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Promoting Alternative Dispute Resolution in Northern Ireland

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Abstract

In England and Wales (e.g., chapter 36 of the Jackson Review of Civil Litigation Costs, 2009); in the Republic of Ireland (e.g., Report on Alternative Dispute Resolution: Conciliation and Mediation, LRC 98-2010); and in Brussels (e.g. Directive 2008/52/EC on certain aspects of mediation in civil & commercial matters) moves to promote alternative dispute resolution are gathering pace. In Northern Ireland, the report in September 2011 by the Access to Justice Review Group to the NI Minister of Justice noted the benefits of ADR in appropriate cases and especially in the early stages of family law proceedings. In the courts, pre-action protocols in personal injury, clinical negligence, commercial and defamation proceedings recommend the use of ADR in resolving disputes in the stated areas and direct parties to, for instance, the dispute resolution service provide by the Law Society of Northern Ireland. More generally, a booklet called "Alternatives to Court in Northern Ireland" was launched in early September 2011 by the Law School at Queen's, the NI Ombudsman and the Law Centre (NI) and has since been made freely available to the general public in an attempt to highlight alternatives to litigation.

To be blunt however, the anecdotal evidence suggests that the use of ADR in Northern Ireland remains low while the resistance to or suspicion of ADR amongst the legal profession remains high. The various (some very) evident reasons for this are discussed in the paper as is the belief within the ADR community in NI that the only way of dealing with this resistance and/or reticence is to take a more forceful approach to the promotion of ADR either by mandating its use in some instances or by punishing (by way of costs) those parties who unreasonably refused to mediate at an early stage in the proceedings.

That being said, although doubtless there are benefits to the use of ADR, this paper also discusses the contention that those within the ADR community and particularly those in mediation must realise that what they are lobbying for is, effectively, some "privatisation" of the civil justice system and that that assignment of power and responsibility away for the ordinary court system is not something that should be done lightly or with undue haste. Of particular note here is the evidence that is emerging from jurisdictions such as Australia and the United States (where there is a much more established and experienced view of ADR) indicating that ADR flourishes only when doubts as to the levels of quality, accreditation and training of arbitrators/mediators/conciliators are addressed fully.

Introduction: The Why and What of Alternatives to Court

The thrust of this paper is fourfold in nature though it revolves principally around a booklet called "Alternatives to Court in Northern Ireland" produced and published in conjunction with the Northern Ireland Ombudsman and the Law Centre (NI). The booklet attempts to show members of the public that there are ways other than litigation in dealing with many types of dispute, how these alternatives to court might work and when it is appropriate to use them. It also includes a detailed directory of dispute resolution services available in Northern Ireland organised by specific types of disputes. The booklet is available online and without charge on NI Direct; the NI Ombudsman's website; the Law Centre NI's webpage; and in Courts, Citizens Advice Bureaus; solicitors' offices, and libraries across Northern Ireland.

Arising from the publication, the four central points to this paper are as follows: why, and what motivated, the decision to produce the document; what the booklet contains – a quick overview of its contents; anecdotal evidence on the health and status of ADR in NI as gathered, in preparing the booklet, from the ADR community (service providers and sole practitioners); from the legal profession; and (most interestingly) from the local judiciary. Finally, some comments on the future of ADR in NI will be given, as informed (as will all other parts) by a comparative perspective to the approach taken to the promotion of ADR elsewhere in the UK and in Republic of Ireland.

It must be noted at this point that the anecdotal research/evidence will, in the coming year, be supplemented by empirical work part funded by the Nuffield Foundation to £23,000 on a grant entitled: "Promoting the Greater Use of ADR: A Northern Ireland case study". The accompanying research statement to this funding is: "To undertake a qualitative survey of a representative sample of the public, ADR service provider industry, legal profession and judiciary in Northern Ireland to ascertain their perception of the (wider) access to; the (current) effectiveness of; and the (future) promotion of ADR processes in Northern Ireland."

In brief, that proposed research has four objectives. First, empirical research to establish evidential patterns about these causes of concern. Second, to carry out an analytical synthesis of this research in order to draw out its implications for the greater use of ADR in NI. Third, to address, by way of a series of practical outcomes, they key "fragmentation" weakness in the current provision of ADR services in NI by, first, arranging for an NI-specific ADR providers conference and forum and then with a view to establishing and maintaining a single online portal for all ADR service in NI. Fourth, the underlying idea is to ensure that this NI-centric study contributes to and supplements ongoing empirical and evaluative research on the use of ADR in the UK as a whole.

