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Managing Construction Conflict: Unfinished Revolution,
Continuing Evolution

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By

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INTRODUCTION

Two decades ago many believed we were experiencing a revolution in the way conflict was managed.¹ Although observed changes were affecting virtually every aspect of human interaction, nowhere was the upheaval more momentous than in the construction sector. Frustration with the costs, delays, risks and limitations of lawyer-driven adjudication prompted growing attention to informal methods aimed at early resolution of disputes, with those who “owned” the dispute back in the driver’s seat. Contractors, architects and engineers, insurers, agencies and other owners, and, yes, construction attorneys were suddenly talking about collaboration, team-building, early settlement and interest-based bargaining. It suddenly appeared as though the world might turn upside down, with “advocate-controlled, adversarial, formalized, rights-based, lengthy and costly” giving way in large measure to “client-controlled, cooperative, relational, informal, interest-based, flexible, early, expeditious and efficient.”

A smorgasbord of options for preventing, managing and resolving conflict was suddenly on the table. There were strategies aimed at the very roots of conflict, including contractual terms aimed at promoting collaboration and reducing the chance of serious conflict,² and partnering, aimed at establishing a “collaborative ethic and working ‘partnership’” on a construction project.³ There were mechanisms for “real time” dispute resolution on the jobsite by a project neutral, or by group of construction experts sitting as a dispute review board (DRB).⁴ Dispute resolution

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¹ See generally CPR Construction Disputes Committee, *Preventing and Resolving Construction Disputes* (Center for Public Resources 1991) (excellent compendium developed under the leadership of Jim Gorton and Jim Wilson with assistance from Peter Kaskell); Thomas J. Stipanowich, *Beyond Arbitration: Innovation and Evolution in the United States Construction Industry*, 31 WAKE FOREST L. REV. 65 (1996) (discussing results of industry-wide survey on conflict management and dispute resolution processes).

² *Id.*, Chapters 2, 3.

³ *Id.*, Chapter 5.

⁴ *Id.*, Chapter 6.

advisors offered a more refined, project-centric means of managing conflict.⁵ Phased or tiered dispute resolution might include early negotiation and, if necessary, negotiation with the assistance of a mediator;⁶ mediation promised to be a particularly flexible tool for facilitating resolution of individual disputes and promoting improved communications and relationships on projects.⁷ There were even proposed new twists on binding arbitration, the longstanding traditional alternative to litigation of construction disputes.⁸ Part I briefly explores this “Quiet Revolution”⁹ in construction conflict management.

Twenty years on, the Quiet Revolution has borne considerable fruit. Partnering remains a critical element of construction for some agencies, and broader contract-based platforms incentivizing collaboration and reduced conflict are available as integrated project delivery systems. Dispute boards are an established feature of many U.S. and international infrastructure projects. Tiered “filtering systems” for resolving construction conflicts are ubiquitous elements of construction contracts, and mediation has become a dominant intervention strategy for dispute resolution in the U.S. and other common law countries and is gaining considerable steam elsewhere. Arbitration is the focus of unprecedented international discussion and debate.

On the other hand, things haven’t turned out quite the way many of us expected. Among other things, we underestimated the grip and staying power of the litigation-oriented legal culture, and the “gravitational pull” it exerts on everything it touches, especially mediation and arbitration. The legal profession inhabits and dominates these vast swathes of the commercial conflict management landscape and is the primary determinant of its contours. Within these realms lawyers largely control the shape and timing of dispute resolution processes, who gets in, and who runs or facilitates the process (typically, lawyers); the shadow of litigation and the litigation model hangs heavy over the scene. In some ways, it is as if, twenty years after 1776, the British Crown was not only still in control of the American colonies, but had actually taken charge of the revolution! The yin and the yang of today’s construction management spectrum are the focus of Part II.

Nevertheless, if we have learned one thing from experience, it is that human operations constantly evolve and change. That has never been more true than today, as we are confronted us with rapid developments on multiple fronts. Looking to the future, Part III considers pertinent trends in the rapidly morphing realm of information technology; the increasing globalization of society; the surprising new insights made possible by behavioral science and the mining of “big data”; the impact of longer productive lives and “active retirement”; and the never-ceasing drumbeat for new forms of professional education and credentialing. Indeed, it may be that the real revolution is ahead of us.

⁵ *Id.* at 387-8.

⁶ *Preventing & Resolving Construction Disputes*, *supra* note 1, at 4-1 - 4-3.

⁷ Stipanowich, *supra* note 6, at 364-78.

⁸ *Preventing & Resolving Construction Disputes*, *supra* note 1, Chapter 8.

⁹ See Thomas J. Stipanowich, *The Quiet Revolution Comes to Kentucky*, 81 KY. L. J. 855, 859-61 (1992-93) (discussing recent wave of initiatives focused on managing and resolving conflict).

I. HARBINGERS OF A “QUIET REVOLUTION” IN THE CONSTRUCTION INDUSTRY

By the last decade of the Twentieth Century the U.S. construction industry was sick, concluded the Construction Industry Institute (CII); the malady was the growth of litigation. The Business Roundtable found the construction industry to be one of America’s least efficient sectors, largely because of the “ ‘adversarial dance’ between parties to the construction project, . . . [creating] ‘a constant state of confrontation.’ ”¹⁰

In earlier times construction claims and controversies tended to be resolved informally and early through jobsite negotiation, decisions by design professionals, or, if necessary, informal binding arbitration without much lawyer involvement. But things had changed due to the growing size and complexity of the industry, inflationary pressures on contractors, tighter owner budgets and time frames for construction, and risk-shifting by owners. More emphasis was placed on lawyered adversarial processes, with many disputes being postponed and eventually consolidated in massive arbitration or litigation proceedings. The economic, business and relational costs were huge.¹¹

Suddenly it seemed everyone was exploring and proposing solutions to the construction industry’s crisis.¹² These included initiatives focused on tackling the roots of construction conflict and promoting jobsite collaboration, including partnering and contract terms to more thoughtfully allocate risk and incentivize collaboration. There were new “real time” analogues to the old short and informal arbitration proceedings such as dispute review boards and adjudication. Finally, there were proposals for phased handling of disputes through successive “sieves”—unassisted negotiation, followed (if necessary) by mediation and, finally, binding arbitration. Early perspectives on and experiences with these approaches were explored in a series of surveys developed through the cooperation of the ABA Forum on the Construction Industry, the Associated General Contractors of America (AGC), Design Professionals Insurance Company (DPIC) and the American Arbitration Association (AAA).¹³

Partnering. A concept borrowed from the manufacturing and distribution sectors and pioneered by the U.S. Army Corps of Engineers, partnering was designed to encourage collaboration and team work by deliberate early efforts to create an atmosphere of trust and cooperation on projects.¹⁴ Facilitated partnering workshops were commonly conducted shortly after contract signing and attended by owner representatives and key members of the design and construction

¹⁰ *Preventing and Resolving Construction Disputes*, *supra* note 1, at 1-1.

¹¹ *Id.* at 1-2.

¹² *See generally Preventing and Resolving Construction Disputes*, *supra* note 1.

¹³ The author helped organize and implement these efforts and analyzed the results. *See generally* Stipanowich, *supra* note 1; Thomas J. Stipanowich & Leslie King O’Neal, *Charting the Course: The 1994 Construction Industry Survey on Dispute Avoidance and Resolution--Part I*, 15 CONSTRUCTION LAWYER 5 (Nov. 1995); Thomas J. Stipanowich & Leslie King O’Neal, *Charting the Course: The 1994 Construction Industry Survey on Dispute Avoidance and Resolution--Part II*, 16 CONSTRUCTION LAWYER 8 (April 1996).

¹⁴ *Id.* at 5-1; Adam K. Bult, et al, *Navigant Construction Forum, Delivering Dispute Free Construction Projects: Part III – Alternative Dispute Resolution* (June 2014), at 7-10.

team. The aim was stronger individual bonds, better understanding of each other's objectives and expectations, and non-adversarial approaches for resolving problems on the job.¹⁵ Surveyed contractors saw partnering as a superior means of reducing dispute-related time and cost, enhancing understanding, opening channels of communication and preserving job relationships;¹⁶ the large majority of contractors expected its usage to grow.¹⁷

Relational contracting. New attention to the causes of conflict on construction projects also centered on contract terms, including provisions for more equitable and efficient allocation of risks on construction projects.¹⁸ Other efforts focused on contractual incentives aimed at aligning contractors' goals with those of owners, thereby promoting collaboration.¹⁹

Dispute review boards, adjudication. Reclaiming some of the territory once served by informal arbitration as an efficient mechanism for resolving jobsite disputes, the dispute review board (DRB) evolved as a short, sharp method for independent expert evaluation of disputes on infrastructure projects and large engineered jobs.²⁰ The concept involved the establishment of a standing panel of construction and engineering experts to periodically convene on site to review, and render summary nonbinding opinions on, disputes regarding subsurface conditions and other issues. The idea was that the standing and expertise of the decision makers would stimulate a quick settlement of the dispute, avoid prolonged conflict and obviate traditional binding arbitration or litigation.

The DRB's British analogue was "statutory adjudication."²¹ The procedure, which was established as a required method for resolving various project payment disputes by the Housing Grants, Construction and Regeneration Act 1996,²² consisted of a very short review and decision making process. Given the temporal limitations, adjudication was necessarily "rough" justice; one English QC suggested that the result might be "little more than a gut reaction" to the dispute.²³ Under the law the adjudicator's determination was only preliminarily binding, and the dispute could later be taken to binding arbitration or litigation.

*Dynamic conflict management: the dispute resolution adviser.*²⁴ In 1991, a custom-designed system for the renovation of a Hong Kong hospital incorporated many different elements in a

¹⁵ *Id.*

¹⁶ Stipanowich, *supra* note 1, at 147, tbl.DD-4.

¹⁷ *Id.* at 156, tbl.EE-4. See also Erik Larson, *Project Partnering: Results of Study of 280 Construction Projects*, 11, No.2 J. OF MANAGEMENT IN ENG'G (1995).

¹⁸ *Preventing and Resolving Construction Disputes*, *supra* note 1, Chapter 2.

¹⁹ *Id.*, Chapter 3.

²⁰ Thomas J. Stipanowich, *The Multi-Door Contract and Other Possibilities*, 13 OHIO ST. J. ON DISP. RESOL.303, 360-64 (1998).

²¹ *Id.* at 363-4; Robert Gaitskell, *Trends in Construction Dispute Resolution*, Society of Construction Law Papers No. 129 (2005).

²² United Kingdom Statute 1996 c 53 Pt II § 108.

²³ John Tackaberry, *Flexing the Knotted Oak: English Arbitration's Task and Opportunity in the First Decade of the New Century*, Society of Construction Law Papers 3 (May 2002).

