INTRODUCTION

At its heart, business is about conflict. Consumers want the lowest prices they can get for the goods and services they buy; businesses want the highest prices they can get for the goods and services they sell. Workers want the highest compensation package possible; employers want to minimize costs. Under the assumptions of competition, the forces of supply and demand ensure that a price that maximizes total welfare (consumer surplus plus producer surplus) is set.

The assumptions of competition are heroic. There must be a lot of buyers and a lot of sellers. All firms will charge the same (market) price, because products are homogeneous (indistinguishable from each other). There must be easy entry and exit into the industry. Both sides of a transaction must have all the relevant information. If any of these assumptions is violated, the industry is not competitive. Under non-competitive conditions, total welfare may or may not be maximized. Most industries in the US are fairly competitive. In many cases, regulation arises to protect the various agents under non-competitive situations.

However, disputes arise, particularly when one agent in a transaction has information that the other party does not. Negotiation of contracts, disagreements about the terms of a contract, and improper behavior can also lead to disputes. Over the past twenty years there has been an explosion in the use of different dispute resolution methods. Organizations from schools and governments to business and courts have considered their use. Some forms are used significantly more frequently. Others are virtually unknown to anyone outside of the profession. How do organizations select the method of dispute resolution that they used. More importantly, how should they select the method? This paper will consider a number of factors that should be considered and then apply them to a variety of dispute resolution methods.

As noted in Shelborn and Porca (2004), alternatives to litigation can reduce the transactions costs associated with settling a dispute. Alternatives can also expand the possible solution set, and offer the involved parties a chance to get more complete information and a more detailed settlement than would occur in a courtroom. Finally, certain alternatives can foster the cooperation necessary to a resolution rather than engendering conflict.
Blackard (2001) states that alternative dispute resolution (ADR) processes can be very beneficial when conflicts arise between management and employees. He notes that the costs can be lower in terms of litigation expense, time and effort, and the process can build trust in management and enhance communication, while supporting diversity and the need for change.

The purpose of this paper is to define the various forms of dispute resolution and to assess the factors to consider when choosing a particular process.

**FORMS OF DISPUTE RESOLUTION**

There are a number of processes that are accepted as part of the arsenal of dispute resolution methodology. The most common forms are discussed below. Sometimes the terminology is used inconsistently and interchangeably.

1. **Litigation**
   Litigation is familiar to most Americans. It involves a case, controversy, or lawsuit being brought in the court. The filing party is called the plaintiff. The party being sued in a civil case, or who is being prosecuted in a criminal case, is called the defendant. If the parties cannot settle (more than 90% of all lawsuits are settled without a trial), the case goes to trial (‘Lectric Law Library). The trial is an adversarial proceeding in which the parties, usually through their attorneys, present evidence and call witnesses to testify in an attempt to prove their case. The party who loses at the trial level can appeal to the appropriate appellate court which will consider only the legal issues in the case. (Findlaw.) Both trial courts and appellate courts are limited by the law in terms of the type of cases they can hear and the remedies that can be awarded. The entire process follows strict procedural rules.

2. **Arbitration**
   Arbitration is a private process in which the disputing parties agree to allow one or several individuals to make a decision about their dispute. The arbitration process is procedurally very similar to a trial, although arbitration can usually be completed more quickly and is less formal. For example, often the parties do not have to strictly follow the rules of evidence in an arbitration hearing, because there is no jury. (ABA, 1; Erickson) In some cases, the arbitrator is not required to apply the law. (ABA, 1) This may produce results not possible in court. At times, the arbitrator’s only job is to interpret the contract that sent the parties to arbitration. After the hearing, the arbitrator issues an award. Some awards simply announce the decision, while others provide a "reasoned" award, which means the arbitrator give(s) an explanation of the decision. (ABA, 1-2) Instead of being held in a courtroom, an arbitration hearing may be conducted in conference room. Erickson and Bowen suggest that this might create a feeling of egalitarianism among parties (Erickson). The arbitration process may be either binding or non-binding.
a. **Binding arbitration** With some exceptions, awards in binding arbitration can only be appealed on very narrow grounds. (ABA 1-2.) Collective bargaining agreements usually contain clauses providing for binding arbitration, but the clauses have become standard in other contracts, such as in construction agreements (Stipanowich, 75-76). The award issued as a result of binding arbitration is enforceable in court. (ABA 1-2.)

