



## Alternatives to Litigation

Unrated

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There are a number of legal methods and procedures available to entrepreneurs. These alternatives generally expedite the resolution of disputes without the need for initiating or continuing the formal (and costly) process of litigation. These alternatives are broadly referred to as that of "alternative dispute resolution" (ADR).

Entrepreneurs often prefer ADR to formal litigation because with ADR, proprietary information, trade secrets, and the like are not subject to the potentially intense scrutiny of the judicial process, where the right of access by the general public and news media can afford competitors the opportunity to misappropriate and use otherwise confidential information.

The most commonly known method of ADR is arbitration, which is where a neutral third-party is selected by the disputants to hear the case and render an opinion, which may or may not be binding on the parties depending upon the terms of the arbitration clause or agreement. In addition to arbitration, various forms of mediation, private judging, mini-trials, and moderated settlement conferences are available to companies who are unable to independently resolve their disputes but who wish to avoid the expense and delay of the full litigation process.

Each type of ADR offers certain advantages and disadvantages, which may make one process far more appropriate for resolving a particular dispute than another. Therefore, the procedures, costs, and benefits of each ADR method should be carefully reviewed with experienced legal counsel.

### General Strategic Benefits of ADR

- **Faster Resolution of Disputes.** Reducing delays in resolving legal claims was one of the driving forces behind the ADR movement. As the number of civil filings continues to increase, it is clear that the courts cannot expeditiously accommodate the influx unless many parties obtain a final resolution of their disputes outside the courthouse.
- **Cost Savings.** In a recent study by the accounting firm of [Deloitte Touche](#), 60 percent of all ADR users and 78 percent of those characterized as extensive users reported that they had saved money by using ADR. Savings ranged from 11 percent to 50 percent of the cost of litigation.
- **Preserving Relationships.** ADR allows parties to resolve a dispute without engendering the bitterness that may destroy a business or personal relationship.

- **Protecting Confidential Information.** Traditional litigation often results in public disclosure of proprietary information, particularly in commercial disputes. Although one party may seek a protective order restricting the other party's access to its trade secrets, the mere process of obtaining such an order subjects the confidential information to outside scrutiny. ADR procedures allow the parties to resolve disputes while better protecting confidential information.
- **Flexibility.** ADR allows the parties to tailor a dispute resolution process that is uniquely suited to the matter at hand. Parties can select the mechanism, determine the amount of information that needs to be exchanged, choose their own neutral, and agree on a format for the procedure.
- **Durability of the Result.** Resolutions achieved by consensus of the disputants are less likely to be challenged than resolutions imposed by third parties.
- **Better, More Creative Solutions.** By giving litigants early and direct participation, ADR provides a better opportunity for achieving a resolution based on the parties' real interests. Such agreements often involve terms other than the distribution of dollars from one party to another, and may well produce a solution that makes more sense for the parties than one imposed by a court.

#### Situations in Which ADR is Successful

- **An ADR Contract Clause is in Place.** The most important indicator of possible ADR success is the existence of an effective contract clause that provides for the use of ADR in the event of a future dispute.
- **Continuing Relationships.** If a continuing relationship between the parties is possible (as with franchisors and franchisees or suppliers and customers), the chances of ADR success are greatly enhanced. The parties can then continue making money from each other for the duration of their agreement rather than severing the relationship and suffering the cost and disruption of litigation.
- **Complex Disputes.** If a case involves, for example, highly complex technology, there is a substantial chance that a jury and even a judge may become confused. Under these circumstances, ADR may be the best option, particularly if the proceedings are conducted before a neutral person who is an expert on the subject of the dispute. Since the parties themselves select the arbitrator, they have the opportunity to choose a well-qualified candidate rather than accepting the random assignment of a judge or being subjected to the caprices of the jury selection process. In addition, the American Arbitration Association has enacted rules specifically designed for use in complex cases.
- **Relatively Little Money is at Stake.** If the amount of money in dispute is relatively small, the cost of litigation may approach or even exceed that amount.
- **Confidentiality is an Important Issue.** In an ADR proceeding, the parties can more easily maintain confidentiality, not just of business information but of the nature of the case. The need for confidentiality can prove to be more important than any other consideration in selecting a dispute resolution process.

