

Introducing a Novel ADR Technique for Handling Construction Disputes: Arbitration

By Allen L. Overcash



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Today, construction arbitration reputedly has limited usefulness. Like litigation, it is used only as a court of last resort for two disputing parties following completion of an unsatisfactory project. This limitation is unfortunate because it prevents arbitration from being a positive step that is useful for all of the parties during the project. This limited view of arbitration does

not reflect its history nor its nature. It is time that the construction industry rejects this narrow image of arbitration and considers it as an effective dispute resolution tool to aid the effort of the parties trying to successfully complete modern projects.

The Current Status of Arbitration in the Construction Industry¹

As construction projects have become more complex and technical,² disputes have become more prevalent and difficult to resolve.³ Estimates indicate the amount of these disputes to be at high levels.⁴ Although the popularity of disputes has apparently grown, there has been no evidence that construction arbitration has similarly grown.⁵ In large part, any lack of growth in construction arbitration is due to its current image as simply an alternative to litigation that is marginally not much more efficient than court proceedings.⁶

New methods of handling construction disputes have developed.⁷ Generally, these include measures of intervention that have proven successful at interdicting disputes during the project. These methods encourage the parties to solve their disputes before they fester into high-stakes adversary proceedings. Meanwhile, arbitration has been consigned to the last realm of dispute resolution, useful if other methods have failed. Now, arbitration is one of the methods (along with litigation) for resolving disputes through formal hearings and orders used after completion of the project.⁸

It is perhaps appropriate that arbitration has

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assumed this position as a last-chance provider because the other methods that have displaced it earlier in the project have proven efficient and effective. Nevertheless, the question remains as to whether arbitration's service to the construction industry is necessarily limited to its current function. This article is intended to challenge the notion that the history and nature of arbitration are so limited. Instead, it is suggested that as a dispute resolution procedure, arbitration can offer much more to the industry.

The History of Arbitration

Arbitration as a method of resolving disputes is not a new concept. The practice of voluntarily submitting disputes to independent arbitrators has thousands of years of history.⁹ Arbitration as a dispute resolution procedure goes back to biblical times. King Solomon's arbitration of a dispute was described in the Bible.¹⁰ As in King Solomon's case, early arbitration proceedings did not necessarily involve binding decisions.¹¹ In fact, early arbitrations might just as well involve processes akin to modern mediation or conciliation proceedings as any process involving a decision.¹² Arbitration was thus a consensual process that operated as much in the negotiation stage as in the decisional stage of potential disputes.

Historically, arbitration grew as a multifaceted procedure that utilized third-party intervention in a variety of ways to solve a dispute. With the development of law and the establishment of courts, arbitration as a decisional process fell out of use. In fact, arbitration decisions were not popular with the courts and therefore were of questionable enforcement value.¹³

Suddenly, the unenforceable nature of arbitration decisions was changed by the passage of statutes. The effect of these statutes was to change an arbitration clause from a "nullity" into a "superclause" enforceable throughout the domestic commercial world.¹⁴ However, the enforceability of arbitration agreements had broader implications for the nature of the proceeding. With modern statutes promoting arbitration to a quasi-judicial process, one effect was to place "bargaining processes" such as conciliation and mediation in a different prospective.¹⁵ This tended to create a dichotomy between negotiation processes and decisional processes with arbitration as part of the latter. This change in the popular image of arbitration has important implications for its usefulness in the construction industry.

Another historical aspect of arbitration is important to the construction industry. "Arbitration is consensual; a

creature of contract. As such, only those who consent are bound.”¹⁶ Therefore, arbitration proceedings customarily include only the two parties who agreed with each other to arbitrate their dispute. Other parties are excluded from the process of deciding a dispute even though they may have a legal or financial interest in the decision.¹⁷ This is important in construction because the inherent context of construction projects is multiparty, and, hence, disputes generally involve the interests of more than two parties.¹⁸

Thus, arbitration has evolved into its popular current image of a decisional process useful to practically resolve a long-standing dispute between two parties. If this image accurately represents its structural limitations, it has little usefulness for multiple parties still in the bargaining stage while the construction project is ongoing. This image also prevents it from being useful to the adjudication of disputes involving more than the several parties who agreed in their contract to be bound by the arbitration decision.

Are these current concepts inherent limitations that prevent arbitration from more comprehensive service to the construction industry, or are they unfortunate images that can and should be altered? They do not represent the inherent nature of arbitration throughout its history. But are they now necessary barriers to its usefulness in the construction industry?

Arbitration and the Post-Project Syndrome

Given the choice between negotiating processes and decisional processes, the construction industry has opted for the former before the latter. Very early, the industry adopted the concept of a nonbinding decision rendered by the project architect immediately upon the appearance of a problem during the project.¹⁹ Industry dispute prevention and resolution techniques have since evolved into a wide variety of measures aimed at encouraging the parties to complete the project without any dispute that would have to be arbitrated or litigated. These include measures to prevent disputes from arising (such as “partnering” to encourage cooperation), negotiating techniques (such as “step negotiations”), neutral advice to the parties regarding potential disputes (such as “dispute review boards”), and facilitated resolution procedures (such as “mediation”).²⁰

The most popular industry form documents provide for these alternative remedies to be exhausted before the parties turn to arbitration or litigation for a binding decision of their dispute. The American Institute of Architects form, for example, provides for referring the matter to an “Initial Decision Maker,” who may or may not be the architect, followed by an effort to resolve the parties’ claims through mediation prior to any arbitration proceeding.²¹ The *ConsensusDocs* provide for a series of measures: discussions between the parties, “mitigation” with either a project neutral or a dispute review board, and mediation followed by either arbitration or litigation.²²

Today, most agreements in the construction industry regard arbitration as a terminal proceeding and counterpart of litigation based on the choice of the parties. Arbitration

and litigation are established as a decisional process of last resort. After all previous methods have failed to resolve the parties’ dispute, these processes are finally brought into play. They are clearly separated from the bargaining process of the parties and do not exist until the parties’ assisted negotiations have failed to reach a satisfactory conclusion.²³

Of course, there are good reasons for the industry to concentrate on the development of dispute resolution measures that can be used during an ongoing project.²⁴ While the project is still in motion, adjustments can be made to mitigate the effect of unexpected problems. The cost of these adjustments may be a fraction of the losses and expenses that the project might suffer if the problem festered and disrupted the relationship of the parties performing the work. Also, during the project, the evidence of the nature and cause of the problem is fresh in the minds of the project participants, most of whom came together as a team aiming to perform only this project. To attempt to accumulate this information at a later time after the team has dispersed would be an effort fraught with expense and error.

Nevertheless, the question is whether arbitration proceedings should come into existence only after the project is over and the various sides to the dispute are firmly in place. If we assume the “judicialization” of arbitration is necessary with its detailed pleadings, extensive discovery, and prehearing motions and filings, followed by extensive trials to reach a binding decision, the answer is obviously “Yes.”²⁵ The months of time and huge amount of expense these procedures take are clearly inconsistent with the management of a dynamic project. Work on the project could not stop pending conclusion of depositions.

Arbitration During the Ongoing Project

Although court-like arbitrations exist, the question remains whether they constitute its inevitable nature. History indicates that arbitration has not always been limited to elaborate hearings resulting in binding decisions. Because arbitration is a creature of the agreement of the parties, could they not by agreement shape its form to match their immediate needs and the needs of the project? Is the concept of arbitration so inflexible that it cannot be sculpted to better serve the interests of an ongoing construction project?²⁶

A binding decision by arbitrators can be a very serious concern to construction parties. Any lawyer is reluctant to waive due process rights when its client faces a final and binding arbitration decision of some dimension. If every construction arbitration proceeding involves a binding decision following a substantial due process hearing, the use of arbitration is necessarily limited. However, does every arbitrator necessarily have to enter such a decision in every case?

It appears that nonbinding arbitration proceedings are not uncommon in the commercial world. Nonbinding arbitration has been utilized by governmental agencies that are not in a legal position to utilize binding arbitration. The US Army Corps of Engineers regards it as an

effective ADR procedure because it allows the parties to select a mutually agreeable arbitrator with the requisite technical expertise, which builds their confidence in the arbitrator's decision. In addition, the arbitrator has great flexibility in selecting the form of the proceeding (short or long, attorneys or no attorneys) as well as recommending a settlement. In fact, the procedure creates considerable impetus for settlement.²⁷

Historically, arbitration grew as a multifaceted procedure that utilized third-party intervention in a variety of ways to solve a dispute.

