

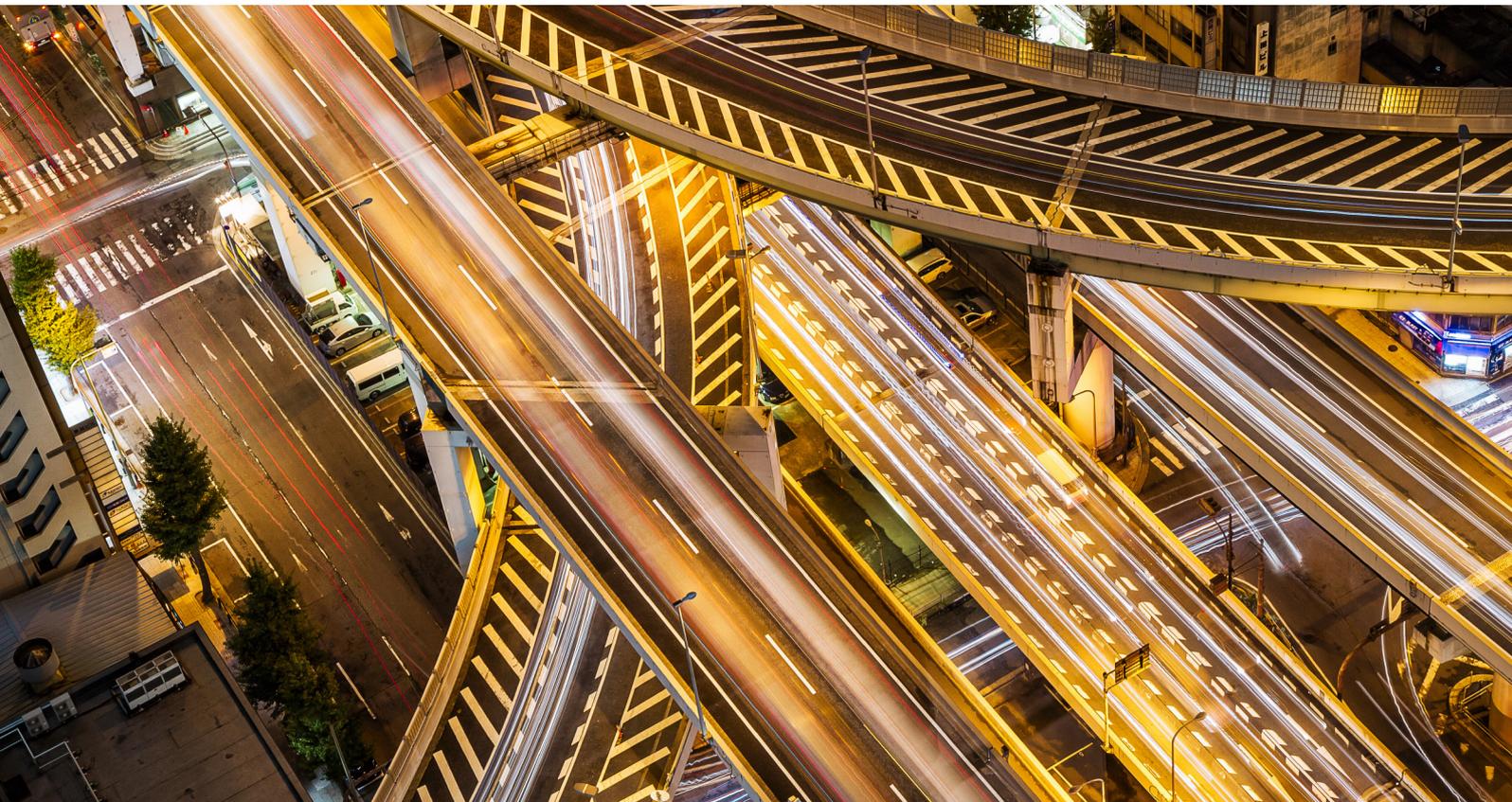


HERBERT
SMITH
FREEHILLS

IMPROVING CONFLICT MANAGEMENT

ENHANCE THE WAY YOUR ORGANISATION
USES ALTERNATIVE DISPUTE RESOLUTION

JULY 2017





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Understanding how organisations manage disputes

In 2007 the legacy Herbert Smith firm undertook a major qualitative research project to understand the way in which multi-national corporations use alternative dispute resolution (ADR).

The output of that project, a research study entitled "*The inside track – how blue chips are using ADR*"¹ remains a decade later one of the few resources available to in-house counsel, practitioners and academics that describes the behaviours of organisations and in-house counsel in using ADR in managing conflict.

Alongside the research report, we prepared an ADR toolkit, which drew on the learning of those in-house counsel that supported the research. The toolkit was designed to provide guidance for in-house counsel and others looking to refine and optimise the way their organisations employed ADR in dispute management processes.

Ten years on we are pleased to relaunch our guide, refreshed and updated to reflect a decade's experience counselling corporates and other organisations on using ADR more effectively, based on the insights we were privileged to gain.

The inside track – how blue chips are using ADR

The inside track was a qualitative study that gathered the experiences of in-house counsel regarding the use of ADR at leading corporations across industry sectors. We observed distinct behaviour patterns among the organisations surveyed, which included Fortune 500 and FTSE 100 companies.

The key output was to propose a taxonomy to describe the way organisations behaved, because it was clear that corporations showed distinct and recognisable dispute resolution "personalities" as to the use of ADR. The taxonomy of these personalities represented four steps on an evolutionary scale between Non-Users and Embedded Users (see diagram opposite).

What was also clear was that ADR use was not a factor of industry sectors or geographies – it all depended on the attitudes and skill levels of a small number of in-house lawyers who had the ability to influence their organisation's approach to conflict management and resolution.

With the benefit of nearly a decade to reflect on the findings, and experience consulting to corporations on how to manage conflict effectively, it is clear that the timing of the research could have been better. *The inside track* was published just before the global financial crisis. Most organisations that we spoke to in the research were interested but, unless they were exposed to a heavy docket of US domestic litigation, were simply not feeling the pressure to change (or adopt) systems for conflict management. Put simply, the burden of litigation (and regulatory investigations) was at a level that meant that conflict management wasn't necessarily foremost in the minds of some General Counsel and even some in-house dispute resolution lawyers.

Of course all of that has changed since the global financial crisis. With the collapse in the oil price and global demand for other commodities, increased activity by regulators everywhere and the rise of business human rights, there will be few organisations that have not experienced a growing burden of commercial conflict.

Global Pound Conference Series

The catalyst for this update has been the Global Pound Conference (GPC) Series – a programme of 29 conferences between March 2016 and July 2017 on the future of civil and commercial dispute resolution. Herbert Smith Freehills has been at the heart of this exciting project to shape dispute resolution in the 21st century, facilitating the GPC Series as the project's first sponsor and leading its execution in multiple locations around the world.

The GPC Series at its heart seeks to understand what the users of civil and commercial dispute resolution want and need to improve their experience of resolving conflict, and what can be done by other dispute resolution stakeholders to achieve those ambitions. Even before the GPC Series was complete and the data gathered subject to detailed analysis, it was clear to us that the insights we gained a decade earlier would help to provide answers to some of the critical questions raised by GPC Series delegates.

