Engineering Dispute Resolution Processes in Advance

By Tracy L. Allen

Oftentimes, transactional attorneys are concerned about the monetary and management details of a business contract or construction contract. After hard-fought negotiations, you may simply decide to cut and paste boilerplate dispute resolution provisions into the final contract. Two years later, the relationship between the parties deteriorates and now your client needs a litigator. Your office is full service, so the client is referred to your litigation partner to process a lawsuit.

Suddenly, your partner discovers the mandatory arbitration clause in the parties' contract and wonders, What have I inherited? Who drafted this? What am I supposed to do with a generic American Arbitration Association clause and its commercial-construction rules of procedure? The clause is often woefully inadequate in its lack of direction. Provisions addressing something as simple as pre-litigation conditions to arbitration or the number of arbitrators who will decide the dispute are absent. The provision is also often silent on discovery protocols and management of increasing e-discovery challenges in complex cases, thus unnecessarily generating more time and expense for all. The vast majority of civil litigation settles. A competent drafter should search for and consider dispute resolution process tools to meet his or her ethical and business duties to the client.

While the time and expense of litigation in a court or arbitral forum continue to grow, clients are becoming highly sensitive to the expense and time commitment associated with a business conflict. Company distraction costs and morale aside, most clients are not in the dispute or litigation business. Fortunately, the legal community is reacting and developing effective methodologies to deliver appropriate solutions to these problems. Proactive lawyers are anticipating the future and guiding clients to consider preventive measures to ease the potential burden of conflict on their organizations.

The Michigan dispute landscape is solidly showered with the timing and use of mediation and case evaluation. These are well-recognized dispute resolution processes that enable parties to reach their probable resolution sooner, but neither process is a one-size-fits-all solution. What else can lawyers offer their clients during the drafting stage to avoid surprises once the case is in arbitration?[1]

Some very creative dispute resolution procedures are being developed and often integrated into the general construction contract. These procedures are being applied to subcontractors' disputes, thus affecting owners as well as builders/developers. The new concepts are especially helpful in construction cases in which there are often many moving parts and tiers of interested participants. This article focuses on some of the more common dispute resolution procedures currently in use.[2]

The construction industry is commended for its forward thinking—engineering the front end of a project to avoid mischief on the back end. Anticipating conflict leads drafters to discuss, develop, and negotiate several staged and progressive processes. All of the concepts are focused on early management, cost savings, and resolution if disputes arise.

Growing in frequency are conversations among transactional drafters about how to incorporate stages of conflict management and resolution into the seminal agreement. Some contracts contain preconditions to the actual litigation forum, such as a "meet and discuss" clause requiring active, face-to-face participation of decision makers and stakeholders to explore solutions. This is often followed by a mandatory mediation session within a defined period. Only after these alternatives are exhausted can the parties resort to a binding decision-making process such as arbitration.

In large construction cases, dispute resolution advisory boards are being created during negotiation of the fundamental contracts and project plan. The entities are written into the contract with "automatic triggers" in the event of a dispute during the development and construction stages.

Customarily, use of an advisory board is intended to avoid delays or interruptions in contract performance. This is especially important to the affected parties whose compensation may be tied to an early completion date bonus or when there are financial incentives for completing performance within certain timelines and budget guidelines.

The advisory board is usually comprised of 1–3 designated subject matter experts who agree to serve the disputants if a disagreement arises during the project. Truncated presentations are made to the stakeholders and board members. The parties usually agree that the board evaluation/determination is binding on all until appealed

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de novo to the next level or tiers of the overall dispute resolution process contained in the underlying contract. If the advisory board opinion doesn't resolve the problem, that opinion customarily has no binding or precedential effect with the judge or arbitrator called on to decide the matter in its full form at the last stage of the dispute resolution process.

The advisory board members are not necessarily lawyers, but more likely to be persons with specific industry expertise. They aid in preserving relationships among the participants, both for the matter at hand and going forward. They have been quantified to be cost effective and their opinions are appealed less than half the time when used in a construction setting.

