**The enforceability of the results of ADR**

This element addresses how the results of an alternative dispute resolution process can be enforced

**Civil procedure rules**

The main CPR which support the content of this element are:

- CPR 40.6

- 40B PD 3

**The results of ADR**

Adjudicative methods of ADR result in an outcome which binds the parties: the result is the decision of the expert in the case of expert determination or the decision of the arbitrator / panel in the case of arbitration.

Non-adjudicative methods result in a binding agreement only if the parties reach a binding settlement agreement. This applies to agreements at a mediation, through negotiation or following early neutral evaluation / expert appraisal.

Arbitration is subject to specific rules with a statutory underpinning and this is not considered in this element.

The enforceability of the results of other forms of ADR is the topic covered in this element – what happens if a party fails to comply with the determination of an expert or with the settlement terms agreed.

**Contractual nature of the results of ADR**

A key concept to understand is the contractual nature of the results of ADR.

In the case of expert determination, the parties agree as a matter of contract to be bound by the results of the expert determination. This agreement could be part of the primary contract which the parties are concerned with (such as a sale of goods agreement) from the outset. Alternatively, the parties might enter into a contract agreeing to be bound by the expert determination after a dispute has arisen. Either way, the parties agree to be bound by the result, save in limited circumstances where it may be possible to challenge an expert determination on grounds of fraud, partiality or manifest error.

In the case of agreements at a mediation, through negotiation or following early neutral evaluation, such agreements are only binding in accordance with ordinary contractual principles – in particular, if they are sufficiently certain.

In either case, part of the agreement is that the existing legal obligations / claims which are at stake in the dispute should be discharged / extinguished by the determination / agreement which is the result of the ADR.

Given the importance of the results of the ADR, determinations / agreements should be clear, comprehensive and recorded in writing.

**Defining the dispute that has been resolved**

As mentioned on the previous page, wherever there is a settlement agreement following ADR, part of the agreement is that the existing legal obligations / claims which are at stake in the dispute should be discharged / extinguished by the determination / agreement which is the result of the ADR.

But how are the legal obligations / claims at stake in the dispute defined?

This is a matter for the parties to agree. They may define what is being settled narrowly:

“…C’s claim as set out in a letter dated x and relating to C’s invoice dated x…’

Or more broadly:

“…any claim arising out of the relationship between C and D, whether contractual or non-contractual including any claims arising in the future…”

When proceedings have been issued, one option is to define the dispute being settled by reference to the claims set out in the particulars of claim. But often parties (in particular the defendant) might want to agree something broader. For example, the defendant does not want to pay to settle a claim brought against it in negligence only to face new proceedings arising out of the same facts but on the basis of a breach of contract.

**Contractual nature of the results of ADR - summary**

The parties enter into a contract to:

- define the obligations / claims which they want to resolve (extinguish);

- instead be bound by:

a. the terms of a settlement agreement which they have agreed; or

b. the outcome of the contractually determined procedure, such as expert determination

**Enforcement before proceedings have commenced**

It follows from what has been said above that the method of enforcing the results of the ADR, such as a determination / agreement that Party A will pay a sum of money to Party B, is by commencing proceedings alleging breach of contract if Party A fails to fulfil its obligation (subject to the point below where settlement is reached after proceedings have been commenced and the terms recorded in a consent order).

Such a claim is then decided like any other breach of contract claim. In the case of a straightforward decision or agreement, such as the one suggested in the previous paragraph, such a claim should be straightforward and may conclude by way of judgment in default or summary judgment in the claimant’s favour.

Note that the breach of contract is the failure to abide by the terms of the determination / agreement resulting from the ADR. The claim is not based on the legal obligations / claims which were originally in dispute because they have been discharged / extinguished. The parties’ positions in relation to the original dispute will therefore not be relevant to the proceedings to enforce the result of the ADR. However, the parties could agree as part of a settlement following ADR that if the terms of the settlement are not complied with, the original legal obligations / claims will be restored, in which case that is what will happen.

**Enforcement after court proceedings have been commenced**

Where the result of ADR comes after the issue of proceedings, for example when a settlement is reached at a mediation in relation to a dispute in the course of being litigated, there are two additional points to be aware of:

There may be the opportunity to record part or all of the settlement in a court order or judgment; andIn any event, steps will need to be taken to stop the litigation proceeding to trial.

To address these points, the parties are likely to agree to a consent order / Tomlin order. These are explained in the element ‘Orders following settlement’ in the Civil Litigation Adapt module. It is important to note that a court order / judgment can only be made in relation to matters within the court’s jurisdiction, such as an order for damages or costs. For example, the court has no jurisdiction to order two parties to trade together on stated terms for the next 6 months, even if the parties agree that and ask the court to so order. Terms that the court cannot order must be recorded in the schedule to a Tomlin order or in a settlement agreement annexed to the Tomlin order.

**Enforcement after court proceedings have been commenced (continued)**

Where an agreement following ADR is recorded in a consent order / public part of a Tomlin order, the terms of the court order can be enforced like any other order (by taking control of goods or seeking an attachment of earnings order, for example)– there is no need for a further order of the court. Recording agreed terms in a consent order also means it is not necessary to start a claim for breach of contract if the other party fails to comply with the terms as the consent order can be enforced in the existing proceedings.

To enforce the terms in the schedule to a Tomlin order, the wronged party must apply to court within the existing proceedings for an appropriate order to convert the contractual obligation into one that can be enforced by the court. So this is, in effect, a two-stage process.

An example of a Tomlin Order is set out on the next page.

**Enforcement methods - summary**

The following are enforced by a claim for breach of contract (new proceedings):

- The decision of an expert following expert determination

- Agreement at a mediation, through negotiation or following early neutral evaluation, before the issue of proceedings

- Agreement at a mediation, through negotiation or following early neutral evaluation, after the issue of proceedings, to the extent not recorded in a consent order or Tomlin order

The following is enforced by direct enforcement of a court order:

- Agreement at a mediation, through negotiation or following early neutral evaluation, after the issue of proceedings, to the extent recorded in a consent order / the order part of a Tomlin order

The following is enforced by applying to court in the same proceedings for a further order:

Agreement at a mediation, through negotiation or following early neutral evaluation, after the issue of proceedings, to the extent recorded in the **schedule** to a Tomlin order

**Summary**

- The determination of an expert following expert determination, and the agreement reached at a mediation, through negotiation or following early neutral evaluation / expert appraisal, are the results of ADR.

- The basis of these results is contractual – failure to comply with the determination / agreement is a breach of contract.

- The remedy for this breach is to commence proceedings for breach of contract.

- By way of exception to the above rule, where the settlement terms are reflected in the body of a consent order / Tomlin order (because proceedings are underway at the time of the ADR), these terms can be enforced directly like any other court order.

- The terms in the schedule to a Tomlin order are enforced by applying to court for an order compelling compliance with the term breached.

- Great care must be taken defining the obligations / claims which are being extinguished by the expert determination / settlement agreement.