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The Forensic Engineer and Alternative Dispute Resolution

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Abstract

The use of “Alternative Dispute Resolution” (ADR) for settlement of cases is proliferating. The process is mandated by the courts in many civil matters to provide a “speedy, efficient and cost effective” way to settle cases. The common forms or processes of ADR are arbitration, mediation and appraisal. “Arbitration” is often specified in construction and real estate contracts and is binding. Non-binding “mediation” is employed to negotiate settlements in civil matters usually among lawyers, but expert reports can be provided and experts may be called to testify. The “appraisal” process is incorporated in most property insurance contracts with minimal guidance on process. In some jurisdictions there are few or no rules governing the actual process beyond selection of appraisers and neutral umpires and little case law defining specific rules and limitations. The Forensic Engineer can participate in the traditional role as expert witness in more formalized settings, or may act as an appraiser or neutral umpire in settings ranging from informal discussions in the field to courtroom settings. This paper is intended provide some exposure to the processes and give insight into some potential problem areas and preparation.

Keywords

Alternative, Dispute, Resolution, Arbitration, Mediation, Appraisal

Types of Alternative Dispute Resolution

The term Alternative as used herein means alternative to the judicial litigation process or “extrajudicial”. The following is intended to briefly summarize the main aspects of the three ADR processes, provide some background on the history and illuminate some significant recent changes made by the courts with the intent to assist the expert in preparation.

Arbitration

The process is governed by specific rules and procedures as set forth by the agreed upon forum. The most commonly used for construction and real estate matters is set forth by the American Arbitration Association (AAA). Model construction contract documents such as American Institute of Architects (AIA) contracts and Engineers Joint Construction Documents Committee (EJCDC) contracts provide for arbitration as the means for settlement of disputes. The contract documents provide options to designate arbitration for dispute resolution and provide for the contract writers to identify specific arbitration organizations and venue.

In the arbitration process the forensic engineer will most likely be involved as an expert but engineers also are listed as arbitrators. An engineer desiring to act as an arbitrator can submit credentials to the AAA and if approved become listed as an AAA approved arbitrator. The process details including definitions and applicability can be obtained online free from the American Arbitration Association online library.

The Federal Arbitration Act was first enacted in 1925, codified on July 30, 1947, and amended in 1954. New sections were added in 1970 and 1988. Chapter 3 was added in 1990. Chapter 2 of the Federal Arbitration Act involves the recognition and enforcement of foreign arbitral awards. Chapter 3 relates to the Inter-American Convention on International Commercial Arbitration. The basic provisions of chapter 1 describe the process, validity and proceedings. The engineer will not need to have extensive knowledge of the act which is intended to provide for alternative dispute resolution in matters involving interstate commerce. The engineer may find it useful to become familiar with some provisions such as Section 1 Definitions; Section 11 Appointment of Arbitrator and Service as a Neutral Arbitrator; Section 12 Disclosure by Arbitrator; Section 14 Immunity of Arbitrator, Competency to Testify, Attorney's Fees and Costs; Section 15 Arbitration Process; Section 17 Witnesses, Subpoenas, Depositions; Discovery; Section 23 Vacating Award. The commentary at the end of each section provides useful information as regards the development and intent of provisions of the sections.

The process and applicability of arbitration is defined by the states based upon the "Uniform Arbitration Act" drafted by the "National Conference of Commissioners on Uniform State Laws". The provisions have been visited by some courts upon the appraisal process.

Under the Uniform Arbitration Act, there are references to "arbitration organization" as discussed above which could mean the AAA which provides its own rules and process. The parties to an agreement to arbitrate select the arbitrators. Per the Uniform Arbitration Act "Arbitrator" means "an individual appointed to render an award in a controversy between persons or parties to an agreement to arbitrate". In the event the parties are unable to select the arbitration panel, the court may select arbitrators. The arbitration panel then issues the findings which are binding to the parties. Except for certain limited issues such as fraud, collusion or failure to hear witness on the part of the arbitrators, there is no right to vacate or appeal. It is rare for the findings of a panel to be vacated. However, it can occur and there are certain aspects to the process which vary with the states, with which the engineer/arbitrator should become familiar.

In general, the process is governed by the contractual terms. For example, a commonly utilized system is AAA which provides a specific process which requires parties to select individual arbitrators. The arbitrators then select the neutral Arbitrator which can be from rosters of persons who have been approved by AAA. Attorneys, engineers, architects and contractors are commonly found on the rosters. It is recommended that those participating in this process familiarize themselves with the Act.

