Alternate Dispute Resolution for Construction Projects

Florida Construction Certification Review Course 2019

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WHY ADR?

- Add value for your client
- Cheaper, quicker, more effective
- Input into selection of tribunal or facilitator
- Resolution options beyond money damages
- Is confidentiality of concern?

ADR Choices

- During the work:
  - Partnering
  - Dispute Boards
  - Standing Neutrals
- After claims:
  - Mediation (pre-suit or pre-trial)
  - Arbitration (binding or advisory)

Today's Discussion

- Mediation
- Arbitration
- Dispute Boards

Mediation

Mediation Attributes

- Voluntary
- Can agree pre-dispute or after dispute occurs
- No written agreement required
- Informal
- Party-directed
- Effective
- Can be repeated if needed

MEDIATION – Florida Statutes

- Chapter 44 FS, MEDIATION ALTERNATIVES TO JUDICIAL ACTION
- Encourages court-ordered mediation
- "…a neutral third person… acts to encourage and facilitate the resolution of a dispute….It is an informal and nonadversarial process with the objective of helping ….reach a mutually acceptable and voluntary agreement…."

Anyone can be a Mediator, but….

- Florida Supreme Court Dispute Resolution Center certification
- Florida Rules for Certified and Court-Appointed Mediators
  - County court mediator
  - Family mediator
  - Circuit court mediator
  - Dependency mediator
  - Appellate mediator

Florida DRC Website

- www.flcourts.org/gen_public/adr/brochure.shtml
- Mediation Ethics Advisory Committee
- Roster of certified mediators
- Applicable rules and procedures
  - Initial certification
  - Renewal of certification

Mediation - Stats. and Rules

- Chapter 44 FS - Mediation Alternatives to Judicial Action
- Sections 44.401-406, FS – Mediation Confidentiality and Privilege Act
- Rule 1.700 Fla. R. Civ. P. – Rules Common to Mediation and Arbitration
- Rule 1.710 Fla. R. Civ. P. – Mediation Rules
- Rule 1.720 Fla. R. Civ. P. – Mediation Procedures
- Rule 1.730 Fla. R. Civ. P. – Completion of Mediation

Mediation Confidentiality and Privilege Act, Secs. 44.401- 44.406 FS

- Mediation communications are confidential and not to be disclosed except to "mediation participant or a participant's counsel."
- Sanctions include costs, mediator fees and attorney fees
- Participant privilege to refuse to testify and to prevent another from testifying in a subsequent proceeding
- Applies to mediation proceedings
  - required by statute, rule or order
  - By agreement of the parties
  - By a Certified Mediator unless parties agree otherwise

No Mediation Confidentiality for:

- Unless parties agree otherwise, no confidentiality or privilege to
  - "signed written agreement reached during mediation"
  - Communication for which privilege is waived
  - Communication used to plan or conceal criminal activity
  - Offered to report, prove or disprove legal malpractice during mediation
  - Offered to void or to defend mediated settlement

  Sec. 44.405 (4) FS

Pre-suit Mediation

- Mediator can
  - Offer safe forum for discussion
  - Provide a quicker path to resolution
  - Diffuse emotional or other barriers
  - Assist in structuring discovery to minimize costs
  - Suggest solutions not previously considered
  - Facilitate solutions not available in court (non-monetary contributions, trading matters of unequal value, i.e. future work, free labor, conversion of default to T for C)

Court Ordered Mediation

- Court may refer – Sec. 44.102 (2)(b) FS or on request of party, Court must refer (with exceptions) – Sec. 44.102 (2)(a) FS
- Counsel must appear at conference – Sec. 44.10 and Rule 1.720(b)(2) Fla. R. Civ. P.
- Party with "full authority" – Rule 1.720 (b)(1)
  - Without further consultation
- Representative of insurance carrier – Rule 1.720 (b)(3)
  - With authority to lesser of last demand or policy limits
- If no settlement, Mediator shall report w/out comment; with consent may report legal issues to be resolved to facilitate settlement
- Mediator does not sign settlement agreement.
- Sanctions for breach of settlement include attorney fees

Preparing for Mediation

- Investigate the facts and objectives
- Who has authority to settle? How does your client make binding decisions?
- Who will attend the mediation conference with decision maker?
  - Field staff with knowledge?
  - Expert consultants?
- Agree that mediation will be conducted as if Court-ordered?

