Can We Avoid Court? Construction Mediation Agreement Considerations

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A common feature of construction contracts is a clause requiring formal mediation of disputes relating to the project. Sometimes the clause is aspirational, merely "requiring" that the parties consider mediation. Other times, however, the clause is designed as a binding precondition that must be satisfied before a party may engage in litigation or arbitration of a dispute. While these clauses present the parties with an opportunity to pause and seriously consider settlement before initiating costly and time-consuming litigation or arbitration, they can present an obstacle when prompt commencement of litigation is necessary or desirable.

The general purpose of mediation is to provide a formal process to try to resolve a dispute by negotiation and, hopefully, avoid all or much of the expense and burden of litigation or arbitration. A mediator is a neutral party who evaluates the dispute, hears from, and confers with the parties and their attorneys, and assists the parties in reaching a negotiated settlement. Formal mediation of construction disputes is extremely common, largely because construction disputes are often complicated and expensive affairs that carry risk for all parties. Mediation, on the other hand, tends to be comparatively inexpensive and, because it is nonbinding, far less risky. A mediator can provide recommendations to the parties to help them try to settle without forcing resolution on them. Critically, mediation communications are confidential and may not later be used against the party, facilitating a more open discussion of the issues.

Mediation, unlike litigation, typically also allows parties to choose the mediator to whom they will entrust the process. Mediation clauses may specify that the parties must mediate with a neutral one well-versed in construction disputes and familiar with the industry. Even when this is not specified, the parties generally must agree on a mediator or engage in a formalized process of selecting one, which provides an opportunity to choose a mediator whose experience is suited to the dispute. There are many mediators who focus specifically on construction disputes and are

familiar with common project delivery methods and contract types as well as claim features like schedule analyses, change order proposals, and pricing evaluation.

But the time is not always right for mediation, and agreements to mediate can present unwanted procedural hurdles. When the parties all believe that mediation is not likely to be productive, they can agree to forgo mediation otherwise required by their contract(s). This may be styled as a modification of the contract. When mediation is a condition precedent to binding dispute resolution – that is, a condition that must be met before proceeding to litigation or arbitration – the parties may simply agree to waive the right to insist on that condition or raise it as a defense in the litigation or arbitration to follow.

Such agreements generally are binding and enforceable, but it is important to specify the scope and parameters of the parties' agreement. Where possible, the agreement should identify and refer to the mediation provision in the contract and specify what is being modified or waived. For example, an owner and a contractor may wish to waive the right to insist that they mediate with each other while retaining the right to insist on mediation of related disputes with subcontractors, design professionals, or other related parties. Careful review of the mediation provisions of the contract(s) at issue and a clear understanding of the parties' goals is important.

What about situations where the parties don't agree? For example, one party may be unable to mediate promptly but needs to commence litigation to preserve its rights due to the impending running of a statute of limitation, a forthcoming problem with witness availability, or the need to issue subpoenas quickly to prevent loss of critical evidence possessed by a third party. Particularly in complex construction disputes, productive mediation can require significant preparation time and exchange of information or documents. Experienced and qualified construction mediators also are in high demand and typically cannot schedule mediations on short notice.

Courts generally have held that agreements to mediate must be given effect, but the case law regarding enforcement is not as well developed as it is for agreements to arbitrate. Commonly, the defendant will raise the failure to mediate as an affirmative defense. However, depending on the jurisdiction, a failure to mediate does not necessarily mean that the case must be dismissed. When mediation is a precondition to litigation but the plaintiff needs to commence suit to preserve important rights, some courts often will simply stay the case and order the parties to mediate per their agreement. In deciding whether to stay or dismiss an action, the court may look at whether the party commencing suit attempted to mediate. When commencement of litigation or arbitration is necessary to preserve a claim, the plaintiff might seek an immediate stay from the court, concurrent with the initial filing of the action, to allow time for good-faith mediation without loss of important rights.

Legal defenses that may be raised against any contract also often are applicable to agreements to mediate. For example, an unconscionability defense to enforcement of the agreement to mediate may be asserted to attack boilerplate mediation provisions in form contracts forced upon a party (so-called contracts of adhesion). And, to the extent involved in the formation of the contract, duress or fraud may be raised to invalidate or preclude enforcement of mediation provisions in some jurisdictions.

Some form of an agreement to mediate is a nearly ubiquitous feature of contracts for large, complex construction projects, often as part of multistep dispute resolution provisions. When mediation is a precondition to litigation or binding arbitration, it may present problems in certain circumstances and give some parties pause at the contracting stage. But in most cases, contracting parties can agree on reasonable mediation provisions, which courts generally will uphold to facilitate efforts to resolve disputes in a fair and efficient manner.

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