The City of London Law Society

4 College Hill
London EC4R 2RB

Tel +44 (0)20 7329 2173
Fax +44 (0)20 7329 2190
DX 98936 – Cheapside 2

mail@citysolicitors.org.uk

www.citysolicitors.org.uk

Litigation Committee response to the Civil Justice Council's Consultation Paper entitled *ADR and Civil Justice*

The City of London Law Society ("CLLS") represents approximately 15,000 City lawyers through individual and corporate membership, including some of the largest international law firms in the world. These law firms advise a variety of clients, from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues.

The CLLS's professional work is conducted through nineteen specialist committees drawn from the CLLS's membership, who meet regularly to discuss pending legislation, law reform and practice issues in their fields. This response has been prepared by the CLLS Litigation Committee (the "Committee"), and addresses issues raised in the Civil Justice Council's interim report entitled *ADR and Civil Justice* (the "Consultation Paper"). The membership of the Committee is set out in the Schedule to this response.

Introduction

The primary focus of the Committee is on high value cases heard, in particular, in the Business and Property Courts of England and Wales. As the Consultation Paper notes (paragraph 4.12), mediation is used "well and widely" in these courts. In the Committee's view, mediation is now "culturally normal" for high value claims – few cases of any substance reach trial without the parties having participated in a mediation, perhaps more than one mediation, in order to try to resolve their differences.

The Committee agrees that it is important to give separate consideration to different levels of dispute (paragraph 3.12 of the Consultation Paper). One size does not fit all. Given the successful use of ADR in high value disputes, there is no need or justification for any substantial change in the requirements relating to mediation or other forms of ADR for cases of this sort. The parties invariably have lawyers, who can and do advise their clients of the merits of ADR and other settlement techniques in the particular circumstances of the case in question. Additional requirements would be of token value only, and would risk imposing extra costs on the parties.

The Committee can, however, see potential benefit in measures that might help to remove any lingering sense that suggesting mediation to the other side is a sign of weakness.

It is doubtless because mediation is an accepted aspect of high value litigation that the Consultation Paper is largely focused on lower value claims, where the parties are less likely instruct lawyers and, as a result, are "highly unlikely… [to] have the confidence and knowledge to suggest mediation" (paragraph 4.12). Since cases of this sort are not the Committee's main focus, this response will not address each of the questions raised in the Consultation Paper but will make a number of general observations.

Compulsory mediation

The Committee can see advantage in providing information to litigants in person that explains what ADR is, how it might be of assistance in the cost-effective resolution of a dispute and how it can be organised, provided that this does not impose excessive time or other burdens on the parties. It is important that any measures, whether in relation to this or anything else, are properly piloted first to ensure that they are effective and do not result in unnecessary costs.

The Committee is, however, opposed to compulsory ADR in any proceedings, whether as a condition to the issue of a claim form or subsequently, and whether ordered on an ad hoc basis by the court or in response to a notice by the other party (as in British Columbia). The reasons for this view are essentially those of the majority set out in the first half of paragraph 9.18 of the Consultation Paper and in paragraph 9.36. In addition:

- The Committee's experience is that mediation is effective when the parties have voluntarily chosen to participate because they genuinely want to resolve their dispute. There may be instances of a party attending a mediation with no intention of settling but, in the course of the mediation, coming to see value in the process and reaching a settlement. However, those instances are relatively rare and cannot justify imposing the cost of mediation, or any other form of ADR, on all cases.

- The principle that ADR should be voluntary is not based solely on the likely outcome of the ADR process. Parties are always free not to settle (eg paragraphs 8.5.5 and 8.7 of the Consultation Paper). Similarly, party autonomy requires that they should be free to decide whether it is in their interests to take part in a process the prime purpose of which is induce them to compromise their rights.

- The Civil Procedure Rule Committee must not act in breach of the European Convention on Human Rights (section 6 of the Human Rights Act 1998). In

> *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576, the Court of Appeal concluded that it was "likely that *compulsion* of ADR would be regarded as an unacceptable constraint on the right of access to the court and, therefore, a violation of article 6 [of the Convention]" (paragraph [9]). The Civil Procedure Rule Committee could therefore only introduce any form of compulsion if it concluded that the Court of Appeal's view was clearly incorrect.

The Committee agrees that civil MIAMs would not be appropriate.

The Committee also notes the Consultation Paper's observation that there "is a national interest in reducing the cost of the civil justice system" (paragraph 3.2). This may be correct, but it is also important to appreciate that the civil justice system (as opposed, for example, to the Family courts) generates a financial surplus that is used to subsidise other court services. The civil justice system is not, therefore, a drain on the nation's resources.

