Chapter VII
DISPUTE RESOLUTION MECHANISMS

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Introduction

This article will cover various recognized methods to resolve disputes in the construction industry. Those recognized mechanisms are usually thought of as Facilitative Mediation, Arbitration, Case Evaluation, Dispute Review Boards (DRB) and the traditional court process. Each of the methods will be described using the following topics: Definition, Definitive Attributes, How to Utilize, and Precautionary Provisions.

This article excludes the concept of "Partnering" which by definition is dispute avoidance and which includes, as part of its methodology, an alternative dispute mechanism.

I. FACILITATIVE MEDIATION

Definition
Facilitative Mediation is defined as a process in which a neutral third party facilitates communication between parties, assists in identifying issues, and helps explore solutions to promote a mutually acceptable settlement. A mediator has no authorative decision-making power."[1] The underlying principle behind facilitative mediation is that both sides will come to the table with a willingness to compromise and with reasonable, logical, meritorious arguments.

Although facilitative mediation is a voluntary process, a court can order facilitative mediation if the court has adopted a local alternative dispute resolution plan. As of May 2003, 42 Michigan Courts have adopted a local ADR plan and 7 more are in the process.[2] The latest figures show that settlement occurs in about three-quarters of all cases that go to mediation.[3] Because facilitative mediation is a relatively new process, it remains under-utilized by the construction industry, despite its many benefits.[4]

In facilitative mediation, there is one mediator. He or she remains neutral, but may take a position to point out the strengths and weaknesses in an argument. The attorney and the contractor are expected to be present at the mediation and participate. The goal is to reach settlement. If the parties reach a mutual agreement, it is binding. There are no sanctions for failing to reach an agreement. Mediation sessions can take place at any point in the litigation, but mediation is most helpful at the early stages of the discovery process. Early mediation may save the parties the extra costs involved in a lengthy discovery process. Generally, the mediator is not time-restricted and is committed to spending as much time as possible to resolve the dispute.[5]

Definitive Attributes
Like arbitration, facilitative mediation can only take place when there is an agreement to mediate a dispute. Unique to facilitative mediation is its ability to be utilized while the arbitration process is ongoing or while the litigation process is proceeding. Facilitative Mediation can also be utilized afterward for settlement or enforcing an award or decision. The concept is merely that the parties, by agreement, are seeking the assistance of a facilitator (third party neutral) to help them resolve their problems. A corollary to this self-directed resolution, is that the parties are usually happier with their own resolution than one crafted by a third party.

Also unique to facilitative mediation is the ability of the parties to create a settlement that is self-executing and that will not require enforceability. However, should the parties fail to include collection procedures or security for the payment of funds in their settlement, then, like arbitration, the settlement agreement may require subsequent litigation to enforce collection or to obtain the enforcement of certain provisions of the settlement agreement.

The mediation procedure is informal. Its informality usually means that the process can be started in the early stage of a dispute. This allows for an early resolution and permits cost savings. However, the savings may not be realized if lengthy mediation is encountered without a settlement.

There is no taking of testimony, receiving of evidence or cross-examination in a facilitative mediation process. Thus, most people agree that the facilitative mediation is unlikely to polarize individuals and thus permit a continuing business relationship.

Benefits of Facilitative Mediation

1. There is a timely resolution.
2. The sessions are private.
3. Everything exchanged is kept confidential. A settlement agreement, if reached, is the only record of the proceedings, and if there is an Agreement to Mediate signed by parties, it is also kept confidential.
4. There is active participation by the attorney and the contractor in resolution of the dispute. This allows the parties to be more comfortable with the ultimate agreement and makes the settlement more likely to be carried out without having additional litigation.
5. This process helps to preserve the relationships between the parties.
6. The process improves case management/resolution.
7. The process improves the party's satisfaction with the end result.
8. Cases move more quickly through mediation than in other dispute resolution procedures.[6]
9. Attorneys and clients are allowed to bring to mediation issues they could not bring in court.
10. The mediator is completely neutral, although may choose to take a position on some issues and provide helpful feedback.
11. The attorney and contractor do not have to wait for the court's docket to clear.[7]
12. The cost is almost always much less than going to trial.
13. There is limited court involvement.

How to Utilize

<u>The Process</u>

Step 1: Choosing a mediator

Once the parties have decided that mediation may be beneficial, choosing a mediator is the next logical step. Attorneys and contractors are advised against choosing a mediator without performing the proper research because choosing a mediator is an extremely important step in the facilitative mediation process.

The contractor should search for a mediator who has extensive experience in the mediation process. The contractor should also choose a mediator who can work with the different types of personalities that will likely be at the mediation table. Although the mediator does not have to be experienced in the law that is at issue in the case, some attorneys and contractors feel more comfortable with someone who is familiar with their issues.[8] Specifically, in the construction industry, it is essential to have a mediator familiar with construction and its terms and conditions. No matter how competent and experienced, a mediator not familiar with construction law may not have enough practical experience to make a major contribution to the parties' negotiations.[9]

Before selecting a mediator:

1.) Interview the candidate by asking:
   - What mediation training have you had?
   - Are you a member of any professional mediation organizations?
   - How long have you been serving as a mediator?
   - Do you conduct mediation in a facilitative or an evaluative manner?

- What kind of experience do you have dealing with construction law and construction law cases?
- Can you please provide two or three references of attorneys who have used your mediation services?

  (Be sure to follow up and call these attorneys)

2.) Attorneys should ask their colleagues if they are familiar with the mediator.
  - Do not ask merely if this mediator settled the attorney's case.
  - Ask specific questions about the mediator's skill level, what tactics she or he used to facilitate discussion, and his or her creativity for advancing discussion.[10]

3.) After researching potential mediators, both sides must then agree to a mediator.

