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RESEARCH ARTICLE

Embedding alternative dispute resolution in the civil justice system: a taxonomy for ADR referrals and a digital pathway to increase the uptake of ADR

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Abstract

This paper examines in three parts how ADR is being embedded into the English civil justice system. Section 1 discusses how courts encourage settlements, and it argues that while mounting costs in litigation lead to negotiated settlements, the participation in ADR primarily mainly occurs when parties are referred to it in a timely manner. Section 2 investigates the time when disputants are referred to ADR, and it proposes a taxonomy formed by three stages in the dispute life cycle: (1) before parties contemplate litigation; (2) at the pre-action phase as a pre-condition to issue a claim; and (3) after a defence is entered. Section 3 notes that the court digitalisation program is increasing ADR referrals across the above three stages, and it argues that these referrals will be more effective when they are timely and coupled with suitable incentives and sanctions, but the latter must take into consideration the parties' power asymmetries.

Keywords: civil justice; mediation; alternative dispute resolution; online dispute resolution; civil procedure

Introduction

Limited court resources and the high cost of litigation have promoted a policy whereby early settlements have incrementally become a crucial aim of the civil justice system.[1] This aim is intertwined with the traditional adversarial model of adjudication where the parties, and not the court, are in control of the process.[2] While common law judges have increasingly gained managerial powers, civil litigation has retained a preference for settlement, which is now expressly encouraged by the courts.[3] In England, the Civil Procedure Rules 1998 (CPR) seek to encourage settlement even before the claim is issued, and all the way to the trial stage, either via alternative dispute resolution (ADR) or via direct negotiation between the parties.[4] This paper examines how mediation, and more broadly

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[1]This was first articulated in FH Heilbron and H Hodge *Civil Justice on Trial: The Case for Change* (Joint Report of the Bar Council and Law Society, 1993) but it was reinforced subsequently in HK Woolf LJ *Access to Justice, Final Report* (Lord Chancellor's Department, 1995).

[2]S Roberts 'Settlement as civil justice' (2000) 63 MLR 739 and N Andrews *English Civil Procedure, Fundamentals of the New Civil Justice System* (Oxford: Oxford University Press, 2003) p 132.

[3]See J Resnik 'Managerial judges' (1982) 96 Harvard Law Review 76 and C Menkel-Meadow 'Pursuing settlement in an adversary culture: the law of ADR' (1991) 19 Florida State University Law Review 1.

[4]CPR 1.4(1), (2), 26.4 and 44.2(5)(a).

ADR, is being used in England to settle civil disputes, and it first argues that for most cases ADR, unlike negotiated settlements, mainly takes place when parties are referred to it. It further notes that increasingly several proceedings in England are embedding ADR into their processes, requiring parties to explore a settlement in advance of court adjudication at various stages of the dispute life cycle. This emerging trend is being intensified as a result of the digitalisation program roll out, which seeks to increase the use of ADR by, inter alia, making participation in ADR mandatory and subject to sanctions for small claims.[5] This change represents a paradigm shift for civil claims that is further eroding the 'alternative' component of ADR.

English courts encourage settlements, on one hand, by requiring parties to exchange their arguments and supporting evidence, and on the other hand, by having a 'pay as you go' system for court fees – which need to be paid by the claimant at various stages of the procedure, such as on the submission of the claim, the track allocation and the trial[6] – and for legal fees, which are typically paid periodically to counsel on an hourly-basis rate. When cases proceed to trial, most costs are recoverable from the losing party, save for two main exceptions. The first exception occurs when one party has rejected an adequate offer to settle which financial settlement was not improved in a subsequent judgment.[7] The rationale behind this penalty is based on the understanding that the refusing party should have accepted a suitable settlement instead of letting the claim progress through the costly court process. The other main exception is when a party has behaved unreasonably by declining to follow a court order or, as is discussed below, by refusing an invitation to participate in mediation or an ADR process.[8]

The academic literature has argued that the single most important factor that encourages participation in ADR is the threat of costs penalties,[9] which seeks to make civil litigation more cost-efficient for those cases that can be settled without an expensive trial. Indeed, disproportionate legal costs for low- and medium-value claims are not unusual; that is why there are ongoing reforms, including notably the consultation on mandatory ADR for small claims,[10] the expansion of the fixed fees regime[11] and the launch of the Online Civil Money Claims (OCMC) service, which integrates online negotiation and telephone mediation as part of its procedure.[12]

This paper argues that ADR primarily takes place not exclusively as a result of cost sanctions, but by and large because parties are referred to these ADR processes. It observes that the ongoing digitalisation of English courts is integrating ADR further into the civil justice system, and it suggests that referrals will be particularly beneficial for court users when they are timely. The paper proceeds in three parts. Section 1 sets the scene by examining how the promotion of ADR has been a goal of civil justice reform for over two decades and it notes how every major report from the Judiciary and the Civil Justice Council found that ADR was underused.[13] It also observes that a crucial part of the digitalisation reform program is to increase the referrals to ADR at the pre-action stage as well as during the court proceedings. The paper claims that while mounting costs of litigation and the threat of cost

[5]Ministry of Justice 'Increasing the use of mediation in the civil justice system' (July 2022) pp 12–18.

[6]S Roberts '"Listing concentrates the mind": the English civil court as an arena for structured negotiation' (2009) 29(3) OJLS 457.

[7]CPR Pt 36.

[8]*Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576 and *PGF II SA V OMFS* [2013] EWCA Civ 1288.

[9]See eg M Ahmed 'Implied compulsory mediation' (2012) 31(2) CJQ 151 and N Andrews *The Three Paths of Justice* (Springer, 2018) pp 265–288.

[10]Ministry of Justice (2022), above n 5, pp 12–18.

[11]R Jackson LJ *Review of Civil Litigation Costs: Supplemental Report Fixed Recoverable Costs* (July 2017) and Ministry of Justice *Fixed Recoverable Costs Consultation* (28 March 2019).

[12]CPR PD 51R introduced an online court pilot scheme for money claims in the county court; M Briggs LJ *Civil Courts Structure Review: Interim Report* (December 2015) and *Final Report* (July 2016) (hereinafter *Briggs IR* and *Briggs FR*). See also Ministry of Justice *Transforming Our Justice System: Summary of Reforms and Consultation* (September 2016) and Government Response (February 2017).

[13]Ministry of Justice, above n 5; Civil Justice Council *Compulsory ADR* (June 2021), available at https://www.judiciary.uk/wp-content/uploads/2021/07/Civil-Justice-Council-Compulsory-ADR-report.pdf.

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sanctions often lead to negotiated settlements, for most civil disputes participation in ADR primarily occurs when parties are signposted to it, or when an ADR step is woven into the court procedure. Furthermore, it notes that the timing of ADR referrals can be crucial in securing the litigants' participation and in achieving settlements. Against this background, Section 2 of the paper discusses developments in ADR from a cross-sectoral standpoint (ie in consumer, family, employment and small claims), which analysis has been neglected by the existing academic literature that has tended to focus on specific legal fields.[14] Accordingly, it examines the timing of referrals, and it proposes a taxonomy consisting of three separate stages in the dispute life-cycle when parties can be referred to ADR: (Stage 1) once the complaint arises and before parties contemplate litigation; (Stage 2) at the pre-action phase as a precondition to issue a claim in court; and (Stage 3) after a defence is submitted. The paper examines the paradigmatic processes employed in each of the three stages, namely, consumer ADR schemes for Stage 1; Family Mediation, Information and Assessment Meetings (MIAMs), employees' notifications to ACAS and pre-action Claims Portals as examples of Stage 2; and small claims telephone mediations in Stage 3. Finally, the third part of the paper argues that the court digitalisation program is further eroding the 'alternative' element of ADR by embedding it deeper into the civil justice system, and notably by making participation in ADR mandatory for small claims and by developing an online funnel that will refer all civil disputes to ADR during the three stages identified above. The paper concludes arguing that these referrals will be more effective in achieving early settlements when they are timely and coupled with adequate incentives and sanctions, but the sanctions must take into consideration the parties' information asymmetries.

