

Stand your Ground or Pistols at 20 Paces

Alternatives to
Litigation??

J. W. Frank

Frank ADR

Historically

- Litigation was an alternative to dueling
- Today – Is there a difference?
- Without planning you could be in a duel!!



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Today

- Court Litigation may be an alternative!
 - Sometimes you “need” to be in court
 - The other party does not “believe” in ADR
 - Litigation is still the most “popular” choice

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Today

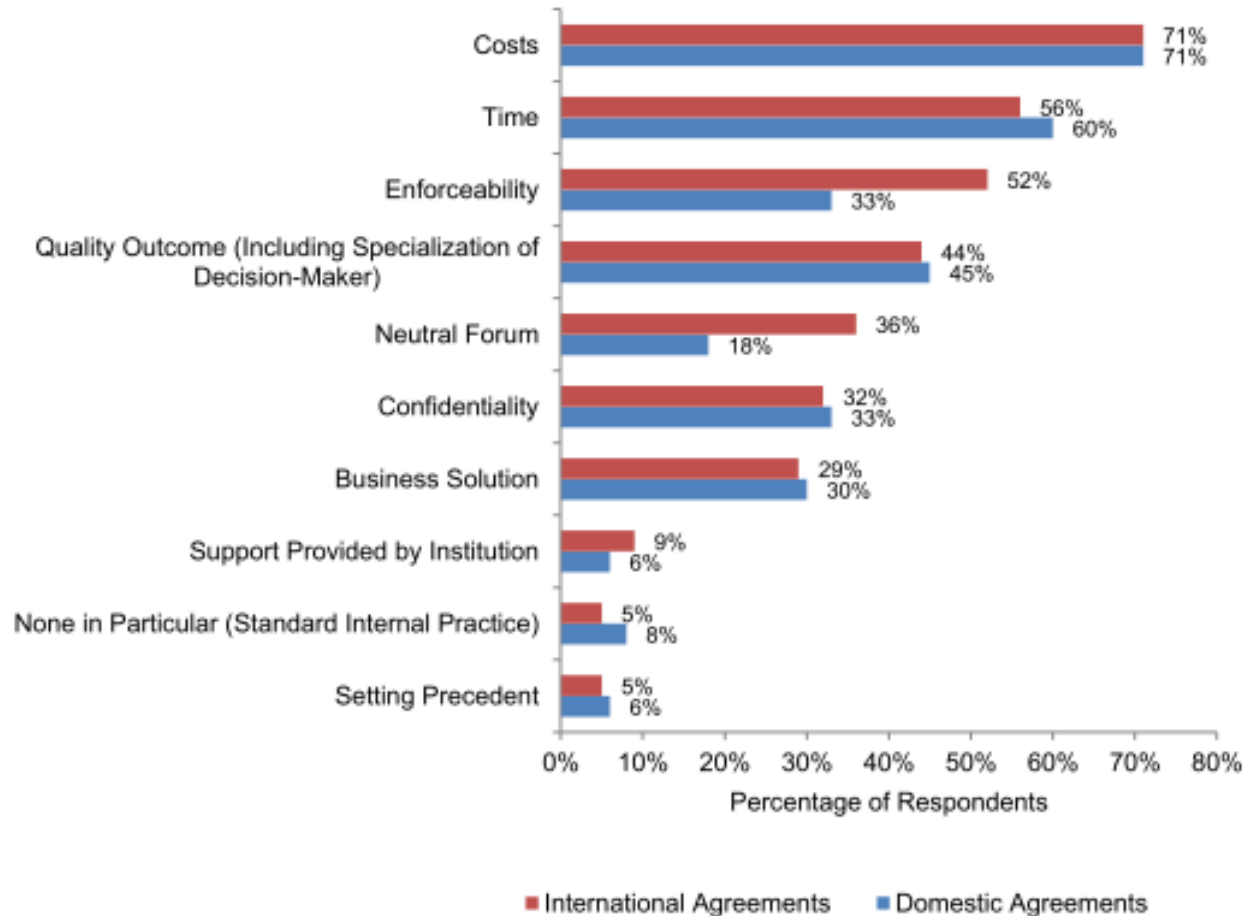
- Alternative Dispute Resolution is an alternative!
 - Especially for International agreements
 - Many non-US parties do not want to be in court in the US
 - US parties often don't want to be in court in a foreign jurisdiction

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To ADR or not to ADR – That is the Question

- Business purpose of the agreement
- Confidentiality
- Time to resolution
- Cost

