

It's good to talk – how mediation can keep you out of the courtroom

Litigation over tax and domestic wrangles will inevitably be lengthy, expensive and stressful, reports Adam Palin. All the more reason then to opt for alternative dispute resolution

While the scales of justice can tip either way in court, there are some certainties when resolving family and tax disputes through litigation. One is that the process will take a long time. Another is that it will be expensive.

There is widespread enthusiasm for relieving pressure on a court system inundated with what are essentially civil disputes such as those between divorcing spouses, warring family members, and individuals and HM Revenue & Customs.

Many think the problem has been exacerbated by recent government cuts to legal aid, which have not only increased the cost of litigation but arguably priced many people out of professional representation.

"The courts are clogged with people representing themselves," says Charlotte Leyshon, an associate at law firm Hugh James. "More and more, practitioners want to avoid going to court if they can."

A solution has been touted in the form of so-called "alternative dispute resolution", which is being increasingly adopted in the UK as a cost-effective way to deal with proliferating caseloads.

ADR incorporates a range of means of settling disputes and includes mediation, arbitration and negotiation. The process is consensual, but is increasingly encouraged.

"Not only does it reduce the burden on courts, but it is normally better for people to reach their own agreements rather than have them forced upon them," says Joanne Edwards, chair of Resolution, an association of family lawyers.

But obstacles remain to rolling out ADR more widely. Not only is there reluctance among participants and practitioners to engage with non-traditional methods, but many also argue there are limits to how widely it can be applied.

Tax disputes

One of the most promising areas for the adoption of ADR in the UK has been the resolution of tax disputes.

The government's increased emphasis on tax compliance, and in particular its clampdown on tax avoidance, has led to more disputes

being taken to litigation. The backlog of cases in line to be heard at tribunal has risen accordingly.

Jane Moore, a technical director at the Institute of Chartered Accountants in England and Wales, says that HMRC has been enthusiastic about the potential to lower the cost of settling disputes, as well as "unbunging" the tribunal system.

"The perception was that some enquiries were dragging on and that many were going to tribunal that really didn't need to."

In 2013, HMRC introduced ADR – in the form of mediation – as an option for businesses and individual taxpayers with longstanding disputes that are heading for the courts.

For cases involving individuals, the tax authority offers one of its mediation-trained officers as a third party facilitator, which is free of cost to the taxpayer.

Peter Nias, a barrister at Pump Court Tax Chambers who has acted as an independent mediator in tax disputes, says the role of the facilitator is to bring a "catalytic quality" to the discussion, unlocking the dispute by talking through the points of dispute individually and confidentially with both parties, then seeking to reach common understanding.

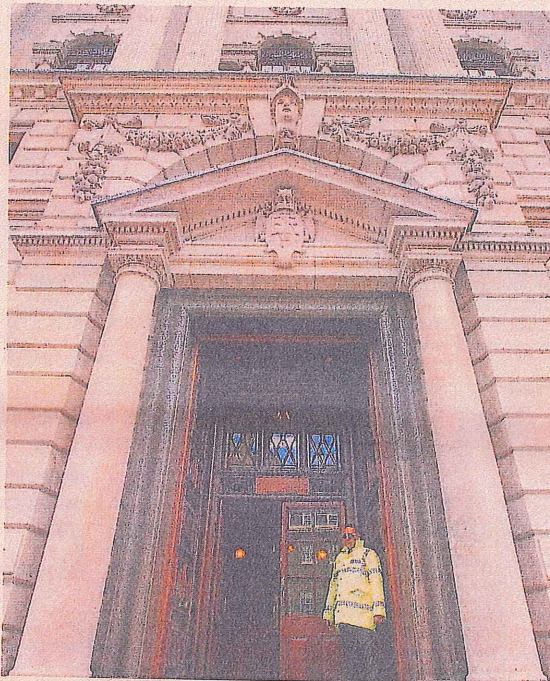
Unlike arbitration – where a legally binding judgment is imposed – both parties are in control of the outcome and any agreement reached during mediation is not binding.

Dawn Register, a partner at accountants BDO and also an accredited mediator, says the private nature of closed-door mediations is attractive to taxpayers who may fear reputational damage from a public tribunal.

