

# PROS AND CONS

This is the first in a series of downloads listing the Pros and Cons surrounding ADR.

The use of ADR to settle a dispute can have the following general benefits:

- **Saving time.** Reaching a resolution through the litigation process can take many months or even years. Although there are cases where the parties might not be ready to explore ADR until an advanced stage of litigation, ADR can usually be arranged and undertaken on substantially shorter timescales – even a matter of days, in some cases.
- **Saving costs.** Resolving a dispute through ADR is likely to be cheaper than doing so through the courts, partly as a result of the shorter timescales involved. Even if the parties are not required to explore ADR by a contractual or other obligation, they are highly likely to be asked to explain whether they have considered or undertaken ADR in any future litigation, and may be subject to costs or case management sanctions if they have not done so. Undertaking ADR at an early stage can therefore reduce the prospect of these sanctions being imposed down the line.
- **Flexibility, choice and control.** A major advantage of many forms of ADR is that they can result in more flexible, imaginative and practical outcomes than a trial. ADR can enable parties to reach solutions that are not based on a “win/lose” paradigm and can save time and costs by cutting through the legal or technical rights and wrongs and focusing on the solution. The parties can be free to tailor the process to suit their needs and to reach settlement based on their interests, rather than having solutions imposed on them. With some forms of ADR, this can also extend to greater choice and control over who conducts the process.
- **Confidentiality.** ADR procedures can be confidential in nature, which can give the parties freedom to air sensitive commercial issues and enable full and frank negotiations.
- **Maintaining positive business relationships.** Unlike litigation, which is adversarial in nature, ADR can enable the parties to a dispute to reach settlement by consent, increasing the likelihood of positive future dealings.
- **Likelihood of settlement.** Proponents of ADR point to the likelihood of achieving settlement as a persuasive reason to explore ADR as an alternative to litigation.
- **Benefits without settlement.** Even if the ADR process in question does not result in settlement, it might produce other benefits for the parties, such as narrowing the issues in dispute, testing the strengths and weaknesses of each party’s case and allowing the parties to air their different perspectives. It is common for ADR to re-establish lines of negotiation between parties, increasing the prospect of settlement being reached before trial.

## Drawbacks of ADR

The perceived drawbacks of ADR can include:

- **Delay and increased cost.** Where settlement is not reached and litigation is ultimately pursued, undertaking an ADR process can result in wasted time and cost for the parties. This should be balanced against the potential benefits of ADR which arise even where settlement is not reached, as well as the adverse cost and case management consequences of unreasonably refusing to undertake ADR.
- **Exposing your hand.** Clients can fear that ADR runs the risk of exposing their “hand”, or a strategy that they will later use if the case does not settle. For most forms of ADR however, anything said will be subject to privilege in any future proceedings.
- **Unenforceable outcomes.** Settlement terms agreed through a non-binding ADR process are not enforceable. It is, however, always open to the parties to formalise any agreement reached in a written and signed contract, or sometimes by way of court order. In addition, some forms of ADR can produce binding, or interim-binding outcomes, with limited rights of appeal, providing greater certainty for the parties to a dispute.
- **Unsuitability to some disputes.** A dispute may be wholly unsuited to ADR in limited but important circumstances, for instance, where there is a need for a precedent, or injunctive relief is required. There are also cases in which the costs of ADR will be excessive or disproportionate, compared to the cost of bringing a legal claim. Dismissing the prospect of ADR and proceeding with litigation on the basis that the process has no reasonable prospect of success should be carefully considered; ultimately it is the court who will decide on reasonableness.
- **Risk of delay to trial.** In cases where the possibility of undertaking ADR is raised at an advanced stage of litigation, there may be a risk that diverting the parties’ attention to ADR will get in the way of the court process and could even delay the trial. Courts can be reluctant to suggest ADR where such a risk could arise, although it may be possible to conduct both processes in parallel.
- **Limitation issues.** Unlike legal proceedings, most forms of ADR do not “stop the clock” for the purposes of limitation, and the parties will therefore need to keep limitation under review and consider the possibility of having to issue protective legal proceedings whilst undertaking ADR.
- **Showing weakness.** Parties to a dispute can be concerned that a willingness to engage in ADR will be perceived as a sign of weakness, or a lack of confidence in their case. In the modern context however, and with judicial encouragement of ADR being such a common feature of litigation, this is unlikely to be a true disadvantage.