

Alternative Dispute Resolution (ADR) Procedures

The background – Traditional dispute resolution procedures

Private Negotiation

1. A lost skill, negotiation is a process of the parties themselves or via skilled representatives, negotiating a deal with the other disputant. Any settlement must be reduced to writing, which requires the skill of lawyers/legal counsel. There are no procedural rules here. Few parties have training in this art, although counsel (Barristers) are in fact formally trained and regularly deploy this skill and are able to reduce any agreement to writing.

Public Litigation

2. Litigation is a (mostly) non-private, structured, expensive, adversarial, process where a Judge will decide a case based upon the issues and evidence put before the court by skilled counsel. It is not however a very flexible process: each party must formally put their case in statements of case and in witness statements and expert reports. The conduct of litigation is a skilled business. Evidence will be tested by way of cross examination of witnesses (including experts) by skilled counsel, and the Judge will decide the issues put to the court. The losing party will have to bear his/her/its own costs and those of the opposition. The rule book is the Civil Procedure Rules which can be found at the Secretary of State for Constitutional Affairs website. The overwhelming majority of litigation is heard in public.

Private Arbitration

3. Arbitration in practice is not dissimilar to litigation but ought to be private in that the proceedings are held in private. Arguably it is more expensive than litigation, in that the loser pays the arbitration costs (venue and the considerable fees of the arbitrator). For arbitration to be binding, there must be an agreement which must be in writing if the Arbitration Act 1996 is to apply. In addition to the Arbitration Act 1996 there may also be rules agreed in the arbitration agreement (whether contractual or ad hoc). Arbitrators come from the ranks of lawyers and other professionals and sometimes, as in my case, from dually qualified and experienced professionals.

Private alternative dispute resolution (“ADR”) - an introduction.

4. On the other hand, ADR is, by definition, not a court procedure. ADR is a set of dispute resolution processes for finding a solution of the parties' own devising. It is an alternative to both arbitration and litigation, and its most important distinction from both of these is that, except in the case of expert determination, there is no judge, arbitrator or tribunal to tell the parties what the answer is or will be. There is therefore, no award or judgment handed down, and no statement of what is the 'right' or 'just' answer. Instead, the parties themselves choose the form of their preferred resolution process, appoint a neutral intermediary or facilitator to assist them,

and then negotiate an appropriate solution which they both find acceptable. Where expert determination is used the independent third party makes the decision but the parties resolve their dispute more quickly by avoiding the formalities of litigation or arbitration.

Some more modern approaches

5. The court may not order parties to use ADR as this might be an obstruction of the right of access to court. The Court of Appeal has recognised that although a court may not compel the parties to use ADR, the court may use robust encouragement and it has recognised the success rate of mediation at an early stage of the dispute. Research suggests that the success rate of ADR will be higher where the process is of the parties' own choosing and design.

Types of ADR mostly deployed in the UK

Mediation

6. Mediation is the most well known and most frequently used form of ADR. Mediation is a form of neutrally assisted (or facilitated) negotiation. It is a process in which the parties to the dispute select a mutually acceptable independent third party, the mediator, who will assist them in arriving at an acceptable solution to their conflict or dispute. In a typical mediation, the mediator will discuss the problem with the parties, both together in open forum, and separately in private sessions.

7. The mediator's training and experience should permit him or her to use all the tools of 'shuttle diplomacy' and lateral thinking to attempt to assist the parties in focusing on underlying real interests and needs, rather than rights or liabilities, and to enable them to construct a solution which both find acceptable. In light of this the mediator plays a key role and careful consideration must be given to the selection of the most appropriate mediator.

Conciliation

8. Conciliation is very similar to mediation in its procedures and first stages, and in the lateral thinking about possible solutions which a conciliator tries to engender. This process differs from mediation in that the neutral (the conciliator) may express an opinion on the merits of the dispute and will himself recommend a resolution of the dispute if he cannot persuade the parties to create their own.

9. Whether or not this recommended resolution is binding on the parties is for them to determine as a matter of contract. If all or any of the parties believes in advance that they will need or want to rely on the conciliator's recommendation, it would be prudent to specify in advance in the agreement to conciliate that the conciliator's recommendation will be binding as a contract. If it is not, the agreement to be bound by it should be recorded in writing when the conciliation settlement agreement is drawn up. It is possible, if either party considers that enforcing the

agreement may present difficulty, for the settlement agreement to be drawn up as a consent award to make it enforceable by the courts as if it were an arbitration award.

