



MASTER OF
THE ROLLS

THE RIGHT HON. SIR GEOFFREY VOS

Mediated interventions within the Court Dispute Resolution Process

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Introduction

1. It is a huge pleasure to be back in Dublin. If my memory serves me correctly, my last visit was to attend the Opening of the Legal Year on behalf of the Lord Chief Justice of England and Wales, then Lord John Thomas, in 2017 or 2018, but I may easily have the year wrong. It is equally an honour and a pleasure to have been invited to speak outside the UK for the first time since the terrible pandemic eased.
2. I have been asked to speak about my views on “mediation in court systems including digital dispute resolution and the hot topic of mandatory mediation in the context of access to the national court system”. Since I became Master of the Rolls and Head of Civil Justice in England and Wales in January 2021, I have been sounding off on this subject quite a bit. Indeed, in some ways, I have been doing so too successfully. Since I pointed out that alternative dispute resolution was in no sense “alternative”, but should be a mainstream part of the dispute resolution process, some Ministers in the UK’s Ministry of Justice have refused to use the term “ADR” moving, more accurately in my view, to the term “DR”.
3. You will perhaps have seen our Government’s Call for Evidence on “Dispute Resolution in England and Wales”, spearheaded by the MoJ’s Minister and Spokesperson in the House of Lords, Lord David Wolfson of Tredegar QC.
4. So, the first questions to ask this afternoon are whether nomenclature matters, and whether there is substance behind the proposition that ADR is not or should not be “alternative”.

5. My thinking on this subject is probably also well known. I believe that the institutions promoting ADR in general and mediation in particular have really done themselves no favours by looking so narrowly at the processes they advocate. It is more effective to see the various techniques of dispute resolution within the integrated whole of the justice system.
6. Again, as is no secret, I think that common law jurisdictions like England & Wales and Ireland need completely to re-think the way we resolve civil, a term I use to include family and tribunals disputes. The processes predominantly used at the moment are derived from the 19th century, if not earlier and are, at their foundation, ruthlessly analogue. Before you push your hands in the air and cry out about how we have all moved to undertaking remote hearings during the pandemic, let me say at once, that, whilst I applaud the use of remote hearings for the right kinds of cases, I do not regard them as a panacea. And whilst they are certainly using a valuable, if hardly new, technology we should all have been using for years, they do not go anywhere near changing the process of dispute resolution. They are simply doing what we used to do face-to-face using digital technology. But the process leading up to the hearing and even the hearing itself remains the same just with video added.
7. Doing court-based dispute resolution differently will, however, provide a significant opportunity for what we used to call ADR.
8. I will deal with these matters as follows: (i) How can dispute resolution be dealt with differently? (ii) How can mediated interventions be integrated in that process? (iii) Can or should alternative dispute resolution be mandatory?

How can dispute resolution be dealt with differently?

9. In considering different and more technologically enabled methods of dispute resolution, one has to start I think with the bulk end of the market, and the position of most people. I am sure that what I am suggesting will, at least, need adaptation if it is to work for commercial dispute resolution and the complex cases dealt with by our Business and Property Courts.
10. We must, nonetheless, bear in mind that 60 million cases are dealt with each year on eBay without apparent dissatisfaction from those using their dispute resolution service, So, an online dispute resolution process is certainly not without precedent.

