

MEDIATION AND ARBITRATION OF CONSTRUCTION DISPUTES



James A. Christopherson, Esq.
100 Park Street
Traverse City, MI 49684
(231) 929-0500
Fax (231) 929-0504
Email: christopherson@ddc-law.com

James A. Christopherson, Esq. is an arbitrator, mediator and practicing attorney. He has over 28 years of experience as an attorney, arbitrator and mediator in complex construction, real estate, healthcare, commercial, contractual, financial and environmental disputes. He is available to help resolve commercial, healthcare, real estate, construction and environmental disputes throughout the United States.

ADR Experience and Qualifications

- Member of the Chartered Institute of Arbitrators
- Arbitrator for the American Arbitration Association: On National Roster of Neutral Arbitrators for both Commercial Arbitration and Construction Arbitration
- Arbitrator for International Institute for Conflict Prevention & Resolution
- Arbitrator for the London Court of International Arbitration
- Dispute Resolver and Arbitrator in the American Health Lawyers Association's Alternative Dispute Resolution Service
- Mediator for the American Arbitration Association
- Facilitative Mediator for the 6th, 13th, 17th, 19th, 20th, 28th, 46th and 57th Judicial Circuit Courts of Michigan
- Facilitative Mediator for the United States District Court for the Western District of Michigan
- Certified Mediator with the Conflict Resolution Service
- Case Evaluator in the United States District Court of the Western District of Michigan and in the 13th, 19th, 28th, 46th and 51st Judicial Circuit Courts of Michigan
- Arbitrator in the United States District Court of the Western District of Michigan
- Arbitrator for the National Arbitration Forum
- Member of the Quality Assurance Committee for the Conflict Resolution Service

Honors, Memberships and Professional Activities

- Member of the American Bar Association's Dispute Resolution, Health Care Law and Construction Industry Sections
- Admitted to the United States Supreme Court (where he has personally argued), the Sixth Circuit Court of Appeals and the United States District Court of the Western District of Michigan
- Past President of the Grand Traverse – Antrim – Leelanau Bar Association
- Member of the Michigan Bar Association's Business Law, Health Care Law and Dispute Resolution Sections
- Appointed by the Michigan Attorney Discipline Board to serve as chairperson of hearing panels
- Member of the Federal Bar Association for the Western District of Michigan
- Frequent Speaker and Author.

Background and Education

- Currently, Partner, Dingeman, Dancer & Christopherson, PLC, Traverse City, Michigan
- J.D., with Honors, Wayne State University, 1980
- B.A., Magna Cum Laude, Michigan State University, 1977
- Recent Mediation and Arbitration Training includes:
 - AAA Arbitration Roadmap: The Standard for Efficient and Cost Effective Arbitration, December 11, 2008, American Arbitration Association
 - American Health Lawyers Association / JAMS Advanced Mediation Techniques November 11, 2004 in Chicago Illinois
 - Michigan Supreme Court approved 40 Hour Mediation Training July 2002
 - Arbitrator II: American Arbitration Association, Construction Industry Arbitration Seminar on May 14 and 15, 2002
 - Pro Se: Managing Arbitration Cases Involving Self-Represented Parties, January 24, 2005, American Arbitration Association
 - Advanced Negotiations & Dispute Resolution Institute, March 15, 2005, Institute for Continuing Legal Education
 - Arbitrator Ethics and Disclosure, August 10, 2006, American Arbitration Association
 - Mediator Tools and the Reflective Practice, November 3, 2006
 - Dealing with Delay Tactics in Arbitration, May 29, 2007, American Arbitration Association
 - Chairing an Arbitration Panel, January 30, 2008, American Arbitration Association
 - Advanced ADR Techniques, Institute for Continuing Legal Education, March 13, 2008
 - Advanced Mediation Training Program: “Involuntary Participants, Advocates and Attorneys – Enhancing the Effectiveness of Everyone at the Table”, January 16, 2009

ARBITRATION AND MEDIATION OF CONSTRUCTION DISPUTES

A. WHAT CLAIMS ARE ARBITRATED?

Claims are arbitrated if the parties have agreed to arbitration in a construction contract or if the parties later agree to arbitration. Without an agreement to arbitrate, one party can not force another party into arbitration. To determine the arbitrability of an issue, a court must consider whether there is an arbitration provision in the parties' contract, whether the disputed issue is arguably within the arbitration clause, and whether the dispute is expressly exempt from arbitration by the terms of the contract.

