

Arbitration

Mediation

WHAT ARE YOU AGREEING TO?

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When reviewing or preparing construction contracts, I often ask my clients – do you want your dispute decided next year by twelve well meaning jurors who have absolutely no knowledge of construction? The cost and time of litigating a construction dispute, coupled with the uncertainty of an outcome before a judge or jury who may have little or no construction knowledge, has led to the inclusion of both arbitration and/or mediation clauses in many construction contracts. What is arbitration and/or mediation you ask? It is important that any contractor understand the difference when presented with a contract that contains either type of clause.

Arbitration is a process by which a neutral third person, chosen by the parties, hears both sides of the dispute during an informal hearing and then decides who wins and who loses. One advantage of arbitration is that the parties are able to pick the arbitrator. This can ensure that the person or persons hearing the dispute have knowledge of construction and technical issues that may be involved. Often the arbitrator selected by the parties is a construction lawyer, contractor, or design professional. Arbitration also typically offers the parties a quick and inexpensive method of obtaining a decision. Discovery in arbitration is usually limited to an exchange of documents.

Arbitration can be either “binding” or “non-binding.” The distinction is important. In “binding” arbitration, the arbitrator’s decision is final. It cannot be appealed unless there has been a fraud, undue influence or some other serious misbehavior by the arbitrator, such as failure to reveal a conflict of interest. The fact that the arbitrator may be wrong or made a mistake is not grounds for an appeal. Thus, it is important to understand that when you agree to binding arbitration you are effectively waiving your right to appeal the decision. “Non-binding” arbitration differs from “binding” arbitration because the parties agree that they have a right to appeal the arbitrator’s decision. If no appeal is filed, an arbitrator’s award becomes binding.

Many contracts also contain a mediation clause that requires the parties to participate in mediation before either filing suit or

demanding arbitration. In mediation, a neutral third person is chosen by the parties try to resolve their dispute. Unlike arbitration, the mediator does not make a decision. Rather, the mediator acts as a facilitator or catalyst and attempts to help the parties collectively reach an agreement to settle their differences. In mediation, the parties control the outcome; that is, to settle or not to settle. During mediation, the mediator, the parties and their attorneys usually meet face-to-face. The mediator opens the session by stating how the session will proceed, who will speak and when and how long the session will last. Parties are asked to confirm their good faith participation and to agree that everything said in the session will be considered confidential (and, therefore, inadmissible at any subsequent court proceeding or arbitration). This allows the participants to speak openly and freely about the dispute. Parties then take turns stating their views of the dispute, with the mediator occasionally asking for clarification. A mediator may also meet with each party separately, during a confidential caucus, during which the mediator will help the party assess their position and that of the other side, identify the issues and generate possible solutions. The mediation will end when either a resolution is reached or the parties agree that they are unable to resolve the dispute. At that point, the parties are free to proceed with a trial or arbitration.

Mediation and arbitration can be useful as long as the parties involved realize the benefits and consequences that each can have on them should a dispute arise. It is therefore important to carefully read and fully understand contractual clauses providing for either mediation or arbitration prior to signing a contract. ■

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