TRANSATLANTIC PERSPECTIVES ON ADR CONFERENCE

Queen Mary University of London at Charterhouse Square
Friday, July 28, 2006 2:30-5:05pm
Panel : "Teaching ADR"

"The Status of ADR Training in Legal Education in the United Kingdom"

Corbett Haselgrove Spurin♦

INTRODUCTION

This paper considers whether or not the concepts and practice of Alternative Dispute Resolution (ADR) should form an integral part of legal training in the United Kingdom (UK). This might seem like a surprising question to ask, particularly for colleagues from the US where ADR, particularly mediation, is firmly established as an integral part of training in many law schools, but as will be demonstrated below, this most certainly not the case in the UK at the present time.

Undergraduate legal education in the UK serves two distinct and separate though complementary functions. On the one hand the Law Degree forms a key stage on the road to legal practice, on the other, it is simply one more discipline (albeit an important and prestigious one) within the University portfolio. Both functions are important. As a platform for the first stage of qualification as a legal practitioner the focus is on substantive law with an emphasis on the assimilation, analysis and application of legal rules and principles. Less than 50% of law graduates enter into legal practice, with the majority of graduates using the status of the law degree as a mark of excellence in academic and intellectual achievement as a passport other careers. From this perspective the emphasis is less upon the acquisition of legal knowledge and rather on the development of critical analytical skills and transferable skills in general. Subsequent professional training courses (Legal Practice Course and Bar Finals) are self evidently practice courses, with the greater part of the syllabus dictated by the professional bodies which both monitor and sanction the programs.

Whilst any law school might chose to incorporate some element of ADR training into its program of study (competition between lecturers for the limited opportunities afforded for optional subjects is considerable), this would not occur across the board unless the legal profession were to mandate it as a core requirement of a qualifying law degree or professional course. Equally, the extent to which such training would be mandated would again be a matter for the professional bodies. For the professions to so determine they would have to reach the conclusion that ADR practice had become an essential and integral part of legal practice. Is there a case for reaching such a conclusion?

INTER-RELATIONSHIP BETWEEN LEGAL AND ADR PRACTICE

The right of audience before the courts in the UK is the sole preserve of the legal practitioner and the judiciary are drawn exclusively from the legal profession. The legal profession plays a major role in client representation in ADR. This is inevitable since the first port of call for a member of the public involved in a legal dispute is likely to be the profession. However, in the UK the exclusive right of audience accorded to the profession does not extend to ADR. Equally, the ranks of ADR practitioners are not the exclusive reserve of the legal practitioner in the UK. ADR forms an important area of legal practice for some specialist practitioners, but many others will have had little or no engagement in ADR at any level whatsoever. This may be in the process of changing, particularly with the advent of court based / promoted mediation which

♦ Mr Spurin LL.B, LL.M, Int.Com.Dip.Arb, FCIArb, is a Senior Lecturer at the Law School, University of Glamorgan, specialising in Dispute Resolution, Construction and Maritime Law. He is the Scheme leader of the LLM Masters in Law program; course leader of the Legal Research and Skills program for the Common Professional Graduate Conversion course to Law at the University of Glamorgan and one time trainer for undergraduate legal skills, moot master and trainer of the UK winners of the Client Counselling competition from Glamorgan in 1991 and from Plymouth University in 1992. He is visiting post graduate lecturer in ADR to the Law School, University of Wales, Cardiff. He has delivered professional mediation, adjudication and dispute resolution board training courses in Kuala Lumpur, Malaysia; Kuching, Sarawak; Athens, Greece; Amman, Jordan, and Dallas, Texas. He is Chairman of the Wales Branch, CIArb. Member of the steering committee of the South Wales Court Mediation Service and a member of the Academic Committee of the Civil Mediation Council.

potentially could impact on every civil litigation practice. Already there are a number of specialist areas where some form of ADR is the norm.[1]

Whilst the courts remain the primary vehicle for the resolution of civil disputes a significant number of disputes are resolved by alternative means, ranging from arbitration, adjudication, conciliation and expert determination to mediation, supplemented by a few exotic variations such as mini-trial and dispute resolution boards. To the extent that it is true to say that supply expands to satisfy demand, recourse to ADR is increasing in the UK, as evidenced by the ever growing range of ADR service providing bodies who promote the benefits of their services to the public and private sector. Admittedly, the converse might apply, namely that there are increasing numbers of suppliers chasing a diminishing market, but for the fact that the market has broadened out from the traditional construction and maritime arbitration base to such an extent that today there are few areas of human endeavour which cannot be accommodated by an off the peg private dispute resolution service.[2]

