

# NEGOTIATIONS

## What are the advantages of negotiation?

- As the most flexible and informal of the dispute resolution methods, negotiation can save the costs and time associated with more formal or assisted dispute resolution processes and might not, for instance, need to involve lawyers.
- Since it does not involve any third parties, the parties retain full control of the discussions, and can bring them to an end at any time. Similarly, negotiation can be undertaken at any stage of a dispute, even very close to trial, without giving rise to the same risk of compromising the trial dates as more formal ADR processes.
- It is a private dispute resolution option, meaning that both the dispute itself and any settlement reached can remain confidential. Therefore, reputations and relationships can remain intact.
- If the negotiations do not succeed and

settlement is not achieved, the parties' rights are not prejudiced provided that discussions proceeded on a without prejudice basis.

## What are the disadvantages of negotiation?

- Direct negotiations between the parties to a dispute can become deadlocked, and the absence of a third party or formal process means that the deadlock can be difficult to break.
- Negotiation may be unlikely to succeed where there is a significant difference in the financial position or bargaining power of the parties, as the weaker party may be less willing to agree to settlement in the absence of a third party, or without the protection of a formal process and the confidence which this may bring.
- In complex or multi-party disputes, direct negotiations may have a lower prospect of success without the assistance of a neutral third party or more formal procedures.

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# Mediation

## What are the advantages of mediation?

- It is a non-binding and private form of dispute resolution.
- The parties retain control of the decision on whether or not to settle and on what terms, meaning that mediation allows more creativity and flexibility over settlement options than litigating in court or arbitration.
- Any settlement reached is consensual, unlike the determination reached by a court, and may reduce the risk of damage to ongoing business relationships.
- The use of an experienced third party can enable parties to reach a new perspective on their case, helping them to avoid or break deadlock resulting from direct negotiations.
- Although mediation is typically used once a dispute becomes apparent, it can also be used at the transaction/deal-making stage, in order to finalise the terms of a deal. This can be particularly useful for transactions with multiple parties or parties from different cultural backgrounds, where differences in commercial and negotiation approaches may create obstacles.
- A mediation can be arranged and undertaken quickly and relatively cheaply, in comparison to litigation or other more formal ADR processes such as arbitration or adjudication.
- Even if settlement is not reached at the mediation itself, the mediation process can

trigger the “conditions for settlement”, and engage relevant stakeholders in the dispute, increasing the possibility of settlement being reached in the days or weeks following the process.

## What are the disadvantages of mediation?

- A mediation can be effective at helping parties reach agreement, but the process lacks the tools available to courts (or some formal ADR procedures) to compel the production of evidence or documents and to get to the “truth” of the matter. As a result, settlement may be less likely in cases where a party believes that there is an important point of principle at stake, or where they believe the other party is not acting in good faith.
- There may be cases involving a total breakdown in relationships, to the extent that mediation is unsuitable, notwithstanding the assistance of a neutral third party (for example, where allegations of serious commercial wrongdoing are made).
- Mediation is not appropriate where a party needs the certainty that settlement will be achieved on the day, since this cannot be guaranteed.
- Although the costs involved in mediation are often significantly lower than litigation, this is not always the case in lower-value disputes, and comes without the guarantee of settlement being achieved.

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## Early Neutral Evaluation (ENE)

### What are the advantages of early neutral evaluation?

- ENE can be a quick and cheap process, which identifies and clarifies the central issues in dispute.
- It can provide a reality check for clients and their lawyers and help them to understand the risks in pursuing litigation, for instance, where direct negotiations have become deadlocked. This may be particularly effective where a judge carries out the ENE, for example, under one of the court schemes in the Chancery Division, Commercial Court or TCC.
- It will identify weaknesses in a party's case and gaps in evidence which, if properly addressed, can be used to improve their position before trial.
- It may be particularly suitable for claims which turn on an issue of construction or an issue of law where there are conflicting authorities.
- Even if the ENE does not result in settlement, the process itself may narrow the issues and focus attention on the more important aspects of the case.

### What are the disadvantages of early neutral evaluation?

- One party may become more entrenched in its position if the evaluation is in its favour, hindering settlement.

- Depending on the size and complexity of the issues, the extent of preparation required might render the ENE disproportionately expensive, especially as the result is non-binding and may not lead to settlement.
- ENE may not be suitable where the dispute turns on issues of fact, as the evaluator may not hear all of the witness evidence that would be heard at a trial.
- ENE carries a certain level of risk. Once an evaluation has been made, it may be difficult for a losing party to recover from this, which may, in turn, compromise that party's negotiating position.
- ENE may not be suitable for large, complex disputes. If the issues cannot be dealt with separately, a consideration of the whole dispute may be time-consuming. The evaluation may be too long and with too many caveats to provide any real assistance.
- The losing party may simply ignore a decision it does not agree with, argue that the decision was not properly considered and that a trial judge, with the benefit of all the evidence, will reach a different conclusion. This may, in turn, lead a party to better prepare its case in litigation, making it more difficult for the winning party to capitalise on the successful evaluation.
- In the context of some courts, if a judge conducts the ENE, they are precluded from playing any future role in the conduct of the case unless the parties agree otherwise, meaning that ENE could be used to tactically "conflict out" a judge.

