Minutes of the Judicial ADR Liaison Committee

Monday, 20th January 2020, The Royal Courts of Justice, London

Present:

Elisabeth Laing (Chair) (EL)
Bill Wood (Deputy Chair) (BW)
David Isbister (DI)
Elisabeth Davies (ED)
Fiona Monk (FM)
Iain Christie (IC)
Judith Turner (JT)
Karl Mackie (KM)
Master Julia Clark (JC)
Nick Parker (NP)
Sarah Watson (SW)
Shirley Hennessy (ShH)
Spenser Hilliard (SpH)
Tony Cooper (TC)
Wolf Von Kumberg (WV)
Leigh Shelmerdine (Secretariat) (LS)

Apologies:

Andrew Higgins (AH)
David Parkin (DP)
Peter Causton (PC)
Richard Lumb (RL)
Sam Allan (SA)
Steve Chapman (SC)

Introductions

1. New committee members and those not present at the previous meeting introduced themselves.
2. ED is the consumer affairs representative on the Civil Justice Council. She is also a Senior Independent Director on the Board of the Parliamentary and Health Service Ombudsman, a CEDR accredited mediator working mainly on charity disputes and currently completing a Masters in Dispute Resolution.
3. SpH represents the Bar Council and is Acting Chair of the Bar ADR Panel; he is a practising barrister and mediator. He is currently working with the Desmond Tutu Foundation which is working with Kings College London to establish a chair in reconciliation and dispute resolution. Kings already has a law department with free mediation clinic and are looking to incorporate dispute resolution into some undergraduate degrees in the Faculty of Arts and Humanities – it's an excellent way of increasing knowledge of ADR. He pointed out that in the UK the universities

which have taken up mediation are second tier; the top universities have steered clear of incorporating dispute resolution into their law degrees. This contrasts with the system in the USA where Harvard Law School has a flagship program on negotiation. His interest lies in raising interest in and awareness of mediation through universities.

4. SW is the principal Technology and Construction Courts (TCC) judge in Birmingham, previously having worked for 10 years in Northampton as a District Judge. She has experience in judicial dispute resolution. Previously she was a partner at Squire Patton Boggs specialising in Commercial Litigation, particularly Corporate Finance Disputes and Engineering Disputes. She has experience in expert determinations. She is a Course Director for the Judicial College on the specialist jurisdictions course and a tutor on the civil course. She has experience training Deputy District Judges to High Court Judges.
5. ShH is a District Judge (DJ sitting in Birkenhead. She was previously at the Bar working almost exclusively on serious brain and personal injury. Was a qualified mediator. Experience of one friendly settlement at ECHR. As a District Judge she manages all kinds of cases apart from Public Family Law.
6. JC represents the Association of High Court Masters; she has been a Chancery Master for 5 years and has conducted Financial Dispute Resolution hearings. Previously, she was a barrister specialising in intellectual property and chancery law.
7. Tony Cooper is Chief Operations Officer at ACAS, so has responsibility for all of ACAS' conciliation, arbitration and mediation services. His experience has been in relation to employment, in both collective and individual disputes.
8. FM highlighted an error in the previous minutes. This has now been corrected.

Updates from subcommittees

Rule Changes subcommittee

9. A member spoke on behalf of the rules subcommittee. The group invited two experts to their meeting, to advise on two different mandatory mediation schemes. A HMCTS small claims mediator who brought the group up to date with opt-out mediation and the Chair of the Ontario Bar Association Joint Mandatory Mediation Committee (OBAJMMC), they have had 20 years mandatory mediation. The Chair of the OBAJMMC is currently living in London and would be willing to address the whole committee if interested. There was consensus that they should be invited to speak.
10. In Ontario, mandatory mediation has been in place in three centres - Toronto, Ottawa, Windsor – for the last 20 years. This is due to rule 24.1 of the Ontario equivalent of Civil Procedure Rules (CPR). OBAJMMC is made up of representatives from Ontario Bar Association; they are currently considering extending it to the whole of the province. Each province in Canada is a separate jurisdiction and run independently.
11. The subcommittee is looking at practical examples of schemes that have some compulsion and how it works.