In addition, the government has committed itself both to encouraging litigants to settle disputes[3] and to embracing ADR procedures for the settlement of disputes involving government agencies.[4] The Government has a vested interest in the growth of ADR since it relieves pressure on the limited resources of the state subsidised court system. Furthermore, ADR is seen by the Government as a vehicle to promote both commercial efficiency and social harmony. Potential benefits to the court's clients from the adoption of ADR highlighted by Her Majesties Court Service include the timely settlement of disputes and a higher degree of party autonomy. ADR offers a degree of procedural flexibility unobtainable before the courts and provides the court's clients with enhanced opportunities to play an active role in the process. Negotiated settlement processes provide clients with autonomy over settlement terms and the ability to fashion outcomes which are not available to the court. There is also a worry that the high costs involved in litigation may act as a barrier to justice which can to some extent be bridged by cost effective ADR services.

Whilst the recent advances of ADR in the UK has been quite remarkable, it is submitted that progress is likely to stall in the foreseeable future, despite the sterling support of Her Majesties Court Service, if ADR is not embraced and promoted by the legal profession. At present support from the profession is patchy. Even as new court based mediation schemes are being established in some parts of the country, other established centres are struggling to survive, starved of support by the local legal community. Thus court mediation referrals and applications to the court to defer to mediation have risen dramatically in some areas and fallen away in others. This can partly be attributed to variable support for court based mediation by the judiciary and partly to variable support by the profession from region to region.

The role of the legal practitioner in the choice of dispute resolution process be it some form of ADR or litigation is significant. Firstly, contract drafting is often performed by legal practitioners. Outside the standard form contract which routinely provides for ADR the inclusion of an ADR provision in a contract is likely to be dependent on advice from the drafting lawyer. In the absence of knowledge by the lawyer of the benefits of ADR this is unlikely to occur. Ad hoc references to ADR require the consent of both parties which is difficult to achieve after the event. The support of ADR by the legal profession is thus central to the continued growth of commercial ADR. Secondly, as noted above, the courts are the primary vehicle for the resolution of civil disputes. The normal expectation when a client seeks advice from a legal practitioner is that the case will go to court. Whilst it is not uncommon in certain fields[5] for disputes to be settled through ADR processes without recourse to the services of a legal practitioner, because the levels of public

1 Note that in specialist areas of practice such as Family Law, mediation is an everyday fact for the practitioner. Similarly, Patent Office mediation is likely to become the norm for those engaged in the field of Intellectual property dispute resolution. Construction adjudication under the aegis of the Housing Grants Construction and Regeneration Act 1996 is the norm in commercial construction dispute resolution practice. Etc. As specialist areas, from the legal training perspective their impact alone would not be sufficiently pervasive to justify a change in the general curriculum of the law school, as opposed to integration into specialist courses

2 Eg. Community, family, consumer, commercial, sport, travel etc.

3 The overriding objective of the Civil Procedure Rules is the provision of cost effective dispute resolution procedures, proportionate to the issues at stake. S1 Civil Procedures Rules 1998.

4 Public Statement on ADR by Lord Irvine, March 2001.

5 Eg community meditation; construction and maritime disputes where industry consultants play a major role representing clients in arbitration and adjudication particularly since ADR is a common feature of such standard form contracts.

knowledge and understanding about ADR are quite limited, unless a legal practitioner directs a client towards ADR where the practitioner is unable to broker a settlement any outstanding issues will inevitably be referred to the court. The exception is where the client knows of and requests ADR.

Clearly it is in the interests both of ADR practitioners and the government that legal practitioners direct clients towards ADR. Before that can occur, practitioners must firstly know about ADR[6] and secondly value it as a service to their clients which they can profitably engage in. Whilst it is not universally accepted that ADR is in all circumstances valuable to clients or to the profession, let us assume for present purposes that that is the case. The question then arises as to how legal practitioners should acquire ADR expertise, be it as an integral part of their legal education in the class room or as an optional part of continuing professional development.

