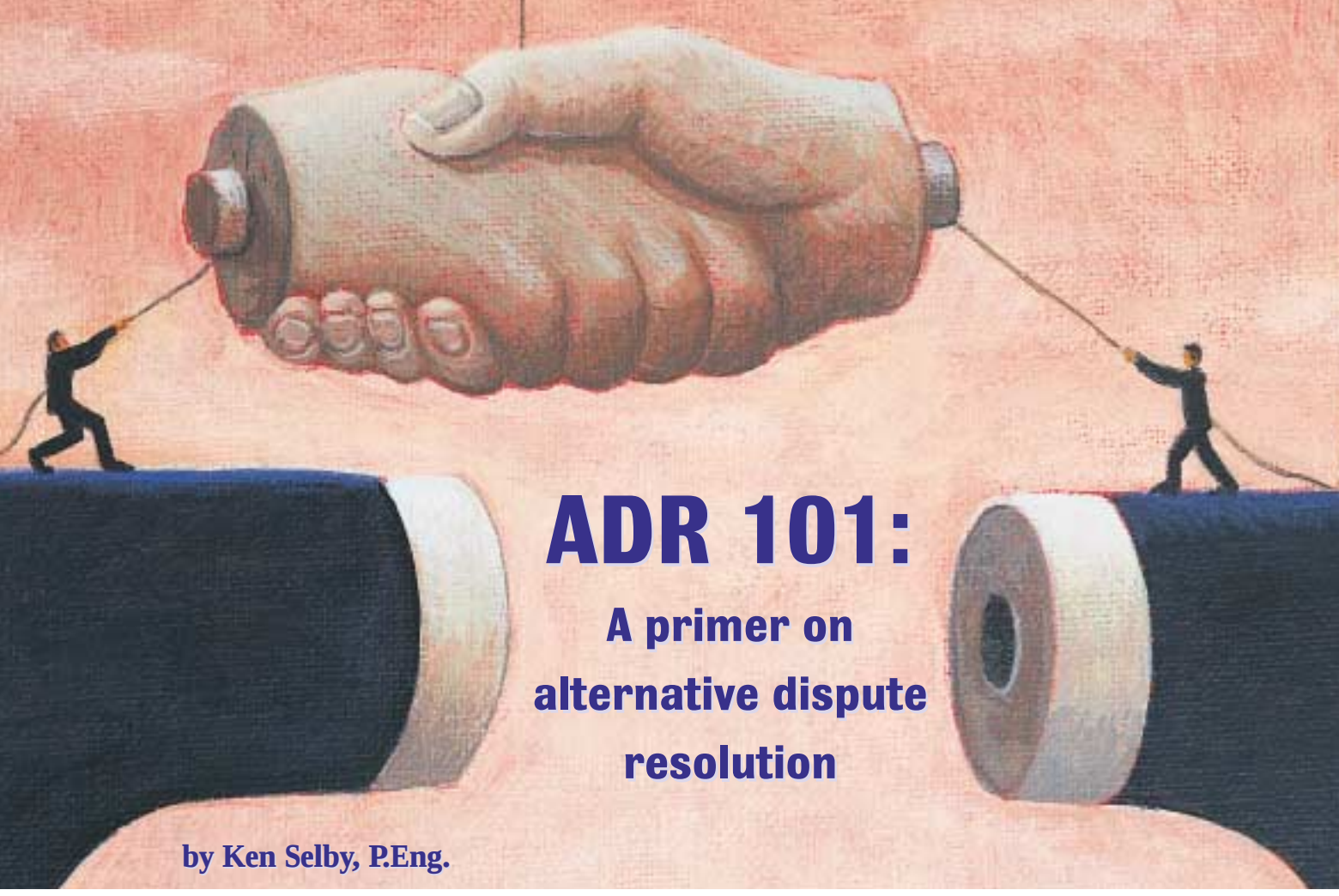

ADR 101:

A primer on alternative dispute resolution

by Ken Selby, P.Eng.

There are a lot of reasons to avoid being involved in legal proceedings, not the least of which are time and money. There's another way to tackle disputes and the day may come when it's the only game in town.

