

What is Alternative Dispute Resolution?



A: INTRODUCTION

In the resolution of a civil dispute anyone is entitled to a fair hearing within a reasonable time, at a reasonable cost, and with appropriate independent input to ensure fairness. There are, however, circumstances in which options other than litigation may be more cost effective, quicker, or flexible, while still resulting in a fair outcome. All those involved in the litigation process need to have a proper understanding of the ADR methods available.

B: DEFINITION

The term 'alternative dispute resolution' has no agreed definition, but clearly the phrase is used to cover the full range of alternatives to litigation potentially available to resolve a civil dispute. Whilst there have always been alternative ways of resolving disputes, the importance of ADR in the context of Litigation is a relatively recent development. ADR is now seen as an essential part of the process by which parties seek to resolve their disputes by way of litigation, as much as an alternative process in itself.

C: PLANNING

The planning of ADR is as important as the planning of the other parts of the litigation process and requires knowledge both of the detail of ADR methods and of factors affecting tactical decisions in ADR.

D: TYPES OF ADR

There are a number of alternative dispute resolution mechanisms available to parties involved in a dispute. There are a number of ADR options available (a) negotiation which is a non-binding ADR process without third party intervention (b) mediation; executive tribunal; conciliation; stakeholder dialogue; early neutral evaluation is non-binding ADR processes with third party intervention and (c) expert determination; adjudication; Dispute Review Board; arbitration and Med-Arb these are binding ADR processes.

(1) NEGOTIATION

Negotiation is the most flexible and informal of the dispute resolution methods. Parties attempt to reach agreement on matters in dispute without the assistance of a third party. Discussions usually proceed on a without prejudice basis. If the negotiations do not succeed to settle the matter, the parties' rights are not prejudiced.

(2) MEDIATION

Mediation is the process whereby parties, with the assistance of neutral third party (the mediator), identify the issues in dispute, explore the options for resolution and attempt to reach agreement. It is a voluntary, 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.

There are different styles of mediation, but the most common in the UK is facilitative mediation, in which, unlike a judge or arbitrator, the mediator will not decide the case on its merits but will work to facilitate agreement between the parties.

(3) EXECUTIVE TRIBUNAL ("MINI-TRIAL")

A representative of each party makes a formal presentation of his best case to a panel comprised of senior executives for the disputing parties and an independent chairperson. The panel then retires to discuss the dispute and the chairperson normally acts as a mediator

between the senior executives. The entire process is private, confidential and without prejudice.

(4) CONCILIATION

Conciliation is similar to mediation except that, usually, the third party will actively assist the parties to settle the dispute. The term is widely used to describe the facilitated settlement discussions that occur in the employment arena. It is also the term used in Europe to describe the function performed by judges when they hold settlement conferences with the parties in an attempt to assist them to reach a settlement of their dispute.

(5) STAKEHOLDER DIALOGUE

This process is primarily encountered in environmental disputes. A series of meetings takes place with stakeholders/interest groups to facilitate decision-making, with the hope of avoiding future disputes.

(6) EARLY NEUTRAL EVALUATION

The parties appoint an independent person to provide a non-binding opinion on the merits which evaluates the facts, evidence and law relating to a particular issue, or the whole case. The rationale is that, once armed with the opinion, the parties will be able to negotiate an outcome, with or without the assistance of a third party.

(7) EXPERT DETERMINATION

Expert determination is an informal process that produces a binding decision. An expert is appointed by the parties to determine an issue, usually of a technical nature. As an expert's decision is an evaluation, this approach is treated as having different legal characteristics to an arbitration award.

(8) ADJUDICATION

Adjudication has been used as a method for dispute resolution in the construction industry for decades, and since the introduction of the *Housing Grants, Construction*

and Regeneration Act 1996, parties to certain construction contracts have had a statutory right to refer disputes to adjudication.

An adjudicator usually provides a decision on disputes as they arise during the course of a contract. Typically, the decision of an adjudicator has interim binding effect; that is, the decision is binding pending agreement of the parties altering its effect or a reference of a dispute to arbitration or litigation for final determination.

(9) DISPUTE REVIEW BOARD (DRB)

A dispute review board is a project specific adjudication process. A panel (usually of three neutrals) is appointed at the start of a project. The panel visits the site of the project, usually three or four times a year, and deals with disputes by providing an interim binding decision (like adjudication). The parties can challenge board decisions via arbitration or litigation. The board can have a preventative effect on disputes.

(10) ARBITRATION

Arbitration is an alternative to litigation as a means of resolving disputes. It is based on the parties' agreement: all parties must agree to submit the dispute in question to arbitration.

Arbitration is a private forum in which an independent arbitrator makes an award, acting in a judicial fashion, to finalise the dispute. The outcome (the award) is final and binding on the parties. The arbitrator focuses on the issues (fact or law) presented by the parties. The matter is referred to arbitration for determination where it is satisfied that the dispute arises under a contractual arbitration agreement (*section 9, Arbitration Act 1996*). The arbitrator cannot meet with each party in private.

(11) MED-ARB (A HYBRID PROCESS)

Med-arb (or arb-med) is when *mediation* is combined with arbitration to resolve a dispute. In med-arb, if mediation fails in whole or on any issue, the parties may agree that the mediator becomes an arbitrator and issues a final and binding award on the outstanding matters.

E: CONCLUSIONS

Owllegal are well versed in all areas of ADR, and can assist clients in both creating the right to utilise ADR, and then using the ADR process to reduce, the time in both money and man hours to reach conclusions to business disputes.