FREQUENTLY ASKED QUESTIONS ABOUT

ARBITRATION AND MEDIATION

By Erica B. Garay, Esq.

ARBITRATION

Q: WHAT IS ARBITRATION?

Arbitration is a common, private dispute resolution mechanism. Generally, parties choose arbitration over litigation because arbitration is usually faster, more efficient and less expensive than litigating a dispute in court. Sometimes it is referred to as "adr," which means "alternative dispute resolution." Arbitrators are paid to decide the parties' dispute. Arbitrators are usually trained to handle disputes. They can be lawyers, former judges, and even have no legal training, such as accountants, architects and engineers.

Q: WHAT IS THE DIFFERENCE BETWEEN ARBITRATION AND LITIGATION?

Litigation is a lawsuit that is heard in court by a judge (and/or jury). Litigation can be in a state court or federal court. You have rights of appeal in litigation. Arbitration, on the other hand, is a creature of contract. That means that you have whatever rights are provided in an agreement to arbitrate. The part of a contract authorizing arbitration is often called "the arbitration clause." Under law, the rights of appeal are extremely limited after receiving an award from an arbitrator or panel of arbitrators. Before agreeing to arbitrate a dispute, or to put an arbitration clause into an agreement, a party should consider the pros and cons of arbitration.

Q: HOW DO I KNOW IF I CAN ARBITRATE?

To find out if you have the right to arbitrate, you need to look at the particular agreement. For example, a shareholder agreement can have an arbitration clause, which would describe what disputes the parties have agreed to arbitrate.

Q: I WANT TO HAVE THE ABILITY TO ARBITRATE A DISPUTE, WHAT DO I DO?

The parties can agree to arbitrate their dispute and put the arbitration clause into an agreement, or amend an agreement to add an arbitration clause, or even enter into an agreement to resolve a specific dispute by arbitration. We refer to these as "pre-dispute" arbitration clause if the parties agreed in a separate agreement to arbitrate future disputes.

An agreement to arbitrate generally includes provisions dealing with the selection of the locale of the arbitration (i.e., county of Nassau), the number of arbitrators (1 or 3), the availability of discovery in the arbitration process (if silent then you only get the discovery that the adr company's rules provide, which usually means that it is streamlined), and even choose a specific arbitrator or specific arbitration company to handle the arbitration. There are many different forms of arbitration clauses that the parties can use.

Q: WHAT KIND OF ARBITRATOR DO YOU WANT?

The parties usually will tell an arbitration provider what type of arbitrator they want or his or her background. For example, in a construction dispute, you might want an architect or engineer to be the sole arbitrator, or a member of a 3-arbitrator panel. In a commercial dispute, you might want an accountant or a lawyer to be the arbitrator(s). You also might want to consider what substantive experience the arbitrators should have (such as experience in employment law, or construction, or shareholder disputes or in a particular industry).

Since your case will be decided by the arbitrator or panel of arbitrators you select, it is important to give a great deal of thought to the identity, experience, and qualifications of the arbitrator(s). The arbitration provider will attempt to find the specific qualifications that you are looking for. An arbitrator from an arbitration provider will have received specialized training in arbitration - what is called "alternative dispute resolution." The provider typically will give you a list of arbitrators to choose from, including their experience, biographical information and hourly (or daily) rates.

Q: I HAVE AN ARBITRATION CLAUSE, NOW WHAT?

The arbitration clause will be enforced by a court. That means that if the other side starts a lawsuit, and the parties, in their arbitration clause, had agreed to arbitrate that dispute, then a court will direct the parties to arbitrate the dispute, and will "stay" - that is, put a halt to - the litigation.

Q: HOW DO I GET TO ARBITRATION?

Under New York law, a party demands arbitration and then proceeds with setting up the arbitration under the auspices of the particular arbitration company that is mentioned in the arbitration clause. (Certain rights spring from serving a "notice of intent to arbitrate.") If no particular arbitration company is mentioned in the agreement, then the parties are free to choose a company. You then follow that company's rules, including paying the required filing fees. The administrator from the company will then direct the parties and assist in choosing an arbitrator (or arbitration panel) to decide the dispute. Jams, nam and the american arbitration association are frequently chosen by parties (and can be designated in an arbitration clause) to hear the arbitration. During the life of the arbitration the arbitrators are paid by the parties, usually in an installment fashion, and on a schedule set by the administrator. The arbitrators' fees are paid either on an hourly or per diem basis. An arbitration clause may award to the prevailing party his or her filing fees and arbitrators' fees.

Q: WHAT RIGHTS DO I HAVE IN AN ARBITRATION?

In arbitration, each side (usually with counsel's assistance) present witnesses and evidence. An arbitration is usually conducted in a stream-lined fashion. The arbitrator(s) will set a schedule for the arbitration and rule on the admissibility of evidence and render an award in the case. An award is a document that decides the parties rights and entitlement to an award of damages. There are very limited rights to appeal an arbitration award. A court will "confirm" an award, so that you can obtain a "judgment," which you can enforce to the same degree as a judgment issued by a court.

Q: ARE THERE ADVANTAGES TO ARBITRATION? ANY DISADVANTAGES?

