Should parties be compelled by law to attempt Alternative Dispute Resolution (ADR)

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INTRODUCTION

Alternative Dispute Resolution ("ADR") is often the most appropriate means to resolve a dispute as it offers a number of advantages over litigation. The primary advantage of ADR is that it offers flexibility to the parties to decide how they wish to resolve the dispute; Other advantages to using a method of ADR over litigation: is that they are usually cheaper, quicker, more private, and less adversarial than litigation

However, ADR is not a panacea and there are instances where litigation is the most appropriate form of dispute resolution. All forms of ADR are contingent on the consent of the parties;[1] whereas parties can be compelled to litigate.[2] In this respect, litigation is still the most appropriate dispute resolution method as a last resort. However, this is not the only instance where litigation is more appropriate than relying on ADR: litigating a matter ensures the enforceability of a judgment or resolution, and there is a well-recognised, institutionalised appeal and review process in England and Wales.

To this end, one has to be careful on the extent to which a party can be compelled to use ADR. As the Civil Procedure Rules recognise, it is appropriate for the parties to give real consideration as to whether their dispute can be resolved using ADR.[3] However, compelling a party to use ADR where it may be inappropriate offers a net disbenefit, as the time and cost taken to reach a resolution is increased. Therefore, there should be encouragement to explore ADR but this should not extent to mandating the parties to a dispute to artificially engage with the ADR process.

I. DEFINITION OF ALTERNATIVE DISPUTE RESOLUTION (ADR)

ADR is an umbrella term used for various methods and processes by which parties can settle disputes outside of litigation before courts.[4] Accordingly, there are various forms of ADR which differ in some respect. Moreover, there are other differences between different forms of ADR: methods of ADR can either be adjudicative, such that they resemble the litigation process, or they can be non-adjudicative, which offers a notably different way to resolve the dispute that is more likely to retain the parties' amicable relationship.[5] Whilst there are common characteristics between various forms of ADR, it is more appropriate to consider each form of ADR independently as each has its own

[1] S. Blake, J. Browne, and S. Sime, A Practical Approach to Alternative Dispute Resolution. (2016. 4th Edition, Oxford University Press).

[2] K. P. Berger. 'Institutional arbitration: harmony, disharmony and the 'Party Autonomy Paradox.' Arbitration International. (2018) 34(1), pp. 473 – 493.

[3] See, for example, CPR, 1.4(e).

[4] Blake (n.1).

[5] L. Charkoudian, D. Thompson, and J. Walter. 'What Difference Does ADR Make? Comparison of ADR and Trial Outcomes in Small Claims Court.' Conflict Resolution Quarterly. (2017). 35(1), pp. 7 – 45.

identity and corresponding advantages and disadvantages.[6] Therefore, this article will focus on two popular forms of ADR: mediation and arbitration, and reference only the other forms of ADR where appropriate to illustrate specific points. To this end, the definitions of mediation and arbitration will be explored immediately below.

1.1. MEDIATION

The first type of ADR explored is mediation, which is a popular form of ADR used widely due to its low-cost nature and the propensity to preserve relationships.[7] It is a non-adjudicative form of ADR and involves the two parties to the dispute attempting to resolve a dispute before an independent third party, a mediator.[8] Like other forms of ADR, both parties must agree to enter into the mediation process, and the process will not proceed if one of the parties does not agree to enter the mediation process.[9] It also tends to be confidential, meaning that members of the public cannot witness the mediation process and will not necessarily know whether a resolution has been reached, and, if successful, on what terms the resolution has been reached.[10]

However, whilst there are similarities between mediation and other forms of ADR, there are also important differences. Whilst a third party is used in other forms of ADR, in mediation the third party, the mediator, acts as a neutral party who has no power to make a binding decision on the parties;[11] and they impose their view on the merits of each party's case only with the permission of the parties.[12] Furthermore, another important difference – particularly between mediation and arbitration – is that the mediator adopts a 'party centred' approach focused on reaching a resolution that respects the needs, rights and interests of the parties involved.[13] Importantly, parties can engage in mediation without prejudicing their right to pursue other forms of ADR or litigation if the parties cannot resolve the matter.[14] Therefore, mediation tends to b40,3bitrate, usually found in an arbitration agreement which will be governed by Arbitration Act 1996 within England and Wales.[16] Through this arbitration agreement, the parties effectively agree not to litigate but instead refer the matter to an arbitrator to conclusively resolve the dispute.[17] Therefore, it is not open to the parties to litigate the dispute after an arbitration award has been handed down; and, indeed, there may not be opportunities to appeal or review the award.[18]

