The ABCs of ADR

*by Jennifer Sorge and Stephen R. Morrison**

INTRODUCTION

ADR is an acronym for "alternative dispute resolution". Dispute resolution refers to the settlement of conflict that may arise between people in a variety of situations. Conflicts, of course, can be settled in many different ways. In everyday life, people often try simple persuasion. In some cases, where power imbalances exist, persuasion can look a lot like intimidation. In extreme cases, people sometimes resort to violence. Indeed, at an earlier time in history, duelling was seen as a quick and effective method of resolving disputes, especially when honour was at stake. Even today, people sometimes take matters into their own hands when they feel that they have no other choice. Because violence and strife is generally seen as harmful to the well-being of society, legal systems have evolved over thousands of years to provide alternatives to these less than satisfactory approaches.

From quite an early point in human history, people have appreciated the benefit of involving neutral third parties to help them resolve their disputes. This appreciation ultimately resulted in the development of a system of courts, where people could go to assert their legal rights and remedies. Over time, procedures and rules of evidence were developed to ensure a degree of fairness and reliability in the process. The result was a system of dispute resolution that lawyers refer to as litigation. In this sense, taking someone to court was an early form of alternative dispute resolution -- an alternative, that is, to pistols at dawn.

For reasons that will be looked at more carefully later, litigation has lately come to be seen as something to be avoided at all costs. In recent times, the fear of long delays, high costs, and unpredictable or unsatisfactory results has caused people to look more carefully at other methods for managing and resolving conflict. From its earliest days, the term ADR generally referred to an array of processes designed to divert disputes away from the courts. Today, however, it is more often recognized that litigation continues to occupy an important place in the spectrum of appropriate dispute resolution mechanisms and need not be the standard against which all other processes are considered to be "alternative". ADR, therefore, should be seen as the full range of approaches to conflict resolution, including litigation.

Negotiation, mediation, adjudication, arbitration, and litigation will be explored as the principal alternatives in the range, together with a few other less common methods that are used in special situations. Each method will be briefly explained, as will its main advantages. Different kinds of conflict call for different methods of resolution, and, often, the final resolution of a dispute requires the application of more than one method.

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THE ADR SPECTRUM

Before the principal forms of ADR are examined in detail, it will be helpful to introduce certain terminology used to describe the methods and their place on the spectrum. Forms of dispute resolution that allow the parties to settle their own differences are often referred to as "consensual", as opposed to those that are more "adversarial" and involve the imposed ruling of a third party decision-maker. Methods that are flexible and have few fixed rules are referred to as "informal", as compared with methods that involve many "formal" procedural conventions and rules of evidence. Finally, some kinds of dispute resolution are described as "interests-based", where others are referred to as "rights-based". While the first two of these distinctions are straightforward, the third requires a little more explanation.

Rights-Based vs. Interests-Based Solutions

From an early age, people tend to be very focused on their rights. Observe the complaint of a five-year-old child when his three-year-old sibling takes a toy off the shelf that the older child has not touched in months. Despite his lack of current "interest" in the toy, the older child may be outraged that his "rights" of ownership have been infringed. As much as people think that they grow out of these feelings as they mature, the difficulty in resolving many disputes is rooted in a way of looking at a situation based on an assessment of legal rights and entitlements, rather than from the perspective of interests and needs.

The difference between interests-based and rights-based approaches can be illustrated through the following example. Imagine two cooks fighting over possession of an orange. Each claims it as their own and demands exclusive possession. In methods of dispute resolution that are rights-based, such as arbitration or litigation, the relevant question is, "Who has the stronger legal claim to the orange?" There will be a winner and loser. Only one cook will end up with the whole orange at the end of the process, regardless of why it is wanted or needed. In typical rights-based methods of dispute resolution, there is little to no room to explore the interests of each party or to craft creative solutions that will meet the needs of both parties.

Interests-based ADR processes, like negotiation and mediation, allow the parties to design creative solutions based on their individual best interests and needs. In this example, a creative solution could flow from an exploration of *why* each of the cooks wants the orange. It may be discovered that one wants to use the zest of the orange peel to make a carrot cake, while the other wants only the fruit for a salad. Obviously, the interests and needs of both parties can easily be met by giving one the peel and the fruit to the other. Unlike the win-lose outcome achieved through rights-based methods, interests-based solutions can result in win-win outcomes. Everyone goes home happy!

