Alternative Dispute Resolution in Civil Justice

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Abstract

Contractual and litigious disputes can be time consuming, protracted and acrimonious; potentially destroying commercial relationships of contracting parties, and adversely impacting the supply chain. They can add substantially to business costs, negating much of its benefits or advantages. The merits of dispute avoidance as emphasized in the civil justice system as well as the importance of a fast, efficient and cost effective dispute resolution procedure cannot be overstated. Interest in ADR grew steadily among the civil justice system including the judiciary and legal profession over the last decade or so, spurred by the need for fair, speedy and proportionate resolution of disputes, with emphasis on settlement, even before court proceedings are commenced. This Paper takes a quick glimpse on the various ADR processes, the advantages and disadvantages of such ADR procedures, and examines the forms of intervention which ADR might take, and their potential institutional locations, particularly the proximity to the civil justice.

Keywords: alternative dispute resolution, access to justice, legislative provisions
1. Introduction

Contractual and litigious disputes can be time consuming, protracted and confrontational; potentially destroying commercial and business relationships of contracting parties, and adversely impacting the supply chain. They can add substantially to business costs, negating much of its benefits or advantages. It is in everyone’s interest to work towards dispute avoidance from the outset, and this is reflected in the emphasis on improving relationships between the contracting parties through teamwork and partnership. Inevitably, however, disputes do occur and when they do, the merits of a fast, efficient and cost effective dispute resolution procedure is therefore paramount.

Also described as Appropriate Dispute Resolution, the term Alternative Dispute Resolution (ADR) is any procedure or combination of procedures, conducted in a controlled structured manner, which is entered into voluntarily by the parties to a dispute, as opposed to one suing the other publicly in an open court. ADR suggests some form of minimal, facilitated intervention, directed towards orchestrating communication and an exchange of information, leaving the parties as far as possible unconstrained in reaching an outcome within their own universe of meaning.

Interest in ADR grew steadily among the civil justice system including the judiciary and legal profession over the last decade or so. In what was perceived as a contemporary perception of crisis in the civil justice system, judges are viewing ADR as a way to ease the burdening backlog of judicial business, whilst the government inclined towards active sponsorship as a means of reduced spending on the courts; amidst the rising public outcry over the inefficiencies and injustices of the traditional juridical systems. A significant push came from Lord Woolf's report “Access to Justice” that identified the need for fair, speedy and proportionate resolution of disputes. This was seen as a move to institutionalise alternative modes of dispute management, and to renovate litigation, and potentially extending governmental provision and perpetuating into areas of dispute hitherto firmly in the „private” sphere.

Those principles lay at the heart of the Civil Procedure Rules (CPR), Statutory Instrument 1998 No. 3132 L.17, which included references to ADR in rules of court and introduced pre-action protocols, with their emphasis on settlement using ADR as an expedient and effective means of settling their disputes, even before court proceedings are initiated. In CPR Rule 1.4(2)(e), part of the Court’s duty in managing cases is that the court must further the overriding objective by actively managing cases and in encouraging the parties to use an ADR procedure if the court considers that appropriate and facilitating the use of such procedure.

According to the Department for Constitutional Affairs Legal Policy (now subsumed by the Ministry of Justice), the proportionate dispute resolution strategy is about much more than just ADR. The vision is that people have access to the information and the range of services (such as Small Claims Mediation and Support Services; Community Mediation and Dispute Resolution Service; Toolkits for Mediation Schemes; National Mediation Helpline; Fast/Multi Track Mediation); they need to understand their rights and responsibilities, alleviating legal problems; and where unavoidable, to resolve their disputes effectively and proportionately.
Support for ADR was demonstrated by the civil justice in *Cowl (Frank) v Plymouth City Council*¹, *per* Lord Woolf at [25], where the Court of Appeal held that judicial review was not necessarily the proper way in the face of alternatives, stating unequivocally that “… *sufficient should be known about ADR to make the failure to adopt it, in particular where public money is involved, indefensible*”.

