Response by eARB Limited

to the Interim Report of the Civil Justice Council's Working Group on ADR and Civil Justice

December 2017

1 **eARB Limited**

1.1 eARB Limited developed and owns the intellectual property in a software program which provides a Cloud based platform for the management of arbitral proceedings (the Platform). This program is also utilised by its sister company eCOURT Limited in the context of civil courts.

1.2 The companies were formed in response to the call by Lord Neuberger, MR (as he then was) of 20 April 2012 to develop a Profession led solution to the challenge of providing effective IT in the civil justice system.

1.3 Effective IT in the civil justice system is defined in chapter 43 of Lord Justice Jackson's Final Report of his Review of Civil Litigation Costs at para 3.1 as possessing the following characteristics, amongst others:

(i) Electronic filing for claim forms, statements of case, witness statements, expert reports and other documents lodged.

(ii) The ability to maintain all documents lodged by the parties to a case or created by the court in a single electronic bundle relating to that case.

(iii) The electronic bundle for each case should be accessible to the parties, court staff and the judge by means of an extranet with unique password.

(v) A facility for online payment of court fees and all other payments into court.

1.4 eARB platforms follow the above specification.

1.5 eARB provides the Platform for the Personal Injury Claims Arbitration Service (PIcARBS) established by Andrew Ritchie, QC and launched in 2015. PIcARBS is the first arbitral scheme in the world to be managed entirely online.

1.6 eARB and eCOURT were founded by Tony Guise with whom Lord Neuberger discussed the need for a Profession led IT solution for the civil justice system in April 2012.

1.7 Until May 2016 Tony practiced for 30 years as a solicitor specialising in commercial litigation and has led the campaign for effective IT in the civil justice system since working with Lord Woolf on the issue in the 1990s. Tony ceased to practice law in May 2016 to concentrate on developing IT solutions for civil justice.

1.8 Tony has held the following positions during which he represented the solicitors profession:

2002-2004 – President, London Solicitors' Litigation Association

2006-2015 – Founder and Chairman, Commercial Litigation Association

2007-2016 – Member, Civil Justice Committee of The Law Society of England and Wales with special responsibility for IT in the civil courts

Further information about eARB may be found on our web site: www.earb.net

eARB may be contacted via email: tonyguise@earb.net

2 Opening observations

2.1 The Working Group's paper (the Paper) gives rise to certain priority issues which we address first so as to explain our approach before we answer the questions posed in section 10 of the Paper.

2.2 Our priority issues are:

a) The identification of the philosophical basis for any solution to the challenges at hand
b) The need for reforms to be online
c) The omission of arbitration
d) The need for compulsion

These are explained below.

3 Philosophical basis for any solution

3.1 Jeremy Bentham developed his rationale for reforms from the work undertaken by a number of philosophers before him. These led Bentham to develop a theory of ethics propounding the notion that the consequences of any proposed reform are determinative of the value of that proposal.

3.2 The guiding principle of Utilitarianism was explained by Bentham in his 1776 work "A Fragment on Government" as a:

fundamental axiom, it is the greatest happiness of the greatest number that is the measure of right and wrong

Thus any final recommendations from this Working Group should seek to secure the greatest benefit not for any sub-set of society but for the citizen at large.

3.3 This approach manifests itself in a number of the issues raised by the Paper.

4 Online

4.1 Whilst it may be axiomatic that all legal services must be online in the 21st century this important reality is often overlooked. The Civil Justice Council's (CJC) recent paper on reforming the procedures for managing noise induced hearing loss claims (NIHL) made no mention of such reforms being online in part or at all. See, the NIHL paper at:

https://www.judiciary.gov.uk/wp-content/uploads/2017/09/fixed-costs-in-noise-induced-hearing-loss-claims-20170906.pdf

4.2 This omission is surprising as the Working Party's brief included the requirement to consider:

How the handling of NIHL claims could be improved, with a view to cases being resolved more quickly and with the costs reduced

4.3 Yet at paragraph 6.22 of that report the NIHL Working Party rejected any further changes to the litigation process. Recommending an online solution (perhaps privately procured) for the proposed reforms would reduce costs and make the NIHL Working Party's proposal for fixed recoverable costs affordable for lawyers and parties alike.

