CHAPTER TWO
ALTERNATIVE DISPUTE RESOLUTION

Opening Scenario

Skycycle Bicycle Emporium, owned by Oscar, has had several complaints filed against it with the Greater Business Bureau. Customers have complained about the quality of the goods and services at Skycycle. There have also been complaints from Skycycle's business suppliers that Skycycle is not honoring their agreements as they should. Oscar asks his best friend, Cisnero, to help him resolve all the disputes, which Cisnero agrees to do. Cisnero sets up a meeting with him, Oscar and each of the complainants to discuss their issues. Each complainant will be able to discuss his or her complaint with Oscar, and Cisnero will try to broker a solution between the complainant and Oscar. Oscar says he has never heard of such a thing and cannot imagine that it would work. Should Oscar try Cisnero's suggestion?

Learning Objectives

After reading this chapter, you should be able to:

- Define what ADR is
- Explain how and why ADR is used in business
- Tell what the most popular types of ADR are
- Give the pros and cons of different types of ADR
- Determine the appropriateness of different types of ADR for various disputes
- Explain how administrative agencies have increasingly mandated ADR
- Set forth newly-emerging ADR alternatives specifically for business
- Suggest ways that ADR can help business

Introduction and background

- When you think of legal disputes, you probably think of them being settled by a court.
- For those conflicts which do not need litigation, there are several alternatives.
- Together, these mechanisms have come to be known as **alternative dispute resolution** or **ADR**.
- The immediate issue was that the startling increase in lawsuits greatly clogged the court system. Litigation was virtually the only recourse for those with disputes, and that route was time-consuming and expensive.
- The more litigious our society became and the more cases there were the more frustration there was at legitimate litigation being held up because of a court system congested with less compelling disputes.
- The growing concern over overcrowded court systems finally overcame judges and lawyers' objections to alternatives to litigation.
- In the past twenty years or so ADR has experienced an explosive popularity.
- The old standbys of **conciliation**, **mediation**, and **arbitration** have been joined by a spate of new and innovative approaches to resolving disputes in far shorter time for far less money.
- Despite its advantages, ADR has not always been favored.

- In fact, as previously mentioned, at one time courts were downright hostile to the idea.

Take Away 2-1
10 Reasons to Use
Alternative Dispute Resolution

Teachable Moment: *There exists some legitimate criticism of arbitration as a substitute of litigation. Some critics argue that arbitration can be as costly as litigation, that it has become known as "arbigation" – alluding to the fact that most large companies now require arbitration for resolution of disputes with customers, and that it has led to satellite litigation involving the FAA. Lastly, they criticize arbitrators for substituting rough justice for reasoned, legal analysis.*

Case 2.1
RODRIGUEZ DE QUIJAS et al. v. SHEARSON/AMERICAN EXPRESS
490 U.S. 477 (1989)

Case Questions

1. Do you agree with the court that "by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum." Why or why not? ***A:*** *Answers could go both ways. Some student might find substantive rights are not relinquished while others might feel that any procedure other than a court procedure diminishes substantive rights.*

2. If arbitration awards can only be reviewed by a court for reasons such as fraud or collusion on the part of the arbitrator, unconstitutionality, and so on, aren't the courts virtually foreclosed to the parties? Discuss. ***A:*** *Yes, but that's the point of arbitration. If every unfavorable decision was reviewable, arbitration would only be another before court, and not a substitute for the court that it is designed to be.*

3. Are you surprised that the Court would re-think it's previously hostile position on arbitration and now decide to endorse it? ***A:*** *Students will answer in a variety of ways, depending on how they feel about the decision.*

Types of Alternative Dispute Resolution

- Unless the state or local law in a given jurisdiction has a prescribed means by which ADR must be pursued, it is very flexible and the mechanisms need not be used in any particular order, though they tend to lend themselves to a natural logic.
- Because they offer considerable cost-saving to the court and parties, time saving and privacy, they should be pursued before litigation.

