Hogan Lovells

Alternative Dispute Resolution in England and Wales

April 2025

Contents

Introduction

Disputes in England and Wales are usually adjudicated after an adversarial process, either by a judge in court-based litigation or by an arbitrator in an arbitration. Litigation is governed by wide-ranging and detailed rules which can make it a complex, time-consuming and expensive process. Very often arbitration is conducted on a similar basis and so can involve similar challenges.

Alternative Dispute Resolution (ADR) embraces a range of options, falling between litigation and arbitration on the one hand and negotiation on the other, for the effective resolution of disputes.

These options include:

- Mediation
- Expert determination
- Adjudication
- Early neutral evaluation.

Mediation is by far the most frequently used of these options. In this note, we give a brief overview of mediation and the other main types of ADR[1].

[1] This note is written as a general guide only, and should not be relied upon as a substitute for specific legal advice.

Support for ADR

Developments over recent years have demonstrated significant judicial (and political) support for ADR in England and Wales. As a result, all parties engaged in litigation or arbitration should give serious consideration to ADR as a means of resolving their dispute.

The UK Government is a keen advocate of ADR, and the English civil court rules – the Civil Procedure Rules 1998 (CPR) – include a number of measures designed to encourage ADR. The CPR require parties, at various stages before and during litigation, to consider whether ADR might be appropriate as a means of settling their dispute. If they decide it would be beneficial to try ADR, the court will usually stay the litigation proceedings while they do so.

The UK has also signed the Singapore Convention on Mediation 2018, an international treaty which aims to provide a means by which settlements reached through mediation may be enforced in Convention states. Once ratified by the UK, the Convention will make it easier to enforce in the UK settlements that were mediated abroad, as well as those mediated in the UK and covered by the Convention due to an international element.

The use of ADR, and in particular mediation, has been given a boost in recent years by a number of cases in which the courts have supported greater use of ADR. It is long-established that a party who has unreasonably refused to attempt ADR may face costs sanctions at the end of litigation even if they win, and this is reflected in the CPR and in the Practice Direction – Pre-action Conduct and Protocols.

Until recently it was thought that whilst the courts should actively encourage parties to refer their disputes to some form of ADR, they could not compel them to do so.

However, in November 2023, the Court of Appeal held that the court can lawfully stay proceedings for the purposes of ADR to be pursued, or even order the parties to engage in ADR, provided that to do so in a particular case would not "impair the very essence of the claimant's right to proceed to a judicial hearing" and would be proportionate to achieving the legitimate aim of settling the dispute fairly, quickly and at reasonable cost[2].

That judgment acknowledges that factors likely to be relevant to such a decision include: whether parties have access to legal advice; the form of any available ADR; the prospects of success for any such ADR; costs; and any anticipated delays which a stay for ADR may cause. The Court of Appeal also recognised that there were likely to be other relevant considerations specific to the facts of each case.

The CPR have since been amended to confirm the power of the court both to encourage and to order parties to use ADR. The "overriding objective" set out in the CPR, of dealing with cases justly and at proportionate cost, now explicitly refers to the promotion and use of ADR.

ADR is also encouraged by amendments to the CPR that apply where the court is exercising its general discretion to award costs. Parties who, in the court's view, have failed to comply with an order for ADR or unreasonably refused to engage in ADR may be penalised in costs after trial, regardless of whether they have been successful overall. Whether a party has acted unreasonably will again depend on the circumstances of each case. However, factors which may be relevant include: (a) the nature of the dispute; (b) the merits of the case; (c) the extent to which other settlement methods have been attempted; (d) whether the costs of ADR

[2] *Churchill v Merthyr Tydfil County Borough Council* [2023] EWCA Civ 1416. (Separately, there is also now a pilot programme whereby certain "small claims" (generally worth under £10,000) are automatically referred to mediation as part of the litigation process.)

would be disproportionately high; (e) whether any delay in setting up the ADR would have been prejudicial; and (f) whether the ADR had a reasonable prospect of success.

Main features of ADR

There are a number of further reasons why parties to a dispute should give serious consideration to ADR. Among other advantages, ADR is flexible and private, and can save time and money. The key features of ADR are explained in more detail below.

Some of the more important features of a typical ADR process are:

– **It is a consensual process**

While it was recently established by the Court of Appeal that the court can lawfully stay proceedings for ADR, or order the parties to engage in ADR in an appropriate case (see above), it remains the case that ADR is typically a consensual process. Further, neither the court nor the mediator can compel the parties to settle a case in the course of ADR without their consent, and most forms of ADR follow a process and format which has been agreed by the parties.

