'DISPUTE RESOLUTION IN THE 21st CENTURY'

ADDRESS BY SIR DAVID FOSKETT TO THE NEW MEXICO FIRST JUDICIAL BAR ASSOCIATION IN SANTA FE

ON 24 JUNE 2019

****

It is a great pleasure to be here in New Mexico and in Santa Fe, in particular, the first visit of my wife and myself to this part of the United States. I had thought that this was to be a holiday, free from any obligations that might be associated with any work I might once have done or with which I am now associated.

However, a conversation between our hosts here in Santa Fe and Justice David Thomson, your most recently appointed Supreme Court Justice, resulted in this invitation to address you. Whilst I have contemplated giving a lecture at 7000 feet above sea level with some trepidation, at the moment I feel up to it. Whether you really wish to listen is a matter for you, but please do not let me interrupt your lunch more than is necessary.

I have given this talk the title 'Dispute resolution in the 21st century' and I should say that I use the expression "dispute resolution process" in the widest possible sense. I will have to be selective about the areas I can cover and I can only touch on those chosen very briefly.

In one guise or another, I have been in the dispute resolution business for a little over 46 years.

My first court appearance as an advocate was on 2 April 1973. I was representing an 85-year old man in an uncontested divorce. He and his estranged wife had been separated for over 35 years. He wanted to remarry.

I can hardly call that my first involvement in dispute resolution because there was no real dispute. However, I helped my client towards what I hope were a happy further few years on this planet.

But the non-dispute scenario changed very quickly and I was soon involved in a wide variety of disputes in a wide variety of areas of the law. This was a hugely beneficial grounding for all aspects of the role that as an advocate I could play when the cases became more complex and specialised as my career progressed.

Although my own practice as a barrister became more focused on commercial and professional negligence work, I tried to maintain as broad a practice as I could. That helped in the work I did as a mediator in the few years before my appointment as a High Court Judge and has been invaluable in the judicial work I have undertaken in that latter role until my recent retirement as a full-time judge. There are few areas of the civil law, not just the English civil law, that have not come my way, in some shape or form, during that period. I have, of course, also had experience of the criminal jurisdiction.

One thing that I found myself doing in those early years, without any kind of tuition in the process, was negotiating the settlement of a civil case at the doors of the court. There was nothing in the teaching for the Bar exams in those days about the law and practice applicable to the settlement process or about how to conduct negotiations.

It is very different now. Indeed even many university law degree courses in the UK contain some modules on this general subject and it is noteworthy that The University of New Mexico School of Law has provided programmes designed to develop competency for mediating a broad variety of disputes for many years.

As part of my advisory practice in those early years, I was called on from time to time to advise on problems associated with settlements that had, for some reason, gone wrong or where there was some uncertainty about the meaning of the words in a compromise agreement or consent order giving effect to a settlement. There was little guidance in the practitioners' books in England and it was this that led to my writing the first edition of a book then entitled "The Law and Practice of Compromise" in 1980. It ran to 162 pages and cost about $23. Now known as "Foskett on Compromise", it is in its 8th edition, runs to 486 pages and currently costs about $400. The 9th edition is due out this year.

I was genuinely staggered – and flattered – to find in my recent travels to Singapore, Malaysia and Hong Kong, that there were people who wanted to meet the man behind the book – and recently even to be photographed with him! I had not realised before just how much lawyers in many jurisdictions had relied upon it.

When speaking to a similar gathering as this in South Carolina last year I asked those present to do what they could to achieve a readership across the whole of the USA. May I do the same here? I could then fulfil my dream of living out the rest of my life on the royalties – both from the book and the film that will be shot here in New Mexico where so many great films have been shot!

Whilst I was kept extremely busy with contested cases during my time as a judge, most disputes do settle and there seems to be a universal desire to avoid litigation if possible.

Rightly or wrongly, and I make no comment about it, political discourse at the moment seems to be somewhat inward-looking. To my mind, it is important that those engaged in whatever capacity in the dispute resolution business continue to look beyond their national boundaries: there is much to learn from each other and the rule of law needs to cross those boundaries.

<u>"Without prejudice" negotiations</u>

In relation to the assorted topics I have chosen to mention, can I begin with the negotiation process itself with a word about what we call the "without prejudice" privilege within our jurisdiction and which I believe is rule 11-408 of the Rules of Evidence in New Mexico? The privilege or rule has a dimension so far as mediation is concerned for which, if my Internet searches are reliable, there has been much enthusiasm in New Mexico over the years. I will be returning to that.

