**ADR: reasons, types and choice**

This element introduces you to the main forms of ADR, why it is important to explore ADR, which ADR might be appropriate for a particular case and how the court encourages use of ADR

**Introduction**

When advising a client on a dispute, it is important to identify the most effective dispute resolution procedure, taking into account the nature of the dispute and your client’s commercial interests. A solicitor acting to resolve civil disputes cannot best pursue their clients' interests if they think only in terms of court proceedings. They must advise in relation to the alternative dispute resolution (ADR) options available.

This element outlines very briefly the main forms of ADR, before turning to why it is important to explore ADR, which ADR might be appropriate for a particular case, when to explore ADR, and how the court encourages use of ADR.

**Types of ADR**

There are several forms of ADR. These include:

**Negotiation**

Negotiation is a communication process between parties that is intended to reach a compromise or agreement to the satisfaction of both parties.

**Mediation**

Mediation is a confidential process intended to facilitate the resolution of disputes through the medium of an impartial third party – the mediator. Generally, each party (usually with legal representatives) will be present in the same location but in different rooms. The mediator will move between the rooms delivering settlement offers and guiding each party to reflect on those offers and the alternatives to reaching an agreement. The mediator has no authority to make any decision which is binding on the parties. In the event that the mediation does not end in an agreed resolution, the content of the mediation will remain confidential and will not be made known to the court.

**Arbitration**

Arbitration is a process by which a dispute is resolved by an impartial adjudicator whose decision the parties to the dispute have agreed will be final and binding. By agreeing to arbitrate disputes parties are agreeing to oust the jurisdiction of the court to hear the matter, and to give the jurisdiction to a different impartial party (the adjudicator) instead.

Typically, the question of whether to arbitrate or not arises at two key stages:

- When negotiating a contract the parties may decide to include an arbitration clause in their agreement to cover disputes that arise in the future; or

- When a dispute has arisen, the parties can choose to deal with it by way of arbitration (ie even where there is no arbitration agreement in their underlying contract).

It can be a long and formal process which is governed by rules and statute.

Advantages of choosing to arbitrate include privacy, easier enforcement in certain jurisdictions, the ability to choose a specialist to determine the dispute and the additional flexibility of arbitration which can be adapted to suit the needs of the parties and the dispute.

**Med-arb**

Med-arb (mediation/arbitration) is a process whereby parties agree that, initially, they will try to resolve any dispute by mediation. In the event that this does not result in satisfactory resolution of the matter, the matter will move on to an arbitration pursuant to which a binding determination will be made.

**Early neutral evaluation / expert appraisal / expert evaluation**

These terms all refer to processes where an independent party is appointed by the parties. The independent party will provide a non-binding assessment of the matter(s) referred to it. The parties will have to pay them for their time and costs. The assessment provides an impartial 'opinion' which might usefully influence the parties in future settlement discussions. The independent party could be a lawyer, but alternatively could be an expert in a relevant matter – such as a medical or engineering expert.

**Expert determination**

Expert determination is where an independent expert on the subject matter is appointed by the parties to determine the dispute.

The procedure is determined by the contract between the parties.

This form of ADR is particularly suitable for disputes requiring a technical knowledge, but may not be suitable if the parties wish to be fully heard and there are issues of credibility.

**Assessment tip:** At first glance expert appraisal and expert determination appear similar but they are different in important regards.

*Expert appraisal*: expert appraisal **does not** deliver a binding decision – just an opinion.

*Expert determination*: the expert **does** give a binding decision.

**Conciliation**

Conciliation involves an independent neutral third party in helping parties to resolve their dispute. The process is usually facilitative, like a mediation, but may occasionally involve more of an evaluation, like ENE. The term has no clear meaning, so the parties should ensure they understand what is involved in any particular conciliation before embarking on it. The details you have been provided in relation to other forms of ADR (like mediation and ENE) will apply by analogy depending on the precise nature of the conciliation involved.

Conciliation often forms part of a statutory scheme or other regulatory scheme, and that scheme might provide who the conciliator should be, and the process involved. This is unlike mediation, where these are matters purely for the parties.

**A summary of types of ADR**

ADR processes without third-party intervention: Negotiation

ADR processes with third-party intervention which do not result in a binding determination: Mediation; Early neutral evaluation / expert appraisal / expert evaluation / conciliation.

ADR processes with third-party intervention which do result in a binding determination: Expert determination; Arbitration

**Why use ADR?**

The following are all potential advantages of ADR, but whether they apply in any particular case will depend on the facts of that case and the particular form of ADR being considered. Each is explained on the following pages:

- court expectations

- better relationships

- less expensive

- saves time

- privacy / confidentiality

- less disruption

- range of outcomes

- outcomes reflect risk

- parties in control

- parties more involved

**The court expects the parties to explore ADR**

The court expects the parties to act reasonably in relation to considering and engaging in ADR, and can impose sanctions if they do not.

