

A Comparison of the Hallmarks of Litigation, Arbitration and Mediation

In a civilized society, if parties cannot work things out between themselves (i.e., private negotiation), then they will need to have a third party intervener step in and either facilitate a negotiation (mediation) or hear and decide the matters in dispute (litigation or arbitration). The following is a comparison of the hallmarks of each.

Hallmarks of Litigation

- ❖ Involuntary - one party can initiate without the other's consent
- ❖ Proceedings and record open to the public
- ❖ Formal with strict rules and procedures defined by governing bodies and case precedent
- ❖ Decisions based on law / remedies defined by law
- ❖ Requires "notice" and opportunity to be heard / due process driven
- ❖ Parties communicate with each other and with the court indirectly through counsel
- ❖ Scheduling based on the court's calendar and needs - not the parties'
- ❖ Outcome is binding and imposed by a judgment - but there is a right to appellate review for error
- ❖ Time-consuming / requires multiple proceedings to get to trial
- ❖ Not particularly efficient
- ❖ Protracted end because of right to appeal



Hallmarks of Arbitration

- ❖ Voluntary - both sides agree via pre-dispute arb clause in business contract OR via submission after dispute arises
- ❖ Proceedings are private - but *not* confidential unless contracted for
- ❖ Formal, but parties pick their rules and define their procedures
- ❖ Decisions are not required to conform to law; no case precedent or *stare decisis*
- ❖ Outcome is binding-but need to confirm award as a judgment to enforce
- ❖ No appellate review unless contracted for - and then may be limited to *arbitral* appellate review process if the provider has such a thing
- ❖ Parties tend to communicate with each other and with the arbitrator indirectly through counsel
- ❖ Scope of hearing and arbitrator's power is defined by contract
- ❖ Scheduling is based on the parties' / counsel's calendars and needs of the case
- ❖ May invite "process litigation" re scope of arbitrator power, contract defenses re enforceability of arbitration clause, emergency or provisional relief, availability and enforcement of third-party discovery
- ❖ May invite a protracted "end" because of right to appeal trial court's decision on confirmation or vacatur of award.



Hallmarks of Mediation

- ❖ Voluntary - both/all sides must agree to sit down at the bargaining table
- ❖ Proceedings are private - no "record" of what is said
- ❖ Informal / no mandatory procedures
- ❖ Parties define the "rules of engagement"
- ❖ Decisions based on party needs, interests, objectives
- ❖ Parties communicate directly even when attorneys are involved
- ❖ Third party neutral is at the table to help the parties talk about the problem, explore possible solutions, negotiate a deal, and close with a firm agreement (negotiated resolution)
- ❖ Scheduling - when to sit down - is based on the parties' calendars
- ❖ Outcome is "decided" by the parties
- ❖ Outcome is binding via private contract - but legal action may be necessary to enforce in the face of breach
- ❖ No decision-maker other than the parties
- ❖ Efficient and economical in terms of party and attorney time
- ❖ Process moves as quickly as the parties are able to meet, make decisions and reach agreement on terms and conditions of deal
- ❖ Only works if decision makers and sometimes other stakeholders (e.g., insurers, guarantors, spouses) are at the table
- ❖ Tends to move more quickly than private negotiation because a day (or more) is reserved to talk through the issues and try to negotiate a deal then and there
- ❖ Intense focus on the problem and reality factors that influence what is possible re a negotiated agreement
- ❖ Outcome is not mandated by law; parties can agree to things not available or recognized as "relief" under the law
- ❖ Broad and strict confidentiality protections for what is said during and in connection with the mediation - Cal. Evid. Code §1119

