

ADR toolkit –

Enhance the way your organisation uses ADR

November 2007



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Introduction

In the course of preparing our research study *The inside track – how blue-chips are using ADR*, it became clear to us that the learning and experience of the inhouse lawyers that we spoke to would be invaluable for other organisations that wished to review their own use of ADR. This ADR Toolkit is intended to assist an organisation, usually through its legal department, to do just that. The tools take the form of questions and issues for inhouse lawyers and/or claims handlers to consider. We do not attempt to set out the answers to the questions for any particular organisation and it would not be possible to do so.

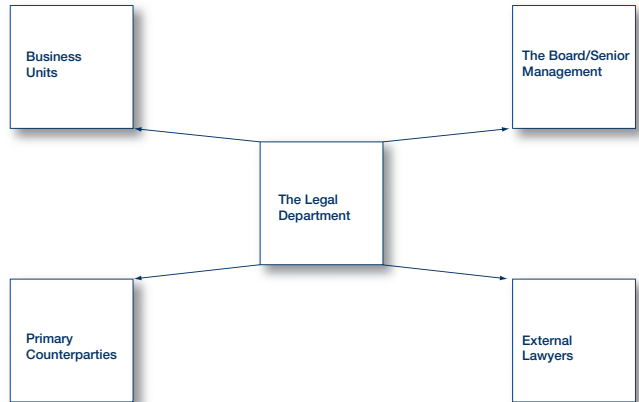
When it comes to using ADR, one size does not fit all. Each organisation needs to work through how it can use ADR most effectively. Each organisation will face its own internal challenges. We have identified some of the common responses and challenges that organisations encounter when seeking to change behaviour in managing conflict using ADR.

Refining an organisation's use of ADR does not have to be an onerous undertaking. Small changes in behaviour by key personnel can have significant positive effects on how organisations manage conflict. Users of this Toolkit should not be daunted by the task in hand. We hope that users will select from the menu of suggestions to assist in those areas they have identified as capable of enhancement.

To explain the structure of this Toolkit, our research has indicated that there are five stakeholders to ADR success in most organisations, with the legal department usually occupying a central role. We therefore start by focussing on the legal department and then look at the way in which the legal department may interact with other stakeholders to ADR success: business units, external lawyers, the board/senior management and counterparties. We also discuss the role of the wider ADR community. The exceptions to this structural

analysis are organisations with significant numbers of non-legally trained personnel conducting claims handling and dispute management functions, general insurers being a good example. Such organisations can also use this Toolkit, adapting the suggestions relating to the legal department to take account of their own systems.

Stakeholders to ADR success



If you would like to discuss the way your organisation uses ADR with us, please contact one of our team or your usual Herbert Smith contact.

Preliminaries – an audit of ADR use

Before the legal department embarks on a systematic review of how an organisation uses ADR, it is likely to be helpful to undertake an audit of current ADR in the context of its portfolio of disputes. The following topics for investigation will yield useful data before moving on to consider what systems could be put in place:

What disputes does the organisation face?

- Identify disputes by type, size, frequency, geography.
- Are there any patterns or categories of claims typically experienced, including repeat claims attached to a particular product line or business unit?
- Are systems in place for the reporting of actual or potential disputes to the legal department and at what stage do disputes come to the legal department's notice?

What are the costs of resolving disputes and how long does this take?

- What is the spend on external dispute resolution lawyers and other related experts (forensic accountants, expert witnesses, electronic document management service providers)?
- What is the internal cost of dispute resolution in terms of inhouse lawyers and time spent by business personnel?
- At what stage of disputes is settlement typically reached and through what dispute resolution processes, including ADR processes?
- Is any assessment of the indirect costs of disputes possible (such as disruption or damage to business relationships)?

What is the capability of the inhouse legal team?

- Assess the number of inhouse lawyers, their capacity and experience.

- Assess understanding of and skills in using ADR processes, particularly if lawyers are located in jurisdictions where ADR is still novel.
- What ADR training is currently undertaken by the inhouse legal team?

