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MANDATING MEDIATION: THE DIGITAL SOLUTION

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Introduction

1. It is a pleasure and an honour to have been invited to deliver this year's Roebuck lecture.
2. I want to address a subject that has proved controversial across jurisdictions, namely mandatory mediation. There are actually two questions. First, the question of whether to mandate mediation within the context of civil proceedings (which include family and administrative proceedings, as being themselves properly called civil proceedings). The second question is whether if mediation is mandated, how that mandation is to be achieved, again within the context of civil proceedings.
3. As a means of answering these mandation questions, I want also to look at the place of mediation in the brave new world that I call the digital justice system we are creating in England and Wales.
4. I shall deal with these questions as follows: first, I will take a look at some European materials that form a useful backdrop to the issues raised by mandatory mediation. Secondly, I will explain briefly the theory behind our developing digital justice system. Thirdly, I will consider the reasons why mandatory mediation has been so controversial, Finally, I will explain why I regard digital justice systems as a solution to the difficulties thrown up by mandating mediation and explain how such mandation might occur in the digital context.

Some European materials that form a useful backdrop to the issues raised by mandatory mediation

5. Back in 2018, I co-chaired a project group comprising the European Law Institute and the European Network of Councils for the Judiciary. It produced a report entitled: *the relationship between formal and informal justice: the courts and alternative dispute resolution*, together with a statement of European Best Practice in relation to the approach that courts and judges should adopt in interacting with all types of (alternative) dispute resolution ((A)DR) processes.
6. The Statement addressed the circumstances in which judges should require parties to pause their litigation to undertake a mediation rather than immediately continuing their court-based dispute resolution process: it said that “judges should consider the parties’ concerns about speed, cost, and the fair determination of their legal rights as well as non-financial considerations such as the provision of apologies and the preservation of business, familial and other relationships” and the availability of legal advice and “power and informational imbalance”.
7. The Statement said that judges must preserve the parties’ access to court-based justice and compliance with article 6 of the ECHR. The key to that part of the Best Practice Statement was that judges had to ensure that the parties understood whether the mediation process was mandatory or voluntary and that judges had also to ensure that consent to a voluntary mediation process was fully informed and freely given.
8. The commentary considered the relationship between formal and informal justice – between courts and mediation processes, and the way in which they could be “combined, utilised or made to function effectively alongside one another”. It concluded that the possibilities were not limitless, as they were constrained by culture, consumer confidence and technology. It gave a boost to the online ‘multi-door court model’ where “any disputant [could] arrive at the portal or the court-house and expect to be directed to the appropriate [dispute resolution provider] after a triage process that determines the most effective approach to the solution of the complaint”.
9. I now realise that much of my thinking in relation to the development of digital justice systems has been conditioned by the work we did in producing that report now 4 years ago.
10. The “multi-door court model” bears a distinct similarity to the front-end of the digital justice system which I will describe in a moment. The second layer of that digital justice system with its range of pre-court pre-action portals is presaged in the Statement, where it said that “[s]ome [s]tates are developing ODR platforms that will aim to solve disputes that arrive on their portal by any available means including ombudsperson suggested solutions, mediation and court determination”, and “[o]ther [s]tates have adopted purely private web-based solutions that have the same effect”.

11. In September 2020, the ELI/UNIDROIT civil procedure rules were published. It had taken a superhuman effort to bring so many jurisdictions together to create a set of rules that could be applied to any of the many participating civil and common law jurisdictions. Rule 9(1) approved by ELI and UNIDROIT in September 2020 provided under the heading “Role of the parties and their lawyers” that “Parties **must** co-operate in seeking to resolve their dispute consensually, both before and after proceedings begin”. In the preamble at [40], the rules provide that: “It is a fundamental principle of the Rules that lawyers and courts must encourage parties, on a properly informed basis in appropriate cases, to make use of out-of-court ADR methods”. “The Rules also provide for in-court-Court settlements, in respect of which the court’s role is not restricted to rendering a decision that gives effect to an agreement reached by the parties, but rather enables the court actively [to] participate in the process that seeks to assist the parties to reach a consensual resolution of their dispute”.
12. It is interesting to note how much these European Rules intended for civil and common law systems are in tune with the direction of travel towards making (A)DR an essential part of the court-based dispute resolution process, whether digital or not.

