



Implementing an effective dispute resolution strategy which promotes the use of ADR

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Organizations can benefit from implementing an effective dispute resolution strategy which ensures that they are consistently using the most appropriate forms of dispute resolution. This guide provides an overview of the techniques organizations can use to create a tailor-made dispute resolution strategy promoting the use of ADR.



Practical guide

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Disputes arise for all organizations. Dealing with a dispute constructively can enable the organization to achieve its ultimate objectives, save on resources, avoid financial exposure, and protect its reputation. In contrast, failing to effectively manage a dispute can negatively impact an organization and risks damaging internal and external relationships and morale.

It is beneficial for an organization to have an effective dispute resolution strategy to ensure that it consistently uses the most appropriate forms of dispute resolution. In order to add value the strategy needs to reflect the organization's mind-set, be flexible, and outcome-focused. The ultimate goal of such a strategy is to ensure that disputes are managed in a way that is in the best interests of the organization whilst also being cost-effective and protecting the organization's reputation.

The default dispute resolution processes within many organizations are negotiation, litigation and arbitration. The drawbacks of litigation and arbitration are that they can be time-consuming and expensive. ADR encompasses a range of options, falling between litigation and arbitration on the one hand and negotiation on the other, for the effective resolution of disputes. These include mediation, expert determination, adjudication and early neutral evaluation; mediation is the most frequently used option.

Benefits of mediation

Mediation is a flexible process, conducted confidentially, where the mediator actively assists the parties in working towards a negotiated resolution of a dispute or difference. Importantly, the parties to the mediation are in control of the decision to settle and the terms of any settlement.

The majority of disputes that are mediated settle. The results of the mediation audit conducted by the leading ADR organization in the UK (the Centre for Effective Dispute Resolution) (CEDR) show that over 89% of mediations result in settlement. These settlements will have resulted in significant savings for the organizations involved, including avoiding incurring costs such as legal fees, management and stakeholder time, experts' fees, document management costs, damaged relationships, and lost productivity.

Those who mediate observe that the value of the process goes beyond whether or not the parties settle. Numerous benefits can come out of mediation. For example, creating an opportunity for the principals from each side to attend a facilitated meeting where they can explain their side of the story, can have a hugely positive effect on the dynamics between the parties. Potential additional benefits include finding out about the other side's interests and the wider context within which the dispute is taking place. These and other tangential benefits are something that should be taken into account when deciding whether or not to mediate a dispute.

Other common forms of ADR

Our client note entitled 'Alternative Dispute Resolution in England and Wales' sets out brief descriptions of the main types of ADR other than mediation. These include, but are not limited to, expert determination, adjudication and early neutral evaluation:

Expert determination

This is an informal process in which the parties appoint an expert who gives a final and binding decision, usually on a limited technical issue.

Adjudication

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

An adjudicator (an independent third person) usually provides decisions on any disputes that arise during the course of a contract. Typically, the decision of an adjudicator is binding on an interim basis, meaning that the decision is immediately binding and enforceable but the dispute may be referred to arbitration or litigation for final determination. This is sometimes described as “pay now, argue later”.

Early neutral evaluation

The parties obtain from a neutral third party (usually a former judge) a non-binding opinion regarding the likely outcome of the dispute if it were to proceed to trial. The intention is that this opinion will enable the parties to negotiate an outcome, with or without the assistance of a third party, or settle the dispute on the basis of the evaluation provided.

England's Commercial Court and the Technology and Construction Court have schemes facilitating early neutral evaluation.



How this guide works

Every organization is different and as a result no one dispute resolution strategy will work for every organization. With that in mind, in this guide we explain the different techniques that an organization can use to implement an effective dispute resolution strategy. As there is often less awareness of ADR processes, significant focus is placed on how to incorporate ADR into such a strategy. We cover the following techniques:

- Dispute resolution audits;
- Early case assessment systems;
- ADR champions;
- ADR education and training;
- Incentives for ADR promotion;
- ADR clauses; and
- Embedding ADR use.