What use, if any, is made of ADR clauses in the organisation's contracts?

- Review dispute resolution provisions in standard terms and conditions or particular categories of contract.

What is the level of understanding of and engagement with ADR of other stakeholders in the organisation?

- Assess the understanding of the business unit personnel that generate disputes.
- Assess the engagement of the board of directors and/or senior management.

What is the nature of the organisation's relationship with its external dispute resolution lawyers concerning ADR?

- Assess the ADR-specific skills of external lawyers.
- When and how is ADR discussed, which processes are favoured and which processes are most effective given the shape of the disputes portfolio?
- What ADR metrics, if any, do the external lawyers generate (particularly to track mediator performance)?

The role of the legal department

When it comes to making changes to the approach of an organisation to ADR, the role of the legal department will usually be critical. So what can the legal department do and who is appropriate to undertake this mission? The tools include designating appropriate leadership, identifying systems that encourage ADR use in a manner compatible with the organisation's profile and culture, training and incentivising the inhouse lawyers to implement and follow those systems and measuring what has been achieved. This may sound daunting, but our research suggests that in practice incremental changes in individual behaviour can yield material changes to the behaviour of the organisation.

Leadership – identifying an ADR Champion

Our research indicated that those organisations that achieved greatest success in embedding the use of ADR in the management of disputes all had one or more senior inhouse lawyers to lead the organisation's efforts – an “ADR Champion”. These organisations tended to have the most positive experience of ADR organisation-wide and the most frequent and successful use of ADR processes. The ADR Champion could be the General Counsel, the Head of Litigation or another designated senior lawyer(s), who is sufficiently versed in ADR issues and, most importantly, enthusiastic about the benefits that ADR can bring.

Action

- Identify a senior inhouse lawyer to act as an “ADR Champion” within the legal department. Consider whether the General Counsel, Head of Litigation or another senior lawyer is appropriate.
- In this role, they can lead ADR initiatives, act as a repository of knowledge on ADR topics and can be tasked with delivering the organisation's ADR goals.

Challenges

- Do you have a team member or members with sufficient time to devote to this role? Few organisations will have the ability

to appoint a full time ADR Champion so this is likely to be an additional responsibility for an existing team member.

- Do you have the necessary skills levels within the legal team to perform this role? Will additional training be necessary?
- If the legal department has an international reach, how will the ADR Champion carry out their role in other jurisdictions? It may be helpful to identify and train lieutenants to act as local ADR Champions.
- Does the ADR Champion have a good understanding of the business environment within which he/she is to operate – understanding the commercial and cultural drivers will be important in establishing credible leadership.

Systems and procedures for encouraging ADR use

The principal objective of implementing an ADR strategy is to ensure that ADR processes are considered and used by the organisation more consistently, more frequently, in a systematic way and preferably at as early a stage of a dispute as possible. There are two basic approaches. The first is to use a formal or semi-formal Early Case Assessment (“ECA”) system, which is a project management-based tool to establish procedures for the management of disputes. The second is to establish a culture of early and proactive settlement of disputes using ADR within the legal department through less formal methods. We set out below some considerations to assist with deciding which approach may be suitable and effective for your organisation.

Early Case Assessment systems

ECA systems are conflict management processes by which organisations analyse disputes in a systematic way at an early stage and make informed decisions as to the appropriate dispute resolution strategies. Although some ECA processes developed in the US have taken the form of somewhat complex process diagrams, current thinking in this area is strongly in favour of simplifying processes. The objective is to ensure easier and more consistent use of the ECA system and

to minimise resistance when the system is implemented. The key objective is to ensure consistent execution of the steps that the organisation considers critical to managing disputes with a view to early assessment and, where possible, settlement.

Do I need an ECA system?

