
CENTRE for EFFECTIVE
DISPUTE RESOLUTION

# Response to the ADR and Civil Justice Interim Report Consultation

## of the CJC ADR Working Group

## (SECTION 10) QUESTIONS FOR CONSULTATION

### 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?*

As an active ADR Centre, CEDR (Centre for Effective Dispute Resolution) probably has a slightly different view on ADR usage to others. Between April 2016 and March 2017 CEDR had 6112 referrals for adjudications (the vast majority were part of Consumer ADR schemes and went ahead), 1515 referrals for mediations (the vast majority were independent enquiries and just under half went on to mediate through CEDR) and 787 arbitrations (the vast majority were part of Consumer ADR schemes). CEDR also performs other ADR processes but in far smaller numbers.

CEDR witnesses that ADR is being used as indicated by our case referrals but through discussions across the market place we see that there is still often resistance within the legal profession to using certain forms of ADR (notably mediation). CEDR believes that where resistance exists, it is often masked by concerns over 'fair process' or 'bad faith' from the other party, whereas in reality much resistance is probably borne out of inexperience or uncomfortableness with the process.

CEDR also recognises that its experience may not be typical of the more general mediation market place, particularly in relation to middle to lower levels of claim, which may well have been impacted by government retrenchment from the National Mediation Helpline several years ago.

*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?*

CEDR can think of no major area that should have been included which has been missed.

In regard to emphasis we agree that parties should be encouraged and incentiviseds to consider settlement through ADR, in fact CEDR believes it is highly desirable to have the option to resolve disputes without recourse to litigation. Alongside this objective to use ADR is a key principle of all commercial Dispute Resolution: to maintain proportionality of the cost of the process with the quantum of the claim (and counter claim) of a case.

All experiences of the use of ADR around the world point to the fact that the more control parties feel they maintain, the higher the likelihood of a workable resolution. For adjudicative processes this means parties are less inclined to challenge the decision and for non-adjudicative (i.e. mediation) it means reaching settlement. So whilst it is only sensible that proportionate processes be available to disputants depending on their claim, it is also desirable that they can exercise as much choice as is practical around how ADR is used.

For CEDR this freedom in using ADR means that parties should be able to choose, when possible and appropriate, which ADR processes they wish to use and how they might wish to adapt that process (providing that it remains fair and workable). Therefore if parties wish to deviate from the 'norm' of a one-day mediation and can agree that they wish (for example) to mediate by holding two half-day meetings with a two-week break in the middle, then that should be permissible. As should parties agreeing that they would rather have a decision delivered by a private independent expert determination rather than a negotiated settlement through a mediation.

### Making ADR culturally normal

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

Understanding of International Arbitration and Construction Adjudication appears to CEDR to be high. In regard to mediation, over time CEDR has witnessed a change in the acceptance by in-house counsel of many organisations (in particular larger international companies) to using the process – including in matters pre-issue of claim. This approach is also echoed elsewhere in the dispute resolution departments of law firms across the jurisdiction of England & Wales. Yet it is not universal and one must conclude that the reason is one or a combination of a couple of factors – related to uncomfortableness with using mediation. This uncomfortableness may well be because mediation is not part of the practice or culture of an organisation or firm as well as mediation leading to a potential reduction of legal fees (due to settlement before trial).

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

Active enforcement of current levels of cost sanctions in combination with experiential education for all lawyers - from Law School through to later Continuing Professional Development - plays a vital role in the future progress of the use of ADR.

The recent (re-)introduction of the County Court Pilots will help with increasing experience and productive use of mediation.

**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?*

CEDR is not aware of any specific criticism of the Department for Business, Energy and Industrial Strategy (when it was the Department for Business, Innovation and Skills) on how it ensured that the UK was compliant with the EU Consumer ADR Directive which came into force in early 2016.

Consumer ADR should be largely understood to be claims under £10,000. In CEDR's experience Consumer ADR works well when there are regulators or industry groups (i.e. trade associations) as well as sufficiently large organisations that are able to analyse their own particular needs and make informed arrangements for ADR for their consumers. This calendar year CEDR predicts it will handle over 10,000 such consumer complaints – most of which will opt to use adjudication with the option of early settlement which is binding on a business but not a consumer.

Where there are smaller businesses without the capacity to evaluate or make their own arrangements for ADR the picture becomes arguably less satisfactory and the provision of ADR becomes sparser – as there needs to be both signposting for consumers and an approved ADR process for the business to use. BEIS assigned general certification of Consumer ADR to the Chartered Trading Standards Institute (for information on legislation in this area and more please see https://www.tradingstandards.uk/commercial-services/approval-and-accreditation/adr-approval). CTSI should possibly be able to provide more detailed information in this area.

