Alternative Dispute Resolution

Michael Cohen, Chairman Emeritus, The Academy of Experts, Past President, EuroExpert

Before even starting to look at ADR (Alternative Dispute Resolution) it is important to look at the legal environment in which the dispute exists.

There are two principal systems of law that operate in the Europe. These are:

: Civil Law

: Common Law

Civil Law
The Civil Law system is found in most of mainland Europe and in countries around the world colonised by them

It is important to realise that the term 'Civil Law' is also used to denote both the 'System' and non-penal (criminal) matters in Common Law Countries.

Common Law
Common Law is the system used in the UK, Ireland, the USA, Canada, Australia, India and most of the countries that were part of the British Empire.

Common-law legal systems place greater emphasis on previous court decisions than do 'civil-law' jurisdictions, such as France and other European countries. Those legal systems trace their origins back to Roman Law and, more recently, the legal codifications instituted by Napoleon Bonaparte.

Lawyers operating in common-law jurisdictions therefore need to work more closely with case law than do lawyers operating in civil-law countries because the English Courts are bound by their previous decisions. This is known as the principle of stare-decisis. ('let the decision stand')

Introduction
It has been recognised for some time that the legal process is not always the most satisfactory way of settling disputes. It can be lengthy, costly, antagonistic, and uncertain, all of which are undesirable, and can lead to dissatisfaction with the legal process itself.

It is not surprising therefore that other ways of settling disputes have been sought, particularly in the United States, where the legal costs involved in litigation have become astronomic.

In Common Law Jurisdictions, the function of the courts is to listen to the cases as presented by the opposing sides and to decide at the end which of those cases the court prefers. At no stage is the Judge involved in investigating the alleged facts or suggesting solutions of his own. Indeed, the so called Rules of Natural Justice preclude the Judge (or arbitrator) from discussing the respective cases of each party with that party separately, it being salient tenets of the Rules that the parties must be aware of all the case against them and that the Judge is seen to be impartial.

There is, therefore, no way built into the legal process that allows the parties to a dispute to discuss their respective cases with frankness without giving away their bargaining positions.

Additionally, the legal process being final, it is necessary once a dispute gets under way to ensure that all possible arguments are put forward, as there will be no second bite of the cherry. It is to get over these two major difficulties that the Alternative Dispute Resolution processes are designed.

In Civil Law jurisdictions the underlying philosophy differs from the Common Law approach where it is for the parties to 'fight' each other so that the truth emerges for the judge. However the investigatory role of the judge in Civil Law jurisdictions produces other, if different problems for the parties who loose a significant amount of control over their dispute.

In both Civil and Common Law jurisdictions the parties 'hand over' their dispute to the legal process and their control diminishes eventually to zero when the court reaches its conclusions.

It has to be clearly understood from the start that all true Alternative Dispute Resolution processes produce non-binding results unless the parties themselves agree at the end of the process that any solution to the dispute shall then be made binding by making a new agreement.

The aim, therefore, of all Alternative Dispute Resolution process is to reach an accommodation, which may not necessary reflect the exact legal standing of the parties but is a solution which the parties can accept.

ADR is therefore:

'A process for finding a solution that the parties can live with.'

Alternative dispute processes
The number of individual systems for settling disputes that can be devised is limitless. Each dispute lends itself to different approaches. This may be determined by the nature of the dispute, the characters of the parties (or their employees), the amount in dispute, and the significance of the dispute to each of the parties.
However, they can be broadly categorised into the most commonly used techniques. These categories are broadly reflective of the role of the independent third party, who in contrast to a Judge in litigation, is there to guide the parties to a solution of their problem.
In litigation or arbitration the ability of the parties to control the proceedings is almost not existent. In ADR processes the parties' control is much greater and varies according to the procedure used.
It must be noted that the diagram does not show all the procedures that are available but only lists some of the more popular ones.

Negotiation
Settling disputes by direct negotiation of the parties is the commonest way that disputes are settled. It is only when direct negotiation break down that some other means of reaching a settlement is required. Negotiation is therefore the starting point for any form of dispute resolution.

