



ALTERNATIVE DISPUTE RESOLUTION ('ADR') IN THE CONSTRUCTION AND ENGINEERING INDUSTRIES

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Introduction:

Construction projects involve several entities, complex designs and specification. Contracts in construction can be extremely complex with a range of intricate technical and legal issues. With the vast amount of complexities, and moving parts, it is likely that construction conflicts and controversies will arise – and the disputes can ripen into actionable legal disputes. When that happens, there is a need for an effective, timely resolution to avoid project delays or shut downs, damaged relationships, and costly protracted litigation. While the two most recognized methods of resolving contract disputes are arbitration and litigation; there are other choices available that can solve disputes economically and streamline the process, including negotiation, mediation, adjudication, and expert determination; all will be discussed herein.

Construction Disputes and Lawsuits are Costly and Time Consuming

The United States is ... “the most litigious society in the world.”¹ We spend about 2.2 percent of gross domestic product, roughly \$310 billion a year, or about \$1,000 for each person in the country on tort litigation, much higher than any other country. Adjusted to 2024 at roughly 2% per year we estimate a corresponding \$370 billion with just fewer than 370 million citizens. This includes the costs of tort litigation and damages paid to victims. About half of this total is for transactions costs — mostly legal fees.

Construction contracts are landing in court more often — and at higher dollar figures — than ever before, as runaway costs and pressure to build faster have led to a spike in disputes. The average value of recent construction disputes in American courts is roughly \$42.8 million at the end of 2022, which is up from \$30.1 million the prior year; the highest value ever recorded and doubles the averages between 2016 and 2019.² Global Construction Disputes average \$52.6 million. From 2021 to 2022 the average value of disputes in North America increased by 42% and remains at historically high levels compared to 2021 and earlier.

“The average time taken to resolve disputes increased significantly, by almost 15%, after steadily declining for three years.”³ The 2021 average dispute length was reported to be 16.7 months in

¹Jakulin, A., *Why are we such a litigious society?* <https://statmodeling.stat.columbia.edu/2015/12/03/why-us-litigious/>

²Schenke, J., National Construction News, Construction Lawsuits Are Spiking As Pressure Rises To Accelerate Projects, June 19, 2023 Accessed at: <https://www.bisnow.com/national/news/construction-development/the-push-to-move-construction-projects-forward-leading-to-huge-spike-in-contract-and-monetary-disputes-119436>

³Construction Dispute Statistics, NIX Patterson, LLP, Accessed at: <https://nixlaw.com/practice-areas/construction-dispute-lawyers/statistics/#:~:text=Construction%20disputes%20often%20happen%20as,site%20conditions%2C%20and%20trade%20disputes.>



North America and 15.4 months globally. “Most disputes are settled through party-to-party negotiation and willingness to compromise plays a key role in early resolution,” and the report notes, “the 2021 survey results showed the most important factor in the mitigation and early resolution of disputes encountered is the owner and contractor’s *willingness to compromise*.”⁴

A construction project without a dispute is nearly inconceivable. Indeed, a full 98% of construction projects result in cost overruns or delays, according to McKinsey. Likewise, design, engineering and management consultant Arcadis found that 70% of construction projects end up with claims.⁵

Contracts

Construction contracts, when executed, are legally binding agreements made between parties agreeing to perform certain tasks and services related to a construction project. While a predominant percentage of agreements are carefully structured and agreed to by the parties; others are not. The more sophisticated contracts typically include precise detailed and comprehensive terms and conditions spelling out the relationships, obligations, and consequences of failing to perform to those terms and conditions of the contract, which include provisions for payment, deadlines, quality standards, and even claims and dispute resolution procedures.

Regrettably, claims and disputes in construction contracts are common because of the increasing complexities of projects, the increasing potential for unforeseen events and conditions, exponential project budgets, and a flourishing trajectory toward costly litigation.

