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Mediation – Not for real litigators?

Nordic lawyers and companies should have all the reasons to show more confidence in mediation which is a faster, better and less expensive dispute resolution method than litigation and arbitration. This article explores the current status of mediation in commercial disputes in Scandinavia.

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"Mediation is a passing vogue, where disputes get settled on a non-legal basis and where it is more convenient to be a therapist than a litigator."

Statements like these are common in the Nordic countries when mediation is up for discussion.

In Denmark, Sweden and Norway, the current status regarding mediation in commercial disputes is disappointing, but improving.

A distinction between court mediation (conciliation) and meditation is imperative. As the name suggests, court mediation takes place within the court system and with judges serving as mediators. Court-based mediation as a dispute resolution method is only available in pending legal proceedings whereas mediation discussed in this article is mediation in its true form as an alternative dispute resolution method outside the court system often with lawyers acting as mediators.

Mediation as a dispute resolution method in the Nordic countries is rather disappointing. In Denmark, 15 requests were made for disputes to be mediated in 2012. In Norway, the number was less than 20, and in Sweden the number was less than 5. The figures are based on information given by the official institutes in the respective countries and it is presumed that some ad hoc meditation has also taken place.

These disappointing numbers cannot be considered a satisfactory result of several efforts and different approaches to support mediation in the Nordic countries.

Since 2003, Denmark has had a special education for mediators, aiming at educating lawyers to become certified mediators. The mediators are organised in Danish Mediation Lawyers and with the support of the Danish Bar and Law Society this organisation established the Danish Mediation Institute with the purpose of offering mediation solutions in private and commercial disputes. Since 2003 mediation has been offered by the Danish Institute of Arbitration.

Norway only provides one forum for mediation, the *Center for Cooperation and Conflict Resolution,* which is a subdivision of *Advokat Lexau Mediator*. This private institution was founded only 3 years ago and is currently seeing less than 20 mediation cases a year. On the educational side, Norway has limited options as only small courses in mediation are available. Accordingly, Norwegian lawyers find themselves at the University of Copenhagen to become certified mediators.

In Sweden, mediation was introduced back in 1999, and a wide range of courses in the fundamentals of mediation were held. Since then, mediation has not gained much of a foothold as the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) sees less than five cases a year. Previously, an education in mediation was provided by the institute, but this was abandoned in 2010 as a result of poor interest.

The question is why we see this reluctant attitude towards mediation and ADR in the Nordic countries?

Is it even true that mediation is actually faster, better and less expensive?

Nearly all mediations are concluded within 3 months from their initiation. No court or arbitration tribunal can match that. Mediation implies solving the dispute according to the interests and needs of the parties, and therefore fundamental legal arguments, such as the incurring of liability for damages, the lack of notice or the calculation of the claim lose the spotlight.

The issue that now takes centre stage is simply that each of the parties leaves with a fair and satisfying result. An obvious advantage with the choice of mediation is that there are no winners and no losers. By choosing mediation, the parties have an opportunity to continue a business venture which would otherwise have been completely compromised by an award or a ruling. In addition, the mediation settlement can even create new business ventures between the parties.

The time table alone makes the costs of mediation significantly lower than litigation or an arbitration process. Naturally, reviewing the case, appointing the mediators and preparing the mediation meeting all involve costs, but the savings are still very significant as approximately 70% of all mediations lead to settlements. Only the remaining 30% continue in arbitration or litigation, and even then the costs have not been futile. The case has been trimmed, and the parties' claims established. This leads to less time spent and lower costs in the subsequent court or arbitration proceedings.

Does the reluctance lie within the courts or the arbitration tribunals?

For several years the courts have been overburdened resulting in prolonged times of proceedings. Thus, it would be expected that the courts would welcome mediation as a change of pace. Considering the very high 70% settlement rate, increased mediation would lead to a substantial improvement of the courts' working conditions.

The Danish courts are very pleased with court-based mediation introduced by amendment to the Danish Administration of Justice Act (*retsplejeloven*) in 2008. Similarly, court-based mediation was introduced in 2008 by amendment to the Norwegian Administration of Justice Act (*retsplejeloven*) and Norway is a pioneer in that area as a significant number of disputes are settled in court-based mediation. The Swedish Code of Judicial Procedure (*rättegångsbalken)* includes a specific rule on court-based mediation empowering judges to attempt to settle the dispute, just as it includes a specific rule allowing the judges to refer the case to mediation.

With the court-based meditation in mind, it is reasonable to suggest that the courts in the respective countries are in favour of mediation as a dispute resolution method.