Take Away 2-2

Three most common types of Alternative Dispute Resolution (ADR)

Teachable Moment: Just in the area of securities, thousands of cases are mediated or arbitrated every year. Using FINRA's (formerly NASDAQ) figures reveals the following:

Mediation Cases Closed

	2009	2010
Cases	72	112

Arbitration Cases Closed

Year	Cases	Year	Cases
1996	6,331	2004	9,209
1997	5,880	2005	9,043
1998	5,484	2006	7,212
1999	4,767	2007	5,345
2000	5,473	2008	3,757
2001	5,582	2009	4,571
2002	5,957	2010	6,241
2003	7,278	Thru 2/2011	957

http://www.finra.org/ArbitrationMediation/AboutFINRADR/Statistics/.

What is Conciliation and how is it done?

- It may seem too simple to even discuss, but the very first thing a party with a conflict should do when involved in a conflict is to attempt conciliation, also called negotiation, with the other party to the dispute.
- Conciliation is important enough that it has been written into some statutes.
- As simplistic as it may sound, conciliation simply involves the parties talking to each other either about their dispute, orally or in writing, in an effort to reach a resolution of the conflict.
- Conciliation costs nothing and nothing is lost if the parties do not reach a satisfactory resolution.

Must I mediate and how is it done?

- Like conciliation or negotiation, mediation of a conflict is not required, but can be quite advantageous.
- Mediation brings into the conflict for the first time an outsider.
- The purpose of the third party is for the third party to try to facilitate the parties reaching a resolution on their own.
- Mediation is most useful when the parties wish to maintain an on-going relationship but simply need help resolving the present conflict.
- A third party outsider may well be able to make headway where the parties themselves were not able to.

- In mediation, a third party is brought into the conflict to try to assist the parties themselves in resolving it.
- **Federal Mediation and Conciliation Service -** FMCS is a government agency that can be used by parties to conduct mediation of a dispute.
- There are also now many private mediation organizations also, as well as attorneys offering mediation ADR as part of their services.
- Most often the mediator engages in a type of "shuttle diplomacy" wherein the mediator goes back and forth between the two parties and listens to their concerns and tries to find a way for each to get what he or she wants from the situation.
- **Agency and court Annexed ADR** - Some courts have instituted some form of an ADR program attached to the court itself.
- State and federal agencies have also increased their support for mediation, up to, and including, mandating it for claims filed.
- EEOC has instituted innovative programs such as its **Universal Agreements to Mediate (UAMs)** and **Referral Back program** for mediation.
- UAMs are agreements the EEOC makes with employers locally, regionally or nationally, under which the employer has an identified contact point with EEOC for scheduling the mediation of claims filed by employees with EEOC.
- Referral Back programs allow EEOC, with the permission of the employee filing the claim with EEOC, to hold off on proceeding with the claim filed by the employee with EEOC and instead refer it back to the employer for handling by the employer's own internal EEOC-approved mediation program.
- EEOC has fully embraced ADR for resolving its claim and continues to explore new innovations like the UAMs and Referral Back programs begun in 2002 and 2003.
- There are definite advantages to the use of mediation which any astute business person should explore and utilize when disputes arise.

Take Away 2-3
Michigan's Court-Annexed ADR Brochure Excerpt

Take Away 2-4
Federal circuit court order instituting a pilot program for ADR

Arbitration

- Arbitration also involves the intervention of a disinterested third party into a dispute, but the purpose and method is quite different.
- In arbitration, the role of the third party is to listen to the concerns and evidence of both parties and impose a decision, much like a judge does.
- Arbitration may be **binding** or **non-binding**.
- In binding arbitration, the arbitrator's award is virtually final, and can only be reviewed by a court of law for reasons involving unconstitutionality, abuse, collusion, or fraud in the arbitrator's decision and like bases attacking the validity of the award itself.
- Binding arbitration agreements are often found in documents that a party may not even be aware contains such provisions.

