

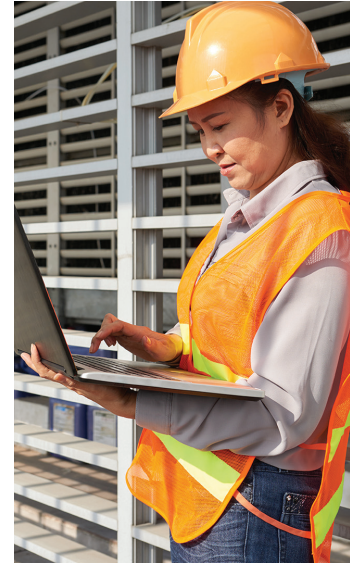


A Tale of Two ADR Provisions

BY STACY LA SCALA, ESQ.

It was the best of provisions; it was the worst of provisions, crafted by the wise and well-meaning alike. For years, construction documentation has been primarily sourced from the American Institute of Architects (AIA). The AIA provided guidance through the publication of contractual provisions involving many aspects of the construction process, including alternative dispute resolution (ADR). It has been observed that the documentation provided by the AIA generally favored both owners and architects, whose forms, as used by contractors, typically required amendment and modification. So much so that in 2007 (updated in 2017), a group of owners, contractors, subcontractors, designers and sureties came together and published their own set of construction contract documents called ConsensusDocs.

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Considering Fast-Track Arbitration? Here's What Both Sides Should Take Into Account

BY JOHN W. HINCHEY, ESQ.

Over the past decade, industry concerns about time and cost have prompted arbitral institutions, industry and bar organizations and even legislatures to develop faster, more efficient and generally cheaper processes for deciding construction disputes.

The procedures that the industry thought might have the most success in reducing the time and cost of construction arbitration have been the accelerated, or "fast-track," procedures, which are designed to significantly reduce the time from

the initiation of the dispute resolution process to a binding determination, whether that determination is final or for an interim time.

Following the example of statutory adjudication in the U.K. and other common law countries, almost every major arbitral institution has promulgated similar accelerated procedures, all in an effort to reduce the time and cost of construction arbitrations. For example:

- In 2005, the CPR International Institute for Conflict Prevention and Resolution developed

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Negotiation in the Red Zone: Excelling When It's Critical

BY ELEISSA C. LAVELLE, ESQ.

The last 20 yards before the end zone on a football field, known as the red zone, is on the critical path to scoring a touchdown. In those final 20 yards, the importance of play-calling is amplified as options become limited and the defense digs in. Just as playing great red zone football is critical to winning the game, so is great skill in the last stage of a negotiation. Clean execution is crucial to achieving success and getting what you want and need from the opposition.

When negotiations take place during the course of a construction project, the need to resolve disputes fast is at a premium to avoid delay and keep a project moving. In the negotiation red zone, what started out as an enormous gap between demands and offers has been chiseled away so that the remaining gap is within sight but not quite within reach. Each move becomes more contested, sometimes accompanied by threats and insults. Apprehension of the risk of no deal—potential delay, increased costs—intensifies the urgency, anxiety and frustration of the negotiators. No one wants to blink or cave, especially if a negotiator is concerned that looking weak or giving in will set a precedent in future negotiations. A negotiator rarely has an

opportunity to recover from a fumble like reputational damage.

The key to success in the red zone starts before the negotiation begins and requires skill and patience as the endgame approaches. Here are four skills to increase effectiveness in the negotiation red zone:

1. Patience, Persistence and Perspective

Negotiators rarely become more complacent as the negotiation continues. One party blames the other for not negotiating in good faith (read: not offering what the accuser wants or refusing to match concessions). Angry accusations and threats of litigation, default termination and attempts to go “pencils down” are exchanged. The result is escalation of hostilities that spiral out of control. Even if the negotiators appear to be maintaining their composure, they may nevertheless experience so much stress and frustration that their cognitive and creative capacities are blocked, causing productive conversation to end.

Although it is easier said than done, one side must break the cycle by stepping back to view the situation from a more calm and patient perspective, taking a break and de-escalating the situation, in order to

resume the dialogue. A useful break in the action may be accomplished by changing the scenery.

An example:

When angry exchanges escalated between attorneys for a surety company that had taken over a project and representatives of a subcontractor who had made a payment bond claim, threatening to completely derail negotiation over disputed change orders, one of the negotiators who had not been a lead negotiator in the discussion, but who had been paying attention to the dynamics in the room, recognized that if something didn't change soon, ultimatums would be delivered and everyone would pack up and leave. He suddenly invited one of the subcontractor reps out of the negotiation room for a cup of coffee, without a clue as to what he would say, but figured anything was better than watching the hostilities intensify at the negotiating table. That abrupt break in the action so surprised the other two disputants remaining in the room that they stopped yelling at each other and wondered together what was going on. After the coffee break, all of the negotiators had

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Negotiation in the Red Zone *(Continued from Page 2)*

regained their composure enough to refocus on reaching a solution instead of making threats.

