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Westminster Legal Policy Forum: Next steps for Alternative Dispute Resolution (ADR) in England and Wales

IN BRIEF

A number of eminent speakers looked at the future of mandatory dispute resolution in the courts of England & Wales and at the current position in Scotland

This virtual event was held on 13th March 2023. A number of speakers, from the MOJ and a wide variety of ADR related bodies, provided insight into how the future of ADR is looking in courts and tribunals in England and Wales. In many of the presentations it was felt that 'alternative' was an unnecessary word and that the focus should be on 'dispute resolution' (DR).

This Update is a summary only of the presentations and is restricted to comments considered to be of the greatest relevance to FOIL members and it does not include those directed primarily at consumer disputes.

Sarah Rose, is Deputy Director of Dispute Resolution Policy at the Ministry of Justice. The purpose of this policy unit is to embed DR across the civil, family and tribunals jurisdictions. The last two years have been revolutionary for DR and the setting up of this unit within that period signals the government's intent and ambition around DR. Reforms will fundamentally change the way people resolve their disputes.

As part of this the development of an end-to-end digital process is important to all levels of the judiciary (but particularly senior judiciary), as a seamless and guided pathway to DR. An online rule

committee will look to link the taking of legal advice; pre-action dispute resolution procedures; and the online courts service. This will be chaired by the Master of the Rolls. The focus will be on *early* DR.

It is felt that there are significant opportunities for change in the civil justice system, as far as DR is concerned. The Civil Procedure Rules (CPR) and Pre-Action Protocols (PAPs) have emphasised the duties on parties to consider DR. The recent shift has been from the judiciary encouraging DR to requiring it, following the Civil Justice Council's report on DR, which looked not only at the legality of DR but also its desirability. The report concluded that provided the form of DR was not disproportionately onerous and does not foreclose the parties' effective access to the courts, compulsory DR is compatible with the parties' rights under Article 6 ECHR and common law access to justice. It is not the intention that parties will ever be required to settle their dispute against their wishes.

Compulsory DR is about changing the emphasis within the justice system, promoting dialogue and compromise in a currently adversarial process. It is felt that this will produce swifter and better outcomes for the parties, in all forms of dispute.

Parties will need to be assisted and supported in such a process. An example of this is the proposal that small claims valued at under £10,000 would be automatically referred to a free, one-hour telephone mediation with HMCTS Small Claims Mediation Service. It is recognised that this service would need to be adequately resourced to meet the increased demand placed on it, but potentially it would result in thousands of cases having the benefit of DR before they might otherwise reach a judge; freeing up judicial resources for more complex cases.

There would be a similar process for higher value claims, although there is no existing in-house DR service provided by the courts and so parties would be referred to third-party mediators.

What a requirement to mediate would involve in practice is the subject of further consideration, along with how compliance with any requirement would be measured and any sanctions applied. Vulnerability needs to be taken into account.

It is recognised that there will be a need for the HMCTS Mediation Service to recruit, train and accredit additional mediators, to handle the increased volume of small claims. User satisfaction and outcomes will be monitored carefully. Mediators need not necessarily come from the legal profession.

[A later speaker, **Martin Ellis,** Acting Chair, College of Mediators, felt that there is ample capacity if mediators were sourced from outside the HMCTS service (see below)].

Better and more comprehensive information (in various formats) will be published to assist the public in understanding what meditation is; what it involves; and how it works. Knowledge of DR needs to become part of legal education.

Rosemary Rand, Deputy Director and Service Owner, Civil, Development Directorate, HM Courts & Tribunals Service and **Julia Hopkins**, Delivery Director, National Business Centres, HM Courts & Tribunals Service discussed supporting court users to achieve mediated settlements.

Despite the high volumes of small claims in the County Court, a huge proportion do not require resolution, as they fall out of the system at an early stage. The point to consider for the remaining cases is the point at which to introduce DR to assist the parties. This is against the background of the attempt also to digitise the court system, including the Online Civil

Money Claims Service (OCMC) and the Damages Claims Service (DCS), which ultimately will become end-to-end services. Many processes will be automated, speeding up the progress of the claim. The expansion of the HMCTS Mediation Service (the service) is an integral part of this programme.

In 2023 there is a team of 27 mediators delivering national appointments for online and paper claims. Since 2021, mediation has been an opt-out service.

The service is currently offered in claims worth up to £10,000 where the claim is disputed. A free one-hour, telephone mediation is arranged, if the parties agree. This is usually two/three weeks after the agreement, rather than the target of 30-weeks for a court hearing. The service has steadily improved, with mediators working from a single list of appointments and efforts made to make it more efficient.

An analysis of user satisfaction/dissatisfaction with the service shows that there was great appreciation that it is a free service and a feeling that it is quicker. Mistrust and lack of engagement by the other party were factors against.

