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A quick fix or a long battle?

Part 2: Early neutral evaluation or arbitration? **Emma Sadler** considers the alternatives to litigation

Alternative dispute resolution (ADR) has increased in popularity steadily over the last decade. In part one of this article the merits of mediation and expert determination were discussed (see *NLJ*, 30 January 2009, p 154). Part two considers the benefits of avoiding litigation by using early neutral evaluation (ENE) and arbitration.

Early neutral evaluation

ENE is one of the least well-known methods of ADR. Its purpose is to provide disputing parties with an indication from an independent evaluator of the likely outcome of a dispute. The Commercial and Admiralty Court Guide provides for its use after proceedings have commenced.

Since the purpose of ENE is to give an early view of the likely outcome at trial, it is important that the evaluator is, as far as possible, put in a similar position to that of a trial judge. To achieve this, considerable preparation may be needed although this can be lessened by co-operation between the parties in producing documents such as agreed statements of fact. For this reason, the cost of ENEs may be high and they are rarely suitable for low value disputes.

ENE is more appropriate and more commonly considered when court proceedings have been issued and preparation for trial is well advanced. In principle, parties can use ENEs at an earlier stage if they are prepared to agree summaries of the points in dispute and provide full evidence on these.

Parties usually agree that any finding of an ENE will be confidential and privileged. The court should not have access to the evaluation decision.

Independent & impartial

The evaluator must be independent and impartial. The evaluator is usually a lawyer but, in principle, technical disputes can be evaluated by an expert in the subject matter. Although the view of an evaluator given in an ENE will be non-binding on the parties, any view is likely to be influential if the evaluator is well respected. The selection of an evaluator is therefore crucially important to the success of this form of ADR.

Parties ignore the views of an ENE at their peril. ENEs can persuade parties to accept the weakness of their case before incurring the expense of trial. ENEs encourage parties to settle before trial without leaving them feeling that they have had to compromise for something less than they could have obtained from court.

Arbitration

Arbitration may be more expensive and slower in producing a final decision than other forms of ADR or litigation.

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Arbitrations can become drawn out by a party who wishes to delay an award and in complex disputes, a tribunal may need to refer matters to the court for interim decisions. These may be matters which would have formed part of the case management in court cases.

Adoption of recent recommendations to improve the management of complex commercial court cases by the Commercial Court's Long Trials Working Party (in the Report and Recommendations of the Commercial Court Long Trials Working Party, December 2007) may encourage parties to choose court rather than arbitration as the forum of choice for high value and complex matters.

Arbitration is appropriate for commercial disputes in which some expertise may be required from the tribunal.

Arbitration is also often chosen by parties because of the confidentiality of the process. This is a major advantage over litigation for many parties who wish to keep details of their dispute private.

The confidentiality of arbitral awards and proceedings is not, however, absolute. The Court of Appeal in *Emmott* v *Wilson* [2008] EWCA Civ 184 held that the general rule of confidentiality may be waived:

(i) with the consent of the court;
(ii) if it is in the interests of justice or in the public interest to do so;
(iii) where it is reasonably necessary in order to protect the legitimate rights of an arbitrating party; and
(iv) with the consent of the owner of the confidential document in question.

An arbitrator's decision cannot provide a precedent for other disputes, even if they involve the same issues of law. This can make the outcome of disputes unpredictable. Some commentators have called for the reporting of arbitral awards to be introduced to ensure consistency in the decisions of similar cases. However, for some, the lack of uniformity is one of the attractions of arbitration. For others, the attraction of arbitration is the long established trade practice and the familiarity of the arbitrators with the matters in dispute.

Arbitral awards are difficult to overturn. The court's leave to appeal will only be granted if the question substantially affects the rights of one or more of the parties and is something the tribunal was asked to determine. In addition, the court must also be satisfied that the arbitrator's decision is factually incorrect or the question is one of general public importance and the decision is open to serious doubt (see the Arbitration Act 1996, s 69(3)). NLJ

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