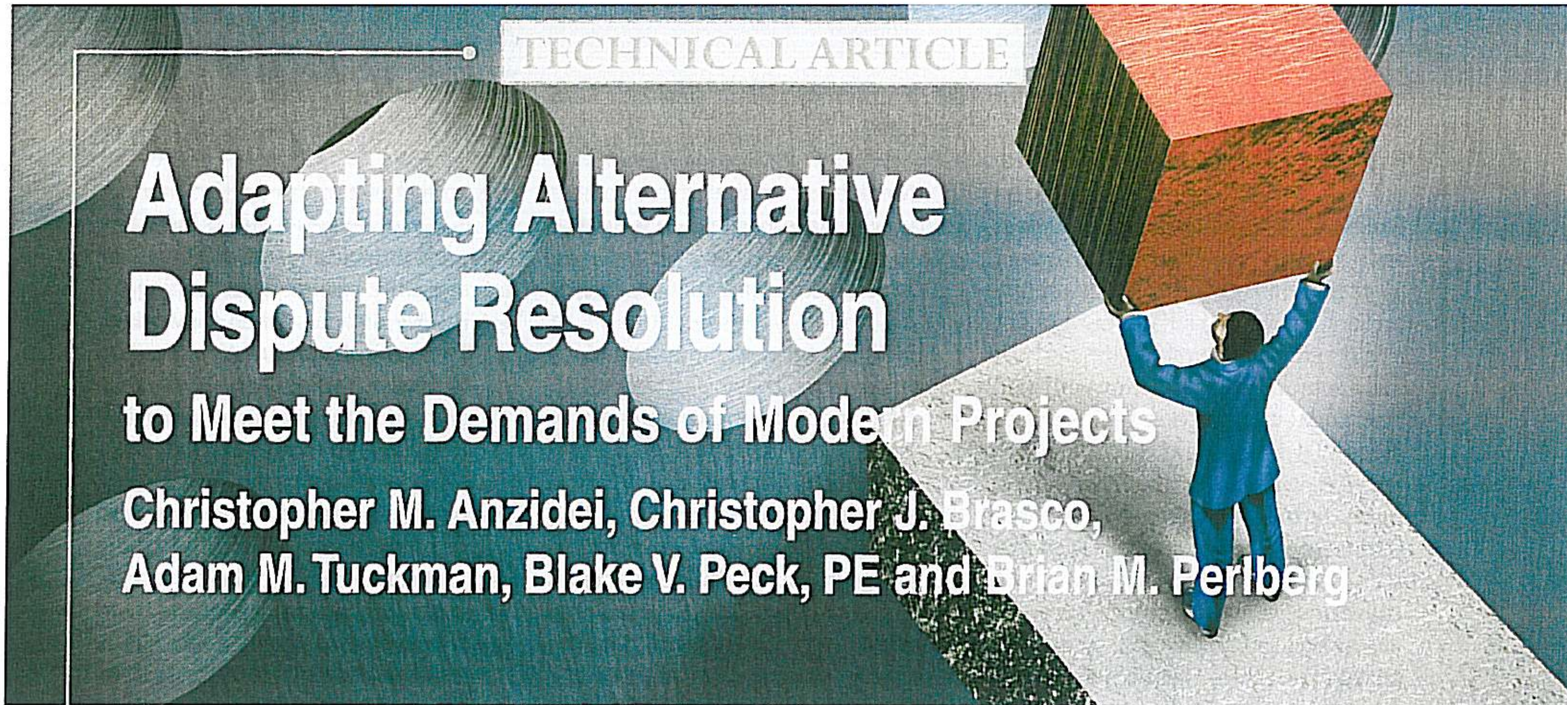

Adapting Alternative Dispute Resolution

to Meet the Demands of Modern Projects

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Abstract: Complexity and uncertainty have become hallmarks of modern construction projects. Over the past two decades, our industry has experienced rapid changes that have fundamentally transformed the industry. Advances in technology and innovation have changed the way projects are planned, constructed, and monitored. Speed to the market has become a premium. Shrinking budgets and alternative delivery methods have presented unique challenges and caused a realignment of project partners, with a marked shift away from the traditional design-bid-build model. And we are still suffering from a global recession, the worst in 80 years. The rapid rate of change and new alignments of project participants have placed a premium on efficient, timely dispute resolution. This article will examine commonly-used ADR (alternative dispute resolution) methods (e.g., mediation, arbitration, DRBs, project neutrals) and discuss how these mechanisms can be adapted to meet the needs of modern projects. Gone are the days when parties can simply reserve rights and fight later. Rather, the authors will suggest ways in which participants can incorporate efficient, effective dispute resolution techniques into their projects. This article was first presented as CDR.1404 at the 2013 AACE Annual Meeting in Washington, DC.

Key Words: Budgets, construction, alternative dispute resolution and projects

The demands of modern construction projects will require the parties to commit to the early identification and resolution of potential disputes.

Industry is experiencing rapid changes that are fundamentally transforming how projects are conceived, delivered, and operated. Change can no longer be viewed as something to be avoided, but must be embraced. Over the past two decades, advances in technology, shifting markets, and the development of new methods of project financing and delivery have been the primary drivers behind a realignment of traditional project participants. Perhaps nowhere is this more evident than in the advent of public-private-partnerships, the development of integrated project delivery methods, and the emergence of lean construction [3, pg 7]. Inherent in each of these advances is the need for greater collaboration among industry participants that have traditionally been adversarial and fragmented [13, pg 558].

