Mediation vs. Arbitration: An Analysis of Alternative Dispute Resolution in the Workplace

Jamin J. Felice
St. John Fisher College

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Mediation vs. Arbitration: An Analysis of Alternative Dispute Resolution in the Workplace

Abstract
Mediation and arbitration are both different approaches to Alternative Dispute Resolution that can be used effectively in the workplace. ADR can be less costly and more efficient, and it focuses on using conflict resolution, rather than the difficulty and confrontation of litigation (Carbonneau, 2007). Although mediators and arbitrators are neutral third parties who are hired by the participant to assist in resolving disagreements, there are big differences between mediation and arbitration (Carbonneau, Slate, 2007). This paper provides a breakdown of mediation versus arbitration to assist in formulating a company policy. The information within this paper could be used when a company is lacking a mediation/arbitration policy, or when an organization may want to improve a policy that is already in place. Overall, after a breakdown of the two methods, mediation is the most preferred method for resolving disputes within a workplace environment. Mediation can provide innovative dispute resolution and the program can be creatively designed to best conform to the culture of your organization.

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First Supervisor
Tim Franz

Second Supervisor
Seth Silver

Third Supervisor
Paul Mastrangelo

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MEDIATION VS. ARBITRATION: AN ANALYSIS OF ALTERNATIVE DISPUTE RESOLUTION IN THE WORKPLACE

Jamin J. Felice

St. John Fisher College
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The document has been reviewed and approved by the undersigned for Jamin J. Felice.

Date: 12-16-08

Dr. Tim Fraz
Advisor

Date: 12-11-08

Dr. Seth Silver
First Reader

Date: 12-9-08

Dr. Paul Mastrangelo
Second Reader

Date: 12-18-08

Jamin J. Felice
Author
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>ACKNOWLEDGEMENT</td>
<td>4</td>
</tr>
<tr>
<td>ABSTRACT</td>
<td>5</td>
</tr>
<tr>
<td>INTRODUCTION</td>
<td>6</td>
</tr>
<tr>
<td>BACKGROUND</td>
<td>7</td>
</tr>
<tr>
<td>Chart 1 ADR Techniques Used By Organizations</td>
<td>8</td>
</tr>
<tr>
<td>MEDIATION DEFINED</td>
<td>9</td>
</tr>
<tr>
<td>ARBITRATION DEFINED</td>
<td>11</td>
</tr>
<tr>
<td>THE DIFFERENCE BETWEEN MEDIATION AND ARBITRATION</td>
<td>15</td>
</tr>
<tr>
<td>Table 1 Table of Differences</td>
<td>17</td>
</tr>
<tr>
<td>THE HISTORY OF MEDIATION AND ARBITRATION</td>
<td>17</td>
</tr>
<tr>
<td>PRESENT DAY MEDIATION AND ARBITRATION</td>
<td>20</td>
</tr>
<tr>
<td>INTERNATIONAL MEDIATION AND ARBITRATION</td>
<td>23</td>
</tr>
<tr>
<td>THE IMPLEMENTATION OF MEDIATION OR ARBITRATION</td>
<td>23</td>
</tr>
<tr>
<td>Table 2 Disputes: Mediation or Arbitration</td>
<td>24</td>
</tr>
<tr>
<td>BENEFITS OF MEDIATION</td>
<td>25</td>
</tr>
<tr>
<td>BENEFITS OF ARBITRATION</td>
<td>26</td>
</tr>
<tr>
<td>PERSPECTIVES</td>
<td>29</td>
</tr>
<tr>
<td>CONCLUSION</td>
<td>30</td>
</tr>
<tr>
<td>REFERENCES</td>
<td>35</td>
</tr>
</tbody>
</table>
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Jamin J. Felice
ABSTRACT

Mediation and arbitration are both different approaches to Alternative Dispute Resolution that can be used effectively in the workplace. ADR can be less costly and more efficient, and it focuses on using conflict resolution, rather than the difficulty and confrontation of litigation (Carbonneau, 2007). Although mediators and arbitrators are neutral third parties who are hired by the participant to assist in resolving disagreements, there are big differences between mediation and arbitration (Carbonneau, Slate, 2007). This paper provides a breakdown of mediation versus arbitration to assist in formulating a company policy. The information within this paper could be used when a company is lacking a mediation/arbitration policy, or when an organization may want to improve a policy that is already in place. Overall, after a breakdown of the two methods, mediation is the most preferred method for resolving disputes within a workplace environment. Mediation can provide innovative dispute resolution and the program can be creatively designed to best conform to the culture of your organization.
Mediation vs. Arbitration: An Analysis of Alternative Dispute Resolution in the Workplace

**MEDIATION VS. ARBITRATION: AN ANALYSIS OF ALTERNATIVE DISPUTE RESOLUTION IN THE WORKPLACE**

“To fight and conquer in all your battles is not supreme excellence. Supreme excellence consists of prevailing without fighting” —Sun Tzu, *The Art of War*

**INTRODUCTION**

Nobody knows exactly where or when Alternative Dispute Resolution or ADR began, but history suggests the actual process, without the specific label, may go back as far as 337 B.C. Both mediation and arbitration are methods of ADR. A brief history of mediation and arbitration in the United States will be examined.

Mediation and arbitration are both different approaches to Alternative Dispute Resolution that can be used effectively in the workplace. When there is a serious dispute that occurs between two parties within a workplace setting, the parties involved may not be dedicated to follow the ADR company HRD policy. This paper provides an analysis of mediation versus arbitration to assist in preparing a company policy, where one is lacking, or perhaps trying to improve one that is in place. A comparison of the two ADR alternatives, mediation and arbitration, will provide the pros and cons of each, and assist managers in deciding which process is best suited to remedy the conflict within a workplace. Although mediators and arbitrators are neutral third parties that preside over the particular process, and each are hired by the participants, there are differences between the processes of mediation and arbitration (Carbonneau, Slate, 2007).

