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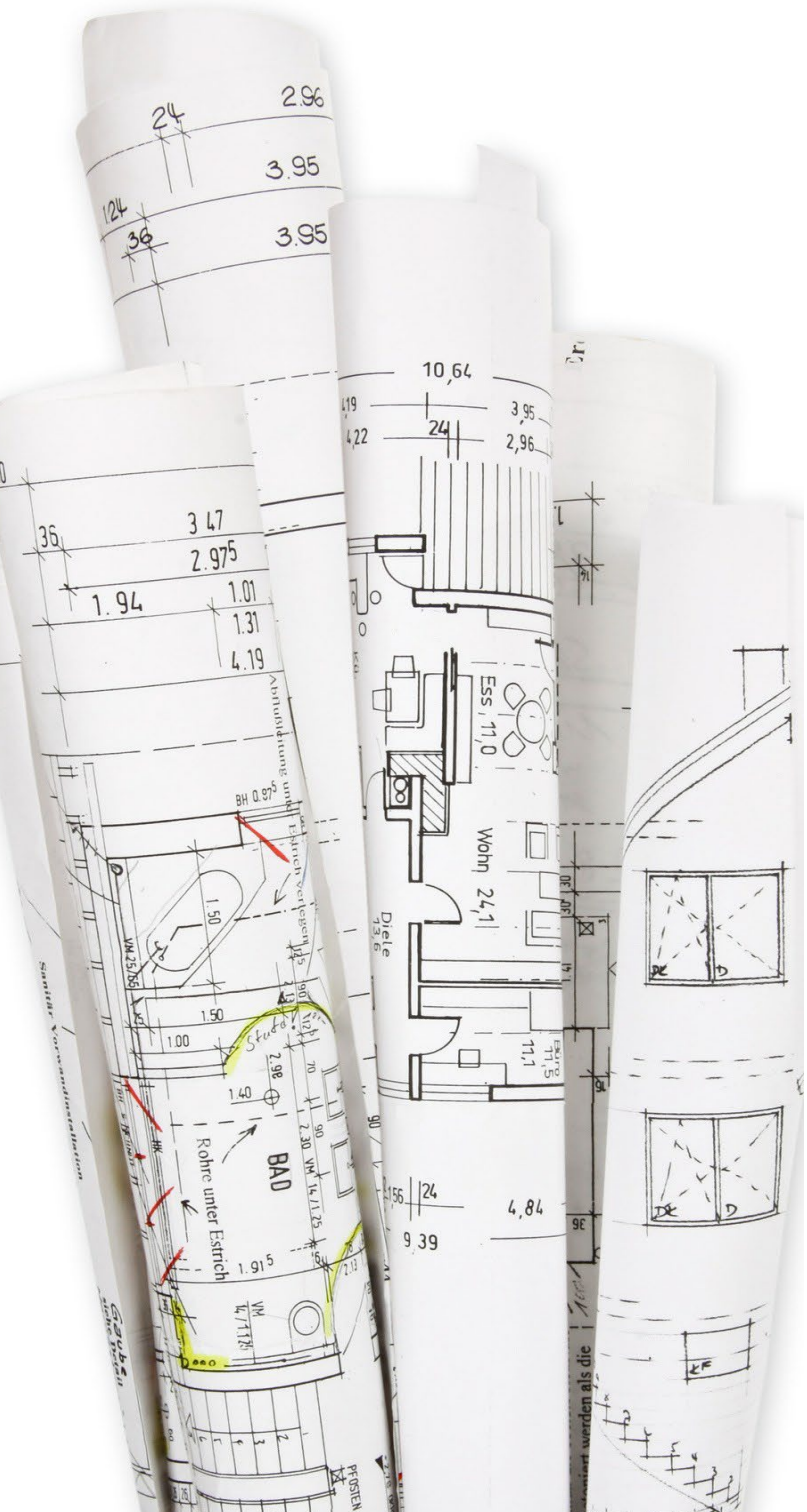

ARBITRATION OF A CONSTRUCTION DISPUTE—A VIEW FROM A RISK MANAGER'S DESK

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In last month's DesignPro Insurance Group's risk management article I outlined the course of a construction industry dispute in litigation. See "*A View from a Risk Manager's Desk—An Architect/Engineer in Litigation*" https://www.designproins.com/news/67912/18373/9-2022.pdf, September, 2022.

In contrast, the dispute track outlined here is for arbitration, as opposed to litigation. In the past risk management article *"Which is the Better Choice of Dispute Resolution Option for a Design & Construction Controversy—Litigation, Arbitration or Mediation?"* https://www.designproins.com/news/56858/15702/12-2020_Newsletter.pdf, December, 2020, I outlined the course of a mediation of a construction industry dispute.

IN THIS ISSUE:

As stated in prior articles, my client architects/engineers (A/Es), from time to time, may end up in a dispute on one of their design and/or construction projects. My view from 42 years in the design and construction industry with regard to arbitration is as follows. This perspective will certainly vary from differing views of other professionals, depending on the players involved, project types, the "all-important facts on the dispute," etc.

