

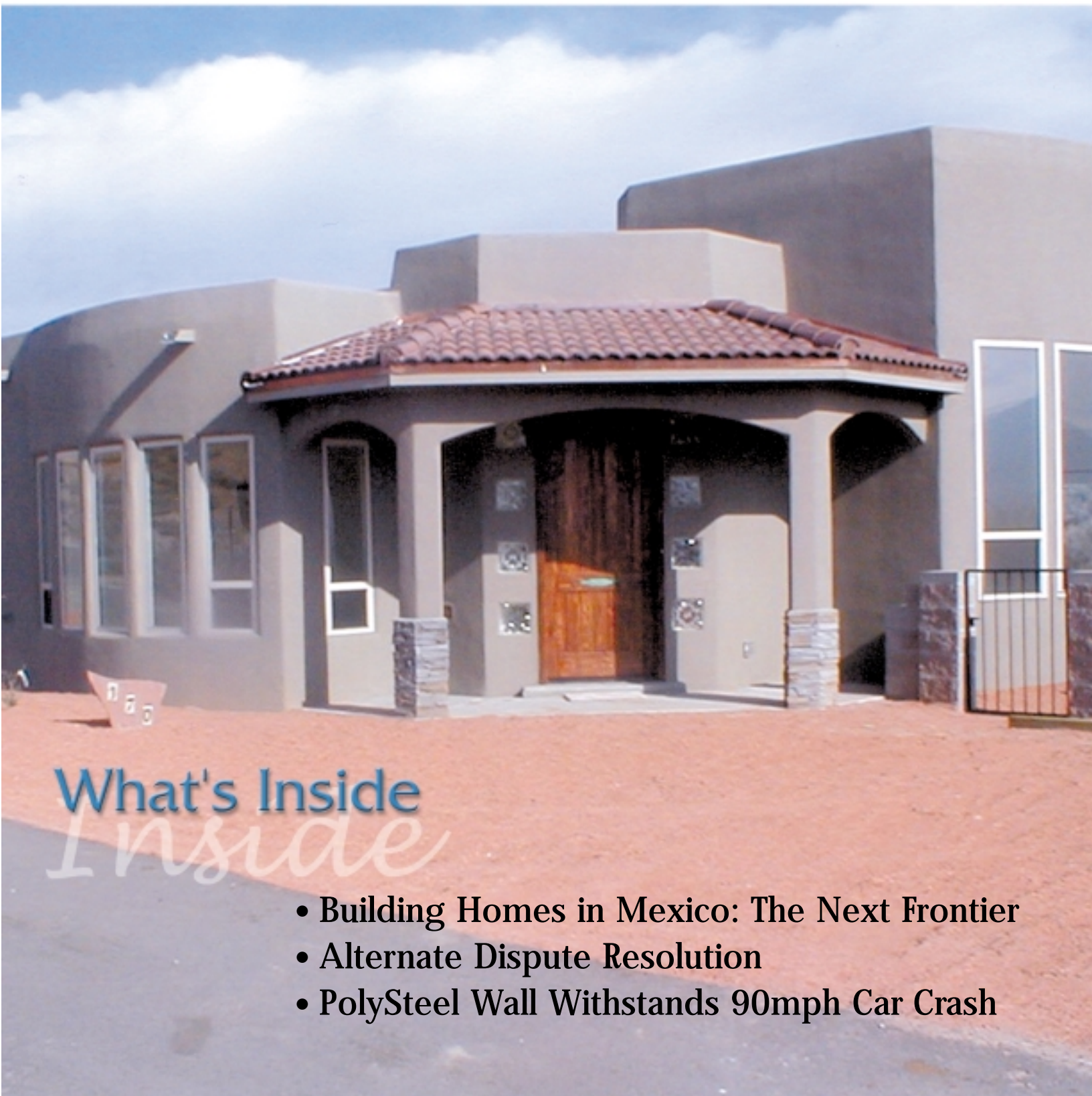


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Alternate Dispute Resolution

By Peter G. Merrill



For many years, we all have been accustomed to believing that we had to "go to court" when we had a dispute over a construction contract item, if we had trouble collecting our monies due, or if our clients had a problem with the standards of construction we use while building or remodeling a house or commercial building. However, that is far from true today. Both you and your client have another option called "alternate dispute resolution" (ADR) which is also more commonly referred to as mediation and/or arbitration.

The mediation process begins with the assumption that both parties are willing to discuss the disputed issues and that they are willing to compromise to some extent. The parties recognize that they are not able to resolve the disputed items by themselves and that a trained neutral mediator will be able to help the parties reach a settlement. By exploring the strengths and weaknesses of each party's position, the mediator, acting as an intermediary, provides an objective point of view and helps to defuse the parties' emotions and guide the parties towards objectively looking at all of the consequences of the various options that are available in the decision-making process. The parties both look at the mediator as a neutral and extend personal and confidential information to the mediator in private discussions that are commonly known as caucuses. At appropriate times during the mediation process, the parties may authorize the mediator to transmit settlement offers to the other party with the ultimate goal of reaching a final settlement agreement on the disputed items.

The mediator's role is not to decide who is right or wrong, but to facilitate discussions between the parties to help them reach a settlement that is fair and equitable to both parties.

Attorneys may be involved in the mediation process but it is not required. The final settlement agreement is a legal document that can be enforced in a court of law.

