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## **Comparing Mediation, Arbitration and Litigation**

Generally speaking, the term "mediation" covers any activity in which an impartial third party facilitates an agreement on any matter in the common interest of the parties involved. Generally speaking, arbitration is a private court that is governed by rules that are distinct from the rules that govern trial courts.

### **1. Mediation**

An overwhelming majority of construction cases are settled through mediation. Mediation is a voluntary process in which a neutral person helps those in a dispute negotiate effectively with each other to resolve their disagreement. The mediator does not act as a judge and has no power to force either party to settle. Instead, the mediator is a facilitator, helping the parties explore the issues and possible outcomes, ultimately leading to a resolution crafted by the parties themselves. The agreement they reach becomes a binding contract that resolves the dispute once and for all.

Construction mediators are nearly always lawyers. Most have significant experience in the field as well as training in mediation skills such as active listening, reframing of issues and consensus building. They combine their training and experience to help the parties solve the problem quickly and efficiently.

Mediators charge by the hour or the day. The mediator's fees will substantially vary. The mediator's fees are divided among all parties participating.

Most construction mediations follow the same format. Each party submits a private or public brief to the mediator (and the other party, if a public brief.) The brief sets forth the facts, the contract provisions and the supporting law for each issue as well

as describing the relief they seek.

Everyone then meets, often at the mediator's office. The parties are almost always represented by counsel, and experts often attend as well. All parties meet together for a joint session in which the mediator explains how the day will proceed.

Sometimes each side's lawyer or expert makes a substantive presentation, explaining their position. These presentations are especially helpful if the mediation occurs early, before a lawsuit has been filed, for example. It gives the parties an opportunity to more clearly understand the other side's position, to evaluate their presentation skills, and allows the party making the presentation to feel like it has been heard by both the mediator and the other side. At the conclusion of the joint session, the parties move into separate rooms and the mediator meets with each party, communicating information and proposals until settlement is reached. These caucuses may last for a short while or hours, as each party explores various resolution options. Most often, a settlement agreeable to both sides results.

i. **Advantages To Mediation**

Mediation has many advantages. First and foremost, the parties control the terms of the resolution, rather than having the terms decided for them by a judge or jury. Their "deal" can reflect business needs like cash flow, or a discount for speedy payment, rather than simply a legal solution.

This advantage becomes even more significant when one realizes that neither the judge nor the jury have much discretion when in court. A jury can only determine the facts and apply law given it by the judge. The trial judge is similarly constrained, having to apply the law handed down by the court of appeals to the facts at hand. If the situation presented calls for a change in the law to provide a just result, the court of appeals must change the law, not the trial court. In contrast, the parties to a dispute can fashion any remedy that suits them. They are not bound by law, precedent or other constraints.

A second advantage is that the parties can fashion a compromise solution. Where the issues are not black and white, but the outcome is, a judicial solution will have someone winning all and someone losing all. In mediation, the parties can recognize the closeness of the issue itself and divide the "spoils" appropriately, rather than giving

everything to the winner when the case is close.

A third advantage is that a negotiated resolution can be obtained quickly. It can take years for a case to proceed to trial. There is no guarantee a party will not appeal. An appeal could take several more years. Should the appellate court decide the case could be retried and possibly back up on appeal.

A fourth advantage of mediation is that innovative solutions to a problem may be explored. You can create your own solutions rather than have a judge or arbitrator impose a decision on you. Thus, you maintain the power to decide rather than have someone else decide for you.

Finally, a negotiated resolution can avoid the significant transaction costs associated with a legal resolution. The parties can avoid the costs of lawyers, of experts, of court reporters, etc., and can apply those savings to part of the solution.

## ii. Disadvantages To Mediation

A mediated solution can be disadvantageous as well. Mediation almost always involves compromise. If one party will not compromise, or wants to "teach a lesson" to the other party, mediation will not be successful.

Further, a mediation result cannot be used to guide the industry as a whole like a court decision can because there is no mechanism for transmitting that information. Further, as mediated solutions do not involve a final decision containing citations to legal authority, third parties cannot easily understand why a particular resolution was reached.

## 2. Arbitration

Arbitration is similar to a court proceeding in that evidence through documents and witnesses to prove relevant facts. In court, issues of fact are resolved by a judge or jury. In arbitration, the arbitrator and not a judge or jury is the trier of fact.<sup>1</sup>

When deciding to arbitrate or litigate the following factors should be considered:

- The availability of provisional remedies.
- Discovery.
- Expense.

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<sup>1</sup> In arbitration, the party seeking arbitration is called a claimant and the party against whom relief is sought is called the respondent.

- The need for rights to appeal or finality.
- The importance of the record.
- The enforceability of the arbitrator's award. and
- The expertise or bias of potential arbitrators.