4.3 It is clear from the ADR Paper that this Working Group is very much alive to the possibilities that online technologies offer.

4.4 A good example of the success achieved when the profession introduces a privately financed ADR solution entirely online is The Portal Company Limited, as to which see further below.

5 Arbitration as a form of ADR

5.1 Surprisingly the ADR Working Party specifically excludes arbitration as a form of ADR, see para 3.19 of the Paper:

We do not see arbitration, an adjudicative process, as within our remit even though in the strict sense it is "alternative" because cases decided in arbitration do not for the most part subsequently trouble the courts.

Yet most cases that are mediated settle which do not therefore subsequently trouble the courts. Therefore the logic of paragraph 3.19 as a basis for excluding arbitration is not understood. It is respectfully suggested that the Working Party revisit this seemingly illogical exclusion and include arbitration within their work.

If further reasons were needed for including arbitration within the scope of the Working Party's activities the following may assist:

5.2 As noted in para 5.24 of the Working Party's Paper, the Court leaflet EX301 *I'm in a dispute – what can I do?* includes arbitration as one of the available ADR options.

5.3 The Working Party will also recall the definition of ADR in the Glossary to the Civil Procedure Rules, 1998:

Alternative dispute resolution

Collective description of methods of resolving disputes otherwise than through the normal trial process.

5.4 The Final Report of Lord Justice Jackson in his Review of Civil Litigation Costs of 2009 has this definition of ADR:

ADR Alternative Dispute Resolution – ways of attempting to resolve disputes so as to avoid litigation. Mediation is the primary form of ADR.

5.5 Lord Justice Briggs' Final Report in his Civil Courts Structure Review (2016) defined ADR with a similar formula:

ADR

Alternative Dispute Resolution – ways of attempting to resolve disputes so as to avoid litigation. Mediation is the primary form of ADR.

5.6 In none of the above definitions is arbitration excluded on any ground.

6 Compulsion – the central dilemma

6.1 To borrow a phrase from the second appendix to the Paper - the central dilemma is compulsion.

6.2 The Working Party are right to say in paragraph 1.12 of the Paper that further discussion is needed about this central dilemma.

6.3 In our view persuasion has not worked as a means of broadening the take up of any form of ADR. During the past 30 years persuasion has been weighed in the balance as a means of encouraging the take up of ADR and has been found wanting.

6.4 8 years ago the high water mark for the persuasion case was made out in chapter 36 of Lord Justice Jackson's Final Report at paragraphs 4.1 and 4.2;

4.1 For the reasons set out above, I do not recommend any rule changes in order to promote ADR. I do, however, accept that ADR brings considerable benefits in many cases and that this facility is currently under-used, **especially in personal injury and clinical negligence cases.**

4.2 I recommend that:

(i) There should be a serious campaign (a) to ensure that all litigation lawyers and judges are properly informed about the benefits which ADR can bring and (b) to alert the public and small businesses to the benefits of ADR.

The words in bold font in the quotation are emphasised by us to draw attention to the fact that ADR is now being provided in the arena of personal injury and clinical negligence cases by PIcARBS (see para 1.5, above). This affords another important reason for including arbitration within the scope of the work being done by this Working Group.

6.5 Despite the "serious campaign" recommended by Lord Justice Jackson little change has been seen to the unhelpful "semi-detached" (per Lord Justice Briggs in his Interim Report on Civil Courts Structure at para 2.86) relationship of ADR with the civil courts.

6.6 Lord Justice Briggs himself accepted that voluntary reforms were unlikely to achieve desired aims when giving the Harbour Litigation Funding Lecture on 12 October 2016. He spoke, in reference to the Profession taking up online case management, that there was:

relatively slow take up whilst voluntary

6.7 The reason for this has nothing, in our view, to do with the reticence of the citizen to adopt online methods of working but everything to do with the reticence of lawyers to embrace new ways of working instead preferring more lucrative ways to those less lucrative but of greater utility to the citizen. This aspect is considered in further detail below.

