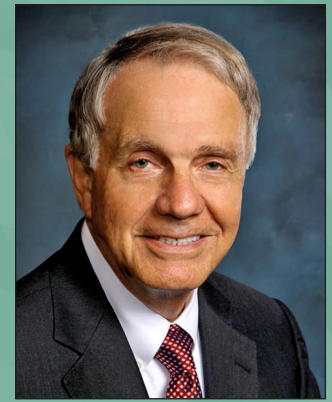


# Rethinking Resolution of Construction Disputes

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Over the past three decades, construction industry leaders and organisations have been increasingly concerned with how best to avoid disputes, but if not avoided, how to resolve those disputes in the most cost-efficient and timely manner.

It is an unremarkable fact that disputes among contracting parties are common in the construction industry, often leading to arbitration and litigation. However, the same industry has a rich tradition of creating and experimenting with alternatives to litigation. Some have characterised this innovative process as analogous to a ‘laboratory’, noting that: ‘The construction industry represents not only the cutting edge of experience with dispute resolution processes, but also the spearhead of experimentation with mechanisms aimed at avoiding disputes by attacking the roots of controversy.’<sup>1</sup>

And yet, this continual searching for the most effective, the most cost efficient, or even the ‘best’ process tends to mask what may be the most important value of alternative dispute resolution. In this article the Author briefly surveys the spectrum of techniques and processes to avoid and resolve disputes and concludes that the goal should not be to discover some ideal or optimum process, but rather to determine which technique or process best suits the values and objectives of the affected parties.

## The spectrum of dispute avoidance

The primary theme of dispute avoidance efforts has been that parties to construction contracts should structure their relationships and take appropriate action to prevent disputes from arising on the job. The spectrum of dispute avoidance techniques has included

enlightened risk allocation in contracting, efforts to improve quality and efficiency of work performed and the use of incentives for exceptional performance. In the 1980s, for example, the emphasis was on improvement of quality of work. The term used was ‘quality assurance’ (QA), and then in the late 1980s, it became ‘total quality management’ (TQM).<sup>2</sup> The emphasis then shifted in the 1990s to project delivery strategies to encourage and motivate the parties to work in a non-adversarial manner. Different approaches evolved in the United Kingdom and the United States to achieve these project delivery objectives – in the US the ‘partnering’ or ‘project neutral’ model was in fashion.<sup>3</sup> In the UK and Australia, it was the ‘project alliancing’ model that led the way,<sup>4</sup> followed by the US version of alliancing, better known as ‘integrated project delivery’.<sup>5</sup>

However, these dispute avoidance techniques should not be confused with procedures to resolve disputes once they arise. Even so, one hears industry representatives opining, for example, that they prefer negotiation or mediation over arbitration, which is little more than recognising an obvious preference to avoid or settle disputes rather than going to trial or arbitration.<sup>6</sup> Without question, in any regime of relational contracts, construction contracts being prime examples, the parties should begin with a view to avoiding or preventing disputes from arising.

## The spectrum of construction dispute resolution

If a construction dispute cannot be avoided, the industry believes that it should be resolved by the most effective and cost-efficient means possible.<sup>7</sup> As with dispute avoidance, the construction community has been particularly proactive and creative in developing

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new techniques, processes, rules and various protocols, guidelines and practice pointers, all with a view to reducing the scope, time and cost of resolving construction disputes.<sup>8</sup>

As a first step, it is difficult to argue against the proposition that parties should attempt to meet and negotiate solutions to their disputes, as they normally do. During the 1990s, especially on the North American scene, construction contracts began to mandate exchanges of relevant documents and information, followed by required negotiation, the assumption being that a prime cause of construction disputes is insufficient knowledge by either or both parties to the dispute, that is, the more facts that can be placed on the table, the more discernible the solution to the problem.<sup>9</sup>

