

ASSOCIATION OF NORTHERN MEDIATORS

Response To The European Green Paper On Alternative Dispute Resolution In Civil And Commercial Law

The Association of Northern Mediators is one of a number of regional civil and commercial mediation providers in the UK. It is not a regulatory body, or one that trains mediators ;but it is a loose association of those panel and accredited Mediators who have been trained and validated by the following national providers:-

Academy of Experts
ADR Group
CEDR
Chartered Institute of Arbitrators
Regents College of Psychotherapy

All our 110 mediators are based geographically in the North of England and are Civil and Commercial mediators rather than either Family or Community based mediators.

The Associations role is therefore to be distinguished between the above who provide training in the UK, and conversely international and national providers of Mediators. For instance, CEDR both trains and appoints Mediators, as does the Chartered Institute of Arbitrators, whereas the Law Society of England & Wales does not train but offers Mediators for appointment. The UK regional providers, of which ANM is but one, are detailed in the link section on www.northernmediators.co.uk, and all allow parties to select their own Mediator rather than appoint mediators , other than for government sponsored court mediation schemes , where we are the preferred source for mediators .

The limited comments of the Association must therefore be looked at in line with the Association's role in promoting mediation and assisting those wanting general information about mediation in the Northern region of England only. One other factor that is important is also its role as a sponsor for Mediators within the UK Courts, again in the Northern region, where Mediation Schemes operate in Leeds, Manchester and Newcastle. Again, our answers to the questions posed within the Green Paper are particularly centred on the role and functions of a local/regional mediation provider, if you like on the micro other than on the macro scale.

Question 1 **Are there problems such as to warrant community action on ADR? If so, what are they? What is your opinion on the general approach to ADR that should be followed by the institutions of the European Union, and what might be the scope of such initiatives?**

ANM considers that the EU's role is to promote, encourage and persuade rather than to exercise legislative action. Mediation and indeed other forms of ADR are best left either to the contractual arrangements agreed between the parties or to other non-legislative mechanisms. We feel that if ADR was regulated by pan-national authorities it would disturb the slow but sure evolution of mediation within the community.

We adopt a similar approach to the Chartered Institute of Arbitrators and the Law Society of England and Wales in seeing the enormous potential for the EU to set an example to community members by putting mediation and ADR procedures at the forefront of its own procurement policies in its own contracts between itself and respectively commercial entities, social entities, employment relations, environmental policies and other areas within its domain. It should aim to achieve a declaration of intent to use litigation as a last resort and to make ADR as a norm rather than as an exception. We recognise the diversity of legal/social traditions and norms within the EU . Whilst that brings a wealth of ideas and experiences, it also makes for difficulties in agreeing a formula. By stressing both the pragmatic and ethical *raison d'être* of ADR the EU might facilitate agreement over these issues.

Question 2 **Should the initiatives to be taken be confined to defining the principles applicable to one single field (such as commercial law or family law) – field by field – and in this way discriminate between these different fields, or should they as far as possible extend to all the fields governed by civil and commercial law?**

The development of English mediation has shown three separate areas of grouped mediators:

- Civil / commercial – to include environmental
- Community – neighbourhood/inter racial etc
- Family – children/finance within separation

The principles of facilitating dialogue between disputing parties may be similar, but UK practice varies enormously. The Association considers that the general pledge to use ADR by EU institutions will only effect the first. The micro or highly politicised areas within say Community based schemes do not lend themselves to EU proclamations. Take policing as an example – if the EU were to try to apply some measure of uniform guidelines to handling police complaints that would impact on national policy. Similarly Family mediation does not lend itself to EU policy statement. We consider that Commercial policy on the macro can move towards a degree of harmonisation, whilst other areas cannot. Organisations such as the CI Arb in the UK in supporting and encouraging closer international co-operation through the likes of UNCITRAL are achieving the contractual framework to regulate international cross border disputes. Certainly the EU's roll should be supportive of that process – but perhaps acknowledging that its prime concern will be limited to the Civil and Commercial fields and not the others.

Question 3 **Should the initiatives to be undertaken deal separately with the methods of online dispute resolution (ODR) (an emerging sector which stands out because of its high rate innovation and the rapid pace of development of new technologies) and the traditional methods, or on the contrary should they cover these methods without making any differentiation?**

Very firmly, our members believe that ODR is a developing area and at the moment members experiences are limited to using ODR as a tool within traditional mediations and not as some sort of separate process. We say this having monitored more than 200 mediations within the region in 2000 to 2001.

