

**ARBITRATION AND MEDIATION:
A VIABLE ALTERNATIVE
TO COURT PROCEEDINGS?**

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The Litigation Process

Almost everyone has either heard or voiced a complaint about the cost, complexity, and time delay of court proceedings in the nineties. At present, it takes at least twelve months from the time that you place your case on the list for trial until the trial is finally heard. Delays of up to two and three years are not unheard of. This is, of course, in addition to the time required to go through the proceedings prior to the placing the case on the list for trial.

As the usefulness of the Court system as a method of resolving anything but major disputes declines, the prospect of turning to a modern variation of "pistols at dawn" comes to mind. However, there is a legal alternative to a regression to our earlier days. Many people are now turning to arbitration and mediation as methods to resolve disputes in a quicker and less expensive fashion. Typically, costs are shared equally.

Arbitration

Arbitration is the resolution of a dispute through a binding decision of one or more arbitrators. The role of the arbitrator is much like that of a Judge in that he/she or they try to resolve the dispute according to the law, rather than by way of compromise. The procedure, while less confrontational than court proceedings, is clearly adversarial. There is a winner and a loser. The awards made by arbitrators are, in the normal course final and enforceable in the same fashion as a judgment of the Court.

The advantages of arbitration are numerous. First and foremost, the process can, to a certain extent be dictated by the parties. The experience of agreeing on the process often brings the parties closer on the merits of the issue between them. And the more that is agreed upon, the lower the likely cost.

Another advantage of arbitration as opposed to litigation is the preservation of some degree

of the relationship between the parties. If the dispute between the parties arises from their commercial dealings, both parties may wish to try and preserve the nature of the relationship to their mutual benefit. Unfortunately, the litigation process, due to its length and expense, often pushes the parties farther apart, thereby destroying any possibility of a continuing relationship.

Unless there is a substantial amount of money involved, it is generally advisable to have only one arbitrator. The arbitrator is chosen by agreement between the parties. If no such agreement can be reached, a court application can be brought to name an arbitrator.

Once an arbitrator is named, the parties will describe his powers and duties in a jointly prepared document called a "submission." This submission will also provide that the arbitration award can be enforced by the Court, should one of the parties not comply with the decision of the arbitrator. The submission will also set forth whether or not the award of the arbitrator can be appealed. However, the courts have shown a very strong reluctance to interfere with the award of an arbitrator.

It should also be remembered that, as opposed to court proceedings, arbitrations are not public information. Therefore, when business issues which you would prefer to keep from your competition are involved, arbitration has the distinct advantage of allowing you confidentiality.

In order to take advantage of the benefits of arbitration, consideration should be given to inserting arbitration clauses in agreements being drafted today. Such clauses are most easily raised with the other party to the agreement when goodwill is at its highest; i.e. when the agreement is first being negotiated.

Mediation

Mediation is a process whereby two or more parties to a dispute use a neutral third party to assist them in reaching a settlement. The process is voluntary so that it only works if both parties are willing. It involves a negotiation where the parties themselves are present but the mediator works to facilitate settlement that the parties themselves have been unable to reach. The result does not bind the parties legally and if it does not work out, they can still take their dispute to an arbitration or to court.

By working with the parties on their underlying interests, a mediator can often achieve a result at settlement that no other form of dispute resolution can do. For example, in an arbitration, or a court proceeding, one party wins and the other party loses. Clearly, this is unsatisfactory in all cases to the loser. In a mediation there is no loser. It is a win win situation if the parties come to a settlement.

Some of the obvious advantages to mediation include speed, cost savings, and confidentiality. When a mediator is appointed by the parties, time is scheduled for the mediation, and any relevant documents are exchanged in advance. There are no formalities to argue about concerning the relevance or admissibility of documents. The parties agree on their documentation or there cannot be a mediation. The appointed time is when the mediation is heard. There is no other mediation going on before the same mediator that day. In this way, there is no delay for hearing, and you do not waste your time.

From the point of view of cost, since procedures are very informal, there are no technical delays and no appointment backups. The parties share the cost of the mediation equally. Therefore, each has a commitment to a solution that works. In many cases, the parties have a need to continue doing business together and must put a dispute behind them quickly and with mutual satisfaction. Mediation achieves this result.

From the point of view of confidentiality, the parties set their own terms of reference for the mediation. Any discussions which go on at the mediation and any involvement by the mediator are not capable of being repeated before a court in a later proceeding if the mediation fails. In this way neither party is prejudiced by what takes place in the mediation in the event of failure, and the parties have every reason to be fully frank in their negotiations.

Mediation also limits the issues in a case; that is, sometimes when a case is allowed to go on longer, additional disputes arise in the framework of the case and it becomes more complex, delayed, more lengthy and more expensive. Mediation avoids all of these problems.

Mediation has been going on for a long time but has recently come to the forefront of dispute resolution. Parties have suffered delays in the judicial system for a long time and should be aware of their alternatives.

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