

ALTERNATIVE DISPUTE RESOLUTION (ADR) FOR LESS COST AND RISK

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If you find yourself considering litigation to resolve a dispute, consider a couple of points:

- First, greater than 80 percent of all civil cases in most jurisdictions, and greater than 95 percent in many, settle at or before trial (from *Beyond Winning: Negotiating to Create Value in Deals and Disputes* by Mnookin, Peppet and Tulumello).
- Second, if most cases settle before trial, but at a late point in the process, it seems obvious that disputing parties could realize considerable savings in time and costs if they resolved their dispute early in the process rather than later near the time of trial.

Are there options other than the threat of litigation that can help disputing parties enjoy savings of time and money? Yes, there are. In general, *alternative dispute resolution* (ADR) processes may be used prior to suit or trial to provide these benefits. Furthermore, by engaging in an ADR process, disputants may reduce the risk of an “all or nothing” costly gamble of winning or losing their dispute in a trial before strangers. Finally, and most importantly, ADR permits participants to engage in self-determination. They control the process themselves and strive to reach common ground in order to resolve their dispute in a way that satisfies their respective needs and interests.

The spreadsheet in this article offers some cost and benefit considerations for using assisted alternative processes available to resolve disputes short of costly and time-consuming litigation. With some caveats, the spreadsheet compares ADR processes available today at reasonable cost in money and time. Generally referred to as “alternative dispute resolution” or ADR, these processes involve alternative dispute resolution professionals, *i.e.*, mediators, settlement facilitators and arbitrators, who are trained and experienced in modern ADR methods. ADR professionals assist disputing participants in resolving their disputes satisfactorily, timely and at significantly less cost than litigation. In addition, most ADR processes permit the participants themselves rather than strangers to control the dispute’s outcome. This would not happen in a formal court trial. This self-determination aspect of ADR is one of its most attractive attributes of ADR in addition to the time and cost-savings benefits.

In a dispute, each party must determine the balance between the benefits and costs of moving forward toward resolution depending on the factual and monetary circumstances involved. The spreadsheet provides criteria for use in choosing an ADR process that allows each participant to be heard, to negotiate fully and to maximize each participant’s opportunity to satisfy its needs and interests. The spreadsheet does not attempt to answer all questions concerning the important choices involved in selecting an ADR process. The intent is to create an ADR menu highlighting some important general criteria for comparing and selecting among several dispute resolution processes to resolve a dispute satisfactorily.

The spreadsheet assumes as a benchmark that the transaction costs of litigation constitute the most expensive and time-consuming dispute resolution process. Transaction costs include the time-based costs involved in preparing a case for trial and then trying it in a formal court setting. These costs include attorney and paralegal fees, pre-trial discovery costs, witness deposition costs, expert witness fees, photocopy costs, telephone charges, expedited document delivery or messenger services, etc. Related costs include the time expended by party litigants themselves and witnesses involved in preparing for and participating in the trial. A contract or business dispute likely will involve costs related to employee witness time spent away from their work assisting in trial preparation and participating in the trial.

The ADR processes described in the columns to the right of the litigation column in the spreadsheet tend to be less formal and time consuming than litigation, resulting in less expense. Moving to the right in each column, the spreadsheet describes the comparative benefits associated with ADR that allow disputing participants to retain control over the dispute's outcome rather than forfeiting that control to strangers, *i.e.*, judges or juries involved in a trial. Some transaction costs similar to those incurred in litigation will occur when using an ADR process, *e.g.*, attorney fees and costs and time spent involved in preparing for and participating in the ADR process, but to a far less degree. The spreadsheet indicates subjectively a decrease in ADR transaction costs as one moves to the right, reflecting that ADR processes typically involve much less time than litigation to reach a resolution and may be used even before a law suit is filed. Arbitration may include transaction costs approaching those of litigation but they generally tend to be less. Although less formal and time consuming than litigation, arbitration still suffers from the involvement of third parties who control the process and make the ultimate win or lose decision.