The construction industry has been at the vanguard of Alternative Dispute Resolution ("ADR"). The objectives are:

1. avoid or minimize conflicts;
2. reduce the financial costs of conflict resolution;
3. preserve the working relationship of the parties . . . ;
4. reduce the time to resolve disputes; and
5. bring to bear the practical and technical insights of adjudicators and advisors from within the industry.

Traditional litigation is often expensive, time consuming, and risky.

Arbitration is a private, informal process by which all parties agree, in writing, to submit their disputes to one or more impartial persons authorized to resolve the controversy by rendering a final and binding award. It is used for a wide variety of disputes from commercial disagreements involving construction, securities transactions, computers or real estate (to name just a few), to insurance claims and labor-union grievances. When an agreement to arbitrate is included in a contract, it might expedite peaceful settlement without the necessity of going to arbitration at all. Thus, an arbitration clause is a form of insurance against loss of good will.

Binding arbitration, historically, has been the favored alternative for adjudication of construction disputes. Binding arbitration offers several

advantages: a limited process, relatively prompt hearings, privacy, informality, and an informed judgment.

Issues:

- How should multiparty disputes be addressed in arbitration clauses?
- Should arbitration be administered by an impartial administrative agency such as the AAA, or can administrative duties be effectively handled by the arbitrators?
- How much discovery should be available in arbitration?
- Should arbitrators write opinions in support of their awards?
- Should arbitrators have the authority to make summary rulings on “legal” issues?

B. WHAT PARTIES PARTICIPATE IN THE ARBITRATION PROCEEDING?

A party cannot be required to arbitrate an issue which he has not agreed to submit to arbitration, and a party cannot be required to arbitrate when he is not legally or factually a party to the agreement. However, not every party to a controversy is required to agree to arbitration before some parties may obligate themselves to arbitrate.

C. TYPES OF ARBITRATION

American Arbitration Association

Criteria for Neutrals Selection

- A minimum of 10 years experience in the construction industry.
- Successful completion of mandatory AAA training for dispute avoidance and dispute resolution.
- Neutrality – commitment to impartiality and objectivity and independence from any type of prejudice or conflict of interest.
- Judicial skills – demonstrated dispute avoidance and dispute resolution skills; appropriate temperament – unbiased, patient, professional; facility with adjudication, negotiation and conciliation.
- Reputation – must command highest respect among other industry professionals, industry attorneys and the business community.
- Commitment and availability – must be willing to serve, if chosen, in accordance with the needs of the parties and be able to devote time and effort to major disputes.

Private Arbitration

National Arbitration Forum

D. RESIDENTIAL CONSTRUCTION ARBITRATION

E. MEDIATION

1. Definition

Voluntary facilitative mediation is a flexible, nonbinding dispute resolution process in which an impartial third party – the mediator – facilitates negotiations among the parties to help them reach settlement.

2. The mediator is neutral.

The mediator will not be taking sides in the case. The parties' efforts should not be directed to convincing the mediator of the merits of their clients' position. Rather, all efforts should be directed toward open and forthright discussion related to attempts to convince the other side that their position merits consideration and, ultimately, acceptance. The mediator's role is to maintain

communication between the parties in a positive and productive manner, to help them consider and weigh issues, and to assist in constructing the ultimate settlement agreement.

3. The process works.

The majority of cases that are submitted to voluntary facilitative mediation settle as a result of this process. The key to the process is that it is voluntary; each of the parties has agreed with their clients to actively participate in the communications that can lead to settlement. Obviously, if the parties or their clients do not want to settle their differences, they cannot force the settlement. However, if the parties want to participate, and their clients actively participate, the mediator will expect them to bring a positive attitude and an expectation of success to the proceeding.

4. It is the clients' case.

Clients must attend with complete authority to settle the case. If the parties are representing a collective body, they should seek a designated spokesperson with sufficient responsibility to meaningfully participate in settlement discussions. The mediator will not expect the clients to be shy during settlement discussions, and will encourage their participation, comments and input at various times in the process.

5. People who respect one another can settle a whole lot more easily than people who do not.

A positive attitude and courteous and respectful communication will create a positive atmosphere. If posturing or advocacy result in insults aimed at the other side, much of the mediator's time will be taken in settling emotional issues without much progress in moving forward. Obviously, when one party postures, it is difficult for the mediator to believe that the party is also listening. The advocates who are most effective in mediation are those who are candid, but courteous. The parties should not be afraid to concede points strategically, and should be willing to dignify the opposing party's feelings, thoughts, and positions.

