The Case for Alternative Dispute Resolution

Whether it's arbitration or mediation, here are the pros and cons of settling out of court.

By Eric C. Peterson, Contributing Writer

Tired of the time and expense of dueling in court before a judge and jury, more businesses are turning to alternative dispute resolution, ADR for short, to settle their differences. It costs less, say legal experts, although there are some caveats.

Cases often take weeks rather than years, with the parties involved dictating the terms of how settlements are reached. And, when all is said and done, settlements often preserve business relationships rather than generate lasting acrimonies.

Arbitration and mediation are the two primary forms of ADR, although there are others. In any case, "ADR became really hot about 15 years ago," says Alan S. Naar, who chairs the ADR Practice Group for Greenbaum Rowe Smith & Davis in Woodbridge. "A good arbitrator with an understanding of what the case is about and who can make a fairly quick and reasonable decision benefits everyone, and I think arbitration, in particular, will continue to be the No. 1 ADR mechanism."

To begin with, the cost of arbitration is generally less than litigation. The reason: "It's a less formal proceeding, you can usually do discovery on a more expedited basis, and the hearing itself can be scheduled at people's convenience," explains Andrew Cevasco, a partner at Archer & Greiner, Hackensack. "You don't have to block out time for a jury trial or work around a court's schedule and the formality of court rules."

"Discovery expense becomes moderate compared to a typical lawsuit in federal or state court," says Gerard H. Hanson, a partner at Hill Wallack, Princeton. "The resolution will be far more expedited than a federal or state court, where the track from inception of the complaint, until trial is at least two years: I have cases that are four years old that still haven't been to trial. And then you can expect another one to two years in the appellate process."

Now, the caveat: Cost doesn't always work in the favor of ADR because time can skew the numbers. "Sometimes costs can be the same or more than a trial," says Cevasco. "That occurs if it's a very contentious matter and the parties are resistant to giving discovery. In litigation, you go to court and have the judge make a ruling. Arbitrators generally don't have the same type of authority."

Indeed, one of the best deals in New Jersey and elsewhere is access to the judicial system, according to Stewart Pollock, of counsel for Riker Danzig Scherer Hyland Perretti in Morristown and a former New Jersey Supreme Court Justice. "You pay a filing fee, generally under $200, and for that you get the courtroom, judge and court reporter. But if that were the only cost, that would be a real plus for judicial proceedings."

That's where the long time-frame of a judicial proceeding can negate any cost benefit. Still, a contentious ADR proceeding can ramp up the cost as well. "The cost of arbitration has to be considered in balance," says Hanson. "Arbitrators are typically going to bill in excess of $500 per hour, sometimes in the $700-800 range. Some of the expense saved by an arbitration can be outweighed by the cost of the arbitrator."

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Indeed, with more litigators becoming involved in arbitration, "people are saying arbitrations aren't as quick as they used to be," cautions Naar. "Still, the concept is that arbitration is supposed to be cheaper and faster."

Knowledge also comes into play as an issue. "If you go to court, you get the luck of the draw," notes Cevasco. "The court assigns someone randomly, and they may or may not know anything about your case. If it's a jury trial, the jury more than likely will know nothing about your industry, and you have to spend a lot of time just educating people.

"If it's a construction case, you can have an arbitrator who's been doing construction cases for 20 years, and they know what to look for in the arguments," he says.

Indeed, one of the most important advantages of ADR is "the ability of the parties to pick the arbitrator," concurs Pollock. "You don't have that ability in the judicial system."

Another advantage of ADR: Confidentiality. "The parties can proceed without hanging all of their laundry out on the wash line," Pollock notes. Yet another benefit relating to timing: "With ADR, there are limited grounds for appealing an arbitrator's decision, so it has enhanced finality," Pollock explains. "Executives generally want to do what they do best - run their companies. The prospect of getting the case behind them can be attractive even if it's not the result they would prefer."

Under New Jersey law, there are limited exceptions for a court to intervene and review an arbitrator's decision. "Basically, you've got to show something akin to fraud, or the arbitrator was somehow biased and the process was tainted," says Cevasco. "In a court case, where the defendant has the right to appeal, a case can be never-ending."

Any reasons to go to court rather than taking the ADR route? For one, "some situations are so fact-sensitive that discovery is going to be needed, and I firmly believe that judicial litigation is far more beneficial for all of the parties," says Hanson. "The other reason not to arbitrate is if you are dealing with a particularly sensitive issue of law, where you want the right of appeal."

