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Biography

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Alternative Dispute Resolution

Abstract: Following the enactment of the Civil Procedure Rules in 1999, potential litigants are expected to pursue alternative means to litigation for solving their disputes. In this article, Nigel Broadbent a Director at Lupton Fawcett LLP in Leeds clearly explains the various activities which fall within ADR, including mediation, family dispute resolution, arbitration, conciliation and adjudication.
Keywords: alternative dispute resolution; arbitration

Introduction

For as long as there have been disputes, there have been resolution alternatives. When states engage in disputes, the ultimate resolution mechanism is war, but just as states (generally) manage to overcome their differences without resorting to bloodshed and annexation of territory, most of the time so do corporations and individuals.

In England and Wales, there has been a concerted effort by the legal establishment to push disputants away from the court room steps. The process of stigmatising, and penalising, the frequently premature rush to court, which characterised earlier generations of litigants, began in earnest with the Civil Procedure Rules ("CPR"), which came into force in April 1999. The product of Lord Woolf's review into civil litigation rules and practices which had developed over more than a century, the stated aim of the CPR and the Pre-Action Protocols ("PAPs") which accompanied them, was to accelerate litigation procedure and reduce its cost. A more circumspect interpretation might have it that the real agenda was to reduce the cost of running the court service, by ensuring that parties were channelled down the route of negotiation and other

alternative dispute resolution (or "ADR") processes, so that inevitably a proportion of cases would settle rather than having to be decided by a judge in a court room.

Initially there were only two PAPs, one for personal injury cases and one for clinical negligence cases, but others were added over time, and there are also now PAPs applicable to construction and engineering disputes, professional negligence claims, applications for judicial review, disease and illness claims, housing disrepair cases, and possession claims based on rent arrears.

The basic ingredients of the PAPs are a set of pre-action correspondence requirements and, in some cases, a without prejudice meeting between the parties. This is "front loading": essentially, setting out a claim with great particularity, substantiated by the production of supporting documents and virtually litigating it in correspondence prior to issuing proceedings. If this formula was intended to encourage settlement and discourage litigation, then it appears to be working. In 1990 and 1991, approximately 350,000 claims were issued in the Queens Bench Division of the High Court. Ten years later, less than 20,000 claims were being issued each year and the numbers have remained at similar annual levels since.

The dramatic increase in court issue fees, and fees payable to the court throughout the duration of the pre-trial part of the case, may have contributed to the decline in the numbers of issued claims.

Some argue that the drop in litigated cases is evidence of a successful change, overturning more than a century of wasteful and expensive litigation practice. Others talk of the erosion of access to justice, an attack on the very fabric of our democratic process. Whichever is right, there is probably something in both points of view and the statistics appear to speak for themselves.

So what is ADR?

ADR is exactly what it says it is: a means of resolving disputes which is an alternative to going to court. ADR can take any number of forms, but all forms fall into one of two sub-sets. One is what might be described as determinative and the other as elective.

Determinative ADR is any non-court process which will determine the outcome of the dispute. It involves a third party, whether an arbitrator, or an adjudicator, or an expert acting in a determinative capacity. The outcome is binding on the parties. Elective ADR is that which facilitates a discussion, which usually turns into a negotiation, but which does not produce a finding or judgment which can be imposed on either party. By elective ADR the parties will provide themselves with a forum in which to air their differences, but whether or not to settle them remains within their control. It may involve a third party, a mediator, for example, or a legal expert instructed to express an opinion, but it does not have to.

Mediation

Mediation is far and away the most common form of formal ADR in civil and commercial legal practice in England and Wales (and no doubt other jurisdictions too). It has the approbation of the judiciary, as well as of a considerable part of the legal profession. Ask any mediator, most are solicitors, and they will tell you that the settlement rate is in the order of 80%. That is, about four out of every five cases which are subjected to a mediation process are going to settle, either at the mediation itself, or in the days and weeks following it. Eighty per cent sounds a lot, but history would suggest that many of those cases would settle anyway.

In a number of high profile cases, the Court of Appeal has sent out the clear signal that any party who unreasonably refuses to take part in mediation may face potentially very heavy costs sanctions at the end of the litigation. A feature of many litigated cases is the "Ungley order", an order (named after the High Court Master who first imposed it, in a clinical negligence case) requiring any party who refuses to participate in mediation to file at court a witness statement explaining their reasons, to be considered by the court in appropriate circumstances following the trial. The import of such an order is unmistakeable: mediate, or face the possibility of sanctions if you don't have an extremely convincing reason for not doing so. It is a courageous litigant who will not at the very least go through the motions of mediation in the face of such an order.

