

# SOMETIMES YOU CAN PICK YOUR POISON: MEDIATION, ARBITRATION OR LITIGATION?

By Rachel S. Fleishman



Over the last decade, the use of alternative dispute resolution procedures has increased dramatically. More and more, parties are opting to turn to mediation and arbitration as a means of resolving disputes more quickly, and at less cost, than is typically associated with full-scale litigation. Sophisticated in-house counsel and business owners may already be familiar with the potential advantages and cost-savings presented by mediation and arbitration. However, many business owners are not yet familiar with the differences between mediation, arbitration and litigation. This article will briefly describe and compare these different approaches to resolving disputes.

## LITIGATION

In the past, most business disputes ended up in litigation. One party would file a complaint against the other party, and the case would drag through the court until it was eventually resolved, often years later, by settlement or, much less frequently, by verdict after trial. On the downside, the cost of discovery – the process of exchanging documents, taking depositions and gathering evidence from third parties – is often substantial. Since the procedural rules governing the scope of discovery in litigation are generally liberal, it is difficult for a party to effectively limit the time, effort and expense associated with discovery. In addition, busy courts often take months to decide even simple motions. Actually getting to a trial can take years. In sum, litigation can be expensive and time-consuming, and can leave the litigants feeling as though they have no control over a process that may have dramatic consequences for their business. On the other hand, though, where the subjects at issue in your dispute are particularly complex and the potential damages are substantial, litigation may be the most advantageous forum

for your case. This is especially so if you are a defendant with strong technical legal defenses to a claim. In such a case, an experienced judge might provide your best chance of ultimately obtaining a good result. Equally important, litigation offers greater possibilities for appeals, if necessary, than arbitration.

## ARBITRATION

Parties can agree by contract to arbitrate a dispute. An arbitration agreement can be entered into long before a dispute ever arises. Indeed, today, many different kinds of business and consumer contracts contain “arbitration clauses,” which require that disputes be submitted to arbitration for resolution. In arbitration, the dispute is resolved by either a single arbitrator or by a panel of arbitrators. One common style of arbitration is for the parties to agree to use a panel of three arbitrators, where both parties select one arbitrator and then the two “party arbitrators” select a third “neutral arbitrator.” The case is thereafter heard by the three-person panel, which issues a written decision that is binding for both parties. The discovery that is permitted in arbitration is typically more limited in scope than what would be permitted in litigation, often much more so. Thus, the costs of arbitration, in all but the largest cases, are often less than the costs of litigation. One potential downside of arbitration is that the arbitrator or arbitration panel might be less familiar with the applicable law than a judge would be. Another downside is that the ability to appeal an arbitration decision to a court is very limited.

## MEDIATION

Of the three options discussed, mediation is the most informal process. Mediation is entirely voluntary. Parties can decide to mediate at any time, even if they are already in the midst of litigation or arbitration. Frequently, mediation is used as

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an effort to settle an ongoing litigation. If parties decide to mediate, they first have to agree upon a person to use as the mediator. The person retained to act as the mediator may be a former judge, a lawyer who is experienced in the relevant field of law, or a lawyer who works as a professional mediator. The role of the mediator is essentially to act as a facilitator, or go-between, to help guide the parties through settlement negotiations. Usually, no discovery is conducted as part of the mediation, although the parties will often have conducted at least some discovery in the course of litigation or arbitration prior to deciding to engage in mediation. The mediation session takes place in a conference room, not a courtroom, with the mediator engaging in “shuttle diplomacy,” going back and forth between the parties, delivering offers and cajoling the parties, sometimes while discussing the merits of the case and the risks to the parties of proceeding with litigation instead of settling. The mediator has no power to force the parties to settle, but rather, can only try to convince the parties to reach a mutually satisfactory settlement. Mediation with an experienced and skilled mediator can be a highly effective solution. For this reason, there are growing numbers of court-ordered mediation programs, where a judge can order litigants to engage in mediation as a means of trying to resolve a case. While a judge cannot force litigants to settle, the judge can force the litigants to at least show up and participate in mediation.

Resolving business disputes can be time-consuming, expensive and contentious. Mediation and arbitration, used wisely and by experienced lawyers, can be an effective means of reaching a speedier and more cost-effective result than litigation.

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