Rapid Resolution ADR

By Philip L. Bruner

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For well over a century, the American construction industry has promoted the nationwide use of nonjudicial dispute resolution methods capable of promptly and fairly resolving complex construction disputes. Beginning with early efforts of the American Institute of Architects, founded in 1857, an industry initiative arose to develop a national contract form.[1] The result was the 1888 Uniform Contract, the first national standard form construction contract drafted by the American Institute of Architects and endorsed by the National Association of Builders (predecessor to the Associated General Contractors of America). The contract form mandated two methods for binding resolution of disputes between the owner and contractor: (1) the architect was given near dictatorial authority to decide with finality all disputes over "the true construction and meaning of the drawings and specifications"[2] and issues regarding existence of "sufficient grounds" to justify owner termination of the contract for cause;[3] and (2) the architect's decisions regarding computation of payment for delays or for authorized 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). This format was carried into the 1905 edition of the Uniform Contract to authorize referral upon timely notice of all disputes not settled by the architect to

> [a] Board of Arbitration to consist of one person selected by the Owner, and one person selected by the Contractor, these two to select a third. The decision of any two of this Board shall be final and binding on both parties hereto. Each party shall pay one-half of the expense of such reference.[4]

This industry's approach to dispute resolution employing those dual ADR methods—empowering the architect of record with initial dispute resolution authority subject to arbitration—was so successful that as late as 1967 a study on the role of lawyers in England and the United States concluded: "[T]he system works so well that [US] lawyers and courts will probably remain relatively unimportant in this sphere of conflict resolution."[5]

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Reasons Why the Industry Favors ADR

The American construction industry's centuries-old love affair with ADR arose out of a perception that private nonjudicial dispute resolution methods were more suitable than court litigation for resolution of construction disputes. In accepting that view, the industry placed itself in the mainstream of human dispute resolution history. ADR traces its lineage back three millennia to local patriarchal tribunals whose judgments were accepted as peaceful alternatives to resort to arms, dueling, or other breaches of the peace.[6] About 2,400 years ago Aristotle advised his fellow Athenians:

> [I]t is equitable . . . to be willing to appeal to the judgment of reason rather than violence; to prefer arbitration to the law court, for the arbitrator keeps equity in view whereas the [court] looks only to the law, and the reason why arbitrators were appointed was that equity might prevail.[7]

Historians of early Rome report that "the earliest judges derived their judicial authority, not from the state, but from the voluntary submission of the parties."[8] This voluntary submission process also was a hallmark of the merchant "courts" established by merchant guilds to resolve disputes arising at trade fairs held throughout Europe in the Middle Ages. Dispute resolution in those merchant courts was presided over by trusted persons who were selected by the parties and who dispensed equity with speed and informality in accordance with a practical "law of the shop" rather than the strict "law of the court."[9] By the Elizabethan era of the early seventeenth century, arbitration was the preferred ADR method for resolving commercial disputes under England's law merchant—the *Lex Mercatoria*. According to a treatise on the law merchant, written in 1622 by a London merchant for the benefit of "all judges, lawyers, merchants and all others who negotiate in all parts of the world," the ADR method ordinarily employed to resolve commercial disputes between merchants was binding arbitration:

> [The] ordinary course to end the questions and controversies arising between merchants is by way of *Arbitrement*, when both parties do make choice of honest men to end their causes, which is voluntary and in their own

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> power, and therefore is called *Arbitrium* or of free will, whence the name Arbitrator is derived: and these men (by some called Good men) give their judgments by awards, according to Equity and Conscience, observing the Custom of Merchants, and ought to be void of all partiality of affection more nor less to the one than to the other: having only care that right may take place according to the truth, and that the difference may be ended with brevity and expedition; insomuch that he may not be called an arbitrator who (to please his friend) makes delays and propagates their differences, but he is rather a disturber and an enemy to justice and truth.[10]

Consistent with this general tradition, arbitration was used widely to settle commercial disputes in America even before the American Revolution.[11] It is not surprising then that this ADR tradition led the construction industry to became an early proponent of arbitration.

What commends ADR to the construction industry as more suitable than litigation for the resolution of construction disputes are six generally accepted perceptions.

First, construction is technologically complex.[12] Construction comprises a host of applied sciences, such as architecture; the engineering disciplines of civil, soils, structural, electrical, mechanical, and others; the materials sciences that govern the extraction, formulation, and manufacture of building materials; and principles of construction and construction management that address the practical building process. Construction's technological complexity is amplified by its uniqueness—most projects are unique, built to a unique design, on a unique site, by a unique aggregation of companies, operating without economies of scale in an uncontrolled environment, where productivity is affected by weather, geology, local labor skills and availability, local building codes, and site accessibility.

Second, construction for generations has been and continues to be the largest segment of the production sector of the United States' economy and quite likely of the world economy. The industry comprises millions of companies that employ many millions of people. The industry's complexity, size, and uniqueness produce sizable numbers of complex claims and disputes.[13]

Third, as a consequence of construction's technological complexity, size, and uniqueness, American law governing construction necessarily has become more complex and has evolved into what some in the judiciary describe as a "separate breed of animal."[14] Construction law today comprises centuries-old legal theories fortified by statutory law and seasoned by contextual legal innovations reflecting broad factual "realities" of industry experience, custom and usage, specialized language, implied duties, and unique concepts of foreseeable risk allocation perceived as invoking the "law of the shop" more frequently than the "law of the court."[15] Construction law addresses the complex web of legal relationships between and among the multitude of parties involved in the construction project—owners, architects, engineers, contractors, subcontractors, material suppliers, sureties, insurers, lenders, and code officials. Those specialized relationships in turn invoke a multitude of legal rights and remedies arising out of common disputes, such as (1) express and implied contractual relationships invoking implied "contextual" rights and duties; (2) tort relationships in the absence of contractual privity; (3) equitable principles governing surety subrogation and indemnification rights and contractor quantum meruit recoveries; (4) statutory rights and obligations created by statutes governing mechanics liens, claims against surety bonds, sales of goods under the Uniform Commercial Code, and awards of public contracts; (5) public duties created by building codes, licensing laws, and health and safety laws; (6) common law principles unique to construction, such as those addressing design errors, implied obligations, and impacts of time involving project delay, suspension, acceleration, and disruption; and (7) specialized damage concepts unique to construction, such as the doctrines of substantial performance, economic waste, betterment, total cost, and other approaches to damage measurement that recognize construction's imperfect world.

ADR traces its lineage back to local patriarchal tribunals whose judgments were accepted as peaceful alternatives to resort to arms, dueling, or other breaches of the peace.

Fourth, because of construction's technological and legal complexity and uniqueness, legal proof of causation and quantification of damages necessarily relies heavily upon opinion testimony of experts. This feature of construction disputes indeed can be frustrating to judges inexpert in construction and mesmerizing to jurors.[16] All too frequently the detailed factual records of construction dispute proceedings appear "formidable" to trial finders of act[17] and to reviewing appellate judges.[18] Thus, ADR, when overseen by selected peers knowledgeable in industry customs and practices, has been viewed universally as an option superior to submission of disputes to judges and juries inexpert in the construction process. Judges themselves often have recognized the wisdom of submitting complex construction disputes to knowledgeable arbitrators or mediators rather than to the courts. Illustrative is the sage advice offered by one federal judge to parties before him at a pretrial conference:

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> Being trained in this field [of construction], you are in a far better position to adjust your differences than those untrained in [its] related fields. As an illustration, I, who have no training whatsoever in engineering, have to determine whether or not the emergency generator system proposed to be furnished . . . met the specifications, when experts couldn't agree. This is a strange bit of logic. . . . The object of litigation is to do substantial justice between the parties litigant, but the parties litigant should realize that, in most situations, they are by their particular training better able to accomplish this among themselves.[19]

Another federal judge with years of experience as a federal district judge and federal appellate judge offered this anecdote about juries:

> I have a favorite quote about a juror who talked about what the jury tried to do on a case: "Judge, we couldn't really make heads or tails of the case. We really couldn't follow all the objections of the lawyers. None of us believed a lot of the witnesses so we made up our minds to disregard the evidence and decide the case on its merits."[20]

Fifth, arbitration is amenable to maintaining business and personal relationships, and has been said to be "well-suited to the task of blurring the distinction between victor and vanquished, so that the parties could continue their relations within the community."[21]

Sixth, local fact finders are known on occasion to hold views reflecting local prejudices and biases. Arbitration can place disputes into the hands of independent impartial neutrals beyond the reach of such local biases and prejudices.[22]

It is no wonder, then, that the construction industry, as well as many in the judicial process, prefer that construction disputes be resolved by arbitrators or mediators who are (1) experienced in the construction process and applicable law, (2) expert in industry practices invoking the "law of the shop," (3) skilled in management of construction dispute resolution practices, and (4) beyond the influence of local prejudices and biases. The construction industry, for its part, employed arbitration extensively as the preferred method of binding dispute resolution throughout much of the twentieth century, during which arbitration maintained undiminished its historic reputation for dispensing timely and cost-efficient equity. In contrast, courtroom litigation developed a generally justified reputation as providing fact finders inexpert in construction matters; as inefficient, untimely, and costly; and as allowing litigators all too often to demonstrate their prowess in fighting to their client's last dollar.[23] Moreover, the American judiciary's early twentieth century hostility to binding arbitration and other private dispute resolution methods, which were said to divest courts of jurisdiction,[24] abated as the industry's use of arbitration was authorized and encouraged locally, nationally, and internationally by congressional enactment of the Federal Arbitration Act of 1925,[25] by most states' enactment of the Uniform Arbitration Act of 1955,[26] by United Nations' promulgation in 1958 of the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards,[27] and, ultimately, by growing judicial support for ADR generally. By the second half of the twentieth century, judicial hostility to arbitration had turned to vocal support as judges with clogged trial calendars recognized the practical wisdom of allowing parties to design their own dispute resolution processes and select their own expert dispute resolvers, and of offering strong enforcement of parties' dispute resolution agreements.[28]

Enthusiastically promoting the practical advantages of arbitration over litigation in the late twentieth century was Warren E. Burger, Chief Justice of the US Supreme Court and one of the judiciary's greatest proponents of arbitration and ADR. In 1985 Chief Justice Burger fired a momentous "shot heard round the legal world" in favor of ADR when he presented this compelling advice to the American legal profession:

