Alternative dispute resolution guidance

Alternative dispute resolution (ADR) is the name given to a variety of individual mechanisms that can be applied when disputes arise; the main aim of these individual methods is to find a resolution to a particular dispute without the need to refer to traditional routes such as litigation. The hallmarks of ADR processes are that it is cheaper, quicker and more flexible, with parties retaining much more control over a dispute than in a litigation process.

Awareness of ADR is applicable to ACCA's membership; during the course of a career in business, disputes can arise in a whole host of areas that accountants and financial professionals come into contact with. Being able to recognise when ADR may be applicable has huge benefits to everyone involved, particularly in respect of resources, time and costs.

The purpose of this guidance is to provide an overview of ADR mechanisms and examples of how it can be used. The intention is to provide ACCA's members with the awareness that they will need to identify when and where the use of ADR may be appropriate throughout the course of their professional career, and within their practice.

ADR MECHANISMS

Negotiation

Negotiation is listed first as it is an often-overlooked dispute resolution mechanism. It goes on every moment of every day across the globe in all sorts of dispute situations.

It can take any number of forms, from a simple conversation to a structured negotiation forum.

Negotiation is the most informal of the ADR methods and probably the most flexible as it is only limited by the framework that is enacted by the negotiators themselves. It is also the least binding as there are rarely structured or formal outcomes to everyday, low-level negotiations.

In a commercial setting, many issues that may have the potential to become a dispute are resolved quickly and easily, often without the people involved being aware that they may have resolved a potential dispute in the making.

The definition of negotiation can be exceedingly wide and its success is generally linked to the skill of those participating. It is an important skill and part of commerce, and should not be underestimated or overlooked.

Negotiation summary:

- flexible
- informal
- low cost
- party-led
- non-binding.

Arbitration

Arbitration is the most formal of the ADR methods and the process is very similar to traditional court litigation. Arbitration usually happens as a result of a clause within a contract, which will specify that in the event of a dispute the parties agree to resolve the matter through arbitration rather than litigation. This is particularly common in commercial contracts due to the fact that arbitration is a confidential process and held in private, as opposed to the public forum of a court hearing.

The process consists of an adjudication panel appointed by the parties to make a decision on the issues within a dispute. The parties select these adjudicators by agreement and agree to be bound by any decision that the adjudicators make. The adjudicators effectively sit as ‘judges’ and each party make representations of both written evidence and oral evidence, usually through appointed advocates. The

process is very similar to a traditional court hearing: the evidence is presented and heard, the adjudication panel then makes a decision and the parties agree to be bound by that decision.

Arbitration is the most formal and usually the most expensive of the ADR mechanisms – costs can be comparable to litigation – and is a well-established and utilised method.

It differs from litigation in that it is the parties who select or appoint the panel and the parties who set the rules and process. It is particularly applicable to disputes that span international jurisdictions: awards and agreements are enforceable across different international jurisdictions through the New York Convention[1]. The convention enables the enforcement of arbitral awards across international borders, and 160 countries[2] are signatories.

Due to the formality of the arbitration process and the parallels with traditional litigation, it is predominantly undertaken by legal professionals including barristers and members of the judiciary. However, there has been an increase in professionals from non-legal backgrounds being involved in arbitrations that fall within their area of expertise or experience.

Arbitration is funded by the parties involved. The costs are usually split; however, there may be costs awards for the 'winning' side. The parties will define and set any cost consequences linked to the outcome.

Arbitration summary:

- confidential
- flexible
- party retains control over the process but not the outcome
- matter is determined by party-appointed panel/individual
- costs borne by the parties.

[1] Arbitral awards are enforceable under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958. This is commonly referred to as the New York Convention.
[2] As at April 2018.

Mediation

Mediation is a confidential, voluntary process where disputes are resolved between the parties with the aid of a neutral-third party mediator. The mediator's role is to facilitate a resolution through dialogue and engagement with the parties. It is possible to have mediation clauses in contracts, although these are not as common as with arbitration. Parties that wish to engage in mediation have to privately instruct a mediator. Mediation can be applied to even the most complex disputes and is one of the more predominant and universal forms of ADR.

There are various forms of mediation and some distinct mediation styles and approaches have developed through practice: broadly, these can be defined as facilitative, evaluative and transformative.

Training in mediation consists of an accreditation course taking between four and six days, and is available from a variety of private training providers. Practitioners may also hold formal post-graduate qualifications in mediation or ADR from traditional universities.

Currently, mediation – which is used in most jurisdictions across the globe – is not compulsory in the UK[3], but the process has seen a huge increase in use over the last 15 years. Mediation has significant judicial support and through case law the judiciary have established cost sanctions for anyone that is deemed to have 'unreasonably refused' to attempt mediation (or ADR) to resolve the dispute prior to beginning court action. If at the end of the case parties cannot provide a reason for refusing mediation, the judge may reduce the amount of costs that the successful party is entitled to.