b. **Nonbinding arbitration** If arbitration is non-binding, the arbitrator's award is advisory and in effect, will only become final if accepted by the parties. (ABA, 1-2) Otherwise, the parties are entitled to still have a trial. The process encourages settlement. Nonbinding arbitration is used frequently as part of a court annexed procedure. (Stipanowich, 87-88) Constitutional protections may prevent the courts from depriving some parties of jury trials.

3. **Negotiation**
Negotiation is a process in which disputing parties attempt to resolve their conflict. They do this unassisted by a neutral third party, but they may be represented by their attorneys. As was previously mentioned, the great majority of lawsuits settle before there is a trial. (ABA, 4) Negotiation is largely unstructured, and as a practical matter, everyone engages in some form of negotiation every day with family members, supervisors or employees, or store salesclerks.

4. **Mediation**
In mediation, a neutral third party or parties assist in settlement efforts. (Stipanowich, 84) It is a private process, and tends to be more flexible than some other forms of dispute resolution. (Stipanowich, 85). Even though courts sometimes mandate that certain cases go to mediation, the process is still considered to be "voluntary" because the courts do not mandate that the parties come to agreement. Some mediators conduct the entire process with all parties in the room. However, other mediators will separate the parties, shuttling back and forth between the two rooms in which the parties are located. If an agreement is reached, the mediator may help reduce the agreement to a written contract, which may be enforceable in court. (ABA, 3) There are three common styles of mediation.

a. **Facilitative** In the facilitative style of mediation, the mediator is totally neutral and avoids presenting personal views on the merits of the case or settlement offers. The goal is to arrive at a settlement that both parties can accept. To achieve this, the mediator tries to get the parties to focus on interests, rather than positions. Total neutrality means not assisting either party, so it may be difficult to remedy a power imbalance between the parties. The mediator must definitely avoid giving legal advice. The best that the mediator can do is to ensure that both parties have a full opportunity to be heard on all issues, and do not feel coerced into accepting a settlement. (Imperati, 709-711.)

b. **Evaluative** A mediator using the evaluative style frequently presents his or her own views on the relative merits of the case, and suggests options. The process of mediation is more directed and perhaps more likely to settle. The mediator places emphasis on the strengths and weaknesses of the cases or on the cost of not settling, rather than on a
mutually beneficial solution. (Imperati, 711-712.) Especially in cases involving civil litigation, parties sometimes specifically seek evaluative mediators.

c. Transformative This is a relatively new dispute-resolution process that is used internally. Transformative mediation is intended to give the disputants a voice in the result and the process. The originators of transformative mediation say it is different from other types of mediation because it attempts to change the quality of the disputants’ conflict interaction. This results in giving the parties a sense of empowerment through making their own decisions. The process also encourages knowledge and understanding of the other side’s position. (Seidel, 386-387.)

5. Ombudsperson
The classical Ombudsman, as seen in Sweden, Denmark, and Finland, operated within the government, and handled complaints against administrative and judicial actions. (Wiegand, 97-99) Today, a variety of organizations, such as government agencies, schools and universities, hospitals, and newspapers, utilize these neutral individuals. Ombuds are usually outside the normal change of command and provide confidential assistance to those with problems with the organization. (Blackard, 59) The ombuds works within the institution to investigate the complaints independently and impartially. The process is voluntary, private and non-binding. (ABA, 4)

6. Neutral fact-finding
Neutral fact-finding is a process in which a neutral third party investigates an issue and makes a report. Employers or others may select the investigator in order to gage their case. In some situations the fact-finders are selected by the court for later testimony. The neutral fact-finding process is particularly useful for resolving complex scientific and factual disputes. (ABA, 4)

7. Minitrial
A minitrial is a private process in which the attorneys present condensed versions of their cases. A neutral third party may give a nonbinding opinion as to the likely outcome at trial. (Stipanowich, 86) The process is intended to encourage settlement.

