Means & Methods of Resolving Construction Disputes

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Introduction

Only two things are certain: death and taxes. Well, three things: death, taxes, and construction disputes. It hasn’t always been this way. The Empire State Building only took fourteen months to build. But that was eighty-seven years ago. Today, with the increase in regulations, red tape, and third-party involvement in projects, construction projects almost always cost more and take longer than the parties anticipate. That has led to the inevitable increase in disputes. Whether the dispute is over payment, poor workmanship, late delivery, or the validity of an unsigned change order, among many other possible reasons, the dispute must be resolved somehow. When these disputes arise, there are as many ways to deal with them as there are different varieties of disputes.

This article surveys some of the variety of ways parties to a construction project can resolve their disputes, and the benefits and challenges of these various methods.

Earliest Methods Of Dispute Resolution

Throughout history, mankind has used many methods of dispute resolution. If two people disagreed over an issue, they could always fight it out. In the Middle Ages, the trial by combat developed, where the parties, or their respective champions, battled each other, Game of Thrones-style to see who was on the side of right and justice (the side that won the fight).
This option later developed into the formal duel, either Three Musketeers-style with swords, or later with guns, the style of Alexander Hamilton and Aaron Burr or old west John Wayne and Clint Eastwood style.

Advantages of these methods included that they were fairly quick and inexpensive, and it was easy to tell who the winner was. Despite the efficiency and effectiveness of these methods, thankfully they are rarely used anymore, and almost never utilized to resolve construction disputes. For one thing, if you lose, there is no avenue of appeal, and in addition, these methods are mostly illegal now.

However, the idea of trial by combat was recently re-introduced by attorney (and Game of Thrones fan) Richard A. Luthmann. In 2015, he filed a motion in Richmond County, New York requesting that the case be resolved by combat: “Defendant invokes the common law writ of right and demands his common law right to Trial By Combat as against Plaintiffs and their counsel, whom plaintiff wishes to implead into the Trial By Combat by writ of right.”

Unfortunately for Luthmann, the court denied his request for a trial by combat, but not without stating that trial by combat was an available remedy that the court had the power to order. The bottom line is that these methods are no longer in vogue, and are illegal now, except maybe in New York.

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More formal and less gruesome methods of dispute resolution have developed over the years, and parties to construction contracts often specify very particularly in their contracts the manner of dispute resolution that will be used if a dispute arises.

For example, the 2017 updates to the AIA standard contracts allow the parties to check-the-box and choose their preferred method of dispute resolution:

Here is the dispute resolution provision in the AIA A101 Standard Form of Agreement Between Owner and Contractor where the basis of payment is a Stipulated Sum:

And here is the dispute resolution provision in the AIA A102 Standard Form of Agreement Between Owner and Contractor where the basis of payment is the Cost of the Work Plus a Fee with a Guaranteed Maximum Price:

The parties to a construction project have the ability to specify which method of dispute resolution they wish to use in their contract. Some of the most popular options that this article will examine below are litigation, arbitration, mediation, dispute resolution boards, and collaborative law.

Litigation

The most familiar dispute resolution process to those who work in the legal world is litigation. Litigation uses a neutral third party, either a judge or a jury, to resolve disputes, including construction disputes. The judge or jury will resolve the dispute based on the facts developed through evidence and witness testimony at a trial and based on the law and the terms of the parties’ contract. To develop the facts and avoid unfair surprises at trial, litigation usually involves a lot of discovery – the parties exchanging relevant documents and deposing the key individuals involved, as well as any expert witnesses.
When prescribing litigation as the dispute resolution process, the parties need to consider whether they want a bench trial in front of a judge, or the traditional jury trial. Do you want jury sympathies to be in play? The parties also need to consider where they would like the location of the litigation to be, and what state or country’s law should apply.\(^3\) Does one side have home-field advantage? At the end of the litigation road, one party usually obtains an order from the court ordering the other party to pay it a certain amount of money. This order can then be appealed by the losing party.

The whole process of litigation: discovery, trial, and appeals can take several months, or even years, and can be very expensive.

