Alternative Dispute Resolution (ADR)

MEDIATION

A. THE PROCESS

Mediation is a process whereby parties submit a dispute to a neutral third party who attempts to guide the parties to a mutually agreeable solution. It is by far the least formal of the ADR approaches and presents an infinite number of options. In contrast to mini-trials, arbitration and litigation, a party's goal is not to convince the mediator that it is right and therefore should win. Instead, a party's goal is to achieve a desired "win-win" settlement. The mediator is not asked to render a decision, but rather to guide the parties to reach an amicable solution to the dispute. Essentially, mediation should be viewed as a continuation of the negotiation process initiated by the parties once a dispute arises, but with assistance from a neutral third party who acts as a facilitator.

Mediation may be required by contract provision, state or federal law, or by court order as a prerequisite to litigation in a few states. On the other hand, because mediation is a process whereby the parties themselves tailor an agreement, it may only continue as long as all parties continue negotiating in good faith and the process has not reached an impasse. The net effect of a requirement to mediate is merely that the parties "attempt" to settle the dispute through mediation. Once an impasse is encountered, mediation ends and the requirement is deemed to have been met. In contrast, an agreement to conduct a mini-trial, arbitrate or to submit a dispute to a Disputes Review Board typically guarantees a decision if the parties do not reach an agreement. In mini-trials and Disputes Review Board matters, the decisions are typically advisory.

Once a mediator is selected, the parties choose a neutral site for the proceeding. The proceeding opens with the mediator explaining the process which will be followed. The mediator's opening remarks also serve the very important purpose of building rapport with the parties. Usually, one party opens with an uninterrupted explanation of its position followed by an uninterrupted explanation given by the other party. It is important that the presentations get the "emotion" out of the dispute and that each party feels it has had its "day in court." Although no direct or cross-examinations are performed, each party is often permitted to ask questions of the other. A general discussion follows.

In order to further understand the respective positions, the mediator almost always meets separately in another room with each party. This is frequently referred to as "caucusing." Discussions held in caucuses are held in strict confidence between the mediator and the caucusing party. During a caucus, the mediator may provide opinions

on how a court may rule on a particular issue and may even suggest alternative settlement proposals. After caucusing, the parties reassemble and general discussions continue. During general discussions, the mediator functions to keep personality conflicts to a minimum and to keep discussions focused on the central issues of the dispute. The process of caucusing and reassembling for general discussion continues until:

- the mediator declares that the dispute cannot be resolved through further mediation;
- the parties declare that they have reached an impasse; or
- the mediator decides that one or both of the parties are not negotiating in good faith.

The process discussed above illustrates the typical mediation process and duties of the mediator. It is important to note that the parties define the role of the mediator prior to mediation. They may give more or less authority to the mediator. Alternatively, if the parties are utilizing an organization to administer the process, they usually agree to adopt the organization's standardized rules and procedures.

B. ADVANTAGES

There are **distinct advantages to mediation.** First, because the process merely requires appointment of a third party, the process may begin very shortly after the dispute arises and the parties find they cannot reach an amicable solution on their own. In addition, because the parties themselves reach a solution, there is no delay in waiting for a decision to be rendered. In arbitration, frequently several weeks elapse before the arbitrator renders a decision. Mediation is also faster than litigation because no discovery or court scheduling problems exist which can result in one to two year lead times between filing a complaint and adjudicating the matter.

A **second advantage to mediation** is its relatively low cost. If the parties are attending to administration matters and arranging the mediation process themselves, the only expense is the mediator's fee and possibly a nominal payment for the use of a neutral site. If an organization such as the American Arbitration Association is employed by the parties, a nominal fee of three hundred to five hundred dollars is charged in addition to the mediator's fee and a reasonable hourly fee for use of the organization's facility. In the event the parties elect to retain independent legal counsel for mediation, those costs will be minimal because the process is less formal and less time consuming than arbitration or litigation.

A **third advantage to mediation** is confidentiality. Because the proceeding is not recorded or transcribed, no public record is available. Additionally, the proceeding is private and not open to the public to observe. In contrast, litigation in the courts produces a transcript which is a public record and the proceeding may be viewed by the public. Although arbitration is also private, because a transcript is kept, there is always the

danger that copies will become accessible to third parties. Most mediation agreements executed between the parties and the mediator prohibit the mediator from disclosing anything learned in exercising his or her duties as mediator. This protection encourages both parties to be open and frank in caucuses with the mediator.