In *Dunnett v Railtrack plc*², *per* Brooke LJ at [15], the Court of Appeal told the parties to consider ADR; which Railtrack refused to contemplate at a stage prior to the costs of the appeal beginning to flow. Notwithstanding that Railtrack won the appeal, they were denied their cost recovery from Dunnett. The court clarified that if lawyers “*turn down out of hand the chance of ADR when suggested by the court, as happened on this occasion, they may have to face uncomfortable costs consequences*”.

The leading case of *Burchell v Bullard*³, is an abject lesson on the dangers and inappropriateness of pursuing legal action in the courts when ADR is clearly available and a better way of deciding the contended issue. Here, Bullard was eventually faced with exorbitant costs resulting from their blatant refusal to take advantage of the earlier offer of mediation.

Many more similar cases demonstrate support through the civil justice and the courts for ADR in lieu of adversarial litigation. Take for instance the case of *Leicester Circuits Ltd v Coates Brothers plc*⁴, where Coates was not awarded full costs though they won, on the grounds that they withdrawn from a mediation process.

Lord Nicholas Phillips, Baron of Worth Matravers, Master of the Rolls, and the President of the newly installed Supreme Court of the UK, during the recent case involving overdraft charges by seven banks and the Nationwide building society, had lamented that the long drawn out series of court hearings would have been averted through the use of amicable settlement with the Office of Fair Trading or through ADR at the Financial Ombudsman Service.

### 2. ADR processes

In the “Dispute Resolution Guidance”, published on Mar 2002 by the Office of Government Commerce (OGC), the Lord Chancellor (as he then was, the Lord Irvine of Lairg, Lord Chancellor’s Department. The Lord Chancellor's Department was abolished in July 2003. Its functions, aims, and objectives were incorporated into the new Department for Constitutional Affairs, the latter of which was then subsequently subsumed by the Ministry of Justice) issued a formal *Pledge* committing Government departments and agencies to settle dispute using ADR techniques. This OGC Guidance

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² [2002] 1 WLR 2434; [2002] 2 All ER 850
³ [2005] EWCA Civ 358
⁴ [2003] EWCA Civ 474
provides an overview of dispute resolution and the spectrum of techniques ranging from informal negotiations through increasing formality and more directive intervention from external sources, to processes which involve the use of an external third party and which are considered as an alternative to litigation. The expediency of avoiding disputes is now mirrored in the civil justice system as the Government's emphasis at improving relationships between the client and the supplier through teamwork and partnering.

The then Lord Chancellor said: “Disputes that end up in court often mean that all parties concerned suffer long, drawn-out court cases. Settling a dispute out of court and through mediation can often result in a swift resolution that satisfies all involved. The Government wants to lead the way in demonstrating that going to court should be a last resort. The Government has pledged, where possible, for its legal disputes to be settled by mediation or arbitration when the other party is willing. Very often there will be alternative ways of settling the issues at stake which are simpler, cheaper, quicker and less stressful.”

David Lammy, Minister for Civil Justice Policy, said: “Progress on this scale clearly demonstrates that the Pledge marks a major step on the road away from a culture of litigation, towards a culture of settlement. This order of improvement demonstrates Government's very real commitment to use ADR to settle its disputes, in suitable cases. In line with the Pledge and with guidance issued by the OGC, Departments have included ADR clauses in standard procurement contracts. And Departments are taking forward programmes of skills and awareness training, underpinned by the work of the ADR sub-group of the Government Legal Service, embedding ADR in the culture.”

Dispute resolution includes any process which can bring about an effective and expeditious conclusion of a dispute. ADR techniques can be seen as a spectrum ranging from the most informal negotiations between the parties themselves, through the more formal and more directive intervention from external sources, to a full court hearing with strict rules of procedure.

Brievly, ADR Techniques include the following broad categories:

(a) **Negotiation** – where parties attempt to resolve the dispute themselves. A most efficient form of dispute resolution in terms of management time, costs and preservation of relationships, due to its merits like confidentiality, party autonomy of process and outcome.

(b) **Mediation** – a private and structured form of negotiation assisted by a neutral third party that is initially nonbinding. It is seen as the preferred dispute resolution route for commercial cases involving multi-party with high value disputes. The settlement can be made legally binding.

