

THE COLORS OF CONSTRUCTION DISPUTE RESOLUTION:

Identifying the Most Appropriate Dispute Resolution Forum and Strategy

In a perfect world, a project is on time, on budget, extras and changes are agreed upon, the work is free of defects, and all contracts are intricately drafted by competent counsel. But in reality, construction disputes arise frequently and test the patience (and civility) of the parties involved.

Construction professionals and attorneys have a wide range of construction dispute resolution methods from which to choose. One's preference may depend, among other things, on the size and complexity of the project, the amount in controversy, existing relationships among the parties, the legal issues involved, the client's expectations, and the desired outcome. Similar to selecting an appropriate project delivery method, there is no one-size-fits-all approach to choosing a construction dispute resolution method. But involving construction counsel in contract drafting, troubleshooting, and dispute resolution almost always leads to a favorable outcome.

Each type of dispute and each mode of resolution presents unique challenges. As each forum differs in terms of procedure, level of formality, and desired result, the lawyer will encounter pitfalls and challenges specific to each setting. Thus, selection of the appropriate forum is paramount.

Common Construction Disputes

Claims for Extra Work, Changed Conditions, and Delays

- Is there extra work or changed conditions which alter the scope of the contract or is there base contract work?
- Has the party asserting a change in the scope of work strictly complied with the contract's notice provision? If not, was such compliance waived?
- Does the claim implicate the design professional's work?

Default and Termination

- Is termination ever advisable, as *wrongful* termination may open the door to allowing recovery for the reasonable value of disputed work (i.e., quantum merit)?
- Have contractual cure periods been noticed and observed?
- If work is defective or nonconforming, would the owner be better served terminating, or instead, by taking over the work and asserting back-charges?
- Are surety bonds worthwhile, given that making a demand on a performance bond often delays the project further?

Mechanic's Liens and Article 3-A Trust Funds

- Have construction costs been financed, so that the filing of a mechanic's lien will effectively cut off payment to the general contractor (or construction manager)?
- Is there a contractual provision requiring that the GC or CM bond and discharge all subcontractor liens?
- When an owner or contractor secures funds for a public or private improvement, a trust is created for the benefit of those who performed work on the project. Does the trustee of Lien Law Article 3-A trust funds keep books that track trust funds separately from non-trust funds?
- Does the trustee keep proper books and records detailing receipts and outlays of trust funds?

Modes of Construction Dispute Resolution

The following is a survey of the dispute resolution forums available to the construction professional. We also highlight the types of construction claims we believe to be best suited for each method.

Litigation

- **Why we like it.** Rules of law and evidence are paramount. Litigation rests on legal principles and provable facts, and case dispositions often result in well-researched, reasoned decisions. If handled by competent attorneys, litigation typically leads to fair and reliable results.
- **Why it sometimes scares us.** It is slow and expensive, and litigants must cope with congested dockets, inefficiencies in the discovery process, and the unpredictability of judges and juries. Not for lack of effort, judges and juries are often hopelessly confused when it comes to the more arcane aspects of construction law, which combines technical disciplines such as engineering, architecture, and time impact analysis.
- **The types of claims it favors.** Litigation is essential for lien and bond-related actions and other disputes governed by statute, insurance disputes, and disputes involving questions of contract interpretation.

Arbitration

- **Why we like it.** The process can (within reason) be tailored to the needs of the parties. Unnecessary and time-consuming discovery can be avoided, as well as pro forma adherence to procedural rules. Arbitrators may be selected by the parties based on pertinent qualifications and expertise in the field.

- **The types of claims it favors.** Arbitration may be preferable in situations where a party has not observed contractual notice provisions or other conditions precedent to asserting a claim; where a party has waived an otherwise recoverable category of damages (consequential, delay, etc.); where the claims are highly technical and require an arbitrator's experience and technical expertise; and other claims where equitable considerations potentially outweigh strict contractual compliance.

Mediation

- **Why we like it.** If the parties are dedicated to making the process work, mediation produces an outcome which meets the needs of most complex construction disputes. Mediation allows the parties to see the whole picture immediately in a way that litigation and arbitration do not. Through mediation, most disputes will reach a cost-effective, expedient, and fair resolution.
- **Why it sometimes scares us.** It is hard to justify the expense of paying a mediator, retaining outside counsel, and tying up project staff for a process that is non-binding and could ultimately fail. Because of this, the parties may half-heartedly approach mediation with an ultimate eye toward litigation, which paradoxically, adds to the overall time and expense of dispute resolution.
- **The types of claims it favors.** Mediation generally favors disputes where the parties wish to maintain good business relations after completion of the project; where the parties each have colorable claims inasmuch that "splitting the baby" may spare the parties further time and disruption; and like arbitration, claims where the mediator's technical expertise may be desirable.

Dispute Resolution Boards ("DRBs")

- **Why we like it.** What distinguishes a DRB from other methods of dispute resolution is that it does not utilize an independent adjudicatory body, but is rather a private tribunal resolving disputes between contracting parties. A DRB provides an expert perspective and familiarity with the project and underlying contract. It is designed to resolve disputes in real-time, thereby freeing up valuable project resources and engendering a proactive attitude among participants.
- **Why it sometimes scares us.** For smaller projects, DRBs may be unduly cost-prohibitive. Moreover, as DRBs are a relatively recent development, some construction professionals may view them as an added cost rather than a potential source of savings. Unlike arbitration, the scope of review of DRB decisions is still an open question, and thus DRB resolutions may invite, rather than avoid, subsequent litigation.

- **The types of claims it favors.** Like mediation and arbitration, DRB constituents bring their expertise and technical experience to bear on resolving disputes in real-time. Thus, more technical claims, such as delay claims or claims for defective or nonconforming work, are best suited for DRBs, given their active role in monitoring the progress of the project.

About the Firm

John E. Osborn P.C. is a nine lawyer firm with more than 25 years of experience representing stakeholders in the real estate, construction, and environmental industries. John E. Osborn P.C.'s practice concentrates in complex construction, environmental, real estate and commercial litigation and focuses on representing large property owners, construction managers, contractors and design professionals. The Firm's owner-clients include school districts, charter schools, colleges and universities, hotels, office buildings, apartment complexes, restaurants, nightclubs, healthcare facilities, nursing homes, arenas, museums, industrial properties, airports, auto dealers and commercial and residential developers.

Clark S. Splichal represents owners and developers, construction managers, contractors and design professionals on complex construction litigation issues. Clark has handled a breadth of civil litigation matters, in state and Federal court, including complex multi-party litigations. Prior to joining **John E. Osborn P.C.**, Clark served as an assistant law clerk to the Honorable Barbara Jaffe of the New York State Supreme Court, New York County.

The content is for your information only and does not constitute legal or professional advice. We encourage you to consult the authors, John E. Osborn, Esq. (JOsborn@osbornlaw.com) and Clark S. Splichal, Esq. (CSplichal@osbornlaw.com), if you have any specific questions or concerns relating to any of the information covered herein.