most pressing problems in virtually all areas of human activity in a number of countries. In some ways the new structures and processes for dispute resolution are a curious mixture of old and new and, in many cases, the old processes continue to exist alongside the new. In Britain there has been the growth and spread of Alternative Dispute Resolution (ADR) and today ADR is gaining a secure foothold in a wide variety of settings and contexts. In a recent booklet entitled *Resolving Disputes Without Going to Court*,[2] the Lord Chancellor's Department reminds potential litigants that "Going to court is not the only way to resolve a dispute. There are other options." This initiative arose as a result of Lord Woolf's Interim Report on *Access to Justice* that "The Lord Chancellor and the Court Service should treat it as one of their responsibilities to make the public aware of the possibilities which ADR offers."[3] In the booklet guidance is given clearly and methodically on how to resolve

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2 *Resolving Disputes Without Going to Court*, Lord Chancellor's Department, December 1995.

3 Lord Woolf, *Access to Justice,* Lord Chancellor's Department 1995.

various types of disputes using ADR, ranging from disputes with neighbours to claims against large commercial organisations.

In essence, ADR describes the range of processes other than *litigation* used to settle disputes. Many of the developing ADR processes are, in fact, being incorporated into court procedures or adopted by legislation as adjuncts to settlement mechanisms through the courts. There is, for example, a Practice Statement from the Commercial Court on the advantages of using ADR especially where the cost of litigation is likely to be wholly disproportionate to the amount at stake.[4] In May 1996 the Central London County Court introduced a pilot scheme using ADR where the amount in issue is more than £3,000 but less than £10,000. Another pilot scheme, incorporating ADR, is to be introduced at the Patents County Court, for a two year trial, to provide low-cost, quick handling of disputes. To be sure, ADR processes have now been welcomed with open arms by a range of individuals and organisations for the resolution of disputes and today they not only enjoy the confidence of the legal profession but have official approval and support.

Why is ADR useful for Charities?

There are certain unique features relating to charities which make ADR methods, notably mediation, ideal for the settlement of their disputes.[5] The primary purpose of a charity is to promote a charitable object which, by definition, benefits the public in some way. Charities solicit donations from the public who contribute in the expectation that donations will be in the furtherance of the charity's purposes. Thus charities need the goodwill and support of the public. This would hardly be forthcoming if charities were frittering away their resources on litigation when an ADR method is readily available as a cheap and efficient alternative.

The recent costly litigation between two charities in perhaps a unique passing-off action *(British Diabetic Association v Diabetic Society and Others* [1995] 4 All ER 812) has thrown into sharp relief the need to use an ADR method to resolve disputes between charities. Robert Walker J found this expensive litigation in the High Court between these two charities deplorable, and could not see how it would

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4 [1994] 1 WLR 14.

5 See for example, Quint, Francesca, 1995 'Alternative Dispute Resolution in the Charitable Sector', *The Henderson Top 2000 Charities,* pp 1-4; Singh, Ramsumair, 'Mediation and Charities', NLJ, 15th December 1995, pp 28-32.

help diabetics.[6] There had apparently been unsuccessful attempts to settle the proceedings; but this only highlights the fact that there is a pressing need for some cheaper alternative form of dispute resolution in cases such as this.[7]

Charities are facing increasing competition for funds - competition which is exacerbated by the advent of the National Lottery. In the current climate, the reputation of charities and the efficient management of their resources are becoming more important and are under close scrutiny. Thus ADR has many advantages for the voluntary sector.

Processes used in ADR

There are many kinds of processes used in ADR, most notably conciliation, arbitration and mediation. All three processes have in common the introduction of a third, impartial party to assist in the resolution of a dispute. Interestingly, all three modes of intervention are provided free of charge - the cost falling on the public purse - by the Advisory, Conciliation and Arbitration Service (ACAS) to assist employees and trade unions, and employers, to resolve their "differences" as ACAS refers to disputes.[8] Conciliation and arbitration have had a long history in Britain and are well known, but mediation was hardly used in this country in industrial relations before ACAS was established in 1974.[9] Mediation is, however, widely used in the USA in many contexts, and is rapidly gaining ground world-wide in both developed and less-developed countries with different traditions and circumstances.

Many grievances or dispute procedures in industry incorporate an ADR process to resolve differences between the parties, and this practice is now becoming widespread in organisations providing a service to customers. The main advantage in using an ADR process is that it is readily accessible, inexpensive, speedy and

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6 *British Diabetic Association v Diabetic Society and Others* [1995] 4 All ER 812.

