

## **DISPUTE RESOLUTION OF CONSTRUCTION ISSUES**

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### **INTRODUCTION**

This section will discuss the process for resolving construction issues and claims in an effort to avoid litigation in court. While arbitration is often seen as another form of litigation, it will be discussed in order to describe a possible alternative to formal court litigation. The traditional way to resolve construction issues and claims was to file suit in court or to file a demand for arbitration. While this remains a common way to initiate litigation of construction issues and claims, the way most issues and claims are resolved is by settlement. Approximately 96% of all civil cases filed in the Massachusetts Superior Courts are resolved by settlement prior to entry of final judgment. Since most cases are settled, it is clearly in the interests of the parties to try to resolve such disputes before expending the enormous time and money to engage in the litigation process.

In recent years, the tremendous increase in mediation of construction disputes has had a profound impact in the way such disputes are resolved. This section will discuss the use of the mediation, dispute review boards and arbitration to resolve construction claims and will compare and contrast the benefits and detriments of each forum.

## MEDIATION

The most significant development in the resolution of construction claims has been the use of mediation in virtually all cases. The Massachusetts Supreme Judicial Court Uniform Rules on Dispute Resolution define mediation as “a voluntary, confidential process in which a neutral is invited or accepted by disputing parties to assist them in identifying and discussing issues of mutual concern, exploring various solutions, and developing a settlement mutually acceptable to the disputing parties.”

Mediators are specially trained to assist the parties in productively identifying the real issues that divide them, understanding what is in the best interest of each party and reaching an agreement or solution to some or all of these issues in order to provide certainty and clarity. Many construction contracts now require that the parties participate in mediation in advance of filing any demands for arbitration or suits in court. There are also certain statutes, which require mediation as a prerequisite to filing suit. While mandatory mediations are often viewed as a formality and parties have lower expectations that the case will settle, it has been my experience that these cases still have a high probability of settling if all parties make a good faith effort to participate in the mediation process.

Timing is critical to the success of a mediation session. It is imperative that the parties feel that they have sufficient information to make informed decisions. If a party believes that it is lacking all the pertinent information, it may be less flexible and less trusting of representations made by the other party. While it is cost-effective to resolve disputes prior to investing time and money in litigation costs, the parties must feel sufficiently knowledgeable for mediation to have the maximum chance of resulting in a settlement. If mediation is attempted after the parties have invested a fortune in litigating a case, it may be too late to obtain the required concessions from both sides to reach a settlement.

Once a mediator is selected, I strongly recommend that the parties and mediator enter into a written agreement confirming the nature of the process and the role of the mediator in order to invoke the additional confidentiality provided by the law of Massachusetts. Massachusetts General Laws Chapter 233, §23C provides that “[a]ll memoranda, and other work

product prepared by a mediator and the mediator's case files shall be confidential and not subject to a disclosure in any judicial or administrative proceeding involving any of the parties to any mediation to which such materials apply." Certain communications made in the course of the mediation are also protected as confidential communications. Chapter 233, §23C defines a mediator as "a person not a party to the dispute who enters into a written agreement with the parties to assist them in resolving their disputes and who has completed at least thirty hours of training in mediation..." and who satisfies certain other experience requirements. Ibid. (Emphasis supplied). The parties should, therefore, also satisfy themselves that the mediator's training and experience comply with the requirements of Chapter 233, §23C. It is also a rule of evidence that settlement negotiations are not generally admissible in evidence.

Once the mediator is selected and the mediation agreement is signed, counsel should meet or speak jointly with the mediator to set forth the ground rules for mediation. I have included the construction industry mediation rules of the American Arbitration Association ("AAA") in the Appendix. In direct contrast to arbitration or hearings before a master, where ex parte communications with the arbitrator or master are generally strictly forbidden, there is no such prohibition in mediation. Nevertheless, this fact should be explained to the participants and any issues regarding communications between parties and the mediator should be resolved. Finally, it is critical to be specific regarding the date, location, starting time and length of available time for mediation. I have encountered surprising problems with parties relating to concerns over the commitment of the other party to a specific time period for the mediation session. If a party announces at the outset of a mediation session that it will only be able to stay for a few hours, this can be viewed as a lack of commitment to the mediation or a lack of respect for other parties. It is critical to avoid such issues by having very clear scheduling rules.

