17 May 2022
APPG on ADR minutes
Topic of discussion: Mandatory mediation

In person attendees:	John Howell MP, Jeremy Wright QC MP, Alberto Costa MP, Christina Fees MP, Bim Afolami MP, Isabel Phillips, Gill Mansfield, Andrew Miller QC, James South, Stephanie McTighe, Lewis Johnston, Alexandra Braby, Catriona Gallagher, Enehuwa Adagu.
Online attendees:	Victoria Harris, Isobel Clarke, Sarah Canning, Laura Streanga, Anita Chiverton, Rahim Shamji, Anouska Wilkinson, Matt Roberts, Charlotte Steinfeld, Suzanne Tagar, Graham Boyack, Nupur Priya, Rosie Olliver.

Introduction from the Chair John Howell MP

- Commented that the purpose of the meeting was to consider mandatory mediation and that the topic has been touched on before which produced a variety of views.

Dr Isabel Phillips

- Firstly, states that there are places in the world where mediation is the socially acceptable default dispute resolution mechanism – gave the example of the indigenous areas of Ecuador.
- Indicates that to get to a point where people are using mediation as a default in the UK, mandatory mediation might be one of the tools that gets us closer to the shift in the culture.
- Identifies that she will briefly discuss the work CIArb has done looking at how mandatory systems of mediation around the world work and what we can learn from them.
- Drew attention to 3 areas – information provision and timing, data and the use of it, plus systems of delivery.
- Information provision, timing and data
- Draws attention to the following under information provisions:
    - That we need to change how information is provided to people.
    - The jurisdictions that have managed a real uptick in cases changed what information is delivered, by who and when it is delivered.
    - That non personalised basic information doesn't dramatically change the uptake of mediation.
    - We have seen an increase in mediation since the introduction of the CPR but not to the extent we might have expected – between 2003 and 2021 commercial cases increased from around 2000 to about 20000. This is considerable but is nowhere near the volume that was expected in 2003 given the number of cases lodged with the courts.
    - In the vast majority of countries where 'mandation' has been introduced, the mandatory element is attending a MIAM (mediation information and assessment meeting), which *can* but does not have to transition into a mediation proper.
    - There are systems around the world that do this or require evidence of attempted mediation pre-issue (Greece, Italy and India).

    - Nigeria, Kenya, Israel and the family system in England and Wales are examples of filtering post issue.
    - But such filtering can only be done effectively if there are resources to do so.
    - Without effective access to legal advice people can't assess their options and risks in relation to mediation.
- Timing
    - States that there are many 'right times' to mediate and refers to the diagram on screen and on the back of the booklets – as parties are ready at different points.
    - There has been a tendency to argue endlessly about which one 'moment' in the litigation cycle is 'the right time' that doesn't reflect the human risk analysis process.
- Data collection
    - Makes the point that data collection on mediation use, settlement and enforcement of cases settled through mediation is currently very deficient in E&W.
    - There needs to be an understanding of what is working and what isn't, but we (in England and Wales) don't have the data to assess this really effectively.
    - An example has been set in Nigeria where settlements reached by mediation are catalogued differently, meaning it would theoretically be possible to cross check both how many cases settled in mediation do in fact need enforcement orders.
    - Effective comparisons cannot be made until better data is available.
- System of delivery
    - Emphasises that it is a question of how this is done and that we need an effective interface the between mediation and court systems.
    - Stressed that in terms of mediator supply we need to work with existing markets (uses the example of the Ontario model).
    - Stresses that we must also avoid over regulation.
- Final point – judges are already overloaded with work and there are serious downsides (overwork, different skill set, fear by parties that judges will actually evaluate not mediate) of expecting judges to mediate illustrated by a number of jurisdictions including Singapore.
- Rounds up by underlining points made on information, timing, data and the way the delivery system works.
- JH:
    - Makes a point about the concern with mandatory mediation – that it puts mediation back into the hands of the lawyers.
    - Notes that he has done a lot of work trying to move mediation out of the hands of lawyers and explains concern that mandatory mediation will undo this work and put mediation back to the hands of lawyers.
    - Stresses that mediation is not on points of law but rather it is based on common sense.
    - The move to bring make mediation mandatory will push put mediation back to into the hands of lawyers.

