

Dispute Resolution

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Disputes and conflicts are an inevitable part of relationships - whether they are personal or business relationships. Dispute resolution options range from the public and adversarial process of litigation to private negotiation, where the parties negotiate directly without the help of an outside party.

Litigation

In the past, litigation was the only dispute resolution procedure used by lawyers in disputes. However over the last decade lawyers and their clients have become convinced that litigation may not always be the most effective way of solving disputes.

Some disputes can only be resolved by litigation and others are difficult to resolve through alternate dispute resolution procedures. For example, mediation may not be appropriate where:

- Relationships are irrevocably severed;
- One party is determined to win at any cost;
- A legal decision is considered essential.

Arbitration or litigation may be the best option for such disputes.

Alternative Dispute Resolution

Alternative Dispute Resolution (ADR) describes any alternative to placing a dispute before a Court for decision. ADR includes negotiation, mediation, facilitation, arbitration, conciliation and combinations of these approaches, such as med-arb (a hybrid of the mediation and arbitration process). The most common alternative procedures are:

- Negotiation – including assisted negotiation;
- Mediation;
- Arbitration.

Negotiation

Negotiation is the process most people undertake when entering a deal and often when resolving a dispute. There is no formal structure for negotiation. Assisted negotiation involves a third party helping the parties to reach a resolution. This person is often a friend of one of the party's or professional adviser.

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Mediation

Mediation is a structured and private dispute resolution process involving an independent person, the mediator, who is appointed by the parties. The mediator assists the parties to identify the issues in dispute, develops options for resolving the dispute and together they reach an agreement which best satisfies the interests of the parties. The solution is the parties' own and the mediator has no power to impose a decision on them.

Mediation may involve consideration of the law, but the emphasis is on minimising the need for formal legal procedures, by involving the parties and their advisers as joint problem-solvers to develop an acceptable outcome.

How Does Mediation Work?

In order for mediation to work, both parties must want to resolve their dispute and must agree to try mediation. It is a voluntary process.

If the mediation option is agreed to, the parties should retain a trained mediator. The mediator will then consult with the parties to set a date, time and venue for the mediation. Anyone involved in the dispute may attend the mediation.

In addition to the parties themselves, family members, professional advisers, or executives and employees involved in the dispute may attend.

The role of the mediator at the mediation is to:

- Control the process;
- Ensure that each party gets an opportunity to state their case;
- Help the parties to identify issues and options for settlement;
- Look for a solution that will satisfy the needs and interests of each party.

Once an agreement is reached, the mediator will record it, or ensure that the parties record it, in writing. All parties will then sign the agreement preferably before leaving the mediation. Any agreement reached between the parties at mediation is a binding contract and, other than in exceptional cases, cannot be appealed.

Arbitration

Arbitration is a private judicial process, which has more similarities with litigation than mediation. The parties appoint an arbitrator who has the power to decide their case. The arbitrator may be a lawyer or other

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specialist who is appropriate to consider the issues, such as a valuer in rental review arbitration. Arbitration is an alternative to court action and although the Courts can in some circumstances review the arbitrator's decision or process, it is usually final and binding.

The arbitration process in New Zealand is governed by the Arbitration Act 1996, which provides for general supervision and support for arbitration and enforcement of arbitrators' decisions by the High Court.

Even if the contract does not specify the method of settling disputes, the parties can still agree to submit a dispute to arbitration.

Comparison of dispute resolution procedures

The traditional form of dispute resolution is litigation, which has the following features:

- Structured process;
- Parties don't have control of the process;
- Long waiting time;
- Imposed decision;
- Decision is binding on the parties;
- Public record;
- May jeopardise the future relationship of the parties.

By comparison, the advantages and disadvantages of negotiation, mediation and arbitration include:

Procedure	Advantage	Disadvantage
Negotiation	<ul style="list-style-type: none">• Informal and unstructured;• Possible to maintain future commercial relationship of parties;• Parties remain in control of the process and the result;• Costs less than litigation;• Quicker than going to Court;• Private and confidential.	<ul style="list-style-type: none">• No decision if parties are unable to agree;• Without a trained and neutral intermediary, can be difficult to reach agreement if parties' positions are entrenched.

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Procedure	Advantage	Disadvantage
Mediation	<ul style="list-style-type: none"> • Structured; • Managed by a trained mediator in a neutral environment; • Skilled mediation avoids entrenched positions; • Flexible approach and parties remain in control of the process and the result; • Personal (as opposed to legal and commercial) issues standing in the way of resolution can be identified and dealt with; • Possible to maintain future commercial relationship of parties; • Other parties (e.g. subcontractors, insurers) may be included; • Costs less than litigation; • Quicker than going to Court; • Private and confidential. 	<ul style="list-style-type: none"> • No decision if parties are unable to agree. • The mediation is a high pressure situation. Therefore care must be taken to avoid entering an agreement the party may later regret.
Arbitration	<ul style="list-style-type: none"> • More informal than litigation; • Fewer barriers to resumption of commercial relationships between parties; • Parties can choose a technical person as arbitrator; • Convenience and flexibility: Hearings are arranged at times and places to suit the parties, witnesses and arbitrator; • Arbitrator's decision is final and binding; • Confidential: Arbitration is a private meeting and the final decision is not published. 	<ul style="list-style-type: none"> • Can be time-consuming and costly; • May jeopardise the future relationship of the parties; • Decision is imposed by the arbitrator; • Parties have less control over the process than they do in mediation.

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If you would like further information about the dispute resolution process or if you would like to discuss the options available to you, please contact:

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