Nonbinding arbitration proceedings could be created by special contract or standard rules adopted by provider organizations and could even be the subject of ad hoc agreements designed to serve the purpose of resolving a specific project dispute. There are many circumstances where a process that is not as binding as an arbitration decision may be useful to parties involved in a dispute. The purpose is to provide the parties with an advisory opinion that they can adopt as their settlement or use as an indicator of the probable result of a trial. It can be a “springboard for discussion” that provides the parties with information about how a knowledgeable fact finder might decide the case. Because it is advisory, there is little argument about whether the arbitrator followed the proper procedure.²⁸

Arbitrators can be appointed very early in the process.²⁹ Even short of a nonbinding decision, why couldn't the arbitrator be given the same flexibility that initial decision makers are routinely given during a project to suggest a compromise or even advise the parties that they cannot make a decision?³⁰ Such nonbinding action could be requested or approved by the parties and would not necessarily have to be preceded by lengthy formal hearings.

Although dispute review boards are generally limited to making recommendations, this is not the case with deliberative bodies throughout the world. The FIDIC contract between the contractor and the employer³¹ provides that the parties shall jointly appoint a dispute adjudication board (DAB). The DAB is similar to the dispute review board (DRB) used in the United States although different in its function in a number of respects, including the nature of its orders.³² Some DABs are appointed at the start of the project and kept abreast of the project by regular visits (“full term”), while others are appointed only for particular disputes (“ad hoc”).

DABs have a great deal of flexibility. After following informal presentations by the parties, DAB members give their opinion orally or in writing in a manner that is not binding on the parties.³³ After a full hearing on the merits of the issue, their order may even be different from the substance of the earlier opinion they gave. A decision by the DAB on the merits of the issue is binding on the parties and can be enforced subject to a further arbitration proceeding.³⁴ Thus, contrary to the general practices of the DRBs, which give recommendations to the parties (albeit recommendations that may later be entered in evidence in an adversary proceeding), the DABs can function both as advisory and/or adjudicative bodies.

The decision of the DAB is immediately binding on the parties, but either party may within 28 days following the decision “give notice to the other Party of its dissatisfaction.” Following notice of dissatisfaction, there is a 56-day period during which arbitration cannot be initiated. This period is devoted to amicable settlement (which may involve negotiations, mediation, or conciliation).³⁵ “Unless settled amicably, any dispute shall be finally settled by international arbitration.”³⁶

A further variation of arbitration is the process of adjudication that has become popular in the United Kingdom.³⁷ As part of this process, the adjudicator, named in the parties' contract or selected by a nominating body, is appointed to hear a dispute referred to it by one of the parties during the project. Importantly, the adjudicator must issue a decision within a very limited time.³⁸ The point of this is to respond to working capital problems that might seriously damage the project if left unresolved.³⁹ Given this limited period of time, the procedures that are to be followed by the adjudicator are very flexible.⁴⁰

Adjudication awards take effect immediately but are binding only until the dispute is finally determined by legal proceedings or arbitration, as appropriate. While arbitration can change the award, arbitration generally only occurs after completion of the project. Adjudication avoids the damage to a project that could result from delaying the resolution of a dispute.⁴¹

Arguably, an arbitration process similar to adjudication could be agreed to by the parties to a construction contract in the United States. There is some authority supporting the concept that such an agreement, even on a summary procedure, would be enforceable.⁴² It is interesting that a commentator on adjudication argues that the process is true to the history of arbitration and is the way that arbitration should develop.⁴³

Information about other dispute resolution systems similar to arbitration illuminates the breadth of the possibilities of arbitration as a useful project tool.⁴⁴ Many options are open to the arbitrator that is appointed early in the project. Based on the agreement of the parties, the arbitrator may make no decision, may make a recommendation, may suggest a compromise, may enter a nonbinding decision, or may enter a decision binding on the parties. In the latter case, the decision may be binding for a limited

period of time, as in the case of adjudication proceedings, or may be final. Therefore, nothing prevents an arbitrator from acting early in the project according to the agreement of the parties and following their instructions in a manner that suits their interests and the project's needs.

An early arbitrator's participation in the process can offer tremendous advantages to the parties, including the flexibility of the proceeding, the saving in speed and cost from the quick resolution of disputes, as well as the real possibility of a final and binding decision should the parties not be able to reach an agreement. However, such a procedure should not be instigated without proper planning and the agreement of the parties recognizing its nature and implications. At a minimum, the parties should execute a clear and explicit written agreement describing the procedure in detail and specifying exactly what information an arbitrator could eventually consider as part of a decision. Following such an agreement would be important to the finality of the process.⁴⁵

The point is not to necessarily displace the other early procedures that are commonly used in the industry such as initial decision makers or dispute review boards. However, the parties may feel that an arbitrator brings some peculiar advantages to their project. An arbitrator can be given the power to enter a legally binding decision that is subject to very little review.⁴⁶ The flexibility of the arbitrator's function coupled with the strength the arbitrator's power adds to preliminary opinions could be considered to be an advantage. We next consider whether these qualities can also apply to multiparty disputes in the construction industry.

The Two-Party Syndrome in a Multiparty Environment

The inherent context of construction projects is multiparty. The principal construction agreement is between two parties: the owner and the contractor. However, these are not the sole parties interested in the project. Independently, the owner relies on other parties for the design of the project and support of its organization and construction. Independently, the contractor relies on other parties such as subcontractors and suppliers to perform at least part of the work. Yet, most of these parties were not related by privity of contract.

As projects have grown more complex and technical in nature, the parties other than the owner and contractor have grown more important.⁴⁷ More of the project is designed and performed by specialists who may communicate with each other either through the prime contractor and owner or directly. New procedures such as *lean construction* endeavor to more directly include these other parties in the design and construction process.⁴⁸ The prime contractor responsible for managing the project may self-perform little of the actual work and in that sense may be a bystander as to much of the project. This development necessitates that effective legal input into the project understands the overall project's goals and objectives and has the ability to appropriately deal with all its participants.⁴⁹

The work of the other parties such as subcontractors

is just as likely to involve disputes as that of the prime contractor. Further, issues affecting one party are commonly intertwined with the work of still other parties on the project.⁵⁰ Other parties, unrelated by privity of contract, are commonly impacted by disruption of one party's work. For example, the mechanical subcontractor reroutes some pipe in response to a design change, and the new route interferes with the electrical subcontractor's plan to hang its conduit. Thus, disputes affecting one party are often intertwined with other aspects of the project and may impact the entire project plan.

Although many disputes are multiparty disputes, our system focuses on the two parties who have signed the agreement that includes arbitration. There is reasonable objection to forcing a party into a proceeding to which it did not agree before an arbitrator it did not select at a forum that only others elected.⁵¹ However, this focus on the two contracting parties may exclude other parties who have an interest in the matter. This does not mean that their portion of the dispute disappears because it may be resolved in a separate forum.⁵²

To attempt to accumulate this information at a later time after the team has dispersed would be an effort fraught with expense and error.

In our example, the mechanical subcontractor may have a dispute with the prime contractor over the amount it should be paid under its subcontract due to the change. The change may have been ordered by the owner's designer. In that case, this issue affects the relationship of the prime contractor to the owner, and the owner's relationship to the designer or other party ordering the change. It also impacts the electrical subcontractor, who now looks to others to support its costs of dealing with the matter. These other parties will be on the outside of the two-party dispute resolution procedure transpiring between the prime contractor and the mechanical sub.

The problem of excluding other interested parties from the dispute procedure commonly applies to arbitration proceedings that are the product of a two-party agreement. However, it also occurs in other dispute resolution efforts. Dispute review boards deal with disputes between owners and prime contractors and only include subcontractors on so-called pass-through claims.⁵³ Independent neutrals are commonly used in prime contractor disputes, but this procedure is not commonly incorporated into subcontracts, nor does it function as a single forum for all parties. For example, the initial decision maker described in AIA contracts is only to hear disputes between the

prime contractor and the owner.⁵⁴ Similarly, the ConsensusDOCS do not involve lower-tier parties in the early stages of a dispute procedure.⁵⁵

The Effort to Unify Dispute Resolution Procedures

Given that construction projects involve many parties, is it really a problem that dispute procedures generally focus on only two parties at a time? After all, we venerate the institution of contracts, and it is logical that disputes over contract provisions should focus on the two parties who created the contract. In construction projects, the contracts are the instruments that are used to define the respective rights and responsibilities of each party in the process. Why shouldn't dispute procedures be limited to the parties who initially agreed with each other on the form of the procedure?⁵⁶

provisions that permit and encourage larger proceedings involving more than two parties.⁶³ Also, there is substantial authority for joining parties who have not been part of the arbitration agreement to the arbitration procedure fashioned by others.⁶⁴ These efforts are in response to the practical advantages of avoiding separate proceedings affecting different parties who have a legal interest in the same dispute and the unfairness of excluding parties who have a legitimate interest in the outcome of the arbitration proceeding.