12. In Ontario, Rule 24 mandates mediation in all civil claims over $25,000 Canadian. Mediation must take place within 180 days of close of pleadings; it was originally 90 days but the deadline was too tight. The parties can agree who will be their mediator. If they cannot agree, they are allocated a mediator from a roster. This is the government's only involvement; the government does not fund it. Parties are liable for the mediator's fee. Mediation takes place in one of the parties' premises or a neutral venue; parties and their lawyers are expected to attend, but not insurers. The court has power to strike out a claim or defence if mediation is not attempted and there may be costs consequences for trying to delay the process.
13. In 2001, a 200-page document called the Hann Report[1] was published to reflect on how the scheme had worked in its first two years. Between 1999-2001 the Hann Report considered data from 23,000 cases and feedback from mediators, lawyers and clients involved in over 3,000 mediations. Between 40 – 60% were completely settled on the day of the mediation; the remainder had the issues narrowed. Costs were saved and it was a positive experience for litigants. Mediators are required to send a report to the court on the outcome of the mediation.
14. The timing of mediation is key - sometimes mediation is too early in the process, before there has been sufficient disclosure and parties are ready to engage in dialogue. Parties may go through the mandatory mediation and have an additional mediation at a later stage.
15. 90% of Ontario Bar Association respondents to a recent survey recommend that the scheme is extended to the whole province.

16. One attendee gave details of the update from a mediator for small claims mediation service, which has been going since 2007. Initially mediators were trained in house and people were judicially referred to the scheme. Then it changed that all cases were offered a one-hour phone mediation, but both parties had to opt-in. Currently 17.8 fulltime equivalent mediators for the entire scheme. Mediators do around 5 mediations per day
17. One member thought when it was launched it was great and there was positive feedback. Now the issue is that there are not enough mediators and HMCTS are not providing sufficient funding for it to run properly. People tick the box to say they want to mediate, but they are not able to get an appointment because there isn't the capacity. Users become frustrated; it is worse than not having.
18. Some statistics were given about the small claims mediation scheme. In the last year there were 46,000 referrals to the scheme (where both parties had ticked the box to say they wanted to take part). 120,000 cases were eligible (those where a defence has been entered out of 1.2 million small claims issued). This represents an opt-in rate of 38%. The rest were default judgements and bulk filings. Only 16,000 mediations took place, so only one third of cases were settled. The rules provide that it must be done within 28 days which creates difficulties because three diaries need to align – mediator, claimant and defendant.
19. One attendee wondered if 28 days was too inflexible. Another stated that extending the deadline would not solve the problem, if the number of mediators is to remain the same.

[1] Baar, Carl and Hann, Robert, *Mandatory Mediation in Civil Cases: Purposes and Consequences*. W.G. Hart 2001 Legal Workshop.

20. One attendee announced that each person is doing around 1000 mediations each according to number of staff versus number of cases.
21. One person suggested that there is scope to have digital mediation. Should be some way to look at what is at stake and then a click and agree system. One individual predicts with the ability to lodge a defence online now, the number of defences filed will go up.
22. One person stated that 60% of the cases referred to the small claims mediation scheme settle during the 1-hour call. The settlement rate is higher the later in the 28 days the mediation takes place. The agreement is sent to both parties, they don't sign anything but are bound by it.
23. One attendee noted there is a very high client satisfaction rate of around 90%.
24. One attendee shared their personal experience using the scheme. A claim was filed against their organisation which was referred to the scheme. They felt that the consumer would not have settled, had a third party not been involved in the process.
25. It was mentioned that the scheme is currently an opt-in scheme. For claims under £300 a pilot has been running since 9 Sept 2019 which is opt-out. This is 20% of small claims. 16 weeks of data – the opt-out rate has been 76%, which is less than the opt-in scheme. Mostly defendants who are opting out – 65%.
26. One member suggested some reasons as to why rates were so low. One of the factors is the online system; defendants have just put in the defence and the next screen says that the case will be referred to mediation. There needs to be a delay between filing the defence and being given the option to mediate.
27. Wording may also be an issue – there is a description to explain what mediation is which says, "you must be willing to negotiate". Again, this is directly after a defence has been filed.
28. It was asked if the language is similar to the language used in the previous scheme.
29. Another stated there is no definition on the current Directions Questionnaires, there is a just a box that asks if a party would like to go to mediation.
30. A further individual stated that parties cannot opt back in if they opt-out in the pilot. May consider asking people at the end of the online process, if they are sure they want to opt-out. There is no human contact with the pilot at present, in the traditional scheme someone contacts the party.
31. It was mentioned that in the traditional scheme once a party has filed a defence, the court sends out a form asking if they want to mediate, so some time has elapsed between the two events. The form asks parties for details of witnesses and experts to support their case which often makes people realise what they need to do to bring a case to trial, this is at the same time as being asked if they would like to mediate. Mediation might seem like being the easier option at that stage.
32. It was shared that settlement rate is 64% for the pilot. Scheme has been extended to £500 and plan is to increase into all cases up to £10,000. Certain types of case are not eligible e.g. personal injury, road traffic accidents, parking, bulk users.
33. One attendee wished to make everyone aware case officers are still looming, but there is little detail and funding, so not sure where this stands. It was reported that more small claims mediators were being recruited.

