

# From Reaction to Proactive Action: Dispute Prevention Processes in Business Agreements

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## INTRODUCTION

Most experienced business leaders and contract and project professionals proudly possess such core skills as defining scope and responsibility and articulating key business and financial terms such as service levels and payment and delivery terms. They are also aware of the standard alternative dispute resolution (“ADR”) procedures of mediation and arbitration. Yet what they may not have thought about is that ADR “reactively” deals with only the symptoms of disputes that have already developed and need to be resolved. Few business leaders and project professionals are aware of how to prevent disputes and at the same time enhance relationships through *proactive/preventive contractual care*.

The proactive/preventive approach to business relationships and contracts is a relatively new concept in the business world. Only recently have businesses started to apply and researchers started to pay attention to innovative contracting techniques and tools that not only proactively prevent and control disputes, but also help to improve performance.<sup>1</sup>

This paper will provide insights into the availability and use of proactive contracting techniques and dispute prevention processes that will help to accomplish two purposes:

1. Prevent problems from occurring, and control problems and differences of opinion so they don't escalate into disputes, conflict and legal action.
2. At the same time, improve communications and create good relationships among the contracting parties, thus enhancing performance.

The paper will first present the case for incorporating dispute prevention and control principles and techniques into business relationships, emphasizing the essential importance of having in place a process for controlling the impact of unanticipated events and problems. It will also address the obstacles that discourage use of these principles and techniques, and describe how those objections can be overcome.

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The paper then deals with specific ways in which contracts can be used to proactively prevent and control problems. It begins by providing an overview of the continuum of dispute prevention and resolution principles, and next describes individual techniques, presenting illustrative contract language that will demonstrate how those techniques can be incorporated into contracts.

The authors hope that this paper will increase interest and encourage empirical research into the field of proactive dispute prevention which can lead to the development of a strong theoretical foundation and more widespread implementation of these techniques – to the benefit of businesses and society as a whole.

## **WHY INCLUDE PROCESSES FOR DISPUTE PREVENTION AND RESOLUTION IN BUSINESS AGREEMENTS?**

Every relationship carries with it the potential for disputes. Common experience has demonstrated that problems, difficulties, differences of opinion, disagreements and disputes can occur at any time, even in the best of families and businesses. Given this reality of the business world, the parties to a business relationship, at the time they enter into that relationship, should always address the subject of how they are going to handle any problems or disputes that may arise between them. At this point they have a unique opportunity to exercise rational control over any disagreements that may arise, by specifying that any disagreements be processed in ways that are likely to avoid litigation, preferably by agreeing on a dispute resolution “system” that will first seek to *prevent* problems and disputes, and next establish a process for *resolution* of any disputes. There are many excellent reasons for taking advantage of the opportunity:

### **Disadvantages of Litigation.** Resolution of a business problem through litigation:

- Deprives business leaders of the opportunity to maintain control over their disputes.
- Takes too long. It will take at least several months (and in some jurisdictions several years) to get a civil case to trial; appeals can lengthen the process by a year or more. This delay can create uncertainty in business planning, adversely affect cash flow, and have other disruptive effects on the business.
- Is too expensive. It costs a lot to bring even the simplest business dispute to trial, in lawyers' fees, time and energy of business people, and costs of experts and consultants.
- Lacks expertise. The resolution of business and technical disputes requires expertise and sophistication. It is difficult to find judges with the qualifications to resolve such issues.
- Is too public. Court filings and proceedings are matters of public record. They are valuable sources of information for business competitors, and, if they are juicy enough or it's a slow news day, they can be reported in the media.
- Is too uncertain. Litigation is a very blunt instrument. It is often very difficult to predict how a judge or appellate court will ultimately resolve a case.
- Is too disruptive of business relationships. The hostility engendered by litigation makes it difficult for business people to continue to carry on normal business relationships and activities with each other.

Many of these reasons apply also to most modern-day arbitrations, which have become more and more like court litigation.

