



Construction ADR Tools in the Field: Partnering, Dispute Resolution Boards, Arbitration and Mediation

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Faculty Biographical Summaries



Deborah S. Ballati has had a broad civil and commercial litigation practice with an emphasis on construction and insurance coverage (for policyholders) for over 30 years. Her clients are involved in all aspects of the construction industry, including owners, contractors, design professionals, subcontractors and sureties. Her experience includes delay and defect claims arising out of commercial, residential and heavy civil construction projects, contract drafting and negotiation and insurance matters related to construction. She has also served as an arbitrator and Judge Pro Tem for the San Francisco Superior Court and the American Arbitration Association (panel of commercial and construction arbitrators). Ms. Ballati is a partner in the law firm of Farella Braun + Martel LLP. She is a Past President and Fellow of the American College of Construction Lawyers. She was the Chair of the ABA Forum on the Construction Industry in 2002-2003. She received her J.D. from Hastings College of the Law and is a Phi Beta Kappa graduate of Stanford University, where she received a B.A. in Political Science. For the last two years, she has taught a course on construction law in the Graduate School of Engineering at Stanford University.

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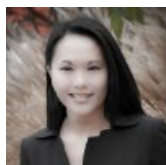
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Ernest C. Brown, Esq., PE is a highly experienced mediator who has mediated over 500 engineering, construction, public works and defect cases, ranging from residential construction to large and complex highway, bridge, commercial, petrochemical and industrial projects. He mediates engineering and construction in the Western United States and Internationally. Mediations typically involve federal and state lawsuits and arbitrations with \$100,000 to \$100 million in dispute. He is a Partner with the San Francisco Office of the National Construction Law Firm of Smith Currie & Hancock, LLP. He has more than thirty years of construction law, project counseling and trial experience, as well as a forensic and civil engineering training and experience. In his legal career, Mr. Brown has resolved more than 2,500 construction disputes, including complex mediations, jury trials, court trials, Dispute Review Boards and Arbitrations. From 1980 to 1984, Mr. Brown was Corporate Counsel for Fluor Daniel, one of the world's largest engineering and project management companies. He is a graduate of MIT in Civil & Environmental Engineering (1975) and earned a MSCE (Construction Management) and Law Degree from U C Berkeley (1978).

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Serena K. Lee is the Vice President for the San Francisco regional office for the American Arbitration Association (AAA). She also served as the Vice President for the AAA's Seattle regional office from 2006-2011. Ms. Lee received her J.D. from Benjamin N. Cardozo School of Law, where she also received her mediator certification. While in law school, Ms. Lee served as the Senior Articles Editor for the Cardozo Journal for Dispute Resolution and was the teaching assistant for the Cardozo Securities Arbitration Clinic. Serena received her Bachelors of Arts degrees in Political Science and Communications from the University of Washington. A frequent speaker and writer on ADR-related topics, Serena is a member of the New York State Bar, the WSBA ADR Section, and the Asian Bar Association of Washington (ABAW). She also serves as the Co-Chair of the Young Lawyers Committee as well as the Vice Chair of Membership for the ABA Section of Dispute Resolution.

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Elizabeth A. Tippin, Esq. has more than 25 years of experience as an attorney and neutral specializing in the resolution of complex multi-party construction disputes, including highway, pipeline, public and private vertical construction, mixed use and residential projects. She has resolved over 1000 disputes as a mediator, arbitrator, DRB member and Special Master, and served for five years as an Administrative Law Judge for the Office of Administrative Hearings. She is a member of the American Arbitration Association's Commercial and Construction Panels. She has provided legal representation to architecture, engineering and related design professional firms, contractors and owners, including preparation and negotiation of contracts; risk management consultation; general counsel business advice, and representation in mediation, arbitration and litigation of claims. For the last ten years she has been an adjunct professor teaching Business and Law in the Graduate Architecture Department of the Academy of Art University, and has lectured on construction and ADR at several other universities and for the AIA. She is a former President of the Mediation Society and former Chair of the BASF Arbitration Committee. She achieved a JD from Golden Gate University and BFA from Arizona State University.

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COMPARISON OF METHODS OF PREVENTION AND RESOLUTION OF DISPUTES IN CONSTRUCTION PROJECTS

	Start of construction →→→→	→→→→	End of Construction/post construction methods		
PROCESS	PARTNERING	DISPUTE RESOLUTION BOARD (DRB)	MEDIATION	ARBITRATION	SPECIAL MASTER
DESCRIPTION	Partnering Facilitator identified to build relationships and communication to reach common goals and dispute avoidance	DRB is three people who are a neutral panel who meet at project, conduct meetings and site visit, informal dispute resolution, and advisory formal opinions on conflict	Non-binding mediation with a third party skilled mediator who works with the parties to communicate information about the dispute and explore options for resolution	If the contract calls for binding arbitration, the Arbitrator is charged with listening and looking at the evidence and making a binding decision	Special Master is a person who will coordinate discovery and conduct settlement conferences in complex litigation
WHEN UTILIZED	Meeting before construction begins with the Partnering Facilitator and all stakeholders, with possible quarterly meetings through duration of the project	At the beginning of the construction project; meets at project site quarterly, reviews project documents, conducts site visits, schedules dispute hearings if necessary	After dispute is identified and most often at the end of the project, Demand for Mediation is served on the opposing side, typically in accordance with contract provisions	After dispute if identified and often at the end of the project, if the contract calls for arbitration, a Demand for Arbitration will be served and an arbitrator selected	After lawsuit is filed and the court identifies the case a complex litigation, a Special Master is usually stipulated to by the owner and contractor. May continue for months or years.
WHO CONTROLS DECISIONS	Internal claims process may resolve disputes. Facilitator makes no decisions	Owner and contractor controls decision. DRB Written Reports are advisory and non-binding	Mediator has no power to make decisions, parties control power to make decisions	Arbitrator makes final binding Arbitration Award	The Special Master has quasi-judicial powers and has the ability to write Orders, which are typically signed by the judge to become orders of the court, but decision to settle remains with the parties.
COMMUNICATION	Increased communication between the parties leads to understanding each parties position, with a focus on shared common goals	Increased communication between the owner and the contractor, informal discussions resolve many disputes, formal decisions are advisory	Usually in a conference room where typically attorneys, experts and parties make presentations and participate in communication process with mediator	Formal presentation of evidence and witnesses before the Arbitrator.	Attorneys and experts typically present the facts and opinions. Insurance carrier claims representatives typically attend settlement conference
RESULT	Open communication resolves issues and reduces disputes.	Process typically resolves conflict during the project with informal decisions or with advisory DRB	Parties retain the power to make decisions. Mediations have a high success rate for resolving conflict	Arbitrator's Award is binding on the parties. One or both parties may not like the decision of the Arbitrator	Special Master meetings can last an extended period of time, but usually are successful in getting case resolved.
COMPLIANCE	No decision so no compliance required	Typically disputes are avoided through communication, informal and formal DRB opinions, but never binding	A formal Settlement Agreement is drafted and executed by all parties, with typical full compliance.	Arbitration Award can be entered in Court as a Judgment	Formal Settlement Agreements are drafted and executed by all parties, with typical full compliance.
COSTS TO THE PARTIES	Minimal expense of the Facilitator on a quarterly basis throughout the project, shared between owner and contractor	Minimal expense of the DRB Members to attend meetings at the project quarterly shared between owner and contractor	Cost of attorney, experts and the mediator can be expensive, but less than formal litigation	Costs of the attorney, experts and the arbitrator can be extensive, but less than formal litigation	Cost of the attorney, experts, and the Special Master can be extensive, but less than full litigation with unlimited discovery.

MULTI-PARTY CONSTRUCTION DISPUTE RESOLUTION PROCESSES

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The perfect construction project is one that has a creative and sustainable design, and is built on time and within a defined budget without any disputes. Design and construction is an inherently complex and difficult enterprise, that is full of potential conflict. Conflict can extend the time period to complete the project and the cost of resolving disputes, impacts not only the owner, but many other entities. For the companies that play a role in the design and construction process, the cost of disputes can erode any profit to be made on a project and may result in an overall monetary loss. Furthermore, construction disputes impact insurers, financial companies, employees and ultimately consumers.

