

Alternative Dispute Resolution



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## Introduction

In most jurisdictions, litigation is governed by wide-ranging and detailed rules which almost invariably make it a complex, time consuming and expensive process. Very often arbitration is conducted on a similar basis and so suffers similar drawbacks.

Alternative Dispute Resolution ("ADR") embraces a range of options, falling between litigation and arbitration on the one hand and negotiation on the other, for more dispute resolution which is potentially more effective.

These options include

- Mediation
- Expert determination
- Adjudication
- Dispute Review Boards.

Globally, mediation is the most frequently used option. In this note, we give an overview of mediation and the other main types of ADR. The use of alternative forms of dispute resolution has always been more common in some cultures such as those found in Asia, but ADR is now growing rapidly in the western world with active support from regulators, the courts, businesses and law firms in the UK and the USA in particular.

## Support for ADR

*The use of ADR has been well established in the United States for a number of years. However, developments over recent years have demonstrated that there is also significant judicial (and political) support for ADR in Europe generally and in England in particular. As a result, all parties engaged in litigation should give serious consideration to ADR as a means of resolving their disputes.*

The importance of ADR has been recognised by the European Commission, which enacted the Mediation Directive<sup>1</sup> on 13 June 2008. It applies to all EU member states apart from Denmark, which has opted out.

The Directive, which Member States are required to bring into force before 21 May 2011, applies only to mediation in cross-border disputes but it states that nothing should prevent Member States from applying similar provisions to internal mediation processes.

The Directive aims to facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings.

It records that mediation can provide a cost-effective and quick extra-judicial resolution of disputes in civil and commercial matters through processes tailored to the needs of the parties. It notes that agreements resulting from mediation are more likely to be complied with voluntarily and are more likely to preserve an amicable and sustainable relationship between the parties. The Directive observes that these benefits become even more pronounced in situations displaying cross-border elements.

The UK's Government is also a keen advocate of ADR, as illustrated by the inclusion in the Civil Procedure Rules 1998 of a number of measures designed to encourage ADR. The Rules require parties, at various stages before and during litigation, to consider whether ADR might be appropriate. If they decide it would be beneficial to try ADR, the court will usually put the proceedings on hold while they do so.

The UK Government has also pledged to use ADR in all suitable cases involving government departments.

In addition, in Lord Justice Jackson's 2009 final report on civil litigation costs<sup>2</sup>, an entire chapter is dedicated to the benefits of ADR. Whilst Lord Justice Jackson concluded that parties should not be compelled to mediate, he urged courts to take whatever steps they could to encourage mediation. He also recommended that parties who have unreasonably refused to mediate should be penalised in costs.

The use of ADR, and in particular mediation, as a dispute resolution process has also been given a boost in recent years by a number of English cases in which the courts have sanctioned greater use of ADR<sup>3</sup>. In a number of those cases, parties who, in the court's view, unreasonably refused to mediate, were penalised in costs at trial. Those cases culminated in a decision of the English High Court in which the parties were ordered by the court to mediate their dispute, despite the reluctance of one of the parties to do so<sup>4</sup>. The effect of those cases was undoubtedly to increase pressure on parties to attempt ADR or risk facing adverse costs orders.

However, a landmark decision of the English Court of Appeal in 2004 clarified that, whilst the court should actively

encourage parties to refer their disputes to some form of ADR, it cannot compel them to do so<sup>5</sup>. Compulsion would achieve nothing except to increase the costs incurred by the parties, delay the determination of the dispute, and damage the perceived effectiveness of the ADR process. However, the Court said that parties who refuse to attempt ADR, or who agree to it only late in the proceedings<sup>6</sup>, should be prepared to justify their position. Furthermore, if a judge takes the view that a case is suitable for ADR, he is not obliged to accept at face value the expressed opposition of the parties. Rather, the judge should explore the reasons for any resistance to ADR. A party's reasons for not attempting ADR could form a defence to a potential adverse costs order.

Case law has established that a party who has unreasonably refused to attempt ADR may face costs sanctions at the end of litigation, and this is now reflected in the 'Practice Direction on Pre-Action Conduct in the Civil Procedure Rules 1998.' Whether a party has acted unreasonably will depend on the circumstances of each case. However, some of the factors which may be relevant include: (a) the nature of the dispute; (b) the merits of the case; (c) the extent to which other settlement methods have been attempted; (d) whether the costs of ADR would be disproportionately high; (e) whether any delay in setting up the ADR would have been prejudicial; and (f) whether the ADR had a reasonable prospect of success.

<sup>1</sup> Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters.