Arbitration

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\(^3\) The parties should be aware of, and keep in mind, state-law venue provisions, such as that in Va. Code Ann. § 8.01-262.1, which provides for venue in Virginia if a construction project is located in Virginia and the contractor is located in Virginia, notwithstanding any venue provision in the contract to the contrary.
Outside of litigation, there are several methods of Alternative Dispute Resolution, or ADR. The method of ADR most heavily utilized in the construction world is arbitration.

“Congress adopted the [Federal Arbitration Act (‘FAA’)] in 1925 in response to a perception that courts were unduly hostile to arbitration.” The [FAA] states that a ‘written provision’ in a contract providing for ‘settle[ment] by arbitration’ of ‘a controversy . . . arising out of’ that ‘contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.’ “In the Federal Arbitration Act, Congress has instructed federal courts to enforce arbitration agreements according to their terms.” This is because of “Congress’s judgment [that] arbitration had more to offer than courts recognized—not least the promise of quicker, more informal, and often cheaper resolutions for everyone involved.”

“Not only did Congress require courts to respect and enforce agreements to arbitrate; it also specifically directed them to respect and enforce the parties’ chosen

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4 See “Mandatory Mediation: An Oxymoron? Examining the Feasibility of Implementing a Court-Mandated Mediation Program,” 11 Cardozo J. Conflict Resol. 479, 480 (Spring, 2010) (“ADR typically refers to any mode of dispute resolution that does not utilize the court system, such as arbitration, neutral evaluation and mediation.”); see also https://www.law.cornell.edu/wex/alternative_dispute_resolution (“Alternative Dispute Resolution” is defined as “Any method of resolving disputes without litigation. Abbreviated as ADR. Public courts may be asked to review the validity of ADR methods, but they will rarely overturn ADR decisions and awards if the disputing parties formed a valid contract to abide by them. Arbitration and mediation are the two major forms of ADR.”).

5 See “Mediation: The ‘New Arbitration,’” 17 Harv. Negotiation L. Rev. 61, 66 (Spring 2012) (“Historically, arbitration has been the most popular alternative to the court adjudication of disputes.”).


8 Epic, 2018 U.S. LEXIS 3086, at *7-8.

9 Epic, 2018 U.S. LEXIS 3086, at *12.
arbitration procedures.” Consequently, there is also a lot of flexibility in the way an arbitration can be conducted, with no rules of civil procedure or evidence to bind the arbitrators. The parties can generally specify in their contract the way the arbitration process will work. “The Federal Arbitration Act allows parties to an arbitration contract considerable latitude to choose what law governs some or all of its provisions.”

The Uniform Arbitration Act was enacted in 1955, and revised in 2000. Similar to the FAA, the revised Uniform Arbitration Act provides that “An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract.” The 2000 revisions to the Uniform Arbitration Act have been enacted in 18 states and the District of Columbia, and have been introduced in 3 others.

Arbitration also involves a neutral decision-maker, but instead of a judge or a jury, the dispute is decided by an arbitrator or a panel of arbitrators. Again, the dispute is resolved based on the evidence and witness testimony at a hearing, but arbitrators are not bound by the law the way a court is. There can be appeals from the decisions of an arbitrator.

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11 DIRECTV, Inc., 136 S. Ct. 463 at 468.
15 Connecticut, Massachusetts, and Pennsylvania.
arbitrator or arbitrators, but judicial review of an arbitration award is somewhat limited.\textsuperscript{16} The fact that the arbitrator or arbitrators did not follow the law is generally not grounds for a court to overturn an arbitration award.

On many construction projects, the parties use American Institute of Architect ("AIA") contract forms. The AIA standard contracts use the rules of the American Arbitration Association ("AAA") as the default rules if the parties choose arbitration as their method of dispute resolution. However, the parties can change this default, or could even use AAA's arbitration rules, without submitting the arbitration to the AAA to administer.

