



Alternative Dispute Resolution

Carolynn Ryan



Industrial Relations Centre (IRC)
School of Policy Studies
Queen's University
Kingston, ON K7L 3N6

Tel: 613-533-6628
Fax: 613-533-6812
Email: irc@queensu.ca
Visit us at: irc.queensu.ca

Where once Alternative Dispute Resolution (ADR) referred to an alternative to the courts, ADR in the field of labour relations is increasingly being referred to as an alternative to arbitration. The objectives of ADR and the newly emerging Internal Dispute Resolution (IDR) are to settle disputes prior to having to go to binding arbitration over which the parties have little control. ADR and IDR are recognized as giving the parties greater direct voice in fashioning remedies and more timely settlements.

ADR has been touted for the cost and time savings. Aside from these potential savings, ADR and IDR are being recognized for the emphasis they place on the social relationship between the parties. Because these methods afford the parties the opportunity to fashion a settlement that exploits mutual gains, it has the potential to protect and even enhance relationships (Melnitzer 1995, 8).

The spectrum of ADR methods is a range of dispute resolution techniques that vary in the amount of control the parties have over the process. The following is a brief overview of the various ADR mechanisms.

Adjudication

Adjudication is a dispute resolution process in which disputants present proofs and arguments to a neutral third party who has the power to hand down a binding decision (Goldberg et al. 1985, 149). The term is generally used to describe the determination of a dispute by a tribunal or court but is also used to designate the grievance arbitration process used in the public service (Sack and Poskanzer 1984).

Arbitration

Arbitration involves a mutually acceptable, knowledgeable, neutral third party, conducting a hearing and making a decision on the merits of the case. The third party may be a single arbitrator selected by mutual consent of the parties (or in default of such agreement, by a government agency) or a tripartite body consisting of a neutral and equal numbers of partisan nominees (Arthurs et al. 1993, 34). It may be administered privately or publicly; it may be voluntary or compulsory; it may be binding or non-binding (Medycky 1988, 4). The arbitrator hears the parties, their evidence, their argument, and makes a decision on the merits of the case (Jacobs 1995, 8).

ADR Processes

- Adjudication
- Arbitration
- Grievance arbitration
- Expedited arbitration
- Interest arbitration
- Neutral-Expert Fact-Finding
- Med-Arb
- Mediation
- Grievance Mediation
- Collective Agreement Mediation (Conciliation)
- Negotiation
- Computer-Assisted Negotiation and Mediation
- Internal Dispute Resolution

Grievance Arbitration

Grievance arbitration is a mechanism for settling disputes relating to the interpretation, application, administration, or alleged violation of an existing collective agreement (Canadian Bar Association 1989, 10). Grievance arbitration is legislatively prescribed in most jurisdictions.

Expedited Arbitration

Expedited arbitration procedures, in most jurisdictions, condense the regular grievance arbitration process. Expedited arbitration is most often utilized where time is of the essence. Either party may request the process. An arbitrator is selected from a list of appointed arbitrators and hearing dates set in advance. In accepting the case, the arbitrator must commit to hold a hearing and render a decision within a specified time frame.

Interest Arbitration

Interest arbitration occurs during the first or subsequent contract in the event of failed negotiations, particularly for public sector employees who are given the right to negotiate collectively but denied the right to strike (Canadian Bar Association 1989, 10). Depending on the jurisdiction, interest arbitration may be compulsory (Kumar and Coates 1989). Parties seldom voluntarily choose interest arbitration or abandonment of the right to strike or lockout which otherwise resolves disputes over the (re)negotiation of the contract (Arthurs et al. 1993, 34).

