INTERNATIONAL ASSOCIATION OF JUDGES
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2ND STUDY COMMISSION

QUESTIONNAIRE

Alternative Dispute Resolution
as a means of improving the delivery of justice
and reducing the delays in civil procedure

I

Question 1

What alternative means are used in your legal system for resolving civil law disputes outside normal court procedures?

Mediation is the most popular form of Alternative Dispute Resolution (ADR) procedure in the UK together with Arbitration, which is discussed below. Recent changes to procedure and legislation have seen an increase in its use, particularly in family disputes. Court-annexed schemes have been established to offer mediation services on a wider range of issues, which is discussed in greater detail below (see answer 4). Mediation can be ‘evaluative’, where the mediator gives an assessment of the legal strength of a case, or ‘facilitative’, where the mediator concentrates on assisting the parties to define the issues. When a mediation is successful and an agreement is reached, it is written down and forms a legally binding contract, unless the parties state otherwise.

Arbitration is well established throughout the UK, and is a popular means of resolving construction and commercial disputes in particular. Arbitration is more closely regulated than other forms of ADR, which is discussed in greater detail below (See answer 2). The arbitrator may be a lawyer, or may be an expert in the field of the dispute. He will make a decision according to the law. The arbitrator’s decision, known as an award, is legally binding and can be enforced through the courts.

Early Neutral Evaluation. This is a process in which a neutral professional, commonly a lawyer, hears a summary of each party’s case and gives a non-binding assessment of the merits. This can then be used as a basis for settlement or for further negotiation. Use of this type of ADR is rare. Expert Determination, Med-arb and Neutral fact finding are also recognised in the UK as ADR methods, but are rarely used.

Ombudsmen are independent office holders who investigate and rule on complaints from members of the public about maladministration in Government and in particular services in both the public and private sectors. Some ombudsmen use mediation as part of their dispute resolution procedures. The powers of ombudsmen vary. Most ombudsmen are able to make recommendations, only a few can make decisions which are enforceable through the courts.

Utility Regulators are watchdogs appointed to oversee the privatised utilities such as water or gas. They handle complaints from customers who are dissatisfied by the way a complaint has been dealt with by his supplier. Use of regulators is wide spread in small-scale consumer disputes.
Question 2

(a) Are any of the alternative means used in your country subject to special regulation by statutory provisions?

In England, Wales and Northern Ireland, only arbitration is subject to statutory regulation, and is governed by the Arbitration Acts of 1950 and 1996. These acts provide for both domestic and international arbitration disputes governed by English law.

In Scotland, the law of arbitration for domestic cases is governed almost wholly by the common law, although the provisions available to parties are set out in the Scottish Arbitration Code of 1999. This is an advisory document which provides guidance on both domestic and international arbitration.

Unlike the rest of the UK, Scotland adopted the UNICITRAL Model Law of Arbitration for international commercial disputes in 1990.

(b) Does a mediator or an arbiter require to have a particular qualification or to have undergone professional training?

At present in the UK, any person may be a mediator or an arbiter. Generally an arbiter will be a member of the Chartered Institute of Arbitrators, who provide training and accreditation of their members. In practice, an arbiter will be an experienced lawyer and/or an expert in the field under dispute.

Mediation is not at present organised to the same degree, although the recent introduction of the Quality Mark Standard of Mediation by the Legal Services Commission in England, Wales and Northern Ireland, which indicates suitability to undertake publicly-funded mediation services, can be seen as an attempt to introduce a recognisable standard of quality for the profession.

The Quality Mark Standard of Mediation does not yet apply in Scotland, due in part to the lack of an official eligibility standard for publicly-funded mediation services, other than general accreditation. This is expected to change following the recent award of Scottish Executive funding to the Scottish Mediation Network, which has been asked to ‘develop a quality assurance framework across all spheres of mediation’.

(c) If a mediator requires to undergo training, who provides such training?

Training is provided by the many mediation bodies currently practicing in the UK. However, only a small number of these bodies are recognised as providing training up to the standard required to achieve the Quality Mark Standard of Mediation. Achieving the necessary standards of competency generally takes between 12-14 months.

