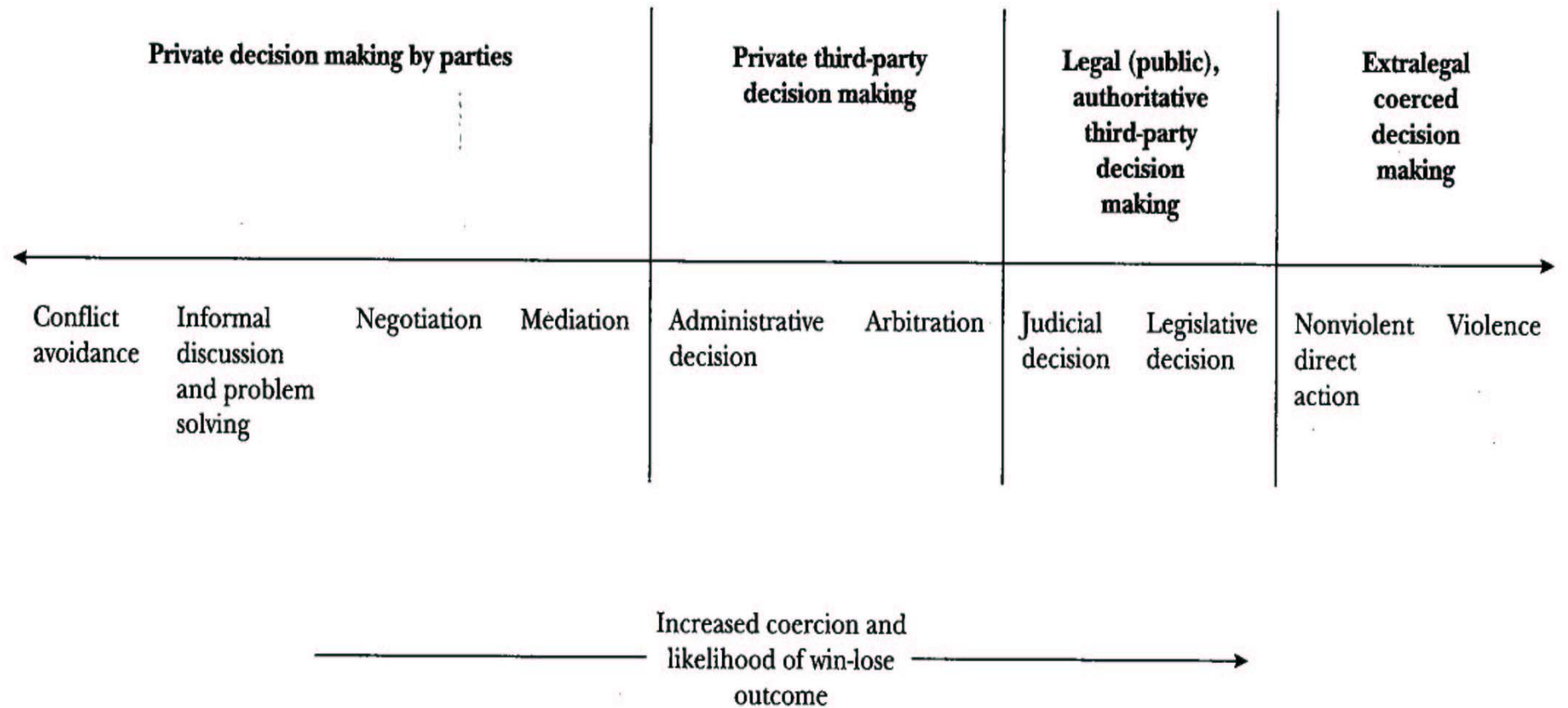


MEDIATION, ARBITRATION & APPRAISAL

**Thomas Brown, Esq., Gibbons PC
Stephen Rogers, Esq., Zelle Hofmann Voelbel & Mason LLP
Kevin Brekka, Esq., FM Global
Roe Vaughn, GAB Robins
Dale Frediani, RMG Consultants, Inc.**

**Loss Executives Association – June 11 – 12, 2009
Portland, ME**

Figure 1.1. Continuum of Conflict Management and Resolution Approaches.



Christopher W. Moore, *The Mediation Process, 2d ed.*
 San Francisco, Jossey-Bass 1996

MEDIATION

What is it?

