

CHECKLIST

ARBITRATION AND MEDIATION

Both arbitration and mediation are alternative dispute resolution systems whereby parties to a contract select either an arbitrator or a mediator to resolve a conflict.

When an arbitrator is chosen, both parties submit to the jurisdiction of the arbitrator and consent to have that arbitrator render a final decision which is not only binding on the parties, but enforceable in a court of law.

When a mediator is chosen, both parties agree to simply submit to voluntary discussion for the purpose of attempting to resolve the conflict without a binding decision being made. An arbitrator has the capacity to resolve a controversy, a mediator does not.

By virtue of the fact that justice delayed is justice denied, there are many people and numerous businesses today that simply believe that justice is not possible within our court system.

In fact, the facts appear to justify that interpretation. Modern litigation techniques with substantial pretrial discovery procedures, will permit a standard commercial case to be extended two, three, four and as much as five or six years. There are some cases, in fact, where litigation takes so long that witnesses have moved, the parties are enjoying other lives, and the original impetus for the litigation has been washed over by day to day living.

In addition to the time period involved in litigation, the expense is substantial. Today's litigation attorneys can charge anywhere from \$100.00 to \$250.00 per hour to litigate a case with up front retainers of between \$1,000.00 and \$10,000.00. Court reporters, investigators, service of process fees, and so forth, continue to add up the cost of litigation whereby a contested dispute over a \$30,000.00 or \$40,000.00 complaint can cost each side as much as \$10,000.00 to \$15,000.00, if not more.

There simply is no justification for that and, in the final analysis, it creates a mockery out of the judicial system which we have available to us in this country.

As an alternative to that judicial system, arbitration has developed and continues to become more popular as the horror stories mount.

In order to effect a different result, businessmen have the capacity to tap into the various alternative dispute resolution systems, including, but not limited to, mediation, arbitration, a structured mini trial, advisory arbitration, and so forth.

The entire procedure begins with the inclusion in your contracts of language which replaces the governing law clause and reads as follows:

The Arbitration Clause. Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration in accordance of the rules of the American Arbitration Association, and judgment upon the award rendered by the arbitrator(s) shall be entered in any court having jurisdiction thereof. For that purpose, the parties hereto consent to the jurisdiction and venue of

an appropriate court located in _____ county, state of . In the event that litigation results from or

arises out of this Agreement or the performance thereof, the parties agree to reimburse the prevailing party's reasonable attorney's fees, court costs, and all other expenses, whether or not taxable by the court as costs, in addition to any other relief to which the prevailing party may be entitled. In such event, no action shall be entertained by said court or any court of competent jurisdiction if filed more than one year subsequent to the date the cause(s) of action actually accrued regardless of whether damages were otherwise as of said time calculable.

In the event that a controversy is already at issue, outside of language that otherwise was in an agreement, the parties still have the opportunity to submit to arbitration if they like. Language as follows should be used:

Submission Agreement. We, the undersigned parties, hereby agree to submit to arbitration under the Commercial Arbitration Rules of the American Arbitration Association. We further agree that the controversy be submitted to one arbitrator selected from the panel of arbitrators of the American Arbitration Association. We further agree that we will faithfully observe this agreement and we will abide by and perform any award rendered by the arbitrator and that a judgment of the court having jurisdiction shall be entered upon the award. In the event that litigation results from or arises out of this Agreement or the performance thereof, the parties agree to reimburse the prevailing party's reasonable attorney's fees, court costs, and all other expenses, whether or not taxable by the court as costs, in addition to any other relief to which the prevailing party may be entitled. In such event, no action shall be entertained by said court or any court of competent jurisdiction if filed more than one year subsequent to the date the cause(s) of action actually accrued regardless of whether damages were otherwise as of said time calculable.

In the event that mediation is desired, the following language should be used:

Mediation Agreement. The parties hereby submit the following dispute to mediation under the Commercial Mediation Rules of the American Arbitration Association.

The Arbitration Process

Following are typical steps in an AAA arbitration:

1. A party files a demand for arbitration with an AAA regional office, and a tribunal administrator is assigned to follow the case through to its conclusion.
2. Other parties named in the demand are notified and replies are requested.
3. The tribunal administrator reviews panel qualifications and selects individuals suitable for the particular case. Information on AAA panelists is maintained on a computer.
4. The list of names is sent to the parties, each of whom numbers in order of preference those persons it finds acceptable.
5. An arbitrator is selected by the administrator according to the mutual desires of the parties. If the parties are unable to agree, the AAA may appoint an arbitrator.
6. The administrator arranges a hearing date and location convenient to the parties and to the arbitrator.
7. At the hearing, testimony and documents are submitted to the arbitrator, and witnesses are questioned and cross-examined.
8. The arbitrator then issues a binding award, copies of

which are sent to the parties by the tribunal administrator.

The Mediation Process

Somewhat different steps are involved in mediation:

1. When parties request mediation, a qualified mediator is appointed by the AAA. If the agreement of the parties names a mediator or specifies a method of appointing a mediator, that designation or method is followed.
2. After a mediator has been selected, the first meeting date is arranged, again through a tribunal administrator assigned to the case.
3. The parties meet with the mediator, who guides the discussion and helps to clarify the issues.
4. Private caucuses may be held between the mediator and each party in an attempt to bring disputants' offers closer together.

In most cases, mediation results in settlement. If not, the parties may agree to submit their dispute to arbitration for a

binding decision.

American Arbitration Association Office

140 West 51st Street

New York, New York 10020-1203

(212) 484-4000

FAX: (212) 765-4874

(Note that the American Arbitration Association is all over the country with as many as eighty-one (81) different offices. The central office, however, in New York City, can cite the address and telephone number for local office.