²⁴ Colin J. Wall, *The Dispute Resolution Adviser in the Construction Industry*, in CONSTRUCTION CONFLICT MANAGEMENT AND RESOLUTION (Peter Fenn & Rod Gameson, ed. 1992), at 328.

program that represented a quantum leap in the evolution of jobsite dispute resolution and “project neutrals.” Because the contract called for demolition and construction to be performed while keeping the hospital and operating theatres operational, the public owner required a system that would identify and resolve disputes in the shortest possible time and prior to completion of the project. The result was a program with tight time frames for jobsite decision making and handling of claims, and a flexible, dynamic dispute resolution system centered upon the figure of a Dispute Resolution Adviser (DRA), a construction expert with dispute resolution skills who would remain throughout the project. The DRA first met with job participants to explain and build support for a cooperative approach to problem solving. Thereafter, the DRA made monthly visits to the site to monitor the status of the job and facilitate discussions regarding emerging issues. In the event of a formal challenge to a project decision, certificate or evaluation, the parties were given time to resolve the matter through negotiation, failing which the DRA could make arrangements for mediation, mini-trial or expert fact-finding. If assisted site level negotiations failed, the DRA was to prepare a report identifying the key issues in dispute, the positions of the parties, and perceived barriers to settlement and make either a recommendation for settlement or a nonbinding evaluation of the dispute. The report would be used by senior off-site representatives of the parties in further negotiations, perhaps assisted by the DRA. Should matters not be resolved within fourteen days of the issuance of the DRA's report, the DRA would set into motion a short-form arbitration procedure or other mutually acceptable means recommended by the DRA. The DRA procedure worked well. Despite the usual problems and several hundred owner-ordered changes, no disputes reached the stage of nonbinding evaluation.²⁵

Mediation. Ultimately, the most significant development in American dispute resolution during the final decades of the last century was the widespread use of mediation. Construction lawyers came to know mediation through court referrals or agency programs, word of mouth and, ultimately, the incorporation of mediation in the dispute resolution provisions of contracts. What Texas mediator Eric Galton has referred to as the “childhood cycle” of mediation was a period of attitudinal change for most of a generation of lawyers including many once-skeptical litigators, some of whom embraced mediation with the fervor of religious converts.²⁶ In a 1991 Forum survey, construction attorneys registered generally positive attitudes toward mediation and saw it as appropriate for the maintenance of business relationships, promoting privacy and confidentiality, resolving disputes quickly and economically, providing an objective perspective on a case, overcoming impasses and dealing with strong emotions.²⁷ Presaging future developments, a slight majority thought it would be appropriate for standardized construction contracts to provide for mediation prior to arbitration or litigation of disputes involving large sums of money.²⁸

²⁵ Stipanowich, *supra* note 20, at 387-89.

²⁶ Eric Galton, *The Preventable Death of Mediation*, 8(4) DISP. RESOL. MAG. 23, 23 (2002).

²⁷ Stipanowich, *supra* note 1, at 94-96.

²⁸ *Id.* at 96-97.

Arbitration. Meanwhile, binding arbitration, the time-honored mechanism for informal adjudication of construction disputes, was increasingly being viewed as a surrogate for litigation and being evaluated by that benchmark.²⁹ A mid-1980s Forum survey of arbitration under the AAA Construction Industry Arbitration Rules indicated that construction lawyers generally compared arbitrators favorably with judges and juries when it came to fairness in decision making; most viewed arbitration as a speedier and somewhat less costly procedure than bench or jury trial, especially in cases under \$250,000.³⁰ However, concerns regarding the quality of arbitrators fed into support for broader judicial review of awards, for reasoned awards, and generalized dissatisfaction with all aspects of arbitration. Attorneys also expressed concerns regarding the differing needs of small and large cases and tended to support a procedural reforms such as the use of preliminary hearings to arrange for discovery, for the narrowing of issues and establishing a schedule; mechanisms for joinder of parties or consolidation of hearings; and arbitrator supervision of document discovery.³¹

Responding to such concerns in the mid-1990s, the AAA's National Construction Dispute Resolution Committee modified the Construction Industry Rules to create "tiers" of arbitration procedures for construction disputes of varying size and complexity, including expedited procedures formulated for low-dollar-value cases and more extensive process for so-called "large, complex" cases. The AAA also pared down its national rosters of neutrals and established stricter experiential and training requirements for arbitrators.³²

II. THE UNFINISHED REVOLUTION

Today, the spirit of the envisioned "Quiet Revolution" is still evidenced in programs anchored in "real time" and on the jobsite. Some create a platform for collaboration among members of the construction team to constructively avoid conflict and manage the claims that are inevitable by-products of performance; others use on-call expert intervention before positions harden and thereby increase the cost, complexity and potential disruptive impact of conflict. In the "lawyered" domains of mediation and arbitration, however, the irresistible force of the revolution in conflict resolution collided with the immovable object of the legal culture and its litigation orientation; present trends and practices reflect the push and pull of these forces.

A. Tackling the Roots of Conflict: Collaborative Contracting

Partnering. Despite the early expectations of many in the industry, partnering never came into general usage and is typically a feature of public construction programs, notably state departments of transportation. Some studies have indicated that the use of partnering has

²⁹ See Stipanowich, *supra* note 20, at 336-57. For a good summary of the historical background of construction arbitration see PHILIP L. BRUNER & PATRICK J. O'CONNOR, JR., BRUNER & O'CONNOR ON CONSTRUCTION LAW §§20.1-20.2.

³⁰ Thomas J. Stipanowich, *Rethinking American Arbitration*, 63 IND. L.J. 425, 458-61 (1988).

³¹ *Id.* at 339-41.

³² Stipanowich, *supra* note 20, at 343-47.

resulted in more projects being completed on or ahead of schedule, in improved contract administration, reduced claims and disputes, reduced owner engineering and administrative expenses, and more value engineering.³³ The California Department of Transportation employs project partnering alongside DRBs (for projects over \$10 million) and Dispute Resolution Advisors (DRAs).³⁴

Integrated Project Delivery. Elements of partnering and relational, collaboration-oriented contracts are melded into the concept of integrated project delivery (IPD),³⁵ a relative newcomer to the U.S. marketplace of delivery systems that has thus far been utilized on only a few domestic projects.³⁶ IPD models are founded on a multiparty agreement between primary stakeholders in design and construction, a commitment to collaboration built on trust, and defining success mutually in terms of project outcomes rather than individual goals.³⁷ IPDs enable design decisions to be enhanced by the involvement of all team members and the free flow of technical and budgetary information. Successful IPD requires effective, open communication, and for this reason considerable effort must be given to establishing protocols for the use and management of information, including building information modeling (BIM).³⁸ The many nontraditional aspects of IPD place new challenges upon participants (such as the criteria for selecting co-venturers,³⁹ the precise contractual form of collaboration, and protocols respecting the measurement of performance of specific goals (including achievement of project milestones, health and safety requirements, life-cycle costs, sustainability, etc.).⁴⁰ However, proponents point out that traditional project methodologies and accompanying adversarialism have contributed to significant continuing inefficiencies in the construction industry.⁴¹

B. “Real-Time” Jobsite Resolution

Dispute boards, adjudication. According to early statistics developed by the Dispute Review Board Foundation, the leading advocacy group for the process, DRBs achieved an extraordinary level of success, both in terms of the number of claims apparently settled after a DRB hearing

³³ Adam K. Bult, et al, *Navigant Construction Forum, Delivering Dispute Free Construction Projects: Part III – Alternative Dispute Resolution* (June 2014), at 9.

³⁴ *Navigant Construction Forum, Delivering Dispute Free Construction Projects: Part II – Construction & Claim Management* (James G. Zack, Jr., ed. 2014) at 4-5.

³⁵ See generally AIA National/AIA California Counsel, *Integrated Project Delivery: A Guide* (2007 version 1) [hereinafter *Integrated Project Delivery*]; Construction Management Association of America, *An Owner’s Guide to Project Delivery Methods*, 1, 28-30 [hereinafter *CMAA Owner’s Guide*].

³⁶ *CMAA Owner’s Guide*, *supra*, at 28. Examples of foreign applications of IPD included project alliancing approaches in the U.K. and Australia. See ACCL Princeton Symposium, *Building the Future*, J. OF THE AMERICAN COLLEGE OF CONSTRUCTION LAWYERS 147-54 (Special Edition—May 2007) (comments of Michael Wilke, C.O.O. Americas, Parsons Brinkerhoff).

³⁷ *Integrated Project Delivery*, *supra* note 35, at 5.

³⁸ *Id.* at 10.

³⁹ *CMAA Owner’s Guide*, *supra* note 35, at 29.

⁴⁰ *Id.* at 11.

⁴¹ *Integrated Project Delivery*, *supra* note 35, at 3.

and the prophylactic effect on disputes of the very presence in place of a DRB.⁴² Although there is little quantitative evidence actually linking DRBs to lower project costs and fewer delays and disruptions,⁴³ industry perceptions of the DRBs tend to be very positive;⁴⁴ a number of public contracting authorities are convinced of their value and committed to their use.⁴⁵ DRBs were even utilized on the nation's largest construction project, the Boston Central Artery/Tunnel Project, for which standing panels were established for all contracts over \$20 million.⁴⁶ The "Big Dig" offers a cautionary tale, however: due to the sheer volume and complexity of disputes and claims, disputes over entitlement were not concluded in "real time" but left to be resolved at the end of each contract; ultimately, the backlog of claims had to be resolved through a "retrofitted" program of negotiation and mediation.⁴⁷

The potential impact of an abbreviated, preliminary expert decision making process on the landscape of conflict resolution is also revealed in the extraordinary growth of "statutory adjudication" in Britain,⁴⁸ where the "vast majority" of adjudication decisions are accepted by the losing parties.⁴⁹ One authority reports that "well over 80% of the adjudication decisions are simply accepted, with the losing party content that it has had a fair chance to put its case to an independent tribunal."⁵⁰ Explains one judge, "The clear message appears to be that in broad terms the industry is content with adjudication."⁵¹

As of 2006, DRBs had been employed on more than 1,300 projects, including many major infrastructure projects, and were credited with directly resolving almost 1,600 disputes.⁵² Dispute Boards are being used on major projects around the globe; and international financial

⁴² See Carol C. Menassa & Feniosky Peña Mora, *Analysis of Dispute Review Boards Application in U.S. Construction Projects from 1975 to 2007*, 26(2) J. MANAGE. ENG. 65 (2010) (more than 90% of cases heard by DRB panels settled in the wake of panel recommendation; effectiveness of DRB as a prevention technique observed on 50% of projects where no disputes were ever heard by DRB panel)

⁴³ However, a recent study of 3,000 projects over a ten-year period indicates that projects that used DRBs "faced reduced costs and schedule growth" when compare to non-DRB projects. See Duzgun Agdas & Ralph D. Ellis, *Analysis of Construction Dispute Review Boards*, 5(3) J. LEGAL AFFAIRS & DISP. RESOL IN ENG'G AND CONSTR. 122 (Aug. 2013).

⁴⁴ See generally Kathleen Harmon, *Effectiveness of Dispute Review Boards*, 129(6) J. OF ENG'G & MNGMT. 674 (2003).

⁴⁵ See, e.g., 2009 Caltrans DRB-DRA Amended 2006 Specifications. Caltrans' specifications call for a DRB in contracts over \$10 million and individual Dispute Resolution Advisors (DRAs) in other projects.

⁴⁶ Kurt L. Dettman, Martin Harty & Joel Lewin, *Resolving Megaproject Claims: Lessons From Boston's Big Dig*, 30(2) CONSTR. LWYR. 5 (Summer 2010).

⁴⁷ *Id.* at 10.

⁴⁸ Robert Gaitskell, *Trends in Construction Dispute Resolution*, Society of Construction Law Papers No. 129, 1-5, 10, 13 (2005).

