

Dispute Resolution: A Preliminary Report on Changes Taking Place in Commercial Construction

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Dispute resolution in the construction industry is a major source of concern for all parties concerned with the construction process. Changes were made in the 2007 version of the AIA contract documents that reflect changing attitudes towards how parties view disputes and how the disputes will be resolved. Negotiation, mediation and arbitration remain the primary mechanism for resolving disputes but new techniques are being explored. This paper reports some preliminary findings discovered in interviews with Owners, Architects, Contractors and Attorneys regarding the most efficient method of resolving disputes and the effect that the changes in the AIA documents may have in the future.

Keywords: Dispute, Litigation, Arbitration, Mediation, Dispute Review Board.

Introduction

The commercial construction industry has steadily increased in complexity over the last few decades (Cheung, 1999). Construction contracts have become extremely complex in their language, often making interpretation very difficult. While it is true that construction contracts often contain anticipatory language for unforeseen occurrences, not all eventualities can be prepared for. Consequently, disputes are inevitable in the construction process (Cheung, 1999). The construction industry thrives on building lasting relationships, so it is absolutely critical that disputes are handled appropriately and expeditiously. Dispute resolution, if handled properly, can have a major impact on the success of a project, as each party involved is able to stay focused on the actual construction of the project itself (Essex, 1996).

Dispute resolution mechanisms are an important decision for construction participants to make. Dispute resolution proceedings can be costly and exhaust a tremendous amount of resources (Cheung et al., 2002). Subsequently, the construction industry has begun to look for the best possible solution in settling disputes. The uniqueness of every construction project demands that every aspect of resolving potential disputes be examined thoroughly to determine which method is the most applicable. Fortunately, dispute resolution as a whole offers many different options to choose from including: litigation, arbitration, negotiation, mediation, and dispute review boards (Essex, 1996).

All parties involved with commercial construction contracts should make an effort to use prevention techniques prior to construction in order to minimize the impact of disputes that may arise. Dispute prevention techniques include an understanding of pre-construction risk mitigation by all parties including: contractors, owners, designers and subcontractors (Cheung, 1999). However, despite all of the pre-construction efforts, it is likely that disputes will arise during the construction process. Once a dispute arises, the construction industry has vacillated over the most effective means of resolving the dispute. The private commercial construction sector has most recently favored mediation and arbitration as means for resolving the dispute. This is reflected in the most popular construction contract document forms; mainly those promoted by the American Institute of Architects (AIA). However, in the latest version of the AIA documents (2007) a significant change has occurred whereby mediation and arbitration is no longer the default mechanism for resolving disputes. Our research is aimed at looking at how the industry views dispute resolution mechanisms and if, indeed, there are changing attitudes in this arena.

Background

Negotiation is almost always the first step in dispute resolution. However, when negotiation fails, other methods are quickly imposed. The use of litigation has historically been the favored option for resolving ones dispute and is often looked upon as the traditional method. However, as a consequence of the enormous cost and resource drain that litigation requires, the United States construction industry began looking to alternative measures to deal with disputes. Alternative dispute resolution, or ADR, has been proven to be a highly effective alternative to litigation since the mid-1970's even though it was not widely adopted in the construction industry until the mid-1980's (Weidner, 2006). ADR refers to any means of dispute resolution that takes place outside of a court room (ADR, 2008). ADR is often thought of as a means of resolving disputes more efficiently and also can assist the parties in understanding the issues between them more clearly, minimizing the adversarial atmosphere that can be created in the midst of a dispute (Essex, 1996).

The application of dispute resolution practices in the commercial construction industry will vary depending on the project in question. Past research indicates that the resolution of potential conflicts between contractors, owners, designers, and subcontractors has several conclusions. Primarily, the dispute resolution discussions focus on: (a) when to resolve disputes (Cheung, 1999; Groton, 1991; Cheung et al., 2002), (b) what type of dispute resolution is appropriate (Groton, 1991; Widiss, 1979; Moffitt & Bordone, 2005; Tarlow, 2008), (c) what has worked and not worked in the past (Korn & Pallas, 2007; Hinchey & Schor, 2002; Keil, 1999; Widiss, 1979), and (d) what forms dispute resolution may take in the future (Essex, 1996; Groton, 1991; Kane, 1992).

