Lessons from abroad

David Greene ponders the benefits of adopting a less adversarial & more international approach to litigation.

As I write this I am heading down to East Africa where I have worked for many years. This work has included advising on civil justice and human rights issues in jurisdictions following common law and civil law in both the French and Dutch/Roman tradition. I have also worked in the courts of many jurisdictions over the years and have had the opportunity to see both systems in operation.

While in Rwanda I am attending a conference at the Kigali International Arbitration Centre and discussing the different approaches of the common law and civil law to arbitration. Kigali is a prescient place to have the debate since it has until recently followed the civil law but, for political and other reasons, is now switching to common law.

Lawyers from the two traditions can be defensive of their own particular process for adjudicative dispute resolution. Domestically this is reflected by some judges who, while in the EU they were able to do so, have resisted on occasion the effective transfer of claims to civil law jurisdictions. It might be said that that has more to do with the broader capability of the other jurisdiction to deal with claims effectively within a reasonable time but also involved questions touching on civil law procedure. The spectre of the "Italian torpedo" still has resonance for some.

Duplication & cost

But the common law is starting to re-appraise a more inquisitorial or accusatorial process. This has crept upon us largely due to the cost of the adversarial process. It may be over-simplifying it but the cost of seeking and achieving a resolution to a dispute as the parties slug it out in the adversarial battle may be multiplied by the number of parties as their lawyers duplicate work to investigate the facts and law. In concept at least, if the court is doing this work in an inquisition then there is less duplication of the work by lawyers.

Cost has been a prime mover behind both the Woolf and Jackson reforms. Both work on a basis of much closer participation of the judiciary in the litigation process. Hardly the harbinger of inquisitorial process but we are becoming used to the closer involvement of the court and judiciary in the stages of the litigation process.

It is in the family courts and now the small claims courts that we see the effective establishment of the process of inquiry by the judge. This development is likely only to increase as the numbers of litigants in person increases. For them the judge has to be much more interventionist. Both family courts and small claims courts still retain the cloak of the adversarial approach but for how much longer should this be sustained?

But a switch is not cost free. The adversarial style places the greatest burden of the civil justice process on the parties. They bring their version of events and law to the court which decides between them where truth and justice lies. That is any event the idea. As said with both parties investigating and seeking to present their version of events there is a certain duplication of work.
The losing party pays for both. Of course, the adversarial process allows for litigation to be a tactical battle and the attainment of the truth and justice may be forestalled by all sorts of events.

The inquisitorial process places a greater costs burden on the state. Adopt such a process here and the costs of civil justice for the state may well increase. That is unlikely to be an additional burden overly welcomed by a state that is seeking to cut the cost of civil justice. The county courts are stretched enough without adding to their burden but this is happening by default.

**A middle way**

There is, possibly, a middle option. The courts could look to the conduct of the international arbitration process. International arbitration often involves parties and arbitrators from different traditions. Those from the Common Law jurisdictions press for the Common Law process, Civil Law practitioners for a more actively inquiring tribunal. The points of friction between the two are often in the disclosure, witness and “trial” process. The international institutions like the International Chamber of Commerce and the London Court of International Arbitration have sought to address the issue and resolve the conflict. The International Bar Association has addressed the issue in a number of papers including the recently published IBA Guidelines on Party Representation. The theme is to adopt the best from both worlds to achieve resolution and to run the process so that it is one recognised by both civil law and common law practitioners.

It may seem a little high blown to suggest that a small claim in the county court could look to adopt procedures from the grand world of international arbitration but there have been stranger bed fellows, and in seeing a way forward for the county court process all avenues should be explored.