Perhaps the most useful and compelling characteristic of mediation is its flexibility. There are virtually no constraints on how and when it can be used and there are no qualifications or entry criteria for practitioners. Arguably this creates the possibility of mediocre or unprofessional, or even unscrupulous, mediators taking appointments and bringing the process into disrepute, but it does not appear so far to have dented the popularity of the process.

Mediation is a form of elective ADR. Commonly, the parties will agree on a neutral, impartial mediator, whose function is to assist the parties in their negotiations. The mediator is not a judge, nor will he (or she, though in civil and commercial mediation most mediators are men – the reverse is true in family law, which has its own type of mediation, referred to below) be acting as a legal advisor, though lawyers make up the vast majority of practising mediators. Mediation is a "without prejudice" negotiation process, which means that it cannot be referred to in open correspondence or in court, prior to judgment.

Typically, on receipt of a (hopefully agreed) bundle of documents and either an agreed case summary, or concise position statements from the disputants, the mediator will absorb the salient facts and points of dispute, both legal and factual, in the case he is being asked to assist to resolve. In practice, most mediators will make contact with their instructing solicitors before the day of the

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mediation to talk through the issues, to establish rapport with the lawyers, to ascertain whether there are any points of particular sensitivity not obvious from the papers, and generally to get a "feel" for the case.

On the day appointed, the parties and the mediator will turn up at an agreed venue, often, but certainly not always, the offices of one of the parties' lawyers, where they should have the private and exclusive use of a room each. There will usually be an informal preliminary discussion between the mediator and each party and their representatives in their private room, following which there will, in many cases, be a joint session in which the ground rules are set out by the mediator, and the parties are invited to introduce themselves and say something to get a discussion going. Sometimes an initial joint session will turn into a heated argument, which may or, perhaps more likely, may not be conducive to achieving a settlement. In that event, the mediator may, with hindsight, wish he had dispensed with a joint session. Usually, however, parties manage to maintain their composure in the opening joint session and will then retire to their respective rooms for further discussions.

At this point, the mediator will visit one of the parties in their room and have a discussion with that party and their representative. Whatever the mediator is told in that meeting is confidential to the party in question. The mediator will then visit the other party in their room and hold a discussion with them, which is also subject to a strict code of confidentiality. There may be more than two parties, so this process can be very time consuming. The mediator will pass between the parties throughout the course of the mediation, asking questions and passing on information when duly authorised to do so. The intention, of course, is to encourage the parties to get into a position where, having been assisted to reflect on risks, up-sides and down-sides, and all the other factors which should be borne in mind when contemplating litigation, they can bring themselves to make, or at least consider settlement offers. When offers are made, settlement becomes a possibility.

Every mediator has their own style, but two common approaches have been identified: *evaluative* and *facilitative*. Probably every mediator would claim to be facilitative – their job is, after all, to *facilitate* a settlement, by encouraging and assisting a constructive discussion between the parties. Not all mediators claim to be evaluative; that is, to be seen to assess the relative strengths and weaknesses of a party's contentions, even if only by innuendo, or by asking leading and/or searching questions of the parties or their lawyers about what they are asserting in the dispute, for example.

Family law mediation and collaborative law

ADR in family law can have significant differences to that in civil and commercial disputes. Family law mediation tends to involve a neutral, independent mediator meeting the divorcing parties on a number of occasions, initially to explain the process, but also to assist the parties to obtain further professional help, for example from financial advisors or from those qualified to help with children issues. If, following the exchange of financial information and obtaining legal advice, the parties are able to agree to a settlement arrangement, the mediator will draw up the agreement for the parties to take to their lawyers. Family law mediation is more "personal" than civil or commercial mediation.

Family lawyers have developed a further ADR process called "collaborative law". This involves each party appointing their own legal representative, and then a succession of meetings takes place at which the parties, with their lawyers, attempt to work out what issues need to be resolved and then how to resolve them. There is no fixed timetable and the lawyers agree at the outset that, if the process does not end in a resolution, then none of them can represent any of the parties in any litigation which may follow.

Arbitration

Many contracts provide for disputes to be resolved by arbitration. If a contract contains an arbitration clause, then any dispute must be resolved by arbitration. Any litigation which is issued must be stayed, on the application of the defendant (provided it has not waived the right to arbitration by filing a defence), to allow the arbitration to take place.

