

Chapter 02

Using Alternative Dispute Resolution



As noted in Chapter 1, the term Alternative Dispute Resolution (ADR) covers a variety of techniques often used to resolve a construction defect litigation (CDL) crisis. Because of its potential importance in minimizing litigation, this chapter discusses the general subject of ADR techniques and also reviews some of the less frequently used ADR methods. Since two ADR techniques – mediation and arbitration – are so widely used, they are discussed separately in Chapter 3 and Chapter 4, respectively.

Specifically, this chapter covers:

- 2.01 What is ADR
- 2.02 Pros and Cons of Choosing ADR
- 2.03 Identification of Major Forms of ADR
- 2.04 Review of Alternative Methods Other Than Arbitration and Mediation
- 2.05 Conclusion
- 2.06 Resources

2.01 What is ADR

The term Alternative Dispute Resolution (ADR) covers a variety of techniques in which the parties to a dispute agree in advance or after a dispute arises to resolve the dispute by a means other than traditional litigation in a court of law. ADR is a means of avoiding a legal trial, and all the time, expense, formalities, and the like that are typically involved therein.

2.02 Pros and cons of choosing ADR

Proponents of ADR techniques cite the following advantages:

1. **Promptness.** One of the major advantages is that when a dispute arises, the parties can initiate the resolution process in a relatively short period of time. Thus ADR avoids the lengthy delays often incurred in litigation, in which it takes a considerable period of time even to obtain a court date.
2. **Time:** The ADR process usually involves less time than litigation overall, particularly when the parties can agree to forego, or modify, legal procedures such as discovery, pleadings, and the like.
3. **Expense:** Even in the case of arbitration, ADR is generally far less expensive than litigation, including cases in which the issue is resolved “on the courthouse steps” before going to trial or during the court trial session itself.
4. **Control:** The parties in ADR cases have a far higher degree of control over the process, since they can select the rules, set limits on appeals, tailor remedies, and even eliminate some types of damages.
5. **Court requirement:** The courts themselves may require, or strongly suggest, that the parties to a dispute utilize some form of ADR before going through the litigation process.

While it would appear that the advantages of ADR are compelling, there are some disadvantages that need to be considered:

1. **Enforcement:** Before the early 1950’s, ADR was a highly suspect methodology within the court system. After enactment of the Federal Arbitration Act and various state arbitration acts, the statutory structure was put in place to promote arbitration and require that court enforce awards through very limited review of arbitration. However, this level of enforcement authority for arbitration does not always exist for other forms of ADR.

2. **Full discovery:** There are some instances in which the legal requirements for full discovery in the litigation process work to the advantage of one of the parties. By entering into an ADR agreement, that party might lose that edge.
3. **“Voluntary” nature:** The courts are now beginning to look into the subject of “voluntary” participation in an ADR agreement entered into before the dispute arises. In the construction industry and others, there is concern that one party, especially a consumer, has little choice in the matter and is essentially forced to waive his/her rights to a trial.
4. **Control:** Similarly, there are some concerns that one party, such as the contractor, has control over the entire process and thus eliminates or severely handicaps the other party’s ability to a fair and impartial hearing and to a decision by a neutral third party.

2.03 Identification of Major Forms of ADR

There are a variety of different dispute resolution mechanisms that come under the general heading of ADR. They include:

1. Mediation (see Chapter 3)
2. Arbitration (see Chapter 4)
3. Dispute resolution boards
4. Dispute resolution service centers
5. Engineer decisions
6. Architects
7. Structured and supervised negotiation
8. Anything else that is something other than court litigation

2.04 Alternative Methods Other Than Arbitration and Mediation

With the exception of mediation and arbitration, each of the above is described briefly in the following paragraphs:

1. **Dispute resolution boards:** A dispute resolution board (DRB) is a board of impartial professionals formed at the beginning of a project to follow the real time construction progress and assist the owner and contractor to resolve issues, avoid claims, and resolve any claims that may arise during the duration of the project.

The use of DRBs started in 1975 with the boring of the Eisenhower Tunnel in Colorado and has spread throughout North America to such a degree that the Dispute Resolution Board Foundation was established in 1996 to promote use of the process and serve as a

technical clearing house for owners, contractors, and board members in order to improve the dispute resolution process.

