

The commercial realities of disputes and litigation

25 October 2023

When faced with a commercial dispute, there are a number of different mechanisms available to assist with its resolution. For instance, parties can either attempt to resolve their dispute via a form of Alternative Dispute Resolution (“ADR”) or by issuing a court claim and proceeding through the litigation process. Both options offer various benefits and there are key aspects to be aware of for each.

The overriding objective

The litigation process is governed by the Civil Procedure Rules (CPR). The overriding objective (the Overriding Objective) is the governing principle behind the CPR, and it concludes that cases must be dealt with justly and at a proportionate cost. Parties to a dispute have a duty to assist the court with furthering the Overriding Objective. To comply, parties must where possible seek to resolve their disputes before commencing litigation, which is often done through a form of ADR.

ADR

ADR is a term widely used to cover alternative ways of resolving a dispute that does not involve taking the matter to court, such as through mediation and arbitration.

ADR is a very popular way to resolve a dispute for a number of key reasons. Commercially speaking, one of the most popular reasons for participating in a form of ADR is due to the private nature of the process. Resolution of disputes through ADR is done behind closed doors, meaning no information about the dispute or the settlement becomes public or is revealed to the court. This is referred to as negotiating “without prejudice” to a party’s openly stated position and can be extremely favourable in many situations. ADR is particularly pivotal in instances where the dispute involves two commercial parties who do not want the wider public to be aware of a breakdown of a commercial relationship, or in situations where there is a high risk of reputational damage.

Often ADR involves help from a third party. If you are involved in a mediation process, the third party will be referred to as a mediator. The mediator will listen to each party discuss their side of the dispute privately with him/her. The mediator will remain neutral and is simply there to assist with reaching a resolution. This can be very beneficial, as the mediator can often identify the issues which are causing deadlock and look for common ground to move beyond them, thereby settling the dispute.

Overall, ADR is usually a less formal and quicker process than taking a claim to court. Due to the collaborative nature of ADR, it is also a good way to maintain a commercial relationship between the parties.

The cost effectiveness of ADR

It is recommended that parties attempt to reach a settlement through a form of ADR before commencing litigation because it avoids going through a lengthy and more expensive court process.

The court process is significantly more expensive than ADR for numerous different reasons. In particular, costs increase due to the length of the process and the general need to instruct a solicitor and a barrister (to represent you through to trial). Court fees are payable to issue a claim. In contrast, forms of ADR such as mediation can be completed on various fixed fee rates. For example, some mediators charge as little as £500 plus VAT to assist with settlement of a dispute.

Adopting ADR helps the parties uphold the Overriding Objective. However, it is sometimes the case that parties cannot resolve their disputes via ADR and if that happens then the dispute will likely get pursued through litigation.

Litigation

Litigation refers to the process of one party issuing a claim in court against another party. During the process of litigating the claim, either party can suggest participating in a form of ADR, and either party can make an offer of settlement, often referred to as without prejudice offers or Part 36 offers. However, each of these offers of settlement has particular rules that they must adhere to which are governed by the CPR.

The litigation process requires the claim to pass through a number of key stages. For example, both parties will have the opportunity to formally state their case as to the factual matrix of the dispute. The Claimant will file a particulars of claim, and the Defendant can respond via a defence. In addition, both parties can prepare witness statements to support their position and are usually required to disclose documents which are relevant to the issues in the case (often regardless of whether they help or hinder a party's stated position). The legal merits of each party's case will be presented to the Judge at trial. The stringent formalities of the litigation process mean that this can be more time-consuming than resolving a dispute through a form of ADR. It is also vital to remember that the litigation process is a public procedure.

The litigation process allocates each claim to one of four specific tracks, namely the Small Claims Track, Fast Track, Intermediate Track and Multi Track. Cases are allocated depending on the value of the amount claimed and their complexities. Each of the tracks has its own requirements for the steps to be taken during the litigation process.

It can also take a significant amount of time for a case to reach trial. These time frames cannot be predicted but can often take upwards of 12 months. In comparison, a mediation appointment can be booked in a matter of weeks, with the appointment usually lasting only one day.

It is also important to be mindful that whilst your claim is proceeding through the litigation process, there is significant management time involved in managing and developing your case. This potential time taken away from the business needs to be factored into the overall 'cost' of resolving the dispute.

The costs of litigation

As mentioned above, litigation can be a costly process and there are various costs involved throughout the claim.

In terms of the recoverability of costs, if your claim is allocated to either the Small Claims, Fast or Intermediate Tracks, your cost will be subject to the fixed costs regime. This means that if you are awarded costs (i.e., the other side is ordered to pay your costs) you are only able to recover a fixed amount. If the amount you have spent on costs exceeds the amount the fixed costs regime allows, you or your company will have to pay the additional amount yourself.

If your claim is allocated to the Multi Track (which is only likely in instances where you have a complex claim exceeding £100,000), the fixed costs regime does not apply. This means that the successful party can potentially recover a greater proportion of their actual costs from the losing party. Initially the parties attempt to agree on the level of recoverable costs between them. If no agreement is reached, the court will assess how much is payable. Although the Multi Track is not covered by the fixed costs regime, and the recoverable costs are therefore uncapped, it is normal for the successful party to recover around 60% - 75% of its costs - which is a key factor to be mindful of if your claim is allocated into this track.

The fixed costs regime and the ability to challenge costs are crucial in ensuring that costs remain certain and proportionate, which aligns with the Overriding Objective.

For any claims issued before 1 October 2023, the fixed costs regime only applies to the Small Claims and Fast Track. For further information regarding the implementation of the fixed costs regime and the Intermediate Track, please follow the [link here to view our recent article](#) by Chloe Poskitt, Legal Director, detailing the main features of the regime and how it operates.

Next steps

When resolving a commercial dispute, some form of ADR should almost always be considered. The court will frown upon any party who refuses to attempt to settle and take that refusal into account when it comes to awarding costs. This is because it is important to comply

with the Overriding Objective. Although there are various options available, there is no right or wrong way to proceed. The method of resolving the dispute completely depends on the nature of the dispute and the factual matrix. Sometimes settlement is not always achievable, in which case parties may need support from lawyers to run cases efficiently through litigation.

If you are currently involved in a dispute and you are unsure how to proceed, please get in contact with the CDR team and we will be on hand to assist.

Key contact



Mark Hickson

Head of Business Development

onlineteaminbox@brownejacobson.com

+44 (0)370 270 6000



Amba Griffin-Booth

Principal Associate

Amba.Griffin-Booth@brownejacobson.com

+44 (0)330 045 2489