10. Conciliation is often to be preferred to mediation when the parties need or want the benefit of the mediator's intervention and assistance in the particular confidential form provided, but also need to be able to define in advance the duration of the process, providing a point at which it may be possible to say that the process has been tried in good faith, but has been completed whether with or without a settlement. Because of this, many contractual ADR provisions which stipulate ADR as a precursor to arbitration or litigation will specify conciliation rather than mediation.

11. Like mediation, conciliation is a "without prejudice" procedure, and is non-binding in that at any time before a settlement is achieved any of the parties, or the conciliator, may terminate the procedure. All the characteristics of privacy, confidentiality and economy which mediation exhibits are also true of conciliation.

12. This definition of conciliation is becoming generally adopted in the ADR world with one notable exception. The Advisory, Conciliation and Arbitration Service (ACAS) means by 'collective conciliation' a process identical to mediation as defined above. The process described here as conciliation is called 'advisory mediation' by ACAS.

Neutral or expert evaluation.

13. These processes are sometimes referred to as early neutral evaluation, because of the stage in a dispute in which they are commonly utilised, but they do not have to be early and could be adopted at any stage, or even be determinative of the dispute.

14. For early neutral evaluation, the parties appoint a mutually acceptable neutral third person to evaluate their dispute and, usually, produce an opinion on its likely, or possible, outcome. The neutral's precise instructions, and the consequent nature of his report, will depend on his instructions as drafted by the parties (and their advisers). They may request an evaluation of their positions as a matter of law, and of liability, or of the likely outcome of a trial or arbitration (not necessarily the same thing as their legal positions), the possible reaction of a jury or other tribunal to their evidence, or a recommended best course of action to resolve or progress matters.

15. The parties, having chosen and instructed their neutral (and agreed his terms), each submit their view of the dispute to him, together with such evidence and documents as they see fit. The process may be (and most usually is) conducted with documents only, but the neutral may choose to interview either or both parties separately, or he may conduct an informal hearing with both parties present together at which solicitors or other advisers may or may not also be

present. The decision as to how to conduct the process will probably be for the neutral, although it is likely that he will also consult the parties before making his choice.

16. In seeking neutral evaluation of their dispute, the parties will need to appoint a skilled negotiator, experienced in dispute resolution and particularly in the practice and procedure in the forum in which it is expected that the dispute will eventually be heard. They may decide that they need to have their dispute evaluated by someone who is also expert in its subject matter in which case the process becomes expert evaluation. Whether a purely neutral or an expert evaluation is preferable will depend on the circumstances of the case and its subject matter, and is a decision for the parties and their solicitors. Particularly technical matters may well be better evaluated by an expert in the field, assuming that one can be found who is acceptable to both parties. Even in an expert evaluation, however, it is desirable that the chosen expert evaluator is also familiar with conventional dispute resolution in the technical subject, if he is to be asked for a view on the probable or possible outcome of the dispute in such a forum.

17. By definition, evaluation of a dispute need not be binding on the parties, unless they so agree in which case the procedure is more nearly neutral or expert determination. This does not make it worthless. A clear understanding of the likely outcome of a dispute in law in the form of a disinterested analysis, or an independent assessment of the merits of each side's arguments, evidence and positions can be of assistance in producing an agreement, if only in producing for each party a realistic appraisal of his worst case and his prospects without a voluntary settlement. A mediator (or conciliator) will often work towards producing such an evaluation of each party's case during a mediation, although he will preserve confidentiality and not reveal his assessment of any one party's position to any other party without permission. He will instead try and use his neutral evaluations of each side's argument to encourage realistic negotiating positions from both.

18. As an ADR process, neutral or expert evaluation implies that both parties participate in the procedure and mutually instruct the evaluator and agree his terms of reference. Due to the assistance which a disinterested or independent assessment can provide in weighing up a position, however, it is quite possible for either party to commission such a view privately without informing the other, although in that case he cannot be said to be participating in any ADR-style negotiation.

19. The Commercial Court offers parties the option, when making an ADR order, of early neutral evaluation before a Commercial Court judge. If settlement is not reached by this process, that judge will not take any further part in the case before the court, unless the parties agree otherwise.

Neutral or expert determination.