Construction Contract Disputes

Construction disputes are disparities or conflicts that often rise during or after a construction project. Construction projects are intrinsically complex, containing diverse elements. They require the synchronized efforts of diverse participants such as architects, engineers, contractors, subcontractors, suppliers, and clients. Each of these participants has distinct responsibilities, expectations, and interests. Disputes can happen when these interests clash or when there are miscommunications, different interpretations of contracts, unforeseen project complications, and delays. These disputes can have serious implications, resulting in project delays, cost overruns, and strained relationships.

Essential elements of a Construction Contract

The details of a construction contract are crucial to the success of a construction project. This is true not only for the individual entity writing the contract but also for the person intended to be bound by the terms and conditions of the contract.

⁴ Ibid.

⁵ Greenberg-Vogt, J. Constructiondive, 5 benefits of arbitration for construction disputes, January 26, 2024, Accessed at: <https://www.constructiondive.com/news/benefits-arbitration-construction-disputes/705803/>



The Parties

Contract must start with identifying and authenticating indispensable parties to the contract. It's difficult to litigate a claim if signatures are not provided by those parties able to bind the company. With projects of astronomical budgets, and extraordinary numbers of subcontractors, vendors, professional and suppliers, it can become challenging to establish who has actual authority to make decisions considered to be binding and actionable during a construction project.

Project Scope

A contract must include, in sufficient detail the services to be provided, including a description of materials, quality, grade, schedule of work, and other specifications pertinent to the construction of the project.

Project Costs and Payment Terms

There should be no misunderstanding as to the cost of services included and cost of services beyond the scope of the project. The schedule of payments, the amount that is due, and the terms and conditions of payment should also be clearly outlined in the contract.

Project Schedule

Be sure to articulate important milestone dates including mobilization, notice of commencement, substantial completion and final completion dates. Contracts must spell out in specificity the individual or individuals as the responsible party in case of delays, especially if caused by the architect/engineer or owners in obtaining required permits, easements, and approvals, or for delays as the result of inclement weather. Be sure to account for lead times from suppliers, and if there are change orders, be sure to fully document any additional time they will require.

Adversarial vs. Non-Adversarial Contracting Methods

Competitive Bid – Traditional Contracts - Adversarial

Most substantive construction project such as public infrastructure “is provided by traditional procurement methods generally based on quantitative selection techniques and adversarial contracting principles.”⁶ Evidence suggests that the traditional procurement method of contracting “is inefficient, and is often delivered late and over-budget.”⁷ Furthermore, the adversarial nature of the contracts means that “disputes over variations, changes to specification, poor documentation and rework or renegotiation may lead to lengthy and costly negotiations or civil action.”⁸ An adversarial

⁶ Regan, M, Love, E.D. Peter, and Smith J., Public Infrastructure Procurement: A Review of Adversarial and Non-Adversarial Contracting Methods, JOURNAL OF PUBLIC PROCUREMENT, VOLUME 15, ISSUE 4, 405-438 WINTER 2015 Accessible at: https://www.ippa.org/images/JOPP/vol15/issue-4/Article_1_Regan-et-al.pdf

⁷ Flyvbjerg, B., Skamris, M.K., & Buhl, S.L. (2004). “What Causes Cost Overrun in Transport Infrastructure Projects?” Transport Review, 24(1): 3-18. Accessible at: https://www.ippa.org/images/JOPP/vol15/issue-4/Article_1_Regan-et-al.pdf

⁸ Love, P.E.D., Cheung, S.O., Irani, Z., & Davis, P.R. (2011a). “Causal Discovery and Inference of Project Disputes.” IEEE Transactions on Engineering Management, 58(3): 400-411. Ibid., Supra



contract is one where people who've signed up to it are likely to act in their own interests if something goes wrong.

Behaviorally speaking, if you are awarded a significant contract by the competitive bid method, you are typically the 'lowest bidder' who just 'left something on the table.' If the difference between you and the next highest bidder is substantial, you might immediately go into a mode of recuperation, retrieval of the difference, in change orders, lower quality of materials or the level of workmanship, cutting corners and the like. The owner is seen as the opposition party wanting to maintain the price in every way possible. This relationship does not typically engender mutual goals, leading to a general breakdown in commitments and diminished trust between the parties.

