



Making Alternative Dispute Resolution Work

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Introduction

- Panel Members

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What is Alternative Dispute Resolution?

- Any method of resolving a dispute outside of the courtroom.
 - Often thought of as mediation and arbitration, but it is much broader than that.

Making Alternative Dispute Resolution Work

- Setting up for Success at the Contract Stage
- Collecting Information and Documentation for Successful ADR During the Contract
- Avoiding the Roadblocks to Success
- Selecting the Right ADR Method

Planning for the Inevitable

- If more than 70% of large projects are “failed projects” in some form then it should be assumed that disputes will arise in nearly all contracts.
- With that in mind, how much attention have you placed on the resolution of disputes at the start of the project?

Setting up for Success at the Contract Stage

- Successful ADR requires pre-planning.
- Does your ADR clause encompass all of the disputes you want it to address?
 - Scope of ADR clause is often challenged.
 - What is your ADR approach to intellectual property issues?
 - What is your ADR approach to confidentiality issues?
 - Will you need the ability to seek a temporary restraining order and/or temporary injunction.

Setting up for Success at the Contract Stage

- Joinder of other parties?
 - Especially important for contractors to consider.
 - Are your subcontracts/purchase orders aligned with the prime contract on joinder?
 - Do want to keep the disputes separate or together?
- Do you want a particular ADR procedure to be a condition precedent to other relief?
 - Ex. Mediation before Arbitration
 - Does this impact statute of limitations issues if you have an extended ADR procedure before being able to file suit?
- Does your jurisdiction permit one party to elect whether an ADR procedure will be used?
 - In Texas, one party may reserve the right to select arbitration or litigation after the dispute arises.

Setting up for Success at the Contract Stage

- Selecting Choice of Law
 - Domestic
 - International
- Why these choices may make a significant difference in the outcome.
- Is your choice of law provision enforceable?
 - Many jurisdictions have laws affecting choice of law elections in construction contracts.

Setting up for Success at the Contract Stage

- Texas – Tex. Bus. & Com. Code 272.001(b)
- “If a [construction] contract contains a provision making the contract or any conflict arising under the contract subject to another state’s law, litigation in the courts of another state, or arbitration in another state, that provision is **VOIDABLE** by the party obligated by the contract to perform the construction or repair.
- **VOIDABLE**

Setting up for Success at the Contract Stage

- Ohio – Ohio Rev. Code Ann. 4113.62(D)
- “Any provision of a construction contract that makes the construction contract subject to the laws of another state, or requires litigation, arbitration or other dispute resolution to occur in another state, is **void and unenforceable** as against public policy.”
- **VOID AND UNENFORCEABLE**

Setting up for Success at the Contract Stage

- Selecting Venue
 - Location of the Project?
 - Location of the Parties?
- Is your choice of venue enforceable?
 - Some states have laws governing the venue of construction disputes.

Setting up for Success at the Contract Stage

- Kansas – Kansas Stat. Ann. Section 16-121(E)
- “Notwithstanding any contractual provision to the contrary, the laws of the state of Kansas shall apply to and govern every [construction] contract to be performed in this state. Any litigation, **arbitration or other dispute resolution proceeding arising from such contract shall be conducted in this state.** Any provision, covenant or clause in such contract that conflicts with the provisions of this subsection shall be void and unenforceable.”

– “SHALL BE CONDUCTED IN THIS STATE”

Setting up for Success at the Contract Stage

- North Carolina – N.C. Gen. Stat 22B-2
- “A provision in any construction contract is **void** and against public policy if it makes the contract, subcontract, or purchase order subject to the laws of another state, or **provides that the exclusive forum** for any litigation, arbitration or other dispute resolution process is located in another state.
- **VOID...if EXCLUSIVE FORUM**

Setting up for Success at the Contract Stage

- Assume:
 - Texas contractor
 - New York project owner
 - Kansas project
 - Subcontractors will be local Kansas contractors
- Owner and Contractor want disputes resolved in Houston, Texas
- Knowing that a subcontractor can raise the objection to a dispute resolution procedure in another state....
 - Should the contractor re-think the joinder of disputes provisions?
 - Should the contractor insist that disputes be resolved in Kansas so that there can be a joinder of disputes?

Collecting Information for Successful ADR During the Contract

- How can you get the information you need to make decisions relative to dispute resolution?
- Audit provisions?
- Claim Notices?
- Require backup documentation?
- Is Discovery permissible?
 - If so, what limits?

Ask the Panel / Ask the Audience

- How much information do you need to collect before you can try to resolve a dispute?
 - Will you really have a better outcome by waiting to collect more information?

Ask the Panel / Ask the Audience

- Waiting until the end of the Project to try to resolve disputes.
 - Is this Good or Bad?

Avoiding the Roadblocks

- Not setting aside contingency that can be used to resolve disputes
 - Disputes are inevitable.
 - Is there money set aside to deal with them?
 - Contractors try to include “risk money” in the contract to cover unexpected costs.
 - Shouldn’t owners also include “risk money” in their budgets?

Avoiding the Roadblocks

- Are the right people involved in the dispute resolution process?
 - Do not just think of this in terms of people in attendance at a mediation.
 - The dispute process begins way before mediation begins.
- Do you have a mix of both informed people as well as relatively disinterested decision makers?
- Do they have enough authority?
- Are the people involved in the dispute too involved in the resolution?
 - Are they suppressing information?
 - Are they playing “CYA”

Selecting the Right ADR Method

- Selecting the right ADR method to resolve a dispute requires careful thought up front before any dispute arises as well as during a dispute.
- Consider/Re-consider other methods if they fit the dispute better.

