Getting help with ADR

A guide to the main players

By BARBARA DAWSON and MICHELE L. STEVENSON

After sitting in the courtroom for the past two months, you are waiting to hear the jury's verdict in a well publicized, high-dollar case that has taken three years of your time and attention and a vast amount of your company's resources. You have entrusted to 12 ordinary members of the community, none of whom has any relevant experience in your industry, a decision that will affect and perhaps drastically alter your company's future. In the best-case scenario, the jury will find for your company, meaning that you have lost three years of time and resources in this dispute. Even then, the reputation and good will of your company has been irreparably tarnished because of the media's negative attention throughout this suit. You cannot wait for this matter to come to an end.

Businesses and their lawyers are increasingly avoiding this unpleasant scenario through the creative use of alternative dispute resolution. This article provides an overview of the present perception and use of ADR, common ADR options, benefits of ADR in business disputes and major ADR providers.

The potential benefits of ADR are widely recognized in the United States, particularly for business disputes. In a recent nationwide survey of more than 1,000 adult Americans done for the National Arbitration Forum:

- 71 percent believe that lawsuits take too long to resolve;
- Only about one in four (27 percent) agree that it is usually worthwhile to initiate a lawsuit over money;
- One third (32 percent) believe reaching an agreement through negotiation and compromise or mediation is a better option than litigation of any kind;
- Three of four respondents (75 percent) are aware of arbitration as a means to resolve disputes over money;
- When told that the cost would be 75 percent less than the cost of a lawsuit, four out of five respondents (82 percent) would opt for arbitration rather than a lawsuit.

Not surprisingly, business use of ADR has steadily increased. In a 1999 study done for Cornell University and Pricewaterhouse, of the 1,000 largest U.S. corporations, from 1994 to 1997, of the 600 companies that responded, nearly 90 percent used some form of ADR. More specifically, four of five respondents used mediation (88 percent) or arbitration (79 percent). Two of five used mediation/arbitration. Other ADR methods used include: mini-trials (23 percent), fact-finding (21 percent) and peer-review (11 percent).

While ADR certainly is not a new concept, now more than ever, parties are able to tailor ADR options to specifically fit their needs. The ability to "custom build" ADR, however, is still not being fully exploited. Not only is ADR an alternative to litigation, it can be specifically designed around the needs and desires of each party involved in the dispute to accommodate unique or idiosyncratic needs or interests of individuals, companies, industries or jurisdictions.

Common forms of ADR include:

Mediation – A neutral third party assists the parties with settlement discussions, fostering open communications and focusing on each party's true interests, as opposed to stated positions.

Arbitration – A neutral third party listens to both parties' positions, hears the testimony of witnesses and delivers a decision and an award. The decision can be binding or advisory, as predetermined by the parties.

Early neutral evaluation (ENE) – Before litigation is filed or during early stages of litigation, each party presents its case to a neutral. The neutral can serve as a mediator between the parties or provide an evaluation or opinion on the strengths and weaknesses of a party's case. Often, the evaluator has particular expertise in key technical areas in play in the dispute.

Mediation/arbitration – The parties mediate the dispute first. If resolved, fine — it ends the matter. If not, then a decision is made by a neutral third party on any unresolved issues. Although the same neutral typically handles the mediation and the arbitration, that need not be the case. This decision may be binding or advisory, as predetermined by the parties.

Short or summary trial – A trial that

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is designed to be completed in a short time, such as one day, allowing each party to give an abbreviated presentation of its case. Either a neutral or scaled-down jury, such as a four-person panel, with a selected neutral presiding, gives a decision. There may be no official record and an appeal may be granted only if the parties have stipulated.

The importance and beauty of ADR is that these different forms may be modified to a client's specifications. For example, in the forms involving a decision maker, a high/low limit can be added to provide a stipulated maximum and minimum amount that can possibly be awarded. This gives parties certainty, with the best and the worst outcome already decided. How the high and low figures are determined remains up to the parties. For example, the last offers of each party in settlement negotiations may define the high and low. Pursuant to the parties' stipulation, any decision would be confined to the agreed-on range.

The high/low alternative used in professional baseball arbitrations has spawned another variation of dispute resolution. "Baseball" allows the neutral to make a decision, with the alternative awards already determined. A high and a low award are agreed on by the parties and the neutral must decide which figure to use. The neutral does not have the freedom to award an amount in between the two figures. Baseball gives the parties the benefit of predictability and avoids any concern about a "split-the-baby" award. This mechanism is not often used, however, because most parties prefer to allow the neutral to have the discretion to make an award *between* the two extremes, instead of being required to select one extreme.

Factors to consider when shaping the ADR mechanism include:

- whether assistance with negotiations is all that is needed or whether resolution of disputes by a third party is necessary;
- whether some issues can be resolved without a third-party decision maker;
- whether a third party neutral or decision maker needs particular industry expertise;
- how long is needed to present the dispute;
- whether the presentation to a third-party decision maker can consist of argument only or if witness testimony is needed;
- whether jurors are necessary; or
- judicial alternatives.

