Business Alternative Dispute Resolution (ADR) Provides Fast, Fair, Flexible, Expert, Economical, Private, Customized Justice

By David J. Abeshouse

I. Introduction

Several years ago, I attended a gathering in Manhattan of nearly 100 business neutrals—commercial arbitrators and mediators. One of the presenters asked the assemblage to describe succinctly the basics of ADR (Alternative Dispute Resolution). I raised my hand, eventually was called on and out spouted this torrent of words: "ADR provides fast, fair, flexible, expert, economical, private, customized justice." The crowd reacted favorably, I was asked to repeat it so that others could jot it down, and, so, the title of today's article was born.

ADR (also referred to increasingly as "Appropriate" Dispute Resolution) encompasses several non-court processes, the best known of which are arbitration and mediation. Many myths and misconceptions about both abound, even among lawyers, some of whom are unfamiliar with the profound distinctions between these two very different forms of dispute resolution. The transactional lawyers who draft business agreements often lack direct experience in dispute resolution, which usually relegates them to mechanically re-using clauses from the past, which may or may not have worked well in those circumstances but clearly are not tailored to the present contract. So summarizing the differences between arbitration and mediation, and occasionally contrasting them with the more familiar court litigation, should forge a good starting point.

(a) Business/Commercial Arbitration

Arbitration (here we address private, not court-annexed, arbitration) essentially is a more streamlined form of litigation, typically conducted in a conference room in a law firm, business party's office, hotel or private club. The arbitrator hears evidence and renders a binding, enforceable award. Federal and state court procedural and evidentiary rules do not apply unless specifically invoked; instead, the applicable arbitral rules, usually promulgated by the governing forum, are designed to expedite the process and afford the parties, their counsel, and the arbitrator(s) more control over how the matter proceeds. (Examples of commercial arbitration rules can be found on the websites of the ADR forums/providers mentioned in the conclusion of this article.) Control over the process can be accomplished in the first instance by including a customized ADR clause in the parties' underlying agreement (rather than the tired, old "standard" clause of two or three bare sentences, use of which squanders the opportunity to guide strategically the future course of any dispute arising out of that agreement).

In the absence of an existing contractual clause, enlightened parties can agree, after the dispute has arisen, to submit it to arbitration by executing a simple submission agreement (a/k/a consent to arbitration); however, it generally is better to put a process in place during the parties' contractual "honeymoon" phase than to try to arrange it once the parties have asserted their enmity. The confluence of the contractual provision, the governing arbitral rules and the participants' input charts the course of the proceeding, which is flexible and party driven.

(b) Business/Commercial Mediation

Mediation, at least in the commercial or business arena, is a settlement negotiation facilitated by a neutral trained in techniques geared to get the parties to "yes." Parties and lawyers can use mediation either before or while the parties are engaged in litigation or arbitration. It also occasionally surfaces in the context of putting together a deal between or among non-disputing parties seeking to work together (*i.e.*, "deal mediation"). We address here mediation principally as a business dispute resolution modality.

What happens in mediation? The full answer is more properly the topic of a separate, longer article or book; but for present purposes suffice it to say that the parties, their counsel and the mediator convene in settlement mode, and the mediator listens to both sides' offerings. It is more of a conversation than an interrogation. Mediators apply numerous techniques to help bring the parties together. Many mediators use the caucus, or private meeting, to elicit information—held in confidence absent express permission to reveal—that can help the mediator to assist the parties in achieving resolution of their dispute. Other mediators prefer to keep the parties in joint general session at all times, reasoning that only in this way can the parties effectively hear each other and the mediator maintain the utmost neutrality.

Most commercial mediators are "facilitative" in nature, whereas some are more "evaluative," either suggesting or opining outright regarding how (and at what dollar figure) the case should settle. Some combine elements of

both (as well as other approaches, such as "transformative" mediation techniques). Mediators add value to the settlement process by, among other things, changing the usual two-sided dynamic, and suggesting creative solutions (based on experience and training) that the parties themselves may not have conjured up.

From that quick foundation, we now examine the characteristics of ADR that might make it suitable for use by clients through inclusion in their business agreements.

II. Fast

(a) Arbitration

Business arbitration usually goes significantly faster than court litigation. Although exceptions occur, statistically cases of similar levels of complexity traveling through the New York State courts and the private processes of the main domestic arbitral forums reflect arbitration durations of between one-third and one-quarter those of litigation. Also, past complaints that arbitrators were more reluctant than courts to grant dispositive motions have been met recently with amendments to arbitration rules encouraging appropriate use of dispositive motions, which has leveled that playing field and neutralized the criticism.