The whole point of the rule is to encourage negotiating parties to engage in their discussions in a spirit of openness with all cards on the table. Our rule is largely derived from the common law and does not depend upon some written rule. That enables the courts to develop the rule to cater for previously unforeseen scenarios without having to secure a rule amendment, but our courts are usually extremely reluctant to sanction any exceptions to the rule. To do so would erode the usefulness of the privilege and discourage settlement discussions.

Derived from our experience, may I utter a word of caution if anyone ever suggests an extension of the exceptions to rule 11-408?

As you may know, the costs regime in the UK is that, generally speaking, the losing party pays the winning party's legal costs.

We have a set of rules in England and Wales whereby a claimant can make an offer of settlement in a way that, if the defendant does not accept it and then does not at least match it at trial, the general rule is that the claimant can obtain enhanced benefits: costs on a more generous basis than would ordinarily be the case, a higher rate of interest on those costs and,

in certain circumstances, an additional lump sum. It was one of the ideas derived from the civil justice reforms instituted some 25 years or so ago in the UK designed to encourage a more focused approach to the settlement of cases. You can appreciate that the failure of a defendant to accept a claimant's offer can have quite significant financial consequences for a defendant if the claimant does better than his offer.

There are exceptions to the general rule, a relatively recently-introduced one of which is that an offer that is not "a genuine attempt to settle the proceedings" would not qualify for these enhanced benefits. An example of a non-genuine offer would be an offer by a claimant to accept 100% of the damages awarded.

When the issue of whether an offer was "a genuine attempt to settle the proceedings" arises, it can require the opening up the content of negotiations that would ordinarily be protected by the "without prejudice" rule in order to see how matters were discussed.

I took the opportunity in a judgment before I retired to "sound off" about the undesirability of this occurring for the reasons I have given[1]. I am not quite certain how a judge can decide in any event whether an offer was a genuine offer to settle except in the obvious case of an offer to accept everything that could possibly be achieved in the litigation.

I rather doubt whether the consequence I have mentioned, namely, opening up what would otherwise would be private and confidential discussions, was intended by the rule-makers when they made the recent change on the rules, but it illustrates the care that needs to be shown when making a change in the rules to cater for a particular problem which then has a collateral, but undesirable, effect.

My purpose in mentioning all this? As I hinted earlier, be warned. Trying to fix one issue by reference to a rule-change can lead to unwanted consequences. A privilege that, certainly so far as English common law is concerned, found its origins in the 19th century, probably earlier, still has a vital role to play in the 21st century.

Mediation privilege

I would like to turn briefly to a related, and important and topical issue, mediation privilege. This is the concept, if it exists, that protects a mediator from being forced to give information in subsequent court or arbitration proceedings about what was said or done at a mediation where he or she had been helping to facilitate a settlement. Confidentiality is the governing feature of all mediations and, as a matter of principle, no mediator would wish to be called to give evidence about what occurred.

As I have mentioned earlier, prior to my appointment as a full-time judge, in addition to maintaining my practice as a barrister, I qualified as a mediator and indeed acted as a mediator in a fair number of mediations prior to that appointment. Now that I am freed from the restraints imposed on a judge, it is one area of dispute resolution that I am re-entering.

Indeed only a few weeks ago I was invited to become the Chair of the Civil Mediation Council in the UK. It was established in 2003 and is a significant voice in the civil, commercial, community and workplace mediation sphere in England and Wales.

It seems to have the same kind of purview as that of the New Mexico Mediation Association[2].

---

1 *JMX v Norfolk and Norwich Hospitals NHS Foundation Trust* [2018] EWHC 185 (QB).

2 https://newmexicomediationassociation.org/about/.

You will understand, therefore, that I have more than a passing interest in the subject of mediation privilege. As I will mention shortly, there is an international dimension to this issue also.

In England, there are two views, each expressed by well-known mediators[3], one being that "a full mediation privilege should be recognised and upheld by the courts" whereas the other is that it should be left to the judges to decide in any case whether such a privilege ought to apply because the judges "will listen to the mediation community" when coming to their decision.