The rows in the spreadsheet provide criteria for comparing ADR processes with litigation and with each other. Moving down each column, the spreadsheet describes criteria, including benefits and costs associated with each process, and associated procedures typically involved with litigation and with each ADR process. The spreadsheet is not intended to constitute legal advice, but to give an overview of different processes for use as a guideline when considering the use of ADR.

ADR vs. LITIGATION

	<u>Litigation</u>	<u>Arbitration</u>	<u>Settlement Facilitation</u>	<u>Mediation</u>
<u>Procedure/Decision-Maker</u>	<ul style="list-style-type: none"> • Judge/Jury • Limited Selection of Jury 	<ul style="list-style-type: none"> • Parties Select Arbitrator(s) 	<ul style="list-style-type: none"> • Parties Select Experienced Settlement Facilitator • Court May Appoint Facilitator In Certain Cases 	<ul style="list-style-type: none"> • Parties Select Mediator Based On Mediator Model Styles, Subject Matter Expertise, Experience
<u>Process</u>	<ul style="list-style-type: none"> • Non-voluntary, <u>Binding Process</u> • Formal Evidentiary Rules, Discovery • Narrow Issue Focus 	<ul style="list-style-type: none"> • Voluntary (Could Be Mandatory) • <u>Binding Process</u> • Limited Discovery • Less Formal, Narrow Focus 	<ul style="list-style-type: none"> • <u>Voluntary, Non-Binding Process (may stop at any time)</u> • Informal, Creative, Interest-Based Solutions • Focus On Interests, Needs Outside Dispute Issues 	<ul style="list-style-type: none"> • <u>Voluntary, Non-Binding Process (may stop process at any time)</u> • Informal, Creative Interest-Based Solutions • Focus On Interests, Needs Outside Dispute Issues
<u>Control</u>	<ul style="list-style-type: none"> • <u>Third Party Strangers Decide Winner-Loser</u> • Only Decide Issues Before Them 	<ul style="list-style-type: none"> • <u>Third Party Strangers Decide Winner-Loser</u> • Only Decide Issues Before Them 	<ul style="list-style-type: none"> • <u>Parties Control, Determine Outcome, Fashion Agreement</u> • Evaluative, Directive Process, May Evaluate Strengths, Weaknesses • Advisory Opinions Possible • Non-Judgmental 	<ul style="list-style-type: none"> • <u>Parties Control, Determine Outcome, Fashion Agreement</u> • Facilitative or Evaluative Process • <u>Address Topics, Interests, Needs, Values Beyond Positions</u> • Non-Judgmental
<u>Risk: Cost/Time</u>	<ul style="list-style-type: none"> • \$\$\$\$ - Lengthy Time to Trial, Large Transaction Costs, Time, Expert Witness Costs • <u>All Or Nothing Decision Limited to Discrete Issues</u> 	<ul style="list-style-type: none"> • \$\$\$\$ - Less Transaction Costs • Limited Discovery • Typically All Or Nothing Award with Limited Reasoning Given • <u>Limited Appeal Rights</u> 	<ul style="list-style-type: none"> • \$\$\$- <u>Reduced Transaction Costs</u> • <u>Reduced Risk/Process Time</u> • Relatively Short Time To Setup Session 	<ul style="list-style-type: none"> • \$\$ - <u>Reduced Transaction Costs</u> • <u>Reduced Risk/Process Time</u> • Relatively Short Time To Setup Mediation Session