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# Adjudication

## What are the advantages of adjudication?

- As a 28-day procedure, it offers a speedy means of resolving disputes, and the TCC's procedure for the enforcement of adjudicators' decisions is equally rapid.
- Adjudication aims to limit disruption and cash flow problems, as disputes may be referred "at any time", thereby allowing a party to speed up the resolution of an issue that may otherwise have jeopardised or disrupted performance of the contract. The tight timetables often ensure that work can continue while the dispute is resolved.
- Adjudication is usually cheaper than litigation or arbitration, as preparation costs are inevitably curtailed by the tight timetable (and each party generally bears its own costs).
- It promotes fairness, as the relative cost-effectiveness of adjudication balances out the financial inequalities between the various parties to construction operations. It provides a speedy and alternative remedy for sub-contractors who, faced with non-payment or unjustified deductions, would otherwise face insolvency, or have to pursue payment through the courts.
- Adjudication proceedings are private, unless the adjudicator's decision is subsequently the subject of enforcement proceedings. There is some debate as to whether they are also confidential.
- A party can choose who adjudicates its dispute, a luxury not available to court users. It may choose a non-lawyer adjudicator with particular expertise in the subject-matter of the dispute (for example, an architect or a quantity surveyor).
- Unless the terms of the contract specify a particular adjudication procedure, the parties are generally free to choose which adjudication procedure will apply. Adjudication procedure rules allow the parties more flexibility than the Civil Procedure Rules (CPR).

## What are the disadvantages of adjudication?

- The tight timescales of the adjudication procedure may mean that an adjudicator is rushed into making a "rough and ready" decision on a matter of considerable legal or factual complexity. This may lead to injustice, and court proceedings may be necessary to right that injustice, leading to duplication of legal costs.
- Adjudication costs are not usually recoverable in the adjudication or in subsequent litigation.
- Unlike court proceedings, which usually require the parties to comply with certain pre-action steps, in arbitration a referring party may take a responding party by surprise (although this could also be used as a tactical advantage).
- A responding party who pays money to a referring party in accordance with an adjudicator's decision that is subsequently reversed by arbitration or litigation may be unable to recover the money paid if, in the meantime, the referring party has become insolvent or gone into administration.
- The adjudicator has no free-standing power to award interest and can only do so in limited circumstances.
- The short timescales involved can leave the parties with insufficient time to investigate the claims or to produce full submissions. They also risk giving the adjudicator insufficient time to consider the material fully before reaching his decision.
- resent "standing costs" without a clearly defined return, particularly if the dispute board consider few or no disputes. The parties are jointly liable for the direct costs of the board members, plus any additional time spent resolving disputes.
- The same board members hear all disputes between the parties, meaning that issues of confidentiality may arise.
- The determination may be nothing more than a compromise between the parties' positions.

- The board’s enquiry is limited and takes place without the opportunity for a proper, judicial examination of evidence. Determinations therefore run the risk of being factually or contractually incorrect or amounting to the board imposing their own ideas on the parties.
- The process is a “claims review” rather than strict dispute resolution, since the board generally gets involved late in the process, after one party has prepared a detailed claim.
- The referral of a dispute to the courts or arbitration can generally only take place when the dispute has been through the

dispute review board process, which may not be cost-effective. This can be a particular issue where a dissatisfied party is escalating a dispute to the court or arbitration, and related disputes arise, which cannot be considered by the court or arbitrator until they have also been through the dispute review board process.

- The process is perceived as contractor-friendly.
- A dispute review board’s determination cannot be enforced like an arbitration award, instead any failure to comply is usually dealt with through arbitration or litigation.

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# ARBITRATION

## What are the advantages of arbitration?

- Unlike court proceedings, the parties to arbitration are subject to duties of confidentiality, and arbitration proceedings are usually held in private.
- The procedure used in arbitration is flexible; the tribunal must tailor the process to the particular dispute, and the parties also have power to agree procedures that are efficient and speedy.
- The parties have the ability to choose a tribunal with expertise relevant to the particular dispute, with all the advantages this can bring.
- In arbitration, the parties have the ability to refer their disputes to a neutral forum, other than one of the parties' national courts. This can be helpful where parties are wary of referring disputes to the "home" courts of their contracting partner. The parties' ability to select the number and identity of arbitrators can further maximise neutrality.
- The tribunal's award is binding in nature, and options for challenging the award are very limited (although this can also be a disadvantage to the party who considers that a dispute has been wrongly determined).
- An arbitration award is relatively easy to enforce both domestically and abroad, provided that the country in which you want to enforce the award is party to a relevant convention. This is one of the major factors in favour of arbitration as opposed to litigation or other ADR methods.
- An arbitration clause can bring a degree of certainty to the forum for raising disputes, without the need to consider complex issues of jurisdiction. This is particularly useful in the case of cross-border disputes.
- It is usually cheaper and speedier than litigation.

## What are the disadvantages of arbitration?

- The flexibility which is a feature of arbitration procedures can also be a disadvantage, in that the lack of certainty can lead to an increase in time and costs of the arbitration, for example, if there is a dispute about whether a particular document is privileged, or the extent to which parties should disclose electronically stored documents.
- It may not be appropriate for multi-party disputes or class-action litigation.
- Although an arbitral tribunal can determine claims and defences summarily (for example, by disposing of meritless claims), in practice they may be less willing than a court to do so. Arbitration may not therefore be appropriate if the claim involved is simple and involves just one defendant, in which case a party may prefer to issue court proceedings and apply for summary judgment.
- An arbitration award, although persuasive, does not give rise to any binding precedent or *res judicata* vis a vis other parties. Therefore, where a final and generally binding ruling is required, for instance, on the meaning of a standard form contract, litigation in court may be preferable.
- Although often cheaper than litigation, this is not always the case when tribunal costs and administrative fees are taken into account.
- While arbitration can represent a speedier means of dispute resolution than the courts, there can be substantial delays if the process involves busy arbitrators, or as a result of the arbitrators' limited powers of coercion when compared with those of the courts.
- If the arbitrator determines a dispute wrongly, the opportunities for challenging or appealing the award are very limited.

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