Prior to the actual mediation date, I frequently communicate and/or meet privately with parties and counsel in large and complex cases, in order to identify issues, assess the positions, temperaments and styles of the parties and counsel, and explain my mediation style. This has proven to be of enormous benefit in avoiding situations where a party arrives at a mediation session and feels unable or unwilling to participate due to a failure to prepare on unforeseen

issues or unfairly surprised by the presence of unexpected participants. For this reason, I also require the parties to identify in advance who will be attending the mediation session.

In addition to, or in lieu of, the private communications and/or meetings, the parties generally provide the mediator with copies of pertinent documents and/or mediation memoranda. These submissions may be shared with opposing parties or kept private. While private submissions may be a bit more candid, they may also create a sense of secrecy and suspicion among parties, which may be an impediment to overcome. Since settlements do require some minimal sense of trust, shared information is generally preferred. I have also experienced problems, where a party discloses significant claims or defenses in a confidential memorandum, and the opposing party first learns of these claims or defenses at the start of the mediation session. This creates a significant obstacle to a productive mediation, as one party feels that it has been deceived and is less willing to make decisions dealing with newly discovered information.

When memoranda are shared, this also serves to reduce the time required for the initial presentation of positions of parties at the joint session of the mediation, as all parties will be familiar with basic issues to be covered and the arguments advanced by parties as to such issues. It also allows a party to prepare a coherent response to an unanticipated argument or a critique of an existing claim. Where questions are raised in memoranda, these can be researched and responded to either at the mediation or in supplemental submissions. The goal is to allow all parties to hear and be heard as to all pertinent issues. This process may start with the exchange of mediation submissions.

Before the date of the mediation session, it is also critical to confirm the absolute settlement authority of all participants. It is important to reconfirm this fact at the beginning of the mediation session. I have a strong preference for having the person with absolute settlement authority present at the mediation. There is no person braver and less willing to settle than the person sitting in his/her office reviewing a file and not listening to the presentation of the other side and the questions and comments of the mediator. If less than absolute authority is vested in a participant, it is critical that a person with total authority is immediately available by telephone.

In the cases of municipalities and insurance companies, the issue of settlement authority can be more complex, and it is best addressed prior to the actual mediation session.

The mediation session will then begin with an introduction and sign in of all persons present. To the extent that experts or other attendees not employed by a party are present, these persons should also sign the mediation agreement to indicate that they will be bound by the confidentiality provisions of the agreement. The mediator should explain the mediation process, describe his/her mediation style and set forth a proposed schedule for the day.

It is typical during the joint session that each party will “vent” its frustrations, fears or anger as to the failure of the other side to agree to its point of view. While the mediator needs to keep the proceedings from getting completely out of hand or further dividing the parties, it is important for each side to feel and believe that it has finally had an opportunity to tell its side and to make the opposing party listen to it. Far more latitude will be allowed than would ever be permitted in an arbitration or court proceedings.

Following the joint session, the parties then meet in private sessions with the mediator. It has been my experience that the private sessions are where most of the productive work is accomplished in a mediation session. As a result, I tend to urge the parties to make the joint sessions brief, so that we may begin with the private sessions. I also warn the parties that the initial settlement positions of the parties are likely to be extreme and provoke outrage. It is critical that the parties get past this stage and not allow it to sabotage the entire mediation session. As a result, it is important to encourage all parties to try to make realistic moves after the initial settlement offers are tendered. This is a very difficult task, but sophisticated parties generally understand the process and try to keep the process going.

The most important thing to remember about the private sessions is that they are indeed private. The mediator must emphasize that any matter disclosed in a private session will be kept private and not disclosed to others if the party so informs the mediator. Often, a party will inform the mediator that it is willing to make an initial offer and will even make a more generous offer later, but it wants the more generous offer to be kept confidential at first.

While my experience has been to keep the parties apart for the rest of the mediation session and to go from room to room conveying information, offers, questions, and responses to

questions, it is sometimes helpful to get all or some of the parties back together. This should only happen if there is a building spirit of trust and it is not likely to provoke a more hostile environment. It is often most helpful in construction cases if there are technical questions or complex factual issues that are best discussed in a dialogue with parties and experts as opposed to being transmitted by the mediator.

Finally, the mediation session hopefully will end with a total or partial settlement. I estimate that between 80% and 90% of my mediations result in a total or partial settlement, although it may in some cases take days or weeks of telephone calls or a subsequent session to reach a settlement. It is important to maintain confidence that a matter will settle. This is particularly true in construction cases, which are ideal candidates for mediation. Since the facts are often detailed and the matters are complex and frequently would involve very lengthy and expensive litigation, the parties have a great incentive to be realistic and try to settle the matter. I always explain that mediation is the best (and sometimes last) chance for a party to determine its fate. While I also explain that some define a good settlement as one that all parties dislike, it is almost always preferable to leaving one's fate in the hands of another, who may not have the requisite or desirable expertise, knowledge or interest in the matter.

