



**US Army Corps
of Engineers**

Pamphlet 2

**ALTERNATIVE DISPUTE
RESOLUTION SERIES**



NON-BINDING ARBITRATION

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The Corps Commitment to Alternative Dispute Resolution (ADR):

This pamphlet is one in a series of pamphlets describing techniques for Alternative Dispute Resolution (ADR). This series is part of a Corps' program to encourage its managers to develop and utilize new ways of resolving disputes. ADR techniques may be used to prevent disputes, resolve them at earlier stages, or settle them prior to formal litigation. ADR is a new field, and additional techniques are being developed all the time. These pamphlets are a means of providing Corps' managers with up-to-date information on the latest techniques. The information in this pamphlet is designed to provide a starting point for innovation by Corps' managers in the use of ADR techniques.

These pamphlets are produced under the proponentcy of the U.S. Army Corps of Engineers, Office of Chief Counsel, Lester Edelman, Chief Counsel; and the guidance of the U.S. Army Corps of Engineers' Institute for Water Resources, Fort Belvoir, VA, Dr. Jerome Delli Priscoli, Program Manager. Dr. James L. Creighton, Creighton & Creighton, Inc., served as Principal Investigator.

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Non-Binding Arbitration

Alternative Dispute Resolution Series

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NON-BINDING ARBITRATION

This pamphlet describes "non-binding arbitration," a private dispute resolution process in which a dispute is submitted to an impartial and neutral person or panel who provides a written, non-binding opinion used as a guide for negotiations towards a settlement. Non-binding arbitration is one of a number of alternative dispute resolution techniques which the U.S. Army Corps of Engineers is using in an effort to reduce the number of disputes requiring litigation.

What is Non-Binding Arbitration?

Have you ever been in the midst of a conflict and longed for just one person who could be fair and objective? The people representing each side may have fixed or biased viewpoints. People's perceptions are often skewed by self-interest. In addition, both sides tend to be aware only of the facts which support their positions. More than that, there are often organizational pressures not to "give in." Acknowledging that the other side may have a legitimate point often implies a criticism of those people within your own organization who played a role in creating the impasse. So it's hardly surprising that the people involved in a lingering conflict have trouble seeing each other's point of view. But how would a person not involved in the conflict view the dispute? What would such a person think was a fair resolution of the conflict?

This idea of finding out what a fair, impartial person would feel about the dispute is at the heart of non-binding arbitration. Essentially the two parties present their facts and positions to a qualified neutral person (or a panel) selected jointly, and this person advises the parties as to what he or she believes are the facts and what would be a fair settlement. In

non-binding arbitration this opinion is just advisory. But normally it carries a great deal of weight because the parties should have confidence in the arbitrator they selected. Also, both parties recognize that if they completely ignore the arbitrator's opinion, it will probably mean that the dispute will be resolved only through costly litigation. So both sides are not inclined to stray too far from the arbitrator's opinion. Of course, in the final analysis, when non-binding arbitration is used, any settlement is a negotiated agreement entered into freely by both parties.

Why Use Non-Binding Arbitration?

Why would you use non-binding arbitration? There are several reasons:

- **Technical Fact-finding**
One of the features that makes non-binding arbitration attractive is the ability to select a technically respected expert who will be able to give an informed opinion based on the critical technical facts in the dispute. By using a technical expert, the parties will be assured that complex technical issues will be given due consideration, from an informed person. After litigation it's not unusual to hear people complain that "the Judge didn't have the

technical background to decide this case." In non-binding arbitration, the parties can select an arbitrator with the specific knowledge to understand complex technical facts and issues.

- **Impartial Opinion**

Since all parties participate in selecting the arbitrator, presumably all sides believe the arbitrator's conclusions will be fair and unbiased. The acknowledged need for a neutral party implies, of course, that you have already decided that the controversy should be resolved. An arbitrator, not having any history of involvement or stake in the outcome, can see the merits (or weaknesses) of both sides' positions in a way that they may not be able to do.

- **Avoid Problems of Litigation**

Even if the sides are polarized, it would still be possible to resolve the controversy in a court of law. Why not let the judge decide the case? There can be a number of reasons: (1) there are significant costs associated with litigation; (2) litigation may delay resolution for several years; (3) judges, who likely do not have technical backgrounds, will be asked to resolve technical disputes; (4) a judicial decision may be an all-or-nothing decision (a risk both parties must bear), while an arbitrator in non-binding arbitration has greater flexibility to recommend a settlement based on his or her perception of fairness; and (5) a negotiated agreement, even if achieved through non-binding arbitration, is more likely to maintain a favorable working relationship between the parties.

- **Overcomes Internal Pressure**

Not infrequently negotiators face pressures from people within their own organization to "hang tough" or "not let those guys get away with it." This may so tie negotiators' hands that they are unable to negotiate a reasonable agreement for fear of losing face within their own organizations. When an arbitrator issues a report with a recommendation, the negotiators can accept the arbitrator's recommendation without having "sold out" the organization to the other side. Because the arbitrator is presumed to be "fair and reasonable," there's less danger of appearing too "soft" if you accept a settlement proposed by the arbitrator. The arbitrator's analysis and recommendation provides a valid and reasoned basis for settlement.

