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TURNING TO ONLINE DISPUTE RESOLUTION IN RESPONDING TO UNEXPECTED RISES IN CONSTRUCTION COSTS

Jonah Lax

The pandemic has caused the price of construction materials to increase at historic levels.¹ For example, in June 2021, the price of softwood lumber was up 125.3% from twelve months prior, and the price of soft plywood products was up 207% over that same period.² This put contractors with fixed price contracts in a difficult position of either keeping their commitment at a significant loss or facing a breach of contract claim. A fixed price contract or stipulated sum contract in construction is where parties set a total established price upfront for the entire project.³ Fixed price contracts accounted for 80% of residential construction contracts in 2020.⁴

Currently, it is difficult to terminate a fixed price contract when a price increase is the sole determining factor. In the 1987 case of *Langham-Hill Petroleum Inc. v. Southern Fuels Company*, the Fourth Circuit pointed out that “[i]f fixed-price contracts can be avoided due to fluctuations in price, then the entire purpose of fixed-price contracts, which is to protect both the buyer and the seller from the risks of the market, is defeated.”⁵ This leaves contractors with limited ways in which to deal with the large cost increases.⁶ Often, the best option is alternative dispute resolution (“ADR”).

Construction disputes are well suited for ADR because the parties—whether they are contractors, subcontractors, property owners, design professionals, or other parties involved in a significant construction project⁷—have a heightened interest in resolving matters swiftly, as time is of paramount importance.⁸ During the building, renovating, or repairing stages, use of the premises is at best restricted and is often entirely useless. As is often said, “time is money,” and

¹ Michael Rudy, *Construction Materials Prices Rises Spread*, YIELD PRO (July 14, 2021), <https://yieldpro.com/2021/07/construction-materials-prices-rises-spread/> [<https://perma.cc/DW6G-GFSJ>]; *Economic News Release*, U.S. BUREAU LAB. STAT., <https://www.bls.gov/news.release/ppi.t02.htm> [<https://perma.cc/EB27-ZUJJ>] (last visited Jan. 9, 2022). The reason for these price increases is attributed to a number of factors coming together at once. See Bill Conerly, *Why Lumber and Plywood Prices are So High—And When They Will Come Down*, FORBES (May 22, 2021, 7:30 AM), <https://www.forbes.com/sites/billconerly/2021/05/22/why-lumber-and-plywood-prices-are-so-high-and-when-they-will-come-down/?sh=19b4e9f54b71> [<https://perma.cc/J9TD-SA52>].

² Rudy, *supra* note 1.

³ Juan Rodriguez, *4 Common Types of Construction Contracts*, BALANCE SMALL BUS. (Nov. 30, 2020), <https://www.thebalancesmb.com/common-types-of-construction-contracts-844483> [<https://perma.cc/7NGV-8BWB>].

⁴ Harry Wahl, *Builders Use Fixed Price Construction Contracts 80% of the Time*, COCONSTRUCT (Nov. 23, 2021), <https://www.coconstruct.com/blog/builders-use-fixed-price-construction-contracts-80-of-the-time> [<https://perma.cc/A37X-AT9L>].

⁵ *Langham-Hill Petroleum Inc. v. S. Fuels Co.*, 813 F.2d 1327, 1330 (4th Cir. 1987).

⁶ Other potential ways out of a contract are by utilizing a force majeure clause or citing frustration of purpose. However, success is unlikely. See Daniel E. Fierstein *Rising Cost of Construction Materials and Its Effect on the Legal Landscape*, LEGAL INTELLIGENCER (Aug. 11, 2021, 11:23 AM), <https://www.law.com/thelegalintelligencer/2021/08/11/rising-cost-of-construction-materials-and-its-effect-on-the-legal-landscape/> [<https://perma.cc/E2NF-LW2T>]; Laurie Stanziale, *COVID-19 Impacts On Construction Contracts: Legal Arguments For and Against Performance*, JD SUPRA (Sept. 13, 2021), <https://www.jdsupra.com/legalnews/covid-19-impacts-on-construction-5855673/> [<https://perma.cc/JK8F-5PX3>].

⁷ *ADR for Construction Disputes: Understand Your Options*, LUCAS & HAVERKAMP, <http://lucashaverkamp.com/adr-for-construction-disputes-understand-your-options/> [<https://perma.cc/Y739-8FDF>] (last visited Jan. 9, 2022).

⁸ Robert J. Kaler, *Construction Law Recognizes That “Time Is Money”*, MOD. CONSTR. SOL. (Mar. 26, 2018), <https://mcsmag.com/construction-law-recognizes-time-money/> [<https://perma.cc/S7FK-U5PA>].

it is essential that disputes are resolved expeditiously—which seldom occurs if litigation is pursued.⁹ Another consideration in using ADR practices in resolving these disputes is that it is important for the relationships between the parties to be maintained, as these relationships can span multiple projects.¹⁰ Using mediation or arbitration can spare these relationships by avoiding the full-out war of litigation.¹¹

While classic ADR practices are often effective in resolving construction disputes, online dispute resolution (“ODR”)—a subset of ADR where the dispute is resolved through technological means and, often, by using automated systems¹²—can lead to further optimization of successful mediations or arbitrations.¹³ ODR has been discussed for a long time; however, it was ultimately during the pandemic that ODR became even more widespread.¹⁴ The flexibility of an online forum—where parties have the ability choose mediators from any geographic location in the world—can enhance resolution. As construction is a complex field and can be highly technical, having a mediator with expertise allows for a well-tailored solution. Additionally, with arbitration, expert witnesses can be brought on without needing to worry about geographical constraints.¹⁵

Interestingly, the flexible nature of ODR can, at times, be counterproductive and instead inhibit settlement. Because certain traits of in-person mediation encourage settlement, fewer end-of-the-day settlements happen when the hassle of physically going into a building for another day of mediation is replaced with the convenience of online mediation.¹⁶ Another component that is lost in an online forum is the emotional or human connection, which is often conveyed through non-verbal communication.¹⁷ These guiding factors can help mediators in zeroing-in on potential

⁹ Edna Sussman, *Why Arbitrate? The Benefits and Savings*, OCT-2009 NYSBA J. 21 (Oct. 2009), <https://sussmanadr.com/wp-content/uploads/2016/07/why-arbitrate-NYSBA-Journal-Oct-09-.pdf> [<https://perma.cc/976A-93AZ>] (“[F]or state court contract cases in the 75 largest U.S. counties, the average length of time from case filing to trial in jury cases was 25.3 months.”).

