

Mike Merrill:

Hello again. This is Mike Merrill, the host of the Mobile Workforce Podcast. Today we had a really nice conversation with Mr. Sam Barakat. And Sam is an expert witness, an arbitrator, and also an um, adjudicator for the construction industry. He also has a background as a professional construction engineer and is a licensed attorney. So Sam brings nearly two decades experience as an arbitration and a witness expert for the construction industry. I think you'll really enjoy today's conversation, and we, in fact, had such a good conversation that we decided we're going to have Sam back on maybe next week. So look forward to that next one as well. So I just wanted to jump right into the conversation and ask you what are the key things and, uh, steps that parties should take before entering into any arbitration process in their business?

Sam Barakat:

Okay. Once you have decided that, okay, the issue is big enough, um, we want to go into arbitration, um, then there are steps that you do, um, just to prepare yourself. For example, the first thing you do is understand your case. Um, and a lot of the time, the people involved in the projects are too involved in the project, emotionally invested, that you really can't objectively, um, quantify your probability of success or even quantify the claim that you have. Right. I mean, look at the claim as a project. So there's a cost benefit analysis to anything, how much you want to invest into defending or prosecuting your claim versus how much you're going to get out of it. So before going into arbitration or before retaining lawyers, or even if you retain a lawyer, talk to your lawyers and say, hey, where are we? How can we evaluate that? And a lot of time, you can hire independent consultants to come and just evaluate the technical issues. Right? Okay. Your change order is worth this. Based on our opinion, we're not involved in the project we came in based on the documents that you have. This is what, uh, your technical issue is. Quantifying it quantity wise. Um,

then you would talk to your lawyer, say, okay, what are my chances for entitlement on that thing? And if your entitlement, then you can do probability times the work of the claim and decide, okay, maybe it's good to proceed, or it's good not to proceed. And sometimes you might not need to hire claim consultants. Sometimes you can have your own team, um, evaluate the claims themselves. That said, most of the time your team project is so busy finishing and completing the projects if you're in the middle of projects that you don't want to distract them like you want to move in peril, in a way, just focusing on completing. Always focus on complete the projects and try to manage other issues in peril without interfering in your ability to complete the work. Uh, because if that becomes a hindrance on your project delivery, on delivering the work that's exasperating the issues as well, and then the future becomes bigger and bigger. So isolating the strategies, completing the work from evaluating the issues, and finding a way to get where you want to get it's also very important. So those are kind of like, general tips that I give. Um, know your claim, evaluate your claim. Um, there are tools, simple tools that sometimes we decide to do to, okay, what would be the most likely scenario? What would be that number? What's the worst kind of scenario? What would be that number? Okay, what's the most likely scenarios? Have, like, three numbers going into before going into arbitration or mediation or anything else. So be prepared to get there. Um, that could be bringing your experts early on in the process just to evaluate your claim and then tell you where you stand. Um, if you have multiple issues, there are tools that help you kind of make decisions. Like three decision making process where you split your issues and assign to issues a probability of success yes or no. And then the cost to litigate that issue and then at the end can have kind of like a mathematical equation to tell you, okay, this is a sweet spot for settling this, or this is a sweet spot of number if I can get I'm better off or not. Those are kind of like, the objective way of looking at it. That said, we're human can never 100% be objective. There's

always an emotional element. There's always an ego element. We all come with a package of biases and heuristics that affects our decisions. Um, so keeping that in mind also sets the expectations moving forward.

Mike Merrill:

Yeah, that's a lot of great advice. So, essentially, number one, um, try and communicate. Don't let small issues stack up to begin with. If they have and now there's an issue and a problem. A lot of times, we're way too close to the tree to see the forest. So we need to bring in an independent third party, which could be a consultant or maybe an arbitrator or an attorney to say, here's the cost benefit analysis or the ROI that you might expect in this situation based on the documentation and what I think that we can defend or dispute and hopefully collect. Um, but outside of that, um, what are some of the pitfalls that you see companies think, like, I have a really strong case, and this is a home run, and really, maybe it isn't. Maybe it's just a money pit for them to follow.