The American Institute of Architects' (AIA) construction contract documents are widely used throughout commercial construction. Dispute resolution has been a concern expressed in the past from owners, architects, and contractors (Gibbs, 2007). Up until the latest version of the AIA documents were issued in 2007, the architect was identified as the initial arbiter of claims. This posed a number of problems and potential areas of conflict. Owners don't want their architects making decisions against them and contractors often believe that architects cannot act impartially when they are being paid by the owner. In addition, architects are reluctant to make decisions that may affect their own liability. This often resulted in the Architect being placed in a "Catch 22" scenario; i.e., simply being caught in the middle. As a result, the latest revisions to the AIA documents have allowed for several changes to their contract documents as related to dispute resolution.

The AIA101-2007 and AIA201-2007 (Owner-General Contractor Agreement and General Conditions to the Contract, respectively) family of documents advocate the concept of a third party neutral as the Initial Decision Maker (IDM). The third party neutral is agreed upon by the parties at the time of contracting and if a third party neutral is not named, the architect takes on the role of IDM. Another important revision in the 2007 documents, as related to dispute resolution, is the freedom to choose between arbitration and litigation. This is often referred to as the "check box" system; and if neither option is selected the default option becomes litigation. As a reflection of the success of mediation in assisting the parties in resolving their disputes, the 2007 documents maintain mediation as the first step in dispute resolution, as did the 1997 documents (Gibbs, 2007).

Some industry professionals believe that there is a tendency to resolve monetary disputes after construction is complete (Groton, 1991). This idea stems from the belief that the cost would be greater to everybody in the long term, if project resources were reallocated to dispute resolution during the construction process. The problem with this belief is that uncertainty about the outcome of the project is increased, creating an adversarial relationship. However, the truth is that the vast majority of industry professionals advocate prompt resolution to construction disputes as soon as they arise (Cheung et al., 2002). These construction leaders recognize the value added in dealing with disputes expeditiously. Research suggests that early dispute resolution practices will help contractors, owners, designers, and subcontractors maintain and preserve their business relationships.

Mediation remains a popular method of dispute resolution. However, in order for mediation to be effective all parties must be willing to listen and try to work things out amicably. Many of the contracts today stipulate that parties must try mediation prior to arbitration or litigation (Tarlow, 2008). The problem with this is that some disputes may already be to the point where a binding resolution may be the only way to resolve the dispute. Alternatively, mediation has proven to be an excellent dispute resolution option if all parties have the right attitude regarding the desirability of resolving the dispute (Tarlow, 2008). Unfortunately, since mediation is non-binding, it may fail to produce a resolution and parties may have to look to binding resolutions, such as arbitration and

litigation. Historically, contractors have looked at arbitration as a favored mechanism under the guise that it is an expeditious, efficient, and economical solution. One distinct difference between arbitration and litigation that is critically important is that arbitration is agreement based and not always provided with standards, as is litigation (Widiss, 1979).

The true benefit of litigation is that legal principles and the right to appeal are what uphold the standards, making litigation an attractive option since previous court rulings provide a solid foundation for future proceedings (Widiss, 1979). Commercial contractors must look for the dispute resolution practice that is most likely to resolve the conflict as economically as possible. Contractors can start the selection process by asking three simple questions: what are the goals of the processes, what aspects of the dispute in question make it resolvable using one practice over another, and what contributions might each practice make to overcoming problems that would prevent an effective resolution from coming to fruition (Moffitt & Bordone, 2005).

Architects and contractors are both under increased pressure today from owners to design and build projects quickly. This pressure only increases the likelihood that disputes will arise. Mediation often proves to be a successful mechanism for resolving disputes quickly but is dependent upon having a mediator that is proactive. A mediator must ask the tough questions so that there is no doubt as to where the proceeding is heading. If a mediator fails to be proactive, then the probability of a successful outcome is diminished (Korn & Pallas, 2007). Mediation, however, may not be the best method to use when parties are trying to resolve a case that deals with a distinct issue of law. Hinchey and Schor contend that litigation establishes a legacy from which attorneys may advise their clients. Furthermore, contractors who build large projects with enormous amounts of money at risk, usually spend a tremendous amount of time in pre-construction negotiation in order to mitigate their risks. These contractors may not be willing to give up their interpretation of these negotiations to a mediator or arbitrator, who is not legally bound to adhere to the terms of the agreement (Hinchey & Schor, 2002).

Whichever dispute resolution method is selected should aim to resolve the dispute as efficiently and effectively as possible. All professionals involved in a construction project typically only have two resources that they can contribute to a construction process: time and talent. Consequently, if the wrong method for dispute resolution is chosen, these two resources may be siphoned away from the project which would open the door for project failure, and the development of an adversarial environment (Keil, 1999).

