This concise yet thorough guide presents the many Appropriate Dispute Resolution (ADR) mechanisms available, such as negotiation, conciliation, mediation, neutral evaluation, expert determination, adjudication, arbitration, dispute boards, litigation, dispute resolution clauses and online dispute resolution.

Each dispute resolution mechanism is clearly explained, with practical considerations as to how they may be appropriate. The key differences between the various mechanisms are provided in an easy-to-read table. The author also explores the reasons a party may need to adopt a particular method.

The international perspectives of ADR are also considered in this book.

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ANIL CHANGAROTH

RESOLVING DISPUTES

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YOUR RIGHTS & OPTIONS

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A guide to the options for Appropriate Dispute Resolution (ADR)

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To my family, my best half *Shyamala* (with her literary approach to life) and sons *Keshav* (having also interned at my chambers and always has a somewhat simpler take on all things important), *Akshay* (a seasoned debater, who often considers matters from differing view points) and *Tejas* (the family's "happy pill", with his incredibly positive attitude to life). All four of them are avid

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And to my team at ChangAroth Chambers LLC – my associate Syafiq Muhammad Lim, LLB (Hons), National University of Singapore, who provided his polished, calm and meticulous detailing of several aspects of this book; practice trainee Mikhail Rashid Wee, LLB (Hons), Singapore Management University, who provided the fresh graduate's clarity and accuracy on the legalities; intern undergraduate Serena Mei Shien Russell, BSc in Management, University of Warwick Business School, who provided insightful perspective from a common person's understanding and views on dispute resolution; intern "A" level Affiqah Juffri Syuriah, Pioneer Junior College, Singapore, who shared her knowledge on mediation and online dispute resolution from her final-year project on community mediation; and ChangAroth Chambers and ChangAroth InterNational Consultancy's alliance partner Resolve Disputes Online trailblazing the Online Dispute Resolution arena and collaborating with my chambers and consultancy's development of community mediation, adjudication and dispute board ODR platforms.

Jai Shree Hanuman

INTRODUCTION

Our everyday interactions with a whole host of people often lead to disagreements, usually arising from the background of contractual agreements or understandings. These could well lead parties to engage lawyers and ultimately turning to the courts for resolution.

The Abraham Lincoln (16th President of the United States) quote "*Discourage litigation. Persuade your neighbours to compromise whenever you can. As a peacemaker the lawyer has superior opportunity of being a good man. There will still be business enough.*" forms the foundation of this guidebook aimed at providing an overview and assisting parties in understanding the diversity of options available for less acrimonious dispute resolution.

The nature of the dispute and how the parties wish to take the dispute forward would possibly determine the best and most suitable method to be adopted when the need so arises for a dispute settlement.

With a clearer understanding of the basic dispute resolution mechanisms available and how these work, many disputes are likely to be resolved in the most appropriate manner, in the fastest time and at the most efficient cost.

The author, in this guidebook, refers to these mechanisms as Appropriate Dispute Resolution ("ADR") as opposed to what is commonly known as Alternative Dispute Resolution, as these are no longer simply alternatives to the conventional dispute resolution mechanism of litigation or arbitration.

The speed, efficiency, and binding nature (often so agreed upon) of these mechanisms are aimed at achieving resolution for the parties, and have resulted in considerably less ill-will being generated between disputing parties. To that end, ADR has a key advantage in situations where parties have to continue interacting even after settlement is reached and hence, for several years now, these more appropriate options have increasingly been chosen. Well-run processes and conclusions can often even improve parties' relationships.

Understanding Basic Terms

Experience from working with members of the communities and clients have repeatedly reminded this author that it is critical to first understand some of the basic terminology:

"Appropriate" refers to as what is considered the most suitable approach, unique and specific to one's needs.

"Claim" refers to stating or asserting the case that one raises, usually supported with evidence.

