



مدیریت ادعاء و اختلافات در طول چرخه حیات پروژه

بخش پنجم:

اجرای برنامه و مدیریت ادعاء، دعاوی و اختلافات در فاز ساخت/اجرا (Construction Phase)

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What we will learn?

☐ Claims management

- ❖ Introduction
- ❖ Project and claim documentation
- ❖ Contract and claim administration
- ❖ Types of claim
- ❖ Claim and dispute notification
- ❖ Claim and dispute tracking and processing
- ❖ Notes to consider before writing the claim

☐ Claims and disputes resolution

- ❖ Resolution methods
- ❖ Contract forms

What we will learn?

☐ Parties' considerations

- ❖ Construction manager
- ❖ General contractor and subcontractors
- ❖ Design consultant

☐ Lessons learned from case studies

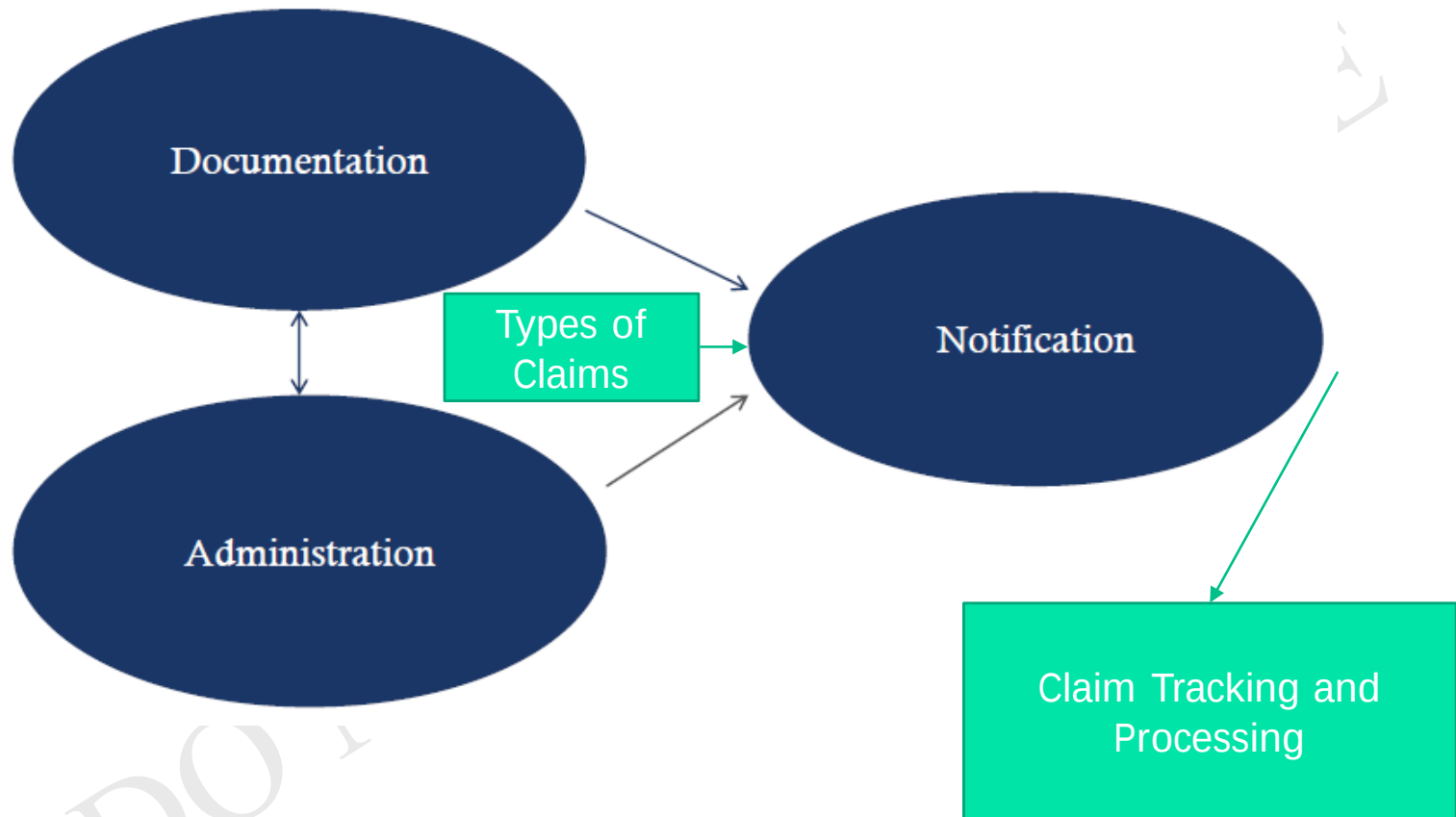
- ❖ Recommendations
- ❖ Examples

☐ Final recommendations

Claims Management

(Claim and Dispute Tracking and Processing)

Suggested terminology for claim management in Construction Phase



Introduction

Based on PMBOK Construction Extension, CMAA, and my experience

- ❑ Regardless of the origin of the potential claim, the claims identification process should
 1. Start with a clearly understood project scope and contract
 2. Include a written description of the claim
 3. Claim issue file development
 4. Claim issue evaluation and assessment
 - i. Time and cost impacts
 - ii. Prompt payments
 - iii. Capability gap analysis
 - iv. Expert judgment
 - v. Pending claim file and statement of claim

Project scope and contract

Based on PMBOK Construction Extension

❑ Strict adherence to the contract can be **very difficult** if one does not fully understand its requirements.

❖ However, a **strict or difficult** to follow contract does not excuse noncompliance.

✓ Seeking legal counsel or expert judgment to assist with the interpretation and requirements is proactive and time well spent.

In many cases, claims not made in a timely manner could become invalid.

Project scope and contract – Claim preparation

❑ **Not only** should the Contract **specify a time limit** for the **filing of claims**, but it should also **specify exactly the information** that the Contractor must **submit when asserting** a claim, **such as the following:**

- ❖ A **clear narrative** of what the claim is with **references to attached documents**.
- ❖ An **explanation** of **why** the **claim item differs** from that **already required** by the **Contract**.
- ❖ **References** to the **specific Contract clauses** that apply.
- ❖ An **explanation** of the **cause (or liability)** for the claim.
- ❖ A **clear definition** of the **specific impacts** associated with the claim (**i.e., extra work, overtime, delay, etc.**).
- ❖ A **detailed breakdown** of the **damages or extra costs** with **supporting information**.

Project scope and contract – Claim preparation

❑ Submission of supplementary documents

If additional information is necessary or not available, say it...

SEE THE FOLLOWING EXAMPLE

Unrelated claim issue will be processed as separate claims and therefore must be submitted as separate claims.

The Contractor shall supplement the written notice of claim within 15 calendar days of filing the notice of intent to file a construction claim with a written statement providing the following:

1. The date of the claim.
2. The nature and circumstance that caused the claim.
3. The Contract provisions that support the claim.
4. The estimated dollar cost, if any, of the claim and how that estimate was determined.
5. An analysis of the schedule showing any schedule change, disruption, and any adjustment of Contract time.

Project scope and contract – Claim preparation

The full documentation of the claim, as presented in the administrative process shall, at a minimum, contain the following elements.

1. A detailed factual narration of events that details the nature and circumstances that cause the claim. This detailed narration of events shall include, but is not limited to, providing all necessary dates, locations, and items of work affected by the claim.
2. The specific provisions of the Contract or laws which support the claim and a statement of the reasons why such provisions support the claim.
3. The identification and copies of all documents and the substance of any oral communications that support the claim. Manuals that are standard to the industry may be included by reference.
4. If an adjustment for the performance time of the Contract is sought:
 - a. The specific days and dates for which it is sought.
 - b. The specific reasons the Contractor believes a time adjustment should be granted.
 - c. The specific provisions of the Contract under which additional time is sought.
 - d. The Contractor's detailed schedule analysis to demonstrate the justification for a time adjustment.

What do you see here?

Project scope and contract – Claim preparation

What do you see here?

5. If additional monetary compensation is sought, the exact amount sought and a breakdown of that amount into the following categories:
 - a. Labor. Listing of individuals, classification, hours worked, and so on
 - b. Materials. Invoices, purchase orders, and so on
 - c. Equipment listing detailed description (make, model, and serial number), hours of use, and dates of use. Equipment rates shall be at the applicable Blue Book Rate, which was in effect when the work was performed, as defined in Subsection 109.03.
 - d. Job site overhead.
 - e. Home office overhead (general and administrative).
 - f. Other categories
6. The above data shall be accompanied by a notarized statement from the Contractor containing the following certification:
Under penalty of law for perjury or falsification, the undersigned,

(Name)

(Title)

(Company)

Description of claim

Based on PMBOK Construction Extension

- ❑ This is a **written description of the work** believed to be outside of the contract, **where it occurred**, and **when it took place**, including **contract specification references** that support the requested claim.
 - ❖ A justification statement
 - ❖ The claim should **document the activities** that **were affected** by the situation, including resources, schedule, etc.