As the commercial construction industry continues to advance in technology and complexity, the need for advanced dispute resolution mechanisms will increase. One emerging concept finding favor in some segments of the industry is dispute review boards. These boards allow a pre-selected panel, normally consisting of three independent parties, to advise disputing parties on a resolution solution specifically tailored to their dispute (Essex, 1996). The review board is often engaged at the outset of the contract and makes a commitment to meet as necessary during the construction process to handle any disputes in a timely fashion. Some commercial contractors are finding this method to be extremely effective. It is designed to keep the panel abreast of all ongoing construction proceedings so that they may offer immediate advice should a dispute arise. This method may also be helpful, particularly for contractors and subcontractors, since field occurrences are difficult and costly to recreate. Research has shown that dispute review boards also help to minimize actual disputes from arising in the first place. This finding is directly attributable to the real-time project knowledge that the panel members possess (Kane, 1992). As project complexity increases dispute resolution may also move towards hybrid forms in the future.

Methodology

The purpose of this study is to look at various dispute resolution practices used in the commercial construction industry and to ascertain which methods offer the best solution. Data was obtained from owners, attorneys, construction executives, and senior project managers in order to gain the broadest perspective on the issue. By focusing on the aforementioned parties for direct information, the study was able to present supportive data to determine which methods offer the best solution for the commercial construction industry.

Data was gathered from industry professionals using a qualitative research approach. Qualitative research can be defined as *subjective*, and is often structured into two categories of research: exploratory and attitudinal (Coles & Naoum, 1998). The purpose of exploratory research is to understand a situation, look for alternatives, and to

propose new ideas (Zikmund, 1997). Exploratory research was used as construction professionals were interviewed regarding their opinions on dispute resolution practices. Attitudinal research was used to evaluate the *opinion, view, or perception* of an individual, towards a certain object (Coles & Naoum, 1998). The interviews provided substantive information as to the current views associated with dispute resolution in order to provide the reader with contemporary information regarding practices that are best suited for resolving commercial construction disputes.

Data Analysis and Results

The data compiled was analyzed using the qualitative approach of triangulation. The data obtained from the interviews was interpreted using a three step process. First, the data was analyzed separately according to professional position to ensure that all data has been properly cataloged. Second, the data was compared using the triangulation method, and extensions thereof, to look for commonalities between the various professionals interviewed. The triangulation method is used to integrate data from multiple sources (Univ. of California; Triangulation, 2008). The goal of triangulation is to find recurring themes that are prevalent throughout the interviews. Extensions of the triangulation method were also used to further develop a rich understanding of dispute resolution. For example, the theory of *complementarity* was used with the construction executives and attorneys as they were both asked questions that are unique, in the sense that they are overlapping as well as different (Gaber & Gaber, 2007). The goal of using the complementarity approach is to understand the difference in thinking between business owners and the attorneys who represent their interests. In addition to using the complementarity approach, the researcher used an additional method of triangulation with the senior project managers known as *expansion* (Gaber & Gaber, 2007). The expansion method was used to extend the range of conceptual understanding by asking questions that target different components of the same framework of questioning. Although the questions are different in their own right, the underlying concepts are similar to those asked the executives and the attorneys. The expansion process allows the researcher to gain a deeper understanding of the affects that the dispute resolution process has regarding various construction professionals.

Initially data was coded *a priori* using themes and keywords derived from the interview questions (Gibbs & Taylor, 2006). The *a priori* codes were used to label the questions asked. In addition, for analysis purposes, the questions were categorized by which participant was asked the question. The ultimate goal of this research is to provide construction professionals with an informed outlook of dispute resolution methods.

Twenty seven questions were used to explore the attitudes of the parties involved with the process. Initially a simple question with an expected outcome was asked and all of the participants agreed that negotiation was the most non-adversarial method of resolving a dispute. All participants agreed that dispute resolution methods made a significant impact on operations with the exception of a single subcontractor.

Next, the parties were asked about the root cause of most disputes. Money and communication breakdowns were factors that result in disputes entering an impasse from which the parties would seek outside assistance from their attorneys.

The next series of questions were aimed at the contracting parties and their interaction with attorneys. General contractors were much more willing to seek attorney involvement than were subcontractors.

Questions were then asked about the importance of having dispute resolution methods contractually defined prior to construction. In a related question, the parties were also asked about the differences in the 1997 and 2007 versions of the AIA documents. The contractors interviewed had not yet been personally involved with the 2007 documents. However, the majority of parties agreed that dispute resolution methods should be defined in the contract and that the Architect should not be the Initial Decision Maker.

