ADR and Civil Justice

CJC ADR Working Group Interim Report

RESPONSE OF THE LONDON SOLICITORS LITIGATION ASSOCIATION

The LSLA was formed in 1952 and currently represents the interests of a wide range of civil litigators in London. It has over 2,300 members throughout London among all the major litigation practices, ranging from the sole practitioner to major international firms. Members of the LSLA Committee sit on the Civil Justice Council, the Chancery Court Users Committee, the Rolls Building Users Committee, the Law Society Civil Litigation Committee and the Commercial Court Users Committee to name but a few. As a consequence, the LSLA has become the first port of call for consultation on issues affecting civil and commercial litigation in London, and it has on many occasions been at the forefront of the process of change. Representatives from the City of London Law Society and the City of Westminster and Holborn Law Society also sit on the LSLA Committee.

This document sets out the response of the London Solicitors Litigation Association to the CJC ADR Working Group Interim Report about ADR and Civil Justice published in October 2017 (the "Report").

There are a number of questions for consultation in the Report and this document responds to those that the LSLA feels it can provide a meaningful response to.

General

The Working Group believes that the use of ADR in the Civil Justice system is still patchy and inadequate. Do consultees agree?

Yes, although our experience is that ADR is widely used in high value commercial claims, it does not seem that this is the case for claims in the mid range.

Making ADR culturally normal

Why do consultees think that a wider understanding of ADR has proved so difficult to achieve?

A lack of awareness is an issue. Parties to high value commercial claims generally retain solicitors, who are required to advise their clients about ADR. It is our experience that litigation solicitors have a good understanding of ADR and in particular, mediation. This is often due to first hand experience as mediation has been encouraged by the courts for a number of years. Where parties are unrepresented, we do not consider that sufficient information about ADR is easily accessible and often parties will not know to seek out this information. This results in a lack of awareness amongst those with lower value claims, who are not represented.

How can greater progress be achieved in the future?

If awareness is raised at the initial stage of litigation, when issuing proceedings, we believe that this will result in a wider understanding of ADR. As is evident with high value claims, a greater level of engagement with the ADR process should result in it becoming culturally normal.

Practically, we consider that the following would assist with this:

1. Including a tick box in the claim form requiring the claimant to certify that (i) reasonable efforts have been made to contact the defendant about the dispute and (ii) the claimant is aware of the obligation to use litigation only as a last resort, that ADR processes are available and that they have been considered.
2. Including information about ADR in the "Notes to Claimants" which accompany the claim form.
3. Introducing more affordable options for mediation of lower value claims.
4. Including encouragement to engage in ADR on all court orders, along with details of where to find further information.

<u>Encouraging ADR at source</u>

Should the Courts treat a failure to use an appropriate conciliation scheme as capable of meriting a cost sanction?

Yes, unless there are legitimate reasons for the parties choosing not to do so. We consider that it would be wrong for mediation to become a mandatory process, imposed on the parties by the court. For a mediation to stand a good chance of success, there has to be a genuine desire by both parties to explore settlement and make concessions necessary to achieve that outcome. Sometimes, parties may be simply too far apart on the merits to consider settlement. Alternatively, they may feel that they do not yet have enough information about the other side's claim on which to make an informed decision about settlement. For example, they may feel that the other side's case should first be tested through disclosure and the exchange of evidence.

Are there other steps that should be taken to promote the use of ADR when disputes (of all kinds) break out? Encouraging ADR when proceedings are in contemplation

We consider that a tick box in the claim form and more information about ADR in the "Notes to Claimants" should be introduced (see above). This information should direct Claimants to an ADR service, which is affordable in the context of the value of the claim, and recommend that they discuss this with the Defendant before issuing the claim.

Is there a case for making some engagement with ADR mandatory as a condition for issuing proceedings? How in practical terms could such a system be made to work. How would you avoid subjecting cases which are not in fact going to be defended to the burden of an ADR process?

