

Pros and Cons of Arbitration

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SUMMARY

This Best Practice identifies the importance of arbitration and some of the reasons to use this method of conflict resolution.

FINDING WAYS TO COME TO TERMS

The standard contract documents published by the AIA contain language requiring the parties to agree to mandatory and binding arbitration. Whenever arbitration is mandatory and binding, it essentially becomes a form of legal adjudication. For most purposes, an arbitration award enforceable in a court of competent jurisdiction is not unlike a judgment in a court of law; the rules may differ but the result effectively has been adjudicated as to the parties involved.

Most professional liability insurers will support any method of equitably settling claims with a minimum of transactional costs, including alternative forms of dispute resolution such as arbitration. Arbitration of claims, however, is not always in the best interest of the architect.

RED FLAG: CONSOLIDATED PROCEEDINGS

From time to time, an architect may enter into an agreement with a client who subsequently insists on mandatory and binding arbitration that includes parties other than the architect and the client, such as the contractor. Such “consolidated arbitration proceedings” may create a climate that is not equitable for the architect. If a client insists on consolidated proceedings or the joinder of nonprofessionals in arbitration between the client and the architect, the architect may want to insist that the dispute be referred to a court of law, not settled by arbitration.

There are at least two reasons why architects may wish to object to allowing parties other than the architect and the client into arbitration:

- The theory of negligence and legal liability applied to an architect generally differs from that applied to a contractor. Depending upon the dispute, the distinction can be subtle. Arbitrators, as well meaning and well trained as they may be, typically are not trained and educated jurists. Arbitrators thus may not have the history of case law—legal precedents and written opinions—available to them that is routinely available to the courts and upon which jurists rely in reaching a judgment. An architect is more likely to be held responsible under a theory other than professional negligence, the only one that should apply, when the proceedings are clouded by the inclusion of a third party, such as a contractor, who is held to a different standard.
- The tendency in arbitration is to spread the responsibility for a dispute among all parties, with all parties contributing in some way to its resolution. But it may not be fair to the owner, to the architect, or to the contractor to be forced to assume responsibility simply because they are a party to a proceeding.

The fewer the number of parties to arbitration, the simpler and clearer the dispute is likely to be and the more likely the arbitrator will be to place the responsibility on the parties to whom it belongs.

WHEN IN DISPUTE, CONTACT YOUR INSURER

Most professional liability insurers do not require a policyholder to obtain the consent of the insurance company before agreeing to mandatory and binding arbitration. But if a dispute arises involving a claim against the architect, and the parties agree to resolve the dispute through arbitration, mediation, a dispute review board, a mini-trial, or another voluntary alternative dispute resolution method, it is very important to notify and obtain the consent of the insurer. The insurance carrier may have a significant

stake in the outcome and may be able to provide valuable assistance in resolving the dispute or claim.

RESOURCES

More Best Practices

The following AIA Best Practices provide additional information related to this topic

- 11.05.01 Dealing with Aggressive Negotiators
- 12.03.01 Damage Control: Managing Claims to Minimize Risk
- 12.03.05 Preparing for Mediation

For More Information on This Topic

See also “Managing Disputes” by Frank Musica, Esq., Assoc. AIA, *The Architect’s Handbook of Professional Practice*, 13th edition, Chapter 12, page 345. The Handbook can be ordered from the AIA Bookstore by calling 800-242-3837 (option 4) or by sending an email to bookstore@aia.org.



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Key Terms

- Practice
- Legal management
- Disputes
- Arbitration claims



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