Mediation
In mediation the parties select an independent third party, or neutral, who will assist the parties to reach an acceptable solution. The mediator should be an imaginative problem solver and is very much involved in the process of reaching a solution.
The Mediator will discuss the problem with the parties both together and separately in sessions know as `caucuses'. These private discussions should be frank and open, and the Mediator will persuade the parties to focus on their underlying interests and priorities.

The Mediator is not there to make judgements but to guide the parties to an acceptable solution. His role is honest broker not judge.

Conciliation
Conciliation is another loosely defined word. In the USA conciliation is usually a very informal procedure, more a discussion aimed at trying to get the parties to discuss their differences. This is also the sense in which it is used in, for example, the title ACAS, the Arbitration, Conciliation and Advisory Service. However, it is more often used to describe a process at the end of which the conciliator produces a recommendation as to how the dispute should be settled if it is not possible for the parties to reach agreement.
This latter use is probably because a number of contracts have ADR clauses included in them for the first stage of their dispute resolution procedure, and these require some sort of conclusion to define the start of the next stage which is usually arbitration.

Expert Evaluation
As a preliminary step to settlement the parties sometimes agree to engage an Expert to investigate and report on the dispute. They may also agree to abide by the opinion of the Expert.

Mini-Trial [or Executive Hearing]
At a Mini-Trial the parties are normally represented by lawyers who make a presentation to a Panel. This Panel will typically consist of a senior manager of each party, who has not previously been involved in the dispute and chaired by a independent neutral person.

Witnesses, such as participants and experts may be called to give evidence. When all the evidence has been presented the panel attempt to reach a settlement. It is essential that the parties' representatives on the panel have sufficient seniority and authority to reach a settlement. If desired the independent Chairman can act as a mediator between the representatives.

As a variant sometimes failing agreement between the parties the independent chairman is empowered to provide a non-binding opinion on the probable outcome if the matter were to be referred to the legal process.
Generally, the Parties are given a fixed time in which to present their cases to the Tribunal. They therefore have to limit their presentations to their "best shot" (i.e. they must concentrate on the points upon which they consider they are strongest).

Mediation/Arbitration [Med/Arb]
This is another American term. In essence it is a mediation which is essentially the same as the contractual form of conciliation referred to above. The Mediator is asked to provide a recommendation on how the dispute should be settled, which if not accepted may then be referred to arbitration. The Mediator may sometimes be authorised by the parties to make an arbitration award.

All these ADR processes have certain features in common:

(a) To be successful it is necessary that there is a representative present for each party who is invested with the authority to agree a settlement.

(b) There must be acceptance by all parties of the need to reach a settlement.

(c) Each process described above, although given a name, is flexible and may be varied to suit any particular problem or circumstance.

A number of principles are incorporated into the ADR and legal processes and these need to be understood.

The Rules of Natural Justice
Common Law requires adherence to two fundamental rules to ensure that justice is not only done but seen to be done. These principles are that:

(a) the Tribunal, Judge or Arbitrator must be, and must be seen to be, disinterested and unbiased, and

(b) each party must be given a fair opportunity to:

a. present his case
b. know the opposing case
c. answer it.

The Rules apply to both litigation and arbitration. In practice in arbitration this means that:

(a) There should be a hearing at which parties have the opportunity to adduce evidence and to address any argument raised.

(b) The arbitrator must not normally receive evidence or argument from one party in the absence of all the other parties.

(c) The arbitrator must act only upon evidence that is admissible in law.

(

d) The arbitrator must not assume the role of advocate for any party.

(e) An arbitrator when using his own expertise, which may be the reason for his selection, must give the parties an opportunity to comment or adduce evidence on such matters.

Human Rights
Human Rights are in many ways the current equivalent of 'Natural Justice'. Today when we speak of 'Human Rights' we usually have in mind a formal convention such as the European Convention on Human Rights (ECHR). However, as mediation and most forms of ADR are not legal or public processes it is not thought that in technical terms the provisions apply. Irrespective, the spirit of Human Rights should always be taken into account.