**Disadvantages of postponing a decision about how to deal with disagreements until after a problem or dispute has arisen.** Deferring consideration of how disputes will be dealt with reduces a party's options. Once a dispute has developed, it is often difficult to get the participants to agree on the time of day, let alone discuss rationally the optimum method for resolving the dispute. At this point the parties are likely to have different agendas and preferences as to how they would prefer to resolve the dispute. One party may want to emphasize the facts and equities, or sophisticated business realities; the other side may prefer to be in a court of law. One party may want a quick resolution; the other party may prefer delay. One party may want to avoid publicity; the other party might prefer public exposure of the controversy. Whenever the parties are unable to agree on the method of dispute resolution, the only remaining dispute resolution system, by default, will be litigation.

**Advantages of proactively agreeing early on a dispute processing system.** Agreeing at the very beginning of a relationship on a method for quick processing and resolution of any future problems or disputes that may arise has many advantages:

- Responsible business managers are accustomed to controlling costs, quality and other aspects of their business relationships. Using private dispute prevention and resolution techniques gives them an opportunity to control disputes as well.
- The beginning of the relationship, when there is an atmosphere of business-like cooperation, and before any disputes have arisen, is the time when the parties can most rationally discuss the optimum method for dealing with any disputes.
- Including the subject of dispute prevention and resolution as an element in the negotiations leading to the establishment of the relationship helps to define an important aspect of the relationship. For example, if you learn that the other party does not want to agree to have an efficient dispute prevention and resolution system, this knowledge can affect how you negotiate other terms of the agreement – or whether you want to enter into the relationship at all.
- Business people often have a real fear of a foreign legal system. Exhibiting a willingness during the negotiations to set up a rational, fair and prompt dispute resolution system should have special relevance in an international transaction.
- Agreeing early on a method for dealing with potential problems can lead to creative business-oriented results, be a cooperative and satisfying experience, and is likely to help to create and preserve continuing business relationships.
- The special value of having a dispute prevention “process” already in place is often overlooked. An existing process will absorb the shock of unexpected events and problems. It channels them constructively, so they can be dealt with realistically and ultimately be solved. In the absence of a process, the parties are left to founder without direction, which can lead to confusion and chaos.
- The ready availability of a fair, efficient, trusted and quick method for processing disputes tends to discourage game-playing, posturing, and delaying tactics; may well encourage the parties to cooperate and deal realistically with each other; and may result in the parties resolving the problem by themselves, without having to resort to the dispute resolution procedure at all.

## HOW TO OVERCOME RESISTANCE TO THE USE OF DISPUTE PREVENTION MECHANISMS

Despite the acceptance of mediation and arbitration as dispute *resolution* alternatives to litigation in many areas of business, there is still considerable resistance to the techniques for *preventing and controlling* disputes. However, knowledgeable business professionals should recognize and overcome the kinds of obstacles and attitudes that can discourage parties from agreeing in advance on a system for preventing and controlling disputes. Some of these problems are:

**Not Wanting to Spoil the Euphoria.** Some people may fear that addressing the subject of dispute resolution during the early stages of a relationship is akin to suggesting to a happy engaged couple that they should enter into a pre-nuptial agreement. However, business should not be an emotional relationship; and ignoring the fact that problems and disputes can routinely occur even between the nicest people is simply a triumph of hope over reality.

**Traditional Resistance to Change.** Given the newness of dispute prevention, many contract and legal professionals have never before included it as a subject in their negotiation agendas and checklists. Accordingly, there is often a built-in resistance to any new idea. One argument for overcoming this resistance might be that preventing disputes can save money. Another argument might be that much of the impetus for preventing disputes comes from business people, and that contract and legal professionals would be well advised to keep up with their colleagues and clients.

**A Perception that Multi-level Dispute Resolution Slows Down the Process.** Some people may feel that specifying more than one level of dispute prevention and resolution, such as partnering or a standing neutral or mediation before resorting to arbitration, imposes an unnecessary and delaying process that will retard the ultimate resolution of a dispute. However, sophisticated business and legal practitioners know that the earlier in the life of a problem or dispute the parties address the problem and deal with it realistically, the more likely they are to resolve it amicably; and that every dispute prevention and resolution system should contain a final and binding “backstop” resolution method of some kind, such as arbitration.

