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Collaborative Construction Claims Process: Another ADR Tool and Perhaps the Lawyer Advocate's Best Tactic?

JAMS

Most construction projects involve some disagreement along the way. And the larger and more complex the construction project is, the greater the chance for something to go wrong. The American Arbitration Association (AAA) recently stated that in 2015, nearly \$2.6 billion in construction claims were filed, the most ever.² In fact, this total outranked all other major industries combined, including the pharmaceutical, financial services, telecommunications, and energy sectors.³ And that was only claims filed with AAA.

It is well-known, with all of these construction disputes occurring, that parties are increasingly shying away from litigation and embracing some form of ADR.⁴ In reality, as Terrence Brookie wrote in 2014, “[m]ost construction litigators spend more time preparing for and participating in ADR than they do in litigating construction disputes in court.”⁵ Contractors, professionals, and owners alike desire to resolve disputes as inexpensively and as quickly as possible in order to complete existing projects and, if possible, maintain working relationships.⁶ ADR has become a popular alternative to construction litigation, with such methods as mediation, arbitration, mini-trials, dispute resolution boards, and partnering.⁷ But clients often want even more cost-efficient resolutions to their disputes than traditional ADR can afford.

Another lesser-known option that may help address the needs of construction clients is the collaborative construction claims (CCC) process. This ADR method requires attorneys and parties to identify the problems and to collaboratively resolve them through various self-administered techniques. Parties and their lawyers can help maximize an efficient resolution while minimizing expert costs and lawyers' fees. As the construction industry keeps moving toward an “ever-increasing emphasis on quick and inexpensive dispute

prevention and resolution mechanisms,”⁸ lawyers should consider adding the CCC process to their repertoire. Since it is lawyer initiated, the CCC process may alleviate clients’ concerns that their lawyers have a financial interest in steering the dispute to more expensive ADR options.

History and options of construction ADR

ADR is not a new phenomenon in the construction industry. It has essentially been around since the industry came into existence.⁹ Although arbitration has been used within construction disputes for nearly a half century,¹⁰ ADR did not become routine until the 1980s.¹¹ More and more players within the construction industry became frustrated with litigation and sought more cost-effective ways to resolve their construction disputes.¹² Even judges wanted no part of construction lawsuits and “spare[d] no effort to divert such cases to any available form of alternative dispute resolution.”¹³ Since the ADR boom in the 1980s, its use has become a mainstay in construction disputes, and it has “continued to gain widespread use.”¹⁴ There are now negotiators, facilitators, mediators, and arbitration providers through numerous organizations such as AAA, JAMS, ICC International Court of Arbitration and CPR.

Parties have several ADR options at their disposal to resolve their problems. The most-used form of ADR within the construction industry is mediation,¹⁵ which involves hiring a mediator to facilitate discussions amongst the parties to “instill realistic expectations in the parties and attempt to find middle ground.”¹⁶ The goal is to reach a settlement without too much lawyering. Mediation is so prevalent in the construction industry that most disputes go to mediation at least once, and the courts often mandate parties to mediate before going to trial.¹⁷ Timing may be the most crucial part if the parties decide to mediate; the earlier it is attempted in the process, the greater the opportunity for saving legal fees.

Another ADR option is partnering. This is an agreement that focuses on project planning at the beginning of the project, with various dispute resolution methods laid out if a problem occurs.¹⁸ Partnering keeps communication open and may result in better opportunities for informal dispute resolution.

Other ADR forms that have been used to resolve construction disputes include conflict management systems, early neutral evaluation in mini-trials, dispute resolution boards (DRBs) or standing neutral panels, internal decision-makers, and arbitration. Arbitration used to be the most popular form of ADR, but the Association for International Arbitration (AIA) removed the mandatory arbitration provisions in its contracts because of the amount of attorneys’ fees and related costs imposed on clients. Many consider arbitration to be litigation without an appeal.