Moreover, the actual time devoted to testimony and argument at trial (typically 3 to 4 hours of active trial time per court day) compares unfavorably with that at arbitration (flexibly, depending on the preferences of arbitrators and parties, from 6 to 10+ hours of active testimony and argument per day). So multi-day hearings in particular can be efficiently attenuated via arbitration, where, for example, a 5-day trial could be heard in a 2 or 3-day arbitration hearing. This is a great boon to all, especially parties conducting hearings in distant cities, as it abbreviates travel. And beyond the math, arbitration also streamlines the processes by eliminating some of the more time-consuming and less useful aspects of court litigation such as excessive discovery and repetitive or otherwise unnecessary motion practice. Most businesses cannot risk the uncertainty inherent in having a significant case languish in court for several years, so the more expeditious arbitration process is preferable in this regard.

(b) Mediation

Business mediation usually is faster than court litigation or even arbitration. Whether the mediation commences instead of arbitration or court litigation, or during it, mediations usually take between one and four months from start to finish, and many are completed with just one in-person session. Shorter duration = fewer billable hours expended (= fractional cost relative to adversarial proceedings).

III. Fair

(a) Arbitration

Commercial arbitration is fair, incorporating essentially all of the procedural safeguards of court litigation: due process, designated rules, standards of adjudicator training and conduct, and even review of decisions. Awards may be reviewed either through the courts based on federal (Federal Arbitration Act) or state (e.g., NY CPLR Article 75) statutory standards and the interpretive decisional law thereunder, or optionally—if contractually provided—through expedited arbitral review (appellate) panels that some forums recently have instituted. For many reasons, not the least of which is that widespread use of arbitration helps relieve overburdened court dockets, federal and most state courts strongly favor arbitration, with the vast bulk of case decisions upholding arbitral awards and supporting broad interpretation of the arbitrability of cases.

(b) Mediation

Commercial mediation is fair because the parties themselves determine the outcome, assisted by counsel and the mediator. Although the process is flexible, there are rules and standards. A party is not compelled to settle through mediation; it is a consensual act. No one other than the parties commits them to a particular result. And if they choose not to resolve the dispute through mediation, they can resort to the binding dispute resolution options such as court litigation or arbitration and delegate responsibility for the eventual outcome to a neutral decider.

IV. Flexible

(a) Arbitration

Business arbitration is flexible; the parties are free, almost without limit, but within the bounds of legal reason, to determine the outlines and particulars of their proceeding by including an arbitration clause in their agreement that sets out how they want the matter to proceed. Several examples distinguish the flexibility of arbitration from the more one-size-fits-all nature of court litigation—in your arbitration clause, you can: (i) select the forum of the proceeding (*e.g.*, American Arbitration Association, JAMS, CPR); (ii) decide which set of rules applies; (iii) determine the breadth or limitation of scope of the arbitration clause—in other words, what is covered by the clause and what is not (*e.g.*, relegating very low-dollar claims to be heard in small claims court); (iv) designate whether one or three arbitrators will constitute the panel; (v) mandate general or specific educational or experiential credentials of the arbitrators to qualify to serve, to ensure expertise of the panel; (vi) designate the venue or locale of the hearing as well as the applicable governing

law; (vii) create a "stepped" clause (*see* section VIII(b), below) incorporating ratcheted levels of resolution efforts such as negotiation and mediation as conditions precedent to arbitration, with stated criteria for moving from one phase to the next; (viii) set some general or specific limits on discovery (here, it is usually advisable to tread lightly, leaving flexible interpretation of stated principles to the arbitration panel, or risk infecting the entire proceeding); (ix) allow in smaller cases for a documents-only evidentiary hearing or a telephonic hearing; (x) permit witness affidavits in lieu of direct testimony so long as the witness appears for cross-examination; (xi) provide that a failure of a party to pay its share of deposits may result in specified sanctions; (xii) direct that the form of the award issued by the arbitrator be either a bare, standard award or a fully reasoned award; (xiii) dictate whether the arbitration panel has discretion to apportion costs and expenses, and/or award prevailing party attorneys' fees; (xiv) invoke arbitral appellate review; and (xv) provide many other options for the proceeding. Note that for enforcement purposes, an arbitration clause always should provide that judgment on the award rendered may be entered in any court having jurisdiction.