1. The promotion of settlement as a goal of civil justice reform

(a) Continuous dissatisfaction with civil procedure

The active promotion of ADR for civil disputes in England and Wales emerged from the Lord Woolf's reports and the CPR 1998 that followed, which provide that a case should not proceed to trial without the parties having considered some form of ADR.[15] The policy preference for settlement goes beyond the parties' private interest in reaching a quick and cost-efficient resolution for their disputes; it also seeks public policy aims, in particular to reduce the courts' workload and to achieve cost savings.[16] Under the CPR parties are required to consider ADR from the pre-litigation stage in accordance with the prescribed conduct requirements contained in the pre-action protocols. These protocols provide claimants with clear guidelines on what they need to do prior to the issue of a claim. If parties do not comply with the protocols, they may not be awarded their costs in the event they succeed.[17] Furthermore, during the Cost and Case Management Conference, which is a hearing before a judge to agree on directions and costs budget, parties may be given a 'Fontaine Order'. This order requires the parties to consider ADR, and if they refuse to participate in an ADR process, they must lodge a witness statement within 21 days explaining their reasons for the refusal, which will be considered by the judge when allocating costs.

The CPR has an overriding objective that requires courts to resolve civil claims justly and in a proportionate manner.[18] This is expected to be achieved through a strict regime of case management by

[14]Eg P Cortes *The Law of Consumer Redress in an Evolving Digital Market* (Cambridge: Cambridge University Press, 2018); M Roberts and MF Moscati (eds) *Family Mediation: Contemporary Issues* (London: Bloomsbury, 2020); L Blomgren Amsler et al 'Dispute system design and justice in employment dispute resolution: mediation at the workplace' (2009) 14 Harvard Negotiation Law Review 1.

[15]Jackson LJ *White Book* (Sweet & Maxwell, 2021) Preface.

[16]B Garth 'The movement toward procedural informalism in North America and western Europe: a critical survey' in RL Abel (ed) *The Politics of Informal Justice Vol 2 Comparative Studies* (Academic Press, 1982) p 200; W Twining 'Alternative to what? Theories of litigation, procedure and dispute resolution in Anglo-American jurisprudence: some neglected classics' (1993) 56 MLR 380; H Genn *Judging Civil Justice, The Hamlyn Lectures 2008* (Cambridge: Cambridge University Press, 2010).

[17]Practice Direction Pre-Action Conduct and Protocols para 13 and CPR 44.3 and 44.4.

[18]CPR 1.4(1) and (4).

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judges, a requirement for parties to cooperate during the litigation process, and their obligation to consider ADR.[19] Although English judges are required to assist parties to settle as many issues as possible early in the procedure, court observations and interviews with English judges found that in practice judges rarely provide settlement proposals or actively persuade parties to settle a claim.[20] Judges can, however, recommend that parties go to ADR when they consider it appropriate to do so; while the level of compulsion is unclear, an unjustified refusal would normally lead to costs sanctions.[21] Courts can also put a temporary stay on proceedings at their own discretion or at the request of one of the parties (made typically in the allocation questionnaire) to allow parties time to explore settlement discussions through mediation or via another ADR process.[22]

Efforts to divert cases from courts to ADR have also come from the UK Government, who took the view that civil courts should be self-funded and focus on adjudicating complex legal issues,[23] envisaging a new civil justice system 'where many more avail themselves of the opportunities provided by less costly dispute resolution methods, such as mediation'.[24] The dissatisfaction with the operation of the civil courts led to its most recent major review by Briggs LJ (as he then was).[25] He observed that part of the problem with the present state of civil justice was that mediation 'has achieved a less than adequate penetration' for most medium-value claims, by which he meant those going to the Fast-Track (ie claims between £10,000 and £25,000) and the Multi-Track (ie claims over £25,000).[26] The Civil Justice Council also noted that mediation was under-used, especially for low-value and mid-value claims, recommending steps increase awareness of its availability and to encourage its use.[27] Yet, Briggs LJ's single most radical and important proposal was the creation of an Online Solutions Court for claims under £25,000, which includes a conciliation step as part of its procedure.[28] Briggs LJ's approach to civil justice reinforces Lord Woolf's philosophy that civil litigation should pursue settlement rather than trial as its main function. The Online Solutions Court is being launched as the OCMC, and at the time of writing it is operating on a pilot basis for claims under £10,000. The OCMC is an important part of the £1.4 billion reform program that seeks to digitalise the operation of all civil courts and tribunals, and it is partly financed from the sale of under-used court estate.[29] The OCMC is being designed with a view to promote early settlements by allowing defendants to make an online offer to settle and by providing a free telephone mediation service offered by HMCTS.[30] While participation has thus far been optional, the Government is consulting the public with a view to making it mandatory for small claims and subject to sanctions.[31]

[19]CPR 1.4(2)(e). See also *Dunnett v Railtrack plc (Practical Note)* [2002] 1 WLR 243, CA, para 13.

[20]M Alberstein and N Zimerman 'Judicial conflict resolution in Italy, Israel and England and Wales: a comparative analysis of the regulation of judges' settlement activities' in M Moscati et al (eds) *Comparative Dispute Resolution* (Cheltenham: Edward Elgar, 2020) p 303.

[21]See B Billingsley and M Ahmed 'Evolution, revolution and culture shift: a critical analysis of compulsory ADR in England and Canada' (2016) 45(2) Common Law World Review 186; cf Civil Justice Council 'Compulsory ADR' (June 2021), concluding that compulsory ADR is lawful and recommending its introduction for claims under £500.

[22]CPR 26.4(1).

[23]Ministry of Justice Consultation Paper CP6/2011 'Solving disputes in the county courts' The Government Response (2012) Cm 8274 and Ministry of Justice 'Court fees – proposals for reform (2013) Cm 8751 at p 4. See also Ministry of Justice 'Dispute resolution in England and Wales: call for evidence' (3 August 2021) p 7.

[24]MoJ (2012), ibid, p 1.

[25]*Briggs IR*, above n 12.

[26]*Briggs FR*, above n 12, para 2.26.

[27]Civil Justice Council ADR Working Group 'ADR and civil justice – final report' (November 2018) para 2.2 and 'The resolution of small claims' Interim Report (April 2021) paras 156 and 158.

[28]*Briggs IR*, above n 12, para 6.1. See also Civil Justice Council Online Dispute Resolution Advisory Group 'Online dispute resolution for low value claims' (February 2015) and JUSTICE 'Delivering justice in an age of austerity' (April 2015).

[29]Ministry of Justice 'Government announces changes to court estate' (24 July 2018), available at https://www.gov.uk/government/news/government-announces-changes-to-court-estate.

[30]See Practice Direction 51ZC – The Small Claims Paper Determination Pilot (1 June 2022).

[31]Ministry of Justice, above n 5, p 14.

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(b) Costs sanctions for unreasonable refusals to mediate

Outside the Small Claims Track, English courts can penalise a party with legal costs if that party has been unreasonable at the time of refusing to accept the other party's invitation to mediate, even if the invitation occurred in the pre-litigation stage.[32] Although courts can request that parties attempt ADR (and refusing a court direction will likely carry costs consequences), in practice judges rarely make these referrals. There are, however, a few exceptions where courts routinely invite parties to try mediation, such as the Technology and Construction section of the High Court and the Civil Division of the Court of Appeal.[33] The former makes ad hoc invitations, while the latter issues standard letters to litigants whose appeals have been admitted by the Court. In addition, the Commercial Court in London, which is a specialised court within the Queen's Bench Division of the High Court, considers the suitability of ADR (ie mediation or early neutral evaluation) for commercial disputes.[34] Interestingly, the 2022 Commercial Court Guide replaced the term ADR for Negotiated Dispute Resolution (NDR).[35] The change of nomenclature reflects the drive to integrate ADR at the heart of the court process rather than seeing it as an alternative to legal proceedings.

An important obstacle for a more energetic encouragement of mediation remains the Court of Appeal decision in *Halsey*, which stated that English courts do not have the power to force parties to go to mediation against their will, as this – in the view of the Court – would infringe the right of access to justice.[36] Despite of the European case law allowing for mandatory mediation[37] and the recognition that the Court of Appeal's statement on Article 6 of the European Convention on Human Rights (ECHR) was not binding as it was made obiter by Lord Dyson, it had undoubtedly a chilling effect on the willingness of English courts to refer parties to mediation and to impose costs sanctions when there was a refusal to mediate.[38] The Court of Appeal extended the ruling of *Halsey* in *PGF II SA*, stating that silence in response to an invitation to participate in mediation is in itself unreasonable regardless of whether there were reasonable grounds to refuse.[39] The Court noted that there may be exceptional cases where silence could be justified, for instance as a result of a mistake in the office.[40] In these cases, the onus would lie on the recipient of the invitation to justify its silence as reasonable. English courts, however, retain significant discretion in the allocation of costs, resulting in a lack of uniformity in the imposition of costs sanctions.[41]

Although courts are increasingly making orders in support of mediation and issuing costs orders against parties who unreasonably refuse mediation,[42] there is a lack of consistency when applying cost sanctions,[43] which remain, overall, a rarity.[44] It follows that costs sanctions on their own cannot be an

[32]See *PGF II SA V OMFS* [2013] EWCA Civ 1288.