BRIEF COMPARISON OF THE 3 DISPUTE RESOLUTIONS

In contrast mediation and litigation, arbitration seems to fall somewhere in the middle between the other two dispute resolution mechanisms.

Mediation is the least time consuming, where the parties to the dispute find a way go through a semi-formal process in front of a seasoned neutral person. The mediator gathers the parties, and the mediator facilitates a common resolution. Hopefully everyone has an opportunity to leave the mediation on reasonable terms, and may even work together in the future on a design and construction project. Time is money, as everyone understands.

Litigation is time consuming. In litigation, legal counsel will gather documents, especially the written and signed agreement between the A/E and their client. If it is a typical dispute in litigation, the matter enters into what is the "discovery phase." This is a period of time, usually lengthy, where the parties' lawyers have an opportunity to review and copy documents to support their client's position in the dispute. In so many words, everyone in the matter has retreated to their corner to build their case for the possible jury trial. Aside from time, litigation polarizes the parties and they have nothing good to say about each other. Jury decisions are a crap shoot with an uncertain result.

Arbitration has found its niche in the construction industry—not as fast as a mediation, but certainly faster than litigation. The Engineers Joint Contract Document Committee (EJCDC) and the American Institute of Architects (AIA) have adopted this form of dispute resolution. The EJCDC E-500, standard form Agreement Between Owner & Engineer for Professional Services, in its Exhibit H, proposes mediation or arbitration, with no mention to litigation.

A. *Arbitration:* All Disputes between Owner and Engineer shall be settled by arbitration in accordance with the ***[insert the name of a specified arbitration service or organization here]*** rules effective at the Effective Date, subject to the conditions stated below. This agreement to arbitrate and any other agreement or consent to arbitrate entered into in accordance with this Paragraph H6.09.A will be specifically enforceable under prevailing law of any court having jurisdiction.

The AIA has utilized arbitration in its documents well over a 100 years ago in its standard form of agreements.

> The AIA documents have mandated arbitration **since 1888** when the first owner/contractor agreement was published. The claim resolution scheme of the A201-1997 continued that tradition by favoring arbitration.
>
> Best stated by the AIA in its website "Understanding Different Methods of Dispute Resolution" at https://www.aia.org/articles/6456563-understanding-different-methods-of-dispute, some characteristics of arbitration include:
>
> - Limited Discovery. Construction projects can generate a massive amount of information, witnesses, and documents. Exchanging these documents can cost a great deal of time and money. Arbitrations are designed to provide a more expeditious and less costly format to resolve disputes. The primary way that arbitrations are designed to save money is by limiting the amount of information and documents that the parties

must share prior to presenting their cases to the arbitrator. If the parties share fewer documents and less information, they typically save a substantial amount of money versus going to court.

- Confidentiality. Arbitrations are not public proceedings. The parties' documents and written submissions, and the arbitrator's decision, are typically shielded from the public.

- Not Necessarily Bound by Precedent. While arbitrators typically follow prior case law, they are not bound to do so like judges, and their decisions are not binding on future arbitrators.

- Limited Right of Appeal. Different arbitration services have different levels of appeal rights and varying appeal procedures. For example, the American Arbitration Association (AAA) requires the parties to describe their appeal preferences in their contract, whereas Judicial Arbitration and Mediation Services (JAMS) allows the parties to agree to the JAMS Optional Arbitration Appeal Procedure at any time. Regardless of the arbitration service, in arbitration the parties' rights to appeal decisions they disagree with is much more limited than in litigation. While limited appeal rights provide finality, it also means the parties have very few options if a matter was wrongly decided.

- Not Bound to Rules of Civil Procedure and Evidence. Arbitrators may have discretion whether to apply the jurisdiction's rules of civil procedure and evidence. This may mean that evidence that is typically excluded may be submitted to the arbitrator(s). Similarly, rules governing service, subpoena, time limitations, etc., may not be applicable in an arbitration setting.

HERE IS A WAY HOW AN ARBITRATION UNFOLDS

Regardless of the form of dispute resolution, an A/E provides professional services, sometimes as a full-scope services (design through construction administration), other times with an abbreviated scope. Something goes amiss. The design and construction of a project is a complicated adventure, and has seemingly an unlimited number of moving parts—the project owner (A/E's client), the budget, specialty consultants, building code officials, construction contractors and their subs, inspectors, construction managers, soil and weather conditions, politics, availability of labor and materials, etc. Sometimes there may even be opposition to the project, such as retail center planned in a residential neighborhood. It is no wonder that a project is ever completed; and in reality some projects are never "completed." They just fade into the landscape of the built environment.

During the course of the project, or after, someone pulls a trigger to initiate a dispute. Not necessarily a "claim," which is understood in the professional liability insurance industry to mean a "demand of money, more time to accomplish a task, etc." But this gets the ball rolling. At this initial stage, people are hopefully to be able to discuss the issue and resolve the dilemma. That is the best outcome, so everyone can get back to their regular tasks at hand. Unfortunately, that does not only happen. People are not bashful when it comes to money. And finger pointing ensues.

