



American Arbitration Association
Dispute Resolution Services Worldwide

Mock Construction Mediation

Presented by

The American Arbitration Association

for

The Claims Avoidance Seminar

of

**The St. Louis Council
of Construction Consumers**

June 13, 2003
8:00 a.m. to 12 noon

at

Orlando Gardens Banquet Center
8352 Watson Road

The Program

The American Arbitration Association (AAA) through its St. Louis office will be presenting to you the case of **St. Louis, Inc. v. ABC Contractor** as they attempt to resolve their dispute through mediation. The following facts are fiction, offered solely to demonstrate how Alternative Dispute Resolution (ADR) can and does work. Any comparison to actual events or persons is unintentional and coincidental.

Introduction

Scott Carfello is the District Vice President of the American Arbitration Association. His responsibilities include overseeing AAA's offices in St. Louis, Kansas City, Chicago and Minneapolis.

The Players for the Presentation

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| Narrator: | John Maupin, attorney |
| The Owner: | Mike Postiglione, P.E. |
| The Owner's Attorney: | Jim Keller, attorney and neutral with AAA |
| The Contractor: | Dennis Bolazina, architect, attorney and neutral with AAA |
| The Contractor's Attorney: | Andy Manuel, attorney and neutral with AAA |
| The Mediator: | Tom Blumenthal, attorney and neutral with AAA |

Note: Biographies for the Players and for Scott Carfello are included in these materials.

The Facts

The Project: St. Louis, Inc. is a private owner of vacant land in downtown St. Louis on which it plans to build a world-class aquarium complex. The centerpiece will be a freestanding 50-foot high 10,000,000-gallon pool of water that will be supported by Plexiglas and discrete concrete columns reinforced with rebar. The concept is to conceal how the water is being held together, allowing maximum viewing from all angles. A structure of this sort has never been built before, anywhere in the world.

The Contracts: St. Louis, Inc. entered into a contract with Unlimited Architect to design the complex, including the main aquarium. The contract included the standard AIA Document B151-1997 Edition, which in Article 7, “Dispute Resolution”, called for mediation and then arbitration with the American Arbitration Association (AAA) of all disputes between the Owner and the Architect. (For ease of reference, this provision is quoted at the end of these materials.)

St. Louis, Inc. then entered into a separate contract with ABC Contractor to build the complex per Unlimited Architect’s design and specifications. The contract called for a fixed price of \$10,000,000, using the AIA General Conditions A201 1997 Edition and the requirements in Article 4 for dispute resolution through mediation and arbitration with the American Arbitration Association. (This provision is virtually the same as that found in Article 7 of B151 and is quoted at the end of these materials.)

The Success: The project was built on time and within budget, to the satisfaction of everyone involved. In the first year more than eight million people from around the world visited the complex and in doing so they put St. Louis back on the world map as a major tourist location. The main aquarium contained the world’s largest collection of rare sea life. Unlimited Architect won AIA’s highest design award. The mayor presented St. Louis, Inc. with the keys to the City and the general contractor, ABC, received the AGC’s highest honor for outstanding work.

The Event: Almost a year after the complex opened to the public, the aquarium Plexiglas broke open in several places and some of its support columns collapsed, causing a significant amount of water in the main aquarium to leak out and onto the streets of downtown St. Louis. The aquatic complex was severely damaged and would have to be substantially rebuilt at a cost of \$3,000,000. The Plexiglas broke open moments after a significant earthquake in St. Louis.

The Demand for Arbitration: St. Louis, Inc. filed a demand for arbitration with the AAA against ABC Contractor, alleging that the collapse was due to poor workmanship and thus the fault of ABC Contractor. St. Louis, Inc. sought \$10,000,000 in total damages to recover for its losses.

The Mediation

Before moving forward with the arbitration, St. Louis, Inc. first proceeded with mediation, the subject of this presentation. The AIA contract documents require mediation as a prerequisite to arbitration. The Parties agreed to use Tom Blumenthal as their mediator.

Unknown Facts: As is typical in mediation, additional facts generally become known as the mediation unfolds. St. Louis, Inc. and ABC Contractor certainly found this to be true.

