# DISPUTE RESOLUTI

## MEDIATION AND ARBITRATION IN TODAY

By Steven J. Slawinski – Attorney at Law

With the ongoing economic impact of the COVID-19 pandemic, disputes are more likely to arise on construction projects. Contractors and owners may find themselves facing formal dispute resolution proceedings, which may include mediation and arbitration. For some, it may be their first time. In the author's experience, while most contractors have heard of both mediation and arbitration, many do not have a clear understanding of either one. Fewer still know enough about arbitration to make an informed decision either to accept or to reject an arbitration clause in a contract they are being asked to sign. This article will provide a basic practical understanding of mediation and arbitration within the context of construction disputes.

**The Dispute Resolution Clause — Pick Your Poison**

Most construction contract documents include dispute resolution provisions intended to chart the parties' course in the event of a dispute. The dispute resolution provisions typically require the parties to make a choice up front at the time of contract formation between arbitration and litigation as the method of binding dispute resolution that will be used. Mediation, a non-binding method, is also frequently mandated. The standard contract documents promulgated by the American Institute of Architects (AIA) call for the parties to expressly select between arbitration and litigation as the method of binding dispute resolution, but where the parties fail to make a selection, litigation is the default method. The dispute resolution provisions of the ConsensusDocs standard documents are similar. Both the AIA and ConsensusDocs contract forms require mediation as a precondition to proceeding with binding dispute resolution.

Binding arbitration can only be used if both parties have expressly agreed or consented to it. Agreements to arbitrate are heavily favored in the law, because arbitration helps to reduce the workload of the courts. The law deems agreements to arbitrate to be "valid, irrevocable and enforceable." Wis. Stat. §788.01. A party refusing to honor its agreement to arbitrate will be ordered to do so by a court. Wis. Stat. §788.03. The decision of whether to agree to arbitration is an important one with significant consequences and should therefore not be taken lightly.

**Mediation — Let's Make a Deal**

Mediation is a non-binding form of dispute resolution intended to help bring about a settlement of a dispute by the mutual agreement of the parties. The parties begin by selecting and engaging a neutral third party to act as the mediator. Attorneys or retired judges are often chosen as mediators. The mediator's fees are usually split equally between the participating parties.

Typically, each party's attorney submits an informal written statement of the party's position to the mediator in advance

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of the mediation. The mediation takes place at the office either of the mediator or of one of the party's attorneys and usually takes no more than a day. At the mediation, the parties are placed in separate rooms, and the mediator engages in shuttle diplomacy going back and forth between them. The mediator acts as a deal broker, who tries to persuade the parties to compromise and to reach a resolution that both parties can live with. The key issues of the dispute are discussed and debated, through the mediator. The mediator tries to get each party to view the strength of its respective position more objectively, often focusing on the weaknesses of the party's position. To facilitate successful mediation, the law generally treats all discussions and settlement offers in connection with the mediation as inadmissible in evidence, in case the mediation fails. Wis. Stat. §904.085.

Mediation is informal. It does not involve the presentation of any evidence or testimony, and the mediator does not make any decision or ruling. The mediator has no power to force a party to make or to accept any settlement offer. All he or she can do is facilitate settlement discussions and negotiations between the parties, and try to persuade the parties to reach common ground.

Since the 1990s, Wisconsin Courts have had the power to order litigants to mediate their cases. See, Wis. Stat. §802.12(1)(e). Mediation has proven to be highly successful in resolving a high percentage of civil cases to the point where actual trials in civil cases have become relatively rare. Because mediation helps to lighten judges' case loads, most judges routinely order parties to mediate prior to trial in civil cases. Furthermore, as noted above, many construction contracts require the parties to mediate as a prerequisite to proceeding with binding dispute resolution. Therefore, regardless of whether the parties have opted for arbitration or litigation, they are likely to mediate the dispute before the case is decided.

But while courts can order parties to mediate, they cannot force parties to settle. Likewise, while the contract may require mediation, it will not require that the parties reach a resolution. Mediation will only succeed if both parties are willing and motivated to compromise their respective positions and to make a deal.

Both the AIA and ConsensusDocs standard contract documents call for early mediation as a precondition to binding dispute resolution (arbitration or litigation). While early mediation may look good on paper, it does not always work, particularly with larger and more complex cases. For mediation to succeed, the parties must first have reached the point where they are ready to mediate. When mediation occurs too early, often the relevant facts have not yet been adequately developed to allow for an accurate or objective assessment of the case. In addition, the parties may not yet be emotionally and psychologically prepared to compromise.

Mediation can be a quick and inexpensive means of resolving a construction dispute. It can be a particularly efficient way to resolve a dispute involving multiple parties. However, because mediation necessarily involves compromise, the ultimate result achieved (the settlement) may often appear disappointing to each of the parties. Nevertheless, mediation has a proven track record as an effective

means of resolving disputes, and it will remain a prominent feature on the legal landscape for the foreseeable future.

