

MEDIATION AND ARBITRATION
PROS AND CONS BETWEEN THESE METHODS VS. USING THE COURT SYSTEM

DIFFERENCES BETWEEN MEDIATION AND ARBITRATION

What are the differences between mediation and arbitration?

Mediation is a non-binding form of dispute resolution in which two or more parties to a dispute meet with a mediator (often referred to as a neutral third party) who assists the parties in negotiating with each other to reach mutually acceptable solutions to their dispute. In order for any settlement to be reached by way of mediation, the parties must voluntarily agree to the settlement terms as mediators do not have the power to issue decisions or awards. If the parties are unable to resolve their dispute through mediation, they are still free to seek recourse through alternative means – often in the form of arbitration or litigation through the courts.

While also a form of alternative dispute resolution, arbitration differs considerably from mediation in several key areas. For starters, arbitration proceedings are more formal and structured than mediation and more closely resemble those of traditional litigation. While arbitration's more rigid procedures can provide much needed structure to parties who are unable (or unwilling) to negotiate the resolution of their disputes, the parties must first specifically agree to submit their disputes to arbitration (usually in an arbitration agreement that forms part of a contract between the parties).

Arbitrator's vs Mediator's roles

In contrast to the role mediators play in disputes between parties, arbitrators preside over the proceedings in much the same way judges do for litigation proceedings. And while arbitration proceedings are generally structured to limit the scope and duration of some of the more litigation-like procedures (such as discovery) in order to accelerate the process and keep costs down, arbitrators have great latitude to extend and modify these procedures. These broad and sweeping powers available to arbitrators to control and direct the proceedings stand in stark contrast to the relative lack of any meaningful authority afforded to mediators.

In addition to the differing procedural structures and powers imbued to arbitrators to control and direct the proceedings, by far the most distinctive difference between mediations and arbitrations concerns the arbitrator's role in making formal decisions about how the parties' disputes should be resolved. Unlike in mediations, where disagreements between the parties merely result in an impasse, the parties of arbitrations never have to agree to the outcome as it is decided for them by the arbitrator. This is because arbitrators, unlike mediators, have the power to decide issues of fact and law relevant to the parties' dispute and then issue binding (and generally final) decisions (referred to as awards) that are not dissimilar to those issued by a judge or court.

It's also important to note that very limited grounds exist for parties to an arbitration to appeal and/or set aside an award issued by an arbitrator. Even in circumstances where the ability to appeal is available, they are rarely successful. While the generally final and binding nature of arbitral awards can bring finality and closure to the parties (especially those on the "winning" side), this same finality comes with the potentially huge risk that the "losing" party will not achieve any of the results or relief it seeks.

From this perspective, mediation can offer the possibility for both parties to achieve some of their desired goals – even if that means neither party gets everything they want. In situations where the prospect of receiving an unfavourable verdict, decision, award, etc. is too uncomfortable to risk, attempting to reach a mutually agreeable resolution by way of mediation can be an excellent alternative to both arbitration and litigation.

PROS AND CONS OF MEDIATION & ARBITRATION VS. CONTESTED COURT HEARINGS

The following is a non-exhaustive list of the Pros and Cons of Mediation and/or Arbitration:

Some of the pros of include:

- (1) mediation and/or arbitration is generally faster than litigation;
- (2) mediation and/or arbitration generally costs less than litigation;
- (3) the rules governing mediation and/or arbitration are simpler to use and easier to understand;
- (4) mediation and/or arbitrations are generally more flexible (the parties can agree on their own scheduling order, the place and time to conduct the mediation and/or arbitration, and schedule it according to the needs of the parties);
- (5) the parties agree on a mediation and/or arbitrator to use for their dispute, as opposed to a random assignment of a judge; and
- (6) no need to go to Court. Instead the mediation and/or arbitration is conducted in a private office setting with flexible times.

Some of the cons of arbitration include:

- (1) *very limited* recourse to appeal a decision;
- (2) awards are typically *not* subject to review by a Court;
- (3) not having a judge or jury decide your case;
- (4) lack of ability to conduct full discovery;
- (5) the arbitration is not open to the public; and
- (6) inability to make full use of the Texas Code of Civil Procedure and Texas Rules of Evidence in pursuing or defending a legal action.