The design of the online platforms is intended to assist litigants in person and the mediation service has been steadily improved better to address user need. This includes assisting the user to understand what mediation is about, before it takes place.

This talk addressed only the mediation service that HMCTS currently offers but it is only one part of the landscape There is nothing to prevent parties from using alternative methods. Other form of DR will fall for consideration, as attention turns to higher value claims.

Professor Dame Hazel Genn KC, Director, University College London Centre for Access to Justice looked at the assessment of the proposals for automatic referral to mediation in small claims.

Having evaluated a number of mediation schemes in the past, this speaker felt that the current proposals are evolutionary, rather than revolutionary. Evaluation shows that mediation can be successful, if the parties agree to mediate. Context is important: most civil disputes settle anyway. By definition, those claims that survive to require referral to mediation are more difficult to settle.

There is a great difference between personal injury and non-personal injury cases; and also, between business users and individual users. Business to business disputes therefore tend to see mediation looked at more favourably. There is a very high opt-out rate in personal injury cases.

Something like 70% of allocations are currently to the small claims track, so it can be seen why hiving off to mediation is so attractive in those cases, which now include more low value road traffic claims. The automatic referral to mediation of more personal injury claims requires consideration. Of cases proceeding to trial, 76% were small claims, an increase of 10% on the same quarter last year. Many of these claims are very low value, again showing why there is an interest in trying to resolve them at an earlier stage. Some of these involve recalcitrant defendants and so compulsory referral to mediation may be a good thing.

To be able to say that compulsory referral to mediation is a good thing, a number of key questions need to be addressed.

1. Will people try to get exemptions?

2. Who will try to get exemptions?

3. Will compulsory mediation increase settlement, irrespective of whether or not people go to mediation; i.e., cases settling in advance of mediation?

4. Will the settlement rate at mediation be the same, higher, or lower than the existing settlement rates?

5. Will mediation reduce the number of cases going to final hearings and if so, by how much?

6. Which cases going to mediation will successfully mediate?

7. What type of cases do not mediate to a settlement: who does not settle and why? This relates to type of claim; value; outcomes; the mediator, all of which are important when looking to extend this process to higher value claims.

Rebecca Clark (RC), Chair, Civil Mediation Council (CMC) addressed the issue of mandatory mediation, including plans for expansion, addressing non-compliance, determining exemptions, and implications for the legal profession and for user outcomes compared to pursuing litigation**.**

The speaker finds the word 'mandatory' to be a difficult and emotive word. The word 'compulsory' is equally difficult. Many steps in CPR are mandatory (e.g., disclosure and witness statements) but they are not referred to as such. Positive language needs to be used to encourage buy-in, such as simply referring to 'mediation'.

The CMC encourages automatic referral to mediation in small claims but identifies a number of key requirements:

1. Participants must be told what to expect: it is about compromise, rather than 'winning'.

2. The allocated time of one hour is not long for a mediator to bring the parties towards a compromise. The CMC believes that the one hour should be capable of extension, or the parties should be able to access further mediation.

The CMC and its members have been looking at benchmarks and minimum standards for mediators and how they may be regulated. A board may be established to oversee civil mediation standards.

When *Halsey* is reviewed by the Court of Appeal in the summer, the CMC will support clarification of the law, in line with the CJC report on mediation.

Brett Dixon, Secretary, Association of Personal Injury Lawyers observed that personal injury claims, by their nature, are different from other forms of dispute. It is not clear to what extent personal injury claims are to be included in the proposed one-hour telephone mediation scheme. If it is, it is difficult to see how it would work.

There are not enough mediators with personal injury expertise. APIL supports ADR but it needs to be agreed to, rather than mandated. ADR would need to take place pre-issue to

have any benefit. The example was given of the RTA Pre-Action Protocol which is designed so that all the work has been done before proceedings are issued. Mediation would duplicate work and increase costs. Firms have their own methods for dealing with ADR.

There are cases that need to be resolved through the court system but the vast majority of personal injury claims registered with CRU are resolved one way or another without requiring a final hearing. Collaboration between the parties is the gold standard: e.g., the Serious Injury Guide, which is providing a form of ADR for higher value personal injury claims.

David Pittaway KC, Barrister, Hailsham Chambers focused on the part to be played by early neutral evaluation (ENE). Whilst he agreed that collaboration is proving to be successful in a large number of personal injury cases, there will always remain a number of claims that are considered to be intractable and will require the judicial process.

Where the parties have taken up strong positions, evaluation can be valuable, at any stage. The advantage of evaluation over mediation is that it allows someone with legal expertise in the field to lead to an outcome.

Going forward there should be scope in the rules for ENE. The speaker agreed that the use of the word 'mandatory' was not necessarily helpful. Stays could be used to allow for both mediation and evaluation.

