

Avoiding War: Three Underutilized Dispute Resolution Methods



Alternative dispute resolution has become a popular way to resolve legal disputes without the time and cost of protracted civil litigation. Among the various dispute resolution methods, mediation and arbitration are by far the most often utilized, gaining traction throughout the construction industry and in many commonly utilized contract forms like AIA. While the two forms of dispute resolution

are generally understood and effective, three less utilized variations of these methods can help resolve particularly difficult disputes when normal arbitration and mediation are unsuccessful.

1. A Mediator's Proposal

In typical mediation, the parties voluntarily agree to mediate their dispute with an agreed upon private mediator, who attempts to negotiate settlement through private caucuses with the parties and their counsel. If the mediator is able to reach mutually agreeable settlement terms, the dispute settles. If not, the mediation ends and the parties return to arbitration or litigation where additional legal costs will be incurred.

But what happens when the mediator confidentially knows the parties are very close to settlement but have exhausted their authority to negotiate further? Both sides believe one last effort at resolution could be productive but both have exhausted their "final number," so to speak? In these instances, a "mediator's proposal" could be utilized to bridge the gap toward settlement.

For example, if one party is demanding \$1 million in exchange for a release of all claims and the most the defendant is willing to pay is \$700,000, the mediator could suggest making a "mediator's proposal" where the mediator suggests a number between the two settlement amounts that he or she believes will resolve the case. Mediators with significant jury trial experience may also inform the parties that he or she believes the mediator's number reflects the likely jury award at trial. Procedurally the mediator meets separately with the parties to disclose and explain the mediator's number, then merely asks the parties to respond "yes" or "no." If both parties answer "yes," the matter is settled but if either party responds "no," the parties are told that the matter did not settle and the mediation is concluded without disclosing either of the party's respective positions.

A mediator's proposal can be a remarkably effective way to bridge the gap between parties' strikingly close settlement numbers. The method also allows strong-willed clients to avoid feeling they "gave in" to the other side in that it is the mediator's proposal (not the opposition's offer) that is ultimately being accepted.

2. Baseball Arbitration

Standard arbitration is a private proceeding where the parties effectively "litigate" their case before a private arbitrator who decides the case and issues an award to the winning party. Arbitration of construction disputes originally rose to prominence

as a result of the delay and inefficiency of the court system and the need for prompt resolution of disputes. The parties to an arbitration typically pay half of the arbitrator's fee, which leads to concern that commercial arbitrators may lean towards "splitting the difference" in an effort to secure future arbitration work from the parties or their counsel.

To mitigate this risk, many contractors have started submitting their arbitration disputes to a process called "baseball arbitration" as opposed to a more standard arbitration procedure. In baseball arbitration, after the parties have presented their evidence to the arbitrator via witness testimony or legal briefs, each party submits a proposed award to the arbitration for evaluation. After evaluating the proposals, the arbitrator must choose one of the awards or the other. The arbitrator cannot compromise or alter the proposals in any way; one must be chosen.

This unconventional methodology is intended to encourage the parties to submit reasonable offers, thereby making their proposals more appealing to the arbitrator, who must choose one over the other. A party submitted an overly aggressive offer risks the arbitrator choosing the opponent's more reasonable offer. When baseball arbitration works, the arbitrator often has to choose between two surprisingly reasonable settlement offers, thereby resulting in an end result both parties can live with.

3. Conciliation

Conciliation is like mediation, but with a twist. In standard mediation procedure, the mediator attempts to negotiate an agreed-upon settlement without making a decision of his or her own. The conciliation process is similar to mediation with the exception that at some point in the negotiation process, the conciliator provides the parties with a non-binding settlement proposal that the mediator believes accurately represents a likely outcome at trial and attempts to account for the parties' related individual interests. The parties are then free to work from the conciliator's proposal by accepting it, revising it or working from it toward a point of compromise. Conciliation can be a remarkably effective dispute resolution procedure, particularly in cases where the parties are entrenched in their positions and may need a third party's "opinion" to move off their respective numbers and toward settlement.

A mediator's proposal, baseball arbitration and conciliation are still relatively uncommon procedures in today's construction dispute environment. But by thinking outside the box and utilizing these variations to standard mediation or arbitration, contractors can often resolve disputes and avoid the cost of time-intensive and costly litigation.

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