

## **AVAILABLE MECHANISMS FOR DISPUTE RESOLUTION**

The central mechanisms available for dispute resolution are arbitration, mediation and litigation. The advantages and disadvantages of each are the topics of this article.

Arbitration is a form of alternative dispute resolution (“ADR”) by which the parties, typically by written agreement executed prior to the time of the relevant dispute, place the dispute before an impartial person rather than a court of law or equity. By definition, arbitration constitutes the “parties’ agreement to submit their disputes or a controversy to a person chosen by themselves for determination.”

Arbitration is similar to an informal trial. The arbitration panel is neutral. Typical panels are comprised of 1 to 3 arbitrators. The key, of course, is selecting a panel that understands the law applicable to the dispute and who can be persuaded into believing your theories of the case. The arbitrators judge the relevance and materiality of the evidence offered. Rules of evidence apply, but are frequently relaxed (which may be good or bad). Evidence packages may be submitted by agreement or stipulation, akin to trial.

Each party may introduce witnesses, documents and other evidence to support its case. After the parties present evidence and argument, the arbitrator renders a final, and, if agreed to, binding decision. Note that reasons for the decision need not be provided. Why? To minimize the likelihood that the award will be upset or overturned and also to limit the burden on the arbitrators.

The critical advantages of arbitration are that it may be significantly less expensive (due to relaxed evidentiary rules) and time consuming than litigation which is formal and often protracted. Arbitration empowers the parties, as they have the

opportunity to select the arbitration panel and further to select how evidence can be introduced.

Of course, arbitration has its disadvantages too. Arbitration is not right for every case as arbitrators will typically award money as damages and rarely will order specific performance or injunctive relief. Also, unlike litigation, unless by agreement, the parties have no right to conduct discovery. Due to relaxed evidentiary rules, hearsay may be admissible which could prove crucial to the arbitrators reaching their decision. You could also encounter arbitrators who fail to grasp the issues in your case. Further more, the arbitrators' decision need not be based upon the law, but could literally be the result of a "gut reaction". Other disadvantages include limited judicial review of the arbitrators' decision (absent evidence of arbitrator corruption, fraud or exceeding authority) and also that there is no right to join parties to an arbitration that may be necessary to fully resolve a dispute.

Mediation is another informal dispute resolution process whereby the parties agree to select an experienced, neutral third-party, a mediator, to listen to their dispute. Usually, during mediation both sides make a presentation or opening statement to the mediator stating their case. Thereafter, the mediator might separate the parties into different rooms and begin conducting a series of meetings to explore the possibility of resolving the issues. The individual sessions allow the mediator and the party to exchange candid comments concerning the strengths and weaknesses of the case. The mediator does not decide the issue or make a recommendation, but only acts as a sounding board and facilitator to bridge the gap between the parties.

The mediator guides the opposing process through the negotiation process, listening to all sides of a dispute, pointing out strengths and weaknesses in the arguments and holding separate caucuses with each side to help the parties develop settlement options outside the presence of the opposing party. Therefore, selecting a good mediator is the key to a successful mediation. The mediator should be experienced in the field at issue. The mediator should not be familiar with the parties or the actual dispute though.

Like arbitration, mediation allows the parties convenience, flexibility and control over the negotiation process, all of which is typically not afforded in litigation. Like arbitration, rules of evidence are relaxed and evidence packages may be submitted by agreement. Position papers are sometimes accepted. Mediation is an extremely cost effective alternative to other methods of dispute resolution and enjoys a high success rate assuming the parties want to entertain the process in good faith. Unlike arbitration, decisions are not “binding”. A successful mediation means the parties have agreed on a resolution.

Litigation is typically the least favored form of dispute resolution. The wheels of justice grind slowly and the cost of preparing a claim, any claim, for trial can be high, often higher than the possible recovery (due to extensive discovery, experts and lengthy trials). Litigation affords the parties the least amount of control over the dispute resolution process. And judges, while knowledgeable of the law in general, might not be knowledgeable about the realities and practicalities of a certain dispute and its circumstances. One does have the right to appeal though.

No one form of dispute resolution is better than the other. Rather, each has its own advantages and disadvantages, as highlighted above. It is important to evaluate

which form of dispute resolution is best suited for the particular type of dispute. If control over the process is important though, one is better off arbitrating or mediating if such mechanisms are available.

### **MEDIATION/ARBITRATION v. LITIGATION**

#### **Mediation/Arbitration**

1. Often early settlement negotiation
2. Select mediator/arbitrator
3. Often set own schedule
4. Limited preparation/discovery
5. Private resolution
6. Customize solution
7. May preserve relationships
8. Limit costs

#### **Litigation**

1. Average of 2 years to trial
2. Take assigned judge
3. Comply with court schedule
4. Full-blown discovery
5. Public proceedings
6. Usually all or nothing
7. Usually sever relationships
8. Costs may be determined by opponent's strategy and court's schedule