READING MATERIALS
FOR
CLASS II (4 October)
&
CLASS III (5 October)

I. The Basics of Arbitration

ARBITRATION DEFINED

- Arbitration is a process in which disputing parties present their respective cases by the use of evidence to a third party neutral, i.e. an Arbitrator, who renders a binding decision on the merits. (Arbitration, by agreement, can be handled on a non-binding basis.) The process is essentially an informal and private form of litigation and does not involve negotiation. Virtually any case that can be litigated can be arbitrated although cases affecting the rights of children may be subject to ongoing judicial review.

SELECTING THE ARBITRATOR

The parties always have the right to agree on the choice of an Arbitrator. When agreement cannot be reached, a selection process will be used.

PRE-ARBITRATION CONFERENCE

Before the arbitration begins, the attorneys and the parties, if so desired confer with the Arbitrator, typically by phone, to cover the particulars of the arbitration: anticipated duration, attendees, witnesses, exhibits, etc. Any other issues that are of concern to the parties can be addressed in the pre-arbitration conference. If discovery is to be a part of the arbitration process, it will be addressed in the pre-arbitration conference. All these matters are handled in an informal fashion.

- At the discretion of the Arbitrator, there may be reason to schedule other pre-arbitration proceedings to streamline the arbitration hearing. If it is deemed to be helpful, the parties may agree, or be asked, to submit prior to the arbitration various pleadings, documents, photographs, etc.

- The attendance of witnesses and the production of documents at the arbitration hearing may be compelled by subpoenas pursuant to governing law.

- Often the parties arbitrate subject to "high" and "low" money limits to which the parties agree before the arbitration. Regardless of the Arbitrator's decision, the award is constrained by these limits established by the parties. The Arbitrator does not have knowledge of the amounts or existence of these limits in issuing an award.

THE ARBITRATION HEARING

Arbitration is adversarial. Although it is relatively informal, arbitration is akin to litigation.

- At the hearing the Arbitrator first explains the ground rules. Generally, the hearing follows the order of a trial; however, the process is informal and subject to the discretion of the Arbitrator. The parties may give opening statements. The cases are then presented, first by the plaintiff and then by the defendant. Rebuttal is allowed.

- The nature of the presentation of the cases is similar to a court proceeding e.g., swearing of witnesses, direct examination, cross-examination, submission of exhibits. However, the formal rules of evidence do not apply. The touchstones of admissibility are relevance and common sense.

- The parties may give closing arguments. Post hearing briefs may be used, when needed. These matters are handled according to the wishes of the parties subject to the Arbitrator's discretion.

- As soon as is reasonable after the hearing, the Arbitrator will render a decision in the form of a written award, a simple statement reflecting the resolution of the dispute. The grounds for the decision are the facts presented and the governing law. The right of appeal from this award is limited to those grounds embodied in the arbitration statute that governs the case. Typically, this means that the reasons to upset the Arbitrator's decision would be limited to those few reasons stated in the governing arbitration statute. Agreements affecting the rights of children may be subject to ongoing judicial review.

THE PROS AND CONS OF ARBITRATION

The main advantage of arbitration is closure. Once the parties engage in the process, they know that resolution will necessarily result. They also know that there is little basis to upset the Arbitrator's decision. In certain kinds of cases, closure may be the overriding goal of the parties, and thus arbitration offers this benefit.

- In highly technical cases, the parties may wish to have a decision maker who is well versed in the subject matter in question. Arbitration allows this.

- Given that discovery is limited, substantial time and costs savings may be enjoyed in arbitration. The relaxed procedures also allow for savings.

- As compared to mediation, arbitration does not allow the parties to keep control of the outcome, and it often does not produce the same level of benefits as mediation in respect to cost and time savings. Nor does arbitration allow the parties to benefit from the problem solving, relation-building processes of mediation. But, used in the right situations, arbitration can be a valuable tool among the various modes of dispute resolution available.

International Arbitration

From Wikipedia, the free encyclopedia

International arbitration is a leading method for resolving disputes arising from international commercial agreements and other international relationships. As with arbitration generally, international arbitration is a creature of contract.

Main Features of International Arbitration

International arbitration has enjoyed growing popularity with business and other users over the past 50 years. There are a number of reasons that parties elect to have their international disputes resolved through arbitration. These include the desire to avoid the uncertainties and local practices associated with litigation in national courts, the desire to obtain a quicker, more efficient decision, the relative enforceability of arbitration agreements and arbitral awards.

The Advantages of International Arbitration

For international commercial transactions, parties may face many different choices when it comes to including a mechanism for resolving disputes arising under their contract. If they are silent, they will be subject to the courts.