> The obligation of the legal profession is, or has long been thought to be, to serve as healers of human conflicts. To fulfill that traditional obligation means that there should be mechanisms that can produce an acceptable result in the shortest possible time, with the least possible expense and with a minimum of stress on the participants. That is what justice is all about. . . .
>
> My overview of the work of the courts from a dozen years on the Court of Appeals and now sixteen in my present position, added to twenty years of private practice, has given me some new perspectives on the problems of arbitration. One thing an appellate judge learns very quickly is that a large part of all litigation in the courts is an exercise in futility and frustration. A large proportion of civil disputes in the courts could be disposed of more satisfactorily in some other way. . . .
>
> My own experience persuades me that in terms of cost, time, and human wear and tear, arbitration is vastly better than conventional litigation for many kinds of cases. In mentioning these factors, I intend no disparagement of the skills and broad experience of judges. I emphasize this because to find precisely the judge whose talents and experience fit a particular case of great complexity is a fortuitous circumstance. This can be made more likely if two intelligent litigants agree to pick their own private triers of the issues. This is not at all to bypass the lawyers; they are key factors in this process. The acceptance of this concept has been far too slow in the United States.[29]

Chief Justice Burger's remarks were noted widely in both private and public sectors. Two years after publication of Chief Justice Burger's remarks, even the federal government, which for more than seventy years had been

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constrained by the US General Accounting Office from using arbitration,[30] acted upon Chief Justice Burger's advice. In 1987 the Administrative Conference of the United States recommended that all federal agencies "adopt policies encouraging voluntary use of ADR in contract disputes."[31] This recommendation led in 1990 to congressional enactment of the Administrative Dispute Resolution Act,[32] which, as amended in 1996 and now implemented by the Federal Acquisition Regulation,[33] authorizes federal agencies and courts to utilize all forms of ADR. Federal ADR activities continue to be monitored by the Interagency Alternative Dispute Resolution Working Group established by President Clinton in 1998 to promote, facilitate, and implement ADR within federal agencies.[34]

Problems With Arbitration, and the Rise of New "Rapid Resolution" ADR Initiatives

In the past two decades, arbitration as an ADR alternative to litigation has lost some of its reputation as the best method to satisfy the construction industry's demands for efficient and cost-effective ADR.[35] This has resulted in a stunning shift of seemingly cataclysmic proportions away from mandatory binding arbitration and toward nonbinding "rapid resolution" ADR methods. At the heart of industry's recent dissatisfaction with arbitration has been the perceived "judicialization" of arbitration, combined with lack of confidence in arbitrators selected from provider lists, who on occasion demonstrated (1) inadequate skills for management of complex cases invoking competing tensions between efficiency and "due process"; (2) inadequate requisite expertise in substantive construction law, industry practice, and arbitration hearing management; and (3) inadequate time to hear a case through to conclusion without interruption. Arbitrations all too frequently assumed the trappings of unwanted judicial proceedings, characterized by overlawyering, unlimited discovery, extensive motion practice, liberal hearing "due process," repeated prehearing and hearing delays, extensive post-award disputes over confirmation of binding awards, heavy expense, and long delay in resolution.[36] This "judicialization" of arbitration, combined with deficiencies in arbitrator selection processes, produced a new round of construction industry demands both for more cost-effective, expedited, and innovative arbitration[37] and for efficient early "rapid resolution" ADR methods employing peer expertise.

In 2007, construction industry dissatisfaction with judicialized arbitration reached the boiling point, and resulted in binding arbitration—for the first time in more than 100 years—being stricken from standard construction industry contract forms as the industry's contractually mandated dispute resolution method. In lieu of arbitration, litigation was established as the dispute resolution default option. This development created a strong incentive for construction industry executives and counsel to give careful thought, both precontract and postdispute, about which ADR methods truly were best suited to resolve particular types of disputes on particular projects, and encouraged drafting of lawyers' rules of professional responsibility in various jurisdictions to impose professional obligations upon counsel to inform clients about ADR and advise them to consider ADR.[38] Some astute observers suggest that ADR is advancing the industry toward the "vanishing trial,"[39] which some say has important implications for the future development of construction law precedent[40] dependent for its evolution on published judicial decisions.[41] Recognizing that ADR can "fit the forum to the fuss," the industry experimented with and then promoted and formally adopted a host of new and innovative nonbinding early intervention rapid resolution ADR methods, such as structured negotiations, project neutrals, dispute review boards, expert determination, initial decision-maker, evaluative mediation, and nonbinding minitrials.[42] A number of those new rapid resolution initiatives have been written into the 2007 edition of the American Institute of Architects A201 General Conditions,[43] the 2007 ConsensusDocs 200 General Conditions,[44] and the 2010 edition of the AIA Document A310 Performance Bond.[45] Consensual early intervention rapid resolution ADR methods now are becoming the industry standard, with litigation remaining the ultimate default option.

Arbitration can place disputes into the hands of independent impartial neutrals beyond the reach of local biases and prejudices.

The new rapid resolution ADR initiatives are hallmarks of a long-term trend in favor of resolving disputes early and quickly under the control of the parties themselves, with or without the help of neutral experts. Sophisticated owners and construction managers on large, complex projects devote significant precontract planning to develop and incorporate into contract documents various escalating ADR dispute-filtering methods tailored to addressing disputes by type and size. Illustrative is the sophisticated ADR plan developed by the joint venture of Bechtel and Parsons Brinckerhoff, manager of Boston's $15 billion Big Dig project,[46] and included in the project's contract documents governing several hundred prime contracts and subcontracts performed between 1991 and 2007. Under the traditional Massachusetts statutory administrative appeal process, claims were to be submitted to the district highway engineer for decision, with right of appeal to MassHighway's chief engineer, with further

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right of appeal to a hearing examiner for the state secretary of transportation, and with the final right to commence suit in Massachusetts state court either after the chief engineer's decision or after the secretary of transportation's decision.[47] Anticipating the filing of thousands of claims on this massive fast track project, the manager and state DOT agreed to place a layer of ADR underneath the traditional claims process mandated by statute and the MassHighway standard specifications (the "MassHighway Blue Book").[48]

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The manager's innovative rapid resolution ADR program, as originally accepted by the state, focused on settling disputes at the lowest project level possible prior to entry into the statutory administrative appeal process, through cumulative implementation of a number of ADR methods—partnering, stepped negotiations that moved disputes as necessary up the chain of authority from one level to the next, and fifty-six dispute review boards (DRBs) established under separate contracts to make nonbinding recommendations to the secretary of transportation on larger claims.[49] Midway through the project, when it was found that around 5,000 claims more than 300 days old remained unresolved at the project level, the manager revised the ADR process to require disciplined structured negotiations (with detailed claim submissions, interim claim payments, and access to contractors' records), evaluative mediation of unsettled claims, and a steering committee of senior executives to ramrod the process.[50] In addition, DRBs were asked to provide nonbinding recommendations on twenty-nine claims valued at $175 million.[51] Reported lessons learned suggest that the revised ADR methods of structured negotiations and mediation, which resolved around $500 million in claims, were successful due to parties' commitment to the process, full disclosure and vetting of issues, senior decision-maker participation, and evaluative mediation by effective mediators.[52]

So what is the full range of modern ADR methods now accepted by the construction industry? The full range comprises a continuum—running from informal to formal—of at least ten alternate dispute resolution methods short of the ultimate sanction of binding litigation war. These ten most widely used construction industry ADR options available for use alone or in tandem with others on any project follow.

1. Informal Discussion/Partnering: The "Hot Tub" Method

Used since time immemorial,[53] direct effective communication through informal reasoned discussion is the beginning point in every effort to resolve a dispute.[54] Whether this beginning takes place between disputing parties at the project, on the golf course, in a health club's hot tub, or just over dinner, the objective is to encourage senior authorized persons to talk through their disputes and to settle them promptly. This hallmark of construction ADR works so long as parties communicate well and engage in principled negotiation. There are no rules applicable to this option other than principled negotiation, ethical conduct,[55] patience, sensitivity,[56] good humor, careful listening, and a reasoned evaluation of risks.

One construction industry innovation of the 1990s that encourages improved communication through informal discussion between and among decision makers is *partnering*.[57] Although partnering is not itself an ADR method, its partnering workshops contribute positively to dispute resolution by promoting good working relationships among parties,[58] and encourages in a nonadversarial atmosphere early agreement on ADR methods for governing avoidance and resolution of future disputes.[59] Prompt resolution of disputes is a fundamental precept of the *spirit of partnership*, a philosophy expressed in 1990 by the commanding general of the US Army Corps of Engineers as follows:

> The Corps of Engineers must be part of a partnership among the people we work with and those we serve. In the spirit of partnership, we must emphasize common interests, cooperative working relations, communication, and understanding. This calls for new ways to deal with conflict. I believe that ADR offers management tools for dealing effectively with conflict while avoiding expense and delay of adversarial proceedings.[60]

Partnering is used today on many large projects. As confirmed recently by the US Transportation Research Board:

> Partnering has become a common practice on large construction projects both within and outside of government, and many transportation agencies have used it in large or complex projects. Technically, partnering is a dispute avoidance process, rather than a dispute resolution method; it entails committing to use a process that seeks to change the attitude and the relationship between parties to a long-term contract or other relationship to promote recognition and achievement of mutual beneficial goals.[61]

2. Structured Negotiations

Because personalities[62] and lack of adequate information are prime causes for the failure of informal settlement

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negotiations at the project level, construction contracts frequently include an ADR clause imposing, as the first among various methods, a disciplined structured negotiation process. This ADR method establishes a formal timely dispute resolution procedure (1) for full disclosure and prompt exchange of information, (2) for timely commencement and conduct of project-level negotiations (sometimes with a mediator chaperone or facilitator), and, if needed, (3) for moving negotiation up to successive levels of higher management in the parties' respective organizations before turning a dispute over to third parties either for a nonbinding recommendation or for a binding decision.[63] Successful negotiators always seek a *win/win solution* and *to keep the high road*.[64] Structured negotiation provisions typically mandate exchanges of documents and other information prior to commencement of negotiations.[65]

The process by which structured negotiations are to be conducted must be agreed on by the parties, usually either in the contract or by postcontract agreement. Like the structured negotiation plan on the Big Dig, such an agreement may contain a host of other provisions relevant to the negotiation, such as interim provisional payments, claim submission requirements, claim evaluation commitments, access to records and information, timelines for moving negotiation forward, negotiation participants and their authority to settle, possible mediator assistance, and oversight by senior management to assure compliance with respective negotiation process obligations.[66] Conversely, such agreements need not be complicated. One illustration of an uncomplicated structured negotiation clause is article 12.2 of the 2007 ConsensusDocs 200 General Conditions, which reads:

> 12.2 DIRECT DISCUSSIONS. If the parties cannot reach resolution on a matter relating to or arising out of the agreement, the Parties shall endeavor to reach resolution through good faith direct discussions between the parties' representatives, who shall possess the necessary authority to resolve such matter and who shall record the date of first discussions. If the parties' representatives are not able to resolve such matter within five (5) business days of the date of first discussion, the parties' representatives shall immediately inform senior executives of the parties in writing that resolution was not effected. Upon receipt of such notice, senior executives of the parties shall meet within five (5) business days to endeavor to reach resolution. If the dispute remains unresolved after fifteen (15) days from the date of first discussion, the parties shall submit such matter to the dispute mitigation and dispute resolution procedures selected herein.

