



Dispute Resolution Options: The Pros and Cons

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There is the construction project that does not involve some sort of dispute, whether it be over payment, the materials used, the method of construction, who caused a delay, or a host of other possibilities. Oftentimes, these disputes cannot be resolved as part of the normal contract claims or change order process, and will need to proceed to the next level, most commonly through litigation, arbitration, or mediation. It is important for a contractor to understand the pros and cons of each of these different dispute resolution options in order to be in the best position to negotiate the terms of the dispute resolution procedures as part of the contract negotiation process.

Litigation

The traditional method for dispute resolution is litigation. Litigation contemplates a lawsuit in court and the dispute is ultimately decided by a judge or jury. Litigation can take place either in federal or state court. Depending on which forum a lawsuit is brought determines the formality and length of the matter. Even though litigation is the most common method, there are several pros and cons to consider in deciding whether litigation is the best option.

Pros of Litigation:

Full Discovery: Litigation allows for "discovery," which permits the parties to obtain documents from the other parties to the lawsuit, and even from others not involved in the suit, as well as to take depositions and statements of the other parties and neutral witnesses in advance of the trial. Full discovery allows a contractor to evaluate the strength of his case versus the strength of his adversary's case.

Claims against Third-Parties: Litigation is the only method of dispute resolution that allows a contractor to pursue claims against entities with which it does not have a contract. For example, in litigation, a subcontractor can sue the owner, developer, or design professional, with whom it did not contract.

Ability to Appeal: If a contractor is not satisfied with the end result and feels that an error has occurred, the contractor has the ability to appeal the decision.

Cons of Litigation:

Time and Expense: Of the three options, litigation is the most time consuming. The discovery process discussed above can take months, and even years to complete. As a result, complex construction cases may take at least 18 months if not longer to resolve through trial. With time comes expense. Therefore, litigation is often viewed as the most expensive dispute resolution option. Some examples of litigation fees and costs include attorney's fees, expert witness fees, court costs, and deposition fees.

Non-Expert Decision Maker: In litigation, the decision maker, whether a jury or a judge, is not an expert in construction. In fact, if it is a jury trial, the decision is in the hands of a group of people who almost certainly have no experience or background in construction.

Privacy: Since most court proceedings and records are open to the public, there is no guarantee of privacy in litigation.

Arbitration

Arbitration refers to a process where an arbitrator or a panel of arbitrators decides the dispute between the parties. The result is generally final with little or no ability to appeal. Therefore, once the arbitrator decides the dispute, the parties cannot go to court and litigate it again or have it decided by another arbitrator. Arbitration is a voluntary alternative to litigation. A contractor cannot force its adversary to participate in arbitration unless they have agreed to arbitration by contract. Where parties to a contract agree to arbitrate any differences, the courts will enforce it as long as it is incorporated into the contract and its

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wording is sufficient to cover the issues in dispute.

Today, many standard construction contracts contain arbitration clauses. In fact, both the American Institute of Architects (AIA) and the Association of General Contractors (AGC) form contract documents contain mandatory arbitration provisions. Therefore, it is important to understand the pros and cons of arbitration before deciding whether to agree to an arbitration provision in a contract or attempt to negotiate the terms to make it voluntary.

Pros of Arbitration:

Time and Expense: Arbitration is traditionally viewed as a faster, less expensive alternative to resolving disputes. While this can be true, there are no guarantees. Arbitration, depending on the arbitrator and the agency administering the arbitration, can move slowly. There will be attorney's fees incurred for the arbitration, just as in a lawsuit. Although legal counsel is not required in an arbitration, attending without counsel can produce unfavorable results, particularly given the limited scope of appeal. In addition, the filing fees associated with arbitration can be very expensive. For example, the standard AAA Arbitration filing fee for a case involving a dispute between \$500,000 to \$1,000,000 is \$8,200, plus a \$3,250 final fee.¹

Expertise: The parties to an arbitration can select an arbitrator with specific knowledge of and experience in construction, a knowledge base that judges and jurors will typically lack.

Flexibility: Unlike trials, which must be scheduled on an overbooked court calendar, arbitration hearings can usually be scheduled around the availability of the parties.

Privacy: Arbitration proceedings are private rather than public.

Cons of Arbitration:

Limited Discovery: There may be limited discovery rights in arbitration depending on terms of the arbitration provision.

Decision is Final: There is virtually no ability to appeal an arbitration award. An arbitration award may be changed or vacated only under very limited circumstances. Since the procedure of an arbitration is informal and based in large part on the parties' contract, problems with procedure do not constitute grounds for changing the award.

Dispute Can Only Involve Parties to the Contract: Because the arbitration process is the result of an agreement between the parties to a contract, other entities who may be involved in the dispute, such as owners, design professionals, and the like, cannot be compelled to participate in the arbitration as they can in litigation unless they are also parties to a contract with a related arbitration provision.

A Court Must Enforce the Arbitration Award: Winning an arbitration award may not immediately end

the dispute. An arbitration award must be converted as a court judgment, which can then be used to collect payment from the losing party.

Mediation

Mediation, in contrast to litigation and arbitration, does not decide the merits of a dispute. Rather, mediation is a formal settlement conference where a mediator works as an intermediary between the parties in an effort to get the parties to reach a settlement. The mediator does not have the ability to force the parties to settle. Mediation is an increasingly popular form of alternative dispute resolution. Many courts will require the parties to mediate the dispute before allowing it to proceed to trial. In addition, the standard AIA contract documents requires the parties to mediate their dispute prior to arbitration.

Pros of Mediation:

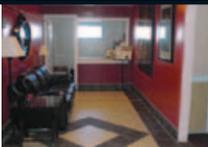
Time and Expense: Mediation is relatively inexpensive, especially when compared to litigation. Although effective mediators charge a premium hourly rate for their services, most mediations occur over a one or two day period so the time and expense are much more contained than litigation or arbitration.

Control of the Outcome: Rather than a judge, jury, or arbitrator deciding the dispute, parties to mediation have complete control of how the dispute is settled. As a result, mediated settlements can allow for creative solutions.

Expertise: Mediators are specially trained to facilitate discussions and allow disputing parties to work out their differences. Further, the parties to mediation can select a mediator



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with specific knowledge of and experience in construction, a knowledge base that judges and jurors will typically lack.

Confidential: Mediation is completely confidential. This allows the parties to openly discuss issues without the possibility of public exposure.

Cons of Mediation:

Discovery: If mediation occurs prior to litigation or arbitration, the parties may not have had the opportunity to learn all of the relevant facts and will have had no opportunity for formal discovery. The parties limited knowledge of the facts at that early stage may inhibit the ability to reach a resolution. Alternatively, if mediation occurs later in the litigation, after discovery has been completed, the parties will be more fully informed about each side's case, but will have lost a significant cost savings by having to spend the time and money to go through discovery.

Potential Lack of Finality: Mediation is a non-binding process; therefore, if the dispute is not resolved in mediation, the parties may still have to resort to litigation or arbitration.

Conclusion

Contractors should consider all of the factors, both pro and con, when negotiating the dispute resolution provisions of a contract. It is not likely that a contractor will be able to completely rewrite the dispute resolution provisions of a contract, but a contractor may have the ability to shape the process of dispute resolution. Because mediation is relatively inexpensive, it is advisable to include mandatory pre-suit or pre-arbitration mediation provisions in your contract. Disputes can often be resolved in a pre-suit mediation and save the parties significant costs and fees that would otherwise be incurred in litigation or arbitration. ▼

1. American Arbitration Association, Construction Industry Arbitration Rules, <http://www.adr.org/si.asp?id=6425>



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