

Beware of Waiving ADR in Your Settlement Agreement



Hon. Abe Gafni

After a protracted negotiation or mediation resulting in a settlement, parties are often eager to memorialize the result on the spot. Accordingly, they will prepare an abbreviated memorandum that summarizes the essential elements of the agreement with the expectation that the settlement details will be fleshed out later in a more formal document.

Moreover, at this stage, they generally focus on the substantive elements of the settlement agreement but fail to consider how disagreements that may arise from its interpretation or implementation are to be resolved.

As a result, the original expectation of the parties that all disputes will be resolved through mediation or arbitration may not be realized if these procedures are not included in the settlement agreement.

Such a situation resulted recently in a matter before the Alaska Supreme Court in *SMJ General Construction v. Jet Commercial Construction* (440 P. 3rd. 210, 2019).

In May 2016, Jet had entered into a subcontract with SMJ "to supply the materials and labor for the construction of a restaurant building and improvements." The contract further contained a requirement that any dispute arising under the contract must first be mediated; and, should the mediation be unsuccessful, the matter would be submitted to arbitration.

Several disputes arose during construction. In particular, SMJ claimed that Jet had violated the subcontract in several respects making it impossible for SMJ to satisfy its obligations. [READ MORE..](#)

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