- In principle any organisation can consider using an ECA system, which seeks to encapsulate good practice in dispute management.
- Organisations with large caseloads are likely to see greater benefits since the purpose of the ECA process is to enforce a consistent approach by inhouse lawyers and/or case handlers.
- Organisations regularly engaged in litigation in the US are more likely to see benefits in an ECA system.
- The ECA system can be adapted to suit particular categories of disputes. High volume, low value, non-complex claims may merit simpler processes.

Action

Establishing an ECA system for the organisation is likely to need a team of inhouse lawyers and business unit personnel to devise and execute the process in a manner appropriate to the organisation. The objective is to establish a system to ensure the following actions occur within a specified time frame:

- Early investigation of facts by a team of appropriate legal and business personnel.
- Early legal analysis of the claims with internal and, if appropriate, external legal resources.
- Assessment of relevant commercial interests and relationships (including with the opponent(s)).
- Assessment of the available dispute resolution methods: negotiation, ADR including mediation, arbitration, litigation or some combination of these processes.

- Analysis of the external costs (lawyers, experts) and internal costs (business unit time commitment) in pursuing the available range of strategies.
- Take strategy decisions based on the above informed assessments.
- Regularly review the strategy and case assessment (say every three or six months).
- Following resolution, analyse lessons learned.
- Consider generating metrics to test efficiency and demonstrate value of the ECA process.

Challenges

- Does the organisation have sufficient numbers of disputes to warrant the investment in establishing and implementing an ECA system?
- The successful implementation of the ECA system will be strongly influenced by the culture of the organisation, hence the importance of buy-in from business units. Consider whether implementation will be assisted by a directive or statement of support from the General Counsel and/or the board or senior management.
- There may be resistance from business units to “let go” of disputes early, especially if business unit personnel are accustomed to resolving their own disputes.
- Both business units and external lawyers operating in jurisdictions unfamiliar with ADR processes will need education, persuasion and occasionally direction as to early settlement and the use of ADR.
- ECA systems that are overly formal or complex can appear intimidating or intrusive to users and give rise to non-compliance for a range of reasons.
 - “It’s just too difficult to comply with this so I won’t bother”

– “I know how to run a dispute – no-one is going to dictate to me what I do”

- A focus on simple procedures which do not appear burdensome is likely to be most effective. Different cultures respond to ECA systems in different ways and implementation is always likely to be harder in anti-authoritarian cultures.

Embedding ADR use without an ECA system

While many organisations will see the benefits that an ECA system could bring, they will also consider that the portfolio of disputes they encounter simply does not justify the investment in establishing such a system. Few businesses welcome additional process burdens that do not deliver economic benefits. Some cultures are instinctively disposed against formality and process. The challenge in the absence of an ECA system is to ensure that inhouse lawyers and case handlers still investigate cases thoroughly and consistently at an early stage and take an informed strategic approach to dispute resolution using ADR whenever practically possible. So what steps can such organisations take if they nevertheless wish to see more consistent use of ADR to resolve disputes? Our research has highlighted the following options.

Action

- Devise a high level policy statement or more specific dispute management guidelines that require the consideration and use of ADR by inhouse lawyers and claims handlers. A policy statement or guidelines could:
 - Make ADR a default choice of dispute resolution method so that for each matter the onus is on the inhouse lawyer or case handler to explain why a case is not or not yet suitable for ADR;
 - Encourage inhouse lawyers and case handlers to raise ADR with external lawyers at an early stage. Put the onus on external lawyers to explain why ADR is not suitable;

- Establish as a core value of the inhouse legal or case handling team advising the business on early commercial settlement;
 - Acknowledge the value of mediations attempted early in the life of a dispute as learning experiences, even if unsuccessful. Encourage inhouse lawyers or case handlers to try again;
 - Consider publicising the policy of early ADR use to counterparties and opponents either generally or on a case by case basis to avoid any perceived weakness in suggesting ADR. Make early ADR use “company policy.
- Have the policy or guidelines encouraging ADR use endorsed by senior management if possible at board level or by the General Counsel or Head of Litigation as appropriate.
 - Encourage regular discussion of ADR experiences and use among inhouse lawyers and case handlers to share know-how and reinforce collective expectations of early usage.
 - Establish a periodic case review and reporting procedure (three or six monthly) to include specific consideration of whether ADR has been attempted and if not, whether and when it will be suitable.
 - Because individual inhouse lawyers and case handlers may have more freedom of decision making than under an ECA system, consider a peer review system when strategic decisions are to be taken.