[33]See the Technology and Construction Court Guide section 7 (October 2022) allowing judges to offer mediation and early neutral evaluation, available at https://www.judiciary.uk/guidance-and-resources/technology-and-construction-court-tcc-guide-october-2022/.

[34]See the Admiralty and Commercial Courts Guide, G.1 and G.2 (11th edn, 2022), available at https://www.judiciary.uk/wp-content/uploads/2022/06/Commercial-Court-Guide-11th-edition-1.pdf.

[35]Ibid.

[36]*Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576; cf Lightman J 'Breaking down the barriers' *Times Online* (31 July 2007).

[37]See C-320/08 *Alassini v Italia Telecom SpA* [2010] ECR I-02213 and C-75/16 *Menini v Banco Popolare* [2017] ECR 457.

[38]Genn, above n 16, pp 78–125; D De Girolamo 'Rhetoric and civil justice: a commentary on the promotion of mediation without conviction in England and Wales' (2016) 35(2) CJQ 162; and Lord Neuberger 'A view from on high' Civil Mediation Conference (12 May 2015).

[39][2013] EWCA Civ 1288; cf M Ahmed 'Mediation: the need for a united, clear and consistent judicial voice' (2018) 37(1) CJQ 13.

[40][2013] EWCA Civ 1288 para 34.

[41]See *Thakkrar v Patel* [2017] EWCA Civ 117, where the court imposed costs, while it declined to do so in *Gore v Naheed* [2017] EWCA Civ 464 (TCC).

[42]R Jackson LJ 'Civil justice reform and alternative dispute resolution' Chartered Institute of Arbitrators (20 September 2016).

[43]Civil Justice Council ADR Working Group, above n 27, paras 5.50–5.58.

[44]Ministry of Justice 'Call for evidence on dispute resolution in England and Wales' Summary of Responses (March 2022) para 1.5.

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effective tool to encourage parties to use ADR precisely because they are not often issued. Moreover, costs sanctions can be a weak threat when they apply only to the small percentage of cases that culminate in trial. This paper argues that for the majority of civil disputes, which are of low and medium value, participation in ADR mostly takes place when the law signposts parties to it (eg in consumer ADR processes) and when ADR is incorporated as part of the proceedings (eg in family, employment and small claims).

The timing of these referrals can impact on how amenable parties may be to exploring a settlement. Referrals often take place at the early stages of the dispute life-cycle as it is then where the greatest benefits can be obtained in terms of cost and time savings, avoiding also the psychological disadvantages of continuing with a dispute.[45] Yet, early referrals may be less effective when parties are not predisposed to explore a compromise or when parties cannot properly assess the merits of the case, for instance because they have not had the opportunity to see witness statements. Thus, as the timing of ADR referrals can be crucial in securing the litigants' participation and in achieving settlements, it would be important to consider when these referrals take place. Furthermore, as discussed below, when referrals are integrated into the proceedings, they are normally not accompanied by cost sanctions.

2. Three stages where parties are signposted to ADR

In England mediation is currently being used in an array of civil cases, including trust and probate disputes, neighbour disputes, landlord and tenant disagreements, commercial disputes, defamation, medical negligence and insurance disputes.[46] But where ADR is mostly used is in statutory schemes that incorporate ADR referrals, notably for consumer disputes in regulated sectors, the pre-action notifications for employment, family and personal injury claims, and the post-defence telephone mediation service for small claims.

This section brings together an analysis of various regulations that signpost and refer parties to ADR at different stages of their dispute life cycle. The purpose of this section is to weave a taxonomy based on the time at which parties are referred to ADR, which have been mostly developed and examined on a sectorial basis. Thus, this section of the paper seeks to fill this gap by examining the timing of the ADR referrals in civil cases (including family and employment disputes) based on three proposed stages: (Stage 1) once the complaint arises and before parties contemplate litigation; (Stage 2) when it is a pre-action requirement to issue a claim; and (Stage 3) after a defence is lodged in court.[47] Accordingly, Stage 1 covers consumer ADR in regulated sectors where traders are required to participate in certified ADR schemes. Stage 2 includes family and employment disputes where claimants must actively consider ADR prior to the submission of a claim, and the pre-action claims portals where parties are required to negotiate before issuing the claim in court. Lastly, Stage 3 encompasses defended claims where either the court or the procedure direct litigants to participate in a mediation process as it occurs in the Small Claims Track and in its digital pathway, the OCMC.

(a) Stage 1: once the complaint arises

(i) Consumer ADR schemes

The paradigmatic example of this stage is the ADR processes employed to settle consumer grievances. Whilst there is a long history of consumer ADR in the UK, its development accelerated in the last decade as a consequence of changes in regulated sectors requiring traders to adhere to certified ADR entities. Within the substantial reform of the consumer ADR landscape, a major development

[45]G Vos 'Mandating mediation: the digital solution' Chartered Institute of Arbitrators: Roebuck Lecture 2022 (8 June 2022) para 15.

[46]CEDR 'The eighth mediation audit: a survey of commercial mediator attitudes and experience in the United Kingdom' (10 July 2018).

[47]The Civil Justice Council suggests a similar taxonomy: pre-action ADR at source, pre-action ADR at the commencement of proceedings and concurrent ADR. See Civil Justice Council ADR Working Group, above n 27, pp 10–11.

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took place with the ADR Directive and the associated Regulation on Online Dispute Resolution, which have been transposed into UK law.[48] However, in a similar vein to the revocation of the Mediation Directive,[49] the UK Government decided to amend the consumer ADR legislation as a result of a wider policy of repealing the aspects from EU laws that provided preferential treatment to parties residing in the EU.[50] Among the main changes in the national ADR landscape, it intends to require all ADR providers in the consumer sector to be publicly certified so that they can be better monitored by the regulators.[51] Moreover, the Government intends to make business participation mandatory in the motor vehicles sector (to include the sale of new and used vehicles as well as their repair) and in the home improvements market.[52]

The ADR Regulations seek the policy objective of stimulating trade, especially in the online arena, by ensuring that consumer complaints can be resolved by certified ADR bodies.[53] Even though the ADR Regulations do not make participation in ADR compulsory, UK traders are required to participate in a certified ADR scheme in most regulated sectors, including energy, estate agents, financial services, higher education, gambling, legal services, pensions, postal services, property letting agents, and telecommunications. In addition, all traders are required to inform consumers about a certified ADR entity once they have rejected a complaint, but unless a sectorial regulation states otherwise, they are not mandated to participate in the ADR process,[54] and in fact, they rarely do so.[55] Consequently, consumer disputes are one of the main categories of small claims reaching the courts.

ADR processes for consumers vary significantly but the most predominant model in the UK is the ombudsman, who operates mostly on digital communications, adopts an inquisitorial approach, and employs a tiered process that provides a conciliatory stage in advance of adjudication. The other main consumer ADR process is adjudication, which, akin to the final ombudsman stage, issues decisions that are normally only binding when accepted by the consumer complainant, who can instead refuse the outcome and pursue the claim in court. These consumer ADR schemes, which often operate digitally on a documents-only basis, are replacing the courts in the sectors where they operate because they are informal, specialised, normally free, and easily accessible online or by phone.[56]

The ombudsman procedure is characterised by providing a diagnosis stage, where a case handler advises consumers on whether they may have a claim that falls within its scope.[57] After this initial triage, most disputes are resolved informally by a case handler acting as a facilitator. The procedure is akin to an informal mediation carried out through caucus discussions over the phone or in writing – increasingly through asynchronous email and web-chat communications. Claims that are not settled move to the next stage, where the case handler issues a reasoned recommendation (often called a 'provisional assessment') based on what is considered to be a fair and reasonable outcome. This phase of the process is akin to

[48]The Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015, SI 2015/542, which implemented Directive 2013/11 on alternative dispute resolution for consumer disputes and Regulation 524/2013 on online dispute resolution.

[49]The Cross-Border Mediation (EU Directive) (EU Exit) Regulations 2019, SI 2019/469.

[50]The Consumer Protection (Amendment etc) (EU Exit) Regulations 2018, sI 2018/1326.

[51]Department for Business, Energy and Industrial Strategy (BEIS) 'Consultation outcome – reforming competition and consumer policy: government response' (April 2022) CP 656.

[52]Ibid.