In a mediation, the parties are given the chance to reach a resolution to the dispute themselves and there is a high level of flexibility in the outcomes that can be achieved. The process is party led; the parties are integral to the resolution and are much more likely to abide by the resolution as they have created it. It is the role of the mediator to facilitate the level of communication between the parties to

[3] Family Court proceedings are the exception in the UK. Many other jurisdictions have mandatory mediation schemes.

encourage a resolution to be reached. The potential outcomes are limited only by what the parties deem would resolve the matter for them; many of the outcomes would not be available in other mechanisms.

Next, we will look at some of the different areas in which mediation is used to give an overview of the flexibility and breadth of the process[4].

In the family courts (England and Wales), it is compulsory in divorce proceedings for couples to attend a Mediation Information and Assessment Meeting[5] (MIAM) to assess if the matter can be mediated rather than proceeding to court. ACCA members have already provided feedback that family mediation has cross-over with their existing work, particularly in providing advice on the division of assets.

Mediation is widely used for community mediation and encompasses a huge variety of disputes, including neighbour, boundary, anti-social behaviour, gang, noise, landlord and tenant, and anything that may arise in a community. Community mediation is usually funded privately or by the local authority where applicable.

Workplace mediation is increasingly used when an employee or employee/employer dispute arises to significant effect, it is estimated that workplace conflict alone costs UK businesses £33bn per year[6] and mediation mechanisms are considerably reducing this cost. Many businesses are building mediation processes into their processes and procedures to address conflict at an early stage.

The area of civil and commercial mediation is probably of most relevance to ACCA members, and encompasses all types of dispute that arise in commercial settings, including: partnership, non-payment, contractual, maritime, investments, procurement, property, financial and generally anything that would traditionally fall within the remit of the civil or commercial court.

[4] This list is not exhaustive, but covers the main areas
[5] As per the Children and Families Act 2014
[6] Confederation of British Industry

Mediation itself is an unregulated industry[7], with mediators coming from a variety of backgrounds, including legal, psychological, therapy, surveying and accounting and finance. All bring relevant expertise and, and many are professionally regulated by their own governing body, although there are very capable practitioners who are not.

The mediation process allows many of the issues that may be driving the dispute to be addressed; these may be emotional issues, entrenchment of position or a breakdown of communication between the parties. The earlier that mediation is considered in a dispute situation, the more effective it is in saving costs, time and resources. Even in the event that a successful outcome is not agreed, often the parties are able to narrow the issues, making the overall resolution easier to achieve.

Any agreement reached through mediation is codified in a 'mediation/settlement agreement'. If a party does not uphold the agreement, it can be enforced through the courts in the same way as any contract.

Recent legislation has assisted in the enforcement of mediation settlement agreements in international crossborder mediations. The EU Mediation[8] Directive enables enforcement of agreements across the EU. In 2019, 46 countries became signatories to the Singapore Convention on Mediation[9], enabling the enforcement of crossborder settlement agreements and demonstrating the shift towards favouring mediation as one of the preferred forms of ADR.

Mediation summary:

- flexible
- party-led, in process and outcome
- confidential
- quick and cost-effective
- wide variety of outcomes
- costs borne by the parties.

[7] As at the time of writing.
[8] Directive 2008/52/EC.
[9] The United Nations Convention on International Settlement Agreements Resulting from Mediation (New York 2018) known as the Singapore Convention on Mediation

Med-Arb

Med-Arb has been developed as a hybrid process between mediation and arbitration. It takes aspects of both processes and combines them into a stand-alone ADR mechanism. It combines the flexibility and party-led traits of mediation with the potential outcome of a binding decision in the event that an agreement cannot be reached between the parties, guaranteeing an outcome to the dispute.

Generally, the process entails the parties appointing a third party 'neutral' and agreeing to the workings of the process. The neutral will then attempt to facilitate a resolution between the parties as per a mediation process. In the event that an agreement cannot be reached, the neutral's role then shifts to one of an adjudicator, and they will then make a determination to the dispute, to which the parties have previously agreed to be bound by.

Due to the dual nature of the process, it is often undertaken by ADR professionals with judicial or decision-making experience.

The Med-Arb process can be used in all of the areas covered by either arbitration or mediation and due to the guaranteed outcome it can be very useful for entrenched disputes.

Med-Arb summary:

- flexible
- confidential
- parties agree to the process and to abide by the decision if required
- guaranteed outcome (can be binding)
- parties retain partial control over the dispute
- costs borne by the parties

Conciliation

Conciliation is an informal ADR process that is very similar to mediation, and there is often little to distinguish a conciliation process from a mediation process. A neutral

third party or conciliator assists the disputing parties in reaching a resolution. As in mediation, there is a focus on facilitation and communication between the parties to enable them to reach a mutually agreeable outcome to any dispute. Conciliation shares the traits of flexibility, confidentially, speed, cost-effectiveness and a party-led approach.

A conciliation process may have a slightly more evaluative approach than mediation and a conciliator may offer up possible outcomes to the dispute that they feel would be appropriate.

Conciliation is used in employment matters, particularly by bodies such as the Advisory, Conciliation and Arbitration Service (ACAS). It is used in the regulatory sphere, notably by ACCA, whose conciliation service resolves complaints submitted against members while also taking any regulatory action that may be necessary. It can also be used in broadly the same way as mediation to resolve a similar remit of disputes. Conciliation can be considered to have a slightly more restorative focus than mediation.

