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## Litigation. Arbitration. Mediation. What is the Difference and Who Should Care?

Most design and construction contracts contain “dispute resolution” provisions that require mediation, arbitration, or litigation. The reference chart below identifies some of the differences and pros and cons among these three options.

	Mediation	Arbitration	Litigation
<b>Will the outcome bind the parties?</b>	<b>No</b> – neither party is forced to settle unless they agree to binding mediation.	<b>Yes</b> – the arbitration award will be enforceable in court and no real appeal is usually available.	<b>Yes</b> – but the parties may have appeal rights.
<b>Is the dispute confidential?</b>	<b>Yes</b>	<b>Yes</b>	<b>No</b> – the litigation filings will be public record.
<b>Will it be fast?</b>	<b>Yes</b> – the parties fully control the process.	<b>Probably Not</b> – While the parties can set the schedule with the arbitrator, contentious disputes that require agreement among counsel will lead to uncertain scheduling.	<b>Yes</b> – in the Eastern District Federal Court, the fastest in the country. <b>No</b> – in State Court where scheduling can be difficult.
<b>Do the parties pay the decision-maker?</b>	<b>Yes</b> – good mediators are hard to find, and without a highly-skilled mediator, a contentious dispute may not be resolved.	<b>Yes</b> – be careful of arbitration provisions for small contracts that require three arbitrators, which can render the dispute cost-prohibitive.	<b>No</b>
<b>Is it expensive?</b>	<b>No</b> – Parties can choose how much to spend in preparation for the mediation, which should be much less than in arbitration or litigation.	<b>Yes</b> – The parties will pay the arbitrator(s) as well as the attorneys during the discovery and trial process, which may match or exceed litigation costs.	<b>Yes</b> – Fees incurred through discovery, construction experts, and trial, can be difficult to limit through trial in contentious cases.

	Mediation	Arbitration	Litigation
<b>Is it predictable?</b>	<b>No.</b>	<b>No</b> – Many times arbitrators are not bound to the same rules of procedure and evidence that are found in court, or can tend to “split the baby” in their awards.	<b>Yes</b> – While individual judges’ or juries’ decisions may be unpredictable, the process and parties’ rights under the law and rules of court should be the same.
<b>Who will decide the dispute?</b>	A mediator of the parties choice. McCammon is the largest group in Virginia, but local construction lawyers or retired judges can also serve as mediator.	An arbitrator with construction experience typically appointed or chosen by AAA or JAMS.	A Judge in rotation to hear the case.
<b>What is the role of the decision-maker?</b>	To facilitate settlement among the parties, who are free to fashion creative options as opposed to only exchanging money.	To hear evidence and issue a decision according to the contract, parties’ agreement, and rules of the arbitration forum.	To hear the evidence and issue a decision according to the law.

In sum, construction industry contracts and policy generally favor arbitration over litigation. This is primarily because the parties can select an arbitrator who has knowledge of the construction industry. We have found, however, that the policy goals of arbitration – speed, industry knowledge, efficiency, and reduced cost – are seldom realized. Accordingly, when drafting contracts we usually discuss the pros and cons of pursuing litigation in favor of arbitration to resolve disputes. Have questions about the nuances of dispute resolution? Contact a member of the Hirschler construction team.