Mark Savill, Managing Director, Lyons Davidson Solicitors; and Chairman, Litigation Reform Group, Association of Consumer Support Organisations felt DR should be made mandatory only in areas where it would be of use. Otherwise, it becomes an additional cost, acting as a barrier to access to justice.

ADR should not be imposed in personal injury litigation, even though it is widely used to settle claims. Arbitration is often used by his firm, in place of mediation.

Processes that work well through mediation are the ACAS scheme for employment disputes; the clinical negligence mediation process; landlord and tenant; and neighbour disputes.

The speaker felt strongly that if two represented parties do not believe that mediation would be successful, there should be an opt-out. In many cases, fixed fees dictate that the parties do not want to string-out the case. Also, those fixed costs do not take into account the additional step that compulsory ADR would impose.

In personal injury claims there would also be an issue about resourcing referrals to ADR, capacity and quality.

Professor Pablo Cortés, Chair in Civil Justice, Leicester Law School, University of Leicester looked at the use of technology in DR and discussed how digitalisation has opened up two routes for DR: replicating existing processes, or re-imagining justice. The latter includes the use of AI, crowd-ODR, and block-chain DR in online market places.

Court processes will need to embed DR but cater for diverse DR processes. It is important that user experience is monitored to inform improvements and the goals of the process must be built in its design.

Tony Buon, Managing Partner, Buon Consultancy looked at the impact of DR on SMEs but made the general observation that digitalisation also throws up challenges and not everyone has access to technology. He was also concerned about the role to be played by interpreters, which is very difficult in a digitised process. The speaker also felt that DR often involves power imbalances, even where, for example, a claimant is represented in a doctor/patient dispute.

Lady Justice Asplin DBE, Chair, Judicial ADR Liaison Committee provided a strategic view from the top of the judiciary. She confirmed that the Master of the Rolls is keen to offer different forms of DR, within and without the judicial system.

We are in the midst of significant change both in relation to attitude and application. Attitude is reflected in the fact that court guides now refer to DR, rather than alternative anything else. DR covers numerous forms, all of which are still available. In case management, judges must be alert to the possibility that DR might break the logjam. A varied toolbox is available to judges but they need better training in soft skills and awareness.

Parties are also becoming aware of alternatives to judicial determination, with its attendant costs and time (delay).

CPR already encourages the courts to assist the parties to settle the whole or parts of claims and take any steps to further the Overriding Objective, including ENE, but little has happened since the 1990s.

Judicial attitudes are changing: (see *TMO Renewables v Yeo (2022)* where the successful defendants were penalised for refusing mediation, which might have saved the costs of a lengthy trial.)

The speaker turned to the application of DR. The courts have the power and judges are being encouraged to use soft skills. A number of pilot projects are underway and are proving effective. The speaker is encouraging the use of ENE in the courts both by judges and independent third parties. More progress is needed in the High Court but whether ENE proves cost effective is an issue.

Lomax v Lomax (2019) confirms that the courts can require ENE but that does not deprive the parties from having the dispute determined by the court if they do not settle.

If and when the MOJ's proposals become law, they have to be implemented and embedded in a way that makes them effective.

The change therefore, is on the way and mediation in one form or another will form an inseparable part of the system. Pre-action protocols will be the way forward and how to settle a dispute in a sensible way early on, will be built in to that scheme.

If the revolution is to be successful, and public confidence is to be maintained, it is essential that not only is there a change of culture, but also that settlement techniques are properly embedded into the system in a seamless way.

The process must be judge led with, for example, the judge, as part of a process, directing that you do X or Y, to move everyone on into accepting that DR is a legitimate process within

the system, which is suitable on some occasions at some junctures in relation to some disputes.

It was also suggested that solicitors and insurers also need educating in DR. No case is a one size fits all, but in certain types of cases where there is an intractable dispute there may be advantages from methods of DR, whether it is mediation or evaluation, or other types.

Beverley Sayers, Family Mediators Association Representative, Family Mediation Council discussed how the family mediation sector has extensive and clearly defined standards, which are overseen by the Family Mediation Council through the Family Mediation Standards Board, which are tasked with the implementation of and adherence to those standards, and the defined complaint complaints process.

The Standards cover everything from the initial extensive and rigorously assessed foundation training, including the standards for selection for training, course content, hours of delivery, trainers, qualification and assessment of trainees. There are then ongoing requirements for supervision and continuing professional development placed on family mediators if they want to continue to refer to themselves as accredited family mediators.

Data is collated and analysed to ensure that family mediation is not discredited by those people who wish to call themselves family mediators without this robust oversight. Moving forward, there needs to be clear information to the public only to use Family Mediation Council registered mediators who meet standards, and subscribe to ongoing oversight and assurance processes.

