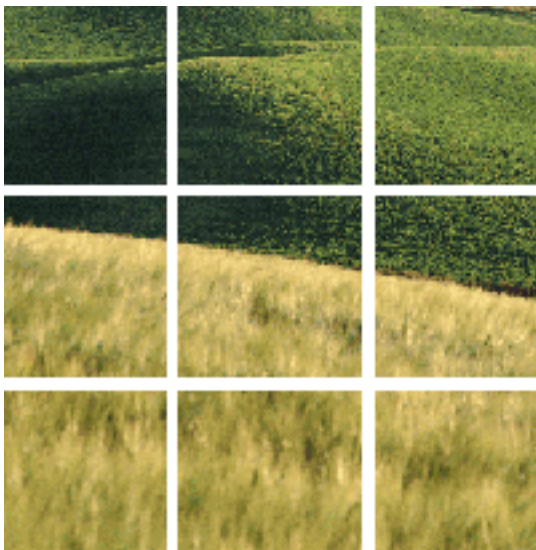




Alternative Dispute Resolution in Hospitality

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Introduction

Because of the significant and rising costs involved in civil litigation, many business organizations are turning increasingly to Alternative Dispute Resolution (“ADR”) as the preferred way of settling conflicts that arise either from contractual agreements or in operations. ADR has become popular because of its focus on fair and reasonable outcomes that are arrived at expeditiously, at less cost than through litigation and in a more cordial, less confrontational atmosphere. Best practice legal departments in well-managed business organizations understand the economic and non-economic benefits of effective conflict management through ADR. And while hospitality may have been slower to embrace the concept than other industries, it is surely now time to bring this important process to bear on the growing burden of litigation on the industry.

Effective risk management calls for the resolution of issues before they become full-fledged disputes. An ADR plan that provides for issue review, mediation and arbitration brings not only financial and economic benefits but also intangible ones including the preservation and improvement of important business relationships.

In order to benefit from an ADR plan, organizations need to agree upon the forum, the procedures to be used and the so-called “providers” who will administer the process before entering into contracts. But even if such a plan is not memorialized in a contract, this should not prevent parties to a relationship from agreeing to a defined ADR process in order to resolve a dispute.

Alternative approaches to ADR may be viewed from the perspective of the increasing use of time and commitment to the outcome, from the preemptive (Issue Review Boards, to the facilitated (mediation) and on to the final and binding (arbitration). There are thus three principal approaches to ADR:

- 1) The Issue Review Board – (an informal forum that recommends non-binding solutions to issues before they become disputes)
- 2) Mediation – (a facilitative or evaluative process to resolve disputes with agreement reached by the parties and enforceable through arbitration or litigation)
- 3) Arbitration – (the final, binding and enforceable resolution of disputes, although occasionally arbitration may be defined as non-binding, with the prior agreement of the parties)

With the increasing popularity of ADR in all areas of business, it was inevitable that the hospitality industry would take note of its advantages. With the escalating costs associated with litigation, organizations involved in the hospitality sector are increasingly recognizing that disputes that arise between parties may be reasonably, fairly and economically resolved through ADR. Hotel management and franchise agreements for example, have frequently included arbitration and mediation provisions but they generally have referred to standard rules and used third-party providers with little background in the industry.



Arbitrators and mediators have thus been brought into hospitality dispute resolution with little understanding of the history and dynamics of the sector. And while neutrality has generally been assured, there has been frustration associated with the frequent lack of understanding of the issues involved on the part of the key players in the process – the arbitrators and mediators.

Currently, Roundhill Hospitality's preferred vendor relationship for the provision of support services in ADR is the Institute of Conflict Management (ICM). We are, however, prepared to serve with other major providers in the ADR field where the circumstances dictate or are appropriate, including organizations such as the American Arbitration Association (AAA), JAMS and the International Chamber of Commerce. Some existing contractual agreements within the hospitality industry for example, provide for the application of AAA or JAMS rules under which we would serve.

Neutrality and Experience

The clear advantage of using our ADR services is to bring not only neutrality and independence to the process, but to ensure that industry experience and understanding is applied when reviewing facts, analysis and testimony and in arriving at findings and conclusions, solutions and awards. We abide by strict professional standards of independence that have been well established and recognized by the hospitality industry for many years. It is thus independence, industry knowledge and professional expertise that is brought to the ADR process and makes a Roundhill solution to ADR more desirable than any other.