(b) Mediation

Business mediation similarly is flexible for all the same reasons as arbitration, plus there are fewer rules to follow in the proceeding itself. There are no evidentiary strictures to which the parties must adhere; sometimes "venting" can help to move the matter along. Ironically, parties obtain their "day in court"—the opportunity to have their stories heard—better in mediation than they do in court litigation. The mediator, the parties, and their counsel are free to determine how they will proceed, and can change the process "on the fly," so long as they maintain standards. For example, some mediations start with separate *ex parte* conference calls with the mediator, whereas others have all sides on the phone together. Similarly, in many commercial mediations the parties submit pre-mediation statements and supporting documents to the mediator before the first in-person session to inform the mediator of the relevant facts, law and settlement positions of the parties. The participants can agree that these pre-mediation statements will be exchanged between the parties or will be private or will be hybrid—partly exchanged and partly private. Another example of mediation flexibility is that whether or not to break out into a private caucus might be decided on the spot, without advance notice, based on how the discussion has developed to that point. A mediation also might include a site visit, a video or online demonstration, provision of information from someone not directly involved in the matter but who need not be qualified formally as an expert witness, or a welter of other possibilities that might be helpful to the process. The creative results that mediation can produce go far beyond those of court litigation or arbitration, where the boundaries are delineated by the rules.

V. Expert

(a) Arbitration

Commercial arbitration affords expert resolution of disputes because the parties have the opportunity—both in drafting the governing contractual clause and often in the initial administrative conference call with the case manager of the arbitration forum—to have a say about what the qualifications of the panelist(s) will be. One might require that the members of a tripartite panel include a lawyer with at least 15 years of commercial litigation experience; a CPA with similar years of audit or fraud or tax experience; and an industry business person with decades of ownership or senior management experience in the garment industry, the oil and gas business or financial services. Parties could seek a French-speaking sole arbitrator with both intellectual property and commercial litigation experience at large- or medium-sized law firms or corporate in-house law departments. Although the possibilities are wide open, it is advisable to avoid excessive specificity or risk rendering the clause less susceptible of performance.

In the ordinary course, once the forum has considered the parties' preferences, they will be provided with the resumes of prospective arbitrators from among whom they may select their choices through the "strike and rank" method. Factors to consider here include the arbitrator's substantive business or legal area experience, presence of a meaningful track record of service as an arbitrator, and the level of arbitrator training. Does the arbitrator's resume reflect substantial and continuing involvement in training over a number of years? Does it reflect that s(he) has conducted numerous arbitrations in the past, as a neutral? Do the substantive areas of the prospective arbitrator's business or legal experience match well with the nature of the matter at hand? What is the arbitrator's reputation for personality, patience, punctuality, proactivity, and other performance criteria? Engaging in this sort of basic pre-selection analysis helps parties reap the benefits of being able to select the adjudicator (disfavored as "judge shopping" in the court system).

(b) Mediation

Commercial mediation applies expertise in both the subject area of the controversy and also mediation itself. So parties and counsel considering engaging a mediator will look to the prospect's background in the substantive area(s) of the case as well as in mediation.

Training is key. The 40-hour mediation certification courses are just the beginning. It is widely accepted that it takes most mediators hundreds of hours of training and several years of mediating experience to develop substantial expertise as a mediator.

VI. Economical

(a) Arbitration

Business arbitration is economical because—as noted earlier—shorter duration and lesser expenditure of hours necessarily yields lower costs, even after adding in the costs of arbitration. The cost of the arbitrator is subsumed by the savings from the fractional duration of the entire process. This becomes particularly clear when considering that the number of hours an arbitrator typically spends on a given matter is a very small proportion of the time that the lawyers representing each party spend on the case because, for example, it takes far greater expenditure of time to create and assemble documents and deal with clients than it does to read those documents. (A fair generalization would be that other than in small, simple cases, the arbitrator might spend one-tenth the time on the case that the lawyer(s) representing each side would spend). Usually, all parties split the costs of arbitration.

With a three-arbitrator panel, the arbitral costs will increase, but need not triple, as the Chair of the panel can deal exclusively with preliminary matters such as discovery issues, and given the special expertise of some neutral arbitrators (*e.g.*, a CPA with a Certified Fraud Examiner or Business Valuator certification, or someone with specific industry expertise), costs for expert witnesses may be eliminated. Three-arbitrator panels should be reserved for large and complex cases, particularly those where having three adjudicators with disparate areas of expertise will be helpful. (The old method of each side selecting an arbitrator, two of whom in turn together select the neutral chair of the tripartite panel, generally has become disfavored.) Regardless of the number of arbitrators on the panel, counsel never will waste several hours—as they might on several occasions during the course of a court case—sitting while waiting for the case to be called on the calendar, often to have it adjourned to another date, both of which instances get billed to the client. Arbitration is individualized justice, not mass justice, and that results in many often overlooked areas of economic savings.

