# Alternative Dispute Resolution – Binding and Non-Binding

Alternative Dispute Resolution or ADR refers to processes, other than judicial determination, in which an impartial person assists those in a dispute to resolve the issues between them. ADR can also be used to mean ‘assisted’ or ‘appropriate’ dispute resolution. Learn more about the ADR process.

## What is alternative dispute resolution?

Alternative Dispute Resolution or ADR refers to processes, other than judicial determination, in which an impartial person assists those in a dispute to resolve the issues between them. ADR can also be used to mean ‘assisted’ or ‘appropriate’ dispute resolution. Sometimes it is used to include approaches that enable parties to prevent or manage their own disputes without outside assistance.

The creative industries are no exception when it comes to disputes. Filmmakers can fall out leaving a film project unable to be completed. Artistic collaborations falter over creative differences or misunderstandings as to costs, processes, and responsibilities. Bands split up unable to agree on ownership of music or what direction to take. Writers may be in dispute with a publisher over royalties.  Such disputes are often characterized by the importance of the personal relationships involved. People who work within the creative industries often need, or desire, to work together on projects in the future and don’t want that opportunity sabotaged by a dispute over the current project. Often the parties – or at least one of them – to the dispute can’t afford the expense of lawyers and going to Court.

Where the only options are walking away or litigation, permanent damage can be inflicted on on relationships and creative projects are often permanently stalled or prevented from coming to fruition.

ADR can provide a relevant, cost effective, fair and timely means of resolving disputes in a manner which, to the extent possible, preserves the parties’ relationships and creates maximum opportunity for projects to be realised and completed. There are a number of different ADR processes including mediation, expert determination and non-binding evaluation. In this information sheet we discuss binding expert determination and non-binding expert evaluation. For information on the alternative ADR process of mediation see Arts Law’s information sheet Alternative Dispute Resolution – Mediation.

## What is binding expert determination?

Binding Expert Determination is a ‘determinative’ ADR process in which an neutral third party, who is chosen on the basis of their specialist qualification or experience in the subject matter of the dispute evaluates the dispute (which might include by hearing formal evidence from the parties) and makes a determination which is binding on the parties. It may be the entire dispute or particular critical issues which once determined may allow the parties to reach agreement on other issues.  They may be legal or factual issues.

It is similar to arbitration however arbitration has well understood rules and processes and the decision of an arbitrator can be appealed to a court. Generally, the decision reached by the expert in a binding expert determination cannot later be appealed and litigated in court. However, there are situations where the process of expert determination is consistent with the rules for arbitration, in which case an appeal process may be available.

## What is non-binding expert evaluation?

Non-Binding Expert Evaluation is an ‘advisory’ ADR process in which an ADR practitioner with expertise in the subject matter disputed considers and appraises the dispute and provides advice as to the facts of the dispute, the law and, in some cases, possible or desirable outcomes, and how these may be achieved.  Their conclusions are not binding on the parties but in

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many cases, an impartial third party view can help the parties re-evaluate their own positions and then resolve the dispute themselves. The expert evaluation may be in relation to the whole dispute or just some issues. Similar to expert determination it may be the entire dispute or particular critical issues. If settlement isn't reached, this evaluation does not preclude either party from initiating litigation or pursuing other forms of ADR.

## Do I have to participate?

If you have entered into a contract which requires you to resolve your disputes by ADR or by binding expert determination or non-binding expert evaluation in particular then you must engage in that process once a dispute arises. Some contracts just specify ADR leaving it up to the parties to choose which type of process they participate in. Generally this has the effect that you cannot start court proceedings until you have undertaken that process. Alternatively, if you refuse to participate then the other party may be entitled to start court proceedings and will let the court know that you have refused to comply with the terms of the contract requiring ADR.

