Weighing the Pros and Cons

Martindale-Hubbell posed the following question to provide a variety of views on this important topic:

What should be my primary considerations in choosing a particular dispute resolution strategy?

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In resolving a business dispute, one key consideration is whether the parties seek to preserve an ongoing business relationship. If they do, a more cooperative, informal and efficient dispute resolution strategy, enabling the parties to control their outcome by mutual agreement—such as direct negotiation or mediation—is usually the wiser course. Such methods maximize the chances of salvaging the relationship in a way that the "winner and loser" outcome of more adversarial and protracted arbitration or litigation proceedings often cannot.

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Dispute resolution often isn't considered early enough in the case-review process. Setting up an effective arbitration or mediation takes as much effort as a pretrial hearing—and in a dispute resolution, not every trial strategy should be disclosed to the other side, which adds another element of complexity. Crafting an organized strategy, bringing together both parties, creating exhibits and compiling demonstrative evidence are essential to success. These efforts take time, but are often worth it; an experienced mediator or arbitrator is more informed and sophisticated than the average jury.

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- Mediation allows your client to hear the other side's position directly from the other side. It is the best status report you can provide your client.
- Arbitration is about replacing the legal system with a streamlined, sophisticated arbiter. Arbitration has its place in technical matters, but it can be just as expensive as traditional litigation.
- Arbitration need not be administered between sophisticated parties. Instead, each party should select a mediator; the two disinterested mediators select a true neutral third; and then, proceed using agreed rules.

Mediation and arbitration once represented exotic alternatives to litigation, revolutionary methods that could save feuding parties money, time and the unpredictability of a jury. As parties have grown more willing to embrace ADR, mediation and arbitration have become standard tools in a legal strategy. Since mediation, arbitration and litigation all have pros and cons, and no two cases are alike, there are many factors to consider when choosing a particular option—or options.

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If each party genuinely believes he or she will prevail, a nonbinding summary jury trial may be the tool to bring them closer together. In a summary jury trial, the parties select 12 jurors from the applicable jury pool and retain a third-party neutral to serve as trial judge. The parties each present a condensed version of the case. The jurors then deliberate and provide feedback. The perspective of the jurors can often lead a party to re-evaluate his or her position in order to facilitate a settlement.

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A sometimes-overlooked strategy is private judging. Although not available in every state, it provides the functional equivalent of a nonjury trial by a retired judge or qualified attorney, jointly selected by the parties for his or her expertise. The process generally involves the streamlined application of procedural rules and more case management by the private judge. It is best suited to cases where an early decision or greater control over the pretrial calendar is important, or where threshold legal issues require prompt rulings. In many states, some rights of appeal are preserved.

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The primary consideration is "the consequences of losing"; not just the case at hand, but the impact losing will have on future similar disputes, business operations, reputation and business strategy. Arbitrators tend to base decisions on concepts of equity, can be arbitrary and there is no appeal. Litigation demands application of the rule of law and provides an opportunity to appeal a trial court disaster. Mediation allows for creative solutions, where litigation and arbitration serve up a number, often intolerable. Think through the end game before you pick your field of play.

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Illustrations by Holly Haugen

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What should be my primary considerations in choosing a particular dispute resolution strategy?

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Private arbitration offers several advantages over litigation, particularly when multinational organizations are involved. If the parties are located in more than one jurisdiction, they can choose a neutral forum of convenience. There is also the ease of enforcement of the arbitration award internationally without needing to re-litigate the issues. And arbitration offers confidentiality of the dispute and ultimate award; the opposing parties may not want the precedent of a court proceeding or all the world to know the details of the dispute.

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As a general dispute resolution principle, it is critical to know your goals and know the other party. The key is to understand your interests and their interests. Particularly in mediations, the most effective results come from avoiding excessive posturing, and, instead, identifying the interests of the other side and proposing mutually agreeable solutions. Making reasonable proposals that can be backed up by objective and legitimate standards will go far in bringing the other side in line with your perspective.

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Mandatory arbitration, once viewed as the be-all, can be straightforward and definitive but is not necessarily as streamlined as it once was, and possibilities of appeal are practically nil. Mediation tends to work best as a precursor to arbitration or trial, giving both sides a glimpse of things to come and an objective outsider urging peace in place of war. Trial, while certainly the most involved, at least allows the check and balance of meaningful appellate review.

Which to use? Focus on the level of complexity of the dispute; then, match a resolution methodology to that.

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