

DISPUTE RESOLUTION — MORE RELEVANT THAN EVER

BASIC DISPUTE RESOLUTION CHOICES

When a dispute, difference or issue separates people, some event or activity — a process — must take place in order for the situation to change and a new or different outcome to arise. We say “must”, not because we think people should always take action, but to indicate that change flows from deliberate choice; unless people elect to be proactive in the face of a conflictual situation, the conflict is likely to continue.

Assuming that they want or need to change the status quo, the parties — meaning the individuals or legal entities directly involved in the dispute — have a number of options available. What option they select and how they proceed depends on many factors, including the level of participation that they want to have; the kind of result that they are looking for — a shared experience versus a legally binding result, for instance — and the degree to which they are able or willing to cooperate. No one process is right for every situation.

Although it makes dry reading, it is necessary at this juncture to spend a bit of time on terminology.

There are six basic dispute resolution methods or choices, and a variety of processes and options within each choice. The basic methods are: *consensual*, *adjudicative*, *informative*, *coercive*, *democratic* and *mechanical*.

A *consensual* dispute resolution method involves a participatory process intended to develop a mutually acceptable end result. People may get together and talk, but there is only an outcome such as a readjusted relationship when everyone says *yes* to the ideas that are generated through discussion. Negotiation — the most fundamental self-help process — and mediation — where a disinterested¹ person helps the parties to negotiate — are consensual forms of dispute resolution.

An *adjudicative* method tends to take the form of a debate over competing positions, and the outcome is the decision of an outside authority that decides (adjudicates) which position will prevail. Litigation — with a judge

¹ “Disinterested” is used here in the sense of “impartial” or “not involved in the dispute” as opposed to “not interested”.

in the public court system — and arbitration — with a private judge — are adjudicative forms of dispute resolution.

An *informative* method is usually an intermediate step on the way to a result. It is intended to provide information to one or all parties or to an outside authority for use in decision-making. Business valuation and workplace investigation — such as the one commissioned by the Canadian Broadcasting Corporation in 2014 after allegations surfaced about former *Q* host Jian Ghomeshi — are informative dispute resolution processes. The person who conducts or leads the informative method is not the final decision-maker and does not have the authority to decide people's rights and obligations.

A *coercive* method seeks to influence an unwilling party to do something that otherwise would not be done voluntarily. Strikes, civil disobedience — such as the Occupy movement — embargoes and boycotts are examples of coercive processes. Generally speaking, these are unilateral measures taken by one party without the approval or cooperation of the other parties — after all, that's the point!

A *democratic* method is a way to identify a result that is supported by the greatest number of people expressing their opinion in a predetermined way. There is a mathematical aspect to it. Voting by a show of hands, written ballot or other recorded means is a democratic dispute resolution method. So too is the practice of using dots or post-its to allow meeting participants to indicate the priorities that they attach to a range of topics or options.

A *mechanical* method relies on an impersonal mechanism with an element of randomness or chance to arrive at an outcome that is a binary choice or one possibility of many. Tossing a coin, drawing straws, picking names out of a hat, a lottery or a random computer selection are mechanical methods.

Figure 1-1 displays these six basic methods and some representative processes for each one. Although the authors have integrated democratic or mechanical methods into dispute resolution mandates from time to time, the more common methods and the ones that occupy the bulk of this book are *consensual*, *adjudicative* and *informative*.