Depending upon the nature and character of the matter of the dispute, the arbitrators may elect to appoint a neutral Arbitrator with particular expertise and knowledge in the field and issues which are in dispute. The Act discusses the efficacy of arbitrators having expertise in issues relating to the matters at hand and recognizes that although it may be presumed that such expertise can introduce bias to the Arbitrator that the parties recognize that the value of the expertise of the Arbitrator may outweigh impartiality. Engineers participate as arbitrators and as neutral umpires. Commonly, the arbitrators select an attorney or retired judge to act as neutral umpire. The actual form of the process may be directed by parties to accommodate the magnitude and complexity of the matter. Matters which commence as judicial proceedings are often stayed where contracts render the issue referable to arbitration. This is governed by section 3 of chapter 1 “if any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in fault in proceeding with such arbitration.”

The process under AIA contracts indicating arbitration is indicated by the following; “if the parties have selected arbitration as the method for finding dispute resolution in the agreement, any claims subject to but not resolved by, mediation shall be subject to arbitration which, unless the parties mutually agree otherwise, shall be administered by the American Arbitration Association in accordance with its construction industry arbitration rules in effect on the date of the agreement. A demand for arbitration shall be made in writing, delivered to the other party to contract, and filed with the person or entity administering the arbitration. The party filing a notice of demand for arbitration must assert in the demand all claims then known to that party on which arbitration is permitted to be demanded.”

Process

Arbitrations commonly take place in a conference room setting with the arbitration panel, attorneys, parties and witnesses present. The process may also take place in a courtroom. Usually the panel has been provided with written statements and reports prior to the arbitration regarding the various issues in dispute. Lawyers representing the parties and may or may not make opening statements depending upon the agreed protocol. The parties present their cases or claims, and present experts to testify regarding various aspects as relate to the matter. Direct and cross examination of witnesses may occur however the proceedings are usually conducted more informally than in a court of law. The forensic engineer in this type of proceeding testifies in the usual way and may be subject to cross examination by the parties. A difference from a court of law is that the arbitrators will typically question the witnesses which is not usual in a court of law.

Court reporters may be present at the arbitration at the election of the parties; however there is no requirement for court reporter to be present. Cross-examination by opposing counsel of the expert would

be as typically encountered in a court room situation; however, in the experience of the writer, this typically occurs with less formality in the conference room setting. The forensic engineer may be asked to refer to exhibits or demonstrative aids. It has been the writer's experience that the expert testifying in an arbitration is often permitted wider latitude in answering questions than would typically be the case in a courtroom setting. In an arbitration it is usually not necessary to lay all the foundation as would be the case in a courtroom setting as the arbitrators are likely to be professionals with a high level of knowledge and expertise of the issues which would not ordinarily exist within a jury. Therefore, testimony can be more streamlined. It is usual for arbitrators to directly question the experts more than occurs in a court trial. Lawyers are likely to make few objections, since the proceedings are generally not subject to judicial review. However, objections might be made such as when fact witnesses begin to offer opinions.

Should forensic engineers find themselves as arbitrators in matters involving issues relating to design professionals and professional liability, there may be merit in appointing a neutral umpire who is a design professional. There are some potential drawbacks to a neutral umpire who is also a design professional, since he may be viewed as having biases to a greater degree than would an attorney or judge simply based upon education and experience. The neutral arbitrator in such a situation might find it more difficult to remain unbiased in the matter as the issues may relate to their specific history and experience. In such situations it may be preferable to select an attorney or retired judge to act as the neutral third arbitrator in order to eliminate this potential. Further, having a neutral umpire who is an attorney or a judge tends to result in the process more closely approximating the judicial process, in that protocols, process and decorum are more closely followed. In the writer's experience, the questioning and answer is usually less confrontational than in a trial setting.

In alternative dispute resolution in a civil matter, the arbitrators will find that it is incumbent upon them to determine causes of the conditions at issue and to determine scope of the remedy or repairs. They need to have the expertise to analyze and come to agreement on costs of a recommended remedy or repairs. In matters involving construction claims or construction defects, documents that include proposed scope of repair with estimates or bids and other construction documents, will normally be reviewed by the panel. The forensic engineer participating as an arbitrator in this process when related to construction disputes should have knowledge of design issues and construction documents and customary and usual practice for the various trades.

