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The Interface between ADR and the Courts

Margaret Bickford-Smith QC[*]

It is a privilege and a pleasure to give the first in what it is hoped will be a series of Chartered Institute of Arbitrators "Oxford Lectures". They have been instituted as I understand it with the aim of creating a forum for intellectual exchange between an experienced Oxford University graduate and members of the Chartered Institute.

Now I am indeed a card-carrying Oxford person. From the age of 13 I was brought up in Oxford, I went to school there, my mother was a City councillor who went on to become Lord Mayor of the City, and I followed my parents (who were both Oxford graduates) to Oxford University. I spent four years there studying Classics and Law. Whilst I was there I was elected Librarian of the Oxford Union; I met my husband and we were married; and in the fullness of time James our son went up to Oxford and did his degree and his doctorate there.

So I have a lot to thank Oxford for. And the least I can do in return is to give this lecture which I hope will prove worthy of its billing and also do a little to provoke thought.

I must thank the Chartered Institute for the opportunity to give this lecture: it is rare for a lawyer to have the occasion to sit back and think about such a broad topic. It has indeed been a luxury to consider my subject, as I was allowed to do, in a constructive way without the straitjacket of an adversarial system of litigation which tends to focus one's thoughts on the merits of a particular client's case and the demerits of the opposition.

So the theme of this lecture is the interface between ADR and the courts, and I propose to look in turn at mediation, arbitration and the court system. On arbitration we heard earlier this evening some compelling comments from Arthur Marriott. I endorse what he said, and I believe and hope that I shall build on that. At the conclusion of this lecture I have a small suggestion of my own about a way forward for the courts and alternative dispute litigation.

I should add that this lecture is about civil private law. I shall not be dealing with public law or family law to which many different considerations apply, nor shall I be dealing with the various other forms of alternative dispute resolution: adjudication, early neutral evaluation, conciliation, Med-Arb and so on.

My subject is the broader topic of the interrelation of the civil courts in England and Wales and their procedure with mediation and arbitration. I begin with some initial thoughts about the characteristics of each. There are of course exceptions to every rule but I want to look in very broad terms at some characteristics of each which deserve comment.

1. Methods of Disposal: Discussion

Mediation

First of all, *mediation*. Its structure as we know is very variable which is a very great merit. Frequently mediation will take the form of, or at least include, a joint meeting of the parties and the mediator: there will be some formality, but there is a wide spectrum from formality to informality over which the parties and the mediator can hover and descend. There may be, and in the United Kingdom there generally are, caucus/breakout meetings. If there have been such sessions, the parties can get back together midway as the mediation proceeds at any stage. The parties' experts may be there at the mediation actually trying to settle issues between themselves, or may be there to assist their instructing clients, or may be absent but at the end of a telephone, or may not be involved at all. Counsel similarly may or may not

[*] This is an edited version of the inaugural CIArb Oxford Lecture delivered on March 19, 2014 by Margaret Bickford-Smith QC. Since 2012 Margaret has been Chair of the CIArb London Branch.

be involved, instructed by each party, for one party, or not at all. These are merely some of the variables: and this short summary only begins to indicate how varied mediation can be.

But there is one thing that distinguishes mediation from what happens a lot in my own later specialist areas, personal injury and clinical negligence. In those fields frequently the parties have preferred to go down the route of having round-table meetings; and what happens in a round-table meeting, it cannot be adequately stressed, is absolutely not what happens in a mediation. In a round-table meeting there is no single person directing events: by contrast the point about a mediator is that he or she should be available to direct the proceedings, and to set the parameters and the structure of the day, in conjunction with the parties.

What mediation has is a bit of the factor of the "Day in Court". There is an opportunity for the parties, in an appropriate case, to face each other across a table and interact. It is not always an opportunity that either they or the mediator may think it is a good idea to take up: sometimes the parties are in personal terms, or even in terms of their legal advisers, so much at loggerheads that nothing is going to be gained by that. But generally there is the opportunity for personal interaction. For example I think a small volume could be written about the art of a personal apology from one party to another; taken advantage of correctly, an apology can be a compelling development in a mediation.

But the other characteristic about mediation that calls for comment is that the result is typically uncertain. Mediation is not rights-based as a process: it should have something to do with the rights of the parties, but it is not a necessary result of the process that what emerges will exactly fit the rights and obligations of the parties. Instead the result is likely to depend in large part on the needs and interests and interaction of the parties, which will not be exactly the same thing.