Sam Barakat:

Yeah. One big pitfall is it's never about winning or losing. Only, um, it's not a boxing match. It's not about a knockoff. Right. It's not win or lose. And even if you end up winning, does not mean in longer run, you're winning as well. Right. I mean, construction industry, it's a small market. Do you want to keep the relationship or not? So there are so many factors involved winning, uh, might not be just getting the award to your favor or the court decision to your favor. Winning could be, okay, I got what I did. I probably lost a little bit of money over here, but the final product of this whole process is good to me. Um, I still have a decent relationship with the other party. I might be able to do more work with them, uh, and so on. So it's not really only about winning or losing or i, um, want to make the other party miserable because I'm so pissed off of them. It's not a criminal or family case where a lot of emotional going on. Construction is all about documents and numbers, um, adds to managing expectations. And this is where I put a lot of burden on lawyers sometimes, and I will get into that, too. Like I said, when you're day to day involved in the project, you're emotionally invested. You look at things differently from somebody that just have no emotional investments, no tie into these things. And this is going

to be your arbitrator, and this is going to be your judge. Right. They're not emotionally invested. They're looking at things purely objectively, and they're only looking at the documents that are available to them. Right. I mean, they're not looking at that conversation you had in the hallway or on the site with somebody. And, yeah, you can capture that through witnesses of fact, and those witnesses might come across good or not on cross examination. Uh, they're only looking at the documents. That pretty much the documents hold more weight. Um, so they're looking at that and try to make a decision objectively. Um, so while you're equitably or justice wise, you have a winning case, sometimes your documents and your presentation would render otherwise. Um, so manage your expectation as to like I said, there's no such a thing as 100% successful case. Um, uh, there's always an element of unknown. I always tell my clients that if you think you have 100% win ning case, and you truly do, let's say your chance of success is only 80%, because there's always 10% to 20% element of elements that you have no control over and nobody will does have control over, um, in the process. So, yeah, managing expectations is the number one advice that I have. It's very hard to do when it's your home, baby, your own money on the line, your own business, but it should be done. And I think professionals that are in this industry has the burden of working with their clients to manage their expectations.

Mike Merrill:

Yeah, so you've mentioned on a few occasions, uh, documentation, and having, uh, not only the right documentation, but also collecting it appropriately, so that not only does it substantiate what you're saying, but it also meets whatever requirements, or, uh, maybe there's legislation requirements or compliance, uh, requirements. Maybe it's a payroll or time and materials agreement or some other way that, uh, you've got to validate what your claim is. What are some tools or some processes that you commonly see companies struggle with that our listeners could be more aware of?

Sam Barakat:

Yeah, that is the common theme in the industry right now. It's the number one challenges that the construction industry is facing right now. You

hear record record from, um, lawyers and dispute professionals all the time. Right. It's a common theme that we keep repeating. Nobody's listening to. And we're all like, why would people not listening to that? Well, there is definitely an added cost for that, right? I mean, there's an added cost for administration from the start of the project. It's like keeping all your records, you're meaning minutes correctly, you're recording your labor, uh, productivity rates and all that stuff. Um, so there is a cost to it that is intangible, that is not seen at the time, but it's key when actually you hit into problems like, do you go into litigations and lessons learned as well, right? And I was always like, oh, my God. I keep giving my because we come to it, looking at it retrospectively most of the time, right? We're coming to it after an issue is risen, and they want us as experts or, um, decision maker to look into it. And I keep telling them, hey, for next time, record the key elements. And they kept falling into the same trap, and I keep wondering why. Um, and by the way, I work on international projects as well. I work overseas on projects. So I was, uh, fortunate enough to see different culture, way different culture of how constructing or how managing projects, right? And they vary a little bit. They all struggle with lot of documentations as well, but some are better than others. Typically, when you work on international projects, uh, parties are transients. Like, they come working on the projects, they leave, go back to their local, uh, black home. Uh, so you see more procedures and you see more documents in there, right. Because people are, uh, trust is there, but it's not the main element. Uh, going back to the US market is still very traditional in a sense, where, um, parties trust general contractors blindly. Uh, it's a good thing, it's a trust going. And it's not that general contractors like a bad face. They're trying to gain, um, something or not do to the best interest of the project. The problem right now, and we're talking about it before the recording, Mike, is we have skilled labor issues in the past. Um, interesting enough, general, um, contractors, they have superintendents informants that have been in the industry for years, so they can close their eyes and deal with the situation and get it done right. So you don't have to go through procedure, uh, you don't have to go through extensive project control schedules. Yeah, they're nice to tick the box because it's in the contract, but they're pretty much all they need is three weeks look ahead and they know how to build it and it works. So everything that is working, why change it? Right.