Step 2: Preparation

Once a mediator is chosen and agreed upon by the parties, the parties should contact the mediator to see if a mediation brief is required. If it is required, the attorney should ask the required length of the brief and when the brief should be submitted to the mediator. Some mediators also require a retainer fee and all mediators charge an hourly fee, which both sides share equally.[11]

Second, the attorney and contractor should develop a progressive strategy prior to going into mediation. Remember that the goal is to negotiate a settlement that is acceptable to both parties. The attorney and contractor should be aware of the strong points and weak points of their side of the case as well as the opposing side's strengths and weaknesses before going to mediation. The parties to a facilitative mediation must also be prepared with documents and summaries in order to have the best opportunity to prevail in its requests. Attorneys are recommended in mediation to assist in the preparation, presentation, and crafting of a solution that is all encompassing. The role of the attorney is not that of a litigator.

Prior to going to the mediation, the attorney and the contractor should keep an open mind and explore all possible settlement options. Both attorney and contractor should consider future costs, interests of the parties, and similar case law precedents in the case when deciding on a strategy for mediation.[12]

Attendance by the contractor is usually voluntary (although highly recommended) unless statute, contract provision, or the mediator states otherwise. Usually, an attorney from each side and one mediator are in attendance, although contractors can represent themselves in facilitative mediation. Attendance by the party who has authority to settle is crucial.[13]

In addition, if the contractor attends the mediation, he or she is usually encouraged to speak during the mediation; therefore, the attorney and the contractor should discuss the content and tone of the mediation so that both are prepared and unified on the day of mediation.

The contractor and attorney should allocate at least one business day to the mediation. Being available only by phone may or may not be a sufficient alternative.[14]

Step 3: The Mediation

The mediation is held at a neutral location. Once at the mediation:

1.) **<u>Methods of Facilitative Mediation</u>**

The parties involved decide the conduct of a mediation session. The mediator and the parties will decide on the best method for mediation based on the
type of case and the parties.

A. The Shuttle-Diplomacy Method

One method used is shuttle diplomacy. One of the significant attributes of this method is that it does not require each side to write down a checklist of its goals for the outcome of the case. The mediator is the only one who does this. Therefore, the parties never have a checklist where they are forced to give up one of their positions. This method is based on a negotiation model. If this method is chosen, each party sits in a separate room, and the mediator works closely with each party, moving back and forth to bring the parties closer to resolving the issues in the case. The mediator is charged with maintaining order and focus during these sessions.[15]

If the mediator and the parties elect to use this approach, the attorney and contractor should be prepared for down time while the mediator is meeting with the other side. The attorney and contractor should also be aware that they should inform the mediator if they want something kept confidential from the other side.

B. The Open Discussion

This mediation approach occurs when both sides are in one room with the mediator and both sides are actively engaged with each other. Both sides participate in an open discussion about the case, its worth, and the strengths and weaknesses of each other's argument. The mediator facilitates discussion between the two sides by asking questions and moving the issues forward. The most significant attribute of the open discussion method is that this method permits each side to experience first-hand the strengths of the other party's position and how it stands up under the scrutiny of the neutral mediator.

C. A Combination Approach

This approach is most commonly used, although it depends on the mediator and the nature of the case. Here, the mediator may meet with the parties together to start and then have the parties break off individually into caucuses to discuss the case with the mediator. This process may occur a number of times until settlement is reached or until an impasse occurs.

2.) At the beginning of the session, the mediator will give an opening statement describing his training and the names of the parties and their counsel. The mediator then may choose to discuss fees, and signing of the Agreement to Mediate. The mediator will set the rules and explain them to the parties regarding order of presentation, decorum, discussion of issues, use of caucuses, and the confidentiality of the proceedings. He or she may also reiterate that parties should treat each other with common courtesy, each party should be allowed to complete his or her statement without interruption, and each party should make a good faith effort to try and settle.

3.) Then, each party will give an account of the facts and issues on their respective sides of the dispute. The contractor or attorney should check with the mediator ahead of time to see if an opening statement by the parties will be permitted.[16]

4.) At the close of the mediation, if the parties are able to reach a settlement, the terms must be written by the parties and signed.[17] The attorney should bring along any settlement language that he or she wants to use.

5.) If the mediation is court ordered, after the conclusion of the mediation, the mediator is required to report to the court whether a settlement is reached within seven days of the close of mediation.

6.) If a settlement is reached, the parties must then submit the appropriate documents to the court to conclude the case within 21 days of the close of the mediation.[18]

Precautionary Provisions

Mediation is, by its very nature, informal, inexpensive, and efficient. It is ideally suited where a settlement can be self-executing. For example, a resolution that directs a party to receive a security deposit or funds from

escrow or an immediate payment of funds is ideal. However, should a settlement require enforcement, the enforcement can require subsequent arbitration or litigation to conclude the case.
In addition, even though case evaluation is generally more cost effective than other ADR methods, the savings may not be realized if a lengthy mediation is encountered without a settlement.

II. ARBITRATION

Definition
Arbitration is the insertion of a neutral party, by agreement of the two disputing parties, to decide their dispute in an efficient, private manner. Although it is somewhat informal, it involves an actual hearing where testimony and documents are presented, and cross-examination is permitted. Arbitration does not come about unless it is provided by written agreement.[1]

In the event American Arbitration Association (AAA) rules are not selected, the parties, in their written agreement, should specify the type of arbitration and procedures, which will be used. The parties can specifically design the arbitration terms such as: how the arbitrators are to be selected, on what basis the decisions of arbitration are to be made, and the number of arbitrators.

The decision process can also be specified. For instance, in addition to instructing the arbitrators to choose the prevailing party and the amount of damages, the arbitrators can be given the responsibility to award hearing costs, attorney fees and other arbitration costs. Similarly, the parties may instruct the arbitrators on the type of award they desire. For example, in baseball arbitration, the arbitrator must choose between the last offer of each party.

Both state and federal statutes provide that written contracts specifying arbitration to settle disputes will be enforced.[2] Similarly, a court's jurisdiction may be invoked to appoint one or more arbitrators where the parties cannot agree upon the selection of arbitrators.

Definitive Attributes

The arbitration process, in the context of construction disputes, is private.[3] It does not generally rely upon prior arbitration cases, nor is its decision reported. It is simply between two parties for their dispute only; it cannot be utilized by anyone else. Thus, one party's results, good or bad, are not known by other arbitrators or anyone else.

