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# Mediating, Arbitrating and Litigating Construction Claims

Modern construction projects involve a multiplicity of parties, highly technical planning and scheduling, and complex legal documents. When not resolved in a timely manner, construction disputes can become very expensive in terms of litigation costs and the dispute resolution process, let alone the scheduling and relationship impacts. The three most commonly used methods of resolving these disputes are mediation, arbitration and litigation. The most practical and efficient method to approach dispute resolution is an early assessment of the dispute, potential project and financial impacts, and assessment of the best method of resolution.

## MEDIATION

### 1. The benefits of mediation.

Mediation is a non-binding procedure wherein a neutral hears both sides of a case and tries to informally assist the parties in settling it. There are many benefits to early mediation and many contracts that have arbitration clauses have a pre-suit mediation requirement. The benefits of mediation are that the cost and time involved generally are less significant than proceeding to trial or engaging in arbitration. Often, mediation is the best way to resolve multi-layered construction disputes involving the owner, architect, construction manager, contractor, subcontractors and suppliers where it is important for the parties to maintain a cordial business relationship. Even short of a full settlement, a mediation can potentially settle out some parties, claims and damages, which may significantly streamline a court action or arbitration. Mediation affords the opportunity to realistically evaluate your case, your opponent's case and your opponent's resolve. Mediation also helps a party see the case through the eyes of the mediator and may alert a party to something missed or not apparent.

### 2. The drawbacks of mediation.

Mediation will only be successful if all parties approach it both adequately prepared to discuss resolution and in good faith, or can be brought to that point by the mediator (assuming the parties' legal counsel have already done their best to do so). Participating in mediation under circumstances where it does not appear that there will be productive results may do harm and make binding arbitration or litigation unnecessarily contentious and expensive. If the parties have been acrimonious, it appears that the other side does not grasp the legal or practical issues, or the opening demand is not within the sphere of reality, it may be best to end the mediation.

The mediator is not a judge or jury and can only assist the parties in resolving disputes should the parties be willing to entertain settling in good faith. That being said, it is also critical to have a good mediator. A good mediator will be knowledgeable about the industry, prepared for the specifics of the mediated issue(s), assist with the parties' communication and understanding of their respective positions to address and weed out purely emotional stances, and facilitate a workable outcome – preferably with a "win-win" result, if possible.

**3. Strategies to ensure a successful mediation.**

In order to have a successful mediation, the two most important factors are the selection of the mediator and the preparation of the attorney and his or her client. The mediator in construction disputes should be well respected and familiar with the construction industry and be able to relate to construction clients. Two of the most important qualities for the mediator to possess are honesty and integrity. However, it is important to determine the mediator's technical experience and training; the frequency at which the mediator has been chosen to serve on construction mediations; the number of construction mediations handled by the mediator within the past three years; the mediator's batting average in terms of settling the cases both appointed by the court and approached by the parties voluntarily; references of the mediator's prior clients; and the mediator's fees.

In a construction dispute, the mediation statement is the most important document to prepare to ensure a positive outcome, and preparation should include client participation. The best mediation statements will attach pertinent bid documents, contract provisions and conditions, job meeting minutes and reports, reference engineering reports and technical specifications, and will anticipate and address the strong points of the other party. If a matter is in litigation, important court deadlines should also be included in the mediation statement. While some mediators will want the mediation statement shared with the opposing party, an often-preferred practice is to prepare two statements; one confidential statement that will advise the mediator of information that a party will not want disclosed to its opponent and a mediation statement that also presents the strength of your case and the reasons that the jury or judge will agree with you.

PowerPoint Presentations that are streamlined and organized can be persuasive when focused on the gravamen of the dispute in a presentation of 25-30 slides that demonstrates the strengths of one's case and conveys the risks of not settling to the opposing party. Importantly, mediation presents an attorney and his or her client the opportunity to address the other party directly rather than through his or her counsel. Having factual, legal or technical points at the ready to refute or question the other side's primary contentions while explaining the reason that a judge or jury will accept your facts with class and integrity can persuade the party that it may be best to amicably resolve a matter before things have to become less friendly in litigation.

