



## Alternative Dispute Resolution (ADR)

What is ADR?.....	2
ADR methods.....	2
Mediation.....	2
Mini trial.....	2
Expert opinion.....	2
The benefits of ADR.....	2
Common questions about ADR.....	3
Why not negotiate instead?.....	3
How confidential is it?.....	3
Is a willingness to mediate an indication of weakness?.....	3
What do you do if no agreement is reached?.....	3
When is the best time to suggest ADR?.....	3
Mills & Reeve’s approach.....	3

Disputes are a fact of life. Almost every commercial transaction has the potential to produce disagreement. In the last few years, however, we have seen a significant change in the way in which those disagreements are resolved. Increasingly, the court room is seen as a weapon of last resort and more and more disputes are settled by negotiation or more structured forms of alternative dispute resolution (ADR) such as mediation.

ADR has become something of a buzz word. Both the private sector and the public sector are using it and judges and government want us to use it even more. This is because it has proved to be a highly effective tool for resolving disputes. When negotiations break down, resolution can be achieved at a fraction of the cost and within a fraction of the time of taking a case through the courts. Rather than winning or losing, businesses can move on from the dispute with commercial solutions that benefit their long term interests and with relationships and reputations intact.

Now, over three-quarters of the members of the Institute of Directors say they would prefer to use mediation or similar techniques rather than go to court; the government has pledged to settle disputes through non-litigious means wherever possible; and judges are referring cases that come before them to mediation in ever increasing numbers. The courts are also penalising parties who refuse to try ADR by not allowing them to recover their legal costs even if the case is successful.

The push to persuade parties in dispute to attempt ADR is to be welcomed. Our view has always been and continues to be that a fundamental component of a good litigation service is the ability to be imaginative in identifying and advising upon possible dispute resolution options.

# MILLS & REEVE

---

Already the vast majority of legal actions are resolved before trial. Our challenge, therefore, is to identify those cases which are capable of resolution and then to adopt whatever process is most likely to achieve that resolution quickly, cheaply, and in the most appropriate manner

## What is ADR?

The term ADR covers a range of techniques which assist parties in dispute to reach a negotiated settlement without the use of a judge or arbitrator. ADR is not an alternative to negotiation, but rather a recognition that there are instances where negotiations can reach stalemate, frequently because the adversarial nature of litigation encourages parties to adopt entrenched positions.

ADR seeks to promote imaginative solutions to disputes in which traditional negotiation techniques are not producing settlement.

There will always be some disputes for which a trial is the most appropriate method of resolution, for example where it is important to establish a legal precedent. For the majority of cases, which are likely to be settled without a trial, ADR should always be considered. With proper advice as to the appropriate and timely use of ADR, those disputes capable of resolution by this type of assisted negotiation will settle earlier and at lower cost.

## ADR methods

There is no set list of ADR techniques; the parties can devise whatever procedure they feel will be most effective in bringing about a resolution of their particular dispute. However, the most frequent ADR methods include:

### Mediation

This is the most popular form of alternative dispute resolution. The parties meet at a mutually agreed time and location and the process begins with a joint session at which the parties set out their case. A trained mediator then meets the parties separately and shuttles between them, trying to develop common ground and testing out ways of resolving the dispute. Until a settlement is achieved, the mediation process is non-binding and the parties are free to walk away. If agreement is reached, it will be documented and signed. The agreement will then be enforceable as a contract.

### Mini trial

A mini trial, or “executive tribunal” is a more formal type of mediation hearing. Presentations are made to a panel which would typically comprise the mediator and a senior executive from each party. Following the presentations the executives will attempt to settle the case with the assistance of the mediator if necessary.

### Expert opinion

The parties appoint an agreed expert and ask him to consider particular points of dispute between the parties, usually of a technical nature. The parties can either agree in advance to be bound by the expert’s conclusions, or simply to use the expert’s conclusions as a guide for further negotiation.

## The benefits of ADR

ADR offers the following advantages:

**Speed** - ADR can be arranged within days or weeks rather than the months or years that can be involved in litigation or arbitration. Typically, the average case is resolved in less than a day. The process condenses weeks’ or even years’ worth of negotiation into a few hours allowing in-depth discussions to take place quickly.

