

ARBITRATION AND MEDIATION

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ARBITRATION AND MEDIATION

Whilst Court proceedings are often contemplated and commenced in order to resolve civil disputes between private individuals or companies, in today's current economic environment when the question of the cost of commencing such proceedings is ever more at the forefront of people's minds, it is becoming more and more common for disputes to be resolved without a Court having to pronounce a formal judgment.

This can be achieved by the parties through informal settlement negotiations or by the use of more formal alternative dispute resolution ("ADR") methods.

ADR is encouraged prior to the commencement of Court proceedings and, indeed, if ADR is considered appropriate once Court Proceedings are underway, then the Court can stay the proceedings in order for the parties to consider ADR. It is also open to the parties to consider what methods of ADR are best suited to the particular facts of their dispute.

ADR can be broadly divided into two types. Firstly, where a binding decision is reached (so called "determinative ADR") and secondly where the parties, after evaluating their respective positions, reach a voluntary settlement (so called "non-determinative ADR").

Set out below is a commentary on the two most popular types of ADR: 'Arbitration', which is a determinative form of ADR and 'Mediation' which is a non-determinative form of ADR.

ARBITRATION

Arbitration is where the parties agree to be bound by the decision of an appointed Arbitrator whose decision can be enforced without the need to commence formal Court proceedings.

In many commercial contracts (for example JCT agreements) the parties agree to include an arbitration clause so that if a dispute does arise then the parties are contractually obliged to arbitrate the dispute rather than litigate it.

Even if it is the case that an arbitration clause is not contained in a commercial contract, the parties to a dispute may agree to arbitrate at any point, even after Court proceedings have been issued.

Arbitrations have many advantages, not least because it gives the parties control over the dispute resolution process which is often not the case when Court proceedings have been issued and a directions timetable is fixed by the Court.

Arbitrations are held in private and the parties are free to jointly appoint an Arbitrator who is an expert in the field in which the dispute has arisen. The parties can, therefore, be more confident that their dispute will be considered and resolved by someone with the necessary expertise.

In addition to this, the parties are generally able to decide the procedure that the arbitration is to adopt, for example what law will be applicable to the Arbitration.



Arbitration in England and Wales is governed by the Arbitration Act 1996 (the “Act”) and England has international recognition for dealing with large scale arbitration matters through bodies such as the Chartered Institute of Arbitrators. If the parties agree that an arbitration will be determined in England then they can be confident that a fair decision will be reached by virtue of the provisions of the Act.

The Act applies to any arbitration agreements that are in writing and sets out which terms of the arbitration are to be mandatory and/or non-mandatory. The Act also caters for the position as to what is to happen if such terms are not specifically catered for in any written agreement.

The Act is also important for other reasons as it allows, for example, the Courts to issue injunctions and provides that any award that is given can be enforced in the same way as if it were an Order of the Court. The Act will only permit an appeal against an award in specific circumstances e.g. in relation to irregularity or on points of law or of jurisdiction. The provisions of the Act assist the arbitration without interfering in the arbitrator’s decision making process unless this is needed.

MEDIATION

Mediation is a form of non-determinative ADR which means that no enforceable judgment is given at the conclusion of the mediation. Accordingly, if the mediation is to be binding, then the agreement that has been reached to determine the dispute will need to be in writing which can then be enforced through the Courts.

Mediation is a form of ADR that all parties should consider very carefully before contemplating Court proceedings. Indeed, under the provisions of the Civil Procedure Rules which govern Civil Court proceedings, the parties to potential proceedings are obliged to consider mediation to resolve the dispute outside of Court in order to save costs and the Court’s time.

At mediation, the parties will appoint a neutral third party to act as a facilitator. The Mediator’s role is to direct the parties to an appropriate outcome once the parties have set out their respective positions. It is not the mediator’s role to give a “judicial” determination in order to determine the outcome of mediation. As with Arbitration, mediation is private and confidential to the parties.

Mediation can be used at the same time as court proceedings are taking place. If successful this can, therefore, lead to a saving in costs that could be incurred if a matter proceeded to trial and was judicially determined. If mediation is successful the Court proceedings can then be determined by means of a Consent Order.

It must also be remembered that mediation can take place before court proceedings are commenced. This has both financial and commercial benefits as not only is mediation generally far less expensive than issuing Court proceedings, but it may also be possible to protect the parties commercial relationship if the dispute can be resolved amicably without the need to issue Court proceedings.



CONCLUSION

Arbitration and mediation are popular forms of ADR that offer a genuine alternative to the commencement of Court proceedings. They are generally quicker, less expensive, more “controllable” by the parties than pursuing Court proceedings to a trial and, if successful, can lead to the parties commercial relationship surviving the dispute.

Accordingly, both of these methods of ADR should be considered very carefully by anyone contemplating the commencement of Court proceedings to resolve civil disputes both private and commercial.

For further information on the different methods of ADR that are available, please contact Martin Steer of our Dispute Resolution Team on [01306 502209](tel:01306502209).

Details of our full range of legal services can be found on our website at www.downslaw.co.uk