

## **Mediation and Arbitration: Litigation Alternatives**

**by Dale Alberstone, Esq.**

With the soaring cost of litigation, including expensive legal fees, filing fees, court reporters and deposition transcripts, many claimants, and particularly individuals and owner operated businesses, now wisely endeavor to avoid court litigation in favor of alternative dispute resolution processes. Parties frequently find that mediation proceedings and/or binding arbitration provide favorable alternatives to costly and lengthy litigation.

My column this month will discuss the nature of these two alternative proceedings as well as the advantages and disadvantages of each.

### **Mediation**

Mediation may be thought of as a non-binding settlement conference which only becomes binding upon the mutual and voluntary agreement of both parties.

The person appointed to conduct the mediation is denominated as the mediator. The mediator is usually a retired judge or a practicing attorney licensed by the State Bar. However, any person jointly approved by the parties may act as a mediator, including building contractors, interior decorators, real estate brokers and accountants.

While such non-judges and non-lawyers may serve as mediators, most parties still prefer that the mediator be a judge or attorney largely because contract disputes, which comprise the great bulk of mediations, involve legal principles.

As relevant to multi-family income housing buy/sell agreements, many contracts require the buyer and seller to participate in a mediation prior to filing litigation. That is generally advantageous to the vendor and purchaser because it allows them the opportunity to control their own destiny through settlement with minimum of legal expense. Contrast that with a judicial verdict where one's destiny is at the mercy of 12 unknown, and often indifferent, jurors.

The mediator's function is to assist the parties in reaching a common resolution that will end the dispute. Bear in mind, however, that the mediator has no power to compel either side to accept his recommendations for settlement or to accept a proposal of settlement offered by the other party.

By definition, mediation is a process by which settlement is voluntary and neither party can be compelled to settle. If, however, the parties do agree on mutual terms of resolution, those terms will be documented in writing, typically at the time of the mediation, and signed by each of the adversaries. That agreement then becomes binding.

In summary, mediation is often a worthwhile and cost saving process by which the parties can voluntarily agree to a common resolution through the assistance of a neutral third party.

Considering the fact that 50% or more of all California venue mediations settle, it is a proceeding which both sides should embrace early on in their dispute.

### **Arbitration**

The decision whether to submit a contractual claim to arbitration rather than have the matter adjudicated in court is usually made at the time the contract is signed. Of course, this is well before the dispute arises. If the parties knew at the time they executed the agreement what the future would hold, it would be an easier decision as to whether to provide for arbitration or

litigation in the contract.

In the real world, parties do not know what the dispute might ultimately be. At best, they can only anticipate.

Some decisions whether or not to arbitrate are relatively easy to make, such as with a buyer who wants to proceed against a seller to compel a sale after the seller (allegedly) backs out of the deal. Buyers often prefer judicial action because litigation offers the opportunity to record a lis pendens (i.e. a cloud on the seller's title). Arbitration does not seem to allow for that procedure. On the other hand, a seller might prefer arbitration if he/she wants to re-sell the property while the original buyer is pursuing an unmeritorious claim for specific performance. Without a lis pendens having been recorded, the seller can deliver clear title to a new buyer (provided that the new buyer is unaware of the pending claim by the original buyer). Also, if the seller ends up losing, it is ordinarily best that seller conveys title to the buyer sooner, rather than later, so that the seller can have early access to the proceeds for early reinvestment.

Most readers are familiar with the litigation process and are aware that it may take well more than a year for a case to conclude. While arbitrations are often concluded in one-third the time, there are a number of other important factors to consider with arbitration. For example, numerous recent cases confirm what I have for many years advised AOA members: **A party has no right to appeal an adverse arbitration award, even if it is erroneous.** Nor does a court have the power to overturn an arbitration decision even if the award is mistaken and contrary to California law. Absent fraud or corruption by an arbitrator, a court generally does not have the jurisdiction to reverse an arbitration award even if it is erroneous or inconsistent with law.

Absent extraneous circumstances, such as bribery, corruption or fraud or the refusal of the arbitrator to hear evidence, and so long as an arbitrator's award is within the scope of the matters presented to him, the court has no power to modify, overturn or reject the arbitrator's award. In two recent cases, for example, the arbitrators failed to award attorney's fees to the prevailing party, even though the contract provided that the winning party would recover his attorney's fees at the conclusion of the arbitration. In both cases, the California Supreme Court determined that as long as the arbitrator's decision was within the scope of the issues presented to him, that decision would not be disturbed by the judiciary.

