

## Dispute Resolution

The number and complexity of contract disputes have increased dramatically in recent years. At the same time, the delays and costs associated with litigation have become more significant

This section provides an overview of dispute resolution methods commonly used.

### Litigation

The increasing trend to alternative methods of resolving disputes suggests a considerable dissatisfaction with the traditional litigation process, at least in certain types of construction cases. However, it must be emphasized that litigation is sometimes, although not always, still the best solution to the parties' problems.

#### ***Advantages***

Despite its defects, litigation does have certain features that can be advantageous and that should not be overlooked. These include:

- mechanisms that make it easy to handle the large number of parties that are often involved in complex situations such as construction disputes
- well-established rules for the discovery of documents
- finality

#### ***Disadvantages***

Litigation suffers from some enormous drawbacks, such as:

- high costs to the parties
- lengthy delay in reaching a final conclusion, particularly as a result of the process of examinations for discovery

- animosity created by the adversarial nature of litigation
- tendency to exaggerate claims and to emphasize the areas of disagreement, while underplaying those areas where the parties might be in substantial agreement
- tendency to postpone the identification of the real issue in dispute until the late stages
- lack of any real management of the dispute, except in extreme cases where the supervisory powers of the courts are invoked

This list of disadvantages has led the industry to explore alternatives for the resolution of construction disputes.

## Alternative Dispute Resolution

The range of possibilities in *alternative dispute resolution (ADR)* has been described in terms of the depth of involvement required of a third party. The alternatives begin with a third party playing a primarily non-intrusive role in the dispute and end with the case of arbitration, where the third party is called upon to render a decision that is binding on the parties. This list is not exhaustive, but it focuses on the methods of ADR that have been found most useful in construction disputes in North America.

These include:

- parties settle dispute by themselves (no intervention)
- structured negotiation
- confidential listening
- conciliation
- mediation
- mini-trial

- mediation/arbitration
- arbitration (maximum intervention)

With the exception of the case in which the parties settle the disputes themselves, each of these possibilities will be briefly described.

### ***Structured Negotiation***

Although negotiation provides the familiar starting point for most contract claims, the chances for its success can be increased if it takes on a more structured form.

For example: A contractor made a formal claim for a price adjustment. The owner then analyzed the claim and returned it to the contractor with detailed comments, together with its own counter-claim. Each party had its own negotiation team, which included senior personnel who had not been involved in the original dispute. After the initial exchange of positions, each side was allotted one day for the presentation of its case in a formal setting, which permitted cross-examination.

This type of approach can be successful, although if it breaks down the parties will probably be forced into litigation. It seems to work particularly well in disputes involving large corporations, where it is possible to bring in senior management who were not involved in the situation that led to the ultimate dispute. This allows relatively objective minds to be brought to bear on the problem and removes obstacles that might have resulted from the egos or personalities of the personnel involved in the front line of claim negotiation.

### ***Confidential Listening***

In this approach, a neutral third party discovers from each of the parties the final position with which they would be prepared to live, the so-called “bottom line”. Without disclosing any confidential information, or the details of either side’s position, the

neutral informs each side if their “bottom lines” are close or overlapping. Experience suggests that at the outset of a dispute, the “bottom lines” can be quite close, so that the information provided by the neutral can lead to the swift negotiation of a settlement.

### ***Conciliation***

Conciliation is best known in the field of labour relations. Generally, a neutral party or conciliator performs a form of shuttle diplomacy between the parties. The role is more activist than that of the confidential listener: the conciliator is seeking to actively facilitate further productive negotiations between the parties.

### ***Mediation***

Mediation goes a step beyond conciliation. A mediator takes an active role in making the negotiation between the parties more effective. Although the degree of involvement varies, the mediator will frequently establish the order of discussion, help to identify common ground between the parties, get rid of irrelevant and unproductive discussions, and defuse animosities. The objectives of the mediator are to keep the parties focused on the real issues, help nudge the parties from fixed positions, encourage compromise, and assist the parties to develop creative solutions.

### ***Mini-Trial***

Sometimes, the parties can be assisted in resolving their dispute by engaging a neutral advisor who has the additional power to submit an advisory opinion evaluating each party’s case and predicting the likely outcome at trial. In Canada, the judiciary has begun to play an active role, particularly in British Columbia, in promoting mini-trials in an effort to induce settlement prior to litigation.

### ***Mediation/Arbitration***

Mediation is conducted as described previously, but if negotiations are unsuccessful, the mediator may render an award of judgement on the dispute in question. Depending on the agreement between the parties, the mediator's award can be either advisory or legally binding. If the award is legally binding, the proceedings change at the last stage from mediation to genuine arbitration.

### ***Arbitration***

Arbitration is the most intrusive form of third party intervention. The arbitrator rarely attempts to facilitate settlement, but is usually retained to resolve the dispute once and for all. Arbitration can be as adversarial as litigation, but it has the advantages of being less costly, and it moves faster to a binding result.

