Design Better Solutions to Project Disputes

BY KEVIN R. SIDO

Engineers, architects, owners, contractors, subcontractors, sureties—all participants in the construction process—have long embraced alternate dispute resolution mechanisms to avoid what they perceive as the flaws of the litigation process. Usually, mediation rather than arbitration is considered the most efficient ADR mechanism, although both have their merits. While project agreements might specify arbitration, mediation, or both, either can be employed even after a dispute arises and even after litigation has been filed.

Arbitration is a binding process through which the parties present their witnesses and proofs to an unbiased arbitrator, typically chosen for his or her expertise in the field. The arbitrator may be one person, but larger cases often provide for a three-person panel. Courts will strongly enforce properly drawn arbitration agreements, as often found in construction contracts. Like litigation in the courthouse, the adversarial system of introducing the proofs exists. Unlike litigation, however, arbitration can be confidential, and in many instances expensive discovery processes are streamlined. Further, the rules of evidence are usually relaxed considerably compared to litigation. At the conclusion, the arbitrator(s) issue an "award" (zero or otherwise) and that award can be enforced just as with any judgment obtained from a jury or bench trial in the courthouse. Arbitration, unlike litigation, offers extremely few grounds for appealing factual or legal determinations. Someone wins, someone loses, and the result is often criticized as being somewhere in between.

Mediation, on the other hand, allows the parties to reach their own result through nonbinding discussions with the assistance of a neutral mediator, a catalyst for the parties' discussions. The mediator does not "decide" anything but instead guides the parties in their process to reach an acceptable compromise in confidential discussions. Mediators are often chosen for their experience in construction, and they are usually lawyers or former judges. The costs of the mediator are typically shared equally between or among all the parties. Mediation, except in large cases, usually has a one-day joint session, preceded by the exchange of documents and position papers. Lawyers are not necessarily required. While the mediator at times might be requested to evaluate the parties' positions, the mediator does not offer legal advice.

Project disputes can be costly, distracting, and time-consuming. Mediation and arbitration, however, can be a smoother route to resolution.

Once a memorandum of understanding is reached, the terms are shortly thereafter drawn up into a fully enforceable contract. In that respect, mediation does become fully binding. Proponents point out that only mediation, with its inherent flexibility, allows the participants to reach their own result, rather than a result dictated by a judge, jury, or arbitrator; presumably, the parties must know what's best for their needs, and thus a "win-win" can result.

Mediation can occur at any point during the course of a dispute. There need not be a pending lawsuit or arbitration. Many mediations occur in litigated matters once documents have been exchanged and a few depositions have been taken. Indeed, at that point, the clients may realize that expenses are rapidly mounting with no result in sight. Mediation can involve all the parties to the dispute, whether designer, owner, or contractor.

Construction contracts may require the parties to mediate a dispute before undertaking arbitration or litigation. Courts are beginning to recognize that such clauses should be enforced, although making an uncooperative party participate in a cooperative process can have problems.

Sometimes an early mediation is unsuccessful. Perhaps additional depositions, or even expert opinions, are required. No problem. The parties can certainly reconvene. Because the process is nonbinding until a result is reached, no one is prejudiced.

Experienced engineers know that construction disputes are often factually intensive and thus costly, distracting, and time-consuming. "Winning" at trial or arbitration might actually leave a valuable client embittered. Owners know the value of efficient dispute resolution; they surely just want to enjoy and use their project without having to wrestle with postcompletion disputes.

Engineers appreciate that a well-crafted design is worth the effort. Mediation, more so than arbitration and certainly litigation, offers engineers and their clients the opportunity to design and craft together an elegant—even early—solution to project disputes.

Kevin R. Sido is a partner in the Chicago office of Hinshaw & Culbertson LLP where he has represented engineers and others in the construction industry for over 37 years. He also is a mediator and arbitrator with ADR Systems of America LLC in Chicago.