These two cases follow a long line of other cases in which our appellate courts and the Supreme Court have acknowledged that the arbitrator's decision will be upheld even if the decision is contrary to law. For example, the primary substantive rule required to be followed with arbitrations before the American Arbitration Association is the following:

The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties.

Nothing within that rule requires that the arbitrator follow the law of California, or for that matter, the law of any other forum. Instead, the arbitrator can make any award which the arbitrator personally feels is just and equitable under the circumstances, so long as it is within the scope of the parties' contract. This leads to three amazing revelations:

1. Just by rendering an award which the arbitrator believes is just and equitable, the award is correct within the context of the arbitration rules.
2. So long as the arbitrator is acting in good faith (and he does not improperly refuse to hear evidence), his decision can never be wrong.

3. Neither party has the right to appeal an arbitrator's award even if the award is contrary to law because it is still a correct decision under the arbitration rules.

All of this brings us to the question of why would anybody want to arbitrate a case if (1) the arbitrator does not have to decide the issues according to law, (2) there is no right to appeal the arbitrator's award, and (3) the arbitrator's decision may be contrary to law? The answer to that question is a balancing of the benefits of arbitration, which include the following:

1. Usually the amount of attorney's fees incurred by each party in an arbitration proceeding are dramatically less than the fees which would be incurred if the case was litigated judicially. The primary reasons for this are that discovery (e.g. depositions and interrogatories) is greatly limited and the case comes before the arbitrator in about one-third of the time it would take to come to trial. Substantially reduced attorney's fees are a powerful inducement to the parties to use arbitration.
2. Most arbitrators try to follow the law and base their decisions on their understanding of the law, rather than reach a decision on purely gut level feelings about the equity of the matter.
3. Arbitration proceedings are generally kept confidential whereas most aspects of litigation are available to members of the public and the press.
4. Usually the arbitration result is fair, or at least no more unfair than what a judgment at trial might bring.
5. The amount of punitive damages is likely to be less than what a jury might award.
6. The parties have control over the selection of an arbitrator but almost no control over the selection of a judge and limited control over the selection of a jury.

### **Conclusion**

What is important to remember with mediation is that it is an informal process by which settlement can not be compelled unless both side agree to the resolution. The mediator's function is to assist the parties in reaching a settlement, regardless of whether the mediator feels that the resolution is fair or that one party might receive a better result in litigation. Because the majority of disputes submitted to mediation settle, both sides should give it serious consideration before filing an expensive and time consuming lawsuit.

With arbitration, what is important to remember is that the arbitrator is not required to follow the law and he may make any award within the scope of the parties' agreement which the arbitrator himself personally feels is just and equitable, even if that result is contrary to established law. Generally, arbitrators examine the law and attempt to follow it in reaching their decisions, but unlike judges, they are not required to abide by it. Hence, to a large degree an arbitrator has more power than a Superior Court judge. Judges can be reversed on appeal whereas arbitrators cannot. No appeal is allowed from an arbitration award.

Whether or not a party to a contract should initial an arbitration clause included in the contract is a question which should be decided on a case-to-case basis. There is no right or wrong answer, although often, after the dispute has arisen, the party wishes he/she had selected the other tribunal to resolve the dispute.

On the other hand, it is almost always wise to include a contractual provision in written agreement mandating mediation prior to filing formal litigation.

## **CORRECTION TO MANAGER WAGES**

In connection with my January 2007 article on “Manager Wages”, several readers have pointed out a printing error. “Exception No. 1” stated that if the rental value of a unit is \$1200 per month and husband and wife managers each work 60 hours per month, the owner need not pay the couple any wages. The word “each” needs to be corrected to “collectively.” The owner need not pay wages if the collective hours worked by the couple are 60 hours per month. I apologize for the typo and thank the readers who pointed that out to me.

*Dale Alberstone is a prominent real estate attorney who has practiced real property and business law in Century City for the past 30 years. He has been appointed to periodically serve as a judge pro tem of the Los Angeles Superior Court and is a former arbitrator for the American Arbitration Association. He also testifies as an expert witness for and against other attorneys who have been accused of legal malpractice.*

*Mr. Alberstone has been awarded an AV rating from Mardindale-Hubbell. An AV rating, registered through Reed Elsevier, reflects an attorney who has reached the heights of professional excellence and is recognized for the highest levels of skill and integrity.*

*The foregoing discussion is intended as a general overview of the law and may not apply to the reader’s particular case. Readers are cautioned to consult an advisor of their own selection with respect to any particular situation.*

*Address correspondence to Dale S. Alberstone, Esq., ALBERSTONE & ALBERSTONE, 1801 Avenue of the Stars, Suite 600, Los Angeles, California 90067. Phone: (310) 277-7300.*