

# Editorial

## ADR Procedures

In January the free-market think tank, the Adam Smith Institute, published a report called *Judgment Day – the Case for Alternative Dispute Resolution*, which calls upon the Government to encourage the use of private mediators to resolve civil disputes. This proposal draws upon the American experience with the extensive use of private Alternative Dispute Resolution (ADR) as an alternative to litigation – though it hardly needs to be pointed out that there is still an awful lot of the latter in the USA!

In commercial disputes, much use is already made in Britain of arbitration – for precisely the main reason put forward by the Institute in support of ADR, that the courts are “inefficient, overcrowded and expensive”. There is also a widespread recognition (an important factor behind the development of ADR in the United States) that the inherently adversarial

nature of litigation encourages the perpetuation of conflict and ill feeling; when the dust has died down, neighbours have to live next door to one another, and companies must go on trading alongside one another in the same market place. Of course, arbitration (culminating in the imposition of a settlement) and mediation (helping the parties themselves to find a mutually acceptable solution) are not quite the same thing. The report includes business law among the areas suitable for ADR treatment – though it is probably fair to say that the greatest potential for this kind of approach is in matrimonial and inter-neighbour disputes – and perhaps defamation. There is already a significant and growing ADR industry in the private sector, notably in the areas of family law.

The Adam Smith report does not call for a completely unregulated free for all in the mediation business. ADR, it says, should be complementary to the public court system and should, indeed, be

encouraged by the courts. The Government should “take steps to ensure that the private ADR industry is an accepted and endorsed alternative to the present system.” The legal aid scheme should be extended to the pursuit of claims via private mediation, because if this is not done “a financial disincentive would be created against the use of the private ADR system”.

The Law Society and the Bar Council, both of which have been giving recent thought to this subject, have given a cautious welcome to the report. The free market arguments on which it is based are likely to find some sympathy in Government circles. The stumbling block may be the Institute’s call for an extension of legal aid. The Lord Chancellor and the Treasury will, as always, look suspiciously at the financial implications. However, the medium term gain (in human as well as financial terms) would probably be substantial, and this is a proposal that in our view deserves very serious consideration – at least as the basis for experiment.