Alternative Dispute Resolution - FAQ's

Questions answered here:

What is a Settlement?

A settlement is a way of dealing with a litigation dispute without having to reach a final judgment by a judge considering the evidence at a trial or other tribunal. A settlement is effectively a contract between the parties resolving the dispute between them agreeing not to pursue any further civil proceedings on the matter before the court. The settlement terms are entirely up to the litigating parties, and can remain confidential.

The courts will record the settlement by the parties agreeing a Consent Order, with the terms of settlement attached as a Schedule. if the settlement is broken, the party in default could be sued for breach of that contract, or face reinstitution of the original proceedings.

The vast majority (over 90%) of cases are resolved by some form of settlement. Both sides often have a strong incentive to settle. Some incentives can be public perception of the litigants, monetary costs in expert/lawyers' fees, and the unpredictability of trial.

Generally, one side or the other will make a settlement offer. The offer then starts the process of Alternative Dispute Resolution (ADR). The parties may hold (and the court may expect) a settlement meeting, often as a round table, or mediation.

What is ADR?

Alternative Dispute Resolution (ADR) is a term used to describe a variety of procedures outside the traditional litigation process, usually entered into voluntarily by parties to a dispute in an attempt to resolve it.

What Makes Up the Various ADR Procedures?

The procedures are sufficiently broad in concept that they may be structured as the parties to the dispute wish, ranging from unassisted negotiation at one end of the spectrum, to binding decisions imposed by an external Third Party.

Non-adjudicative processes include:

- Negotiation (Assisted / Non-Assisted)
- Mediation
- Settlement conferences / Round Table
- Early neutral evaluation
- Dispute Settlement Panel

Adjudicative processes include:

- Adjudication
- Arbitration
- Ombudsman
- Executive mini-trial
- Judicial mini-trial

Is it Compulsory?

The duty to encourage parties to use ADR is set out in Part 1.4(2) e of the Civil Procedure Rules "Active Case Management includes ....encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure"

CPR 1.3 expressly requires the parties to help the court further the overriding objective.

ADR is defined in the CPR as a "…collective description of methods of resolving disputes otherwise than through the normal trial process…". ADR, therefore, covers a range of processes, with negotiation and mediation at one end and mutual evaluation, mini-trial or and Arbitration (where third parties impose solutions) at the other.

The court may require evidence that the parties have considered some form of ADR. Unreasonable refusal to consider ADR may result in sanctions.

Why include negotiation in ADR- Don't people negotiate in most cases?

Yes, parties and their lawyers do negotiate in most cases. Indeed, some 90% to 95% of cases settle before trial using some form of negotiation. ADR claims negotiation as one of its procedures because increasingly agreements are structured to require parties to negotiate as a precondition to going to litigation. In those agreements, it is only after a good-faith attempt to negotiate a settlement has failed that litigation may proceed. Where negotiation is used at the outset of a dispute, it is frequently successful, and often involves less cost than litigation.

What is the most frequently used form of ADR?

Mediation is the most frequently used form of ADR, though it may be used in conjunction with other forms of ADR.

What is mediation?

Mediation is a way to:

- Start settlement negotiations
- Break a deadlock
- Prevent escalation of litigation

Mediation is a process where the parties agree to appoint a third-party neutral to assist them in attempting to reach a voluntary settlement. The neutral does not make a decision and the parties may terminate the process at any time. It is confidential and “without prejudice”. The parties are encouraged to seek independent legal advice, and where a voluntary settlement is achieved, it only becomes binding when the parties have concluded and usually signed a settlement agreement.

How does Mediation work?

A neutral person who might often by an expert in the relevant field or experienced lawyer mediator meets with the parties and their representatives at the negotiating table to conduct a mixture of joint and private meetings. The Mediator's job is then to:

- Clarify the issues

- Analyse the risks of continuing to court
- Promote discussion of possible solutions

Creative solutions

In a classic "facilitative" mediation, the Mediator helps the parties themselves to resolve their dispute, rather than by imposing a solution. The Mediator concentrates on parties' interests rather than their strict legal rights. The Mediator tries, if possible to achieve a creative solution where both can be winners, even if this might mean re-writing a contract or otherwise looking beyond the strict application of the law. The intention is for it to be quick, informal and inexpensive.

