

1995

Resolving Travel and Tourism Disputes through the Use of Alternative Dispute Resolution Processes

Ann R. Shulman

Follow this and additional works at: <https://scholarworks.bgsu.edu/visions>

Recommended Citation

Shulman, Ann R. (1995) "Resolving Travel and Tourism Disputes through the Use of Alternative Dispute Resolution Processes," *Visions in Leisure and Business*: Vol. 14 : No. 2 , Article 5.
Available at: <https://scholarworks.bgsu.edu/visions/vol14/iss2/5>

This Article is brought to you for free and open access by the Journals at ScholarWorks@BGSU. It has been accepted for inclusion in *Visions in Leisure and Business* by an authorized editor of ScholarWorks@BGSU.

RESOLVING TRAVEL AND TOURISM DISPUTES THROUGH THE USE OF ALTERNATIVE DISPUTE RESOLUTION PROCESSES

BY

**ANN R. SHULMAN, J.D., LL.M., CO-DIRECTOR OF THE GEORGE WASHINGTON
UNIVERSITY TRAVEL AND TOURISM DISPUTE RESOLUTION FORUM**

AND

**SENIOR ASSOCIATE
INTERACTION ASSOCIATES
600 TOWNSEND ST., SUITE 550
SAN FRANCISCO, CALIFORNIA 94103**

ABSTRACT

Although travel and tourism is one of the world's leading industries, it lags behind many other industries in both its understanding and use of alternative dispute resolution (ADR) methods. Within the travel and tourism industry, inefficient management of internal and external disputes costs millions of dollars and working hours each year. The efficient functioning of this vast network is jeopardized by disputes that rupture vital relationships within the travel and tourism industry and damage the industry's all-important public image.

The aim of this article is to illustrate how the use of ADR processes can save time, reduce costs and strengthen relationships by promoting the cooperative resolution of disputes in the travel and tourism industry. One of the primary reasons that travel and tourism disputes continue to be resolved through the court system or not resolved at all appears to be that the industry lacks information about alternative means of resolving disputes. The Travel and Tourism

Dispute Resolution Forum provides disputing parties within the travel and tourism industry with the opportunity to avoid the expense, inefficiency and potential destructiveness of litigation by using alternative dispute resolution methods to arrive at a negotiated settlement.

BACKGROUND INFORMATION

Context

Although travel and tourism is one of the world's leading industries, it lags behind many other industries in both its understanding and use of alternative dispute resolution (ADR) methods. In many fields, the application of alternative dispute resolution processes to address conflicts has become common practice. Numerous disputes relating to business practices and partnerships, labor relations, family disputes, the environment, community issues, education and health care are resolved through the use of one or more alternative dispute resolution techniques.

Within the travel and tourism industry, inefficient management of internal and external disputes costs millions of dollars and working hours each year. The success of the \$3.5 trillion travel and tourism industry depends on effective interaction among millions of individuals and organizations around the world. The efficient functioning of this vast network is jeopardized by disputes that rupture vital relationships within the travel and tourism industry and damage the industry's all-important public image.

The aim of this article is to illustrate how the use of ADR processes can save time, reduce costs and strengthen relationships by promoting the cooperative resolution of disputes in the travel and tourism industry. One of the primary reasons that travel and tourism disputes continue to be resolved through the court system or not resolved at all appears to be that the industry lacks information about alternative means of resolving disputes. Although the use of ADR has grown dramatically in many other fields during the last decade, ADR methods are relatively unknown and unused in the travel and tourism industry today. A fundamental purpose of the Forum is to educate industry members about ADR techniques such as mediation and arbitration and to provide a venue to actually use these techniques to resolve travel and tourism disputes.

The Players

Airlines, travel agents, tour operators, hotels and resorts, rental car companies, cruise ships, travel insurers and other members of the travel industry are entangled in increasing numbers of disputes with passengers and guests, employees,

local communities, government agencies, suppliers and clients.

The Problem

Millions of dollars and working hours are wasted each year on travel and tourism disputes. Many of these disputes lead to needless litigation, a process that can drag on for years, destroy productive relationships, ignore cross cultural differences, and yield unpredictable results.

