

ALTERNATIVE DISPUTE RESOLUTION PROCEDURES

Overview

The Civil Procedure Rules encourage so called “Alternative Dispute Resolution”. Alternative Dispute Resolution (ADR) refers to a number of alternative procedures to going to Court. The Civil Procedure Rules actively encourage ADR, if the Court considers this is appropriate. The settlement of disputes by ADR can help to save costs, preserve commercial relationships and reputations and can provide a wider range of solutions than offered by litigation.

ADR is a means of resolving disputes by using a third party to help reach a solution. There are various types of ADR such as mediation, expert appraisal or expert determination. ADR is voluntary. Either party can withdraw at anytime. In contract neither party can withdraw from litigation without paying the other party's costs. If the parties are unable to negotiate a settlement, the Court will usually impose its solution.

Legal advisers must ensure that ADR options are discussed and realistically considered from the outset. Judges can encourage the use of ADR by applying pressure at the case management conference and other hearings.

ADR is akin to negotiation but with an independent third party who can endeavour to see both sides point of view. The independent third party is the essential feature of ADR. He cannot impose a solution. Because he is independent and cannot do anything to harm them, the notion is that he is more likely to be trusted and the parties are more likely to be open.

ADR is significantly cheaper than litigation because it is quicker. ADR is private and non-confrontational. Skilled neutral third parties can help the parties to resolve their dispute in a relatively short time.

The parties pay the independent third party a fee for services. Parties will usually instruct lawyers but if ADR works it would be a significant reduction in time the lawyers spend in preparing and presenting the case. Time spent attending Court is reduced.

Although a party cannot be made to accept ADR against his wishes, the Court can take into account the failure to undertake ADR. If parties reach an agreement this can be embodied in a contract and this itself would be enforceable by Court Order.

Types of ADR

There are various types of ADR. Parties to a dispute are entirely free to agree the methods and procedures most appropriate to their dispute. The following are number of ADR methods.

A “mediator” will usually take written statements from both sides. He will discuss the case and tell them what he thinks about it on a “without prejudice” basis. The mediator will not disclose confidential information to the other party. The discussions help the mediator identify real areas of disagreement and the points that are most important. He then tries to move the parties towards a constructive solution.

The parties and the mediator will typically be in the same building. This enables matters to be dealt with quickly and if necessary parties can meet face to face to iron out difficulties. It is possible however have mediation without any meeting conducted by telephone or correspondence.

“Med/Arb” is a form of alternative dispute resolution where the parties agree to submit to mediation but if it does not work agree to refer to arbitration. They may use the mediator who has been acting as mediator, as the arbitrator. This will save costs as the arbitrator already knows the facts of the case. There is a risk he may become privy to confidential information so the agreement will usually give either party the right to object to the mediator becoming arbitrator if necessary.

A further form of ADR is a structured settlement procedure. Here the parties appoint a neutral person who sits as chairman of a tribunal consisting of himself and

representatives of both parties. The representatives will not be connected with the dispute but will have authority to reach compromise if they see fit.

In expert “appraisal” the parties refer the dispute to an independent expert in the field concerned. His opinion is not binding but he can influence subsequent negotiations.

Another method is “expert determination” the parties select an expert to decide the matter, they agree to accept his decision. This decision cannot be enforced as an arbitration award, but would be binding as a contract.

Commercial ADR

Commercial agreements may provide for ADR methods. Sometimes the agreement might specifically require ADR before any court or arbitration dispute commences. There are legal issues as to whether and to what extent these can be enforced.

A well drafted agreement should include clauses which are helpful to the process. There could for example, be a clause requiring full disclosure of information. Confidentiality provisions are usually provided. The method for appointment of a mediator should be stipulated. Usually an independent third party will chose in the absence of agreement as to appointment.

Public Sector Schemes

There are a number of Ombudsman schemes in the public and private sectors. There are schemes covering diverse matters such as financial services, pension schemes, telecommunications, local government housing, estate agents, legal services and the like.

This Guide is intended as an overview and broad outline of the matters covered in it. Its purpose is to inform and raise awareness. We are happy to offer specific legal advice on particular circumstances.

This Guide should not be relied on as a substitute for comprehensive legal advice with reference to the particular circumstances.

While we have taken due care in the preparation of this publication, we do not accept legal liability as a result of any reliance placed on anything in this Guide. The reader should rely only on specific legal or taxation advice.

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