ADR can be less costly and more organized when used in an organizations’ HRD. It focuses on conflict resolution, rather than the difficulty and opposition that go hand-in-hand with litigation. Although mediation or arbitration can be used to resolve a dispute, it can be used in conjunction with litigation. In this situation, the process can be a voluntary option to the
Mediation vs. Arbitration: An Analysis of Alternative Dispute Resolution in the Workplace

participants prior to trial. However, this can also be an involuntary process when the presiding judge mandates the parties to participate. Over the years, ADR has become a common source for dispute resolution in our legal system. However, it has been criticized because there are questions about the benefits to the participants when it becomes an involuntary option.

This paper will also provide a comparison of the methods used to resolve disputes within stateside organizations and the methods used at businesses in other countries. Statistical data and current reported business trends in the United States will be included in this assessment. Overall, after analysis of the two methods, mediation is the most preferred method for resolving disputes within a workplace environment. Mediation can provide innovative dispute resolution and the program can be creatively designed to best conform to the culture of your organization.

BACKGROUND

According to Brindley (2006), “Just a few years ago, the average person would likely have said that there is no difference among litigation, mediation, and arbitration. All three situations involve problems and lawyers—a combination most people try to avoid,” (p. 50). The majority of our society probably knows about lawsuits and the consequences. One person may hire an attorney, or represents him or herself, and files a legal action, thereby causing others person to also hire attorneys or represent themselves counter, and stand up against the civil action. A civil action affects individuals in many ways. It can be costly, lengthy, emotionally draining. A judge or a jury decides the case. They will decide who is right or wrong, or at fault in legal actions and until that occurs; everything literally hangs in suspense. As many know, there is no certainty in the outcome for either party.

Today, ADR has gained recognition as an alternative method for possibly resolving differences to hopefully avoid the shortcomings that revolve around legal actions. “....the
Mediation vs. Arbitration: An Analysis of Alternative Dispute Resolution in the Workplace

acronym ADR encompasses any method of resolving any dispute that does not require the ultimate decision to be made formally by a judge, a jury or any other decision-maker that has been designated as the competent forum of dispute resolution by the respective state authorities,” (Duve, 1999, p. 221). Attitudes regarding ADR have evolved over the years. Most companies would prefer to allow the courts to settle disputes, despite the advocacy by many for ADR (Anonymous 2, 1997). In a survey accomplished by the Society for Human Resource Management (SHRM) 79 percent of the employers surveyed preferred other methods as opposed to ADR. (See the following chart).

![Chart 1](image)

In 1997, there was a prediction that companies would eventually turn to ADR after the expense of litigation increased and the cost benefit would be realized. However, during this period of time the impact of ADR had yet to be fully understood. As few as “600 large corporations approved ADR for use in their organization, and the two most often chosen processes were
Mediation vs. Arbitration: An Analysis of Alternative Dispute Resolution in the Workplace

arbitration and mediation” (Gallagher, 1994, p. 19). In 1994, “more than 1,200 law firms pledged to promote ADR” (Gallagher, 1994, p. 19). “While ADR doesn’t seem to reduce the number of charges filed, the theory is that it will solve cases quicker” (Anonymous 2, 1997, p. S5). The outcome is that more companies have turned to ADR to avoid the higher cost of litigation. The cost benefit of ADR has been realized by many organizations and hopefully soon understood by more.

Today, most everyone in the business world is probably familiar with the term ADR, and more than likely finds the terms mediation or arbitration just as familiar. However, individuals may not know about the processes, unless they have been actual participants. In any case, the use of mediation and arbitration to resolve conflict within an organization is on the rise. ADR has reduced the number of probable lawsuits because employees are content with the process, as well as the results (Gallagher, 1994).

**Mediation Defined**

Mediation is a form of ADR. Mediation is a process of involvement between disagreeing parties to promote a settlement, or negotiation. A person who presides over mediation is called a mediator. A mediator will go through training to be a neutral facilitator. The training provides the mediator with the proper tools to help disputing participants reach a mutually agreeable solution. Participants may voluntarily choose to go through mediation to resolve disputes. Mediation typically is a step that is taken when the participants realize that an agreement is not plausible without help. It could also be mandated by a contract between the parties, or prior to a civil trial, a judge can mandate mediation by order. The participants involved in this process of mediation realize that the process will be confidential. This means whatever is said during the negotiations cannot be used by the participants should the mediation not resolve the issues.
Mediation vs. Arbitration: An Analysis of Alternative Dispute Resolution in the Workplace

However, each participant must be willing to negotiate and compromise during the mediation process. This form of resolution is a shared effort that is controlled by the participants. Mediation can be used within an organization to solve conflicts between employees. Mediation can also be used if there is a dispute between employer and employee. The mediator’s knowledge assists the participants and the process. It is beneficial to the process and participants if the mediator has subject matter expertise.

Collaboration can be used in conjunction with mediation. As such it becomes a structured problem solving ADR method that encourages participants to examine their behavior and communication. The alternative method has been used to achieve resolution in divorce and family law matters. Collaboration can be a repetitive process that does not require leadership. Individuals or organizations work together toward a resolution of common goals in the presence of a mediator.

“A mediator acts more like a facilitator” than a decision maker. (Gallagher, 1994, p. 19). A mediator must remain neutral while the participants present their sides of the issues. The mediator acts as an intermediary during the process, rather than a judicial officer. In this capacity the mediator listens without prejudice to both sides and then helps them to determine the strengths and weaknesses of each side. During the process, the mediator must keep things moving, helping the parties to address the important issues and find justification for the issues, around the problem while also being able to listen extremely well. A mediator must be fully informed about the issues and ensure that the process stays on track to ensure a fair resolution. The mediator helps both participants realize where their interests deviate and unite (Dana, 2001). During the process, the mediator may have to help alleviate the emotions of participants and guide them toward detachment (Slate, 2007). Throughout the process the mediator will remain
Mediation vs. Arbitration: An Analysis of Alternative Dispute Resolution in the Workplace

Mediation is a neutral, especially when the participants offer confidential or personal information during private discussions. Private discussions with the mediator are referred to as caucuses (Dana, 2001). There may be settlement offers during the caucus, and the mediator acts as the go-between the participants. A final settlement agreement between the participants is one definition of a successful mediation. The document itself is a contract, which is considered a legal document.

