

The Choice Is Yours: Navigating the Multilane Highway of Construction Dispute Resolution

By Thomas J. Stipanowich

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Using a deliberate and thoughtful approach to managing and resolving conflicts can reap great dividends. Have you considered all options in order to best serve your client's interests? Not doing so could lead to missed opportunities and unnecessary costs and delays.

When it comes to construction disputes, contractors, design professionals and project owners know four sobering truths: (1) these conflicts tend to mount and intensify; (2) related costs skyrocket; (3) finding solutions becomes more difficult and complicated as things move into "litigation mode"; and (4) as a result, job progress may be delayed or disrupted, relationships stressed and business goals undermined.

In light of these realities, construction parties seek to resolve conflicts more quickly and cost-effectively, instead of going down the long and costly road of litigation. A recent poll by leading construction law firm Smith, Currie & Hancock¹ of corporate counsel representing contractors, design professionals and owners indicated that "an efficient, cost-effective dispute resolution process" topped the list of business priorities in dispute resolution. Depending on the circumstances, parties may prioritize other goals, including getting on with business, maintaining control over dispute resolution, ensuring a fundamentally fair process and outcome (as measured by the law or other standards), maintaining privacy and confidentiality, and preserving business relationships, among other things.

In order to achieve their individual business goals, parties can choose from many options for managing and resolving conflicts during or after a construction project. In the course of resolving disputes on this multilane highway of process options, parties often make multiple lane changes. "Litigotiation"²—the practice of seizing opportunities to negotiate at appropriate times before, during and after adjudication—has always been a common practice. Today, however, there are other options, including arbitration, mediation and advisory evaluation, as well as options *within these rubrics*.

Which processes you choose, and when, is critical. The poll of in-house counsel highlighted the relationship between process choices and achieving business goals. Here are several key considerations for construction parties and counsel.

Should we employ a multistep dispute resolution ladder?

Standard construction contracts routinely include some form of a multistep dispute resolution ladder, commencing with a provision for direct negotiations and/or third-party intervention in

real time. Further steps often include mediation and binding arbitration. By placing the initial emphasis on negotiated settlement, stepped arrangements prioritize maximal party control, informality, economy and efficiency. If early-stage negotiation fails, stepped processes envisage increasingly robust intervention by third parties culminating in binding arbitration (or litigation). Given the emphasis parties tend to place on efficient, low-cost resolution and the fact that most disputes are ultimately resolved by informal settlement rather than through the decision of a third party, stepped “channeling” of disputes is a logical approach.

However, lawyers have different opinions regarding stepped processes. Many feel that the potential benefits of such provisions outweigh the costs. Others believe that even without contractual provisions, parties will negotiate or mediate if and when it is in their best interest to do so, and that settlement-focused preliminaries may prove to be a waste of time and delay the eventual bargaining. Whatever one’s perspective, a closer look can be beneficial.

Should there be a provision for early negotiations?

Because it avoids the rancor that is sometimes a byproduct of adjudication, negotiating an early settlement may produce more satisfactory results while enabling parties to maintain or even restore their relationships. A negotiated settlement may permit parties to promote their business interests through integrative terms and in-kind trade-offs that could not otherwise be obtained through litigation or arbitration. Early settlement gives parties the opportunity to work through their differences and explore solutions in private, thus allowing them to avoid the publicity and visibility that is part of litigation (and sometimes arbitration). Finally, research has shown that negotiated or mediated settlements are more likely to be more sustainable and to be complied with voluntarily than decisions issued by third-party arbitrators or judges.

The poll of in-house counsel indicated that one of the more popular ways of accomplishing a company’s goals in dispute resolution is through project-level negotiations, or by negotiation between senior executives. Respondents favored providing for such arrangements in their contracts. In order to make the most of such provisions, their precise contours should be tested and shaped by the parties themselves.

When is mediation most effective, and what provisions should be made in the contract?

The potential benefits of mediation for construction parties are generally understood, including the ability of parties and counsel to exercise considerable control over the process and the outcome. While the latter usually involves a financial settlement, parties may be able to craft creative solutions and preserve or improve business relationships. Mediation is relatively inexpensive, which helps parties to limit or avoid the unpredictability and expense of arbitration or litigation.