Why use mediation?

Savings in cost and time are the dominant reasons, but there are other significant reasons, such as:

- preservation of business relationships
- arrangements may be made quickly
- process usually takes one day or less
- simple and easy process
- confidentiality
- process non-binding
- the outcome is within the control of the parties
- high level of satisfaction

Is Mediation binding?

The mediation process is voluntary, non-binding and "without prejudice". The parties can leave it at any time and continue with litigation. An agreement resulting from mediation forms a binding contract between the parties like any other negotiated agreement. No one can be compelled to reach agreement, and a decision is not

imposed in mediation.

What sort of cases are suitable for Mediation?

It is suitable for:

- Avoiding the risks of going to court
- Controlling the outcome of the case
- Saving the costs of legal proceedings
- Securing a win/win settlement

When should Mediation be avoided?

It should not be used where:

- A court order or an injunction is required
- A legal precedent needs to be established

When should Mediation be proposed?

Mediation should ideally be used to prevent disputes, or to intervene at an early stage. Failing that, Mediation is best used when all the parties are sufficiently informed about the case to be able to negotiate effectively. It can also be used as a last resort to avoid a Trial. If you are a party involved in litigation, proceedings will normally be suspended to allow Mediation to be tried. There is a very short time scale.

Ground rules for Mediation

- The aim is to give the parties a framework in which they, along with the neutral third party Mediator can negotiate their own settlement.
- The Mediator must be well trained and conform to a strict code of conduct and ethics.

- The Mediator must instil confidence and trust in the parties that he is unbiased and not a "quasi judge", imposing a decision.

The Mediation Process

Once all the parties have agreed to mediate, a convenient time and location will be arranged and a Mediator appointed. The process is simple. It is this informality which gives Mediation many advantages over arbitration or litigation. All parties to the dispute will be present at the Mediation and must be represented by a person with authority to settle the case. The Mediation begins with an open session with all parties present.

The Mediator begins by explaining the process as part of his opening statement. After he has answered any questions that the parties may have, each side is given the opportunity to describe the facts of the case and explain their position. These explanations will usually include any relevant written materials, a description of any witnesses and a summary of their evidence. There are, however, no formal rules of evidence.

These presentations give everyone the opportunity to fully understand the case so that they may effectively analyse their risks.

The Mediator then meets privately with each party and attempts to help them reach agreement. These meetings are entirely confidential and no information will be given to the other party unless expressly agreed. The Mediator will, however, act very much as a devil's advocate in asking you the tough questions about the strengths and weaknesses of the case.

How long does a Mediation last?

Mediation would usually involve half a day, or a full day. It would be unlikely, even for complex cases, to last longer than a full day.

What does Mediation cost?

This depends upon the organisation providing the Mediator. However, because of the relatively short amount of time involved, Mediation costs will usually be assessed either at an hourly rate and divided between the number of parties, or there will be a day's charge for the Mediator, again to be divided between the parties. A full day's Mediation fee may be around £2,500 - £5,000 plus VAT, subject to the complexity of the case, its value, and the amount of documentation and preparation required. It would be unlikely that you would be required to pay another party's costs of a Mediation.

How do you refer a case to Mediation?

You can either choose your own Mediator, by agreeing with the opponent, or you can ask for a Mediator to be appointed from for example one of the following:-

Association of Northern Mediators 01347 825279

ADR Group 0203 600 5050

Academy of Experts 0207 430 0333

CEDR 0207 536 6000

Is ADR suitable in all cases?

