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Alternative approaches to resolving housing disputes

Lessons for the UK from three international case studies

Policy briefing

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This briefing paper examines three international case studies on the use of Alternative Dispute Resolution (ADR) to resolve housing disputes: the Civil Resolution Tribunal in British Columbia, Tenancy Services in New Zealand, and the Residential Tenancies Board in Ireland. The findings from these case studies point to certain key principles that may help to improve dispute resolution for landlords and tenants in the UK private rented sector (PRS).

Key findings

- A multi-tiered dispute resolution system may result in a significant number of cases being resolved early.
- Prioritising active participation in the dispute resolution process can increase client empowerment and access to justice.
- Delivering proportionate and appropriate dispute resolution can potentially remove barriers to accessing the system.
- A user-focused approach in the digitisation of dispute resolution systems will prevent people being excluded from the system.

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Alternative Dispute Resolution (ADR)

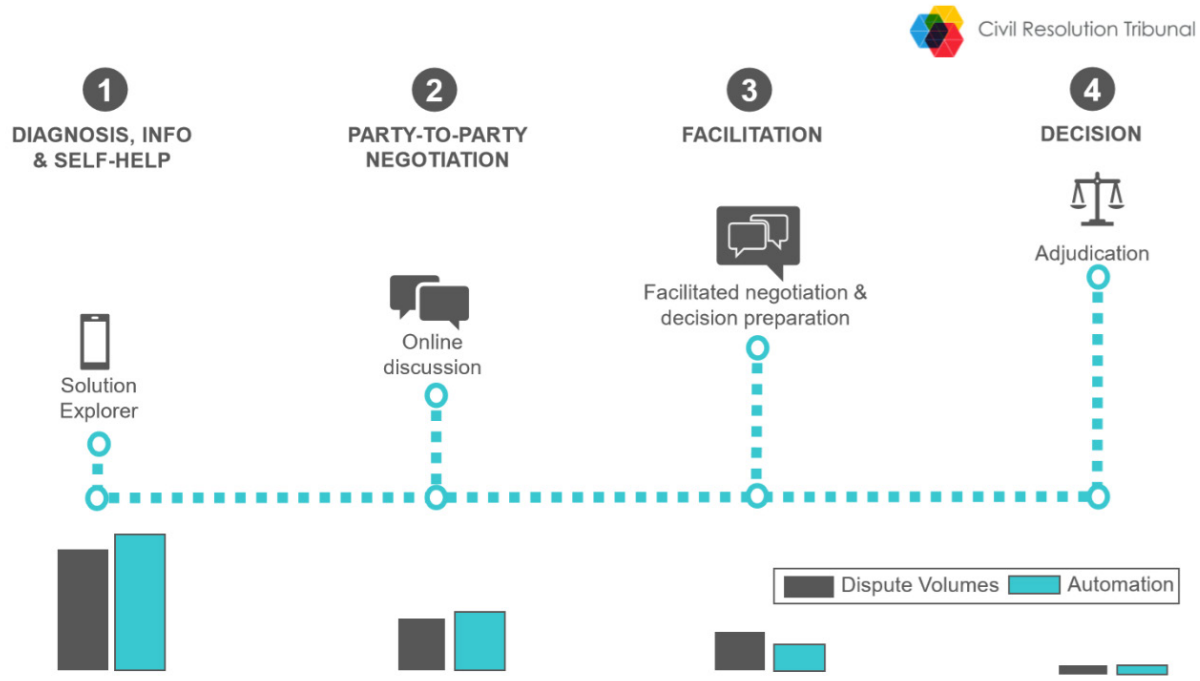
There is no universally agreed definition of Alternative Dispute Resolution (ADR), with the term covering activities that embrace a diversity of philosophies, practices and approaches. In this briefing paper ADR is understood as a process that allows landlords and tenants to resolve housing disputes without the use of courts or tribunals. ADR can also be seen as an alternative to processes of informal negotiation occurring with or without the involvement of lawyers, advisors or community organisations, or indeed as an alternative to not taking any action.

