

Dispute Resolution Techniques

By David J. Hatem, PC and Jordan S. Rattray

Construction projects are built through the application of ideas, decisions and judgments made by different individuals and stakeholders in the project. Misunderstandings and differences of opinion are daily occurrences, even on successful projects. It is common for some issues that arise during the course of a project to become a dispute. There are as many ways to resolve disputes as there are ways for disputes to arise. Disputes are resolved through techniques ranging from court judgments to negotiations between business partners. In response to the restrictiveness and uncertainty in taking disputes to trial, alternative methods of resolving disputes have become commonplace.

The occurrence of a dispute is often anticipated by parties, and dispute resolution procedures are agreed to and defined in contracts. Other times, a dispute resolution process is developed in response to the circumstances surrounding the dispute and the needs of the parties. This article will describe some of the more typical dispute resolution techniques, and the benefits and limitations to each option. The parties to a dispute should look at the issues and circumstances involved in their dispute when choosing a dispute resolution technique.

Traditional Dispute Resolution

Litigation

Litigation is the traditional way of formally resolving a dispute that parties are unable to resolve on their own. Litigation is the process of resolving a dispute through the court system, which commences when one party, the Plaintiff, files a Complaint against another party, the Defendant. The parties to the litigation are represented by attorneys. Ultimately the court, through either a jury verdict or a judge's decision, will enter a judgment in favor of one party. The litigation process is defined and governed by Rules of Civil Procedure, which can be rigid and inflexible when compared to alternative methods of dispute resolution.

Litigation is typically the final step in the process, initiated only after the parties have been unable to resolve the dispute and need the assistance of a decision maker, the judge



or jury. Through the process of litigation the parties identify the issues in dispute, exchange information and documents, gather testimony from people with knowledge, and retain expert witnesses to render opinions. Ultimately, after what might be several years, the parties will present their factual and legal arguments to a judge or jury which will render a decision, thereby resolving the dispute. In its simplest form, a litigation case will involve one Plaintiff and one Defendant; however, it is common, especially in construction related cases, for cases to involve multiple parties, cross-claims, counter-claims, and multiple claims for damages.

Litigation is very expensive, and requires a lot of time from both attorneys and from the project personnel and representative principals of the firm. The costs associated with the exchanging of information, especially in the era of emails and electronic documents, and preparing for trial can be daunting, especially when there are multiple parties. Once a lawsuit is filed, it does not mean that the parties must give up trying to resolve the dispute on their own. The parties are permitted, and are usually strongly encouraged by the Court, to try to resolve the dispute on their own using Alternative Dispute Resolution techniques, any time before a judgment is entered by the Court. Once a judgment has been entered, either party has the option of appealing the decision to a higher court. It often takes years for a case to be resolved once litigation is initiated.

Alternative Dispute Resolution

In response to the expense, formality and risk of an adverse finding inherent in litigation cases, Alternative Dispute Resolution

(ADR) methods have been developed. The most common forms of ADR are Arbitration or Mediation. ADR also covers informal negotiation or other methods of resolving a dispute other than through a judgment entered by a court. All ADR methods are voluntary and must be agreed to by the parties. Contracts often set forth the method(s) of dispute resolution that the parties do or may agree to should a dispute arise. Contractual dispute resolution processes can be straight forward or can set forth numerous steps the parties must take before the final resolution method (typically litigation or arbitration) can be commenced.

Arbitration

Arbitration involves the resolution of a dispute through the issuance of an award by a single arbitrator or an arbitration panel. Arbitration is similar to litigation in that all parties will present their factual and legal arguments to a decision maker, who will issue an award, which is intended to be a final resolution of the dispute. There are however some significant, and important, differences between litigation and arbitration proceedings.

The most significant shortcoming of arbitration is that, with the exception of a few very limited circumstances, there is no right to appeal an award once issued. This removes an important check and balance which is inherent in the litigation process, the right to appeal a bad decision. Any party should consider the lack of appeal before agreeing to arbitrate a dispute. Other differences are that the parties must pay for the time of the arbitrator(s), and discovery is typically not allowed, or limited by agreement. Resolution of the dispute is often efficient

and a decision is typically issued more quickly than in litigation. Additionally, the proceedings are confidential and are not a matter of public record. Another important difference is that an arbitrator may also consider issues of equity or fairness, and are not limited by legal precedent like a court is. Depending on your position, this can either be helpful or harmful. The parties have the right to agree to any of the factors of an arbitration proceeding, such as whether the award will be binding or non-binding.