	<u>Litigation</u>	<u>Arbitration</u>	<u>Settlement Facilitation</u>	<u>Mediation</u>
<u>Confidentiality</u>	<ul style="list-style-type: none"> • Public 	<ul style="list-style-type: none"> • Private 	<ul style="list-style-type: none"> • Private 	<ul style="list-style-type: none"> • Private
<u>Advantages/Benefits</u>	<ul style="list-style-type: none"> • Decision May Establish Precedent, Preserve Business Core Values • Discourage Lawsuits • <u>Appeal Rights Preserved</u> • Enforceable Decision 	<ul style="list-style-type: none"> • No Court Docket Line • Parties Schedule, Shorter Time Than Trial • Lower Transaction Costs • Enforceable Award 	<ul style="list-style-type: none"> • <u>Reduced Transaction Costs</u> • <u>Brainstorming, Find Common Ground Leading to Creative Solutions</u> • <u>Problem Solving Rather Than Adversarial, May Discuss Strengths-Weaknesses, Advisory Opinion Possible</u> • May Preserve Continuing Relationship • <u>Agreement Enforceable</u> • <u>Still Litigate If No Agreement</u> 	<ul style="list-style-type: none"> • <u>Reduced Transaction Costs</u> • <u>Brainstorming, Find Common Ground Leading to Creative Solutions</u> • <u>Problem Solving Rather Than Adversarial, May Discuss Strengths-Weaknesses</u> • May Preserve Continuing Relationship • <u>Agreement Enforceable</u> • <u>Still Litigate If No Agreement</u>

Definitions

The following describes litigation and some ADR processes available from trained and experienced ADR professionals. The list includes some ADR processes not included in the spreadsheet.

Litigation – Litigation generally involves two or more parties involved in a dispute resolved through a trial that results in a public record of the outcome. A judge or jury issues a binding decision that may be appealed. Parties settle prior to trial greater than eighty percent (80%) of civil lawsuits filed in most jurisdictions in the United States and greater than ninety-five percent (95%) in many jurisdictions. In many instances, the parties involved in a lawsuit settle on the day of trial after a significant expenditure of time and money.

Arbitration – This confidential process generally involves two parties who present their respective versions of the matter in dispute to one or more arbitrators. Arbitrators conduct the hearing in a less formal setting than in a court proceeding. The parties may provide opening arguments, present documentary evidence and witnesses, cross-examine the opposing party’s witnesses and provide closing arguments and briefs. Arbitrators follow relaxed guidelines regarding the rules of evidence. Arbitrators decide the outcome by issuing a brief award. If the

parties agree, the arbitrators may issue a more detailed written award, with findings of fact and conclusions of law. There are very limited grounds on which an arbitration award may be appealed to a court.

Settlement Facilitation – A settlement facilitation process involves a neutral settlement facilitator and is voluntary and nonbinding, meaning each party may end the conference at any time prior to reaching agreement. The settlement facilitator (sometimes referred to as a neutral and who is a mediator for all intents and purposes) in joint session with the parties and engages them in discussion of their issues, topics, values, needs and interests. The neutral may conduct a confidential caucus with each party to explore options for settlement. The neutral may evaluate and point out the strengths and weaknesses of each party’s case, suggest options for settlement, make non-binding recommendations for resolution or give an advisory opinion as to the possible outcome if the case goes to trial. These characteristics distinguish settlement facilitation from the facilitative mediation model where the mediator guides the communications but does not suggest options, discuss strengths and weaknesses or opine about a possible trial outcome. Settlement facilitation is essentially the same as the directive-evaluative mediation process discussed below.

Mediation – Mediation involves a voluntary, non-judgmental, neutral and confidential communication process. A trained, professional mediator employed by the parties serves as a neutral intermediary and facilitates communications between the parties with the goal of finding common ground leading to a binding agreement resolving the dispute. In joint session with the parties, the mediator listens to the parties’ presentations, gathers information from the parties, assists the parties in communicating topics for discussion and reflects and reframes the parties’ presentations regarding their values, interests and needs. The mediator helps the parties in their brainstorming of options and creative solutions leading to agreement. The mediator may hold a separate, confidential discussion, or caucus, with each party to assist them in reaching an agreement. The mediator uses the caucus when the parties may feel more comfortable in discussing certain topics only with the mediator on a confidential basis or when the mediator determines that a caucus may be help clarify issues, discuss a party’s settlement offers or be helpful generally to the mediation’s progress. Use of caucuses during mediation will depend upon on the circumstances and the mediator’s approach to their use. Mediation is non-binding and voluntary, meaning the parties may withdraw from mediation at any time so long as they bargain in good faith up to that point. The agreement the parties reach in mediation generally is binding and enforceable.

