Weightmans

A response to the CJC ADR Working Group Interim Report

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About Weightmans

Weightmans LLP is an ABS and a top 45 national law firm with revenue of £95 million which employs 1,300 people across 9 offices. Weightmans is a full service law firm and is highly respected in the public sector, acting for many local, police and fire authorities, and NHS trusts. Weightmans provides strong, diverse commercial services for public sector bodies, large institutions, owner-managed businesses and PLCs and has a full family and private client service including: wills, tax, probate and residential conveyancing. Weightmans is a proud leading national player in insurance, with a formidable reputation and heritage with one of the largest national defendant litigation solicitor practices and an annual turnover in civil litigation work approaching £60 million. Weightmans deals with motor, liability and other classes of claims for clients from the general insurance industry, other compensators including the NHSLA, local authorities, and self-insured commercial organisations such as national distribution and logistics companies.

Weightmans is actively involved in the insurance sector and has a number of major insurers as clients. Weightmans also specialises in the London Insurance Market, cyber liability, and automotive technology including autonomous systems and telematics, robotics and artificial intelligence, business crime, regulatory compliance, legal and commercial risk as well as offering in-house advisory services to insurers, non-insurer compensators and self-insureds.

The consultation

We are pleased to be able to respond to your consultation as follows:

General

Question 1

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

Comments

Whilst we agree that the use of ADR is patchy, it doesn't necessarily translate to it being adequate. It is our view that ADR is more widely adopted in those cases where it has clear merits, and perhaps the slow uptake in other cases is a result of it

being deemed unbeneficial to the settlement process. It would be a mistake to proceed on the assumption that simply because a claim is not concluded by ADR it is subject to adjudication by the courts. In many cases claims are successfully negotiated without recourse to ADR.

Question 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?

Comments

We offer no view.

Making ADR culturally normal

Question 3

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

Comments

We believe that there is a wide understanding of the availability of ADR. Whilst ADR may assist in some cases, there are other cases where either the parties do not see benefit in compromise and are determined to obtain a judicial decision, or otherwise they are able to conclude the claim through a process of negotiation that does not entail ADR. A considerable volume of claims will fall into the latter category.

Question 4

How can greater progress be achieved in the future?

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Comments

We believe that the focus needs to be on providing court users with real examples of how mediation may assist their case. A real life example, perhaps a video, demonstrating how mediation works would be helpful in achieving a higher degree of penetration in these cases.

Encouraging ADR at source

Question 5

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

Comments

We believe that the consumer ADR Regulations are perfectly adequate.

Question 6

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

Comments

Whilst we agree that unreasonably refusing to have recourse to ADR a matter that is genuinely capable of settlement through ADR should warrant a costs sanction and a sanction for failing to use an appropriate scheme seems unreasonable. The courts already have the power to impose such sanction and on occasion exercise that power. We are opposed to ADR becoming mandatory as it will simply increase costs in those cases where it is simply not appropriate or necessary.

Question 7

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

Comments

Regular signposting of the benefits of ADR at key stages in the dispute process is helpful, although we repeat our view that

ADR should not be mandatory in all cases. Please see our answer to question 26 which details cases where a form of mandatory ADR could be beneficial.

Encouraging ADR when proceedings are in contemplation

Question 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?

Comments

Please see our responses to questions 6, 7 and 26.

Question 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).

Comments

We repeat our answer to question 7 and think the signposting of ADR at key points in the claim is essential to increase take up. Our view is that the proposed declaration is excessive, especially in light of the fact that it may need to be adopted by unrepresented claimants. We would propose that a watered down version outlining that ADR has been considered and will be considered as the claim progresses would be more appropriate.

Question 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?

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Comments

We offer no views.

Encouraging ADR during the course of the proceedings

Question 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?

Comments

We do agree that the stage between allocation and CMC is the best opportunity for the parties to consider ADR, whilst taking stock of their respective cases, albeit that in some cases evidential exchange may aid a narrowing of the issues and ADR certainly has application beyond that initial stage. However, whilst the court should certainly be encouraging the use of ADR at this stage, we remain of the view that ADR should not be mandatory, nor should the parties face undue pressure from the court to enter into ADR where it is not deemed appropriate.

Question 12

How would you avoid subjecting cases which are not in fact going to be defended to the burden of an ADR process?

Comments

We repeat that ADR should not be mandatory, so the issue would not arise.

Question 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?

Comments

We repeat our answers to questions 11 and 12.

Question 14

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

Comments

We repeat our answers to questions 11 and 12.

Question 15

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

Comments

We offer no views.

Question 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?

Comments

The point at which the court should assess the reasonableness of any refusal to mediate is at the conclusion of the case. The court simply does not have the resources to assess the appropriateness of using ADR throughout the lifecycle of a claim. In the event that the resource was to be made available, it is our view that that resource would be better spent providing

additional mediation services to those that cannot afford them.

Question 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)?

Comments

We repeat our answer to question 16.

Costs sanctions

Question 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?

Comments

We repeat our answer to question 6.

Question 19

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

Comments

We offer no view.

Question 20

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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?

Comments

We offer no view.

Question 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?

Comments

We offer no view.