Consequently, this section has described two popular types of ADR and begun to highlight how ADR can overcome some of the problems with litigation. The next section will develop this

[6] Waring (n.6).
[7] C. Menkel-Meadow, 'Mediation, Arbitration, and Alternative Dispute Resolution.' International Encyclopedia of the Social and Behavioral Sciences, (2015) UC Irvine School of Law Research Paper No. 2015-59.
[8] *Ibid.*
[9] L. Boulle and M. Nesic. 'Mediator skills and techniques: Triangle of Influence.' (2010) Bloomsbury Professional.
[10] *Ibid.*
[11] M. S.Herrman, N. Hollett, J. Gale, and M. Foster. 'Defining Mediator Knowledge and Skills.' Negotiation Journal. (2001) 17(1), pp. 139 – 153.
[12] *Ibid.*
[13] Menkel-Meadow (n.9).
[14] *Ibid.*
[15] Blake (n.1).
[16] Arbitration Act 1996.
[17] K. P. Berger. 'Institutional arbitration: harmony, disharmony and the 'Party Autonomy Paradox.' Arbitration International. (2018) 34(1), pp. 473 – 493.
[18] *Ibid.*

theme further and assess the advantages of ADR when compared with litigation.

II. COST

As described, the first problem associated with litigation is that it is often expensive. As examined above, court fees plus legal fees often result in the parties to a dispute paying an exorbitant sum of money for the luxury of vindicating their legal rights. This is further compounded by the time taken to resolve the dispute is often prolonged due to court availability, and the time taken to resolve a dispute only increases if judgments are appealed. Therefore, relying on the litigation process is often time consuming and costly.

ADR can help to alleviate these problems because pursuing ADR if usually a cheaper way to settle disputes. The third parties used to resolve the disputes under ADR often charge less money that the costs used to litigate a matter.[19] Moreover, the time taken to utilise an ADR process and resolve the dispute tends to be shorter than resolving the dispute through litigation; this means that costly legal support is required for a shorter time.[20] Furthermore, even with arbitration which tends to utilise costly legal support, there are also opportunities to reduce the cost of proceedings: parties can agree efficient procedural steps to reduce the amount of time taken to reach a dispute, and it is open for parties to select to use one arbitrator (as opposed to a panel of arbitrators) to reduce costs further.[21] This aspect of ADR overcomes a major issue with litigation currently, as the current economic environment means that the number of cases that qualify for legal aid funding has been reduced.[22]

However, it is important to recognise that ADR is not always cheaper and quicker, and that litigation may sometimes be more appropriate. Time will not be saved in commencing any ADR process if a party is fundamentally unwilling to compromise, or the relationship between the parties is acrimonious.[23] Furthermore, a party that pursues arbitration can spend just as much money engaging with the arbitration process than they would in pursuing the litigation process.[24] The process often employed in arbitrations bears a resemblance to the litigation process, and parties often hire just as large and qualified legal teams to support the arbitration process.[25] Therefore, the net result may be that just as much money is spent in pursuing arbitration when compared to litigation.

III. FLEXIBILITY

Another problem associated with litigation is that it offers little flexibility. Parties litigating on a civil issue in England and Wales must follow the Civil Procedure Rules. Whilst these rules do permit some tailoring with the agreement of both parties,[26] this tailoring is very much an exception. Typically, the CPR prescribes the procedural steps

[19] Blake (n.1).

[20] R. Jackson. 'Review of Civil Litigation Costs: Final Report.' *Review of Civil Litigation Costs.* (2009). Available at: https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf.

[21] S. Shavell. 'Alternative Dispute Resolution: An Economic Analysis.' Journal of Legal Studies. (1995) 24(1), pp. 1 – 28.

[22] Owen Boycott, 'Access to justice under threat in UK, says supreme court judge', *(The Guardian, 26 September 2018)*<https://www.theguardian.com/law/2018/sep/26/legal-aid-access-to-justice-under-threat-in-uk-says-supreme-court-judge> accessed 4 January 2019.

[23] Garajova (n.22).

[24] Shavell (n.30).

[25] Berger (n.19).

[26] Vorassi, 'England's Reform to Alleviate the Problems of Civil Process: A Comparison of Judicial Case Management in England and the United States.' (2004) 30 J. Legis. 361, pp. 361 – 372.

that must be taken, timescales to complete those steps, and a number of rules that dictates what is and is not permitted.[27] Therefore, parties that engage in the litigation process do not have much freedom to tailor the procedural rules to suit their interests or requirements.