Keep in mind that if the parties do not come to an agreement, there will be no settlement and they will need to proceed to the next specified dispute resolution process such as arbitration, or they may proceed to civil litigation in a court of law, whichever your construction contract specifies.

Arbitration is another form of alternate dispute resolution. In binding arbitration, the parties agree to abide by the decision of the arbitrator and the arbitrator's decision is final and not generally subject to appeal. In non-binding arbitration, the parties do not agree to be bound by the arbitrator's decision and they use the arbitration process in order to obtain an advisory opinion. In non-binding arbitration, the parties may decide to abide by the arbitrator's decision in order to end the dispute without resorting to what would probably be lengthy and costly litigation.

The arbitration process allows the parties to select an individual or several individuals with a specialized expertise in the subject matter of the dispute to review the evidence and listen to the parties and witnesses or other specialists, and render a decision.

In residential construction arbitrations, there is usually one arbitrator. In more complex cases or in cases where there is a large amount of money involved, the parties may request more than one arbitrator, usually three, and that panel of arbitrators, who have a comprehensive knowledge on construction matters, is selected. One of the main advantages that arbitration offers over civil litigation is that in civil litigation, a judge is randomly assigned to hear a particular case and may not have the necessary substantive or technical expertise to fully appreciate the intricacies of legal counsel's arguments or have a comprehensive knowledge of the construction matters in dispute. I would like to remind you that a judge's main responsibility is to interpret and rule on matters of law, while an arbitrator's main responsibility is to render a final award that is fair and equitable to the parties involved. Who would you like to handle your dispute resolution process?

My favorite form of alternate dispute resolution is a combination of mediation and arbitration called "Med-Arb". In med-arb, the mediator is empowered to act as an arbitrator and renders a final binding decision at the end of the mediation process on any items that remain unresolved by mediation. This process allows the free flow of information and discussion of the disputed items without the formality of a full-blown arbitration. However, there is the assurance that at the end of the process, there will be a final settlement agreement that recognizes the items agreed upon by the parties and the binding decision of the mediator on the unresolved disputed items. Both mediation and non-binding arbitration do not offer the finality of binding arbitration and med-arb.

As an example of med-arb, I once had a mediation concerning a major addition on a residence. The general contractor and the homeowner had 32 items on which they could not come to an agreement prior to mediation. Their construction contract called for a standard mediation, however, after discussing the case with both parties, they decided to go with the med-arb process as they had a desire to end the process with one session. They also had the confidence in me, because of my construction background, to render a final and binding decision on any unresolved items.

At the end of the med-arb session they were pleasantly surprised to see that they had come to an agreement on 30 of the 32 items on their own with my assistance as the mediator. They signed a "Final Settlement Agreement" reflecting those 30 resolved items and then looked to me to render a decision on the last two remaining unresolved items. I rendered my decision, which they both willingly accepted as fair and equitable, and they added those two items to their settlement agreement, which concluded the med-arb session.

It is not unusual for there to be several med-arb procedures on one construction project. The contractor usually has negotiated a "General Contractor's Fast Track Med-Arb Agreement" that establishes a set fee with the mediator/arbitrator for these quick, short med-arb procedures without the usual paperwork that a med-arb would require. This fast track med-arb process allows the project to continue with little loss of time and money. The fast track agreement is also very helpful if negotiated between the general contractor and subcontractors on larger jobs where disputes are likely between themselves during the construction process.

In a short article like this one, it is impossible to fully review the many options and advantages that the alternate dispute resolution process offers to the contractor, subcontractors and/or the homeowner. It is also impossible to fully explain all the benefits of alternate dispute resolution as compared to civil litigation. If you would like more information, please log on to my website www.mediate.com/cdrsnm where you will find a great deal more interesting and informative articles, forms and documents on alternative dispute resolution programs. You will also find a section on "Suggested Contract Language" that offers you a variety of clauses that you could add to your construction contract to make certain that you and your clients will not have to resort to a lengthy and costly civil litigation process if you run into any disputes on your construction project. Having the proper dispute resolution language in your contract is like having an insurance policy against expensive litigation and it is easy to add it to your contract.

Even if your contract calls for civil litigation, you can still use alternate dispute resolution if both you and your clients agree to pursue the ADR process and avoid litigation.

You can also jointly choose to use ADR during your construction project even if your construction contract calls for another dispute resolution procedure.

I know that there are many of you who take a great deal of pride in your work, never seem to have any disputes with your clients, and take care of their concerns right away. However, I know of contractors who have been forced out of business and/or into bankruptcy because of just one major lawsuit that they had with a totally off-the-wall client, who had money to burn on litigation in order to get their way. Civil litigation will not only cost you a lot of money, it will cost you a great deal of time away from your business and emotional strain to yourself, your employees, and your family. The choice is yours.

Peter Merrill is a past president of NMHBA, and a Certified Kitchen Designer. He is also the president of Construction Dispute Resolution Services, a company that specializes in mediation and arbitration for the construction industry. He is a member of the National Kitchen and Bath Association's Legislative Committee. He serves as a National Director of the National Association of Home Builders and is a member of the NAHB Construction, Codes and Standards Committee and several Construction & Codes Subcommittees. For more information about the benefits of mediation or arbitration, you can check his website: www.mediate.com/cdrsnm.