Cavignac

JANUARY 2021

Litigation, Arbitration, Mediation

Does It Matter?

By Tom Owens | PLAN

Project disputes, unfortunately, are not uncommon in the design and construction industries. Clients have disputes with design consultants. Design consultants, in turn, have disputes with contractors, subcontractors, and subconsultants. Perfect projects simply don't exist.

How these disputes are resolved has a dramatic effect on project success and the financial well-being of all parties involved. That's why specifying preferred project dispute resolution techniques in your client, and other, contracts is so important.

Avoid Litigation, Right?

Ask most design professionals and they'll likely tell you that when a dispute arises, litigation should be avoided if at all possible. They'll often opine that submitting to arbitration, mediation, or any of the spin-off alternative dispute resolution (ADR) techniques is preferable to going to court. After all, litigation subjects you to publicly airing your dirty laundry and damaging your reputation. Plus, your fate is left in the hands of a single judge or a public jury, neither of whom are likely to be knowledgeable of the design and construction professions. Who knows how they might rule on a complex case?

But is that so? Should litigation be avoided at all costs? Are arbitration and mediation two largely interchangeable approaches that offer substantial benefits over litigation? You might be surprised to learn that opinions of litigation and ADR techniques have recently changed.

Litigation, Not So Bad?

Today, many design firms and their legal defenders are becoming more open to taking a dispute through litigation. They reason that if you have a jury trial, you'll likely get to participate in the jury selection process. Your legal team can reject potential jurors who seem averse to the design professions or, uncommonly, incapable of understanding the issues at hand. And if you are not comfortable with a jury trial, you can request a bench trial where the judge hears and rules on the case.

With litigation, your defenders have the tools of discovery and deposition to get relevant facts to the judge or jury. Other types of ADR do not always fully utilize these tools.

Plus, litigation gives you the right to challenge the validity of the entire case through dispositive motions. The case may get thrown out before it even has a chance to start.

Even if the case proceeds, many judges now require that the parties enter into voluntary mediation and try to get a compromise agreement before beginning the more expensive and time-consuming litigation process.

Speaking of compromises, if you have a strong legal case, litigation is more apt to grant you a complete victory. Arbitration, mediation, and other ADR techniques tend to work out a compromise where the "innocent" party is likely to have to contribute to the settlement.

Should you receive a negative judgment, litigation gives your legal team the right to appeal it. There is no appeal process with most binding ADR proceedings such as arbitration.

A final point on litigation: Don't give up your right to a jury trial. Clients may ask you to sacrifice that right in fear that juries tend to be more sympathetic to small design firms versus large property owners or developers. You should attempt to keep all dispute resolution processes in your toolbox whenever possible (some jurisdictions prohibit waiving a jury trial).

At the very least, you should postpone the decision to grant a jury waiver until after a claim occurs. Then, you and your attorney can decide if a jury waiver makes sense based on the specifics of the case and the track record of jury awards in the jurisdiction.

Arbitration, Not So Good?

Arbitration in one of the most familiar and frequently used methods of dispute resolution. In fact, we've seen an uptick in the number of client contracts that call for arbitration as the preferred choice for settling disputes. With arbitration, the two parties to a contract select a neutral party to act as the arbitrator. The arbitrator conducts a hearing, acting much like a judge during litigation. The arbitrator hears the two sides simultaneously, renders a decision, and awards based on his or her judgment.

While arbitration can certainly result in fair decisions by qualified arbitrators, there are a few caveats you should be aware of before accepting it as the mandatory dispute resolution technique.

First of all, arbitration is binding. Whatever the arbitrator rules is final. There is no appeal process, no higher court to go to. In order to get a ruling overturned you would likely have to demonstrate that the arbitrator acted with malice, was corrupt, committed fraud, exceeded his or her powers, or otherwise improperly conducted the arbitration. You can't appeal a decision simply because you think the arbitrator reached the wrong conclusion.

Also, arbitrators don't have to explain their rulings. They are not bound by strict legal principles; their decisions are not reviewed by a judge or other legal expert. Whatever an arbitrator deems as just and equitable based on his or her opinion of the evidence presented stands. Overall, be advised: Arbitrators may be inherently biased. Many arbitrators who specialize in design and construction disputes are ex-practitioners, either former design professionals, contractors, subcontractors, or owner representatives. It is only natural that they will view the project dispute through tinted glasses and rule accordingly.

Despite common perceptions, arbitration is not necessarily less expensive nor less time consuming than litigation. True, a full-blown jury

trial will likely cost more and take more time than an arbitration hearing. However, only a fraction of litigations goes all the way through a court trial. Most claims are settled out of court, dismissed, or limited by the judge. Arbitration, on the other hand, typically goes through full hearings before a ruling is made. There are likely American Arbitration Association fees to pay, along with compensation for the arbitrator. Additionally, while it is not mandatory to involve your own legal counsel in the proceedings, many companies find it is advisable to do so in order to get the ruling they are looking for. These costs add up.

