INAUGURAL MEETING OF THE
INTERNATIONAL JUDICIAL DISPUTE RESOLUTION NETWORK

OPENING SPEECH ON BEHALF OF ENGLAND AND WALES

SHARING EXPERIENCES OF THE JDR PROCESS

1. It is a great honour to have been asked to deliver this speech at the inaugural meeting the International Judicial Dispute Resolution Network on behalf of the Judiciary of England and Wales and to share our experiences of the JDR process. We are all privileged to be involved in this important development in dispute resolution which will transform the service we provide to parties to litigation and create dispute resolution mechanisms which minimise delay, are proportionate, flexible and suited to the modern world.

2. I am the lead judge in relation to alternative dispute resolution on behalf of the judiciary in England and Wales. My brief includes encouraging all forms of alternative dispute resolution as part of the judicial process both in person and online and whether judge-led or conducted by a third party. We are in the midst of an ambitious reform project which is intended to bring justice into the digital age and increase access.

Introduction

3. As you will know and will have seen from our "Country Statement" ours is a common law system. It is a combination of statute and law declared by judges, derived from custom and precedent.

4. The bulk of small and straightforward civil claims are dealt with in the County Court by district judges with more complex cases being heard by circuit judges. In general, cases with a value over £100,000 go to the High Court. We have specialist courts within the High Court for a variety of matters including family, business and property

matters, technology and construction and pure commercial matters. We also have a well-developed tribunal and ombudsman system. In particular, tax, property and employment matters are generally dealt with in the tribunals with second appeals to the Court of Appeal.

Online in outline

5. As I have already mentioned, we are in the midst of an ambitious reform program under which it is intended that all claims will be commenced online and will be subject to an integrated system in which alternative dispute resolution plays a part at every stage. The Online Civil Money Claims and the Damages Claims Online portals are already active and will be joined by Possession Claims Online. Those systems encourage dispute resolution from the start both by way of suggestions built into the system and if necessary, case officer or judge led intervention.

Small claims - DRH

6. At the moment, small claims are dealt with, for the most part, by District Judges. They form the bulk of all civil claims. There are approximately 94,000 annually. District Judges have long recognised the benefits of rigorous case management, both from the point of view of the parties and the court system and have practised that art. As we mentioned in our Country Guide, the principle that judges should seek to facilitate the resolution of disputes is enshrined in the procedure rules for each jurisdiction in England and Wales.

7. A recent Civil Justice Council report (Resolution of Small Claims – January 2022) has suggested that all such claims worth under £500 should be required to mediate and that complex and higher valued small claims should be the subject of a dispute resolution hearing.

8. In addition to those proposals, one of the positive side effects of the Covid 19 pandemic is that those case management practises have been highlighted, encouraged and monitored in order to illustrate their efficiency.

9. In a number of centres around the country, a dispute resolution hearing ("DRH") has been introduced in suitable small claims. The small claims are block listed and the district judge explores the potential for settlement with the parties. The approach is somewhere between early neutral evaluation and informal judicial mediation. Emphasis is placed upon any obvious weaknesses in the particular case whether legal or evidential, and the uncertainty, stress, delay and expense caused by litigation. The DRH also gives the judge the opportunity to give the parties a sense of proportion in relation to the case itself and the costs likely to be incurred.

10. Not only are cases settled but robust case management gives the judge the opportunity to identify the real issues in the case, if necessary, to strike out hopeless claims or elements of claims and to give further directions in order to progress matters smoothly and efficiently at the least cost and time, should they proceed further.

11. The statistics available suggest that around 48% of cases settle on the day as a result of such intervention. Those which are listed for a final hearing require a shorter listing time. It is also possible to deal with all but around 15% of those cases without a face to face hearing. Overall the settlement rate in the courts where the DRH has been introduced have remained [well] above the national average and a considerable amount of court time and resources has been saved.

12. The saving in court time is less dramatic. Care needs to be taken to balance the resources necessary for an effective DRH hearing against those which may be saved if a settlement is not reached. Obviously, it is important that the judge has the opportunity to gain a proper understanding of the case in advance of a DRH. This time must be factored in and may affect overall capacity for listing. Furthermore, in our system, a different judge must be available to hear the trial if the matter does not settle. That may be difficult to achieve in small court centres and has led to the need

to rely upon judges from elsewhere. This may lead to more hearings taking place online.

13. To complete the picture, I should add that a free non-judicial mediation service is offered for all small claims worth less than £10,000. The mediation is carried out by a neutral trained mediator.

Multi-Track Settlement Meetings

14. Settlement meetings have also been introduced in some court centres for multi- track cases. These are more complex cases of a higher value. They are dealt with by circuit judges who are more senior than district judges.