A series of questions were asked to explore the attitudes of the respondents to the services of the American Arbitration Association (AAA) or other arbitration facilitators. Also explored in this line of questioning is whether there is a preference for a single arbitrator or a panel of arbitrators. To further explore arbitration, participants were questioned about the lack of appeal in arbitration. The majority of the respondents favored arbitration over litigation and had a preference for a single arbitrator, unless the particular situation dictated a panel. No preference, one way

of the other (i.e., positive or negative) was evident as it related to the AAA or any other arbitration facilitator. A number of the respondents stated that their experience was generally a joint administration of the arbitration proceedings by the parties; i.e., using no formal entity or association as a facilitator. General contractors and subcontractors had mixed responses about arbitration's lack of appeal while attorneys stated that there should be no concern since the parties interested in a right to appeal should favor litigation in the first place.

Questions were asked to determine if the participants felt that mediation was an effective form of dispute resolution. There was some concern among all parties interviewed that since mediation is not binding it is often not taken as seriously by all parties and some may try to play the system. However, a great majority of the respondents stated that mediation was effective in resolving disputes. Attorneys stated that the success of mediation is, to a large degree, dependent upon the skill of the mediator. A mediator who takes charge of the proceedings and acts in a forceful manner is much more likely to end with a settlement than one that is more passive. In addition, the attorneys offered that parties often appear to have a preconception regarding the likelihood of a settlement being reached prior to the mediation. Parties that go in with a positive attitude that the dispute will be resolved during the mediation are much more likely to succeed than those going in without a positive approach. Furthermore, some of the respondents indicated that mediation was treated simply as a precursor to arbitration or litigation.

The attorneys unanimously agreed that litigation offered more legal challenges than alternative methods. They stated that litigation could be very complex and time consuming, and that judges and juries often had limited construction knowledge. Attorneys also reported that most executives were knowledgeable about dispute resolution methods and the distinctions between the alternatives; but that it really depended upon the specifics of the project and the dispute as to which method was most appropriate. All of the attorneys interviewed felt that dispute resolution methods were making positive improvements, but they went on to say that mediation, arbitration, and litigation were here to stay. Attorneys pointed out that advances were being made in dispute review boards. They opined that while many in the industry believe that dispute review boards were appropriate only for federal projects they are seen more frequently in private commercial construction than just a few years ago. The attorneys also stated that some are experimenting with hybrid forms of dispute resolution such as a mediation-arbitration hybrid.

Attorneys were also questioned about the changes in the most recent version of the AIA documents (2007). All of the attorneys agreed that the change in the consolidation clause was important. The 1997 AIA forms require disputes involving the architect to be held at a hearing separate and apart from other parties; i.e., that claims against architects cannot be consolidated with claims against other parties. To illustrate, an owner has a potential dispute that involves both the architect and the general contractor. The owner would be required to have two hearings in order to resolve this matter under AIA 1997. Many owners and contractors were frustrated with this clause and were threatening to discontinue use the AIA contract documents altogether if it was not modified. The change is reflected in the 2007 AIA documents in that their no longer is the "no consolidation" clause.

Most of the attorneys stated that it was too early to adequately assess the changes in the dispute resolution clauses from the 1997 to 2007 AIA documents. That we are still at least a couple of years away from being able to see if the "check box" system and the default provision for litigation will have any effect on how the parties handle disputes.

Project managers were also questioned and all reported that when a dispute arose on one of their projects they were intimately involved in dispute resolution process. They also reported that there was a heightened degree of tension on a project during the course of the dispute resolution. The project managers also reported that they had worked with IDMs other than an architect and these always turned out to be independent construction managers. They also reported that they were personally involved with the data collection process during disputes and this required a significant amount of their time.

Conclusions

Not surprisingly, the research results indicate that all parties prefer to settle disputes by negotiating. All agreed that maintaining relationships and keeping dispute resolution costs to a minimum are very important factors in how they conduct business and that negotiating a settlement is the best way to accomplish this goal. Mediation is seen as an effective form of dispute resolution by all of the general contractors and attorneys. However, subcontractors offered different opinions on the matter with some preferring mediation while others found it futile since it is non-binding.

All parties essentially agreed that litigation is the worst form of dispute resolution mechanism. However, an interesting part of this research is the attorneys' attitude towards dispute resolution. Attorneys have similar opinions to the construction executives, in that they believe that the quicker disputes can be resolved, the better for everyone; but they take a legalistic approach towards the subject, essentially stating that any dispute resolution is fine as long as the parties have the freedom to choose during the time the contract is negotiated.