Overall, it must be noted that ADR in the context of this project entails private mechanisms that promote arbitration, mediation, conciliation, early determination, evaluation or negotiation of civil and commercial disputes. The project does not seek to evaluate criminal-related projects such as restorative justice schemes nor does it consider court, tribunal or other administrative law-led facilities such as the small claims court, industrial tribunals, social security appeal tribunals etc

1. Alternatives to Court in Northern Ireland: Why a Public Information Booklet?

In England and Wales, a public information booklet on alternatives to court, produced and promoted by the (then) Community Legal Service, has existed since 2006, as adapted in 2010

by then Scottish Executive's Justice Department for use in that jurisdiction. The information therein was partly gleaned from and supplemented by the ADRnow website (www.adrnow.org.uk) an information website providing an overview of ADR schemes in the UK; an outline of how they work; and an honest appraisal of the "pros and cons" of alternative dispute resolution. ADRnow is independent of ADR providers and government run by the Advice Services Alliance (ASA), a registered charity, and is the umbrella body for independent, not-for-profit advice networks in the UK.

From this, three points are noteworthy.

First, the idea developed within Northern Ireland – from stakeholders in the ADR community such as the Law Centre (NI); the NI Ombudsman; and thereafter supported by the Courts and Tribunals Service of NI and Department of Justice NI; with the NI judiciary and NI Minister of Justice also lending their support – for a Northern Ireland-specific public information booklet on alternatives to court. In this, there was an admission within the ADR community in NI that the sector would benefit hugely from an effort to "map" the various ADR-related services available in the local region and to do so in a manner accompanied by basic operative principles of ADR generally and, specifically, a directory of the various service providers in NI across different areas of law and dispute resolution.

Second, common to the motivation in England, Wales and Scotland to produce such public information booklets, was the need to address the fact that "fragmentation" is seen as a core weakness in the promotion of alternative dispute resolution mechanisms. For example, and put simply, in evaluating the NI public's perception of ADR, a knowledge gap relating to the fragmented nature of the ADR community in NI meant and means that, even when willing, members of the public have little idea of whom to contact to initiate an ADR process and what specific ADR process, if any, might be suitable to their type of dispute.

A related point of interest here is that in discussing ADR with those who both offer ADR services and those who act on a referral basis (e.g., Citizens Advice) a point made consistently was that, although the benefits of ADR are considerable, there are some risks and that a critical evaluation of these risks was always needed. In particular, people can have unrealistic expectations of what ADR can achieve. ADR might be unsuitable for their type of dispute (e.g., domestic abuse claims) or for the outcome (e.g., a binding agreement or financial compensation). Accordingly, it should always be made clear that it is always important, where appropriate, for individuals to obtain independent legal advice and for them to be made aware of the (sometimes hidden) financial costs and disadvantages of ADR.

Third, this limited effort to promote ADR facilities in Northern Ireland must also be located within a wider drive to promote ADR, as below:

European Union
Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (Transposed NI by: SI No 157 of 2011)

> Rectial 25: Member States should encourage the provision of information to the general public on how to contact mediators and organisations providing mediation services. They should also encourage legal practitioners to inform their clients of the possibility of mediation.

> Article 9: Member States shall encourage, by any means which they consider appropriate, the availability to the general public, in particular on the Internet, of information on how to contact mediators and organisations providing mediation services.

England and Wales

Jackson Report: Review of Civil Litigation Costs in England and Wales (Jan 2010)

> Section 4.2 recommended: (i) There should be a serious campaign (a) to ensure that all litigation lawyers and judges are properly informed about the benefits which ADR can bring and (b) to alert the public and small businesses to the benefits of ADR. (ii) An authoritative handbook should be prepared, explaining clearly and concisely what ADR is and giving details of all reputable providers of mediation. This should be the standard handbook for use at all JSB seminars and CPD training sessions concerning mediation.

Northern Ireland

Access to Justice in NI Review: Report (August 2011)

> Section 5.54 speaks about "Promoting ADR and ensuring the availability of information to the public on the available options."

Republic of Ireland

Law Reform Commission Report on ADR: Mediation and Conciliation (LRC 98-2010)

> Paras 4.30 and 12.41 recommend that "the Courts Service should commission or prepare comprehensive information booklets on the various dispute resolution processes which are available for the resolution of disputes, including the processes of mediation and conciliation."

