Response by CMS to
CJC's Consultation Paper
ADR and Civil Justice

Introduction to CMS

CMS Cameron McKenna Nabarro Olswang LLP (CMS) does not have a traditional litigation or arbitration department but rather our disputes lawyers are spread throughout the firm so that they become specialists in the business sector in which they are working. We have over 300 disputes lawyers specialising in Energy, Insurance, Construction, TMC, Lifesciences, Banking & Insolvency, Corporate and Commercial, IP, Hotels & Leisure, Pensions, Employment and Real Estate. Most of our work and therefore our experience relates to high value disputes and the lawyers on both sides of these disputes tend to be experienced in mediation, so it is used regularly, so much so, we consider that it is already very well established as our 'cultural norm'. We have no relevant experience of many of the matters raised in the consultation paper, such as consumer ADR or conciliation schemes, 'middle-value disputes', the small Claims Mediation scheme or ODR schemes. Accordingly, we have not responded to the question raised in the CJC's paper on these issues.

General

10.1 Do we agree that the use of ADR in the Civil Justice system is still patchy and inadequate?

Much of our work relates to high value disputes and, because the lawyers on both sides of these disputes tend to be experienced in mediation, it is used regularly. We therefore do not consider that its use in our practice is either patchy or inadequate. We agree, however, with the working group that separate consideration should be given to lower value disputes where mediation is not the 'cultural norm'.

10.2 Do we consider that the Working Group has ignored important precedents from other systems or that there are other areas of inquiry with which we need to engage?

We do not consider that the Working Group has 'ignored' important precedents from other systems but we do consider that they have not given other systems the scrutiny that they deserve.

The Working Group Interim Report[1] states that their researches into overseas ADR systems has proved less fruitful that they had hoped in part '***because it is enormously difficult to gauge the "success" of overseas systems*** *even where it is possible to read and understand how they are intended to work****. Italy is a good example****. It is the only European system with a* ***mandatory pre-action mediation requirement****. Anecdotally there is a great deal of negative feedback about the system, not only from lawyers but from mediators as well. But some also comment that problems may only be temporary because litigants are, whether they like*

[1] Section 7: Overseas ADR Systems

it or not, being forced to engage with the ADR and awareness of ADR is inevitably growing.'[2] [emphasis added]

The Interim Report explains that its consideration of overseas ADR systems is focused on a limited number of overseas examples and this is based, in part, on an article by one of its members attached as Appendix 2 to the Report. This article refers to the experience of Italy at some length[3] and includes references to a number of papers published between 2012 and 2013. In 2013 the Italian system was fundamental changed and there are now available four years of statistics relating to the success of that new system that have, it would seem, not been considered by the Working Group. The statistical data can be found in English on the website of the Italian Ministry of Justice[4].

The fundamental change that we refer to is detailed in the body of the Interim Report[5] but an important distinction between the old and the new scheme is sometimes obscured by imprecise language. The initial scheme introduced in 2010, and abandoned in 2013, did provide for mandatory mediation. However, it was replaced in 2013 by a new scheme which is fundamentally different from the original scheme in that it does NOT provide for mandatory mediation. It provides instead that, in specific types of commercial disputes (accounting for about 10% of all civil claims), the Claimant must before issuing a claim in the court first file a request with an accredited mediation provider for an appointment for all of the parties to the dispute to attend an 'initial information session' with a mediator within 30 days of the request at a cost of EUR40 (or EUR80 for claims over EUR250,000). The purpose of the meeting is to encourage the parties to voluntarily enter into settlement negotiations and/or a mediation. It is therefore wrong to describe this as some form of mandatory mediation. The distinction between the old and the new scheme is accurately reflected in paragraph 7.6 of the Interim Report but it describes it incorrectly in paragraph 7.9 where it states that 'T*he new system* ***made pre-action mediation mandatory*** *in a much more limited range of disputes* ..' . It also describes it inaccurately in paragraph 7.3 as a '***mandatory pre-action mediation requirement'***. This is unfortunate because, as is made clear in Section 8 of the Interim Report (entitled 'Compulsion or Persuasion'), there is internationally wide spread concern that the use of compulsion is not appropriate in what is otherwise a consensual process. By incorrectly describing the Italian system as a form of pre-action mandatory mediation it may lead those who are opposed to mandatory mediation to dismiss the Italian experience without proper consideration of its merits.

