

One Size Does Not Fit All

ADR

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Although alternative dispute resolution strategies have been broadly discussed for a long time and although they have been effectively used for many years, there remains a strong tendency among clients, and many lawyers, to group all alternative dispute resolution strategies together under the acronym ADR. In fact, this term encompasses a wide range of alternative dispute resolution strategies including negotiation, mediation, neutral evaluation and arbitration, to name but a few of the ADR options available.

So how does one go about choosing the optimal approach for their particular dispute? Are there criteria that can be applied to this process to ensure that the process employed will more likely end in a successful conclusion than not?

Due to the unique and multi-faceted aspects of disputes it is difficult to set out hard and fast rules to be followed in every case, but there are some indicators that may be of some assistance when navigating the ADR waters. This article will endeavour to outline, in a summary fashion, some of the considerations that counsel and their clients may use to determine the most appropriate course of action for them. Most ADR techniques are seen as being more cost effective, efficient and timely methods of resolving disputes than the traditional litigation process so those criteria are not of much assistance in differentiating between the various techniques which are available. In addition, the monetary size of the dispute, the number of parties or the complexity of the issues, while often cited as reasons for or against a particular course of action, are generally not factors that will determine which procedure should be followed in any particular case. Other criteria should be examined in order to arrive at an informed decision as to how to proceed. These additional criteria require a careful analysis of the nature of the dispute, the objectives of the decision makers in the particular case and the preferences of the parties involved.

Negotiation

Negotiation between the parties is most suitable where it is likely that the parties will be able to reach an agreement as to the matters at issue and the general process to be used to attempt to resolve the dispute. Negotiation is particularly useful where the parties are concerned about the damage to their relationship or the prospect of a useful relationship going forward. However, negotiations often breakdown if the parties are unable to get beyond their basic positional approach to problem solving and, as a result, they do not address the underlying needs, desires, concerns and fears of each party. These underlying needs, desires, concerns and fears are generally referred to as a party's "interests".

Mediation

A skilled mediator can add considerable value to the process by carefully questioning the parties to get past their negotiating positions to bring out and articulate their interests. Where there are deep-seated positions being advocated by one or more of the parties that is often a good indicator that there may be some tension or conflict behind the scenes which is negatively impacting on the ability of the parties to manage their own dispute. Many times the parties to a dispute go around and around on the same issues without understanding why they are unable to get beyond certain positions or points of view. Through careful questioning, a mediator can lead the parties through a process to fully explore and express their interests which are not always clearly articulated or even well understood by the parties themselves. A mediator is also necessary and can provide a valuable service where an independent person is required to even-handedly manage the dispute resolution process.

Neutral Evaluation

An evaluation of the case by an independent neutral may also be useful where the parties need an independent person to assess and evaluate the dispute and manage the dispute resolution process. However, the criteria that most strongly points to the use of a neutral evaluator, instead of a mediator, arises where there are contested facts or inferences about certain facts and a disagreement as to the law to be applied to those facts. In such a case, in order for the parties to believe and accept that their dispute has been appropriately dealt with, it is necessary for an independent and knowledgeable person to offer advice or to provide an influential opinion as to the merits of the respective parties' positions.

Arbitration

Finally, apart from those circumstances where the use of an arbitrator is mandated by statute or by contract, the use of an arbitrator should also be considered in circumstances such as those outlined above for an independent neutral. The additional criteria that would require the special skills of an arbitrator would include the need to test the evidence or testimony of the parties under oath. Also, if there is a need to impose sanctions or award damages then an arbitrator would be required.

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