

# Glossary of Dispute Resolution Terms

<http://www.mediate.ca/glossary.htm>

"Man does not live by words alone, despite the fact that sometimes he has to eat them."

*Adlai Stevenson*

**Adjudication:** Any of the forms of dispute resolution in which the parties to the dispute present proofs and arguments to a neutral third party who has the power to deliver a binding decision, generally based on objective standards. The term subsumes arbitration and litigation.

**Advisory Opinion:** A non-binding, objective assessment of the relative strengths of the opposing positions in a dispute and the probable outcome of the case if it were to proceed to trial, rendered by a neutral third party, provided to stimulate settlement.

**Arbitration:** Any of the forms of dispute resolution involving a mutually acceptable neutral third party making a decision on the merits of the case, after an informal hearing which usually includes the presentation of evidence and oral argument. The process has four main variations (creating numerous permutations):

- binding or non binding
- voluntary or compulsory
- private, statute authorized, court-annexed (alternatively termed court-connected)
- one arbitrator or a panel

In Ontario, all arbitrations, whether private, court-annexed or pursuant to statute, are subject to the *Arbitration Act* S.O. 1991, c.17 as amended., unless the application of that statute is excluded in whole or in part by the agreement of the parties or the statute which authorizes a particular arbitration. Most labour arbitrations are specifically regulated by a particular statute

The *Arbitration Act* does not define "arbitration".

**Binding Arbitration:** Any form of arbitration in which the parties agree or a statute or court directs that the decision of the arbitrator is conclusive of the dispute. In limited circumstances, the decision is subject to judicial review (in Ontario under the *Arbitration Act*, or the specific statute authorizing the arbitration, such as the *Labour Relations Act*, R.S.O. 1990 c. L.2)

**Compulsory Arbitration:** Arbitration of disputes which the parties are obliged to submit to arbitration either pursuant to the terms of a contract which the parties entered into prior to the dispute or pursuant to the provisions of a statute.

**Grievance Arbitration:** A form of labour arbitration wherein the parties submit disputes over rights that arise under an existing collective agreement.

**Non-binding Arbitration:** Any arbitration process wherein the parties are not bound to accept the decision of the arbitrator as a conclusive disposition of the dispute.

**Private Arbitration:** Any process wherein two or more parties agree, either prior to any dispute within the contract establishing their relationship (on either a compulsory or voluntary basis) or by an agreement in response to a dispute, to submit their dispute(s) to arbitration. The parties determine the parameters and procedures which will govern the arbitration and may impose a range ("High-Low") in which any acceptable result must fall. The decision of the arbitrator is typically

binding in the parties, subject to limited judicial review.

**Voluntary Arbitration:** Any form of arbitration in which the parties may choose whether to submit a particular dispute to resolution.

**Avoidance:** The simplest form of dispute resolution in which the aggrieved party ends the dispute by forgoing its rights and taking no steps towards any relief.

**Conciliation:** An informal process in which a passive third party is positioned between the parties to create a channel for communications, usually by conveying messages between the parties who are unwilling to meet face to face, to identify common ground and to eventually reestablish direct communications between the parties. The term is often interchanged with mediation; however, conciliation involves a more passive third party. The process can be readily combined with mediation.

**Confidential Listening:** A process wherein a neutral third party reviews the confidential settlement positions of all parties and advises the parties whether a negotiable range exists, but does not disclose any further information. The parties may agree beforehand to settle at the midpoint of any range revealed by the process.

**Counselling:** Counselling is a process where clients are helped in dealing with their personal and interpersonal conflicts by a third party therapist.

**Dispute Prevention:** Initiatives which persons and organizations take to structure their operations to minimize the risk of disputes and/or structuring relationships by contract to avoid litigation of those operations to minimize violations.

**Compliance Programs:** A form of dispute prevention whereby key employees are familiarized with legal and regulatory restrictions relevant to their operations in order to stimulate the restructuring of those operations to minimize violations.

**Negotiated Rule-Making:** A broad concept embracing all processes, such as "Notice and Comment" and "On the Record Rule Making", in which a rule-maker, typically a government department, incorporates input from those persons with an interest in a proposed rule or regulation in to the substance of the rule. The term may be extended beyond the government context to any negotiation focusing on the structuring of the future relations of parties.

**Divorce Mediation:** See Mediation

**Early Neutral Evaluation:** A non-binding process, typically required under the relevant rules of court, wherein the parties and their counsel meet shortly after the initiation of a court proceeding and confidentially present the factual and legal bases of their cases to each other and a third party lawyer experienced in the substantive area. The third party identifies issues, assesses the strengths of the cases, structures a plan for the progress of the case, and, if requested by the parties, may encourage settlement.

**Final Offer Selection:** A form of arbitration wherein both parties submit their "best offers" to an arbitrator, who must select one as the binding award, usually following a hearing of the parties' cases.

A variation used in some U.S. jurisdictions involves the parties submitting their best offers to a court office, simultaneously with a determination of an award by an arbitration judge. The party whose offer is closer to the decision is awarded the amount of its offer.

Another variation could permit the arbitrator to select items from each party's

offer, rather than selecting the entire offer of one party.

**Modified Final Offer Selection:** A variation of final offer arbitration wherein the arbitrator may reject both offers as being unacceptable and propose an award. The parties may either accept the award or reject it and require the arbitrator to select one of the offers.