The forensic engineer participating as an arbitrator in construction disputes must have knowledge of design issues, construction documents including contracts and project manuals (specifications), project drawings and specific elements in drawings such as hierarchy of order of importance, for example, items shown on drawings versus items indicated on drawings and the implications. The arbitrators must determine causes of the damage or conditions, determine scope of the remedy or repairs, and have the expertise to analyze and come to agreement on costs for the remedy or repairs. The ultimate outcome of an arbitration called "award" is normally a monetary agreement.

EJCDC Arbitration Clauses;

The contract documents provide space to identify specific forum for arbitration. Per the EJCDC model contract; “Arbitration: all disputes between owner and engineer shall be settled by arbitration in accordance with the (insert name of a specified arbitration service or organization) rules effective at the effective date, subject to the conditions stated below this agreement to arbitrate and any other agreement or consent to arbitrate entered into in accordance with paragraph H6.08.A will be specifically enforceable under prevailing law of any court having jurisdiction.” The above language contained in the Engineers Joint Construction Documents Committee model contract describing arbitration. As can be seen, the methodology for the arbitration can be per any agreed upon arbitration service or organization. As a practical matter, arbitrations generally follow similar formats based upon the Uniform Arbitration Act whereby the parties appoint arbitrators and proceed as described above. This format is streamlined and typically does not involve the usual discovery process as the matters are intended to be extra-judicial. The usual discovery process with which the forensic engineer would be familiar in matters litigated in the courts is typically not involved in the arbitration process. For example, depositions may or may not be taken. Typically the process does not involve subpoena or other methods of discovery with which the forensic engineer would be familiar although witnesses and documents may by subpoenaed depending upon the rules of the agreed forum. In the arbitration process, the arbitrators through the neutral umpire will typically request that the parties produce documents that are intended to be part of the arbitration to each party timely prior to the arbitration. This allows the parties to the dispute to see the claims and counter-claims, proposed remedies and proposed costs in a timely manner so that they can prepare for and participate effectively in the arbitration process.

Mediation

Paragraph 15.4.1 of the AIA model contract includes the word “mediation.” The process is usually non-binding and conducted more informally. It has been the writer’s experience in matters involving construction that the majority of matters are settled in non-binding mediation. The process is accomplished as follows. The parties to the dispute first agree upon a mediator. Mediators are mostly attorneys with significant experience in construction claims matters or construction defect matters and are mutually agreed upon by the parties. The mediation process is normally accomplished blind, meaning that the mediator will discuss the issues and claims individually with parties separately. The mediator then approaches the parties independently to encourage resolution or movement. Expert reports may be confidential meaning that the reports are produced only to the mediator and not opposing parties. This process permits the mediator to understand the positions of the parties and to judge the weight and credibility of different experts which is useful for the mediator in encouraging the parties towards resolution.

As part of this process, the forensic engineers may with the agreement of the parties meet with the mediator under settlement rules and conditions to openly discuss the aspects of the damages, proposed remedies and costs. Lawyers representing the parties do not attend such proceedings. Issues or statements made by experts in these types of proceedings are not discoverable should the matter proceed to litigation.

Experts unaffiliated with the parties to the dispute may be consulted by the mediator without the knowledge of the parties to the dispute. This is sometimes done so that the mediator can go to an outside unaffiliated expert to gain an understanding or baseline or reality check on certain issues that may arise in the mediation.

The forensic engineer may be invited by the mediator to attend an experts-only conference under settlement rules which is participated in by defense experts only or all experts. In such situations, the experts may find themselves contributing to discussion of scopes of repair and more efficient scopes of repair on matters that the expert was not initially or directly involved in. For example, if the expert retained by counsel representing a certain subcontractor finds himself involved in an experts only conference with the mediator discussing proposed remedies, the expert may, based upon their experience and expertise, contribute to discussion of scopes of repair relating to other trades. It has been the writers experience that such experts-only conferences conducted with the mediator can result in more cost-effective remedies than initially proposed. Armed with such information, the mediator is often able to move the parties closer together and assist in resolving the dispute. Given the high costs, inherent risks and long schedule associated with litigation, the mediation process has largely displaced court trials in settling construction related disputes.

