Global Developments and Challenges in Costs and Funding of Civil Justice

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1 Introduction

Access to justice is a basic human right[1] and a fundamental constitutional principle.[2] It is also a right which, as Lord Reed succinctly put it in *R (on the application of Unison)* v. *Lord Chancellor*,[3] is 'inherent in the rule of law'.[4] It is the cornerstone of a liberal democratic society. The right of access to civil justice continues, however, to be undermined and severely restricted as a consequence of disproportionate and crippling litigation costs, the complex nature of the civil court process and the severe delays that exist before justice is obtained.[5] The matter is made worse by the rapid decline of public legal aid in many countries, which has meant that those with limited means are increasingly unable to vindicate and enforce their legal rights.[6] Furthermore, the reduction of state funding of the civil justice system by successive governments[7] and, in particular, the substantial increase in the number of individuals who are forced to litigate, if they do, without legal advice or representation, has put unprecedented pressure on the courts to continually ration their limited resources in managing cases.

Against that background there have been two prominent developments, each of which seeks to mitigate the problems associated with litigation costs and funding, and thereby increase access to justice. The first is the emergence of private forms of litigation funding in the wake of the gradual decline in civil legal aid. These include legal expenses insurance, contingency fee agreements, damages-based agreements (DBAs)[8] and third-party funding (TPF). The second development is the attempt by policy makers and the judiciary to reform the rules on litigation costs to make them more predictable, transparent and proportionate. Reforms to costs rules include the introduction of fixed recoverable costs (FRCs),[9] costs shifting rules[10] and the greater use of costs sanctions by the courts.[11]

While these developments are welcome in trying to bridge the access to justice gap, they also raise challenges, are surrounded by legal uncertainty and are not always effective or available to those who require assistance. For example, the TPF market is either unregulated, as in the United Kingdom,[12] or, as Legg would argue, is becoming increasingly regulated, as in Australia.[13] Furthermore, in Europe, TPF is primarily available for high-value commercial disputes, thereby excluding lower value claims.[14] In addition, certain more risky or commercially less interesting (idealistic) claims may go unfinanced. TPF also raises major ethical concerns including the real risk of conflicts of interest between the

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1 See Art. 6 (1) (Right to a Fair Trial) of the European Convention on Human Rights and Art. 47 (Right to an effective remedy and to a fair trial) of the EU Charter on Fundamental Rights. For a detailed discussion of Art. 6 and access to justice, see J.H. Gerards and L.R. Glas, 'Access to justice in the European Convention on Human Rights system', 35(1) Netherlands Quarterly of Human Rights 11 (2017).

2 For example, see Art. 30 of the Cypriot Constitution.

3 *R (on the application of Unison) v. Lord Chancellor* [2017] UKSC 51.

4 *Ibid*., at [66].

5 The EU Commission Justice Scoreboard 2021 considers costly and lengthy judicial proceedings as the main impediment to access to justice.

6 See, for example, the comments of Lord Justice Briggs in *Civil Courts Structure Review: Interim Report* (Judiciary of England and Wales, 2015); Lord Justice Briggs in *Civil Courts Structure Review: Final Report* (Judiciary of England and Wales, 2016); and The Lord Chancellor, the Lord Chief Justice, and the Senior President of Tribunals, *Transforming Our Justice System* (September 2016), www.gov.uk/government/publications/transforming-our-justice-system-joint-statement (last visited 19 May 2022). For a discussion of the decline of legal aid, see R. Smith, 'After the Act: What Future for Legal Aid?' *Tom Sargant Annual Lecture* (2012) and the contribution of J. Sorabji in this issue.

7 This is certainly true of the UK.

8 DBAs are discussed later in this article.

9 The UK government has consulted on extending fixed recoverable costs to most civil cases with a value of up to £100,000 see www.gov.uk/government/consultations/fixed-recoverable-costs-consultation (last visited 19 May 2022). They are also consulting on extending fixed recoverable costs to lower value clinical negligence disputes see www.gov.uk/government/consultations/fixed-recoverable-costs-in-lower-value-clinical-negligence-claims (last visited 19 May 2022). Singapore and Cyprus are on the cusp of major reforms – see the contributions by D. Quek Anderson and N. Kyriakides respectively in this issue.

10 For example, Qualified one way costs shifting (QOCS).

11 For example, the English courts have discretion under CPR Part 44 to penalise a party in costs for unreasonable litigation behaviour, both before and after formal proceedings were issued. For a discussion of the use of these papers in relation to the unreasonable refusal to engage with alternative dispute resolution procedures, see the contribution by D. Anderson Quek in this issue.

12 On the issue of regulation of the TPF market, see the contributions by A. Cordina and M. Legg in this issue.

13 *Ibid.* See also J. Tidmarsh's contribution on the concerns with TPF in this issue.

14 *Ibid.*

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commercial incentives of the private funder, the professional obligations of lawyers and the rights and expectations of clients. As for private legal expenses insurance, not all potential litigants may qualify for insurance cover, and if they do, they may be unable to pay the necessary premiums; and contingency fee agreements may be inherently unfair to the unsuccessful party in the litigation.