Some individuals may feel that they are not suited to present their position. They may feel that legal counsel will help strengthen their presentation. Participants may choose to have legal representation, but it is not a requirement (Duve, 1999). If the participants do not have an attorney they will have to speak for themselves. Professional witnesses, specialists, or anyone who could assist the participant by strengthening their position may be involved with the mediation (Dana, 2001). If both participants agree, the mediation session can take place at a designated place, which could include their place of work or any area involved in the dispute. The greatest benefit of mediation is the freedom of control that the participants maintain throughout the process, as well as over the outcome (Nolan-Haley, 2007).

**ARBITRATION DEFINED**

Arbitration is a form of ADR. Arbitration is the process of a hearing by and then determination of a case in by an arbitrator. “Arbitration is neither negotiation nor mediation,” (Carboneau, 2007, p. 10). Arbitration is a form of ADR and may be considered by many to be superior to mediation when uncertainty is unacceptable and a decision is needed on an issue or dispute within a specific timeframe that is determined by both participants. Arbitration can be binding or non-binding, which is a decision that must be made at the beginning of the process by the participants involved.
Participants agree to accept the determination of the arbitrator in binding arbitration (DeSouza, 1998). The participants agree that they do not have to accept the arbitrator’s determination in nonbinding arbitration. In nonbinding arbitration, the participants are essentially seeking a suggested opinion. However, the participants may choose to comply with the opinion of the nonbinding arbitration arbitrator, in hopes of ending the dispute and avoiding possible litigation. Nothing prevents the participant who received favorable opinion in nonbinding arbitration from filing a civil action and basically forcing the other party into binding arbitration after a judge mandates it prior to trial. Arbitration in this situation is favored by the courts (Carbonneau, 2007). Unlike mediation, having an outcome from arbitration is not always voluntary. However, it is confidential like mediation. The court may mandate arbitration and compel the participants to complete the process within a specified time. In some cases, in the beginning of civil trial proceedings, a judge will mandate the process of mediation or arbitration through in hopes that mediation may not render a decision. Arbitration is used because it ensures a decision within a required timeframe. Arbitration is used for grievance and interest cases. This includes labor disputes that involve disputes such as sabotage during a strike (Petersen & Boller, 2004).

Together the participants choose an arbitrator, or more than one arbitrator, depending on the situation. However, the ability of the participants to choose an arbitrator who has an expertise, specific to the dispute, really increases the possibility of a reasonable outcome or resolution. “Arbitration, like mediation, is generally private and confidential. Arbitration is often more timely and less expensive than litigation, although generally not as swift or [as] inexpensive as mediation,” (Carbonneau, 2007, p. 10). Although arbitration lacks some of the benefits of mediation, it is an effective and desirable means of reaching resolutions when
Mediation vs. Arbitration: An Analysis of Alternative Dispute Resolution in the Workplace.

Disputes must be resolved, or when having a final decision within a certain timeframe is important.

A preliminary conference begins the arbitration process with the arbitrator and both participants in attendance. Each party may be represented by an attorney who may review the issues and speak for their respective client. The ground rules and procedures are reviewed during the arbitration process and agreed to by both participants, and “a valid written agreement to arbitrate deprives the courts of jurisdiction to entertain any matter covered by the agreement,” (Carbonneau, 2007, p. 12). Any communication with the arbitrator must be made in the presence of both participants, after the preliminary conference. Should a private conversation occur between a party and the arbitrator, the opposing party could file an action to vacate an unfavorable award. Participants of arbitration are allowed and expected to select an arbitrator who is a subject matter expert in line with the dispute.

The arbitrator is the decision maker and hears evidence to make a final decision after the proceeding, just like a judicial officer would (Carbonneau, 2007). The “arbitrator acts more like a judge” than a mediator (Gallagher, 1994, p. 19). According to Israel (2006), an arbitrator must “keep an open mind,” and not permit him or her to become too controlling while allowing participants to present their case (p. 7). Israel (2006) contends that an arbitrator must keep things moving, attempt to be flexible with time, and “address and analyze arguments, and make [a] clear reasoned and responsive decision, issue subpoenas on request” (p. 8). “An arbitrator must also become fully informed about the issue” (Israel, 2006, p. 10). “The process is smoother if exhibits are admitted in numbered sequence” (p. 12). An arbitrator should ensure that a grievant is credited for unemployment benefits, and not ask if the “grievant has anything to add, or if they are satisfied with Union’s representation” (Israel, 2006, p. 13). Israel (2006) believes that “
Mediation vs. Arbitration: An Analysis of Alternative Dispute Resolution in the Workplace 14

unlike a mediator an arbitrator needs to use good cross-examination skills like King Solomon” (p. 14).

At the start of the process, if there are attorneys involved, they typically would make an opening statement like a trial, presenting the facts favorable to the party they represent. Their testimony and documents can be submitted as exhibits during the hearing. Subpoenas for witnesses or documents can be submitted by the attorneys or arbitrator. The arbitrator alone determines the importance of the evidence submitted. Therefore, the arbitrator decides if the evidence is substantial enough to be admitted as exhibits for each party.

Having closing arguments is considered an option. If there are closing arguments the arbitrator will finish the process by making a determination and the prevailing party is awarded. The arbitrator may take up to thirty days before deciding the issues, award, and naming the prevailing party. The arbitrator is not obligated to provide an explanation for the final decision. The decision cannot be appealed unless the arbitrator fails to follow rules and procedures of the Federal Arbitration Act, and some form of the Uniform Arbitration Act that has been adopted by the state in which the process is held. Arbitration awards may be vacated if the arbitrator fails to disclose their relationship with anyone involved in the process, including an attorney, the attorney’s law firm, witnesses, or a participating party, etc. An arbitrator must withdraw from a case if any fact, circumstance, or individual, could jeopardize their neutrality (Carbonneau, 2007). The disadvantage of binding arbitration is that the participants agree to give up control over the final decision, as well as the fact that the participants do not have any control or power throughout the process. The disadvantage of non-binding arbitration rests with the fact that unless the participants abide by the arbitrator’s decision, there is potential that it could lead to
Mediation vs. Arbitration: An Analysis of Alternative Dispute Resolution in the Workplace

litigation down the line. It could be considered beneficial that the decision following binding arbitration is final, conclusive, and enforceable in a court of law.