There may not be one definitive dispute resolution method that is best suited for all situations, but the research clearly indicates that negotiating disputes and dealing with them quickly is the best course of action. More research will be available in the coming years once the latest versions of the AIA documents become more widely used. It will be interesting to see if the new AIA contractual language (e.g., check box system) leads to a decrease in arbitration and an increase in litigation. The attorneys also agree that advancements are being made in dispute resolution methods with the dispute resolution boards and some attempts at hybrid systems. However, they also point out that mediation, negotiation, and litigation practices were here to stay. The research clearly indicates that disputes will always be prevalent in commercial construction, and they must be resolved as quickly as possible to preserve professional relationships and the perpetuity of the commercial construction business.

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Appendix A

Interview Questions

Construction Executive Questions:

1. What types of dispute resolution methods do you feel are most non-adversarial, and are best suited for relationship preservation?
2. When choosing a dispute resolution option, what factors are you most concerned with in terms of the impact on operations? (Do you decide or do you rely on advice from your attorney; do you use different methods for different clients; do you use different methods for different types of work)?
3. Is there one method that stands out among construction executives (or for your company) as the best all around?
4. When do you consider a dispute at an impasse and solicit outside assistance?
5. What individual is responsible for dealing with the attorneys?
6. How important is it that dispute resolution options be contractually defined prior to construction?
7. Do you like the change from 1997 to 2007 AIA Docs re dispute resolution? (i.e., Initial Decision Maker not having to be the Architect, and the new "check box" option in the 2007 version to allow for arbitration or litigation, should mediation attempts fail.)
8. If you do like the check box option in the 2007 version, why?
9. How would you choose the Initial Decision Maker? What is important to you when making this decision?
10. Have you used AAA's arbitration services before, or any other facilitator?
11. If no to question 10, have you been involved in deciding who will be the arbitrator with the other party involved? In other words, were both sides able to work together in picking their arbitrator?

12. In arbitration, do you favor a single arbitrator or a panel of arbitrators (i.e., 3)?
13. Is the lack of appeal in arbitration a concern?
14. Do your contracts require mediation prior to arbitration (according to the 1997 AIA version)?
15. Since mediation is non-binding, do you feel that it is effective? Do you feel that the environment offered by mediation is non-adversarial and conducive to an amicable solution?

Questions for Attorneys:

1. How important is it that dispute resolution options be contractually defined prior to construction?
2. What options present the most legal challenges for an adequate resolution?
3. How knowledgeable are construction executives about dispute resolution as a whole?
4. What does the future of the construction industry look like in terms of dispute resolution advancement?
5. Do you like the change from 1997 to 2007 AIA Docs re dispute resolution? (i.e., Initial Decision Maker not having to be the Architect, and the new “check box” option in the 2007 version to allow for arbitration or litigation, should mediation attempts fail).
6. What are your thoughts in regards to the Initial Decision Maker not having to be the Architect?
7. Why did the architects agree to being “consolidated” with other parties in construction related disputes in the 2007 version of the AIA documents?
8. If you do like the check box option in the 2007 version, why?
9. In arbitration, do you favor a single arbitrator or a panel of arbitrators (i.e., 3)?
10. Is the lack of appeal in arbitration a concern?
11. Do you feel that contractual consistency is important between the different parties in construction? (i.e., between Owners and GC’s and GC’s and Subcontractors).
12. Since mediation is non-binding, do you feel that the odds of a successful resolution are worth the effort, or do you believe that arbitration or litigation offer a better solution all around for construction related disputes?

Questions for Senior Project Managers:

1. How involved are you with dispute resolution?
2. Where do you see the biggest impact of a selected dispute resolution option in terms of worker productivity? Is there a negative impact on the jobsite as a whole? (i.e., attitude, schedule concerns, etc.). Do superintendents express the significance of these issues to you?
3. Can you sense a heightened degree of tension on a project if a particular dispute resolution option is in use? Can you elaborate on any experiences that you may have had?
4. What are your thoughts in regards to the Initial Decision Maker not having to be the Architect?
5. Have you had to deal with an IDM other than the Architect?
6. What type of information are you responsible for collecting when disputes arise?
7. How does the data gathering process impact your productivity, in terms of your day to day professional responsibilities?
8. Do you find it difficult to get other parties to be helpful in data gathering once a dispute arises? Do you sense an attitude shift in the professional relationships with subs, owner, etc. once a dispute is ongoing?
9. Have you ever personally been involved in an actual mediation, arbitration, or litigation proceeding? (i.e., had to testify or participate directly).
10. If yes to number nine, what resolution method have you found to be the most productive and palatable for all parties involved?