Disputes not settled by such direct discussions may be referred, under the "dispute mitigation and dispute resolution procedures" in article 12.3, either to a project neutral or to a dispute review board, or may be submitted directly to mediation and then ultimately to either arbitration or court litigation, where costs will be borne by the nonprevailing party.[67]

3. Standing Project Neutral

The concept of a standing project neutral contemplates that one or a number of individuals shall be either identified in the contract or later appointed pursuant thereto, and shall be on call to assist the parties in agreeing upon dispute resolution procedures, facilitating negotiation, mediating disputes, rendering recommended proposals for settlement, and otherwise relentlessly pushing settlement.[68] Perhaps the most important role for a project neutral is early neutral evaluation of the facts and law governing a dispute in order to give parties the neutral's nonbinding view on the merits of the dispute. The trend in favor of a standing project neutral constitutes a rejection of the historic role of the design professional as the key party to whom disputes should be initially referred for a nonbinding decision.

4. The "Initial Decision Maker"

One significant change made by the American Institute of Architects in its A201-2007 General Conditions of the Contract for Construction was to allow parties to remove the architect of record from its historic role as the professional peace keeper and initial decider of disputes between the owner and contractor, and to authorize the parties to appoint their own initial decision maker to whom disputes initially are to be submitted. Giving the parties the right to appoint a third party to act in the architect's stead was an extraordinary alteration in traditional construction industry relationships, which had existed for 120 years under standard construction industry contract documents. From the 1888 Uniform Contract until the 2007 AIA A201 General Conditions, the architect of record exercised a strong hand in resolving disputes between the owner and contractor over scope of work, design document intent, and termination for default disputes.[69] The architect's retreat in 2007 from its historical initial dispute resolution role was explained by the distinguished American lawyer and dispute resolver Carl M. Sapers of Boston, as follows:

> Very few contractors or subcontractors today would put their trust in the disinterestedness of the architect. A number of factors have brought about this 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 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

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to the construction industry, gave the architect the special standing to resolve disputes in a fashion which both sides accepted as disinterested.[70]

A second important factor leading to this change undoubtedly was the architect's discomfort in being asked to opine on contract disputes requiring significant legal expertise and evaluation, such as those involving the "materiality of breaches" and the existence of just cause supporting contract terminations for default. Such legal implications in the initial decision maker's (IDM) role are apparent in the AIA's 2007 empowerment of the IDM to request additional supporting data, reject claims, approve claims, suggest compromises, or advise the parties to utilize other dispute resolution processes.

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Today, only if the parties fail to appoint an initial decision maker will the architect retain that role. Section 15.2 of AIA Document A210 (2007) provides that the architect will serve as the initial decision maker if no third party is appointed to serve in that capacity. In the future it is probable that the construction industry may shift the IDM role toward that of a project neutral, dispute review board, or expert determiner.

5. Standing Dispute Review Board

Under the impetus of the American Society of Civil Engineers and the Dispute Review Board Foundation, many civil projects in the United States today are awarded under contract provisions that require the parties to establish, at the beginning of the project, a standing dispute review board to which all disputes arising on the project will be submitted for nonbinding determinations.[71] Board members designated by the parties typically have both substantive and procedural expertise. According to the Dispute Review Board Foundation,[72] the dispute review board process has achieved extraordinary results in which more than 98 percent of more than a thousand projects on which the DRB process has been invoked were completed without resort to arbitration or litigation.[73]

6. Expert Determination

Even where standing neutrals may not be appropriate, expert recommendation and determination of disputes may still be appropriate on an ad hoc basis. This concept has been advocated for more than thirty years by the International Chamber of Commerce.[74] According to one commentator,

> The expert should, as soon as possible after . . . consulting with the parties, prepare a provisional time table for the conduct of the expertise proceedings. . . . The ultimate task of the expert is to issue a written expert's report in which he denoted the findings that he made within the limits of his mission statement. This report can only be issued once the expert has heard the parties and/or allowed the parties to make written submissions. The expert's report will not be binding upon the parties unless the parties agree otherwise.[75]

This expert determination process bears similarities to court appointment of experts under rule 706 of the Federal Rules of Evidence, and to court appointment of a special master under rule 53 of the Federal Rules of Civil Procedure to, inter alia, hold trial proceedings and make or recommend findings of fact and conclusions of law on issues to be decided by the court without a jury.

7. Mediation

Where neither informal nor structured negotiations result in settlement, parties frequently invoke the assistance of a third-party mediator to assist them in the dispute resolution process. The world's administrators and judiciary have been supportive of this trend.[76] Success frequently depends upon the quality of the mediator selected, the parties' preparation, the extent of document and other discovery prior to mediation, and other factors.[77] Mediators who practice mere *shuttle diplomacy* are viewed as less effective than *evaluative mediators*—those who understand the construction industry and offer meaningful insight and risk analysis to the parties based on the relevant facts, applicable law, and practical considerations. The evaluative mediation process allows the parties themselves to retain control over settlement but affords the parties the benefit of perspectives brought to the process by the mediator.[78] The broad international acceptance of mediation recently was confirmed in 2008 by the European Union Mediation Directive,[79] which requires member states, by 2011, to give formal recognition to mediation as a part of their justice systems. Although in the United States *mediation* and *conciliation* frequently are deemed to be synonymous and used interchangeably, the concept of conciliation in international construction clearly contemplates an evaluative process rather than mere shuttle diplomacy.[80] As explained by a British commentator:

> [T]he difference between mediation and conciliation lies in the role played by the neutral party. In one, he simply performs the task of persuading the parties in dispute to change their respective positions in the hope of reaching a point at where those positions coincide, a form of

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> shuttle diplomacy without actively initiating any ideas as to how the dispute might be settled. In the other method, the neutral party takes a more active role probing the strengths and weaknesses of the parties' cases, making suggestions, giving advice, finding persuasive arguments for and against each of the parties' positions, and creating new ideas which might induce them to settle their dispute. In this latter method, however, if the parties fail to reach agreement, the neutral party himself is then required to draw up and propose a solution which represents what, in his view, is a fair and reasonable compromise of the parties. This is the fundamental difference between mediation and conciliation.[81]

One growing use of mediation is in prehearing management of litigation or arbitration that focuses on resolution of disputes over acceptable discovery plans.[82] Such disputes in large, complex cases can involve myriad problems, such as those related to document exchanges, electronic discovery of documents, and number and scope of depositions. Some trial courts appoint mediators or special masters to facilitate, hear, and resolve such disputes in the interest of moving cases along toward trial.

8. Adjudication

The adjudication dispute resolution process has its origins in the United Kingdom's Housing, Grants, Construction and Regeneration Act of 1996, which requires construction disputes to be submitted promptly to an adjudicator for an initial decision that is binding until completion of the project, and subject to challenge only thereafter. The objective of the adjudication process is to keep the parties working and monies flowing through to contract completion without interruption. Adjudication thus has been described as the "pay now, argue later" approach. It has had a highly satisfactory reception in the United Kingdom and is being recommended in some quarters for adoption here in the United States.[83] The perceived advantages of adjudication are its ability to keep money flowing pending completion of the project, its relative economy, and the high frequency of acceptance of recommendations of respected adjudicators and the significant reduction in litigation. In a broad sense, the same advantages can be offered by the project neutral and IDM if the parties agree.

9. Minitrials and Miniarbitrations

Parties may agree to participate in nonbinding miniproceedings in which judges or arbitrators offer recommended nonbinding decisions either on selected issues or on the entire matter based on limited admission of evidence and arguments of counsel.[84] The matter or issues in dispute often are submitted on either affidavits, expert reports, or memoranda, and on the taking of limited testimony. Like all other evaluative nonbinding recommendations of third-party neutrals, the minitrial or miniarbitration offers a nonbinding third-party perspective on the likely outcome of matters in dispute.

10. Arbitration

Arbitration,[85] the dominant dispute resolution process in the construction industry for well over a hundred years, is no longer the ADR option mandated by industry contract forms for binding resolution of construction disputes.[86] But arbitration still is widely used and by no means has been consigned to the dust bin of history. Fixes to address the construction industry's dissatisfaction with binding arbitration already are being proposed.[87] Parties who continue to use arbitration are those who know how to assure its efficiency and cost-effectiveness.[88] Critical elements in assuring satisfactory use of arbitration are (1) precontract planning for conflict management with competent counsel;[89] (2) drafting a well-thought-out arbitration agreement that confirms applicable law[90] and rules,[91] and defines the powers of the arbitrators[92] and other conditions; (3) selecting arbitrators with requisite skill and expertise in construction industry practices, construction law, and case management; (4) filing (or otherwise making early disclosure of) detailed statements of claims and defenses; (5) requiring information exchanges and limiting document and deposition discovery to the issues;[93] (6) encouraging prehearing dispositive motions; (7) promoting joinder of parties; (8) creating set points for exploration of settlement before the arbitration hearing;[94](9) permitting effective arbitrator control of the hearing; (10) allowing use of written witness statements and affidavits, subject to live cross-examination; (11) using a *chess-clock procedure* to control hearing time; (12) requiring written expert reports and rebuttals,[95] subject to live cross-examination; (13) requiring a reasoned award addressing all issues presented for determination; and (14) providing for appeal to an appellate arbitrator where there is concern over the limited statutory scope of judicial review.[96] Selection of arbitrators who are experts in the *substantive law of construction* (to reach a correct decision) **and** *procedural management of cases* (to control and move the hearing along to expeditious conclusion), **and** who *possess the trust and respect of the parties* is critical to the parties' ultimate willingness to accept any award.[97] Definition of arbitrator powers and parameters of the arbitration process also is vital. Careful delineation of issues to be submitted to and decided by the arbitrators is essential. Agreement on arbitration rules—which can vary considerably[98]—is imperative.