It is concerning that the Interim Report makes no reference to recent reports and statistics compiled by the Italian Ministry of Justice and it closes its consideration of the Italian system stating *'.. anecdotally there are reports of ADR being brought into disrepute as so many resent being brought into an unfamiliar process*

[2] Paragraph 7.3
[3] Pages 74 to 76 of the Interim Report
[4] https://webstat.giustizia.it/_layouts/15/start.aspx#/SitePages/Studi%20analisi%20e%20ricerche.aspx
[5] See para 7.6

and having to spend time and money attending with their legal advisers at a perfunctory meeting, possibly held at some distance from their home base'[6].

Italian mediator Leonardo D'Urso[7], one of the founders of the leading Italian provider of ADR services ADR Centre, has provided us with the following analysis of the Italian Ministry of Justices statistics which shows that in each of the three full years in which the scheme has operated more than 30,000 cases that otherwise would have been commenced in the civil courts were settled through voluntary mediation instigated as a consequence of the information sessions. The Slides referred to in the Table below are contained in the Ministry of Justice's report on its statistics[8].

	2013*	**2014**	**2015**	**2016**
(a) Cases referred for compulsory information sessions (slide 7)	13,802	131,360	151,469	138,127
(b) Both parties attend the information session (slide 10)	NA	55,565 42.3%	68,009 44.9%	64,919 47%
(c) Percentage of cases referred that settled at mediation after voluntarily agreeing to mediate as a consequence of the information session (slide 13)**	32.4% of (a) **4,471**	24.4% of (a) **32,051**	22.6% of (a) **34,231**	24.1% of (a) **33,288**
(d) Cases issued in the civil courts in the categories of dispute where compulsory information sessions have been required	112,900	86,672	81,940	84,125***
(c) + (d) = the number of disputes in the categories caught by the scheme.	117,371	118,723	116,171	117,413****

*Compulsory information scheme only started on 20 September 2013

** These numbers reflect the number of cases taken out of civil justice system as a consequence of the information sessions

*** This shows that the number of cases issued in 2016 is 25% lower then the number of cases issued in 2013

**** This shows that the number of disputes arising in the categories caught by the scheme has been constant during the period that the scheme has been running.

The addition of (c) being the number of cases settled to (d) the number of cases issued shows the number of disputes arising each year in the categories caught by the scheme. The number of disputes arising each

[6] Paragraph 7.11

[7] Leonardo D'Urso is the Scientific Expert of the CEPEJ/Council of Europe working group of mediation, the Co-founder and CEO of ADR Center – one of the largest mediation provide based in Italy and the co-author of two relevant Eu publications "Re-Booting The Mediation Directive: Assessing the limited impact of its implementation and proposing measures to increase the number of mediations in the Eu" (2014) and the most recent one "Achieving a Balanced Relationship between Mediation and Judicial Proceedings".

[8] https://webstat.giustizia.it/Analisi%20e%20ricerche/Civil%20mediation%20in%20Italy%20as%20of%202nd%20quarter%202017%20(ENG).pdf

year has remained constant throughout the life of the scheme, so the reduction of 25% of cases issued is a genuine reduction resulting from the operation of the scheme and not a reduction due to a fall in the number of disputes arising.