A **final advantage** experienced in most mediation is resuscitation of the relationship between the parties in dispute. Because the solution comes from the parties, there is usually a feeling of accomplishment. Both parties are further satisfied because the solution maximizes the needs of both parties.

C. WHEN TO USE

Mediation should be used when negotiations between parties are more likely to be successful with the assistance of a neutral. Mediation is effective when facts are in dispute or when the amount of recovery is disputed. Mediation is not particularly effective on publicly funded transportation projects when the dispute centers on the law and not the facts.

D. STRATEGY

Preparation for a mediated settlement is somewhat different from preparation for a mini-trial or arbitration. I believe it focuses on searching for a "win-win" resolution of the dispute. In that search, each party must seek to understand the other party's needs and position. For example, a transportation construction contractor should determine if the project is federally funded and, if so, what role the federal agency will have in the settlement. A contractor should also determine the politics of settlement. Will the settlement have to be approved by the governor or the attorney general? If the owner is a city or county, will the settlement have to be approved by the city council or board of supervisors? Will any settlement be subjected to intense media scrutiny? Are the issues involved in the dispute ones that the owner would prefer not to have a legal precedent against them? Is there another contractor waiting in the wings with a similar claim?

Another part of the preparation for medication involves establishing a negotiation plan and strategy. What is your bottom line? Are there any deal breakers? What movements will you make before reaching the bottom line and how will you justify your proposal?

During both the general sessions and caucuses it is important to demonstrate an understanding of the other party's position. Such an understanding can be demonstrated by preparing a visual aid showing the other party's positions(s) on a given issue and your response.

As a piece of final advice, keep in mind that for most contractors and public owners, there will be projects constructed in the future. As a result, it is important to remove emotion and bitterness, reestablish trust, and convince the other party that your position is fair-minded.

MINI-TRIALS

A. BACKGROUND

It has been reported that the first mini-trial was used by Telecredit, Inc. and TRW, Inc. in the late 1970s to resolve a patent infringement lawsuit. After three years of expensive litigation, the parties conducted a two-day mini-trial and settled the case in thirty minutes [see Eric Green, "Recent Developments in Alternative Forms of Dispute Resolution Procedures," 100 F.R.D. 513 (1983)].

Mini-trials in public construction were first used by the U.S. Army Corps of Engineers in the mid-1980s. The first instance involved an acceleration claim by Industrial Contractors, Inc. in the amount of $630,000. After presentations by the Corps and the contractor and a neutral appraisal by former Claims Court judge Louis Spector, the parties settled the claim in a matter of hours [see 43 Federal Contracts Report 257].The second Corps mini-trial settlement involved a $61 million claim by a joint venture.

B. THE PROCESS

Mini-trials are typically more structured than mediated settlement conferences. While many experts consider the title "mini-trial" to be a misnomer, it does share some aspects of a trial. The primary difference is the separation of the advocacy role from the management/negotiation role. By far the most important feature of a mini-trial is the makeup of the panel. For mini-trials to work effectively, the senior executives must have authority to resolve the dispute.

Mini-trials are typically initiated by a written agreement spelling out in detail the process the parties agree to follow, the timing and place of the mini-trial hearing and the role of the principals and neutral. Ironically, it sometimes takes longer for the lawyers to reach an agreement on the process than it takes for the principals to settle the dispute. Several organizations have sample or model mini-trial agreement forms that can be used as a beginning step in drafting.

Mini-trial agreements should cover at least the following:

1. The issues in controversy.
2. The identity of the senior executives.
3. The method of selecting the neutral and what role he or she will perform.
4. What discovery, if any, will be done prior to the mini-trial hearing.
5. The timing and length of "position papers" to be submitted by the parties (usually under 30 pages).
6. Whether and when a pretrial hearing site visit will be made.

