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SPECIAL FOCUS

Inside the retirement home for judges

Lord Thomas and Lord Neuberger are the latest to enter the booming alternative dispute resolution market, and some worry the courts are losing out

By Catherine Baksi on Nov 29, 2017 0 0

PREMIUM

Lord Clarke of Stone-cum-Ebony, Lord Neuberger of Abbotsbury and Lord Thomas of Cwmgiedd have become arbitrators on leaving the bench

DAVID BEBBER FOR THE TIMES; SUPREME COURT/PA; LAUREN HURLEY/PA

- Parties appreciate confidentiality and informality
- Fears it may undermine case law
- Retired judges not always the best choice as mediators

A boom in alternative dispute resolution (ADR) means that there has never been a better time to be a recently-retired judge on the prowl for a spot of work to keep the grey cells active.

Three former senior judges are touting for business as arbitrators and a report from an influential judicial advisory body trying to encourage parties away from litigation has put the spotlight on alternatives to traditional court litigation.

ADR – mediation and arbitration in particular – is a growing business. The 2016 Centre for Effective Dispute Resolution (CEDR) mediation audit showed there were 10,000 commercial mediations in claims worth £10.5 billion performed in the previous 12 months in the UK, up 5 per cent on 2014. Last year, the International Court of Arbitration of the International Chamber of Commerce recorded 966 new cases for administration. They involved 3,099 parties from 137 countries, a record in its 94-year history.

Arbitration has become the default means for settling international commercial disputes, says Khawar Qureshi, QC, commercial and international law silk at Serle Court chambers in Lincoln's Inn. Arbitration centres are proliferating across the world, he points out, with some, such as Singapore, witnessing "massive growth in the number of arbitrations". "Rightly or wrongly, the perceived benefits of confidentiality, informality,

expertise/credibility, choice of party appointed arbitrators, cost and speed are seen as favouring arbitration instead of most domestic court processes," he says.

Senior corporate in-house lawyers agree. "Arbitration also allows parties to choose what may be perceived to be a more neutral forum for resolving the dispute," Kevin Smith, managing counsel for global litigation at Shell, says. He says that in cross-border cases arbitration is attractive where foreign court orders are difficult to enforce. "Many countries are signatories to the New York Convention, which requires local courts to recognise non-local arbitration awards," he explains.

International corporations, including Shell, have signed the "21st-century corporate ADR pledge", committing to managing and resolving disputes through negotiation, mediation and other alternative processes when appropriate. "It sends an external signal that we see ADR not as a sign of weakness, but rather a process that can be helpful in identifying solutions to disputes," Smith says.

"We are about business, not disputes, and will always look for ways to get the right solution. That does not mean that you give up the value of your rights where you have them. It is about getting the balance right – making the most of your rights, but doing it in an efficient way that allows business to continue."

Mediation, has been around since the 1970s but has been something of a slow burn. This is explained in part, according to Michael Wood, consultant solicitor at Keystone Law and a registered mediator with the Civil Mediation Council, by the desire of "a lot of solicitors to rack up fees by going to trial".
Andy Rogers, a director at the CEDR, suggests there is a generational gap, where older lawyers in firms that have an older-style culture still have a deference to the bench.

Family law, says Nigel Shepherd, chairman of family lawyers' group Resolution and a partner at the national law firm Mills & Reeve, is "behind the curve in embracing alternative dispute resolution, compared to its civil law counterparts" because of a lack of understanding among lawyers. "With greater understanding comes greater use," he says, observing that there are still pockets of lawyers who do not believe family disputes should use mediation because of the power imbalance between parties and the vale it draws over inadequate disclosure.

Rogers says that mediation has been boosted by the UN commission on international trade law's convention on enforcement of conciliate settlement agreements, which sought to be the mediation equivalent of the 1958 New York Convention, putting conciliated settlement agreements on the same footing as arbitral awards.

And the EU Consumer ADR Directive and European Online Dispute Resolution Platform have promoted alternatives for consumer disputes across the union. Wood says that its use is growing steadily with encouragement from the government, which is "busy shutting down all the county courts", and the judiciary, who are increasingly making costs sanctions against parties who unreasonably refuse mediation.

"It's a brave man who tells his client to refuse a request to mediate from the other side," says Wood. As a result, he suggests, mediation is becoming a box-ticking exercise and the percentage of settlements is falling.

The Legal Aid, Sentencing and Punishment of Offenders Act 2012 was a "significant blow", Shepherd says, because the vast majority of mediation referrals come from solicitors and removing legal aid cuts off that route.
In family and employment cases parties are required to take steps to explore settlement and the argument rages over whether mediation should be made compulsory – something that Shepherd suggests is a "contradiction in terms". Wood, on the other hand, is broadly in favour of compulsion, predicting that it is likely to be introduced in some areas, such as medical negligence, in the near future.

Last month, the ADR working group of the Civil Justice Council said that the "system as a whole is not working" and alternatives had "not become an integral part of the civil justice system". A minority of members of the advisory body proposed making mediation either a condition of access to the court or of progressing beyond the case management conference.