Challenges

- Achieving cultural change in organisations can be difficult and will likely require visible personal commitment by an appropriate leader: the ADR Champion;
- To avoid inconsistent approaches consider what techniques will suit the organisation in building collective experience and peer pressure. Will team meetings or conference calls be a forum to discuss the policy? Can it be an agenda item on a legal department annual gathering or retreat? It may be

harder to influence personnel located in jurisdictions not familiar with or disposed towards ADR use.

- In the absence of any systematic approach akin to an ECA, there is likely to be an even greater premium on ensuring that inhouse lawyers and case handlers are well trained in ADR processes to use the processes confidently and to overcome internal or external resistance.

ADR education and training

Many organisations that report a systematic and embedded use of ADR in dispute management make a significant commitment to ADR specific training for inhouse lawyers and case handlers. Indeed they see it as vital to have a highly skilled team in order that resistance to ADR use, whether it is encountered internally from business colleagues or externally from counterparties or external lawyers, can be met confidently. A deeper understanding of ADR techniques can bring a range of benefits to an organisation. In addition to an enhanced ability to see a problem from both sides, most advanced ADR training (including mediator skills training) develops communication skills which can help to improve personal and team performance beyond case management decisions. While on-the-job experience is invaluable, it may be necessary to engage in some formal training if the desired result is a certain base level of ADR knowledge to be spread throughout the legal department.

Action

- Identify what level of training and skills is required for various personnel engaged in the dispute management function:
 - The ADR Champion and/or other senior lawyers overseeing a dispute resolution portfolio will likely need to have high skill levels to provide effective leadership. Consider undertaking mediator skills training courses leading to accreditation by reputable training providers or at least advanced representation skills training;

- Inhouse lawyers may need to be trained to a consistent level identified as appropriate by the organisation. Consider whether training can be provided by inhouse personnel such as the ADR Champion or others with high skill levels, by an external training provider such as one of the ADR institutions or by external law firms.
- Devise means of reinforcing training and skill levels through sharing information and know-how at regular team meetings or conference calls, annual gatherings or using the organisation's intranet.

Challenges

- The choice of training provided by ADR institutions can be bewildering but the key distinction is between:
 - Basic training in the mediation process and concepts, likely to be regarded as a minimum for all inhouse lawyers (whether contentious or non-contentious) and case handlers;
 - Mediation advocacy training which will focus on the skills that inhouse lawyers or case handlers need to attend mediations and play a confident and active role as advocates on behalf of the organisation;
 - Mediator skills training which gives a thorough understanding of the communication, negotiation and deadlock breaking techniques mediators use, which is likely to be valuable for the ADR Champion and other senior litigation lawyers.
- One key challenge identified by organisations we spoke to in our research was ensuring that new personnel joining the legal or claims handling team are not overlooked in terms of training. Skill levels need to be sustained and refreshed and opportunities to share practical experiences in a training environment can be stimulating.

Goals and incentives to use ADR

Our research indicated that some organisations measure and assess the use of ADR by their inhouse lawyers and case handlers and link this to appraisal targets and bonuses. The most difficult issue is likely to be the nature of the linkage. This could be direct, so that personal rewards are affected by, for example, the percentage of cases resolved by mediation. It could be indirect, so that appropriate use of mediation is reviewed in the context of overall performance in managing a portfolio of disputes.