The AAA rules provide for an independent special arbitrator (the "R-7 arbitrator") to consider and rule upon a request to consolidate separate arbitrations or parties joined.⁶⁵ The R-7 arbitrator has substantial powers including establishing a procedure for the selection of arbitrators in the newly constituted case and allocation of their compensation.⁶⁶ JAMS provides that the organization itself will decide consolidation issues and existing arbitrators will decide joinder issues.⁶⁷ These measures are in addition to judicial assistance and state laws promoting consolidation and joinder in arbitration proceedings.⁶⁸

Generally, all of these measures favor consolidation or joinder of parties to related claims.⁶⁹ In our illustration, the change in design that the mechanical subcontractor complained about likely involved the same claim that the prime contractor presented to the owner over changes the owner's designer had made. The mechanical subcontractor's claim was a pass-through claim against the owner in that sense. It seems obvious that because the three parties are involved in the same claim, the merits of the claim and their respective responsibilities should be heard as one proceeding. In fact, it is common that parties with a purely pass-through claim participate in the same proceeding considering that claim. This procedure is normally a product of agreements that specifically permit the joinder of common claims.⁷⁰

Should the concept of a unified proceeding be extended past these pass-through claims? Should all the parties participating in a construction project be parties to a single proceeding, even though their claims may be independent? If the dispute between the mechanical subcontractor and electrical subcontractor did not involve the prime contractor and owner, should this dispute still be part of the prime contractor/owner proceeding?

One argument for broader consolidation is that the distinction between pass-through claims and independent claims is very subtle and unclear during an actual construction project. In our example, when the electrical subcontractor appropriately claims interference by the mechanical subcontractor, the motives and sources of the interference are unclear. Also, an arbitration proceeding that included third parties, even with different claims, arguably helps the arbitrators more fully understand the substantive background of the disputes.⁷¹ Another argument is that any dispute between any of the parties to a complex project may well impact the success of the project even if the issues are theoretically confined to the warring parties. At a minimum, such disputes might impact aspects

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However, some knowledgeable authors have advocated including all of the related disputes in a single proceeding.⁵⁷ Because a construction project inherently includes multiple parties whose interests are affected by a dispute, it seems more reasonable to include these affected parties within the same dispute resolution procedure.⁵⁸ Because construction is a collective effort and a dispute carries a collective impact, it stands to reason that a collective dispute resolution procedure is in the interest of the efficiency of the project.⁵⁹ Because multiple disputes must be resolved in some way, the alternative to resolve them in separate proceedings is neither efficient nor practical.

Because they can result in a piecemeal resolution of a complex dispute, separate dispute procedures have been criticized.⁶⁰ Duplicate dispute resolution proceedings between separate parties involved in a construction project create the potential for conflicting results.⁶¹ The concern over different results even ignores the extra time and expense involved in multiple proceedings, each of which must separately school the triers of fact in the circumstance of the disputed issues.⁶² Any dispute proceeding on a complex project necessarily involves some education of the neutral in the logistics and demands of the project, and it potentially wastes valuable time to duplicate this process. Therefore, there have been some industry efforts to avoid this problem.

A number of efforts to include all interested parties in arbitration proceedings exist. These include contract

of the detailed project schedule, as well as the working relationship of the parties. In any event, some offshore documents are structured more in the direction of universal inclusion of all disputes that occur during the project.

Multiparty arbitrations are dealt with under FIDIC documents that utilize DABs for the resolution of disputes.⁷² The FIDIC documents distinguish so-called related claims of subcontractors from “unrelated claims.” Generally, related claims of a subcontractor resemble the concept of pass-through claims the subcontractor might assert through the prime contractor against the owner.⁷³ The prime contractor may require the subcontractor to assist in the prosecution of related claims before the DAB of the main contract.⁷⁴ Disputes over whether a claim is related or unrelated are resolved by a special referee.⁷⁵ Unrelated disputes are resolved by a subcontractor DAB.⁷⁶ Disputes with respect to any DAB ruling are submitted to binding arbitration.⁷⁷

Establishing Unified Multiparty Arbitrations

Given the benefit of including all parties in a unified dispute resolution proceeding, how can such a proceeding be effectively established? Three principles need to coincide to achieve this objective. First, because arbitration is a creature of contract, the agreement of the parties needs to create a unified procedure in a practical manner. Second, because the nature and quality of the arbitrators will determine the efficiency of the procedure, they must be appropriately selected. Third, the procedure itself must be administered in a manner that reaches a fair result in the allotted time and at the allotted cost.

If multiple-party arbitrations are to become common in construction, they must be created by contract.⁷⁸ Although there is much impetus for consolidated arbitrations, they need to be initiated by the parties’ agreements.⁷⁹ This does not mean that the preparation and drafting of the agreement should simply be left to each of the individual parties who might participate in the program.⁸⁰ This would seem to be a problem that the principal parties to the project (such as the prime contractor and owner) should deal with. The principal parties might frame a contract provision that either requires or encourages other parties to agree to their inclusion in any arbitration proceeding.⁸¹

Why is it in the interest of the principal parties to initiate and administer a unified program for the entire project? In a simple sense it would enable these parties to avoid being in the middle of a dispute.⁸² The prime contractor in our example would avoid the risk and expense of dealing with the mechanical subcontractor on the one hand and separately dealing with the owner/designer on the other hand with the resulting exposure to substantial expense and the possibility of inconsistent results. In a larger sense it could provide all parties with a unified effective and efficient dispute resolution mechanism that might save everyone unnecessary risk and expense, improving the efficiency and lowering the cost of the project.

Once it is in existence, the most important aspects of a unified dispute resolution program are the nature

and qualifications of the individual or panel that will administer it. All parties must have trust in the arbitrator if the program is to work. This, of course, includes their neutrality. But it also includes their expertise in the administration of the program and the framing of its result.⁸³ This will depend upon the experience and acumen of the arbitrator they select. However, in order to establish trust, all must join in the selection process. For example, at the start of the project the prime contractor and owner might circulate the names and resumes of potential arbitrators among all parties who would have the opportunity to interview any of the nominees and strike some of the names from the list.⁸⁴

If there is to be a single unified arbitration proceeding, there needs to be a procedure that will match the needs of the resolution of each particular dispute. It is notable that subject to the parties’ direction, many standard agreements give the arbitrator broad discretion over the procedure that is to be followed.⁸⁵ Agreement of the parties should not only include the standard rules of procedure that would be used but also reference to the type of binding or nonbinding decisions that would be rendered. In fact, the parties could agree on terms of reference that set forth the procedure they agreed upon for the handling of individual disputes on the particular project in question, considering the timing of the project as well as its logistics.

Although projects have grown more complex and technical in nature, the parties other than the owner and contractor have grown more important.

Concern over the cost and timing of multiparty proceedings is well founded. The agreement on the procedure to govern the proceeding needs to give central consideration to this issue. How will the facts concerning any problem be presented to the arbitrator? Will lawyers be involved? How will the information about the problem be discussed and what, if any, expression will the parties receive from the tribunal? The entire procedure will be of no advantage to the parties or the project if its function requires preparation and time away from the project by the principals.

Again, why should this elaborate proceeding be organized as an arbitration rather than some other dispute resolution device? Depending upon the nature of the project and the interests of the parties, a number of multiparty procedures might be discussed and agreed upon. Arbitration may have the advantage of providing expertise

more closely cognizant of the legal position and rights of the individual parties as well as the potential of entering binding orders subject to limited review.

Summary

Our technical multiparty construction industry requires timely and effective dispute resolution techniques to function efficiently. Arbitration has accumulated the reputation as a form of only postproject litigation. The industry currently justifiably avoids this concept as unsatisfactory, moving arbitration to a last-chance proceeding. Neither the history nor the nature of arbitration relegates it to this limited status.

