

Primer on Alternative Dispute Resolution - Part I - Arbitration

[by Harvey W. Berman](#)

In America, the traditional method of resolving disputes has been the filing of a lawsuit and having the case decided by a judge or a jury. The parties often go through an arduous and expensive process of formal discovery (interrogatories, depositions, requests to produce documents, and requests to admit) interspersed with motions requesting the court for some type of relief prior to the trial. After trial, the losing party has the right to appeal the case to a higher court. However, for many years the lawsuit has been under attack and its reputation eroded primarily because of the expense and time of the proceedings coupled with the lack of expertise and sometimes interest of the judge or jury deciding the case.

To address these deficiencies, a system of alternative dispute resolution (“ADR”) has been rapidly gaining momentum. This system includes the use of arbitration, mediation, and other nontraditional methods of dispute resolution. These methods are especially beneficial for the commercial and construction industry which typically seek a quick resolution of disputes. The oldest and best known method of ADR is binding arbitration.

Arbitration is a private proceeding initiated by agreement of the disputing parties. The parties agree on a neutral decision-maker (called an arbitrator) who holds informal proceedings at a time and location agreed upon by the parties or assigned by the arbitrator. The arbitrator is often selected for his or her skill in the subject matter of the dispute and for his or her reputation for honesty and fairness. The arbitrator is not required to be a lawyer. The parties usually equally split the cost of the arbitrator’s fee. Sometimes there is one arbitrator and sometimes there are three. The number of arbitrators will depend upon the agreement of the parties or the administrative rules that the parties have agreed upon. The right to appeal a decision of an arbitrator is usually limited by law or by agreement of the parties and is significantly less than the right of appeal in cases involving court litigation.

If the disputing parties wish to do so, they can determine by agreement some or all of the rules that will apply to their arbitration (e.g. the method of selecting arbitrator(s), number of arbitrators, location of hearing, whether discovery is permitted, who pays the cost of the proceeding, etc.). If the parties wish to avoid the time required to determine all of these rules, they can agree to have their dispute administered by the American Arbitration Association, the Center for Public Resources (providing only limited administration), or one of the other local or national organizations that provide this service. Each organization has its own rules. The disputing parties will usually be required to pay a fee to the organization for its services which varies with the organization and the type of services provided.

Arbitration is particularly attractive for builders, suppliers, remodelors, subcontractors and suppliers because the parties benefit from having an arbitrator skilled in construction matters with the time and interest to evaluate the many complex documents and issues that are often involved. Other benefits for the construction industry include the confidentiality of most arbitration proceedings, the increased speed in obtaining a decision, and limited discovery. Another benefit arises from a recent change in the Occupational Code that now permits complaints filed by owners with the Michigan Consumer & Industry Services (CIS) to be resolved by arbitration or mediation if specified in the construction contract.

The main drawback of arbitration is the limited right to appeal a ruling by the decision-maker although many see this as a benefit. However, this limitation applies to all disputing parties. The

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although many see this as a benefit. However, this limitation applies to all disputing parties. The parties are waiving their full right to appeal a decision for expediency and cost-savings. There are other limitations of arbitration depending upon your point of view such as the lack of a jury option and the absence of full discovery unless otherwise agreed.

For an arbitration clause in an agreement to be effective, it must include the following words or words of similar effect: "Judgment upon the award entered by any arbitrator(s) may be entered in any court having jurisdiction thereof." Further, since arbitration usually arises by agreement of the parties, the details of the arbitration depend upon the terms agreed upon by the parties. The parties have considerable flexibility in drafting arbitration provisions, however, as with any agreement, the parties are stuck with what they agreed upon unless the parties all agree to a change. Careful drafting is extremely important!

If you wish to obtain additional information relating to arbitration, visit the American Arbitration Association's website at <http://www.adr.org>. Part II of this article will focus on another popular method of ADR: mediation.

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