THE LAW OFFICE OF DENNIS NEGRON
1772 Las Palomas Drive
La Habra Heights, California 90631-8012
Phone: 562-697-2944
Fax: 562-684-4630 or 801-640-4510
Email: dennis@dirtatty.net or dennis@dirtatty.com
Website: www.dirtatty.com or www.lawyers.com/negronlaw

ARBITRATION – IS IT GOOD OR BAD FOR YOU? VOLUME I – ADVANTAGES

The use of the alternate dispute resolution provisions is very common in consumer and commercial agreements. After negotiation, the most common form of alternative dispute resolution is arbitration. Each of us, either in our personal or business lives have or will agree to use some form of alternative dispute resolution. The use of alternative dispute resolution processes has dramatically increased in the last twenty (20) years, to the point where an entire industry has flourished. Alternative dispute resolution processes range from:

- Negotiation;
- Arbitration;
  - Binding;
  - Non-binding; and
  - Binding, except for.
- Mediation;
- Fact finding processes;
- Hire a Judge; and
- Other.

Alternative dispute resolution ("**ADR**") provisions appear in all sorts of agreements in several forms. Sometimes they appear as a provision or several provisions and on other occasions as separate agreements attached to or incorporated into a base agreement. Although the final form of ADR processes are not defined, restricted or absolute the more commonly contractually mandated forms of ADR are arbitration, mediation and a combination of negotiation, mediation and arbitration. The focus of this newsletter is to address the advantages of arbitration.

It is not uncommon to become confused on the difference by and between litigation, arbitration and mediation. Our society is very familiar with litigation, which is the prosecution or defense of a claim in a Court of law sanctioned by the State or Federal government. We have all watched Hollywood's version of a trial at the movies or on television. Although, these trials bear little resemblance to the real thing they do give us all a general idea of what a trial is like. May be I missed it but I have yet to see an arbitration in a movie or on television? Now there is an idea for Hollywood, "Arbitration the Movie". I bet there will be some long lines for that one!

In determining whether it is better to litigate or use arbitration many equally astute lawyers and businessmen have differed. Years ago, if you were a large corporation more than likely you preferred litigation over arbitration. You had more money; you could hire the best lawyers in town and were better equipped to defend yourself in a Court of law. Although there are still some organizations that take this approach, most are on the endangered species list or rapidly moving towards the implementation of an ADR policy and procedure. Most ADR policies and procedures include arbitration as an integral component.

If you must resort to a third party to resolve a dispute, which is better litigation or arbitration? To this question there is simply no easy answer. There is nothing inherently wrong with either process of dispute resolution. Some matters are simply best left to litigation and other matters are best left to arbitration. One form of dispute resolution process is not superior over another form, just different. In some circumstances, arbitration is preferred; in other circumstances you may prefer litigation. Each have their advantages and disadvantages and the individual must make a learned decision on which form of dispute resolution process to apply to his/her particular circumstance.

Arbitration: After the more commonly used form of dispute resolution, negotiation, arbitration is probably the most commonly used and the best known form of the ADR processes. It is as a general rule, less formal than litigation but more formal than mediation. It may involve a formal all hands hearing or a hearing where only the arbitrator(s) are present to evaluate the various submittals of the parties or any combination that the parties have agreed to. Arbitration is the process of resolving a dispute or a grievance outside of the Court system by presenting it to an impartial third party (known as an Arbitrator) or panel (known as an Arbitration Panel) for a decision that may or may not be binding, depending on the agreement of the parties. The arbitrator serves the role of the Judge to the issue at hand.

What rules apply? Although the law forbids illegal or agreements that are contrary to public policy, for the most

part the law strongly favors the parties rights to agree on any form of arbitration that they desire. The parties can select one arbitrator or a panel. They can set the timing and the rules or submit to an organization like the American Arbitration Association subject to their rules and procedures. In other words, unless the actual mechanism for the arbitration is illegal or against public policy the agreement to arbitrate is generally enforced by the Courts.