7. The dates and location of the hearing and negotiating sessions.
8. Who may attend the hearing.
9. The length and timing of party presentations (usually one half to one day for each) and rebuttal, if any.
10. Who will be permitted to make the presentations.
11. Permitted communication between the advocates and senior executives once the hearing begins.
12. Whether or not cross examination will be allowed.
13. How questions by the senior executives and neutral will be handled.
14. How expenses and costs will be shared.
15. Confidentiality of the proceedings.
16. Who may attend the negotiating sessions.
17. The ramifications, if any, to a party who terminates the mini-trial agreement.
18. Whether the neutral will be asked to write an advisory opinion if negotiations fail, and if so, how will the opinion be used.

C. WHEN TO USE

Mini-trials work most effectively in resolving large, complex disputes that may involve many separate claims. As in mediation, they do not work effectively to resolve pure legal issues. Mini-trials involve a far greater commitment of time and resources than mediation. The key component is the willingness of the senior executives to commit the time necessary to participate in the hearing and negotiations. Because mini-trials have a substantial advocacy component to them and because neutrals are typically called upon to advise the principals on how their dispute might be handled in court, mini-trials are an effective ADR tool when the project personnel and advocates need their "day in court" and when the opinion of an outsider is necessary to facilitate a resolution.

Arguably, the Disputes Review Board process results in as thorough an inquiry into the merits of the dispute as an administrative hearing. Additionally, because a written decision and basis for such decision is published, the department director has no less a record on which to render his or her final decision. Also, because the Disputes Review Board is composed of neutral parties and therefore more likely to indicate what a court might decide, the department director is in a better position to make his or her final decision. In many states, the administrative review board process is statutorily imposed, therefore requiring an amendment to state law if the owner desires to substitute the Disputes Review Board process. On the other hand, where the administrative review process is dictated by standard specifications, it may easily be altered on a project-by-project basis through special provisions.

In the event the administrative review board requirement cannot be eliminated for projects involving Disputes Review Boards, an owner must ask itself whether it is willing to defer to the decisions of these newly created boards. If, for example, an

owner is unwilling to routinely accept findings by Disputes Review Boards without automatically referring such disputes to the administrative boards, the purpose of the new concept is defeated. In such a case, it might be best not to consider implementation of this ADR method. On the other hand, if the owner is generally willing to accept the findings of Disputes Review Boards, reserving denial for genuine controversies where it truly feels a dispute's merits were wrongly decided, the system has fair chances of success. A prerequisite to implementing the Disputes Review Board method is to gain not only the approval of top owner officials but also their genuine comfort in using Disputes Review Board findings in making settlement decisions.

ARBITRATION

A. THE PROCESS

Arbitration is a quasi-formal hearing whereby parties present their case to a neutral arbitrator or group of arbitrators which renders a decision which the parties may or may not be required to abide by. Arbitration may be required by contractual provision, by statute, or by court order as a prerequisite to litigation. Additionally, parties may voluntarily submit to arbitration when they find they cannot resolve a dispute through negotiation. Once a decision is rendered, the party seeking to enforce an award by arbitration may petition the courts to confirm the award. Once confirmed, the award has the same enforceability as a judgment rendered by the courts.

The process begins when one party makes a demand for arbitration, in writing, upon the other. In cases where arbitration is required by contract, statute, or court order, the consent of the other party is not needed. The demand letter serves as notice that the serving party wishes to exercise its legal right to arbitration. The parties may choose to employ an organization specializing in ADR to coordinate the proceedings or they may handle the process themselves. Using an organization usually entails payment of a nominal fee of between three hundred and five hundred dollars in addition to hourly fees for an arbitrator. Some organizations also charge a nominal hourly fee for use of their facilities during the proceeding. Regardless of which approach is taken, the parties must first choose an arbitrator or panel of arbitrators. If an organization is employed, the parties are given a list of available arbitrators with pertinent biographical information. Each party then excludes a given number of arbitrators from the list as a matter of right and the panel consists of those remaining. Arbitrators are usually experienced in the construction, engineering or contract administration areas. Frequently, arbitrators are either practicing or former attorney stating the nature of the proceedings do not require this, especially where the dispute involves no legal issues.

An arbitration proceeding generally resembles a court proceeding in that both parties make opening statements where each summarizes its theory of the dispute. The petitioning party presents its case first, calling witnesses who are then cross-examined by the responding party. The responding party follows with its case in the same manner. Each party is generally represented by legal counsel although in cases involving purely factual issues, for example, where only the quality of the work is in question, parties

frequently choose to represent themselves. The proceeding concludes with each party making a closing statement. At the end of- the proceeding, the arbitrator either issues a ruling which is later followed up by a written opinion and award, or decides to take the matter under submission. In the latter event, the arbitrator may require written briefs from the parties if there are legal questions involved. The final ruling is usually issued in a period ranging from a few days to at most a month after the hearings are concluded and briefs received.

