Beyond Facilitation: When is Evaluation Appropriate in Dispute Resolution

"A call for more dispute resolution options" - An address by Sam Townend KC

Background- the expansion of use of ADR post-Civil Procedure Rules

1. I started in practice in 1999, the same year that the Civil Procedure Rules took effect and by which alternative forms of dispute resolution were given a shot in the arm.

2. Of course, alternatives to court-based dispute resolution have a long and respected history in England and Wales- mercantile arbitration probably being the most longstanding dating back to the 17th century, but also, for example, the 28 day adjudication process, now on a statutory footing in my own practice area of construction law, which had been provided for in standard forms of building contract since the 1950s. Arbitration, mediation and other forms of dispute resolution were, however, traditionally seen as in competition with litigation, a distraction from the truest form of justice. This substantially changed with the introduction of the Civil Procedure Rules which gave express procedural encouragement to alternatives to resolution in court alongside, or as a diversion from, litigation.

3. That encouragement only heightened as the Civil Procedure Rules settled in, with amendments including responding to the Jackson Costs Review in 2013, being made to firm up the commitment to getting cases resolved out of the court room. Such as the express reference to Early Neutral

Evaluation being included in CPR Part 3, the court's case management powers, for the first time in 2015.

4. Alternatives to court-based dispute resolution or what used always to be called ADR have had the active support of Government, the senior judiciary, and the legal professions.

5. So far as Government is concerned we have seen multiple ADR initiatives and with substantial success:

   (1) For example, the introduction of the small claims mediation scheme. From 22 May 2024, parties to many small claims disputes valued at less than £10,000 have been required to attend mediation through the HMCTS Small Claims Mediation Service. Eligible cases are automatically referred to a free, one-hour, telephone mediation session aimed at facilitating early resolution. The SCMS currently achieves settlement in approximately half of all referred cases- a very cheap facilitated disposal of cases in the civil justice system.

   (2) There has been the introduction of a £500 voucher for mediation in private law family cases. The scheme provides a £500 voucher to all those who would not otherwise qualify for Legal Aid to put towards the cost of a mediation. The Government has extended the family mediation voucher scheme to 2026 with the stated objective of promoting cost-effective conflict resolution for families. Admittedly it is a very modest effort to fill the gap left by the evisceration of legal aid in private law family cases, but it is better than nothing, and settlements are being reached, again diverting disputes from a final determination in court.

(3) Most recently, following a successful pilot, NHS Resolution, what used to be called the NHS Litigation Authority, is to start using Early Neutral Evaluation for clinical negligence cases- just a few weeks ago awarding contracts for provision of ENEs to CEDR (Centre for Effective Dispute Resolution), Global Mediation and Trust Mediation.

6. While each of these initiatives are towards the end, or as a result, of reducing Government spend on the courts, litigation and legal aid, they also mark a recognition of the essential part alternative forms of dispute resolution have to play.

7. The senior judiciary have, if anything, been even more sharply encouraging of ADR:

(1) As everyone concerned with civil dispute resolution must now know the Court of Appeal in *Churchill v Merthyr Tydfil Borough Council* [2023] EWCA Civ 1416 determined that the Court can mandate parties to engage in mediation without that necessarily being contrary to their right to a fair and public hearing under Article 6 of the ECHR.

(2) In her keynote speech to the British Institute of International and Comparative Law in January last year, the Lady Chief Justice, Baroness Carr, spoke on the topic of 'Mediation After the Singapore Convention' characterising mediation as "*a central focus for anyone engaged in dispute resolution*" as well as stressing, gratifyingly, "*the importance of the legal profession to the effective future*

development of mediation." Her address was principally concerned with the mediation of international commercial disputes and the introduction of institutions, such as a London Dispute Resolution Committee to make recommendations on how best to provide a holistic approach to international mediation, arbitration and litigation and a Mediation Council of England and Wales with a remit of maintaining and enhancing standards, more than on the process which she took, rightly, as evidently successful. As to maturity of mediation in the UK market, I note the pending application of the Civil Mediation Council towards obtaining Royal Charter status to formally establish mediation as a distinct profession and to introduce the concept of a "Chartered Mediator".

