Why You Should Consider ADR for your Ethics and Contracts Disputes

What is ADR?

Alternative dispute resolution (ADR) refers to various procedures other than litigation for resolving disputes. ADR comes in a wide variety of forms and procedures. The most common forms of ADR are arbitration and mediation dispute resolution.

Arbitration and Mediation

In the most common form of **arbitration**, a dispute is presented to a neutral decision maker who has the authority to render a decision that is binding on the parties. In **mediation**, a third-party neutral assists the contending parties to reach agreement regarding their disputes, but does not have the power to render decisions that are binding on the parties.

Arbitration is less formal than adjudication. It involves, however, some form of adversarial presentations by the parties, often in the format of a traditional trial or hearing.

Mediation tends to be even more informal, with the mediator meeting both individually and collectively with the parties to gather information, gain understanding of the positions of the parties, and explore ideas for settlement.

Other ADR

While arbitration and mediation are the most common forms of ADR, many other hybrid forms have been developed. For example:

- **Med-arb**

  The parties agree to mediate, but also agree that if mediation is unsuccessful for a certain period of time, the matter is then submitted to binding arbitration.
- **Summary jury trials and mini-trials**

  Parties use these forms of ADR to gain information about the likely result if their dispute were submitted to trial, but without the delay and expense involved in a full-fledged trial. The information gained from these mock trials often leads to a negotiated settlement.
- **Many others**

  Indeed, parties have virtually unlimited flexibility to create dispute resolution mechanisms tailored to their particular needs.

What are the Benefits of Arbitration?

Consider:

- **Competency**

  The arbitrator, if chosen carefully, will have significant experience and competency in your industry and issue.

- **Time**

  Arbitrations tend to move faster than trials.

- **Effectiveness**

  Because they are faster, arbitrations tend to be more effective than trial.

- **Finality**

  There is a reduced possibility that the decision of the arbitrator can be overturned on appeal or subject to collateral attack.

- **Control on procedure**

  The arbitration format is entirely within the control of the parties. Parties can make the arbitration as formal or informal, as much or as little like a federal court procedure as the they wish. One of the factors that makes arbitration attractive is that discovery is not available (unless the parties have provided for limited or complete discovery in their agreement to arbitrate). Given the cost of discovery today, particularly electronic discovery (whose costs can reach millions), this advantage is particularly important.

- **Privacy**

  If the parties agree to arbitration, the proceedings will be entirely private and so will the arbitrator's decision.

So, Why Do Some Parties Dislike Arbitration?

Some of the objections that have been made against arbitration are:

- **Lack of competency of the arbitrators**

  This concern might have some merit if the arbitrator is simply chosen from a list. But if the parties select an arbitrator who is experienced in the field and highly respected for his judgment and fairness, this objection fails.

- **No rules**

  The objection is sometimes made that arbitration lacks rules, particularly rules of evidence and rules for discovery. It is probably true that the general tendency of most arbitrators is not to apply the rules of evidence strictly. But this is a plus for arbitration, not a minus, because the rules of evidence may result in unnecessarily lengthy proceedings. Moreover, the rules governing arbitration are a

matter of agreement between the parties. If the parties want an arbitrator that applies rules of evidence, they can so provide in their agreement. Parties can also provide for some discovery by inserting this possibility in their agreement. In general, if you want an arbitrator that is very respectful of the rules of evidence, you can choose an alternative dispute resolution lawyer.

- **Finality**

  Lack of appeal from an arbitrator's decision is another objection that is sometimes made. The concern is reduced if the parties are careful in selecting the arbitrator. Besides, what the parties give up in terms of a right to appeal, they gain in finality. When the arbitrator is experienced, finality is a major benefit.

- **Costs**

  Some critics of arbitration claim that it is quite costly. For example, parties do not have to pay a fee to a court, but they do have to pay fees for arbitration. However, the speed and reduced cost of arbitration resulting from the elimination or reduction of discovery in most cases more than compensates for the costs of arbitration.

Better a Single Arbitrator or a Panel?

It depends. But consider these factors:

- **Time**

  The three-person panel may increase the time of the proceeding. To mutually agree on hearing dates is harder when you work with two lawyers and three arbitrators.

- **Cost**

  The panel arbitration (the one in which each party picks one arbitrator, and those two choose a third arbitrator) increases costs. If you choose a highly respected professional, you do not need a panel and you save costs.

For more information see, e.g., *Dispute Resolution Ethics: A Comprehensive Guide*, (Phyllis Bernard & Bryant Garth, eds. 2002)

Nathan Crystal of Crystal & Giannoni-Crystal, LLC, can provide ADR services (standard or tailored to the needs of the parties) in his areas of practice both nationally and internationally.

Contact Us for additional information about our ADR services, and for information on our fees.