Construction and the Law

Mediation, Arbitration, and Litigation, Oh My!

Michael Bosse

Michael Bosse is a shareholder at Bernstein Shur in Portland, Maine. He is the chair of the firm's Construction Law Practice Group and recently authored a book entitled "Building the Construction Case: A Blueprint for Litigators." Michael can be reached at mbosse@bernsteinshur.com.

BERN
STEIN
SHUR

This month's article focuses on the different dispute resolution mechanisms generally available to participants in construction cases. The available choices include voluntary mediation, binding arbitration, and litigation. In this article, I will address the pros and cons of each approach so that the reader can understand the benefits and disadvantages of each method, and hopefully, proactively choose the desirable dispute resolution method at the contract drafting and negotiation stage.

Mediation

A mediation is a voluntary meeting between the parties where both sides present their case and then work to resolve the matter voluntarily between them. Sometimes it can occur as a precondition to the filing of a lawsuit, and sometimes it is ordered by a court after a lawsuit has already started. Regardless, in most mediations, a neutral third party, usually but not always a lawyer with construction experience, will conduct the mediation.

The mediation usually begins with an opening session with the mediator and all parties who have a stake in the dispute in the same room (on occasion, attendees can include lenders and insurance companies). The mediator will first provide instructions and guidelines on how the mediation will procedurally occur, and then the mediator will listen to both sides' best cases. In construction mediations, the parties will usually then separate into different rooms, and the mediator will conduct a shuttle diplomacy back and forth between the claimant and defendant in an attempt to get the parties to voluntarily reach a settlement.

Although mediators do not have the ability to actually decide the case, trained mediators have different tools available to them, including the substantive arguments of the parties, the cost of further proceeding with the case, other business factors that might be present on either side, and any other facts or circumstances that are useful to the mediator to move the case towards a resolution. It is a mistake to think that every mediation ends up in the middle of the two parties' position. One side often has a better case, or an exceedingly stronger case, and that is reflected in the settlement negotiations. Sometimes parties are armed to the teeth and ready to fight, and sometimes parties are flat broke and just want the matter over. In any event, mediation is an opportunity for the parties to resolve the case voluntarily and not by way of a third party deciding the case.

Binding Arbitration

Binding arbitration is often used as a second step if the construction mediation is unsuccessful. Alternatively, it can be a standalone first and last stop to the outcome of a case. In binding arbitration, an arbitrator is chosen by the parties instead of a mediator, and that arbitrator is actually vested with the authority to decide the case. Arbitrations are often thought of as mini-trials, in the sense that they offer the opportunity to present documents and witnesses just as in a trial setting. Instead of taking place in a courtroom, however, a binding arbitration usually occurs at the office of the arbitrator or one of the lawyers representing the parties.

There is a certain level of pre-arbitration discovery that occurs between the parties, but there is usually an effort to keep it fairly streamlined so that the arbitration process is as cost efficient as possible. Arbitration offers people a setting where someone will decide the case for the parties, but it is not intended to be a full blown trial and it intended to be significantly less costly. The rules of evidence are loosely applied, and the factual and legal conclusions reached by an arbitrator are almost never overturned in court. So, if you choose arbitration instead of all out litigation in court, part of what you are bargaining for is the idea of "rough justice" or "overall fairness." Of course, during the pendency of an arbitration process, the parties are always free to try to resolve the case on their own. But if voluntary resolution eludes the parties, then the arbitrator will decide the outcome of a case after a hearing.

Litigation

Finally, there is litigation. Litigation has taken place in some form since our country gained its independence almost 250 years ago andlitigation of construction cases has come to be an expensive proposition for parties. There is extensive pretrial discovery and depositions that are often taken by both sides in a case, and many cases have more than a modest amount of motion practice, which vastly increases the cost of litigation. Everyone's project files are exchanged and reviewed by the lawyers and the parties and all of these efforts cost time and money for the parties, and even then, an actual trial is still far off in the distance.

Many construction disputes are tried to a single judge; however, the parties usually have the ability to select a jury trial if either one of them wishes to do so. A jury trial of a construction matter ups the cost again, because now instead of trying the case to a trial judge who likely has some familiarity with construction cases, the case is being tried to a jury that almost certainly will have little experience with construction litigation. Jury trials have more formality and more uncertainty, and that causes all sides to spend more money getting ready. Like binding arbitration, however, litigation is a dispute resolution mechanism where if the case is not resolved, a fact finder, whether it is a jury or judge, will decide the case at the end of the day for the parties.

Mediation, arbitration and litigation all have their own distinct advantages and disadvantages. From a cost perspective, mediation is the least expensive dispute resolution mechanism, and litigation is likely the most expensive. Binding arbitrations are usually less expensive than litigation, but they have fewer procedural safeguards than the court system, and arbitration decisions will be virtually appeal proof, unlike court cases that will almost always have a right of appeal.

Different entities that I have represented over the years have had different opinions on which dispute resolution mechanism they like most, and that has depended on their personal preferences and past experience. Some clients I have represented have always wanted to go to litigation, and other clients have used litigation only as a method of last resort, trying very hard to resolve the case outside of a courtroom. If you have a preference, and you have the bargaining power, assert your best choice for dispute resolution into the contract you are drafting and negotiating. Otherwise, you may find yourself resolving a dispute in an arena that you dislike at a cost or manner that may not be acceptable to you at the end of the day.