Dispute resolution advisory boards are also a tool parties can deploy by agreement in the absence of a prior contractual obligation. Disputes early in a large commercial project often benefit from the results of a subject-matter evaluation. Advocates and clients can factor risk, analyze other expert opinions, and understand the merits of each disputant's position. Often, the advisory board results can also focus targeted discovery efforts for effective production of information later in the life of the dispute.

A second concept included with use of an advisory board—or as an alternative—is the incorporation of a "real time" mediation clause in the contractual documents. Drawn from successful implementation in large projects in foreign countries, the real-time mediation clause predetermines and preselects subject matter neutrals who will be called on during construction if disputes arise. For example, if the HVAC installer and electrical engineers disagree on who should redesign and fix the nonworking HVAC system already partially installed, the parties enter into real-time mediation with an electrical or HVAC construction expert. The resolution may be complete or a status-quo negotiation to keep the project moving forward without prejudice to the parties to litigate.

In a similar vein, early neutral evaluation or fact finding are common stages in a well-developed and negotiated construction dispute resolution provision. The neutral can be someone retained by all parties to the conflict or a single party. The evidentiary or precedential impact of the neutral's assessment is determined on a case-by-case basis by the parties agreeing to engagement of the neutral. If the dispute is highly technical or complex, it is probable everyone will benefit from the economies and education a neutral subject-matter expert can provide. The neutral may be called on at the outset to collect facts, similar to independent investigations in sexual harassment employment disputes. Alternatively or additionally, the early neutral may analyze expert opinions or assist in preparing to depose an expert. He or she may also be integrated into a mediation process, particularly if confidentiality of the opinion is important to the parties.

If the neutral's role is to go beyond pure fact finding into a more evaluative role, it is important for underlying reasons for the party (or parties) using the neutral to be clear what use and influential effect the evaluation will have in the conflict.[3] Often, the early neutral evaluation has no binding or precedential effect, by agreement of the parties, in part because at the time of engagement, no one can be certain about the outcome of the analysis. Yet it can be a potent tool used by the disputants to focus on discovery, realistically evaluating the likelihood of success in light of the litigation processing costs and persuading a recalcitrant client or advocate to adjust an unrealistic expectation.

Lastly, the construction industry is also deploying a concept humorously referred to as "hot tubbing." It is a gathering of the disputants' experts into a single process for purposes of receiving, evaluating, and debating highly technical issues of the dispute. As originally conceived, their analysis is obtained through a presentation process that invites testimony and cross-examination by attorneys and opposing experts in the presence of the decision makers. The objective is to provide clarity and definition of the factual, technical, and legal issues at stake. Such a process has the potential for limiting debate on matters on which the experts agree, allowing parties to more clearly assess risks of particular positions and the persuasiveness and effectiveness of their own experts.

None of these concepts should raise fear in the minds of advocates seeking victory for clients. Rather, they can be very effective tools for managing, targeting, focusing, and streamlining conflict. Properly deployed, they can also reduce the overall expense of a complex commercial dispute. When the transactional lawyer and a litigator consult in the contract drafting stage, they are engineering the present and the unknown future for the good of the client. A dialogue about the many dispute resolution options is a value-added service. Being able to evaluate potential conflicts and risks in the context of negotiations raises the quality of services. It shows lawyers are truly working with the clients' best interests in mind if and when conflict arises. ■

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ENDNOTES

1. Doug Van Epps; Richard Hartford, the author; and the Macomb County Bar Association have created a Taxonomy of Dispute Resolution that can be used in a given commercial case to guide on the use of dispute resolution. The Taxonomy is available at <http://www.adrprocesses.com> (accessed July 15, 2016). A modified version has also been created for use by judges and is available at <http://courts.mi.gov/Administration/SCAO/OfficesPrograms/ODR/Documents/ADR%20Guide%2004092015.pdf> (accessed July 15, 2016).
2. These concepts are discussed in the context of a construction dispute, but are easily adaptable to many other types of commercial or business conflicts.
3. Note that an otherwise discoverable report is not generally protected merely because it is used in a confidential process unless it will have no other use and was obtained for the sole purpose of use in the mediation.