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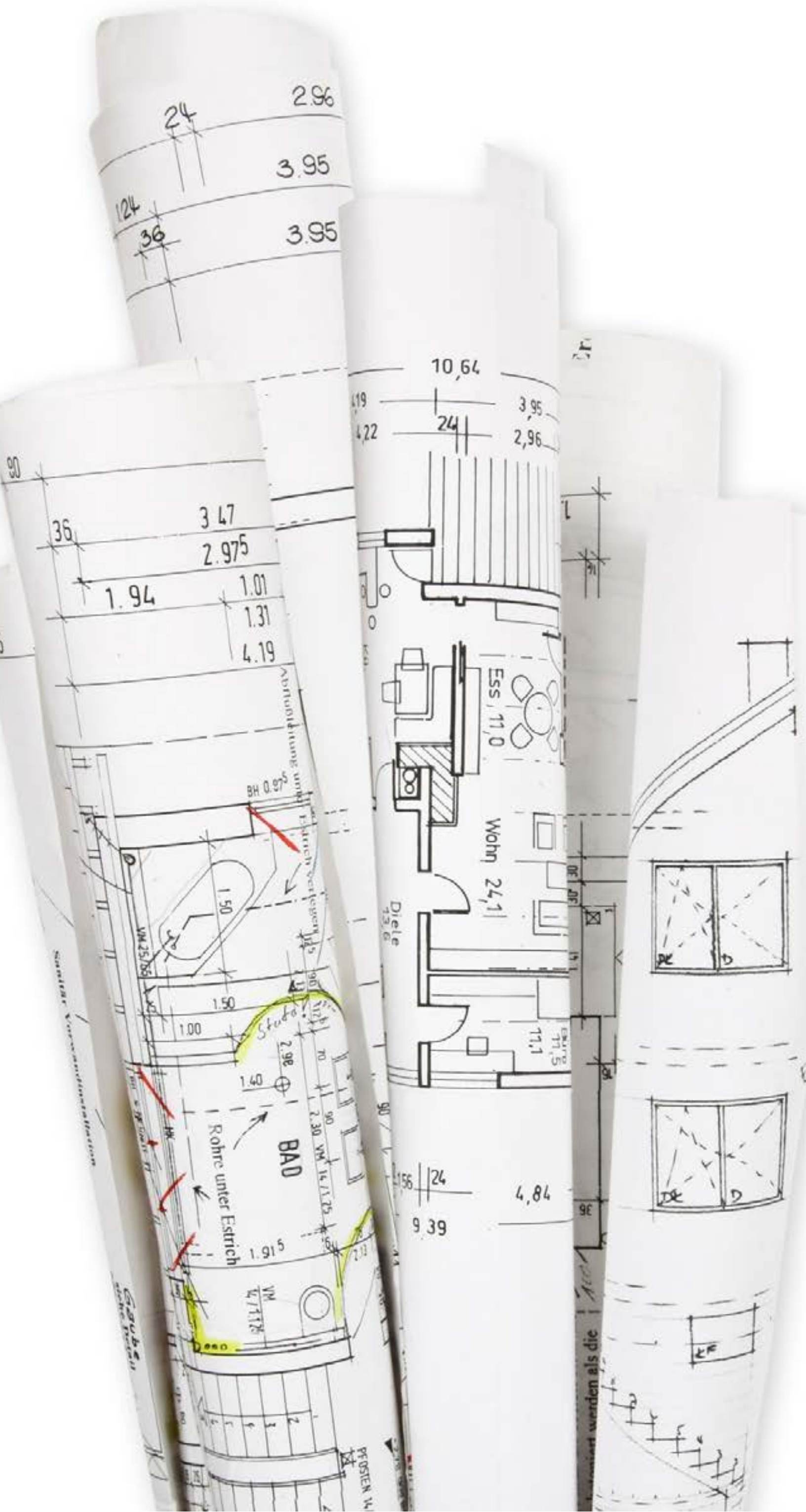

Which is the Better Choice of Dispute Resolution Options for a Design and Construction Industry Controversy—Litigation, Arbitration or Mediation?

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There are different schools of thought regarding the choice of dispute resolution of a design and construction industry claim. The following overview is a general comparison of litigation, arbitration and mediation. Professional association agreements may address dispute resolution options in their contract negotiations. The Engineers Joint Contract Documents Committee (EJCDC E-500) Agreement Between Owner & Engineer for Professional Services, Article 6.09 states that:

> A. Owner and Engineer agree to negotiate all disputes between them in good faith for a period of 30 days from the date of notice prior to exercising their rights at law.