<sup>2</sup> Review of civil litigation costs - final report, December 2009 ([www.judiciary.gov.uk](http://www.judiciary.gov.uk)).

<sup>3</sup> R (Cowl) v Plymouth City Council [2001] EWCA Civ 1935; Dunnett v Railtrack [2002] EWCA Civ 303; Hurst v Leeming [2002] EWHC 1051 (Ch); Leicester Circuits Ltd v Coates Brothers plc [2003] EWCA Civ 333; Royal Bank of Canada v Secretary of State for Defence [2003] EWHC 1841 (Ch); and Darren Egan v Motor Services (Bath) Ltd [2007] EWCA Civ 1002.

<sup>4</sup> Shirayama Shokusan Co Ltd v Danovo Ltd (Unreported, 5 December 2003).

<sup>5</sup> Halsey v Milton Keynes General NHS Trust [2004] EWCA Civ 576.

<sup>6</sup> Burchell v Bullard & Others [2005] EWCA Civ 358.

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## Main features of ADR

*Unlike litigation or arbitration, most types of ADR are non-adjudicatory and non-adversarial. ADR is suitable for resolving a wide range of business disputes both domestic and cross-border, but it is particularly useful in a situation where the parties find themselves in a dispute, the existence or continuation of which is likely to endanger or destroy an ongoing relationship.*

The more important features of ADR are:

### **CONSENSUAL**

The English Court of Appeal decision in *Halsey* (see above) has restored the traditional view that ADR is consensual, in that parties must normally agree to refer their disputes to some form of ADR. The court cannot compel them to do so, although it can, as explained above, penalise them in costs if they refuse unreasonably to try ADR.

### **WITHOUT PREJUDICE AND CONFIDENTIAL**

ADR is conducted in privacy and on a "without prejudice" basis. The result of a reference to most types of ADR only becomes binding on the parties once they have reached an enforceable agreement. Until then, either party can withdraw and start or continue proceedings before a court or an arbitral panel. If the reference to ADR does not result in a settlement and litigation or arbitration then starts or continues, neither party may use or refer to anything that arose during the ADR process<sup>7</sup>.

### **COMMERCIAL SOLUTIONS**

ADR allows parties to seek solutions which are not available through litigation or arbitration and which can accommodate their commercial needs and interests. By way of simple example, a claim for money due can be settled by a discount on future services which may preserve, or even enhance, a business relationship.

### **FLEXIBILITY**

The form of procedure can be tailored to suit the needs of the parties. ADR may occur either before the start or during the course of litigation or arbitration proceedings. The parties are free to agree whether the proceedings should continue or be stayed during the ADR process.

### **INEXPENSIVE AND QUICK**

Compared with litigation, ADR is inexpensive, particularly if it leads to the resolution of a dispute at an early stage. It is also quick to set up and implement; in many cases mediation for instance takes no more than a day.

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<sup>7</sup> See, for example, *Venture Investment Placement Limited v Hall* [2005] EWHC 1227 (Ch).

## Mediation

*Mediation is the most commonplace form of ADR. The parties engage the assistance of a neutral mediator to help them reach a negotiated agreement to resolve their differences without adjudication.*

A mediator can assist the parties by establishing a private and constructive environment for negotiation, managing and facilitating discussion, smoothing out personal conflicts, assisting in the process of information gathering and risk assessment, identifying creative options and helping to devise and implement strategies designed to overcome obstacles which might arise during the negotiations.

To achieve these objectives, a mediator will continually seek the views of the parties, sometimes on a joint and sometimes on an individual basis, and will engage in shuttle diplomacy which may be necessary. However, a mediator has no power to make any decision or to impose his view on the parties and they will always retain their right to have the dispute determined by the courts if it cannot be resolved by mediation.

The biggest hurdle to the use of mediation is very often persuading all the parties to a dispute to agree to participate. In the absence of a contractual clause requiring disputes to be resolved by ADR, the involvement of an independent ADR body can assist in convincing an unwilling party to participate.

Once parties agree to mediation, the usual preparations involve:

- agreeing the time, place and length of the mediation
- identifying and nominating the mediator
- preparing and sending to the mediator and the other parties a brief summary of one's case and the main supporting documents
- identifying who will be one's representative at the mediation - this needs to be somebody with full authority to settle. The parties' lawyers can, and usually do, attend and play a useful role in the mediation but the primary role is that of the client's representative
- confirming that the mediation is entirely confidential and without prejudice.

