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THE ''INITIAL DECISION MAKER'': THE NEW INDEPENDENT DISPUTE RESOLVER IN AMERICAN PRIVATE BUILDING CONTRACTS

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In May 1885, the prominent American architect George C Mason of Newport, Rhode Island, described with obvious trepidation the perilous role of the architect in serving as the initial dispute resolver—the professional ''peace-keeper''—between the owner and the contractor on American building projects:

> ''The architect is, by virtue of his position and the wording of all contracts drawn by him, an independent and judicial advisor, as well as a designer and supervisor of construction. It is a well known axiom of architectural ethics, that, 'in his relations to clients and contractors, the architect should be an impartial arbitrator, and under no circumstances should he act as a special pleader for either party'. The owner of a building in course of erection is naturally anxious to secure results satisfactory to himself at the minimum cost, both of time and money. The contractor, with the same end in view, is further desirous of securing as large a margin of profit upon his work and the materials furnished as is consistent with honesty and his mechanical reputation. The trouble begins when, in the race for employment and in competition with his fellows, the would-be contractor seeks to obtain a contract below the current rates of materials and labor and without a fair and equitable margin for profit. This is supplemented in many cases by the action of the owner, who, asserting in the first instance his willingness to accept cheap work, gradually pushes the contractor for an increase both in quantity and quality. Each party is thus endeavoring to get ahead of the other and the result is disastrous to sound building. The above evils are of frequent occurrence, and are patent to all who are interested in the development and elevation of the building trades.''[1]

To address such endemic evils, the American Institute of Architects, founded in 1857, had begun in 1871 to develop the first national building contract in association with a group of contractors known as The National Association of Builders (the predecessor to the modern Associated General

[1] *The Newport News*, 1 May 1885.

Contractors of America). Their first joint ''Uniform Contract'' was published in 1888, three years after Mason's commentary on the evils of the construction process.

The 1888 Uniform Contract gave the architect a strong, even dictatorial, hand in resolving timely and finally most disputes arising under the construction contract. Article II stated that: ''It is understood and agreed by and between the parties hereto that the work included in this contract is to be done under the direction of the said Architects, and that their decision as to the true construction and meaning of the drawings and specifications shall be final.'' Article V also provided that the architect's ''certification'' of ''sufficient grounds'' was a precondition to the owner's right to terminate the contract for cause. Only the architect's decisions regarding payment for delays or for authorised change orders, when timely ''dissented'' from by the aggrieved party, could be referred to binding arbitration before a panel of three arbitrators (one appointed by each party plus a third selected by them).

For 120 years from 1888 to 2007, the standard contract forms co-sponsored jointly by the American Institute of Architects and contractor associations adhered generally to this basic dispute resolution approach under which the architect was the front-line initial decider of disputes between the parties. As late as 1967 this time-honoured dispute resolution process was said to ''work so well that lawyers and courts will probably remain relatively unimportant in this sphere of conflict resolution''.[2] In the four decades since that time, however, contractor and owner claims routinely have implicated alleged design errors or omissions or on-site administration negligence on the part of the design team, and the architect's impartiality as the decision-maker has come under continuing suspicion.

In November 2007, the AIA introduced its latest edition of the AIA General Conditions of the Contract—without contractor co-sponsorship for the first time in a century—in which the architectural profession released its grip on and retreated from its historic dispute resolution role by authorising the parties themselves to designate by contract their own ''Initial Decision Maker'' (''IDM''). Only where parties fail to name an IDM will the architect remain in that role by default. In addition to retreating from its historic dispute resolution role, the 2007 AIA General Conditions also eliminated its century-old mandate for binding arbitration, and instead have established court litigation rather than arbitration as the designated default dispute resolution option. Thus, the AIA is forcing parties to address at the time of contract formation their preferred dispute resolution approaches, and to designate their preferred decision-making persons. Those changes in century-old traditions have come with the recognition that ''one size of

[2] Johnstone and Hopson, *Lawyers and Their Work: An Analysis of the Legal Profession in the United States and England* (1976), p. 327.

ADR does not fit all'', and that the 21st century construction industry now has available to it a host of ADR methods suitable to particular kinds of disputes.[3]

The AIA's historic ADR role retreat is intended to encourage the parties themselves to pick an independent IDM and thereby to distance the architect from conflicts of interest that can arise from its wearing of multiple hats on a project (independent design professional of record, owner's agent on the construction site and impartial decider of disputes). The distinguished American lawyer and dispute resolver, Carl M Sapers of Boston, recently addressed the reasons for the AIA's retreat from its longstanding decision maker role as follows:

> ''It is a remarkable fact that this paradoxical role was carried off with nearly complete success, at least until 1967 . . . Very few contractors or subcontractors today would put their trust in the disinterestedness of the architect. A number of factors have brought about the change. One factor was certainly the increased complexity of construction projects, which made more convincing any challenge to the architect's judgment . . . Perhaps the most significant change, however, has been the change in the way professionals now fit into American society. At least until the end of World War II, doctors, lawyers, and architects, as members of the 'learned Professions', operated with broad independence and with the broad respect of the community. In general, they were recognized as pursuing professional interests rather than personal enrichment. That independence, applied to the construction industry, gave the architect the special standing to resolve disputes in a fashion which both sides accepted as disinterested.''[4]