Neutral-Expert Fact-Finding

A third-party neutral with substantive or technical expertise examines and evaluates disputed facts central to the controversy that may involve complex scientific, sociological, technical, economic, business, or workplace issues. The fact-finder, who is not authorized to resolve the matter, then submits a report detailing his or her findings and recommends how the issue should be resolved. The report is usually made public and contains non-binding recommendations for settlement (Jackson 1989, 11). Such information may reduce uncertainty and thus promote settlement (Tannis 1989, 49). The settlement may be reached between the two parties as a result of the fact-finder's report due to the combination of two forces. The neutral determination of the issues in dispute and the recommendations for settlement may force the parties to jointly reexamine the issue (Jackson 1989, 11). Furthermore, the public pressure on the parties may be great because the report contains a recipe for resolving the dispute without a work stoppage that may be a great inconvenience to the public (Jackson 1989, 11).

Med-Arb

This technique is a combination of mediation and arbitration. The parties set out to resolve their dispute through mediation but agree in advance that if they are unable to resolve all aspects of their dispute through mediation, the same third party neutral will continue to deal with the matter as an

arbitrator' (Jacobs 1995, 11). If there are any issues that have not been resolved by the mediation process, the neutral will render a binding decision. When acting as mediator, the neutral may have greater ability to effect a voluntary settlement.

Mediation

Mediation is the intervention into a dispute or negotiation by an acceptable, impartial, and neutral third party who has no decision-making power, to assist disputing parties in voluntarily reaching their own mutually acceptable settlement of issues in dispute (Moore 1986, 14). The mediator may make suggestions, provide background information, and note avenues open to parties for settlement (Kumar and Coates 1989).

Grievance Mediation

Grievance mediation is the mediation of disputes relating to the interpretation, application, administration, or alleged violation of an existing collective agreement during its term (Canadian Bar Association 1989, 10). Grievances can be filed as individual or policy grievances. Individual grievances seek remedy for only one employee and typically involve discipline or discharge. Policy grievances are filed by the union to effect a change in the interpretation and subsequent administration of the collective agreement.

Collective Agreement Mediation (Conciliation)

Conciliation is an informal process where a third party helps to bring disputants to agreement through improvement of communication, lowering of tensions, identifying issues and potential solutions (Pitsula 1987, 3 as reported in Standing Committee on the Administration of Justice 1990). Conciliation is used when parties reach an impasse while negotiating a new agreement before any work stoppage occurs (Canadian Bar Association 1989, 10). 'In the majority of Canadian jurisdictions, conciliation must be attempted before the parties are legally free to break off negotiations, or to have recourse to economic sanctions' (Arthurs et al. 1993, 35).

Negotiation

Negotiation is any form of verbal communication, direct or indirect, whereby parties to a conflict of interest discuss, without resorting to the assistance of a neutral, the form of any joint action which they might take to manage a dispute between them (Morley 1977, 26). The parties to the dispute must agree to the negotiated resolution before it is considered resolved (Elliott and Goss 1997, 12). The term 'negotiations' usually refers to the process of collective bargaining with a view to arriving at a collective agreement. Negotiations are conducted by negotiating committees selected by the union and employer (Kumar and Coates 1989).

Computer-Assisted Negotiation and Mediation

HR Professionals are beginning to use computer-assisted means to aid in dispute resolution. Software packages are being developed to assist in negotiation and mediation practices. One such package, called *Negotiation Assistant* (Shell 1995, 119), helps individual negotiators understand their own preferences in a negotiation, match those preferences with those of a negotiation counterpart, and show them where the best tradeoffs might lie. The program guides individual negotiators in a 'two-party transaction through a set of steps to identify and weigh quantitatively the issues and options in a negotiation' (Shell 1995, 12). The individuals are then connected on local area network with other parties to allow them to negotiate, displaying to each user, their own confidential, subjective value for each offer and counteroffer until a deal is reached. Once the parties have settled the deal, the computer synthesizes the information and provides information with respect to potential deals that would make both parties better off (Shell 1995, 120). The computer provides facts and data that may allow the parties to enhance the settlement for a more efficient contract.