2. Alternatives to Court in Northern Ireland: The Booklet's Contents

The contents of the above booklet was divided into four parts: first, a broad non-prescriptive definition of ADR; second, a cautious emphasis on its advantages over litigation; third, an introduction into the various types of ADR processes that exist in NI; and, finally, an accompanying directory of ADR service providers.

The broad umbrella-like definition of ADR, and the booklet more generally, was unapologetically targeted to the small-scale disputes or, at least, the explicit emphasis was on what might be called "domestic" arbitration and mediation and how it might be used in family, commercial, consumer and even disputes relating to personal injury.

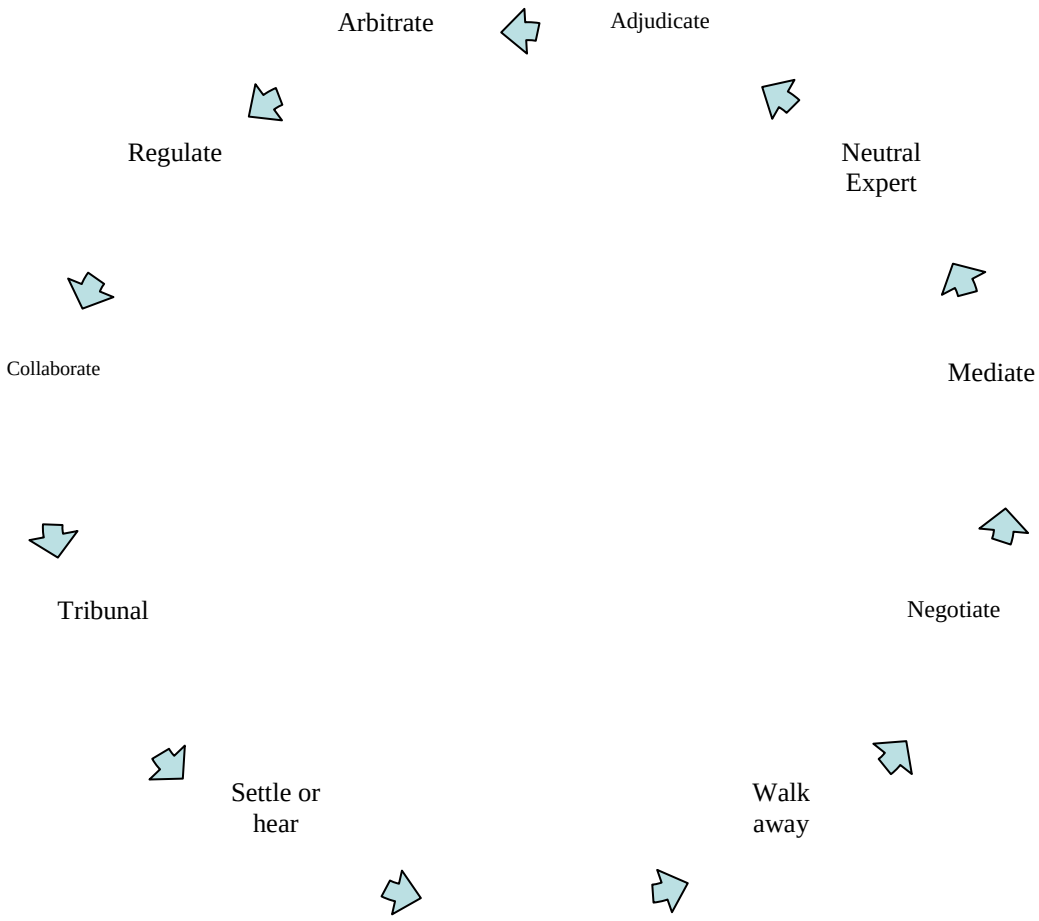
In addition, the implicit emphasis on the booklet was directed towards explaining for the lay person the alternatives to litigation i.e., other ways of sorting out a dispute caused by, for example, a breakdown in their relationship with their spouse, partner, parent, neighbour, landlord, retailer, financial service provider or a public body; with an accompanying underlying idea to **empower** the ordinary person to use ADR to resolve their dispute (through an internal complaints or grievance procedure) rather than **assign** it to the legal profession and all the expense, stress and time that may entail.

