

COLLAS DAY | DISPUTE RESOLUTION

Mediation

An alternative dispute resolution procedure.

April 2008

The Royal Court Civil Rules, 2007 (the 'New Rules') came into force in Guernsey on 4 February 2008. This statutory instrument supersedes the Royal Court Civil Rules, which date back to 1989, and sets the Island's rules in a similar framework to the Civil Procedure Rules ('CPR') adopted in England and Wales back in 1999.

One significant improvement brought about by the implementation of the New Rules is that they explicitly recognise alternative dispute resolution ('ADR') as a valuable alternative to proceeding to trial. The New Rules go further than just recognising ADR, imposing a duty on the Court to actively manage cases by, amongst other things, "encouraging the parties to use any appropriate form of alternative dispute resolution and facilitating the use of such procedures."

Practice Direction No. 3 of 2008 (*Royal Court Civil Rules, 2007 - Case Management Conference*), issued by Her Majesty's Greffier, gives further guidance as to how the New Rules should be interpreted. Paragraph 10 of this document directs that the issues to be addressed at a case management conference will include ADR. It further directs that Counsel will be expected to indicate whether ADR has been considered and, if not, to explain why not. It states that if ADR is to be progressed a decision must be taken as to whether Court proceedings are to be stayed pending the outcome of ADR.

It is widely believed that the Royal Court is likely to follow the practice of the English Courts and apply cost related sanctions to those who refuse to consider or participate in ADR.

Types of Alternative Dispute Resolution

There are a number of different types of ADR that are recognised by the Court, including mediation, expert determination, arbitration and adjudication.

- **Mediation** centres on the appointment of an independent third party, the aim of such person being to assist the parties in resolving their dispute. The parties in dispute, not the mediator, decide the terms of the agreement, but the mediator has an important role in reviewing any agreement and checking that the parties are able to perform their obligations under it.
- The process of **expert determination** also introduces an independent third party to proceedings. The expert considers the claims made by each side and issues a binding decision upon them. In the majority of cases, the person chosen to fulfil this role is a specialist on the subject matter of the dispute and is chosen on the basis of a joint decision made by the parties involved. Expert determination is deemed the most suitable type of ADR for determining technical aspects of a complex dispute.
- In **arbitration** proceedings, a third party listens to both sides of a dispute and makes a decision to resolve it, which is legally binding on both sides. Even if either of the parties involved is unhappy with the arbitrator's decision, they are bound by it; it is not ordinarily possible to go to court after arbitration has taken place. Arbitration is in many ways an alternative form of court proceedings, with its own set of procedural rules governing issues such as disclosure of documents and evidence. It takes place, however, in a private rather than public forum and is in many ways less formal than a court hearing.

- **Adjudication** is the legal process by which an arbiter or judge reviews evidence put forward by the parties in dispute, with a view to making a decision which determines rights and obligations between the parties involved. An adjudicator is usually an expert on the subject matter in dispute and is not bound by the rules of litigation or arbitration. Their decisions are often interim ones, in that they can be finalised using arbitration or some other process.

Benefits of mediation

Although each of the types of ADR outlined above will, under certain circumstances, be the most appropriate course of action, mediation is now widely recognised as the most popular form of ADR as it offers solutions beyond those that a court could ordinarily impose. It is increasingly used in commercial, personal injury and clinical negligence cases. Family mediation is particularly effective as it helps those involved in family breakdown to communicate better with one another and reach their own decisions about children, property and finance. There are a number of reasons why parties should consider mediation as a means to resolve a dispute:

- **It Works:** Perhaps the most compelling reason anyone involved in a dispute should consider mediation is that it works. It is reported that 80% of all cases that enter mediation are settled out of court. The parties involved retain complete control over the outcome of the matter rather than seeing it handed over to a third party such as a judge, sheriff, tribunal or arbiter. The litigation process, by comparison, is unpredictable, producing winners and losers and ultimately offering limited solutions. Litigation is also more costly and time consuming than mediation. A conclusion can be reached much more quickly through mediation, which can be arranged to take place in a matter of weeks or, if required, even a few days.

■ **Maintains Relationships:** Mediation is particularly useful if the parties to the dispute wish to maintain an ongoing commercial relationship. If a party goes through the pain and expense of a court-based dispute it will often end the process feeling unable to maintain a working relationship with the other party. The nature of the mediation process attempts to avoid conflict and to work to the requirements of both parties, meaning that no one should feel like they have 'lost' the dispute. A mediator can help test issues and change parties' positions without either party losing face. The parties can feel that they have retained control of the process rather than having a result imposed by a third party and this allows a relationship to continue through the process of mediation, and beyond.

■ **Confidentiality:** Confidentiality is also a key part of the mediation process and is one of the main reasons why it appeals to disputants as a type of ADR. Nothing disclosed in private to a mediator is allowed to be disclosed to any other party without permission, thus enabling a confidential airing of all aspects of a dispute without fear of the details falling into the public domain.

■ **Informality and Flexibility:** Mediation is also less formal than the court process and is particularly appealing to clients that are commercially aware, as it allows them to resolve disputes in a way that they are familiar with i.e. by way of negotiation. It is also flexible in that there are no fixed rules or procedure, as the parties work with the mediator to find the most appropriate way to reach a resolution. Those involved are encouraged to speak openly and frankly about the dispute to the mediator and to the other parties, helping everyone involved to build an understanding of the real issues. The outcome is not restricted to 'legal solutions', and often involves

the parties agreeing a contractual way forward, issuing written explanations, statements of regret, reassurances and agreed statements to the media, or other non-monetary outcomes.

■ **Doesn't Close Doors:** Mediation seeks to bring a dispute to an end, however the process does not affect any other rights parties may have to pursue the matter elsewhere if mediation does not succeed. Even if on the day of mediation a settlement cannot be reached, in the majority of these cases the parties go on to achieve a settlement before trial, often within days of the mediation. This is because the mediation process helps the parties understand their opponent's position and their own aspirations for a settlement.

■ **Always an Option:** It is important to point out that it is not the case that the only time to mediate is before proceedings are issued. Often the necessary consensual desire to settle does not materialise until later on, when the litigation has progressed to the stage when witness statements have been exchanged. Often that is when self-doubt begins to creep in and the parties to a dispute become more amenable to the possibility of mediation.

In view of the above, lawyers, litigants and all manner of concerned parties will no doubt welcome those sections of the New Rules that help encourage parties to reach agreement without having to resort to the Royal Court.

For more information relating to ADR generally, or for advice on how ADR could be applied to a particular dispute, contact:

Christian Hay
Head of Dispute Resolution
t: +44 (0)1481 734275
e: christian.hay@collasday.com



► **collas day** PO Box 140, Manor Place,
St Peter Port, Guernsey GY1 4EW
► t: +44 (0)1481 723191 f: +44 (0)1481 711880
e: inbox@collasday.com ► w: collasday.com

▶ **collas day** PO Box 140, Manor Place, St Peter Port, Guernsey GY1 4EW
▶ **t:** +44 (0)1481 723191 ▶ **f:** +44 (0)1481 711880 ▶ **e:** inbox@collasday.com ▶ **w:** collasday.com