

## Alternative Dispute Resolution in Jersey

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David Benest  
Managing Partner



Jeremy Heywood  
Partner

### Introduction

**In virtually every dispute the parties will have to consider whether it is possible to reach settlement by means of 'alternative dispute resolution' ("ADR"). Not every case is suitable for ADR, and not every case that makes use of ADR will result in settlement. However, parties are expected to properly consider ADR and will likely be penalised by the Court if they do not.**

### ADR in Jersey

Judicial endorsement of ADR has been formalised in changes to the Royal Court Rules and ADR is now integral to litigation in Jersey. In many judgments, The Royal Court has endorsed the use of ADR and stated that it will penalise unreasonable refusal to engage in ADR in costs.

The overriding objective requires the Court to encourage parties to explore ADR. There is also specific provision for the imposition of a stay in proceedings to allow parties to consider ADR.

Importantly, the Court has the power to impose adverse costs orders on a party who unreasonably refuse to engage in ADR, even if that party is ultimately successful at trial.

### What is ADR?

ADR is any means of resolving a dispute other than a determination by a court after the 'usual' trial process.

It is possible to seek to settle the entire case or to seek to settle discrete issues (such as the apportionment of liability between multiple defendants). The most appropriate means of ADR will depend on the nature of the case, the needs and attitudes of the parties, and the stage reached in proceedings. The most common forms of ADR are:

### Negotiation

Negotiation is the most common form of ADR. Negotiation between the parties can be entered into at any stage.

In the early stages, negotiation is usually conducted by correspondence on a 'without prejudice' basis. Later in proceedings, a 'joint settlement meeting' is more common, where negotiations are conducted in person.

Negotiation is (usually) cost-effective, quick and achieves finality. The parties are also able to be more flexible, in terms of remedies, than a Court.

### Mediation

Mediation is a more formal, structured, form of ADR. The parties instruct (and pay for) an independent mediator to facilitate negotiations between the parties in an attempt to reach a settlement.

The mediation is entirely 'without prejudice' and confidential. The mediator is trained to assist the parties to reach settlement, not to determine the case. Mediation allows the parties to negotiate freely, through the intermediary of an independent person, and to reach a fuller resolution of all matters in dispute, more quickly and cost effectively than if the matter proceeded to trial.

The disadvantage is that there is a cost associated to mediation which, if unsuccessful, adds to the overall cost of the proceedings.

### Arbitration

Arbitration is usually the result of a contractual provision governing the commercial relationship between the parties. Such clauses usually specify the qualifications of the arbitrator to be appointed and the manner of his appointment. Proceedings follow much the same path (and with much the same expense) as if before a court, but with greater flexibility and confidentiality. The arbitrator's decision is binding upon the parties and usually final and without appeal, but the parties have control of the proceedings.

The main benefits of arbitration are confidentiality and, particularly in disputes involving complex, industry-specific technical aspects, the ability to select an arbitrator with experience in the relevant field.

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The disadvantage is that it may not be any quicker or cheaper than court proceedings.

### Expert Determination

Expert determination is a form of dispute resolution which is often confused with arbitration. Expert determination is, however, different. It is a process by which an independent expert in the field of the dispute is appointed by the parties to decide the issues. The parties agree the precise terms of the questions to be determined by the expert.

The expert's decision is agreed by the parties to be legally binding.

The principal advantage to expert determination is that the parties have a decision-maker who is an expert in the field. Proceedings are usually agreed to be confidential.

Also, the proceedings might be considerably more cost efficient, particularly if the issue is one which is amenable to a determination on the papers.

### Benefits of ADR

There are many benefits to parties in engaging in ADR. The most important are:

#### Risk

However strong a case a party has, all litigation carries with it risk, for example: witnesses, whether expert or not, might come across poorly when giving live evidence; a key legal issue might be determined in a novel manner. The consequences of losing in court can be severe, not just in damages, but also in costs. ADR allows a mitigation of that risk by achieving a certain result at an earlier stage at a lesser cost. Settlement brings certainty.

#### Costs

Even if a party wins at trial, the costs of getting to that point will be significant. Even if a costs order is made in favour of the successful party, there will usually be a shortfall between the costs incurred and the costs recovered. If the successful party is held to have acted unreasonably, including unreasonably refusing to engage in ADR, they risk being deprived of all or part of his costs.

### Commercial considerations

The parties may have an existing commercial relationship and wish to resolve the dispute in a

way which will best allow that relationship to continue thereafter. The dispute may also involve matters which the parties wish to keep confidential. Occasionally, whatever the rights and wrongs, a party simply wishes for a swift resolution on commercially sensible terms. All these are factors which suggest ADR might be a better way of resolving the dispute.

### Flexibility

Formal legal proceedings have strict rules of procedure and timetables which must be adhered to under threat of sanctions (usually in terms of costs). Equally, the Royal Court is limited in terms of the remedies which it can award.

ADR is much more flexible. The parties are, to a large extent, free to agree their own timetables and procedure. The parties are also able to deal with all the underlying causes of the dispute between them.

### Conclusions

ADR is an integral aspect of litigation in Jersey. Any party to proceedings needs to consider and, where appropriate, engage in ADR. A failure to do so, without reasonable excuse, will likely result in adverse costs orders being made against a party, even if that party is successful at trial.

Whilst not appropriate to every dispute, ADR can provide a sensible, confidential, and cost-efficient means of resolving a dispute.

This briefing is only intended to give a summary of the subject matter. It does not constitute legal advice. If you would like legal advice or further information, please contact us using the contact details below.

#### David Benest, Managing Partner

+44 (0) 1534 760860  
david.benest@bcrlawllp.com

#### Jeremy Heywood, Partner

+44 (0) 1534 760851  
jeremy.heywood@bcrlawllp.com