Alternative Dispute Resolution – A Faded Fad or Viable Alternative for Business Disputes?

By Adam Campbell

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Over the years, alternative dispute resolution – or ADR – has enjoyed varying degrees of popularity. Not too long ago, all civil disputes ended up in litigation, often with a great investment of time and expense. Various forms of ADR then arose, usually touted as quicker and cheaper methods of resolution. More recently, sophisticated adversaries have questioned the effectiveness of ADR. Much of this dissatisfaction could have stemmed from not matching ADR to the parties' goals, or from misperceptions as to how the chosen ADR procedure would work. With these thoughts in mind, let's look at the two most common forms of ADR.

Mediation involves the use of a neutral person to guide the parties to a potential settlement. The mediator often is a retired judge, practicing attorney, or businessperson with expertise in a particular subject. The mediator can help the parties overcome specific roadblocks, lower tensions, develop alternative viewpoints, or re-evaluate the worth of the claims on each side of the dispute. All of these techniques can result in an outcome satisfactory to all parties, without further litigation.

Success of mediation often rests on two factors. First, mediation between parties who are not really ready to compromise will usually fail, while a mediation between motivated parties is more likely to succeed. Second, the parties must select the right mediator, whose credentials and ability to achieve settlement have the respect of all parties. Some disputes require a mediator whose opinions or technical expertise will hold sway. Others cry out for a mediator who forcefully directs the parties toward an agreement. Yet others will want a mediator with a softer touch who calmly guides the parties to a resolution.

The other common form of ADR is private arbitration. While many participants (and lawyers) view arbitration as simply litigation before a private judge or judges, arbitration actually is its own brand of proceeding with its own advantages and disadvantages when compared to litigation. On the positive side, arbitration rules generally provide for a quicker timeline and fewer procedures for the parties to follow. These advantages usually mean that the parties to arbitration will incur lower legal fees and obtain a final result sooner than would have been possible through the court system. On the negative side, arbitration typically involves added expenses for the arbitrator's fees, and possibly for the administration of the matter by a sponsoring organization that applies its own rules. Other disadvantages can accompany the speed of arbitration. For instance, the truncated procedures of arbitration sometimes provide for a more minimal exchange of information between the parties before a hearing than would be true before a court trial. That abbreviation can lead to surprises at a hearing. More significantly, arbitration usually is binding, meaning that the final decision of the arbitrator cannot be appealed, but rather vacated only for the narrowest of reasons, such as obvious bias.

As is the case with mediation, arbitration can be a viable option for the parties facing certain disputes. On the other hand, a trial before a publicly selected judge or a citizen jury may be the preferred option for other disputes. Private arbitrators have a vested interest in being selected to arbitrate the next dispute, thus lending credence to the theory that arbitrators tend to "split the baby" when deciding issues. Parties who seek a clear decision, and who need to preserve the right to appeal, should consider the traditional litigation option.

Once a business decides on arbitration, matching the proceeding to both the dispute and the parties' expectations becomes important. The selection of the appropriate arbitrator, or arbitrators, with the right knowledge and expertise will validate the eventual result for all parties. The choice of the rules to govern the arbitration likewise will determine the parties' trust in the process.

So, how can a business plan its ADR options in the most optimal manner? Before disputes arise, contracting parties can chose to insert clauses requiring ADR into their contracts. That path allows the parties to agree on a course of action before any dispute divides the parties. However, a word of caution is necessary here. The contracting parties should contemplate which advantages of ADR they seek, and which disadvantages they can tolerate, before using such clauses. Utilizing form contract provisions especially can lead to unanticipated results. Even if an ADR clause does not govern the legal dispute at hand, the parties still can opt for mediation or arbitration when a disagreement arises. Proper planning, including consideration of the right ADR method, and the selection of the appropriate ADR provider, remain key to the success of any chosen ADR proceeding. Advice from legal counsel who understands ADR and the types of disputes that a business may face also can help that business apply ADR appropriately to resolve its disputes.