

Helping you weigh the options

A guide to Alternative Dispute Resolution



Many commercial disagreements are capable of being resolved in the normal run of business. Sometimes disagreements escalate into disputes and resolving them as quickly as possible is a priority for all concerned. Parties invariably negotiate to some degree at the outset of a dispute either as an alternative to, or at the same time as, litigation or arbitration. Although negotiations are often successful, personalities and commercial pressures, and the difficulty in taking a flexible or creative approach, can result in an impasse.

Used effectively, Alternative Dispute Resolution (ADR) can help you to break the impasse and resolve disputes at a much earlier stage and at lower cost than may be possible in litigation or arbitration.

What is ADR?

The main types of ADR other than negotiation include:

Mediation

A voluntary, non-binding, private process in which a trained independent person helps the parties to try to reach their own negotiated settlement. The precise role of the mediator varies depending on the nature of the case, the needs of the parties and the style of the individual mediator. Mediation is by far the most commonly used form of ADR and has a high success rate. Mediation is used in many jurisdictions across the world.

Adjudication

A process whereby a neutral third party makes a decision that is binding, pending any subsequent court or arbitral award. There is a statutory adjudication process imposed on construction disputes in England and Wales. Parties are also required to consider adjudication under the Pre-Action Protocol for Professional Negligence.

Expert opinion

Using an expert to answer a series of questions which represent the areas of dispute between the parties. The non-binding process is usually persuasive in influencing the resolution of the dispute without recourse to a hearing.

Expert determination

The appointment of an expert in the subject matter of the dispute to make a decision which the parties agree beforehand to accept as binding. It is usually adopted for specific technical issues. Although generally classified as a form of ADR, this is significantly different from the other methods, most importantly in that the outcome of the process is generally binding on the parties and non-appealable.

Early Neutral Evaluation (ENE)

ENE is a non-binding preliminary assessment of fact, evidence or legal merits by one or more independent professionals, often retired judges.

When is ADR relevant?

The parties can agree in advance that they will or may try one of these methods to resolve any dispute and many commercial contracts will include dispute resolution clauses involving one or more of these methods. This has the advantage of putting ADR automatically 'on the agenda' in the event of a dispute and providing a mechanism for reaching a quick solution.

The Civil Procedure Rules applicable in England and Wales require the parties to consider whether ADR would be more suitable (particularly as it can be cheaper and quicker) than litigation to resolve the dispute, and to endeavour to agree upon a method. A party that unreasonably refuses to participate in ADR may be penalised when the court considers costs following judgment at trial.

In practice ADR can take place any time from pre-issue to appeal but the optimum timing in any dispute will depend on the particular circumstances, including whether the issues in dispute are sufficiently clear.

Why use ADR?

The benefits and drawbacks of trying ADR will vary from process to process and case to case but the following usually apply:

Advantages	Disadvantages
<ul style="list-style-type: none">– may unearth underlying issues and hidden agendas, making creative solutions possible to satisfy the needs of all the parties– the process and the outcome is confidential and without prejudice– speed of settlement – can be arranged within days or weeks– early settlement saves management time and legal costs– avoids adverse publicity associated with a court judgment– parties make the decisions (except in expert determination). They do not have to hand over control to a judge or arbitrator and are more likely to comply with the settlement they reach– flexible and informal– can help to preserve commercial relationships– high success rate usually justifies risk of wasted costs. Although impossible to quantify exactly as the process is private, it is generally accepted that a large majority of ADR attempts result in settlement either immediately or shortly afterwards, as the process often causes the parties to re-evaluate the strength of their case or narrow down the areas of real concern– the right to litigate or arbitrate is not directly affected by ADR. Unless the parties have agreed they will try an ADR process before issuing proceedings, litigation or arbitration can be commenced or continued whilst ADR is pursued and will be available if no settlement is secured	<ul style="list-style-type: none">– settlement is voluntary so there is no guarantee of a settlement being reached– preparation for the ADR process involves extra cost which is not ordinarily recoverable from the other side– requires significant input of senior management time, involvement of key decision makers is generally critical– the process can be exploited by a cynical opponent, in terms of being unwilling to settle at all but seeking information for use in a litigation forum or used to delay ultimate resolution of the dispute– does not itself stop time running for the purpose of limitation of actions (although this can simultaneously be achieved by other means)– unsuitable if you need an injunction or a court decision allocating blame– is not binding on third parties and does not create any precedent if one is required

How Eversheds Sutherland can help

Not all disputes can be resolved by ADR but the high success rate, particularly for mediation, and the additional benefits such as clarification of the issues makes it a highly attractive option.

We work with clients to identify the appropriate commercial solution for every dispute. Hard fought litigation might be the

best approach (or unavoidable), but in many cases we will use ADR to achieve a successful outcome. Our legal advisors are highly experienced and can advise you in preparation for and during mediation and other ADR processes. For further information, please speak to your usual Eversheds Sutherland contact or one of our PSL team detailed below.

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