404:BEST OF ACC CHAPTERS Issues in Mediation & Arbitration for Corporate Counsel

The Honorable John W. (Jack) Cooley
former United States Magistrate

The Honorable Joy V. Cunningham
Senior Vice President and General Counsel
Northwestern Memorial Healthcare

The Honorable Gino L. DiVito
former Justice of the Illinois Appellate Court

Anita M. Rowe
Past President
Association of Conflict Resolution, Chicago Chapter

Faculty Biographies

The Honorable John W. (Jack) Cooley

John W. (Jack) Cooley is in private practice as a mediator and arbitrator offering dispute resolution services nationwide, and he is a founding member of Judicial Dispute Resolution, Inc. ("JDR") in Chicago. He has served as a special master for federal judges and as an arbitrator and mediator in a wide variety of complex, multi-million dollar commercial disputes, both domestic and international in character. An adjunct professor of law at Northwestern University School of Law, he teaches a course in negotiation and mediation. He is the author of *The Mediator's Handbook: Advanced Practice Guide for Civil Litigation, Mediation Advocacy, Arbitration Advocacy, The Arbitrator's Handbook, the Creative Problem Solver's Handbook for Negotiators and Mediators,* and more than sixty articles on litigation, judicial, and ADR topics.

Formerly, Mr. Cooley was a United States magistrate in Chicago, an assistant United States attorney, the senior staff attorney for the United States Court of Appeals for the Seventh Circuit, and a litigation partner in a Chicago law firm.

Mr. Cooley is a past chair of the mediation committee of the ABA section of dispute resolution and a current council member of that section. He is a fellow of the American Bar Foundation, the International Academy of Mediators, and the Chartered Institute of Arbitrators, London, England.

Mr. Cooley, a Vietnam War veteran, is a graduate of the United States Military Academy at West Point and the University of Notre Dame Law School, receiving a year of his legal training in international and comparative law at the school's Centre for Legal Studies in London, England.

The Honorable Joy V. Cunningham
Senior Vice President and General Counsel
Northwestern Memorial Healthcare

The Honorable Gino L. DiVito

Gino L. DiVito cofounded the Chicago law firm of Tabet DiVito & Rothstein LLC. Since his retirement from the judiciary, he has concentrated in trial and appellate advocacy in all types of cases, primarily focusing on commercial and complex civil litigation. In November 1997, Mr. DiVito and other retired judges founded Judicial Dispute Resolution, Inc., an alternate dispute resolution company. He is an officer of that company and conducts arbitrations and mediations in a wide range of subject areas.

Mr. DiVito served as a judge for more than 20 years. For the last eight of those years, he was a justice of the Illinois Appellate Court. During that time, he served as the presiding justice of the First District's second division, as a member of the court's executive committee, and as the chairman of the court's computer and information committee. For the preceding 12 years, he served as a trial judge in the circuit court of Cook County, presiding over both civil and criminal cases. He also served as a Cook County assistant state's attorney, the last three of those years as the chief of the criminal division and the supervisor of more than 330 attorneys.

Mr. DiVito is the immediate past president of the Appellate Lawyers Association. He serves as a member of the Illinois Supreme Court planning and oversight committee for a judicial evaluation program and the Special Supreme Court committee to study Rule 23. He has been the president of the Illinois Judges Association, the president of the Markey/Wigmore Inn of Court, and the chair of the Illinois chapter of the American Judicature Society. He has served as a member of the Illinois Supreme Court committee on the rules of evidence, and he has been a member of the boards of the Chicago Bar Association, the Illinois State Bar Association, the Chicago Bar Foundation, the Appellate Lawyers Association, the Illinois Lawyers' Assistance Program, and the John Howard Association. He is a member of the Association for Conflict Resolution and has served as a member of the board of directors of the Association for Conflict Resolution-Chicago chapter.

Mr. DiVito graduated from Loyola University of Chicago School of Law, where he is an adjunct professor and teaches advanced trial advocacy.

