ADR and Civil Justice
A Response to CJC Consultation

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About BLM

BLM is the leading insurance and risk law specialist in the UK and Ireland. The firm is deeply established in the insurance sector, the Lloyd's and London Market, amongst brokers, and represents 13 of the top 15 UK insurers and four of the top five global insurers.

We have established a deep-rooted presence in the general insurance sector, the London Market and amongst brokers. We also have a significant presence among corporate businesses many of whom are multi-national, the public sector and the health and care industry. Our team of over 200 partners and more than 800 legal specialists are completely dedicated to the insurance and risk market and are recognised for having the capability, creativity and energy to support our customers and help them find solutions to their problems.

BLM has very significant experience of ADR processes including alternatives to civil litigation such as arbitration and adjudication, of compulsory mediation in the Employment Tribunal and of the Joint Settlement Meetings (JSMs) / Round Table Meetings (RTMs) that predominate within personal injury.

BLM lawyers will be representing clients in mediations at least once / twice a week. In 2017 BLM dealt with approximately 75 mediations. This response is based not only on the experience of BLM's lawyers but the feedback of a number of insurer clients who hold senior technical claims positions.

General

There is broad support for ADR processes (which of course includes mediation) amongst BLM lawyers and clients. It is recognised that mediation is well integrated as one of the settlement mechanisms in non-injury cases. It is suited to higher value and multi-party actions or those cases where communication between the parties (or their representatives) has become difficult. Clients value the opportunity for confidential facilitated discussion offering the prospect of early resolution, certainty of outcome and costs savings.

The vast majority of cases of a small to moderate value settle at the pre-litigation stages and, in general, through negotiation. This is the cultural and behavioural norm. BLM and its clients are supportive of and would wish to see more cases resolved through mediation but would want to retain the flexibility to use ADR in those cases where it is appropriate to do so. The point was articulately expressed by one of our clients who confirmed that he was supportive of "any methods to ensure that the parties are finding a way to resolve differences by mutual collaboration". In many instances there is constructive engagement and we are therefore cautious about automatic referral to and resistant to compulsory mediation. We do not favour Type 1 and / or Type 2 compulsion.

It is recognised that there is a need to make ADR "culturally normal" but the balance to be struck is to ensure that traditional methods do not become culturally abnormal with mediation as the default thereby causing delay and adding to the costs and complexity of resolving claims.

It is agreed that discretionary powers to order ADR (Type 3 compulsion) should rest with the Court in a limited number of cases and the powers to impose sanctions on the party reluctant to mediate should be strengthened.

Making ADR culturally normal

As discussed, known and familiar processes do resolve cases and are culturally normal and accepted. It is acknowledged that there is an inertia that provides a systemic resistance to change. It is also recognised that civil ADR is not familiar to consumers and that professional advisers can influence consumer choices. A mechanism that requires a party to consider, and for professional advisers to discuss ADR processes with clients, would go some way to raising awareness of ADR alternatives amongst consumers. The role of the professional adviser is important and the adverse impact of withdrawal of legal aid on MIAMs appears to confirm the importance of the role of the instructed lawyer when advising whether to mediate.

We take the opportunity to draw the attention of the CJC to ADR in the Republic of Ireland. Mediation is the predominant form of ADR and is used much more routinely in areas of personal injury and clinical negligence than is the case in the UK. We would be happy to provide further assistance and effect introductions to the CJC if that assists. We also draw attention to the Republic's Mediation Act 2017 which is not yet in force. Of particular note in the context of this consultation are (i) obligations imposed on practising lawyers to advise on mediation (ii) the appointment of a statutory Mediation Council of Ireland and (iii) Court powers in respect of mediation.

Encouraging ADR at source

We cannot comment more widely than within the insurance sector but note that the Financial Ombudsman Service is widely publicised, used and accepted by consumers. We believe that it provides a useful model for consumer ADR.