Biographies

Dennis A. Bolazina

Dennis, an architect who graduated from Washington University in St. Louis, is principal of Bolazina Architects and Consultants, AIA. Dennis has practiced in St. Louis since 1972. After a career of designing many building types, he currently specializes as a consultant to Developers and Investment Partners on hotel and high rise condominium projects that are in distress in New Orleans, Miami and Dallas, providing project management, loss control, dispute resolution and litigation support. Bolazina is also an attorney, JD graduate of St. Louis University, and provides Mediation and Arbitration services as a panel member of the American Arbitration Association. Bolazina serves on the Construction Advisory Panel of the American Arbitration Association and the Construction Alliance Panel for the American Institute of Architects.

Thomas M. Blumenthal

Tom is a principal in the law firm of Paule, Camazine & Blumenthal, P.C.; and formerly was affiliated with the law firm of Susman, Shermer, Rimmel & Shifrin, 1983-1993, was full time faculty member of Washington University School of Law, 1979-1983 and was an Adjunct Professor of Trial Practice at St. Louis University School of Law, 1986-1989; Undergraduate education: Washington University, A.B. 1973; law degree: University of Missouri-Columbia 1976; Reginald Heber Smith Community Lawyer Fellow, 1976-1978. Principally practices in the area of general business litigation including employment, construction, commercial and intellectual property issues. Trained as a Mediator at the Center For Dispute Resolution, CDR Associates, in Boulder, Colorado in July of 1995. Approved neutral for U.S. District Court for Eastern Missouri, American Arbitration Association and the Missouri Bar Complaint Resolution Program. Member of the Association of Attorney Mediators. Trained as an Arbitrator with the American Arbitration Association in both the Arbitrator Workshop and the Arbitrator II Training Workshop.

Scott Carfello

Scott was named Vice President of the Chicago office of the American Arbitration Association in 1987 and promoted to District Vice President in 2002. He currently serves as the American Arbitration Association's liaison to the American Bar Association, and is a member of the Dispute Resolution, Business Law and Construction Law Sections of the American Bar Association. He is also active in the Chicago Bar Association, having served as chairman of the Alternative Dispute Resolution Committee in 1996-1997. He is a member of the Illinois State Bar Association's Committee on Alternative Dispute Resolution. He is a member of the Adjunct Faculty at The John Marshall Law School, teaching in the LLM Program in Real Estate. He was a member of the Adjunct Faculty at DePaul University's School for New Learning, where he designed courses entitled "Dispute Resolution" and "Negotiating The Deal". He has lectured at Northwestern University Law School, Chicago Kent College of Law, the University of Illinois School of Law and Northern Illinois University School of Law. He has been an instructor for Arbitrator and Mediator Training Programs sponsored by the American Arbitration Association, and has written two different chapters on ADR for the Illinois Institute for Continuing Legal Education. Scott Carfello received a Bachelor of Science degree in Political Science from Illinois State University in 1977 and a Juris Doctorate degree from the John Marshall Law School in 1988.

James R. Keller

Jim, a partner at Herzog, Crebs & McGhee, LLP, St. Louis, Missouri, has been practicing law for 23 years. He focuses his practice on business litigation, construction law and Alternative Dispute Resolution (ADR), both as a lawyer and as a neutral. He has tried more than 70 cases before juries and judges in state and federal courts around the country. He graduated from Washington University School of Law in 1980 and has a Bachelor of Journalism degree from the University of Missouri in 1977. Since late 1999 Mr. Keller has been an arbitrator in more than 40 cases for AAA involving construction and business disputes in Missouri, Illinois and Iowa, ranging from \$8,000 to \$10,000,000, including several as the panel chair. Mr. Keller is the chair of The Construction Advisory Committee of AAA, St. Louis Region, and past chair of AAA's Program Committee for the St. Louis Region. He is a frequent speaker at AAA and various Bar Association programs on the topics of construction and ADR, including a presentation on arbitration for the Missouri Bar in September 2002 at its two-day seminar on Dispute Resolution. In December 2002 he was the trainer for other AAA neutrals within the St. Louis area on programs dealing with updates in the law in 2002. He also is the co-chair of the

Construction Law Committee of the Bar Association of Metropolitan St. Louis. He has authored more than 30 articles in the last three years on ADR, construction and consumer fraud. He is the legal writer for the St. Louis Construction News & Review and a mediator on the list of court-approved mediators, having recently mediated a dispute involving the construction of the new federal courthouse in downtown St. Louis.