[53]Communication on ADR for Consumer Disputes in the Single Market COM(2011) 791. See generally P Cortés (ed) *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford: Oxford University Press, 2016).

[54]The Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015, reg 19(2).

[55]See BEIS 'Modernising consumer markets' Consumer Green Paper (April 2018) para 145, available at https://tinyurl.com/yd7me6bq.

[56]C Hodges *Delivering Dispute Resolution – A Holistic Review of Models in England and Wales* (Oxford: Hart Publishing, 2019) p 15.

[57]C Hodges 'Consumer ombudsmen: better regulation and dispute resolution' (2014) 15(1) *ERA Forum* 593.

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early neutral evaluation (ENE),[58] but some ombudsman schemes invite parties to comment on the provisional assessment before the case handler issues the decision. If one of the parties is not satisfied with the decision, then the dispute escalates to a more senior case handler (ie an ombudsman) who will issue a final decision, which will normally be binding on the trader when the consumer has accepted the decision.

In 2018 the UK Government issued a consultation to improve quality standards of certified ADR schemes, and examine the need to extend compulsory ADR schemes for traders in areas of high consumer detriment.[59] The consultation paper noted that 'more that can be done to give consumers access to high quality dispute resolution services and to avoid costly court hearings'.[60] The main hurdle for consumers seeking redress is to persuade businesses from non-regulated markets to opt in – and pay for – ADR. The consultation noted that the voluntary Consumer Ombudsman received only 5,600 complaints from non-regulated sectors in 2017, and businesses agreed to participate in only 6% of these cases.[61] It is thus not surprising that the main reason why consumers do not use ADR before going to court it is because businesses normally refuse to participate in it.[62] As noted above in relation to the motor and home improvement sectors, the Government is considering the extension of the mandatory ADR model to other sectors where there is a high volume of consumer grievances. Accordingly, in recent times it decided to launch a railway ombudsman[63] and made it mandatory for private landlords to be part of an ADR scheme to deal with complaints relating to repairs and maintenance.[64] Yet, the Government believes that it would be disproportionate to make ADR mandatory in every sector due to the costs imposed upon business.[65]

Therefore, a crucial limitation of the current signposting system is the voluntary nature of ADR in non-regulated sectors, especially as the cost of ADR is typically covered by a trader who has already rejected the claim and knows that the consumer is unlikely to contemplate the escalation of a low-value claim through the courts. Effective and accessible courts can thus help to fill these gaps to ensure consumer redress, and when appropriate, refer parties to ADR. Some of these gaps are expected to be covered by the OCMC but, as has been noted elsewhere, there is currently a lack of coordination between the courts and the existing consumer ADR infrastructure.[66] Furthermore, as examined below, there are other areas where considering ADR is a precondition to issuing a claim in court – namely in family, employment and in personal injury claims from road traffic accidents.

(b) Stage 2: pre-action ADR

(i) Family mediation

Like in the consumer sector, family law is an area where public policy is working towards changing the dispute resolution culture, especially by requiring separating couples to consider mediation prior to commencing court litigation. The Family Law Act 1996 marked the start of the institutional promotion of amicable settlements[67] and, similar to the CPR, the Family Procedure Rules (FPR) 2010 state in their overriding objective that part of the judges' case management power includes 'encouraging the

[58]ENE is an ADR process whereby an independent evaluator, who is often a judge, provides the parties with a preliminary assessment of the facts and legal merits. While the outcome is not binding, the impartial assessment often helps parties to reach a settlement.

[59]BEIS, above n 55.

[60]Ibid, para 10.

[61]Ibid, para 145.

[62]The most common reason given by consumers for not using ADR (70%) was that the trader refused to participate. See BEIS 'Resolving consumer disputes – alternative dispute resolution and the court system' Final Report (April 2018) p 4, available at https://tinyurl.com/ybgxnjdh.

[63]See https://www.railombudsman.org/about-us/.

[64]See The Property Ombudsman, https://www.tpos.co.uk, and the Property Redress Scheme, https://www.theprs.co.uk/Consumer.

[65]BEIS, above n 55, para 155.

[66]P Cortés 'The online court: filling the gaps of the civil justice system?' (2017) 36(1) Civil Justice Quarterly 54. See also the discussion about the online funnel below in Section 3(a).

[67]Family Law Act 1996, Part III.

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parties to use a non-court dispute resolution procedure'.[68] The change in the terminology from ADR to 'non-court dispute resolution', akin to the change of nomenclature in the Commercial Court, seeks to emphasise that mediation and other ADR mechanisms should not be seen as an alternative or secondary to the court process, but as mainstream.

In family cases, the legal framework concerning divorce and disputes over children encourages ADR. The First Hearing and Dispute Resolution Appointment as well as the Financial Dispute Resolution (FDR) appointment allocate a trained District Judge to assist the parties to resolve their issues in a quick, cheaper and more amicable manner (ie in Stage 3 of our classification after court proceedings have started).[69] Parties are required to submit proposals of settlement seven days before these meetings. The FDR hearing is without prejudice, and the District Judge acting as mediator (or rather as a conciliator as the judge can make settlement proposals) will take no further part in the proceedings. The FDR has been hailed by the Master of the Rolls as a very successful form of court integrated ADR.[70] Although the FDR has been used for over 25 years, covering mostly the division of property and arrangements for children, the use of pre-action mediation (ie Stage 2 of our classification) is a more recent development.[71]

Since 2014 the Family Procedure Rules have required individuals seeking to issue proceedings to attend a Mediation Information and Assessment Meeting (MIAM) to discuss with a mediator whether their dispute is capable of being resolved through mediation or another ADR process.[72] These meetings are compulsory except in cases of domestic violence and child protection concerns. The first page of the court application form requires the applicant to confirm their participation in a MIAM, which many providers are increasingly offering online, in particular since the Covid-19 restrictions led to an increase in demand for distance means of communication over non-essential face-to-face meetings.

MIAMs seek collaboration between the parties by requiring them to adopt an interest-based approach in the resolution of their dispute before their right-based positions become entrenched in the court process. Although the cases that proceed to family mediations achieve a high settlement rate of around 70%,[73] the low conversion rate from MIAMs to mediations shows that it is below its potential. With the goal of increasing conversions, in 2021 the Ministry of Justice launched a voucher scheme whereby parties attending a MIAM will be informed of the possibility of applying for a £500 voucher towards the cost of their mediation.[74] This scheme is not means tested and it is administered by the Family Mediation Council. The instant success of this incentive led to an extension of the voucher scheme. The success of the scheme suggests that subsidising the cost of mediation can be a powerful incentive for individual parties (unlike commercial clients) for whom the fees can operate as a barrier to their participation in mediation.

However, the participation levels in MIAMs are low.[75] This is because respondents are not legally required to attend a MIAM and there are a significant number of claimants who do not attend it

[68]Family Procedure Rules 2010, SI 2010/2955, Part 3 and r 1(4)(2)(f).

[69]FPR 2010, r 9.17(1).

[70]G Vos MR 'The relationship between formal and informal justice', Hull University (26 March 2021) para 21, available at https://www.judiciary.uk/speech-by-sir-geoffrey-voss-master-of-the-rolls-speech-to-hull-university/.

[71]Practice Direction Supplementing FPR Pt 3 (Pre-Application Protocol for Mediation Information and Assessment) Annex B.

[72]Child and Families Act 2014, s 10 and FPR 2010, rr 3.5–3.10. See also Legal Aid Agency 'Family mediation guidance manual' (September 2018), available at https://tinyurl.com/y93a84tc.

[73]An empirical study found that a full or partial agreement was reached in 68% of cases. See B Hamlyn et al 'Mediation information and assessment meetings (MIAMs) and mediation in private family law disputes – quantitative research findings' (Ministry of Justice Analytical Series, 2015) p 3.

[74]Ministry of Justice '£1 million voucher scheme to help families resolve disputes outside of court' Press release (26 March 2021), available at https://www.gov.uk/government/news/1-million-voucher-scheme-to-help-families-resolve-disputes-outside-of-court?utm_medium=email&utm_source=. See also The Law Society 'Family Mediation Week 2022: further investment for mediation voucher scheme' (17 January 2022), available at https://www.lawsociety.org.uk/topics/family-and-children/family-mediation-week-2022-further-investment-for-mediation-voucher-scheme.

[75]Hamlyn et al, above n 73, p 3.