Another significant attribute of most arbitrations is that the decision is only a result. No explanation of the reasons for the decision is provided, unless specifically required by the parties. One may be successful and not know why, leaving nothing instructive for resolving future decisions. A review of the arbitrator's decision is virtually impossible. Since there are generally no reasons attached to the decision, the arbitrator's reasoning is not challengeable by a reviewing body. Thus, if there is an error made about the admissibility of the evidence or an error of law, it is generally not known or appealable. On the other hand, an attractive feature of arbitration is the finality of the decision.

Additionally, the Federal Court in the Western District of Michigan, unlike state court, may order all cases that involve less than $100,000 to arbitration.[4] For the purposes of arbitration, discovery is limited to one hundred twenty (120) days from and after the last responsive pleading. The arbitration hearing shall be scheduled for a date no earlier than one hundred forty (140) days and no later than one hundred eighty (180) days after the filing of the last responsive pleading. Resolution presented by the arbitrator may be rejected and a trial may be requested. However, if the party demanding the trial does not obtain a result substantially more favorable to it than the arbitration award, and the court determines that the party demanding the trial was acting in bad faith, the party demanding the trial may have attorney fees imposed.

The Federal Court also has the power to order a summary jury trial or a mini-hearing.[5] A summary jury trial is an abbreviated procedure whereby attorneys summarize their cases before a six-person jury. The verdict is advisory only unless stipulated to be binding. Similarly, mini-hearings are proceedings in which attorneys present their positions to the party's senior officials or to impartial experts in an attempt to resolve the dispute. The parties are left to fashion a procedure, which they feel is appropriate to resolve the case. The court may also prescribe certain procedures and time limitations.

Procedures prior to a hearing in arbitration are obviously much different than in court. There is minimal discovery of the other party's position. There are typically no written questions or depositions. The arbitration rules merely provide for exchanging documents. On the other hand, limited discovery shortens the time between the notice of arbitration and when the hearing commences. Any expansion of discovery obviously defeats the speed, efficiency and cost savings attributes of arbitration.

An arbitration award is not automatically enforceable. The award does not mean the loser will pay; it may require the prevailing party to avail itself of a court of competent jurisdiction to enforce the award. In construction lien cases where the contractor desires to foreclose its lien and the construction contract requires arbitration, the contractor is compelled to utilize both arbitration and circuit court. The arbitration award only deals with an award of money damages. Thus, there are some instances where arbitration is only a partial remedy.

Unlike the judicial process, the parties often have more input into the selection of the arbitrators. This may be a distinguishing factor in a disagreement concerning technical construction issues versus the application of law or the interpretation of statutes. The arbitrator may be selected by contractual agreement or through the AAA. The latter permits the opportunity to strike those who may have bias or that for some reason may not be to the liking of one or another party. In addition, the new amendments to the Arbitration Rules and Mediation Procedures, published by the AAA, now include a specific provision emphasizing the importance of impartiality and independence of arbirtrators.[6] The arbitrators are usually trained by the AAA, have training in the hearing process, and have experience in the industry in which they are asked to serve.

How to Utilize

If arbitration is deemed the desired alternative dispute mechanism, the process begins by drafting a contract with the terms, scope, and administrative rules to invoke arbitration. In order for the arbitration clause to be enforceable, irrevocable and binding, it must contain specific language that “an award rendered by the arbitrator may be entered in any court having jurisdiction of the same.” This renders the arbitration process final, binding, and enforceable in court. If the language mentioned above does not appear in the written contract, the arbitration may be considered optional and revocable at any time throughout the arbitration hearings.[7]

Secondly, contract terminology usually specifies when a party must demand arbitration. For example, it must be filed "within a reasonable time," or within a specified number of days after the issue becomes a dispute.[8]

The third step is to file a demand for arbitration. Although forms are not necessary, the AAA supplies forms that may be utilized in commencing a matter for arbitration. (See Appendix B). It is a prerequisite of the AAA that the party requesting arbitration attach a copy of the contractual clause that requires arbitration, or a quote from the clause which authorizes the dispute to go to arbitration. The demand for arbitration must be served on the respondent via certified mail (return receipt requested is recommended) and three copies should be sent to the regional office of the AAA.[9] All of these forms and on-line filing is available through the AAA website.[10] The following outlines the procedures generally applicable to arbitration under the AAA rules.

There is an initial, non-refundable set-up fee of $325 per party before beginning arbitration with the AAA. The parties are responsible for filing fees and administrative fees, which depend on the amount in controversy. The party that is producing the witness shall pay the expenses for that witness. The arbitrator also must be compensated, which can be a substantial cost. This is in contrast to the court system where there is a nominal, flat fee regardless of the size of the case, and there is no direct charge for the judge. [11]

The claim for arbitration shall contain a statement that the demanding party desires to arbitrate and a statement that sets forth the nature of the dispute and the amount involved. An answer is not required by the respondent. Depending upon the factual situation, the respondent may desire to file an answer to put its position on paper for the benefit of the arbitrators. The respondent also has the opportunity to file a counterclaim, which shall comport to the same rules as the claimant. The counter-claimant must also pay a fee.

Either party may make a new claim or a different claim or different counterclaim in writing up to the point in time that the arbitrator is appointed. After the arbitrator is appointed, any amendments will require the arbitrator's consent.

For claims of $75,000 and under, the parties may agree to use expedited procedures. Generally, expedited procedures allow for notice by telephone and the appointment of a single arbitrator by the AAA without the submission of lists of proposed arbitrators. The hearing will be held on a minimum of seven days notice by phone and shall be completed within one day. The award shall be rendered within fourteen days from the date of closing of the hearing.

It is important to note that a party may request a particular locale. If not objected to within ten days after notice of the same, the request shall be honored. In the event of an objection, the AAA determines the locale.

The appointment of an arbitrator shall be determined as follows: each party reviews simultaneously a list of arbitrators submitted by the AAA; each party will have ten days to strike the names of those arbitrators for which there is an objection. The AAA selects the arbitrator(s) from the remaining names, or if there are no remaining names, the AAA selects the arbitrator(s) from a new list. Alternatively, the AAA will honor an agreement of the parties in selecting an arbitrator by name or method. Generally one arbitrator is used, for cases under $100,000 unless the AAA, in its discretion, or the parties themselves, direct that a greater number of arbitrators be used. For cases over $100,000, AAA generally ensures that three (3) arbitrators are used.