THE DISPUTE THEN EVOLVES INTO A CLAIM

If the parties in the construction dispute have selected arbitration in their agreements, or have elected

this method down the road on their own, the “claim” must be reported to the A/E’s professional liability insurance company, through their insurance agent. (If the A/E does not have professional liability insurance, disregard the prior sentence.) The agent can assist in gathering some basic information about the claim, but ultimately it rests with the insurance carrier to take the ball and run, to mount a defense. The insurance carrier would then assign the matter to outside legal counsel, which is not part of the internal insurance team.

If it is a typical dispute in arbitration, the parties’ legal counsel will first select an arbitrator, or if the dispute involves a significant amount of money, three arbitrators. The rule of thumb—one million dollars would be considered a significant sum in the dispute. The civil procedures of the state courts allow the parties to select independent arbitrator(s) by mutual agreement. On the other hand, if the parties’ agreements contain an arbitration clause that will be the course to be taken. There are various organizations offering arbitration services, such as JAMS (Judicial Arbitration & Mediation Services)/ENDISPUTE or the American Arbitration Association.

Both have a stable of experienced construction industry arbitrators that are available, that are suggested to the parties’ legal counsel. Arbitrators are compensated by the parties, based upon a predetermined fee that they established prior to the hearing. Obviously, the more experienced and qualified the arbitrator, the higher their fee.

After vetting the qualifications and availabilities, an arbitrator or arbitrators are selected. The arbitrator(s) will then convene a preliminary hearing to establish procedures for the process, and set dates for exchange of information, the hearing itself, etc. It is important to note, that the preliminary hearing is a procedural matter, and no evidence is allowed at that time. Then the parties may agree to exchange “limited discovery,” with the approval of the arbitrator(s).

During the arbitrator hearing, each party has the opportunity to present their case with witnesses and documents (called “Exhibits”). Witnesses are not allowed to be present to hear the sworn testimony of other witnesses, so as to not influence what they say to the arbitrator(s). A cynical footnote could evolve, as the facts presented may not end up as a “truth-telling” contest, as everyone may shed the light of the discovery only in their favor.

The hearing itself has a semi-formal format, but as stated above there it does not necessarily allow for the civil procedures and evidence establish by the states, through their legislative bodies. One example typically encountered is when one party submits hearsay as evidence. Opposing counsel may object, but typically the arbitrator(s) will allow hearsay to be submitted, with the proviso that the testimony will be given its proper weight in the judgment of the arbitrator(s).

SETTLEMENT WITHIN THE ARBITRATION, OR THE DECISION

The next step is the close of the hearing, after all the parties have had an opportunity to be heard, and all evidence is admitted by the arbitrator(s). The parties may at that point, try to settle their case on their own. That may happen when one party decides that their case is so weak, that it is better to “cut their losses and run.”

If no settlement occurs, the arbitrator(s) will then have an opportunity to study the evidence presented, and a written decision is made through the organization offering the arbitration services. It is up to the arbitrator(s)’ discretion as to whether to issue the decision in a detailed, reasoned format. During the preliminary hearing, the parties’ legal counsel had an opportunity to request such a reasoned decision if they so stated.

The parties then have to “live” with the decision, and follow through with the written order. As stated above, the decision is non-appealable except for extra-ordinary circumstances are proved. For example, it is shown that the arbitrator or one of the arbitrators did not disclose a relationship with one of the parties. But, this is rare.

About the Author

Eric O. Pempus, FAIA, Esq., NCARB has been a risk manager for more than 17 years with experience in architecture, law and professional liability insurance, and a unique and well-rounded background in the construction industry. Prior to risk management, 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 35 years. As a Fellow of the American Institute of Architects and AIA National Ethics Council 2021 Chair, 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.

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Speaking Engagements:

"Reducing Risk for Yourself, Your Company & Your Clients"
Webinar; 2:30 – 3:30 pm, CDT
"Minimizing Risk by Maximizing Compliance with Rules of Professional Conduct"
Webinar; 3:30 – 4:30 pm, CDT
October 26, 2022, National Program

AIA Colorado

"Avoiding Risky Business: How's to Control Claims & Understand the Insurance Process"
Co-Presenters: Brad Bush, CPCU, AU and
Eric. O. Pempus, FAIA, Esq., NCARB
Live Program, Keystone Conference Center,
Dillon, Colorado
12:30 – 1:30 pm, MST
November 4, 2022

"Federal Construction Project Administration and Management" Handling Ethical Issues in Government Construction Law
Webinar 4:00 – 5:00 pm, CDT
December 16, 2022, National Program

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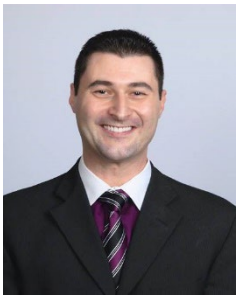

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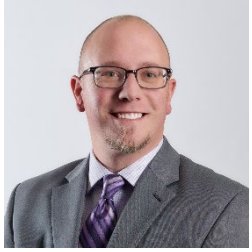

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