

A Guide to Arbitration and Mediation for New Lawyers

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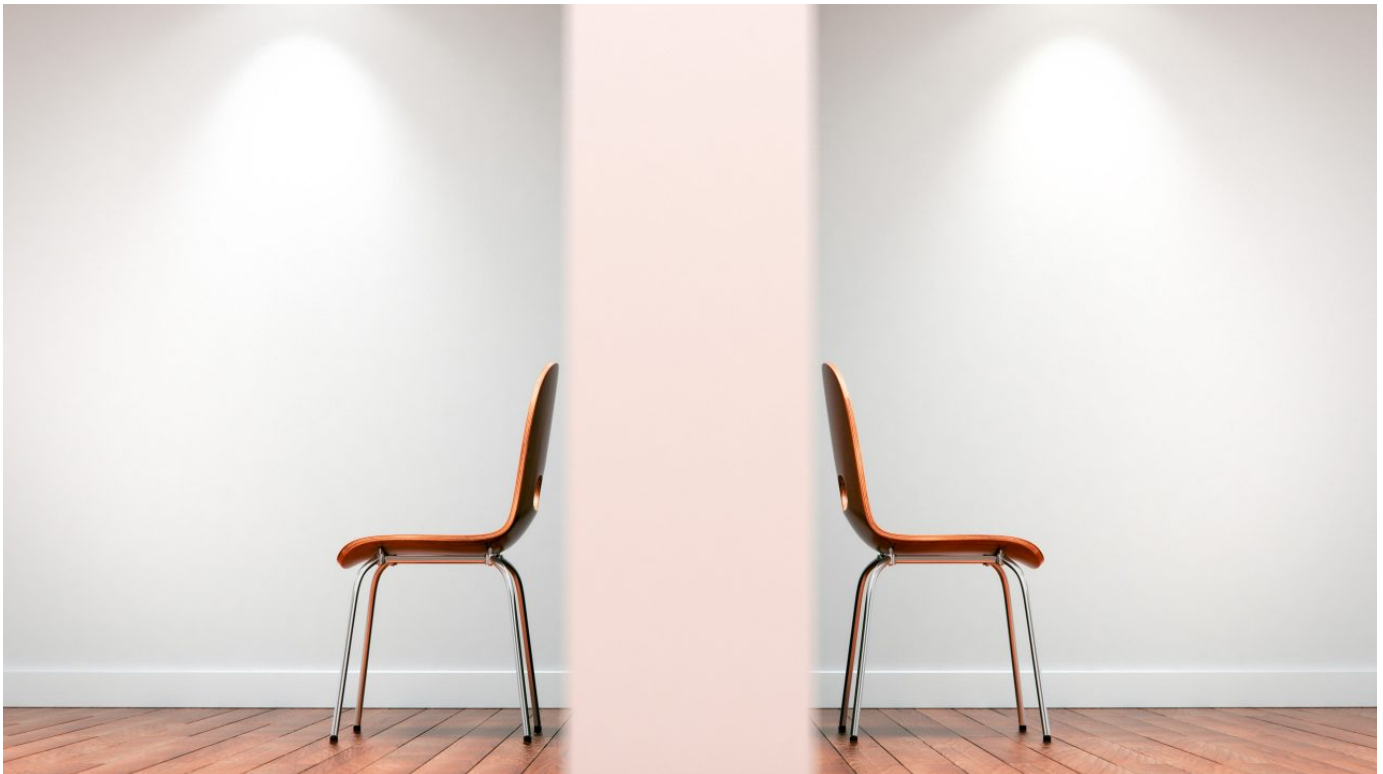
Practice Areas

Practice Areas & Settings

Alternative Dispute Resolution

Summary

- Arbitration and mediation are popular alternatives to traditional courtroom litigation in dispute resolution, and the authors provide an overview of the fundamental differences between these approaches.
- It is important for new lawyers to understand the nuances and advantages of these alternative dispute resolution methods to navigate the complex field effectively.



