Arbitration and Mediation "Nuts and Bolts" for Owners and Contractors

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"FOUNDATION" FOR THE SPEAKER – 35 years of arbitrations and 10 years of mediation as a "consumer" until 1996. Then, AAA Training in Frisco. Many mediation and arbitration matters since (e.g., Cotton Gin, Public Park, Lake Pleasant, Medical Clinics, Desert Sonoran Boulevard Subdivision's retaining walls). Mediating from 2 to 28 parties' disputes in the field of construction.

- ARBITRATION -

1. **What arbitration is** – a final decision based upon evidence presented in a procedure and setting that is less formal than a courthouse litigation, and presented to a knowledgeable "trier of fact" on a time track which is faster than the courthouse track, and therefore, usually less expensive. Arbitration is private (records are not accessible to the public). Ordinarily, there are few discovery requests (few depositions, interrogatories, etc.). There ordinarily is no appeal from the decision.[1]

2. **Reasons why we need arbitration**: High cost of courtroom litigation. Lack of experience of many judges with construction and business law. Crowded court dockets that result in lengthy and therefore, expensive proceedings. Rules of Evidence that are 300 years old, many of which make litigation expensive. Avoidance of endless expensive depositions, usually.

3. **What does it cost**? From $180 to $400 per hour. This may be apportioned among the parties. Can you afford it? It is an economic alternative to spending 2½ years in litigation.

4. **Are there cases where arbitration may NOT be advisable**? Perhaps, when an EXTENSIVE "discovery" of the facts is needed. How do you cope with that? Careful drafting of the arbitration clause in your contract.

5. **Where does one hold an arbitration**? In AAA offices, or in the arbitrator's office, or a lawyer's office. Advantages of not being in the courthouse.

6. **The Experience of the Arbitrator**. How to maximize the likelihood of getting one who knows your field.

[1] Appendix A is an outline of points on how to draft a good arbitration clause.

7. **What do you do as an Owner or Contractor before you arbitrate** (in preparation):

   (a) Pre-Arbitration Statement

   (b) Jointly organized (and tabbed) books of Exhibits

   (c) Preparation of witnesses

   (d) Use of experts

8. **What does the arbitrator do to "kick it off**"?

9. **War Story**: The Flagstaff apartment complex and the builder/operator, a "creative remedy" which could not have occurred in the courthouse.

Conclusion – Arbitration is swifter, usually less expensive, less fraught with evidentiary (legal) issues, heard by a knowledgeable "judge," and is not complicated by appeals. It is "good for business."

- MEDIATION-

1. **What mediation is** – a facilitated "extruding" of the parties' own desires to reach a settlement, enhanced by confidential "reality therapy" consultation and by caucuses and Churchill-style "serial diplomacy."

2. **What mediation is not** – early "neutral" evaluation, or "suggested settlements" proposed by an avuncular figure. Big issue: "directional" vs. guided mediation.

3. **The reason we need mediation**: "Adversaryitis." In Arizona, Maricopa County, 93 judges (30 civil) x 1,800 active files each. $350 - $400 per hour lawyers who hope to impose their legal fees on the other side. Interest on contract amounts. Two years plus six-months trial delay. Certainty. Inventive remedies. Evaluation in a pre-expensive stage. Confidentiality of process/result. *See* A.R.S. § 12-2238.

4. **What does it cost?** From $180 to $400 per hour, split among/between two or more "mediatees." Can you afford it? It is a very economic intervention to avoid a costly litigation process, even if the next-step process is the (cheaper than the courthouse) arbitration.

5. **When does one do mediation?**

   - When a problem arises on a job site or in a business transaction – before arbitration or litigation is even mentioned. Rare! Why is that?

   - When you have to as a precondition to arbitration under an AIA A201, or when your contract arbitration clause says you must. Starting to occur more and more as the AIA documents are now being used.

   - When you are into arbitration or litigation and want to avoid the expense of preparing for whatever fact, law, or other issues you may face. Often!

   - When you are in state or federal court litigation, have done a little discovery, and want to try to "bring it to a close." Most frequent! Often done pursuant to a judge's suggesting it occur instead of a settlement conference. Why is that?

