

CIVIL COURTS REVIEW
CBI RESPONSE – 11 March 2008

INTRODUCTION

The CBI is the principal business association in the UK and represents many thousands of businesses in Scotland. The CBI has a keen interest in the effective resolution of business disputes and is a founder member of CEDR, the Centre for Effective Dispute Resolution.

We welcome this Review of the civil courts in Scotland and are pleased to offer the following comments below, in response to the questions for discussion. These comments are made in the context of commercial disputes and where we refer to ADR this should be understood to mean mediation.

Should the civil justice system be designed to encourage early resolution of disputes, preferably without resort to the courts? If so, what would be the key features of such a system?

We consider that resort to litigation should not be the automatic first option and companies should fully consider other means of resolving their disputes. For example in contracts for major projects, the resolution of disputes usually proceeds through executive negotiation, then mediation and only if both these fail is there finally resort to court.

We believe that the civil justice system needs to recognise these other pathways to resolving disputes and encourage their adoption.

In our view, one key feature of the system should be effective communication with potential litigants so they are aware of ADR. They could be required to certify, for example, that they have considered ADR or been through the process of ADR before commencing litigation.

A very important point is made, in paragraph 5.18, that, “The formality of the process may encourage a party to become detached from any responsibility for taking steps to resolve the dispute.” This can all too frequently occur and executives pass control of the process to litigators who are relied upon to resolve the matter. Involvement of executive management in this certification process would therefore be desirable.



Once this hurdle has been passed and the litigation commenced, another key feature that we support is an early case management conference to expose the parties to the course of the litigation, its timetable and costs. This should also enable further consideration of ADR.

Are the principles and assumptions in paragraphs 1.11 to 1.14 a sound basis for developing the Review's recommendations?

We agree that the two principles of proportionality and value for money are key to the reform proposals. We also agree with the points made in paragraph 1.13 that the value of the matter is not only monetary but may involve many other factors, such as the need for judicial precedent to clarify the law.

We note that the overriding objective of the CPR in England requires the court to deal with a case "justly" and that there are similar objectives in British Columbia and Queensland. This broad objective has appeal to us.

Should the court (a) encourage, (b) require or (c) in some other way facilitate the use of mediation or other methods of dispute resolution?

We believe the court should both encourage and facilitate the use of mediation to resolve disputes. We would not be in favour of mandatory mediation. But we believe measures that can be used by the court, through case management and costs orders, can be very effective in concentrating the minds of the parties on other means of resolving the dispute.

For example, if the court considered it a case suitable for ADR, it could impose a delay in fixing a trial date to give the parties an opportunity to go through mediation in good faith.

A case management conference can also require the parties to give an estimate of their costs to the end of trial. In at least one case before the High Court, this led to a mediated settlement when it was appreciated that the total costs of the several parties exceeded the value of the claim.

Are there particular kinds of dispute in which the use of mediation or other methods of dispute resolution is not appropriate and in which a judicial determination is essential?

In commercial disputes it may be important to obtain a declaration from the court as to the rights of the parties, or an interpretation of a document or legislation. This could be particularly important in cases involving intellectual property and other property rights.

The vast majority of commercial cases are settled and the settlement process can be helped through obtaining an early decision of the court on the interpretation of a particular contractual provision, such as an exclusion clause for example. This can then lead rapidly to a negotiated or mediated settlement.

Other disputes are in practice frequently resolved through the obtaining of an interim interdict to restrain particular conduct or enforce rights. Since mediation is a voluntary process the only option may be to resort to coercive remedies in the absence of an agreement to mediate.

What form should mediation or other methods of dispute resolution take and how should these be funded?

In a commercial context, we believe there are a number of mediation providers who can offer an effective service. The Civil Mediation Council in England has been considering how standards for these organisations can be set and monitored.

Funding is normally through the parties sharing the costs of the mediation equally.

Another form of dispute resolution which can be effective is early neutral evaluation. This enables the parties to obtain an assessment through a retired judge, for example, of how the case would be viewed by a court. On the basis of this, the parties may find it easier to reach a negotiated or mediated settlement.

Judicial case management and case-flow management

We very much favour judicial case management, which is explained as the active intervention of the judiciary in order to expedite the progress of cases. We support its use at an early stage to identify the issues in dispute and make orders for the efficient processing of the case.

We have recently been involved in a project looking at the procedures for speeding up the review of cases by the Court of First Instance in Luxembourg and have been impressed at how this becomes possible through more active case management.

In our view judicial case management is an essential component of the civil justice system and underpins access to justice.

CBI 11 March 2007