"Demand" refers to formally raising a claim alleging legal obligations that may have been breached or defaulted upon, and are to be distinguished from a lawsuit and/or suing a party.

"Dispute" refers to the disagreements that naturally arise out of the parties being unable to agree on the contract or agreement.

"Resolution" refers to the logical conclusion where a solution addresses the dispute and achieves the appropriate result for the parties involved.

"Suing" refers to commencing or instituting formal proceedings as opposed to merely making a demand (which is not a lawsuit).

ADR processes are generally far less adversarial than litigation considering these often take place in an environment of co-operation that characterises them. Considerably less ill-will is generated between disputing parties.

The appropriate mechanisms considered in this guidebook are Negotiation, Conciliation, Mediation, Neutral Evaluation & Determination, Expert Determination, Adjudication, Arbitration, Dispute Boards and Litigation. Dispute Resolution Clauses, Online Dispute Resolution and international perspectives on ADR are also considered.

Dispute Resolution Processes

Dispute resolution mechanisms can generally be divided into two main processes: Consensual processes such as Conciliation, Negotiations and Mediation, where parties have control over the process and attempt to reach an agreement between themselves and Adjudicative processes such as Expert Determination, Adjudication, Arbitration and Litigation, where an impartial third person, adjudicator, arbitrator or judge determines the outcome.

As disputes are often not straightforward, these two processes should not be considered as being mutually exclusive and so parties should not bind their hands to merely one process. A combination of the processes may also be helpful with cost and time savings.

Due consideration must, however, be given to the risks involved in carrying out these processes in certain ways insisted upon by the parties. For example, parties may insist on conducting mediation in the manner of litigation hearing, resulting in it being no different from litigation in terms of time and cost. In a similar vein, even if mediation succeeds, the enforceability of a mediated settlement may nonetheless cause unease and uncertainty.

Multi-tier Dispute Resolution

As dispute resolution mechanisms are not to be seen as being mutually exclusive, parties may well agree on the application of these processes in a multi-tiered dispute resolution clause allowing them to adopt a simpler method before advancing to more adversarial processes.

Relevant Considerations for Choosing a Mechanism

There is a wide array of practical considerations to take into account when choosing the appropriate dispute resolution mechanism to govern parties' contracts and/or to resolve parties' disputes, including whether the pace of proceedings is suitable for the parties, whether disputes are likely to be factual or legal and many other common factors.

For example, in a construction contract where disputes arise in the middle of a project, it is crucial for parties to keep to their timelines and hence an expedient resolution would be the prime concern at the top of the parties' priorities. Thus, the dispute resolution mechanism that is chosen by the parties ultimately depends on the nature of the contract, the complexity of the dispute, the needs of the parties, whether they wish to maintain amicable ties after resolving the dispute, amongst other considerations.

Dispute Resolution Forums

There are numerous forums through or at which claims are attended to and resolved, namely:

(1) Community Disputes Resolution Tribunal ("CDRT")[1]

The CDRT (as part of the State Court) was established through the enactment of the Community Disputes Resolution Act[2] that created a new statutory Tort of Interfering with the enjoyment or use of places of residence, on the principle that no individual should cause any unreasonable interference with his neighbour's enjoyment or use of that neighbour's place of residence.

(2) Community Justice Centre ("CJC")[3]

The CJC is an independent charity dedicated to the purpose of ensuring that Litigants-in-Person ("LiPs") also have access to justice through the concept of community partnership. The CJC is the result of the partnership between the public sector, the philanthropic sector and the legal profession, in order to better

1 https://www.statecourts.gov.sg/CWS/CDRT
2 Community Disputes Resolution Act 2015 (Act 7 of 2015)
3 https://cjc.org.sg

ensure that those who have been wronged, but do not have the means to make their voices heard, have access to the justice that they should be getting.