My intuitive view is that the latter view is likely to prevail in England, but there is an important question about how and in what form the views of the "mediation community" could be conveyed to the court if the issue arose.

I do not know how many judges in New Mexico have been trained as mediators before they were appointed as judges – the sense I have obtained from my Internet searches is that it is very few. Certainly, few judges at the level I attained in the English judiciary - and indeed higher - will have been trained as mediators.

In an ideal world, where money and time is no object, I would say that anyone who is a judge should receive mediator training so that he or she knows how a mediator operates. In that way, judicial encouragement to parties to pursue mediation will come from a well-informed source. Frankly, the techniques of mediation can sometimes come in useful in court, in any event. But that investment in time and money is, I am sure, asking too much. I will be returning to an analogous issue a little later.

I have considerable sympathy with the view that, save in the most exceptional circumstances, what is said or done at a mediation should remain entirely confidential and that a mediator should not ordinarily be required to give evidence about anything that occurred during the mediation. This is even though the mediator, as the independent facilitator, is arguably the best person to give wholly detached evidence about an issue that may arise about what occurred. However, it risks undermining the advantage to the whole mediation process which is the ability of the mediator to have entirely confidential conversations with each party to the mediation without the possibility of those conversations subsequently being divulged. That is the objection in principle that mediators would have in giving evidence.

When preparing for this talk I came across the New Mexico Mediation Procedures Act. I am not sure when it was first enacted but, if I may say so, it appears that your legislators had a good grasp of what should be kept confidential in a mediation and when confidentiality might be set aside. The primary position within the Act is that "all mediation communications are confidential, and not subject to disclosure and shall not be used as evidence in any proceeding" except as specifically provided by the Act and that mediators "shall not be required to make disclosure, either through discovery or testimony at trial or otherwise, of any matter related to mediation communications", again except as provided in the Act, and also "to prove or disprove a claim of mediator misconduct or malpractice filed against a mediator".

Mediation as a means of resolving disputes that otherwise would proceed through the full litigation or arbitral process is undoubtedly here to stay, but there are still issues discussed in jurisdictions throughout the world about whether mediation or some other form of ADR should be made compulsory either before litigation is commenced or at some stage during the course of it.

[3] Michel Kallipetis QC and William ('Bill') Wood QC.

I do not have time today to reflect on the debate. Whilst ADR is not compulsory as such in England, it is strongly encouraged by the courts and costs sanctions can come into play in litigation if a party unreasonably refuses to engage in some form of ADR, most usually mediation. I am aware that it is compulsory in some States in the US (for example, in South Carolina where I was about 9 months ago), but I do not understand it to be so in New Mexico. If I understand your rules correctly, in every civil case the parties must participate in a settlement conference with a judge unless otherwise ordered by the court. What happens at such a settlement conference is governed by rule 11-408 and remains confidential.

I am more than happy to be told that I am wrong, and I hope that I cause no offence when I say that I rather suspect that the judge does not really act as a mediator would and merely offers some provisional, possibly robust, views on the merits of each party's position. If that is so then, whilst there is nothing wrong intrinsically with the process, it is not true mediation and, of course, is another reflection of the fact that many judges are not trained in mediation techniques. Moreover, a mediator often assists parties to think outside the confines of the particular piece of litigation if litigation is pending and sometimes arrangements are made that could not have been ordered by the court.

Judicial encouragement for parties to engage in true mediation is, however, a very important driver as my earlier comments suggest.

About 3 years ago, the then Director of Training at the Centre for Effective Dispute Resolution ('CEDR') in the UK, James South, said this:

> "A key motivation for jurisdictions around the world to consider the use of mediation is to reduce case load burdens and improve clearance rates of the courts."

It certainly represented a large part of the incentive for putting mediation high on the agenda in the civil justice reforms to which I have already referred, but that was at a time when the court lists in the UK were significantly over-crowded. I would prefer the motive to be a belief in the efficacy of the process rather than the force of circumstance, but any encouragement is welcome for whatever reason.

However, I must move on. I have been talking about mediation in the context of domestic disputes – in other words, disputes within the home jurisdiction of the particular court system.

Cross-border disputes

As is well known, there are a great many cross-border disputes that fall to be resolved in some way, usually outside the domestic judicial systems of the parties involved and often by means of arbitration rather than litigation through the courts.