Other Considerations

In addition to the distinctions described above, methods of ADR are sometimes compared to each other by reference to the speed of the process, the level of cost involved, the degree of control that the parties have over the selection of a neutral third party to assist them, and the degree of privacy that can be achieved. Also, where parties to a conflict have or need to maintain an ongoing relationship, whether business or familial, the method of dispute resolution selected can have a significant impact on their ability to achieve this objective. Choosing the right method of dispute resolution will involve, in each case, a consideration of all of these factors.

Timely Solutions

In most situations, parties will favour timely solutions. Disputes that are not resolved quickly tend to fester and become more difficult to settle in the future. As individuals invest more time and money in their conflict, they tend to become more entrenched and less flexible in their positions. The expression “justice delayed is justice denied” reflects the reality that, whether rights or interests are at stake, both sides suffer when a conflict cannot be resolved relatively quickly. Again, to use the example of the fight over the orange, both sides will lose if the orange turns rotten and mouldy while the dispute is being resolved. In addition, as time passes, memories may fade, important witnesses may die or move away, and critical documents may go missing. Sometimes, a quick result is to be preferred over a more perfect but slower outcome.

Cost Effectiveness

Cost is, of course, a major consideration. In some methods of dispute resolution, such as litigation, it is not uncommon that the combined legal costs of the two parties can exceed the amount in dispute. And, even though the court system allows the victorious party to recover a portion of its legal costs from the losing party, this recovery rarely represents more than 60% of the actual costs incurred. Similarly, the winning party may discover, after the fact, that the loser does not have the financial means to satisfy the judgment. In other words, one can win, and still lose. It is sometimes said that, in these situations, only the lawyers win. Finally, as will be discussed later, the burden of legal costs can sometimes be used as a weapon by the more financially well-off party.

Selection of the Neutral

The ability to select a third party neutral facilitator or decision-maker acceptable to both parties can also be very important in some kinds of dispute. In litigation, the parties rarely have any say in the selection of the judge that will hear the case. Judges are assigned by the court administration, often without specific regard to the type of case being tried. In some situations, it makes no difference.

In others, where the dispute involves a specialized area of knowledge, it can be extremely helpful for the parties to be able to select an individual who is already knowledgeable in the field. Not only might they get a better result, but, also, the process can be quicker, if they do not have to provide this person with a lot of background information about the business or industry in which the conflict has arisen.

Privacy

Privacy can be an important issue. Litigation occurs in courts that are open to the public and the media. Open access to the courts and to court records is a hallmark of the justice system, and judges almost never agree to bar the public or seal court records. Most other forms of ADR are conducted in private. Business disputes may involve trade secrets or otherwise sensitive proprietary information that one or both of the disputants may want to protect. In some cases, it may be damaging to a company's reputation with its customer base to have a conflict fought out in a public forum. In many disputes between individuals, sensitive or embarrassing information may be involved, and the parties may not want to air their dirty laundry in public. This may be especially true in the case of family law or estate disputes.

Maintaining Ongoing Relationships

Finally, the need to maintain ongoing relationships can be a vital consideration. Anyone who has witnessed or experienced some of the more formal, rights-based, adversarial forms of dispute resolution, such as arbitration or litigation, can attest to the fact that parties often refuse to speak to each other after the case is over, much less do future business together. In the personal sphere, it can tear families apart, sometimes permanently. By contrast, some of the more informal, interests-based, facilitative forms of conflict resolution, such as negotiation or mediation, can result in a better understanding and appreciation of an opponent's perspective and end with a mutually acceptable settlement and a handshake.

In summary, those forms of ADR at one end of the spectrum tend to be more informal, interests-based, speedier, lower cost, private, and consensual. They also tend to allow the parties to select a mutually acceptable neutral third party to assist them and, when successful, are more likely to preserve existing relationships. As one moves along the spectrum, the approach becomes more formal, rights-based, slower, increasingly expensive, public, and adversarial, resulting in an imposed solution. The parties have less ability to control the selection of a decision-maker and are less likely to maintain any ongoing relationship.

THE ALTERNATIVES

Litigation

Litigation is the most formal, adversarial, and rights-based process available to parties in conflict. In litigation, following a series of procedural steps designed to allow the parties to better understand their opponent's case, each side presents legal arguments and admissible evidence before a judge or a judge and jury in court. Eventually, the court makes a decision, and the parties may have certain rights of appeal, if they disagree with the outcome. As noted above, the losing party usually pays a portion of the winner's legal costs and disbursements, in addition to the amount awarded in the judgment.