So all in all mediation is designed to be unstructured, flexible, litigant friendly and it is non-adjudicative. There may be an opportunity for the mediator to be an evaluative mediator: he or she may be asked to evaluate the issues. The mediator may or may not wish to take up the opportunity. They may take the "Let's be devil's advocate, let's ask questions" way of being implicitly evaluative but not specifically and expressly evaluative. So, frequently, what one encounters in a mediation is a facilitative approach, or something halfway between the evaluative and the facilitative.

Now, subject to an exception to which I shall return, the other essential thing to say about mediation is that what goes on in a mediation is confidential: confidential overall to the parties, and confidential (as to what is said in any breakout procedure or caucus that takes place) to the individual party entity which assisted by any advisers or representatives has shared facts or comments with the mediator.

Arbitration

Turning similarly to an initial overview of relevant aspects of arbitration, what we see is that to some extent arbitration has this in common with mediation: it too is, in general and subject to exceptions, confidential. But arbitration is adjudicative and once the arbitration reference is commenced (subject of course to opportunities for settlement by negotiation or indeed mediation) there will be a certain result. There may be something of a "Day in Court" factor in some arbitrations, i.e. those where there is a hearing as opposed to those conducted in writing. Procedure and practice are variable: in some cases they are fairly formal but the whole process is designed to be flexible, to be litigant friendly, in particular as to the disposal of what would otherwise be called interlocutory matters, with an opportunity for speed and relaxation of strict time limits and so forth. Nevertheless there is a structure there and dealings are business-like. There is of course the restriction of the right of appeal—in some non-UK jurisdictions there is greater restriction of the right of appeal—which means that you cannot have a re-hearing of the whole arbitration before a court.

In this respect it is notable that the restriction in the right of appeal in arbitration has increasingly been mirrored by limitations to appeal avenues in court proceedings.

The courts

And so we come to the courts themselves. What are the relevant features that we should identify in court procedure? The first and the most important is that the process is open and transparent. There has indeed recently been a clearly stated trend to transparency, and concern has been expressed about the dangers of what the press are pleased to call secret hearings. These are mostly in areas that are not relevant to the subject matter of this lecture—family law, public law and matters of that kind. But it is important to appreciate at the outset that what goes on in the courts is presupposed to be open justice.

The courts also provide a solution which is adjudicative; and once proceedings are commenced there should be (subject to settlement and so forth) a certain result.

In the courts there is supposed to be a "Day in Court" factor: the party who says "I want my Day in Court" generally will have it if the case is not disposed of before trial. It must however be acknowledged that the extent of that opportunity has been in recent years somewhat cut down because of the limitations placed on witness evidence. Various limitations apply but—in particular—the statement of a witness is routinely "taken as read" in chief. It has to be said that this can be something of a disadvantage to both the court and the litigant. The court may less easily be able to assess the "flavour" of a litigant as witness, his standpoint and what he is saying, and insofar as the litigant wishes personally to be able to address "that Judge" he or she may be disappointed in that they may very well not really have that opportunity.

Passing on to court procedure and practice, these are formal, prescribed, and themselves subject to precedent. And the procedure is altogether designed to be certain and not flexible, subject to permissible judicial discretion: it is supposed to be litigant-*fair* in the sense of impartial, and not necessarily litigant *friendly* in terms of the transaction of business. It is supposed to be structured, and business-like but in a different sense: not just in the sense of having regard to the business needs of the parties, but also the business needs of the State which is the court service that administers the system, and the business needs of the other court users. This is because, stacked up behind every case which is in court or nearing a court hearing, are all the cases that are waiting to come on.

2. Dispute Resolution by Mediation: Further Comment

I want now to pass to some particular comments about the downside and some disadvantages of these methods of disposal.

So, going back once again first to mediation, it always seems to me that the surprise is not so much that mediation has not taken hold as much as some individual mediators who would wish to practise in this sector would like: the surprise to me is that mediation has taken hold and succeeded to the extent that it has. Mediation numbers have been on the rise; mediation techniques are increasingly the subject of interest and comment. There are a plethora of training organisations large and small, down to some solo enterprises, which have sprung up. Gold standard accredited bodies are known and recognised and good quality continuing professional development is available.

But there are some aspects of mediation which give rise to persistent unease, not least among the legal profession. Now I speak as a friend of mediation: indeed I speak as a mediator myself. There is much to be said for the view that the more mediations there are the greater will be the confidence in this way of disposal and the less will be the cause for concern. But it has to be admitted there are some problems.