11. The way I see things is relatively simple. At the front end, there should be a regulated website and associated app providing a signpost to all accredited dispute resolution platforms. In a recent speech at the Guildhall, I said that we might call that front end “Claims R Us” for the sake of argument. In that way, consumers, SMEs and anyone else can simply go to one place online to find out where and how to make a claim in any civil field. The website and associated app would direct enquiries to the appropriate pre-action portal, be that linked to an ombuds, or a review mechanism, or some other portal. Or where it is needed directly to the point of entry for an online court if that is appropriate because no pre-action portal exists.
12. This website can be cheap and easy to establish and maintain. Undoubtedly it would make a huge contribution to access to justice. I first came across such a thing in Belgium, where they used to have a more limited front-end point of entry called Belmed. As I see it, the Claims R Us entry point would be regulated, and its content created, by the new Online Rules Committee that our Government is currently legislating to create.
13. That takes me on to the second layer, which is the pre-action portals themselves. In England and Wales, we already have many such portals operating online, and resolving large numbers of small disputes online. They include 300,000 complaints per annum dealt with by the Financial Ombuds Service, 15,000 by the Housing Ombuds, 20,000 by the Communications Ombuds, and some 57,000 cases dealt with by the Energy Ombuds.
14. In addition, we have pre-action portals for personal injury cases (dealing with more than 500,000 cases per annum) and whiplash claims, which started in May 2021 and is rapidly growing. At the last count, that had already dealt with 60,000 cases. The Road Traffic Personal Injury portal is funded by government but the whiplash claims portal was built by the Motor Insurers Bureau. Lawtech UK is proposing a privately funded SME portal to resolve a stubbornly large number of claims by and against SMEs, and there are many more such pre-action portals in prospect. In short, there is already something of a free, but currently dispersed, market of these portals out there. Each would, as I see it, be able to seek accreditation by the new Online Rules Committee.
15. In family justice, an applicant cannot make any kind of application to a family court without having attended a pre-claim Mediation Information and Assessment Meeting or MIAM. These meetings are conducted online

and explain different ADR approaches that might be more suitable than court proceedings.

16. Likewise, before any claim can be made to an Employment Tribunal, claimants have to notify the Advisory, Conciliation and Arbitration Service (ACAS) by serving an early conciliation notification on ACAS. ACAS then explains the possible approaches to conciliation and asks the claimant if they want to participate. If they do not, they receive a certificate enabling them to proceed to issue a claim in the tribunal.
17. The array of pre-action portals should serve to resolve small disputes so as to help disputes enter the court system only when they really need to do so.
18. I have proposed that the new Online Rules Committee, which will govern the digital court procedure, should also have a role in integrating the justice system as a whole. It can have responsibility for ensuring that both publicly and privately funded pre-action portals integrate with the court system by allowing them to demonstrate that they undertake the necessary online mediation process appropriately and fairly, as with current Pre-Action Protocols. Allowing portals to seek such accreditation from the Online Rules Committee, what I have elsewhere called the 'blue tick', ensures that the claims R us website, layer one, can point to clearly accredited portals, layer two. But accreditation can also require portals to produce a common data set so that any case that does not settle within the portal can be seamlessly transmitted directly either into a more suitable portal or ultimately by API into the appropriate online court-based dispute resolution service.
19. That online court process is the third layer. In England and Wales, we already have online systems for proceedings in relation to civil money claims (Online Civil Money Claims), civil damages claims (Damages Claims online), property possession claims, public and private family claims, and some tribunal claims. These online court claims platforms all look and feel the same, having been created as part of Her Majesty's Courts and Tribunals Service's Reform Programme. They are, as yet, at a relatively early stage, but judges are already giving directions online within Online Civil Money Claims and elsewhere.
20. The key issues in dealing with dispute resolution differently are to ensure that the process is cohesive, more streamlined, less costly to the users and that cases are resolved far more quickly. Obviously starting cases online

assists in that process, but it is not the only factor. For many years now (since 2016 actually) all our Business and Property Courts' cases have been started electronically using CE-file, but the actual process followed has not been different. CE-file is now being used widely across the High Court and the Court of Appeal. It is a good programme that does away with much of the paper, but it is not the smart online dispute resolution process that HMCTS's Reform Programme is aimed at creating.

21. For today's purposes, I am not going to deal with issues such as how factual and expert evidence can be provided more efficiently in the online space – though it can. Nor will I deal today with the need for assistance to be provided to those who have difficulty using the online space. Suffice it to say that, whilst I am certain that special measures need to be taken to ensure that the digitally disadvantaged can achieve the same benefits as those who are less so, I do not think that we should allow the tail to wag the dog. Just as I have started from the position of bulk claims, we should also look at the majority of users in the justice system. Most young people now obtain everything on their smart phones without difficulty and we should not build our future systems, including our future justice systems, without keeping that fact very clearly in mind.
22. I will move now to look at the way in which online cases can be more effectively resolved by mediated interventions.

How can mediated interventions be integrated in that process?