Negotiated Contracts – Non Adversarial

Complex construction projects are exposed to uncertainty and high risk, and coupled with the problems of imperfect information, the project environment may easily become a breeding ground for adversarial relationships and defensive behavior. The construction and engineering industries have worked diligently to employ sophisticated construction delivery methodologies, hoping to move away from traditional bidding and adversarial relationship, in an attempt to minimize risks, to optimistically avoid inherent conflicts that arise from complex projects and their contracts, all which can lead to crippling conflicts, disputes, and costly litigation.

Several contracting methodologies and experimental relationships arose in an effort to mitigate, control, or even eliminate risk from contracting. Construction management at risk was an early method of establishing a dependable, reliable cost containment methodology, while streamlining the delivery system on a fast track schedule and managing a project to stay within budgetary and time constraints. These methods relied upon partnering concepts, strategic alliances, and establishing a commitment-trust relationship between the parties. The underlying concept was intended to lead to a minimization of unforeseeable events, cost overruns, enhanced understanding of plans and specifications, and to create a relationship that, through commitment to one another, would reduce conflicts, and controversies, and minimize or eradicate costly litigation if disputes arose.

The dynamics of commitment-trust relationships are more adaptable to long-term working relationships, across several projects, where the parties are likely to work with each other for extended durations. The high costs of substantive projects, the numerous parties to the project, financial and legal risks inherent to high projects, makes these relationships tend to be individual project events where the project itself may be the only distinct project the entire team will work on together over multiple career paths. Enduring relationships take years to cultivate and fences are erected and battle lines drawn continuously between parties.

As the costs skyrocket on complex projects and the parties are forced into larger and larger arenas of participants, the risks increase, and the relationships become thin. When something happens on a



substantial project, with fortunes on the line, the immediate behavior is to circle the wagons (your own first), identify the issues and causes, then to operate in a veritable circular firing squad, pointing fingers at anyone but yourself. Either of the contract means and methods above, can work in theory, but when you have to protect your own interests first; even by having utilized the best practices to avoid or mitigate risks, you will inevitably have to fend for yourself.

The top 12 drivers of construction disputes

According to a report commissioned by the law firm of Skolnick Legal Group, published March 25, 2022, “the primary cause of construction claims and disputes is design problems.”⁹ Construction projects are prone to more unforeseen physical conditions and deficiencies in workmanship. Tight timetables increase design problems.” Claims and disputes have a staggering toll on the construction industry. A select study including 1,100 projects was \$48.6 billion without legal fees. The extensions in connection with the projects amounted to 593 years.

Disputes can arise at any stage of the construction process, from faulty or dishonored commitments at a project’s commencement, to fundamental disputes over performance after project completion. Contracts outline what is assured between two parties during a project. If the end result is not as stated in the contract, the affected party may make a legal claim for breach of contract. Construction litigation can be quite complex due to the high number of parties and numerous moving parts involved. This creates several opportunities for issues to arise that can quickly skew the project’s deadline or halt the production altogether. “Construction litigation may deal with anything from material suppliers, to local government agencies that provide permits, to contractors, architects, and property owners.”¹⁰ Significant drivers of disputes include:

Incomplete Designs and Design Errors

Successful construction projects begin with great designs. If errors are made during the planning phase of a project, profitability suffers—sometimes drastically if the issue isn’t caught until much later in the construction process.¹¹ Faulty or incomplete designs lead to costly rework, budget increases, and scheduling delays. According to a HKA CRUX Insight 2020 report; “design problems are now the primary cause of construction claims and disputes.”¹²

⁹ Skolnick Legal Group, How to avoid the top 12 drivers of construction disputes?, March 25, 2022, Accessible at: <https://www.skolnicklegallgroup.com/blog/2022/03/how-to-avoid-the-top-12-drivers-of-construction-disputes/>