The first is a persisting problem about the choice of mediators. I have been interested (veering away to what I am not supposed to be talking about, the field of family finance

arbitration) to hear that as that method of disposal develops one thing that is concerning family practitioners and particularly solicitors is how exactly they go about their choice of arbitrators. So far as mediators are concerned, the problem of how to choose a mediator is a problem that continues and is unlikely to go away. As I speak, in 2014, those experienced mediators who started in (shall we say) the mid-1990s or thereabouts are much sought after, but they have been operating for 10, 20 years—maybe more. Those who are less experienced find it very difficult to get a start, they need experience under their belt to get recommendations and without experience how are you going to get experience? It is a circular argument. Further, not even all those who are experienced can be expected to be at the top of their game for every mediation on every day of the week: so reports of how individual litigants fared at the last mediation that *X* did for them may not be entirely fair or reliable.

One might ask: Well, can this not be helped by regulation? It seems to me that regulation is not particularly helpful either: indeed on analysis the logical answer is that bolting on a regulation framework to a problem about choice fails to address the real issue. Because the problem at the root of all of this is that any recommendation of individual mediators is essentially subjective. "*X* was a brilliant mediator in my mediation" put in another way all too often means, "I liked the result".

This difficulty arises out of an essential characteristic of mediation itself which raises concerns, I believe, amongst litigants themselves and their advisers, but also in the courts: namely that it is by nature confidential and it is not generally subject to review. There is an unease about this. Let's face it, the consequences could in theory be very serious. In some non-UK jurisdictions, for example, it would not be unknown for confidential sessions to be understood to be vulnerable to venality and corruption. Passing over this, as we can in relation to mediation sessions in the United Kingdom—though I ask myself rhetorically "How would you know?"—we come on to a problem which is in many ways equally if not rather more concerning: there is an obvious possibility that various things may in the more usual course of events go wrong in the course of a mediation. There is potential for misrepresentation by one party to another; for undue influence, or duress; for what is called economic duress. There are potential problems arising out of inequality of bargaining power between the parties; ignorance (through impecuniosity, or lack of proper advice) of one party about their rights; a wrong perception by a party as to what a mediator is saying, as to whether that mediator is or is not advising or urging settlement. And there is of course the possibility (which we hope that ethical and professional standards would prevent, but nevertheless there must *be* a possibility) of a mediator actually advising a party incorrectly about their rights.

Such mishaps will be—as one assumes—very rare indeed, and of course should not happen; but the fact that the whole process is confidential is nevertheless a problem. The dual problem is not only that mediation is confidential, but that it is also and overtly not a rights-based or a rights-orientated process but a needs- or interest-oriented process. As Professor Hazel Genn memorably said, mediation "is not about just settlement. It is just about settlement".[1]

So, so far as confidentiality is concerned, it is encouraging to know that as a result of Ramsey J.'s decision in *Farm Assist*[2] there are exceptions to what used to be thought to be the *absolute* confidentiality of what went on in a mediation. When I started out as a mediator I was told by the people that I sat with: "Well", they said,

> "At the end of this session I shall tear up my papers, I shall throw them away, I shall never refer to them again. It was confidential and that is that."

[1] Hamlyn Lectures, 2008.

[2] *Farm Assist Ltd (in liquidation) v The Secretary of State for the Environment, Food and Rural Affairs (No.2)* [2009] EWHC 1102 (TCC), Ramsey J.

It is now established that confidentiality is not absolute but qualified: on limited public interest grounds, a court may take evidence (including the evidence of the mediator) as to what transpired in the course of a mediation. I don't need to go into the details of all of that with this audience.

3. The Courts as Dispute Resolvers: Further Comment

Now we come on to the disadvantages of the courts. It always seems to me that where two or three lawyers are gathered together, nowadays there's a great deal of shaking of heads about the ills of the world. Lawyers are in this respect a bit like farmers. Farmers always used to complain about the weather; they now complain about politicians (of any colour), bureaucracy and the weather. Lawyers now complain about politicians (of any colour), bureaucracy and the court system. They all complain, farmers and lawyers alike, about funding.

It must be said that complaints about court funding have stark, statistical, support.