International commercial contracts usually specify the seat of the arbitration and the law that is to govern the interpretation of the contract and the procedure of the arbitral tribunal. One of the selling points of arbitration is the confidentiality of the private process involved.

A recent survey published on 4 April[4] suggests that direct negotiation remains the largely preferred option to resolve cross-border disputes, with arbitration and mediation further down the list of preferences, arbitration beating mediation by quite some distance. That is the result of this particular survey which, I should say, does not claim statistical reliability.

I was at the Inter-Pacific Bar Association ('IPBA') Annual Conference in Singapore in April. The Asia-Pacific Region is an area where there are many cross-border commercial disputes

[4] https://www.cedr.com/docslib/CEDR_CPR_report_040419.pdf.

arising from the major infrastructure projects being undertaken in the region. The Singapore International Mediation Centre ('SIMC') would, I think, claim that mediation is more popular in that region than the survey I have mentioned shows.

However, perception is everything and there is a perception that there are difficulties in enforcing the terms of any settlement agreement concluded following a mediation. In the survey I have mentioned, it is noted that "it would appear that mediation is at somewhat of a disadvantage when it comes to concerns over enforcement, presumably due to the different status of mediation across jurisdictions."

Is the perception valid?

Most mediators will say that the success rate of mediations is high (in the region of 80-90%) and that was certainly my experience when conducting domestic mediations before my appointment as a judge. I cannot speak directly of the current situation with regard to international mediations and the survey suggests a lower rate in international disputes although I believe that the SIMC would suggest that mediations conducted there are almost invariably successful.

So far as enforcement is concerned, the general experience is that when parties reach a mediated settlement agreement, ordinarily there is no difficulty with compliance: the parties have reached an amicable settlement and will adhere to its terms voluntarily. It follows that the prospects of compliance are generally good.

Where a party fails to honour an agreement, separate proceedings to enforce the contract are required, which itself involves considerations of the applicable law and brings into focus other practical issues such as whether any order obtained is enforceable in the jurisdiction where the assets of the recalcitrant party are situated. It does follow, therefore, that, in the unusual situation of non-compliance, there are issues about enforcement that arguably represent an obstacle to the growth of mediation in cross-border disputes.

It is an issue that has been addressed recently by The United Nations Commission on International Trade Law ('UNCITRAL').

As you will know, the New York Convention 1958 was prepared by the United Nations prior to the establishment of UNCITRAL in 1969 although the promotion of the Convention is a central part of UNCITRAL's programme of work.

Ordinarily, each State that signs the Convention (and there are 159 at the last count) will enforce, in accordance with its own procedures, foreign arbitral awards issued in other contracting States. So, for example, a foreign arbitral award that is sought to be enforced in England will be enforced in accordance with English rules of procedure. The Convention does not apply to anything other than an arbitral award – so it does not apply to a mediated settlement agreement that is not translated into an agreed arbitral award.

UNCITRAL has drafted a new convention which is to be known as the Singapore Convention (because that is where it is going to be signed in August this year) that applies to settlements of international commercial disputes after a successful mediation. It largely mirrors the New York Convention and will oblige any country that signs up to it to enforce a mediated settlement agreement of an international commercial dispute in accordance with its own rules of procedure. It does not apply to agreements that have been embodied in a court order or an arbitral award.

An obvious purpose of the Convention is to make mediation of international commercial disputes more attractive than at present. Will it do so?

Some commentators have said that it heralds "a bright new dawn for cross-border dispute resolution", is "Good News for Businesses" and that it represents "A Game-changer". Others are more circumspect and I have heard anecdotal evidence that there are question-marks over how many countries will sign up to it.

Some argue that the Convention is unnecessary if a novel method of dealing with mediated settlements of international disputes that is available in Singapore itself is more widely adopted.

I have already mentioned Singapore International Mediation Centre ('SIMC'). Singapore also has the Singapore International Arbitration Centre ('SIAC'). The two bodies have collaborated to offer parties to a cross-border dispute an arrangement known as the Arbitration-Mediation-Arbitration service (or, more colloquially, the 'Arb-Med-Arb' service)[5]. It enables the parties to attempt mediation after the commencement of formal arbitration proceedings before a single arbitrator. That arbitrator does nothing more than give a few directions and refers the matter to SIMC for mediation. If the mediation succeeds, the mediated settlement is referred back to the single arbitrator who then makes a consent award embodying the agreement.

