ADR IN CONSTRUCTION DISPUTES: ARBITRATION AND DISPUTE BOARDS ARE NOT THE ONLY ANSWER

Disputes between parties to a construction project are relatively commonplace. Many can be resolved without great difficulty, but this is not always possible. This article considers some of the most commonly used methods of Alternative Dispute Resolution (ADR) in the construction industry in addition to arbitration and Dispute Boards.

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Arbitration and Dispute Boards

ADR originated in the United States in the 1970s in response to dissatisfaction with traditional litigation as a means of dispute resolution. As the volume of litigation increased dramatically, the cost, delay and uncertainty of outcome were motivating factors in the development of alternative methods.

The construction industry was quick to embrace this movement. In the intervening years arbitration and Dispute Boards have become increasingly common on international projects, especially where the FIDIC form of contract is used. Arbitration has often been used in place of litigation and, in many cases, Dispute Boards have provided an effective means for parties to obtain interim decisions on disputes that either pave the way to an ultimate amicable settlement or provide the parties with a suitable status quo pending final resolution by arbitration or litigation.

These two forms of ADR have well-documented strengths, and in many cases the use of arbitration or a Dispute Board will be appropriate. But as is the case with all forms of ADR, neither is a panacea and in some instances may not be suitable for the particular dispute, or parties, in question. For instance, concerns have been expressed over the increasing time and cost commitments required by arbitration, and the expense of maintaining a Dispute Board and funding its periodic visits during times of no disputes is sometimes cited as a drawback. Further, some parties have become dissatisfied by the emphasis on speed at the possible expense of natural justice and procedural fairness.

It is in this light that we set out below some alternative ADR methods that parties may decide to use to resolve their disputes.
"Adjudicative" ADR
ADR processes tend to fall into one of two categories: "adjudicative" and "non-adjudicative". The former involves an independent third-party reaching a decision on the merits of a dispute, whereas the latter focusses on assisting the two parties to negotiate a settlement.

Arbitration and Dispute Boards are examples of "adjudicative" ADR. The other prime example in this category is known as "Med/Arb". This involves a combination of the mediation and arbitration processes. The precise mechanics of this tool vary, but broadly speaking the parties attempt to mediate the dispute (mediation is explained in more detail below) having agreed to resort to arbitration if a settlement cannot be reached. If the matter is not resolved completely during mediation, or if certain issues remain unresolved following or during the mediation process, the mediator is entitled to decide the issues as an arbitrator.

"Non-adjudicative" ADR
"Non-adjudicative" processes are greater in number than the "adjudicative" alternatives and offer parties a degree of flexibility in their use. We set out below some of the most commonly used methods.

- **Mediation** is the facilitation of a negotiated agreement between disputing parties by a neutral third party who has no decision-making power. The mediator takes an active role in assessing the merits of the dispute but does not impose a decision, although he or she may indicate which arguments might be considered particularly strong by a court or arbitral tribunal. The main role of the mediator is to facilitate discussion between the parties and help to identify common ground or areas where one or both parties could compromise. When performed well, and when the parties are willing to reach a settlement, this approach can lead to the negotiation of an agreement on some or all of the issues in dispute. The role of a mediator distinguishes mediation from mere negotiation, which is the most common form of dispute resolution. Supporters of mediation are of the view that it enhances the parties' understanding of the dispute and minimises future disputes by maintaining open communication between the parties.

- **Conciliation** is where a third party, the conciliator, simply structures and leads the negotiations. The conciliator does not deal with or advise upon the substantive issues but rather acts to bring the parties together and to smooth the process of, and facilitate, their discussions.

- **Early Neutral Evaluation** is a non-binding process in which one of or both of the parties retain a credible neutral party to provide an evaluation based on the merits of the case. The expression "early" reflects the preference to use this option at an early stage before major costs are incurred. The opinion of the neutral party is in no way binding; instead, the intention is that it will guide the parties in their approach to the disputed issues. The parties are free to conduct the ongoing negotiations alone thereafter. The term "Non Binding Arbitration" can be applied when this process takes on a more formal hearing approach akin to arbitration, yet any opinion given is still advisory and non-binding on the parties.

- **Mini-Trial** is a process that has greatest use in the resolution of disputes involving complex questions of mixed law and fact. In a mini-trial each party, through lawyers and experts, presents its case in an abbreviated form. This is just as in a regular trial but with the notable difference that the case is presented to the senior management of the parties themselves. After the hearing the respective management attempts to negotiate a resolution. The mini-trial approach allows the decision-makers to see the dispute from the outside and sets the stage for a settlement. A neutral party can potentially be involved in the hearing, either to act in a "facilitative" manner to explore the issues and the needs of the parties or "evaluatively" by providing a view of the issues put forward for consideration. For a mini-trial to be effective the parties must have a relatively good understanding of the issues on both sides. For this reason, prior to commencing a mini-trial, some expedited and limited disclosure of documentation between the parties may be appropriate.
Conclusion

No one form of dispute resolution, whether it be court litigation or ADR, will be a perfect fit for every situation. But used creatively, ADR offers parties the chance to approach disputes in a timely and cost effective manner and, in a best case scenario, in a way which can preserve business relationships. The construction industry has led the way in its adoption of a wide range of ADR processes that are worth exploring as possible alternatives to formal proceedings.

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