



# Don't Ignore the Mandatory Mediation Provisions in Your ADR Agreement

**Judge Abraham J. Gafni (Ret.)**

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The past 50 years have seen an incredible increase in the use of arbitration as a preferred method for the resolution of disputes. As a result, articles, books, and legal opinions have emphasized the need to carefully draft mandatory arbitration provisions and the care that must be taken to assure that such provisions are not waived.

To a lesser but nonetheless increasing degree has been the requirement of mandatory mediation as a prerequisite to any final decision-making process, be it arbitration or court litigation.

However, because mediation, by its very nature, suggests resolution by agreement, too often parties do not give sufficient attention to the drafting of and adherence to mandatory mediation provisions, and the impact these may have on subsequent adjudicatory proceedings.

Two recent cases reflect how parties were denied their claimed right to arbitration because they failed to carefully draft or comply with mandatory mediation requirements.

A federal case, *Rivas v. CBK Lodge General Partners (Camelback)*, 2021 U.S. Dist. LEXIS 139345 (M.D. Pa., July 27, 2021), involved a claim against Camelback, a water park owner, for personal injuries suffered as a result of the alleged malfunction of a water slide. Camelback filed a third-party complaint against Whitewater West Industries, the manufacturer of the water slide, seeking indemnification.

Whitewater filed a motion to dismiss the third-party complaint, alleging that Camelback had failed to participate in mandatory mediation required by the contract between them.

In a provision titled “Resolution of Disputes,” the Camelback-Whitewater contract provided that in the event of a dispute, representatives of the parties should initially engage in direct discussions. If resolution did not result from those discussions:

“The parties shall next endeavor to resolve the dispute through mediation. Mediation shall be conducted at Camelback’s offices in Cohoes, New York, under the Construction Mediation Rules of the American Arbitration Association [AAA] by a mediator who is experienced and knowledgeable about the construction industry ... Unless otherwise agreed in writing, Whitewater shall continue the work and maintain the project schedule during any dispute resolution proceeding.”

In response to Whitewater’s motion to dismiss, Camelback contended that the mediation clause was only intended to apply to commercial disputes between Whitewater and Camelback arising from the construction of the waterslide and not to an unrelated subsequent indemnification claim. Camelback asserted that this was evidenced by the language in the provision relating to the “construction industry” and a mediator who was “knowledgeable” in that field, as well as the requirement that Camelback continue working on the “work” throughout the dispute-resolution proceeding. Camelback also argued that mandating mediation would compel the plaintiff in the personal injury suit to mediate her claim, even though she was neither a signatory nor third-party beneficiary of the Camelback-Whitewater agreement.

The court rejected Camelback’s argument. It recognized that the Indemnification clause specifies that it only pertains to issues “that may arise from the work.” “In contrast, the ‘resolution of disputes’ clause is not limited to situations that ‘arise from the work’” Rather, it expansively refers to “any dispute that arises between the parties.”

In short, the court noted, “This language does not preclude an indemnification claim through a Third-Party Complaint from the all-encompassing language of ‘any dispute.’”

“If the intent of the parties was to limit the requirement of mediation to “work”-related issues, then such qualifying language could have been included.”

Accordingly, Camelback would be required to mediate its dispute with Whitewater before Camelback could file an indemnification claim against Whitewater. The court, therefore, granted Whitewater’s motion to dismiss Camelback’s third-party indemnification complaint.

The court also noted that compelling mediation between Camelback and Whitewater as a condition precedent to Camelback’s filing a third-party complaint, would not deprive plaintiff of her right to jury trial. As the third-party complaint only related to a claim for indemnification, plaintiff would not be required to participate in the mediation, and her claim would be tried later in court.

Similarly, a Texas court refused to confirm an arbitration award because the parties had failed to mediate prior to arbitration.

*Burke (claimants) v. Roberson, (respondents)* (Court of Appeals, First District of Texas, No. 01-19-00920-CV, 12/27/20), involved the vacating of an arbitration award rendered in favor of claimants and against six respondents, none of whom participated in the arbitration and only two of whom were signatories to the agreement to arbitrate.

Claimants asserted that prior to the arbitration, they complied with the governing arbitration clause because they properly demanded mediation under the clause which provided:

“Except as otherwise provided above by Section 12.1, any controversy which touches on or concerns this agreement shall be resolved by mediation, and if such mediation is unable to resolve the controversy, then exclusively by binding arbitration administered pursuant to American Arbitration Association Rules (AAA) then applicable for commercial disputes.”

The respondents disputed that they ever received claimants’ mediation demands. It was undisputed, however, that they never responded to any such demands and no mediation ever occurred.

Thereafter, the claimants filed an arbitration demand with the AAA. The claimants’ demand asserted that all conditions precedent to arbitration had been satisfied, as the respondents had “failed and refused” to respond to the claimants’ mediation demands. The respondents again disputed that they had received the claimants’ mediation demands or the claimants’ arbitration notice. It was undisputed, however, that none of the respondents had responded to the claimants’ mediation demands or notice of arbitration, entered an appearance at any time, or participated in the final arbitration hearing.

The arbitrator issued a final award in favor of the claimants, after expressly finding that he had jurisdiction “over the matters submitted because the AAA had ‘assured’ him and the claimants had also ‘confirmed’ that ‘all notices’ had been ‘properly made’ to the respondents.”

In considering whether the arbitration award should be confirmed or vacated, the court noted that a trial court “shall” vacate an arbitral award if the party seeking *vacatur* shows that the arbitrator “‘exceeded’ his ‘powers.’” An arbitrator exceeds “his” powers by “deciding a matter not properly before him”.

The court concluded that the agreement required mediation as a condition precedent to arbitration. Accordingly, before the parties had a right and duty to arbitrate a dispute, the dispute must be submitted to mediation.

The claimants contended that respondents had waived their right to mediation by “ignoring” claimants’ mediation demands. This argument was rejected because under Texas law, “waiver cannot be implied by a party’s inaction.” In this case, that the respondents may have simply ignored claimants’ mediation demands could not serve as the basis for a determination that their right to mediation had been waived. (The court never determined whether it was satisfied that such notices had, in fact, ever been given by claimants or received by respondents). Accordingly, the matter was not properly before the arbitrator, who exceeded his powers in making the final award.

Several lessons may be learned from these cases:

- The careful attention given to mandatory arbitration provisions must also be given to mandatory mediation provisions.
- Mandatory mediation provisions should precisely reflect whether they apply to “all disputes” or will be limited to disputes of a particular nature or kind.
- Notice of a demand for mediation should be given in a form that will provide an indisputable record establishing that such demand had been made and received.
- Agreed waivers of mediation should be executed.
- If an adversary has ignored a demand for mediation, this should be brought to the attention of the court with a request for an order directing mediation or a judicial determination that mediation has been waived.

In short, while mandatory mediation provisions are very useful in seeking to resolve disputes, assure that they are drafted carefully and that all of their requirements are satisfied so that they do not become an obstacle to subsequent arbitration or court litigation. •

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