Today, counsel for parties intending to arbitrate large and expensive matters typically follow the "party appointment" process, under which each party selects one arbitrator, and the selected arbitrators appoint a third as chair (all three arbitrators being deemed and treated as "neutrals" throughout the proceedings).[99] That process offers the parties the greatest confidence that the right arbitrators have been selected to hear their particular disputes. Counsel also focus on defining the remedy parameters (e.g., high/low limitations on awards, "baseball" arbitration, elimination of punitive damages, award of attorneys'

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fees to the prevailing party, etc.), powers of the arbitrators, and the issues to be decided. Arbitration agreements sometimes place limits on damages or other remedies that can be awarded by the arbitrators. Where damages or remedies are not limited and where the arbitrators are empowered to decide "all disputes under the contract or arising out of the breach thereof," the arbitrators are accorded extraordinarily broad discretion to fashion equitable remedies.[100]

Rapid resolution ADR methods satisfying those demands and suitable for resolution of complex disputes will continue to evolve.

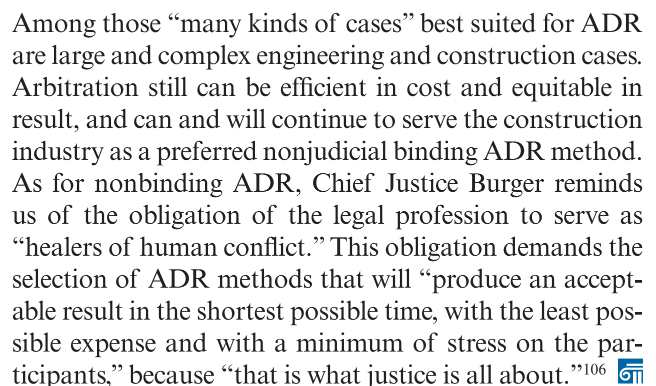
One major concern often raised against binding arbitration is the limited right to overturn an adverse arbitration award. Under the Federal Arbitration Act, parties may not enlarge by agreement the scope of statutory judicial review or the grounds for award vacation.[101] Under some state laws not preempted by the Federal Arbitration Act under the Commerce Clause of the US Constitution, parties' power to enlarge the statutory scope of judicial review still is permissible.[102] To avoid this issue entirely, parties are beginning to use an appellate arbitrator process under which parties maintain full control over the scope of review of an arbitration award.[103] Illustrative is rule (D) of the JAMS Optional Arbitration Appeal Procedure, which provides, "The Appeal Panel will apply the same standard of review that the first-level appellate court in the jurisdiction would apply to an appeal from the trial court decision."[104] This is the wave of the future.

Expect an Evolution of Methods

The construction industry for over a century has been at the forefront of American utilization of ADR. The global construction industry, today as in past generations, demands efficient, cost-effective, and innovative ADR. Rapid resolution ADR methods satisfying those demands and suitable for resolution of complex disputes will continue to evolve. ADR no longer is the humorist's acronym for "another day ruined," but rather the industry's acronym for "another dispute resolved." At the heart of these rapid resolution methods are found carefully structured processes, efficient case administration, and skilled experts who serve as impartial facilitators, project neutrals, independent decision makers, adjudicators, mediators, and arbitrators. Those who regard ADR as less attractive than court litigation often are those who were unwise in selecting unsuitable processes and procedures, unskilled neutrals, or inefficient case administrators. Although some US industry participants (typically those who view their last ADR as "unsuccessful") still take their disputes to court, ADR throughout history has served the construction industry well.

Those who still regard litigation as their dispute resolution option of choice may wish to reflect again upon the advice offered to the American legal profession in 1985 by US Supreme Court Chief Justice Warren E. Burger:

> My overview of the work of the courts from a dozen years on the Court of Appeals and now sixteen in my present position, added to twenty years of private practice, has given me some new perspectives on the problems of arbitration. One thing an appellate judge learns very quickly is that a large part of all litigation in the courts is an exercise in futility and frustration. A large proportion of civil disputes in the courts could be disposed of more satisfactorily in some other way. . . . My own experience persuades me that in terms of cost, time and human wear and tear, arbitration [and all ADR] is vastly better than conventional litigation for many kinds of cases.[105]



Among those "many kinds of cases" best suited for ADR are large and complex engineering and construction cases. Arbitration still can be efficient in cost and equitable in result, and can and will continue to serve the construction industry as a preferred nonjudicial binding ADR method. As for nonbinding ADR, Chief Justice Burger reminds us of the obligation of the legal profession to serve as "healers of human conflict." This obligation demands the selection of ADR methods that will "produce an acceptable result in the shortest possible time, with the least possible expense and with a minimum of stress on the participants," because "that is what justice is all about."[106]

Endnotes

1. *See Proceedings of the Fourth Annual Convention of the American Institute of Architects of 1870*, at 45–46 (1871), in which a senior member of the Institute proposed the following:

> There has been a great deal of difficulty during all my professional life in regard to this matter of contracts. . . . It seems to me that the form of contract should be a professional matter and the form should be adopted by the Institute. . . . Now there is a great deal of good that may be brought out by the adoption of a form of contract by this Institute. It is just that kind of thing that everybody will be glad to get hold of who is going to build, provided they see in it safety all around. . . . I would propose that there be a Committee appointed to prepare a form of contract to be adopted by the American Institute of Architects, to be recommended to all with whom we have to do. I think, sir, that that will be about one of the best things we have done, if we can prepare a form that will insure strict justice to all, will put an end to all fraud and jobbing, and will bring out the contractor as he ought to be brought out; so that if he fails in his contract he shall suffer, and if he succeeds, he shall be properly paid. I therefore move that the Trustees be requested to prepare a form of contract to be used by our profession. . . . The motion . . . was then adopted.

2. Contractual language stating that decisions of design

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professionals and other deciders of fact are "final" has been included for decades in both private and public construction contracts, and in the first half of the twentieth century routinely was enforced by courts. See Merrill-Ruckgaber Co. v. United States, 241 U.S. 387, 393, 60 S. Ct. 662, 665, 60 L. Ed. 1058 (1916); United States v. Moorman, 338 U.S. 457, 461–62, 70 S. Ct. 288, 291, 94 L. Ed. 256 (1950). Judicial exceptions are recognized to enforcement of such decisions that are found to be "arbitrary, capricious or [lacking in] a rational basis." See Westinghouse Elec. Corp. v. New York City Transit Auth., 82 N.Y.2d 47, 54–55, 603 N.Y.S.2d 404, 407–08, 623 N.E. 2d 531, 534–35 (1993), and Westinghouse Elec. Corp. v. New York City Transit Auth., 14 F.3d 818, 823 (2d Cir. 1994).

3. Am. Inst. of Architects, The Uniform Contract, arts. II, V (1888). The architect's issuance of a "certification" of "just cause" was a precondition to the right of the owner to terminate a contract for "cause."

4. Am. Inst. of Architects, Form 19642-PL, The Uniform Contract, art. XIII (1905). In reflecting upon the efficacy of the arbitration clause, the American Institute of Architects was aware that the clause might not be legally enforced in all jurisdictions but regarded the clause as having significant benefit nevertheless. See *Proceedings of the Thirty-Ninth Annual Convention of the American Institute of Architects of 1905*, at 52 (1906), in which the chairman of the Committee on Uniform Contract reported:

> The Committee on Uniform Contract has consulted and taken the advice of a competent attorney, and is aware that no arbitration clause can oust the Court. That, however, does not make it expedient to print the Uniform Contract without the "arbitration" clause, as in nearly every instance of dispute which arises between the contractor and owner both parties are willing to submit the dispute to arbitration in accordance with their agreement with each other, but if either party to the agreement should fail to agree with the decision of the arbitrators he is not stopped from carrying the matter into Court if he so desires. . . . If you can submit an arbitration clause that will oust the Court, the Committee would be very glad to take it into consideration. Arbitration will generally afford quick and inexpensive means of settling differences, but it will not estop either party from his right to carry the questions in dispute into Court for a trial by jury or for adjudication by authorized judges.

5. *See* Quinton Johnstone & Dan Hopson, Lawyers and Their Work: An Analysis of the Legal Profession in the United States and England 323 (1967).

6. *See* Earl S. Wolaver, *The Historical Background of Commercial Arbitration*, 83 U. Pa. L. Rev. 132, 134 (1934) (noting that patriarchal tribunals offered the earliest ADR processes); Margit Mantica, *Arbitration in Ancient Egypt*, 12 Arb. J. 155, 155–59 (1957); Henry T. King Jr. & Marc A. LeForestier, *Arbitration in Ancient Greece*, 49 Disp. Resol. J. 38 (Sept. 1994).

7. Kaja Harter-Uibopuu, *Ancient Greek Approaches Toward Alternative Dispute Resolution*, 10 Willamette J. Int'l L. & Disp. Resol. 47, 55 (2002). Also reported is the quotation of an Athenian law of private arbitration enacted in 403/2 B.C., which was quoted by the orator Demosthenes as follows: "If any parties are in dispute concerning private contracts and wish to choose any arbitrators, it shall be lawful for them to choose whomsoever they wish. But when they have chosen by mutual agreement, they shall abide by his decisions and shall not transfer the same charges from him to another court, but the judgments of the arbitrators shall be final."