**The Difference Between Mediation and Arbitration**

Many people mistakenly believe that mediation and arbitration are the same. Although mediation and arbitration have mutual principles, they each have different approaches that share a common goal. Both mediation and arbitration look for resolution without the inconvenience of a lawsuit. Of the two processes, mediation is the most flexible and innovative because it lacks the strict standards of arbitration. Although the flexibility and innovation of mediation allows the participants control, mediation does not assure there will be a resolution.

The main difference of arbitration to mediation is witnessed by the processes. The arbitrator makes the final decision after the evidence has been presented. In essence, the arbitrator is a stand-in judge. In this neutral role, the arbitrator will listen to both sides of the case and decide what the final outcome will be. In other words, the arbitrator determines who is right or wrong.

If both participants have agreed to binding arbitration, the arbitrator’s decision is binding in a court of law. Basically, when arbitration is the type of ADR chosen, there is a winner, and as a result, a loser.

By contrast, during mediation a mediator will act as the facilitator. During the process the mediator will attempt to motivate discussions. Being in a neutral role, the mediator also listens to both participants. However, the mediator will make an effort to resolve the participants’ conflict during the process, by reaching an understanding of the conflict. This process involves having the mediator assist the participants in defining the issues, and helping them realize common interests, to eventually reaching an agreeable solution. The mediator is not at all concerned with who is right or wrong. Having this type of flexibility and innovation allows
Mediation vs. Arbitration: An Analysis of Alternative Dispute Resolution in the Workplace

the mediator to guide the participants to mutually beneficial solutions. Mediation can either be considered a win-win or lose-lose situation for each participant because compromise is the key to resolving the issues. Mediation is successful when both participants form a settlement agreement. The mediator will assist the participants in writing the final settlement agreement. The final settlement agreement is a legal binding document in a court of law.

Mediation and arbitration are confidential. Participants may want to be represented by an attorney, if they chose. In most scenarios, participants chose an attorney for the arbitration process. Because mediation and arbitration can be mandated by a judge, prior to a civil trial, parties already have representation and typically they will support their clients through the process. Although each settlement or decision is confidential, when mandated by a judge prior to the civil trial, the willingness of the party to negotiate will be reported by the participants’ attorney to the judge prior to trial. If the mediation and arbitration process is unsuccessful, the parties will realize the expense and litigation delays. If the mediation and arbitration process is successful, the parties will avoid the expense and litigation delays through resolution. The resolution comes in a form of a settlement agreement. The mediation final settlement is a legal document. The arbitration decision is also a legal document. Therefore, all are binding in a court of law. (See the following table showing the differences in mediation, arbitration, and litigation).
The History of Mediation and Arbitration

Arbitration is one of the oldest forms of settling disputes between people, as well as between nations; no one knows exactly when it got started (Carbonneau, 2007). However, arbitration is known to be older than the common law system in England, which the United States later adopted (Ruben, Elkouri, & Elkouri, 2004). In 1224, England was known to use arbitration to settle commercial disputes (Hill, Sinicropi, & Evenson, 1997). In Ancient Rome during the Middle Ages, commercial disputes were settled through the use of arbitration (Ruben, et. al., 2004). Solomon, the “King of Israel for 40 years, was one of the most highly regarded arbitrators of all time” (Israel, 2006, p. 12). Philip the Second, who was the father of Alexander
Mediation vs. Arbitration: An Analysis of Alternative Dispute Resolution in the Workplace

the Great, applied the principles of arbitration to resolve territorial disagreements (Ruben, et. al., 2004). Native Americans also employed arbitration to resolve disagreements that would occur from within the tribe, as well as between the diverse clans (Hill, et. al., 1997).

Our first President “stated that he considered any arbitration decisions derived from his will to be as final, conclusive, and binding as a decision of the Supreme Court of the United States,” (Bales, 1997, p. 5). The Interstate Commerce Act, which Congress accepted into law in 1887, contained a clause that allowed the employees of the Railroad Industry to use voluntary arbitration when there were disagreements (Bales, 1997). The Federal Arbitration Act, which Congress accepted into law in 1925, promoted the reliability of the use of arbitration to resolve conflict (Bales, 1997).

Supported by the Federal government, grievance arbitration was a preventative to labor strikes that was used in negotiations for labor relations during World War II (Ruben, et. al., 2004). President Roosevelt demanded that the War Labor Board include arbitration in collective bargaining labor union agreements during World War II (Hill, et. al., 1997). As a result of its success during this period, arbitration is now a standard clause of most unions’ collective bargaining agreements with employers, including on a state, local, and federal government workplaces.

“When looking for a historical reference to the initial use of mediation, commentators often quote the Bible” (Kovach, 2003, p. 17). Some historians believe the practice of mediation was developed in Ancient Greece and then recognized in Roman civilization when it was applied in Roman law. Mediation during this period was used “to resolve religious and political disputes” (Kovach, 2003, p. 17). “Mediation professionals were probably first employed as direct appointees of the Secretary of Labor to fill the position of Commissioners of Conciliation
Mediation vs. Arbitration: An Analysis of Alternative Dispute Resolution in the Workplace in 1913" (Rau, Peppet and Sherman, 2006, p. 75). In 1946, a mass employment of mediators came with the creation of the Federal Mediation and Conciliation Service (FMCS) whose primary focus was to resolve labor disputes (Rau, et. al., 2006). Other cultures had a more extensive history of mediation, although “China likely has the longest history of mediation use” (Kovach, 2003, p. 18). However, according to Kovach (2004), “mediation as a process of resolving conflict has been gaining popularity and acceptance in the United States since 1976” (p. 1). Kovach attributes this increase as the direct result of the frustration and disappointment experienced by parties after attempting dispute resolution though our legal system. However, it is possible that the increase in the use of the mediation process is a reflection of its continued success.