Courts have handled disputes for centuries. But resolving differences in them is a costly, time consuming, risky and often frustrating process. And following a court case few disputants are satisfied with the outcome.

Since over 97 per cent of lawsuits eventually settle before a judgment is rendered, it makes sense to seek early settlement, before large legal costs have been incurred by those in dispute. The term "alternative dispute resolution" (ADR) was chosen to represent an alternative to an overburdened court system.

ADR is generally private and confidential, while the court system is public with judgments being written and widely available for use as precedents. In a legal proceeding, the parties make very little direct input to the court system, while they can be more involved and have more control over the alternative processes. If the adversarial court process is replaced by a more collaborative procedure, there is a better chance of maintaining a business relationship. Often, very little attention is paid to the dispute resolution options before a problem arises. While there are many options that fall under the ADR umbrella, mediation and arbitration are by far the most commonly used. A mediation session is typically conducted first, and only if matters do not settle does arbitration follow.

As far as engineers are concerned, the construction industry has the greatest number of disputes. Recently, I mediated one in which many issues were discussed over several days. The contract required the use of mediation. Often, there were five engineers and two architects at the table acting as consultants or representing the several parties. Most of the issues were settled, but some were not. My next assignment was to arbitrate a four-party dispute involving an owner, a contractor, a subcontractor and a supplier. The submission to arbitration was made into a court order and it consolidated two court actions. One engineer was involved on the contractor's team and both of the expert witnesses were engineers. On the third day of hearings, it was settled. Clearly, engineers play a large and varied role in the resolution of these kinds of disputes.

New mandatory program

Courts in the cities of Toronto and Ottawa are now mandating mediation before most of the civil (non-criminal) cases can be litigated. Among the few exceptions are disputes involving construction liens. It is intended that this system will spread across the rest of the province when the courts are ready for the change. Ontario Chief Justice Roy McMurtry has stated that "atti-

tudes must change and counsel must realize that suggesting ADR mediation or arbitration is not a sign of weakness but often a sign of strength."

This compulsory program is causing a change in the practice of most litigators. Some are embracing the mandatory program and marketing themselves as problem-solvers, while others view mediation as an unnecessary obstacle to carrying on their practices. About half of the mandatory mediations have been settling. In contrast, some organizations report an 85 per cent success rate when the parties' attendance has not been mandated.

Coming soon to an act near you

Increasingly, provincial and federal acts are being rewritten to include provisions for ADR instead of continuing to rely upon the court system. In 2001, Ontario's *Condominium Act* began requiring mediation–and if necessary arbitration—for most types of condo disputes. Previously, these would have required going to court.

As far back as 1994, the federal Department of Justice announced that it intended "to play a leadership role in promoting alternatives to courtroom litigation." The ministry stated that "the development of mechanisms for alternative dispute resolution are not simply options–they are imperative." Public Works and Government Services Canada implemented a project in 2001 requiring mediation and arbitration procedures when dealing with companies in Canada's construction industry.

It's in the contract

When direct and unassisted negotiations are unsuccessful, contracts increasingly require multi-step dispute resolution provisions. A stipulated price contract (referred to as a CCDC 2 -1994) is standard for building construction. This requires mediation and arbitration to resolve disputes. A companion document (CCDC 40 - 1994) provides rules and timelines that govern the administration of these disputes. CCDC 2 is now about eight years old and a number of changes are being considered to reflect the industry's collective experience. One can accept such standard contacts as they are written, delete clauses, or add supplementary conditions to meet the specific needs of the project. For example, the Lester B. Pearson International Airport uses these dispute resolution rules with a few supplementary conditions for their large design/build contracts. PEO's *Guideline on Use of Agreements between Engineer and Client for Professional Engineering Services* (including a sample agreement) also includes provisions on fees mediation and arbitration of disputes. It is available under Publications on PEO's website. Printed copies may be purchased by contacting PEO's publications desk.

