

Online Dispute Resolution

With a considerable fanfare the Civil Justice Council has outlined its vision for the way in which civil claims for up to £25,000 should be dealt with in the future.

The Chairman of the Civil Justice Council describes the report as “exciting” and “important”, and in some respects it is. However, readers of the report may well be left with the feeling that it is an exercise in identifying a way in which to drag an ailing civil justice system, rather belatedly, in to the 21st Century.

Very sensibly the authors reviewed the global landscape for the resolution of small scale disputes “online” – by which they mean with the use of IT and the internet. That review shows that globally, millions of small scale disputes are being resolved online (by “Online Dispute Resolution”, or “ODR”) every year, whether by ebay (60 million a year), Nominet, Cybersettle or a host of other IT based systems.

The report proposes the introduction of ODR in three tiers: dispute avoidance/online evaluation, dispute containment/facilitation and finally dispute resolution. Each of these tiers envisages online communication of information and statements of case. The tiers move from “informational” through “inquisitorial” to “adversarial”.

Whilst the report describes its proposals as a “fundamentally new approach” to the resolution of civil disputes, it skirts around the problems that exist in the current system and the causes of those problems.

Arguably this is a major oversight. Although it is undoubtedly attractive to ditch a system that has obvious deficiencies, to do so without at least identifying the nature and underlying causes of those deficiencies carries a real risk that the same mistakes will be made all over again.

The Council’s lack of interest in the operation of the current system is perhaps illustrated by (or the result of) the fact that the working party responsible for the report did not include one solicitor. Solicitors are of course the only people in the country permitted to conduct litigation for reward on behalf of parties to litigation and as such have extensive first-hand knowledge of the machinations of the civil justice system.

The report identifies a number of laudable characteristics that ought to be displayed by a civil justice system (affordable, intelligible, speedy, consistent, trustworthy and so on). However, because the report fails to address the causes of the problems in the current system, it does little more than to posit a new utopia that boils down to the idea that if one uses IT and the internet, it is possible to determine cases without the need for everyone to attend court – the judge included.

There are three fundamental points that the report misses.

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Firstly the current system has to deal with a plethora of dispute types. These disputes relate to commercial contracts, housing disrepair, tenancy issues (commercial and residential) property disputes, negligence claims, insolvency, sale of goods, mortgage repossessions and so on. It is inherently difficult for one system of civil justice to cater for this variation in dispute- type, and it is this feature of the current system that causes many of its problems. By contrast the existing ODR systems – for example ebay, Nominet, the Financial Ombudsman Service and the Traffic Penalty Tribunal all specialise in one type of dispute. To imagine that a single ODR service can cater for all of the dispute types that currently arise in the jurisdiction is a very bold step indeed, and one without precedent globally.

Secondly there is no connection between the value of a case and its complexity. It is freely assumed that low value claims are less complex than high value claims, but this is not the case. A claim for £25,000 is just as likely to throw up difficult issues of fact and law as a case that is worth 100 times that amount. Generally the approach taken in the civil justice system to date has been to provide one mechanism that is capable of dealing with cases of all degrees of complexity. This in itself is a laudable objective, but its pursuit has been one of the causes of the deficiencies in the present system.

Thirdly there are certain specialist procedures within the current system that operate very effectively. The success of those procedures ought to be allowed to shed some light on the best way to reform the current system. The process for enforcement of adjudication awards by the Technology and Construction Court is a good example. That process is overseen in a hands- on manner by judges expert in the relevant field, and where the court behaves proactively and (to use a term borrowed from the Civil Justice Council’s report) robustly to push the process to a prompt and cost-effective conclusion.

Whilst the Civil Justice Council therefore offers a bold vision for dealing with claims up to £25,000 in the future, it might well be helpful for the reformers to take a little more notice of the true nature of the existing system (with its good and less good aspects). There is little to be gained by ditching a system that has evolved over many years in favour of an ODR mechanism that so far has existed only to deal with in discrete and limited types of dispute.

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