

Alternative Dispute Resolution



This document on Alternative Dispute Resolution outlines "Alternative" forms of Dispute Resolution (ADR) when resolving contractual disputes.



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The Alternatives

- Types of dispute resolution and processes involved
- Advantages/disadvantages of each process
- Dispute Resolution is becoming big business
- Increasingly parties are required to consider "Alternative" forms of Dispute Resolution (ADR)
- Parties should always consider whether some form of dispute resolution procedure would be more suitable than litigation
- Parties may be required by the court to provide evidence that alternative means of resolving the dispute was considered
- If this avenue is not explored the court may have regard to this when determining costs

There are many cards to play when resolving disputes:

- Litigation
- Mediation
- Arbitration
- Expert Determination
- Creative methods of dispute resolution

Which card to play?

Litigation

Overview of Process

- Statements of case
- Case management conference
- Exchange of documents
- Exchange witness statements
- Exchange of expert witness statements
- Trial and judgement

Pros

- Courts have more power
- Efficient
- No requirement to pay for judges time/court room
- Multi-party litigation
- Can be appealed more easily

Cons

- Public record
- Time delay
- Media scrutiny
- Cost
- Potentially uncertain results
- Breakdown of commercial relationships
- Agreement to negotiate in good faith with the assistance of a neutral third party

3 core concepts:

- (i) Mediator is neutral
 - (ii) Process is confidential/without prejudice
 - (iii) Parties determine the outcome
- Two main types – facilitative/evaluative

Mediation

Overview of Process

- The Mediator helps the parties to reach a resolution by:
- Identifying the interests of the parties and the real issues in the disagreement and
- Helping the Parties explore solutions that benefit both parties ("win/win" solutions)
- Plenary sessions and "shuttle diplomacy"
- The Mediator offers no opinion on the strengths and weaknesses of either parties' case
- Modelled on settlement conferences held by judges
- The Mediator helps the parties reach a resolution by:
- Meeting with each party separately
- Pointing out the weakness of their cases and
- Predicting what a judge or jury would be likely to do based on evidence presented

Pros

- Without prejudice process
- Speed (most mediations conclude in one day)
- Cost-effective
- Flexible
- Enables creative, business-driven solutions
- Preserves business relationships
- Parties retain control, parties can walk away at any time
- Can be used in conjunction with other dispute resolution processes

Cons

- Settlement may not be achieved
- Can be cynically approached
- Non-binding unless settlement achieved
- Shows your hand to your opponent
- Wasted costs and possible delay

What is Arbitration?

- Dispute is resolved by a nominated third party
- Consensual dispute resolution process
- Final/valid/binding awards
- Arbitration Agreement (consider: applicable law/seat of arbitration/procedural rules/language of arbitration/number of arbitrators/areas of expertise/scope of arbitration agreement)
- Institutional arbitration - ICC/LCIA/AAA
- Ad hoc arbitrations

Overview of Process

- Claimant's request for arbitration/points of claim
 - Respondent's answer (defence and counterclaim)
 - Claimant's reply
 - Appointment of Tribunal/terms of reference
 - Procedural hearing setting the steps and timetable for final arbitration hearing
- Note – Procedural steps tend to be similar to litigation (i.e. disclosure/witness statement/expert evidence/final hearing)

Pros

- Confidential
- Opportunity for neutral forum
- Expert "judge" (in particular field such as IT or telecommunications)
- Flexible procedure
- Final and binding

Cons

- Cost – arbitrators/process itself
- Speed
- Cannot be used where coercive action may be required eg injunctions
- Difficulty joining in third parties
- Non-compliant opponents
- Little or no right of appeal

Arbitration - A global solution?

- Further reasons to choose arbitration
- Cross-border enforcement – New York Convention
- Does not preclude jurisdiction of courts to deal with emergency applications
- Safest solution to dispute in international context
- Provide neutrality where parties come from different jurisdictions

What is Expert Determination?

- Appointment of independent third party who makes a final and binding determination
- Tends to be used in relation to contracts that require a valuation and for resolving technical matters
- Differs from arbitration to extent supervisory/ supportive powers of courts excluded

Pros

- Quick and cost effective
- Private
- Powers derived from contract
- Detailed procedure
- No need to appoint technical experts
- Quick decision on technical
- Issues particularly helpful on large projects

Cons

- Absence of due process
- Totally in hands of expert
- Challenge to expert's jurisdiction

- No requirement for reasons to be given for decision
- No enforcement convention
- No right of appeal

Conclusion

- There are advantages and disadvantages of using different types of Dispute Resolution
- Members need to understand the dispute resolution options available at the time of negotiation of the contract with the customer
- Potential costs consequences of not explaining alternative dispute resolution
- Commercially ADR should always be considered
- ADR tools can be used in conjunction with litigation/arbitration
- Seek an early merits assessment
- Keep your dispute resolution options under constant review

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