"Usually everyone wants a resolution... [and] usually there is a middle ground that is acceptable to both sides, albeit for different reasons." She says the potential for ADR in resolving tax disputes is illustrated by its successful adoption in Australia.

The Australian Taxation Office concluded that its mediation pilot delivered considerable savings in time and money. According to the ATO, 95 per cent of taxpayer participants said they would choose mediation to resolve any future disputes.

Mr Nias says the evidence in the UK has been similarly encouraging. In 2014, the large majority of applica-



HM Revenue & Customs has mediation specialists – Getty

The divorcee How to split up amicably for the greater good

Three months after their decision to split permanently, Natasha Brittan and her ex-husband opted for mediation in managing their divorce process.

"We wanted our divorce to be as kind and nice as possible, not least because of our two children," she says.

Having engaged two mediators to help unravel their complicated financial situation, stretched by the recent recession, they drove together to the first session. "You have to leave your ego at the door and adopt the mindset that this is for the greater good of our future."

No stone went unturned during the sessions, she says, with the mediators bringing an air of transparency that fostered an

environment of trust and collaboration.

After seven sessions, spread over two years because her ex-partner was working abroad, the two felt equipped to draft and submit their agreed settlement.

While some close to her initially questioned her faith in the collaborative process, Ms Brittan says this has been vindicated by the friendship she shares with her ex-husband. "They thought we were going to head for all-out war before the start."

The costs of mediation – roughly £250 an hour, with sessions lasting between one and two hours – were borne by the couple, but Ms Brittan says they proved "enormously good value".



tions for ADR were accepted by HMRC, and of these, most mediations have been successfully completed with only a minority of cases proceeding to litigation.

"This demonstrates to me the success of the programme," he says.

Face to face with the taxman

Like many other tax practitioners, Ms Register is optimistic about the potential for mediation in resolving tax disputes, but says the timing must be right. "The dispute has to be relatively mature and an impasse must have been reached with the Revenue."

Paul Noble, a tax director at Pinsent Masons, says it is appropriate where the dispute is over the facts of a case and when communication between taxpayers and HMRC has broken down, but not where a "black and white" issue is on the table.

He says the tax authority is restricted by its Litigation and Settlement Strategy (LSS), which binds it to litigate where the perceived chance of success at tribunal is better than evens, unless the taxpayer settles in full first. The LSS, introduced in 2007 to achieve consistency in the resolution of tax disputes, is seen by many tax practitioners as a straitjacket on HMRC, limiting capacity for negotiations.

Any settlements agreed with HMRC officials in mediations must comply with the LSS, and be signed off by senior officials.

While there is mistrust among some parties of the independence of HMRC facilitators, Mr Nias says they have brought impartiality to mediations in his experience. "Technically they are employees of the Revenue, but they are very sensitive to the fact they could be seen as partisan."

Ms Moore says their independence has proved much less of a problem than expected. Also, an experienced HMRC facilitator is able quickly to understand the technical points of a tax dispute.

She compares mediation favourably with internal review, a mechanism where taxpayers can request that a decision made by HMRC be reviewed by another team in the authority. "Some view it as nothing more than rubber-stamping."

The greatest obstacle to the rollout

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— as long as interest rates remain low PAGE 10



Attending a mediation assessment meeting has been a legal requirement for divorcing couples since April last year — ColorTime/Getty

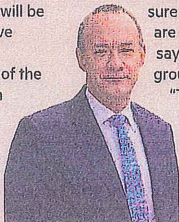
The mediator My starting point is naive optimism

Peter Nias, who has mediated a number of large disputes between taxpayers and the Revenue, says that positivity from the intermediary is crucial.

"I make clear at the start of proceedings, 'the approach I'm going to take today will be one of Panglossian, naive optimism!'"

He says that the role of the third party is to offer an independent perspective, and to challenge parties on their positions.

"The mediator



should ask, 'what do you think the other side are thinking?'"

Mediation can be tiring. "There is something I call 'the banana moment', around an hour after lunchtime when there is often an explosion of frustration." An injection of energy at this point can be the catalyst for agreement, Mr Nias says. He also insists on breaks for lunch.

