

Best Practices

BY TERI KIRK

Valuable time and rising litigation costs are forcing industry to take it out of the courts. Resolving disputes using e-business techniques is the wave of the future.

ILLUSTRATION BY SIMON NG

IMAGINE THE CONSTRUCTION WORKERS are on site and the equipment has not arrived. Suddenly you're stuck with a bill for wages on idle workers and the project is behind schedule. It's not your fault – maybe a supplier is to blame. Your recourse is to recover costs from the supplier, but you can't agree. There is a dispute – you don't see issues the same way. It seems the only solution exists through the legal system – to sue for your losses. But the cost of getting lawyers and staff involved in litigation are almost the same as the losses incurred and it's starting not to make sense. Also, time is of the essence, the project needs to get going or more losses will mount and litigation might cause more delays. The other factor – you want to preserve an otherwise positive business relationship with the other side. What are the options?

According to recent statistics, the

average value in dispute among companies in Canada is around \$40,000. Dialogue among business leaders cites cost and time as the top two concerns associated with litigation. So with average cost to the parties over \$50,000 per dispute – more than the average amount in claim – litigation can prove to be fruitless. Furthermore, the costs of litigation continue to mount by about 7% year-over-year. In fact, businesses in North America spend nearly \$40 billion US each year on legal fees associated with litigation. About 15% of all claims arise out of the construction sector – disputes with suppliers, contractors, trades and customers. Few are million dollar suits. The average amount in dispute in courthouses across the continent is \$80,000, with 86% of all claims under \$150,000. The average time to resolution in North American courthouses

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runs about 600 days. That’s nearly two years – way out of line with today’s just-in-time operating environment.

Alternatives to litigation need to be built into contracts to encourage companies to overcome differences outside of the court system. In response to the negative factors involved with the litigation process, insurers and other industry sectors are rapidly migrating to alternative dispute resolution (ADR). Estimates suggest around 50% of all commercial contracts now include mandatory ADR clauses targeted at eliminating litigation as a solution to business issues. Furthermore, with ADR becoming commonplace, the process is evolving into the modern realm of e-business.

It all began with a report by the McMaster University School of Business examining industry’s shift from litigation to ADR and the future of resolution management. The report recommended industry incorporate e-business tools into ADR. The same electronic tools normally used to conduct business processes should be deployed for the ADR process, the report outlined. “Online dispute resolution is a new and powerful way to resolve business disputes and has the potential to save companies much time and money,” the McMaster business school outlined. “(The process) draws on experienced ADR professionals [and] adapts ADR rules and practices to take advantage of the Internet and to provide parties with Web-enabled tools to enhance problem-solving.” Indeed, industry has an appetite for incorporating information technology into new avenues.

Using e-business solutions received further support in 2000. The Canadian e-Business Opportunities Roundtable established a forum for dispute resolution. The roundtable led to a federal funding initiative and resulted in the development of The Electronic Courthouse by NovaForum Inc. (now known as DRS Services), available at www.ElectronicCourthouse.com. “The Electronic Courthouse was created to provide a centre of excellence for ADR in today’s business market, focusing on insurance and similar disputes in the \$10,000 to one million dollar range,” says Robert Kuh, an account executive with the company.

While most litigation costs are incurred prior to a trial, the ADR process is designed to streamline preparation stages. The Electronic Courthouse service modules include model forms to prepare submission and supporting documentation, secure electronic filing and an online legal database with more than 70,000 answers to commonly asked legal questions, and translation services.

The Electronic Courthouse carries a roster of resolution professionals including members of most major law firms throughout Canada. Services by the Electronic Courthouse are offered as part of the Canadian Bar Association’s Member Services provider program. “At the Electronic Courthouse, we match the needs of the parties with the skills and experience of our resolution professionals, with the parties making the ultimate choice,” Kuh says. He adds that the service works for the entire spectrum of Canadian businesses including the construction industry.

