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# When Designing Your Dispute Resolution Strategy, Consider the Courthouse

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When negotiating contracts, design professionals tend to focus primarily on scope and compensation, giving comparatively little attention to the proposed dispute resolution provisions. This is a mistake. Overlooking dispute resolution provisions when negotiating contracts can create unintended consequences and limit strategic options in the event of a claim. Although many people in the construction industry advocate for the use of arbitration to resolve construction disputes, the prudent design professional should carefully consider whether litigation may better protect their interests.

## Understanding Arbitration

Arbitration is a private, binding method of dispute resolution conducted outside the public court system. Rather than having a judge or jury decide the case, the parties present their evidence and legal arguments to one or more neutral arbitrators, who issue a written decision known as an arbitration award. The process is typically governed by the parties' contract, which may specify the applicable rules, the organization administering the arbitration, the scope of available discovery (if any), and the method for selecting the arbitrator. In most cases, the arbitrator's decision is final and binding, with only very limited grounds for appeal or judicial review.

## Broader Discovery Increases Access to Information

Design professionals are frequently drawn into complex multi-party disputes involving numerous project stakeholders. Defending against these claims almost always requires access to project records and testimony from parties to the dispute – including from project participants who are not involved in the dispute. In litigation, courts provide robust discovery tools which allow litigants to subpoena non-parties, compel the production of documents, and obtain testimony through depositions to establish facts relevant to the dispute. In arbitration, discovery between parties is generally more limited, with some arbitrators prohibiting third-party discovery all together. Moreover, even if an arbitrator would permit third-party discovery in an arbitration proceeding, some federal courts have held that arbitrators are not permitted to order non-parties to appear at depositions or demand that they produce documents ahead of the actual arbitration hearing. While limited discovery may theoretically reduce the cost to litigate a dispute, it also reduces access to information which may be critical for the evaluation/resolution of the dispute.

## Litigation Provides Predictability & Appellate Review

Judges apply established legal precedent when addressing issues like standard of care, causation, and damages. This predictability allows design professionals, and their professional liability insurers, to better assess exposure and make informed decisions regarding litigation strategy and settlement. Before trial, design professionals are permitted to file dispositive and other pre-trial motions which may dispose of a case entirely or narrow the issues and/or evidence that may be presented at trial. A judge's application of precedent allows design professionals to assess the potential success of these motions and their general strategy. Further, in the event of an unfavorable ruling on one of these motions, judicial decisions are subject to post-trial motions and appeal.

By contrast, arbitrators (who may not even be lawyers) generally are not subject to appellate review of their interpretation/application of applicable legal precedent and lack any incentive to grant a dispositive motion ahead of an arbitration hearing. In fact, one of the rare grounds for reversing an arbitrator's award (in some jurisdictions) is the arbitrator's failure to consider evidence of one of the parties. Rather than rule on black-and-white legal issues, it is not uncommon for arbitrators to issue "split" decisions reflecting what they believe to be the equitably correct outcome. This can impede a design professional's ability to assess exposure and resolve the dispute ahead of the hearing.

Recognizing that one of the critiques of the arbitration process is the lack of meaningful appellate review, the American Arbitration Association ("AAA") created a panel of appellate arbitrators that parties could opt to include as part of the arbitration process. According to a recent article published by the American Bar Association,[1] "50 percent of the appellate arbitration awards adopted (affirmed) the underlying award, and 50 percent substituted the underlying award with the appellate award in whole or in part." In other words, the industry experts acting as arbitrators got the initial decision wrong half of the time. While judges may not be industry experts, they are not reversed 50 percent of the time, either.

## Costs

Complex arbitrations often involve arbitrator compensation and administrative fees which can rival or exceed litigation costs. In arbitration, the parties are responsible for compensating the arbitrator(s) for their time – usually on an hourly basis. As such, there can be significant fees associated with retention of an arbitrator.

While there may be some reduced cost to arbitration in a case where the arbitrator limits or restricts the scope of permissible discovery, it is not uncommon for parties to an arbitration to

[1] https://www.americanbar.org/groups/litigation/resources/newsletters/appellate-practice/winter2024-appealing-possibility-appeals-arbitration/

agree that the nature of the claims warrants a more robust amount of discovery. As such, there may not be significant savings on the discovery front by proceeding with arbitration.

Arbitration can also result in significantly greater costs tied to the briefing of issues. In litigation, courts often impose page limitations on party submissions. By contrast, where there are no standing rules capping the length of motions, pre-hearing filings, and/or post-hearing briefs, the length of written submissions in arbitration can be substantially greater than in litigation – driving up the cost of the arbitration.

## Conclusion

Arbitration remains appropriate in some situations, particularly smaller disputes where confidentiality and expediency are paramount. Nevertheless, design professionals should resist the assumption that arbitration is always preferable. In many professional liability disputes, litigation offers broader discovery, greater predictability, meaningful appellate review, and more effective management of multi-party claims. Thoughtful consideration of dispute resolution provisions during contract negotiations can significantly influence outcomes when disputes arise.

For design professionals, selecting the proper dispute resolution forum is a strategic risk management decision. The courthouse may offer the procedural protections necessary to achieve fair and reliable outcomes in complex construction disputes which are unavailable in arbitration.

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