

Why use ADR? Pros & cons

Thinking about ADR?

This leaflet is for you if you've heard about alternative dispute resolution (ADR) and are wondering whether to use it to try and resolve a dispute.

It will help you to understand:

- The advantages of ADR
- The risks in using ADR
- What the alternatives are

We try to explain any technical or unusual language as we go along. But you may also find it useful to check out the jargon buster at the back of this leaflet where we also explain some of the terms you may come across when looking into ADR.

You may also be interested in our leaflet 'Finding and choosing a mediator' which looks at one particular type of ADR - mediation.

Note: Fees information in these leaflets applies to England and Wales only.

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What is ADR?

ADR is the name used for different ways of solving a dispute. For example, mediation, arbitration, adjudication and ombudsmen are all types of ADR. In many circumstances they are alternatives to going to court – which is why they are sometimes known as ‘alternative dispute resolution’.

At Advice Services Alliance we like to use the term ‘appropriate dispute resolution’, because we believe that it’s important to use the most appropriate way of resolving a dispute. What’s appropriate depends on a lot of things – your circumstances, the type of dispute, the urgency of the problem, the cost etc.

Find out more about different types of ADR in the Jargon Buster.

Before you start – what are your alternatives?

When you think about whether to use mediation or another type of ADR to sort out a dispute, it’s helpful to think about your other options. Are you considering ADR because you think it will be better than the alternative? If so, do you know what those alternatives are? Or are you wondering whether to try ADR because you don’t seem to have any other choices? Below we outline your main options:

Doing nothing

ADR might be an alternative to doing nothing. Sometimes doing nothing is the right choice for you. You might feel that the problem is just not worth spending more time or money on, or that it will eventually sort itself out. Or you might feel doing something could make matters worse, and that you can live with the problem as it is. The important thing is that you have thought about it and weighed up the pros and cons of doing nothing, and you know what your options are.

Important: If the problem is serious or urgent, however, get advice before making your decision. There are some problems that just can’t be left to themselves.

Going to court

ADR might be an alternative to going to court or to a tribunal. If so, you should think about which process might be cheaper, which might be quicker, which you would find less stressful, and what outcome you might end up with. If someone is threatening to take you to court, you can consider whether you want to suggest some kind of ADR rather than a court hearing. You should get advice about your situation before deciding whether to go to court or not.

Negotiating and working it out yourself

ADR may also be an option for trying to resolve a problem where there are no formal alternatives. In neighbour disputes, for example, there may not be an easily available legal remedy. If this is the case, you should think about whether attempting ADR is better than an informal chat with your neighbours, or in fact doing nothing at all.

Being forced to consider ADR

You always have a choice about whether or not to use ADR, but you might not have a choice about considering it. If you are going to court to deal with a family dispute such as divorce or separation, for example, you are required to meet with a mediator first and consider mediation. In future this might also be true if you are going to court with a non-family dispute, such as a consumer claim. And if you have a dispute covered by a contract that requires you to use arbitration, you might not have a choice.

Either way, over the next few pages we outline some of the commonly agreed pros and cons of different types of ADR.

Reasons for using ADR

There are ongoing debates about the pros and cons of different ADR options. When thinking about the claims that are made for any dispute resolution option, do bear in mind who is making the claim, and why. Some of the claims are true, but only in some contexts.

Cheaper

Mediators will commonly claim that mediation is quicker and cheaper than going to court. Mediation can be much cheaper than taking legal action. However, research published by the government shows that this is not always the case. As you might expect, when mediation ended in a settlement, people thought it was quicker and cheaper than going to a full court hearing. When the mediation didn't end in a settlement, they thought it just added time and costs to the process.

There are fees for making a claim in court. Currently, in England and Wales, fees for making a small claim range from £35 (for a claim up to £300) to £120 (for a claim up to £5,000). The fees for making a claim using the courts' Money Claims Online service are slightly cheaper.

If your claim is not for money, but for something else – for example, if you are asking the court to tell someone to do something or stop from doing something – the fee is £175.

Remember that if you can't afford to pay the court fees, you might be entitled to a reduction in the fee or even having the fee waived so you don't pay it at all. This is important, because (unlike the courts) most mediation providers won't reduce their fees if you can't afford to pay.

Also remember that there may be other fees involved in using the courts – including a fee for allocating the case and a fee for enforcing a payment ordered by the court.