Civil Resolution Tribunal (CRT), British Columbia

The CRT is an online administrative tribunal that has operated in British Columbia, Canada, since July 2016. It provides an example of a dispute resolution system that uses ADR processes to resolve housing disputes entirely via digital channels.

The CRT is a complete end-to-end dispute resolution system covering four key processes (see Figure 1). Stage 1 is a free online tool, which uses a simple question and answer format to help disputants diagnose their problem.[1] Once the nature of the problem has been identified, users receive guidance in the form of self-resolution tools and downloadable forms.

Figure 1: Civil Resolution Tribunal (CRT)'s end-to-end dispute resolution system [2]



If the user cannot resolve their dispute using the self-help tool then they can begin the dispute process. This begins with voluntary party-to-party negotiations, providing the disputing parties with the opportunity to communicate directly with each other to resolve some "easy" disputes early and inexpensively.[3]

If negotiation is unsuccessful or one party is unwilling to engage then parties enter a mandatory facilitation stage (Stage 3). In this stage, staff with mediation skills and experience support parties in reaching an agreement via various channels. This process differs from mediation in that staff can provide disputants with an evaluation of the dispute and likely outcome if it were to progress to adjudication.

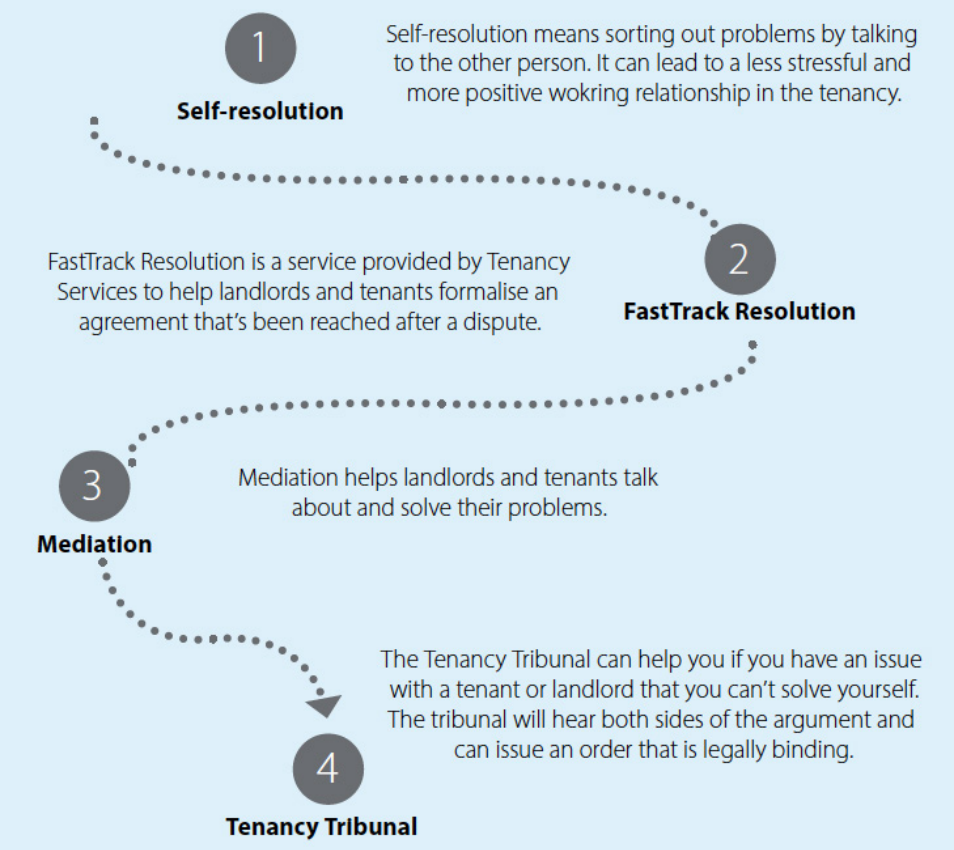
If the dispute is not resolved at this stage, the facilitator will support parties in preparing for adjudication (Stage 4) by helping them organise their claims. This is the final stage and involves an independent Tribunal member making a decision in regard to the dispute. Both the facilitated agreements and the adjudication decisions can be enforced like a court order.

