ADR : A User's Introduction to Some Available Methods

In this note, I propose to set out the principal methods available for the resolution of private disputes, and the resolution of some classes of disputes, which may have a public element.

Necessarily, in a short note, there is no time to give a deeply academic treatment, and many users will wish to refer to more authoritative text, or to seek appropriate legal or other advice.

There are learned arguments about what is meant by Alternative Dispute Resolution, ADR. The logical meaning is simple. Alternative Dispute Resolution, in a legal context, embraces all means of resolution that are available as alternative to proceedings in court.

In general, any persons who have a dispute of any substance have a right to seek to have that dispute heard and determined by an appropriate court. In most countries, the court has an inherent jurisdiction to hear private disputes and it will hear them whether or not the defendant or responding party has agreed to that jurisdiction. That, then, is the essential difference between litigation and all forms of ADR. At one point or another, ADR methods are voluntary and depend upon the consent of the parties in the dispute.

There is one cautionary note to include here - there are countries who have enacted legislation to make one or more methods of ADR obligatory. The United Kingdom, for example, has introduced a right to what is called 'adjudication' for parties to construction contracts. The essential principle remains. The law provides, however, for every construction contract to be deemed to have an agreement to adjudication in it. Other countries have provided for mediation to be ordered by a judge, or to be a necessary step on the way to litigation. However, it is still true to say that consent is the underlying principle, even if the consent itself is not fully free.

Similarly, some States of the United States of America have legislated, and some Courts have provided as a part of Court procedure, for mediation to be required as a condition of proceeding with an action. This also contravenes the principle of consent, and that in turn affects the way in which parties view the process - and may even affect the outcome, for essentially psychological reasons, which we cannot discuss here.

So, as this note is essentially an overview for the possible user, let me first set out the processes that are available and from which a choice can be made. Mine is not an exclusive list and there are variants to almost every approach, so the reader is urged, indeed strongly urged, to seek legal advice before embarking on any of the courses open. The choices I propose to review, as alternatives to litigation are these:

1. Do Nothing
2. Negotiate directly
3. Find an Expert
4. Find a Mediator
5. Find an Adjudicator
6. Find an Arbitrator

Each of these approaches has its merits, and I propose to look at them from a user's point of view.

1 Do Nothing

Disputes can often involve an expense of time and spirit, as well as money, and the outcome is rarely certain. Involvement in a dispute can distract attention from other, more important matters in business and personal life. It is surprising how often people, having found themselves faced with an insult or injury - real or perceived - decide, after careful thought, to let the matter go and to chalk it up to experience. Doing nothing is a very practical option and anyone with a grievance should consider the benefits of inactivity first and foremost. Talking it through with a friend or professional may help to get things into perspective, but be warned that it is often too easy for other people to urge you to action - they will not have the burden of it.

In certain circumstances, and on taking advice, it may be as well to write to the other party saying something like "I propose to do nothing about this, but I reserve my rights" or something of the kind. There is often a great pleasure in taking the moral high ground, especially if you do not lose much by doing so.

2 Negotiate Directly

There is almost never harm in writing or telephoning the other party and saying "Let's talk about this over . . . . . *a game of golf, lunch, dinner, a walk by the sea, any of those things*." It is sometimes said that to make the first move displays weakness, but that is nonsense - you may be negotiating from strength or weakness, and a willingness to discuss a solution is a sign of moral strength, not weakness. It also puts you in the position of gaining a *tempo*. If you initiate the negotiation, the other party may expect you to make the first proposal, which puts you in a leading position. No third party is involved. Whether you offer to play host (and that itself gives an advantage) or 'go Dutch' is a matter of judgement. A variant on direct negotiation would be negotiation through friends or through your respective solicitors - but think what would happen if you agreed

to negotiate through a mutual friend - you would have created a form of mediation without knowing it.

3 **Find an Expert**

The two of you, parties in dispute, can agree to find an expert who will know about the matters that concern you, and may look into your differences and form his or her expert opinion.

Now, and this is very important, you can use that expert in two very different ways. You can agree merely to obtain that expert opinion, and then use it to guide your own negotiations. Alternatively, you can agree to abide by that decision - to be bound by it.

If you agree to be bound, then you will have contracted to accept the expert's opinion and to act on it. If you then fail to comply with your bargain, it can be enforced by a Court. Moreover, expert determination, as it is called, is generally not open to appeal or correction in the court, except, in the event of egregious misbehaviour by the expert.

Examples where expertise has been used in this way include such questions as the opinion of Counsel as to the proper interpretation of a Contract, the opinion of an engineer as to the probable cause of a failure of a machine, and the opinion of a stockbroker as to the valuation of shares.

Some times the distinction between an expert and an arbitrator or adjudicator may be blurred, and experienced experts will encourage the parties to make their purpose clear. Certain forms of contract, such as those of the IChemE in UK, have provision for an expert to determine all disputed matters or disputed matters of particular kinds. The parties choose how to limit the range of subjects for the expert to resolve.

Specialist institutions, including NADR, will often suggest the names of persons having experience of expert determination. Although the only obvious requirements are competence and, of course, the trust of both parties, there are legal considerations, such as the need for fairness, that favour the use of an expert who has made such determinations before.

4 **Find a Mediator**

Mediation requires only that the two of you in dispute should agree to have someone mediate between you. However, in recent years, a mediation industry has come into existence and is growing, with many organisations (of which NADR is but one) providing training and accreditation and developing sets of more or less formal rules. The principle is simple, the mediator uses his or her skills to enable the parties to negotiate towards an agreement of their own.