We do not consider that the failure to use FOS should be a factor in considering whether a Court should impose a costs sanction. FOS appears to be the default jurisdiction for consumer insurance disputes. It should continue to exist entirely separately from civil litigation. There should be no costs consequences in civil litigation consequent on its availability and non-use. We do not consider that there should be any role for ombudsmen during the currency of proceedings. We consider that this is only likely to add to complexity, cost and delay.

Encouraging ADR when proceedings are in contemplation

BLM and our clients believe that considerable caution should be exercised before adding complexity and additional steps to the civil litigation process. We endorse the Working Group's reluctance to recommend that engagement with ADR should be a mandatory step before issue of proceedings. We have strong concerns that compulsion that would diminish the effectiveness of mediation as a solution whilst adding to the cost of the process. We express these concerns notwithstanding our largely positive experience of a mandatory process within the Employment Tribunals.

Within the tribunal process we believe that there are other factors which positively impact on the use of ADR through ACAS: that the Tribunals are non-costs bearing and have a greater proportion of self-represented parties. It may be that those factors would be relevant when considering ADR processes in the Small Claims Track (whilst also acknowledging that the economics of delivery of ADR in low value claims is probably the paramount issue.)

We note that the British Columbia CRT (Civil Resolution Tribunal) only allows lawyer representation of a client in exceptional circumstances with compulsory facilitation by a Court official (or mediator) as a pre-condition of adjudication. We note that the compulsion in this instance is post-issue and that the process is designed to exclude legal representation.

Civil MIAMs: again we and our clients have concerns about adding complexity and cost to the process in every case where there is no clear evidence that mediation is appropriate or indeed available in every case.

Encouraging ADR during the course of the proceedings

We agree and endorse the recommendations of the Working Party. It is agreed that the stage between allocation and CCMC is the appropriate time for judicial consideration of the appropriateness of ADR.

There is a recognition that in certain types of cases (neighbour disputes being an example) that there should be a strong presumption in favour of ADR. Additionally in other cases the Court should have the power to order parties to mediate (Type 3 compulsion). In the substantial majority of cases the default position should be that ADR may be the preferred option but this should be a rebuttable presumption that it is subject to the parties demonstrating an intention to constructively engage with each other to narrow issues and avoid trial. This presumes that ADR processes are available to the parties - see the issues discussed below in relation to lower value cases.

A Notice to Mediate process may well be appropriate mechanism to assist a party (or parties) to encourage a reluctant party to mediate.

There is very strong support for the recommendation that the interim costs sanction be available at the allocation / CCMC stage.

Costs sanctions

The Courts should retain the right to impose costs sanctions for an unreasonable failure to use ADR.

It is agreed that a re-consideration of the Halsey guidelines is appropriate having regard to the many changes in litigation that have occurred since that 2004 judgment

ADR and the middle bracket

As we have noted the mediation process is well established as a settlement mechanism in higher value non-injury related civil claims. Whilst the benefits and savings that arise from a successful mediation are acknowledged there are costs associated with the preparation for a mediation. Preparation of the position statements of the parties, of documents for the mediator, the mediators fees and the costs of the legal representative of the parties are substantial. Thus the cost / benefit that arises in higher value cases is dissipated in cases falling in the middle and lower values. This does affect the demand for ADR / mediation and we agree that ADR is not used to the same degree.

Whilst recognising that flexibility of a mediation is a strength there has been some feedback that this variability can add to costs and uncertainty. The ADR community should consider some best practice guidelines for practitioners which would provide guidance on the degree of preparation, the content of a position statement, the volumes of supporting witness statements or expert evidence that might be provided. In setting expectations and bringing some consistency to the process this will help with the preparation and cost and assist in meeting some of the cultural challenges associated with introducing mediation to practitioners and clients who are unfamiliar with the process.