LEGAL EDUCATION

The majority of legal practitioners in the UK will have undertaken a Bachelor's Degree in law (LLB)[7] accompanied by professional training to become a solicitor (The Legal Practice Course or LPC) or barrister (Bar Finals) followed by articles or pupilage.

- The traditional LLB degree course involves three years full time study or part time equivalent.
- The LPC and Bar Finals involve a year of full time study or two years part time study.
- Articles and pupilage will account for a further two years of on the job training.

Accordingly it usually takes a minimum of six years to become a qualified legal practitioner in the UK. At this stage formal education comes to an end and thereafter continuing professional development takes centre stage. Six years sounds like a long time but, during that period the trainee will be exposed to a great deal of information, much of which has to be assimilated and applied. The question therefore is whether or not there is a need to add to that work load by including ADR practice and procedure (be it a little or a lot). If so, would it be in addition to what is already covered, or would something have to be omitted to make room for it, and if so what would be omitted?

The Law Degree.[8]

The primary focus of the Law Degree is substantive law. Total face to face class room exposure will be somewhere between 12 – 15 hours per week. The core content of a qualifying law degree is set by the Law Society. Thus core subjects,[9] namely the substantive law of contract, tort, equity and trusts, property, crime together with Legal Systems, Constitutional law and European Community law account for approximately 60% of most qualifying law degrees.[10] The remainder of the program will be optional, with some facility for non-law subjects such as foreign languages.

Within a law school program ADR could be integrated into Legal Systems and / or Legal Skills. A law school could chose to offer a distinct ADR module, most likely as an option rather than as a core module. Alternatively, ADR could feature as part of extra-curricular activity.

[6] The profession has been quick to take on board the cost risks of ignoring mediation by virtue of s44 CPR 1998 epitomised by ***Halsey v Milton Keynes General NHS Trust : Steel v Joy & Halliday*** [2004] EWCA (Civ) 576 and fire fighting strategies to gain cost advantages by proposing mediation are now common. This demonstrates that the profession can and will take note of ADR when there is a perceived need and potential tactical benefit to be gained from proposing ADR, but many such offers do not demonstrate a genuine commitment to or understanding of ADR processes. The courts have not been fooled by spurious last minute offers of mediation and have robustly resisted applications for reductions of costs in such circumstances, see e.g. the recent judgment of Mr Justice Jacks in ***Patricia Mary Wright v HSBC Bank Plc*** **[2006] ADR.L.R. 06/23**

[7] There are alternative routes including the Common Professional Examinations, a graduate conversion course in law, legal executive courses, HND and HNC law courses with fast track conversion to LLB. There is also provision for foreign lawyers to undertake practice conversion courses.

[8] Given the diversity of provision in undergraduate law programs, the discussion below is pitched in general terms.

[9] The subjects areas are described here in broad terms. The exact scope and title for such subjects will vary from institution to institution.

[10] The number of modules in a law program can vary radically from one school to another. At the tightest level students might study a 4/4/4 program, moving upward to a 5/5/5 program or even a 6/6/6 program over three years. To further complicate matters some faculties will offer half modules.

It is quite likely that some reference is already made to ADR during the course of many Legal Systems programs, though how much emphasis and coverage is likely to be variable, ranging from a brief reference without any assessment to in depth evaluation of the systems coupled with a coursework or exam question. Some legal systems text books provide a respectable amount of coverage of ADR though others leave it out completely. If it is not in the chosen core text it is unlikely to be dealt with.

Legal skills may be offered as a distinct module or integrated into Legal Systems. With legal skills there is the scope for students to be ***briefly*** exposed to client interviewing, negotiation/mediation and advocacy skills in addition to study skills, essay writing, problem solving and research techniques. Emphasis is placed upon the word briefly because law school cohorts tend to be large and given the breadth of coverage within the syllabus time is at a premium.

Assessing interpersonal skills for large numbers places enormous strain on staff resources which few law schools are willing or able to accommodate. Furthermore, since legal skills underpin legal study such courses tend to take place at the beginning of a law course. It would be unrealistic to expect high degrees of sophisticated interpersonal skills from the average school leaver.

