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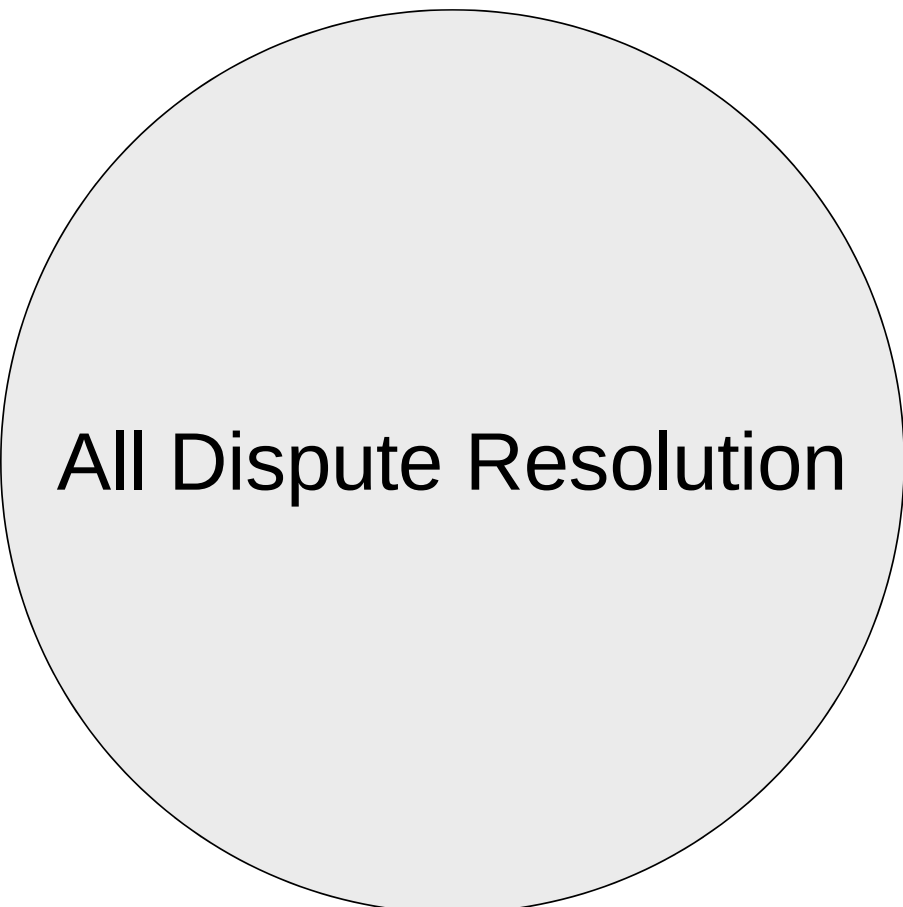
ADR, MEDIATION, FACILITATIVE MEDIATION AND EARLY INTERVENTION IN THE ERA OF COVID-19: A TOPOLOGICAL DIAGRAM OF DISPUTE RESOLUTION

Rhys Clift



All Dispute Resolution

- This is a snap-shot presentation of Dispute Resolution and the place of Litigation, Arbitration, ADR, Mediation, Facilitative Mediation and Early Intervention within it, notably in the era of COVID-19 .
- This represents a fairly comprehensive picture of dispute resolution. English Law, English procedure. The focus of this presentation is civil not criminal disputes.
- Dispute Resolution, in particular Mediation (in various guises), remains very much open for business.

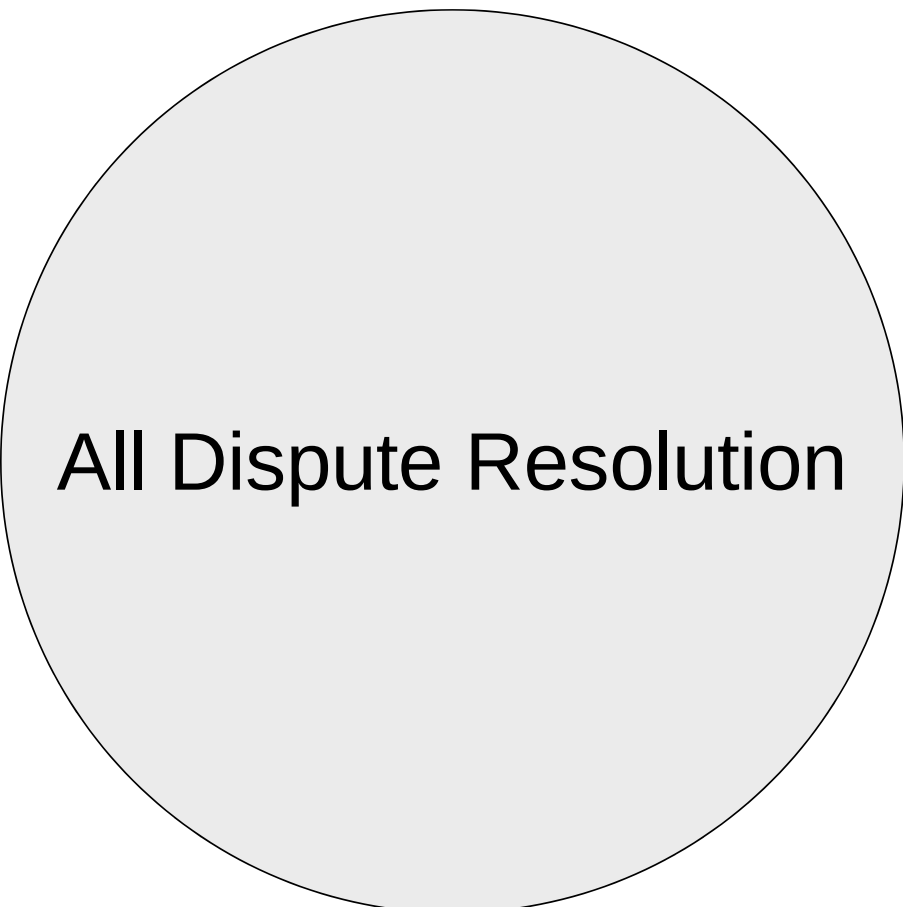


All Dispute Resolution

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All Dispute Resolution

- This presentation illustrates how various types of Dispute Resolution inter-relate, and touches on the role of disaster (the COVID-19 pandemic) in combination with innovation (Skype, Zoom and Microsoft Teams) as a catalyst for change.
- The images show just the core information. They are not to scale. They do not reflect the numbers of cases in litigation, arbitration or mediation etc in any one year.