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

In general, yes. However, in regard to consumer claims, failure to respond and consider a genuine claim or complaint by a business is currently a breach of consumer rights and does not need further sanctions.

The current ability of the courts to apply cost sanctions in civil cases with regards to failure to consider ADR and refuse ADR is sufficient although not always consistently applied.

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

Information should be available and accessibly to disputants on the use of ADR. This is already established in consumer rights regulations and in the Pre-Action Protocols of the Civil Procedure Rules. The issue is that the 'signposts' informing disputants of this could often be bigger.

**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?*

The section of the Pre-Action Protocols on Settlement and ADR is very clear that there is an expectation that parties are routinely required to consider ADR. *EG: "11. If proceedings are issued, the parties may be required by the court to provide evidence that ADR has been considered. A party's silence in response to an invitation to participate or a refusal to participate in ADR might be considered unreasonable by the court and could lead to the court ordering that party to pay additional court costs."*

It is possible that with careful drafting this wording could be strengthened but without the bench paying consistent increased scrutiny to this section of protocols it would not make much difference.

*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)*

Broadly speaking in the UK the Civil Procedure Rules have helped to develop a culture where mediation is regularly considered and used. Early Case Law in Halsey did send an initially dampening message about the usefulness/suitability of mediation in most cases. Therefore new clear language about the effectiveness of proactive judicial direction would be beneficial.

*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?*

Experience in the UK in commercial mediation MIAM pilots from several years ago is that they are problematic as unless there is compulsion to turn up on the part of the parties and remuneration of the mediators, eventually you just end up with empty rooms at courthouses.

Anecdotally the mandatory mediation information meetings in Italy in insolvency and personal injury cases have resulted in mediations taking place and settlements being reached – whereas otherwise there would have been none. Albeit that this has been with difficulty and resistance from the legal community.

Also anecdotally the mandatory commercial mediation information meetings in Poland would appear to struggle to get over a 40% success rate in mediations going ahead with many of those that do ending unsuccessfully and preemptively.

**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?*

This answer will vary dependent on the parties and their claim. Ultimately ADR can and should be encouraged at all stages of the litigation process up to a judgement or summary judgement.

*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 proceedingfurther?*

A case management meeting is an ideal occasion for parties to have to answer difficult questions as to why ADR has not been tried to date. Ensuring that this is always formalised into each meeting is a good idea. A judge should feel completely at ease to direct parties mediate their dispute (or undergo any other ADR process). Direction or recommendation by a judge should be sufficient compulsion.

*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?*

Mediation can and does work in all types of commercial disputes so CEDR does not see why one area should be targeted above others.

The two examples chosen of Clinical Negligence and Boundary Disputes are two areas where there are often Conditional Fee Agreements (and sometimes Litigation Insurance in the latter example) for one of more of the parties. Arrangements over legal costs and the creation of an additional 'party' to a mediation is often a hurdle to settlement. For this reason making mediation compulsory in these areas without addressing CFA's first would be problematic.

*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?*

Yes, that would seem reasonable.

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

Possibly. CEDR already has a voluntary notice it offers to parties. Where there is a CEDR contract clause use of the notice becomes a formal trigger for a mediation. Please see CEDR's ADR Notice portal introduced in 2015 - https://www.cedr.com/adr/.

*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?*

Broadly speaking in the UK the Civil Procedure Rules have helped to develop a culture where mediation is regularly considered and used, despite the early Case Law in Halsey sending its dampening message. New clear language about the effectiveness of proactive judicial direction would undoubtedly be useful.

*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)?*

This might possibly work. Sanctions at this interim stage would most likely remove some of the threat of later sanctions which might compel parties to try mediation at this later stage. A judge's direction to try mediation is likely to be the most compelling method.

**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. CEDR cannot see any circumstance where this should not be the case.

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

Halsey was early Case Law that sent a dampening message about the usefulness and suitability of mediation in most cases. Despite other pieces of Case Law being more supportive of Mediation, Halsey has not been 'trumped'. Therefore new clear language about the effectiveness of proactive judicial direction would be useful, possibly even flipping Halsey to say parties are expected to mediate unless specifically exempted (for example by case type or judicial approval).

Now that over a decade has passed, mediation has been used and seen to work in certain quarters and the CPR has been amended several times, we are unsure if this item of case law continues to have the same currency in lawyers' minds when they prepare a case today.

**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?*

There is probably a gap in the middle market (yet to be quantified) but this would be also in terms of legal advice on ADR. It might be fairer to argue that there is a gap in the legal services landscape depending on the lottery of where one gets one's legal advice. If you get what is desired and intended in the current justice system one can have rounded advice that will include a strategy on how to find resolution both through settlement discussions alongside looking at a litigation option. If you are unlucky however you can have legal advice (through an individual or a firm) that is fixated on only reaching trial.

