

ALTERNATIVE DISPUTE RESOLUTION

The following is a paper prepared by Kevin McKee, on Alternative Dispute Resolution methods for a talk at the Thames Valley Branch of the Chartered Institute of Arbitrators on Wednesday 8 February 2006.

What do we mean by ADR?

Alternative Dispute Resolution (ADR) is any procedure or combination of procedures entered into voluntarily by the parties to a dispute or disagreement. ADR has also been described as Appropriate Dispute Resolution.

ADR and the Courts

Whilst ADR has always been with us, since the civil procedures rules (CPR) were introduced in 1999 the courts now encourage parties to use ADR instead of litigation where this is appropriate.

The CPR imposes an obligation to further the objective to deal with cases justly by actively managing cases including '*encouraging the parties to use an alternative dispute resolution procedure if the Court considers that to be appropriate*'. This encouragement can be given at any time but the CPR require that specific consideration is given pre-action and through the allocation questionnaire sent to the parties following the pleadings which requires the parties to state whether they would like a stay to consider ADR. The court can also order such a stay on its own initiative.

The courts have made clear their support for ADR. In *Cowl v Plymouth City Council* the Court of Appeal stated that '*today sufficient should be known about ADR to make the failure to adopt it, in particular where public money is involved, indefensible*'.

Mediation is a process often encouraged by the courts. In *Dunnett v Railtrack plc* the Court of Appeal told the parties that they should attempt ADR; which Railtrack refused to consider. Notwithstanding that Railtrack won the appeal, they did not recover their costs from Ms Dunnett. The court stated that if lawyers '*turn down out of hand the chance of ADR when suggested by the court, as happened on this occasion, they may have to face uncomfortable costs consequences*'.

A number of subsequent cases have made it clear that there are situations where a winning party can refuse to mediate and still receive its costs, but this involves a significant risk.

It can be seen that there is now support through the CPR and the courts for ADR and particularly for mediation.

Classification of ADR Processes

On the 23 March 2001 the Lord Chancellor published a formal pledge committing Government departments and agencies to settle disputes by ADR techniques. This

pledge is restated in a document published by the Office of Government Commerce (OGC) entitled *Dispute Resolution Guidance*. This document provides an overview of dispute resolution and considers that dispute resolution techniques can be seen as a spectrum ranging from informal negotiations through increasing formality and more directive intervention from external sources, to a full court hearing with strict rules of procedure. It describes ADR as a commonly used term to include a range of processes which involve the use of an external third party and which can be considered as an alternative to litigation.

It does not, therefore, consider direct negotiation or litigation as forms of ADR. It also accepts that there is a debate over whether arbitration is a form of ADR but states that for the purposes of the Government pledge arbitration is deemed to be a form of ADR.

It categorises dispute resolution techniques as follows:

Negotiation – the most common form of dispute resolution, where the parties themselves attempt to resolve the dispute.

Mediation – a private and structured form of negotiation assisted by a third party that is initially non-binding. If settlement is reached it can become a legally binding contract.

Conciliation – as mediation, but a conciliator can propose a solution.

Neutral evaluation – a private and non-binding technique whereby a third party, usually legally qualified, gives an opinion on the likely outcome at trial as a basis for settlement discussions.

Expert determination – a private process involving an independent expert with inquisitorial powers who gives a binding decision.

Adjudication – an expert is instructed to rule on a technical issue – primarily used in construction disputes as set out in the Housing Grants, Construction and Regeneration Act 1996 where awards are binding on the parties at least on an interim basis – i.e. until a further process is invoked.

Arbitration – a formal, private and binding process where the dispute is resolved by the decision of a nominated third party, the arbitrator or arbitrators.

Litigation – the formal process whereby claims are taken through the civil courts and conducted in public. The judgements are binding on parties subject to rights of appeal.

More information about each of the ADR methods and an indication of the respective advantages are detailed below.