ARBITRATION

- Written agreement to arbitrate
  - Awards to be confirmed in court
- Statutory frameworks
  - Ch. 682 FS Revised Florida Arbitration Code
  - Ch. 684 FS Florida International Commercial Arbitration Act
  - Ch. 44 FS Florida Voluntary Binding and Court-Ordered Arbitrations
  - 9 USC Sec. 1 et seq. Federal Arbitration Act
- Ad hoc or administered

Revised Florida Arbitration Code - Ch. 682 FS

- Agreements executed after July 1, 2013 (and until June 30, 2016 to earlier agreements only with consent of parties)
- Effective for arbitrations conducted in Florida. Any person can be arbitrator.
- Certain requirements not waivable pre-dispute Sec. 682.014(2) and (3) FS
- Other non-waivable provisions Sec. 682.014(3) FS (includes grounds for vacating, modifying or enforcing arbitration award Sec. 682.13- 682.15 FS)

RFAC Grounds for Vacating Award Sec. 682.13 FS

- Award procured by corruption, fraud, or other undue influence
- Evident partiality by a neutral arbitrator, arbitrator corruption, or arbitrator misconduct prejudicing a party
- Arbitrator refused to postpone hearing upon a showing of sufficient cause, refused to hear material evidence, or violated Sec.682.06 FS

RFAC Grounds for Vacating Award (2)

- Arbitrator exceeded the arbitrator's powers
- No agreement to arbitrate, unless challenger participated in the arbitration proceeding without objecting under Sec. 682.06(3) FS at or before beginning of hearing
- Arbitration conducted without proper notice of initiation per Sec. 682.032 FS prejudicing a party

Florida International Commercial Arbitration Act

- Chapter 684 FS

FICAA – Sec. 684.002 FS

- Applies to international commercial arbitration, subject to any agreement in force between the USA and any other country, if the place of arbitration is in Florida
- International = at conclusion of agreement, parties to arbitration have places of business in different countries, or place of arbitration is outside countries of parties, or substantial part of the obligations to be performed are outside countries of parties, or parties expressly agree

FICAA Grounds to Set Aside Award Sec. 684.0046 FS

- Requested within 3 months after award, and
- A party was under some incapacity, or
- The arbitration agreement is not valid under the chosen law or under Florida law, or
- Proper notice not given, or
- Ability to present case compromised, or
- To the extent the award concerns dispute not contemplated or beyond matters submitted, or
- Composition of arbitral tribunal not proper, or
- Public policy is violated

Florida Voluntary Binding ARBITRATION

- Sec. 44.104 FS – parties may agree in writing to arbitrate prior to or after a lawsuit is filed, if no constitutional issue involved
- Decision within 10 days of hearing
- Appeal within 30 days of decision on grounds in Sec. 44.104(10) FS
  - (a) Alleged failure of the arbitrator to comply with rules of procedure or evidence
  - (b) alleged partiality or misconduct by arbitrator
  - (c) decision violates US or Florida Constitutions

Florida Non-Binding Arbitration – Sec. 44.103 FS

- Court ordered or agreed by parties
- Limited submissions of evidence and testimony and trial briefs
- Decision in writing
- Final if trial de novo not requested timely
- Trial judge does not see arbitration decision
- If trial result to Plaintiff 25% less (Defendant 25% more) than award, then attorneys fees and costs will be assessed. Sec. 44.103(6)FS

Federal Arbitration Act – 9 USC Sec. 1 et seq.

- Written arbitration agreement, involving maritime or agreement in commerce
  - Commerce = among States or with foreign nations
- Subpoenas allowed to compel attendance at hearing of persons or documents
- Award can be confirmed in court within one year of entry unless vacated or modified under 9 USC Sec. 10-12 (3 months to vacate)

FAA Grounds for Vacating Award 9 USC Sec. 10

- Corruption, fraud or undue influence
- Evident partiality or corruption in an arbitrator
- Arbitrator misconduct in refusing to postpone the hearing upon sufficient cause shown, or in refusing to hear material evidence, or other misbehaviour by which the rights of a party are prejudiced
- Arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definite award was not made
- *Hall Street Assoc. LLC v. Mattel, Inc.* 552 U.S. 576 (2008)

FAA Grounds for Correcting Award 9 USC Sec. 11

- Evident miscalculation or material mistake in the description of any person or thing
- Award made on a matter not submitted to them, unless it is a matter not affecting the merits
- Award is imperfect in form not affecting the merits

Some ADR Providers and Standards

- American Arbitration Association (adr.org)
- International Centre for Dispute Resolution (adr.org)
- JAMS (jamsadr.com)
- International Institute for Conflict Prevention and Resolution (cpr.org)
- International Chamber of Commerce (iccwbo.org)
- Chartered Institute of Arbitrators (ciarb.org)
- United Nations Commission on International Trade Law (UNCITRAL)
- College of Commercial Arbitrators (www.theCCA.net)

Typical Provider Arbitration Rules

- Commercial rules (include mediation)
- Construction rules (include mediation)
- International rules
- Fast track or small dispute rules
- Regular rules
- Large complex case rules
- Appellate arbitration rules

Drafting Arbitration Clauses

- Ad hoc or administered? Which provider and rules?
- Qualifications of arbitral panel members? How many?
- Venue and choice of law?
- Limits on time to file demand?
- Scope of disputes to be arbitrated? Confidentiality?
- Submissions with demand?
- Joinder and consolidation? Mediation in parallel?
- Discovery and e-discovery? Language?
- Appeals?
- [PLEASE: Do NOT adopt Florida or Federal Rules of Evidence]

Dispute Boards

Who is Using Dispute Boards?

