The Lloyd's Market Association (LMA)

This consultation response is provided by the Lloyd's Market Association (LMA), which was formed in 2001, and represents all the businesses which underwrite insurance at Lloyd's of London. Its members together constitute one of the world's largest commercial insurers, bringing many billions of pounds of foreign exchange to London each year. Through the LMA, the interests of Lloyd's Underwriters and Managing Agents are promoted wherever decisions are made that affect the market.

For more information about the LMA visit: www.the-lma.com

Scottish Consultations on Proposed Reforms to Scottish Court Procedural Rules

Initial Remarks

The LMA is pleased to be providing a response to this consultation, but is disappointed that it was omitted from the original list of consultees. Given our clear interest in all matters relating to the processing and settlement of personal injury claims in the UK we would ask to be included in any future consultation on relevant issues.

The LMA's view of Alternative Dispute Resolution (ADR), within the context of this consultation, is that the term ought to refer to ADR in its widest sense, and that it should not be a euphemism for court-based mediation. The terms 'ADR' and 'mediation' were used almost interchangeably in the consultation document, and in each instance the LMA has assumed that the wider definition of ADR was intended.

Question 1a. **Do consultees consider that such a rule is necessary or desirable?**
Comments: Yes

Question 1b. **Please provide comments to explain your reasons**
Comments: We agree that the sheriff court rules ought to permit the encouragement of

ADR.

Question 2a. **Should the rule encourage rather than compel parties to seek resolution of matters in dispute by way of ADR before resorting to litigation?**
Comments: Yes, the rule should encourage, not compel, parties to consider ADR.

Question 2b. **Please provide comments to explain your reasons**
Comments: Compulsion to complete ADR should not be introduced, as in some cases ADR may not be appropriate. ADR essentially promotes a compromise, and in some cases a litigant will feel that the weight of evidence is so strongly in their favour that a compromise does not represent a reasonably outcome, and in such cases the litigant should be entitled to directly pursue a judgement without recourse to ADR.

Question 3a. **Should the court have the power to require parties to an action to consider ADR?**
Comments: Yes – see response to 2b above.

Question 3b. **Please provide comments to explain your reasons.**
Comments: A discretionary power, when used, should oblige parties only to consider, undertaking ADR.

Question 4a**. Should the parties to the action be required to give notice with reasons in writing as to whether or not they consent to a referral to mediation?**
Comments: Yes. NB As per our initial remarks above, we assume here that ADR in its widest sense is meant, rather than just 'mediation', which is only one example of ADR.

Question 4b. **Please provide comments to explain your reasons.**
Comments: Unless disclosure of reasons why ADR is being refused are required there is a risk that ADR will be dismissed without good reason by parties seeking to inflate costs and

damages inappropriately.

Question 5. **Do consultees have any comment to make in relation to this part of the recommendation?**

Comments: To set the potential use of this new rule in context, it is our belief that in many cases ADR (and specifically mediation) is not normally required or helpful, and this should be borne in mind. Over-use of this rule is likely to harm the genuine interests of both parties. Insurers have a strong tendency towards pragmatism and have no desire to lengthen proceedings when a settlement represents the best outcome.

Also, it is our view that a rule encouraging ADR should operate throughout, wherever possible, rather than being limited to the pre-action phase only.

Question 6a. **Do consultees consider it appropriate to have an express reference in the rule relative to awarding of expenses?**

Comments: No.

Question 6b. **Please provide comments to explain your reasons.**

Comments: We believe courts already have this power under general heading of Costs (where the power to enquire if both sides have acted reasonably is already in effect).

Question 7a. **Is it appropriate to include a reference to ADR in each set of court rules namely**

- **Ordinary Cause Rules 1993** - YES
- **Summary Applications, Statutory Applications and Appeals etc. Rules 1999** - NO
- **Summary Cause Rules 2002** - NO
- **Small Claim Rules 2002?** - NO

Comments: Reference to ADR should only be applied to Ordinary Cause Rules 1993. It should not be applied to courts that deal with low-value cases.
Question 7b. **Please indicate with reasons whether the reference should be incorporated into all, some or none of the court rules.**
Comments: Yes to inclusion in ordinary cause rules – therefore applying to every type of court that their rules apply to e.g. commercial, construction, etc. Small courts etc. should be excluded already a low-cost arbitration facility.

Question 7c. **If you think that the reference should only be incorporated into some of the court rules please indicate, with reasons, which set(s) of court rules.**
Comments: See 7b above.

Question 8a. **Do consultees consider that rule 33.22 should be deleted from the OCR in the event of the all-encompassing rule being introduced?**
Comments: Yes.

Question 8b. **Please provide comments to explain your reasons.**
Comments: If you are applying the rule to the ordinary cause rules, and therefore all the courts that this will apply to – including family court, ADR is being replaced, not abandoned.

Question 9a. **Do consultees have any comments to make in relation to this recommendation?**
Comments: The provision should allow the identification of where people have not responded to offers etc., and should encourage the judge to apply pressure to non – responders for failing to respond to settlement offers.

Question 9b. **Please indicate, with reasons, whether this reference provision should be incorporated into:** a) **All or** b) **Some or** c) **None of the court rules**
Comments: we favour option (b)

Question 9c. **If you think that this provision should only be incorporated into some of the court rules please indicate, with reasons, which set(s) of court rules.**
Comments: The provision should apply to every court that the OCR apply to. The other courts essentially handle small claims and therefore ADR will not be necessary or cost-effective.

Question 10. **Consultees are invited to provide comments on the terms of recommendation three.**
Comments: The use of this facility should not be introduced at all levels. For example, not small claims – it would not be cost-efficient, and these courts are already essentially an arbitration facility.

Also, we do not support judges doing the ADR themselves, and in fact we believe that ADR should not normally be conducted as court mediation – the rule should permit the consideration of all types of pre-litigation ADR. Judges are too close to the court process – asking a judge to conduct an arbitration event, prior to going on to deliver a judgement, could produce a clear conflict of interest.

Question 11a. **Please indicate, with reasons, whether a new paragraph, in the terms outlined above, should be incorporated into both:**

- **Rule 8.3 of the Summary Cause Rules 2002 and**
- **Rule 9.2 of the Small Claim Rules 2002**

Comments: No.

Question 11b. **If you think that the reference should only be incorporated into one set of the court rules please indicate, with reasons, which set(s) of court rules**

Comments: We oppose the inclusion of this provision into the Small Claim Rules. With larger claims insurers will want room to negotiate the settlement and to be open with the courts regarding what we tried to do to settle the claim. Where the claimant has not cooperated this should be taken into account by the judge.

Question 11c. **Do consultees have any views on the recommendation that rules 8.3 and 9.2 should otherwise remain for the time being unaltered?**

Comments: None.

Question 12. **Do consultees have any comments about the proposed rule as drafted? It should be clear to which part(s) of the rule the comments relate.**

Comments: * 9A.2 (1) – it should be specifically noted (perhaps in the practice notes?) that 'consider' does not mean 'compel'.

Question 13. **Do consultees have any comments to make on the proposed form of notice? It should be clear to which part(s) of the notice the comments relate**
Comments: None.

For further information about the Motor Underwriters at Lloyd's, the Lloyd's Market Association or the information contained in this response please contact David Powell (detailed below).

LMA
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