8. Summary jury trial
The summary jury trial is very similar to a minitrial except that the condensed presentations are made before a jury that renders a nonbinding verdict. (Stipanowich, 87) It also encourages settlement.

9. Private judging
Private judging is a process in which the disputing parties agree to retain a neutral person, frequently a former judge, as a private judge. The private judge hears the case and makes a decision in a manner similar to a judge. In some states, the decision of the private judge may be appealable in the public courts. (ABA, 5)

10. Conflict coaching
Conflict coaching is a process of conflict analysis in which a coach and disputant communicate in order to develop the disputant’s conflict-related understanding, strategies, and skills. The coach functions as both facilitator and expert. (Brinkert, 517-518.)

11. Case evaluation or early neutral evaluation
In case evaluation parties present the facts and the issues in dispute to an experienced neutral case evaluator. The case evaluator advises the parties on the strengths and weaknesses of their respective positions, and assesses how the dispute is likely to be decided by a jury or other adjudicator. The opinion is nonbinding and may lead to settlement.

Early neutral evaluation is similar, but it takes place soon after a case has been filed in court. The case is referred to an expert, usually an attorney, who is asked to provide a balanced and unbiased evaluation of the dispute. The expert again identifies each side’s strengths and weaknesses and provides an evaluation of the likely outcome of a trial in an attempt to bring about a settlement. (ABA, 2)

12. Other forms of dispute resolution
Especially in the workplace, employers may use other or combined forms of dispute resolution. They may set up panels to review the dispute. The panels may be composed of external or internal third party neutrals, or they may also be composed of the employee’s peers. Some employers institute an ad hoc or open door policy. If an ad hoc policy is utilized the employer is familiar with different forms of dispute resolution, and utilizes whatever is most appropriate as disputes arise. There is no formal process that must be followed. An open-door policy tells the workers that the “door is always open,” and encourages them to report any problems or issues.

A similar process would be a multi-door process. The name "Multi-Door" comes from the multi-door courthouse concept, which would include a courthouse with multiple dispute resolution doors or programs. Cases are referred through the appropriate door for resolution. (ABA, 3-4)

**FACTORS TO CONSIDER IN CHOOSING A METHOD**

There are a number of factors parties should consider in selecting the best form of dispute resolution. Most comparative research probably involves mediation and arbitration, or compares these two processes to litigation.

1. Fairness
Perceptions of fairness have implications for the effectiveness of the dispute resolution. The parties’ perceptions of procedural fairness have been found to have an effect on the acceptance of an unfavorable outcome, and on evaluations of the neutral party (Brett & Karambayya, 1989; Brett, Karambayya, & Lytle, 1992). Procedural fairness improves
satisfaction with the resolution, fosters better relationships between the parties, and prevents the recurrence of the dispute (Brett et al., 1992).

Some research has suggested that disputants prefer mediation, in which parties cannot be forced to accept a settlement (Erickson), to arbitration, even if the mediation results in an impasse (Brett & Karambayya, 1989). Mediation also produces better results when evaluating factors such as satisfaction, fairness, and recurrence (Brett & Karambayya, 1989).

Fairness has been an issue in situations involving mandatory arbitration. Parties are required to use arbitration in many employment settings, consumer credit disputes, and broker-client disputes. The arbitrator or arbitrators are theoretically selected by the parties. However, if the pool of arbitrators is small, this may be an illusion. Further if one party, such as an employer, utilizes the services of the small pool of neutrals more often, they become known as “repeat players.” The concern is that arbitrators will be more inclined to please them in order to insure future business. Also, it is not uncommon for the agreement to arbitrate to limit remedies, and eliminate some steps common in litigation, such as discovery. Some arbitration hearings are also limited in terms of time. Other forms of dispute resolution may or may not be perceived a being fair depending on how they are structured.

2. Confidentiality
Court proceedings, of course, take place in public. (Carper) All other forms promise some degree of confidentiality. In an arbitration hearing, even if the procedure is as much as like litigation as possible, its most attractive characteristic is that it promises to be confidential.