Question 22

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

Comments

We offer no view.

Question 23

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

Comments

There are several possibilities. ADR could be recoverable as a disbursement in the usual way. ADR could be ring fenced as an element of some fixed costs as per the discussion in relation to counsel's fees or it could simply be consumed within the fixed

fee aspect of the costs, thereby ensuring that there are no additional costs to engaging in mediation. Our preference would be the latter.

Question 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 medicated under these schemes? Why, if they are unsuccessful, are they not being used?

Comments

We offer no view.

Question 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?

Comments

We offer no view.

Low value cases/litigants without means

Question 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?

Comments

We see the benefit that the Small Claims Mediation Scheme ('SCMS') can bring to low value claims. We also, whilst uncomfortable with the principle of mandatory mediation, see the benefit that the SCMS can bring in cases brought or

defended by a litigant in person. A last ditch opportunity to negotiate a settlement with those unrepresented parties may well go some way to freeing up court and judicial resource. However, the effectiveness of the SCMS must be considered and arguably a success rate of less than 40% would indicate that is isn't worthy of the allocation of additional resource.

Whilst personal injury claims are out of scope for Briggs based reforms, we anticipate that the Civil Liability Bill will seek to introduce a tariff of damages for low value RTA soft tissue injury claims. The introduction of such a tariff would substantially reduce the quantum and therefore limit the need for the SCMS in those cases.

Whilst the report makes reference to the claims portal as a form of mediation, albeit one that '*does not involve the intervention of a human third party neutral in the dispute*' this is not the view that we take. It is merely an online platform to facilitate the exchange of information and a process to be followed in the event that liability is admitted.

Question 27

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

Comments

In our experience, litigants in person (LIPs) are generally without the benefit of legal training and can quickly become entrenched making a hearing before a judge an inevitable outcome. This is a very difficult mind-set to alter and the use of the SCMS in these specific cases could well be advantageous in helping them see the other parties position and the potential for settlement.

Question 28

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

Comments

Recent reports suggest that for the year ending March 2017, the government recorded a surplus of almost £102m from

HMCTS. It is our view that these profits should be reinvested into the court service to improve the services that the courts provides to its more disadvantaged users. Whilst we accept that the court has many competing priorities we would suggest a percentage of these profits could be spent in further developing SCMS and this would be infinitely more desirable and sustainable than the provision of such services through pro bon schemes.

Question 29

What are the other funding options available?

Comments

Please see our response to question 28.

Question 30

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

Comments

We do agree, and it is our view that anybody providing such mediation services should do so in a wholly independent, transparent, accessible, and without any financial interest basis.

The on-line opportunity

Question 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?

Comments

There will be others better placed to answer this question so we offer no view.

Question 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?

Comments

So long as any ODR techniques that are introduced are replicated in such a manner that they are accessible by those without the benefit of digital access there can be no question of any unfair advantage. ADR/ODR should be accessible to all, regardless of digital capabilities.

Question 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?

Comments

We have no views on how such techniques should be introduced, save that we do not believe that a system of online blind bidding is helpful. We must remember that we are dealing with matters of great importance to the individual (regardless of value) which should not be denigrated to an auction style process.

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

Question 34

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

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Comments

Whilst consumer conciliation has a clear place in online dispute resolution tools of auction and shopping sites, this is less readily transposed into a litigation arena. Any attempt to make such conciliation schemes mandatory has clear access to justice issues which need to be carefully considered.

Challenges for Judicial ENE

Question 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?

Comments

We agree that JENE has significant advantages over other types of mediation as it is more likely to result in litigants more fully understanding the strengths and weakness of their case. However, the JENE service could in theory be used by those unscrupulous litigants seeking to conflict out a trial judge that they perceive as less favourable to their case. The mechanism of how the JENE service would work would need careful consideration to avoid this unintended consequence..

Question 36

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

Comments

We offer no views.

Challenges for online dispute resolution

Question 37

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

Comments

We agree. However, we repeat our answer to question 32.

Question 38

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

Comments

We offer no views.

Question 39

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

Comments

We offer no views, save that ODR is already culturally normal with such organisations as ebay, Paypal and Amazon. So long as the Courts ODR is introduced in a fair and transparent manner, having been adequately piloted, there is no reason why it will not become culturally normal. At the same time we must remember to replicate ODR for those without digital capabilities.

Challenges for Mediation

Question 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 as the strength of mediation is seen as inconsistent and unreliability by other stakeholders.

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Comments

We agree. There is the possibility that a mediation service may be viewed as pro claimant or pro defendant and it is vital that any such perception is eradicated. Perhaps one way of dealing with the issue is a Medco style random allocation of mediators available to act for the parties if they are unable to agree on which mediator to use.

Question 41

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

Comments

Please see our response to question 40.

Question 42

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

Comments

The introduction of further regulation into an already heavily regulated claims process is unlikely to be helpful and will only increase complexity and cost. Any steps to regulate must be proportionate and focused on ensuring the independence, and transparency, of the mediation system.

Question 43

What other challenges are faced by mediation?

Comments

We offer no further views.

Can we help?

If you have any questions or should we be able to assist you further in this regard, you can contact:

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