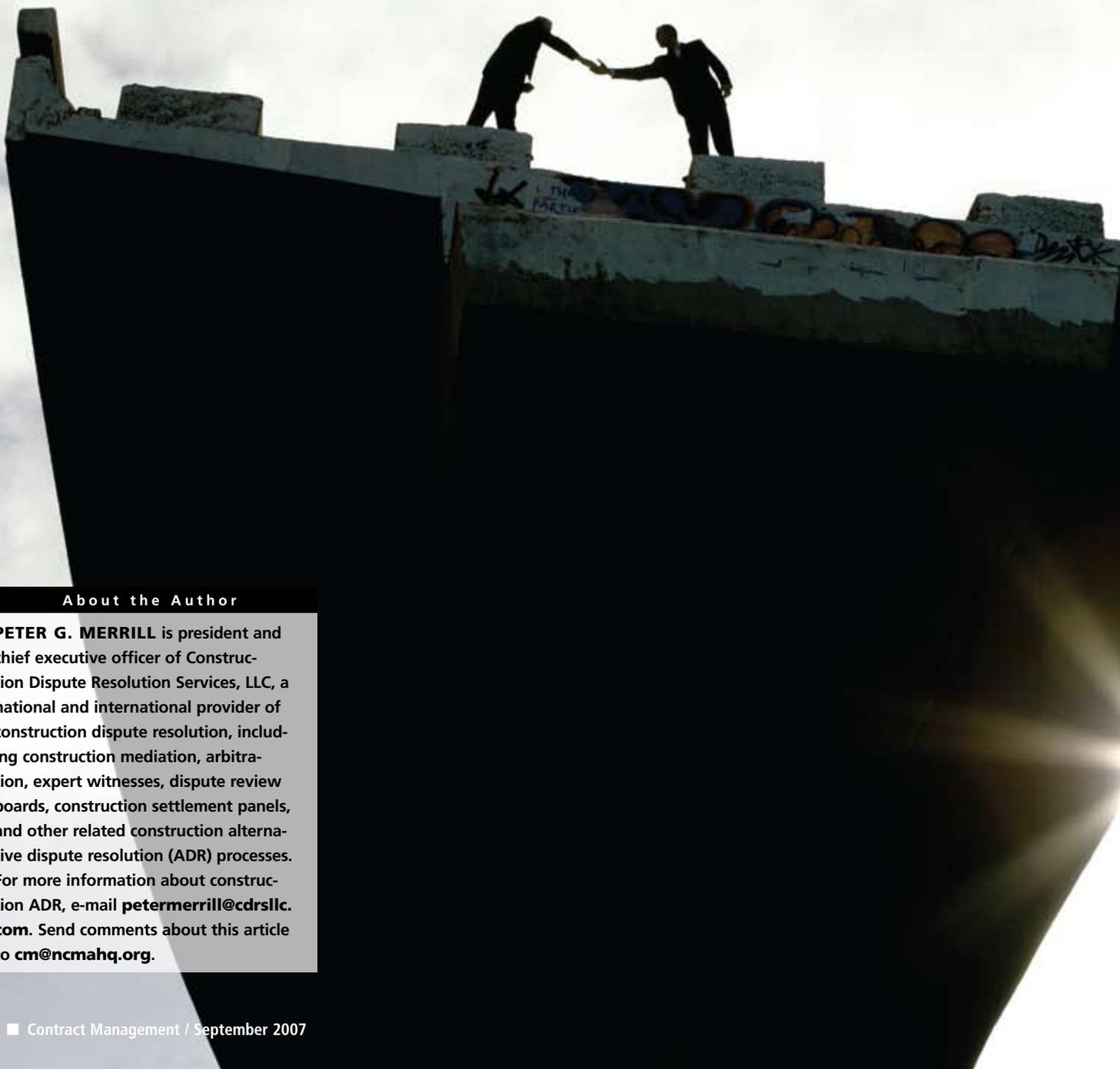


Handling Construction Disputes

Litigation vs. Alternative Dispute Resolution



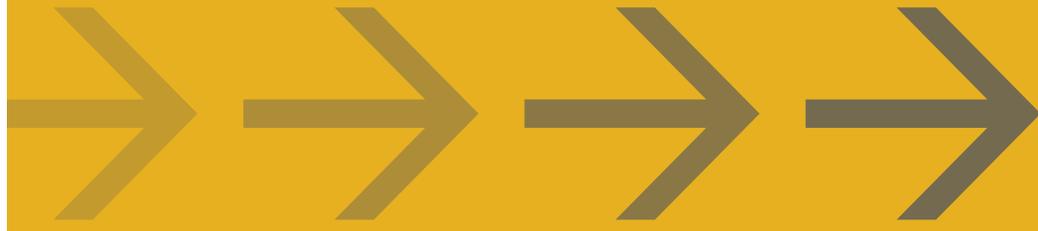
About the Author

PETER G. MERRILL is president and chief executive officer of Construction Dispute Resolution Services, LLC, a national and international provider of construction dispute resolution, including construction mediation, arbitration, expert witnesses, dispute review boards, construction settlement panels, and other related construction alternative dispute resolution (ADR) processes. For more information about construction ADR, e-mail petermerrill@cdrsllc.com. Send comments about this article to cm@ncmahq.org.



WHETHER YOU ARE BUILDING A ROAD, A RESIDENCE, A commercial building, or any other major construction project, it is almost impossible to get through the entire project without having at least a few disputes to handle. Those disputes are usually minor in nature and are generally worked out through discussion between the contractor and project owner. The vast majority of construction projects are completed without any major disputes that can't be resolved between those two parties. Those major disputes that can't be settled by the contractor and project owner require additional assistance to settle the dispute and will need to proceed on to binding mediation, binding arbitration, or litigation—whichever is specified in the construction contract—to settle the dispute completely.

Litigation that uses the court system is a right granted by the Constitution of the United States. If there is no provision for dispute resolution in a construction contract, either party, including the contractor, has the right to sue the other party using the court system. Binding mediation and binding arbitration are two forms of alternative dispute resolution (ADR) that offer a final and binding resolution to the dispute rather than using the court system. To use ADR, the parties must agree in writing that they will use either binding mediation or binding arbitration. In effect, the parties are giving up their right to sue each other. There are several reasons why most contractors are specifying ADR in their construction contracts.



Binding mediation and arbitration, two forms of alternative dispute resolution (ADR), offer a simple, expeditious process for settling disputes quickly—without a long and costly court case.

BY PETER G. MERRILL



