

An Introduction to Principled Negotiation, Client Representation in Mediation, and the Arbitration Process

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EDITOR'S NOTE: The first four chapters of this Workbook provide an introduction to the topic of business dispute anticipation and resolution that does not involve resort to the public courts. In this chapter, the three main categories of ADR—negotiation, mediation, and arbitration—are defined and explained in general terms, and the stage is set for more specific application of the principles of nonjudicial dispute resolution.

There are no perfect contracts. Therefore, it is to be expected that, at some point during the life of a project, parties to business agreements will need to reformulate the terms of their deals. Usually, this takes place by assent, to the benefit of the deal and the mutual advantage of the parties. Sometimes it doesn't.

An aggrieved party to a business deal ordinarily makes every effort to rectify the situation prior to asserting a legal claim for damages. It's perfectly understandable why that should be. Legal proceedings distract businesspeople from their jobs. They cost money. They take time. Their outcome is uncertain and legally (rather than commercially) structured. Legal proceedings often lack finality as the losing party seeks appellate review. Relationships go very sour very fast. In short, very few businesspeople make money suing their business partners.

Alternative Dispute Resolution, or ADR, was initially an effort to devise ways to resolve business conflicts that minimized or eliminated the need to go to court. The practice has become so mainstreamed, however, that it's hardly an alternative any more—it's the way most people do business. When you consider how many disputes are resolved through discussion or negotiation and never ripen into legal claims, you realize that fixing problems is usually more profitable than vindicating contractual rights. Then consider that of the 273,312 civil cases filed in U.S. District Courts in the 12 months ended June 15, 2015, only 2,935 of them—1.1%—were disposed by trial, and you appreciate that business disputes simply don't get resolved in court. They get resolved by what we used to call "alternative" dispute resolution.

Business lawyers are, nevertheless, essential players in business conflict management and resolution. But to best serve their clients, business lawyers might need a slight shift in focus. A transactional counselor may stuff a contract full of warranties, reps, and assurances—but the contract still has no value unless those promises can be effectively enforced by means of a dispute resolution clause. A dispute resolution expert who (as I was trained to do) examines a client's contract for rights, defenses, statutes of limitations, fraud, and other causes of action might also spend time understanding what the client initially wanted out of the joint venture and how best to negotiate a resolution that achieves it.

Classically, ADR is divided into three "baskets": Negotiation, Mediation and Arbitration. The first two result in consensual outcomes whose terms are determined by the parties themselves. The third is an adjudicative process, the outcome of which is determined by a third-party and is final and binding upon the disputants. Here are some rudimentary features of each ADR process.

Negotiation

Considering the fundamental role that legal negotiation plays in rendering legal services, it is surprising that until very recently, few law schools offered training in the skill. Even today, not a single law school includes a stand-alone course in negotiation skills in its list of courses required for graduation. This despite negotiation's being at the core of real estate, bankruptcy, deal making, securities, sales, tax disputes, legislation, administrative regulation, alternate corporate vehicle formation, and—as noted above—dispute resolution.

Negotiation styles and strategies can be understood in at least three polarities. “Adversarial vs. Collaborative” bargaining compares negotiators who trade proposals like tennis players volley with negotiators who invite joint problem solving like a group working on a jigsaw puzzle at a beach house. “Distributive vs. Integrative” bargaining refers to processes designed to allocate (and therefore compete for) a fixed value, like pennies on a table, as opposed to bargaining strategies that are susceptible to value-adding components, as when in raise negotiation, sources of value include not only dollars but also flex time, vacation time, retirement benefits, or healthcare. “Interest-based vs. Positional” bargaining compares negotiators who assess various offers and demands in an effort to obtain the underlying objective of the principal to negotiators who exchange bid-ask-bid-ask and end up somewhere between their initial positions.

No one approach is suitable for every negotiation. And in any event, there is no right and wrong in negotiation. Nevertheless, both scholars and experienced practitioners tend to agree that interest-based bargaining tends to yield more nuanced and commercially robust outcomes; that integrative bargaining tends to yield outcomes that benefit both parties; and that collaborative bargaining tends to repair and even improve business and professional relationships, both between the principals and their lawyer agents.

