
Kluwer Mediation Blog

What is the difference between an online auction website and Her Majesty's Courts and Tribunals?

Bruce Greig (Bruce Greig, Civil and Commercial Mediator) · Tuesday, July 6th, 2021

Less than you might think, according to Sir Geoffrey Vos, the newly-appointed Master of the Rolls. The Master of the Rolls is responsible for the administration of civil justice in England & Wales. Sir Geoffrey was sworn in to this post in January 2021. He has spoken several times since then about his vision for a system of civil justice which integrates all types of dispute resolution.

The eBay reference comes from his observation that giant consumer-facing websites like eBay manage to resolve tens of millions of disputes every year, almost entirely without involving judges and courtrooms. They have careful processes which allow parties to first attempt their own resolution, then perhaps involving some automated AI, before eventually reaching a real person, depending on the size and complexity of the dispute. These processes have very high user satisfaction.

Should the Court Service learn something from this?

Sir Geoffrey thinks so. His vision is to incorporate all forms of dispute resolution into one integrated system, with the majority of the action probably taking place online. At the moment, the court system is considered to be something almost entirely separate from other forms of dispute resolution. Indeed, all other forms of dispute resolution are of course referred to as "alternative dispute resolution".

This language lies at the root of the problem which Sir Geoffrey is trying to solve. He says "why do we keep on talking about Alternative Dispute Resolution? There is nothing alternative about either mediation, early neutral evaluation, or judge led resolution."

He observes that, once claimants have entered the court system they are often ill-disposed to a mediated settlement. They've paid a court fee, they are entitled to their time in court. They don't want to compromise.

This is starkly clear from the data: there are around two million cases per year in the County Courts [HMCTS Quarterly Statistics - using figures up to end of Q1 2020 figures to match up with latest figures on mediations <https://www.gov.uk/government/collections/civil-justice-statistics-quarterly#2020>].

Most of those go undefended, though, so are likely to be simple debt enforcement matters rather than real disputes. So let us focus just on the 65,000 or so cases where the matter goes to trial. How many of those attempted mediation? It is hard to be sure, but probably about 2%. The Centre for Effective Dispute Resolution estimates that there are 12,000 mediations per year, excluding those operated by mediation schemes like NHS Resolution [CEDR Annual Mediation Audit 2020 <https://www.cedr.com/foundation/mediation-audit/>]. Approximately 90% of those settle, leaving 1,200 to continue to trial. It might be that many of the smaller cases found their way to the Court Service's own Small Claims Mediation Service and so are not counted in those 1,200 mediations but even if you exclude all the Small Claims (<£10k), and just look at trials involving larger claims, there are still 17,000 of those. 1,200 mediations out of 17,000 trials is still just 7%. And these cases can't have attempted arbitration either, because they would have received a binding judgement at arbitration, and so would not then appear in the trial figures.

These are rough numbers, because there is some uncertainty in the mediation data, which are built up from CEDR's survey of members. But you can see from these rough numbers that there is a huge opportunity to overhaul the dispute resolution process offered by the Court Service. If all those cases were entering a "Dispute Resolution Service", rather than the "Court Service", would the parties be more willing to engage in alternatives to court? Surely they would.

What if the court system learnt from Amazon, eBay and PayPal and offered the parties to a dispute a wide range of resolution procedures? And used AI to prompt the parties to attempt the most appropriate procedure for their claim, at the most appropriate time.

Lots of processes can be initiated online already, but the services are very disjointed. You might start a case now with the Financial Ombudsman, but if that does not reach a satisfactory conclusion you need to start again with, say, a mediator. If the mediation fails, you have to start a new case with the Court Service.

Sir Geoffrey envisages an elegant, joined-up system, where all disputes start in the same place and are guided through whatever the most appropriate resolution service might be. Each dispute might attempt several different types of resolution before eventually being settled. All of this would be managed by the Court Service.

He says "My theory is that almost every dispute has a sweet spot when it is amenable to consensual resolution. But that sweet spot will occur at different times for different disputes, and in many cases will be hard to identify. That is why I am so much in favour of online dispute resolution processes that allow mediated interventions to be suggested frequently at almost every stage of the resolution process."