All Dispute Resolution

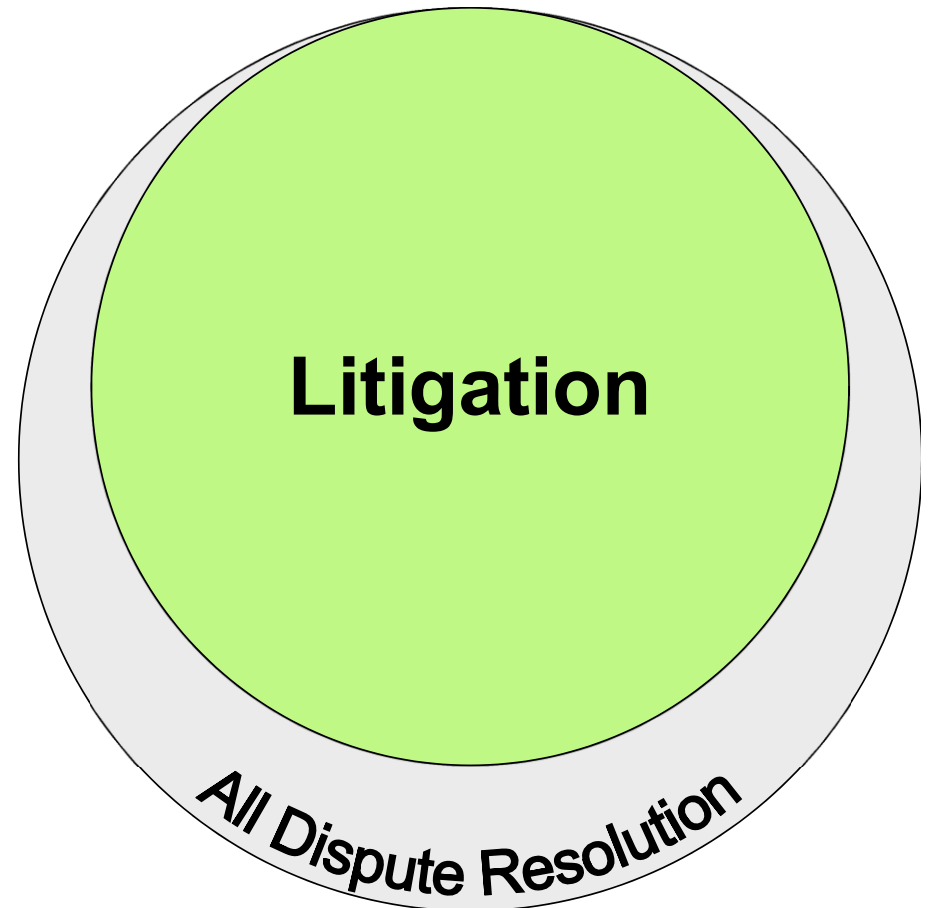
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Litigation is a form of Dispute Resolution

- One can define Litigation as a compulsory decision-making process. In the absence of earlier resolution, it will conclude with a trial, possibly an appeal, and a final judgment.
- There will be consequences in terms of winners and losers and, generally, orders as to who shall pay the legal costs incurred.



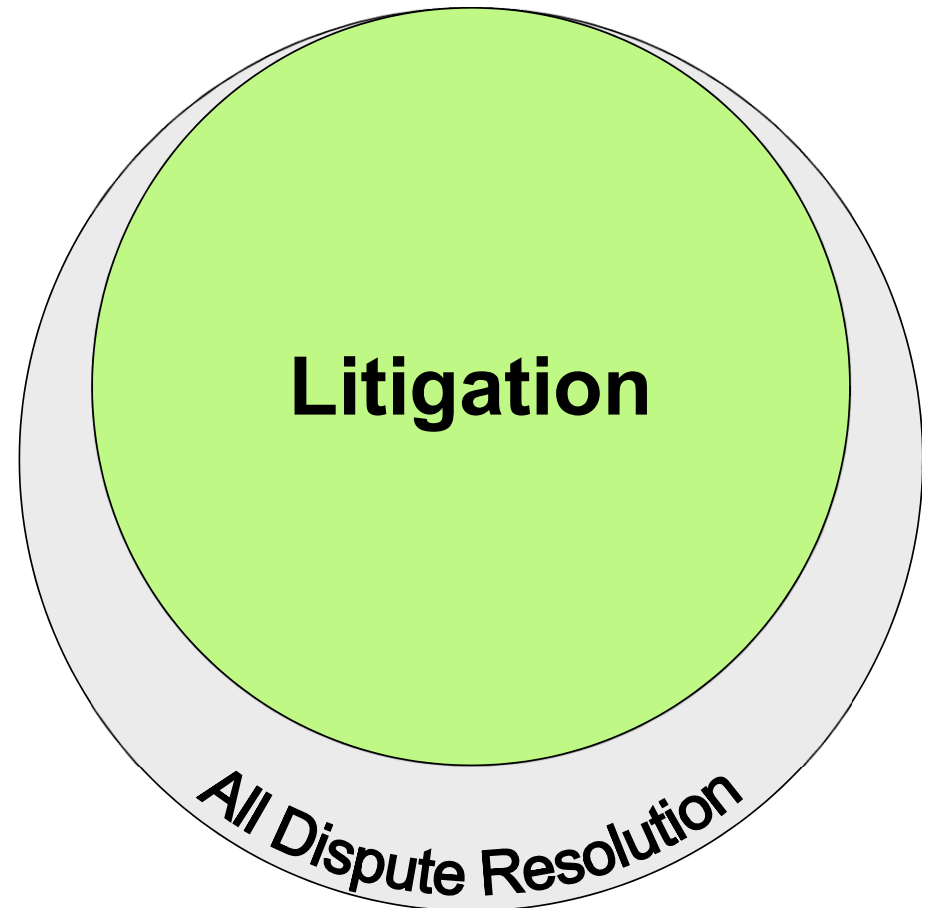
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Litigation is a form of Dispute Resolution

- A remarkable transformation has taken place, driven in a few short weeks by necessity (COVID-19) and technical feasibility. Litigation can function well online using software such as Skype for Business, Zoom and Microsoft Teams.
- The judge, counsel and solicitors can take part, remotely without the need to attend in person.
- Solicitors and counsel can communicate privately. Parties/clients can observe.



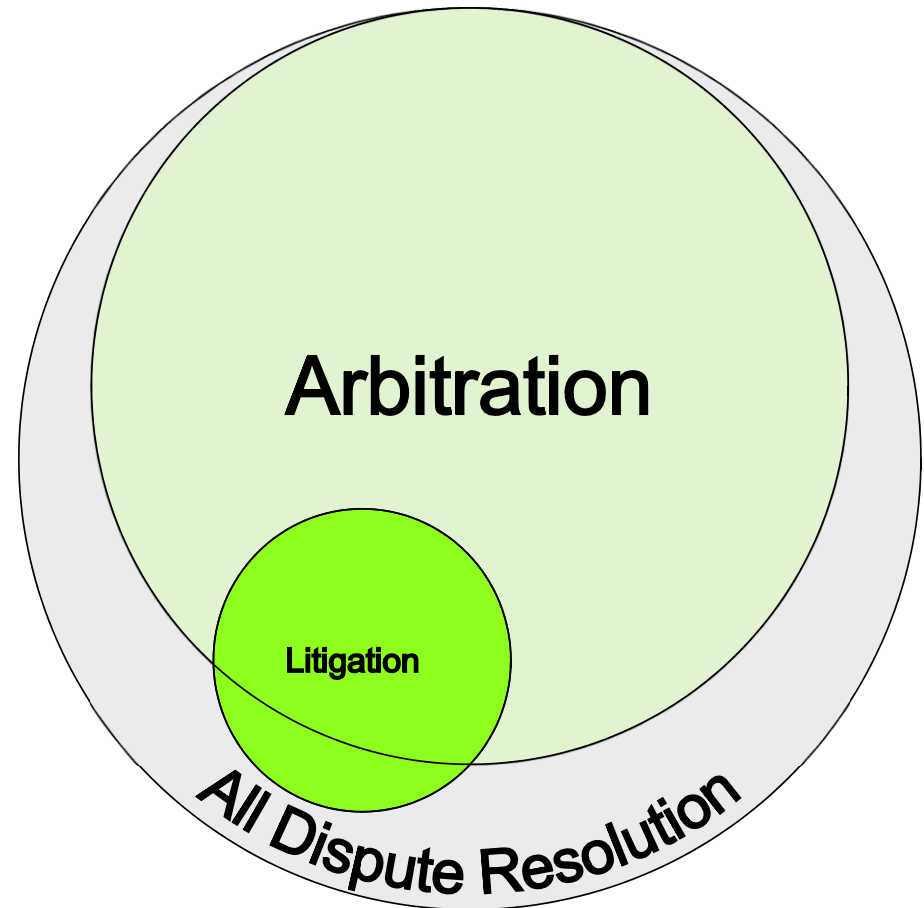
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Arbitration is a form of Dispute Resolution

- Arbitration is (often) a compulsory decision-making process. Parties chose the Arbitration Panel. In the absence of earlier resolution, it will conclude with a hearing (viva voce or on documents), possibly an appeal, and a Final Award.
- There will be consequences in terms of winners and losers and, generally, orders as to who shall pay the legal costs incurred.
- Some contracts include jurisdiction and arbitration clauses.
- Arbitration is sometimes described as ADR. It has more in common with litigation.



