

Alternative Dispute Resolution Options

Arbitration, Mediation:

Arbitration and mediation are alternative methods of resolving disputes. Arbitration is the most formal of the various processes as it has many similarities to a court system, in that the parties appear before an adjudicator, who later renders a decision with **respect** to settlement of the disagreement.

Similar to the court system (and opposite to mediation), arbitration is governed by the Arbitration Acts of each province. The legislation outlines the rights of the parties in dispute; the requirements of an arbitrator; time sequences for notice, hearings and awards; and methods of appeal of an arbitral award. The Act makes it mandatory for the arbitrator to act as a neutral third party, treating each party equally and fairly, and extending to both all rights of natural justice. Failure to do so can result in a successful appeal by one of the parties to overturn of the award.

Advantages of Alternate Dispute Resolution:

Those who utilize a dispute resolution process do so for one of the five key advantages:

1. **Choice of the arbitrator/ mediator:** the parties can choose an independent third party who has experience in the background area of the argument, thus saving the time having to explain to a judge the nuances of the issues (ie: construction background for dispute over a construction contract).
2. **Less Expensive:** The parties can: determine costs in advance regarding arbitrator or mediator fees; select less expensive meeting facilities; and reduce or eliminate other costs normally associated with court appearances (court reporters etc).
3. **Saves Time:** when you are paying both a lawyer and an arbitrator by the hour, saving time is important. The parties can agree to meet every day, or second day, or any other time. There is no waiting for a court hearing date to be set. The hearings can be shorter, also, where the arbitrator has the background experience in the area of dispute.

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4. **Confidential:** Both mediation and arbitration can be conducted on a confidential basis if the parties desire it. Some types of arbitration awards are filed with the court, becoming public knowledge. But the Arbitration Acts of some provinces specify that the hearings and content are to be kept confidential *unless the parties agree otherwise*.
5. **Relationships:** Parties wishing to continue to work together or do business together are better able to do so when a neutral third party is able to assist them to reach an agreement through mediation, or is given the task of making an independent decision and an arbitration award.

Mediation:

In mediation the neutral mediator chairs discussions by the parties and facilitates their developing an agreement. The final agreement is usually more readily adopted by both parties as it is the parties that create the terms. However there is no legislation governing mediation agreements, or making them final and binding, and no system of enforcing agreements, except through a breach of contract suit.

Arbitration

In industries like construction, dispute resolution clauses are becoming regular features of the contracts. It is preferable to have an agreement to arbitrate before any problems arise, as people in dispute are less likely to agree later as to how to resolve the issues.

Parties entering arbitration jointly agree to the appointment of an independent, experienced individual to act as arbitrator. The arbitrator then sets a Hearing date; requests the parties to provide appropriate documents involved in the dispute; selects a meeting facility; and opens the Hearing. The parties may attend alone, or may be accompanied by legal counsel.

The parties each present their cases. Each has an opportunity to offer rebuttal of points raised. Each party may cross-examine the other party. The parties enter into evidence whatever material they deem to be relevant. (contracts, invoices, correspondence etc). The arbitrator can ask questions for the purpose of clarifying the testimony given. The Hearing adjourns, the arbitrator reviews the evidence and oral testimony, and writes an award, which is final and binding. Whereas courts rely primarily on proof "beyond a reasonable doubt", arbitrators, when faced with equally credible witnesses and conflicting testimony, may apply the *principle of the balance of probabilities* - what probably happened.

The Award has the status of a court order and may be enforced through the courts if one of the parties does not comply with the terms of the Award. Under very limited conditions the parties have the right to appeal an arbitration Award to the court.

