Professional Perspective

Lowering Litigation Risk & Redefining Wins Via Alternative Dispute Resolution

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A litigation "win" historically meant obtaining a final verdict or judgment in one's favor after a full-blown trial before a judge, a panel of judges, or a jury. The analysis of a "win" has become much more complicated for corporate America. Every dispute has obvious, easily measurable costs, such as the financial cost of retaining counsel and experts.

Less obvious costs or risks to business operations also exist, including the distraction of key officers, directors, and employees from their primary responsibilities; lost investment opportunities and the inability to take advantage of new opportunities; negative impact on workforce morale; negative publicity and reputational harm; and the establishment of adverse precedents.

These non-monetary costs are often significant and can outweigh the obvious monetary costs or risks of a trial. Therefore, a litigation "win" must be measured not merely by whether a lawsuit is won or lost but also by the disputes avoided, financial and business costs saved, and resolutions that preserve or potentially enhance relationships.

Barring significant mergers and acquisitions, litigation budgets often comprise the bulk of a company's legal budget. Thus, companies have been analyzing the costs, risks, goals, and overall management of their litigation dockets. The result is that many companies are choosing to resolve disputes through alternative dispute resolution processes, including mediation and arbitration rather than traditional litigation.

This article will explore the distinction between these alternate dispute processes so that companies can maximize their benefits. Litigation and arbitration are comparable, alternative means to dispute resolution, while mediation is a totally different process that can be employed prior to or throughout the litigation or arbitration process.

Litigation vs. Arbitration

Litigation is the traditional, formal adversarial dispute resolution process where typically one party wins and the other party loses. In litigation, a judge, panel of judges, or jury renders a final, binding decision resolving the parties' disputes following a trial in open court. At the trial, conducted within the confines of court rules and legal precedents, the parties present arguments and submit evidence to the decision-maker in various forms, including documentary, testimonial, and photographic. Throughout the litigation process, mini-trials in the form of contested motions are conducted, and orders are entered on issues ancillary to the ultimate disputes.

Arbitration is similar to litigation in that the disputing parties agree that one or several impartial arbitrators will render a binding decision or "award" resolving their dispute, and, often, one party wins and the other party loses. However, the stringent rules of evidence and procedure that apply in litigation are not applicable to arbitration. In fact, while there are certain rules that govern arbitration and arbitrators are bound to follow the law, there is flexibility in the process, and the parties may agree upon streamlined procedures to govern their arbitration. For example, parties to arbitration may agree to limit the number of depositions that may be conducted, the number of hours a deposition may last, page limitations on briefs, the number of hours or days each party will have to present its case to the arbitrator, and so on.

Litigation and arbitration are alternative means to resolving disputes through a decision-maker's issuance of a binding order, ruling or decision. Below are several key distinctions between these processes.

Arbitration	Litigation
• Consent of each participating party required to proceed via arbitration	• Consent of the parties not required to proceed via litigation
• Private, thus avoiding negative precedent and potential reputational harm	• Public, thus greater risk of negative precedent and reputational harm

• Quicker resolution, if properly managed • Streamlined process, parties have input • Parties select arbitrator(s) • More likely to preserve parties' relationship • Decisions generally are final, but review may be possible • Decision-maker more likely to have industry-specific expertise • Financial costs generally are lower than in litigation • Generally less disruptive to business operations than litigation • Additional necessary parties cannot be compelled to participate	• Delays due to stringent litigation procedures and overburdened courts • Rigid, often cumbersome rules of evidence and procedure • Judges are assigned, and the jury pool is selected through court processes • More adversarial and less likely to preserve parties' relationship • Decisions generally subject to multiple layers of appeal • Judge/jury not likely to have industry-specific expertise • Generally more expensive, given length of the process, motion practice, protracted discovery • More disruptive to business operations given publicity and protracted discovery • Additional necessary parties can be compelled to participate

The key to achieving the full benefits of arbitration is the parties' proactive control over the process. Agreeing in as much detail as possible to a dispute resolution process when first entering into a business relationship before a dispute arises is critical. When parties fail to agree upon and adhere to a streamlined process, arbitration can become almost indistinguishable from litigation.

Mediation

Mediation is an entirely different form of dispute resolution. While litigation and arbitration are alternative means of resolving a dispute through the imposition of a ruling by a third-party, mediation is a dispute resolution process whereby the parties fashion their own settlement through negotiation.