Contemporaneous documentation should be recorded promptly at the **time of the occurrence** and **cover all aspects** that support the claim and the contract provisions.

Claim issue file development

Based on CMAA

- ❑ Once a potential dispute has been identified, or a claim has been submitted to the CM,

it is imperative that the **CM** establishes a separate file to **properly monitor** the status of the issue.

- ❑ If the claim is the peak of an issue that has been progressing through the **various stages** of the administrative process, then the CM should establish a potential claim issue file that contains all **relevant documents** related to the issue.

Claim issue evaluation and assessment

Based on CMAA

- ❑ The **CM** should **review** the **claim issue** and **determine** if the **claim submittal** **complies** with the **requirements** of the **contract**.

If so, the CM should provide

1. **Objective** evaluation as to potential merit
2. Independent **cost and schedule** evaluation
3. Review of the **reasonableness** of the alleged **damages**

***If additional information is needed**, the **CM** should promptly request the necessary information from the contractor*

*while providing a realistic **timeframe** for the expected response.*

Time and cost impacts

Based on PMBOK Construction Extension

- ❑ All time extension requests and time impact analyses should be **reviewed promptly** in order to avoid claims later of **Constructive Acceleration**.
 - ❖ This type of claim most frequently occurs when owners ignore time extension requests, deny them outright without respectful analysis, or refuse to engage with contractors over such requests,
resulting in substantiated cost impacts for the contractor.

The Constructive Acceleration Doctrine allows recovery for the additional expenses the contractor can establish.

Time and cost impacts – Tracking of costs for disputed items (time and material)

❑ If a contractor has been directed to **perform disputed work**,

It is imperative that the **CM validates** that

1. Work being performed is in fact **part of the disputed work** and **not paid** for under another undisputed pay item, and
2. That **all labor**, **material**, and **equipment** are **accurately documented**.
 - ❖ The **CM and the contractor** should **both confirm** by signature the amount of **manpower and equipment** dedicated to the disputed item on a **daily basis**.

*By doing so, the CM **eliminates the potential dispute** over the quantum of effort with the contractor, since the actual effort was **verified contemporaneously**.*

Time and cost impacts – Schedule management

❑ The **CM** has the **primary responsibility** of

1. Reviewing the contractor's schedule and update
2. Determining the schedule status
3. Analyzing cause of delays
4. Reviewing the contractor's time extension requests
5. Working with the contractor to identify recovery plans, in the case of delays

Fully has been taught in advanced level of planning and scheduling course

Time and cost impacts – Schedule management: Resource loading

- ❑ If appropriate, the **CM** should recommend that the contract requires a **resource-loaded schedule**.
- ❑ This information enables the **CM** to **understand** and **monitor** the **contractor's commitment** of resources in the accomplishment of the work.
- ❑ It is important for the contractor to **commit sufficient resources** to properly **progress the entire project, not just the critical path**.
- ❑ The **CM** should **track and monitor** the resource commitments by the contractor to identify ***deviations from the current plan*** that may ***present concern*** as to the contractor's ***ability to sustain the planned rate of progress***.

Time and cost impacts – Schedule management: Critical path

❑ The CM should

1. **Track** the **progress** of the contractor **against critical path and near-critical paths**
2. **Monitor** the change in **float** on critical and near-critical paths on the project.

Time and cost impacts – Delay claims

❑ If a **delay claim** is submitted by the **contractor**,

CM needs to **validate** that the alleged delay has been **properly presented** and substantiated by the **contractually prescribed methodology**.

❖ The **construction contract** should **specify** what **schedule delay analysis methodology** is to be employed by the contractor **when filing** a delay claim.

1. Many contracts today contain a **TIA submittal requirement** that is intended to address a **predicted delay** caused by the underlying contract deviation issue
2. If the delay claim is **presented after the delay and claimed impacts** have occurred, then a **forensic delay analysis** will be required.

Time and cost impacts – Delay claims

❑ The CM must

1. **Be acquainted** with the contractually prescribed method
2. Should also be **well versed** in forensic schedule analysis

*More complex analyses may be developed, typically after the fact, and the **CM** should be able to consider and evaluate these analyses in consideration of the **contract terms** and the actual events that occurred.*

Under any circumstance, the **CM** must **advise the owner** as to whether the delay is *excusable or unexcusable, compensable or non-compensable*.

Thereafter, the CM can assist the owner in the negotiation and resolution of the disputed delay.

Time and cost impacts – Delay claims: Recovery and mitigation

1. If a delay claim has been submitted and reviewed, and
2. Owner has agreed that the contractor is **entitled to relief**, the owner has two options:
 - a) **Time Extensions** - The owner can grant a time extension and delay damages to the contractor for the length of the excusable delay.
 - b) **Recovery** - If an **extension** to the project completion date is **not feasible** for the owner due to an **external constraint**,
then the owner can authorize the contractor to recover the work on the critical path by employing additional resources, working additional shifts, or working overtime.
 - ❖ If the delay is excusable, then the **cost of recovery** would likely be compensable to the contractor.

Time and cost impacts – Delay claims: Liquidated damages

❑ If the construction contract requires the **assessment of liquidated damages** for late completion of any milestone,

then the **date** upon which the **liquidated damages** begin to accrue is **established in the contract**.

If excusable delays have been granted, the **contract milestone dates** need to be **adjusted** to the new date(s), resulting from granted time extensions.

Prompt payments

- ☐ Construction is mostly done on a **cost-reimbursable basis**
- ☐ Depending upon the **contract terms**,
contractors may be able to *seek routine reimbursements* for work successfully completed during the previous period.
- ☐ A **failure to do so** may subject owners to **legal penalties or slow payments**,
which may **adversely impact a contractor's financial ability** to proceed with the work as planned and
leave the owner exposed to claims of owner interference with the work.



Capability gap analysis

- ☐ If the **CM** does **not have the capability** to review CPM schedules, time extension requests, and delay claims,
the **owner should engage a professional** to perform these functions.
- ☐ If **both** the owner and the contractor teams have **competent construction project managers** with a mutual **understanding of the contract requirements**,
it is more likely that **time extension requests and delay claims** can be resolved on the job site **through negotiation**.

Expert judgment

Depending on the project delivery method employed,

the **owner may seek advice** from one or more of the contract stakeholders as to **whether a claim is valid**.

This may be the designer of record or the construction manager.

Pending claim file and statement of claim

- ❑ As a good practice, **items identified as potential claims** should be kept in their own separate files that contain **all related documentation**, including **correspondence and contract references**.
 - ❖ This ensures that relevant **information and documents** are collected and retained in an **accessible file or database**.
- ❑ **Without this proactive approach** for organizing and **indexing**,
managing the hundreds to tens of thousands of project documents will become an **extremely expensive component** of qualifying and proving the claim.

Claims Management

(Notes To Consider Before Writing the Claim)

Important notes to consider before writing the claim

- ❑ When an **event or events have occurred** that the **project team consider** give rise to the **need to submit a claim** it is sensible to **consider certain matters before proceeding**.

YOU WILL SEE 7 KEY POINTS ERE!

Important notes to consider before writing the claim

☐ Things to be **considered in the early stages** are the following:

1. The likely outcome and seriousness of the event.

- ❖ Will it have a **serious enough impact** on the claimant to **justify the submission** of a claim?

Important notes to consider before writing the claim

❑ Things to be **considered in the early stages** are the following:

2. The value of the claim.

❖ Obviously the **ends must justify the means** here and

- ✓ if it will **cost a significant amount to prepare a claim** for a **small return**,
it *may make little economic sense* to pursue the action.

Similarly, if a claim is *likely to attract a high return*, it is probably worth *providing the necessary resources to ensure a **high-quality effort** is made.*

Important notes to consider before writing the claim

❑ Things to be **considered in the early stages** are the following:

3. The strength of the claim and its chances of success.

❖ Are the chances of success **great** enough to **justify** the **effort and expense**?

Important notes to consider before writing the claim

☐ Things to be **considered in the early stages** are the following:

4. The strategy should also consider how the claim is to be persuasive.

- ❖ It is **unlikely** that the claimant will **receive the full value** of his claim submission, so it is wise to **include a negotiation margin**.
- i. Maximizing all issues leaving a **large amount for negotiation**, or
- ii. Ensure that all **arguments are absolutely sound**?
 - ✓ The **second one** usually results in a **submission with a lesser value**, but is often **harder to defend** against.
 - ✓ It is also **true to say** that while an inflated claim strategy may have a **chance of success if reviewed by inexperienced parties**,
*however, such a claim is **unlikely to succeed** when the experts get involved.*

Important notes to consider before writing the claim

☐ Things to be **considered in the early stages** are the following:

5. Some claims are complicated in their very nature and if this is the case, they require a certain amount of knowledge and experience to prepare.

