



FREQUENTLY ASKED QUESTIONS ABOUT ARBITRATION & MEDIATION

Arbitration vs. Litigation vs. Mediation, What's The Difference? - New York

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Written By: Erica Garay

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.

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 streamlined 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.

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 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, as well as federal or state law. The arbitration award 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: 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.

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 to facilitate a settlement.

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 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.

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

Q: Are there other benefits of ADR?

Yes, because ADR is private, what happens in the case 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 arbitrator.

Q: How do I find a mediator?

Many Courts have panels of mediators who can be retained. That Court's rules apply to payment obligations. A mediator can also be hired from a private company such as the American Arbitration Association or NAM. Experienced mediators can also be found at law firms, such as Meyer, Suozzi, English & Klein, P.C.

Erica B. Garay is Chair of the Alternative Dispute Resolution law practice, and a Member of the firm practicing in the Litigation & Dispute Resolution practice.