

ADR

An offer one can't refuse: mediate

A growing trend toward pushing mediation in England and the United States raises many issues.

By Kathryn Kirmayer
and Jane Wessel

SPECIAL TO THE NATIONAL LAW JOURNAL

MEDIATION HAS LONG been accepted on both sides of the Atlantic as a useful method of resolving many types of disputes without the often unnecessary disruption and expense of litigation. And in cases where the parties voluntarily engage in mediation as a preliminary—or parallel—method of dispute resolution, the results are generally very positive. Even if the mediation does not resolve the dispute, it can focus the parties' arguments and narrow the issues, shortening later litigation and perhaps expediting the final resolution.

How far can courts go in pushing unwilling parties to mediate? Mandatory mediation certainly raises questions of how far courts may go, as a matter of legal authority, and how far courts should go, as a matter of public policy. But even assuming both law and policy support mandatory mediation, at the end of the day there may be no practical way to force unwilling horses to drink. In this respect, English courts edging toward a concept of compelled or even just "robustly encouraged" mediation might do well to take note of lessons apparently not yet learned in the United States.

In England, parties are actively encouraged by the procedural rules and by the court to mediate suitable claims. Muscle is added to this encouragement by what is commonly known as the

Kathryn Kirmayer and Jane Wessel are co-chairwomen of the international arbitration practice of Washington's Crowell & Moring. Kirmayer is a partner in the firm's home office, where she focuses on complex commercial arbitration and litigation. Wessel is a U.S.- and U.K.-qualified counsel in the firm's London office and specializes in international arbitration, mediation and cross-border litigation.

English Rule on costs, which generally operates so that the loser pays the winner's costs, including reasonable legal fees. There have been a handful of cases in recent years in which costs have not been awarded to the otherwise successful party because that party unreasonably refused to mediate. See, e.g., *Dunnett v. Railtrack PLC*, [2002] EWCA Civ 302; *Royal Bank of Canada v. Secretary of State for Defence*, [2003] EWHC 1841 (Ch).

Other recent judgments have limited the circumstances in which it would be appropriate to refuse an offer to mediate. For example, in *Hurst v. Leeming* [2002] EWHC 1051 (Ch), the High Court stated that mediation should be refused only in exceptional circumstances. In *Shirayama Shokusan Co. Ltd. v. Danova Ltd.*, [2003] EWHC 3006 (Ch), the High Court went so far as to order mediation over the objection of one of the parties.

In May 2004, the English Court of Appeal clarified the extent to which the High Court may pressure parties into mediation. *Halsey v. Milton Keynes General NHS Trust: Steel v. (1) Joy & (2) Halliday*, (2004) EWCA (Civ) 576. The court stopped short of making mediation compulsory, on access to justice grounds. The court said, "It seems to us that to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to the court." *Halsey*, ¶ 9. Without deciding the point, the court expressed concern that a compulsory system of mediation might amount to an involuntary waiver of the right of access to courts and therefore be in breach of Article 6 of the European Convention on Human Rights, which protects the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. In light of this, the court concluded that "compulsion of ADR would likely be regarded as an unacceptable constraint on the right of access to the court and, therefore, a vio-

lation of Article 6." *Id.*

However, the Court of Appeal gave due warning in the *Halsey* judgment that sanctions in costs will be considered if the parties do not seriously consider the merits of going to mediation. The court stated, "All members of the legal profession who conduct litigation should now routinely consider with their clients whether their disputes are suitable for ADR. But we reiterate that the court's role is to encourage, not to compel. The form of encouragement may be robust."

Burden on losing party

Depriving the winning party of some or all of its costs is, and should remain, the exception to the general rule, and for that reason, the *Halsey* court held that the burden is on the unsuccessful party to prove why an exception should be made. The losing party must show that the successful party acted unreasonably in refusing to agree to ADR. This will be determined by considering all relevant factors, including:

- The nature of the dispute and its inherent suitability for ADR. The court stated, "in our view, most cases are not by their very nature unsuitable for ADR."

- The merits of the case and the reasonableness of the parties' belief that they have a strong case.

- Whether other settlement offers have already been made but rejected.

- Whether the costs of mediation would be disproportionately high.

- Whether mediation would result in an unacceptable delay to the trial of the action where it is suggested late in the day.

- Whether mediation would have had a reasonable prospect of success.

Thus, in England, the courts have declined to compel mediation, but they nonetheless stand ready to use "robust" forms of "encouragement"—including the extreme sanction of denial of attor-

ney fees to the winner. Of course, for many litigants, this will be a distinction without a difference. If the specter of sanctions in costs potentially awaits even a winning litigant who refuses “unreasonably” to first submit his or her case to mediation, what litigant would take that risk? Rather, the prudent course is plainly to go through the mediation unless there is a very strong justification to refuse to do so, to protect the right to recover costs and fees down the road.