Many untrained negotiators approach the deal table prepared with a list of demands and justifications, including alternative proposals and reservation points, eager to take control. Perhaps ironically, the most experienced negotiators listen far more than they speak. Preparing for a negotiation involves determining what your client wants, what he or she is willing to do to get it, and what the alternative is in the event that the negotiation fails. But learning what the counterparty wants and thinking up ways that your client’s objectives can be attained on terms that the other party consents to—that is much of the art of successful negotiation.

In this “dance,” the skilled negotiator knows when to reveal and when to withhold, when to concede and when to seek reciprocation, when to assert what’s important to a client and when to misdirect an adversary with respect to priorities, and when to agree to a component of a multifaceted deal and when to hold it in abeyance pending the resolution (often through trade-offs and exchanges) of the entire deal. And the negotiator knows how to do all of this in an ethical manner.

Negotiation literature is very, very robust, and the challenge of finding a negotiating style that works is every lawyer's White Whale. But the fundamental enticement is the lure of Sherlock Holmes's "dog that didn't bark." Negotiators seek the lawsuit that wasn't filed, the business divorce without recriminations, the problem that never ripened into a conflict, the conflict that never ripened into a dispute.

Mediation

Mediation is negotiation with adult supervision. Negotiators who reach an impasse in resolving the problem to their clients' mutual satisfaction are often well advised to bring in a mediator to test whether what looks like an impasse is, at heart, the product of mistrust, miscommunication, an inability to recognize mutually beneficial prospects, or an understandable lack of candor.

Mediators are injected into a negotiation on certain terms. First, they are equally trusted by both parties to the negotiation. Second, they promise that they will not reveal information learned from one party without that party's permission. Third, they extract from the participants an undertaking that nothing communicated during the process can be used in subsequent litigation—information and statements in mediation are not only confidential, but privileged. And fourth, they are skilled at listening, probing, reality testing, detecting interests that lie beneath positions, and steering the parties towards "yes."

Some mediators see themselves as the person who enters a dispute over a group of oranges, and who comes to learn that one party wants the peel and the other the pulp and therefore both sides' interests can be met. Some see themselves as moderators of emotional behavior, allowing venting and suggesting a cooler analysis, sometimes at the behest of a client's own attorney. The most appealing and simplest image of a mediator may be of the wise old woman who privately visits two estranged young lovers, one at a time. Each of the angry, hurt people confides in her the reasons for their estrangement, and it takes very little time before the old woman has more information, insight, and understanding than either of the two young people. She is in a position to help because she knows things about them both that neither one knows about the other—including ways they can make each other happier than they would be alone.

This role of the “trusted mandarin” is one of the essential attributes of mediation, and the reason so many commercial mediations result in agreement where direct negotiation failed. The mediator soon knows the deal better than each party and is possessed of information and analysis that each party cannot possibly possess because—through caution, distrust, or negotiation strategy—they were not privy to it to the degree the mediator is. The mediator can develop an understanding of critical negotiation components—underlying business objectives, possibilities for mutual gain, the necessity of modification of terms—that can serve to lead the parties to robust commercial outcomes. And suggestions or queries (or even challenges) that come from the mediator are usually more attentively received than the same words coming from a counterparty.

One of the most frustrating things an ADR practitioner can hear is that counsel does not want to engage in mediation “because the mediator always splits the baby.” As we will see below, it is arbitrators who possess the authority to adjudicate a dispute, rendering a final and binding award that is not susceptible to review on the merits and that is enforceable in courts in the United States and abroad. A mediator, by contrast, is a weird combination of a counselor and a midwife. In mediation, it is the parties, not the neutral, who devise and agree upon a commercially rational outcome. To paraphrase James Joyce, upon the successful conclusion of a mediation, the mediator refines herself out of existence.

