Litigation versus Alternative Dispute Resolution - Part I

"Which is best? Which is fastest? Which is fairest? Which is the least expensive?" These, and many more questions have been asked over the years regarding the best method of resolving disputes. And oftentimes, the answer depends upon those you ask. So, let's break the issue down to bite-size bits:

Defining the Terms.[1] The term "litigation" generally denotes "court". In its most basic format, there is a "plaintiff" (who is generally seeking a remedy either in damages, or performance, or some other form of relief) and a "defendant" (who is resisting, or defending against the legal action).

The counterpart to in-court litigation is arbitration, where there is a "claimant" rather than a "plaintiff" and a "respondent", rather than a "defendant".

The judge is the person who hears the case in court, and the arbitrator serves that role in arbitrations. Judges are employees of the state, arbitrators are private individuals, and usually attorneys.

Public vs. Private. In most cases, court hearings are open to the public, for all interested persons to attend. Arbitration is private; it is held at a mutually convenient venue and is not open to the public.[2]

Findings of Law and Fact. Judges oversee court proceedings, and rule on legal matters. If there is no jury, the judge is also the finder of fact. If there is a jury, they decide upon facts, i.e. who's telling the truth.

In arbitrations, there is a single arbitrator, or a panel of three. The arbitrator(s) make(s) the findings of fact and conclusions of law.

In both proceedings, the lawyers submit written memoranda to the judge or arbitrator in advance of the hearing.

Judge vs. Arbitrator. When a case is filed in court, it is generally assigned to a specific judge only when the trial date is set. There are certain exceptions, but the point is that one cannot file a lawsuit and expect that a certain judge will hear it.

In arbitration, the parties either agree upon a single arbitrator or a panel of three, or it is done by the arbitration service provider, after giving each party the right to identify their preferences from a group of names.

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[1] Unless otherwise specified, this article is based exclusively upon Oregon law, including the Uniform Arbitration Act, ORS 36.44 et seq.

[2] Venue refers to where the hearing is heard. For court hearings, venue is dictated by procedural rules, e.g. if involving real property, venue must be placed in the county court where the land is located. In arbitrations, generally the same rules are followed.

The difference is significant, since available arbitrators can be selected based upon their familiarity with the subject matter in dispute. One of the main Oregon arbitration service providers issues a list of names of attorney-arbitrators. Each side privately notifies the provider of their selections, in order of preference. The provider looks for names the parties both agree upon (or came closest to agreeing upon) and assigns that person.

Trial by Jury. Since the right to a jury trial is guaranteed in the state and federal constitutions,[3] it is not something that can be taken away against one's will. This means that all agreements to give up the right to a jury trial must be consensual and in writing; arbitration cannot be forced upon any party to an agreement.

However, while the right to a jury trial may not be taken away in the court system, it can be procedurally deferred. Under ORS 36.400 et seq., all claims seeking only a money judgment (as opposed to a claim for specific performance, injunctive relief, partition, etc.), must be arbitrated first, if the amount in issue, exclusive of attorney fees, is $50,000 or less. If one of the parties is dissatisfied with the arbitral award, they can appeal it into the court system, and ask for a jury trial.

Right of Appeal. Court decisions may be appealed. In Oregon, we have two levels of appellate courts. The first is the Oregon Court of Appeals, and the other is the Oregon Supreme Court. The decisions coming from the appellate courts are the building blocks of our "common law", i.e. the law developed by court precedent. Appeals can add years to the judicial process.

It is technically correct to say that arbitral decisions cannot be "appealed" – in the same way court decisions are appealed. Oftentimes, litigants appeal a judge's decision in an effort to get it reversed in whole or in part.

In arbitration, there is recourse to the court system, including the appellate courts, but the scope of review – i.e. what can result after the arbitration ruling – is limited. Within 30 days of receipt of the award, a party may request that errors in computation, clerical or typographical mistakes, or errors of a similar nature be corrected. A party may also ask that the award be modified or clarified. Similarly, arbitrators may amend or correct an award on their own motion.

Arbitral awards may be set aside by the court, but the basis for doing so relates not to whether the decision was legally or factually correct, but rather due to procedural irregularities involving proper notice, etc., or claims that the award was procured by corruption, fraud or other undue means by the arbitrator.[4]

If the arbitrator makes an error in his or her written decision, the parties can certainly bring it to their attention, if done so within 30 days of receipt. But if not, the decision stands, and is not subject to review by the court system. Why? Because the parties in the

[3] There are minor exceptions in Oregon, e.g. small claims under $250.
[4] For the specifics, see, ORS 36.705 and 36.710.

arbitration had a say in who would hear the case, and they presumably vetted the arbitrator's legal acuity during the selection process.

Enforcement of Award. Insofar as enforcing a court judgment vs. an arbitration award, there isn't a big difference. If a money judgment is awarded against a defendant in court, it can be registered in one or more counties, and executed upon through garnishment of wages and bank accounts, and foreclosure of the defendants' real or personal property.

Similarly, if an arbitration award is made against a respondent who ignores it, the claimant may petition the court to have it "confirmed" and it then become a legally enforceable judgment, in the same way as one that issues from the court.[5]

Speed. There is little question but that arbitrations are much faster than court proceedings. Subject to exceptions for cases designated as "complex", lawsuits are required to be tried within one year. Arbitrations are typically heard within three to four months.

Procedural Complexity. For those handling cases in both court and private arbitration, the differences are like night and day. Complaints, motions, and answers (called "pleadings") must be in proper form and can be laborious and technical to draft.

In arbitration, the procedural rules generally only require that the claim be stated clearly and the nature of relief stated. Frequently, a statement of claim can be drafted on a single page or less. If there is a procedural issue in dispute, the attorneys simply schedule a hearing with the arbitrator – usually within a week, either in person or telephonically, to iron things out or get a ruling.

When a procedural disagreement arises in litigation, a motion must be prepared, stating the relief sought, e.g. to state the claim with more particularity. The other side has a right to file a response. Then, a hearing date is set, and a judge hears the matter. Between start and finish, one to two months can easily pass. There is little question but that, compared to the ease of arbitration filings, the preparation of legal pleadings in court is very time consuming and labor intensive. This is why arbitration hearings can be heard much soon than claims filed in court.

Certainty of Hearing Dates. While some counties are better than others, the court system is laden by unknowns, thereby resulting in delays. First, due to "speedy trial" rights, criminal cases are usually heard first. This can result in reducing the number of available judges and forcing civil cases to be reset at the last minute. While not necessarily anyone's fault, having to prepare for a trial that gets postponed by weeks or months, can add costs, especially attorney fees.

Arbitrations are rarely reset, since all the parties and the arbitrators have agreed, well in advance, on the hearing date, and how many days it will take.

[5] ORS 36.700.

Rules of Evidence. Oregon lawyers follow the Oregon Evidence Code when in court. The judge makes evidentiary rules, e.g. whether certain testimony or evidence may be offered. In most cases, these rules are most strictly enforced when there is a jury. In other words, to a degree, the rules of evidence are relaxed slightly, when there is no jury, since there is less risk the judge will give credence to patently inadmissible evidence.

This relaxation is even more pronounced in arbitration. Barring evidence that is clearly irrelevant, most of it comes in, upon the theory that the arbitrator will be able to sift the wheat from the chaff.

Thus, the procedural easing in most arbitrations makes for a smoother, less formal and less contentious proceeding. Evidentiary objections are rare, as most evidence has been exchanged by the parties in advance.

[Next: Part II - Arbitration under Sections 37-38.3 of the OREF Residential Real Estate Sale Agreement.]