The new IDM language in Section 15 of the AIA A201–2007 General Conditions of the Contract for Construction reads in pertinent part as follows:

> ''§15.1.1 A Claim is a demand or assertion by one of the parties seeking, as a matter of right, payment of money, or other relief with respect to the terms of the Contract. The term 'Claim' also includes other disputes and matters in question between the Owner and Contractor arising out of or relating to the Contract. The responsibility to substantiate Claims shall rest with the party making the Claim.
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> §15.1.2 Claims by either the Owner or Contractor must be initiated by written notice to the other party and to the Initial Decision Maker. Claims by either party must be initiated within 21 days after occurrence of the event giving rise to such Claim or within 21 days after the claimant first recognizes the condition giving rise to the Claim, whichever is later.
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> §15.1.3 Pending final resolution of a Claim, except as otherwise agreed in writing or as provided in Section 9.7 [Architect's delay in issuing certification for payment] and Article 14 [termination], the Contractor shall proceed diligently with performance of the Contract and the Owner shall continue to make payments in accordance with the Contract Documents. The Architect will prepare Change Orders and issue Certificates for Payment in accordance with the decisions of the Initial Decision Maker . . .
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> §15.2.1 Claims, excluding those arising under Sections [pertaining to hazardous materials, emergencies and the Owner's adjustment of property insurance losses] shall be referred to the Initial Decision Maker for initial decision.

[3] See Philip L Bruner, ''Global Engineering and Construction ADR: Meeting an Industry's Demand for Specialized Expertise, Innovation and Efficiency'', 2009 JCCCL 69.

[4] Carl M Sapers, ''In with the Initial Decision Maker'', *JAMS Global Construction Solutions* (Winter 2010), pp. 12–14.

> The Architect shall serve as the Initial Decision Maker, unless otherwise indicated in the Agreement . . .
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> [A]n initial decision shall be required as a condition precedent to mediation of any [included] Claim arising prior to the date final payment is due, unless 30 days have passed after the Claim has been referred to the Initial Decision Maker with no decision having been rendered. Unless the Initial Decision Maker and all affected parties agree, the Initial Decision Maker will not decide disputes between the Contractor and persons or entities other than the Owner.
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> §15.2.2 The Initial Decision Maker will review Claims and within ten days of the receipt of a Claim take one or more of the following actions: (1) request additional supporting data from the other party, (2) reject the Claim in whole or in part, (3) approve the Claim, (4) suggest a compromise, or (5) advise the parties that the Initial Decision Maker is unable to resolve the Claim if the Initial Decision Maker lacks sufficient information to evaluate the merits of the Claim or if the Initial Decision Maker concludes that, in the Initial Decision Maker's sole discretion, it would be inappropriate for the Initial Decision Maker to resolve the Claim.
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> §15.2.3 In evaluating Claims, the Initial Decision Maker may, but shall not be obligated to, consult with or seek information from either party or from persons with special knowledge or expertise who may assist the Initial Decision Maker in rendering a decision. The Initial Decision Maker may request the Owner to authorize retention of such persons at the Owner's expense.
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> §15.2.4 If the Initial Decision Maker requests a party to provide a response to a Claim or to furnish additional supporting data, such party shall respond, within ten days after receipt of such request, and shall either (1) provide a response on the requested supporting data, (2) advise the Initial Decision Maker when the response or supporting data will be furnished or (3) advise the Initial Decision Maker that no supporting data will be furnished. Upon receipt of the response or supporting data, if any, the Initial Decision Maker will either reject or approve the Claim in whole or in part.
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> §15.2.5 The Initial Decision Maker will render an initial decision approving or rejecting the Claim, or indicating that the Initial Decision Maker is unable to resolve the Claim. This initial decision shall (1) be in writing; (2) state the reasons therefor and (3) notify the parties and the Architect, if the Architect is not serving as the Initial Decision Maker, of any change in the Contract Sum or Contract Time or both. The initial decision shall be final and binding on the parties but subject to mediation and, if the parties fail to resolve their dispute through mediation, to binding dispute resolution [i.e. arbitration or litigation as the parties agree] . . .
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> §15.2.6.1 Either party may, within 30 days from the date of the initial decision, demand in writing that the other party file for mediation within 60 days of the initial decision. If such a demand is made and the party receiving the demand fails to file for mediation within the time required, then both parties waive their rights to mediate or pursue binding dispute resolution proceedings [i.e. arbitration or litigation] with respect to the initial decision.''

