

# Alternative action

How to use alternative dispute resolution to resolve legal conflicts **Interviewed by Chelan David**

**W**hen a dispute occurs between businesses, it is not uncommon for one of the parties to turn to the court system for resolution in the form of a lawsuit. However, there is an alternative method to resolving legal issues that can save you both time and money.

Alternative dispute resolution, or ADR, is a process in which legal disputes are resolved by trained mediators or arbitrators rather than a judge. Under certain circumstances, ADR can be used to settle disputes more quickly and less expensively than if they were decided in litigation. ADR also provides the parties with greater privacy because proceedings are not taking place in a public forum.

"Privacy is one of the principal advantages of arbitration or mediation over litigation," says Stephen J. Siegel, a partner with Novack and Macey LLP.

*Smart Business* spoke with Siegel about how ADR can benefit your business and when it is an appropriate choice for dispute resolution.

## What are the most commonly used forms of ADR?

The two principal forms of ADR in the United States are arbitration and mediation. Arbitration is similar in some respects to litigation. Both are adversarial processes in which the parties offer evidence and arguments to try to obtain a favorable binding ruling from a neutral decision-maker.

But, arbitration is different from litigation in several key respects. Unlike in the court system, the parties typically participate in selecting one or more of the arbitrators. Also, there are only a handful of grounds on which you can try to overturn an arbitration award and these are very hard to establish. In addition, U.S. arbitrations are generally resolved in less than a year, whereas it often takes several years to get a decision 'on the merits' in business litigation. Finally, on average, there is less discovery and less motion practice in arbitration than in litigation.

Mediation is quite different from arbitration and from litigation. First, though mediations are sometimes contentious and have adversarial elements, a successful mediation requires the parties to collaborate with a neutral mediator and one another to negotiate an agreed resolution to the dispute. Second, there are fewer rules in mediation and generally, the mediator and parties are free to design the process to suit their needs. Third, if settlement efforts fail, a mediation does not



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commonly lead to any sort of binding ruling.

## Under what instances is it most appropriate to use ADR?

Arbitration and mediation are tools. They are helpful if used wisely, and can be frustrating and costly if not. Arbitration is a good tool for resolving repeat disputes of a known size and complexity. For example, if your company periodically has pricing or performance disputes with its customers that are significant but not 'bet the company' events, arbitration might be a good way to resolve those disputes. It can provide you with a confidential process, a say in who the arbitrator is and the opportunity to limit discovery and motion practice to help contain costs.

On the other hand, in large, complex or unique disputes, arbitration may not be the best choice because it offers little or no right to appeal. If you don't agree with the award, you'll generally have to live with it, whereas in litigation, an appellate court can take a fresh look at the legal issues. Also, with bigger disputes involving multiple claims and issues, the parties often want more discovery and the opportunity to file motions to resolve issues before trial. Litigation is well suited for such cases, though arbitrators often permit discovery, and sometimes allow motion practice.

Mediation is worthwhile for nearly any dispute that both parties want to resolve but

which they are having trouble settling on their own. Setting aside a time and place to meet about settlement, and working with a neutral party frequently helps parties to bridge differences that seemed insurmountable.

Even when a settlement is not reached during mediation, the process can still be beneficial. For example, it might bring the parties closer to a settlement and facilitate reaching a settlement in the future. Even if no settlement is ever reached, mediations often provide the parties with insights into their adversary's positions, goals and strategies, and that can be invaluable as the dispute proceeds. Most mediations are valuable whether or not the mediation leads directly to a negotiated resolution.

On the flip side, a common frustration occurs when two parties want to settle but the mediator is not skilled at working the parties toward common ground. So take the time to investigate and select your mediator carefully.

## How do ADR costs compare to cases processed in the court system?

Generally, arbitration should reduce your direct costs in attorney's fees and other dispute-related expenses as compared to a litigated outcome. This is because there is less motion practice and discovery and the process typically leads more quickly than litigation to a hearing on the merits of the dispute. But, these savings are not always realized. Sometimes arbitrations get very involved and complicated. The choice of how to manage arbitration is as important as the choice of whether to arbitrate. Once you've agreed to arbitrate, you have an important task in laying out the ground rules to keep it less costly, burdensome and time-consuming than litigation. You have to manage the process to achieve those goals.

In general, mediation is less expensive than litigation or arbitration, but it's hard to compare the costs. Mediation is often a supplemental way to resolve a dispute that's in litigation or arbitration, so unless the mediation leads directly to a settlement, it may increase your direct costs. If the parties go to mediation simply because they were asked or required to do so, not out of a genuine desire to resolve the matter, then it can be an added cost with little or no benefit. But, as with arbitration, if you select your neutral party carefully and manage the mediation process, you'll increase the chances of saving costs and obtaining an acceptable outcome. <<

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