Mediation and Arbitration 101 for Architects, Engineers & Contractors

By Gary L. Cole AIA, ALA, Esq.

*[**Gary L. Cole AIA, ALA, Esq**. http://www.lawarkbuilding.com/, is Chicago-based Illinois and Florida-licensed attorney and Illinois-licensed architect. He practices design & construction law, real estate law, preservation law and accessibility law, is an arbitrator with the American Arbitration Association's Construction Division, and is a Certified Mediator and on the roster of Mediators for the Association of Licensed Architects. He can be contacted at garycole@lawarkbuilding.com.]*

[Author's note: Nothing in the following article should be construed as legal or business opinions or advice. Readers should always consult their legal or business professionals for specific advice and information.]

With civil litigation's rising costs, mediation and arbitration are growing in popularity as potentially quicker and more cost-effective *alternative dispute resolution* forums. Architects, engineers and contractors who incorporate well-considered mediation and arbitration clauses into their contracts and service agreements may have an advantage over those who don't, and, who later find themselves embroiled in costly and protracted litigation.

Mediation and arbitration, however, differ fundamentally in their approaches and some conflicts may be better resolved in one forum over the other.

Mediation Basics

Broadly speaking, *mediation* is a more informal dispute resolution process than arbitration in which a neutral party – a *mediator* – assists two or more parties in reaching a negotiated settlement on their own.

Mediation is private, confidential and generally non-binding, unless a settlement agreement is entered into by the disputing parties. Many contracts, especially design and construction agreements, contain requirements that parties attempt to resolve any disputes through mediation as a prerequisite to pursing arbitration and/or litigation.

Mediation can occur though a process known as *facilitative mediation*, in which parties propose their own solutions and a mediator serves more to facilitate productive communication toward reaching a settlement. Or, when requested by all parties, the mediator may express an opinion regarding a possible solution in a process known as *evaluative mediation*.

But mediation has its limits. Like any negotiation, successful mediation is dependent on the parties' good faith in seeking a mutually agreeable resolution to their dispute. But as a practical matter it's unlikely that disputing parties will approach mediation with exactly the same conciliatory attitude, so it's the mediator's role to facilitate and maintain a productive dialogue with that goal in mind.

Arbitration Basics

In disputes where parties are unlikely to arrive at a mutually agreed upon solution to their dispute, arbitration may be the better forum. Arbitration's proceedings are more formal than mediation, but typically less so than civil litigation.

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However, unlike mediation, disputes in arbitration are not resolved by the parties, but by a neutral – an *arbitrator* - (or sometimes a tribunal of arbitrators), who, in the case of *binding arbitration*, renders a binding judgment, much like a judge in traditional litigation.

Arbitration is generally conducted through a formal hearing in which the arbitrator hears the arguments of the disputing parties. In advance of the hearing, the parties and the arbitrator conduct one or more conference calls to agree on the date of the hearing, discovery scope, deadlines and other relevant issues. Discovery may include subpoenas for the production of documents and witnesses to appear at the hearing for examination and cross-examination.

Following the hearing, which can be accomplished in as little as a day, the arbitrator may request additional information from the parties. Once all post-hearing issues are resolved, he will then render his judgment, known as an *award*. And, absent a clear showing of factors such as an invalid arbitration agreement, or corruption, fraud, partiality, or misconduct by the arbitrator, it's unlikely that an award will be vacated if appealed.

Mediation and Arbitration in Practice

Like every business, design and construction are vulnerable to disputes, some foreseeable, many not. It's possible for architects, engineers and contractors to have long and productive practices and never be drawn into legal conflicts. Unfortunately, design and construction professionals sometimes make mistakes. But even when not at fault, absent a contractual requirement for mediation and/or arbitration, proving so may require architects, engineers and contractors to first endure lengthy and expensive legal battles.

But as the saying goes: "*The best defense is a good offense,*" and design, engineering and construction professionals should consider understanding how to plan properly for disputes using mediation and arbitration clauses in their contracts and service agreements.

Contracts and Service Agreements

It's rarely a good idea to provide design or construction services without a written contract, whether it's an industry-standard form agreement, something home-grown, or even a letter agreement. But regardless of the form used, many architects, engineers and contractors focus more on an agreement's business terms that affect them in the present: scope of work, deliverables, fees and payment schedule, milestones, etc.; than the risk management provisions that may affect them in the future, such as insurance, limitations of liability, warranties, indemnities – and, of course – mediation and arbitration clauses.

Contracts for design, engineering and construction services can be thought of in two ways: (1) as business plans for governing the interaction between parties working together toward a defined outcome; and/or, (2) pre-arranged battle plans in the event a dispute arises. And it's a mistake to think that just because a dispute doesn't arise between the time of a contract's execution and a project's completion that it never will. Statues of limitations can extend the period of potential legal liability for many years.

All services architects, engineers and contractors provide harbor potential disputes; all well-drafted contracts and service agreements ensure that some protections against disputes are in place. But regardless of the type of agreements used, it's important to remember that a form is just a form and can be modified nearly any way that's agreeable to parties in an arm's length transaction. This includes whether and how agreements provide for mediation or arbitration.

