New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
ALM.
MAY 17, 2022

An ADR Primer for Non-ADR Professionals

By Myrna Barakat

By **Myrna Barakat**

As the alternative dispute resolution—or ADR—world grows and becomes more prevalent, many business lawyers, and even some litigators, may find the difference amongst the various ADR processes somewhat unclear. Selectors may also confuse the role a neutral plays in each and waver in determining the best person to choose for their case. I describe below the traditional ADR mechanisms, namely arbitration and mediation, and the attributes of an effective arbitrator and mediator. I then cover Med-Arb, a lesser-known mechanism, and discuss dispute avoidance measures, which are gradually gaining traction.

Arbitration

Arbitration is often viewed as a more efficient and less costly alternative to litigation. It is a dispute resolution process that is generally supported and enforced by the traditional courts. Basically, it involves the parties selecting their adjudicator and agreeing to the procedural rules they will follow. The concept of party autonomy is at the heart of the arbitration process. For disputes involving highly technical matters, selecting the decision maker based on their qualification as opposed to a court-imposed judge can be particularly appealing. For smaller disputes and parties seeking a swift process, the ability to bypass extensive discovery and cumbersome processes is another major advantage. For international transactions, arbitration allows parties to avoid having to submit to the courts of a foreign nation that may have national biases. More generally, arbitration centers and arbitrators have shown themselves to be much more easily adaptable to change than courts: The shift to remote in arbitration hearings was rather swift while courts have moved relatively slowly, if at all, creating a significant backlog.

That being said, arbitration can have its drawbacks. Although it's often viewed as a confidential process, it may not always be. For example, if enforcement of an arbitration award is contested in court, the judge's ruling in and of itself may disclose portions of the arbitration proceedings. Also, unless the parties have separately agreed to confidentiality, they are not prevented from making disclosures. Another concern with arbitration is that arbitrators are generally viewed as reluctant to make the tough decisions and more likely to find a "middle of the ground" solution that appeases both parties. Unlike judges, arbitrators are generally selected by the parties and paid by them for their services; they could therefore be less inclined to alienate a party for fear a gossiping party may damage the arbitrator's reputation and future appointments. Further, an arbitration award is generally not appealable: Although a party may contest enforcement of an award under narrow procedural grounds, generally, an arbitration award is final. Finally, the biggest benefit of arbitration, namely a swift and economical process, is not always assured. It requires that both parties agree to it. Although arbitrators generally try to encourage the parties to act expeditiously and avoid unnecessary discovery and lengthy processes, ultimately their hands will be tied by the terms the parties agree, or don't agree. Since often one party has an interest in drawing proceedings out, the arbitrator's ability to streamline the process may be limited absent an arbitration agreement that imposes specific limitations on the parties. It's also worth noting that the general finality of arbitral awards can, in and of itself, extend the process: Arbitrators may be overly

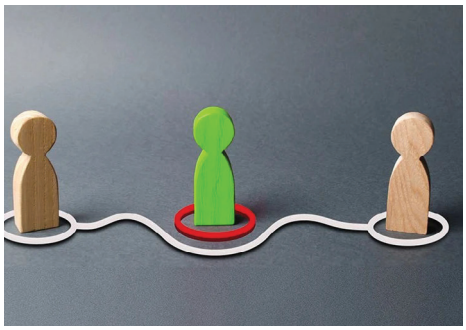
cautious to ensure not only that the right result is achieved but also that the procedure followed does not transgress any of the limited grounds for vacatur.

An effective arbitrator is obviously one who can quickly recognize and dissect the relevant facts, understand and digest the law with precision, and, ultimately, be able to analyze the data fairly to adjudicate responsibly. That doesn't necessarily mean that they need to have extensive experience in the specific subject matter of the dispute but rather that they have the skills and experience to be able to familiarize themselves with the intricacies quickly. They also need to have a good grasp of the legal framework involved. An arbitrator however need not be a lawyer, in fact a fair number are not. That being said, an effective arbitrator must have the wherewithal to be able to understand and process the legal elements of the dispute and opine within their confines.

Mediation

Although mediation is often referred to in the same context as arbitration, it is a significantly different process. To start, it is a voluntary process: Even if parties may be contractually obligated to attempt to settle a dispute by mediation or compelled to do so by a court, ultimately the outcome of a mediation depends solely on the will of the parties. A mediation involves parties discussing and negotiating amongst themselves with the help of a third party, the mediator, to try to resolve their dispute. They alone determine the outcome of their discussions. Generally, it is an attempt to resolve a matter to avoid going to either arbitration or litigation. This in itself is often an incentive to attempt mediation. That is, even if parties believe they have a strong case, avoiding the cost, headache and time of an adjudicative process can often be a factor in trying to settle. Although a party could use mediation as a stalling technique, the parties can parallel process and attempt mediation even as they start the adjudicative process. Mediators are subject to strict confidentiality obligations restricting them from disclosing any information that is shared with them by either party during the process. Some exceptions apply but as a general rule they can't even be compelled by a court to disclose. That being said, unless the parties themselves contractually agree to confidentiality, they are not prohibited from disclosing any information they learn during the process. Finally, unlike arbitration, mediators regularly have one-on-one, or "ex parte," discussions with the parties as part of the mediation to help advance the process.