Arbitration

Arbitration is an adjudicative process resulting from the parties’ contractual agreement to waive any right to assert claims in a judicial forum and instead to engage a mutually selected private party to hear evidence and issue a final, binding and non-appealable decision on the merits of the dispute.

Arbitration is of centuries’ lineage. No doubt a Phoenician merchant, dissatisfied with the quality of cotton he was being offered by an Egyptian seller, agreed to abide by the decision of an old wizened cotton merchant there on the wharf. Arbitration in such an instance illustrates the fundamental features of the process—it is mercantile; it is fast; it is reliable; it involves a private adjudicator selected by the parties for his knowledge of the business rather than the law; and it

allows busy merchants to go on their way without being diverted by lengthy, costly, and uncertain judicial proceedings.

You wouldn't know it to read the newspapers, but modern commercial arbitrations continue this tradition without serious disruption or challenge. Every month hundreds, even thousands of business disputes are resolved by final and binding arbitration under the rules of the American Arbitration Association, the Singapore International Arbitration Centre, JAMS, the Hong Kong International Arbitration Centre, the London Centre for International Arbitration, the International Chamber of Commerce, CPR Institute, and many other reputable providers of arbitration services. Agreements to arbitrate rather than litigate are negotiated; demands for arbitration are served and answered; arbitral awards are issued and complied with, all in service of the commercial objectives of the parties. In the United States, entire industries use arbitration as the exclusive means of resolving disputes—including securities and major league athletics.

The practice is not abstruse. The Commercial Rules of the American Arbitration Association are readily available and describe a straightforward method of conducting an arbitration; the process averages well under a year from assertion of a claim to issuance of an award. By their agreements, parties can customize the process as they see fit—setting forth qualifications for arbitrators, determining what law or rules shall govern the contract and the arbitration, limiting or expanding prehearing exchange of information, providing for efficient exchange or joint testimony of experts, and so on. Arbitration is a creature of contract, and an agreement to arbitrate will be enforced by American courts unless attacked on grounds applicable to the enforceability of any contract.

American arbitration law is currently wrestling with important questions of policy. Are agreements to arbitrate enforceable against consumers who are unaware of the existence or import of the agreements? Are provisions of arbitration agreements purporting to prohibit collective redress enforceable? What is the relationship between state consumer protection laws and federal judicial policies favoring arbitration? Who decides these questions, the arbitrator selected by the parties or a court seized of a motion to compel arbitration or to vacate or enforce an arbitrator's award? Has the litigation that sometimes surrounds arbitration procedures rendered the process as costly and time-consuming as litigation would have been in the first place?

These challenges are, for the most part, around the edges of the envelope of private dispute resolution. For the purposes of this introductory essay, practitioners should approach arbitration with a degree of confidence borne of centuries of commercial usage. Though arbitral awards may not be appealed, the finality they promise often has commercial value. Though court judgments may not be recognized outside the jurisdictions that issued them, arbitral awards are enforceable in almost 200 countries by operation of the New York Convention. Though courts are public forums, arbitration hearings (and, usually, arbitration awards) are confidential. And while courts randomly assign the judge who will preside over the dispute, parties to arbitration select the adjudicator based on predetermined criteria and can demand an award that reflects not only the law, but also standard practices in the industry and other relief that a court may not be empowered to render.

Of course, methods of dispute resolution are as many and varied as the human mind can conjure. Counsel might consider variants of consensual non-binding processes, such as conducting a mini-trial before senior executives of the disputing companies, seeking a non-binding evaluation of the claims and defenses from a retired and trusted jurist, or asking a mediator to propose an outcome in the event that parties cannot reach agreement during mediation. They can come to a side agreement that will conform an arbitrator's award to a number within pre-agreed boundaries. Indeed, in the chapters that follow, several examples of ingenious methods of commercial dispute resolution processes are described, the product in each case of the particular needs of a particular industry or commercial application.

One hopes that with this general introduction, the reader can intelligently discuss pre-dispute contractual provisions in deals that are designed to preserve the value of the transaction and also discuss with a client or a counterparty the fastest, cheapest and most appropriate way to resolve a commercial dispute once it has presented itself.