

we deliver creative and effective business solutions and counsel

BERGER SINGERMAN

attorneys at law



CONSTRUCTION LAW ALERT

April 2007

www.bergersingerman.com

Planning for the Inevitable Construction Dispute: Alternative Dispute Resolution or Litigation?

by Jeffrey S. Wertman, Esq.

Disputes are an inevitable part of construction projects. These disputes come as a result of a process that require the cooperation, coordination and interdependency of different trades. As construction becomes more complex, this often results in intricate disputes, which primarily arise from the complexity and magnitude of work, multiple contracting parties, detailed and often unclear contract documents, insufficient planning, financial issues, and communication problems. Any of these factors can sidetrack and delay a project and lead to litigation or arbitration, increased costs, and a breakdown in the parties' relationships. An early investment of time focusing on the dispute resolution process could avoid costly problems later.

Often provisions requiring mediation or arbitration are simply inserted into construction contracts without really thinking about whether they are appropriate. This Construction Law Alert discusses various forms of Alternative Dispute Resolution ("ADR"), including their advantages and disadvantages.

Introduction

The two basic forms of ADR are mediation and arbitration. These dispute resolution mechanisms were created as an alternative to traditional litigation in court.

Mediation

Mediation is a confidential and private attempt by parties to resolve a dispute outside of court. Mediation, which is voluntary and non-binding, typically involves the use of an independent third party to act as mediator. The mediator may offer suggestions but resolution of the dispute lies with the parties themselves. Thus, unless the parties agree to resolve the dispute, there is no resolution. Mediation is particularly appropriate when the primary goal of the parties is to preserve a current or future business or personal relationship. Trying a case to an arbitrator and litigating a dispute in court are adversarial by nature and can irreparably damage ongoing business and personal relationships. Over the last few years there has been increasing growth of mediation in resolving construction disputes. Mediation is now mandatory in some construction industry contracts before a party can resort to arbitration or litigation.

Arbitration

Arbitration is the submission of a dispute to one or more impartial persons for a final and binding decision. The arbitrators may be business persons or attorneys with expertise in a particular field. The parties in their contracts decide the range of issues to be resolved by

arbitration, the scope of the relief to be awarded, and many of the procedural aspects of the process. Arbitration is similar to a court case in that the case is actually tried and the arbitrator issues a finding that is legally binding upon the parties. However, arbitration is less formal than a court trial and arbitrations hearings are private.

In ADR, the parties can take a more active role and have more control over the process than they do in litigation. ADR allows the parties to reach more creative and flexible solutions than litigation.

Arbitration vs. Litigation

The following discussion compares arbitration and litigation in various categories: time; cost savings; choice and expertise of decision maker; formality and flexibility of proceedings; privacy; discovery, number of parties; interim relief; and the importance of relying upon on or establishing legal precedent.

Time

Time is a very important consideration for most parties. Arbitration can help resolve conflicts in a portion of the time needed to litigate cases. Most court cases can take at least one year or more to get to trial. Appeals extend the time required to reach a final result still further. Arbitration can often resolve a case in a portion of the time it would take to litigate the dispute.

Cost Savings

Cost savings is another very important consideration. Arbitration has the potential for greater cost savings than litigation. Arbitration is designed to be faster, more streamlined, and more informal than litigation. The savings comes in the form of reduced legal bills and the fact that arbitration is generally faster and less expensive because there is far less discovery, motion practice and no appeal. Some insurers may even reduce the amount of their deductibles to insureds who agree to resolve their disputes through ADR. Arbitration can be expensive, although less than litigation, if there is a liberal provision for discovery.

Choice and Expertise of Decision Maker

Decision-maker expertise is another factor to consider. Parties who resolve disputes through arbitration have access to neutrals who are already experts in the subject matter of their disputes. Arbitration can help the parties avoid a random selection of judges with little expertise in the area of the dispute and submission to a jury with no such expertise at all. Through contractual arbitration, the parties can agree in advance to have an experienced neutral with targeted industry experience decide the matter. This can limit the risk of awards, decisions and results outside the range of reasonable industry expectation.

Formality and Flexibility of Proceedings

Arbitration is conducted in a manner that is more informal and flexible than litigation. Hearings often take place in an office and arrangements can sometimes be made to have proceedings held during evening hours. Testimony might also be allowed by telephone.

Privacy

Arbitration is not open to public scrutiny like disputes litigated in court. The hearings and awards are kept private and confidential, which helps to maintain positive working relationships.

Discovery

The streamlined discovery process can make arbitration riskier. It may be more difficult to see all opposing party's documents and evidence before trying the case. Therefore, if a party needs to obtain documents and testimony from the opposing side or third parties, arbitration may not be the best choice. Also, evidence that would clearly be excluded in court is routinely admitted in arbitration. Arbitrators, unlike judges, do not follow the rules of evidence, and therefore, arbitration tends to result in almost any document or witness testimony being considered by the arbitrator. This may be an advantage or disadvantage depending on the particular evidence in your case.

Number of Parties

When it is anticipated that disputes which may arise will involve multiple parties (outside the contractual agreement containing the provision requiring the parties to arbitrate), it can be difficult to join all those parties in an arbitration proceeding. In such a case, litigation may be the best choice.

Interim Relief

If a party needs extraordinary relief, such as a restraining order or an injunction, this is not generally

available in arbitration. The courts are in a better position to provide this type of relief.

Importance of Relying on or Establishing Precedent

Litigation may be the option of choice where the law is settled. This can yield a more predictable and certain outcome than arbitration where arbitrators need not give any reasons for their decisions and do not have to follow the law in arriving at a decision. In addition, litigation is best suited if a party wants to establish a legal precedent to discourage similar suits.

Conclusion

The expensive and time-consuming nature of litigation may make ADR an attractive alternative for resolution of a construction dispute. Mediation is generally a very attractive option, particularly as a prerequisite to either arbitration or litigation. Arbitration comes with both benefits and drawbacks. Before you sign an agreement containing a provision for ADR, you should first carefully evaluate your options. ■



Jeffrey S. Wertman

jwertman@bergersingerman.com
(954) 627-9912

Jeffrey S. Wertman is a member of Berger Singerman's Dispute Resolution Team. Jeff focuses his practice in the areas of construction law, construction litigation, construction ADR, and general civil, corporate, commercial and complex litigation in state, federal and appellate courts.

The hiring of a lawyer is an important decision that should not be based solely on advertisements. Before you decide, ask us to send you free written information about our qualifications and experience.