Organizations that construct a large number of projects often create their own standard contract documents, which also periodically get revised after they have been found to have deficiencies. One such example is Ontario's Ministry of Transportation, which has many construction projects underway at any given time. Its standard contract document includes a referee system for major projects. The Toronto Transit Commission uses dispute review boards (DRBs) for such big projects as its new Sheppard subway line. Each of these organizations is effectively using a speedy form of non-binding arbitration, which is designed to minimize any delays associated with the resolution of disputes. The decision of the pre-selected referee or board is almost always upheld; however, it can be challenged if either party wishes to do so. Parties and their lawyers frequently get caught up in self-interest and effectively ignore any facts or law that support the other side. Independent referees or DRBs are selected to act as objective agents of reality.

At any time, the parties can agree to use ADR even after a court action has been commenced. However, it is usually difficult to get disputing parties to agree; indeed, they are often barely speaking to each other. To save their clients' time and money, some law firms are now encouraging them to settle their differences rather than battling it out in the litigation stream.

What is mediation?

With mediation, a neutral and impartial third party with no decision-making power, assists the disputing parties by:

- creating a settlement meeting;
- facilitating constructive communications;
- identifying the parties' needs and interests;
- establishing options and considering advantages of each;
- assisting the parties to reach a consensus; or
- improving their understanding of the positions/issues before adjudication.

Ontario's Mandatory Mediation Program encourages mediators to use this facilitative approach. There are some disputants who want and some mediators who use a more evaluative approach. In these cases, mediators tend to assess how they believe a court would deal with the facts.

Parties using mediation are often represented by legal counsel. There are cases where parties are represented when only a few thousand dollars are in dispute, while other disputes involving more than a million dollars can find the parties without counsel. The money involved and the knowledge of the parties would typically play a role in whether counsel is required.

How is a mediator chosen?

There are many who believe that all a mediator requires is good generic mediation skills. Others suggest that in certain areas it is wise to have a mediator familiar with the subject area. In his book *Mediating Legal Disputes*, Dwight Golann states that in more complex cases, a mediator's "lack of detailed knowledge about the subject matter or prior history of a dispute can be a weakness that is impossible to rectify on an ad hoc basis. This has fueled a trend for mediators to specialize in certain subject areas, such as construction or patent disputes. If they do not know about the particular case, it is thought, they will at least be familiar with the issues that arise in the area. Subject-matter knowledge is always desirable in a neutral, provided that he or she has strong process skills."

There are several ways of finding a mediator. The attorney general's office has a roster for mandatory mediation with several

hundred mediators who passed its screening procedure. The parties either agree on a mediator by a deadline or the program coordinator will have one assigned to mediate the case. The ADR Institute of Ontario has more than 500 members from a wide variety of backgrounds, and several potential names can be provided or a mediator can be assigned if required. Those involved in many disputes often share their knowledge of potential mediators. Some large law firms keep a database indicating their experiences with given mediators.

Consider a construction dispute between an owner and a contractor. Often each side suggests several possible mediators. There is a tendency to be suspicious about the other party's choices. A balanced set of related experiences increases the chance of a mediator being ranked high by both parties. Effective resolution of similar disputes could also be important in the selection process.

What is arbitration?

The ADR Institute of Canada defines arbitration as a "legal procedure for resolving disputes using one or more neutral decision makers called arbitrators." Assuming an Ontario dispute is being dealt with, the governing legislation is found in the *Arbitration Act* R.S.O. 1991. Different acts would normally govern federal or international disputes.

The Ontario act has 57 sections but only six of them are compulsory. This means that the parties can craft an arbitration agreement to make the process more efficient for their circumstances. The essential sections are: matters being arbitrated cannot be litigated; parties must be treated equally and fairly; court may extend time limits; grounds upon which a court may set aside an award; grounds for a non-participant to have award set aside; court will enforce an award.

It is often specified that the arbitration will be final and binding. By eliminating errors in fact or law as a possible cause, this wording significantly reduces the opportunity for a dissatisfied party to appeal the award. There is normally a 30-day period for the correction of any errors found in an award. The parties can establish pleadings and set deadlines and other administrative procedures in the arbitration agreement. Alternatively, the contract may state or the parties agree that the administration aspects of the arbitration would be carried out by an organization like the ADR Institute.