⁴⁹ *Id.* at 11 ("Figures given anecdotally are that there have been about 15,000 adjudications thus far . . . Of this enormous number only about 300 have reached the courts, and of these about 200 reported decisions have resulted.")

⁵⁰ *Id.*

⁵¹ Frances Kirkham, *The Future of Adjudication*, Society of Construction Law Papers 1-2 (Sept 2004).

⁵² Data published by the Dispute Review Board Foundation. See http://www.drb.org/manual/Summary_of_DRBs_2005.xls (last visited August 12, 2014).

institutions are now mandating the process use on large infrastructure projects.⁵³ Dispute Adjudication Boards (DABs), which render decisions that are binding unless and until they are reversed by arbitration or litigation, are provided for in FIDIC Conditions.⁵⁴ The International Chamber of Commerce (ICC) recently published its own Dispute Board documents.⁵⁵

Project mediation, standing mediator. Although for some reason project mediation appears not to have seen extensive use, the appointment of a “standing” dispute resolution professional to mediate issues as they arise during the course of a construction project can be of value in keeping the job on track and helping to limit the number of claims that must be subjected to more formal and expensive dispute resolution procedures.⁵⁶

Dispute resolution advisors (DRAs) have seen limited use, although the highly customized and dynamic approach used in Hong Kong may not have been replicated in other venues.

C. Mediation: Multi-dimensional Instrument, Whistle-stop on the Litigation Line⁵⁷

In the United States, mediation has become the dominant template for third-party intervention in conflict, including construction disputes, and it appears to be in a growth mode throughout the world. Since construction mediation came onto the scene in the U.S. late in the Twentieth Century, mediation has become a standard feature of contractual stepped procedures for resolving construction disputes,⁵⁸ and in most parts of the country it is almost unimaginable that a case would proceed through litigation without at least one “stop” along the way for mediation. As a lawyer in one of my recent arbitrations put it, “By this time in a case [late in discovery] we have usually had at least one mediation, and sometimes two!” Mediation has also come to the fore in other leading common law countries such as the U.K., Canada, Australia, New Zealand, and user demand is taking root in other parts of the world.

But in the United States, where modern mediation first took root, mediation processes, like arbitration, have evolved along lines very different from those imagined by early proponents. Some originally envisioned mediation as a revolutionary mechanism capable of encouraging disputants to assume a primary role in resolving their own conflict, repairing broken relationships, promoting interest-based solutions, and even opening up the justice system by engaging people from different disciplines and community sectors as mediators. But while mediation is capable of achieving all of these things and to some extent has done so, some believe it has fallen short of its promise. Peter Adler, a consultant with deep roots in the modern history of U.S. mediation, recently conducted an informal survey of mediators he knew

⁵³ See, e.g., *EIC Contractor's Guide to the MDB [Multilateral Development Bank] Harmonised Edition (June 2010) of the FIDIC Conditions of Contract for Construction (April 2011)*, 28 INT'L. CONSTR. L. REV. 439 (2011).

⁵⁴ AXEL-VOLKMAR JAEGER & GÖTZ-SEBASTIAN HÖK, FIDIC - A GUIDE FOR PRACTITIONERS 396-7 (2010).

⁵⁵ See generally Nicholas Gould, *Establishing Dispute Boards—Selecting, Nominating and Appointing Board Members*, Society of Construction Law Papers No. 135 (Dec. 2006).

⁵⁶ See NICHOLAS GOULD, ET AL, *MEDIATING CONSTRUCTION DISPUTES: AN EVALUATION OF EXISTING PRACTICE* 17 (2010) (discussing project mediation in the U.K. and CEDR's Project Mediation package).

⁵⁷ I am indebted to litigator-turned-mediator John Van Winkle for the highly appropriate “litigation train” metaphor. See JOHN R. VAN WINKLE, *MEDIATION: A PATH BACK FOR THE LOST LAWYER* 1 (2001).

⁵⁸ See Thomas J. Stipanowich, *Arbitration: The “New Litigation,”* 2010 ILL. L. REV. 1, 29-30.

personally or by reputation and found that although their stories were an interweaving of the good and the bad, there was a group sense that mediation had large devolved into a game of numbers, or positional bargaining.⁵⁹ Lawyers had gradually established “hegemony, a takeover of the mediation work and a slow but steady disenfranchisement of non-lawyers.” Although there are many positive aspects to the continuing, evolving relationship between lawyers and mediation, there is concern about the potential for lawyers to frame and dominate the process, game the system, limit the mediator’s role and control communications⁶⁰--at worst, turning mediation into a mere whistle-stop on the litigation line.

Evolution of construction mediation as a lawyered process. Given the inherent flexibility of mediation and the critical importance of maintaining clear lines of communication and good relationships between project team members during the course of a project, it seemed natural that mediators might be able to step in early for the purpose of helping nip conflict in the bud, fostering better job communications and strengthening relational ties. Sometimes this happens.⁶¹ From early days, however, the mediation of construction disputes tended not to focus on those things, but rather on settling cases along the road to trial or arbitration. From the beginning, mediation usually came about after—often long after—the parties had “lawyered up”; it was rarely embraced as a strategy of “real time” intervention on a job, while the conflict was fresh and positions not yet hardened. Instead, it was usually prompted by a court or by attorneys.⁶² The mediator was nearly always a lawyer, and sometimes a retired judge.⁶³ And sooner or later the process nearly always got down to the hard slogging: the back-and-forth of distributive bargaining resulting in a monetary settlement.⁶⁴

Experienced lawyers in mediation. As mediation of construction disputes has become settled practice, a trend reinforced by the inclusion of mediation as an element in stepped contractual dispute resolution provisions, the early patterns have continued. The difference is that most litigators now have garnered extensive experience with mediation and with a wide variety of mediators. They may use these insights in a variety of ways. They may work strategically with the mediator by, for example, providing helpful information about the dynamics of the dispute and the personalities of the participants, and by ensuring that the negotiation “dance” proceeds in a way that best protects their client’s interest while exploring tradeoffs, and, occasionally,

⁵⁹ Peter S. Adler, *Expectation and Regret: A Look Back at How Mediation Has Fared in the U.S.*, 7th National Conference, Civil Mediation Council, London, May 2, 2013, at 5.

⁶⁰ *Id.* at 6-7.

⁶¹ See, e.g., *Navigant Construction Forum, Delivering Dispute Free Construction Projects: Part II – Construction & Claim Management* (James G. Zack, Jr., ed. 2014), 32 (noting that mediation is always in an option in resolving job claims and disputes); Stipanowich, *Multi-Door*, *supra* note 20, at 368-9 (discussing successful example of use of standing mediator on public project).

⁶² See Stipanowich, *Beyond Arbitration*, *supra* note 1, at 111, tbl.J (65% of reported cases involved mediation by post-dispute agreement of the parties; about 29% were mediated pursuant to a court order or court rules).

⁶³ See *id.* at 116, tbl.O (64.5% of mediators in reported cases were attorneys; 21.1% were retired judges).

⁶⁴ See *id.* at 120, tbl.R (the vast majority of settlements (298 out of 315 cases) involved money; a much smaller percentage resulted in an agreement to perform certain work (32 out of 315; only a handful of cases produced other outcomes from settlement)).

options for value creation.⁶⁵ While it is expected that some degree of manipulation will occur as attorneys withhold information or mask intentions from the mediator (just as mediators manipulate the process and parties in various ways, consciously or unconsciously), mediators believe the process generally works. More than three-quarters (76.7%) of respondents to a 2014 Straus Institute Survey of experienced mediators in the membership of the International Academy of Mediators viewed the increasing familiarity of counsel with the mediation process as a positive development.⁶⁶

On the other hand, attorneys may contribute to mediation dysfunction by actively misleading the mediator regarding the prospects for settlement and insuring that the day of resolution is postponed in order for the litigation train to proceed through full discovery.⁶⁷ The vast majority (84.2%) of respondents to the IAM/Straus Institute Survey of experienced mediators indicated that attorneys sometimes use mediation as a means of continuing the litigation process with no intent to settle.⁶⁸ While counsel may not be faulted for wanting to have material information in hand before concluding a settlement, this does not mean that full discovery is necessary; indeed, a skilful mediator may be able to help the parties identify and target priorities for information exchange.

Counsel sometimes employ mediation for the sole purpose of obtaining information regarding the opposition's case. Moreover, according to Peter Adler, mediators are expressing growing concern about lawyers taking control of the mediation process, limiting joint sessions and insisting that all communications go directly through them.⁶⁹

Thus, the increasing sophistication of attorneys has many positive and some negative implications for successful mediation. It must also be said that their experience has undoubtedly equipped many attorneys with the skills and understanding to more successfully engage in direct negotiations with their counterparts, thus easing the need for mediators.

Mediation as professional practice. Today, mediation is a professional livelihood for a growing number. Nearly half (47.7%) of those responding to the 2014 IAM/Straus Institute Survey of experienced mediators indicated that mediation practice occupies ninety percent or more of their work time. Almost eighty percent (79.1%) of the respondents devote more than half their time to

⁶⁵ An excellent discussion of advocacy during mediation may be found in Dwight Golann, Ch. 12, "Advocacy at Specific Stages," in DWIGHT GOLANN, *MEDIATING LEGAL DISPUTES: EFFECTIVE STRATEGIES FOR NEUTRALS AND ADVOCATES* 255 (2009).

⁶⁶ The IAM-Straus Institute Survey on Mediator Practices and Perceptions was sent to 153 individuals, all IAM Fellows, and 85.0% (130 individuals) participated in the survey; 78.4% (120 individuals) completed the entire survey. The respondent pool included individuals who stated they "regularly practiced" in Africa; Asia, including the Middle East; Australia and New Zealand; Canada; Europe (both Western and Eastern, with a majority from the UK); Latin America; and the United States. These and other data from the IAM/Straus Institute Survey will be published in Thomas J. Stipanowich & Zachary P. Ulrich, *The IAM-Straus Survey on Mediator Practices and Perceptions* (article in progress).

⁶⁷ SUSAN N. EXON, *ADVANCED GUIDE FOR MEDIATORS*, 71-72 (2014)

⁶⁸ See *supra* note 66.

⁶⁹ Adler, *supra* note 59, at 7.

mediation practice. Nearly three-quarters (73.8%) of respondents had mediated 1,000 or more cases.⁷⁰

Mediators: styles vs. strategies. Since the earliest days of “modern mediation” there has been discussion and debate about the techniques mediators use. Thousands of mediators received training based on the principle that mediators should respect party autonomy by avoiding any expressions of opinion regarding the issues in dispute or the prospects for recovery in court (a reality that is still pervasive in mediation training in other parts of the world), but it soon became clear that many mediators were engaging in some form of evaluation at some stage of mediation, and that parties often sought out such input.⁷¹ Eighty percent of the mediators responding to the IAM/Straus Institute Survey indicated that their reputation as a mediator who can offer useful assessments of parties’ cases is a factor of some importance in attracting and maintaining clients.⁷² Indeed, in our 1991 Forum survey of specific mediation experiences of construction attorneys, there was actually a statistically significant correlation between evaluation and settlement. Of course, approaches to conveying evaluations vary considerably.