Historically, arbitration did not arise as a purely decisional tool. It was, in fact, an important part of the negotiation process. The rise of laws that enforce arbitration decisions had the curious effect of labeling it as a purely decisional proceeding. Faced with the consequence of important decisions, advocates reasonably applied due process measures to the process that increase the cost and time. Although an arbitration proceeding can function this way, it can also be a summary, even nonbinding procedure that can be useful to an ongoing project.

Necessarily, arbitration is a consensual process. With exceptions, this limits its application to the parties who agreed to use it. Excluding other parties who have an interest in the proceeding is a problem for complex projects employing many related participants. It makes sense that all parties who are affected by the outcome of a dispute participate in the same dispute resolution proceeding. In their agreement, the prime parties to a construction project can initiate a unified proceeding that includes others.

The usefulness of construction arbitration is only limited by the imagination of the parties and the form of their agreement. Because it is the only ADR measure that includes the possibility of a binding enforceable agreement, it should receive serious consideration by anyone designing a modern construction project. But construction arbitration needs to be administered in a way that makes a positive contribution to the success of the project. Experienced construction arbitrators should be freed from the yoke of acting only as morticians for dysfunctional projects and instead be employed to assist the success of new ventures. 🏗️

Endnotes

1. Thomas Stipanowich has authored a very authoritative article on the current status of efforts to deal with construction disputes in a recent issue of this publication, *Managing Construction Conflict: Unfinished Revolution, Continuing Evolution*, CONSTR. LAW., Fall 2014, at 13–26 [hereinafter *Managing Construction Conflict*]. Professor Stipanowich's article includes a comprehensive review of the place of arbitration in construction disputes following the "revolution" in the handling of construction disputes that introduced "a smorgasbord of options for preventing, managing, and resolving conflicts" (*id.* at 13) that relegated arbitration to "a surrogate for litigation" (*id.* at 15).

2. "Over the last four decades, construction projects have continually become much more dynamic in nature, largely due

to the increasing complexity and uncertainty of these projects. In addition, the industry as a whole has become much more dynamic as illustrated by its continual fragmentation (citation omitted) which contributes specifically to increased complexity—more parts, more interfaces." Matthew W. Sakal, *Project Alliancing: A Relational Contracting Mechanism for Dynamic Projects*, 2 LEAN CONSTR. J., no. 1, Apr. 2005, at 67, 67.

3. "There is a general worldwide acceptance that the severity of disputation is higher in the construction industry than in other major sectors of the economy." Coop. Research Centre for Constr. Innovation, *Dispute Avoidance and Resolution: A Literature Review*, Rep. No. 1 (2007-006-EP), at 47 (hereinafter *Literature Review*).

4. It is obviously difficult to estimate, much less measure, the costs of disputes to the construction industry. However, some sources have reasonably estimated the cost to exceed \$10 billion a year in the United States, so it has been suggested that the "sheer volume of transactional costs is staggering." *See id.* at 11.

5. Evidence even indicates a significant decline in arbitration usage in some arbitration settings. David H. Burt, *The DuPont Company's Development of ADR Usage from Theory to Practice*, DISPUTE RESOL. MAG., Spring 2014, at 5, 6. "The AAA's important construction caseload dropped off dramatically in recent years." Survey results indicate "a decided decline in the number of companies currently using arbitration for commercial disputes." *Managing Construction Conflict*, *supra* note 1, at 20.

6. "Recent discussion by many commentators has argued that arbitration should not be considered as alternative because arbitration has become too much like litigation." *Literature Review*, *supra* note 3, at 28. "At the heart of industry's recent dissatisfaction with arbitration has been the perceived 'judicialization' of arbitration . . ." "In 2007, construction industry dissatisfaction with 'judicialized' arbitration reached a 'boiling point,' and resulted in binding arbitration—for the first time in over 100 years—being stricken from standard construction industry contract forms as the industry's contractually-mandated dispute resolution method." 7 PHILIP L. BRUNER & PATRICK J. O'CONNOR JR., BRUNER AND O'CONNOR ON CONSTRUCTION LAW § 21:3, at 16, 17 (2014). "Criticism of American arbitration is at a crescendo. Much of the criticism stems from standard arbitration procedures that have taken on the trappings of litigation." Thomas J. Stipanowich, *Arbitration and Choice: Taking Charge of the "New Litigation,"* 7 DEPAUL BUS. & COM. L.J. 401, 402 (Spring 2009) [hereinafter *Arbitration and Choice*].

The protocols for arbitration, recently published by the College of Commercial Arbitrators, extensively analyzes the concerns with modern arbitration proceedings in chapter II, which is titled "The Root of the Problem: Arbitration Has Become Too Much Like Litigation." COLLEGE OF COMMERCIAL ARBITRATORS, PROTOCOLS FOR EXPEDITIOUS, COST-EFFECTIVE COMMERCIAL ARBITRATION (2010) [hereinafter PROTOCOLS].

7. There are at least nine ADR options other than arbitration widely used in the construction industry today, including informal discussion/partnering, structured negotiations, standing project neutral, the initial decision maker, standing dispute review board, expert determination, mediation, adjudication, and minitrials/miniarbitrations. BRUNER & O'CONNOR, *supra* note 6, § 21:3.

8. The authors describe the "stunning shift of seemingly cataclysmic proportions away from mandatory binding arbitration as better than litigation, and toward non-binding" rapid resolution ADR methods. *Id.* at 16. "Some astute observers suggest that ADR is advancing the industry toward the 'vanishing trial.'" *Id.* at 17.

9. Philip L. Bruner, in his *Introduction to CONSTRUCTION ADR* (Adrian L. Bastianelli III & Charles M. Sink eds., 2013) [hereinafter Bruner], quotes Aristotle's advice to Athenians regarding arbitration's equitable nature. His introduction describes the use of arbitration

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137. *Id.* at 95–96.
 138. *Id.* at 96.
 139. 804 F. Supp. 2d 808 (N.D. Ill. 2011).
 140. *Id.* at 811–12.
 141. *Id.* at 812 (internal citations omitted).
 142. *Id.* at 813.
 143. *Id.* at 813–14. The *Hay Group* decision found that the term “production,” as used in FRCP 45(a)(2), referred to the delivery of documents, not their retrieval, and, therefore, “the district in which the production . . . is to be made” is not the district in which the documents are housed, but the district in which the subpoenaed party is required to turn them over. In this regard, the court referred to the Notes to the 1991 Amendment of Rule 45, which state that “Paragraph (a)(2) makes clear that the person subject to the subpoena is required to produce materials in that person’s control whether or not the materials are located within the District or within the territory within which the subpoena can be served.” *Hay Grp., Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 412 (3d Cir. 2004).
 144. 2004 WL 5613816 (N.D. Ohio 2004).
 145. *Id.* at *1–2.
 146. *Id.* at *3. FRCP 32(a)(3)(B) permits a deposition to be used in lieu of live testimony at trial.
 147. *E.g.*, UAA 2000, § 17(d).
 148. *E.g.*, *Ruggiero v. Richert*, 2011 WL 2910066 (S.D. Fla. July 18, 2011) (striking of defenses as sanction for refusal to comply with arbitrator orders upheld where the Financial Industry Regulatory Authority (FINRA) Code of Arbitration Procedure provided that “[t]he panel may sanction a party for failure to comply with any provision in the Code, or any order of the panel or single arbitrator authorized to act on behalf of the panel”). Where the sanction power is granted by rule, the arbitrator’s power is limited by the scope of the authority granted. *See Kashner Davidson Secs. Corp. v. Mscisz*, 531 F.3d 68, 77–79 (1st Cir. 2008) (award vacated because arbitrators exceeded powers by dismissing claims when applicable arbitration rules only permitted “action to obtain compliance with any rulings by the arbitrators”).
 149. 2013 WL 3227536 (5th Cir. May 10, 2013).
 150. *Id.* at *4 (citing *Forsythe Int’l, S.A. v. Gibbs Oil Co.*, 915 F.2d 1017, 1023 n.8 (5th Cir. 1990)). In *Forsythe*, the court held that the failure of an arbitration panel to address claims of discovery misconduct did not constitute grounds for vacating an award. The court noted, however, that “[m]isconduct, even when deemed irrelevant to the merits, may nevertheless subject offenders to other sanctions. Arbitrators may, for example, devise appropriate sanctions for abuse of the arbitration process. *See Bigge Crane & Rigging Co. v. Docutel Corp.*, 371 F. Supp. 240, 246 (E.D.N.Y. 1973).” *Accord Marshall v. Duke*, 114 F.3d 188, 189–90 (11th Cir. 1997) (award for attorneys’ fees confirmed because of, among other things, the right of “every judicial and quasi-judicial body” to award attorneys’ fees under the common law bad faith exception to the “American Rule”).
 151. *See also Inter-Chem Asia 2000 PTE Ltd. v. Oceana*