– **Its 'without prejudice' nature**

ADR is conducted in private and on a "without prejudice" basis. The result of a reference to most types of ADR only becomes binding on the parties if and when they have reached an enforceable settlement agreement. Until then, either party can withdraw from the ADR process and start or continue proceedings before a court or an arbitral tribunal. If the reference to ADR does not result in a settlement and litigation or arbitration then starts or continues, neither party may use or refer to anything that arose during the ADR process - for example they cannot refer to offers to settle which may have been made by one side to the other during the ADR process, but which were rejected.

– **It can produce commercial solutions**

ADR allows parties to seek solutions which are not available through litigation or arbitration and which can accommodate their commercial needs and interests. By way of example, a claim for money due could be settled by a discount on future services, which might preserve, or even enhance, a business relationship.

– **It is flexible**

The form of procedure can be tailored to suit the needs of the parties. ADR may occur either before the start or during the course of litigation or arbitration proceedings. The parties are free to agree whether those proceedings should continue or be stayed during the ADR process.

– **It is inexpensive and quick**

Compared with litigation and arbitration, ADR is inexpensive, particularly if it leads to the resolution of a dispute at an early stage. It is also quick to set up and implement; in many cases, for example, the mediation itself takes no more than a day following some preparations by each party and an exchange of limited materials.

Mediation

Mediation is the most common form of ADR. The parties engage the assistance of a neutral mediator to help them reach a negotiated agreement to resolve their differences without formal adjudication.

A mediator can assist the parties by establishing a private and constructive environment for negotiation - facilitating discussion, smoothing out personal conflicts, assisting in the process of information gathering and risk assessment, identifying creative options, and helping to devise and implement strategies designed to overcome obstacles which might arise during the negotiations.

The mediator will typically speak with each party ahead of the mediation to understand their respective positions and the issues in dispute, and during the mediation will engage with the parties to explore ways in which the dispute might be resolved - sometimes on a joint and sometimes on an individual basis, and usually involving an element of 'shuttle diplomacy' by the mediator between the parties. However, the mediator has no power to decide the dispute or impose their view on the parties, who retain their right to have the dispute determined by the courts or an arbitral tribunal if it cannot be resolved consensually by mediation.

The biggest hurdle to the use of mediation is often persuading all of the parties to a dispute to agree to participate. In the absence of a clause in a contract requiring the parties to engage in ADR, the involvement of an independent ADR body can assist in convincing an unwilling party to participate.

Once parties agree to mediation, the preparations typically involve:

- agreeing the time, place and length of the mediation;
- identifying and engaging the mediator;
- preparing and sending to the mediator and the other parties a brief summary of each side's case and the main supporting documents;
- identifying who will be the parties' representatives at the mediation – these should be individuals with full authority to settle. The parties' solicitors can, and usually do, attend and play a useful role in the mediation. However, the primary role is that of the client's representative;
- confirming that the mediation will be entirely confidential and 'without prejudice'.

The mediation itself will usually involve:

- an opening joint or plenary session chaired by the mediator, at which each of the parties will briefly summarise its case and address any key issues from its perspective;
- private sessions between each of the parties and the mediator;
- further joint sessions if the mediator thinks they would be useful, as they might be if, for example, points of detail need to be discussed or resolved;
- if agreement is reached, the drawing up and signing of a document setting out the terms agreed. If litigation has already started, this can be incorporated into a court order or can remain as a separate agreement which can be enforced in the same way as any other contract.

Even if a dispute is not settled at the mediation itself, it is often the case that the process will have led the parties to re-evaluate their respective positions such that they are then able to agree a settlement in the days or weeks following the mediation.

Other types of ADR

Set out below is a brief description of the main types of ADR other than mediation.

Conciliation

Conciliation is very similar to mediation, although it usually has a statutory basis with conciliators appointed by an outside body rather than the parties. During conciliation the neutral third party actively helps the parties to settle the dispute, for example by suggesting settlement options. Conciliation is commonly used in employment and family disputes.

Early Neutral Evaluation

The parties obtain from a respected, neutral third party a non-binding opinion regarding the likely outcome of the dispute if it were to proceed to trial. The intention is that this opinion will enable the parties to negotiate an outcome, with or without the assistance of a third party, or settle the dispute on the basis of the evaluation provided.