(3) Community Mediation Centre ("CMC")[4]

The CMC provide mediation services to residents in Singapore who face social, relational and community disputes. The CMC is operated by the Community Mediation Unit comprising full time public service officers of the Ministry of Law and volunteer mediators. Mediation through the CMC is suitable for disputes arising between neighbours, family members, friends, colleagues, tenants or any other type of interpersonal relations.[5] Parties must be aware that mediation at the CMC is not tailored for legal, contractual or commercial disputes. Interested applicants may apply online directly with their Singapore Personal Access pass ("SingPass").

(4) Employment Claims Tribunal ("ECT")[6]

The ECT deals with disputes arising between employees and employers in the course of one's employment, and whether you are an employee or employer. Established under the Employment Claims Act,[7] it provides both employers and employees with a speedy and low-cost avenue to resolve their salary-related disputes. Interested parties can only file their ECT claims online through the Community Justice and Tribunals System ("CJTS"), with mediation being compulsoryfor parties.

4 https://www.mlaw.gov.sg/contents/CMC/
5 https://www.mlaw.gov.sg/content/cmc/en/Our_Services/disputes-suitable-for-mediation0.html
6 https://www.statecourts.gov.sg/cws/ECT/Pages/An-Overview-of-the-Employment-Claims-Tribunals-(ECT).aspx
7 Employment Claims Act 2016 (Act 21 of 2016).

(5) Family Justice Courts ("FCJ")[8]

The FJC are established under the auspices of the Family Justice Act[9] and forms a specialised body of courts dealing exclusively with all family-related matters, in order to better understand the complexities underlying family disputes, and to have better consistency in the administration of justice. The FJC is comprised of the Family Division of the High Court, the Family Courts, and the Youth Courts (formerly known as the Juvenile Courts).

(6) Small Claims Tribunal ("SCT")[10]

The SCT was first formed in 1985 in order to provide a swift and cost-effective forum for the resolution of small claims between consumers and suppliers for claims up to S$10,000.00 (or S$20,000.00 subject to parties' consent) filed within one year from the date on which the Cause of Action accrued on sales of goods, provision of services, tort for damage caused to property, refund of motor vehicle deposits and specific aspects of lease of residential premises. The SCT now uses the same electronic case filing and management system, the Community Justice & Tribunal System ("CJTS"), thus allowing parties to file claims and access court e-services from any location with an internet connection.

(7) State Courts Centre for Dispute Resolution ("SCCDR")[11]

The SCCDR is court annexed mediation through judge led court dispute resolution of civil, commercial, criminal and Tribunal matters. The SCCDR also conducts Neutral Evaluation, Judicial Mediation and Conciliation.

8 https://www.familyjusticecourts.gov.sg/
9 Family Justice Act 2014 (Act 27 of 2014)
10 https://www.statecourts.gov.sg/cws/SmallClaims/Pages/GeneralInformation.aspx
11 https://www.statecourts.gov.sg/cws/Mediation_ADR

(8) Singapore International Arbitration Centre ("SIAC")[12]

The SIAC is an independent, neutral and non-profit leading international arbitration institute which provides neutral arbitrations and its case management services to the international business community and promotes arbitration as a preferred mode of dispute resolution.

(9) Singapore International Commercial Court ("SICC")[13]

Launched in 2015, the SICC is a division of the Singapore High Court that is empowered to try, hear and decide on transnational commercial disputes. It is also empowered by parties' jurisdiction agreement to submit to the SICC's jurisdiction. The High Court and the SICC may also transfer cases between each other, depending on the suitability of the case at hand. It serves as a companion rather than a competitor to arbitration, providing one more option among a suite of viable alternatives to resolve transnational commercial disputes.

(10) Singapore International Mediation Centre ("SIMC")[14]

The SIMC is an independent, non-profit institution which aims to provide world-class mediation services and products, which are targeted specifically at parties' needs in the context of cross-border commercial disputes, with a particular focus on Asia, with case management under SIMC Rules. Settlement agreements are enforceable as a consent order under the Singapore Mediation Act or as an Arbitral Award under the Arb-Med-Arb Protocol.