- While binding arbitration awards are subject to only very limited review by a court of law by a dissatisfied party, parties can, however, contract to have their arbitration award review be broader than the limited review generally provided.

Case 2.2
Cable Connection, Inc. v. DirectTV, Inc.
44 Cal4th 1344; 2008 Cal. LEXIS 10354
(S. Ct. Cal. 2008)

Case Questions

1. Does the court's decision make sense, given what you know about arbitration? ***A:*** *The case makes sense because if a party is to trust the arbitration process, there should be a way to correct clear errors of law or legal reasoning. It acts as a check on the arbitration process.*
2. Why do you think the U.S. Supreme Court would not allow parties to broaden the scope of arbitration award review? ***A:*** *Because the federal rule is governed by statute. If the rule is to be expanded, it should be done just as it was under the state statute, i.e., by the legislature, and not by the courts.*
3. Given what you know about the purpose of ADR, does it seem consistent for parties not to be able to decide on the scope of their judicial review? Explain. ***A:*** *It makes sense because arbitration should be the resolution of the issues, and not a stepping stone to the court when one party is unhappy in the decision.*

- In more than 20 state and federal districts, court-annexed arbitration programs have been adopted to help ease court dockets.
- Most systems have a roster of arbitrators, many times attorneys, who hear the cases and render an award.
- The American Arbitration Association, the most popular national arbitration organization, maintains a roster of arbitrators which anyone can use to choose an arbitrator.
- It is also possible for arbitrators to sit to hear conflicts in panels of three or more, rather than sitting alone.
- When there is more than one arbitrator, generally the majority rules.
- Collective bargaining agreements between labor unions and employers commonly contain a provision for binding arbitration requiring that contract disputes will be handled by an arbitrator rather than a court.
- **Commercial arbitration** addresses virtually all disputes to be arbitrated other than labor.
- Arbitrators can be found who specialize in certain areas, such as securities disputes, marital conflicts, environmental disputes, business disputes, sports conflicts, and so on.
- The **Federal Arbitration Act** applies to commercial agreements which affect interstate commerce and make the arbitrator's awards in such cases legally enforceable.
- The Better Business Bureau has an automobile arbitration program which allows car owners to negotiate with manufacturers free of charge and receive a decision within ten days.

Other Alternatives

- In addition to the mechanisms described above, parties may also use any of several other alternatives developed in recent years which may be appropriate for their dispute.

Take Away 2-5
Other Alternatives

- **Mock Trials** - An attorney may wish to use this to determine how a jury might react to his or her case.
- **Minitrials** - Minitrials are used for business cases and are presented to top business executives rather than ordinary citizens.
- **Regulatory Negotiation** - This mechanism is used by administrative agencies wishing to avoid protracted litigation with interested groups over regulations which the agency wants to pass.
- **Summary Jury Trial** - Some jurisdictions provide for summary jury trials after cases have been filed if the case will require a great deal of time for trial and is unlikely to be settled by negotiation.

Summary

End of Chapter Questions

1. Antwon, who owns a large investment firm, is having a dispute with Tyrell, the owner of the company that makes the computer software Antwon's employees use to make their market predictions. The dispute has gone on for several weeks but the parties have been unable to come to a satisfactory solution. Antwon and Tyrell wish to maintain their working relationship with each other, as it is mutually beneficial, but they would like to resolve this conflict and move on with their other business concerns. On these facts, what is most likely the best way of resolving the dispute and why? ***A:*** *The parties could engage in a mock or min trial, or use mediation proceedings. Because the parties wish to maintain their working relationship, it's important that they resolve the dispute without destroying their relationship.*

2. Zhaio Ping is involved in an arbitration that has been heard by a five-member arbitration panel. When the arbitration panel hands down its award, Zhaio learns that two of the panel members did not agree with the award and instead favored an award more favorable to Zhaio. Can Zhaio use as the basis for appealing the award the fact that two of the arbitrators did not agree with it? Explain. ***A:*** *No. The panel's decision is the resolution, even though there were dissenters to the opinion. It does not form the basis for an appeal.*

