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Loukas Mistelis

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England and Wales

ADR in England and Wales: a successful case of public private partnership

Loukas Mistelis

Significant reforms to state judicial systems have emerged throughout England and Wales over the past decade. These 'access to justice' reforms have come to shore with the wave of liberalisation and privatisation of public services that swept the western world as well as the so-called emerging markets of the late 20th century. The United Kingdom has been one of the driving forces of such reforms in Europe.

Courts' support for ADR

The two most important pieces of legislative reform are the new English *Arbitration Act* 1996 and the *Civil Procedure Rules* (CPR) which came into effect on 26 April 1999. The CPR implement the changes recommended by Lord Woolf's 'Access to Justice' Report¹ and provide wide support for ADR. The driving force behind the reforms was a combination of the lawyers involved in commercial

litigation, a handful of academics, and the courts. Both the Lord Chancellor's Department and the Department of Trade and Industry also played a significant role in the enhancement of ADR.

The Court of Appeal in several recent decisions has highlighted the institutional encouragement for disputing parties to engage in ADR. Most notably, in *Cowl v Plymouth City Council*,² Lord Woolf, the architect of



the CPR, himself delivered a clear and unconditional reminder to those involved in public law cases to remember that trial litigation should be the last resort. Refusing judicial review to residents over the closing of the local authority home where they lived, he stated at the outset of his judgment:

The importance of this appeal is that it illustrates that, even in disputes between public authorities and the members of the public for whom they are responsible, insufficient attention is paid to the paramount importance of avoiding litigation whenever this is possible. Particularly in the case of these disputes both sides must by now be acutely conscious of the contribution alternative dispute resolution can make to resolving disputes in a manner which both meets the needs of the parties and saves time, expense and stress.

Lord Woolf further suggested that the Court might of its own motion fix a hearing at which the parties could be required to explain what they had done to resolve a dispute without resort to the courts. He then turned to the issue of which disputes are apt for mediation:

We do not single out either side's lawyers for particular criticism. What followed was due to the unfortunate culture in litigation of this nature of over-judicialising the processes which are involved. It is indeed unfortunate that, the process having started, instead of the parties focussing on the future they insisted on arguing about what had happened in the past ... the parties should have been able to come to a sensible conclusion as to how to dispose of the issues, which divided them. If they could not do this without help, then an independent mediator should have been recruited to assist. That would have been a far cheaper course to adopt. Today sufficient should be known about ADR to make the failure to adopt it, in particular when public money is involved, indefensible.

Court-annexed or court encouraged ADR is rather recent. Despite the relatively short time period ADR has been utilised in practice, considerable experience has already accumulated in England and Wales. The following ADR systems currently exist:

- Commercial Court and the

- Technology and Construction Court³
- family law disputes⁴
- Court of Appeal
- Central London County Court⁵
- Patents County Court⁶
- employment tribunals.⁷

Increase in ADR

The increasing incidence of court-annexed or court encouraged ADR has led to fewer cases being litigated in English courts. Undoubtedly, the introduction of ADR was not the only reason. The new CPR not only encourage parties to settle their disputes by recourse to ADR, they also discourage parties from litigating small claims by introducing the principle of proportionality, according to which litigation costs should be ideally lower than the amount in dispute.

The full potential of the Woolf Reforms and the emergence of ADR will unfold over the next few years. However, the tripartite dispute resolution spectrum (ADR, arbitration, and litigation), is now clearly defined and delimited.

A search of the Lexis and WESTLAW online legal databases conducted on 31 January 2002 for reported and unreported cases in all UK courts gave 766 returns for conciliation, 274 returns for mediation and 95 returns for ADR. These numbers are far from definitive as they refer only to ADR matters that have not settled. The majority of the returns are from the years 1997-2001 — one more indication of the quantitative as well as qualitative importance ADR has acquired in recent years.

During this period, the smaller number of ADR cases that were finally referred to litigation can be further classified according to subject matter as follows:

- 54 cases (65.1 per cent) were ADR cases relating to socially sensitive areas in the public interest. In particular:
 - 12 were family law cases;
 - 12 were consumer disputes;
 - 1 was a community dispute; and
 - 29 were public (administrative) law disputes
- 29 cases (34.9 per cent) were ADR cases relating to financial disputes. In particular:

- 15 were commercial law disputes;
 - 3 were financial disputes;
 - 2 were insurance disputes;
 - 8 were construction disputes; and
 - 1 dispute related to maritime law
- 10 cases (10.63 per cent) were ADR cases with a foreign element relating to the parties or the subject matter of the dispute.

