

Common ADR processes – An overview

This is the first in our series of **ADR practical guides**, designed to provide clients with essential guidance on various processes falling under the banner of "alternative dispute resolution" (ADR), with a particular focus on mediation. ADR is an increasingly popular way of resolving disputes. This guide provides a snapshot of the most commonly used processes, highlighting the main advantages and disadvantages of each.

Common ADR processes

1. Mediation	Structured settlement discussions facilitated by a neutral third party with no decision-making power
2. MedArb/ArbMed	Hybrid processes combining mediation with arbitration
3. Early neutral evaluation	Neutral third party provides a non-binding evaluation of the dispute
4. Expert determination	Neutral third party with expertise in the subject matter makes a (usually) final binding decision
5. Adjudication	Neutral third party makes a decision that is binding pending any subsequent court or arbitral award

1. Mediation

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

It is a structured settlement negotiation facilitated by a neutral third party (the mediator) with no decision-making power. The style of mediators can vary from "facilitators" (who assist the parties in their negotiations) to "evaluators" (who encourage settlement by expressing views on the merits and likely outcomes).

Principal advantages:

- The introduction of a mediator, who typically spends a good part of the mediation process engaged in "shuttle diplomacy" between parties located in separate rooms, enables parties to appraise their cases with a third party in confidence. Usually progress can be made in mediation even where direct negotiation has become deadlocked.
- The focus is on the parties' overall interests rather than just on their legal rights. Important factors such as business relationships, external commercial pressures and reputational issues can be taken into account.
- The process is conciliatory and any successful outcome is consensual, in contrast to the contentious approach taken in litigation/arbitration which ends in the imposition of a solution by a court or arbitral tribunal. This can improve the chances of preserving business relationships.
- Whilst many mediations follow a broadly standard template, the procedure is flexible and can be adopted to suit the parties and the dispute.
- The range of available outcomes is also flexible, with scope for non-monetary remedies such as the provision of services, payments in kind and apologies. This contrasts with the more limited range of outcomes in litigation/arbitration (eg money damages, specific performance and injunctions).
- Mediation is quick and consequently cheap. Only the largest, most complex multi-party disputes require a mediation of more than 1-2 days.
- The process is confidential and conducted on a "without prejudice" basis. This means that usually neither the substantive discussion at the mediation nor the documents generated in connection with it can subsequently be referred to in litigation or arbitration proceedings.
- Mediation has a high degree of success in resolving disputes, either on the day of the mediation or shortly afterwards as a result of progress the parties have made.
- Even when a settlement is not achieved, the process will always provide an opportunity for decision-makers to focus on the issues in dispute and the range of possible outcomes. They will also reflect on the full economic costs and risks, be that in terms of legal costs, management time and brand or reputational issues.
- Mediation can also provide an opportunity to re-establish lines of communication which often break down when a dispute escalates.

There are very few true disadvantages of the mediation process although it may not be suitable in some cases, such as:

- where the parties to the dispute require a court judgment (eg where provisions in standard terms and conditions need to be determined definitively for the purposes of an ongoing trading relationship) or a remedy that a mediation process cannot provide, such as an injunction; or
- where there has been such a serious breakdown in trust between the parties that they cannot negotiate in good faith. That said, in practice even fraud cases are often mediated with success.

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

2. Mediation variants - MedArb and ArbMed

Standard mediation as described above is commonly used in arbitrations. However, there are also two variants – MedArb and ArbMed – which are closely linked to the arbitral process and combine mediation with arbitration, with the same person acting as both mediator and arbitrator. These hybrid approaches are more popular in certain jurisdictions but may be prohibited or restricted under some institutional arbitration rules or at specific seats of arbitration, typically due to concerns about the mediator/arbitrator's access to confidential information during the mediation and the potential impact this could have on the impartiality and fairness of the arbitral process.

Mediation-Arbitration (MedArb)

- The parties first attempt to resolve their dispute through mediation. If mediation is unsuccessful, the mediator assumes the role of arbitrator and issues a binding award.
- The main drawback is that parties may be reluctant to disclose their candid assessment of the dispute – particularly the perceived risks – given that the mediator could later act as arbitrator.
- There is also a risk that the parties might use comments made by the mediator about the strengths and weaknesses of their positions to refine arguments or introduce additional evidence in the arbitration, gaining an advantage they would not otherwise have had.
- Concerns may also arise regarding impartiality. It may be difficult for an arbitrator to disregard confidential or "without prejudice" information disclosed during the mediation, which may increase the risk of a challenge to either the arbitrator or the award.