COMPARISONS: MEDIATION / ARBITRATION

ARBITRATION

VOLUNTARY - PARTIES CHOOSE

MANDATORY- PARTIES CHOOSE

MANDATORY - DICTATED

(le: Dept. Natural Resources)

SINGLE ARBITRATOR (#1)

PANEL OF THREE (COMMON)

NEUTRAL THIRD PARTY

ALL PARTIES IN MEETING

NO CAUCUSING

PRIMARILY FACTUAL BASED

(Performance, quality, cost etc)

WITNESSES, EXPERTS

BINDING

(Court can enforce/ legislation)

ARBITRATION ACT

MEDIATION

VOLUNTARY - PARTIES CHOOSE

MANDATORY- PARTIES CHOOSE

MANDATORY -DICTATED

(le: construction contracts)

SINGLE MEDIATOR (#1)

TWO MEDIATORS (RARE)

NEUTRAL THIRD PARTY

Usually ALL IN MEETING

CAUCUSING IS COMMON

OFTEN EMOTION BASED

(Preserving relationships)

RARELY OUTSIDERS

NOT BINDING

(No legislation- often contract used)

NO GOVERNING LEGISLATION

Variety of Approaches to ADR

- Arbitration
- Conciliation
- Independent Referees
- Mediation
- Negotiation
- Mediation/Arbitration combinations

Types of Arbitration

- AD HOC - specific purpose arbitration
- BINDING - the most frequent type
- COMPULSORY - ordered by courts, governments CONTRACTUAL - clauses in contracts
- DOCUMENTARY - "documents only" - no hearings
- GRIEVANCES - collective agreements

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Situations where ADR is not suitable

Arbitration is not appropriate where:

1. A criminal act is involved
2. A legal document makes an alternate approach mandatory
3. A party lacks the legal capacity (under age, mental capacity etc)
4. Coercion or fraud used to force party to use ADR
5. The issue can't be arbitrated under Manitoba legislation
6. The dispute is subject to the International Commercial Arbitration Act
7. The arbitration agreement is invalid (expired, or party missed deadline)
8. The dispute involves a point of law only a Court can determine
9. The disputed matter is required by law (pay taxes, workers compensation)
10. A party cannot seek arbitration to avoid matters of public safety

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Skills of the Arbitrator

1. Ability to address the formalities of organizing a Hearing
2. Ability to summarize the facts and issues , separate out irrelevant points
3. Ability to reference the appropriate laws relied upon for Awards
3. Ability to recognize inconsistencies, and to give proper weight to evidence
4. Ability to clearly convey the decision to the parties, in easily understood terms
6. Ability to maintain good relationship with parties, create trust for arbitrator
5. Ability to remain impartial and independent - does not show bias toward issues
6. Ability to avoid potential conflict of interest - social/ business with either party
7. Ability to control Hearings when party(s) is/are emotional or aggressive
8. Ability to preside in a courteous, respectful manner
9. Ability to keep all information strictly confidential
10. Ability to provide information in Hearings without prejudicing the case.
11. Ability to listens actively, recognize key issues on which to request clarification
12. Ability to avoid discussing issues with one party unless the other party is present

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Writing an Arbitration Award

- consider only what was proven in hearing, not what was claimed
- items claimed by one party, not refuted by other party can be considered
- decisions can be " on basis of probability" in arbitrations (but "beyond reasonable doubt" in courts)
- don't be swayed by feelings toward or against legal counsel
- arbitrators can consider "justice" and not just the "law"
- decisions not based on external knowledge of arbitrator if those items not specifically raised during the hearings
- awards to be made ONLY on issues identified by parties in preliminary hearing
- awards written in clear language easily understood by parties
- awards must be written in manner that satisfy a legal challenge
- arbitrator should state what evidence was considered in decision, what evidence not considered (often evidence is received "under protest")
- be very clear in stating awards (example: if money to be paid, interest too? date by which it is to be paid ? Etc)
- try to understand the differences between the parties based on human limitations -(ability to remember, attitudes, emotion, perspective)
- consider the laws and regulations that relate to the case

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ADR Practitioners not suited for all Disputes

A person who has taken conflict management courses is not necessarily a mediator. It depends on whether the courses included techniques of formal mediation, role playing, setting up contracts, and other regular techniques. A person who agrees to arbitrate a dispute is not necessarily an arbitrator - may not understand his/her liabilities and the responsibilities imposed by the Arbitration Act of Manitoba.

A person whose mediation training is in one area of dispute resolution - family mediation, for example - is not automatically capable of doing a mediation of a commercial dispute where the law and language is different.

One of the key factors in being successful as a mediator or arbitrator is gaining the trust of the parties. To trust you, the parties have to feel that you can understand their problem, and have the background to handle the case .