The Response

The Travel and Tourism Dispute Resolution Forum provides disputing parties within the travel and tourism industry with the opportunity to avoid the expense, inefficiency and potential destructiveness of litigation by using alternative dispute resolution methods to arrive at a negotiated settlement. In addition to saving time and money, ADR can strengthen ongoing relationships between parties by improving communication and clarifying misperceptions.

WHAT IS ALTERNATIVE DISPUTE RESOLUTION?

Alternative Dispute Resolution (ADR) includes a variety of techniques whereby a neutral party or parties help disputants to reach a mutually acceptable resolution of their conflicts through a series of negotiated agreements. The field of ADR includes a range of methods that vary in the degree of control the disputing parties have over the process. At one end of the scale is direct negotiation, where the parties to a dispute negotiate directly with one another and

have complete control over the process, with no outside assistance or interference. At the other extreme is arbitration, where a neutral or panel of neutrals makes a decision that is binding on the parties in a structured adversarial proceeding based on the law and facts of the case.

The center piece of ADR is mediation. While there are as many different mediation styles as there are mediators, the primary function of a mediator is to assist the disputing parties to negotiate a satisfactory settlement by facilitating communication between the parties, identifying issues, helping to generate options, monitoring the communication process and intervening at appropriate times. A mediator does not have the authority to impose a decision on the disputing parties, but serves mainly to facilitate the negotiation process between parties in order to help them reach an agreement that meets their needs.

The ADR field includes a number of processes, many of them court-related, such as mini trials, summary jury trials, early neutral evaluation and med-arb, a hybrid process which combines both mediation and arbitration. However, the Forum focuses on the following non-court-related processes to resolve travel and tourism disputes: mediation, arbitration, facilitated problem solving, negotiated rulemaking, and collaborative planning. Fundamental to the success of all of these processes is the use of interest based negotiation, a means of discovering and satisfying the underlying interests of parties rather than meeting the stated positions or demands that they bring to a negotiation.

HOW IS ALTERNATIVE DISPUTE RESOLUTION USED TO RESOLVE DISPUTES IN THE TRAVEL AND TOURISM INDUSTRY?

The Travel and Tourism Dispute Resolution Forum offers a variety of ADR services to address problems that arise in the travel and tourism industry. The following section describes several of the Forum's ADR processes that are particularly useful for resolving disputes that commonly arise in the travel and tourism industry.

Mediation

In mediation, a person with no substantive interest in the outcome of the conflict assists the parties in reaching a negotiated settlement of their differences by identifying the underlying interests of all parties and working to help generate innovative solutions that meet as many of these interests as possible. By discovering and satisfying the underlying interests of parties, mediation often achieves greater satisfaction and therefore greater compliance with mediated agreements than with externally imposed resolutions. The mediator is not empowered to render a decision for the parties; the decision-making power remains with the parties and the mediator assists the parties to communicate, identify issues, generate options and negotiate with one another to reach acceptable agreements.

Benefits of Mediation

Preserves relationships. Mediated processes are particularly appropriate in the travel and tourism industry where disputing

parties often need to preserve ongoing relationships or want to resolve a dispute in as non-adversarial a manner as possible. The parties in a mediation learn to communicate with each other and work together towards common goal: the resolution of dispute, not finding a winner and a loser. Parties gain an understanding of each others' perceptions of the situation and become personally invested in the decision-making process. Because all parties invest significant time fashioning a resolution to their problems, there is a high degree of ownership in the process which is reflected by a high degree of compliance with agreements reached.

Parties control the outcome. In mediation, the parties negotiate directly with one another with the help of the mediator who is present at all sessions. Mediators use normal, everyday language, not legalese, and the parties control the ultimate decisions. Each mediation results in a solution designed for the parties to the particular dispute at hand, without concern about the impact on future disputes. The resulting agreements may be binding or non-binding, as the parties choose.

Not limited to legal claims. Mediation looks beyond legal issues to explore the relationship between the parties. The potential outcomes of a mediation process are not limited to preexisting legal remedies or to finding fault on the part of one or more parties. The range of possible "win-win" solutions is as broad as the imaginations of the participants.

Cost and time effective. Because the parties do not have to engage in lengthy discovery or follow complicated court procedures and pay large lawyers' fees, mediation often saves parties time and

money. The parties may still retain counsel to advise on certain rights, but lawyers control neither the cost nor the process of the mediation. In most cases, mediation results in significantly lower cost and lower stress than adjudication.

