ADR and early neutral evaluation
28th January 2016

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ADR and early neutral evaluation
The law as stated during this webinar is up to date as of 15th January 2016
Chair's Introduction
Dom Regan
Professor
City Law School, London

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Hardwicke Chambers
Alternative Dispute Resolution – drop the A

- Been talking about it for years and most have been doing it for years
- The Jackson ADR Handbook – the judges all have a copy have you?
- Where does ADR fit into your litigation strategy?
- Not alternative just all part of dispute resolution
- You cannot act non-negligently in dispute resolution without at least considering ADR and the advantages and disadvantages of the same

Commercial cases - we have moved on

- The Commercial Court Working Party on ADR in 1999
  “The Working Party believes that there are many cases within the range of Commercial Court work which do not lend themselves to ADR procedures. The most obvious kind is where the parties wish the court to determine issues of law or construction which may be essential to the future trading relations of the parties, as under an on-going long term contract, or where the issues are generally important for those participating in a particular trade or market. There may also be issues which involve allegations of fraud or other commercially disreputable conduct against an individual or group which most probably could not be successfully mediated.”
**Take your pick**

- Adjudication – particularly in construction disputes
- Arbitration
- Brokered talks
- Conciliation
- Early Neutral Evaluation
- Expert Determination
- Joint Settlement Meetings
- Mediation
- Online Dispute Resolution

**ADR jargon**

- ADR: Alternative Dispute Resolution
- ADRg: ADR group
- APCM: Assessed Professionally Competent Mediator
- BATNA: Best Alternative To a Negotiated Agreement
- CADR: Costs Alternative Dispute Resolution
- CAMS: Court of Appeal Mediation Scheme
- CEDR: Centre of Effective Dispute Resolution
- CIA: Chartered Institute of Arbitrators
- CMC: Civil Mediation Council
- CSP: Court Settlement Process
- eADR: electronic ADR
- ED: Expert Determination
- EE: Expert Evaluation
- ENE: Expert Neutral Evaluation
ADR Jargon continued

- ICDR: International Centre for Dispute Resolution – New York
- ICC: International Chamber of Commerce
- iDR: internet Dispute Resolution
- JSM: Joint Settlement Meeting
- LCIA: London Court of International Arbitration
- Med-Arb a mediator who then becomes the arbitrator in the dispute
- Med-Exp a mediator who then becomes the expert determiner in the dispute
- MIAM: Mediation Information Assessment Meeting (family disputes)
- MSEO: Mediation Settlement Enforcement Order
- ODR: Online Dispute Resolution
- SCMS: Small Claims Mediation Scheme
- WATNA: Worst Alternative To a Negotiated Agreement

ADR – pros and cons

- Access to justice
- Expense
- Time
- Relationships
- Outcomes – flexibility, imaginative
- Control
ADR – what the courts keep saying

- Halsey v Milton Keynes General NHS Trust [2004]
- PGF II SA v OMFS Co 1 Ltd [2014]
- Garritt-Critchley v Ronnan [2014]
- Laporte v The Commissioner of Police of the Metropolis [2015]
- Northrop Grumman Mission Systems Europe Ltd v BAE Systems Ltd [2014]

- It’s expected – you don’t need to be told
- Refuse ADR at your own cost
- Don’t assume you’re too far apart to mediate

And even in detailed assessments ...

- Reid v Buckinghamshire Healthcare NHS Trust [2015] – Master O’Hare
  Party who had refused to mediate was ordered to pay the other side’s costs
  on an indemnity basis.

Bristow v Alexandra Hospital NHS Trust [2015] – Master Simons ordered paying
Party – again NHS – to pay proportion of costs on indemnity basis fair failing to
engage in mediation

Further decisions from the SCCO are now expected in relation to the refusal to
mediate costs disputes

CADR set up for that specific purpose
Early Neutral Evaluation – why less popular?

- an independent person is appointed to look at the case and provide a neutral evaluation of the rights and wrongs in the hope that it will cause the parties to reach agreement based upon that evaluation.

- Problems:
  - Parties may not want the weaknesses of their position and strength of other side’s position pointed out and emphasised at such an early stage
  - Not binding
  - “Losing” party goes away thinking that the evaluator got it wrong or of other ways of dealing with the weaknesses identified

Colm Nugent
Barrister
Hardwicke Chambers
Which form of ADR?

