All-Party Parliamentary Group on Alternative Dispute Resolution (ADR)

Notes: Civil, Consumer, Commercial, Costs ADR
25 May 2016, 15:00-16:30, Committee Room 20, Palace of Westminster

Chair: John Howell OBE MP

Attendance

Parliamentarians

John Howell OBE MP
Christina Rees MP
Alberto Costa MP

Non-Parliamentarians

Peter Causton, ProMediate (UK) Limited and Civil Mediation Council
Chris Gill, Senior Lecturer in Administrative Justice, Queen Margaret University
Tim Hardy, Head of CMS Cameron McKenna's Litigation department, Chair of CIArb's Practice and Standards Committee (PSC)
Carolyn Hirst, Lecturer in Ombudsman and Complaint Handling Practice at Queen Margaret University.
Jo Holland, Small Claims Mediation (UK) Ltd
Michel Kallipetis QC, Civil Mediation Council
Paul Randolph, Civil Mediation Council
Andrew Ritchie QC, PIcARBS
Chris Wilford, Head of Policy, CIArb

In addition, there was an invited audience of ADR experts.

Introduction

1. The APPG on alternative dispute resolution (ADR) was launched in November 2015 to help change the culture of dispute resolution in the country by providing a valuable forum within Parliament to discuss the latest developments in ADR and to promote its wider use.

2. ADR mechanisms are a range of procedures that serve to resolve disputes generally involving the intercessions and assistance of a neutral third party. ADR mechanisms include arbitration, mediation, adjudication, expert determination and online dispute resolution (ODR). They provide a cost-effective and faster alternative to costly and time-consuming court process.

3. When parties enter into an ADR process, there are a variety of factors that come into play when deciding which mechanism to utilise for the resolution of the dispute. These include the nature of the dispute, the relationship between the parties, the interests of the parties (and positions), the amount in dispute, costs and speed: in short they choose the process most appropriate for their needs and interests

4. This third session provided members of the group with an overview of forms of civil, consumer, commercial, costs ADR, their advantages and disadvantages, as well as how they relate to each other and the courts. It followed a session on the 08 February 2016 which introduced the main forms of ADR and a session on the 15 March 2016 which explored family ADR.

5. Speakers provided an overview of consumer ombudsman, consumer mediation, consumer ADR, complex and multi-party commercial mediation, the psychology of civil mediation, commercial arbitration, and arbitration in clinical negligence. Parliamentarians then questioned them and an invited audience on a variety of topics including the current regulatory framework and the latest developments in the sector.

Key points

6. Chris Gill and Carolyn Hirst of Queen Margaret University considered that consumer ombudsmen could be distinguished from other forms of consumer dispute resolution and represented a distinct form of dispute processing, with its own functions, forma and limits. Furthermore, the distinct functions, forms and limits of consumer ombudsmen afforded them a particular zone of competence. The view of Ms Hirst and Mr Gill was that Consumer Ombudsmen's 'added value' made them suitable to dispute involving: high power imbalances; high potential for consumer detriment; significant consumer vulnerability; high levels of public interest; engagement of social and human rights in addition to contractual rights.

7. Ms Hirst explained that the three distinguishing features were
    I. Advice, information and support
    II. Inquisitorial approach (accessibility and learning); and
    III. Provision of feedback (industry and regulation)

8. Jo Holland provided an overview of the development of her practice and a critique of the implementation of the EU ADR Directive. Big business are the gatekeepers in this evolving environment and she believes that ADR services are being misused at present. She believes that engaging consumers and enforcement action against businesses refusing to engage in the process will tackle poor uptake, leading to ADR being used at a much earlier stage.

9. Peter Causton is founder and director of an ADR certified Provider, ProMediate (UK) which provides mediation services under the ADR directive. During his presentation, Mr Causton made the following points –
    i. ProMediate promotes equal partnership
    ii. ProMediate deals with small low value matters
    iii. There is a duplication of competent authorities
    iv. Competent authorities are demanding a fee
    v. Providing a service that consumers want to use but the way in which it is structured is off putting
    vi. Lack of advertisement of the scheme and ADR reforms
    vii. The scheme is not sustainable in its current form and required more compulsion

10. Michel Kallipetis QC presented to the APPG the top 5 things that he considered should be known about mediation as follows –
    I. Unlike litigation, mediation is not a spectator sport

II. Unlike litigation, the client and their advisors fashion the solution rather than a judge or an arbitrator
III. Unlike litigation, there are no rules and anything and everything which the disputants wish to discuss and resolve is open to them if they choose – you expect that the mediator has done their homework on the case
IV. Unlike litigation, the parties to a dispute can choose the mediator and speak to the mediator privately before or during the mediation, confident that all that they discuss is confidential and privileged, and will not be revealed to the other parties unless they choose to do so;
V. Unlike litigation, the disputants control the speed of the process and, most importantly, the cost.

11. Paul Randolph Mr Randolph referred to the psychology of civil mediation as 'litigating to mediate rather than litigating to trial' and sought to understand why parties are still prepared to litigate.
    I. Vindication
    II. Proved right
    III. Revenge
    IV. Money is a great publisher
    V. Neurological advancement
    VI. Government has a moral duty to protect

12. Tim Hardy looked at the alternatives to litigation and referred to the litigation volume which consisted some 2850 pages in comparison to the CIArb Guidelines of just 14 pages – he explained that both documents applied the same rules in many respects, however the Guidelines were much simpler. He added that new rules were being compiled alongside a new set of Business Arbitration rules for small businesses for up to £100kk and £150k for a counter claim within three months for a base fee of just £250.

13. Andrew Ritchie QC provided an overview of 8 problems with the courts and why arbitration for personal injury (PI) claims has a valuable role to play. The 8 problems were:

    I. Increase in costs
    II. Change in overriding objective
    III. Strict adherence to rules and multiple applications
    IV. Cost budgeting
    V. Everything on paper
    VI. No front desk staff in local county courts
    VII. Don't know which judge you will get
    VIII. Courts not coping with volume

14. In PI it has not been used sufficiently in the sector, different approaches to mediation that make it suitable for PI and clinical negligence. PIcARBS is simple, post-event agreement so after pre-action protocol so that it can go straight to arbitration. 16 QCs from major sets are signed up to the scheme which will set out to deal with claims within 28 days, with an estimated saving of £60,000 per case.

An online E5 system on a secure server supports the scheme. The NHS Litigation Authority have written to PIcARBS to state they are open to arbitration.

15. A general discussion followed which primarily focused on the implementation of the EU Consumer ADR Directive, as well as the need to raise awareness of ADR at a time of significant civil justice reform.

Summary

16. There remains a huge problem with regards to public awareness of ADR and the sector should take a leadership role in engaging citizens directly.

17. The implementation of the EU ADR Directive has not gone well and big businesses are not using ADR services effectively.

18. The Online Court being proposed by the Judiciary of England and Wales could play a massive role in fostering a culture change amongst the population at large. It is an opportunity the sector must seize, coupled with reforms to legal education and more active engagement of the wider public.

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