

# ALTERNATIVES TO COURT



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Most people who have a complaint or dispute immediately think that the only way to sort out the complaint or dispute is to issue court proceedings. This is not the case. Before taking any action you should consider all of the alternatives available to you.

Involving the courts to solve a problem can be expensive, very stressful and very time consuming. There are other ways of dealing with your complaint or dispute and this varies depending on the nature of your problem.

## What alternatives are there to court?

There are alternative ways of sorting out disputes and these are known as 'Alternative Dispute Resolution' (ADR). ADR includes things like Arbitration, Mediation and Ombudsman schemes.

You may ask yourself why use an ADR scheme instead of going to court? ADR schemes are not there to replace the courts but the important thing to remember is that they can have advantages over going to court. These advantages include:

- being more flexible
- solving your problem faster
- less stressful
- costing less money

If you have a problem with a person or an organisation that you deal with regularly (for example a neighbour), ADR can lead to a better, longer-lasting solution to your problem. It may also lead to much better communication in the future. You can use some ADR schemes as well as going to court or to a Tribunal. ADR can help the parties focus on the issues that are causing the problem, making it easier for you to reach an agreement or for a judge to make a decision. The Civil Procedure Rules 1998 which govern all court proceedings now say that you must think about whether some form of ADR would be a better way to reach an agreement before going to court. If you refuse without good reason to consider ADR, you may not recover your legal costs even if you win your case.

## Should I consult a Solicitor in order to use Alternative Dispute Resolution?

Most people seek advice when going to court and therefore it is recommended that you should in most cases seek advice when choosing an ADR method. Advice can also be useful when you are writing a letter in relation to your particular problem or using a formal complaints procedure.

**Knight Polson has various experts, depending on the nature of the particular matter, who can advise you on all aspects of ADR.**

## Deciding whether to use an Alternative Dispute Resolution scheme?

This will depend on:

- the result you want
- what you can expect to achieve
- how you want to go about solving your problem
- how willing the other side is to try and solve the problem

The result may be different in going to court than ADR.

Going to Court can result in:

- an order that something be done or stopped
- Compensation
- a judgment from the court about who is right and who is wrong



Using ADR can result in:

- a change in the way a person or organisation behaves
- a promise that a person or company won't do something
- something you own repaired or replaced
- an apology
- an explanation for what happened to you
- a mistake corrected
- compensation

What you want to achieve will not necessarily be achievable or possible for your particular problem, and it's important to know this before starting out. You will need to find out if ADR can produce the result you want. For example, if you have been injured during medical treatment and your main priority is to get compensation, you will more than likely need to take court proceedings, because you will not get compensation through any complaints procedure or via the Ombudsman. If you feel that alerting people to the problem is the most important thing, so that it doesn't happen to someone else, then you will have a better chance of getting this from the Ombudsman.

It may not be possible to achieve everything you want from a single form of Dispute Resolution. The result is one thing, but how the problem is resolved can be just as important. You need to think about:

- what it will take to get your problem sorted out
- how much it will cost
- how it will affect your life, your family and your work
- how much time you can spend on the problem

You may see that it is important to have a meeting so that you can state your case in person. Mediation can usually offer this. You might feel that you don't want to go to a meeting but would rather have the matter dealt with on paper only (through letters and other written information). Ombudsman schemes normally use this kind of 'documents only' process. You may feel you need a more formal hearing where someone independent decides the rights and wrongs of your case. A Court, a Tribunal or an Arbitrator can offer this.

It is important for you to remember that some methods have to be the last thing you try rather than the first. This is because those methods are 'binding' (which means that the parties must do what they are told or agree to do). If you use a binding method, you can't go on to use a different method if you are unhappy with the result. In some cases, you can't use two methods at the same time. Remember that for some types of problem there is a time limit for taking a case to court or to another Dispute Resolution process. So if you are using one

process, you need to be sure that it will not put you beyond the time limit for taking your case elsewhere if you need to. In some cases, a contract may specify the type of Dispute Resolution method to be adopted in circumstances where there is a dispute.

## **Mediation**

Mediation involves an independent Mediator (someone who will not take sides and cannot gain or lose by the outcome). The Mediator will help you and the other person or organisation find a solution to the problem. The parties involved in the dispute, not the Mediator, decide what will happen and what the terms of any agreement will be. The process is voluntary so you cannot force the other person or organisation to take part.

Mediation is not binding and what is said in mediation is confidential, so it cannot be used in court later unless both sides agree otherwise. It is normal to keep to an agreement reached through mediation, because the terms are agreed between the parties themselves. You can ask a court to turn an agreement made in mediation into a consent order, which can then if need be, be enforced through the court.

Mediation can be used for a range of different problems.

## **Adjudication and Arbitration**

Adjudication and Arbitration are sometimes described as a private version of going to court. They involve an independent Adjudicator or Arbitrator who is impartial (someone who will not take sides, and cannot gain by the outcome), who hears both sides of the disagreement and makes a decision that will solve the problem.

You and the other person or organisation must both agree if you want to use Adjudication or Arbitration.

The process and outcome is confidential. Sometimes the Adjudicator or Arbitrator makes their decision based on documents alone that each person gives to support their case. At other times they hold a hearing where both sides can present their case. However, this is usually less formal than a court hearing.

Adjudication is a less formal process than Arbitration. Adjudication is not usually binding on the person making the complaint, so you can take your case to court if you do not agree with the Adjudicator's decision. Arbitration is binding on both sides, so you can't take your case to court after the Arbitrator has made a decision, unless they have made obvious legal mistakes or behaved improperly.

