

3.3 Use and Trends in ADR Take-Up

With the exception of disputants themselves, all the stakeholder groups expressed a view that the use of ADR is increasing. Among ADR practitioners, however, both among those who combine ADR provision with an active legal practice and among those who focus entirely on ADR, there is a view that the increase in ADR take-up, especially mediation, has not been as pronounced or as extensive as predicted in the 1980s and 1990s. Nevertheless, it is clear that in some sectors, ADR has become a significant mechanism for dispute resolution often prior to disputes being filed within the courts. This is particularly the case in relation to building disputes, insurance, and professional indemnity claims.

It also seems that there is the beginning of a movement away from arbitration as an extra-court or ADR mechanism for dispute resolution and a move towards the use of mediation techniques. This in part reflects a view expressed among lawyers that arbitration fails to give the benefits of other forms of ADR. Many lawyers see arbitration as a costly exercise with the appointment of an appropriate arbitrator often leading to considerable delay. The processes of arbitration are seen as often embracing the adversarial nature of court adjudication without the safeguards of the court in relation to appeal and precedent. Some lawyers felt that there was an increasing trend towards challenging arbitration outcomes on technical grounds, which increased the cost of the arbitration pathway. At the heart of those appeals was a fundamental dissatisfaction among parties with arbitration processes.

Despite perceptions that mediation has benefits that exceed those of arbitration, the lawyers participating in the lawyers survey reported that mediation is still only used in a minority of cases. Lawyers report that in relation to:

- Unfiled cases within the District Court jurisdiction, only 12.2 percent were resolved by mediation and 5.5 percent were resolved through arbitration. The vast majority of disputes were resolved through lawyer-to-lawyer negotiation.
- Unfiled cases within the High Court jurisdiction, 36.6 percent were resolved through mediation, 6.9 percent

were resolved through arbitration and 44.9 percent were resolved through lawyer-to-lawyer negotiation.

Lawyers and ADR practitioners tend to agree that there are significant regional variations in the interest shown towards ADR, especially mediation. ADR practitioners - both those in legal practice and other practitioners - identified Auckland, Hamilton and the Bay of Plenty/ Rotorua as high-use regions for ADR.

The reasons why some areas were more likely to use ADR, especially mediation, are varied and complex. In general, the data from stakeholders suggests that high levels of negotiation and/or mediation were used where:

- the local legal culture was non-litigative
- courts were seen as unlikely to be able to adjudicate or provide Judicial Settlement Conferences in the timeframes desired by disputants
- the use of ADR had become the 'usual' pathway, such as for professional indemnity and other significant insurance related disputes
- the judiciary supported ADR
- there was a trusted pool of ADR practitioners well-known and acceptable to lawyers.

It was suggested by some lawyers in Christchurch that Judicial Settlement Conferences in the High Court rather than ADR became a preferred pathway. The Christchurch High Court was seen as providing rapid access to Judicial Settlement Conferences. Those Judicial Settlement Conferences in the High Court were seen as being effectively managed and effective and many lawyers saw a benefit in having disputants being exposed to the weight that a member of the judiciary could bring in encouraging disputants to have realistic views of the implications of pursuing litigation.