Top tip

Find out what the costs of taking out a court claim would be, then compare these to the ADR options. If you receive certain benefits then you don't have to pay court fees, and if you are making a small claim then you won't be asked to pay for the other side's legal costs. So the cost of going to court might be less than paying for mediation.

And don't forget that most court cases don't actually go to a hearing before a judge but instead end in a settlement. This, too, is likely to be cheaper than a full court hearing. So a more realistic cost comparison might be between you (or your adviser) negotiating a settlement directly with the other side, and choosing to go to a mediation session where you can tell your own story.

Some forms of ADR are free to use – such as ombudsmen schemes. These are likely to be cheaper than taking legal action. But tribunals are also free – for now. There are proposals to charge fees for employment tribunals, but other tribunals make no charge for lodging an appeal.

Quicker

Some forms of ADR can be quicker than going to court. If you are involved in a small claim in court, for example, your case can go to mediation sooner than a hearing can be arranged.

Other forms of ADR, such as ombudsmen investigations, can take a long time. So if the matter needs to be resolved urgently, get advice from an adviser before deciding. For example, you might need to go to court to get an injunction to stop someone doing something, if your safety or home is at risk.

Here are some of the commonly agreed benefits of ADR:

Not adversarial

Going to court can risk making a bad situation worse. That's because the legal system is adversarial – it puts one side against the other, and at the end there is a winner and a loser. Using mediation, where you talk to each other to find a solution you can both live with, can help preserve an ongoing relationship. This might be useful if you have a dispute with your neighbour, your ex-partner, your child's school, or your landlord. This doesn't mean keeping silent when you disagree, or agreeing with someone when you don't. It means hearing the other person's point of view, and having them hear yours, and agreeing what happens next.

Getting what you want

There is a much wider range of outcomes with ADR than with courts. Mediation or an ombudsman investigation may well be more appropriate than court if what you want is an apology, an explanation, or a change in policy or practice by an organisation.

Flexibility

ADR processes are usually more flexible than the court process. Most ombudsmen will investigate your complaint through letters and documents, without a formal hearing. Mediators will usually bring both parties together for a face-to-face discussion. Acas will try to negotiate a deal through a series of phone calls. So think about whether you prefer sorting out a problem by phone, through letters or emails, or face to face.

Longer lasting

When it works, mediation can produce a solution that satisfies both sides. Mediators encourage people in dispute to have creative discussions about a range of options. Rather than just aiming for an acceptable compromise, they will try to end up with an agreement which reflects the best possible outcome for all involved. This can have an effect on what happens afterwards.

Research on family mediation indicates that agreements reached through mediation are more likely to work out in practice, and to last longer, than those imposed by a court. Almost all of the mediated agreements made in small claims cases are complied with – hardly any need enforcement action by bailiffs. This is not true of court orders, which often require the winning party to take action, and pay extra costs, to enforce them.

A full investigation

Ombudsmen have the power to investigate problems in depth, and, like courts, can require information to be provided by the organisation complained about. Unlike courts, they are free to the user. Poorly performing local authorities and government departments can be identified by the public services ombudsmen. If your problem is a symptom of much wider problems with a particular council or public body, then the ombudsman can investigate one complaint, and suggest wide-ranging changes in practice to make things better for everyone.

But ombudsmen won't necessarily take on your complaint to investigate. They might decide that it isn't something they can consider or that another type of resolution would be more appropriate, such as going to court.

In addition, some ADR options provide a remedy where there are few other practical, affordable options; this could include issues such as neighbour disputes about noise or low-level anti-social behaviour, or complaints to the Financial Ombudsman Service about financial service providers.

Risks in using ADR

There are some situations when ADR may not be appropriate, and may even be risky for one of the parties. It is a good idea to get some independent legal advice about this. It is important for solicitors and legal advisers to use their professional judgement in each case, but these are some of the factors you should think about:

Power differences

There may be an imbalance of power between the parties, which could make face-to-face mediation unfair. This could include family or neighbour mediation where there has been violence or the threat of violence; or mediation between an individual and a large organisation such as a local authority or company, where the size and resources of the organisation could put the individual at a disadvantage. This doesn't always mean that mediation is inappropriate, but it's something to consider.

Urgency

There may be an urgent need (for example if you are threatened with being evicted or losing your home) which requires an immediate legal remedy.

Reluctant opponent

Mediation requires both parties to be willing to give it a try, so if the other side is not willing to mediate, you might need to go to court instead.