In the 1960’s the National Training Laboratories applied the behavioral science of conflict resolution to workplaces. By the 1970’s, mediation was “a facilitated process to settle disputes as an alternative to litigation” within few organizations (Dana, 2001, p. vii). Economic and political factors caused the use of mediation to grow in industrial relations during the late 1980s. According to Van Gramberg (2006, p. 173) the changes were the result of the implementation of human resource management policies and practices that focused on the individual worker and rejected other third parties such as labor unions. The decline of labor unions and advancement of individualism in the workplace triggered the growth of mediation in private sector industries (Van Gramberg, 2006, p. 174). Mediation has grown to be a reliable tool to resolve workplace conflicts that include but are not limited to disputes between staff members, allegations of harassment, contractual disputes relating to the terms and conditions of employment, and workers’ compensation claims (Boule, 2005, p. 298).
Mediation vs. Arbitration: An Analysis of Alternative Dispute Resolution in the Workplace

**Present Day Mediation and Arbitration**

The Civil Rights Act of 1991 supported the process of arbitration to be utilized during the analysis of antidiscrimination laws. Most recently on November 9, 2006, Pennsylvania Governor Edward G. Rendell mandated mediation for all workers’ compensation claims (Anonymous, 2007). According to Anderson and Young (2007), “Recent cases in the U.S. and Europe may make international arbitration a more attractive option in international intellectual property disputes,” (p. 27).

Today, the legal world also refers to mediation and arbitration as ADR (Carbonneau, 2007). “Contractors and lawyers in the United States have been at the vanguard of the ADR movement. Their efforts have led to today’s general acceptance of arbitration, mediation, and a creative med-arb arrangement to resolve the most complex and difficult project disputes,” (Jaffe & McHugh, 2007, p. 51). Med-arb is a process chosen by the participants at the onset of ADR that is a combination of the mediation and arbitration. Med-arb can be a neutral, resourceful, and lucrative method in the resolution of conflicts as an alternative to lengthy and costly litigation. A med-arb proceeding attempts to combine the beneficial qualities of each mediation and arbitration process. The participants form a med-arb agreement that outlines their commitment to the process. It begins with the standard procedures of a basic mediation without pleadings, discovery, subpoenas, and the other formalities that are common to binding arbitration. During the med-arb process, the mediator has the freedom that mediation allows them in being able to talk to the participants both collectively and privately. The participants present their case to each other in hopes that they can resolve all issues and form a settlement agreement. The mediator assists the participants’ contention to understand the positions and concerns of each other. If all issues are successfully resolved, the med-arb process comes to a close. However, if there are
Mediation vs. Arbitration: An Analysis of Alternative Dispute Resolution in the Workplace issues that are not resolved at the conclusion, the med-arb process continues for the unresolved issues to binding arbitration. The remaining issues will be resolved in a timely manner in a binding arbitration forum. This outcome for the participants could be potentially unacceptable as the arbitrator could impose an unfavorable decision. However, binding arbitration means that the decision of the arbitrator is final and it cannot be subjected to litigation. This is why it is especially important to the participants that most, if not all, of the issues be resolved during the mediation process of med-arb.

Today mediation is viewed as “a high benefit, low risk, voluntary option that is controlled by the” participants “to resolve or narrow the issues of disputes” (Nolan-Haley, 2007 p. 259). “Whether its appeal has peaked because of a growing disenchantment with commercial arbitration or the perception that internal arbitration has become like U.S. litigation, mediation is beginning to blossom on the international dispute resolution landscape” as well as in the U.S. (Nolan-Haley, 2007, p. 259).

There are many forms of arbitration. National and international companies used commercial arbitration to settle disputes (Ruben, et. al., 2004). Arbitration may be used as a tool in the courts to settle civil cases like divorces, wills, and property disputes. The judge mandates the arbitration to free up the docket and allow more time for criminal cases (Carbonneau, 2007). Today, arbitration is considered a popular process as it ensures a decision will be made within a required timeframe. Grievance and interest cases use arbitration to solve their differences. Labor unions use grievance arbitration in the workplace, which is a widely accepted means of conflict resolution through negotiations (Ruben, et. al., 2004). In a publication of the Bureau of National Affairs (BNA) Labor Arbitration Reports, an analysis was conducted of 70 arbitration cases that happened during labor union disputes that covered the period of “1968 to 1999 reflect an
Mediation vs. Arbitration: An Analysis of Alternative Dispute Resolution in the Workplace extended time period of arbitral thinking regarding the important issue of sabotage” (Petersen & Boller, 2004, p. 52).

Non-union organizations use the productive channel of compulsory arbitration for dispute resolution (Hill, et. al., 1997). It is considered best for a business to have a process of ADR in place for dispute resolution between employees. Dispute resolution provides a possibility for workers to air out their disagreements, as it reportedly increases morale by resolving the conflict, which increases productivity. “To prevent a sense of unfairness or otherwise avoid negative employee relations issues, employers should rigorously follow clear-cut policies and procedures, as well as communicate to employees, to assure an effective ADR process” (Gallagher, 1994, p. 19).

“During the 1920s, three competing arbitration organizations—the Arbitration Society of America, the Arbitration Foundation, and the Arbitration Conference—recognized that they were essentially seeking the same goals and tried to negotiate an integration of their different approaches. When their negotiations reached an impasse, they called upon a mediator. The mediator worked with the group over the course of a year and a settlement was reached that resulted in a merger of the three pioneering organizations into a single entity. Since 1926, that entity has been known as the American Arbitration Association,” (Slate, 2007, p. 1).

