

Barriers to use

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This paper was prepared and settled jointly by the members of ADRAC.

Whilst it would be nice if this was a very short paper, the unfortunate reality is that, even today, there are still barriers preventing a greater use of ADR.

In this paper, no attempt will be made to identify whether there are particular forms of ADR which have greater use than others (although, it would probably be conceded that arbitration and mediation are the two forms most commonly used, particularly in commercial disputes). That will be for another day.

Set out below are suggestions as to why, even today, barriers still exist. There is no suggestion that these are or should be equally weighted.

Information Vacuum

Putting aside regular users of ADR, there is a lack of information, or at best an insufficiency of information, about what ADR is and how it works. This includes the different forms of ADR, how each works, what are the circumstances when each should be used (and, on the flip side, when they shouldn't be used), what are the advantages of each of the forms of ADR (and, again, what are their disadvantages), and similar issues.

Associated with these is the belief that "public disputes" or disputes about matters that affect the public interest are not suitable for ADR because of the perception that resolutions achieved in a private or closed process are tantamount to back room deals. Interestingly, these beliefs and perceptions still persist widely, despite the fact that public sector regulators are, perhaps, the flag carriers of ADR in disputes about public administration.

Negative views on the benefit of ADR

Whilst a number of the matters identified in the previous section might similarly fall into this area, the primary source of negativity arises from what potential (and even ad hoc) users consider to be the cost benefit analysis of undertaking ADR. This is not so much related to the direct cost of the use of particular forms of ADR (apart perhaps from arbitration) but, for example, in instances where litigation is already under way, whether one party believes that it will ultimately end up paying more than

if it allowed the dispute to proceed to an ultimate judgement and the other party taking the opposite view.

Internal processes

This barrier, obviously, arises more prevalently in the commercial sphere, particularly in circumstances where an entity has an in house legal function. Invariably, whilst the in house lawyers might understand ADR, they are generally not the ultimate decision makers. That is left to the business and, generally, most are very sceptical or apprehensive about using ADR, who view it as either a distraction or another way for the external lawyers to increase their billings.

Appropriate third party (who should be the person in the middle?)

Whilst it may seem that there is a large pool of potential appointees, the reality is, in large commercial disputes, retired judges are still usually the first choice. This is particularly so in circumstances where external lawyers are involved in putting together a panel of potential appointees.

Added to this is the fact that most will look at the recent successes of potential appointees without having any details of what the issues were about, the strengths or weaknesses of each position, and similar matters.

Enforceability of outcome

Enforceability is available in many of the most used forms of ADR, in particular arbitration 'binding' third party determinations, and the like.

Other issues include the breadth of releases, particularly in circumstances where some parties will attempt to have included in any settlement agreement a release of all matters associated with the issue, even if those matters had not yet arisen or been understood by either party.

Enforceability in mediation is a different question from enforceability in determinative processes. In arbitration, for example, there is usually a process available that enables registration of an arbitral result as an enforceable judgment of a Court. A similar result can be achieved contractually by parties to a binding third party determination or forms of expert determination.

Mediation is capable of producing results in non-justiciable disputes which could never be enforced. It is capable of producing results that are partially enforceable on contractual grounds depending on the outcome of the mediation. The different levels of enforceability in mediation can amount to a barrier to use.

Cultural and attitudinal factors

Several years ago Tom Howe QC spoke about various 'habits' of thought that can constitute barriers to the utilisation of ADR. Although Tom's presentation was directed principally to government departments and agencies (and their lawyers)

many of the points made by him have wider application. A link to Tom's paper can be found [here](#).