The arbitrator or arbitrators are chosen by the parties, and paid by the parties in equal shares. The arbitrators are usually experienced construction attorneys, or architects, engineers, or contractors. Under the FAA, if the arbitration agreement prescribes a method for choosing the arbitrator, that method will be followed, but if it is

\textsuperscript{16} Compare Wachovia Sec. v. Brand, 671 F.3d 472, 478, n.6 (4th Cir. 2012) ("the FAA limits courts' ability to vacate arbitral awards as part of its comprehensive scheme to replace judicial hostility to arbitration with a national policy favoring it . . . The FAA notably does not authorize a district court to overturn an arbitral award just because it believes, however strongly, that the arbitrators misinterpreted the applicable law. When parties consent to arbitration, and thereby consent to extremely limited appellate review, they assume the risk that the arbitrator may interpret the law in a way with which they disagree. Any more probing review of arbitral awards would risk changing arbitration from an efficient alternative to litigation into a vehicle for protracting disputes.") (internal quotations and citations omitted), with "Mediation: The 'New Arbitration,'" 17 Harv. Negotiation L. Rev. 61 (Spring 2012) ("In some states, the finality of arbitration awards has been affected adversely by a high success rate with motions to vacate and by contractual agreements to expand judicial review of awards."), and E. J. Miller Constr. Co. v. Holt, 56 Va. Cir. 153, 153 (Cir. Ct. 1998) (vacating a portion of an arbitration award awarding delay damages because the arbitrator exceeded his powers when he "both misinterpreted the contract and committed an error of law.").
silent on the issue, upon request, a court will choose the arbitrator.\textsuperscript{17} For smaller disputes, one arbitrator is usually used, while a panel of three arbitrators is often used for larger disputes.\textsuperscript{18} Different methods of selection include the strike-and-rank method, where each party is presented with a list of potential arbitrators and must strike the arbitrators it objects to and rank the others, with the highest-ranked arbitrators being chosen; or each party choosing one arbitrator, with those two arbitrators together picking the third.

The main advantage of using arbitration is that it is quicker and less expensive than litigation.\textsuperscript{19} However, this is becoming less and less the case.\textsuperscript{20} Especially in large construction disputes, arbitration is becoming more similar to litigation, with extensive discovery and motions practice for months leading up to the arbitration hearing.\textsuperscript{21}

\textsuperscript{17} 9 U.S.C. § 5.
\textsuperscript{18} See American Arbitration Association Construction Industry Arbitration Rules and Mediation Procedures, Rule R-18(a) “If the parties have not agreed on the number of arbitrators, the dispute shall be heard and determined by one arbitrator, unless the AAA, in its discretion, directs that three arbitrators be appointed. A party may request three arbitrators in the demand or answer, which request the AAA will consider in exercising its discretion regarding the number of arbitrators appointed to the dispute.”
\textsuperscript{19} See http://ccbjournal.com/articles/35162/arbitration-without-feel-litigation-it%E2%80%99s-all-about-control-and-it-starts-discovery (“When parties agree to arbitrate, they are protecting against the variable and often unpredictable aspects of litigation. By placing the parties in a private setting without the rigors and demands of the public courts and federal or state rules, arbitration is supposed to be faster, straightforward and, above all, cost-effective.”); “Mediation: The ‘New Arbitration,’” 17 Harv. Negotiation L. Rev. 61, 66 (Spring 2012) (“Many parties seeking finality, privacy, informality, speed, low cost and decision-making expertise gravitate to the arbitration process.”).
\textsuperscript{20} See “Mediation: The ‘New Arbitration,’” 17 Harv. Negotiation L. Rev. 61 (Spring 2012) (“Arbitration is, in many respects, in crisis mode. U.S. practitioners complain that business arbitration has become as slow and costly as litigation.”).
\textsuperscript{21} See http://ccbjournal.com/articles/35162/arbitration-without-feel-litigation-it%E2%80%99s-all-about-control-and-it-starts-discovery (“Alas, arbitration alone is no guarantee for a less expensive, speedier outcome. . . . although parties were contracting to arbitrate at increased rates, they were not placing limits on discovery, which resulted in arbitrations that more closely mimic litigation. . . . . But in practice, unless parties and the arbitrator carefully and consciously limit discovery, arbitration
parties can counter this trend and preserve the speed and low cost of arbitration by limiting the amount of discovery either in the arbitration agreement or in a preliminary hearing or conference with the arbitrator. The AAA also has fast-track procedures, for speedy resolution of claims of less than $100,000, with a 45-day timeline from the preliminary telephone conference with the arbitrator to the hearing date.