The consent award is valid and enforceable because it does not offend the principle that applies to the New York Convention, namely, that there is no power to make a consent arbitral award when there is no extant dispute or difference between the parties at the time the arbitration begins. In the Arb-Med-Arb scenario there <u>was</u> a genuine dispute at the time when the arbitration began.

If the mediation fails, the continuing dispute is referred back to the single arbitrator and the arbitration continues, usually with two more arbitrators appointed, as if nothing had happened. It does not give rise to the complications that can sometimes arise when an arbitrator is asked to perform the role of mediator and *vice versa*.

If an arrangement such as this was entered into more or less anywhere in the world, the New York Convention itself would be a sufficient means of enforcing the consent arbitral award, provided the country where enforcement was sought was a signatory to the Convention. If that were the case there would be no need for a convention such as the Singapore Convention. However, for this arrangement to work there needs to be an accepted system in a particular jurisdiction chosen by the parties as the seat of their arbitration for this to occur and there does also need to be a complete guarantee that a consent arbitral award will be enforced in any of the States that have signed up to the New York Convention.

Is there any doubt about that? There should not be, but there have been suggestions that the New York Convention does not apply at all to consent or agreed awards, the basis for the argument being that the drafters of the New York Convention apparently actively considered

---

[5] This is how the SIMC describes the process: "Arb-Med-Arb is a unique hybrid process that combines arbitration and mediation in a manner that provides maximum value at minimal cost, efficiency coupled with flexibility and confidentiality combined with enforceability, all within an institutional framework and rules that incorporate global best practices. In a nutshell, the service allows parties to attempt mediation after the commencement of arbitration proceedings. If parties are able to settle their dispute through mediation, their mediated settlement may be recorded as a consent award. A consent award is generally accepted as an arbitral award, and subject to any local legislation and/or requirements, is generally enforceable in more than 150 countries under the New York Convention, an international convention on the enforcement of arbitral awards. If parties are unable to settle their dispute through mediation, they may continue with the arbitration proceedings."

whether to state expressly that an agreed award was subject to the Convention and decided not to do so, meaning, it is argued, that they did not intend that the Convention should apply to such an award.

Speaking for myself, I did not find the argument very persuasive and one item of relatively recent good news in this context is that your judicial colleagues in the District Court for the Southern District of Texas in Houston rejected the argument that the Convention does not apply to an agreed arbitral award in a case called *Transocean Offshore Gulf of Guinea VII Ltd v Erin Energy Corp*[6], decided on March 12, 2018. It does not, strictly speaking, bind any other court, but it will be a persuasive authority.

There are, of course, other, entirely legitimate, reasons why a State may decline to enforce an agreed arbitral award even though it is a signatory to the New York Convention, one being that "[the] recognition or enforcement of the award would be contrary to the public policy of that country."

The Singapore Convention also contains the "public policy" let out to which I have just referred, but it also provides an exception where "there was a serious breach by the mediator of mediator standards" or where there was "a failure by the mediator to disclose to the parties circumstances that raise justifiable doubts about the mediator's impartiality or independence." It does not require any sophisticated legal analysis to raise the question of what constitutes "mediator standards" and what matters might raise "justifiable doubts about the mediator's impartiality or independence" and by whose criteria are they to be judged. These are "wriggle factors" one can see being deployed, probably on spurious grounds, to prevent or delay enforcement by a party that has changed its mind about compliance.

So, we must wait to see how the Singapore Convention works in practice.

Apology legislation

There are two other broad areas in the context of dispute resolution that I would like to touch on before sitting down. However, there is one other matter which I should like to mention in passing as I am here in New Mexico. It does have a bearing on how certain types of dispute are resolved.

If my research is accurate, you do not have what is commonly called 'apology legislation', in other words, legislation that protects an apology or expression of regret from being relied on in litigation to prove fault. I know that a large number of States in the US do have statutes to this effect, but that a number do not including New Mexico.

There are obviously policy considerations behind either having or not having a particular piece of legislation and it is not my place to say how those policy considerations play out in a particular jurisdiction. However, I have to say that I am personally in favour of legislation that generally protects apologies from amounting to admissions of liability or being admitted in court as evidence in civil liability cases.