A brief explanation of the theory behind the developing digital justice system in England and Wales

13. When I refer to a digital justice system, I mean one that is based online, or perhaps on-chain, and does not employ historic methods to identify the issues that need to be resolved. I am referring to a smart system every aspect of which is dedicated to one of two things: first, the identification of the real issues that divide the parties, and secondly the resolution of those issues at the earliest possible stage in the dispute.
14. The practical foundation of this smart system is actually simple. It is a common data architecture. A common and consistent approach to how information, ‘data’, about an issue or case is collected as it heads through the system towards the resolution of a case. Digital systems designed and built using these common building blocks or ‘data standards’, will be what allows all participants and contributors to the justice system, whether claimants, defendants, lawyers, mediators, or judges, to become integrated in a way which is simply impossible in the analogue world.
15. It is wise in this context to be aware of the reasons why it is so important to develop systems that are devoted towards resolving disputes at the earliest possible stage. That is, of course, because of the huge economic and psychological disadvantages of continuing dispute. The economic drag and loss of economic productivity caused to people and businesses involved in lengthy disputes at all levels of society is far greater than most people can imagine.

16. The digital justice system we are adopting in England and Wales will have a web-based front end that will help any would-be claimant, whether represented by lawyers or advisers or not, to establish where they need to go to assert their claim, and perhaps also help them to understand its legal elements. In most cases, that will then direct them to a pre-action on-line portal, whose essential purpose is resolution.
17. These pre-actions portals, of which we already have many, are mostly privately funded. They include Ombuds portals resolving disputes in different economic sectors such as financial services, energy supply, telecoms or health care. They include the Road Traffic Accident portal and the personal injury portal, already together handling some 600,000 road traffic cases annually. There are likely to be many of these pre-action portals, perhaps as many as 100, each dealing with a different kind of case.
18. The processes that the portal will take claimants through, may still in some cases come with an element of human interaction, but the administration of those processes will be smart and digital. What will matter most is that these portals will hold the information about the issue in a standardised way consistent with other portals and with the digital court system if the case has eventually to proceed from the pre-action portal space to the online court process itself. This means that, if all resolution attempts fail, the relevant data or information can be transmitted by an application programming interface (or API), directly into the digital court.
19. The third part of the funnel into which all cases will go, whether civil, family or administrative will be the court-based digital justice system itself. All court claims of whatever kind will, in due course I hope, be started and progressed online. By the end of the HMCTS Reform Programme early next year, almost all public and private family claims, civil claims and the major tribunal claims in employment, immigration and social security will all be started and progressed online.
20. The online process in both the pre-action portal space and in the court-based digital justice space will be directed towards identification and early resolution of the core issues that divide the parties. The process will use what I call 'decision trees', a series of questions guiding parties to the identification of the issues in the case, so as to obviate the need for lengthy complaints or statements of case, and highlighting where agreement already exists. Mediated interventions aimed at securing compromise will be integrated at every level. Those interventions will employ every available method from algorithms suggesting resolution of interim or interlocutory issues (or even the ultimate dispute between the parties) to online human mediation to early neutral evaluation by judges or remote or face-to-face mediations.

The reasons why mandatory mediation has been so controversial

21. There are a number of reasons why mandatory mediation has been so controversial. First, in many European countries, there is a generalised lack of confidence in the neutrals who offer mediation services. That has not, however, stopped some of these countries introducing mandatory mediation before allowing access to court systems, for example in Italy.
22. Secondly, in countries like the UK, the courts have suggested that delaying court proceedings to allow mediation to take place is or might be regarded as a breach of article 6 of the ECHR.
23. In *Halsey v. Milton Keynes General NHS Trust* [2004] 1 WLR 3002, my predecessor but one, Lord Dyson MR, said at [9] that “It seems to us that to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to the court”. He relied on *Deweert v. Belgium* (1980) 2 EHRR 439 at [49] where the ECtHR had said that the right of access to a court could be waived but that such waiver should be subjected to “particularly careful review” to ensure that the claimant is not subject to “constraint”.
24. In January 2021, I asked the Civil Justice Council to report on the legality and desirability of compulsory (A)DR. Its report was published on 12 July 2021. It concluded that mandatory (alternative) dispute resolution was compatible with Article 6 of the European Human Rights Convention and was, therefore, lawful. It said at [58-9] of its report that “any form of ADR which is not disproportionately onerous and does not foreclose the parties’ effective access to the court will be compatible with the parties’ Article 6 rights”. If there is no obligation on the parties to settle and they remain free to choose between settlement and continuing the litigation then there is not “an unacceptable constraint” on the right of access to the court. The logic, they thought, applied to (A)DR as well as Early Neutral Evaluation. In *Rosalba Alassini* [2010] 3 CMLR 17, the Court of Justice of the European Union had attached importance to the fact not only that the parties retained a free choice as to whether to settle or not but also that the ADR process was free and caused no delay to the ultimate resolution.
25. The Civil Justice Council thought that what mattered was that any cost and delay was proportionate. It concluded that more work was necessary to determine the types of claim and the situations in which compulsory (A)DR would be appropriate and most effective in analogue and online justice. They commented that their conclusions “placed another ... powerful tool in the box [and] the opportunity to initiate a change of culture in relation to dispute resolution which will benefit all concerned”.