**Preserves or creates a better relationship between the parties**

In many forms of ADR, factors such as business relationships, reputational issues or personal emotions can be taken into account as necessary. This means that the process can assist the parties in maintaining a commercial and/or personal relationship. Parties can explore emotional dimensions, or agree a future trading relationship. Court proceedings do not offer such opportunities.

**Less expensive**

An appropriate form of ADR, if successful, can lead to a resolution at less cost than litigation.

**Saves time**

An appropriate form of ADR can also lead to a conclusion more quickly than litigation.

**Greater privacy / confidentiality**

Litigation involves filing documents at court which might be accessible by the public, and hearings (including the trial) will generally be public. All the forms of ADR already identified are essentially private and confidential.

**Less disruption to clients**

Forms of ADR such as mediation can be much less disruptive to clients – they might not need to search for documents, engage in as many internal meetings or attend court the way they might in the case of court proceedings.

**Outcomes that reflect risks.**

In non-binding forms of ADR the parties can agree a settlement that reflects the risks to each side. For example, in a financial claim, the parties might agree that the claimant has a 60% chance of winning, and if the claimant wins, they will recover £100,000. In such circumstances, both parties might be attracted by a settlement by which the defendant pays £60,000 to the claimant – less than the full sum to reflect the possibility that the claimant loses and recovers nothing.

In court proceedings, the judge cannot decide the claim in such a way. The judge must decide each issue and then give a judgment accordingly, and cannot discount the judgment sum to take into account the uncertainty that it is the right judgment.

**Greater control over the process**

In many forms of ADR, the parties have greater control over the process.

One aspect of control is the ability to choose any third party involved (eg an arbitrator or mediator). Parties cannot control the court process in the same way nor choose the judge.

**Greater involvement of the parties themselves.**

Clients often prefer mediation (for example) to litigation as there is a greater opportunity to get involved in the process and have their say. Litigation can feel like an alienating and detached process for many clients.

**Which form of ADR should a party choose?**

Unsurprisingly, this all depends on the individual circumstances.

When you know the details of a case, you could look back over the material under the 'why use ADR' heading in this element to consider which of those advantages are most important for your client. When you have done that, you can consider which form of ADR offers most by way of those advantages.

**Task:** Imagine a dispute between two commercial parties. They generally have a good and productive relationship but have fallen into a dispute over one of their many contracts. It concerns a matter which would harm both parties' reputations if it were to become public. At the heart of the dispute there is nothing technically or legally complex, but there is a dispute about a particular meeting which senior management on both sides are personally involved in. Your client wants the matter dealt with quickly so the parties can restore their previously good working arrangements. What form of ADR would you recommend?

Looking at factors mentioned under 'Why use ADR?' above, we can see here that preserving a relationship is important for your client, as is speed of resolution and privacy. Given the ongoing commercial relationship, there could also be benefits in terms of the range of solutions / outcomes that ADR could offer.

Neither arbitration nor court proceedings are likely to be quick – these are probably best considered a fall-back if another form of ADR is unsuccessful.

There is nothing technical to suggest that expert appraisal or expert determination is justified.

An adversarial process such as arbitration or expert determination is also less likely to help the parties to preserve their working relationship.

Mediation allows the parties to reach a solution consensually and to take into account all aspects of their working relationship, including the future of that relationship. It allows a safe and confidential space to explore the meeting which senior management were involved in, and a mediator can help the parties to work through any sensitivities in that area (early neutral evaluation would not offer this advantage).

Mediation, whilst costly, is probably no more so than many other options, and can be relatively quick.

Whilst there is no 'right answer', these facts do suggest that if informal negotiations do not succeed, your client might consider mediation to be an attractive option.

**Which types of case are not suitable for ADR?**

Very few. In practice, most concerns about the suitability of a case for ADR can be overcome if the ADR is appropriately chosen and timed.

**Role of lawyers**

A legal representative acting in their client's best interests will:

- Ensure their client is fully aware of the options for ADR.

- Help their client to pursue any ADR which it wishes to pursue.

- Act within the authority to settle granted by the client in any settlement discussions. It is generally prudent to involve the client directly in the final approval of any settlement agreement.

**Summary**

- There are many types of ADR including:

Negotiation

Mediation

Early neutral evaluation / expert appraisal / expert evaluation

Expert determination

Arbitration.

- Some types of ADR provide for a third party to determine the dispute, some types provide for a third party to help the parties to reach an agreement, and some types do not involve a third party.

- There are many advantages of ADR, including saving of time and money, privacy and confidentiality, greater empowerment and involvement of the parties, and a broader range of potential outcomes.

- Legal representatives must consider and advise their clients in relation to ADR.