Legal rulings are almost invariably rights-based. Judges and juries have very little leeway to construct creative solutions that best meet the interests and needs of both parties. The party bringing the claim does not always win, and even when it does win, it does not always get everything that it claimed. The trial system is not geared towards finding win-win outcomes.

Litigation rarely produces timely results. It can take several years to get to trial, and an appeal can add one to two additional years. Regrettably, some parties or their lawyers make the situation worse by trying to use a variety of procedural devices to cause delay as a tactic to wear the other side down. Most people's experience with litigation is that it is painfully slow.

Nor is litigation usually cost effective. It is very difficult for parties to access and understand the litigation process without the assistance of lawyers on both sides, and this makes it very expensive. Every step in the proceeding costs money and, again, this is sometimes used by one party to place an unbearable financial strain on the opponent. Just about the only way that litigation is less expensive than other forms of dispute resolution is that the parties do not have to pay for the use of the judge or the courtroom facilities. Those are provided by the state.

The parties in a litigation process have no control over the selection of the decision-maker; judges are appointed to cases. As a result, it is less likely that the parties will secure a judge with knowledge in the area of dispute.

Litigation proceedings are public. All of the documents filed in the court can be read and copied by any member of the public or the media, and anyone can come into the courtroom and watch the trial. Also, when the case is over, anyone can order a copy of the word-for-word transcript of the evidence of the witnesses, so long as they are prepared to pay the court reporter. Parties cannot maintain privacy over their private documents or information, or control the impact of the proceedings on their reputation.

Finally, litigation is extremely adversarial. To some, it is a game. To others, it is more like a war! Litigants often make terrible and exaggerated claims against

each other. While people sometimes go into a lawsuit with great enthusiasm, they inevitably find that it takes a huge emotional toll on them. As a result, litigation usually negatively affects the relationships between the parties, and opposing litigants rarely do business or maintain relationships with each other in the future.

Yet, despite all of these drawbacks, in some situations, litigation may be the only realistic option available to parties. This is especially true when disputes involve complex legal issues or are concerned with an evolving area of the law. Sometimes, a claimant must go to the courts to obtain an urgent remedy, like an injunction, to prevent some immediate harm to them or their business. Finally, litigation may be the only option, if other forms of ADR have failed to resolve the issue.

When thinking about litigation, it is important to remember that there is a difference between the litigation process and the trial itself. Lots of litigation gets started. All it takes is the issuance of a relatively inexpensive statement of claim. Only a tiny percentage of litigation cases, however, go to trial -- on average, fewer than 5%. Most claims that start out in the litigation process either are abandoned at some point along the way or get resolved through one of the other processes that will be described. The problem is that lots of time, money, and emotion are usually invested before the parties move the case to a quicker, cheaper and more congenial form of dispute resolution.

Negotiation

From a very early age, everybody has some experience with negotiation, and it is a regular feature of everyday human interaction. Children negotiate for a later bedtime or larger allowance. With teens, it may be the keys to the family car. For adults, it pervades almost every aspect of their lives. Despite all of this experience, however, few become very professional in the exercise of this skill set, especially when personally concerned with the outcome. In light of this, help is usually required in the resolution of serious disputes.

Negotiation of important legal disputes should be distinguished from the sort of everyday bargaining referred to above. Successful negotiation requires a degree of emotional detachment, the ability to see the problem from the other side's point of view, a realistic sense of potential outcomes, and a knack for identifying creative solutions that both sides can live with. For all these reasons, when the stakes are high, it is extremely difficult for parties to act as their own negotiators. Even if they have most of the skills outlined above, their emotional investment in the case usually interferes with their ability to exercise those skills. The use of trained and skilled negotiators can also go a long way to addressing the power imbalances that may exist between two disputing parties.

In addition to professional assistance, successful negotiations usually require a lot of thoughtful preparation. When parties simply show up at the negotiating table without having done the necessary background work, the results are often a disaster, and the parties leave the room further apart and angrier than when they started. If either or both parties are unwilling to make necessary concessions to reach a solution, negotiations will fail. Because the negotiation process can be tactical in nature, there are often feelings of distrust and unease amongst the parties that may impede creativity. The use of aggressive and misleading tactics may also injure the relationship between the parties, and feelings of apprehension and anger may linger, even if settlements have been reluctantly achieved.