3. The Music Review Board, an agency charged with monitoring decency in music broadcast on the airwaves, is contemplating issuing regulations requiring advisories to be placed on music to inform potential buyers of the level of violence, sex and adult language is contained in a compact disc of music. The Music Review Board anticipates that there will be a long, involved dispute between the Board, the music industry, and many of the artists whose music will be affected, resulting in years of court litigation by artists challenging the regulations. As legal advisor to the Music Review Board, what would you advise them to do to minimize resistance by the music industry as they contemplate these regulations? ***A:*** *I would advise them to set up an alternative to litigation to resolve disputes.*

4. When Megan dropped her silk blouse off at the cleaners, she had no idea that when she picked it up, it would be a different color than when she left it, and would have holes in the bottom and buttons missing. Megan immediately informs Saloum that she is not paying for the dry cleaning and wants money for a new silk blouse. Saloum demands the money for the cleaning and refuses to pay for a new blouse. When their discussions become quite heated and the issue is not resolved, Rousley, a well-trusted neighbor to them both happens to enter the cleaners and offers to help them with the dispute. What has Rousley offered to do? If Megan and Saloum agree to let Rousley help and eventually Rousley makes a suggestion that neither Megan nor Saloum is happy with, what can Megan and/or Salloum do about their respective claims? ***A****: Rousley has offered to mediate the dispute between Megan and Salloum. If either of them is not satisfied with the result, they can pursue it further either in court or through another alternative means.*

5. If Amir has a dispute with Chad, explain why Amir should not immediately take it to court? ***A****: Because there are other, less costly ways to resolve the dispute which might be more efficient and quicker than bringing a lawsuit.*

6. Bradley files a negligence case in court because he was rear-ended by Cheryl and the insurance companies refused to pay the entire repair bill. After filing the suit, Bradley receives a letter from the court recommending that he participate in court-annexed mediation for his claim because it will save him time and money. Bradley refuses because he says he wants his day in court and he will not have it if he goes to mediation. Is Bradley correct? Explain. ***A:*** *No. Even if he mediates, it's a non-binding resolution. If Bradley does not like the result, he can still bring a lawsuit.*

7. Sheldon Industries had a lot on the line. Its recent industrial accident had seriously damaged not only their plant employees and plant, but also their public reputation. The company is being sued for millions of dollars. It has doubts about whether its witnesses will be believed and come across as down to earth and appealing to a jury. They are also a bit shaky about how their theory of the case will be accepted by a jury. With so much riding on the line, Sheldon Industries would like to have some idea of what might happen with its case. What should they do? ***A:*** *They should test their case using a mock trial, mini-trial, or summary jury trial.*

8. In conciliation, a disinterested third party hears the dispute and tries to get the parties to come to a mutually satisfactory agreement. True or False? ***A:*** *False. Conciliation occurs between the parties themselves.*

Ethics Issue

Fernandina works as a receptionist in the office of a local mediation service. One day a client, a storeowner with whom the mediation service does a considerable amount of business, comes in to take part in a mediation between the client and a customer who has a dispute with the storeowner about an expensive item the customer purchased. The mediation service's code of ethics says that the mediation service is to render all services in a way that treats each dispute as objectively as possible, and it precludes them hearing disputes involving businesses or individuals with whom the mediators have a personal relationship. When the customer shows up, Fernandina realizes that the customer is the same person with whom the mediator is having a clandestine extramarital affair. Under the firm's code of ethics, anyone who knows of a conflict of interest is responsible for making the conflict known and adhering to the code. It becomes clear to Fernandina that the mediator is planning to mediate the dispute. Fernandina is afraid of losing her job if she tells, and afraid of losing it if she does not tell and the firm finds out she knew. Think this ethical dilemma through and decide what Fernandina should do. ***Suggested Thoughts:*** *The right thing to do is to reveal the clandestine relationship to another member of the firm in a supervisory position, and let them deal with the mediator. For Fernandina to confront the mediator might jeopardize her position, but the supervisor that confronts the mediator might be able to keep Fernandina's name out of it. In other words, she may be protected. If it's Fernandina herself that ahs to confront the mediator, then she has to consider the fact that her job will be placed in jeopardy. She should do the right thing, nonetheless, and hope for the best. To risk sullying her reputation by going along with the less-than-candid mediator really puts her in the same dirty ethical water as is the mediator. She should remain above that at all costs to herself.*

