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### **MEDIATE LIKE A BUTTERFLY, ARBITRATE LIKE A BEE**

Let's face it; legal disputes have become a part of the construction process. Given that fact, I think there is something to be learned from those whose business is "disputes", professional boxers.

When boxer's contracts are being negotiated they know there is going to be a fight. So naturally each side attempts to negotiate conditions that will be to their advantage. Where will the fight take place? What rules will apply? Who will be the judges? The answers to these questions are determined in writing in advance of the fight and often provide a distinct advantage to one of the contestants.

If a dispute arises on a construction project similar questions must be answered. Like a boxer's contract, the construction project contracts you sign can also answer questions regarding the location of dispute resolution proceedings, the rules to be applied and even the identity of the decision maker. You need to understand the impact the answers to those questions will have on your ability to defend or prosecute if a dispute arises before you sign the contract.

Arbitration and mediation are two tools which are commonly used for the resolution of disputes arising from construction projects. Clauses in contracts which require arbitration or mediation often have a significant impact on the outcome of a dispute by determining issues such as the location of hearings, the rules to be applied and the identity of the decision makers. It is important to understand the differences between them and their respective advantages and disadvantages.

Arbitration can be best understood as an contractual alternative to the "default method" for resolving construction project disputes, litigation. Absent a written agreement to arbitrate, the parties to a dispute must resort to a lawsuit and an ultimate decision by a Judge. However, written agreements to arbitrate are enforceable and the Courts will refuse to decide disputes to which they apply. Arbitration is a binding process by which the parties to a dispute present their cases to an impartial arbitrator. The arbitrator decides the dispute and the parties are bound by the decision. They pay the expenses of

the proceeding including the arbitrator's fees. Except in extraordinary circumstances, there is no appeal from an arbitrator's decision. Think of arbitration and litigation as "either/or" alternatives, either you agree to arbitrate or disputes which cannot be settled will be decided by litigation.

Mediation is a method of attempting to avoid the need to litigate or arbitrate rather than a mutually exclusive alternative. Parties who unsuccessfully attempt to mediate a dispute are free to seek a decision from a Judge or arbitrator. Mediation is a non-binding negotiation of a dispute with the assistance of an impartial third party. The mediator does not decide the dispute but facilitates discussion between the parties with the goal of reaching a mutually tolerable settlement. As mediations are both confidential and non-binding they present little risk and often lead to settlement by allowing skilled mediators to provide the participants with a "sneak preview" of the strengths and weaknesses of their positions. A properly drafted mediation clause is generally a positive addition to a construction project contract.

Deciding whether to agree to an arbitration clause in a contract is a much more complicated matter. An arbitration can be a cost-effective proceeding presided over by impartial arbitrators with construction project experience which leads to a decision accepted by all to have been based upon the proof presented. Arbitration can also be a shockingly expensive, seemingly endless series of hearings presided over by arbitrators with the disturbing combination of inadequate knowledge of construction projects and the power to render a decision which can not be appealed.

Deciding to include an arbitration clause raises many other important contractual issues. Many clients who have retained me after a dispute has erupted have learned that they have put themselves at a disadvantage by agreeing to poorly drafted arbitration clauses (including the language contained in the standard AIA documents). I have seen a contract which required an arbitration to be held in New York City on a modest project located in Upstate New York and others which prevented the project's owner, contractor and architect from participating in the same arbitration. I often encounter contracts which prevent an architect from compelling a consultant from participating in an arbitration despite the fact that the architect is subject to liability for work performed by the consultant. Similar issues regularly occur between contractors and their subcontractors.

Don't get "sucker punched" before you step into the ring by signing a contract you do not understand. Sure, you can always call a lawyer after you are on the ropes but in my experience it is wiser to do so long before the bell rings!