This is not just the usual 'let's encourage ADR to take the pressure off the courts' type of talk, which we hear from the judiciary from time to time. Sir Geoffrey does seem to be very serious about it:

"What we are lacking, I think, is the ultimate integration of ADR into the dispute resolution process. As Head of Civil Justice, this is what I am hoping to achieve in the

months and years to come.”

Is this realistic? I see two objections, one technical and one political.

From a technical point of view, can the public sector implement something like this? Can the Ministry of Justice really build a service where users are seamlessly passed from one step to the next, with the system pulling in a mediator, or a judge, or an ombudsperson as required? I would say they probably can. Big public sector technology projects generally get a bad press, but there have been some excellent successes in the UK in recent years. Passport renewals, VAT returns, car tax - these can all be done online and work very smoothly. There is already a pilot scheme running in the small claims track to manage claims online, called Online Civil Money Claims. This is much more than just filing a claim form online: the whole process is managed online, with users entering structured data like dates and amounts, receiving notifications and case updates online, and so on. You can imagine that pilot scheme gradually expanding to encompass more types of dispute, and more types of dispute resolution.

The political objection is: is it the business of the court service to involve itself directly in other forms of dispute resolution? Should that not be left to the private sector? Arbitration, for example, is almost by definition a private sector activity. The whole point of arbitration is that you are paying a private expert to perform the role of a judge because he or she can provide a decision faster, and outside the public scrutiny of a courtroom.

What right does the court service have to position itself as the integrated provider of all dispute resolution services?

How you view this question will depend greatly on your political persuasion. But think back on those numbers we looked at earlier. At the moment, very few disputes are reaching private sector providers. Lots of disputes take a very long time indeed to be resolved. It is quite possible for a dispute over a contract to last far longer than the original contract itself. If the court service raises the profile of mediation and arbitration, surely private sector providers of those services will benefit. It hardly seems likely that the court service will crowd out private providers here. Quite the opposite: the court service is best placed to route more disputes to private dispute resolution professionals.

I don't think that Sir Geoffrey is envisaging the Court Service recruiting large numbers of dispute resolution professionals to work alongside the existing army of court clerks, ushers and judges. When he talks about the 'ultimate integration of ADR into the dispute resolution process' I don't think he means that the Court Service will actually provide all these different dispute resolution services, but merely that the Court Service will more actively manage a dispute throughout its lifecycle, ensuring it has access to the most appropriate intervention at the most appropriate time. At the moment, the Civil Procedure Rules tell parties that they ought to attempt some form of ADR before troubling the court with their dispute but, as we have seen, many do not.

If the dispute sits in an integrated online process, managed by the Court Service from

start to finish, it seems much more likely to me that parties will attempt other forms of dispute resolution if they are offered and easily available. An option to “Click here to book a mediation session next week, pay online” would surely push the number of mediations well above that 7% figure we saw earlier.

Why do all this?

Because slow, inefficient justice is bad for the economy. Legal rights are crucial to the smooth functioning of a free economy. Protracted disputes stop real people and real employees concentrating on their work and on their business. It is absolutely the job of the courts to ensure that legal rights can be swiftly and effectively enforced. It is not enough just to have a court system and leave everything else to the private sector. It is no good having a court system if you have to wait months or years to use it. The courts should, I think, be responsible for ensuring that disputes can be resolved quickly and cheaply and should offer whatever solutions they can to do this. This would be a great boon to the mediation profession, and an even better boon for businesses and people who just want whatever it takes to resolve their disputes swiftly.

This post focuses very much on the latest developments in the UK. An interesting question therefore is whether other jurisdictions around the world are using technology to integrate ADR into the local justice system? Please feel free to share your local experience in the comments section!

Links:

<https://www.judiciary.uk/wp-content/uploads/2021/05/MR-to-LIDW-10-May-2021.pdf>

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This entry was posted on Tuesday, July 6th, 2021 at 4:00 pm and is filed under ADR Agreements, Commercial Mediation, Conciliation, Court Procedure and Litigation, Dispute Resolution, Domestic Courts, Mediation and Society, Mediation Institutions and Rules, mediation models, Mediation Practice, mediation process, Mediation Schemes (In Courts, etc.), National Mediation Laws, Uncategorized

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