6. **Where does one do it?** In AAA offices, or in a mediator's office or a lawyer's office. Advantages of each.

7. **Ethics of mediators**: Must scrupulously over-disclose, never misrepresent, devil's advocate, but not be counsel for any party. Don't draft the document that resolves the case.

8. **What do you do as an Owner or Contractor before you mediate** (in preparation):

   - Mediation Statement, 5 to 7 pages, limited exhibits, exchanged or not (better exchanged).

   - Simple Graphics, item lists, site maps, photos (to focus opposition interest and to heighten awareness).

   - Preparation Session, lawyer and clients, reality therapy, no surprises.

   - Plans A, B, C and a draft form of settlement agreement.

9. **What does the mediator do to "kick it off"?** A generic introduction (one version, Tierney's, is attached as Appendix B). Note the relevance of our local statute, A.R.S. § 12-2238(B) on confidentiality of the process.

10. **What do you do while you are doing it?** Remember, each party is trying to arm the mediator with facts/law which he can use to convince the other side to make a deal!

    - Cool and pre-prepared opening statement, but a short one and one that is non-adversarial;
    - Terse, calm rebuttal;
    - Use the time between caucuses to gather facts to refute the opposition's points, or defuse them, and to create "next move" scenarios; and
    - "all hands on deck" when the mediator arrives.

11. **What you want to leave the process with** – a resolution, or a substantial narrowing of the issues, or a better process for resolving the problem.

12. **War Story**: How the BOR "stayed out," but mediation still succeeded.

    War Story: The plastic-extrusion company and the "cooked books."

    War Story: The Telecommunications Company and the "missing" information, leading to a 3-month hiatus in the mediation.

    War Story: the Cotton Gin. How fifty problems became 10 line items, thus a small arbitration.

13. **"Bad Manners" during Mediation** (and solutions therefore):

    - They did not come to listen – or to negotiate;
    - Extreme and unsupported positions are taken;
    - Offers are met with a recitation of old "insults" earlier received;
    - Key depositions await to be done and no one will evaluate or "move" on the issues pending that event;
    - Someone important is not "at the table."

Conclusion – Mediation works, it's economical, it can save "stomach acid" and free up your time. It should be provided for in business documents, much as it is included in the AIA documents.

APPENDIX A

Drafting an Effective ADR Clause

"A cautionary note – we spend too much time trying to make sense out of arbitration agreements precisely because litigants spend too little time in drafting them. Increasingly we have been presented with incoherent hybrids and bizarre mutations of supposed agreements for judicial or contractual arbitration. Oftentimes the 'remedy' is worse than the disease. We can only warn: Read the label before applying."

in *National Union v. Nationwide Insurance*, 69 Cal. App. 4th 709 (01/28/99)

"We perceive a significant trend in the law, both in this jurisdiction and elsewhere toward a heightened awareness of the potential for unfairness in pre-dispute arbitration clauses. We applaud this trend. In the final analysis, no dispute resolution method, whether in court or out, will be accepted by litigants unless it is (and is perceived to be) fair, prompt and economical."

in *Maciejewski v. Alpha Systems*, 73 Cal. App. 4th 1372 (08/05/99)

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A. Four Items Which Govern the Arbitration Proceeding

1. Parties Agreement
2. AAA Rules (Commercial or Construction Rules)
3. State and U.S. Arbitration Statutes (§ 12-3001 or 9 U.S.C. § 1)
4. Case Law

B. Advantages to Having a Well Written ADR Clause

1. Makes it clear <u>which</u> disputes are arbitrable (can set "tiers").
2. Self-executing, sets time limits and puts action dates on the calendar.
3. Provides for a complete set of rules and regulations (AAA Rules or some other).
4. Eliminates disputes over the locale of the proceeding. The clause can be explicit re: locale, or if through AAA, per AAA Rules, the Association will decide the locale.
5. May limit parameters for some of the remedies available in arbitration.