No. For ADR to be successful, the parties must genuinely wish to achieve a settlement. There are cases in which this will not be the desire of one or more of the parties. Examples are:

- cases where the parties wish to establish a precedent
- where a point of law exists upon which the parties wish to have a formal judicial ruling
- where a court order is required to enforce a judgment
- where evidentiary processes are required to protect the rights of a party
- where extraordinary court relief is sought, such as a declaratory judgment.

Even though a case may not in the first instance appear to be suitable for ADR, the case should be reviewed on a periodic basis to assess whether or not it might

subsequently be submitted to ADR.

What is the difference between mediation and arbitration?

Arbitration involves adjudication by a third-party neutral. While it is possible to structure arbitration to be non-binding, most arbitration is designed to be binding. Arbitration will in most instances arise by agreement of the parties, either arising out of a pre-existing agreement or based on the specific terms of an arbitration agreement entered into after the dispute has arisen. Unless otherwise agreed, the terms of the applicable Arbitration Act will govern. The single most important distinction therefore, is that the decision of the arbitrator, unless otherwise agreed, will be binding, and the decision may be entered on the court record.

What is the difference between a mediator and an arbitrator?

The mediator does not make a decision, but rather works with the parties to assist them to find a solution, satisfactory to them, of the dispute between them. An arbitrator, also a third-party neutral, makes a decision based on the arbitration agreement and the evidence presented in the arbitration proceedings, and the decision, unless otherwise agreed, is binding on the parties.

Isn't arbitration as expensive as litigation?

In some circumstances arbitration can be as expensive and time consuming as litigation. It need not be. The parties and their lawyers have the means to avoid those consequences. If they specifically address issues such as production of documents and the conduct of discovery of documents, and deal with them by agreement, arbitration can be conducted in an expeditious and cost-saving manner.

Doesn't ADR suggest weakness?

Parties and their lawyers may be reluctant to consider negotiation, or any other ADR process, because they fear that to do so suggests a weakness in their case. To overcome that appearance, many companies and law firms are adopting policies

promoting ADR in suitable cases, the effect of which is to actively and voluntarily consider the use of ADR wherever suitable. The hurdle to resolution may be one of perception. The reality is that ADR (except for binding arbitration) is a non-binding process - one from which a party may walk away at any time. Parties remain in control of the process, and the outcome.

What is the EU Proposal on ADR & ODR Directive & Regulation?

The European Commission published proposals on Alternative Dispute Resolution (ADR) and Online Dispute Resolution (ODR). The documents can be found on the following website:http://ec.europa.eu/consumers/redress_cons/adr_policy_work_en.htm

The Commission proposed:

(i) a Directive on consumer ADR to ensure that quality ADR entities exist to deal with contractual disputes arising from the sale of goods and the provision of services by traders; and

(ii) a Regulation on consumer ODR to enable consumers and traders to access directly an online platform which will help to resolve contractual disputes arising from cross-border online transactions through the intervention of an ADR entity complying with the Directive.

When is the best time to suggest ADR?

Resolution of a dispute requires careful preparation whether the process used is ADR or litigation. Careful analysis of the dispute involves fact and document gathering and involvement of those who are able to provide evidence. Analysis of the facts and the law are necessary to permit an assessment of risk and of the value of a claim or level of exposure to a claim. Contemporaneous with these assessments, consideration should be given to the use of ADR. If for any reason, ADR is not initially thought to be appropriate, it should nevertheless be considered as circumstances develop and as procedural milestones in litigation are passed - such as at:

- the close of pleadings
- production of documents

- completion of discoveries
- setting down for trial
- the time of witness preparation for trial.

The success rates from using ADR are such that the presumption ought to be that ADR should be used, and justification be sought as to why it is not being used.

What is an executive mini trial?

An executive mini trial is not really a trial at all. It is rather a process which involves negotiation structured to involve senior executives who have no involvement with issues giving rise to the disagreement. Senior executives from each side listen to a summary of key elements of the dispute presented by each of the parties. These presentations may be made to the executives on their own, or by agreement of the parties, a third-party neutral may be present. The intent is that the parties use the presentations to try to conclude an agreement by focusing on the business issues. An involved Neutral endeavours to assist in the process.

