Minutes of the Judicial ADR Liaison Committee

Friday, 11th October 2019, The Royal Courts of Justice, London

Present:

Mrs Justice Elisabeth Laing (Chair) (EL)
Bill Wood (Deputy Chair) (BW)
Antony Sendall (AS)
David Isbister (DI)
District Judge Richard Lumb (RL)
Fiona Monk (FM)
Iain Christie (IC)
Judith Turner (JT)
Karl Mackie (KM)
Nick Parker (NP)
Peter Causton (by phone) (PC)
Sam Allan (SA)
Steve Chapman (SC)
Wolf Von Kumberg (WV)
Leigh Shelmerdine (Secretariat) (LS)

Apologies:

Tony Cooper - ACAS

Introduction

1. As it was the first meeting of the Committee each attendee introduced themselves and explained who they were representing at the meeting and a little about their experience with ADR.

2. WV represents the Chartered Institute of Arbitrators (CIArb); he has 30 years' experience with an international firm; dispute resolution was part of that work. WV is the former Chair of the Board of Management for CIArb. He is a certified CEDR mediator and an arbitration Fellow of the Chartered Institute of Arbitrators. As Assistant General Counsel at Northrop, Wolf was responsible for developing a dispute management process including an ADR Policy.

3. SC is from Her Majesty's Courts and Tribunals Service (HMCTS). He is head of the civil jurisdiction covering the relevant claim types.

4. AS from The Bar Council (standing in for Spenser Hilliard). AS is from Littleton Chambers and is a mediator.

5. RL is a District Judge sitting in Birmingham. He was a member of the Civil Justice Council's Working Group on ADR which produced the report which led to this Committee. He cases manages big clinical negligence claims.

6. IC is from the Civil Mediation Council (CMC). IC is a barrister, civil and commercial, family and workplace mediator and is CMC's company secretary.

7. FM is the Regional Employment Judge for Midlands West. She is a mediator judge and chairs the ADR liaison group for Tribunals. She is the principal judge for implementation and strategy involved in the Reform programme across tribunals. She is on a committee which was set up recently between tribunals and ombudsmen to look at the ways their different schemes work.

8. JT represents Ombudsmen. She works for the Dispute Resolution Ombudsman, a non-statutory ombudsman scheme which was originally set up as The Furniture Ombudsman, but diversified following the ADR Regulations 2015. She is the current Chair of the Ombudsmen Association Policy Network.

9. NP represents The Law Society (TLS) and is on TLS's Civil Justice Committee. He is a partner in a law firm which specialises in civil and commercial litigation, so uses ADR regularly on behalf of clients. Has been a civil and commercial mediator for around 15 years. He is also a Deputy District Judge.

10. DI attended on behalf of the Chartered Institute of Legal Executives (CILEx). He is a private client lawyer. He has been mediating since 2012 and now is involved in 40+ mediations a year. Works exclusively through Clerks Room.

11. KM set up and represents Centre for Effective Dispute Resolution (CEDR). He is a psychologist and barrister by training; he worked to establish ADR in the UK and Europe. He has practised continuously as a mediator alongside other duties at CEDR.

12. PC from ProMediate is a dual-qualified solicitor and barrister with concurrent practising certificates. He runs the mediation provider, ProMediate, and has run an ADR provider dealing with consumer cases. He set up and is currently the Treasurer of the Association of Fee Paid Judges; he is a Deputy District Judge in North West. Also helped to set up and now runs the mediation pilot in Manchester County Court. Law Society Council member for litigation.

13. BW on behalf of the Civil Justice Council (CJC). He is a mediator in private practice and has been mediating for about 20 years. He was Vice Chair of the CMC for a long time, but since 2014 he joined the CJC as the ADR representative. He chaired the CJC Working Group on ADR which produced the reports that led to this meeting.

14. EL has no experience of ADR and mediation. She is the liaison judge for litigants in person (LIP) and identifies the overlap between ADR and LIP as the reason for being appointed to chair this committee by the Master of the Rolls.

15. SA is CJC Secretary and Private Secretary to the Master of the Rolls.

Comments on the Terms of Reference

16. It was raised how ambitious the terms of reference seemed to be, but reasoned that the points outlined were all good ones. Many of those present supported the terms of reference as comprehensive and covering broad ground, and proposed no changes. Some of the wording was lifted directly from the CJC report.