**A Perception by One Party That It Will Benefit From an Inefficient Method of Resolving Disputes.** A party that thinks that it has – or is seeking – superior bargaining power may think that it will benefit by denying the other party an opportunity to have a dispute resolved promptly and efficiently. For example, a party that is obligated to pay money may, if the other party has no ready recourse, think that it can obtain leverage simply by withholding payment. Such a strategy ordinarily only works once, because once it is exercised, the other party won't be tricked again. And if such an intended strategy is revealed during contract negotiations, the other party can increase its pricing to offset the risk that it may be deprived of the use of its money for an extended period of time, or it may refuse to enter into the business relationship.

**Bottom Line:** In short, there is no rational excuse for a responsible business not to include in its agreements a system for processing disagreements as promptly and efficiently as possible.

## THE CONTINUUM OF DISPUTE PREVENTION, CONTROL AND RESOLUTION TECHNIQUES

A generation ago, lawyers and some business people knew of only one basic method of resolving disputes: court litigation. The only generally-acknowledged variation to this model

was a recognition that as a practical matter about 95% of all law suits are ultimately settled sooner or later before trial – with “later” rather than “sooner” being the traditional norm. Only a few industries (textiles, the diamond market, construction) have had a long tradition of using expert industry arbitration panels to resolve disputes privately and expeditiously.

Today there are a variety of techniques which can be adapted to meet the needs of any business relationship. New techniques are being developed every day. Most of the techniques can readily be incorporated into contracts; other techniques can be employed in special situations.

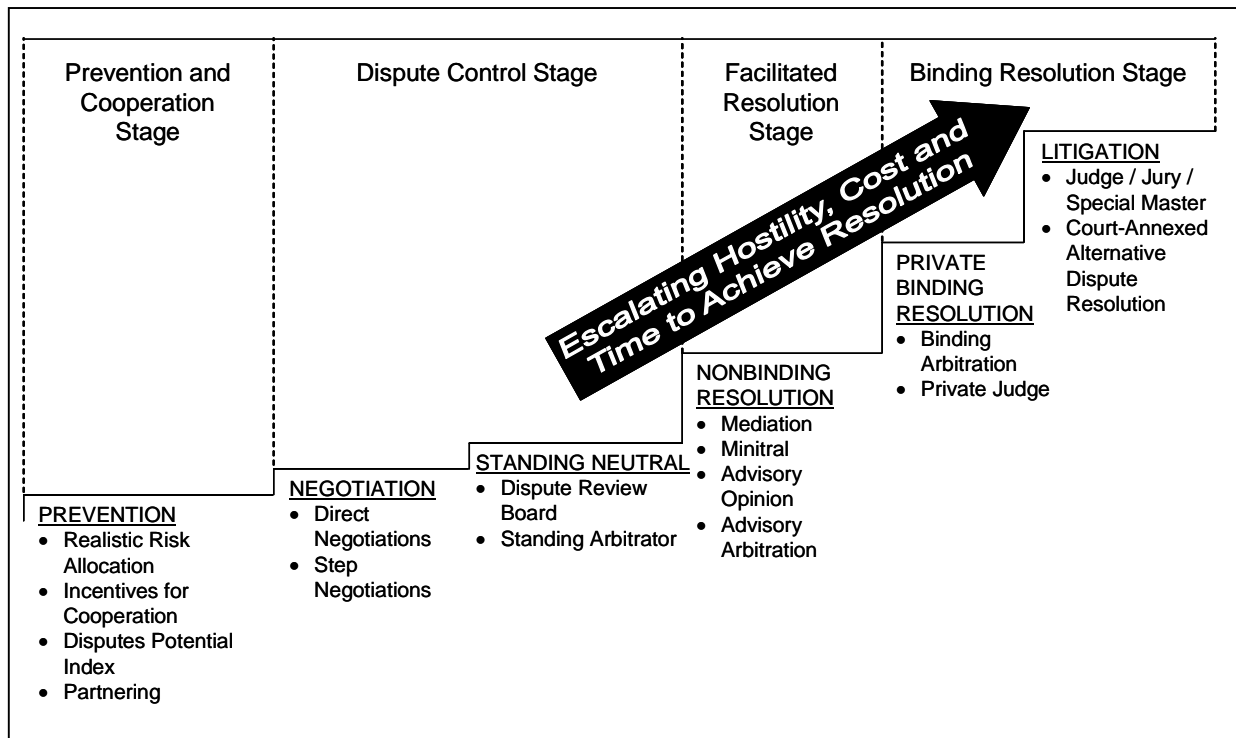
The next section of this paper will describe several well-developed dispute resolution tools. These tools form a continuum or spectrum that can be illustrated by the “stair step” sequential model (Figure 1) located on the next page, developed in the construction industry, which lists techniques in the order in which they would normally be employed in the life of the dispute, beginning first with the techniques that help most in preventing or controlling disputes and offer the greatest potential for saving money and preserving relationships. They are grouped on the step chart into four successive (and escalating) stages of dispute resolution:

