

Alternative Dispute Resolution

Issue resolution without a legal battle

BY ROGER S. CLINE

In the early 1980s, Gerry, the CEO of a small hotel management company in the Midwest, saw it coming. Tensions between his operating team and one of his hotel owners had escalated over what had seemed like a straightforward issue—whether to change a restaurant that had seen better days. The planning had gone well at first, but over time went from bad to worse as result of misunderstandings and disagreements over the economics. Market conditions were deteriorating and the owner, strapped for cash, pulled the plug. Later, with earnings in decline and a performance test default in the contract on the horizon, the relationship collapsed into two years of severe acrimony and litigation.

Gerry and his attorney realize how different it could have been. They decided in future management contracts they would insist on a provision requiring the parties to resolve their disputes through arbitration rather than court litigation. The outcomes would be binding and they would hopefully save some money.

The decision was a smart one. The company is now larger, having tripled in size over the years and, while it hasn't avoided litigation altogether, most of its disputes have been resolved through arbitration at a fraction of the cost of full-scale litigation.

But Gerry's arbitration experience has not been all good. One of his problems has been the involvement of arbitrators who have had little experience in the hospitality industry. As a result, he has spent more time than necessary explaining the basics of the business. He has wondered whether some outcomes might have been different if the arbitrators had a better understanding of the industry.

ALTERNATIVE DISPUTE RESOLUTION

Beyond the hospitality industry, Gerry is not alone. Because of the significant and rising costs involved in civil litigation, many business organizations are turning to alternative dispute resolution (ADR) as the preferred way of settling. ADR has also become popular because of its less confrontational approach, which can result in the preservation of important business relationships.

Best-practice legal departments in well-managed business organizations understand both the economic and non-economic benefits of effective conflict management through ADR. While hospitality may have been slower to embrace the concept than other industries, it is now time to bring this important process to bear on the growing burden of litigation on the industry.

To benefit from an ADR plan, organizations need to agree upon the forum, the procedures to be used, and the 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 from agreeing to a defined ADR process to resolve a dispute.

BRING INDUSTRY KNOWLEDGE TO THE TABLE

Hotel management and franchise agreements have frequently included arbitration and mediation provisions that refer to standard

rules and use third-party providers with little background in the industry. Responding to this need, the International Society of Hospitality Consultants (ISHC) has organized a panel of certified arbitrators and mediators who bring broad industry experience ranging from technical to marketing, operational, financial, and economic areas.

Arbitration is a well-established form of dispute resolution that provides parties with a final and legally binding decision. The decision is enforceable by a court of law typically after only a limited review and usually cannot be appealed. Most commercial arbitration is provided for in a contract. In the absence of contractual language, the parties may jointly initiate the process by executing an arbi-

tration agreement that will define the rules and procedures.

The parties choose a neutral arbitrator. In some cases, a panel of three arbitrators is required, whereby one party selects one arbitrator, the other party selects a second, and the two party-appointed arbitrators go on to select a neutral third. In more complex matters, the parties use attorneys, but in more simple situations the arbitrators may represent themselves.

The arbitrator will rule on discovery requests and disputes, read briefs submitted by the parties, review documentary evidence, hear testimony, examine evidence submitted during a hearing, and render an opinion on liability and damages, as appropriate. The opin-

ion is rendered as an award after the hearing 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.

Occasionally, when 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**, damage awards are limited to a pre-defined range where both a floor and a ceiling are agreed upon. In **baseball arbitration**, the arbitrator must select one of two damage awards presented respectively by the two parties. In **night baseball arbitration**, the concept is the same but 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.

MEDIATION

Like arbitration, mediation is conducted in private but involves a neutral party who assists the parties 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. In mediation, the dispute may involve two or more parties.

A skilled mediator, while not having authority to impose settlement, may impact the outcome by setting the ground rules. The mediator's task is to improve communication between the parties, ensuring 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 progresses, the mediator should determine the level of resolution that parties are willing to accept. This may range from simply ending animosity between parties, finding a resolution of the dispute, or the reparation of the relationship. 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.

WHAT'S YOUR ADR?

For many in hospitality, ADR has been all about revenue. But alternative dispute resolution can in fact help the bottom line. It will not always produce the desired outcome for one party or another, but it will frequently provide the chance to preserve a relationship. For those with an involvement in the hospitality industry, qualified and experienced arbitrators and mediators can help resolve disputes, save money, and preserve relationships. ■

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