Alternative resolutions

Alasdair Davidson, left, and **Jon Barclay** of Bedell Cristin look at the increasing success of different ways of resolving disputes outside the courtroom

ADR is a term much-used by lawyers who deal with litigation and is something we all promote.
ADR stands for 'alternative dispute resolution' – a collection of processes or means used to resolve conflicts without resort to the traditional route of the courts.
There are many types of ADR and examples include:

■ Mediation

This is the most common form and used often in the Bailiwick. It involves an independent third party, usually with particular relevant experience of the subject matter in dispute, who will try to help the parties reach a solution to their problem. A mediator often has specialist training and is certainly not there to take sides or make judgments – their role is to foster effective communication and build consensus.
That can involve 'reality testing' of each party's arguments using active listening techniques and a mediation will classically involve the mediator going back and forth between the parties trying to bring them closer together. If the parties reach agreement, then that is recorded in a binding contract.

■ Arbitration

This is a more formal process than mediation where the parties agree to have their dispute submitted to one or more independent arbitrators who make a binding decision on the dispute. The parties agree, essentially, to their own private court and judge with rules of procedure, evidence and so on. Indeed, many retired High Court judges in England are in demand internationally as arbitrators.
Arbitration may be conducted on paper only, involve a full-blown 'trial' or even use a mixture.
Arbitration clauses are found frequently in contracts setting out how future disputes may be determined along with the location for arbitration, the rules to be used and even how arbitrators are to be chosen. Unlike mediation, a party cannot withdraw unilaterally from arbitration.

■ Negotiation

Simply agreeing to a round-table meeting with or without lawyers is a form of ADR in itself. This may suffer from a lack of structure or the assistance of a neutral third party but can still be very effective if approached with the proper attitude (posturing usually fails to impress).

■ Neutral evaluation

The parties agree to an independent third party (usually an expert in the area) who will give a non-binding opinion on the strengths and weaknesses of the respective positions and a view on how a court might decide the matter.
ADR can solve the most seemingly intractable disputes. Its success means that judges in many jurisdictions expect parties to try ADR with costs penalties imposed on those who refuse unreasonably to do so. The main advantages are clear:

■ Parties can reach agreement on issues that go far beyond the narrow legal dispute or what a court could order – the focus is on achieving practical solutions suiting the parties' needs and interests rather than legal 'rights'.

■ It saves money – litigation is costly in terms of management time, let alone legal fees, plus ADR is usually swifter than court-based litigation.

■ Parties retain control through consensual involvement and engagement – litigation is quite impersonal and cases can seem to take on a life of their own, with clients having little control over the process.

■ It is confidential – no airing of dirty laundry in a public courtroom with preservation of reputations and, often, relationships.

ADR can be used in just about any kind of situation – building cases, commercial matters, neighbour disputes, trustee issues, family breakdown and so on.
While the most common method used is mediation, parties can adopt any form of ADR they chose.

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An unusual example of the flexibility of ADR involved the leading auction firms of Christies and Sothebys.
Each had made proposals as to how they would best sell a large collection of impressionist paintings including works by Cezanne and Picasso and there were millions of dollars to be made in commission.
The seller simply could not choose which was best and the firms were unable to decide between themselves. In order to resolve the impasse, the firms agreed to adopt a novel form of ADR – a game of rock-paper-scissors.
Christies won with 'scissors' beating 'paper' – strategic advice provided by the 11-year-old daughter of one of their directors.
We are not suggesting that the Royal Court in Guernsey will encourage the use of this particular means of ADR any time soon or that you should ever look to resolve disputes using games of chance. However, the use of structured ADR such as mediation, plus a little lateral thinking, can pay dividends in resolving disputes and, hopefully, provide a more satisfactory outcome than litigating in court.
Indeed, when considering ADR, parties should not only look to the advantages it can offer but weigh up carefully the disadvantages of litigation.