If there is no contractual clause requiring ADR then it is simply a tool that can be used if the parties all agree. ADR in that situation is voluntary. If you wish to try and resolve your dispute by obtaining an expert assessment and the other party does not, then any expert view you might obtain cannot be binding on the other party and would be wholly at your cost. You would still of course be able to use it settlement negotiations to try and reach an agreement. Your only other choices then may be to walk away or start court proceedings.

## What occurs during binding expert determination and non-binding expert evaluation?

The parties prepare written submissions for evaluation by the expert, and the expert will make either an independent determination on the issues (Binding Expert Determination) or provide a non-binding opinion with an explanation of the reasons supporting that opinion (Non-Binding Expert Evaluation). Depending on the circumstances – this may be made solely on the written submissions or after hearing from the parties in person.

## How do binding expert determination and non-binding expert evaluation differ from mediation?

In mediation, the parties retain their control over the dispute and the mediator will adapt the process to their needs, and will not provide an opinion on the appropriate solution. In contrast, in expert determination and evaluation, the parties are effectively agreeing to allow a third party, the expert, to form a view for them. If that 'view' is binding it can provide finality to the dispute in a cost-effective and speedy manner – whether or not all parties are happy with that outcome. If the parties agree that that 'view' is not binding it can still be a critical catalyst in breaking a deadlock between the parties helping them to reach a resolution.

Unlike binding expert determination, certainty of resolution cannot be assured through mediation or non-binding expert evaluation.

Expert determination or evaluation can be especially effective when the dispute involves a technical or specialised area, where the expertise of the expert will be critical. The independent expert can offer the benefit of experience and practical insight on the issues of the dispute.

## What are the advantages of an expert determination or evaluation?

1. **cost and time effective**

Binding Expert Determination or Non-Binding Expert Evaluation is usually less expensive than going to court because:

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a. preparation work required is less compared to preparing for a court hearing;
b. expert determination or evaluation can usually be arranged at shorter notice, than the significant delays common in Australian courts;
c. a dispute which may take several days to resolve in court can often be done much more quickly because the process is not bound by the rules of evidence.

2. **private and confidential**

Before the ADR process begins the ADR practitioner and the parties agree may agree in writing that they will not disclose to anyone else what is discussed during the process. Court proceedings, on the other hand, are generally open to the public and the media.

## How does the Arts Law Centre of Australia's ADR service work?

Arts Law's ADR service provides parties in dispute with access to experts who can assist as mediators or as experts for the purpose of binding expert determination or non-binding expert evaluation.

Arts Law has access to a panel of mediators and experts who offer their services for the purpose of providing a low cost ADR to artists and arts organisations. It is designed for parties who are not represented by lawyers.

Before considering ADR, you should seek legal advice as to your legal rights and how the different types of ADR processes work. Subscribers to the Arts Law Centre can get this advice from one of the Centre's panel lawyers.

### Do I need to be a subscriber to Arts Law?

Yes. Whilst the Arts Law Centre of Australia does not charge any fee for its ADR service, if you are the person calling Arts Law and requesting ADR, you must become an Arts Law subscriber. For more information on subscription and the cost of subscription please contact Arts Law or go to the Arts Law website (www.artslaw.com.au/Subscriptions/).

### Are there any costs involved in Arts Law's binding expert determination or non-binding expert evaluation service?

Yes. Arts Law recommends to its panel of ADR practitioners that their fees should not exceed $200 per hour (exclusive of GST) for disputes involving two parties. The parties will be advised if their chosen expert charges more that this recommended amount.

This charge is usually borne equally by the parties. It is not possible for Arts Law to ascertain the cost of the process up front – this is something the parties should discuss with the expert before proceeding. It should be noted that Arts Law cannot dictate the fees that ADR practitioners charge. There are a small number of pro bono ADR practitioners which may be available to parties in significant financial distress.

More information regarding the Arts Law's ADR Service.

**Disclaimer**

The information in this information sheet is general. It does not constitute, and should be not relied on as, legal advice. The Arts Law Centre of Australia (Arts Law) recommends seeking advice from a qualified lawyer on the legal issues affecting you before acting on any legal matter.

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