Typical Alternative Dispute Resolution Approach

- Some combination of the following:
 - Initial Determination by a project participant (A/E)
 - Work must continue during dispute
 - Formal Claims Process (Notices and Other Submissions)
 - Executive Negotiations/Previously Uninvolved Senior Management
 - Mediation
 - Arbitration

Advantages/Disadvantages with Executive Negotiations

- Advantages
 - Happens early in the “dispute” before a lot of costs are incurred
 - Should have more of a detached/ un-emotional view towards the dispute
 - If done properly can resolve the dispute or set the tone of cooperation through resolving the dispute
- Disadvantages
 - May happen too early so enough facts are not known or are unclear
 - May remove the effectiveness of a mediation if the mediation appears to just be a re-hashing of the executive negotiations
 - No neutral third party and maybe no lawyers involved to aid in an honest evaluation of potential exposure
 - Executives may lack sufficient first hand data or knowledge to resolve.

Advantages/Disadvantages of Mediation

- **Advantages**
 - Able to resolve the dispute while controlling the outcome to some extent
 - Learn about the other parties position
 - Allow for venting/airing of grievances
 - May assist with a more honest risk assessment about your case
- **Disadvantages**
 - If done too soon, before parties can realistically analyze the facts and legal positions can be discouraging and feel like a step backwards
 - Requires concessions
 - Can reveal strategy to addressing a case
 - Can reveal weaknesses to the other party who then can fix them

Advantages/Disadvantages of Arbitration

- Advantages

- Confidential (at parties option)
- Can be less formal
- Can be more flexible
- Can incorporate site visits
- Can be custom crafted to suit the parties/arbitrators needs
- Can have a subject matter expert decide the case
- No need/less need to educate the arbitrator on the basic issues (i.e. what an RFI is, how change orders work, etc.)

- Disadvantages

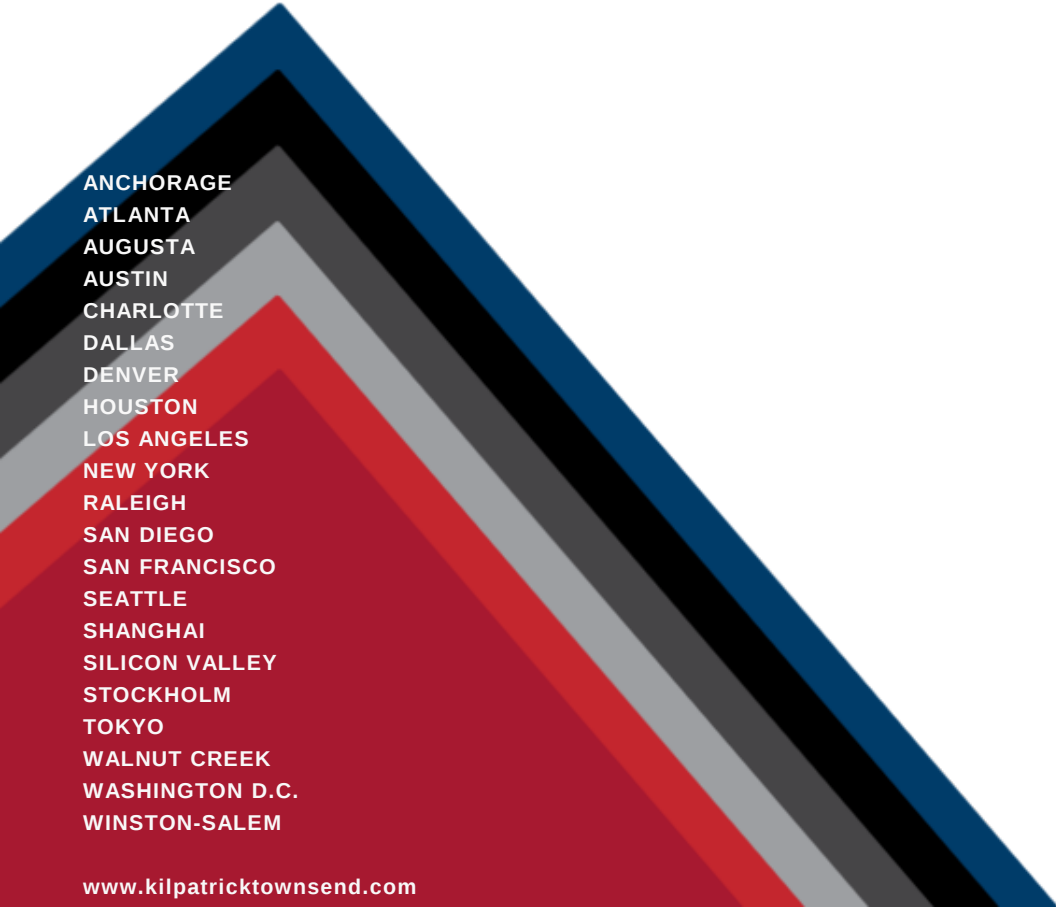
- No real chance for appeal (unless egregious)
- Filing fees and arbitrator expenses typically more than trial
- May not be able to bring in third parties
- Discovery costs can be high if not well defined and controlled.

(MIS)perceptions of Arbitration

- “Cheaper”
 - Construction disputes can be complex. We find that the complexity of the case drives the cost more than the dispute resolution procedure
- “Quicker Result”
 - Again due to the complexity of construction cases, there is a certain amount of time required to sort through and properly develop a case.
- “More/Less Biased”
 - Law firms who arbitrate often may benefit from some familiarity in understanding the preferences of particular arbitrators. However, law firms who litigate in front of the same judges may also gain the same type of familiarity.
- “Splitting the Baby”

Other ADR Procedures worth considering

- Dispute Review Boards
 - Binding
 - Non-Binding
- Third Party / Neutral Evaluation
- Med-Arb
- Baseball Arbitration
- High Low Arbitration

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Questions?