12 https://www.siac.org.sg
13 https://www.sicc.org.sg
14 http://simc.com.sg/

(11) Singapore Mediation Centre("SMC")[15]

The SMC provides mediation services such as commercial mediation, small case Commercial Mediation Scheme, industry schemes, Neutral Evaluation, Adjudication, Singapore Domain Name Dispute Resolution Services, consultancy, Family Mediation, and the recently launched Singapore Infrastructure Dispute Management Protocol. The SMC also provides training in negotiation, mediation and conflict resolution.

(12) State Courts of Singapore

The State Courts of Singapore comprise the District Courts and Magistrates' Courts – both of which oversee criminal and civil matters – as well as the Coroner's Courts, the Small Claims Tribunal, and the Employment Claims Tribunal. More details can be found in the chapter on Litigation.

(13) Supreme Court of Singapore

The Supreme Court consists of the High Court and Court of Appeal and hears both criminal and civil cases. In criminal cases, the High Court is empowered to try all cases. More details can be found in the chapter on Litigation.

(14) Tripartite Alliance for Dispute Management[16]

The Tripartite Alliance for Dispute Management ("TADM") was jointly set up by the tripartite partners: the Ministry Of Manpower ("MOM"), the National Trade Unions Congress ("NTUC") and the Singapore National Employers Federation ("SNEF") to help employees and employers manage employment disputes, or self-

15 http://www.mediation.com.sg/about-us/#mediation-as-a-stance
16 http://www.tadm.sg/about/

employed persons manage payment-related disputes, amicably. It operates mainly out of the Devan Nair Institute for Employment and Employability.

1

NEGOTIATION

General Overview of Negotiation

Negotiation involves two parties discussing their positions with respect to a situation/matter/dispute in hope of achieving an end that is satisfactory for both parties. It is often the most obvious and preferred route for parties to settle a dispute.

Negotiation can generally take place at any stage of parties' dealings with each other even before a dispute has formally arisen. There is an unlimited range of solutions available to parties (subject to what is enforceable), and parties have full control of the process and the outcome, subject only to what they are able to agree on. As such, it allows for the preservation of relationships, and it is usually confidential and cheaper that the other dispute resolution mechanisms.

In a commercial setting, negotiation is most effective between fully briefed senior executives who have all the authority needed to settle the parties' various disputes. These senior executives may most likely have the greatest emotional investment in it too.

With the senior executives, it may well become less about the rights and wrongs of a dispute or legal justice, but instead more of a matter

of commercial pressures, bargaining and compromise driven by the parties' need to move on and to not get stuck in the dispute.

However, with a private dispute, detaching emotions from the issues may be considerably more difficult for parties, when their only wish is to achieve a solution that can be seen as just and fair by all.

A negotiator's skills will also affect how successful the negotiation is as it will depend on the negotiator's ability to shift the parties from taking "positions"/"rights" to considering "interests" of the parties. These factors contribute to negotiation being the simpler, most flexible, quickest and cheapest form of dispute resolution.

Weighing Options

During negotiations, it is common to come across the terms "BATNA", "WATNA" and "MLATNA", which are benchmarks that parties can use to determine whether they should settle or walk away from the negotiation.

(1) Best Alternative to Negotiated Agreement ("BATNA")

BATNA is essentially the most favourable course of action available to a party in the event that they cannot come to an agreement with the other party. Knowing your BATNA allows you to better gauge the relative advantages of entering into the negotiated agreement, and to also consider the "intangibles" which should influence the opponent's approach to the negotiations. The better your BATNA, the greater your power. You should therefore explore vigorously what you will do if you do not reach agreement, as this can strengthen your hand.