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Mediation (including conciliation)

Mediation is negotiation with the assistance of a neutral third party. It is often referred to as '*structured negotiation*'. It has all the advantages of conventional negotiation as set out above but the involvement of the neutral can make the negotiation more effective. Mediation is now being used extensively for commercial cases, frequently for multi-party and high value disputes. Statistics show that over 75% of commercial mediations result in a settlement either at the time of the mediation or within a short time thereafter.

Neutral evaluation

The aim of neutral evaluation is to test the strength of the legal points in the case. It can be particularly useful where the dispute turns on a point of law. Each side submits an outline of their case with an indication of what evidence they would be able to produce at trial. A third party neutral, usually a retired judge or lawyer, gives a confidential opinion as to what the outcome of a trial would be. This procedure can be carried out entirely on paper, saving the parties the time and expense of an oral hearing. The opinion can then be used as a basis for settlement or for further negotiation.

Expert determination

In expert determination, the parties agree to be bound by the decision of an expert in the field of the dispute. This process can be useful where the dispute is about a technical matter. The expert will commonly be given powers to investigate the background of the dispute himself, rather than just relying on the evidence the parties choose to present.

Adjudication

The term '*adjudication*' is used almost exclusively for dispute resolution under Part II of the Housing Grants, Construction and Regeneration Act 1996 (HGCR). Under the HGCR Act construction contracts must include a provision for adjudication, with the adjudicator giving a decision within 28 days of referral. The Adjudicator's decision is binding until a final determination reached by agreement, arbitration or litigation, or the parties may take the adjudicator's decision as final. For these reasons, adjudication is different in kind from other forms of ADR, which are optional and less tied to a single subject area. Like litigation and arbitration, adjudication is an adversarial process.

Arbitration

Arbitration is governed by statute, principally by the Arbitration Act 1996. It is a process for resolving disputes in which both sides agree to be bound by

the decision of a third party, the arbitrator. If court proceedings are begun by one party they will normally be stayed on the application of the other party relying on the existence of an arbitration clause. The agreement to arbitrate should be in writing. It can take the form of a clause within the original contract, or can be made after a dispute has arisen. It is possible, as long as all parties agree, to amend an arbitration agreement at any stage so that it serves the needs of the parties better. The Arbitration Act gives the widest discretion to the parties to decide between themselves how their dispute is to be resolved, but provides a fallback position if agreement cannot be reached. Like litigation and adjudication, arbitration is an adversarial process. The grounds for appeal are limited.

Principal stages of Dispute Resolution

The OGC Guidance sets out the principal stages of dispute resolution as follows:

Stage 1	Negotiation
Stage 2	Non-binding techniques and processes
Stage 3	Binding techniques and processes.

The broad categorisation of ADR techniques given above into these stages is shown in Diagram 1 and the principal features of these techniques are detailed in Table 1 hereto.

Other forms of ADR (not described in OGC Guidance)

Med-arb and similar combinations

Med-arb is a combination of mediation and arbitration, although the two processes are kept separate. Mediation is attempted first but if the parties themselves can find no agreement, then the process switches to arbitration where a binding decision will be issued. In some cases the same person will act as both mediator and arbitrator. In other cases a different third party is brought in to arbitrate. The idea is to incorporate the advantages of mediation with the finality of arbitration. Critics have pointed out, however, that using the same third party as both mediator and arbitrator compromises the '*without prejudice*' nature of mediation.

There are variations on this composite theme with '*arb-med*' and '*med-rec*'. Arb-med seeks to avoid the disadvantages of med-arb in that the third party acts first as arbitrator and, in this capacity, proceeds to make a written decision based upon the submissions of the parties. The decision is not revealed to the parties however unless the next mediation stage is unsuccessful. Obviously the potential costs of this process are likely to be higher.

With med-rec the mediator encourages the parties to reach their own agreed resolution but in the event that they do not then they can ask the mediator to recommend a resolution which is not binding unless it is accepted by both parties.



