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SORT IT OUT! The English Courts Take a Step Towards Mandatory Mediation

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Mediation is globally recognized as an effective dispute resolution mechanism. A trained mediator can assist apparently diametrically opposed parties in finding a resolution that avoids the time and costs of court proceedings, especially fully contested and lengthy final hearings. Over 50 countries have signed the United Nations Convention on International Settlement Agreements Resulting from Mediation (the **Singapore Convention**) under which settlement agreements resulting from a mediation process can be recognized and enforced internationally without the need to bring a court claim for breach of the settlement agreement.

In England, where mediation is well established and continues to increase in popularity, parties to potential court claims have long been required to engage in pre-action correspondence, and to consider a form of alternative dispute resolution (**ADR**), (resolution outside of the court process, whether by negotiation, mediation, arbitration or expert determination), before formally issuing a claim.

The Ministry of Justice (**MOJ**) is, however, currently consulting on the scope of the first ever mandatory requirement on parties to participate in mediation as part of the litigation process. This article will provide an overview of the steps a party ought to take before issuing a claim in England, and then explain how the MOJ's consultation might impact these steps.

Pre-Action Protocols (**PAPs**)

The pre-action steps parties are expected to take before issuing claims in England & Wales are codified in the Civil Procedure Rules (**CPR**). There are both a general scheme applying to all civil claims (contained in a practice direction, which operates as guidance to the CPR), and specific protocols for particular types of disputes, including construction & engineering, professional negligence, personal injury, debt claims and judicial review.

The six-fold objectives of the PAPs are to help the parties to:

- understand each other's position;
- make decisions about how to proceed;
- try to settle the issues without proceedings;
- consider a form of ADR to assist with settlement;
- support the efficient management of those proceedings; and
- reduce the costs of resolving the dispute.

While not mandatory, parties should take compliance with the PAPs seriously. With England & Wales being a cost-shifting jurisdiction, the successful party's reasonable and proportionate costs incurred in relation to pre-action steps are normally recoverable from the losing party in the usual way. Failure to comply, however, can lead to adverse cost consequences and a winning party who fails to comply with the PAPs without good reason can be penalized by being limited in its costs recovery. A party may also have no good grounds to resist a stay of proceedings to consider ADR, on the application of the other party or the Courts' own motion.

English judges increasingly see ADR as an integral part of the process. Sir Geoffrey Vos, Master of the Rolls (the head of civil justice in the court system of England & Wales), recently opined that "*Alternative Dispute Resolution should really be renamed as "Dispute Resolution" since it is not alternative at all.*"

Compulsory mediation

It does not look like ADR will remain purely optional (albeit strongly "encouraged") for long. The MOJ recently announced that it intends to require parties in certain types of claims to attempt mediation. The initial proposal is to make mediation compulsory for county court claims valued up to £10,000, whereby the parties involved will receive a free hour-long telephone call with a professional court-trained mediator. The proposed compulsory mediation would take place after a claim is issued (so would not be part of the PAPs), but still at a relatively early stage of the proceedings, after the claim is allocated into the small claims track within the court system (reserved for lower value, less complex claims).

The aim, however, is to extend mandatory mediation to more types of claims, including higher value and more complex commercial disputes, over time. This proposal is currently in a 10-week consultation with practitioners, due to close on 4 October 2022, with the results expected shortly thereafter. Even just the first limb relating to small cases is expected, annually, to give an additional 272,000 parties access to mediation. The MOJ expects that up to 20,000 cases will settle through this process, freeing up significant judicial resource to be used for more complex cases.

Concerns about the proposals are expected to include human rights challenges, the dichotomy of forcing parties into a “consensual” process, the lack of flexibility, and potential for increasing time and costs of resolution if the requirements are used as a tactical delay. Several such matters have, however, already been anticipated; for example, the Civil Justice Council’s report on 12 July 2021 concluded that making mediation compulsory does not breach Article 6 of the European Human Rights Convention and is, therefore, lawful.

The political desire eventually to expand the scheme outside of the county courts and to larger and more complex cases is already evident. The government has also introduced a pilot scheme for contractual claims up to £500,000 in the Court of Appeal, where, upon permission to appeal being granted, the relevant papers will be automatically referred to a mediator. Although this is a voluntary scheme, parties should expect to have to justify to the Court of Appeal a decision not to attempt mediation.

The latest proposals address some of the backlog seen in the courts, including as a result of the COVID pandemic, but also tap into a wider consciousness about ADR. Similar compulsory mediation schemes have been successfully operated in New Zealand and Ontario, Canada, and have been seen to increase access to justice. The UK government is also considering acceding to the Singapore Convention.

The government and the judiciary have made it clear that they see ADR, and in particular, mediation, taking an increasingly important role in the early resolution of disputes in England & Wales. Whether formally required or simply expected, due consideration and appropriate use of ADR must form part of any well-advised party’s litigation strategy. Outside injunctions and other urgent relief, the English Court will expect a claimant to have at least attempted to keep its claim out of the courts.

Related Professionals

- **Julia Bihary**
  Pro Bono Counsel
- **Charles Bishop**
  Associate
- **Dorothy Murray**
  Partner