There are also potential wider opportunities to develop funding options for particular jurisdictions. In his detailed critique of TPF in Ireland, Capper[15] argues that one of the reasons why TPF should be reformed is because of Ireland's status as the only common law country remaining in the European Union post-Brexit, which presents an opportunity to develop a 'common law legal hub' for litigation and other forms of dispute resolution. The judiciary and policy makers have also introduced procedural reforms to control litigation costs. These reforms in some common law jurisdictions include, for example, controlling the unpredictable and disproportionate costs of disclosure[16] and promoting the role of alternative dispute resolution (ADR) procedures to encourage the early resolution of disputes which may save costs for the parties as well as preserve the courts' finite resources.

This special issue of the *Erasmus Law Review* brings together articles by civil procedure scholars which focus on a number of European jurisdictions (England and Wales,[17] Cyprus and Ireland) as well as the United States, Australia and Singapore. A wider perspective of the costs of court adjudication and its impact on access to justice within the European Union is also provided through a detailed analysis of the EU Justice Score Board.[18] The articles provide a detailed critical perspective of costs rules, funding arrangements, recent procedural developments and the impact on access to civil justice. In this article, we briefly consider the right of access to justice and the evolving concept of 'justice' before focusing on private modes of funding civil litigation. We then consider procedural developments and reforms which aim to increase access to justice by controlling litigation costs. The increasingly significant role played by ADR within the civil justice system and its impact on costs and funding are also discussed before ending with concluding remarks.

15 See the contribution of D. Capper in this issue.

16 See later for a discussion of the Disclosure Pilot Scheme in the Business and Property Courts of England and Wales. See also the contribution of J. Tidmarsh in this issue on the reforms to the American costs rules regarding discovery.

17 Hereinafter 'England' or 'English'.

18 See the contribution of A. Dori in this issue.

2 Access to Justice and the Evolving Concept of 'Justice'

The civil justice system enables disputing parties to vindicate and, where necessary, enforce their legal rights and obligations under the general auspices of the state. It also provides the basis for the consensual resolution of disputes through ADR procedures and the means to enforce settlement agreements. The civil justice system must be accessible to all those who need to use it. In their seminal work on access to justice, Cappelletti and Garth[19] explained that the term 'access to justice' serves to focus on two basic purposes of the legal system: first, the system must be equally accessible to all; second, it must lead to results that are individually and socially just. It is the former purpose of the civil justice system – access to justice – which is still or has even become increasingly difficult to achieve.

The term 'access to justice' is frequently referred to in civil justice scholarship and policy documents and is increasingly referred to both judicially and extrajudicially. Access to justice is not, however, an easy concept to define. The traditional but narrow understanding of the right is to equate the term 'access to justice' to a litigant's right to have access to the civil courts or, to put it another way, to have his day in court, and to imply that 'justice' can only be dispensed by the courts. This understanding of access to justice is evident within English jurisprudence. In *Unison*,[20] Lord Reed explained that access to justice was 'the constitutional right of unimpeded *access to the courts*'[21] and emphasised that access to justice was 'inherent in the rule of law'. Although his Lordship appeared to impliedly acknowledge that access to the courts provided the backdrop for the consensual settlement of disputes, this judgment firmly focused on the right for disputing parties to have access to the civil courts. Lord Reed explained the relationship between a citizen's right to access the courts and the rule of law when he said,

> At the heart of the concept of the rule of law is the idea that society is governed by law. Parliament exists primarily in order to make laws for society in this country. Democratic procedures exist primarily in order to ensure that the parliament which makes those laws includes members of parliament who are chosen by the people of this country and are accountable to them. Courts exist in order to ensure that the laws made by parliament, and the common law created by the courts themselves, are applied and enforced. That

19 M. Cappelletti and G. Garth, 'Access to Justice: e Newest Wave in the Worldwide Movement to Make Rights Effective', 27 *Buffalo Law Review* 181 (1978). See also M. Cappelletti and B. Garth, 'Access to Justice and the Welfare State: An Introduction', in M. Cappelletti (ed.), *Access to Justice and the Welfare State* (1981) 1 and E. Storskrubb and J. Ziller 'Access to Justice in European Comparative Law' in F. Francioni (ed.), *Access to Justice as Human Right* (2007).

20 *R (on the application of Unison)* v. *Lord Chancellor* (n. 3).

21 *Ibid*., at [76]. Emphasis added.