It is a common accusation that Nordic arbitrators find mediation inadequate and for various reasons prefer not to resort to it. To arbitrators engaging in mediation, it may seem less attractive as mediation grants the power of decision to the parties, leading to settlements often made in an informal manner and in accordance with the parties' interests and needs. Such method of solving a dispute seems to be colliding with the responsibility of the arbitrator to solve the dispute on the merits and in accordance with the prevailing law.

Nonetheless, both in Sweden and in Denmark the arbitration institutes have adopted mediation as an alternative means of dispute resolution, which could be an indication of willingness towards mediation.

Thus, arbitration tribunals as an institution seem to be relatively positive towards mediation.

Does the reluctance lie with the lawyers?

A vast number of mediators believe that lawyers are the main reason why commercial disputes are not resolved through mediation.

Just as many arbitrators are reluctant to engage in mediation, many lawyers tend to refrain from mediation for similar reasons, including the uncertainty of what mediation would lead to, if anything, along with the unfamiliar mediation process conducted on the whims of the parties.

Traditionally, the primary objective of a lawyer is to ensure the best settlement for his client. By engaging in mediation, a lawyer relinquishes control over the dispute and this primary responsibility could be seen as being brought into question.

Habitual thinking is an essential element. In a dispute the only concern is getting an accurate legal ruling. To both parties and their lawyers, this means initiating legal proceedings. In addition, lawyers often have a tendency to overestimate the importance of their particular cases requiring the authority of an award or a ruling.

Some lawyers would – privately - argue against referring a dispute to mediation as it would imply the conversion of a potentially profitable case into a settlement resulting in a much lower fee, compared with litigation or arbitration. Needless to say, disregarding mediation in order to raise a fee would be a violation of various codes of ethics and rules of professional conduct.

Does the reluctance lie with the clients?

Professional business clients are often familiar with mediation as a dispute resolution method. The clients do business internationally and have in-house legal departments with lawyers who know that mediation is an alternative.

It is important to note that the clients are keen to avoid legal disputes when doing business. Thus, the clients have an obvious interest in solving the dispute as quickly as possible with the commercially best outcome and lowest costs, in order to return to their business ventures without unnecessary interruption.

When asking your professional business clients' general legal counsels whether they prefer mediation to arbitration or litigation in general, they would prefer mediation.

However, in an actual dispute the general legal counsel would be more likely to choose arbitration or litigation as it is the “responsible” choice.

The reluctance lies in the absence of confidence

Before any change can occur, lawyers need to find confidence in mediation as a proper dispute resolution method.

In a dispute the lawyer currently takes refuge in the system in which he has confidence. To the Nordic lawyer this would be either the court system or arbitration. The lawyer would not risk losing control over the dispute neglecting the primary responsibility to his client.

In the event that the lawyer actually suggests or even recommends mediation, another barrier presents itself, this time from within the client's organisation.

Mediation would lose its purpose if a settlement was conditional on the subsequent approval of the board of directors. Accordingly, the decision of mediation often requires the boards of directors’ consent. This involves issuing a power of attorney to the general legal counsel to settle the dispute at a certain level. Thus, the decision of mediation requires the general legal counsel to explain the benefits of mediation to the management, and the management then to the board of directors. Obtaining this consent is often time-consuming and complicated.

However, suggesting mediation within the organisation requires not only a lot of explanation but equal amounts of courage.

The general legal counsel will be responsible for getting the best possible result. The responsibility has shifted from the external lawyer to the general legal counsel. Using the ordinary methods, litigation and arbitration, the lawyer remains in control, and getting the best possible result is his responsibility.

The general legal counsel would keep out of the line of fire by just forwarding the court’s ruling or the award from the arbitration tribunal to the management.

Numerous surveys show that mediation is actually faster, better and less expensive. Mediation seems to be the most appealing dispute resolution method for companies, as they get their dispute settled in the best possible way, but also for the lawyers as they get happy and satisfied clients. The advantages of mediation seem to far outweigh the disadvantages.

The Nordic lawyers and Nordic companies should have all the reasons to be more familiar with and show more confidence in mediation. This does not only apply to litigators and general legal counsels, but also to M&A lawyers, contact lawyers, the management and board of directors. Future contracts should be drafted with a dispute resolution clause designed as an escalation clause with the first remedy being mediation.

The silver lining is the ongoing positive developments in Denmark. The Danish Mediation Institute has recently appointed a full-time managing director who, in conjunction with the Association of Danish Law Firms, has taken on the mission of promoting mediation within Denmark, a mission fuelled by the encouragement of new numbers for Denmark for 2013, which suggest a slight upturn in requests for mediation.