Collaboration is also the key to realizing the promise offered by many of the new technologies available to project teams. As but one example, in less than 30 years, projects have gone from being designed on pencil and paper, to computer-aided drafting (CAD) which gained prominence in the 1980s, to the building information modeling (BIM) programs that are prevalent today [14]. With the use of BIM, the parties have an opportunity to cooperate in the design process and simulate construction before actually building the project [14].

Other changes affecting the construction landscape have prompted a greater need for teamwork among project participants. With the rapid development of technology in markets such as health care, project planners now place a premium on "speed to market" or face "project obsolescence" before the work is even complete [9]. Globalization has introduced new markets and supply chains, but also potential legal, cultural, and language barriers.

Finally, shrinking budgets have necessitated alternative delivery methods that have presented unique challenges and caused a realignment of project relationships from those typically understood in the traditional design-bid-build model. Alternative delivery methods, such as design-build, public-private partnerships and integrated project delivery, have now become common-place. The challenge of performing in these new environments is made all the more difficult by a sluggish and unpredictable world economy. Indeed, the industry has continued to change amidst a global recession and debt crisis that has been the worst in at least 80 years. Some experts predict that the present economic climate has brought about permanent changes in how owners procure construction work and how contractors market their services [6, pgs 2-4 and 9-11].

The companies that succeed in these turbulent times will be those that learn to work together to identify risks and solve problems. A collaborative project culture is necessary to foster the ingenuity necessary to solve the problems which inevitably arise in the construction process. Yet, perhaps the greatest threat to achieving the collaboration required to successfully deliver modern projects is the distrust that is sown by unresolved claims issues. As such, now more than ever, there is a premium on efficient, timely, dispute resolution. Gone are the days when parties can simply reserve rights and fight later. All of the demands of modern projects—whether new technologies, global partnerships, integrated project delivery methods, alternative financing arrangements, or financial constraints—will require the parties to collaborate for their projects to succeed.

Mindful of this heightened demand for effective claims avoidance and dispute resolution, this article will examine commonly-used alternative dispute resolution methods (e.g., mediation, arbitration, DRBs, project neutrals) and discuss how these mechanisms can be adapted to meet the needs of modern projects.

II. Overview of Commonly-Used Alternative Dispute Resolution Methods

The term "alternative dispute resolution" (ADR) is commonly used to refer to procedures that are used for the purpose of resolving disputes privately, informally, and at a lower cost to the parties [11]. Several of the most common ADR methods are described as follows:

Mediation: Mediation is a process in which the parties use a neutral third-party mediator (usually an experienced construction lawyer or industry professional) to facilitate settlement negotiations between the parties [11]. Mediation can occur at virtually any stage of a dispute, and many contracts (such as the AIA forms) require the parties to submit their disputes to mediation prior to filing a lawsuit. While mediation is often contractually required, the process itself is non-binding. The parties themselves control the outcome of mediation. Each party is free to settle—or not.

The mediator's role is to facilitate settlement discussions by exploring each party's position through a variety of procedures, including the use of position statements, presentations, joint negotiation sessions, and private sessions. The mediator will typically attempt to understand the parties' settlement goals and assist the parties in pursuing an agreement that resolves the dispute in a manner that is acceptable to all participants.

Arbitration: Arbitration is an ADR mechanism that allows the parties to submit their disputes to a neutral third-party arbitrator (or panel of arbitrators) for a final and binding decision instead of pursuing a lawsuit [11]. Several different organizations are available to administer arbitrations by providing access to a pool of arbitrators (again, usually construction lawyers and professionals), case management services, and a set of procedural rules to govern the process. Proponents of arbitration argue that its streamlined procedures enable the parties to resolve their dispute faster and more cost-effectively with the use of an arbitrator (or panel of arbitrators) with industry expertise.

Project Neutral: A project neutral is an experienced industry professional whose function is to assist the parties in attempting to resolve disputes when they arise. The project neutral's duties are typically outlined in a written grant of authority from the parties [11]. While mediation typically involves an advanced effort by the parties to resolve their claims or disputes, a project neutral often participates early in the project to assist the parties in resolving their claims and disputes before the parties become too entrenched in their positions.

Dispute Review Boards: A dispute review board is a panel of impartial industry professionals who are engaged by the parties for an entire project in order to assist in resolving disputes, based upon a written grant of authority from the parties [11]. Most DRBs are comprised of a panel member who is nominated by the owner, a second member nominated by the contractor, and a third member who is selected by the other two panel members. The purpose of the DRB is to hear disputes that cannot be initially resolved by the project participants. The DRB will typically request submissions from the parties, hear evidence and arguments, and then issue a written advisory report on the merits of the dispute. Depending upon the terms of the parties' agreement, the DRB's findings may or may not be binding or admissible as evidence in any subsequent dispute resolution proceedings. In fact, most DRBs provide only non-binding recommendations.

III. Adapting ADR Methods to Meet the Demands of Modern Projects

The construction industry is, by its very nature, adversarial, with each party seeking to preserve its financial stake in the project [6, pgs 3-4]. These adversarial relationships often lead to increased disputes, decreased efficiency, and dissatisfied participants [13, pg 58]. While many in the industry seek to move toward a more collaborative approach to construction (as evidenced by the rise of integrated project delivery systems), the transition from adversaries to collaborators is not easily made.

The adage that trust has to be earned, and should come only after the passage of time, is instructive when the goal is fostering a project culture where disputes are cooperatively resolved. Unexpected problems test a relationship, and mutually-developed solutions to those same problems cement a relationship. Effective integration of ADR techniques, including the use of a standing project neutral, into a project's claims-handling procedures can assist the parties in creating an environment that embraces change—which will be the litmus test for success on modern projects.