Business owners, and their attorneys, use methods for dispute prevention, dispute avoidance and efficient conflict resolution to reduce and eliminate conflict in construction projects. Some of the techniques involve strategies to avoid disputes even before the construction of the project starts. These techniques for staying out of trouble include:

Owners select an architect that is competent and responsible to provide the plans and specifications that comply with the standard of care;

The architect selects the design team that is competent and responsible;

Architects use techniques such as peer review to check the contract documents for errors, omissions and coordination;

Project delivery methods are carefully chosen appropriate for the project, including design/bid/build, construction management, design/build, bridging, and the integrated project delivery method; and

Owners select a contractor, who in turn selects subcontractors, that are competent, responsible and have the experience to provide the labor and materials to construct the project according to the contract documents and the standards in the industry.

However, even with all of these dispute avoidance and prevention methods, disputes are still prone to arise in construction projects. Sources of conflict may stem from errors and omissions in the plans, construction defects, processing of Requests for Information and Change Orders, changes as a result of fast tracking, changed conditions in the field, coordination of subcontractors, delay, extended overhead claims, demands by inspectors, unavailability of inspectors, and a myriad of other situations and conditions that impact the schedule and the costs of the project.

Some projects utilize a strategy that reserves all disputes until the end of the project, where litigation is instigated. Since design and construction cases often involve multiple parties, with a myriad of conflict issues, litigation can become extremely expensive before the parties even get to the courthouse steps to actually go to trial. Additionally, construction projects are so complex that at the end of the project, memories have faded, people and documents have disappeared, and claims have grown in size and complexity. Additionally, statistics have shown that waiting till the end of the project increases the cost

of resolving disputes. Litigation is a time consuming and expensive process, avoiding litigation and/or finding another way of resolving conflict is important in construction projects.

The construction industry has explored ways to resolve conflict with less cost. Sophisticated construction contracts define a stepped or systems approach to prevent and resolve disputes, such as incorporating administrative claims presentation, partnering, dispute resolution board, mediation and arbitration. The system design for conflict resolution in construction contracts is complicated by the fact that there are many companies that are involved in the design and construction process, with separate contracts that define different scopes of work and compensation terms. Designing the right conflict resolution system for the project and implementing that system is an important step in attempting to control the project budget and schedule. Using a systems design approach can also avoid disputes, resolves disputes quicker, and preserve relationships between people that may be involved with each other in a another project in the future.

This article describes the concepts that can be incorporated in contracts for construction projects, small and large so that conflict is prevented, avoided, and resolved in an efficient manner, including partnering, dispute resolution boards, initial decision maker, mediation, arbitration, and the use of Special Masters in litigated complex designated cases.

PARTNERING

Partnering in the construction industry is a formal process of creating a collaborative team that builds relationships between specific individuals including the representatives of the owner, contractor and other key stakeholders on a project. The goal of partnering is to improve communication about all aspects of the project, identify common goals, and to reduce and avoid conflict during the construction process. The increased communication develops relationships based upon trust, dedication to common goals, and an understanding of each other's expectations and values. The projected benefits of using this process include improved efficiency and cost effectiveness, increased opportunity for innovation, and improvement of the quality of the built environment.

Often partnering is required on large public projects, but the process can be utilized on any size project, including small private residential design and construction projects. Typically the contract between the owner and the contractor requires both parties to participate in the partnering process. Pursuant to the terms of the contract, both parties jointly select a facilitator to conduct the partnering process and pay for the facilitator's services jointly.

The first partnering meeting is at or near the beginning of the construction process. At the first meeting the facilitator leads the key stakeholders in developing guidelines for better communication. Some of the other issues that may be discussed include:

- Identification of the project's goals and objectives;
- Strategy for how the project teams can work collaboratively;
- Identification of management issues, commercial issues, or construction challenges;
- Communication and decision making process;
- What is working and not working; and
- Development of an internal dispute resolution process.

Partnering sessions can continue throughout the project with the facilitator, the owner and the contractor representatives. The process can allow additional stakeholders to come to the table to address a broad range of management issues. The meetings can also include architects and engineers, sub-contractors, as well as funding entities, utilities, and governmental agencies. The partnering process has proven to be effective in creating a collaborative team approach between different entities, promotes communication, avoidance and resolution of conflicts, and overall has been is an effective tool for reducing the cost of disputes in construction projects. A resource for more information on partnering is: The International Partnering Institute at <http://www.partneringinstitute.org>

INITIAL DECISION MAKER

Many of the AIA Documents incorporate the process of identifying an Initial Decision Maker (IDM) who renders initial decisions on claims. Often this is the architect or engineer on the project, however, contractors are critical of designating the architect or engineer for the project because they are paid by the owner and there is a perception of bias. The IDM can be an independent person who is not otherwise involved in the project and can be a Dispute Resolution Advisor (DRA). The DRA functions similar to a Dispute Resolution Board, except that instead of a three person panel, only one person is identified. See the discussion below on how Dispute Resolution Boards operate. The IDM process can have a positive impact on the resolve of disputes during the project.

DISPUTE RESOLUTION BOARDS

Dispute Resolution Board and Dispute Review Board are terms that are used interchangeably and are known as DRBs. International dispute boards are frequently referred to as Dispute Adjudication Boards (DAB) or Dispute Boards (DB). A broad definition of a DRB is that it is a board of impartial professionals formed at the beginning of the project to follow the construction progress, encourage dispute avoidance and assist in the resolution of disputes for the duration of the project.

Typically, a DRB is formed because the contract between the owner and the contractor require a DRB to be utilized and sets forth the terms for its creation and operation. The DRB functions as an objective, impartial and independent body. It is usually comprised of three people who are designated at the beginning of a construction project. DRB panel members are chosen by the parties, by an examination of their expertise and reputation. One member is designated by the owner, one by the contractor, and the two DRB members usually choose the third member, who may or may not be the Chair depending on the contract terms for DRB appointment. All DRB members must be approved by both the Owner and the Contractor. (Note that a Dispute Advisory Board is similar, but is composed of only one person.)

The DRB is formed with a three way contract between the DRB members, the owner and the contractor. Typically, the first meeting of the DRB is held prior to or at the beginning of the project, with the owner, contractor, and the three DRB members. The Chair of the DRB provides an agenda and conducts the meeting. Documents, including the plans and specifications, weekly progress summaries, schedules, meeting minutes, and other documents are provided to the DRB members. The DRB is introduced to the project and conducts a site visit. Typically, the owner makes a presentation about the scope of the project, and the contractor presents the status of construction and any present or anticipated problems. At the meeting, all parties agree for a schedule for the DRB meetings, such as every month or at least quarterly. At a regular DRB meeting, conflicts may be presented and discussed informally.

In the event that a dispute cannot be resolved in the normal course of a meeting, the dispute may arise to the level of a formal hearing before the DRB. No attorneys are allowed at the hearing. Each party presents testimony and documents to support their position on the issues. After the hearing, the DRB issues a written advisory report and opinion that may be used in any subsequent mediation, arbitration or litigation. Either party may request clarification or request reconsideration. Although, the DRP report is advisory, it is often accepted by the parties to resolve the dispute. The long history of review of the recommendations by DRB's has shown that most parties have found the recommendations to be appropriate and acceptable.

DRBs have been used successfully on thousands of construction projects to avoid and resolve construction disputes. The goal is to resolve all disputes during the construction process, so the no disputes remain at the end of the project. The process was initially employed for large heavy engineering construction projects, including tunnels, dams, and highways, but the process more recently has been utilized on smaller projects including vertical construction projects. The DRB process allows for disputes to be resolved as they arise rather than waiting until the conflicts simmer throughout the project, and possibly become greater due to overhead costs of managing the project with unresolved conflicts. This process allows the contractor and the owner to work more effectively as a team, with less friction and discord, to resolve disputes as they arise, and to get the project completed with shared goals.

Partnering and DRBs can successfully be used on the same project if the parties understand the roles to be played by each and utilize the partnering facilitator and the DRB in a complementary process on the project. The costs of including both partnering and DRBs on a project are far less than the costs of arbitration or litigation. A resource for additional information on DRBs is the website of the Dispute Review Board Foundation at <http://www.drpf.org>.

MEDIATION

Mediation in construction cases, as with other types of cases, is a process where a third party, the mediator, is selected and retained by the parties, to assist in communication toward resolution of a dispute. Although the mediator does not have the power to make a decision, for construction cases it is important to select a mediator that is knowledgeable in the technical issues of construction. There is little time for the mediator to get up to speed on the technical issues, understand the contract documents, the contract terms, the standard of care, the standard in the industry, and other construction issues. The mediator's prior knowledge of construction terms, as well as the mediator's ability to communicate information about the issues is important for the resolution of the dispute. For this reason, mediators selected for construction cases usually are attorneys specialized in construction, or sometimes architects, engineers or contractors. The fees for the mediator are typically split equally between the parties.

