



Heal & Co. LLP LAWYERS

ASSISTING CLIENTS IN THE BUILT ENVIRONMENT

COCA Board Meeting December 1, 2009: Alternative Dispute Resolution and Construction - How to make It Work for You

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why do you care about ADR?

2009 has been a tumultuous year

economy is uncertain

basic two year limitation periods means
disputes arising in 2008 will be litigated or
gone by 2010

are we out of the recession yet?

bad news/ good news

global GDP fell 1% for the first time since the 1960's

on a macro level economies are more synchronized

MCHUMOR.com by T. McCracken



"Build it, and they will sue."

Introduction

- Making dispute resolution work for you
 - litigation, its not such a bad thing?
 - changes coming for 2010
 - alternatives to litigation
 - mediation
 - expert determination and dispute review boards
 - arbitration

Alternative Dispute Resolution:

- What does it look like?
 - it takes many forms, negotiations, facilitated negotiation - partnering, mediation, neutral evaluation, arbitration
 - a mix of the foregoing

ADR's Current Most Popular Form

- mediation
- arbitration

Look Who's Talking

- who to bring
- let the clients do the talking?
- what does a successful mediation look like: have this discussion with the client before

What are the Expectations?

- have you been through the process before
- prep the client with a letter, a discussion and perhaps show them a video of a mock mediation

Exchanging Offers Before Process Starts

- when to do it and when not to
- first reasonable offer anchors the settlement range

What is my BATNA?

What is my WATNA?

Know the Difference between Without Prejudice and Confidentiality

- information in the session is not confidential
- information in the session is only without prejudice settlement discussions (Rule 24.1.14)
- mediation is like email - it is informal, people have their guard down and sometimes say too much

Mediation can be a Source of Intelligence about the Case

- Does opposing counsel understand the factual or legal issues properly
- Is the Client running the show or is counsel

Mediation can be Like the TV Show the Weakest Link

- Mediator or opposing parties will find the weakest link of the mediation

When Should you use a Retired Judge as a Mediator?

- almost exclusively evaluative
- tend to shuttle offers back and forth (like Henry Kissinger)
- retired judges are useful when clients need a reality check and you think counsel is sympathetic but you need someone with grey hair to tell a client the same thing
- do not discount a mediation as an opportunity to have all decision makers in one room at the same time

Focus on the Expense of Continuing the Litigation

Mediation

There are No Rules to Mediation

Get Momentum on Your Side

Remember Mediation is Voluntary - You
can Always Walk Away

Arbitration Clauses

- mandatory or discretionary
- choice of law, choice of forum (or seat of arbitration)
- choice of rules
- interlocutory court proceedings: attacking enforceability of clause, challenging arbitrator choice

Stays pending Arbitration

- *Penn Construction v. Constance Lake*
- plaintiff contractor sued owner and others, including project consultants
- litigation proceeded
- plaintiff then moved to stay litigation for arbitration

Stays pending Arbitration (cont'd)

- judge dismissed stay motion, and upheld by Court of Appeal
- “However, by bringing this action, the appellant defined the parameters of its dispute with the respondents more broadly than it could have under arbitration. The appellant has cast a broad net by commencing the action and, in our view, cannot escape the consequences. Any right the appellant may have to arbitrate certain aspects of its dispute with the respondent must now be considered in the light of the claim it has advanced in the action”
- multi party, multi issue dispute

Conclusions

- use contract to control risk
- include dispute resolution mechanisms as part of your risk management regime
- *“good, fast and cheap... pick any two”*