ADR can overcome those problems as most forms of ADR permit a greater degree of flexibility when compared to litigation. There are two manners in which ADR offers flexibility. First, flexibility is apparent in the ADR process because there are numerous types of dispute resolution process under the banner of ADR that a party can choose from.[28] However, despite permitting limited tailoring, the litigation process is standard and does not allow disputes to be resolved in novel ways. For example, a complex commercial dispute between two businesses can be resolved privately through arbitration whereas family mediation is a more appropriate way to resolve a private family law matter where the topics are sensitive.[29] Equally, if a dispute concerns particularly technical issues, it is possible to resolve the dispute through a technical expert as opposed to a legal expert.[30] Therefore, parties can choose different processes depending on the best means to resolve the specific dispute.

Furthermore, flexibility is also offered once a party chooses an appropriate form of dispute resolution because all types of ADR permit a greater level of tailoring than litigation offers. With respect to mediation, the parties can choose the identity of the mediator and what qualifications they ought to have.[31] Furthermore, they can agree the time, location, and duration of the mediation and what the appropriate terms of the resolution should be.[32] Equally, in terms of arbitration, the arbitration process is constrained in part through the Arbitration Act 1996 in England and Wales, however other than those mandatory provisions the procedural steps in anticipation of arbitration are fully configurable.[33] Therefore, both forms of ADR offer significantly more flexibility than litigation offers, which is often appropriate to the specific parties' needs.

However, ADR does not solve all issues pertaining to a lack of flexibility in the litigation process. All of the tailoring described above is contingent on the party's agreeing to those terms, and when parties are in dispute they may not be amenable to agreeing on these terms.[34] This reveals an advantage of litigation: parties are compelled to engage with the process without their prior agreement.[35] Therefore, whilst flexibility is undoubtedly an advantage, there may be times where the strict, inflexible nature of litigation is advantageous.

IV. PRIVACY

Additionally, the litigation process is conducted in public. Members of the public and media are able to witness the court proceedings and the judgment of the court is published meaning members of the public are able to review it and understand the resolution.[36] This is particularly

[27] Blake (n.1).

[28] Family Online Mediation and Arbitration Service (FOMAS), 'Could "Alternative" Be The New Norm In Family Law?' *New Law Journal.* (2020) 7891(1).

[29] Waring (n.6).

[30] E. Sadler. 'A Quick Fix or a Long Battle?' *New Law Journal.* (2009) 7354(1).

[31] L. Boulle and M. Nesic. 'Mediator skills and techniques: Triangle of Influence.' (2010) Bloomsbury Professional.

[32] E. Sadler. 'A Quick Fix or a Long Battle?' *New Law Journal.* (2009) 7354(1).

[33] H. Yu. 'Five Years On: A Review of the English Arbitration Act 1996.' (2002) *Journal of International Arbitration.* 19(3), pp. 209 – 225.

[34] K. P. Berger. 'Institutional arbitration: harmony, disharmony and the 'Party Autonomy Paradox.' Arbitration International. (2018) 34(1), pp. 473 – 493.

[35] J. Lafferty. 'The Evolution of Litigation.' New Law Journal. (2017) 7773(1).

[36] M. Garajova. 'Privacy and Confidentiality in International Commercial Arbitration under Institutional Arbitration Rules.' *Resolution of International Disputes.* (2017) 61(1), pp. 61 – 77.

problematic for commercial parties, or those valuing privacy, as members of the public will be able to witness the parties airing sensitive information.[37] Therefore, parties often view the public nature of litigation as a problem.

One of ADR's major benefits is that it allows parties to resolve disputes in private. Mediation and arbitration are virtually always held in private meaning that the public are not privy to the proceedings, discussions, or resolution of the sessions; only those that are party to the dispute will have full knowledge of the discussions.[38] This can be contrasted with the litigation process, which poses problems for parties that value their privacy. Litigation is held typically in a public courtroom meaning that members of the media and the general public are able to sit in on a case and listen to arguments and understand evidence being relied upon.[39] Another aspect of privacy that ADR embodies is that any settlement reached through mediation or arbitration is private and not publicised, unlike judgments handed down in litigation.[40] These resolutions are usually caveated through a confidentiality clause meaning the parties are contractually not permitted to share details of the resolution.[41] The only exception to this rule is if the settlement resolution needs to be enforced where the settlement must be publicised in order for the resolution to be enforceable. Therefore, generally speaking, members of the general public are not privy to discussions or resolutions in pursuing ADR.