Action

- Consider whether effective use of ADR is specified as an aspect of performance grading in appraisals for inhouse lawyers managing disputes and case handlers. Merely identifying the use of ADR where appropriate as a goal in the annual appraisal cycle can have a positive effect by increasing awareness of ADR processes.
- In some circumstances, it may be appropriate to link use of ADR processes directly with personal rewards, such as bonus schemes, particularly where an organisation seeks to incentivise a change in dispute resolution behaviour. It is more likely that this will be effective where higher volume, lower value claims are being conducted but it can be effective for personnel handling lower volume, complex disputes.
- Consider whether attending ADR training is or can be specified as a goal in the annual appraisal cycle.

Challenges

- The principal risk arising from a direct link between ADR use and personal reward for claims handlers is that cases will be mediated and settled inappropriately in order for bonus targets to be met, so that active monitoring of behaviour is likely to be required.
- Other risks are that individual inhouse lawyers or case handlers will allocate their time inappropriately in favour of cases that are capable of easier resolution through mediation.

- If ADR related goals are included in appraisal targets the inhouse lawyers or case handlers will need to have adequate existing skill levels to ensure the goals are achievable.
- If attending ADR training is a specified appraisal goal, resources may be required to meet training costs unless such training is available from, for example, the organisation's retained law firms.

ADR metrics

Many organisations will undertake some monitoring of its disputes portfolio and generate some metrics linked to this, often in connection with tracking external legal spend. There can be good reasons for organisations to generate ADR-specific metrics provided this is done in a manner consistent with the organisation's objectives. Usually the legal department will be best placed in an organisation to generate relevant ADR metrics, although where non-lawyer claims handlers conduct dispute handling, the business units may themselves be in a position to do so.

There are two main reasons to generate ADR metrics. The first reason is to generate statistics that can be deployed to demonstrate time and costs savings and improved dispute outcomes where this information is required to convince the organisation (or parts of it) of the value of ADR processes. Where an organisation already understands the benefits of ADR, the second reason is to allow ADR use to be monitored in an appropriate way against dispute management objectives.

Action

Consider generating ADR metrics on some or all of the following issues:

- Assessment of savings in external legal costs through ADR use.
- Assessment of savings in management time through ADR use.

- Assessment of the impact (positive or negative) of disputes on business relationships and improvements/damage limitation through ADR use.
- Operating a case tracking system to review progress of disputes and steps taken to use ADR.
- Assessment of the stage at which disputes are settled in connection with ECA systems.
- Track which mediators are used and assess mediator performance to share experience with other inhouse lawyers or case handlers. This is increasingly relevant given the increase in direct mediator appointments where no ADR institution oversees performance and feedback.
- Formalise the process of debriefing following disputes and disseminating lessons learned on operational issues and, if appropriate, dispute resolution process issues.

Challenges

- Self evidently the organisation should not waste time and energy generating metrics that are of no utility. The focus should be on the information that will directly assist in achieving the organisation's dispute management objectives.
- Many organisations will not have a sufficient number of disputes to generate meaningful metrics or derive benefit from them.
- If metrics are to be generated, the resources and structures should be in place to ensure that the information is shared and used appropriately, likely to be a responsibility of the ADR Champion.
- Gathering and retaining information on mediator performance is often valuable and generally requires only modest effort.

ADR clauses in contracts

In most organisations the legal department will also influence either directly or indirectly the organisation's preferences on methods of dispute resolution specified in contracts. The

purpose of this section of the Toolkit is not to set out an exhaustive discussion of the learning on ADR clauses. There is a wealth of information readily available on ADR clause drafting and most ADR providers offer a menu of clauses. We highlight the range of considerations that organisations we spoke to in our research took into account when deciding whether to use an ADR clause at all and, if so, what type.

Our research indicated that many organisations, including those reporting a systematic and embedded use of ADR in dispute management, were concerned to maintain maximum flexibility in their dispute resolution options at the point of dispute. As a result, they were reluctant to include mediation clauses in their contracts as a compulsory step in the dispute resolution process. Other organisations, however, favoured ADR clauses in as many of their contracts as possible to ensure a consistency of approach and to maximise the opportunities for settlement in all disputes handled.