Another advantage of using arbitration is that arbitrators are often more experienced in the underlying issues involved in construction disputes than a judge or jury would be. Many construction disputes involve highly technical facts, and architects, engineers, or construction attorneys will be much more familiar with the subject matter than a generalist judge or a jury would be.

A disadvantage of using arbitration is the lack of recourse if a party loses. Appeal opportunities are limited, and courts generally defer to arbitration awards. An arbitration rules also can also lead to substantial amounts of discovery and costly motion practice. Without an electronic discovery plan, arbitration becomes little more than sophisticated and expensive forum shopping. The forum and the rules alone will not save you.

See id. (noting that "[t]here are ways to limit discovery throughout the hearing. The need to do so is frequently emphasized in arbitration rules. For example, the AAA Preliminary Hearing Procedure P-1(b) states, ‘Care must be taken to avoid importing procedures from court systems, as such procedures may not be appropriate to the conduct of arbitrations as an alternative form of dispute resolution that is designed to be simpler, less expensive and more expeditious.’").


See supra note 16; LaPrade v. Kidder, Peabody & Co., 345 U.S. App. D.C. 358, 246 F.3d 702, 706 (2001) (“It is well settled that a court's review of an arbitration award is limited . . . arbitration awards can be vacated only if they are in manifest disregard of the law, or if they are contrary to some explicit public policy that is well defined and dominant and ascertained by reference to the laws or legal precedents. Manifest disregard of the law means more than error or misunderstanding with respect to the law. Consequently, to modify or vacate an award on this ground, a court must find that (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it
award will only be overturned under the FAA for corruption, fraud, evident partiality or misconduct by the arbitrators, or the arbitrators exceeding their powers under the arbitration agreement.25

Again, parties specifying arbitration as their chosen method of dispute resolution should consider the location where the arbitration will be held, and whether it is a convenient or neutral site. The parties also should carefully consider whether to include provisions allowing for the joinder of other parties into the arbitration, or the consolidation of the arbitration with other related arbitrations.26 It can be advantageous to have an avenue to bring all interested parties into one arbitration, but it can also complicate and bog down the process to have too many parties involved.

At the end of the arbitration process, the arbitrator or arbitrators will issue an award to one party, which can be enforced in court. The FAA specifically provides courts the ability to enter an order confirming an arbitration award.27 The parties should consider whether they will ask the arbitrators for a standard award, which will be quicker, just


26 See AIA A201-2017 General Conditions of the Contract for Construction, §15.4.4.2 (providing that “either party may include by joinder persons or entities substantially involved in a common question of law or fact whose presence is required if complete relief is to be accorded in arbitration.”); American Arbitration Association Construction Industry Arbitration Rules and Mediation Procedures, Rule R-7 (establishing a procedure for the appointment of a single arbitrator to decide contested issues of joinder).

saying which party won and how much they should receive, or a reasoned award, which would be slower and more expensive in terms of the arbitrator’s time, but which would read more like a judicial opinion and lay out the reasons that the arbitrators decided the case the way they did.28

Mediation

As litigation continues to be expensive and arbitration becomes slower and more expensive, many parties include a requirement in their contract that the parties mediate before proceeding to litigation or arbitration.29 Courts also often refer construction cases to mediation at some point before trial.30 “[T]he ADR Act of 1998 gave district courts the mandate to establish ADR programs and listed mediation as an appropriate ADR process.”31 That Act instructed each federal district court to “devise and implement its

