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**ALTERNATE DISPUTE RESOLUTION TECHNIQUES**  
**FOR**  
**FAMILY BUSINESS DISPUTES**

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**Presentation by Marcel Alter given to the Family Business Network of the  
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The words ‘**ALTERNATE DISPUTE RESOLUTION**’ refer to the system given to resolving disputes outside the Court System. As such, there is nothing new in the concept, as the Courts handle only a small amount of the day-to-day interaction between people, Businesses and institutions

What it means will depend on the Society we live in.

Back in our caveman days disputes were resolved by parties clubbing each other. Whilst effective in ending the immediate dispute such a system has some obvious drawback for today’s business world. Thus the alternative was to develop a Legal System backed by The Courts. The System and the Courts do not stop Disputes but provide the framework for resolving disputes. The Court being the arbitrator for disputes that the parties cannot resolve themselves.

The words ‘ADR’ conjure up a number of pictures.

Let’s take the ‘ **Dispute**’ part of it. It can have many meanings. As a ‘Dispute’ you may put –

- *Disagreement*



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- *Fight*
- *Different Opinions*
- *Tension*

How do these manifest themselves in a Small Business arena?

- *Absenteeism*
- *Unhappy working relationships*
- *Dispute with suppliers*
- *Lack of incentives*

Are there any positives?

- *Change of management*
- *Study*
- *Bringing in of small business advisors*

## **“RESOLUTION”**

How can these conflicts be resolved?

Internally, within us it can be left with -

- Doing nothing*
- So-What attitude*
- Anger*
- Slashing of tyres*
- Galvanising action*
- Going on Holiday*



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Externally, it can have -

- a) *Confrontation*
- b) *Yelling*
- c) *Threatening*
- d) *Court Action*
- e) *Negotiation*
- f) *Marriage*

Each of these has a cost to it whether it is emotional oppression, relation or monetary.

**THE ALTERNATIVE part of ADR** is how we deal with it.

In our litigious society one reaction is to go to Court and we all have had the experience of going **to Court and Litigation**.

There the Dispute is dealt with in terms of Rules and Procedures, Hearing and the so-called Binding Decision being made.

The advantage is that it is –

- (a) *Binding*
- (b) *Backed by the State*
- (c) *Final*

The disadvantages are –

- (a) *It is costly*
- (b) *You are stuck with the Rules and Regulations*
- (c) *If there is a Judgment, there may not be means of enforcing it*
- (d) *There is at least one unhappy party, usually two*
- (e) *Costly*
- (f) *Time consuming*
- (g) *Will often include bringing in either witnesses or experts.*



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## **ARBITRATION**

In fact many contracts in the small business arena the process is written into the contract as the preferred manner of ADR as it is seen as

- Quicker
- Confidential
- Expert determination

It is similar to Litigation, although here the parties can themselves, pick who is to be the judge, and choose the procedure. It has many of the advantages of the Court and is usually faster and cheaper. But it also has all the disadvantages, including the disadvantage that it is subject to scrutiny of the Courts.

Its major advantage in the context of Small Business, is that one gets to choose their own Judge but even so, they must read the evidence and unfortunately in my experience it will take just as long.

## **COUNSELLING**

This is a therapeutic process in which a qualified counsellor assists in the treatment of psychological behavioural problems which may require long-term professional involvement.

The advantage is it may treat the actual process but in the context of it resolving a dispute between the parties will usually take too long and it takes a lot of prodding before the parties will recognise they have this sort of problem.

## **STRAIGHT-OUT NEGOTIATION**

This is a bi-lateral, multi-lateral processing which the parties or their representatives attempt to resolve the Dispute through discussion, education, bargaining which takes place without the assistance of any impartial third party.



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The advantage is that it can be done now at any time and any place.

The disadvantage is that the parties already know each other and are usually entrenched in their position and come to the process with a lot of baggage with nowhere to unload but on the other party.

### **CASE APPRAISAL**

This is a system where a third party with qualifications or expertise gives a view on the facts, reports, evidence or submissions. The parties either accept the ruling as binding, or use it for non-binding opinion in subsequent negotiations.

