

## Member Communication Experience

# Why Every Construction Project Needs a Dispute Resolution Plan

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Anyone who has spent time in construction knows that disagreements are part of the landscape. Owners, contractors, trade partners, designers, and suppliers are all working under pressure, often with competing priorities and different interpretations of their obligations. Unpredictable factors such as weather delays, material and labor shortages, and unexpected cost spikes add to the risk of disputes. Conflicts can drain resources, fracture relationships, and throw schedules into disarray, placing the successful completion of the project at risk.

In addition to drafting contracts that clearly define the roles, duties, and obligations of the parties, the parties to construction contracts must plan and establish critical mechanisms to manage dispute resolution. A well-drafted contract with thoughtful dispute resolution provisions can mean the difference between a project that stalls under the weight of conflict and one that moves forward to completion.

The following article discusses common dispute resolution provisions to consider for your next project.

## Contracts as Risk Mitigation Tools

Construction contracts are, at their core, risk management instruments. They allocate responsibilities, define performance standards, and establish payment structures. Just as



importantly, they provide a path forward when things don't go as planned.

Well-drafted dispute resolution provisions play a critical role when other contract terms lack necessary clarity. By specifying how conflicts will be addressed – through negotiation, mediation, arbitration, litigation, or some combination thereof – parties establish clear mechanisms to achieve resolution before emotions are high and positions are entrenched.

Industry-standard contracts, like those issued by the American Institute of Architects or ConsensusDocs, recognize the importance of these provisions by incorporating them into their templates.

While these forms offer useful defaults, they shouldn't be adopted blindly. Every project has unique risks and dynamics. Sophisticated owners and contractors modify or replace standard provisions to ensure that dispute resolution is tailored to the project's size, complexity, and relationship dynamics.

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## Likelihood of Disputes and the Importance of Resolution

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Disputes in construction tend to arise from familiar pressure points. Scope creep, delays – no matter the cause – allegations of defective or nonconforming work, and disputes over payment remain common flashpoints. What makes these disputes so costly is not only the substance of the disagreement but the consequences. Projects that stall while parties argue suffer financially. Legal costs and expert fees mount. Executive time is consumed by conflict instead of business development. Even when a dispute is ultimately resolved, collateral damage can linger in the form of strained or broken relationships and reputational harm to the project and the parties involved in the dispute.

A dispute that is addressed promptly and effectively may still leave scars but not derail the project or consume resources out of proportion to the underlying issue. Structured, step-by-step processes for resolution are essential to keeping disputes contained.

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## What Happens in the Event of a Dispute?

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When a conflict arises, the first question should be: What does the contract require? Well-drafted agreements typically outline a series of steps, beginning with notice and informal negotiation, and escalating to more formal processes if necessary.

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### Executive Conference

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The earliest stage is often direct negotiation between project executives. This is where many disputes are resolved,

particularly if both parties are motivated to avoid escalation and seek a fair result and are willing to compromise to reach that end.

Executive-level meetings give decision-makers a chance to address the problem candidly, weigh risks, and craft business-oriented solutions. The process is quick, preserves relationships, and is relatively cost-free. Its success, however, depends entirely on the parties' willingness to compromise. When emotions are high or positions are rigid, negotiation can falter.

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## Formal Mediation

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If executive-level negotiation fails, construction contracts often require that the parties pursue some form of mediation. Many contracts make mediation a mandatory step before arbitration or litigation. Mediation brings in a neutral third party – often an attorney with relevant experience in construction – to help the parties bridge their differences. The mediator does not impose a decision but reviews the facts, the law, and the relevant contract terms, providing a neutral view on fair disposition of issues while creating space for dialogue and compromise.

Mediation has many virtues: It is confidential, less costly than arbitration or litigation, and flexible enough to allow for creative solutions. It also often serves as a helpful guide to understanding the relative strengths and weaknesses of positions taken by the parties. This perspective often serves as a sufficient deterrent to escalating matters to formal litigation. Mediation is not, however, a panacea. Because it is nonbinding, parties can walk away without resolution, adding another layer of delay and potentially increasing hostilities before formal legal proceedings begin.

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## Arbitration and Litigation

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The parties may have no choice but to escalate matters when compromise proves elusive. Construction contracts typically call for either binding arbitration or litigation – not both. And critically, if the parties prefer arbitration, they need to state

their agreement to pursue this venue in lieu of litigation in the contract. Arbitration cannot be forced upon nonconsenting parties.

Litigation and arbitration share several common attributes. Both are subject to rules that govern the presentation of evidence, and the ultimate decision of the judge, arbitrator, or arbitration panel are binding on the parties. But they also differ in various material aspects.

Arbitration involves the formal presentation of witnesses and documentary evidence to a neutral arbitrator – typically a one- to three-person panel comprising disinterested but knowledgeable practitioners with relevant industry knowledge. Arbitration is private, often faster than litigation, and can be tailored to the needs of the project. But it is not without drawbacks. Costs can be significant, particularly if a panel of arbitrators is involved. The limited rights of appeal mean that errors are hard to correct. And some parties feel that in an effort to be fair, arbitrators too often “split the baby,” leaving neither side fully satisfied. Arbitration can be the right choice, but only if the parties understand both its strengths and its limits.

Litigation, by contrast, involves trial in a court of law before a judge and possibly a jury. These proceedings, in federal or state court, offer the parties full discovery rights, enforceable judgments and the ability to appeal. Litigation also creates a public record, which can serve as a deterrent against bad actors. But these advantages come at a price: Litigation is slow, expensive, and adversarial. Sensitive business matters become public, and judges or juries may lack the technical expertise to grasp the nuances of construction disputes.

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### **Importance of Detailed Dispute Resolution Terms in Contracts**

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The quality of a dispute resolution process is often determined long before the first disagreement arises. Too often, parties treat dispute resolution clauses as boilerplate that doesn't need attention, an afterthought tacked onto the end of a contract. This is a mistake. These clauses should be drafted with care, because they shape the trajectory of every dispute that follows.


The most effective contracts lay out a clear, step-by-step escalation process: e.g., start with executive negotiation, move to mediation, then proceed to arbitration or litigation if necessary. Well-drafted contracts detail deadlines for bringing claims, often coupled with strict waiver provisions that, if not observed, can result in parties forfeiting their rights to pursue claims. They set forth documentation requirements to ensure that early, informal claims are supported by records, not just rhetoric. They establish any prerequisites that must be satisfied before engaging in mediation. And in case executive negotiation and mediation fail, they specify which jurisdiction's law applies and the venue where proceedings must take place. Construction contracts should also allocate responsibility for costs and attorneys' fees, providing disincentives for parties to stake out unreasonable positions.

These provisions provide certainty and efficiency when thoughtfully tailored. The parties know in advance how disputes will be handled, reducing the likelihood of tactical maneuvering or forum shopping. The process follows a road map rather than becoming a battlefield. By contrast, vague or generic clauses create uncertainty, invite procedural skirmishes, and often delay resolution. In an industry where time truly is money, that is a risk few can afford.

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### **Final Thoughts**

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Disputes are an unavoidable reality of construction. While conflict can never be entirely avoided, its impact can be controlled. Proactive planning through careful contract drafting and a commitment to structured dispute resolution prevents disputes from leading to project failure. The lesson for construction professionals is straightforward: Do not treat dispute resolution clauses as boilerplate to be ignored in contract drafting or negotiation. Invest the time and attention to tailor these provisions to your project. The payoff comes when conflict arises and you have a clear, efficient path to resolution laid out. 



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## About the Authors

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