¹⁰ Klyashtorny, N., Nochumson P.C., *The Most Common Causes of Construction Litigation*, Accessed at: <https://nochumson.com/the-most-common-causes-of-construction-litigation/>

¹¹ Raken, E., Design Problems Affecting the Construction Industry, July 28th, 2022, Accessed at: <https://www.rakenapp.com/blog/design-problems-affecting-the-construction-industry>

¹² Fabris, P., HKA CRUX Insight 2020 report, *Design problems now the primary cause of construction claims and disputes*, December 7, 2021 Accessed at: <https://www.bdcnetwork.com/design-problems-now-primary-cause-construction-claims-and-disputes?page=29>



Identifying common design problems is the first step to avoiding them. Most frequently, design errors stem from a lack of clarity, miscalculations, and missing information. Designs for most projects are incredibly complicated. Blueprints aren't just visual plans for the exterior or interior architecture of a building or structure, they also determine the layout for the practical elements, like electricity and plumbing, and they contain all the exact measurements needed for implementation. Additionally, there may be multiple designers or design teams working on the same project, all who have their own unique communication styles. This complexity leaves plenty of room for error.

Late disclosure of design information

“Design problems are more likely to occur as a result of increasingly tight timescales imposed upon third parties engaged in design” that result in late or incomplete designs and conflict between the parties, the report says. “Failings in the management of third parties across increasingly complex supply chains”¹³ also cause major problems.

Workmanship and Quality deficiencies

Construction work presupposes a certain quality of workmanship. When the quality does not align with this standard, it can cost a lot of money and time to repair it. “A workmanship dispute occurs when the property owner challenges the quality of the skill or quality control of a project either after the work is completed or when something happens to reveal poor workmanship after the fact.”¹⁴ It can also happen when a construction company challenges the work of a subcontractor they hire for a job site.

Unforeseen changes in site conditions

The most prevalent unforeseen conditions are defects uncovered during renovations, such as rot, decay, damaged plumbing, outdated or obsolete electrical systems, and hazardous materials. Concealed code violations and defective work left from earlier projects, or original construction, are yet another source of delays and cost overruns. For new construction, unforeseen conditions are usually underground, such as poor soils, rock removal, or old utilities not clearly shown on as-built drawings.¹⁵

Changes in scope

This dispute mostly arises when the owner and general contractor disagree over the scope of the work to be done. Project owners often demand changes in the scope of the project during its construction phase. This leads to disputes as the new changes might not be mentioned in the contract documents. While scope changes ranked within the top of the list of primary dispute

¹³ Ibid.

¹⁴ Cotney, *What Is a Workmanship Dispute?*, Accessed at: <https://www.cotneycl.com/what-is-a-workmanship-dispute/#:~:text=A%20workmanship%20dispute%20occurs%20when,poor%20workmanship%20after%20the%20fact>.

¹⁵ Stonemark Construction Management, *Unforeseen Conditions: Hazards That Can Derail a Renovation Project*, Accessed at: <https://stonemarkcm.com/blog/unforeseen-conditions-hazards-that-can-derail-a-renovation-project/>



causes,¹⁶ they were followed by incorrect design; incomplete design; poor management of subcontractors and suppliers; unforeseen physical conditions; the late issuance of design information; deficient workmanship; differences in contract interpretation; and late approvals.

Restricted worksite access

This can be a misleading concept in that restricted access is not particularly focused on a lack of physical access to the construction site (property) in and of itself. However, Access is fundamental to the successful execution of a construction project. In the event of a construction dispute, inadequate consideration is often given to the access required to successfully prosecute or defend a dispute, or construction claim. The "access" required in these circumstances is not access to the project site, but rather access to: project-related documentation (including, communications and digital records); and key project personnel.