Proper preparation usually involves a careful evaluation of the strengths and weaknesses of one's own case and that of the opponent, gathering as much information as possible concerning an opponent's understanding or misconceptions about the matter, consideration of an opponent's ability to provide the desired outcome, and looking at what can be done for the opponent in this give-and-take process. If a party appoints someone to represent them with the negotiations, that individual must also be provided with a realistic range within which to settle the dispute.

In the case of legal disputes, negotiations can occur before or after a lawsuit is started. If the parties are willing to move from their initial positions to try to reach a resolution, almost any dispute can be successfully negotiated. The negotiation process is voluntary, informal, and can be the quickest and least expensive resolution method, if the parties are willing to make concessions. In negotiation, parties identify issues of concern, search for mutually acceptable resolution options, and bargain to try to bring about settlement directly with the other party. The negotiation process is not facilitated by a neutral third party, and any resolution reached between the parties is consensual, not imposed. Negotiations are usually conducted in private and are generally specifically stated to be "without prejudice", so that, if negotiations are unsuccessful, any admissions made or offers transmitted cannot be used in any subsequent proceedings. When skilfully handled, negotiations have tremendous potential to preserve important relationships.

Mediation

Mediation, sometimes referred to as facilitation or conciliation, involves structured settlement negotiations led by a neutral third party who has been selected by agreement of the parties. The mediator's job is to skilfully guide and facilitate the negotiation process, but, unlike a judge in a courtroom, the mediator has no decision-making power. While the mediator may occasionally suggest a resolution, known as a mediator's proposal, the mediator may not impose a resolution on the parties.

A skilled mediator thoroughly understands the negotiating process. Parties sometimes select mediators who are also knowledgeable about the business or field in which the dispute has arisen. While this can be helpful, it is rarely as important as the individual's mastery of mediation skills. A good mediator can assist the parties in evaluating the strengths and weaknesses of their own and their opponent's case, understand their opponent's perspective, develop creative solutions, and deliver difficult messages to the other side more effectively than they can sometimes be conveyed directly. When a party exhibits overconfidence in its position, the mediator can often administer a much-needed reality check. Skilled mediators use their understanding of human nature, together with a variety of techniques, including humour and highly-nuanced and selective communications, to gradually bring disputing parties around to a consensus.

The mediation process is flexible and usually quite informal. It can be designed around the needs of the parties, their individual circumstances, and the nature of the dispute. The mediation process might be set up and conducted differently in the case of a family or estate dispute than when dealing with a multi-party business conflict. In most cases, however, the mediator will spend some time meeting with the parties together in one room, followed by individual caucus meetings with each side in private. In some cases, the mediator will go back and forth between the parties exploring settlement options and carrying offers, until agreement is reached. Once a settlement is arrived at, the parties will commonly be brought back together to confirm the terms of the agreement, to be congratulated on their good efforts and, where appropriate, to exchange handshakes. The agreement itself will usually be recorded between the parties' lawyers by way of a handwritten memorandum and later documented in more formal minutes of settlement.

Like unassisted negotiations, mediation can allow for the crafting of creative, mutually-acceptable, win-win solutions. These interests-based solutions can include apologies, the return of property, or an agreement for an extended or expanded business relationship between the parties. The mediation process minimizes the atmosphere of conflict and creates a better chance that the relationships between the parties will be preserved. Mediation is also very cost- and time-efficient. When parties cooperate, mediation can be organized on relatively short notice and is usually conducted in as little as half a day and rarely more than three days. The parties typically split the cost of the mediator's fees. Even accounting for this and the cost for their own lawyers, successful mediation is substantially less expensive than even the preliminary stages of litigation. The involvement of lawyers in mediation is not a requirement, but, in the case of most serious legal disputes, it is highly advisable.

Like negotiations, mediations are conducted in private, and, if the mediation fails to bring about a settlement, nothing said to the other side or to the mediator can be used in subsequent proceedings. For this reason, neither side can ever call the mediator as a witness, should the matter proceed to arbitration or trial.