Mini-trial

This is a voluntary non-binding process. The parties involved present their cases to a panel comprising senior members of their respective organisation assisted by a neutral facilitator. After hearing presentations from both sides, the panel asks questions to test the strengths of the cases put to them and then the parties attempt to negotiate a settlement assisted by the facilitator.

Stage 1

Stage 2

Stage 3

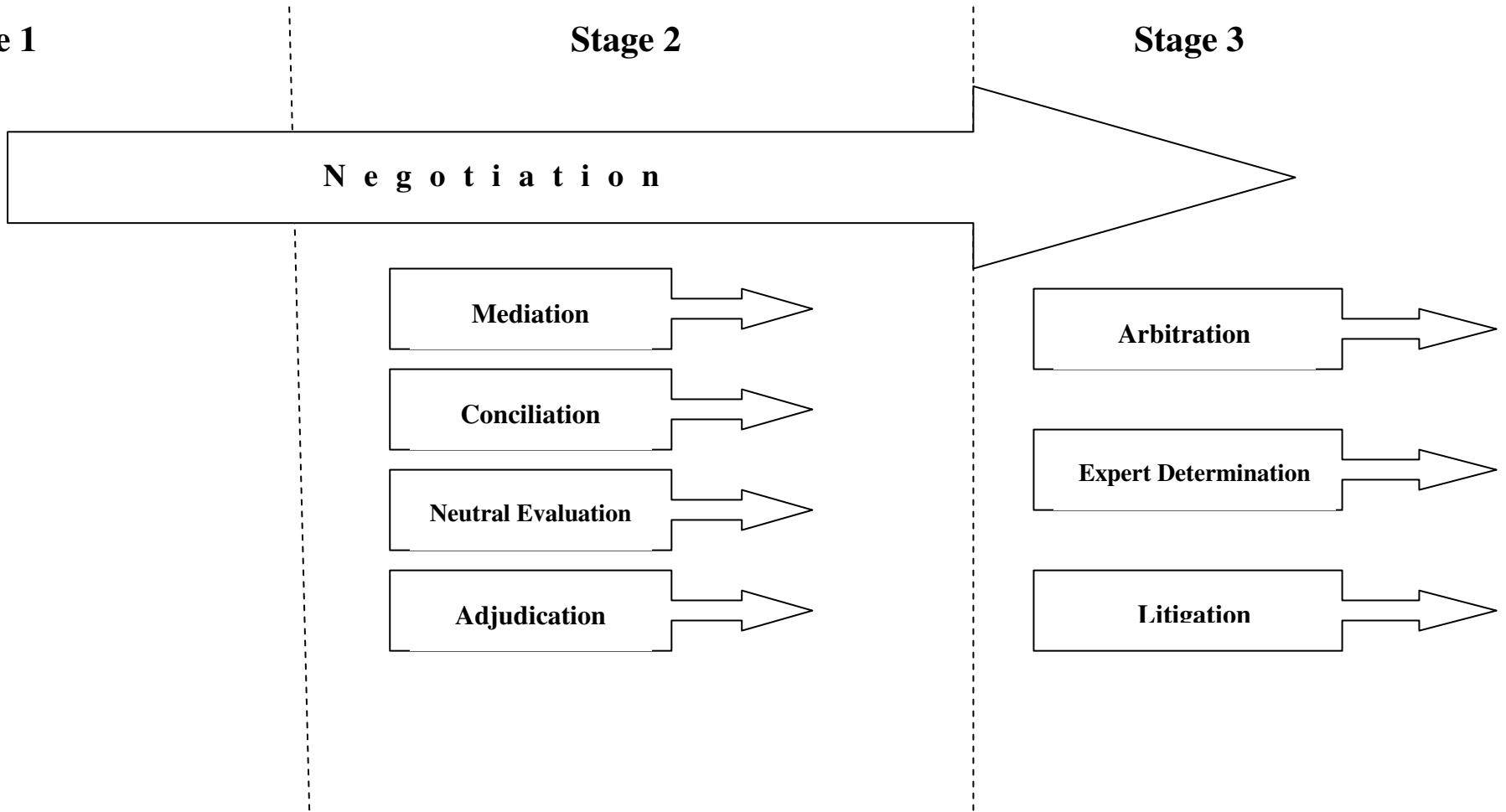


Diagram 1: Principal stages of Dispute Resolution

Method	Common Law/Statute Basis	Frequency of use	Speed	Cost	Confidentiality	Binding	Adversarial	Special Features
Stage 1								
Negotiation	No	Very common ubiquitous	Varies	Low	Yes	No	No	Can continue throughout the dispute
Stage 2								
Mediation	No	Common	Fast	Low	Yes	No (unless agreed)	No	
Conciliation	No	Fairly Common	Fast	Low	Yes	No (unless agreed)	No	Often included with mediation
Neutral evaluation	No	Infrequent	Fast	Low	Yes	No	No	
Adjudication	Yes	Common	Fast	Low	Yes	Yes (until arb/lit)	Yes	Statutory adjudication is construction specific
Stage 3								
Arbitration	Yes	Common	Contingent	Contingent	Yes	Yes	Yes	
Expert Determination	No	Fairly Common	Fast	Moderate	Yes	Yes	Yes	
Litigation	Yes	Common	Slow	High	No	Yes	Yes	

Dispute resolution options

Dispute Resolution Boards

A Dispute Resolution Board (DRB) generally comprises a panel of three experienced, respected and impartial members. DRB's are most often used in the construction and engineering industries and are generally established at the commencement of a project. The members are kept informed of progress and matters pertaining to the project by receipt of reports and periodic visits to the site. When a difference or dispute between the parties cannot be resolved internally then it is referred to the DRB. The Board reviews submissions and convenes a hearing giving the parties an opportunity to state their case.

The Board makes a written, non-binding recommendation for resolving the dispute. The recommendation gives reasons for the conclusions that have been reached. Acceptance by the parties of the recommendations is facilitated by their confidence in the DRB, through their appreciation of the member's technical knowledge and understanding of the project as well as by the opportunity provided for the parties to be heard.