6.8 Before turning to the case for compulsion we applaud the Working Party's conclusions in paragraph 7.22 of the Paper:

Ultimately a better guide for us may be the limited domestic experience of members of the working party who have mediated with parties who attend unwillingly (often because of an ADR clause in a contract). This shows that in a surprisingly large number of cases they are in fact drawn into the process, become engaged and frequently settle.

6.9 We draw attention to paragraph 8.5.8 of the Paper which unfortunately omits two ADR schemes namely the arbitration schemes provided by PIcARBS and the Institute of Family Law Arbitrators.

6.10 We are aware that, despite the concern expressed in paragraph 8.8 of the Paper about the reticence of insurers to embrace ADR, this attitude is now changing with the involvement of AXA and 12 of the leading Personal Injury Claimant firms in the Clyde & Co/PIcARBS Arbitration Pilot.

6.11 We also note paragraph 9.3 of the Paper which, correctly, draws attention to the:

…the digitisation of legal proceedings which is overwhelmingly the most significant force for change.

This is certainly true and both The Portal Company (for low value personal injury claims) and PIcARBS (for high value personal injury and clinical negligence claims) are good examples of entirely online dispute management ADR processes which are transforming the civil justice landscape.

6.12 Why compulsion? We say compulsion is now of most utility because:

a) Lawyers, not clients, are culturally adverse to change;
b) The experience of the past 30 years of the voluntary approach has shown it does not work;
c) *"a lawsuit is more often than not the more lucrative path for lawyers"* – this is not a view we endorse but one suggested by the authors of a report referenced in Appendix 2 of the Paper, see below.

6.13 Appendix 2 to the Paper is helpful in its review of other nations' approach to the issue of compulsion and its extensive referencing of the academic studies. We summarise the most helpful of those comments below:

6.14 Austria

They observe that `take-up' is increased greatly if mediation is funded or compulsory. Contentious legal activity in Austria is court-centred and `ADR has yet to be established as a real alternative', no doubt because `a lawsuit is more often than not the more lucrative path for lawyers'.

6.15 Italy

Not surprisingly, mandatory mediation caused the volume of mediation references to swell.

and,

Arbitration is a favoured form of dispute resolution in high-value commercial litigation.

6.16 Page 76 of the Paper lists points which the report's authors identify in favour of mandating mediation, chief amongst them, in our view, is number 4:

….court referred ADR only begins to develop as a real alternative to court proceedings where it is subject to some kind of mandating.

6.17 In our view compulsion is the way forward to reduce the courts' workload and improve access to ADR.

6.18 A good example of de facto compulsion achieved without the need for primary legislation is The Portal Company. The features of this ADR process are:

- Entirely online
- Though not compulsory it is treated as compulsory by reason of the opening words of the Protocol governing its use:

Preamble

2.1 This Protocol describes the behaviour the court expects of the parties prior to the start of proceedings where a claimant claims damages valued at no more than the Protocol upper limit as a result of a personal injury sustained by that person in a road traffic accident.

6.19 As noted in para 5.16 of the Paper, the same wording is employed, mutatis mutandis, in the Preamble to the Protocol for claims arising from Employers and Public liability claims.

6.20 Though not mandatory the word "expects" has been enough to see hundreds of thousands of such claims proceed through the Claims Portal every year. The phrasing is a good

precedent to bear in mind; as the Paper observes, the phrasing has led to a de facto mandatory system being created. The Claims Portal is also a privately funded solution to the civil courts dilemma of overcrowded workload. It combines both ADR and online technology in a cost and time saving master stroke.

6.21 We favour the introduction of compulsion and are encouraged to do so by the experience of The Portal Company and the NHS Resolution's (NHSR's) recent adoption of a Mediation Pilot and the NHSR's endorsement of PIcARBS as a means of resolving clinical negligence claims outside the civil courts in an effort to reduce cost and shorten the time claims take to conclude.

SECTION 10: QUESTIONS FOR CONSULTATION

The questions posed in the paper appear in bold font whilst our responses are shown in plain font.

General

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

We agree.

10.2. The Working Group has suggested various avenues that may be explored by Judges, by lawyers and by ADR professionals in order to improve the position. We will ask questions in relation to these proposals below. But do consultees think that the Working Group has ignored important questions or precedents from other systems or that there are other areas of inquiry with which we need to engage?

