Fact - 80% of disputes that are referred to mediation settle successfully. No publicity, no delays, no permanent damage.

In recent times there is an increasing appetite from the business community to avoid Court litigation because of the associated costs, delay and the damage it can do to business and relationships. Increasingly, modern lawyers are seeking alternative and more practical solutions for their clients to ensure that the disputing parties can reach an amicable resolution and continue their business relationship, while minimising the time and costs spent in resolving disputes. Welcome to the world of Alternative Dispute Resolution ‘ADR’.

What relevance does ADR have to CPAs? It has every relevance. How many practices suffer disputes between partners in the practice? With their employees? With clients? How many times are you the first or last to find out about a client in a contractual dispute with another party?

Types of ADR

Question: If I have a dispute and I want to resolve it without going to Court, what options do I have?
Answer: You have more options than you think!

Arbitration

Arbitration has become demure litigation. It is a binding process whereby a third party neutral, usually a specialist arbitrator, is appointed to hear a dispute and to impose a decision which is final and binding on the parties. It is a private forum, unlike the courtroom which is public. The decisions are subject to a very limited form of Appeal before the High Court. The process is adversarial and mostly formal. However, where the issues are complex and there is extensive documentation and a considerable number of witnesses, then arbitration can be more time consuming and costly than litigation.

I acted for one of the parties involved in a partnership dispute in an accountancy practice. I took over the case in the ninth year of arbitration. In the tenth year, the arbitrator finally made his decision. The arbitrator’s considerable costs were discharged by the losing party; however it demonstrates very clearly that arbitration is not always the perfect alternative to litigation (despite the fact that most partnership agreements contain arbitration clauses).

Judicial Appraisal

This is where parties present their cases in written form to a retired Judge who gives an appraisal of the likely result were the case to go to Court. Both parties present submissions to the retired Judge. The parties can decide if such an appraisal is binding or not.

Construction Type ADR - Adjudication

Adjudication is very popular in construction disputes where commonly disputes between subcontractors and contractors are referred to 30 day adjudication. This is a process whereby the
parties present their claims and defences and a decision is made which is binding by an adjudicator within 30 days. This was brought in to help speed up the construction dispute resolution process, particularly for subcontractors who are almost exclusively reliant on payment from contractors who withhold payment and delay that payment by referring the dispute to arbitration which may take years to resolve.

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**Expert Determination**

An expert is often used on disputed financial valuation or particularly for the valuation of companies and shareholdings. Usually the expert’s decision is final and binding.

**Conciliation /Mediation**

Conciliation is often interchangeable with the term mediation but is used in Irish construction disputes primarily. In construction disputes the process usually involves a quantity surveyor or engineer who attempts to reconcile disputing parties in respect of construction disputes such as final account negotiations etc.

The most common form of Alternative Dispute Resolution in this country and abroad is Mediation. Mediation is a confidential process whereby a third party neutral assists the parties towards a negotiated agreement of a dispute. The mediator does not impose a decision but assists the parties in reaching their own terms of settlement.

**What can I expect in “normal” litigation or arbitration?**

If arbitration or litigation commences between disputing parties, you can usually expect the following:-

- The relationship will break down irretrievably.
- A huge amount of personal management time is consumed with lawyers.
- Legal costs accelerate as you go further into the process.
- The parties personally involved become distracted from the running of their business.
- A decision will be imposed on the parties, usually two to three years on after the origination of the dispute.
- The resolution of the dispute will be outside your control whereby Lawyers and Barristers will take over the running of the case.
- If you lose, it is likely that the Court will order you to pay the costs of the winning party.

Under these circumstances, it is hard to see how these processes are appropriate to resolve commercial disputes.

**What are the advantages of Mediation?**

- Mediation costs a fraction of the cost of litigation/arbitration.
- Barristers do not need to be instructed for mediation, thus lessening the exposure to legal costs.
- Mediation usually takes place over one or two day period and can occur within a very short timeframe from the origin of the dispute.
- Mediation is more likely to preserve the relationship between the parties.
- Because of the speed of mediation, less time will be spent distracted from the business.
- The parties are in control of what they say, what they concede and whether they settle. The law has a much lesser role in this process.
- Very flexible terms of settlement can occur, for example an apology could be part of the settlement terms. Such terms would simply not be available from an imposed decision from an arbitrator or a Judge.
- The process is totally confidential with the parties signing up to a confidentiality agreement. Any disclosures made in the process cannot be later used in a Court or arbitration scenario.

**Mediation- What circumstances?**

- Mediation is used increasingly by the Courts. It is one of the steps that parties must investigate prior to commencing family law proceedings. Mediation has been introduced by statute to personal injury litigation cases.
- The Commercial Court, which hears commercial disputes in which claims are in excess of €1,000,000, continues to recommend mediation to disputing parties.
- The most high profile case which has been referred to mediation is the dispute between Pat Kenny, the broadcaster, and his elderly neighbour, Gerard Charlton, in respect of a claim over neighbouring land. That case had been fought vigorously for a period of two years prior to it coming on for Hearing. In that case, the Judge strongly recommended the parties refer their dispute to mediation and within a period of days, the matter had been resolved to the satisfaction of both parties and the terms still remain confidential to this date.

**How does the process work?**

In advance of the mediation, the mediator will ask the parties for case summaries which summarise both parties’ positions together with any supporting documentation. The mediator will then make contact with the parties or their Lawyers in advance of the mediation to explain the process. The mediation will usually take place over one or two days. The mediator...
will call the parties into a joint meeting to identify the issues in dispute and to allow the parties to make their opening statements. Thereafter, the mediator will separate the parties and shuttle between them, acting as a conduit and a facilitator in negotiating an enforceable agreement between the parties. Any agreement is reduced to writing and executed by the parties and is enforceable just like any contract.

Agreement is the key. For mediation to work, the disputing parties must agree to it. It is not unusual for the parties to refer the dispute to mediation despite their contract providing for an alternative method of dispute resolution such as litigation or Arbitration. Any agreement is reduced to writing and executed by the parties and is enforceable just like any contract.

Partnership/client breakdown

Mediation is being used increasingly in partnership disputes and particularly in the dissolution of the partnerships where work in progress, fee income and the partnership property and employees must be distributed. It serves no purpose for professionals to have their dirty linen cleaned in public. Accountants ought to be loath to find themselves in the courtroom where partnership disputes arise. The obvious much more discrete, expeditious and cost effective method would be to refer the dispute to Mediation.

Likewise, in disputes with clients, if the letter of engagement provided for alternative and tiered means of dispute resolution, this will go a long way to reducing instances of complaints made by clients to the regulatory bodies which can often open a can of worms. Therefore, negotiation and mediation would be ideal methods of dispute resolution if used quickly upon notification of a dispute.

Summary

If you or your clients find yourselves in the early days of a dispute, don’t always reach for the nuclear litigation option. The use of ADR processes, especially mediation, with experienced advisors, can help resolve problems quickly, cost effectively and privately.

Think about it – every time!

“If you or your clients find yourselves in the early days of a dispute, don’t always reach for the nuclear litigation option.”

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