(c) **Conciliation** – like mediation, but a conciliator can propose an effective solution.

(d) **Neutral evaluation** – a private and non-binding technique whereby a third party, usually legally qualified, a retired judge or lawyer, gives a confidential opinion on the likely outcome at trial as a basis for settlement discussion.
(c) **Expert determination** – a private process involving an independent expert with inquisitorial powers who gives a binding decision.

(f) **Adjudication** – an expert is instructed to rule on a technical issue – primarily used in construction disputes as set out in the Housing Grants, Construction and Regeneration Act 1996 where awards are binding on the parties at least on an interim basis, until a further process is invoked. Part II of the HGCR Act 1996 s108 now requires every construction contract to provide for the right to refer disputes to adjudication.

(g) **Arbitration** – governed by statute, it is a formal, private and binding process where the dispute is resolved by the decision of a nominated arbitral tribunal. There is a debate over whether arbitration is a form of ADR but for the purposes of the Government *Pledge* arbitration is deemed to be a form of ADR.

(h) **Miscellaneous Forms** – including “Med-Arb” or similar combinations, where mediation is initiated and switching to arbitration should mediation fails; variations of “arb-med” and “Med-Rec”, etc.; and “Mini-Trial”, which is a voluntary non-binding process.

(i) **Dispute Resolution Boards (DRB)** – a panel of experienced, respected and impartial members set up within the contract spectrum to resolve differences or disputes at an early phase. Even though recommendation of the DRB is non-binding, they can be admissible in future proceedings.

(j) **Ombudsman** – impartial “referees” in public or private sector organizations, where decisions are generally non-binding.

(k) **Litigation** – in the absence of a consensual process, this is a formal process whereby claims are taken through the civil courts and conducted in public. The judgments are binding on parties subject to rights of appeal. Potentially lengthy and costly, the adversarial process and outcome is controlled by the judiciary.

When contemplating ADR processes, careful consideration must be given at the outset on how to achieve or enforce settlement, with clear express contract provisions for the resolution of disputes which are appropriate having regard to their nature and substance and that such mutually agreed provision should, so far as possible, ensure that relationships with contracting parties are maintained. In particular, it is sound policy that litigation should be treated as the dispute resolution method of the last resort.

Once the contract is in place good contract management is the key to dispute avoidance. Good management techniques include expeditious pre-empting of potential disputes and facilitating regular discussions to alleviate possible areas of conflict. When disputes do arise, it is important to manage it actively and positively and at the right level in order to encourage early and effective settlement. Unnecessary delays and inefficiency can only lead to rapid escalation of costs with adverse impact on working relationships.
2.1 Court based ADR initiatives

Since 1996 in the United Kingdom, both the Commercial Court and the Court of Appeal have been instrumental in identifying cases regarded as appropriate and suitable for ADR, where judges suggest, or make an Order directing parties to attempt ADR. Such Orders, implemented as a voluntary scheme, do have a positive impact on settlement by opening up communication between the parties. At the end of the settlement, parties were able to avoid trial costs, leading to substantial savings for the parties.

Although the scheme is non-mandatory, and even facilitated by the courts free or at nominal costs to the parties, such precatory Orders do impose substantial pressure on parties to settle through ADR, particularly with an implicit threat of penalties for refusal without any valid reasons. Notwithstanding, not all cases may be appropriate for ADR, as the timing may not be opportune. Parties may simply refuse, or being overly cautious to even contemplate ADR, having no faith in ADR as a process in general. Sometimes, parties may be concerned with the intransigence of opponents, and the problems caused by pressuring unwilling opponents through an ADR Order to come to the negotiating table. Occasionally, there may be a mismatch between the mediator’s approach to mediation and the expectations of the parties and their advisers, resulting in unnecessarily protracted proceedings.

In the Court of Appeal, there are special characteristics that need to be considered before recommending the cases for mediation, since not all cases are deemed suitable for mediation. A judgment may be required for important cases due to policy reasons; or an appeal may be turned on a point of law, and not entirely appropriate to be resolved using ADR forum.