Educated and experienced legal advisers do routinely consider, recommend and use ADR (especially mediation) for their clients. Unfortunately many in legal services do not (for whatever reason) and are not always held accountable by the bench for their failure to do so.

*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?*

CEDR would argue this is not the problem (see the below answer regarding CEDR's small claims). The use of Mediation in particular cases is hampered where there are already litigation costs and these are frequently representing a substantial proportion of the claim and therefore adding these to any negotiation is a further obstacle to settlement. Conditional Fee Agreements and Litigation Insurance, which can see legal costs being incurred at quite rapid speed, only exacerbate the issue.

One of the issues in smaller claims is that parties do not want to add mediation fees on top of other existing fees in the case. Possibly if the mediation was successful the court might refund some or a proportion of the court's fees.

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

CEDR has developed its own scalable Mediation and Arbitration products for cases that fall within these bands of claim and beyond. The Mediation product has been fairly widely and successfully used in recent years (it was introduced in 2011). We do not, as a matter of course, specifically monitor other ADR providers with similar products and so cannot offer additional comment.

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

In certain circumstances this could be a useful idea, however when one compares the cost of mediation with the cost of funding a piece of litigation the amounts are often so small respectively it does not make much difference.

*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?*

This has not been the experience of this ADR Provider (but for a number of reasons we are unable to provide specific data on uptake). CEDR's view is that if the County Court Mediation Pilots which are being introduced around the UK prove successful (and receive healthy signposting from the courts and elsewhere) then they will be an additional strand in place that will increase access and information about mediation.

*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?*

CEDR frequently uses the rates as published on the Civil Mediation page of the Justice website for low value mediations (not just for cases that come via this route). However for cases closer to the £50,000 claim limit (that qualify for a four hour mediation), as they tend to be more complex, we regularly offer parties a full day mediation (which is an increase in fee of less than £100). This option is usually taken up by the parties.

We have not had any complaints about confusion or inconsistency in this regard. If the Civil Justice Council Working Group is able to share any examples of comments of this nature that would be helpful.

Parties retain the right to consider and use different ADR solutions, sometimes these include the use of mediation (and other forms of ADR). This seems like a satisfactory situation.

**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?*

There has been relatively little published about the activity and success of the Small Claims Mediation scheme that CEDR has seen since 2009 (including who the current mediators are, who they are trained by and how they do any continued professional development). Therefore it is impossible to offer any comment on the current workings of the SCM.

*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?*

In regard to Consumer ADR this area has been addressed by the Department for Business, Energy and Industrial Strategy (when it was the Department for Business, Innovation and Skills) when looking to ensure that the UK was compliant with the EU ADR Directive which came into force in early 2016. This created a system of certifying bodies (usually regulators) in different industries for Consumer ADR Schemes – the main one of which is the Chartered Trading Standards Institute.

With regard to other areas of small claims our main concern is that parties have, where possible, access to and choice in using proportionate ADR processes. For very small claims (i.e. second hand cars or washing machines) the cost of mediation - unless it is free – may not be proportionate to the claim.

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

The issue with mediating Small Claims is that mediation will take at least three hours, for which a mediator will expect to be paid, and furthermore, whilst it is likely it is not guaranteed to reach an

outcome. This is a huge potential risk in consumer disputes where a business is expected to pay for the vast majority of the process (e.g. spending £300 on a mediation over a washing machine) only for that dispute to continue on to court as a small claim.

There are other instances where the mediation process is essential as claimants have to feel heard (which gives a higher chance of success). Examples are complaints over the funeral of family members and claims over non-invasive cosmetic surgery. In these instances CEDR provides a phone mediation/conciliation process.

Unless one has administrators and supervisors who work for free as well as mediators who work pro-bono there will always be a cost for setting up and holding a mediation. The only places in the world where one finds 'free' mediation is where the costs are underwritten. When one looks at what has happened with regard to small claims in Punjab State in Pakistan, for example, mediation is free to all those with a small claim because it has trained and diverted a number of first-instance judges to mediate these claims.

*10.29. What are the other funding options available?*

The main option for pro-bono mediation would be the government, although (as stated above) in the ADR schemes set up under the Consumer ADR Directive, the businesses (which are the defendants) meet the vast majority of the cost of ADR (if not all of it) regardless of the outcome.

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

Yes. CEDR has some guidance for mediators in working in these circumstances. Circumstances will differ greatly in cases with unrepresented parties depending on context (e.g. Does that party have phone access to their lawyer? Has a claim been issued? Is the agreed settlement only a single payment from claimant to defendant? Is the settlement agreement in the form of a heads of terms that requires a lawyer to review and create a contract?). Therefore an experienced mediator can use their judgement on what to do with an unrepresented party.