Arbitration in Hospitality

Arbitration is a well-established form of dispute resolution that provides the parties with a final and legally binding decision. The decision is enforceable by a court of law typically after only a very limited review and may not be appealed except under very limited circumstances. Occasionally, the parties may agree to a non-binding arbitration but this is the exception rather than the rule.

Most commercial arbitration is provided for in a contract where the parties have agreed that if they do have a dispute, rather than pursuing their remedies within the public court system, they will have it resolved in a less formal, private way. And most arbitrations are indeed private – the deliberations, materials used and testimony of experts and advocates are retained on a strictly confidential basis. Arbitration language in a contract may provide for conditions when the arbitration can be initiated and set a limitation period. Others may call for arbitration to be preceded by preliminary steps such as good faith negotiation or mediation.

In the absence of contractual language, the parties to a dispute may nevertheless jointly initiate the process by executing an arbitration agreement that will define the rules and procedures and may deal with other details such as the discovery process.



The arbitrator is chosen by the parties to the contract and is viewed as being neutral and independent. In some instances, a panel of the three arbitrators will be called for in the agreement, whereby one party selects one arbitrator, the other party selects a second, and the two “party-appointed” arbitrators go on to select a third “neutral”. The parties in more complex matters generally use attorneys but in more simple arbitrations may represent themselves. Unlike litigation, the rules of evidence in arbitration proceedings are not restrictive.

The arbitrator will rule on discovery requests and disputes, read briefs submitted by the parties, review documentary evidence, hear testimony and examine evidence submitted during a hearing and finally render an opinion on liability and damages, as appropriate. This opinion will be rendered as an “award” after the hearing has been completed and may be presented with or without the reasoning that supports it. The award may then be confirmed by a court in the appropriate jurisdiction and subsequently entered as a judgment, thus becoming legally binding on the parties involved.

The Federal Arbitration Act, read in conjunction with state arbitration law, where such exists, generally governs the arbitration process. The arbitration provided for in a contract may limit the types of issues to be resolved, the scope of the relief and a number of the procedures to be used.

If arbitration is provided for in a contractual agreement, the rules to be applied are generally defined in the contract as those of a selected provider of arbitration services. Parties to an arbitration will generally have varying needs for information which is produced through a process of “discovery”. This process can range from the informal exchange of information in smaller less complicated cases to a highly formalized discovery process in larger or more complex cases.

Where the parties have retained experts who in turn undertake investigations and have a need for information and access to people, the process of discovery can become extensive and costly. In order to mitigate the costs, some parties will agree to an abbreviated schedule of depositions of key experts and fact witnesses, with rights reserved to continue discovery if a settlement is not reached early in the process. Agreements of this type may be difficult for the parties to agree to in which event the process can be mediated by the neutral. There is also a need to consider the appropriate balance between the cost of discovery to the respective parties and the benefits of more complete information.

Occasionally, where the parties have agreed, there may be a provision for a particular form of arbitration. Alternative forms include bracketed, baseball and night baseball arbitration. In “bracketed arbitration”, the damage awards are limited within a pre-defined range where both a floor and a ceiling are agreed upon. In this manner, awards that are higher than the maximum are reduced to the ceiling and conversely those that are lower than the floor, are increased. In “baseball arbitration” (also known as “final offer arbitration”), the arbitrator must select one of two possible damage awards presented respectively by the two parties and in “night baseball arbitration”, the concept is the same except that the figures are not revealed to the arbitrator. In this latter instance, the parties agree to accept the high or low figure closest to that of the arbitrator’s.



The rules for arbitration that are promulgated by those organizations that provide arbitration services generally cover much of the same ground including:

The jurisdiction and authority of the provider; the scope and application of its rules and their amendment; the fees for administering the process; the limitations of liability; the application of waivers; the alternative forms of arbitration; the agreement of the parties; the initiation of arbitration and filing of a claim and the process of amending such claim; communications; confidentiality; qualifying and appointing the arbitrator or panel of arbitrators; representation of the parties by attorneys; preliminary conferences; disclosure; the exchange of information and discovery process; the scheduling, noticing and conduct of the hearing; the discontinuance and postponement of proceedings; notices and oaths; pre-hearing submissions; evidence; witnesses; post hearing filings; and the scope, form and delivery of the final award.

