

Essay LAS-7 Undertake the essay: 'Do you think that the courts offer the best means of solving disputes?'

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Introduction

The English Legal System must account for a plethora of Court cases every single year. Thousands of legal disputes are likely to occur and it is the Courts role to resolve such disputes. However, it has recently been argued that this method of solving disputes is not generally the best means of doing so. It is indeed debatable to suggest that the methods of Alternative dispute resolution are the most effective. In this essay I intend to explore the arguments in favor of the use of the courts and the arguments in support of Alternative Resolution.

Main

The Courts

The Court system is a relatively complicated system that is often the only means of resolving some disputes. It is logical to comprehend how one can argue that the court system is and should be the preferred method of resolution.

Explanation of the Court System (Litigation)

The Court System works in an intricate manner, it is imperative to follow the pre trial protocol and to ensure that the correct procedure is followed. An Individual must decide which court to use (this will mainly be the County Court or the High court) and then they must issue a claim. This involves filling out an N1 form and paying the court fee. A scheduled date will be given and the individual must simply appear in court and state their case.

Advantages of the Court System (Litigation) to solve Civil Disputes

There are a wide range of Advantages to using the courts as a way to solve a civil dispute.

Firstly, the decision made by the court must be upheld and can be enforced. This has the benefit of ensuring that if one of the 2 parties has won the case they will surely receive their award (or damages) for the wrong doing in question. If the Losing party fails to pay any cost enacted by the Judge it may lead to very stern consequences. For example: custodial action or bankruptcy. This binding decision creates certainty in the law and upholds the power that the law has been granted by parliament. If hypothetically the courts could not enforce its own decisions then its practice would surely lead to a flawed institution.

Furthermore, to elaborate it is evident that via the doctrine of judicial precedent the decision made is binding on all other similar cases. This ensures that the judges will reach a fair decision for every single case of the same attributes. Of

course practically this is likely to be very difficult to achieve however, it is important to strive for an immaculate system. Binding precedent ensures that an individual will not be given an unfair result in comparison to any similar case. Additionally, If Judicial precedent applies than the Lawyers representing the individual are able to evaluate whether or not an individual has a case against the other party by looking at previous similar cases and assessing critically whether he precedent can be applied.

Secondly, another advantage of the use of the Courts to resolve Civil disputes is that the courts allow for a competent appeal route if an individual feels that the result was in some way wrong or that a type of legislation should be changed if for example it is deemed incompatible with today's social climate. The clear appeal routes allow an individual to easily appeal. The main appellate courts are the, first, Divisional courts which hear appeals from inferior courts and tribunals. Secondly, the court of appeal which hears appeals from The High court divisions the county court and tribunals. Finally, the House of Lords which hears appeals from the Court of Appeal and the Divisional Courts.

Another possible advantage of this system is that the case will be heard by a legal professional and it is possible to be represented by a legal professional. This means that the level at which these individuals will interact will be high. Therefore there is no worry that the legal aspects of the case will not be thoroughly dealt with. Judges, Solicitors and Barristers all go through intense levels of academic success before they become lawyers. Therefore they are likely to provide a competent and successful service to tge public.

Additionally, another advantage of using the court system is the fact that it allows individuals to attain legal aid where necessary. This is relative to the disposable income of the individual (which is the money left after taxes), the disposable capital (which evaluates the assets of the Individual), the criteria of the funding (a code of provision as to the attributes of the funding) and the merits of the case (whether the case will be successful or not).

Finally another advantage is that the case is likely to be extremely formal. Therefore, All procedure will be completed and followed accurately and carefully. This allows the parties to plan and carefully organize around the contents of the case.

Disadvantages of the Court System (Litigation) to solve Civil Disputes

On the other hand there are also a range of disadvantages to using the courts to resolve civil disputes.

Firstly, the extensive cost of the court system is a serious disadvantage. The cost of litigation is dear as solicitors can charge from about £100 an hour to over £300 an hour for work completed by solicitors in specialist firms. The cost is especially

apparent if the individual loses the case as the judge can often demand that you pay the oppositions legal fees. This can sum up to lots of money and if you fail to receive legal funding because the case is for example worth under £5,000 or because it is a tribunal hearing you may find yourself with substantial losses. Legal funding is not readily available to all members of the public and is often widely restricted.

