

PROBLEM SOLVED!

EFFECTIVE STRATEGIES FOR GETTING THE MOST OUT OF ALTERNATIVE DISPUTE RESOLUTION

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WHAT IS ALTERNATIVE DISPUTE RESOLUTION?

- **Any** method of settling disputes outside the courtroom
- Common forms are negotiation and conciliation
- Most common forms are mediation and arbitration

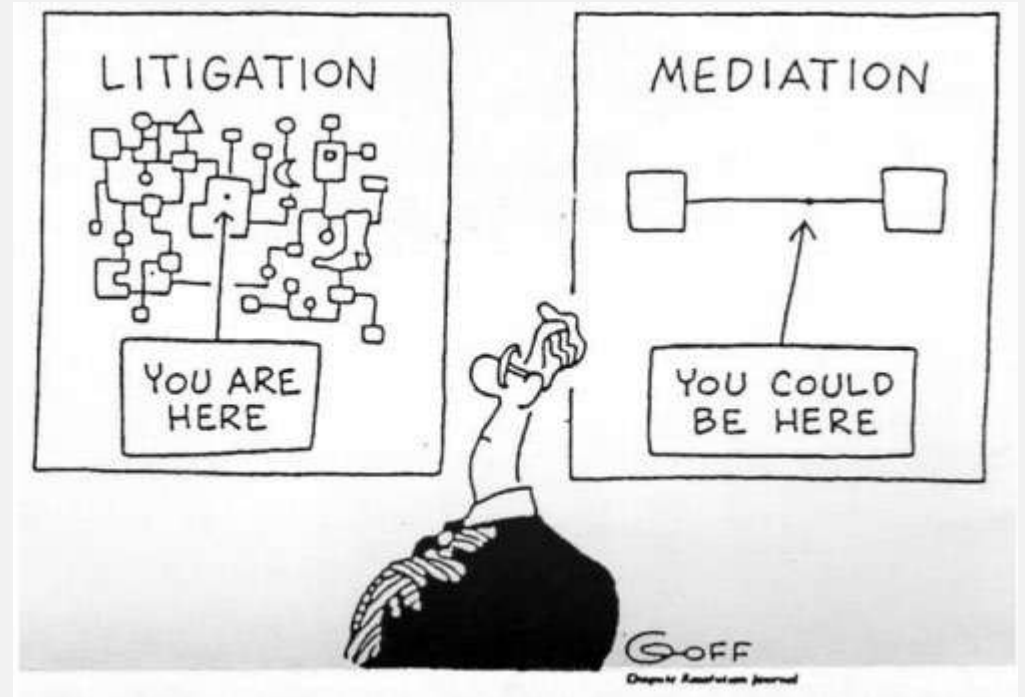




MEDIATION AND ARBITRATION: WHAT YOU NEED TO KNOW

WHAT IS MEDIATION?

- Negotiation facilitated by a neutral third party
- Mediation is usually voluntary, although some statutes, rules or court orders may require mediation
- Non-binding and the parties control the process – time and place, payment, attendees and other factors
- Resolutions are usually memorialized in written agreements and are typically enforceable – process can continue without an initial resolution



WHAT IS ARBITRATION?

- Initiated by a notice of intent to arbitrate the dispute
- Response period followed by the selection of arbitrators then the arbitration hearing
- Presided over by a single arbitrator or a panel of arbitrators



"Ahh, the arbitration team is here."

IMPORTANT ASPECTS OF ARBITRATION

- Specifically authorized by federal law – federal arbitration act
- Binding – although possible options for appeal
- Creature of contract
- Rules can vary widely (AAA, JAMS, contract, streamlined procedures)



BEST PRACTICES IN MEDIATION



SELECTING THE MEDIATOR

- Process – choose from a proposed group
- Subject matter expertise
- Choose the right style for the case and the parties
- Consider the mediator's rate and how the costs will be shared
- Consider potential bias



PREPARE, PERSUADE AND STAY COOL



- Efficient preparation – know key facts and strengths and weaknesses
- Submit a persuasive, yet credible position paper
- Do not make inflammatory opening statements – modern practice has largely dispensed with opening statements

KNOW WHEN TO *HOLD EM* AND WHEN TO *FOLD EM*

- Know when to mediate – next window, next door approach
- Communicate a willingness to try the case if necessary
- Don't reveal too much to the mediator (i.e., your bottom line)
- Make it count – may be the best shot your client gets at a reasonable settlement
- By the same token, be prepared to walk out to avoid a complete waste of time



BEST PRACTICES FOR ARBITRATION



"That's your best advice? Play nice!"