7 See Morris, Debra, 'What in a Name? - The Cost to a Charity of Protecting its Name' (1996/7), CL&PR, p 1. Luxton P, 'Three Charity Cases': Helping Out, Laying on and Pass "Off", NLJ, No 68, Easter 1996, pp 12-18.

8 These services are still provided free to the parties, but s.251A Trade Union and Labour Relations (Consolidation) Act 1992 (inserted in the Trade Union Reform and Employment Rights Act 1993) gives ACAS a power to charge fees and a power for the Secretary of State to require the charging of fees for some or all services.

9 See Singh, Ramsumair [1986] 'Mediation in Industrial Disputes in Britain', [1986] 17 IRJ at 24-31.

informal and, importantly, usually leads to a satisfactory resolution of the dispute. At the same time, it should be procedurally fair, yet flexible, and should not disadvantage either party, particularly an individual who may have a dispute with a powerful organisation.

Within recent years there has been a transformation of organisations as they grapple to cope with changes in the environment and, in particular, with the rapid pace of the introduction of information technology. The instantaneous communication of information globally is now commonplace: evidenced by e-mail, fax, the internet and other modes of transmission, retrieval and storage of information. Undoubtedly there are many advantages associated with these developments but they also pose difficult problems in the relationship between organisations and their employees, and organisations and their customers. Indeed, it would seem conflict is inherent in, and inseparable from, all areas of human activity in contemporary society and especially in relation to organisations.

Not surprisingly, simultaneous and parallel to these developments, there have emerged individuals and organisations specialising in the prevention and resolution of disputes without *litigation*. Universities too have not been slow to respond: law students, among others, are being educated on ADR techniques. The literature in the field of ADR is growing. There is also a proliferation of specialist agencies providing ADR as the demand for their services continues to grow. Of particular relevance to charities is the use of mediation, and this mode of intervention is being adopted by many charities. It is, therefore, appropriate and timely to examine this mainstream ADR technique, and to evaluate its contemporary usage and potential.

What is Mediation?

Attention has already been drawn to three modes of intervention used in ADR, but it is useful to put them in perspective before analysing one of them, *mediation*. Arbitration, as universally understood, "is a procedure whereby a third party (whether an individual arbitrator, a board of arbitrators, or an arbitration court)... is empowered to take a decision which disposes of the dispute".[10] A resort to arbitration which is a final-stage event, is a recognition by the parties that further negotiations will not lead to an agreement, and that a settlement will have to be imposed from the outside. Conciliation and mediation both involve "procedures whereby a third person provides assistance to the parties in the course of negotiations, or when negotiations have reached an impasse, with a view to helping

[10] ILO, *Conciliation and Arbitration Procedures in Labour Disputes,* Geneva, 1980, p 15.

them reach an agreement".[11] Mediation is a process of settling disputes whereby an independent person makes recommendations as to a possible solution.[12] There is sometimes an overlap or confusion with *conciliation* - usually defined as a less proactive form of intervention where the third party aids the disputants to reach their own agreement rather than seeking, as in *mediation,* to suggest actively the terms of a possible agreement. For this article the subtlety of this distinction need not be explored other than as a way of illustrating that the process of *mediation* may take a number of forms. It should be noted, however, that mediation and conciliation are close cousins as they both involve a continuation of the negotiating process, and any solution arrived at will have to be mutually agreeable to the parties involved.[13] Mediation is an important mode of intervention when there are parties in dispute who might be able to reach an agreement with outside help, where otherwise they could not reach such an agreement or could only obtain a solution by litigation. There are many situations where this might happen. The parties may feel that they may lose face by changing their previous demands; there may be an imbalance of power between the parties which can be counterbalanced by the use of a mediator. Frequently, an impasse or delay in arriving at a solution to a dispute could have damaging effects not only for the parties, but on other parties unconnected with the dispute, or on the community as a whole. Through the process of mediation, parties in dispute can be helped to shape their own agreement and, at the same time, sustain the working relationship so vital in the case of charities. One of the strengths of mediation is its flexibility in resolving all types of disputes. Mediation fits in well with the British tradition of compromise and consensus, and it is therefore surprising that it has only recently been instituted in Britain.

Mediation is not only cheaper, but avoids the long gestation periods involved in litigation before a case is settled. Hearing a case in public, in a court, does not make for co-operative endeavour after a judgment is given since, in the nature of a court judgment, there is a winner and a loser.