Overall, the key is to make sure that all participants are relaxed, so Mr Nias says that he does not set ground rules.

"The informality of the arrangement, with parties being able to walk away, can have a liberating effect... One should not be prescriptive."

of mediation in tax disputes may be attitudes. Mr Nias recognises there are concerns about discrepancy of outcomes achieved through mediation, which could conflict with taxpayers' right to equal treatment.

"Some people worry that 'alternative' dispute resolution is mysterious and about people doing deals, but this is not the case." While outcomes may differ, cases are never identical, he says.

There has been a degree of ambivalence towards mediation among lawyers and accountants. "Sometimes it's very difficult to accept that compromise might be the best outcome, especially for advisers," says Mr Nias.

Ms Register adds that some taxpayers are wary of facing their accusers

directly. "Taxpayer reluctance can stem from having to be there in person and eyeball senior HMRC officials. It can be quite intimidating for some people."

Family disputes

While ADR is voluntary for those involved in tax disputes, it is effectively mandatory for the resolution of family disputes.

"Courts can come down quite heavily on parties who don't engage with ADR [and] in some circumstances can impose sanctions if it is not attempted," says Carly Russell, a solicitor at Berkeley Law.

Attending a mediation information and assessment meeting (MIAM),

has been legally required since April 2014 before an application for divorce can be made to the courts.

Miams offer a forum for couples and a trained mediator to discuss whether mediation may be suitable for resolving their dispute and a costly court case.

Ms Edwards says that mediation is widely perceived as much quicker than going through the courts, which can take up to 18 months. It is also usually much cheaper, though public spending on mediation has fallen by more than half, leaving couples to pick up the cost. Despite cuts to legal aid, mediations undertaken by Resolution members nearly trebled between 2010 and 2013.

Ms Edwards says that, as with tax disputes, some couples find it hard to sit around a table with their estranged other half. "People often don't like being in the same room as their ex-partners. It can be uncomfortable and emotional... making mediation very hard."

Ms Leyshon says that while it is easier for divorcing couples and families disputing a will or probate to live with a decision they have agreed themselves, rather than one that has been imposed, arbitration can be an effective alternative where there are intractable differences.

Arbitration has long been used to settle commercial disputes, but only introduced into family law three years ago. It is entered into voluntarily by all parties and is run by a nominated figure whose judgment is binding.

"It has the advantage of being quick, probably within 12 weeks, unlike the court where you're lucky if

it's less than 12 months," says Ms Leyshon.

But it can be expensive, depending on who is selected as the arbitrator. Ms Edwards says that those trained for family arbitration range from relatively junior solicitors to retired High Court judges, with fees varying widely. "It is certainly not the preserve of the uber-wealthy, however."

Another option for family disputes is collaborative practice, where contesting parties agree to act in good faith to reach a mutually acceptable agreement, and whose legal representation is limited to the process. With the lawyers precluded from taking the case to court, they have an incentive to resolve the dispute amicably, says Ms Edwards.

The involvement of lawyers raises costs, though — which may explain why cases using collaborative practice have not risen in recent years.

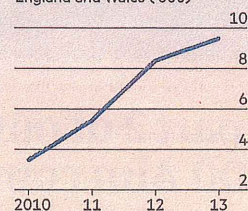
Ms Russell says that while many families are reluctant to engage with ADR, the costs of litigation can erode the value of an estate. "The family house can often end up being sold to cover the costs of disputing a will."

"I often experience clients saying they want their day in court, but when you explain the cost, and the reality that they would be facing [a judge] who is not interested in their family situation but the law, [ADR] looks more attractive."

Ms Leyshon says that there remains an unhelpful attitude among many family lawyers, wary of losing fees they would secure through litigation, that constrains the uptake of ADR, however. "They are missing the point. Nobody wants to spend money on lawyers in a divorce."

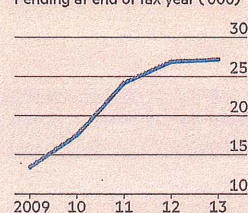
Family dispute mediations

Reported by Resolution members, England and Wales ('000)



Tax tribunal cases

Pending at end of tax year ('000)



Sources: Resolution; Pinsent Masons