Typically, a DRB is composed of three respected and impartial professionals who are experienced in the type of construction being proposed for the project. Use of the DRB is most often specified in the contract's overall change order/claim dispute resolution mechanism prior to beginning the work. It should be inserted in the dispute resolution ladder between the contractor's request for an equitable adjustment and the engineer's or owner's final decision.

To implement a DRB, the Board members are selected and approved by both the owner and the contractor soon after award of the contract. The DRB is officially established when the parties execute a three-party agreement.

When properly implemented, the DRB provides major benefits in terms of both claims avoidance and resolution of disputes, most often at a cost far lower than either arbitration or litigation. It is the only alternative dispute resolution mechanism that utilizes independent, experienced professionals who visit the site during the course of construction. On the negative side, it is a process primarily designed to help in very large projects and it does not involve consumers.

2. **Dispute resolution service centers:** In some areas of the country, including Thurston County in Washington State, there are separate dispute resolution organizations that provide a variety of arbitration and mediation services to address many types of disputes, including domestic disputes, performance claims, payment issues, construction contracts, and others.

These not-for-profit organizations are governed by a local Board of Directors and managed by a hired Executive Director. With a small staff, they rely on volunteers who are trained in arbitration and mediation types of work. They are funded by a combination of donations and other fund raising activities, fees for services, state and federal grants, and sometimes even local government assistance since they can have significant value in reducing the demand for local court intervention. The fees they charge for services are generally quite modest and designed to encourage both parties to seek their assistance.

The success of local dispute resolution service centers is highly dependent on two factors:

1. The ability of the local organization to recruit and train a skilled core of volunteers to utilize the principles of mediation in a variety of different situations to resolve disputes.
2. The willingness of both parties to submit to and abide by the process and ultimately reach a decision.

3. **Engineer decisions:** Sometimes it is specified in the contract that the engineer or engineering firm responsible for designing a portion of the work shall be responsible for resolving any conflicts for that portion. Obviously, this approach has its limitations, the most obvious of which is that the engineer is hired by the owner and hence his/her independence is somewhat suspect. Beyond that, given the complexity of today's projects, there are often several engineering firms involved at various stages and part of the dispute may in fact involve differences at the interface of the work by two different professionals.

In addition, this approach usually does not provide an overall look at the entire project and may not apply when the project has been completed.

4. **Architects:** Similarly, the architect who designed the project may also be identified, generally by the owner, as the person responsible for resolving conflicts. This approach has limitations similar to those described above for engineers, especially with regards to independence from the owner.
5. **Structured and supervised negotiations:** The parties may agree on a specific procedure to be followed in the event that a dispute arises. This agreement would be formalized in the contract between the owner and contractor. It might include a moderator or facilitator who would lead the negotiation discussions and might have authority to decide whether to admit certain pieces of evidence, allow cross examination, set time limits, and the like.
6. **Any other procedures outside of litigation:** Almost any technique other than those listed above can be considered as an ADR method, if it helps to prevent litigation. The only real requirement, of course, is that both parties agree to the method employed. One such example is the use of what is called "neutral evaluation." A neutral evaluator is a mutually agreed upon party hired to make a disinterested, yet educated, prediction as to the merits, possible costs, and likely result of a construction defect claim. The evaluator provides valuable information for both sides at a fraction of the cost of discovery and at the same time provides a framework upon which a solution can be built.

2.05 Conclusion

Each of the ADR methods described above has its advantages and limitations. Certainly there are no "text book" answers. Each project has its unique characteristics and almost invariably the contracting parties differ in each instance. But in each case, there are several common questions that need to be addressed:

- Do state laws support/limit/restrict the use of ADR?
- Can ADR methods be included in a contract as an opt-in, opt-out feature?
- Is the decision(s) binding or non-binding?
- What are the provisions for enforcement of the decision(s)?

- What, if any, are the methods for appeal?

And, of course, ultimately the bottom line question is the issue of the cost of employing some sort of ADR techniques as opposed to litigation. Since most ADR techniques are by definition voluntary in nature and since most cases vary widely in scope and content, there is little hard statistical data to support and demonstrate the magnitude of differences between ADR and litigation from the cost viewpoint. However, there is general agreement that all forms of ADR are less costly than litigation and are often more effective if properly carried out.