James South

- Starts by outlining that CEDR supports mandatory mediation and that there are 4 points he will be made in relation this this.
- First point: his roots and that mandatory mediation does work

    - His own experience comes from New Zealand and his work with the Tenancy Tribunal Mediation Service, which is a quasi-mandatory mediation service, that last year resolved 20,000 cases with a 90% settlement rate.
    - Uses above statistics to illustrate that mandatory meditation does work and can make a significant difference.
- Second point: mandatory mediation works better than other techniques
    - Explains that having tried different techniques, mandatory mediation is most effective in getting large uptake of mediations form the courts and can begin to trigger this change that is needed.
    - Acknowledges that other methods such as public awareness raising and particularly CPR changes work but they are not sufficient to trigger widespread there is not uptake.
    - Stresses that this discussion is on mandatory entry into mediation only – mandatory mediation does not remove the voluntary nature of mediation or mean mandating settlement or the terms of settlement.
- Third Point- High Quality Service Provision is Key
    - Turns to the issues that need to be addressed if mandatory mediation moves forward:
    - Starts with the importance of high quality of service.
        - (A) Mediator Supply.
    - he had been asked by members of the Judiciary if we have the mediators to provide the service? Identifies CEDR as a service provider and recognises that there are other ones out there.
    - Gives assurance that if there are cases there will be mediators to cover them.
        - (B) Service providers.
    - Highlights that after 30 years of practice in the UK that there are many mediation service providers that can provide the service to scale and gives the example of CEDR
    - Conclusions that the systems and services are already in place to service demand as a result of mandatory mediation.
        - (C) Adequate funding.
    - Mediators and the service provider must be properly renumerated, even if this requires disputants to fund it.
    - That is still a cheaper option compared to the cost incurred in litigation.
- Final point: protection of disputants
    - (A) regulation
    - Starts by pointing out that in terms of regulation the comparison between mediators and lawyers
    - Elaborates by stating that lawyers give advice and the harm that arises from advice would equate to professional negligence.
    - On the contrary, mediators don't give advice therefore the level of harm from poor practice is more minimal.
    - Identifies that the current system of self-regulation works well.
    - Stressed he did not believe there needed to be a system of full regulation, as the current market works well but would support an independent benchmark of the current standards to ensure that they are fit for purpose.

    - (B) of litigants in person
    - Protection of litigants in person is important but notes that Mediators are already trained to deal with such power imbalances and most have considerable experience mediating with LiP's. Did suggest that perhaps additional training for mediators who were mediating under a compulsory mediai0on scheme, could be put in place to further protect litigants in person.
    - Finishes by noting that the step change in the use of mediation could be helpful and that the profession were well placed to take next step.
- JW, proposed the following questions:
    - What happens if mediation is not successful?
    - Is there benefit of the mandatory mediation stage because it helps refine the issues?
    - Is there a case for a form of assessment by mediators on who is to blame if a settlement is not reached? Or will this undermine the basis of trust mediation is built on?
- JH: Adds from experience education is essential, as people do not understand difference between mediation and arbitration.

Gill Mansfield FCIArb

- Begins by drawing attention to her experience of the US system.
- Notes that it may be a surprise that many leading commercial mediation practitioners do not believe that mandatory mediation is a good idea.
- Refers to the direction of travel suggested in the CJC report and stressed that there are serious misgivings about the direction that may take us in.
- Acknowledges even amongst those opposed to mandation there is a broad agreement that something needs to change as the current system is not working effectively.
- Moves on to identify that there needs to be something done to increase up take of non-adversarial processes.
- Points out agreement with Master of the Rolls, Sir Geoffrey Vos, that "too many cases still go through the courts unnecessarily" and that a better way forward is needed.
- Recognises that just nudging people into mediation is not working on its own, so there needs to be greater encouragement.
- Good litigators can see the benefits of mediation and non-adversarial dispute resolution processes plus the judiciary can too.
- Stresses that there are real concerns from the CJC report, as making mediation mandatory may do more harm than good – could be damaging to the reputation of mediators and undermine the mediation process just as the process is becoming mainstream.
- States the need to be very careful that mediation doesn't become a tick box exercise on the way to litigation where people go through the motions, and to ensure that the quality of the process and outcomes is maintained.
- That there is a need to protect the cornerstones of mediation – confidentiality, the "without prejudice" privilege, that it is conducted by a neutral, impartial third party, and party autonomy.
- Elaborates that party autonomy means that parties own the outcome of the mediation in addition to parties owning the process and can decide when to mediate.