Communications made during mediation are frequently protected by evidentiary rules, and are not admitted during a trial. (Stipanowich, 85) Furthermore, in 2005, the American Bar Association, American Arbitration Association, and the Association for Conflict Resolution passed the Model Standards of Conduct for Mediators. While it does not have the force of law, it does provide some guidance as to generally accepted conduct by mediators. It states that a mediator shall maintain the confidentiality of all information obtained by the mediator in mediation, unless otherwise agreed to by the parties or required by applicable law.

The Code of Ethics for the International Ombudsman Association provides that the ombudsman will hold all communications with those seeking assistance in strict confidence, and will not disclose confidential communications unless given permission to do so. The only exception to this privilege of confidentiality is where there appears to be imminent risk of serious harm. (The IOA Code of Ethics.)

3. Cost
Cost is one of the primary reasons given for resorting to an alternative dispute resolution method. Any reduced cost may be due in part to the reduced time involved. (Discussed below.) Less complex methods are probably less expensive than litigation.
Due to its informality and flexibility, and the fact that it can be conducted in any convenient location, mediation is often less expensive than more elaborate techniques. It also does not always require attorney participation. (Stipanowich, 85).

It is often assumed that arbitration is also less expensive than litigation. That may not always be the case. Courts exist in every state and in most counties, and they are already staffed. (Carper) The cost of access to the courts is low but litigation can be expensive because parties must pay their own attorneys as well as other expenses such as expert witnesses and other fees. (Carper) In mediation, parties must pay the attorneys if brought to mediation, and also pay the mediator’s fees. If the case does not settle, parties will still have to pay costs of arbitration or litigation. (Carper).

In arbitration, parties must still pay their attorneys and witnesses, but if they use an ADR organization, they must also pay forum fees. (Carper) Someone may also have to pay for a conference room for hearing. Furthermore, the parties must also pay the arbitrator’s fees and expenses. Fees vary based on the arbitrator and the type of case. Some charge by the hour, some by the day. If the arbitrator must read briefs from the parties, or prepare a reasoned award, he or she will charge for those days also. (Carper; Silberman, 9-10)

A survey on the Cost of Arbitration prepared by Public Citizen in 2005, found that for an $80,000 consumer claim filed in the Circuit Court of Cook County, Illinois, the filing fee would be $221. If that same claim was brought before the National Arbitration Forum (NAF), the forum fee would be $10,925. The American Arbitration Association (AAA) would charge up to $6,650, and Judicial and Mediation Services (JAMS) would charge $7,950. There are additional fees in arbitration. NAF charges $75 to issue a subpoena, $150 for discovery requests, and $100 for continuances.

Currently, AAA frequently charges an initial filing fee and a case service fee. The fees correspond to the amount of the claim. For a claim of $0 - $10,000, the filing fee is $750, and the Case Service Fee is $200. For a claim of $75,000 to $150,000, the filing fee would be $1,800, and the Case Service Fee would be $750. Filing fees in courts can vary from state to state and even from county to county. (AAA) In North Carolina, filing fees are not based on the amount of the claim, but on the court in which the claim is filed. Filing fees are usually $76, $90, or $110, plus $15 for each item of civil process served by the sheriff.

4. Speed
Courts in most states are overcrowded, and trials are delayed. In 2005, Erickson and Bowen found that in Colorado, it took three years or more for a case to come to trial. (Erickson) Any other method of dispute resolution would probably be faster than that.

An arbitration hearing may be scheduled as soon as convenient for the parties’ and arbitrator(s)’ schedules, sometimes in a matter of weeks. Arbitration rules frequently have a time limit for the arbitrator to enter an award. (Erickson) Due to its informality and flexibility, mediation is often speedier than more elaborate techniques. (Stipanowich,
85). Also, many believe it is generally better to deal with disputes early on. They often go on longer than they should, and turn into a bigger case than they need be, sometimes due to misunderstanding of facts and legal issues. The sooner these can be resolved, the sooner the case can be settled. (Levin)

5. Expertise/qualified neutrals
In courts, decisions are made by a trained judge, or by a jury, unless waived. In arbitration, nonlawyers are often asked to make legal determinations. In mediation, the mediator does not actually make legal determinations, but an unrepresented party may waive legal rights without realizing it. There are qualified neutrals experienced in all forms of dispute resolution. The real issue is the method used for identifying and selecting them.

