A quick fix or a long battle?

Part 1: Mediation or expert determination? **Emma Sadler** considers the alternatives to litigation

Mediation is probably the most well known and widely promoted form of alternative dispute resolution (ADR). It enjoys the support of the courts and promotion by organisations such as the Centre for Effective Dispute Resolution. Some of the commonly accepted advantages of trying to resolve disputes by mediation are: its comparatively low cost; the speed with which a mediation can be arranged; the fact that the decision is consensual and not unilaterally imposed; and the potential confidentiality of both the mediation and any related settlement agreement.

The financial cost of mediation is usually low in comparison to litigation or other forms of ADR. However, it can cause parties to incur unnecessary costs in situations where there is little prospect of a settlement being concluded but they feel unable to refuse mediation outright because of the risk of cost sanctions. *Halsey v Milton Keynes General NHS Trust* [2004] 1 WLR 3002, [2004] All ER (D) 125 (May) held that the court could take into account a party's unreasonable refusal to engage in mediation when assessing liability for costs. Since this case, some legal advisers have viewed mediation as an unavoidable step which must be undertaken prior to or during litigation in order to protect their clients from an adverse costs award. Parties with weak cases sometimes try to pressurise their opponent into mediation in the hope that the opponent will accept the argument that it is cheaper to pay something or take a discount in recovery to settle at mediation than to be successful in a dispute but not be awarded costs.

Mediation by its nature will only be successful if both parties are willing to compromise to reach a solution. It may be inappropriate in disputes that have little room for compromise, such as possession proceedings. The April 2008 changes to allocation questionnaires that require the parties to give details about steps taken to settle claims and ask whether the parties would like the court to arrange mediation is an example of the sorts of encouragement used by the courts to promote mediation and a reason why parties may enter mediation when it is not appropriate.

Behaviour in and results of mediation are not necessarily privileged from the court. *The Earl of Malmesbury v Strutt & Parker* [2008] All ER (D) 257 is recent authority for the court being able to look at a party's conduct in mediation. The behaviour of a party that willingly enters into a mediation but takes an unreasonable position during the mediation can be examined and that party treated in the same way as someone who has refused to mediate.

> **"ADR is not always preferable to litigation or negotiation between parties"**

Because mediation does not produce a binding decision without the agreement of the parties, there is the possibility of arguments as to whether an agreement was reached. While this is normally avoided by the early signing of settlement agreements, this is a risk that expert determination and litigation do not share.

Expert determination

The convenience of expert determination is the relative simplicity of the procedure and low cost, certainly when compared to litigation. The parties can agree the terms on which the expert is appointed. The expert should have experience in the subject matter and be able to understand and assess the matters in dispute quickly, usually without the submission of evidence from other experts. Expert determination is appropriate for disputes of a technical nature. These include service charge disputes and rent reviews, construction disputes and accountancy matters.

The scope of an expert's powers will be governed by the terms of the contract entered into by the disputing parties. The parties can decide whether or not the expert's decision is confidential. It will not remain confidential if it is necessary for a party to try to enforce the determination through court.

If the parties do not expressly provide otherwise, an expert's decision can only be challenged on limited grounds and cannot generally be appealed. Unless the parties agree otherwise, the available grounds for appealing an expert's decision are: (i) deceit or fraud; (ii) bias or acting unfairly; and (iii) the expert acting outside of his jurisdiction or authority.

If any of the above grounds can be proven, the expert's decision can be rendered void and unenforceable. If not, the expert's decision will be binding on the parties. This will be the case even if the parties believe the decision is wrong. In *Owen Pell Limited v Bindi (London) Limited* [2008] EWHC 1420, the judge held that because the expert had answered the right question, even if the answer was wrong, the determination would still be final and binding.

Is ADR always preferable?

ADR is not always preferable to litigation or negotiation between parties. Some matters can only be settled by the court, such as eviction of squatters and applications for injunctions. Other disputes may be more quickly resolved through a court procedure, such as by summary or default judgment. Even where a negotiated settlement is sought by a claimant, the threat of litigation and the costs and other sanctions that a court can impose may focus an opponent's mind more than the possibility of ADR. Care needs to be taken to consider whether ADR should be attempted, and, if so, which form of ADR is appropriate. NLJ

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In part two, the author will discuss early neutral evaluation and arbitration