ADR clause options

There are three basic approaches to using ADR clauses:

- Mandatory clauses, which require the parties to attempt an ADR process (usually mediation) in advance of litigation or arbitration. These can be stand alone ADR clauses or incorporated in an escalation clause (where mediation is only attempted once senior executive settlement discussions have been unsuccessful).
- Non-mandatory clauses, whereby the parties agree that they may use an ADR process (usually mediation) but that they shall not be obliged to do so prior to commencing litigation or arbitration.
- Not to use an ADR clause at all, on the basis that any agreement to use ADR is best entered into at the point of dispute and not at point of contract.

Mandatory ADR clauses

There are a range of reasons why organisations select mandatory ADR clauses, which frequently depend upon the

nature of the contract to be entered into. Some of the reasons are as follows:

- The key driver of course is that an organisation wishes to use an ADR process, usually mediation, as often as possible to resolve disputes and to do so before litigation or arbitration in the interests of averting legal costs.
- It may be easier for mandatory ADR clauses to be used in contracts providing goods or services on standard terms where there is no scope for negotiation of the contract.
- Mandatory ADR clauses are popular in many long term supply, service or project contracts where the preservation of the commercial relationship is of paramount importance.
- It may be difficult to persuade counterparties in jurisdictions unfamiliar with ADR processes to accept mandatory ADR clauses, but many organisations that have a systematic and embedded approach to ADR use actively seek to educate and persuade counterparties as to the benefits of ADR (mediation).
- Mandatory ADR clauses will require parties to undertake the specified ADR process, usually mediation, in every case. If the dispute is not yet ripe for mediation, this requirement can be perceived as unnecessary and wasteful of costs, although the process will likely lead to the issues being established and clarified earlier than might otherwise be the case.
- Organisations will need to assess whether the burden of complying with such clauses outweighs the benefit: for organisations exposed to burdensome US litigation, for example, there may be powerful reasons to accept a mandatory clause. It may be that the risk of wasting time and costs on some unsuccessful mediations is nevertheless far outweighed by the successful mediations that prevent disputes escalating to litigation.

Non-mandatory ADR clauses

Non-mandatory ADR clauses can be of utility to organisations unwilling to use mandatory clauses or unable to persuade a counterparty to accept a mandatory clause. Some of the considerations in choosing a non-mandatory clause are as follows:

- Even though one party will not be able to compel the other to use mediation, the presence of the clause helps to avoid any concern by either party that a suggestion of mediation would be a sign of weakness.
- Many organisations prefer to retain maximum flexibility in their choice of dispute resolution options at the point of dispute but are nevertheless strongly in favour of ADR. The use of a non-mandatory clause preserves flexibility but allows an organisation to make clear that it is in favour of using ADR processes.
- The primary objection to non-mandatory clauses is that the counterparty cannot be compelled to engage. Such clauses are sometimes criticised as “toothless”.
- Even for parties that believe ADR clauses are unnecessary because of their own willingness to propose and use ADR at the point of dispute, there will rarely be any downside to including a non-mandatory clause, which ensures that ADR is on the dispute resolution agenda.

The legal department and other ADR stakeholders

While the role of the legal department will be crucial in effecting change in the organisation's approach to using ADR, there are four other stakeholders with which the legal department will interact.

Business units

Our research indicated that for most organisations, the costs of conducting a dispute are borne by the business unit in which the dispute originated. Whilst this of itself should provide a powerful incentive for business units to settle cases, through ADR processes where appropriate, in practice the legal department can face a number of challenges when interfacing with business unit personnel.