6. The parties should be realistic in their expectations.

The mediator appreciates that a client's expectations are often very high, and that counsel can run the risk of diminishing credibility with a client by delivering the unpleasant truth. If that is the case, the parties should let the mediator know and the mediator will attempt to assist the process during mediation. However, as a lawyer, the mediator appreciates the fact that very few cases result in one side

getting everything that it wants. The parties should appreciate the circumstances of their case during the mediation process.

7. The mediation process is confidential.

Everything that the parties say is confidential within the mediation process. The process is a settlement discussion and cannot come into evidence. The parties can concede something for purposes of settlement discussion and go right back to an advocacy position on that same point if the case does not settle.

8. Everything the parties tell the mediator privately is confidential.

Although the process starts in a joint session with brief opening statements from each side, the parties will likely spend considerable time in private caucuses. A private caucus will result in the mediator meeting privately with the party and their client. Everything told to the mediator in the caucus will be confidential, and the mediator will not discuss that information with the other side unless specifically authorized to do so.

9. Be prepared to complete a settlement document.

Documentation can be as difficult as achieving the settlement itself. If the case is settled, the mediator will want to leave the mediation session with a written settlement agreement. If the parties have standard language that they want in any comprehensive agreement, they should bring it along and put it on the table during negotiations.

10. Be prepared to invest a lot of time.

Some of the time may be spent in private caucus, so the parties should be prepared to spend some time sitting alone with their clients. Obviously, down time can be frustrating, so the parties should come prepared to use it productively. The parties should encourage their clients to do likewise or the clients will likely become impatient.

11. Be flexible and creative.

There are no rules on how a mediation proceeds once it starts. If one thing does not seem to be working, the mediator will attempt to try something different. If the parties have any ideas on what might work, they should tell the mediator. The mediator does not expect to have a corner on the wisdom in the room. If the parties have a constructive idea on how to keep the settlement process moving,

they should not hesitate to share it. The parties should invest themselves in the process by thinking creatively and tactically about what might move the case to settlement.

F. OTHER FORMS OF ALTERNATIVE DISPUTE RESOLUTION (ADR)

Case Evaluation

Dispute Review Board

G. MEDIATION AND ARBITRATION CLAUSES

Some of the more important elements a practitioner should keep in mind when drafting, adopting or recommending a dispute resolution clause:

1. The clause might cover all disputes that may arise, or only certain types.
2. It may specify only arbitration which yields a binding decision or also provide an opportunity for non-binding negotiation or mediation.
3. The arbitration clause should be signed by as many potential parties to a future dispute as possible.
4. To be fully effective, “entry of judgment” language is important.
5. It is normally a good idea to state whether a panel of one or 3 arbitrator(s) is to be selected, and to include the place where the arbitration will occur.
6. If the contract includes a general choice of law clause, it may govern the arbitration proceeding. The consequences should be considered.

Arbitration

The parties can provide for arbitration of future disputes by inserting the following clause into their contracts (the language in the brackets suggests possible alternatives or additions).

Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the _____ in accordance with its _____ Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

Arbitration of existing disputes may be accomplished by use of the following:

Negotiation

In the event of any dispute, claim, question, or disagreement arising from or relating to this agreement or the breach thereof, the parties hereto shall use their best efforts to settle the dispute, claim, question or disagreement. To this effect, they shall consult and negotiate with each other in good faith and, recognizing their mutual interests, attempt to reach a just and equitable solution satisfactory to both parties. If they do not reach such solution within a period of 60 days, then, upon notice by either party to the other, all disputes, claims, questions, or differences shall be finally settled by arbitration administered by the _____ in accordance with _____ Rules.

Mediation

If a dispute arises out of or relates to this contract, or the breach thereof, and if the dispute cannot be settled through negotiation, the parties agree first to try in good faith to settle the dispute by mediation administered by _____ before resorting to arbitration, litigation, or some other dispute resolution procedure.

If you have any questions about the issues raised in this article, please contact Mr. Christopherson at christopherson@ddc-law.com or 231-929-0500.

The opinions expressed in these materials are intended for general guidance only. They are not intended as recommendations for specific situations. The laws, rules, regulations and statutes are subject to change. As always, please consult a qualified attorney for specific legal guidance.

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