

Herbert Smith

Pros and cons of common ADR processes

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We set out in this document a short discussion of the advantages and disadvantages of some of the most common dispute resolution processes under the banner of Alternative Dispute Resolution ("ADR"). ADR is not susceptible of a precise definition and, in the UK, encompasses any dispute resolution process outside traditional litigation and arbitration. It should be noted that in the US arbitration is typically considered to be an ADR process. It is not discussed in this note.

Mediation

Mediation is overwhelmingly the most popular and most frequently used ADR process across jurisdictions. Mediation is a structured settlement negotiation facilitated by a neutral third party, the mediator, who has no decision-making power. The style of mediators can vary along a continuum from pure facilitators who assist the parties in their negotiations to evaluators who express views on merits and outcomes to encourage settlement.

The principal advantages of mediation are:

- The introduction of the third party mediator, who typically spends at least a part of the mediation process engaged in shuttle diplomacy between the parties located in separate rooms, enables parties to appraise their cases with the mediator in confidence. Usually progress can be made where direct negotiation has become deadlocked.
- The focus of the process is upon the interests of the parties rather than on their legal rights alone. Thus factors such as business relationships, external commercial pressures, reputational issues or personal emotions can be taken into account to the extent necessary.

- The process is conciliatory by its nature and the outcome consensual (if successful), in contrast to the contentious approach in litigation/arbitration and the imposition of a solution by a court or arbitral tribunal.
- Whilst most mediations follow a broadly standard template, the procedure is entirely flexible to suit the parties and the dispute. The solutions and range of available outcome are similarly flexible, with scope for non-monetary remedies including the provisions of services, payments in kind and, if necessary, apologies. This may be contrasted with the fixed procedure of litigation/arbitration proceedings and limited range of outcomes: money damages, specific performance and an injunction.
- Mediation is quick, consequently cheap and entirely confidential. Only the largest most complex multi-party disputes will require a mediation of more than 1-2 days. The costs savings are self-evident. The process is conducted under the "without prejudice" head of privilege and the substantive discussion in mediation cannot be referred to in litigation or arbitration proceedings.
- Even when mediations are "unsuccessful" in that a settlement is not achieved on the day(s) of the mediation itself, the process will always provide an opportunity for the parties to focus on the issues in dispute, consider the true economic costs and risks of the dispute to them (legal costs, management time, intangible costs such as brand or reputational issues) and will provide an opportunity to re-establish lines of communication which are often broken when the dispute escalates. Sophisticated ADR users increasingly recognise that mediation has a valuable role to play in establishing the conditions for settlement by ensuring that appropriate decision makers are engaged, focused on the relevant issues and apprised of the costs and risks of possible outcomes if settlement is not achieved.

There are very few true disadvantages of the mediation process:

- Mediation will not be suitable where the parties to the dispute require a court judgment (for example where provisions in standard terms and conditions require determination in light of an ongoing trading relationship) or a remedy that a mediation process cannot provide, such as injunction.

- It has been suggested that fraud cases may be less suitable for mediation but this is probably only the case where there has been the most serious breakdown in trust between the parties. Many fraud cases are mediated with great success.

Mediation Variants – MedArb and ArbMed

There are two hybrid processes which are closely linked to mediation: Mediation-Arbitration (MedArb) and Arbitration-Mediation (ArbMed). Neither is widely used but each may occasionally be appropriate for use in a particular dispute.

MedArb requires the parties to undertake a mediation which, if it is not successful, will see the mediator change roles and become an arbitrator of the same dispute. The principal disadvantage with MedArb is that parties are typically reluctant to disclose to the mediator their true assessment of the dispute (particularly the risks) given the possibility that the mediator may in due course sitting as a sole arbitrator handing down a binding award.

ArbMed requires the parties to undertake an arbitration (usually very short) following which the parties then undertake a mediation to attempt to resolve the dispute by agreement without the award being delivered. If a settlement is achieved – and the risk of losing the arbitration is intended to encourage the parties to adopt a reasonable approach to settlement – then the award is never handed down. If no agreement is reached at the mediation within an agreed time limit the award is handed down and is binding upon the parties. Given the costs of undertaking the arbitration first and then mediating, this process is more suitable for disputes which turn on relatively short questions that will not require extensive evidence.