Whilst the DRB's recommendations for resolution are non-binding, the DRB process is most effective if the contract includes a provision for the admissibility of a recommendation given by the DRB in any future proceedings.

Dispute Resolution Hierarchy

In the construction industry the Government is encouraging a move away from traditional (adversarial) contracting towards performance based collaborative arrangements, or partnering. Partnering is a management approach based on aligning objectives, a search for continuous measurable improvements and an effective method of settling disputes. Modern partnering contracts generally provide for a problem-solving or dispute resolution hierarchy, these provide for the problem to be referred to increasingly senior individuals in the respective organisations/partnering team until the issue is resolved. If this process proves unsuccessful the problem is referred to the '*core group*' established to oversee the partnering arrangement who will seek to assist the parties in achieving a resolution. If this fails, then the problem is referred to mediation and/or conciliation. This is all without prejudice to the right of any party to adjudication, arbitration or litigation.

This might all be considered to be a complicated and protracted arrangement, however the underlying principals of promoting communication, negotiating in good faith and internal team dynamics are all in line with the partnering philosophy. The widespread effectiveness of such problem solving hierarchies remains to be seen and experience and uniformity of the process is still being developed.

Grievance/Complaints Procedure

Complaints or grievance procedures are usually the first stage of resolution for many disputes. Some complaints procedures are compulsory in that a complainant is not allowed to proceed to the next stage if they have not first exhausted the complaints procedure. One advantage of an efficient and effective complaints procedure is that

disputes can be handled at a local level and often informally. However, because many complaints procedures do not have in-built time limits they can seriously delay the resolution of the dispute. Also complaints procedures cannot be said to be independent because they are established by the organisation that is the focus of the dispute, or by a professional body representing that organisation or individual.

