

AN INTRODUCTION TO MEDIATION AND OTHER DISPUTE RESOLUTION MECHANISMS PRACTICE NOTE

Adam Gersch and Ian Cain of Goldsmith Chambers present a briefing note on mediation and the alternative dispute resolution [‘ADR’] options available to litigators and their clients.

This note will focus on the merits of ADR, review the most popular ADR mechanisms, assess the impact of the global Covid-19 pandemic and provide tips for what litigators can do to ensure that they, and their clients, obtain the greatest benefit from engaging with mediation.



IS LITIGATION STILL THE FIRST CHOICE FOR DISPUTE RESOLUTION?

1. The strength of the court system in England and Wales had seen it evolve over several centuries into the main method for resolving disputes within the jurisdiction. The pre-eminence of the of the court system is such that other forms of dispute resolution are often referred to as ‘alternative’ dispute resolution [‘ADR’], carrying the implication that litigation is the normal first choice. However, the potential for delay, complexity and cost of litigation, comically outlined by the fictional case of *Jarndyce v Jarndyce* in *Bleak House* by Charles Dickens, has led to an increasing use, and variety, of other dispute resolution mechanisms.
2. Further, since the introduction of the Civil Procedure Rules 1998 [‘CPR’] following the 1995 report of Lord Woolf, the parties to all civil litigation claims have a duty to help the court to deal with cases justly and at a proportionate cost (CPR 1.3). One of the easiest ways for the court to deal with cases quickly and cheaply is to encourage the parties to settle the dispute between themselves or using another dispute resolution mechanism that does not require the input of the court. For example, the Pre-Action Protocol for Judicial Review states at Section 9:

“The courts take the view that litigation should be a last resort. The parties should consider whether some form of alternative dispute resolution (‘ADR’) or complaints procedure would be more suitable than litigation, and if so, endeavour to agree which to adopt”

3. The Practice Direction on Pre-action Conduct and Protocols and the specific pre-action protocols within the CPR provide a framework for the pre-action conduct of claims and the need for parties to consider ADR at the earliest stage

of litigation. CPR 26.4A provides that parties in proceedings on the small claims track may indicate that they agree to ADR and the claim will be referred to the Small Claims Mediation Service. Additionally, the Court will enforce contractual ADR clauses between parties, provided that they are sufficiently clear.

4. The courts have wide case management powers under CPR 1.4 to encourage and allow the parties to explore suitable ADR mechanisms, including ordering stays for 1 month to allow for ADR (CPR 26.4). All litigators have a duty to advise their clients about all of the applicable mechanisms for resolving the dispute and a failure to comply with a reasonable request to undertake ADR may lead to costs sanctions (CPR 44.2). In *Burchell v Bullard* [2005] EWCA Civ 358, the court penalised a party who ignored an offer to mediate made at the pre-action stage after considering that the refusal was unreasonable. However, the courts had already made it clear in *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ that no party can be forced by the Court to mediate or engage in ADR.
5. Therefore, it can longer be said that litigation is the normal first choice, and it is instead the last resort of dispute resolution.

ALTERNATIVE DISPUTE RESOLUTION MECHANISMS

6. ADR does not have an agreed definition, but it is described in the CPR glossary as:

“a collective description of methods of resolving disputes other than through the normal trial process.”

7. ADR processes come in two forms: those that are binding, meaning that the outcome is final and can be enforced, or non-binding, which means that the parties can proceed to litigation to resolve the dispute if they are not satisfied with the resolution. There may be a contractual obligation on the parties to use a specified form of ADR, either before legal proceedings are brought or in alternative to pursuing a legal claim.
8. The different dispute resolution mechanisms can have a number of benefits and pitfalls when compared to each other and with litigation. For the purposes of this briefing note, we will focus on the four most common forms of ADR: Negotiation, Conciliation, Arbitration and Mediation.

Negotiation

9. Negotiation is where the parties attempt to reach an agreement on the matters in dispute without the assistance of a third party. Such discussions will usually be held on a without prejudice basis between lawyers to ensure that the positions of the parties are not weakened if the negotiations fail and the case proceeds to trial.
10. Negotiation is one of the most flexible and informal of the ADR mechanisms which can save costs and time for the participants. The parties keep control of

the discussions, meaning that they can be started and ended at any time. The dispute and the resolution can remain confidential which allows reputations and relationships to remain intact. If unsuccessful, the parties' rights are not prejudiced, and the matter can proceed to trial.

11. The downside is that negotiations can often become deadlocked and the absence of a third party and entrenched process can make that deadlock difficult to break. The outcome of negotiation is heavily reliant on the skill and engagement of each side's negotiator. Problems can be caused if there is an imbalance of power or financial means between the parties and/or in complex disputes with multiple parties as one party is likely to feel that they have a weaker negotiating position and will seek the assistance of a third party.