Because sooner is better when it comes to resolving construction disputes, several approaches have been taken to resolve construction disputes on the job, some in ‘real time’ while the work is being performed. Generally these arbitration-alternative procedures are non-binding in the sense that the parties are not bound to resolve or accept a decision or recommendation for resolving their dispute, even though the parties may be contractually or legally obligated to go forward with the process, that is, the process is a mandatory requirement.<sup>10</sup>

One of the earliest examples of on-the-job dispute resolution was the engineer’s historical role as the professional peacekeeper between the employer and contractor. However, the fact that the designer or engineer was traditionally hired by the employer led to concerns about the engineer’s independence and neutrality in decision-making. As a result, most construction standard form contracts have now relieved the engineer or design professional of the traditional obligation to perform an adjudicative role on disputes between the employer and contractor. Instead, the traditional decision-making role of the architect and engineer is migrating to presumably independent third parties, such as ‘independent decision-makers’ and dispute adjudication boards.<sup>11</sup> As an example, the latest FIDIC form contracts have effectively removed the engineer from a disputes decision-making role, replacing it with a required submission to a dispute avoidance/ adjudication board (DAAB), followed by arbitration or litigation.<sup>12</sup> In fact, many construction contracts and dispute resolution provisions now require a succession of mandatory negotiation, which, if unsuccessful, then leads to required mediation or conciliation, which are conditions to proceeding with arbitration or litigation.<sup>13</sup>

Even though mediation, conciliation and dispute review boards have proven demonstrably effective in resolving construction disputes, they should not be viewed as ‘either–or’ alternatives to

arbitration. Instead, these structured negotiation procedures with the assistance of third parties should be viewed as a prelude or as filters to arbitration or litigation. That is to say that the probable and desirable consequence of this filtered or tiered approach to dispute resolution is that only the most intractable and difficult disputes will go to the more elaborate, costly, time-consuming, trial-like arbitration procedures as a last resort.

### Efforts to reduce time and cost of arbitration

That the arbitral process takes too long or costs too much is a top concern about commercial arbitration generally, and particularly so in the construction and technology sectors of the business community.<sup>14</sup> A sobering example in the US occurred in 2007 when the American Institute of Architects dropped arbitration as the default process for ultimately resolving construction disputes in their suite of contract forms.<sup>15</sup> Now, the parties must affirmatively elect to arbitrate.

Over the past 20 years or so, growing concern about the increasing time and cost of arbitration has prompted arbitral institutions, industry and bar organisations, and even legislatures, to develop faster, more efficient and generally cheaper adjudication processes for deciding construction disputes. In the UK, for example, the procedure that the industry thought might have success in reducing the time and cost of construction dispute resolution was statutory adjudication.<sup>16</sup> Enacted in the mid-1990s, it was said that the underlying purpose of statutory adjudication was to provide a ‘pay now, litigate later’ solution on the assumption that anything that goes awry can be cured in subsequent litigation or arbitration.<sup>17</sup>

Under the English version of statutory adjudication, a party to a ‘construction contract’, as defined, has the right to refer a dispute arising under the contract for statutory adjudication under specified procedures providing for:

- a written notice of adjudication, briefly stating a description of the dispute, names of parties, details of where and when the dispute has arisen, and the nature of redress sought;
- after appointment of the adjudicator, the referring party must, within seven days, produce and serve on the opposing party pertinent information from the construction contract, including ‘such other documents as the Referring Party intends to rely upon’;
- the adjudicator is then required to ‘act impartially in carrying out his duties... in accordance with any relevant terms of the contract... [and] shall [decide] in accordance with the applicable

law in relation to the contract’ and ‘shall avoid incurring unnecessary expense’;

- The adjudicator may act inquisitorially and ‘take the initiative in ascertaining the facts and the law necessary to determine the dispute’, including requesting documents or written statements, deciding the language(s) to be used and whether there shall be a hearing or meetings of the parties, making site visits, conducting tests and inspections, appointing experts, assessors or legal advisers, establishing a timetable and deadlines for responses, and generally establishing the procedure to be followed by the parties in the adjudication;
- the adjudicator’s decision is required to be made within 28 days after the date of referral (or 42 days thereafter if the referring party consents), and if requested by one of the parties, the adjudicator shall provide reasons for the decision; and
- in the absence of directions by the adjudicator relating to the time for performance of the decision, the parties are required to comply with the decision, immediately upon receipt.<sup>18</sup>