As all of the techniques can be used independently, organizations can pick any combination in order to create a tailor-made dispute resolution strategy which achieves their specific objectives.

Dispute resolution audit

Prior to any implementation of a new dispute resolution strategy, it is helpful to start with an audit of the organization's current dispute resolution systems, previous dispute resolution experience and approach towards and use of ADR. This enables the organization to find out more about some or all of the following.

Dispute resolution systems

The systems that are in place for material disputes to be reported to the organization's legal department and the stage at which they are reported.

Dispute resolution experience

- The types of disputes that the organization most commonly faces and whether there are any patterns to the claims encountered;
- The costs to the organization of resolving disputes, including:
 - the internal costs, such as time spent by in-house lawyers, stakeholders and senior management;
 - The external spend on lawyers, experts, document management etc.;
 - the indirect costs, such as damage or disruption to internal and external relationships, morale and increased financial exposure; and
- The length of time it generally takes to resolve or settle disputes by reference to the type of dispute resolution process used.

Approach towards and use of ADR

- The degree to which the organization already uses ADR in relation to its disputes;
- The level of understanding within senior management and the in-house legal team of ADR processes;
- The approach to ADR amongst the stakeholders who generate disputes, senior management and the in-house legal team;
- External lawyers' ADR skills, the processes they favor and the stage at which ADR is discussed with them; and
- The extent to which ADR clauses are inserted into the organization's contracts.

Early case assessment systems

Early case assessment (ECA) systems can be tailored to suit the particular organization and do not have to be overly formal. The key objective is to analyze disputes in a systematic way, at an early stage, to consistently select the most appropriate dispute resolution process or combination; acknowledging that it is often beneficial to combine adversarial and ADR processes.

ECA systems are usually devised by in-house lawyers in conjunction with stakeholders. In order to succeed they should reflect the organization's culture and mind-set on dispute management.

Steps to include in an ECA system

An ECA system should aim to ensure that the following steps are followed, often within a specified time-frame:

- Examination of the key facts;
- Legal analysis of the claims;
- Assessment of relevant commercial interests and relationships (both internal and external);
- Consideration of how the dispute impacts the organization's wider objectives and goals;
- Review of the potential dispute resolution processes that could be used including negotiation, ADR, arbitration, litigation or any combination thereof;
- Assessment of projected internal and external costs in relation to the potential dispute resolution processes;
- Dispute resolution strategy development and selection;
- Review of this strategy and the case assessment at regular intervals; and
- Analysis of lessons learnt once the dispute has been resolved.

ADR champions

As there may be a lack of awareness of ADR processes within some organizations, in order to build them into the dispute resolution strategy it is often necessary actively to promote and embed the use of ADR.

An ADR champion's role is to promote and embed the use of ADR within their organization. ADR champions are usually lawyers but could be anyone who is passionate about promoting the use of ADR and who has a good understanding of the various ADR processes.

ADR education and training

External ADR education and training may be beneficial for organizations where levels of ADR knowledge and practical experience are low or inconsistent. Training can be provided by one of the ADR organizations, an accredited mediator or an external law firm with sufficient ADR expertise. Where the 'ADR champion' or senior lawyers managing the disputes portfolio have a good understanding of ADR processes, they may prefer to provide the training themselves.

The training will need to be tailored to meet the needs of the audience, taking into account their current knowledge levels and their roles within the organization. ADR education and training can focus on one or more of the following:

- Main types of ADR other than mediation, such as Early neutral evaluation, Expert determination and adjudication;

- The mediation process, theory and objectives;
- The skills required by those who will represent the organization at a mediation, such as negotiation and advocacy; and
- The full range of techniques used by mediators to help parties to resolve their disputes.

Incentives for ADR promotion

Members of the in-house legal team and/or claims handlers managing an organization's disputes portfolio can be incentivized actively to promote and embed the use of ADR. Incentives such as personal targets or bonuses can be linked to individuals raising the option of ADR, using ADR processes and/or obtaining additional ADR training.