Lawyer criticism in the evolution of construction ADR

The increased use of ADR in the construction industry has not come without its criticisms, especially those aimed at lawyers as they become a more expensive component. The newer ADR processes have marginalized lawyers, and some have even removed them altogether from the dispute resolution process to “facilitate quick and inexpensive settlements.”¹⁹ This is a result of the perception that construction lawyers are used to being litigators and only get in the way of producing cost-effective settlements.²⁰ Lawyers are viewed as “profit eaters” or “unnecessary overhead” who drive their fees up as a result of formalistic and time-consuming dispute resolution processes.²¹ Construction professionals are dissatisfied with the “legal profession’s inability to guide a dispute towards efficient settlement” and would rather resolve the dispute on their own.²²

As a result of this negative perception of lawyers, the construction industry has turned to non-lawyer alternatives. Such examples include integrated project delivery (IPD), design-build projects, lean design/

construction, ConsensusDocs, non-lawyer neutrals, design review boards (DRBs), and even changes to the AAA, which allows for fast-track and a la carte services tailored to the situation. These alternatives minimize the role of lawyers and prevent them from churning the ADR process to generate more billable hours.

How does the CCC process address the lawyer criticism?

The CCC process is a lawyer- and party-driven process that identifies “eligible” construction disputes. After the attorneys and parties identify the issues, they come together to solve the dispute, which may include exchanging various “currencies” to reach a financial settlement. These settlement currencies may include more than the usual money and release exchange; they could include, for example, the contractor committing his forces to actually fix the construction defect. The ultimate goal of the CCC process is to minimize attorney or expert fees and to achieve a quicker result. While this process is not much different from routine lawyer settlement efforts, if properly presented to clients and adversaries, its implementation may have significant tangible and intangible benefits that other forms of ADR may not be able to offer.

To facilitate this form of ADR, a construction lawyer doesn’t necessarily need any new skills. The lawyer needs to have a deep understanding of construction law principles, how the industry works, insurance coverage, and all of the parties involved. It is also beneficial to have knowledge of architecture, the engineering and construction industry, owner/developer needs and priorities, and emerging trends and technology. The lawyer must be more of a problem solver and consensus builder than a litigator who can identify win-win opportunities for the parties involved.

Here’s how the CCC process works:

1. The attorney evaluates if the claim is “ripe” for the CCC process.
2. The attorney consults with his or her client, describing the CCC process, its flexibility, and ultimate goals.
3. After the client agrees to use the CCC process, the attorney proposes to the adversary or adversaries to use it. The proposing attorney should anticipate potential obstacles, such as whether the adversaries are insurance lawyers or brokers even willing to participate in the CCC process.
4. Both sides should identify and address any legal or procedural issues that could affect the CCC process, such as contract mandates, statute of limitations, or tolling agreements.
5. Both sides will then negotiate the CCC process; everything should be committed to writing if possible. An example is an agreement stating that the CCC process is a settlement communication and therefore not admissible in court.
6. Both sides will then need to agree on the proper procedure to identify the construction issues:
 - a. For defect claims, hire a technical third-party neutral or have party experts collaborate to identify and agree on the problem (i.e., the sharing of defect and repair information between experts).
 - b. For issues relating to changes in scope; differing site conditions; delay, disruptions, acceleration, and other timerelated problems; and insufficient plans / specifications termination, have a single neutral identify the issues or let the party experts collaborate.

7. Both sides will then negotiate the division of responsibility going forward.
8. If allocation of financial liability hits an impasse and cannot be achieved by the parties and attorneys alone, a third-party neutral should be engaged to help “push the deal over the goal line.”
9. A resolution may entail various forms of settlement currencies, including:
 - a. Money from a party;
 - b. Performance from a party (i.e., contractor repair);
 - c. Money from the insurance company;
 - d. A promise or commitment from a party to complete future work; and
 - e. A confidentiality and nondisparagement agreement.
10. The settlement documents are signed and executed.