- Comments that all these benefits have made mediation successful but, this could be undermined by mandatory mediation.
- Moves on to consider how to deal with perfunctory performance? Observes that there are really key questions which have not properly been addressed in UK.
- Left out the idea that one of benefits of mediation is its voluntary nature, as in the current system although parties are not compelled to mediate it is no longer a purely voluntary process (as a result of costs consequences if they fail to do so).
- This does not undermine mediation, but if mediation is voluntary people are more likely to engage with it.
- Uses example of British Columbia – where their notice to mediate process seems to be a good example of a system where parties engage in spite of compulsion.
- JH: highlights that he sat in on case where the judge ordered mediation before deciding the case and asks what is wrong with this approach and how can we encourage the approach the judge took in this case.
- BA, states that his interest is in the attitude of solicitors to mediation:
    - A lot depends on attitude of solicitors that are advising clients, also how has this changed over the last 5 to 10 years.
    - If there are more solicitors in favour of mandatory mediation, then this might be the right time for introducing this.

Andrew Miller QC

- Gives the perspective of a commercial mediator and states belief that making mediation mandatory is good if it becomes a real part of the dispute resolution process.
- Reflected that how mandatory mediation is introduced is more complicated.
- Points out that the question of mandatory mediation requires an understanding of where mediation currently sits in the legal system and how it sits with solicitors and counsel.
- Equally crucial to understand the relationship between mediation and litigation, this relationship is his main focus.
- Question whether there should be mandatory mediation at its highest creates certain assumptions that – users have a choice as to whether they mediate their dispute or not, this further implies that litigants know and understand what mediation is. However, in many disputes this is not the case.
- Used a seatbelt analogy – once seat belts were made mandatory everyone used them, but we cannot compare this with mandatory mediation because, everyone knew what a seatbelt was but in terms of mediation most people including court users do not know what mediation is.
- Lay individuals do not understand what mediation is and even within the dispute resolution forum, many litigants do not have a proper understanding of what mediation is.
- If skilled commercial lawyers do not understand what mediation is, the role of mediation and the use of it during the dispute resolution process – it is unsurprising that users of mediation also do not understand what mediation is.
- Highlights things that are known about mediation – that mediation works (it averages a 75-80% settlement rate) and it is more flexible than litigation, it is faster and cheaper than litigation.

- Stresses the point that any dispute going to mediation is more likely to have lower costs – which of itself begs the question why mediation is not being used more.
- Links this to the point that the gatekeepers of mediation are the lawyers (primarily the solicitors) – they decide when or if a case goes to mediation.
- Parties are sometimes advised not to mediate at all and often to mediate late in the process.
- Case example – one party wanted to mediate, and one did not want to mediate until after disclosure of documents, so they incurred even more costs.
- Poses the question – why aren't users of the court resolution process using mediation more? Explains that this is because they do not understand or know the benefits of mediation.
- Stresses surprise at how many businesspeople do not know what the benefits of mediation are.
- Makes point that clients do not say they object to mandatory mediation, maybe because it is hard for them to object to something they are not familiar with or know nothing about.
- Posed the question as to whether you can make something mandatory that few people actually know about or understand about.
- Personally, he supports mandatory mediation, but users (both lawyers and clients) need to be aware of mediation.
- Lawyers need to understand mediation, need education on mediation and he underscores that the best gift any lawyer can give to his/her client is the 'Gift of Settlement'.
- Caveats that if there is mandatory mediation, it does not mean that it will be mandatory to settle a dispute. Any dispute that does not achieve a settlement can still go to trial. However, he emphasises that it gives parties a chance to resolve, narrow and settle the dispute.

Discussion

- JH: stated this APPG is part of the education process, the APPG has had success raising the issue of mandatory mediation with the Ministry of Justice, Housing and Levelling Up but there have been issues with following though. Asks question whether solicitors are the only gatekeepers.
- CR: mentioned that can mediators cope with increase in mediation if it becomes mandatory? As an example, the Bar Council struggled with increase of fees.
- JW: he noted there aren't just 2 options here –
    - Keeping with system now or change it and using mandatory mediation.
    - We should we rather not force mediation but offer it and bring up the cost consequences for non-compliance.
    - Comments that the judge will be told if parties did not attempt mediation, this could be an additional incentive.
- IP made the following points:
    - That in Ecuador, lots of mediations happening by default and we need a shift where people do not always require the court to resolve their dispute.
    - Small Claims Mediation service are one hour telephone mediations and asks whether people think of one hour being enough time to spend in this dispute resolution process.
    - Identifies that many people don't go to lawyers because they do not have access to them.