In the wake of the court initiatives, an accreditation process for ADR providers was mooted in 2005, thus providing a quality benchmark for civil mediation as well. Over time, an effective relationship is bridged between the judiciary and these ADR providers who may be reputable national organisations or professional institutions. More significantly, the scheme resulted in a high rate of success in settlement.

3. Advantages of ADR procedures

Clearly, the civil justice system supports the use of ADR through its Pledge to provide the appropriate clauses in their standard procurement contracts and through rules and guidelines for ADR processes governed by the civil justice court procedures.

Some of the significant advantages of ADR procedures are:

(a) The expeditious process where the schedule for proceedings are largely controlled by parties instead of being subject to the vagaries of the court system.
(b) The informality and flexibility to suit the requirements of the dispute. There are in reality no rules of precedents; hence each case is dealt with based on facts and circumstances within the regulated legal regime.

(c) Parties are allowed to control the procedure, including the crucial rules governing evidence, pleadings and procedure that are otherwise strictly enforced in courts.

(d) Providing the parties with an opportunity to be heard and to understand their respective positions. This is important as ADR process is not inquisitorial or accusatorial, hence putting parties on the offensive or defensive mode. Instead, they are encouraged to express their views before the ADR tribunal. This is not withstanding the fact that there are in place clear rules of ADR Procedures.

(e) Providing a forum for „decision makers” to get involved.

(f) Remaining confidential to the extent agreed by the parties. This advantage is popular with parties where sensitive commercial issues and considerations are paramount as opposed to the likely publicity that open court hearings will solicit.

(g) Providing the support of a neutral third party to facilitate discussions and/or resolve the dispute.

(h) Allowing consideration of outcomes other than strict contractual entitlements.

(i) Helping to maintain working relationships.

(j) Reducing litigation and court costs, since no specialized court facilities are utilized, not to mention that the personnel involved are most likely less costly than the judges and law lords themselves!

The above substantive advantages and standards developed by well-established ADR mechanisms has been proven particularly useful in specific areas of law such as in labour disputes, for example in cases of “unjust dismissal”, and just-cause terminations. The presence of a skilled neutral with substantive expertise, the avoidance of issue-obscuring procedural rules, the arbitrator’s freedom to exercise common sense, party autonomy, and the tradition of limited judicial review of arbitral decisions – all make arbitration superior to litigation.

Disputes in which community values, coupled with the rule of law as a rich source of justice, is more successfully resolved through mediation.

4. Disadvantages

Conversely, it has been argued that the institutionalisation of private negotiations promoted as a preferred, primary means of dispute management might seem unnecessary, even absurd. In many respects, a „culture of negotiation” towards an amicable solution is already inherent, whilst the
assertion of legal rights through litigation or resorting to third party adjudication is very much a matter of last resort.

ADR may not be as popular in every discipline as hoped, in that “it is making slow headway on the ground as a means of resolving civil disputes”. The abandonment of formal mediation in divorce proceedings under the Family Law Act 1996 was an obvious example. Pilot Studies by the Legal Aid Board (since replaced by The Legal Service Commission, an executive non-departmental public body created under the Access to Justice Act 1999) on Family Law Act had showed that in private matrimonial matters beyond the hope of reconciliation, couples have invariably passed the point for any effective mediation to be possible. Besides, laws protecting battered women and legal mechanisms to ensure the enforcement of child-support awards, and such like, may become simply a mirage if all “family law” disputes are blindly pushed into mediation. Such issues presented extend beyond questions of unequal bargaining power. For instance, battered women often need the aggressor evicted out of the home or arrested – goals which are fundamentally inconsistent with mediation. The goals of mediation, i.e., communication, reasonable discourse, and joint resolution of adverse interests – work against the most immediate relief the battered women require, which is protection from violence, compensation, possession of her home without the batterer, and security for her children. Only the judicial system has the power to remove the batterer from the home, to arrest when necessary, and to enforce the terms of any decree such as a personal protection injunction if a new assault occurs. Empirical data showed that the therapeutic model in mediation is ineffective and that firm law enforcement including imprisonment is required to resolve family violence and spousal abuse.