Construction schedule delays

This dispute arises when the construction schedule suffers delays or disruptions. This might happen for a multitude of reasons, including weather, unforeseen site conditions, or labor shortages. Schedule disputes can result in cost overruns and ultimately the project may witness delayed commissioning. Good documentation and record-keeping is critical to success in any construction dispute. Without contemporaneous project records, there is limited evidence upon which to advance or defend a claim and, therefore, a reduced chance of a positive outcome.

Contract management or administration failures

“One of the often overlooked and under recognized issues that leads to or exacerbates disputes on construction contracts is poor contract administration and/or a failure by the Client to hold the Contract Administrator to account.”¹⁷ The Contract Administrator is a key role on most construction contracts, while the label changes depending on the contract (Architect, Engineer, Project Manager, Employer’s Representative are all in common use), the responsibilities are broadly similar, and include: Managing the project, that means coordinating what the Client or representatives need to do to ensure they don’t delay the works, making sure designs are reviewed when they should be reviewed; Holding the Contractor to account on submissions, progress, and other matters; Assessment of claims for time and/or money; Managing risk in the interest of the project as a whole – not just in the interests of the Client; and Keeping the Client informed, the Contract Administrator will be the Client’s first port of call and should be making sure the Client has all information and knowledge needed to make informed decisions.

¹⁶ Slowly, Kim, Constructiondive, *Scope changes still top list of construction dispute causes*, November 12, 2020, Accessed at: <https://www.constructiondive.com/news/scope-changes-still-top-list-of-construction-dispute-causes/588695/>

¹⁷ Doherty, John, Quigg – Golden, *Poor Project Management – A Key Issue in Construction Contracts*, May 24, 2022, Accessed at: https://www.linkedin.com/pulse/poor-project-management-key-issue-construction-contracts-/?trk=pulse-article_more-articles_related-content-card



Financial and Payment misunderstandings or failures

One of the most common challenges faced in the construction industry is payment disputes. Payment disputes arise due to numerous reasons, such as delays, defects, scope changes, or disagreements over contract terms. The most common causes of payment disputes in construction contracts are: Scope Changes; Delays; Defects and Quality Issues; Payment Timing; and Non-Payment.

Poor subcontractor or supplier management

Subcontractors and vendor, suppliers play a significant part in the success of most construction projects. It's important that subcontractors and or suppliers aren't only chosen purely on price. The subcontractor's or supplier's ability to deliver the project on time and to the required quality and safety standards is equally important. The selection of the cheapest subcontractor may not have been the best strategy in terms of project completion schedule and or quality control. Poor performing subcontractors and vendor, suppliers might cost the project more money than if a more expensive subcontractor had been selected in its place. These criteria may lead directly to disputes related to project delays and workmanship and quality deficiencies

Adverse weather conditions

Construction is impacted by adverse weather, with the actual impact varying from project to project, the site location and the region. The greatest impacts of adverse weather are upon construction exposed to the elements, whether directly as in the case of earthwork, concrete, etc., or when working inside interior, non-conditioned spaces. Precipitation, high winds, cold and hot temperatures, high rates of snowfall, not to mention exceptional weather events (acts of God), can all adversely affect progress, the production rate of the workforce and worker productivity. Weather issues generate their fair share of controversy between parties to construction contracts, as evidenced by litigation reported over the past ten years.¹⁸

How to Resolve Construction Disputes

Although some construction disputes end with litigation, there are various dispute resolution methods that can be used to resolve a building and construction dispute, including:

Contractual Provisions

The first line of defense against payment disputes is a well-drafted construction contract, which includes clear and detailed payment terms, including schedules, milestones, and methods of calculation. They should also address dispute resolution procedures in the contract terms and conditions.