Anita M. Rowe

Anita M. Rowe is an arbitrator and mediator in Chicago. She has served on the following arbitration panels: Federal Mediation and Conciliation Service, Chicago Transit Authority and Amalgamated Transit Union, Local 308, Bituminous Coal Operators' Association/United Mine Workers of America, District 17, U.S. Postal Service/National Association of Letter Carriers, Great Lakes Area Expedited Arbitration Panel, NASD Dispute Resolution, Inc. (employment and securities panels), Cook County Mandatory Arbitration Program, and the Better Business Bureau in Chicago. Mediation panels include the national Merrill Lynch Claims Resolution Process and Smith Barney Dispute Resolution Program, (mediating class action sex discrimination claims), as well as the Center for Conflict Resolution, Inc., the National Mediation Centers, and the Mediation Research and Education Project, Inc.

Prior to becoming a fulltime arbitrator and mediator, Ms. Rowe represented the federal government, public and private sector employers as well as individuals in labor and employment matters.

She is a past president of the Chicago chapter of the Association for Conflict Resolution, and currently serves on the board of the Center for Conflict Resolution, Inc. in Chicago. She is also a member of the ABA section on dispute resolution and section of labor and employment law, the Illinois State Bar Association labor law section and section on alternative dispute resolution, and the Chicago Bar Association labor and employment law and alternate dispute resolution committees.

She received a BS, summa cum laude, from Emerson College, and her JD, cum laude, from Georgetown University Law Center.

Chapter One
GENERAL DESCRIPTION OF MEDIATION IN THE ADR CONTEXT

The plaintiff and defendant in an action at law, are like two men ducking their heads in a bucket, and daring each other to remain longest under water.

—Samuel Johnson

In the last decade of the twentieth century, the legal profession has experienced vast changes. Not insignificant among them is a growing interest among advocates in the use of alternatives to traditional court litigation to resolve their clients_ disputes more efficiently and economically, with less risk and better results. In the days of Samuel Johnson, as suggested by the opening quotation, no alternatives to the traditional judicial process existed. Lawyers took their cases to court and subjected themselves to a seemingly interminable, self-torturing ordeal, with the worst-case potential of double asphyxiation. Fortunately for today_s advocates, alternatives now exist. We can learn about and apply new and innovative methods for resolving disputes when the court process does not appear to provide the best procedural alternative to satisfy our clients_ emotional, economic, and psychological needs and interests.

Among the many dispute resolution alternatives available to us today, the most prominent are mediation and arbitration. Although this book focuses principally on mediation, it is instructive to view it initially in the context of other dispute resolution processes, particularly arbitration. A companion NITA book, *Arbitration Advocacy*, provides in-depth treatment of the arbitration process and the art and science of arbitration advocacy. This chapter will discuss several topics necessary to developing a working knowledge of both processes. We will define mediation and arbitration and view them in the context of other dispute resolution mechanisms, consider the differences between the two processes, compare the relative advantages and disadvantages of court litigation, arbitration, and mediation, and gain an understanding of the distinctions between mandatory and voluntary mediation and arbitration. In addition, we will become familiar with the three basic steps to initiating alternative dispute resolution—choosing which process to use, persuading opposing counsel to participate, and selecting the appropriate provider of dispute resolution services.

1.1 OVERVIEW OF THE PROCESSES

Mediation and arbitration are two principal processes in a broad spectrum of means for resolving disputes, collectively called alternative dispute resolution, or ADR. Mediation may be defined as a process in which a disinterested third party (or *neutral*) assists the disputants in reaching a voluntary settlement of their differences through an agreement that defines their future behavior. The essential ingredients of classical mediation are (1) its voluntariness—a party can reject the process or its outcomes without repercussions—and (2) the mediator_s neutrality, or total lack of interest in the outcome. Arbitration, on the other hand, may be defined as a process in which one or more neutrals render a decision after hearing arguments and reviewing evidence. The essential distinction between the two processes lies in *who* makes the resolution decision for the parties. In mediation, the parties participate in a joint decision-making process and make the decision themselves. In arbitration, the parties relinquish their decision-making right to the neutral who makes a decision for them. By preagreement, the decision of the neutral is either binding or nonbinding. If binding, the decision is final, and the winning party may enforce it against the losing party. If nonbinding, the decision is advisory in aid of settlement.