Requiring engagement with a formal ADR process as a condition to issuing proceedings would not be appropriate given the associated costs and the number of claims that are not defended. However, we do encourage mandatory engagement with the principle of ADR, in the form of a tick box on the

claim form requiring certification that (i) reasonable efforts have been made to contact the defendant about the dispute, where appropriate and (ii) the claimant is aware of the obligation to use litigation only as a last resort, that ADR processes are available and that they have been considered. For the reasons stated above, we do not consider that parties should be ordered to mediate. In some cases, it will also be inappropriate for the claimants to contact the defendant about the dispute in advance, for example where urgent injunctive relief is required or when there is a risk of a "torpedo" action designed to obtain jurisdiction elsewhere.

Can the prompts towards ADR in the pre-action protocols and the HMCTS Guidance documents be strengthened or improved? Should a declaration be included in the terms of R9?

Yes, see above.

Encouraging ADR during the course of the proceedings

Do consultees agree with the Working Group that the stage between allocation and the CCMC is both the best opportunity for the Court/the rules to apply pressure to use ADR and also often the best opportunity for ADR to occur?

We agree that this may be a good occasion to apply pressure on the parties to mediate, this also ties in well with the proposal recently published by the Disclosure Working Group. In our view, it is important that the parties are given an opportunity to ensure that their respective positions are properly and fully pleaded, including details of loss, before pressure is applied to engage in a formal ADR process. This stage will often be the best opportunity for ADR to occur but not always. Sometimes, parties will rightly feel that they have insufficient information to mediate at the CCMC stage. Instead, they may feel that the other side's case needs to be tested through disclosure and evidence before participating in a mediation.

Do consultees agree with those members who favour Type 2 compulsion in the sense that all claims (or all claims of a particular type) are required to engage in ADR at this stage as a condition of matters proceeding further?

We do not agree that this should be compulsory. We think it should be a presumption. In the event that the parties have not attempted or engaged in ADR by the CCMC, all parties should be required to provide written reasons for this, without being required to disclose the content of without prejudice discussions. These written reasons should be considered and discussed at the CCMC. In the event that they are not considered satisfactory, the Court should then order a stay pending ADR and/or impose a cost sanction. This should apply to all sectors and types of claim.

Do consultees agree that the emphasis needs to be on a critical assessment of the parties' ADR efforts by the Courts in "mid stream" rather than a process which simply applies the Halsey guidelines at the end of the day after judgment? Is it practical to expect the CCMC to be used in this way? If directions were otherwise agreed between the parties can the courts reasonably be expected to require the parties to attend purely to address ADR?

Yes, we think this is essential for increasing engagement, which will in turn in make ADR culturally normal for all levels and types of claim.

Are costs sanctions at this interim stage practicable? Or is there no alternative to the court having the power to order ADR ad hoc in appropriate cases?

Costs sanctions can be used alongside the power to order ADR, as set out above.

Costs sanctions

Do consultees agree that whatever approach is taken at an earlier stage in the proceedings it should remain the case that the Court reserves the right to sanction in costs those who unreasonably fail or refuse to use ADR?

Yes

Do consultees agree that the Halsey guidelines should be reviewed?
Yes

ADR and the middle bracket

Do consultees agree that there is an ADR gap in the middle-value disputes where ADR is not being used sufficiently?

Yes, based on the data within the Report.

Is part of the problem finding an ADR procedure which is proportional to cases at or below £100,000 or even £150,000 in value?

The cost of ADR is a factor but we would expect the cost of existing ADR options to be proportionate for claims of this level. It is our experience that ADR is almost always a valuable exercise, irrespective of whether there is a settlement and therefore the costs involved are rarely wasted.

Could the ADR community do more to meet this unmet demand?

It seems likely that it is the cost of legal representation that is disproportionate rather than the ADR provider itself. The ADR community could therefore do more to provide feasible opportunities for ADR to take place without significant input from legal representatives for claims at this level.