At a very mundane level, most of us would apologise for bumping into someone in the street even if it was not our fault. But it is not a large step from that to a more serious accident where the immediate reaction of the person who is not injured is to say "sorry" or express some regret to the person who was. I have long thought it unfortunate (a) that insurance companies seek to prevent their insured from saying "sorry" in such a context and (b) that when someone does so,

6 https://casetext.com/case/transocean-offshore-gulf-of-guinea-vii-ltd-v-erin-energy-corp.

the recipient of the apology then tries to create an admission of liability out of a polite expression of regret.

However, leaving aside my personal views on the merits of such legislation, in the context of dispute resolution and indeed in the context of some mediations I have conducted, an apology often means far more than the money and it can unlock a door that otherwise seems firmly closed. There is a great deal of learning on the question of whether an apology connotes a sign of weakness. Most mediators would say that it does not. What are the words of the Elton John song? "Sorry seems to be the hardest word." In the 21st century, it should not be.

Let me move on.

Information technology

As we survey the dispute resolution landscape for the rest of the 21st century, what are the most prominent features in that landscape?

The increasing use of information technology must surely rank amongst the most significant. The constantly increasing sophistication of IT is evident, particularly to those of us of a generation that remembers black and white television. It is already at the heart of professional legal practice and thus is embedded in the dispute resolution process. I claim no sufficient technical expertise to justify what I am about to say, but my perception is that the IT systems upon which court systems function often lag well behind what is available in the market, certainly at any rate in the UK.

Since all court systems throughout the world depend largely on State funding for their existence and support, and there is little political mileage in spending generously in this regard, this is almost inevitable. However, it does not bode well for any initiatives designed to bring court processes up-to-date and to make them more accessible both to the technically up-to-date legal profession and to the public more generally.

Now that observation may not apply in New Mexico and in the US generally where public investment in the judicial system may be more generous than elsewhere. I simply do not know, but I have noted that very recently New Mexico has embarked on an Online Dispute Resolution ('ODR') pilot programme in several counties and that there are plans for expansion during the year relating essentially to debt claims. The effectiveness of programmes such as this depend on a number of things, the efficiency of the IT environment being one.

Another factor that may be of significance to the effectiveness of any such programme is the quality of the advice or assistance given in relation to mediation to those who engage with the programme. A report I have seen suggests that the New Mexico programme "will facilitate settlements and provide parties free access to mediators". The mediator will have been trained and the assistance given will be given online.

It is rather similar to the ODR proposals currently being implemented in England and Wales. In a lecture given almost exactly two years ago, our most senior civil judge, the Master of the Rolls, Sir Terence Etherton, talked about the proposed Online Solutions Court which he said would differ in three fundamental ways from a traditional court, one which was that "it would formally incorporate ADR into its processes".

The current proposals concern relatively low value claims, as indeed does the New Mexico programme, but another senior judge in England said last year that he anticipated that "the developments in smaller litigation … are bound to be the blueprint for the roll-out of online dispute resolution to more significant and high value disputes."

The formal incorporation of ADR into these processes is the issue upon which I would like to make a brief comment.

The Master of the Rolls concluded that lecture by spelling out its perceived advantages and said this:

> "It will incorporate mediation and conciliation into procedure, helping parties resolve their disputes consensually. Where consensual resolution is not possible, it will provide effective online adjudication, the default option for many cases."

He referred there to "helping parties to resolve their disputes consensually" and summarised what it would mean in practice as follows:

> "It will require case officers … to assist parties to manage their claim and to facilitate settlement. This is a significant departure from the court's existing role as it will require a court officer actively to engage the parties in mediation and conciliation processes. Case Officers will promote the best resolution method for each case: mediation, online ADR, early neutral evaluation … or proceeding straight to a full trial."

The suggestion there is that a "case officer" might intervene online or by telephone "to facilitate settlement", an expression, you may recall, that was used in the report I mentioned concerning the New Mexico pilot scheme.

The general perception of those involved in the planning of the arrangements in England is that the "case officer" will be an influential figure in the system and that case officers will have a crucial role. What is not yet clear is the extent and nature of any training to be given to case officers and whether, for example, they are to act as the mediator in any case or whether, as is more likely, they will merely be the link between the litigants and a mediator. If it is the latter, what training will the mediator have been given? Even if the case officer is not to be the mediator, should he or she be trained in mediation techniques in order that any guidance given to the litigants is well-informed?