- **Cooperation and Problem Prevention Stage.** The highest and best form of dispute resolution is prevention of problems and disputes. One of the best ways to prevent disputes is to establish an atmosphere of cooperation. Establishing clear communications, and techniques for encouraging alignment of interests and teamwork, such as partnering and incentives for cooperation, can create such an atmosphere, improve relationships, prevent some problems, and keep some disputes from arising.
- **Dispute Control Stage.** Dealing promptly and realistically with problems, differences of opinion and minor disagreements at the time they arise and before they can develop into full-fledged disputes can do much to contain and control disputes. Early negotiation, or obtaining “real time” dispute resolution assistance from a pre-selected standing neutral, can resolve disputes at the source and can even help in preventing disputes.

If the parties are unable to solve problems through the use of Cooperation and Problem Prevention techniques, or Dispute Control techniques, then the process becomes transformed from dispute “prevention” to dispute “resolution.” At this point the parties lose some measure of control over the problem, because they will have to turn to “outsiders” (people who have not been directly involved in the relationship) for assistance in the resolution of the dispute. At this point the levels of hostility, cost, and time for achieving final resolution of the dispute begin to rise significantly.

- **Nonbinding Facilitated Resolution Stage.** When disagreements develop into real disputes, the parties should use structured, facilitated negotiations, assisted by a skilled negotiator, mediator, fact-finder or evaluator, or some other method of Alternative or Appropriate Dispute Resolution (ADR) to enable them to achieve a mutually-acceptable resolution of most disputes, to avoid having to turn the dispute over to an arbitrator or court for final resolution.
- **Binding Resolution Stage.** When all other efforts at resolution have failed, it is necessary to have a “back stop” adjudication process in which the dispute will ultimately be resolved by a third party – preferably in an expert, prompt, efficient and private manner – such as arbitration.

Since the focus of this paper is on the field of proactive prevention and control of disputes, it will not address in any detail the well-known traditional processes that are involved at the Nonbinding Facilitated Resolution Stage or the Binding Resolution Stage. However, it is prudent to note that any carefully-crafted dispute prevention and resolution process should recognize that every dispute resolution system must ultimately include a binding dispute resolution process. If the parties do not designate arbitration as their final and binding method, then, by default, litigation becomes the final and binding dispute resolution method.



**Figure 1 – Dispute Resolution Stages & Steps<sup>2</sup>**

None of these techniques is immutable, and they can all be adapted to fit the special needs of any particular transaction. Individual techniques from two or more stages can be combined into multi-level dispute resolution systems.

### **SPECIFIC TECHNIQUES AND ILLUSTRATIVE LANGUAGE**

The contract planning and negotiation stage is the logical starting point for articulating techniques that have been proactively selected by the parties to prevent, control, reduce and resolve disputes. The existence in the contract of techniques for handling disputes, and the parties' knowledge that these techniques are readily available, will direct any disputes into channels where they can be dealt with constructively; in many cases their mere availability encourages the parties to act more forthrightly with each other and resolve their disputes without the necessity of using the prescribed techniques.