## ARBITRATION

Arbitration is a private process of dispute resolution whereby parties submit their dispute to an arbitrator, chosen directly by the parties for the conduct of a hearing or hearings and for the promulgation of a binding decision. Although arbitration is a common law concept, statutory

sanction of arbitration may be found in the U.S. Arbitration Act, 9 U.S.C. §1, *et seq.* and the Uniform Arbitration Act which has been adopted in one form or another by a majority of the states. In most large construction projects, there are arbitration clauses contained in the documents.

**1. Arbitration clauses.**

Below is a standard arbitration clause:

> Any controversy or claim arising out of or relating to this contract, or the breach Thereof, shall be settled by arbitration administered by the American Arbitration Association under its Construction Industry Arbitration Rules, and judgment on Award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.
>
> The following are options that can be added to the standard arbitration clauses:
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> Selection of Arbitrators, Locale Provisions, Governing Law, Conditions Precedent to Arbitration such as Mediation, Consolidation/Joinder, Discovery, Duration of the Arbitration Proceeding, Award/Remedies, Assessment of Attorney's Fees, Form and Scope of the Award, Confidentiality, Appeal of Construction Arbitration Awards, and Statutes of Limitations.

**2. The benefits of arbitration.**

The parties select the arbitrator as opposed to being assigned randomly to a judge. Arbitrators are selected from a pool of professionals, typically with experience in the construction industry and, therefore, may provide a greater level of expertise than a judge. Such persons should have a greater capability to comprehend project issues and documents and to scrutinize liability and damage claims common to the construction industry than most trial judges. Another advantage of arbitration is that it is private and confidential. Conducted by private agreement, arbitration is not open to the public, and the decisions reached are not a matter of public record. Parties can present evidence as long as it is relevant and non-cumulative and there is also less risk of a punitive damages award and run-away juries.

**3. The drawbacks of arbitration.**

The major disadvantage of arbitration is that arbitration awards are virtually non-appealable. In addition, discovery in arbitration seems to be mirroring litigation in terms of pre-trial and trial practice. As a result, there often is no reduced expense over going to court. Because evidentiary rules are more relaxed in arbitration, undesirable and otherwise inadmissible evidence may be admitted. Arbitrators are less receptive to technical and procedural defenses (like statutes of limitations) and they are more likely to base their determinations on factual issues and their experience rather than consider jurisprudence.

Furthermore, it is difficult to set aside an award rendered by an arbitrator. Courts are limited in their ability to vacate an arbitration award to cases where the award was procured by

corruption, fraud, or undue means, where there was evident partiality or corruption and where the arbitrator is guilty of misconduct, or the arbitrator exceeded his or her authority. Courts can correct mistakes in miscalculations of figures or where the arbitrator ruled on a matter not before him or her. However, errors in proceedings or conclusions of the arbitrator where there is no evidence of fraud will not be set aside.

**4. American Arbitration Association enacted new rules to address the drawbacks of arbitration.**

In 2015, the AAA amended its Construction Industry Arbitration Rules and Mediation Procedures and enacted rules that were to send a clear message that arbitration should be faster, cheaper and a more efficient alternative to court litigation of complex construction matters. Rule 7 now requires that all requests for consolidation or joinder must be made prior to the appointment of the mediator or arbitrator or within 90 days of the date the AAA determines that all administrative filings have occurred to help streamline the litigation. New Rule 10 provides that the parties must mediate any claim or counterclaim that exceeds $100,000, however, a party can opt out of it unless the contract specifies mandatory mediation. New Rule 23 allows an arbitrator discretion to schedule a preliminary hearing to provide more structure and organization to get arbitration to be more effective and efficient. New Rule 24 gives the arbitrator greater control over the exchange of information with a view toward achieving economical progression of the arbitration, which also balances the parties' ability to present their case. As to electronic documents, the new rule provides that such information must be provided to a party in a way that is more convenient and economical for the producing party. New Rule 25 gives an arbitrator the power to issue orders related to confidentiality, impose reasonable parameters for the exchange of information, allocate costs of document production and take certain actions when there is willful non-compliance with an order of the arbitrator. New Rule 34 permits parties to file dispositive motions to dispose of all of a claim or part of a claim or narrow the issues in the case. New Rule 39 allows requests for emergency relief and an expedited hearing, and, under it, an arbitrator will be appointed in 24 hours to address issues promptly. Finally, new Rule 60 gives the arbitrator the power to sanction a party who does not comply with the AAA rules or an order by the arbitrator.