- Petrochemicals AG*, 373 F. Supp. 2d 340, 354 (S.D.N.Y. 2005) (arbitrators authorized to award attorneys’ fees as sanctions against a party where both parties requested attorneys’ fees in their submissions). *Accord Synergy Gas Co. v. Sasso*, 853 F.2d 59, 65 (2d Cir. 1988) (arbitrator did not exceed authority in awarding attorneys’ fees where employer acted in bad faith by deliberately choosing to breach its contractual obligations and by bringing a wholly spurious and unmeritorious claim of arbitral misconduct).
 152. 264 F. Supp. 2d 926 (N.D. Cal. 2003).
 153. *Id.* at 944. The court further found no evidence in the parties’ agreement that they intended to confer “contempt-like” power on the arbitrator.
 154. 943 F.2d 1056 (9th Cir. 1991).
 155. *Id.* at 1064.
 156. 564 F.3d 81 (2d Cir. 2009).
 157. *Id.* at 86.
 158. *Hamstein Cumberland Music Grp. v. Williams*, 2013 WL 3227536 (5th Cir. May 10, 2013). *Accord Marshall v. Duke*, 114 F.3d 188, 189–90 (11th Cir. 1997) (award for attorneys’ fees confirmed because of, among other things, the parties’ “bilateral agreement” to submit the issue to the arbitrators).
 159. 373 F. Supp. 2d 340 (S.D.N.Y. 2005).
 160. *Id.* at 353.
 161. *Id.* at 355–359. *But see Polin v. Killwood Co.*, 103 F. Supp. 2d 238 (S.D.N.Y. 2000) (upholding sanctions against a party’s attorney based on FRCP 11 and AAA Employment Rule 32(c) authorizing “any remedy or relief that the arbitrator deems just and equitable, including any remedy or relief that would have been available to the parties had the matter been heard in court”). The “available in court” language does not appear in the current AAA or JAMS commercial or construction Rules. *See AAA COMMERCIAL RULES*, *supra* note 21, R. R-43; *AAA CONSTRUCTION RULES*, *supra* note 21, R. R-45; *JAMS COMPREHENSIVE RULES*, *supra* note 35, R. 24; *JAMS CONSTRUCTION RULES*, *supra* note 35, R. 24. The UAA 2000, however, explicitly allows arbitrators to “take action against a noncomplying party to the extent a court could if the controversy were the subject of a civil action in this State.” *Id.* § 17(d).
 162. 2008 WL 4560624 (S.D. Tex. Oct. 9, 2008).
 163. In this regard, the court noted that the authorities relied upon by the plaintiff only involved situations where the arbitrator sanctioning of parties was upheld. *Id.* at *4 (citing cases).
 164. 9 U.S.C. § 7.
 165. *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 103 S. Ct. 927, 942 n.32 (1983) (“The Arbitration Act is something of an anomaly in the field of federal-court jurisdiction. It creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate, yet it does not create any independent federal-question jurisdiction under 28 U.S.C. 1331 or otherwise.”). *See also Amgen, Inc. v. Kidney Ctr. of Dela. Cnty., Ltd.*, 95 F.3d 562, 567 (7th Cir. 1996).
 166. *Stolt-Nielsen SA v. Celanese AG*, 430 F.3d 567, 571–72 (2d Cir. 2005) (maritime jurisdiction provided an “ample basis for subject matter jurisdiction”).

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in early Rome and later in the Middle Ages and up through the seventeenth century in merchant proceedings. Among other things, Bruner cites the descriptions of the procedures in merchant courts, which were marked by speed and informality including the absence of lawyers and appeals. Some of these courts were reputed to do

justice before the next tide and some described as “dusty feet” courts (“presumably obligated to provide remedies before the merchant parties could shake the dust off their feet”). *Id.* n.10.

10. Frank D. Emerson, *History of Arbitration Practice and Law*, 19 CLEV. ST. L. REV. 155, 155 (1970) (hereinafter *Emerson*). Emerson describes the account in the Old Testament of Solomon acting as one of the earliest arbitrators (I Kings 3:16–28). Faced with a dispute between two women over a child, Solomon tested their veracity by suggesting he dismember the child, prompting the true mother to declare herself.

11. The author describes the Athenian tyrant Peisistratus as

appointing justices to further his policy of keeping people out of the city, first by encouraging a friendly settlement and only if that failed, then by making binding decisions. Emerson, *supra* note 10, at 156.

12. Early arbitration proceedings seemed to involve both bargaining processes similar to mediation or conciliation as well as judicial decisions. Modern institutions of arbitration have separated the quasi-judicial process from the conciliation and mediation process. *See id.* at 157.

13. *Id.* at 157–58. Prior to the enactment of the FAA “there truly was judicial hostility to arbitration” and “arbitration agreements were essentially unenforceable in federal court.” Richard Frankel, *The Arbitration Clause as Super Contract*, 91 WASH. U. L. REV. 531, 537–38 (2014).

14. Thomas J. Stipanowich, *Arbitration and the Multiparty Dispute: The Search for Workable Solutions*, 72 IOWA L. REV. 473, 482–83 (Mar. 1987) [hereinafter *Solutions*]. “Courts have strayed from the FAA’s original purpose and have turned arbitration clauses into a type of “super contract.” Frankel, *supra* note 13, at 532–33. The author calls this “arbitration favoritism” with the consequence that “many litigants are improperly losing their right of access to the courts and are being forced to submit to arbitration.” *Id.* at 533.

15. Emerson, *supra* note 10, at 157.

16. “These words summarize the most fundamental principle of American arbitration.” *Solutions*, *supra* note 14, at 477.

17. “[T]he contractual and thus relative nature of arbitration frequently leads to unfavorable results Third parties are altogether excluded from the arbitration process, notwithstanding legal or financial interests they might have in the pending dispute.” Dr. Stavros Brekoulakis, *The Relevance of the Interests of Third Parties in Arbitration: Taking a Closer Look at the Elephant in the Room*, 113 PENN ST. L. REV. 1165, 1167 (Spring 2009).

18. “Unfortunately, the parties to a prime contract for construction seldom go to battle in isolation.” *Solutions*, *supra* note 14, at 478. Most construction-related disputes are much more complex than simple two-party controversies. *See id.* at 479.

19. James P. Groton & Stanley P. Sklar, *Dispute Resolution Processes*, in MATTHEW BENDER’S CONSTRUCTION LAW, ch. 21, at 560. “About 100 years ago, the industry started using a combination of two forms of private dispute resolution that were designed to keep the project moving, reduce conflict, and provide quick and expert resolution of disputes: (1) nonbinding decisions by the project architect . . . and (2) a prompt, informal and ad hoc arbitration . . . to provide a quick decision on any disputed issue involved in the architect’s decision that could not be resolved through negotiation.” The authors note that “about a generation ago” this system broke down.

20. *Id.* at 562. The industry has adopted a host of new and innovative nonbinding early-intervention “rapid resolution” ADR methods. Bruner, *supra* note 9, at lii. “The new ‘rapid resolution’ ADR initiatives are hallmarks of a long-term trend in favor of resolving disputes early and quickly under the control of the parties themselves, with or without the help of neutral experts.” BRUNER & O’CONNOR, *supra* note 6, § 21:3.

The use of mediation continues unabated among large companies, and there are indications that the use of mediation will continue to grow globally. Comparisons by corporate counsel of mediation and arbitration frequently emphasize the high degree of control they maintain over process and result in mediation, and contrast their experiences in binding arbitration. It appears that many business counsel now view mediation as their third-party-intervention strategy of choice, for many, the preferred adjudicative “backdrop” is not arbitration but litigation.

Thomas J. Stipanowich, *Reflections on the State and Future of Commercial Arbitration: Challenges, Opportunities, Proposals* 73 (Pepperdine Univ. School of Law, Legal Studies Research Paper No. 2014/29, Nov. 4, 2014, <http://ssrn.com/abstract=2519084>) [hereinafter *Reflections*].

21. AM. INST. OF ARCHITECTS, AIA DOCUMENT A201-2007 GENERAL CONDITIONS OF THE CONTRACT FOR CONSTRUCTION, art. 15 Claims and Disputes. The Standard Form of Agreement between Contractor and Subcontractor, AIA DOCUMENT A401-2007, provides for mediation ahead of binding dispute resolution (art. 6). Mediation is perceived as having an impact on some arbitrators’ case loads. *Reflections*, *supra* note 20, at 72.