The broad definition of ''Claim'' in §15.1.1 confirms that the IDM's dispute resolution ''jurisdiction'' extends to all ''Claims (except those specifically excluded) between the parties'', i.e., the owner and contractor. This means that the IDM may decide disputes such as what work is within the scope of the contract, whether the work is properly performed, whether the work has been delayed and by what cause, and what compensation the contractor should receive, Other provisions that underscore the breadth of the IDM's ''jurisdiction'' require the IDM to provide the crucial certification of ''just cause'' as a precondition to the validity of a contract termination

"for cause" (§14. 2.2) and of sums due to the owner or contractor upon termination for cause (§14.2.4). The IDM's "jurisdiction", however, does not extend to claims between the owner and architect or other third parties, even though the architect's liability for design or construction administration malfeasance, or other third-party subcontractor or material supplier liability, surely will be decided by the IDM as between the contractor (who is liable for its subcontractors and suppliers) and the owner (who issues the design documents and employs the architect as its "agent" for contract administration). Here lies the "rub".

Significantly, the AIA General Conditions documents are silent on, and leave to local law, a number of important issues pertaining to the IDM and the IDM decision:

(1) The question of the preclusive effect upon the architect and owner, in later litigation between them, of an adverse binding (see §15.2.5, above) IDM decision that finds the owner liable to the contractor for the architect's malfeasance. The American law doctrine of collateral estoppel could be invoked by the architect, in later litigation brought by the owner against the architect for indemnification, to preclude the owner from challenging the IDM's adverse binding decision, but might not preclude the architect, a "non-party" to that decision, from challenging the decision.[5]

(2) The issues of consolidation with other cases and joinder of third-parties are addressed (under §15.4.4) only with respect to "binding dispute resolution proceedings", i.e., arbitration or litigation. No mention is made, and no rights are created, to demand consolidation or joinder of third parties in IDM or mediation proceedings.

(3) The issue of enforcement of the final decision, that becomes binding by failure of either party to demand mediation within 30 days of its issuance is left to local law, which typically would allow reduction of the decision to judgment under the provisions of the applicable arbitration statute. The IDM's binding decision is likely to survive a challenge to its legality because American courts have a long history of upholding parties' "freedom to contract" in this context.[6]

(4) The IDM process imposes no time limitation on the IDM for issuance of the IDM's decision. This is contrary to English adjudication, which demands prompt issuance of a decision. Only if the issue involves the architect's delay in issuance of its certificate of payment or the termination of the contract for cause

[5] See 3 *Bruner & O'Connor on Construction Law*, §10:95 *et seq.*
[6] See *ibid.* 5, §17:83.

> may the aggrieved party stop performance; otherwise both parties must proceed with performance in accordance with the ''decisions of the Initial Decision Maker'' ''pending final resolution of the Claim.'' The language of §15.1.3 requiring performance in accordance with the IDM's mere ''decision'', without mention of it being a ''final and binding decision'', suggests that the IDM has authority to issue temporary interim decisions as needed to keep the job moving.

The AIA's use of the ''Initial Decision Maker'' language was by design. Under time-honoured American law the term has been construed in contexts related to the issue of litigation ''ripeness''.[7]

The import of the AIA's new IDM language is to compel parties to engage in the Initial Decision Making process as a first formal step in the dispute resolution process and encourage them to establish the procedural preconditions under which the parties may proceed on to mediation, arbitration or litigation. By allowing and encouraging the architect to be replaced in the IDM role by a professional dispute resolver, who likely will have expertise in the rapid resolution of construction disputes and claims as well as skill in negotiation and mediation, the AIA has adopted a process that enhances substantially the prospects for early dispute settlement on American building projects. The IDM process can combine the flexibility and benefits of many ADR processes, such as that of serving as facilitator of structured negotiations or of acting comparably to project neutrals, adjudicators, dispute review boards, mediators and informal arbitrators. But the big question mark remains whether parties will take the time to select and appoint a qualified person as IDM when entering into their agreement.

The AIA's ''IDM'' is an obvious response to the growth over the last four decades of a panoply of construction industry dispute resolution methods that side-step the architect's historical role and reduce the architect's legal risks—contract clauses requiring partnering, structured negotiations, mediation, standing project neutral dispute review boards, expert determinations, expedited non-binding mini-arbitrations and expedited binding arbitrations.

So how is the AIA's new ''IDM'' concept faring in America? Anecdotal evidence suggests that the American construction industry's large players are focusing carefully during contract negotiations on tailored dispute

[7] See *Williamson County Regional Planning Commission* v. *Hamilton Bank of Johnson City*, 473 US 172, 192–193, 105 S Ct 3108, 3019–3020, 87 L Ed 2d 126 (1985). (''The question whether administrative remedies must be exhausted is conceptually distinct . . . from the question whether an administrative action must be final before it is judicially reviewable. While the policies underlying the two concepts often overlap, the finality requirement is concerned with whether the initial decision maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate.'')

resolution clauses and are beginning to appoint IDMs from outside the architectural profession. Persons with legal and dispute resolution training, and construction law expertise, are most favoured as IDMs because of their ability to understand quickly the issues in dispute and how to rapidly employ the full range of ADR processes to help the parties conclude their dispute—negotiation facilitator, project neutral mediator, DRB, marshaller of technical experts to assist with fact issues, and informal decider of disputes. The non-architect ''IDM'' thus can bring a much larger skill set to bear on resolving disputes than any architect, untrained in law, historically could. Although quantitative information on IDM use is only anecdotal to date, it seems clear that use of a non-architect IDM is burgeoning in America.