

Alternatives to litigation

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Arbitration, mediation can save money and avoid a messy fight

By Robert F. Copple
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If war is a tool of diplomacy, then litigation is a tool of negotiation. Most companies believe litigation is simply the next step in a negotiation that has failed. This is particularly true in commercial disputes between buyers, sellers, vendors, customers, manufacturers and distributors. Part of this shift from diplomacy to warfare has to do with our otherwise admirable American concepts of justice that include standing up for your rights, having your day in court and, if necessary, "I'll take this fight to the U.S. Supreme Court."

Once the litigation gauntlet is thrown, there usually is a shift toward retribution and vindication.

Indeed, Annenberg Institute research has concluded that the longer a complaint or injury goes without being resolved, the more crystallized the parties become and the less likely they are to compromise.

Litigation creates its own problems. It is an expensive luxury. Even the Fortune 500 are scrutinizing litigation costs and searching for more effective ways to end disputes.

Litigation can be emotionally draining and time consuming.

The idea of a day in court is devolving from a right to a myth. Fewer than 5 percent of cases filed are tried.

What happens to the rest? Most are settled, but often after much money spent, blood shed and relationships destroyed.

As a result, many companies are looking at alternative dispute resolution — arbitration or mediation — that uses a neutral third party.

Arbitration is a mini trial. The arbitrator is a private judge who reviews evidence, hear testimony and make a decision about who, if anyone, is at fault. The neutral decides if one party owes the other money and if so, how much.

Arbitrators are usually lawyers but in some areas, such as labor, securities trading and construction, the arbitrator may be a non-lawyer with experience and training.

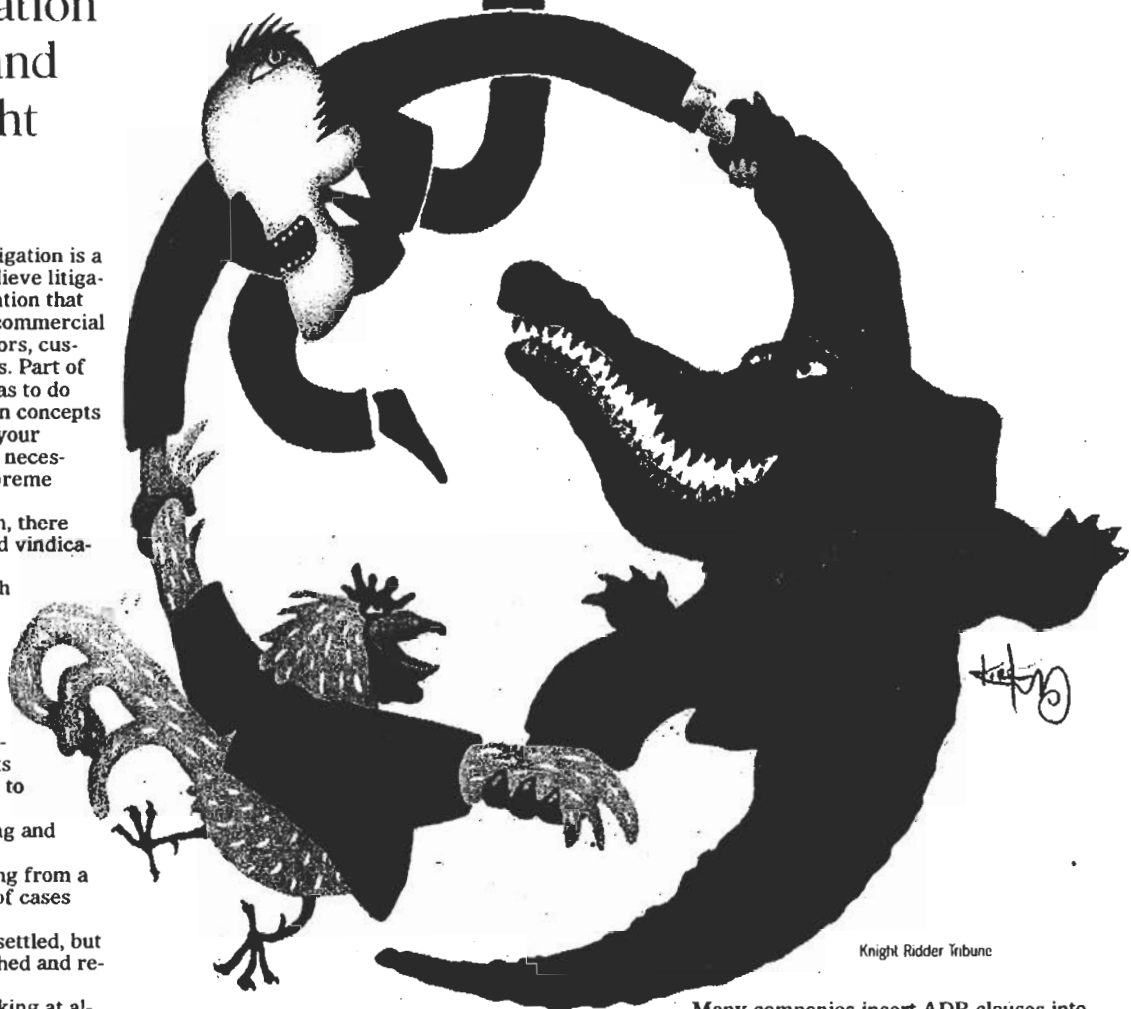
The advantages to arbitration are many.

If the parties can agree to limit the scope, arbitration can be cheaper than a trial by 25 to 50 percent. Attorneys may be reluctant to forgo portions of their cases, but sophisticated lawyers often see dispute resolution as the best interest of their clients.

Another benefit is that arbitration can lead to a much quicker resolution of a dispute, and the results and evidence can be confidential.

Finally, the parties can agree that if they are dissatisfied with the arbitrator's ruling, they can still go to court.

Mediation is a different process in which a third-party neutral with psychological, business and legal skills moves the parties toward an amicable settlement. The mediator works to get the



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About the author



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parties beyond their crystallized positions.

The mediator can soften the parties' resolution by focusing on their positions' weaknesses and the risks they face by going to trial. Good mediators employ creativity in looking for common interests between the parties, such as ongoing or future business relationships.

A mediated settlement can leave both parties with a sense that a compromise was best. Sometimes neither party likes the result but prefers it to the risk of war.

Parties need not wait for a dispute before they consider alternative dispute resolution, or ADR.

Many companies insert ADR clauses into their commercial and employment contracts to establish ADR procedures. This saves money and may head off a litigious vendor, customer or employee. However, ADR provisions must be evenhanded and not unfairly restrict access to the courts.

The U.S. Army Corps of Engineers used to assume that about 80 percent of its projects would result in some kind of post-construction litigation. In response to that enormous cost, the Corps established milestones in its projects. The parties were required to identify and resolve through ADR any disputes that had arisen during that period. As a result, the Corps estimates that its litigation has decreased to about 25 percent of its projects.

The same process was used in resolving construction disputes arising out of the "Big Dig" underground highway project in Boston.

Where can you get ADR help? Mediators and arbitrators are known by word-of-mouth in the legal communities.

Also, major ADR organizations can locate neutrals and provide guidance for writing ADR into contracts. The organizations include the CPR Institute for Dispute Resolution, the American Arbitration Association and the Judicial Arbitration and Mediation Services.