Mediation is often required by the terms of construction contract, prior to resorting to arbitration or litigation. However, parties to a construction dispute can agree to utilize mediation without having a specific contract term so requiring. In complex cases with multiple parties, the mediation may extend over several sessions, however, most disputes can be resolved in one or two days of mediation with an effective mediator. The mediation begins with a joint session where the parties talk about the dispute and show documents that assist in communicating information. The visual images, include the contract documents, photographs, videos, and selected project documents.

The mediator will use various techniques to close the gap between demands and offers to settle. If a settlement is reached, a formal Settlement Agreement is written to set forth the specific provisions of the agreement of the parties. Whether the case settles or not, all communications and documents prepared for the mediation are confidential and cannot thereafter be distributed.

Contracts for design and construction projects may require that partnering and dispute resolution boards be utilized during the construction of the project, and if at the end of the construction, any disputes remain, mediation will be the next step to resolve the dispute. Although the parties may spend substantial sums of money to pay for attorneys and experts to prepare for and attend the mediation, overall the mediation process is highly successful in resolving many construction disputes.

ARBITRATION

Arbitration in construction cases, as in other types of cases, is a formal private process where the parties meet with an Arbitrator, present evidence in the form of testimony and exhibits, and the Arbitrator is charged with making a decision called an Arbitration Award. Arbitration can be binding (final) or non-binding (advisory). If a contract provision calls for arbitration, the arbitration is usually considered binding. Placing a binding arbitration clause in a contract means that the parties are giving up the opportunity to participate in litigation. The California Contractors State Licensing Board also has an arbitration program for contractors and consumers that provides for mandatory arbitration and voluntary arbitration. For more information on this program go to the website: <http://cslb.ca.gov>.

A typical clause in a contract requiring arbitration usually includes the ADR provider who will administer the arbitration process, such as American Arbitration Association. Other terms of the contract might dictate where the arbitration will take place, the number of arbitrators (single arbitrator or panel of three), discovery limitations, and the process or timing to serve a Demand for Arbitration.

After a Demand for Arbitration is filed with a provider, the other party has an opportunity to file a counter-claim. Thereafter, both parties are provided a list of potential arbitrators, with an opportunity to participate in the selection process. The background of the arbitrator, who has been admitted to the panel of construction arbitrators, has experience in construction and the arbitration process. Selection of the arbitrator is very important, because the arbitrator will be making a final binding arbitration award. The arbitrator will provide a disclosure of potential conflicts to the parties, which gives the parties additional information to accept or reject the proposed arbitrator. If there are no objections, the arbitrator is appointed.

Prior to the arbitration, there is a pre-hearing conference with the arbitrator and the attorneys or parties if unrepresented. The prehearing conference includes discussing production of documents and other discovery requests, scheduling dates for exchange of documents, site visits, list of witnesses, filing of arbitration briefs, and the dates for the arbitration hearing. Prior to the arbitration hearing, the parties and their attorneys spend time preparing the evidence, experts, and an Arbitration Brief. The arbitration hearing is a formal process with opening statements, introduction of evidence including testimony of witnesses and exhibits. Once the hearing arbitration has concluded, the arbitrator reviews the evidence and prepares an Arbitration Award, which is sent to the parties. The Arbitration Award is final and binding.

Contracts for construction projects can include partnering, dispute resolution boards and mediation for the avoidance of and resolution of disputes, prior to an arbitration to reach a final decision. Arbitration is private and due to its finality, it resolves disputes for less money and quicker than formal litigation.

SPECIAL MASTERS

Once a lawsuit is filed in court, if it is a construction case with multiple parties and many issues, the judge assigned to the case will designate the case as complex litigation and refer the case to a Special Master to coordinate discovery and conduct settlement conferences. The Special Master can spend more time working with the parties to coordinate discovery, than would be possible for the judge. The Special Master process reduces the costs of litigation by limiting and coordinating discovery, Furthermore, the Special Master gets to know the parties and the issues, so that he or she is in a knowledgeable position to conduct settlement conferences to resolve the case.

The Special Master is typically selected by the major parties. He or she is an attorney who has been trained to provide assistance in complex construction matters. A Special Master is in a quasi-judicial roll, in that he or she can issue orders called Case Management Orders (CMC Orders) to manage and expedite communication of information, discovery, and mandatory settlement conferences. Typically, the CMC Orders are sent to the judge who is in charge of the case, who signs them making them an Order of the Court.

To eliminate the necessity of parties from filing and serving individual answers and cross-complaints, the CMC Order provides that all parties are deemed to have cross-complained against each other and filed an answer with a defined and all inclusive list of affirmative defenses. The Order also requires that parties comply with discovery orders, including establishment of a document depository, production of project files to the depository, response to limited sets of interrogatories, production of the plaintiff's expert's defect report identifying all design and construction defects and the cost to repair those defects, production of insurance coverage and identification of coverage disputes, site inspections and destructive investigation, and a joint defense statement in response to the plaintiff's list of defects.

As the case proceeds, which may be over several months or even a year, the Special Master may issue orders for meetings with the parties' experts to narrow the issues and attempt agreement as to the cost of repair, and mandatory settlement meetings. Typically, the Special Master submits regular reports to the judge in charge of the case. If parties do not attend the events designated in the CMC, the Special Master has the power to divulge that information to the judge and recommend sanctions. Because there is no confidentiality in the Special Master process, the CMC Order should not refer to the Special Master as a mediator.

The process of conducting settlement discussions often is done in groups. The Special Master must understand all the issues and be able to coordinate settlement discussions effectively with all of the parties, their attorneys, their insurance carrier representatives, and experts. If one party settles, they file a motion with the court to have the settlement determined to be in good faith, thus barring cross-claims for contribution and indemnity.

The goal of the Special Master is to get the case resolved completely. If the case does not resolved as to all parties, the case will return to the Court for scheduling a civil trial for the remaining parties in the case. Designating a Special Master for a multi-party complex litigation case, has been shown to

significantly reduce the cost of litigation and successfully get the case resolved. The fees for the Special Master will be allocated to the parties on a pro-rata basis according to issues against them. When considering the costs associated with a civil trial, the costs of a Special Master are considerably less.

SUMMARY

ADR systems design for construction projects starts when the contracts for the projects are being drafted. Incorporation of partnering and dispute resolution boards has been demonstrated to effectively to avoid conflict and informally resolve conflict during the time that the project is built. If at the end of the construction disputes still exist, mediation should be the next step to resolving any remaining conflict. Arbitration has been shown to be not only confidential, but cost less than litigation, with better party satisfaction than proceeding to trial. Construction is a multi-party complex endeavor full of conflict, but drafting contracts with a system approach to conflict avoidance, prevention and informal resolution is effective in completing the project for the budget allocated and according to the schedule defined.

Elizabeth A. Tippin, Esq. has more than 25 years of experience as an attorney and neutral specializing in the resolution of complex multi-party construction disputes. She has resolved over 1000 disputes as a mediator, arbitrator, DRB member and Special Master, and served for five years as an Administrative Law Judge for the Office of Administrative Hearings. She is a member of the American Arbitration Association's Commercial and Construction Panels. etippinlaw@gmail.com



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“The Right ADR Tool”

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The US Construction Industry is traditionally one of the most contentious segments of commercial enterprise. The nature of the work involves a great number of private players, local public entities and community groups, A/E and construction entities, sureties, insurance companies and complex issues.

There are many engines of change on a project, including environmental, political and economic. These drive disputes over extra work, design changes and project delays. These project events result in substantial costs to all parties and result in a wide variety of project disputes. In short, it is a contentious realm.

In response to these challenges, the industry has developed a sophisticated array of dispute resolution methods. The term “Alternative Dispute Resolution” is a legal misnomer, as it generally means resolving disputes without the use of a court or jury trial. In reality, almost all disputes are resolved without a trial and the number of construction disputes that are actually resolved by a jury or judge is estimated at less than 5% by most legal practitioners.

