THE ABC OF ADR

Mediation as a means of ADR—or Alternative Dispute Resolution—is becoming a preferred way to settle construction disputes

by Gary Morgerman

Ask any construction executive if his attorney ever suggested mediation as a means of settling a construction dispute and the response will surely be “No”. Few owners, contractors, developers, architects or engineers are aware that this method of Alternate Dispute Resolution (ADR) is available to the construction industry.

While negotiation is the industry’s preferred means of settling disputes, construction mediation is a far superior method of resolution than the more formal, and preferred choices of the legal community; arbitration and litigation. Though rarely used, mediation is faster, cheaper, the least painful and most satisfying.

Mediation is simply a voluntary negotiation process where the parties invite a neutral expert to participate and assist them in moving toward a settlement that is agreeable to each disputant. The mediator cannot impose a settlement on the parties. And any settlement achieved is value free; it is not for the mediator to decide whether it is fair or not, although invariably it is.

Mediation’s Uniqueness

The uniqueness of mediation is that it allows the parties to be directly responsible for the agreement they negotiate. They never give up control over the process as they do in arbitration and litigation. The mediator serves at the pleasure of the parties and can be dismissed by either side at will. If this occurs, the proceedings are terminated without prejudice to either party and all that transpired remains confidential.

But once parties agree to mediation, rarely do they short-circuit the process. Adversaries who mediate their differences achieve voluntary, mutually satisfactory settlements in better than four out of five cases, with more than 80 percent of the participants saying they would use the method again. Despite these impressive statistics, however, the American Arbitration Association (AAA) last year administered more than 4300 construction arbitrations but only 75 mediations.

No wonder Robert Coulson, president of the AAA, calls mediation the “sleeping giant” of ADR.

Why is the construction industry not using mediation?

Part of the reason lies in its recent introduction into the field of construction disputes. Mediation is not yet part of traditional legal training; in fact, arbitration was only introduced into law school curricula within the last five or six years. Consequently, it is not only construction executives, but attorneys as well, who are unfamiliar with the mediation process and unwilling to
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Traditional Methods

A major impediment lies in the reluctance of the construction community, and its legal advisors, to alter the traditional, time consuming, contentious and expensive ritualistic methods of resolving disputes. These procedures have burdened the industry for decades and have contributed to the $50 billion in legal expenses that corporations in the United States paid out and the 13 million civil suits that were filed in state courts last year.

Large companies are becoming fed up with the tribulations of lawsuits. Dominic B. King, general counsel of US Steel, observed: “The present system of litigation is a national scandal. If everyone goes on doing this mating dance, you spend an enormous amount of money on pretrial discovery in cases you know are going to be settled. But when we suggest ADR to outside counsel, they always find lots of reasons why we shouldn’t try it. I’m never sure whether it’s their professional judgment or the economics creeping in.”

To stem this tide, more than 200 large corporations have signed ADR Pledges, agreeing to try to settle their disputes privately, using mediation, minitrials and other informal means. In New York, bills have been introduced making mediation mandatory in certain civil proceedings. The American Institute of Architects is now including a mediation clause in its standard contracts. General insurance companies are saving millions in legal fees utilizing mediation and other ADR methods.

Unfortunately, however, tens of thousands of construction companies, for which mediation is ideally suited, have not followed this trend. They perpetuate, instead, the traditional settlement procedures of the industry: Combating executives try to reach a settlement on the phone. If this fails, one will consult an attorney who will try to resolve the dispute with opposing counsel. If not settled at this point, invariably one attorney will file a lawsuit or demand arbitration; lawyers will perceive a strategic advantage for the initiator of a suit. Past this point, rarely do the construction executives become involved. And it is even rarer at this juncture for an attorney to suggest that an impartial mediator be brought in to assist in settling the dispute.

So the ritual continues, and depending upon how long it will be before the case will be heard, the attorneys either attend to their firm’s other business or prepare the construction case; often utilizing extensive and expensive discovery procedures and using up valuable management time of their clients. Ninety-five percent of these cases will be settled, but not until most have reached the courthouse steps or the parties have gathered for
the initial arbitration proceeding. Attorneys focus on settlement at the last minute, while mediators focus on settlement from the *first instant* they are involved.

Another factor that thwarts voluntary mediation are clients, and their attorneys, who would not consider any solution except a decision rendered by a judge, a jury or an arbitration panel. Settlements are for wimps; real advocates give no ground, take no prisoners and are prepared to go down in flames maintaining hard-nosed images. They believe that settlement overtures to an opponent, such as suggesting that a mediator be brought in, would be perceived as a weakness in their case and prejudicial to their bargaining position.

Such posturing is predominantly found in the senior segment of the bar and among the elders of the building trades. They have not yet adopted the newer methods of ADR. Hopefully, and in this writer’s view and absolute necessity for economic competitiveness and survival, the new generation of construction people will embrace, and master, the faster, cheaper and more effective means of dispute resolution; particularly mediation.

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To date, mediation has been mainly used to resolve final contractual disputes. Any construction project, however, can incorporate a mediation clause in its agreements whereby all contracting parties agree beforehand that a pre-selected mediator will be called in to assist in resolving disputes that have reached an impasse during construction. While this limited mediation is conducted, progress on the job continues unaffected.

While many mediations are conducted under the auspices of the AAA, independent companies and individuals offer this service. As mediation has no formal procedural rules, the techniques each mediator uses vary within general guidelines and basic precepts. But certain elements must be present in any mediation in order for it to be successful.

The mediator selected by the parties must be an expert in the field of dispute. The mediator should have experience as an arbitrator and must be trained; settlement skills are not instinctive. He or she must be patient, creative, firm, a good listener, persuasive, possess a sense of humor, and most importantly, must have the absolute trust and confidence of the parties. The parties, in turn, must come to the mediation with an honest desire to settle their dispute and prepared to make the concessions towards that goal. Under these conditions mediation will almost invariably succeed, often with surprising dispatch.

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**Conclusion**

Construction mediation is shamefully underutilized. There is no excuse for not considering its use at some point in a dispute. Undoubtedly, it is the best method to resolve disputes if negotiations between the parties fail. It is for the executives within the construction community and their sureties to become knowledgeable about mediation and insist that their advisors and lawyers do likewise so that an evaluation of its applicability to the dispute at hand can be made objectively.

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**About the Author:** Gary Morgerman is a construction consultant in Long Island, N.Y. Specializing in mediation and arbitration, Mr. Morgerman is on the AAA’s Panel of Construction Experts in both disciplines. This article is reprinted with permission from the New York Construction News.