The Royal Institution of Chartered Surveyors
Founded in 1868 and with over 180,000 students, trainees and members worldwide, the Royal Institution of Chartered Surveyors (RICS) is the oldest and largest professional organisation for the international land, property, construction and related sectors.
Internationally RICS annually appoints 7000

- Arbitrators
- Mediators
- Expert Determinators or Evaluators
- Adjudicators
- Dispute Board Members
- Expert Witnesses
RICS: Expert dispute resolution in the built environment by built environment experts
ADR Explained

Arbitration
Expert Determination
Adjudication
Mediation

Before
A dispute comes to DRS

During
When a dispute is with DRS

After
DRS has made an appointment
There are traditional methods for resolving disputes which have been used for many centuries

Modern society demands we use more sophisticated methods
Modern society uses more conventional methods for resolving disputes

Everybody has a right to use the courts (as long as they can afford it)

Courts are formal, expensive, time consuming and just a bit scary (even for lawyers)

So what are the alternatives to going to court?
ADR stands for alternative dispute resolution (Alternative to the courts)

Arbitration; Mediation; Expert Determination; Adjudication; Negotiation; Conciliation; Dispute Boards; Stakeholder Consultation; Independent Decision Making; Ombudsman; Early Neutral Evaluation; Independent Review; Neutral Assessment...
Arbitration

It is a form of ADR because it is an alternative to the courts for resolving disputes.

Note: though some lawyers say ADR is everything except courts and arbitration.

In the UK, the process is regulated by an Act of Parliament: the Arbitration Act 1996.

Section 1 (c) says “… the court should not intervene [in arbitration]…”

In practice there is very limited scope for Court intervention in arbitration.
Arbitration

Arbitrator’s decisions are called “awards”.

Awards are binding and usually easy to enforce in a court of law.

In most countries where arbitration is used, there are very limited grounds on which to appeal an arbitrator’s award in court.

A party cannot challenge an arbitrator’s decision in court simply because they do not like it.

An arbitrator can decide all procedural and evidential matters, unless the parties jointly agree otherwise.
Arbitration

An arbitrator’s decision is an evaluative opinion based purely on the evidence submitted by the parties.

An arbitrator cannot undertake an inquisitorial role.

An arbitrator can rule on his own jurisdiction, and can decide if he is validly appointed to deal with a dispute (or not).

If an appointed arbitrator decides he has no jurisdiction to deal with a dispute between two parties, the party who started the arbitration will usually be obliged to pay the costs incurred by both of them.
Arbitration

An arbitrator can award costs (he must do unless otherwise agreed by parties)

The principle an arbitrator must follow is that the losing party will pay his own costs and the costs of his opponent.

Where it is not clear cut as to who has won and who has lost, and arbitrator will allocate the liability for costs as he sees fit

An arbitrator must only decide a dispute within the parameters of the parties’ contentions (even if he thinks they are both wrong)
Arbitration procedure

After an appointment is made

The arbitrator writes to parties setting out timetable and asking for copy of documents

Parties often say “hold fire” for now

Each party sends written evidence to the arbitrator and the other party (submissions)

Each party comments on the other party’s evidence (counter-submissions)

Arbitrator can inspect the property mentioned in the evidence

Arbitrator makes a decision and decides who pays for the arbitration
Adjudication

A generic term used to describe a range of dispute resolution processes, but most commonly associated in the UK with the construction sector.

S108 of the “Construction Act” 1996 says that all “construction” contracts must provide for 28-day adjudication of disputes by an independent adjudicator.

DRS appoints c1000 adjudicators per year.

There are bespoke forms of adjudication e.g. FMB scheme, JCT Home Owner Contract Scheme.

The Construction Act 1996 lays down a strict timetable which must be complied with, otherwise the adjudication is invalid.
Adjudication

A party issues a notice of intention to refer to adjudication and applies to RICS for an adjudicator

Adjudicator decided dispute within a set period (usually 28 days)

Decision can be challenged by arbitration (if contract provides) or litigation, but is binding in the interim (*Macob v Morrison*)

Has been described as “quick and rough justice” but adjudicators are bound by rules of natural justice
Adjudication timetable

1. A party begins adjudication timetable by notifying the other party that he is taking a dispute to adjudication. This is called the “notice of adjudication”

2. The party who begins the adjudication is called the “referring party” and he has 7 days from when he issues his notice of adjudication until he hands (refers) the dispute to the adjudicator.