These are the three major categories of construction disputes: 1) Contract Disputes on large and small construction projects, involving mainly extra work and delays, 2) Construction Defect Claims, where the major topics are repair costs and loss of use, and 3) Construction Accidents, involving liability and compensation for injured workers and financial recovery for third party property damage. (This seminar will largely concentrate on the first of these, where the most sophisticated methods of dispute resolution are currently being deployed in hundreds of projects.)

On a small, repetitive project the contractor may be able to finance the disputed work, thus postponing the dispute resolution process until after the job is complete. If the dispute is not too substantial, the final list of change order disputes can be resolved after the project is complete, in one venue; when the facts are known. This is the path chosen for Caltrans disputes where the majority of contracts require arbitration after the Project is complete.

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But where a large project spans many years, the contractor cannot afford to finance extra work costs and overhead until completion of the project. Furthermore, subcontractors may complete their work months or years before the end of the project as a whole.

And on Design Build and Public-Private Partnerships where responsibilities for permitting and design are divided among many parties, substantial disputes may stall the project until long after the squabbles are resolved. Without real-time resolution of issues, such projects are subject to extremely long delays and radically increased project costs.

On complex projects, advanced ADR tools can provide the real-time resolution of disputes that can be invaluable, as well as a dispute process for more significant issues. Even on smaller projects, these same principals can be applied in a leaner, less costly way that can substantially sooth project delivery and reduce the frictional costs of litigation.

The following are checklists that are helpful in selecting, implementing and utilizing dispute resolution:

1. When Do You Select the Construction ADR Tool?

1. When you Write the Contract (packing the tool box)
2. When a Dispute Starts (grabbing the right tool)
3. Private v. Court-Ordered During Litigation
4. Post-Trial and Appellate ADR

2. Strategic Issues in Selecting the Right ADR " Hammer" :

1. Size of the Dispute
2. Complexity of the Issues
3. Need for Discovery
4. Cost of Resolving the Dispute
5. Financially Crushing the Opponent
6. Speed of Resolution
7. Industry Knowledge of Qualified Neutrals
8. Method of Selecting the Neutrals
9. Who Pays for the Neutrals
10. Value of Privacy
11. "Fact" Case v. "Legal" Case
12. Exchange of Documents
13. Involvement of Experts
14. Venue of the Action

15. Location of the Hearings
16. The Need to Bring in Third Parties
17. Interest of Major Parties in Settling
18. Insured Losses and Bonding
19. The Runaway Jury
20. Bankruptcy of a Party
21. Political Considerations (Public Boards)
22. Judicial Review

3. Types of Construction ADR

1. Meet and Confer
2. Partnering
3. Mediation
4. Standing Neutral
5. Ombudsman
6. Dispute Review Boards
7. Fact Finder
8. Hearing Officer
9. Project Neutral®
10. Contractual Arbitration
11. Standby Arbitration Panel
12. Private Judging
13. Stipulated Reference (CCP 638)
14. Judicially Appointed Reference (CCP 639)
15. Special Master

4. Practical Considerations:

1. Who, What, When, How & Where?
2. Scope of Jurisdiction?
3. Advisory or Binding on the Parties?
4. Professionally Administered or Ad Hoc?
5. Appealable? Enforceable?
6. Disclosures, Advance Deposits & Fees

5. Important Sources of Law:

1. **California Arbitration Act:** Civil Procedure 1280, et seq.
2. **Federal Arbitration Act:** 9 USC 1 (Also see Federal Alternative Dispute Resolution Act of 1998 (28 USC 651 (b)))
3. **State Contract Act:** Pub Contract Code 10240 (Arbitration) & California Code of Regulations tit. 1, 1300, et seq.
4. **Local Agency Claims:** Pub Contract Code 20104.4 (\$375,000)
5. **HOA Claims Against Builders:** Civil Code: 1375-1375.1 – “dispute resolution facilitator.”
6. **Reorganized California Rules of Court:** The California Rules of Court were reorganized and renumbered to improve their format and usability, effective January 1, 2007.
7. **California Evidence Code:** Sections 1115, et seq. (mediation privileges), Section 1152 (settlement discussions)
8. **California Code of Civil Procedure:** CCP 998 (Settlement Offers) & CCP 664.6 (Settlement Enforcement)
9. **Other California Codes:** Arbitration: A total of 328 code section group(s), Mediation: A total of 175 code section group(s), (e.g. CSLB Arbitration (B & P 7085). These do not include ordinances or rules of the California County, City or local agencies.)
10. **Other US Codes:** Arbitration: 318 Statutes, Mediation: 216 Statutes, Ombudsman: 120 Code of Federal Regulations.
11. **Recent California Court Cases:** Bowers v. Lucia (2012) (a contract term for binding mediation is enforceable); Ahdout v. Hekmatjah (2013) (arbitration awards that allegedly fail to enforce the Contractors' State License Law disgorgement provision are subject to judicial review).
12. **Pending California Legislation:** Legislative Bills introduced so far in the 2013-14 Session: Mediation - 2 and Arbitration - 4 Bills
13. **Indian Tribes:** Arbitration Agreement as waiver of Sovereign Immunity
14. **International Arbitration:** 9 USC 201 (Treaty on Enforceability of Foreign Awards), California CCP 1297.11 (International Arbitrations in California), Carriage of Goods at Sea, International Chamber of Commerce, etc.

6. When Litigation Starts– California Judicial Council Case Management Statement (CMS) Form

1. **Mediation** (CMS Section 10. c. (1))
2. **Nonbinding Judicial Arbitration** under Code of Civil Procedure section 1141.12 (discovery to close 15 days before arbitration under Cal. Rules of Court, Rule 3.822(b)) (CMS Section 10. c. (4))
3. **Binding private arbitration** (CMS Section 10. c. (5))
4. **Neutral case evaluation** (CMS Section 10. c. (3))
Variation - Bench-Bar Panel
+ Settlement Conference (CMS Section 10. c. (2))

7. Proposed Uniform Laws- Arbitration & Mediation

The National Conference of Commissioners on Uniform State Laws (NCCUSL), now in its 121st year, provides states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law.

REVISED UNIFORM ARBITRATION ACT (2000): This act revises the Uniform Arbitration Act of 1956, adopted in 49 jurisdictions. The primary purpose of the act is to advance arbitration as a desirable alternative to litigation. A revision is necessary at this time in light of the ever-increasing use of arbitration and the developments of the law in this area.

ENDORSED BY: American Arbitration Association, National Academy of Arbitrators, National Arbitration Forum

UNIFORM MEDIATION ACT (2001): Provides rules on the issues of confidentiality and privileges in mediation. The Act establishes an evidentiary privilege for mediators and participants in mediation that applies in later legal proceedings. It also provides a confidentiality obligation for mediators. The Act was amended in 2003 to add a section on International Conciliation.

Comparing Cost *in* Construction Arbitration & Litigation

By Susan Zuckerman

An expert panel assesses the cost of arbitrating and litigating a hypothetical two-party construction dispute.

The key question everyone asks about arbitration is whether it is cheaper than litigation. The problem with answering this question is that rarely does one have the opportunity to arbitrate and litigate the same case. It is only possible under a statutory scheme providing for non-binding arbitration and allowing a dissatisfied party in arbitration to seek a trial *de novo*.¹ The only other basis of comparison is the rare instance in which a lawyer has the opportunity to arbitrate and litigate two similar cases.²

For this article, we asked three experienced construction litigators and arbitrators from different parts of the country—Joseph F. Canterbury, Jr., of Dallas; Christi L. Underwood of Orlando, Florida; and Howard D. Venzie Jr. of Philadelphia³—to estimate the claimant’s cost of arbitrating or litigating in state court⁴ a hypothetical two-party construction dispute⁵ in order to see how they compare.

Wanting more than a cursory “bottom line” estimate, we asked our experts to first opine on how the case would be staffed by counsel and to set the attorney fee rate.

Then we asked them to identify the varied representational activities they *typically* see at each stage of construction arbitration and litigation, and then estimate the hours required to perform them. (We are not suggesting this is the “ideal” arbitration or litigation.) We asked them not to artificially increase the cost of litigation by adding litigation activities (e.g., a motion to join third parties).

Our experts determined that this hypothetical would likely be staffed by a mid-level partner, an associate and a paralegal. The hypothetical rates charged for their services are \$300, \$200 and \$100 per hour, respectively.

We calculated the arbitrator’s compensation using a \$2,200 per diem rate, and the mediator’s compensation using a \$310 hourly rate. These rates represent an average of the rates charged by AAA arbitrators and mediators from different parts of the country.