28 See American Arbitration Association Construction Industry Arbitration Rules and Mediation Procedures, Rule R-47(c) (“The parties may request a specific form of award, including a reasoned opinion, an abbreviated opinion, findings of fact, or conclusions of law no later than the conclusion of the first Preliminary Management Hearing. If the parties agree on a form of award other than that specified in R-47 (b) of these Rules, the arbitrator shall provide the form of award agreed upon. If the parties disagree with respect to the form of the award, the arbitrator shall determine the form of award. After the conclusion of the Preliminary Management Hearing, the parties may not change the form of the award without the arbitrator’s express consent. In such event, the arbitrator shall confirm the nature of the change to the form of award.”).
29 See “Mediation: The ‘New Arbitration,’” 17 Harv. Negotiation L. Rev. 61, 66 (Spring 2012) (“Arbitration’s fading popularity over the last two decades has energized mediation’s growth and has helped it to displace arbitration as the ADR process of choice.”).
30 See “Renovating the Multi-Door Courthouse: Designing Trial Court Dispute Resolution Systems to Improve Results and Control Costs,” 18 Harv. Negotiation L. Rev. 281, 283 (Spring 2013) (“Mediation and other ADR procedures have been institutionalized in federal and state courts as a means of addressing public dissatisfaction with the courts.”).
own alternative dispute resolution program, by local rule adopted under section 2071(a) [28 USCS § 2071(a)], to encourage and promote the use of alternative dispute resolution in its district.”

Mediation is “a process of facilitated negotiation, in which a neutral third party, the mediator, assists the disputing parties in understanding their underlying concerns or needs, and in negotiating a possible settlement of their dispute.” The mediator is a neutral party with no interest in the outcome. For construction disputes, the mediator is usually a judge or an attorney with experience in the construction industry. Choosing an effective mediator is essential. “Empirical analysis strongly documents that mediator qualities are highly predictive of the likelihood of settling a given case . . . each percent increase in a mediator's settlement rate yields a 0.60% greater likelihood of settlement.”

No two mediations are ever the same. They can be conducted however the parties and the mediator want. Mediations can occur while litigation or arbitration is pending, or before any complaint or demand for arbitration is filed.

34 “Renovating the Multi-Door Courthouse: Designing Trial Court Dispute Resolution Systems to Improve Results and Control Costs,” 18 Harv. Negotiation L. Rev. 281, 310-11 (Spring 2013).
35 See “Mandatory Mediation: An Oxymoron? Examining the Feasibility of Implementing a Court-Mandated Mediation Program,” 11 Cardozo J. Conflict Resol. 479, 481 (Spring, 2010) (“Formality is eschewed within mediation because this mode of dispute resolution emphasizes self-determination, collaboration and creative ways of resolving a dispute as well as addressing each party's underlying concerns.”).
Below is a sample subcontract provision requiring mediation between a general contractor and a subcontractor, but only if the general contractor chooses to use it:

Mediation/Litigation. All claims, disputes and other matters in question arising out of or relating to this Subcontract ("Claims"), except for Claims which have been waived because of Subcontractor’s failure to confirm to the requirements of this Subcontract for the timely assertion of its claims, shall be processed as follows. The parties shall first confer informally to determine if the Claims can be resolved. If such informal negotiations fail to resolve the Claims, then the Contractor shall within ten (10) days of a written confirmation of impasse inform the Subcontractor in writing whether the Contractor prefers to have the Claims mediated. If so, the parties will promptly confer regarding an acceptable mediator. If the parties cannot agree, they shall petition the Chief Judge of the Circuit Court for the City of [] to designate a mediator with experience in construction disputes. In the event that the Claims are not resolved in mediation, then the party asserting the Claims may initiate litigation in the Circuit Court for the City of [] unless the Contractor shall elect to have the matter resolved in the Circuit Court where the Project is located, as shall be communicated to the Subcontractor at the termination of failed mediation. If the Contractor does not invoke mediation with in ten (10) days of the written notice of impasse, then the party asserting Claims may initiate litigation according to the terms of this provision. If the Subcontractor files a claim in a forum not permitted by the terms of this provision, it shall be liable to the Contractor for all damages and expenses, including attorneys’ fees, incurred as a result of the claim not having been filed as so permitted.

Mediation has many advantages. Mediation can be particularly useful in specialized industries such as construction.\(^\text{36}\) Mediation is faster and less expensive than litigation or arbitration.\(^\text{37}\) This makes it particularly useful for resolving a dispute while a project is ongoing.\(^\text{38}\) In mediation, the parties control their own fate, and they can work

\(^{36}\) "Renovating the Multi-Door Courthouse: Designing Trial Court Dispute Resolution Systems to Improve Results and Control Costs,” 18 Harv. Negotiation L. Rev. 281, 287 (Spring 2013).