Why use ADR? First, it's a less time consuming and potentially less costly alternative to litigation. While there can always be an exception, ADR as a general rule is faster and cheaper than full-blown litigation. By virtue of the limited duration of most cases handled through ADR, costs are saved because the dispute does not linger, thereby preventing fees and costs from mounting.

The potential savings become apparent when one compares the amount of time (and resulting fees and costs) required for:

- a typical one-day mediation to resolve a matter;
- a one-week arbitration of a case to a neutral who knows your industry; and
- a one-month jury trial to a group of individuals literally hailed from off the street without any knowledge of, or interest in, your industry.

Second, ADR provides a service to your client that litigation cannot: It can be tailored specifically to meet the needs and wants of your client. When ADR is used, the parties control how the dispute resolution process will be handled. The parties are able to define the procedures to be followed in the process. The parties also are able to select the neutral or decision maker who will assist with the resolution. The parties are not confined to a specific judge or jury under ADR.

Third, ADR is not confined by the rules of evidence or of civil procedure. Absent an agreement that the rules of evidence and procedure apply, the parties have the ability to control the scope of the issues that will be discussed. The flexibility in ADR allows the process to be structured to more likely reach positive business resolutions. For example, if a continuing business relationship is desired, the parties can stipulate to avoid issues or testimony that would be likely to lead to the destruction of the relationship that would be possible in normal litigation.

Alternatively, if the parties believe that it is important for both sides to be able to lay it all on the table and make sure the neutral hears all of their evidence – whether hearsay or inadmissible in court on any other grounds –

How to reach some providers

American Arbitration Association
Corporate headquarters: 212/716-5800
Customer service: 800/778-7879
www.adr.org

CPR Institute for Dispute Resolution
212/949-6490
www.cpradr.org

JAMS-Endispute
800/352-5267
www.jamsadr.com

National Arbitration Forum
800/474-2371
www.arbitration-forum.com

they can stipulate to let that happen. In short, the parties, not the rules, determine how the case will proceed.

The fourth reason to use ADR: Participants may derive more satisfaction from the resolution process. The inherent benefits of controlling one's own situation should not be overlooked. Mediation, which is simply a negotiation with the assistance of a neutral, preserves complete control for the parties to pick a resolution that they can live with. Other forms of ADR, in which a neutral makes decisions about the merits of the parties' positions, offer risk of dissatisfaction with a result. Nevertheless, the parties still have the satisfaction of having selected the decision maker and designed the process through which that person learned the details of the dispute.

Another reason: ADR can be confidential and can completely resolve the dispute. The parties may stipulate that the dispute resolution process be completely confidential. No public record of the event need even be recorded in many circumstances. Not only does the confidentiality save the parties from potential embarrassment, it also may help to preserve business relationships. The decision of whether to make ADR binding or not presents significant consequences. If binding and nonappealable, the process allows finality, which may have a value all by itself.

And the final reason to use ADR: The process, if nonbinding, may educate the parties. Even a nonbinding procedure has the benefit of giving the parties significant information about the case and the parties' respective positions. Both preparing to present your own case and seeing the case as presented by the other side results in an education about the strengths and weaknesses of the parties' positions. Of course, the other side – for good or for ill – also is learning about the case. At a minimum, the learning through this process may be effective in narrowing the issues that are in dispute.

The downside of nonbinding ADR is that if the parties do not expect a

And then, on the Net . . .

By Garrett Ordower

The goal of clickNsettle.com is to get cases settled and get them settled quickly and fairly.

"We started the company eight years ago because of the concept that dispute resolution is a quicker, more efficient alternative to the court system," said Roy Israel, president and CEO of clickNsettle.com. "On average it takes 30 months in the United States to get your day in court, 1.6 percent of all cases go to verdict and $160 billion were spent on those cases last year. Why spend all that time and money so that three years from now you can settle on the steps of a courthouse? Why not do it today and save all that time and money?"

ClickNsettle.com started as National Arbitration and Mediation, and changed its name to reflect the changing direction of the company. As an offline company, clickNsettle offers 1,100 neutrals, 200 employment specialists and 200 international arbitrators. The for-profit company, based in Great Neck, N.Y., went public three years ago making it the only publicly held dispute resolution company.

With clickNsettle, all of the information, from arbitrators' backgrounds to the determining of a meeting place, is available online. If the parties fail to check their hearing schedules, the company has a triple-notification system to ensure that everyone is at the right place at the right time.

"We are extremely tight in our coordination of cases," Israel said.

He credits that tightness as the reason why 440 different insurance companies have chosen clickNsettle as their dispute resolution company, constituting a large percentage of the company's business.

About 1,000 lawyers took advantage of the online abilities of clickNsettle in 1999, which remains small in comparison to the approximately 10,000 firms who used the offline abilities of the company. But Israel expects those numbers to change.

