

Should alternative
dispute resolution be
made compulsory?



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Introduction.

It is a sad fact of life that disputes can and do arise from even the most trivial incidents and activities. They are always totally unexpected and usually highly predictable. ^[1] For a long time, people have been worried about civil litigation. It is costly, time consuming, worrying and takes a long time to decide. ^[2] Alternative Dispute Resolution (ADR) is a term which refers to various procedures developed in the United States over the last 15 years or so in an attempt to overcome some of the weaknesses in the litigation and arbitration processes. ^[3]

This essay will look at Alternative Dispute Resolution in England. I will start by looking at the concept of Alternative dispute resolution. I will briefly examine Lord Phillip's speech delivered in India on 29 March 2008. Finally, I will give my views on whether Alternative Dispute Resolution should be made compulsory in England and the problems that would be encountered if Alternative Dispute Resolution is made compulsory in England.

Alternative Dispute Resolution

A focus on rights has played a significant part in the transformation of Western political culture from the harmony ideology of feudal societies in to 20th century participatory democracy. However, 30 years on from the birth of the civil rights movement in the United States, there are those who now express scepticism over the achievements of a rights oriented public culture.

^[4] As a consequence, some now propose a rethinking of rights ideology, as both a method of dispute resolution and a definition of social relations, and

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the development of alternative process for dealing with conflicts and claims.

[5] Such strategies are generally described as offering alternatives, since adjudication according to rights remains the formal approach to dispute resolution in the west. [6]

In common law jurisdictions, conversation about alternatives to litigation began to take institutional shape from the early 1980's, in a range of disparate experimental procedures sharing the common label ' Alternative Dispute Resolution', with its universal acronym ADR. [7] The relationship of this growing complex of practices to lawyer negotiations, litigation and adjudication is far from straight forward. Some of the innovations taking place are directed towards speedy settlement of disputes between litigants without the involvement of lawyers, others appear to be implicated in, and are indeed extensions of legal practice, while others appear as supplements to, or modifications of court process. [8]

The English Legal System is based on the adversarial system of litigation. This means that both sides to a case separately prepare their respective submissions and then arrive at court and participate in a quasi-gliadiatorial contest until the tribunal of fact (in civil trials this usually being a judge) pronounces the winner. [9] In recent times, there is now been an acceptance that alternatives to the adversarial system of justice may be appropriate due to the high cost involved in the adversarial system of justice. One of the easiest alternatives to implement is to encourage disputes to be resolved other than by recourse to litigation. This has led to the establishment of

Alternative Dispute Resolution (ADR). [10] Since 1990, many British lawyers, <https://assignbuster.com/should-alternative-dispute-resolution-be-made-compulsory/>

have taken an active interest in ADR, as a means of avoiding the public and private expense and the private pain of litigation. ^[11]

The increased importance of ADR mechanisms has been signalled in both legislation and court procedures. For example the Commercial Court issued a practice statement in 1993, stating that it wished to encourage ADR, and followed this in 1996 with a further direction allowing judges to consider whether a case is suitable for ADR at its outset, and to invite the parties to attempt a neutral non-court settlement of their dispute. ^[12] In cases in the Court of Appeal, the Master of the Rolls now writes to the parties, urging them to consider ADR and asking them for their reasons for declining to use it. Rule 26.4 of the Civil Procedure rules (CPR) 1998 enables judges, either on their own account or at the agreement of both parties, to stop court proceedings where they consider the dispute to be best suited to solution by some alternative procedure, such as arbitration or mediation. ^[13]

There is no universally accepted definition of ADR. The phrase ADR encompasses a range of procedures other than litigation which are designed to resolve conflicts. ADR processes include negotiation, mediation, conciliation, expert determination, adjudication, and arbitration. ^[14]

Alternative Dispute Resolution or ADR may be defined, "as a range of procedures that serve as alternatives to litigation through courts for the resolution of disputes, generally involving the intercession and assistance of a neutral and impartial third party. In some definitions, and more commonly it excludes all forms of adjudication. ^[15] The Department for Constitutional

Affairs defines ADR as , “ The collective term for the ways that parties can settle civil disputes, with the help of an independent third party and without the need for a formal court hearing. ^[16]