What is a judicial mini trial?

A judicial mini trial is a non-binding, flexible ADR process, involving counsel for all of the parties to the litigation, who present arguments to the judge, in the presence of the clients. Neither the judge nor the counsel is gowned during the presentation. An agreed Statement of Facts should be prepared, if possible, together with copies of expert reports, medical reports and authorities attached. No evidence is adduced. Rather, arguments are presented based on agreed facts or facts essentially agreed upon. Counsel may refer to evidence from Examinations for Discovery. Counsel, by arrangement with the Trial Co-ordinator, make an appointment with the mini trial judge assigned to the timeframe for which the appointment is arranged, and the judge is then able to assess whether or not a mini trial is appropriate, and confirm the date for the mini trial, and the time to deliver briefs. Usually the mini trial takes no more than one or two days. The non-binding opinion of the judge rendered at the conclusion of the mini trial is strictly confidential. The mini trial judge will not discuss the opinion given at the mini trial with anyone else on the bench. No costs are assessed at the mini trial. If the parties are unable to conclude a settlement, the case will proceed to trial in the normal

manner.

What is early neutral evaluation?

Early neutral evaluation (ENE) is a process in which a person experienced in the subject matter of a litigated dispute, will convene a brief, non-binding meeting to hear the parties outline the key elements of their cases. The evaluator will identify the main issues and explore possibilities of settlement. In addition, the evaluator will assess the merits of each party's case. If settlement is not achievable, the evaluator may assist the parties by indicating procedural recommendations, the intent of which is to streamline the litigation process.

What is Adjudication?

Please refer to our article on Professional Negligence Adjudication scheme included in the pre- action protocol. https://levisolicitors.co.uk/news/professional-negligence-adjudication-2/

What Next?

In all cases, you are obliged to consider Mediation/ADR, and be ready to tell the court the reasons why the option of referring the case for Mediation/ADR is not taken. We look forward to discussing this with you, and the way in which it affects your case, so that we can advise you on the best way to protect and advance your interests.

Contact Us

If you would like more information about our services and advice about funding options including No Win No Fee (Conditional Fee Agreements) please call our team on 0800 988 7756

ADR Mediation Checklist

Factors Favouring Mediation	Yes	No
A business relationship could continue or be resumed.		
It is desirable for you to be able to control the outcome of the dispute.		
The position of each side has merit, and a trial could well result in either side prevailing.		
Trial preparations would be costly and protracted.		

A speedy resolution is important.		
The dispute raises highly technical or other complex, factual or legal issues which may be obscuring the real interests.		
The law on the legal issues is well settled.		
You need to avoid an adverse precedent.		
Publicity about the case or its outcome should be avoided.		
No further discovery (of documents / data) is required - or limited expedited discovery will suffice - for each side to assess its strengths and weaknesses.		
The case lends itself to settlement before a trial court decision.		
A presentation by each side of its best case will help promote a better understanding of the issues.		
A strong presentation will give one side or the other a more realistic attitude about the case.		
A mediator could help diffuse the emotion or hostility which may bar a settlement of the		

dispute.		
Neither side really wants to litigate.		
You can see no good reason why the case should not settle.		

Factors Weighing Against Mediation	**Yes**	**No**
The amount in dispute is extremely large		
A vital corporate interest is involved.		
At least one side requires a judicial decision for its presidential value.		
There is no bona fide dispute; the other side's case is without merit.		
The advantages of delay run heavily in favour of one side.		
The case can most probably be settled in the near future through		

simple unassisted negotiations.		
The other side has no motivation to settle (e.g. expectations of a large judgment, highly emotional stake in being vindicated).		
More time must elapse before each side's positions and the settlement possibilities can all be evaluated.		
Cases where one party requires full open, public personal vindication – e.g. some libel cases.		
Cases involving crime or family (children) cases where the court's jurisdiction is paramount.		