Has a great advantage in large. disputes where an expert opinion may be needed to resolve an issue which is causing a dead-lock.

But has all the difficulties and problems of the Arbitration or the Litigation system.

### **MEDIATION AND CONCILIATION**

This is my preferred option both as a an experienced legal practitioner who relies on the litigiousness of the business world and as a long term advisor to many small businesses.

But whilst the concept is known the actual process is not.

**Mediation is the process in which the parties are assisted by the third party to improve the process of decision-making and assist the parties reach an outcome to which they can assent.**

Its core features are –

- a) A process or a method
- b) In Which the relative parties and or their representatives
- c) With the assistance of a third party
- d) Attempt through discussion, negotiation to make decisions
- e) To which the parties can assent to i.e., the process of facilitated negotiation.
- f) And which allows the parties to move on



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**The Mediation Process itself is that of –**

- (a) Bringing the parties in conflict to a convenient location before the neutral third party,
- (b) Inviting them to, in their own words, tell the history of the matter, that is, how they see the facts, the issues, the position and where they believe the matter should go,
- (c) The Mediator reframes or puts the position to the parties in neutral. Language.
- (d) The Mediator separates the problem from the people and prioritise the issues,
- (e) Once the issues are prioritised, the mediator will assist the parties to discuss options, alternatives,
- (f) The mediator assist the parties come to terms with the issues or achieve Resolution,
- (g) Once there is a Resolution, the Mediator will assist the party's reality test how the reality test will affect the situation, themselves, their colleagues.
- (h) Document the conclusion and Plan of action
- (i) The Mediator Hands implementation back to the parties and their advisors

**The advantage of Mediation is that -**

- a) It is quick
- b) Can be done any place any time
- c) Does not require that litigation be started
- d) Does not require lots of preparation
- e) Is confidential
- f) Allows each party to evaluate their position
- g) Allows each party to evaluate each other.
- h) If it doesn't work, all the other alternatives are still available.



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The process itself allows the parties to come out of their “bunkers’ to speak to a third party.

The Mediator sets the rules and provides the parties with the opportunity to be heard.

The Mediator re-frames the issues into neutral language and assists the parties to prioritise the issues, interests and concerns.

Once the history, issues and concerns are on the table, the Mediator then assists the parties to negotiate settlement.

The major advantage is that it is the parties’ settlement, and whilst non-binding, the parties have been heard, had their say, and have had a part in developing the solution.

Whilst they may not be happy with the outcome, they know it is the best alternative available in all the circumstances.

### **LET US GIVE YOU AN EXAMPLE OF THE SYSTEMS at WORK.**

The Law is – ‘If a dog bites a man, the dog is to be put down within forty-eight (48) hours And the man bitten is to be paid Fifty thousand dollars (\$50,000.00).’ A very simple law! Let’s look it at how the different systems would apply it.

#### Caveman style

Man shoots dog and its owner

But in today’s society is arrested, charged with cruelty, starts a blood feud and doesn’t get his money is sued for damages so ends up in Court

#### A Dictatorship

The Law is there, the dog is put down within forty-eight (48) hours and an award is made for Fifty thousand dollars (\$50,000.00) which the Police come and collect.

#### The Court System

The parties would come to argue their cases, firstly the **person bitten** would come with his evidence of how he was bitten and would have his doctor’s evidence of how it



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caused him pain and suffering. Accordingly, he should get the full Fifty thousand dollars (\$50,000.00).

**The Dog Owner** would come and argue that –

- (a) No one saw the man being bitten,
- (b) His bite could be from somewhere else,
- (c) That it caused him no discomfort and bring his own doctor and,
- (d) That the man was trespassing on his property and attempting to steal his oranges,
- (e) The dog behaviourist would give advice as to how dogs behave in these circumstances.

**The Judge/arbitrator** would make a ruling as to whether or not he accepted the evidence that the dog bit the man and if so, how much of the Fifty thousand dollars (\$50,000.00) the man should get.