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When envisioning the dynamic field of [dispute resolution](#), legal practitioners and the public often picture traditional courtroom litigation battles. In practice, however, arbitration and mediation are two equally popular and effective methods of dispute resolution. These two methods fall under the umbrella of alternative dispute resolution (ADR) and have become increasingly useful and relied-on avenues for resolving disputes.

Parties seek the skills of mediators when attempting to resolve their disputes amicably, and arbitration presents unique procedural features that parties may take advantage of in effectively and efficiently resolving even their most significant, high-stakes disputes. For new practitioners seeking to navigate the complex terrain of dispute resolution, understanding the nuances and advantages of these two ADR methods is essential.

Primary Methods of Dispute Resolution

Litigation, arbitration, and mediation are the most common dispute resolution mechanisms. Each method is distinct, and young practitioners need to understand their fundamental differences. Litigation is the conventional method of resolving disputes through the court system. In the United States, it involves presenting cases before a judge or jury, leading to a binding decision with associated appeal rights. This process is formal, often lengthy and costly, and requires strict adherence to the relevant court's legal procedures and rules. Arbitration and mediation provide two alternatives to resolving a matter before the courts.

Arbitration: A Discreet and Flexible Avenue for Dispute Resolution

[Arbitration](#) is a private dispute resolution mechanism that provides a structured yet flexible alternative to litigation. In arbitration, disputing parties present their case to a neutral decision-making body referred to as the arbitral tribunal. The tribunal typically consists of a sole arbitrator or a panel of three arbitrators. The parties generally have the right to choose or agree upon the member(s) of the tribunal and challenge a proposed arbitrator. The tribunal is tasked with assessing the parties' respective positions and then delivering a decision in an arbitral award. The parties are generally bound to the award, which can be enforced in courts, including, often, in other legal jurisdictions where the losing party may have assets. Parties may also challenge the award under certain, often limited, circumstances. Arbitration is considered more efficient and cost-effective than traditional litigation while also boasting other attractive procedural benefits, such as confidentiality protections for the parties.



While, like court proceedings, [arbitration](#) involves a certain degree of structure and formality, it departs from traditional litigation in several critical ways:

A Creature of Agreement

Party consent is the cornerstone of arbitration. Absent a valid agreement that reflects both parties' desire to resort to arbitration should a dispute arise, the parties may not rely on this method of dispute resolution. The arbitration agreement (also referred to as the arbitration clause) may encompass any disputes between the parties or be limited in scope. The clause may also specify the governing law, arbitral seat, number of arbitrators, and rules governing the arbitration. Parties generally agree that the arbitral award will be final and binding.

Private and Confidential

While courtroom litigation is public and prioritizes a degree of transparency, arbitration takes place in a private setting, and the parties may agree to certain procedures that protect their confidentiality. This is a particularly attractive and valuable feature for parties seeking to avoid embarrassment or are interested in safeguarding sensitive information.


Speed and Efficiency

Arbitration was once renowned for its expediency, often leading to quicker and more cost-effective resolutions than traditional court proceedings. With its growing adoption by parties, including for their most complex disputes, arbitration has frequently become as lengthy and expensive as litigation, and sometimes more so. Nonetheless, the procedural flexibility of arbitration means that parties have enormous influence in setting the pace of the arbitration and may adopt procedures and timetables that allow for more efficient and cost-effective resolution of their dispute, if mutually desired.

Specialized Expertise

Parties typically select arbitrators for their specialized knowledge in specific areas of law or industry. Arbitrators are often retired judges, legal scholars, or seasoned attorneys with many years of experience dealing with disputes in a specific industry. The ability to choose decision-makers with particular expertise makes arbitration a wise choice for resolving complex disputes involving highly technical industries or nuanced areas of the law.

Mediation: Returning the Power to the Parties

[Mediation](#) adopts a more collaborative approach than litigation or arbitration. It involves working with a neutral mediator—typically jointly selected by the parties—tasked with facilitating the disputing parties in reaching a mutually acceptable resolution. Unlike arbitration and litigation, mediation does not result in a final, enforceable decision but rather an agreement between the parties. 