Action

- Business units will generally wish to resolve disputes quickly and amicably, recognising that litigation or arbitration will be an expensive and time consuming diversion from normal trading activities. Nevertheless the onus will usually be on the legal department to suggest that an ADR process is suitable in any given dispute given that the concepts may be unfamiliar to those not customarily involved in disputes.
- The legal department therefore has a training role in relation to ADR. The fundamental issue is how and when training to the business units should be delivered. Essentially two approaches prevail.
- Many organisations that use ADR in a systematic and embedded way report that they consider the legal department should include training on ADR as part of broader education to the business units on dispute resolution processes. This training is delivered on a rolling basis and is not confined to situations when disputes have arisen. The frequency and nature of disputes for business units will dictate the depth of education necessary.

- Other organisations perceive less value in the legal department committing resources to training business units in ADR processes in advance of an actual dispute arising, at which point appropriate training is given to allow business unit personnel to participate appropriately.

Challenges

- For almost all organisations there will be a challenge in resource terms if the legal department is to undertake education of business units in ADR processes other than only at the point of dispute. Techniques reported as effective include presentations by the legal department, internal legal briefing documents and use of the organisation's intranet. Face to face presentations are reported as most effective but place a heavy burden on the resources of the legal department.
- For organisations trading in jurisdictions which are not familiar with ADR, the education task may be more difficult, not least since the process can be treated with some suspicion:
 - Some business unit personnel will need to be convinced that a mediator is able to assist the parties when direct discussions have failed;
 - Other business unit personnel will be determined to “have their day in court” and need persuading that the interests of the organisation are best served through settlement;
 - Some personnel in jurisdictions not familiar with ADR may view ADR processes with suspicion simply because they originated in the US.
- Legal departments that generate ADR metrics that record cost and time savings can use these to help demonstrate the benefits of ADR to business units.

The board and senior management

Our research indicated that for most organisations the senior inhouse lawyers with responsibility for disputes - the General

Counsel or the Head of Litigation - provided the leadership in terms of the organisation's approach to ADR. However, support for ADR use from board or senior management level can provide valuable assistance to the legal department in seeking to change an organisation's dispute resolution culture.

Action

- The board and senior management are ideally placed to endorse organisation-wide use of ADR. In some organisations, a single individual on the board or in senior management can motivate and support the legal department's efforts to use ADR more consistently.
- Where the legal department establishes an ECA system or propagates policies or guidelines on using ADR, a statement of support from the board or senior management can incentivise personnel to follow a new approach.
- Some organisations have found it useful to have a public organisation-wide statement or pledge to use ADR in all appropriate circumstances. The best known statement of this nature is the CPR Pledge signed by many organisations in the US. This type of pledge can assist those who want to suggest ADR to a counterparty but are concerned that it may be viewed as a sign of weakness (ie, ADR is "company policy").

Challenges

- In order to persuade a member of the board or other senior management to commit time and resources to the organisation's use of ADR, it may be helpful to generate ADR metrics that illustrate savings in costs and time spent by business unit personnel where disputes are resolved through ADR processes.
- Some organisations question the value of a public pledge or statement in support of ADR use, regarding such matters as internal to the organisation. Pledges may also be perceived as restricting flexibility in dispute resolution options at the point of dispute.

External lawyers

This section of the Toolkit is not intended to and does not try to suggest how organisations manage relationships with their external lawyers. What it does is explain some techniques used by organisations that report a systematic and embedded use of ADR in dispute management to ensure that their external lawyers are appropriately aligned with the organisation's objectives in relation to ADR use.

Action

- When appointing external lawyers, consider seeking information on a firm's commitment to and expertise in ADR use. For example, ensure that appropriate questions are asked in the context of a procurement exercise, panel review or pitch process.
- Write in to the terms of engagement with external lawyers the requirement that ADR be actively considered at an early stage on all dispute mandates and that the issue of settlement (including through ADR processes) be revisited and discussed on a regular basis, perhaps every three or six months.
- Where the organisation uses an ECA system, external lawyers will need to be made aware of the requirements for advice to be provided within the timetable prescribed by the system.
- Some organisations place the onus on external lawyers to explain why any particular dispute is not suitable for ADR.
- When assessing value added services to be provided by external lawyers, consider the extent to which they can assist with ADR training to the legal department or to business units.
- Check whether external lawyers generate any metrics on their own ADR use. This can be particularly useful in relation to mediator performance, given that most organisations rely on their external lawyers for mediator recommendations and the increasing trend in England and Wales is for direct appointment of mediators rather than appointments through the ADR providers or institutions.