17. As tribunals were not explicitly mentioned, it was agreed the words "including tribunals" would be added to the opening paragraph of the Terms of Reference. In the second paragraph, the Senior President of Tribunals to be added to the list of those parties to be considered and advised in relation to this committee.

18. One member felt the Terms of Reference were disappointing because they were not focussed on implementing the recommendations from the final report of the CJC's ADR Working Group. The broad scope of the Terms of Reference suited the group better, as not to be restricted going forward. In the year since the report and recommendations were published, certain things had changed; the group does not want to become just an implementation group for the report at the risk of excluding new and different ideas from the wide experience and expertise available from the members of this committee.

19. It was raised if 'notice to mediate' should be mentioned in the Terms of Reference. Minuting 'notice to mediate' may be more useful than including it in the Terms of Reference.

Frequency of Meetings

20. Members were asked how they felt about the frequency of meetings – would two a year be enough? Those present concluded that quarterly meetings would be more appropriate. Meetings would be three hours in length. Would need to have sub-committees that report to the main committee. It was also mentioned that a lot can be done online, so sub-committees can progress things without necessarily meeting face to face.

Views on what the Committee should do, within its Terms of Reference, in order to produce work for the next year

21. Views were asked from each member on possible work streams, to enable the group to sketch out a program for future work.

22. A member noted that CIArb is very involved in training for the judiciary, professions and users. Their work has led them to understand the huge benefits of ADR and mediation in business to small and medium sized enterprises (SMEs). They would be keen to look at ways of educating this broad group, particularly (SMEs), employer organisations and chambers of commerce. An example of the Engineering Employers Federation was given.

23. HMCTS is keenly interested in recent developments and impact of the opt-out scheme in Online Civil Money Claims, although it has only been running for one month so far.

24. One member sees that the largest barrier to the expansion of ADR and mediation is lack of education in the professions and wider public. They expressed concern due to how little it features

in the training of barristers. They noted that mediation is not well understood among the professions and more widely, people see it as another form of negotiation, which it is not. They are keen that teaching and qualification bodies build it in to their program of study.

25. It was suggested that professional bodies could build ADR into their code of conduct to make it a professional requirement which would force the teaching and qualification bodies to take notice of it. A member mentioned it might be worth looking at the assessment criteria for SQE qualifying so that the teaching curriculum is based on the assessment. They also noted that codes of conducts are generally outcome focused rather than rules based, so would need to be worded carefully. Several members mentioned the need for it to be embedded at all levels of education and in the courts, so that the need for education and use filters both up and down through the process. Another member noted that starting earlier than professional qualification would be useful. It was also mentioned that at post-graduate and legal training level there are some courses that include mediation, e.g. Manchester Metropolitan University has a module which includes the option to train as a mediator and University of Central Lancashire also offers mediation training. It was raised that mediation needs to be driven primarily by the courts and judges at case management stage rather than giving penalties at the end of the process. If it became part of the system, providers would be more likely to teach it because part of the process. There are no consequences if parties fail to engage and judges do not have any interest in making orders.

26. One member agreed that education and awareness is key to get ADR to become the norm, especially at an early stage. At the case management conference stage, although ADR is often mentioned in the first paragraph of the order because it is in the template, people do not give any thought to what it really means. It is not well understood. From past experience in personal injury or clinical negligence cases, there is often a joint settlement meeting shortly before trial, and there is a mad scramble before trial to comply, but nothing is considered earlier in the process due to concerns about professional liability and risks that parties are seen to be under-settling the case. The Working Group's report mentions the aspiration that ADR should have equal weight with other directions, cost management and budgeting at both costs and case management hearings. It should be part of the discussion to find out what steps parties have taken so far and what their future plans are for mediation. This would require a significant cultural change from the judiciary, particularly District Judges, as the majority of case management is done by them around the country. It was noted that there is no Judicial College module on ADR. Judicial College funding is an issue. Education and awareness of judges are important: some pay lip-service only.

27. Judicial mediation has been part of the process for around 10 years; at each case management hearing, where the case fulfils the criteria, the judge will discuss with the parties to find out if they are interested in judicial mediation and will immediately make directions in relation to that. This is also the case in other tribunals, e.g. the property tribunal. Employment Tribunals developed their own training, and then helped train those in the Property Chamber. They felt that attention should be drawn to financial and commercial benefits of hearing time saved by training judges to be aware of mediation.