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> role includes ensuring that the executive branch of government carries out its functions in accordance with the law. In order for the courts to perform that role, people must in principle have unimpeded access to them. Without such access, laws are liable to become a dead letter, the work done by parliament may be rendered nugatory, and the democratic election of members of parliament may become a meaningless charade. That is why the courts do not merely provide a public service like any other.[22]

When reflecting on extrajudicial statements and civil justice policy documents, it is evident that the English senior judiciary has taken divergent approaches to the meaning of access to justice. In his major review of the structure of the civil courts, Lord Justice Briggs viewed the civil courts as existing primarily to 'provide a justice service rather than merely a dispute resolution service', which encompassed recourse to an 'expert, experienced and impartial court for obtaining of a just and enforceable remedy'.[23] In contrast, the Master of the Rolls, Sir Geoffrey Vos, has more recently embraced a wider understanding of access to justice to encompass ADR. In a series of recent extrajudicial speeches, Sir Geoffrey has set out his future vision of a wholly digitised civil justice system which integrates sophisticated ADR procedures that will provide the parties 'with a continuing drive to help then find the best way to reach a satisfactory solution'.[24] Sir Geoffrey further explained,

> The whole system will be focused on resolution. … Continuous mediated interventions will be integrated into the whole digital justice system, making use of every available kind of dispute resolution from online or telephone to in-person mediations, early neutral evaluations or the use of AI to suggest outcomes.[25]

Also, in other jurisdictions and at the EU level, the concept of access to justice has evolved to also encompass ADR. While in the 1990s the European Commission referred to access to justice meaning access to courts,[26] the acknowledgement of the importance of alternative ways to resolve consumer disputes soon resulted in a broader understanding of this concept.[27] As the 2002 EU Green Paper on ADR noted, 'ADRs are an integral part of the policies aimed at improving access to justice'.[28] The preamble of the 2008 Mediation Directive states that 'the objective of securing better access to justice … should encompass access to judicial as well as extrajudicial dispute resolution methods'.[29] The more recent instruments on ADR, in particular the Consumer ADR Directive,[30] have also contributed to the integration of ADR within the EU access to justice spectrum. Lastly, while Article 6 of the ECHR (European Convention on Human Rights) and Article 47 of the EU Charter on Fundament Rights formally do not encompass access to out-of-court dispute resolution procedures, the case law of the Court of Justice on mandatory ADR has acknowledged the importance of ADR in supporting the administration of justice.[31]

This approach transforms the notion of justice to include a variety of dispute resolution methods, including the civil courts and ADR procedures. In doing so, it broadens the nature and characteristics of a civil justice system that goes beyond simply perceiving it as court adjudication and access to the civil courts.[32] This multifaceted approach to access to justice is also becoming a defining feature in other parts of the world, including in Singapore's civil justice system. As Quek Anderson explains in the present issue, ADR has been promoted in Singapore not merely because of its economic virtues of saving costs and time but also for its inherent value in creating a justice system with diverse dispute resolution options 'bringing a consensual dimension to the quality of justice, and helping parties find the most suitable forum to fit their needs'.[33]

Gaining access to the court does not necessarily ensure that parties have *effective* access to justice and other procedural factors will be necessary for the right of access to be exercised properly. Commenting on the UK Supreme Court's decision in *Coventry* v. *Lawrence*,[34] Silva de Freitas cogently argues that the right to fair trial under Article 6 of the ECHR is not simply limited to the right of access to a court and that without the procedural guarantee of equality of arms, access to a court cannot be exercised meaningfully.[35] There are also challenges in trying to measure the quality of access to justice across different civil justice systems. As Dori observes in her detailed critique of the EU Scoreboard's approach in measuring the costs of judicial services, 'the idiosyncrasies of the national systems and the heterogeneity of

22 *Ibid*., at [66].
23 LJ Briggs, *Civil Courts Structure Review: Final Report* (n. 6).
24 The Right Hon. Sir Geoffrey Vos 'The Relationship between Formal and Informal Justice', Hull University Friday 26 March 2021 at [7-8].
25 The Right Hon. Sir Geoffrey Vos 'The Future for Dispute Resolution: Horizon Scanning', *The Society of Computers and Law*. Sir Brian Neill Lecture 2022. Online – Thursday 17 March 2022 at [6].
26 See, for example, 'European Commission, Green Paper on Access of consumers to justice and the settlement of consumer disputes in the single market', COM (1993) 576 final.
27 A. Biard, J. Hoevenaars, X.E. Kramer and E. Themeli, 'Introduction: The Future of Access to Justice – Beyond Science Fiction', in X.E. Kramer, A. Biard, J. Hoevenaars & E. Themeli (eds.), *New Pathways to Civil Justice*: *Challenges of Access to Justice*, (2021) 1-20, at 6-7.
28 European Commission, 'Green Paper on Alternative Dispute Resolution in Civil and Commercial Law', COM (2002) 196 final, para. 9.
29 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, OJ 2008, L 136/3, no. (5).
30 Directive 2013/11/EU of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No. 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR), OJ 2013, L165/63.
31 Joined cases *Rosalba Alassini* v. *Telecom Italia SpA* (C-317/08), *Filomena Califano* v. *Wind SpA* (C-318/08), *Lucia Anna Giorgia Iacono* v. *Telecom Italia SpA* (C-319/08) and *Multiservice Srl* v. *Telecom Italia SpA* (C-320/08), ECLI:EU:C:2010:146; *Livio Menini, Maria Antonia Rampanelli* v. *Banco Popolare Società Cooperativa* (C-75/16), ECLI:EU:C:2017:457.
32 M. Ahmed, 'Moving on from a Judicial Preference for Mediation to Embed Appropriate Dispute Resolution', 70(3) *Northern Ireland Legal Quarterly* 331 (2019).
33 See the contribution by Quek Anderson in this issue.
34 *Coventry* v. *Lawrence* [2015] UKSC 50.
35 See the contribution of E. Silva de Freitas in this issue.

