



## DISPUTE RESOLUTION

### Mediation or Arbitration?

#### Introduction

Parties involved in disputes are increasingly turning to alternative dispute resolution (“ADR”) to resolve their conflicts. Two forms of ADR, mediation and arbitration, are becoming a more popular alternative for resolving disputes than going to court.

The Royal Court Civil Procedure Rules 2007 (the “Rules”) explicitly recognises ADR as a valuable alternative to litigation in Guernsey. Alongside the recognition of ADR the Rules also impose a duty on the Royal Court to actively manage cases by (among other things) encouraging the parties to use any appropriate form of ADR by facilitating the use of such procedures. ADR can be very cost-effective and can reduce the time and stress to the parties involved by avoiding trial.

#### What is Arbitration?

Guernsey’s arbitration law is contained in the Arbitration (Guernsey) Law 1982 (as amended) (the “1982 Law”). The 1982 Law is based on the English Arbitration Act 1950, but has incorporated the Geneva, Washington and New York conventions. In addition a number of orders and regulations apply, governing such matters as evidence and procedure.

Arbitration can deal with all types of commercial disagreements. It is a confidential process by which the parties agree in writing to submit their disputes to an arbitrator, who will listen to the facts and then render an award. Arbitration awards can be either binding or non-binding, depending on the agreement of the parties in the proceedings.

Arbitration is most commonly used to resolve industrial disputes in the Island. The Chartered Institute of Arbitrators

has a Channel Island branch with qualified arbitrators spread between Guernsey and Jersey.

#### Why opt for Arbitration?

A principal advantage is the privacy afforded by arbitration proceedings as opposed to public court proceedings.

Arbitration can help to avoid hostility because the parties fully participate and sometimes help to structure the resolution. In many cases, this means they are able to work together peaceably and avoid unnecessary hostility towards each other which is often the case in litigation. Resolving a case through arbitration can prove cost effective. It can be cheaper than litigation because the process is quicker and is generally less complicated than court proceedings.

According to a recent study by the Federal Mediation and Conciliation Services, the average time from filing to decision was about 475 days in an arbitrated case, while a similar case took 18 months to three years go through the courts.<sup>i</sup>

#### Do Parties Have to Accept the Arbitrator’s Decision?

If the arbitration is non-binding, either side can appeal to a court to decide the outcome. When the decision is binding, both parties must accept the decision of the arbitrator without any right of a court appeal, unless the appeal concerns a question of law. The court may confirm or set aside the award or remit the award to the arbitrator accompanied by the court’s opinion and the question of law which was subject to the appeal. An appeal may be brought by any party with the consent of all other parties or by leave of the court if it considers that the determination of the question of law could substantially affect the rights of one or more of the parties.

#### Is a Foreign Arbitration Award Enforceable in Guernsey?

A foreign arbitration award is enforceable in Guernsey either by action in the court, or it may be enforced in the same way as a judgment or order of the court to the same effect with

the court specifying the manner of enforcement, provided that it meets certain requirements set out in the 1982 Law and is not contrary to public policy or Guernsey law.

#### **Advantages of Arbitration**

Parties are allowed to choose arbitrators to suit their timetable, therefore saving on time. This is because arbitration can be heard without the delays that are often involved when a case goes to court. Unlike court rules which are usually set out in formal procedures which are never varied, parties to an arbitration contract are free to refine the basic arbitration procedures to meet their particular needs. Another advantage for the parties is that they are able to select an arbitrator with particular knowledge in the field of the dispute, rather than a judge who may not be familiar with the issues involved. The arbitrators will also try to persuade the parties to go through mediation in an attempt to gain a negotiated settlement without the need to arbitrate at all.

