

INTERNATIONAL TREND OF ON-LINE DISPUTE RESOLUTION

- 1 It is both a pleasure and an honour to have been invited to speak on a panel with such distinguished speakers. Thank you all for coming to listen to me.
- 2 I shall deal with on-line dispute resolution from the English perspective.
- 3 In England, there are effectively 3 kinds of dispute resolution:
 - **Litigation**, where you go to court, a judge decides the issues, and his ruling is legally binding on all the parties to the litigation.
 - **Mediation**, where you agree to try to resolve your differences with the help of an independent third party, who mediates between you. If you reach agreement, your written agreement will be legally binding on all the parties, whether or not the mediation is carried out through the court. That is different from China, where any such agreement will only be binding if the mediation is carried out through the court.
 - **Arbitration**, where the parties arrange for 1 or 3 arbitrators to decide the issues. The arbitrators' award is legally binding on the parties and can be enforced in most

countries through the application of the New York Convention.

4. All 3 forms of dispute resolution have their advantages and disadvantages.
5. Litigation, mediation and arbitration have all traditionally involved face to face hearings. But recently there has been a move to dealing with disputes online.
6. There are both advantages and disadvantages to online dispute resolution.
7. The main **advantages** are:
 - a. **Cost:** the cost savings can be considerable, not just in what you pay the lawyers but also for the parties. If you have a dispute between someone who lives in Beijing and someone who lives in England, dealing with the matter online can save a huge amount of cost in the travel and accommodation costs of the parties and their lawyers.
 - b. **Efficiency:** dealing with disputes online can often resolve them more quickly than having one or more physical hearings

- c. **Control**:if you are dealing with your dispute online, you have to work with the other side to resolve the dispute, and you often have more control of the outcome of the dispute.
 - d. **Flexibility**:online dispute resolution can be much more flexible than dealing with your disputes in the traditional way.
8. The greatest **disadvantage** of online dispute resolution is where there are factual disputes, particularly in litigation or arbitration, and the judge or arbitrator will have to decide between the parties when making findings of fact. In those cases, it is much more satisfactory to have the witnesses physically before you, because you actually see the person, and it is then easier to decide who is right and who is wrong on the facts.
9. Online dispute resolution uses the internet. This will involve email or videoconferencing. There is another helpful tool to assist in negotiating, called **blind bidding**. Where both parties agree that something should be paid, but do not agree on how much, they submit their highest and lowest acceptable settlement bids (which the other side does not see) to a computer system. The computer system suggests or makes a settlement figure. This has been very useful, for example in New York

where 2/3 of the disputes settled within 30 days of submission, and resulted in considerable savings in litigation costs.

10. The English courts are overburdened with litigation. They have for some years been doing their utmost to persuade would-be litigants to find other ways of dealing with their differences, in particular through mediation.

11. The English courts have for some years now penalised successful litigants if they have refused offers of mediation from their opponents, even if the successful party thought that mediation would be pointless.

12. Last year, Professor Susskind --- Chair of the Civil Justice Council's Online Dispute Resolution Advisory Group --- produced a Report calling for radical change in the way that the English court system handles low value civil claims. He felt that the current court system was "too costly, too slow and too complex" for low value claims.

13. He believes that a primary role of the English state is to provide an affordable and accessible public dispute resolution service, with an independent judiciary at its core.

14. What Professor Susskind suggested was that for low value claims, there should be an internet-based court service known as HM Online Court, which he hoped would be launched in 2017. That online court would

have two major benefits: a more affordable and user-friendly service for those using the courts, and substantial savings in the cost of the court system ie his view was that ODR can deliver more affordable and accessible dispute resolution. What he suggested was a 3 tier system:

- a. **Tier One:** this would provide **online evaluation**. That would help users be aware of their rights and obligations, and to understand the options and remedies available to them.
- b. **Tier Two:** this would provide **online facilitation**. This service does not involve judges but online facilitators who, communicating via the internet, would review the papers in the case and help the parties through mediation and negotiation. When necessary, they would use telephone conferencing facilities.
- c. **Tier Three:** this would involve **online judges**. They would decide suitable cases or parts of cases on an online basis, largely on the papers, again supported where necessary by telephone conferencing facilities. Online judges would have the discretion to send cases to the conventional court system, eg where there was an important issue of legal principle involved or where it was felt that the credibility of witnesses would be better judged in a physical courtroom.

15. At the request of the two most senior English judges, the Lord Chief Justice and the Master of the Rolls, and building on the Susskind Report, Briggs LJ has recently produced a groundbreaking Report on the future of the English civil courts.

16. What he has suggested is an Online Court, initially for money claims of up to £25,000 (ie c 200,000 yuan) but with some specific exclusions (eg claims for possession of homes, professional negligence claims, and intellectual property claims). He wants the court to be called the **Online Solutions Court** initially, and eventually the **Solutions Court**.

17. He has effectively followed the three tier process recommended by Professor Susskind:

- a. The first stage would be an automated online stage, designed to help litigants without lawyers to articulate their claim in a form which the court can resolve, and to upload their key documents and evidence.
- b. The second stage would be a conciliation stage, handled by a Case Officer. This could involve telephone or face to face mediation.
- c. The final stage would be a judge's determination of a disputed case by the most appropriate of face to face trial, video or telephone hearing, or determination on the documents.

18. In fact, Briggs LJ believes that the establishment of such an Online Court would result in mediation becoming the cultural norm. That is what he said to the Chartered Institute of Arbitrators' mediation symposium less than a month ago¹.

19. Briggs LJ is alert to the importance of not excluding lawyers from the Online Court where their instruction could in fact save unnecessary cost and time. Thus he recommended that early legal advice should be an element of fixed recoverable costs in the Online Court, because such advice might make a would-be litigant with a hopeless or exaggerated case see reality.

20. It remains to be seen how such an Online Court will work. It has considerable attractions in the saving of cost and time both to litigants and the government which has to provide the judges to deal with cases that do not settle, and buildings and staff where trials are held. Critical will be the IT efficiency: the British government has a long and unhappy history of expensive IT disasters. Let us hope that the Online Court does not prove to be one of them.

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¹ 26.9.16

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