Importantly, the issue with the public nature of litigation is not realised with respect to every type of dispute. Some disputes, such as those family disputes involving children, are conducted in private and any judgment handed down uses synonyms to mask the identity of the parties.[42] Therefore, whilst ADR undoubtedly offers a significant advantage over litigation with respect to privacy, some litigation disputes are conducted in private.

V. DIMINUTION OF RELATIONSHIPS

Parties that engage with the litigation process often damage their relationship, which is particularly problematic if the parties are required or compelled to interact with one another after the dispute is resolved. Fundamentally, litigation is an adjudicative form of dispute resolution where the parties construct arguments to demonstrate why they are correct and their opponent is incorrect, and this often involves outing any private, negative information about the other party.[43] These issues can place an insurmountable barrier in the way of a continued relationship after the dispute has been resolved.

ADR offers alternatives to an adjudicative process, which may be more likely to preserve the parties' relationship. Mediation is a prime example of a non-adjudicative dispute resolution process where trained mediators facilitate the resolution of the dispute for the mutual benefit of the parties.[44] Mediators employ a number of tools to preserve the relationship of the parties by ensuring they come across as unbiased, and using break out areas with parties to ensure they have an opportunity to discuss any proposal from the other party and to cool off if discus-

[37] M. Hadani, 'The Reputational Costs of Corporate Litigation: Long-Term Media Reputation Damages to Firms' Involvement in Litigation.' Corporate Reputation Review. (2020). 2(1), pp. 75 – 91.

[38] M. Garajova. 'Privacy and Confidentiality in International Commercial Arbitration under Institutional Arbitration Rules.' *Resolution of International Disputes.* (2017) 61(1), pp. 61 – 77.

[39] Waring (n.6).

[40] M. Garajova. 'Privacy and Confidentiality in International Commercial Arbitration under Institutional Arbitration Rules.' Resolution of International Disputes. (2017) 61(1), pp. 61 – 77.

[41] *Ibid.*

[42] B. Deffains, D. Demougin, and C. Desrieux. 'Choosing ADR or litigation.' International Review of Law and Economics. 49(1), pp. 33 – 40.

[43] L. Charkoudian, D. Thompson, and J. Walter. 'What Difference Does ADR Make? Comparison of ADR and Trial Outcomes in Small Claims Court.' Conflict Resolution Quarterly. (2017). 35(1), pp. 7 – 45.

[44] *Ibid.*

sions become heated. [45] These techniques can both ensure that a settlement is agreed whilst not damaging the parties' relationship further.

Equally, the parties' relationship can be preserved further through the parties not being constrained in proposing remedies, even if these remedies are unconventional. A problem posed by litigation is that certain cause of actions leads to certain legal remedies, without much opportunity for the parties to agree alternative remedies.[46] However, parties which engage in mediation have the capacity to agree any type of remedy they wish which serves to resolve the dispute; crucially, this does not need to directly correlate to the legal rights invoked in a party's case.[47] Therefore, with this freedom to agree any remedy deemed appropriate, it is open to the parties to create remedies that are mutually beneficial to both parties and there does not necessarily have to be a winner or loser.

However, the issues described in litigation damaging a party's relationship are not solely confined to the litigation process. Some ADR processes, such as arbitration, are adjudicative also which poses the same problems with the preservation of any relationship.[48] Furthermore, merely because the parties litigate does not necessarily mean that their relationship is irreparable.[49] Parties may be able to amicably navigate the process without damaging their relationship. However, on balance, ADR offers non-adjudicative alternatives which are more likely to preserve a continued relationship between the parties.

Consequently, whilst ADR undoubtedly overcomes many of the problems associated with ADR, and has a number of key advantages, it is important to remember than not every problem is overcome by ADR. This means that in some circumstances litigation is the most appropriate way to resolve the dispute. However, this should not obstruct the need for parties to consider using ADR before commencing the litigation process.

VI. COMPULSION TO USE ADR

The previous section demonstrates how ADR have often overcome many of the problems presented by litigation, however – to take this a step further – there have been some commentators arguing that parties should be compelled to use ADR.[50]

Currently, the CPR does not compel parties to use ADR because parties have a choice as to whether they do or do not use it. However, the CPR encourages the use of ADR. This is seen most clearly in considering the CPR's overriding objective and the court's duty to manage cases under this objective; there is a prevailing duty for the court to encourage parties to use an alternative dispute resolution.[51] However, this is not tantamount to compelling parties to use ADR because this duty is applicable only if the court sees ADR as being appropriate, which implicitly means that there are some circumstances, as examined above, where pursuing ADR is inappropriate.