national judicial statics impact how individual characteristics should be measured and compared across EU jurisdictions' and therefore it is challenging to accurately measure access to justice.[36]

3 Private Funding of Litigation

The gradual decline of civil legal aid has caused a major shift towards the private sector in financing litigation. This shift has led to the creation and promotion of various private funding models such as legal expenses insurance, contingency fee agreements and TPF. Although the policy rationale underpinning these funding models is to increase access to justice for those with limited means, they raise particular concerns including the commodification of justice, conflicts of interest between the various parties to the funding arrangement and the lack of regulation. Similar concerns also relate to DBAs – a funding option which is beginning to develop in England and Scotland.[37] A DBA is a funding arrangement between a lawyer and a client whereby the lawyer's fees are dependent upon the success of the case and are determined as a percentage of the damages received by the client. Under a DBA, a lawyer may not recover costs more than the total amount chargeable to the client under the DBA and will not receive anything in the event that the case is unsuccessful.[38]

In England, DBAs were introduced as part of Sir Rupert Jackson's package of reforms to civil litigation costs.[39] Taking inspiration from the Canadian system, Sir Rupert favoured introducing DBAs, explaining that it was 'desirable that as many funding methods as possible should be available to litigants'[40] to increase access to justice. Also, the Scottish government has recently introduced DBAs through the enactment of Part 1 of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018. Prior to the 2018 Act, lawyers were prevented from enforcing *pacta de quota litis* – agreements for the share of a litigation – otherwise known as DBAs. Although DBAs were not *pacta illicita* (unlawful agreements), they could not be enforced if challenged by a client. The Taylor Review on *Expenses and Funding of Civil Litigation in Scotland*[41] concluded that, given the limited availability of legal aid, DBAs should be permitted as a means of promoting access to justice. The recommendations of the Taylor Review are now reflected in the 2018 Act and subordinate legislation.[42]

It is clear to see why DBAs are being promoted and encouraged by policy makers and the judiciary.[43] DBAs provide another option for litigants to finance their disputes. They increase the choice and variety of funding options available to litigants and can, more broadly, encourage competition within the private sector funding market to improve existing funding models and encourage funders to think more innovatively in creating new funding options. However, DBAs are, like TPF, unregulated and there are no means by which they are monitored. Furthermore, it has been argued that, given the potential financial risks to non-commercial clients in particular of having to potentially pay a large percentage from their damages to their lawyers, appropriate safeguards are necessary, including the provision of easily accessible information to educate and inform prospective clients of the nature and, more significantly, the implications and risks of entering into DBA arrangements. It has also been argued that the necessary professional regulatory bodies[44] must also carefully monitor the development of DBAs, including collating relevant data on, for example, the types of DBAs being offered, the rate of take-up and the types of clients entering into DBAs.

One of the potential strengths of DBAs is that they can be used to fund collective redress actions and thereby increase access to justice for many who would otherwise be unable to bring claims. Indeed, DBAs can provide further impetus to the EU's Directive[45] on collective redress scheme for consumer disputes. In doing so, the concerns regarding the lack of appropriate safeguards and the need to monitor DBAs may be effectively addressed by the EU Directive.

36 See the contribution of A. Dori in this issue.

37 For a detailed discussion of the latest developments, see M. Ahmed, 'Revisiting Hybrid Damages-Based Agreements', 1 *Journal of Personal Injury Law* 33 (2022). See also R. Mulheron 'The Damages-Based Agreements Regulations 2013: Some Conundrums in the "brave new world" of Funding', 32(2) *Civil Justice Quarterly* 241 (2013).

38 The Explanatory Memorandum to the English legislation which governs DBAs – SI 2013 No. 609 The Damages-Based Agreements Regulations 2013 – defines DBAs at para. 2.1 as an agreement between 'a private funding arrangement between a representative and a client whereby the representative's agreed fee (the payment) is contingent upon the success of the case, and is determined as a percentage of the compensation received by the client'. The relevant legislative definition is to be found in s58AA of the Courts and Legal Services Act 1090.

39 Lord Justice Jackson *Review of Civil Litigation Costs: Preliminary Report* (May 2009); Lord Justice Jackson *Review of Civil Litigation Costs: Final Report* (December 2009).