    - Referral of cases to mediation and sanctions is not consistent and this is highlighted in the CPR.
    - Questions whether the shift in the uptake of mediation would happen via solicitors only?
    - Uses the example of how same sex partnership became acceptable after being legislated for which led to a shifted attitude.
    - Explains that we need a shift where lots of people are mediating, points out that success is not just about settlement, people still come out of mediation knowing what to do with regards to the case.
    - Mediator assessment very problematic and lawyers make the process difficult.
- JH: maybe we a need stick in the system, he emphasises that there is a negative aspect to keeping the system.
- GM:
    - Lots more we could do, the reason mediation has become a more viable industry is because of judicial support for mediation. The shift was after the judiciary began to accept mediation as part of civil justice system.
    - There will still be solicitors who are opposed; therefore, we need a process of education and we must educate lawyers to know how mediation works.
    - Happy that the CJC report moved away from *Halsey v Milton Keynes General NHS Trust* [2004] 1 WLR 3002.
    - She welcomed judges taking mediation and making it part of our civil justice system.
    - Raises the concern that judges should remain judges and not mediate and there should be provisions in CPR for this.
- JS: if the judiciary mediate then they become gatekeepers and he gives belief that mandating mediation is still a way to increase the uptake of mediation.
- JW: asks whether mandatory mediation affects the success of the mediation?
- JS: answers that no, mediation it is still effective even when mandatory mediation is introduced. Also, mediators can assess on the refusal of clients to mediate but they rarely do this.
- AM:
    - In all commercial cases, if they are already in the judicial system, the chance of a very early mediation or pre-action mediation has been lost and mediation is already happening late in the process.
    - In respect of the process, the procedural rules and the judges we need to something that forces there to be an attempt to mediate and mediate at an early stage before significant costs have been expended.
    - He gave the example of expert reports that he said rarely take the matter further, as experts always have opposing views
    - Quality is a real issue, clarifies that anyone can become a mediator after a course, and this can undermine quality. Parties to mediation, especially the lawyers are interested in the quality of the mediator.
    - He mentions that we must look at quality of mediators if mediation is going to be increased by making it mandator.

    - We require a change in the industry when it comes to mediation as this jurisdiction does not understand mediation – he makes a comparison to the US to illustrate this.
    - Conversation needs to be about educating on what mediation is, even contractors, developers, in-house counsel and CFOs are not aware of the benefits of mediation. This needs to change and mandatory mediation is one way to achieve this, but it would have to come with the ability for greater education and knowledge.
- JW:
    - Remarked that there is no need to advise client about refusing to mediate, as sanctions do not really exist for failure to do this.
    - Observes that we rely on lawyers to advise clients to mediate because that is the right thing to do, rather than lawyers having to be professionally obliged to give this advice to clients.
- AM:
    - Agrees that there is no professional obligation to advise clients to mediate.
    - There has been a move by the judiciary from one of encouragement to mediate to one of an expectation that parties to mediate, but the penalty is not that significant if a party has won the case.
- JW:
    - Many clients think it's a waste of time to mediate because litigation is inevitable
    - If we want to guarantee quality, we need regulation.
    - Could satisfy concern about quality by getting judges to mediate, but this will create issues as it increases the court backlog.
- JS: answers by stating that there are very few complaints about mediators.
- JW: responds by saying that complaints will increase against mediators if mediation is made mandatory.
- JS: there are ways to introduce mandatory mediation without using a full regulatory approach.
- IP:
    - Indicates that there will be a transition, the current situation will not move overnight. She stated that mediation is not mandatory yet, as in other jurisdictions a case can be struck out for not mediating.
    - Asks the question on how can we inform people about mediation differently in a way that will make a difference?
- GM: address the issues of costs – judicial mediation is not free as the cost sits with the public purse. The big issue is the potential of shifting cost of mediation from private litigants to public purse.
- JH: refers to the trip to Singapore and how it was a good example to what Gill raised.

End of session.