Another disadvantage is the fact that relationships can be destroyed if the process of the court system is followed through. If 2 organisations working together are caught up in a legal battle it is unlikely that after the outcome of the case they will be able to maintain a working relationship. This means that the overall consequences of the court case may lead to the separation of working relationships. This is a clear disadvantage of the court process.

Furthermore another possible disadvantage is the inaccessibility of the court process. It is seen to be extremely inaccessible to the public. Many people are intimidated or afraid of the court process which makes them reluctant to follow the court process. The Access to Justice Act 1999 aimed to improve the accessibility of legal aid and advice; however it did not give contingencies as to the stress and pressure of the actual court process. Perhaps this could be one of the drawbacks to the civil court process.

A final disadvantage of such a process is the delay that occurs in so many court cases. It can take a very long time for some cases to get to court. This can be up to a year or even 2 for some of the more prominent cases. This long wait before cases can lead to many key points and issues being changed or even forgotten. This is clearly a disadvantage.

There are a range of advantages and disadvantages to the court system.

Alternative Dispute Resolution

It has recently been frequently argued that methods of Alternative Dispute Resolution should be preferable to the use of courts to solve civil disputes. Alternative Dispute Resolution involves using any ulterior method than the court process to solve disputes. It is the courts primary aim to promote the use of Alternative Dispute Resolution and it has been known for judges to ensure that some form of Alternative Dispute Resolution is considered.

Negotiation Explained

Negotiation can be described as the direct divergence between the 2 separate parties involved in the dispute as they attempt to find a common ground and resolve the dispute. This type of Alternative Dispute Resolution is likely to be considered first before the court system and is likely to continue up to and throughout the court proceedings. This is reflected in the high number of cases settled out of court.

Advantages

The advantages of negotiation are firstly, it is well known for being quick and simple. Negotiation can be resolved a lot quicker than many civil disputes in civil courts. The speeds in which these disputes are resolved are very important when considering the efficiency of the English Legal System. As many court cases can be bureaucratic negotiation avoids the length of wait for court.

Additionally, it has the advantage of being entirely private. This is particularly beneficial towards civil cases that involve public organisations and profit organisations. These types of businesses must maintain a public decorum. This means that they must consistently look good in the public eye. Negotiation in civil disputes allows these businesses to solve their individual disputes with others and to keep their personal affairs private.

Moreover Negotiation benefits from being very cheap in comparison to the court process. The only costs that are required to be paid are the costs of perhaps solicitors to assist with the negotiation on each side. These lawyers will negotiate on behalf of their clients.

These advantages are very important when considering the choice of Negotiation in Alternative Dispute Resolution.

Disadvantages

On the other hand there are some disadvantages that must be taken into account when considering the use of Negotiation.

Firstly, Court cases can end up dragging on for several years and therefore Negotiation may continue for a very long time. This can become tedious and tiresome to both parties. Additionally there are occasions in which negotiation occurs at the pre trial stage and continues all the way up to the date of the court case and is then resolved at the morning of the case.

Also negotiation can increase in costs as the negotiations drag on. This may dramatically increase the costs of the negotiation if for example a paid lawyer has been employed. It is evident that this is a disadvantage as money is wasted on unnecessary negotiation.

Furthermore, negotiation can only work if both parties are cordial and are willing to negotiate with each other. It is evident that if they cannot work together it is impossible for negotiation to work. This is simply due to the fact that the 2 parties will be in continuous disagreement and find it impossible to meet at a common ground to resolve the dispute at hand.

Finally, the decisions between the parties will not be binding as they are not carried out formally in court. This means that the doctrine of judicial precedent does not apply.

Mediation Explained

Mediation is similar to negotiation but it involves a neutral mediator that aims to help each party reach a common ground in the dispute. The mediator does not choose either side nor does he play a huge role in proceedings. He simply aims to bring the 2 parties onto a common ground in an attempt to further the resolution of civil disputes. Mediators are generally supplied for around £1,000

Advantages

The advantages of mediation are firstly, the fact that it is very cheap in comparison to the litigation process.