26. I have repeatedly and publicly endorsed the Civil Justice Council's report, and I understand that the Ministry of Justice is currently actively considering whether and in what types of case to introduce mandatory mediation. They are starting with the consideration of doing so for small claims and in some private family cases.
27. The third reason why mandatory mediation has been controversial is that, certainly in the commercial context and perhaps in some other areas too, it is not thought that forcing parties into mediation actually works. It can harden their resolve to fight their case through the courts and generally entrench the parties' positions. I spoke last week at a conference organised by the Stockholm Centre for Commercial Law and the Oxford Institute of European and Comparative Law on Adequate Dispute Resolution Mechanisms and their interactions, at which the expert arbitrators attending were very clear that mediation mandated at the wrong time in a dispute's progress is most unlikely to succeed, and can have the effect of entrenching the parties hostile positions.
28. The fourth reason why mandatory mediation has been controversial is a jurisdictional one that arises under procedural codes applicable in various states. The question raised is whether, once the court is seized of legal proceedings, it is permissible for it to make orders aimed at requiring the parties to engage in a process aimed at reaching a consensual solution, rather than progressing the judicial resolution that the court process is designed to achieve. This problem is based on a premise that the courts and mediation are distinct and separate processes.
29. In England and Wales, this perceived problem is being resolved in part by the introduction of an Online Procedure Rules Committee designed to regulate, not only the online courts space, but also to provide governance for the pre-action portals which will aim to resolve a range of different kinds of dispute without the need for formal legal proceedings to be initiated. The Online Procedure Rules Committee will be making provisions designed to achieve resolution of legal problems in the digital space, so it cannot be suggested that it would be exceeding its jurisdiction by doing precisely what it has been established to do. The legislation for the OPRC was passed in May in sections 22-24 of the Judicial Review and Courts Act 2022. Its members will hopefully be appointed shortly and it should start its work by the end of this year.

Why digital justice systems are a solution to the difficulties thrown up by mandating mediation

30. Let me now try to explain why digital justice systems are, in many ways a solution to the difficulties thrown up by mandating mediation. I have already explained how an integrated digital justice system will work in England and Wales.

31. The process is peculiarly well suited at all stages to the integration of a variety of types of mediated intervention. Most commercial litigators see mediation as a separate staged process involving a trained neutral mediator agreed upon by the parties, and a face-to-face or remote process of caucuses and plenary sessions. It is the essence of that process that the mediators promote the conditions for offers and counter-offers to be made bringing the parties closer together, but do not themselves suggest the solution to the case. That is, of course, because once the mediator has done so and has had their suggested offer rejected, there is nowhere else to go. If the mediator changes the offer they have themselves suggested, one party or the other is bound to regard their impartiality as compromised.
32. In a digital environment, however, different processes are engaged. The issues for resolution are identified by asking and answering questions rather than by presenting statements of case drafted in an adversarial manner.
33. The pre-action portals are dedicated to resolution of particular types of claims. I have mentioned road traffic claims and the various ombuds processes already. It is important to understand that different types of claim are amenable to different types of online resolution approaches.
34. Broadly there are four types of claim equivalent to B2C, C2B, B2B and C2C: large corporation or state authority versus the individual; the individual against large corporation or state authority; corporate versus corporate; and individual versus individual. Family claims are, for example, in the first category for public law claims and in the fourth category for private law claims. Housing possession claims are in the first category. Debt collection claims are in the first category. Small consumer claims are in the second category and so on.
35. The importance of these categorisations is to understand how such claims can be resolved in the online space. With claims against individuals, the resolution process often needs to be directed at providing debt relief or insolvency mechanisms alongside enforcement processes, since few of those claims will be substantively defended. Claims brought by individuals against either other individuals or small corporates or even the state are, on the other hand, often substantively disputed and can only be resolved once the real questions in contention have been identified. That is where the decision trees come into their own. Individuals and consumers are often not represented by lawyers, so the process needs to be accessible, undertaken in simple language and properly directed. Commercial claims between businesses will probably be the last to be digitised, but they too will ultimately benefit from the changes being pioneered at the bulk end of the market.
36. The benefits that a digital justice system provides include far easier and better access to justice. By providing a common data standard throughout the case, a

digital justice system abrogates the need for repetition of partisan statements of case that become ever more aggressive and sometimes embellished. And critically a digital justice system allows for the proper integration of mediated interventions and a truly coherent dispute resolution mechanism. It is to that integration to which I now turn.