3. The other party is the respondent, and he doesn’t have to do anything until the adjudicator is appointed/nominated and has contacted him.

4. In many cases the referring party will request DRS to nominate the adjudicator. We must tell the referring party who the adjudicator is within 5 days from the day we receive a request to nominate. This includes weekends.
Adjudication timetable

1. On the day DRS receives a request for an adjudicator we must enter the details on the database, tell the referring party we’re dealing with it and tell the respondent we are dealing with it

2. By day 2 we should have selected an adjudicator, spoken to him/her and sent an invitation by email or fax

3. By end of day 3 we should be ready to make the nomination

4. By 4 pm on day 5 the nomination should have been made

5. A nomination is made when we tell the referring party the name and contact details of the adjudicator, preferably by email or fax
Adjudication procedure

An adjudicator’s jurisdiction, i.e. his authority to decide the dispute, starts, not when he is nominated, but when the referring party hands (refers) the dispute to him.

This is called the “referral notice” and the adjudicator must receive it within 7 days from the date on which the referring party issued his notice to the other party of his intention to go to adjudication.

After the dispute is referred to the adjudicator he must make a decision within 28 days, or the adjudication is invalid.

The referring party (and only him) can grant an extension of up to 14 days.

From issuing a notice to getting a decision must take no more than 35 days (or 49 days if the referring party agrees).
Expert determination

Is a reference to a binding tribunal and should not to be confused with the role of “expert witness”

There is no statutory regulation (i.e. it is regulated by contract law)

Scope of jurisdiction and terms of reference derived from contract with parties

Undertakes an investigative role, but will generally seek submissions from parties

Cannot award costs unless the contract which appointed him says so
Expert determination

Is used routinely in UK to resolve commercial rent review disputes

About half of our rent review applications for experts and half for arbitrators

An expert is more of a detective than an arbitrator because he makes his decision based on his own investigations (though he can take evidence from the parties)

Expert determination is also used to resolve other property disputes such as:
- service charges
- dilapidations
- insurance reinstatement issues
- freehold valuation
Expert determination

An expert gets his powers from the contract between the parties

He is not bound by parties’ submissions, and can decide on basis of own knowledge and expertise

No legal mechanism to appeal an expert’s “determination”

An expert is liable in negligence (a party can obtain damages for resulting loss)

An expert can make a wrong decision and still not be liable in negligence, as long as he answers the right question (See Jones v. Sherwood)

An expert cannot usually decide who pays for the determination
Mediation

Different methods include (but not limited to):

**Facilitated** (mediator helps parties to find their own solution, but does not impose his own solutions)

**Evaluative** (mediator offers views on specific issues or overall positions in order to help push negotiations forward)

**Stakeholder Consultation** (multi-party mediation)
Mediation

Appointments made free of charge

RICS charges mediators a referral fee

Appointments are made from RICS panel

People who pass our mediation training become “accredited” mediators

They then apply for panel membership

Mediators are taught how to mediate

We promote mediation in property and built environment
Mediation procedure

Mediation is different because it is “non-adversarial”

Mediators do not impose decisions

The process aims to find solutions that satisfy all parties

• Initial contact with the parties
• Private meetings with each party
• Joint meeting – setting the agenda
• Further private meetings
• Exploration
• Settlement
Mediation benefits

Fair and transparent

Quick and informal

Able to deal with issues which courts cannot

Economically viable

Able to maintain relationships

Able to deal with emotive issues

Adaptable
Mediation benefits

Releases pressure off “wired” people

Moves from entrenchment to forward planning

Mediator acts as catalyst

Safe forum to explore people’s needs

Is flexible not “rule bound”

Active listening

Reality checking

Gets innovative solutions

Deals with emotive issues
Key mediation skills

Relentlessly neutral
Non-judgmental
Avoids assumptions
Empathetic
Actively listens
Is discreet
Is respectful
Has patience
Is tenacious
Knows when to listen, when to speak and when to be discreet
The Rules provide that all mediators under the scheme will need to:

- have attended a forty hour contact training programme certified by an institution such as RICS\(^1\)
- be accredited by and affiliated to such an institution\(^2\) and
- be able to provide a certificate of good standing from such an institution\(^3\)

\(^1\)Rule 1(1)  
\(^2\)Rule 1(2)  
\(^3\)Rule 3(1)(e)
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