Private selection of an arbitrator by each party where those arbitrators select a third arbitrator is not recommended. If a party selects an arbitrator, that arbitrator is likely to accept or advance the argument of the party to select them. On the other hand, arbitrators who are selected as a group from the AAA are usually viewed as more impartial decision-makers.

The AAA rules do not require a stenographic record. If a party desires such a record, it shall make arrangements directly with a stenographer and notify the other parties of the arrangements in advance of the hearing.

The arbitrators shall have the discretion to require the disqualification of witnesses other than a party to the hearings. The arbitrators shall interpret the rules. The arbitrators shall maintain the privacy of the hearings unless law provides otherwise.

Even though an arbitration matter is somewhat informal, very seldom can a party rely upon a general discussion of its position. Any party to an arbitration must be prepared and organized, and should engage an attorney. They must prepare a hearing book to lead the arbitrator through the proceedings and have their case organized in a concise and easily understood manner. Evidence may be received by affidavit, witness, or documents. All parties shall be afforded an opportunity to examine documents or other evidence. Each party (attorney) should be prepared to cross-examine the other party's witnesses in an efficient manner. There is nothing in the rules to prevent the use of experts to enlighten the arbitrator about a particular event or provide an opinion.[12]

Once notified of arbitration, a party must attend and proceed. Even though the proceedings are designed to be more informal than in a courtroom, a party's absence will not render the arbitration decision inapplicable or unenforceable.

The award shall be made within thirty days after the close of the hearings. It shall be in writing, signed by a majority of the arbitrators.

Precautionary Provisions

Arbitration is not designed to hear disputes among parties who do not voluntarily agree to arbitration. Thus, an owner and contractor cannot force an architect to be a part of an arbitration decision process. Even though a dispute may involve an owner, engineering firm and contractor, they are generally subject to separate agreements (i.e., the owner and contractor, and the owner and architect/engineer). Thus there is a distinct likelihood that there would be separate arbitration proceedings between the owner and contractor, and the owner and engineer. As a result, utilizing arbitration may provide partial results and/or different results among parties to a single dispute.

Generally, interest accrues in arbitration matters at a lower rate than interest in circuit court. There is some case law that pre-award interest will accrue only at five percent, with post-award interest accruing at the same rate as a circuit court judgment.

It is most important to note that the perceived advantages of arbitration (cost effectiveness, short total duration, speed of hearings, and quick and final decision) are substantially reduced when the originally designed process is not followed. For instance, if discovery is permitted (other than as an exchange of documents and a list of witnesses), hearing preparation costs begin to mount. When more than a few days of hearing are required, scheduling those hearings with two parties and three arbitrators becomes difficult. It often results in hearings only two or three days a month over a period of six months to a year. Hearing dates separated by months often necessitate transcription to allow adequate preparation, which presents additional cost. As a result, the advantages designed by arbitration may not be realized.

Finally, once in arbitration the arbitrators have the jurisdiction and power to make legal determinations, possibly without the benefit of having legal experience.

III. CASE EVALUATION

Definition

Case Evaluation, formerly called Mediation, "is a process through which a panel of attorneys not involved in the dispute hear issues specified by the parties, and then render a monetary evaluation of the case . . Penalties

may attach for not accepting the outcome of this process; failure to receive a more favorable trial verdict than the evaluation results in penalties to the party rejecting the evaluation."[13] In order for case evaluation to be an option, the court of the jurisdiction in which the case is to be heard must have adopted an Alternative Dispute Resolution Plan.

Definitive Attributes

After the litigation process has begun, cases involving monetary damages or division of property may take advantage of case evaluation.[14] Case evaluation is not designed to decide equitable issues of injunctions, specific performance or ownership of property, etc. Court case evaluation is a process to evaluate the case for purposes of settlement and/or trial worth by three independent, experienced lawyers.

How to Utilize

There are three ways that a case can go to case evaluation: 1.) On written stipulation of the parties, 2.) On written motion by a party, 3.) On the Judge's own initiative. Case evaluation is set after all interrogatories, depositions and requests for production of documents are completed. The ADR clerk is required to set the date, time, and place of case evaluation and notify the parties at least 42 days before the date of the hearing. Each party must pay a $75 fee for case evaluation, which is a flat fee that will not increase regardless of counterclaims, cross-claims, or third-party claims.

Fourteen days before the hearing, each party's attorney must submit three copies of documents pertaining to the issues to be evaluated and a brief summary of the party's factual and legal position. The rules of evidence do not apply to case evaluation summaries. At the evaluation, each party presents its case in 15 minutes to three case evaluators. No testimony is presented and parties are discouraged from attending case evaluation. Any evidence or documents presented at the case evaluation are not admissible at any court proceeding.

The case evaluators usually issue an award the day of the case evaluation hearing and no later than 14 days following the hearing date. If both parties accept the panel's evaluation, the judgment will be entered for the amount of the evaluation and the case will be resolved. If one or both of the parties rejects the evaluation, the case will proceed to trial. However, sanctions may be issued if a party's claim or defense was determined to be frivolous. In addition, there may be additional sanctions for a party that rejects the case evaluator's award and, subsequently, a verdict is rendered which is less favorable than the evaluation. Overall, case evaluation provides an independent evaluation of the case and encourages settlement, which, if accepted by both parties, avoids trial costs.

The case evaluation panel can consist of attorneys and/or judges. The case evaluators must be in good standing with the State Bar, have practiced for at least five years, and have experience in civil matters, including at least three years experience in the practice area that he or she evaluates. Unlike facilitative mediation, there is no formal training procedure that a case evaluator must go through. An independent selection committee chooses the potential case evaluators and adds them to an approved list.