ODR is becoming such an internationally-accepted process that it saw the emergence two years ago of the International Council for Online Dispute Resolution ('ICODR')[7], an organisation incorporated in the United States, which is seeking to establish global standards for ODR and its embedded mediation processes if required. One of its objectives is to provide training and continuing education for ODR practitioners.

I have no doubt that the training it provides is excellent and well-informed. The course with the most extensive content costs about $1200, but it appears to be for those already trained in mediation techniques. Full mediation training costs considerably more – the equivalent of in the region of $7000 for a 5-day course in the UK. Whichever training is generally regarded as the best for those in providing mediation within an ODR process or guidance about it, the question is "who is going to foot the bill?" Will it be the State that is funding the publicly-provided ODR process or will the individual mediator be expected to do so? If the latter, what return on their investment might they anticipate?

My message here is that the revolution that ODR is designed to achieve must not fall by the wayside by under-investment in the IT or the personnel who are put in place to assist in the

[7] https://icodr.org.

process. Consumer dissatisfaction must be avoided at all costs because it will affect respect for the law, judicial processes and processes designed to avoid litigation.

A final, and exceedingly brief, reference to artificial intelligence and the role it could play in dispute resolution in the future.

Artificial intelligence

The role that artificial intelligence ('AI') might play in legal systems throughout the world and in the judicial function is much debated on the Internet and I am certainly not going to claim to understand all the nuances of the debate.

However, the increasing sophistication of computer technology raises the question of whether the analytical processes of which computers are capable can assist, supplement or even replace the human intervention in any dispute resolution context.

A former judicial colleague said in a lecture last year that his understanding was that "machine learning", as he described it, is already able to predict the outcome of all commercial disputes with much greater accuracy than lawyers who give advice and can give a predicted outcome at a percentage above 90% reliability. I have seen predictions like that in other contexts.

As he rightly observed, however, acceptance by human beings of machine-driven forecasts is not necessarily a foregone conclusion and there will be those who will wish to take their chances in the litigation process – or indeed in a negotiation process, possibly with the assistance of a mediator – without paying regard to what AI has suggested may be the outcome of the case.

Undoubtedly, AI is going to influence dispute resolution as the rest of this century unfolds, but as one researcher in the field has said, it is unlikely to replace judges or lawyers, but may generate useful information about "patterns in cases that lead to certain outcomes."

It is often thought that AI neutralises or overcomes human bias. I came across one quotation in a scientific magazine a couple of years ago that said this:

> "One of the great promises of artificial intelligence … is a world free of petty human biases …. But a new study shows that computers can be biased as well, especially when they learn from us. When algorithms glean the meaning of words by gobbling up lots of human-written text, they adopt stereotypes very similar to our own."

This is a story that is going to run and run, is it not?

Conclusion

If one is looking for some kind of literary parallel to where civil justice and dispute resolution systems stand worldwide at the moment, the question is whether we are facing some kind of 'Brave New World' as immortalised in Aldous Huxley's novel of the same name published in 1932.

The unappealing scenario of Huxley's novel, set in the year 2540 AD and thus some 500 years hence, is one where normal human reactions and emotions play little part in everyday life. To my mind, it is difficult to envisage any dispute resolution system that does not depend, at least to some extent, on the personal qualities and abilities of a human being, whether acting as a judge, arbitrator or mediator.

Looking ahead 500 years is, perhaps, asking too much. The 21st-century has another 81 years to go. Indeed looking ahead only a few years is difficult enough given the velocity of change in and the increasing sophistication of IT.

Dispute resolution systems undoubtedly face interesting and challenging times. As I have already said, and I venture to repeat, it is important that the developing systems, whether IT-based or otherwise, do not let down those who seek and have access to them.

Maintenance of respect for the rule of law depends on it and it is vital for the preservation of a civilised society, including a peaceful international community, that the rule of law survives intact. Furthermore, in an age where ADR is being so actively promoted in all areas, it is also just as important that the alternative means by which disputes are resolved command equivalent respect and are not treated as second-class citizens in a litigious and disputatious world.

As one of our most-loved broadcasters[8] used to say at the end of his radio show, "If you have been, thanks for listening."

[8] John Ebdon who died in 2005.