UNDERSTANDING MEDIATION AND ARBITRATION

While disputes are generally resolved through trial, many disputes may be resolved in a proceeding that does not involve a court in any way. Two means to resolve disputes are mediation and arbitration.

Let's begin with a discussion on mediation. Mediation is a meeting between parties to a dispute, their representatives and a mediator to discuss settlement. The mediator's role is to help explore issues and settlement options. The mediator may offer suggestions and point out issues that the parties may have overlooked, but resolution of the dispute rests entirely with the parties themselves. The American Arbitration Association, perhaps the group that conduct more mediations than any other, reports that mediation can work as statistics show that 85% of commercial matters and 95% of personal injury matters end in written settlement agreements.

Any type of civil dispute can be resolved by mediation. Mediations can originate in different ways. First, mediation can occur when a dispute initially arises and before a lawsuit is ever filed. Second, mediation can occur as an adjunct procedure to pending litigation. That is, as soon as the parties file a lawsuit, they can use mediation in an effort to resolve the dispute at the inception of litigation or at any time thereafter but prior to a trial being held. Third, mediation can occur during or immediately after a trial but before a decision is announced by a judge or jury.

Arbitration on the other hand is a referral of a dispute to one or more impartial persons for final and binding determination. Parties can exercise additional control over the arbitration process by adding specific provisions to their contracts' arbitration clauses or, when a dispute arises, by agreeing to modify the arbitration rules to suit a particular dispute.

The most important step in initiating arbitration is the agreement to arbitrate. This agreement can be of one of two kinds: it can take the form of a *future-dispute arbitration clause* in a contract or, where the parties did not provide in advance for arbitration, it can take the form of a submission of an existing dispute to arbitration.

The parties can provide for the arbitration of future disputes by inserting the following clause, or something similar, into their contracts.

> *Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by [describe group to conduct arbitration under [describe particular rules that will apply—for example with the American Arbitration Association parties to a construction contract may refer to its Construction Industry Arbitration Rules], and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.*

Arbitration of existing disputes may be accomplished by the use of similarly worded language except the parties would specifically describe the dispute that they are choosing to arbitrate.

Arbitration hearings are conducted somewhat like court trials, except that arbitrations are less formal. Arbitrators are not required to follow the strict rules of procedure or evidence that apply to complaints and trials.

After both sides have had an equal opportunity to present their respective cases, the arbitration hearing will be declared closed and usually an award will be entered within a month's time. The award is the decision of the arbitrator on the matters submitted to him or her and is binding. The purpose of the award is to dispose of the controversy finally and conclusively. There is no requirement that the arbitrator identify his or her reasons for ruling a certain way; in fact this is oftentimes discouraged as it may otherwise encourage the losing party to seek to set aside the arbitration award by filing a complaint with a court. Although there is voluntary compliance with the majority of awards, judgment on the award can be entered in a court having appropriate jurisdiction if necessary.

How does arbitration differ from mediation?

- Arbitration is less formal than litigation, and mediation is even less formal than arbitration.

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- Unlike an arbitrator, a mediator does not have the power to render a binding decision.
- A mediator does not hold a hearing as would an arbitrator but instead conducts informal joint and separate meetings with the parties to understand the issues, facts, and positions of the parties.
- In contrast, arbitrators conduct a hearing with witnesses presenting testimony and presenting documents.
- The outcome of an arbitration is binding whereas whether to settle during a mediation is entirely voluntary.

Many construction contracts will contain arbitration provisions—requiring that any and all disputes as between two contracting parties be arbitrated. Furthermore, some construction contracts, where a subcontractor for example is selling to a general contractor who in turn is contracting with a third party owner, will require that to the extent the owner and general contractor have arbitration provisions, they can compel the subcontractor to participate in such arbitration proceedings. One of the primary arguments for arbitration of construction disputes is that many judges and juries do not understand the intricacies of the construction process. Furthermore most likely this process will be faster and less expensive.

There are drawbacks however to arbitration. First, arbitration is becoming increasingly more formal and can drag on for years. Many construction attorneys are selected as arbitrators and are more inclined to allow extensive discovery and presentation of evidence. Discovery may not be allowed in arbitration. Without the aid of discovery, a company may find itself defending against allegations of wrongdoing while having no effective method for gaining information that the other party may have which could be important to their defense. Another potential disadvantage is arbitrations are binding and there is no right of appeal except in extraordinary circumstances. As such, an unfair or incompetent determination may be final and binding. In fact, even improper decisions of law or erroneous findings of fact may not be appealed.

Mediation has far fewer drawbacks than arbitration. One drawback is if mediation is not successful, the parties are back where they started and may have to resort to litigation (if a complaint has otherwise not been filed) or another form of alternative dispute resolution. For this reason, it is important to require that all communication during mediation remains confidential.