Precautionary Provisions

A growing concern with case evaluation relates to the quality of the evaluators. "Case evaluator affiliation (an attorney serving as a plaintiff representative one week, as a neutral the next week), qualification (how well can the attorneys on the panel actually evaluate the case), and lack of training and evaluation are all perennial concerns."[15]

IV. DISPUTE REVIEW BOARDS

Definition

The Dispute Review Board (DRB) mechanism is a non-binding method to resolve disputes through the use of impartial, specially selected and recognized experts who are engaged as construction commences and are provided with a continuous flow of construction documents. The three party review board is hired by the owner and the contractor for a particular project to hear disputes, oftentimes at the construction site. The panel must not be delayed by lack of familiarity with the project and must issue a written report stating the reasons for their decision.

DRBs have often been termed "Standing Neutrals" because one party accepted by both sides is the neutral decision maker who begins with the commencement of the construction process and remains on-call until the project is complete.

Another variation of DRBs concerns the scope of their decision. Oftentimes, DRBs make recommendations as guidelines, but leave the actual settlement and dollar amounts to the parties for specific calculation and resolution. Although the decision is non-binding, it is usually admissible as evidence in later court proceedings if needed.

Similar to mediation or arbitration, utilization of DRBs is by agreement. The terms of that agreement dictate the nature, scope, and process. In public works contexts the public owner may specify utilization of a DRB process as part of the construction contract and require that the successful contractor fulfill certain terms and conditions.

Definitive Attributes

One of the most distinguishing features of the DRB process is the familiarity that the review board members have with the project. Their familiarity begins with receipt of the contract, plans, specifications, pre-construction meeting minutes, and continues with progress meeting minutes, and site visits. However, neither the contractor nor owner is permitted to separately contact any DRB member. The familiarity attribute significantly reduces the need for background testimony or the admission of basic contract documents and thus reduces the hearing time significantly.

Perhaps equally significant is the speed in which a DRB can be invoked. Since DRB members are compensated, on-call experts, they can be available on short notice to hear and resolve disputes. Since they are designated for a particular project, a number of other variables, such as scheduling conflicts are reduced. DRBs may also permit the elimination of the administrative step of requiring a preliminary decision by the architect or engineer prior to invoking the DRB. Oftentimes it is considered wise to avoid an architect's or an engineer's ruling, as it will not be viewed as impartial because the ruling of the architect or engineer may involve their own actions or decisions.

Just as the process can be invoked in a timely fashion, the decision will usually be forthcoming in a matter of days, rather than in a matter of weeks. An early decision has the effect of allowing the parties to concentrate on the completion of construction and is instructive to them when additional disagreements arise.

Since the decision is in writing and must contain the rationale for the decision, it provides instruction to each party as guidance for future matters of potential dispute. Specifically, contractors are less likely to make claims for matters that they know are likely to be viewed dimly by the DRB to avoid loss of credibility for future meritorious claims. Likewise, owners will be less likely to deny claims for fear of being considered

arbitrary in their position and thus taint their position on future matters for which they have a legitimate position.

The overall nature of DRB hearings is designed to be business-like, as contrasted to arbitration or court hearings, which are more formal. Although the parties are requested and encouraged to present written documentation with the aid of an informal oral presentation, they are encouraged to do so without the aid of attorneys. The process is designed to be less judicial and more business-like, avoiding the adversarial premise upon which the judicial system operates. Oftentimes the examining, questioning, and probing is done by the review board members as opposed to either the owner or contractor. There is likely to be less cross-examination and more presentation and explanation in an attempt to convince the DRB members to reach a particular conclusion.

The fact that the decision with its rationale can be entered as evidence in court carries great weight even though the decision itself is non-binding. It is not difficult to understand that the courts are not likely to second guess or make a finding against an impartial, three member panel that has a great deal of experience and that is chosen by the contractor and owner.

DRB members are usually engaged on a fee for services basis at an hourly rate. Obviously, the amount of dollars expended for three panel members to review the contract documents and visit the site prior to any dispute having occurred can be somewhat costly in itself. The cost involved for hearing a dispute is additional. However, it is believed that the DRB method is cost effective when viewed in the overall context of the cost of construction, in comparison to arbitration, case evaluation or litigation. It is also thought to be cost effective when viewed by the amount of disputes it resolves by its mere presence. Finally, it is viewed as cost effective as it reduces the necessity of experts.

It has only been since approximately 1989 that articles and information have been published regarding reported DRB experiences.[16] Robert J. Smith, a recognized DRB expert, summarized various statistics. Dispute Review Boards have been used for over a quarter century on more than 800 construction projects (mainly public infrastructure construction) with a 99 per cent success rate.[17]

Mr. Smith reports that the total cost of using a DRB over the life of contract has ranged from .4% to .51% of the total construction cost. While this is less than one percent, the fees typically have ranged from $50,000 to $80,000 for all members for a project. The cost of a hearing is usually $1000 to $2000 per board member per day plus expenses. It is, however, thought that this cost and expense is more than offset by lower bid prices which no longer need to include the cost of arbitration or litigation. An historical attribute of DRBs is that they are effective in avoiding litigation, which is the very essence of an alternative dispute resolution process.

At first the DRBs were utilized primarily on underground projects. At the present time, they are used on other projects as well, including public sports arenas, paper mills, private housing developments, subway stations, highways, freeway interchanges, bridges and dams. Colorado, Hawaii, Washington, California, Maine, Maryland and Arizona are states that are believed to be utilizing some type of DRB in their public contracting. The review board process is being utilized currently on the Boston Central Artery Tunnel project.

How to Utilize

Similar to any other alternative dispute resolution mechanism, utilization of the DRB requires an agreement concerning the utilization, implementation, procedures, and scope of authority. In private work, the above

terms are negotiated to consensus. In public projects, the public owner establishes the review board by the instructions to bidders and provisions set forth in the contract upon which the bidders are providing their bid. Public contract bidding instructions to contractors usually include a budget for the process, costs expected to be paid by the contractor, scope of authority of the DRB, and methodology for selection of the DRB members.

The DRB member selection is usually accomplished by the owner and contractor each nominating three prospective members with the owner selecting one of the contractor's three choices, and vice versa. The remaining two from each side are alternates in case the selected member cannot fulfill the terms of the agreement. The two selected members then select a third member to act as the "neutral" or chairperson of the board. Oftentimes, the neutrals are attorneys. The neutrals are selected by the members and by both parties, with both parties' approval, subject to the same requirements of expertise, impartiality and the absence of any conflict of interest.