¹⁰ Michael Emerson, *Mediation: Achieving Client Driven Solutions and Preserving Business Relationships (From a Former GC’s Perspective)*, JD SUPRA (Oct. 18, 2019), <https://www.jdsupra.com/legalnews/when-mediation-makes-sense-preserving-90179/> [<https://perma.cc/5RYM-JDHX>] (“[Mediation is] a way for parties that are in a significant business relationship and wish to continue it to resolve their disagreements.”).

¹¹ *Id.*

¹² ABA CENTER FOR INNOVATION, *ONLINE DISPUTE RESOLUTION IN THE UNITED STATES: DATA VISUALIZATIONS 1*, AM. BAR ASS’N (Sept. 2020), <https://www.americanbar.org/content/dam/aba/administrative/center-for-innovation/odrvisualizationreport.pdf> [<https://perma.cc/DH6W-4SV7>].

¹³ Albert Bates Jr. & R. Zachary Torres-Fowler, *ADR for Construction Disputes During COVID-19: How to Manage Dispute Resolution Before and After the Dust Settles*, JD SUPRA (May 4, 2020), <https://www.jdsupra.com/legalnews/adr-for-construction-disputes-during-69737/> [<https://perma.cc/N3X4-8U7G>] (“While mediation and negotiation discussions inevitably require the parties to assess the veracity of the other parties’ positions, commercial considerations are typically the driving factor in reaching an amicable resolution.”).

¹⁴ Alberto Elisavetsky & Maria Victoria Marun, *Online Dispute Resolution (ODR): The Great Tool in Times of Pandemic*, MEDIATE (May 2020), <https://www.mediate.com/articles/elisavetsky-odr-pandemic.cfm> [<https://perma.cc/4WM3-YT8H>].

¹⁵ Anjelica Cappellino, *A Guide to Using Experts in Arbitration*, EXPERT INST. (Nov. 2, 2021), <https://www.expertinstitute.com/resources/insights/a-guide-to-using-experts-in-arbitration/> [<https://perma.cc/3QCN-PD8G>].

¹⁶ Scott D. Cessar, *Construction Litigation & Pandemic Perspectives*, CONSTR. BUS. OWNER (Oct. 2020), at 17, <http://digital.constructionbusinessowner.com/october-2020?m=38804&i=673512&p=18&uri=%2Foctober-2020&ver=html5> [<https://perma.cc/JZB8-6M72>] (“Many cases mediated in person settle late in the day based on the sense of urgency of getting something done. . .”).

¹⁷ Michele M. Feeney & Amy Lieberman, *Planning for Success in Online Mediation*, ARIZ. ATT’Y (Nov. 2020), at 57, <https://www.azattorneymag-digital.com/azattorneymag/202011/MobilePagedReplica.action?pm=2&folio=56#pg59> [<https://perma.cc/3KPD-Q9WN>] (“Some things that created emotional connection in pre-COVID mediations are no longer possible.”).

solutions, but are largely absent when the sessions are conducted in a virtual environment.¹⁸ However, others have pointed out that platforms such as Zoom allow all participants' faces to be viewed simultaneously, offering a better read on the parties' facial cues and emotions.¹⁹

The move to online ADR was once considered novel, but due to the pandemic, it is now commonplace.²⁰ ODR's efficiencies can be utilized to swiftly resolve construction contract disputes, and if mediators and arbitrators gain proficiency in the various technologies, ODR will be a formidable contender among mainstream ADR practices.

¹⁸ Noam Ebner & Jeff Thompson, *Face Value: Non-Verbal Communication and Trust Development in Online Video-Based Mediation*, 1 IJODR 103, 110–11, 119–20 (2014) (Discussing that online mediation is deficient in utilizing the METTA Model of Nonverbal Communication. METTA stands for Movement, Environment, Touch, Tone, and Appearance.).

¹⁹ Jeff Trueman, Cecilia B. Paizs, & John Greer, *No Need to Panic: Online Dispute Resolution Works*, 2 MD. BAR J. 140, 142 (2020), https://issuu.com/marylandstatebarassociation/docs/issue_2_2020_maryland_bar_journal_magazine___msba-/s/11101289 [<https://perma.cc/JC92-AR7D>].

²⁰ ODR is now so common that courts have produced guidelines specifically for online mediation. *See e.g., Using Zoom to Conduct Online Mediation: Considerations and Resources for Community Dispute Resolution Program Centers*, MICH. SUP. CT. (Apr. 2020), https://www.courts.michigan.gov/siteassets/odr-temporary/documents/zoom-online-mediation-considerations-v1.pdf/?404%3bhttps%3a%2f%2fmisc01mstru25qprod__d17f%3a80%2fAdministration%2fSCAO%2fOfficesPrograms%2fODR%2fDocuments%2fZoom+Online-Mediation+Considerations+v1.pdf=&r=1 [<https://perma.cc/ECK4-3TBS>].