The Commercial Court and the Technology and Construction Court have schemes facilitating early neutral evaluation.

Expert Determination

This is an informal process in which the parties agree to appoint an expert, who will review the issue in dispute and deliver a final decision on it which becomes binding on the parties. It is often used where disputes arise in relation to focused technical issues.

Judicial Appraisal

Schemes are available whereby former judges and senior barristers can be asked to give preliminary advice on their views of the legal position in a dispute following representations from both parties. It is up to the parties to agree whether or not this opinion will be binding.

Expert Appraisal

This involves the parties to a dispute jointly putting their case to an independent expert for review. The expert can be legally or technically qualified. Once the expert has given their views, the parties meet – usually at a senior level – to discuss the expert's opinion and to try to settle the case.

Adjudication

Adjudication is a well-established method of dispute resolution in the construction industry – parties to certain construction contracts have a statutory right to refer disputes to adjudication.

An adjudicator (an independent third person) usually provides decisions on any disputes that arise during the course of a contract. Typically, the decision of an adjudicator is binding on an interim basis, meaning that the decision is immediately binding and enforceable but the dispute may still be referred to arbitration or litigation for final determination. This is sometimes described as "pay now, argue later".

"Med-Arb"

This is a hybrid process in which the parties initially submit their dispute to mediation on the basis that, if no agreement is reached, they will refer the matter to arbitration. The arbitrator may be the same person who has been acting as the mediator. This saves costs because the arbitrator already knows the facts of the case. However, this can also mean that during the mediation, the parties may have given the arbitrator confidential information relating to their commercial position which would not have been shared in a standard arbitration.

Mini-Trial or Executive Tribunal

The parties present their case (in the form of time-limited submissions) to a panel comprising senior executives (one from each party) with authority to settle, and an independent chairperson. The panel then adjourns to discuss settlement of the issues,

with the chairperson normally acting as a mediator between the senior executives. Unless the parties request, the chairperson does not make a binding determination, although he or she may agree to provide an opinion on the merits of the case and its likely outcome at trial. The whole process is private, confidential and 'without prejudice'.

Final Offer Arbitration

The parties submit to a neutral third party an offer of the terms on which they are prepared to settle. The neutral third party then chooses one of the parties' offers.

Neither party should make an unrealistic offer because that might result in the neutral choosing the opponent's offer.

Dispute Review Board

This typically involves the appointment of a board or panel at the start of a construction project. The board usually comprises an independent member appointed by each party and a chairperson (who may be an expert, depending on the nature of the dispute) who is appointed by the other members. The board visits the site of the project a few times a year, and deals with disputes by providing an interim binding decision. Board decisions can be challenged through arbitration or litigation within a specified time limit. The use of a DRB can help to prevent disputes. DRBs are often used for large scale construction projects, for example construction of the London Olympic Stadium.

ADR for consumer disputes

Consumer ADR regulations[3], introduced before Brexit to implement EU law, require businesses selling to consumers to provide information about a certified ADR provider (whether or not the business intends to use that ADR scheme). Businesses may be required to use a particular ADR entity by law, under contract or under the rules of their trade association.

3 The Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015 (SI 2015/542)

Timing

There is no particular time at which a case can, or should, be referred to ADR. It may occur at any stage before or during litigation or arbitration up to and including trial, or even between trial and judgment. The potential benefits, particularly in terms of costs savings, are obviously greater the earlier it happens.

In some cases, parties need to "lock horns" before they can be persuaded of the benefits of a negotiated settlement. However, it is often much better to try to resolve a dispute before starting formal proceedings and becoming entrenched in litigation or arbitration. Indeed, the CPR require the parties to consider ADR before commencing proceedings, and at various other stages during an action, and then to retain evidence of their having done so[1].

In an increasing number of cases, parties are inserting clauses in contracts requiring any disputes to be referred to some form of ADR before the commencement of litigation or arbitration. This gives a party the opportunity to refer the dispute to ADR as soon as it has arisen. The Commercial Court has enforced an agreement by the parties to attempt to resolve their disputes through mediation and stayed litigation proceedings which had already been commenced, to enable that mediation to take place.

The inclusion of an ADR clause in the contract in dispute will also help overcome the concern on the part of some people that proposing ADR will be perceived by the opponent as a sign of weakness. It should be stressed, however, that experience shows that any such concern is almost always misplaced.

Whichever route is chosen, the longer a reference to ADR is delayed, the greater will be the costs of litigation or arbitration for the parties in the meantime.