1 <http://hsfnotes.com/adr/key-adr-publications>

Four steps on an evolutionary scale

NON-USERS

were, as the name suggests, organisations that did not use ADR processes, usually due to a lack of understanding of processes and options at some level of decision making. While few in number even in 2007, what was alarming at the time was that the Non-User organisations were ruling out the use of effective dispute resolution tools based on misunderstandings of sometimes basic concepts.

“(The Non-Users) reported the least favourable experiences of external lawyers in relation to ADR”²

NEGOTIATORS

were organisations that had a strong cultural preference for direct negotiation with counterparties and did not see the value in introducing a third party neutral, such as a mediator, unless and until a business relationship was irretrievably broken. Consequently they were predisposed to use ADR processes less and later in the dispute resolution cycle, foregoing at least some of the potential benefits of ADR in terms of costs savings and repairing damaged relationships.

“Typically, we would try to resolve [disputes] without a process as formal as mediation... Once we had got to that stage, the relationship is gone”

**GENERAL COUNSEL,
SERVICE SECTOR**

AD HOC USERS

were organisations that recognised the benefits of ADR use but did not or could not take a systematic approach to it for a range of reasons. Some preferred flexibility (and therefore rejected a structured approach) but more often it was an inability to exert sufficient control over the organisation's behaviour in dispute resolution to use ADR systematically. As a result they were often frustrated with external counsel, feeling that disputes that were capable of settlement had run on too long.

“I've looked back at a couple of cases I have had... and thought I should perhaps have shouted a bit louder about mediation”

**SENIOR LITIGATION
LAWYER,
FINANCIAL SERVICES**

EMBEDDED USERS

at the top of the evolutionary scale, took a systematic approach to using ADR processes wherever possible through a range of styles reflecting their geographies and corporate cultures. They were the heaviest and most consistent ADR users, reporting economic benefits and the most constructive relationships with their external dispute resolution lawyers.

“We don't need to be persuaded about ADR – we know the benefits of it ... so it's a 'no-brainer' as far as we are concerned”

**HEAD OF WORLDWIDE
LITIGATION,
INVESTMENT BANK**

A decade of experience

So how have organisations responded ten years on?

Our primary observation is that in many jurisdictions there has been a slow and steady climb up the evolutionary scale in our taxonomy:

- **Non-Users** are now rare – few organisations engaged in commerce in the major global centres will have escaped conflict and most are now at least aware of concepts like mediation and conciliation, even though usage, understanding and enthusiasm is still inconsistent.
- **Negotiators** are becoming rarer too – the role of the neutral in facilitating negotiation is more widely accepted in our experience. Even those organisations that are confident negotiators are usually willing to accept that the introduction of a third party can assist in changing the dynamics of some conflict resolution.
- **Ad Hoc Users** consequently account for a substantial majority of commercial organisations today in our estimation – they understand ADR processes and recognise the benefits of using them but for a wide range of reasons still find it difficult or impossible to use ADR systematically and habitually.
- **Embedded Users** have, happily, grown in number and sophistication across all industry sectors. The use of Early Case Assessment (ECA) systems is more common, particularly among corporations with material experience of US litigation. Outside of the US, sophisticated in-house counsel find a range of ways to achieve similar success in ensuring their organisations use ADR as early as possible in the dispute cycle, are not deterred by occasional setbacks, and continue to educate business colleagues, external counsel and counterparties on the benefits of ADR that they perceive in economic and reputational terms.

Testing our taxonomy

We thought it important to take our learning and test it in a new environment. We chose Asia – in particular, Hong Kong³. Hong Kong is well-known as a global financial centre and leading regional dispute resolution hub. It enjoys a strong, independent judiciary as well as world class international arbitration services. Mediation and other forms of ADR are heavily supported by a myriad of institutions. With the advent of time and in the context of a different audience, how did our taxonomy fare?

Our discussions in Asia (see over) show that the information we gathered in 2007 and the lessons learned are still squarely relevant today and in the coming years.

Evolution, learning and opportunities

Our experience over the past decade has reconfirmed the need for organisations to understand the importance of assessing where they are on the evolutionary scale (between Non-Users and Embedded Users), deciding whether they want to move and, if so, what steps they need to take.

The guidance set out in the following pages is based on the insights of in-house counsel who have learned the hard way through lost opportunities to settle disputes and through heavy legal and other fees in conflict resolution. Those in-house counsel also devised tools, having learned some tough lessons, to be more effective in the future. It is those lessons and tools that we share through this updated guide.

We are clear that education and understanding remain at the heart of effective ADR use. But the experience of attending a mediation or two, hopefully with a positive experience, is not enough to bring about organisational change. It takes a deeper understanding of how business colleagues, counterparties and external counsel behave. It takes a deeper commitment by an organisation to choose dispute resolution tools that prevent the escalation of conflict where possible and promote ADR at the earliest opportunity.

The prize is worth striving for, however. Organisations that have worked to be Embedded Users have reduced the costs of conflict materially – in some instances by staggering amounts. More than that, they have equipped themselves with the mindset and the tools to strive for the very thing that all the stakeholders in the GPC Series have identified as the objective for civil and commercial dispute resolution in the 21st century: efficiency.

“The guidance... is based on the insights of in-house counsel who have learned the hard way...”

³ See our guide “ADR in Asia Pacific - Spotlight on Hong Kong”, at <http://hsfnotes.com/adr/adr-key-publications>

Spotlight on Asia

In 2015, our Hong Kong disputes team canvassed the views of around 100 international clients and contacts on their use of ADR, in particular mediation. They did this through direct interviews and a bespoke voting App.

The research marked the fifth anniversary of Hong Kong's Practice Direction 31, which, akin to the UK model, requires parties to file documents in court stating whether they have attempted mediation or are willing to do so. Despite Practice Direction 31 being couched in non-mandatory terms, all those surveyed said they interpreted it as mandatory in light of the threat of adverse cost orders for unreasonably refusing to mediate. This had naturally led to an uptick in mediation in Hong Kong, and we gauged the same in Singapore (where the laws are similar). Our guidance on jurisdictions where court-annexed mediation is mandatory (eg Indonesia), or is common practice in the context of arbitration proceedings, also confirmed an increased use of mediation in Asia.

GPC Hong Kong, attended by over 200 delegates from across Asia, provided further insights on commercial parties' preferences and needs when it comes to dispute resolution.

Combined, these have helped inform our understanding of how we see the user taxonomy operating in Asia:

- We have encountered few genuine **Non-Users** in Asia. Mediation has gained momentum with increasing governmental, legislative and institutional support across the region. This has naturally increased the body of users. In Hong Kong, our survey highlighted that Practice Direction 31 has changed the way litigating parties and their advisors think about mediation. They now see it as a necessary stage of the litigation cycle. And we see this in legislation and procedures in other Asian jurisdictions, where mediation has become a more regular adjunct to litigation or arbitration.