Furthermore, there are certain cases not entirely suitable for settlement through ADR, for example, cases involving intentional wrongdoing like fraud, abuse of power, public law, Human Rights and vexatious litigants. In Halsey v Milton Keynes General NHS Trust\(^5\), the Defendant was held justified in refusing mediation, as not all cases are suitable for mediation, especially when fraud is alleged.

There will also be disputes where, for example, a legal precedent is needed to clarify the law, or where it would be contrary to the public interest to settle. Such spectra of disputes therefore cannot be amicably settled through ADR.

Although ADR is perceived as a sign of reducing state-power, the converse may also be true. This is because of the implied pressure on parties to accept the ADR schemes that the court imposes such as through grants in voluntary sector schemes. When courts threaten with imposing costs for unreasonable refusal to engage in ADR, people intending to decline mediation but relent only because of fear of sanction and costs penalties, and compelled to comply by legislation. The question arises, therefore, as to whether the contemporary rules of ADR are consistent with the requirements of Human Rights Act 1998 Article 6, on any possible tension between the “compulsory or semi-compulsory” nature of ADR and the right of access to the court.

\(^5\) [2004] EWCA Civ 576
Another aspect is the worry that a growing fashion for mediated negotiations may operate to the disadvantage of weaker parties where significant disparities of power are obviously evident, and the possibility that ADR may enhance imbalances in power between the parties, rather than redressing them. This is because the indigent party may be disadvantaged with less resources than his opponent with deeper pockets in fortifying his team to defend the case. The consequence is that the poorer disputant may be under pressure to settle because they may lack the financial prowess to sustain the dispute all the way to the courts. At the other end of the spectrum, interveners adopting directive or therapeutic approaches, while purporting to orchestrate joint decision-making, may insidiously exercise coercive power over the parties. This power can be potentially covert, in the sense that it may not be experienced as such by the parties; and unregulated, in that these private processes are not attended by any of the procedural safeguards which surround litigation.

More particular weaknesses in the ADR processes can be identified:

(a) Because of the finality of decisions of ADR processes, and the binding nature of some of these determinations, the right of access to appeals depends on the statutory provisions governing the ADR process. But such availability, if any, is usually restricted to judicial review on questions of law rather than any erroneous decisions made by the tribunal.

(b) Even though confidentiality is an added attraction to parties in the dispute, the effect is that cases involving issues of general public importance are not given publicity and consideration that they might merit. The lack of precedent therefore denies each tribunal of that crucial referencing to earlier decisions when adjudging the present case.

The establishment of alternative agencies and the ensuing informal procedures, which enjoy the authority of the court but which are stripped of the procedural safeguards of the judiciary, carry the risk of unregulated coercion and manipulation of weaker parties by stronger ones, and of both parties by the intervener. Attempts by courts to oversee and regulate hitherto private settlement-directed negotiations present the same dangers. These dangers flow from the nature of the authority which successful courts must of necessity enjoy. Since time immemorial, common law judges and the courts perform a narrow function in hearing disputes and then formulating and handing down a decision, and where the authoritative superior mandates a decree; and where judges are equipped with coercive powers in the event of our failure to comply with their orders. This circumstance in itself makes court sponsored negotiatory processes potentially problematic; and evidence so far available in Britain suggests that parties subject to such processes experience them as coercive. It must be doubted whether uncoerced negotiations are possible at all under the supervision of court personnel.

5. Empirical evidence

Initially, there were teething problems and dissatisfaction amongst the legal fraternity over the evolving ADR processes. There were complaints that compromises either came too late, were too expensive, or were too time consuming and too stressful an encounter. The processes through which the parties eventually reach agreement turned out to be too difficult to launch, and the route to
resolution too tortuously indirect and travel over it can be obstructed by emotion, posturing, and interpersonal friction.