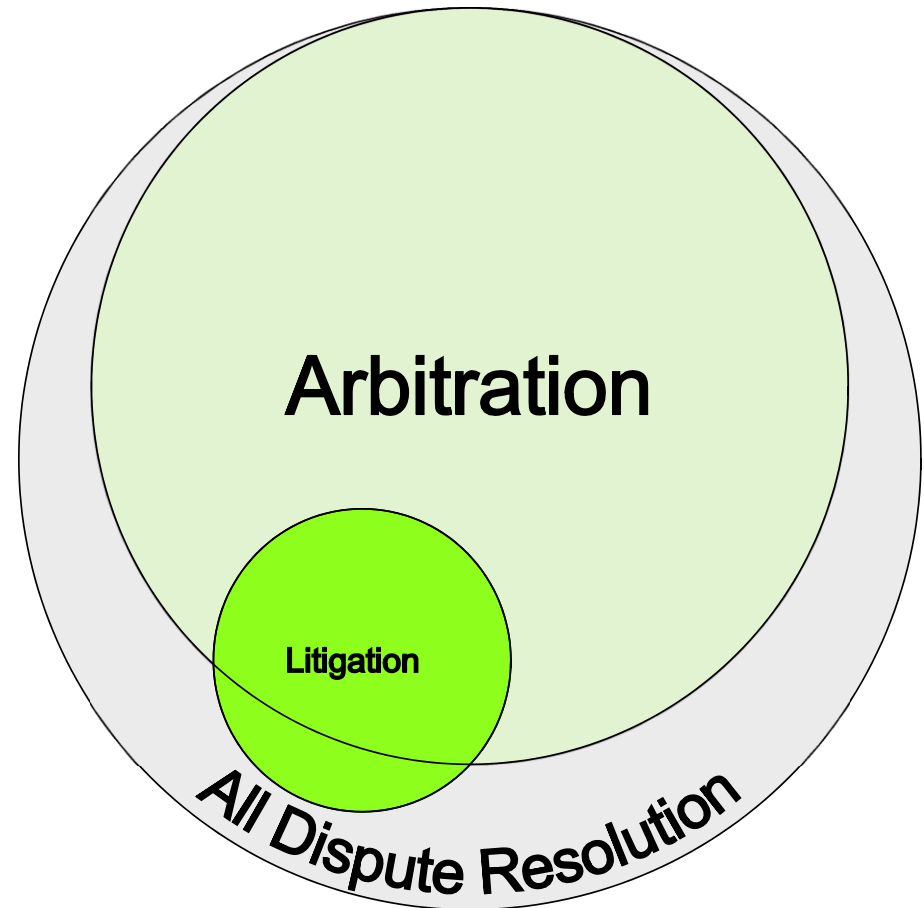
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Arbitration is a form of Dispute Resolution

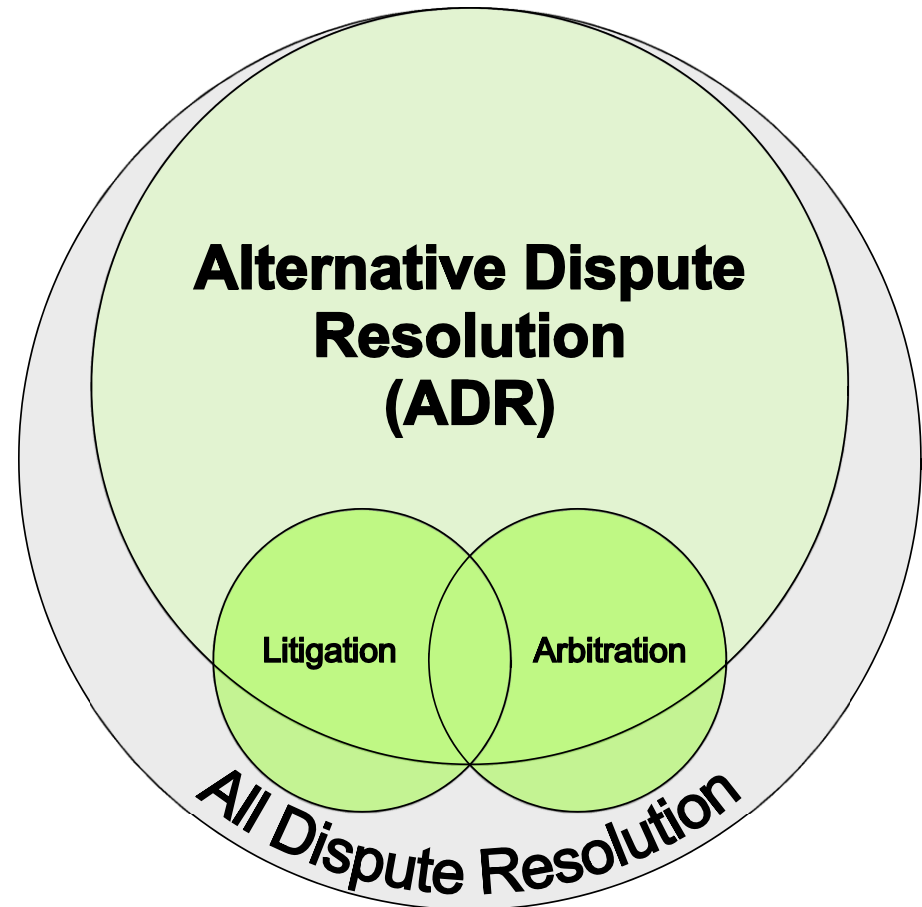
- Arbitration can also function well online using software such as Skype for Business, Zoom and Microsoft Teams, a matter of great importance in the global maritime trade.
- The Arbitration Tribunal, counsel and solicitors can take part, remotely without the need to attend in person.
- Solicitors and counsel can communicate privately. Parties/clients can observe, privately.



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Alternative Dispute Resolution (ADR)

- ADR is the name used for a group of dispute resolution processes. Generally they are non-compulsory or voluntary.
- Some are decision-making and binding, some are decision-making but not binding, some are purely consensual (both as to participation and final resolution).
- ADR is often used in parallel to litigation or arbitration but can be used in isolation.



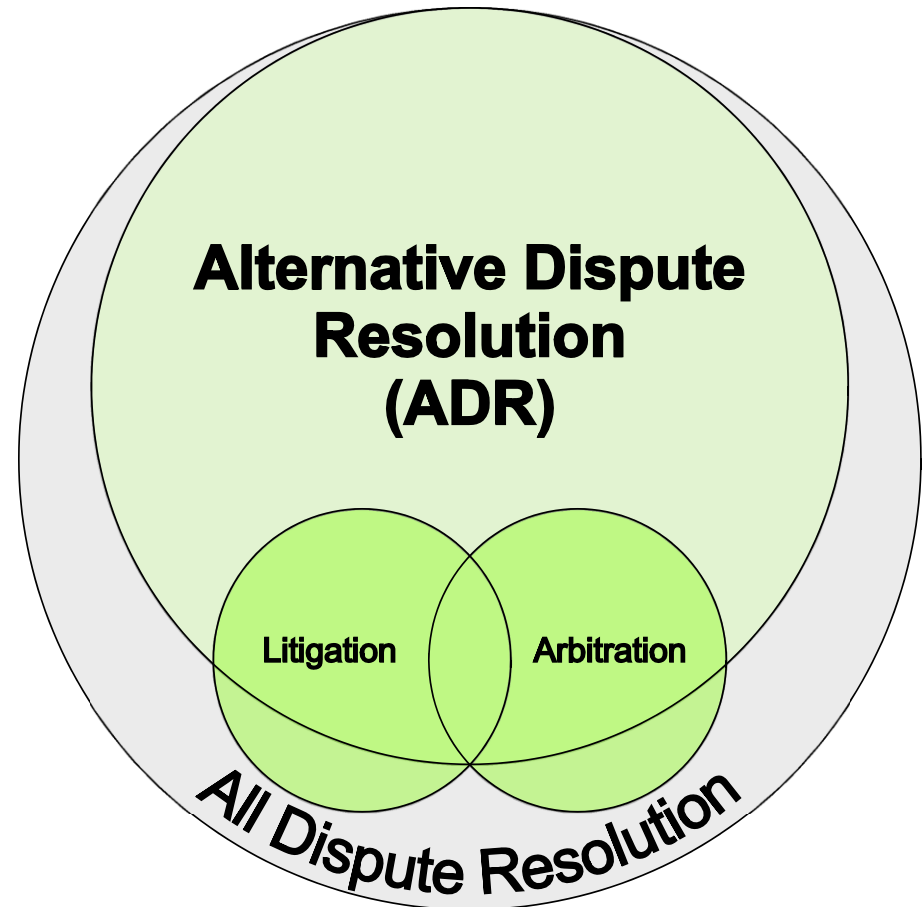
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Alternative Dispute Resolution (ADR)