- **Encourages a Decision**

Even though an arbitrator's recommendation (in non-binding arbitration, at least) does not "decide" the issue, it creates considerable impetus for a decision. It pushes the parties to make a decision, and get the dispute resolved. After the arbitrator's recommendation, any party avoiding a decision will be clearly seen as "foot-dragging" or "unwilling to bite the bullet." During negotiation, this failure to make a hard decision might be disguised for some time in the by-play of negotiation.

- **Timely Decision**

Non-binding arbitration is a way to get a timely answer to a difficult question, without the delay of litigation. Whether a single arbitrator or a panel is used, the parties are galvanized into action by the recommendation.

Other Forms of Non-Binding Arbitration

Although the description of non-binding arbitration above presents it in its "classic" form, there are several variations on the concept. For example, the Corps of Engineers is using a form of non-binding arbitration called "disputes review panels" on major construction projects as a way of preventing disputes from reaching the stage where litigation might be required. An arbitration panel is selected jointly by the Corps and the contractor before construction begins. The panel reviews disputes as they arise, recommends resolution, and work progresses. Experience shows that these panels have been effective in preventing disputes from halting work, and permit the Corps and contractor to maintain a solid working relationship.

Another variation on non-binding arbitration is the use of "settlement judges" to resolve contractual disputes, as practised by the Board of Contract Appeals. The Settlement Judge procedure allows the parties to present the case to a Judge who will render an advisory opinion on the merits. In most cases, the Settlement Judge will not be the trial judge should the issue fail to be resolved. The procedure allows the parties to get an informed evaluation of the case. Once the Settlement Judge has issued an opinion, negotiations begin between the parties.

Comparison with Other ADR Techniques

There are a number of alternative dispute resolution (ADR) techniques, of which non-binding arbitration is but one. Suppose for a minute that you are con-

vinced that the sides are too polarized for one-on-one negotiation, yet you know you don't want to go to litigation, how does non-binding arbitration compare with other ADR techniques? The two most likely alternatives to non-binding arbitration are mediation or the mini-trial.

In mediation, a neutral party would be brought in. But rather than trying to render any opinion as to the merits of the case, a mediator would try to bring about a negotiated settlement by ensuring a fair process, trying to improve communication between the parties, maybe even helping forge an agreement by serving as the communication link between the parties. One of the important factors in deciding to use non-binding arbitration, rather than mediation, is an assessment of whether the parties are capable of reaching a negotiated settlement without the added influence of a technical recommendation by an arbitrator.

The mini-trial, which is the other major option, is a structured process in which the sides make the presentation of facts and positions not to an independent arbitrator, but to senior management representatives of each of the parties who have little or no prior involvement in the dispute, but do have the authority to commit their organizations to a binding agreement. The management representatives often select a neutral advisor who can either chair the presentation, or advise on the technical aspects of the dispute. After the presentation, the management representatives get together, usually without attorneys or other staff present, and seek to reach a negotiated settlement.

The advantage of the mini-trial is that facts are revealed directly to decision makers, and they then meet immediately to try to reach agreement. The process is determined and remains in the control of the decision makers. The disadvantage of the mini-trial is that it may involve a significant commitment of time from very senior management of each of the parties. As a result, it is a process that may be used on only a few important disputes each year.

The boundaries between these ADR techniques can get very blurred. An arbitrator may choose to act in a way which encourages voluntary agreement, rather than place the emphasis on the arbitrator's recommendation. The manner in which the arbitrator's recommendation is reported back to the organizations can be handled in a way which encourages negotiation between senior managers. In point of fact, one of the advantages of virtually all ADR techniques is that you can design them to meet the needs of your particular situation.

Concerns about the Use of Non-binding Arbitration

Some people are concerned that arbitrators will use a "split the difference" approach. Their concern is that, rather than really make hard judgments about the relative merits of the positions, the arbitrator will recommend a settlement which is midway between the two positions.

If there is a concern, the remedy is for the parties to agree on specific limiting instructions to the arbitrator. Since the arbitrator's role is defined by the parties, the arbitrator can be instructed to make

judgments as to the technical facts of the case. Or, the arbitrator could be instructed not to recommend a specific dollar amount, but instead recommend the principles or process by which the dollar figure should be calculated. Once the arbitrator recommends a principle or process for settlement, the parties may then be able to negotiate the actual price, and it would not be based on simply splitting the difference.

Another concern is that arbitration may not be suitable for all cases. This is entirely true. The Corps of Engineers confines the use of non-binding arbitration and other ADR techniques to cases where the law is established and where settlement turns on the facts of the case. Interpretations of a new law or regulations, for example, would not be an appropriate issue for non-binding arbitration. They would be resolved better by a judge.

Why Not Binding Arbitration?

In non-binding arbitration, the arbitrator's recommendation is not final. The parties choose whether to accept it, and if they don't like the recommendation, the dispute will continue. In situations where getting a prompt resolution is a prime consideration, it might be preferable to use binding arbitration, where both parties commit in advance to accept the arbitrator's recommendations as binding and final.

At the present time, Federal agencies -- including the Corps of Engineers -- do not have the authority to use binding arbitration. The Comptroller General has concluded that, in the absence of a Federal statute specifically authorizing the use of