There are choices: the mediator may simply chair a discussion between the parties, taking a more or less active role as they, the parties, wish; in a commonly seen variant, sessions chaired by the mediator, the so-called plenary sessions, alternate with private discussions or caucus sessions, in which the mediator sits with one or other party and carries the thoughts of one to the other (sometimes characterised as "shuttle diplomacy"). The mediator also hears things from a party which help with understanding the position, but may not be repeated to the other party. Confidentiality is very important.

There are other choices: The mediation may be intended simply as a means to a deal (so-called "interests" mediation) or it may be to help the parties achieve a fair result (so-called "rights" mediation). The parties may choose to use a mediator solely as a passive messenger, or they may ask the mediator to bring his own knowledge into play. They are more likely to ask for that knowledge where the issues are of fact and the mediation is about rights, or intended to predict what may happen in Court.

It is as well for there to be a clear understanding about which of those choices is preferred by the parties, because different ADR organisations have different approaches. Some favour a deal at any price, some favour a fair outcome. It is sometimes said that an agreed deal must be fair, but that ignores the weight of bargaining power which one or other party has. "A man, convinced against his will, is of the same opinion still."

One advantage claimed for mediation is that it opens the way to lateral thinking, and to the settlement of disputes by the use of creative alternatives for example, leaving things as they are in the disputed contract and entering into some other deal which suits both parties - perhaps on another project. It is sometimes forgotten that, even with arbitration and litigation, two parties may always agree to an alternative deal, limited only, as in mediation, by their ability to imagine.

5 **Find an Adjudicator**

Strictly speaking an Adjudicator is anyone who makes a decision in a more or less judicial manner. However, the contract forms used by the World Bank have provided for a Board of Adjudicators in major contracts, and the UK construction industry, through the Housing Grants, Construction and Regeneration Act 1996, has a statutory right of adjudication implied in every contract (there are exceptions, and there is now jurisprudence as to what is a construction contract

for the purpose of the Act).

An Adjudicator has wide ranging powers, but has an obligation to make a decision within 28 days from receiving a claim, commonly called a 'referral' (he or she is a kind of referee). The referring party may agree to extend the time, but the essential purpose of Adjudication is to keep the cash flow going without stopping the construction. As it happens, the Arbitration Act 1996 was intended for the same purpose, but the drafters made a mistake, by making s.39 optional, but that is another matter.

Adjudicators are available from a wide range of appointing bodies (NADR is one, of course). Many are competent construction professionals, but there are lawyers available too. Agreement as to the Adjudicator is very desirable, but not necessary, because the Act deems there to have been an agreement in the contract (whether there was or not), and the Secretary of State has prescribed a default Adjudication Scheme.

Many of the plethora of appointing bodies have their own rules for Adjudication and it would be invidious, in the note, to discuss any one in particular. The essential features of Adjudication are that it has to be done briskly and that the decision of the Adjudicator must be complied with straightaway, even though it is a provisional decision, made subject to the final decision of a Court or Arbitrator. There are dangers about that, one or other party may become insolvent in the interim. The Courts have considered this question when deciding whether or not to enforce Adjudicators decisions.

6 Find an Arbitrator

Arbitration is, even now, the principal alternative to litigation. In Arbitration, the parties choose someone to hear their respective cases and make a binding decision. There is legislation in most countries to regulate and supervise the process, but essentially, the principle is the same. Arbitration usually results from an arbitration clause in a contract, or in the standard membership terms of a club, such as a commodity association. The arbitration agreement is in existence before the dispute.

It is perfectly possible, however, to make an agreement to arbitrate after the dispute has arisen. From time to time, parties may compromise an action brought in the Court, by referring it to arbitration.

The Arbitrator (or arbitral tribunal - larger international cases often have three arbitrators - one appointed by each party and the third agreed in some way) will act judicially, and give directions as to what the parties should do. There is great flexibility of procedure, the arbitrator may leave everything to the parties, or may take his or her own initiative in ascertaining the facts or the law.

Arbitration is a serious business, although, in the right hands it can be fair, efficient and quick. However, because it is final and binding (subject to limited scope for appeal), no-one should venture into it with out advice from a lawyer with specialist experience of arbitration.

In England and Wales, an arbitrator can order an interim payment, but only if the parties have agreed (this is the effect of s.39 of the Arbitration Act 1996). So useful is this provision that a number of sets of arbitration rules provide for it (for example CIMAR - the Construction Industry Model Arbitration Rules).

Arbitration is particularly useful in international trade. That is because the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, recognised in almost every trading nation, provides for enforcement of Awards all over the world, while Court judgements do not always work so freely in foreign lands.

Arbitrators can be found in the lists of most of the major technical institutions, and bodies such as the Law Society, the Chartered Institute of Arbitrators or, of course NADR, as well as in arbitral organisations such as the ICC in Paris, the LCIA in London or their equivalents around the world. Most arbitral institutions provide full administrative services also, with clerks or counsel handling the file.

Conclusion

This has been a brief overview of the main ADR processes. Although the processes all stem from the principle of voluntary agreement, there is real variety and each method is worthy of a book of its own.

I have set out to show that variety in outline - anyone who needs to have recourse to some form of dispute resolution should seek the advice of an experienced practitioner as, although the principles may be clear and the processes inherently simple, there are pitfalls.

ADR has come to stay, however. No businessman or professional should ignore the implications, and in England and Wales (and in many other jurisdictions world-wide) no contentious lawyer should even consider going to a Court in the present legal climate without first looking carefully, and being seen to have looked carefully, at the alternatives.

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