Once the terms of the settlement are clearly agreed upon, it is very important to reduce the settlement to writing as soon as possible. This is frequently done at the mediation or within a day or two following the mediation. It often depends on the complexity of the settlement and the level of trust between the parties. Any complex agreement involving additional duties or responsibilities of parties should, in the absence of very unusual reasons to the contrary, be reduced to writing. In the case of a very complex settlement, it is recommended that a memorandum of understanding outlining the general terms of the settlement be executed at the end of the mediation, and that counsel work expeditiously to draft a more complete and comprehensive settlement agreement thereafter.

I recommend that even the most basic settlements be reduced to writing, as I have experienced at least one case where a verbal agreement for one party to pay another party a set amount resulted in a later misunderstanding. The party to be paid thought that the stipulated amount did not include payment for certain unpaid invoices, which would also be paid. The

party paying (and I) thought that the settlement covered payment of all claims. While the matter was resolved, this confusion could have been avoided if a formal settlement agreement had been drafted.

Parties involved in construction disputes must become familiar and comfortable with the mediation process. It is clear that a large percentage of all construction claims will be mediated, and many construction contracts now require mediation. Mediation requires different preparation and skills from litigation, and parties should understand this fact when selecting counsel and mediators to address construction claims. Since most construction claims are settled and not decided by a judge, master or arbitrator, it is critical that parties develop appropriate mediation skills and strategy.

### DISPUTE REVIEW BOARDS

In large complex projects, it is becoming more common for the parties to establish what are commonly referred to as dispute review boards. These boards are generally described and provided for in the underlying contract between the parties.

I have included a sample Dispute Review Board Agreement and Specifications, as prepared by the AAA, in the Appendix. Dispute review boards are often comprised of experts, who are familiar with the area of construction involved in the project. While many professionals in the construction field do not advocate appointing attorneys to dispute review boards, it is clear that attorneys with specialized knowledge or expertise in the areas to be covered should be acceptable to many participants.

Most dispute review boards are selected by the parties, and in the case of an owner and contractor, one common method of selection is for the owner to select a representative, the contractor to select a representative and the two representatives to select a third person. It is generally accepted that each party has the right to object to any proposed representative. This fosters a trust and respect for all members from the start of the project. Once the dispute review board is established, it is very important to carefully define the roles and standards of conduct for its members. These individuals must know whether they are all to be completely neutral and

thus avoid any ex parte communications with any party, or are the two selected representatives to be partial and only the third representative be neutral. I strongly urge parties to consider keeping all representatives as neutrals, as this promotes open communications between members of the dispute review board and also tends to decrease the adversary process in which disputes are reviewed. The dispute review board meets during the course of the project and discusses any issues, which have arisen or which are anticipated to occur.

The parties generally present their positions by a narrative from the individuals, who have first hand knowledge and have been involved in the project. Attorneys may participate in making presentations, although it is not required and the role of attorneys in dispute review boards varies. It is definitely not the case for attorneys to cross-examine participants.

The advantage of a dispute review board is that it is in place during the course of the project and is comprised of qualified individuals, who provide timely feedback to the parties regarding the disputes. While the opinions of the dispute review board do not have to be binding, this is to be encouraged as a part of any agreement in order to minimize the potential for litigation. Even where there is an agreement that the recommendations of the dispute review board are not binding, there is a tendency of the parties to accept these findings and not engage in litigation.

Some parties may even wish to make it clear that the members of the dispute review board are acting as arbitrators and that the findings of these arbitrators will be treated as a formal arbitration award. In these circumstances, it is clear that the parties have agreed upon a dispute resolution board, and the findings of such a board will only be reversed under the same standards that an arbitration award will be vacated.

### ARBITRATION

Arbitration is similar to being in court in that it results in a decision issued by a neutral party, who is the arbitrator. It is often different from a court proceeding due to its faster, more flexible, more efficient and less formal nature. The Massachusetts Supreme Judicial Court's Uniform Rules on Dispute Resolution define arbitration as follows:

“Arbitration” means a process in which a neutral renders a binding or non-binding decision after hearing arguments and reviewing evidence.”