Arbitration is a process which resembles litigation in many ways and in substantial disputes will involve just as many lawyers, if not more, than litigation through the courts. Being a contractual mechanism for resolving disputes, the parties are subject to the terms of the contract in how they appoint an arbitrator, what timescales apply, and what country's law will apply.

Arbitration is usually conducted in a manner which is very similar to litigation. Although the parties can agree to vary the process (and in that way there is a material distinction between litigation and arbitration), there are usually statements of case, disclosure of documents, witness statements, expert witnesses, and an arbitrator (or sometimes three arbitrators) hearing the evidence and sitting in judgment. Arbitral awards can be enforced through the courts. Arbitral awards can also be recognised internationally. Perhaps the crucial difference between arbitration and litigation is that, in the former, the parties can appoint whoever they deem appropriate. In court proceedings, you have the judge who is assigned to your case.

The International Chamber of Commerce (ICC) operates its own arbitration scheme, and it is not uncommon to find ICC arbitration as the stipulated dispute resolution mechanism in high value commercial contracts, particularly contracts with governmental aspects. It is very

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expensive, which is perhaps another reason why ICC arbitration is relatively rarely used.

Adjudication

Adjudication was introduced by the Housing Grants, Construction and Regeneration Act 1996. It is a means to resolve disputes before construction works have finished. The process of adjudication is similar to arbitration, but of a much more abbreviated nature. It is usual for it to be concluded in 35 or 42 days. The adjudicator will rule on the subject matter of the dispute as an interim determination. Whilst it is subject to a final determination in arbitration or court proceedings subsequently, the courts have held that the adjudicator's decision is binding until that final determination is made. Because it is a speedy and, inevitably, more "rough and ready" means of resolving disputes in very quick time, it can appear unsophisticated. But relatively few adjudications are followed by litigation or arbitration, and in that sense adjudication can be seen to be a form of ADR. What is more, there is of course nothing to prevent parties to an adjudication holding settlement discussions prior to the adjudicator making his finding.

Early neutral evaluation

Early neutral evaluation is a relatively rarely used ADR tool. It involves the appointment of a neutral expert, often a lawyer or an industry expert, to assess the parties' submissions, and the evidence which may be available. The expert will express an opinion which, whilst not binding on the parties, is likely to be influential. A party whose case is supported by the expert may be inclined to become entrenched in his view, and his opponent may simply not agree with the expert. This is an elective form of ADR. It is not binding, and its perceived disadvantages are many, some would say, compared to other forms of ADR.

Expert determination

Expert determination is a contractual means of resolving disputes. It is a favourite of lawyers dealing with the sale and purchase of businesses, though it appears in other types of contracts as well. Sale and purchase agreements frequently include provisions for the payment of deferred consideration based on accountancy analysis of the purchased company's post-deal financial performance. Often such contracts will provide for any differences between the seller and the buyer in relation to the accounts to be determined by an independent accountant, acting as an expert rather than as an arbitrator. This means that he will be presented with information by both sides, and he will use his expertise to determine what the figures are. Being a matter of contract, the parties are at liberty to agree whatever timescales, appointment provisions etc they wish. But the expert's determinations as to the matters he is asked to adjudge are binding on the parties, so this is a determinative form of ADR.

Negotiation and conciliation

There are now so many recognised forms of ADR that it is easy to overlook the simplest, and oldest. Negotiation is what we all do, all the time, in order to adjust the minor and not-so-minor quarrels and disagreements with others which crop up in the course of a lifetime. It has no prescribed form, and it can be as formal or as informal as the circumstances of the dispute require. In some areas, notably employment law, agencies such as ACAS have been established with the primary aim of resolving disputes and reducing conflict, by negotiation and by conciliation, helping aggrieved parties come to an acceptable resolution of their differences.

Conclusion

ADR is not going away. It has developed a lot of impetus in recent years, and it is now part of the fabric of everyday dispute management practice. Indeed, many law firms have changed the names of their litigation departments to "dispute management" or "dispute resolution". Although the courts have stopped short of insisting on mediation, or other forms of ADR, in court cases, the message is clear: if you are a litigant and you are not prepared to negotiate, or attempt to resolve your dispute outside the court room, then you are, very likely, going to be punished at the end of your case.

Biography

Nigel Broadbent qualified as a solicitor in 1991 and has worked in dispute management and mediation ever since. He is a Member and Director of Lupton Fawcett LLP Solicitors in Leeds.

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