As to anecdotal reports of a 'great deal of negative feedback about the system'[9], it should be noted that the statistics show that the number of Respondents attending the information sessions has steadily risen from a low of 41% in 2014 rising to a high of 48.4% in 2017.[10]

In the same way that the analysis of the Italian scheme ends with a negative anecdote, so does the analysis of the USA experience of compulsory mediation. In respect of the USA the Interim Report closes with reference to negative anecdotal reports that '*contacts in the US have reported from those states which have imposed mandatory mediation that there are, once again, perfunctory, box-ticking mediation meetings which are often wound up quickly after a short and frustrating discussion'.*[11] Our understanding based on reading learned texts on the subject is that the success of mediation in the USA was in no small part due to the introduction of a statutory power for district judges to require mandatory mediation of particular types of dispute in discharging their duty to manage their own caseloads.[12] There is a wealth of research material available on the use of mandatory mediation in the USA as a pre-condition to commencing litigation which we consider the Working Group should take account of.

Making ADR culturally normal

10.3 Why has a wider understanding of ADR proved so difficult to achieve?

Much of our work relates to high value disputes and the lawyers on both sides of these disputes tend to be experienced in mediation, so it is used regularly, so much so, we consider that it is already very well established as our 'cultural norm'. We therefore do not have direct experience of the difficult referred to.

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

We consider that the Italian model deserves closer scrutiny as it is based upon the benefits to be gained by creating an opportunity for the parties to obtain a better understanding of ADR from an independent third party with requisite experience before proceedings are issued.

[9] Paragraph 7.3 of the Interim Report
[10] See Slide 10 of the Ministry of Justice's report on its statistics
[11] Paragraph 7.15 of the Interim Report
[12] See the Civil Justice Reform Act 1990 and the Alternative Dispute Resolution Act 1998

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?

We do not have direct experience of the difficult referred to.

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

We do not have direct experience of the difficult referred to.

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

We consider that the Italian model deserves closer scrutiny as it is based upon the benefits to be gained by creating an opportunity for the parties to obtain a better understanding of ADR from an independent third party with requisite experience before proceedings are issued.

Encouraging ADR when proceedings are in contemplation

The Working Group have not asked a question about the issue of the costs of pre-action mediation but it does form part of the discussion in Section 5: Current Measures for the Encouragement of ADR. We consider that this is worthy of more attention. Our experience strongly suggests that claimants who have not issued proceedings before attempting to mediate a dispute are not taken seriously. In complex high value cases this particular disincentive is often addressed by a tiered dispute resolution clause requiring negotiation and/or mediation before proceedings can be issued. Additionally, in high value cases where costs are not as sensitive this is addressed by preparing the case so that the claimant can demonstrate that they are committed to issue immediately after the mediation if it does not result in a settlement. However, in smaller value disputes a tiered dispute resolution clause is less likely, the costs are already going to struggle with proportionality and there is no incentive to mediate before issuing if the claim will not be taken seriously. If, however, the Defendant knew that the costs of the mediation would be added to the recoverable costs if they lost, they would be inclined to take the Claimant more seriously. We consider that a rule change to address this is worthy of more careful consideration.

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 Working Group describe this as Type 1 compulsion and discuss 'the modern international experience' of mediation in Appendix 2. The Italian model is discussed at greatest length not least because it is, as the paper describers it, '*the only European system with a mandatory pre-action mediation requirement*'. We take issue with it being described as a mandatory pre-action mediation requirement. It is important to use precise language that makes clear that the Italian model does NOT impose compulsory

mediation on the parties. Rather it requires the parties to attend an 'information session' to learn about the mediation process and to explore how it might be used in their case. The parties can decline to proceed to mediation without any sanctions.

As to the question how would you avoid imposing the burden of 'an ADR process' on cases that are not going to be defended, the answer is simple. Adopting the procedure in the Italian scheme, if the Respondent fails to attend the information session the Claimant receives a certificate of non-attendance and can issue the proceedings. The cost of the session is Euros 40 to 80 and is a relatively small sum that should be treated in the English system as recoverable costs payable by the Respondent in any event.

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)

We do not consider that much is to be gained by amending these documents. We do not consider that additional 'prompts' in protocols or the HMCTS Guidance would address this. We consider that closer consideration should be given to both declarations in claim documents and a civil equivalent of a 'MIAM' for smaller cases.

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?