Main Considerations When Negotiating Dispute Resolution Clauses

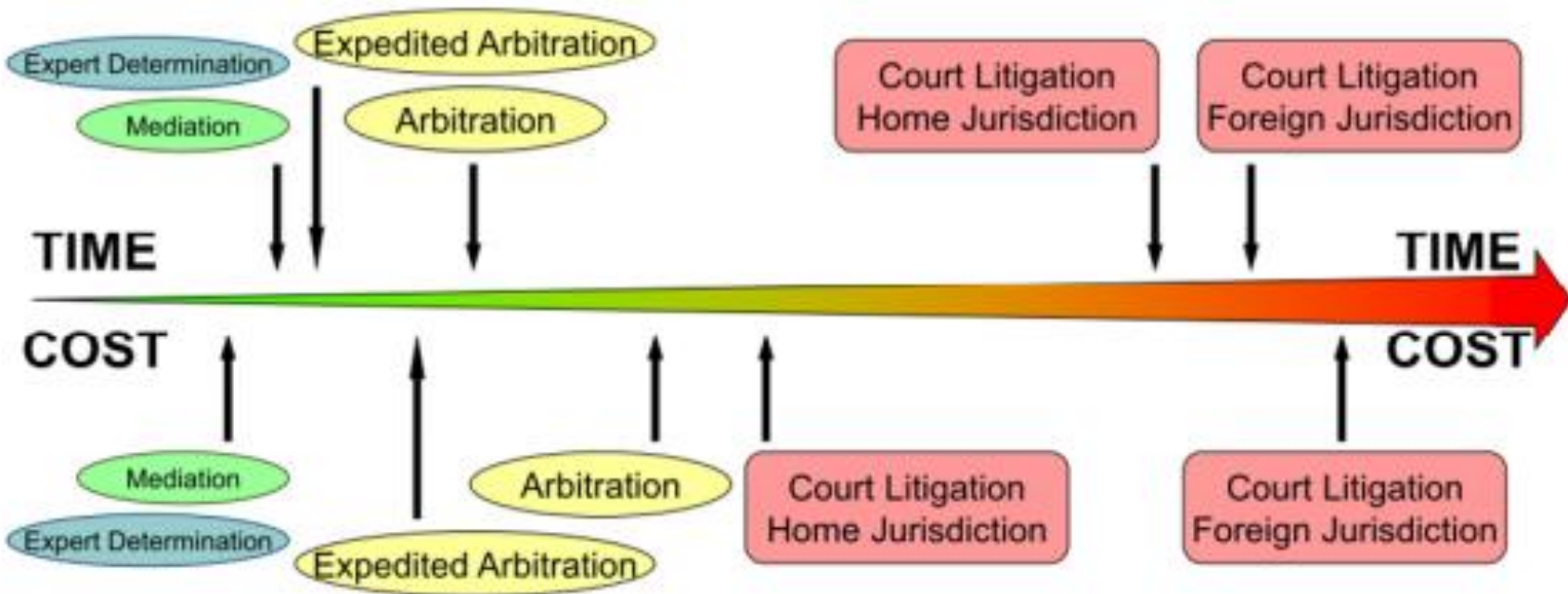


Source: WIPO Arbitration and Mediation Center, International Survey on Dispute Resolution in Technology Transactions

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To ADR or not to ADR – That is the Question

- Business purpose of the agreement
- Confidentiality
- Time to resolution
- Cost
- Control over process
 - Neutral decision maker
 - “Expert” decision maker
 - Custom rules for resolution
- Relation with other party



Source: WIPO Arbitration and Mediation Center, International Survey on Dispute Resolution in Technology Transactions

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To plan or not to Plan – Another Question