When contemplating the use of a standing project neutral in any particular circumstance, it is important to be mindful that any ADR process is a result of an agreement among the participants. As such, ADR is inherently adaptable and can be shaped to meet the contours of any particular relationship or commercial transaction. Theoretically, the adaptability of ADR concepts is only bounded by the participants' imaginations. A real practical limitation, however, is that flexibility in developing ADR procedures is, as a practical matter, severely curtailed after a dispute has occurred. For example, a guiding principle when attempting to integrate a standing neutral into a project is to agree on the neutral's role, authority and the process for engaging that neutral in the initial agreement(s) governing the work and, at the very latest, before a dispute arises.

If the ability to effectively collaborate is a necessary condition for success on modern projects, so then is the ability to timely address potential problems and disputes. Thus, effective ADR arrangements should be conceived to accomplish dispute avoidance as well as dispute resolution. Considered herein are a few ADR concepts that can be successfully used to facilitate early claims identification and resolution.

A. Encouraging Stakeholder Participation In Dispute Avoidance and Early Dispute Resolution

It is often overlooked that the parties themselves, as stakeholders in the project, can and should function as "first responders" in avoiding or resolving disputes. Recognizing this principle, many standard contracts now require early interaction between project stakeholders as a prerequisite to pursuing dispute resolution. For instance, early stakeholder involvement in a multi-step process can be found in the standard form agreement published in the **ConsensusDocs Form 200**, *Standard Agreement and General Conditions Between Owner and Constructor (Lump Sum Price)*. Highlighting the ConsensusDocs' efforts to foster efficient dispute resolution is the title for the contract clauses: "Dispute Mitigation and Resolution." To mitigate and resolve disputes prior to costly litigation before arbitrators or judges, the ConsensusDocs 200 contract calls for the parties initially to seek a resolution of a dispute without third-party intervention.

The first step under the ConsensusDocs approach involves project-level representatives of the parties with decision-making authority to engage in good faith direct discussions of the issue [4, §12.2]. If the project-level discussions are unfruitful, then the dispute rises to the parties' senior executives [4, §12.2]. The parties' senior executives are typically divorced from the entrenched positions of the project participants, which often hampers development of a deal. Thus, progressing the dispute to senior executives encourages early resolution because it allows the impact of the dispute to be considered from a holistic business and project-oriented perspective. Moreover, the standard ConsensusDocs provisions motivates a prompt business resolution among the senior executives by providing for the discussions to be completed within 15 days of the initial referral of the dispute to the project-level representatives [4, §12.2].

Under the ConsensusDocs Form 200, it is only after the parties are unable to resolve a dispute independently that is referred to a neutral decision maker, which is either a project neutral or Dispute Review Board, as chosen by the parties at the time of contracting [4, §12.3.1]. The standard ConsensusDocs provisions provide for the neutral decision maker to be continually available to the parties throughout the project for resolving disputes. With respect to the neutral's participation in the project, the standard disputes clauses in the ConsensusDocs state that the neutral, "shall make regular visits to the Project so as to maintain an up-to-date understanding of the Project progress and issues and to enable the Neutral/Board to address matters in dispute between the Parties promptly and knowledgeably" [4, §12.3.1]. A prompt determination is accomplished by the provision requiring the neutral to issue findings within five business days of the matter being submitted [4, §12.3.1]. The neutral's findings under the standard clause are nonbinding, however, so that unresolved matters after the neutral process can be the subject of binding arbitration or litigating in the courts [4]. In sum, whether this approach or another is used, the first key to successful dispute resolution is to draft contract clauses that foster early stakeholder involvement.

B. Incorporating Mediation Techniques To Facilitate Early Claims Resolution

There are many different ways that the parties can integrate a neutral third party into their projects in order to assist in problem-solving. Important considerations when tailoring this ADR concept to a particular project include: the size and complexity of the project;

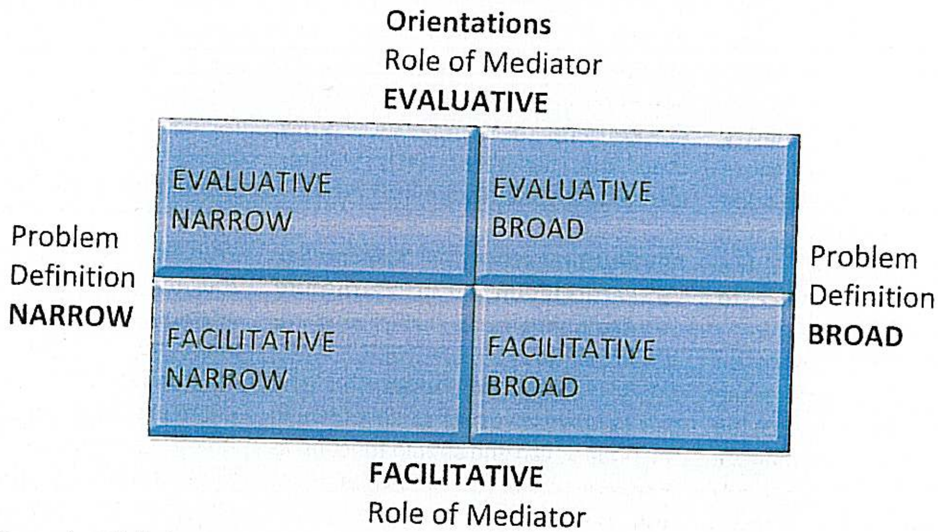

Figure 1—Riskin's Grid

the layers and complexity of contractual agreements; and the depth and anticipated duration of the business relationships involved in executing the project. All projects can benefit from an emphasis on early claim resolution through an application of the myriad derivations of the standing neutral model. Small to mid-sized projects involving traditional project delivery methods (design-bid-build, design-build and the like) would likely benefit from some mix of early project stakeholder involvement with a referral to a mediator and/or project referee as may be required.