These proactive techniques are not rigid; they can be adapted to meet the needs of the parties, or the nature of the particular dispute. (It should be noted that the suggestions in this paper regarding use of contract language are not intended and should not be taken as legal advice.)

## **A. Proactively Promoting Good Cooperation and other Techniques to Prevent Disputes**

### **Realistic Allocation of Risks**

One of the most powerful ways to prevent and control disputes between contracting parties is to rationally allocate risks by assigning each potential risk of the business relationship to the party who is best able to manage, control or insure against the particular risk. Conversely, unrealistic shifting of risks to a party who is not equipped to handle the risk can increase costs, sow the seeds of countless potential disputes, create distrust and resentment, and establish adversarial relationships that can interfere with the success of the business enterprise.

Unfortunately, this fundamental principle of good business management and dispute prevention is not widely recognized or understood. In particular, lawyers involved in contract negotiations for their clients who seek zealously to obtain the “best possible deal” by shifting all possible risks to the other party can sometimes create problems of a far greater magnitude than any temporary benefit or satisfaction gained by “winning” the “battle” of the contract negotiations.

Realistic risk allocation promotes efficiency, lowers costs, and creates better relationships. The result in nearly all cases will be fewer disputes and a greater chance for success of the enterprise.

In many cases it will be obvious that certain risks logically should be assigned to a particular party. Other risks can possibly be handled equally well by either party, and some risks may be such that they cannot be effectively handled or even insured against by either party; the assignment of those risks will have to be dealt with through bargaining, and the result of that bargaining will likely be reflected in the economic terms of the deal.

In a one-time short-term transaction between two parties who never expect to do business again with each other, it may not make a difference to anyone but the parties themselves if the party with superior bargaining power shifts risks to the other party that the other party can't control. However, in any business relationship of long duration or where there are repeated transactions, there are advantages to having a balanced relationship where neither party is exposed to inordinate risk, and where both parties profit. In multiple-party relationships, realistic assignments of risk are particularly important to the maintenance of healthy relationships and control of costs. In the classic multi-party example of the construction industry, an owner's use of superior bargaining power to shift risks unrealistically to another party typically creates a chain reaction of cost inflation, downstream risk-shifting, resentment, defensive and retaliatory tactics, and misunderstandings caused by different perceptions as to the enforceability of some risk-shifting provisions. The result is usually adversarial relationships, disputes and claims, which could have been avoided by intelligent sharing of risks.

### **Incentives to Encourage Cooperation**

Where a business is contracting with a number of different organizations which have diverse interests, and where the cooperation of all of these organizations with each other is important to the success of a transaction or business objective, it is often helpful to structure a system of incentives to encourage such cooperation. Well-conceived positive incentive programs can be an effective means of aligning the goals of all of the participants, can encourage superior performance, and discourage conflict. Such incentives can take many forms. One example of such an incentive system is the establishment by the leader organization in the enterprise of a bonus pool which, upon attainment of specific goals, will

be shared among all of the people with whom the leader organization contracts. Under such a system the bonus is payable only if all of these participants as a group meet the assigned goals; the bonus is paid either to everyone, or to no one. This device provides a powerful incentive to the participants to work cooperatively with each other, and reduces conflicts which can occur in a common enterprise when every participant might otherwise be motivated solely by its limited perception of its own short-term interests, rather than the success of the enterprise as a whole. It encourages participants to subordinate their individual interests temporarily to the legitimate needs and success of the enterprise as a whole, for the ultimate benefit of all project participants.

Following is an example of language establishing an incentive plan, taken from a construction contract, where the general contractor, using funds provided by the owner of the project, seeks to encourage cooperative behavior among the subcontractors who are collectively performing the bulk of the on-site construction work:

#### *BONUS POOL PLAN*

*The General Contractor will establish a Bonus Pool program offering every Subcontractor a cash incentive for achieving the Project Goals outlined below.*

*The Project Goals are:*

- a. The project is completed by the Completion Date;*
- b. There are no unresolved claims by any subcontractor for interference or damage by any other subcontractor or contractor; and*
- c. There have been no accidents which have caused more than \_\_\_ work days to be lost.*

*If all of the Project Goals are achieved, the General Contractor will pay to each Subcontractor, in addition to each Subcontractor's normal compensation, a bonus of \_\_\_% of the Subcontractor's adjusted contract sum.*

#### **Partnering**

Partnering is a team-building effort in which the parties establish cooperative working relationships through a mutually-developed, extra-contractual strategy of commitment and communication. It can be used for long-term relationships, or on a project-specific basis. The relationship is based upon trust, dedication to common goals, and understanding of each other's individual expectations and values. The expected benefits from such a relationship include improved efficiencies and cost effectiveness, increased opportunity for innovation, and continual improvement of quality products and services.