34. One member announced that tribunals are a lot further ahead. Case officers do case management work, saving expensive judicial time. They could be used for early stage ADR.
35. One member felt that some of the small claims cases are going through this mediation scheme could go via another route, there could be further signposting to existing organisations which could help.
36. It was reported HMCTS used to send out information regarding the main mediation organisations.
37. It was said that the ombudsman is working on is public education, and the alternatives website or the possibility of a single portal so that the right information is available at the right time to guide consumers down the right route.
38. Another wondered if there is more scope for parliament to intervene to get people to use ombudsman services before coming to court.
39. One member remarked the Department for Business, Energy and Industrial Strategy (BEIS) white paper will look at the ADR regulation and will look at making it mandatory. There is scope for discussion with government.
40. It was noted in ADR schemes which are non-binding on consumers, companies do often automatically refer consumers to adjudication for which the company pays.
41. It was argued that the key is for people to be signposted to other organisations before they have paid their court fee, if they have a suitable dispute. The current online system does not mention ombudsman.
42. One attendee stated that the volume of work done by ombudsman services is huge, the Financial Ombudsman Service does more than 1 million cases a year.
43. A member referred to the online form for money claims[2] which states "Before making a claim, contact the person or organisation to try to resolve the issue by discussion or mediation." The bit about mediation is a clickable link.
44. One member said that currently the form and other references to mediation on gov.uk websites are linked to the CMC website; this is a temporary measure. Previously the link was to an MOJ page which listed mediators operating under the fixed fee mediation scheme, a hangover from the days of the National Mediation Helpline; this page was taken down last August. There should be a proper landing page signposting users to the various ADR schemes and providing links to where they can get more information. CMC are inundated with calls from members of the public asking for help.
45. CMC have made a number of suggestions to the MoJ and HMCTS as to what needs to be done through its Government Liaison Working Group. One attendee wondered if this committee should ask MOJ and HMCTS to set up this mediation landing page as soon as possible.
46. One member noted it is unfortunate that both the MOJ and HMCTS representatives have sent apologies for today. It is an urgent matter.
47. One member warned the signposting needs to be to free or charitable organisations which charge an affordable fee. Fee for the smallest claims is £35. If mediation is more expensive than this, people will opt to go to court because it is cheaper for them.

[2] https://www.gov.uk/make-money-claim

48. One member asked for guidance and opinion on where the Rules subcommittee should focus its attention. CMC made a submission for one type of automatic referral to ADR in all civil claims. The Rules subcommittee had concluded that they should be looking at working examples of mandatory mediation schemes and what potential rule changes would be needed to introduce them in England and Wales.
49. One attendee asked if the subcommittee wanted to focus on actively influencing or learning and distilling?
50. One member felt it time would be best spent looking at comparative jurisdictions models, but may be both. For the next meeting plan to get more detail on the scheme in British Columbia and look how that might be adopted here.
51. One individual announced that hearing the views of other members shows there is a mismatch between judges and HMCTS. This is a good forum to level out these issues.
52. It was felt that the option for an online confidential mediation should be explored. A system where parties can type in what they would be happy to pay/accept, so that some claims may be able to be settled that way without the need for any human mediator. Others agreed that online blind bidding works well.
53. One attendee told the group of a software called Smartsettle available in the US which has a worldwide patent, which does what is described above.