15. Suitable cases are listed for a day's confidential settlement meeting. The judge uses a variety of techniques akin to mediation and early neutral evaluation. In the pilot conducted in Kent, Surrey and Sussex, the judge never sees the parties separately. All negotiations and offers are required to take place and to be made in the presence of the judge and "behind the scenes" discussions are discouraged.

16. The meetings take place early in the litigation process shortly after the case management conference, unless expert evidence is required. Where the case turns upon expert evidence, the settlement meeting takes place after the joint expert's report is available or after experts have given a joint statement.

17. Such meetings are held in all types of multi-track cases except committals and commercial landlord and tenant lease renewals.

18. Cases are listed for one day and the judge hold two staggered start meetings each day. The judge goes back and forth between the two meetings, giving the parties time to give their representatives instructions in the meantime.

19. The data available from a small sample suggests that 41% of cases settle as a result of the judge led settlement meetings. This has led to a significant saving in court time of something in the order of 95 sitting days. In fact, 34% of cases listed for a settlement meeting settled merely as a result of the listing, without the meeting having to take place. 43% of cases settled at the settlement meeting, 17% after the settlement meeting but before the pre-trial review, 1% at the pre-trial review and 5% after the pre-trial review but before trial itself. The feedback from the professions and the parties is positive and some parties now positively request settlement meetings.

20. Once again it is important to factor in that judge led settlement can only be an effective tool if the judge is given sufficient time to prepare and has a proper grasp of all of the issues in advance.

21. Although one size never fits all and there may be many opportunities for settlement, for the most part, in both small claims and multi-track, it is likely that the sweet spot for settlement will fall at a relatively early stage in the proceedings before too many costs have been incurred and the parties have become completely entrenched.

22. Most recently, a judge in the Technology and Construction Court proposed a standard order for domestic property renovation disputes in order to facilitate settlement. (The Sky's the Limit Transformations Ltd v Mirza [2022] EWHC 29 (TCC)). He proposed that directions were given at the first case management conference requiring only limited disclosure, a single joint expert and a stay for mediation. If the parties are unwilling to mediate, then a compulsory ENE should take place before another judge.

Family

23. I should just mention that dispute resolution tools have long since been used in our Family courts. Mediated Information and Assessment Meetings take place in all private family matters before proceedings commence. All alternative dispute resolution mechanisms are explained to the parties.

24. Financial dispute resolution hearings ("FDR"s) are also entrenched in family disputes. They are conducted, more often than not by a judge. They are also occasionally conducted privately by third party mediators, who are often well known members of the profession or retired judges. Since 2020, approximately 9,000 FDRs have taken place annually.

Tribunals

25. A judicial mediation scheme is part of the established landscape in the Employment Tribunal. Formal judicial mediation has also taken place in residential property and land registration cases in the First Tier Tribunal (Property Chamber) for some 12 years. A mediation is offered at the first opportunity before the parties become entrenched. "Mediation friends" have been provided to assist unrepresented parties and administrative staff have been given mediation familiarising training in order to enable them to provide the parties with relevant information and support. These initiatives increased the take up of the mediation offer. In the last six months, approximately 62% of cases which went to mediation were settled.

Early neutral evaluation

26. Early neutral evaluation is available not only as a tool within the DRH or settlement meeting format. It is available throughout the system, including, as I have just mentioned, the TCC. It has been used in the Business and Property Courts and the Commercial court.

27. A good example is a group of three related claims which were about property development joint venture (JV) agreements and allegations of wrongdoing of various kinds which the subject of ENE in the Business and Property Courts. The issues ranged from allegations of wrongly spending venture funds on pursuing a professional negligence claim against a solicitor, wrongly diverting a purchase opportunity to one of the venturers, failure to account properly for income or deal to deal with it according to the terms of the JVA, and other complaints.

28. The judge spent 2 days pre-reading the bundles and the position statements which had been limited to 40 pages, and then had a half a day hearing to allow each side to respond to the other's position statement and to answer the judge's questions. It then took approximately 2 days to re-read the documentation and write a short form of decision with reasons.

29. After the ENE, the parties agreed a stay of all three actions and the matter has not come back to court. The saving in court time and costs will have been considerable.

30. Although ENE is a very useful tool, it too has its pitfalls. One must take care not to allow it to become yet another weapon in the war of attrition between the parties. Without careful management, it may increase delay, become a drain on court resources, especially as another judge must hear the trial if the matter does not settle, and inflate the cost of the proceedings.

Judicial Training

31. None of this can be achieved unless judges are confident to step beyond their traditional role and engage in assisting settlement. We recognise that judges need the appropriate soft skills to achieve the desired goals both for the parties and the judicial system. They also need to take a more pragmatic view of their role. In order to facilitate that change, we are looking to introduce soft skill elements in our present training courses in order to give judges the ability to make that shift and to carry out their wider function with confidence.

Third Party Mediation

32. We are also making use of court approved and appointed mediators (small claims mediation) and third party mediators.

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