Appraisal

The appraisal process is provided for in most property insurance contracts. In the event that an insured and insurer fail to come to an agreed-upon scope of repair and cost, the insurance contract provides for a dispute resolution process called appraisal. Either party (the insurance company or the insured) may elect the appraisal process to settle a dispute regarding settlement of a loss. In this process each party hires someone to act as an appraiser. Within a timeline provided in the contract such as 20 days, and under various states laws, parties must appoint/hire their appraiser. After appraisers are appointed/hired, the appraisers must agree upon a neutral umpire also within a specified time period such as 20 days. The forensic engineer may act as the appraiser or the neutral umpire. In the event the appraisers are unable to agree upon the neutral umpire, the appointment of the neutral umpire can be remanded to the courts. The appraisal panel is charged with “appraising the loss”. The appraisal award is binding. This process is similar to the arbitration process but with essentially no specified protocol. The neutral umpire, in a property insurance dispute, often is an experienced insurance adjuster, repair contractor or attorney that has experience in insurance claims and has knowledge of determining scope and cost of repairs. Forensic engineers acting as appraisers must have the ability to assess the loss whether it is from storm, fire, collapse, collision, etc. The appraisers must then agree upon the scope the repairs which may be highly detailed and specific and costs of repair and issue an award. The award may be made by any two of the three panel members, either the two appraisers or either appraiser and the neutral umpire can decide the matter.

Appraisals may be more formalized depending upon the parties involved and complexity of the issues in dispute. The parties may be represented by lawyers but this is not required. The forensic engineer in

this type of appraisal process may be brought in to provide expert testimony. The actual process including testimony may occur out in the field standing on site of the loss, or it may occur in a conference room or a courtroom depending upon the level of structure and formality the parties have agreed upon.

In more complex matters involving many trades or many issues, the parties to the appraisal may agree to a more formal process with the parties being represented by counsel. The two appraisers may be appointed/hired by the parties and often are experienced attorneys or experienced insurance professionals. The neutral umpire in this more structured setting is usually attorney agreed upon by the parties. In this more formal setting, the process may involve touring the loss location followed by convening in a conference room. Multiple experts, contractors and insurance professionals may testify at the proceedings. The property owners may also testify. A court reporter is usually not present but may be brought in depending upon the nature of the matter and the wishes of the parties. The same skills and knowledge required of the arbitrator may be required of the appraiser. The engineer acting as an appraiser must be able to evaluate the loss, may need to understand some insurance coverage issues, and must be able to understand and determine the scope of the loss, including the remedy or repair and the costs. The determination of damage and authority and purview of the appraisal panel may require knowledge of some terms of the insurance contracts and appropriate case law, which may vary from state to state. For example, in the state of Minnesota there have been multiple recent appellate and Supreme Court decisions which bear directly upon the process and which have further defined what constitutes damage or loss and which have further defined the limits of purview and authority of the appraisal panel. The forensic engineer providing appraisal services should become aware of such issues.

In the appraisal process, issues may arise which are beyond the authority of the appraisal panel. For example, issues relating to coverage in insurance contracts have been held out of the mediation process and reserved for litigation. However some level of assessment of coverage may be inserted into the process simply to determine the loss. A recent Supreme Court decision in Minnesota illustrates that changes in the limits of the appraiser's authority may change over time based upon case law. ("Cedar Bluffs Townhome Condominium Association, Inc., Respondent, vs. American Family Mutual Insurance Company, Appellant (A13-1024). The forensic engineer should be briefed by counsel or the carrier regarding the limits that apply to the matter. Recent appellate and Supreme Court case law has trended towards expanding the scope of purview of the appraisal panel to determine issues which previously had been reserved for litigation. Although it would appear to be a straight forward matter for the forensic engineer to assess damage, this issue in fact may be more complex and nuanced than initially recognized. It may be necessary to understand how loss is defined in the specific insurance contract and the adjustments which may have been made by case law. It may be useful for a representative of the carrier to provide testimony regarding the coverage issues. A common issue which arises in evaluation and appraisal of property damage claims which can be contentious relates to issues of appearance and matching color of materials. Insurance contracts may use terminology such as "similar" or "comparable" or "like kind and quality" in defining repair materials. As noted, recent appellate and Supreme Court

case law in the State of Minnesota has provided some guidance on assessing these issues. The appraiser needs to have a working knowledge in applying the guidance. The notions regarding matching vary with the States and the appraiser must be aware of the limits in the jurisdiction of locale of the loss. Material matching issues may be central to the appraisal and may be the primary driver of costs of repairs. Prior to the recent court decisions, the issue of matching was seen as a cosmetic issue not as a damages issue. The court found that the issue of difference in or “reasonable match” in color of siding constituted a loss and found that it was within the purview of the appraisal panel to determine. Previously, the issue of matching was reserved for litigation. In general, the case law has served to broaden the scope of authority of the appraisal panel. The forensic engineer acting as an appraiser or in the role of neutral umpire in an insurance appraisal therefore must be able and willing to render a determination as to “reasonable match” with respect to appearance in proposed materials for repairs. This issue may come to the fore, for example, when there is storm damage on one or two elevations of a structure or one side of a roof and siding or windows of a certain vintage are damaged by hail, wind or wind-borne debris and the windows may no longer be made and the siding is no longer available. The notion of reasonable match which does not necessarily mean exact likeness and type of material is an important concept for the engineer who is participating in this process.

