



Subject: Dispute Resolution in England and Wales: Call for Evidence

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Representation: The CCUA has drawn upon the views of the CCUA membership including those of the Policy and Reform Committee. See further detail under “introduction” below.

Introduction

The Civil Court Users Association (“CCUA”) welcomes the opportunity to contribute to this consultation from the Ministry of Justice.

The CCUA seeks to work with other stakeholders in a constructive and balanced manner, to achieve an efficient and cost-effective court service for its members which is also fair and proportionate for all court users.

Our members issue around 85% of all money claims in the County Court in England and Wales, as well as being involved in a wide range of other litigation including, for example, repossession and return of goods claims. Our members include businesses

operating within the financial services sector, utilities, legal firms, insolvency practitioners, enforcement agents, plus many others.

Overview

The Association is extremely supportive of the concept of alternative dispute resolution (“ADR”), providing it is conducted in the right circumstances and is properly resourced.

ADR is not appropriate for many court actions and for that reason the CCUA remains steadfastly opposed to compulsory ADR as a general approach in all situations.

Response to the Foreword, Introduction & The Issue

The foreword states that “...litigation is still far from the last resort and too many cases still go through the court process unnecessarily.” It is really impossible to argue with that point, as this would be true even if it only applied to just one lone case. However, we do have to query the extent of any problem.

It must be remembered at all times that the vast majority of money claims are not disputes at all. They are brought in respect of debts, not disputes. They are *capable* of being disputed, but very few are. Many are resolved amicably without the need for legal action, by agreement of repayment terms or other solutions. Of those where legal action is taken, over 85% of money claims proceed immediately to default Judgment. In financial services claims that % is often closer to 100% than 85%. Where they are defended, the defence is often spurious and results in a swift summary Judgment.

The main barrier to settlement of those claims without need for legal action is not therefore any absence of dispute resolution, or even the existence of any dispute at all. It is simply due to insufficient motivation upon prospective Defendants to engage with their creditors to find a solution. Successive efforts to improve this have completely missed the point and have tasked the creditor with ever more hoops to jump through, despite the fact that the creditor is all too willing to engage and often already make strenuous attempts to encourage the debtor to engage with them. They do not wish to bring a legal claim if it can be avoided, they simply want to be paid. Dispute resolution is completely irrelevant as regards this huge number of legal claims.

So, when it is said that “...too many cases still go through the court process unnecessarily”, we do have to point out that whilst that may be so, it is the tip of the iceberg. The vast majority of the iceberg comprises cases which are resolved and which do not proceed at all, or which did need to be issued, but often proceeding immediately to default Judgment. We would strongly urge that this is not overlooked. The system currently works well for a huge proportion of cases.

Under “The Issue”, we are concerned by the apparent assumption evident in the following statements-

“Nearly 300,000 claims were defended and the majority of those were settled or withdrawn before the hearing stage (just under 65,000 claims went to trial in 2019). While the courts fulfil a vital role for resolution of many disputes, this attrition does highlight areas where problems might be dealt with in different ways. Evidence from surveying civil court users shows that the majority would have preferred to avoid court and see court proceedings as a last resort (68% overall: 57% for damages claimants but rising to 80% and 81% among money and possession claimants respectively).”

We cannot deny that some of these “...problems might be dealt with in different ways.” However, we would strongly advocate that these very same statistics are actually evidence of the success and benefit of having taken legal action, for the reasons set out below.

We certainly agree that most claimants view litigation as a last resort. Aside from many other considerations, the huge court fees, other costs and time involved in litigation are more than a sufficient disincentive.

However, just because a court user says that they would have preferred to avoid court action does not necessarily mean that they regret having done so or that they are disappointed with that decision, or the outcome which resulted. In many cases it is the very fact that court action is taken which finally forces engagement and resolution. As we have made clear above, particularly regarding money claims, there is often little or no dispute which needs resolving, the situation requires legal action. We would suggest that far from being negative, the “attrition” which is referred to is often representative of an extremely positive outcome which fully justified the issue of legal proceedings.