Um, but I know these generations are retiring and there is a big gap to fill. So you got a new generation that not there yet. So there's a lot of learning curve to get there. Um, so what do you do now? You can't still rely on the old ways, like, okay, we've been doing it forever, we know how to build it. So you have to rely more on procedures and project controls and more industrialized way of doing construction, where a lot of more procedures so that the non skilled labor can do the work based on guidelines. And with that comes records and documentations. And so better documentation process, not only for disputes, but also in the future for managing projects and managing your risks. I think people have to do better with documentations and have procedures in place for that.

Mike Merrill:

Yeah, I've heard it said for many years. He who has the most documentation wins in most cases. Right?

Sam Barakat:

Uh, yeah.

Mike Merrill:

They're also setting a precedence that we are a company that keeps records, that takes these things seriously. And if you're having a dispute with a company that does not have any of this, uh, you're setting some sort of a precedence, even maybe with a judge that says clearly this company is doing their best to try and do what they're supposed to be doing and maybe the other party is not. Um, does that lean in favor?

Sam Barakat:

Yeah, the old say picture says 1000 words. Right. I mean, one daily report documents can trump any witness statement that you have in front of you. Right? Uh, I do a lot of delay analysis as an expert, and sometimes one daily, uh, log trumps the whole schedule. Right? Like your whole CPM schedule. Um, so, yeah, having records, having documentations, having organized documentations. Right. Retrospectively, we get gigabytes of information sometimes that we like, oh, shit, now I'm going to have to find the needle in the taste egg. So having organized, um, documentation

and tools that help you to do that, um, improves the process better and even becomes a prevention of disputes as well. Right. If you have all the story in front of you and you show it to the other parties, then the party is going to say, okay, it's not worth the pie. Right. You have your order in place and let me settle here. So that even helps you not in litigating or prosecuting or defending your case, but also in preventing the whole thing to escalate. Yes.

Mike Merrill:

So you mentioned having a settlement or maybe making a compromise. How open should companies be to working things out and not having to go through the entire process of litigation, if not necessary, what's your advice there?

Sam Barakat:

Yeah, uh, I use that say also when playing Fogart. Sometimes one bird in hand is better than ten on the tree. Right. You should always be open, and parties should always be professional enough to be open to settlements, even the other side, uh, uh, all the time. And if your lawyer is not open to it, make your lawyer be open to it. Right. Some lawyers in arbitration are more used into litigations in front of juries, and they're used to be like, I need to look confident. I need to be the person that show the other party's flaws and all that stuff. And I don't want to settle, because if I settle, it's a sign of weakness, and that doesn't play as much in arbitration or alternative, or, uh, other ADR alternative dispute resolution processes. Um, so be open. Be open. And if you can't reach a settlement that, hey, you probably would have got a little bit more money if you continue do that. Because by the time you end up paying us as experts or arbitrators, or are you paying the lawyers, you're probably better off with the settlements than moving forward, right? Yeah.

Mike Merrill:

Ah, sure. So, again, compromise is often maybe winning, really.

Sam Barakat:

Right. And keeps relationships too. Right. When we're mediating a case, we spend a lot of time talking to lawyer, to parties about, give me the background of your business, right. Give me the relationships that you have in the market, how important those are for you. These are techniques that any mediator or trade mediator will go through, um, trying to talk to their parties and manage their expectation. Use that same technique. Even if you're an arbitration obligation, always, uh, be open to, um, settlement. That said, be smart about it too. Right. So you also want to be smart about it when you go into, uh, what you talk, always be open to discussion about settlements, but you also want to be smart about it. When you're going into, uh, mediation, um, or you talking about settlements, you'd want to show all your cards if there's no value of showing these cards. Right. But if your case is developed enough after discovery, and after all the evidence that you think you can have a fruitful conversation with the other party and reach a settlement, you should always be open to that.

Mike Merrill:

So when a company settles, or, uh, comes up with, uh, some type of an arrangement, that's it, right. There's no appeal. They can't go back. If they lose, then they could appeal one time. Is that right? Can you talk through that a little bit for the listeners?