Even though the arbitration hearing closely parallels a typical courtroom trial, it is much less formal and yields results which are much less likely to be overturned by the courts than a trial court ruling. For instance, arbitrators do not follow the rigid rules of evidence that are strictly adhered to by the courts. Generally, most evidence a party desires to present is admitted unless it is redundant, excessive, or cumulative. Normal relevancy and hearsay rules are relaxed in favor of permitting the evidence to be presented, but appropriate weight is given to the accuracy or reliability of such evidence in the deliberation process. When in doubt, arbitrators will generally admit evidence so as not to infringe upon a party's due process rights. Also, documents admitted into evidence in an arbitration hearing are not subject to authenticity requirements unless the opposing party objects and provides a legitimate basis for concerns over authenticity. Frequently, the arbitrator will visit the project when observation of the site will aid the arbitrator in resolving factual issue.

The parties may agree on a variety of different types of awards. For example, the parties may agree on the upper and lower limits of the arbitrator’s authority. They may choose not to advise the arbitrator of their agreement. If the award is greater than the upper limit it will be reduced and if it is less than the lower limit it will be increased.

Another approach is referred to as Last Best offer. Under this approach the parties negotiate their final positions and submit final settlement offers. In one approach, the arbitrators are not advised if the final offers and render a decision. The final settlement offer closest to the arbitrators award is the one that is accepted.

An arbitration award has greater finality than does a court judgment. A trial court judgment may be reversed for many reasons, including erroneously admitting or failing to admit evidence, giving incorrect instructions to the jury, incorrectly applying a rule of law, or numerous other procedural errors made during the proceeding. Conversely, an arbitration award will only be reversed under limited circumstances. First, an arbitration award will be reversed for infringing upon a party's constitutional right to due process. For example, a party must be given sufficient notice of the hearing so that it can prepare its case. Due process also requires that a party be given adequate opportunity to present its case, cross-examine witnesses, and have its case heard by an impartial arbitrator. Second, an arbitration award will be reversed in the event it was procured by corruption or fraud. Examples of fraud and corruption include purposeful misrepresentation under oath and coercing witnesses to lie under oath. In the event a court reverses an arbitration award, it will usually order another arbitration proceeding. A party seeking vacation of

an award for one of the reasons discussed above has a limited time, usually ninety days, to do so. After this period, the award is generally deemed final and not subject to attack.

B. ADVANTAGES

Because arbitration can be commenced much sooner and concluded in less time than litigation, some feel it is more economical. Additionally, discovery is limited, which eliminates the need for lengthy depositions, interrogatories and document production.

The major advantage of arbitration over mediation or mini-trials is that the decision is binding on the parties. As explained above, it is very unlikely that an arbitration award will be overturned.

C. WHEN TO USE

Arbitration should be used when there is little chance of settlement and the parties prefer to have experienced construction industry neutrals decide their dispute rather than a judge and/or jury.

MEDIATION-ARBITRATION

A. THE PROCESS

In mediation-arbitration non-binding mediation is combined with binding arbitration. During the process, the parties can agree to have a single individual or single panel act as both the mediators and arbitrators. Under the American Arbitration Association Rules, a different person or persons acts as the arbitrators if the mediation is not successful.

Mediation-arbitration is a two-step process. Under the first step, the parties present their positions in much the same manner they would in a normal mediation and the mediator acts in much the same manner as he or she would in a normal mediation. If the mediation is unsuccessful then the parties move to the second step which is a formal arbitration. At the arbitration hearing the parties present evidence just as they would in a normal arbitration hearing.

B. ADVANTAGES

The main advantage of a mediation-arbitration process is that it gives the parties an incentive to negotiate an agreement because they know that if they do not negotiate an agreement that they will have a final decision by the neutral. This advantage is particularly true in instances where the mediator also acts as the arbitrator.

C. WHEN TO USE

Mediation-arbitration should be used when there is a special need to have the potential finality of an arbitration award as an incentive for the parties to reach a settlement.