Arbitration has always been a common way to resolve construction disputes, because many construction contracts provide that all disputes shall be resolved in arbitration. It is an essential prerequisite to the arbitration process that the parties agree upon arbitration. It cannot be imposed without the agreement of all parties, and such agreement may be expressed in the terms of the contract between the parties or by a joint submission to arbitration at the time the claim is filed.

Historically, the AAA is the forum for resolution of these cases, and it has extensive rules governing the arbitration process. Copies of the American Arbitration Association Dispute Resolution Procedures governing arbitration and mediation, as amended through January 1, 2003, are included in the appendix to this section. Copies of the Rules may also be obtained from the American Arbitration Association, 133 Federal Street, Boston, MA 02110, or from the AAA’s web site, which is located at [www.adr.org](http://www.adr.org).

This article will primarily describe the AAA arbitration rules for regular track cases, which rules apply to disputes involving between \$75,000 and \$1,000,000. Cases involving \$75,000 or less are governed by the Fast Track Rules, which provide for a more expedited and less formal process. There is no discovery and hearings are generally limited to one day. These cases present a very efficient alternative to formal court proceedings.

Cases involving \$1,000,000 or more are governed by the Large, Complex Construction Case procedures. These procedures generally anticipate that more extensive discovery will take place and that the arbitrators (there are almost always three arbitrators) will help manage the litigation process.

Regular track cases are heard and decided by one or three arbitrators, who are neutrals experienced in the construction field. The AAA has a list of arbitrators known as its Panel. Arbitrators have completed training at the AAA and have also frequently been involved in arbitration as attorneys or as parties. In recent years, the AAA in Boston has greatly reduced the number of arbitrators in its Panel and has required more extensive training as a prerequisite for

admission to the Panel. Continuing education and training is also required and provided by the AAA. Since the parties select arbitrators based on their expertise in the area involved in the dispute, this is another advantage that arbitrators have over many judges and almost all jurors, who often lack such expertise and must be educated as part of the trial process.

Customarily, larger or more complex cases involving very technical issues are heard by a panel of three arbitrators. It is common for the panel to consist of an attorney, a contractor and a design professional. Panels are often assembled in accordance with the nature and subject matter of the case involved. A case involving a site claim might result in the appointment of a panel of a construction attorney, a site contractor and a geotechnical engineer. The parties are sent lists of proposed arbitrators, together with copies of the panel cards listing the qualifications, experience, references and compensation rate of each arbitrator. The parties then mark the list in accordance with their preferences and strike the names of any objectionable arbitrators. In the event that the parties are unable to agree upon arbitrators, the case administrator of the AAA will appoint a qualified arbitrator. If there are three arbitrators, one will be appointed as chair and will preside over the hearings and make ruling on objections and other evidentiary issues. While this role is often reserved for the attorney, there are experienced and knowledgeable non-attorney arbitrators, who serve as chair of a three-person panel. Often these individuals have served as sole arbitrators and have considerable experience in conducting hearings.

This article will discuss the general rules for the average arbitration case. The AAA has rules tailored to the smaller or fast track cases, as well as rules for large, complex construction cases involving over \$1,000,000. Once all arbitrators are appointed, a preliminary telephone conference call or hearing is scheduled to outline the discovery schedule, complete the identification and disclosure of all likely witnesses (this is often necessary in order to avoid any possible conflict of interest of an arbitrator), discuss any special issues, such as whether a site visit is required, and schedule hearing dates.

While discovery in arbitration is generally far more limited than in court, parties typically exchange document requests and produce documents, and the parties are required to exchange exhibits two business days before the hearing. By agreement of the parties or order of the

arbitrators, more extensive discovery, including depositions, may be conducted when this is appropriate.

Arbitration cases are almost always brought to a hearing stage in much less time than it takes to be reached for trial in court. Hearings are scheduled in accordance with the schedules of the arbitrators and parties, and the dates, times and locations of hearings may vary in accordance with the work and travel demands of those involved. It is not unusual for arbitrators to schedule one or more site visits, if this is appropriate. The inherent flexibility in the arbitration process presents a considerable advantage to the court system, which often imposes on parties trial dates and times, which are frequently changed with little or no notice, in accordance with the convenience of the court.

Arbitration proceedings are also subject to confidentiality, if the parties deem this appropriate. This represents a considerable advantage over court proceedings and pleadings, which are public record other than in the rare event that a court order seals or impounds these records. This type of activity has been subject to increasing attack as it pertains to court proceedings, while it is understood as part of the culture of most arbitration proceedings that the matters, including in some cases the very existence of the dispute, will be kept confidential.