Andrew W. Manuel

Andy is an attorney with the Construction Law Practice Group of Greensfelder, Hemker & Gale, P.C. His practice is concentrated on construction and/or engineering problems and he has been engaged in various types of legal representation for contractors, design professionals and owners. His practice covers the spectrum of the construction process from bidding issues and the preparation of construction contracts to preparing and resolving claims during the project and afterwards by negotiation, alternative dispute resolution processes (mediation/arbitration) and/or litigation. Prior to becoming an attorney, Mr. Manuel worked for ten years as a mechanical engineer/project manager for a large engineering and construction company in Houston, Texas. He is a Registered Professional Engineer in the state of Texas, and an Arbitrator with the American Arbitration Association. Mr. Manuel is currently a Co-Chair of the Construction Law Committee of the Bar Association of Metropolitan St. Louis, and a member of the American Society of Mechanical Engineers, the Engineers' Club of St. Louis, the Missouri Bar, the Illinois Bar and American Bar Associations. Mr. Manuel received his B.S.M.E. degree, cum laude, and his J.D. degree, magna cum laude, from the University of Houston.

John W. Maupin

John is of counsel to the Clayton law firm of Seibel & Eckenrode, P.C. He received his law degree from the University of Missouri-Columbia in 1975 and began his practice with the Missouri Highway Commission. John was general counsel and vice president of Fred Weber, Inc. from 1984 to 1994 and has been in private practice since then, primarily representing contractors and owners in construction matters.

Michael A. Postiglione

Mike is a registered engineer in Missouri, Illinois, Indiana, Florida, Nevada, New York, Wisconsin, Minnesota, Tennessee, Kentucky, Idaho and Kansas. He received his training at Manhattan College in New York,

graduating in 1973 with his B.E.E. degree. He continued his studies, receiving his P.D.D. from the University of Missouri at Rolla in 1983. This later degree specialized in complete building systems. Mr. Postiglione is the Founder and President of Avanti Technologies. He is responsible for systems design and firm management. He directs the work of engineers and technicians on a variety of projects. Mr. Postiglione has directed engineering assignments for office buildings of all types and sizes, hospitals, educational, housing, industrial and rehabilitation projects. Mr. Postiglione is the recipient of many industry awards and recognitions, Including the Ernst and Young Entrepreneur of Year in 1990, serving as a National Vice President for the American Council of Engineering Companies, and being named to Fellow status of that same organization.

Contract Provisions

Article 7 DISPUTE RESOLUTION¹ (between Owner and Architect)

7.1 MEDIATION

7.1.1 Any claim, dispute or other matter in question arising out of or related to this Agreement shall be subject to mediation as a condition precedent to arbitration or the institution of legal or equitable proceedings by either party. If such matter relates to or is the subject of a lien arising out of the Architect's services, the Architect may proceed in accordance with applicable law to comply with the lien notice or filing deadlines prior to resolution of the matter by mediation or by arbitration.

7.1.2 The Owner and Architect shall endeavor to resolve claims, disputes and other matters in question between them by mediation which, unless the parties mutually agree otherwise, shall be in accordance with the Construction Industry Mediation Rules of the American Arbitration Association currently in effect. Request for mediation shall be filed in writing with the other party to this Agreement and with the American Arbitration Association. The request may be made concurrently with the filing of a demand for arbitration but, in such event, mediation shall proceed in advance of arbitration or legal or equitable proceedings, which shall be stayed pending

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mediation for a period of 60 days from the date of filing, unless stayed for a longer period by agreement of the parties or court order.

- 7.1.3** The parties shall share the mediator's fee and any filing fees equally. The mediation shall be held in the place where the Project is located, unless another location is mutually agreed upon. Agreements reached in mediation shall be enforceable as settlement agreements in any court having jurisdiction thereof.

