ALM | LAW.COM

New York Law Journal

Designing Business Disputes: How Shall We Fight?

By Jack P. Levin
October 28, 2025

Experienced lawyers are creatures of habit. They sometimes overlook that clients have the freedom *at any time* to design dispute resolution procedures that work best for them. If they didn't pay attention to their dispute resolution clause when they originally entered into an agreement, they can modify it.

Even when businesspeople have *no* contractually prescribed method for working out their differences and seem headed for court, they can take a pause and design an approach, including mediation, a tailored form of arbitration, or a suitable hybrid. This can save them time, money, and a lot of aggravation, but it requires some intention and knowledge of the possibilities. This article describes some of those alternatives and gives examples of how disputing parties have implemented them to everyone's advantage.

The Out-of-Court Alternatives

In the popular mind, when people are in a dispute they cannot resolve, whether it's in a business relationship or even in a crumbling marriage, they "go to court." However, for a long time, alternatives to the courts have been available, especially in certain industries and relationships.

iStockphoto

Mediation is an out-of-court process for the resolution of disputes through discussion and negotiation supervised by a third party. It isn't new; even in ancient civilizations, people used to take their disputes to a wise person for resolution – the head of the family, the community leader, the clergy. The acceptance of mediation, especially commercially, has evolved.

Until relatively recently, the macho culture of litigation in the U.S. regarded mediation as "soft." But this is changing as business better understands the need to prevent and manage disputes efficiently.

Mediation can be applied to any dispute. If the mediation is successful, it is incorporated into

a settlement agreement, all without the fighting that would happen in a court proceeding.

Arbitration is a private, non-public process that works like a court, but according to rules agreed upon by the parties to the dispute. They submit their dispute to one or more arbitrators, who render a binding decision. Arbitration has been used in many industries, including the construction industry, for over one hundred years. Because the parties choose their arbitrators, they can employ people who have appropriate experience and technical expertise. Use of arbitration can avoid delay or stoppage of a project while the dispute is processed.

"Alternative Dispute Resolution" ("ADR") covers all dispute resolution techniques that are alternatives to the courts. Courts themselves now have robust ADR programs, mostly mediation, because it saves money. Often relying on *pro bono* services from the legal community, "court-annexed" mediation programs divert disputes away from lengthy pretrial proceedings that take up the time of court personnel and strain the funding of the courts.

With Mutual Consent, More Options Available

Arbitration and mediation, like all ADR, are consensual and within the parties' control. Even in court-annexed mediations, the parties can craft solutions that a judge might not have the time or inclination to entertain.

In traditional litigations, the outcomes are generally black and white. Judges and juries declare winners and losers. The parties to a mediation can accomplish something more subtle, layered, and potentially enduring than merely winning in court. In a court battle the winning party doesn't always get what they want in the exactly form they want it. They have little control over the win when they place their fate in the hands of a judge or jury that might not understand the dispute—or their business or industry—quite well enough.

Sometimes, the give and take in a mediation can lead not just to the resolution of a particular dispute but to the restoration of the relationship in which the dispute arose. In business, that can be golden. There is flexibility in arbitration, as well. For example, it can be paused to permit negotiation.

If parties take full advantage of their freedom to choose, arbitration and mediation permit them to craft a process that works for their specific problem, their schedule, and their budget.

How and When To Agree on the Rules of Engagement

The negotiation of any transaction focuses on the key terms. What is being sold? What is the price? What are the representations? Wise parties consider dispute resolution one of those key terms and negotiate it up front. However, there are times when the negotiators don't want to focus attention on the possibility of disputes.

Typically, before the contract is finalized, it occurs to the deal lawyers that they need to consider a dispute resolution provision. (The provision is sometimes referred to the "champagne clause" because the lawyers are addressing the issue as an afterthought, only after the deal people have agreed on the material terms of the transaction.)

If one side has greater bargaining power, it may be able to dictate that term: Will the parties be required to mediate before litigating? Will disputes be in the courts or in arbitration? Under what state's law? If arbitration, how many arbitrators and under what rules? There may be a discussion about this, or the other side may choose to leave it alone.

The deal lawyers may call a litigation colleague who may or may not have sufficient experience to ask the right questions and suggest appropriate and effective language. The quality of the

dispute resolution provision will reflect the parties' negotiating power, the time and attention devoted to the task, and the experience of the lawyers involved in the drafting.

What makes for a good clause is advance attention to the type of transaction the parties are entering into, the type of disputes that might occur, and how the business might be affected as a dispute unfolds. Ideally, a dispute resolution clause does not get in the way of the transaction the parties negotiated. Having a dispute is burden enough. The wrong dispute resolution clause can create inefficiencies and expense that burden the relationship further, just as the right clause can expedite resolution.