28. One member felt there is a lot to be learnt from tribunals' experience. Mediation is often considered in the very small cases (new online procedures for bringing claims of small value) and in the very big claims, but there is a lacuna in the middle range of claims. The standard we should reach is that parties can reach an agreement that everybody is moderately pleased with.

29. Another member has issues with the training of judicial mediators as it is focussed on the civil and commercial model. They believe round-table discussion are better than the shuttle method - community mediation would be a preferable style. They feel that one of the issues is that ADR is seen as part of the process, rather than outside the process. They have questions about the efficacy of mediation when it is within the judicial process.

30. It was highlighted that lack of judicial time on the part of district judges and deputy district judges was a factor, due to staff chronic shortages. In an ideal world they would like there be to more than an hour in costs and case management hearings for judges to engage properly in the process by encouraging parties to narrow the issues and settle. In the real world with existing resources this is just not possible.

31. It was stated that the CMC's objectives are to promote wider use of mediation and other forms of ADR and educate the judiciary, professions and the wider public. Whilst they agreed that work should continue on these fronts, 20 years of education and encouragement had not led to widespread use of mediation, despite its unquestioned benefits. There have been so many false dawns since mediation was introduced to the UK in the 1990s, yet it has still not been significantly taken up in the civil justice system. They were encouraged by the interim report of the CJC Working Group that hinted at possible greater compulsion and making the process of ADR more mandatory, but was disappointed that in its final report the Working Group had pulled back from making that recommendation. The CMC submitted a proposal to the Working Group for "automatic referral" to mediation for all civil clams and this remained their proposal.

32. They welcomed the opt-out mediation scheme for OCMC currently being piloted by HMCTS, which was mentioned earlier, and hoped that would provide valuable data when considering an "automatic referral" scheme.

33. If that pilot was successful, it was suggested in rolling out the opt-out system across the whole civil justice system. It was pointed out that cultural change can also be achieved by measures which contain a degree of compulsion. For example, drawing an analogy with moving from an opt-in to opt-out system for organ donation in Wales which has drastically reduced waiting lists and eliminated deaths while waiting for organ transplants there. That is now being implemented in England. Why we are waiting to take more robust measures such as automatic referral to mediation if we are agreed on the wisdom and benefits to society of ADR as stated in the CJC Working Party report. There are hundreds of mediators available immediately to service an increased demand in mediation should it arise. One of the members would be willing to serve on a sub-committee to work on this. They agreed with the proposed changes to the N181 form and the suggested terminology 'make it opt-out, give express reasons why you are choosing not to mediate, these will

be reviewed and there may be cost sanctions at the end'. Perhaps costs sanctions should be considered mid-stream as there are different times when it is appropriate to mediate.

34. An audit of what is happening in tribunals would be useful and then can raise awareness of what is already in place.

35. It would be useful to see what there is on ADR across the whole sector. The *alternatives* website idea is of particular interest as a 'one stop shop' for parties in all types of dispute. To start that piece of work would need to know what else is there already.

36. One of the members said that a lot of disputes settle without coming to court, so solicitors do have a culture of using ADR, but it can always be increased. He feels that possible costs sanctions after trial are a weak threat, given that only around 5% of cases make it to trial. The threat of sanctions is needed earlier in the process. The major practice issue is what fits for medium-sized case. Perhaps reviving the national mediation help-line would be of benefit.

37. A question was asked to find out if judges raise ADR in case management hearings. Some District Judges do, especially to litigants in person for small claims and they usually make a little speech asking the parties if they want to step outside: quite often they do and agreement is reached.

38. One member felt sitting in small claims where most of parties are litigants in person is challenging because you get no help with the law like you would with represented parties. The law is usually outlined at start of the hearing. When people upload details onto a system, more focused than in the past. Long way to go with the system.

39. Regarding ADR in small claims, judges act as a mediator sometimes. It was suggested that when parties are given time to talk, they can often resolve their issue. A significant piece of work that this group can do would be to work on re-educating judges especially in small claims. Only one order has been made referring to mediation pilot. Most of the cases which have been referred have settled. You only need two conference rooms (and they are often empty) and mediation usually works when it happens. ADR should be included in costs budget.