22. CONSENSUSDOCS, 750: STANDARD AGREEMENT AND GENERAL CONDITIONS BETWEEN OWNER AND CONSTRUCTOR—2011, art. 12. The subcontract form provides for discussions, then mediation, followed by arbitration.

23. The dichotomy between negotiations and quasi-judicial decisions may not be that clear in ongoing construction contracts, nor may it be practical. For example, a recent concept of the “Guided Choice Mediator” encourages the mediator, even in the face of an impasse, to stay with the process into the decision-making stage. Paul M. Lurie, *Guided Choice: Early Mediated Settlements and/or Customized Arbitrations*, 7 J. AM. COLL. CONSTR. L., no. 2, 2013, at 167.

24. “An advantageous dispute resolution process will ideally seek to settle a dispute with an acceptable outcome within the least amount of time, as cost-effective as possible, with the least amount of resources, and hopefully the preservation of the working relationship between both parties.” *Literature Review*, *supra* note 3, at 29.

25. Arbitration has been criticized as being as costly and time-consuming as litigation. “At the heart of industry’s recent dissatisfaction with arbitration has been the perceived ‘judicialization’ of arbitration, combined with lack of confidence in arbitrators selected from provider lists.” Bruner, *supra* note 9, at li. “The arbitration process is frequently expensive and lengthy and simply mimics litigation.” Daniel Atkinson, *Arbitration or Adjudication?*, RAFFA & EBEL: WEBLOG, at 1 (Aug. 21, 2001, posted Feb. 12, 2014), <http://www.rlawyers.eu/weblog/arbitration-or-adjudication/>. “Recent discussion by many commentators has argued that arbitration should not be considered as alternative because arbitration has become too much like litigation.” *Literature Review*, *supra* note 3, at 28.

26. Referring to the criticism of arbitration based on its expense and delay: “It is truly ironic that similar concerns exist in the context of arbitration, which is first and foremost a creature of contract and therefore inherently highly flexible.” Arbitration and Choice, *supra* note 6, at 405. “Since arbitration is a creature of contract, and therefore wholly subject to the will of business users, one may reasonably wonder why parties should ever perceive a dissonance between their expectations and their actual experience.” *Id.* at 406. “Approached . . . as part of a thoughtful and multi-faceted approach to resolving conflict, binding arbitration is more likely to prove its particular value as a response to business needs and priorities.” *Id.* at 421. Arbitration has been referred to as the “engine of choice.” *Managing Construction Conflict*, *supra* note 1, at 20.

27. U.S. ARMY CORPS OF ENG’RS, NON-BINDING ARBITRATION: AN OVERVIEW, IWR PAMPHLET 90-ADR-P-2 (2010).

28. Steven C. Bennett, *Non-Binding Arbitration: An Introduction*, 61 DISPUTE RESOL. J. 2, May–July 2006, at 2.

29. For example, the Commercial Arbitration Rules of the American Arbitration Association provide for the appointment of a single emergency arbitrator in response to an application for emergency relief prior to the constitution of the arbitration panel. AM. ARB. ASS’N, COMMERCIAL ARBITRATION RULES R-38, EMERGENCY MEASURES OF PROTECTION. Most international arbitral institutions and tribunals offer quick and effective relief pending the ultimate resolution of the dispute. John W. Hinchey, *International Arbitration*, in CONSTRUCTION ADR, *supra* note 9, ch. 14, at 346.

30. The “Initial Decision Maker” who deals with disputes under the AIA form of contract has significant flexibility short of entering an order. Rather than make a decision on the dispute, the IDM may suggest a compromise or advise the parties that it is unable

to decide the dispute. AIA DOCUMENT 201-2007, art 15.2.2. The decision of the IDM is final and binding but subject to later binding dispute resolution. *Id.* art. 15.2.5.

31. Commonly used Conditions of Contract for international construction projects are published by the Federation Internationale des Ingenieurs-Conseils (FIDIC).

32. “The DRB does not issue a decision, verdict, or award, unlike an arbitration panel or court. Instead it provides a written findings and recommendations that include an analysis to support the DRB’s conclusions.” Adrian L. Bastianelli III & Robert A. Rubin, *Dispute Review Boards and Other Forms of Construction ADR*, in CONSTRUCTION ADR, *supra* note 9, ch. 24, at 574. “The difference is that the DAB gives a decision which must be implemented, whereas the DRB just gives a recommendation.” Brian W. Totterdill, FIDIC USERS’ GUIDE: A PRACTICAL GUIDE TO THE 1999 RED AND YELLOW BOOKS 42 (Telford Publishing 2006). See also Suzanne H. Harness, *Initial Decision Maker (IDM)*, in CONSTRUCTION ADR, *supra* note 9, ch. 23, at 564.

33. “Sub-Clause 20.2(RB) includes a provision that the Parties may refer any matter to the DAB for an opinion at any time. The matter does not have to be a dispute, as defined at Sub-Clause 20.4, but may be a claim or a difference of opinion.” Totterdill, *supra* note 32, at 298.

34. “20.4 . . . If the DAB has given its decision as to a matter in dispute to both Parties and no notice of dissatisfaction has been given by either Party within 28 days after it received the DAB’s decision, then the decision shall become final and binding upon both parties.” *Id.* at 301.

35. “20.5 . . . Where notice of dissatisfaction has been given under Sub-Clause 20.4 above, both Parties shall attempt to settle the dispute amicably before the commencement of arbitration.” *Id.* at 303, subcl. 20.5.

36. *Id.* at 305, subcl. 20.6.

37. “The Adjudication process has superseded arbitration as the construction industry’s preferred method of resolving disputes since it is true to the roots of arbitration.” Atkinson, *supra* note 25.

38. Adjudication has the advantage of speed, requiring quick decisions during the ongoing project. “Adjudicators are required to decide cases within 28 days from receipt of the referring party’s Referral Notice.” Michael Evan Jaffe & Ronan J. McHugh, *U.S. Project Disputes: Has the Time to Consider Adjudication Finally Arrived?*, in AAA HANDBOOK ON CONSTRUCTION ARBITRATION AND ADR, ch. 6 (2d ed. May 2010).

39. “Because the UK process moves to a decision expeditiously, it provides a vehicle that prevents the sort of disruption of the revenue and cost streams that occur when the dispute process is slow, cumbersome, costly or indecisive.” *Id.*

40. “In the absence of a detailed adjudication procedure agreed to by the parties, the adjudicator will set the procedure. Thus, the adjudicator may hold meetings, question the parties, visit the site, request further documents or information, appoint experts or legal advisors, or conduct a ‘mini-trial’ at which witnesses provide evidence and are subject to cross-examination.” *Id.*

41. “Resolving disputes long after they have arisen can have disastrous consequences for construction parties.” *Id.*

42. *Id.*

43. Atkinson, *supra* note 25, at 1, 3.

44. “Many arbitrators, arbitration practitioners and scholars are now recognizing that the traditional paradigm of the arbitrator as single-minded adjudicator must be refined to incorporate a broader concept of the arbitral role, including active case management at all stages of the proceeding, early resolution of some or all issues, and activities that set the stage for settlement.” Thomas J. Stipanowich & Zachary P. Ulrich, *Commercial Arbitration and Settlement: Empirical Insights into the Roles Arbitrators Play*, 6 PENN STATE YEARBOOK ON ARB. & MEDIATION 1, 29 (2014).

45. Professor Kristen Blankley, of the Nebraska College of Law, has authored an important article on the dilemmas facing the

parties over the use of communications exchanged in a mediation that is part of a “med-arb” proceeding. Kristen Blankley, *Keeping a Secret From Yourself? Confidentiality When the Same Neutral Serves Both as Mediator and as Arbitrator in the Same Case*, 63 BAYLOR L. REV. 317 (Spring 2011). While recognizing the advantages of speed, efficiency, and finality of a “same neutral med-arb” proceeding, professor Blankley describes its potential drawbacks including the potential that the neutral might impermissibly decide the dispute based on confidential or privileged information it earlier learned from the parties. *Id.* at 321.