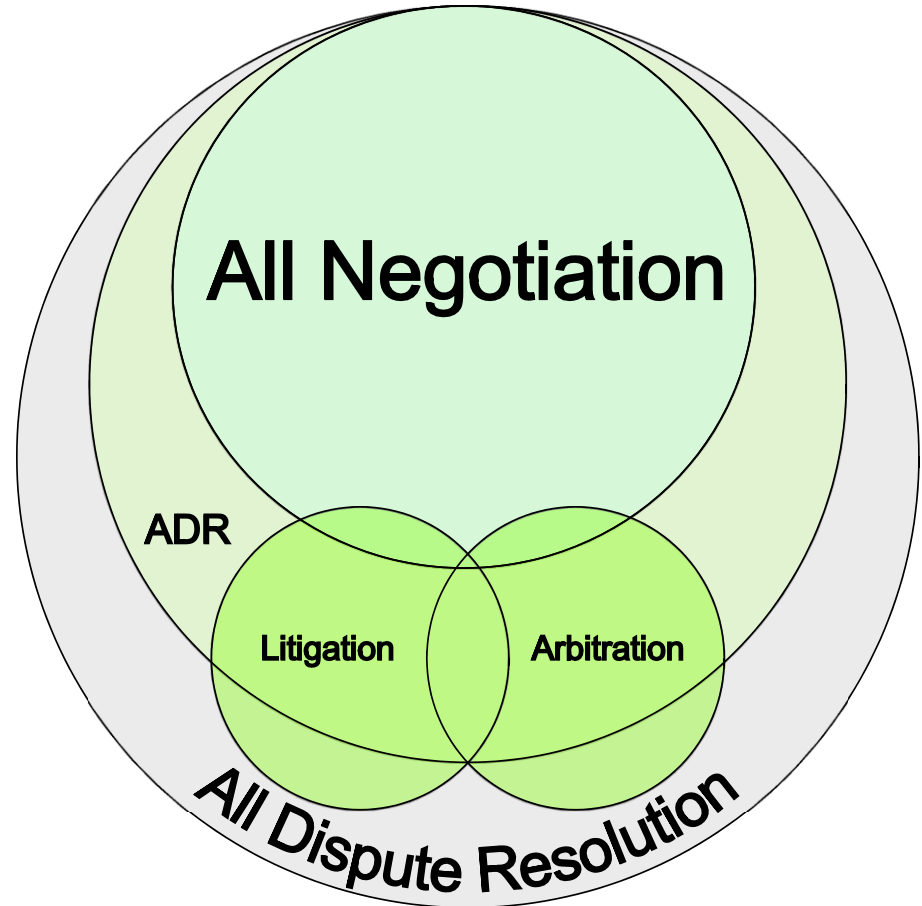
- Certain types of ADR can function very well online using software such as Skype for Business, Zoom and Microsoft Teams.
- Parties and solicitors can take part, remotely without the need to attend in person.
- Solicitors can communicate privately with counsel and experts (in case of need).



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Negotiation is a form of Dispute Resolution, a subset of ADR

- Negotiation is a voluntary process, a type of ADR. It is deal-making.
- Negotiation is often the means by which disputes are resolved, including those which are subject to litigation or arbitration.
- Negotiation can take many forms. It can be difficult to persuade parties to speak to each other. Parties generally cannot be obliged to negotiate, still less to agree to settle.



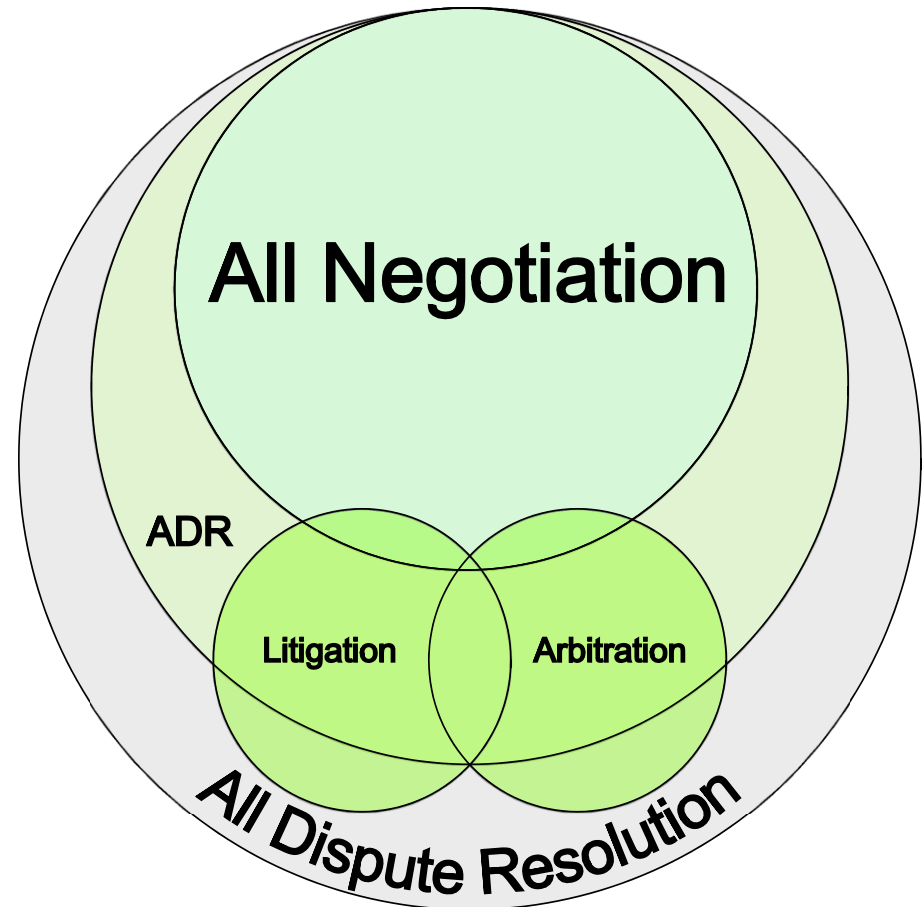
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Negotiation is a form of Dispute Resolution, a subset of ADR