Table 1, which represents the costs of the hypothetical arbitration, shows a total outlay for the owner of \$94,500, while the costs of litigation, shown in Table 2, are 27% higher at \$120,300. We show the estimated costs of the owner’s outlay for mediation in Table 3 at \$10,140, clearly the most economical choice.

Then, of course, there is the issue of appeals. An appeal as of right is an almost irresistible temptation in litigation. According to our experts, this would add another \$25,000-\$35,000 to the cost of resolving the dispute. By comparison, they think that the cost of preparing a motion to vacate or defending against one would cost between \$5,000-\$7,500.⁶

Although these cost estimates are undeniably speculative, our experts believe that the figures shown for arbitration are fair and reasonable. They have also pointed out that because arbitration is a flexible process, the estimated arbitration costs could be reduced by streamlining the proceedings to eliminate certain activities in Table 1. For example, the parties could agree, either in their arbitration agreement or in an early preliminary conference, that there would be no depositions or dispositive motions (which are rarely granted anyway) or post-arbitration briefs. If

these steps are eliminated, the owner’s costs in the hypothetical arbitration would be \$81,500, while the litigation would cost 47% more (\$120,300).

Another area of potential savings is attorney fees. More than half the cost of arbitration is attributable to lawyer time spent on the case. Attorney fees could be reduced by an agreement with counsel to staff the case with one attorney, with minimal delegation to associates and paralegals.

As to litigation costs, our experts believe their estimates are conservative because litigation tends to involve more activities than are listed in Table 2. Thus, the cost of litigating probably would be greater than \$121,100.

Despite the speculative nature of this exercise, we think this cost comparison should interest owners, design professionals, contractors, subcontractors and anyone else who has to determine the forum in which to have claims decided. While the difference in overall cost between the two processes will probably attract the most attention, the estimates of the component costs should be of interest because they shed light on areas where there is potential for parties to control the cost of the case.⁷

This article does not compare the overall time it would take to conclude the hypothetical arbitration or litigation because there are too many variables, particularly on the litigation side, for example, venue and docket congestion. While our experts have different ideas about the length of proceedings, they agree that, if counsel for both sides cooperate and desire to move the case along, that arbitration is still generally faster than litigation.

The estimates of component costs should be of interest because they shed light on areas where there is the potential for cost control.

HYPOTHETICAL DISPUTE

The owner of a commercial building has a claim against an architect arising out of a remodeling project. The claim is for design defects and inadequate workmanship in connection with the flooring, which the owner contends is unstable and suf-

fers from vibration problems. The owner seeks \$600,000 in damages for repair costs and loss of use.

The dispute raises issues of professional malpractice, the standard of care, the scope of repair and loss of use.

REPRESENTATION ACTIVITIES IN HYPOTHETICAL ARBITRATION

The first activities “priced” by our experts are steps counsel would take to investigate the magnitude of the owner’s claim (which involve a site visit and interviews with key personnel) and prepare the demand for arbitration. Our experts suggest that these activities could take 16 hours. We are assuming that no counterclaims are filed by the architect in the answer.

The next activity is participation in an AAA administrative conference with the case manager. Our experts say this would take no more than one hour on the phone.

[We are assuming that the owner and the architect agree to mediate using a local attorney as the mediator. Counsel’s activities related to mediation would involve drafting written mediation submissions; selecting the mediator; attending the mediation (which our experts suggest could take 1.5 days in a case of this nature); and wrap-up activities (18 hours in all). We are assuming that the mediation terminates without a settlement. Counsel’s mediation-related activities are set out separately in Table 3, along with the mediator’s compensation and expenses. It did not seem appropriate to include these costs in the total arbitration costs.]

We are assuming that the parties select a local construction lawyer who has no conflict of interest as the arbitrator.

The next cost estimated is counsel’s participation in a preliminary hearing on the telephone with the arbitrator. This is estimated to take 2 hours. We are assuming that this results in an arbitral order scheduling a document exchange, four depositions (two experts and two fact witnesses for each side), each to take no longer than 5 hours, and a 4-day hearing that will include a site visit.

The next activities involve discovery. Our experts estimate that it would take an associate perhaps 3 hours to prepare a document request and 16 hours to go through the client’s files, read the documents, duplicate and then “Bates”-stamp them for production to the adversary.

As for depositions, they assume 10 hours to prepare four witnesses to be deposed. We are assuming that each deposition takes 5 hours, as allowed by the arbitrator.

Our experts think there would be third-party document discovery (from the contractor, subcontractor and possibly the engineer) in a case like this, and estimate the cost of this activity at 8 hours.

We are assuming for purposes of the hypothetical that there is a discovery dispute. Our experts say that the arbitrator would deal with this by telephone in about 1 hour.

Also priced is time that counsel must spend with the owner’s expert, guiding the investigation and assisting with the preparation of the expert report. Our experts estimate that this could take 4 hours.

Also included is the time to respond to a dispositive motion to dismiss. Our experts estimate that this might take 5 hours.

The next activity is counsel’s preparation of a statement of claim for the hearing. This is estimated to take 4 hours.

The four-day arbitration hearing follows. The estimate of counsel fees is based on 12-hour work days during which counsel prepares the witnesses to testify in the evening and attends the hearing during the day. Also included is the time spent preparing the owner’s post-trial brief, which our experts suggest could take 16 hours.

REPRESENTATION ACTIVITIES IN HYPOTHETICAL LITIGATION

Some of the activities in litigation are the same or similar to those in arbitration, but the amount of time spent by counsel is greater. For example, our experts estimate that the fact investigation and preparation of a complaint in litigation would take 24 hours.

Parties often file objections to pleadings in litigation, unlike in arbitration. Our experts do not address these costs in Table 2, so the reader should mentally add them.

There is nothing in litigation that is comparable to the AAA’s administrative conference.

Instead, the attorneys participate in status/scheduling conferences with the court. Our experts suggest that there would be two such conferences on the telephone with the judge, each taking about two hours of preparation and telephone time.

The attorneys also participate in a case management/scheduling conference in person with the court, which our experts say would take about 2 hours plus 2 hours more to prepare a case management order.

Discovery is reputed to be more expensive in litigation than in arbitration. The reasons are that the parties are allowed broader document discovery, tend to take more depositions, and typically exchange interrogatories and requests to admit. Our experts estimate 27 hours for an associate to locate, read, stamp and produce documents; 16 hours to prepare and exchange interrogatories and requests to admit; and 15 hours to prepare 6 witnesses for depositions. They think that third-party document discovery would take the same

Table I. Estimated Cost of Arbitrating a Hypothetical Construction Dispute

ARBITRATION	COST	COMMENTS
FILING and CASE SERVICE FEE	\$ 8,500	
LEGAL FEES		\$300 partner rate unless otherwise noted
fact investigation & preparation of demand	\$ 4,800	16 hours
AAA administrative conference	\$ 300	1 hour
1 preliminary hearing via telephone	\$ 600	2 hours telephone
Discovery		
prepare document request	\$ 600	3 hours @ \$200 hour
produce documents	\$ 3,200	16 hours @ \$200 hour
prepare for 4 depositions	\$ 3,000	10 hours @ \$300 hour
attend depositions (take & defend)	\$ 6,000	5 hours @ \$300 hour, 4 witnesses
third-party documents discovery	\$ 2,400	8 hours @ \$300 hour
discovery problems	\$ 300	1 hour discussions with arbitrator
Facilitate expert witness investigation, case preparation and report	\$ 1,200	4 hours
Respond to adversary dispositive motion	\$ 1,500	5 hours
Prepare statement of claim	\$ 1,200	4 hours
Final hearings		\$500 hour for 1 partner and 1 associate
prepare for & attend	\$24,000	12 hours per day for 4 days
prepare post-arbitration brief	\$ 4,000	16 hours @ 250 blended rate
TOTAL LEGAL FEES	\$53,100	
LEGAL EXPENSES	\$ 2,000	photocopying, outside copying of discovery documents, faxing, express delivery, local travel and parking
TOTAL LEGAL FEES & EXPENSES	\$55,100	
EXPERT FEE-OWNER	\$12,000	\$225 per hour/includes time spend preparing for and attending deposition and hearing, preparing expert report
TRANSCRIPTS		
4 depositions	\$ 2,000	\$500 per day
ARBITRATOR COMPENSATION	\$16,500	\$2,200 per diem for 7.5 days
ARBITRATOR EXPENSES	\$ 400	\$100 day per hearing day
TOTAL OWNER COSTS	\$94,500	
Motion to vacate/defend against such motion	\$5,000-\$7,500	

amount of time as in arbitration (8 hours).