One of the major problems incurred by using the court system is the very long time it usually takes to have a case come before the court. If the dispute does go to court, most residential disputes are heard by a judge with a few disputes being heard by a judge and a jury. Most court cases take at least six to nine months to get to court, and it is not unusual to see a construction court case take a year or more before they are scheduled to be heard. Many contractors go out of business while waiting for their case to be heard.

Although both binding mediation and binding arbitration offer a final and binding decision to construction disputes, binding arbitration is more widely used and accepted. Binding mediation is gaining in popularity, especially in smaller disputes, and is less costly than arbitration.

Binding arbitration is much faster than court litigation and is typically handled within 90 days of the initiation of the binding arbitration process, unless the dispute is complex in nature. If an accelerated binding arbitration process is specified in the construction contract according to the rules and procedures of a specified ADR provider, the arbitration hearing can be held within 30 to 60 days. With both parties cooperating, binding arbitration hearings have been known to even be held within 14 days of the initiation of the process.

Another time-related benefit of the use of ADR is the total time it will take to finally settle the dispute. When litigation is used, if either party is unhappy with the verdict, they can appeal. This appeal process can add many months and even years

to the dispute resolution process. Binding arbitration is more final than going to court, as the arbitration award is final and binding and generally not subject to appeal. It may only be appealed for specific procedural reasons, such as the arbitrator not disclosing a former or current personal or business relationship with one or the parties. The award cannot be appealed if one of the parties does not like the award results.

Another benefit of the arbitration process is its informality. When a case goes to court, you must use an attorney, as there are specific processes that must be followed including the Federal Rules of Evidence. Arbitration does not mandate the use of evidence rules and in many other ways is far more relaxed and informal than the litigation process. Attorneys are not required



in the arbitration process although they are recommended in anything other than a simple construction dispute.