Challenges

- External lawyers may show resistance to ADR, particularly in relation to early use of the process. Inhouse lawyers will be better equipped to confront that resistance with greater skills in ADR processes and empirical evidence from ADR metrics.
- For organisations purchasing legal services in many jurisdictions, it will be necessary to recognise that external lawyers in jurisdictions unfamiliar with ADR may be very resistant to suggestions of ADR. The organisation may itself need to educate external lawyers or at least give explicit instructions to attempt an ADR process in the face of considerable resistance.

Counterparties

When organisations that are systematic and embedded users of ADR propose it to counterparties, they typically encounter two main types of resistance to the suggestion: lack of understanding of the process and, less frequently, lack of resources to engage in it.

Action

- When counterparties are reluctant to engage in ADR because of lack of understanding or suspicion of the processes, the inhouse lawyers in an organisation can play an essential educational role in explaining to counterparties the value in the process.
- In limited circumstances, some organisations believe that it is useful to fund the costs of the mediator and/or venue (rather than the customary sharing of such costs) in order to persuade a counterparty to engage in the process. Our research indicated that these circumstances tend to be limited to situations where either the counterparty is of limited means or has very little experience of ADR and the organisation believes the mediation process will likely lead to or materially assist with resolution of the dispute.

Challenges

- In order for inhouse lawyers to persuade counterparties unfamiliar with ADR of the value of attempting the process, inhouse lawyers will need to be able to meet all of the objections typically advanced by counterparties in such circumstances:
 - “Proposing ADR is a sign of weakness”;
 - “The mediator will add nothing to direct discussions”;
 - “ADR is another procedural hoop to jump through and will just take time and further costs”.
- Will the counterparty take the mediation seriously if they have made no financial contribution to the process?
- Will the fact that only the organisation has funded the costs of the ADR process lead the counterparty to perceive that the dynamics of the mediation are unfavourably altered ie, the mediator is on the side of the organisation that paid?

Engagement with ADR organisations

There are many ADR organisations and institutions providing a wide range of ADR related services to the commercial and legal communities. Some are focussed on assisting parties to use ADR processes, some are focussed on training and the dissemination of ADR learning and know-how, others focus on corporate users of ADR and provide a forum for inhouse lawyers to exchange experiences with and learn from peers. Most organisations that adopt a systematic and embedded approach to ADR use report that they are members of one or more ADR organisations. They typically believe that such organisations are worthy of financial support because of the valuable role they play in enhancing the environment for dispute resolution. The membership subscriptions are usually very modest indeed in comparison with the external legal spend on dispute resolution of many organisations.

Action

- Membership of ADR organisations can provide access to the latest developments and know-how in ADR processes. Many ADR organisations provide increased access to information and training for members.
- Membership may confer discounts on training and other services provided by ADR organisations.
- Active engagement with ADR organisations can provide an opportunity to meet with and share experiences with peers and competitors on dispute management and ADR best practice.
- Membership of ADR organisations sends a positive message both within an organisation and externally to lawyers and counterparties as to the organisation's commitment to dispute resolution through ADR.

Challenges

- Naturally the membership subscriptions represent an additional cost to business. In reality they are very modest for most organisations of any size.
- In order to ensure that proper value to the organisation is derived from membership, it may be necessary to appoint one or more personnel to conduct the relationship with the ADR organisation and disseminate learning appropriately, perhaps the ADR Champion.

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The content of this briefing does not constitute legal advice and should not be relied on as such. Specific advice should be sought about your specific circumstances.

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