



The importance of coordinating dispute resolution clauses in construction contracts

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A lot of time is spent by construction owners assessing the type of dispute resolution clauses to include in design and construction contracts. In fact, it is possible to debate for hours whether arbitration or litigation is the best method of dispute resolution, or whether there should be a separate procedure for smaller claims and another for larger claims. This article does not seek to answer those questions, but rather, addresses a more fundamental question that causes unnecessary risk and expense for construction owners—do the dispute resolution clauses in place work together to afford an easy and efficient mechanism for recovery in the event of design and construction claims?

In most cases, construction owners have no idea of the answer to this question. In part, this is because the responsibility for negotiating certain design and construction contracts is often divided among different individuals in the owner's business. In addition, owners often involve outside counsel in the preparation of the construction contract with the general contractor, without involving them in the preparation of other design and construction contracts. As a result, most construction owners do not consciously attempt to make sure their dispute resolution processes with various design and construction contracts work together.

Why is this important? Most construction disputes of any significance involve the participation or liability of multiple parties. For example, damaging settlement in a building after construction might involve the negligence of the geotechnical engineer, the structural engineer, the architect and the general contractor (not to mention its subcontractors). When faced with the need to make such a claim, the owner might look into each contract with these parties and find the following:

1. The geotechnical engineer's contract has litigation as its procedure, but calls for the litigation to occur in a state other than the one in which the project is located.
2. The structural engineer's contract calls for arbitration where the project is located.
3. The architect's contract calls for litigation, but provides that a trial by jury is waived.
4. The construction contract provides for arbitration of claims less than US\$ 1 million and litigation of claims above that amount.

In the example above, the owner has no chance of getting the appropriate and responsible parties in one forum to completely resolve the dispute. That could mean multiple legal proceedings, multiple sets of legal fees and—even worse—inconsistent results where one of the designers is found to be at fault in one forum, and the contractor is found to be the real party at fault in another forum. Simply put, this is an owner's worst dispute resolution nightmare.

Best Practice: Decide on the appropriate dispute resolution procedure for your company and make sure that procedure is reflected throughout the design and construction contracts that are being executed for a particular project.

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