In short, yes. The Italian information sessions are, we understand, very similar in purpose to MIAMS. We are informed by Mr D'Urso that in response to the introduction of the Italian scheme there are now over 650 private mediation businesses conducting the information sessions. It seems highly likely that private mediation businesses in England and Wales could provide the same or a similar services at a relatively low cost.

As discussed below, as the costs of an unsuccessful pre-action mediation may not be recoverable as costs of the case, this is a positive incentive NOT to conduct a mediation before issuing. Consideration should be given to amending the rules on this issue.[13]

[13] Civil Procedure Rules PD 47 para 5.12(8)

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?

We do not agree with the Working Group in this respect. Every case is different and so the optimal time for mediating will differ. Additionally, in our experience both parties are more likely to agree to a mediation later in the proceedings when they have exchanged all evidence.

*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?*

We do not favour Type 2 compulsion in general. In many cases we consider that it would be too early.

In particular, there is no need to introduce compulsory mediation for high value cases as it would bring with it the need for rules and sanctions, likely to add to the costs, and remove advantages such as flexibility as to timing and freedom to design a form of ADR best suited to each case.

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 do not favour compulsion by reference to sectors. We do not have direct experience of clinical negligence or boundary/neighbour 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?

We do not favour compulsion for the complex high value cases we routinely handled. We would leave it to others to judge whether it may be appropriate for other types of cases.

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

We would like to know more about the scheme and whether it is open to, and/or how it handles, abuse. It seems that it does enable one party intent on aggravating the other party to force them into an expensive and possibly pointless exercise. Additionally, the provisions enabling one party to make an 'allegation of fault' seems likely to spawn satellite litigation and the provisions in paragraph 36 allowing disclosure of evidence of the alleged default undermines the confidentiality in the mediation itself.

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?

We agree that it would be helpful if the court were able to assess the parties ADR efforts, without trespassing into conduct in any negotiations themselves. Depending on the particulars of the case we see that there may be cases where it would be appropriate for the court to require the parties to attend purely to address ADR.

*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)?*

In smaller value cases where the costs quickly become disproportionate the additional cost of mediation is a disincentive to using it, particular where there is a small budget and a fear that an inordinate amount of time will be spent on mediation to no avail. This can be addressed in part by specifically agreeing that while the parties will, for the time being, split the mediator's fee, the lawyers' costs of preparing for and attending at the mediation should be costs in the case, recoverable in the usual way[14]. However, the judge hearing the application for appeal in the case cited found that, while the Costs Master had probably been right, the authorities did not provide a clear answer on this. Additionally, although it is clear that the court has jurisdiction to make an order in relation to the costs of an unsuccessful mediation after proceedings have commenced[15] that is not necessarily the case in respect of a pre-action mediation[16]. Consideration should be given to clarifying the rules on recovery of the costs of the lawyers' involvement in a mediation that does not result in a settlement, both before and after the issue of proceedings, as costs in the case. This would help to encourage the use of mediation before proceedings and in smaller cases after issue where the additional costs of a failed mediation are a positive disincentive to its use.

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.

Sections 10.20 to 10.34

We do not have any relevant experience of cases in these sections.

[14] Lobster Group v Heidleberg Graphic Equipment Ltd and Close Asset Finance Ltd [2008] EWHC 413 (TCC)
[15] Chantrey Vellacott v The Convergence Group Plc & Others [2007] EWHC 1774
[16] Lobster Group v Heidleberg Graphic Equipment Ltd and Close Asset Finance Ltd [2008] EWHC 413 (TCC)

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?

We have no experience of JENE. It is something we have considered occasionally but we have never concluded that it would be appropriate. We have experienced judges expressing initial views that have changed once the case has been examined in detail and we have never felt sufficiently confident in the process, particularly in complex cases with large sums in dispute.

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?

Yes. We do not consider that they are capable of mitigation. Even a non-binding evaluation has too much risk attached to it.

Challenges for online dispute resolution

We do not have experience of cases which we consider would be appropriate for ODR.

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?

No. The judges and professionals we deal with are entirely comfortable with the mediation currently available through the services of ADR providers such as CEDR and/or available through hiring experienced independent mediators.

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December 2017