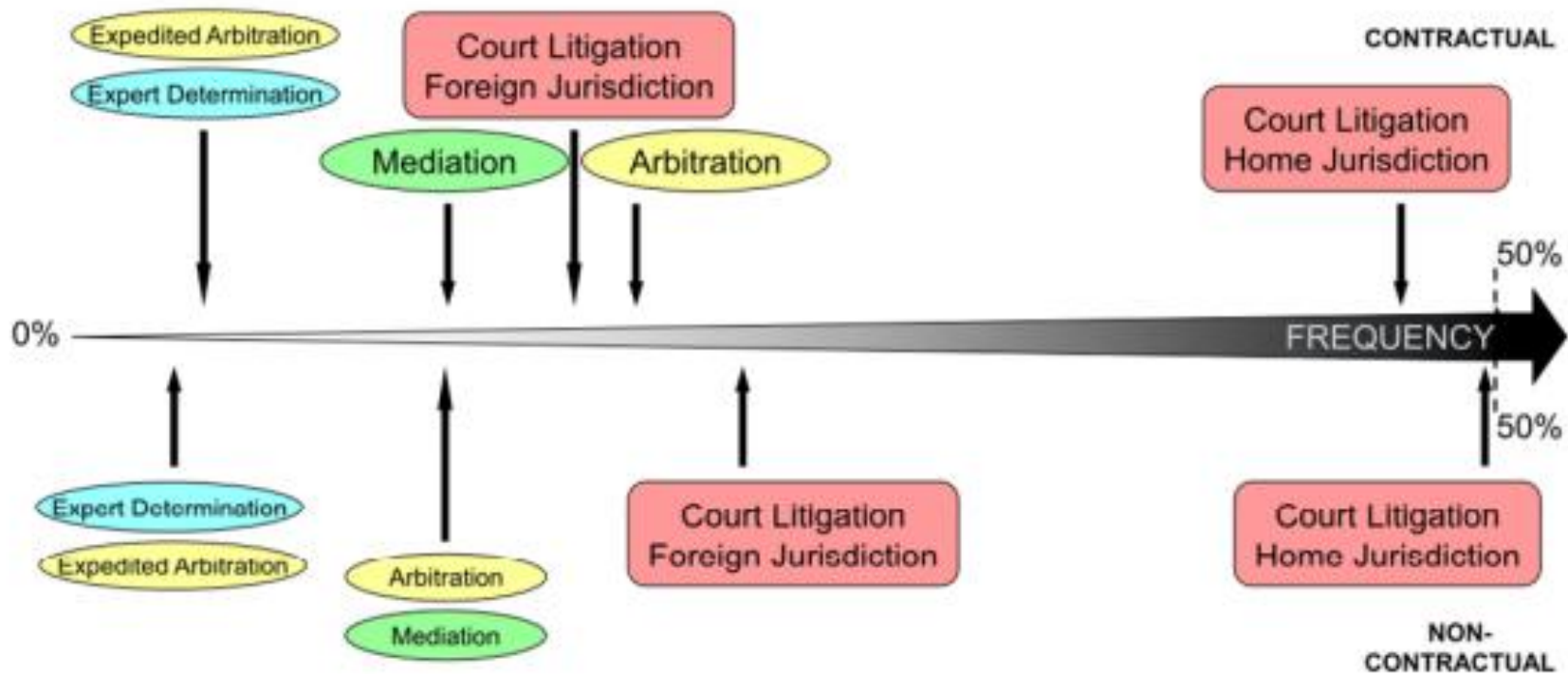
- Think about the Optimum Dispute Resolution process for your client
- Know the other side(s)
- Do you need to be in Court?
- Don't leave this until the end!!

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To plan or not to Plan – Another Question

- You can agree with the other party to use ADR after the dispute has begun
- ADR may be better than being in a “foreign” court

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Source: WIPO Arbitration and Mediation Center, International Survey on Dispute Resolution in Technology Transactions

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What Type of ADR?

- Single type
 - Mediation followed by court
 - Arbitration only
- Stepped approach
 - Mediation followed by Arbitration

Arbitration Clause Issues

- Scope of the Arbitration Clause
 - Be careful about bifurcation
- Step Issues
 - Be clear about the time for each step
 - Make sure that one party cannot delay by refusing to participate in a step

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Arbitration Clause Issues

- Rules issues
 - Choice of Rules matters
 - Know the defaults for the chosen Rules
 - Make sure the Rules fit the situation
 - Customize the procedure if necessary
- Law, Place and Language issues
 - The place matters
 - Can impact the procedural rules vs. court
 - Law does not have to be the law of the contract
 - Make sure it is a language that is convenient

Arbitration Clause Issues

- Arbitrator issues
 - 1 vs. 3 arbitrators
 - Qualifications of the arbitrator(s)
 - How the arbitrator(s) are appointed
 - Modify the Rules if needed
- Confidentiality
 - Make sure main agreement confidentiality clause applies
 - Don't assume Rules adequately cover this

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Arbitration Clause Issues

- Awards, Enforcement and Appeal
 - Type of Award
 - Provide that a court can enforce the award
 - If the Rules allow, consider an appeal process
- Necessary Parties
 - Make sure that all necessary parties have agreed to arbitration in writing

Conclusion

- Plan ahead and make the choice to

ADR or not to ADR

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Thanks

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