23. I have already mentioned how troubled I am by the narrow approach of some in the mediation community.
24. The beauty of the online space is its flexibility. But let me start this section of my talk by dealing with how cases can generally be resolved.
25. Those of us that have spent a lifetime in the world of dispute resolution know that cases in all fields form an infinite spectrum. They range from the cases that are settled instantly on resolution being intimated, to those that stubbornly resist compromise until the highest court in the land is about to or has actually spoken.
26. The first essential point is, however, that most cases are, in fact, amenable to consensual resolution in one way or another provided that the intervention is applied at the right time and in the right way. I describe this as the sweet spot at which the case is most likely to resolve. Since the sweet spot is different for every case, it is obviously no use suggesting

mediation once and then walking away and allowing the lengthy, costly and disruptive court-based dispute resolution process to take its course.

27. The second essential point is that there is more than one way to skin the cat. Formal mediation with all the parties and their lawyers present may work very well for major commercial disputes, but it is impracticable overkill for a small claim proceeding in the local court. There is a range of options, all of which should be deployed in the right cases and at the right time. This is what I often call the continuous mediated interventions that the online process allows to occur.
28. The range of mediated interventions includes, **first**, bots that pop up online suggesting resolution in a simple case based on the parties' positions. A claim for €1,000 defended on the basis that only half the goods were delivered may be settled instantly if a bot pops up and suggests that the defendant should pay for what it accepts was actually delivered. **Secondly**, if the AI driven bot fails to resolve the claim, the judge looking to make directions in an online case may be able to see, and then suggest, an obvious resolution. No harm is done if the resolution suggested is not accepted. Obviously, the judge in question can recuse themselves from the substantive determination if necessary. **Thirdly**, in the county court in England and Wales, we are now suggesting telephone mediation, undertaken by trained HMCTS officials, in almost every small claim, whether started online or not. These are very successful in large numbers of cases. **Fourthly**, where all of the previous interventions fail, face-to-face mediation can also be proposed. There are some cases that require it, though a surprisingly small number in the small claims firmament.
29. In my view, however, we should not be satisfied with simply going through a list of possible interventions and suggesting them in a set order. If one intervention does not work, we should be considering another, and on and on. Every aspect of the process ought to be directed towards resolution rather than dispute. We all know how entrenched the parties can become when their cases are pleaded at great length and they are required to file lengthy witness statements explained their case in even greater detail. The court process, inadvertently I am sure, often actually has the effect of drawing focus onto the grievance making the parties more, rather than less, intransigent. Repeating the case their lawyers have written down, again and again, in pleadings, witness statements, experts' reports and

written and oral argument serves to persuade the parties, but rarely the opposing party, how right they are.

30. Other interventions that can be suggested in more complicated cases, include early neutral evaluation either by a judge or by an independent lawyer. That has been used very successfully in the Business and Property Courts. Moreover, every judge looking at a case ought to be considering what preliminary issue needs to be resolved in order to set an appropriate stage for consensual resolution. It is no longer enough for judges to think that their role begins and ends with hearing the evidence, the legal argument and delivering judgment. We are not just there to referee a fight, we are there to break it up. Lord Woolf shifted the paradigm of the courts from seeing their role as searching for perfect justice, to one where they had to seek expedient and proportionate justice. I hope to shift the paradigm again towards a focus on resolution rather than dispute.
31. I have asked the Civil Justice Council in England and Wales to prepare some advice on the how the online dispute resolution space could work best with an emphasis on resolution rather than dispute. I hope to be able to share that report next year.
32. So, what then should be done with the not uncommon type of litigant who sets their face against even participating in any kind of mediated intervention?

Can or should alternative dispute resolution be mandatory?

33. The question of whether the court can require parties to engage in alternative dispute resolution has been a hot topic for some considerable time. In January 2021, I asked the Civil Justice Council to report on the legality and desirability of compulsory ADR. Its report was published on 12 July 2021. It concluded that mandatory (alternative) dispute resolution was compatible with Article 6 of the European Human Rights Convention and was, therefore, lawful.
34. In *Halsey v Milton Keynes General NHS Trust* [2004] 1 WLR 3002, Lord Dyson MR said at [9] that “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”, relying on ECHR authority saying that the right of access to a court could be waived but that such waiver should be subjected to “particularly careful review”

to ensure that the claimant is not subject to “constraint” (see *Deweere v. Belgium* (1980) 2 EHRR 439 at [49])