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However, the American Institute of Architects Document B101 (2017) Standard Form of Agreement Between Owner & Architect is more definitive, and states:

> **§ 8.2.4** If the parties do not resolve a dispute through mediation pursuant to this Section 8.2, the method of binding dispute resolution shall be the following:
> *(Check the appropriate box.)*
> ___ Arbitration pursuant to Section 8.3 of this Agreement
> ___ Litigation in a court of competent jurisdiction
> ___ Other: *(Specify)*

LITIGATION OF A DESIGN & CONSTRUCTION INDUSTRY DISPUTE

The advantage of litigation is that a decision of a court of law may be appealed. The resolution of a design or construction dispute may be very complex, requiring the facts to be brought to light in the discovery period—including interrogatories, requests for admissions, depositions, reviewing oppositions' documents, motions to dismiss the case, and other pre-trial pleadings. If something goes awry in the process, that is why the appellate courts are there as a safety net. Also, litigation has clear procedural and evidential rules, with a formal process for evidence disclosure. Moreover, it is an open system of justice, whereas other alternative dispute resolution options are private matters, which may not occur in accordance with the due process of the law.

ARBITRATION OF A DESIGN & CONSTRUCTION INDUSTRY DISPUTE

While litigation in a court of law dates back to Roman times (or earlier), it may be inappropriate in some situations for the built environment, in the modern era of the design and construction industry. For example, a claim on a small project or a simple dispute could be appropriate for an arbitration. Arbitration as a dispute resolution process has been favored for decades in the construction industry. One of its advantages is that the arbitrators are selected or appointed based upon their knowledge and experience in the design and construction industry. Theoretically, arbitrators would make reasoned decisions better than a jury, who are from different walks of life, other than the design and construction industry. However, one of the disadvantages of arbitration is that the decision cannot be appealed, except for extraordinary reasons—such as an arbitrator did not disclose a conflict of interest with one of the parties, or an arbitrator was unduly influenced by a bribe.

Moreover, some say that arbitration, especially in large complex cases, may take a long time to resolve, resembling litigation. There are times the advantage of arbitration that has limited discovery of facts has been abused, making the process lengthy—with numerous motions from the parties for the arbitrator(s) to rule upon regarding pre-hearing issues. For example, arbitrator(s) in a case may allow depositions and other discovery tools to be utilized, slowing down the dispute.

MEDIATION OF A DESIGN & CONSTRUCTION INDUSTRY DISPUTE

All this being said, the favored dispute resolution option in the design and construction industry is that of mediation. Mediations are carried out with a neutral person (the mediator who is knowledgeable and experienced in the design and construction industry), who does not make a decision on the dispute for the parties. Rather the mediator hears the facts from the parties, and uses their skill to work with the parties to reach a common result. The settlement should be in writing, signed by the parties, and is a contract that would be enforceable in a court of law should one or more of the parties does not honor their agreement. Mediation has several advantages compared to litigation and arbitration, including:

- Less time consuming, because a mediation can be conducted earlier in the dispute, well before an arbitration or jury trial.
- Less money to reach a decision, because much less time for the parties to prepare for an arbitration or litigation, minimizing attorney fees.
- A settlement is usually a compromise by the parties to the dispute, making the decision their decision and not someone else's—such as a judge, jury or arbitrator.
- Mediations may preserve the relationships between the parties, because it is a mutual settlement, whereas litigation or arbitration polarizes the combatants.
- Many liability insurance carriers will offer their insured a credit for their deductible if they participate in a mediation, and the dispute is resolved.

- Moreover, design and construction documents and records in large projects can become overwhelming voluminous, and sometimes boring to a jury as opposed to a juicy murder trial.
- And not the least reason, if the mediation is conducted early in the dispute, it allows the parties to get back to work in their chosen profession or occupation much earlier, rather than spending time navigating though the litigation or arbitration process.

A HYPOTHETICAL MEDIATION OF A DESIGN & CONSTRUCTION INDUSTRY DISPUTE

So, this is how a mediation may occur, recognizing there may be many variations of the approach. For this example, let's assume there is a major dispute on a large complex sports venue, involving numerous parties (project owner and owner rep, architect, consulting engineers, construction manager, constructors, special consultants, suppliers, fabricators, etc.).