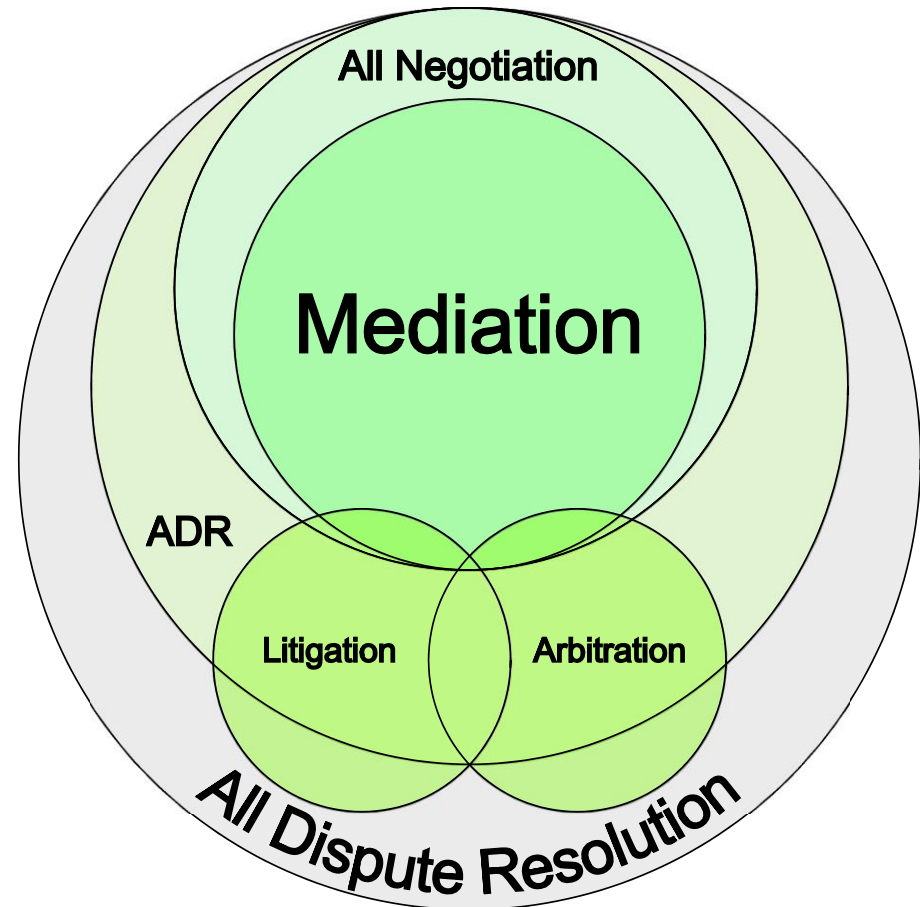
- It has never been necessary to meet to negotiate. But where a meeting is needed or useful, Negotiation can function well online using software such as Skype for Business, Zoom and Microsoft Teams.
- Parties, clients and solicitors can take part, remotely without the need to attend in person. Counsel can participate if needed.
- Parties, clients, solicitors, counsel and experts (in case of need) can communicate privately.



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Mediation is a form of Negotiation

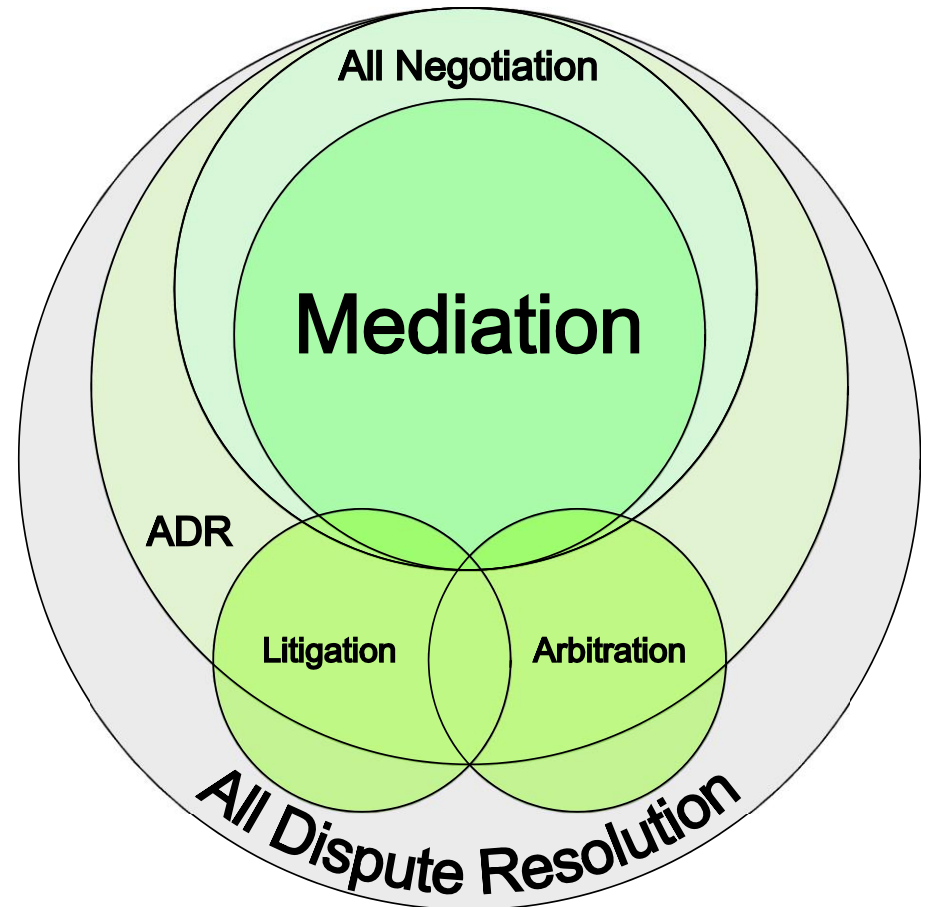
- Mediation is a voluntary process often used as a means by which to settle disputes which are the subject of litigation or arbitration. Parties can be encouraged by the courts to mediate (by costs pressures).
- The key defining feature is the involvement of an independent third party, the mediator, who assists the parties to negotiate or reach their own settlement.
- Mediators control the process but make no orders, judgments or awards. They make no decisions as to who pays legal costs. The parties control the result.



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Mediation is a form of Negotiation

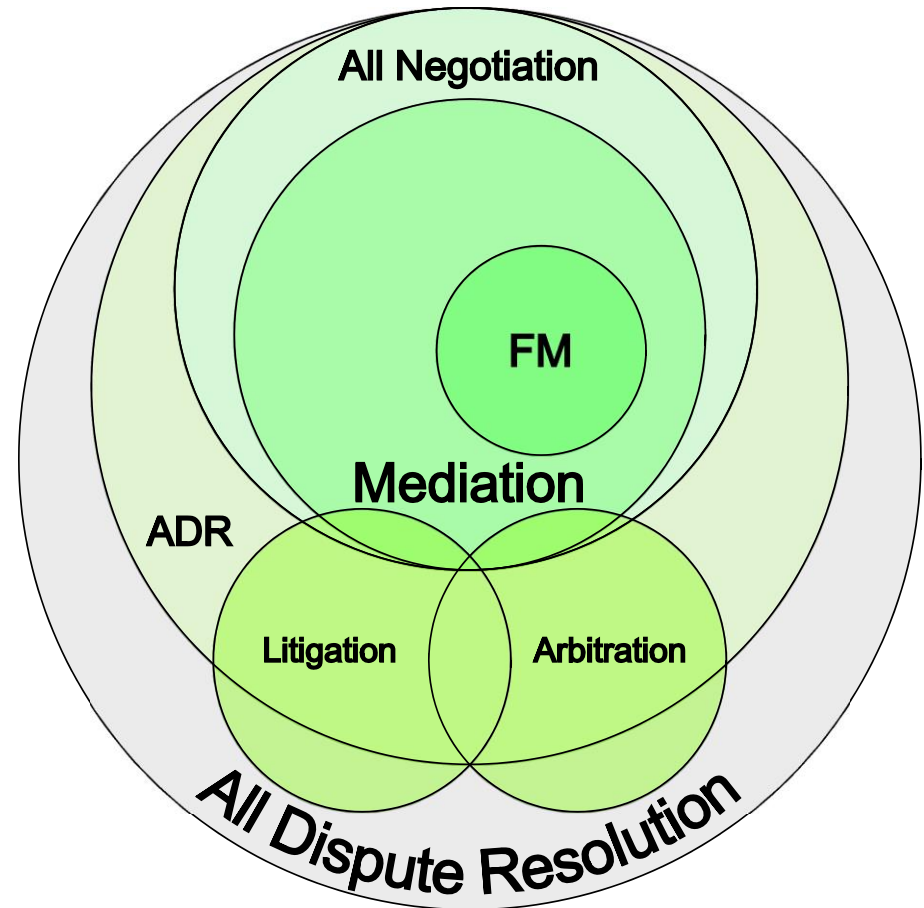
- Mediation is hugely successful in resolving disputes. Over the last 20 years it has become widespread and well-established, especially for large commercial disputes. It has been a slow-burning revolution.
- In Mediation, disaster (in the shape of the COVID-19 pandemic) has been the catalyst for rapid change, in conjunction with innovation in the shape of Skype for Business, Zoom and Microsoft Teams.
- Online Mediation or Visual ODR, may be different in many respects from traditional Mediation. Care is needed, but it can be nonetheless remarkably effective.