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Industry-standard owner-architect agreements often contain carefully crafted dispute resolution provisions, but differ in their approach. For example, the *Association for Licensed Architect's (ALA) OA3-2002 Short Form Owner/Architect Agreement* (http://www.alatoday.org/), provides in relevant part:

"Should any claim arise between the Owner and Architect, the parties agree to submit such claim to mediation, as a condition precedent to litigation. Mediation shall be conducted by and under the rules of the Association of Licensed Architects, unless the parties mutually agree otherwise. Should the parties fail to resolve the claim through mediation, the claim may then be litigated." [ALA OA3, Section 9.0]

Notice that the parties are required to try and resolve their dispute through mediation as a *condition precedent* (prerequisite) to litigation. And I say *try* because mediation may fail – the parties may not come to an agreement – in which case the drafters of the ALA's form agreement wisely skipped requiring arbitration as a prerequisite to litigation. I say *wisely* because the threat of litigation can be a powerful motivator for the parties to amicably settle their disputes in mediation. But even if mediation fails, and absent an *express* requirement to arbitrate in their contract, disputing parties can generally still agree to pursue binding arbitration.

However, the *American Institute of Architect's (AIA) B141 – 1997, Owner-Architect Agreement* (http://www.aia.org/), takes a different approach by requiring – unless the parties agree otherwise - mediation as a condition precedent to arbitration under the *Construction Industry Mediation Rules* of the *American Arbitration Association* (AAA) (http://www.adr.org/). And if mediation fails, then the dispute "*shall be decided by arbitration*" - unless the parties decide otherwise - under the AAA's *Construction Industry Arbitration Rules*.

Of course, the AIA form is just a form, and during the contract negotiation phase the parties are free to strike the mediation requirement and proceed immediately to arbitration, or strike the arbitration requirement and proceed to litigation, or simply follow the ALA's approach and require mediation as the only condition precedent to litigation.

Recognizing that disputes are common occurrences during construction projects, contracts produced by ConsensusDOCS – a coalition of more than thirty contractor and engineering organizations – take a little different approach to dispute resolution.

The *ConsensusDOCS Document 200 - Owner/Contractor Agreement & General Conditions (Lump Sum)* (http://consensusdocs.org/), requires the parties to first attempt resolution informally through *direct discussions* with their respective business representatives. If direct discussions fail to resolve the issues, the parties have the option of proceeding through a *project neutral* or *dispute resolution board* - who were pre-selected during the contract's negotiation - to *mitigate* conflicts, while construction continues unabated.

Failing resolution of disputes through *direct discussions* or *mitigation*, the parties then proceed to mediation. If mediation fails to provide a solution, the parties then proceed to one of two venues for dispute resolution – binding arbitration or litigation – depending on which option they pre-elected prior to contract execution.

The differences between the dispute resolution procedures in the design professional-driven agreements and in the contractor and engineering driven-contracts is that the former's provisions appear to contemplate a more formalized process invoked when professional services have been terminated, and the latter seeks to resolve differences as they occur as a way of continuing the construction and possibly avoiding a complete project meltdown. But, as stated before, parties to design, engineering or

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construction agreements are free to craft dispute provisions as they see fit – there is no *one size fits all* approach to alternative dispute resolution planning.

Regardless of the type of form contract used, the effectiveness of alternative dispute resolution will depend on a variety of factors such as the nature of the dispute and the relationships of the parties, but also on how mediators and arbitrators are selected.

Factors When Considering Mediation or Arbitration

Proper planning is the key to having control over the forum used to resolve a dispute. As discussed above, absent contractual provisions that require parties to mediate or arbitrate, or some later agreement to do so, most irreconcilable disputes stand a good chance of ending up in court. In preparing contractual mediation and arbitration clauses, there are a number of factors that architects, engineers and contractors should consider, with a few of them as follows:

▪ What's the likely nature of any dispute?

▪ Is it likely, or even desirable, that a business relationship with the other party be salvaged in the event of a dispute?

▪ What's the best venue (location) for the mediation or arbitration?

▪ What specific rules should govern the mediation or arbitration?

▪ Who selects the mediator or arbitrator?

▪ What's the timeframe for commencing and completing the mediation or arbitration?

▪ What are the associated costs and fees?

▪ What professional experience is required of a mediator or arbitrator, including the extent of their understanding of design and construction issues?

This last consideration is one of the most important - whether a mediator or arbitrator has the proper training and experience in design, engineering and construction matters to understand the complexities of a construction-related dispute. Even a dispute as seemingly straightforward as breach of contract for non-payment may require a mediator or arbitrator to understand not just whether a party delivered the services they contracted to provide, but whether the non-payment occurred because of alleged defective design work or engineering, improper execution by the contractor, other factors, or a combination of all. How effective will a mediator be in helping the parties reach an agreement, or how effective will an arbitrator be in rendering a fair award, if they're unable to grasp the substance and subtleties of the parties' claims because of a lack of knowledge and experience in the design and construction industries?

There's no way for architects, engineers and contractors to completely prevent disputes from ever occurring, but handled correctly during contract preparation, mediation and arbitration may provide quicker and more cost-effective solutions than traditional litigation, and architects, engineers and contractors can get back to the businesses they're best at – designing, engineering and building.

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