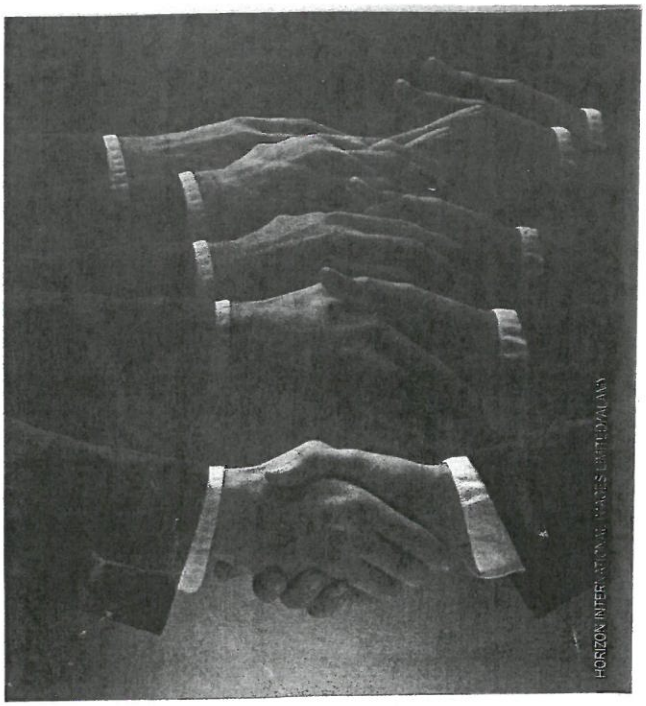
ADR

Avoiding litigation

Craig Beauman looks at alternative dispute resolution, the umbrella term for methods of finding solutions to disputes without taking cases to the civil courts.

Craig Beauman



Problems of cost, delay and complexity are inherent in the civil court system, and in many cases individuals have turned to alternative dispute resolution (ADR). ADR concentrates on reaching amicable agreements that satisfy both parties, rather than relying on the adversarial approaches often characteristic of litigation.

The single most common criticism of civil litigation is the potentially enormous cost of bringing a case to court. The demand on the courts' time and the use of the professional services of a lawyer mean that even a simple case can become extremely expensive.

In North Tyneside in 2008, a claimant in a divorce case launched court proceedings against his wife over custody of their young child. The ensuing court battle cost him just over £40,000. Despite having to pay this bill out of his own pocket, he was still not granted custody by the judge. His ex-wife, however, was granted full legal aid to fight the case because she was not employed at the time. Under the **Family Law Act 1996**, such persons relying on public funding of their cases are required to meet with a third party to discuss avoiding litigation. However, they are not forced into a compromise and can pursue the matter through the courts, thus increasing costs for the other side.

The criticisms of civil litigation have not gone unnoticed by the judiciary and politicians. In 1996, Lord Woolf wrote his report 'Access to Justice', in which he stated that the foundations of a fair legal system were practically non-existent in England and Wales. His recommendations reflected his fundamental belief in an accessible, cost-effective and less complicated system.

One of his main proposals was the use of alternative methods of resolving disputes. Instead of taking an action to court, claimants should be actively encouraged, and in some cases forced, to seek redress by talking to the other party on a formal or informal basis that does not involve the expense of litigation.

The promotion of ADR was never meant to be a quick-fix solution; indeed, many civil cases such as divorces ultimately have to go through the formal proceedings of the courts. However, there are certainly many cases where ADR could be advantageous, both in terms of avoiding the expense and time of a court case and by providing a win-win resolution for both parties.

However, some people are still reluctant to use ADR. If a person becomes involved in a dispute, it is only natural to seek assistance and advice from a solicitor, and it would not be in a solicitor's interest to suggest ADR and miss out on the valuable court fees chargeable to their client.

In the year after Lord Woolf reported on the state of the civil courts system, the newly elected Labour government commissioned the Middleton Report to check through his recommendations. This report confirmed the 1996 recommendations and again suggested the increased profile of ADR to ease a backlog of civil cases and the ever-spiralling cost of litigation.

The profile of ADR has been raised in several Court of Appeal cases, most notably *Dunnett* v *Railtrack* (2002) where the court decided that parties who refused potential ADR could, even if successful, be made to pay their own costs, rather than making the losing side pay them.

Types of ADR

There are four main types of ADR:

- negotiation
- mediation
- conciliation
- arbitration

Each type provides a potential solution, if both parties are willing to work towards agreement. However, because the decisions are not binding for some types of ADR, many cases may still proceed to litigation.