Yes, as follows:

- Applying the approach of Utility to every recommendation
- Arbitration
- The experience of the PIcARBS' scheme and the views of Insurers, Claimant firms and NHSR about that arbitral scheme
- The IFLA arbitral scheme
- The importance of combining online solutions in every recommended reform

Making ADR culturally normal

10.3.
Why do consultees think that a wider understanding of ADR has proved so difficult to achieve?

The existence of ADR is well known after thirty years. Its take up is low because:

a) ADR remains a voluntary exercise; and,
b) The theory and practice of ADR is not taught enough to those seeking to enter the profession of law.

On the latter point there is PhD research being undertaken in Australia intended to identify whether ADR is being sufficiently taught to students in existing clinical legal education courses in Australia. The Working Party may wish to learn more about this research.

The philosophy underpinning the research is utilitarian:

Law students engaged in clinical practice who understand and adopt these processes will become lawyers who focus first on client's needs and interests when problem solving and resort to adversarial practice only when necessary.

Further details of the research may be found here:

https://adrresearch.net/2017/12/21/keeping-up-with-change-no-alternative-to-teaching-adr-in-clinic-an-australian-perspective/

10.4. How can greater progress be achieved in the future?

Compulsion

Encouraging ADR at source

10.5. Is there a case for reviewing the operation of the consumer ADR Regulations? Why has their impact been so limited?

Failure to be as thorough as the Paper suggests.

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

Yes

10.7. Are there other steps that should be taken to promote the use of ADR when disputes (of all kinds) break out?

Compulsion and further resources available with links to online ADR solutions such as The Claims Portal Company and PIcARBS. Most citizens have the skills to manage online solutions and will readily accept any solution that delivers a resolution which avoids the slow and expensive civil courts.

Encouraging ADR when proceedings are in contemplation

10.8. 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?

Yes, for the reasons given in our opening observations.

A pre-action protocol would express the expectation that a form of ADR would be undertaken and completed with a certificate from the Neutral confirming satisfactory and fulsome engagement to be produced to the Court with any proceedings for issue. Similar to MIAM, see below.

The admission could be indicated at the commencement of the ADR process which would then lead to either an alternative resolution or court proceedings on receipt of the intended defendant's statement admitting the claim.

10.9. 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 claim document in the terms of R9 (see paragraph 9.19 above)

Yes to both points

10.10. Are MIAMs on the family model a practical solution at the pre-action stage? Have the Working Group over-stated the practical difficulties of introducing civil MIAMs? Have they under-stated the potential advantages of doing so?

Yes, a MIAM certificate is a similar concept to that we suggested in response to question 10.8.

The Working Group is right to explore a civil MIAM further as the experience from Family work is positive for the citizen.

Encouraging ADR during the course of the proceedings

10.11. 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?

In a voluntary regime, yes. However the empirical evidence of the past 30 years has shown that a voluntary regime to be unsuccessful in terms of increasing the use of ADR.

10.12. Do consultees agree with those members who favour Type 2 compulsion (see paragraph 8.3 above) 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?

Yes

10.13. If compulsion in particular sectors is the way forward, what should those sectors be? Should they include clinical negligence? Should they include boundary/neighbour disputes?

We agree clinical negligence and the other sectors mentioned would benefit together with Probate disputes.

10.14. Alternatively, should the emphasis at this stage be on an effective (but rebuttable) presumption that if a case has not otherwise settled the parties will be required to use ADR?

The past 30 years' experience has demonstrated the failure of strong encouragement as a means of increasing the use of ADR, which has been to the detriment of the citizen.

10.15. Would it be beneficial to introduce a Notice of Mediate procedure modelled on the British Columbia system?

Yes

10.16. 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 the judgment? Is it practical to expect the CCMC to be used in this way? If directions were otherwise agreed between the parties can the court reasonably be expected to require the parties to attend purely to address ADR?

Yes

10.17. 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 (Type 3 compulsion)?

Both can be used but ADR should be ordered wherever appropriate under a voluntary regime.

Costs sanctions

10.18. 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 issues?