Early Neutral Evaluation ("ENE")

ENE is a non-binding ADR process whereby a neutral party is retained to provide a non-binding evaluation on the merits of a dispute. As the name suggests this is usually most effective if attempted early in the life of the process before significant costs have been incurred. There are no procedural requirements for ENE beyond those agreed between the parties.

The advantages of ENE are that where parties are engaged in direct discussions, the opinion of a mutually respected neutral may assist the negotiations. An opinion from a senior solicitor, QC or retired judge on a disputed point of contractual construction can assist the parties with a realistic

appraisal of their cases and break deadlocked positional bargaining.

The principal disadvantages of ENE are that the process is non-binding and parties can (and do) simply ignore an opinion with which they disagree. It can also polarise positions in negotiation if one party perceives it is "right" in light of the opinion.

Expert Determination

Expert determination is a flexible dispute resolution procedure that is a matter of contract. The appointment of the expert, his terms of reference and powers will be governed by agreement between the disputing parties. Agreements for expert determination typically provide for the decision of the expert to be final and binding with no appeal. The decision-maker is appointed as expert and not arbitrator and will not therefore be obliged to observe the rules of procedural fairness to which an arbitrator would be subject.

Expert determination can be highly effective where the parties anticipate a specific type of technical dispute arising in which the expertise of the decision-maker will be critical. Examples include completion accounts disputes, valuation disputes and technical engineering disputes. The process is generally materially quicker than litigation or arbitration, is confidential and the procedure will be determined by the expert in the absence of agreement between the parties.

The disadvantages to expert determination are primarily the risk of an unfavourable outcome against which there will usually be no appeal. Expert determination is very occasionally undertaken on a non-binding basis. This carries with it a real risk of polarising the positions of the disputing parties and wasting time and costs if either or both parties choose not to be bound by the determination.

Adjudication

Adjudication is a dispute resolution method introduced by The Housing Grants, Construction and Regeneration Act 1996, which is now a near standard method of resolving disputes in the construction industry in the UK. The process consists of an abbreviated court-like procedure under the direction of the Adjudicator, in which disclosure and/or rules of evidence may be applied flexibly or dispensed with altogether. The process is quick and can often be undertaken in just a few weeks. The decision of the Adjudicator is binding pending a final determination of the dispute by way of litigation or arbitration in which the court or

an arbitral tribunal may affirm the Adjudicator's decision. In practice few adjudicated disputes are subsequently referred to litigation or arbitration. The primary advantage is certainty and minimising disruption to the parties to a long term construction or project dispute.

There is in principle no reason why adjudication could not be applied by agreement in a context other than construction. In practice whilst the "quick and dirty" justice of adjudication has become accepted within the construction industry, few other industry sectors have sought to adopt the process.

Baseball Arbitration

Baseball arbitration is a binding ADR process developed in the US as a means of resolving disputes over professional baseball players' salaries. The primary feature of baseball arbitration is a requirement that the parties exchange final figures (in a monetary dispute) at an early stage, usually before an arbitral tribunal is constituted. Those figures are then binding on the parties throughout the arbitral process and the Tribunal may or may not be told about them (in the latter case the process is described as "night" baseball arbitration). The figure of the party which is closest to the award made by the Tribunal becomes the binding figure that is payable. Less frequently baseball arbitrations involve non-monetary remedies with the Tribunal assessing which party's final offer is the preferred ultimate award.

The main advantages are that the requirement for each party to set out a final figure at an early stage discourages unreasonable or inflated offers and negotiation can often take place to resolve the matter whilst the arbitration is on foot. The process does not allow an arbitral tribunal to "split the baby" on difficult cases.

The primary disadvantages are the lack of a level playing field, since the parties are often required to settle upon their final figure in advance of disclosure/discovery or witness/expert evidence. Thus a party that names its figure on the basis of a critical assumption may only discover its error when evidence emerges after the figure has been set. In consequence baseball arbitration is most likely to be suitable in simple quantum disputes where there is limited information to be exchanged between the parties.

Contacts

If you would like to discuss ADR processes generally or which process(es) might be appropriate for your dispute, please contact:



Sonya Leydecker

Partner, Head of Litigation and Arbitration Division

sonya.leydecker@herbertsmith.com

T: +44 20 7466 2337

M: +44 7768 525973



Alexander Oddy

Partner, Head of ADR

alexander.oddy@herbertsmith.com

T: +44 20 7466 2407

M: +44 7767 453490

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