But while many lawyers and dispute resolution professionals agree that mediation is frequently effective, there is sharp debate over how and when mediation should be undertaken. The conventional stepped process establishes mediation as a preliminary step before adjudication,

sometimes as a contractual condition precedent to the obligation to arbitrate or litigate. However, some advocates and dispute resolution professionals argue that mediation undertaken before the commencement of adjudication often occurs before disputes are ripe for settlement, and that a better approach is to let the parties mediate at some stage of adjudication, when they have more information and are more emotionally ready to negotiate.

But some lawyers and mediators do see value in early mediation, which can produce a resolution without the delays, costs and risks of litigation. They recognize that some mediators, particularly those with a track record of settling disputes early, have the skills and determination to move a matter forward even before formal discovery by working with parties to facilitate the exchange of key information. If mediation is not initially successful, a mediator may be able to help the parties agree on a process that will produce a resolution, such as an advisory evaluation or a customized form of arbitration (such as final-offer arbitration). In any case, parties may appreciate tenacious mediators who stay involved pending the commencement of arbitration or litigation and remain ready to facilitate settlement discussions. Usually, the costs of early mediation are negligible compared to the opportunities presented.

Therefore, it may be helpful to include a contractual provision for preliminary mediation to overcome “in-the-box” thinking favoring late-stage mediation. This is especially true because many lawyers are reluctant to engage in any negotiations without the involvement of a mediator.³

Should provisions for negotiation or mediation give a nudge or a mandate?

Assuming parties want contractual provisions for negotiation at the job or senior level, and/or for mediation, should participation be a requirement that is enforceable by a court? If so, should negotiation or mediation be a condition precedent to further steps such as arbitration or litigation? Again, opinions vary.

Parties may include contractual provisions for negotiation or mediation without much concern for their legal enforceability. After all, in many cases parties pursue negotiation and/or mediation (with or without contractual requirements) and reach a settlement without resorting to adjudication or, alternatively, moving to the final (adjudication) stage without bickering over procedures. Nevertheless, parties are advised to consider enforcement issues if they are concerned that they may require judicial assistance in compelling an involved party to come to the negotiating table. At the same time, they should be aware that provisions to negotiate or mediate disputes prior to adjudication are a double-edged sword, as a claimant’s failure to formally comply with such provisions may be used by the defendant to postpone or even derail adjudication.⁴

What kind of arbitration is appropriate?

Before the advent of mediation, arbitration was the sole alternative dispute resolution process, a true alternative to going to court. Arbitration offered decision-making by industry experts (with a strong emphasis on multidisciplinary panels) and an escape from the procedural formalities associated with litigation. Pre-hearing discovery and motion practice, if any, was minimal. Resultant “justice” was often measured in non-legal terms.

Today, much has changed. While arbitration is still a valuable alternative featuring subject-matter experts as decision-makers; relative brevity and finality; and a cost-effective, efficient process (thanks, among other things, to limited discovery), it has gradually become more like litigation. This litigation-like model may—or may not—be the most effective solution for construction disputes. The challenge for parties and counsel is reflected in responses to the survey of in-house counsel: On the one hand, parties tend to prioritize having an efficient, cost-effective approach to resolving disputes in order to get on with business; on the other hand, lawyers have abiding concerns regarding procedural due process and an outcome consistent with legal standards. It is up to the parties to take advantage of the procedural choices inherent in contract-based arbitration to achieve the proper balance among these priorities; however, they do not always avail themselves of the opportunities.

Some years ago, the College of Commercial Arbitrators Protocols for Expeditious, Cost-Effective Commercial Arbitration⁵ offered guidance for business parties, counsel and other stakeholders in arbitration that led some organizations to offer expedited, or fast-track, arbitration procedures. For example, in addition to including Expedited Procedures (including limitations on discovery) for use in conjunction with its Comprehensive Arbitration Rules and Procedures, JAMS publishes Streamlined Arbitration Rules designed for use with respect to controversies in which no disputed claim exceeds \$250,000.⁶ The Rules contemplate hearings before a single arbitrator; expedited schedules for each stage of the process; early, voluntary, informal exchange of “all non-privileged documents and information . . . relevant to the dispute or claim,” including anticipated exhibits and names of prospective witnesses; and other special elements.