- Intervention in a negotiation or conflict
- Acceptable 3rd party
- No decision-making power
- Assists parties
- Non-binding
- Mutually acceptable settlement of dispute

MEDIATION

Parties' Attitude

- Open to 3rd party participation
- Willing to listen and seriously consider other side's views
- Sincere willingness to explore resolution
- Win – Win exercise

MEDIATION

Mediator Qualities

- Personal credibility
- Trustworthiness
- Impartiality
- Expertise
- Experience
- Problem solving & negotiation skills
- Past performance

MEDIATION Process

■ Participants

- Adjuster
- Experts
- Party-representatives
- Business / decision makers
- Attorneys

MEDIATION

Process Cont'd

- Collect & analyze background information
 - Mediator
 - Parties
 - Confidentiality
 - Written submissions, meetings
 - Identify parties' interests
 - Identify conflicts

MEDIATION

Process Cont'd

■ Mediation

- Cross presentations
- Private meetings with mediator
- Confidentiality
- Define issues
- Identify strengths & weaknesses
- Identify options for settlement
- Assessment
- Bargaining
- Agreement

MEDIATION

Process Cont'd

- Shuttle diplomacy
- Mediator evaluation
- Settlement documentation

MEDIATION

Advantages

- Confidentiality
- Speedy resolution
- Minimize risks of imposed outcomes
- Reduce high costs of litigation
- Parties choose mediator
- Reflects parties concerns & priorities
- On-going business relationships
- Educates decision makers
- Provides independent assessment

MEDIATION

Disadvantages

- Non-binding
- Limited access to information
- Mediator has no power
- No due process safeguards
- Disclosure of position if not settled
- Mediator focus on any settlement (\$\$)

APPRAISAL

*In case the Insured and the Company shall **fail to agree** as to the actual cash value or the **amount of loss** ...*

- Insurance policy
- Fail to Agree
- Amount of loss vs coverage

APPRAISAL

*... on written demand of either, each shall select a **competent and disinterested** appraiser ...*

- Mandatory?
- Timing
- Competent
- Disinterested – independent – impartial

APPRAISAL

*The appraisers shall first select a
competent and disinterested umpire*

- Competent
- Disinterested
- Failure to agree

APPRAISAL

The appraisers shall then appraise the loss, stating separately actual cash value and loss to each item; and, failing to agree, shall submit their differences, only, to the umpire.

- Informal vs formal process
- Right of parties to participate

APPRAISAL

*An **award in writing**, so itemized, of any **two** when filed with the Company shall determine the amount of ... loss.*

- Form of award
- Presumption of validity
- Binding
- Challenges

APPRAISAL

Each appraiser shall be paid by the party selecting him and the expenses of the appraisal and umpire shall be paid by the parties equally.

- Interest, attorney's fees & costs

APPRAISAL

■ Advantages

- Consistent with policy
- Faster
- Cheaper
- Complex technical loss measurement issues
- Bad faith issues
- Parties choose appraisers (competency)

■ Disadvantages

- Lack of procedural safeguards
- Form of award
- Coverage issues
- Compromise awards

ARBITRATION

- One or more neutrals render a decision after hearing arguments & reviewing evidence
- By agreement / contract
- Scope
 - Broad / narrow
 - Loss measurement and coverage

ARBITRATION

- Insurance
 - Insurance policies
 - Joint loss agreements
 - Reinsurance
 - Ad hoc agreements

- Public policy
 - Federal Arbitration Act
 - Alternative Dispute Resolution Act 1998
 - Uniform Arbitration Act

- Sponsoring Organizations
 - CPR Institute for Dispute Resolution
 - American Arbitration Association
 - JAMS
 - ARIAS

ARBITRATION

Arbitrators

- Timeline for selection
- Single or tripartite
- Selection of umpire
- Partisan, neutral, impartial, disinterested
- Disqualification
 - Evident partiality or bias
 - Financial / personal interest in outcome
 - Disclosure
- *Ex parte* communications

ARBITRATION

Arbitrators Cont'd

■ Qualifications

- Present or former executives of insurance or reinsurance companies
- Expertise
- Experience
- Intelligence
- Objective
- Patience
- Common sense
- Advocacy skills
- Ability to make decisions
- Ability to control the process

ARBITRATION Process

- Demand
- Arbitration panel convened
- Organizational meeting
- Scheduling
- Stenographic record
- Hearing
 - Opening statements
 - Proof / evidence
 - Cross examination
 - Rebuttal
 - Closing arguments
 - Post hearing briefs

ARBITRATION

- Form of award
- Confirmation
- Vacating, modifying or correcting award
- Confidentiality
- Expenses

ARBITRATION

Advantages

- Privacy / confidentiality
- Parties control forum & form
- Parties select arbitrators
- Expertise
- Written procedures
- Business-like atmosphere
- Expeditious
- Enforceability
- Avoid judicial precedent
- Control expense
- Bad faith issues

ARBITRATION

Disadvantages

- Lack of quality control
- Arbitrators not accountable
- Legalistic trends
- Rules of evidence
- Limited discovery
- No precedent
- No uniformity
- Minimal written decision / reasons
- Not appealable
- Compromise awards