Whether one discloses one's BATNA to the other side depends on one's assessment of the other side's thinking. If you have an extremely attractive BATNA, let the other side know it. If they think you lack one, when in fact you have one, then you should also let them know it. However, if your best alternative is worse for you than they think, do not weaken your hand by disclosing it. Consider the other side's BATNA. If their BATNA is so good that they do not see a need to negotiate on the merits, you must consider what you can do to change it. If both parties have attractive BATNAs, the best outcome for both parties may well be to not reach agreement.

(2) Worst Alternative to Negotiated Agreement ("WATNA")

Similarly, WATNA is essentially the least favourable course of action available to a party in the event that they cannot come to an agreement with the other party. For instance, parties might consider that in the event they are unable to reach a settlement, they would have to go through the formal court process to resolve the dispute, which might be something they wish to avoid at all costs.

Knowing the other party's WATNA and your own WATNA is useful as they know their minimum point and know when to be more accommodating towards other options for fear of your WATNA. If both parties prioritise avoiding their WATNA, they may be more willing to compromise and reach a settlement. However, if one party's WATNA is not compelling, they might decide to walk away from the negotiation.

(3) Most Likely Alternative to Negotiated Agreement ("MLATNA")

MLATNA is the best estimate or reality check of outcome. Here, parties are not looking at the best or worst case scenarios, but the most realistic outcome, in light of all the circumstances, should they fail to come to an agreement. Considering a MLATNA means that each party thinks about what a neutral decision maker would mostly likely decide and it prevents parties from being entrenched in their own views. If one's MLATNA is not that different from the negotiated settlement, parties may compromise and this allows for settlements to be reached far more expeditiously.

Facilitating Negotiations

Parties are often encouraged to think creatively and to brainstorm during negotiations, including suggesting as many solutions as possible, to help frame and prioritise the options for the parties, while keeping track of all the suggestions, thus focusing the parties' attention and provide a record for future discussion and analysis.

At this time, the facilitator should be alert to any negotiation traps that the parties may fall into. These will only slow down negotiations and move the parties away from a solution. The traps a mediator should look out for include the Investment Trap, the Reactive Devaluation Trap, the Predictability Trap and the Familiarity Trap.

(1) Investment Trap

Parties often defend their past investments vigorously, even when these investments were clearly mistakes. Part of this stems from an aversion to having to suffer the "humiliation" of admitting to bad judgement. This unwillingness to admit mistakes bogs down the negotiating process, with parties often failing to realise that a corporate culture that leaves no room for mistakes causes their negotiators to place unwarranted restrictions on themselves during a negotiation.

To allow for effective negotiations, a facilitator may assist the parties by helping them to honestly examine whether reluctance to break out of an investment trap is not largely due to a wounded self-esteem, and then confronting this fear. This is best done in the context of a caucus.

(2) Reactive Devaluation Trap

Parties may undervalue or devalue a proposal simply based on the source of the proposal or the context, for example from someone they perceive as an adversary, even if an identical offer would have been acceptable when suggested by a neutral or an ally. In a similar vein, they often value a concession that is offered less than a concession that is withheld.

(3) Predictability Trap

People are generally quite good at predicting certain matters such as time, distance, weight, volume, etc. They become increasingly accurate in their predictions thanks to the regular feedback they receive. However, our ability to make predictions about less certain matters (such as future prices, the weather, etc) is limited by over-confidence, over-cautiousness and our memories.

For example, those who overestimate the possible growth in earnings of a company are likely to be prone to offering wage deals that will expose the company to serious future difficulties while those that underestimate earnings growth is likely to forego a settlement that could have been achieved through a slightly more flexible approach.

When faced with decisions that could have important consequences, many negotiators choose to "*err on the safe side*." Similarly, in budget negotiations, heads of department adjust their forecasts to "*be on the safe side*." This causes drawn out negotiations and often results in unnecessary competition.

Negotiators may allow dramatic past events embedded in their memory banks to influence predictions they make during a negotiation. For example, the notion that a negative event which occurred in the past may happen again could dominate a negotiator's thought process.

