POINT COUNTER POINT
RESOLUTION CONSULTANTS

How and Where do I Start?

We frequently receive phone calls from individuals interested in engaging in a mediation or arbitration process and wondering how to proceed. Each situation is unique and the way forward will be driven by those unique circumstances.

For instance, we recently received a phone call from an individual who wanted to engage in mediation or arbitration with an insurance company. The individual did not agree with the decision the insurance company had made regarding his claim. In that case and in any situation where there is some form of policy, agreement, or contract defining the relationship between the parties, the first place to start is to examine the terms of the policy, agreement, or contract. Specifically, you will be looking to see if there is a pre-defined contractual procedure to:

1. Appeal a decision made under the terms of the policy or agreement; or
2. Request or initiate some form of alternative dispute resolution such as mediation or arbitration when the parties disagree on some aspect of the agreement or contract.

If these terms are stipulated in the policy, agreement, or contract, you are bound by those terms and must initiate the process as directed. If the contract or agreement merely states something along the lines of “In the event of a dispute or disagreement, the parties may request mediation (or arbitration)”, the best approach to initiate the process is to send a written request for mediation or arbitration to the other party. The parties can then work together to choose and/or locate an appropriate mediator, arbitrator or arbitration panel.

If, on the other hand, there are no provisions in the policy, agreement or contract for appeal or alternative dispute resolution; or if there is no formal agreement, contract or policy in place that defines your relationship with the other party to your dispute, you can suggest mediation or arbitration to that party.

If the other party is resistant to the idea of mediation or arbitration, you may wish to let them know that both mediation and arbitration are private and confidential processes. In mediation, anything said during a session is confidential and cannot be used against the parties if the matter goes to court.

In arbitration, the decision made by the arbitrator is only binding if the parties agree at the outset that it should be so. It is possible that if one party does not agree with the outcome, they may wish to proceed to court. However, arbitrators are bound by many of the same rules as the courts such as:

1. They are bound by the concept of procedural fairness meaning that:
    a. The decision-maker must be free of bias;
    b. The decision-maker must provide all parties to the dispute an equal opportunity to present their case and to respond to the other party's case.
    c. The decision-maker who hears the case must decide the case;
    d. The decision-maker must give reasons for his/her decision;
2. They are bound to make their decision based on the provisions of any policy, agreement or contract defining the relationship between the parties and/or any applicable legislation including *The Arbitration Act*, 1992 of Saskatchewan;
3. They are bound to make their decision based on the "balance of probabilities" standard of proof. In other words, it is more probable than not that a party's version of the facts is more likely the correct one.

As such, a decision made by an arbitrator will likely be very similar to that made through an expensive and protracted court case unless the arbitrator made significant errors in his/her decision-making process.

In any event, if the other party is agreeable to an alternative dispute resolution process, you can then decide which form (mediation or arbitration) would be more appropriate for your situation.

As a general rule, if maintaining or preserving your relationship with the other party is important to you which might be the case with a business partner; an employer, supervisor, or co-worker; a family member; or a friend, the best approach would be to have your dispute mediated as it is a collaborative approach to solving the dispute. If you are not concerned with preserving the relationship and you just wish to obtain a quick decision, arbitration may be more appropriate.

The next consideration is how to select a mediator or arbitrator. Typically, mediation involves a single practitioner. Both parties to the dispute should work together to select a mediator. However, if the parties cannot agree on a single mediator, co-mediation may be a viable alternative. Each party would select a mediator and the two mediators would then work together to help the parties resolve their dispute.

Arbitration may involve a single decision-maker or a panel. A panel typically involves three arbitrators. Each party to the dispute chooses one arbitrator. The two chosen arbitrators then appoint an independent third arbitrator. The advantage to a panel is that there are three decision-makers who hear the case and a majority decision decides the matter. The disadvantage is the additional cost. Conversely, a single decision-maker is more cost effective but it may be challenging to find an arbitrator that both parties can agree on.

All parties to a dispute have to agree to participate in a mediation or an arbitration. A party cannot be forced to participate unless the issue is already before the courts and subject to mandatory mediation. In that case, the mediation will be arranged through the Ministry of Justice's Dispute Resolution Office.

At Point Counter Point Resolution Consultants, we have the knowledge and expertise to help you navigate this process. For further information, contact:

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