It costs around £1,000 for the mediator and this is incomparably cheap.

Mediation is far quicker than the court process. It does not have the long time delays like a court case has and will therefore be a better option for parties who wish to get the matter resolved very quickly.

Mediation also has the advantage of being less formal. This means that arrangements can suit the parties in question, hence the time, dates and meeting places will be agreed by the parties and the whole process will be much less formal than a civil case.

Privacy can be seen as another advantage of mediation. Mediation, just like Negotiation is conducted between the 2 parties and although the third neutral party is suggesting his/her input it is still private to the public. It is very unlikely that the press will get involved. This ensures there is no loss of publicity to businesses.

Mediation (like negotiation) ensures that there is a reasonable relationship maintained between the two parties. They will not be involved in court action and if the mediation case is settled and both parties co-operate in a reasonably than there will be a greater chance of a relationship continuing between the two parties. This is especially important in divorce cases.

A final advantage of mediation is that it is possible to get a professional mediator from one of many mediation services; preferably a mediator with major experience.

Disadvantages

However, there are some disadvantages to mediation for example just like negotiation it depends on whether or not the parties can work together. It is evident that if they cannot work together it is impossible for negotiation to work. This is simply due to the fact that the 2 parties will be in continuous disagreement and find it impossible to meet at a common ground to resolve the dispute at

hand. Even if the mediator attempts to bring them to common ground it may be futile and the parties may just go to court anyway and have wasted a mass of time.

Another disadvantage which is similar to negotiation is that the legal costs may rise if lawyer are called in or the individual wishes to have the very best mediator.

Conciliation Explained

Conciliation is almost identical to mediation in the way that the parties attempt to negotiate with the help of a neutral third party. However the main difference between conciliation and mediation is that the neutral third party plays a much more active role in the proceedings by actually suggesting plausible and possible settlements for the dispute & grounds for compromise.

There are a wide range of Conciliation services available. One of the main conciliation service is ACAS (The Advisory, Conciliation and Arbitration Service). ACAS will then issue a conciliation officer to offer assistance with proceedings and try to help resolve matters before an employment tribunal is needed.

Advantages

Conciliation is very similar to mediation in many ways and therefore most of the advantages and disadvantages are the same. The fact that conciliation is very cheap in comparison to the litigation process is a major advantage.

Conciliation is far quicker than the court process. It does not have the long time delays like a court case has and will therefore be a better option for parties who wish to get the matter resolved very quickly.

Conciliation also has the advantage of being less formal. This means that arrangements can suit the parties in question, hence the time, dates and meeting places will be agreed by the parties and the whole process will be much less formal than a civil case.

The conciliator plays a much more active role in the case proceedings. This is an advantage as it means that the case is more likely to be settled than mediation as the conciliator will be placing forward possible options for agreement. The conciliator will give plausible suggestions about how to rule.

Finally privacy will come in as a good advantage of conciliation as parties may wish to keep the case private without the involvement of the press which could give them a bad reputation and a bad name.

Disadvantages

Conciliations disadvantages are also very alike to mediation. The main problem with conciliation is that if the parties cannot get along it will not work. Therefore if

the parties are unwilling to resolve the dispute and co-operate with each other then it is very unlikely that the case will be solved.

Secondly it is very long to enforce the award. It defeats the purpose of alternative dispute resolution because if the award cannot be enforced the courts must do so and therefore the wait for the court system must take place regardless.

Finally costs of conciliation may become excessive as is the same for mediation and negotiation.

Arbitration Explained

Arbitration can be defined as allowing a third party individual to make a binding decision as to the resolution of the case. The agreement to go to arbitration can be made by the parties at any time.

Arbitration often occurs in commercial disputes between businesses or consumer claims. Many commercial contracts include what is called a Scott V Avery clause, which is a clause where the parties in their original contract agree that in the event of a dispute arising between them, they will have that dispute settled by arbitration.

There can be 1 or more arbitrators that make the decision.

Advantages

The main advantage of arbitration is the fact that the parties have the freedom to choose the time place and quality of the arbitrator. This flexibility is very good for the parties.