#### Special Situations

- **Skeptical and Mistrusting Adversary.** The adversary may see the other side's efforts to employ ADR after a complaint has been filed as a ploy designed to get an edge in

litigation. If the parties are sufficiently hostile, one side may refuse to agree to otherwise well-qualified arbitrators simply because they were suggested by the opponent.

- **Parties or Counsel with Harsh Attitudes.** When the parties or their counsel are particularly emotional, belligerent, or abusive, they are likely to be focused on airing their grievances, not upon an imminent resolution of the case, thereby significantly diminishing the chances for successful non-binding ADR.
- **One of Many Cases.** If the case at issue is one of many expected to be filed, it is highly unlikely that the defendant will be motivated to agree at an early stage to the use of ADR, particularly if it is non-binding. This may be one of those rare situations where full-blown litigation is actually more cost-effective due to the efficiency gained by the consolidation of multiple cases.
- **Delays.** If a delay will benefit one of the parties, then the chances for the successful use of ADR are diminished.
- **Monetary Imbalances.** If a monetary imbalance exists between parties, and the wealthier party thinks it can wear down the other party through traditional litigation, then it will likely prove difficult to obtain the wealthier party's agreement to ADR.

## Understanding the Different Types of ADR

**Arbitration:** There are many types of formal arbitration. Each involves a process whereby the parties to the dispute agree to submit arguments and evidence to a neutral person(s) for the purpose of adjudicating their claims. The evidentiary and procedural rules are usually not nearly as formal as in litigation, and there tends to be greater flexibility in the timing of the proceeding and the selection of the actual decisions makers.

Arbitration may be a voluntary proceeding, as when the parties to a contract have selected it as a means of dispute resolution, or it may be a compulsory, court-ordered procedure that is a prerequisite to full-blown litigation. Entrepreneurs leading growing companies wishing to avoid the cost and delay of litigation should consider adding arbitration clauses to contracts prior to entering into them.

The clause should specify: the parties agree to submit any controversy or claim arising from the agreement or contract to a binding (or non-binding) arbitration; the choice(s) of location for the arbitration; the method for selecting the neutral(s) who will hear the dispute; any limitations on the award which may be rendered by the arbitrator; which party shall be responsible for the costs of the proceeding; whether the loser will pay the winner's attorneys' fees; and any special procedural rules that will govern the arbitration, such as those employed by the American Arbitration Association.

The following arbitration clause is recommended by the American Arbitration Association (AAA):

"Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association, and judgment rendered upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof."

Because the arbitrator selected is usually an attorney whose expertise may be negotiating rather than adjudicating, arbitration often results in "splitting the baby down the middle," rather than a clear award for one party. Additionally, because no jury is involved the likelihood of recovering punitive or exemplary damages from an attorney or experienced arbitrator—who is unlikely to be swayed by emotional appeals—is reduced.

A key consideration for those drafting contracts is whether the decision of the arbitrator will be binding or non-binding. If the parties agree the award will be binding, then they must live with the results.

Binding arbitration awards are usually enforceable as written by the local court unless there has been a defect in the arbitration procedures. On the other hand, the opinion rendered in a non-binding arbitration is advisory only. The parties may either accept the result or reject the award and proceed to litigation. The court may also order the arbitration as a non-binding proceeding in an effort to resolve the differences between the parties before moving further toward trial. The major drawback of non-binding arbitration is that after the award is made, the losing party often threatens litigation (a trial "de novo," or new trial) unless the monetary award is adjusted. Thus, the party that wins the arbitration is often coerced into paying or accepting less than the award simply to avoid a trial after arbitration.

There are many sources of arbitration rules. Unless the parties have specific rules and procedures in mind which will govern the arbitration, the two best-known in the U.S. are the American Arbitration Association and the International Chamber of Commerce. Both offer their rules at no cost; the fees for handling arbitration proceedings vary for these and other such organizations. Other sources include the UN Commission on International Trade Law Arbitration Rules, the Inter-American Commercial Arbitration Commission, and the Center for Public Resources Rules for Nonadministered Arbitration of Business Disputes.

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