**Multiple Offer Selection:** A variation of final offer arbitration wherein the parties submit a predetermined number of different offers to the arbitrator who selects the one and announces which party's offer have been selected but does not identify the particular offer. The other party then chooses one of the offers submitted by the selected party. This variation is most effective where several issues have been submitted to arbitration.

**Repeated Offer Selection:** A variation of the final offer arbitration wherein the arbitrator may require the parties to submit new offers after determining that the first offers were both unacceptable.

**Mediation:** Some degree of intervention in a dispute or negotiation by an impartial, neutral third party who has no decision-making power. The third party informally assists disputing parties in voluntarily reaching their own mutually acceptable settlement of issues in dispute by structuring the negotiation, maintaining the channels of communication, articulating the needs of each party, identifying the issues, and, if requested, making recommendations on disputed issues. The process may involve counsel, but open communication between the parties as well as between their counsel is encouraged.

**Closed Mediation:** Mediation in which all discussions are confidential and the mediator is not a compellable witness in any subsequent proceeding. As the overwhelming majority of mediations are closed, the use of the term "mediation" without qualification connotes closed mediation.

**Court-Annexed Mediation:** this form of mediation exists where mediation services are incorporated into the court process and may either be ordered by the court or voluntarily agreed to by the parties. The parties maintain their rights to proceed to trial if mediation fails. Any settlement that is reached becomes a judgment of the court. The term is often used interchangeable with court-annexed conciliation.

In certain of the United States, the mediation of divorces involving custody and access issues can be completed by the court, although the court is not required to make the order. In Ontario, this form of mediation has been incorporated into the United Families Court experiment.

**Open Mediation:** Mediation after which the mediator either files a report with the court which ordered the mediation to occur, or is compellable as a witness in any subsequent proceeding.

In Ontario, s.3 of the *Family Law Act* R.S.O. 1990 c. F.3 provides for open mediation of family law disputes where the parties so agree. This is an exception to general mediation practice.

**Preventative Mediation:** A program which is intended to establish a more cooperative approach to conflict resolution, rather than resolving actual conflicts, in the labour relations context. It consists of three elements:

- joint action committees which provide a communication channel between labour and management representatives, sometimes with a mediator;
- relationship improvement seminars to establish dispute resolution

- strategies; and
- joint training programs.

The Preventive Mediation Program of the Ontario Conciliation and Mediation Service assists in the establishment of these programs.

**MED/ARB:** This process commences as a mediation of a dispute by a neutral third party, but if the mediation does not successfully resolve the dispute, the third party assumes the role of arbitrator and imposes a (typically binding) decision upon the parties.

**Mini-Trial:** This informal and inherently flexible process, typically used in commercial disputes between corporate entities, combines mediation, negotiation and non-binding arbitration. The exact structure is determined by agreement between the parties, but involves, after a limited preparation period, the summary presentation by counsel of each party's best case to a panel consisting of the opposing decision makers (who have had no personal involvement in the dispute) and usually a neutral third party. The third party may render an advisory opinion at the conclusion of this "information exchange". The principals then attempt to negotiate a settlement with the assistance of the third party acting as mediator. If no settlement is reached, the parties may proceed to trial. This process is distinguishable from a summary trial.

**Negotiation:** An form of communication, direct or indirect, whereby parties who have opposing interests, discuss, without resort to arbitration or other judicial processes, the form of any joint action which they might take to manage and ultimately resolve the dispute between them.

**Principled Negotiation:** An alternative to traditional competitive or cooperative negotiation in which the parties focus on the issues in dispute, rather than the positions taken by the parties, and attempt to understand the needs of the other party and create new options with achieve mutual gain as assessed by objective standards.

**Ombudsman:** An independent officer of a government or other large institution who investigates complaints of administrative injustice and attempts to mediate disputes between aggrieved members of the public and the government or institution. The traditional use of the word has been limited to government and public bodies (such as universities).

**On-Line Dispute Resolution (ODR):** ODR takes existing dispute resolution mechanisms, applies technical resources and expertise over the Internet and can be delivered from any distance. All or part of the process can be online.

**Private Judging:** A process agreed to by the parties whereby the dispute is presented to a neutral third party, typically an experienced lawyer or retired judge, hired by the parties, who renders a binding decision. The third party may be drawn from a "private court". The process assumes the form of a private trial, governed by the rules of the private court or rules specifically drafted by the parties, and relevant arbitration legislation. The judge may serve as a mediator initially.

In most American jurisdictions, the court may refer a matter to private judging, and the decision is entered as a judgment of the public court and may be appealed accordingly. In Ontario, the process (e.g. the Private Court) is governed by the *Arbitration Act*, and the decision is an award under that statute. The right of appeal is consequently limited to judicial review under that statute (subject to a right to appeal within the private court).

**Therapeutic Intervention:** This is a form of mediation in which not only is a solution to the dispute sought, but the relationship of the parties is repaired and the parties' individual and collective abilities to deal with problems are improved.

**Therapy:** See Counselling

**Trial:** A dispute resolution process in which a judge or a jury of the public courts makes a binding decision on the merits of the case after a full, public hearing, conducted according to formal rules of procedure, which includes the presentation of evidence and oral arguments by the parties. In Ontario, a trial is the final step in an action; an application is a summary procedure by which litigation may be concluded without a trial.