

INSIDE THE MINDS™

TRENDS IN ALTERNATIVE DISPUTE RESOLUTION

LEADING LAWYERS ON UNDERSTANDING THE BENEFITS
AND DRAWBACKS OF ARBITRATION, MEDIATION, AND
NEGOTIATION IN TODAY'S LEGAL LANDSCAPE



ASPATORE

S. Bewersdorf, Foley & Lardner LLP; Amy M. Johnston, Miller Canfield Paddock and Stone PLC
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I N S I D E T H E M I N D S

Trends in Alternative Dispute Resolution

*Leading Lawyers on Understanding the Benefits
and Drawbacks of Arbitration, Mediation, and
Negotiation in Today's Legal Landscape*



ASPATORE

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A Primer on Alternative Dispute Resolution in Today's Legal System

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Introduction

I regularly counsel clients involving litigation matters. In discussing those matters, to the extent mediation or arbitration is not already compelled by the parties' agreements, one of the issues that I like to explore is whether some form of alternative dispute resolution makes sense as part of an overall legal strategy. The initial consideration of alternative dispute resolution is important for a host of reasons. As cases proliferate, flooding the dockets of already-overburdened court systems, parties more and more frequently are turning to non-traditional means to resolve their disputes. Litigation alternatives provide a vast array of potential benefits to clients, including efficiency, enhanced case control, confidentiality, and finality. The goal of this chapter is to provide an overview of the alternative dispute resolution (ADR) landscape. This chapter proceeds in six parts. First, I describe the three main types of ADR: arbitration, mediation, and negotiation. Second, I discuss the differences between formal and informal tribunals. Third, I briefly explain the laws and regulations governing ADR processes. Fourth, I identify the key advantages and disadvantages of ADR. Fifth, I outline strategies for addressing disputes through ADR, including determining whether ADR or traditional litigation is best for a particular client, preparing a legal strategy, and ensuring a successful outcome. Finally, I conclude by highlighting the emerging trends in ADR. Each of these topics alone could warrant a chapter. My goal with this chapter is to provide a general overview of the ADR landscape and a framework for considering ADR as part of an overall dispute resolution strategy.

Main Types of ADR

There are three main types of ADR, and they often overlap. As such, parties may turn to a combination of ADR processes to resolve their disputes.

Arbitration

Arbitration involves two or more parties submitting their dispute to a neutral third party—or panel of neutrals—who considers the parties' arguments and evidence and renders a judgment in favor of one of the parties. Often, an arbitrator's decision is legally binding, just like in

litigation, but it can also be non-binding. Even a non-binding arbitration award can become binding, however, if the parties agree to it. Once an arbitrator makes a decision, the court must confirm it, as arbitrators' awards are not self-enforcing. Once confirmed, the award has the force of a court judgment.

Unlike litigation, parties turning to arbitration both must agree to engage in this form of dispute resolution. They may do so once the conflict arises or through a contract in anticipation of a dispute. Once parties agree to arbitration, they generally forfeit certain legal rights and remedies—for instance, the right to a jury trial and right to an appeal—unless they can show fundamental unfairness, a high threshold.

Mediation

Mediation, like arbitration, involves a neutral third party. Unlike an arbitrator, however, a mediator only *facilitates* the dispute resolution process and usually does not make a definitive decision. A mediator typically assists the parties by pointing out the strengths and weaknesses in their respective cases. To achieve a resolution in mediation, both parties must agree to the settlement for it to be binding. Parties therefore do not forfeit their legal rights and remedies by agreeing to mediation.

The main goal of mediation is to reach a compromise, a result the mediation process helps foster by ensuring the contents of mediation discussions are confidential. This encourages the parties to be open and honest, as they know their disclosures cannot be raised in court if the parties subsequently decide to litigate their case.

Negotiation

Negotiation involves the parties engaging in direct discussions to work toward a mutual agreement. This typically occurs by way of bargaining between the parties' lawyers. Parties can also meet face-to-face, although lawyers still generally lead the process by representing and advising their clients. Once the parties agree to settle, they execute a binding agreement.

ADR Forums

Formal Tribunals and Mediation Processes

Formal tribunals feature structured procedures and usually take place in a controlled setting. Arbitration, both binding and non-binding, is usually a more formal setting, although mediation can also be conducted in a formal setting. Formal tribunals may appeal to more sophisticated clients whose main interests are resolving their dispute quickly and cost efficiently, while also having the predictability of a court-like process and procedure.

Informal Tribunals and Mediation Processes

An informal ADR tribunal is simply any dispute resolution process that does not follow standardized rules and procedures. One example is a company that has an internal employee dispute resolution department. Informal tribunals are particularly well suited to unsophisticated clients who may be intimidated by a more formal setting. These tribunals allow clients to focus on the substance of the dispute and the possible solution, rather than extrinsic factors, such as fear of speaking before a formal arbitration panel or judge or following specific procedures.

Laws Governing ADR Processes

The laws governing the ADR process vary widely by jurisdiction. For example, although most states have promulgated statutes based on the Uniform Arbitration Act (UAA) or the Revised Uniform Arbitration Act (RUAA), some states have modified or rejected particular provisions of these acts. If the dispute involves an international party, a lawyer should investigate whether that party's home country recognizes ADR at all, and if so, how its laws differ from those in the United States.

Changes in ADR Laws

One current trend in ADR laws is broader recognition of the validity of ADR processes and awards. The RUAA, for example, tends to give arbitrators powers to award remedies similar to those ordered by judges.