(4) Familiarity Trap

Negotiators frequently negotiate to maintain the status quo. This stems from a natural reluctance to break out of their comfort zones. Further, those designated to negotiate on behalf of companies or institutions are often strongly conditioned to maintain the status quo. This is because experience has taught them that venturing beyond the status quo is potentially dangerous.

Breaking Deadlock

Often, there is an impasse in negotiations as a result of the fact that one party still has an emotional issue that has yet to be addressed, for which an apology may have to be made. When legal advisors are present, they may also have warned parties about making possible admissions of liability through apologies, and so parties may be reluctant to do so for fear of jeopardising their position.

There may be other reasons for a deadlock during negotiations. Common ones include a mediator's failure to control the process; a mediator's failure to recognise or deal with the parties' emotions, such as anger; the parties' adoption of a positional negotiation stance; and one party's realisation that he has made too many concessions without any returns.

The negotiator can pick up on many of the above reasons if he/she is alerted to the signs that will be evident from the parties' behaviour.

Impasses are common in many negotiations, for which there are strategies that can be employed to try to break the deadlock, such as encouraging the parties by reminding them of the progress made so far and the common ground between them; consider a break in the proceedings to allow the parties some time to rest and reflect where necessary to cool down; take the parties into caucus if he feels that they need to vent or that he needs an opportunity to make them consider their WATNA positions, this will add some reality and perspective to their thinking and could help to break the deadlock; and remind the parties of external pressures to settle, such as deadlines and court dates.

ABOUT THE AUTHOR

Anil Changaroth, a Mediator, Adjudicator and Arbitrator, is an Advocate & Solicitor of Singapore (since 1995). He qualified as a barrister of England and Wales in 1993 and a solicitor of England and Wales in 2009, apart from being trained in International Treaty Arbitration. He holds a Master of Science in Construction Law and Arbitration awarded jointly by King's College London and the National University of Singapore.

Anil is Managing Director and General Counsel of ChangAroth Chambers LLC and ChangAroth International Consultancy. The Chambers is part of the pioneer batch of legal practices on the Singapore Academy of Law's Future Law Innovation Programme (FLIP) and is recognised as the Law Society of Singapore's SmartLaw (legal technology) practice. It primarily focuses on Building, Construction and Infrastructure work and most aspects of Commercial, Civil, Criminal and Corporate front end advisory work and Appropriate Dispute Resolution services representing parties in Singapore and the region. He is also conversant in Mandarin, Malay, Malayalam and Tamil, besides English.

Anil, a fellow of the Chartered, Singapore and Philippines Institute of Arbitrators and the Asian Institute of Alternative Dispute Resolution and trained in International Investment Treaty Arbitration at the Asia International Arbitration Centre (AIAC), has practiced with the international arbitration practice group of Lovells Lee & Lee. He was also General Counsel and Director of the Contract Advisory and Dispute Management division of Davis Langdon & Seah (now part of Arcadis Group). He also sits on the Board of the Singapore Indian Chamber of Commerce and Industry and Council of the Society of Construction Law Singapore and is honorary advisor to construction industry related institutions.

Anil's practice has over the years developed to deal with more of the appropriate DR mechanisms, including as Mediator and Arbitrator, and has for over 23 years served in the constituency of the Honourable Deputy Prime Minister Tharman Shanmugaratnam with *pro bono* legal services.

ChangAroth InterNational Consultancy was incorporated in Singapore in 2017, and is setting up collaborations with practices in Australia, Bangladesh, Indonesia, India, Mauritius, Philippines and Sri Lanka, to facilitate Singapore's Infrastructure Asia initiative, the Singapore Convention on Mediation and China's Belt & Road initiative, and consult on international trade, investment treaty, construction and infrastructure projects, Appropriate Dispute Resolution and developing legal technologies.