

A Guide to ADR in England and Wales Provided by Shoosmiths

Although the United Kingdom comprises England, Scotland, Wales and Northern Ireland, this guide relates only to the current position in England and Wales because Scotland and Northern Ireland have their own individual legal systems.

The rules and procedure of the Civil Courts in England and Wales are contained in the Civil Procedure Rules (CPR) which were introduced in 1999 and which lay down the framework within which all civil litigation must be conducted.

The philosophy underlying the CPR is expounded in the report of Lord Woolf entitled "Access to Justice".

Forms and Regulation of ADR

The term ADR includes processes such as adjudication, conciliation, expert determination, early neutral evaluation, judicial appraisal and without prejudice negotiation but the most widely used form of ADR is mediation.

There is currently no authorised regulator or regulatory body for ADR in England and Wales. Training and accreditation of mediators is provided by a number of organisations, among whom are the Centre for Effective Dispute Resolution (www.cedr.co.uk), the ADR Group (www.adrgroup.co.uk), and In Place of Strife (www.mediate.co.uk)

In 2003, the Civil Mediation Council (www.civilmediation.org) was established to represent the common interest of mediation providers in promoting and developing mediation. A number of mediation providers are currently accredited under its pilot scheme and applications are assessed on an ongoing basis. Members of the Council include independent mediators, academic lawyers, legal professional bodies and government departments.

There is a European Code of Conduct to which individual mediators can voluntarily decide to commit. Organisations can ask mediators who accept referrals under the auspices of that organisation to respect the Code. This extends to offering training, evaluation and monitoring of mediators.

However, the ADR industry is currently unregulated and there is no recognised qualification criterion for offering one's services as a mediator. In light of the increased pressure on parties by the Courts to attempt some form of ADR before or in the course of legal proceedings, it may only be a matter of time before the training, qualification and monitoring of providers of ADR services becomes subject to formal regulation.

The Overriding Objective

The purpose behind the CPR is to enable the Court to deal with cases "justly" having regard to a number of factors set out in CPR Part 1 and which include the concept of proportionality bearing in mind

- the amount of money involved
- the importance of the issues
- the financial position of each party

The parties are under a duty to help the Court to further the overriding objective (CPR Part 1.3).

The Court's Case Management Powers

The Court is given every encouragement to take a pro-active approach towards managing cases from the outset. The Court has the widest possible discretion to award costs against a party held to have failed to comply with directions of the Court (costs sanctions – see below) including taking into account whether or not a party has complied with any relevant pre-action protocol (see below) (CPR Part 3).

Structure of the Courts

Civil proceedings are issued in the High Court of Justice or in one of a number of local County Courts.

The High Court is divided into the Queen's Bench Division, the Chancery Division and the Family Division. The divisions of the High Court include a number of specialist Courts such as

- the Commercial Court
- the Mercantile Court
- the Technology & Construction court
- the Companies Court
- the Patents Court
- the Admiralty Court

The Chancery Division and a number of specialist courts publish individual Guides setting out their requirements for the practicalities of conducting litigation. The Guides are supplemental to the CPR. A common factor in the various Guides is the encouragement of the use of ADR as a means of resolving disputes or particular issues. (see below Case Management Conference).

Pre-Action Protocols

The current climate is based on the notion that litigation should be a remedy of last resort and that, certainly between commercial organisations, every effort should be made to achieve a settlement before Court proceedings are embarked upon. Lawyers are expected to assist clients to negotiate outcomes rather than rush into Court.

To that end, a number of pre-action protocols have been issued as part of the CPR governing the behaviour expected from both Claimant and Defendant before Court proceedings are issued. The protocols do not apply in cases of emergency where an injunction is sought. However, in all but exceptional circumstances, parties are expected to exchange early and full information about a prospective legal claim with the aim of settlement rather than litigation.

The Court has wide power to penalise a party for non-compliance with a relevant protocol by means of sanctions including paying the other party's costs on the indemnity basis.

At present, pre-action protocols are in place for only a few types of dispute (see below) but the Practice Direction states that in all other cases, the Court will expect the parties to act reasonably in exchanging information and documents and in trying to avoid the necessity for proceedings.

The pre-action protocols direct the parties to consider ADR at the early stage as an alternative to litigation although it is recognised that no party can or should be forced to mediate or enter into any other form of ADR. Parties are expressly warned that if the protocol is not followed the Court will have regard to such conduct when determining costs.

Parties may be required by the Court to provide evidence that alternative means to resolving the dispute were considered at the pre-action stage.

Pre-action protocols are in place currently for the following disputes:

- Construction and engineering.
- Defamation
- Professional negligence
- Judicial Review
- Personal Injury
- Clinical Disputes
- Disease and illness claims
- Housing Disrepair cases

Case Management Conference

Following (1) the issue and service of a claim and (2) service of defence to the claim (with or without a counterclaim) the Court will arrange a date for a Case Management Conference (CMC) at which a timetable will be set for the future progress of the case to trial. The CMC is attended by legal representatives.