It is common for organizations to track external legal spend and cost-savings. Organizations can also track ADR usage and any associated cost-savings including internal costs, external spend and indirect costs. If these metrics are tracked then the entire team managing the organization's disputes portfolio can be set cost-savings targets which can also be linked to bonuses. Similar targets can be set for panel firms' dispute resolution teams. If the stakeholders and senior managers within an organization can see identifiable cost-savings resulting from increased ADR use they are likely to be motivated to further embed the use of ADR.



ADR clauses

By agreeing to have an ADR clause in a negotiated contract or including an ADR clause in standard form terms and conditions, an organization can systematically embed the use of ADR in its management of disputes.

ADR clauses stipulate how the parties intend to incorporate ADR processes into any dispute resolution process. Mandatory clauses tend to specify that an ADR process, usually mediation, must be attempted by the parties prior to the commencement of formal litigation or arbitration proceedings. Non-mandatory clauses state which ADR process the parties have agreed to use, most commonly mediation, but do not oblige them to do so before commencing proceedings. Tiered clauses require the parties to adhere to a specified order of dispute resolution processes, moving on to the next process only once the previous one has failed to resolve the matters in dispute within the timeframe stipulated.

Embedding ADR use

Guidelines

Dispute resolution management guidelines outline an organization's expectations for the in-house lawyers and/or claims handlers managing its disputes. Methods of actively encouraging the consideration of and use of ADR within such guidelines include:

- Promoting the discussion of early settlement and early stage mediation (or other forms of ADR) with the stakeholders;
- Requiring those managing the dispute to use ADR or explain why the matter is not currently or never will be suitable for ADR;
- Insisting on ADR being raised with external counsel at an early stage in the dispute and, if ADR is not built into the dispute resolution strategy, obliging external counsel to explain why ADR is unsuitable; and
- Where ADR is not used, stipulating a review of the dispute resolution strategy and case assessment at regular intervals.

Senior management

The approach adopted by senior management and the Board to ADR and the extent to which they publicly support its use can significantly impact the dispute resolution culture of an organization. Their stance can be expressed with, for example:

- A formal statement of support for ADR use;
- A requirement for stakeholders and the in-house legal team to either use ADR or explain why it is not appropriate; and/or
- A public pledge by the organization to use ADR processes wherever possible.

External counsel

In order effectively to implement a consistent dispute resolution strategy, external counsel will need to be fully apprised of the organization's chosen strategy and all that it entails. If an ECA system has been put in place, then external counsel will need to know what steps are involved and the relevant time-frames.

Similarly, if guidelines are implemented or senior management has conveyed a formal approach to ADR, then the organization's expectations will need to be communicated to external counsel. This is particularly important if external counsel are expected to comply with specific obligations.

If external counsel are based in jurisdictions where ADR is less common, time may have to be spent educating them and ensuring they are completely aligned with the organization's approach. Conversely, if external counsel is experienced with ADR, their assistance may be enlisted to formulate the ECA system, draft the guidelines and/or any formal statements. External counsel may also be able to assist with ADR education and training and the selection of ADR clauses. If external counsel's ability to assist with the promotion of ADR is important to an organization, then consideration can be given to including it as an element of a law firm panel review, pitch process or global engagement letter.

Here to help

Hogan Lovells' ADR team has extensive experience in resolving commercial differences using mediation, expert determination, adjudication and early neutral evaluation. We were a founding member of CEDR and are prominent in other leading ADR organizations.

This experience enables us to help our clients to implement dispute resolution strategies which actively seek to promote the use of ADR.



Further information

If you would like further information on any aspect of ADR or in relation to implementing a dispute resolution strategy, please contact any of the people listed on the next page or the person with whom you usually deal within the firm.

Contacts



Neil Mirchandani

Partner, London

T+44 20 7296 2919

neil.mirchandani@hoganlovells.com



Suzanne Tager

Senior Associate, London

T +44 20 7296 5327

suzanne.tager@hoganlovells.com



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