- i. Do **in-house resources** contain **adequate experience and knowledge** to produce the desired result, or
- ii. Should **additional resources** be **brought in**?

Important notes to consider before writing the claim

❑ Things to be **considered in the early stages** are the following:

6. Client relationships should be considered.

❖ Claims are **inevitably** viewed negatively by the respondent.

- i. At best, the person **responsible for reviewing** the claim will consider inconvenience and
- ii. At worst, the claim will be viewed as an **attempt** by the ‘greedy and unscrupulous’ contractor to **maximize** his returns by any means from the ‘poor, hard-done-by and totally innocent’ client.

While the **reality** will most likely fall somewhere between **these extremes**, existing and future client relationships should be considered, maybe at **executive level**.

Important notes to consider before writing the claim

❑ Things to be **considered in the early stages** are the following:

7. The parties who are likely to make the determination should also be considered.

- ❖ Do they have a **responsibility** to protect the Employer's interests or to be impartial?
- ❖ Are they actually **likely to act impartially**?
- ❖ Is the person likely to have **sufficient knowledge** to
 - i. Understand the **matter in question**
 - ii. **Contractual principles** relied upon
- ❖ Is the **Employer** likely to **engage the services** of an **expert**?

Claims and Disputes Resolution

(Resolution Methods)

Suggested terminology by CMAA

❑ A **typical hierarchy** of **potential disagreements** may include the following:

1. *A request for change*
2. *A request for equitable adjustment*
3. *A formal claim*
4. *Litigation*



Suggested terminology by CII

If the **owner admits** the claim of contractor and **grants him extension of time or reimbursement of additional cost**, or both,

the issue is sorted out.

However, if the **owner does not agree** to the claim put out by contractor and there are **differences in the interpretations**,

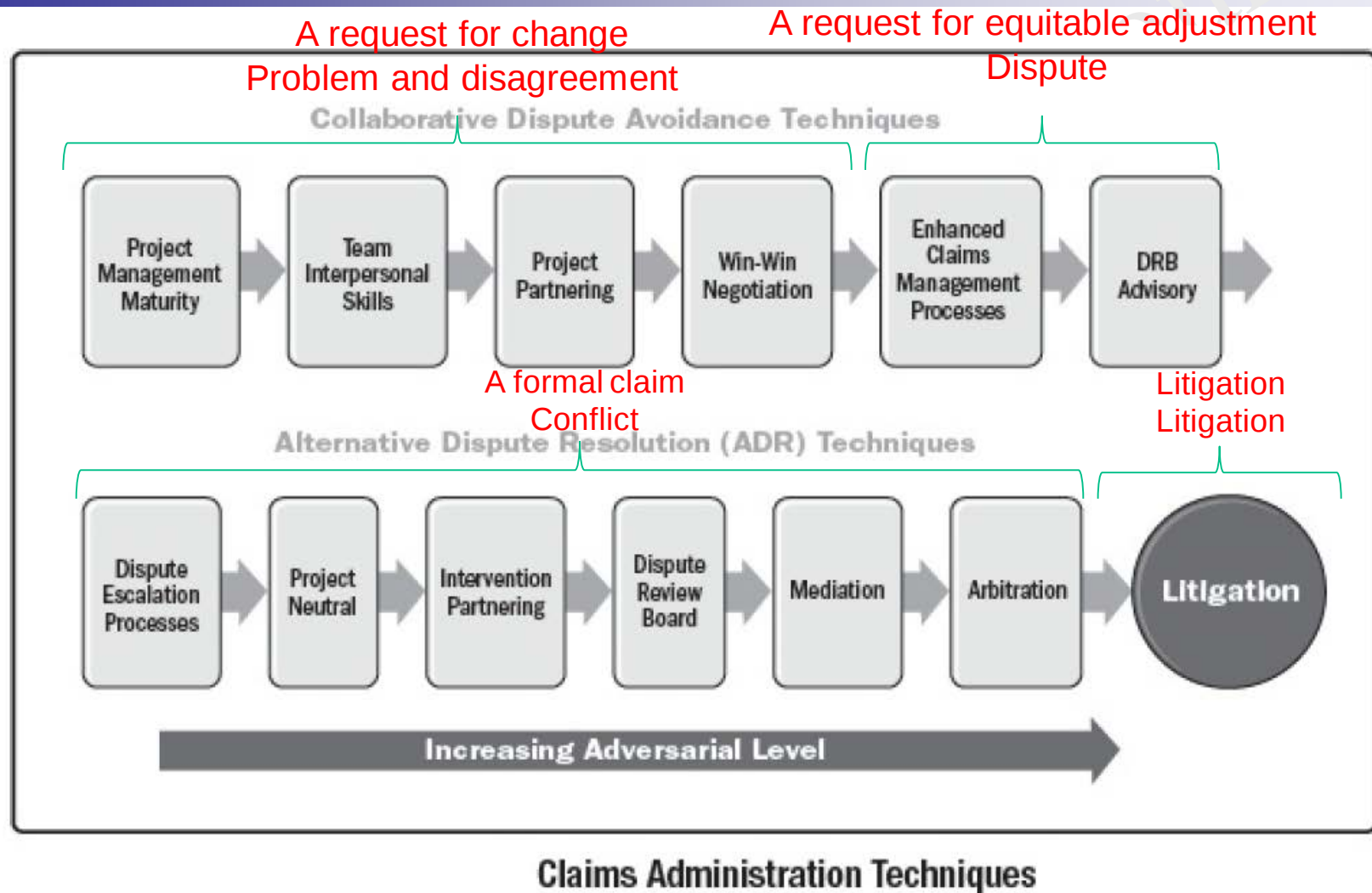
the issue takes the form of a dispute

Dispute

It is “**any contract question or controversy** that must be settled **beyond** the jobsite management”

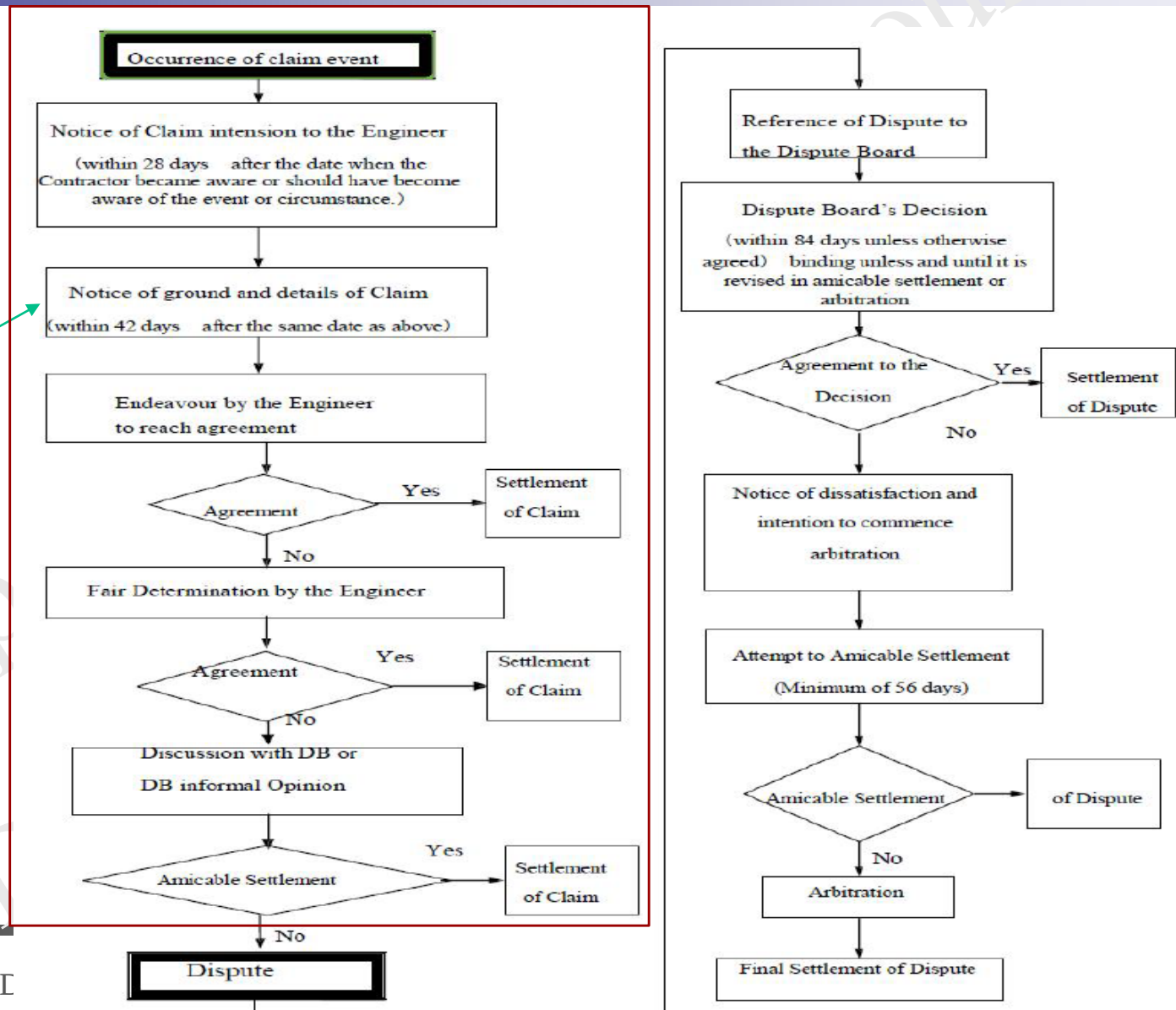
Individuals Involved	Stages in the Claims Process				
	Problem	Disagreement	Dispute	Conflict	Litigation
Litigators					Formal court documentation and proceedings
Consultants & Neutrals				Assist with quantification and entitlement on an issue-by-issue basis	
Sponsors, Standing Advisors & Standing Neutrals			Attempts at resolution removed from day-to-day management		
Project Managers	Routine discussions & negotiations	Substantial honest negotiation on defined problem			
Level of Resolution	← On the Project →			← Removed from the Project →	