¹⁸ Over 50 of approximately 1200 cases reported in Construction Claims Monthly (www.bpinews.com) from January 2000- January 2010 present weather citations. Accessed at: [https://pmaconsultants.com/publication/PDL-Field-Zann-%20Force Majeure Weather Modeling.pdf](https://pmaconsultants.com/publication/PDL-Field-Zann-%20Force%20Majeure%20Weather%20Modeling.pdf)



Party-to-party Negotiation

Many construction contracts require the parties to negotiate their differences and or disputes. This may require named persons or senior executives to negotiate. Some clauses contain an obligation to negotiate in “good faith” or require them to engage in “bona fide” negotiations. The law concerning the requirements of ‘good faith’ is not settled in the US but is in practice in many countries, and where construction contracts may be for international work, this may become useful.

Mediation

In mediation, the parties are the decision makers and only they can reach a mutually satisfactory agreement and find solutions that facilitate completion of a project still under construction or preserve relationships for future construction projects. This contrasts with litigation and arbitration, where control of the dispute is relinquished to a court or arbitrator that has no interest in facilitating timely completion of a project or preserving relationships.¹⁹ A mediator cannot bind the parties to any outcome. Unlike arbitration or litigation, mediation is a process that focuses on respecting the respective interests of the parties rather than directly applying the applicable law or taking the form of a consensual tribunal.

In mediation, the solution does not reflect the mediator’s view or interpretation of the law or the dispute but results from the sole will of the parties. The final decision will be by mutual agreement of the parties and is not made or imposed by the mediator. The parties judge themselves. Finally, mediation is a low-cost process compared to other alternative dispute resolution methods in the construction field. It preserves and strengthens long-term business relationships by restoring dialogue between the different actors in the dispute.

Adjudication

Adjudication is a method of resolving construction disputes without involving a prolonged legal process.²⁰ Instead, both parties meet with an adjudicator who acts as a judge in the case. Once both sides have laid out their side of the dispute, the adjudicator helps them reach an agreement. It is similar to summary judgment in a trial where the judge makes the final decision instead of a jury. The overall process is faster, and there is only one person to review your side of the case. It is similar to summary judgment in a trial where the judge makes the final decision instead of a jury. The overall process is faster, and there is only one person to review your side of the case. For adjudication to be an option, it must be outlined in the contract for the project.

Arbitration

Binding arbitration is heavily relied upon as a dispute resolution mechanism for the construction industry. Many construction disputes involve aspects that may make them challenging to litigate,

¹⁹ Kessler, L., *Using Mediation to Resolve Construction Disputes*, September 28, 2017, Accessible at: [Paper](#)

²⁰ Cotney, Trent, Attorney, *Understanding Adjudication in Construction Disputes*, Accessible at: [Paper](#)



including: Many individual claims; voluminous evidence and documents; multiple parties; technically and logistically complex issues; and industry-specific legal concepts.²¹ It is much easier to schedule construction arbitration than litigation, which is dependent on the court's docket, the availability of judges (and sometimes juries) and requires many months of discovery to get to a trial. Arbitration parties have the flexibility to schedule the hearing as they choose, and indeed, can also select an arbitrator who has soonest availability. The abbreviated schedule of arbitration can allow a project to continue while it's pending, which reduces project delays. Most arbitration involves limited discovery, such as sharing of key documents, and negotiations over whether more document exchanges are necessary.

Expert determination

This is a process in which an independent expert is appointed to decide disputes. The types of dispute that can be determined, the relief that can be awarded and whether the expert's decision is binding will depend on the terms of the expert determination clause.²² The popularity of the mechanism has increased due to the flexibility it can offer compared to full-scale litigation in terms of simpler procedure, expedited timing and reduced costs, as well as the perception that it is less subject to judicial intervention.

Litigation

All litigation is costly and time consuming. Construction cases often take longer and are more expensive to litigate than other commercial cases due to building's fact-sensitive nature and the sheer volume of documents involved. Litigation requires extensive discovery. The complex nature of the construction process leads to time-consuming and costly document exchanges, depositions and pretrial motions. Discovery also delays the resolution of a dispute. Because time is money, achieving a quick resolution leads to cost savings while keeping construction work on track, and saves litigation expenses.