- Settlement meeting lawyers alone (RTM)
- Settlement meeting with parties present (JSM)
- Mediation
- Evaluative mediation
- Early neutral evaluation
- Arbitration

Round Table meeting – lawyers alone

- Relatively inexpensive, quick and swift to arrange
- More susceptible to video-conferencing if necessary
- May be useful as a precursor to formal proceedings
- May be the precursor to a JSM or other form of ADR
- Can be of particular benefit when matters of law and/or costs and/or insurance coverage are primary issues
Joint settlement meeting – everyone present

- If at a very early stage can shape expectations and give parties ability to consider how they intend to go forward.

- Post-witness evidence and exchange; it may be the last gasp before an inevitable trial

- Thrashing out the issues will improve the prospects of a post JSM-settlement even if the JSM itself fails

- Gives the clients the opportunity hear the other sides’ case in person; that can sometimes break a logjam

- More than one JSM may be necessary

Mediation

- Does not rely entirely on the parties themselves to continue to pursue settlement at the meeting

- Avoids the taking of intractable positions at an early stage

- Can bring a fresh pair of eyes on the problem or specific issue

- Maintains a line of communication during and after mediation in heated or rancorous disputes
Mediation (2)

- Parties have a direct line of communication to mediator
- Opportunity for issues to be explored (and perhaps resolved) which could not be addressed within trial process.
- A good mediator will get beyond the combative “that’s our final offer, they can take it or leave it” approach.
- A good mediator will find a way out of an impasse that the parties themselves cannot (or sometimes, will not).

Evaluative Mediation

- A more low-key and less ‘judgemental’ alternative to ENE
- Mediator, experienced in the area concerned, forms a view (at parties request) on issue or issues
- Can be effective if one side is being intransigent or unreasonable though a failure to assess/evaluate their case properly
- Can be particular effective where you are faced with client-driven ‘litigation’
Early neutral evaluation

- May be more suited to more involved litigation such as construction or technical disputes
- Client/lawyer needs to be pretty confident in the likely outcome before agreeing.
- May give parties chance to rehearse and refine arguments before trial
- Can be effective if one unresolved issue is the main stumbling block and can be susceptible to E.N.E. rather than a preliminary issue hearing.

Arbitration

- Formal proceedings in an informal setting, so may be ARD in a largely technical sense
- Evidential rules much more relaxed than in a court
- usually a requirement of commercial contracts
- Arbitrator will ordinarily be experienced in the area of dispute concerned.
- Rulings are binding and enforceable; extremely difficult to overturn in a civil court
Strategies to make the ADR a success

- Choose the right time
- Prepare the paperwork – have you the facts (and if needed) the legal arguments ready
- Prepare the client! Reserves of patience is the best thing they can take with them to any ADR.
- Prepare the mediator – any party can have pre-mediation discussions with him/her to determine what they want to happen (or not)
- Give the position paper some careful thought – it’s not a trial skeleton argument or rehash of the pleadings
- Openness and candour with information
- On objective of settlement on the basis of compromise over a desire to ‘win’.
- Ensure all concerned have full settlement authority and you are speaking with that person
- Don’t waste the opening session on banalities – set the tone.
- Make the plenary sessions work - maybe its time the client said something?
- Get rid of the ‘barnacles on the boat’
- Get into a bargaining discussion as rapidly as possible
- Don’t take or accept a ‘bottom line’ approach

How to keep the ADR/mediation on track

- Emphasise the benefits of choosing negotiation over litigation/confrontation and the costs of making a different choice
- Make sure everyone knows, and buys into, the ground rules
- Sequencing the issues
- Creation of an atmosphere where differences can be explored discussed without confrontation
- Framing and then reframing the problem – getting round interpretational issues
- Identifying and focusing on that which is common ground
- Using caucuses and plenary sessions
- ‘Shuttle diplomacy’ where direct communication is unlikely to be productive
- Reality testing proposals or ideas before communicating them to other side: making parties consider the possible response and whether that advances their cause?
- Getting the parties to consider mechanisms by which their agreement can be implemented at an early stage.
The Bottom Line

- ADR is going to be considerably less expensive than the alternative

- Simply having all the parties in the same building or room is likely to have benefits

- The worst outcome is that the ADR does not succeed in resolving the issue or all the issues

- But ADR is very likely to narrow the issues in dispute (and therefore save trial time)

- The ADR process makes the prospects of subsequent settlement infinitely greater

- You always have the option of trying again

Thank you and reminders

- This webinar is accredited with 2 CPD hours (SRA grade = intermediate). These can be gained by passing the CPD quiz which is found in the CPD Quiz section. You should answer 7 out of 10 questions correctly, and will have two attempts at the quiz. Our SRA reference is KJ/LNUK.

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We hope you’ve enjoyed this session.

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