What is it used for? Arbitration is used to resolve all types of disputes by and between parties. It can be used to resolve only one question (e.g., what is the fair market value of a product or land) or it can be used to resolve an entire dispute (e.g., personal injury, liability and damages).

Why use, what advantages? Arbitration is seen as beneficial to commerce and the Court system. Some of the perceived advantages of arbitration are set forth below:

- **Flexible**: Can be voluntary, involuntary, binding, non-binding; require a formal hearing with parties or a hearing without the parties. It can be ordered by a Court or agreed to by the parties. The parties can specify the process, the selection of the arbitrator(s) and locale of the actual hearing. You can be selective and arbitrate certain classes of disputes while reserving the right to litigate others. It can be a design to suit process.
- **Time**: In most circumstances but certainly not all, a resolution via arbitration is perceived as a much more efficient method of resolving disputes. Simply put, most arbitrations take a lot less time and work to receive a ruling than litigation. For most disputes a resolution can be accomplished using arbitration in as little as 90 days to 180 days. Most forms of litigation (the exception being matters that receive preferential treatment in the Courts e.g., unlawful detainer) can take years and then the result is often appealable.
- **Cost**: Even though you may have an all parties hearing in arbitration, it is a less formal process than litigation and the time to prepare for a hearing is less than typical litigation. The time to conduct the actual hearing is generally much shorter than any actual trial. In any business but particularly the legal business, time is money! Since less time is spent preparing for and presenting to an arbitrator or arbitration panel it is simply less costly. Although on some occasions arbitration can be just as costly as litigation, this is rare.
- **Types**: Although the actual mechanism for the arbitration itself, hearing or non-hearing, the scope of the arbitration is as flexible and imaginative as the drafters. There are basically three (3) types of arbitration. Binding, non-binding and binding except for. Binding arbitration is for all intent and purposes final. It has the same effect as a trial except it is not generally subject to appeal. The other added feature is that in a binding arbitration the parties can agree that this is it and it is totally non-appealable for any reason whatsoever (except such grounds as exist for the revocation of any contract). Non-binding arbitration has the advantage of allowing the parties to present less than their best at the hearing (sandbagging). Although the parties can later agree to accept the arbitration award and make it final the arbitration award is nothing more than a good indication of what may happen in trial. The binding except for form, is specified as binding except for certain circumstances often cited is the California Code of Civil Procedure § 1286.2 (fraud, corruption etc.).
- **How initiated**: Arbitrations can be initiated in one of two ways, (a) voluntarily; or (b) involuntarily. When voluntarily entered into, the agreement to arbitrate is agreed upon sometime after the actual dispute has arisen. In other words, the parties to the dispute have made a knowing and free choice to use arbitration to resolve their dispute, after the dispute has arisen. When involuntarily entered into, the arbitration is either mandated by a pre-existing agreement by and between the parties to the dispute or by a Court. Court ordered arbitration is not binding unless the parties agree to make this arbitration binding.
- **Hearing**: The actual arbitration hearing itself is less formal and more fluid than litigation. Litigation is for the most part a public hearing. Arbitration is for the most part non-public and private. Litigation is mired in tradition and procedure that has developed through the years. Although arbitration is thought of as a mini trial most of the stodgy traditions of a Courtroom are suspended.
- **Motions**: Upon the commencement of litigation I have heard some frustrated clients and lawyers say, "let the games begin!" Often the shear volume of the paper war by and between lawyers is overwhelming to the parties and an **enormous cost in legal fees**. This is especially true when one side of the litigation has an unlimited war chest and the other side is of limited means. It is not a seldom event to see the cost of prosecuting a claim or the defense of a claim exceed the allegation of damages or a reasonable settlement amount for the issue at hand. Motions are seldom used or allowed in arbitrations. Although legal motions are a time-honored process of civil procedure they are extremely costly and time consuming. Those that can afford to institute extensive pleadings often do so at the expense of their opponent.
- **Convenience**: A Judge's Courtroom is the last vestige of American aristocracy and the Judge is definitely the king/queen of his/her Courtroom. Often matters set for trials do not start as anticipated and certainly do not conclude when hoped for. Often a Judge's prior case has not concluded, or there is no Courtroom available due to the priority of criminal matters or other matters trailing for trial. All of which results in the trial being continued from time to time to time. Courts tend to think of time in 30, 60 and 90 day intervals when the average citizen desires to get things done now. Courts tend to think of time as something of their sole domain. Although the Courts endeavor,