[1] Practice Direction – Pre-Action Conduct and Protocols, and also individual Pre-Action Protocols for specific types of litigation (www.justice.gov.uk)

Cases suitable for ADR

The vast majority of cases are capable of being resolved by ADR.

ADR procedures such as mediation are in many instances essentially sophisticated methods of negotiation. This means that if a case is capable of settlement by negotiation, it is also capable of being settled through a mediation.

The fact that a case is complex or involves a multiplicity of parties and/or issues does not mean that it cannot or should not be mediated. Often, the cost of litigation in such cases points positively in favour of ADR. Experience, both in the UK and in other countries such as the USA, demonstrates that ADR is more than capable of resolving high value and complex disputes.

Usually, the issue is not whether a dispute is capable of being resolved by ADR, but rather when an attempt to settle in this way should be made and what form of ADR is most suited to the particular situation.

There are only a few categories of cases which may be inherently more suited to being resolved at trial. One such category is cases where an issue of legal principle or precedent is involved, which necessitates a binding and public decision. Similarly, disputes involving allegations of fraud or other commercially disreputable conduct can be more difficult to resolve consensually than other types of dispute, although even this is not always the case. Sometimes it is said that cases where emergency injunctive relief is necessary are unsuitable for ADR, but there is no reason why ADR should not be explored in such cases once the injunction is in place.

Sometimes it is apparent that a party is defending an action for strategic or tactical reasons and does not want to settle. In such cases, the parties will probably not be able to agree to ADR, but even in such cases the issue may be one of timing – even a party in this situation may well not want to go all the way to trial. Indeed, a party who shows a determination not to attempt ADR come what may should be prepared to justify its position and could be penalised in costs even if successful at trial.

Conclusion

While there can be no guarantee that ADR will be successful, a 2023 survey by a leading ADR organisation in the UK (the Centre for Effective Dispute Resolution (CEDR)) found that around 90% of the mediations surveyed were successful, saving very substantial costs for the parties involved.

If you do become involved in a dispute, you should give serious consideration to whether or not it is suitable for some form of ADR and, if it is, the best moment to try to initiate an appropriate process. If you are involved in negotiating contracts you should consider including an ADR clause. As noted earlier, the current judicial climate appears to be leaning towards enforcement of such clauses, provided they have been properly drafted.

ADR at Hogan Lovells

In today's economic climate, it is vital for businesses to resolve disputes in ways that are both cost-effective and commercially oriented. Traditional litigation or arbitration may not be the most appropriate method of resolving commercial differences.

Hogan Lovells' dispute resolution team has extensive experience in resolving commercial differences using methods such as mediation, expert determination, adjudication and early neutral evaluation. We have employed ADR techniques to resolve all manner of disputes, involving multi-million dollar claims in many regions of the world, using the techniques independently or combining them with traditional forms of litigation and arbitration.

We were a founding member of CEDR and are prominent in other leading ADR organizations, including the ADR Group in the UK, the International Institute for Conflict Prevention and Resolution (CPR) in the United States and the European Centre for Conflict Management (EUCON). Our lawyers have also appeared in arbitration proceedings before ICC, ICSID, AAA, ICDR, JAMS, LCIA and ad-hoc tribunals. Many of our lawyers are also accredited mediators and adjudicators. We help clients select the right ADR method and provide advice on tactics and timing.

Training

If you would like any live training on this subject, we would be happy to give a presentation or organise a seminar, webinar or whatever is most convenient to you.

Further information

If you would like further information on or to discuss any aspect of Alternative Dispute Resolution in England and Wales please contact one of the people listed below or the person with whom you usually deal.