No precedent

Agreements reached in mediation do not act as precedents in future cases. They are usually private and confidential. If you need to establish a legal point that other people can rely on, you may need to go to court.

No ruling on legal rights and entitlements

You cannot get a ruling on your legal rights, including discrimination and human rights, in ADR processes. You can still resolve a dispute about these issues, but you won't get a decision about whether or not the law has been broken.

Can take a long time

Ombudsmen investigations can be very slow – even up to a year or more for an investigation.

Lower compensation amounts

Although ombudsmen can make compensation awards, they are often lower than is likely to be achieved in court. Research shows that in mediation of small claims cases, settlement amounts tend to be lower than amounts claimed. If you need a significant sum of money in compensation, then you might get a higher award through the court.

Binding decisions

Arbitration, and often adjudication, are processes that result in legally binding decisions. This means that you cannot reject the decision if you don't like it, and you can't take the claim to court instead.

Quality control

There are no consistent quality standards or regulation for ADR providers, so it can be hard to know how to choose a good service.

The cost of ADR

The cost of different ADR options varies, from free to extremely expensive.

Arbitration

Most arbitration schemes charge a fee. An experienced arbitrator in a commercial dispute can be very costly. However, consumer arbitration schemes run for a trade association are usually relatively low-cost. For example, most claims under the ABTA arbitration scheme for holiday disputes currently have a registration fee of £108.

Mediation

Mediation costs vary depending on the type of mediation involved.

Community mediation is usually free to users, although some services charge a small fee.

With family mediation, it can be hard to work out how much it's going to cost at the start. The total cost depends on lots of different things: the number of issues to be decided, how complicated they are, how long it takes to reach an agreement, which service you use, and whether you can get legal aid. If you are on legal aid, it is definitely cheaper to use mediation than to get a solicitor to negotiate for you. Legal aid for mediation (and the legal advice you get alongside it) does not need to be paid back. But legal aid to pay for a solicitor to negotiate for you or take the matter to court may have to be. If you're paying for mediation yourself, you and the other party could end up paying anything between £100 and £1000 each.

Civil/commercial mediation costs can be high; the Centre for Effective Dispute Resolution (CEDR), for example, says that for most mediations the cost will be between £1,500 and £3,000 per party. Under its Mediation 125 scheme, the mediation fee for claims up to £75,000 is £1,000 plus VAT.

Centre for Effective Dispute Resolution:
<http://www.cedr.com/solve/fees/>

Fixed-rate mediation is available from providers listed on the government's Civil Mediation Directory. This is an online tool that helps you to locate a local mediation provider; all providers listed are accredited by the Civil Mediation Council. Mediations are provided at a fixed, subsidised rate, which starts from £50 + VAT per party for a one-hour session for small claims (of less than £5,000), increasing to £425 + VAT per party for a four-hour session (for claims up to £50,000).

Civil Mediation Directory: <http://www.civilmediation.justice.gov.uk/>

Top tip

When contacting a provider listed in the Civil Mediation Directory, it is important to mention that you located them via the Directory, in order to obtain the fixed-fee rate.

Don't forget that in court cases, the loser usually pays the costs of the winning side, except in the small claims process. Unless it is agreed otherwise, in mediation the usual arrangement is that each side pays their own costs. Remember that clients eligible for Legal Aid can claim the cost of mediation as a disbursement under the funding code. Ask your solicitor about this.

Mediation in England and Wales is now 'free' in all small claims cases - there is a mediation officer, paid by the government, in every court area. It isn't in fact free; you can only access this if you (or the other party) have paid the court fee. But once the court fee is paid, there is nothing further to pay to have mediation. The small claims mediation officer will offer free telephone or face-to-face mediation in small claims disputes, if both parties are willing.

Ombudsmen

Ombudsman schemes are free to use, but it's worth thinking about the cost of copying and sending documents and letters. If your complaint is upheld, you can usually claim back reasonable expenses but any compensation you receive will not reflect your time in terms of lost earnings, nor will it usually cover professional fees.

Three important points to consider

1. ADR schemes are NOT alternatives to advice.

- You nearly always need good, informed legal advice before deciding how best to resolve your dispute. This is especially true if there are time limits for taking legal action, as there are in many employment disputes, and if you are using mediation to reach a legally binding settlement.

- You may need advice as you go along – in family mediation, in particular, it's worth checking with a solicitor in between meetings to make sure that the outcomes you are discussing are safe and fair.

