Alternative Dispute Resolution

Alternative Dispute Resolution ("ADR") is any way of resolving a legal dispute between two or more parties other than by litigation. The benefits of using ADR are many and include flexibility, a high success rate, the fact that ADR is normally both cheaper and quicker than litigation and, for businesses, the maintenance of important business relationships that might otherwise be damaged by litigation.

ADR is voluntary in the sense that parties to a dispute cannot be forced to use ADR. However the Civil Procedure Rules require parties to consider and, where possible, use ADR before having recourse to legal proceedings. An unreasonable refusal to use ADR will probably result in the court penalising that party in costs. ADR can be used before or after litigation has started.

The obligation to consider using ADR is reflected in the following wording reproduced from typical court directions order:

"At all stages the parties must consider settling this litigation by any means of Alternative Dispute Resolution (including Mediation); any party not engaging in any such means proposed by another must serve a witness statement giving reasons within 21 days of that proposal; such witness statement must not be shown to the trial judge until questions of costs arise."

There are a number of different types of ADR. The main ones are informal negotiation (by telephone or correspondence); round table meeting; mediation; conciliation; expert determination; adjudication; arbitration (although some lawyers do not regard this as ADR); executive tribunal (mini-trial); stakeholder dialogue; early neutral evaluation; dispute review board; and med-arb (a hybrid process).

Mediation is the most common form of ADR and there has been a considerable increase in its use in recent years. However, it is still probably under-utilised in the sense that many more disputes could be settled through mediation. Mediation involves the appointment of a neutral third party – the mediator – whose role is to encourage the parties to find their own solution to the dispute. Unless the parties specifically ask the mediator to do so, the mediator will not impose his or her own solution upon the parties – the solution must come from the parties themselves. In the case of business disputes, the mediator will encourage the parties to consider their commercial interests rather than their strict legal rights.

Mediation has the great advantage over litigation that it can result in outcomes that cannot be achieved by litigation. For example, one party may issue the other with a formal written apology, or the parties might agree a new means of cooperating with one another. These are outcomes that could not be achieved through litigation as the court simply does not have the power to make orders in these terms.

In business disputes, mediation also has the substantial advantage of confidentiality. Parties to litigation often run the risk that commercially sensitive or private information will be revealed, either to the opponent or to the public. For example, anyone may obtain from the court a copy of the statements of case (previously called pleadings). Everything said in the course of mediation remains confidential.

Some 70-80% of all cases going to mediation are resolved. Some mediators claim success rates of over 90%. Even if the dispute is not resolved through mediation, often the process will have enabled the parties to narrow the issues in dispute, and the parties can then litigate the outstanding issues.

On the majority of claims under £10,000 HM Courts & Tribunals Service offers free mediation through the Small Claims Mediation Service.

If mediation is successful then the parties normally sign a legally binding agreement.

Most forms of ADR have disadvantages. In the case of mediation, for example, there is the risk that a cynical opponent might exploit the process either simply to comply with the Civil Procedure Rules, or to try to probe the other side's strengths and weaknesses. If mediation is wholly unsuccessful, and the parties then go on to litigate the dispute, overall legal costs may end up being even higher, because of course the costs of the mediation will have been incurred as well as the costs of the litigation. Sometimes a party may feel that it has such a strong case that it will only end up compromising unnecessarily in the ADR process.

If proceedings have not been issued, it is important to remember that limitation deadlines still apply when ADR is being used. Therefore if a potential claimant is about to run out of time to issue proceedings then that party should not use ADR without first issuing proceedings.

Although ADR is not suitable in all cases, the message coming from the courts could not be clearer: any unreasonable refusal to engage in ADR is very likely to result in the refusing party being penalised in costs.

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