Group Exercise

Ask around and see if anyone you know has a dispute going on. Nothing serious, just roommate troubles, or a light dispute with a significant other, or even a sibling's dispute with a parent. See if you can assist them by trying to mediate the dispute. In doing so, you want to gather all the pertinent facts from each of them, then see if you can discuss it with each of them and try to find a solution that will work for resolving the issue. No yelling or even raising your voice, no dictating what should be done. Just try your hand at trying to reach a solution.

Review Questions

1. Why is ADR a positive thing?
   A: It relieves congested court dockets and allows disputes to be settled more quickly.
2. Compare and contrast mediation and conciliation.
   A: Conciliation simply involves the parties talking to each other either about their dispute, orally or in writing, in an effort to reach a resolution of the conflict. Mediation brings into the conflict for the first time an outsider for the purpose of the third party to try to facilitate the parties reaching a resolution on their own.
3. What are the biggest savings for a business looking to resolve a dispute by using ADR?
   A: The costs of litigation.
4. What are mini-trials used for?
   A: Mini-trials are used for business cases and are presented to top business executives rather than ordinary citizens.
5. What is regulatory negotiation?
   This mechanism is used by administrative agencies wishing to avoid protracted litigation with interested groups over regulations which the agency wants to pass.
6. Why is regulatory negotiation such a benefit to agencies?
   A: There is less likelihood of a challenge once the regulations are promulgated.
7. What sorts of programs have agencies been using to help with their caseload?
   A: Mediation and arbitration.
8. Why did agencies adopt ADR practices?
   A: To help prevent so many cases going to court and clogging up the court system needlessly.
9. How do courts use ADR in rendering their services?
   A: By selecting certain cases and forcing them to mediate before setting them on the calendar.
10. Does an arbitration award have to be unanimous if by more than one arbitrator?
    A: When there is more than one arbitrator, generally the majority rules.
11. How are arbitrators generally chosen?
    A: Each party views the list and strikes persons they do not want until agreement is finally reached.
12. What is a mock trial?

A: The attorney assembles a mock jury comprised of ordinary citizens, presents the case as if in court, and then requests them to make a decision.

13. What is the difference between a mini-trial and a mock trial?
    A: A mock trial is presented to ordinary citizens, while a mini-trial is presented to business executives.
14. What is the ADR form traditionally used in collective bargaining?
    A: Labor arbitration permits the parties to the collective bargaining agreement to dispose of disagreements arising under the contract without resort to the time-consuming method of litigating every disagreement.
15. Are claimants using court-annexed ADR generally required to accept the decision of a mediator?
    A: No.
16. What are the bases upon which an arbitration award can be judicially reviewed?
    A: For reasons involving unconstitutionality, abuse, collusion, or fraud in the arbitrator's decision and like bases attacking the validity of the award itself.
17. What is a summary jury trial and how is it used?
    A: Without telling them that their decision is not binding, a small (about 6 people) jury is chosen just as a regular jury would be, the case is presented in summary fashion by the parties, and the jury renders a verdict. Based on the jury's input, the parties are urged to negotiate a settlement if it is appropriate.
18. What is binding arbitration?
    A: When the parties agree to abide by the decision (called an **award**) reached by the arbitrator, thus ending the dispute.
19. Is all arbitration binding?
    A: No. There is binding and non-binding arbitration.