



See you in Court, err . . . Arbitration?

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Determining how to resolve a business dispute is an important consideration for any business. For instance, will the business litigate the dispute in open court, before a judge at the local courthouse? Or, will the business prefer to resolve its dispute through alternative dispute resolution (“ADR”), behind closed doors, before a carefully selected arbitrator? The answers to these and other questions can substantially affect the outcome of the dispute, including the cost, confidentiality, and time required to resolve the dispute. ADR provides businesses with various options for resolving disputes. This article will briefly discuss two forms of ADR, mediation and arbitration.

What is mediation? In general, mediation is a private, non-binding form of dispute resolution. A mediator is a person that presides over a mediation proceeding and works to resolve the parties’ dispute by building towards a mutually agreeable outcome. Generally, a mediator will build to a resolution by utilizing shuttle diplomacy. In practice, mediation often begins by separating parties into separate rooms. After the mediator is educated as to the parties’ strengths and weaknesses in the case, the mediator will shuttle between rooms working to develop an agreeable resolution.

What is arbitration? Arbitration is a second form of dispute resolution that, depending upon the existence of a possible agreement, can either be binding or non-binding. In arbitration, and similar to litigation, parties present their case to an independent third-party. The third-party is referred to as the arbitrator, or in some circumstances, a panel of arbitrators. An arbitrator or panel of arbitrators will hear the case, consider the law, and ultimately render a judgment, much like a judge.

ADR is frequently touted as providing several advantages over litigation. One regularly cited advantage is that the overall costs associated with proceeding by ADR are often lower than the costs of resolving a dispute through litigation. Additionally, as compared to litigation, procedural rules applied during an ADR proceeding are generally more flexible and often controlled by the parties –advantages that can simplify the proceedings as well as lower costs. Further, unlike litigation, in ADR, the parties often choose a neutral third party to resolve their dispute. This latter advantage can prove to be especially valuable in highly-technical cases where the parties can carefully select an arbitrator with an appropriate degree of expertise in the relevant field of law (in litigation, the parties cannot select their judge).

ADR is also chosen by parties that are seeking to limit disclosure of private or sensitive information. Unlike litigation, ADR proceedings are generally not open to the public and the parties' filings are not subject to public disclosure. As a result, ADR is often used as a means of seeking resolution of a dispute without compromising sensitive information or airing out the business' dirty laundry. Several additional advantages are also regularly cited.

While ADR may have several advantages, the advantages can come at a cost. For example, in arbitration, a prevailing party may not be entitled to recover its attorneys fees and costs, whereas if the same claims were pursued in litigation, the prevailing party may be entitled to recover its attorneys fees and costs. Further, unlike litigation, parties are generally required to pay an arbitrator(s) for his or her time and facilities, an extra upfront cost to resolving a dispute. Additionally, a party's ability to appeal an arbitration award is severely limited. As a result, an erroneous arbitration award cannot be easily overturned through appeal. And finally, discovery (the ability for a party to discover facts in a dispute, whether through written discovery, depositions, or subpoena) may be more restricted or completely eliminated in ADR proceedings.

Laws governing ADR can vary from state to state. If you are interested in utilizing ADR or simply have questions, you may want to consider consulting a licensed attorney.

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