

Avoiding disputes saves money, time, relationships

Commentary by Stuart Sobel

Much has been written about alternative dispute resolution techniques, such as arbitration or dispute review boards. They are alternatives to traditional litigation that are often viewed as preferable to litigation in some respects. They may be more private, final and streamlined, for example.

But they can also be inferior to litigation. There is limited ability to discover opposing evidence and, because of limited appeal, mistakes cannot easily be remedied. And like litigation alternative dispute resolution still only comes into play after a dispute has ripened.

Traditional and alternative dispute resolution both take a toll on the clients who spend time and money with lawyers instead of their business. They also damage the clients' relationship. It is not likely that a dispute, played out through any resolution process, will leave the parties willing to continue doing business in the future. Making matters worse, dispute resolution has become increasingly uncertain.

Courts have been clogged with foreclosures, distracting judges from devoting the time necessary to properly consider and adjudicate complex business disputes. Court clerk budgets have been slashed, making it more difficult for the court staff to have filed up to date and hearing times promptly available.

Courts have more matters and less staff with which to address their increased case load. Results become more erratic, slower and less predictable. At its heart, an effective dispute resolution process must be predictable; a result – or at least a range of outcomes – given a set of facts should be likely. Unfortunately, that is no longer the case in too many instances.

Arbitration, long touted as the cheaper alternative to litigation, has also become more expensive as the administrative costs, as well as the arbitrators' fees, have increased. The trend in arbitration to allow wider, longer and more expensive discovery has gained traction, adding to its cost. Often, the resemblance of arbitration to litigation has become unmistakable.

Arbitration's attribute of being more "final" than litigation, since appeal is significantly curtailed in arbitration, is attractive only when the result is perceived

as fair and appropriate. When it is not, the growing expense and limited appeal rights tend to outweigh the benefits. Dispute review boards, which are now becoming common in large government or public-private infrastructure projects, have similarities to arbitration and similar shortcomings.

Review boards are often composed of industry professionals who, while long on specialized knowledge valuable in resolving disputes, are often short on process management. They are not trained judges, accustomed to addressing substantive and procedural issues, which are necessarily intertwined in any dispute. They are, many times, not even lawyers, and so lack the basic understanding of due process and management of evidence that is so necessary to move the process of resolution efficiently and reliably toward a fair result.

Simply put, every form of dispute resolution has shortcomings that lead to expense, uncertainty and frustration. For that reason, over the years, I have vacillated in advising clients whether to opt for litigation or arbitration. The answer was never clear and seemed to vary, depending on recent experiences, bad and good, in both fora.

Because of this frustration with the mechanisms for resolving disputes, lately my attention has turned to methods of avoiding disputes entirely, so that dispute resolution becomes unnecessary.

Human nature being what it is, and given the fertile environment for dispute presented in any construction project where a dozen or more varied disciplines come together to realize a shared vision, disputes are not likely entirely avoidable. But they are, in most respects, predictable.

For example, construction project disputes center around issues of scope, time, extra or charged work, and cost and time impacts from various sources. If the parties recognize this early on, mechanisms for addressing them proactively can be built into the contractual arrangements.

Projects have successfully avoided protracted disputes by building into their agreements periodic meetings with high level executives from all parties, even including a designated facilitator, to discuss and resolve problems that have not ripened into claims, change order requests or full-blown disputes. The facilitator stays abreast of the project and anticipates problems by attending regular job meetings, such as owner/architect/contractor meetings, and receiving copies of key correspondence, and they can conduct informal mediation sessions.

This process can be stepped, with higher level executives being required to attend when the job-site managers are unable to resolve issues. The higher level executives, who are familiar with the indirect, but very real costs of disputes in terms of lost productivity, lost opportunity, legal fees and expert fees, are often

able to blast through the logjam, keeping the project moving and avoiding the dispute altogether.

Even when disputes cannot be resolved at the project level, early and, if necessary, repeated mediations can prove to be worthwhile. These mediations are structured settlement conferences facilitated by who is trained in the art of getting people to move off of entrenched, strongly held positions.

As I have frequently explained to my clients, mediation, even when it does not result in settlement of the dispute, serves worthwhile purposes: your view of reality will be vetted by a neutral person (the mediator) and your adversary's distillation of the evidence will be presented for you to understand. This enables weaknesses in your position to be addressed before formal dispute resolution.

Often executives forced to attend the mediation by contract or court order meet privately, or in the presence of the mediator, but without lawyers, and strike a business deal. This allows them to preserve their relationship beyond this project or this dispute. Even when there the parties cannot reach a settlement at mediation, they are often lead to re-evaluate their position – and later move toward a settlement.

Dispute avoidance is preferable in every respect to dispute resolution. It saves relationships, money and time. The return on the investment in such a process is great.

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