8. J.B. Moyle, Imperatoris Justiniani Institutionum 633 (5th ed. 1912).

9. *See* Harold J. Berman, Law and Revolution: The Formation of the Western Legal Tradition 347 (1983) ("In all types of [merchant] commercial courts the procedure was marked by speed and informality. Time limits were narrow; in the fair courts justice was to be done 'from tide to tide,' in guild and town courts 'from day to day.' Often appeals were forbidden. Not only were professional lawyers generally excluded but also technical legal argumentation was frowned upon. The court was to be 'ruled by equity . . . whereby every man will be received to tell his facts . . . and to say the best he can 'in his defense'"). *See also* Leon Trakman, *Ex Aequo et Bono: Demystifying an Ancient Concept*, 8 Chi. J. Int'l L. 621, 629–30 (Winter 2008) ("The rationale behind this process of [merchant judges] reaching decisions was that itinerant merchants who traveled with their goods from guild to guild, fair to fair, and port to port should receive an expeditious remedy before a merchant court without having to delay their mercantile journey. So significant was this interest in expedited resolution of disputes that Medieval Law Merchant courts in parts of what are now France were named piepowder or 'dusty feet' courts, presumably obligated to provide remedies before the merchant parties could shake the dust off their feet.").

10. Gerard Malynes, Consvetvdo, Vel Lex Mercatoria, or The Ancient Law-Merchant 447 (1622). This tradition continued to be followed by merchants for centuries. *See* Wyndham Beawes, Lex Mercatoria: Or a Complete Code of Commercial Law 498 (1st ed. London 1752) (6th ed. London 1813) (recommending that merchants employ arbitration to "prevent many suits at law").

11. *See* Bruce H. Mann, *The Formalization of Informal Law: Arbitration Before the American Revolution*, 59 N.Y.U. L. Rev. 443 (June 1984).

12. The judiciary itself has embellished this legendary reputation for complexity. *See, e.g.*, Erlich v. Menezes, 981 P.2d 978, 987 (Cal. 1999), in which the Supreme Court of California observed:

> [T]he [owners] may have hoped to build their dream home and live happily ever after, but there is a reason that tagline belongs only in fairy tales. Building a house may turn out to be a stress-free project; it is much more likely to be the stuff of urban legends—the cause of bankruptcy, marital dissolution, hypertension and fleeting fantasies ranging from homicide to suicide. As Justice Yegan noted below, "No reasonable homeowner can embark on a building project with certainty that the project will be completed to perfection. Indeed, errors are so likely to occur that few if any homeowners would be justified in resting their peace of mind on [its] timely or correct completion."

13. *See* Morse/Diesel, Inc. v. Trinity Indus., Inc., 67 F.3d 435, 437 (2d Cir. 1995) (observing that "major construction projects generate major litigation" in which "the management of either is perilous").

14. Paul Hardeman, Inc. v. Ark. Power & Light Co., 380 F. Supp. 298, 317 (E.D. Ark. 1974) ("Construction contracts are a separate breed of animal; and, even if not completely *sui generis*, still . . . [the] law must be stated in principles reflecting underlying economic and industry realities. Therefore it is not safe to broadly generalize.")

15. *See* Philip L. Bruner & Patrick J. O'Connor Jr., Bruner & O'Connor on Construction Law (2002, supplemented annually).

16. *See* Philip L. Bruner, *The Historical Emergence of Construction Law*, 34 William Mitchell L. Rev. 1 (2007).

17. *See* Blake Constr. Co. v. C.J. Coakley Co., 431 A.2d 569, 575 (D. C. 1981):

> [E]xcept in the middle of a battlefield, nowhere must men coordinate the movement of other men and all materials in the midst of such chaos and with such limited certainty of present facts and future occurrences as in a huge construction project such as the building of this 100 million dollar hospital. Even the most painstaking planning frequently

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> turns out to be mere conjecture and accommodation to changes must necessarily be of the rough, quick and ad hoc sort, analogous to ever-changing commands on the battlefield. Further, it is a difficult task for a court to be able to examine testimony and evidence in the quiet of a courtroom several years later concerning such confusion and then extract from them a determination of precisely when the disorder and constant readjustment, which is to be expected by any subcontractor on the job site, became so extreme, so debilitating and so unreasonable as to constitute a breach of contract between a contractor and a subcontractor. This was the formidable undertaking faced by the trial judge in the instant case.

See also *Kiewit-Atkinson-Kenny v. Massachusetts Water Resources Authority*, 2002 WL 31187691, at *12 (Mass Super., Sept. 3, 2002), in which the court expressed its frustration at the parties' requests for the court's interpretation of contract language:

> The contract language . . . is sprawled over hundreds of pages and contained in several documents, not all speaking consistently with one another; and the "record" is massive, covering literally thousands of pages. The burden placed on this court is immense, and, it fears, after all of its attempts to give fair attention and correct rulings to the various issues, whichever side does not prevail will first seek reconsideration and thereafter will ultimately appeal, and may well argue that material facts remain in dispute. In short, this memorandum and the orders it produces may turn out to be an exercise in futility driven by a hugely over-litigated case. One need only look at the fact that the contract in issue contains provisions for a Disputes Review Board made up of three experts in the kind of construction at issue who themselves have taken months to resolve some of these very same issues, only to be asked to reconsider their initial conclusions and then, because their determinations are not binding, to have the issues raised again in this litigation. Here, a single judge—not a panel of experts in the subject of tunnel construction—is asked to resolve the issues because the parties themselves refuse to accept the decisions of their contractually assembled team of experts.

18. *See* Decker & Co. v. West, 76 F.3d 1573, 1577 (Fed. Cir. 1996):

> This is one of those messy government [construction] dispute cases in which, during the performance of the contract, neither of the parties acquitted themselves with pure grace. Working through the detailed record of such a case causes one to understand better the ancient curse of "a plague o' both their houses." See William Shakespeare, *Romeo and Juliet*, act 3, sc. 1. Nevertheless, since the parties could not resolve their dispute, we must.

19. E.C. Ernst, Inc. v. Manhattan Constr. Co., 387 F. Supp. 1001, 1006 (S.D. Ala. 1974).

20. Honorable Frank M. Hull, *Comments Before the 2004 Joint Meeting of The American College of Construction Lawyers and the Canadian College of Construction Lawyers (February 28, 2004)*, 39:4 Constr. L. Rev. 3d (Carswell) 13–15 (Feb. 2005).

21. Bruce H. Mann, *The Formalization of Informal Law Arbitration Before the American Revolution*, 59 N.Y.U. L. Rev. 443, 455 (June 1984) (observing that continuing relationships were enhanced by arbitration being "expeditious and inexpensive"; "less public and less adversarial than litigation"; "permeated with notions of compromise and reconciliation" inherent in the initial decision to submit to a voluntary, mutual process; and emphasizing "ties to the community").

22. Illustrative is *Osceola County Rural Water System, Inc. v. Subsurfco, Inc.*, 914 F.2d 1072 (8th Cir. 1990), in which a Iowa nonprofit owner that operated a 680-mile rural water system, which annually leaked 40 percent of the water pumped through it, commenced suit in a rural county served by the system to recover against the contractor and surety $7.2 million to reconstruct the entire line. The owner demanded trial by jury. The contractor demanded arbitration, and the court litigation was stayed. In the arbitration, three arbitrators with extensive construction experience concluded that the pipeline had been installed in accordance with the owner's design specifications, which were found to be defective and the cause of the water leakage. The arbitrators denied the owner's entire claim and awarded the contractor its full contract retainage.

23. *See* Philip M. Armstrong, *Why We Still Litigate*, 8 Pepp. Disp. Resol. L.J. 379 (2008).

24. *See* Home Ins. Co. v. Morse, 87 U.S. 445, 451 (1874) (stating that "agreements in advance to oust the courts of jurisdiction conferred by law are illegal and void"). *See also* William M. Howard, *The Evolution of Contractually Mandated Arbitration*, 48 Arb. J. 27 (Sept. 1993).

25. 9 U.S.C. § 1 *et seq.* (2010), entitled the "United States Arbitration Act." Enactment of the Federal Arbitration Act in 1925 reflected widespread recognition of arbitration's efficacy, such as those expressed by Harlan F. Stone, then dean of the Columbia University Law School and subsequently chief justice of the US Supreme Court, in *The Scope and Limitation of Commercial Arbitration,* 10 Proc. Acad. Pol. Sci. City N.Y. 501, 503 (1922–1924):

> [T]he very refinements and complexities of our court machinery, which make it a more or less effective instrument for administering justice in the difficult or complicated case, often make it cumbersome or dilatory when applied to controversies involving simple issues of fact or law. This is especially the case when the issue of fact turns upon expert knowledge as to the nature or quality of [work or materials] or the damage consequent upon the failure to perform a contract. . . . There are of course numerous other examples of cases in which the real issue is one which can be better determined by a layman having training and experience in a particular trade or business than by judge and jury who have not had that training and experience.

26. *See* Uniform Arbitration Act (with revisions through 2000 known as the "Revised Uniform Arbitration Act"), which was promulgated by the National Conference of Commissioners on Uniform State Laws.

27. *See* 6 Bruner & O'Connor on Construction Law, *supra* note 15, §§ 20.2, 20:141. *See also* John W. Hinchey & Troy L. Harris, International Construction Arbitration Handbook (2008).

28. *See* Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24–25 (1983) (enunciating proarbitration policy).

29. Warren E. Burger, chief justice of the US Supreme Court, *Remarks Before the American Arbitration Association and the Minnesota State Bar Association: Using Arbitration to Achieve Justice* (August 21, 1985), 40 Arb. J. 3, 6 (1985) (emphasis added). *See also* Warren E. Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274, 275 (1982) (quoting Abraham Lincoln: "Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them that the nominal winner is often the real loser—in fees, expenses and waste of time.").

30. *See* Harold Bruff, *Public Programs, Private Deciders: The Constitutionality of Arbitration in Federal Programs*, 678 Tex. L. Rev. 441 (1989) (discussing issues inhibiting the use of binding arbitration for settlement of public sector disputes).

31. *See* Admin. Conference of the United States, Recommendation 87-11, Alternatives for Resolving Government Contract Disputes, 52 Fed. Reg. 49,148 (Dec. 30 1987).