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Facilitative Mediation (FM) is a subset of Mediation

- In Facilitative Mediation the mediator assists the parties to negotiate their own resolution. It is probably the dominant form of ADR.
- The mediator expresses no view as to the relative strength or weakness of parties' positions, nor as to how the matter might be resolved on a just and equitable basis. But there may be "reality testing".



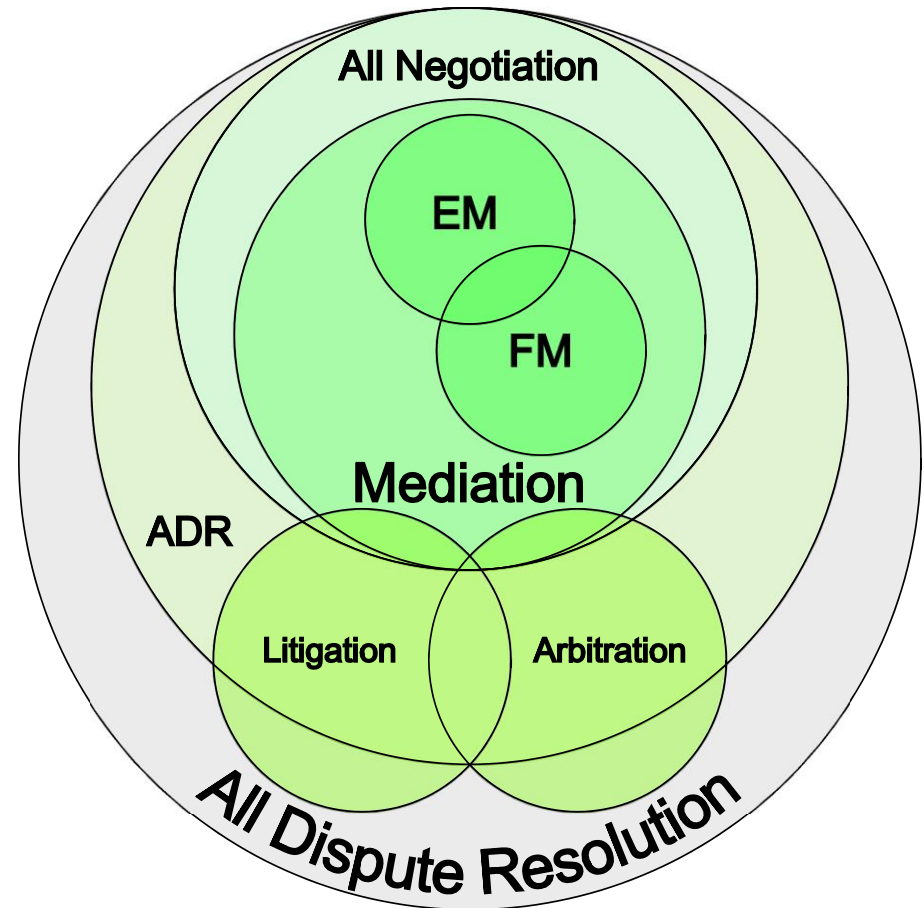
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Evaluative Mediation (EM) is a subset of Mediation

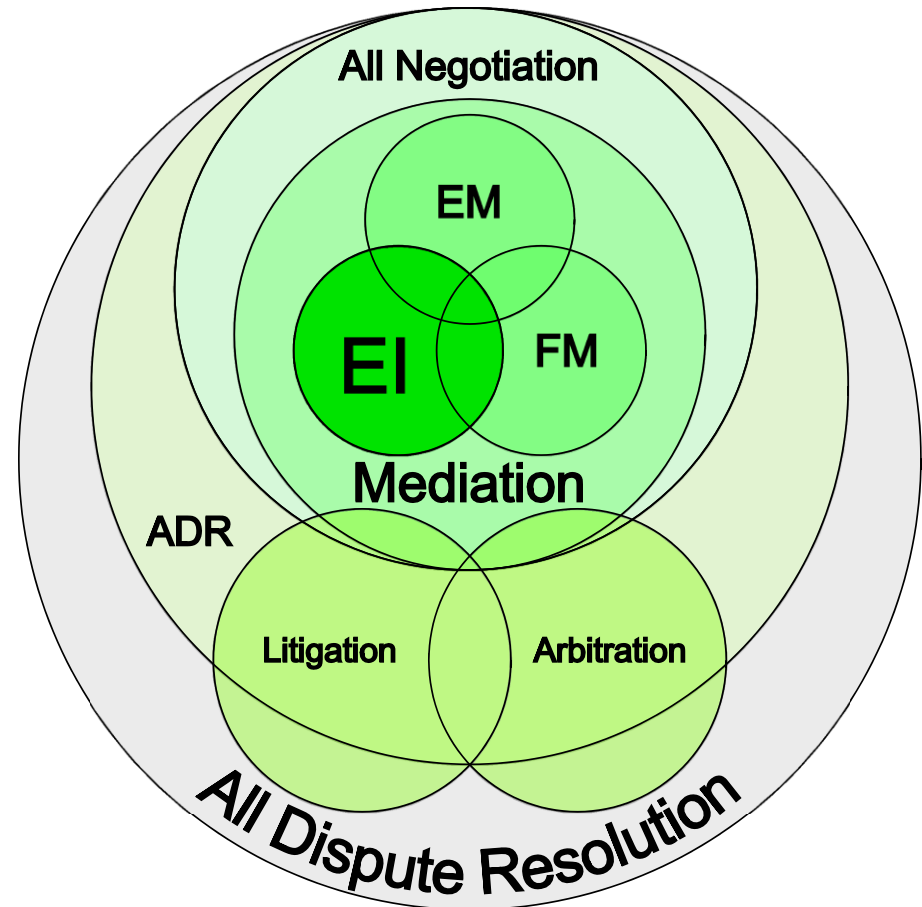
- In Evaluative Mediation the mediator assists the parties to reach a resolution, often after Facilitative Mediation.
- The mediator will express a view as to the relative strength or weakness of parties' positions, or as to how the matter might be resolved on a just and equitable basis, generally only with the agreement of all parties.
- Mediation can shift between Facilitative and Evaluative.