Advantages of the CCC process

There are several advantages for clients when selecting the CCC process. First, it can reduce legal and expert fees. Another important benefit is that the process is collaborative, not adversarial, and that helps maintain positive working relationships among the parties—especially when the project is underway. Allowing experts to collaborate eliminates attorney-led discussions, gives the parties a better understanding of each side’s position, and can lead into a better investigation and suggested result. The entire CCC process offers flexibility at any time, which can be tailored to the needs of the parties or the project. Finally, instead of just procuring a financial settlement and termination of a business relationship, the CCC process can help ensure the project is completed or repaired, which is the ultimate goal.

Lawyers benefit through the use of the CCC process as well. Perhaps one of the biggest intangible benefits to the lawyer is client goodwill. No longer will the lawyer be viewed as a “profit eater,” but rather as a problem solver. Even if the adversary declines to use it, the lawyer demonstrated to his or her client an effort to avoid more expensive dispute options. If litigation ensues after the CCC process, expert efforts can be leveraged or reused. Participating in the CCC process may also enhance a lawyer’s role as a possible future neutral.

What types of construction claims are candidates for the CCC process?

Although the CCC process has several advantages to help resolve the construction dispute in a collaborative and non-adversarial manner, the attorney must decide at the outset if the case is appropriate for it.

The following are instances when the dispute is “ripe” for the CCC process:

1. There are no contractual dispute resolution boards or standing neutral frameworks that will hijack the lawyer’s suggestion of using the CCC process;
2. The lawyer adversary is open to collaboration;

3. The parties to the dispute have a long-standing relationship, with the potential to work together in the future;
4. The dispute is about a defect with defined facts and damages, but it requires technical expertise where non-lawyer experts may collaborate and mutually find a better fix;
5. The dispute involves sophisticated and claim-experienced owners who disfavor lawyer-intensive arbitration or litigation and would prefer a more collaborative approach; and
6. The dispute arises during the construction project, and the parties desire to resolve the issue and complete the work.

The following are situations in which the CCC process may not be appropriate:

1. The adversary either does not have his or her own attorney or is relying on insurance-appointed counsel, who may not want to participate in the CCC process;
 - a. Insurance defense and coverage lawyers and adjusters may not be ideal for the CCC process because their law practice business model, and absence of a long-term relationship with the construction professional, or even lack of construction industry knowledge, may impede collaboration.
2. A no-show party is missing from the dispute because it is out of business, has no money, or refuses to participate in the CCC process, which could chill others' participation;
3. The dispute involves a public construction project. Public projects have dispute laws and rules to comply with. Also, there may be political or public scrutiny if the CCC process is attempted;
4. There are too many parties involved in the dispute, which can increase the difficulty of attempting to use the CCC process, because of an increased chance of one party's objection to participation;
5. Delay and impact claims may involve multiple subjective factors, requiring sifting through mountains of documents and data to determine the cause of the delay;
6. A party has E&O coverage, and the design professional's deductible is high;
7. Legal or procedural issues exist, such as statute of limitations or claim tardiness; and
8. One of the parties is insolvent.

Goals of the CCC process

The ultimate goal of the CCC process is to avoid litigation through a lawyer-driven collaborative process. Instead of pointing fingers, the CCC process endeavors to reach an agreed-upon resolution through party, attorney, and expert dialogue by narrowing the issues early in the process. The resolution is one that maintains the relationship between parties and provides the framework on how to resolve the dispute. Through discussion with experts, parties will set up their respective liabilities and responsibilities moving forward. This may lead to a "supervised fix" by the responsible party. Legal and expert fees will be reduced, leaving more money on the table for repairs or settlement. Even if CCC efforts are unsuccessful, they can be leveraged in litigation or in another ADR process. Finally, the client will view the lawyer as a problem solver and not the problem.



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