It seems to have taken the powers that be a long time to arrive at the conclusion that England and Wales cannot afford the system of public support for private access to justice which we have enjoyed since the heyday of the 1970s and 1980s. This has led to what can neutrally be described as a retreat by the state from the adjudicative process. We now have a situation that Lord Neuberger has described with commendable restraint and economy of wording in the foreword to the book that is before us.[3] After noting the rapid rise of mediation he goes on:

> "It is desirable that every dispute which can properly and fairly be resolved without going to court can be so resolved particularly when the sums and other issues that are at stake are, in objective terms, small. Further, while it seems to me that it is a fundamental requirement of a modern democratic society that access to the courts should be available to everyone, the cost of litigation and cutbacks in legal aid mean that, at least for the moment, this is more of an aspiration than a reality. So long as this remains the melancholy reality, arbitration and mediation represent an almost constitutionally vital service."[4]

At the same time Lord Thomas, the Lord Chief Justice, has said that owing in particular to the rise in the number of litigants in person, civil practice may have to be radically overhauled so that inquisitorial procedures are put in place in cases where litigants in person appear.

Also, the Government is set substantially to increase the court costs payable by litigants. The judiciary, as well as representatives of court users, have complained about this.

I have so far failed to mention the question of costs: the elephant in the room. The costs of litigation have escalated to such a degree that it has no longer been possible for the courts to overlook the problems that these increases have generated and where they fall. Just as the Woolf Report reforms to the Civil Procedure Rules caused a change in the culture of litigation, so the implications of the Jackson report are still being worked out in the courts; but change is now no longer a prospect for the future— it is already in progress.

And so we come to *Mitchell v News Group Newspapers Ltd*.[5] The case itself, a decision of a Court of Appeal delivered by the Master of the Rolls, could just possibly have been restrictively construed as applying only to the circumstances it covered until one looks at the express words of paragraph 34 onwards and in particular paragraphs 40–46. Paragraph 40 begins:

[3] Julio César Betancourt and Jason A. Crook (eds), *ADR, Arbitration, and Mediation: A Collection of Essays* (London: Chartered Institute of Arbitrators, 2014).

[4] Lord Neuberger, "Foreword" in Julio César Betancourt and Jason A. Crook (eds), *ADR, Arbitration, and Mediation: A Collection of Essays* (London: Chartered Institute of Arbitrators, 2014), p.xii.

[5] [2013] EWCA Civ 1537.

> "We hope that it may be useful to give some guidance as to how the new approach will be applied in practice. It will usually be appropriate to start by considering the nature of the non-compliance …"

and so it goes on, referring to trivial non-compliance and various other matters; and, going on to paragraph 46, we read:

> "The new, more robust, approach that we have outlined above will mean that from now on relief from sanctions should be granted more sparingly than previously …".

Time, and the focus of this lecture, do not permit further reference to the authority or the discussion of its merits and demerits.[6] So far as I am concerned, we must proceed upon the basis that we are where we are. For those of us who are practitioners, unless we get the opportunity to appear in a court where we can criticise or distinguish *Mitchell*, criticism is rather beside the point, and the room even for analysis is limited. We are under a duty to advise those whom we represent. The "new, more robust approach" impacts on those procedural matters where there has been default, argument will rage as to what is and is not trivial, and a potentially time-consuming regime of cost-budgeting is now in full swing. Whatever the reasons (and the reasoned justification for the reforms has been carefully advanced), litigation is not, or it is no longer, client friendly.

I ask myself, "What is client friendly?" And I see in the volume before us[7] an article from 2000 by my esteemed colleague in Chambers, and well-known arbitration figure, Andrew Bartlett QC. You will find it at p.472. It is entitled "*Client-friendly arbitration*".

It seems to me that the timing of that article was not fortuitous, because 2000 was the stage at which the Woolf reforms were beginning to work through the system. It was of course also when the Arbitration Act [1996] was relatively young and fresh. I commend the article to you for reading: it refers to the philosophy of the Arbitration Act, and goes on to deal with the question what clients do want, how arbitration can meet clients' needs, and the room for flexibility in the arbitration process.

4. Arbitration: The Way Forward

And so I move on to consider whether there is a way forward that we can practically try to promote. I am after all today speaking to the Chartered Institute of Arbitrators, and I have a small suggestion that I will as briefly as I can outline to you.

I call it "*AJAR*": which is short for *Ad-hoc Judicial Arbitration Route.*

The idea of judges sitting as arbitrators is not new—for example, most obviously, in the Technology and Construction Court—but it has to be said that it is not much used. The courts are not going to be particularly interested in giving up the time of their expensive judges and sending them off to arbitrations. But judicial arbitration can be a useful way of proceeding. It seems to me that it is possible to envisage a system of arbitration which would be user friendly, would take the pressure off the courts, and would relieve the pressure on those litigants who are currently and increasingly finding themselves, or in the future will be, stacked up behind litigant in person cases or cases that are taking a very long time.