Patience, persistence and perspective, when anger and frustration threaten to derail a negotiation, can often place the negotiation back on track to achieve an acceptable agreement. No one makes a deal if either party stops talking. If the parties are unable to tear themselves away from the fight, a skilled mediator should be able to read the room, anticipate and manage disruptive emotions and conduct, and assist the negotiators by engineering a change of scenery or break in the action in order to resume constructive conversation.

2. Identify the Obstacles and (If Possible) Solve the Other Guy's Problem

One or more times in the negotiation, roadblocks develop that look like they're just too challenging to overcome. Negotiation is about persuading the other party to give you what you need and/or want. When arguing the obvious merit of your position hasn't convinced your opponent to give in, what do you do when he digs in his heels and just says no?

One way to overcome a stubborn negotiator is to diagnose the reason for his obstinacy by asking questions and listening to his responses. What's at stake for him? Why is a particular issue so contentious? Sometimes he'll just tell you if you ask directly why a particular demand is so important. Is there some other way to get him what he needs without hurting you? Other times, it may take some behind-the-scenes investigation or even an evaluation of the relationship between the parties.

Make it easy for the other side to give you what you need by solving their problem, if



“The sure route to a poor outcome in the negotiation red zone is to lose your composure and make an unforced error.”

you can, but ensure that the cost to you is an acceptable trade-off.

All negotiators have blind spots, and often a negotiator can be his own biggest obstacle to progress. Always reflect on how your own behavior may be contributing to the roadblock. If it is, think about whether acknowledging this to your opponent will be so disarming that it resets the way the parties communicate during the negotiation. If the other side's behavior is the problem, it will likely be useless to point this out, but once again, asking questions may reveal their motivations. The idea is to change the conversation to open opportunities to discuss creative alternatives and solve the other side's problem. If that can happen, the roadblock is removed. However...

3. Don't Be Exploited

Every negotiator, no matter how experienced, is concerned about leaving money

on the table, being exploited or looking weak. Being cordial does not mean giving in. Success on this point depends on two processes:

a. Preparation before the negotiation begins should determine exactly what goals you must achieve in the negotiation—a time extension, money, an agreed-upon protocol to streamline decision-making—and your “Plan B.” What will you do if there is no agreement, and how does your Plan B compare to each offer made by your opponent? In other words, what is your “or else?” What can you do independent of the deal either to benefit yourself or to affect your opponent?

b. Observe each concession and respond accordingly. Making a generous concession (provided that it is still within the range that you are willing to

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Negotiation in the Red Zone *(Continued from Page 3)*

concede to make the deal) may elicit a generous response from your opponent. If you make a significant concession, you should expect a reciprocal response. It may sound obvious, but if your opponent refuses to play that game, don't continue to be generous. Instead, simply go back to matching his response.

4. Be Willing to Walk Away

Sometimes an offense decides to go all in on fourth down instead of settling for a field goal. Successful negotiation is about knowing your objectives and getting what you need if you can. From the very begin-

ning of the negotiation, clarity about your objective and whether your opponent's final offer is just not acceptable is essential. This willingness to walk away if you can't achieve satisfactory resolution in the negotiation conveys the strength of your conviction and shapes your approach to the negotiation from beginning to end. When agreement is just out of your grasp, the temptation is to compromise, or split the difference, either figuratively or literally. If doing so doesn't violate your critical objectives, go ahead. However, as is often said, no deal is better than a bad deal. The challenge is to be absolutely clear about whether the other side's demand is worse than your probable alternatives to no deal, but also not to stop talking until you are certain you've squeezed everything possible out of your opponent.

The sure route to a poor outcome in the negotiation red zone is to lose your composure and make an unforced error. By paying close attention to what your opponent is revealing about his own objectives, while calmly and tenaciously maintaining absolute commitment to your own, you strengthen the prospect of a satisfactory result. ●



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Fast-Track Arbitration

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accelerated construction arbitration procedures for use both in the United States and globally. The result of this committee's work was the promulgation, effective June 2006, of the CPR Rules for Expedited Arbitration of Construction Disputes.