The American Arbitration Association (AAA) is one of the most established arbitration organizations known that has been offering mediation for most of its 81-year history (Slate, 2007). The AAA has over 7,000 arbitrators and mediators worldwide (American Arbitration Association., 2007). Grievance arbitration has expanded beyond the scope of industrial relations (Hill, et. al., 1997). For example, arbitration was put into practice for the 1996 Olympic athletes
Mediation vs. Arbitration: An Analysis of Alternative Dispute Resolution in the Workplace

who had a requirement for eligibility to be a part of the Olympics by taking a drug test (Bales, 1997). Arbitration was used when there was a disagreement about the drug test procedures or results happened.

INTERNATIONAL MEDIATION AND ARBITRATION

"Arbitration is one of the most commonly used means of resolving disputes in the international business arena" (Ries & Woo, 2006, p. 62). Ries & Woo claim "today arbitration is playing an increasingly important role in Asia," although it "is not used very often in Japan, its popularity is increasing there" (p. 62). China uses arbitration more than ever because of their "increasing role in the global economy" following their "entry into the World Trade Organization" (p. 62). Both Japan and China have recently "upgraded their international arbitration procedures for the benefit of all concerned" (p. 62).

International developments include the implementation of a law in 1999 entitled the Civil Justice Rules, "which required both the courts and legal advisors to play an important part in encouraging the use of ADR, especially focusing on mediation" (Jackson & Caligari, 2007, p. 23). "Mediation has come to be recognized as a serious and cost-effective means of reaching practical, rapid, and commercially sound solutions to a range of disputes" (p. 23).

THE IMPLEMENTATION OF MEDIATION OR ARBITRATION

Mediation or arbitration could be implemented for disputes listed in the table below that afflict companies, which in some instances, would prevent a legal action in a court of law. A common misunderstanding is that mediation and arbitration are exclusive to certain disputes. The reality is that the option or choice is up to the participants. There may be an instance where one process would work better than another. There are key considerations to factor when making a choice of the ADR process that best suits your situation, as well as the nature of the
Mediation vs. Arbitration: An Analysis of Alternative Dispute Resolution in the Workplace

dispute. For instance, if the dispute is detail oriented and involves pertinent documents that outline your standing—you may want to consider the more formal process of arbitration. However, mediation and arbitration usage or applicability is not set in stone. Sometimes the choice may factor down to personal preference. (See the following table of disputes).

**Disputes: Mediation or Arbitration Claims**

<table>
<thead>
<tr>
<th>Breach of contract</th>
<th>Breach of promise</th>
</tr>
</thead>
<tbody>
<tr>
<td>Employment benefits</td>
<td>Sexual harassment</td>
</tr>
<tr>
<td>Retaliation or sabotage</td>
<td>Wrongful discharge</td>
</tr>
<tr>
<td>Wage disputes</td>
<td>Workers’ compensation</td>
</tr>
<tr>
<td>Violations of laws</td>
<td>Employee discrimination</td>
</tr>
<tr>
<td>Torts</td>
<td>Employee misconduct</td>
</tr>
<tr>
<td>Retirement claims</td>
<td>Unfair labor acts</td>
</tr>
<tr>
<td>Labor union disputes</td>
<td>Management disputes</td>
</tr>
</tbody>
</table>

Table 2

The versatility of the ADR process is witnessed in the participants’ choice to combine mediation and arbitration to resolve the dispute. This choice is called med-arb. Usually the process begins with mediation, following an agreement between the participants. If all issues of the dispute are resolved during this process, the med-arb is closed following the signing of the settlement agreement by both participants and the mediator. If there remain unresolved issues, then binding arbitration is the next step in the med-arb process, to achieve final resolution. Binding arbitration has standards during the process that are very similar to litigation. In binding arbitration the participants agree to abide by the arbitrator’s decision. Binding arbitration means that the decision of the arbitrator is final; the decision could be potentially unfavorable for one or both of the participants.
Mediation vs. Arbitration: An Analysis of Alternative Dispute Resolution in the Workplace

The med-arb process is less expensive than litigation and the participants commit themselves to resolving the disputed issues within a shorter time frame. It can be more expensive than mediation, if there are unresolved issues following the mediation process, the participants must join in binding arbitration, —which is more costly. However, the issues are completely resolved at the end of the med-arb process in a very timely manner.

**Benefits of Mediation**

Mediation may be a better option for all concerned in most disputes. “Mediation is no longer the stepchild of internal dispute resolution practice. Scholars and practitioners recognize its enormous potential as a confidential, cost-saving, time-saving, relationship-enhancing process that gives control over disputes to the affected parties and often results in greater levels of satisfaction than litigation,” (Nolan-Haley, 2007, p. 259).

Mediation is controlled by the participants and because of this it has been determined to be an excellent resource. It really gets to the bottom of the issues of disputes. Mediation has many benefits over civil actions or other methods of resolving disagreements. Essentially, it saves time and money. The mediation process does not include discovery, like arbitration and civil actions. There are no motions. It contains no trial or appeals requirements. Mediation has a high success rate of both resolving and narrowing the issues, and it avoids much of the animosity associated with litigation, which allows for the restoration or continuation of positive business relationships. Mediation is more desirable than other alternatives because it is more flexible and the process is innovative in finding solutions for the participants involved:

“...it is evident in most sectors of the industry that there is a much greater desire to resolve disputes through negotiation or mediation, rather than arbitration or litigation. Negotiation or mediation leaves the outcome in the hands of the parties...
Mediation vs. Arbitration: An Analysis of Alternative Dispute Resolution in the Workplace involved in the dispute, and it normally costs significantly less than slugging it out in court or arbitration. That is why mandatory mediation now is being required in more standard-form agreements, particularly those published by the American Institute of Architects and the Associated General Contractors” (Bieniewicz and Pratt, 2007, p. 44).