Positive outcomes of Arbitration in Construction Disputes

Finality²³

Arbitration awards are generally final (absent an arbitrator's mistake or wrongdoing) and are enforceable by courts in all 50 states and the District of Columbia. In general, a reviewing court will uphold the award as long as the arbitrator acts within their authority. Thus, parties to arbitration can generally be confident that the process will result in a resolution and conclusion to the dispute.

²¹ Bates, A., Fowler, R. Z., Reuters, Practical Law Journal, Construction Arbitration, May 2023, Accessed at: <https://www.reuters.com/practical-law-the-journal/litigation/construction-arbitration-2023-05-01/>

²² JonesDay, Insights, xpert Determination Clauses: A Tailored Alternative for Construction Projects?, February 2021, Accessed at: <https://www.jonesday.com/en/insights/2021/02/expert-determination-clauses-a-tailored-alternative-for-construction-projects#:~:text=This%20is%20a%20process%20in,of%20the%20expert%20determination%20clause.>

²³ Greenberg-Vogt, J. Constructiondive, 5 benefits of arbitration for construction disputes, January 26, 2024, Accessed at: <https://www.constructiondive.com/news/benefits-arbitration-construction-disputes/705803/>



Confidentiality²⁴

Arbitration is a private process, and unlike litigation, the parties can prevent the proverbial airing of their dirty laundry in public. Proprietary and sensitive project information is preserved. Lastly, the confidential nature of the proceedings prevents reputational damage, thereby preserving relationships among project participants that might be impacted by a public dispute.

Flexibility²⁵

Because arbitration is a contract-based proceeding, the parties are free to tailor anything and everything about it. From the location of the process, to the rules, selection of arbitrators, procedures and timelines, the parties can choose how they want to work together toward a resolution. Indeed, the process can even be modified to conform to the complexity of the dispute – leading to greater efficiency and satisfaction with the outcomes.

The Ultimate Dispute Resolution Methodology – Dispute Avoidance and Resolution

As in all risk intensive undertakings, construction is likely one of the most risk prone industries, and as such the age old axiom that an ounce of prevention is far better than cure; so dispute avoidance in construction should begin as early as possible. In comparing construction risks to that of an absolutely uncompromising and an unforgiving aviation industry, the best defense against a potential failure is the application of a rigorous and exacting preflight inspection. In the construction world, dispute avoidance aims to ensure that project and business objectives are analyzed and incorporated early into the planning process, as “most disputes arise from pre-contract issues.”²⁶ Managing risk begins at the pre-contract phase to identify, reduce, and mitigate or eliminate as best possible, issues during the project take-off or execution phase.

Clear and detailed contracts, open communication, and a willingness to negotiate are the first steps in avoiding disputes. When disputes do arise, various mechanisms, including mediation, arbitration, and litigation, can be employed to reach a resolution. It is essential for all parties involved in construction projects to be well-informed about the terms of their contracts and the available mechanisms for resolving disputes to ensure the success and timely completion of projects.

Dispute avoidance in construction refers to proactive measures and strategies implemented to prevent conflicts, disagreements, or disputes from arising during the construction process. This can be aided by open communication between all parties to the construction project and process. It may be difficult to convince parties to discuss dispute resolution while planning a project however it is

²⁴ Ibid.

²⁵ Ibid.

²⁶ Capital Consulting International, *Dispute Avoidance in Construction*, Accessible at: <https://cci-int.com/services/claims-consulting/dispute-avoidance/#:~:text=Open%20communication%20is%20key%20to,foster%20a%20positive%20working%20environment>.



likely that the more the parties think about what should happen in the event of a dispute, the more the parties are likely to reach a simplified, efficient, and attentive resolution.

The parties should decide early whether to enter into a contract with arbitration and or a well-articulated mediation option or provision well before any foreseeable dispute arises. As always recommended, an experienced, quality construction lawyer should assist in evaluating the risks of arbitration, as well as to offer advice on any or all of the alternative dispute resolution options available to you.

Respectfully;

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