

JDRN Country Report England and Wales

The below report provides a brief, high-level, overview of Judicial Dispute Resolution (JDR) process in England and Wales, focusing on Civil, Family and the Employment Tribunal. There are different arrangements in each jurisdiction and local arrangements across the country. It would be impossible in this short overview to adequately cover all the different variances.

1. Introduction to the country and its legal framework

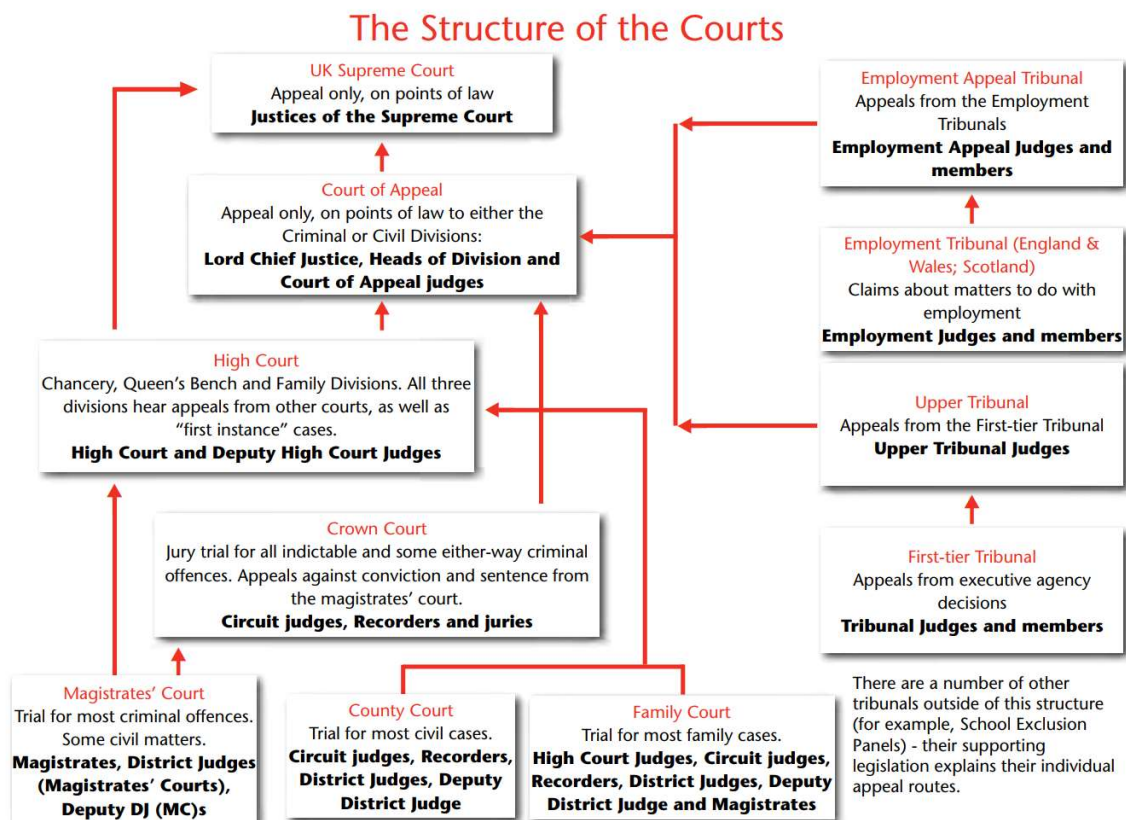
a. Overview of the Country's legal system

What is the country's legal system based on? For example, is it based on the civil or common law system, or a hybrid of the two?

The legal system in England and Wales is a common law system, meaning the law is declared by judges, derived from custom and precedent.

How are the courts structured? Are there specialist courts like family courts or constitutional courts?

Different types of cases are dealt with in specific courts. The structure of the courts is shown in Figure 1 below:¹



¹ Figure 1: diagram of the structure of the courts in England and Wales.

*At which level of the judiciary is the JDR process or elements of that process implemented?
To what extent is the JDR process implemented?*

It is enshrined in the procedure rules governing each jurisdiction in England and Wales that judges will try to facilitate resolution.²

The majority of cases that use JDR are below the High Court and are therefore heard by Circuit Judges and District Judges. There are examples of 'soft' JDR being used throughout the system, where judges use their judicial discretion to encourage dispute resolution (DR) at various points in the process.