Mediation in Hospitality

Like arbitration, mediation is conducted in private but involves a neutral who assists the parties to a dispute in reaching their own settlement. While mediation is mostly a voluntary process, it can be mandated by a court of law or provided for in a written contract between the parties. It is a relatively straightforward process where the parties may represent themselves or use advocates. In a mediation, the dispute may involve two or more parties. The neutral may either facilitate the process of the parties reaching their agreement or be called upon to evaluate the argument and evidence and advise on a resolution.

A skilled mediator, while not having authority to impose a settlement, may have an important impact on the outcome by setting the ground rules, the ways in which the parties understand and analyze their respective positions and the demeanor and dynamic of the process. The mediator's task is to improve communication between the parties, ensuring that there is an effective exchange of information and then assist in the development of alternative solutions. The mediator's evolving understanding of the parties' respective interests is also helpful in placing focus on the issues at hand.

As the mediation process progresses, the mediator should be attempting to determine the level of resolution that parties will be willing to jointly accept. And this may range from the simple halting of animosity between the parties, through a resolution of the underlying basis for the dispute and on to a repair and reconciliation of the relationship. The end result may fall anywhere along this spectrum and may nevertheless constitute success, from the perspective of the parties themselves.

The process typically involves the mediator convening the parties, meeting separately with each side and listening carefully to their stories. This enables the identification and ranking of the key issues, shuttling between the parties, maintaining confidences when called for, facilitating a solution and bringing the mediation to closure, hopefully with a written agreement prepared and executed by the parties. It is important to



have individuals representing the parties actually in attendance at the mediation or supported by those available by phone who have authority to negotiate and to execute a settlement agreement.

Mediation as a process is less formal than arbitration, has no rules of evidence and has little structure in terms of how the facts and positions are presented. Mediation can be designed in whichever way appears appropriate to the parties and to their mediator with a view to moving the process forward while producing the optimum exchange of facts, opinions and interests that will in turn support negotiation and resolution.

The challenge for the mediator is to avoid becoming evaluative when the role calls for mere facilitation. The time for evaluation is when the mediator is asked to provide it by the parties and when such assistance is needed. It is more frequently used in larger more complex matters where the gap between the parties is wide. On such occasions, the mediator may provide an assessment of the case, evaluating its strengths and weaknesses, its value and the likely outcome if the process were to move to arbitration or litigation. But, unlike arbitration, the evaluation and the conclusions that may be drawn from it, does not produce a binding outcome, unless the parties agree to make it so.

A successful mediator needs to bring some important qualities to the task if he or she is to be successful. They include among other traits, sincerity, trustworthiness, honesty, integrity, maturity, tact, the ability to appear and behave in an independent and neutral way, open-mindedness, a positive and optimistic attitude, the ability to ask relevant questions and as importantly to listen carefully. Supplementing these personal traits, it clearly helps if the individual has the ability to quickly grasp complex business matters that may involve strategic, marketing, organizational, process, technology, financial or economic issues. It is especially beneficial if the person has experience with the particular type of business involved and understands the industry context within which it operates.

Mediation tends to have a high-success rate since the parties are involved in the process, have more control over the outcome and are more inclined to follow through and comply with the settlement agreement. In addition to whatever economic or financial considerations are at stake, the preservation of valuable relationships is often just as important.

Because of the time-consuming and costly nature of litigation, mediation offers the parties a potentially appealing alternative even when litigation is underway. Summary judgments motions, for example, while designed to bring a matter to prompt closure in court, often take some time and where the outcome is in doubt, it may be the moment to attempt settlement and use mediation to bring a mutually acceptable resolution to the dispute.

As with arbitration, the mediation process may be subject to a provider's rules and procedures. They tend to be less extensive than those of arbitration, but provide an appropriate framework within which the process can be directed and managed.