Question 4 How might recourse to ADR practices be developed in the field of family law?

We have no experience with Family law.

Question 5 Should the legislation of the Member States be harmonised so that in each Member State ADR clauses have the same legal value?

An ADR clause, like any dispute resolution clause , is given the interpretation and weight that the national courts give to that clause , and we believe that trying to harmonise the application of ADR clauses is not something that should be attempted by the EU, not outside the closer integration of the contractual codes generally.

Question 6 If so, should the validity of such clauses be generally accepted or should such validity be limited where these clauses appear in membership contracts in general or in contracts with consumers in particular?

On the one hand the answer is 'Yes' , but it is best expressed in terms of expressing a desire that these clauses should be accepted throughout the EU , not as a regulatory one.

Question 7 What in any case should be the scope of such clauses?

Really this is a contractual question befitting the individual contract .

Question 8 Should we go as far as to consider that their violation would imply that the Court has no jurisdiction to hear the dispute, for the time being at least?

No. as clearly national codes give differing values to parties who ignore ADR clauses. The UK code set out in CPR Rule I setting out the over-riding objective is a useful one for adoption in principle by member states. The regional courts are increasingly penalising parties who ignore either mediation agreements or more often the courts suggestion to mediate eg boundary disputes between neighbours have a high cost low value and hence benefit mediation.

Question 9 Should the legislation of the Member States be harmonised so that in each Member State recourse to an ADR mechanism entails suspension of the limitation periods for the seising of Courts?

No , that is a matter for national codes.

Question 10 What has been the experience of applying the Commission recommendations of 1998 and 2001?

The experience outside the international practices in London is negligible. The desire for mediators to adopt a simple but comprehensive set of standards may be something the EU could require of national agencies such as our own Law Society in the hope that similar ethical standards (which need not be complex) are adopted in all member states.

Question 11 Could the principles set out in the two recommendations apply indiscriminately to fields other than consumer protection law and in particular be extended to civil and commercial law?

There is no reason why the principles don't have universal application.

Question 12 Of the principles enshrined in the recommendations, which in your view could be incorporated in the legislation of all the Member States?

That really is a matter for discussion and agreement with the members.

Question 13 In your opinion, should the legislation of the Member States in regulated areas such as family law be harmonised so that common principles may be laid down with regard to procedural guarantees?

No comment

Question 14 What initiative do you think the institutions of the European Union should take, in close co-operation with interested circles, as regards the ethical rules which would be binding on third parties?

This question is not at all clear. General standards of ethics to aspire to is one thing (and we have given our views in the prior paragraphs) , but regulatory ethical standards are once again something which we believe should be done nationally. The EU could encourage and assist member states in setting standards – but it's a developing area and even setting ethical standards in the UK has proved fractious , as many mediation training organisations fail to see the benefit of 'minimum' standards when their own are perhaps far higher.

Question 15 Should the legislation of the Member States be harmonised so that the confidentiality of ADRs is guaranteed in each Member State?

A matter for national regulation and dependant on the applicable law to each contract – lex forii.

Question 16 If so, how and to what extent should such confidentiality be guaranteed? To what extent should guarantees of confidentiality apply also to publication of the results of ADRs?

A matter of contractual regulation within each mediators contract – confidentiality should be built into the ethical code for mediators. The one follows the other.

Question 17 In your opinion, should there be a Community rule to the effect that there is a period of reflection following ADR procedures before the agreement is signed or a period for withdrawal after the signing of the agreement? Should this question be instead handled within the framework of the ethical rules to which the third parties are subject?

No

Question 18 Is there a need to make ADR agreements more effective in the Member States? What is the best solution to the question recognition and enforcement of ADR agreements in other Member States of the European Union? Should specific rules be adopted to render ADR agreements enforceable? If so, subject to what guarantees?

Enforcement is a contractual matter and not something that needs regulation.

Question 19 What initiatives in your view should the Community institutions take to support the training of third parties?

Beyond limited moral support and the recommendation of an ethical code none, although as mediation develops the EU should keep this area under review.

Question 20 Should support be given to initiatives to establish minimum training criteria with a view to the accreditation of third parties?

As 19

Question 21 Should special rules be adopted with regard to the liability of third parties? If so, which rules? What role should ethical codes play in the field.

No – not on a EU scale . National Law Societies and validating bodies should be self regulating as with arbitrators.

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