Because discovery motions are common in litigation, we are assuming that the parties would each file one motion. Our experts estimate 6 hours to prepare and present a discovery motion for the owner and 4 hours to defend against one made by the architect.

Next are activities related to the owner’s expert. Our experts estimated that counsel would spend 8 hours to facilitate the expert’s investigation and assist with the report.

We are assuming that the architect files a dispositive motion (as in the arbitration). Our experts believe it would take more time to prepare the owner’s response in litigation (10 hours) because papers filed in court tend to be more formal.

The next activity priced is counsel’s preparation of a pre-trial brief. This is estimated to take 16 hours.

A motion commonly filed before trial is a motion in *limine* to exclude certain evidence. We

Table 2. Estimated Cost of Litigating the Hypothetical Construction Dispute

LITIGATION	COST	COMMENTS
FILING FEE	\$ 300	
LEGAL FEES		\$300 per hour rate unless otherwise noted
Fact investigation & preparation of complaint	\$ 7,200	24 hours
2 case management status conferences with judge	\$ 1,200	2 hours each
Case management order and scheduling conference	\$ 1,200	2 hours in 2 hours preparation of order
Discovery		
prepare document request	\$ 600	3 hours @ \$200 per hour
produce documents	\$ 5,400	27 hours @ \$200 per hour
prepare & respond to interrogatories & requests to admit	\$ 4,800	16 hours
prepare for 6 depositions	\$ 4,500	15 hours
attend depositions	\$ 9,000	5 hours @ \$300 per hour, 6 witnesses
third-party document discovery	\$ 2,400	8 hours @ \$300 hour
prepare discovery motion	\$ 1,800	6 hours
defend against discovery motion	\$ 1,200	4 hours
Facilitate expert witness investigation, case preparation & report	\$ 2,400	8 hours
Respond to adversary’s dispositive motion	\$ 3,000	10 hours
Prepare pretrial brief	\$ 4,800	16 hours
Prepare pretrial motion in <i>limine</i>	\$ 4,000	16 hours @ \$250 blended rate
Bench trial		\$500 per hour for 1 partner and 1 associate
prepare for & attend	\$36,000	12-hour days for 6 days
prepare post-trial brief/findings of fact and conclusions of law	\$ 7,500	30 hours @ \$250 blended rate
TOTAL LEGAL FEES	\$ 97,000	
LEGAL EXPENSES	\$ 2,000	
TOTAL LEGAL FEES & EXPENSES	\$99,000	
EXPERT FEE-OWNER	\$ 15,000	\$225 per hour: includes time spend preparing for and attending depositions and hearings, and preparing expert report
TRANSCRIPTS		
6 depositions, 6-day trial	\$ 6,000	\$500 per day, 12 days
TOTAL OWNER COSTS	\$120,300	
Appeal as of right to appellate court	\$25,000–\$35,000	

are assuming such a motion would be made in the hypothetical, which is estimated to take 16 hours.

Our experts believe that a case like this is more likely to be heard by a judge rather than a jury. We are assuming a 6-day bench trial for this exercise during which counsel puts in 12-hour days. It is longer than the arbitration because bench trials

are often held on non-consecutive days, so they require additional preparation time. Our experts believe that both the partner and associate would attend the trial. This would enable the associate to prepare post-trial motions and briefs, which the partner would review. Our experts estimate 30 hours to accomplish these tasks.

Table 3. Estimated Cost of Mediating the Hypothetical Construction Dispute

MEDIATION	COST	COMMENTS
Mediator compensation		\$310 per hour
prepare for and attend	\$2,790	18 hours (1.5 day mediation plus preparation); owner's share is one half of \$5,580
Mediator expenses	\$ 150	\$100 per day
Owner's Attorney Fees	\$7,200	\$300 per hour for 24 hours (includes preparing written mediation submissions, attending mediation and wrap-up activities)
TOTAL	\$10,140	

WORDS OF CAUTION

The costs calculated by our experts measure a human activity and therefore are subject to wide variation, regional or otherwise. Would a hypothetical mediation of a \$600,000 construction case involving professional malpractice and scope of repair issues take one day or two before being terminated? Our experts split the difference and used 1.5 days.

Would the arbitration hearing take three days or five? Our experts settled on four days, assuming that the parties would choose to file post-trial briefs and forego final oral argument.

All the hours of legal work estimated by our experts are just that, reasonable estimates. They may be considered overly liberal by some readers and too conservative by others.

Also, lawyers and neutrals charge more or less, depending on their experience and the area of the country. Which leads to the following point: The costs for the individual activities shown in Tables 1, 2 and 3 may vary, up or down. This does not

make them useless, only a starting point for a recalculation using estimates more appropriate to where the reader lives.

In addition to the suggestions made earlier about how to streamline the arbitration, there are also time management techniques that could shorten the hearings. These include the witness panel whereby experts testify simultaneously, the attorney's summary presentation of the case, written witness statements in lieu of live direct testimony, and a chess clock to limit the length of direct and cross examination. All of these techniques are available to the parties to use.

In a letter to the editor of *BusinessWeek* in May of this year, AAA President and CEO William K. Slate II emphasized ways that the parties can use technology to speed up the arbitration process. Parties can file their cases online and upload and download documents as well.

ENDNOTES

¹ Donald Wittman, "Arbitration in the Shadow of a Jury Trial: Comparing Arbitrator and Jury Verdicts," 58 *Disp. Resol. J.* 59 (Nov. 2003-Jan. 2004).

² Jeffrey R. Cruz, "Arbitration vs. Litigation: An Unintentional Experiment," 60 *Disp. Resol. J.* 10 (Nov. 2005-Jan. 2006).

³ The members of this expert panel are on the AAA Board of Directors.

⁴ Attorney fees in federal court litigation

tend to be greater.

⁵ The facts in dispute in the hypothetical are loosely based on a case that was actually administered by the American Arbitration Association.

⁶ Some courts are willing to impose sanctions on a party who files a frivolous motion to vacate an award. *B.L. Harbert International, LLC v. Hercules Steel Co.*, 441 F.3d 905 (11th Cir. 2006).

⁷ William K. Slate II, "The Positive

Side of Arbitration," Letter to the Editor, *BusinessWeek* (May 21, 2007), stating with regard to the costs of arbitration: "The AAA offers several options to allow its customers to control the costs of their arbitration cases, including limiting the number of arbitrators presiding on a case, offering expedited procedures, and even allowing for the entire process to be conducted over the Internet to cut down on travel and correspondence costs."



How often do you have the opportunity to arbitrate and litigate a similar case so that you can compare the processes?

That opportunity presented itself to Jeffrey Cruz who shares his views on how the two processes stacked up.

Arbitration vs. Litigation

TOPICS COVERED

- A Tale of Two Cases; Backgrounds
- Differences in the Two Cases
- Lessons Learned?

Arbitration vs. Litigation: An Unintentional Experiment

By Jeffrey R. Cruz

Jeffrey R. Cruz is a partner in Postner & Rubin in New York City. A member of the ABA Forum on the Construction Industry (ABAFCI), the Construction Law Committee of the ABA Section of Litigation, and the New Jersey Bar Association Construction Law Committee, he currently serves on the Construction Advisory Committee of the American Arbitration Association.

Mr. Cruz is an adjunct professor at Pratt Institute School of Architecture, and a co-author of the *New York Construction Law Manual* (Shepard's/McGraw-Hill 1992, West 1998 and 2004 Supplement). He has also written chapters in the *State Public Construction Law Source Book* (CCH 2002) and the *Construction Business Handbook* (Aspen, 2004). He edits the Postner & Rubin newsletter, *Construction and the Law*, and is co-editor of the "Hard Hat Case Notes" in *The Construction Lawyer* (ABAFCI).

How often do you have the opportunity to arbitrate and litigate a similar case so that you can compare the processes? That opportunity presented itself to Jeffrey Cruz who shares his views on how the two processes stacked up.

Arbitration or litigation? Coke or Pepsi? Regular or decaf? Our choices and preferences are based in part on what we hear from others, but the more substantial factor in those choices and preferences is personal experience. Many of our clients already know that they prefer Pepsi and can't stomach decaf—but they have no preferences when it comes to dispute resolution because they have had little or no experience with it.

