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The advantages of pre-litigation mediation clauses to resolving disputes

Commentary
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While most lawyers agree there are both benefits and potential pitfalls to including an arbitration clause in an agreement, there is really no downside to including a mandatory pre-litigation mediation clause in lieu of, or in addition to an arbitration clause. Mediation, like arbitration, falls under the umbrella of "alternative dispute resolution," allowing parties to avoid the courtroom. While mediation and arbitration offer some overlapping benefits, there are fundamental differences in how the proceedings are conducted and the decisions are enforced.

An arbitration proceeding is conducted in a manner similar to a trial, but occurs expeditiously, and will typically resolve disputes in six months to a year. Arbitration is less formal than a trial, and the arbitrator is not required to strictly follow the rules of evidence. Arbitration proceedings can take between a day and a few weeks, depending on the case's complexity. During arbitration the parties can present evidence in the form of documents, witness testimony and even expert reports and testimony. The benefits of arbitration include its expediency, a lower cost, and the proceedings, unlike litigation, are generally confidential. Most significantly, the decision reached by the arbitrator after completing the proceeding is final and binding on all of the participating parties.

One reason that arbitration clauses in contracts are controversial is that appealing an arbitrator's decision is very difficult. In fact, it is far more difficult than appealing a judge or jury's decision. Appealing an arbitrator's decision requires a showing of "corruption, fraud or misconduct in procuring the award, the partiality of an arbitrator appointed as a neutral, or the arbitrator exceeded his or her authority." New York Civil Practice Law and Rules § 7511. Therefore, if you believe the arbitrator made an error in law or fact, unlike litigation, that alone is not grounds to appeal the award.

Pre-litigation mediation differs from arbitration in that it is more streamlined, less burdensome and not binding. Most mediation merely requires each of the parties or their counsel to submit a written mediation statement and participate in an in-person meeting with a hired mediator (usually a lawyer). Mediation statements are relatively brief. They outline the facts and legal arguments supporting each party's position with the goal of providing the mediator with a basic background. At the mediation session parties do not mark exhibits, take testimony, or hire experts, and the mediation session often lasts only a day. While the mediator may ask the parties to explain their positions on specific facts, their statements are not sworn testimony.

Mediators often place the parties in separate conference rooms and take turns speaking with each side about the strengths and weaknesses of the case. Some mediators focus almost exclusively on the economics of the dispute. The mediator's goal is to reach a consensus, ultimately in the form of a dollar figure, and resolve the case. Similar to arbitration, mediation offers the benefits of greater expediency, cost reduction and preserves the confidentiality of information and documents, but ultimately the decision reached by the mediator is merely a recommendation.

Because a mediator's decision is not binding, where one or both of the parties refuse to accept the mediator's recommendation, the parties will need to move forward with the case, either through litigation or arbitration. Despite its lack of finality, advantages to mediating include receiving a neutral third party's opinion regarding the strengths and weaknesses of each side and neutral assessment of the monetary value of the parties' claims. It also assists the parties in sharpening and focusing the issues involved in the dispute, ultimately streamlining litigation in the event the mediation fails.

Studies have shown that of the civil disputes that go to litigation, approximately 95 percent of the cases end up settling before trial. While the cases differ greatly with regard to how far the litigation progresses before settling (some settle right after the complaint is filed, while others will not settle until the eve of trial) and the terms of settlement, it is clear there is a far greater chance that a case will settle rather than proceed to trial.

This statistic also highlights what most litigation attorneys know—there is a benefit to starting settlement discussions early because a case is almost never settled on the first set of terms offered. Therefore, even if mediation does not immediately resolve a case, starting a settlement dialogue at the beginning of a case may lead to an earlier resolution. Engaging in mediation also provides the parties with an early opportunity to identify the strengths and weaknesses of the opponent's case. Naturally, an earlier resolution results in an overall cost reduction for litigating (or arbitrating) the case, as costs increase the further along a case progresses. Therefore, even where a party has decided to include an arbitration clause as an alternative to litigation, there are still benefits to first trying to resolve the dispute through mediation.

The inclusion of a mandatory pre-litigation mediation provision in a contract is not a significant hurdle to contract enforcement, but the format and requirements of mediation, if spelled out in the provision, should be tailored to the type of dispute likely to arise. Simple disputes can often be mediated informally, and a provision requiring decision makers to meet (with or without lawyers) to discuss potential resolution might suffice. For contracts begetting high-stakes disputes, a provision setting forth the procedure for selecting a mediator, the location of mediation, dictating who must attend the mediation and providing the terms for sharing mediation costs may be appropriate.

Overall, almost any dispute can benefit from entering into mediation prior to litigation or arbitration. Parties should seriously consider including a mandatory pre-litigation mediation provision whenever entering into a commercial, business or employment contract.

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