There are also other examples contained in the Civil Procedure Rules that demonstrate the application of the overriding objective. For example, before commencing the litigation process, the parties are expected to comply with

[45] Sadler (n.13).

[46] E. Sadler. 'A Quick Fix or a Long Battle?' New Law Journal. (2009) 7354(1).

[47] *Ibid.*

[48] L. Charkoudian, D. Thompson, and J. Walter. 'What Difference Does ADR Make? Comparison of ADR and Trial Outcomes in Small Claims Court.' *Conflict Resolution Quarterly.* (2017). 35(1), pp. 7 – 45.

[49] *Ibid.*

[50] See, for example, R. Reuben. 'Public Justice: Toward a State Action Theory of Alternative Dispute Resolution.' (1997) 85 Calif. L. Rev. 577, pp. 577 – 613; and S. Landsman. 'Nothing for Something - Denying Legal Assistance to Those Compelled to Participate in ADR Proceedings.' 37 Fordham Urb. L.J. 273, pp. 273 – 299.

[51] CPR 1.4(e).

the relevant pre-action protocol.[52] The purpose of the pre-action protocols, in part, is to try and settle the issues in dispute without the need for proceedings.[53] Therefore, the pre-action protocols encourage parties to explain their position and find opportunities to find common ground and resolve any issue.[54] The pre-action protocols make clear that litigation should be treated as a last resort, and that parties should continue to consider the possibility of reaching a settlement at all times.[55]

These provisions do have teeth, however, which displays that the CPR's approach to ADR is perhaps more than mere encouragement, and veers towards a greater level of compulsion that the wording of the CPR initially suggests. The best example of this is to consider the court's approach to the allocation of costs, specifically in relation to those parties that unreasonably choose not to engage in ADR. A party that was silent in response to a request to mediate was held to act unreasonably and incurred a cost penalty;[56] equally, costs were awarded on an indemnity basis where a party refused to engage in mediation as they denied liability and stood behind their case.[57] Therefore, a party can be severely disadvantaged in unreasonably refusing to engage in ADR, however this falls short of compelling parties to engage in ADR as costs are not always awarded in favour of the party willing to explore ADR.[58]

The position struck by the CPR towards compelling parties to explore ADR is reasonable as it embodies an appropriate balance between recognising advantages in ADR and recognising that not all disputes benefit from exploring other forms of dispute resolution. ADR, by definition, only works if the parties agree to it and are willing to engage with it because ADR is not always the best way to resolve the dispute. Therefore, the court deemed a party was reasonable in not engaging with the mediation process where the other party has previously broken two mediation resolution previously agreed.[59] In these instances, compelling a party to engage in further ADR would obstruct to swift resolution of the dispute and elongate the dispute resolution process. Consequently, whilst there are undoubtedly advantages in pursuing ADR, there can also be good reasons why ADR may not be appropriate. Therefore, to compel parties to engage in ADR could actually obstruct, rather than promote, the administration of justice.

CONCLUSIONS

Consequently, ADR is a form of dispute resolution that does largely overcome the problems associated with litigation in England and Wales. ADR tends to be cheaper and quicker than following the litigation process, and it offers other advantages over litigation: ADR tends to be conducted in private, offers more flexibility than litigation, and can be non-adversarial to preserve party relationships. However, ADR is not the solution to all problems; litigation is still an appropriate dispute mechanism of last resort, and if parties are unwilling to engage in settlement, then it could be quicker, cheaper, and better to simply resort to the litigation process immediately. Therefore, whilst ADR does overcome many problems to litigation, it is not an answer to every problem posed in dispute resolution.

To this end, parties are not, and should not, be compelled by law to attempt ADR. Parties can already compel another party to engage

[52] Blake (n.1).
[53] Para. 3(c), Practice Direction: Pre-Action Conduct and Protocols, CPR.
[54] *Ibid.*
[55] Para 8 and 9, Practice Direction: Pre-Action Conduct and Protocols, CPR.
[56] *PGF II SA v OMFS Company 1 Ltd* [2013] EWCA Civ 1288.
[57] *DSN v Blackpool Football Club* [2020] EWHC 670.
[58] See, for example, *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576.
[59] *Simon Kelly v Raymond Kelly* [2020] EWHC 245.

in ADR through a contract, and some parties still opt to rely on the litigation process. ADR, by definition, only works if the parties agree to it and therefore if parties are compelled to engage with ADR then it will likely have limited success. Furthermore, as described above, ADR is not always the best way to resolve the dispute; litigation can be appropriate and it is non-sensical to require parties to engage with ADR when a reasonable judgment call is better suited to decide whether ADR is worthwhile exploring.