32. 5 U.S.C. §§ 571–583 (2010).

33. FAR 33.204, 33.214 (2010). Although authorizing broad

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use of ADR, the Federal Acquisition Regulation does recognize that in limited instances ADR may be inappropriate for resolving public contract disputes that involve a (1) need for an authoritative decision to serve as future precedent, (2) significant question of government policy that requires further development of the law, (3) need to maintain established policies without variation among individual decisions, (4) matter that significantly affects persons who are not parties to the ADR process, (5) need for a full public record, and (6) significant need for the agency to maintain control and jurisdiction over the dispute.

34. *See* Fed. Interagency Alternative Disp. Resol. Working Grp., *Report for the President on the Use and Results of Alternative Dispute Resolution in the Executive Branch of the Federal Government* (2007) ("[T]he agencies in the executive branch are still a long way from employing ADR to its full potential. Alternative dispute resolution is still being used to 'fix problems' as they occur, and needs to grow into a system of proactive conflict management. The key to reducing conflict is early intervention and anticipatory dispute resolution which prevent the escalation of disagreement."). *See also* www.adr.gov.

35. *See* Thomas J. Stipanowich, *Arbitration and Choice: Taking Charge of the "New Litigation,"* 7 DePaul Bus. & Com. L.J. 383 (Spring 2009) ("Despite meaningful efforts to promote better practices and ensure quality among arbitrators and advocates, criticism of American arbitration is at a crescendo.").

36. *Id.* at 401.

37. *See* The College of Commercial Arbitrators Protocols for Expeditious, Cost-Effective Commercial Arbitration (2010), of which Professor Thomas J. Stipanowich is editor-in-chief. JAMS also has issued expedited arbitration rules and recommended arbitration discovery protocols. *See* JAMS, Recommended Arbitration Discovery Protocols for Domestic, Commercial Cases (2010), *available at* www.jamsadr.com.

38. *See* Marshall J. Breger, *Should an Attorney Be Required to Advise a Client About ADR Options?*, 13 Geo. J. Legal Ethics 427 (2000). *See also* Model Rules of Prof'l Ethics RR. 1.2, 1.4 (2010 ed.) (discussing an attorney's duty of consultation with client).

39. *See* Thomas J. Stipanowich, *The Arbitration Penumbra: Arbitration Law and the Rapidly Changing Landscape of Dispute Resolution*, 8 Nev. L.J. 427 (Fall 2007). *See also* Thomas J. Stipanowich, *ADR and the "Vanishing Trial": The Growth and Impact of "Alternate Dispute Resolution,"* 1 J. Emp. L. Studies 843–912 (Nov. 2004); Thomas J. Stipanowich, *Beyond Arbitration: Innovation and Evolution in the United States Construction Industry*, 31 Wake Forest L. Rev. 65 (Spring 1996).

40. *See* Right Honourable Beverley McLachlin, *Judging the "Vanishing Trial" in the Construction Industry*, 3 JAMS Global Constr. Solutions 1 (Winter 2010) ("[T]he just resolution of disputes depends on agreement on basic principles of law. In the area of construction law, the operative legal principles are not set out in any Code. Rather, they have been developed, and must continue to develop, through the common law as applied by the courts. It thus emerges that even in a world dominated by ADR, the courts are essential. They and they alone can discharge the task of norm-setting."); Andrew D. Ness, *Wither Construction Law? How Can Construction Law Continue to Grow and Evolve in the Era of the "Vanishing Trial"?*, 30 Constr. Law. 5 (Summer 2010) ("We are going to have to consider alternative methods of generating new legal rules and abandoning absolute ones if the construction law tree is going to continue to grow, as it must in the long run. It is frankly hard to imagine this [by one] trained in a common law system."); Richard C. Reuben, *ADR and the Rule of Law: Making the Connection*, 16 Disp. Resol. Mag. 4 (Summer 2010) ("[M]any of our most established ADR processes—arbitration, mediation, even negotiation—depend on the law to secure such crucial functions as enforcement, confidentiality, and legitimacy. Plainly, then, ADR and the rule of law do not exist in mutually exclusive spheres. And yet, . . . there has been little explicit consideration of the relationship between the two—in particular, whether, and under what conditions, ADR might contribute to, or undermine, the rule of law, and vice versa.").

41. The common law of construction, like the English law merchant, will continue to evolve over time even with wide use of ADR. To enhance preservation, promotion, and facilitation of the common law of construction, a new approach for reporting arbitration awards (while preserving parties' confidentiality by deleting party and place names) could be developed along the lines of present systems for reporting federal agency administrative decisions. Legal treatises explaining the law and industry practice issues also will have a continuing role in the evolution of common law precedent. For a brief history on the role of legal treatises, see Winston S. Churchill, The Birth of Britain 164–65 (1956):

> About the year 1250, a judge of Assize named Henry of Bracton produced a book of nearly 900 pages entitled *A Tract on the Laws and Customs of England*. Nothing like it was achieved for several hundred years, but Bracton's method set an example, since followed throughout the English-speaking world, not so much as stating the Common Law as of explaining and commenting on it, and thus encouraging and helping later lawyers and judges to develop and expand it. Digests and codes imposed in the Roman manner by an omnipotent state on a subject people were alien to the spirit and tradition of England. The law was already there, in the customs of the land, and it was only a matter of discovering it by diligent study and comparison of recorded decisions in earlier cases, and applying it to the particular dispute before the court.

42. *See* John W. Hinchey & Laurence Schor, *The Quest for the Right Questions in the Construction Industry*, 57 Disp. Resol. J. 8 (Aug.–Oct. 2002) ("[E]specially during the last 15 years, the American construction industry has proactively and creatively developed and refined means of avoiding and resolving the issues and disputes that inevitably arise during the course of a building project.").

43. AIA A201 General Conditions (2007) eliminated binding arbitration as the mandated ADR method, authorized parties to appoint their own neutral "initial decision maker" in lieu of the architect of record, and maintained mediation as a precondition to proceeding with either agreed binding arbitration or litigation.

44. ConsensusDocs 200 General Conditions (2007) rejected binding arbitration as the mandated ADR method and provided for disputes to be resolved through structured negotiation, dispute review boards, project neutrals, or mediation as a precondition to proceeding to either voluntary arbitration or litigation.

45. AIA A310 Performance Bond (2010) maintains and enhances communication among the owner, contractor, and surety by authorizing either the owner/obligee or the surety, upon issuance by the owner of a formal notice that it is considering defaulting the contractor, to request a conference (at which attendance is mandatory) to discuss the owner/obligee's grounds for considering possible termination for default. Only after the opportunity to attend such a requested conference does the surety's obligation under its bond legally arise.

46. *See The Big Dig—Project Background*, MassDot [hereinafter MassHighway Blue Book], www.massdot.state.ma.us/Highway/bigdig/projectbkg.aspx; *Big Dig*, Wikipedia.org, www.wikipedia.org/wiki/Big_dig. The Big Dig project was commenced in 1991 and completed in 2007.

47. *Id.* at 2–3.

48. For a detailed description of the Big Dig ADR process, see Kurt L. Dettman, Martin J. Harty & Joel Lewin, *Resolving Megaproject Claims: Lessons from Boston's "Big Dig,"* 30 Constr. Law. 5 (Spring 2010) (discussing the Big Dig's "original

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plan" and reasons why the plan was revised midway through the project).

49. MassHighway Blue Book, *supra* note 46, at 3–4. 50. *Id.* at 6–8.

51. *Id.* at 11. For lessons learned regarding use of dispute review boards on the Big Dig, see Kathleen M. J. Harmon, *Case Study as to the Effectiveness of Dispute Review Boards on the Central Artery/Tunnel Project*, 1 J. Legal Aff. Disp. Resol. Eng. Constr. 18 (Feb. 2009).

52. MassHighway Blue Book, *supra* note 46, at 12–13.

53. *See* Isaiah 1:18–19 (King James Version) ("Come now, and let us reason together, saith the Lord: though your sins be as scarlet, they shall be white as snow; though they be red like crimson, they shall be as wool. If ye be willing [to reach agreement] ye shall eat the good of the land.").

54. *See generally* Roger Fisher & William Ury, Getting to Yes (1981) (presenting approaches to "principled negotiation" developed by the Harvard Negotiation Project).

55. *See* Steven G. M. Stein & Melissa R. Pavely, *Good Faith in the Negotiation, Performance and Enforcement of Construction Contracts*, 4 JAMS Global Constr. Solutions 4 (Winter 2011).

56. *See* Roy S. Mitchell, *Cultural Sensitivities in International Construction Arbitration*, 3 JAMS Global Constr. Solutions 1 (Spring 2010).

57. *See supra* note 48, at 5, 7 ("Partnering . . . consisted of an effort by trained facilitators, initially at off-site conferences and later repeated during the course of the contract, to educate all Project participants on the mutual benefits of working toward common goals rather than each participant independently pursuing its own selfish ends. By using partnering, Project management attempted to establish a way of doing business that emphasized open communications and joint solutions, rather than the win-lose battles that would sour relationships and waste resourses on fighting legal battles rather than getting the job built."). *See also* Chris Skeggs, *Project Partnering in the International Construction Industry*, 20 Int'l Constr. L. Rev. 456 (2003); Frank Carr, Partnering in Construction: A Practical Guide to Project Success (1999); Partnering Manual of the Associated General Contractors of America (1995).

58. *See* James H. Kell, *The Benefits of Partnering*, 54 Disp. Resol. J. 29 (Feb. 1999) (offering a step-by-step partnering process checklist).

59. *See* Kimberly A. Kunz, *Counsel's Role in Negotiating a Successful Construction Partnering Agreement*, 15 Constr. Law. 19 (Nov. 1995) ("Partnering, simply put, is the express recognition of the implied covenant of good faith and fair dealing. It requires contracting parties to use best efforts, through a mutually developed, formal strategy of commitment and communication, to create an environment of trust and team-work for the cooperative avoidance of disputes, and the facilitation of project completion in a timely and cost-effective manner.").

60. US Army Corps of Eng'rs, Commander's Policy Memorandum No. 11 (Aug. 1990). For an interesting article on informal negotiation, see Jay Folberg, *Negotiation Lessons from the Pawn Shop*, 8 JAMS Disp. Resol. Alert (Spring 2008) (written by the former dean of the University of San Francisco Law School, and discussing what the author learned by watching his father run a pawn shop in East St. Louis).