But their interim report, which is currently the subject of consultation, stopped short of suggesting the process should be mandatory. It proposed a "presumption that, in most cases, if parties have not been able to settle a case by the directions stage they should be required to bring forward proposals for engaging in some form of ADR".

For David Bailey, partner at London law firm Healys, the whole process is in danger of becoming "just another form of litigation", with parties coming "legally tooled up". It starts, he says, with the choice of the mediator – often a former or practising lawyer or a judge, and continues with parties attending flanked by a solicitor, barrister and sometimes an expert, with written position statements and bundles of documents, right through to achieving settlement. Rather than making a party feel empowered, he suggests, the drive to "settlement at all costs" can make one side feel that they are the loser.

Regardless of the process, the choice of mediator or arbitrator can be crucial. In selecting, credibility, expertise and availability are crucial, Qureshi says.
In recent years an increasing number of English judges have joined the ranks of arbitrators – most notably and recently the former lord chief justice, Lord Thomas of Cwmgiedd, the former president of the Supreme Court, Lord Neuberger of Abbotsbury and his former Supreme Court colleague, Lord Clarke of Stone-cum-Ebony.

One senior commercial silk notes a "concerning" trend of senior judges retiring early to sit as arbitrators. "Twenty years ago the pool of retried judge arbitrators was small; now it has expanded. This risks the diminution in the reputation of our courts, if you cannot retain judges.

"Work will increasingly gravitate towards arbitration, reducing the case law on which to develop the law."

But is a retired judge a good choice? "Some clients and lawyers firmly believe that retired judges should not be appointed to sit as arbitrators because they lack the soft skills required," Qureshi says.

One box they do tick, says Matthew Weiniger, QC, a partner at the City of London "magic circle" firm Linklaters, is that of being good lawyers with a strong reputation for probity, something particularly important in some emerging markets where parties can be suspicious of those in authority.

Smith says that mediators play a different role and require "someone with a skill set that allows them to relate to and create empathy with the parties and to be creative in the way they facilitate a potential deal space". Mediation, he adds, "usually benefits from a less adversarial and more constructive approach. A judge, driven by the idea of finding an objective right and wrong

and who may be great at intervening and pushing the parties, may not be such a good mediator".

For Rogers, the most successful mediators are lawyers. While retired judges are favoured in some jurisdictions, like Hong Kong, where there is a "culture of deference", in the US, he says, they are regarded as behaving "as if they are still judges" – being too directive, closing down the issues and removing choice from the parties.

As with everything else, the spectre of Brexit looms. Although it may reduce the number of cases going through the English courts, Weiniger suggests that it may boost the number of arbitrations, as arbitral decisions are enforceable in most countries under the New York Convention, while court judgments may become harder to enforce once Britain is out of the EU.

In civil matters, the future for mediation could also be affected by the drive towards an online court, trumpeted by Lord Briggs of Westbourne, now a Supreme Court justice, in his final report on the civil courts structure review. In a speech to the Chartered Institute of Arbitrators' mediation symposium in September, Lord Briggs predicted that under a three-stage online system, mediation will become the norm for straightforward money claims up to £25,000. "In short, it seeks to take the A out of ADR," he said.

New kids on the block

- **Lord Neuberger of Abbotsbury** Retired in July as the president of the Supreme Court and joined One Essex Court in the Temple. Called to the bar in 1975, he practised largely in property law, taking silk in 1987. He was appointed a High Court Judge, sitting in the Chancery Division, in 1996, and made supervisory chancery judge for the Midland, Wales and Chester and Western circuits from 2001. In 2004, he was made a Lord Justice of Appeal, and appointed judge in charge of technology and modernisation, and in 2007 he was promoted a Law Lord and became a peer. He was appointed Master of the Rolls in 2009 and became president of the Supreme Court in 2012.

- **Lord Thomas of Cwmgiedd** Retired as lord chief justice last month and joined Essex Court chambers in Lincoln's Inn Fields, where he started practising commercial law in 1972. He was appointed a High Court Judge and became a judge of the Commercial Court, being in charge in 2002 until his appointment in 2003 as a Lord Justice of Appeal. He was Senior Presiding Judge from 2003 to 2006. In October 2011, he succeeded Sir Anthony May as President of the Queen's Bench Division and in 2013 succeeded Lord Judge as Lord Chief Justice of England and Wales. He was president of the European Network of Councils for the Judiciary from May 2008 to December 2010 and a founder member of the European Law Institute; he now sits on its executive committee.

- **Lord Clarke of Stone-cum-Ebony** Retired from the Supreme Court in September and joined Quadrant Chambers on Fleet Street. He practised at the commercial bar, before being appointed a High Court Judge in 1993, sitting in the Admiralty, Commercial and Crown Court. He was appointed to the Court of Appeal and Privy Council in 1998 and was Master of the Rolls from 2005 to 2009. He was the first High Court judge to be appointed directly to the Supreme Court.