There is usually less discovery in arbitration and this means that it is less expensive and faster. Depending upon the case, having less discovery can be helpful, or may make the case more difficult for a party to win. On the other hand, because it is faster and limits discovery, arbitration may be less expensive, and you may get an "award" sooner than if the same case were litigated in court. One disadvantage is that an arbitration award is very difficult to overturn on appeal, which can be a serious problem, if you lose.

Q: THE ARBITRATION IS OVER AND I RECEIVED AN AWARD, WHAT HAPPENS NEXT?

Once an arbitration award is received, the arbitration has usually concluded. There may be rights to seek reargument, modification or clarification of an award, but often those rights are limited and must be exercised quickly. You need to check the arbitration association's rules and your arbitration clause. The arbitration award, if not paid, can be "confirmed" by a court. The losing party may seek to have a court "vacate" the award. The right to vacate the award is limited by state and/or federal statutes to certain stated grounds.

Once an award is confirmed by a court, you get a "judgment." You can use New York's judgment enforcement remedies in order to collect on the judgment. A party can also settle a case after getting an award from the arbitrator(s).

Q: I'M NOT GETTING ALONG WITH A PARTNER, OR IF I HAVE A DISPUTE WITH A VENDOR, IS THERE ANY OTHER WAY I CAN USE AN "ARBITRATION" CLAUSE?

Yes. If, for example, you have a deadlock, or disagreement with a partner, or there's a deadlock at a board of directors, if there's an arbitration clause, the parties can appoint an arbitrator who can act as the tie-breaking vote. This can be very useful to avoid litigation or further disputes.

By using the arbitrator to handle a dispute and resolve it at an early stage, you can avoid the destruction of and salvage business relationships.

MEDIATION

Q: WHAT IS MEDIATION?

Mediation is a settlement meeting, which is run by a trained mediator. The mediator's "job" is to help the parties to reach a settlement of their dispute. The mediator does not decide who is right, nor make an award of damages. Rather, the mediator helps to facilitate the resolution of the parties' dispute.

If there is a court case, the mediator usually reports back to the judge as to whether the case settled.

A mediator should have substantial training in various techniques that have been found to help parties address and resolve their disputes.

Q: WHAT IS THE DIFFERENCE BETWEEN ARBITRATION AND MEDIATION?

A mediator is not deciding the case. In other words, a mediator does not determine which side would - or should - "win" a case. Rather, the mediator's role is *only* to facilitate a settlement. There is no "award" at the end of the mediation. Rather, if the parties were successful in settling their dispute, the parties will enter into an agreement that memorializes the terms of the settlement.

Usually the parties and the mediators will sign a "memorandum of understanding" [frequently called an "MOU"] that sets for the settlement terms. That settlement can be a binding and enforceable agreement or the parties can agree that they have only "agreed to agree" or that the settlement is effective only if they later agree on more formal documents.

You should consider having the settlement at the end of the mediation being "binding" so that the other side is not able to have "buyer's remorse" and walk away from a settlement that you thought you had.

In this regard, it is often helpful to include in the MOU another clause that allows the parties to use ADR to resolve any further disputes they may encounter regarding the terms of the settlement, the form of the documents, or the interpretation of the MOU. Another idea is to have someone (including the mediator) be designated to serve as an arbitrator to resolve a violation or breach of the MOU, should the mediation (of this second dispute about the MOU) fail.

Q: CAN THE MEDIATOR "FORCE" THE PARTIES TO SETTLE?

No. A mediator cannot force a party to settle. Instead, it is the job of the mediator only to help the parties settle the case. If there is a court case, the mediator usually reports back to the judge as to whether the case settled.

A trained mediator can assist the parties by identifying what "common interests" they may have in reaching a settlement; what possible future business relationships they may have; or possibly finding remedies or other business solutions that might not be available in a court.

For example, under applicable state law or contract, the parties might not have a right to buy-out a business partner. A mediation, however, can accomplish that result.

Q: WHAT HAPPENS AFTER THE PARTIES SETTLE THEIR DISPUTE THROUGH MEDIATION?

After a settlement is reached, the parties should outline the terms of the settlement in a signed agreement – this is the MOU discussed above.

The parties can choose to enter into a more formal agreement thereafter. Usually, once a settlement is reached, that agreement is enforceable in a court, or through arbitration – as long as it is in writing.

If mediation does not resolve the dispute, then the arbitration or litigation resumes, or can be commenced.

Q: WHAT IS "MED/ARB"?

It is becoming more common for dispute resolution clauses in pre-dispute contracts, to include a requirement that the parties first try to mediate their disputes before a neutral (whether or not the mediator or mediation company is identified) prior to commencing an arbitration.

Usually, the mediator and the arbitrator will be two different people.

Q: ARE THERE OTHER BENEFITS OF ADR?

Yes. Because ADR is private, what happens in the mediation or arbitration is confidential. This may be important if proprietary, confidential and/or trade secret information is involved. Competitors and others cannot learn what is happening during the pendency of the arbitration. The proceedings are private, and do not take place in a public courtroom. The settlement is also private and confidential, and not placed in the public court files. It may be difficult for a court to maintain the confidentiality of certain proceedings or a settlement, as there are court rules that may limit a judge's right to seal the record.

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