Many of the public-private-partnership initiatives ("P3" projects), however, are at a dollar value and complexity level that warrant the use of a standing neutral(s) dedicated to addressing and resolving nettlesome project issues in real time. Maintaining productive working relationships may be of particular importance on P3 projects. In general terms, P3 projects affect a reordering of traditional project roles and relationships in such a way that the parties may share a joint interest in project success well beyond the performance of the construction work. Furthermore, given the drivers in the industry and the need for collaboration on modern projects, all large dollar procurements are opportunities to successfully use the concept of a standing neutral to engage in the process of early claims resolution.

When maintaining productive relationships is at a premium, mediation can be a particularly valuable compliment to your ADR procedure. While it is always beneficial to arrive at a just and workable solution, the engine of collaboration is especially fired when the parties come together and craft their own solution. Mediation, when well done, can maximize the parties' opportunities to determine their own outcome. As initially conceived, mediation was a process whereby the parties would exercise self-determination with the mediator serving as a learned guide in the process. This aspect of control makes mediation an attractive form of dispute resolution.

Popular experience with mediation does not always align itself with these foundational concepts. Yet, mediation remains an attractive alternative to resolve business disputes. In a recent survey of corporate counsel, respondents expressed a preference for mediation over either litigation or arbitration as a means for resolving commercial disputes [8]. The respondents indicated that mediation often resulted in time and cost savings [8]. Another main reason why a mediated solution is preferable to a result achieved through either litigation or arbitration is that the parties themselves control the outcome of mediation, and the mediation is conducted in a confidential setting that is more conducive to "saving face" publicly [17, pg 26-27].

Mediation also offers positive advantages when maintaining relationships is essential because mediation is an ADR technique that can encourage the parties to conceive of solutions beyond the initial problem presented. The parties' interests are aligned in several ways, numerous possibilities present themselves by which a skilled mediator can assist and allow the parties to find common ground.

1. Developing An Approach To Mediation That Meets Your Project Needs

Most people considering ADR procedures have a limited view of mediation, based on experiences where the aim was to pry a solution from tight-fisted parties that had long ago demonized each other. Given this somewhat stilted perception, it is important to take a fresh look at the possible approaches to mediation before crafting a mediation process and selecting a mediator for your project.

The risk when considering mediator styles is to over-simplify because an effective mediator will undoubtedly employ numerous approaches when attempting to develop a solution to a problem. Nonetheless, understanding the conceptual models for mediating disputes will be instructive when shaping a process to meet the particular challenges presented by your project [18].

Law Professor Leonard L. Riskin developed a model to depict the basic mediation methods, commonly referred to as Riskin's Grid. Riskin's Grid is shown as figure 1 [15, pgs 22-25]. The grid is formed at the intersection of the continuum addressing the role of the mediator (ranging from evaluative to facilitative) and the continuum addressing the mediator's definition of the problem (ranging from a narrow position based approach to a broad interest based approach). While Riskin's more recent scholarship suggests alternative grids to deal with more nuanced considerations, the basic model is a worthwhile reference when determining which mediator orientation and mediator is best suited to your project circumstance [15, pgs 22-25].

a. The Role Of the Mediator – Evaluative v. Facilitative

An advantage of mediation is that it can be conducted in a manner that restores relationships instead of fragmenting them. Whether this is achieved will depend, in large measure, on how the process is conducted. The evaluative approach has also been referred to as directive [15, pgs 22-25]. A prototypical evaluative mediator is commonly seen as the "head banging" type that will push the parties toward resolution. Typical of this approach, the mediator may inject his or her own assessment of the strength and weaknesses of the issues being addressed and predict outcomes. To some, the influence exerted by an "evaluative" mediator stands at odds with the principle of party self-determination under-girding the mediation process [15, pgs 22-25]. You should expect the evaluative mediator to be very influential in the process and its outcome.

By contrast, facilitative or elicitive mediators seek to advance the process by helping parties to make their proposals and assessment of risks [15, pgs 22-25]. The parties are assisted by a mediator ready to ask each party probing questions framed to have them consider alternatives to the present impasse, but reluctant to provide his or her own assessments. A facilitative mediator will also support the parties' self-determination by confronting each with the possible consequences of continued discord.

The facilitative possibilities which mediation offers make it an important ADR methodology to consider when maintaining relationships is a primary concern. Mediations should be structured to emphasize party self-determination and the mediator's early efforts should be focused on elicitive techniques aimed at helping the parties' fashion their own solution. Only after a party has declared that they have reached an impasse should the mediator use more directive techniques such as suggesting a potential outcome or recommending solutions. When structuring their ADR process, parties can consider giving the mediator the authority to suggest an outcome or even to render a decision, but this should only come after a serious effort has been made to have the parties bridge their own differences.

b. The Mediator's Definition Of The Problem – Narrow Problem Orientation v. Broad Problem Orientation

Another potential benefit of mediation in circumstances where the parties' relationship is multi-faceted is that the problem or impasse can be framed in a way that takes the expanse of the parties' relationship into consideration. In Riskin's Grid, the question of problem definition is presented by establishing a continuum ranging from narrow to broad [15, pgs 22-25]. A narrow conception of the problem begets a process that proceeds "in the shadow of the law" with the parties' legal rights central to the debate. At the other end of the spectrum, a broad definition of the problem plumbs the parties' interests beyond the legal question presented by the immediate circumstance. The parties are viewed against the wider vista of their relationship to each other and the marketplace or community within which they participate. When engaged in the effort of early claims resolution, a mediator should take advantage of the myriad potential trade-offs on an ongoing project to help the parties develop a solution to their problems.