Mediation enjoys a very high success rate. Skilled mediators are generally able to achieve settlement in over 85% of the cases referred to them, when the parties come willingly to the mediation session. As is the case with negotiations, careful individual preparation is required, and this is often reflected in written briefs exchanged between the parties and given to the mediator in advance. When properly done, these written briefs will not only state the party's position, but will also attempt to show an appreciation of the other side's perspective and a willingness to explore creative options for resolution.

Other Informal Processes: Fact-Finding, Early Neutral Evaluation, Mini-Trial and Expert Determination

The broad ADR spectrum contains several other informal dispute resolution processes, including fact-finding, early neutral evaluation, mini-trials, and expert determination. They are used less frequently than the principal forms of dispute resolution, often in certain specialized kinds of disputes

In a fact-finding process, a neutral third party conducts an investigation into the cause of the disagreement between the parties, attempts to determine the facts in dispute, and presents findings and recommendations for possible solutions. Fact-finders do not generally concern themselves with the legal issues surrounding the dispute. Fact-finding can be useful in disputes involving complex scientific and factual issues. The fact-finding process offers a degree of flexibility in that the parties can choose to make the fact finder's decision binding or not. The fact-finding process is usually agreed to be entirely confidential. If the parties choose to accept the fact-finder's conclusions, they can save enormous amounts of time and money. Fact-finding is often used in the case of labour relations disputes.

Early neutral evaluation is a process by which the parties present facts and issues, either orally or, more often, in writing to a mutually acceptable neutral case evaluator who advises the parties on the strengths and weaknesses of their positions and provides a *non-binding* assessment of how the dispute is likely to be decided by an adjudicator, arbitrator, or judge. The early neutral evaluation process often takes place soon after a case has been filed in court and the neutral evaluator's assessment is often used to plan settlement or litigation strategies. The result of an early evaluation often provides a valuable reality check to one or both parties and encourages negotiation or mediation leading to settlement. As a result, early neutral evaluations often bring about time-effective negotiated or mediated settlement of the dispute along the lines recommended by the neutral evaluator, thereby saving substantial time, costs, and stress. Since the early neutral evaluation is non-binding, however, there is no prejudice to either parties' position, and they are free to escalate the dispute to another form of dispute resolution.

In a mini-trial, the parties select a mutually acceptable neutral who presides over an abbreviated hearing to render an opinion as to the likely outcome of the matter if it were to proceed to trial. As opposed to early neutral evaluation, mini-trials usually occur later in the pre-trial process and actually involve the oral testimony of some of the potential witnesses. The neutral may either render a *non-binding* decision or work with the parties in an attempt to reach a settlement. Mini-trials are more informal and flexible and follow more relaxed rules for discovery and case presentation than litigation. Just as in early neutral evaluations, mini-trials serve to better inform the parties as to the merits of their case and, as a result, the parties are better prepared to engage in negotiations or mediation. Accordingly, mini-trials can contribute to a relatively cost- and time-effective resolution.

Finally, expert determination is the process by which parties present their cases to a mutually acceptable expert. The expert gathers information, asks questions, and provides an opinion on the issues presented and on their implications for each party’s case. Expert determinations are highly effective where the dispute hinges, in whole or in part, on a specific type of technical or scientific issue. Expert determinations can provide quicker and more cost-effective solutions than litigation or arbitration. Because they have selected an expert that they both have confidence in, the reality checks that follow expert opinions can have a major influence on the parties’ beliefs and expectations and can be very influential in causing the parties to reconsider their positions.

Adjudication

Adjudication is an interim decision-making process that is suitable for resolving disputes during ongoing ventures, such as large construction projects. A neutral adjudicator is pre-appointed to resolve any disputes as they occur throughout the life of the project. The parties can select an adjudicator with expertise in the area of the potential disputes. In addition, the parties will agree in advance on a set of rules of procedure, disclosure, and evidence. Because decisions are made on a quick and informal basis, the result may be imperfect. The adjudicator’s decisions, however, are binding, but only until the project has been completed. At the end of the project, if either party is dissatisfied with the adjudicator’s decisions, they can reopen the disputes, as if the adjudication had never occurred. When this happens, no reference is made in any subsequent procedure to the fact that adjudication occurred or to the result.