37. Pre-action portals can use different digital structures that are appropriate to the type of dispute they aim to resolve. Online ombuds processes are already designed differently as between financial services and energy to take two mainstream examples. But what most ombuds have in common is the tiered approach to resolution suggesting to the parties repeated online solutions for the issue identified until both parties accept the solution proposed. This is, of course, the exact antithesis of the approach that commercial mediators employ. I mention, as an aside, that we should not be afraid of offering different kinds of solutions suitable for different situations. There is more than one way to skin a cat. I was reprimanded by a French colleague when I used that expression recently. The reprimand reminded me how colourful, if sometimes unintelligible, is the English language!
38. Other pre-action portals, like the road traffic portal, put the claimant in touch with insurers and provide them with the details they need – medical reports and details of loss of earnings and replacement car hire costs etc – to allow those insurers make an appropriate offer to settle the claim. Again, a completely different approach to that which may well be necessary when an SME portal and an intellectual property portal are created to allow speedy resolution of claims made between small businesses.
39. But the point here is not the differences between the processes within each of these separate pre-action portals. It is that all of these pre-action portals and the interventions aimed at resolution within them lead to a large percentage of the claims being settled consensually without the need to enter the third layer of the putative digital funnel, which is the issue of digital court proceedings.
40. There is, therefore, ultimately often going to be no need to mandate mediation as a separate action within a digital justice system. The entire process is directed towards achieving resolution of the issue identified. That is not, of course, to say that mediation will not be one of the tools available within the digital justice system. It will. The Online Civil Money Claims platform in England and Wales, for example, has already dealt with some 300,000 claims in the last 3 years. It will likely be dealing with well over a million claims next year when bulk claims brought by utilities and major corporates will fall within its ambit. Within Online Civil Money Claims, there will eventually be bots or algorithms that suggest solutions to the parties as the claim progresses. For example, if the claim is against a builder for £1,000 for failing to erect a 100-metre fence, and the

defence is that he erected 50 metres of it, the bot might suggest that £500 was paid to settle the claim.

41. If such an intervention did not work, the next stage might be for the platform to suggest telephone mediation, whereby the parties would speak to a lawyer to try to resolve the issue already identified online. If a telephone mediation failed, one can imagine face-to-face mediation being proposed. Another report commissioned by the Civil Justice Council has proposed compulsory mediation for small claims. That will hopefully be introduced shortly, but we may find that the element of compulsion is less likely to be required as the smart components of the digital justice system become better developed and integrated. Most individuals and businesses embark upon claims and litigation to achieve speedy resolution of their problem. They are not looking for a lengthy and costly war of attrition. Some very few people may be, but the bulk are not. Once it is realised how efficiently the digital justice system brings about compromise, whether at the pre-action portal stage or at the online court proceedings stage, parties are likely to become even less resistant to the mediation processes offered.
42. It is worth emphasising two things about the digital justice system that I am talking about. First, great care must be taken to ensure that the systems are accessible to the vulnerable and the digitally disadvantaged. That is an imperative, but it should not mean that we neglect providing digital systems to deliver justice economically and quickly to the vast bulk of the younger population of today that expect everything to be delivered instantly at a few clicks on the mobile devices. Secondly, nothing I have suggested will prevent parties who are unable to settle their dispute within the portal or the digital space from seeking and obtaining a judicial resolution, undertaken face-to-face or remotely by a real judge. That will and must remain an available option in every case. I would still hope, however, that the vast bulk of claims will be resolved consensually without the need for as many judicial hearings as we have today.

Conclusions

43. Let me try now to draw a few of the threads together.
44. First, the European Law Institute/ European Network of Councils for the Judiciary Statement and the European Civil Procedure Rules, with which I began, allude to an obligation on the parties and their lawyers to seek consensual resolution of their disputes. That is a major departure from the approach with which I was brought up when I trained as a lawyer in the 1970s. It is, however, very much the approach that lawyers and litigants alike understand to be necessary in the modern environment.

45. Secondly, whilst mandation is desirable and, I think, lawful in the analogue world to force the parties to consider consensual solutions even if they are determined to continue their dispute, it is likely to be less important in the digital world, where the process will be different.
46. Finally, returning to the title of this talk: *mandatory mediation: the digital solution*, I think it is obvious that the creation of a digital funnel designed at every stage to identify issues and resolve them, with integrated mediated interventions at every stage, will ultimately render the issue of mandation academic. Mandation may still remain a useful tool in the box in some specific kinds of case as we build the digital justice system, but it is likely in the future to be unnecessary to impose a mandatory formal mediation at a particular stage in every case. The frequency and diversity of suggested mediated interventions will mean that the parties will inevitably be exposed to the possibility of compromise at times when they are amenable to it.
47. I look forward to answering your questions.