Circular nature of dispute resolution

- Anti-clockwise from the dispute = increasing emphasis on hard/binding/litigation-like nature of the dispute resolution process;

- Clockwise from the dispute = increasing emphasis on soft/non-binding/ADR-like nature of the dispute resolution process;

- Overall, ADR = emphasis on the significant benefits (time; money; stress) in trying to resolve the dispute as near (in time and space) to the happening/origins of the dispute as possible e.g., preferably on the steps of your neighbour's porch rather than on the steps of court.



In addition, and throughout the booklet there was a cautious emphasis on the advantages of ADR over litigation such as the conciliatory; confidential; flexible; and consensual nature of ADR. Nevertheless, it is also stressed throughout the booklet that it remains very important for the individual to seek independent legal advice from a solicitor; an independent centre or a local Citizens Advice Bureau.

Independent advice can assist with technical issues such as whether there might be a difficulty in using an ADR process at the same time as litigation; time limits; and the non-binding or binding nature of any agreement reached e.g., in employment disputes. Moreover, it is stressed that individuals need to be careful as to the nature of an agreement reached in an ADR process. In arbitration, the arbitrator's decision is legally binding and it is very difficult to challenge it subsequently in a court. Mediation is a non-binding process. This means that any agreement made is not automatically legally binding and any written record of the mediation's outcome is simply a "memorandum of understanding" and is not legally binding in nature. A mediated agreement can, however, be made legally binding. If both parties agree, they can ask the court to turn the mediation agreement into a court order, which can be enforced directly through the court. Moreover, a signed mediated agreement is a contract, and either of the parties can go to court to try and enforce it. A court will have to decide just how much weight to give to the contract. Overall then, in deciding whether you want the individual wants a mediated settlement to become legally binding and enforceable, they should first seek advice.

3. Alternatives to Court in Northern Ireland: Reflections

The clear benefits that ADR processes can have over litigation notwithstanding (less adversarial, speed, privacy, and flexibility in procedure and outcome etc), the anecdotal evidence gathered in writing the above booklet suggests that the knowledge and uptake of ADR remains low among the public while the reticence to engage with it remains relatively high in the legal profession. Moreover, there were (and are) specific concerns amongst the judiciary in NI regarding the training and accreditation of ADR service providers and, more generally, on the question of the "privatisation" of civil justice. In reaction, those within the ADR community in NI appear to be of the view (and it is one shared in Britain and Ireland more generally) that its use will flourish, and lawyers will truly embrace it, only when it becomes mandatory for the parties to first consider an ADR process to resolve their dispute. These four points of concerns form the basis of the aforementioned Nuffield research project.

In evaluating the NI **public's perception** of ADR, two knowledge gaps became apparent: the aforementioned point on the fragmented nature of the ADR community in NI (that, even when willing, members of the public have little idea of whom to contact to initiate an ADR process and what ADR process might be even suitable); but also the general view that, compared to a court hearing, an ADR process might not give a party a sufficiently public validation of the wrong committed against them. This goes to a more general point: before *entering* an ADR process one should think about the result one wants on *exiting* the process. In this, it must always be stressed that the outcomes differ between going to court and using ADR i.e., by going to court you might get (hard remedies) such as a declaration by the court about who is right and who is wrong; the court validated power of order (an injunction) that something be done by the other party or that they are stopped from doing something that is harming you or your interests; compensation – money to compensate for any loss or damage suffered by you. In contrast, by using ADR you might get (soft remedies) and you might be

happy to accept a change in the way a person or organisation behaves; a promise that a person or company will not do something; something you own repaired; something you own replaced; an apology; an explanation for what happened to you; a mistake corrected; and compensation (for example, for an injury)

In evaluating the NI **legal profession's perception** of ADR, the rather blunt message is that in straitened economic times **A**(nother) **D**(rop) (in) **R**(evenue) is seen as an income threat. Moreover, despite the fact that members of the profession use an enhanced set of negotiation and settlement skills on a daily basis, there has yet to emerge the view that mediation or conciliation should take place at as early a stage as possible in a dispute rather than the hurried and hushed negotiations on the day of trial. The principal exception here is in family law proceedings where many members of the profession on both sides of the border have enthusiastically engaged with collaborative law techniques. The (provocative) question that must be asked directly of the legal profession is whether this attitude to negotiated settlement/ADR is best serving their clients. Why is it – unlike in jurisdictions such as those within the US and Australia – ADR in Northern Ireland is seen as a threat rather than an opportunity for lawyers to add to their revenue streams by using their existing enhanced set of ADR skills of negotiation and settlement?

