

- (a) mediation, whether or not referred to a mediator in accordance with rules of [court](#);
- (b) early neutral evaluation;
- (c) [judicial resolution conference](#);
- (d) settlement conference;
- (e) reference of a question, a [civil proceeding](#) or part of a [civil proceeding](#) to a special referee;
- (f) expert determination;
- (g) conciliation;
- (h) arbitration;

ADR

Focus is on non-court dispute resolution

- [Prevention rather than post-conflict solutions](#)
- [Cooperation rather than conflict](#)
- [Problem solving rather than solely dispute resolution](#)
- [Truth finding](#)
- [Multidisciplinary](#)

Limitations of litigation

- Unpredictable outcomes
- Win-lose outcomes
- Delayed, expensive
- Stressful
- Process focused on legal rights (vs durable solutions)
- Damage to relationships
- Publicity

Benefits of ADR

- Flexibility (process)
- Control by parties
- Privacy
- Cheaper, faster
- Creative solutions (win-win)
- Enforcing outcomes
- Communication, relationships
- Inclusion of non-parties

Varieties of ADR

Box 8.1 **Exploring ADR processes**

Unlike negotiation, where parties in dispute interact directly with each other, ADR involves an independent practitioner who assists parties to attempt to reach a resolution.

Facilitative processes assist parties in dispute to identify issues, develop options, consider alternatives and try to reach an agreement about some issues or the whole dispute. Examples of facilitative processes include mediation, conciliation and facilitated negotiation.

Advisory processes consider and appraise the dispute to provide advice on the facts of the dispute, the law and, in some cases, possible or desirable outcomes and how these may be achieved. Examples of advisory processes include case appraisal, conciliation (where advice is offered) and neutral evaluation.

Determinative processes evaluate the dispute, including the hearing of formal evidence from parties in dispute where appropriate, before making a determination. Examples of determinative processes include arbitration, expert determination and private judging.

Source: AGD (2013a).

Online DR

ODR is 'the application of information and communications technology to the prevention, management, and resolution of disputes' (Katsh and Rule 2016)

Sourdin's typology

- **Supportive technologies** – role in informing, supporting and advising
- **Replacement technologies** – replace functions and activities conducted by humans; replacement of face-to-face interactions (ie email)
- **Disruptive technologies** – technology can change the way dispute resolutions functions (ie AI)

ODR: Risks, challenges, shifts

- Risks and challenges
 - Accessibility – not for all
 - Communication online vs face-to-face
 - Loss of access to body language, non-verbal cues
 - Parties may opt-out, become non-responsive
 - Strategic online conduct – scope for lying, mistrust of information
 - Time vs fairness and procedural safeguards
 - What trade-offs are we comfortable with?
 - Effectiveness – whose perspective?
 - Privacy and confidentiality – security, scale (big data)

Arbitration process

1. **Agreement to Arbitrate:** The parties to a dispute must agree to submit their dispute to arbitration, usually through a written agreement or contract. This agreement will typically include the scope of the arbitration, the rules that will govern the proceedings, and the qualifications of the arbitrator.
2. **Selection of Arbitrator:** Once the parties agree to arbitrate, they will select an arbitrator or a panel of arbitrators. The arbitrator(s) must be impartial and have the necessary expertise to resolve the dispute.
3. **Conduct of Proceedings:** The arbitrator will establish the procedures for the conduct of the arbitration, which will typically involve exchanging evidence and making submissions in writing or at an oral hearing.
4. **Decision:** The arbitrator will make a binding decision, known as an award, that resolves the dispute. The award is enforceable in court, and the losing party may have limited rights of appeal.

Pros

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Cons

1. **Limited rights of appeal:** The losing party in an arbitration proceeding may have limited rights of appeal, which can be disadvantageous if the arbitrator makes an incorrect decision.
2. **Lack of transparency:** The confidentiality of arbitration proceedings can also be a disadvantage, as it can make it difficult for other parties to understand how the dispute was resolved.
3. **Limited discovery:** Parties in arbitration proceedings have limited access to the discovery process, which can make it more difficult to gather evidence.

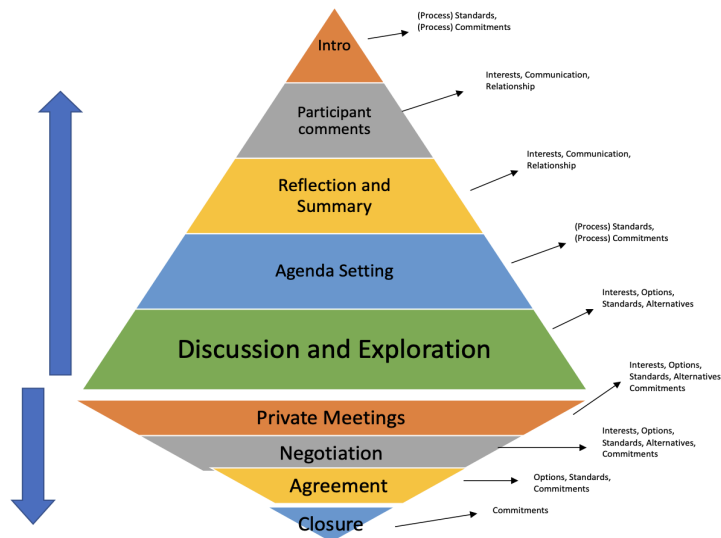
Mediation

NADRAC definition

“Mediation is a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement.

The mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted.”

Mediation Model



Moore - The mediation process

- Welcome
- Bring parties into the mediation room
- Introduce all participants in the mediation meeting
- Recognise and affirm
- Clarify the mediation process / role
- Voluntary
- Approval
- Identify/agree proposed procedure
- Confidentiality
- Agreement on logistics , meetings, guidelines, costs
- Good faith

Bolitho

16. An essential feature of the proper administration of justice in this context is that it be transparent and open, a requirement appropriately discharged in this case by a trial of the issues arising on the remitter, followed by a reasoned judgment.

17. In the relevant sense, the mediation process is **fundamentally different**. It is a **confidential**