Figure 1-1	
Dispute Resolution Methods	
METHOD	PROCESS EXAMPLES
CONSENSUAL	<ul style="list-style-type: none"> • Negotiation • Mediation • Conflict coaching

Figure 1-1	
Dispute Resolution Methods	
	<ul style="list-style-type: none"> • Facilitation • Collaborative practice • Restorative justice initiatives • Partnering
ADJUDICATIVE	<ul style="list-style-type: none"> • Litigation • Arbitration • Binding expert determination • Agency, board, commission determination
INFORMATIVE	<ul style="list-style-type: none"> • Fact finding or investigation • Neutral evaluation • Advisory board • Valuation • Expert opinion • Technical inspection
COERCIVE	<ul style="list-style-type: none"> • Stonewalling • Strike • Civil disobedience • Boycott • Embargo
DEMOCRATIC	<ul style="list-style-type: none"> • Election • Referendum • Straw poll • Dots or post-its
MECHANICAL	<ul style="list-style-type: none"> • Coin toss • Drawing straws • Lottery • Name from a hat • Random computer selection

Readers will notice that the six major methods appear to be distinct, but in practice they are frequently combined, especially consensual, adjudicative, and informative methods.

Figure 1-2**Answering “yes” to most of these suggests a consensual process**

- [] Do you prefer to participate in a conversation rather than present facts and arguments?
- [] Is there a reasonable chance of engaging the other party in a conversation, for whatever reason?
- [] Is there a need or opportunity for a composite or creative remedy that is not constrained by law, protocol or precedent?
- [] Do you prefer a customized outcome that you help to shape?
- [] Will the real issue(s) be distorted or bypassed if the matter is framed in legal terms such as who has what rights or who committed what legal wrong?
- [] Are you willing and able to go beneath your preferred solution to reveal what is motivating that solution, and are you open to other possible solutions?
- [] Are you open to hearing what is important to the other party and taking their needs into account in a resolution, as well as your own?
- [] Are you prepared to live up to and take responsibility for the outcome if one is reached? Is your answer the same for the other party?
- [] Do you want to convey openness, responsiveness and caring — such as to vulnerable persons?
- [] Does the process need to accommodate non-parties or the broader public or take cultural or other differences into account?
- [] Are you unable or unwilling to face the risk of loss if you put the matter to an outside decision-maker?
- [] Do the monetary or non-monetary costs of other methods such as litigation (*i.e.*, legal fees, expenses, executive time and strained relationships) exceed anticipated benefits?
- [] Are there issues that you prefer not to resolve and that are better left as ambiguous or doubtful to give you maximum flexibility in the future?

Figure 1-3**Answering “yes” to most of these suggest an adjudicative process**

- [] Are you concerned about the abuse of power by a public body or official?
- [] Are you facing a claim that is genuinely frivolous or opportunistic and that should be tested for its *bona fides*?
- [] Is a legal precedent unavailable and genuinely needed to govern future similar cases?
- [] Do you have the resources to fund the quest for a legal precedent?
- [] Is it necessary to label or categorize something in a formal or authoritative way? For example, as *income* or *capital* or as *meeting the threshold that entitled someone to payment*?
- [] Do you genuinely need an interpretation or an assessment of whether something conforms to a statute, regulation or higher, more authoritative text?
- [] Does an impasse exist — especially around a pivotal question — which cannot be resolved by negotiation or other procedure such as voting?
- [] Do you need an external authority to:
 - a) ensure participation;
 - b) obtain information or get disclosure;
 - c) enforce an outcome; or
 - d) enforce collective values or societal rules?
- [] Are you willing and able to participate in a process that resembles a debate more than an ordinary conversation?
- [] Do you believe that truth and justice best come about through an adversarial enquiry?
- [] Do you need or want to place responsibility for the outcome on someone else?
- [] Are you able and willing to face the risk of loss if you put the matter to an outside decision-maker?

Figure 1-4

Answering “yes” to most of these suggests an informative process

- [] Are you or any of the other parties missing relevant, necessary information or data to support a voluntary, informed choice?
- [] Are you or any of the other parties missing relevant, necessary information to convince a decision maker or to promote the “best” decision by an outsider?
- [] Is the same information available to all parties? If not, would that be helpful?
- [] Will additional information will be of a persuasive value or lead to a more informed outcome?
- [] Is there a good chance that it would break an impasse around a pivotal question?
- [] Would the involvement of an outsider or a non-partisan individual make the information — or the process — more acceptable or trustworthy?