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either. Moreover, the removal of legal aid for family cases had a knock-on effect in the number of referrals by solicitors, who, contrary to popular belief, play an important role in making these referrals. This was noted by Briggs LJ when he observed that

> it was a striking feature of the removal of Legal Aid from private law family proceedings, and the consequential dramatic increase in the proportion of litigants in person, that mediation rates fell sharply rather than (as had been hoped) rose, because litigants in person are less (if at all) aware of the advantages of ADR than lawyers.[76]

Even though legal aid was not removed from the mediation stage, the fact that more litigants did not seek legal advice in advance of starting a court action resulted in the number of MIAMs being halved.[77] Thus, the removal of legal aid for most family disputes reduced the parties' opportunity to be informed about, and refer to, MIAMs.

Other factors that impact on the low take up of MIAMs are that, first, judges do not impose cost penalties on litigants (let alone self-represented litigants) as they are involved in a procedure that departs from the adversarial approach; secondly, their timing, as MIAMs take place in the pre-action stage, when the claimant is ready – and hence determined – to issue proceedings in court and so there is very limited expectations from this meeting; and thirdly, as Hodges observed, MIAMs are not sufficiently integrated into the dispute resolution process as it is based on the private provision by certified mediators.[78] Therefore, there is a need to join up the system by integrating it further into the procedure (which, as it is argued below, the digitalisation program is already helping to deliver) and by requiring family judges to be more proactive in referring litigants to ADR, especially when one party has not attended the MIAM.[79]

(ii) Employment conciliation

Another major type of pre-action mediation is the conciliation scheme used for employment disputes. Conciliation is normally used as an umbrella term for regulated non-adjudicatory schemes where the neutral third party, the conciliator, may take a more active role, akin to an evaluative mediation, proposing settlements to the parties in dispute. In the UK this is run by the Advisory, Conciliation and Arbitration Service (ACAS), which is an independent statutory body funded by the government that provides conciliation services for disputes that fall within the purview of the Employment Tribunal.[80] Since 2014, before a claim can be lodged with the Employment Tribunal, the claimant has a legal obligation to notify ACAS through an online form or by phone.[81] ACAS will then allocate a conciliator to the case within two working days. The participation in the pre-action mediation (called early conciliation) is voluntary, so parties must agree to the process before it starts, and they can opt out at any time. Parties can also agree to participate in ACAS conciliation after issuing the claim in the Employment Tribunal.[82]

The goal of the conciliation is the preservation of the employment relationship, and it usually takes place before proceedings are issued in a tribunal. The main advantages of going to conciliation are that

[76]*Briggs IR*, above n 12, para 6.11.

[77]National Statistics *Legal Aid in England and Wales* (Ministry of Justice, January–March 2017) p 28.

[78]Hodges, above n 57, p 337.

[79]Under FPR, r 3.3(1) the court must consider, at every stage of the proceedings, whether ADR is appropriate.

[80]Employment Rights (Dispute Resolution) Act 1998.

[81]The Employment Tribunals Act 1996, s 18 (as amended by the Enterprise and Regulatory Reform Act 2013). For the online notification see www.acas.org.uk/earlyconciliation.

[82]This service is known as 'post-ET1 conciliation' since it occurs following the submission of an Employment Tribunal claim form, ie 'ET1'. See Evaluation of ACAS Conciliation in Employment Tribunal Applications 2016, ACAS Research Paper, Ref 04/16, 12. Most of these claims relate to unfair dismissal claims, workplace discrimination, redundancy payments or disputes around selection procedures, deductions from wages or unpaid notice/holiday pay, rights to time off or flexible working, and equal pay.

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the service is free of cost and, when successful, it cuts down the cost and time used in the resolution of the claim.[83] Another main advantage is the parties' ability to reach a settlement that goes beyond the remedies available in a tribunal. For instance, outcomes can involve a positive job reference by the employer, an apology or changes in behaviour or working conditions.

The early-conciliation process cannot exceed one calendar month, but parties may request a two-week extension. If parties need more time, they can continue with the conciliation until the Tribunal hearing. ACAS avers that 75% of claims are settled before they need a judicial hearing.[84] The conciliation service is effective and well regarded, with 96% of users reporting high satisfaction rates.[85]

The vast majority of the early-conciliation notifications submitted to ACAS are made online by completing a simple form on the ACAS website.[86] If ACAS conciliation fails, parties can opt for a judicial mediation in a private preliminary hearing before a trained employment judge; over 65% of cases settle at this session or soon thereafter.[87] In addition, after the first case management hearing, parties can opt in for a 'judicial assessment', similar to ENE, which consists of an independent and confidential assessment of the strengths and weaknesses of the parties' claims.[88] While all these ADR processes may be conducted by the same judge, a different judge will be allocated if the case proceeds to trial.

A critical element for the take up of mediation is accessibility to the Employment Tribunal. This was noted in the *UNISON* case, where the Supreme Court quashed the fees charged by the Employment Tribunal because they found that these fees breached the right to access to justice enshrined in Article 6 of the ECHR, as set out in the Human Rights Act 1998.[89] A crucial factor behind the Court's decision was the 'sharp, substantial and sustained fall in the volume of case receipts as a result of the introduction of fees'.[90] Furthermore, the Court observed obiter that whereas it is:

> 'often desirable' for employment disputes to be resolved by 'negotiation or mediation' […] those procedures can only work fairly and properly if they are backed up by the knowledge on both sides that a fair and just system of adjudication will be available if they fail. Otherwise, the party in the stronger bargaining position will always prevail.[91]

Certainly, without an accessible judicial process employees are at significant risk of under-settling their claims.[92] Unsurprisingly, the impact of the *UNISON* case in scrapping tribunal fees not only increased the number of claims in the Employment Tribunal, but they also increased the uptake of ACAS early-conciliations by 25% when compared with the same period the previous year.[93]

Another factor that would increase the uptake of ADR in employment cases would be the introduction of cost sanctions. This change has been advocated by the Employment Lawyers

[83]L Dickens 'Employment tribunals and alternative dispute resolution' in L Dickens (ed) *Making Employment Rights Effective. Issues of Enforcement and Compliance* (Oxford: Hart Publishing, 2012).

[84]ACAS *Annual Report and Accounts 2021–22*, p 23, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1089912/acas-annual-report-accounts-2021-2022-web-optimised.pdf.

[85]Ibid, p 5.

[86]Available at https://ec.acas.org.uk/Submission/Create.

[87]Ministry of Justice *Judicial Mediation Employment Tribunals* (July 2014), available at https://www.gov.uk/government/publications/judicial-mediation-at-employment-tribunals-england-and-wales-t612. See also A Boon et al 'What difference does it make? Facilitative judicial mediation of discrimination cases in employment tribunals' (2011) 40 Industrial Law Journal 45.

[88]Presidential Guidance *Protocol on Judicial Assessments* (3 October 2016). See also the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, SI 2013/1237, Sch 1, r 7.

[89]*UNISON, R v Lord Chancellor* [2017] UKSC 51 (26 July 2017).

[90]Ibid, para 91.

[91]Ibid.

[92]Ibid. para 92. See also academic concerns raised in family mediation in T Grillo 'Mediation alternative: process dangers for women' (1991) 100 Yale LJ 1545.

[93]See ACAS Quarterly Reports (April 2016–December 2016) and (April 2017–December 2017), which were previously available on the ACAS website, but have now been removed.

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Association, which recommended treating refusals to participate in ADR as evidence of unreasonable behaviour that could trigger a costs award.[94]

(iii) Claims portals: the whiplash portal

A number of pre-action protocols now require prospective litigants to explore a settlement before they are allowed to escalate their claims to court. These pre-action processes are increasingly supported by online dispute resolution (ODR) platforms that facilitate the negotiation between the parties and their legal representatives. Two important initiatives in this area in England are the Claims Portal for personal injury claims from road traffic accidents and the new Whiplash Portal for low-value personal injury claims also resulting from road traffic accidents.