The one exception to the foregoing difficulty in obtaining hard cost data is the use of arbitration which is a more formalized approach to ADR and hence somewhat easier to define in terms of time and the resultant costs. An example of costs differences between arbitration and litigation is included in Chapter 4, which deals with arbitration.

2.06 Resources

Some of the sources for additional information on the general subject of ADR are:

- **U.S. Department of Justice, Office of Dispute Resolution**
(<http://www.usdoj.gov/odr/index.html>)
- **Title 9 of the U.S. Code**
(<http://www.law.cornell.edu/uscode/html/uscode09>)
- **Cornell/PERC Institute of Conflict Resolution**
(<http://www.ilr.cornell.edu/depts/ICR/>)
- **Print Source: Federal Judicial Center, Alternative Dispute Resolution Publications** (http://www.fjc.gov/library/fjc_catalog.nsf)
- **Dispute Resolution Board Foundation,**
19550 International Boulevard So., Suite 314, Seattle, Washington 98188,
Telephone 206-878-3336
Fax 206-878-3338

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1. Alternative Dispute Resolution is a technique often used to:
 - a) Force people to talk over their differences
 - b) Avoid law suits on construction issues**
 - c) Get the government involved in contract disputes
 - d) Keep unions out of contract matters
 - e) All of the above

2. Proponents of ADR claim its advantages include all but one of the following:
 - a) Saves time
 - b) Ensures issues will be promptly addressed
 - c) Makes sure that decisions will be enforced**
 - d) Generally saves money
 - e) Gives opposing parties some control over the process

3. Opponents of ADR claim that all but one of the following are problem areas:
 - a) It is difficult to understand the process**
 - b) Enforcement can be a problem area
 - c) There may be advantages to have a more complete discovery process
 - d) It may not be really voluntary
 - e) One party may have too much control over the process

4. The two most important methods of ADR are the use of:
 - a) Architects and engineers
 - b) Dispute resolution boards and dispute resolution centers
 - c) Mediation and arbitration**
 - d) Judges and lawyers
 - e) None of the above

5. A Dispute Resolution Board is a panel of:
 - a) Judges assigned to resolve a dispute
 - b) Lawyers appointed by the statewide Bar Association
 - c) Respected community lawyers known to both parties
 - d) Experienced industry professionals**
 - e) Representatives of both sides in the dispute, who pick a moderator

6. Dispute Resolution Board was first used in the construction industry in:
 - a) 1898 when the dam above Johnstown Pennsylvania broke during a huge rainstorm
 - b) 1906 in San Francisco after the great earthquake and fire
 - c) 1940 when the Tacoma Narrows Bridge (known as “Galloping Gertie”) collapsed in a severe wind storm
 - d) 1975 in Colorado in connection with the boring of the Eisenhower Tunnel on Interstate Highway 70**
 - e) 1989 when the Oakland Bay Bridge collapsed during an earthquake

7. The Dispute Resolution Board is the only ADR mechanism that provides a:
 - a) Lower cost ADR method than litigation
 - b) Agreement dependent upon the parties’ willingness to enforce
 - c) Impartial hearing before an independent panel
 - d) Job site review by independent construction professionals**
 - e) Review by appropriate court

8. Dispute resolution service centers are usually funded by:
 - a) Fees for services collected from the parties to the dispute
 - b) Fund raising events ranging from auctions to special dinners
 - c) Local government financial assistance
 - d) State and federal grants
 - e) All of the above**

9. The major problem in using engineers or architects to resolve construction disputes is that they are:
 - a) Too technically oriented to deal with the usual type of construction problem
 - b) Perceived as agents of the owner**
 - c) Only familiar with a limited portion of any large project
 - d) Not involved on a daily basis with the project
 - e) None of the above

10. When considering the use of an ADR mechanism, the key question to ask is:
 - a) How do my state laws affect the use of ADR?
 - b) Can ADR be used as an opt-in. opt-out measure?
 - c) Is the decision binding or non-binding?
 - d) What are the provisions for enforcement of the decision(s)?
 - e) What, if any, are the methods for appeal?
 - f) All of the above**