For smaller claims, mediators who have recently received accreditation could be utilised more fully. It is our experience that there is not a shortage of mediators available but the proportion who are at considered to be "top quality" and therefore regularly used for high value commercial claims is small. This is in part because mediators are judged on their experience and it is difficult to get experience in the initial stage after training. Therefore, if the cost of a mediator is an issue, there must be an opportunity for mediators looking to gain practical experience to be paired with those looking to resolve low value claims.

Should the costs of engaging in ADR be recognised under the fixed costs scheme?

Yes

Low value cases/litigants without means

Assuming an increase in manpower and the increase in flexibility over dates that have been indicated to Lord Briggs, do consultees think that a further reform or development of the Small Claims Mediation scheme is required?

Yes. In addition to the issues with manpower and flexibility, it is our experience that the current scheme does not offer a true mediation service. It appears that it is a way of facilitating offers where parties are not represented but this is as far as it goes. It is important that small claims mediators receive appropriate training to conduct a mediation under time pressure, without giving parties the impression that they will be "in trouble with the judge" if they do not reach a settlement.

Is further effort needed outside and additionally to the SCM scheme to make sure ADR is available for lower value disputes? What do consultees see as being the challenges in dealing with this are?

Yes. The main challenge is likely to be the administration costs in setting up mediations and raising awareness, rather than the cost of the mediators themselves. As discussed above, we do not consider that there is a shortage of mediators who are keen to gain experience and will do so for a minimal fee. Technology should be considered as a means to dealing with this administration challenge.

How can we provide a sustainable, good quality, mediation service for this bracket? Is pro bono mediation viable?

Funding will be required for the administration aspects of the service to be viable. An online platform, matching parties with mediators and allocating times, dates and venues would be an effective way of streamlining the administration process but this would require significant upfront costs.

However, we consider that there are sufficient professionals willing to provide their time pro bono for this element of the service to be viable without funding. These professionals could also be used to deal with some of the administration burden, such as arranging times, dates and venues.

What are the other funding options available?

Mediation providers could be required to make a contribution to this service.

Do consultees agree that special ethical challenges arise when in particular mediators are dealing with unrepresented parties?

Yes but these challenges need to be overcome in order for the service to be effective.

Challenges for online dispute resolution

Do consultees agree that ODR has enormous potential in terms of delivering ADR efficiently and at low cost?

Yes

Do consultees agree that specified standards for ODR would assist its development and help deal with any stakeholder reservations?

Yes

What are the other challenges that the development of ODR faces? How else can ODR be rendered culturally normal?

ODR is likely to be viewed sceptically as it is largely an unknown. Promotion and engagement are essential for its development. As the online court system becomes more widely used and compulsory online issue and filing becomes the norm, ODR is likely to feel more familiar and will begin to be considered culturally normal.

Once ODR is developed into a functioning product, roadshows and demonstrations are likely to helpful in providing information and raising awareness.

<u>Challenges for Mediation</u>

Do consultees agree that Judges and professionals still do not feel entirely comfortable with mediation in terms of standards and consistency of product? Is there a danger that the flexibility and diversity which many regard as the strength of mediation is seen as inconsistency and unreliability by other stakeholders?

This is very subjective, much like selecting legal representation. Standards and styles will inevitably vary and there will be a top tier, which is generally well respected by all stakeholders. The choice of mediator is often based on personal past experience or word of mouth.

How do consultees think that these concerns can be reassured and addressed?

A requirement for mediators to have a recognised "accreditation" or "qualification" would assist. A requirement for mediators to be regulated would also assist. For example a simple code of conduct could be introduced, which must be adhered to by all mediators.

Is there a case for more thorough regulation? How could such regulation be funded and managed?

Yes. Stakeholders are likely to feel more comfortable if mediators can be held to account. This could be managed by an arm of the SRA or the Bar Council, as the majority of mediators are already regulated by one of these organisations.

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