Resolution of Disputes — The Next Generation

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Three strikes — you're out! This is a fundamental rule of baseball. But in many States this is one of the primary drivers behind the need to find alternative ways to resolve construction disputes. Court dockets have become more crowded with the advent of the "Three Strikes and You're Out" laws.[6] And, the length and the cost of resolving disputes in the courtroom has grown exponentially over the years, turning litigation into the least cost effective means of resolving disputes in the United States. Construction industry disputes are common and the amounts in dispute are frequently quite high. Additionally, the nature of disputes in the construction industry are often quite complex, thus making it difficult to present issues clearly to a non-technical judge and jury. As a result, the construction industry has been in the forefront of the development of alternative means of resolving disputes. Alternative dispute resolution (ADR) has become common in construction.[2,3] This article identifies and discusses, in a summary manner, nineteen (19) forms of ADR that are being used in the construction industry. Some are merely variations of a theme, but all are different, and all have advantages and disadvantages that need to be considered prior to selection. The various forms of ADR are presented in what the author believes is a logical order following a dispute from the project site to the courtroom.

Forms of ADR in the Construction Industry

Escrow Bid Documents

Escrow Bid Documents (EBD) is a form of ADR in that it provides for resolution of some disputes quickly and at low cost. EBD is a system wherein the low bidder submits all of the documents they relied upon in making their bid to the owner who examines the documents jointly with the low bidder. Once the contract is awarded, the documents are escrowed with a neutral third party (local bank or trust agent) for safekeeping. An escrow agreement is put in place concerning who can access such documents, the privacy and confidentiality of the documents, who pays for the storage of the documents, etc. The EBD are referred to in the event that a disputed issue involves how an item was bid, what interpretation was used in the bid, what productivity factors were used, etc. In this way, critical project documentation is preserved in the safekeeping of a neutral third party and referred to when such documents will aid the parties in resolving particular issues in dispute.

The advantages of EBD are that bidding documentation which may help resolve issues is protected and available for use in the event of a dispute at a relatively low cost. Further, it is perceived that the mere existence of such EBD prevents fabricated claims from arising on the basis of "I bid it this way and your way will cost more". Any time such a statement is made, the party receiving the statement is within their rights to request immediate access to the EBD to confirm the statement.

The author is unaware of any disadvantages to the EBD system.

Neutral Advisor

A Neutral Advisor is an individual or firm retained on behalf of the project to advise the parties on disputed issues. The role of the Neutral Advisor on the project is to listen to and research both sides of a disputed issue and to provide advice openly to both sides designed to lead to resolution of issues. The fee may be paid by one or the other of the parties but in the instance where the author served as a Neutral Advisor, the parties split the cost equally. The concept is to retain an independent third party who has no financial interest in the outcome of the dispute who provides advice to the parties in order to prevent a dispute from growing.
The most frequently cited advantage to this form of ADR is quick advice on an issue from a neutral party who is familiar with the parties and the project and has no vested interest in the outcome of the disputed

issue.

The disadvantages cited by some, at least, is the fact that the advice is not a decision, that the Neutral Advisor may become so familiar to the parties that they stop listening to the advisor, and that the Neutral Advisor may, over time, become prejudiced toward one of the parties.

Owner/Agency Review Boards

Some public owners, particularly those with larger, long duration construction programs, have established their own in-house Review Boards to hear disputes that cannot be resolved at the project level. Such Review Boards are typically made up of very senior employees of the owner's staff who attempt to review the disputed issue in-house in an effort to resolve disputes caused by personality conflicts or misinterpretation of contract requirements by the owner's staff. Such Review Boards are normally structured to handle appeals of lower level decisions in a simple, informal manner. They normally act promptly upon the contractor's request although some have been known to have extremely complex requirements and be very slow to act.[5]

The apparent advantages to Owner Review Boards are the ease of obtaining an appellate hearing on an adverse decision at the project level and the very low cost involved with such a hearing.

The most commonly cited disadvantages include the lack of impartiality as the Review Board members are generally employees of the owner (thus creating an apparent conflict of interest), the lack of due process, the lack of timeliness in some cases, and the difficulty of obtaining judicial review of the findings of such Review Boards.