2. Adapting a Mediator's Bargaining Approach To Support Early Claims Resolution

Dispute resolution theory contrasts two bargaining models. The most familiar of these approaches is referred to as distributive or competitive bargaining. As the name suggests, this process involves each party seeking an advantage by maintaining a position that allows it to obtain the better part of a fixed sum. The opposing model is integrative or cooperative bargaining in which the possibility of a negotiated solution is sought beyond the parties' opposing positions on a particular issue. The dispute is recast against the broader context of the parties' interests, with less immediate emphasis placed upon the parties' differences. It is the potential for cooperative bargaining on an ongoing project that makes mediation an important ADR tool to consider when early claims resolution is the goal.

a. Distributive ("Competitive") Bargaining

In a distributive negotiation, the parties distribute between or among themselves the value being negotiated. In the context of commercial litigation, a distributive negotiation is often conducted concerning a monetary sum associated with the parties' respective responsibility for a particular legal problem. Distributive bargaining is characterized by competitive maneuvering to obtain the most advantageous position allowable with respect to the relatively fixed subject of their negotiations. Inherent in the distributive bargaining process is a tension between the competition generated by the "zero-sum" exchange and the desire to cooperate in reaching a solution of the problem. A successful negotiator recognizes the tension between competition and cooperation and manages it by being mindful of the dynamics of distributive bargaining and the tendencies of the participants in the particular negotiation.

b. Integrative ("Cooperative") Bargaining

The concept underlying integrative or cooperative bargaining is to assist the parties to view their dispute in a broader context. Consideration is given to the parties' interests beyond the resolution of the issue(s) presented by their dispute. Understanding a party's broader interests presents each party with the opportunity to satisfy the other's needs without necessarily conceding the particular issue that is the source of conflict. Reaching a negotiated solution is no longer a zero-sum game. Instead of a competition pitting the parties in a battle over a defined issue, the focus is expanded by inviting the parties to consider alternative ways they can create value for each other without necessarily losing in that exchange. In theory, the competition animating distributive bargaining is replaced by a more cooperative model where the parties can increase the possible benefits to be shared, while also increasing the likelihood of developing a negotiated settlement.

The integrative bargaining process begins with an effort to create a list of the interests underlying each party's negotiating stance on the defined issues. The mediator also accounts for the parties' overarching needs as presented by the commercial circumstance. Having numerous shared interests in an ongoing project will provide the parties with ample opportunities to identify points of common concern as grist for discussion. A skilled mediator is invaluable at identifying interests that lie below the surface of the dispute. Dispute resolution theory refers to these interests as the "below the line" interests. Fertile areas to examine include the value the parties ascribe to:

- their relationship;
- shared project incentives;
- their standing in the industry or business community; and
- the principles at issue in the dispute to be decided.

After defining each party's interests in a negotiated solution, the varying means of satisfying these needs are explored during discussions with the parties.

The benefits of integrative bargaining are most readily realized when the parties value an ongoing relationship. Relatedly, the success of an integrative approach relies on capturing or developing trust between the negotiating parties. Attempts at innovation almost always rest on the ability of the parties to trust each other. The trust engendered through cooperative problem-solving makes mediation a potentially invaluable ADR technique when engaged in early claims resolution on modern projects.

C. Using a Project Neutral(s) as a Means of Achieving Early Claims Resolution

A standing project neutral is an ADR method often used to support the parties' early resolution of claims, usually with the neutral in the capacity as initial decision-maker or project referee [10, pg 5]. When adapting this approach to suit the needs of the modern project, careful consideration should be given to a selection process which ensures that all interested parties endorse the authority granted to the neutral(s). Empowering the neutral to discharge his purpose in the manner that the parties envisioned is a fundamental key to the success of the neutral process. Trust in the project neutral process at the forefront of the project, and even more so, the person acting as the neutral, will foster a positive attitude and commitment toward continually involving the neutral in potential stalemates [10, pg 11]. When the parties believe the neutral process is an effective tool in the resolution of claims, they are more likely to seek his consultation early and often, which will only benefit the parties and the project in the long run.

The role of the standing neutral can be fulfilled by an individual or board, as dictated by the size and complexity of the project and needs of the parties [10, pgs 6-7]. The decision whether to choose one person or a board may depend upon the parties' preferences to have a neutral available to address various technical aspects of the project, knowledge of the law, experience with project financing, or myriad other concerns underlying any particular project. For example, one project neutral in a commercial construction project may have the technical expertise to address structural engineering issues, but may not be well-versed in issues concerning the various aesthetic design elements for the exterior or interior finishes. Of course, maintaining a board of experts for addressing each particular aspect of the project may be a costly endeavor. Nevertheless, the costs of employing standing neutrals must be weighed against the potential exposure resulting from significant disputes, which often jeopardize the success of the entire project.

As justified by the size and complexity of the project, the parties may look to the neutral to be invested in the daily operations of the project. This can, and often should, involve participation in the parties' development and/or implementation of risk management/risk avoidance procedures for the project. For instance, a project neutral may join in weekly or monthly progress meetings among the project participants to facilitate potential claims issues before they arise [10, pg 6]. If the contractor is forecasting a potential change event in upcoming work, then the project neutral can suggest alternative means and methods or value engineering to both the contractor and owner's satisfaction that may resolve the change before any impacts are experienced. The intangible future value of such pre-dispute "resolution" is difficult to measure. Yet, when potential impacts are not properly addressed in advance, the opportunity costs of a solution foregone will almost certainly lead to costly claims and unintended consequences.

