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Insights

LOOKING FORWARD - THE FUTURE OF (COMPULSORY) ADR IN BUSINESS DISPUTES AND THE IMPACT OF CHURCHILL V MERTHYR TYDFIL

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SUMMARY

Considered as a cheaper, quicker and less stressful mode of dispute resolution, alternative dispute resolution ("**ADR**") is no longer seen as an "alternative", and indeed has been re-named "NDR" (negotiated dispute resolution) to reflect that. Instead, it is becoming an integral part of the dispute resolution process – one which is focussed on achieving earlier and less costly resolution over which parties have control rather than engaging in an often expensive, drawn-out dispute before the court with an uncertain outcome. Here we explore where its future lies and what this means for your business.

NDR IN A CHANGING LEGAL LANDSCAPE

DEVELOPMENTS IN THE COURT RULES

Procedural mechanisms to encourage parties to use NDR are already embedded in the Civil Procedure Rules, perhaps most importantly including the requirement for parties to comply with the Pre-Action Protocols and the possibility of costs sanctions for not doing so. Following a review, the Civil Justice Council ("**CJC**") has proposed a draft replacement to the current general protocol, one which strengthens the emphasis on mandatory compliance with pre-action stages and fortifies judicial powers to enforce non-compliance.

The CJC's proposals represents a major step forward in embedding a coherent approach to encouraging serious attempts to consider settlement earlier in the life of claims and narrowing the issues where settlement is not reached so as to refine the litigation process.

COMPULSORY MEDIATION?

The English judiciary is increasingly encouraging parties to engage in mediation and other forms of NDR, and recent case law reflects judicial support of NDR as a means to resolve disputes to obviate, or at least limit, the need for court intervention to resolve disputes.

Despite this general shift, there has been judicial scrutiny as to whether the move towards NDR should be constrained: in the landmark case of *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576, the Court of Appeal provided guidance on when the court may penalise a party for unreasonably refusing to engage in NDR (they can), but perhaps more noteworthy was their indication that parties could not be compelled by courts to take part in NDR (although they would be strongly encouraged particularly in the early stages of litigation).

However, the recent Court of Appeal decision in *Churchill v Merthyr Tydfil* [2023] EWCA Civ 1416, has clarified the position. In *Churchill*, the court reconsidered remarks made in *Halsey* which indicated that forcing unwilling parties into mediation infringed their right to court access. The conclusion was that, whilst the court can be guided by Halsey's principles, they are not compelled to follow them when considering whether the court has authority to stay proceedings for non-court based dispute resolution. Instead, the questions that the court must consider in such circumstances are whether it would be proportionate to do so, and whether the parties' right to a judicial hearing is preserved. In other words, the Court of Appeal has confirmed that parties **can** be compelled to mediate albeit as long as their ultimate right to access the courts is retained and it is proportionate and cost-effective. No real guidance as to when and how such compulsion should be exercised was provided though: the courts retain a wide discretion depending on the specific set of circumstances before them. This might seem to inherently preserve some uncertainty but we suggest that it would be unhelpful for the Court of Appeal to have handed down stringent guidelines in this area where, as the court seems to have recognised, so much is fact-specific.

The *Churchill* decision clearly demonstrates the Court of Appeal's commitment to dispute resolution mechanisms that are fair, expedient and cost-effective. For practitioners and clients alike, this should be a welcome decision, and reaffirms the importance of considering NDR, alongside litigation, when seeking to resolve complex disputes.

In line with increased judicial encouragement of NDR, on the recommendation of the CJC, the Ministry of Justice has announced that they will introduce a compulsory mediation scheme for small claims valued up to £10,000 in any event. It is estimated that around 92,000 cases annually will be referred automatically to a free hour-long telephone session with a court-provided mediator before the case can progress to a hearing. It is hoped that this will free up to 5,000 court sitting days a year. Whilst still in its infancy, even if this initiative proves effective with small claims, it will remain to be seen whether compulsory mediation is expanded to claims of higher values. This is particularly so given the Court of Appeal's stress on proportionality and cost effectiveness requirements in the *Merthyr* case: it is not clear that such compulsion would fulfil the need to assess each case on its own facts.