Interim costs penalties

The Committee does not consider that it is realistic or appropriate for the court to impose costs or other penalties at an interim stage in proceedings as a result of the refusal by a party to participate in mediation or any other form of ADR.

The principal reason offered in the Consultation Paper in support of the imposition of interim costs penalties is that the "conclusion of a well-conducted trial and a carefully prepared judgment are not a hospitable background against which to submit that the whole thing might have been better avoided!" (paragraph 5.53). But the fact that a judge may be more willing at an early stage in proceedings to penalise a refusal to mediate does not begin to justify bringing forward the consideration of the consequences of that refusal. The right point at which to consider the reasonableness or otherwise of a refusal to mediate is after the trial because it is only then that the judge can take into account all relevant matters, including the merits of the underlying claim. As the Consultation Paper notes (paragraph 5.48), one of the most common reasons deployed for a refusal to mediate is a party's belief that its case is water-tight. That cannot be considered before the court has determined the merits of the case.

There is a risk that an interim costs order will lead to satellite litigation on costs. Alternatively, the threat of an interim costs penalty will increase the number of parties attending a mediation for the sole reason of avoiding that penalty rather than in a genuine attempt to settle. This would render the process "perfunctory and meaningless", in the words of the Consultation Paper (paragraph 3.31).

Costs decisions after trial

With regard to costs penalties after trial, the Committee notes that mediation and other forms of ADR involve encouraging parties to compromise their rights. The Committee,

like Lord Justice Patten in *Gore v Naheed* [2017] EWCA Civ 369, has "some difficulty in accepting that the desire to have his rights determined by a court of law in preference to mediation can be said to be unreasonable conduct particularly where, as here, those rights are ultimately vindicated." The Committee accepts that there may be circumstances in which a refusal to mediate will be unreasonable, but the mere fact of wanting the court to decide the merits of a claim is not, of itself, unreasonable.

If a losing party has refused to mediate, that refusal will be largely irrelevant because the losing party will probably be ordered to pay the successful party's costs in any event (CPR 44.2(2)). If a winning party has refused to mediate, the losing party may try to reduce the winner's costs recovery by seeking to demonstrate that the winner's refusal to mediate was unreasonable. But in these circumstances the unsuccessful party has available better means to demonstrate its willingness to settle or to give the successful party its due. It can make one or more Party 36 offers, which will provide near automatic protection in costs if the successful party fails to obtain a judgment that is more advantageous than the offer (CPR 36.17(1)). If the case is not susceptible to money offers, the ultimately unsuccessful party can make an offer without prejudice save as to costs, which the court can then take into account in making its decision as to costs (CPR 44.2(4)(c)).

If a proposal of mediation followed by firm settlement offers does not encourage the recipient to engage in mediation or other settlement discussions, it seems unlikely that mediation itself would result in settlement. A comparison of any substantive settlement offers with the court's final decision offers a more concrete basis upon which to assess where costs should fall than speculation as to what mediation might have achieved.

It is also important that the legal system is coherent in its encouragement of settlement. In order to bring the costs benefits set out in Part 36, a Part 36 offer must remain open throughout the proceedings (CPR 36.17(7)) and the recipient of the offer must fail to obtain a judgment that is more advantageous than the offer (CPR 36.17(1)). What is "more advantageous" for these purposes involves a purely financial assessment (CPR 36.17(2), reversing *Carver v BAA plc* [2008] EWCA Civ 412). CPR 44.2(4)(c) also allows the court to take into account "an admissible offer to settle" outside Part 36. To give an offer to enter into a process that might lead to settlement the same or similar consequences as a substantive offer to settle the proceedings themselves sets a far lower bar, and potentially undermines CPR 36. Indeed, it could lead parties to feel that they do not need to make actual settlement offers.

13th December 2017

Schedule

THE CITY OF LONDON LAW SOCIETY
Litigation Committee

Individuals and firms represented on this Committee are as follows:

Simon James (Chairman)	Clifford Chance LLP
Jan-Jaap Baer	Travers Smith LLP
Duncan Black	Fieldfisher LLP
Patrick Boylan	Simmons & Simmons LLP
Jonathan Cotton	Slaughter & May LLP
Andrew Denny	Allen & Overy LLP
Richard Dickman	Pinsent Masons LLP
Angela Dimsdale Gill	Hogan Lovells International LLP
Geraldine Elliott	Reynolds Porter Chamberlain LLP
Gavin Foggo	Fox Williams LLP
Richard Foss	Kingsley Napley LLP
Tim Hardy	CMS Cameron McKenna Nabarro Olswang LLP
Jonathan Isaacs	DWF LLP
Mark Lim	Lewis Silkin LLP
Iain Mackie	Macfarlanes LLP
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Kevin Perry	Cooley (UK) LLP
Patrick Swain	Freshfields Bruckhaus Deringer LLP