Mediation

Mediation is a non-binding, strictly voluntary, entirely confidential process which uses the assistance of a third party neutral, a mediator, to achieve a settlement of the dispute. Mediation is flexible process that can be tailored to the needs of the parties and the dispute. Mediation involves the mutual agreement of all parties to enter into the mediation and the mutual selection of the mediator. The mediator has no authority to bind the parties and merely facilitates resolution of disputes through the exchange of information and settlement negotiations. The parties to a mediation are bound by confidentiality, and cannot use any of the information that is shared through the mediation process against the other party at any time (i.e. at an arbitration hearing or trial).

Through mediation, the parties will educate the mediator of their position. Often, but not always, the parties will exchange mediation statements or presentations with each other. The mediator's communications with each side cannot be shared with the other side. While most mediations involve a one- or two-day session which will or will not result in a settlement, other mediation processes can involve numerous informational exchange sessions followed by negotiation sessions

Less Formal Processes

There are also less formal methods of resolving disputes which do not involve the use of third-parties. Often contracts will require, as a first step to resolving a dispute, less formal negotiation or partnering sessions as a way to talk through and resolve issues before a dispute arises.

Partnering

Partnering is sometimes required by contract as a means of identifying and discussing contentious issues with the

ultimate goal of moving the project forward. Participants in a partnering session will be the project personnel and principals. The parties will identify issues and discuss them as they arise. If resolution of issues cannot be achieved at the partnering session, the parties often discuss ways to work around the dispute until it is resolved. While a partnering session is a method of resolving issues, it is also intended to encourage communication and maintain good working relationships.

Negotiation

Negotiation of a dispute, whether it involves a casual conversation between long time business partners or structured settlement discussions, can be a cost effective way to resolving any dispute. At the beginning of a dispute, parties to the dispute may sit down and try and negotiate a resolution of some or all of the issues in dispute. If not entirely successful, a negotiation session may result in the narrowing of issues in dispute. Successful negotiations are dependant on the parties understanding of the issues in dispute and other factors which influence the ability to resolve the dispute together.

Conclusion

There are numerous techniques for resolving a dispute. Some techniques are formal, while others are informal and are tailored to the needs of the dispute. The parties to a dispute can agree to any method of resolution and often contracts spell out a resolution process. When agreeing to a dispute resolution process, whether it is in the contract negotiation stage or after the dispute has arisen, each party must weigh the benefits and limitations of each available dispute resolution technique. All alternative methods of dispute resolution are voluntary, and must be agreed to by all parties. Therefore, they are often more successful methods of resolving a dispute in a timely and cost effective manner.

David J. Hatem, PC, is the founding Partner of the multi-practice law firm Donovan Hatem LLP. He leads the firm's Professional Practice Group. Mr. Hatem can be reached via email at dhatem@donovanhatem.com.

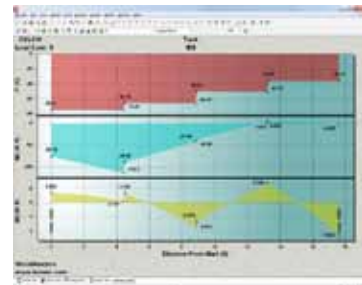
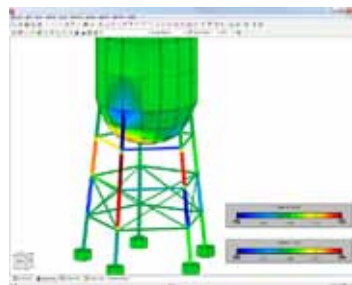
Jordan S. Rattray is an associate in the Professional Practices Group at Donovan Hatem LLP. Ms. Rattray can be reached via email at jrattray@donovanhatem.com.

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