- Using the AAA Construction Industry Arbitration Rules and Mediation Procedures (AAA/ICDR) (amended and effective June 1, 2010), the parties to a construction dispute may opt for the Fast Track Procedures. In most cases, the total time for a construction case held under the AAA/ICDR Fast Track Procedures should not exceed 60 days from the arbitrator's appointment to the award, "unless all parties and the arbitrator agree otherwise or the arbitrator extends this time in extraordinary cases when the demands of justice require it."
- Effective February 2015, JAMS issued a revised set of JAMS Engineering and Construction Arbitration Rules & Procedures for Expedited Arbitration (JAMS Expedited Construction Rules). The JAMS Expedited Construction Rules are intended "to govern binding arbitrations of disputes administered by JAMS and related to or arising out of contracts pertaining to the built environment, including without limitation claims involving architecture, engineering, construction, surety bonds, surety indemnity, building materials, lending, insurance, equipment, and trade practice and usage, where the Parties have agreed to expedited arbitration."
- The Construction Industry Development Council, India, in cooperation with the Singapore International Arbitration Centre, has established an arbitration center in India known as the Construction Industry Arbitration Association (CIAA). The CIAA Arbitration Rules provide for

tight time frames for appointment of arbitrators and for rendering the award. Under the CIAA Rules, the arbitrator is required to make a reasoned award within 45 days from the close of the hearing.

But the efforts to accelerate arbitration procedures and to reduce the time and cost of construction arbitration must take into account certain inherent tensions and contradictory attitudes of parties to commercial disputes. Ask almost any businessperson who is not then engaged in a serious commercial dispute, and you will likely hear strong complaints about delays associated with arbitration. Yet, when that same businessperson's substantial assets are at risk, or if a company's very existence is on the line, procedural efficiency will likely be of lesser concern than preservation of assets. In other words, when serious interests are at risk, getting it right often trumps getting it done.

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Fast-Track Arbitration

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Two other factors that often lead to delays in construction arbitrations are who wants the money and who will have to pay. The party with claims seeking to recover substantial sums will likely press for speed and efficiency of process, whereas the party that ultimately will write the check typically wants more time for case preparation and careful deliberation.

Usually, the complaining party seeking recovery will be better, if not fully, prepared to present its case and will resist efforts to engage in discovery. On the other hand, the responding party is often heard to claim “surprise” or “ambush,” with pleas for more time for full disclosure of the claimant’s evidence. Thus, claimants will almost always insist on speedy resolution, whereas respondents will not.

There is also the fact that lawyers want to be thoroughly prepared in order to lessen the risk of losing a client’s case or being professionally embarrassed. Lawyers do not like ugly surprises, and neither do their clients. Thus, they will almost always urge full production and exchange of project documentation, and even the taking of depositions, to test the memories and biases of witnesses. Yet, quite obviously, discovery is the enemy of speed and efficiency in regard to “getting it done.”

The success of fast-track arbitration, especially for substantial construction disputes, will depend on parties who are willing to compromise their “positional” or “circumstantial” status in the process, even when it may hurt.

Success will also depend on arbitrators who can commit to the process. In major construction cases, arbitrators will have to devote close to their full time to the task of fast-tracking arbitrations, and they must be prepared to resist the inevitable motions for continuance and extensions of time.

At the same time, the tribunal must balance speed against the need for fairness and a reasonable opportunity for each party to prepare.

Similarly, counsel must commit to prepare and to move the case forward consistent with the accelerated procedures. This time commitment may give larger law firms an advantage over solo practitioners and

dural choices that are made in the context of arbitration.

In the end, it may be said that the intrinsic values of arbitration do not include speed or economy or even efficiency. Rather, it is party choice that transcends speed and economy, worthy as these values may be. If the parties so choose, they can have speed and early finality of their dispute. On



“[W]hen...substantial assets are at risk, or if a company’s very existence is on the line, procedural efficiency will likely be of lesser concern than preservation of assets.”

smaller firms, who must attend to other matters.

While the construction industry is legitimately concerned that the traditional ways of resolving construction disputes are taking too long and costing too much, it must be remembered that accelerated processes that lead to cost and time savings may derogate from the quality of arbitration as a means of reaching a fair and just result.

Quite obviously, time can be saved by implementing an accelerated, or fast-track, timetable for the arbitration, but cutting time may result in an injustice to one or both parties. Indeed, a cost-benefit analysis should be done for virtually all proce-

the other hand, the parties can exercise their autonomy to engage in a protracted and thorough grinding out of the issues. In either event, the choice should not be seen as reflecting on the value of the arbitration process itself, but rather on the core values of the parties making the choice. ●



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A Tale of Two ADR Provisions

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For construction practitioners, serious consideration must be paid to the ADR provisions up front, as a failure to understand and allocate the tail risk can have dire consequences; hence, a tale of two approaches to ADR.

ConsensusDocs – ADR

The ConsensusDocs ADR provisions provide a multi-step process by which party representatives are initially required to negotiate with one another. Failing resolution, senior executives are then required to meet in good faith to attempt resolution of the dispute.

The ADR path in the ConsensusDocs then forks depending upon the desires of the parties at the time of contracting. One fork sends the parties to a mitigation procedure involving a nonbinding finding by either a project neutral or a dispute review board (whose determination may be introduced in subsequent litigation).