Tenancy Services, New Zealand

In New Zealand the Residential Tenancies Act (1986) established Tenancy Services as an independent judicial body that provides dispute resolution for landlords and tenants. The Act created both a tribunal and a mediation service, allowing parties to reach an agreement among themselves rather than directly approaching the Tribunal for adjudication, thereby replacing an inefficient and costly court system.[4]

Tenancy Services provide a multi-stage dispute resolution service (see Figure 2).

Figure 2: Tenancy Services multi-stage dispute resolution service[5]



Landlords and tenants can use the mediation and tribunal process if there has been a breach of the residential tenancy agreement as contained within the Act. Unlike British Columbia, disputants do not move through the pathway in a linear fashion; mediation is available when an application is submitted to the Tribunal.

The primary aim of the mediation service is to ensure that disputes are resolved before formal Tribunal hearings take place. While participation in mediation is voluntary, the Tribunal has the power to halt proceedings and refer parties to mediation.

The Act establishes the role of the mediators as also conciliatory in nature, stating that mediators may "make such suggestions and recommendations and do all such things as they think right and proper for inducing the parties to come to a fair and amicable settlement".[6]

While the terms mediation and conciliation are often used interchangeably, there are some fundamental differences. Mediators will usually not provide advice, but rather support disputing parties in reaching their own agreement, whereas in conciliation a third party can advise on the best course of action. This latter approach requires in-depth knowledge of substantive matters, and Tenancy Service mediators are generally experts in tenancy law.[7]

Residential Tenancies Board (RTB), Ireland

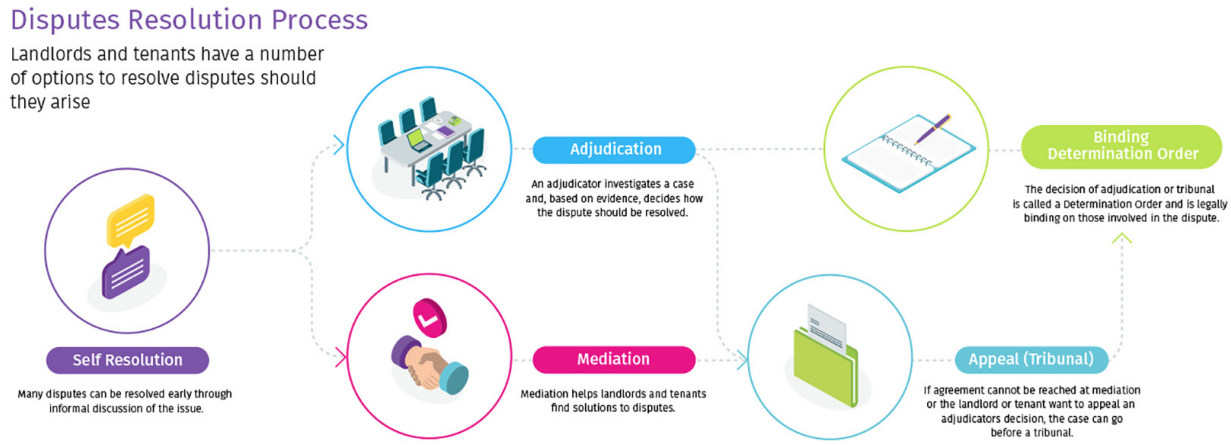
In Ireland the RTB was established under the Residential Tenancies Act (2004) to operate both a national register of private residential tenancies and a dispute resolution service, providing landlords and tenants with the opportunity to resolve disputes outside the courts.