“There is no doubt that the construction industry is looking for fast and affordable dispute resolution processes and access to mediators and arbitrators who know our industry and can be fair and neutral in resolving disputes,” says Rob Graesser, a governor of the Canadian College of Construction Lawyers and lecturer on construction law at the University of Alberta. “The service (Electronic Courthouse) allows me, as a mediator, and the parties, to benefit from standard forms, rules of procedure, and other resources accessible through the Internet to assist them in moving from dispute to resolution.”

Speedy resolution to disputes is the objective whether it be through litigation or ADR. ADR through the Electronic Courthouse is both time and cost efficient compared to litigation through the court system. The average time to resolution is significantly quicker – between 20 and 90 days. Cost savings are huge – 99% less costly than litigation, Kuh says. Parties are guided through a resolution process incorporating the steps involved in a conventional dispute resolution, he says. The Electronic Courthouse simply provides (ADR) e-service options each step of the way. Sides do not even have to meet face-to-face.

Things to Know About Effective Dispute Resolution

Avoid litigation from the start

Mandatory mediation and arbitration clauses are now included in about half of all commercial contracts. These clauses can be tailored to fit preferences by specifying, for example, whether mediation (facilitated negotiations of a settlement) or arbitration (binding decisions of a third party neutral) will apply. Model ADR (Alternative Dispute Resolution) clauses are available to download from the Electronic Courthouse home page.

Preserve the relationship

It is very difficult to engage in litigation and preserve the relationship with the supplier, contractor or customer. A fast affordable ADR process allows resolution improving the chances of preserving business relationships.

Reduce costs

ADR is widely recognized as a cost effective alternative to litigation. However, cost savings are only assured if clear rules governing the ADR process, including time standards, are in place. A good ADR service provider will ensure the sides are committed to a set of rules to move quickly and affordably through each step. A well-drafted ADR clause should require both parties to share the costs of the process up front, while authorizing the resolution professional to re-appportion costs according to the success of the parties.

Decrease the average time to resolution

If matters proceed to trial in a dispute through the courts it can take up to four years. A good ADR service provider can provide time standards allowing parties to choose different time tracks: a fast track (20 days) or moderate time track (60 days).



Reduce demands on personnel

Litigation imposes enormous demands on personnel, often at the most senior levels. An effective ADR process will reduce the amount of time required by managers and external counsel to achieve resolution.

Build the brand

Any competitive business must champion its friendly professional services and steady customer relationships. Litigation tends to undermine these core messages. Speedy and confidential ADR practices can augment, rather than undermine, your customer value proposition and brand.

Keep it confidential

Commercial disputes are never a company's finest hour and airing these issues in the public courts is, generally, best avoided. Confidentiality clauses should form part of an ADR best practices regime.

Use technology to optimize efficiency

Many of the steps from dispute to resolution can be carried out or facilitated through IT-assisted tools designed to reduce turnaround time, streamline document processing and reduce meeting time. Automated tools should be e-service options allowing choice among conventional or IT-assisted processes to carry out a step in dispute.

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“The e-service allows parties to meet electronically in a resolution room,” Kuh explains. The Electronic Courthouse sets up a resolution room and a separate secure electronic workroom for each side. Each can work independently in the secure room on draft documents, sharing and receiving input and other documentation from counsel or other designated participants, he says. “The parties will use the resolution room and their secure workroom to better assess the other party's position and consolidate their own,” Kuh adds. The parties work through the electronic medium to meet a pre-determined resolution date.

“The Electronic Courthouse offers contractors the opportunity to resolve construction claims in a timely and affordable way without damaging the relationships that are so vital to future business interactions,” says Stephen Kushner, president of Merit Contractors Association.

Contractors need to be willing to take the first step in dispute resolution which means the ADR method has to be put into the initial contract. That small step virtually guarantees a quick and cost effective mechanism to finding the best business solution.

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E-commerce has become a business foundation and ADR is not far behind. Taking dispute resolution into the electronic world is a practice catching on that can only result in better outcomes for Alberta contractors. 