



COMMON ADR PROCESSES - AN OVERVIEW

This is the first in our series of **ADR practical guides**, designed to provide clients with essential practical guidance on various processes falling under the banner of 'alternative dispute resolution' (ADR), with a particular focus on mediation.

This guide provides a snapshot of the most commonly used ADR processes, highlighting the main advantages and disadvantages of each¹.

COMMON ADR PROCESSES	
1. Mediation	structured settlement discussions facilitated by a neutral third party with no decision-making power
2. MedArb / ArbMed	hybrid processes combining mediation with subsequent arbitration (or vice versa)
3. Early neutral evaluation	neutral third party provides a non-binding evaluation of the dispute
4. Expert determination	neutral third party with expertise in the subject matter makes a (usually) final binding decision
5. Adjudication	neutral third party makes a decision that is binding pending any subsequent court or arbitral award
6. Baseball arbitration	modified arbitration where the arbitrator's decision determines which of the parties' previously submitted final offers becomes the amount payable

1. MEDIATION

Mediation is overwhelmingly the most popular and most frequently used ADR process across jurisdictions.

It 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, often through 'shuttle diplomacy') to 'evaluators' (who encourage settlement by expressing views on the merits and likely outcomes).

Principal advantages:

- 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 parties' overall interests rather than on their legal rights alone. Important 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, or by the third party in other types of ADR processes. This can improve the chances of preserving business relationships.

FOOTNOTE

¹ Although ADR is not susceptible of a precise definition, in the UK it generally encompasses any structured dispute resolution process outside traditional litigation and arbitration. In the US, arbitration is more likely to be included within references to 'ADR', but is not addressed in this guide.

COMMON ADR PROCESSES - AN OVERVIEW

- Whilst many mediations follow a broadly standard template, the procedure is entirely flexible and can be adopted to suit the parties and the dispute. The solutions and range of available outcomes are similarly flexible, with scope for non-monetary remedies such as the provision of services, payments in kind and apologies. This may be contrasted with the fixed procedure of litigation/arbitration proceedings and their limited range of outcomes (money damages, specific performance and injunctions).
- Mediation is quick and consequently cheap - only the largest, most complex multi-party disputes require a mediation of more than 1-2 days.
- The process is confidential and conducted under the 'without prejudice' head of privilege, so that usually neither the substantive discussion at the mediation nor the documents generated in connection with it can be subsequently referred to in any litigation or arbitration proceedings.
- Mediation has a high degree of success in resolving disputes, either on the day of the mediation or shortly afterwards as a result of progress the parties make at the mediation.
- Even when mediations are 'unsuccessful', in that a settlement is not achieved on the day(s) of the mediation, the process will always provide an opportunity for the parties to focus on the issues in dispute and consider the true economic costs and risks to them (in legal costs, management time and intangible costs such as brand or reputational issues). It can also provide an opportunity to re-establish lines of communication which are often broken when the dispute escalates. 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, although it may not be suitable in some cases, such as:

- where the parties to the dispute require a court judgment (for example, where provisions in standard terms and conditions need to be determined definitively for the purposes of an ongoing trading relationship) or a remedy that a mediation process cannot provide, such as an injunction
- where there has been the most serious breakdown in trust between the parties so that they cannot negotiate in good faith. While it has been suggested that fraud cases may be less suitable for mediation, in practice many fraud cases are mediated with success.

For more on detail on the mediation process, see our [ADR practical guide No. 2: 'An introduction to mediation'](#).

2. MEDIATION VARIANTS - MEDARB AND ARBMED

Two hybrid processes closely linked to mediation - where an arbitration is conducted either before or after a mediation but the arbitral award is delivered only if the mediation is unsuccessful. Neither is widely used but each may occasionally be appropriate for use in a particular dispute.