Negotiation

This method of ADR is commonplace in everyday life and the most informal way of resolving disputes. The parties agree a solution 'over the fence', without the need for the intervention of lawyers. For example, if a youth were to smash his next-door neighbour's greenhouse with a football, the quickest and most cost-effective way to resolve the issue is the neighbour coming to an agreement with the youth's parents to pay for the repair – probably out of the youth's pocket money. The advantage here is that the matter can be resolved quickly and privately, without the parties falling out with one another. Furthermore, once an agreement between the parties has been established, a binding contract can be made (usually orally). If the parties agreed on £50 to repair the glass, *prima facie* that would be binding.

Sometimes lawyers become involved in negotiation, perhaps to resolve issues before court, such as agreeing contact arrangements for children during a divorce.

Mediation

This type of ADR involves an independent, neutral third party acting as a go-between, trying to get the parties to talk through what each side wants and negotiate a mutually beneficial compromise. Usually, the mediator does not offer an opinion.

Mediation is particularly appropriate for divorce cases. Due to the adversarial nature of such a case, if any or all of the issues can be resolved without an acrimonious battle between the parties, the true spirit of ADR is met. For example, an organisation called Relate provides a facilitation service to partners going through marital or civil partnership difficulties. The aim is to try to facilitate a solution by working out what the problems are, and perhaps, through mediation, avoid long, protracted divorce litigation that only serves to increase hostility and further sour relationships.

If, however, mediation (or potentially any method of ADR) has no real hope of success, according to the Court of Appeal in *Hurst* v *Leeming* (2002) either party can refuse to be forced into such a process without penalty in later litigation.

Conciliation

Conciliation is similar to mediation, except that the neutral third party – the conciliator – has the power to suggest a resolution and how the parties can come to a settlement and avoid litigation. Therefore, a conciliator takes a much more active and dominant role than a mediator.

Mediation involves an independent, neutral third party acting as a go-between for the disputing parties.

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Conciliation is often used in cases of unfair dismissal through the Advisory, Conciliation and Arbitration Service (ACAS). ACAS looks to resolve the issue by seeking the claimant's re-employment without having to take the case to a more formal hearing, if there is a genuine reason for doing so.

Arbitration

Arbitration is the most formal type of ADR. In certain types of agreement, such as those signed between holiday-makers and holiday companies, there is a clause providing that if there are any problems between the parties that cannot be resolved through negotiation, the parties *must* seek redress through arbitration. This is called a *Scott* v *Avery* clause and is governed under the **Arbitration Act 1996**. This type of arbitration was set up by the Association of British Travel Agents (ABTA). Initially, ABTA offers a conciliation-type service, but can, if requested, send the dispute to full arbitration. The arbitrator (or panel of arbitrators), who will either be a lawyer or an expert in the area at dispute, remains neutral.

There are two main types of arbitration:

- Paper-based – both parties in dispute complete written submissions to the arbitrator concerning their issues. The arbitrator considers both sides' arguments and provides a written decision to the parties.
- Face-to-face hearing – this is similar to, though less formal than, a court appearance. Both parties give their submissions and the arbitrator decides the outcome, called an 'award'. The award is binding on both parties and can be enforced or even challenged in the courts. If the award is challenged (under sections 68 and 69 of the 1996 Act), it must be either over a procedural irregularity during the hearing or on a point of law.

Clearly, there are many advantages of arbitration over litigation. However, in practice, as this type of ADR is similar to litigation, it could end up costing more than going to court. The use of an expert arbitrator is expensive, and one or both of the parties may employ the services of lawyer. Some might argue this type of ADR is simply 'enforced litigation' for the benefit of the party that has included arbitration in its standard contractual terms.

Conclusion

ADR provides discreet methods of dispute resolution as alternatives to, or to complement, formal proceedings of civil litigation. Both the courts and the government (and clearly many of the parties to disputes) would prefer parties to use ADR as a substitute to the courts. In many cases, these methods provide fairer, cheaper and quicker means to an end than formal court proceedings.

However, with so many parties to legal action having access to public funding being pitted against those who do not, ADR remains a pipe dream for some. Those facing divorce proceedings, for example, have discovered this to their considerable cost.

Craig Beauman is the Programme Manager for Business, Psychology and Law at Newcastle College and a member of the editorial board for A-LEVEL LAW REVIEW.