The benefits of mediation are significant since it is an ideal mechanism for parties to avoid a costly and lengthy court or arbitration process. Although the mediator's fees are paid by the parties, the cost can be nominal compared to that of an adjudicative process and the upside can be substantial. It's also the only opportunity parties have to craft a solution that is mutually beneficial and outside the realm of the contractual arrangement that is in dispute. Mediation can be particularly helpful for parties who have a long-term relationship. Disputes involving supply chain parties, joint venture partners and family businesses are examples of relationships that would suffer dramatically beyond the subject matter of the dispute if a court or arbitration process is needed. Mediation offers the parties the



Credit: 3dreams/Shutterstock

ability to go as narrow, or broad, as they desire in the scope of the matters they want to resolve. It gives them the opportunity and forum to reset their relationship for the future and salvage it.

The drawbacks of mediation are limited and can generally be mitigated by the parties: By attempting mediation while the adjudicative process is underway, parties avoid delaying that process should mediation fail. Further, parties can enter into confidentiality agreements to foster openness during mediation but limit the potential that any sensitive information becomes public.

Although many arbitrators also act as mediators, the attributes of an effective mediator are significantly different from those of an arbitrator. Here again, a mediator need not be a lawyer. And when they are, I would argue that the skills of a transactional lawyer lend themselves squarely to those of an effective mediator. For mediations where parties want guidance on the law and chances of success in court, a mediator who is a lawyer or former judge may be of value. In any case, effective mediators are those who are viewed by the disputants as being honest brokers and trusted facilitators. They must be able to recognize the unspoken issues and help parties flesh them out. They then must have the technical and analytical fortitude to work with the parties to "think outside the box" and craft solu-

tions that are perceived by both of them as mutually beneficial.

Med-Arb

As its name suggests, Med-Arb is an ADR mechanism that involves parties agreeing to a process whereby they attempt mediation with a mediator who would then act as an arbitrator for the dispute should mediation fail. Its biggest benefit is the time and money efficiency of the process since redundancies in the two processes are eliminated. This can be particularly appealing for disputes involving small dollar amounts and parties with limited resources. Its drawbacks can however be detrimental to the overall aim of the processes: Parties may be reluctant to be open and forthcoming with information during the mediation process when they know that the person mediating their dispute may ultimately also be the one deciding it if it goes to arbitration. Further, the ability of a mediator-turned-arbitrator to exclude any inadmissible or confidential information obtained during mediation when deciding a case is questionable. An effective neutral for Med-Arb proceedings is therefore someone who is not only qualified to act as both a mediator and arbitrator but also who has the stature that will allow parties to trust that they will be able to act effectively and ethically for both processes notwithstanding the potential conflict.

Dispute Avoidance Processes

Although not generally adopted yet, dispute avoidance processes can be particularly effective for parties in ongoing relationships. These processes are aimed at foreseeing or resolving disagreements before they become disputes needing third-party intervention. These dispute avoidance processes are prevalent in the construction industry but are gradually gaining interest generally. The concept is simple: Craft a process that involves an independent third party who follows the parties during their relationship with a view to guiding them during their interactions and helping them steer clear of disputes that can be detrimental to them and their mutually beneficial relationship. The neutral's role is to catch disagreements, implement a process to address them and work with the parties to resolve them swiftly and effectively.

The benefits of this process are not dissimilar from those of a successful outcome in the Prisoners' Dilemma framework: The best outcome is when both parties collaborate, the worst is when they are not aligned. Dispute avoidance processes are more successful when they are tailored to the parties and their relationship. They obviously add a cost to their business arrangement but one can view that as an investment to avoid the costs they would incur if a problem balloons into a legal dispute. They can also be viewed as invasive and burdensome to the relationship. However, parties can work with their neutral to craft a process that limits these drawbacks.

Generally, an effective neutral for dispute avoidance is one who is trusted by both parties and highly perceptive to be able to pick up on unspoken cues. Familiarity with the specifics of the business context is also helpful so that they can foresee potential issues. It's also someone who has the wherewithal to be viewed by the parties as independent even as they give the parties the "tough love" they may need to hear to mitigate the risk of enabling improper or destructive behavior that could jeopardize a long-term relationship.

Parties can turn to ADR and craft a mechanism that suits them once a dispute arises even if it wasn't previously contemplated. As interest in ADR grows, so do the number of processes and permutations that fall within its sphere. At the onset, both arbitration and mediation have compelling advantages for many disputants. The variations in these traditional processes allow disputants to further tailor their dispute resolution structure to the specifics of their dispute and their needs. While Med-Arb is one such option, there are others, such as Arb-Med, and more will likely arise with time as parties get more comfortable with the benefits of a tailored dispute resolution mechanism. The newest ADR concept calls for a process design consultant to work with parties to design a dispute resolution process tailored to their specific circumstances. Dispute avoidance techniques are also slowly growing in interest in new industries and will likely continue to develop. Generally, for transaction parties and disputants the key is understanding the benefits and drawbacks of each process so that they can make optimal decisions in selecting the process that works best for them and the effective neutral for their circumstances.

Myrna Barakat *is a commercial arbitrator and mediator; she divides her time acting as a neutral and advising a broad range of domestic and international companies and investor groups on mergers, acquisitions, and other strategic initiatives. She can be reached at mbarakat@mb-cap.com (BarakatADR.com).*