Arbitration also has the benefit of being a private hearing which avoids publicity. Additionally it is much quicker than the court process. This is very alike to the other versions of Alternative Dispute Resolution.

The decision or award can also be enforced by the court process.

Another advantage is that the case will be heard by a 'technical expert' in the field of expertise. This will insure a more fair trial as the arbitrator knows the subject well and will have an idea of if there was a problem. It also allows for the use of witnesses which may also help a party state their case.

A final advantage of arbitration is the fact that it is Much more Informal than the court process.

Disadvantage

The major disadvantage of arbitration is the fact that there is the possibility of unexpected legal points arising. If the case is not being heard by a lawyer then the arbitrator will fail to answer any points that involve legal technicalities etc. Therefore it is probably quite essential that at least one of the arbitrators should be a solicitor / academic lawyer who has specific knowledge about the law.

Furthermore Arbitrators fees are often very expensive and could in some cases end up almost the same as in court. This is definitely a disadvantage because it would make more sense to simply go to court. Not only this the rights of appeal for arbitration are very low and the award or decision given by the arbitrator is usually final.

Additionally another disadvantage is that even though the cost of arbitration is so high there is no legal aid available. This means that people who are less financial well off will be incapable of following through with such a service.

Finally the delays of arbitration amount to almost the same as the courts process.

Tribunals

Tribunal is a generic term for any body acting judicially, whether or not it is called a tribunal in its title.

Advantages

A major advantage of tribunals is the fact that they make an award rather than give a judgment. They are not absolutely bound by previous decisions of the tribunal, although they may look at previous cases for assistance in making their decisions. They are however bound by decisions of courts.

The process is also very cheap due to the fact that applicants can represent themselves without using lawyers. The process is generally quick because there are speedy hearings. Also, tribunals can offer a party local knowledge and this can be beneficial to acquire, especially if a party is representing themselves.

Disadvantages

A big disadvantage of tribunals is that those who represent themselves may not be as well equipped to win the case. This means that the party who is represented by a lawyer has a higher success rate. This means that if a party is more affluent and can afford legal representation they have a higher chance of winning claims in tribunals.

Additionally there is no right to appeal from a tribunal consequently there is no uniform appeals system, and some tribunals offer no appeal rights at all. Appeals when allowed to the High Court are expensive and often complex.

“Beyond the basic types of alternative dispute resolutions there are other different forms of ADR:

Case evaluation: a non-binding process in which parties present the facts and the issues to a neutral case evaluator who advises the parties on the strengths and weaknesses of their respective positions, and assesses how the dispute is likely to be decided by a jury or other adjudicator.

Early neutral evaluation: a process that takes place soon after a case has been filed in court. The case is referred to an expert who is asked to provide a balanced and neutral evaluation of the dispute. The evaluation of the expert can assist the parties in assessing their case and may influence them towards a settlement.

Family group conference: a meeting between members of a family and members of their extended related group. At this meeting the family becomes involved in making a plan to stop the abuse or other ill-treatment between its members.

Neutral fact-finding: a process where a neutral third party, selected either by the disputing parties or by the court, investigates an issue and reports or testifies in court. The neutral fact-finding process is particularly useful for resolving complex scientific and factual disputes.

Ombuds: third party selected by an institution – for example a university, hospital – to investigate complaints by employees, clients or constituents. The ombuds works within the institution to investigate the complaints independently and impartially.”

Conclusion

To conclude, I do not think that the courts are the best method of resolving disputes. The courts themselves promote the use of Alternative Dispute Resolution due to its many advantages. It is quick simple and extremely cheap in comparison to the bureaucratic litigation system.

Bibliography

The English Legal System Jacqueline Martin

The English Legal System Course Companion and Revision Guide by Jo Smillie

<http://www.natran.ca/mediation.html>

<http://www.uark.edu/depts/comminfo/Lindsley/lc3.html>

http://www.adviceguide.org.uk/c_alternative_dispute_resolution.pdf

http://en.wikipedia.org/wiki/Alternative_dispute_resolution

http://www.infolaw.co.uk/partners/alternative_dispute_resolution.htm

<http://en.wikipedia.org/wiki/Tribunal>

<http://www.revision-notes.co.uk/revision/5.html>

