

# Take the fast boat to China

Avoid litigation and save your time, money and stomach lining with Alternate Dispute Resolution.

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ONCE UPON A TIME, conflict resolution meant swords and armor, but those days are long past. Today, litigation masquerades as the more civilized version of trial by combat. But blood is still shed in the form of time, money and executive stomach lining.

When factoring the costs of running a business, no one can dismiss the possibility that they may end up in civil court, either as plaintiff or defendant. With the world growing more complex each year, such a possibility edges ever closer to probability, while the chances for an outright victory decrease. In most cases, the financial burden for mounting an attack or a defense must be shouldered up front.

There are alternatives, ones which can help make the experience less costly, less time consuming and frequently less adversarial. As the name implies, "Alternate Dispute Resolution" (mediation, arbitration and their kinsmen) may be the answer.

Although Alternate Dispute Resolution is becoming more common, especially among larger corporations, many small businesses are, as yet, inexperienced with the growing phenomenon. This is unfortunate as "ADR" has demonstrated an astounding track record in recent years, both for quick resolutions and relatively bloodless ones. Many times the combatants not only resolve their differences, but also—because many ADR methods soften the acid producing hostility of traditional litigation—continue a productive business relationship.

As the wallowing barge of litigation plows ever more slowly through increasingly treacherous seas, is it any wonder why businesses—from the smallest sole proprietorship to the largest multi-national—are jumping ship for the sleek speed of the clipper named ADR?

## Historical precedent

The timeliness of Alternate Dispute Resolution on the legal scene is unquestionable. Although the layman often views the legal system as monolithic, it is actually experiencing a constant evolution. On more than one occasion, the American judicial system has undergone a fundamental change.

By the middle of the nineteenth century, U.S. court procedures had become so unwieldy that a general outcry arose



among all parties involved—litigants, lawyers and judges. In 1848, New York became the first state to completely rewrite procedures for trying civil lawsuits in its state courts.

Fifty years later, great thinkers like Roscoe Pound again called for reform. He wrote in 1906, "Uncertainty, delay and expense, and above all the injustice of deciding cases upon points of practice, which are the mere etiquette of justice...have created a deep-seated desire to keep out of court, right or wrong, on the part of every sensible business man in the community." In 1938, Pound's successors in interest succeeded in revolutionizing the system with the adoption of the Federal Rules of Civil Procedure.

With the exception that today a "sensible business man" could very likely be a woman, those sentiments echo the feelings of the modern business person. Nor are the highest levels of government unaware of the problem. In 1982, U.S. Supreme Court Chief Justice Warren Burger

expressed the thought that many of the "conditions that caused the dissatisfaction in 1906 are still with us.... The delays and high costs in resolving civil disputes continue to frighten away potential litigants, and those who persist and ultimately gain a verdict often see up to half of the recovery absorbed by legal fees and expenses."

## Mediation

Of all the ADR options, mediation is usually the least complicated and least expensive. The basic form of mediation pre-dates written history. Essentially, the involved parties agree to sit down and informally present their arguments to a neutral third party, often someone with legal and technical expertise in the field. The mediator functions as a facilitator and, if need be, a referee. Unless all sides reach an agreement, the suggestions and judgments of the mediator are non-binding.

Can anything so simple actually work? The people most experienced with mediation emphatically say yes. Mediation firms agree that a successful resolution can be reached about 85 percent of the time. Additionally, mediated settlements are seldom broken, but if broken, they can be enforced like any other contract.

Considering that the mediation process is non-binding, there is something almost metaphysical about the success rate. A closer examination reveals some logical explanations for this success. Businesses are familiar with the give-and-take of negotiation. They also want to control their own destiny and be part of the decision making process, instead of having it imposed by decree. Mediation supplies both.

The fulcrum for a successfully mediated dispute is the mediator. An experienced mediator will have the ability to sense when the parties are ready to compromise, competently suggesting alter-

## Legal matters

natives and moving the proceedings toward a mutually satisfying conclusion. Many mediated sessions end in a win-win situation, a significant consideration if keeping a business relationship intact is important.