Suggested terminology by PMI



Claims management process – Sample 1

Submitting final details of the claim **within 42 days** of the **end** of the **events** giving rise to the **claim**



Claims and disputes resolution

Refusal by the owner to recognize the claim does not ordinarily authorize the contractor to refuse to continue its field operations.

However, the contractor should proceed with the work in dispute only after filing a written protest with the owner.

Although the *disputed work may be performed under protest*, the contractor must continue field operations with diligence, relying on remedies stipulated in the contract to settle the questions of compensation and extension of time.

Claims and disputes resolution

☐ AIA A201-2017: General conditions for construction

§ 15.1.4 Continuing Contract Performance

§ 15.1.4.1 Pending final resolution of a Claim, except as otherwise agreed in writing or as provided in Section 9.7 and Article 14, the Contractor shall proceed diligently with performance of the Contract and the Owner shall continue to make payments in accordance with the Contract Documents.

Claims and disputes resolution

The **requirement** that the contractor **must proceed** with the disputed work **does not** apply,

*if the **change or modification** involved is **beyond the scope** of the contract.*

(۲۹-الف-۲)

جمع مبلغ مربوط به کاهش مقادیر و حذف آن‌ها نباید از ۲۵ درصد مبلغ اولیه پیمان بیشتر شود. اگر این مبلغ، از حد تعیین شده بیشتر شود و پیمانکار با اتمام کار با نرخ پیمان موافق باشد، عملیات موضوع پیمان در چارچوب پیمان انجام می‌شود. ولی در صورتی که پیمانکار مایل به اتمام کار نباشد، پیمان طبق ماده ۴۸ خاتمه داده می‌شود.

The **distinction** between what is and **what is not within the scope** of the contract is often **difficult** to establish however,

*and should not be invoked by the contractor **without** **consultation with legal counsel.***

☐ If a contractor submits a claim,

CM should **promptly mitigate** any further escalation by immediately **administering the dispute resolution process.**

☐ The CM should **understand all the administrative requirements** contained in the contract regarding the **submission of claims** by the contractor.

☐ The **dispute resolution process** specified in the construction contract is for the **benefit of the owner** and the contractor,

and is intended to **protect both** from a **delay in resolution.**

CM's role

- ❑ Each construction contract should identify the **administrative remedies** to be followed during the project in the **event** the contractor or owner are in **dispute**.
- ❑ The **specific dispute resolution process** should be identified and may include **any one, or more**, of the **commonly used methods** and processes.
- ❑ The **CM** should endeavor to **resolve disputes** at the **project level** **before** allowing the **dispute to escalate** to a **higher management level** for resolution.
- ❑ Many contracts specify **alternative dispute resolution (ADR)** methods in lieu of, or before, the **last resort of litigation**.

CM's role

- ❑ The **CM** often plays an important role as a **facilitator** in the **resolution** of construction claims.
- ❑ There are **several different approaches** that can be used to **negotiate agreements**.
 - ❖ However, **true negotiations** can only occur **when**
 - all the parties are willing to honestly** participate and the negotiations are done with representatives
 - who have the authority** to enter into such agreements.

National construction dispute resolution committee (NCDRC)

❑ In an effort to provide a remedy for the excessive litigation which they saw arising from construction projects,

leaders of the industry in 1991 established a task force whose purpose was to

promote awareness and understanding, of private dispute resolution techniques, and to encourage their use as standard practice in the industry.

The National Construction Dispute Resolution Committee (NCDRC) (www.adr.org.) was formed as a committee of the American Arbitration Association.



National construction dispute resolution committee (NCDRC)

- ❑ **This committee** represents all segments of the construction industry: **public and private** owners, architects, engineers, contractors, subcontractors, insurers, lenders, and others.
- ❑ All share a common goal, which is to actively seek **ways of avoiding unnecessary disputes** and litigation in construction.
- ❑ The **NCDRC** has emerged as a **provider of leadership to the industry** in moving toward the best utilization of ADR methods for the benefit of the construction process.

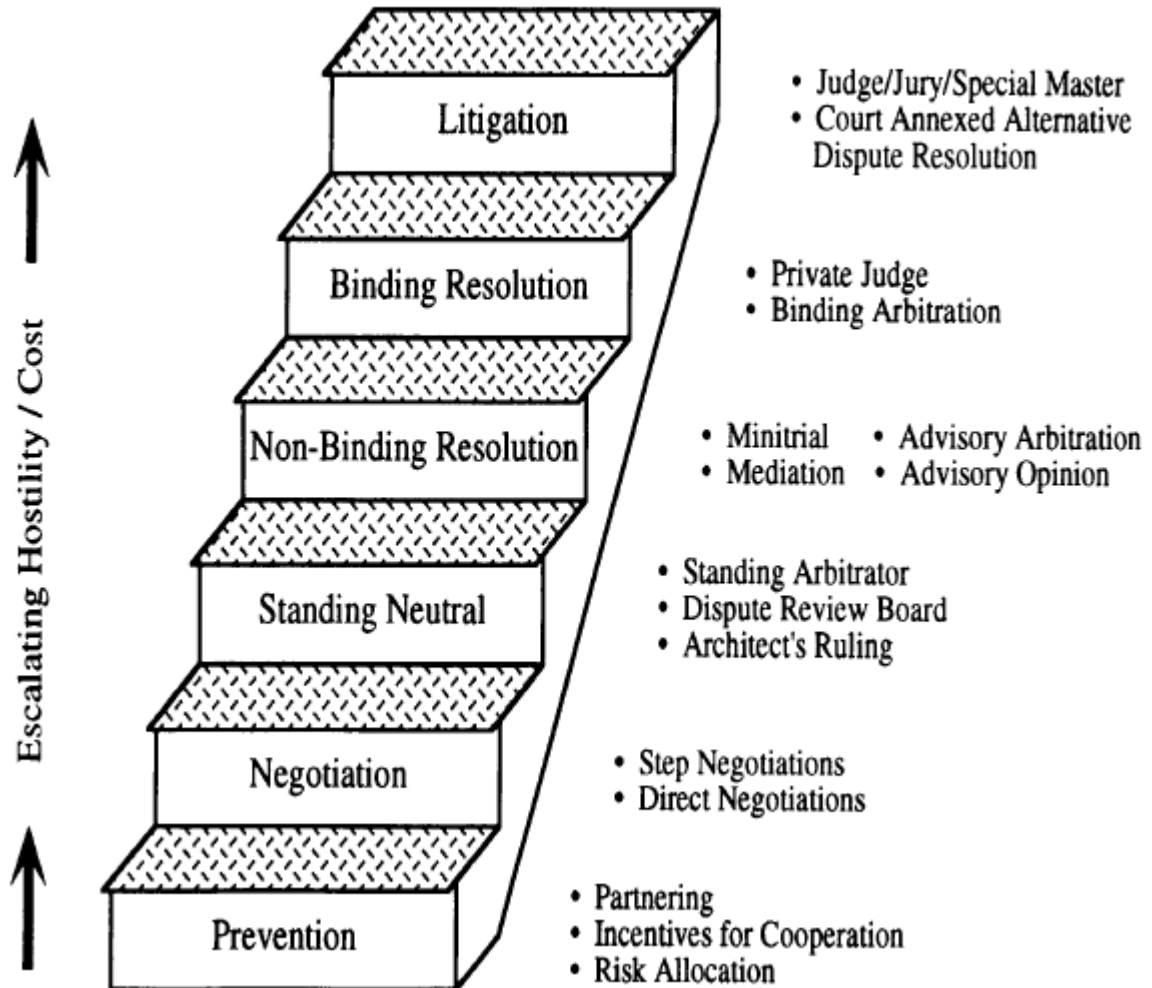


Alternative dispute resolution

- ❑ Different techniques exhibit rising levels of hostility and cost source

We will review these headings concisely in the course provided at Consulting Level in ACEMI.

