



# PLI

## Practicing Law Institute

### Handling Construction Risks 2007: Allocate Now or Litigate Later

ADR Choices -- Mediate, Arbitrate  
or Litigate?

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## **L. TYRONE HOLT, ESQUIRE**

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# Arbitral Immunity



**Pfannenstiel v. Merrill Lynch, et. al.**

--- F.3d ----, 2007 WL 512511  
(C.A.10 February 20, 2007)

The Tenth Circuit joins the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eight and Ninth Circuits in expressly recognizing the doctrine of arbitral immunity.

“Arbitrators are immune from liability for actions taken in connection with administering arbitration”



## Pullara v. American Arbitration Association

Case No. 05-05-00087-CV  
Court of Appeals, Sixth Appellate District of Texas

“It is the general principle that arbitrators and their sponsoring organizations are immune from civil liability for bias or the failure to disclose a possible source of bias. We adopt that principle.”

Citing *Stasz v. Schwab*, 124 Cal. App. 4<sup>th</sup> 420, 441  
(Cal. Ct. App. 2004)



# **Mediation Settlement Agreements**



## Fair v. Bakhtiari

40 Cal.4th 189, 147 P.3d 653  
Supreme Court of California December 2006

“... a settlement agreement must include a statement that it is “enforceable” or “binding,” or a declaration in other terms with the same meaning. The statute leaves room for various formulations. However, arbitration clauses, forum selection clauses, choice of law provisions, terms contemplating remedies for breach, and similar commonly employed enforcement provisions typically negotiated in settlement discussions do not qualify an agreement for admission under section 1123(b).”



## Yaekle v. Andrews

--- P.3d ----, 2007 WL 609872  
(Colo.App. 2007)

“If the parties involved in a dispute reach a full or partial agreement, the agreement upon request of the parties shall be reduced to writing and approved by the parties and their attorneys, if any. If reduced to writing and signed by the parties, the agreement may be presented to the court by any party or their attorneys, if any, as a stipulation and, if approved by the court, shall be enforceable as an order of the court.





- Litigation**
  
- Arbitration**
  
- Mediation**

**The Decision to use ADR Must  
Generally Be Made In Advance**



## Mediation

-- a condition precedent  
to litigation or arbitration



## “Better, cheaper, faster”?

Compared to what else?

- Should I draft a unique and “better” clause” or use an existing arbitration clause?
- Should I create my own procedures, rules and limitations?
- Why “draft” or “create” new language?
- Do you have clear and specific goals in mind?



# Litigation

## - the default process

- The processes, rules, administration, judges and procedures are already in place
- No administration or arbitrator fees
- Nothing to negotiate or prepare
- No control over the process
- No specialized knowledge or background



# Litigation

## Characteristics

- No knowledge or understanding of the industry customs, practices and procedures
- No opportunity to determine the processes or procedures
- No opportunity to select the fact finder
- No opportunity to tailor the process to individual needs



# Litigation

## Characteristics - continued


- You can not control access or timing to the procedures [most jurisdictions].
- Not adaptable to unique procedures or situations
- Everyone must be treated the same, i.e., equally
- Technical expertise and backgrounds vary and may not be adjusted or addressed.



# Arbitration

## Key Decision Factors

- ❑ Private vs. Confidential
- ❑ Private process – See AAA Rule R-24
- ❑ “The arbitrator and the AAA shall maintain the privacy of the hearings unless the law provides to the contrary.”
- ❑ Additional protection may be provided by the arbitration agreement
- ❑ Illustrative uses: partnership agreements, joint venture agreements, operating agreements



In arbitration, if the parties choose to do so, they can make the process what they want it to be, including:

- Limited or specifically defined discovery
- Single or three arbitrators
- Specific arbitrator qualifications
- Length of process
- ADR provider/administrator
- Predefined time frames for all or parts of the process





# Arbitration

## Essential Elements, Issues, Pitfalls and Problem Areas

- Select an established institutional set of rules/procedures – AAA, CPR, JAMS, etc.
  - Modify them as necessary
  - Do not use untested or “cute” procedures
- Make sure that the submission procedures are clear
- Select Choice of Laws – avoid unduly limiting jurisdictions or choose the FAA.
- Selection locale for hearings.



# Arbitration

## Essential Elements, Issues, Pitfalls and Problem Areas

- ❑ Transaction lawyers should consult with experienced litigators or experienced neutrals when drafting unique clauses.
- ❑ You can make it better, cheaper and faster, but you need to clear about what that means for your client.
- ❑ Talk to your client about its experiences and goals with the dispute resolution process.
- ❑ The length and complexity of the process generally have a direct relationship to the costs but longer and more complex do not necessarily mean “better”.



# Questions