Notwithstanding and in support of ADR in line with the government's Pledge commitments, the Ministry of Justice published Annual Reports giving overviews of the main activities undertaken by Government departments and agencies. Each Annual Report contains a review of ADR use in the civil service and a brief summary of the activities under the Pledge, which includes case illustrations and statistical data; information on the development of awareness of ADR use by Government departments and agencies; as well as other ADR activities within Government. This includes Her Majesty’s Revenue and Customs; Department for Environment, Food and Rural Affairs; Ministry of Defence; Department for Work and Pensions; and Treasury Solicitor’s Department. In 2006/07 alone, ADR was used in 331 cases with 225 leading to settlement, saving costs estimated at £73.08 million. This was compared to previous year's returns, where ADR was attempted in marginally fewer cases, (336 cases in 2005/06), with fewer settlements (241 in 2005/06) - a slightly lower settlement rate of 68% (72% in 2005/06).

The legal fraternity has, as a consequence, become notably more settlement-conscious in handling disputes away from their traditional partisan roles, whilst beginning to develop new forms of practice and novel modes of approaches under the theatrics of neutrality. For example, lawyers in family law mooted the establishing of a „Conciliation Board” to administer a „Recommendation Procedure” designed „to give the parties the benefit of an impartial, confidential and economical recommendation how to settle their differences”. Under this procedure, barristers offer neutral opinions on financial issues submitted to them by the solicitors to the respective parties. However, this procedure conceived „in the hope that the intervention of a neutral and experienced outsider might nudge the parties towards a settlement” had not been widely used; as those operating it indicated that advisory opinions have been sought in no more than a handful of cases a year.

6. Critique

By incorporating ADR as part of the judicial repertoire of dispute management, the courts have, in embracing the ADR regime, extended to oversee and regulate the process of negotiation conducted by parties and their legal representatives in the period leading up to the trial, and over reaching an area of activity hitherto in the „private” domain. This inevitably raises the concerns of informal justice and the scope of judicial surveillance of settlement attempts in the pre-trial period. The potential for coercion and exploitative manipulation presented to the court even where the tone of such an appointment remaining muted should not be underestimated. Even the „suggestion” of further negotiation on the part of the judge must weigh heavily with many parties. Such an occasion vigorously handled would impose enormous pressure on the parties to settle. A regime of this kind coaxes the parties towards settlement, delays their access to judgment; but the spheres of „settlement” and „adjudication” remain distinct.

The other concern is that consideration must be given as to whether an ADR mechanism is being proposed to facilitate existing juridical milieu, or as an alternative entirely independent from the
established system. Also, whether this will involve public rights and duties or will result in an abandonment of the bedrock of the constitutional system in which the “rule of law” is created and principally enforced by legitimate branches of government, and whether rights and duties are being delimited by those the law seeks to regulate. Curtailing the jurisdiction of the courts may result in diminished rights for individuals and other groups.

Because the ADR movement is still evolving, the training and expertise of those who serve as neutrals and mediators in the ADR systems must be emphasised to ensure quality, adequate staffing and funding over the long term. Whether private litigants will prefer ADR in lieu of or merely in addition to litigation; what effect ADR may have on the judicial caseload; whether one can avoid problems of “second class” justice for the poor; and whether one can avoid the improper resolution of public law questions in wholly private fora; all these issues must be thoroughly appraised to ensure the system is adequately evaluated before the ADR regime is permanently established.

7. Conclusions

There is a potential tangible role of ADR within the traditional court system; and the use of ADR process has admittedly had considerable benefit to the parties in terms of savings in costs, maintenance of working relationships and freeing up management time to concentrate on future developments rather than being embroiled in past problems. However, ADR must be seen as options or contractual requirements within the range of conflict management and dispute avoidance techniques available in the legal landscape. They may not be appropriate or successful in all cases; nevertheless, there is a powerful case for approaching ADR positively. ADR would never replace litigation, but instead would be used to make the traditional court systems work more efficiently and effectively, and certainly has this enormous advantage of reducing caseloads by enhancing the effectiveness of settlement; whilst because ADR is under the careful supervision of the courts, there is far less danger that ADR would become a nefarious scheme for diminishing the rights of the underprivileged in the community. After all, the overarching goal of ADR is to provide equal justice to all.

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