Mediation is generally private and confidential, which allows for more control over the participants’ public image and facilitates resolution of a dispute in a way that does not affect other matters (Nolan-Haley, 2007). According to Bates and Holt (2007), “The initial contact between the mediator and the parties is very important to the success of the process,” (p. 39). This stands to reason because the comfort level felt by each participant with the mediator is important to the success of mediation. The desire to continue to negotiate or mediate is less likely if a participant feels ill at ease with the presiding mediator. Another important factor to the process of mediation is the fact that it does not force an outcome for the participants that could be potentially unacceptable. In other words, there is no possibility that a third party could impose an unfavorable decision, as could happen in arbitration. In mediation there are no winners or losers. If a satisfactory outcome cannot be reached for all participants in mediation, other areas may be pursued, such as litigation.

**Benefits of Arbitration**

The arbitration process is similar to a civil action court proceeding, but the principles of discovery and evidence are not as stringent. The arbitrator makes a final determination after conferences with the participants. “Decisions rendered by third parties often can turn on intangibles and variables that are difficult, if not impossible, to control,” (Bieniewicz & Pratt, 2007, p. 44). Bieniewicz and Pratt (2007), also note, “…many times have participants left a trial
or arbitration thinking that, in their case, things could not have been presented any better, yet they are quite surprised when the judge, jury or arbitrator found in favor of the other party” (p.44).

The downside to arbitration is the fact that parties who represent themselves have to prepare and give a presentation of their case on their own, if they do not have legal counsel. If it is not effective, it could adversely affect the final decision (Bieniewicz & Pratt, 2007).

According to Bieniewicz and Pratt (2007), there are contractors, tired of encountering surprise decisions in their opponent’s favor, that are using a new solution called “empowered negotiating,” (p. 44). It helps participants prepare for an effective presentation when faced with the dilemma of arbitration without counsel.

Time and funds lost by organizations from employer-employee disputes, and employee-employee disputes, as well as preventing potential litigation, has caused several members of management to take stock and create an internal ADR services program (Bresler, 2000). The program ensures employees will “take their grievances to a committee of both workers and management that” in turn “investigates and delivers a binding decision” (Bresler, 2000, p. 3).

This program includes a peer review environment that encourages communication and fairness. According to Bresler (2000) a case study of the company, SAIC\(^1\) revealed a competent example of a working four-level process, (Stage 3 and 4 is med-arb):

“The SAIC employee dispute resolution program has four levels. All disputes begin at stage 1. If not resolved there, employee complaints may proceed to stage 2 and then possibly to stage 3 or 4. The latter two stages are only for disputes involving legally protected rights, including discrimination, breach of contract,

\(^1\) Science Applications International Corporation
Mediation vs. Arbitration: An Analysis of Alternative Dispute Resolution in the Workplace

torts, and claims of violation of any federal, state, or other governmental law or regulation” (p. 3-4).

Stage 1 is the least formal of the steps in the process that involves meeting with human resource professional and managers, present the complaint verbally, and then attempting to resolve the issue follows. At Stage 2 the employee writes the complaint, management responds, and a peer review of five representatives takes place, where the claimant is interviewed and provides witnesses. Following a one to two hour deliberation the peer review committee makes its “determination and recommendations” (Bresler, 2000, p. 4). The employee has one week where he can accept or reject the recommendations. If rejected, Stage 3 involves mediation, whereby a neutral third-party is assigned by SAIC to attempt to find a common ground and resolve the complaint. “A $50 filing fee is required from the employee for this phase, and attorneys are permitted in the proceedings” (Bresler, 2000, p. 4). The mediator provides recommendations following the proceedings, and if the complaint is resolved, “a memo of understanding will end the matter” (Bresler, 2000, p. 4). If not, Stage 4 arbitration begins, which is the most formal of the four stages. “A third party arbitrator is selected from a list from the American Arbitration Association” to preside over the proceeding (Bresler, 2000, p. 4). Stage 4 requires attorneys from both sides, “and the employee must pay a $150 filing fee” (Bresler, 2000, p. 4). Following this process, the decision is binding on all parties.

A case study of 342 unfair dismissal complaints and resulting arbitration awards in 17 industries located in Australia was done to determine whether employees would benefit under Australian federal legislation (Chellia & D’Netto, 2006). It concluded that over half of the arbitration determinations were in favor of the employees, while only ten
Mediation vs. Arbitration: An Analysis of Alternative Dispute Resolution in the Workplace

percent of the complainants received reinstatement. According to Chellia and D'Netto “The results of the study enabled researchers to gain a deeper understanding of the arbitration process and recognize independent variables that are associated with the arbitrator's decision in unfair dismissal cases” (p. 483). The conclusion and analysis of the study marked that employees do not realize an advantage from using arbitration.

PERSPECTIVES

Without Kurt Lewin, who was born in 1890, perhaps mediation and arbitration would not have evolved into the effective process that they are today. Clearly, the impact of behavioral science in conflict resolution would not have been realized in the workplace. Possibly mediation would not have become a facilitated process that was used to settle disputes as an alternative to litigation in 1970. And quite possibly arbitration would never have evolved into its present distinct process.

Kurt Lewin is the father of modern social psychology. He was the first to analyze social behavior using scientific methods and experimentation (Dana, 2001). While Lewin stressed the relevance of theory, he also held that theories required realistic application. For example, trial and error is a common strategy used to solve problems. Creating an environment by using outlined components of mediation or arbitration to resolve a dispute between willing participants is a far more realistic approach, and more likely to achieve successful results. Based on this logic, it is likely that he would have endorsed mediation and arbitration, as well as a means of understanding and practicing conflict resolution. Lewin refined a theory that gave emphasis to the individual personalities, interpersonal conflict, and situational variables which were subjected to Gestalt psychology. Lewin believed that behavior is influenced by and interacts with individual traits and the environment. This theory had considerable effect on social psychology.
Mediation vs. Arbitration: An Analysis of Alternative Dispute Resolution in the Workplace and ADR methods. Lewin’s theory provided the foundation in the evolution of ADR. His theory supported the concept that our individual characteristics and the environment interact to cause behavior.

