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Mediation and Arbitration in Real Estate and Construction Disputes

Leveraging Alternative Dispute Resolution to Achieve Favorable Outcomes

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1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

Adrian L. Bastianelli, III, Partner, **Peckar & Abramson**, Washington, D.C.

Michelle M. Leetham, Of Counsel, **Ogletree Deakins**, San Francisco

Paul M. Lurie, Partner, **Schiff Hardin**, Chicago

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Mediation and Arbitration in Real Estate and Construction Disputes

Adrian L. Bastianelli IV

Michelle M. Leetham

Paul M. Lurie

Importance of including mediation and/or arbitration in pre-dispute commercial real estate and construction agreements

Need for consistent treatment across all related contracts

Is mediation a waste of time?

- Is it a sign of weakness in subsequent negotiations?
- Ratify agreement to mediate
- Learn strengths and weaknesses
- Lack of good faith
- Create settlement environment

Why mediation fails?

- What is failure?
- Lack of mediator diagnosis
- Lack of appropriate design
- Lack of decision makers participation
- Lack of risk related information (too early)
- Emotional reasons
- Bad predictions: lawyers and experts
- Gender and ethnic differences
- Client expectations not anticipated
- The wrong mediator?

Appropriate Design Considerations

- Mediator interviews
- Public session?
- Briefs and for whom
- Get experts into collaborative mode
- Time-long days?
- Place: comfort of surroundings

How important is the mediator?

- Parties trust the mediator
- Subject matter knowledge
- Knowledge of mediator in negotiation psychology
- Prepared mediator
- Creative mediator-Getting to Yes
- Hard working mediator

Overcoming impasse

- Avoid terminating the mediation
- Adjourn to exchange more information
- Empower decision makers
- Guided Choice Arbitration
- Framing: avoid loss
- Apology
- Mediator evaluations
- Mediator proposal

What am I looking for in selecting the mediator?

- Mediator track record v. resume
- Facilitative v. evaluative mediator
- Trusted by other party
- Ability to persuade
- Optimistic
- Hard worker
- Do I want a retired judge?
- Cost

Where to find the right mediator

- “Does anyone know a good mediator?”
- Agencies: AAA, CPR, JAMS, Locals
- Court programs?
- Interviews

Mediation Agreements

- Disclosures-related to trust
- Pre-dispute agreement should not include a lot of process detail
- Incorporation of rules e.g. AAA
- Understanding of relevancy of statutes e.g. UMA
- Confidentiality e.g. California
- Consolidation

How do I get the best result?

- Defining the “best result”
- Preparation
- Bringing the right people
- Understand your BATNA
- Manage expectations
- Patience and persistence
- Use the mediator
- Understand the mediator’s tactics
- What kind of negotiator gets the best results?

Settlement Agreements

- Never leave without one
- Advocates prepare not mediator
- Consider having each party prepare a settlement agreement before they come to the mediation

Arbitration

- Unlikely if not in pre-dispute agreement

Arbitration Clauses-Scope

- Avoid potential ambiguities
- Limit on dollar amounts
- Limit on type of dispute
- FAA: enforce in court of competent jurisdiction
- Included in all project contracts
- Consolidation and joinder
- Naming of arbitrators in contract

Arbitration –Administration or not

- Anticipate selection disagreement
- Anticipate arbitrator vacancy
- Anticipate need for removal to protect award
- Who handles the money?
- Compare party appointed aka *tri-partite* aka *ad hoc* either administered or not.

Arbitration Rules

- Use even if not administered
- Expedited Rules: AAA, CPR and JAMS.
- Number of arbitrators
- AAA Large Complex Rules v. Standard v. Expedited.
- Site of arbitration
- Choice of law: substantive and procedural e.g FAA, RUAA
- Avoid Federal Rules of Civil Procedure

Selecting the arbitrator

- AAA, ICDR, JAMS, and CPR panels
- Party appointed
- Ability to manage proceeding
- How do I find out about an arbitrators tendencies?

Arbitration Cost Control

- Is there a cost problem with arbitration?
- What can be done to overcome it?
- See College of Commercial Arbitrators Protocols www.thecca.net
- Customization
- Guided Choice Arbitration with mediator facilitation
- Selecting counsel and arbitrators who are dedicated to a cost effective proceeding

Discovery

- Balance cost, time, and need
- Documents
- Depositions

How do I reduce the cost of e-discovery?

- See protocols of AAA (ICDR), JAMS, Int't Bar Assn. Chartered Inst, ICC
- Early meet and confer sessions
- Limit disclosure by date, timekeeper, and accessibility
- Requirement that party requesting metadata demonstrate the need for information outweighs expense and burden

Cost savings in the hearings

- The chess clock
- Prefiled testimony
- Proffers and stipulations
- Expert panels

What is the key to an effective presentation?

- Know the arbitrators
- Limit the presentation to key documents and issues
- What is effective cross examination?
- Select experts who the arbitrators will respect
- Prove your damages
- Do I want a prehearing or post hearing brief?

Avoiding Vacatur of Award

- Arbitrator disclosures
- Use FAA jurisprudence
- Reasoned awards
- Electronic transcripts. Courtroom Connect, LiveNotes

Speaker Information

Adrian L. Bastianelli IV

202.293.8815 ext. 7118

abastianelli@pecklaw.com

Michelle M. Leetham

415.536.3445

michelle.leetham@ogletreedeakins.com

Paul M. Lurie

312.258.5660

plurie@schiffhardin.com