The Court is likely to enquire whether the parties have considered whether the dispute, or particular issues in it, could be resolved through ADR. The Court may include in the directions time table a stay on the action at a suitable juncture (whether before or after exchange of witness statements and/or disclosure of documents) to allow for ADR to take place.

The Court has no power to order the parties to attempt ADR, but is likely to give "strong encouragement" (with a veiled threat of costs sanctions for refusal) in cases regarded as suitable.

Increasingly, in complex cases judges expect lawyers to be willing and able to identify discrete issues (for example, on quantum) that might be resolved or narrowed by ADR even if the dispute itself is not likely to settle at any early stage.

The Court Guides make clear the obligation on lawyers to consider with their client and with the other parties the use of ADR. A client must be informed about the costs consequences of an unreasonable refusal to consider ADR (see below – costs sanctions). A lawyer who fails adequately to advise the client with regard to ADR exposes himself to a claim of professional negligence.

The standard form order that will be made by the Admiralty and Commercial Courts, in a case considered suitable for ADR, requires the parties to exchange lists of neutral individuals available to conduct ADR and then to endeavour in good faith to agree such individual and take "such serious steps as they may be advised to resolve their disputes by ADR procedures".

If the case does not settle, the parties are required to inform the Court what steps were taken towards ADR and why such steps have failed.

This is almost, but not quite, a situation where the Court is compelling the parties to undertake ADR.

Court – run mediation schemes

The Court of Appeal

An ADR scheme operates in the Court of Appeal, administered by the Centre for Effective Dispute Resolution (CEDR). It is entirely voluntary and may be terminated by a party at any time.

On considering a written application for permission to appeal, a Lord/Lady Justice is expressly required to consider whether the matter is suitable for mediation. If so, details of the case are sent to CEDR to contact the parties inviting them to agree to mediation.

In its first year of operation, the scheme achieved a settlement rate of 68%.

Central London County Court

This busy London Court ran a pilot scheme until 31 March 2005 offering a 3 hour time limited mediation service for civil disputes. Initially, there was a low take up rate.

The Court was empowered to serve a notice of referral to mediation on parties chosen at random and the parties then had to respond stating whether they agreed or objected to mediation. If the latter, the party was required to give reasons for objection.

Similar pilot schemes are running at

- Manchester County Court
- Reading County Court
- Exeter County Court

These are designed for small claims (typically less than £5,000 in value).

Technology and Construction Court (TCC)

A controversial pilot scheme running from 1 June 2006 until July 2007 has been instigated by the judges of the TCC for use in construction cases which are frequently complex and high value.

As with other such schemes, it is entirely voluntary. Participating judges will receive training in ADR and it remains to be seen what take up rate and settlement rate is achieved.

Costs Sanctions

Given that

- At present the Court has no power to order a party to engage in ADR.
- All ADR processes are confidential and there can be no complaint to the Court if a party suspects that his opponent has acted in bad faith in relation to ADR.

BUT

- the CPR including the pre-action protocols and the individual Court Guides expect and require parties to give due consideration to using ADR at some point to seek settlement of the dispute or, at least, to narrow the issues in dispute.

In what circumstances is the Court likely to penalise a party in costs for refusing to mediate?

The general rule is that the losing party pays the costs of the successful party but the Court has a very wide discretion having regard to all the circumstances, including conduct both before and during the proceedings

Thus, the successful party could have a proportion of its costs disallowed or even be ordered to pay a proportion of the loser's costs if the Court considers that it has unreasonably refused to mediate.

However, the burden is on the unsuccessful party to persuade the Court to depart from making the usual order that costs follow the outcome. The leading authority on this much debated issue is the judgment of the Court of Appeal in *Halsey v. Milton Keynes NHS Trust* [2004] 1 WLR 3002.

The factors that may be taken into account in deciding whether refusal to mediate was unreasonable include (but are not limited to):

- the nature of the dispute
- the merits of the case – whether a party reasonably believed he had a strong case
- the extent to which other settlement methods have been attempted
- whether the costs of ADR would be disproportionately high
- whether any delay in setting up and attending ADR would be prejudicial e.g. by the delaying the trial
- whether ADR had a reasonable prospect of success. The burden is on the unsuccessful party to show that there was a reasonable prospect that mediation would have been successful. However, the stronger the encouragement

from the Court for ADR, the easier it will be for the unsuccessful party to discharge the burden of showing that the other party's refusal was unreasonable.

Conclusion

ADR – and especially mediation – has become an integral part of litigation in England and Wales. Save in the most clear cut case (where the Claimant or Defendant would have a good prospect of securing a summary judgment on the basis that the defence or the claim itself has no real prospect of success), any party who unreasonably refuses to engage in a form of ADR risks suffering costs penalties at the conclusion of litigation.

Those who provide mediation services are increasingly professional in their approach.

Those who advise clients in dispute resolution are – or should be – well aware of the need to give due consideration from the outset to factoring ADR into the time table.

For further information about ADR and/or dispute resolution in England and Wales, please contact Angela Taylor on + 44 1604 543319.