The principal benefit of adjudication is timeliness. It allows a decision to be made before a dispute has had a chance to fester and infect the relationship between the parties with further ill will. In some situations, unresolved disputes may cause workers to put down their tools or owners to withhold payments from contractors. When this happens, the project is unnecessarily delayed and, in extreme cases, it can slide into insolvency. Adjudication allows determinations to be made when the facts are fresh in everyone's mind, while witnesses are still available, and

before important documents have been lost or misplaced. Adjudication, when effectively used, helps to minimize work disruption and ensures continued cash flow.

Because they know that the adjudicator's rulings are ultimately non-binding and cannot be referred to in any future contest, the parties are usually willing to live temporarily with the imperfect outcomes that this quick, efficient, and relatively informal process may sometimes produce. In reality, however, experience shows that most adjudicated decisions are accepted on a permanent basis, making subsequent proceedings rare. Whether this is due to the quality of the decisions, or merely fatigue on the part of the parties, the result is the same. In appropriate circumstances, adjudication can represent a low-cost, quick, and effective way to resolve disputes in the case of ongoing ventures or projects.

Arbitration

Arbitration is a procedure for the resolution of disputes through the appointment of an independent arbitrator who considers the merits of a dispute and renders a final and binding decision called an award. In this sense, arbitration is sometimes referred to as "private court". In other words, it can be much like litigation, except that the parties have mutually agreed upon the selection of a judge.

Arbitration, however, can have significant advantages. It offers the parties a large measure of control over procedural processes, evidentiary rules, and, most importantly, choice of the decision-maker. The parties may select an arbitrator with knowledge in the area where disputes have arisen. In addition, parties can choose an arbitration process that is tailor-made to their particular needs and the nature of the dispute. Finally, arbitration proceedings are usually stipulated to be confidential and are conducted in private. Members of the press and public are excluded, and no one but the parties has access to the documents filed or a transcript of the proceedings.

Arbitration can be efficient in terms of time and money. Often, arbitration can be arranged within days or weeks and can take much less time to complete than litigation. If the arbitration process is kept simple, it can be relatively inexpensive. On the other hand, the services of the arbitrator are generally paid for by the parties, either equally or by the losing party. Similarly, the disputants have to arrange and pay for the facilities where the hearing will occur and a court reporter, if a transcript is to be available. In these cases, arbitration can actually be more expensive than litigation, where the judge, courtroom, and court reporter are paid for by the state from tax dollars. Finally, unless they have agreed otherwise in advance, parties to arbitration have limited rights of appeal.

In addition to full arbitration proceedings, there are variations sometimes used in special situations where the ultimate issue in dispute simply involves the dollar

amount that one side will pay to the other. These variations are sometimes referred to as final offer selection or “baseball” arbitration, after the way that some salaries are determined in the major leagues. In advance of the hearing, each party submits its best offer to the other party and to the arbitrator. After hearing the parties’ cases, the arbitrator selects the offer considered the most reasonable as the binding award. The arbitrator cannot award an amount in between the two offers, so there is no splitting of the baby. This forces each party to think long and hard about its final offer, since each wants to been seen as most reasonable in the eyes of the arbitrator.

In another variation of this method, sometimes referred to as “night-time baseball” arbitration, the arbitrator is kept in the dark as to the final offers exchanged, until after a decision is rendered. Then, the final offer closest to the arbitrator's award is the amount paid. For example, if one party’s final offer is to pay $500 and the other party agrees to accept no less than $1,000, and the arbitrator, without any knowledge of these final positions, makes an award of $650, the claimant will receive only $500, since that is the amount closest to the award. If the arbitrator's award is $751 or higher, the claimant will receive $1,000, since the award is at least $1 closer to the higher amount than to the lower. In another twist on this method, the parties sometimes agree, where neither wishes to take inordinate risk, that the high and low offers will constitute a cap and a collar on the result. In other words, if the arbitrator's award is $425, the claimant will still receive $500, but if the arbitrator awards $1,250, the maximum paid will still be only $1,000.

All of these methods encourage the parties to create reasonable final or best offers, and this often results in a convergence of the parties’ positions to a point where they can actually resolve their dispute without having to complete the arbitration. These methods discourage unreasonable or inflated offers. Since both parties are trying to come up with final offers that are as close as possible to what they think an arbitrator, acting reasonably, will do, their two offers may be close enough for them to say, “Let’s just split the difference and not spend more money on the arbitration costs”.