Dispute Review Boards

Typically, a Dispute Review Board (DRB) is a three person panel. (A variation on this theme is the **One Person DRB** for small projects.)[7] Generally, one member is selected by the owner and the second by the contractor, each choice being subject to veto by the other party. The third person on the DRB is normally selected by the first two, subject to veto by both parties. Similar to arbitration panels, the idea is to select knowledgeable and experienced individuals to help resolve issues quickly. DRB's generally come into existence at the beginning of the contract and continue until the final dispute is settled and final payment made. (Two variations on this approach are, first, a panel selected to specifically act as a **Single Dispute DRB** and, second, an **End of the Job DRB** selected and convened only to hear issues not settled during the life of the project.) The DRB generally meets throughout the life of the project, at the site, and is provided all routine project information. The concept is to keep the DRB fully informed of the project and its progress so as to allow them to focus quickly on a disputed issue without the need to teach them the project history. The DRB is generally convened at the request of either party when an issue cannot be resolved by negotiation. The DRB hearing is structured according to the rules established by the DRB itself. It is typically informal, without any transcript and most often, without the involvement of attorneys. DRB's issue recommendations, not decisions or determinations. The parties are free to reject such recommendations and continue the dispute into arbitration or litigation. However, if the national model language is used in the DRB agreement, the recommendations of the DRB are admissible as evidence if the dispute is continued into a legal forum.[4]

The most commonly cited advantages of DRB's are experienced, knowledgeable panels who are familiar with the project and the its history. Also cited as advantages are such items as the speed with which a DRB hearing can be scheduled and the recommendation received, and the fact that most DRB agreements preclude attorneys from participating in DRB hearings.

The most common criticism of this system is the cost (estimated to be between 0.5% and 1.0% of construction cost). Some also contend that the mere existence of a DRB encourages disputes to continue

beyond the level of negotiations. Others criticize the DRB form of ADR because they are limited to making recommendations rather than enforceable decisions.

Mediation

Mediation is an entirely different form of ADR. It is a private, informal and voluntary submission of a dispute to a forum where the parties are assisted by a neutral third party in reaching a voluntary settlement. The two variations of this theme are the **Individual Mediator** or a **Mediation Panel**. Mediation is a form of negotiation into which a third party is inserted. It is non-binding. The process is quite simple. Both parties make their presentations to the mediator at a joint session. Then, generally, the parties are separated and the mediator meets with each privately to discuss strong and weak points, areas of potential settlement, etc. The mediator moves between the parties trying to structure a settlement. Frequently, mediators will offer assessment of the positions asserted and sometimes even offer mediator recommendations. The concept is that the mediator assists the parties in carving out their own resolution rather than rendering a decision.

The advantages of mediation are that it is inexpensive, requires a small investment of time, is non-binding, and is private and confidential. Mediation is flexible, limited only by the willingness and ingenuity of the mediator and the parties. Mediation focuses on common interests.

The disadvantage of mediation is that mediators are trained to drive a deal and, as a result, sometimes are uninterested in facts or contract language. The mediator's job is to push for resolution regardless of the issues. This becomes a real disadvantage when the parties enter into mediation at the urging of a court but are on opposite sides of zero. That is, when the parties do not agree on the merits of a claim but the mediator is still pushing for settlement, mediation can be a frustrating and fruitless exercise.

Med/Arb

Med/Arb (mediation/arbitration) is a combined form of ADR. This form of ADR has been borrowed from labor relations where it has been used for some years. The process is initiated with mediation of the issues. To the extent that issues can be resolved by mediation, they are settled. Once the parties agree that the remaining issues cannot be resolved by mediation, such issues are moved into the arbitration process. By the terms of the original Med/Arb agreement the parties agree that the same individual who served as the mediator becomes the arbitrator for the unresolved issues. Two variations of this theme include **Med-Then-Arb** which is identical to the above except that two different neutrals are used, and **Arb/Med** in which the neutral arbitrates the dispute, makes an award and then mediates the dispute while the award remains in a sealed envelope. If mediation fails, the arbitration decision is unsealed, presented to the parties, and becomes binding.

The advantage of this system is that the parties are committed to a continuum of dispute resolution which will lead for full resolution of all issues, in one forum or another. Further, the mediator becomes fully knowledgeable of the issues in dispute before becoming the arbitrator. To that extent, it is perceived that this individual will be a much more effective arbitrator.

The most frequently cited disadvantage of the Med/Arb system revolves around the role, power, and neutrality of the mediator/arbitrator. To be an effective mediator, the mediator needs the complete confidence of the parties during mediation and must be able to obtain confidential disclosures from each side. Knowing that the mediator may become the arbitrator, the parties may withhold some information which could inhibit the success of the mediation. On the other hand, if the mediator gains a substantial amount of confidential knowledge from the parties, this could make it difficult to be a neutral arbitrator.