The first example of pre-action ODR is the Claims Portal for road traffic accidents with personal injury claims under £25,000.[95] The goal of this portal is to facilitate a settlement between the parties when the defendant has admitted liability and the dispute is on the quantum. If the insurer defendant denies liability, then the case can proceed to the County Court. In addition, a new Whiplash Portal has dealt with low-value personal injury claims since 2021. The new portal, formally known as the Official Injury Claim, has been developed by the Motor Insurers' Bureau at the request of the Ministry of Justice, and it is free of charge.[96] The motivation behind the portal was to deter fraudsters, resulting in a reduction of insurance premiums. It can be used by claimants with minor personal injuries, such as whiplash, cuts, bruises and minor fractures when the compensation sought is under £5,000 for personal injury, and up to £10,000 for other losses, such as loss of earnings or damages to the vehicle.[97] The portal guides users on how to make a claim, obtain a medical report, process the claim and obtain economic compensation, which is largely determined by the fixed tariffs set in the Whiplash Injury Regulation 2021.[98]

The launch of the portal was accompanied by an amendment to the CPR 1998, which increased the limit for personal injury cases in the Small Claims Track from £1,000 to £5,000. This is a significant change because the Small Claims Track severely restricts the recoverability of costs for legal representation.[99] The aim of this pre-action portal is to facilitate an expeditious resolution, avoiding the expense and time of litigating small claims in the County Court. To that end, unlike the Claims Portal, the Whiplash Portal processes claims where liability is disputed and allows for a more fluid use of ADR, which is not limited to the pre-action stage. Accordingly, a discrete element of claim can be referred to the court for adjudication, while the case remains in the portal. Hence, if parties refer an element of the claim to the court (eg liability), the court will review the evidence submitted by the parties in the portal and will adjudicate that element of the claim after a hearing. Once the contested issue is resolved, the case will resume in the portal so that the parties can settle the remaining issues (eg the quantum). The portal also allows parties to make up to three offers to settle. However, unlike in the Claims Portal mentioned above, the final offer made by the parties in the Whiplash Portal does not carry Part 36 costs sanctions because these cases are small claims that usually do not trigger costs orders.

(c) Stage 3: defence stage

(i) Small claims mediation

The final stage in the dispute life cycle when ADR may take place is after a defence is submitted in court. Although court referrals for medium- and high-value claims are rare, there is a well-established

[94]See Employment Lawyers Association 'ADR and employment disputes' (November 2017) p 41, available at tinyurl.com/tk386pyk.

[95]The portal is governed by two pre-action protocols, the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents and the Pre-Action Protocol for Low Value Personal Injury (Employers' Liability and Public Liability) Claims.

[96]See https://www.officialinjuryclaim.org.uk.

[97]See MIB 'Official Injury Claim', available at https://www.mib.org.uk/.

[98]SI 2021/642.

[99]Civil Procedure (Amendment No 2) Rules 2021, SI 2021/196. See also Pre-Action Protocol for Road Traffic Accidents and Civil Liability Act 2018.

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Small Claims Mediation Service run by HMCTS, which applies to around half of all civil claims (excluding family cases) lodged in court. This scheme first started operating on a pilot basis in 2007 and it was rolled out nationally in 2014. It offers a free telephone mediation, where court staff who have undergone mediation training make a series of two-way telephone calls to explore with the parties the possibility of reaching a settlement that would obviate the parties' need to attend the trial.[100] The mediation scheme is popular amongst litigants because it provides a one-hour mediation free of cost, it takes place over the phone (saving the need to go to court), parties can mediate without the need to meet or speak to one another, and it is confidential. In the year 2020/21 there were 16,811 small claims mediations,[101] which accounts for around one in four defended claims.

Increasingly the small claims process starts as part of the OCMC service, which is an important part of the reform programme, and has been operating on a pilot basis since 2018. At the time of writing the OCMC is available for litigants in person (LIPs) with claims under £10,000 against a single defendant.[102] As noted above, the OCMC service embeds ADR as part of its process, which has three distinguishable procedural steps: (1) the claim submission (with includes pre-action information about mediation – ie Stage 2 of our dispute-cycle taxonomy) and response via the online platform where the defendant may make a without prejudice settlement offer; (2) parties are signposted to use telephone mediation (ie Stage 3 of our taxonomy), and if parties opt out or if a settlement cannot be reached, then the court appoints a legal adviser or a judge to assist the parties with their case management; and (3) a judge adjudicates the remaining unsettled claims with a hearing that may be remote or face-to-face, or without a hearing, based on the documents submitted by the parties.

Step 1 has been developed to assist with the electronic filling of the various elements of the statement of claim and with the defendants' response, to ensure that the claim falls within the scope of the process. This initial phase of the procedure seeks to avoid the escalation of disputes by offering the defendant the possibility of making a 'without prejudice' offer to settle. An objective of the new service is to reduce the time it takes to settle, which HMCTS reports has already been slashed from an average of 13.7 weeks to 5.2 weeks.[103] Once fully developed, Step 1 will offer a fully automated triage process that replaces the pre-action protocols. This function will take time to be developed and it will need to be subject to periodic improvements. The quality of this information would rest on the progress of developing suitable software designed by knowledge engineers (which in due course may be complemented by machine learning and artificial intelligence) to suggest settlements and resolutions. Unresolved claims will move to the next phase.

In Step 2 parties can use the telephone mediation service, but at the time of writing there are no costs sanctions for not attempting mediation. A recent change of strategy to increase the uptake of ADR has been the introduction of the opt-out model, whereby parties are automatically allocated to a mediation slot, though they can opt out without the need for a justification.[104] Moreover, at the time of writing the Government is proposing to require parties not only to consider but to participate in mediation for all cases allocated to the Small Claims Track, and subject to sanctions in the event of non-compliance.[105]

If a settlement cannot be reached, then directions questionnaires and case management directions are provided either by a 'legal adviser' (when claim is under £300 in the current pilot)[106] or by a

[100]See HMCTS *Civil Court Mediation Service Manual* (February 2009), available at https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Guidance/civil_court_mediation_service_manual_v3_mar09.pdf and S Prince 'Mediating small claims: are we on the right track?' (2007) 26(2) CJQ 328.

[101]Civil Justice Council *The Resolution of Small Claims: Interim Report* (April 2021) para 49, available at https://www.judiciary.uk/wp-content/uploads/2021/06/April-2021-The-Resolution-of-Small-Claims-interim-report-FINAL.pdf.

[102]See https://www.moneyclaims.service.gov.uk/eligibility.

[103]HMCTS *Annual Report and Accounts 2018–19* p 7, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/818799/HMCTS_Annual_Report_2019_WEB.pdf.

[104]Practice Direction 51R, Online Civil Money Claims Pilot. Section 6.

[105]Ministry of Justice, above n 5, p 14.

[106]PD 51R, para 20.1(1)(a).

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District Judge. The name legal adviser here is something of a misnomer, as they are not allowed to provide legal advice to litigants, but only make case management directions that can be appealed to a judge, including referring parties to contact the Small Claims Mediation Service when they have previously opted out of mediation.[107]

Whether an opt-in or opt-out model is employed, the use of incentives and sanctions would further increase the level of participation. Notably, the online medium may impact on the existing incentives built into the Small Claims Track. For example, presently the Small Claims telephone mediation model has a powerful incentive for parties to use it because it is free and, if successful in reaching a settlement, parties obviate the need to take a day off work to attend a court hearing, which may be quite intimidating, especially for LIPs. This incentive may dissolve once Step 3 is fully operational with digital hearings and documents-only adjudication becoming more prevalent. Furthermore, evidence-based research found that LIPs are less likely to settle and create additional work for court staff and judges, taking on average 50 per cent more court time than legally represented litigants.[108] Hence, it is submitted that LIPs need not only referrals, but also incentives and sanctions, to increase further their participation in ADR. This view is endorsed in the recent consultation which proposes the use of mandatory mediation for small claims, with a view to extending it to all claims falling within the jurisdiction of the County Courts.[109] Under the Government proposal the requirement to participate in mediation beyond small claims would entail referrals to external mediators outside the court service, and thus the Government is consulting on how to develop a system that would ensure the quality and accountability of private mediation services. Participation in the small claims mediation is incentivised by providing a convenient process (ie over the phone and free of cost), and under the current proposal refusal to participate would trigger sanctions in terms of costs or the harsher sanction of striking down a party's claim or defence.[110] However, the Master of the Rolls has recently noted that compulsion is less likely to be required as the digitalisation of the justice system develops automated referrals, which may include a further invitation to a face-to-face mediation when the telephone mediation has failed.[111]

Inevitably, there will always be a number of disputes that cannot be settled, and those cases will need to proceed to the last phase of the procedure, where a judge will adjudicate the dispute. In the final Step 3 unresolved claims are sent to a District Judge for final determination. These small claims represent the lion's share of cases determined at trial in civil courts.[112] Judges can determine claims after a hearing which may take place via the telephone, video link, or after a face-to-face hearing. Under a new sub-pilot, a judge may also decide a case without a hearing, based on the documents submitted by the parties.[113] The removal of the oral hearing without the parties' consent represents a major shift from the traditional adversarial model where the oral hearing has been a main pillar of the court proceedings, and it could even amount to a breach of Article 6 of the ECHR (unless the hearing is offered on an unrestricted appellate level) as stated in the Guidelines developed by the Council of Europe for the use of ODR in the courts.[114]

This step incorporates another fundamental shift from the traditional civil procedure, as judicial involvement is no longer present in the early stages of the dispute, where the emphasis is on dispute

[107]PD 51R, Schedule to Section 20: Table A, para 4.