Conciliation

12. Conciliation is similar to mediation (see paragraph 18 below) except that, usually, the third party will actively assist the parties to settle the dispute (for example, by making suggestions regarding settlement options). The term is widely used to describe the facilitated settlement discussions that occur in the employment arena. It is also the term used in Europe to describe the function performed by judges when they hold settlement conferences with the parties in an attempt to assist them to reach a settlement of their dispute.
13. The advantages and disadvantages of conciliation are similar to those for mediation, but in addition the parties may be assisted by the more pro-active approach of the third party in steering them towards a settlement.

Arbitration

14. Arbitration is a private forum in which an independent arbitrator makes an award, acting in a judicial fashion, to finalise the dispute. The award is final and binding on the parties and applications to the court are limited to supporting the process or setting-aside the award on very limited grounds. The arbitrator cannot meet with either party in private. Arbitration can take different forms, including telephone arbitration and baseball arbitration (where each party submits a proposed monetary award to the arbitrator and, after a final hearing, the arbitrator will choose one award from the submitted awards without modification).
15. Unlike with open court proceedings, the dispute in arbitration can be kept private and confidential between the parties. Specialist tribunals can be selected to determine the particular dispute and they are usually faster than litigation. Arbitration awards are relatively easy to enforce and the options for challenging the awards are limited.
16. The flexibility of the arbitration process can be a disadvantage as the lack of certainty can lead to increased time and costs. Arbitrary tribunals are less willing to determine a claim summarily than courts which can increase the time wasted. Arbitrators have limited powers of coercion compared to the courts

which can result in delays to the process and if a party is on the losing side, they can find the inability to challenge the award frustrating.

Other ADR mechanisms

17. The other ADR mechanisms, not covered in detail within this note, include:

- i. **Executive tribunal** – a representative of each party makes a formal presentation of his best case to a panel comprised of senior executives for the disputing parties and an independent chairperson. The panel then retires to discuss the dispute and the chairperson normally acts as a mediator between the senior executives. The decision is usually non-binding unless the parties agree otherwise.
- ii. **Early neutral evaluation** - the parties appoint an independent person to provide a non-binding opinion on the merits which evaluates the facts, evidence and law relating to a particular issue, or the whole case. The rationale is that, once armed with the opinion, the parties will be able to negotiate an outcome, with or without the assistance of a third party.
- iii. **Expert determination** - an expert is appointed by the parties to determine an issue, usually of a technical nature. the procedure is not subject to arbitration legislation and the supervision of the court, but the decision is usually contractually binding on the parties.
- iv. **Adjudication** - an adjudicator usually provides a decision on disputes as they arise during the course of a contract. Typically, the decision of an adjudicator has interim binding effect; that is, the decision is binding pending agreement of the parties altering its effect or a reference of a dispute to arbitration or litigation for final determination.
- v. **Dispute review board ['DRB']** - a panel (usually of three) is appointed by the parties at the start of a project. The panel visits the site of the project, usually three or four times a year, and deals with disputes by providing an interim binding decision (like adjudication). The parties can challenge board decisions via arbitration or litigation.
- vi. **Med-Arb** - if mediation fails in whole or on any issue, the parties may agree that the mediator becomes an arbitrator and issues a final and binding award on the outstanding matters.
- vii. **Ombudsman** – The Ombudsman act like umpires in complaints brought against public or private organisations. They are independent from the organisations they investigate and usually hear complaints that have not been dealt with by an organisation's internal complaints procedure.

AN INTRODUCTION TO MEDIATION

18. Mediation is a voluntary, non-binding and confidential dispute resolution process using an independent and neutral third party (the mediator) to assist the parties in reaching a negotiated settlement agreement.
19. The most common form in the UK is facilitative mediation where the mediator will not decide the case but will instead facilitate the discussion between the parties. If a mediator was asked to assess the strengths and weakness of a case and provide their opinion, this would become evaluative mediation.
20. The use of mediation instead of litigation can have the following general benefits:
 - i. **Saving Costs** – parties can reduce court and legal fees and avoid the risk of cost sanctions.
 - ii. **Saving time** – mediation can usually be arranged and undertaken in a much shorter timescale than litigation.
 - iii. **Confidentiality** – discussions are usually confidential in nature which allows the parties to openly air their concerns and issues (see paragraph 22 below).
 - iv. **Maintaining positive relationships** – reaching a settlement by consent increases the likelihood of positive future dealings between the parties.
 - v. **Flexibility and control** – a settlement agreement can suit the needs of the parties, rather than having a solution imposed upon them by a court order, leading to flexible, imaginative and practical solutions to disputes.
 - vi. **Client involvement** – Clients have a larger role in mediation compared to litigation, so they are less likely to complain about the result and their interests not being put forward correctly if they are deeply involved.
 - vii. **Increased likelihood of settlement** - by way of example, the 8th Mediation Audit produced by the Centre for Effective Dispute Resolution in July 2018 refers to an aggregate settlement rate of 89% for mediation.
 - viii. **Benefits without settlement** – even if a settlement agreement cannot be reached, other benefits may be produced for the parties, such as the testing of their case, a narrowing of the issues and the ability to see the other side's perspective.
21. On the other hand, the potential disadvantages of using mediation are:
 - i. **Unsuitability for some disputes** – in cases where there is a need for a precedent or injunctive relief, mediation is unlikely to be suitable.