Sam Barakat:

Yeah. Typically, when you settle, either if you're in arbitration or litigation, that settlements, uh, it's binding. You can't appeal unless there are, uh, stuff in the settlement agreement that does not include, uh, the scope of what you think your settlement is. But typically, um, uh, those are final and binding. Now, also, when you settle in arbitration, you can ask for a consent award right. You can ask the arbitrator to provide you with an award, like similar award based on your settlement. We call it a consent award. This award, if you're dealing with the parties in different jurisdiction, becomes like an actual award that you can enforce in different jurisdiction. Um, to answer your question, yeah, it's final and binding, and, uh, uh,

you cannot appeal it on the merit. I mean, you only can appear it if there are breaches in the settlement agreement, um, itself.

Mike Merrill:

Okay. But if you actually go through with the case and you lose, you have one opportunity to appeal, is that correct?

Sam Barakat:

Okay. That explained the differences between arbitration and litigations. So arbitration is a private dispute resolutions. So pretty much the state and the government is saying, if you're arbitrator and an arbitrator reach a decision, it's final and biting. You cannot appeal on the merits or most of the issues. Your ground for appeal are very limited. So to appeal an arbitration case, the ground for appeal is very limited. Uh, in most cases, it has to do with that the arbitration or the arbitrator has jurisdiction over your case. To start with, was there any egregious mistake that the arbitrator has done, or the tribunal has done to be ground for challenge? Was there any due process? I mean, the tribunal said, no, I'm not going to listen to your witness. Um, was there any undisclosed conflict of interest? Was the arbitrator? But there are very limited ground for challenges for arbitration in local courts, the supreme courts, or the lower courts, you can always appeal to an appellate court. Right. So the process much longer in litigation than in arbitration when it comes to the finality of the decision.

Mike Merrill:

Okay, that's very helpful. I know there is a difference in a distinction, I want to be clear about that for the listener, so they understand, uh, of course, have good counsel, whatever the case. You're good at building things, or running a business, or being an entrepreneur, or negotiating. But when it comes to the law and legal issues, hire, uh, a professional. Right?

Sam Barakat:

Yeah. And the one advice for clients as far as hiring lawyers in arbitration, um, hire a lawyer like you hire your project manager. Hire a lawyer that is a project manager. I call them case managers, right. A lawyer

that can do a cost benefit analysis for you. Uh, not always the wealth are money to dress lawyers that speak very eloquently and are, uh, very arrogant, and they don't want to talk to the other part. Those lawyers in arbitration, not always the most effective lawyers. I mean, you want lawyers that gets it done and tell you the bad and the good, right? I mean, just try to manage your case, manage your cost in litigating or arbitrating the case. These are the lawyers that you really want to hire. Um, and especially in arbitration, I tell you, as an arbitrator, um, credibility points are important because we all come with biases and heuristics, but they don't have as much impact as when you are in front of a jury. Right. Um, with arbitrator, if a witness does not appear to be not confident, uh, yeah, I mean, maybe back in my subconscious might have some effect, but I try to objectively look at the evidence and not be affected by that. So a lawyer that makes the witness look bad, probably, um, it's good. But how much of effect that is, I mean, not as big as when you are in a trial, that's for sure. But a lawyer that can manage the case, that can get you as much evidence in front of us or in front of a tribunal with a little amount of money possible, those are the lawyers that really, I would think, that will provide you, um, with the product that you want.

Mike Merrill:

That's good. So are there some common things that you see maybe companies don't learn from appropriately, where they don't really make the corrections, and they end up back in the same boat again because they fail to document a certain thing? Or what's the area of weak point that you seem to notice coming up again and again in the construction industry?

Sam Barakat:

It's ego and emotion.

Mike Merrill:

Okay.

Sam Barakat:

I understand. It's hard to detach yourself from the case. Um, a lot of clients are so emotionally involved in a case that, um, they make the wrong decisions because

they just want to win. Uh, if that is the end product, then that's fine, but at least have that expectation that this is the end product. Right. I don't care how much I want to spend on the case. If the emotional satisfaction of winning a case is what you're after, let's make that a goal from the start. So manage your goals and objectives from the start of the case. This is what I would recommend.

Mike Merrill:

Yeah. And I remember we talked before we started recording. I was a builder for about a decade and was a general contractor. I remember it was very common that companies, uh, would wear as a badge of honor. I've never been sued, I've never been in litigation. I've never had a problem. And when somebody did raise a suit or file a claim against them, they would just hit the ceiling. They just couldn't believe they were just beside themselves. How dare you. I've never had this happen. I don't want this blemish on my record, so to speak. What is your advice to somebody who has that reaction or that feeling?