**i. Appealing an Arbitration Award**

One draw back to arbitrating is the limited judicial review permitted of the arbitrator's decision. Except as provided in California Code Of Procedure §1286.2 (vacation of award) and in California Code Of Procedure §1286.6 (correction of award) or a specific provision in the arbitration agreement, the merits of an arbitration award are not subject to judicial review, even if an error of law appears on the face of the award or causes substantial injustice. See *Moncharsh v Heily & Blasé* (1992) 3 C4th 1, 10 CR2d 183.

**ii. Expenses Compared**

There is no absolute guideline for determining if an arbitration or litigation will be cheaper. As a general rule, if the hearing is expected to be more than 15 days, litigation will probably be cheaper than arbitration.

- Arbitration fees: The arbitrator fees are split equally amongst the arbitrating parties. California Code of Procedure §1284.2
- Administrative fees: Arbitration providers charge administrative fees for appointing arbitrators, providing hearing rooms, scheduling and calendaring, handling exhibits and for arbitration compensation and expenses. These fees are quit expensive.
- Reporter Fees: A party who wants a court reporter to make a record of the proceedings must pay for the court reporter.
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**iii. Discovery**

Discovery is only permitted if the arbitration agreement provides. See California Code of Procedure §1283.1. In the absence of a provision to the contrary, discovery in construction arbitration cases usually consists of only examination of the jobsite and the opposing party's documents and exhibits. The parties usually stipulate to produce other

documents so to avoid subpoenaing the documents and having to read them at the arbitration.

Ordinarily, depositions, interrogatories, request for admissions, physical examinations, and order for inspection of documents are not available in construction industry arbitrations. Arbitrators may suggest that parties stipulate to conduct discovery. The arbitrator, however, does not have the authority to order depositions. See California Code of Civil Procedure §1283.

Full or limited discovery can be specified in the arbitration agreement or by stipulation. Many counsels will specify document production and a limited number of depositions for each side.

#### **iv. Law and Motion**

There is no law and motion procedure in arbitration although parties occasionally apply to arbitrators for orders before evidentiary hearings. Again, these issues can be addressed in the construction contract.

One difference between arbitration and litigation was that a 998 motion could not be made in arbitration. This, however, has changed. A party in arbitration can now make an offer to allow an award to be entered. If the opposing party fails to obtain a more favorable award, that party may, not recovery post offer costs and must pay the opposing party's costs from the time of the offer. (These 998 offers are an excellent litigation tool for leverage to settle a case.)

#### **v. Efficiency**

Arbitrations can sometime be more efficient because the arbitrator can be more available than a court. Further, an arbitrator can work late, start early or even take a short lunch break. Courts however, have a set schedule as well as many other cases on their dockets.

#### **vi. Arbitrators' Expertise and Bias**

One non-economic factor to consider is that fact that arbitrators usually have areas in which they specialize in. Thus, they are going to have an excellent understanding of

the subject matter being litigated. Judges, on the other hand, hear a myriad of cases in many different areas of the law. A judge or jury may not have basic knowledge to understand the complexity of a construction case.

Arbitrators, like judges have biases. Selecting an arbitrator should take some consideration and not be chosen quickly. Some arbitrators will lean more favorably on the defense side while other arbitrators will lean more favorably on the plaintiff's side.

It is in the best interest of any party to select an arbitrator who appears to be neutral. A one-sided arbitrator may just bend over backwards for the other side just to not appear biased. Further, you want to maintain your relationship with opposing counsel for future cases. You may lose your credibility and repute with opposing counsel should you have the reputation for selecting biased arbitrators.

#### **E. Litigation**

The term litigation is usually used to define the process of resolving a dispute in court. It is a process distinguished from arbitration or mediation.

But of much greater importance is the role of litigation as an incentive for without the threat of litigation, settlement of disputed claims would be near impossible. Plaintiffs and defendants alike typically settle to avoid the risk of a less desirable resolution at trial.

Litigation, despite its obvious disadvantages, plays a key role in the negotiating of construction claims. This is because the basic question being negotiated is what will happen if the parties fail to reach an agreement and are left with the judge or jury as their only remedy.

Each party should determine its own negotiating position by reference to the likely outcome of trial. The plaintiff should recognize the virtue in settling for an amount representing a discount from the probable recovery at trial. The defendant should appreciate the advantage of avoiding the cost and risk of trial to determine its settlement position accordingly.

The litigation of a construction claim usually commences with a party asserting a claim for money. It may be a subcontractor seeking recovery from a prime contractor or a prime contractor seeking recovery from an owner.

The decision is, of course, made by the party that elects to file a complaint thereby initiating adversarial proceedings. The decision to end the adversarial proceedings early may depend on whether or not (1) the plaintiff extends a reasonable settlement offer and whether defendant accepts a reasonable settlement offer.

When the parties allow a claim to go to trial, each is making a wager that the case will be resolved on terms preferable to the terms on which the case can be settled. One or both parties will lose that bet.

In determining the probable cost of litigation, both the amount of anticipated expenses at the duration of the litigation must be taken into account. A specific amount recoverable at the end of trial (or after the appeal) is worth less than payment of the same amount now.)