

CIVIL PROCEDURE SUMMARIES

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APPROPRIATE DISPUTE RESOLUTION

1. LIMITATIONS OF LITIGATION

- Unpredictability of outcome, & risk of unfavourable decision or enforcement
- Delay & costs; Courts concerned with legal rights rather than durable solutions to disputes
- Parties' relationships often irrevocably damaged.

Determinative: third party makes a determination on dispute, e.g. arbitration

Facilitative: third party helps to manage the process of dispute resolution, e.g. mediation

2. ARBITRATION

- A **private process** whereby parties appoint an arbitrator of their choice, rather than having a judge imposed upon them by the court.
- The arbitrator need not be a lawyer, & may have superior technical/expert skills that can assist in deciding a case that is more technical than legal.

Court-Annexed ADR – Rules:

- *Supreme Court* – **R 50.08 SCR Arbitration**
 - Referral to Arbitration under Commercial Arbitration Act with parties' consent.
- *Magistrates' Court*:
 - **Arbitration** with parties' consent:
 - **ss102-106A.**
 - Matter < \$10,000 **MUST** go to arbitration: **s102**

ADVANTAGES	DISADVANTAGES
➤ Outcome is enforceable .	➤ Cost of expert arbitrators can outweigh benefits.
➤ Arbitrator can be an expert in the field of dispute.	➤ Imbalance of power between parties can enforce decisions a weaker party would not normally accept in court.
➤ Less expensive & timely .	➤ Cost of case preparation
➤ Process is flexible .	
➤ Confidential .	
➤ Quasi-judicial – less formal than litigation	
➤ Decision of arbitrator is binding .	
➤ Legislative regulation of the process: <ul style="list-style-type: none">◦ <i>International Arbitration Act 1974 (Cth)</i>◦ <i>Commercial Arbitration Act 1984 (Vic)</i>	

3. MEDIATION

- Mediation is essentially **facilitated negotiation**. The mediator acts as a **process facilitator**, but does not express opinions or offer advice to the disputants. There is **no set procedure** & it can be adapted to the dispute/parties.
- Parties must both **consent** to any resolution reached & the process remains confidential.

Supreme Court – R 50.07 Mediation

- *At any stage of a proceeding the Court may, with or without the consent of any party, order that the proceeding or any part of the proceeding be referred to a mediator.*

County Court:

- s47A *County Court Act* & rr50.07 & 50.08 CCR

Magistrates' Court

- **Mediation** with/without parties' consent:
 - s108 MCA 1989; rr50.04 of Magistrates' Court General Civil Procedure Rules 2010

MEDIATION	LITIGATION
• Decision made by parties.	• Decision made by 3 rd party.
• Process and outcome are private.	• Process and outcome usually public.
• Outcome is based on interests.	• Outcome is based on legal rights.
• 3 rd party's role is to facilitate negotiation.	• 3 rd party's role is to decide who is right/wrong.

A. PROCESS

- Unregulated profession, but NADRAC has voluntary national accreditation standards.
- Vast discrepancy in how mediations are conducted.
- Some mediators will express opinions about the strengths and weaknesses of a party's case, others won't.

B. OUTCOME

- A settlement incorporated into an agreement. Such an agreement amounts to a contract.
- Parties can enforce the agreement in court if the agreement to agree was drafted with sufficient certainty and in good faith (and the terms are enforceable) – not easy!
- Contrast with effect of a court judgment or arbitration award.

C. WHEN NOT TO USE MEDIATION

- History of **fraud or dishonesty**.
- Need to set a **precedent** – commercial reasons, insurance companies.
- Significant **power imbalance** between parties.
- One party has **no incentive to settle**.
- Mediation – about **compromise**, not justice.

ADVANTAGES	DISADVANTAGES
➤ Accessible – can be conducted on short notice, produce timely decisions & less formal than a courtroom.	➤ It can favour the stronger party who has more bargaining power. Weaker party more likely to accept a less than satisfactory outcome.
➤ Voluntary – parties that engage in mediation want to do so inferring that each party can freely choose to participate & whether to reach an agreement.	➤ Parties may become too emotional.
➤ Confidential – Court room is public & disclose information. Useful where parties don't want to release sensitive information & allows them to argue freely w/o interests being in the public view.	
➤ Agreement is binding – drafted up in form of K	➤ Not easy to enforce – must sue for breach of K.
➤ Helps preserve working relationships.	➤ Party may want to use mediation to bide their time & not want to participate but seeing it as another step along the way to court.
➤ Allow parties to develop creative solutions .	

4. PARTIES REQUIRED BY COURT TO ATTEND ADR

- Parties are not required to settle but must negotiate '**in good faith**'
 - This is a **question of fact** based on all the circumstances.

A. INDICIA OF ABSENCE OF GOOD FAITH

1. Unexplained **failure to communicate** w/ other parties w/in a reasonable time
2. **Failure** to take reasonable steps to **facilitate & engage** in discussions between the parties
3. **Failing** to respond to **reasonable requests** for **relevant information** w/in a reasonable time
4. Stalling negotiations by **unexplained delays** in responding to correspondence or telephone calls