There are numerous pilots and local DR initiatives happening in court centres across England and Wales. Judges also provide early neutral evaluation in order to assist in narrowing issues and in settlement.

2. Objectives of the Judicial Dispute Resolution (JDR) process

a. What was the impetus for the introduction of JDR process and the use of dispute resolution modalities?

There was no fixed impetus for the introduction of the JDR process and the use of dispute resolution modalities in England and Wales. Some of the advantages of JDR process are covered in the answer to question *b* below.

b. What are objectives and key outcomes of the JDR process?

The main objective of the JDR process is to provide swift and cost-effective access to justice for suitable cases.

Key outcomes: The JDR process may lead to settlement. Even in cases that do not settle, it can help narrow the issues. JDR can also assist in preserving the relationship between parties. If JDR is successful it benefits the system as a whole, not just the parties, as it frees up court resource which can be allocated elsewhere.

3. Legal framework for the JDR process

a. What is the source of the court's authority to implement the JDR process, including the use of dispute resolution modalities (e.g. legislation, rules of court, practice directions, convention, inherent case management powers, inherent jurisdiction of the court, case law etc)?

Answers to *a* and *b* are dealt with together in the answer to question *b* below.

b. Are there specific legislation, regulations or other guidelines to enable or allow the judge presiding over the JDR process to carry out judicial mediation, early neutral evaluation or employ other related JDR modalities (which traditionally are not regarded as part of the role of the judge)?

² Civil Procedure Rules: [Rules & Practice Directions - Civil Procedure Rules \(justice.gov.uk\)](https://www.justice.gov.uk/civil-procedure-rules); Family Procedure Rules: [Family Procedure Rules \(justice.gov.uk\)](https://www.justice.gov.uk/family-procedure-rules); Employment Tribunal Rules [Employment tribunal procedure rules - GOV.UK \(www.gov.uk\)](https://www.gov.uk/employment-tribunal-procedure-rules).

The primary sources of law in England and Wales are legislation and case law. The jurisdictions have procedure rules which govern their respective practice and procedure. For example, the Civil Procedure Rules (CPR) are used by the Court of Appeal, High Court and County Courts, the Family Procedure Rules (FPR) are used by Family Courts, the Employment Tribunal Rules of Procedure are used in the Employment Tribunal. The overriding objective seeks to ensure that parties to litigation are dealt with fairly and expeditiously. Part 1.4 of both the CPR and FPR obliges the court to further the overriding objective by “actively managing cases” including the use of dispute resolution.³ A similar sentiment is included in part 3 of the Employment Tribunal Rules of Procedure which states “[a] Tribunal shall wherever practical and appropriate encourage the use by parties of the services of ACAS,⁴ judicial or other mediation, or other means of resolving their disputes by agreement”.⁵ Civil Procedure Rule (CPR) 3.1(2)(m) authorises the court to “take any other step or make any other order for the purpose of managing the case and furthering the overriding objective, including hearing an Early Neutral Evaluation with the aim of helping the parties settle the case”.⁶

An example of case law is Norris J’s judgement in ***Seals & Anor v Williams* [2015] EWHC 1829 (Ch)** where the legal representatives for the parties are commended for proposing an ENE hearing (paragraph 3). Paragraph 3 also sets out some of the advantages of the ENE process.⁷

4. Details of the JDR process

a. Description of the JDR process

What are the characteristics of the JDR process? Which dispute resolution modalities (e.g. early neutral evaluation, judicial mediation) are practised?

The types of dispute resolution modalities in England and Wales include:

- ENE hearings: a hearing where parties appoint a neutral, often judicial, evaluator to assess the strengths and weaknesses of each side’s case. The evaluator does not decide legal issues or advocate a way of resolving matters. ENEs are usually employed at an early stage in proceedings. If the case does not settle at this stage, the judge who has acted as the evaluator is excluded from any further involvement in the case. Parties can also appoint an evaluator on a private basis.
- Dispute Resolution Hearings (DHR): take place after an application has been made regarding a financial or children’s matter. The First Hearing and Dispute Resolution Appointment (FHDRA) is the first of these hearings used in family proceedings. In financial proceedings, the first hearing is known as the First Directions Appointment (FDA).