The further recommendations of Jackson LJ include the introduction of an Intermediate Track for cases under £100,000. A grid of Fixed Recoverable Costs includes a ring fenced allowance for specialist lawyers attending a JSM or mediation of between £1,200 and £2,000 and also an allowance for the instructing solicitor of £1,000. We do consider this to be a useful proposal which will encourage professionals to consider and advise clients on the appropriateness of mediation and thereby encourage its use. Within the context of broad and positive support for ADR and mediation we do sound a note of caution: the creation of an incentive to mediate should not be an indication or a permission to do so in every case.

Low value cases/litigants without means

The commercial issues discussed above are accentuated in low value cases. These cases cannot bear the additional cost that arises from a formal ADR process but it is acknowledged that a neutral third party can assist in the resolution of cases involving litigants in person. However unless ADR processes are provided and administered by the Courts or the cost of the mediator or neutral third party is funded other than by the parties there appear to be very significant problems in providing consistent ADR in low value cases. Relying on pro-bono services may be an expedient but will lead to inconsistent service (and one suspects) non-existent ADR in many locations. Feedback is that the challenge for pro-bono mediation is as much around the provision of administrative support as availability of mediators.

We note the recommendations of Briggs LJ and the conciliation process at Stage 2 by a Court Officer. We endorse Briggs LJ's recommendation that appropriately trained staff are necessary. A BLM clients with experience of County Court ADR has noted that in some instances the available service is no more than a "post-box" that adds little value and does affect the users perception of and desire to use the service.

We draw to the attention of the CJC a judicial mediation process that operates in the Jersey Royal Court. The Master of that Court invites litigants of the Petty Debts Court (the equivalent of the Small Claims Track) to a mediation. We understand that the effect is to significantly reduce the volumes of cases that would otherwise progress to an adjudication resulting in a net saving of Court time and resource.

The ethical challenges for mediators in dealing with unrepresented parties are noted. Integration of a Court based ADR service may provide an opportunity for the Court to assist in circumstances where a settlement order needs to be prepared.

The on-line opportunity

BLM clients welcome the opportunities that can arise from online dispute resolution. Many are very interested in the possibilities that arise from new and innovative processes that result in faster cost efficient resolution. BLM clients would be very interested in exploring the ODR opportunities that arise from, for instance, "blind bidding" that would be required of all parties to a dispute.

A greater role for conciliation/ombudsmen during the currency of proceedings

We do not consider that this is appropriate. FOS is an effective ombudsman service which is distinct from the court process and should remain so.

Challenges for Judicial ENE

BLM clients do welcome and note the opportunities that arise from Judicial ENE and support greater use in appropriate cases. Experience of BLM clients of Judicial ENE in other jurisdictions is positive.

The disadvantages of Judicial ENE noted in the report at 10.36 are also accepted. Consequently we do consider that JENE should be a discretionary ADR option.

Challenges for online dispute resolution

We agree that ODR has enormous potential to deliver efficient and low cost ADR. We have discussed above the benefits that would accrue in respect of best practice guidance in providing process consistency and predictability for users. Those same points apply in respect of ODR.

Challenges for Mediation

BLM and its clients are sophisticated and experienced users of ADR and of mediation. They are able to select appropriate mediators and "filter" the less effective. Notwithstanding the fact that few qualitative problems are experienced there is very strong support for more thorough regulation. The "quality assurance" that is noted in the report in respect of Judicial ENE at paragraph 9.57 should also be available to parties using the civil mediation process.

In the context of the final question of the consultation at paragraph 10.43 we think it right to mention that a number of our respondees have expressed concerns about greater "positional" posturing in the mediation process, that fewer mediations are concluding within the time allocated and that the mediation process is remaining open for longer.

BLM clients do want to encourage ADR development and innovation. It is acknowledged that there could be a tension between more thorough regulation and the predictability of best practice guidelines but it is hoped that exercises such as this consultation, the further work and discussion that will follow will assist in developing ADR in the civil process.