Most critical to the success of a DRB is the qualification and selection of the DRB members. Above all, the members must be impartial and have the appearance of being impartial without any conflict of interest. Specifically, a member that was formerly an employee of either the contractor or owner is usually disqualified. Secondly, the board members must have acknowledged technical expertise in the type of work being undertaken, or have recognized expertise and knowledge of construction law and dispute resolution techniques or case evaluation. Critical to success is that the owner and contractor have confidence that the members understand the project, have experience, and will render and have the ability to render impartial and equitable decisions.

Depending upon the nature of the construction project, the DRB may make more than one visit to the job site. The goal is to permit them to remain familiar with the project, its participants, and the uniqueness of the progress of the work. First hand accounts are invaluable for an effective DRB.

When either the owner or contractor believe that their bilateral negotiations will not result in the resolution of a dispute, they may independently, or together, implement the DRB hearing process. Procedurally, each side should submit a written representation of their view of the dispute with documentation and support of their position. Each party's position should be clearly and adequately stated, and should indicate which individuals have knowledge of the events.

At the hearing, each makes a presentation concerning their position by having the actual key player(s) assist in the presentation. The opposing side should likewise present its rebuttal position with its key player(s).

At the close of the proceedings, the board should make its written recommendations as soon as practical. Two weeks is the suggested and desirable time for the decision. The DRB should state the reasons upon which it bases its decision. The board members are not to act as consultants nor give advice on the construction work. The decision, depending upon the nature of the dispute, can be complete and include a specific dollar amount. Alternatively, the DRB's decision may be a mere recommendation for resolution, leaving the parties to work out the details and compute dollar amounts if necessary. The type of decision should be either delineated in the initial agreement or delineated for each particular dispute to be resolved.

The parties need to decide at the commencement of construction what happens if either party rejects the decision. Since the decision is nonbinding, the parties need to have an agreement on review or appeal procedures. The parties may decide that an appeal from a DRB decision is through arbitration or litigation.

The notice to arbitrate or litigate should be required to be filed within a reasonable length of time (30 days from the date of the decision), even though the actual hearings or commencement of the arbitration or litigation may occur after the project is completed.

Costs for the DRB need to be decided upon from the onset. As often happens in case evaluation, an average of the hourly rates of the DRB members can be adopted as the hourly rate paid to all members. Likewise, the amount of hours incurred by each DRB member can be averaged for purposes of billing. Some owners and contractors set a budget of hours for DRB members for each particular function, except hearings.

Precautionary Provisions

Utilization of the DRB process should be fully understood and set to writing between the contractor and owner. Utilization of the process should be simple, business-like and efficient, with hearings held in a timely fashion. If a DRB process is set up in such a way that it is cumbersome and time-consuming to get to the board, and there are multiple layers of procedures, it detracts from its original concept of being a job site resolution procedure. Where small projects are concerned, it is probably not cost-effective to have a three-member panel. A single neutral should be selected.

As an overall concept, both the owner and contractor must be fully committed if the DRB process is to be effective. Fully committed means that each party should view the DRB process with the same attention and dignity that it gives to the prosecution of the construction work.

In summary, to effectively utilize the DRB process, the ASCE model and guidelines are an appropriate start.[18] Lawyers should not be discouraged from being the neutral panel member as many of the issues in any dispute will likely require legal interpretations or some knowledge of the law. However, that is not to say that lawyers should be encouraged to serve as advocates in the board hearing proceedings. To be effective, the process should be a readily available, on-site resolution technique during construction rather than a post construction technique like arbitration and litigation.

V. TRADITIONAL COURT PROCESS

Definition

Traditional court litigation is created by law to determine a winner and a loser in a public setting through an adversarial process. Recently, those in the judicial process (lawyers, judges and the participants) have recognized that total litigation, although fair and just, is not necessary for some types of disputes. Thus, once the litigation process has begun (i.e., filing the complaint and answer), there are a number of alternative methods that might be chosen to resolve the dispute.

Disputes involving $25,000 or less are filed in the district courts of Michigan. In district court, discovery is not permitted before entry of judgment unless the parties stipulate or the parties granted leave of the court.[19] This shortens the process, eases cost burdens and results in earlier hearings.

Definitive Attributes

The court process of litigation prides itself on fairness and the ability to gain equitable relief. Fairness and equity in the court system require a thorough investigation of the facts, opinions of experts and research of legal precedent. This process, which occurs after the fact is, by its very nature, time consuming and expensive. The litigation process is not designed to be justice by an assembly line, but rather provides fair and equitable results after the submission of each party's position to the test of cross-examination. It is not unusual for it to take one to two years to obtain a trial date, depending upon the court jurisdiction. The court system is designed to determine a winner and a loser.

Unlike alternative dispute resolution mechanisms, the court process is public and depends upon statutes and rulings in prior cases (known as common law) upon which decisions are based. Thus the rulings, in any particular case, are a product of prior case law and reasoning.

Likewise, the ruling in any particular party's case may become precedent for future cases. However, decisions handed down at the trial court level are not reported cases and thus do not have precedential value. A reported case is a ruling at the appellate level. However, there are reports today that inform lawyers of trial court decisions, which are instructive, informative and helpful.

As a result of this process of precedents, the litigation process to resolve disputes provides a degree of instruction and reliability upon which the parties can make business decisions. In some areas of the law (i.e., Uniform Commercial Code), relationships between parties in commerce have been codified to provide additional reliability regarding the outcome in the event of certain activity.

In addition to the powers listed above, courts have the power of equitable relief to fashion remedies of specific performance, injunctive relief or division of property. The trial court also has the power of enforcement of its decisions. It may order garnishments to obtain the collection of money and/or foreclose construction liens to sell property to satisfy a judgment. The power of equitable relief is not generally available in alternative dispute resolution mechanisms of arbitration or court ordered case evaluation.

Another factor unique to the court litigation process is that the losing party or party that is dissatisfied with the court's decision has the right to an automatic appeal to the Court of Appeals. The appeal can be based upon either an error of law or fact.