³ CPR part 1.4 <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part01>; FPR part 1.4 https://www.justice.gov.uk/courts/procedure-rules/family/parts/part_01 (accessed 20 April 2022).

⁴ ACAS is the Advisory, Conciliation and Arbitration Service.

⁵ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1032803/consolidated-rules-october-2021.pdf

⁶ [PART 3 - THE COURT’S CASE MANAGEMENT POWERS - Civil Procedure Rules \(justice.gov.uk\)](https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part03)

⁷ [Seals & Anor v Williams \[2015\] EWHC 1829 \(Ch\) \(15 May 2015\) \(bailii.org\)](https://www.bailii.org/uk/ew/casereport/2015/Seals%20%26%20Anor%20v%20Williams%20%5B2015%5D%20EWHC%201829%20%28Ch%29%20%2815%20May%202015%29.html)

- FDR hearing: the FDR hearing takes place after the first appointment hearing (FDA) which is largely procedural. An FDR is a court-assisted negotiation process in family cases where parties appear before a District Judge. FDR-type hearings are also used in some types of Business and Property Courts cases in Birmingham.
- Employment Tribunals judicial mediation scheme: suitable cases are identified by an employment judge and parties are offered judicial mediation on a voluntary basis.
- Issues Resolution Hearing (IRH): used in care proceedings after the case management hearing to try to resolve outstanding issues. Hearings are in front of a judge or magistrates assisted by a legal advisor.

In addition to the formal examples of JDR above:

- Many judges also use DR 'soft skills' to facilitate negotiation.
- There are various dispute resolution pilot schemes in England and Wales. For example, in Birmingham and Hereford the use of DRH hearings in small claims (excluding road traffic accident claims where liability is in dispute) is being piloted.

How is the JDR process carried out? Is the JDR process conducted online? Are technological tools used to facilitate the JDR process?

The JDR process can be carried out by telephone, video hearing or in person. The judge will determine what is appropriate for the particular case and the parties involved. The judge will take into account the request of parties.

The Master of the Rolls, Sir Geoffrey Vos, has spoken at length about the digital justice vision for England and Wales. In a speech on mediated interventions within the court DR process in 2021, he explains that in the future online mediated interventions could follow a number of steps: firstly an Artificial Intelligence bot suggests a resolution, if unsuccessful the judge looking to make directions in an online case may be able to see, and suggest, an obvious resolution, thirdly telephone mediation and finally face-to-face mediation.⁸

Do judges conduct early neutral evaluation and judicial mediation or are these outsourced to third parties?

Early neutral evaluations can be carried out by the judiciary. Judges can also suggest that parties go to private ENE in appropriate cases, this individual is likely to be a judge, retired judge, or Queen's Counsel.⁹

The Small Claims Mediation Service is a free service offered by Her Majesty's Courts and Tribunals Service (HMCTS) for small claims up to £10,000, facilitated by a trained HMCTS mediator.¹⁰ Although this is not an example of JDR, it is an example of DR offered by the courts.

⁸ <https://www.judiciary.uk/wp-content/uploads/2021/10/Master-of-the-Rolls-GEMME-Mediated-interventions-within-the-Court-Dispute-Resolution-Process.pdf>

⁹ Queen's Counsel are barristers or solicitor advocates who have been recognised for excellence in advocacy.

¹⁰ HMCTS is the branch of government that oversees the operational management of the courts.

An example of an outsourced form of mediation is the Mediation Information and Assessment Meeting, which is conducted by a trained mediator (more information on non-court dispute resolution in Family proceedings can be found in FPR part 3).¹¹ Other examples include the High Court Mediation Scheme Court of Appeal Mediation Scheme (both of which are outsourced to the Centre for Effective Dispute Resolution) and arrangements with local providers in local areas.

b. Eligibility criteria for the JDR process

Is the JDR process mandatory or optional? Is it mandatory for certain types of disputes only?