Mediation-Arbitration (Med-Arb)

Mediation-arbitration is a hybrid process that starts with a mediation of a dispute by a neutral third party and, by prior agreement, transforms into arbitration with the same neutral third party acting as an arbitrator, if the initial mediation is unsuccessful. If the dispute reaches the arbitration stage, the neutral third party arbitrator will impose a binding decision upon the parties.

Med-arb is advantageous in that it ensures that a final resolution will be reached, either through a successful mediation or through an imposed arbitration award. Med-arb is also advantageous in that it begins with a relatively informal and potentially time-efficient mediation process, which leaves the result in the hands

of the disputants. If arbitration is necessary, med-arb is time- and cost-efficient, in that there is no loss of time or cost to acquaint a new independent third party with the facts of the dispute.

The participation of the same neutral in both the mediation and arbitration steps of med-arb, however, may cause parties to be less candid with the neutral during the mediation phase. One or both parties may hold back information if they believe that it will prejudice them, should the matter proceed to the arbitration phase. In other words, the mediation process may be undermined if the parties perceive that confidential information acquired during that phase might be used in the adjudicative phase. Similarly, it may be difficult for the arbitrator to ignore information that is learned during the mediation phase, even though that information may be technically inadmissible evidence in the arbitration. As a result, med-arb is rarely used in practice, except in the resolution of family law disputes, and it requires the highest level of skill and experience on the part of the mediator/arbitrator.

Who Gets to Choose?

So far, the discussion assumes that the parties to a dispute get to select the form of resolution best suited to them. Sometimes this is true, but not always. In some cases, specific legislation, such as the *Condominium Act* or the *Labour Relations Act*, requires that certain disputes be resolved in a particular way. In Ontario alone, dozens of pieces of legislation require some types of dispute to be arbitrated. In other situations, a contract entered into between two parties may dictate the method that any disputes under that contract are to be resolved. Sometimes, the contract will require escalating forms of dispute resolution, starting with negotiation, interposing mediation, and ending with arbitration or litigation. Even where this is not required by legislation or a binding contract, the parties may choose to try one form of ADR in the hope that it will resolve their dispute, while reserving the right to escalate the matter to a more formal process, if they are unsuccessful. Finally, the rules of court in Ontario now require that the parties to most kinds of litigation attempt mediation as a condition of bringing their case to trial.

When neither legislation nor a contract dictates the form of ADR to be used, the parties to the conflict get to choose. Except in the case of litigation, however, they must agree on the method to be used. While one party can always sue another, it is impossible to force another party to negotiate or mediate in good faith, to adjudicate, or to arbitrate a dispute. Often, the first negotiation that parties must engage in is the selection of a form of ADR acceptable to both, including the selection of a mutually acceptable neutral third party, where necessary. This is sometimes not as easy as it may seem. Parties in conflict will often evaluate their strategic and tactical advantages in bargaining for the ADR method that they determine to be most advantageous to them. For example, where the parties do not enjoy the same financial wherewithal, the wealthier

party may wish to choose the most expensive process with a view to beating the less well-off opponent into submission. Or, when one disputant knows that the other has serious privacy concerns, he may insist on litigation to force his opponent to cave in to avoid public disclosure.

Conclusions and Observations

In selecting the most appropriate dispute resolution process, parties must weigh the advantages and disadvantages of each method. While less formal ADR processes, such as negotiation and mediation, offer greater flexibility, cost, and time savings, and the possibility of creative win-win solutions that serve to maintain the goodwill between the parties, less formal processes do not provide a guarantee that the dispute will be resolved. More formal ADR methods, such as litigation or arbitration, sacrifice those advantages, but provide the parties with a greater degree of finality and certainty. Less formal processes are not suitable where parties require a court judgment or a remedy that a mediation or negotiation process cannot provide.

There is a common misconception that less formal methods of ADR, including mediation and negotiation, inevitably involve compromising or meeting halfway. While some of the less formal dispute resolution processes may promote a degree of compromise, many creative outcomes are available that go beyond meeting halfway. Less formal processes that allow for the designing of creative solutions can often be used to ensure that the interests of both parties are met. Given the breadth and depth of human ingenuity, it is inevitable that the nature of the disputes that will arise between people will be many and varied. Accordingly, there will be no “one-size-fits-all” approach to settling those conflicts. This article has provided a brief overview of the most popular methods of alternative dispute resolution available. While each has its pros and cons, they all beat pistols at dawn!