"Although we do not think mediation will be helpful every time, we do it anyway because it is compulsory"

Our Asia survey



At a glance

28%

had mediated between 1 and 4 times in the past 5 years (24% had mediated between 5 and 10 times and 22% had not mediated at all)

47%

When it came to mediator selection, 47% said they relied on recommendations from contacts in the market, whilst 38% deferred to the advice of their external lawyers

50%

of the respondents said that the 'mindset of the parties' was the single most important factor in a successful mediation

43%

said that cost and time savings were the greatest advantage of mediation; for a quarter of the delegates, the flexibility of outcomes was the biggest draw

53%

of delegates said they want a mediator who commands the respect of the parties and has gravitas. Just over a quarter said subject matter knowledge was the most important factor; only 3% voted legal knowledge the critical aspect

Spotlight on Asia

However, we should make no mistake - mediation in Asia remains under-utilised. The message we heard throughout our Hong Kong interviews, and something that we have observed elsewhere in the region since, is that corporates are still not mediating very often. Some (notably those we surveyed in the leisure and energy industries) hadn't mediated at all. Instead, they tended to escalate disputes internally to senior representatives, before arbitrating.

"In most cases... a better and more cost effective result can be achieved through without prejudice negotiations"

With mediation usage still lagging considerably behind litigation and arbitration in the region, we observe a preference by lawyers and their clients to stick to what they know. And this is likely to perpetuate the pool of Non-Users unless and until they (think they) have to mediate.

- Despite an increased exposure to mediation, our Asia research indicates that commercial negotiation remains the primary tool for settlement - over mediation or any other process. Does this suggest more pure **Negotiators** in Asia than we estimate globally? Not necessarily. Whilst much is made of the Confucian, consensus-driven approach to conflict resolution in Asian society, parties are not choosing negotiation to the exclusion of other processes. Indeed, our research shows that commercial parties are using mediation, often due to the 'codification' of mediation in many Asian jurisdictions. Those we surveyed said mediation had around a 50% success rate which accords broadly with market trends for commercial disputes. Given the vast majority of disputes don't result in trial or an arbitral hearing, commercial settlement clearly continues to account for the gap.
- In line with our global assessment, our Asia research suggests that the majority of corporates in the region are now **Ad Hoc Users**. They will mediate when this is either required (actual or perceived) or when it is recommended (typically by external advisors or by the court/arbitral tribunal). But we found few in-house counsel pro-actively championing mediation or putting it on the agenda.

- However, when faced with mediation, corporates in Hong Kong are generally pragmatic about the benefits of it. Their definition of 'mediation success' appears to be broader than a simple question of success/failure. When we asked whether those mediations that failed were nevertheless worthwhile, the resounding response from almost all was 'yes'. Some mediations which did not yield settlements on the day were instrumental in initiating a later resolution. Even where mediations did not put the dispute on track for settlement, they enabled clients to learn more about the respective parties' cases, and/or served to narrow the issues in dispute.

"Mediation as a forum to gain intelligence is very useful. You learn what is really grating the other side and that may have nothing to do with legality. It may, for example, come down to an apology"

- We have encountered few **Embedded Users** in Asia. We asked whether organisations officially promoted ADR in resolving disputes - through a policy, ECA procedures, or time/cost saving metrics and the overriding response was "no". Instead, settlement was generally approached on an Ad Hoc basis.
- Yet it is clear that the most sophisticated organisations treat dispute avoidance and dispute management as highly important. Some have developed systematic case review and time-cost saving analysis. In terms of providing for ADR in contracts (which is often seen as a way of embedding ADR processes into the fabric of later conflict resolution), the overriding view amongst those we surveyed was that ADR clauses requiring or permitting parties to attempt ADR before and/or during litigation or arbitration were currently neither used nor liked in Hong Kong, or more generally across Asia. An important qualification to this is in the construction and infrastructure sectors, where escalation clauses are commonly seen in contracts.

"We certainly have early case assessment and utilise time-cost saving analysis"

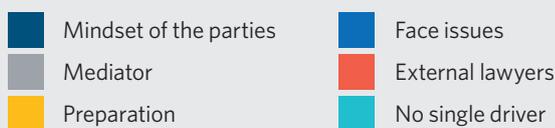
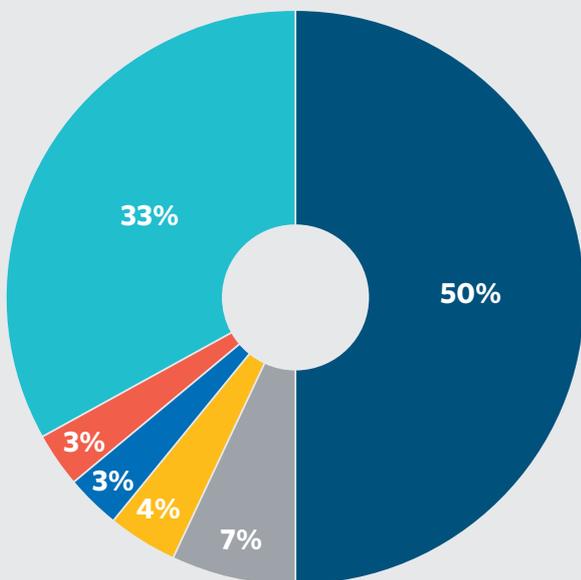
In summary (and in line with our 2007 research):

- Actual use of mediation in Asia continues to lag behind positive attitudes to it
- Parties that attempt mediation see benefits from the process even if the mediation does not result in settlement
- External lawyers have a critical role to play – in educating their clients (and themselves) on how best to deploy mediation to maximise chances of settlement
- Commercial organisations, through their in-house lawyers, the business units and, critically, senior management, should seek to develop a pro-active approach to mediation
- The mindset of the parties is key to the success or failure of mediation (see below)

The most important factor for ADR success?

When asked "What is the most important factor for ADR success?", the overriding response was telling: the willingness of the parties to compromise. In terms of dispute resolution, organisations are in control of their own destiny. Other stakeholders - lawyers, mediators, judges - can influence them but it is ultimately in-house lawyers, the business units and, critically, senior management who can develop an holistic approach to mediation and maximise its use.

The second most important factor was the mediator. The organisations who cited this noted that the right mediator could influence the mindset of the parties by bridging an impasse.



Preliminaries – an audit of ADR use

Before the legal department embarks on a systematic review of how an organisation uses ADR, it is likely to be helpful to undertake an audit of current ADR usage in the context of its portfolio of disputes. The following topics for investigation will yield useful data before moving on to consider what systems could be put in place.

What disputes does the organisation face?

- Identify disputes by type, size, frequency, geography.
- Are there any patterns or categories of claims typically experienced, including repeat claims attached to a particular product line or business unit?
- Are systems in place for the reporting of actual or potential disputes to the legal department and at what stage do disputes come to the legal department's notice?

What are the costs of resolving disputes and how long does this take?

- What is the spend on external dispute resolution lawyers and other related experts (forensic accountants, expert witnesses, electronic document management service providers)?
- What is the internal cost of dispute resolution in terms of inhouse lawyers and time spent by business personnel?
- At what stage of disputes is settlement typically reached and through what dispute resolution processes, including ADR processes?
- Is any assessment of the indirect costs of disputes possible (such as disruption or damage to business relationships)?

What is the capability of the in-house legal team?

- Assess the number of in-house lawyers, their capacity and experience.
- Assess understanding of and skills in using ADR processes, particularly if lawyers are located in jurisdictions where ADR is still novel.
- What ADR training is currently undertaken by the in-house legal team?

What use, if any, is made of ADR clauses in the organisation's contracts?