As indicated, mediators may use several mediation models that should be discussed with the mediator at the time of employment. This discussion assures that the model the mediator uses meets the parties’ needs. For example, in a facilitative mediation model, the parties brainstorm options and create solutions to reach a resolution of the dispute that meets their needs. The facilitative mediator does not suggest options for resolution, point out the strengths and weaknesses of each party’s case, or give an advisory opinion regarding possible outcomes if the dispute proceeds to litigation and trial.

The evaluative or directive mediation model is similar to the settlement facilitation or mediation process discussed above but differs in some aspects. A mediator using the evaluative or directive

mediation model may suggest options for settlement, may discuss the strengths and weaknesses of parties' positions in a caucus, and, at the parties' request, may give an advisory opinion regarding the possible outcome of the dispute if the case goes to trial. Mediators following either the facilitative mediation model or the evaluative, directive mediation model do not act as advocates for either party or give legal advice.

Related Dispute Resolution Processes

Mini-Trial – This nonbinding, voluntary process is typically used by companies, private entities and government agencies involved in complex disputes involving significant dollar amounts. The mini-trial has some of the formal aspects of the beginning parts of a trial or arbitration in addition to the attributes of mediation. In the mini-trial, each party appoints a member to a three-member panel. The party's member should be someone at a high level in the organization or government agency who has had little involvement in the dispute and who is not intimately familiar with the dispute's factual underpinnings. The parties select a neutral, third-party member who chairs the process, guides the parties through the process and serves as a mediator if needed.

Each party makes an informal presentation of witnesses and evidence. Each party engages in some, limited informal questioning of the other party's witnesses and presents argument to the panel. After both parties complete their presentations, the parties engage each other in negotiations. Each party's panel member participates in the negotiations. The third-party neutral serves in the capacity of a mediator if the parties deem it necessary to facilitate a resolution or to resolve impasses as they may arise. An agreement reached by the parties is generally binding and enforceable.

Early Neutral Evaluation – This is a nonbinding process used to provide parties with an early evaluation of each party's case with the goal of reaching settlement early before each party expends significant transaction costs in preparing for trial. The parties involved make an informal presentation of facts and argument to the selected neutral. The neutral provides an advisory opinion on the issues raised by the parties. Using the neutral evaluation, the parties may then proceed independently with their negotiations with the goal of resolving the dispute. Typically, the neutral may not have further involvement with the parties once the neutral provides the neutral evaluation to the parties.

Dispute Review Board – This process has been used in large ongoing construction projects to resolve disputes as they arise on site during construction. At the beginning of the project, the parties (*e.g.*, the owner of the new facility and the prime contractor who will construct the facility) appoint one or more persons to serve on a panel of neutrals, *i.e.*, the Dispute Review Board. The panel members typically have legal, engineering and construction expertise and experience in the type of project involved. If a dispute arises, the Dispute Review Board assembles. The parties present facts, issues and argument concerning the dispute to the Dispute Review Board which relatively quickly issues a decision the parties have agreed will be binding.

Takeaways

- Use the spreadsheet to compare the benefits and costs of using ADR to achieve a timely “win-win” dispute resolution with expensive, time consuming litigation before strangers in a public forum in an all or nothing “win-lose” litigation gamble.
- Use an ADR process, *e.g.*, mediation, to resolve a dispute as soon as possible for a significant savings in transaction costs, recognizing that most lawsuits settle before trial, often just before the trial begins.
- Use creative and informal communications facilitated by a mediator to resolve a dispute timely, even before a lawsuit is filed, on common ground meeting each participant’s needs that is recognized as a principal, reduced-cost benefit of ADR.

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