There are three principle forms of ADR. Arbitration, Mediation and Conciliation. Some commentators argue that ADR can be divided in to two classes, those being adjudicative and consensual. ^[17] The former is called arbitration, and it is quite similar to court proceedings and this has led critics to ask, if there is anything alternative about ADR. ^[18] Four goals of ADR are : To relieve court congestion, as well as undue delay and cost; to enhance community involvement in the dispute resolution process; to facilitate access to justice and finally; to provide more effective dispute resolution. ^[19]

Lord Phillip is a staunch supporter of Alternative Dispute Resolution. I believe that he wants ADR to be made compulsory in England

Conclusion.

Alternative Dispute Resolution no doubt has many advantages. There is a chance that you may quickly resolve your problem and you may be awarded compensation. The procedure is less formal court proceedings. In some cases, the decision may be binding on one of the parties, but not on the other party, thereby leaving one party free to pursue the matter through the court if he wishes. Alternative Dispute Resolution is usually much cheaper than going to court and the procedure is confidential.

ADR will be difficult in disputes between more than two parties, where the parties have not already contracted for a consolidated arbitration and the parties will not agree to arbitration, going to court is potentially the only way of getting interlocking disputes resolved by the same tribunal. [20]

A party that is proposing to enter a number of related contracts should particularly bear this situation at the drafting stage. There are two specific aspects to the matter. First, the related contracts should provide for an identical scheme of dispute resolution otherwise that party may find itself involves mediation or arbitration or litigation depending on which other party is involved. [21]

Secondly, the drafting must address the need for multi party proceedings, and establish a back to back set of contractual obligations for this purpose. A difference in the powers at different levels will make the mufti-party proceeding very difficult to conduct. [22] If these two aspects of the matter are not addressed, the parties will be better off, with litigation as the fall back method of dispute resolution. [23]

Where a number of actions raise substantially similar issues, such that a decision in one of them will probably enable the parties in the others to compromise their dispute, litigation is likely to be preferable [24] .

Where there is a difficult question of interpretation of common form contract, or of the application of a common form of contract to some event which affects a large number of similar contracts or the operation of a market, it

may well be preferable to obtain an authoritative ruling of the courts on the point. [25]

In numerous jurisdictions, legislation ensures that in the case of a consumer dispute, where the terms upon which the consumer purchased the goods or services includes an arbitration clause, the consumer has a choice of whether to take his dispute to arbitration or litigation. [26]

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Footnotes

[1] d'Ambrumenil, (1998) p. 5

[2] Bevan (1992) p. 2

[3] Bevan, (ibid) p. 2

[4] MccFarlane, J (1997) p. 1

[5] MccFarlane, J (ibid) p. 2

[6] MccFarlane, J (ibid) p. 2

[7] Palmer, M & Roberts, S (1998) p. 2

[8] Palmer, M & Roberts, S (ibid) p. 2

[9] Gillespie, A (2007) p. 469

[10] Gillespie, A (ibid) p. 470

[11] Darbyshire, P (1992) p. 12

[12] Slapper, G & Kelly, D (2003) p. 314

[13] Slapper, G & Kelly, D (ibid) p. 314

[14] Tweeddale, A & Tweeddale, K (2005)

[15] Brown, H & Marriott, A (1999) p. 12

[16] cited in Gillespie, A (ibid) p. 470

[17] Shipman, 2006 p. 182 cited in Gillespie, A (ibid) p. 470

[18] Boon and Levin, 1999, p. 373 Gillespie, A (ibid) p. 470

[19] Freeman, M (2006) p. 98

[20] Tackaberry, J & Marriott, A (2003)p. 22

[21] Tackaberry, J & Marriott, A (ibid)p. 23

[22] Tackaberry, J & Marriott, A (ibid)p. 23

[23] Tackaberry, J & Marriott, A (ibid)p. 23

[24] Tackaberry, J & Marriott, A (ibid)p. 23

[25] Tackaberry, J & Marriott, A (ibid)p. 23-24

[26] Tackaberry, J & Marriott, A (ibid)p. 24