- Review dispute resolution provisions in standard terms and conditions or particular categories of contract.

What is the level of understanding of and engagement with ADR of other stakeholders in the organisation?

- Assess the understanding of the business unit personnel that generate disputes.
- Assess the engagement of the board of directors and/or senior management.

What is the nature of the organisation's relationship with its external dispute resolution lawyers concerning ADR?

- Assess the ADR-specific skills of external lawyers.
- When and how is ADR discussed, which processes are favoured and which processes are most effective given the shape of the disputes portfolio?
- What ADR metrics, if any, do the external lawyers generate (particularly to track mediator performance)?

The role of the legal department

When it comes to making changes to an organisation's approach to ADR, the role of the legal department will usually be critical. So what can the legal department do and who is appropriate to undertake this mission?

The tools include designating appropriate leadership, identifying systems that encourage ADR use in a manner compatible with the organisation's profile and culture, training and incentivising the in-house lawyers to implement and follow those systems and measuring what has been achieved. Our research suggests that in practice incremental changes in individual behaviour can yield material changes to the behaviour of the organisation.

Leadership – identifying an ADR Lead

Our research indicated that those organisations that achieved greatest success in embedding the use of ADR in the management of disputes all had one or more senior in-house lawyers to lead the organisation's efforts – an "ADR Lead". These organisations tended to have the most positive experience of ADR organisation-wide and

the most frequent and successful use of ADR processes. The ADR Lead could be the General Counsel, the Head of Litigation or another designated senior lawyer(s), who is sufficiently versed in ADR issues and, most importantly, enthusiastic about the benefits that ADR can bring.



Actions

- Identify a senior in-house lawyer to act as an "ADR Lead" within the legal department. Consider whether the General Counsel, Head of Litigation or another senior lawyer is appropriate.
- In this role, they can lead ADR initiatives, act as (or designate colleagues as) a repository of knowledge on ADR topics and can be tasked with delivering the organisation's ADR goals.



Challenges

- Do you have a team member or members with sufficient time to devote to this role? Few organisations will have the ability to appoint a full time ADR Lead so this is likely to be an additional responsibility for an existing team member.
- Do you have the necessary skills levels within the legal team to perform this role? Will additional training be necessary?
- If the legal department has an international reach, how will the ADR Lead carry out their role in other jurisdictions? It may be helpful to identify and train lieutenants to act as local ADR Leads.
- Does the ADR Lead have a good understanding of the business environment within which he/she is to operate? Understanding the commercial and cultural drivers will be important in establishing credible leadership.



Top Tip

Leadership

A few committed individuals can make a big difference in the process of embedding an ADR culture.

The role of the legal department

Systems and procedures for encouraging ADR use

The principal objective of implementing an ADR strategy is to ensure that ADR processes are considered and used by the organisation more consistently, more frequently, in a systematic way and preferably at as early a stage of a dispute as possible. There are two basic approaches. The first is to use a formal or semi-formal Early Case Assessment (ECA) system, which is a project

management-based tool to establish procedures for the management of disputes. The second is to establish a culture of early and proactive settlement of disputes using ADR within the legal department through less formal methods. We set out below some considerations to assist with deciding which approach may be suitable and effective for your organisation.

Early Case Assessment systems

ECA systems are conflict management processes by which organisations analyse disputes in a systematic way at an early stage and make informed decisions as to the appropriate dispute resolution strategies. Although some ECA processes developed in the US have taken the form of somewhat complex process diagrams, current thinking in this area is strongly in favour of simplifying processes. The objective is to ensure easier and more

consistent use of the ECA system and to minimise resistance when the system is implemented. The key objective is to ensure consistent execution of the steps that the organisation considers critical to managing disputes with a view to early assessment and, where possible, settlement.

“ECA is just a concept. It's like mediation for example. It doesn't matter how you do it, under whose rules. The whole point is that you do it”

**SENIOR LITIGATION COUNSEL,
MANUFACTURING/INDUSTRIAL**

Top Tip

ECA systems

Whether through formal or informal systems, the key is to ensure that ADR is considered early, proactively and repeatedly in all disputes.

Do I need an ECA system?

- In principle any organisation can consider using an ECA system, which seeks to encapsulate good practice in dispute management.
- Organisations with large caseloads are likely to see greater benefits since the purpose of the ECA process is to enforce a consistent approach by in-house lawyers and/or case handlers.
- Organisations regularly engaged in litigation in the US are more likely to see benefits in an ECA system.
- The ECA system can be adapted to suit particular categories of disputes. High volume, low value, non-complex claims may merit simpler processes.



Actions

Establishing an ECA system for the organisation is likely to need a small team of in-house lawyers, perhaps with support from business unit personnel, to devise and execute the process in a manner appropriate to the organisation. The objective is to establish a system to ensure the following actions occur within a specified time frame:

- Early investigation of facts by a team of appropriate legal and business personnel.
- Early legal analysis of the claims with internal and, if appropriate, external legal resources.
- Assessment of relevant commercial interests and relationships (including with the opponent(s)).
- Assessment of the available dispute resolution methods: negotiation, ADR including mediation, arbitration, litigation or some combination of these or other processes.
- Analysis of the external costs (lawyers, experts) and internal costs (business unit time commitment) in pursuing the available range of strategies.
- Take strategy decisions based on the above informed assessments.
- Regularly review the strategy and case assessment (say every three or six months).
- Following resolution, analyse lessons learned.
- Consider generating management information such as tailored dashboard reporting metrics to test efficiency and demonstrate value of the ECA process through costs savings and dispute resolution outcomes.



Challenges

- Does the organisation have sufficient numbers of disputes to warrant the investment in establishing and implementing an ECA system?
- The successful implementation of the ECA system will be strongly influenced by the culture of the organisation, hence the importance of buy-in from business units. Consider whether implementation will be assisted by a directive or statement of support from the General Counsel and/or the board or senior management.
- There may be resistance from business units to “let go” of disputes early, especially if business unit personnel are accustomed to resolving their own disputes.
- Both business units and external lawyers operating in jurisdictions unfamiliar with ADR processes will need education, persuasion and occasionally direction as to early settlement and the use of ADR.
- ECA systems that are overly formal or complex can appear intimidating or intrusive to users and give rise to non-compliance for a range of reasons.
 - “It’s just too difficult to comply with this so I won’t bother”
 - “I know how to run a dispute – no-one is going to dictate to me what I do”
- A focus on simple procedures which do not appear burdensome is likely to be most effective. Different cultures respond to ECA systems in different ways and implementation is always likely to be harder in anti-authoritarian cultures.

The role of the legal department

Embedding ADR use without an ECA system

While many organisations will see the benefits that an ECA system could bring, they will also consider that the portfolio of disputes they encounter simply does not justify the investment in establishing such a system. Few businesses welcome additional process burdens.⁴ Some cultures are instinctively disposed against formality and process. The challenge in the absence of an ECA system is to ensure that in-house lawyers and case handlers still

investigate cases thoroughly and consistently at an early stage and take an informed strategic approach to dispute resolution using ADR whenever practically possible. So what steps can such organisations take if they nevertheless wish to see more consistent use of ADR to resolve disputes? Our research has highlighted the following options.



