

Distinguishing Mediation from Arbitration

What is mediation?

Mediation is a process in which parties to a dispute hire a neutral third person to help them facilitate a discussion of their dispute and the possible outcomes, with the hope of reaching a settlement and avoiding any further legal proceedings and costs. In mediation, the parties are in control of the outcome and any settlement is by mutual agreement. If mediation does not result in a settlement, the parties are then free to pursue litigation or arbitration, as applicable.

What is arbitration?

Arbitration is a process in which parties to a dispute hire a neutral third person to hold a hearing, listen to evidence and decide who is right and who is wrong. When parties agree to arbitrate, they give up their right to a trial by judge or jury and they give up their right to appeal a decision they do not agree with.

What is the difference between mediation and arbitration?

A mediator uses the power of persuasion to try to steer the dispute to a mutually agreed-upon solution. An arbitrator uses the power of an award (the arbitrator's decision, like a judgment in court) to decide for the parties who wins and who loses.

Does the C.A.R. residential purchase agreement (RPA) address mediation or arbitration or both? If so, how?

Paragraph 30A of the RPA obligates buyers and sellers to try and resolve their differences in mediation before pursuing any other legal action, such as a lawsuit or arbitration. This is a requirement of the contract. It is not optional. It applies even if the parties do not initial the arbitration clause.

Paragraph 31 of the RPA states that the buyers and sellers agree that instead of going to court, they will arbitrate disputes that are not resolved in mediation. This paragraph is only binding on the parties if they each initial the clause or if they incorporate it into a counter offer.

Why would a buyer or seller agree to arbitration if they are giving up some legal rights?

The decision to arbitrate rather than litigate involves trade-offs. Arbitration hearings are private, not open to the public. Arbitration decisions are confidential, not subject to public review. Buyers and sellers can choose their own arbitrator and select, if they desire, a person with subject matter expertise. An arbitration hearing may often take place sooner than a court hearing, and therefore a possibility in saving costs, legal expenses and time by proceeding in arbitration rather than litigation. The parties may find that these factors make up for the loss of the right to trial by jury or right to appeal or both in opting for arbitration.

Should a buyer or seller initial the arbitration clause?

Each buyer and seller must make their own decision and should consult with legal counsel if they have questions about the advantages and disadvantages of arbitration.

Are there any exceptions to mediation or, if applicable, arbitration?

The most often used exemption is for matters within the jurisdiction of the small claims court for amounts under \$10,000.