This system would not apply to family work, and it would not apply to cases where there are litigants in person. But other than those cases it seems to me that it should be perfectly practicable at any stage after commencement of proceedings in court (by agreement of the parties, which is of course an essential arbitral requirement) to transfer a case to what might be called the *Judicial Arbitration Route*.

[6] For some discussion of these aspects from the standpoint of a commercial litigator, see J. Bickford Smith, "Default and its consequences: litigating in the post-Jackson world: A practical view from the Bar", Practical Law Company, December 2013, available at: *http://www.littletonchambers.com/articles-downloads/default-and-its-consequences-plc-jbs.pdf* [Accessed July 3, 2014].

[7] Betancourt and Crook (eds), *ADR, Arbitration, and Mediation: A Collection of Essays* (2014).

At whatever stage the parties were to decide that they wished to go to judicial arbitration the court, possibly after a short case management hearing, would wave goodbye to the case. It would see no more of the file, or anything to do with the case administration: the court file would simply be closed and it would be marked "Date […]: Transferred to arbitration" with transmission details. This point is important, and intended to be helpful to the court service: administrative time and therefore public expenditure would be kept to a minimum.

For those who are smart at mnemonics, *AJAR* means that we are hoping to push the door between the courts and alternative dispute resolution *AJAR*.

It is important that this arbitration route should properly be, and be seen to be, a *Judicial Arbitration Route*. It is important, in terms of confidence in the process, that the litigants and their advisers should have confidence in the arbitrator. It is important that the arbitrator should be a judge. Considering matters from the viewpoint of the parties to litigation, they have I believe the right to be assured that any nominated arbitrator is a judicial appointee before whom, had the dispute proceeded to a final court hearing, they might have appeared anyway: otherwise, from their standpoint, the scheme would not be truly a court adjudicative alternative to court resolution.

Judges are not all appointed as permanent judges who sit full-time: there are part-time judges. It would not be sensible to take away the full-time judiciary from sitting in the courts (which would defeat a major object of the exercise, namely un-clogging the lists, and lightening administration) but it seems to me that there is a good body of part-time judges—appointed recorders, deputy judges and former judges—who sit in civil cases who could sit as judicial arbitrators. Nowadays competitions for recorders are run periodically by the Judicial Appointments Commission (JAC), and those who are appointed are not merely qualified as barristers or solicitors but they have competed with others and been successful. Recorders by definition have experience of sitting in a judicial capacity.

There would be a question, if as I suggest the courts close their file, as to who would administer this procedure. It seems to me that the scheme for running such arbitrations could be along well-known lines, and is not new. The conduct and ancillary administration of an individual case would be done by the arbitrator. As to the administration of the scheme, and any necessary arbitration training for the part-time judiciary, the Chartered Institute of Arbitrators (a body with the Royal Charter which is about to celebrate its 100th anniversary in relation to arbitration matters) could do that. The CIArb would be able in the normal way to assign arbitrators drawn from a specially composed panel of part-time judges, recorders, deputies and so forth.

It would be necessary to train recorders and other part-time judges in award writing. Training in award writing would not be new to the Chartered Institute, with its acknowledged and long-standing expertise. In view of the judicial element which I have suggested in the staffing of the scheme, however, I would point out that this training could be done in conjunction with the Judicial College.

I add that, from the point of view of the Chartered Institute, it would be good if it could persuade some of these appointees to become Members of the Institute, possibly by a special route after training: this would be a welcome development, and a good route to a productive exchange of ideas.

Finally, and more generally, I believe that such a scheme would also give added impetus to private arbitration in England and Wales. In short, there might be more interest from litigators advising clients, who (knowing that ultimately they might go down the *Judicial Arbitration Route* after commencement of proceedings), might decide to pre-empt litigation altogether by opting for ad hoc arbitration with a chosen arbitrator before ever they reached the stage of litigation.

I would hope that this scheme if implemented would help the court system and add an extra element of flexibility to it. It should assist both the courts, and court users—litigators, representatives and litigants themselves.

And I would hope that it would give litigants the benefit of in-court resolution where appropriate, and alternative dispute resolution where it will best serve them, so that they can make use of the best elements of the various current routes to dispute resolution, which I have discussed today.