The mediation itself will usually involve:

- an opening joint session chaired by the mediator, at which each of the parties will briefly summarise its case
- followed by private sessions between each of the parties and the mediator
- further joint sessions if the mediator thinks they would be useful, as they might be if, for example, points of detail need to be resolved
- if agreement is reached, the drawing up and signing of a document setting out the terms agreed. This can be incorporated into a court order or remain as a separate agreement which can be enforced in the same way as any other contract. The enforceability of settlement terms has been confirmed by the English High Court<sup>8</sup>.

The cost of the mediator (and the services of any ADR body used) are usually shared equally between the parties and usually depend upon the value of the claim. Each party will also incur costs in preparing for the mediation although these are likely to be relatively small when compared with the cost of litigation or arbitration.

<sup>8</sup> *Thakrar v Ciro Citterio Menswear* [2002] EWHC 1975 (Ch).

## Other types of ADR

Set out below is a brief description of the main types of ADR, other than mediation.

### CONCILIATION

Conciliation is similar to mediation except that the neutral party actively helps the parties to settle the dispute by, for example, suggesting settlement options. The term is widely used to describe the facilitated settlement discussions common in the employment arena.

### EARLY NEUTRAL EVALUATION

The parties obtain from a neutral third party a non-binding opinion regarding the likely outcome of the dispute if it is taken to trial. The rationale is that, armed with the opinion, the parties will be able to negotiate an outcome, with or without the assistance of a third party. Alternatively, they can settle the dispute on the basis of the evaluation provided.

The Commercial Court and the Technology and Construction Court in England have schemes facilitating early neutral evaluation.

### EXPERT DETERMINATION

This is an informal process by which the parties appoint an expert, who then gives a final and binding decision, usually on an issue falling within the expert's technical specialisation.

### JUDICIAL APPRAISAL

Schemes are available whereby former judges and senior counsel are available to give preliminary advice on their views of the legal position in a dispute following representations from both parties. It is up to the parties to agree whether this opinion is to be binding or not.

### EXPERT APPRAISAL

This involves the parties to a dispute jointly putting their case to an independent expert for review. This expert can be legally or technically qualified. Once the expert has given his views, the parties meet either at senior level or at some other level to discuss the expert's opinion and try to settle the case.

### ADJUDICATION

Adjudication is a well-established method of dispute resolution in the construction industry - parties to certain construction contracts in England have a statutory right to refer to disputes to adjudication.

An adjudicator usually provides a decision on disputes as they arise during the course of a contract. Typically, the decision of an adjudicator has interim binding effect, ie the decision is binding pending the parties' agreement altering its effect or a

reference of the dispute to arbitration or litigation for final determination.

### 'MED-ARB'

Initially, the parties submit their dispute to mediation. If no agreement is reached the parties refer the matter to arbitration. The arbitrator may be the same person who has been acting as the mediator. This saves costs because the arbitrator will already know the facts of the case. However, there is a risk that during the mediation the parties will have given the arbitrator confidential information relating to their case. The risk of that can make the mediation stage less effective.

### MINI-TRIAL OR EXECUTIVE TRIBUNAL

The parties present their case (in the form of time limited submissions) to a panel comprising senior executives (one from each party) with authority to settle, and an independent chairperson. The panel then retires to discuss the dispute and the chairperson normally acts as a mediator between the senior executives. Unless the parties request, the chairperson does not make a binding determination.

### FINAL OFFER ARBITRATION

The parties submit an offer in the terms on which they are prepared to settle to a neutral third party. The neutral third party then chooses one of the parties' offers. Neither party should make an unrealistic offer because that might result in the neutral choosing the opponent's offer.

### DISPUTE REVIEW BOARD

A panel (usually of three neutrals) is appointed at the start of a construction project. The panel visits the site of the project periodically during the year, and deals with disputes by providing an interim binding decision. The parties can challenge board decisions via arbitration or litigation. The board can have a preventative effect on disputes. DRBs are often used for large scale construction projects.

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## Timing

*There is no particular time at which a case can, or should, be referred to ADR. It may occur when settlement negotiations have become deadlocked, or at any stage before or during litigation or arbitration up to and including at trial. The benefits, particularly in terms of costs, are obviously greater the earlier it happens.*

In some cases, parties need to "lock horns" before they can be persuaded of the benefits of a negotiated settlement. However, it is usually much better to try to resolve a dispute before starting proceedings and becoming entrenched in litigation. Indeed, the Civil Procedure Rules in England now require the parties to consider ADR before commencing proceedings, and at various other stages during an action, and then to retain evidence of their having done so<sup>9</sup>.