Issue Review Boards (IRB) in Hospitality

An Issue Review Board is ideally suited to those on-going business relationships where there is a need to quickly resolve issues before they become disputes. Used historically in the construction industry where time-sensitive projects must move forward promptly and where delays for dispute resolution can have significant economic impacts, the IRB also has application in operational environments. Within the hospitality industry, IRBs may be used for example not only for development projects but also with owner/operator issues that might arise out of a management agreement.

Promulgated by the Institute for Conflict Management, IRB procedures may be amended by the parties to a relationship to suit their particular needs. The intention is that any party may refer an issue to the Board that is within its purview. The IRB is designed to function quite independently of the parties' interests and render a non-binding recommendation for resolution of the issue. While the recommendation is non-binding, it may be admissible as evidence in the event the parties subsequently take the issue into a dispute resolution process.

The IRB itself typically comprises a panel of three members, whose party-appointed members like an arbitration panel, are selected firstly by each of the parties who then select a "neutral" third member who will generally serve as Chairperson. Since the IRB serves at the pleasure of the parties, it may be dissolved by mutual consent of the parties, generally upon completion of the project in the development context, or at the end of the contract, if the IRB is being used in an operational context.

Meetings of the IRB will occur with as much frequency as the parties deem appropriate but will generally involve a monthly or bi-monthly sequence for a project in development and quarterly for operational groups. Within the operational context, an IRB is especially useful for large projects where the "asset management" function representing an owner's interests are interfacing with an operational team representing an operating company. And while such relationships tend to bring very knowledgeable people together to deal with operational issues, there are nevertheless frequent occasions when an issue requires resolution in an independently organized forum such as within an IRB.

The formation of an IRB is ideally conceived of during contract negotiation stages so that the process for referring issues for resolution is institutionalized from the very outset. Contract language would among other elements, provide for the selection of the Board's members, the nature of the agreement between the Board and the parties involved, the process for referring issues to the Board, the application of a defined set of rules and procedures, the frequency of meetings, the treatment of fees and expenses, notice and communications, immunity, the basis for Board member substitution or replacement and finally the Board's dissolution.



Cornell University's Survey on the use of ADR

In a comprehensive study of the use of ADR in American industry¹, Lipsky and Seeber surveyed the corporate counsel of the 1000 largest U.S. Corporations and found that the vast majority of corporations had used one or more ADR procedures in recent years. A total of 88 percent of the 606 respondents had used mediation and 79 percent, arbitration. Most respondents furthermore indicated that the use of ADR would grow significantly in the future. Over 84 percent said they are likely or very likely to use mediation in the future, while 69 percent said the same about their future use of arbitration.

Corporate policy appeared to vary but most respondents indicated that they either litigate first and then move to ADR or litigate only in cases where it seems appropriate to do so and used ADR for all others. Smaller companies appeared to be more litigious and larger ones more "pro-ADR". Aside from the economic motivation to using ADR, respondents in the Cornell survey suggested a desire to gain greater control over the process and the outcomes, especially given their general concerns about the risk and uncertainty of litigation. High levels of respondent satisfaction with the results achieved through ADR also support the study's conclusion concerning the future growth that may be anticipated as ADR is increasingly adopted as an alternative to litigation.

Of particular interest in the Cornell study, was the concern respondents expressed relating to the qualifications of mediators and arbitrators. A majority believed that they were "somewhat qualified" and concerning arbitrators in particular, almost half stated that they lacked confidence in arbitrators and close to 30 percent reported that there was a shortage of qualified arbitrators. There did not appear to be a shortage of ADR neutrals, but rather a shortage of qualified neutrals.

What's Your ADR?

For many in the hospitality industry, ADR has been all about revenue. But these three letters clearly have more to offer the business than income. Alternative Dispute Resolution can in fact save a great deal of money. It will not always produce the desired outcome for one party or the other but it will frequently provide the opportunity to preserve the relationship and will generally produce a fair and reasonable outcome. For those with an involvement in the hospitality industry, qualified and experienced arbitrators and mediators can help resolve disputes, save money and preserve relationships – not a bad line-up for those who thought ADR could only mean average daily rate!

¹ "The Appropriate Resolution of Corporate Disputes: A report on the Growing Use of ADR by U.S. Corporations"; by David B. Lipsky and Ronald L. Seeber; Cornell University; 1998