It may be helpful to view the two processes in the context of the ADR spectrum as shown on the following page.

ALTERNATIVE DISPUTE RESOLUTION SPECTRUM

LEAST FORMAL	NEGOTIATION CONCILIATION FACILITATION MEDIATION MED-ARB ARBITRATION COURT-ANNEXED HYBRIDS
MOST FORMAL	COURT ADJUDICATION

The ADR spectrum may be viewed graphically as extending from the least formal process on the top of the above chart—pure negotiation—to the most formal process on the bottom—court adjudication. Pure negotiation, which is familiar to all advocates, is the only process in the spectrum in which the parties and counsel engage without the assistance of a neutral. Many times, however, it serves as an ancillary dispute resolution mechanism to other processes in the spectrum. Moving down on the chart, in conciliation the neutral_s goal is to assist in reducing tensions, clarifying issues, and getting the parties to communicate. In essence, it is the process of "getting the parties to the table" and inducing their active involvement in solving their problem. In facilitation a neutral functions as a process expert to facilitate communication and to help design the process structure for resolving the dispute. Ordinarily a facilitator deals only with procedures and does not become involved in the substance of the dispute.

Mediation and arbitration, already defined, combine in the process called med-arb. In med-arb, by preagreement of the parties, the neutral first conducts a mediation to settle the entire dispute or part of it, after which the neutral arbitrates any unresolved issues. The same neutral may perform the role of mediator and arbitrator, or different neutrals may serve in those roles. Court-annexed or mandatory arbitration is a form of nonbinding arbitration administered by court systems. Hybrid processes are specially designed to meet the procedural needs of particular kinds of disputes. Hybrids that have, in recent years, become recognized methods of ADR include the mini-trial, summary jury trial, simulated juries, and expert panels. Chapter 7 describes these and other hybrid processes. The most formal and final of the dispute resolution processes is, of course, court adjudication. It is always a viable alternative to the other ADR processes, and in some instances it may be the most advantageous alternative to best protect and serve your client_s interests.

1.2 IMPORTANT DIFFERENCES BETWEEN MEDIATION AND ARBITRATION

As previously noted, the most basic difference between arbitration and mediation is that arbitration involves a decision by the intervening third party, or neutral, after an evidentiary hearing, while mediation does not. Another way to distinguish mediation and arbitration is to compare the neutral_s mental functions under each process. In arbitration the neutral uses primarily “left brain” or “rational” mental processes—analytical, mathematical, logical, technical, administrative; in mediation the neutral employs mostly “right brain” or “creative” mental processes—conceptual, intuitive, artistic, holistic, symbolic, emotional. Further, an arbitrator deals largely with the objective, whereas a mediator deals primarily with the subjective. The arbitrator is typically a passive participant whose role is to determine right or wrong; the mediator, by contrast, is generally an active participant who attempts to move the parties to reconciliation and agreement, regardless of who or what is right or wrong.

Because the role of the mediator involves instinctive reactions, intuition, keen interpersonal skills, and sensitivity to subtle psychological and behavioral indicators, in addition to the application of logic and rational thinking, some people find it much more difficult to perform effectively than the role of the arbitrator.

Besides the distinctions outlined above, the two processes also differ in that they are typically employed to resolve two different types of disputes. Parties generally use mediation where they reasonably believe they will be able to reach an agreement with the assistance of a disinterested third party. Mediation is also used when parties will have an ongoing relationship after resolution of the conflict. On the other hand, parties generally use arbitration under two conditions: no reasonable likelihood of a negotiated settlement exists, and the relationship between the parties will not continue after they have resolved the dispute. If parties use the two processes in sequence, mediation occurs first, and if it is unsuccessful, the parties resort to arbitration. Viewed in terms of the judicial process, arbitration is comparable to a trial, and mediation is akin to a judicial settlement conference.