Somewhat like arbitration, the loser in the court system does not pay the winning party's actual attorney fees. By statute, the prevailing party is entitled to expert witness fees, out of pocket costs for depositions, filing fees, and nominal statutory fees for the trial and other court activity. However, there are certain instances when actual attorney fees are awarded, such as when there is a specific statute that applies to the relief sought, including suits to foreclose construction liens.[20]

How to Utilize

Litigation in the court system almost always requires an attorney. In focusing on pursing a claim through the litigation system, an attorney will gather the facts, file a lawsuit and conduct discovery. Conducting discovery involves requesting documents, asking interrogatories, requesting admissions, and deposing the other party's witnesses. During the process there will be motions and counter-motions regarding dismissing the case or limiting certain defenses or testimony.

The court usually requires a scheduling conference at an early stage of the litigation to determine the schedule to disclose witnesses and complete discovery.[21] When discovery has been completed, the court sets the matter for a pretrial, case evaluation and often times facilitative mediation. The pretrial conference focuses on narrowing the issues, listing the witnesses and marking the documents as evidence to be utilized at trial. The trial is usually scheduled along with other cases to be tried which may require repeated preparation before the case goes to trial.

Litigants who engage in the traditional court process need to undertake the following to assist their attorney in achieving the best possible results: 1) dedicate one person to be the contact for the attorney to obtain documents and information, 2) gather necessary documentation, 3) list all known persons with their address and phone number that have any knowledge regarding the situation, 4) be prepared to dedicate time, people and resources to assist in the litigation process (answer interrogatories, attend depositions, analyze the opposing party's factual positions, obtain expert witnesses, and permit the conducting of computer research when necessary), 5) be as organized as possible.

The litigation process involves planning, strategy and choosing from one of the many options within the process. Litigants should be prepared to discuss strategy at length with their attorney. Strategy discussions, such as the amount of discovery, will often be crucial with respect to the cost of the litigation and the resulting benefit. Consideration should be given as to whether or not a lien should be foreclosed, if a suit on the contract is sufficient, whether certain motions should be filed, etc.

Precautionary Provisions

Whether real or perceived, the loss of direct control by a litigant occurs when the traditional process is utilized. The process most always requires each party to have an attorney. Scheduling of events is subject the schedule of the opposing party and attorney and is heavily directed by the judge. Utilization of the litigation process should not be commenced unless there is a dedication to the process and a commitment of time, energy and resources. The process is thorough, albeit expensive.

CONCLUSION

In summary, facilitative mediation is designed to be a cost-effective tool used to settle a case. Arbitration is a private, somewhat informal, adversarial, expedited hearing process. Case Evaluation is a process involving a panel of attorneys who analyze and render a monetary decision in a case. A Dispute Review Board is a business-like inquisitive hearing designed to be non-adverse and is specifically designed to occur during the construction project. Court litigation is a public adversarial process involving the formality of attorneys and much preparation.

If both parties believe that an impartial neutral will help them craft their own settlement, facilitative mediation is the preferable resolution mechanism. Should the parties desire to have a final decision maker in an informal and expedited process, which is not appealable, arbitration is usually the preferred option. Similarly, when the issues to be decided are factual or dependent upon expert testimony, arbitration is usually the desired option. If the parties agree that a binding form of settlement negotiation may be preferable, case evaluation is the appropriate mechanism. If the parties believe that the construction project will have disputes that need resolving during construction in a non-adversarial manner, a Dispute Review Board is probably the best alternative.

Despite the proclivity today to utilize alternative dispute resolution mechanisms, there are many who remain steadfastly convinced that the traditional judicial system still provides the fairest and most equitable method to resolve disputes. The court system is thorough, provides the protection of an appeal, the safeguards of a stenographic record, and public trials which are administered by a trained judge who makes decisions based upon statutes and prior decisions.

Whether it is in the conventional judicial system or an alternative decision making process, the role of the legal profession is to assist with the resolution of disputes.

For a summary comparing the various dispute resolution mechanisms, see the attached Dispute Resolution Comparison Chart (Appendix A).

APPENDICES

1.MCR 2.411.

2.Kelly Reed, Selection of a Third Party Neutral: What every litigator (and mediator should know, ADR Newsletter, ADR Section of the Michigan Bar, May 2003, Vol. 10, no. 3.

3.Thomas E. Woods Mediation Services Outline (provided for those using Mr. Woods as a mediator).

4. Gary A. Morgerman, Construction Mediation: After 20 Years, Poised at the New Millennium January 2001.

5.Dale A. Iverson The Changing Face of Mediation in America, Alternative Dispute Resolution Newsletter, Smith, Haughey, Rice & Roegge.

6.Joyce A. Mitchell, What is mediation and How does it work? Findlaw.com 1998.

7.Catherine A. Jacobs, Facilitative Mediation-A Good Option Michigan Probate & Estate Planning Journal, Vol. 22, Fall 2002, Issue 1.

8.Kelly Reed, Selection of a Third Party Neutral: What every litigator (and mediator should know, ADR Newsletter, ADR Section of the Michigan Bar, May 2003, Vol. 10, no. 3.)

9.Gary A. Morgerman, Construction Mediation: After 20 Years, Poised at the New Millennium January 2001.

10.Kelly Reed, Selection of a Third Party Neutral: What every litigator and mediator should know, ADR Newsletter, ADR Section of the Michigan Bar, May 2003, Vol. 10, no. 3.

11.Thomas E. Woods, Mediation Services Outline .

12. Joyce A. Gates, Joyce A. Mitchell & Associates, P.C., What Is Mediation And How Does It Work? www.findlaw.com

13.Kelly Reed, Selection of a Third Party Neutral: What every litigator and mediator should know, ADR Newsletter, ADR Section of the Michigan Bar, May 2003, Vol. 10, no. 3.

14.Kelly Reed, Selection of a Third Party Neutral: What every litigator and mediator should know, ADR Newsletter, ADR Section of the Michigan Bar, May 2003, Vol. 10, no. 3.

15.Thomas E. Woods, Mediation Services Outline .