"Without Prejudice"
This is a Common Law legal expression. The Common law tries to encourage parties to settle their differences without resorting to the courts. To this end, the courts recognise that in order to reach a settlement each party will probably have to compromise its position in any negotiations leading to a settlement. If the negotiations fail and any such compromises could be used as evidence in subsequent litigation it would be a strong disincentive to fruitful negotiations.

The courts therefore treat any dealings, whether in meetings or by correspondence, which are aimed at reaching an agreement as confidential between the parties and no party may disclose to a court the details of any such dealing without the express consent of the other party or parties. Such dealings are said to be "without prejudice".

If agreement is subsequently reached as a result of "without prejudice" negotiations the agreement is not of course "without prejudice" in the sense that it is then available for implementation in the courts. Any admissions or concessions made during the negotiations remain "without prejudice" and cannot be used as evidence in any subsequent proceedings.

Confidentiality
Confidentiality is an undertaking by one individual to another that anything that passes between them in any negotiation will not be passed to a third party without the express authority of the person providing the information.
Confidentiality does not, of itself, have any standing in common law, but if broken could lead to an action either for breach of contract, or breach of a duty if the person providing the information suffers any damage or injury as a result of the disclosure of information provided in confidence.

Confidentiality may arise in negotiations when one party may provide confidential information in its own defence. Confidentiality will almost certainly arise between a mediator and the parties in a mediation, and does not terminate with the conclusion of either the negotiation or mediation.

Legal processes

Arbitration and Litigation
If the ADR processes do not lead to a solution the parties will have to resort to the legal processes of litigation or arbitration to obtain satisfaction. In the USA arbitration is often referred to as an ADR process, but as far as the UK is concerned Arbitration is not considered an alternative process. Over this, and many other terms, there is confusion not only between the two countries but also within them.

In the Europe (which includes the UK!) Arbitration is frequently the chosen method of resolving commercial disputes. For example, many insurance and re-insurance contracts have arbitration as the dispute forum. However, once either arbitration or litigation is started control of the proceedings passes from the parties to the Arbitrator or Court.

It is important to appreciate the similarities as well as the differences between the various forms of dispute resolution. These are what give each system its "advantages".

‘Attitudes’ of both parties and their lawyers about the selection of dispute resolution process, often exist and have come from an unfortunate experience in the past. These often influence decisions about the content of contracts. When selecting the Dispute Resolution route it is important to appreciate the similarities as well as the differences between the various forms of dispute resolution. These are what give each system its ‘advantages’ and ‘disadvantages’. Is there a perfect system? The cynic would say ‘yes’ – if you win, it was the best!

Differences between Litigation, Arbitration and Mediation

This table shows some of the differences between these forms of dispute resolution.

Feature	**Litigation**	**Arbitration**	**Mediation**
Regulation	Y	Y	N
Binding	Y	Y	N
Natural Justice	Y	Y	N
Third Party Decision	Y	Y	N
Liability Determined	Y	Y	N
Parties' Priorities	N	N	Y
Neutral Assistance	N	N	Y
Appeals Permitted	Y	Y	N
Exclude Appeals	N	Y	N
Choice of Tribunal	N	Y	Y
Technically qualified	N	Can Be	Can Be
Confidentiality	N	Can Be	Y
Publicity	Y	N	N
Precedent setting	Y	N	N
Proceedings ‘fast’	N	Maybe	Y
Expensive	Y	Probably	N
Lawyers needed	Y	May Be	N
Documents only	N	Can Be	N
Good for continuing relationships	N	May Be	Y

NOTE

1. If Mediation does not lead to a solution the parties will have to resort to the legal processes of litigation or arbitration to resolve the dispute.
2. If Arbitration: during the arbitration (but not a part of the arbitration) an ADR process can take place

If Litigation: during the litigation (but not a part of the litigation) an ADR process can take place. It is becoming increasingly common for Common Law courts to ‘expect’ Mediation to take place before or during the case. See for example the English Court of Appeal’s recent comments in Dunnett v Railtrack TLR 3/4/2002.