COSTS

In high value claims, the general rule still remains that a winning party should recover a substantial contribution to their costs from the losing opponent. However, in some small claims, the position was different – only pre-set fixed costs were recoverable. From 1 October this year, this fixed recoverable costs regime has been extended to claims for damages up to £100,000. The direction of travel seems to be to an environment in which litigation is discouraged by a regime which provides only for the recovery of very limited costs and we expect the fixed costs regime ultimately to be extended to much higher value claims.

The extension of the fixed costs regime will inevitably encourage litigants to seek other fora for the resolution of their disputes, including through NDR.

THE SINGAPORE CONVENTION

Turning to another development in the world of NDR, the UK Government signed the Singapore Convention on Mediation on 3 May 2023. The ratification of the Convention (due to take place in 2024) will result in an alternative procedure for enforcing in the English courts settlement agreements achieved by mediation anywhere in the world.

The Convention provides an effective means by which a party to a mediated settlement agreement may apply to the country which is a party to the Convention, without having to go through the costly process of establishing breach through court proceedings. Bringing certainty to the enforceability of international commercial mediation settlement agreements in the UK, the Convention has been widely welcomed as a positive development for parties who have sought to avoid their disputes entering the courts.

Practical benefits of the Convention, when ratified, will include:

- Only the country in which enforcement of the agreement is sought must be a party to the Convention (rather than the country of the location of the project, the country of the governing law of the contract, or even the party's address) – parties can therefore seek enforcement in jurisdictions where there are available assets.
- The Convention provides very limited grounds for refusing enforcement (for example, a party's incapacity, and a breach of conduct by the mediator). Such limited grounds for refusal bolster the certainty of effective enforcement.

The Convention can be regarded as another building block adding to the attractiveness of resolving commercial disputes via mediation. It seems likely as a result that mediation will be viewed increasingly as a sensible, cost-effective alternative to court proceedings when such an enforcement regime exists, especially - as seems inevitable – when more and more countries sign up.

LOOKING FORWARD?

The use of NDR (particularly mediation) is likely to increase either through compulsion or through an increased need or desire voluntarily to seek alternative means of resolution where only fixed costs are recoverable and/or enforcement of mediation agreements increasingly becomes easier and cheaper.

Even whilst NDR remains voluntary (outside what a party contractually agrees), there is likely to be increased judicial scrutiny surrounding attempts at settlement, and refusals to participate in NDR (not only at pre-action stages, but throughout all stages of proceedings) with, in all likelihood, the increased use of costs sanctions for those who behave "unreasonably".

Moving forward, it will therefore be increasingly important proactively to seek and meaningfully engage with the NDR process. This includes communicating offers to mediate promptly and parties collaboratively providing documents and further information necessary to make an effective attempt at mediation. If you decline to mediate, you will need to review the reasons for your refusal on an ongoing basis to ensure they remain reasonable.

As, for all the reasons we have explored, NDR becomes firmly entrenched as an integral part of the dispute resolution process, it will be incumbent upon all businesses properly to consider the very real advantages of NDR. We finish by identifying just a few of those benefits:

- Avoiding a potentially lengthy court process will allow you to focus attention and energy on your business, rather than the dispute.
- The flexibility of NDR provides for a wider range of outcomes, that are not necessarily available through a formal court process. This can include securing an apology or the release of a joint public statement; and beneficial commercial negotiations on issues such as costs.
- The less contentious nature of NDR often enables parties who would not otherwise have been able to contemplate working together again - or who must contractually or commercially do so - to resurrect their working relationship.
- NDR allows parties potentially to bring matters outside the central dispute itself to the NDR process, which may not only result in a commercial settlement but may achieve additional commercial aims and cohesion between parties for mutual future growth and success.
- NDR is confidential, so facilitates openness and communication between parties, assisting the promotion of a settlement in the best interests of both parties.
- NDR in some (though not all) forms puts control back in the hands of the parties and eliminates the uncertainty in outcome inevitably involved when the parties seek a resolution through the courts.

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