(3) These days one must also, of course, include within ADR, what has been dubbed ODR, Online Dispute Resolution, by that most pioneering Master of the Rolls, Sir Geoffrey Vos. His longstanding forceful advocacy in favour of a digital justice system as an engine to resolve disputes has gone a long way towards pushing the agenda for change in dispute resolution. Sir Geoffrey has championed alternatives to court-based dispute resolution in the digital space. Last April at the International Forum on ODR at Greenwich University he argued that Amazon and eBay, with their turn-key online dispute resolution systems, have proven that online dispute resolution for small disputes can be particularly effective and called for more general application of similar such tools. As you may know, on these platforms parties are initially encouraged to resolve their disputes voluntarily through assisted negotiation software. If they cannot reach a settlement, the claim escalates to adjudication. PayPal freezes the money involved in the transaction of the dispute,

thus ensuring the enforcement of the final decision. It resolves over 60 million disputes a year.

(4) These are, of course, quick, cheap and efficient ways to resolve the millions of the simpler consumer-type disputes that arise in Britain every year. Just last week the Master of the Rolls announced that he will retire from the senior judiciary in October this year. Can I be one of the first publicly to pay tribute to his work, including on ODR and ADR. He will be missed.

Facilitative mediation- a story of success

8. Supported by this background, facilitative mediation has been hugely successful.

9. In the 11th Mediation Audit published by the CEDR 2025 (see CEDR Mediation Audit 2025), it reports that the total mediation settlement rate for 2022 was around 87%. The majority of cases (70%) settle on the day of mediation itself.

10. For the year ended September 2024, the total market size for commercial mediation was in the order of 21,000 cases, a 24% increase on the reported 17,000 cases in 2022. According to CEDR every year for the past two decades the number of mediated cases is up on the last.

11. By achieving earlier resolution of cases that would otherwise have proceeded through litigation, the commercial mediation profession saves business around £8 billion a year in wasted management time, damaged

relationships, lost productivity and legal fees. Since 1990, the mediation profession has contributed savings of £64 billion. Mediation is delivering a Return on Investment to society of around 100:1.

12. Facilitative mediation has come of age and is here to stay. Nothing I have to say seeks to gainsay that success.

Civil justice system still not meeting the country's needs

13. And yet, despite the significant expansion and success of alternative dispute resolution, diverting so many cases from the court room, the civil justice system as a whole is still not succeeding for small businesses, consumers, and other parties.

14. The Civil Justice Quarterly statistics for July to September 2025 show that the average time between issue and trial was 39 weeks for small claims, and 60 weeks for fast, intermediate and multi-track claims. While in the last year or so the time from issue to trial has been coming down incrementally, it remains not good enough, leaving meritorious claimants without remedy and guiltless defendants in limbo for far too long.

15. This system comes at a price in time then, but also money. Uncomfortable though it may be for me to say to a Bar audience, legal costs are high and remain a major barrier to accessing justice. According to Ministry of Justice figures, legal costs accounted for an average of 35% of the value of a claim in the UK in 2020, a figure substantially higher than comparable jurisdictions such as France (10.7 %) and Germany (6.6 %).[1]

[1] Impact Assessment template

Reforms to litigation

16. Innovations in litigation are required to bear down further on party costs, particularly outside the halcyon environment of the Building and Property Courts Division of the High Court, as the specialist Chancery, Commercial, IP and TCC courts are soon to become collectively known:

(1) Consideration should be given to bearing down further on the costs of disclosure. One means to do so would be to embrace, in full, arbitration style disclosure where parties simply disclose the documents upon which they rely, to be served with pleadings rather than at a separate stage, and any further disclosure is to be permitted on reasoned application only.

(2) Another, perhaps more controversial, way to curtail legal spend might be to dispense with witness statements altogether, as is the case in the civil courts of Northern Ireland, with the requirements being only for a party to identify the witnesses to be called prior to trial, together with provision of witness summaries, to identify the issues of fact upon she or he will be examined in chief. An old-fashioned discipline it may well be for the Bar, but examination in chief keeps the witness evidence adduced limited and targeted to the issues in the case and would mark a real saving for the vast majority of cases that are settled post-issue, but prior to final hearing.