[108]National Audit Office 'Implementing reforms to civil legal aid' HC 784 (20 November 2014) pp 14–15.

[109]See Ministry of Justice, above n 5.

[110]Ibid, pp 12–18.

[111]Vos, above n 45, para 41.

[112]In the year to February 2021 small claims made up 77.8% of the total number of final hearings in the civil courts: see Ministry of Justice *Civil Justice Statistics Quarterly*, available at https://www.gov.uk/government/collections/civil-justice-statistics-quarterly.

[113]Practice Direction 51ZC – The Small Claims Paper Determination Pilot (1 June 2022).

[114]Guideline 23: 'The use of ODR in courts should not in itself deprive parties of a right to request an oral hearing before at least one level of jurisdiction': see Council of Europe *Online Dispute Resolution Mechanisms in Civil and Administrative Proceedings, Guidelines* (16 June 2021), available at https://rm.coe.int/publication-guidelines-and-explanatory-memoreandum-odr-mechanisms-in-c/1680a4214e.

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settlement, but limited for the minority of cases that reach this final step. Hence, a clear objective of the OCMC is to reduce the judicial time employed in resolving disputes by decreasing the number of judicial hearings (including trials) whilst increasing the number of facilitated settlements.[115]

The OCMC departs from the adjudicative paradigm and follows the basic premise of a 'multi-door court house' envisaged in the 1970s by Sander,[116] whereby the courts' role extends to the provision of dispute resolution options that go beyond preparing the parties for trial.[117] Yet, rather than matching disputes to processes from the outset, the OCMC requires parties to go through different procedural steps that seek early settlements in advance of the more costly judicial adjudication.[118] Therefore, the OCMC, akin to family proceedings, incorporates dispute resolution steps as part of its process. This approach is due to be extended in the Court Reform Program to all non-criminal cases from the pre-court stage of the dispute life cycle. As it is discussed below, a new online funnel is being developed to integrate ADR referrals for all civil disputes across the three stages discussed in this section.

3. The demise of 'A'DR: from an alternative to an integral part of civil justice

This paper has argued that ADR rarely occurs spontaneously, nor is it based exclusively on the risk of litigation costs: by and large, parties participate in ADR when they are signposted to it. The first part of this paper observed that civil justice in England has evolved in recent years, providing courts with greater managerial powers that require parties' cooperation and a consideration of ADR. However, this paper has suggested that while the steady increase of costs as the case progresses in court can lead to a higher number of negotiated settlements, participation in ADR for most civil disputes mainly occurs when parties are referred to it, which can happen at different stages of the dispute life cycle. Many consumer disputes in regulated sectors have already been taken out of court with the emergence of publicly certified ADR bodies, whose underpinning sectorial legislation makes participation mandatory for businesses (Stage 1 of our suggested taxonomy). In addition, English courts are increasingly embedding ADR into their proceedings,[119] either as a pre-action requirement, such as in family, employment and personal injury claims resulting from road traffic accidents (Stage 2), or as a post-defence invitation or requirement as it is expected to be for small claims (Stage 3).

The court digitalisation program seeks to intensify the referrals to ADR across the three stages. To that end, the Master of the Rolls has recently announced the launch of an 'online funnel' which will channel all civil, family and tribunal claims.[120] He believes that the new website, a first step towards which has been taken with the approval of the Judicial Review and Courts Act 2022,[121] will be transformational in terms of widening access to justice.[122] The function of the funnel will be to channel most non-criminal claims towards ADR options, such as ombudsman schemes and mediation providers (Stage 1). When a case cannot be settled, then it will progress to pre-action court portals (Stage 2), and if the dispute cannot be settled there, then a digital bundle in the form of an interoperable Application Programming Interface will be generated so that it can be transferred to court, where further referrals to ADR will occur as the case proceeds to trial (Stage 3).[123]

As ADR is being embedded into the court process, where it is even possible for parties to face cost sanctions for not participating, ADR can no longer be seen as an alternative to the court process, but

[115]See UCL Laws and the Legal Education Foundation 'Workshop briefing paper: measuring success in online courts: an empirical challenge' (October 2018).

[116]F Sander 'Varieties of dispute processing' (1976) 70 FRD 111.

[117]See J Sorabji 'The online solutions court – a multi-door courthouse for the 21st century (2017) 36(1) CJQ 86.

[118]Ibid, at 100. See also D Quek Anderson 'The convergence of ADR and ODR within the courts: the impact on access to justice' (2019) 38(1) CJQ 136.

[119]CPR 1.1(1), 1.4(1), 1.4(2), 26.4(1), 44.2 and 44.4.

[120]G Vos MR 'London International Disputes Week 2021: Keynote Speech' (10 May 2021) para 10.

[121]Chapter 2 Online procedure.

[122]Vos, above n 120, para 36.

[123]G Vos MR 'Reliable data and technology: the direction of travel for civil justice' Law Society Webinar on Civil Justice and LawTech (28 January 2021) para 38.

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rather as an integral part of the civil justice system. Indeed, the removal of the 'alternative' attribute of ADR has already happened in the Commercial Court and in the family courts which have changed their nomenclature to 'negotiated dispute resolution' and 'non-court dispute resolution' because these consensual processes are no longer seen as an alternative or secondary to the court proceedings, but as a central part of it. This view has been endorsed by the Master of the Rolls, who stated that ADR 'should really be renamed as "Dispute Resolution" since it is not alternative at all'.[124] This integration can also be appreciated with the growth of pre-court portals, such as the Whiplash Portal, which have a more flexible relationship with the court system, whereby, as noted above, an element of the claim can be sent out for court adjudication before the case returns to the portal for the parties to negotiate a final settlement.

This final part of the paper notes that the court digitalisation program is increasing the ADR offering within the judicial process, which in turn is blurring the lines between ADR and the court process. In so doing, it is changing ADR's nature from being an alternative option to a judicial process, to be an essential part of the court proceedings, especially when the participation in ADR is a compulsory element of the proceedings. Mandatory ADR, which has thus far mostly applied to information sessions in family and employment cases, is currently being considered for application to small claims, which captures most civil claims. The paper concludes by noting that these ADR referrals will be more effective when they are timely and when coupled with suitable incentives and sanctions, but sanctions ought to be accompanied by adequate safeguards that avoid LIPs from being unduly penalised.

(a) The online funnel: more referrals to ADR in the era of digital courts

The Master of the Rolls has announced that in the imminent future pre-action portals (including some consumer ADR schemes) will be linked to the court system via an 'online funnel', which will provide court and tribunal users with an online end-to-end solution.[125] He envisages that once cases reach a court or a tribunal, technology-powered processes will continue making ADR referrals when it is believed that the cases are ripe for settlement, such as after expert evidence is submitted or once liability has been accepted.[126] In addition, the Government is consulting on a proposal to make telephone mediation mandatory for all small claims and subject to penalties for those who unjustifiably refuse to participate.[127]

The active promotion of ADR is underpinned by the growing recognition that judicial (but also private)[128] adjudication is often not the best process by which to resolve private disputes. This realisation is not new, and during the past few decades a growing number of scholars have endorsed the need to turn courts into dispute resolution centres that operate as a 'multi-door court-house'[129] that helps 'fitting the forum to the fuss'.[130] The academic discussion on the incorporation of ADR in the civil justice system predates the English CPR, and it was especially fruitful in the US, where Abel observed in the early 1980s that the State encourages private dispute resolution processes.[131] Prior to that, Cappelletti and Garth identified three waves in the access to justice movement, with widespread legal aid forming the first one, collective redress the second one, and ADR the third one.[132] In the UK

[124]G Vos MR 'Recovery or radical transformation: the effect of Covid-19 on justice systems' London School of Economics (17 June 2021) para 19.

[125]Ibid, para 28. See also Judicial Review and Courts Bill 2021, ch 2.

[126]Ibid, para 38.

[127]Ministry of Justice, above n 5, pp 12–18.

[128]M Galanter 'The hundred-year decline of trials and the Thirty Years War' (2005) 57(5) Stanford Law Review 1255 at 1266.

[129]Sander, above n 116.

[130]F Sander and S Goldberg 'Fitting the forum to the fuss: a user-friendly guide to selecting an ADR procedure' (1994) 10 (1) Negotiation Journal 79.