No dispute resolution clause can fully anticipate the disputes that may occur. Imagination, flexibility, and most of all good intentions can go a long way to resolving disputes in the most efficient and flexible manner.

Of course, by the time there is a dispute, good intentions may be in short supply. In that moment, each side may prefer to apply the dispute resolution clause offensively. For example, where a three-arbitrator panel is required, the side that wants to increase expense will not agree to have the dispute decided by a single arbitrator. If the clause requires that the arbitrators decide the dispute within 120 days, both sides will be under greater pressure than if they had provided for a more relaxed pace, one that, for example, gives time for mediation.

When negotiating a dispute resolution provision, each side tries to game out what sort of clause will be in its best interests in the future. As no one has a crystal ball, the moment the dispute arises is an excellent opportunity for the parties and their lawyers to step back, take a breath, and think about whether their clause serves them. If not, they might consider renegotiating its terms.

Tailor the Terms to the Moment

What lawyers often forget and clients don't always know is that agreements can be renegotiated in light of changed circumstances. If the lawyers are skilled and sensible, if the clients are looking to solve their problem instead of just "winning," and if everyone is willing to put emotions aside and plan for a better way, there may be alternative approaches to managing, if not resolving, the specific conflict that has emerged.

I was recently engaged by businesspeople who had been partners for decades in numerous ventures. They no longer saw eye to eye and wanted to go their separate ways. Some of their differences were substantive. Others reflected years of bickering. Their lawyers saw this as an opportunity to design a process that would first involve a mediation, failing which there would be an arbitration.

What made the design of the process work is that:

• The parties had known each other for a long time and understood their personal dynamic as well as their business differences. That is, they knew themselves and their long history that was standing in the way of resolution.

• They wanted a fair division of interests (although, of course, each had a different concept of fairness).

• Each wanted a process that would end within a reasonable period of time and at reasonable cost.

• Even after a separation, the parties were going to have a continuing relationship because of ongoing projects, so they wanted a process that would enable them to resolve future problems.

The parties, with their counsel and myself as neutral, designed the process from the ground up. Mediation would take place for a fixed period of time. If the matter did not settle in that time frame, the mediation would end and

the arbitration process would begin, using the same neutral. The rules of the arbitration were agreed upon.

This process, called "med-arb," is well known but not frequently used. It is something that many neutrals will not do because it can create ethical issues when the neutral brings to the arbitration phase what he has learned, sometimes in confidence, during the mediation phase. But these problems can be dealt with in agreements entered into in advance. Like many relationships, the workability of such an arrangement depends on the integrity and good faith of the participants.

Not every dispute requires this level of imagination and process design. When there is a preexisting dispute resolution clause, it's healthy to ask whether it will well serve the parties in the actual dispute that has arisen. Without shedding their gladiator aura, experienced lawyers may advise clients to consider changes in a dispute resolution clause to better achieve their clients' needs.

For example:

If there is no agreement to mediate, suggest it. Mediation takes a bit of time and money, but it is not a limitless process. The parties can decide how much time and money to spend on it. Mediation can provide something that fighting usually cannot: early information exchanges that assist in understanding the strengths and weakness of each side's arguments. In some cases, the exchange of information can create an "ah-ha moment," one in which a piece of information can change the thinking of lawyers and their clients. Even if the dispute does not settle, everyone moves forward with more knowledge.

If there is an arbitration clause, does it work for these parties in this dispute? Is this a relatively small value dispute with a clause that requires three arbitrators instead of one? Three-member arbitration panels are very expensive. If the parties can agree on saving money and getting to the point, they might agree on one arbitrator.

Does the clause permit a lot of discovery, including depositions? It may be wise to agree on doing less and getting to the hearing. Discovery eats up dollars.

Does the clause provide that the dispute must be fully arbitrated on a short schedule? Is this realistic? Or, conversely, should the dispute be put on an expedited schedule to get it done?

Of course, parties and their lawyers sometimes want to create maximum pain and maximum delay. That's the opposite of what alternative dispute resolution is for, but there's no law that requires people to be reasonable.

When they want to be reasonable, alternatives to the courtroom offer the possibility of flexibility, creativity, and strategic thinking that don't exist before a busy judge. A judge tells you what to do. A mediator and an arbitrator are hired by the parties and are there to serve them. If parties and their counsel can handle the freedom to decide on their process, they can save time, money, and aggravation.

Freedom of choice is a challenge. Those who are up to it can better manage their disputes and get on with their business and their lives.

Jack Levin *is a full-time neutral managing conflict prevention and dispute resolution. Before becoming a neutral, he practiced law for 40 years. He can be reached at levin@levinadr.com.*