- ❑ However, some of them will be reviewed in this course!

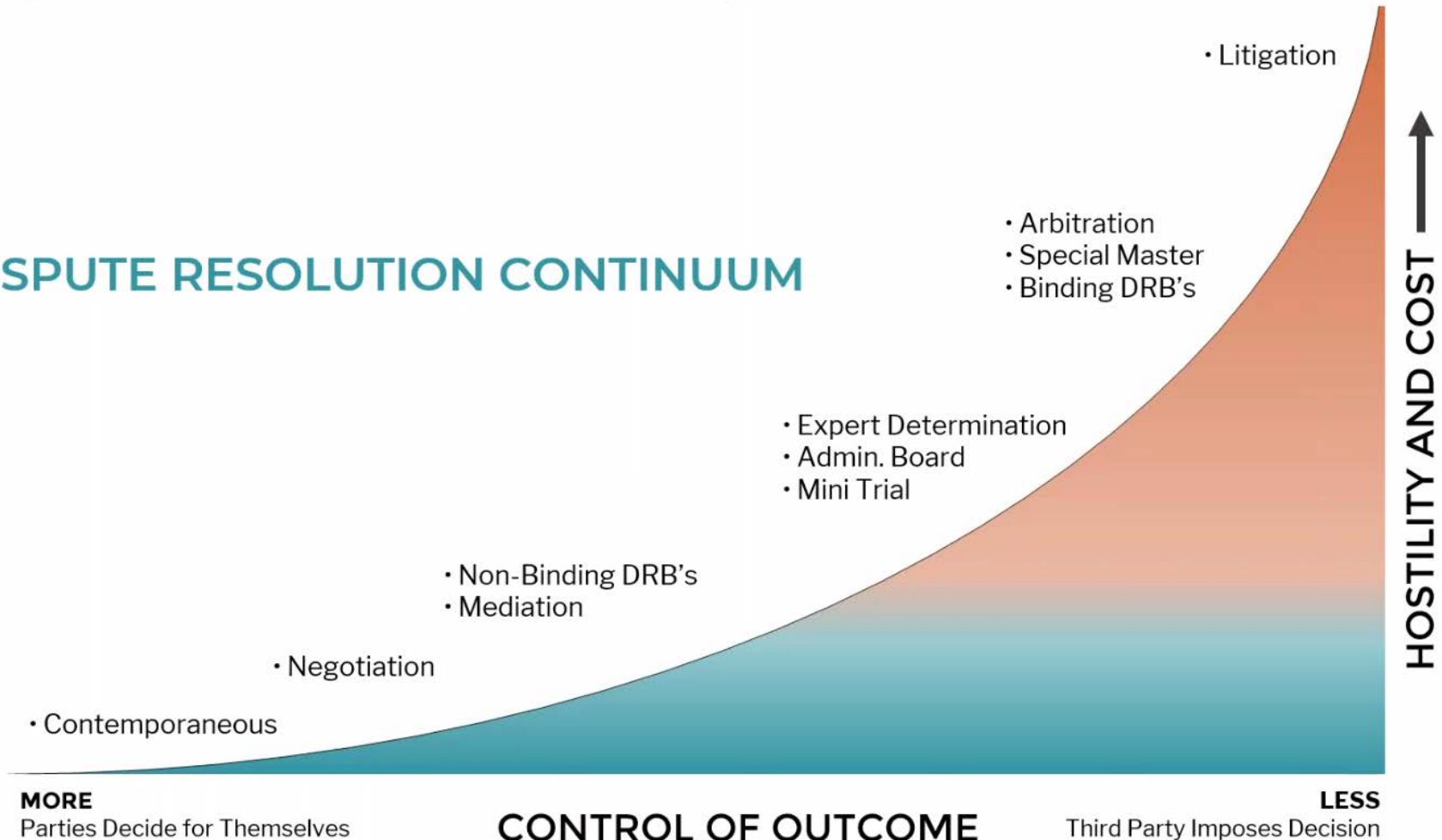




Alternative dispute resolution

- ❑ Another model by HKA Consulting Inc.

DISPUTE RESOLUTION CONTINUUM



Alternative dispute resolution – Major methods

- ☐ Partnering

- ❖ Many call this method as dispute **prevention alternatives**

- ☐ Engineer's decision clause

- ☐ Negotiation

- ☐ Mediation

- ☐ Arbitration

- ☐ Dispute review board

- ❖ Many call this method as dispute **prevention alternatives**

- ☐ Litigation

Alternative dispute resolution – Other methods

- ☐ Early neutral evaluation
- ☐ Non-binding summary jury trial
- ☐ Mini-trials
- ☐ Private judging
- ☐ Boards of contract appeals
- ☐ Etc.

Alternative dispute resolution – Partnering

- ❑ The Construction Industry Institute (CII) Partnering Task Force defined partnering in its 1989 report as follows:

“Partnering is a long term commitment between two or more organizations for the purpose of achieving specific business objectives by maximizing the effectiveness of each participant's resources. The relationship is based upon trust, dedication to common goals and an understanding of each other's individual expectations and values. Expected benefits include improved efficiency and cost-effectiveness, increased opportunity for innovation, and the continuous improvement of quality products and services.”

In its publication, *Partnering: A Concept for Success*

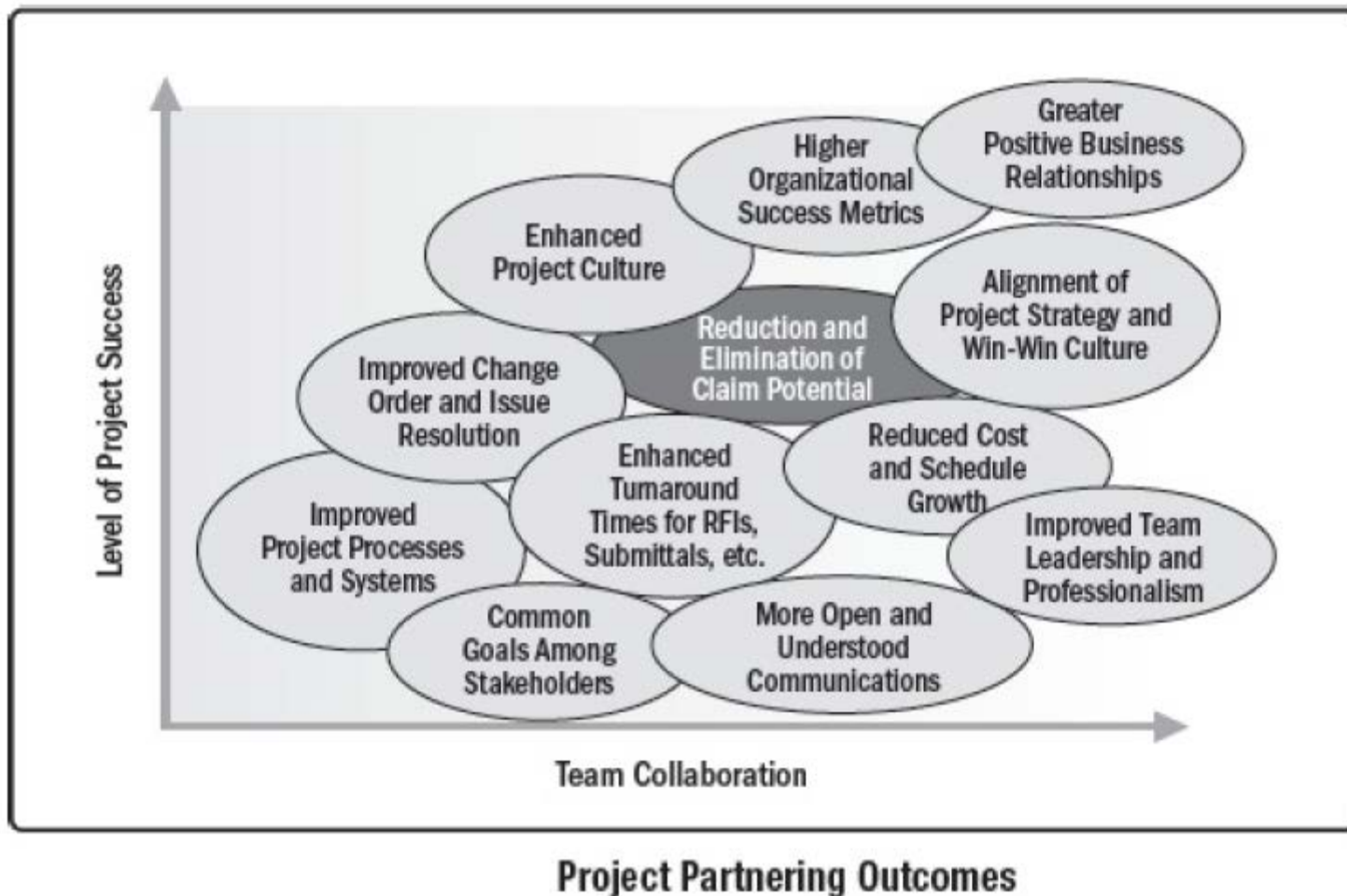
Alternative dispute resolution – Partnering