CONCLUSION

“There is a quiet and ongoing revolution in the workplace” (McDermott & Berkeley, 2000, p. 161). McDermott & Berkeley claim “this revolution involves the rise in legal disputes between employees protected under employment law and their employers” (p. 161). New and old laws creating workplace rights, our cultural diversity and existing discrimination that was not corrected by the Civil Rights Act of 1991, sexual harassment, state employment laws, and legal remedies, “and the willingness of employees to sue their employer — have all exposed organizations to increasing volumes of litigation related to workplace conduct” (McDermott & Berkeley, 2000, p. 161). According to Hanson (2006), “Companies have a number of internal and external conflict-resolution at their disposal,” (p.77). Without an internal system for collaborative ADR — productivity, employee and customer retention, as well as the protection of critical business initiatives — to name a few, are all at risk.

Litigation costs can be astounding for employers, regardless of the merits of the lawsuit (McDermott & Berkeley, 2000). The use of mediation and arbitration is an attempt by our society to go back to the roots in the old way of resolving disputes, where everyone tries to resolve their problems among one another, rather than resort to becoming a part of our legal system. However in a work environment, arbitration does lack several of the benefits that mediation offers. Arbitration is very much similar to a trial, in process as well as in outcome, but it is usually more expensive than mediation (and not as expensive as trial). The process results in
Mediation vs. Arbitration: An Analysis of Alternative Dispute Resolution in the Workplace

A losing party who may or may not have the ability to appeal. It is quite frankly the results of litigation, without the benefits of appeal.

Mediation, on the other hand, is typically much faster than litigation. Mediation can be arranged quickly and it could be resolved within a day or two. Mediation is considered a fair, efficient, and confidential process that allows participants to settle their employment disputes by reaching a settlement agreement. Legal fees and expenses are significantly less than in arbitration, and the distraction of business executives is reduced (Carbonneau, 2007). For historical reasons, arbitration has received an unequaled share of attention in antitrust and regulatory environments, even though it often has less to offer than mediation. However, the arbitration clauses mentioned in many agreements, including contracts, are now often interpreted to cover mediation or any other appropriate ADR process.

Although mediation is beneficial and it has earned consideration in an organization’s desire to resolve disputes, it is not a universal remedy. The success of mediation will only be realized through the participants’ dedication and commitment to the process. There will be instances where the dispute is not necessarily appropriate for resolution by mediation. For instance, mediation resolutions can be as simple or complicated as necessary, but when a complex resolution is required mediation may not be the best answer. Litigation may be necessary in this instance. There may be instances where mediation is not completely successful by resolution of a settlement agreement. However, many dispute cases within workplaces in the United States and internationally are appropriate for the mediation process. Everyone really benefits when the participants are committed to its success. Participants who are committed to the process of mediation greatly increase the probability for dispute resolution (Slate, 2007). Having such a policy to resolve disputes within an organization or company that is offered
Mediation vs. Arbitration: An Analysis of Alternative Dispute Resolution in the Workplace through their HRD could improve morale once the benefits are realized over a period of time (Gallagher, 1994).

The participants of mediation control the outcome, determine the mediation's style and processes, and benefit greatly from its flexibility (Dana, 2001). Choosing and agreeing on a suitable mediator is an important step that should be based on the needs of the participants and the fit with the mediator's expertise and style (Slate, 2007). The participants can have significant input into the process and should be guided by the experience of the mediator in ways that increase the likelihood of reaching an efficient and satisfactory outcome (Dana, 2001). The process empowers employers and employees to find resolution.

Mediation is held in a neutral environment, which puts participants at ease. This could contribute greatly to the success rate that mediation has. Participants freely present their position in the presence of a neutral mediator. The mediator works with the participants in an attempt to limit the issues, putting them in perspective, and helping the participants determine the best solution to their problems rather than seeking to impose a solution. The mediation process involves an atmosphere that allows the participants be open and helpful; it creates a medium in which everyone freely exchanges their point of view. The methodology of this process attempts to ensure that participants can live with the result. There is no binding settlement agreement imposed until each participant arrives at a decision that is satisfactory to them (Slate, 2007 & Dana, 2001). This factor basically reinforces that of the two ADR processes, mediation would be the most beneficial process used in a workplace when there is a need to resolve a dispute. It is clear that an ADR services program that is managed by HRD personnel can offer substantial benefits to an organization and its workforce. However, according to Kelly & Berke (1996) an
Mediation vs. Arbitration: An Analysis of Alternative Dispute Resolution in the Workplace

organization would have to carefully consider the following factors at a minimum, “in the development phase of an ADR services program:

- What type of process will best suit your organization?
- Will it be mandatory or voluntary?
- What types of claims will be subject to or excluded from the program?
- What procedural rules will the process include?” (p. 15)

An ADR services program will be successful within an organization as long as they set the stage with each employee, including providing the information to a prospective employee at the application and interview (Gallagher, 1994). By accepting arbitration as a condition of employment, employees cannot take their employers to court over disputes covered under the agreement. An ADR services program policy should include informal methods that encourage employees to discuss their problems with their supervisor, a department head, or a panel of peers. According to Gallagher (1994), at a minimum the following guidelines should be implemented “as company policy to ensure an ADR services program’s success:

- The ADR services program is made known to all employees;
- Knowledge of ADR builds trust in the process;
- Complaints are not to be disclosed;
- Complaints are scrutinized and investigated;
- Employees’ feelings are considered and treated with respect to during the process;
- Professionals with the proper expertise are included during the process; and
- Policies and procedures are translated in clear and simple words” (p. 9).

However, having a successful ADR services program should not be the end to an organization’s HRD objective. A training program offered by HRD in the workplace that would
provide the tools and skills needed for employees to identify why conflict begins, how to target these problems, that identifies why problems occur, and how to develop and implement the skills to discuss these problems is taking a proactive step toward preventing conflict. Overall an ADR services program would pay for itself over time because it is faster and less expensive than litigation. This eventually benefits the employees which would prevent potential lawsuits to ending work loss of stressed or injured employees. An ADR services program would benefit the organization and any Human Resource Development program because conflict is inevitable.
Mediation vs. Arbitration: An Analysis of Alternative Dispute Resolution in the Workplace  

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