Construction Report

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PROBO-JUDGES: Will Computers Decide Your Next Construction Dispute?

Mediation and arbitration clauses are common in construction contracts these days. Technology has also started to find its way into contracts and on to job sites. Could the two now be combined to impact construction in an even bigger way? An article I recently read in the Wall Street Journal seemed to suggest that the answer could be yes.

The author of the piece, Vanessa McConnell, queries whether computers can solve legal disputes and reports that GE, in an effort to save litigation costs incurred in disputes with contractors and suppliers, has started to selectively use a new procedure called "cybersettlement" to resolve certain project disagreements. This dispute resolution process has been included in some of GE's service and supplier contracts in the European oil and gas markets to handle claims of $65,000 or less. While its inclusion has been largely limited to these operations, the suggestion is that GE has found some success with it and may be considering its use on our shores soon.

"Cybersettlement" works as follows. If a dispute arises, the claimant pays a $500 filing fee and both sides upload relevant documents to a designated website. At the time of the initial submission, the parties also each enter 3 predetermined settlement figures in anticipation of a settlement "auction". Claimant lists its settlement demands in descending order and the defendant lists its offers in ascending order. A computer then compares the numbers in order from highest to lowest (claimant) and lowest to highest (defendant) in a double blind process. If a demand and offer in any of the rounds overlaps, a settlement is reached and the $500 fee is then split equally.

If no settlement is reached, the dispute moves to an online arbitration after an additional payment of $1,000. The previously uploaded documents are transmitted to a single staff engineer designated by the International Centre for Dispute Resolution for review. That engineer then evaluates the claim, determines a winner, and communicates his or her decision to the Centre for transmission to both parties. No lawyers, witnesses, discovery, or hearing dates are required.

The jury is still out as to whether this process will work. It seems more than coincidence that it has not yet appeared in the United States given the Constitutional problems it might present. This issue aside, there are other possible pitfalls. It removes credibility determinations and tasks an engineer looking at documents to make an ultimate decision without any way to authenticate documents or understand context. For example, what happens when the party allegedly responsible for providing written notice submits a document suggesting it was given and the other side denies ever receiving it? An accurate determination of the issue becomes virtually impossible without witnesses and the opportunity to challenge credibility.

Second, the settlement negotiation is not really negotiation. There are many dynamics at play in settlement discussions, including a sense of fairness and trade-offs made between the parties. This auction style mediation does not allow for that fluidity. This online bidding process and subsequent arbitration also seems overly simplistic for complex and document intensive cases – especially without opportunity for argument by the parties and an opportunity to explain the significance of certain records.

Conversely, it is beyond question that the biggest complaints about litigation are cost and the amount of time it takes to get to the end. A simple procedure like this one provides more efficiency in both cost and time. The use of an engineer can also be helpful because it increases the chances of having someone who understands construction deciding the case. Finally, this process removes some emotion from the dispute and prevents parties from engaging in litigation tactics used to drive up costs or make the other side suffer. Rather, the focus remains on getting to resolution.

Ultimately, this approach merits further discussion and will no doubt garner attention. It will be interesting to see if it gains traction in both the business and legal communities.