Neutrality and Enforceability of Arbitration Awards

The ability to resolve disputes in a neutral forum and the enforceability of binding decisions are often cited as the main advantages of international arbitration over the resolution of disputes in domestic courts. And there is solid legal support for this view. The principal instrument governing the enforcement of commercial international arbitration agreements and awards is the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the "New York Convention"). The New York Convention was drafted under the auspices of the United Nations and has been ratified by more than 140 countries, including most major countries involved in significant international trade and economic transactions.

The Basics of Mediation

MEDIATION DEFINED

Mediation is a voluntary, consensual process that uses a trained, neutral third party to facilitate the negotiation of disputes. The goal is to reach a binding settlement agreement. Typically, attorneys for the disputing parties are integrally involved throughout the process, but this is not a requirement.

THE BENEFITS OF MEDIATION

- **Control by parties** - The parties remain in charge of the outcome.
- **Opportunity for better results** - The parties understand their dispute better than any court or jury could.
- **Effective** - Approximately 85% of cases handled by The McCammon Group reach settlement.
- **Greater compliance** - Parties are more likely to comply with a mediated result than with a judgment or an arbitration award.
- **Reduced time and expense** - Mediations are usually concluded within a day. They can be scheduled within a few days.
- **Voluntary, consensual process** - The parties stay in control. The result is determined by the parties.
- **Preserved, improved relationships between parties** - This is important where the parties have an on-going business or personal relationship.
- **Decreased stress and disruptions** to ongoing activities.
- Private and confidential
- **Improved skills and relationships** - Mediation helps parties in future negotiations and dispute resolution.

AGREEING TO MEDIATE

There are several ways to get to mediation.

1. Most often, one party decides it would be helpful to resolve the dispute through mediation and suggests mediation to the other party. The other side, typically, agrees.
2. In pending litigation, the court often suggests or even orders that the parties consider mediation.

SELECTING THE MEDIATOR

Once the parties have agreed in principle to the mediation process, counsel, or their clients, determines which of mediators would be best suited to serve. Resumes are available to help the parties in their selection.

The basic role of a mediator is not to render a decision but to facilitate a negotiation. If the parties choose, an additional role of a mediator may be to evaluate the issues in

dispute. These roles should be considered in picking a mediator. Additional factors to be considered involve the individual characteristics of the mediator:

- Neutrality and integrity
- Inter-personal skills
- Experience
- Training
- Subject matter expertise, if the parties desire evaluation of the issues
- Availability

PRE-MEDIATION CONFERENCE

Before the mediation occurs, the attorneys usually confer briefly with the mediator, typically by phone, to cover various particulars in preparation for the mediation: anticipated duration, attendees, format of mediation, etc. If the parties and the mediator deem it helpful, the parties may agree to submit prior to the mediation various pleadings, documents, photographs, etc. to give the mediator a background in the facts and the law of the dispute.

THE MEDIATION

INTRODUCTION

The mediator first explains the process to be utilized and establishes the ground rules. All those in attendance sign a mediation agreement which, among other things, binds them to strict confidentiality.

PRESENTATION OF VIEWS

One party presents its view of the dispute. This presentation is informal and can be accomplished in any number of ways. This can be done by the attorney and/or the client. Pertinent documents are often presented. Cross-examination is not used; nor are any rules of evidence or procedure utilized. The other party (or parties) then responds in kind. Each party is free to respond until it is satisfied that its views have been fully presented.

PROBLEM SOLVING/NEGOTIATING STAGE

The parties and their counsel, working with the mediator, then initiate negotiations. The mediator focuses the parties on solving problems.

While the legal and factual aspects of the dispute continue to be relevant in the negotiation, the possible solutions may involve extra-legal issues, including business and personal matters. These non-legal matters are often at the heart of the dispute, yet they cannot be adequately addressed in a courtroom.

The negotiations continue until successfully completed or until an impasse is reached. The presence of a decision maker for each party is critical to these negotiations.

Often, these negotiations and problem solving activities involve private caucusing among the mediator, one party and its attorney. Anything identified in a caucus as

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confidential will not be disclosed by the mediator to the other side without authorization. The mediator will then meet privately with the other party and counsel.

RESOLUTION

A settlement agreement is reduced to writing when the parties reach agreement. If no agreement is reached in the mediation, then the mediator will follow-up with the parties, often through counsel, to continue to seek a resolution.

FOLLOW-UP

When a mediation session does not result in a settlement agreement, the prospect of settlement often remains viable. In those instances, the mediator will subsequently follow-up to keep the parties and their attorneys focused on finding a solution. By calling, or even re-convening the parties, the mediator patiently and with perseverance assists the parties to explore fully the potential for resolution.

THE ATTORNEY AS ADVOCATE IN MEDIATION

Mediation is not really an alternative to litigation. It is an additional method for dispute resolution. It is often used in the context of an ongoing litigation to supplement that process. It follows that the expanded role of attorney as advocate, counselor and problem solver is central to mediation. Those attorneys who have recognized this fact and have sensed the increasing demand of clients for these services have strengthened their client relationships.