Recently, along with another practitioner, I spoke at a lunchtime seminar at our local American Arbitration Association (AAA) office¹ to about a dozen commercial and construction arbitrators. We talked about our expectations as “users” of the arbitration process and recommendations for increasing the level of satisfaction that our clients have with arbitration. As a prelude to that discussion, we also talked about whether our clients were electing to include arbitration clauses in their contracts. Even with the recent boom in alternative dispute resolution (ADR), many clients are still unfamiliar with the arbitration process. Some of these clients are first-time owners of construction projects. At the contract drafting stage, they usually are preoccupied with breathing life into their project and feel trepidation about its launch. At this point in time, they are not inclined to focus on how to resolve future disputes with their designers and contractors.

Construction lawyers and professionals have all kinds of old chestnuts they like to dust off when asked to recommend a dispute resolution process for a contract. For example, some say that arbitration is better for subcontractors, litigation is better for contractors, or that you should arbitrate when your case is strong on the facts, but weak on the law. Others have it that you would be better off litigating when the contract is drafted in your favor.

Today it is vital to be able to advise clients on dispute resolution based on more than old chestnuts. The attorney’s experience is perhaps the most important source of advice on this subject, although that is not the only source. Attorneys rarely have the opportunity to compare arbitration and litigation in the same case. That opportunity probably only arises in jurisdictions where a statute permits a trial *de novo* following a non-binding statutory arbitration.

A few years ago I found myself in the unusual situation of being involved in an arbitration and in a litigation of two roughly similar cases, the former in New Jersey and latter in New York. Although the amount in controversy in the New York litigation was much greater, the cases were close enough to be instructive on the advantages and disadvantages of using arbitration and litigation. This article compares key aspects of these two cases. This comparison is based, not on empirical research conducted under controlled conditions, but on my fortuitous involvement in two similar

cases very close in time. It was simply one of those random opportunities that occasionally arise during the course of a legal career that allows the practitioner to make useful observations.

A Tale of Two Cases

1. Background of the New Jersey Case

The New Jersey case involved the design, construction and startup of a cogeneration facility owned by an independent power producer. My firm represented the owner against the design-builder (called the EPC contractor—for engineer, procure and construct), which was contractually responsible for designing the plant, procuring all materials and equipment, constructing and then commissioning and turning over a fully operating plant to the owner. The owner’s contract with the EPC contractor contained a warranty clause providing a one-year period from commercial operation in which to raise any deficiencies in the EPC contractor’s performance. This contract contained an arbitration clause calling for arbitration administered under the AAA Construction Industry Arbitration Rules.

In this case, the owner asserted a variety of claims against the EPC contractor within the one-year warranty period concerning various systems around the plant. In fact, virtually every significant plant system (except the steam turbine generators and the gas turbine generators) had a warranty claim associated with it. Although the claims filled the spectrum between relatively minor (deficient boiler drain valves) and very significant (leaking tube to drum joints in the plant’s heat recovery steam generators), there was a common thread running through the claims. For each claim—from the simple to the complex—we had to learn the engineering behind how these plant systems were designed, constructed, procured, commissioned and operated, and eventually devise a persuasive and cohesive presentation for a trier of fact.

The EPC contractor asserted counterclaims for the balance due under the contract, a bonus for completing the project on schedule and a delay damages claim.

2. Background of the New York Case

The New York case also involved a design-build power plant project but it had a different owner and design builder, called the “turnkey” contractor. Here, my firm represented the turnkey contractor against the owner of the plant. As in the New Jersey case, the turnkey contractor was contractually responsible for designing, procuring, constructing, commissioning and turning over an operating plant to the owner.

When the owner terminated the turnkey contract prior to completion of the project for alleged performance defaults, the turnkey contractor asserted that it was wrongfully terminated and claimed additional compensation and an extension of the time for completion of the contract. The owner asserted counterclaims seeking substantial damages for delay and defective and incomplete work. This case ended up implicating at least as many technical engineering issues as the New Jersey arbitration. In addition, the parties had completely different views of the construction schedule.

The contract in this case did not contain an arbitration clause, so it was headed to state court.

Because these cases involved very different amounts in controversy, one might conclude that this would account for the different experiences in arbitration and litigation. While the amount in controversy was certainly a factor, in my view, it does not tell the whole story.

Differences in the Two Cases

1. Commencing the Proceedings

The New Jersey case was commenced by a simple demand for arbitration. The contract required the parties to each appoint an arbitrator, and for the two party-appointed arbitrators to select the arbitrator who would serve as chair of the panel. The parties nominated their arbitrators and the chair was selected. This process was not unduly combative. Indeed, it was completed in several weeks. (However, it is not difficult to imagine how objections and challenges, legitimate and otherwise, to arbitrator candidates might extend the time to appoint a panel.) Within a short time after selection of the panel, the chair convened an administrative conference.

The litigation in the New York case had a more tortuous beginning. Our client, the turnkey contractor, commenced an action in state court in California seeking to attach funds belonging to the owner. It also filed a complaint for breach of contract. The owner commenced a separate breach of contract action in state court in New York. Before our client and the owner would even begin to address the merits of their respective claims, they would spend two years filing motions and appeals relating to three issues:

1. our client’s pre-trial attachment of the owner’s funds in California,
2. the proper venue (i.e. New York or California) for the breach of contract action, and
3. disqualification of the owner’s counsel for a conflict of interest.

Some readers may have already guessed that the California court granted our client’s motion to disqualify the owner’s counsel, while the New York court denied it. The non-prevailing party in each action appealed, which led to more time and attorneys’ fees.

2. Pre-Hearing and Pre-Trial Motions

The two cases had more than technical complexity in common. Another element they shared was potentially dispositive legal issues tempting enough to provoke early motions for summary judgment.

In the New Jersey arbitration, the EPC contractor consistently took the position prior to and throughout the arbitration that the owner had not given proper notice of the warranty claims under the contract and that some claims had not been asserted within the one-year warranty period. In the New York case, the owner consistently took the position during construction and prior to and during litigation that the turnkey contractor failed to comply with the contract’s notice provisions concerning the assertion of claims.

The arbitrators in the New Jersey case permitted the EPC contractor to file a motion for summary judgment based on the warranty provision. They asked parties to organize their arguments and supporting documents by claim so that a decision could be rendered for each claim.

In the New York litigation, the parties filed their summary judgment motions and opposition papers. But in contrast to the arbitration, they received no guidance from the court as to how to organize their claims so that they might be examined in the most efficient manner. In my experience, I have rarely seen a state court provide pre-filing direction or guidance to the parties to facilitate disposition of a motion for summary judgment.

The result? The arbitrators in the New Jersey case rendered decisions indicating which claims did not survive summary judgment, and which did, and perhaps more importantly, what needed to be proved in order for these claims to be viable in the arbitration.

3. Preliminary Hearing

One of the keys to making the New Jersey case run as smoothly and efficiently as it did was the preliminary hearing conducted by the panel. This hearing was not on the telephone, as such hearings often are.

At the preliminary hearing, the panel conducted an intensive inquiry into the nature of the claims and counterclaims that would be presented. Then it challenged the parties to pare down the amount of discovery they wanted in order to prepare for the hearings. The panel also asked us to work cooperatively to present the claims and counterclaims in an orderly and efficient manner, and devise creative approaches to presenting the evidence also in the most efficient and effective way.

As a result, the parties discussed several witness-presentation techniques, many of which have been discussed in the pages of this *Journal*, such as using a panel of witnesses and having party experts testify simultaneously so that they can challenge each other's testimony.² Although the parties did not agree to use these innovative techniques, they did agree to run the hearings on a "chess clock." The chair directed each party to estimate the amount of time that would be needed to present its case in chief, cross-examine witnesses and present rebuttal. As I recall, the chair then reduced these estimates by 10-20%. He also said that the clock would run except for breaks and questioning by the panel, and then advised us, "Once you run out of time, you're done, so think twice before you ask a question you've already asked or call a witness whose testimony you suspect may be cumulative."

There were no analogous preliminary hearing discussions in the New York litigation. Thus, court procedures had to be followed, without creative adjustments.

