Arbitration versus mediation
Do you know the difference?

Many contracts include provisions for alternative dispute resolution mechanisms — ways to resolve conflicts without going to court. There are two common forms of alternative dispute resolution: mediation and arbitration.

Mediation is a process in which the disputing parties ask a neutral third person to help negotiate and recommend a settlement. The mediator’s efforts and his or her recommendations are not binding on the participants or enforceable by a court. Arbitration, on the other hand, is an agreement to bypass a court action and submit a dispute to the binding decision of an arbitrator or a panel of arbitrators.

The key difference is that mediators negotiate and make recommendations in an informal setting, while arbitrators perform a judicial function and, at the end of a more formal hearing, make a binding ruling that will be enforced, if necessary, by a court of law.

Through their written agreement, the parties can, in advance of a dispute, select their own private judge, agree to their own schedule and even create their own discovery process and procedural rules. An arbitrator’s final ruling is legally binding and often comes sooner than a traditional court ruling, with less acrimony, at a lower cost and with little or any publicity.

Mediation and arbitration are not mutually exclusive, and some contracts include both approaches. Under these provisions, if negotiation with the help of an objective professional mediator fails, then the parties can call for arbitration.

The benefits of carefully drafted mediation and arbitration provisions include:
- Minimized risks of a runaway jury
- Reduced cost compared to in-court litigation
- Simpler procedural and evidence rules and flexible scheduling
- Less hostility among the parties
- Wider range of relief — more equitable remedies are available
- Avoidance of unwanted ripple effects of public lawsuits and adverse judgments

Careful consideration
Although mediation and arbitration are common, the process may not be best for every dispute. Weigh the pros and cons when entering into a business contract or waiving your rights to a trial.

In addition, take special care when drafting alternative dispute resolution clauses in the consumer and employment context to avoid legal challenges. Agreeing to boilerplate clauses without careful review can cause unintended results, such as:
- Loss of important procedural guarantees
- Limited rights to necessary discovery
- No written reasoned decision
- Loss of appeal rights
- Difficulty in bringing in necessary third parties

If drafted and implemented correctly, then alternative dispute resolution provisions in contracts will be enforced. Consider your needs when deciding whether to adopt these procedures as part of your overall dispute resolution strategy.

Both mediation and arbitration work and, more often than not, either approach will be faster and cheaper than traditional litigation.

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