40 Lord Justice Jackson *Final Report* Ch. 12, at [para. 4.2].

41 Available at http://www.cicm.com/wp-content/uploads/2013/07/Resources_GovCon_2012_TaylorReview_ReviewOfExpensesAndFundingInCivilLitigationInScotland.pdf (last visited 19 May 2022). See also the Scottish Government's *response Review of Expenses and Funding of Civil Litigation in Scotland: A Report by Sheriff Principal James A Taylor Scottish Government Response* (2014).

42 The Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 (Success Fee Agreements) Regulations 2020.

43 In the leading decision of *Zuberi* v. *Lexlaw Limited* [2021] EWCA Civ 16 the English Court of Appeal provided important judicial clarification and guidance on DBAs by confirming that lawyers are permitted to charge time costs upon the early termination of a DBA. For a critique of the decision, see M. Ahmed 'Revisiting Hybrid Damages-based Agreements' (n 29).

44 The Bar Standards Board and the Solicitors Regulatory Authority in England and Wales.

45 Directive 2020/1828/EU of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, OJ L 409/1. Also referred to as the EU Representative Actions Directive for consumers (RAD). For a critique of the Directive, see D. Fairgrieve and R. Salim 'Collective Redress in Europe: Moving Forward or Treading Water?', 71(2) *International & Comparative Law Quarterly* 465 (2022) and A. Biard and X. E. Kramer, 'The EU Directive on Representative Actions for Consumers: a Milestone or Another Missed Opportunity?' 27 *Zeitschrif Fur Europaisches Privatrecht* 251 (2019).

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The Directive, which was adopted in November 2020 and will be effective as of 25 June 2023, introduces a right of collective redress across the EU. It requires Member States to put in place procedures by which 'qualified entities' will be able bring representative actions to seek injunctions, damages and other redress on behalf of a group of consumers who have been harmed by a trader who has allegedly infringed EU law. Although the Directive does not prohibit TPF (whether TPF or other funding arrangements) of collective redress actions, Article 10 restricts its use by requiring Member States to ensure that conflicts of interest between funders and claimants are prevented. Member States must also ensure that any TPF does not have an impact on the protection of the consumers' interests, including by ensuring that decisions taken by the qualified entity are not unduly influenced by the funder or that the action is not funded by a competitor of the defendant. The Directive further provides that the courts will be required to assess compliance with these limitations and will be able to take appropriate measures, if necessary. These obligations on Members States provide effective safeguards for the use of DBAs while allowing DBAs to be used as another means of funding collective actions and increasing access to justice.

Interestingly, in June 2021, the European Parliament published a Draft Report with recommendations to the Commission on Responsible Private Funding of Litigation.[46] This report and the recommendations show a concern about the growth of TPF in Europe and the intention appears to be to limit the use of TPF schemes by imposing strict requirements. It remains to be seen whether the European Commission will follow up on this European Parliament initiative.

4 Costs Rules and Procedural Reforms

As well as promoting private funding options to increase greater access to justice, policy makers and the judiciary have introduced procedural mechanisms in an effort to make litigation costs more proportionate, predictable and transparent. The English civil justice system is undergoing wide-ranging reforms, including the digitisation of the civil court process, and Singapore and Cyprus are both on the cusp of implementing radical changes to their civil justice systems. In his discussion of the forthcoming reforms to the Cypriot civil justice system, Kyriakides notes that 'it is expected that the coherency of the reformed civil procedure rules will provide transparency and clarity to parties involved in civil litigation'.[47]

One of the ways in which civil justice systems have tried to control costs is through FRCs. FRCs set out the amount of legal costs that can be recovered by the winning party at different stages of litigation, from pre-issue to the court hearing.[48] A fundamental principle of FRCs is that the recoverable costs are 'fixed', so that parties have certainty as to the amount of costs they may recover, at different stages of litigation, when a judge allocates a claim to a particular band. FRCs are a defining feature of the German system and one which other European countries have adopted. FRC was also a major recommendation of Sir Rupert Jackson's reforms,[49] and at the time of writing, the UK government is consulting on proposals to extend FRCs to higher value civil claims.[50] Although FRCs have obvious benefits for the parties, their lawyers and the wider civil justice system, it should not be perceived as a stand-alone procedural mechanisms which simply qualifies the costs of certain procedural steps. FRCs should be developed and implemented in tandem with other procedural innovations, reforms and funding options to truly enhance access to justice. Furthermore, developing DBAs in line with the UK government's introduction of FRCs will bring about greater costs certainty and transparency for non-commercial clients. Similarly, Sorabji persuasively argues for the introduction of a mandatory before-the-event insurance scheme with FRCs and the abolition of costs shifting.

Although the principal policy rationale underpinning procedural reforms is to increase access to justice by controlling costs, there are potential dangers that those reforms may inadvertently undermine access. Take, for example, the recent proposal in America to introduce costs shifting in the discovery exercise. The American rule on costs in civil litigation is that each party is responsible for paying its own costs and legal fees, including those associated with discovery. However, because discovery is a major feature of American litigation and is likely its largest cost component, Rule 26 of the Federal Rules of Civil Procedure was amended in 2015 to make explicit the power of the trial judge to shift the responding party's discovery costs to the requesting party. Although a major procedural reform in American civil procedure, Tidmarsh notes that a principal concern with the reform is the potential adverse impact it may have on access to justice. He explains that disputes involving asymmetrical information often involve a smaller or weaker party with little information suing a larger commercial party with more information. In this scenario, cost shifting may place a large financial burden on the weaker party, thereby deterring them from pursuing

46 European Parliament, Draft Report with recommendations to the Commission on Responsible private funding of litigation (2020/2130(INL)), 17 June 2021.