they are just too busy to accommodate everybody's schedule. Whether you are a witness, defendant, plaintiff, no matter, your schedule must comport with the Courts. Arbitration for the most part is resolved promptly with one hearing and scheduled to the mutual convenience of the parties.

- **Comfort**: As a general rule, a Judge's Courtroom is dark, dreary and for the most part not a place where well adjusted human beings like hanging. The setting for an arbitration is anywhere the parties so desire. Arbitrations can be held in a dark, dank room or at a conference room at a resort.
- **Definitive Result**: If the arbitration is binding, the ability of the parties to appeal to a higher Court after losing at the trial Court level is limited. Unfortunately, some skilled trial lawyers manage to keep matters going but for the most part, binding arbitration is in fact the final resolution to the dispute at hand. In addition thereto, litigation provides for the ability of a skilled lawyer to appeal the entire case for a mere procedural issue. As a general rule, appeals in arbitration are limited and unusual.
- **Sophistication of the trier**: Judges are very intelligent individuals with significant legal acumen. When a matter is set for normal litigation the Judge may not have the slightest experience in the matter at issue. The fact that the Judge may not have any knowledge or experience in health care, real estate, corporations or the issue at hand does not prohibit him/her from presiding over such matter. When the subject matter of the trial is not within the existing knowledge of the Judge the parties to the dispute will expend a great deal of time and money to educate the Judge on the industry custom and practice. This is only more costly if the industry custom and practice is what is at issue. On the other hand, the arbitrators are **specifically selected** because of their acumen and experience in a given area of the law.
- **Arbitrator vs. Jury Award**: It is a well-perceived fact that juries provide some very unusual awards. It is a perception amongst most litigators that as a general rule, arbitrators do not award unjust damages. In most circumstances, this is an advantage if you are on the defense side. At the same time, if you are on the plaintiff, in a non-binding arbitration and you receive a rather substantial award, this is strong incentive for the defense to settle.
- **Parameters**: Although there is nothing preventing parties from setting parameters before they go to trial, this almost never happens. Often when arbitration is in fact voluntary the parties will agree on parameters before the matter is submitted to the arbitrator. These parameters are often referred to as highs / lows, minimum / maximum, and ceiling / floor. For the most part this is an inducement to the parties so that they will voluntarily agree to use arbitration. How does this work? The parties as part of the process of agreeing to use arbitration will agree that no matter what the arbitrator decides no award will be below a specified amount or above another specified amount. The advantage here is that such an agreement takes away a lot of the gamble of proceeding to trial whereby the plaintiff could end up with nothing or the defense could be hit with an unjust award.
- **Control**: Often it is stated that "litigation has a life of its own." What I understand this to mean is that no one is in control. Once litigation is commenced the control moves from the parties of the dispute to the lawyers, Court rules, civil procedure and the Judge. Since for the most part, arbitration is a design it yourself process, the parties have the ability to build in any controls they so desire.

CONCLUSION

Arbitration or any ADR procedure is not a panacea for the resolution of disputes. No form of ADR should be entered into lightly. In certain circumstances, ADR may not be conducive to you or your business. In other circumstances, it could be very advantageous. The next newsletter will specifically address some of the disadvantages of arbitration.