

# Alternative Dispute Resolution - What Is It?

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It is a common misconception that the majority of legal disputes are determined at Court before a judge. While you may have your heart set on “having your day in Court”, most disputes are settled outside of the Court process via various methods of alternative dispute resolution (“ADR”).

## **What is ADR?**

This is an all-encompassing term which refers to the various methods in which parties to a dispute can settle their matter without having it determined at Court before a judge.

ADR can be attempted at any time during the dispute and even after formal Court proceedings have started.

While there are numerous forms of ADR, three of the most commonly utilised methods are:

## **Solicitor negotiation**

This involves the disputing parties respective solicitors negotiating on their behalf to reach a settlement. Offers will go back and forth with the hope that a settlement acceptable to both parties can be agreed.

## **Mediation**

The disputing parties jointly instruct an independent third party (the mediator) to help facilitate a negotiated settlement. The mediator will often be a qualified legal professional with knowledge of the relevant area of law. They can therefore steer the parties towards a settlement by assessing the strengths and weaknesses of each side’s case and suggesting solutions that are acceptable to each of them.

## **Arbitration**

This is more akin to the Court process and involves a third party hearing both sides of the case before making a decision which is binding on both parties. Unlike Court proceedings, arbitration takes place in private and therefore has the advantage of confidentiality.

Furthermore, many commercial contracts contain an “arbitration clause” which places a legally binding obligation on the parties to settle their dispute via arbitration rather than through the Court process.

## **Do I have to take part in ADR?**

While you may think the chances of your dispute settling outside of the formal Court process are remote, it is important to note that the Court actively encourages parties to engage in ADR and stress that Court proceedings should be a matter of last resort.

Although there is no general legal requirement to participate in ADR, Pre-Action Conduct Protocols require the parties to at least consider it. Failure to respond to a reasonable proposal to engage in ADR can therefore result in adverse costs consequences meaning, if successful at trial, the judge may order a significant reduction in the amount of legal fees that you can recover.

In light of this, it is important to remain open to the idea of engaging in ADR even when you are doubtful of the prospects that it will succeed.

## **Advantages and disadvantages of ADR**

### **Advantages:**

- Cost – ADR tends to be cheaper than Court proceedings as the dispute is often concluded within a much shorter time. Indirect costs such as time spent at Court and meeting with your solicitor and/or barrister are also reduced.
- Confidentiality – all discussions and offers made during the ADR process are “without prejudice”. This means that they cannot be referred to in later Court proceedings without the consent of all parties. Therefore, frank discussions can take place without fear of later ramifications.
- Flexibility – there are many different forms of ADR which means the parties can select the most suitable one for them. Furthermore, neither party is bound to reach a settlement as ADR is a voluntary process.

### **Disadvantages:**

- Uncertainty of success – as either party is usually free to leave at any time, reaching a settlement is not always guaranteed. Therefore, unsuccessful attempts to engage in ADR can sometimes further prolong the dispute.
- No formal disclosure process – unlike Court proceedings, there is no obligation on the parties to disclose their respective evidence. Therefore, parties often participate in ADR without knowing every detail of the case.

### **What form of ADR is most suitable for my case?**

As with all disputes, each case will turn on its own facts and therefore a detailed analysis of the relevant facts is required before comprehensive advice can be given.

If you require any further advice, please contact a member of our Litigation Department on 01384 371622.

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