- ii. **Limitation issues** – mediation does not stop limitation periods from expiring and protective proceedings may still need to be issued.
- iii. **Showing your case** – there is a fear that mediation risks exposing a trial strategy that would be used in litigation.
- iv. **Showing weakness** - parties are often concerned that a willingness to engage in mediation shows that they have a weak case.
- v. **Risk of delay to trial** – if mediation is ongoing at a late stage of litigation, trial dates and dates for direction may have to be moved.
- vi. **Exposing the client to scrutiny** – As the client is more involved in the mediation process, they are exposed to closer scrutiny than through litigation and cannot be contained as easily by their lawyers.
- vii. **Success rates can be misleading** – many success rates for mediation are based on those that go ahead. Some cases will fail to be mediated when the parties cannot determine the nature and format of the mediation.
- viii. **Requirement to act in good faith** – mediators do not have the power to compel parties to produce facts or documents to get to the “truth” or core issues in a case.

CONFIDENTIALITY IN MEDIATION

22. The without prejudice rules and exceptions apply to communications passing between the parties made in the context of a mediation, so these cannot be relied on or referred to in subsequent court proceedings if the mediation is unsuccessful (*Aird v Prime Meridian Ltd* [2007] BLR 105). The without prejudice rule is often specifically stated in the mediation agreement between the parties. Following the case of *Venture Investment Placement Ltd v Hall* [2005] EWHC 1227, the court will uphold these clauses and grant an injunction to restrain a party from referring to any part of the discussions that took place during a mediation.
23. In mediation, the following communications will be protected by the without prejudice rule:
- i. any oral or written communications made specifically for the purposes of settlement, such as position statements, correspondence about the mediation, offers and concessions;
 - ii. any communications passing between the parties and the mediator before, during or after the mediation with a view to exploring settlement; and

- iii. communications created for the purpose of trying to persuade the parties to mediate.
- 24. The without prejudice rule will not protect open offers, those that can be communicated to the court on the question of costs and communications that are not aimed at the settlement of the dispute. The mediation agreement itself is not protected by the without prejudice rule and it can be provided to prove its terms. If all parties to the mediation waive privilege, then the communications can be placed before the court. This privilege is enjoyed by the parties, but not the mediator, so if the parties agree to waive the privilege then the mediator must provide the documents.
- 25. Communications passing between a client and their lawyer made for the purposes of giving or receiving legal advice are protected by legal professional privilege as per *Three Rivers District Council v Bank of England (No 5)* [2003] QB 1556. Further, the mediation agreement will usually state that neither party can reveal any detail of the mediation process or any information obtained during the mediation without the express consent of the other party. Even in the absence of an express clause, one is likely to be implied, as it would destroy the basis of mediation if either party could publicise the matters that took place between them and the mediator.
- 26. The duty of confidentiality relates to anything given to the mediator during the process and anything revealed to them in the private meetings of each party. This applies even after the mediation process has been completed or terminated. The following exceptions to confidentiality apply:
 - i. where disclosure is required by law;
 - ii. to prevent risk of harm to the public at large;
 - iii. if the mediator believes that there is a risk of significant harm to the health, life or wellbeing of a person or a threat to their safety if the confidential information is not disclosed;
 - iv. if disclosure is necessary to prevent criminal activity;
 - v. if a court determines that it is necessary to determine what was said and done at a mediation in order to determine whether a settlement agreement should be set-aside for economic duress (as per *Farm Assist Ltd (in liquidation) v The Secretary of State for the Environment, Food and Rural Affairs (No 2)* [2009] BLR 399);
 - vi. if one party is seeking to vitiate an agreement reached at a mediation on the grounds of undue influence or misrepresentation;
 - vii. if a mediator is facing allegations of negligence or breach of contract; and

- viii. if a solicitor in a mediation is facing a professional negligence claim (as per *Youlton v Charles Russell* [2010] WL 1649039).