The RTB deals with a wide range of disputes such as breaches of tenancy obligations, claims for cost and damages, and rent disputes. The RTB also addresses disputes that relate to security deposits.[8] Landlords who have not registered their tenancy with the RTB do not have access to the dispute resolution service, but their tenant(s) can still use it.

The RTB operates a multi-stage dispute resolution system (see Figure 3) which offers two forms of ADR: adjudication and mediation. While landlords and tenants are usually required to first attempt adjudication or mediation, under some exceptional circumstances a dispute may be referred directly to a Tribunal hearing (e.g., in the case of a serious dispute, such as a threat to life). Certain disputes must be referred to the RTB within a set timeframe (although this can be extended under exceptional circumstances).[9]

The evidence base for, and development of, each of the three case study dispute resolution processes is further assessed in the full report.

Figure 3: Residential Tenancies Board Dispute Resolution Process[10]



Key learning from the case studies

A multi-tiered dispute resolution system may result in a significant number of cases being resolved early.

A two or three-step process, in which mediation precedes other more formal forms of adjudication, is at the core of the case study systems. Performance data from these services suggest that a participatory and facilitated negotiation process may allow a significant number of cases to be resolved before formal adjudication proceedings take place. The benefits of a range of available ADR options are widely cited in the literature, and the creativity and flexibility associated with ADR is arguably one of its greatest strengths. Hybrid ADR systems can be constructed by combining different consensual (e.g., mediation or facilitated negotiation) with determinative processes (e.g., adjudication). A multi-tiered system that allows procedures to be tailored to the individual requirements of a case can be contrasted to a "one-size-fits all" approach associated with formal justice proceedings, which often excludes and alienates parties.[11]

Prioritising active participation in the dispute resolution process can increase client empowerment and access to justice.

Each of the case studies aims to prevent disputes escalating into formal processes or proceedings by employing a "self-resolution" stage, which helps clients make informed choices on how to proceed with their housing problem or dispute. Within this stage information is provided to increase knowledge of rights and entitlements. By prioritising early self-help processes, these case studies can be seen to embrace a philosophy of empowerment which encourages participants to become actively involved in resolving the dispute.[12]

For certain problems and disputes, information alone is likely to prove insufficient. Each case study example provides alternative options for problems that cannot be solved by self-resolution channels alone. In these instances active participation can be further prioritised by allowing clients to choose between different dispute resolution mechanisms and by providing a consensual form of ADR (such as mediation).[13]

The ADR literature suggests that active participation in the dispute resolution process may bring about greater commitment to the solutions the parties themselves helped determine, and consequently leads to higher rates of compliance (when compared to formal litigation).[14]

Delivering proportionate and appropriate dispute resolution can potentially remove barriers to accessing the system.

The case studies demonstrate systems of dispute resolution in which courts and tribunals continue to play a key role. However, rather than being the first or only means of dispute resolution, they are positioned as a last resort. The phrase 'appropriate dispute resolution' is used in the literature to refer to a system which provides a range of options for resolving a dispute.[15]

Appropriate dispute resolution also means that the process required to resolve a case will vary according to the needs of the parties and the dispute at hand.[16] In the case studies, the extent of resources, service involvement, staff expertise, time taken, and cost associated with each stage is designed to escalate and reflect the nature and complexity of individual cases. The effort required from the disputants also gradually increases as the claimant progresses along the pathway.[17] In this sense the systems can be seen as aiming to provide a response that is proportionate to the needs and complexity of individual cases.