61. *Current Practices in the Use of Alternative Dispute Resolution*, Legal Research Digest 50 (US Transp. Research Bd., Oct. 2008, updated Sept. 29, 2009).

62. *See, e.g.*, Embrey v. United States, 17 Cl. Ct. 617 (1989) (noting that different perspectives on the adequacy of the contractor's performance led to a deterioration of jobsite relationships that caused the contractor's superintendent to describe the government's contracting officer in correspondence as an "arrogant jerk," "a bully," "a running sore of malcontent," and "an individual who won't change, without the pain and suffering he apparently needs.").

63. *See* James Groton, *The Progressive or "Stepped" Approach to ADR: Designing Systems to Prevent, Control, and Resolve Disputes*, *in* Construction Dispute Resolution Handbook (1997).

64. *See generally supra* note 54; 5 Dep't of Def., Contract Pricing Reference Guide § 1.2 (2000) (guidance to government negotiators); Ava Abramowitz, Architect's Essentials of Contract Negotiation (2d ed. 2009) (a comprehensive guide to negotiation principles, tools, and techniques); X. M. Frascogna Jr. & H. Lee Hetherington, The Lawyer's Guide to Negotiation: The Strategic Approach to Better Contracts and Settlements (2001); Robert A. Rubin, *The Ethical Negotiator: Ethical Dilemmas, Unhappy Clients, and Angry Third Parties*, 26 Constr. Law. 12 (Summer 2006).

65. *See* ICDR Guidelines for Arbitrators Concerning Exchanges of Information (May 2008). *See also supra* note 27, § 1:8 (2008):

> A prime cause of construction disputes is insufficient knowledge held by either or both parties to the dispute. The more facts that can be placed on the table, the more discernable the solution to the problem. In fact, information exchange is at the heart of construction dispute resolution because, in most instances, the truth of the matter will usually be found in the contemporaneous documentation. The starting place to provide for the exchange and communication of data relative to the dispute is in the construction contract itself. The contract may require that the parties prepare, maintain, and preserve certain categories of records and other sources of information with respect to the project—for example, tender estimates, accounting records, job meeting minutes, change order logs, reports of weather conditions, and test reports. More to the point, the contract can require that these categories of documents be presented to the other party as a contractual condition to assert a claim. It will be easier and far more economical for the parties to exchange information and documents at this early stage of the dispute rather than under the formal requirements of discovery in the context of a lawsuit or even arbitration.

66. *See supra* note 48, at 5, 7.

67. For a notable recent opinion interpreting "prevailing party" and addressing other construction issues, see Weitz Co. v. MHWashington, 2011 WL 43620 (8th Cir., Jan. 7, 2011).

68. *See* Kenneth C. Gibbs, *Five Tips on Educating Your Clients About Project Neutrals*, 1 JAMS Global Constr. Solutions 2 (Fall 2008); Linda Debene, *Assisted Solutions by Neutrals to Common Project Challenges*, 3 JAMS Global Constr. Solutions 10 (Fall 2010).

69. *See* Philip L. Bruner, *The "Initial Decision Maker": The New Independent Dispute Resolver in American Private Building Contracts*, 27 Int'l Constr. L. Rev. 375 (Summer 2010).

70. Carl M. Sapers, *In with the Initial Decision Maker*, 3 JAMS Global Constr. Solutions 12 (Winter 2010). *See also supra* note 42, at 8, 13 ("Notwithstanding tradition, the quasi-adjudicative role of the design professional has been controversial, especially in light of the multiple roles and allegiances of design professionals. For example, many of the ABA Forum survey responses indicated that a substantial majority of design professionals and contractors agreed that design professional decisions should not be final and binding, unless the parties so agreed after the dispute had arisen" (citing as authority Dean B. Thomson, *Arbitration Theory and Practice: A Survey of AAA Construction Arbitrators*, 23 Hofstra L. Rev. 137 (Fall 1994))).

71. *See* Duncan Glaholt, *Reviewing Dispute Review Boards*, 3 JAMS Global Constr. Solutions 7 (Fall 2010); Daniel McMillan & Robert A. Rubin, *Dispute Review Boards: Key Issues, Recent Case Law and Standard Agreements*, 25 Constr. Law. 14

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(Spring 2005) ("expanding use of DRBs on major construction projects requires that construction lawyers become more familiar with the DRB process, standard DRB agreements, and the varied roles lawyers may play in the DRB process").

72. *See* Disp. Resol. Bd. Found., www.drb.org.

73. *See generally* Hinchey & Harris, *supra* note 27, § 1:10.

74. *See* ICC Rules for Expertise, ICC Pub. 649 (effective Jan. 1, 2003). *See also* Donald Marston, *Final and Binding Expert Determinations as an ADR Technique*, 18 Int'l Constr. L. Rev. 213 (Apr. 2001); Hinchey & Harris, *supra* note 27, § 1:16.

75. Nael G. Bunni, The FIDIC Forms of Contract 460 (3d ed. 2005).

76. See, for example, the new European Union Mediation Directive, IP/08/628 (Apr. 23, 2008). In a March 29, 2008, speech supporting mediation, England's Lord Chief Justice, Lord Phillips, exclaimed: "It is madness to incur the considerable expense of litigation . . . without making a determined attempt to reach an amicable settlement. The idea that there is only one just result of every dispute, which only the court can deliver is, I believe, often illusory. . . . Parties should be given strong encouragement to attempt mediation before resorting to litigation."

77. *See* Douglas S. Oles, *Ten Common Reasons for Failure in a Mediation*, 3 JAMS Global Constr. Solutions 1 (Fall 2010); Paul M. Lurie, *Using Failure Analysis to Design Successful Mediations*, 3 JAMS Global Constr. Solutions 1 (Fall 2010); Deborah S. Ballati, *Success in Claims Resolution and Mediation: The Insurance Component*, 4 JAMS Global Constr. Solutions 1 (Winter 2011).

78. *See* Stephen B. Goldberg & Margaret L. Shaw, *The Secrets of Successful (and Unsuccessful) Mediators*, 8 JAMS Disp. Resol. Alert (Winter 2008); Scott R. Belhorn, *Settling Beyond the Shadow of the Law: How Mediation Can Make the Most of Social Norms*, 20 Ohio St. J. on Disp. Resol. 981 (2005); Robert J. Gomez, *Mediating Government Contract Claims: How Is It Different*, 32 Pub. Cont. L.J. 63 (Fall 2002). *See also* Hinchey & Harris, *supra* note 27, § 1:9.

79. European Union Mediation Directive, PI/08/628 (Apr. 23, 2008). *See also* Joe Tirado, *The European Mediation Directive*, 3 JAMS Global Constr. Solutions 12 (Fall 2010); Hubert Andre-Dumont, *The New European Directive on Mediation—Its Impact on Construction Disputes*, 26 Int'l Constr. L. Rev. 117 (Spring 2009).

80. *See* ICC ADR Rules (July 2001); UNCITRAL Conciliation Rules (Dec. 1989).

81. *See* Bunni, *supra* note 75, at 443. *See also* Hinchey & Harris, *supra* note 27, § 1:9.

82. Mediation can be effective in litigation and arbitration as an effective case management process by which to reach consensus of the parties on deposition discovery, scheduling, hearing time allotted to each party, and how the case otherwise might most efficiently be tried. *See* Laurence M. Watson Jr., *The Case for Mediated Case Management*, 1 Am. J. of Mediation 1 (2007) ("'Process debates' are procedural arguments that seem to erupt and flourish in complex cases. They can involve a wide range of peripheral issues. They are always focused on the *litigation process* (the way we are going to argue) rather than the *subject of the lawsuit* (what we are arguing about).").

83. *See* Michael Jaffe & John McHugh, *U.S. Project Disputes: Has the Time to Consider Adjudication Finally Arrived?*, 62 Disp. Resol. J. 51 (July 2007). *See also* Doug Jones, *Is Adjudication the Holy Grail?*, 2 JAMS Global Constr. Solutions 9 (Spring 2009); Harvey J. Kirsh, *"Adjudication" as a Method of Resolving Construction Disputes*, 1 JAMS Global Constr. Solutions 6 (Fall 2008); Robert Fenwick Elliot, *10 Days in Utopia*, 27, The Arbitrator & Mediator 57 (2008); His Honour Humphrey J. Lloyd, Adjudication: A Public Law Response (unpublished paper presented to the Canadian College of Construction Lawyers, June 3, 2006); Doug Jones, Adjudication—Should It Be Encouraged? (unpublished paper presented to the Society of Construction Law of England and Wales, Oct. 7, 2008).

84. *See* Jon T. Anderson & G.W. Snipes, *Stretching the Concept of Mini-Trials: The Case of Bechtel and the Corps of Engineers*, 9 Constr. Law. 3 (Apr. 1989); Paul F. Geller, *When the Walls Come Tumbling Down: A Call for ADR in the CIC*, 13 Constr. Law. 12 (Jan. 1993) ("If the dispute cannot be prevented and cannot be resolved through negotiation, mediation or DRBs, the parties can consider the innovative procedure known as the mini-trial. The mini-trial is a hybrid process, combining elements of negotiation, mediation and adjudication—and may be particularly useful where the parties are at negotiation impasse.").

85. For an overview of the construction industry arbitration process, *see generally* 6 Bruner & O'Connor on Construction Law, *supra* note 15, §§ 20:2 *et seq. See also* Hinchey & Harris, *supra* note 27, §§ 20:1 *et seq.*; The College of Commercial Arbitrators, Guide to Best Practices in Commercial Arbitration (2006).

86. *See* Thomas J. Stipanowich, *Arbitration: The Choice Is Yours!*, 3 JAMS Global Constr. Solutions 7 (Winter 2010).

87. *See* The College of Commercial Arbitrators, Protocols for Expeditious, Cost-Effective Commercial Arbitration (2010); Thomas J. Stipanowich, *Revelation and Reaction: The Struggle to Shape American Arbitration*, *in* Contemporary Issues in International Arbitration and Mediation: The Fordham Papers (2010); Richard Chernick & Zela Claiborne, *What Providers Can Do to Promote Efficiency*, Nat'l L.J., Nov. 22, 2010 ("As criticism of costly arbitration has grown stronger, some providers are also responding by offering more than one kind of arbitration procedure and revising their rules with the goal of helping parties design a process to fit the case.").