Mediation is also fast (generally concluded in one day) and private. As common as they are, lawsuits can give a business the stigma that something has gone wrong. They can make clients, suppliers and even employees nervous, in addition to possibly giving competitors an edge. Mediation is a closed-session procedure, unlike the public forum of court.

With the cooperation of all sides, mediation can be appropriate for practically any civil dispute, big or small, including personal injury cases, real-estate or landlord/tenant disagreements, partnership and commercial contract conflicts, employment disputes and a multitude of others.

### Arbitration

Despite mediation's high success rate, the limiting factor remains the willing-

ness of opposing parties to consider the process. When former allies become adversaries, anger, frustration and a sense of betrayal—along with a strong desire to strike out and punish the other side—can overpower the reasoning mind's desire to get the matter resolved and get on with the business of business.

## Litigation tends to calcify the negative emotions.

Litigation tends to calcify the negative emotions, reducing the potential for constructive resolution and pushing the possibility of future business relations out the back door. Although nearly 90 percent of civil lawsuits are settled before trial (suggesting that the elusive creature known as "your day in court"

is an endangered species), by then the damage may be done and a great deal of time and money wasted.

In essence, arbitration follows the same course as mediation; the parties submit their dispute to a neutral third party (or parties, depending on the complexity of the disagreement). Unlike mediation, the arbitrator's judgments are normally final and only under unusual circumstances can the decision be appealed, either to the court system or another arbitrator. Non-binding arbitration is also an option.

Arbitration works most efficiently when the dispute is one of fact; one party stepped beyond the boundaries of the contract, defaulted on a promised action, or broke a law. New questions of law are best left to the procedural and evidentiary safeguards of litigation.

The biggest corporations in the country, indeed the world, now include arbitration clauses in contracts as a matter of course. Smaller businesses are beginning to follow their lead. Including an arbitration clause or clauses in a contract can be relatively simple. Conversely, in

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a complicated negotiation, such clauses can be very detailed.

Because arbitration agreements are contractual in nature, the parties have broad power to specify all issues, terms and conditions. They may even decide to exclude certain issues from arbitration. While state and federal statutes provide basic procedural guidelines for conducting arbitrations, the contract can delineate a multitude of specific provisions: how to notify each other of a dispute, where to hold the evidentiary hearings, selection of the arbitrator (the United States Arbitration Act calls for a single arbitrator but a panel of three is not uncommon), the arbitrator's qualifications, the extent of their power to decide and bind the parties to the decision, how cost will be apportioned, what jurisdiction's law will be applied, what appellate opportunities will be available (if any), etc.

For simple contracts many lawyers feel a general-purpose arbitration clause provides adequate protection. If the intent of a contract clause is primarily to avoid the hassles of lengthy and debilitating litigation a statement like, "Any

disputes between the parties shall be settled by arbitration," may suffice. This language can be adequate to indicate that the parties intend to arbitrate differences and is usually sufficient to permit a court to enforce the intent.

#### Before you proceed

You should understand that there is a trade-off for the speed, reduced costs and efficiency of binding arbitration: You may lose the opportunity for a complete judicial review of grievances.

With arbitration, the safeguards and protection provided by the judicial rules of procedure and rules of evidence are greatly reduced. These rules were developed to insure that both sides receive a fair hearing and justice is served. The best jurists and thinkers in this country have carefully developed these procedural and evidentiary safeguards through argument and deliberation for hundreds of years.

With this in mind, no one should assume that mediation, arbitration or any of the presently evolving ways to resolve contractual disputes are magic

beans. There are certainly cases when litigation represents the best alternative. Additionally, the different types of Alternate Dispute Resolution are not always interchangeable with one another. Careful thought and the advice of experienced counsel should be utilized before any final decision. Still, few would disagree that ADR techniques are here to stay and can offer viable and often quicker, less expensive and more gentle options to traditional methods.

Want more information? Contact the following organizations:

American Bar Association  
Standing Committee on Dispute  
Resolution  
(202) 331-2258

American Arbitration Association  
(212) 484-4000  
Judicate  
(800) 631-9900

For the names of mediators and arbitrators in your area call the state Bar Association. ■

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