Finding The Right Tool For The Job — Resolving Construction Disputes With Mediation Or Arbitration

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Construction projects, regardless of size, involve risks that often lead to disputes. These disputes, whether they are over the competitive bid process, incomplete design, ambiguous contract clauses, poorly defined scope, delays, or cost overruns, have led to an increase in the complexity and number of construction claims. In an effort to reduce the cost and delay associated with traditional litigation, parties often turn to mediation or arbitration as an alternative to resolving their disputes. These processes can be agreed to ahead of time and required by the construction contract, or the parties can agree to them after the dispute arises through a separate dispute resolution agreement.

While it is well known that mediation and arbitration are alternatives to traditional litigation, it is not always understood how they work or how they differ. Understanding these differences is important when deciding which of the two is best suited for a specific situation. Generally speaking, mediation is appropriate for situations in which both parties are prepared to compromise and, with the help of a neutral person, reach a mutually agreed upon resolution. Arbitration, on the other hand, may be more appropriate when parties need to reach a final decision but there is no likelihood of negotiating a settlement. In that case, the parties can look to an arbitrator to make a final determination for them.

Other differences between mediation and arbitration include:

Timing and Time Commitment

Mediations are usually easier and quicker to schedule than an arbitration hearing. Mediations tend to conclude within a few days. Mediation briefs are often exchanged and provided to the mediator in advance, which allows the parties to better understand each other's position prior to the mediation session. By contrast, arbitration hearings usually last much longer than mediations, require a considerable amount of planning and preparation, and often include some litigation-type steps such as the exchange of

documents, possible examinations for discovery, and the preparation and exchange of expert reports. Under both processes, the parties have the flexibility of agreeing to an appropriate schedule, rather than being subject to a schedule dictated by the rules of court.

Cost

Mediation can be much more cost effective than either litigation or arbitration, but only if it results in a resolution. The three main cost components of mediation include internal business costs for preparation and attendance, the cost of lawyers or other advisors to prepare and attend, and the cost of the mediator and session room. The arbitration process tends to be longer and more involved, including the presentation of evidence, possible discoveries, legal submissions and expert reports. This inevitably results in significantly higher costs than mediation, and can approximate the cost of traditional litigation.

Preserving the Business Relationship

The biggest advantage of mediation over arbitration is that it avoids the adversarial process and, therefore, may preserve the business relationship. If the parties choose to do so, mediation can focus more on the business interests of the parties than on their legal positions. The parties are able to meet in a neutral environment, with an objective mediator, and concentrate on creating a solution to their dispute. The mediator will assist the parties in identifying the strengths and weaknesses of their positions while discovering the underlying interests at the heart of the dispute.

Control

In mediation, the parties maintain control over how the dispute will be resolved. A mediator has no authority to impose a settlement or tell the parties how the dispute must be resolved. The parties must agree on the final outcome. Often, mediation accomplishes more in a single session than months of meetings and exchanging correspondence. In arbitration, the final outcome is based upon the decision of the arbitrator and the parties can be bound by it even if they do not agree with it (depending on terms of the arbitration agreement).

While there is no guarantee that mediation will resolve the dispute, some best practices to increase your chances of a successful mediation include:

- Plan to spend a concentrated period of time in the mediation and do not plan to conduct other business during sessions.
- Consider and factor in the cost of avoiding future litigation or arbitration.
- Make an effort to understand the other side’s position.
- Resist setting a “bottom line” or “top dollar” settlement number until the mediator has discussed the case with you.
- Ensure there is sufficient information. Exchange mediation submissions, documents and relevant information in advance.
- Be prepared to address technical issues. Have an expert available to discuss any reports with the mediator and other party.

- Each party should have someone attend who has settlement authority, to allow a final settlement to be reached.
- Before you attend, discuss internally the concept of settlement and possible options. Think about other business terms that might be negotiated in addition to the payment of money.
- Maintain a flexible attitude and open mind about your settlement options.
- Determine an objective and rational basis for your settlement proposals.
- Leave extra time in case sessions are constructive but more time is needed to reach a settlement.

Resolving disputes outside of court can save time, money, and head off the stress and frustration of prolonged litigation. While very different, mediation and arbitration each serve a useful purpose. Where the parties are motivated to reach a resolution and preserve the business relationship, mediation may be an effective and economical tool to resolve disputes. Where settlement is unlikely, arbitration can offer a faster and confidential alternative to the often protracted process of traditional litigation. In either event, understanding the differences between these two alternative dispute resolution processes is key in choosing the best strategic path forward.

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