❑ AGC lists seven key elements of partnering.

1. **Commitment**
2. **Equity**
3. **Trust**
4. **Development of Mutual Goals/Objectives**
5. **Implementation**
6. **Continuous evaluation**
7. **Timely responsiveness**

Alternative dispute resolution – Partnering

❑ In PMBOK Construction Extension.



Alternative dispute resolution – Partnering

*The CM should foster a **partnering culture** on the project even in the absence of a formal **partnering requirement** in the interest of claims avoidance.*

The CM's actions, communications, and conduct should be positive and cooperative.

You will see the comprehensive procedure in the IQ, EQ, and VQ Course!

Alternative dispute resolution – Engineer's decision clause: An overview

- ☐ The **contractor** submits **all claims** to the project **Architect or engineer (A/E)**
- ☐ The A/E's **decision** is **final** and **binding** on all parties
- ☐ **Used** to be common in **public works** contracts, **not common now!**

Alternative dispute resolution – Engineer's decision clause: Pros

- ❑ As a party **intimately familiar** with the overall project, the A/E is in a **good position** to **judge the validity** of the contractor's claims
- ❑ It is **appropriate** that the A/E, as the owner's representative at the site, be given **prompt notice** of any **contractor complaints**
- ❑ In practice, **many claims**, particularly the **smaller ones**, are **resolved by the A/E** to the **mutual satisfaction** of the owner and the contractor

Alternative dispute resolution – Engineer's decision clause: Cons

- ❑ The A/E has **conflict of interest**
 - ❖ He/She is **owner's representative**
 - ❖ It creates perception of **unfairness** and **lack of objectivity**
- ❑ **Contractors** and their **trade associations** **object** to this practice
- ❑ It creates an **unfavorable bidding climate**: **fewer bidders** and **higher bids**
- ❑ It **attracts hostility** from the **courts**
 - ❖ Courts does not like this method

Alternative dispute resolution – Negotiation: An overview

- ❑ New version of the **engineer's decision clause**
- ❑ The **contractor** is asked to **submit** claims to the **CM (or A/E)**
- ❑ The **CM (or A/E)**'s **role** resembles the role of a **mediator**
- ❑ The **CM (or A/E)**'s **decision** is **not final nor binding**
 - ❖ Some items would be defined as **artistic effects** and the decision of **CM (or A/E)** is **binding on those items**

The CM is likely to be a primary participant in such negotiations as the person most knowledgeable on behalf of the owner.

The CM should support these negotiations in an objective, honest, and ethical manner.

Alternative dispute resolution – Negotiation: An overview

❑ If contractors are not happy with the decision:

1. Private owners or the contractor are **free to submit** the dispute to **arbitration** (sometimes mediation before arbitration)
2. Public contracts usually call for the **initial submission** of a dispute to the **A/E** but **allow** for an **appeal** to an **administrative board** which is **not bound** by the **A/E's** findings

Alternative dispute resolution – Negotiation: An overview

❑ Negotiation is:

- ❖ Voluntary
- ❖ Bilateral/Multilateral
 - ✓ Can involve two, three or dozens of parties
- ❖ Non-adjudicative
 - ✓ Involves only the parties involved in the project (not a third-party neutral)
- ❖ Informal
- ❖ Confidential
 - ✓ There can be criterial governing disclosure as specified in the contract
 - Like the rule of **Access to Information Act and the Privacy Act**
- ❖ Flexible

Alternative dispute resolution – Negotiation: Typical procedure

❑ Each negotiation has its own **unique** characteristics.

❖ There is thus **no uniform** manner

*For example, the **timing** of an **offer** and the question of **which party** is to make the **first offer** fall within the discretion of the negotiator and are determined by the **overall dynamic of a particular negotiation**.*

Alternative dispute resolution – Negotiation: Typical procedure

1. Negotiation Session
2. Don't forget statutory/Policy considerations

During any negotiation, some considerations should be kept in mind,

let's look at them!

Alternative dispute resolution – Negotiation: Typical procedure

Do not forget to consider the following points

1. Initial assessment:

- ❖ Authority/Mandate to negotiate and reach an **agreement** or settlement
- ❖ Willingness to negotiate
- ❖ Credibility of other party(ies)
- ❖ Ability to **negotiate** (equality?)
- ❖ Alternatives to **negotiation**
- ❖ Know the other **side's objectives**

Alternative dispute resolution – Negotiation: Typical procedure

Do not forget to consider the following points

2. Contact with the other party to arrange/confirm:

- ❖ Agenda
- ❖ Location (neutral)
- ❖ Timetable
- ❖ Participating parties
- ❖ Public/Confidential nature (See statutory requirements, below)
- ❖ Official Languages
- ❖ Support services (word processing, etc.)

Alternative dispute resolution – Negotiation: Typical procedure

Do not forget to consider the following points

3. Preparation of a strategy and interest assessment:

- ❖ Study the **issues**
- ❖ Harmonize/reconcile **competing interests** within the team
- ❖ Assess the **BATNA** (Best Alternative to No Agreement) for all parties
- ❖ Assign roles for **team members** (spokesperson(s), etc.)
- ❖ Create **options** for mutual gain (“win-win”)
- ❖ Consult relevant rules and policies mentioned in the contracts

Alternative dispute resolution – Negotiation: Typical procedure

Do not forget to consider the following points

4. Points to consider for a negotiation:

- ❖ Concentrate on **interests**, not positions
- ❖ Separate the **people** from the **problem**
- ❖ Listen **carefully** and **actively**
- ❖ Respect the **other party** (e.g., any cultural, linguistic or other differences)
- ❖ Create and propose **options** for mutual benefit (**“win-win”**)
- ❖ Use **objective standards**
- ❖ Assess **progress** in light of **one's BATNA**
- ❖ Anticipate and avoid **responding** to provocative tactics
 - ❖ Proactive tactics are used in an **attempt to influence someone** to carry out an **immediate request**.
- ❖ Communicate frequently with the **client**
- ❖ Remain within the **limits** of the negotiating mandate

Alternative dispute resolution – Negotiation: Typical procedure

Do not forget to consider the following points

5. Consider using experienced counsel and experts for a proper and OBJECTIVE assessment of:

- ❖ Legal issues
- ❖ Technical facts
- ❖ Impacts
- ❖ Damages
- ❖ The most advantageous way to present your position

Alternative dispute resolution – Negotiation: Pros

❑ **No need** for resource to a **third-party neutral**, therefore:

1. **Quickest** and can begin right away
2. **Least expensive**

❑ **Informal** with no set rules

❑ The parties **control** the process

❑ Does **not preclude (avoid)** other methods

❖ Not binding

Alternative dispute resolution – Negotiation: Cons

- ❑ May **not lead** to any **resolution**
 - ❖ **Cannot guarantee** to reach an agreement
 - ❖ Anyone who chooses to **terminate** negotiations may do so **at any time** in the process and this may result to **loose money and time.**
- ❑ **Both party** should have **authority**
- ❑ The **absence of a neutral third party** may encourage one party to attempt to **take advantage** of the other. Therefore:
 - ❖ May need to **compromise**
 - ✓ May **lose** your true **rights**

Alternative dispute resolution – Mediation: An overview

❑ Not new

❖ Used in India, Islamic world, Greece, Rome & China, medieval Europe

❑ As **litigation & arbitration** became too lengthy, too expensive industry turned to **mediation**

❖ Popularity grew from **1980's on**



Mediation now most popular form of ADR

Private, confidential, informal submittal of dispute to non-binding dispute resolution process