(d) Is there a professional organisation of mediators which lays down rules of professional conduct?

Family mediation is the most developed practice area, and the most coordinated. The UK College of Family Mediators aims to be the professional body for family mediators in England, Scotland, Northern Ireland and Wales. The UK College must approve the code of conduct of each of its member organisations. Other providers have different quality assurance mechanisms, with accredited lawyer-mediators in England and Wales regulated by a code of practice by the Law Society of England and Wales.

In Scotland, some family mediators are accredited by the Law Society of Scotland and by Comprehensive Accredited Lawyer Mediators (CALM).
Commercial mediation does not as yet have a corresponding professional body. However, the Mediation Quality Mark sets out standards for performance which include minimum levels of training and accreditation, professional practice supervision and client communication. Most of the prominent mediation providers in the UK who offer commercial mediation services are approved to this standard. These include CEDR (Centre for Dispute Resolution), the ADR Group, Mediation UK and The Academy of Experts.

Question 3

(a) Insofar as alternative dispute resolution procedures are available and are in use in your country, what are the principal areas of law in which disputes are settled by the alternative procedure?

In 2001, the UK Government announced a pledge to consider and use ADR ‘in all suitable cases wherever the other party accepts it.’ As a result, most disputes involving a governmental body have seen a form of ADR used initially to find resolution. In the year 2003/2004, ADR was used in 229 government cases, with 181 leading to settlement. This included employment, commercial, procurement and negligence disputes, which were settled by both Arbitration and Mediation.

Mediation is also used primarily in employment, family and community disputes, and is popular under these circumstances because it is considered to offer the greatest chance to preserve a working relationship between the parties involved. Arbitration or Expert Determination are the forms of ADR most commonly used in commercial and construction disputes, where both the expertise of the arbiter and binding nature of the decision are attractive.

(b) Are there any types of civil law dispute which cannot be resolved by such alternative means but must be decided by a court?

In the judgement of Halsey v Milton Keynes General NHS Trust (2004), the judges commented ‘in our view, most cases are not by their very nature unsuitable for mediation’. Some disputes however, on the grounds of public policy, are not eligible for settlement by ADR. This would include, for example, those dealing with questions of status or human rights.

Question 4

(a) Is any publicly funded system of mediation available in your country? In particular, is there any mediation service annexed or attached to the courts?

Publicly-funded mediation is available throughout the UK to eligible parties when entering into ADR which can be considered part of court proceedings. Funding in England, Wales and Northern Ireland is provided by the Legal Services Commission, and by the Legal Aid Board in Scotland.

In England and Wales, court schemes are being run for the Court of Appeal and for courts in London, Birmingham, Cardiff, Exeter Guildford and Swansea. In addition, the Automatic Referral to Mediation Scheme (ARMS pilot) has been running alongside the voluntary scheme in the Central London County Court. Under the scheme, 100 cases are to be automatically referred to an optional mediation service. It is hoped this will provide information on the types of cases most suitable for mediation.

Scottish court schemes have been introduced in the Sheriff Courts of Edinburgh, Glasgow and Aberdeen. The cases primarily dealt with are commercial and consumer disputes.
(b) If so, for what type of civil law dispute is publicly funded mediation available?

Publicly-funded mediation is available to eligible parties on divorce and separation disputes, as it is to community and commercial disputes. The publicly-funded Advisory, Conciliation and Adjudication Service (ACAS) provide both a conciliation and adjudication service free of charge when dealing with employer/employee disputes.

Question 5

(a) To what extent, and by what means, are the courts in your system able to encourage or require parties to attempt mediation or some other form of alternative dispute resolution either as a preliminary to commencing any litigation or in the course of ordinary court proceedings?

Following Lord Woolf’s 1995 Interim Report on Access to Justice, the Civil Procedure Rules (CPR) for England and Wales were changed. Courts were obliged to encourage parties to use ADR in appropriate cases, and could order a stay of proceedings for mediation to take place. As a result, a judge can make an ADR Order in Commercial Court as part of his case management duties, which amounts to a robust recommendation to mediate. While not punishable with contempt of court if ignored, judges will penalise those who refuse an order or pre-trial offer to mediate if that refusal is seen as unreasonable, as seen in the recent case of Burchell v Bullard & Orr (2005). This will be done when considering the award of costs of trial.