Arbitration Panel

Arbitration in construction is not new, having arisen in the 1880s under the earliest forms of the American

Institute of Architects (AIA) contract documents. Arbitration is a consensual process based upon agreement between the parties. Arbitration panels are generally three person panels selected by agreement of the parties either on their own or through the auspices of an organization such as the American Arbitration Association (AAA). Arbitration is generally an informal process, dispensing with the rules of evidence, prehearing motions and most of the discovery process all of which are inherent to litigation. Thus, it can be made flexible to fit the circumstances of the project. Arbitration is always focused on a single project and generally concerned only with disputed issues not resolved between the parties at the site level. Once the agreement to arbitrate an issue is reached and a panel selected, the hearing itself can proceed rather quickly and the determination of the panel issued promptly upon completion of the hearing. And, in most arbitration agreements, the arbitration decision is enforceable in court. Although not within the scope of this paper, in 1995 AAA made substantial changes to the Construction Industry Arbitration Rules to allow for expedited hearings on small disputes, special rules and special panels for complex claims, etc.[1]

The perceived advantages of arbitration follow. Since arbitration devoted to a single case, it is generally quicker than litigation. Both the hearings and the decision are private matters, thus there is little publicity concerning the proceedings or the outcome. Properly selected arbitration panels will be knowledgeable of construction and experienced in construction disputes. Arbitration panels are also allowed to grant any remedy or relief that is “equitable”. And, the decision of the arbitration panel is final and conclusive of the matter.

The apparent disadvantages of arbitration follow. Arbitration panels generally do not explain the basis of their decisions, thus there is little understanding of why a decision is reached. The ability of the losing party to appeal a decision is severely restricted. Since the arbitration decision is almost always final, the expense of preparing for arbitration is almost the same as preparing for litigation. Finally, as some have commented, “Arbitration is the only real crapshoot in construction disputes — everything else can be appealed!”

Advisory Arbitration

The discussion above remains the same for this form of ADR with the exception of the fact that the determination of the panel is *not* final. It is advisory only.

The advantages set forth above also remain the same except, again, the decision is not final.

The disadvantages change due to the fact that the decision is advisory. The apparent disadvantage is that one can go through the entire arbitration process, receive an advisory opinion, and have the losing party refuse to accept the opinion.

Single Arbitrator

The discussion above is fundamentally the same for this form of ADR. The distinction is the fact that a single arbitrator is used in place of a three person panel. The arbitrator must, therefore, act solely as a neutral.
The advantage is that the cost of arbitration is substantially decreased and it is easier to schedule hearings since the parties only have to coordinate their schedules with a single arbitrator.

The disadvantages set forth above remain fundamentally the same. There is an added disadvantage in that if one arbitrator on a three person panel becomes confused or sidetracked in a particular issue, it is likely that another arbitrator can straighten the situation out. With a single arbitrator, there is no built in check and balance system and the risk of a bad decision due to confusion increases dramatically.

Baseball Arbitration

This is a unique form of arbitration borrowed directly from the professional sports world. In this form of ADR, a single, neutral arbitrator is retained. Both parties present their strongest case with the settlement value

they believe is supported by their case. The arbitrator then chooses one of the two positions asserted. The arbitrator cannot carve out an equitable determination but is required to select one position or the other. The concept is that the parties will be more realistic in their demands as they realize that the arbitrator is required to select one position or the other and the parties will be bound by that selection.

The advantage lies in the quickness of the hearing and the decision. Hearings under this form of ADR are more typically presentation type hearings and not burdened with numerous experts or exhibits.

The disadvantage is in the fact that arbitrator can only select one position or the other. Thus, the arbitrator is unable to carve out a compromise position. Compromise in this form of ADR, to the extent is exists at all, lies with the two parties keeping their own positions as reasonable as possible.

Shadow Mediation

This is actually a form of Arb/Med in that a mediator is retained to sit through the arbitration hearings as an observer. At any time during the arbitration if either of the parties wants to mediate a specific issue and the other party agrees, the arbitration proceeding is put on hold and the Shadow Mediator, who is familiar with the case having attended all arbitration proceedings, assists with mediation of the issue. The Shadow Mediator is also free to suggest possible avenues of settlement of issues to the parties during the arbitration proceedings. If the mediation is successful, the issue is resolved and removed from the arbitration proceeding. If it is unsuccessful, the issue is returned to the arbitration forum for a determination. Thus, there are two processes running concurrently, with separate neutrals. If total agreement can be reached through mediation, the arbitration panel may be dismissed.

The apparent advantage to this system is that it allows parties to remove selected issues from the arbitration process as the situation becomes clarified during arbitration and allows them to carve out their own settlement, at least of some issues. As the size and scope of the disputed issues are reduced, the likelihood of resolving the entire dispute rises.