In an increasing number of cases, parties are inserting clauses in contracts requiring any disputes to be referred to some form of ADR before the commencement of litigation or arbitration. This gives a party the opportunity to refer the dispute to ADR as soon as it has arisen. The English Commercial Court has recently enforced an agreement by the parties to attempt to resolve their disputes through mediation and put litigation proceedings which had already been commenced on hold, to enable a mediation to take place<sup>10</sup>. The French Cour de Cassation has also enforced a clause requiring the parties to mediate before litigating and dismissed proceedings commenced in breach of that clause<sup>11</sup>.

The inclusion of an ADR clause in the contract in dispute will also help overcome the concern on the part of some people that proposing ADR will be perceived by the opponent as a sign of weakness. It should be stressed, however, that experienced practitioners are satisfied that any such concern is almost always misplaced.

Whichever route is chosen, the longer a reference to ADR is delayed the greater will be the costs of litigation or arbitration for the parties.

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<sup>9</sup> Practice Direction - Protocols, paragraph 4.7. See also individual Pre-Action Protocols for specific types of litigation ([www.justice.gov.uk](http://www.justice.gov.uk)).

<sup>10</sup> *Cable & Wireless plc v IBM UK Ltd* [2002] EWHC 2059 (Comm).

<sup>11</sup> *Poirè v Tripièr* (Cour de Cassation, 14 February 2003).

## Cases suitable for ADR

*The vast majority of cases are capable of, and in fact are, resolved by negotiation. Often, however, this only happens at a very late stage in the proceedings (sometimes even during trial) after very considerable costs have been expended.*

ADR procedures such as mediation are essentially sophisticated methods of negotiation. Thus if a case is capable of settlement by negotiation, it is also capable of being settled by mediation and probably more effectively and at an earlier stage. The fact that a case is complex and/or involves a multiplicity of parties and/or issues does not militate against mediation. Frequently, the cost of litigation in such cases militates positively in favour of ADR. Experience, both in the UK and in other countries such as the USA, demonstrates that ADR is more than capable of resolving high value and complex disputes.

Usually, the issue is not whether a dispute is capable of being resolved by ADR, but rather when an attempt to settle in this way should be instituted.

As the English Court of Appeal recognised in *Halsey* (see above), there are some, but relatively very few, categories of cases which are inherently more suited to being resolved by litigation or arbitration. One such category is cases where an issue of legal principle or precedent is involved which necessitates a binding and public decision. Another is where there are allegations of fraud or other commercially disreputable conduct. Sometimes it is said that cases where emergency injunctive relief is necessary are unsuitable for ADR, but there is no reason why ADR should not be deployed in such cases once the injunctive relief is in place.

Again sometimes it is apparent that a party is defending an action for tactical reasons and does not want to settle. In such cases, the parties will probably not be able to agree to ADR but the issue may be one of timing - a party in this situation will rarely want to go all the way to trial. Indeed, a party who shows a determination not to attempt ADR at all, should be prepared to justify its position and may well be penalised in costs even if successful at trial.

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## Conclusion

While there can be no guarantee that ADR will be successful, the experience of the leading ADR organisation in the UK is that over 85% of all mediations held under its auspices are successful, saving very substantial costs.

If you do become involved in a dispute you should give serious consideration to whether or not it is suitable for some form of ADR and, if so, the best moment to try to initiate an appropriate process. If you are involved in negotiating contracts you should consider including an ADR clause. As indicated above, the current judicial climate appears to be inclining towards enforcement of such clauses, where they are properly drafted.

### **ADR AT HOGAN LOVELLS**

In today's economic climate, it can be vital for businesses to resolve disputes in ways that are both cost-effective and commercially oriented. It is often the case that traditional litigation may not be the most appropriate method of resolving commercial differences.

Hogan Lovells' Alternative Dispute Resolution team has extensive experience in resolving commercial differences using methods such as mediation, expert determination, adjudication, and 'early neutral evaluation'. We have employed ADR techniques to resolve all manner of contractual and tortious disputes involving multi-million dollar claims in many regions of the world, using the techniques independently or combining them with traditional forms of litigation.

In the UK, we were a founding member of the Centre for Effective Dispute Resolution (CEDR) and are prominent in other leading ADR organizations including the ADR Group and the International Institute for Conflict Prevention and Resolution (CPR) in the United States and the European Centre for Conflict Management (EUCON). Our lawyers have also appeared in arbitration proceedings before ICC, ICSID, AAA, ICDR, JAMS, LCIA, and ad-hoc tribunals. Many of our lawyers are accredited mediators and adjudicators. We help clients select the right ADR method and provide advice on tactics and timing.

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