"The offline aspect today is bigger than the online aspect in terms of the volume of cases," Israel said. "However, there is no question that the Internet and technology in general are going to grow in influence and affect not only law, but all business. Look at the legal industry today and imagine it without e-mails or Lexis-Nexis. Clearly technology is going to affect the industry in the future."

To that effect, clickNsettle introduced a blind-bid negotiation system online, which allows parties to enter their ideal settlement amount into the system without the other party seeing it. If the settlement amounts that the parties enter are within 30 percent of each other, the system splits the difference and settles the case. If not, the numbers remain hidden and neither party is the wiser as to what the other one wants.

Israel believes that in-person arbitration will always remain a viable part of ADR. But he still believes that the first step should be an online one.

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binding resolution, they may not fully use the opportunities that it offers. This, of course, may hurt all parties involved in the ADR process, by wasting time, energy and resources.

With ADR increasing in popularity, the marketplace of service providers also is growing. Different providers offer varying levels of administrative assistance with the ADR process, ranging from providing neutrals that the parties may use for their resolution to coordinating the entire process. The use of either a full-service provider or an experienced and creative neutral may facilitate the process and may ease the tension for an unseasoned participant faced with the various possibilities.

American Arbitration Association. The AAA is a major provider that primarily focuses on business disputes. The AAA is a not-for-profit organization with international services, serving 39 countries and has a roster of approximately 20,000 trained neutrals, most with many years of experience as a neutral. According to the association, 85 percent of commercial matters and 95 percent of personal injury matters submitted to AAA arbitration end in written settlement agreements. In addition to assisting in conflict resolution, AAA also provides educational training services on negotiation techniques. It works with numerous companies assisting in the design and implementation of a proper ADR system, tailored specifically for that company.

The AAA handled 95,143 cases in 1998 and 140,188 cases in 1999, representing nearly an 80 percent increase in caseload. It also receives membership support from more than 7,000 companies, organizations, professional firms, unions, academic institutions, government agencies and individuals. The AAA emphasizes the quality of its neutrals, which is pivotal to a proper resolution. Association neutrals have previous experience, undergo a mandatory education program, and must follow standards of ethical conduct developed with the American Bar Association.

CPR Institute. The institute is another major provider. CPR's mission is to establish ADR in conventional business law departments and in law firm practice. CPR wishes to "make the legal profession the preferred delivery system of ADR."

> 'Trial by adversarial contest must go the way of trial by battle and blood.'

CPR was established in 1979 as a nonprofit alliance of 500 international corporations, law firms and legal academics, all introducing and using ADR in the dispute resolution process. According to CPR, commercial cases are settled 80 to 90 percent of the time in mediation. CPR estimates that 681 companies that used its services during the last five years saved a total of $211 million, with an average of $311,000 saved per company. CPR's neutrals have a combined success rate of more than 85 percent in ADR. Currently, its neutrals are attempting to resolve a total of more than $7 billion in dispute.

CPR is different from other ADR providers in that it focuses on "self-administered" ADR. Self-administered ADR rests administration responsibilities with the neutral, as opposed to the provider. The parties may choose to use CPR's services to help in the selection of a neutral or the parties may directly contact a neutral from CPR's roster and otherwise bypass the services of CPR. CPR takes the position that this process allows a more cost-effective approach for ADR resolution than offered by other providers.

JAMS-Endispute. JAMS also is a well-respected, full-service ADR provider with more than 20 years of experience. JAMS prides itself on offering very experienced neutrals and highly trained case managers. JAMS selects its neutrals from former judges and lawyers based on their experience, reputation and proven ADR track record. According to JAMS, their neutrals have a collective resolution rate of 90 percent. In addition to its substantive expertise, JAMS touts its commitment to public service. JAMS' Web site states that the organization donates more than $1 million of its resources to various charities, outreach activities and volunteer programs.

National Arbitration Forum. The forum is yet another ADR provider. It is an international network of lawyers, law professors and former judges. The Forum's neutrals follow a code of procedure that requires the neutral to base its decision on rules of law.

Other private ADR providers. Other ADR providers exist in most states and cities. Numerous retired judges and qualified neutrals perform the services through private practice. These individuals may or may not be affiliated with other providers. State or local ADR organizations or bar committees typically can provide information on the local providers.

Court programs. ADR programs offered through the courts should not be overlooked. An increasing number of state and federal courts have developed programs through which judges and practicing lawyers with ADR experience are available to serve as neutrals, usually without charge.

As Warren Burger, former chief justice of the U.S. Supreme Court, said, "For many claims, trial by adversarial contest must, in time, go the way of the ancient trial by battle and blood. Our litigation system is too costly, too painful, too destructive for a truly civilized people."

ADR can help maintain business relationships when disputes arise between parties; it can be customized to specifically fit the parties' interests and desires. ADR service providers, and experienced neutrals, can assist with the customization of procedures.

In a nutshell, ADR may allow the parties to avoid much of the cost, pain and destruction of litigation.