When planning for the project neutral's role, another consideration must be the extent of the authority conferred upon the project neutral(s). The question of the appropriate authority granted to the project neutral(s) is further considered in Section III.D of this article, which addresses methods for handling disputes when the parties are unsuccessful in resolving them. In this discussion, it is important to recognize that the agreement concerning the neutral's powers plays a significant role in determining whether any particular exercise of authority is binding upon the parties. An act or decision within the recognized scope of the neutral's authority is more likely to be found conclusive if later subjected to challenge. Accordingly, the parties should carefully draft the agreement for employing a project neutral and decide together whether the neutral's decisions will be binding. Once an opportunity arises for the neutral to act, the parties should also confirm that the proposed action falls within the scope of authority agreed upon.

As an example, the AIA's most recent contract forms adopt the concept of a standing project neutral. The *AIA Standard Form of Agreement Between Owner and Contractor* released in 2007 endorses the approach of maintaining a standing neutral to assist the parties resolve claims and disputes short of litigation. Under the standard AIA Document A101 – 2007 and accompanying general conditions, A201 – 2007, the standing neutral is known as the "Initial Decision Maker" ("IDM"). As defined in the A201 document, the IDM is "a person designated to render initial decisions on claims" [2, §1.1.8]. The IDM is designed to be a third-party and is designated to be the project architect unless the parties agree to delegate the authority to another person by their contract [1, §6.1]. Authority is granted to the IDM in the standard A101 contract to review claims as a prerequisite to mediation or litigation [2, §15.2.1]. A key feature of the IDM process is that the decision-maker under the standard A101 contract is essentially a hybrid arbitrator and mediator for the parties, but without the formality of a mediation or arbitral proceeding. The IDM may invoke fact-finding powers when rendering decisions that are similar to arbitrators in that the IDM may consult with, or seek additional information from, the parties, or other any persons with special knowledge or expertise concerning the claim [2, §15.2.3]. In the mediator role, the IDM may suggest a compromise to the parties rather than approving or rejecting the claim [2, §15.2.2]. The Initial Decision may be final and binding if not subject to further aspects of the disputes process. In sum, whether the AIA approach, or another is utilized, the parties may benefit from the assistance of a project neutral with clearly defined responsibilities.

D. Adapting Binding Dispute Resolution to the Modern Project

Despite the parties' best efforts at implementing procedures to encourage collaboration and minimize claims, there will inevitably be certain disputes that cannot be avoided or resolved through planning, partnering, negotiations, or other facilitative means. At one time, arbitration was regarded as more advantageous than litigation for the resolution of many commercial disputes because it was seen as a more streamlined, cost-effective, and faster process [17, pgs 4-5]. A common complaint heard from many project stakeholders, however, is that neither litigation nor arbitration provides a completely satisfactory avenue for claims resolution [17, pgs 4-5].

Despite all of its drawbacks, arbitration still has one inherent advantage over litigation: the parties have at least some measure of control in structuring the arbitration process [17, pg 51]. The parties to federal court litigation cannot simply agree to opt out of the discovery procedures set forth in the Federal Rules of Civil Procedure. With arbitration, however, the parties can craft procedures that will facilitate their goals—whether it be speed, cost savings, finality, confidentiality, or the need for a fact-finder with industry-specific expertise. The remainder of this section will explore the purpose of arbitration, its perceived drawbacks, and ways in which the parties can tailor their binding ADR provisions to meet project-specific goals.

1. The Initial Purpose Arbitration

While arbitration has been used for many centuries, the use of binding arbitration became a more viable and accepted alternative to litigation following the passage of the Federal Arbitration Act (FAA) in 1925 [16, pg 2]. The current version of the FAA provides that written provisions (in contracts involving maritime or commerce) to submit disputes to arbitration are valid and enforceable [9 U.S.C. § 2]. Prior to passage of the FAA, many courts treated arbitration with hostility and declined to enforce arbitration agreements. The FAA was intended to place arbitration agreements "on equal footing" with other contracts by ensuring the enforcement of provisions requiring arbitration of disputes [16, pg 2]. In enforcing the FAA, the US Supreme Court has repeatedly reiterated the "national policy favoring arbitration," Southland Corporation v. Keating, 465 U.S. 1, 10 (1984). As a result, courts typically construe contracts broadly in favor of arbitration.

The legislative history of the FAA indicates that the US Congress was primarily concerned with the costliness and delays of litigation in enacting this national policy favoring arbitration [16, pg 1]. This original concern has only become exacerbated by the recent explosion of caseloads at both the state and federal level. For example, in 1950, there were approximately 92,000 new case filings in federal court [5]. By 2004, this number had grown to 326,000 new federal cases (excluding bankruptcy filings), an increase of over 350 percent in just over 50 years [19 and 20]. In addition, there were 45.2 million new case filings in state courts across the country (excluding traffic cases) in 2004 [12, pg 1].

As court dockets have become more burdened, many private litigants have pursued arbitration, which is perceived as a faster and potentially less costly means of dispute resolution [16, pg 2]. A recent survey of corporate counsel revealed that, while most corporations still prefer litigation to arbitration, counsel believe that they will obtain a "faster resolution" in arbitration [7, pg 19]. Other perceived advantages of arbitration include the confidentiality of the process and the ability of the parties to select an arbitrator with specialized expertise or background related to the dispute [17, pg 5].