88. *See* Zela Claiborne, *Designing a Cost-Effective Construction Arbitration*, 3 JAMS Global Constr. Solutions 10 (Spring 2010); Stipanowich, *supra* note 86, at 7; Michael Timpane & Linda Debene, *Reshaping ADR Strategies for Today's Global Engineering and Construction Market*, 2 JAMS Global Constr. Solutions 1 (Summer 2009).

89. *See* Celeste M. Hammond, *The (Pre) (As)Sumed "Consent" of Commercial Binding Arbitration Contracts: An Empirical Study of Attitudes and Explanations of Transactional Lawyers*, 36 J. Marshall L. Rev. 589 (Spring 2003) ("The thesis of this article is not that transactional attorneys perpetrate legal malpractice when they advise business clients about predispute arbitration provisions. Instead, the thesis is that where the lawyer, as advisor/counselor, is egregiously incorrect in her own understanding and expectations, the client has not "knowingly" assented to arbitration and the agreement to arbitrate is not legally enforceable.").

90. *See* James F. Nagle, *ADR in Federal Contract Disputes: What Law Applies?*, 4 JAMS Global Constr. Solutions 13 (Winter 2010) (addressing prime and subcontract issues over law applicable in federal procurements).

91. *See, e.g.*, JAMS Construction Arbitration Rules, JAMS Construction Rules for Expedited Arbitration, and JAMS Rules for International Arbitration and International Mediation at www.jamsadr.com; AAA Construction Industry Arbitration Rules (regular track, fast track, and large complex case procedures), AAA Construction Industry Mediation Rules, and ICDR International Arbitration and Mediation Rules at www.adr.org.

92. *See* David Co. v. Jim W. Miller Constr. Inc., 444 N.W.2d 837 (Minn. 1989) (upholding an arbitration award, held to be authorized by an arbitration clause covering "all claims, disputes and other matters in questions . . . arising out of or relating to the contract documents or the breach thereof" that required the contractor to buy the defectively built project at the developer's full resale price).

93. *See* JAMS, Recommended Arbitration Discovery

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Protocols (2009). *See also* 2010 Revised IBA Rules of Evidence for International Arbitration; Nathan O'Malley, *An Annotated Commentary on the 2010 Revised IBA Rules of Evidence for International Arbitration*, 27 Int'l Constr. L. Rev. 461 (Oct. 2010). *See also* Richard Chernick, *Discovering New Ways to Make Arbitration More Attractive*, The Recorder (Apr. 12, 2010) (discussing new rules for streamlining the discovery process proposed by international ADR groups).

94. *See* Harvey J. Kirsh, *Arbitration & Settlement*, 4 JAMS Global Constr. Solutions 10 (Winter 2010).

95. *See* Jesse B. Grove III, *An Arbitrator's Tips on Experts to Avoid*, 2 JAMS Global Constr. Solutions 1 (Spring 2009); Barry Brower, Paul Ficca & Neil Gaudion, *Why Is an Expert's Evolving Role Important in the Construction Arbitration Process?*, 2 JAMS Global Constr. Solutions 1 (Spring 2009).

96. *See Optional Arbitration Appeal Procedure*, JAMS (2003), *available at* www.jamsadr.com.

97. *See* John W. Hinchey, *Selecting Qualified Arbitrators Is the Key to Success in International Construction Cases*, 1 JAMS Global Constr. Solutions 1 (Fall 2008); Michael J. Altschuler, *Arbitrating Before a Non-Attorney Construction Industry Neutral*, 63 Disp. Resol. J. 60 (Jan. 2009).

98. *See, e.g.*, JAMS Expedited Construction Arbitration Rules; "Fast Track" Procedures of AAA Construction Industry Arbitration Rules and Mediation Procedures. *See also* Jesse B. Grove III, *New Rules for Expedited Construction Arbitration in the United States*, 24 Int'l Constr. L. Rev. 136 (Spring 2007).

99. *See* Hinchey, *supra* note 97, at 1; Christopher R. Seppala, *Obtaining the Right International Arbitral Tribunal: A Practitioner's View*, 25 Int'l Constr. L. Rev. 198 (Spring 2008).

100. *See* David Co. v. Jim W. Miller Constr., Inc., 444 N.W.2d 836 (Minn. 1989) (upholding an arbitration award requiring the contractor to buy from the owner/developer the defectively built project at the full resale price that the owner/developer would have received if the project had been properly constructed, even though the resale price was well in excess of the contractor's construction price).

101. *See* Hall Street Assocs. LLC v. Mattel, 552 U.S. 576, 128 S. Ct. 1396, 170 L. Ed. 2d 254 (2008) (holding that parties could not enlarge by agreement the scope of judicial review of arbitration awards under the Federal Arbitration Act).

102. *See* Cable Connection, Inc. v. DIRECTTV, Inc., 44 Cal. Rptr. 4th 1334 (Cal. 2008) (holding that parties may enlarge by agreement the scope of judicial review of arbitration awards under the California Arbitration Act).

103. *See Optional Arbitration Appeal Procedure*, JAMS (June 2003), *available at* www.jamsadr.com.

104. *Id*. at 2.

105. Burger, *Remarks*, *supra* note 29.

106. *Id*.

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Over the last few years, arbitration as a form of alternative dispute resolution has come under considerable scrutiny, both within the construction industry and beyond. Several leading commentators have pointed out the proliferation of litigation tactics and procedures in arbitration, which can turn arbitration into a new form of litigation.[1] These commentators have raised the question whether arbitration, especially of larger disputes, offers any real cost advantage over litigation. The construction industry professionals responsible for revisions to the standard form construction contracts have eliminated contract provisions requiring arbitration of disputes, and replaced them with provisions making arbitration optional at the election of the parties.[2] The American Arbitration Association (AAA), in response, has focused its self-evaluation and arbitrator training efforts on means and techniques to make arbitration less costly for the parties. The AAA Construction Industry Arbitration Rules were revised in 2009 to include provisions that are designed to reduce the cost of this process, and other provisions that make it clear that the arbitrator or panel of arbitrators has authority to implement procedures, whether identified in the AAA Rules or not, to achieve an "efficient and cost-effective dispute resolution process."[3] The College of Commercial Arbitrators, a nationwide association of experienced commercial arbitrators, has issued a set of Protocols for Expeditious, Cost-Effective Commercial Arbitration, including a great many detailed suggestions from its members.[4]

In view of these developments, it is particularly appropriate to examine, in some detail, what *cost-effective* means in the context of arbitration, and how it can be achieved in the specific context of construction arbitration. How is cost-effectiveness to be measured? How can arbitration be made more cost-effective than litigation? How can some arbitration procedures be made more cost-effective than others? Who is responsible for achieving a "cost-effective dispute resolution process"? Who is to blame when the process is not cost-effective? These questions are basic, but their answers are complex.

Cost-effective arbitration is possible, but only if the arbitrator and counsel exert control over the legal, expert, and arbitrator costs through continual cost-benefit analysis of procedural alternatives throughout the arbitration process. The cost-benefit analysis requires more than the simple enforcement of arbitration rules. It requires the evaluation of alternative arbitration procedures, including their associated fees and fee trade-offs, and comparison to the costs of alternative litigation procedures. The analysis is necessarily case-specific and requires the exercise of judgment by an experienced and well-informed arbitrator.

Judicial Economy and How It Affects the Costs of Litigation

Arbitration as an alternative to litigation has traditionally differed in that the costs of arbitration have been subject to greater control. Litigation, under either federal or state rules of civil procedure, is a process that is generally not controlled by a neutral with a primary goal of making the proceeding cost-effective. The litigating parties are given full access to the tools of discovery (interrogatories, subpoenas, document requests, depositions, etc.), and it is left to counsel to use the tools in a cost-effective manner, frequently with little help from the judge except the threat of sanctions. Sanctions are typically used to punish parties for refusing to provide discovery to other parties but are otherwise not used as a means to make discovery cost-effective. Counsel are typically motivated by considerations of cost-effectiveness, i.e., they want the best result for their client at the lowest cost, but they often assume that the best strategy toward that goal is to make the litigation process as expensive for their opponents as possible. The choice of discovery tools then can become a matter of interdependent strategic decisions, in which each side tries to impose costs on the other, with the expectation that the other side will do the same, either independently or in retaliation. At worst, the result is a discovery process that looks like unregulated retaliation iterated ad nauseum. Experience demonstrates that the threat of sanctions is not sufficient to keep discovery from becoming a long, tedious, and extremely expensive process.

Judges are generally motivated to minimize the time they spend on any particular case because of the time demands of their dockets. Their motivation is reinforced by the judicial system, through many of the procedural rules and practices, in both state and federal courts, driven by considerations of judicial economy. Such considerations do not necessarily lead to the most cost-effective control of the litigation process.

The pretrial process illustrates this point in several ways. Pretrial rules and orders often require the parties to make early disclosures of the entirety of their case (contentions, supporting documents, legal arguments, percipient witnesses, expert witnesses, their expected testimony, reports, etc.).[5] These disclosures impose incremental legal fees at the front end of a lawsuit for two purposes. First, they are meant to make it easier for the judge to understand and manage the case. Second, they are meant to promote early evaluation of the case by the parties, leading to settlement. The overall goal is judicial economy, but the cost of pursuing that goal may be additional legal fees for the parties, incurred in preparing the required disclosures. This incremental cost is not necessarily cost-effective because it does not necessarily result in any offsetting reduction in subsequent legal fees or other litigation costs sufficient to create an overall reduction in the costs of the litigation.

Considerations of judicial economy also often result in the relative lack of judicial control of the discovery process. Pretrial discovery in civil cases is recognized as a process meant to promote the resolution of cases short of trial.[6] As such, it has advanced the goal of judicial economy by eliminating trial time, but it has imposed potentially substantial legal fees on the parties in the process, and it has imposed new costs on the judicial system, required for the resolution of discovery disputes. Considerations of ju-

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