6. Can allow for an administrative conference, which usually helps expedite the process (e.g. if AAA Rules are employed). Such a conference will:

    a. Clarify issues and claims;

    b. ID witnesses, exhibits, schedule document exchange;

    c. Estimate number of days for hearings; decide if there is to be a court reporter;

    d. Establish tone of proceedings, let you get to know arbitrator; and

    e. Pin down what type of award you want.

C. Customize Your Arbitration Agreement to Meet Personalized Needs: Issues to Consider

1. Mediation. It can be condition precedent to filing to arbitrate, or specified to be concurrent.

2. Mediation-Arbitration (Med-Arb)

    a. If not resolved through mediation, go directly into arbitration.

    b. Generally, smart folks don't recommend that the mediator becoming the arbitrator (due to information learned in mediation caucuses).

3. Governing Law

    a. Some agreements state that they will be governed and interpreted in accordance with State laws. Making the RUAA applicable is a <u>good</u> idea.

    b. Make sure to be familiar with those laws. A California footnote: <u>hostility</u> toward Arbitration in California.

4. Locale Provisions

    a. If stating locale, consider convenience for lawyers, parties, witnesses, and court reporters.

    b. Check to be sure there is a pool of qualified arbitrators in that area.

    c. Be familiar with the chosen governing law (i.e., NY– no punitive damages allowed).

5. Arbitrator Selection Criteria / Number of Arbitrators

    a. Require a retired judge? Lawyer? CPA? Years of experience?

    b. Consider costs.

    c. Party-appointed "panels". Not highly recommended: cost and delays.

6. Five Basic Essentials You Should Not Tamper With. (The *Armendariz* case from California): Lawyer representation, fee imposition, remedy limitation, evidence restriction, damage restriction.

7. Consolidation (Big "bugaboo" in Construction) (See AIA 201. The 2007 version relaxes this somewhat.)

    a. Consider when there may be multiple parties with disputes arising from the same transaction.

    b. Are the witnesses the same?

    c. Allows one omnibus resolution for all, avoids conflicting rulings.

    d. How about giving the arbitrator discretion on consolidation?

8. Remedies

    a. Should you/can you limit the scope of the arbitrator's authority in award?

    b. Broad: "Any remedy or relief that the arbitrator deems just and equitable."

    c. Yes or No on punitive damages, allow interest, attorney's fees, etc.

    d. Be careful on exclusions of fees or remedies that they would be able to receive in court. (*See* the Armendariz case from California. Paragraph 6 above.

9. Discovery

    a. Some say AAA Rules forbid discovery. Not true. The Rules don't encourage it, but there's the way to get it: Suggesting hearing time savings.

    b. If you want it, determine scope (i.e., 2 depositions each + RFP for 10 categories), establish time limits.

c. Allow arbitrator to resolve all other outstanding discovery issues and to enter sanctions, as our RUAA now provided.

10. Written Opinions (Reasoned Award vs. Detailed Award)

a. Not usually provided in domestic cases, but we see it more and more.

b. Pros: You know why. It forces a thoughtful approach.

c. Cons: If award is not written well, it might encourage an appeal.

11. Appeals of Awards to Courts:

a. Essentially only for bias, refusal of legitimate postponement or refusal to accept evidence.

b. May want to provide for some provisions under which loser can appeal, i.e. Complex cases to a pre-designated appeal panel.

c. Mixed results in courts, but recent U. S. Supreme Court case does not allow parties to create appeal rights if the appeal goes to the Courts.

d. Can provide for review panel of arbitrators. Give time limits, reasons by which award can be overturned, make it final and binding after review.

12. Large Complex Case Program (LCCP by AAA), cases of $1 Million or more

a. Number of Arbitrators (3).

b. Expertise and Qualifications of Arbitrator, rigorous criteria.

c. Supplemental Procedures, mandatory administrative conference and preliminary hearing, consideration of reasoned awards.

