

Cerno

Distinguish; determine; resolve.

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Welcome

Welcome to the first newsletter from Cerno, a consultancy providing dispute resolution advice and services to the construction, engineering, industrial and maritime industries and related professions such as lawyers, architects and engineers.

The purpose of this and subsequent newsletters is to provide information on matters of general interest and updates on latest the developments in the field of dispute resolution and related case law. In this issue there is a brief overview of various forms of Alternative Dispute Resolution.

Alternative Dispute Resolution

Litigation, that is "going to court", is probably the most well known form of dispute resolution. It is a formal process operated by the courts, intended to provide justice between two or more parties who are in dispute. It is a process in which there is confidence that the dispute will be heard by an independent third party; however it can be a very time consuming and costly process.

To combat the negative aspects associated with litigation a number of alternative processes have developed, which fall into the three broad categories of negotiation, mediation and adjudication; however in truth those three categories can be subdivided many times and tailored to suit the practicalities of the situation, the nature of the dispute and the parties' desires, ranging between a process where the outcome is entirely the parties' own responsibility to a process where the outcome is determined by a third party.

*Alternative Dispute Resolution processes offer the flexibility
of resolving disputes rapidly and cost effectively.*

Here a range of possibilities are summarized with particular reference to the degree of control retained by the parties and the flexibility of the process.

Litigation

The neutral is a judge or other official appointed by the court to make a binding determination.

Parties have the least degree of control and procedural rules are strictly prescribed.

Private Judging

The court refers the case to a referee privately chosen by the parties to decide some or all of the issues.

This is similar to litigation but the parties can choose, and must pay for, the neutral and can agree to simplify and speed up procedures.

Administrative or statutory tribunals

Binding adjudication based on statutory requirements, through tribunals and appeal tribunals.

As for litigation but procedures are supposed to be less formal.

Arbitration

A process regulated by statute or by contract, in which a neutral, privately chosen by the parties or by a body agreed by them, makes a binding determination.

Similar to litigation but the parties agree on the choice of arbitrator and the procedure can be tailored to meet their needs. The Arbitrator makes a binding, enforceable award.

Expert Determination

Parties appoint an expert to consider the issues and make a binding decision or appraisal without necessarily having to conduct an enquiry following adjudicatory rules.

As for arbitration, but the procedure accords with contractual instructions given by the parties to the third party expert.

Adjudication

Commonly found in the construction and engineering industries, this may be based in statute or in contract. An adjudicator is appointed to deal with disputes, often contemporaneously as they arise.

The Adjudicator has authority to make decisions using informal procedures. The decisions are binding unless and until challenged by either party by moving to arbitration or litigation.

Dispute Board

Similar to adjudication, and in some contracts referred to as a Dispute Adjudication Board, it commonly comprises three neutrals rather than one to make recommendations or decisions. Ideally this Board is established at the start of a contract but can be instituted on an ad hoc basis.

Ombudsman

An independent neutral who deals with public complaints against maladministration. Can investigate, criticize and publicise, and sometimes award compensation.

The degree of party control depends upon the terms of reference of the ombudsman. Usually power is in the hands of the neutral.

Med-Arb

A neutral third party acts as mediator. If the parties cannot agree a settlement the mediator becomes an arbitrator to make a binding determination.

This provides the initial flexibility of the mediation process with the process becoming more constrained in the arbitration stage. Alternate versions of the process facilitate different persons acting as mediator and arbitrator.

Arb-Med

The parties have arbitration and the arbitrator makes a sealed award. The parties then mediate the dispute, aiming to avoid unsealing the award. In another form arbitration is commenced and immediately adjourned in favour of the dispute being mediated and the agreement made in to a consent award.

Unlike med-arb the arbitration is held first and the process follows that for arbitration. Alternatively the process can be operated as a mediation from commencement, with any resulting agreement turned into an award, or the arbitration leg being revived if a settlement is not reached.

Early Neutral Evaluation

An independent neutral makes an evaluation of the case which is not binding but helps them in their decision-making, or helps the parties to narrow and define issues and promote efforts to settle.

Here the power remains with the parties who can be influenced by the neutral third party. In a related format, a neutral fact-finding expert is engaged to produce a report that all parties accept. In that alternate form the neutral has great power to influence and the report, though not binding, has authority.

Mediation

Mediation can take various forms including being purely facilitative, or being evaluative. A neutral assists the parties to negotiate settlement and arrive at their own resolution.

Depending upon the format the parties retain full control, or allow the neutral the power to make decisions on parts, or all of the dispute.

Negotiation

Typically negotiation is either between the parties, or through their nominated representatives.

The two parties retain the power to agree the outcome, but in the case of negotiation through representatives lose power over the process.

CIArb News

*News for members of
the Chartered Institute
of Arbitrators in Trinidad
& Tobago*

The Trinidad & Tobago branch of the Chartered Institute of Arbitrators (CIArb) is a branch of the regional, Caribbean Chapter.

Formed in 2010 the branch has a current membership of some 20 professionals, including engineers, surveyors, attorneys and judges; all of whom have interest in the resolution of disputes by Alternative Dispute Resolution processes.

It is hoped that in the coming months the local branch will commence hosting regularized meetings for members and non-members to discuss topics of interest, and to hear from guest speakers. Details of such gatherings will be included in future newsletters.

Anyone interested in joining the CIArb can obtain information directly from the Institute (www.ciarb.org) or by writing to info@cerno.org.

Upcoming Events

It is intended that future newsletters will include details of local events of interest. Anyone wishing to have details of an event considered for inclusion here should write to info@cerno.org and provide relevant details.

Contact Information

Cerno can be contacted by e-mail to info@cerno.org.

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