

ALTERNATIVE DISPUTE RESOLUTION IN THE UNITED STATES

Alternative Dispute Resolution (“ADR”) is defined as the mechanisms available to resolve disputes outside of the court system. In the last 10 - 15 years, there has been a virtual explosion in the growth of ADR in the United States. This is due to the fact that it is usually quicker and less expensive to resolve disputes in ways other than litigation and trial. As such, most written contracts now have ADR provisions incorporated into them, requiring the parties to the contract to submit all disputes to an agreed upon form of ADR. One of the results of the growth in ADR has been a significant decrease in the number of cases in the court system.

ADR in the United States consists of two procedural mechanisms: arbitration and mediation. Arbitration is similar to a private trial. The parties to the dispute agree to choose an arbitrator, usually a retired judge or experienced lawyer, to whom the dispute will be presented. In more complex cases, the parties often agree to a panel of three arbitrators, and a decision of the majority will be the prevailing order. In all arbitrations, the arbitrators serve as both judge and jury. In other words, they play the role of a judge in terms of deciding issues of law and evidence, and they also decide issues of fact and render a verdict, such as a jury.

Arbitration is often referred to as “private judging,” and has grown into a lucrative profession for retired judges, who can earn far more as arbitrators in the private sector than they did as judges in the public sector, charging anywhere from \$300 - \$1,000 dollars per hour. The parties can very easily select an arbitrator and schedule an arbitration hearing within a few months, far sooner than the one to two years it takes to go to trial in the courts.

While arbitration can resolve a dispute much quicker than litigation, and the arbitration proceeding is quicker and far less formal than a court trial, there are also serious disadvantages and risks to arbitration. The most substantial risk is the lack of an appeal from the decision or judgment of the arbitrator; the arbitrator’s decisions and rulings, however erroneous, are binding and not subject to review. Additionally, the parties are not entitled to discovery (depositions, subpoena of documents, etc.) as they are in court cases and therefore there is a risk that both surprise evidence and its opposite, missing evidence, may dictate the outcome of the proceeding.

Mediation, on the other hand, is the process through which a neutral third party mediator attempts to achieve a settlement among the parties to the dispute. There is no adversarial proceeding, such as in an arbitration. Rather, the parties retain a mediator (again, usually a retired judge or experienced attorney) to use his or her coercive skills to bring the parties to a settlement. Successful mediators are able to present both sides with the risks and weaknesses of their respective cases, in order to make them reassess their positions and move closer together towards reaching a deal.

The same private firms that offer arbitration also offer mediation. This is often a beneficial way of attempting resolution of a dispute before the costs of proceeding through litigation and trial are incurred; in other words, parties often attempt mediation in the quest to achieve early settlement. Often, the same contracts that require disputes to be subject to

arbitration also require that mediation first be attempted in the hope that the dispute is resolved in its early stages.

Even the courts have recognized the growth in ADR. Judges often refer cases to arbitration or mediation, in the hope that the matter will resolve itself in either of those forums, before proceeding to trial. By all indications, it appears the growth and popularity of ADR will continue in the United States.

Vogt & Resnick, LLP
Attorneys at Law
4400 MacArthur Blvd., Ninth Floor
P.O. Box 7849
Newport Beach, CA 92658-7849
(949) 851-9001; Fax (949) 833-3445
Email: law@vogt-resnick.com
Web: www.vogt-resnick.com