47 See the contribution of N. Kyriakides in this issue.

48 FRCs were first implemented for road traffic accident cases with a value of up to £10,000 damages in 2010.

49 Sir Rupert Jackson, *Review of Civil Litigation Costs: Supplemental Report Fixed Recoverable Costs* (2017), available at www.judiciary.uk/wp-content/uploads/2017/07/fixed-recoverable-costs-supplemental-report-online-2-1.pdf (last visited 19 May 2022). See also Lord Justice Jackson 'Confronting Costs Management', *Harbour Lecture* (13 May 2015); Lord Justice Jackson 'Was It All Worth It?', *Lecture to the Cambridge Law Faculty* (5 March 2018); and Sir Terrance Etherton MR, 'Civil Justice After Jackson', *Cockerton Memorial Lecture* (2019), Liverpool Law Society 15 March 2018.

50 See above n. 8.

their claims through the courts.[51] A further example of procedural innovations which may inadvertently undermine access to justice is the Disclosure Pilot Scheme (DPS),[52] which is currently operating in the Business and Property Courts of England and Wales. As with discovery in America, disclosure[53] in the English system has traditionally been an expensive and time-consuming process, both for the parties and the courts. The difficulties with disclosure were highlighted by the *RBS Rights Issue Litigation* in which Mr. Justice Hildyard severely rebuked the parties for 'an unfocused disclosure process, which has fanned out exponentially and extravagantly without sufficient control and direction'.[54] In an effort to remedy these problems, the senior judiciary, in partnership with the profession and policy makers, introduced the DPS. In *UTB LLC* v. *Sheffield United Ltd*,[55] Sir Geoffrey Vos explained that the DPS was

> intended to affect a culture change. The Pilot is not simply a rewrite of CPR Part 31. It operates along different lines driven by reasonableness and proportionality.

Despite the noble aims of the DPS, the profession has raised concerns. A recent evaluation[56] has revealed that compliance with the DPS is in fact undermining its objectives. The evaluation feedback revealed that 85% of respondents felt that complying with DPS had actually increased costs; 71% stated they believed the DPS increased the burden on court time and 78% did not identify any cultural change in the disclosure process following the introduction of the DPS. These findings are concerning given that the DPS has now been operating for over 2 years and has been adjusted and amended on several occasions. Despite these efforts, the DPS appears to suffer from the same problems as those associated with the traditional disclosure regime under CPR Part 31 – high costs, complexity of the system and delays – which all run counter to achieving greater access to justice.

5 Costs and Funding Implications of ADR

ADR procedures are an essential and necessary aspect of modern civil justice systems.[57] In addition to the economic and practical virtues of ADR, it also has, as noted earlier, the potential to transform the nature of civil justice by creating a justice system with diverse dispute resolution options and helping disputants to find the most suitable forum to fit their needs. Australia, for instance, has crafted a justice system which includes a range of dispute resolution services within the court process as well as outside of it, and Singapore will soon introduce compulsory ADR.[58]

Despite the economic and practical virtues of ADR, the power of the courts to penalise parties for unreasonably refusing to engage with ADR and the application of the factors which the courts use to assess unreasonable behaviour in refusing to engage with ADR (for example, the merits factor)[59] appear to have brought about greater complexity in the cost-effectiveness of ADR.[60] Quek Anderson argues that the expanded role of ADR in the civil justice system will have a positive impact on access to justice only when the court engages in a holistic and accurate assessment of the factors with an accurate comparison of the respective implications of ADR and litigation.[61]

A further point to note in respect of the English civil justice system is the inconsistent and divergent approaches taken by the courts on the issue of compulsory ADR, which further exacerbates the problems of determining the cost-effectiveness of ADR for the parties. The issue of whether the courts have the powers to compel parties and, more significantly, whether courts should exercise those powers, has been a controversial one which has resulted in two distinct and divergent judicial schools of thought: the 'orthodox' school of thought, which formally rejects the idea of compulsory ADR and seeks to uphold the right of litigants to go to trial, and the pro-ADR school of thought, which, although officially rejecting compulsory ADR, impliedly compels the parties to engage with ADR through the

51 See the contribution of J. Tidmarsh in this issue.

52 The Disclosure Pilot Scheme (DPS), introduced on 1 January 2019, pursuant to Practice Direction (PD) 51U of the Civil Procedure Rules. Various revisions have been made since the DPS was implemented.

53 CPR Part 31 sets out the rules on the disclosure and inspection of documents.

54 *The RBS Rights Issue Litigation* [2015] EWHC 3433 (Ch).