Ombudsman

Ombudsmen are impartial '*referees*' who adjudicate on complaints about public or private organisations. Over the last 30 years a number of public-sector ombudsmen have been established in the UK and during the 1980's industries such as banking and insurance established ombudsman schemes. Ombudsman services are generally free to the complainants but will not consider a complaint unless the organisation concerned has been given an opportunity to deal with it through its own internal complaints procedure. Their decisions are not (generally) binding on the consumer, so consumers are free to go to court or use another dispute resolution process if they remain dissatisfied.

As regards public sector ombudsmen, in most cases their remit of is limited to reviewing how a decision was made and determining whether there was maladministration in decision-making and a resulting injustice to an individual.

Regulators

Regulators oversee the way complaints are handled by privatised regulated industries. Like ombudsmen schemes they are free to complainants. They have a limited remit in that they look at the way a complaint was dealt with, not the original source of the complaint. The complainant is required to exhaust any complaints procedure before approaching the regulator.

Agreement to use ADR

Parties who use ADR to settle their disputes can select a method and a provider of their own choosing, depending on the source of the dispute. While ADR is not usually compulsory, clauses providing for ADR in contracts are binding so long as they are specific. The OGC in their Dispute Resolution Guidance state that including ADR clauses in contracts '*allows the settlement process to begin at an earlier stage and obviates the frequent problem of persuading the other party to the dispute to engage in an ADR process*'. The Guidance also includes model clauses and requires that an appropriate clause is incorporated into all (government) contracts.

The inclusion of such contractual clauses will obviously increase the role of ADR as will the support of the courts, and this is considered by the writer to be a good thing for the cost effective resolution of disputes. However, compulsion to take part in an ADR process against the wishes of a party may reduce the effectiveness of the process where this relies on the parties reaching a consensual outcome.

Conclusion

The government clearly supports the use of ADR through its pledge to provide appropriate clauses in their standard procurement contracts and through rules governing court procedures.

The advantages of ADR procedures are that (to a greater of lesser extent) they:

- Are flexible to suit the requirements of the dispute
- Allow the parties to control the procedure
- Provide the parties with an opportunity to be heard
- Provide the parties with an opportunity to understand their respective positions
- Provide a forum for 'decision makers' to get involved
- Remain confidential to the extent agreed by the parties
- Provide the support of a neutral third party to facilitate discussions and/or resolve the dispute
- Allows consideration of outcomes other than strict contractual entitlements
- Help to maintain working relationships
- Reduce costs

ADR techniques must, however, be seen as options/contractual requirements within the range of conflict management and dispute resolution techniques available. They will not be appropriate or successful in all cases, however with the success rate for mediation claimed to be between 70-80% (disputes settling either on the day or shortly afterwards) there is a powerful case for approaching ADR positively.

From the writers own experience the quick and effective resolution of long-standing disputes through the introduction of an ADR process has had considerable benefit to the parties in terms of savings in costs, maintenance of working relationships and freeing up management time to concentrate on future developments rather than past problems.

Acknowledgements:

This paper provides a review of ADR techniques and is based on the writers own knowledge and experience together with a review of literature on the subject. The following articles have been reviewed and may be of interest to anyone wishing to find out more on ADR. Also the Chartered Institute of Arbitrators provide training courses for the accreditation of mediators.

Introduction to Civil and Commercial Mediation	Peter Fenn
Dispute Resolution Guidance	Office of Government Commerce
Alternative Dispute Resolution	Infolaw
Alternative Dispute Resolution (ADR)	Dept. for Constitutional Affairs
Dispute Resolution Board Procedure	RICS
Dispute Resolution Board Concept	The DRB Foundation
Construction Disputes after Latham and Egan	CEDR

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