In appraising the loss it is necessary to determine what is damaged and how damage is defined. In the published decision, the Minnesota Supreme Court referred to a State of Wisconsin decision in defining damage and repair. “*The Farmers Automobile Insurance Association, Plaintiff, v. Union Pacific Railway Company, Defendant. Joseph P. Donaubaauer, Plaintiff-Appellant-Petitioner, v. The Farmers Automobile Insurance Association, Defendant-Respondent, Union Pacific Railroad Company, Defendant (2007AP1992).*” In this decision the notion of repair was determined by the court not to mean “brick for brick, fixture for fixture” reconstruction meaning that appropriate repair did not mean exact duplicate of the property prior to the loss.

The purpose in providing the two references above is to illustrate that appraisal of damage and appropriate repair may be conditioned upon case law and would vary from region to region. Therefore the engineer acting as appraiser or neutral umpire should obtain working knowledge of these aspects of the work so as to apply them.

Appraisal Considerations

The appraisal process contains essentially no rules or specific process. There may be no discovery. The appraisers are required to be disinterested, meaning that they have no other interest than being paid for their time and expenses, and do not have a direct or indirect benefit from the outcome of the appraisal. Engineers participating in the appraisal process need to be aware of some potential pitfalls which vary in different states. Those acting as appraisers or neutral umpires should become aware that, although not specified in writing, essentially the same precepts as put forth in the Uniform Arbitration Act have been applied to disputes arising out of appraisals. For example, an appraisal award may be

vacated if the panel fails to permit a party to be fully heard, *Schoenich v. American Ins. Co.*, 109 Minn. 388,391 (1910). This case relates to the panel refusing to allow the parties to introduce their evidence. Per the court; “The referees selected to adjust a loss occurring under the Minnesota standard policy are not vested with absolute authority to make independent investigation and base their award on the result thereof, but are required to give interested parties reasonable opportunity to present evidence bearing on the case. The failure to grant such opportunity, unless waived, may vitiate the award.” It is incumbent upon the appraisers to hear any witnesses that the parties wish to produce.

Appraisers should take care so as not to “perform independent investigations”. It is usual practice for appraisal panels to visit the site of a loss and make observations, hear testimony from witnesses, and to review and consider documents and evidence submitted by the parties. The individual appraisers and the appraisal panel will usually be provided with and expected to review the documents along with the neutral umpire prior to the appraisal. The observations of the loss site and review of the documents produced prior to the appraisal does not constitute independent investigation. However, individual appraisers are not permitted to make independent investigations. “Independent investigation” has been ruled when appraisers privately collected evidence without the knowledge of the full panel. The Supreme Court of Minnesota in *Christianson v. Norwich Union Fire Ins. Soc.*, 84 Minn. 526, 530 (1901) issued a ruling which gives guidance on these points. Although the matter involved an arbitration to determine the loss related to a fire, the elements of this decision have been referenced in matters in which appraisal was the method of determining the loss. The court found; “Such board should sit in a body, and receive evidence offered by the respective parties, submitting the same to the usual tests of cross-examination. While its individual members are prohibited from privately collecting evidence from different sources, a reasonable latitude is allowed them in the examination of the premises, remnants of goods, and causes of the fire, for the purpose of better understanding and weighing the evidence on the principal question before them, viz. what is the just damage to the property involved? But, while a certain liberality is permissible in acquainting themselves with the circumstances surrounding the fire without the medium of witnesses, such board is not selected for the purpose of seeking evidence secretly, and determining the amount of the loss by reason of such personal knowledge.” Appraisers should not visit the scene of the loss or engage in evaluation of the loss independent of the panel unless specifically agreed by the panel. Other issues that might result in the vacating of an award could include fraud or collusion.

Protections

According to the Uniform Arbitration Act, “An arbitrator is immune from civil liability to the same extent as a judge in a court acting in a judicial capacity”. It is not the intention of the courts that appraisers be subject to cross-examination. The Uniform Arbitration Act does not discuss the appraisal process; however, the courts have applied the provisions of the act in disputes arising from appraisals. The engineer acting as an arbitrator or appraiser may wish to include contract language that includes the above immunity statements.

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