Sam Barakat:

Yeah, that's fine. If you want to create a spotless image, that's fine. Um, and arbitration is confidential, by the way, so it's not public. Uh, the reality is that there are so many factors outside the party's controls in the construction project that you're going to have differences. Ah. And if you don't have the budget to fund those differences, you're going to end up in somebody else deciding the decision for you. Um, so it should be part of business if people think about it as, okay, this is another trade I have to pay for, right. Or this is another element of the product, or this is another contingency that should be part of my bottom line. PNL um, uh, sheet, then they will manage their expectation much better. If you lose an arbitration on one issue, it doesn't mean you're worse or better than the other party, right? It just meant that the circumstances at that time led to a situation where you lost. So what's a big deal.

Mike Merrill:

Yeah, that's the way that one, the.

Sam Barakat:

Next one you win, you're never going to win every hand. Right?

Mike Merrill:

Yeah. That's good advice. So in this day and age, as we kind of wrap up, uh, this segment of the conversation, we'll need to have you back on again, because there's a lot more to talk about. Maybe we'll do that another week. Uh, but I am curious, um, with technology, and with the pandemic we've been through, and uh, the virtualization of a lot of these processes just because of efficiency, um, how does a virtual arbitration function versus something in person that, uh, maybe we used to do in the past, maybe ten years ago?

Sam Barakat:

Yeah. Everything else change comes slowly with time. Um, we can't say we're fortunate or unfortunate to have of COVID ah, that kind of like kick started the whole remote working versus remote doing business. Um, so virtual arbitration or mediation or any other process has a lot of advantages. Um, the obvious one is much more cost effective for everybody. For everybody. Uh, more outreach as far as evidence. Right. You can hire an expert that is not in your local market, and for the same price that the one is in your local market, so you can look better. That suits your case for other witnesses. Um, but it has its issues as well, because it's still a brand new I'm m not brand new, but newish things. Uh, most of lawyers arbitrators, um, are used to hearing settings that you're used to their techniques that work for them, they're comfortable with them. Now it's a little bit different. Right. Um, so it has its issues, but with time, and the more we're doing that, we're doing a m lot of virtual arbitrations and a lot of virtual hearings. Uh, people are learning and improving, and um, there are a lot of protocols and guidelines out there as well, tools that helps. Um, so yeah, it's improving and most of the issues are it related, uh, obviously. Right. Um, we got buffering right now during this case. Uh, so if the parties are aware of some of the it limitations, they can create an agreement in advance as to, okay, what are we going to do about it? What is the plan b? So what if this platform shuts down on us? Um, do we have a platform b that we can go back and tap into so that uh, we lose the time or we lose uh, the due process, the effectiveness

of the evidence, uh, how do we present our exhibits more efficiently online? A big discussion, big element is how do we secure the flow of information? Because arbitration is confidential. Uh, with all the cyber attacks out there, um, it's a whole new topic to talk about. Uh, there's a lot of learning curve, but ah, I do think it's a good thing. I think the advantages outweighs, um, the cons I guess. Um, um, so I do foresee more virtual or remote ADR, uh, processes to continue. Um.

Mike Merrill:

Great, well that's awesome. So this has been a lot of fun, a great conversation I think very helpful. Uh, good tips and insights, um, good things for companies to consider. Hopefully they're doing a good job of documenting. Uh, and then again batting down those little issues as they come up, those nats or those mosquitoes swatting them away so they don't turn into big yellow jackets or know where. It's a lot more threading.

Sam Barakat:

That's a good analogy.

Mike Merrill:

Well um, so just to wrap up Sam, and again thanks for joining us. Um, what is the final thing that you would hope the listeners would come away with from the conversation we've had today?

Sam Barakat:

In order to guarantee a success, ah, in your claim you have to preventing going to arbitration or litigation is the number one key. Uh, there is no such a thing as I have 100% guaranteed success in my claim. There's always going to be unknown. Of course people can improve their probability of success, but there's always going to be factors outside your control that m affect um, your percentage of success. So if the people keep that in mind before going into arbitration, that's a good thing to manage expectations.

Mike Merrill:

That's great. Well this has been awesome. Thanks again for joining us and uh, looking forward to catching up with you again down the road and doing this again on a different topic.