However, after approximately five years of experience with statutory adjudication, the Society of Construction Arbitrators assessed the advantages and disadvantages of statutory adjudication relative to full-scale arbitration.<sup>19</sup> The conclusion drawn was that the perceived ‘wrongs’ of arbitration had been overstated and there was much to be seen as ‘right’ with arbitral processes. For example, there was a closer balance that could be struck as between the 28-plus day statutory adjudication process and full-scale arbitration which often takes one to two years or more to complete. The result of this balancing analysis was the promulgation in 2004 of a set of rules to be known as the 100-Day Arbitration Procedure.<sup>20</sup>

Essentially, the 100-Day rules expanded the 28-day time period to 100 days, but beginning upon the filing of the statement of defence or counterclaim. Thereupon, a procedural conference is quickly arranged among the arbitrator and the party representatives to obtain their views on future procedures. The arbitrator is expressly granted authority to: (1) order any submission or other material to be delivered in writing or electronically; (2) take the initiative in ascertaining the facts and the law; (3) direct the manner in which the time of the hearing is to be used; (4) limit or specify the number of witnesses and/or experts to be heard orally; (5) order questions to witnesses or experts to be put and answered in writing; (6) conduct the questioning of witnesses or experts; and (7) require two or more witnesses and/or experts to

give their evidence together. Finally, the arbitrator is to make an award within 30 days of the oral hearing.<sup>21</sup>

After the introduction of the 100-Day Arbitration Procedure, almost every major arbitral institution promulgated similar accelerated procedures, all in an effort to reduce the time and cost of construction arbitrations. Some examples:

- In 2005, the CPR International Institute for Conflict Prevention and Resolution (‘CPR Institute’), taking the English Statutory Adjudication and 100-Day Arbitration Procedures as guides, formed an advisory and drafting committee to develop accelerated construction arbitration procedures for use both in the US 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 (‘CPR Expedited Construction Rules’).<sup>22</sup>
- On 1 June 2007, the Institute of Arbitrators and Mediators Australia (IAMA) (now the Resolution Institute) published a new set of rules with the goal of reducing the costs associated with arbitrations and to provide the parties with quick determinations. The stated objective of the IAMA Fast Track Rules is to enable an arbitrator to produce an award, excepting only costs, within 150 days after appointment. In general, the IAMA Fast Track Rules follow the same patterns as the English 100-Day Arbitration Procedure and the CPR Expedited Arbitration Rules.<sup>23</sup>
- On 20 August 2009, the CPR Institute promulgated their Global Rules for Accelerated Commercial Arbitration (‘CPR Global Accelerated Rules’). The CPR Global Accelerated Rules provide for a schedule ‘that will result in issuance of the Award in as short a period as feasible under the circumstances, consistent with the reasonable needs of the parties, the subject matter of the arbitration and such other factors as the Arbitral Tribunal determines to be appropriate, but not later than six (6) months from the Selection of the Arbitral Tribunal’.<sup>24</sup>
- Effective from 1 August 2016, the Singapore International Arbitration Centre (SIAC) issued the sixth edition of its arbitration rules, which included several new provisions for expedited arbitration. The expedited procedure significantly shortens the timeframe of arbitration with the potential to reduce costs. For example, the tribunal now has the discretion to decide whether an expedited procedure case is to be decided on the basis of documentary evidence only, and makes it clear that if there is any conflict between the terms of the arbitration agreement and the expedited procedure, the provisions in the latter will apply.<sup>25</sup>