\(^{37}\) See “Mediation: The ‘New Arbitration,’” 17 Harv. Negotiation L. Rev. 61, 71 (Spring 2012) ("Studies of corporate use of ADR show a distinct preference for mediation over arbitration because of the cost savings involved.").

\(^{38}\) See “Renovating the Multi-Door Courthouse: Designing Trial Court Dispute Resolution Systems to Improve Results and Control Costs,” 18 Harv. Negotiation L.
together to craft a more creative remedy than just one party paying money to the other.\textsuperscript{39} If the mediation is successful, the parties will enter into a settlement agreement, which can provide for remedies that courts or arbitrators do not have the power to order. Finally, the mediation process is confidential.\textsuperscript{40} And even if it is unsuccessful, the process helps the parties focus on the strengths and weaknesses of their cases and helps to narrow areas of disagreement. “Reaching settlement . . . is simply one goal of mediation. Mediation also aims to enhance parties’ self-determination, preserve ongoing relationships, increase public satisfaction with the legal system, and establish a participatory democracy.”\textsuperscript{41}

\textsuperscript{39} See “Mediation: The ‘New Arbitration,’” 17 Harv. Negotiation L. Rev. 61, 68-69 (Spring 2012) (“Mediation’s core values of self-determination and party participation have been its traditional and essential selling points . . . Self-determination enhances the development of parties’ problem-solving capacities, their ability to craft individualized justice on their own terms based on their own interests and values. It is what helps parties move beyond mere justice to achieving a sense of peace in resolving their disputes. Peace in mediation includes interior peace, offering opportunities for apologies, forgiveness and reconciliation”).

\textsuperscript{40} See Construction and Application of State Mediation Privilege, 32 A.L.R.6th 285, 2. (“all states have enacted statutes or rules designed to protect mediation communications from disclosure in legal proceedings. Many of these statutes are based on the Uniform Mediation Act, approved by the American Bar Association and the National Conference of Commissioners on Uniform State Laws, with a mediation privilege as its centerpiece.”); “Mediation: The ‘New Arbitration,’” 17 Harv. Negotiation L. Rev. 61, 69-70 (Spring 2012) (“Mediation also offers protection from exposure in public forums. Confidentiality, an almost sacred canon in the mediation process, is protected by statutes, ethical codes and agreements between the parties.”).

\textsuperscript{41} “Renovating the Multi-Door Courthouse: Designing Trial Court Dispute Resolution Systems to Improve Results and Control Costs,” 18 Harv. Negotiation L. Rev. 281, 317 (Spring 2013).
However, mediation will only work if both parties are committed to trying to resolve the dispute. If one party is not truly interested and is just going through the motions, the mediation will just be a speed bump on the way to either litigation or arbitration.\textsuperscript{42}

Mediation can be used during a project to encourage cooperation between the parties and to resolve small disputes before they turn into larger disputes.

The location of the mediation can be chosen as a neutral site, where neither party will have home-court advantage, but logistical considerations often dictate the location.

\textbf{Resolving Disputes As They Arise During A Project}

Often, the goal of the parties is to avoid the expense and time of litigation and arbitration. Especially if a dispute arises during the early stages of a project, it is often in both parties' best interest to resolve it so the project can continue on-time and on-budget.

Disputes, minor or massive, are resolved every day on major construction projects. The best way to do this is to build relationships with individuals from the other party from Day 1. It is very important to find reasonable people from the other party to work with. In order to keep things running smoothly and to resolve disputes smoothly as they arise, it

\textsuperscript{42} See “Mandatory Mediation: An Oxymoron? Examining the Feasibility of Implementing a Court-Mandated Mediation Program,” 11 Cardozo J. Conflict Resol. 479, 492 (Spring, 2010) (noting that the “peculiar problem in mandatory mediation” is “that the horse may be led to the water (i.e. ordered to participate in mediation) but cannot be forced to drink.”).
is important to understand other parties’ internal organization, personnel, and roles, and who makes the decisions and why.