Parties and neutrals who wish to engage in this procedure, however, should be careful to execute detailed contracts expressing the parties’ wish to engage in med-arb and expressing what mediation communications, if any, can be considered for the purposes of the arbitration award. Without this type of explicit disclosure, any award resulting from the med-arb procedure may be subject to vacatur under the Federal Arbitration Act or comparable state statutes. Without such explicit waivers, the med-arb procedure would ironically be subject to postarbitration litigation, threatening the finality of the process so deliberately chosen.

Id. at 366.

46. The real possibility of a binding decision may be an important impetus to settlement of disputes. As Professor Stipanowich pointed out, “the linear arrangement of elements in multistage dispute resolution templates does not take account of the reality that dispute resolution is very often nonlinear. It is frequently not viewed as possible or practicable to settle a case before the filing of an arbitration demand.” *Managing Construction Conflict*, *supra* note 1, at 19. “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.” *Id.* at 23. “The results of the CCA/Straus Institute Survey indicate that in recent years experienced arbitrators have tended to observe higher rates of settlement in the cases they arbitrate.” *Reflections*, *supra* note 20, at 70–71. It “is only natural that advocates and arbitrators reflect on the role arbitrators might play in creating an environment for settlement.” *Id.* at 71.

47. “Modern business transactions, particularly in the international context, have become extremely complicated, requiring the participation of several parties for the delivery of large-scale projects. For example, a typical construction project may involve the employer and the main contractor but also an engineer or an architect, several subcontractors, suppliers, and financiers.” Brekoulakis, *supra* note 17, at 1167.

48. Construction has become more dynamic in nature and increasingly complex, fostering such innovative formulas as Project Alliancing, regarded as a dynamic departure from traditional construction contracts. Sakal, *supra* note 2, at 67.

49. Howard Ashcraft has authored an article of critical current interest in a recent issue of this publication. Howard Ashcraft, *The Transformation of Project Delivery*, CONSTR. LAW., Fall 2014, at 35. In his article Mr. Ashcraft predicts that projects will increasingly involve a collaborative effort by all participants. “In private projects, collaboration will prevail, and in the immediate future will be a mix of true IPD, virtual IPD, and collaborative forms of design/build and CMaR.” *Id.* at 40. The implications for construction lawyers include the following: “the lawyer will need to learn to be a facilitator as well as a negotiator and have the skills to align the many project participants to jointly agreed goals.” *Id.* at 41.

50. “Because of the interdependent nature of these separate contractual relationships, a dispute arising out of a construction contract will have a ripple effect which will precipitate separate, but related, actions.” Matthew D. Schwartz, *Multiparty Disputes and Consolidated Arbitrations: An Oxymoron or the Solution to a Continuing Dilemma?*, 22 CASE W. RES. J. INT’L L. 341, 344.

51. “Because joinder may involve bringing a third party before an arbitration panel, which that party had no voice in selecting,

joinder must be employed with particular discretion.” *Solutions*, *supra* note 14, at 492–93.

52. Dr. Brekoulakis states:

However, multiparty commercial projects are usually executed through several bilateral contracts which contain bilateral dispute resolution arrangements, usually in the form of either arbitration or choice of courts agreements. This practice leads to the “jurisdictional fragmentation of the multiparty project,” where the several parties involved are subject to the jurisdiction of different adjudicatory *fora* (arbitral tribunals or national courts). Thus, a dispute arising between two persons bound by an arbitration agreement in connection with a multiparty project will have to be resolved by arbitration exclusively between these two parties. Other parties cannot participate in the resolution of the dispute through arbitration, even if they have played an active role in the actual project. Notwithstanding any legitimate interest they might have in the outcome of the dispute, these parties will remain third parties both to the arbitration proceedings and the ensuing arbitral award.

Brekoulakis, *supra* note 17, at 1168.

53. “Claims by contractors against owners on behalf of subcontractors or suppliers (pass-through claims) may be heard by the DRB. Disputes by a subcontractor or supplier with the contractor, or both the owner and the contractor cannot be considered by the DRB.” DISPUTE RESOLUTION BD. FOUND., PRACTICES AND PROCEDURES, sec. 2, ch. 5, at 2 (Jan. 2007).

54. AIA DOCUMENT A201-2007, art. 15.2.1. However, this provision is subject to any agreement of “all affected parties.” It is conceivable, therefore, that pass-through claims of a subcontractor against an owner might be presented to the IDM by agreement of all parties. There is no IDM in the AIA subcontract agreement where the parties are left to mediation followed by a form of binding dispute resolution. See AIA DOCUMENT A401-2007, art. 6.

55. The ConsensusDocs have a set of comprehensive dispute provisions in the owner/contractor agreement. See CONSENSUSDOCS 200, STANDARD AGREEMENT AND GENERAL CONDITIONS BETWEEN OWNER AND CONSTRUCTOR–2011. Following step negotiations, the parties have the option of selecting a “dispute mitigation” procedure. The dispute mitigation procedure may involve a project neutral or a dispute review board, either of which will enter a nonbinding finding that may later be introduced in evidence. See art. 12, Dispute Mitigation and Resolution. The ConsensusDocs agreements between constructor and subcontractor do not include any procedure for a project neutral or dispute review board. See CONSENSUSDOCS 750, *supra* note 22, art. 11, Dispute Mitigation and Resolution.

56. Compulsory consolidation of arbitrations has been criticized as being an impermissible intrusion on the parties’ agreements and consolidated arbitrations have been criticized as more time-consuming and more costly, as well as frustrating the intentions of the parties. See Schwartz, *supra* note 50, at 342–43.

57. “A construction arbitration proceeds far more quickly and efficiently if each of the project’s contracts clearly provides for inclusion of all parties to a dispute.” Charles M. Sink, *Consolidation and Joinder*, in CONSTRUCTION ADR, *supra* note 9, ch. 6, at 123.

“Whether consolidation or some other procedural mechanism is employed to bring about joint arbitration hearings, the goal is the same: accommodating multiparty disputes in such a manner as to achieve, economically and efficiently, fair and final resolution of the entire controversy.” *Solutions*, *supra* note 14, at 493.

“The interests of third parties should be taken into account in arbitration proceedings. . . . [A]rbitration should be a dispute resolution system which, under particular circumstances, is flexible and able to communicate with third parties that have legitimate interests in a dispute pending before a tribunal.” Brekoulakis, *supra* note 17, at 1172.

“In the construction industry, it is likely that, in the absence

of express language to the contrary, parties intend to be able to resolve disputes involving common questions of law and fact in one proceeding.” BRUNER & O’CONNOR, *supra* note 6, § 21:280, at 606. “One of the perceived disadvantages of arbitrating construction disputes is the difficulty of obtaining the participation of all relevant parties in one proceeding.” *Id.* § 21:277, at 598.

58. “The determination of a dispute in bilateral arbitration proceedings will take place against the backdrop of a multilateral commercial project. Consequently, it is likely that the bilateral proceedings will adversely affect the legal or financial interests of third parties that are closely related to the dispute. This risk is generally recognized in litigation. Thus, the vast majority of national civil procedures provide for extensive third-party mechanisms, which give interested third parties the opportunity to participate in the bilateral proceedings and prevent possible adverse effects.” Brekoulakis, *supra* note 17, at 1169.

59. “If arbitration proceedings allowed for the interests of third parties, they would have a far-reaching dispute resolution impact, which would be welcome in the context of multiparty projects. Arbitrators would thus have a wider jurisdictional remit and would be able to consider the full picture of a multiparty project, which would better position them to assess and to determine the pending dispute.” *Id.* at 1178–79.

60. *Solutions*, *supra* note 14, at 485–88.

61. *Id.* at 480.

Multiparty arbitration proceedings will prevent the commencement of several bilateral proceedings with overlapping subject matters. Parallel overlapping proceedings create the risk that the determinations of an arbitral award between the two parties to an arbitration agreement might be irreconcilable, not to say conflicting with those of a subsequent award or judgment between a third party and one of the parties to the first arbitration. . . . [T]he issuance of two irreconcilable awards with inconsistent determinations on the same factual or legal issues turns potentially wrong awards into clearly wrong ones. . . . irreconcilable awards constitute a legal sore. Brekoulakis, *supra* note 17, at 1176–77.

62. “From a policy standpoint, to increase its efficiency standards, arbitration has to be able to interact with third parties and allow for their interests.” Brekoulakis, *supra* note 17, at 1175.