#### **Mediation**

Mediation is: "... A flexible process conducted confidentially, in which a neutral person actively assists parties in working towards a negotiated agreement of a dispute or difference, with the parties in ultimate control of the decision to settle and the terms of resolution".<sup>ii</sup>

Mediation offers another way to resolve a conflict. The mediator facilitates a mutual agreement. He or she participates and reacts to discussion but imposes nothing upon the parties. It can help the parties to come to a genuine understanding and find a resolution that addresses the parties' needs and interests of both parties. The result is much more flexible than a litigated outcome because the parties may agree to a solution that a court might not have the jurisdiction to order. A mediator will listen to both sides of the dispute in an informal setting and will try to facilitate a resolution. Any recommendations made by the mediator typically are non-binding on the parties unless agreed otherwise. When agreement is reached, the agreement is immediately set down in writing and signed by the parties,

at which point it becomes an enforceable contract. If the mediation is unsuccessful, the dispute could then proceed to court.

#### **Why Mediate?**

Mediation is quick, private and inexpensive compared to litigation. Mediation sessions are usually scheduled within a few weeks or at most a couple of months from the time of a request. Most sessions last only a few hours or a day depending on the type of case, unlike going to trial which may take many months or years to resolve. Participating in mediation means being personally involved in all the events that occur during the mediation and it gives the parties the opportunity to gain a realistic understanding of the dispute and the chance to voice their opinions and concerns.

Another reason to mediate is that the court through its case management process will take note of whether or not the parties have agreed to mediate. If it is viewed one of the parties has been unreasonable in refusing to mediate then the court may impose cost sanctions on the unhelpful party when determining costs, even if they "win".

#### **Finding a Mediator**

The Guernsey Mediation group has its own pool of qualified and experienced mediators for both civil and commercial cases. Alison Ozanne is Group secretary and will ensure that an unbiased impartial mediator who is familiar with the kind of dispute involved is found to help negotiate a settlement. If a mediator has had little or no knowledge of the issues involved and cannot be found in Guernsey, then an alternative mediator will be sought from the United Kingdom or elsewhere.

#### **Advantages of Mediation**

If you're already involved in proceedings, mediation partially offers a huge benefit, if successful. It enables the parties to resolve the dispute without the need to go to trial. Mediation is less formal and gives parties the chance to air opinions and ideas in a way not possible in court and to come up with practical solutions which litigation may

discourage. Mediation is private, conducted without prejudice and with absolute confidentiality. What is said during mediation cannot legally be revealed outside the mediation proceedings or used later in a court of law. Like arbitration but unlike litigation, the very fact that the mediation is taking place at all is never made public, unless the parties wish it to be. One of the most powerful attributes of the process is that it enables the parties to maintain their relationship once the dispute has been resolved to save face. If agreement is reached, the results are only publicised if the disputants agree to it.

### Conclusion

As can be seen there are very good reasons for attempting any form of ADR as an alternative to more traditional means of settling disputes. The courts are increasingly supportive of these methods of dispute resolution and critical of parties who do not attempt ADR. Sir Geoffrey Rowland, has been quoted as saying

“whilst practising advocates might earn less in fees by mediation it is seen as a better way of looking after the interests of their clients. There may be a situation where one party can sue, but they have to take into account that they may lose or that they are likely to drive the other party into bankruptcy, in which case they will get none or very little of the amount they are awarded due to the vast amount of money which is involved in litigation costs”.<sup>iii</sup>

*This Red Guide is only intended to give a brief summary and general overview of this area of law. It is not intended to be, nor does it constitute, legal advice and should not be relied upon as doing so. If you would like legal advice or more information in relation to the matters covered in this Red Guide or generally in relation to a corporate issue, please contact our corporate team on +44 (0)1481 723723, or by email at [corporate@aohall.com](mailto:corporate@aohall.com). Members of our corporate team, together with their contact details, are listed on our website at [www.aohall.com](http://www.aohall.com).*

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i Nolo Legal Information; Arbitration Pros and Cons; available at <http://www.nolo.com/legal-encyclopedia/arbitrationhj-pros-cons-29807.html>;jsessionid. Date accessed 12.08.2011  
Arbitration (Guernsey) Law 1982.  
Geoffrey Rowland; New system will take settlements out of court. Wachtmeister W. Guernsey Press. 31.12.2005.