55 *UTB LLC* v. *Sheffield United Ltd and others* [2019] EWHC 914 (Ch). See also *McParland & Partners Ltd and another* v. *Whitehead* [2020] EWHC 298 (Ch); *Lonestar Communications Corporation LLC* v. *Kaye and others* [2020] EWHC 1890 (Comm); *Energy Works (Hull) Ltd* v. *MW High Tech Projects UK Ltd and another* [2020] EWHC 1699 (TCC); *Pipia* v. *BGEO Group Ltd (formerly known as BGEO Group plc)* [2020] EWHC 402 (Comm); *Breitenbach and others* v. *Canaccord Genuity Financial Planning Ltd* [2020] EWHC 1355 (Ch); and *The State of Qatar* v. *Banque Havilland SA and others* [2020] EWHC 1248 (Comm).

56 The Third Interim Report on the Disclosure Pilot Scheme (25 February 2020), available www.judiciary.uk/announcements/update-on-the-operation-of-the-disclosure-pilot-scheme-disclosure-pilot/ (last visited 19 May 2022).

57 B. Billingsley and M. Ahmed 'Evolution Revolution & Culture Shift: A Critical Analysis of Compulsory ADR in England and Canada', 45(2) *Common Law World Review* 186 (2016).

58 See the contribution of Quek Anderson in this issue. Also, in other jurisdictions compulsory ADR is emerging, for instance, in Italy, Norway and Belgium. See X.E. Kramer, J. Hoevenaars & E. Themeli, 'Frontiers in Civil Justice – Privatising, Digitising and Funding Justice', in X.E. Kramer, J. Hoevenaars, B. Kas and E. Themeli (ed.), *Frontiers in Civil Justice Privatisation, Monetisation and Digitisation* (2022).

59 The factors used by the courts in assessing unreasonable refusal to engage with ADR were set out by the English Court of Appeal in *Halsey* v. *Milton Keynes General NHS Trust* [2004] 1 WLR 3002 – is the contribution by D. Quek Anderson for further details.

60 For a detailed critique of the Halsey 'merits factor' see M. Ahmed, 'The Merits Factor in Assessing an Unreasonable Refusal of ADR: A Critique and a Proposal', 8 *Journal of Business Law* 646 (2016).

61 See the contribution of Quek Anderson in this issue.

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threat of cost sanctions.[62] The evolving ADR jurisprudence on the issue of compulsory ADR has been inconsistent and contradictory and sends out confusing messages to the profession on the extent of their ADR obligations. It also means that the courts are inconsistent in exercising their costs powers, which creates further complexity in assessing the overall cost-effectiveness of ADR for the civil justice system.

The Civil Justice Council's[63] recently concluded that compulsory ADR may not undermine the right to a fair trial where litigants are able to withdraw from the ADR process and continue to seek court adjudication, it will be for the senior judiciary to dismiss the orthodox approach to compulsory ADR. The Civil Justice Council's conclusions have been endorsed and supported by Sir Geoffrey Vos in his recent extra-judicial speech to the Chartered Institute of Arbitrators in which he argued that the question of compulsory mediation will become moot in the digital justice system that is currently being built.[64] However, the courts must grasp the *Halsey* nettle and finally and definitively dismiss the orthodox approach to compulsory ADR, thereby allowing a more consistent body of jurisprudence to develop. Until then, the jurisprudential inconsistencies will continue to undermine the ongoing reforms which seek to further integrate ADR procedures within a future online civil justice system.

The integration of ADR procedures within an online civil justice system may offer the greatest opportunity to fully realise the cost-effectiveness of ADR to the parties and the courts.[65] The fundamental aim of the current English reforms is to modernise the civil court process by moving away from an expensive, complex and slow paper-based system to an efficient online court process that is 'just, proportionate, and accessible to everyone'.[66] A number of recent online schemes have been implemented within the English civil justice system;[67] for example, court users[68] are able to issue proceedings for money claims through the Online Civil Money Claims (OCMC),[69] which incorporates a mediation 'opt-out' stage before the parties are permitted to proceed to the final stage of judicial determination. The opt-out mediation stage of OCMC represents a significant judicial and policy shift which recognises the increasing significance of ADR in the resolution of disputes and gives practical effect to a wider understanding of access to justice. It also provides firm foundations to give practical effect to Sir Geoffrey Vos' future vision of an online justice system which will include sophisticated integrated ADR procedures. As Sir Geoffrey explained,

> My vision for civil justice in England and Wales will allow all claimants to start their claims online, creating a single transferable data set, allowing vindication of legal rights either within the online space or, for the most intractable cases that are not resolved by mediated intervention, by the most efficient judicial resolution process.[70]