Although mediation and arbitration differ substantially, they both have the underlying structure of a decision-making process. The chart below depicts the interrelationship of their various stages; the stages of mediation are discussed in more detail in section 2.1.

STAGES OF MEDIATION AND ARBITRATION

MEDIATION PROCESS	ARBITRATION PROCESS
Initiation	Initiation
Preparation	Preparation
Introduction	Prehearing Conference
Problem Statement Problem Clarification	Hearing
Generation & Evaluation of Alternatives Selection of Alternatives	Decision Making
Agreement	Award

1.3 RELATIVE ADVANTAGES AND DISADVANTAGES OF MEDIATION, ARBITRATION, AND COURT ADJUDICATION

Most trial advocates are well aware of the advantages and disadvantages of litigation culminating in a court adjudication. They are not always as knowledgeable, however, as to the advantages and disadvantages of arbitration and mediation and how to assess them in relation to court adjudication. This section seeks to clarify the relative advantages and disadvantages of these three processes by analyzing them in terms of the nature of the forum, the nature of the procedures, and cost.

1.3.1 Relative advantages of the processes

With regard to the nature of the forum, court adjudication of course occurs in a public forum where judges are randomly assigned cases that they are responsible to supervise and decide and for which decisions they are held accountable. Both mediation and arbitration are nonpublic, a trait advantageous to resolving certain types of disputes where the parties desire privacy of the proceedings and of the outcome. Further, in both private mediation and arbitration, by mutual agreement the parties select qualified neutrals, who sometimes have specific expertise relevant to the dispute. Also, in arbitration, but more so in mediation, the parties usually have significant control over the resolution process. Representation by counsel is advisable but not necessary in some instances.

As to the nature of the procedures, in the court adjudication process, the procedures are highly structured and institutionalized, typified by detailed rules and numerous compliance mechanisms. Rules of evidence enhance the reliability of proof of claims and defenses. Court adjudication yields results that are appealable and ultimately final and binding and enforceable, making absolute closure a real possibility. In disputes not requiring these types of stringent procedures, mediation and arbitration offer certain measurable advantages. Arbitration, while having some of the evidential and procedural

regularity of court adjudication, is conducted in a less formal and less rigorous setting, thereby enhancing the potential for a more expeditious resolution. Applying legal and equitable norms and creating remedies often tailor-made to the situation, arbitrators issue decisions as awards that can be enforced through the judicial process, bringing finality to the conflict.

Some disputes are best resolved in settings having few, if any, procedural restraints. With respect to those disputes, the mediation process offers several advantages. With minimal procedural requirements, mediation provides an unlimited opportunity for the parties to exercise flexibility in communicating their underlying concerns and priorities regarding the dispute. It can educate the parties about potential alternative solutions, empower them to improve and strengthen their relationship in future interactions, and stimulate them to explore and to reach creative solutions affording mutual gain and a high rate of compliance.

As to the cost of the process, court adjudication is publicly funded—tax dollars pay the cost of the judges_ services and other court administrative services. In mediation and arbitration, the parties usually share the neutrals_ fees and certain administrative costs. Depending on the nature of a particular dispute, however, the fees and costs associated with private mediation and arbitration processes are normally much less than those associated with a case that traverses the course of the court adjudication process.

1.3.2 Relative disadvantages of the processes

Each of the three processes also has disadvantages. With respect to the nature of the forum, the proceedings of the complex court adjudication process routinely mystify parties, who usually need to be represented by legal counsel. Moreover, a judge randomly assigned to hear a particular case may not have the necessary substantive or technical expertise to fully appreciate the intricacies of legal counsel_s arguments. Also, the crush of court caseloads sometimes results in substantial delay in processing individual cases. Parties often find that the court adjudicative process significantly disrupts their personal lives over long periods of time and ultimately produces a result that leaves them even more polarized than they were when they commenced the process.