Actions

- Devise a high level policy statement or more specific dispute management guidelines that require the consideration and use of ADR by in-house lawyers and claims handlers. A policy statement or guidelines could:
 - make ADR a default choice of dispute resolution method so that for each matter the onus is on the in-house lawyer or case handler to explain why a case is not or not yet suitable for ADR;
 - encourage in-house lawyers and case handlers to raise ADR with external lawyers at an early stage. Put the onus on external lawyers to explain why ADR is not suitable;
 - establish as a core value of the in-house legal or case handling team advising the business on early commercial settlement;
 - acknowledge the value of mediations attempted early in the life of a dispute as learning experiences, even if unsuccessful. Encourage in-house lawyers or case handlers to try again;
 - potentially be published to counterparties and opponents either generally or on a case by case basis, to avoid any perceived weakness in suggesting ADR. Make early ADR use “company policy”.
- Have the policy or guidelines encouraging ADR use endorsed by senior management if possible at board level or by the General Counsel or Head of Litigation as appropriate.
- Encourage regular discussion of ADR experiences and use among in-house lawyers and case handlers to share know-how and reinforce collective expectations of early usage.
- Establish a periodic case review and reporting procedure (three or six monthly) to include specific consideration of whether ADR has been attempted and if not, whether and when it will be suitable.
- Because individual in-house lawyers and case handlers may have more freedom of decision making than under an ECA system, consider a peer review system when strategic decisions are to be taken.



Challenges

- Achieving cultural change in organisations can be difficult and will likely require visible personal commitment by an appropriate leader: the ADR Lead;
- To avoid inconsistent approaches consider what techniques will suit the organisation in building collective experience and peer pressure. Will team meetings or conference calls be a forum to discuss the policy? Can it be an agenda item on a legal department annual gathering or retreat? It may be harder to influence personnel located in jurisdictions not familiar with or disposed towards ADR use.
- In the absence of any systematic approach akin to an ECA, there is likely to be an even greater premium on ensuring that in-house lawyers and case handlers are well trained in ADR processes to use the processes confidently and to overcome internal or external resistance.

⁴ Although they might revise that view if use of an ECA system achieved a measurable and material saving in legal costs.

ADR education and training

Many organisations that report a systematic and embedded use of ADR in dispute management make a significant commitment to ADR specific training for in-house lawyers and case handlers. Indeed they see it as vital to have a highly skilled team in order that resistance to ADR use, whether it is encountered internally from business colleagues or externally from counterparties or external lawyers, can be met confidently. A deeper understanding of ADR techniques can bring a range of benefits to an organisation. In

addition to an enhanced ability to see a problem from both sides, most advanced ADR training (including mediator skills training) develops communication skills which can help to improve personal and team performance beyond case management decisions. While on-the-job experience is invaluable, it may be necessary to engage in some formal training if the desired result is a certain base level of ADR knowledge to be spread throughout the legal department.



Actions

- Identify what level of training and skills is required for various personnel engaged in the dispute management function:
 - The ADR Lead and/or other senior lawyers overseeing a dispute resolution portfolio will likely need to have high skill levels to provide effective leadership. Consider undertaking mediator skills training courses leading to accreditation by reputable training providers or at least advanced negotiation and mediation advocacy skills training;
 - In-house lawyers may need to be trained to a consistent level identified as appropriate by the organisation. Consider whether training can be provided by in-house personnel such as the ADR Lead or others with high skill levels (ie a "train the trainer" programme), by an external training provider such as one of the ADR institutions or by external law firms⁵.
- Devise means of reinforcing training and skill levels through sharing information and know-how at regular team meetings or conference calls, annual gatherings or using the organisation's intranet. Publicise successes, particularly where the business is pleased with the outcome. Share lessons learned from cases where using ADR faced challenges.



Challenges

- The choice of training provided by ADR institutions can be bewildering but the key distinction is between:
 - Basic training in the mediation process and concepts, likely to be regarded as a minimum for all in-house lawyers (whether contentious or non-contentious) and case handlers;
 - Mediation advocacy training which will focus on the skills that in-house lawyers or case handlers need to attend mediations and play a confident and active role as advocates⁶ on behalf of the organisation;
 - Mediator skills training which gives a thorough understanding of the communication, negotiation and deadlock breaking techniques mediators use, which is likely to be valuable for the ADR Lead and other senior litigation lawyers.
- One key challenge identified by organisations we spoke to in our research was ensuring that new personnel joining the legal or claims handling team are not overlooked in terms of training. Skill levels need to be sustained and refreshed and opportunities to share practical experiences in a training environment can be stimulating.



Top Tip

Education and training

Teams change rapidly – regularly refresh your training and sharing of lessons learned.

⁵ Assuming they have suitably experienced personnel.

⁶ Note that mediators in some jurisdictions will routinely convene meetings in mediations at which business personnel and in-house lawyers are present without external legal advisors.

The role of the legal department

Goals and incentives to use ADR

Our research indicated that some organisations measure and assess the use of ADR by their in-house lawyers and case handlers and link this to annual performance review targets and bonuses. The most difficult issue is likely to be the nature of the linkage. This

could be direct, so that personal rewards are affected by, for example, the percentage of cases resolved by mediation. It could be indirect, so that appropriate use of mediation is reviewed in the context of overall performance in managing a portfolio of disputes.



Actions

- Consider whether effective use of ADR is specified as an aspect of performance grading in performance reviews for in-house lawyers managing disputes and case handlers. Merely identifying the use of ADR where appropriate as a goal in the annual appraisal cycle can have a positive effect by increasing awareness of ADR processes.
- In some circumstances, it may be appropriate to link use of ADR processes directly with personal rewards, such as bonus schemes, particularly where an organisation seeks to incentivise a change in dispute resolution behaviour. It is more likely that this will be effective where higher volume, lower value claims are being conducted but it can be effective for personnel handling lower volume, complex disputes.
- Consider whether attending ADR training is or can be specified as a goal in the annual performance review cycle.



Challenges

- The principal risk arising from a direct link between ADR use and personal reward for claims handlers is that cases will be mediated and settled inappropriately in order for bonus targets to be met, so that active monitoring of behaviour is likely to be required.
- Other risks are that individual in-house lawyers or case handlers will allocate their time inappropriately in favour of cases that are capable of easier resolution through mediation.
- If ADR related goals are included in performance review targets the in-house lawyers or case handlers will need to have adequate existing skill levels to ensure the goals are achievable.
- If attending ADR training is a specified performance review goal, resources may be required to meet training costs unless such training is available from, for example, the organisation's retained law firms.



Top Tip

Goals and incentives

Consider incentives to use ADR if you have good enough ADR metrics to assess outcomes.

ADR metrics

Many organisations will undertake some monitoring of their disputes portfolio and generate some metrics linked to this, often in connection with tracking external legal spend. There can be good reasons for organisations to generate ADR-specific metrics provided this is done in a manner consistent with the organisation's objectives. Usually the legal department will be best placed in an organisation to generate relevant ADR metrics, although where non-lawyer claims handlers conduct dispute handling, the business units may themselves be in a position to do so.