6. Flexibility
On a continuum of rigidity versus flexibility, a trial has the most rules and restrictions, followed by arbitration, and then probably, summary jury trials and minitrials. The most flexible method would probably be negotiation, followed by mediation.

7. Satisfactory result/compliance
Courts can, of course, compel compliance even when the losing party is not satisfied with the result. Courts can also enforce arbitration awards and settlement agreements. It is widely believed that because mediation allows participants to take an active role in structuring the settlement, and even the process, satisfaction and compliance more likely. (Stipanowich, 86) Mediation can produce results that are not possible in litigation or even arbitration. In litigation, a judge or jury can only award what is permitted by law. In arbitration, results are often limited to what parties have agreed to or to what a contract specifies.

8. Maintenance of relationships
Court proceedings and arbitration are adversarial in nature, and damaging to a relationship. Mediation and negotiation are not. (Carper) One of the objectives of transformative mediation is to maintain, and improve, the relationship.

9. Establishing precedent
Despite all the advantages of other forms of dispute resolution, only litigation is designed to establish precedent. There are certain situations where parties need a determination from the courts. “Important legal issues . . .deserve public attention and debate.” (Silberman, 18)

10. Predictability
Methods with the greatest predictability in their result are those that follow precedent. Of course, offers made in mediation and negotiation, though unpredictable, can be rejected.

11. Timing/when to use during the dispute
Mediation, negotiation, and some other less formal methods can be used at any time and can be used more than once. Consequently, parties can negotiate or mediate as soon as a
claim is filed. If there is no settlement, it can be attempted again. Combinations of methods can be used. Even after a court decision, parties frequently mediate when the case is on appeal.

12. Power issues
Power relates not only to the ability to propose and enforce settlements, but also to the ability to have issues even be addressed (Stulberg, 1998). The more formal methods of dispute resolution, such as litigation and arbitration, are probably the most effective means for neutralizing power differentials. While there are techniques that mediators can use to minimize, in some situations the power differentials are just too great for the weaker party to engage in meaningful mediation.

13. Empowerment
Self-determination is considered to be an important core of the mediation process.

“Components of self-determination include: (1) having the necessary information for decision-making; (2) the ability to make autonomous decisions, including consenting to the mediation; (3) the capacity to articulate one's perspective, to negotiate in one's own best interest, and to evaluate options and alternatives; and (4) the ability to carry out an agreement.

(Oberman, 795-796)

Mediation allows participants to take an active role in structuring the settlement and the process, making satisfaction more likely (Stipanowich, 86).

CONCLUSION

There are no hard and fast rules as to when to use which method. All the above factors should be considered, as well as any underlying issues to the dispute. Types of issues and the nature of the dispute will dictate that some factors are more important than others in a particular dispute.
REFERENCES


American Bar Association (2006). What you need to know about dispute resolution: the
guide to dispute resolution processes.
http://www.abanet.org/dispute/draftbrochure.pdf (Visited 12/22/08.)


Brett, J. M., Karambayya, R., & Lytle, A. (1992). Effects of Formal Authority and
Experience on Third-Party Roles, Outcomes, and Perceptions of Fairness.
Academy of Management Journal, 35.

Developing an Individual Disputant Process. Conflict Resolution
Quarterly. 23:

Carper, D. L., J.B. LaRocco, 2008. What parties might be giving up and gaining when
deciding not to litigate: a comparison of litigation, arbitration and mediation.

http://www.lawmemo.com/arb/res/cost.htm (Visited 12/22/08.)


practice models: the intersection of ethics and stylistic practices in mediation.
Willamette L. Rev. 33:703-737.

IOA Code of Ethics


Levin, Diane J. Dispute management biggest cost control opportunity companies have.
Model Standards of Conduct for Mediators.

North Carolina Civil Court Costs.

http://www.nccourts.org/Courts/Trial/Documents/civil_costs.pdf (Visited 12/22/08.)