Diversity of dispute resolution options: evaluative mediation and early neutral evaluations

17. My thesis for today, however, and to kick off the panel session that will follow, is to call for change in what is available to assist parties in resolving

their disputes outside of court. I call for consideration to be given, and efforts made, to introduce a further diversity of options to parties seeking to resolve their disputes outside of the forum of the courts. In particular, to offer options of non-binding evaluation of disputes with the aim of jump-starting settlement discussions, as an addition to the regular tool box of dispute resolution options. These would be alternatives to the rather softer encouragement of the creation of the right environment for settlement provided by facilitative mediation.

18. Two types of forum, in my view, warrant consideration and encouragement, through education, training and, in the end, practice.

19. The first, is towards greater use of evaluation in mediation as an alternative to orthodox facilitative mediation. As matters stand facilitative mediation is the form of mediation taught by almost all British mediation training organisations and the service that, by default, mediators appointed through mediator nominating bodies provide.

20. We have become culturally inured to facilitation only, wary of mediators giving a strong view on the law and merits, for fear that it might be regarded as a breach of trust in the mediator and the process, even, fear that it takes a degree of control away from the lawyers acting for the parties. These points have merit and need to be borne in mind. However, in my view, in the right cases, with informed consent, evaluative mediation may well assist parties to reach a resolution quickly and efficiently. It directly presses parties to assess with realism the strengths and weaknesses of their case, particularly where there is a significant legal or technical component, guiding them to a settlement position that is reasonably likely broadly to

reflect the outcome of a final litigated determination, but without the time, effort, emotion and cost associated with a trial.

21. The panel will explore the risks and benefits of greater evaluation in mediation, but certainly on the face of it, it cuts to the chase in a way that purely facilitative mediators do not, the unusual, but worst of whom, are little more than message passers.

22. The second forum I suggest warrants renewed attention is Early Neutral Evaluation:

(1) ENE is an alternative dispute resolution technique developed around 30 years ago by the US district courts. The case managing judge, or other neutral, provides an early view or indication as to the likely outcome.

(2) While settlement was not its primary objective, ENE did help resolve many cases. Its success led to the process moving beyond the courtroom and becoming an alternative dispute resolution technique in its own right. It has had marked success in relation to disputes in the family courts, with the development of ENE or Financial Dispute Resolution hearings, and as I say, it is now to be provided for NHS Resolution for clinical negligence cases. Pushing at what I hope is an open door, I argue that it may well have a role for other civil disputes, most obviously neighbour disputes, or those disputes with heavy contractual and technical components.

(3) The success of ENE lies in its ability to clarify legal and factual disputes and to identify the key risks and likely outcomes before

substantial costs are incurred in the court phase of the dispute. ENE is distinct from mediation in that it focuses directly on the evidence and the law, the neutral view being delivered by a Judge or equivalent, whereas evaluative mediation involves a more light touch evaluation.

(4) By identifying critical questions and risks at an early stage, ENE can help create an environment conducive to settlement. A realistic "reality check" on the strengths and weaknesses of each position may, in the best cases, facilitate settlement discussions by encouraging parties to adopt more realistic negotiating positions. Even where ENE does not result in settlement, it can narrow the issues and focus attention on the most significant aspects of the case.

(5) Early enthusiasm towards its use a decade or more ago in the civil courts fell away, and ENEs into dis-use, notwithstanding express provision for their use in the CPR and specialist court guides. It is a little unclear as to why and it may be that the civil courts no longer consider they have capacity to provide ENEs, but I suggest that the courts and Specialist Bar and Solicitor Associations should look again at this form of dispute resolution, observe what the family courts have to teach us, to ascertain whether it might, indeed, provide a cheaper and potentially effective means of hastening the process of getting both parties into the settlement zone and avoiding the costs and time associated with a final trial.

(6) The exploration of when evaluation is appropriate in dispute resolution beyond the courts is today's theme, and I look forward to

hearing from the panel which now follows, and you, as to your thoughts on this important topic.

23. Can I thank Keating Chambers for hosting this event, the events staff here led by Sarah Sutherland, Alec Chen, the legal assistant here at Keating who helped with this address, and to Nell Ferrall, the Bar Council policy analyst that looks after the ADR Panel, many of whom make up the speaking panel that will follow immediately after this address.

Sam Townend KC

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