Hoping to chart the evolving territory of mediation practice, Professor Len Riskin’s famous “grid” identified a spectrum of mediator approaches differentiating “facilitative” from “evaluative” techniques, and another spectrum distinguishing “narrow” emphases (focusing on the issues in dispute, party positions, the likely disposition of the dispute in the absence of a negotiated settlement) and “broad” emphases (embracing concerns about underlying party interests, needs, and other factors).⁷³ Our growing self-awareness of and continuing discussion about what mediators do and why they do it led Riskin to tinker with his grid, reflecting more nuanced insights. For present purposes, several points are particularly important. First of all, we know that it is common for mediators to tailor their approaches to the circumstances, and “move around the grid” during the course of a single mediation. (As one successful construction mediator vividly remarked, “I am facilitative in the morning and evaluative in the afternoon.”) Second, there is appreciation of the fact that mediators’ activities are directed not only at substantive discussions but at process management; both are critical elements of the recipe for resolution, and mediators’ approaches to both these elements will vary depending on mediator styles or strategies. Finally, we understand that some mediators’ approaches are purely *reflexive*—that is, a matter of their individual style or character traits—and that some successful construction mediators are sought out precisely because they always handle cases a particular way. That said, most mediators will best serve the parties and process by using approaches *reflectively* and *strategically*—that is, as a deliberate response to specific circumstances.⁷⁴

⁷⁰ See *supra* note 66.

⁷¹ Stipanowich, *supra* note 20, at 367.

⁷² *Id.*

⁷³ See *supra* note 71.

⁷⁴ See, e.g., Marjorie Aaron & Dwight Golann, Ch. 8 “Merits Barriers: Evaluation and Decision Analysis,” in GOLANN, *supra* note 65, at 145-62 (discussing if, when and how mediators might offer evaluations).

Convening: “upfront” work. Just as experienced arbitrators are coming to grips with the need to set the stage for the arbitration process through carefully planned prehearing conferences, today’s mediators tend to place great emphasis on preliminary preparation before the actual mediation session(s).⁷⁵ In addition to developing a picture of the issues in dispute, they may familiarize themselves with the history of negotiation, the “temperature” of the parties and key personalities at play. They may work with counsel to lay the groundwork for an appropriate mediation process, including the agenda for initial joint sessions and the tentative timing and even the planned duration of caucuses. Extensive forward planning is critical for the mediation of complex construction cases involving many parties.

Mediators’ varying approaches to the process. Data from the IAM/Straus Institute Survey also confirm the notion that mediators employ various approaches to different elements of the process, exemplified by their use of joint sessions and caucuses.⁷⁶ Some mediators (52.4%) always or usually begin mediation with all parties in a joint session; others (39.7%) always or usually being the mediation with all parties in caucus. Some (24.6%) always or usually keep parties in caucus during the entire mediation; others (29.4%) never do so. Some tend to tell parties that all information shared during caucus will be confidential unless they instruct the mediator to share it; others tend to tell parties that they will share any information learned during caucus with the other party as they see appropriate, unless instructed not to share it. A large minority (42.8%) say they “sometimes reveal information to parties in caucus that may be construed as sharing more information than I have been given direct permission to share.”

*Stepped processes; mediation and arbitration.*⁷⁷ Today, mediation of construction disputes is likely to occur pursuant to a provision in a multi-phased dispute resolution procedure that begins with some form of job-based initial procedure and culminates in some kind of adjudication (arbitration, litigation or hearings before an administrative tribunal). Stepped dispute resolution provisions are a straightforward response to the reality that most construction disputes are amenable to a negotiated resolution, and that there are multiple benefits associated with early, informal resolution.⁷⁸ Stepped approaches are intended to function as a series of sieves or filters to cull all of the issues and controversies that may be resolved short of binding adjudication. Where direct negotiation between representatives of the parties is unavailing, the intervention of a mediator may help break the logjam and craft a workable resolution.⁷⁹

⁷⁵ See *id.* at 35-50.

⁷⁶ See *supra* note 66.

⁷⁷ This section is adapted from Thomas J. Stipanowich & Zachary P. Ulrich, *Commercial Arbitration and Settlement: Empirical Insights into the Roles Arbitrators Play*, 6 YEARBOOK ON ARBITRATION AND MEDIATION 1, 8-10 (2014).

⁷⁸ See COMMERCIAL ARBITRATION AT ITS BEST: SUCCESSFUL STRATEGIES FOR BUSINESS USERS (Thomas J. Stipanowich & Peter H. Kaskell, ed. 2001), Chapter 1 (discussing importance of multi-tiered approaches for management of conflict and avoiding stand-alone arbitration provisions). See also CEDR COMMISSION REPORT, ON SETTLEMENT IN INTERNATIONAL ARBITRATION, FINAL REPORT 4, ¶4.2.1 (Nov. 2009) [hereinafter CEDR COMMISSION REPORT] (discussing benefits of multi-tier dispute resolution clauses).

⁷⁹ See *id.* at 11-14.

But the linear arrangement of elements in multi-stage dispute resolution templates does not take account of the reality that dispute resolution is very often “non-linear.” It is frequently not viewed as possible or practicable to settle a case before the filing of an arbitration demand. This may be because of differing (and often, unrealistic) expectations on the part of counsel or parties regarding the likely disposition of issues should the case go to trial or arbitration or the settlement value of a case,⁸⁰ the perceived need for more information,⁸¹ law firm economics or other factors. Recent empirical research indicates that legal advocates’ judgments and choices regarding settlement may be clouded by, and settlement delayed by, lawyers’ excessive reliance on intuition, the desire to avoid perceived loss; the tendency to seek confirmation of the biases they bring to litigation; the notion that it is always better to have more information; and concerns about justifying previously spent dollars in litigating a case.⁸² When settlement does not occur during the preliminary stages of dispute resolution, the arbitration proceeding becomes the backdrop against which negotiated settlement discussions will occur. In many such cases, mediation is postponed until a relatively late stage in the pre-hearing process when discovery is completed or well-advanced.⁸³

Over the years, there have been efforts to “think outside the box” of the linear framework of stepped dispute resolution by exploiting its potentialities in different ways. For example, it has been suggested that mediators be equipped with a wider variety of tools to break impasse at early stages of conflict (such as a more nuanced appreciation of cognitive factors affecting negotiations).⁸⁴ They may also facilitate the parties’ focus on key factual issues and related, limited information exchange⁸⁵ or targeted binding or nonbinding decisions by judges or arbitrators that could lay the groundwork for resolution of conflict.⁸⁶ Even where substantive issues cannot be resolved in mediation, mediators may nevertheless focus on facilitating agreements regarding dispute resolution process elements and helping parties to set the stage for arbitration proceedings with features that are effectively tailored to the issues at hand.⁸⁷

Finally, some have promoted or participated in forms of “med-arb,” by which we mean a proceeding in which a single third party serves, or agrees to serve, as both the mediator and

⁸⁰ Andrew J. Wistrich & Jeffrey J. Rachlinski, *How Lawyer’s Intuitions Prolong Litigation*, 86 SO. CAL L. REV. 571, 576 (2013); Paul M. Lurie, *Using the guided choice process to reduce the cost of resolving construction disputes*, 9 CONSTR. L. INT’L 18, 21 (Mar. 2014).

⁸¹ *Id.*; Lurie, *supra*, at 20.

⁸² See generally *id.* See also RANDALL KISER, BEYOND RIGHT AND WRONG: THE POWER OF EFFECTIVE DECISION MAKING FOR ATTORNEYS AND CLIENTS 89-195 (2010) (discussing “decision errors” by attorneys and related psychological and institutional factors).

⁸³ See Lurie, *supra* note 80, at 19 (noting that “mediation is frequently seen as a tool to be used close to trial or an arbitration hearing as a hedge against an unfavorable judgment or award”).

⁸⁴ Lurie, *supra*, at 19-20.

⁸⁵ COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 78, at 19.

⁸⁶ Lurie, *supra* note 80, at 20-21. Cf. Wistrich & Rachlinski, *supra* note 80, at 624-626.

⁸⁷ *Id.* at 19-20. Paul Lurie’s Guided Choice concept actually centers on the notion of using mediation to “diagnose” a dispute and assist parties in structuring an appropriate dispute resolution process, possibly including an appropriately tailored form of arbitration.

arbitrator.⁸⁸ Sometimes, arrangements are made between disputing parties and a third party “neutral” prior to the commencement of any services that the latter will mediate the dispute and, failing a complete resolution of the dispute, will arbitrate all outstanding matters.⁸⁹ A variant of this kind of arrangement is “MEDALOA”—mediation followed by last-offer (or final offer) arbitration.⁹⁰ Sometimes, third parties who are engaged in mediating a dispute are asked to shift to an arbitral role and adjudicate the dispute;⁹¹ in other cases arbitrators are invited to assume the role of mediators.⁹² These kinds of dual-role arrangements raise a variety of legal, practical, and ethical issues that have led many U.S. practitioners and neutrals to avoid them,⁹³ although dual roles tend to be more readily embraced in some other parts of the world in some formats such as conciliation within arbitration.⁹⁴ There are indications, however, that many U.S. dispute resolution professionals do engage in such activities, albeit relatively infrequently.⁹⁵

International trends. Beside the United States, “modern” mediation is most fully developed in the United Kingdom, Canada, Australia and New Zealand, but it is developing at various rates in many other countries. The International Academy of Mediators, a leading body of experienced mediators, includes members from the U.S., Canada, U.K. and other countries in the E.U., Australia and New Zealand, Latin America, the Middle East, other parts of Asia, and Africa. Following up on its Directive on mediation, the E.U. has provided various forms of support for the development of mediation in member countries. All of this will help to promote greater use of mediation in international disputes.

D. Arbitration: Coming to Grips with “New Litigation”⁹⁶

Decline in domestic construction arbitration. As long as any of us can remember, binding arbitration has been a dominant feature in the landscape of construction conflict. But in recent years arbitration has faced increasing challenges. The AAA’s important construction caseload dropped off dramatically in recent years, as shown in the table below. Significant reductions in the number of mediations and arbitrations reflect the impact of the Great Recession, the worst

⁸⁸ See COMMERCIAL ARBITRATION AT ITS BEST, *supra* note 78, at 20-24.

⁸⁹ See *id.*

⁹⁰ See *id.* at 25-26.

⁹¹ See *id.* at 22-24 (setting forth suggested guidelines for handling such arrangements) .

⁹² See *id.* at 29-30 (setting forth suggested guidelines for handling such arrangements).

⁹³ See *id.* at 20-22 (discussing attitudes of leading arbitrators and practitioners on CPR Commission and concerns regarding med-arb); Thomas Stipanowich, *Contract and Conflict Management*, 2001 WIS. L. REV. 831, 853-55 (2001), available at <http://ssrn.com/abstract=1377917>. See also CEDR COMMISSION REPORT, *supra* note 78, at 3, 11-12 (Nov. 2009) [hereinafter CEDR COMMISSION REPORT], available at http://www.cedr.com/about_us/arbitration_commission/Arbitration_Commission_Doc_Final.pdf (reporting results of a commission sponsored by CEDR, the London-based mediation and mediation training organization).

⁹⁴ For an excellent tabular summary of different national laws and their posture regarding arbitrators’ promotion of and involvement in settlement efforts and related issues, see CEDR COMMISSION REPORT, *supra*, at Appendix 4, 18ff. See also *Reflections on Med-Arb and Arb-Med: Around the world*, 2 N.Y.DISP. RESOL. L. 71-119 (Spring 2009) (collection of articles highlighting use of med-arb and variants).