Arbitration-Mediation (ArbMed)

- In this process the parties begin with arbitration. At a point before the award is delivered they will attempt a mediation. If a settlement is reached, the parties enter into a settlement agreement. This settlement can then be recorded as a consent award if the parties wish. If no agreement is reached at the mediation within an agreed time limit, the arbitrator delivers the award, which is binding upon the parties. The existence of a pending award is intended to encourage the parties to adopt a reasonable approach to settlement.

- One advantage is that the arbitrator, already familiar with the case and the parties, is well-placed to help facilitate a settlement. The parties will also have had the opportunity to consider how their case has been received both by the arbitrator and the other party.
- Similar concerns to those in MedArb regarding impartiality can also arise in ArbMed.

3. Early neutral evaluation (ENE)

A neutral party is retained to provide a non-binding evaluation on the merits of a dispute. This is usually most effective if attempted at an early stage in the life of the dispute, before significant costs are incurred. There are no particular procedural requirements for ENE beyond those agreed between the parties. The evaluator simply expresses a view on the strengths and weaknesses of the case as presented and what the outcome might be. They do not seek to resolve the dispute or suggest how it might be resolved.

- The key advantage is that where parties are engaged in direct discussions, the considered opinion of a mutually respected neutral may assist the negotiations. An opinion from a KC or retired judge on, for example, a disputed point of contractual construction can assist the parties in forming a realistic appraisal of their case and encourage parties to step away from deadlocked positions.
- It can be particularly useful where a case turns on specific legal or technical issues.
- The principal disadvantage is that the process is non-binding, and parties can (and do) ignore an opinion with which they disagree. It can also entrench positions if one party perceives its case to be "right" in light of the opinion and then make settlement more difficult.

4. Expert determination

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

The decision-maker is appointed as an expert and not as an arbitrator and is therefore not obliged to observe the rules of procedural fairness to which an arbitrator would be subject.

- This process can be highly effective in the case of technical disputes where the expertise of the decision-maker is critical. Examples include disputes relating to completion accounts, valuation and technical engineering.
- It is significantly quicker than litigation or arbitration. It is also confidential and flexible.
- The principal disadvantage is the risk of an unfavourable decision, against which there will usually be no appeal. While expert determination is occasionally undertaken on a non-binding basis, this carries with it a risk of polarising the positions of the parties and wasting time and costs if either or both parties choose not to be bound.
- The expert's remit is dependent on contractual provisions. They do not have the same powers as judges, eg to call for disclosure of documents or summon a witness. It may therefore be difficult for an expert to have the full picture of a dispute.

5. Adjudication

Introduced by the Housing Grants, Construction and Regeneration Act 1996 (**1996 Act**), adjudication is an established method of resolving disputes in the UK construction industry. Parties to a "construction contract" (as defined by the 1996 Act) have a statutory right to refer a dispute to adjudication at any time. Such right cannot be excluded by contract.

Adjudication involves a fast-track procedure, resulting in an adjudicator's decision within 28-42 days from the date on which the dispute is referred. The disclosure of documents and/or rules of evidence may be applied flexibly or dispensed with altogether.

The adjudicator's decision has interim binding effect, meaning that the parties must immediately comply with it, and it remains binding unless or until the dispute is finally determined by legal proceedings, arbitration or agreement. In practice, relatively few adjudicated disputes are subsequently relitigated or referred to arbitration, although it is common for parties to enforce an adjudicator's decision through the Technology and Construction Court.

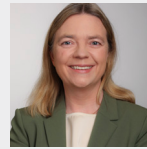
The primary purpose of adjudication is to enable parties to obtain a rapid decision and minimise disruption to the project, including by reducing cashflow problems. It can be well-suited to straightforward payment disputes, but is unlikely to be appropriate for disputes involving complex factual or technical issues.

Parties in the construction industry often agree to adopt adjudication as their dispute resolution process, even where the construction contract falls outside the scope of the 1996 Act. However, whilst the "rough and ready" justice of adjudication has been widely accepted by the UK construction industry, few other sectors have embraced it on a similar scale.

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