4. Discovery

At the preliminary hearing in the New Jersey case, the parties each expressed a need for extensive pre-arbitration discovery, including document production, depositions, a site inspection and discovery from third parties. The panel did its best to persuade the parties to keep their discovery requests to a manageable level. The parties then agreed that each side would take no more than three depositions (including depositions of nonparties). The panel authorized an inspection of the plant and helped the parties fashion reasonable rules for the inspection. The panel was invited to attend the site inspection in the hope that seeing the plant in operation would help the arbitrators visualize and understand the technical issues in the case.

In the New York litigation, the parties exchanged discovery requests requiring the exchange of over a million pages of documents. They also served dozens of deposition subpoenas on parties and third parties. In addition, they requested three site inspections, and destructive and non-destructive testing.

Although the parties were required to—and did—provide periodic reports to the court describing their progress in completing discovery, progress was slow at best. The entire discovery process took three years and it often felt like an unsupervised free-for-all.

5. Conducting Hearings and Preparing for Trial

Because of the complexity of the issues, the arbitration of the New Jersey case could not be completed in one hearing day. In order to accommodate the busy schedules of everyone involved, the panel scheduled the hearings to take place one week out of every month until concluded. The parties agreed to focus on discrete claims during each week of hearings. The panel required each side to pre-mark its proposed arbitration exhibits and organize them in binders, and serve them on the other side and the panel about a week before each round of hearings. Objections to any exhibits had to be exchanged prior to the hearing week during which the exhibits were intended to be presented so the arbitrators could promptly rule on them. The chess clock contributed greatly to moving the proceedings along.

The process also benefited from the customary relaxation of evidentiary rules in arbitration. Thus, all exhibits were deemed admitted unless objected to. Business records and other hearsay evidence were admitted without the need to lay a formal evidentiary foundation. The panel asked clarifying questions and often conducted extensive questioning after counsel had concluded direct or cross-examination.

It is my understanding that the arbitrators deliberated after each monthly round of hearings in order to exchange their thoughts about the evidence while still fresh in their minds. The arbitrators rendered opinions on the pre-hearing motions for summary judgment but did not issue interim decisions on the discrete claims. The case settled before the end of the hearings, less than two years after the demand for arbitration was filed.

Even though the panel did not have to issue an award in the arbitration because of the settlement, I believe my client in the New Jersey case received a fair hearing by a sophisticated panel whose members understood and appreciated the legal and technical details involved.

In the New York case, counsel for the parties estimated it would take six months to complete the trial. Both parties demanded a jury trial, so if the case had been tried, a dozen ordinary citizens and a judge, none of whom was likely to have an engineering or construction background, would have had to try to understand the failure analyses, critical path method schedule analyses and highly technical facts and expert testimony in order to decide the case. However, this case never went to trial. It settled just before the trial was to begin.

Nevertheless, the New York litigation lasted much longer than the arbitration (three-and-a-half years longer) as a result of the motion practice and extensive discovery described above, and the need for extensive trial preparation, including the need to prepare expert witnesses for trial. Had the case been tried, I believe the parties would have had significant difficulty dealing with the substantial volume of technical data and expert witness testimony that would have been offered into evidence since New York court rules provide for very limited discovery of experts and do not provide for expert witness depositions.³

Lessons Learned?

We construction litigators are “result-oriented” folks. In both cases one result was the same — both settled before a decision was made by a third-party decision maker. This result, however, is not important to the lessons learned. These lessons are very practical. Arbitration led to a resolution in much less time overall and allowed the parties to customize the process to a complex construction case. True, the case that was arbitrated involved less in controversy. But I don’t think that is terribly significant since the issues were of equivalent complexity.

I believe that at several different stages of the process from claim to resolution, arbitration presented the “alternative” we so fervently seek from ADR. During the pre-discovery stage, arbitration provided a forum in which to custom tailor the process of gathering and presenting the evidence so that the issues could be decided. A big dividend was the panel’s strong interest in limiting and managing discovery. The efforts to curb discovery to what was important were instrumental in moving the case along.

The proceedings were made more efficient because arbitration, unlike litigation, allows flexibility in scheduling hearings, organizing the evidence, and presenting witness testimony. It also allows questioning by the panel.

Technically complex engineering and scheduling issues are usually well suited to arbitration since the parties can select arbitrators who understand such issues. I imagine that counsel for both sides would have adopted very different approaches in the New York litigation if it had been destined for arbitration, rather than a jury.

In the litigation, the parties became embroiled in a procedural morass that consumed two years of motions on the attachment, attorney disqualification and venue issues and related appeals. Would arbitration have prevented this? Probably not, but arbitrating could have saved substantial time involved in motion practice over the venue issue.

Although the New York case settled before trial, I think the prospect of a long costly trial before a jury contributed to the parties’ decision to settle.

I am not advocating any particular dispute resolution process for every situation. Each case has its own needs. I have even had some bad experiences with arbitration. But it has not soured me on the process, which, when managed properly, can give the parties a fair hearing in less time and at less cost. (Of course, if you always prefer to litigate, then my conclusions from this accidental experiment with arbitrating and litigating two similar cases may not interest you.)

I hope my experience will encourage you to arbitrate and take stock of that experience at different stages of the process. Then you can mine that experience about the advantages and disadvantages you have encountered. You can also compare your experiences with the experiences of other lawyers in and out of your firm and see what was different about them. By doing so, we put ourselves in a better position to counsel our clients well when it comes time to pick a dispute resolution method and forum.

SEE CHART ON FOLOWING PAGE

ENDNOTES

¹ This is the AAA's New York Regional Office.

² See e.g., Robert J. Macpherson, Richard F. Smith & Roy S. Mitchell, "Innovations in Arbitration: Improving the Presentation of Evidence in Construction Arbitration," 58 (no. 3) *Disp. Resol. J.*, 30-34 (August/October 2003).

³ N.Y. Civil Prac. L. & Rules, art. 31.

Comparing Arbitration to Litigation in Two Similar Cases

	New Jersey Case (Arbitration)	New York Case (Litigation)
Pre-trial Proceedings	7 months	6 years
Depositions	6 total, limited by the panel. Only 5 were actually taken, 3 by one side, 2 by the other.	Dozens were requested but were not limited by the court until the discovery period ended.
Document Discovery	Manageable. Several exchanges took place over several months	Over 1 million pages exchanged over several years
Site Inspection	Parties worked out an orderly site inspection that also benefited the panel.	3 inspections requested. Neither the judge nor the jury saw the plant before hearing technical evidence and hearing arguments.
Dispute Deciders	2 construction lawyers and 1 engineer	Jury with 12 lay people.
Right to Appeal	None in this case; appeals in arbitration are very limited	"Interlocutory" appeals added at least 2 years to the pre-trial proceedings
Expert Discovery	Pursuant to the panel's directives, the parties exchanged expert witness information, including reports, in an orderly fashion.	State law provides very limited expert discovery; therefore, the parties faced "trial by ambush."
Efficiency of Hearings	Parties agreed to use a "chess clock" to keep the hearings moving. The parties and the panel could arbitrate into the evening if necessary or useful.	No trial was held, but had there been one, its pace would have been controlled to a large extent by the judge. Long trial days with a jury are often not feasible.
Innovative Techniques for Presenting Evidence	Parties discussed using fact witness panels and expert witness confrontation.	Traditional rules of evidence and order of trial apply.
Handling Documentary Evidence	Binders exchanged in an orderly way. Evidentiary objections were discouraged by the panel.	Hundreds of trial exhibits were exchanged, making them difficult to manage
Length of Hearings/Trial	40+ hearing days over a period of 16 months (one week of hearings per month) before the parties agreed to settle.	Trial estimated to take 6 months, requiring court appearances 4 to 5 days each week. However case settled before trial.

New Jersey Case

Plant completed: May 1992
 One year warranty period: May 1992–May 1993
 One year "evergreen" period under warranty: May 1993–May 1994
 Claims asserted and negotiated: 1995-1996
 Arbitration demanded by Owner: August 1996
 Pre-arbitration proceedings (including summary judgment motion and discovery): August 1996–March 1997
 Arbitration Hearings: Spring 1997–Summer 1998
 Parties settled: Before the end of 1998.

New York Case

Plant completed: August 1996
 Litigation commenced by Turnkey Contractor: January 1997
 Pre-trial proceedings (attachment proceeding, motion to disqualify counsel, appeals, discovery): January 1997–Fall 2002
 Intensive preparation for trial: Fall-Winter 2002
 Settled case on eve of trial: January 2003



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