When used on a project-specific basis, partnering is usually instituted at the beginning of the relationship by holding a retreat among all personnel involved in the project who have leadership and management responsibilities, in which the participants, assisted by an independent facilitator, become acquainted with each other's objectives and expectations, recognize common aims, develop a teamwork approach, initiate open communications, and establish nonadversarial processes for resolving potential problems.

Partnering can be initiated on an ad hoc basis, or by the contract. It is essentially a good faith and non-contractual process. If initiated under the contract, care should be taken to preserve the extra-contractual nature of the process, unless the parties consciously want certain aspects of their partnering relationship to take on the status of contractual obligations.

A typical provision for initiating the voluntary partnering process would be as follows:

## VOLUNTARY PARTNERING

*The parties intend to encourage the foundation of a cohesive partnering relationship which will be structured to draw on the strengths of each organization to identify and achieve reciprocal goals, to accomplish the objectives of the contract for the mutual benefit of both parties.*

*This partnering relationship will be bilateral, and participation will be totally voluntary. Any cost associated with effectuating this partnering relationship will be agreed to by both parties and will be shared equally.*

*To implement this partnering initiative, at the beginning of the relationship representatives of the parties will initiate a partnering development seminar and team-building workshop. These individuals will make arrangements to determine attendees at the workshop, agenda of the workshop, duration, and location, and engage an independent facilitator. Persons required to be in attendance at the workshop will be key personnel from both organizations who are involved in operations under the contract. Representatives of organizations not parties to the contract may also be invited to attend as necessary or appropriate. Follow-up workshops may be held periodically throughout the duration of the contract as agreed by the parties.*

*The establishment of a partnering charter will not change the legal relationship of the parties to the contract nor relieve any party of any of the terms of the contract.*

### **Contractual terms that can enhance the partnering relationship**

Some people, particularly in the construction industry, believe that the best partnering relationships are founded on an explicit contractual commitment of good faith and reasonable (or fair) dealing. The laws of many countries impose an implied obligation of good faith and fair dealing in every contract. If the parties want to contractually confirm this kind of relationship, they can include an explicit contractual covenant of good faith and fair dealing, along the following lines:

*The parties, with a positive commitment to honesty and integrity, agree to the following mutual duties:*

- a. Each will assist in the other's performance;*
- b. Each will avoid hindering the other's performance;*
- c. Each will proceed to fulfill its obligations diligently;*
- d. Each will cooperate in the common endeavor of the contract.*

## **B. Dispute Control Techniques**

### **Negotiation**

Negotiation is the time-honored method by which parties try to resolve disputes through discussions and mutual agreement. Negotiation is not only a free-standing dispute resolution technique, but it also can be a useful adjunct to every other dispute control and resolution technique.

A variant of negotiation is the "step negotiation" procedure, a multi-tiered process that can often be used to break a deadlock. If the individuals from each organization who are involved in the dispute are not able to resolve a problem at their level promptly, their immediate superiors, who are not as closely identified with the problem, are asked to confer and try to

resolve the problem; if they fail the problem is then to be passed on to higher management in both organizations. Because of an intermediate manager's interest in keeping messy problems from bothering higher management, and in demonstrating to higher management the manager's ability to solve problems, there is a built-in incentive to resolve disputes before they ever have to go to the highest management level.