Internal Dispute Resolution

IDR processes fall on the far end of the ADR spectrum as the mechanism that offers the parties the most control over the resolution process. IDR programs involve procedures developed internally to address and resolve employment disputes in-house before those disputes become full-scale litigation or require more formal ADR processes (Simon and Sochynsky 1995, 32). The key to an IDR process is in preventing a dispute from escalating into requiring more formal resolution processes. These systems allow employees to vent frustrations and air differences and allow them to work together with management in order for the dispute to be resolved. These internal procedures employ mechanisms such as complaint procedures, ombudspersons, and peer review committees. IDR policies and procedures may utilize techniques from the above ADR mechanisms within the confines of one organization. Some processes offer negotiation, fact-finding, mediation, or arbitration by trained in-house personnel.

References

- Arthurs, H.W., D.D. Carter, J. Fudge, H.J. Glasbeek, and G. Trudeau. 1993. *Labour Law and Industrial Relations in Canada*. 4th ed. Toronto: Butterworths.
- Canadian Bar Association. 1989. *Report of the Canadian Bar Association Task Force on Alternative Dispute Resolution: A Canadian Perspective*. Ottawa: Canadian Bar Association.
- Elliott, David C. and Joanne H. Goss. 1997. Grievance mediation: How and why it works. *Workplace News* 3 (April 1997).

- Goldberg, Stephen B., Eric D. Green, and Frank E.A. Sander. 1985. *Dispute Resolution*. Boston: Little, Brown.
- Jackson, R.L. 1989. *Fact Finding Under the School Boards and Teachers Collective Negotiations Act of Ontario*. Toronto: Ontario Education Relations Commission; Queen's Printer for Ontario.
- Jacobs, Paul. 1995. The Range of ADR Options. A paper presented at How To Win-Win in a Win World, Friday, October 27, 1995, Metro Toronto Convention Centre.
- Kumar, Pradeep and Mary Lou Coates, eds. 1989. *The Current Industrial Relations Scene in Canada: Glossary of Common Industrial Relations Terms*. Kingston: IRC Press, Queen's University.
- Medycky, Christine. 1988. An Overview of Alternative Dispute Resolution Processes. A paper presented at the Canadian Bar Association—Ontario program on Alternative Dispute Resolution; What's all the Fuss About and Where Is it Going? Toronto, 3 October 1988.
- Melnitzer, Julius. 1995. Alternative dispute resolution hits its stride. *Workplace News* 1 (Dec. 1995).
- Moore, Christopher W. 1986. *The Mediation Process: Practical Strategies for Resolving Conflict*. San Francisco: Jossey-Bass.
- Morley, Ian E. and Geoffrey M. Stephenson. 1977. *The Social Psychology of Bargaining*. London: Allen-Unwin.
- Sack, Jeffrey and Ethan Poskanzer. 1984. *Labour Law Terms: A Dictionary of Canadian Labour Law*. Toronto: Lancaster House.
- Shell, G. Richard. 1995. Computer-assisted negotiation and mediation: Where we are and where we are going. *Negotiation Journal* 11 (April).
- Simon, Howard A. and Yaroslav Sochynsky. 1995. In-house mediation of employment disputes: ADR for the 1990s. *Employee Relations Law Journal* 21 (Summer).
- Standing Committee on the Administration of Justice. 1990. *Alternative Dispute Resolution*. Toronto: Queen's Printer.
- Tannis, Ernest G. 1989. *Alternative Dispute Resolution That Works!* North York: Captus Press.

Carolynn Ryan is a Labour Relations Advisor with the Workers' Compensation Board of British Columbia. She has a Bachelor of Psychology degree from the University of British Columbia and is working on a human resources certificate from the British Columbia Institute of Technology. She is a 1997 graduate of the Master of Industrial Relations program at Queen's University.

This paper is reprinted from the IR/HR Legal Review, volume 3, number 2, published in August 1997 by IRC Press.

© 1997, IRC Press
Industrial Relations Centre,
Queen's University,
Kingston, ON K7L 3N6