“Litigation is a basic legal right guaranteeing every corporation its decade in court.” Attributed to David Porter, Executive Vice President of Microsoft.

Most courts and juries are ill-equipped to handle complex business and technical litigation matters, yet most construction contracts fail to address dispute resolution and do not have provisions customized to the subject matter and unique needs of the parties.
Unlike litigation, ADR allows parties to define nearly all aspects of their dispute resolution process. Overall, only ADR allows parties the full right of self-determination over the resolution of disputes, while litigation often exposes business parties to greater risk, costs, delays and uncertainties.

Taking full advantage of ADR means understanding each available process – whether mediation, arbitration, dispute review board or a combination – and the options for customization before executing a contract.

**MEDIATION**

Although success, and finality, are never guaranteed with mediation, it allows for control over the final settlement. Parties can craft a settlement otherwise impossible through trial verdict, as the parties can specify customized non-monetary terms. But, even if no settlement is reached, early mediation adds value. Through mediation, parties learn more about the strengths and weaknesses of various positions to move forward.

Mediation does not have to be a one-off. Most complex construction disputes will mediate more than once, and, if suit is initiated, most courts will order mediation regardless. Likewise, private arbitration services encourage mediation before a final hearing. If the parties engage an active mediator, it is also typical for that individual to continue to serve as a conduit for settlement talks, and to explore settlement possibilities throughout the course of the dispute.

Although mediation is driven by each party’s willingness to participate, the process is customizable. The mediation provision can specify a timeframe, identify a particular mediator, require exchange of claim and defense information and reaffirm confidentiality requirements.

**ARBITRATION**

Arbitration offers the most finality and control of ADR. In contrast to mediation, in which the third party is merely a facilitator, arbitration places the decision in the third party’s hands. In most circumstances, the court’s only role is to confirm the arbitrator’s decision or award, on an exceptionally deferential standard.

Final arbitral awards in less than one year are not uncommon, whereas trial to verdict in less than one year is exceptionally uncommon. A well-crafted arbitration provision and parties who treat arbitration like arbitration, rather than litigation, will ensure a faster and more cost-sensitive result.

Like mediation, the arbitration provision can specify the timeframe, a decision maker, confidentiality, discovery and other procedural characteristics. Parties can specify each to ensure that disputes are quickly and efficiently handled. With the active presence of an
arbitrator, compliance with procedural requirements is mandatory. For example, discovery may be limited to written discovery and depositions, saving a large amount of time and cost – or may be more expansive, for costlier, more complicated projects – the parties control these parameters, which will be enforced by the arbitrator and respected by the court.

**DISPUTE REVIEW BOARD**

DRBs offer a middle ground between mediation and arbitration, providing recommendations in a manner akin to arbitration, but with the goal of assisting the parties to resolve a dispute themselves like mediation. This particular ADR process has been employed on billions of dollars’ worth of infrastructure projects in the United States, including, the Big Dig in Boston and the South Terminal program at Orlando International Airport.

DRBs usually consist of panels of neutral, seasoned construction professionals who render nonbinding recommendations to assist contract parties in resolving disputes. DRB members tend to be empaneled for the duration of a project and are familiar with the work and issues that arise. The DRB’s recommendations may be accepted by the contract parties, resolving the dispute, or may offer the starting point for negotiations.

One of the primary benefits of the DRB process is its availability to resolve disputes as they arise, versus when parties are already headed to litigation. The DRB process may be customized for the project and the parties. Additionally, the parties may specify submission and hearing requirements, procedures for acceptance and rejection of DRB recommendations, the admissibility of DRB-related materials in later legal proceedings and payment structures of DRB members.

Underscoring the flexibility of the processes described above, each may be used individually, or in combination with the others. In all cases, the parties design the process and exercise control in a manner not afforded to them in court.

Given the panoply of options available, it is incumbent on the construction executive to carefully negotiate the mode of ADR specified in each contract, and to customize it to the needs of the parties and the project. No two projects are alike.
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