Following is a contract clause committing the parties to good faith negotiation:

#### **GOOD FAITH NEGOTIATION**

*The parties will attempt in good faith to resolve promptly any controversy or claim arising out of or relating to this agreement by negotiation between representatives of the parties who have authority to settle the controversy.*

The following paragraphs will implement a step negotiation process:

#### **STEP NEGOTIATIONS**

*If a controversy or claim should arise, the parties will attempt in good faith to resolve any controversy or claim arising out of or relating to this agreement promptly by step negotiations between managers and executives of the parties who have authority to settle the controversy.*

*If the controversy or claim cannot be resolved promptly by the representatives of the parties at the operational level, then the middle level managers for each party will meet at least once and will attempt to resolve the matter. Either manager may request the other to meet within seven days, at a mutually agreed time and place.*

*If the matter has not been resolved within ten days of their first meeting, the managers shall promptly prepare and exchange memoranda stating the issues in dispute and their position, summarizing the negotiations which have taken place and attaching relevant documents, and shall refer the matter to senior executives, who shall have authority to settle the dispute. The senior executives will promptly meet for negotiations to attempt to settle the dispute.*

*If the matter has not been resolved within ten days from the referral of the dispute to senior executives, either party may refer the dispute to another dispute resolution procedure.*

#### **Standing Neutral, Standing Mediator or Standing Arbitrator**

One of the most innovative and promising developments in controlling disputes between parties who are involved in any type of long-term relationship (such as a joint venture or construction project) is the concept of the pre-selected or standing neutral to serve the parties as a "real time" dispute resolver throughout the course of the relationship. This neutral, or a board of three neutrals (designated variously as a "standing neutral," "mutual friend," "referee," "dispute resolver," or "dispute review board") is selected mutually by the parties early in the relationship; is briefed on the nature of the relationship; is furnished with the basic documents describing the relationship; routinely receives periodic progress reports as the relationship progresses; and is occasionally invited to meet with the parties simply to get a feel for the dynamics and progress of the relationship. The standing neutral is expected to be available on relatively short notice to make an expert recommendation to the parties to assist them in resolving any disputes that the parties are not able to resolve themselves. It is important to the effective working of this process that the parties be mutually involved in the selection of the neutral, and that they have confidence in the integrity and expertise of the

neutral. Typically the neutral's role, if called in to help resolve a dispute, is to render an impartial nonbinding decision concerning the subject matter of the dispute. (In some instances the role of the neutral is changed to act simply as a standing mediator to act as an informed facilitator in negotiations between the parties.)

Although the standing neutral's decisions are typically not binding, experience has shown that neutrals' decisions have generally been accepted by both parties, without any attempt to seek relief from any other tribunal. This result is enhanced where there is a contract requirement that in the event of any subsequent arbitration or litigation, the decisions of the standing neutral will be admissible in evidence.

Three critical elements are essential to the success of the standing neutral technique:

1. Early mutual selection and confidence in the neutral.
2. Continuous involvement by the neutral.
3. Prompt action on any submitted disputes.

The existence of a pre-selected neutral, already familiar with the business relationship between the parties and its progress, avoids many of the initial problems and delays that are involved in selecting and appointing neutrals after a controversy has arisen. The ready availability of the neutral, the speed with which he or she can render decisions, and particularly the fact that this neutral will hear every dispute which occurs during the history of the relationship, all provide powerful incentives to the parties to deal with each other and the neutral in a timely and frank manner, by discouraging game-playing, dilatory tactics, and the taking of extreme and insupportable positions. In practice, the nature of this process is such that the mere existence of the neutral always results in minimizing – and often totally eliminating – the number of disputes that have to be presented to the neutral. Even though some expense is involved in the process of selecting, appointing, initially orienting, and periodically reporting to the neutral, the costs are relatively minimal, even when the neutral is called on to resolve disputes.