Arbitration and mediation similarly have forum disadvantages. Private arbitration lacks quality control since the arbitrators are independently selected in individual cases and are not generally accountable to any supervisory authority. In mediation the neutrals have little power or authority over the parties and certainly no power to impose unwanted outcomes on them. Consequently, one or more parties can significantly influence settlements in some situations by the power they possess and exercise behind the scenes. Moreover, in mediation there is no application or development of public standards.

As to procedural disadvantages of the court adjudication process, a limited range of possible remedies exists, and because of the rigidity of the procedural structure, compromise is difficult. Arbitration, a process becoming increasingly encumbered by “legalization,” has its own drawbacks, which include the lack of public norms, the lack of binding precedent, insufficient opportunity for full discovery, relaxed rules of evidence, usually no written reasons for decisions, no uniformity of decisions, and usually no opportunity for appeal. Similarly, mediation has several procedural disadvantages: no real due process safeguards exist, participation by the parties cannot be compelled by

subpoena or otherwise, access to information may be severely constricted, and outcomes need not be principled. Closure to mediated outcomes is weak in the sense that they are nonbinding and unenforceable, except as provided by relevant contract law.

Finally, as to costs, the public substantially funds the administration of the court adjudication process. In many situations, however, it can be extremely expensive to use because the cumbersome discovery process and delays sometimes cause huge investments in attorneys_ time and therefore increased attorneys_ fees. Some complex arbitration hearings can spread over weeks and months, costing the parties much more than they had initially projected. Unsuccessful preadjudication or prearbitration mediations can also add somewhat to the overall cost of securing closure of a dispute.

For your convenience and quick reference, the charts that follow present the advantages and disadvantages of the three processes.

ADVANTAGES OF THE PROCESSES

COURT ADJUDICATION	ARBITRATION	MEDIATION
Public Forum	Privacy	Privacy
Neutrals are accountable	Parties control forum	Parties control forum
Already institutionalized	Expertise	Parties select neutrals
Rules of evidence	Parties select neutrals	Reflects concerns and priorities and disputes
Announces and applies public norms	Written procedures	Flexible
Precedent	Expeditious	Process educates disputants
Deterrence	Choice of applicable norms	Addresses underly-ing problem
Uniformity	Tailors remedy to situation	Often results in creative solutions
Independence	Enforceability	High rate of compliance
Decision appealable	Relatively inexpensive	Relatively inexpensive
Binding/closure		
Enforeceability		
Publicly funded		

DISADVANTAGES OF THE PROCESSES

COURT ADJUDICATION	ARBITRATION	MEDIATION
No control over selection of judges	Lack of quality control	Neutrals have no power to impose settlement
Lack of special substantive or technical expertise	Neutrals unaccountable	No power to compel participation
Requires lawyers	Becoming increasingly encumbered by "legalization"	Limited access to information
Mystifying	Relaxed rules of evidence	No due process safeguards
Delay	Limited or no discovery	Powerful party can influence outcome
Time consuming	No public norms	Weak closure
Polarizes, disruptive	No precendent	Not binding
Compromise difficult	Usually no written reasons for decision	No application/ development of public standards
Limited range of remedies	Usually no appeal	Outcome need not be principled
Expensive		

1.4 MANDATORY VERSUS VOLUNTARY MEDIATION AND ARBITRATION

Traditionally, mediation and arbitration have been voluntary in the sense that the parties agree, either before or after the dispute arises, to submit such dispute to one or both resolution methods. However, in recent years there has been an increasing trend toward the creation of statutes and court rules providing for mandatory (also called court-annexed) mediation and arbitration both as a means of easing the backlog of cases and as an attempt to reduce the amount of time and money the parties spend to resolve their disputes. The rules governing these programs vary significantly from jurisdiction to jurisdiction, and you should take care to apprise yourself of the specific requirements of the jurisdiction in which you are representing a client. For example, with respect to

mandatory mediation, in some jurisdictions the courts send all cases of a particular type to mediation as a prerequisite to litigating in the system. Some rules permit defendants to waive the mediation requirement, others do not. In some jurisdictions, the mediations are facilitative; in others, evaluative. (See section 2.2.) In some states, judges can independently determine whether a case should be submitted to one of any number of ADR processes for treatment, and in others, rules require neutrals to report back to judges on settlement progress. Some mandatory ADR programs require the parties to share the cost of the neutral, while others appoint the neutrals and pay them a nominal session fee. Some mandatory arbitration programs impose penalties, in the form of court costs and fees, on parties who reject the mandatory arbitration award, go to trial, and fare worse than they did in the arbitration proceeding.