Encouragement and Awareness

54. A member of the encouragement and aware subcommittee announced that they are looking to raise awareness and encourage use of existing provisions or things that are developed in due course. The group was unsure if they need to consider cost considerations for suggestions they might make.
55. One committee member said the subcommittee are targeting two groups - the public and businesses (SMEs, business associations and chambers of commerce links) otherwise the area is too broad.
56. The subcommittee plan to consider peer mediation and mediation in schools. One member wondered who organises mediation awareness week? The answer given was John Allison. The member felt the week is very London-centric and not very high profile.
57. One member remarked there should be a website tied in to online court. Whether and how this happens is reliant on other conclusions drawn by the committee as a whole. People naturally go to website to find information so where the website leads to is crucial.
58. A member asked where this subcommittee ends its task and where does the education subcommittee pick up. Clarification between the remit of the two groups is needed.
59. The same member shared the result of survey of small business users – only 8% in 2016 said they had used ADR to settle their last dispute, 35% said it was not used due to lack of awareness, many of those who are aware of ADR said they thought it was unsuitable for commercial disputes. This indicates that on the SME front, there is a lot to be done.

60. One member felt the challenge is knowing the audience, SMEs is a huge group with many subsets. May need to focus and narrow to target a specific group where this Committee can add the most value. It may be that this subcommittee could try to disseminate information through representative bodies who have greater reach e.g. Federation of Small Businesses. It was also recognised that there is a larger issue surrounding centralised resources – how does PLE fit with this and how does PLE of ADR fit within the larger issue? It would be useful to target, prioritise and sequence the key themes to influence what is going on, recognising there are limited resources.
61. One member stated the results of the survey shared (para 59 of this document) suggest there is woeful ignorance in SMEs of ADR, which is not replicated in larger organisations.
62. A member felt it is worth engaging with BEIS ahead of the white paper which they are due to publish in March. ADR will become mandatory within the home improvement sector will. How do you ensure the industry is brought along with changes that are made e.g. a sole trader who does not answer the phone all day due to being on a roof working, how do we ensure people are able to comply with what is expected?
63. A member opined that SMEs encompass a huge audience and it will be a significant piece of work to target them.
64. Another member felt ADR should be brought to the attention of those with most to lose, which is often smaller entities.
65. A member then returned to the earlier mention of a website and expressed his opinion that there is the need for a mother lode website that has information about ADR and ombudsman.
66. One member wondered who does the responsibility lie with to host a website?
67. Another answered it would likely need to be MOJ.
68. A member shared that she understands that the fees paid for civil cases are such that the civil justice system makes a profit, which is used for other areas of the justice system such as crime and family.
69. One member proffered that the website which has been talked about is almost a reinvention of the previous consumer direct website. The group should consider what are the chances of success with the proposals it plans to undertake.
70. One member has a contact from Citizens Advice who worked on Consumer Direct website who they could invite to speak the group if it would be useful.
71. A member wondered whether it is within the Committee's remit to write a report to HMCTS to ask for website of this type.
72. Another answered that as a Committee of the Judge's Council (JC) the most appropriate option may be to submit a report to the JC and ask leadership judges to raise it with HMCTS on our behalf.
73. One member repeated that it would be useful to raise directly with DP and /or SC if they had been in attendance. This point would be reported back to the Master of the Rolls at the next CJC meeting.

74. A member noted that two absent members will read the minutes, so will be able to see the conversation that was had. They wondered if a direct request could be put to MOJ along with the minutes, asking for the point to be addressed at the next meeting.
75. A member gave information on why the previous civil justice mediation page (the Mediation Directory) on the MoJ website had been shut down; it was said that it was too expensive to maintain and then shortly after there was a security issue with the website so it was closed. The previous page was not the type of website that we have been discussing, but it was something at least. It listed CMC-approved mediation providers willing to provide services under a fixed fee mediation scheme. CMC has just done a consultation of its own on whether to re-introduce the scheme, the results of which will be known soon. It relates to a proposed fixed fee scheme for civil claims under £50k.
76. A question was asked to clarify if it was the same scheme as a previous scheme where people came to court, sometimes out of hours.
77. A member responded that it was not a court run scheme.
78. One member mentioned that there are current pilots in Exeter and Manchester trying to bring back that programme, and from feedback so far, the pilots are not successful. We need to hear about these pilots from MOJ.