The single largest disadvantage of this form of ADR is one of cost. This ADR form employs two neutrals at all times thus increasing the cost of ADR.

Rent-A-Judge/Private Judge

In some construction disputes, there are issues of law which must be decided in order to reach resolution of the dispute. Generally issues of law ought to be decided by judges as they are skilled and experienced in deciding legal issues. But, litigation need not result. One form of ADR which allows input from judges but avoids the need for litigation is the Rent-A-Judge or Private Judge concept. The concept is to retain the services of a retired judge who is experienced with construction litigation. The private judge will typically conduct the process in a formal manner resembling the litigation process but without the need to await an available judge and courtroom. The private judge will generally render decisions which may be either advisory or determinative of the issue, depending upon the terms of the agreement between the parties.

The advantages of this form of ADR follow. Retired judges practicing this type of ADR are most often skilled in managing complex construction cases and making decisions. The cost of this form of ADR is typically lower than many other forms and certainly a great deal less than litigation, generally being split between the two parties to the dispute. Finally, the speed with which a hearing can be established and held is considerably faster than litigation.

The primary disadvantage cited by most is that the underlying process remains the same regardless of the fact that the trier of fact is a retired judge. That is, if a private judge is used in a trial, in arbitration, or in mediation, the process is still a trial, arbitration or mediation.

Mini-Trial

A Mini-Trial is a voluntary, confidential and non-binding procedure. Generally, they involve summary presentations by attorneys and experts of the best case for each side, followed by questions and rebuttals. Mini-Trial agreements frequently limit these presentations to a half-day or a single day for each side. The Mini-Trial concept requires that top management representatives (with authority to settle) participate in the proceeding. The Mini-Trial is typically presided over by a jointly selected neutral who advises the parties, after the presentations are complete, concerning the apparent strengths and weaknesses of the cases. The neutral then assists the parties in negotiating a settlement at this point, somewhat like a mediator. The concept is to get top level management to sit through and listen carefully to both their own best case as well as that of the other side, and to reach a management decision that is based upon a realistic appraisal of both positions.

The advantages of this system are the relatively low cost (compared to litigation or arbitration) and the fact that each party gets to present their entire case as if in court or in arbitration. Additionally the neutral advises and assists top management of both parties in finding ways to resolve the dispute rather than rendering a decision. Non-binding results, privacy, party participation and control over the process are also considered advantages of this ADR form.

The disadvantages of the Mini-Trial system arise if the top management personnel were personally involved in the issues in dispute thus making them unsuitable as panel members. Other disadvantages arise if the issues in dispute involve legal matters or matters of credibility as management personnel may not be trained to handle such issues. Finally, this system is not cost effective if the matter in dispute is not very costly.

Summary Jury Trial

A Summary Jury Trial is similar to the Mini-Trial in many respects. The concept is that the attorneys for both parties are each given one hour to summarize their case before a “rented” jury of six people. Introduction of evidence is obviously limited due to the time limitation and witnesses and experts are not allowed to participate in the proceeding. The neutral advisor may be either a sitting judge from the local court or may be a Rent-A-Judge. After the case summaries have been presented, the judge provides a short explanation of the law concerning the issues in dispute and the jury retires to the jury room. The jury tries to reach a consensus opinion on the case. Failing that, individual juror views are presented anonymously. Generally, Summary Jury Trial verdicts are advisory and not binding (but may be made so by agreement). The concept is for the parties to gain an understanding of how a potential jury will react to the case prior to going to trial.
The advantages of the system are that the cost is relatively low compared to litigation and the time needed to present the case is minimal. Another significant advantage is that when each of the parties has to summarize their case into a precise one hour presentation, both sides are forced to focus on real issues and forego all legal theatrics.

The single most commonly cited disadvantage is that the jury has to form an opinion based solely on a one hour presentation from each side, a timeframe that is short in the extreme, given the complexity of the typical construction case.

Voluntary Settlement Conference

A Voluntary Settlement Conference is probably the quickest and least expensive means of resolving a case when both sides agree that it is to their advantage to compromise but want to do so in the context of a legal forum rather than direct negotiations. In this form of ADR, both sides meet to attempt to reach a settlement with a judge acting as a neutral negotiation facilitator. The negotiation and the settlement take place under the guidance of the judge and the judge is able to offer suggestions for settlement as well as opinions on various legal issues that may arise during such discussions.

The advantages often cited for this form of ADR include the ability to schedule the Voluntary Settlement Conference with a judge of the parties' choice and the quickness of scheduling and holding the

conference(s). Also cited as an advantage is the fact that discovery need not be complete in order to hold the conference.