Contacts

Michael Roberts

Partner, London
T +44 20 7296 5387
michael.roberts@hoganlovells.com

Kieron O'Callaghan

Partner, London
T +44 20 7296 5970
kieron.ocallaghan@hoganlovells.com

Louise Lamb

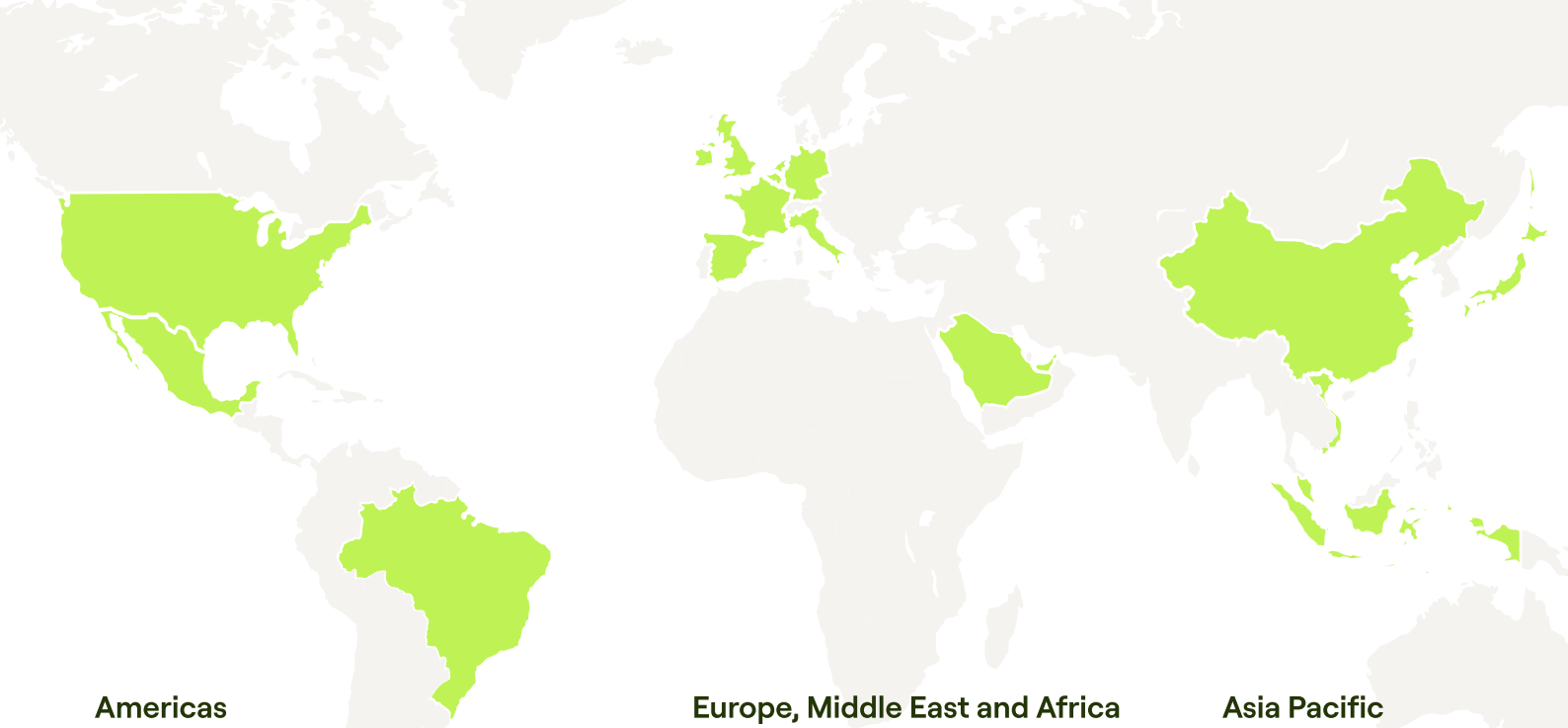
Partner, London
T +44 20 7296 5770
louise.lamb@hoganlovells.com

Neil Mirchandani

Partner, London
T +44 20 7296 2919
neil.mirchandani@hoganlovells.com

John Tillman

Partner, London
T +44 20 7296 5054
john.tillman@hoganlovells.com



Americas

- **Boston**
- **Denver**
- **Greater Washington, D.C.**
  - Baltimore
  - Washington, D.C. and Northern Virginia
- **Houston**
- **Los Angeles**
- **Miami**
- **Minneapolis**
- **New York**
- **Philadelphia**
- **Northern California**
  - San Francisco
  - Silicon Valley
- **Latin America**
  - Brazil
  - Mexico

Europe, Middle East and Africa

- **Amsterdam**
- **Brussels**
- **Dublin**
- **Germany**
  - Berlin
  - Düsseldorf
  - Frankfurt
  - Hamburg
  - Munich
- **London**
- **Luxembourg**
- **Madrid**
- **Milan**
- **Rome**
- **Paris**
- **Middle East**
  - Dubai
  - Riyadh

Asia Pacific

- **Greater China**
  - Beijing
  - Hong Kong
  - Shanghai
- **South East Asia**
  - Ho Chi Minh City
  - Jakarta
  - Singapore
- **Tokyo**

www.hoganlovells.com