Mediation is often an attractive choice for parties seeking creative, business-oriented solutions or trying to preserve their commercial relationship. Parties may agree to submit mediation statements and a select number of key documents to the mediator to express and support their positions. Mediations tend to be more efficient and less costly than other forms of dispute resolution that typically require multiple submissions and extensive document exchanges. Parties often explore mediation in parallel to attempting to resolve their dispute through more formal and binding methods like litigation and arbitration.

Mediation diverges from the formal and adversarial structure of arbitration and litigation by prioritizing collaboration and compromise between the parties:

Neutral Mediators

A **neutral third party**, the mediator, facilitates the negotiations between the disputing parties. The mediator is not a decision-maker. Rather, the mediator's role is to listen to the parties' respective positions to assist them in achieving a reasonable resolution. Some mediators take a facilitative approach. This can include assisting the parties in their negotiations, asking key questions, and creating an environment for them to reach a mutual understanding without necessarily opining on the merits of their positions. Other mediators take an evaluative approach. This involves the mediator assessing the strengths and weaknesses of the parties' respective positions and suggesting resolutions based on their evaluation of the law and merits. Many arbitrators and dispute practitioners also serve as mediators as part of their practice.

Voluntary Process

During a mediation, disputing parties voluntarily come to the table to engage in an effort to reach an amicable resolution that they deem mutually satisfactory. Importantly, parties retain full control over the final outcome and are under no obligation to accept a particular resolution. If the parties do reach an amicable settlement, they often agree to memorialize it in a written agreement that is binding upon them and which contains a new dispute resolution provision.

Creative Outcome

Parties frequently resort to mediation in parallel to an ongoing litigation or arbitration proceeding. In addition to serving as an opportunity to test the strength of one's positions and determine whether pursuing the dispute to a final, binding decision is advisable, mediation also allows the parties to explore creative resolutions that would not otherwise be available in litigation or arbitration. For example, the parties may ultimately decide that the preservation of their relationship takes precedence over financial compensation. Mediation allows them to explore a strategic business resolution as opposed to financial compensation or other forms of relief, such as a public apology or charitable contribution.

Cost Efficiency



Mediation generally outshines arbitration or litigation in terms of cost-effectiveness. It is typically a more expedient mechanism for the resolution of disputes that allows parties to avoid the expense of a lengthy trial or arbitration hearing. Parties often choose to attempt mediation when faced with the prospect of a potentially lengthy and costly legal battle through other dispute resolution mechanisms.

Knowing and Leveraging Your Options Leads to Better Outcomes

In the world of dispute resolution, arbitration and mediation are essential features of any practitioner's toolkit. Regardless of whether you are negotiating the dispute resolution provision on a deal or representing a client in a complex dispute, consider all of the available dispute resolution tools at your disposal. Tailor your proposed strategy to the facts at issue and preferred outcomes of your client from a cost, efficiency, or business relationship standpoint. You can only do this if you have acquired an appreciation of the advantages and drawbacks of each of the dispute resolution mechanisms available. You will then be able to leverage this knowledge to determine which dispute resolution method will best suit your client's goals in any given circumstance, in turn leading to far better outcomes for them.

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Additional Resources in Arbitration and Mediation

- [ABA Section of Dispute Resolution](#)
- [Alternative Dispute Resolution: A Practical Guide for Resolving Government Contract Controversies, Third Edition](#)
- [Dispute Resolution Processes](#)
- [International Arbitration](#)
- [Tech Arbitration Tips](#)
- [Power in Mediation](#)
- [Binding Mediation Is Not the Same as Arbitration](#)

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Multinational organizations trust Randa Adra with their most complex and high-stakes disputes. A partner in the International Dispute Resolution and Litigation Groups of Crowell & Moring LLP, Randa serves as a strategic...

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Ibrahim Ati, a dual-educated legal professional with credentials from both Europe and the US, specializes in disputes, having an expertise in both civil and common law systems. Having passed the New York Bar and obtained an...

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