BE PRECISE IN CRAFTING THE SCOPE OF THE ARBITRATION AGREEMENT



- Broad form language vs. narrow intermediate form
- Identify rules and covering body
- Consider a mandatory mediation clause as a precursor
- Use a single arbitrator when appropriate
- Specify the governing law and venue

ARBITRATOR SELECTION

- Process – contract will control – single vs. neutral
- Must be capable and experienced
- May need special expertise depending on the case
- Judicial background and potential bias?
- Must be able to supervise an efficient and economical process – strong management skills



The background of the slide features three black silhouettes of people sitting at a table, facing each other. The silhouettes are simple, with circular heads and rectangular bodies. The table is represented by a dark horizontal bar across the middle. The overall background is a dark, muted brown color.

PRELIMINARY CONFERENCE PREPARATION

- Best chance to ensure an impartial and effective process
- Arbitrator will propose a scheduling order
- If possible, confer with client and opposing counsel to streamline issues

DOCUMENT PRODUCTION, DISCOVERY LIMITATIONS AND MOTIONS

- Early mandated production of documents
- Early expert identification and production of reports
- Limit depositions and dispense with interrogatories and requests for admission
- Limit motions



THE RULES OF EVIDENCE (OR LACK THEREOF)

- Federal and state rules of evidence do not apply
- Evidence is considered if the arbitrator considers it relevant and material and can weigh it accordingly
- Deposition transcripts are admissible provided there has been an opportunity for cross-examination
- Affidavits or other recorded testimony may be admitted and weighed as the arbitrator sees fit

HEARING TIME IS \$ – DON'T WASTE IT!

- For live testimony – agree to specific time limits for direct and cross and agree to call witnesses once
- Submit testimony by depositions, stipulated declarations and/or reports when possible
- Have witnesses testify by video or telephone if possible
- Use objections wisely – not a jury trial!
- Hold the hearing on consecutive days

ESTABLISH THE FORM OF AWARD

- Forms – bare, reasoned and findings of fact and conclusions of law
- JAMS – presumption of reasoned
- AAA – findings of fact and conclusions of law
- If you want a bare award, you need to advise the arbitrator
- “Brief” reasoned is a good alternative



APPEAL WITH CAUTION!



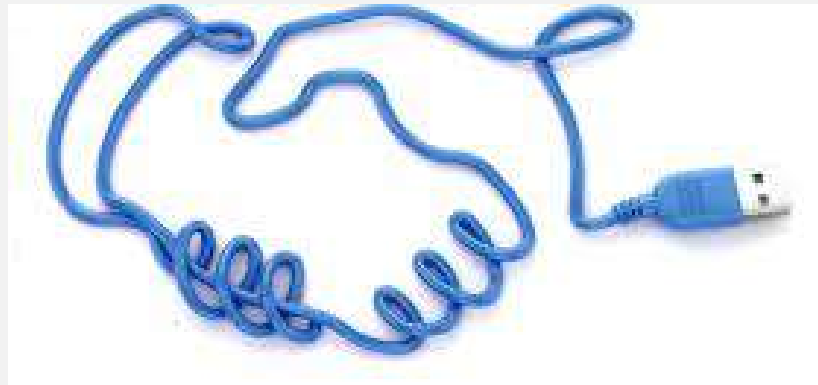
- FAA – award procured by fraud, corruption or undue means
- FAA – arbitrator was prejudiced, refused to consider material evidence or exceeded his/her powers
- JAMS/AAA provide for optional internal appeal procedures to which the parties may agree

THE FUTURE? ONLINE DISPUTE RESOLUTION (ODR)

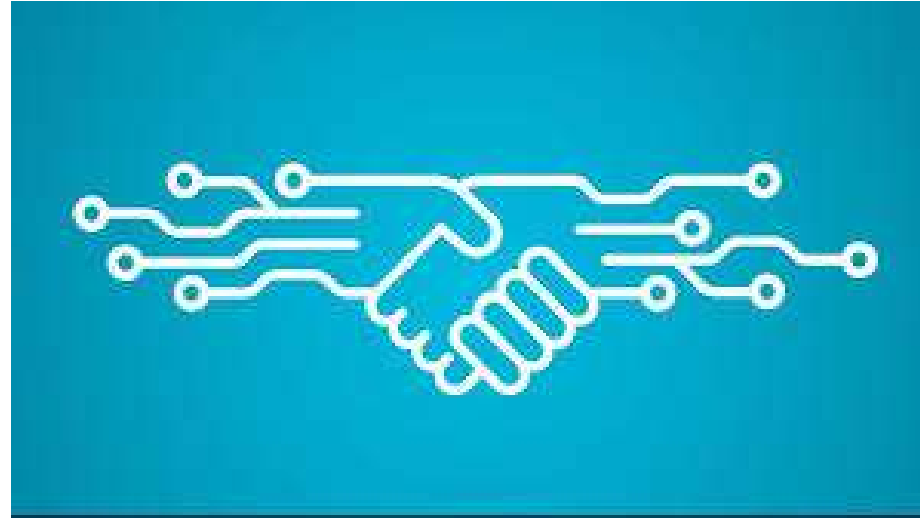


WHAT IS ODR?