One of the most important reasons to use ADR is the great difference in costs relating to the use of the litigation process as opposed to the use of ADR. Arbitration is almost always a fraction of the costs of the litigation process. On larger cases, I have seen arbitrations to be very costly, but in my opinion, the large costs were related to the arbitrator and the attorneys conducting the arbitration very much like a court case would be conducted. That is why, in addition to specifying ADR to settle a dispute, it is recommended that the contract also specify a provider of that ADR process.

There are several ADR providers, such as Construction Dispute Resolution Services, the American Arbitration Association, the National Arbitration Forum, and several other national and local ADR providers. If you specify a provider who knows construction, it should be to your advantage as a contractor.

If a construction case is heard by a judge and/or a jury who have a limited or no construction knowledge related to the issues in the dispute, it is generally the best and most convincing presentation that will be the winner, not necessarily who is right or wrong. The construction industry phrase that sums up this problem is, "If the judge doesn't know the difference between rebar and a Hershey Bar, he or she is not the right person to hear the case." Presentation of the case most likely will be long and costly due to the lack of construction knowledge of the judge or jury.

If you were sick or injured, you would go to see a doctor because he or she knows how you are built and what steps are necessary to correct your problem. In some cases, the doctor will refer you to a specialist. If your building is sick, you likewise need to go to a construction-knowledgeable specialist to specify the proper steps to correct your problem. Large national ADR providers have lists of ADR specialists who are proficient in handling

disputes related to specific construction disputes, such as mold and mildew, subsidence, exterior insulation and finish systems (EIFS), structural issues, plan interpretation, etc. I can't emphasize enough the importance of selecting and specifying a provider of ADR services who specializes in construction disputes.

Prior to going to court or arbitration, it is very strongly recommended that the parties first attempt to settle their disputes through a preliminary ADR process called the mediation process. Mediation is not final and binding unless the parties come to a full settlement at the end of the mediation process. Again, it is important to use a mediator, who can also be supplied by an ADR provider, who has vast construction knowledge. It may interest you to know that about 95 percent of mediations are successful in settling construction disputes if the mediator is an experienced and trained construction mediator. The mediation process is an informal and inexpensive process that can save both parties considerable time, expense, and anguish if it is successful. If it is not successful, it is a small price to pay in an attempt to avoid the more formal and expensive processes to reach a final and binding resolution to the dispute.

It is not unusual for a smart contractor to have negotiated a general contractor's fast track agreement, where a mediator and an arbitrator are pre-selected by the parties and should be available on a moment's notice to conduct a mediation or an arbitration. Each of the parties have pre-signed the mediation and arbitration agreements and have signed the appropriate documents to facilitate a quick and inexpensive resolution to any possible disputes. If the services of the mediator and/or arbitrator are not necessary during or after the construction project, the parties would have only spent a small administrative fee to set up the fast-track process, and would have proceeded through the construction project with a certain peace of mind knowing that any dispute would be efficiently and expeditiously handled.

If there is a major dispute early in the construction process, if it is not expeditiously handled, it may cause extreme tension between the parties as they continue with the construction project or the project might need to shut down pending the resolution of the dispute. I can remember a residential construction project where we conducted three separate binding mediations as the project continued. The project finished on time and within budget. Most importantly, the parties were pleased with the project and remained good friends and a good reference for the builder. If those disputes had gone to court, I'm certain that the project would not have been completed on time and within budget, and the builder probably would not have been the builder who completed the residence.

On larger construction projects, we highly recommend the use of a dispute review board or a construction settlement panel to handle all disputes between any of the parties involved in the construction project, including the project owner, general contractor, subcontractors, material suppliers, designers, and architects. A full description of these processes was published in the article, "Construction Dispute Review Boards and Settlement Panels: Save Time, Money, and Headaches," in the May 2007 issue of *Contract Management* magazine.

Please keep in mind that any two parties can agree to anything at any time as long as it is not contrary to law. As ADR is an inexpensive, expeditious, and simple process, if you do not have ADR in your construction contract, both parties can mutually agree to elect to settle the dispute through the use of ADR, even if litigation is specified. If you do not have ADR and an ADR provider in your construction contract, you need to add it as soon as possible. There are so many issues that are not controllable or unforeseen on a construction project. Dispute resolution is controllable and should not wait until a dispute develops to be addressed. By that time, it's too late. **CM**