In the absence of appropriate contractual arrangements, achieving cost-effectiveness and efficiency in arbitration may depend on how effectively arbitrators can manage parties and process, and the willingness of counsel to forego court-like discovery, motion practice, evidentiary objections and the like.

Might a real-time approach involving third-party facilitation or evaluation help to avoid, minimize and manage jobsite conflict?

There is another very important but frequently overlooked set of choices involving opportunities for promoting early resolution of disputes on the jobsite in real time. Having touched on the benefits of early negotiation above, we will now consider ways in which third-party evaluation or facilitation may come into play.

Historically, real-time jobsite conflict management involved early decision-making by project architects and/or engineers. Given the potential conflicts of interest on the part of project design professionals, however, new forms of expert evaluation involving independent third parties have been developed—the most prominent being dispute boards composed of construction experts who offer nonbinding decisions on infrastructure projects as a way of promoting informal settlements of claims and controversies.

Less well known is the work of other kinds of project neutrals, including standing mediators, who routinely facilitate discussion and the resolution of issues as they develop. By resolving conflicts before parties lawyer up and move into litigation mode, real-time mediation can maximize the efficiency and cost-effectiveness of dispute resolution.⁷

A model for effective real-time conflict management on construction projects is currently being pioneered by Intel Corporation. Responding to concerns about the duration, cost and unpredictability of litigation and the limitations of lawyer-driven mediation, Intel augmented the company's traditional stepped dispute resolution system for construction disputes with a custom program for dispute prevention.⁸ At the heart of Intel's program is a third-party neutral who is engaged by the owner and general contractor at the beginning of a construction project. Having extensive professional construction expertise and conflict resolution training or experience, as well as communication soft skills, the neutral earns the trust of key members of the construction team. During monthly visits to the jobsite, the neutral assesses job progress and risks, and meets with a senior risk management team appointed by the owner and contractor to survey and evaluate project risks. The team consults with the neutral on appropriate options for addressing developing concerns, including coaching or advisory efforts aimed at dispute prevention as well as more formal dispute resolution roles. Thus far, Intel's conflict management program has been successful in avoiding formal legal disputes on the projects it has been employed, which represent more than \$5 billion in construction!

Thoughtful planning can make a big difference.

Never before have there been so many useful options for preventing, managing and resolving construction conflicts. Construction parties and counsel have the opportunity to make thoughtful, deliberate process choices in order to meet their particular business priorities. Will you seize the opportunity?

¹ Smith, Currie & Hancock Survey of Corporate Counsel (2016).

² The term was first employed in Marc Galanter, " . . . A Settlement Judge, Not a Trial Judge": Judicial Mediation in the United States, 12 J. LAW & SOC. 1, 1 (Spring 1985).

³ See JAMS Clause Workbook: A Guide for Drafting Effective Dispute Resolution Clauses for Commercial Contracts (Effective June 1, 2018), available at <https://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS-ADR-Clauses.pdf>

⁴ See, e.g., Sor Tech, LLC v. MWR Life, LLC, 2019 U.S. Dist. LEXIS 146817, 2019 WL 4060350, *13 (S.D. Cal. 2019).

⁵ COLLEGE OF COMMERCIAL ARBITRATORS PROTOCOLS FOR EXPEDITIOUS, COST-EFFECTIVE COMMERCIAL ARBITRATION (2010).

⁶ JAMS STREAMLINED ARBITRATION RULES & PROCEDURES (Effective July 1, 2014).

⁷ See Thomas J. Stipanowich, *Beyond Getting to Yes: Using Mediator Insights to Facilitate Long-Term Business Relationships*, 34 ALTERNATIVES TO THE HIGH COST OF LITIGATION 97 (July/August 2016). See also JAMS Sample Project Neutral Clause, available at https://www.jamsadr.com/files/uploads/documents/jams_project_neutral_clause.pdf.

⁸ The program was spearheaded by Howard Carsman, manager of construction claims and contracts for Intel Corporation.