TIPS TO PREPARE FOR MEDIATION

27. Here are our top tips for preparing for a mediation:

- i. **Select a good mediator or mediation service provider** - most mediation providers will suggest a mediator or provide a selection of suitably experienced mediators from their accredited panel. Check the mediators experience, qualifications and insurance and review the mediation procedure.
- ii. **Know your case** - effective preparation need not take a long time but remember that the session involves a discussion of the case rather than a presentation of the evidence. Be clear about your client's objectives.
- iii. **Prepare a short case summary for service prior to the mediation** - consider a confidential settlement statement for the mediators' use only and identify the main documents essential to explain the case.
- iv. **Make a list of the strengths and weaknesses of your case and that of your opponent** - give thought to your negotiating strategy and be prepared to assist the mediator in determining the best way to persuade the other side of your position.
- v. **Determine who should attend the mediation** - Always ensure that you have sufficient authority to settle the case and ensure that you discuss the mediation process with your client, so they know what to expect.
- vi. **Prepare and practise a short opening statement for the first joint session** - introduce yourself, go over the main facts and explain your analysis of the case. If your presentation follows your opponent, indicate any agreement or disagreement with their statement.
- vii. **During the mediation, examine the points of the agreement and disagreement.** Consider the best likely outcome if the case is not settled and then discuss the worse likely outcome with your client. assess the risks and explore areas of potential movement.

28. In a case where counsel would usually be instructed for trial, it would be highly beneficial for them to attend the mediation in order to provide further assistance to the client. Appropriately experienced counsel should be able to explain the mediation process, agree the terms of the mediation agreement, prepare and deliver the opening statement, present the client's best interests, provide guidance on suitable creative settlement offers, review the merits of the client's case as the discussions continue and draft the settlement once it has been agreed.

29. A typical mediation will last half a day, or if there are a number of parties who will need to deliver opening statements, the mediation may last a day with negotiations not commencing until some way into the day. However, it will be an intense day, and litigators will need to prepare for the available time to be used up very quickly. Each of the parties will have to select and prepare a bundle of key documents for the mediator and, where possible, the contents of this bundle should be agreed. The parties may be benefited with supporting charts, summaries and schedules to support their points.
30. Finally, parties should be prepared for the emotional aspects of mediation. An opening statement provided by the parties in mediation can have a profound effect on the subsequent negotiations. As the client is directly involved in the settlement discussions, you may find that there will be stronger arguments based on emotion than there would be in litigation. In almost all mediations there is a stage where the parties believe that they cannot continue with the discussions and they have hit a brick wall, but they will need to persevere in order to reach a settlement that is in their best interests.

COVID-19 AND THE FUTURE OF ALTERNATIVE DISPUTE RESOLUTION

31. There is a general sense amongst litigators and mediators that the present global Covid-19 pandemic has encouraged parties to be more co-operative than they otherwise would be. There is an increased likelihood that parties are able to reach an agreement and settle their disputes without the input of the courts. Due to the increased backlog of cases in the civil courts caused by the pandemic, there is a greater drive from parties to resolve their disputes quickly and focus on more pressing issues.
32. On 31st March 2020, the Civil Mediation Council ['CMC'] published a letter to members from Sir David Foskett which highlights that, despite the current situation, the need for mediation "*has not gone away*" and the outbreak could "*result in a greater demand for the help that mediators can bring*". Therefore, many mediators are publishing detailed guides as to how mediations can operate using different video conferencing platforms, including Microsoft Teams, Skype for Business and Zoom.
33. It is not easy to replicate the ability to narrow the issues or settle a case at the door of a court when solicitors and counsel do not see each other before a hearing. It is still worth contacting another party shortly before a hearing to explore whether any issues can be agreed. Provided that a court is open, consent and settlement orders should still be processed by the court on the papers, but it may take slightly longer than usual.
34. The response to remote mediation has been generally positive, with mediation organisations noting that parties feel more comfortable as they can do the mediation from their "home territory" and do not have to be in the same room as the other parties at any time. However, organisations have also noted that parties have a perception of bias caused when some parties are able to appear via video (and see each other) and they can only attend via audio. Therefore, it

is strongly recommended that if a remote mediation is contemplated that the technology is in place for all of the parties to attend remotely via video.

35. Regarding the future of ADR more widely, the Civil Justice Council working group on ADR published its final report on the future role of ADR in the civil justice system in December 2018. The report sets out 24 recommendations, many of which are directed at introducing more forceful methods of encouraging parties to use ADR and the establishment of a judicial ADR liaison committee. However, the report specifically concludes that it does not advocate the introduction of compulsory mediation.

36. As previously noted, litigation is now the last resort in dispute resolution. Therefore, litigators and parties who embrace and fully engage with the other dispute resolution mechanisms, will gain the greatest benefit.

This note is for general information only and is not and is not intended to constitute legal advice on any general or specific legal matter. For legal advice on particular cases please contact Ben Cressley, Senior Civil Team Clerk, on 0207 427 6810 to discuss instructing Counsel.

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