There are two main reasons to generate ADR metrics. The first reason is to demonstrate time and costs savings and improved dispute outcomes. While costs savings will usually have a direct and positive impact on the organisation's bottom line (which might be thought sufficient), this information can also assist the legal department in adding value and convincing the organisation (or parts of it) of the value of ADR processes. Where an organisation already understands the benefits of ADR, the second reason is to allow ADR use to be monitored in an appropriate way against dispute management objectives.



Actions

Consider generating ADR metrics on some or all of the following issues:

- Assessment of savings in external legal costs through ADR use.
- Assessment of savings in management time through ADR use.
- Assessment of the impact (positive or negative) of disputes on business relationships and improvements/damage limitation through ADR use.
- Operating a case tracking system to review progress of disputes and steps taken to use ADR.
- Assessment of the stage at which disputes are settled in connection with ECA systems.
- Track which mediators are used and assess mediator performance to share experience with other in-house lawyers or case handlers. This is increasingly relevant given the increase in direct mediator appointments where no ADR institution oversees performance and feedback.
- Formalise the process of debriefing following disputes and disseminating lessons learned on operational issues and, if appropriate, dispute resolution process issues.



Challenges

- Self evidently no organisation should waste time and energy generating metrics that are of no utility. The focus should be on the information that will directly assist in achieving the organisation's dispute management objectives.
- Many organisations will not have a sufficient number of disputes to generate meaningful metrics or derive benefit from them.
- If metrics are to be generated, the resources and structures should be in place to ensure that the information is shared and used appropriately, likely to be a responsibility of the ADR Lead.
- Gathering and retaining information on mediator performance is often valuable and generally requires only modest effort.



Top Tip

Metrics

Nothing persuades the business like measurable and material costs savings.

The role of the legal department

ADR clauses in contracts

In most organisations the legal department will also influence either directly or indirectly the organisation's preferences on methods of dispute resolution specified in contracts. The purpose of this section of the guide is not to set out an exhaustive discussion of the learning on ADR clauses. There is a wealth of information readily available on ADR clause drafting and most ADR providers offer a menu of clauses. We highlight the range of considerations that organisations may take into account when deciding whether to use an ADR clause at all and, if so, what type.

Some organisations, including some of those which reported a systematic and embedded use of ADR in dispute management,

were concerned to maintain maximum flexibility in their dispute resolution options at the point of dispute. As a result, they were reluctant to include mediation clauses in their contracts as a compulsory step in the dispute resolution process.

Many other sophisticated organisations favoured ADR clauses in as many of their contracts as possible to ensure a consistency of approach and to maximise the opportunities for settlement in all disputes handled. For at least some categories of contracts, organisations routinely include tiered ADR clauses.

ADR clause options

There are three basic approaches to using ADR clauses:

- Mandatory clauses, which require the parties to attempt an ADR process (usually mediation) in advance of litigation or arbitration. These can be stand alone ADR clauses or incorporated in a tiered or escalation clause.
- Non-mandatory clauses, whereby the parties agree that they

may use an ADR process (usually mediation) but that they shall not be obliged to do so prior to commencing litigation or arbitration.

- Not to use an ADR clause at all, on the basis of a view that any agreement to use ADR is best entered into at the point of dispute and not at point of contract.

Mandatory ADR clauses

There are a range of reasons why organisations select mandatory ADR clauses, which frequently depend upon the nature of the contract to be entered into. Relevant factors include the following:

- The key driver of course is that an organisation wishes to use an ADR process, usually mediation, as often as possible to resolve disputes and to do so before litigation or arbitration in the interests of averting legal costs.
- It may be easier for mandatory ADR clauses to be used in contracts providing goods or services on standard terms where there is no scope for negotiation of the contract.
- Mandatory ADR clauses are popular in many long term supply, service or project contracts where the preservation of the commercial relationship is of paramount importance.
- It may be difficult to persuade counterparties in jurisdictions unfamiliar with ADR processes to accept mandatory ADR clauses, but many organisations that have a systematic and

embedded approach to ADR use seek actively to educate and persuade counterparties as to the benefits of ADR (mediation).

- Mandatory ADR clauses will require parties to undertake the specified ADR process, usually mediation, in every case. If the dispute is not yet ripe for mediation, this requirement can be perceived as unnecessary and wasteful of costs, although the process will likely lead to the issues being established and clarified earlier than might otherwise be the case.
- Organisations will need to assess whether the burden of complying with such clauses outweighs the benefit: for organisations exposed to burdensome US litigation, for example, there may be powerful reasons to accept a mandatory clause. It may be that the risk of wasting time and costs on some unsuccessful mediations is nevertheless far outweighed by the successful mediations that prevent disputes escalating to litigation.

Non-mandatory ADR clauses

Non-mandatory ADR clauses can be of utility to organisations unwilling to use mandatory clauses or unable to persuade a counterparty to accept a mandatory clause. Some of the considerations in choosing a non-mandatory clause are as follows:

- Even though one party will not be able to compel the other to use mediation, the presence of the clause helps to avoid any concern by either party that a suggestion of mediation would be a sign of weakness.
- Many organisations prefer to retain maximum flexibility in their choice of dispute resolution options at the point of dispute but are nevertheless strongly in favour of ADR. The use of a non-mandatory clause preserves flexibility but allows an organisation to make clear that it is in favour of using ADR processes.
- The primary objection to non-mandatory clauses is that the counterparty cannot be compelled to engage. Such clauses are sometimes criticised as “toothless”.
- Even for parties that believe ADR clauses are unnecessary because of their own willingness to propose and use ADR at the point of dispute, there will rarely be any downside to including a non-mandatory clause, which ensures that ADR is on the dispute resolution agenda.

Tiered clauses

‘Tiered’ or ‘escalation’ clauses provide for contractual parties to seek to resolve any disputes by progressing through a series of different steps (typically starting with senior executive settlement discussions, then mediation or other formal ADR process, then litigation or arbitration). It is usually mandatory for one step to be completed (without settlement being reached) before a party can move to the next step.

- Such clauses have the potential to take the immediate heat out of a dispute through informal discussions before it is escalated through knee-jerk responses at the time a dispute arises. They are particularly common in sectors typically involving long term projects, where maintaining relationships and keeping the project on track is a priority.
- However, such clauses pose particular challenges. The first is to design a stepped process that will be suitable for every type of as-yet-unknown dispute that may arise under the contract. The second is that the courts (in England at least) have taken a relatively strict approach to such clauses and will only enforce them (to restrain a party from commencing litigation or arbitration prematurely) where the clause is sufficiently clear as to when each step will be considered completed, including timings. Drafting to ensure this can be a very technical exercise.
- For both those reasons, if such a clause is to be used, it is important that it be carefully considered in the drafting of the contract. All too often these type of clauses are treated as ‘boilerplate’ and inserted without thought for whether they are fit for purpose. This can be counterproductive and in fact obstruct the dispute resolution process and lead to satellite disputes.

Top Tip

Clauses

Use ADR clauses thoughtfully – one size does not fit all but they can be a powerful tool in changing behaviours and preventing escalation of disputes.

Other ADR stakeholders

While the role of the legal department will be crucial in effecting change in the organisation's approach to using ADR, there are four other stakeholders with which the legal department will interact.

Business units

Our research indicated that for most organisations, the costs of conducting a dispute are borne by the business unit in which the dispute originated. Whilst this of itself should provide a powerful incentive for business units to settle cases, through ADR processes where appropriate, in practice the legal department can face a number of challenges when interfacing with business unit personnel.