63. Standard documents now include provisions for permissible consolidation. Both the AIA and ConsensusDocs do recognize the possibility of joining all parties in a later “dispute resolution” procedure after the earlier dispute mitigation procedures have failed. The AIA form provides that either party may consolidate this arbitration proceeding with another similar arbitration proceeding involving common questions of law or fact or may join another party involved in common questions in order to obtain complete relief if such party consents. AIA DOCUMENT A201-2007, art. 15.4.4, Consolidation or Joinder. Section 112.6 of ConsensusDocs 200 provides that all parties necessary to resolve a matter will be parties in the same dispute resolution proceeding. The ConsensusDocs also provide that “to the extent disputes between the Constructor and Subcontractor involve in whole or in part disputes between the Constructor and the Owner, disputes between the Subcontractor and the Constructor shall be decided by the same tribunal and in the same forum as disputes between the Constructor and the Owner.” CONSENSUSDOCS 750, *supra* note 22, sec. 11.6.

The ICC Rules of Arbitration (article 7) allow a party to an arbitration to request the joinder of another party. The request for joinder is made to the Secretariat of the ICC. The rules also provide for claims between multiple parties under certain conditions (article 8). In addition, the rules allow the ICC Court, at the request of a party, to consolidate two or more arbitrations where, among other things, “the disputes in the arbitrations arise in connection with the same legal relationship” (article 10).

64. “More conclusive evidence suggesting that third-party interests are worth protecting in arbitration can be found in the plethora

of national judgments and arbitral awards extending the scope of arbitration agreements and proceedings to include 'non-signatory' parties based upon various sometimes innovative, theoretical constructions such as equitable estoppel, incorporation by reference, assumption, agency, alter ego or piercing the corporate veil, and the doctrine of 'group of companies.'" Brekoulakis, *supra* note 17, at 1170-71. See also Solutions, *supra* note 14, at 492, 498-99; BRUNER & O'CONNOR, *supra* note 6, § 21:93. One author contends that courts "have given non-signatories greater rights to enforce arbitration clauses than other contractual provisions." Frankel, *supra* note 13, at 569. The author is particularly critical of the courts' use of the doctrine of agency (*id.* at 571-80) and equitable estoppel (*id.* at 580-87).

65. AM. ARB. ASS'N, CONSTR. INDUS. ARBITRATION RULES & MEDIATION PROCEDURES RULE R-7, CONSOLIDATION OR JOINDER.

66. *Id.* RULE R-7(c). This proceeding "avoids the concern that sitting arbitrators may not be entirely free of self-interest in deciding whether to combine proceedings or add parties." Sink, *supra* note 57, at 130.

67. "When rendering its decisions, JAMS will take into account all circumstances, including the links between the cases and the progress already made in the existing Arbitrations." Sink, *supra* note 57, at 130-31.

68. *Id.* at 131-40.

69. Other guidelines (IBA) refer to whether there are common issues of law or facts and whether consolidation would serve the interests of justice. The AAA Grain Rules provided "for consolidation of arbitrations when: (1) the contracts which are the bases of the arbitrations are interrelated or the parties or disputes are so interdependent 'that consolidation will result in a more economic or efficient disposal of the issues presented . . .'; (2) 'there exist common issues of fact . . . the proof of which will or could be substantially the same'; and (3) consolidation will not result in substantial prejudice to any party." Solutions, *supra* note 14, at 517.

70. Allen L. Overcash, *ADR from the Contractor's Perspective*, in CONSTRUCTION ADR, *supra* note 9, ch. 27, at 629, 635-40.

71. "The most convincing argument for third-party arbitration proceedings is that arbitration arrangements should remain in tune with their substantive background." Brekoulakis, *supra* note 17, at 1187.

72. References are made to provisions of the FIDIC CONDITIONS OF SUBCONTRACT FOR CONSTRUCTION FOR BUILDING AND ENGINEERING WORKS DESIGNED BY THE EMPLOYER, GENERAL CONDITIONS.

73. Related Claims are defined as a subcontractor's claim that "(a) arises from an event or events that may also give rise to additional payment and/or an extension of time as may be claimable in accordance with the Main Contract; (b) concerns issue(s) which is/are the subject of a Contractor's claim in accordance with Main Contract . . .; or (c) involves issue(s) which is/are also involved in a dispute between the Contractor and the Employer under the Main Contract." *Id.* cl. 20.2.

74. *Id.* cls. 20.2, 20.4, 20.8.

75. *Id.* cl. 20.2. See ICC RULES FOR A PRE-ARBITRAL REFEREE PROCEDURE.

76. FIDIC CONDITIONS, *supra* note 72, cl. 20.7.

77. See *id.* cl. 20.6.

78. "Not surprisingly, the starting point for many a judicial inquiry is whether the parties agreed to arbitrate the dispute in question." BRUNER & O'CONNOR, *supra* note 6, § 21:47, at 251. Although federal law requires one to be party to a written agreement, "[a] significant body of case law has developed on the issue of whether arbitration agreements may be extended to non-signatories . . ." *id.* § 21:47, at 251. "Multiparty disputes are a fairly common feature of construction contracts . . . As a result, multiparty disputes should be anticipated and provided for in the respective arbitration clauses." Schwartz, *supra* note 50, at 372.

79. "A more acceptable method of guarding against the problems of multiparty disputes would be for the parties to include or exclude consolidation in the arbitration clause at the time of

contracting. Such an agreement could be made in the primary contract and incorporated by reference in the various subcontracts." Schwartz, *supra* note 50, at 372.

80. One problem is the necessity of drafting and making publicly available specific rules for the inclusion of all parties in a single arbitration proceeding, particularly if the arbitrator is to be given substantial flexibility in the administration of that proceeding. Individual arbitration agreements are not negotiated and are carefully drawn, and it is unreasonable to expect the drafters of agreements to have specific knowledge or understanding of the procedural niceties of this form of dispute resolution. Solutions, *supra* note 14, at 496. "Thus, contractual stipulations regarding arbitration of multiparty disputes are only effective if employed in a carefully structured network of related contracts reflecting a mutual agreement to arbitrate." *Id.* at 517. "Promoting economy and efficiency in arbitration depends first and foremost on proper contract planning . . . those charged with choosing business dispute resolution provisions must take a much more considerate approach to the selection of arbitration procedures." PROTOCOLS, *supra* note 6, at 24.

81. The following clause has been suggested for consideration by the prime contractor:

Any dispute arising out of or related to the interpretation of this subcontract or the performance thereof shall be resolved by arbitration. If there is an arbitration provision in the prime contract documents, and if arbitration proceedings are commenced under the prime contract documents in a dispute that is related to work described in this subcontract, then at the demand of any party to the arbitration proceedings, or the arbitrator, the subcontractor shall become a party to the arbitration proceedings and be bound by the award, and a judgment may be entered on the award.

JAMES ACRET & ANNETTE DAVIS PERROCHET, CONSTRUCTION ARBITRATION HANDBOOK, 2013 ED., § 1:14, at 53. This clause could be effective to join pass-through proceedings but does not necessarily establish a total unified dispute resolution system for the entire project.

82. A single proceeding might benefit a party caught in the middle by eliminating the time, expense, and risk of multiple proceedings, but it could be an additional cost to the parties who would otherwise have avoided multiple proceedings. Structuring and scheduling the hearings are more difficult. The disadvantages might be offset, however, by the economy of the testimony related to the common issues and facts and the organization of the hearings. Solutions, *supra* note 14, at 505-06.

83. "Efficient and economical process depends upon the active efforts of arbitrators to employ effective process management skills, coupled with the discernment and willingness to make early rulings that will effectively truncate or streamline proceedings and the fortitude to enforce agreed timetables." PROTOCOLS, *supra* note 6, at 13. "Commercial parties are generally looking for 'muscular' arbitrators who will take control of the arbitration and actively manage it from start to finish, encourage and guide efforts to streamline the process, make a serious effort to avoid unnecessary discovery or motions, and generally conduct the arbitration fairly and thoughtfully but also expeditiously." *Id.* at 69.

84. In order to give all parties some voice in the selection of arbitrators, their agreements could all include a process such as the AAA procedure where they select from a list, and, if they fail to agree, the AAA will select a panel that would facilitate their intent. Solutions, *supra* note 14, at 503.

85. See, e.g., ICC RULES OF ARB., art. 22.2, Conduct of the Arbitration ("[T]he arbitral tribunal, after consulting the parties, may adopt such procedural measures as it considers appropriate, provided that they are not contrary to any agreement of the parties."); AM. ARB. CONSTR. RULE R-32(b) ("The arbitrator, exercising his or her discretion, shall conduct the proceedings with a view toward expediting the resolution of the dispute.").