This would all take time, effort and probably anger, as the parties would have to take diametrically opposed positions. The costs would also be exacerbated as an injunction would have to be applied for to ensure the dog was not put down.

### The Mediation System

Whilst the facts would not differ and in the first instance, the man would tell about the injuries, how he got them and the effect it has on his life.

The other side would also have their position, which they would communicate to the other side via the medium of the Mediator.

Discussion could revolve around the fact that ‘Yes, the man was trespassing’ a fact he may not wish to agree to in Court proceedings



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as to why he was trespassing, the meaning of the dog to its owner, the fact that even though the dog was dangerous, it had saved somebody's life, the fact that this was a dispute between two neighbours and had nothing to do with the dog bite,

**The solution** might revolve around

having a higher fence,

a new gate,

providing the neighbour with lemons from the tree on a regular basis,

a donation of Fifty thousand dollars (\$50,000.00) to a local charity or research in rabies,

how the parties can handle each other in the future,

all alternatives not available to the Judge or in a process by which the parties

**Let me now set you a problem which is probably not an uncommon one.** We have a Family Business whose Head is "Sixty Something"; One of First Generation of Two Brothers who formed the Business; one has two children who are in the Business but to put it bluntly, "Dimwits"; and there is a daughter who has her MBA and knows all the new systems and can see the potential of the Business, if only she could get her Dad and Uncle to see it she is stuck by the fact that she is –

- a) A woman,
- b) Has education where everybody else in the firm has been brought up by the seat of their pants or have a Degree from the School of Hard Knocks
- c) Is ambitious to move the Business to its next stage,
- d) Owing to the Mortgage guaranteed by the family and the fact that she is being paid a large salary, she could not get anywhere else and cannot move.



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- e) Her equally dim-witted partner works for you the advisor
- f) A large customer has told her how impressed he is with a competitors new computer
- g) The cousin is having an affair with her best friend

The conflict has been simmering for some years.

You, as a Business Adviser, are aware of the conflicts and have in fact been requested to advise the Company as to future markets. You are concerned it is about to burst into open warfare as a result of the company's decision to place one of the uncle's sons as the Head of the new division and the death of our heroin's Father.

You, as an Accountant, know all of this as you have been doing the books for thirty years and know all the parties intimately. You know it is affecting morale of both the management group and workers who are taking sides and know that each camp has taken legal advice and know that lawyers are being talked to some big clients are about to walk.

Your position, however, is compromised by the fact that –

- (a) You are Adviser to all,
- (b) You wish to keep the business as a client,
- (c) all the parties think you are on one or the other side,
- (d) You may have become too closely involved in the business and cannot see all the issues and
- (e) have your own positions. And solutions
- (f) you like the parties

So, being the Adviser you are, you call a Mediator in.



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What are the advantages to you?

What are the disadvantages to you as a Business Adviser?

The advantages are –

- (a) That you have input into the process,*
- (b) You maintain impartiality,*
- (c) At the end of the process the Mediator is not involved in the work of restructuring or re-positioning the Company or a party; that is left to the Accountant or the Professional Adviser.*

Should the matter go to Litigation, what are the advantages and disadvantages of the Professional Adviser? The disadvantages obviously are-

- (a) That there will be a position of no return,*
- (b) The Business will be broken up,*
- (c) Probably lose it all. Whilst you may have an initial position of drawing some papers up or putting some figures forward, the parties may focus upon you as part of the reason for the breakdown.*

The possible Solutions are

Thus as a Businesses advisor you must at all times be aware of the situation both internally and externally effecting the dynamics of any Family business. Just as the advisor has sold their expertise to the businesses, on the basis that a third parties advise and experience would be beneficial when coupled with the expertise available from experience and within. The Advisor also must Know their own limitations. The major one being that they are advising a solution to one receptive party, or are attempting to change a system or culture



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**Mediation allows for the parties to communicate and negotiate, with the Solution  
the work, and the fees for such restructuring to go to the advisor  
So before parties contemplate suicide, pistols at dawn or men in wigs call the  
Mediator.**

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