Mediations can be speedily arranged, and most of them last only one day. If they involve the parties to the dispute in their 'settlement' they 'own' the agreements arrived at and thus are more likely to abide by them. Moreover, the mediation process provides a catharsis for the parties: they have the opportunity to express

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11 Ibid.

12 Ibid.

13 It might be noted that "conciliation" is derived from the Latin *conciliare* meaning "to bring together" or "to unite together"; "mediation" is derived from the Late Latin *mediare* meaning to "occupy the middle position".

their emotions and feelings in a constructive manner and one not constrained by formal court procedures. *Mediation is a 'win-win' situation: there are no losers.*

The mediation process is a voluntary one: the parties in dispute must all agree to refer an issue to mediation. The process is confidential, informal and flexible. The mediator does not make an award as in the case of arbitration and other forms of adjudication. The main function of the mediator is to assist the parties in arriving at a mutually agreeable settlement. Often the mediator will see the parties in separate rooms to explore areas of agreement and disagreement, and possible solutions, before having a joint meeting with them. The parties are not committed to accept any result. If they agree on a solution it is voluntarily arrived at and binding only in the sense of a mutually agreed contract between them.

The procedures used in mediations are particularly suitable for charities, given their unique characteristics. In sharp contrast to the directors of commercial organisations and private individuals, the trustees of charities are not free to enter agreements of their choice but must always act in accordance with the governing instrument and the furtherance of the objective of the charity. Inevitably, in some cases, an apparent solution to a dispute will need to be referred to the Charity Commissioners for consideration and advice before the trustees can commit themselves to it. The flexibility of mediation, and its voluntary nature, readily facilitate this process.

If the mediation is successful, as most are, the agreement arrived at is confidential to the parties, and press publicity can be avoided or limited to an agreed statement. This is particularly important for charities as bad publicity is bad for most organisations but especially for charities. The knowledge that a charity is involved in conflict, particularly internal conflict, will not endear it to potential donors. If the mediation is unsuccessful, a rare event, at least the parties will have had the opportunity to explore the issues which divide them with an impartial person. Since mediation is relatively quickly arranged much time would not have been lost. At the end of the mediation, whatever the result, the mediation process should have assisted the parties to continue their relationship to their mutual advantage. This situation is far less likely to occur where one of the parties was sued for damages, whatever the outcome.

The Use of Mediation by Charities

Charities are becoming aware of the advantages of using mediation to resolve their differences. In June 1995 the National Council for Voluntary Organisations (NCVO) introduced a pilot dispute resolution service using mediation, which

initiative is supported by the Charity Commission.[14] In 1993 the Centre for Dispute Resolution (CEDR), a non-profit making organisation established in 1990 with the aim of promoting and encouraging the use of ADR over a wide range of activities, introduced a Charities Group to settle differences in the charities sector.[15] The NCVO has specifically excluded from its remit the mediation of disputes between charities, but this gap is filled by CEDR and, indeed, other organisations. Thus there is now adequate provision for charities to resolve their disputes through mediation.

In 1996 CEDR and ACENVO (Association of Chief Executives of National Voluntary Organisations) are to collaborate on a mediation service for ACENVO members and organisations. The service will be available for disputes with commercial organisations, public authorities and for internal conflicts involving staff or trustees.[16]

There is, as yet, no comprehensive evaluation of the use of mediation in the charitable sector, but an indication of its use and potential can be had from the types of case referred and for which advice is sought. Between April 1995 and July 1996, the first 15 months of its existence, the NCVO's mediation service had twelve cases involving charities referred to it. Of these, eight were successfully completed, and four were on-going.[17] An evaluation exercise conducted by the NCVO, in February 1996, when five cases were successfully completed, revealed that there was general satisfaction with the mediator's skills and the outcome of the cases.

Confidentiality prevents disclosure of details which would identify the charities concerned. An essential characteristic of these disputes was that they were multi-faceted and complex, making them ideally suitable for resolution by the flexible process of mediation which allows for an issue-by-issue approach to be undertaken.

The issues involved in successful mediations, and the types of cases received by the NCVO for assistance, reveal that many of these disputes are peculiar to charities. They include the roles and responsibilities of paid staff and trustees; differences over the direction and ethos of the organisation; personal relationships affecting work arrangements and employment issues within the organisation. It is

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[14] Information supplied by NCVO.

[15] Information supplied by CEDR.

[16] Information supplied by ACENVO and CEDR.

[17] Abstracted from statistics supplied by NCVO.

not surprising that these issues should come to the fore as most charities are usually not subject to the same discipline as commercial organisations where the structures and processes of work arrangements are highly organised. To some extent the scope for misunderstanding in charities is therefore greater than in other types of organisation making it all the more important to have a quick-acting mechanism, as is mediation, for their resolution.