7.2 ARBITRATION

- 7.2.1** Any claim, dispute or other matter in question arising out of or related to this Agreement shall be subject to arbitration. Prior to arbitration, the parties shall endeavor to resolve disputes by mediation in accordance with Paragraph 7.1.
- 7.2.2** Claims, disputes and other matters in question between the parties that are not resolved by mediation shall be decided by arbitration which, unless the parties mutually agree otherwise, shall be in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association currently in effect. The demand for arbitration shall be filed in writing with the other party to this Agreement and with the American Arbitration Association.
- 7.2.3** A demand for arbitration shall be made within a reasonable time after the claim; dispute or other matter in question has arisen. In no event shall the demand for arbitration be made after the date when institution of legal or equitable proceedings based on such claim, dispute or other matter in question would be barred by the applicable statute of limitations.
- 7.2.4** No arbitration arising out of or relation to this Agreement shall include, by consolidation or joinder or in any other manner an additional person or entity not a party to this Agreement, except by written consent containing a specific reference to this Agreement and signed by the Owner, Architect, and any other person or entity sought to be joined. Consent to arbitration involving an additional person or entity shall not constitute consent to arbitration of any claim, dispute or other matter in question not described in the written consent or with a person or entity not named or described therein. The foregoing agreement to arbitrate and other agreements to arbitrate with an additional person or entity duly consented to by parties to this Agreement shall be specifically

enforceable in accordance with applicable law in any court having jurisdiction thereof.

- 7.2.5** The award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.

**4.4 RESOLUTION OF CLAIMS AND DISPUTES
(between Owner and Contractor)**

- 4.4.1 Decision of Architect.** Claims, including those alleging an error or omission by the Architect but excluding those arising under Paragraphs 10.3 through 10.5, shall be referred initially to the Architect for decision. An initial decision by the Architect shall be required as a condition precedent to mediation, arbitration or litigation of all Claims between the Contractor and Owner arising prior to the date final payment is due, unless 30 days have passed after the Claim has been referred to the Architect with no decision having been rendered by the Architect. The Architect will not decide disputes between the Contractor and persons or entities other than the Owner.

- 4.4.2** The Architect will review Claims and within ten days of the receipt of the Claim take one or more of the following actions: (1) request additional supporting data from the claimant or a response with supporting data from the other party, (2) reject the Claim in whole or in part, (3) approve the Claim, (4) suggest a compromise, or (5) advise the parties that the Architect is unable to resolve the Claim if the Architect lacks sufficient information to evaluate the merits of the Claim or if the Architect concludes that, in the Architect's sole discretion, it would be inappropriate for the Architect to resolve the Claim.

- 4.4.3** In evaluating Claims, the Architect may, but shall not be obligated to, consult with or seek information from either party or from persons with special knowledge or expertise who may assist the Architect in rendering a decision. The Architect may request the Owner to authorize retention of such persons at the Owner's expense.

- 4.4.4** If the Architect requests a party to provide a response to a Claim or to furnish additional supporting data, such party shall respond,

within ten days after receipt of such request, and shall either provide a response on the requested supporting data, advise the Architect when the response or supporting data will be furnished or advise the Architect that no supporting data will be furnished. Upon receipt of the response or supporting data, if any, the Architect will either reject or approve the Claim in whole or in part.

- 4.4.5** The Architect will approve or reject Claims by written decision, which shall state the reasons therefore and which shall notify the parties of any change in the Contract Sum or Contract Time or both. The approval or rejection of a Claim by the Architect shall be final and binding on the parties but subject to mediation and arbitration.
- 4.4.6** When a written decision of the Architect states that (1) the decision is final but subject to mediation and arbitration and (2) a demand for arbitration of a Claim covered by such decision must be made within 30 days after the date on which the party making the demand receives the final written decision, then failure to demand arbitration within said 30 days' period shall result in the Architect's decision becoming final and binding upon the Owner and Contractor. If the Architect renders a decision after arbitration proceedings have been initiated, such decision may be entered as evidence, but shall not supersede arbitration proceeding unless the decision is acceptable to all parties concerned.
- 4.4.7** Upon receipt of a Claim against the Contractor or at any time thereafter, the Architect or the Owner may, but is not obligated to, notify the surety, if any, of the nature and amount of the Claim. If the claim relates to a possibility of a Contractor's default, the Architect or the Owner may, but is not obligated to, notify the surety and request the surety's assistance in resolving the controversy.
- 4.4.8** If a Claim relates to or is the subject of a mechanic's lien, the party asserting such Claim may proceed in accordance with applicable law to comply with the lien notice or filing deadlines prior to resolution of the Claim by the Architect, by mediation or arbitration.