35. At [58-9] of the CJC report, it was concluded that “any form of ADR which is not disproportionately onerous and does not foreclose the parties’ effective access to the court will be compatible with the parties’ Article 6 rights”. If there is no obligation on the parties to settle and they remain free to choose between settlement and continuing the litigation then there is not “an unacceptable constraint” on the right of access to the court. The logic, they thought, applied to ADR as well as ENE. In *Rosalba Alassini* [2010] 3 CMLR 17, the Court of Justice of the European Union had attached importance to the fact not only that the parties retained a free choice as to whether to settle or not but also that the ADR process was free and caused no delay to the ultimate resolution. The CJC thought that what mattered was that any cost and delay was proportionate. It concluded that more work was necessary to determine the types of claim and the situations in which compulsory (A)DR would be appropriate and most effective in analogue and online justice. They commented that their conclusions “placed another ... powerful tool in the box [and] the opportunity to initiate a change of culture in relation to dispute resolution which will benefit all concerned”.
36. I entirely endorse the CJC report. It would be out of step with the objectives of justice systems across the world for it to be impermissible to require parties to participate proportionately in attempts to resolve their disputes consensually.
37. Interestingly, ELI/UNIDROIT civil procedure rule 9(1) approved by ELI and Unidroit in September 2020 provides under the heading “Role of the parties and their lawyers” that “Parties must co-operate in seeking to resolve their dispute consensually, both before and after proceedings begin”. In the preamble at [40], the rules provide that “It has ... become the dominant procedural policy of the European Union over the last couple of decades. It is a fundamental principle of the Rules that lawyers and courts must encourage parties, on a properly informed basis in appropriate cases, to make use of out-of-court ADR methods”. “The Rules also provide for in-court-Court settlements, in respect of which the court’s role is not restricted to rendering a decision that gives effect to an agreement reached by the parties, but rather enables the court to actively participate in the process that seeks to assist the parties to reach a consensual resolution of their dispute”.

38. In my view, the direction of travel ought to be clear. It should be possible, particularly in small claims for the Court to direct a party to attempt to reach a consensual resolution through mediated interventions. The mandated process should not, of course, be costly or cause delay in judicial resolution. But none of that should mean that parties can, as they sometimes do, resolutely refuse to consider mediation. Being entitled to one's day in court is not the same thing as being entitled to turn down appropriate and proportionate attempts to reach consensual solutions.
39. Indeed, another Civil Justice Council report is expected shortly to recommend that small claims worth less than £500 should be subject to mandatory mediation, and should then, if not resolved consensually, be resolved by the judge on the papers without oral evidence or submissions.

Conclusions

40. Let me draw some conclusions from what I have been saying. I believe that the time has, at last, come for mediation and other dispute resolution intervention processes. No longer 'alternative' but as a part of an integrated digital whole.
41. Governments across Europe and beyond are taking the need for speedy and cost-effective disputes resolution far more seriously than ever before.
42. The problem that is not often understood and acknowledged is the hidden economic and social cost of civil disputes. Ongoing disputes tend to obsess individuals and businesses alike, causing psychological and economic harm. Only if they can be resolved cheaply and quickly can the individuals involved in them get back to their normal economic and individual productivity. Work is being done on the figures for the costs of slow and inefficient dispute resolution, but they are surprisingly high. This is or should be a matter of great concern for economic and business ministries as well as justice ministries.
43. The progress towards effective online dispute resolution allows justice systems the opportunity to improve access to justice as well as the full range of mediated interventions that we have historically called 'ADR'.
44. We are at an exciting stage in history. Technology now allows us to rethink the justice process. I have focussed tonight on the opportunities that that allows for mediated case resolution, but it goes further than that. We also can and should, I think, reconsider how we resolve the disputes judicially where mediation fails. The current system is much loved by those who

have been part of it for as many years as I have. But, it is nonetheless cumbersome, costly and slow. Technology allows us to tackle each of those drawbacks. Time does not allow me this afternoon to explore that subject in more detail.

45. I will, therefore, leave you with this thought. The mediation community can and should be in the vanguard of advocates for online dispute resolution. It offers the very best prospects of really, finally, ditching the 'alternative' from alternative dispute resolution.