With arbitration, documents are produced, discovery may occur, fact and expert evidence is presented in a similar fashion to litigating in the courts, and an award is made. If not controlled, the process can become almost identical to litigation, losing much of its possible advantage. Since the parties are paying for the arbitrator(s) and possibly for the hearing room, this would make arbitration of questionable value. It is therefore necessary for those involved, especially the arbitrator(s), to balance control of the process with treating the parties "equally and fairly" and not to stray from the disputed issues listed in the agreement.

Parties can consolidate a number of issues into a single arbitration. In addition, anyone who might be involved in a dispute can join the arbitration. For example, it would not make sense for a contractor to be awarded most of a claim in arbitration against the owner and then turn around and take the consulting engineer or architect to court seeking the balance.

How is a tribunal chosen?

A tribunal can be a single arbitrator or a panel of three. One arbitrator would be less costly than three; however, three allows for more balanced experience. If a single arbitrator is to be used, both sides would likely produce several possible names and a match would be sought following ranking. If there were three parties each represented by counsel and the panel involved three arbitrators, it would be necessary to establish a number of hearing days when all nine people could be available. This might result in a delay of months, so you might wish to establish availability before finalizing the selection.

With a panel of three, each side often picks one arbitrator and that pair selects a third party to chair. For a very complex technical dispute, this combination could be an engineer or architect representing each of the parties and perhaps a former judge to chair the tribunal. This would provide some balance between the technical aspects of the dispute and the legal requirements. A major role for the chair would be to see that nothing occurred during the arbitration that would allow the award to be appealed. As with the court system, an arbitrated dispute can be settled before an award is made.

It is also possible for organizations such as ADR Ontario to name arbitrators and/or administer the dispute according to the national *ADR Canada Rules for Mediation and Arbitration*. If the parties cannot agree on a tribunal, the *Arbitration Act* provides for the court to name the arbitrator(s).

What to look for

A survey on mediator selection for construction disputes was reported by the American Arbitration Association. Nearly 700 American lawyers with construction practices ranked factors–from the most important to the least–in choosing a mediator for a construction dispute. The number in brackets is the average rating, 1 being the highest.

1. (2.36) subject matter expertise
2. (2.86) reputation
3. (2.89) mediation experience
4. (3.73) acceptability to all parties
5. (3.94) mediation style
6. (4.73) size of claim
7. (4.88) legal experience
8. (5.71) mediator's experiences

They were then asked if they would select lawyers as mediators. Despite subject matter expertise having the top priority in their own list, and legal experience placing seventh, 92 per cent selected lawyers.

Here are some tips from the American Arbitration Association for those entering mediation:

1. Pick the mediator wisely
2. Be prepared (most aren't)
3. Identify the weaknesses in your case
4. Learn the weaknesses in your opponent's case
5. Know your actual damages
6. Calculate your transaction costs
7. Be sure that decision makers will be involved
8. Consider the team approach
9. Present a condensed story
10. Use winning graphics
11. Know your bottom line
12. Keep your cool
13. Make settlement less onerous for your opponent
14. Be prepared to make a painful business decision

If those involved are careful, arbitration can start sooner, take less hearing time, be less costly and be more flexible than the court process. This flexibility facilitates hearings near a project, including site visits, allows for extended hearing hours, and makes possible the use of modern technology regarding the supply of documents and recording of testimony. The disputants can have greater control over both the process and the choice of the arbitrator(s).

Where is ADR going?

The court system is aiming to reduce the backlog of cases in the interests of fairness and to cut government costs. In addition to the mandatory program, both contracts and legislation are tending to require more efficient and effective dispute resolution.

More disputants are becoming better informed that there are alternatives to court and they are increasingly seeking fair, fast and cheaper solutions. A reasonable settlement is almost always a better business decision than protracted litigation.

It should be noted that those who insure engineers for professional liability indicate that the ratio of claims to policies is increasing, which is causing premiums to rise. The large majority of these claims relate to engineers associated with the construction industry.

Ken Selby, P.Eng., is vice president of the ADR Institute of Ontario.