Some contracts will require, or some parties will utilize, meetings at the project level and at the management level to try to resolve disputes as they arise, before even using a formal mediation. This is a form of step negotiation, which requires the individuals directly involved in the dispute to seek resolution through direct negotiation. In step negotiation, if a resolution is not reached at one level within a specific length of time, the dispute is elevated to the next level in the organization. This process continues up to the senior levels of each organization.

Below is a dispute resolution provision requiring the parties to attempt to resolve the dispute through informal negotiations, before instituting arbitration:

Dispute Resolution: Any and all claims and disputes arising out of or related to the performance of this contract by either party shall be resolved first by the parties conferring in an attempt to resolve the claim or dispute and if unable to do so, then by submitting the claim or dispute to arbitration pursuant to the Virginia Arbitration Act Governing Arbitration and Awards.

This sample provision requires executive negotiation, then litigation, or whatever alternative dispute resolution process the parties agree on:

3.11.1.2. Executive Negotiation. During the first ten (10) Days following the delivery of the Dispute Notice (and during any extension agreed to by the Parties, (the “Negotiation Period”) an authorized executive officer of Contractor and an authorized executive officer of Owner shall attempt in good faith to resolve the Dispute through negotiations. If such negotiations result in an agreement in principle among such negotiators to settle the 

43https://www.americanbar.org/content/dam/aba/migrated/dispute/essay/constructiondisputes.pdf.
Dispute, they shall cause a written settlement agreement to be prepared, signed and dated (an “Executive Settlement”), whereupon the Dispute shall be deemed settled, and not subject to further dispute resolution.

3.11.1.3. Alternative Dispute Resolution. If an Executive Settlement is not achieved, at the conclusion of the Negotiation Period, the Dispute may, by mutual agreement of the Parties, be submitted for resolution by binding Alternative Dispute Resolution (“ADR”).

3.11.2. Litigation. The Parties reserve all rights to adjudicate any Dispute not submitted to ADR hereunder, in any court of competent jurisdiction, in an action at law or equity; provided, however, that each Party hereby waives the right to a trial by jury in any such action.

3.11.3. Other Dispute Resolution Procedures. Notwithstanding the provisions set forth above in this Article 3.11, the Parties may, by mutual agreement, submit any Dispute for resolution in any other manner that they may agree to in writing at the time such Dispute arises; provided, however, that a Party’s agreement to any such other dispute resolution procedure with respect to any particular Dispute shall not act; as a waiver of the right of any Party to have any other Dispute resolved in accordance with the Dispute resolution procedures set forth above in this Article 3.11.

Dispute Resolution Boards

The goal of dispute resolution boards is to achieve real-time conflict control by using experts on-site to address and resolve disputes rapidly. Dispute resolution boards often utilize three neutral experts, who visit the site periodically in order to monitor progress and potential problems. When requested by the parties, the board conducts an informal hearing of the dispute and issues an advisory opinion that the parties use as a basis for further negotiations.

The advantage of this system is that disputes can be resolved by neutral experts as they arise, so the projects can continue on track. A disadvantage is that a reliance on the dispute resolution board can take the onus off of the parties to settle disputes themselves, leading to more disputes arising.

Collaborative Law

Collaborative Law is an alternative dispute resolution process that first developed for use in divorce and family law.\(^45\) It has spread into other areas, including construction disputes.

The goal of collaborative law is to remove the disputed matter from the litigious court room setting and to treat the process as a way to “trouble shoot and problem solve” rather than to fight and win.\(^46\) As part of the collaborative law method, both parties retain separate attorneys, whose job it is to help the parties settle the dispute. Collaborative law is not a condition precedent before litigation or arbitration, like mediation, but a replacement for them. If the negotiations break down, the parties may not then proceed to court. If they do, the collaborative law process terminates and both attorneys are disqualified from any further involvement in the case. This disqualification is the feature that separates collaborative law from other processes, and makes it a pure settlement

\(^45\)https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/newsletter/june2016/abney_expanding_collaborative.pdf.
\(^46\)https://www.mediate.com/articles/beaulier1.cfm.
The lawyers, as well as the parties, are focused solely on settlement. They have no incentive to strategize or position for later litigation or arbitration. By using the collaborative law process, parties signal to each other that they truly intend to work together to resolve their differences amicably through settlement.