⁹⁵ See Stipanowich, *supra* note 93, at 853-54.

⁹⁶ Portions of this section are adapted from Thomas J. Stipanowich, *Reflections on the State and Future of Commercial Arbitration: Challenges, Opportunities, Proposals* (article in progress).

economic downturn since the Great Depression, on activity in the construction sector.⁹⁷ However, while the number of mediations decreased by about one-third between 2008 and 2013, the arbitration caseload dropped by an even greater proportion (around 43%).

AAA Construction Caseload (2008-2013)⁹⁸

Construction	2008	2009	2010	2011	2012	2013
Arbitration	3,075	2,805	2,322	1,817	1,733	1,767
Mediation	994	940	807	743	707	666
Total	4,069	3,745	3,129	2,560	2,440	2,433

One reason for the disparity may be the very fact that increased use of mediation has lessened the demand for arbitration by producing more early settlements. Or perhaps some attorneys believe that many of the benefits traditionally sought from arbitration, including efficiency, expedition, privacy and business-oriented results, are more effectively achieved in mediation. But neither of these explanations fully explains why, a mere decade after the debut of a mediation stage in the American Institute of Architects documents, the drafters elected to remove arbitration as the default process for binding adjudication.⁹⁹ Moreover, when results from a 2011 survey of corporate counsel in major corporations are compared with data from a similar survey in 1997, there is a decided decline in the number of companies currently using arbitration for commercial disputes;¹⁰⁰ also, fewer corporate counsel are expecting their companies to use arbitration for commercial disputes in the future.¹⁰¹ The question is, why would arbitration, which for so long was synonymous with dispute resolution in the construction industry, be perceived as inferior, and not superior, to litigation as a means of adjudication?

Users' contrasting perspectives on arbitration. All indications are that business users and counsel seem to be divided in their views of arbitration as a substitute for litigation in court. Lawyers who choose litigation over arbitration may do so because of the perceived need for process *control*—that is, the sort of control that comes with the stages of litigation as framed by federal and state court procedures, including broad discovery, rules governing the admission of evidence, adherence to legal standards and appeal on the merits.¹⁰²

Outside counsel, the advocates who typically handle adjudication, are likely to be even more biased in favor of litigation. One long-time, well-regarded consultant to the construction industry shared with me that the outside attorneys he deals with, retains or represents generally

⁹⁷ Deltek Clarity 35th Annual Architecture and Engineering Industry Study (2014), at 4.

⁹⁸ Emails from Ryan Boyle, Vice President - Statistics and In-House Research, American Arbitration Association, to author (Sept. 6, 2013, June 16, 2014).

⁹⁹ For a discussion of the recent evolution of dispute resolution provisions in standard construction contracts, see Thomas J. Stipanowich, *Arbitration: The "New Litigation,"* 2010 U. ILL. L. REV. 1, 30 (2010).

¹⁰⁰ See Thomas J. Stipanowich & Ryan J. Lamare, *Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration and Conflict Management in Fortune 1,000 Corporations*, 19 HARV. NEGOT. L. REV. 1, 46-8 (2014), available at <http://ssrn.com/abstract=2221471>.

¹⁰¹ *Id.* at 49-50.

¹⁰² *Id.* at 63.

prefer litigation to arbitration. While he believed that this preference among outside counsel is in some respects a matter of familiarity and comfort with evidentiary and procedural rules in court, the main reason was economic. Once the litigation train begins to roll, full-blown discovery permits law firms to “milk the juice out of a case” by deploying armies of associates (billing long hours at high rates) and paralegals; as discovery winds down and the law firm has made the bulk of its potential fees, the case often settles. Even cases taken on a contingency may incentivize such conduct since contingencies are often mixed with an adjusted but still substantial hourly rate. Leaving the larger ethical and moral questions aside, it is significant that a white paper jointly produced by the American College of Trial Lawyers strongly disparaged the “one-size-fits-all” character of modern U.S. discovery and called for the facilitation of appropriate choices to fit specific circumstances.¹⁰³

Of course, many attorneys understand that arbitration is an “engine of choice.”¹⁰⁴ Choice-making in arbitration should depend on the goals and priorities of users. For some, this could mean a procedure tailored to “getting it right” in a litigation sense, with full-blown court-like due process. If the parties so desire, arbitration can be tailored to provide virtually all of the key elements of litigation (but in a decidedly more private setting, subject to rules or agreements promoting confidentiality).¹⁰⁵ Appellate arbitration rules even permit a surrogate form of appeal on the merits.¹⁰⁶ But for other businesses the greater part of justice may be getting the dispute over with and getting on with business, or having a clear and final decision as a foundation for forward planning;¹⁰⁷ in other words, justice is about how a fundamentally fair result can be achieved with speed, economy, and finality. Arbitration can accommodate and facilitate these and other goals by permitting parties to make choices regarding:

- decision-maker(s) (permitting the selection of persons with specific substantive knowledge or experience, professional qualifications, or process management skills, or a tribunal melding these attributes);
- process, from federal-court-like procedures to streamlined/expedited approaches;
- the standards by which decisions are made (legal, trade, technical, or, perhaps, “equitable”);
- the degree of privacy of the hearing room, and the confidentiality of arbitration-related information;
- venue

¹⁰³ INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, FINAL REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM 3 (Mar. 11, 2009).

¹⁰⁴ See generally Thomas J. Stipanowich, *Arbitration and Choice: Taking Charge of the “New Litigation,”* (Symposium Keynote Presentation), 7 DEPAUL BUS. & COMM. L.J. 383, 388 (2009) (discussing how business users and counsel may make more effective use of arbitration through the exercise of choice).

¹⁰⁵ Stipanowich, *supra* note 99, at 64-66.

¹⁰⁶ Stipanowich, *supra* note 104, at 429-30. The American Arbitration Association published new appellate arbitration procedures in 2013. AMERICAN ARBITRATION ASSOCIATION, OPTIONAL APPELLATE ARBITRATION RULES (Effective Nov. 1, 2013).

¹⁰⁷ Stipanowich, *Arbitration and Choice*, *supra* note 104, at 388.

- the law governing the arbitration process; and
- the level of supporting administration services.

“Drift” toward a litigation model. Over the last two decades, however, arbitrations have tended to drift in the direction of a more formalized, lawyer-dominated model with many of the trappings of litigation in federal or state court.¹⁰⁸ In the words of one industry expert with whom I spoke, many attorneys “want to make arbitration as much like litigation as they can.” This means, among other things, a much stronger emphasis on pre-hearing process including sometimes-extensive discovery and motion practice. These realities have presented new challenges for arbitrators.

Responses to concerns about increasing cost and delay. Not so long ago, cost-effectiveness and speed were among the primary reasons for choosing arbitration over litigation.¹⁰⁹ However, as arbitration processes take on more of the characteristics of litigation in court, cycle time and costs inevitably increase, reducing the relative benefit of the arbitration alternative in some eyes.¹¹⁰ These developments recently inspired a number of U.S. and international initiatives such as the *College of Commercial Arbitrators Protocols for Expeditious, Cost-Effective Commercial Arbitration*,¹¹¹ premised on the notion that increased cost and delay are a shared problem of business users and counsel, outside counsel, arbitrators and arbitration provider institutions. The *Protocols* offer pertinent guidelines and proposed action steps for all four sets of stakeholders.

Importantly, the AAA and other leading provider organizations have recently placed greater emphasis on giving arbitrators tools to more effectively manage the pre-hearing process.¹¹² Some providers also now offer a variety of “accelerated,” “expedited,” “streamlined” or “fast track” rules;¹¹³ it remains to be seen whether clients and counsel will embrace these procedures for cases involving more than relatively small amounts in dispute. In order to encourage resort to such alternatives, it is up to providers or other proponents of arbitration to collect data on the

¹⁰⁸ Adam K. Bult, et al, *Navigant Construction Forum, Delivering Dispute Free Construction Projects: Part III – Alternative Dispute Resolution* (June 2014), at 21; Stipanowich, *supra* note 99, at 8-24 (discussing evolution of arbitration as the “new litigation”).

¹⁰⁹ See Stipanowich, *supra* note 99, at 64-65.

¹¹⁰ In the 2011 Fortune 1,000 survey, more companies viewed the costs of arbitration as a barrier to its use than in the 1997 survey.

¹¹¹ PROTOCOLS FOR EXPEDITIOUS, COST-EFFECTIVE COMMERCIAL ARBITRATION: KEY ACTION STEPS FOR BUSINESS USERS, COUNSEL, ARBITRATORS & ARBITRATION PROVIDER INSTITUTIONS (Thomas J. Stipanowich, et al, ed., College of Commercial Arbitrators, 2010) [hereinafter CCA PROTOCOLS].

¹¹² See, e.g., AMERICAN ARBITRATION ASSOCIATION, COMMERCIAL ARBITRATION RULES, R-9 (integrating mediation into process for larger cases); R-21 (preliminary hearing); R-22 (pre-hearing exchange and production of information); R-23 (enforcement power of arbitrator); R-33 (handling of dispositive motions); R-38 (emergency measures of protection); R-58 (sanctions by arbitrators); CCA PROTOCOLS, *supra* note 111, at 78-80 (listing JAMS, CPR, ICC and other procedures).

¹¹³ See CCA PROTOCOLS, *supra* note 111, at 79-80.

performance of arbitrations conducted pursuant to such rules and publish resulting statistics along with pertinent success stories or cautionary tales.¹¹⁴

It appears that many arbitrators are now embracing the concept of proactive case management at all stages of arbitration. Responses to the recent survey of many of the United States' most experienced arbitrators by Pepperdine's Straus Institute for Dispute Resolution in cooperation with the College of Commercial Arbitrators (CCA) indicates that seasoned arbitrators are tending to recognize the importance of their role in actively managing the arbitration process from the outset, beginning with thorough preliminary hearings or prehearing conferences.¹¹⁵ Two key priorities are managing discovery and motion practice—both primary sources of cost and delay. Veteran arbitrators are also employing a wide array of techniques for managing hearings, including (with consent of counsel) “chess-clocks” to enforce definitive bounds on time allocation and “hot-tubbing,” the practice of putting expert witnesses on the stand at the same time for the purpose of promoting real mutual engagement on key points in controversy.

Demise of the multi-disciplinary tribunal. Another aspect of arbitration “drift” toward a litigation model is the increased emphasis on appointing arbitrators with legal backgrounds and a commensurate de-emphasis on the use of multi-disciplinary panels. The pervasiveness of lawyer-arbitrators was reflected in responses to the recent CCA/Straus Institute Survey: *all* of those who responded to the survey claimed backgrounds in the law and legal practice; between nine and ten percent (9.4%) were retired judges. Many of these respondents arbitrate construction cases.¹¹⁶ Today, some national and regional provider organizations are wholly built on the notion that people want dispute resolution professionals of legal or judicial background. But is this always the best solution for *construction* disputes?

It is understandable that parties to construction disputes would want attorneys on their arbitration tribunal. In addition to being particularly well attuned to addressing legal issues, they tend to bring special skills and insights into the management of processes for the handling of claims. But is it really necessary or appropriate for *all three* members of an arbitration tribunal to be attorneys? We should stop to consider what we are giving up by eschewing a panel that includes not just lawyers but professionals of other disciplines. For while attorneys may have the edge

¹¹⁴ *Id.* at 43-44.