Legal Skills training has a chequered history in law schools. Such courses tend to be introduced by members of staff dedicated to its development, who have a passion for it and have the requisite skills to teach it well. They often expend enormous amounts of additional time and effort developing and delivering the program and do an extremely good job. However, when that staff member moves on to other things, it can prove difficult or indeed impossible to find another member of staff able to deliver the program and/or willing to commit themselves to so doing. The program eventually fades away or is diluted and merged into another program.

The provision of a distinct ADR module is perhaps the best that a law school could offer the undergraduate in the current context. However, as an option, it would not go far towards ensuring that all graduates had been exposed to ADR before graduating. Take up for such an option would be dependent upon reputation and student perceptions. Premium options such as commercial law, evidence, family and succession would no doubt continue to take precedence in most institutions. Also, given the breadth of specialist areas of practice embraced by ADR, the choice of subject matter and the breadth of coverage would inevitably be both limited and idiosyncratic.

A significant role in skills training has been fulfilled by extra-curricular activities. Many, but far from all law schools engage in debating, mooting, client counseling and negotiation competitions, both national and international. In some institutions this is supported by staff. In others the initiative is taken by the student law society, with or without help and assistance from staff. There are competitions for all these activities and at the final stages standards are extremely high. Some of these competitions are open to both undergraduates and post graduates whilst other competitions provide separate streams.

Less than 50% of the law schools take part in such programs. The level of investment, both in terms of library resources and staff commitment, required from a school to take part in international mooting for instance is considerable. In the absence of sponsorship most law schools are unlikely to make the additional investment required to take part such programs.

The uptake in skills competitions of law schools with modular programs is very low since inter-sessional examinations coincide with the preliminary rounds for most of these competitions. Understandably, few students are prepared to juggle with extra-curricular skills commitments and examinations at the same time. This is particularly the case today when so many students also undertake part time work to help finance their studies.

The percentage of students from those institutions that take part in the first knock out stage of these competitions, let alone those who progress to the finals is both self selective and rapidly shrinks as the competitions progress through the stages. It is notable that a high percentage of the students that take an active part in extra-curricular activities are older students rather than those who have entered University directly from high school. For those who take part the quality and quantify of skills exposure, even at the earliest stages, is likely to far exceed anything that is delivered in formal classes, but the conclusion again

must be that it is not a prospective vehicle for ensuring that all future graduates would have been exposed to ADR.

Professional Training.

The primary focus of both the Law Practice Course and the Bar Course is legal skills and practice. As such they would be an ideal vehicle for ADR training courses. The content of these courses is regulated by the professions and is very extensive and complete, leaving little scope for additional coverage. Whilst such courses involve eighteen hours of class contact per week, candidates are advised to treat the course like a full time job so that a full 40 hours a week need to be dedicated to the successful pursuit of the course.

The core texts for both courses contain several pages on ADR but, it is submitted, far from sufficient for present purposes. Clearly it is open to staff to develop this material further and no doubt some do so and provide ADR electives. However, it should be noted that whilst negotiation was previously a core skill, it was dropped from the curriculum five years ago, the view having been taken that whilst practitioners require drafting skills, negotiation skills are not central to what they do. It could take some doing to reverse this decision.

That said, the legal practice course is currently in the process of radical change and the present program (The LPC which replaced the LSF) is due to be replaced by LPC 2 in 2008. This will apparently be a modular program with trainees being able to accumulate credits from a variety of training providers. It is far too early to be able to make any predictions as to whether or not ADR will be mandated under the new scheme, though there appears to be a current in favour of non-adversarial dispute resolution being projected by the regulating bodies at the present time.

Conclusion on ADR coverage at law schools.

Whilst there may well be law schools that provide more than adequate coverage of ADR at some stage during the four formal years of legal education in the UK, it is submitted that at the present time coverage is minimal. It would be possible for law schools to improve upon this state of affairs but it is most unlikely that coverage would ever be sufficient across the board to ensure full ADR awareness amongst all future graduates.

UNIVERSITY ADR PROVISION OUTSIDE THE LAW SCHOOL PROGRAM

None of the above is to suggest that the Universities in the UK have completely ignored ADR. This is far from the case, as the wide range of institutions in the UK which have Chartered Institute of Arbitrator accreditation for their post graduate ADR programs is testament. Even so, the number of Universities that offer post graduate ADR courses is modest. The majority do not.