Flexible, informal. Mediation is a private, confidential, flexible process structured by the mediator according to the needs of the parties.

Voluntary. The Forum handles both mediation processes that are mandated by prior contractual agreement and that are agreed to voluntarily by the parties after a dispute arises.

Binding or non-binding. The parties have discretion to determine at the outset whether they want the resulting mediated agreements to be binding or nonbinding.

Arbitration

Arbitration is the ADR process most similar to litigation. It is an adversarial adjudication which results in a final and binding resolution of the dispute. Whereas in other forms of ADR the parties fashion their own resolution of the dispute, in arbitration the neutrals, or arbitrators, have the power to render a decision which is enforceable by the courts.

In arbitration, disputing parties submit their disagreement to a panel of one or more impartial arbitrators. The panel conducts the arbitration hearing or series of hearings and makes a decision based on law and facts relevant to the case. While arbitration is a private proceeding that eliminates many of the formal process requirements of litigation, the proceeding is normally much

more formal and structured than mediation. Further, information in an arbitration process is presented in an adversarial manner, whereas in mediation, the neutral assists parties to build agreements based upon areas of common understanding.

Parties may select to use arbitration instead of litigation where privacy is important and when decision-making by arbitrators with subject matter expertise is desired. Many parties prefer to have their disagreements decided by arbitrators who can be selected for their subject matter experience, rather than by judges who cannot be so selected. Because of the simplified hearing procedure, arbitration can be more efficient and cost effective than litigation. Arbitrators have discretion to significantly limit discovery, and the parties can agree on the level of pre-hearing disclosure they deem appropriate.

The potential drawbacks to using arbitration are that the parties experience little ownership in the process, and therefore may be less inspired to fashion innovative solutions and less motivated to comply with the resolution reached. Further, there is relatively little direct communication between parties due to the adversarial nature of the process, so many of the benefits of direct mediation discussed above are lost.

Facilitated Problem Solving and Collaborative Planning

Facilitation. Facilitation is a process in which a neutral person with no substantive decision-making power helps a group of individuals to make decisions and solve problems. The facilitator's main role is to help the group increase its effectiveness by improving its communication, deci-

sion-making and problem-solving processes. The facilitator guides the group by offering models for group problem-solving and providing feedback and analysis as the group progresses. While the roles and responsibilities of the facilitator are often similar to those of the mediator, the two have different objectives. While the objective of mediation is to help parties negotiate a settlement to a particular conflict, the objective of facilitation is to help a group to improve its problem-solving capability so that it can reach a goal or complete a task to the mutual satisfaction of all participants.

While a mediator serves as an intermediary between disputing parties, a facilitator is at the service of the entire group and does not shuttle between group members. Facilitators serve a vital role for groups working toward consensus by making process suggestions and overseeing the communication and problem-solving methods of the group. A facilitator helps develop and modify the agenda, enforces ground rules, helps parties define issues and develop options, keeps channels of communication open and assures that group members stay focused on objectives.

In collaborative planning and facilitated problem-solving processes, parties work together to resolve common problems in a cooperative manner. With the help of a facilitator or facilitation team, the parties design and implement a strategy to make consensus-based decisions and to find solutions to problems affecting the group. Facilitated problem-solving and collaborative planning processes vary depending on the size and complexity of the issues at hand, however most proceed through the following stages:

Stage One: Designing and Initiating the Process. The purpose of this stage is to help identify appropriate participants and to agree on a process to use to resolve a problem. Throughout this stage, the facilitator or facilitation team works to establish a constructive climate for potential discussions by developing relationships with stakeholders and relevant resource people and encouraging parties to come to the table. Major areas of concern are identified and a broad list of potential issues is generated and prioritized in order to select a single issue or narrowed list of issues as the focus of the facilitated problem-solving or collaborative planning process.

Potential parties are identified and underlying interests are explored through one on one interactions with the facilitation team. The group gathers information about the issue, generates a list of sub-problems that contribute to it and identifies what the desired outcomes at the conclusion of the problem-solving process would be. All stakeholders are instructed about collaborative problem-solving or planning methods and as inclusive a group as possible is asked to commit to participation in the process.

Stage Two: Defining the Problem. The purpose of this stage is to agree on what the problem is and why. Throughout this stage, the facilitation team serves as a filter for information among the stakeholders. Facilitators are responsible for setting meeting schedules and confirming logistics for large and small group meetings. The facilitation team identifies relevant resources and people to collect additional information about the issue being addressed.