40. A change in process can drive improvements. UTIAC (Upper Tribunal Immigration and Asylum Chamber) are moving online. They have worked with the Home Office, looking at quality of information that comes with appeals. This clarifies what the claim is about. The Home Office are looking again at 12% of decisions. The decision comes in; judge looks at it. The process now draws attention to weakness of case at early stage.

41. Some members felt more judges should be trained as mediators. There could then be a list of judge mediators. This may help to make more mediations successful. At present small claims mediation service is not effective because it is not very well funded. Those involved don't have time to look and don't have the file. Having judges as mediators would involve more hearings, but cases

would not go on to final hearing. In some courts an initial appointment for the parties to come in for 15 minutes would be enough.

42. CEDR used to run a judges' forum with judges from the Central London County Court up to the Master of the Rolls. Judges from different divisions shared their work and it worked well. They saw themselves as a sort of Parliamentary Select Committee - they had guest speakers to showcase particular cases, could focus on one particular area in the civil justice. Caution was raised that this could risk becoming too London-centric and the rest of the country is ignored. We want to focus on national outcomes. These are wonderful ideas and in due course replication of the CJC's National Forum for Litigants in Person for ADR would be a fantastic event, but more work within this committee is needed first.

43. In response to the analogy with Parliamentary Select Committees, it was mentioned that a member had been part of the Steering Group that set up the All Party Parliamentary Group (APPG) on ADR in 2017. They had held a number of sessions in the House of Commons concerning different forms of ADR and the use of ADR across different sectors in order to raise awareness amongst legislators. He noted that it is very poorly attended by parliamentarians; there is very little traction in government for ADR, except in the criminal justice sector where restorative justice gets more attention because it is seen as an issue of victim's rights and rehabilitation of offenders. He stressed the need for more collaboration between different mediation bodies across all sectors and wants to highlight that CMC is already driving this forward through its All Mediation Forum (attended by the Family Mediation Council and others).

44. A member questioned whether courts/judges would be more comfortable in using ADR if mediators were regulated.

45. It was suggested that sub-committees should be set up to further the work of the Committee; updates could then be shared with all members at the quarterly meetings. Five sub-committees were proposed.

- ADR outside civil areas, e.g. tribunals
- Encouragement and public awareness including online information
- Education of professions and generally
- Rule changes for promoting use of ADR, e.g. opt-out/automatic
- Education of Judges

46. Expectation that sub-committees will exchange thoughts and produce a short paper for the next meeting. All those present agreed that their email addresses could be shared with other members of the committee for this purpose.

Any other business

47. One member wanted to highlight an out of date statement in the report about what CMC does to resolve complaints against mediators. They agreed that guaranteeing the quality of mediators to

the public was an important step if mediation was to be adopted more widely. CMC has a system of registering mediators and has a set of criteria which must be met: initial 40 hours training, maintain a minimum level of practice, requirements about ongoing CPD, have a complaints process, be insured and be bound by the EU Code of Conduct for Mediators. CMC has also introduced an adjudicatory process to investigate complaints against mediators and at least one mediator had been suspended from its membership since this process was introduced. However, the CMC can only regulate its own members and many practising mediators are not members of the CMC. In the future development of a separate standards and regulatory wing, e.g. Civil Mediation Standards Board, as has happened in respect family mediation would be desirable.

48. It was questioned if any funding is available for the *alternatives* website. A preliminary discussion took place with the Ministry of Justice and there is a severe lack of funding – austerity plus. It was recommended that the sub-committee focussed on awareness should resume conversations with the Ministry of Justice about this.

49. It was mentioned that there was an increasing use of paper evaluations in low-value cases. Someone looks at the merits of the cases and advises settling in a way. This type of mediation is cheap, effective, cuts case numbers and gets the job done. The Small Claims Mediation Service is done wholly by telephone appointment; the success rate is 60%, although there are issues of capacity. More mediators have been appointed. These figures are based on the scheme being opt-in, so it is assumed parties had an understanding that compromise may be required to settle. Success rates may change under an opt-out scheme. Updates will be provided on proportion who opt out. The rules sub-committee should keep an eye on this. As members had concerns what can be achieved in an hour on the phone.

Next meeting date

50. The next meeting will be on Monday 20 January 2020 in the Royal Courts of Justice