In mediation, the parties select one or more "neutrals" who facilitate the parties' negotiations and assist them in reaching a consensual resolution of their differences. Mediation may be employed prior to and during litigation or arbitration. While parties can agree in advance to mediate a dispute and courts can mandate that a dispute be mediated, the parties are not required to come to an agreement, but rather, they are obligated to attend the mediation and negotiate in "good faith."

Several of the most compelling reasons for disputants to engage in mediation are:

- The disputants have significant input in establishing the processes to be followed
- The disputants control the outcome by fashioning their own settlement, and nothing is imposed on them against their will
- The parties' resolution does not have to follow legal precedents and rules
- The disputants can fashion purely business-minded solutions that neither a judge, jury, nor arbitrator could impose
- The mediation and any agreement reached by the parties in the course of the mediation are confidential

- Mediation is generally less costly than litigation or arbitration
- Disputes generally are resolved quicker through mediation than litigation or arbitration
- Engaging in mediation does not prohibit full-blown litigation or arbitration to judgment if a consensual resolution of the dispute(s) is not achieved
- When a complete resolution of the parties' differences is not achieved through mediation, mediation often results in a partial settlement, narrows the issues for trial or arbitration, provides insight into adversaries' positions, strengths and weaknesses, and generally streamlines and facilitates trial preparation
- The majority, if not all, of the preparation for mediation will have to be done if the disputants' differences are not consensually resolved and they proceed to arbitration or litigation

Reliable data on the success rate of mediation generally does not exist for a variety of reasons. First, the nature of mediations makes them difficult to track. They are confidential, and there is no centralized reporting authority for mediations. While many mediations arise in a pending action at the direction of a judge or other decision-maker, many mediations are commenced upon the consent of the parties, where no formal proceeding is pending. Additionally, mediations take place in virtually all types of commercial and noncommercial disputes, including certain criminal matters.

Second, "success" in mediation can be measured in numerous ways. When parties leave a mediation with an agreement in place that resolves all of their differences, it is indisputable that success has been achieved. Frequently, however, the outcome of a mediation is not so simple. For example, often, a partial settlement will be achieved, or the number of disputed issues to be tried or the discovery to be conducted may be narrowed through mediation. Many would label these mediations "successful." Additionally, a formal mediation may set the stage for the parties to continue negotiations that result in a settlement after the close of the mediation. Depending on the case, some may say it should have settled with the mediator, and therefore the mediation was unsuccessful, while others may say the parties would not have reached the settlement but for the work of the mediator.

Despite the lack of statistics regarding the success rate of mediation, numerous articles state that mediation is highly successful. FINRA, which tracks mediations conducted under the FINRA Mediation Program, confirms this by reporting that four out of five, or 80%, of cases mediated under FINRA's program result in settlements. Given that there is so little to lose and such potential upside to mediation, it is surprising that all commercial parties entering into contracts or business arrangements do not specify that any disputes between them proceed to mediation.

The likelihood that mediation will result in a settlement increases where the parties are fair, reasonable businesspeople who develop and adhere to a well-conceived dispute resolution plan that has been memorialized in writing before a dispute arises. A dispute resolution plan that includes a combination of clear, detailed mediation and arbitration processes is likely to result in a swifter, more cost-efficient resolution of a dispute than litigation.

With increasing frequency, sophisticated businesspeople are incorporating dispute resolution processes into their contracts before any disputes between them arise. Some parties even agree that before litigation or arbitration is commenced, the parties must engage in a mediation. While opening the lines of communication early could prevent litigation or arbitration, if it does not, it may set the stage for a future consensual resolution of any disputes.

Common mediation triggers during arbitration or litigation include filing a response to the complaint, denial of a motion to dismiss, completion of initial disclosures, or completion of discovery. Pre-dispute agreements to mediate generally include an agreement upon how the mediator will be chosen, what documents will be exchanged, the length of time that will be spent mediating, who will pay for the mediation, and other mediation details the parties wish to solidify before a dispute arises.

Unless otherwise agreed between the parties, there is no prohibition against engaging in mediation multiple times throughout litigation or arbitration, whether subject to a prior agreement or engaged in spontaneously upon the agreement of the parties or at the direction of the judge or arbitrator.

Conclusion

One thing is clear: full-blown, unplanned litigation is inherently risky and costly. Even when a litigant achieves a legal "win" at trial, it may suffer significant financial and business losses. A streamlined dispute resolution process, fashioned by the parties at the time they enter into a business relationship, almost certainly will result in a more business-minded resolution of any dispute that arises, and will be less costly in terms of money and business impact than litigation.