Education of professions and generally

79. A member explained that subcommittee had perhaps set its terms of refence too wide, as they too had considered SMEs. The subcommittee looked at engaging with the production of materials, another member had helpfully pointed out the CILEx currently produce materials so could work together to revamp what is produced. That would not cover practitioners who have been qualified for some time, so a suggestion to contact The Law Society to see what continuing profession development is available was made.
80. The subcommittee have been looking at undergraduate and postgraduate courses and the prevalence of ADR and its take up. Using the Ombudsman Association as an example, the same member mentioned it had gone to give a lecture to undergraduates and one of the students who attended that lecture now works for the OA. The OA has an appetite, and could be used to pull together what is happening in academic circles.
81. A member mentioned two potential pilots which the group had considered.
82. Pilot 1 – case management based ADR training for judges. Provide training on ADR methods and case management training to judges at county courts with a significant backlog of cases. Judges to then advise on mediation. Proposal to analyse the effect of education of judges and then look at data arising from that. Judges after 6 months the parties interviewed and analysis of changes in workload whether pilot affect number of cases and report on feasibility of using scheme. This is of course subject to the project being funded.
83. One member raised an issue that decisions on directions are taken on paper, judges do not sit down with parties and directions already include a section on other options.

84. Another noted that a lot of this is happening informally already. There is an issue of LIPs not reading orders. By transferring the responsibility to get judges to have parties in and discuss, rather than the paper option is adding additional workload for judges.
85. A member felt the general view of District Judges is that mediation is seen in a good light and is encouraged e.g. in boundary disputes.
86. One member wondered if it the job of this committee to get big data from HMCTS. Comparison of court where education takes place for judges with a court where education is not taking place.
87. Another noted this overlaps in to the judicial education subcommittee's territory.
88. A different member noted that most DJs are doing financial remedy work for divorces (which effectively makes mediation compulsory) so have some experience and understanding of how well it can work in the right cases.
89. A member gave details on the second pilot which overlaps with the education and awareness subcommittee. It was suggested to hold a series of roundtable meetings in regional business centre with SMEs to study how best to raise awareness whether through Chambers of Commerce or industry bodies.
90. Another member asked if this pilot should be considered further by the education and awareness subcommittee.
91. It was stated that this pilot, once developed, may be considered by CIArb for funding.
92. Another member raised a point which was mentioned in the previous meeting regarding education of professions and codes of conduct (CoC). Lawyers who come through qualification now are likely to be aware, so may be better to look at those who qualified some time ago. DI approached CILEx about the possibility of updating their CoC and was faced with some difficulty that CoC are supposed to be broad and high level, not so outcome focused. May be better to look at mandatory CPD as an easier approach.

ADR outside of civil

93. This subcommittee had completed a scoping exercise and will circulate a paper regarding the position of ombudsman and tribunals. Focused on tribunals at present, but opportunity to include ACAS and others. Another raised the suggestion to include an additional tribunals member to the Committee. There's an overlap between property chamber, tribunal and county court, so someone from there might be useful.
94. One member felt some of the work overlapped with the education and awareness subcommittee. In the paper they have outlined what is already available and have highlighted several things on the horizon.
95. Members responded:
    - it would be helpful to know what works and what does not.
    - that success is jurisdiction specific, a variety of practices work.
    - the group could pull together further information to then distil best practice.
    - that it is essential to consider not just what kind of service is being offered, but who will pay for it and how it will be funded.

96. One member asked if ACAS has data. They thought it would be interesting to see how successful claims are at each stage. ACAS agreed to share with members data showing engagement and how many claims are referred.

