



# ALTERNATIVE DISPUTE RESOLUTION

A HANDY GUIDE

## An introduction

At Brodies we understand when litigation is the best option for our clients but also where their interests are best served by dispute resolution through alternative channels.

In a market where reputational risk, confidentiality, flexibility of process, speed of resolution and cost control play an increasingly significant role in business decision-making, Alternative Dispute Resolution (ADR) is becoming ever more popular with commercial clients.

Our ADR offering has grown and developed to reflect the needs of our clients and we continue to invest in our practice and the skills of our specialist lawyers.

Our experts are able to deal with disputes across Scotland and to provide support and guidance to clients at a local, national and international level.

●● **Mediation can take place at any point in a dispute, either before or during court or other proceedings.**

In almost all commercial disputes, mediation will be discussed or considered at some stage.

## What's the right method for you?

### Litigation

If you want or need to go to court, you may elect to have any dispute decided by the Commercial Court of the Court of Session or, in relation to lower value disputes, the Commercial Court at a local Sheriff Court (e.g. Glasgow), where the nature of the dispute means you are entitled to do so.

#### Why/when to use litigation?

Commercial actions can be raised in court where there is a dispute in relation to any transaction or relationship of a commercial or business nature. Commercial actions are generally more flexible in terms of procedure than ordinary actions, the allocated judge will give stricter supervision of the progression of the case, and be pro-active in its management. The judge allocated to the case will have a high level of commercial awareness and an understanding of the matters in dispute.

### Benefits of litigation

As the Commercial Courts adopt a much more active case management role in resolving commercial disputes, their procedures generally allow for a speedier and more efficient means of dispute resolution.

### Mediation

Mediation is a flexible voluntary and confidential process where a neutral independent mediator assists parties to work out their own solution rather than a decision being imposed upon them by a third party, such as a court.

#### Why/when to use mediation?

The flexible and confidential nature of mediation, and the fact that nothing said or done during the process is binding, unless parties reach a solution they all accept, makes mediation a very useful process to use in commercial disputes. Mediation can take place at any point in a dispute, either before or during court or other proceedings. In almost all commercial disputes, mediation will be discussed or considered at some stage.



## Benefits of mediation

Mediation is interest-focused with parties controlling the outcome, timing and cost. It has a success rate of over 75%.

## Expert determination

Expert determination differs from other forms of dispute resolution in that considerable reliance is placed on the expert's professional know-how and expertise, which he will use in seeking to resolve the dispute.

### Why/when to use expert determination?

In practice, it tends to be limited to the determination of the technical or financial valuation aspects of disputes, for example valuing a shareholding for buy-out purposes. However, there is no reason in principle why it could not be used for wider categories of dispute.

### Benefits of expert determination

One of the big advantages of expert determination is that it is generally very quick, often resulting in disputes being resolved within a matter of months. The downside however, is that an expert's determination is generally binding, with very limited rights of appeal, meaning that an expert determination is fine unless you don't like the result.

## Adjudication

Adjudication is a process developed primarily for the construction industry, whereby a 'man of skill' is appointed and the parties set out their respective cases over a 28-day period, before the adjudicator makes a decision on the dispute. His decision is binding until overturned by litigation, arbitration or agreement.

### Why/when to use adjudication?

In theory, adjudication can be used in any kind of dispute. However, it can be difficult to get a considered decision within 28 days in more complex disputes or those involving a large amount of evidence. In these kinds of cases parties often extend the period by consent. Adjudication is intended to resolve disputes on an interim basis, to allow the project to be completed pending the substantive dispute, unless the parties have resolved their differences by then.

## Benefits of adjudication

Speed is a key benefit of adjudication – it is possible to get a resolution in 28 days.

It is flexible – you can refer small elements of a dispute to adjudication, potentially unlocking resolution of the major dispute. You can also appoint a lawyer as adjudicator to decide the legal aspects, followed by a second adjudication with a quantity surveyor to value entitlement.

- Adjudication is intended to **resolve disputes on an interim basis**, to allow the project to be completed pending the substantive dispute.

## Arbitration

If something akin to a judicial decision is required then arbitration should be considered.

Arbitration is a process in which an independent expert in the subject matter of the dispute is appointed by the parties to resolve the issue that has arisen.

### Did you know?

Over the past four years, civil cases initiated in both the Court of Session and the Sheriff Courts across Scotland have dropped by 41%.

## Why/when to use arbitration?

If you place value in keeping your dispute confidential or preserving your relationship with the other side, arbitration may be the best approach. It should be given serious consideration where you would otherwise find yourself in the national courts of a jurisdiction with which you are unfamiliar or uncomfortable, particularly where there is political instability or a record of judicial partiality.



## Benefits of arbitration

Arbitration is flexible, confidential and allows parties to select a judge with suitable expertise to determine the issue. There are limited grounds for court interference in decisions of arbitrators and no appeal to the Supreme Court. Parties can control costs by agreeing the extent to which the arbitrator can award costs against the unsuccessful party.

There are clear advantages in enforcing your decision, as arbitral awards are recognised far more readily outside of the EU than UK court judgments.

## How we can help?

With dispute resolution, it is definitely not the case that one size fits all.

All of the above examples of dispute resolution have their relative advantages and disadvantages and it may be that a combination of some, or all would work best for you.

We are experts in all these forms of ADR and would be happy to discuss them with you, either at the time of entering into a contract or when a dispute arises.

## Key contacts



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