4.5 **MEDIATION**

- 4.5.1** Any Claim arising out of or related to the Contract, except Claims relating to aesthetic effect and except those waived as provided for in Subparagraphs 4.3.10, 9.10.4 and 9.10.5 shall, after initial decision by the Architect or 30 days after submission of the Claim

to the Architect, be subject to mediation as a condition precedent to arbitration or the institution of legal or equitable proceedings by either party.

4.5.2 The parties shall endeavor to resolve their Claims by mediation which, unless the parties mutually agree otherwise, shall be in accordance with the Construction Industry mediation Rules of the American Arbitration Association currently in effect. Request for mediation shall be filed in writing with the other party to the contract and with the American Arbitration Association. The request may be made concurrently with the filing of a demand for arbitration but, in such event, mediation shall proceed in advance of arbitration or legal or equitable proceedings, which shall be stayed pending mediation for a period of 60 days from the date of filing, unless stayed for a longer period by agreement of the parties or court order.

4.5.3 The parties shall share the mediator's fee and any filing fees equally. The mediation shall be held in the place where the Project is located, unless another location is mutually agreed upon. Agreements reached in mediation shall be enforceable as settlement agreements in any court having jurisdiction thereof.

4.6 ARBITRATION

4.6.1 Any Claim arising out of or related to the Contract, except Claims relating to aesthetic effect and except those waived as provided for in Subparagraphs 4.3.10, 9.10.4 and 9.10.5, shall, after decision by the Architect or 30 days after submission of the Claim to the Architect, be subject to arbitration. Prior to arbitration, the parties shall endeavor to resolve disputes by mediation in accordance with the provisions of Paragraph 4.5.

4.6.2 Claims not resolved by mediation shall be decided by arbitration which, unless the parties mutually agree otherwise, shall be in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association currently in effect. The demand for arbitration shall be filed in writing with the other party to the Contract and with the American Arbitration Association, and a copy shall be filed with the Architect.

4.6.3 A demand for arbitration shall be made within the time limits specified in Subparagraphs 4.4.6 and 4.6.1 as applicable, and in other cases within a reasonable time after the Claim has arisen, and in no event shall it be made after the date when institution of legal or equitable proceedings based on such Claim would be

barred by the applicable statute of limitations as determined pursuant to Paragraph 13.7.

- 4.6.4 Limitation on Consolidation or Joinder.** No arbitration arising out of or relating to the Contract shall include, by consolidation or joinder or in any other manner, the Architect, the Architect's employees or consultants, except by written consent containing specific reference to the Agreement and signed by the Architect, Owner, Contractor and any other person or entity sought to be joined. No arbitration shall include, by consolidation or joinder or in any other manner, parties other than the Owner, Contractor, a separate contractor as described in Article 6 and other persons substantially involved in a common question of fact or law whose presence is required if complete relief is to be accorded in arbitration. No person or entity other than the Owner, Contractor or a separate contractor as described in Article 6 shall be included as an original third party or additional third party to an arbitration whose interest or responsibility is insubstantial. Consent to arbitration involving an additional person or entity shall not constitute consent to arbitration of a Claim not described therein or with a person or entity not named or described therein. The foregoing agreement to arbitrate and other agreements to arbitrate with an additional person or entity duly consented to by parties to the Agreement shall be specifically enforceable under applicable law in any court having jurisdiction thereof.
- 4.6.5 Claims and Timely Assertion of Claims.** The party filing a notice of demand for arbitration must assert in the demand all Claims then known to that party on which arbitration is permitted to be demanded.
- 4.6.6 Judgment on Final Award.** The award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.

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