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The new landscape for ADR post-Churchill

Rachael Johnson Wednesday 21 February 2024



The UK Court of Appeal's decision on alternative dispute resolution (ADR) in the Churchill case has drawn further attention to the potential role for mediation in resolving issues. *In-House Perspective* considers what mediation brings to the table for businesses and their counsel.

In November 2023, the UK Court of Appeal found that parties to a dispute can be ordered by the court to engage in alternative dispute resolution (ADR). The judgment, handed down in the *Churchill v Merthyr Tydfil County Borough Council* case (*Churchill*), overturned a previous ruling in the *Halsey v Milton Keynes General NHS Trust* case (*Halsey*), which argued that compulsory ADR 'would be regarded as an unacceptable constraint on the right of access to the court'.

Jane Colston, Co-Vice Chair of the IBA Litigation Committee and a partner at Brown Rudnick in London, says 'the Court of Appeal's decision in *Churchill v Merthyr Tydfil* confirms the integral role ADR and mediation play in effectively resolving disputes'. She argues that by overturning the *Halsey* judgment and treating ADR positively, 'the Court has both encouraged parties to think strategically when approaching complex dispute resolution and supported parties seeking to resolve disputes in a cost-effective and fair manner'.

“The Court [in *Churchill*] has encouraged parties to think strategically when approaching complex dispute resolution

Jane Colston

Co-Vice Chair, IBA Litigation Committee

The judgment in *Churchill* reflects a broader rethink of the priorities of dispute resolution. There's a growing understanding that the courts are not the only place to access justice, and that mediation and other forms of ADR should play a greater role in resolving disputes. Sir Geoffrey Vos, Head of Civil Justice in the UK, has said 'ADR should no longer be viewed as "alternative" but as an integral part of the dispute resolution process; that process should focus on "resolution" rather than "dispute"'.

Abhijit Mukhopadhyay, former Website Officer of the IBA Corporate Counsel Forum and President (Legal) & General Counsel at Hinduja Group, says it has become 'a universal feature' for judges across jurisdictions to ask whether mediation has been undertaken or attempted. He says this has become more common over the past decade.

According to Helen Dodds, an international lawyer and former Global Head of Legal, Dispute Resolution at Standard Chartered Bank, ADR has historically been less common in emerging markets. Sometimes general counsel will need to alter their approach to disputes depending on the jurisdiction they're working in.

For some, the way to shift the focus onto resolution rather than dispute is to make mediation mandatory, either before going to trial or before a judgment is reached. The judgment in *Churchill* will assist in making mediation mandatory in the UK. Exactly how that might be implemented in practice is up for debate. For William Wood KC, an international commercial mediator at Brick Court Chambers in London, the big question post-*Churchill* is what will replace *Halsey*. It's difficult to say, for example, what sort of sanction should be put in place for not obeying an order of the court to mediate. Options could include dismissal of the claim or striking out a defence.

General counsel working internationally are likely to have carried out business in jurisdictions where mediation is already mandatory, such as Italy. Federico Antich, Member of the IBA Mediation Committee Advisory Board and Founder of Studio dell'Avvocato Antich in Florence, says 'the Italian experience shows [mandatory mediation] can be done in a very easy way, in a very accessible way'.

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Member, IBA Mediation Committee Advisory

Routes to access justice

In overturning *Halsey*, *Churchill* removed its concern that mandatory mediation amounts to a denial of justice. *Halsey* referenced Article 6, paragraph 1 of the European Convention on Human Rights (ECHR), which states that ‘everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law’.

Antich says the *Halsey* judgment was flawed in mentioning this section of the ECHR because ‘it does not say what the party’s lawyers [...] convinced the court to sustain.’ He argues this part of the ECHR only refers to the need for a swift trial, which mediation can provide. Therefore, he argues, ‘there is no reason to consider mediation as way to block the access to court’.

The question of whether access to justice means access to the courts is being grappled with across jurisdictions. In India, section 6 of the country’s draft Mediation Bill 2023 provided for compulsory pre-litigation mediation in civil or commercial disputes before parties could approach a court or a tribunal. However, this provision was not included in the final Mediation Act 2023. Instead, the final Act makes pre-litigation mediation voluntary rather than mandatory.

According to Neerav Merchant, Conference Quality Officer of the IBA Litigation Committee and Head of Disputes at Majmudar & Partners in Mumbai, mandatory pre-trial mediation was removed from the final version of India’s Mediation Act on the basis of recommendations outlined in the country’s Standing Committee report. In particular, the report advised that mediation should be voluntary because making it mandatory would amount to a denial of justice where parties are unwilling to mediate.