Adjudication and Arbitration can be used for a range of problems.

If you have a dispute with a business, check whether they are a member of a trade association. If they are, ask the trade association whether they have an Adjudication or Arbitration scheme to deal with your problem. You can also contact the IDRS (Dispute Resolution Service) to see which organisations they run schemes for.

## **Grievance and complaints procedures**

These are usually the first stage of resolution for many disagreements you have with organisations or government departments. In some cases, you can use another method of sorting out a problem (such as an ombudsman) but only if you have gone through the complaints procedure.

The best complaints procedures are usually those where complaints are handled at a local

level, often informally. However, many complaints procedures do not have time limits, so sorting out a problem can take a long time. Also, complaints procedures are not independent, because they are drawn up and handled by the organisation you are complaining about.

If you are frustrated by a complaints procedure and feel you have done everything possible to sort out the problem the next stage is often an ombudsman.

## **Litigation**

Litigation (taking a case to a court or tribunal) often ends in a settlement (an agreement) before the final hearing. However, if a settlement can't be reached, an independent person (a Judge) or a tribunal hears arguments from both sides and then makes a judgment. Unlike most Alternative Dispute Resolution processes, in litigation the decision is made public and hearings can often become public knowledge.

Litigation can be used for a range of problems.

## **Negotiation**

This involves dealing directly with the person or organisation regarding the particular problem. You can do this yourself, or you can get a representative (such as a solicitor) to do it for you. Negotiation is usually a good first step. It starts with you approaching the other side with details of your problem and make suggestions for how it can be sorted out. The other side does not need to agree to take part before your approach. The process is not binding, although both sides can agree to make any agreement legally-binding. Most disagreements can be solved through negotiations. A common example is settlement discussions between solicitors.

Negotiation is different from Mediation in that the person negotiating for you:

- acts for you, and represents your interests
- is not independent
- may also advise you about the best course of action in your particular circumstances

## **Ombudsmen**

Ombudsmen are independent and look at complaints about public and private organisations. They are often a last resort when complaints cannot be sorted out through an organisation's own complaints procedure.

Ombudsman services:

- are free to use
- will normally consider your complaint only after you have used the complaints procedure of the organisation you have a problem with
- don't take sides
- make decisions that are not binding on you, so you are free to go to court or use another dispute resolution process if you are not happy with their decision. (Except for the Pensions Ombudsman, whose decisions are binding on both you and the company).

In most cases, the Ombudsmen dealing with public organisations (such as local authorities or government departments) can only review how a decision was made and say whether:

- there was 'maladministration' in the way it was made
- it resulted in an injustice

They don't look at whether or not the decision itself was right. Maladministration can include:

- an organisation or department not following its own policies or procedures

- rudeness
- taking too long to do something
- not doing something they should have
- treating you less fairly than other people
- giving you wrong or misleading information

The private-sector Ombudsmen (who looks at complaints about banks and insurance companies, for example) can generally look at whether a decision was fair and reasonable based on industry standards of good practice. They can also award you compensation if they agree with your complaint.

There are ombudsmen schemes for a range of different consumer complaints, including complaints about:

- estate agents
- financial services (banks, investments and insurance, for example)
- pensions
- telephone services

If a company you have a problem with is a member of an ombudsman scheme, it should make this clear, for example, in a brochure or on its letters to you.

### **What is the cost of Alternative Dispute Resolution?**

In assessing the cost you need to take into account:

- fees or charges for the ADR service (unless it is free)
- your own expenses, including things like travel expenses and photocopying
- the cost of legal help and advice
- the risk of you not getting what you want

For example, you need to know if you will be responsible for paying the other side's legal fees and other expenses if you lose. You also need to know if you can expect to get your costs and expenses paid if you win.

The general principle that applies in civil courts in England and Wales is that the 'loser' pays the other side's costs as well as their own subject to a court assessment, except in the family courts and the small claims courts, where each side normally pays their own costs. In ADR, the general principle is that each side pays their own costs.

You should also be aware that if you unreasonably refuse to consider a form of ADR before or during court proceedings, then you may not get your legal costs back, even if you win.

Mediation costs can vary, depending on the type of mediation. For example:

- community mediation is usually free to local residents
- family mediation services often charge an hourly rate. Some have a scale of fees
- commercial mediation providers charge according to the complexity and value of the claim
- many county courts in England and Wales provide free small-claims mediation for people who have an existing claim in court
- mediators through the National Mediation Helpline will provide half a day of mediation for £250 plus VAT per party

If you are eligible for legal aid, the Community Legal Service fund may pay for the cost of your mediation or other form of ADR. Sometimes, the organisation you are complaining about pays all the costs because they are financially stronger.

You may have to pay for travel expenses, childcare costs, and time off work if you have to go to a hearing. Photocopying evidence can be expensive, so don't forget this cost if you are using a process such as arbitration where you have to provide many documents.

### **Getting help with the costs?**

You may be able to get help with the costs of using an ADR scheme if you are eligible for legal aid. This will depend on whether you can afford to pay and if you meet other conditions. If you meet these conditions, you may get help with:

- the costs of preparing your case for mediation or arbitration
- the cost of legal advice before and during an ADR
- the fee for mediation or arbitration

### **Interested?**

If you would like to learn more about this subject and the service **Knight Polson** can offer, please contact:

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This leaflet is not a complete guide to the law and is not intended to be a guide to how the law will apply to you or to any specific situation. You should speak to a professional about your particular problem.