Actions

- Business units will generally wish to resolve disputes quickly and amicably, recognising that litigation or arbitration will be an expensive and time consuming diversion from normal trading activities. Nevertheless the onus will usually be on the legal department to suggest that an ADR process is suitable in any given dispute given that the concepts may be unfamiliar to those not customarily involved in disputes.
- The legal department therefore has a training role in relation to ADR. The fundamental issue is how and when training to the business units should be delivered. Essentially two approaches prevail:
 - Many organisations that use ADR in a systematic and embedded way report that they consider the legal department should include training on ADR as part of broader education to the business units on dispute resolution processes. This training is delivered on a rolling basis and is not confined to situations when disputes have arisen. The frequency and nature of disputes for business units will dictate the depth of education necessary;
 - Other organisations perceive less value in the legal department committing resources to training business units in ADR processes in advance of an actual dispute arising, at which point appropriate training is given to allow business unit personnel to participate appropriately.



Challenges

- For almost all organisations there will be a challenge in resource terms if the legal department is to undertake education of business units in ADR processes other than only at the point of dispute. Techniques reported as effective include presentations by the legal department, internal legal briefing documents and use of the organisation's intranet. Face to face presentations are reported as most effective but place a heavy burden on the resources of the legal department.
- For organisations trading in jurisdictions that are not familiar with ADR, the education task may be more difficult, not least since the process can be treated with some suspicion:
 - Some business unit personnel will need to be convinced that a mediator is able to assist the parties when direct discussions have failed;
 - Other business unit personnel will be determined to "have their day in court" and need persuading that the interests of the organisation are best served through settlement;
 - Some personnel in jurisdictions not familiar with ADR may view ADR processes with suspicion simply because they originated in the US.
- Legal departments that generate ADR metrics that record cost and time savings can use these to help demonstrate the benefits of ADR to business units.



Top Tip

Business Units

Business people "get" ADR in practice – help them accept the opportunity.

The board and senior management

Our research indicated that for most organisations the senior in-house lawyers with responsibility for disputes - the General Counsel or the Head of Litigation - provided the leadership in terms of the organisation's approach to ADR. However, support for ADR

use from board or senior management level can provide valuable assistance to the legal department in seeking to change an organisation's dispute resolution culture.



Actions

- The board and senior management are ideally placed to endorse organisation-wide use of ADR. In some organisations, a single individual on the board or in senior management can motivate and support the legal department's efforts to use ADR more consistently.
- Where the legal department establishes an ECA system or propagates policies or guidelines on using ADR, a statement of support from the board or senior management can incentivise personnel to follow a new approach.
- Some organisations have found it useful to have a public organisation-wide statement or pledge to use ADR in all appropriate circumstances. The best known statement of this nature is the CPR Corporate Pledge signed by many organisations in the US and, more recently, in the UK.⁷ This type of pledge can assist those who want to suggest ADR to a counterparty but are concerned that it may be viewed as a sign of weakness (ie ADR is "company policy").



Challenges

- In order to persuade a member of the board or other senior management to commit time and resources to the organisation's use of ADR, it may be helpful to generate ADR metrics that illustrate savings in costs and time spent by business unit personnel.
- Some organisations question the value of a public pledge or statement in support of ADR use, regarding such matters as internal to the organisation. Pledges may also be perceived as restricting flexibility in dispute resolution options at the point of dispute (although in practice the language is usually neutral and allows for flexibility on a case-by-case basis).



Top Tip

The board and senior management

A senior management ADR sponsor can be a game-changer.

⁷ Since 2013, the Centre for Effective Dispute Resolution (CEDR) has been CPR's partner in promoting in the UK an updated iteration of the original Pledge, the 21st Century Corporate ADR Pledge. Details can be found at www.cedr.com/foundation/corporate-adr-pledge/

Other ADR stakeholders

External lawyers

This section of the guide is not intended to and does not try to suggest how organisations should manage relationships with their external lawyers. What it does is explain some techniques used by

organisations that report a systematic and embedded use of ADR to ensure that their external lawyers are appropriately aligned with the organisation's objectives in relation to ADR use.



Actions

- Ensure that appropriate questions are asked in the context of a procurement exercise, panel review or pitch process.
- Write in to the terms of engagement with external lawyers the requirement that ADR be actively considered at an early stage on all dispute mandates and that the issue of settlement (including through ADR processes) be revisited and discussed on a regular basis, perhaps every three or six months.
- Where the organisation uses an ECA system, external lawyers will need to be made aware of the requirements for advice to be provided within the timetable prescribed by the system.
- Some organisations place the onus on external lawyers to explain why any particular dispute is not suitable for ADR.
- When assessing value added services to be provided by external lawyers, consider the extent to which they can assist with ADR training to the legal department or to business units.
- Check whether external lawyers generate any metrics on their own ADR use. This can be particularly useful in relation to mediator performance, given that most organisations rely on their external lawyers for mediator recommendations and the increasing trend in England and Wales is for direct appointment of mediators rather than appointments through the ADR providers or institutions.



Challenges

- External lawyers may show resistance to ADR, particularly in relation to early use of the process. In-house lawyers will be better equipped to confront that resistance with greater skills in ADR processes and empirical evidence from ADR metrics.
- For organisations purchasing legal services in many jurisdictions, it will be necessary to recognise that external lawyers in jurisdictions unfamiliar with ADR may be resistant to suggestions of ADR. The organisation may itself need to educate external lawyers or at least give explicit instructions to attempt an ADR process in the face of considerable resistance.

"If a lawyer has a commercial orientation, then it's pretty much a given that they will be ahead of the curve on ADR"

**SENIOR LITIGATION COUNSEL,
MANUFACTURING/INDUSTRIAL**



Top Tip

External lawyers

Challenge your external lawyers to support and implement your organisation's desired approach to ADR.

Counterparties

When organisations that are systematic and embedded users of ADR propose it to counterparties, they typically encounter two

main types of resistance to the suggestion: lack of understanding of the process and, less frequently, lack of resources to engage in it.



Actions

- When counterparties are reluctant to engage in ADR because of lack of understanding or suspicion of the processes, the in-house lawyers in an organisation can play an essential educational role in explaining to counterparties the value in the process.
- In limited circumstances, some organisations believe that it is useful to fund the costs of the mediator and/or venue (rather than the customary sharing of such costs) in order to persuade a counterparty to engage in the process. Our research indicated that these circumstances tend to be limited to situations where either the counterparty is of limited means or has very little experience of ADR and the organisation believes the mediation process will likely lead to or materially assist with resolution of the dispute.

“The Embedded Users were persistent in proposing mediation...”⁸



Challenges

- In order for in-house lawyers to persuade counterparties unfamiliar with ADR of the value of attempting the process, in-house lawyers will need to be able to meet all of the objections typically advanced by counterparties in such circumstances:
 - “Proposing ADR is a sign of weakness”;
 - “The mediator will add nothing to direct discussions”;
 - “ADR is another procedural hoop to jump through and will just take time and further costs”.
- Will the counterparty take the mediation seriously if they have made no financial contribution to the process?
- Will the fact that only the organisation has funded the costs of the ADR process lead the counterparty to perceive that the dynamics of the mediation are unfavourably altered ie, the mediator is on the side of the organisation that paid?
- When dealing with any of the above stakeholders, it may be useful to be able to point to concrete examples of mediation being used successfully. The CPR Institute’s “European Mediation and ADR Guide”, to which Herbert Smith Freehills contributed extensively, is a useful resource in this regard, containing numerous mediation “success stories”.⁹



Top Tip

Counterparties

Be positive, be persistent and be prepared to meet objections and explain the opportunity that ADR presents.