¹¹⁵ The College of Commercial Arbitrators-Straus Institute for Dispute Resolution Survey on Arbitration Practice (Fall 2013) [hereinafter “the CCA/Straus Institute Survey”] was conducted under the umbrella of the Straus Institute's Theory-to-Practice Research Project in connection with a report on the future of arbitration which Professor Stipanowich was invited to present to the CCA during the fall of 2013. The Survey consisted of 65 multiple-choice and short-answer questions on respondents' arbitration experiences and opinions on arbitration practices and the future of the arbitration field-at-large. The Survey asked questions pertaining both “domestic” (defined in the Survey as “in the U.S. between U.S. parties”) and “international” (all other) arbitrations. The Survey was sent electronically to 212 individuals, all CCA Fellows, of whom 134 individuals (63.2 % of the subject pool) completed the survey instrument. The Survey and associated data are available from the author upon request. These and other data from the Survey will be presented in full in Thomas J. Stipanowich & Zachary P. Ulrich, *Arbitration in Evolution: Current Practices and Perceptions of Experienced Arbitrators* (article in progress) and discussed in Thomas J. Stipanowich, *Reflections on the State and Future of Commercial Arbitration; Challenges, Opportunities, Proposals* (article in progress). Portions of this section are drawn from the latter.

¹¹⁶ Slightly less than half (45.7%) of respondents claimed experienced with construction cases. *See id.*

when it comes to applying principles of law, matters such as evaluating conflicting expert testimony on, for example, professional standards of care, testing procedures, or assessing damages for lost productivity may be most effectively handled by one who has skills not in the typical lawyer's wheelhouse. As an arbitrator alongside two other lawyers, I occasionally feel like I am in a boat with all the oars on a single side: in some respects our collective expertise is redundant, and in other respects insufficient. I welcome the wisdom and expertise of an experienced, respected engineer or contractor as a touchstone on some key issues relating to design and construction practice.

Furthermore, if parties are determined to use only lawyer-arbitrators, do they really need three? The conventional wisdom is that three minds may be better than one, and tend to limit the likelihood of an unsound award. (There may be other reasons, as noted below.) On the other hand, a multi-member tribunal entails relatively high transaction costs, including increased cycle time. The CCA/Straus Survey reveals that many arbitrators have experience as the sole decision-maker in cases involving high stakes,¹¹⁷ and more consideration should be given to "one in lieu of three."

Much more could be said regarding the general lack of diversity in the ranks of dispute resolution professionals, and the subject should be of concern in the arena of construction disputes. Among the experienced arbitrators who provided gender information for the CCA/Straus Institute survey, only 19 of 123 (15.4%) identified themselves as female.¹¹⁸ This disparity, which probably reflects the long-time under-representation of women in the senior ranks of law firms (most notably in construction), will hopefully be rectified with time.

Application of the law and other standards in decision making. Do arbitrators follow the law? Adherence to legal standards appears to be a primary concern of many users of arbitration, along with the old saw that arbitrators tend to engage in inappropriate compromise.¹¹⁹

Although these concerns linger, one wonders to what extent they are relics of past decades, when construction arbitration was much less "legalized" and, most importantly, arbitrators often rendered decisions without an accompanying statement of reasons and perhaps without a claim-by-claim breakdown. In the absence of such information, aggrieved parties might imagine arbitrators were engaging in all sorts of inappropriate behavior in decision making.

Today, the environment of arbitral decision making is much changed, and the recent responses of experienced arbitrators tend to underline the attention given to legal authority in arbitration. Not surprisingly given their legal background and orientation, an overwhelming majority of experienced arbitrators in the CCA/Straus Survey said they do pay close attention to legal arguments. Nearly all arbitrators (97.7%) asserted that they always "carefully read and reflect upon legal arguments and briefs presented by counsel," while the rest usually do so. The great majority (86.7%) indicated that they always "do [their] best to ascertain and follow applicable

¹¹⁷ See *id.*

¹¹⁸ *Id.*

¹¹⁹ See Stipanowich & Lamare, *supra* note 100, at 53, tbl. P.

law in rendering an award” in the absence of a contrary agreement between the parties; most of the rest (11.7%) usually do so. It is also quite common for arbitrators to invite counsel to brief legal issues in the case (with 54.7% always extending an invitation and another 35.2% usually doing so).¹²⁰

All of that said, the responses also offer a puzzling caveat: more than a quarter of respondents (33 out of 128) stated at least sometimes they “[felt] free to follow [their] own sense of equity and fairness in rendering an award even if the result would be contrary to applicable law.”¹²¹ For present purposes, it is sufficient to note that depending on which arbitration procedures control and how those procedures are to be interpreted, arbitrators may or may not find themselves wrestling with the interplay between rules of law and their own concepts of equity or fairness. Where facing such issues, arbitrators are well-advised to reflect upon and seek to understand the relevant expectations of the arbitrating parties. Of course, the best solution is for arbitrating parties to make sure that the arbitration procedures they adopt clearly reflect their joint expectations regarding applicable standards.

In cases where the parties’ agreement and incorporated procedures do not make clear their intent regarding applicable norms, arbitrators may always seek guidance at the outset from the parties. However, compelling hints may often be gleaned from surrounding circumstances. In today’s law and lawyer-dominated environment, parties (or at least, their legal representatives) seem to be sending messages that legal doctrine and the normal run of judicial remedies should control, and my own experience of recent years is that arbitrators do their best to understand and follow applicable law. Legal issues are briefed and argued, and, often, blueprints for final awards put forward. Moreover, most arbitrators probably adhere to the view that a reputation for applying personal justice in lieu of the law is unlikely to enhance one’s resume as an arbitrator since it might be perceived as promoting unpredictability and risk in arbitration and, moreover, inconsistent with the goals of the parties.

At the end of the day, there may still be circumstances where arbitrators believe that in the name of fairness they have no alternative but to refuse to follow the law. But for the very reason that arbitrators’ awards are almost entirely immune to vacatur on substantive grounds, arbitrators bear a particular ethical responsibility to ensure that they are acting in accordance with the expectations of the arbitrating parties. In other words, far from being a sanction for ignoring the law in favor of one’s own brand of personal justice, the broad leeway given by courts to arbitral awards should be balanced by an enhanced ethical obligation of the arbitrator to wield authority with care and dutiful attention to the understanding of the parties.

For those parties who need further assurance against the risk of an errant award, there are alternatives such as final-offer (baseball) arbitration, bracketed arbitration, and appellate arbitration procedures.¹²²

¹²⁰ See Stipanowich & Ulrich, *supra* note 115.

¹²¹ *Id.*

¹²² JAY FOLBERG, ET AL, RESOLVING DISPUTES: THEORY, PRACTICE AND LAW 598-99, 601(2d ed. 2010).

Arbitration and settlement. It should come as no surprise that arbitrators are reporting that a higher percentage of arbitrated cases are being settled prior to award or even prior to hearing.¹²³ This development parallels the reduced incidence of trial in U.S. litigation, although our current information indicates that a much higher percentage of arbitrated cases apparently still go to hearing.

These realities prompt a number of questions. Why, for example, are some arbitrators reporting much higher rates of settlement in their cases than others? What role, if any, might arbitrators appropriately play in setting the stage for settlement? While most U.S. arbitrators appear to be wary of switching hats midstream and becoming mediators in a case, their pre-hearing management of dispositive motions and of discovery may offer some avenues for “teeing up” settlement discussions.

Party-appointed arbitrators: independent, partisan, or “predisposed”? Many construction cases are heard by tripartite panels that include wing arbitrators appointed unilaterally by the parties. This approach, which is also the prevailing approach for resolution of international commercial disputes, may result in a panel that works well and produces reasonably satisfactory awards. However, there are perceptions that some party-appointed arbitrators are predisposed toward the parties that appointed them and may lean toward their appointing party’s position in rendering awards even when applicable procedures call for them to be independent and impartial.¹²⁴ In a given case, participants may have very different understandings of what the party-arbitrators are actually doing, and this is not a healthy state of affairs. Both in the U.S. and internationally, these perspectives underpin a continuing debate about the role of party-appointed arbitrators and the expectations of participants in this regard. There are some who support the notion of “predisposed initially but able to be fair” while others find that concept problematic. If the debate is ever resolved in some fashion, it may be with the help of new studies regarding brain science and the origins of bias in decision making.

The professional crunch. As the first and second generations of construction lawyers continue into and through active retirement, retirees’ forward plans often include service as an arbitrator and mediator. (For this reason, the identities of the American College of Construction Lawyers and the College of Commercial Arbitrators are becoming increasingly conflated in my mind.) Although these attorneys well remember the days when service as a construction arbitrator was almost invariably carried on as an occasional activity with a strong public service component, retirees now expect to enter the burgeoning ranks of a *corps professionnel*, commanding fees commensurate with their age, experience, and accustomed rates. Some will succeed. However, recent research reinforces the conclusion that many lawyers-turned-dispute-resolution professionals may not be welcomed with an overabundance of appointments.¹²⁵ In the

¹²³ For an in-depth discussion, see Thomas J. Stipanowich & Zachary P. Ulrich, *Commercial Arbitration and Settlement: Empirical Insights into the Roles Arbitrators Play*, 6 YEARBOOK ON ARBITRATION AND MEDIATION 1 (2014).

¹²⁴ See Stipanowich & Ulrich, *supra* note 115.

¹²⁵ See *id.*

construction arena the hard reality that too many would-be arbitrators are chasing too few cases is exacerbated by the devastating impact of the recent economic downturn on construction. The construction arbitrator oversupply appears to have been exaggerated by the fact that in recent years some construction attorneys, lacking legal business, have reportedly turned to “neutral work” in the hopes of supplementing their revenues. The new phenomenon of decades-long active retirement, and how to channel active retirees’ considerable time, energy and desire to engage is one of the great challenges for our future.

International arbitration. Today, construction arbitration is more and more frequently concerned with international disputes.¹²⁶ Given the particular advantages arbitration offers companies doing business across borders,¹²⁷ including an alternative to national court systems, confidentiality, worldwide enforceability of awards and flexibility of procedure,¹²⁸ corporations rely heavily on arbitration to resolve international disputes¹²⁹ and tend to be satisfied with the process.¹³⁰ The American Arbitration Association’s international caseload through its International Centre for Dispute Resolution, including both arbitration and mediation, has grown dramatically over the past decade, from 646 cases in 2003 to 1,091 cases in 2013.¹³¹ U.S.-based parties, counsel and arbitrators are increasingly interacting with counterparts from many different countries and legal systems in variegated processes that have been likened to Frankenstein’s monster—“a legal entity comprised of body parts originating from different jurisdictions and imbued by life only after its creation.”¹³² In this procedural amalgam, U.S. arbitration practice has influenced international practice and been influenced in turn.

III. THE CONTINUING EVOLUTION: FIVE TRANSFORMATIVE TRENDS¹³³

Our world is evolving and changing at an unprecedented pace, and it is perhaps foolhardy to hazard a guess at where we may be two or three decades on. It is therefore appropriate to briefly

¹²⁶ For an excellent treatment of international construction arbitration, see JOHN W. HINCHEY & TROY L. HARRIS, *INTERNATIONAL CONSTRUCTION ARBITRATION HANDBOOK* (2008).

¹²⁷ NIGEL BLACKABY, ET AL, *REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION* 31-34 (5th ed. 2009).