In June 2021, the UK Civil Justice Council published a report reviewing the ADR landscape in the country at that time, including consideration of the *Halsey* judgment in the context of making ADR mandatory. The report concluded that ‘parties can lawfully be compelled to participate in ADR.’ It also ‘identified conditions in which compulsion to participate in ADR could be a desirable and effective development’.

Overturning *Halsey* accords with the idea that justice doesn't have to be delivered in court in front of a judge. 'What clients want is to resolve the dispute,' says Colston. 'We lawyers have interpreted that to mean you go before a judge who decides who's right and who's wrong and [because] mediation doesn't achieve that [...] we're depriving a person of access to justice'.

According to Dodds, 'people want to be heard and [think] "I want my day in court"'. However, she says what they really want is to have their distress acknowledged. She says that can sometimes be achieved more successfully via mediation than from court.

Wood KC, meanwhile, explains that there's already a high rate of settlement in the UK. Encouraging mediation isn't about changing that rate of settlement, it's about making it happen earlier and with reduced costs for the client.

Making the case for mediation

Encouraging greater use of mediation has benefits for the legal system and for society. Mediation can be cost-effective and quicker than going to trial. Engaging in mediation treats judges and the courts as a precious resource and can help alleviate the backlog of cases many jurisdictions are experiencing, which in turn takes pressure away from the courts. Antich says that reducing the volume of cases the courts were dealing with was one factor that motivated the Italian legislator to make mediation mandatory in the country.

Colston says mediation encourages parties to focus on their criteria for a win much earlier in the process. Mediators aim to understand what constitutes a win for the client rather than defining a victory in terms of what the court can offer, which isn't always what the client truly wants. In many cases, a mediation offers outcomes that the court can't, such as an apology, or a public statement.

In mediation, a significant amount of time is spent working through the options rather than simply pursuing the first one that's raised. 'It's only then', says Colston, 'when you've thought through all of the options, then you judge them against the criteria to find the win-win.' For her, where litigation is about blame, mediation is a more thoughtful and creative process in which the client defines success.

Dodds says that mediation puts the in-house lawyer's clients from within the business in the driving seat. Once internal clients understand mediation, she says, they like it because it resembles a business negotiation, which they're very used to. Building that understanding of mediation is critical. Sometimes ignorance of what mediation entails and the outcomes it can offer leads internal clients to have unrealistic expectations. Dodds suggests explaining to internal business clients the commercial realities of wanting adjudication, 'and the commercial possibilities of mediation and that they are in charge [...] which is often where they want to be'.

Timing is critical to success in mediation. Each case will have its own unique window of opportunity when mediation is most likely to succeed, depending on the nature of the dispute and the circumstances surrounding it. Jenifer Swallow, a lawyer and business adviser, and former General Counsel at Wise – formerly TransferWise – and Mind Candy, says it's most effective to mediate early on, and ideally even before proceedings when matters can begin to go awry.

The right time to mediate might be influenced by commercial factors or by the stage the parties are at in litigation. For example, if discovery is about to happen and one or both parties know the landscape will change, or if it's just taken place and that shift has already occurred.

For Dodds, mandatory mediation overlooks the importance of timing by stipulating when it should take place. 'A court-appointed mediator at a time of the court's choosing wouldn't necessarily create that positive environment that's needed for a mediation to succeed', she says.

Litigation versus mediation

Swallow argues that because litigation is the well-established, default approach to dispute resolution, the process underpinning it can be initiated very quickly without providing a sensible window to consider mediation. Consequently, when a court suggests or requires mediation, she says, 'it can feel like a jarring thing that happens in the middle of an otherwise fast flowing river, often approached with cynicism'. Antich agrees, and adds that, because many people are not accustomed to considering mediation and therefore don't view it as an option, 'the mainstream brings the parties to litigation'.

Swallow believes that if there were better infrastructure in place to support mediation, it could become the default option for resolving a dispute. She says litigation lawyers can also encourage its use and help shift the approach away from a 'default to adversarial' culture.

There are some cases, however, that can't be resolved by mediation. Some litigation is undertaken for strategic purposes – for example, a test case to set a precedent – and therefore the argument and the decision needs to be heard publicly. Dodds argues, however, that such instances are rare, and that the majority of commercial disputes can be resolved by mediation.