**Control** - the parties agree the mediator or expert, the venue, the timetable, the procedure and the agenda. They also determine what information is disclosed to the other side. Control over the decision making is therefore retained by the parties.

**Cost** - early settlement saves management time and legal costs. A case resolved by ADR is likely to be far more cost effective than a case which proceeds to trial.

**Confidentiality** - ADR is entirely private. Potentially unwelcome publicity can therefore be avoided and any agreed settlement will not set a precedent.

**Flexibility of solutions** - A court is restricted in the type of orders it can make. ADR offers the opportunity to agree more creative, flexible settlement options than a court could order.

## Common questions about ADR

### Why not negotiate instead?

In effect, ADR is an extension of negotiation. With ADR a neutral third party becomes involved who can actively assist the parties in reaching a creative settlement.

It may be that negotiations are difficult to start up or, once started, have broken down. ADR can assist in jump-starting the process again.

### How confidential is it?

The whole process is treated as a “without prejudice” negotiation. All discussions and documents generated in connection with an ADR process will be privileged communications and will not be referred to in any court hearing that might subsequently take place.

### Is a willingness to mediate an indication of weakness?

Attempting to settle a dispute to avoid cost and delay is not a sign of weakness. Willingness to talk through a problem rather than to keep one’s arguments in reserve is indicative of confidence in one’s case, not the reverse. It is not difficult to communicate this to your opponent.

### What do you do if no agreement is reached?

About 70 per cent of civil and commercial mediations result in settlement on the day, with an additional 20 per cent of cases settling soon after the mediation. Even if a settlement is not achieved, ADR has more benefits than risks. In all likelihood, most of the work carried out in preparing for ADR would have been undertaken during the litigation anyway. Further, the information gleaned from the other side during the process may well assist in narrowing the issues and highlighting the real areas of dispute. If ADR does not work then litigation can be commenced or continued.

### When is the best time to suggest ADR?

Mills & Reeve will review a case’s suitability for ADR at different stages in the litigation process. Not all cases will be suitable and the timing will vary in each case as more information comes to light. In some cases, the timing will be determined by the court.

## Mills & Reeve’s approach

At Mills & Reeve we are committed to helping you find the most practical solution to any problem.

We ensure that this commitment is fulfilled in a number of ways:

**Trained litigators** - all our litigators are trained in the use of mediation and other forms of ADR.

**Qualified mediators** - a number of our litigators are trained and experienced mediators.

**ADR clauses** - all non litigators are trained in the use of ADR clauses so that these are considered when drafting contracts and other commercial agreements.

**Reviews** - all cases are reviewed at regular intervals to determine their suitability for ADR.

**One stop service** - Our litigators are able to handle disputes from claims investigation through to trial. ADR will be considered at the earliest possible stage and consequently at the lowest possible cost to our clients.

**IF YOU HAVE ANY QUESTIONS ABOUT MATTERS RAISED IN THIS GUIDE PLEASE FEEL FREE TO DISCUSS THEM WITH THE PERSON HANDLING YOUR DISPUTE.**

---

[www.mills-reeve.com](http://www.mills-reeve.com) T +44(0)344 880 2666

Mills & Reeve LLP is a limited liability partnership authorised and regulated by the Solicitors Regulation Authority and registered in England and Wales with registered number OC326165. Its registered office is at Monument Place, 24 Monument Street, London EC3R 8AJ, which is the London office of Mills & Reeve LLP. A list of members may be inspected at any of the LLP's offices. The term "partner" is used to refer to a member of Mills & Reeve LLP.

The contents of this document are copyright © Mills & Reeve LLP. All rights reserved. This document contains general advice and comments only and therefore specific legal advice should be taken before reliance is placed upon it in any particular circumstances. Where hyperlinks are provided to third party websites, Mills & Reeve LLP is not responsible for the content of such sites.

Mills & Reeve LLP will process your personal data for its business and marketing activities fairly and lawfully in accordance with professional standards and the Data Protection Act 1998. If you do not wish to receive any marketing communications from Mills & Reeve LLP, please contact Suzannah Armstrong on 01603 693459 or email [suzannah.armstrong@mills-reeve.com](mailto:suzannah.armstrong@mills-reeve.com)