- The Construction Industry Development Council (CIDC) of India, in cooperation with the SIAC, has established an arbitration centre in India known as the Construction Industry Arbitration Association (CIAA). The CIAA Arbitration Rules provide for tight timeframes for the 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.<sup>26</sup>
- Effective from 1 January 2017, the Stockholm Chamber of Commerce (SCC) adopted new Rules for Expedited Arbitrations ('Expedited Rules').<sup>27</sup> The Expedited Rules mirror, to a great extent the regular Arbitration Rules, but there are distinguishing features. For example, under the Expedited Rules a sole arbitrator decides the dispute; the award is to be made within three months from the referral of the case; the number of submissions and deadlines to exchange them are limited; an award does not have to be reasoned; and a different (lower) table of costs applies.<sup>28</sup>
- Effective from 1 March 2017, the International Chamber of Commerce (ICC) introduced an expedited procedure providing for a streamlined arbitration with a reduced scale of fees.<sup>29</sup> This procedure is automatically applicable in cases where the amount in dispute does not exceed US\$2m, unless the parties decide to opt out. One of the important features of the ICC Expedited Procedure Rules is that the ICC Court of Arbitration may appoint a sole arbitrator, even if the arbitration agreement provides otherwise. Other features of the ICC expedited procedure are that the case management conference convened pursuant to Article 24 of the Rules shall take place no later than 15 days after the date on which the file was transmitted to the arbitral tribunal, subject to extension by the tribunal; the tribunal has great discretion to adopt such procedures as it considers appropriate; the case may be decided solely on the basis of the documentary evidence; hearings may take place by video conference, telephone or similar means of communication; and the tribunal is required to render its award within six months from the case management conference.<sup>30</sup>

### **Situational tensions with efforts to reduce time and cost**

Although well intended, the efforts to accelerate and to reduce the time and cost of construction arbitration are in tension with certain basic interests of the parties and counsel. Ask almost any commercial person who is not then engaged in a serious dispute and you will likely hear strong complaints about delays and costs associated with arbitration. Yet, when that same commercial person's substantial assets are at risk or if the company's very

existence is on the line, concerns about getting it done quickly and cheaply often give way to greater concerns about getting it right. Another situational status that often leads to tension in construction arbitrations is 'who wants the money?' and 'who will have to pay?' A party that is seeking to recover substantial sums will likely press for speed and efficiency of process, whereas, the party that will ultimately write the cheque may want more time for case preparation and careful deliberation.

Typically, also, the initiating or complaining party seeking recovery will be better, if not fully, prepared to present their case and will, most likely, resist efforts to engage in prolonged document disclosure and extended written submission dates. Conversely, 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 well-known fact, quite understandably, that lawyers want to be thoroughly prepared so as to lessen the risk of losing their client's case or being professionally embarrassed. Lawyers do not like ugly surprises, and neither do their clients. Further, to the point, and especially so with construction disputes, it is generally the case that the truth of the matter is likely to be found in the contemporaneous written records that were generated as the job progressed, rather than in the witness statements prepared for the arbitration. After the dispute is in full flower, truth tends to be filtered through the competing interests of the opposing parties. Construction disputes counsel know these dynamics well. Thus, they will almost always urge full production and exchange of project documentation, perhaps even the taking of depositions, to test the memories and biases of witnesses. Yet, quite obviously, because contemporaneous records usually take time to acquire and analyse, the tedious effort to 'get it right' becomes the enemy of speed and efficiency for 'getting it done'.

Other tensions can be found in the nature of the dispute. If the issue has to do with quality of workmanship or conformance to specification, the case may require less time because technical experts can usually observe and test the physical condition at issue and reach resolution relatively quickly. On the other hand, if the issue is legal or contractual in nature, such as with issues concerning wrongful termination or claims for delay, more complex questions can arise, thus requiring procedural time and energy.

And, finally, it should not be forgotten that very large, complex and high-value disputes, which formerly were resolved in the courts with much expenditure of time and expense, are now be-

ing arbitrated. Thus, there is little reason to expect that less time or less expense will be incurred when the same type of disputes are in arbitration.

