FORUM OF INSURANCE LAWYERS

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CJC Report on Compulsory ADR

On 12 July, the Civil Justice Council (CJC) published its report on compulsory Alternative Dispute Resolution (ADR). ADR in this context is defined very broadly, as including any dispute resolution technique in which the parties are assisted in exploring a settlement by a third party, whether an agent external to the court process (e.g., a mediator) or a judge playing a non-adjudicative role. It therefore encompasses archetypal mediation, conducted usually over the course of a day by a neutral individual; short-form telephone mediations, typically time-limited, as under the Small Claims Mediation scheme; Evaluative appraisals, typically, but not necessarily, conducted by a judge, in the form of Early Neutral Evaluations (ENEs) and Financial Dispute Resolution hearings; ombudsmen performing a function which may blend elements of conciliation with an evaluation; and online processes.

The authors of the report posed two questions:

1. Can the parties to a civil dispute be compelled to participate in an ADR process? (The "legality" question) This is fundamentally a question of the law of England and Wales and human rights law in particular.

Having reviewed the relevant case law and recent trends in decisions, the report concludes that parties can lawfully be compelled to participate in ADR. It is noted that compulsion already exists through

IN BRIEF

A report from the CJC suggests that, subject to certain caveats, it would not be unlawful for parties to be compelled to take part in ADR.

The report sees the benefits of compulsory ADR in a number of areas as long as the parties are free to return to the court if they wish to seek adjudicative justice

the rules of civil procedure in England and Wales, requiring participation in ADR at a number of points. The situation is no different from an order or direction, which requires compliance and carries a sanction for default, which can include striking out the claim or defence.

The only caveat is that there will always be a number of considerations when compulsion is being considered to ensure that there is no risk of infringing a party's rights under Article 6 European Convention on Human Rights.

2. If the answer is yes, how, in what circumstances, in what kind of case and at what stage should such a requirement be imposed? (The "desirability" question).

The report adopts the position that there will always be factors some of which could point to compulsion being appropriate and others which may militate against it.

However, where participation in ADR occasions no expense of time or money by the parties (as with answering questions in an online process as to a party's willingness to compromise) it is very unlikely that the compulsory nature of the system will be controversial – as long as the ADR is otherwise useful and potentially productive.

Judicial involvement in ENE and other hearings is proving highly effective and these are available free to the parties. As long as they seem appropriate for the particular type of case being considered and can be resourced within the court system, compulsion in an even wider range of cases would not seem to be unacceptable.

Finally, as mediation becomes better regulated, more familiar and continues to be made available in shorter, cheaper formats the authors see no reason for compulsion not to be considered in this context also.

The free or low-cost introductory stage seems the least likely to be controversial. Above all, as long as all of these techniques leave the parties free to return to the court if they wish to seek adjudicative justice (as at present they do) then it is thought that the greater use of compulsion is justified and should be considered.

The report sees the importance of educating lawyers and clients better to understand the ADR process and its benefits.

<u>The report in context</u>

The CJC is currently undertaking a review of the Pre-Actions Protocols. The first stage of the review, a survey, was concluded in December last year, with FOIL submitting a detailed response. The next stage of the review is now underway, looking at general principles for pre-action conduct, and the specific requirements for different types of litigation covered by the specialist PAPs. Nicola Critchley, partner at DWF and member of the FOIL National Committee, and Andrew Underwood, consultant at Keoghs, are both involved in the CJC working groups.

It is well-known that the Master of the Rolls is very supportive of ADR. There is the potential for the CJC to recommend a pre-action approach that places much more emphasis on pre-action behaviour including disclosure and in the light of the report, perhaps some form of compulsory ADR, to either achieve settlement of the claim or narrow the issues in the event that proceedings are issued.

FOIL is involved in the debate through its Sector Focus Teams and a PAP Review working group. If you would like to be involved in its work in this area please contact Shirley Denyer on info@foil.org.uk

The full report is available at: Civil-Justice-Council-Compulsory-ADR-report-1.pdf (judiciary.uk)