The LLM, MSc, MBA etc is an ideal vehicle for ADR education, both academic and professional. The masters program dedicated to ADR has the ability to deliver a comprehensive training package, though many such programs such as construction concentrate on specific fields of ADR practice. The added maturity and experience of post graduate students means that they are often in a position to take the best advantage of and profit from ADR programs. The primary focus of many LLM ADR students is ADR practice. They are likely to be drawn from many disciplines, not just from law. The number of post graduates that are from or will go into legal practice is quite limited.

Law is taught on a great variety of undergraduate and post graduate programs. Where ADR is particularly relevant to a discipline it may well receive considerable coverage. A good example of this is the construction field. Thus, an undergraduate or post graduate construction program in the UK today would be incomplete without at least some reference to adjudication. Similarly, it is not surprising that negotiation skills feature alongside partnering and conflict management in many business and management study programs.

CONCLUSION.

It is important for ADR to engage the legal community. The continuing growth and uptake of ADR is at least in part dependant upon the support of the legal profession, in particular those members of the profession who are not as yet converts to ADR. This cannot be achieved by bland CPD courses that merely extol the virtues of ADR as given statements of fact without proof. That message has already been delivered to, but

not necessarily been received by, the profession. Whilst most in the profession can reiterate the ADR mantra, often without conviction, far fewer have a real understanding of ADR or the ability to engage in it effectively. The legal profession will need to be convinced that ADR offers benefits both to clients and to the profession. How to convince the profession is another matter.

The efficacy of ADR is more a matter of belief and opinion than fact. In the absence of outside imperatives such as court ordered mediation or cost penalties, it is the perceptions of the profession that will carry the day. ADR has both its supporters and its detractors. There is no shortage of material demonstrating the benefits clients have reaped from engaging in ADR but then again neither is there a shortage of examples of clients who have had their fingers burnt by so doing. On the basis that "*good news is no news*" it is more likely that negative rather than positive experiences will be shared between members of the profession, which makes it even harder to project a positive ADR image.

In the grander scheme of things ADR in still in its early developmental stages in the UK. It continues to evolve and adapt to suit the needs of specific fields of practice. There are so many models of ADR in current use that generalisations, the bread and butter of what a law school can provide, are of limited value. It is likely that over time ADR will gradually undergo a process of rationalisation, trading off flexibility for certainty. Minimum standards of training, accreditation and enforceable codes of ethical practice are likely to be established in the not too distant future at least in specific fields of practice such as court based mediation. Some degree of accountability may be imposed upon appointing bodies with knock on effects for the way they regulate the activities of their members. The teaching of standardised rules, regulations, practices and procedures are more likely to be within the reach of the average law school.

Certainly if ADR were to be built into the law school's core curriculum prevailing gaps in the profession's knowledge and understanding of ADR could be plugged for future generations. Even so there remain limits to what law schools could achieve. It is most unlikely that the entire gamut of ADR and its specific applications could or would be catered for. The most obvious candidate for expanded coverage is mediation as Her Majesties Court Service raises it profile. Even so, such coverage is likely to be basic and rudimentary. Whether or not it would also imbue enthusiasm and commitment to mediation as well is yet another matter. At the very least, since some of the failures of ADR may be attributable to inappropriate choices of ADR process and or a failure of practitioners to engage effectively in that process, assuming sufficient ADR coverage is provided by the law schools such defects could be remedied for the future. Whatever the law schools do is unlikely to turn around disillusioned practitioners who have had "*bad*" ADR experiences and in such cases the new recruit might still encounter stiff resistance to ADR as they enter into practice.

Without wishing to detract from the important role played by the law schools, it should be remembered that formal legal education is limited. The legal practitioner builds upon the basics inculcated at law school and really learns his craft on the job, be it before the court, arbitral tribunal or mediation. The remaining vehicle for ADR training within the legal profession lies in continuing professional development, with a focus on representing clients within all aspects of ADR rather than in training to become an ADR practitioner. It is submitted that this is an area that the ADR community could and should actively engage in, but first the legal profession needs to be convinced that it is worthwhile investing in such training.

The fact that many legal practitioners specialise in the ADR field is proof that some in the profession can benefit from engagement in it. This provides a starting point upon which we in the ADR community can build.