

# Creative Construction Dispute Resolution in Hard Economic Times

The construction industry now finds itself in an era of diminished demand, capital raising challenges, currency fluctuations and regulatory constraints, all to be tested by the traditional risks and uncertainties that attend building projects. How will the inevitable disputes arising from this new era best be resolved, and what is the future of construction dispute resolution?

Perhaps more than any other sector of commerce, the construction industry has been proactive and creative in the development of techniques and processes for reducing or mitigating conflict. Particularly, in the last few years, many leaders and organizations involved with ADR and dispute resolution have developed more informal processes, all with a view to reducing the scope, time and cost of resolving commercial disputes.

## Tiered and "Real Time" Dispute Resolution

In the U.S., mediation has been commonly used as a prelude to arbitration or litigation, and contracts typically require a succession of mandatory negotiation, then mediation or conciliation, as conditions to proceeding with arbitration or litigation. Mediation and conciliation are very generally defined as private, usually confidential, informal processes in which the disputants are assisted by one or more unbiased, disinterested neutral third parties to reach a negotiated settlement of the dispute. Mediation and conciliation have proven to be demonstrably effective in resolving construction disputes; and, as the international communities outside the U.S. become more familiar with these nonbinding ADR processes, the use of such procedures will continue to grow in use and popularity. What makes mediation effective

It is a rare construction case where the immense investment in a full-scale arbitration or litigation is in any way proportional to the improvement in the provable merits of the case. Yes, there is the occasional "smoking gun" out there that some might argue justifies the expense of an elaborate trial process, but these cases are few and far between when sophisticated construction industry stakeholders are involved. It is much more likely that if the construction professionals, assisted by a trained mediator, view the merits of a dispute as "50/50" or "90/10", after a good, hard, joint look at the facts and law, and after consideration of any necessary input by experts, then, in all probability, it will still look pretty much the same after pleadings, productions, pre-hearing examinations and much of the eventual trial or arbitration. In a business environment where clients are often seeking the 80% solution and the resistance to significant expenditures on legal fees is intensifying across the market, it seems that the clients could very well consider it commercially unwarranted to spend millions of dollars and years of effort to fight for that last 20% of the "real" case. In other words, the work product would be a reasonably reliable "snap shot" of a likely end result on the merits, based upon the facts as (admittedly) partially known and the law as commonly understood.

Process Design

A promising remedy for reducing cost and time in resolving construction disputes may be real-time dispute resolution by ADR process designers who are capable,

experienced construction professionals who would be prepared to meet with the parties within a period of a few days. They would then gather the pertinent information and recommend a specifically tailored process to best suit the problem. Most ADR and arbitral institutional providers still offer only the traditional panels of mediators and arbitrators who are prepared to follow only traditional methods, usually requiring many weeks and months to put a process into place and bring the dispute to a conclusion. In contrast, construction professional, trained in process design, would be prepared to make an early assessment of disputes and recommend either creative or traditional methods (or a combination of both) to resolve disputes. For example, if a dispute was keyed to an engineering or accounting issue, the neutral might recommend an engineering expert or accountant to make an "expert determination" that would be either binding or nonbinding. On the other hand, if mediation, conciliation or arbitration is more appropriate, the neutral advisor would be prepared to put those processes in place and move the process forward as rapidly and efficiently as the parties would permit.

Even though conflict in construction is perhaps inevitable, the parties to construction projects now have the advantage of "choice"--- an array of options at the stage when conflict develops, to reduce the scope, time and cost of the conflict.

Mr. Hinchey is recognized in the United States and internationally as a leader in construction law, with extensive experience in resolving significant construction disputes as a mediator and arbitrator. Prior to his retirement in 2011 from King & Spalding, an international law firm, he led their construction disputes practice for 18 years. Mr. Hinchey now focuses his practice on international and domestic construction arbitration and dispute resolution,

having served as an arbitrator and mediator in a great variety of large complex construction disputes.

Mr. Hinchey has served as Chair of, and received the highest achievement "Cornerstone" award from, the world's largest organization of construction lawyers, the American Bar Association Forum on The Construction Industry; He is a fellow and has served as President of the American College of Construction Lawyers; he is also an honorary fellow of the Canadian College of Construction Lawyers; a fellow of the College of Commercial Arbitrators and Mediators; the CPR International Institute Distinguished Panels of Neutrals---(Construction)(Cross-border) (ADR); and the ICC, LCIA and CIARB (International Arbitration) Panels. He is also on the Council of Distinguished Advisors to The Straus Institute, Pepperdine University School of Law. Mr. Hinchey has been frequently listed in Chambers and Partners, Best Lawyers in America, U.S. Legal 500, Guide to the World's Leading Experts in Commercial Arbitrators, Superlawyers (Corporate Counsel Edition), Who's Who in American Law, Who's Who in America; as one of the top eight "Most Highly Regarded Individuals---Global" in the International Who's Who of Construction Lawyers and Commercial Arbitration; and recently received the 2012 Arbitration "Lawyer of the Year Award" - Washington D.C. - from Best Lawyers in America.



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