It could be said the encouragement of ADR has been the most successful PPP (public private partnership) project of recent UK governments. What has traditionally been a public service is now offered and performed by private providers, often with some support from public funds, to the extent that legal aid is now also made available to users of ADR services. The success of this form of PPP in dispute resolution can also be confirmed by statistics, according to which in 2000/01 27 per cent of all cases administered by CEDR (Centre for Dispute Resolution) were cases referred to it by the courts. The growth in cases referred by the courts is demonstrated by the figures: 8 per cent in 1998/99, 19 per cent in 1999/00 and 27 per cent in 2000/01.⁸

A variety of ADR mechanisms are now well established in the UK and a wide range of disputes are now resolved by ADR. There are horses for courses and disputants have a wide choice of options for settling their disputes by whatever mechanism appears to be adequate in the given set of facts and the particular circumstances of the parties.

A large number of ADR institutions have emerged providing comprehensive training and information as well as dispute resolution services. The qualitative and ethical standards are high although more may and will be done in the future towards increased self-regulation. The standards of current self-regulation are quite satisfactory.

The speed of development in ADR and its institutionalisation point to two conclusions:

1. ADR users are not particularly concerned with the type of ADR mechanism; what matters is the resolution of the dispute rather than the technique involved. That said, direct negotiations and mediation appear to be the most

popular and successful ADR mechanisms.

2. ADR is increasingly an important business sector. Most large commercial law firms understand they need to have a well-defined ADR practice. Litigation groups of the 1980s became litigation and arbitration groups in the 1990s and have now evolved to become 'dispute resolution' groups to accommodate ADR, in general, and mediation, in particular. ADR service providers are normally structured as charities or not-for-profit organisations. If they are well organised they have the capacity to expand and become significant employers.

Into the future

Community mediation, which started slowly in the early 1980s, is now fully established and well rooted across the country. The peculiarity of community mediation is that results are achieved without any strict application of law. Disputes are settled within communities, with the expectation and the experience being that common sense prevails.

In terms of online dispute resolution, the future will undoubtedly see an increase in its use particularly with respect to consumer disputes.

Some suggest England needs a Mediation Act. Whether or not an Act is introduced, mediation is here to stay. In any event, the current pragmatic view is that the providers of ADR services should be regulated rather than the ADR process itself. In the last two or three decades it has become evident that the service is dynamic and should remain so. This view is forward-looking and justified by the imperative of encouraging the continued dynamic growth of ADR

Modern ADR in England is an example of a successful PPP, with the private sector increasingly assuming the role traditionally played by public service providers. This is consistent with current economic ideology, the trend towards globalisation and settlement of disputes without strict application of law. ●

Loukas Mistelis is Senior Lecturer in International Commercial Law at the University of London and can be contacted at l.mistelis@qmul.ac.uk

Endnotes

1. Lord Woolf *Access to Justice* (Report to Lord Chancellor on the civil justice system in England and Wales) July 1996.
2. See *Cowl and Others v Plymouth*

City Council, (unreported, CA, 14 December 2001, reported in *The Times* 8 January 2002) per Lord Woolf LCJ [2001] EWCA Civ 1792.

3. CPR Rule 1.4 (accessible at www.lcd.gov.uk/civil/procrules_fin/contents/parts/part01.htm#rule1_4) (last visited 26 January 2002)).

4. Rules 2.71 to 2.77 of the Family Proceedings Rules 1991, Pilot Scheme organised by the Solicitors Family Law Association in 1998 which has become the national norm as of June 2000.

5. Genn H *The Central London County Court / Pilot Mediation Scheme - Evaluation Report* (accessible at www.lcd.gov.uk/research/1998/598esfr.htm) (last visited 26 January 2002)).

6. See, for example, *Unilever v Procter & Gambler* [1999] 2 All ER 691 per Laddie J.

7. See Department of Trade and Industry News Release no P/2001/30 dated 20 July 2001, which announced the review of employment disputes resolution and DTI document entitled *Routes to Resolution: Improving Dispute Resolution in Britain*, available at www.dti.gov.uk/er/individual/et.htm (last visited on 26 January 2002).

8. *Resolutions*, Summer 2001 (issue no 28), p 3 (available at www.cedr.co.ukSk).