- Tunnel, road, bridge, port, dam and transit projects
- Infrastructure projects: airports, hospitals, hydoelectric and other power plants, water and waste water, and universities
- FDOT, Broward Aviation Department, Miami-Dade Aviation Department, Orlando Aviation Authority, UW, Caltrans, CDOT, Big Dig, NY MTA, WMATA, BART, DART, Toronto Transit Commission, Panama Canal, World Bank, London Olympics, Rio Olympics
- 2010 over 2200 projects > $150 B in USA
- FIDIC and ConsensusDocs (form specifications)

Dispute Boards – Because Stuff Happens

- Provide opportunity to intervene and facilitate
  - Confidential discussion
  - Before money is spent on a solution
  - Before it's too late to improve the field conditions

- Avoidance of claims = primary goal
- Mitigation of impacts = secondary goal
- Dispute Resolution = Plan B

What is a Dispute Board?

Skilled, impartial industry professionals selected by both parties who:

- Visit the jobsite & meet with project team regularly to facilitate job progress

- Help avoid or mitigate impacts of unplanned events

- Help resolve disputes before claims arise, in real time, at project level

- If needed, issue recommendations or decisions

Why recommend a Dispute Board?

- Mitigates impacts of activities not yet performed for the best interest of the project
- Disputes don’t aggregate or compound
- Helps reduce/prevent acrimony between project teams
- Allows project team members to focus on their responsibilities on the job
- Validates decisions to compromise
- Process cost dramatically lower

Dispute Boards – how?

- Process
  - Contract specification creating Dispute Board
  - Engagement agreements with Panel members
  - Professional, problem-solving, confidential

- People
  - Trust and respect for Dispute Board panel
  - Educate the project team

Creating the Dispute Board

- Local Regulation or procedures, i.e **www.dot.state.fl.us/construction/CONSTADM/drb/DRBMain.shtm**
- Specification in Contract Documents
  - Purpose, Member selection, relationship to bilateral mechanisms in the Contract, hearing procedures, post-decision actions by the Parties
- Engagement agreement between each Panel member, owner and contractor
  - Establish scope of services, responsibilities of members and parties, fees, release of liability

Objectives of Dispute Board

- Dispute avoidance
- Dispute mitigation
- Facilitation & communication
- **NOT** Technical Advisors
- **NOT** Mediation – NO EX PARTE communications!

Selection Criteria for Dispute Board Panel Members

- Experience appropriate for project
  - Engineers, contractors, construction lawyers
- Ethical – Disclose relationships
- Available and interested
- Neutral and unbiased
- Trained in Dispute Board practice, mediation and arbitration skills

Dispute Board Regular Periodic Meetings and Site Visits

- Monthly meetings
- Confidential Facilitation - where the real value is gained
  - Review schedule and discuss potential disruptions
  - Review current RFI and claims logs and compare to prior logs
  - Invite all stakeholders

Dispute Board Informal Guidance Procedure

Before costs incurred

Limited presentations

Early “quick read” oral guidance by Panel

de novo “formal” proceeding if not accepted

Dispute Board Formal Proceedings can be:

- *De novo,* or
  based on record
- Non-binding recommendation, or
  binding written decision
- Admissible, or
  inadmissible
  in subsequent arbitration or litigation
  proceedings

Dispute Board Formal Proceedings:

- Referral by either party, but *only after discussion at regular meeting*
- Prehearing written submissions
- Oral presentations - not sworn
- No cross-examination
- Panel questions presenters
- Reasoned report to persuade parties



University of Washington Experience:

- Since 1993 UW used Dispute Boards on
  - Over 40 contracts
  - totaling over $4 Billion
  - only 2 formal hearings in 20 years

Deb's Dispute Board War Stories

- Arsht Center of Performing Arts, Miami
- Miami International Airport North Terminal Development Project
- Cost $2K/person/day = $75K/year*

* For smaller projects - reduce cost with shorter meetings and smaller Board (not less frequent meetings)


CARNIVAL CENTER
TO
Airport
Biscayne
Blvd
Arenas



Dispute Boards - Take-Aways

- How?
  - Pick good panel members
  - Get buy in from all parties
  - Start meetings and site visits early in the contract with no preconditions
  - Don’t cancel or postpone meetings and site visits
  - Don’t wait for a dispute to arise
  - Stay ahead of the game; be pro-active
- Why?
  - Brings value to your client

Dispute Boards for Smaller Projects

- Dispute Board Panel = 1 local member
- Regular meeting is ½ day or less

Dispute Boards -Reference Material

- Dispute Resolution Board Foundation: www.drb.org
- American Arbitration Association: www.adr.org
- International Chamber of Commerce: www.iccwbo.org
- International Institute of Conflict Prevention and Resolution: www.cpradr.org
- International Federation of Consulting Engineers (FIDIC): www.fidic.org
- ConsensusDocs (200.4 and 200.5): www.consensusdocs.org
- FDOT: www.dot.state.fl.us/default.shtm
- American Society of Consulting Engineers: www. ASCE.org Menassa & Peña Mora, "Analysis of Dispute Review Boards Application in US Construction Projects from 1975 to 2007" (Journal of Management in Eng'gApril 2010)

Questions?

Thank you!

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