Individual party or panel

Alternative dispute resolution – Mediation: An overview

- ❑ **Negotiation** between parties assisted by a **neutral third party**
- ❑ **Third party** is selected to **facilitate** settlement as a “mediator”
 - ❖ **Often** is a lawyer, but **not have to be**
- ❑ The parties **agree** to the **process**
- ❑ **Mediator** does **not make a decision** and has **no power** to do so
 - ❖ **Conflict check**
 - ❖ Remember the **main role is to facilitate** the discussion between parties
 - ❖ All parties must **come to an agreement** to have successful mediation
- ❑ **Private and confidential**
 - ❖ Can tell the mediator to **keep** some points **secret** and **don't reveal** that against you
- ❑ **Not legally binding**, **unless** and until a **settlement agreement** or settlement term sheet is **signed** at the end of the mediation
 - ❖ A **signed agreement** has the **force of a contract**, when **signed**, becomes **binding**



Alternative dispute resolution – Mediation: An overview

□ Typical road to use mediation

- ❖ Claim filed
- ❖ Analysis performed
- ❖ **Negotiations** attempted
- ❖ **Negotiations** fail
- ❖ Dispute starts
- ❖ Parties agree to **mediate**



Alternative dispute resolution – Mediation: An overview

Although it is desirable to include a clause in the contract providing for mediation, it is not necessary for the parties to agree to attempt mediation in the event of a post-contract dispute.

- ❑ The **CM** may wish to **recommend** and **incorporate** a **contract clause** in the trade contract that is administered under the **CM's jurisdiction**. Such a clause would read as follows:

*If during this contract, the parties are **unable to resolve** the dispute or controversy among themselves (**negotiation**), they shall at **first endeavor** to settle such a dispute in a **non-binding**, **voluntary manner** by referring same to (name of individual or dispute-resolution firm) **prior to filing for arbitration** or having recourse to a **judicial forum**.*

Alternative dispute resolution – Mediation: An overview

☐ Mediation is:

- ❖ Voluntary
- ❖ Non-coercive
 - ✓ Mediator does **not decide** for parties, but helps them make their own decision
- ❖ Informal
- ❖ Confidential
 - ✓ There can be criteria governing disclosure as specified in the contract
 - Like the rule of **Access to Information Act and the Privacy Act**
- ❖ Flexible

Alternative dispute resolution – Mediation: Typical procedure

How to hold a mediation session?

1. Starting off with all parties in the same room (called joint session)
2. Beginning the mediation session
 - ❖ **Open communication** and negotiation between the parties
 - ❖ Establish an **open** and **positive tone**
 - ❖ Establish **ground rules** and behavioral guidelines
 - ❖ Assist the parties in constructively **discharge emotions**
3. Defining issues and setting an agenda
 - ❖ **Identify** broad topic **areas of concern** to the parties
 - ❖ **Obtain agreement** on the **issues** to be **discussed**
 - ❖ Determine the **sequence** of **handling** the **issues**

Alternative dispute resolution – Mediation: Typical procedure

How to hold a mediation session?

4. Uncovering hidden interests of the disputing parties

- ❖ Break out and take each party and put them **into separate rooms**
 - a) Sometimes keep them **separate for the rest** of the entire mediation session
 - b) Sometimes ask them to **go back to the joint session**
- ❖ Identify the **interests** and **needs** of the parties
- ❖ Educate the parties about **each other's** interests and needs
- ❖ Show diplomacy and **exchange documents**, facts by going back and forth between the rooms and **take each offer** from each party **until you reach an agreement**

Alternative dispute resolution – Mediation: Typical procedure

How to hold a mediation session?

4. Uncovering hidden interests of the disputing parties

- ❖ Contractor presents position
 - ✓ No examination by other side
 - ✓ Mediator may/may not summarize
- ❖ Owner presents position
 - ✓ Mediator may/may not summarize
- ❖ May have question & answer session
 - ✓ Lead by mediator
- ❖ May have discussion session

Alternative dispute resolution – Mediation: Typical procedure

How to hold a mediation session?

5. Generating options for settlement

- ❖ Develop an **awareness** among the parties of the **need** for **options**
- ❖ Generate **options** through **brainstorming** and **dialogue**
- ❖ Assist in **lowering** parties' commitment to positions or **sole alternatives**

*Typically you are a facilitator and should not tell either side that your case is **horrible**, instead you only point out **some weaknesses** and try to reach an agreement*

However, some mediator may put themselves in the position of evaluator and tells either party the major risk in their cases.

Alternative dispute resolution – Mediation: Typical procedure

How to hold a mediation session?

6. Assessing options for settlement

- ❖ Review the **interests** of the parties
- ❖ Assess how **interests** can be **met** through **various options**
- ❖ Assess the **costs** and **benefits** of **each option**

7. Final bargaining

- ❖ Bring the **parties' interests** together
- ❖ Generate **willingness** to **compromise**
- ❖ Create an agreement or **memorandum** of understanding

8. Achieving formal settlement

- ❖ Identify procedural **steps** to operationalize the **agreement**
- ❖ Formalize the **settlement** and create an **enforcement mechanism**

Alternative dispute resolution – Mediation: Typical procedure

What is the role of a mediator?

- ❑ **Regardless of what techniques** are used by the mediator to assist the parties in reaching a solution, the mediator is **not** empowered to **render a decision**.

Mediator = Negotiation facilitator

- ❑ **Neutral**

- ❖ Helps analyze positions
- ❖ Identifies strong, weak points
- ❖ Role is advisory – to both parties
- ❖ Assists in structuring acceptable settlement

Alternative dispute resolution – Mediation: Typical procedure

Do not forget to consider the following points

- ❑ The **choice** to go to the mediation **rests with the parties**, all of whom **must agree** to attend.
- ❑ The parties **must mutually select** a mediator, either through referrals or directly.
- ❑ The **mediation agreement** should be **drafted**, laying out a number of critical items, including, but **not limited** to:
 - ❖ The **logistics** of the mediation
 - ❖ The **cost-sharing arrangement** (normally 50/50)
 - ❖ The **mandate** of the **mediator**
 - ❖ Whether the mediation will be **confidential or of public record**
 - ❖ **How disclosure** would operate – in advance or as required by mediator
 - ❖ **Amount of money** to pay to the mediator

Alternative dispute resolution – Mediation: Typical procedure

Do not forget to consider the following points

- ❑ Select a mediator who is **not only a professional** in the mediation field, but is **knowledgeable** in the **construction industry**.
- ❑ Select a **mediator** based on references
- ❑ Prepare a **persuasive presentation** of your position
- ❑ Base your **position** on the **contract/law** and the established facts
- ❑ Highlight the **weaknesses** of the both sides' **positions**
- ❑ Know your **minimum expectations**
- ❑ Consider using **experienced counsel** to present the legal attributes of your case
- ❑ Consider using **independent experts** to:
 - ❖ Provide objectivity & credibility (independent view)
 - ❖ Apply accepted analytical techniques
 - ❖ Present facts in a persuasive manner
 - ❖ Quickly evaluate the strengths and weaknesses of the other side's case.

Alternative dispute resolution – Mediation: Pros

- ❑ **More control** over the process and outcome
 - ❖ When you are in **court** you are **dictated** by the **schedule and process**
- ❑ **Advantageous** in **complex cases** which involve numerous issues.
- ❑ **Shorter** time frame
- ❑ **No discovery** required, but you can have some (**mediation statements**)
- ❑ Generally, the **least expensive** option after negotiation
- ❑ Give each party **sense of other's case** and opportunity to **test other party's resolve**
- ❑ **Informal process** allows parties to describe the dispute from his or her perspective **without the restrictions**
 - ❖ Parties **retain control** over the process

Alternative dispute resolution – Mediation: Cons

- ❑ Mediator qualifications are up to the parties
- ❑ Mediator's objective is a **deal, not justice**
- ❑ Possible lack of participation by all parties due to voluntary nature
- ❑ Successful mediation requires compromise
- ❑ Enforceability of a mediation agreement
- ❑ No guaranteed outcome
 - ❖ You may pay a lot of money with no success
 - ❖ Since parties to a mediation meet face to face, there is **concern**, particularly in cases **involving harassment**, that there might be a power imbalance between the parties.
 - ❖ *For example, if a female employee felt she had been harassed by a male superior, she might not be able to confront him as a person with an equal voice at the mediation sessions.*
 - ❖ **Use separation in this case**

Alternative dispute resolution – Mediation: Cons

- ❑ Mediators trained to **“drive a deal”**
 - ❖ Not always concerned with **facts**
 - ❖ Not always concerned with **contract**
 - ❖ Not always concerned with **law**
- ❖ Mediation difficult if parties on **“opposite sides of \$0”**

Alternative dispute resolution – Mediation: How to succeed at mediation

The points mentioned in the following section used and documented by Navigant

Consulting Inc. in 2015

1. General points
2. Preparation for mediation
3. At mediation
4. After mediation

Alternative dispute resolution – Mediation: How to succeed at mediation

1. General points

- ❖ Be prepared
 - ✓ **Know** your **facts**
 - ✓ Be able to **document facts**
- ❖ Stay relaxed, cool, business-like
- ❖ Keep process **informal**
- ❖ Prepare & practice!
- ❖ Do a **“reality check”** of your case
- ❖ **Don't fall in love** with your case

Alternative dispute resolution – Mediation: How to succeed at mediation

1. General points

- ❖ Maintain **“objectivity”** and focus on **facts**
- ❖ Understand & define **“win”** for YOU!
 - ✓ **What** do you need to **attain** to succeed?
 - ✓ **What** can you **give up** to succeed?