As an example, it is often the case that Defendants take the position that Claimants are bluffing about the prospective issue of proceedings. They decline to negotiate, and this provokes commencement. Once the claim is commenced the Defendant welcomes a forum to voice their concerns only to find that the Claimants evidence is usually overwhelming, and they then indicate a willingness to mediate within the Directions Questionnaire / Allocation process. Many such cases go on to settle via Tomlin Orders (not mediation as addressed below). This has nothing to do with attrition, but the situation clearly required the issue of legal proceedings to move matters forward and was largely unavoidable to the Claimant, short of abandoning the claim.

The Questions

We note that some of the questions relate to very specific areas or are very similar to other questions. Please note that we only answer those questions where we have points to make additional to those which we have addressed above or elsewhere.

Question 1: Do you have evidence of how the characteristics of parties and the type of dispute affect motivation and engagement to participate in dispute resolution processes?

Again, the biggest point that we would make is that for dispute resolution to be at all relevant, there must be a dispute. Many court actions do not feature disputes at all. This is the biggest reason why ADR must never be made compulsory across the board, as it will serve no purpose whatsoever other than to unnecessarily increase bureaucracy.

That said, we have many members who do believe that where a dispute does exist, ADR can be very effective. A genuine dispute where all parties are behaving constructively are the key ingredients.

Question 2: Do you have any experience or evidence of the types of incentives that help motivate parties to participate in dispute resolution processes? Do you have evidence of what does not work?

Parties are incentivized by swift, economic outcomes, keeping costs to a minimum.

Recent changes, where mediation now runs concurrently with the legal action and the court hearing fee is no longer refunded, have been a disaster. The action should be stayed whilst mediation takes place, thereby avoiding costs unnecessarily escalating, as well as avoiding unnecessary work for the courts. That would also mean that the court fee would not be payable if mediation resulted in a positive outcome. Currently, the fact that costs are incurred unnecessarily, often including a hefty hearing fee, is a barrier to a successful outcome of mediation.

Question 5: Do you have evidence regarding the types of cases where uptake of dispute resolution is low, and the courts have turned out to be the most appropriate avenue for resolution in these cases?

As above, any claim where there is not actually a dispute. This represents a huge proportion of court cases, including the vast majority of all money claims.

Question 8: Do you have evidence about whether dispute resolution processes can achieve better outcomes or not in comparison to those achieved through the courts?

Any case where there is a genuine dispute and where all parties are constructively engaging and wish to find a solution.

Question 11: What would increase the take up of dispute resolution processes? What impact would a greater degree of compulsion to resolve disputes outside court have? Please provide evidence to support your view.

As above, the key ingredients are a genuine dispute and a real desire to find a solution amongst all of the parties.

In many cases, such as the vast majority of money claims, there is no dispute at all and ADR would be utterly pointless.

In other cases, even if there is a genuine dispute, if any one party will not engage outside of the court process then ADR is likely to be doomed to failure.

Therefore, whilst many of our members support and use ADR in the appropriate cases, we strongly believe that compulsory ADR would be a pointless disaster in all but the most specific of circumstances.

Questions 16 – 21, Dispute resolution service providers

Whilst we do not have any points to raise in direct answer to any of the questions, one of the biggest current issues with ADR is the lack of resource, particularly court mediators.

The amount of court mediators is woefully inadequate. Whilst this paper is laudable in its intentions, unless there is an appetite to provide adequate resource for ADR then these considerations are doomed to be nothing but academic.

Currently the court offers one mediation appointment, often at very short notice. If any one party is unable to attend (bearing in mind that this may require counsel, etc), then the opportunity is lost.

The lack of mediators also leads to substantial delay. Again, given that the court action continues alongside mediation with fees and other costs continuing to accrue, this delay is a major disincentive to use mediation in the first place, or alternatively those additional costs are then a barrier to eventual resolution.

As above, this was made substantially worse by the recent decisions to no longer stay the court action whilst mediation occurs and to no longer refund the hearing fee where a resolution means that a hearing is no longer required. Those changes defy all logic and should be reversed.

The lack of resourcing and the recent changes are the biggest current barriers to our members using ADR, even where they would like to. The recent changes in particular have undoubtedly resulted in a reduction of take up by our members.

Rob Thompson

Chair, Civil Court Users Association

29th October 2021