ADR (Alternative methods of Dispute Resolution)

ADR is used to settle cases outside of court (i.e. without the use of legal proceedings/litigation) There are four types of ADR: -Mediation -Arbitration -Negotiation -Conciliation

Rise of ADR -The Woolf Report 1996 included the suggestion of an increased use of ADR in its recommendations -The 1999 Civil Procedure Rules allow judges to ‘stay’ court proceedings, so parties may explore methods of ADR

Negotiation -The two parties involved interact and try to solve the problem themselves -The parties may use solicitors if they are finding it hard to come to an agreement

Advantages of Negotiation

· Negotiation is the most private method of solving disputes
· Negotiation tends to be both quicker and cheaper than other forms of dispute resolution

Disadvantage of Negotiation

· There is no guarantee that the problem will be resolved

Mediation -Involves the use of a neutral third party who does not make the final decision -The Mediator does not express his/her views unless specifically asked to do so -The Mediator acts as a go-between/ facilitator carrying offers to and fro -An example of a Mediation service is the West Kent Mediation Service

Formalised settlement conference -More formal method of approaching Mediation -Involves a ‘mini-trial’ where each side presents its case to a panel composed of a decision-making executive from each party and a neutral third party -Once all submissions are made, the executives (with help of neutral party) will come to an agreement -If the executives cannot come to an agreement, the neutral advisor will act as a mediator between them -Even if the matter is not resolved, it narrows down the issues so it won’t take long if the case goes to court

Advantages of Mediation

· Mediation can be used to settle disputes faster than they could be solved in court
· Cheaper than taking court proceedings
· Allows business relations to remain in good terms
· Allows a commercial common sense decision to be made that will benefit both parties
· Matters discussed in Mediation are not publicised
· The Centre For Dispute Resolution claims to have solved 80% of its cases
· Avoids the winner/loser result of court proceedings
· Allows both parties to remain in control

Disadvantages of Mediation

· There is no guarantee that the issue will be resolved
· Mediation works best only when the parties are prepared to cooperate (e.g. in a business relationship)
· Mediation requires a skilled Mediator
· Amounts paid in Mediation settlements are considerably lower than amounts awarded in court hearings
· Mediation does not suit cases where there is an inequality of bargaining power

Conciliation - Involves the use of a neutral third party who plays an active role but does not make the final decision - The Conciliator expresses his/her opinions on the merits of each side’s case - The Conciliator may put forward a possible settlement plan - An example of a Conciliation service is ACAS – Advisory Conciliation and Arbitration Service

Advantages and Disadvantage of Conciliation are generally the same as those of Mediation

Arbitration -- The parties agree to let a third party make a binding decision - Arbitration is often used in landlord/tenant disputes and consumer/provider disputes

Agreement to Arbitrate - Parties may make an agreement to arbitrate at any time - Many commercial contracts include a Scott v Avery Clause which specifies that in an event of an argument, the dispute will be solved by arbitration - The Arbitration Act 1996 states that courts may refuse to hear a case if the parties have a previous agreement to settle their dispute through Arbitration - The Consumer Arbitration Agreements Act states that consumers cannot be forced into Arbitration, they may make use of the small claims track if they wish to do so - If the reference to Arbitration is not in writing, the common law will apply

Choosing the Arbitrator - Some contracts may specify in advance whom the arbitrator would be if a dispute was to take place - If there is no arbitrator specified, the case may be referred
to a specialist Arbitration body (e.g. Institute of Arbitrators) to choose one - The Arbitration Act 1996 states that parties may choose the number of arbitrators they wish to use, if they cannot agree on a number, then only one will be used - Arbitrators usually have a certain expertise from the relevant field of commerce

The Arbitration Hearing - The procedure is left to the agreement of the parties to decide and 'paper hearings' are quite common - Paper hearings are where the two sides put all the points they wish to raise into writing and submit this, together with any relevant documents, to the arbitrator who will then read all documents and make his decision - Alternatively parties may send documents to the arbitrator and attend a hearing to make oral submissions to the arbitrator to support their case - Witnesses may be called to give evidence - The date, time and place of the Arbitration hearing can be decided in consultation with the arbitrator

The Award - Decision is binding on parties - Decision can be enforced through the courts - Decision can be challenged in courts on grounds of serious irregularity in the proceedings or on a point of law, as of the Arbitration Act 1996

Advantages of Arbitration

· Parties can choose their own arbitrator (e.g. technical expert, lawyer, professional arbitrator)
· Privacy
· Speed
· Questions of quality can be decided by an expert, this saves time of using expert witnesses and explaining all the technicalities to a judge
· Hearing time and place can be arranged by the parties
· Informal procedure
· Cheaper than going to court
· Award can be enforced through court
· Reduces the court workload

Disadvantages of Arbitration

· Legal Aid is not available for Arbitration, therefore individuals who are in a dispute against a big business will feel at a disadvantage
· A legal point may arise in the case which is not suitable for a non-lawyer arbitrator
· Professional arbitrator fees are expensive
May be expensive if parties opt for a formal hearing with witnesses and lawyers

- Individuals may be forced into arbitration because it specifies it in their contract
- There is no general right of appeal
- Secrecy of case facts may not always be in the public’s best interest
- May be time-consuming as some professional arbitrators have a waiting list

Past Paper Questions

Specimen Paper

(a) Describe the different methods of Alternative Dispute Resolution available to deal with civil disputes. [18]

(b) Discuss the advantages and disadvantages of using Alternative Dispute Resolution. [12]

January 2009

(a) Describe the different methods of Alternative Dispute Resolution (ADR) available to deal with civil cases. [18]

(b) Discuss the advantages and disadvantages of using mediation and conciliation rather than using the courts. [12]

June 2010

(a) Describe the methods of Alternative Dispute Resolution available to deal with civil cases. [18]

(b) Discuss the advantages and disadvantages of using arbitration rather than using the courts. [12]