The parties have retreated to their corners, and of course have retained legal counsel, and litigation has ensued. Each party has their own insurance policy or two, and their carriers are involved probably with outside counsel as well. Some of the parties are experienced in the design and construction industry, others not. Some are experience in disputes, and others not.

Some of the parties know it is best to attempt to settle the dispute as soon as possible, and get back to work in their profession or occupation. Therefore, they encouraged their insurance carriers and legal counsel to push for an early mediation. And of course, so do the parties' insurance carriers. The lawyers arranged a mediation date, location, and the selection of a mediator (sometimes called a "neutral"). It is customary that the parties exchange pre-hearing briefs with copies to the mediator, spelling out their position on the case so the neutral has a general idea of the dispute is about, before the proceeding starts.

In this hypothetical, the gymnasium's roof trusses included catwalks so maintenance and other workers could perform various tasks high above the gymnasium floor. A spotlight operator was hoisting equipment up to a catwalk when he leaned on a railing that failed, falling to the seats below. He was severely injured. There was no game at the time, but the college planned to bring a basketball recruit into the gymnasium, and wanted to impress the high school player having a spotlight shown on him when he entered.

At the initial stages of the dispute, there was no doubt that the shop drawings for the railing system became the focal point in the matter.

https://www.chcfab.com/products/catwalks/

Each party or their legal counsel made their brief oral explanation in the general group meeting in front of the mediator as to why they were not responsible, and others were, for the accident.

After the parties made their opening statements in the general meeting, the mediator stated the reasons why mediations are successful, is when he has an opportunity to have separate meetings with each or the parties and their legal representatives in what is called a "caucus." In a caucus, the mediator heard some additional facts that the parties did not want

https://commons.m.wikimedia.org/wiki/File:Site_visit_from_WMF_meeting_with_WMNO_board.jpg

to share in the general meeting. The mediator assured the parties that he would not reveal this confidential information to the other parties, unless permission is given.

The process of caucusing allowed the mediator to gain insight in each of the separate meetings, when he could suggest that compromises could be made, to lead to a global settlement. In this hypothetical case, the parties recognized that litigation would be lengthy, and a just jury verdict would be uncertain, so they allowed additional facts that could be shared in other caucuses. Fortunately, after several rounds going back and forth into several caucuses, the mediator was able to reach a settlement with each party contributing to a resolution with an agreed upon distribution of the money damages, to compensate the spotlight operator's injuries. Case closed.

IN CONCLUSION

Mediations have a high success rate in the design and construction industry. It is also true that a mediator's job is difficult. Nevertheless, the parties, their legal counsel and the insurance carriers know the advantages of mediations. A sample mediation is as follows, or something similar, as a suggestion that could be used in a design and construction industry agreement.

> Any claim, dispute or other matter in question arising out of or related to this Agreement shall be subject to mediation as a condition precedent to binding dispute resolution. The mediation, unless the parties mutually agree otherwise, shall be administered by ___________________. A request for mediation shall be made in writing, delivered to the other party to this Agreement, and filed with the person or entity administering the mediation. The request may be made concurrently with the filing of a complaint or other appropriate demand for binding dispute resolution but, in such event, mediation shall proceed in advance of binding dispute resolution proceedings, which shall be stayed pending mediation for a period of 60 days from the date of filing, unless stayed for a longer period by agreement of the parties or court order. The parties shall share the mediator's fee and any filing fees equally. The mediation shall be held in the place where the Project is located, unless another location is mutually agreed upon. Agreements reached in mediation shall be enforceable as settlement agreements in any court having jurisdiction thereof.

About the Author

Eric O. Pempus, FAIA, Esq., NCARB has been a risk manager for the last 15 years with experience in architecture, law and professional liability insurance, and a unique and well-rounded background in the construction industry. He has 25 years of experience in the practice of architecture, and as an adjunct professor teaching professional practice courses at the undergraduate and graduate levels for the last 33 years. As a Fellow of the American Institute of Architects and a member of the AIA National Ethics Council, he has demonstrated his impact on architectural profession. He has presented numerous loss prevention and continuing educational programs to design professionals and architectural students in various venues across the United States and Canada.

The above comments are based upon DesignPro Insurance Group's experience with Risk Management Loss Prevention activities, and should not be construed to represent a determination of legal issues, but are offered for general guidance with respect to your own risk management and loss prevention. The above comments do not replace your need for you to rely on your counsel for advice and a legal review, since every project and circumstance differs from every other set of facts.

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Virtual kickoff event on April 23, 2021 followed by a month of professional development (PD) presentations from April 24, 2021 to May 24, 2021.

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