**Arbitration – It's Decision Time**

In the construction industry, arbitration has been a popular means of dispute resolution for many decades. During the contracting process, contractors often choose between arbitration and litigation as the method of binding dispute resolution without fully understanding the differences and the ramifications of those differences.

Arbitration is a dispute resolution process in which a neutral third person or panel of neutrals selected by the parties presides over a formal hearing as evidence and testimony is presented, culminating in a decision on the merits by the arbitrator or panel of arbitrators. Arbitration comes in two flavors: binding and non-binding. In the context of construction disputes, arbitration is typically always binding, and therefore, the focus of this article will be on binding arbitration.

Wisconsin courts lack the power to order any party to engage in binding arbitration in the absence of an agreement to do so. Wis. Stat. §802.12(2)(b). But courts will enforce a valid agreement to arbitrate. Wis. Stat. §788.03. If there is an agreement to arbitrate, it is usually found in the dispute resolution provisions of the contract documents.

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Arbitration is generally a more streamlined process than litigation in court, however this is less true the larger and more complex the case becomes. In litigation, the parties typically investigate and develop their cases through the formal pre-trial discovery process. The parties may obtain documents from one another and from third parties and they may interrogate witnesses in sworn depositions. In litigation, the discovery process is where much of the heavy lifting is done and where much of the expense is incurred. Generally, in arbitration, the discovery process is more limited and often no discovery is allowed in smaller and simpler cases. The limitations on discovery are intended to streamline the proceedings to save time and money. However, if proving your case depends upon obtaining evidence from the opposing party or from third parties, the limitations on discovery can be a serious handicap.

The arbitration hearing is conducted much like a bench trial in court. Witnesses testify, being examined and cross examined by the parties' attorneys, and evidence is presented. The rules of evidence tend to be more relaxed than in court, and in some cases witness affidavits are allowed in lieu of live testimony. The arbitrator presides over the hearing, much like a judge does at trial in court, and he or she is the sole decision maker being both judge and jury. The arbitrator's decision (award) typically only gives the bottom line (who won and how much they won), often with little or no explanation of how the arbitrator arrived at his or her decision. The arbitrator's award is legally enforceable. A court will confirm (rubber stamp) the arbitrator's award and enter a judgment consistent with it. Wis. Stat. §788.12. The judgment may then be enforced just like a judgment arising from a civil lawsuit in court.

One advantage of arbitration is that the parties may select an arbitrator that understands and is familiar with construction disputes. Many judges lack these qualifications. It is also relatively easy to bring the arbitrators to the construction site to see it for themselves, but this is rarely done with a judge and jury.

In litigation, the loser at trial always has the right to appeal the decision to a higher court. Consequently, the trial is not necessarily the end of the dispute. In arbitration, generally there are no appeals allowed. The arbitrator's award is final and is enforceable. A court will only upset an arbitrator's award on grounds of fraud, misconduct, or corruption, not merely because it may have been wrongly decided. Wis. Stat. §788.10. The lack of appeals in arbitration is good for winners and bad for losers, but brings a swifter conclusion to the dispute.

One important disadvantage of arbitration is that it can be difficult or even impossible to require third parties to join in the proceedings. For example, in a dispute between an owner and a general contractor alleging defective work, the G.C. may wish to require the subcontractors that performed the work in question to participate in, and be bound by, the arbitration proceedings, but the G.C. would be unable to compel them to do so in the absence of their agreement or consent. In litigation, parties can be joined without their consent.

Whereas court proceedings are public in nature, arbitration proceedings are generally considered private. At the request of a party, arbitrators often issue gag orders enforcing the privacy of the proceedings. This can be an advantage or a disadvantage, depending upon the party's circumstances. It can be an invaluable advantage to a party seeking to avoid any bad publicity that may arise from the dispute or from the proceedings. It can be a disadvantage to the opposite party counting on the leverage from such potential bad press.

While the streamlined nature of arbitration may result in lower attorneys' fees, the arbitrator or panel of arbitrators do not come cheap. The arbitrator or the panel will charge by the hour for their time spent on the case and, in addition, there may be substantial administrative fees. These fees and expenses are typically split equally between the parties to the dispute. In large and complex cases, particularly where a panel of arbitrators is used, the arbitrator's fees and expenses can become quite substantial; sometimes making arbitration more expensive than litigation.

As between arbitration and litigation in court, arbitration is not always the better option. Which option is best depends upon the facts and circumstances of each case.

**Conclusion**

Because it is non-binding, being required to mediate rarely has disastrous consequences. But the significant differences between binding arbitration and litigation can have an impact on the outcome of the dispute. When entering a contract, a contractor should consult legal counsel to assist in making the important decision on whether to opt for arbitration or litigation as the designated means of binding dispute resolution.

*Steven Slawinski is an attorney and shareholder with the Milwaukee law firm of O'Neil, Cannon, Hollman, DeJong & Laing S.C. He currently serves on the ABC of Wisconsin Board of Directors. He can be reached at steve.slawinski@wilaw.com or 414-276-5000.*