To help facilitate the digitisation of the civil courts, the UK government has very recently promulgated the Judicial Review and Courts Act 2022,[71] which will establish an Online Procedures Committee (OPC). The OPC will be responsible for drafting appropriate procedural rules so that 'disputes may be resolved quickly and efficiently …'[72] through the online environment. Compare the wording of the 2022 Act with that of the Civil Procedure Act 1997, which, inter alia, established the Civil Procedure Rule Committee (CPRC) following the Woolf reforms of the 1990s.[73] Under s1(3) of the 1997 Act, the CPRC must exercise its powers 'with a view to *securing that the civil justice system is accessible, fair, and efficient*'.[74] The emphasis here is on access to the civil justice system in the traditional sense of access to the court and its procedures. The wording used in the 2022 Act clearly reflects policy objectives to modernise the civil justice system through the digitisation of its procedures and processes. It is particularly interesting to note that the powers of OPC must be exercised so disputes 'are resolved quickly and efficiently,' which reflects the wider understanding of the purpose of the civil justice system in providing parties with appropriate forms of dispute resolution procedures and therefore embodies a wider notion of access to justice.

62 See M. Ahmed, 'Formulating a More Principled Approach to ADR within the English Civil Justice System', in X.E. Kramer, J. Hoevenaars, B. Kas and E. Themeli (eds.), *Frontiers in Civil Justice Privatisation, Monetisation and Digitisation* (2022).

63 *Civil Justice Council Compulsory ADR* (June 2021), https://www.judiciary.uk/wp-content/uploads/2021/07/Civil-Justice-Council-Compulsory-ADR-report-1.pdf (last visited 19 May 2022).

64 The Right Hon. Sir Geoffrey Vos Master of the Rolls 'Mandating Mediation: The Digital Solution' Chartered Instituted of Arbitrators: Roebuck Lecture 8th June 2022.

65 Lord Justice Briggs, *Civil Courts Structure Review: Interim Report* (Judiciary of England and Wales, 2015); Lord Justice Briggs, *Civil Courts Structure Review: Final Report* (Judiciary of England and Wales, 2016); The Lord Chancellor, the Lord Chief Justice, and the Senior President of Tribunals, *Transforming Our Justice System* (September 2016), available at www.gov.uk/government/publications/transforming-our-justice-system-joint-statement (last visited 19 May 2022); HMCTS Chief Executive, Susan Acland-Hood, 'Modernising the Courts and Tribunal Service: Future of Justice Conference', (14 May 2018).

66 The Lord Chancellor, the Lord Chief Justice and the Senior President of Tribunals, *Transforming Our Justice System* September 2016 available at www.gov.uk/government/publications/transforming-our-justice-system-joint-statement (last visited 19 May 2022).

67 Other examples include the electronic filing of court documents (known as CE Filing) in the Business and Property Courts and the Supreme Court and the Disclosure Pilot in the Business and Property Courts.

68 Both litigants in person and legally represented court users.

69 Practice Direction 51R.

70 Sir Geoffrey Vos, Master of the Rolls, 'Reliable data and technology: the direction of travel for Civil Justice', *Law Society Webinar on Civil and LawTech* (Thursday 28 January 2021), available at www.judiciary.uk/announcements/speech-by-the-master-of-the-rolls-reliable-data-and-technology-the-direction-of-travel-for-civil-justice/ (last visited 19 May 2022). Add 2022 speeches including to Worshipful Soc of Arbitrators April 2022.

71 Judicial Review and Courts Act 2022.

72 s18(3)(c)

73 The Rt Hon Lord Woolf, *Access to Justice Interim Report* (Lord Chancellor's Department 1995); The Rt Hon Lord Woolf, *Access to Justice Final Report* (Lord Chancellor's Department 1996).

74 Emphasis added.

Finally, ADR may also complement and enhance the effectiveness of litigation funding models. Sorabji convincingly argues that a mandatory before-the-event expenses insurance scheme would need to be integrated within the wider English civil justice reforms and that distinct advantages of doing so would be to promote consistency across government and judicial policy, which would thereby promote the successful implementation of the new scheme, and the promotion of the principle of proportionality, which has been a central feature of English civil procedure.[75]

6 Conclusion

There is no doubt that enhancing access to justice remains a continuing challenge for most civil justice systems. The costs and procedural reforms and funding options have at their core the aim of bridging the justice gap left by the decline of civil legal aid, and they should be applauded for providing alternative means for parties to access justice. There are, however, legitimate concerns. Private funding options should be monitored and regulated so that they strike the correct balance between ensuing that they remain attractive to the litigation market and lawyers while at the same time protecting the interests of the parties and fulfilling the aim of increasing access to justice. This can only be achieved through constructive and continuing engagement between the private sector, policy makers, the profession and the judiciary. It is also important to avoid developing private funding options in isolation to other procedural reforms that are taking place in the civil justice system and vice versa; a wider approach should be taken whereby private funding models develop in tandem with procedural reforms, such as FRCs and ADR. Finally, policy makers and the judiciary must ensure that procedural reforms actually achieve their efficiency objectives rather than inadvertently increasing complexity, delay and costs, which are the enemies of justice.

75 See the contribution of J. Sorabji in this issue.

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