If the parties did not choose to go through the mitigation procedure at the time of contracting, the second fork leads to mediation. The mediation option includes the ability to select mediators from AAA, JAMS or a body of the parties' choosing.

The provision provides that the parties choose mediation through one of the following:

- The current Construction Industry Mediation Rules of the American Arbitration Association (AAA) administered by AAA
- The current Mediation Guidelines of JAMS administered by JAMS
- The current rules of [_____] administered by [_____]

If the mediation or mitigation processes fail to resolve the dispute, the ADR paths merge, sending the parties to binding arbitration or litigation. If arbitration is selected, the parties are given the option to determine which rules will be applied to their dispute. Article 12.5.1.2 provides that the arbitration shall use one of the following:

- The current AAA Construction Industry Arbitration Rules administered by AAA; AAA Construction Fast-Track Rules shall apply to all two-party cases when neither party's disclosed claim or counterclaim exceeds \$250,000. If arbitration is selected but no rules are selected, then this subsection shall apply by default.
- The current JAMS Engineering and Construction Arbitration Rules and Procedures administered by JAMS
- The current Arbitration Rules of [_____] administered by [_____]

AIA ADR

Like the ConsensusDocs ADR provisions, the AIA ADR provisions were also updated in 2017. Of particular interest in the new AIA ADR provisions are new time restrictions, which, if not followed, may severely restrict a party's rights, including a potential waiver.

In contrast to ConsensusDocs, there are no requirements that the parties meet in order to resolve the matter. Instead, the AIA ADR provisions have two separate dispute resolution paths determined by the time that a claim arises. Claims are defined broadly to include all disputes and matters in question between the owner and contractor arising out of or relating to the contract.

For claims that arise prior to the first year following substantial completion, the owner and contractor are required to submit their dispute to an initial decision-maker (IDM) "within 21 days after occurrence of

the event giving rise to such claim or within 21 days after the claimant first recognizes the condition giving rise to the claim, whichever is later." The AIA form, by definition and default, designates the architect of record as the IDM.

If a dispute remains following the IDM's decision, there is a demand-shifting procedural step (new to the 2017 form) that gives either party the power to compel the other party (within 30 days) to proceed to mediation. Failure to timely proceed to mediation signifies a mutual waiver of rights for that claim.

For claims that arise after the first year following substantial completion, the parties go directly to mediation. This new demand-shifting provision appears once again in the mediation provisions. Should the matter fail to resolve at mediation, either party may demand (within 30 days following mediation or 60 days following the demand to mediate) that the other party proceed with arbitration or litigation. Should the party receiving the demand fail to file a demand or suit, then both parties waive their rights to proceed to arbitration or litigation.

Parties considering the use of either ConsensusDocs or AIA forms need to understand that each set of construction documents requires thoughtfulness and up-front risk assessment. The decisions at the time of contracting will have a significant impact on both the timing and resolution of the dispute. ●



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The JAMS Global Engineering and Construction Group provides expert mediation, arbitration, project neutral and other services to the global construction industry to resolve disputes in a timely manner. Learn more at www.jamsadr.com/construction.

Representative Matters

Zela “Zee” Claiborne, Esq. was appointed chair of an arbitration panel for an oil and gas case in Houston, Texas.

Kenneth C. Gibbs, Esq. will serve as a mediator of a major P3 infrastructure project in Pennsylvania and a light rail project in Houston, Texas.

John W. Hinchey, Esq. was appointed sole arbitrator in a JAMS-administered case involving breach of contract and fraud claims against a home developer in Georgia.

Honors

Robert B. Davidson, Esq. was named as a “2017 Arbitrator of the Year” by *Best Lawyers* and awarded a lifetime achievement award by Who’s Who.

Thomas I. Elkind, Esq. was named a 2017 *Super Lawyer* for Construction Litigation.

Upcoming Events

Philip L. Bruner, Esq. will speak at the ABA Forum on Construction Law in Ft. Meyers, FL in January 2018 on challenges faced in multi-tiered litigation, bringing subcontractors into dispute proceedings and whether “sole discretion” arbitration clauses are enforceable against non-parties.

John W. Hinchey, Esq. will speak at the ABA Forum on Construction Law meeting in Montreal in October 2018 on how the ICC Rules and practice differ from domestic U.S. arbitration.

Patricia H. Thompson, Esq. will speak on “Ethics and Compliance—What Every Contractor, Subcontractor, Design Professional and Their Counsel Need to Know” at the ABA Forum on Construction Law in Ft. Myers, FL in January 2018. She will also speak on “Effective Use of Arbitration” at the Midwinter conference of the ABA TIPS Fidelity and Surety Law Committee meetings in Washington, D.C., in January 2018. ●

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