Other Methods

Many other methods of dispute resolution can be used as well. Many contracts call for the architect or engineer of record to be the initial decision-maker if there is a dispute between the owner and contractor during the project.

Conciliation is a variation of mediation. It is similar to mediation in that it encourages parties to reach a solution through a structured dialogue, but it utilizes a more involved mediator/conciliator. A conciliator will provide more input and make more suggestions to the parties as to how best to come to an agreement than a traditional mediator would.

The parties can utilize the services of experts to resolve specialized construction disputes. Expert determination is useful “when there is a valuation dispute.” The benefits of using expert determination are that it is an economic way of finally resolving valuation disputes, and is less expensive and quicker than many other methods. Some

47https://www.americanbar.org/content/dam/aba/images/dispute_resolution/Linda_Wray_Article_of_interest.pdf.
disadvantages are that, since this is outside the normal legal process, it is more difficult to challenge the decision of an expert, and an expert’s report or recommendation cannot generally be enforced without further court or arbitration proceedings.

Special Considerations For International Projects

International projects have their own special considerations when it comes to dispute resolutions.

International projects can be challenging, with parties from different countries with different values, goals, and visions resulting in a high potential for disputes.

If dispute resolution boards are used, FIDIC (Fédération Internationale Des Ingénieurs-Conseils or International Federation of Consulting Engineers) and ICC (International Code Council) Dispute Board procedures are commonly used.\(^\text{49}\) A Single Standing Neutral can also be used, which is basically a one-person Dispute Resolution Board.

Mediation can be particularly useful in international construction disputes, where cultural differences may be as important as factual and legal differences.\(^\text{50}\) A possible


\(^{50}\) See “Mediation: The ‘New Arbitration,’” 17 Harv. Negotiation L. Rev. 61, 71 (Spring 2012) (“Beyond U.S. borders, there are multiple examples of mediation’s ascendancy.”
downside of using mediation in the international context is whether the mediator will seem biased if he or she is from the same country as one of the parties. The increased possibility of language barriers or cultural differences can also pose a challenge to a successful mediation.

The international arbitration scene is well-developed. London and New York are the most favored locations for arbitration for international corporations.\(^{51}\) If arbitration is the chosen dispute resolution method, given the complexities of international construction projects and detailed technical issues, it is particularly useful to have a decision-maker who is more experienced in this area (specialist construction lawyers or engineers for instance) than a generalist judge. Arbitration also has the advantage that internationally-recognized arbitrators might be more respected by both parties than the court system of one of the parties. There can also be a greater appearance of neutrality by using arbitration than the court system of one of the parties. It is convenient to enforce arbitration awards: most courts around the world support the arbitration process and will enforce an arbitration award,\(^{52}\) making this a popular mechanism for international cross-border disputes. The choice of arbitration rules is important. The U.S.-based International Institute for Conflict Prevention and Resolution ("CPR") is one prominent provider of

The United Nations Committee on International Trade has adopted a Model Law on International Commercial Conciliation. The World Trade Organization’s (WTO) dispute settlement system offers mediation as one method of resolving disputes between members. The World Intellectual Property Organization (WIPO) has a mediation component, and on the legislative front, the European Union issued a Mediation Directive requiring that member states implement mediation programs to resolve cross-border commercial disputes by May 2011.\(^{51}\).  

\(^{52}\)See the FAA, 9 U.S.C. § 9.

If litigation is the preferred avenue of dispute resolution, the parties need to consider carefully beforehand where the litigation will be conducted, and what country's law will apply to any disputes. The parties should also keep in mind that a judgment obtained in one country might not always be enforceable in another country.

Conclusion

Key points:

- Disputes in construction projects are all too common today.
- The parties to a construction contract have great leeway in crafting the dispute resolution provisions in their contract.
- Each dispute resolution option has advantages and disadvantages.
- Every construction project is different and each contractual arrangement should reflect this.
- The parties should carefully consider which option or combination of options best suits them and their project.