16. Catherine A. Jacobs, Facilitative Mediation-A Good Option Michigan Probate & Estate Planning Journal, Vol. 22, Fall 2002, Issue 1.

17.Joyce A. Gates, Joyce A. Mitchell & Associates, P.C., What Is Mediation And How Does It Work? www.findlaw.com

18.Catherine A. Jacobs, Facilitative Mediation-A Good Option Michigan Probate & Estate Planning Journal, Vol. 22, Fall 2002, Issue 1.

Arbitration, Dispute Review Boards, Case Evaluation, Traditional Court

1.The American Institute of Architects (AIA) Document A201. 4.6.2 General Conditions provides for arbitration of disputes through the AAA. The construction industry may use arbitration without specifying AAA.

2. MCL 600.5001 et seq; MSA 27A.5001 et seq; and 9 U.S.C.S. 1 et seq.

3. The information in the remaining sections on arbitration generally relates to common arbitration practices and those set forth in the AAA rules and procedures.

4. W.D. Mich. L. R. 16.6

5. W.D. Mich. L. R. 16.2

6. This provision was adopted into the rules on July 1, 2003.

7. In the event that the arbitration is being stipulated to after the fact, the parties should sign an agreement. The agreement specifying arbitration must be attached to the demand for arbitration. The demand for arbitration can be submitted jointly.

8. AIA A201 General Conditions. 4.6.1 indicates that a demand for arbitration must be filed within 30 days after the party making the demand receives a final written decision. Other time periods may control as to when a demand for arbitration may be filed depending on the factual setting. Thus, the general conditions and the contract documents should be reviewed prior to making a decision about filing arbitration.

9. For the specific rules on filing arbitration, please check with the AAA construction industry Arbitration Rules as amended and effective July 1, 2003.

10. This site is found at www.adr.org.

11. Taken from the Construction Industry Arbitration Rules and Mediation Procedures, www.adr.org.

12. Generally in arbitration cases, each party obtains an attorney to present its case and cross-exam the other party's witnesses.

13. Douglas A. Van Epps, Michigan ADR Update and ADR Court Trends, Presented at 1st Annual Advanced Negotiation and Dispute Resolution Institute, March 20, 2002.

14. MCR 2.403

15. Douglas A. Van Epps, Michigan ADR Update and ADR Court Trends, Presented at 1st Annual Advanced Negotiation and Dispute Resolution Institute, March 20, 2002.

16. A description of the DRB process and guidelines for its implementation was published in 1989 by the American Society of Civil Engineers and entitled "Avoiding and Resolving Disputes in Underground Construction." The 1991 update is entitled, "Avoiding and Resolving Disputes During Construction."

17. Robert J. Smith, Robert A. Rubin, "A New Look at Dispute Review Boards," Constructor, Vol. LXXXIV,No. 6 June 2002. <http://www.agc.org/content/public/PDF/NewsBulletins/CONSTRUCTOR/2002/june02.pdf>

18. Robert J. Smith, in his article, "A New Look at Dispute Review Boards" he asserts that Dispute Review Boards are a very efficient way to avoid the courtroom.

19. MCR 2.302(A)

20. MCL 570.1118; MSA 26.316(118)

21. MCR 2.301; MCR 2.401

Chapter VII

DISPUTE RESOLUTION COMPARISON CHART

	Facilitative[19] Mediation	Arbitration	Court Ordered Case Evaluation	Dispute Review Boards	Traditional Court
Type of Process	There is one neutral mediator chosen by the parties.	Private expedited process. Somewhat adversarial.	Sessions usually limited to brief presentations.	Decision by experts in a business-like setting through an inquisitive process.	Adversarial, formal and thorough.
Reviewable	No.	No except for fraud or bias.	No.	Yes. Either party is entitled to arbitration or litigation. Difficult to overturn.	Automatic right to appeal for an error of fact or law.
Binding	No unless parties agree to settle.	Yes.	No, however sanctions may be imposed on the rejecting party	Non-binding. Admissible in court.	Yes, but right to appeal.
Cost	$150-$300/hour plus a retainer in some cases. Parties share cost.	Somewhat expensive.	Economical, but occurs after discovery and is and added cost.	Total cost is uncertain. It is believed to be cost effective.	Generally viewed as the most expensive.
Attorney Necessary	Recommended. Parties should attend.	Recommended.	Mandatory. It is not recommended that the parties attend.	Optional.	Mandatory.
Length of Process	Mediator commits to spending as much time as necessary as long as he/she sees progress. Sessions can take place at any point in the case.	Designed to be concluded in months. Can be time consuming over a period of many months depending upon the nature of the case. Can occur during construction.	Quick – takes less than 1 hour. Occurs during the litigation process.	Quick with short hearings. Designed to occur during construction.	Longest. Usually at least one year. Typically occurs after construction is concluded.

[19] Dale A. Iverson "The Changing Face of Mediation in America," Alternative Dispute Resolution Newsletter, Smith, Haughey, Rice & Roegge.

Ease of Use	***Somewhat.***	***Easy. May take time to choose mediator.***	***Easy. Set up by Court.***	***Difficult to implement the process. Use is efficient.***	***Perceived to be difficult.***
Formality	Somewhat formal.	Informal.	Somewhat formal.	Informal.	Most formal.
Rationale Provided	No.	Not applicable.	No.	Yes.	Generally yes.
Multiple Parties	No.	Yes.	Yes.	Yes.	Yes.
Cautions	Benefits of speed and cost effectiveness can be lost if a case permits discovery and other legal procedures and/ or cases that require more than a few days of hearing.	Used primarily as a settlement tool, but settlement may not always be reached in every case.	If a resolution is not reached, it can become an extra procedural step requiring cost and incurring delay. Sanctions can be imposed based on acceptance/rejection of evaluation.	Fairly new and bold. Requires a cost commitment and a commitment to set up the rules.	Requires patience, a heavy personal commitment to preparation and a substantial monetary commitment.
Totality of Relief	Awards are usually for money damages only. Cannot issue injunctions. May require court enforcement.	Can be total.	Can be total.	Can be total.	Complete. Includes money damage awards, injunctions, enforcement, etc.

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