[131]R Abel 'The contradictions of informal justice' in R Abel (ed) *The Politics of Informal Justice, Volume I: The American Experience* (New York: Academic Press, 1982) p 267.

[132]M Cappelletti and B Garth 'Access to justice: the newest wave in worldwide movement to make rights effective' (1978) 27 Buffalo Law Review 181.

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legal aid has virtually disappeared for civil cases and collective redress has not taken off; however, a new wave, one could argue, may come with the increased use of technology in dispute resolution processes, which increasingly integrates an interest-based stage (ie settlement negotiations) prior to a rights-based stage (ie adjudication) as part of an ODR tiered process that more and more expects parties to consider ADR before judicial adjudication.

The efforts to interconnect different processes, especially formal and informal ones, which has been referred as process pluralism,[133] acknowledges the need to provide access to justice in different ways to the traditional litigation model.[134] But this view has also faced critics who argue that while ADR processes may increase access to redress, they deliver a second class justice for the weaker party;[135] in other words, this critique notes that there is a trade-off between the goals of efficiency (ie access) and fairness (ie justice),[136] which is particularly acute when technology is incorporated in the dispute resolution process.[137] To minimise this risk while promoting settlements, court-annexed and certified ADR processes are increasingly regulated and supervised to ensure procedural fairness, particularly in those areas discussed in this paper where disputants, who often have power imbalances, are signposted to it, as it is in family, employment and consumer sectors. The timing of signposting to ADR is also important. Thus, the online funnel would be instrumental in ensuring that disputants consider the suitability of ADR at each of the three stages suggested in our taxonomy.

Nonetheless, court processes must be truly accessible for both parties, as it is only then that the weaker party in the dispute will be safeguarded from accepting under-settlement. This was noted by Briggs LJ when he warned that 'mediation would potentially yield justice for the richer, more powerful or risk-tolerant litigant if the weaker party could not refuse an unjust offer by saying: "see you in court".[138] In the same vein, as the Supreme Court's *UNISON* decision showed, increases in tribunal fees not only lower the number of claims, they also discourage the use of ADR, as potential defendants will be less threatened by the prospect of judicial intervention. Similar to how high fees deter claims from reaching the Employment Tribunal, economic incentives and penalties can have an impact on chilling or fuelling litigation and settlements, and – as is argued in the next section – when coupled with ADR referrals, they can also increase their uptake.

(b) Incentives and cost sanctions with safeguards for LIPs as a mechanism to encourage participation in ADR

Referrals are more effective in encouraging parties to use ADR when they are accompanied by incentives and by the risk of sanctions. This explains why, as discussed above, it has been decided to extend the voucher scheme to subsidise the cost of family mediation. In the same vein, HMCTS continues to provide small claims mediation free of charge and in a convenient manner over the phone. Furthermore, there are plans to make the participation mandatory and subject to sanctions with a view to increasing the uptake of ADR for small claims and beyond.[139] The Government has proposed

[133]C Menkel-Medow et al *Dispute Resolution: Beyond the Adversarial Model* (2nd edn, Aspen, 2011).

[134]M Galanter 'Justice in many rooms: courts, private ordering, and indigenous law' (1981) 13 Legal Pluralism and Unofficial Law 1; M Cappelletti 'Alternative dispute resolution processes within the framework of the world-wide access-to justice movement' (1993) 56 MLR 282.

[135]O Fiss 'Against settlement' (1984) 93 Yale LJ 1073 and M Palmer 'Formalisation of alternative dispute resolution processes: some socio-legal thoughts' in J Zekoll et al (eds) *Formalisation and Flexibilisation in Dispute Resolution* (Brill, 2014) p 21. See also The European Law Institute and the European Network of Councils for the Judiciary 'The relationship between formal and informal justice: the courts and alternative dispute resolution' (2018), available at https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ADR_Statement.pdf.

[136]D De Girolamo 'Sen, Justice and the Private Realm of Dispute Resolution' (2018) 14(3) International Journal of Law in Context 353.

[137]E Katsh and O Rabinovich *Digital Justice* (Oxford: Oxford University Press, 2017) p 39.

[138]*Briggs IR*, above n 12, para. 2.23.

[139]Ministry of Justice, above n 5, p 14. The consultation is enquiring on the type of cases that should be exempted, such as when the Government itself is a party.

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to enable judges to put a case on hold when a party has not attended mediation. In the event of continued non-compliance, a judge would be able to choose a suitable sanction, which would typically involve pausing (or 'staying') the case until the parties participate in mediation, but it could also include an adverse costs order or the more draconian outcome of striking out a party's claim or defence.[140]

Yet, adequate safeguards should be put in place to prevent placing too much pressure on LIPs, especially for small claims where the cost of legal representation and advice will often be disproportionate to the compensation sought. Since LIPs may not understand ex ante the suitability of ADR, it is submitted that a number of safeguards should be incorporated, including, but not limited to, the following: (a) the risk of cost sanctions should be communicated to them in clear and unequivocal terms; (b) the value of the sanction should be capped for small claims; (c) ADR should be offered free or at a proportionate cost; (d) there should not be adverse costs orders after participating in one ADR process; and (e) LIPs should be allowed to request a cooling-off period in advance of agreeing to a settlement, giving them the opportunity to reflect on the proposed settlement and to seek advice on its adequacy.[141]

As a rule, consensual ADR should always be promoted in advance of court adjudication. However, a one-size-fits-all approach will be less effective than a more nuanced and targeted approach. It was noted above that most consumers who issue a claim in court do so because businesses had refused to participate in (and pay for) an ADR process. Consequently, to promote pre-action ADR, businesses ought to be encouraged to participate in a certified ADR process. A plausible approach would be to treat these businesses in a similar manner to those who were penalised by a court for refusing to participate in mediation. Accordingly, businesses should be required to either participate in ADR when requested by a consumer, or to provide the reasons for their refusal in the online funnel. These justifications should be taken into consideration by the court when making costs orders, which could entail, for example, the removal of the restrictions in the recovery of legal costs for small claims. Conversely, if it is a consumer or an LIP (excluding bulk court users, such as debt collection agencies) who rejected the other party's invitation to try ADR in the pre-action stage, but agrees to use it before the adjudication phase, then the costs penalties should not go beyond the court fees.

It follows that the forthcoming online funnel should not only make referrals in the three stages, but also register the party's reasons for their refusal to participate in ADR, which could carry costs consequences. Similarly, courts ought to penalise on costs those businesses that, in compliance with their information obligations,[142] have signposted consumers to a publicly certified ADR entity, but refused to participate in the ADR process, leaving consumers with the courts as the only avenue via which to seek redress.

Conclusion

This paper departed from the observation that while most defended claims are settled in court, only a very small percentage of civil cases currently go to mediation and other ADR processes, which are widely considered to be under-used. The paper argues that ADR rarely occurs spontaneously or based exclusively on the risk of costs penalties but, by and large – save for the most sophisticated commercial parties – participation in ADR takes place when parties are referred or signposted to it during their dispute life cycle.

As the timing of these referrals can influence the parties' willingness to participate in ADR, this paper offered a taxonomy based on three main stages. Stage 1 occurs when disputants are referred to ADR as their main dispute resolution route. This stage takes place before disputants contemplate

[140]Ibid, pp 14–15.

[141]This last safeguard is a requirement for the certification of consumer ADR entities in the EU. See Directive of Consumer ADR 2013/11/EU, Art 9(2)(b).

[142]The Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015, reg 19.

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court litigation, as is the case for consumers and traders in many regulated sectors. Stage 1 offers an autonomous ADR system, which recognises that court litigation for these consumer disputes would frequently be unsuitable given their low value and the preference for an informal and expeditious process. Thus, the fall back to litigation is normally only used when a business has refused to participate in ADR. Conversely, the other two stages are forms of encouraging ADR as a substitute to court adjudication. Stage 2 referral takes place when it is a pre-requisite to consider ADR before the claim is issued in court, while Stage 3 of our taxonomy occurs when the referral occurs post-defence.

Lastly, this paper has argued that the digitalisation program, and in particular the online funnel, will further integrate ADR into the civil justice system by ensuring that parties consider ADR at each of the three stages of their dispute life cycle. This new referral system, where participation is expected to become mandatory for most small claims, will blur the paradigmatic divide between courts and ADR, further eroding the 'alternative' attribute of ADR. However, power imbalances may disincentivise stronger parties from participating in ADR during the pre-action stages. This paper has argued that with a view to increasing their efficiency, ADR referrals should be coupled with adequate economic incentives and costs sanctions, but these sanctions ought to contain suitable safeguards that account for the parties' power asymmetries.

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