Anecdotally, those **within the ADR community** in Northern Ireland appear to be of the view (noted above) that its use will flourish, and lawyers will truly embrace it, only when it becomes mandatory for the parties to first consider an ADR process to resolve their dispute. A proposal of this nature for civil and commercial proceedings has been suggested by the Law Reform Commission of Ireland. In Northern Ireland, a recent report on access to justice suggests making it a condition of legal aid in particular cases that the option for ADR be considered and requiring reasons if that option has been rejected. In England and Wales, the courts have held the ADR should "robustly" be encouraged by way of costs implications for parties who unreasonably refused to mediate.

Similarly, and again as noted in the recommendations of the recent NI Access to Justice Review, some consideration might have to be given to financial incentives to encourage mediation in publicly funded cases; making it a condition of legal aid in particular categories of case that the options for ADR should have been considered; and/or requiring reasons if that option has been rejected.

Mandatory use of ADR does not appear on the agenda in any part of the UK (though it has been adopted in other EU jurisdictions e.g., Italy in commercial mediations). Denying a right of access to the courts until such time as alternatives to litigation are considered, is seen as problematical and one which may even have human rights implication pursuant to article 6 of the European Convention on Human Rights. Focussing on mediation in particular, the central thrust of mediation is that it is a negotiated settlement premised on both parties agreeing to the all aspects of process. The parties are given ownership of the settlement increasing the likelihood that they will abide by its terms. By forcing either one of parties into mediation, will not the core consensus of that mediation be undermined to the detriment of its lasting effect? Second, and more practically, asking the parties first to "consider" ADR might be used as an excuse by a party simply to drag out the proceedings such that the whole process merely becomes a "tick the box" exercise with no constructive engagement apart from antagonising the dispute.

As an aside here on the ADR community in NI, and a recurring point made to the author in preparing the "alternatives to Court in NI" booklet was that, when compared to the established networks of the legal profession, the ADR community's lobbying power is weak. Practical initiatives to consolidate the representative power of the ADR industry in NI will therefore be key in the future development of ADR in NI.

Although a number of pre-action protocols, promoting ADR and better case management, are in place under court rules in Northern Ireland (see appendix 1 for a select example of the pre-action protocol on personal injury); equally, a number of the **judges in NI** privately appear to be of the opinion that the greater use of ADR equates, in effect, to the greater privatisation of the civil justice system. It must be acknowledged that that assignment of power and responsibility away for the ordinary court system is not something that should be done lightly or with undue haste. It demands, for example, that the training, accreditation and continuing professional development of ADR service providers is always of a transparent, authoritative standard. Having said that it must be pursued further as to what is meant by the privatisation of civil justice in this context; are the fears surrounding this delegation of power justified; and what might be done to address any doubts as to the standard of training and accreditation?

In academic concerns, the apprehension expressed by the judiciary resonates with the work of emanating from Harvard Law School by P Murray "The Privatisation of Civil Justice" (2011) 85 (8) *Australian Law Journal* 490-504; and that carried out at the UCL by Professor Hazel Genn, *The Hamlyn Lectures 2008: Judging Civil Justice* (Cambridge, CUP, 2010) – abstracts below.

> Murray, 2011
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> "Civil justice, traditionally considered a function of democratic government, has had, it is argued in this article, its decision-making function largely supplanted by a system of dispute resolution by private, profit-making actors and agencies, relating to both arbitrators and mediators. This development, allowed to thrive in an atmosphere of deregulation, is explored in this article. The author highlights issues such as the delegation of public power, lack of transparency, the danger of impartiality, the subtle influence of repeat players and inequality in bargaining power, raising serious issues about civil justice and even the rule of law, before briefly offering possible solutions."
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> Genn, 2010
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> "The civil justice system supports social order and economic activity, but a number of factors over the last decade have created a situation in which the value of civil justice is being undermined and the civil courts are in a state of dilapidation. For the 2008 Hamlyn Lectures, Dame Hazel Genn discusses reforms to civil justice in England and around the world over the last decade in the context of escalating expenditure on criminal justice and vanishing civil trials. In critically assessing the claims and practice of mediation for civil disputes, she questions whether diverting cases out of the public courts and into private dispute resolution promotes access to justice, looks critically at the changed expectations of the judiciary in civil justice and points to the need for a better understanding of how judges 'do justice'."