**Know where you want to end up
before going into mediation!**

Alternative dispute resolution – Mediation: How to succeed at mediation

1. General points

- ❖ Remember.....

***Mediation is simply continuation
of the preceding negotiations with
the assistance of a neutral
facilitator!***

Alternative dispute resolution – Mediation: How to succeed at mediation

2. Preparation for mediation

❖ Mediator selection

- ✓ Key to successful mediation!
- ✓ Choose mediator very carefully
- ✓ Decide on type of mediator
 1. Evaluative mediator
 2. Facilitative mediator
 3. Subject matter experience

How to select the mediator?

Alternative dispute resolution – Mediation: How to succeed at mediation

2. Preparation for mediation

❖ Mediator selection

How to select the mediator?

- ✓ Identify potential mediators
- ✓ Get list from American Arbitration Association (AAA), attorney, others
- ✓ Research background, track record, history, reputation
- ✓ Get recommendations
- ✓ Talk to owners, contractors, attorneys
- ✓ Don't be fooled by "record of success"
- ✓ Consider "personality" & ability to work with disputing parties

Alternative dispute resolution – Mediation: How to succeed at mediation

2. Preparation for mediation

❖ Process understanding

- ✓ Work with attorney
- ✓ Learn mediation process (remember we talked about?)
- ✓ Understand mediators don't make decisions
- ✓ May offer mediator proposals
- ✓ Understand roles
 - o Yours
 - o Project staff
 - o Attorney
 - o Experts mediator

Alternative dispute resolution – Mediation: How to succeed at mediation

2. Preparation for mediation

❖ Process participation

- ✓ Actively **participate** in formation of “**ground rules**”
- ✓ Actively **participate** in **document exchange**
- ✓ Assist in **preparation** of **mediation brief**
 - **Attorney** knows how to write briefs—**entitlement**
 - **You know facts** of case – **causation & damages**
- ✓ Disagree, agree on **your role** at mediation
 - This is not a “wake me when it’s over” process

Alternative dispute resolution – Mediation: How to succeed at mediation

2. Preparation for mediation

❖ Process participation

- ✓ Prepare to participate in
 - o Presentation
 - o Discussion
- ✓ Get ready to make decision
 - o Key role, only you can decide!

Alternative dispute resolution – Mediation: How to succeed at mediation

2. Preparation for mediation

❖ Be prepared

- ✓ Learn your case
- ✓ Value your case
 - o Calculate costs & losses **factually**
- ✓ Prepare **arguments**
- ✓ Organize **documents**
- ✓ Build up own **confidence**
 - o **Documentation** would be very helpful
- ✓ Transmit **confidence to others** on your team

Alternative dispute resolution – Mediation: How to succeed at mediation

2. Preparation for mediation

❖ Critical documents

- ✓ During preparation, identify **critical documents**
- ✓ Key to success is documented **facts and damages**
- ✓ **Organize** documents **together with presentation**
- ✓ **Bring** documents to mediation
 - **Have copies** to turn over to other side & mediator

Alternative dispute resolution – Mediation: How to succeed at mediation

2. Preparation for mediation

❖ Legal support

- ✓ Attorney fees?
- ✓ Statute limitations?
- ✓ Enforceability of contract language?
- ✓ Confidentiality of settlement?

Alternative dispute resolution – Mediation: How to succeed at mediation

2. Preparation for mediation

❖ Entitlement support

- ✓ If questioned about **entitlement**, be ready to **address**
 - Have contract clause, specs, drawings, etc. ready for mediator
- ✓ **Don't rely solely** on presentation **skills and logic**
 - Mediators may ignore logic
 - Must **deal** with **documented entitlement** issues

Alternative dispute resolution – Mediation: How to succeed at mediation

2. Preparation for mediation

❖ Learn own strong points

1. During preparation, find **your strong points**

o **Strong points** = **Facts** which lead to settlement in **your favor**

➤ Points which are

- i. Clearly in your favor
- ii. Solidly documented
- iii. Cannot be argued or “interpreted”
- iv. Cannot be dismissed or ignored

Alternative dispute resolution – Mediation: How to succeed at mediation

2. Preparation for mediation

❖ Learn own strong points

2. Document strong points
3. Figure out **how to emphasize** presentation of strong points during presentation
4. Determine **how strong points** can be used to **leverage favorable** settlement

Alternative dispute resolution – Mediation: How to succeed at mediation

2. Preparation for mediation

❖ Learn own weak points

1. During preparation, find **your weak points**

o **Weak points** = **Facts** which lead to settlement in **other party's favor**

➤ Don't have to like them, but must be **able to deal** with them

i. In other party's favor

ii. Not well documented

iii. Can be argued or “interpreted”

Alternative dispute resolution – Mediation: How to succeed at mediation

2. Preparation for mediation

❖ Learn own strong points

2. Be prepared to **accept weak points**
3. Learn **how to acknowledge** weak points
 - ✓ If possible, **present** weak points in **your presentation**
 - ✓ The idea is to **minimize damage to own** case

Alternative dispute resolution – Mediation: How to succeed at mediation

2. Preparation for mediation

❖ Learn other side's strong and weak points

- ✓ Examine **other side's claim** & **presentation** objectively
- ✓ Study **claim** from **their point** of view
- ✓ Examine **other side's case** as if you **want to approve it**
- ✓ Find **their strong points**
 1. Learn how to handle
 2. Decrease your damage
- ✓ Find **their weak points**
 1. Learn how to use to own advantage
 2. Decrease your damages

Alternative dispute resolution – Mediation: How to succeed at mediation

2. Preparation for mediation

❖ Learn other side's strong and weak points

- ✓ Provide **mediator** with weapons to “shoot holes (discredit)” in other side's case

✓ **To convince mediator your case is stronger, you should prevail!**

Use mediator to convince other side!

What points should be focused?

Alternative dispute resolution – Mediation: How to succeed at mediation

2. Preparation for mediation

❖ Learn other side's strong and weak points

- ✓ Find, document, point out in mediation
 - ✓ Mistakes
 - ✓ Inconsistent statements
 - ✓ Undocumented statements
 - ✓ Overinflated costs
 - ✓ Unrealistic damages
 - ✓ Double counted costs
 - ✓ New legal theories
 - ✓ Claims that violate contract provisions

Alternative dispute resolution – Mediation: How to succeed at mediation

2. Preparation for mediation

❖ Know own real damages

- ✓ Mediators focus heavily on **damages** and tend to

- Set aside “soft costs”

- General and administrative costs

- Dismiss and **cut down overinflated costs**

- ✓ Calculate “**real**” damages

- ✓ Be prepared to

- Show **detailed calculations**

- Document **damages**

- Tie real damages to **contract language**

(if silence, refer to standards!)

Alternative dispute resolution – Mediation: How to succeed at mediation

2. Preparation for mediation

❖ Estimate failure cost

- ✓ If mediation fails
 - Arbitration or litigation likely to result
- ✓ Calculate **“BATNA** (best alternative to no agreement)”
 - Cost of doing **legal battle**?
 1. Have **attorney** provide **realistic estimate** of **legal cost**
 2. Prepare **estimate** of **yours** and **your staff’s costs**
 3. Analyze **“risk”** of **legal battle**
 4. Assess **other side’s legal costs**

Compare the cost of “failure cost” and the cost of “agreement”

Alternative dispute resolution – Mediation: How to succeed at mediation

2. Preparation for mediation

❖ Rehearse (practice)

- ✓ Run **mock** mediation
- ✓ Use **real mediator** (you can hire for half a day)
 - **Your staff knows your stuff** and not recommended
- ✓ Present case
- ✓ Present other's case
- ✓ Get prepared for mediation day

موسسه مهندسی و مدیریت ساخت علوی پور (ACEMI)

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