A few more things you should know about arbitration:

- Arbitration typically lacks a formal discovery process. You'll have limited chances to gather and present evidence with likely no interrogatories or depositions.
- The arbitration hearing is typically limited to the two parties to the dispute. Cross-claims or third-party claims are not allowed, even if you feel that a third-party bears responsibility for the dispute and subsequent damages.
- Binding arbitration awards often result in a win-lose situation that damages the working relationship between the client and the design firm. You might win the case, but lose a valued client.

Mediation, Still the Best?

That brings us to mediation. Here, opinions have not changed to any large extent. Mediation, a nonbinding negotiation led by an impartial party, is still regarded as the best ADR technique for resolving disputes while preserving working relationships. In fact, the American Institute of Architects' (AIA) contract documents now default to mediation as the ADR technique of choice. Additionally, some professional liability insurance carriers give premium credits of 50% of their deductible, up to $25,000, when their insureds successfully resolve disputes with mediation.

Unlike litigation or arbitration, mediation is a nonbinding process: A ruling is not imposed on either party. The mediator works to get both parties to examine the facts of the case, get to the core of the dispute, and agree to a mutually acceptable solution. Neither party is bound to settle. Compromise is the name of the game.

Here are how mediation proceedings typically go: The neutral mediator schedules a joint session for representatives from both sides to discuss the dispute. All relevant parties should attend, and there must be someone from each side who has decision-making authority.

The mediator will explain how the mediation process will commence. It is typically a fairly informal process, and the mediator will go over any specific ground rules that apply. Once agreement is reached regarding the process, each side is invited to share its position on the dispute, being as specific as possible. The mediator gathers facts, and asks questions as they deem necessary. The mediator also evaluates the dynamics of the relationship between the two parties, looking for areas of agreement and disagreement.

In some instances, the mediator may gather sufficient information during this initial joint session to propose a resolution to the dispute. If the proposal is acceptable to both parties, the mediation process can end here, and the resolution is drafted in writing and signed by both parties. Most likely, however, the parties will have differing opinions on the cause of the dispute, and potential damages and awards.

Neither may be willing to give in to compromise at this early stage.

If a stalemate is reached, the mediator will likely call an end to the joint session and schedule a separate caucus with each party. Here, the mediator meets with one party at a time, who is free to bring in subject matter experts and outside witnesses to help explain their case. Limited discovery may be allowed in the form of voluntary depositions and project document reviews. The mediator gathers the information, poses pertinent questions, and brainstorms alternate resolutions to the dispute with each party. Hopefully, the caucuses end with each party moving from their original position, becoming more willing to give-and-take on the issues at hand.

Following the separate caucuses, the mediator brings both parties back together for a second joint session. The mediator summarizes the core issues and highlights areas of agreement (or at least some positive movement in the points of contention) that were revealed during the caucuses. The mediator may also propose a settlement and encourage negotiations between the two sides.

It is not unusual for parties to reach substantial agreement on the core issues during this second joint session. If so, the parties can work toward cementing a final resolution. Both parties must sign the negotiated agreement. Upon signature, this becomes a binding contract.

Sometimes, however, the rounds of joint sessions and caucuses must continue. If negotiations reach a point where no progress is being made, the mediator may make one final proposed settlement. Again, this is nonbinding and both parties must agree in writing to accept it.

If the mediation fails to reach a resolution, the parties are free to end the process and seek resolution through litigation, arbitration or some other ADR technique. Because mediation is typically held "without prejudice," any information voluntarily revealed by one party cannot be used as evidence by the other party during any future litigation.

What's Best for Us?

Each of the three dispute resolution techniques discussed here – litigation, arbitration and mediation – can result in a favorable outcome for design professionals. However, generally speaking, we recommend that your contracts with clients and subconsultants commit to mediation as your first dispute resolution technique.

You might also want to specify the secondary dispute resolution technique the parties will execute (litigation, arbitration or some other ADR technique) in the event mediation does not lead to a successful resolution.

It is best to get a mediation clause in your contracts before a dispute arises. It can be difficult to get two parties to agree to anything once a contentious dispute arises. The major professional associations for design professionals all offer recommended language for mediation clauses, as do some professional liability insurers. Work with your attorney to craft language that fits your particular situation.

It is usually recommended that you do not select a particular mediator in your contract clause, nor should you allow your client to unilaterally select the mediator. It is preferable to mutually agree to a mediator after a dispute arises. That way, you and the other party can agree on a

mediator with appropriate knowledge of the issues involved. Check with your attorney and your insurance agent or broker for a list of recommended mediators in your area who specialize in the design professions. Finally, your contract clause should specify who will pay for the mediation services. Costs are usually split evenly between the two parties. These costs should be insurable under your professional liability policy, subject to limits and deductibles.

The preceding material is provided for informational purposes only. Before taking any action that could have legal or other important consequences, speak with qualified legal and insurance professionals who can provide guidance that considers your own unique circumstances, including applicable employment laws.