There can be strategic reasons to mediate as well. Litigation brings with it publicity, which could damage the organisation's reputation, for example. A dispute also indicates a problem with a business relationship. The success of the business and its ability to grow is linked to the quality of its relationships. General counsel and their teams need to think about the value and role of the relationship at stake in the dispute and act accordingly. Mediation offers a pause in proceedings where parties can review the facts and the numbers involved, and assess the risks. Outside counsel don't necessarily come to a case with these factors in mind. Therefore, in-house lawyers need to consider whether they want to mediate and make sure it happens.

'From the commercial world I can say, we all try resolution', says Mukhopadhyay. For him, resolution should be at minimum cost and allow the organisation to carry on business. 'As business lawyers it is not our job to fight litigation', he adds. 'We are not a law firm. [The] best thing is that you resolve it and maintain the relationship'.

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Mukhopadhyay says this approach to dispute resolution is part of his organisation's culture. It might be harder, though, to advocate for mediation in an aggressive business culture, perhaps one that's very sales driven. In some cases, the law is specifically used by organisations as a weapon. Swallow says this type of practice runs counter to lawyers' codes of conduct and societal duties, regardless of whether it's corrected by regulators.

Meanwhile, cultural factors can vary across jurisdictions. For example, Dodds says it's important that parties have confidence in the mediator. In a cross-border dispute, one party may prefer the mediator to be from their own jurisdiction. It's worth accommodating this preference if possible because it might increase the chances of the mediation succeeding. For Dodds, 'choice of mediators by the parties is really important.'

Financial modelling can also help in-house lawyers assess whether it's worth pursuing litigation based on the likelihood of a win. They could also consider the amount of time and money that would be spent over the course of litigation in contrast to the resources that could be used to settle the case more quickly out of court.

How technology fits in

Technology looks set to play an important role in redefining the dispute resolution landscape. It'll make the question of what we mean by justice and how it should be delivered even more relevant because more online platforms will be available to resolve disputes. If we expand our understanding of justice to be something that's available through forums other than the courts, then technology has a significant part to play in making it more accessible to a wider range of parties.

Dodds says parties might be coming to mediation because it's their only viable alternative to litigation. This is perhaps exacerbated by governments encouraging parties to mediate to alleviate pressure on the courts. She believes that in the near future, technology will provide cost-effective and time-efficient alternatives to litigation, which will allow parties to make a more informed and nuanced choice to mediate.

Swallow says that, for example, in the coming decade delivering justice could involve evidential matters disappearing from the courtroom because the information required to decide the case will be held on immutable data records such as blockchain. Lower-level disputes could even be decided by code, with a right of appeal.

There's also potential for the use of automated mediation services using zones of settlement, or services where parties record blind bids on the court's computer and when the two sides make matching bids, the case is automatically settled on those terms. These systems could include behavioural nudging that will make mediation something that's undertaken seamlessly, rather than participants being forced to enter into it. 'You're going to find yourself starting the early stages of a mediation online almost without noticing', says Wood KC, 'and it's going to seem completely natural'.

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International Commercial Mediator, Brick Court Chambers

Dodds believes more online adjudicative dispute resolution services will become available in the next few years. For example, she's involved in an online dispute resolution service called pinqDR, which is built on the fundamentals of arbitration and offers a binding arbitral award that's enforceable around the world.

With the introduction of technology-based solutions such as these, mediation and other non-court-based options such as arbitration will increasingly be seen not only as an alternative to litigation but as one of a range of options available to resolve a dispute.

The art of mediation

Mediation is an art form and only works well when skilled mediators preside. Antich says mediators require empathy and negotiating skills as much as knowledge of the law. Parties risk losing time and money if they don't choose a skilled, trained mediator. As such, general counsel must do so carefully. Mukhopadhyay says it's important for general counsel to retain a list of properly trained mediators. For him, 'untrained mediators will spoil the game'. He adds that being a mediator requires a significant amount of training. 'To deal with people, to understand the subject. And then how to take a common path and then how to bring the parties together',

X explains.

f allow says in-house lawyers should give mediation a go. 'Find a mediation opportunity that's all-ish; try it, experiment with working with a mediator and test its benefits to the business in and the legal team's toolkit', she says. 'We have a duty as lawyers not to waste court time, not to over-inflate facts or accusations, to be fair, to be proportionate in our approach to litigation. There's a part of that which means litigation shouldn't be our default: it's often not the only option.'

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