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The How and Why of Alternative Dispute Resolution: What It Means to the Architect and the Owner

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In the face of increasing cost and delay, many are turning to places other than the courts for resolution of disputes. In the legal profession this move away from the court system and towards other means has been termed "ADR," or, "alternative dispute resolution."[1] "ADR" embraces "all means of dispute resolution . . . [which are] . . . alternatives to a formal decision-making process." Accordingly, the acronym "ADR" encompasses any method of resolving any dispute that does not require the ultimate decision to be made formally by a judge, a jury, or any other decision-maker that has been designated as the competent forum of dispute resolution by the respective state authorities."[2]

For architects and owners this has meant inclusion of formal requirements within the *Standard Form of Agreement Between Owner and Architect* for mandatory *arbitration* and *mediation*. Article 1.3.4 mandates "mediation" as "a condition precedent to arbitration…"[3] Article 1.3.5 specifies that "any claim, dispute or other matter in question arising out of or related to this Agreement shall be subject to arbitration."[4] Arbitration can occur only after mediation.

What is mediation? What is arbitration? For many, the distinction between these two processes blur, lost in the hazy conclusion that "you don't have to go to court." The distinctions are far more telling.

Mediation

Mediation is a process by which *the disputing parties* arrive at a solution. No formal rules attach, nor is any solution imposed upon the disputants by a third party, such as a judge, jury, or arbitrator. Indeed, the hallmark of "mediation" is the absence of an imposed decision. Resolution of the dispute lies entirely within the parties' hands. If they cannot reach a compromise solution, then mediation fails. A mediation is generally conducted by a *mediator* who acts "only with the consent of both parties . . . employed both as a buffer between the parties and as an inventor of mediate solutions."[5] The mediator acts as a buffer through his or her physical presence, and by reason of his or her participation in a process of "proposal and counterproposal . . . actively and openly assist[s] in constructing a solution meeting the interests of both parties."[6]

Unlike mediation, where the goal is to reach a compromise resolution, arbitration is an adversarial *process.*

Arbitration

Arbitration is a creature of an altogether different sort. While it is an "alternative" process to that of a court, it is nonetheless one that contemplates an "imposed" decision. Having embraced "arbitration," the parties engage in a dramatic shift from mediation, removing themselves from the realm of self-determination to that of a third-party directed-determination. Unlike mediation, where the goal is to reach a compromise resolution, arbitration is an *adversarial* process — one side opposing the other, with a neutral and disinterested third party — generally either a single arbitrator or a panel of three arbitrators — weighing the evidence and imposing a solution.

"So," you might ask, *"what's the difference between litigation before a court and an arbitration?"*

First, there are no formal rules of procedure or evidence governing the actual arbitration, *apart from those adopted by the parties themselves.* Thus, as in the AIA *Standard Form Agreement*, parties may adopt pre-existing rules to govern the conduct of the proceeding, such as those promulgated by the American Arbitration Association ("AAA").[7] In court, the rules of the proceeding are set and are not subject to negotiation. Not so in an arbitration. There, the rules may be tailored to suit the needs of the parties and the nature of the dispute.

Second, unless specifically agreed to by the parties, the arbitrators need not be legally trained and need not apply legal principles in reaching their decision. Arbitration thus theoretically "frees" the decision-maker(s) (the "arbitrators") to do "what they think is right," without regard to a given law, case, or regulation.

Third, *the parties* select the arbitrator(s). In a court system, the judge is assigned, and there is little opportunity to change the assignment. In an arbitration, the parties agree who will preside; and if they cannot, a neutral organization, such as the *American Arbitration Association*, *CPR Institute for Dispute Resolution*, or *JAMS-ENDISPUTE*, will. These organizations undertake administration of arbitrated disputes, acting in effect like the "courthouse," receiving documents, coordinating scheduling, ensuring payment, and so forth.

Most important, arbitration is entirely private. Disputes do not become media events, and no "reported" decision makes its way into the law books.[8]

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The irrevocable choice

There is, however, one little catch. In 1925 Congress enacted the *Federal Arbitration Act* (also termed the *United States Arbitration Act)*, known euphemistically as the "FAA."[9] The goal of the FAA was to place arbitration agreements on the same footing as other terms within a contract. Prior to enactment of the FAA, courts were divided whether they had to actually enforce an agreement to arbitrate, struggling with the question whether a person could be made to forsake the courts, which are, after all, the foundation of society's dispute resolution process. Enactment of the FAA ended the struggle.

The catch: *Once you agree in writing to arbitrate, you are committed to such course.* Only in extremely specific (and limited) situations will you be permitted to avoid the arbitration agreement and proceed to court. Thus, selection of the "alternative" remedy of "arbitration" is generally an irrevocable choice to walk one of two forks in the road. In this, it differs markedly from mediation. No such limits apply to mediation. If a mediation fails, the parties may proceed to court. Having selected arbitration, however, the parties are bound to that course. A court has the power to enforce the arbitration agreement and will end any attempted lawsuit once one party invokes the arbitration agreement. The role of the court following arbitration is to "confirm the arbitration award," and having done so, reduce it to an enforceable judgment. The court may also "vacate" the award.

What does this mean for architects and owners? In *Moses Cone Memorial Hospital v. Mercury Construction Corp.*[10] the United States Supreme Court addressed a suit brought by an owner against the construction company. The parties had agreed to arbitrate. The architect was to initially attempt resolution of any disputes before any formal dispute resolution process was undertaken. Ignoring the arbitration clause, the owner sued in State court. The construction company went to federal court to enforce the arbitration agreement (which could also be enforced in state court). The Supreme Court recognized a "federal policy favoring arbitration,"[11] further holding that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration . . ."[12]

> Mediation *is a process by which* the disputing parties *arrive at a solution.*

Thus, the arbitration clause found within the *Standard Form Agreement* is a form of protection, shielding the architect and the owner from what some regard as the onerous processes of litigation. Even if litigation is filed, the existence of an arbitration agreement will generally mandate an order to arbitrate, resulting in a stay or dismissal of the suit.

> *Once you agree in writing to arbitrate, you are committed to such course.*

The arbitration clause in the *Standard Form Contract,* if unaltered, *requires* binding arbitration. Litigation is no longer an option. However, AIA Document B511 provides recommendations on how to set dollar limits for arbitration.

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[1] The term "alternative" is, in some quarters, now being replaced by the word "appropriate." *See,* Jeffrey S. Wolfe, *Across the Ripple of Time: The Future of Alternative (Or Is It "Appropriate?") Dispute Resolution,* 36 TULSA LAW JOURNAL 785 (Summer 2001).

[2] Christian Duve, *Dispute Resolution in Globalization Context,* 221 N.Y.L.J. 9 (1999). ***[Is that citation correct? — Jay]***

[3] AIA Document B141-1997, *Standard Form Agreement*, The American Institute of Architects (1997).

[4] *Id.*

[5] Martin Shapiro, COURTS, A COMPARATIVE AND POLITICAL ANALYSIS, note 4, at 3 (1981).

[6] *Id.*

[7] The AIA *Standard Form Agreement* states, in part that the arbitration, "unless the parties mutually agree otherwise, shall be in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association." Article 1.3.5.2.

[8] The exception is in labor arbitrations, which are "reported."

[9] Title 9 United States Code §§ 1-16 (2001).

[10] 460 U.S. 1, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983).

[11] *Id.* at page 24.

[12] *Id.*

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