

Briefing Note: Alternative Dispute Resolution – the main options

An Introduction to the Briefing Note

Alternative Dispute Resolution ('ADR') is the term given to established methods of resolving disputes other than formal court proceedings. The current court rules require parties to consider and engage in ADR (whether in place of or at the same time as formal court proceedings) where possible and in any event before court proceedings are issued. There may be costs sanctions imposed on parties who do not explore ADR prior to commencing proceedings. This briefing note should not be relied upon as legal advice and you should contact us for advice on your specific circumstances.

Negotiation

Negotiation is the most flexible and informal of the dispute resolution methods. It is both voluntary and non-binding. Parties attempt to reach agreement on the matters in dispute between themselves, without the assistance of an independent third party. Each negotiator is identified with their respective 'side' and will look at the case from their side's point of view. Negotiation should be considered and commenced as soon as possible and a genuine attempt made to limit the areas of dispute between the parties to prevent costs escalating unnecessarily. Negotiation should also be considered even when Court proceedings have been issued and are ongoing. Discussions between the parties usually proceed on a 'without prejudice' basis and the parties will attempt to find an outcome that they both agree to. If the negotiations do not succeed in settling the matter, the parties' rights are not prejudiced. Negotiation is a private and confidential dispute resolution option, and can therefore preserve the parties' reputations and relationships.

Mediation

Mediation is a confidential process of negotiation, facilitated by an independent and impartial third person, a mediator. Mediation can be used in almost any kind of case and can be available at any time throughout the process of a dispute. The parties have control over the choice of mediator (who will usually come from a business or legal background) and the mediator will not make a decision but will work to facilitate agreement between the parties. Generally, the parties share the costs of the mediator and the mediation; however this is a matter for agreement between the parties.

It is a condition of mediation that parties will treat all discussions and documents as confidential and 'without prejudice'. Usually what is said or written cannot be used in later proceedings if the mediation does not result in settlement.

Mediation provides a private forum in which the parties can gain a better understanding of each other's positions and in which they can work together to explore options for resolution. It can address all parties' interests and preserve a working relationship between them or make the termination of a relationship more amicable.

During the mediation there will usually be an initial joint meeting attended by all parties and their representatives, at which the mediator will provide an overview of the process, his role and the likely procedure. Each party will have an opportunity to express its view of the problem. The mediator will meet privately with each party to discuss the problem confidentially. This allows each party to have a realistic look at their cases in private and to consider various alternatives, without fear that any weaknesses discussed will be communicated to other parties.

The parties have control over the outcome of the mediation. The process relies on the ability of the parties to reach a voluntary agreement. A party may withdraw from mediation at any time.

Briefing Note

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Summary:

An introduction to other non-court forms of dispute resolution.

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There is a high rate of success in mediation. Parties can gain a thorough understanding of the other parties' points of view and have an opportunity to be heard and understood themselves during the process. Settlements achieved in mediation can also address personal, commercial and other important interests, which might not be possible if a court determined the outcome in the case. Mediation can also reduce the time, cost and stress that would otherwise be involved in achieving resolution.

Early Neutral Evaluation

Early neutral evaluation is a non-binding process which provides an independent assessment of the merits of a case. It involves the parties instructing a chosen neutral evaluator to make a preliminary assessment of the facts at an early stage in a dispute. Normally the parties submit written case summaries and supporting documents; however it is for the parties to agree whether the evaluation will proceed on the basis of written submissions and documentary evidence only, or on the basis of a hearing. If a hearing will take place, each party will have an opportunity to present its evidence and make submissions on the questions in issue. A party can be represented or assisted at any hearing.

The evaluator does not resolve the dispute but focuses on the key factual and legal issues raised in the case and advises on how it could or should be resolved. The evaluator writes an evaluation in private that usually includes an assessment of the strengths and weaknesses of each case, an estimate of the likely outcome and any suggestions for resolution.

Early neutral evaluation is most useful in cases where: the parties are far apart on their view of the law or the value of the case; the case involves technical or specialist subject matter; liability is not an issue – the sum in dispute is; an expert opinion has previously been sought; and/or the parties require the matter to be kept private and confidential.

The neutral party will usually charge an hourly rate, together with disbursements. Typically the parties agree that the fees and expenses will be shared.

Early neutral evaluation often helps the parties to negotiate a settlement or move to another dispute resolution method while avoiding the expense of litigation.

Expert Determination

Expert determination is a binding process that can offer an effective means of settling a technical issue or dispute between contracting parties. Although it is possible to arrange an expert determination on an ad hoc basis, it is most usually provided for in commercial agreements. Expert determination may be sought broadly in two categories of dispute: where a valuation is required; and where an expert opinion is needed on a technical matter.

The parties select an expert to decide the case for them and agree to accept his decision. The expert should possess expertise and technical knowledge relevant to the dispute. The procedure adopted depends on the terms of the contract in which the parties agree to appoint an expert, as supplemented by the expert's terms of reference. The outline of the expert's powers and duties should have been agreed and the parties and the expert then proceed to agree a precise definition of the issue the expert is to decide and the procedure within that framework. Consideration needs to be given to: the matters in dispute; the scope of the expert's function; the nature of any submissions to be made; whether or not there should be an oral hearing; the timetable involved; the burden of proof; the means by which the expert will deliver his decision; and the power of the expert to appoint a legal adviser to assist with any issues of construction.

Expert determinations are carried out in private and the decision is binding on the parties. There are only very limited grounds for setting aside an expert determination. If one party fails to accept the decision, the other party can sue for breach of contract.

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Arbitration

Arbitration involves an independent party or parties, the arbitrator or arbitral tribunal, acting in a judicial fashion to make an award and finalise a dispute. Like a court judgment, the decision of an arbitrator is final and binding. Decisions can only be set aside in exceptional circumstances. Decisions are widely enforceable internationally.

The rights and obligations of the parties to arbitrate their dispute arise from an arbitration agreement. The agreement to arbitrate can be a free-standing agreement or may be a clause within a wider agreement between the parties. The parties are usually free to choose where the arbitration is to take place and the rules that will govern the procedure of the arbitration, although agreements frequently incorporate institutional arbitration rules. Arbitration proceedings are usually confidential.

The arbitrator derives his power to determine disputes from the arbitration agreement and has no power to determine disputes that fall outside the scope of the agreement. The arbitrator will focus on the factual and legal issues presented by the parties.

Arbitrators are subjects to various important duties including the duty to act fairly and impartially between the parties, the duty to adopt sensible procedures and the duty to avoid unnecessary delay and expense.

Following the appointment of the arbitrator or tribunal, there will often be a preliminary meeting, at which the tribunal will set down the procedural timetable for all or part of the arbitration after hearing the parties' submissions. The parties should seek to agree this procedure in advance. There will then be a hearing of the dispute in which each party will present their case, usually by way of his solicitor. The arbitrator cannot meet with each party in private. Unless there is an agreement otherwise, the hearing may be attended only by the arbitrator or tribunal, the parties and their representatives.

After making its decision, the arbitrator may make either one award dealing with all of the issues in dispute or a series of awards, each dealing with a separate issue in dispute. Where the parties have reached a settlement and agreed terms, these terms may be incorporated into an award to facilitate enforcement. The arbitrator also has the power, if the parties consent, to make a provisional order. Any award is equivalent to a judgment in litigation and can be enforced in the same way.

If you would like to know more about this topic or our other legal services, please contact Jeremy Laws on 01323 435900 or by email jpl@gabyhardwicke.co.uk:

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