Fiona Chute, Senior Associate, Brodies Solicitors looked at ADR from a Scottish commercial solicitor's perspective and the reforms that are being planned north of the border.

At present, there is no requirement for the parties to mediate before they litigate and in some forms of court procedure, there is not even a requirement to consider ADR before proceeding at court, or any costs consequences of failing to do so. In some ways that can be viewed as a positive because it means that if parties to a Scottish dispute are mediating, it is often because they really want to mediate for its own sake.

In newer forms of procedure, such as simple procedure (claims of £5,000 or under), which was brought in in 2016, ADR is being encouraged much more by the Scottish judiciary. So, in simple procedure the Sheriff does have certain powers. The Sheriff must encourage cases to be resolved by negotiation or ADR where possible, and the Sheriff may do anything or give any order considered necessary to encourage negotiation or ADR between the parties. Likewise, in simple procedure in Scotland, there are certain obligations on the parties. Parties must consider throughout the progress of a case, whether their dispute could be resolved by negotiation or ADR. Parties must approach any negotiation or ADR with an open and constructive attitude.

In higher value claims in Scotland, the Sheriffs' or the judges' powers are less express, but they are there to a certain extent. So, for example, in actions using the commercial procedure in the Court of Session, which is for claims of £100,000 pounds or more, there is a Practice Note requiring pre-action communication during which both parties should consider carefully and discuss whether all or some of the dispute may be amenable to some form of ADR.

During the progress of the litigation, parties also have to lodge a list of issues. Also, they should consider and discuss whether resorting to ADR might be appropriate in respect or of some or all of the issues. There can be some cost consequences in failing to comply with this practice note, although it is not as formalized as the pre-action protocols are in England and Wales.

The practice of commercial mediation is essentially the same north and south of the border and, as in England, there is no formal regulation of commercial mediators in Scotland. However, it is possible to become accredited as a specialist by the Law Society of Scotland.

As far as reform in Scotland is concerned, for several years, practitioners in Scotland have been teased with the prospect of a Mediation Scotland Bill, either as a private member's bill or in implementation of government policy. In 2019, a report was published by Scottish Mediation, which made a total of 27 recommendations. All of them though, were based around bringing in some element of compulsion to consider mediation without an element of compulsion to actually mediate.

Proposals include having a list of exemptions to the requirement to consider mediation, as well as the creation of an early dispute resolution office, which in particular, would greatly increase the availability of mediation in lower value disputes. In response to this report, the Scottish Government has created a delivery group to take the recommendations forward. It is also committed to holding a public consultation, but that consultation has been delayed due to Covid.

Martin Ellis, Acting Chair, College of Mediators advised that the College covers all types of mediation with an almost 50:50 split between family mediators and non-family mediators. It has a practice standards committee.

The speaker made five points:

First, a regularly expressed concern is that mediation is introduced too late in the court process, as early mediation is always better than late mediation. So, it is good to note this concern had been acknowledged today.

Secondly, on developing capacity to accommodate a 700% increase in the volume of cases through the Small Claims Mediation Service, there is today spare capacity and there is no lack of mediators available to do this work. If the application process could be opened up to all qualified mediators, the HMCT service could be greatly expanded at speed.

Thirdly, there is a need to develop standards for non-family mediators in the way that family mediators have already, but it is a developmental need rather than crisis that we need to fix. There is no need for extensive regulatory oversight, which will simply add further bureaucracy but with no real gain.

Four is not an easy one to admit to, but the structure of mediation sector is a mess. Apart from the pharmacy sector, where there is a structure via the FMC, with non-family mediation, there are different organizations set up in different times with different genders, which is not ideal, but it is where we are currently. It means there is no one organization that can claim to represent all non-family mediators.

Last but not least, the mediation sector in the UK struggles to be heard partly due to the fragmented structure of the non-family sector, but also because it is too easily seen as a small subset of the larger question. The mediation sector needs to have an identity of its own to be seen as a sector in its own right, with strong links to but clearly separate from the legal profession.

Summary

There is no doubt that the senior judiciary will push for DR to be introduced throughout the civil claims system. This seminar highlighted that mediation is not just a simple concept that can be applied across the board, and that there are a large number of different situations which arise including commercial disputes and personal injury disputes, and large claims and small claims, all of which need to have tailored procedures to help achieve resolution.

There was a perception that the greatest challenge that DR has in the future is to persuade claimants, defendants, insurers, the legal profession and other professional bodies to buy into the system. Judges will require appropriate training. This appears to ignore the fact that in every settled case that insurers and/or their solicitors handle there is a form of dispute resolution that brings claims to a settlement without the courts judication.

The issue of standards with non-family mediators is a very important one and was the focus of many questions posed by delegates. The whole mediation sector would like to have a conversation with the MO J and the courts and tribunals service.

All of this is in the context of processes that will be digitised.

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