Judicial Education

97. A rapporteur for the group told the Committee that there is a continuing education course for any judge who sits in the business and property courts, technology and construction, circuit commercial, chancery (property, trusts, probate and insolvency). Almost compulsory for judges who sit in those areas to attend, on a 3-year cycle. Mandatory module on case management module within the course which includes ADR specifically ENE and financial dispute resolution which is used in Chancery.
98. On the civil course for Deputy District Judges, there are opt-in modules so people can choose what to study. Will find out what judges are currently being taught regarding ADR and what needs to change.
99. It was anecdotally shared that the position is not as bad as might be expected as most DJs do FDR and children work where ADR is used routinely.
100. It was explained that in family remedy work there is a huge amount of judicial discretion in the outcome – there isn't a right or wrong but what is fair. Not same process as civil as theoretically there is a right or wrong answer. They are banging the drum for ENE as they believe it is under used.
101. Less knowledge with CJs as they use it less. DDJs are taught how to give a steer to parties.

Nick Chambers' Talk

102. One member told the Committee even though the talk was focused on judges, the same idea of an evaluative approach is popping up in other contexts too, e.g. whiplash reforms due to go live in April, with barristers who have personal injury experience to do a quick evaluation for cases under £10k. Potential for huge volume of work. As soon as there are specific proposals this committee should look at them.
103. It was asked who is funding that scheme. A response was provided that it is likely to be insurance companies in a syndicate.
104. One member presumed that rules would need to be created for the process.
105. A member understands that the rules are currently being drafted by Civil Procedure Rule Committee.
106. One member is to find out if there is someone on the CPRC who is responsible for ADR, so there can be discussion between us and them.
107. A member felt the talk highlighted the lack of data gathering.
108. Another member agreed that HMCTS are not good at collecting data and they ought to be doing it, particularly as things move online and it becomes easier.

109. A member wondered if the subcommittee targeting awareness and education have considered LIPs/vulnerable people as a subgroup.
110. Another member mentioned at the OA there is an issue with digital exclusion, lacking data and currently looking at addressing this within the ombudsman schemes. Will look to share with the group.
111. A further member felt the reform programme working group looking at access to justice issues, LIPEG, should have access to this kind of information.
112. A different member remarked that ACAS has early conciliation and internal research has shown that people do not understand when jargon and complex vocabulary is used e.g. impartial. Language is key consideration.
113. Another member asked if any of the subcommittees felt they had capacity to look at this area. No response was received, so it may be considered again at a later stage.

Types of ADR – a new subcommittee

114. One member remarked that finding out what types of ADR provisions are available now is being covered by other subcommittees, so did not feel there is a need for an additional subcommittee.
115. Responses received:
- felt that the discussions from today have highlighted the use of ENE, which has been under used historically. They urged all subcommittees to keep ENE in mind, especially considering Lomax v Lomax.
- wondered if the group are forgetting about expert determination. It is a potentially under used form of ADR, e.g. to be bound by a determination of a surveyor rather than by a court – significantly cheaper and likely to get a similar outcome.
- added that expert determination issued in corporate finance and construction – often built into the contract.
- mentioned that there was a similar scheme run by the Royal Institute of Chartered Surveyors (RICS) which had been mentioned before, but he had not heard about it recently.

116. A member shared that CEDR has data showing client satisfaction on types of ADR and litigation. Feedback on ENE is not so good, on complex cases without a mediation attached.

Experts as guest speakers

117. At the Civil Justice Council's conference Juliet Carp had given a talk. Juliet said she was an employment litigator but had only fought a handful of cases in her career. Interested to see what her approach to dispute resolution is. She will be invited to speak at the next meeting.
118. Jennifer Egsgard to speak at the next meeting.

AOB

119. It was mentioned that several committee members had requested to share the minutes from the previous meeting. Given that the group has been set up to raise awareness of ADR, it seems logical that the group would publish minutes.
120. As this committee is sponsored by the Judges' Council, permission would be sought from them to publicise the work.
121. Committee members agreed that there would be two versions of the minutes, a detailed note of the minutes for members only and a summary version to be published publicly on CJC website. Desire to ensure Committee is a safe space to raise issues, that would not necessarily want to be made public.
122. One member felt it would be useful to be able to share a summary of the work we are doing with professional bodies.

Next meeting

123. Monday 27 April 2020 at the Royal Courts of Justice.