Family mediators - especially those with Family Mediation Canada - are very capable at handling family cases. They have taken courses, and learned the "language" of families in dispute. They understand the family situations that lead to disagreement; and understand "interest based" negotiations. They know how to make the parties feel comfortable. Preserving relationships is often one of the main goals. The same situation applies to arbitrators who handle cases involving individuals, families, neighbours.

But the language, the nuances, and the goals of parties involved in business or commercial disputes are different. A ADR practitioner has to understand contractual relationships and law; understand that commercial disputes are "rights based"; and have to use the business language (agency, tort, subrogations, partnerships, productivity; trade practices; industry technicalities, and a host of other business concepts). An practitioner who undertakes a business dispute using only restorative justice concepts may encounter problems (as many cases on record have shown) in the same way a arbitrator specializing in commercial disputes would have problems with family mediation..

Mediation involves disputes. In some cases arbitrators are called upon to resolve commercial cases in which there are no disputes. The parties seek a decision in advance. In other cases the arbitrator may make an award without ever having seen the parties together in a room ("documents only" arbitration). In commercial disputes preserving relationships often has a low priority for the business parties involved. They will continue to do business as long as the price, product, or conditions are beneficial to each of them.

Sample ADR Cases:

Construction: A contractor builds a house. The owner discovers water in the basement. An engineer's opinion is: faulty construction. The contract has a clause requiring arbitration. Evidence to be considered will be building plans, building code, sales contract.

Insurance: A building is partly damaged by fire. The owner claims damages; the insurer offers a price. The owner objects to the low figure. The policy includes a clause for a sole arbitrator.

Leases: A couple's apartment lease gives them option to renew but doesn't give a renewal rent rate. The owner wants a rent increase, the couple doesn't. The issue is monetary; arbitration is an appropriate process.

Grant: The government gives grants to farmers to offset losses due to poor weather, low grain prices. The land owner claims the full rebate. The land renter claims the rebate as he is the one experiencing added costs. The government mandated arbitration of any disputes.

Tuition: A student pays full tuition in advance to a private training center, which is later unable to deliver the full courses offered. There is no contract. The student must convince the center owner that using ADR processes is preferable than going to court, or otherwise the only recourse is litigation.

Neighbours: One neighbor has a 40-foot tree that overhangs the fence, blocking the sun and dropping sap and leaves on the driveway next door. A major argument ensues. This is a case probably best suited to mediation in order to preserve peace between the families.

Arbitration Case Samples ©

8. Owner loses on "balance of probabilities: A major industrial firm issued a tender for major renovations ; and awarded the contract to a large subcontract firm. After the work was done and paid for, during a tax audit, the government discovered that the subcontractor owed a significant amount for sales tax it failed to collect from the owner. The owner was billed by the sub and rejected the claim. Arbitration. The contractor claimed that the tender documents were misleading in that they included a rubber stamp section indicating PST was to be excluded. The contractor excluded the PST it paid to buy materials to fabricate into the work. The owner claimed the extra stamp was merely a reminder not to add PST to the total quoted price in that section where the lump sum had been listed on the tender form. Documents were examined. Elsewhere in the construction documents, and in other owner contracts produced, the matter of PST was clearly stated. Decision: There appeared to be no reason to restamp documents, and the arbitrator ruled that "on the basis of probabilities" the stamp had misled the contractor to believe that this meant something other than the traditional standard clause in the tender form. **(A) The owner amended the document in an unclear manner and (B) courts hold that when different words are used, they are to be interpreted as meaning something different.**

Note: courts decide if issues are "beyond reasonable doubt" but arbitrators decide on the principle of " the balance of probabilities".

9. Builder Uses cheaper products: The first-time buyer of construction services , when visiting the site during the building process, noted that OSB sheathing was being applied to the exterior walls. He checked with the drawings and noted that plywood GIS had been indicated. As OSB was, at the time, 55% of the cost of plywood, the buyer demanded that (a) either he receive a credit or (b) the sheathing be replaced with the plywood specified. The builder refused, stating that there was no real different in the two materials. Arbitration. Ruling: the plans were part of the total construction document package covered by the contract signed by the builder and the buyer. Buyer wins. **Builder failed to comply with the requirements of the construction documents.**

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