While mediation is an informal process, conciliation is less formal and the process itself has no legal standing. It may also be concluded without any written agreement; it is up to the parties how they wish to codify any agreement.

Conciliation summary:

- informal
- confidential
- party-led and controlled
- restorative
- costs borne by the parties.

Expert determination

Expert determination is the determination of a disputed issue by a party-appointed independent expert. The appointed expert has particular expertise in the subject

matter of the dispute and the parties agree to be bound by the decision that the expert makes.

Expert determination is confidential and the decision made is legally binding, with very limited opportunities to challenge any decision made. The expert is chosen by the parties, usually from a list of potential experts[10], or the parties can simply agree to appoint an individual directly.

An agreement is then drawn up between the parties, consenting to be bound by any decision of the expert. At this stage the matter is then left to the expert to determine; this may be done on paper evidence alone or the parties may have the opportunity to make representations.

Expert determination can be used to resolve all or part of a dispute. It can also be used to great effect to narrow issues between parties prior to, or in conjunction with, other ADR mechanisms being deployed.

Due to the existing skill and expertise of ACCA members, they are already in a good position to undertake formal expert determination work for disputes that fall within their area of knowledge or practice.

Expert determination summary:

- neutral
- confidential
- parties defer control of the dispute to the expert
- guaranteed outcome
- minimal appeal opportunities.

Early neutral evaluation

Early neutral evaluation (ENE) is an ADR mechanism deployed at an early stage in a dispute and is designed (along with most ADR) to prevent a dispute progressing to

[10] The Academy of Experts.

court. ENE differs from other forms of ADR as it does not produce a final decision or outcome to the dispute. It is generally (but not limited to) complex disputes.
The ENE process is an assessment by a neutral third party of the strengths and weaknesses of each party's case; the third party provides an evaluation of the respective positions, evidence, facts or technicalities, which can then be used as either a stand-alone process or as a starting point for further ADR or ENE. It provides a neutral third-party perspective on the merits or weaknesses in any particular dispute.

In the UK, ENE is offered in the technology and construction, chancery and commercial courts, which will appoint a third party to conduct the evaluation. Alternatively, ENE neutrals can be appointed privately outside of the court process. Neutral third parties are usually appointed due to their mix of technical expertise and experience of providing reasoned judgment.

As the title suggests, ENE is generally undertaken during the early stages of a dispute to narrow and crystallise the issues between the parties. Once it is clear that a dispute has arisen, the earlier ENE can be used, the better.

ENE summary:

- flexible
- confidential
- wide application
- narrows issues
- only assesses strengths and weaknesses.

Mini-trial

Mini-Trial is a semi-formal tribunal or hearing before an appointed panel of usually between one and three people. The panel is appointed by the parties to act as a neutral to make a determination on the issues. Although it is named 'trial', it is more of a settlement process that adopts similar techniques to a trial process.

Mini-trials are one of the more expensive forms of ADR. It is not a commonly used form of ADR in the UK but is widely used in other jurisdictions.

Each party presents a summary of the issues or case to the appointed panel that then assists the parties in attempting to reach a resolution. The presentation can be done by an appointed advocate, mediator or the parties themselves; the decision-makers on the panel will then help to facilitate an outcome.

The main advantages of the panel are to provide expertise and an objective view on the dispute and parties positions from a neutral perspective. As with other forms of ADR, the process is usually voluntary, it is confidential and it is the parties who design the remit of the process and what the mini-trial will be asked to determine.

Mini-trial summary:

- voluntary
- confidential
- flexible
- party-led
- no guaranteed outcome.

Conclusion

The above guidance is not exhaustive and each of the ADR processes or mechanisms have far more detail and nuances to them than can be included here. ACCA members are encouraged to be aware of ADR; there can be no doubt that the ADR industry is growing on a global scale, and individuals and businesses are becoming alert to the huge value that ADR can.

ACCA members are often among the first people who may become aware of a dispute that a client or business may be embroiled in. An accountant's position as a business and financial expert and adviser means that being alert to ADR can add value to your existing practice or area of work and can generate revenue, while providing the best possible outcome for clients.

The value of ADR should not be underestimated. The remit and range of issues that can be referred to an ADR process is vast and will continue to grow as industry realises the huge cost that disputes or conflict can have. Disputes drain resources, time, energy, money and prevent commerce from functioning smoothly. Dealing with disputes in the best and most efficient way really is a win-win situation, and ADR provides a credible, viable and better way of resolving problems than protracted and costly litigation.

One of the key aspects of ADR as a whole is the flexibility and creativity that is engrained and encouraged in resolving disputes or problems. Outcomes are generally only limited by the creativity of the parties or neutrals, and whatever may resolve a particular dispute for a particular party can be achieved through a successful ADR process.

ACCA members will have the opportunity to find out more about ADR and how it can be incorporated into their existing area of work in the coming months, including training and case studies, to help you add this valuable skill set to your existing repertoire.

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