CEDR has successfully completed a number of mediation cases involving charities. The undermentioned three cases are illustrative of the types of disputes settled by mediation.[18]

Case A

This case involved two large charities. They had entered into an unwritten agreement to collaborate on a building conversion to provide a new form of hospice. The claimant's property services department and outside consultants provided architectural services, but neither the claimant nor the consultants were paid their fees. The respondent refused the claim, alleging negligence by the architect. The amount in dispute was £120,000. An essential feature of this dispute is that the disputants wished to maintain *a working relationship,* as they had a close joint interest in the project. Unable to settle the dispute themselves, they referred the issue to CEDR to be settled by mediation.

The issue was settled in one day. Mediation facilitated an equitable outcome acceptable by both parties and it was possible for them to maintain an on-going business relationship.

Case B

This case involved a national charity and a construction company, and arose over the final account for the construction of a building providing new accommodation. The sum in dispute was £1m. Both parties took entrenched positions, and could not arrive at a mutually agreeable solution. In the event they agreed to refer the issue for settlement by mediation.

The dispute was successfully settled in five days. Despite their entrenched positions, their positive attitude, which prevailed during the mediation and was assisted by the mediation process, contributed greatly towards a settlement.

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[18] CEDR supplied details of the cases but, for reasons of confidentiality, the parties are not identified.

A problem unique to charities which had to be overcome during the mediation was the concern felt by the party representing the charity at having to justify the terms of the settlement both to the trustees of the charity and to the Charity Commissioners.

Case C

This case is concerned with an industrial relations issue, and the type would be readily recognisable by specialists in this field. An employee, who had been employed by a national charity for eleven years, alleged unfair dismissal and a date had been fixed for an Industrial Tribunal hearing. The sum involved was £10,000 but non-financial issues were also important in the resolution of the dispute.

The charity felt strongly that, as one of their chief functions was the relief of poverty, they should not waste money on litigation and, moreover, should avoid bad publicity. The case was settled by mediation in one day. As part of the settlement the employee was given a written apology by the employer as well as a favourable reference.

This outcome could not have been achieved had the case gone to an Industrial Tribunal. Indeed, this outcome brings into sharp focus the strength of mediation: it is possible through this process to resolve several issues on an issue-by-issue basis expeditiously, and to the satisfaction of the parties concerned.

Although the main focus of this article is on mediation and charities, it is of significance to note the acceptance of this form of intervention to settle disputes in other spheres. In a recent survey, with a sample size of some 1,000 people, conducted by the National Consumer Council, people who had a civil dispute within the last three years were asked how they preferred their dispute to be settled. They were asked to choose from three alternative modes of settlement: mediation and arbitration - these terms were carefully explained - and a full trial in court. Over half (53%) chose mediation, roughly a quarter (23%) arbitration, and only about a twelfth (8%) chose a full trial. The rest (12%) could not decide.[19] Conspicuously, mediation was by far the most preferred mode of settlement.

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[19] *Seeking Civil Justice, A Survey of People's Needs and Experience,* National Consumer Council, November 1995.

Conclusions

Mediation has been described as the "sleeping giant" of ADR. At bottom, it is a process for joint problem-solving in a constructive manner for mutual gain. It is eminently suitable for the resolution of disputes with their unique objectives, traditions and contemporary circumstances.

It is, of course, not claimed that all disputes can be resolved by mediation. For mediation is not a panacea. However, it should be considered before turning to an adversarial process and, in particular, litigation on the examples of disputes that have been given in this article, mediation as a facilitative and consensus-building process allowed solutions to be developed and implemented co-operatively by former adversarial parties. Turning conflicts into constructive opportunities for positive gains is what mediation is all about.

Mediation, however, does not create a precedent, which in most situations would be considered an advantage, but in some a disadvantage particularly where the law needs to be clarified, or to determine who was at fault in some particular event, in order to formulate policy. In these cases *litigation* may be the only means of resolution of a dispute.

In the area of charities there is generally a public interest in the outcome of a dispute; often, too, there are bargaining imbalances between the parties. In these circumstances the mediator may have an ethical and social responsibility to assist the parties to arrive at a mutually agreeable solution to their dispute. Yet an essential requirement for mediation to be successful is that the parties to a dispute must have a desire to settle it. Where there is a *will* to settle a dispute *means* will usually be found by mediation to bring the parties to an agreement.