

Alternative Dispute Resolution – Ignore it at your cost

Alternative Dispute Resolution is nothing new. It has been a feature of dispute resolution, notably in the USA but also elsewhere, for over 20 years. Recent years have seen its increased use in the UK and, most recently, in the shipping and insurance fields.

A number of English court decisions have made ADR almost compulsory with severe costs penalties for failure to use it, even for a successful party. Whilst not shipping cases, they are of general interest and may affect the conduct of maritime cases before the English courts and in London arbitration.

What is ADR?

Alternative Dispute Resolution is described by the Commercial Court as the:

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

It includes mediation, conciliation, mini-trial, expert determination, and early neutral evaluation, all of which have one thing in common. The parties to the process are guided towards settlement by a neutral third party appointed by them. He or she may be a lawyer, technical expert, commercial person or layman, appointed by the parties on terms of reference that they agree. The parties remain in control.

The response to ADR has been mixed. The shipping and insurance markets have, in general, been slow to adopt ADR procedures.

However, changes in the Civil Procedure Rules ('CPR'), brought about by the Woolf Reforms, did prompt new thinking in dispute resolution methods. The CPR provide that the court must encourage the parties to:

“..use alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure.”

In the notes to the CPR, the editors observe:

“..the encouragement and facilitating of ADR by the court is an aspect of active case management which in turn is an aspect of achieving the overriding objective. The parties have a duty to help the court in furthering that objective and, they have a duty to consider seriously the possibility of ADR procedures being utilised for the purpose of resolving their claim or particular issues with it when encouraged by the court to do so. The discharge of the parties' duty in this respect may be relevant to the question of costs because, when exercising its discretion as to costs, the court must have regard to all the circumstances, including the conduct of all the parties”

These changes have led to something of a settlement culture. Parties are now more conscious of the range of alternative methods for resolving disputes and an offer to use ADR is no longer seen as a sign of weakness, but as a sign of good sense from a party who does not want to (and may not need to) litigate.

The most common form of ADR is mediation.

Why mediate?

The CPR require the court to manage cases actively, including encouraging the use of ADR. In practice this means some form of mediation. The court can encourage, though not compel, mediation, even if one party is unwilling to participate. It can order a stay of proceedings, either of its own volition or at one party's request, whilst the parties explore mediation. A party who unreasonably refuses can be exposed to cost penalties

Court decisions

An unsuccessful party to court proceedings will usually be ordered to pay the costs of the successful party. However, a series of decisions have displaced this rule in cases where the successful party has refused to mediate.

In the 2002 Court of Appeal judgment in *Frank Cowl and Ors v Plymouth City Council*, Lord Woolf ruled that:

“..insufficient attention is paid to the paramount importance of avoiding litigation whenever this is possible....If litigation is necessary the courts should deter the parties from adopting an unnecessarily confrontational approach..”

This case was followed by *Cable & Wireless v IBM* in which Cable & Wireless had attempted to bypass a contractual agreement to seek ADR by commencing court proceedings. The court held that the agreement was contractually binding and that they were not entitled to move directly into court proceedings without first exploring ADR.

Next came the "landmark" ruling on mediation - *Dunnett v Railtrack* - the case of the runaway horses. Before this case, it was recognised that an unreasonable refusal to mediate might have costs consequences for the refusing party. Here the court went further. It made express reference in the judgment to the duty of both the parties *and* their legal advisers to try to resolve disputes through ADR. Failure to do so could result in "uncomfortable costs consequences".

The case, in brief, concerned the death of the claimant's horses. They escaped from a field adjoining a railway line through an open gate and were killed by a train. The claimant sued Railtrack who were responsible for the gate. The claim was dismissed and Dunnett appealed.

The Court of Appeal strongly recommended the parties to "explore the possibility of ADR". Dunnett was willing to do so but Railtrack refused to even consider it. Dunnett had rejected settlement offers from Railtrack. Railtrack then took a tactical decision to allow the matter to be determined by the court. Railtrack did not want to incur the expense of mediation when they were not prepared to increase their settlement offer.

The Court of Appeal also dismissed the claim and Railtrack sought the usual order for a winning party to recover its costs. However, the Court of Appeal denied Railtrack their costs, penalising them for their refusal to consider mediation, even after the court had encouraged it. The case therefore set a precedent for litigation strategy in subsequent cases.

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Next in *Hurst v Leeming*, the defendant refused to mediate, believing the claimant's case was weak and mediation likely to fail. The court ruled that this did not justify a refusal to mediate. Neither was the fact that heavy costs had already been incurred good reason for refusal, though that would be taken into account in the mediation process

Two 2004 Court of Appeal cases; *Halsey v Milton Keynes General NHS Trust* and *Steel v Joy and Halliday* have now confirmed that the general rule that "costs follow the event" - the loser pays the winner's costs - can be displaced where the winner has unreasonably refused to mediate. However, as an exception to the general rule, the burden is on the losing party to show the winning party's refusal to mediate was unreasonable.

The court has given some welcome guidance on factors to consider when deciding if refusal to mediate is unreasonable. These include:

- The nature of the dispute.
- The merits of the case.
- If other settlement methods have been attempted.
- Whether the costs of mediation would be disproportionately high.
- Any prejudicial delay in setting up and attending the mediation.
- Whether the mediation had a reasonable prospect of success, the burden of proof being on the unsuccessful party.
- The court's encouragement to use ADR.

Litigants have a right to adopt any stance they wish during mediation. The court

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should not investigate why the process did not succeed. No party can be forced to mediate. To do so would achieve nothing except to run up costs. However, Members who want to be certain of recovering their costs in court proceedings are advised to:

- Observe any mediation clause agreed in their contracts.
- Abide by any direction of the court to consider mediation.
- Ensure they have good and sufficient reason to refuse any suggestion to mediate.
- Actively consider ADR as a viable alternative to litigation.
- Follow through any agreed mediation.

Leaving aside costs consequences, mediation can give litigants a range of solutions unavailable in conventional litigation. These include the continuation of a business relationship on new terms, or an agreement by one party to do something without any existing legal obligation to do so.

Mediation can provide an opportunity to explore settlement before substantial costs are incurred and to evaluate the strengths and weaknesses of a case at an early stage. If no settlement is reached, the parties can proceed with the litigation without fear of prejudicing their claim. Nothing revealed in the mediation can be used against them. The process is confidential. Even if unsuccessful, valuable work will have been done in preparing for the litigation.

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