- You could also find it helpful to get some advice before deciding whether to accept a solution agreed through mediation or conciliation. In equalities mediation, for example, accepting a settlement at the mediation means that you can't take the same dispute to court or tribunal later.

2. When deciding whether or not to try ADR, think about your bargaining position.

- If you are afraid of violence or intimidation, it may be safer to get a solicitor to try to negotiate on your behalf, or to take your case to court for a judge to decide.

- If the other side won't negotiate with you or agree to mediate, you may need to start legal action in order to get them to take your claim seriously.

- If you are concerned that the other side won't do what they promise, you may need to think about using the courts to enforce action.

- ADR may not be the best solution if you need to rely on a legal precedent from an earlier judgment. Your case may also be important in setting a precedent for the future, or in making the press and public aware of bad or illegal actions by large organisations.

3. Think about what kind of process would suit you best.

- If you'd prefer to tell your story face to face, and have a conversation about the problem with the other side, then mediation may be right for you.

- If you'd be more comfortable sending in copies of letters and documents for someone independent to make a decision, then perhaps adjudication, arbitration, or an ombudsman scheme would suit you best.

- If you are unsure that you can explain your concerns and say what you want to have happen, you may be happier to get a legal adviser or a solicitor to negotiate on your behalf.

- If you want to have a day in court, and for a judge to make a public pronouncement about who is right and who is wrong, then you may want to take legal action.

Jargon buster

The jargon	What it means
Adjudication	<p>This involves an independent third party – the adjudicator – considering the claims of both sides and making a decision. This is usually done on paper. Both sides send in written details of their argument, with copies of any letters, reports or other evidence. The adjudicator then makes a decision based on this information, and on what is generally considered to be good practice in the business concerned. The adjudicator is usually an expert in the subject matter in dispute.</p>
ADR	<p>This stands for ‘alternative dispute resolution’ or ‘appropriate dispute resolution’. It is used to describe mediation, ombudsmen, adjudication and other ways to resolve disputes that are an alternative to going to court or tribunal.</p>
Arbitration	<p>In arbitration an independent third party considers both sides in a dispute, and makes a decision that resolves the dispute. The arbitrator is impartial; this means he or she does not take sides. In most cases the arbitrator’s decision is legally binding on both sides, so it is not possible to go to court if you are unhappy with the decision.</p>
Conciliation	<p>In conciliation, as in mediation, an independent person (the conciliator) tries to help the people in dispute to resolve their problem. The conciliator should be impartial and should not take sides. The parties in dispute are responsible for deciding how to resolve the dispute, not the conciliator. In some conciliation, the conciliator gives an opinion about what is a reasonable resolution.</p>
Early neutral evaluation	<p>In early neutral evaluation (ENE) an independent third party considers the claims made by each side and gives an opinion or evaluation. The opinion can be about the likely outcome of the case, or about a particular point of law. The third party can either be an expert in the subject of the dispute, or an expert in law (such as a barrister or a judge). The same opinion is given to both sides in the dispute. The opinion is not legally binding.</p>

Expert determination	In expert determination, an independent third party considers the claims made by each side and issues a binding decision. The third party is usually an expert in the subject of the dispute and is chosen by the parties, who agree at the outset to be bound by the expert's decision. It can be most suitable for determining technical aspects of a complex dispute.
Litigation	Litigation usually means using the courts or tribunals. It can also apply to what goes on before a case goes to court, such as negotiation between solicitors representing parties in dispute.
Mediation	In mediation, an independent third party (the mediator) helps parties with a dispute to try to reach an agreement. The people with the dispute, not the mediator, decide whether they can resolve things, and what the outcome should be.
Negotiation	This is a form of dispute resolution – probably the most common one. You can negotiate directly with someone you are in dispute with, or you can have someone negotiate for you, such as an adviser or solicitor.
Ombudsmen	Ombudsmen investigate and resolve complaints about organisations and government bodies. They also encourage good practice in the way complaints are handled.
Precedent	Court decisions set precedent, which means that a decision made by a judge in one case can be used as support in other cases. Mediation outcomes apply only to the case mediated, and because they are usually confidential they are not reported in public. This might be a factor to consider if you want your case to help other people with the same problem.
Small claim	This is a type of claim that is heard in county court. The limit on the amount that can be claimed in a small claim is currently £5,000 – but this is increasing to £10,000. You might be offered mediation by the court if you are involved in a small claim.

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