

## 5th Annual Arbitration & Investment Summit 2017

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**Topic: Alternate Dispute Resolution (ADR) as an approach to resolving disputes in Construction Projects.**

I would like to briefly examine the key players, stages and processes of construction projects from an Architect and Project Manager's perspective and to suggest that there is a correlation between the size/complexity of projects and the need for dispute resolution.

It's my thesis that the greater the size and complexity of a project, the greater the likelihood there will be conflicts and disputes, and thus the need for ADR. In fact the very nature and dynamics of the project stages of Planning, Design and Construction, along with their related processes tends to engender conflicts and therefore the need for ADR. The processes that are required through the various stages of the project tend to be "messy", with many moving, and oftentimes conflicting parts that have to somehow be effectively managed in order to have a high probability of a successful project.

If we examine each of the components or elements that go into a typical project, it is interesting to note the following:

### OWNER

Projects can have a single owner or an organization with a variety of stakeholders who oftentimes will have conflicting requirements and agendas. As a general rule the greater the size and complexity of the project, the larger the owner/stakeholder organization tend to be.

Generally owners have as one of their main objectives to achieve as much as possible for the least amount of expenditure....”more for less”

To add a bit of complexity, the Owner generally has a separate contractual relationship with the Consultant and the Contractor. The Consultant as a part of their responsibility, is charged with advising and directing the Owner who they have a direct contractual relationship as well as the Contractor who they do not have a direct contractual relationship.

### **CONSULTANT**

Can be an individual or an organization who may have contractual relationships with other consultants to form a Consultant Team.

The Consultant is usually hired by the Owner to plan/design and coordinate the efforts to execute the Project with one of the main aims of ensuring that the Owner gets what is paid for and the Contractor constructs what has been designed.

### **CONTRACTOR**

Who can be an individual or an organization and the Contractor by extension will tend to have contractual relationships with various subcontractors and suppliers.

The Contractor who is usually hired by the Owner to construct what has been planned and designed by the Consultant. The Contractor usual primary objective is construct as little as possible for as much as possible...”less for more”.

### **AUTHORITY HAVING JURIDICITION (AHJ)**

The AHJ has no formal contractual relationship with the Owner, Consultant or Contractor, but have an implied relationship with all parties since they are charged with review, approval, inspection as per codes, standards and regulations that impact the planning, design and execution of projects.

There are times when there are conflicting requirements from the various AHJ during the review, approval and inspection phases of the project.

Some examples of AHJ would be:

- Town Planning for initial Approval In Principle for the proposed project.
- Ministry of Works for granting a Building Permit for the construction of the project and the issuance of an Occupancy Certificate once the project has been completed and inspected. Fire Department and Department of Environmental Health who approve and inspect as a part of the Building Permit and Occupancy process.
- Utility Companies, primarily Water & Sewerage and Bahamas Power & Light ( former BEC) for the approval of proposed Residential Subdivisions

### **SCOPE/COST/TIME DYNAMICS**

Adding another layer to the mix, is the balancing of the three primary elements of Scope/Cost/Time that impact projects. If the project scope is not clearly defined or incomplete, it will have an adverse effect on the cost and time, usually with increase cost and a longer time to complete. If cost is a major consideration, then it may have an adverse impact on the scope and time, usually implying a reduction of scope. If the major factor to consider is time, then it may have an adverse impact on scope and cost, usually implying a decrease in scope and increase in cost.

### **TYPICAL STAGES/PHASES OF PROJECTS**

#### **PLANNING**

This is the stage where the Owner is exploring the nature and feasibility of the project. The usual players involved during these stage are:

Owner – provides the financial investment for the project

Consultant – provides the planning consultancy for the project

**AHJ – review/approve the proposed planning of the project**

## **DESIGN**

**This is the stage where generally the Owner and the Consultant are refining and finalizing the requirements for the project. The usual players are:**

**Owner – who want to be assured that what is being designed reflects the requirements and the financial investment they are prepared to commit, which at times can be conflicting....Project Scope verses Project Cost.**

**Consultant – who has to ensure that all of the project requirements have been incorporated into the design of the project.**

## **BID/TENDER**

**This is the stage where what has been planned and designed by the Owner and the Consultant given to the Contractor for their costing. This is usually the first time the Contractor get involved to any extent with the project.**

**Owner – who wants to be assured that all of their requirements have been included in the costing by the Contractor.**

**Consultant – who has to ensure that they have included all of the agreed requirements into the design for the Contractor to provide their costing.**

**Contractor – wants to be assured that their costing reflects only what has been designed by the Consultant.**

## **CONSTRUCTION/CLOSE-OUT**

**This is the stage where the design of the project is essentially handed over to the selected Contractor to construct, with generally some construction administration responsibilities by the Consultant.**

**Owner – wants to be ensured that the Contractor is constructing all of their requirements for the financial investment they have committed to the project.**

**Consultant – has to ensure that the Contractor is constructing what has been designed for the financial investment made by the Owner.**

**Contractor – only wants to construct what has been designed by the Consultant for the financial investment made by the Owner**

## **ADR OPTIONS**

**As was posit, that the very nature of the process tends to engender conflicts and therefore the need for dispute resolution, let explore some of the key ADR options available and suggest which one can be more appropriate that others, depending on the nature of the dispute.**

### **NEGOIATION**

**This is considered the simplest and cheapest way to settle disputes. This method requires the disputing parties to get together and find a workable solution to the conflict. This method tend to work well only if the disputing parties are prepared to approach the situation objectively and unemotionally, which unfortunately is often a major challenge in construction projects, due to emotional nature of the process and financial risk.**

**An issue of concern is that even if the disputing parties can find a workable solution, there can be legal challenges to what was agreed if one of the parties decides at a later date to renege on the negotiated settlement.**

### **MEDIATION**

**The method is often used when the negotiations fails. The disputing parties agree to appoint a Mediator, who is to act as a neutral third party and their role is to assist the parties in resolving the dispute. The primary aim is to get the parties to agree on a workable solution. This method has proven to have a higher success rate that Negotiations and tend to save time and money.**

Mediation has a similar challenge as Negotiation, in that there can be legal challenges to what was mediated if one of the parties decide to renege on the agreement.

## ADJUDICATION

The method of dispute resolution was established primarily for construction contracts. The primary aim is to resolve disputes on an interim bases in order to allow for the project cash flow to continue..."pay now, argue later", pending final resolution by Arbitration or Litigation if necessary. This method is usually quicker and cheaper than both Arbitration and Litigation and the decision of the Adjudicator is provisionally binding and enforceable on both disputing parties.

## ARBITRATION

This method of dispute resolution tends to be referenced in many construction contracts. The primary aim of Arbitration is for the parties to resolve their dispute privately outside of the formal court system. The parties get to select the Arbitrators and generally agree on how they want the dispute to be settled. The challenges for Arbitration is that it tends to be more expensive than all the other methods, and sometimes even more expensive than Court Litigation, but usually can be completed in less time than going to court.

## COURT LITIGATION

This method of dispute resolution is used when Arbitration is not used or fails due to some legal challenge. The advantage of going to court is that the disputing parties do not have to pay the judge or for the use of court facility and administration.

The major challenges with Court Litigation is that it is a public proceeding, can take years for the dispute to be resolved and it tends to be very expensive in the long run.

## **RECOMMENDATIONS**

The use of ADR is an effective way of resolving disputes between parties, the main challenge is how one decides which method to use.

I would like to suggest that for construction projects, depending on the size and complexity of the project and the issues, start of by attempting to first Negotiate for a quick and inexpensive resolution of the dispute, then lead up to Adjudication or ultimately Arbitration.