**ADR: timing and judicial encouragement**

This element explores when a party should engage in ADR and how the court encourages parties to engage in ADR

**Timing**

When should a party engage in ADR?

Firstly, a contract between the parties may already have specified how and when ADR should be used. For example, a commercial contract might provide that before the parties commence proceedings in relation to the subject matter of the contract, they first need to refer certain issues for expert appraisal.

Secondly, some forms of ADR can only be considered at particular times. For example, arbitration is an alternative to court proceedings, and therefore will almost always be pursued before any court proceedings have been commenced.

More generally, a decision on timing involves balancing various factors, as set out on the next page.

**Factors suggesting earlier is better**

- Cost saving: the earlier the ADR, the greater the cost saving in the event of success

- Better relationships and information: even if ADR does not lead to a settlement, it can improve the relationship between the parties and produce useful information (for example, an opinion gained during early neutral evaluation might inform the way a party approaches litigation).

**Factors suggesting later is better**

- If ADR is attempted later, the parties will better understand each other's case. However, this should be relatively clear by the time statements of case are finalised, if not earlier.

- If ADR is attempted later, the parties will better understand the evidence that each party has available: but it will rarely be justifiable to wait until all information / evidence is available. In addition, an exchange of information /evidence can often be agreed in advance of an ADR procedure or as part of it.

- If a party engages in ADR too early, it may have incurred costs doing so when the dispute is not genuine and would not have been pursued anyway.

**CPR Influences on timing**

As well as these general considerations, the CPR also contain various provisions which have implications for when ADR should at least be considered.

- The various pre-action protocols and the practice direction on pre-action conduct require the parties to consider ADR;

- The guidance accompanying Precedent H (costs budget) requires the inclusion of some elements relating to negotiations and advising on settlement.

- Directions Questionnaires (Fast / Intermediate / Multi-track) require legal representatives to confirm that they have explained to clients the need to try to settle, the settlement options and possible cost sanctions. It also includes the option to request a stay for settlement. Parties must state expressly why a settlement might not be achieved at this early stage in the proceedings, if they do not require a stay of the proceedings. Whilst a stay following DQs is common, the court has the power to stay the proceedings at any stage.

- At a case management conference, the court is likely to want to know what steps the parties have taken to explore alternative dispute resolution. The court can give directions that are aimed at encouraging ADR (as explained elsewhere in this element). The court is required to manage cases including by encouraging and facilitating ADR if appropriate (CPR 1.4(2)(e)).

**How does the court encourage the parties to engage in ADR?**

The starting point is that the court can:

- Provide information about ADR; and

- Stay proceedings for, or order, the parties to engage in ADR. If the court makes an order for the parties to engage in ADR, the court must ensure that it does not impair the claimant’s right to proceed to a judicial hearing and is proportionate to settling the dispute fairly, quickly and at reasonable cost. There are currently no fixed principles as to what would be relevant for the court to consider when determining whether proceedings should be stayed or when ordering the parties to engage in ADR.

- Encourage parties to consider ADR and engage in it.

We will consider the way that the court encourages ADR by looking firstly at the area of costs, and secondly at other forms of encouragement.

**Costs**

The usual costs order at the end of an English court case is that the unsuccessful party pays the successful party's costs. Costs are, however, always at the discretion of the court. One of the factors which the court will consider when making a costs order is the conduct of the parties (CPR 44.2 (4)), which includes conduct before, as well during, proceedings (including compliance with pre-action protocols) (CPR 44.2(5)).

Accordingly, the court can encourage the parties to engage in ADR by rewarding positive ADR behaviour and punishing poor behaviour in costs. Note that the court will rarely know (for example) exactly what happened at a mediation, as this will be 'without prejudice’, but it will know whether or not a party has agreed to mediate at all.

One issue that comes before the court is where the successful party in the litigation would normally be entitled to its costs but that party has refused to engage in ADR. If a party refuses to engage in ADR then when it comes to assessing costs the court will consider whether that refusal was reasonable, and if not, the court might impose a costs penalty. The burden of proof will be on the unsuccessful party to show the court why it should depart from the general rule on costs to deprive the successful party of some or all of its costs on the grounds that it refused to agree to ADR.

The court will look at all the circumstances, including:

- The nature of the dispute – how suitable it is for ADR;

- The merits of the case – a refusal to engage in ADR may be more justifiable if the party justifiably believes it to be very strong.

- The extent to which other settlement methods have been attempted.

- Whether the costs of ADR would be disproportionately high (but note that free or fixed-fee mediations are potentially available in relation to low value claims which might make the costs proportionate even for such claims);

- Whether any delay in setting up and attending the ADR would have been prejudicial – particularly if it is very close to trial; and

- Whether ADR had a reasonable prospect of success – this by no means requires the alleging of unreasonable behaviour to show that it would have succeeded.

The points above are about whether a party should be penalised for refusing to engage in ADR when invited to do so. The court does not take the same approach when considering what the consequences should be for a party who has simply failed to suggest ADR. The court will not refuse to award costs to a successful party simply because it did not positively suggest ADR. Clearly where such a failure amounts to a breach of court order or of one of the pre-action protocols / PD on Pre-action Conduct, then the situation is different.

On the other hand, silence in the face of an offer to engage in ADR is likely to be considered unreasonable and to be sanctioned in costs (unless the parties are already engaged in a form of ADR).

**Practical advice**

It flows from the above that upon receipt of an offer to engage in ADR, a party should:

- Consider with its legal advisors the merits of that offer;

- Respond promptly, in writing, setting out reasons for its decision, and noting the principles above;

- If it does not wish to engage in ADR, explain in what different circumstances it would agree to ADR. It would very rarely be appropriate to indicate that ADR will at no stage be appropriate;

- Make that letter 'open' or 'without prejudice save as to costs’; and

- Consider making a separate note of any reasons for refusal that it is unwilling to express to the opponent at that time, in a form which can be later shown to the court if necessary.

**Other forms of encouragement**

We have mentioned above the various stages in proceedings when the court rules specifically require that consideration be given to ADR. At a CMC, the court has various powers that can be used to encourage ADR. For example:

- The court can order a stay in order that the parties can explore ADR;

- The court can direct the parties to consider ADR and require an explanation of the parties' thinking in that regard.

- The court can reinforce the direction mentioned immediately above, for example with the following direction:

“At all stages the parties must consider settling this litigation by any means of Alternative Dispute Resolution (including Mediation); any party not engaging in any such means proposed by another must serve a witness statement giving reasons within 21 days of that proposal; such witness statement must not be shown to the trial judge until questions of costs arise”

The requirement to produce a witness statement creates a record of the situation so that the court can consider this when it comes to costs and encourages the identification of any obstacles to the adoption of ADR in order that they might then be overcome (29 PD 4.10(9)).

**Summary**

- Engaging in ADR early leads to greater costs savings in the event of success, and even if unsuccessful, can start court proceedings off on a better footing.

- Engaging in ADR late might mean the parties have a better understanding of all the issues, evidence and likely outcome at trial.

- In many cases, the former considerations outweigh the latter.

- Parties are required to consider ADR by the practice direction on pre-action conduct and the various pre-action protocols. It must be considered as part of the case management process.

- The court can penalise a party that unreasonably refuses to engage in ADR in costs. There are a number of factors that the court will consider before deciding to do this.

- The court can also stay claims in order that the parties can explore ADR, can order the parties to engage in ADR and can take other procedural steps.