⁸ *The Inside Track*, page 34

⁹ A copy of the publication can be downloaded for free at <https://www.cpradr.org/resource-center/toolkits/european-mediation-adr-guide>

Engagement with ADR organisations

There are many ADR organisations and institutions providing a wide range of ADR related services to the commercial and legal communities. Some are focused on assisting parties to use ADR processes, some are focused on training and disseminating ADR learning and know-how, others focus on corporate users of ADR and provide a forum for in-house lawyers to exchange experiences with and learn from peers.

Most organisations that adopt a systematic and embedded approach to ADR use report that they are members of one or more ADR organisations. They typically believe that such organisations are worthy of financial support because of the valuable role they play in enhancing the environment for dispute resolution. The membership subscriptions are usually very modest indeed in comparison with the external legal spend on dispute resolution of many organisations.



Actions

- Membership of ADR organisations can provide access to the latest developments and know how in ADR processes. Many ADR organisations provide increased access to information and training for members.
- Membership may confer discounts on training and other services provided by ADR organisations.
- Active engagement with ADR organisations can provide an opportunity to meet with and share experiences with peers and competitors on dispute management and ADR best practice.
- Membership of ADR organisations sends a positive message both within an organisation and externally to lawyers and counterparties as to the organisation's commitment to dispute resolution through ADR.



Challenges

- Naturally the membership subscriptions represent an additional cost to business. In reality they are very modest for most organisations of any size.
- In order to ensure that proper value to the organisation is derived from membership, it may be necessary to appoint one or more personnel to conduct the relationship with the ADR organisation and disseminate learning appropriately, perhaps the ADR Lead.



Top Tip

ADR organisations

The civil dispute landscape has changed hugely, in no small part due to the efforts of ADR organisations - work with them to benefit from their experience and to help shape the future landscape.

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Further resources

Herbert Smith Freehills maintains a range of resources to keep clients up to date on all matters ADR and to assist them in making the best use of it in managing their disputes.

ADR Practical Guides

Our [ADR Practical Guides](#) series is a collection of short guides designed to provide practical assistance on various aspects of ADR (particularly mediation) – such as deciding when to mediate in a dispute, choosing a mediator, and preparing for the mediation. It also includes a 'business-friendly' guide for those unfamiliar with the process, summarising what mediation is and what participants should expect in the process.

(herbertsmithfreehills.com/latest-thinking/adr-practical-guide-series-and-toolkit)

ADR Blog

Our ADR blog, '[ADR Notes](#)' reports on ADR news from across the world, including legal and industry developments. You can either search by topic or jurisdiction, or subscribe to be notified when a new report is posted.

(hsfnotes.com/adr)

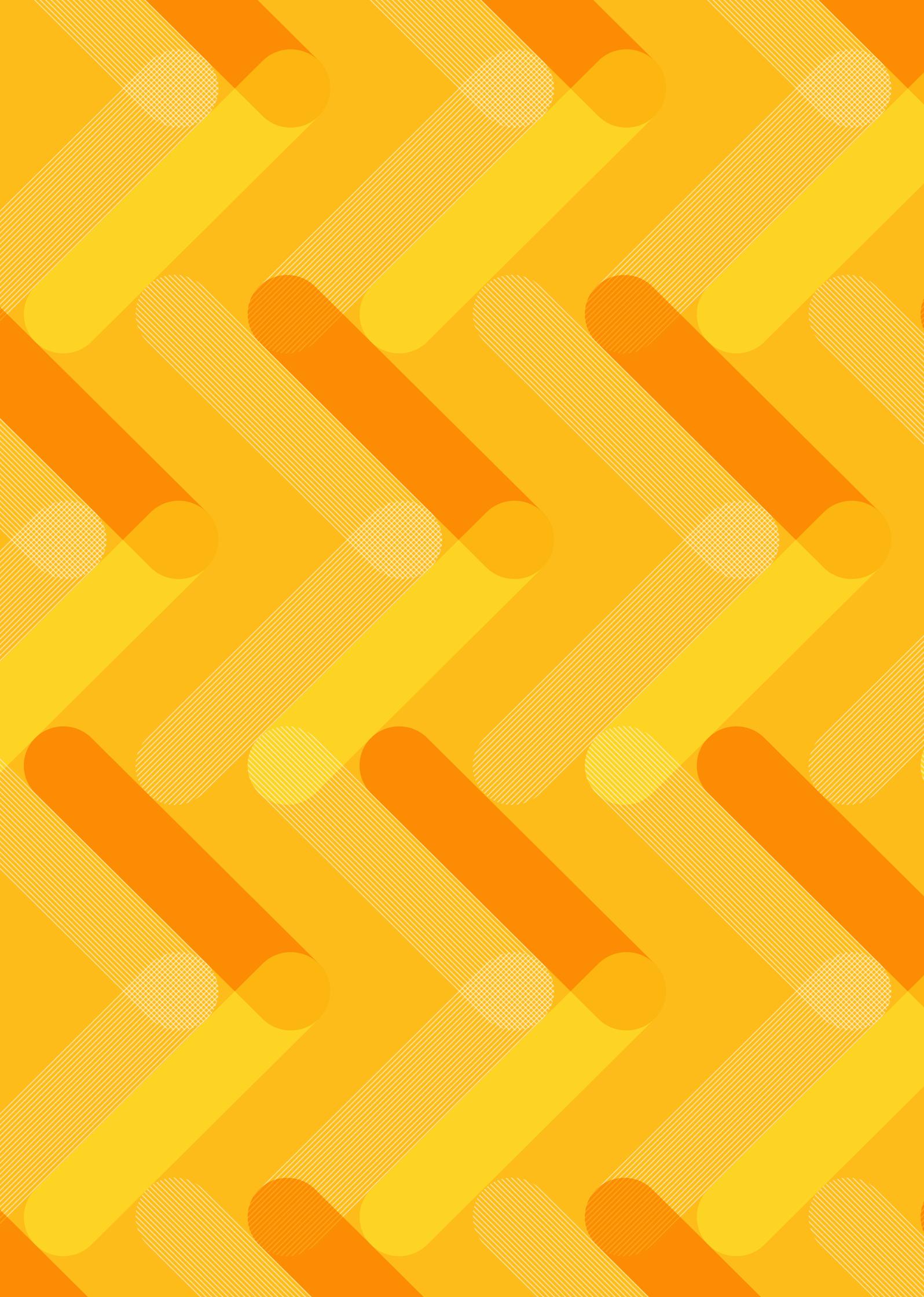
ADR Hub

Our [ADR Hub](#) features in-depth commentary and insights from our lawyers across the globe examining the changing role of ADR in dispute management, including observations arising from the Global Pound Conference (GPC) series

(herbertsmithfreehills.com/adr)

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