The Case for Early Intervention in Construction Disputes

by

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It seems that recently construction disputes have dragged on with no resolution in sight. While some of this is due to the nature of construction disputes, some of the delay is due to court backlogs, "economy" (or lack of one) and others "gilding the lily". The result is that the real issues in the dispute and the practical solutions for those issues are lost in so much process, procedure, documents, lawyers, and experts. The involved parties are correct to think that they have lost control of their own dispute. It's simply a truism: The longer the dispute lasts, the more expensive it gets, and the less profit there is at the end of the day.

Early intervention in construction disputes avoids lost time, money, productivity and profits. And while everyone agrees that this is true, many contractors, remodelers and home owners do not include a pre-determined, agreed upon process for dispute resolution in their contract documents. There are resources for this, however:

AIA contracts

AIA documents have required that all disputes be decided by binding arbitration since 1888. Many Contractors and Owners, however, have deleted the provisions requiring binding arbitration. While the A201-2007 still requires mediation before any binding dispute resolution process, the 2007 form allows the parties to literally "check a box" to determine whether disputes will be resolved by arbitration, litigation, or "other". If no box is checked, the default is *litigation*, not *arbitration*. If the parties choose binding arbitration, the parties may also choose their own provider of arbitration services. This is a change from the A201-1997 that requires that the arbitration be administered by the American Arbitration Association. For early intervention, the forms allow for a neutral third party to make non-binding decision on claims. In some cases the process of preparation for neutral evaluation leads to the resolution of the dispute before it even gets to the neutral.

Mediation and Arbitration:

Contract provisions may include mandatory mediation and arbitration prior to any litigation being started. If there is a dispute, a mandatory mediation and arbitration provisions requires resolution without use of the court system. Mediation can be initiated at any time and the parties control the outcome of the dispute with the assistance of a neutral. Some if not all issues can be resolved even within a larger dispute.

Most states enforce these provisions and some states will enforce a waiver of jury trial within the same provision if it is carefully worded and specifically agreed to by the parties. Provisions such as this have a significant impact when they also include a section that requires a non-compliant party to pay the others attorney fees and costs if the provision is not followed, i.e. by filing a lawsuit without first proceeding to mediation or arbitration.

Along these lines is "med-arb" where the neutral tries to resolve the dispute with mediation but if the parties agree that mediation is not going to further resolution, then the neutral is empowered to make a decision in the case with the use of arbitration.

Arbitration

The use of arbitration, at times, resembles full blown litigation. A concept now in play is fast tract arbitration for disputes of lesser values. By contract or agreement, the parties stipulate to an arbitrator and that disputes below a certain amount will go to arbitration within a certain time period, and with limited discovery. 50/50 means disputes under $50,000 go to arbitration in under 50 days. Requiring this procedure makes quick work of resolving disputes that may arise.

A New Service Model

Beyond these models, the construction industry should have available a resource to resolve disputes early and efficiently without fear of extraordinary legal costs. This means providing access to experienced services that are available to answer the daily legal issues that arise, review construction documents, assist in the resolution of disputes, and provide representation in litigated matters.

One such model for these services is a "subscription" to legal services, which in concept is a lot like an old fashion retainer agreement. The goal is to permit the construction and renovation industries to subscribe to a service at an affordable rate and thus provide a resource for early intervention. This service would address the daily legal issues that arise without the expense of a monthly bill for legal services while at the same time reducing the potential for legal issues. Under this model, a "member" would subscribe for an annual fee. The member would be assigned to a contract attorney, telephone number, and email address for the routine day to day legal issues that arise. A less than 24 hour response should be expected. Other services, such as contract/document reviews could be submitted by the "member" to their designated attorney at a preferential fixed fee. The documents may range from proposals, contract documents or employment contracts. The "member" and attorney could contract separately this service. In addition, "members" would be required to use mediation, med-arb or arbitration to resolve disputes. The goal would be to provide cost efficiencies in the process for the member, and to obtain a prompt resolution of that dispute.

Results

Results count. Whatever the process is that you choose, include it in your contract documents, get an agreement to mediate or arbitrate, or if you are in litigation, ask – even beg the judge to refer the case to mediation or arbitration……The difference between the discussion and exchange found in mediation and the argument and posturing of litigation is clearly reflected in the statement of Robert Quillen, "*Discussion is an exchange of knowledge; argument is an exchange of ignorance.*"