PREPARING FOR MEDIATION

The parties and their counsel are well served by appropriate preparation. Both the party and attorney should enter the mediation with:

- A realistic view of the case; including its weaknesses as well as its strengths
- A clear understanding of the needs and goals of the client
- An initial presentation of their viewpoint
- A willingness to compromise

PERFORMING IN MEDIATION

Then they should be prepared to:

- Listen
- Evaluate
- Explore options to be considered in the general session and in caucuses.
- Explore and evaluate different settlement scenarios.
- Find ways to assist the other party to be flexible on critical issues.
- Explore a resolution
- Make a decision

BEING SUCCESSFUL IN MEDIATION

Being successful means getting to the best possible result with the lowest possible cost – both emotional and financial. The key to that result is that the decision maker in mediation is not a judge, the lawyers, or the mediator – the decision makers are the

parties, with the advice and assistance of counsel. Thus, the most effective approach to mediation is likely to be based on a desire to reach a good resolution and end the dispute, rather than the combative style that may have characterized earlier interactions between the parties and their counsel. Being open to the possibility of crafting a creative solution means that the result may be something that both parties can live with more readily than if the result were imposed on them.

CONFIDENTIALITY

Generally, the interaction taking place within the mediation process is confidential. There are only a few exceptions to this made. This encourages a full exchange of facts, views and feelings. However, the settlement agreement itself is not confidential unless so negotiated.

The Center for Legal Solutions, Inc.

A Non-Profit Organization Dedicated to Dispute Resolution

AGREEMENT TO MEDIATE

The undersigned parties have agreed to mediate a dispute at the Center for Legal Solutions, Inc. with a mediator. For good consideration by mutual promises, the undersigned parties understand and agree:

1. MEDIATION PROCESS. Mediation is a non-adversarial settlement negotiation that can only result in a resolution if all Parties voluntarily agree.

2. GOOD FAITH. By signing this agreement, all parties pledge to cooperate and participate in good faith in all mediation sessions and to use their best efforts to obtain a mutual agreement.

3. MEDIATOR'S ROLE. The mediator will not act as a judge or attorney for any party and will not offer legal advice. The mediator shall be neutral and only act to facilitate a mutual agreement between the parties. The mediator's opinions, suggestions or advice, if any, shall not be binding on anyone. Neither the Center for Legal Solutions, Inc. or any of its mediators shall be liable to any party for any act or omission alleged in connection with any mediation conducted in accordance with this Agreement.

4. CAUCUS. Sometimes, the mediator may convene a caucus (private meeting) with each party and their counsel for clarification of issues. Information developed during the caucus may be confidential between such parties and the mediator, as indicated at the time. Such information will not be shared unless permission of that party is obtained.

5. CONFIDENTIAL AND PRIVILEGED. All that occurs during the mediation process shall be confidential and shall not be revealed in any subsequent legal proceedings or otherwise. All parties agree not to institute any action based on the mediation or to subpoena the mediator or the Center for Legal Solutions, Inc. to testify or produce any records or do anything, at any future legal proceedings. If any party does so, they hereby agree to indemnify and hold the Center for Legal Solutions, Inc. and the mediator harmless for any liability, expense and cost, including attorney fees, incurred by the mediator or the Center for Legal Solutions, Inc. as a result of such action. All parties shall be bound by the confidentiality and privilege provisions of this Agreement despite terminating their participation in mediation. All parties will also continue to be bound by their agreement to pay for those services rendered up to the point of that party's withdrawal from mediation as per the Center for Legal Solutions, Inc.'s Fee Policy. Facts, documents or other things otherwise admissible in evidence in any subsequent legal proceedings or otherwise will not be rendered inadmissible by reason of their use in mediation.

6. COSTS AND FEES. The fees for the mediation session are in accordance with the Center for Legal Solutions, Inc.'s Fee Policy. All fees, expenses, costs and travel time will be split equally among all parties, unless otherwise agreed in writing. Payment is expected at the time services are rendered unless other arrangements are made in advance. The Center for Legal Solutions, Inc.'s contract for services is with the attorney(s). We expect payment from the attorney regardless of client activity.

This the _____ day of _____, 20_____.

Signature:	_____	Signature:	_____
Print Name:	_____	Print Name:	_____
For:	_____	For:	_____
Date:	_____	Date:	_____
Signature:	_____	Signature:	_____
Print Name:	_____	Print Name:	_____
For:	_____	For:	_____
Date:	_____	Date:	_____
Signature:	_____	Signature:	_____
Print Name:	_____	Print Name:	_____
For:	_____	For:	_____
Date:	_____	Date:	_____

_____ _____

Mediator Date