Alternative forms of dispute resolution

Introduction
For some time it has been recognised that the legal process is not always the most satisfactory way of resolving disputes. The function of the court in the UK is to listen to the case presented to it by the opposing sides and to decide which of those cases it deems more justified. The Judge does not investigate the alleged facts nor does the Judge suggest solutions of his own. The Rules of Natural Justice preclude the Judge (or arbitrator) from discussing the respective cases of each party with that party. The outcome is therefore often uncertain and the process lengthy and costly, all of which are unpopular and can lead to dissatisfaction with the legal process itself. It is hardly surprising therefore, that alternative ways of resolving disputes have been sought.

ADR gives far more opportunity for different avenues to be explored in order to resolve the dispute as quickly and cost effectively as possible!

What is ADR?
There is no method built into the legal process that allows the parties to a dispute to discuss their respective cases with frankness and without giving away their bargaining position. Additionally, by virtue of the legal process being final, it is necessary once a case has commenced to ensure all possible arguments are aired since there will be no second chance. It is to overcome these two major difficulties that Alternative Dispute Resolution (ADR) processes have been designed.

Some people consider that ADR encompasses all the procedures which offer alternatives to the courts. Others consider ADR to be only those procedures which produce non-binding results. There is no clear definition on which is correct. For the purposes of this information sheet, procedures which offer alternatives to the courts are included under the heading of ADR.

The aims of ADR
The aim of all ADR processes is to reach a resolution as quickly and economically as possible. Some of the processes may result in a compromise which may not necessarily reflect the legal entitlement of the parties, but is nonetheless a solution which the parties can accept.

What are the various types of processes?
The number of individual processes for settling disputes which can be devised are limitless since each dispute is unique. The process may be determined by the nature of the dispute, the personalities involved for each of the parties, the amount in dispute, the significance of the dispute to each of the parties and their expectations. The most commonly used processes are set out within this information sheet. Several of these processes can be used if one or more of them prove to be unsuccessful. Benefits from one process can also be combined with the benefits of one or more of the others to produce a tailor made procedure best suited to resolve a particular dispute.

Arbitration
The fair resolution of disputes by an impartial arbitrator without unnecessary delay or great expense. The arbitrator ascertains the parties' rights and obligations under a contract.

Arbitration is a judicial procedure very similar to that of the courts except that arbitration is conducted in private. This is one of the key advantages arbitration has over litigation. An arbitrator has some significant advantages over a judge in that the arbitrator (in construction disputes) is skilled in construction matters and as a consequence the amount of evidence required to prove a case may be materially less than in court proceedings.

The expertise of the arbitrator ought to enable the matters in dispute to be brought into sharper focus a good deal quicker. This should therefore result in considerable savings in time and money as compared with the courts.

Unfortunately, this has not always been the case, as in recent years some arbitrations have been conducted as if they were before the court and as a consequence the benefit and intention of saving time and costs have been lost. The advantages of arbitration still remain and are achievable providing the parties (and their advisers) do not themselves undermine them.

In response, new accelerated procedures were introduced in 2015 by the Royal Institute of Chartered Surveyors (RICS), and the Chartered Institute of Arbitrators (CIArb), and it is hoped that these will result in arbitration being concluded a good deal quicker (with the resultant savings in costs), in suitable cases, than had previously been the case.

Adjudication
Adjudication, in the UK, can be commenced as a right under the Housing Grants, Construction and Regeneration Act 1998, as amended by the Local Democracy, Economic Development and Construction Act 2009, although there are a few exceptions.

Legislation is now in place in the Republic of Ireland (the Construction Contracts Act 2013) which legislates for adjudication, and effectively outlaws the practice of 'pay when paid'. The legislation came into effect on 25 July 2016.

Adjudication is a judicial process similar to arbitration which ascertains the parties' rights and obligations under a contract but which is conducted under far greater time constraints, usually 28 days which can be extended by the agreement of the parties.

The adjudicator's decision can be enforced through the courts if not complied with. If a reluctant party does not comply, the successful party can enforce the decision through a very quick and cheap procedure through the courts without having to re-open the arguments put before the adjudicator. The decision is, however, only binding until such time as the dispute is finally determined by legal proceedings or by arbitration (should the parties still wish to pursue their dispute through the courts or arbitration) or by agreement.

Statistics suggest that the majority of adjudication decisions are accepted by the parties, no doubt somewhat reluctantly by the losing party. Where the losing party does not accept the decision, the dispute can be referred to either the courts or arbitration for final determination. The original decision, however, if valid, is not overturned but merely superseded by the subsequent judgement or award.

Mediation
The parties select an independent third party to assist them in reaching an acceptable solution. Their role is that of honest broker and not a judge. The parties can agree that the settlement reached by them is binding, if not, the dispute can be resolved through the courts, arbitration, adjudication or one of the other forms of ADR. The parties should be prepared to make compromises. The final deal may not necessarily take account of either party's legal entitlement or obligations. Statistics suggest that this is a very quick, economical and effective way of resolving disputes.