At present, the JDR process in England and Wales is largely optional.¹² The question of compulsory mediation was explored in a recent Civil Justice Council report in 2021. The report concluded that mandatory (A)DR is compatible with Article 6 of the European Human Rights Convention, and therefore lawful.¹³ Annex 1 of the report explores existing procedural rules encouraging parties to engage in ADR including:¹⁴

- CPR 3.1(2)(m): see for example **Lomax v Lomax** [2019] 1 WLR 6527 where the Court of Appeal held that CPR 3.1(2)(m) does not require that the parties consent to ENE (and that it would be contrary to the overriding objective to imply such a requirement) and said court guides were incorrect in stating that ENE can't be ordered without the consent of the parties. It emphasised that ENE is part of the court process (as opposed to an obstacle to reaching court).¹⁵
- FPR 9: under FPR part 9 the court has a duty to order an FDR appointment. Both parties must attend unless the court orders otherwise. The role of the judge during the FDR appointment is not outlined in detail in either the FPR or Practice Direction 9A however the Family Justice Council's best practice guidance suggests that the role of the judge falls between two phases, ENE followed by mediation.¹⁶
- Road Traffic Accidents (RTA) Small Claims Protocol: the new pre-action protocol applicable to these claims makes clear that parties are expected to try and settle, with court proceedings as a last resort.¹⁷
- ACAS Early Conciliation: under the Employment Tribunals Act 1996 a person may not present an application to institute Employment Tribunal proceedings without an early conciliation certificate from ACAS.¹⁸

As recommended by the Civil Justice Council report on the resolution of small claims, the Ministry of Justice are exploring policy options for introducing a model of post-issue automatic referral to mediation within the County Court.¹⁹

¹¹ [PART 3 - NON-COURT DISPUTE RESOLUTION \(justice.gov.uk\)](#)

¹² Exception is the FDR which is included in the FPR.

¹³ <https://www.judiciary.uk/wp-content/uploads/2021/07/Civil-Justice-Council-Compulsory-ADR-report.pdf>

¹⁴ [Civil-Justice-Council-Compulsory-ADR-report.pdf \(judiciary.uk\)](#) (Annex 1 pp. 49-

¹⁵ CPR 3.1(2)(m) [Civil-Justice-Council-Compulsory-ADR-report.pdf \(judiciary.uk\)](#);

¹⁶ https://www.judiciary.uk/wp-content/uploads/2014/10/fjc_financial_dispute_resolution.pdf

¹⁷ <https://www.justice.gov.uk/courts/procedure-rules/civil/cpr-pap-update-feb-2021.pdf>

¹⁸ [Employment Tribunals Act 1996 \(legislation.gov.uk\)](#)

¹⁹ [SMALL CLAIMS \(judiciary.uk\)](#)

Judges can also encourage DR by considering an unreasonable refusal to participate in DR when awarding costs. An example of this can be seen in the RTA Small Claims Protocol which makes clear that parties are expected to attempt to settle the claim and that a failure to follow the Protocol will result in costs consequences.²⁰

When would the court recommend JDR process to parties?

The decision to recommend JDR process to parties lies with the judge who will determine whether it is appropriate. Certain cases, for example where there is evidence of domestic violence, child protection concerns, urgent risk to life and some housing cases will likely not be deemed suitable.

c. Training of judges conducting the JDR process

The Lord Chief Justice is responsible for training the courts' judiciary in England and Wales. These responsibilities are exercised through the Judicial College. The Judicial College's programme is updated annually. Discussions are ongoing about how best to include soft skills necessary for ENE and encouragement to settle in appropriate cases in future judicial training.

d. Statistics on the JDR process

There are no formal publications of statistics relating to the effectiveness of the JDR process. However HMCTS has conducted ad-hoc analysis of various local JDR schemes, revealing mixed results. In some cases, settlement rates are well over 70%, in other cases settlement rates are closer to 50%. Evaluation remains ongoing to fully understand impacts but there is likely an overall benefit to parties with earlier resolution and the efficient operation of the justice system due to judicial time saved.²¹ A wider national comparison is not possible due to a lack of data.

²⁰ <https://www.justice.gov.uk/courts/procedure-rules/civil/protocol/pre-action-protocol-for-personal-injury-claims-below-the-small-claims-limit-in-road-traffic-accidents-the-rt-a-small-claims-protocol#4>

²¹ Figures from unpublished statistics from Birmingham and Kent, Surrey and Sussex.