20. These processes are similar to neutral or expert evaluation, and conducted in a similar manner, except that the neutral or expert will be asked not to opine on what the outcome of a dispute might be in any given context, but to say what it should be.

21. It has been held that clauses in a contract which require the parties to resolve a dispute by expert determination are valid and binding. The parties must comply with all of their provisions and the parties have no recourse to the courts. Where a defendant has refused to comply with an expert determination clause in the contract, the claimant may recover damages if it has to issue legal proceedings.

22. In an expert determination there need not be pleadings, disclosure or formal hearing with cross-examination or formal oral submissions. If the parties wish, the expert determiner can be limited to the material they put before him, although this is not necessarily the case in arbitration.

23. As in other alternative dispute resolution processes the agreed determination should be reduced to writing and signed by all parties as well as the determiner. If an expert determination clause provides that the expert should give reasons for his decision(s) the court will order that adequate reasons be given.

24. It is important to note that the decision of the neutral or expert will not be binding unless the parties agree so beforehand. The agreement to seek neutral or expert determination of a dispute should as far as possible ensure that the parties will be bound, or if absolutely necessary should specify a time limit and method for challenging the determination by court proceedings.

25. Careful consideration of the best determiner of the dispute will be crucial to the acceptability of his findings and the likelihood that both parties will continue to be bound by them after the event. An expert cannot, unlike an arbitrator, make an award or order, and it is possible that the parties may agree only to be bound by his determination for a limited time, or pending some other eventuality or finding. The court may decline to overturn an expert determination or to disqualify the parties' appointed expert.

Adjudication

26. Non - Housing Grants, Construction and Regeneration Act 1996 adjudication is another process in which the parties appoint a neutral, who may also be expert in the subject matter of the dispute, to decide the dispute. The adjudicator's decision can be finally binding, of temporary or interim effect, or advisory only, depending on the parties' terms of reference to him. Adjudication is therefore conceptually and practically very similar to expert determination and to informal arbitration. How any given ADR procedure is categorised between these three is largely a matter of degree, and personal preference. Arbitration, however informal, is nonetheless constrained by statutory and common law, and expert determination has been the subject of

several judicial decisions. If the process is described as 'adjudication', however, it will be free of any of these controls and the parties retain control of procedure, timing, evidence and costs. The adjudication is enforceable only as a matter of contract between the parties, and therefore the agreement to have a dispute adjudicated should be drawn up carefully and signed by all parties to the dispute. It is important to ensure that the appointed adjudicator has jurisdiction to act. Similarly, the eventual adjudication should be reduced to writing and signed by the adjudicator and all parties.

27. A party to a construction contract has the right to refer a dispute arising under the contract to an adjudicator by virtue of Housing Grants, Construction and Regeneration Act 1996.

Executive hearings or 'mini-trials'.

28. These are also sometimes known as 'supervised settlement procedures'. These hearings may be binding if the parties so agree. The process consists of a semi-formal hearing, by senior decision making executives of both parties who hear each side's arguments presented either by lawyers for each side, or by lower ranking managers of each side. They are usually assisted by a third, neutral, tribunal member frequently a lawyer or technical expert, who will chair the hearing. Procedural rules, timing and duration of the hearing are all subject to agreement in advance by the parties but the general practice is constant. The tribunal receives an oral submission, from the advocate for each side, of the case as he sees it, with facts and arguments appropriately marshalled. Expert or other witnesses may give evidence, in person if desired, and the tribunal may question any or all of those appearing before them, as they see fit. There may have been an agreed exchange of documents in advance, or for an agreed bundle of documents to be provided to the tribunal. It is generally left to each advocate to choose how his presentation may be made. The normal rules of evidence will not usually be applied, but each advocate will have the opportunity at the end of the submissions and expert and witness statements to sum up. The tribunal then determine the dispute, producing a binding settlement or an evaluation, as the parties have previously agreed. At this stage the neutral may adopt either an advisory role, on technical or legal matters or a facilitative role assisting the other two members to reach a resolution.

29. One of the advantages of the mini-trial is that it is often the first time that the top management of the two parties have any knowledge, and in any detail, of the dispute apparently existing in their names. As a process the mini-trial combines the characteristics of several other forms of ADR, allowing the advocates and representatives of the parties who have been most closely involved in the dispute an opportunity to present their cases for expert determination or a form of adjudication. At the same time, because the parties are the tribunal, the final outcome of the dispute remains in the parties' control, assisted by the facilitative and advisory skills of the neutral third member of the tribunal. Typical mini-trials are short, a day or so, and therefore provide all the savings in costs and time associated with ADR generally.

