



Alternative Dispute Resolution in England and Wales

January 2016

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Introduction

Disputes in England and Wales are usually adjudicated after an adversarial process, either by a judge or by an arbitrator. Litigation is governed by wide-ranging and detailed rules which can 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 the effective resolution of disputes.

These options include:

- Mediation
- Expert determination
- Adjudication
- Early neutral evaluation.

Mediation is by far the most frequently used option. In this note, we give an overview of mediation and the other main types of ADR.

Support for ADR

Developments over recent years have demonstrated that there is significant judicial (and political) support for ADR in England and Wales. 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 Directive¹. The Directive aims to facilitate access to ADR 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.

The Directive came into force on 13 June 2008 and applies to all EU member states apart from Denmark, which has opted out. In England and Wales the Directive has been implemented to apply to most civil and commercial cross-border mediations, but not to domestic mediations.

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

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

In addition, in Lord Justice Jackson's 2010 final report on civil litigation costs², an entire chapter was 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 had unreasonably refused to mediate should be penalised in costs.

The use of ADR, and in particular mediation, as a dispute resolution process has been given a boost in recent years by a number of cases in which the courts have sanctioned greater use of ADR. In some of those cases, parties who, in the court's view, have unreasonably refused to mediate, have been penalised in costs after trial, regardless of whether they have been successful or unsuccessful overall.

However, a landmark decision of the 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 so³. 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 only agree to it late in the proceedings, 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, he 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 CPR (Practice Direction – Pre-action Conduct and Protocols). Whether a party has acted unreasonably will depend on the circumstances of each case. However, 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.

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- ¹ Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters
 - ² Review of civil litigation costs - final report, December 2009 (www.justice.gov.uk)
 - ³ *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576.

Main features of ADR

As well as the judicial and political support for ADR mentioned above, there are a number of reasons why parties engaged in litigation should give serious consideration to ADR. Among other advantages, ADR is flexible and private and can save time and money. The key features of ADR are explained in more detail below.

Some of the more important features of ADR are:

- **It is a consensual process**

The 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.

- **Its 'without prejudice' nature**

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 from the ADR process 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.

- **It can produce 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 example, a claim

for money due could be settled by a discount on future services, which might preserve, or even enhance, a business relationship.

- **It is flexible**

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 those proceedings should continue or be stayed during the ADR process.

- **It is 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, for example, mediation takes no more than a day.

Mediation

Mediation is the most common 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 his or her objective 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 where necessary. However, a mediator has no power to make any decision or to impose his or her view on the parties, who 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 of the parties to a dispute to agree to participate. In the absence of a clause in a contract 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 each

side's case and the main supporting documents;

- identifying who will be the parties' representatives at the mediation – these should be individuals with full authority to settle. The parties' solicitors can, and usually do, attend and play a useful role in the mediation. However, the primary role is that of the client's representative;
- confirming that the mediation will be 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;
- 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 High Court. Where a settlement results from mediation of a cross-border dispute to which the Mediation Directive applies, the settlement can be enforced through a mediation settlement enforcement order.

Other types of ADR

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

Conciliation

Conciliation is very similar to mediation except that it usually has a statutory basis, with conciliators appointed by an outside body rather than the parties, and during conciliation the neutral third party actively helps the parties to settle the dispute, for example by suggesting settlement options. Conciliation is commonly used in employment and family disputes.

Early Neutral Evaluation

The parties obtain from a neutral third party 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.

The Commercial Court and the Technology and Construction Court have schemes facilitating 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.

Judicial Appraisal

Schemes are available whereby former judges and senior barristers can be asked 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 or not this opinion is to be binding.

Expert Appraisal

This involves the parties to a dispute jointly putting their case to an independent expert for

review. The expert can be legally or technically qualified. Once the expert has given his views, the parties meet – usually at a senior level – to discuss the expert's opinion and to try to settle the case.

Adjudication

Adjudication is a well-established method of dispute resolution in the construction industry – parties to certain construction contracts have a statutory right 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, until the parties either reach agreement or refer the dispute to arbitration or litigation for final determination.

"Med-Arb"

This is a hybrid process in which the parties initially submit their dispute to mediation on the basis that, if no agreement is reached, they will 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 already knows 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.

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 adjourns to discuss settlement of the issues, with the chairperson normally acting as a mediator between the senior executives. Unless the parties request, the chairperson does not make a binding determination, although he or she may agree to provide an opinion on the merits of the case and its likely outcome at trial.

The whole process is private, confidential and without prejudice.

Final Offer Arbitration

The parties submit to a neutral third party an offer of the terms on which they are prepared to settle. 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

This typically involves the appointment of a board or panel at the start of a construction project. The board usually comprises an independent member appointed by each party and a chairperson (who may be an expert, depending on the nature of the dispute) who is appointed by the other members. The board visits the site of the project a few times a year, and deals with disputes by providing an interim binding decision. Board decisions can be challenged through arbitration or litigation within a specified time limit. The use of a DRB can help to prevent disputes. DRBs are often used for large scale construction projects, for example construction of the Olympic Stadium.

ADR and Online Dispute Resolution (ODR) for consumer disputes

Two recent pieces of EU legislation, the ADR Directive⁴ and the ODR Regulation⁵, aim to increase the use of ADR for consumer disputes in the EU by giving shoppers a fast, cheap and informal way to settle disputes with traders as an alternative to court proceedings. Among other things, the Directive requires traders who are obliged to use an ADR service to provide details of that service on its website and/or in its terms and conditions of sale. The ODR Regulation requires the European Commission to create a European ODR platform, which is an interactive website providing an out-of-court system for settling disputes regarding any

purchase made domestically or across EU borders.

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- ⁴ Directive 2013/11/EU on alternative dispute resolution for consumer disputes
⁵ Regulation (EU) 524/2013 on online dispute resolution for consumer disputes

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 or the substantive hearing, or even between trial and judgment. The benefits, particularly in terms of costs, are obviously greater the earlier it happens.

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.

⁶ Practice Direction – Pre-Action Conduct and Protocols, and also individual Pre-Action Protocols for specific types of litigation (www.justice.gov.uk)

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 CPR 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 so⁶.

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 Commercial Court has enforced an agreement by the parties to attempt to resolve their disputes through mediation and stayed litigation proceedings which had already been commenced, to enable a mediation to take place.

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 experience shows that any such concern is almost always misplaced.

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.

parties will probably not be able to agree to ADR but even in such cases 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 come what may should be prepared to justify its position and may well be penalised in costs even if successful at trial.

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 points 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 made.

As the Court of Appeal recognised in *Halsey* (above), there are only a few categories of cases which are inherently more suited to being resolved at trial. 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.

Sometimes it is apparent that a party is defending an action for tactical reasons and does not want to settle. In such cases, the

Conclusion

While there can be no guarantee that ADR will be successful, the experience of a leading ADR organisation in the UK (the Centre for Effective Dispute Resolution (CEDR)) 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 noted above, the current judicial climate appears to be leaning towards enforcement of such clauses, provided they have been 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.

We were a founding member of CEDR and are prominent in other leading ADR organizations, including the ADR Group in the UK, 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 also accredited mediators and adjudicators. We help clients select the right ADR method and provide advice on tactics and timing.

CPD Points

CPD points are available for reading this note if it is relevant to your practice. If you would like any live training on this subject, we would be happy to give you a presentation or organise a seminar, webinar or whatever is most convenient to you.

Further information

If you would like further information on any aspect of Alternative Dispute Resolution in England and Wales please contact a person mentioned below or the person with whom you usually deal.

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