As argued by the Law Commission in 2008, having a wider range of mechanisms available can contribute to the overall proportionality of a dispute resolution system. It removes access barriers because people are able to bring claims at a proportionate cost.[18] The literature stresses that best practice in designing a proportionate and appropriate dispute resolution system entails an understanding of the available ADR processes and a creative willingness to design an approach that matches the mechanism to the needs of the situation.[19]

Each case study system contains a formal adjudicative stage at the end of the process that delivers binding decisions. Not every dispute can be resolved by, or is necessarily appropriate for, ADR. Providing a proportionate response means that sometimes courts or tribunals proceedings will be the most appropriate route to resolution. The ADR literature emphasises that if a claimant's access to justice is to be upheld then binding conflict resolution should be available as an accessible alternative.[20] This also provides certainty that the dispute will be resolved one way or the other.

A user-focused approach in the digitisation of dispute resolution systems will prevent people being excluded from the system.

Dispute resolution systems must be considered from the point of view of users.[21] This is particularly important in the design and development of digital processes and systems. In each case study technology has been incorporated within the dispute resolution system, and British Columbia provides an example of a system that has been fully digitised. The literature on online dispute resolution suggests that digital tools can offer significant opportunities to deliver faster, cheaper, transparent and more accessible justice.[22] However, e-government initiatives are often defined and pursued without examining people's everyday experiences of using and engaging with digital technologies.[23] At the same time, the forms used by courts and tribunals are rarely designed in collaboration with people who use them.[24] As a result, new technological systems carry a range of potential negative effects. These can be associated with the risk of excluding people with needs such as visual or hearing impairments, mental health issues, or literacy issues. Or they can be associated with taking complex and inaccessible paper-based processes and simply replicating them digitally, thereby failing to take the opportunity of moving online to make the system more responsive and user-friendly.

Sociological analysis of technology illustrates that different people use and interpret technology in a variety of ways.[25] The literature shows that the accessibility of digital systems will depend on the extent to which the abilities, uses, and barriers of different groups of users are recognised and incorporated into the system's design.[26] The British Columbia case study provides an example of a dispute resolution system that has been designed by focusing on those who would actually use the technologies. The system sought to accommodate and respond to the diverse needs of people who would be using the systems by vigorous user testing before the design was finalised.

British Columbia also illustrates how a focus on the actual user of the disputes resolution system should be a continuous and ongoing process, since it might not be possible to anticipate all the factors or circumstances that affect a person's ability to use a system.[27] This can be achieved by means of ongoing user testing, as well as by providing opportunities for users to provide feedback.

Conclusion

This briefing paper discusses three international examples of the use of ADR in addressing housing disputes. Because of the significant complexity and differences between civil legal systems, it cannot be assumed that a specific model or approach will automatically be transferable or necessarily operate well within a UK context. However, as illustrated above, the models apply approaches that reflect key lines of argument in the literature on best practice in resolving disputes. This allows us to identify certain key principles that could be applied in a UK context to improve dispute resolution for landlords and tenants.

Policy Recommendations

- UK Governments should recognise the significant barriers that many landlords and tenants face in accessing justice and take action to ensure a wider range of processes are available to resolve disputes.
- UK Governments should ensure that a consensual form of ADR (such as mediation) is available to landlords and tenants in the PRS before disputes escalate to courts or tribunals.
- Every nation of the UK should provide opportunities for the early resolution of disputes by increasing investment in the provision of advice and information.
- Governments should ensure that there is a clear pathway around the system to allow people to access dispute resolution mechanisms that are most appropriate to their case.
- As UK Governments consider how to improve dispute resolution in the PRS, we urge them to ensure that all digital developments are underpinned by rigorous user-testing and consultation with those using the system and the organisations that support them.

About the project

This briefing was prepared by Dr Jennifer Harris in collaboration with Dr Gareth James.

The full accompanying report can be found on the CaCHE website.

This project is part of a wider programme of work on issues relating to developments in, and the operation of, the UK private rented sector. The broad objective of the programme is to contribute to improving standards in the UK PRS. The work is funded by the TDS Charitable Foundation and SafeDeposits Scotland Charitable Trust.

TDS Charitable Foundation Funded project

SafeDeposits Scotland Charitable Trust

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