Sub-problems are sorted into groups where distinctions are elaborated and similar problems are grouped together. A list is

generated and differences among stakeholders' definitions of the problems are resolved with the assistance of the facilitation team. Stakeholders evaluate each sub-problem to determine the extent to which it serves as a barrier to resolving the conflict. With the assistance of the facilitation team, the group reaches consensus on the problem definition and causes, as well as the order that problems are to be addressed.

Stage Three: Generating Solutions. During this stage, possible solutions are identified and evaluated. Facilitators assist participants to agree on solutions that everyone is willing to support. For each prioritized problem, stakeholders generate lists of possible solutions. Each solution is evaluated to determine which stakeholders' interests are served, how well the solutions will resolve the problem and what is required for implementation. Stakeholders consider possible solutions, working to resolve differences until consensus is reached, and unresolved issues are identified.

Stage Four Implementation. Stakeholders agree on a plan for implementing the agreed-upon decision(s). An action plan, covering what, who and when specific implementing events will take place, is developed and agreed to by stakeholders. Stakeholders assume roles and responsibilities for the implementation of the action plan. The action plan is monitored and evaluated periodically and problems are documented.

Negotiated Rulemaking

Negotiated rulemaking is a form of public policy mediation where parties having a

stake in proposed government regulations reach agreement on key provisions through the assistance of facilitators or mediators. The negotiated rulemaking process offers the opportunity to create better rules that are more practical and more acceptable to the interests affected by the rule. Higher levels of compliance and lower costs for administration and enforcement of negotiated rules make the negotiated rulemaking process more cost-effective than traditional methods. The process also appears to foster the creation of innovative solutions that allow former adversaries to work cooperatively, and often leads to better long-term relationships among the parties involved in the process. The Forum specializes in using consensus building methods to insure that the parties affected by a given tourism rule or regulation have input on the formation of that rule.

WHAT STEPS ARE REQUIRED TO SUBMIT A DISPUTE TO THE FORUM FOR RESOLUTION?

Any party may unilaterally initiate the process by contacting the Forum to discuss available dispute resolution options and request assistance in contacting other parties or stakeholders to obtain agreement from them to proceed. At this time, the Forum will provide information on a variety of issues that pertain to all forms of ADR, such as:

- **The necessity of confidentiality.** Confidentiality is necessary in most non-public ADR processes so that the mediators, facilitators or arbitrators can fulfill their role as neutrals and not risk becoming an adversary or witness against one of the parties in the future.

- **Voluntary participation in the process.** The Forum cannot mandate that any particular party take part in a dispute resolution process. However, some parties may seek dispute resolution services pursuant to a clause in a contract requiring them to do so prior to pursuing litigation.

- **Good faith interest in settlement on all sides.** For any ADR process to be successful, the parties must have genuine incentives to reach a settlement outside of court.

- **Binding vs. non-binding process.** The choice between a binding or nonbinding process is at the parties' discretion. The Forum provides information to help parties select the option that best meets their needs.

The parties select appropriate neutral(s) from the Forum roster that are acceptable to all parties. The Forum roster includes a variety of trained ADR professionals and experts in the field of travel and tourism, including faculty members of the George Washington University Tourism Studies Program. The parties decide upon an initial meeting date to discuss proposed rules governing the ADR process, such as the role of the neutral(s), restrictions on communication with the neutral(s) outside of the meetings, how the ADR process works, confidentiality, a proposed schedule for meetings, the arrangement for cost-sharing and payment of the neutral(s).

CONCLUSION

The Travel and Tourism Dispute Resolution Forum offers an alternative to resolving travel and tourism disputes through litigation. The Forum offers mediation, arbitration, collaborative planning,

facilitated problem-solving and negotiated rulemaking services to resolve the myriad disputes that arise among members of the travel and tourism community, travelers, travel suppliers, national and local governments, tour operators, hotels, property owners, and travel agents, to name a few. Alternative dispute resolution has

achieved significant success in a variety of industries. The establishment of the Forum creates opportunities for success in resolving travel and tourism disputes efficiently and effectively, while creating stronger relations among members of the travel and tourism industry.

CONFLICT RESOLUTION METHODS