**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?*

Yes we believe it could be the same prompts used. However CEDR has seen no concrete plans from the UK Government or Regional Governments in regard to ODR, including timescale or financial commitment to invest in and build an OSC in the UK's jurisdictions.

*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?*

If it is perceived that parties are forced to mediate rather than free to decide on an ADR process this would likely incur many of the same criticisms of mandatory mediation. Unavoidably there will be issues of digital inequality with ODR, the solution is to be mindful and flexible in instances where there is an issue.

*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?*

CEDR delivers a large proportion of some of its Consumer ADR online.

The current situation with Resolver (www.resolver.co.uk) as a free tool available for consumers is a good example of how a dispute resolution journey can be conducted online.

The option for online bidding is useful but CEDR can see no real advantage to this being done blind – there should be transparency.

See also CEDR's guidance for mediators working with technology:
https://www.cedr.com/about_us/modeldocs/?id=70

**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?*

CEDR advises businesses, regulators, trade associations and governments on which ADR processes could be used so they make informed decisions. There have been instances where mediation/conciliation has been confused with more adjudicative processes, particularly in relation to the term ombudsman (who is an investigator not a facilitator of negotiations) and this has led to confusion we feel, when it comes to the implementation of the EU Consumer ADR Directive. The right to litigate after a Consumer ADR process, if there is not settlement, should not be affected.

**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?*

CEDR has no knowledge of any demand for JENE. Although the service would be free to users presumably there would be a cost to the state. Arbitration by retired judges however has proved quite popular in London based on market hearsay, although CEDR does not currently work with any.

*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?*

CEDR has no useful input on this topic. Presumably parties can decide on this issue themselves when considering Judicial ENE.

**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?*

Possibly depending on how much the system and neutrals cost. Proportionality of the claim to the method of ADR used - as well as the disputants feeling that they can both exercise some control - will continue to be important factors for success.

There will be an important difference for ODR in the UK as to elsewhere in the world. Investment in ODR as used in British Columbia (and Arbitration ODR as being developed in Russia) makes sense where you have a dispersed population separated by distances of hundreds of miles, many islands, mountains and areas with harsh winters offering an absolute obstacle to attending court. In the UK, ODR will be more for convenience than necessity for the majority of the population.

*10.38. Do consultees agree that specified standards for ODR would assist its development and help deal*

*with any stakeholder reservations?*

Probably, providing these standards are not so specific as to remove all flexibility from the ADR process.

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

A clear and easy user experience in combination with appropriate education of the system and process will be essential for its success.

**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?*

Uncomfortableness with mediation often comes from a lack of experience of mediation. Whilst CEDR is aware that lawyers (and by extension some judges) may not be fully comfortable with mediation, it is unaware of any substantiated complaints that mediation lacks consistency or suffers from poor standards.

Over-regulation of the mediation market and in particular the process is a real danger and would stop mediation from being responsive to the needs and demands of its users.

Evidence and wording of this criticism would be useful so as to see what remedies might be considered.

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

Experiential education (whereby participants experience mediation in action) for all lawyers - from Law School through to later Continuing Professional Development - plays a vital role in the future progress of the use of ADR.

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

At the long-standing behest of the Ministry of Justice the Civil Mediation Council (CMC), which has always accredited commercial mediation providers, introduced the registration of individual mediators in 2015. With criteria that establishes a basic standard acceptable for practice, the CMC now has Registered Status for individual Mediators, Mediation Providers (whose mediators must meet the same standard as individuals), Mediator Training Courses and will shortly introduce Registration of In-House Workplace Mediators.

Different areas of government have now established that CMC Registration is a necessary requirement for mediating with them. This includes the Court of Appeal, the County Court Mediation Pilots and the NHS Clinical Negligence Mediation Scheme and also includes mediation schemes currently in development with the Court of Protection and the Department for Education.

CEDR supports this level of self-regulation by the industry and is a CMC Registered Provider and Trainer.

*10.43. What other challenges are faced by mediation?*

The legal profession has been contracting in terms of headcount for the last decade and does appear, to many

sources, to be in a period of sustained change. Computer programmes are widely predicted in the next decade to enhance and even replace much of the work of lawyers (both in terms of drafting contracts [M&As etc.] and also calculating outcomes at trial). With Ministries of Justice around the world continuing to withdraw funds from civil litigation infrastructure, mediation and ADR will undoubtedly continue to have a useful role but with a smaller legal sector its character will undoubtedly change. For example, in the future, expert knowledge of the law will be available in mediations via technology but the parties may routinely not have legal representation present.

CEDR (Centre for Effective Dispute Resolution) - December 2017