

# Dispute resolution 101

*Continuing our look at routinely encountered legal issues through the eyes of two fictitious electrical distribution companies: Exploring the difference between litigation, mediation, and arbitration.* by **Daniel Goldberg**

**In our June column**, we reviewed some of the issues that arise when a lawsuit is started and whether emails that had been sent by Alvin Amp, the owner of Distributor in a Rush, were going to find their way into his lawsuit. The fact is that there is often a lot of confusion about the different methods for resolving disputes, and Amp recently called for some advice on the differences between three of the forums in which business owners often find themselves when there is a dispute on a job: litigation, mediation, and arbitration.

• **Litigation** is the “traditional” form of dispute resolution, sometimes taking place after the unpleasant discussions where one party—often through frustration more than anything else—too quickly screams, “I’ll see you in court.”

Imagine Amp has a beef with Bobby Busduct, owner of Distributor in Control, that simply cannot be resolved. Amp can now file a formal complaint in court. (Depending on the amount at issue and the circumstances of the parties, the complaint could be filed in state court or federal court.) If he prepares a complaint and files it in court, he has to serve the complaint on Busduct’s company. Busduct then gets the chance to answer the complaint and file any claims back over against Amp that he may have (called counterclaims).

Both parties then go through a formal discovery process to determine the facts, which can include written questions and depositions. If the matter does not settle before trial, there is ultimately a hearing in front of a judge—or a judge and a jury—and judgment enters for one party or the other.

Litigation gets expensive quickly. Each side needs an attorney, and because the courts move slowly, parties need to consider whether filing a formal complaint is the right way to go. Sometimes there is just no other route; in other cases, alternative dispute resolu-

tion (ADR) methods can be considered.

• **Mediation** is one of the more widespread uses of ADR. It is a less formal way to resolve a dispute by which the parties hire a mediator, often splitting the cost, who tries to help bridge the differences between the two sides to bring them to an agreement.

The format at the mediation is as limitless as the creativity of the mediator him- or herself. It is critical to find a good mediator to get the job done. Some mediations start out with all parties in one room, each expressing his or her side of the story to the mediator. Principals are (or should be) there, so that there is someone with authority to get it resolved if an agreement between the parties begins to take shape. The mediators often break the sides out separately, going over strengths and weaknesses of each side’s position to bridge the gaps.

The process is private, not in court, and very often results in a resolution much more quickly than a court litigation can. If a compromise is reached, a settlement agreement can be reduced to writing. The process is confidential and, in almost all cases, a mediator can’t be required to testify in court if no agreement is reached. If an agreement is not reached, other than the time spent trying to get to an agreement and the cost of the mediation, there really is no

downside. The process is not binding, and even if it does not work, each side has a much better handle on the issues that are important to the other side and still retains the right to go to court.

• **Arbitration**, unlike mediation, is binding. Here, the parties are also in front of a third party, but instead of bringing the dispute to a mediator, who would attempt to facilitate a resolution by agreement, an arbitrator has the authority to issue a binding arbitration decision, which is then almost universally enforceable.

The way that parties get to arbitration is by agreement, generally by virtue of their underlying contract. If the parties have agreed to arbitrate, the parties also generally agree in advance as part of their contract what rules will apply to their arbitration.

At an arbitration, there is an arbitration panel (sometimes one person, sometimes three, sometimes more) who listens to the evidence, hears witnesses, and issues a binding arbitration decision (fully enforceable in court). Some attorneys swear by arbitration; others do not like the finality of the process without the rights of appeal that they would have in court. ■

**Goldberg** is an attorney specializing in liens and bonds at Ruberto, Israel and Weiner, P.C., in Boston. He can be reached at 617-570-3560 or [djg@riw.com](mailto:djg@riw.com). This column was published for informational purposes only, is not legal advice, and does not create an attorney-client relationship. Materials concern topics offered for general information only and should not be relied upon or used as a substitute for professional advice. Consult an attorney before making decisions with legal implications.