Summary

In September 2011, the author was involved in a joint initiative designed to promote ADR in NI and involving a partnership between the NI Ombudsman, the Law Centre (NI) and the School of Law at Queen's University. The new booklet called "Alternatives to Court in Northern Ireland" attempts to show members of the public that there are other ways of dealing with many types of dispute, how these alternatives to court might work and when it is appropriate to use them. It also includes a detailed directory of dispute resolution services available in NI appropriately organised by specific types of disputes. The free booklet is available online on various sites including NI Direct – the official government services website for NI; and, over the coming months, in Courts, Citizens Advice Bureaus; solicitors' offices, libraries etc across Northern Ireland. Given the escalating demands on court time and legal aid, it was unsurprising that the initiative was endorsed at its launch by the NI Minister of Justice, David Ford, who, echoing recent comments by the jurisdiction's Lord Chief Justice, Sir Declan Morgan, noted that ADR is an idea "whose time has come".

The clear benefits that ADR process can have over litigation notwithstanding (less adversarial, speed, privacy, and flexibility in procedure and outcome etc), the anecdotal evidence gathered by the author in writing the above booklet suggests that the knowledge and uptake of ADR remains low among the public while the reticence to engage with it remains relatively high in the legal profession. Moreover, there were specific concerns amongst the judiciary in NI regarding the training and accreditation of ADR service providers and, more generally, on the question of the privatisation of civil justice. In reaction, those within the ADR community in NI appear to be of the view (and it is one shared in Britain and Ireland more generally) that its use will flourish, and lawyers will truly embrace it, only when it becomes mandatory for the parties to first consider an ADR process to resolve their dispute. These four points of concerns form the basis of this (continuing) research project.

This continuing research as supported by the Nuffield Foundation in 2013 will now move to the stage of undertaking a qualitative survey of a representative sample of the public, ADR service provider industry, legal profession and judiciary in Northern Ireland to ascertain their perception of the (wider) access to; the (current) effectiveness of; and the (future) promotion of ADR processes in Northern Ireland.

APPENDIX 1
IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND,
QUEEN'S BENCH DIVISION
PRE ACTION PROTOCOL
FOR PERSONAL INJURY LITIGATION

[2] This pre-action protocol aims to achieve best litigation practice by encouraging:

- More pre-action contact between the parties.
- Better and earlier exchange of information.
- Better pre-action investigation by both sides.
- Placing the parties in a position where they may be able to settle cases fairly and early without litigation.
- Enabling proceedings to proceed according to the court's timetable and efficiently, if litigation does become necessary.
- The promotion of an overall "cards on the table" approach to litigation in the interest of keeping the amount invested by the participants in terms of money, time, anxiety and stress to a minimum, consistent with the requirement that the issues be resolved in accordance with accepted standards of fairness and justice.

Offers to settle

[13] On receipt of a written admission of liability from the defendant, the plaintiff should proceed to complete his medical evidence and, as soon as the information is available, send his medical evidence to the defendant**'s r**epresentative together with a schedule of measured special damages including all relevant receipts, invoices, vouchers, etc.

[14] If no written offer of settlement is made by the defendant within 21 days of the date of posting of medical evidence the plaintiff should proceed to issue proceedings.

[15] If a written offer to settle is made by the defendant a written counter-offer may be made by the plaintiff within 21 days of the date of posting of the offer. The defendant will then have a further 21 days to either accept or reject the plaintiff's counter offer.

[16] If settlement cannot be reached between the plaintiff and the defendant, correspondence in respect of any offers may be produced to the court when the case has been disposed of so that it may be taken into account on the question of costs.

Alternative dispute resolution

[17] The parties should consider whether some form of alternative dispute resolution procedure would be more suitable than litigation, and if so, endeavour to agree which form to adopt. During the course of any litigation both the plaintiff and the defendant may be required by the court to produce evidence that alternative means of resolving their dispute have been considered. This is likely to involve production to the court of the standard mediation correspondence, a copy of which may be obtained from the Commercial Court website, together with the parties' replies thereto. Different forms of alternative dispute resolution are available and a mediation service is provided by the Law Society of Northern Ireland. Generally, the courts take the view that litigation should be a last resort and that claims should not be issued prematurely when a settlement is still being actively explored. It is expressly recognised that no party can or should be forced to mediate or enter into any form of alternative dispute resolution.