2. Perceived Drawbacks of Arbitration as Alternative to Litigation

While arbitration remains a prevalent method of dispute resolution, there are more frequent complaints regarding the costliness and delays of arbitration [17, pg 5]. Indeed, both corporate counsel who prefer litigation and those who favor arbitration cite "lower costs" and "better results" as their primary justification [7]. The lack of a perceived cost savings in arbitration is understandable. The modern arbitration proceeding has evolved in many ways to resemble a typical court case, so much so that one commentator labeled arbitration as "the new litigation" [17].

For example, the modern arbitration case in a contract dispute will likely include detailed statements of claims, pre-hearing motions, extensive document discovery (including voluminous electronic discovery), multiple depositions, pre- and post-hearing briefs, hearings that can extend over weeks—or even years—and even post-hearing motions and appeals [17, pg 6]. Most arbitration organizations publish separate sets of rules for managing large construction cases. While these procedures are intended to ensure a fairer process for the parties, they often result in a litigation-style arbitration. For instance, the American Arbitration Association's *"Procedures for Large, Complex Construction Disputes,"* apply where any party has asserted a claim in excess of $1 million. Under these rules, the arbitrator has broad authority to issue third-party subpoenas and order the exchange of discovery between the parties, including the production of documents (including electronic documents), the propounding of written interrogatories, and the taking of depositions. Not surprisingly, many commentators now perceive there to be little difference—at least from a cost standpoint—between litigation and a standard arbitration [17, pg 5].

3. Practical Tips for Adapting Binding Arbitration to Modern Projects

While court rules and procedures often constrain the parties from controlling the scope of litigation, the parties have substantial discretion to control the scope of their arbitration proceedings through their written agreements. The parties also have options beyond merely selecting litigation or arbitration in their contracts.

a. Customize Your Disputes Procedures

While parties rarely enter into contracts expecting the worst-case scenario, the contract negotiation phase presents the best opportunity for the parties to consider what types of disputes may arise on a project, and how they want those disputes to be adjudicated. When the world of potential disputes only exists as a hypothetical, there is less of a risk emotion or perceived litigation advantages/disadvantages will drive either party's decisions.

When selecting a contract's disputes procedures, many parties simply do no more than select a preference for litigation or arbitration (and perhaps stipulate the venue and choice of law). Similarly, many arbitration clauses do not go beyond the basics of agreeing upon the location, number of arbitrators, and manner of arbitrator selection. While those are important considerations, parties that select arbitration can also tailor the dispute resolution procedures in their contracts to meet the needs of their individual projects. Below is a checklist of several important points for the parties to consider when drafting arbitration provisions:

- **Scope of Arbitrable Claims and Arbitrator Authority**: The parties should consider the scope of arbitrable claims in designing their disputes provisions. Most arbitration clauses are broadly written and provide for arbitration of all claims or disputes arising from the transaction. This may not suit all parties or all projects. For instance, on a project that involves alternative financing arrangements (e.g., public-private partnerships), the contractor may seek to have the flexibility to arbitrate construction disputes, while litigating claims involving project financing. Similarly, the parties may seek to carve out claims for specific performance or injunctive relief, where appropriate, from their arbitration clauses. The parties should also consider designating whether the arbitrator is empowered to decide issues of arbitrability—that is, whether a given claim or dispute falls within the scope of the arbitration clause. Alternatively, if the parties seek to arbitrate all claims, they should consider the appropriateness of granting the arbitrator authority to issue interim awards or otherwise address the potential need for injunctive or other preliminary relief.

- **Procedures to Streamline or Expedite Proceedings**: While most arbitrators will exercise discretion in implementing procedures that are intended to expedite or streamline the process, the parties may also consider stipulating their own ground rules for the arbitration. Indeed, while the AAA and other organizations have published expedited arbitration procedures, these procedures may not be available without agreement of the parties. Thus, the parties may consider stipulating such procedures in their contract, including procedures pertaining to: (i) the scope and length of the discovery process; (ii) the scope of electronic discovery (including cost-shifting provisions where e-discovery may prove to be expensive); (iii) the time limit for a hearing to be completed (and potentially, the maximum number of hearing hours/days); (iv) the time limit for issuance of an award; (v) the basis for a decision (e.g., law, equity, etc.) and whether the arbitrator must publish a reasoned decision; and (vi) the availability of motions practice, including motions for summary judgment and other dispositive motions.

- **Size and Composition of Arbitration Panel**: The parties should also consider how many arbitrators will comprise the panel (typically, most panels are composed of either one arbitrator or a panel of three arbitrators), whether the arbitrators must possess specific qualifications or expertise, and how the arbitrators will be appointed.

- **Administered or Non-Administered Arbitration**: The parties should consider whether or not to use an organization to administer the arbitration. There are several such organizations that will manage and oversee the administrative aspects of the arbitration for a fee. While the administration fee is seen by some as a deterrent, such organizations typically offer both logistical support and a set of procedural rules that provide further structure to the proceeding. Certain organizations also provide for flexibility in their rules, by expressly allowing the parties to modify the rules by agreement (the *CPR's Arbitration Rules* and the *AAA's Commercial Arbitration Rules* are two such examples).

- **Finality of Award and Availability of Judicial Review**: Under the FAA, there are limited grounds to vacate or appeal an arbitration award. The parties should consider whether any unique project circumstances would justify expanding the scope of judicial review, such as a standard of review for errors of law or abuse of discretion by the arbitrators.

- **Joinder of Parties**: It may be necessary to provide for the joinder of multiple parties in a single arbitration, particularly in projects involving multiple stake-holders working cooperatively, or projects involving multiple trade contracts.

