

# ProNetwork News

## Risk Management Tools for the Design Professional

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Ms. Brumback received both her undergraduate degree (with honors and highest distinction), and her *Juris Doctor* degree from the University of North Carolina at Chapel Hill. In addition to her prominent reputation in the field of Construction Litigation, she is known for her extensive involvement with Bar Association matters and community groups.

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### Private Arbitration: A better way to resolve construction disputes?

By Melissa Dewey Brumback, J.D., LEED Green Associate

Architects and Engineers are very familiar with the concept of arbitration of construction disputes. The three main standard sets of form documents - AIA, EJCDC, and ConsensusDOCS, - all contemplate resolving disputes outside of a courtroom. In the past, the default tribunal was arbitration, and, in the case of AIA documents, arbitration through the American Arbitration Association (AAA).

AAA arbitration is, by and large, successful. The tribunal understands that construction disputes are not like typical breach of contract cases, and that individuals with specialized training and knowledge will likely better understand industry norms and terminology. Leaving such concepts as Requests for Information, Construction Change Orders, Construction Change Directives, Construction Administration v. Construction Management, Acceleration, Critical Path and other industry terms to a lay jury is often deemed unwise. By utilizing AAA arbitration, the parties can instead get a panel of industry experts to hear their case and, presumably, the matter can be dispensed with much more quickly and cheaply than traditional courtroom litigation.

However, if you have ever had a chance to participate in a full AAA arbitration, you know that its benefits come with costs: hefty filing fees, inflexible coordinators, uncertain evidence rules and more chance of a panel "splitting the baby."

What is the best venue, then, for construction disputes? That depends on the size of your project, the nature of the dispute and the jurisdiction you are in. However, one option that is being used more and more is private arbitration.

Private arbitration can either be negotiated up front, during contract drafting, or after a dispute has arisen. In fact, I have even gotten opposing counsel to agree to private arbitration after they have filed the lawsuit.



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### Private Arbitration - *Continued*

A sample up-front arbitration agreement can be very simple and straightforward, such as:

*All the parties will cooperate with each other to resolve conflicts informally. Any disputes shall be governed only by the laws of the State of \_\_\_\_\_ [including but not limited to all applicable statutes of limitation and repose related to the bringing of an action], and such dispute shall only be brought through binding arbitration among the parties.*

*Such a proceeding shall commence by the delivery of a written Demand for Arbitration signed by a party to the other party. The Demand shall state the general nature of the Complaint. The other party shall respond, in writing, within 20 days. Thereafter, the parties shall endeavor to agree to appoint one person to serve as an Arbitrator to their dispute.*

*If the parties cannot so agree within 30 days after service of the response, either party may file a lawsuit in the Courts of General Jurisdiction for \_\_\_\_\_ County, \_\_\_\_\_ State, and move to stay the matter so that the Court may thereafter enter an Order appointing a neutral third party to serve as arbitrator in this matter.*

*The arbitrator shall establish procedural rules for a hearing of the dispute on the merits, including limited discovery and other matters as necessary, and shall conduct an arbitration hearing with relaxed rules of evidence as justice may require. The arbitrator's decision shall be binding on the parties, and is authorized to assign attorney fees to the prevailing party, in the arbitrator's discretion. The arbitrator's order shall be enforceable in the Courts as necessary.*

“One important caveat to using private arbitration is that, similar to AAA arbitration, the decision is binding and enforceable in Court.”

Notice that in this provision, the specific discovery and evidentiary rules are left up to the arbitrator, and that there is also a provision for the Court appointing an arbitrator if the parties cannot agree on such a person.

### Private Arbitration – *Continued*

**What are the benefits of private arbitration?** Unlike AAA arbitration, in private arbitration, anything goes. The parties construct an arbitration agreement that determines who and how many people serve as arbitrators (a single panel arbitrator in a smaller dispute works just fine). The arbitration agreement also determines whether there is discovery, and if so, how much. In this way, expenses can be minimized so that only the absolutely essential discovery is conducted. This saves on time and expenses for both sides.

If you are considering adding private arbitration to your contracts, consider whether you want to address discovery limitations upfront. Here is just one example of a discovery-limiting arbitration provision:

*Each party shall have the right to take the deposition of one individual and any expert witness designated by the other party. Each party also shall have the right to make requests for production of documents to any party. Additional discovery may be had where the Arbitrator selected pursuant to this Agreement so orders, upon a showing of need.*

Using this provision would further ensure that the benefits of private arbitration are fully realized.

One important caveat to using private arbitration is that, similar to AAA arbitration, the decision is binding and enforceable in Court. Absent an agreement within the arbitration provision itself, such decisions are generally binding without benefit of any judicial review. There are a few, limited cases which may be subject to review, such as when abuse of discretion is found. However, in general, the decision will be upheld by the courts, win, lose, or draw. The key to making the most of private arbitration, then, is to fully vet the proposed arbitrator, to make sure you are not getting someone unfamiliar with legal standards, or someone who too often sides with one particular entity. A private three-person panel, while more cumbersome and expensive, can help to minimize the risk of a rogue arbitrator in the case where you have any doubts about the likely arbitrator for your case.

While not a panacea for each and every construction dispute, private arbitration is another weapon to add to your risk-limiting arsenal the next time you begin negotiating a contract.

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