¹²⁸ *Id.* at 8.

¹²⁹ Queen Mary University of London & PwC, *International Arbitration: Corporate attitudes and trends 2008* 5 (44% of respondents said they used international arbitration to resolve international disputes more than litigation, mediation or other ADR mechanisms). See, e.g., Camille A. Laturno, *International Arbitration of the Creative: A Look at the World Intellectual Property*, 9 *TRANSNAT’L LAW.* 357, 371 n. 92 (“Arbitration is increasingly the preferred forum for dispute resolution in international commercial transactions of all kinds. . . .”) (Spring, 1996); Leon E. Trakman, “*Legal Traditions*” and *International Commercial Arbitration*, 17 *AM. REV. INT’L ARB.* 1, 29 (2006); *Current Trends in International Arbitration*, CALIFORNIA BAR ASSOCIATION, available at <http://international.calbar.ca.gov/Education/CurrentTrendsInInternationalArbitration.aspx> (“[I]nternational arbitration continu[es] to grow rapidly as a preferred method for resolving cross-border commercial disputes . . .”).

¹³⁰ *Id.* at 5 (86% of respondents in 2008 study said they are satisfied with international arbitration).

¹³¹ E-mail from Ryan Boyle, Vice President – Statistics and In-House Research, American Arbitration Association, to Tiffani Willis, Aug. 27, 2013.

¹³² Veijo Heiskanen, E. Gaillard, *Aspects Philosophiques du droit de l’arbitrage international*, 20 *EUROPEAN J. OF INT’L L.* 942, 946 (2009).

¹³³ Portions of this section are adapted from Thomas J. Stipanowich, *Reflections on the State and Future of Commercial Arbitration: Challenges, Opportunities, Proposals* (article in progress).

highlight five trends that are likely to have a growing impact on our lives, on law practice and the management of conflict.

A. Technology

In every aspect of our lives, documentation and communication is increasingly digital and virtual, and the implications for managing and resolving conflict are immense. In an age when clients demand greater value for money, and rapid results, technology offers many opportunities for achieving efficiency and economy and, hopefully, providing fair and satisfactory experiences and results. It also presents many new challenges.

As a primary means of communication across distances and even within homes and offices, e-mail has become an indispensable element in conflict and its resolution. Electronic interchange is the backbone of modern business transactions; therefore, students in my negotiations class regularly bargain online with students across the country, learning by experience the benefits, limitations, and protocols of negotiation through electronic media.¹³⁴ Email is also a prime ancillary tool for dispute resolution professionals in mediation and arbitration,¹³⁵ as well as a major element in the vast and expanding mass of electronic data that represents the greatest emerging challenge for parties and arbitrators seeking to actively manage discovery in the interests of efficiency and economy.¹³⁶

Arbitration hearings in complex construction cases are often high-tech events, with arbitrators and counsel utilizing digital displays on two or three monitors at once. Lawyers and arbitrators are deriving important benefits from services such as LiveNote, which permits the viewing, highlighting and annotating of testimony in real-time,¹³⁷ and may feature streaming video feeds permitting testifying witnesses to be observed long-distance.¹³⁸ Electronic transcripts available via cloud offsite storage enable practitioners to search the content of transcripts from anywhere in the world with internet access.¹³⁹ Moreover, transcripts in electronic formats are easily searchable, helping counsel locate and direct a witness's or arbitrator's attention to key portions of the transcript,¹⁴⁰ and saving arbitrator time during award preparation.¹⁴¹

¹³⁴ See JAY FOLBERG & DWIGHT GOLANN, *LAWYER NEGOTIATION: THEORY, PRACTICE AND LAW* 165-80 (2d ed. 2011) (discussing pros and cons of online negotiations).

¹³⁵ See THOMAS SCHULTZ, *INFORMATION TECHNOLOGY AND ARBITRATION: A PRACTITIONER'S GUIDE* 153-67 (2006).

¹³⁶ It has been estimated that "90% of all business information is electronically stored."¹³⁶ Richard Posell, *E-Discovery in Arbitration* (May 2010), available at <http://www.mediate.com/articles/posellR1.cfm>. If parties have not already set parameters for preservation of data, the best practice is for counsel and the arbitrator to resolve early on issues such as the preservation of such information, and the scope and manner of its production. This proactive approach may avoid intractable disputes down the line. See, e.g., CCA PROTOCOLS, *supra* note 111, at 53-54.

¹³⁷ <http://legalsolutions.thomsonreuters.com/law-products/solutions/livenote-stream> (last visited July 22, 2014).

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ <http://info.agilelaw.com/request-ebook?gclid=CJqx2MuK178CFQqDfgodsk8Adw>

¹⁴¹ <http://legalsolutions.thomsonreuters.com/law-products/solutions/case-notebook>

Providers are moving to paperless secure online systems such as AAA Webfile® for the filing of cases and subsequent documentation.¹⁴² However, despite the growing embrace of various forms of technology in arbitration, we have yet to see significant transplantation of mediation or arbitration hearings from in-person settings to online.¹⁴³ In this pioneering era of online dispute resolution (ODR), existing systems tend to be rather limited in scope and flexibility, suitable for simple cases with the most basic fact patterns as opposed to the broad run of commercial disputes.¹⁴⁴ At present, the real benefit of online mediation and arbitration is in high-volume, low value disputes between parties separated by great distance; in such cases e-mediation or e-arbitration offers a methodical approach to cost-effective, efficient dispute resolution.

But there are indications that change is afoot. Today, for example, many routine court appearances take place telephonically via CourtCall. Despite some judges' complaints, telephonic appearances are now commonplace; the next, and growing iteration is internet-based video appearances. CourtCall recently introduced video conferencing services in some court rooms,¹⁴⁵ "allowing judges to simulate a typical day in court."¹⁴⁶ The video conference may be one- or two-way, meaning that judges retain the option of whether to appear themselves on video, or merely via audio feed.¹⁴⁷

Not surprisingly, arbitration providers are beginning to offer similar services. JAMS recommends the use of their "Virtual Conference Room" service;¹⁴⁸ another provider offers binding "Virtual Arbitration"¹⁴⁹ in which the entire arbitration is conducted via the web.¹⁵⁰ Then there is eQuibbly, which assures users that "[a] former official court [j]udge will resolve your dispute online in a matter of weeks."¹⁵¹

The benefits of online appearances are multiplied in international arbitrations, where travel costs are exponentially greater. Moreover, video appearances may assist in preserving the continuity of arbitral proceedings, obviating the need to suspend proceedings until minor parties or witnesses are available, or where unavoidable delays in international travel arise. One would expect that even if participants are resistant to conducting hearings on the merits online, the method could be utilized for some preliminary conferences and arbitrator deliberations. The International Chamber of Commerce (ICC) report *Techniques for Controlling Time and Costs in*

¹⁴² <https://www.adr.org/aaa/faces/services/fileacase?>

¹⁴³ See Julio Cesar Betancourt & Elina Zlatanska, *Online Dispute Resolution (ODR): What Is It, and Is It the Way Forward?*, 79 ARBITRATION No. 3, 256, 262-3 (2013).

¹⁴⁴ *Id.*

¹⁴⁵ <http://www.courtcall.com/ccallp/info?c=CCVIDEO> (last visited July 22, 2014).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ <http://www.jamsadr.com/virtual-conference/> (last visited July 22, 2014).

¹⁴⁹ <http://www.thevirtualarbitrator.com/>; see also <http://www.virtualcourthouse.com/index.cfm/category/9/who-we-are.cfm> (another completely online ADR and arbitration venue) (last visited Aug. 14, 2014).

¹⁵⁰ *Id.*

¹⁵¹ <http://www.equibbly.com/> (last visited Aug. 14, 2014).

*Arbitration*¹⁵² urged arbitrators to consider the need for physical meetings, and to identify instances where information technology could be utilized for greater efficiency and cost savings.¹⁵³ The report recommended the use of video conferencing for procedural hearings, and allowing witnesses the opportunity to appear via video at evidentiary hearings.¹⁵⁴

Another fascinating opportunity afforded by digital media, coupled with a large and expanding pool of self-described “neutrals,” is the concept of an online “community court” that offers advisory or binding evaluations of legal or factual issues.¹⁵⁵ Tapping the market for early independent evaluation and case assessment,¹⁵⁶ providers of dispute resolution services may now make it possible to submit summaries of issues in dispute with supporting arguments (and, perhaps even streaming video of select witness testimony) for evaluation by not just one “neutral,” but five, ten or fifty. The input of the evaluators might include responses to specific questions and comments on the strengths or weaknesses of a position. Such approaches might become an important factor in early settlement of complex construction disputes.

Will computers ever replace humans as mediators and adjudicators? Even without getting into the debate between legal positivists and their detractors,¹⁵⁷ such concepts raise many concerns. As Richard Susskind observed some years ago,

“[C]omputers cannot yet (if ever) satisfactorily recognize speech, understand natural language, nor perceive images. . . . Computers have not yet been programmed to exhibit moral, religious, social, sexual and political preferences akin to those actually held by human beings. Nor have they been programmed to display the creativity, craftsmanship, individuality, innovation, inspiration, intuition, commonsense and general interest in our world that we, as human beings, expect of one another as citizens but also of judges acting in their official role.”¹⁵⁸

Time will tell.

BIM, IPD and conflict management. Of course, the most significant technological opportunity facing the construction industry is building information modeling (BIM), which is the set of information and work collaboration tools, including shared database, 3D models and related tools to simulate a building, its performance and its construction that creates a perfect setting for

¹⁵² See *Techniques for Controlling Time and Costs in Arbitration* (2007), available at gjpi.org/wp-content/uploads/icc-controlling-time-and-cost.pdf

¹⁵³ *Id.* at 11 (recommendation 28), 12-13 (recommendation 39).

¹⁵⁴ *Id.* at 17 (recommendation 74).

¹⁵⁵ See Colin Rule & Chittu Nagarajan, *Leveraging the Wisdom of Crowds: The eBay Community Court and the Future of Online Dispute Resolution*, available at

https://www.law.northwestern.edu/colloquium/negotiation/documents/ColinRule_ACRTheWisdomofCrowds.pdf

¹⁵⁶ See Stipanowich & Lamare, *supra* note 100, at 43-44.

¹⁵⁷ See Richard Susskind, *The Computer Judge: Early Thoughts*, in RICHARD SUSSKIND, *TRANSFORMING THE LAW: ESSAYS ON TECHNOLOGY, JUSTICE AND THE LEGAL MARKETPLACE* 275-92 (2000).