- Type of dispute resolution that uses technology to facilitate the resolution
- Now, particularly popular for e-commerce disputes where the parties are located very far from one another
- Other names:
 - iDR
 - eDR
 - eADR
 - oADR



The New Handshake



ODR METHODS – BOTH VOLUNTARY AND BINDING

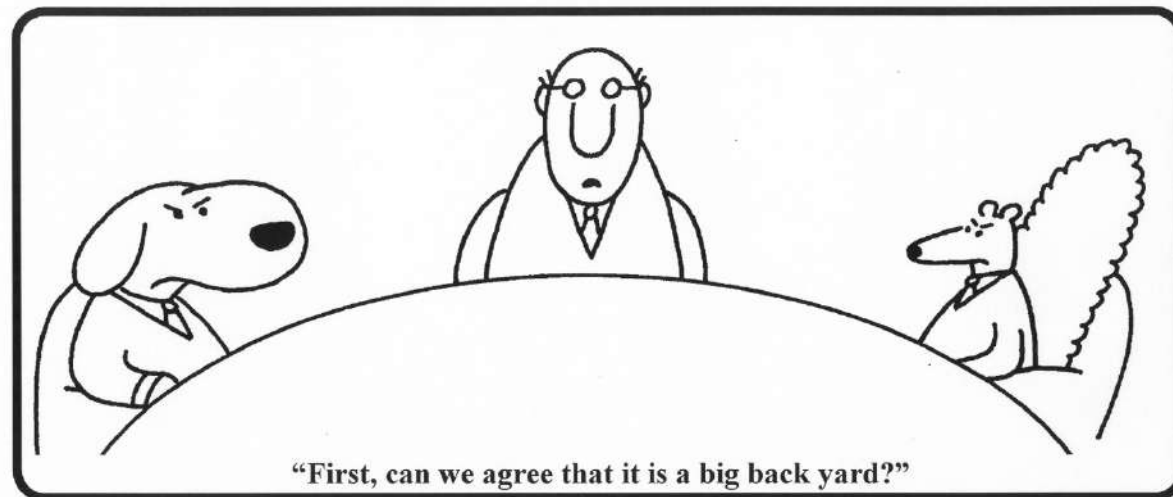
VOLUNTARY ODR METHODS

- Automated negotiation
 - Double blind bidding
 - Visual blind bidding
- Designed for disputes where liability is not challenged
- Difference is the number of parties
- Success in the areas of insurance compensation and commercial dispute
- Assisted negotiation
- Technology assists more in the traditional role of a mediator
- SquareTrade – eBay – used to resolve disputes between buyers and sellers
- Complaint (form)/invitation/acceptance
- Flexible technology allowing parties to re-shape the problem

The logo for SquareTrade, featuring the word "square" in blue with a red square above the 'u', and the word "trade" in blue below it.The logo for eBay, featuring the word "eBay" in a multi-colored font: 'e' is red, 'b' is blue, 'a' is yellow, and 'y' is green.

IF FAILED NEGOTIATIONS – SECOND PHASE

- Mediator for \$29.95
- Mediator uses the SquareTrade technology to propose solutions
- Agreements are confidential and become binding as contracts





ONLINE ARBITRATION

- More of a piecemeal online process in most cases
- Parties have the right to examine witnesses (Skype, Zoom, etc.)
- Key aspect is being able to hold a hearing online
- Main challenge is that judicial enforcement partially defeats the purpose of an online process

ICC ARBITRATION CASE STUDY

- International Ten Figure Dispute
- Agreement by the parties to hold the hearing electronically (multiple parties all over the world)
- Document review platform contained more than 110,000 documents
- Six week, stop-clock hearing with over 40 witnesses and 22,000 exhibits



BEST PRACTICES????

- Ensure that everyone buys into the online process
- Engage a proven service provider early in order to make sure all parties are sufficiently familiar with the platform
- Know what disputes may be good for some form of online arbitration

ADR, ODR, WHATEVERR – WHERE DO WE GO FROM HERE?

- Out of court resolution options are here to stay and certain to grow as litigation costs continue to escalate
- More mandated ADR as dockets continue to get clogged and judicial resources run thin
- Some form of ODR will almost certainly be applied to a much broader range of disputes
- Attorneys should be skilled in the traditional practices of mediation and arbitration and apt to learning about ODR options that could ultimately save their clients significant time and money

QUESTIONS?

- Comments, Concerns or Thoughts?
 - Who needs a break?
 - Thank you very much!