Many people criticize these programs for their coercive nature, pressuring parties who are sometimes unrepresented into forgoing substantial due process rights they would otherwise enjoy in the traditional trial proceeding. However, because a growing number of courts consider early settlement of cases to be in the parties_ and the court_s best interests, the courts are likely to expand rather than shrink their employment of mandatory mediation and arbitration.

1.5 INITIATING THE PROCESSES

How you initiate the mediation and arbitration processes will depend on the particular circumstances. If you are proceeding in a court that has a mandatory ADR program, the court will notify you of the date that it has scheduled your case for a mediation conference or an arbitration hearing, as appropriate. If the dispute in which your client is involved arises out of a contract and the contract contains a mediation and/or arbitration clause, then the terms of that clause determine the steps to initiate the appropriate ADR process. If the contract clause contains no specific guidance, or if the dispute is not based in contract, then you will have wide latitude in initiating the appropriate ADR process. But you must negotiate several hurdles before you can accomplish initiation: you must (1) tentatively decide which process would be most appropriate for your dispute, (2) convince opposing counsel that the process you are suggesting is the appropriate one, and (3) with your opposing counsel, jointly decide on the provider of neutral services that you will engage.

1.5.1 Choosing between mediation and arbitration

Assuming you have narrowed your options to mediation and arbitration for use in resolving your dispute, you should consider several important criteria in choosing between them. Section 2.5 discusses additional criteria. If the parties to the dispute will have future dealings with each other and it is desirable for them to preserve a continuing relationship, mediation is indicated. On the other hand, if the parties do not need or desire to have future dealings, or if they have repeatedly acted in bad faith and have become hostile toward each other over a long period of time, arbitration, providing a decision on past events, may be the better choice. If one party is considerably more powerful than the other, the party with less power may benefit from the fairness-determining aspects of arbitration. If one or more parties need to avoid a win-lose decision—a published

opinion, for example, which may concretize undesirable rights and/or duties into the future—mediation is the favored choice. Large corporate clients, for example, that are engaged as defendants in a high volume of low-dollar disputes, where there is also a premium on speed of decision, privacy, and closure, may be well advised to opt for arbitration over mediation. If, in a particular dispute, your client has no clear legal entitlement, you are probably better advised to use mediation so that you can concentrate on favorable facts in the process or end the process at any point you think appropriate. A case having multiple parties and/or multiple issues may be better suited for mediation than arbitration because a greater opportunity for beneficial trade-offs exists in such a facilitated bargaining process. If a fair resolution of the dispute requires that certain witnesses be compelled to be present, then you clearly should choose arbitration over mediation. The chart that follows organizes and highlights some of these important criteria you should consider when choosing between mediation and arbitration.

IMPORTANT CRITERIA FOR SELECTING BETWEEN MEDIATION AND ARBITRATION

MEDIATION	ARBITRATION
Desire to preserve continuing relations	Need to offset power imbalance
Emphasis on future dealings	Need for decision on past events
Need to avoid win-lose decision	High volume of disputes
Disputants desire total control of process	Need to compel participation
Dispute has multiple parties and issues	Premium on speed and privacy
Absence of clear legal entitlement	Premium on closure

1.5.2 Persuading opposing counsel to participate

After you have tentatively selected mediation or arbitration and have convinced yourself of the wisdom of your choice, you must then convince your opposing counsel that your choice of process is a reasonable one. This is not always easy. Lawyers who have never used or been involved in a mediation, for example, are reluctant to use it for the first time. This is just human nature. If they have never experienced it, they feel unknowledgeable and therefore uncomfortable about recommending it to their clients. What if their clients ask questions about the process? Those lawyers will inevitably be embarrassed when unable to provide their clients with an explanation. Or worse yet, they may provide information that is incomplete, inaccurate, or derogatory of the mediation process altogether.