Once arbitration hearings commence, there is increasing pressure to complete the case in a short period of time. Historically, there has been some criticism of arbitrators for allowing cases to be tried over a long period of time with long gaps between hearing dates. While all parties agree that this is not desirable, the need to accommodate the schedules of many busy individuals has made this inevitable. Recently, an increased emphasis has been placed on arbitrators to hear cases for either consecutive days or several days in consecutive weeks, until the matter is completed. Arbitrators are now authorized to approve or deny requests of one or all parties for continuances. Arbitrators and parties may also agree upon flexible times and locations for the hearings, including site visits and hearings at the site.

Arbitration hearings are more informal than court proceedings, but the same format of calling witnesses and direct and cross-examination generally applies. While the formal rules of evidence used by the courts do not apply, arbitrators have the authority to be the judge of the relevance and materiality of the evidence offered. Some arbitrators do require that the parties

adhere to certain rules of evidence, and it is helpful for all parties and arbitrators to review this issue during the preliminary conference or hearing. Arbitrators have the right to exclude evidence and will reject evidence that is cumulative, unreliable, unnecessary or of minimal value. There is also a desire to keep the hearings concise and litigation of peripheral or unrelated issues will not be allowed.

Once the case has been completed, the parties will be allowed to file briefs outlining their positions on the pertinent legal and factual issues. The hearings will be declared closed upon receipt of such briefs. The arbitrators will then have 30 days to render their award, and all decisions of the arbitrators must be by a majority, unless the concurrence of all is required by agreement of all parties or by statute. Unless the parties agree to the contrary, the form of the award will be concise. It will present a breakdown as to how each claim has been resolved, such as “Party B shall pay Party A the sum of \$150,000.00 on account of Party A’s claim for a change order for increased cost to install platinum widgets on the subject project.” If requested in writing prior to the appointment of the arbitrator or if the arbitrator believes it is appropriate, the award may provide a more detailed written explanation.

Once an Award is rendered the parties may, in accordance with the Uniform Arbitration Act as enacted in Massachusetts in General Laws Chapter 152, §§11, 12, and 13, move in Court to confirm (§11), vacate (§12) or modify or correct (§13) an Award. The standard of review of an arbitration award by a court is limited. The most common grounds for vacating an award are the very narrow grounds of evident impartiality, corruption, fraud or misconduct by the arbitrators or that the arbitrators exceeded their powers. An important consideration when selecting between arbitration and filing in court is that errors of law, improper evidentiary rulings and errors of fact are not grounds for reversing arbitration awards, but they may be grounds for reversing the judgment of a court. “Absent fraud, errors of law or fact are not sufficient grounds to set aside an award.” Plymouth-Carver Regional School Dist. v. J. Farmer & Co., 407 Mass. 1006, 1007 (1990). Where finality is desired, an arbitration award is subject to less scrutiny than a court order if challenged, and a lengthy appeals process may be avoided.

Motions to dismiss and motions for summary judgment are also available in court as a way of deciding cases prior to trial. While pre-hearing motions may now be heard by arbitrators,

this is a relatively new procedure, and it is clear that far fewer cases in arbitration are resolved as a result of pre-hearing motions. It is not clear whether the new rules will encourage more summary disposition of cases by ruling on motions. See AAA Rules R-33(b) and R-37, which provide for the filing and ruling on motions, including motions, which could dispose of all or part of the case [Rule R-33(b)] and motions for injunctive relief and to preserve property (Rule R-37).

Accordingly, many lawyers tend to favor selecting arbitration for fact intensive and technical cases and courts for cases, where they intend to rely upon complex legal arguments. These are only general policies and clearly there are experienced and qualified arbitrators and judges, who capably decide all types of construction cases.

Finally, there had been an ambiguity in the law regarding whether in cases seeking recovery pursuant to statutes, such as General Laws Chapter 93A (the Massachusetts Consumer Protection Act), which provides for the award of multiple damages and attorneys fees, an arbitrator may award such relief. In the case of Drywall Systems, Inc. v. ZVI Construction Co., Inc., 435 Mass. 664 (2002), the Massachusetts Supreme Judicial Court upheld an award of multiple damages and an award of attorney's fees by an arbitration panel. While this decision has been questioned by some practitioners, it is clearly now the law of the Commonwealth of Massachusetts that arbitrators now possess the power to award multiple damages and attorney's fees under Chapter 93A.

Since arbitrators possess broad powers, which are subject to far less review than a decision of a judge, parties and counsel need to carefully consider whether or not to include arbitration clauses in their contracts.

## **APPENDIX**