30. There are a variety of Ombudsman schemes which were all founded on the need for consumer protection and assistance in the event of disputes with suppliers of goods and services.

31. Although not commonly described as ADR, they represent a range of methods of dispute resolution from neutral or expert evaluation or determination to informal adjudication. In general, they are documents-only procedures. In addition, some providers, such as the Financial Ombudsman Service, will utilise mediation or conciliation for selected disputes.

32. Recourse to the appropriate ombudsman is usually voluntary for the consumer or complainant, and usually is only available when the subscribing respondent's own internal complaints handling procedures have been exhausted.

33. The ombudsmen's decisions are binding to varying degrees, some being binding on both parties, some on neither and some such as the Financial Ombudsman scheme binding on the member company only if the complainant accepts the complaint.

34. The precise rules as to operation of and eligibility for each scheme vary, and should be checked with the appropriate office. Nonetheless, their common characteristics mean that all the Ombudsmen's Schemes should properly be considered as ADR and should be included in the range of dispute resolution methods to be considered when a dispute on a covered matter first arises.

Selecting the most appropriate ADR process: the types compared.

35. Mediation is a well-known and commonly discussed form of ADR. However, it also appears first in this list of ADR options because it is the one which grants the most control to the parties themselves over the final form of the settlement or resolution of their dispute. The other ADR processes described above reveal in increasing order, insofar as exact comparison is possible, a gradual relinquishing of that control to the neutral or tribunal.

36. Which ADR process to choose in a given dispute will obviously depend in part on the nature of the dispute. Very often that decision will be affected by the size of the amount in dispute, or its importance to one or both of the parties.

37. Some disputes will lend themselves naturally to a given form of ADR. Family and employment disputes will often be suitable for some style of mediation or conciliation, perhaps combined with some form of counselling. Disputes as to causation of a problem, collapse of a building, or an illness may best be resolved by expert determination or adjudication. Complicated contractual performance disputes may benefit from either expert determination or a mini-trial.

38. A creative approach to drawing up such a strategy will recognise that ADR processes are adaptable, and amenable to change to suit the circumstances. There is no need to be confined by the separate definitions of ADR processes described above. A hybrid form of ADR, or the use of

two or more forms together, may be the best approach. For example, an early evaluation of liabilities, or of the probable outcome of a full hearing, might then enable mediation or conciliation from a more informed starting point. Some aspects of a dispute such as the cause of structural damage, or legal liabilities or remedies might best be established by expert determination or adjudication. Such adjudication might be of temporary effect only, to enable progress to a final settlement which then replaces the adjudication as part of that settlement.

39. The Court of Appeal has also considered other cases in which ADR may not be suitable. If a party's case has merit, an application for summary judgment may be more appropriate. If the claim or defence is without merit, ADR should not be used as a tactical device by a claimant to extract a settlement or by a defendant to delay court proceedings. Where other settlement methods, such as without prejudice correspondence, have been attempted and failed, it may not be worth incurring the additional costs on an ADR process or where other factors, such as an unreasonably obdurate stance demonstrated by one party, suggest that ADR does not have a reasonable prospect of success. Alternative dispute resolution may not be appropriate if it is proposed at a late stage in court proceedings and will have the effect of delaying a trial.

40. The following table attempts a comparison of the characteristics of litigation, arbitration and mediation.

	Litigation	Arbitration	ADR
Control of proceedings	Limited as subject to CPR	Subject to arbitral agreement, institution rules and arbitrator	Parties determine procedure in conjunction with neutral facilitator
Choice of tribunal or neutral	Limited as subject to CPR	Yes	Yes
Binding process	Yes	Yes	No unless contract entered
Decided by third party	Yes	Yes	No
Providing precedent	Yes	No	No
Determination of liability	Yes	Yes	No
Adversarial	Yes	Yes	No
Limited to legal remedies	Yes	Yes	No
Confidential	No, a hearing may be in public and some court records available to public	Yes	Yes
'Without Prejudice'	No unless communications fall within the rule	No unless communications fall within the rule	Yes
Appeal on a point of law	Yes	Yes	No

41. The above note (and table) is mostly taken from Atkin's Court Forms vol 6(2), published by Butterworths which is a very useful starting point in considering ADR.