### Is there an ideal process?

Especially over the past ten years or so, we have seen that various international organisations have made concerted efforts to identify and remedy the causes of cost and delay in commercial and construction arbitration.<sup>31</sup> One such conference took place in the US in 2010, sponsored by the College of Commercial Arbitrators with various other arbitral institutions, including the Chartered Institute of Arbitrators.<sup>32</sup> This conference was called as a three-day summit gathering of representatives of all segments of the business and arbitration communities, including corporate counsel, outside counsel and the most experienced international and domestic arbitrators in the country. The purpose of the summit was threefold: (1) to identify, as precisely as possible, the causes of delay and high cost associated with arbitration proceedings; (2) to determine who or what groups were most responsible for delay and cost; and (3) to develop responsive remedial measures to lessen the time and cost of arbitration. The summit resulted in a 90-page set of findings and ‘Protocols for Expedient, Cost-effective Commercial Arbitration’. Essentially, the Protocols broke down the universe of arbitration participants into four groups: the commercial business users and their corporate in-house counsel; the arbitral institutions; outside counsel; and, of course, the arbitrators. The Protocols recognised that each of the four groups had particular opportunities and responsibilities to manage the time and cost of arbitration, and undertook to identify the precise measures that each of the four groups could take to manage and reduce time and cost.<sup>33</sup>

With similar objectives in mind, the ICC first published guidelines for efficiently and fairly arbitrating international construction disputes in 2001 (Final Report on Construction Industry Arbitrations).<sup>34</sup> This so-called Final Report provided useful guidance on a range of best practices for managing ICC and ad hoc construction arbitrations all over the world. Following issuance of the Final Report, in spring 2019 the ICC issued an updated set of tools, techniques and guidelines in ICC Commission Report: Construction Industry Arbitrations: Recommended Tools and Techniques for Effective Management.<sup>35</sup>

This updated 2019 report, like the 2001 report, recognised that construction arbitrations are in many respects no different from other commercial arbitrations, but noted that construction cases typically raise more complex factual, technical and legal issues –

such as multiple parties that may require joinder of additional parties or the consolidation of separate arbitrations, not to mention the typically huge quantities of documentary evidence. The 2019 report’s 27 pages of recommended practices read like a practice guidebook and focus on the full spectrum of processes in typical ICC construction arbitration cases – from start to finish. Its recommended tools and techniques were suggested by experienced construction arbitrators and scholars from a variety of countries, all in an effort to accommodate and harmonise the approaches of different national jurisdictions, and with the goal of reducing time and cost in construction arbitrations.<sup>36</sup>

### Conclusions

So, after decades of searching unceasingly for ideal techniques and processes to reduce time and cost in arbitration, what have we learned? Perhaps, to paraphrase T S Eliot, at the end of all our exploring will be to arrive where we started and know the place for the first time.<sup>37</sup> We know that conflict can often be avoided by taking preventative measures at the inception of contracting, but not always, and at what cost? We know that some disputes can be resolved while on the job, but not every dispute and not on every job. We know that time can be saved by implementing a variety of procedural techniques, including an accelerated timetable for the arbitration. However, cutting time may result in an injustice to one or both parties.

In summary, we know the causes of delay and cost, we know the remedies and we know which parties are in the best position to remediate the problems. Taking only one example, arbitrators must be willing to at least consider making earlier decisions in the form of granting applications to dispose of substantive issues. Yet, 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 so move the case forward consistent with an accelerated timetable. However, this time commitment may put larger law firms at an unfair advantage over solo practitioners and smaller firms that must attend to other matters.

Clearly, concerns about excessive time and cost for arbitrations are legitimate, but there is no easy or quick fix. There can be no simplification or streamlining of arbitral procedures without significant trade-offs. What is ‘streamlining’ and ‘efficient’ for one party is likely to be viewed by the opposing party as denial of due process or injustice. In the end, it may be said that the intrinsic values of arbitration are not speed or economy or even efficiency. Rather, it is party autonomy that transcends all of these

alternative values, worthy though they may be. If the parties so choose, they can have speed and early finality of their dispute. On 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 the core attributes of arbitration, but rather the core values of the parties making the choice.

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