If confronted with the situation of an opposing counsel who is uneducated in ADR, you might try the following. Agree to meet with him to explain your experiences with mediation, for example, and answer any questions he may have. Or, offer to provide a videotape of a mediation of the type of dispute in which you are engaged. Many videotapes available through law school libraries and other sources are quite instructive on the process and the dialogue one may experience during the ordinary course of a mediation. Viewing the video may be enough to quell counsel_s jitters. Another option may be even better: you can contact the dispute resolution organization that you propose to engage to administer the mediation and have one of its case managers give your opposing counsel a call. Case managers spend a great deal of their time persuadi<$IADR (alternative dispute resolution);persuading opposing counsel to participate>ng opposing parties in cases to use ADR, and they are frequently quite successful.

1.5.3 Selecting the appropriate type of neutral services

Currently many sole practitioners and even law firms offer ADR services. You can obtain background information on these lawyer- proiders from ADR directories available in most law school libraries. In addition, by one estimate nearly 400 nonprofit and for-profit organizations across the United States specialize in providing ADR services.

For your convenience, a list of various dispute resolution organizations appears in appendix K.

Use of Alternative Dispute Resolution by Corporations

Presented by:

Joy V. Cunningham

Introduction

Alternative Dispute Resolution (ADR) as a tool for managing an ever-growing portfolio of litigation and disputes can be very effective. The court system recognizes the need for alternative forums for resolving certain disputes. Nevertheless, ADR as a process for solving disputes and resolving matters which would otherwise be litigated, has not yet maximized its potential. Although that is changing in some industries, the change is slow. This summary outlines three factors which influence the use and growth of ADR as a corporate tool for resolving disputes.

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Introduction

The three factors which most influence the use of ADR by corporations are:

- Organizational Culture
- Knowledge of ADR
  - Informed Potential Beneficiaries
- Personal Preference of Decision-Makers

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Organizational Culture

- Organizational culture impacts how the corporation conducts its business, including dispute resolution.
- Historical factors and experience will shape the focus.
- Organizations that have had success with traditional litigation processes through the judicial system may prefer the certainty of that system.
- On the other hand, if there have been negative experiences with traditional litigation, the organization may be ripe for the introduction of ADR.

Knowledge of ADR

Informed Potential Beneficiaries

- Lack of knowledge or being uninformed about ADR processes is often the greatest factor hindering an organization's use of ADR in resolving pending disputes.
- This is changing as businesses become more cost conscious. If ADR is recognized as costs and time effective, it will grow in popularity.
- The opportunities for educating an organization's decision-makers regarding the potential benefits of ADR to an organization may be few and are often serendipitous.
- In commercial organizations, ADR has gained traction in recent years. The challenge will be to introduce it to industries in which it has traditionally been unknown or unused.

Personal Preference of Decision-Makers

- Personal preference of decision-makers is an important factor in whether an organization will embrace ADR.
- In order to overcome barriers to the introduction of ADR into an organization, engaging and raising the interest of an organization's decision-makers is a key element.
- If the key decision-makers become engaged and interested, an organization can incorporate ADR into its resolution process relatively quickly.
- Influencing the decision-makers should be a focus of those who wish to introduce the benefits of ADR to the broader business community.

Focus for Decision-Makers

Factors which are important for decision-makers:

- An understanding of the different ADR methods and the strengths and weaknesses of each.
- Utilization of the most appropriate ADR method according to an organization's business philosophy.
- Acceptance of ADR processes as a true alternative for resolving disputes.

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Focus for Decision-Makers

- Understanding the processes on an operational level:
  - How does it work-practically;
  - Cost benefit analysis;
  - Level of participation and control;
  - Selection of ADR professionals;
  - Outcome of the process; and
  - Ultimately will this benefit the organization.

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