Mediation-Arbitration (MedArb)

- The parties undertake a mediation on the basis that, if it is not successful, the mediator will change roles and become an arbitrator of the same dispute. The theoretical advantage is that the parties work harder to achieve a negotiated agreement, to avoid the arbitration stage.
- The principal disadvantage 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 ultimately be sitting as a sole arbitrator handing down a binding award.
- There may also be concerns that the arbitrator may lose impartiality as a result of having confidential discussions in private sessions with the parties. Whether this is warranted or not, it may increase the chance of a challenge to either the arbitrator or the award.

Arbitration-Mediation (ArbMed)

- The parties first undertake an arbitration (usually very short), followed by a mediation before the arbitral award is delivered. If a settlement is achieved at the mediation - 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 that turn on relatively short questions not requiring extensive documents or evidence.
- One theoretical benefit of combining the roles of arbitrator and mediator is that the arbitrator-mediator will not need to read in to the case to step in to the alternate role, which could result in modest costs savings, and may place the arbitrator-mediator in a better position to assist with its settlement.

COMMON ADR PROCESSES - AN OVERVIEW

3. EARLY NEUTRAL EVALUATION (ENE)

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 at an early stage in the life of the dispute, before significant costs have been incurred. There are no particular procedural requirements for ENE beyond those agreed between the parties.

- The key advantage is that where parties are engaged in direct discussions, the considered opinion of a mutually respected neutral may assist the negotiations. An opinion from a senior solicitor, QC or retired judge on, for example, a disputed point of contractual construction can assist the parties with forming a realistic appraisal of their cases and encourage parties to step away from deadlocked positions.
- The principal disadvantage is 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 its case is "right" in light of the opinion.

4. EXPERT DETERMINATION

A neutral third party is appointed, on the basis of their expertise in the industry or the subject matter of the dispute, to deliver a binding decision. The selection of the expert, his terms of reference and powers are governed by agreement between the parties.

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.

- 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.
- Generally significantly quicker than litigation or arbitration, is confidential, and flexible as to procedure (the procedure will be determined by the expert in the absence of agreement between the parties).
- The principal disadvantage is the risk of an unfavourable decision, against which there will usually be no appeal. While 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.

5. ADJUDICATION

Introduced in the UK by The Housing Grants, Construction and Regeneration Act 1996, adjudication 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, but where the disclosure of documents and/or rules of evidence may be applied flexibly or dispensed with altogether.

- The decision of the adjudicator is binding pending any final determination of the dispute by way of litigation or arbitration. In practice, few adjudicated disputes are subsequently referred to litigation or arbitration.
- The process is quick and can often be undertaken in just a few weeks. The primary advantage is providing the parties with certainty and minimising disruption (including cashflow problems) to a long term construction or project.
- In principle, there is no reason why adjudication could not be used by agreement in a context other than construction. However, 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 it.

6. BASEBALL ARBITRATION

A binding ADR process originally developed in the US as a means of resolving disputes over professional baseball players' salaries.

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 process and the tribunal may or may not be told about them (if not, the process is described as 'night' baseball arbitration). The submitted figure that is closest to the award made by the tribunal becomes the binding figure that is payable.

- 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.
- Primary disadvantages are the lack of a level playing field, since the parties are often required to commit to their final figure in advance of disclosure of documents or witness/expert evidence. Thus, a party that names its figure on the basis of a certain critical assumption may subsequently discover that the assumption was

COMMON ADR PROCESSES - AN OVERVIEW

unfounded. As a consequence, baseball arbitration is most likely to be suitable in simple quantum disputes where there is limited information to be exchanged between the parties.

- The process does not allow an arbitral tribunal to reach compromised outcomes on difficult cases, which might be possible in some cases where a tribunal had more flexibility as to the shape of the award.

KEY CONTACTS

Alexander Oddy
Partner, Head of ADR
T +44 20 7466 2407
alexander.oddy@hsf.com



Jan O'Neill
Professional support lawyer
T +44 20 7466 2202
jan.oneill@hsf.com

For the latest ADR news, go to the Herbert Smith Freehills blog 'ADR Notes' at <http://hsfnotes.com/adr>