

ADR vs. Litigation: A Guide for Businesses



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When is Alternative Dispute Resolution (ADR) the right choice? The only correct answer is; it depends. This non-answer is often the best initial response when drafting agreements and considering the addition of an ADR clause. Further questions ultimately determine whether ADR is called for.

ADR refers to the resolution of disputes outside of Court litigation. One form is mediation—whereby a neutral third party (mediator) works with parties to reach a mutually acceptable resolution. A mediator is a facilitator and will not impose a resolution on the parties. During arbitration, another form of ADR, the arbitrator acts as a private judge, taking evidence and rendering a binding award enforceable by a Court.

Most clients and their transactional lawyers abhor talking about the end of a business relationship while trying to build one. But inserting a “boilerplate” clause regarding litigation or ADR that you believe will skirt controversy while negotiating a deal may later prove disastrous. While dealmakers generally focus on the economic advantages of a successful transaction, considering the economics of what happens if a deal fails is equally important.

Always consider mediation

Whether arbitration is suitable is a more considered discussion; inserting a mediation clause in a contract is a must. A mediated resolution could save a client significant costs in the future. While business

people negotiate for a living, courts follow the law. The outcome of a litigation is win or lose; not, e.g., whether parties can negotiate a payout of monies owed. That outcome is only achievable through mediation.

Ideally, a contract will contain a clause requiring the parties to mediate prior to litigation or arbitration. Some say it's premature to mediate so soon, but first mediating a conflict before an unbiased neutral makes particular sense. A seasoned mediator will request that the opposing parties come prepared with information -- even with an accountant or other expert-- to detail the situation and increase the likelihood of a resolution. Even if ultimately unsuccessful, mediation can give the parties a perspective as to their positions and possible outcomes.

Arbitration is expeditious, cost-effective

Time is money. Arbitration presents an excellent opportunity to resolve problems within a year – not years, as is often the case in Court. Additionally, you can choose who will preside over your dispute, unlike a Court litigation.

Most clients can ill afford to divert attention from their business and a contentious litigation is expensive. While in arbitration there will be document discovery, but interrogatories or depositions are unlikely, providing substantial cost savings to businesses. Arbitration may appear to have higher costs upfront, with arbitrator and filing fees, but long-term savings are realized when a controversy ends quickly without excessive discovery, Court motions and appearance costs.

When to Litigate

Litigation should be avoided in low stakes controversies. A client's ability to sustain litigation costs, the time involved and the need for an expedited ending to the problem must be examined. More complicated or longer term contractual relationships with more money

at stake will usually warrant litigation.

Other considerations

An ADR provision should always reserve the right to seek immediate injunctive or similar relief in Court in an emergency situation. New York's Court practice statute, CPLR 7502(c) provides for injunctive relief in aid of arbitration. The parties may also choose to insert rules for obtaining immediate relief in arbitration, including, for example, under the AAA Rules on Emergency Procedures.

Unless your controversy has a gazillion dollars at stake, insert a clause requiring the matter to be arbitrated by a single arbitrator. Otherwise, the default rules of different arbitral forums may require a three member panel for a controversy exceeding certain amounts, tripling arbitration fees.

A simple arbitral forum selection clause will save on costs associated with a Court-appointed arbitrator. Expenses can be further controlled through low cost forums, such as the Nassau County Bar Association's Arbitration and Mediation Panels.

Arbitration clauses should also state that the arbitration or mediation will be held locally to save on travel costs.

Final cautions

While arbitrators can compel parties to produce documents, they may not be able to compel out of state or other non-parties to produce documents or appear at trial. Arbitration is a great forum for a client if the documents and witnesses needed to prove a case can be obtained “in-house.” This is becoming more achievable as emails often provide a written record of communications and transactions.

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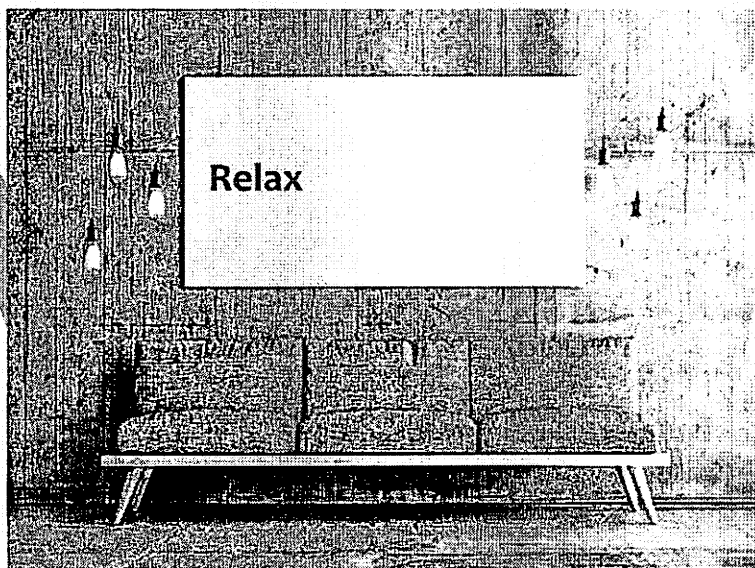
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