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Early Intervention (EI) is a form of Mediation

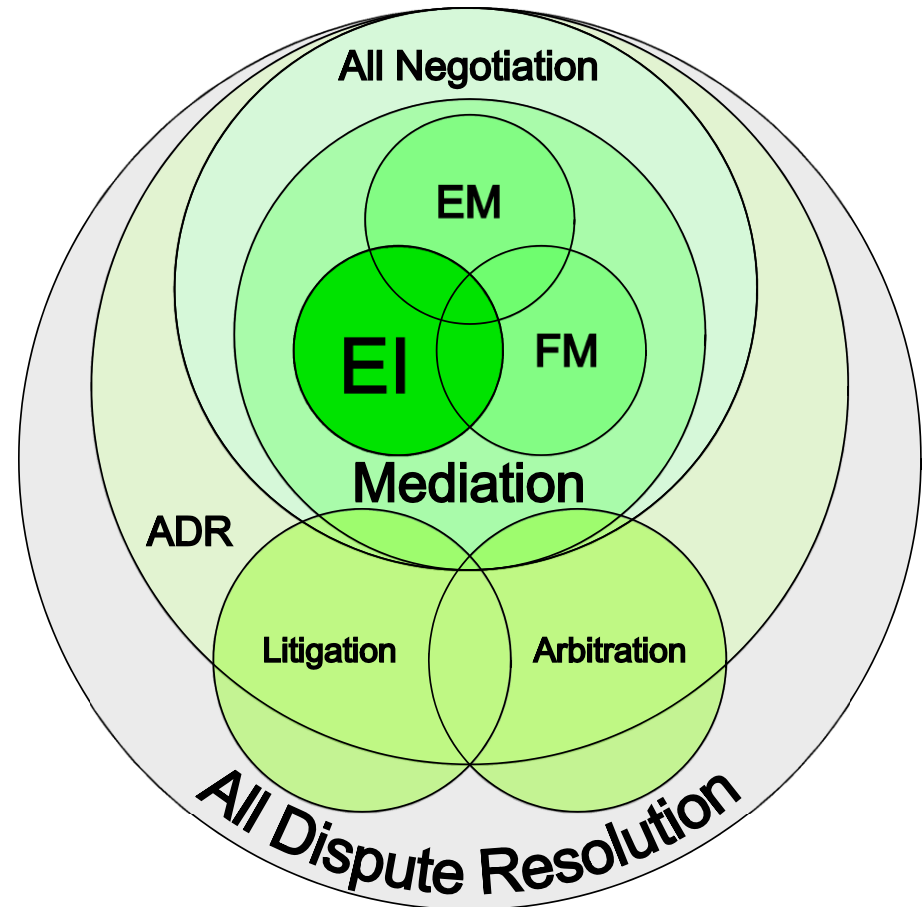
- Early Intervention is a new form of mediation which has gained particular traction in the last 5 years, notably in the resolution of maritime disputes.
- The concepts are applicable across a wide range of disputes.
- It can break an impasse where parties will not speak at all. It can be the prelude to and lay the ground for Mediation.
- Matters can shift between EI and Mediation by another means.



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Early Intervention (EI) is a form of Mediation

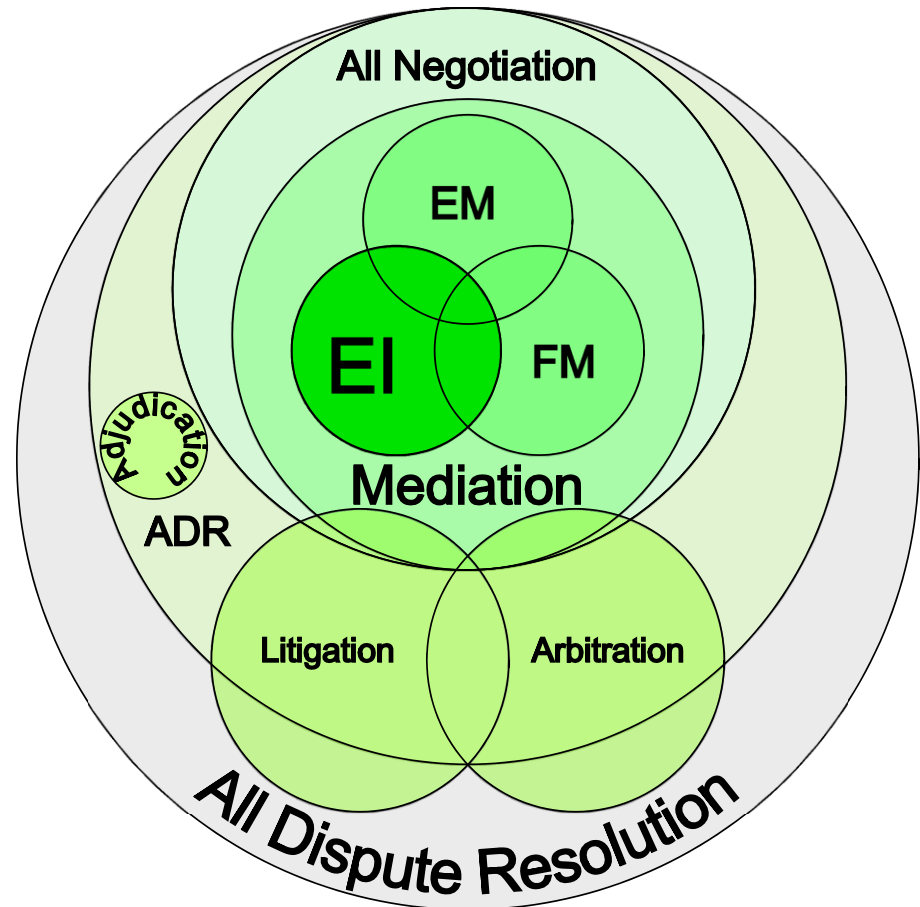
- In Early Intervention the mediator assists the parties to negotiate or reach their own resolution. It has a different form and dynamics to Mediation.
- The mediator expresses no view as to the relative strength or weakness of parties' positions, nor as to how the matter might be resolved on a just and equitable basis (unless all parties so agree).
- Early Intervention online offers a ready means to solve disputes on line, perhaps used in conjunction with traditional Mediation by Visual ODR. Care is needed, but it can be nonetheless remarkably effective.



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Adjudication is a form of ADR

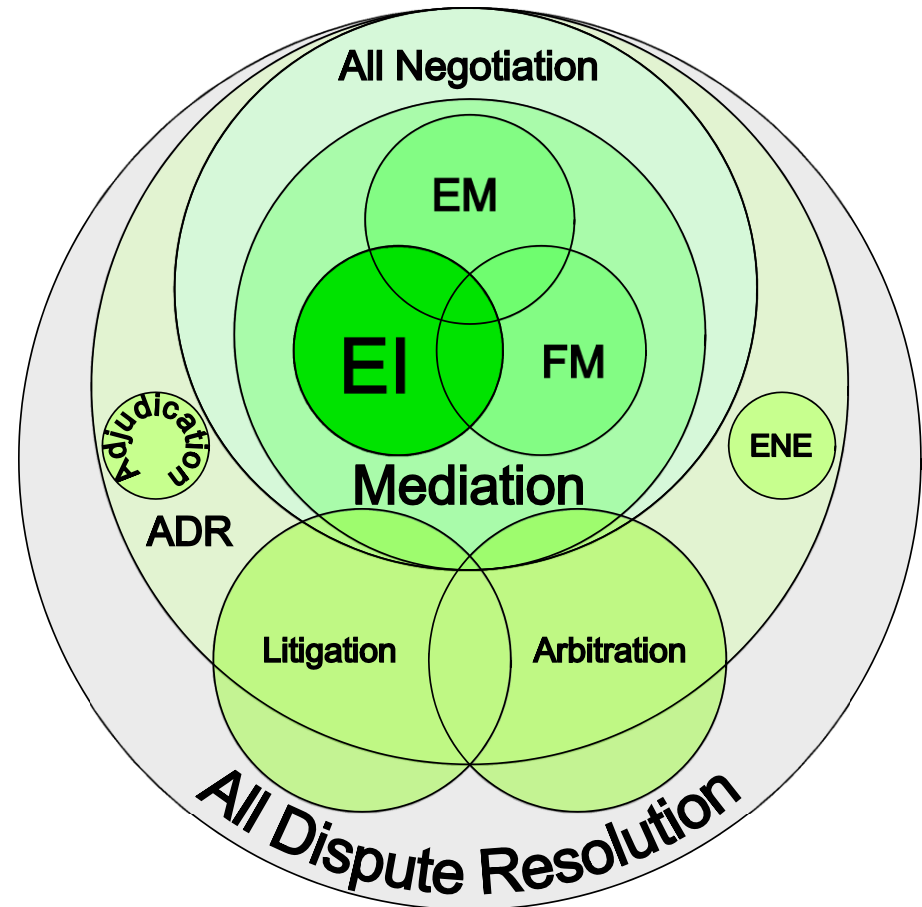
- Adjudication is a decision-making process. It is shown here for the sake of completeness. It is not a process of negotiation.
- The party appointed as adjudicator will, in the absence of earlier resolution, issue a decision which is binding.
- It is a rapid process, used especially in construction disputes, designed to ensure that the critical path of construction is not disrupted by disagreement(s).



