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# Today's Business: Refining the process of alternative dispute resolution during a pandemic

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With the COVID-19 pandemic, the world has changed, and the Alternative Dispute Resolution process along with it.

Over the last decade, ADR, including nonbinding mediation and arbitration, has been in increased demand among business litigants. Today, these sessions have gone “virtual.”

Under non-binding mediation, a “neutral” individual facilitates a negotiation between the parties to reach a compromise. The matter can only settle if the parties agree to terms, meaning either party can walk away if it is not satisfied with a proposed outcome. Arbitration, by contrast, is a private trial before an arbitrator who sits as a judge. In most arbitration, the arbitrator, often selected by agreement of the parties, hears testimony, receives documentary evidence and issues a binding, written opinion. Unless an arbitrator exceeds his or her authority, or issues a decision that is arbitrary or capricious, the decision will not be overturned by the courts.

Both mediation and arbitration typically proceed by agreement of the parties. Arbitration commonly is provided for in contracts as an alternative to proceeding in court. A court cannot require a party to relinquish its rights to proceed in court in favor of arbitration if it has not agreed to do so. Mediation often is agreed to informally by parties to a pending litigation, or as a process even before commencing an action. Given that mediation is non-binding, courts sometimes order the parties to mediate in an effort to resolve the dispute.

When assessing cost and risk, many businesses have come to the conclusion that ADR provides a less expensive, and quicker, means of resolving business disputes than litigating through trial in the state and federal courts. While private mediation or arbitration often does not result in recovering 100 percent of claimed losses, it allows parties to fix their risks, even if that means anticipating a compromised recovery in mediation, or defined parameters in arbitration.

The success of ADR traditionally has centered around in-person contact between and among the litigants and the neutral. Very often, the close proximity and personal interaction of the parties during mediation allows the mediator to lessen the impact of rhetoric and ease the parties toward a resolution. Arbitrators themselves also have benefited from in-person proceedings, which help the arbitrator to observe witnesses and evaluate their credibility.

Because of the need for social distancing, most ADR proceedings now are being conducted by remote video conferencing. While litigants, and even neutrals, initially mourned the loss of the personal interactions of ADR, most have been pleasantly surprised at how effective the process remains even by video. Various video platforms provide the ability to convene all parties in one “room” where typical functions of offering evidence, directing testimony, cross examining witnesses and conducting arguments can take place. In mediation, the platforms allow for breakout rooms where the parties can be separated and the mediator can move back and forth between rooms to have private conversations with the parties. The technology is not complicated.

The debate in the ADR community is whether, when the pandemic eventually eases, parties will want to rush back to in-person ADR. On one hand, remote proceedings save travel time and costs. On the other, the saved costs arguably lessen the stakes, particularly in mediation, and make it easier, especially for defendants, to decline to settle.

The pandemic has highlighted a consistent truth: ultimately, the success of settlement in mediation comes down to how motivated the parties are to resolve their disputes, whether in-person or by video. This depends on the relative merits and practical business considerations, with assistance of skilled mediators. Similarly, capable arbitrators still can evaluate witnesses and evidence, even if the ideal of receiving it in person is unavailable. Businesses should take solace in knowing that, even in the midst of COVID-19, ADR remains an effective means of resolving disputes.

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