There appears to be no identifiable disadvantages to this form of ADR.

Special Master/Settlement Judge

The Special Master form of ADR (sometimes referred to as a Settlement Judge) has been called “ADR's last clear chance before trial”.[3] The concept of a Special Master is for the court to appoint someone with authority and time to control the discovery process (such as deciding objections to deposition questions, document disputes and claims of privilege), to rule on all pretrial matters in lieu of a judge, and to facilitate settlement discussions. Special Masters may be requested by either or both parties or may be imposed unilaterally by a court. Payment is typically split between the disputants. By putting the litigation into a rational framework, the Special Master is often able to help the parties reach a settlement prior to the trial.
The advantage of the Special Master system is that it can save a great deal of cost during the pretrial period with respect to needless discovery battles and help facilitate settlement discussions.

The perceived disadvantages of this system are that a Court may grant too much authority to the Special Master (for example Summary Judgement Motions). Some also fear the possibility of private discussions between the Special Master and the trial judge concerning the details of settlement negotiations or positions asserted by the parties.

Alternatives While in Litigation

Some believe that ADR stops once litigation commences. If one can accept the statement that ADR is any procedure designed to lead to resolution of a dispute at a lower cost and in less time, then there are some forms of ADR which may be practiced within the context of the litigation process. Some forms of ADR practiced during litigation include those listed below.

Court Appointed Experts

If the parties agree that certain issues in dispute require expert testimony and can agree to share the cost of such experts, then court rules in most States allow appointment of the experts by the court. Typically, once agreement on which issues need expert testimony is reached, each side nominates two or three experts to the judge and the judge selects one per issue. The expert then works for the court and is charged with the task of providing neutral, expert witness reports and testimony.

The advantage is, in the first instance, a substantially lower cost for both parties. The other apparent advantage to this system is the fact that time is saved during litigation and the parties avoid conflicting expert reports and testimony which have to be sorted out by judges and juries.

The only apparent disadvantage is that if the wrong expert is selected by the judge, then the expert's reports and testimony may be given far greater weight than they deserve. Thus, the parties and the judge must be very cautious in who they nominate and select.

Judge Pro Tem

A Judge Pro Tem (or temporary judge) is authorized in a number of States. The concept is for the parties to stipulate to the court that they will accept appointment of a temporary judge, who is normally named by the parties in the stipulation. The court then appoints the temporary judge, who must be an attorney and who becomes the trial judge for the case. The temporary judge has all the powers of a sitting judge and runs the case in the same manner and fashion as any other litigation. The temporary judge simply acts in lieu of a permanent judge with all other aspects of litigation remaining the same. Finally, the Judge Pro Tem maintains jurisdiction over the case until a final determination is reached and can hear and determine all

post-trial motions.

The advantage is that a case can be gotten to trial much faster through use of a Judge Pro Tem since the only case on the judge's docket is the case between the parties.

The disadvantage, at least in some States, is that by stipulating to accept a Judge Pro Tem, the parties have given up their rights to a jury trial.

Trial by Reference (Referee)

Trial by reference before a Referee, who need not be a judge or attorney, has long been accepted in both common law and statute. A Referee is a neutral appointed by the court, at the re<%-2>quest of the parties. The court order appointing the Referee sets forth the Referee's authority.<%0> Unless otherwise specified in an agreement between the parties, the Referee will conduct themselves in accordance with formal rules of procedure. There are two commonly accepted forms of trial by reference. Under a General Reference, the Referee submits findings of fact and conclusions of law to the court. The Referee's report is binding on the court and the court issues judgment based upon the report. Under Special Reference the Referee's authority is limited to particular issues as outlined in the order of reference. More significantly, the Referee's report contains findings and recommendations, which are made to the court in an advisory fashion. The court is free to issue its own judgment. In both cases, the cost of the Referee is typically allocated between the parties.

The advantages of such a system are speed of trial, ease of scheduling the hearings, and privacy of the proceedings. Others cite the ability of the parties to select a Referee who has expertise in the types of issues in dispute, the flexibility of procedures, and the ability to appeal decisions or recommendations.

The disadvantage most commonly cited concerning trial by reference is that the parties have to pay their own costs of trial preparation and pay the costs of the Referee. Further, the Referee's decision lacks finality as it can be appealed.

Conclusion

As noted at the outset of this article, the construction industry is in the forefront of finding ways to resolve disputes without resort to litigation. While nineteen forms of ADR (and a number of variations) have been identified in this article, the author is certain that other forms of ADR exist. Further, it has become clear that the forms of ADR are truly only limited by the skill, imagination, and desire to settle disputes on the part of the parties to the dispute.

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