- **Consolidation of Claims**: Most practitioners would reflexively respond that all claims should be consolidated into a single arbitration, mainly for the sake of efficiency and to avoid piecemeal litigation. While this may be the best approach in most circumstances, the parties may consider whether they would benefit from more immediate guidance arising from the arbitration of individual claims. This is analogous to the rules for appealing claims under the *Contract Disputes Act*, where each adverse contracting officer's decision must be separately appealed to the board of contract appeals. For example, on a project with an extended performance period, the parties may actually benefit from obtaining a ruling on a delay claim submitted early in the project.

The above list of considerations is not exhaustive, and there is not necessarily one model provision that will meet the demands of every modern project. Nevertheless, the parties would be well-served by identifying the unique aspects of their project and tailoring their dispute resolution procedures to address their specific needs and goals.

b. Expand the Menu of Choices Beyond Litigation or Traditional Arbitration

Another common misconception is that selecting a dispute resolution procedure begins and ends with choosing either litigation or arbitration of disputes. Indeed, these do not necessarily have to be mutually exclusive forms of dispute resolution. Rather, the parties can identify certain types of disputes to be submitted to arbitration (for instance, construction disputes) and others to be subject to litigation (for instance, financing disputes).

Similarly, the parties may not be limited just to arbitration if they are seeking a form of binding dispute resolution that keeps their case out of the courts. There are several hybrid ADR approaches that are intended to maximize the benefits of using ADR while still enabling the parties to obtain binding decisions (or at least interim binding decisions for the purposes of the project) in an expeditious manner. Several of these hybrid approaches are addressed below:

- **Binding Dispute Review Board Decisions**: Most DRBs issue only non-binding recommendations. This is mainly because the DRB process is viewed as a facilitative, non-adversarial process and because DRBs have historically achieved a high success rate of producing settlements [10]. Nevertheless, the parties may craft an agreement that includes procedures for a DRB to serve the same function as an arbitration panel, with authority to issue binding awards. Alternatively, other variations of the DRB process allow the parties to grant the DRB authority to issue awards that are either binding for the interim of the project or binding unless a party objects and files suit (or arbitration) within a certain period of time.

- **Standing Arbitrator**: Similar to the DRB or project neutral concepts, the parties may agree to appoint a standing arbitrator who is nominated at the outset of the project, prior to any disputes. The arbitrator would have the authority to render binding decisions on an expedited basis. While this method may promote prompt resolution, the parties may need to institute controls or negotiation protocols (such as multi-step dispute-resolution procedures) in order to avoid the potential acrimony and interruptions that could arise if either party had the ability to submit disputes to the standing arbitrator without attempting to resolve the disputes with the other contracting party.

- **Baseball Arbitration**: In this form of arbitration, each party submits a proposed award to the arbitrator. Following a hearing, the arbitrator selects one of the proposed awards, without modification [11]. The parties may also vary this process by merely exchanging offers and agreeing that the prevailing offer shall be the one that most closely conforms to the arbitrator's award [11]. While this form of arbitration is typically used only to determine monetary awards, this process could be adapted to a construction contract to determine other disputes, such as delay disputes—particularly if the hearing is conducted on an expedited basis while the project is ongoing (e.g., Arbitrator selects between contractor's delay claim for 100 days of compensable delay and owner's counter-offer of 25 days of excusable delay). This method incentivizes the parties to take reasonable positions, while addressing the oft-heard complaint that arbitrators too often just "split the baby."

- **High-Low Arbitration**: In this form of arbitration, the parties privately exchange offers and agree to conform the arbitrator's award to either the "high" offer or the "low" offer in the event that the award is above the high offer or below the low offer [11]. In the event the award falls within the range between the high and low offer, the parties are bound by the award [11]. As with baseball arbitration, this method is typically used only for monetary awards but has the potential to be expanded to delays or other disputes.

- **Mediation-Arbitration**: In this process, the parties engage in mediation and agree to submit all unresolved disputes to final and binding arbitration [11]. This may allow the parties to reach a partial settlement, while narrowing the scope of the arbitration [11]. In this process, the mediator does not typically serve as the arbitrator (in order to facilitate a productive mediation while ensuring the arbitrator's impartiality), although the parties are free to stipulate that the mediator shall issue a binding award in the event that the mediation does not produce a settlement.

- **Arbitration-Mediation**: In this process, the parties select an arbitrator to hear their dispute [11]. After the award is written (but prior to issuance), however, the arbitrator serves as mediator and attempts to assist the parties in reaching a negotiated settlement. In the event a settlement is not reached, the arbitrator issues a final, binding award [11].

As with disputes clauses, no single form of ADR will be the "best" approach in all circumstances. Rather, as with drafting a disputes provision, the parties should consider the unique characteristics of their project and the nature of the possible disputes in selecting an ADR approach that balances their goals with the potential risks—not the least of which is the risk of waiting until all of the money has been spent before obtaining a result.

IV. Conclusion

The construction industry, like many sectors of the economy, has been radically impacted by the rapid changes experienced in the past two decades, including changes in technology, markets, financing, and delivery methods. These changes have ushered in a new era that will require more and better collaboration between the parties to ensure the success of their projects.

Over roughly the same time period, unsatisfied litigants, their legal counsel, and organizations across the construction industry (and other industries) have begun to craft various ADR mechanisms that are intended to resolve disputes privately, informally, and at a lower cost to the parties. These mechanisms include stakeholder involvement, the expanded use of mediation and project neutrals, and various forms of arbitration. The authors submit that parties to a construction contract would be well-served by considering the panoply of ADR options when tailoring dispute-resolution provisions for their construction contracts. ◆

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