D. Conclusion

1. Keep it simple, straightforward

2. Avoid delay, sidebar litigation, extra expense, frustration

APPENDIX B

Generic Mediator's Opening Statement

[Prestatement; Greeting]

[Get names, sign-in sheet and ask how to address them]

I. CONFLICTS

Each of you has received the Bio provided by the AAA. Has any of you or your attorneys found any problematic relationships in that Bio? Let me tell you that [in reviewing the two "Mediation Statements" which you sent to me, I find that I have had no prior dealings with or knowledge of either of you or your lawyers or the property]. In checking the closed files, which were once opened by other lawyers in the firm, I found that there are no conflicts. Are you all okay with that?

II. EXPERIENCE

I have been involved in mediations for approximately _____ years, starting out as a "consumer." I have found that it helps to let you know that I have (as a lawyer) represented owners, construction managers, general contractors, subs, engineers, architects, suppliers — and I have represented no one group more than any other group. After AAA training, in _____, I became a mediator.

III. ROLE AS MEDIATOR

My role as a mediator is a simple one. My mission is to listen to your explanation of your own experiences in this dispute. Following your explanations of what has happened, that led to the filing of the AAA proceedings, I will try to help both parties to reach a mutually satisfactory settlement. I do not urge any specific result or terms. I do not write any language. I only help you go through the process of your own crafting of a settlement with which you can both live.

IV. VOLUNTARINESS/CONTROL/AVOIDING EXPENSE

The mediation process is one that § 4.5.1 of the 1997 AIA 201 General Conditions requires you to engage in because, by so doing, you may be able to avoid the considerable expense, the delay, and the inconvenience that arbitrating may bring — and the uncertainty that is entailed in waiting several months for a costly arbitration proceeding to occur.

There is one other thing that results from this mediation approach to solving this dispute. This may be the last occasion when, working together, you two can cooperatively control the solution that is applied to this problem. Today, you sit

together, on the same side of the table, trying to deal like businessmen with this problem. You two control how it will be handled — but, if we cannot find a way to solve it in a collegial fashion today, then it becomes a statistic on some third party's desk calendar. It gets handled by arbitrator X and you may find that arbitrator's solution diverging far from what either of you wanted or thought could happen.

If you go on arbitrating, hearings are then set, preparation-work is done at the cost of huge lawyer's fees and your time [a real expense that you simply never get paid for] gets spent on preparation for an adversary hearing before an arbitrator (who try as he may) will never know as much about this dispute as you two know. Along the way, you pay a small platoon of lawyers to put forth your best case — and that all costs money and your time from day to day.

V. CONFIDENTIALITY

These proceedings here today are private and they are confidential. I'm sure you have been told that, by Arizona Statute (§12-2238(B)), nothing said here can be quoted back at you should arbitration later be needed — and I cannot be called to testify as a witness what either of you has said to me or to each other here today.

One other aspect of confidentiality which is important among us: I will — if you ask me to do so — treat something which you tell me in one of our meetings as NOT TO BE REPEATED to the other party, but you have to be express and clear on that when we talk.

VI. ATTITUDE

Now, let me tell you the attitude with which I would like you to work with me to explore whether your problem can be solved. I would like you to be candid to me; I would like you to be non-confrontational to the other side; I would like you to respect the other party's commitment to grapple with this dispute and to fully explain how he sees the events and the obligations of the parties. Now, am I right that you have both come here with that commitment, to try to resolve this matter?

VII. MECHANICS

Okay, here are the mechanics of how we are going to proceed then.

Mr. _____, you are the Demandant in the proceedings. So we will commence by asking you to explain your view of the situation for 5 to 10 minutes. Then, Ms. _____, as Respondent and Counterclaimant, you will go next. Mr. _____, if you feel the need to make some comments on that presentation, you may do so. At that point, we will make sure that no one has anything that still needs to be said, and then we will go into "caucus." First, I'll meet with the Demandant, then the Respondent, and we will go back and forth like that, seeing if we can work out a businessman's resolution to this problem.

It may be that, even before we reach some mutually acceptable conclusion, we come back into a session or two where all of us are present. And, if that occurs, I will state clearly for you what the occasion is for that joint session. If we can reach agreement, I'm going to ask that you document the key parts of the agreement before we all leave this office so there will be no question what we agreed on and that it is a final and binding resolution of the problem.

VIII. START!

Okay, all understood? Mr. _____, you may start off . . .