(b) Mediation

Business mediation is economical because it is even more expeditious than arbitration, and with far fewer hours billed by counsel and mediator, the cost savings relative to court litigation and even arbitration can be, and usually are, immense. Inasmuch as over 95% of business litigations eventually settle before trial, getting an earlier and better settlement via mediation makes sense for most parties in most cases. Essential discovery can be conducted early, setting the stage for prompt resolution that saves the parties the vast bulk of fees and expenses that they otherwise would have incurred.

VII. Private

(a) Arbitration

Commercial arbitration generally is private and confidential, and can be made more so by the execution by the parties and counsel of a confidentiality agreement, which can be "so-ordered" by the arbitrator(s). Business arbitration awards are not published like court decisions, and there exists no searchable database of these private awards, so arbitration awards set no precedent. Arbitrators are held to standards of privacy and confidentiality that ensure that they will not divulge information regarding a proceeding over which they have presided, and the law generally protects arbitrators from being called to testify as witnesses in subsequent proceedings. The privacy and confidentiality of business arbitrations stands in stark contrast to the "public record" of court litigation and is viewed as a significant advantage to certain businesses that prefer not to air their dirty laundry in public, particularly considering the easy access to video and online information that abounds today.

(b) Mediation

Commercial mediation is private. Mediators are held to standards of privacy and confidentiality that ensure that they will not divulge information regarding a proceeding in which they have participated, and the law generally protects mediators from being called to testify as witnesses in subsequent proceedings. Most private mediation agreements (which parties and counsel execute to engage the mediator) reiterate these principles, so they enjoy contractual foundation as well.

VIII. Customized

(a) Arbitration

Business arbitration is customized, as noted in section IV(a) above on flexibility. This starts with the contractual arbitration clause and follows in the arbitration panel's application of the rules and clause to developments in the matter. And because in arbitration the rules of evidence are bent, not broken, the progress of the hearing itself is not impeded with excessive evidentiary objections and arguments. Arbitrators tend to take most evidence "for what it's worth," assessing how relevant, probative and reliable it is, based on their experience. There is no need to protect the evidentiary integrity of the arbitral process from layperson jurors. Private arbitrators as a rule do

not maintain large dockets, so they can afford each case more individualized attention than can judges, who are governmental employees.

(b) Mediation

Business mediation likewise is customized, as noted in section IV(b) above on flexibility. Indeed, one can create a "stepped" clause, encompassing multiple levels or steps of dispute resolution. For example, a stepped clause might start with requiring negotiation of a conflict and move through increments ending in either binding arbitration or court litigation. Perhaps the best known of these stepped clauses is the "med-arb" clause, which first requires mediation of the dispute and, failing that, arbitration (usually before a different neutral, because the mediator has been "tainted" by hearing non-evidentiary and legally irrelevant information proffered in a wholly different context with a different purpose than parties and counsel apply in arbitration). Every aspect of mediation is tailor-made for the proceeding at hand, and changes in the process can occur on an as-needed basis.

IX. Conclusion

So, business ADR indeed provides fast, fair, flexible, expert, economical, private, customized justice for parties who invoke ADR processes. Doing so takes a modicum of lawyerly strategic foresight, deciding which process(es) to use; how to customize the myriad potential particulars of the clause to best suit the situation and/or the party being represented; and how best to raise the negotiation issue of including an ADR clause in the parties' underlying business agreement. The many advantages of ADR answer in large measure that final issue, so it is important to be armed with knowledge about ADR processes. Online resources for drafting clauses can be found on the websites of ADR providers/forums such as the American Arbitration Association (AAA) (www.adr.org); JAMS (www.jamsadr.org); and CPR (www.cpradr.org); as well as best practices organizations such as the College of Commercial Arbitrators (www.thecca.net). The AAA last year designed an online tool to help practitioners construct clear and effective ADR provisions (www.clausebuilder.org). This article and these online resources furnish a good starting point for fulfilling a lawyer's professional obligations to (i) fully inform clients about all options for resolving conflicts that might arise out of a business agreement, and (ii) be able to draft an appropriate dispute resolution clause if the informed client wishes to invoke ADR.

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