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Early Neutral Evaluation is a form of ADR

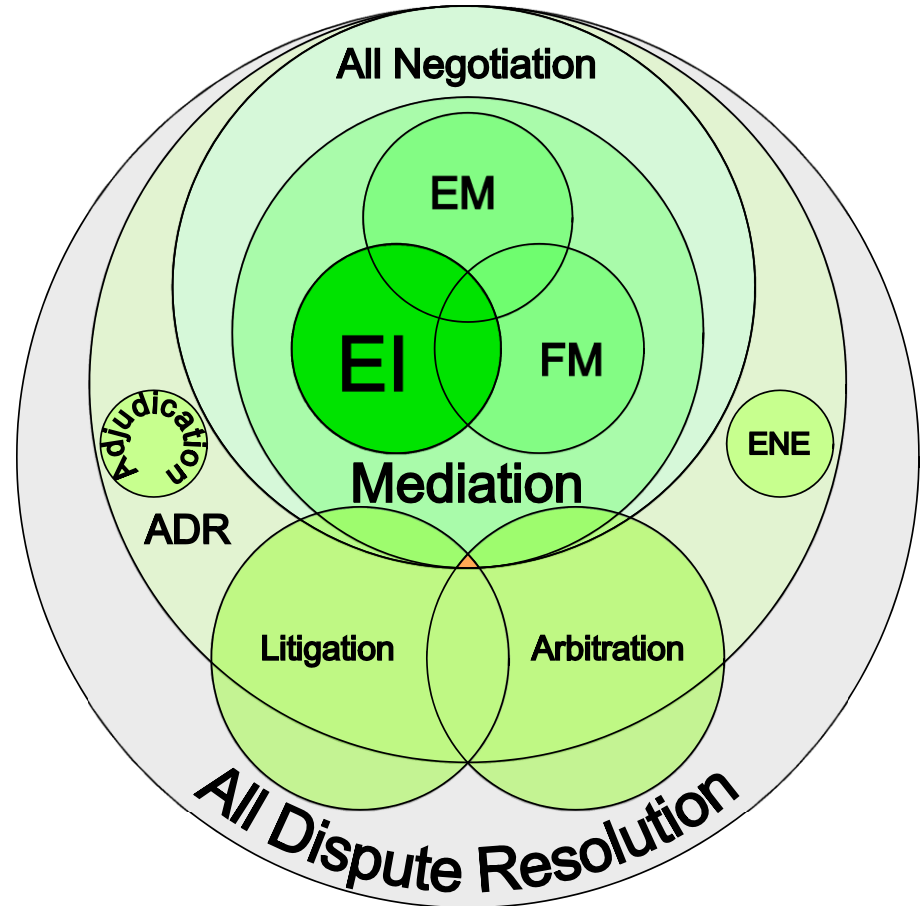
- In ENE the evaluator assists the parties to reach a resolution. ENE is shown here for the sake of completeness. It is not a process of negotiation.
- The evaluator will express a view as to the relative strength or weakness of parties' positions, or as to how the matter might be resolved on a just and equitable basis, generally only with the agreement of all parties.
- The ENE evaluation is not binding. Generally there are no orders as to who will pay legal costs of a dispute. It has much in common with EM.



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Court Supervision

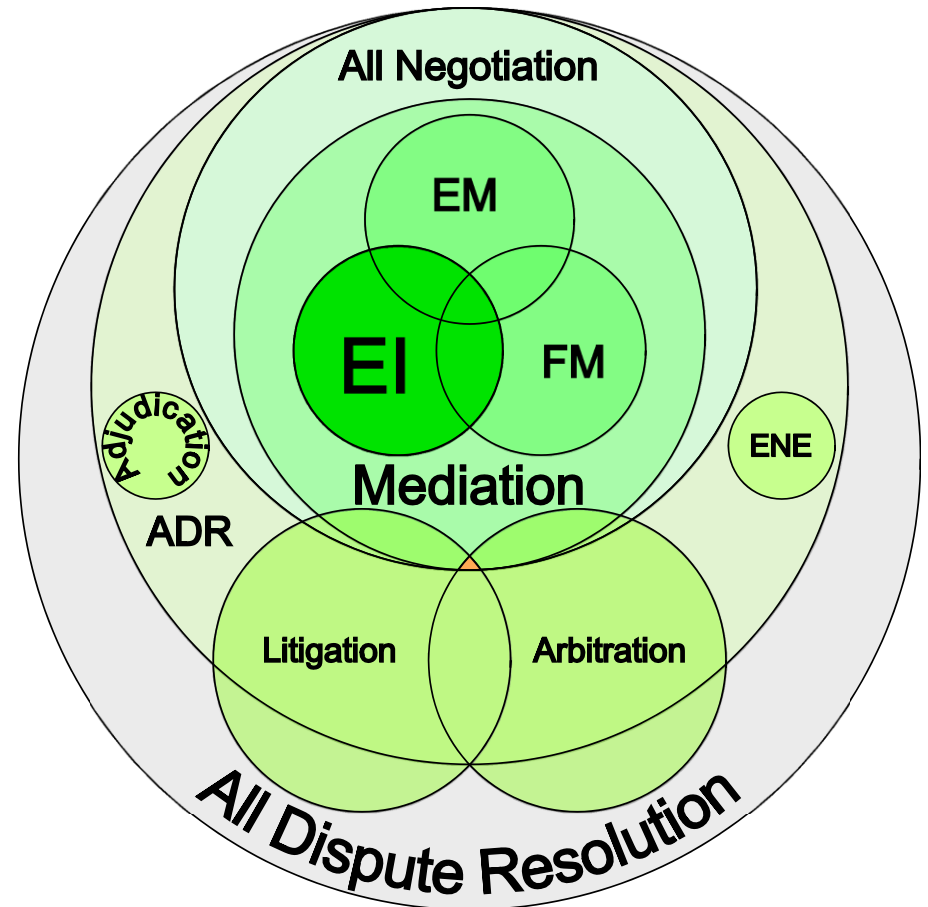
- Note the intersection right at the very centre of the image.
- At some point the courts will ultimately regulate or supervise all forms of dispute resolution, whether litigation, arbitration or ADR.
- The courts will, for example, always have jurisdiction over matters concerning potential breach of the criminal law.



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Conclusions

- ADR has effected revolutionary change in dispute resolution, over the last 20 years.
- Early Intervention offers a new means of resolving disputes by negotiation. It has gained considerable traction in the last 5 years, in maritime disputes.
- The advent of the COVID-19 pandemic has effected yet further rapid change in dispute resolution on line, used in conjunction with modern software systems.
- The new Visual ODR (whether Mediation or Early Intervention) has the look of permanent change.



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References

- This presentation is a companion piece to a new paper: *“The new Visual ODR: Online Facilitative Mediation and Early Intervention in the world of the COVID-19 pandemic”*, to be published shortly
- See also book: *“An Introduction to Alternative Dispute Resolution: Mediation in England and Wales”*, by the author on Amazon. It provides more detail, especially comparing arbitration and mediation, together with wider material on the phenomenon of mediation.
- The book is described as one of 21 the best ever E Books on Alternative Dispute Resolution and one of the best E Books on ADR and on Mediation to read in 2020.
- Thanks: to Honorary Professor Nic Clift, Senior Industry Fellow of RMIT University for assistance in formatting.

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