Other factors, however, can swing the decision back in the favor of ADR. Reputation is one: "If you're a big company that doesn't have a good reputation, you might not want to have your fate decided by a jury," says Naar. "Companies are also wary of jury trials if one company is 'David' and one is 'Goliath.' Goliath generally likes to avoid jury trials."

While much of the focus here has been on arbitration, mediation is another growing form of ADR. The difference? The arbitrator reaches a conclusion, much like a judge, while a mediator is "facilitative - someone who is a catalyst to settlement," Cevasco explains. "If the parties are reasonable, a mediator can help bring people closer together."

"Even in an arbitration setting, the litigants should consider mediation to the extent the dispute warrants it," says Hanson.

In the same vein, Pollock has two pieces of advice to mediators: "Don't hesitate to think outside the box on issues presented by the parties, and trust your instincts. The key for the mediator is to get the trust of the parties, and everyone should be flexible. If not, it won't work."

Pollock notes other forms of ADR can be considered and explored before masking any decision on how to proceed.

In any case, legal experts note that specific provisions should be written into any ADR contract. Among them:

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Confidentiality, if required; how the case is administered, either via the American Arbitration Association (AAA), CPR Institute, JAMS or another group; discovery issues, including limits; scheduling; number of arbitrators; and arbitration guidelines. "Most typical guidelines followed are the Federal Arbitration Act and, locally, the New Jersey Arbitration Act," Pollock notes.

Venue is another clause factor. "There is often a real advantage to being in one state or another, not only for the convenience of the parties, but also law issues," Pollock says. "There can be huge differences in statutes, particularly in employment cases."

How does New Jersey stack up as a venue? "The state has a good statutory framework, and within the last 10-15 years, the Legislature has revisited the arbitration acts with additional legislation," Pollock says.

Franchising can play an interesting role in venue. "A franchisor will often include a venue selection clause, obligating arbitration to take place where the franchisor does business and that jurisdiction's law will apply," Hanson says. "Certainly, there are benefits for the company to do so, one of which is the inconvenience for a franchisee that may be trading 3,000 miles away."

Will ADR continue to grow? Legal experts say "yes." AAA figures set the tone, noting that the number of large, complex commercial cases has grown by over 15 percent in just the past five years, according to Pollock. "Arbitration is certainly not a secret anymore," adds Cevasco. "Arbitration was once the exception and not the rule, but over the past 10 years it's become, while not necessarily standard, at least a standard consideration in every contract."

As ADR has grown, it has evolved as well. "Arbitration provisions have become much more sophisticated," notes Naar. Once, the parties might have simply submitted a dispute to AAA for resolution, but now they're specifically dictating time, place, the arbitrator (by name and specialty), level of discovery, even terms by which the dispute will be resolved.

Another change relates to what happens when the case is resolved. "In the old days, arbitrators would often render one-line opinions," Pollock recalls. "Now, in complex commercial

cases, the parties generally want a 'reasoned award' – something like a good trial court or appellate division opinion. They want to know why the panel decided the way it did."

And, of course, one obvious change in the process relates to a truly modern phenomenon: "The most prominent illustration of increased discovery is electronically stored data," Pollock notes. "I have a case right now, the outcome of which could be predetermined by the discovery of the data."

Bottom line, "arbitration is growing in popularity for all the reasons we've discussed - it's generally cheaper, quicker and it's private," says Hanson.

"There's an old saying - 'a good settlement is when both sides walk out of the room a little bit upset,'" Naar concludes. "Sometimes, when you go to court and think you're going to win, you end up losing. The benefit of ADR is that you know what the resolution is, and you've voluntarily agreed to it." NJB

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In 1973, a record TV audience watched top female tennis player Billie Jean King defeat the iconic chauvinist Bobby Riggs in the famous "Battle of the Sexes." Now, nearly 40 years later, the grand stage will move from the tennis court to the golf course as LPGA Star Paula Creamer takes on CBS Sports Commentator Gary McCord in Golf's "Battle of the Sexes" on October 6-7, at Forsgate County Club in Monroe.

The true winner of the "Battle of the Sexes" will be the charity beneficiaries of The Forsgate Foundation, a non-profit organization that has donated over $400,000 to worthwhile organizations since its inception in 2003.

This year, The Forsgate Foundation will donate a portion of the proceeds to Make-A-Wish New Jersey, the latter which grants the wishes of children with life-threatening medical conditions.

Golf tournament participant packages (both individual and foursome) are available; visit www.forsgatecc.com.