Family mediation has also increased following the Family Law Act 1996, which placed much greater emphasis on mediation as a means to resolve divorce and separation disputes. Couples who wish to apply for public assistance to engage legal representation must first attend a meeting with a mediator to discuss whether mediation is suitable for the parties, the dispute and the circumstances.

In Scotland, judges have the power to suspend proceedings to allow mediation or any other form of ADR to be carried out. The Court of Session Practice Note 6 of 2004 also requires parties to have examined prior to litigation whether a dispute can be resolved by non-judicial means.

(b) Is the court administration able to assist litigants, or potential litigants, in using alternative dispute resolution procedures by, for example, explaining the various possibilities of alternative dispute resolution or providing information about mediators or arbiters?

The position of the courts to ADR and mediation in particular has been laid down in the pre-action protocols of the CPR, Court Guidance Notes and the judgements of Halsey and Burchell v Bullard; practitioners should consider ADR as an important part of the mainstream justice system. As such the onus is on the legal practitioner to recommend a form of ADR to their client or accept an offer to mediate where appropriate. As described in answer 5(a), a recommendation to consider ADR can be made by a judge, but it is not stipulated that any further information or advice on the most appropriate form of ADR be given.

Question 6

(a) Has the use of alternative dispute resolution procedures in your country been increasing in recent years?

Yes
(b) If so;-
(i) Are there any particular reasons for the increase in use of alternative dispute resolution procedures?

Please see answer 5(a) for a description of the procedural changes which have encouraged the increase in the use of ADR procedures. This is a slightly misleading statistic however: while in recent years the number of attempted mediations has increased, the settlement rate has dropped quite dramatically. It has been suggested that increased pressure from the judiciary has led to more mediations being undertaken by unenthusiastic participants, who attend simply to avoid any potential financial punishment with regards to costs in the following trial.

(ii) Has the increase in use sufficiently reduced the burden of work on the courts to allow the courts to improve the delivery of justice?

It is unclear whether the increase in the use of ADR is having a significant effect on the burden of work on the courts. In addition to the falling success rate highlighted in answer 6(b)(i), statistical evidence also suggests that there is still a reluctance to opt for ADR when available. The take up rate on two voluntary schemes attached to the Central London County Court and the Court of Appeal was only 4%. The ARMS pilot discussed above has also seen a disappointing take up, with around 80% of all cases referred opting out of mediation. Similarly, the Family Law Act changes discussed in answer 4(a), which required publicly-funded parties to explore the possibility of mediating their dispute, led to a significant increase in the number of cases referred to mediation providers, but did not lead to a substantial increase in the number of mediations completed.

In Scotland, the scheme attached to Edinburgh Sheriff Court assisted slightly over 100 people in two years. In contrast to the volume of applications made to the court over this period, this is not a significant amount.

(iii) Has any alteration been made to the rules of procedure or the practices of the courts in response to the increase in the use of alternative dispute resolution?

There have been no further changes to rules of procedure in England, Wales and Northern Ireland since the changes to the CPR in 1999.

Procedural changes in Scotland are confined to the Court of Session Practice Note issued in 2004. This requires parties in a commercial action to have engaged in pre-litigation communication to discern if the dispute in question is best resolved by judicial means.

Question 7

In your system does the court provide any procedures in which a judge acts as a mediator?

There is no court procedure in which a judge acts as mediator.

Question 8

Are there any proposals to change the law relating to alternative dispute resolution procedures?

There are no changes proposed to the law on England, Wales and Northern Ireland. In Scotland, the Arbitration (Scotland) Bill is in existence, but is yet to be introduced to the Scottish Parliament. The Bill is intended to consolidate the existing provisions and introduce
new provisions which clarify areas of uncertainty, creating a strong legislative framework while retaining as much flexibility for matters not part of that framework.

II

Which points would you wish to discuss in detail?

III

What subject do you suggest for the next meeting?