The standing neutral concept was first used in the construction industry, which has developed standard detailed specifications for the establishment and operation of such a process, using either a group of three neutrals called variously a "Dispute Review Board" or a "Dispute Resolution Board," or a single "Dispute Resolver." This process is readily transferable to other industries. Parties who wish to set up a standing neutral process can refer to such sources as the International Chamber of Commerce (for ICC Dispute Resolution Rules and clauses, see [www.iccwbo.org/court/dispute\\_boards/id4424/index.html](http://www.iccwbo.org/court/dispute_boards/id4424/index.html); for ICC Dispute Board Rules on Dispute Review Boards (DRBs); Dispute Adjudication Boards (DABs); and Combined Dispute Boards (CDBs), see [www.iccwbo.org/court/dispute\\_boards/id4352/index.html](http://www.iccwbo.org/court/dispute_boards/id4352/index.html)), the Dispute Resolution Board Foundation ([www.drb.org](http://www.drb.org)), the American Arbitration Association ([www.adr.org](http://www.adr.org)), or the standard documents of the Federation Internationale Des Ingenieurs Conseils (FIDIC) ([www.fidic.org](http://www.fidic.org)), and adapt the language to the specifics of the particular business relationship or transaction.

In the construction industry the decisions of a standing neutral are typically merely advisory. However, in certain business contexts the parties may wish to treat the standing neutral's decisions as binding. In this case the standing neutral becomes a standing arbitrator, and the operative contract language, in addition to providing for the continuing nature of the standing neutral's assignment, should also contain appropriate language that makes the decisions binding under the applicable arbitration statute, and reference the arbitration rules of an established arbitration agency.

## CONCLUSION

Through the proactive and preventive approach to business relationships, business leaders and contract and project professionals can, in their contracts, simultaneously prevent and control disputes and encourage cooperation and teamwork, leading to improved performance.

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<sup>1</sup> Aspects of proactive management of relationships, contracts, sources of disputes and risks are reflected in a body of practice and literature created within the framework of the Nordic School of Proactive Law (NSPL) ([www.proactivelaw.org](http://www.proactivelaw.org)), and the National Center for Preventive Law ([www.preventivelawyer.com](http://www.preventivelawyer.com)). The work of the NSPL has chiefly been carried out through periodic international conferences. The 2005 Conference, *Fusing Best Business Practices with Legal Information Management and Technology*, was organized in Stockholm, Sweden. Conference papers were published in Volume 49 of the Scandinavian Studies of Law Series, 'A Proactive Approach', [sisl.juridicum.su.se](http://sisl.juridicum.su.se). The most recent conference, *Commercial Contracting for Strategic Advantage* was held in Turku, Finland in June 2007. IACCM Finland was one of the organizers, and selected papers presented at the conference will be co-published by the IACCM and Turku University of Applied Sciences in a forthcoming book. As an outgrowth of that conference, various leaders in *proactive / preventive law*, together with a number of practitioners who seek to expand the field beyond legal concerns, met to form the ProActive ThinkTank. The mission of the ThinkTank is to provide 'a forum for business leaders, lawyers, academics and educators to discuss, develop and promote the proactive management of relationships, contracts and risks, and the prevention of legal uncertainties and disputes'. The ThinkTank website ([www.proactivethinktank.com](http://www.proactivethinktank.com)) will provide a venue for collecting and sharing such information as best practice tools and techniques, case studies, articles, and reports on ongoing research. Additional information on the ProActive ThinkTank can be obtained by contacting the authors.

<sup>2</sup> Adapted from Groton 1997, p. 7; *see also* Groton 2007a.

## REFERENCES

Groton, J. (2007a). The "Up Front" Prevention, Control and Early Resolution of Disputes: Dispute Prevention and Management Lessons that Businesses Can Learn from the Construction Industry. In the *Proceedings of the Conference "Commercial Contracting for Strategic Advantage—Potentials and Prospects"*, Turku, Finland, 13–16 June 2007, p. 32–44.

Groton, J. (1997) The Progressive or "Stepped" Approach to ADR: Designing Systems to Prevent, Control and Resolve Disputes. In Cushman, R.F., Fisher, L.N., Butler, S.D. & Myers, J.J. (Eds.): *Construction Dispute Resolution Formbook*, New York: John Wiley & Sons, p. 1–33.

## RESOURCES / FURTHER READING

In addition to those mentioned above, the following resources will be of interest to researchers, business leaders and their professional advisers who wish to explore in more depth the origins and concepts leading to the development of the techniques discussed above, and other useful dispute containment devices.

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