



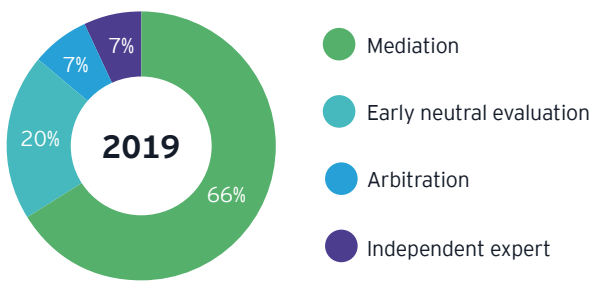
Compulsory purchase survey 2019 – Alternative dispute resolution

The issue

Our previous compulsory purchase surveys identified alternative dispute resolution (ADR) as one of the key contributors in making the compulsory purchase process clearer, fairer and faster.

In our latest survey we sought to explore the reasons for the low use of ADR and how this might be improved.

Q: What forms of ADR have you used?



Our findings

Use of ADR in compulsory purchase order cases in the last 12 months increased to 27% of respondents in 2019 (2017: 19%, 2016: 15%). Mediation remains the most common form of ADR, as identified in 66% of responses (2017: 57%, 2016: 80%). Other forms of ADR show little movement except for the use of independent experts which fell to 7% (2017: 14%, 2016: 10%).

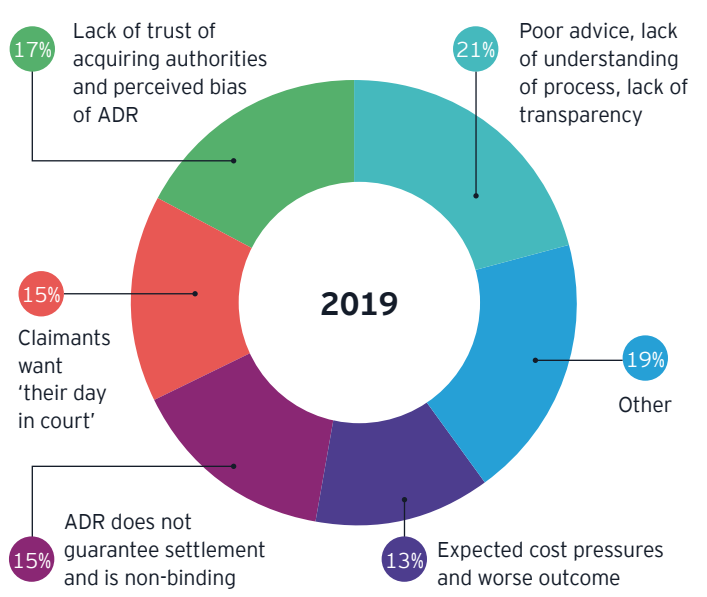
Our findings suggest that, while the use of ADR has increased from 2016 to 2019, there are varied reasons for claimants to reject its use.

Many potential improvements to ADR were suggested and we believe that expert determinations could play a key role.

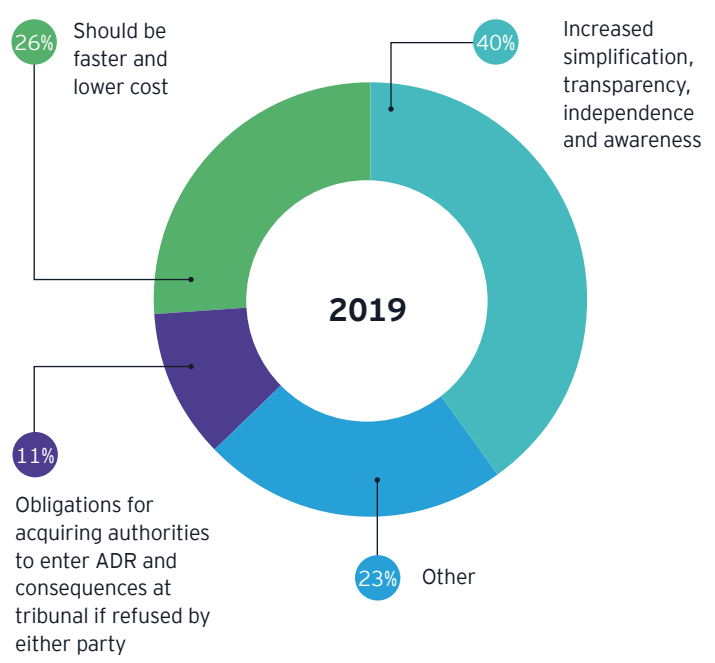
“ADR is entirely flexible and can be tailored, but it requires knowledge of the options and experience in practice to make effective use of it. Greater education and awareness of the available ADR mechanisms is necessary and support from key sector bodies such as the RICS and CPA to promote use of ADR is essential.”

David Holland
Partner, Squire Patton Boggs

Q: In your view, why might ADR be rejected by claimants?



Q: How can ADR be changed to drive improvements to fairness, efficiency and effectiveness?





The case for using expert determination for compulsory purchase disputes

Expert determinations are a tried and tested method of dispute resolution – offering a fast, flexible and lower cost form of resolving disputes involving accounting and finance matters. But they are not yet actively used in the world of resolving the quantum of claims for compulsory purchase disputes. Perhaps that is because it is a procedure that takes place in private and, whilst well known for resolving transaction disputes involving completion accounts and earnouts, little is known of their application for resolving disputes around disturbance losses. **We think this should change – and expert determinations could play a valuable role in improving access to fair and speedier outcomes.**

So how does expert determination work?

Its key feature is that it is based on a contractual agreement between the parties and the expert determiner. The expert determiner is instructed to consider the parties' submissions, ask questions if necessary, and then form a determination or decision. That outcome is normally binding, unless there is manifest error or fraud, or unless the parties agree on a non binding determination. The key elements and stages are as follows:

- ▶ Each party makes 'submissions' together with such supporting evidence as they see fit to the independent expert. Usually each party makes two submissions to the independent expert, an initial one and a second one in reply to the opposing party's initial submission.
- ▶ The independent expert may then write to the parties asking for further information usually requiring a written response. Everything is typically conducted in writing, but it is not unusual for the expert to also require oral submissions.
- ▶ The expert issues the determination in the form requested by the parties – usually a short written explanation of the determination, but 'unreasoned' (i.e., unexplained) determinations are also possible.
- ▶ All of the above stages run according to a timetable agreed between the parties, subject to the independent expert's agreement, and normally they can start quickly and only take a few months to resolve.

In our experience of acting as expert determiner, the great benefit to this is that the parties can resolve their differences fairly quickly, with relatively less cost than other methods currently used, and in a private setting.

So why might expert determination be better than, say, mediation?

Mediation does have a role and can facilitate a negotiation between the parties with a view to them reaching an agreement or narrowing the issues. However, critically, a mediator is not empowered to determine the dispute as is an expert determiner. Hence why some mediations are unsuccessful and may draw out the disputes process rather than accelerate it.

If you are interested in discussing the potential for expert determination of disputes relating to compulsory purchase of businesses, please feel free to get in touch with one of EY's Compulsory Purchase & Business Disturbance team:

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