Yes

10.19. Do consultees agree with the Working Group that the Halsey guidelines should be reviewed?

Yes

ADR and the middle bracket

10.20. Do consultees agree with the Working Group and with Lord Briggs that there is an ADR gap in the middle-value disputes where ADR is not being used sufficiently?

Yes

10.21. 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?

Such schemes are available and the full range of case management is available via, for example, PIcARBS for a single fee and all online rather than the substantially higher issue fees and further interlocutory fees charged by the civil courts which processes are all, in the main, entirely paper based.

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

The ADR community has responded but the cultural reticence of the legal profession requires compulsion to ensure the citizen enjoys the full benefits of the ADR community's varied offer.

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

Yes, as most cases undergoing ADR will settle thereby delivering a significant benefit to the costs of running the civil justice system.

10.24. Anecdotal evidence suggests that the various fixed fee schemes are not receiving any very great take up. Is this the experience of providers? What kind of volumes are being mediated under these schemes? Why, if they are unsuccessful, are they not being used?

The lack of compulsion. The introduction of compulsion will transform these concerns from challenges to benefits.

10.25. What pricing issues have arisen as between consumer mediation, the civil mediation website fixed price scheme and schemes such as those operated by CEDR and Clerksroom? Are there inconsistencies and confusions?

We cannot say and suggest further research is undertaken in the next stage of your work.

Low value cases/litigants without means

10.26. 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?

Introduce compulsion

10.27. 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 area?

Compulsion

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

Compulsion will see the over-supply of mediators fully engaged to meet newly rising demand at a price which reflects the market.

10.29. What are the other funding options available?

None

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

Yes but mediators are trained to meet those challenges.

The on-line opportunity

10.31. In the digital sector how is the Tier 1 prompting for mediation going to work? Can the same prompts be used outside the Online Solutions Court when digital access becomes possible across other jurisdictions?

These issues can be addressed within the design of the Platform introducing the use of AI and chatbots to support users. Given the funding challenges faced by MoJ after 2020 private solutions should be sought as The Portal Company has delivered a privately funded solution for MoJ.

10.32. What issues arise with the use of Tier 1 of the OSC and the other forms of digital access which are now intended? Is the use of ODR techniques going to lead to unfair advantages for litigants with digital access?

No because most litigants are already familiar with the relevant functionality which should be simple by design. The experience of the State of Washington for example for LiPs applying for domestic violence injunctions should be considered in this context.

10.33. How should ODR techniques be introduced? Which techniques are going to be appropriate? Could a system of online blind bidding be beneficial? How are they being introduced within the wider digital provision?

Different procurement strategies are available. A system of licensing with compulsion could see Platforms introduced which involve no cost to the State beyond specification.

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

10.34. Is consumer conciliation still underused? How could its use be expanded? Should it be used alongside civil proceedings to a greater extent?

Consumer conciliation is booming as a form of full ODR making the role of the civil courts in this connection irrelevant.

Challenges for Judicial ENE

10.35. Do consultees agree that JENE has certain distinct advantages (if the judicial resources are available to provide it) in terms of providing a free ADR service with no regulatory/quality risk?

JENE is a very useful tool and it should be amongst the tools available under compulsion.

10.36. Do consultees feel that a loss of party autonomy and the narrowness of the legal enquiry are disadvantages of the system and if so how can this be mitigated?

No. The low take up probably arises from the cultural reticence on the part of lawyers to embrace opportunities to forestall litigation. Compulsion will overcome this.

Challenges for online dispute resolution

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

Yes but it will only deliver these perceived benefits if made compulsory.

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

Yes

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

Compulsion to overcome the Profession's cultural reticence. As for the citizen, he or she will readily embrace any process which will deliver a resolution quickly, comparatively cheaply and online. That is the expectation of the citizen today.

Challenges for Mediation

10.40. 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?

We have not heard such concerns expressed in public or private.

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

Not applicable

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

Yes, mediators can fund and manage in other words – self-regulation: to raise standards and enhance credibility.

10.43. What other challenges are faced by mediation?

To develop a more complete offering by developing ways of working with ENE providers, arbitral schemes so as to provide a holistic ADR offer and all available online either totally or as a case management system.

To train tomorrow's lawyers in ADR to ensure that they resort to ADR first rather than second. See our response to question 10.3

END