¹⁵⁸ *Id.* at 286-7.

integrated project delivery.¹⁵⁹ As Howard Ashcraft explains, “Building information models are platforms for collaboration.”¹⁶⁰ Interestingly, a recent experimental study in which architecture and construction students completed projects using traditional design and construction approaches as well as multidisciplinary BIM teams indicated that teams using BIM are more likely to engage in integrative or issue-based, constructive conflict, and less likely to engage in competitive conflict or avoidance.¹⁶¹

B. Globalization

As society becomes increasingly global, U.S. parties and counsel are likely to be drawn into conflict with international partners, thus entering territory that is unfamiliar in many respects from American domestic practice.¹⁶²

For example, although the U.S. “modern mediation” model has been highly influential, there are places where the very concept of retaining an independent professional mediator for the express purpose of resolving commercial disputes has not been meaningfully embraced. In China, for example, mediation is normally conducted by individuals who operate from a position of authority relative to the parties. Chinese judges often act as conciliators prior to adjudicating a case, and the rules of leading Chinese institutions sponsoring private arbitration likewise provide that arbitrators may try to informally resolve the dispute prior to rendering a decision on the merits.¹⁶³ However, these approaches tend to be far different from modern mediation as practiced in the United States.¹⁶⁴ Although institutions such as the Beijing Arbitration Commission partnered with Western parties to develop and promote stand-alone Western-style mediation procedures,¹⁶⁵ it remains to be seen whether the latter will take hold in China.¹⁶⁶

Other countries have established a national framework for mediation but have yet to generate significant demand due to lack of understanding of the nature and value of mediation and resistance by the legal profession. Greece now has laws promoting and regulating mediation including extensive guidelines for mediator training and accreditation, pursuant to which a thousand mediators have been credentialed. Greece lacks only one thing: parties and attorneys willing to mediate litigated cases!¹⁶⁷

¹⁵⁹ *Improved Building Industry Results through Integrated Project Delivery and Building Information Modeling*, available at http://images.autodesk.com/adsk/files/bim_and_ipd_whitepaper.pdf

¹⁶⁰ Howard W. Ashcraft, *Building Information Modeling: A Framework for Collaboration*, 28(3) CONSTR. LWYR. 5, 5 (2008).

¹⁶¹ See Tamera L. McCuen, *The Effect of Building Information Modeling on Conflict and Conflict Management in Interdisciplinary Teams*, available at <http://ascpro0.ascweb.org/archives/cd/2009/paper/CERT173002009.pdf>

¹⁶² See generally MICHAEL MCILWRATH & JOHN SAVAGE, *INTERNATIONAL ARBITRATION AND MEDIATION: A PRACTICE GUIDE* (2010); J.C. GOLDSMITH, ET AL, *ADR IN BUSINESS: PRACTICE AND ISSUES ACROSS COUNTRIES AND CULTURES* (2006).

¹⁶³ See generally Thomas J. Stanowich, et al, *East Meets West: An International Dialogue on Mediation and Med-Arb in the United States and China*, 9 PEPP. DISP. RESOL. L.J. 279 (2009).

¹⁶⁴ *Id.* at 385-88.

¹⁶⁵ *Id.* at 379-80.

¹⁶⁶ *Id.* at 385-86.

¹⁶⁷ Interview with Dimitra P. Gavril & Theodora Syriou (Aug. 8, 2014) (notes on file with author).

Finally, although American commercial mediators tend to be accustomed to engaging in evaluation, mediators from many other countries view such activities as beyond the scope of their role and incompatible in some respects with the concept of mediation as a “facilitated” process.¹⁶⁸ Conversely, dispute resolution professionals from other jurisdictions may be more comfortable than U.S. counterparts with arbitrators rendering nonbinding evaluations of parties’ cases in their role as “conciliators.”¹⁶⁹

Legal practitioners and mediators are thus being drawn into a global conversation—face-to-face and online--regarding virtually every aspect of mediation theory, doctrine, procedure and practice. The same is equally true of arbitration. On occasion this dialogue (when systematically conducted by reputable organizations) has produced procedural solutions that help to bridge differences among systems and modes of practice, such as the International Bar Association’s widely embraced *Rules on the Taking of Evidence in International Arbitration*¹⁷⁰ and other evolving “soft law” guidelines.¹⁷¹ A broader effect of the continuing interchange may be to encourage and help people to be more thoughtful and deliberate about the way they practice, whether internationally or domestically. Construction lawyers and arbitrators are now considering the pros and cons of extensive witness statements as a substitute for direct examination, various international procedures for the handling of multiparty disputes, the filing of joint reports by expert witnesses detailing points of agreement and disagreement, and other elements from other systems.

C. Insights through Behavioral Science and “Big Data”

Risk aversion. Anchoring. Attribution error. Reactive devaluation. These concepts from the realm of cognitive psychology have recently become a part of the lexicon of negotiation and conflict management.¹⁷² As our sights are broadened by interaction on a global scale, experiments with cognition and the mining of “big data” have opened yet another frontier for exploration. We are being given new opportunities to reflect on the impact of our perceptions on lawyering and resolving conflict¹⁷³ and to glean new insights into group behaviors by analyzing masses of information.

Thanks to the work of behavioral economists and others, we are coming to understand that far from being engines of rationality, human beings operate subject to the dictates of mental processes that skew our perceptions and steer us onto unpredictable paths.¹⁷⁴ In one way or

¹⁶⁸ See, e.g. GOULD, ET AL, *supra* note 56, at 5-6 (discussing distinctions made in the U.K. between mediation and conciliation).

¹⁶⁹ See *id.* See also CEDR COMMISSION REPORT, *supra* note 78.

¹⁷⁰ INTERNATIONAL BAR ASSOCIATION, IBA RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION (29 May 2010).

¹⁷¹ See generally SOFT LAW IN INTERNATIONAL ARBITRATION (Lawrence W. Newman & Michael J. Radine, ed. 2014).

¹⁷² See EXON, *supra* note 67, at 62-72.

¹⁷³ See generally JENNIFER K. ROBBENHOLT & JEAN R. STERNLIGHT, PSYCHOLOGY FOR LAWYERS: UNDERSTANDING THE HUMAN FACTORS IN NEGOTIATION, LITIGATION AND DECISION MAKING (2013).

¹⁷⁴ See DAN ARIELY, PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS (2008).

another many of these insights are relevant to managing and resolving conflict. Russell Korobkin and Chris Guthrie, among others, advanced our awareness of dynamics at the bargaining table.¹⁷⁵ Studies by Guthrie, Jeffrey Rachlinski, Judge Andrew Wistrich and others are deepening our appreciation of the psychological factors affecting judicial decision making.¹⁷⁶

These insights are reinforced by the parsing and rigorous assessment of available data. Susan Franck's assessments of data relating to international investment arbitration are offering a more nuanced understanding of those procedures.¹⁷⁷ Randall Kiser has used datasets from VerdictSearch California to offer in-depth analysis of decision making by lawyers during settlement negotiations.¹⁷⁸ Employing "neural networks, predictive modeling, and genetic algorithms," Donald Philbin isolated trends across groups of similar negotiations and within particular negotiations, and created Now Picture It Settled®, web-based software that allows negotiators to "optimize their concession strategies and predict where a round will end."¹⁷⁹

A decade ago lawyers and dispute resolution professionals had very little awareness of these dynamics. Going forward, they can ill afford to ignore them.

D. Longer Productive Lives, "Active Retirement"

As discussed above, the progress of the first generations of ADR-acclimated attorneys into and through decades of active retirement presents challenges as well as opportunities. Lawyers-turned-dispute resolution professionals in their sixties, seventies and eighties are vigorously seeking employment as mediators and arbitrators alongside younger colleagues, many of whom are still in law practice. While all will not be equally successful in promoting a dispute resolution practice, their abundant time and energy may be productively channeled in a variety of ways. These include helping develop guidelines for managing conflict, producing blogs, participating in continuous online discussion and debate regarding developments in related law and practice, teaching as adjunct instructors, and even offering their services for online evaluations as described above.

E. Professional Practice, Education and Credentialing

Although the legal sector has been particularly resistant to innovation, the consumers of legal services are putting pressure on law firms—especially large firms—to improve services and

¹⁷⁵ See, e.g., Russell B. Korobkin & Chris Guthrie, *Heuristics and Biases at the Bargaining Table*, 87 MARQUETTE L. REV. 795 (2004); Chris Guthrie & Dan Orr, *Anchoring, Information, Expertise and Negotiation: New Insights from Meta-Analysis*, 21 OHIO ST. J. ON DISP. RESOL. 597 (2006).

¹⁷⁶ See, e.g., Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1 (2007); Chris Guthrie, Jeffrey J. Rachlinski & Andrew Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777 (2001).

¹⁷⁷ See, e.g., Susan Franck, *Empirically Evaluating Claims About Investment Treaty Arbitration*, 86 N.C.L. REV. 1 (2007).

¹⁷⁸ See generally RANDALL KISER, *BEYOND RIGHT AND WRONG: THE POWER OF EFFECTIVE DECISION MAKING FOR ATTORNEYS AND CLIENTS* (2010).

¹⁷⁹ <http://www.csoftx.com/panelist/philbin-jr-donald-r> (Last visited August 15, 2014).

shorten dispute resolution cycle times while reducing cost.¹⁸⁰ Driven by the changing legal job market and ABA Standard 302(a)(4), adopted in 2004, law schools (which are themselves increasingly driven by market pressures) are expanding all kinds of skills instruction, including clinics, externships and role-playing simulations.¹⁸¹ Prominent among these offerings are courses aimed at counseling and advocacy in negotiation, mediation and arbitration;¹⁸² the Pepperdine's Straus Institute is among programs offering LL.M. and other master's degrees as well as a concentration in dispute resolution for law students. Graduates will therefore be increasingly prepared for a world in which a brace of tools for effective conflict management is central to practice, and more attuned to embrace emerging practice models like collaborative law¹⁸³ (which has yet to become a significant practice alternative in the construction or commercial arenas).

As discussed earlier, many current and former litigators and transactional lawyers are marketing themselves as dispute resolution professionals. Even with training, however, not every lawyer (or non-lawyer) possesses the skill set and instincts to function effectively as a mediator or arbitrator, and concerns about informed choice and transparency have driven a growing international dialogue regarding professional credentialing.¹⁸⁴ As noted above, even some countries that lack substantial demand for mediation have already established a regulatory framework for the process, including professional certification.¹⁸⁵ Moreover, the very presence of a raft of regional, national and international organizations seeking to engage the attention of the field and the energies of participants adds momentum to such efforts. Nevertheless, many questions remain about how credentialing should be done and, equally importantly, who should do it. Ultimately, one must ask: What organization or group of organizations are most likely to be responsive to the needs of users in specific sectors or settings (including, for our present purposes, construction owners and those engaged in design and construction) and are broad enough to embrace the full range of potential dispute resolution professionals, including non-lawyers?

¹⁸⁰ See J. Stephen Poor, *Re-Engineering the Business of Law*, N.Y. TIMES (May 7, 2012) (op-ed by chairman of Seyfarth Shaw).

¹⁸¹ ABA SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, A SURVEY OF LAW SCHOOL CURRICULA: 2002-2010, at 15.

¹⁸² Julie Macfarlane, *What Does the Changing Culture of Legal Practice Mean for Legal Education?*, 20 WINDSOR Y.B. ACCESS. JUST. 191 (2001).

¹⁸³ Jim Hilbert, *Collaborative Lawyering: A Process for Interest-Based Negotiation*, 38 HOFSTRA L. REV. 1083 (Summer 2010).

¹⁸⁴ See, e.g., Doug Jones, *Comments on the Speech of the Singapore Attorney General in International Arbitration: The Coming of a New Age?* (Albert Jan van den Berg, ed.), 17 ICCA CONGRESS SERIES 29 (2013) (discussing certification of arbitrators and mediators through the Chartered Institute of Arbitrators (CI Arb)); Irena Vanenkova, *The Unique Value of Becoming IMI Certified*, available at <http://www.mediate.com/articles/imi1.cfm> (touting the International Mediation Institute's worldwide credentialing system for mediators).

¹⁸⁵ See *supra* text accompanying note 167.