**5. Strategies to ensure a successful arbitration.**

The four most important factors are (1) selection of the arbitrator, (2) preparation of the attorney and his or her client, (3) limiting the issues to be arbitrated, and (4) establishing a reasonable time frame for deciding the issue(s) so that the costs can be controlled. The AAA's Enhanced Neutral Selection Process enables the parties to interview potential arbitrators or pose mutually agreeable questions to ascertain whether the arbitrator has the proper experience and disposition, and the parties should take advantage of it. Under the new Rules, an arbitrator can hold a Preliminary Conference to discuss streamlining the arbitration, and you should attend to present your client's position and discuss a case schedule which codifies the scheduling order. Formal rules of evidence do not apply in arbitration and arbitrators consider evidence presented to them. The new rules permit an arbitrator to rule on substantive motions where opposing party's claims may be dismissed, in whole or in part. A party should prepare for arbitration with the same diligence that (s)he prepares for court in terms of document preparation and preparation of witnesses that are necessary to present your client's case. Despite the limited ability to

overcome an adverse verdict, an attorney and his or her client should consider making and keeping a record, and having it transcribed in the event of corruption, fraud, misconduct, failure to accept testimony or evidence and failure to rule on a motion presented. The arbitration transcript should be treated like a trial transcript and the panel should not be allowed to go off of the record.

## LITIGATION

### 1. The benefits to litigation.

Litigation is a term encompassing any court process to resolve disputes. There is a large body of substantive law and procedure that exists which automatically controls the lawsuit and parties do not have to create the rules that will govern the lawsuit. If a party is not happy with the verdict of a judge or a jury, there is the possibility of a more favorable verdict on appeal. Court rules allow each party to use a variety of methods to discover information known only by the opposing party or a third party, including depositions, interrogatories (written questions) the opposing party must answer under oath, and subpoenas for the production of documents. These procedures greatly increase the chances that each party will discover the weaknesses and strengths of their respective cases before trial. Courts can construe the language of a policy as a matter of law where arbitrators may be inclined to consider the technical aspects of the litigation.

### 2. The drawbacks to litigation.

It takes time, and often at great expense, for a case to be resolved though litigation. The reasonable probability is that the trial will not go forward on the first date that it is set. Parties do not choose the presiding judge. Many jurors and judges are not versed in construction litigation, and do not have the expertise to evaluate the claims. There is also a greater risk of punitive damages.

### 3. Strategies to ensure successful litigation.

Preparation, preparation and preparation. Cases are won or lost in the discovery phase. Make sure that the discovery sought from your opponent is tailored to the issues in your litigation and that you compel your opponent for more complete answers if they are not provided. Witnesses should be prepared for deposition as if the entire case depends on it because it does. To be prepared, each witness should understand, review and discuss, the complaint, contract, expert reports, answer and affirmative defenses, key documents, literature, and all documents produced in discovery. If an attorney and his or her client knows their case well and their opponent's case even better, they should be able to present the evidence at trial in a manner such that complex issues are explained clearly so that they are understood. Since many judges and juries are not familiar with the intricacies of construction litigation, it is important to have qualified experts who can explain your client's position clearly and in a manner that the trier of fact will understand. Also, understand the jurisprudence and do not be afraid to think outside of the box in filing pleadings to dispose of issues.