The U.S. approach

By contrast with the English regime, mandatory mediation has been around for quite a while in the United States. Whether the authority to compel participation in nonbinding dispute resolution procedures arises from the inherent powers of the courts to manage their affairs, from state or federal statutory sources like the Civil Justice Reform Act of 1990 or the Alternative Dispute Resolution Act of 1998, from federal, state or local court rules, or from some combination of the above, there is widespread support for the proposition that the courts may compel litigants to participate in mediation, summary jury trials, settlement conferences and the like. See, e.g., *In re Atlantic Pipe Corp.*, 304 F.3d 135 (1st Cir. 2002) (holding that district court had inherent power to require parties to participate in nonbinding mediation and to share the costs thereof); *State of Ohio ex rel Montgomery v. Louis Trauth Dairy Inc.*, 164 F.R.D. 469, 471 (S.D. Ohio 1996) (holding that local rules, in conjunction with Fed. R. Civ. P. 16, authorized court to require parties to participate in summary jury trial); see also Amy M. Pugh and Richard A. Bales, “The Inherent Power of the Federal Courts to Compel Participation in Nonbinding Forms of Alternative Dispute Resolution,” 42 Duq. L. Rev. 1 (Fall 2003). Cf. *In re NLO Inc.*, 5 F.3d 154, 157-58 (6th Cir. 1993) (holding that district courts do not possess inherent power to compel parties to participate in summary jury trials).

But what happens when one side accuses the other of merely going through the motions or, stated in a more lawyerly fashion, of failing to participate in the mediation in good faith? Certainly if a court has the authority to compel mediation (or to sanction a party for unreasonably refusing to mediate), it should mean more than merely having the authority to compel the parties physically to appear at a particular date and time. It seems logical that with the authority to compel participation in

mediation must come the authority to compel good-faith participation.

The good-faith debate

In fact, in the United States there is significant debate about the need for, and the efficacy and possible side effects of, a good-faith requirement in mediation. See, e.g., Ulrich Boettger, “Efficiency versus Party Empowerment—Against a Good-Faith Requirement in Mandatory Mediation,” 23 Rev. Litig. 1 (2004); Maureen Weston, “Confidentiality’s Constitutionality: The Incursion on Judicial Powers to Regulate Party Conduct in Court-Connected Mediation,” 8 Harv. Negot. L. Rev. 29 (2003); John Lande, “Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs,” 50 UCLA L. Rev. 69 (2002); Roger L. Carter, “Oh, Ye of Little (Good) Faith: Questions, Concerns and Commentary on Efforts to Regulate Participant Conduct in Mediations,” 2002 J. Disp. Resol. 367 (2002); Alexandria Zylstra, “Privacy: The Road from Voluntary Mediation to Mandatory Good Faith Requirements: A Road Best Left Untraveled,” 17 J. Am. Acad. Matrim. Law. 69 (2001); James J. Alfini and Catherine G. McCabe, “Mediating in the Shadow of the Courts: A Survey of the Emerging Case Law,” 54 Ark. L. Rev. 171 (2001).

Critics of a good-faith requirement argue, among other things, that good faith is inherently hard to define, that any attempt to legislate in the area will simply spawn satellite litigation, that a good-faith requirement will lead to coerced settlements and that enforcement of a good-faith requirement will place at risk the bedrock principle of confidentiality in mediation. Advocates of a good-faith requirement argue that without the requirement of good faith, the mediation process is subject to abuse, in addition to being less effective.

The reality is that in many U.S. jurisdictions, both state and federal, parties to court-sponsored mediation are required to participate in good faith. See, e.g., 12 Okla. Stat. 1824 (3) (“parties shall participate in mediation in good faith, and put forth their best efforts with the intention to settle all issues if possible”); see Lande, 50 UCLA L. Rev. at 78-80 for additional citations. The

sources for this authority include state statutes, Federal Rule 16, local court rules and common law. And, not surprisingly, litigation over compliance with the good-faith requirement has followed. As Lande notes, claims for costs or other relief have been based on failure to attend mediation sessions, failure to send a representative with settlement authority and failure to participate substantively, among other things. *Id.* at 82-84 and cases cited therein.

The perils of this path should be obvious. As an example, while courts have refused to find a lack of good faith based solely on a party’s refusal to make a settlement offer (see, e.g., *Dawson v. United States*, 68 F.3d 886, 897 (5th Cir. 1995) (reversing order imposing sanctions for failure to make settlement offer, and noting that “there is no meaningful difference between coercion of an offer and coercion of a settlement”), courts also have sanctioned parties for not sending to the mediation a representative with adequate authority to settle the case. See *Nick v. Morgan’s Foods Inc.*, 270 F.3d 590, 596 (8th Cir. 2001) (upholding award of sanctions based in part on failure to send representative with appropriate settlement authority to mediation); *In re Stone*, 986 F.2d 898, 903 (5th Cir. 1993) (noting that district courts have inherent authority to require party to have representative with full settlement authority present, or “reasonably and promptly available,” at pretrial conferences). A party who reasonably—or unreasonably, for that matter—believes that settlement is not appropriate, but who is nonetheless ordered (or “robustly encouraged”) into mediation and required to send a representative with “authority to settle” is truly on the horns of a dilemma.

Whether it is through “robust encouragement” or outright order, courts and legislatures on both sides of the Atlantic seem determined to lead even reluctant parties to mediation. But this raises the question of whether compelled mediation, in the absence of genuine good faith, is truly worthwhile, never mind appropriate. And compelling good faith in this area is akin to forcing horses to drink...and like it, too. **NLJ**

This article is reprinted with permission from the October 18, 2004 edition of THE NATIONAL LAW JOURNAL. © 2004 ALM Properties, Inc. All rights reserved. Further duplication without permission is prohibited. For information contact, American Lawyer Media, Reprint Department at 800-888-8300 x6111. #005-11-04-0011

**In England,
courts use
‘robust’ forms of
‘encouragement.’**

**Legislating the
good-faith
requirement
will spawn
litigation.**