It is becoming increasingly the case that the courts will require a party to have tried to settle their case through mediation before the court will allow the matter to proceed to trial. Courts require very good reasons why mediation has not been undertaken if cost penalties are to be avoided.

Expert Evaluation (Determination)
As a preliminary step to settlement the parties may agree to engage an expert to investigate and report on the dispute. The parties may, if they so wish, agree to be bound by the opinion of the expert (expert determination). If not the dispute (if it still remains after the expert has reported his opinion) can be resolved through the court, arbitration, adjudication or one of the other forms of ADR.

The expert, who is chosen for their knowledge in a particular aspect of the construction process, is required to be totally independent. Presented with the same facts experts often come to the same conclusion. It is therefore eminently sensible for parties to engage just one expert rather than each of them incurring the expense of appointing separate experts.

Conciliation
This is usually considered to be an informal procedure, and is more along the lines of a discussion aimed at trying to get the parties to discuss and settle their differences. Should there be no settlement, the conciliator often produces a recommendation as to how the dispute should be settled.

Mini Trial
The parties are normally represented by lawyers who make a presentation to a panel. This panel typically consists of a senior manager of each party, who has not previously been involved in the dispute and chaired by an independent neutral person.

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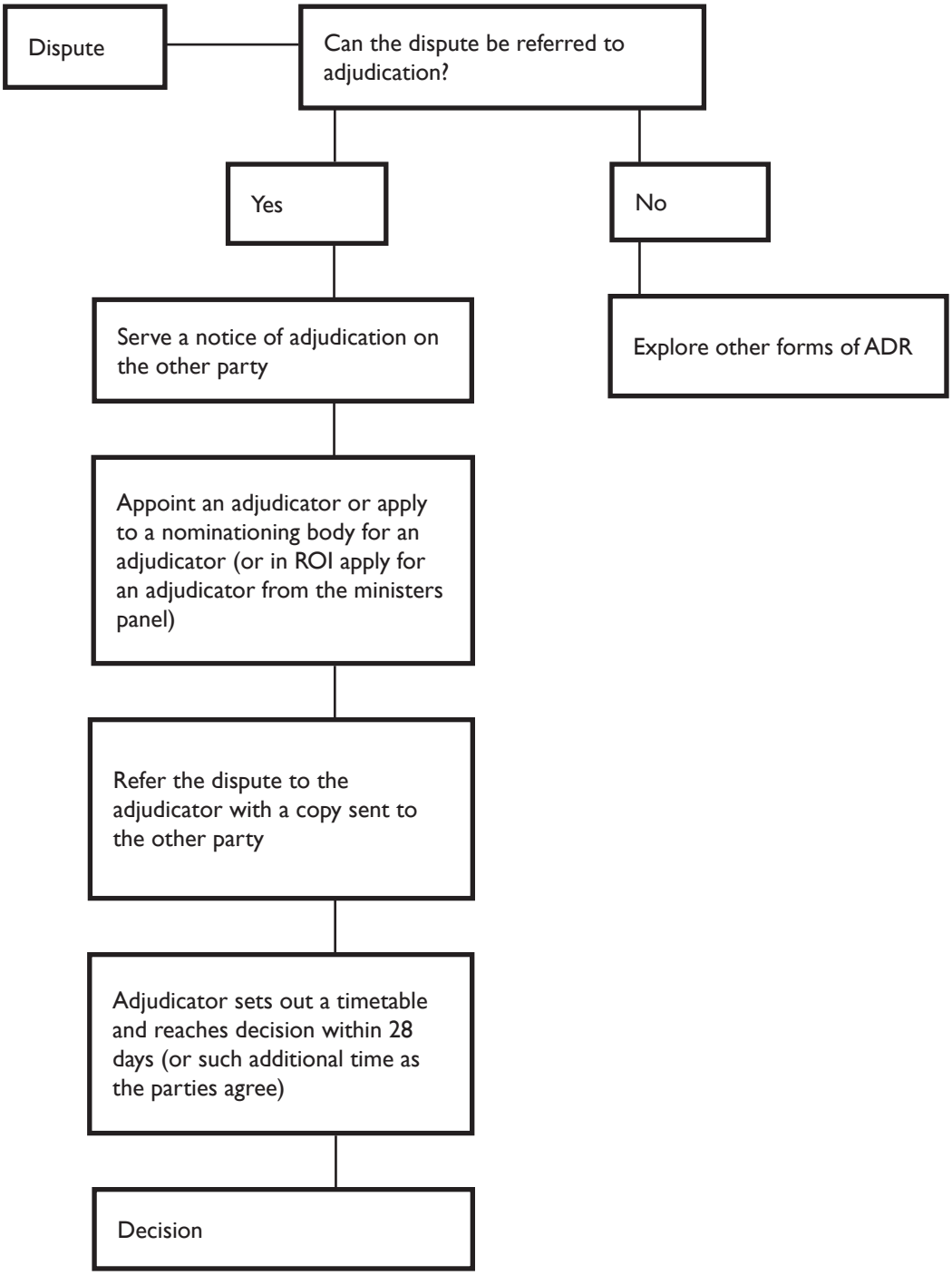
The adjudication process



How does adjudication fit into the dispute landscape