# *The Construction Attorney's Toolbox – Building Solutions*

*by Kent B. Scott*

**Introduction**

Today's current economic climate presses owners and contractors to complete projects in less time for less money. These pressures have created more demanding time schedules and monetary budgets that, in turn, have created an increased number of disputes. Another developing trend is the increased costs in time, money, efficiencies and lost opportunities taken up by these disputes. Rather than solving the technical problems experienced on the project, the parties get mired down into bolstering opposing positions. The fees incurred in resolving disputes become a major component of the dispute. The dollars that should go into the project are now going into the project dispute.

A construction project, by its very nature, can be a combustible breeding ground of disputes. There is a lot of money that passes through many hands over a period of months or even years. There are risks over which neither party has immediate control. Profit margins are often low and there is little room for adjustments or mistakes. There are many variables and components that are poured into the creation of a home, office tower, sports arena, church or other building improvement.

The creation of a construction project is an art requiring the parties to design, build, change, pay, and negotiate with each other so as to produce the desired result, *i.e.,* a place to live, work, play, worship or otherwise gather. The expectations of the parties involved with a project do not always result in a meeting of the minds. Differences in what was wanted and when for a desired price can give rise to conflict in many forms. Most conflicts are readily resolved, but some continue to fester and grow. Some disputes find their way into legal counsel's office where the client comes for assistance in having a problem solved.

This article will address some of the tools available to the attorney who is in the midst of a dispute the parties could not resolve on their own. Four tools representing systems of dispute resolution are discussed: (1) negotiation, (2) mediation, (3) arbitration, and (4) dispute review boards. These tools are not meant to replace the courtroom, which is the foundation of the dispute resolution process in our country. The four tools discussed herein are, for the most part, optional and consensual. They represent *alternate* ways of bringing a disputed matter to resolution. They are to be used by the lawyer to bring about a resolution every bit as much as the Utah and Federal Rules of Evidence and Utah and Federal Rules of Civil Procedure. To know when, where and how to use these tools is the art of the advocate.

**A. Negotiation**

Most conflicts between parties involved with a construction project are resolved through negotiation. Negotiation has, is and will be the most widely used method in which to resolve disputes. The parties, as a general rule, feel better about reaching a resolution by common consent as opposed to having a judge, jury or arbitrator impose a resolution.

According to the Harvard Model of Negotiation, there are seven components that make up a negotiation. They are:

**1. Alternatives**

Most conflicts have more than one way of being resolved. In order for a conflict to be resolved information about the subject and personalities of the parties is essential. "If the client accepts this alternative what will happen?" "Are there other alternatives?" "What will happen if the client walks away?"

**2. Interests**

What are the client's needs and wants? What are the needs and wants of the other party? Find the interests of the parties and you will be on the road to resolution.

**3. Options**

Options are the possibilities that operate to reach an agreement. It takes creativity and courage to explore different ways of seeing the problem. Attorneys want to please their clients but should

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not be a mirror of their client's thoughts and feelings. The best clients are open to suggestions. The attorneys and clients that make resolutions happen develop the capacity to look past their positions and focus on their interests.

**4. Legitimacy**

Both attorneys and clients need to evaluate whether a proposed resolution is going to work. In order to make that assessment, it is best to measure a specific proposal against objective criteria. The feelings of the parties are important, but so is the workability of the resolution reached. If it doesn't work, the parties will climb back into the arena of conflict. On the other hand, if it works, then work it through to final resolution.

**5. Commitment**

It takes commitment to reach a resolution and to carry out its requirements. Most parties want to have their problem resolved, but they lack the commitment to reach that result. Attorneys vary in their level of commitment. Unfortunately there are those attorneys who commit themselves to prolong a dispute for one of the following reasons:

- it is in their economic interest to keep the dispute going;
- they have not taken the time to study the information required to enter into successful negotiations; or
- they have not developed the independence required to deliver information to the client that it does not want to hear.

Clients also vary in their level of commitment. The ability to reach a resolution to a conflict is inhibited by one or more of the following:

- the client gets hung up on its position and is not able to see options;
- the client is not willing to spend the time and effort to obtain and evaluate information about the dispute; or
- the client is not willing to accept responsibility for resolving the dispute ("it's all his fault" or "this is the attorney's job").

**6. Communication**

Communication means there are a "sender" and a "receiver." Too often people are caught up in what they are going to say to respond to what is being said ("sending"). They do not focus on that which is being said ("receiving"). When everyone is "sending" and no one is "receiving" stalemate results. Effective negotiation requires two-way ("sender" – "receiver") communication.

**7. Relationship**

Some disputes involve relationships that need to be continued (joint venture partners). Some relationships have the potential to develop for the better once the dispute is resolved (architect-owner, owner-contractor, contractor-surety). Other relationships need closure. The relationship factor is critical when evaluating the options for a resolution and determining which option, if any, fits the interests of a particular party.

Conflict is not the enemy. It is the mother of opportunity to negotiate a just resolution. How the parties in their negotiations react to a particular set of circumstances determines the success or failure of a commercial relationship. The road to resolution is prominently marked with learning opportunities.

**B. Mediation**

The 1997 Edition of the AIA A-201 General Conditions contains a provision that requires the parties to mediate their dispute before resorting to arbitration or litigation. The contract requirement, in part, states:

> If a dispute arises out of or relates to this contract, or the breach thereof, and if the dispute cannot be settled through negotiation, the parties agree first to try in good faith to settle the dispute by mediation administered by the American Arbitration Association under its Construction Industry Mediation Rules before resorting to arbitration, litigation, or some other dispute resolution procedure.

The mediation of a construction dispute has traditionally been voluntary. The AIA A-201 mediation requirement, similar contract provisions and required court-annexed alternative dispute resolution programs have brought a new element to the dispute resolution scene: mandatory mediation. Mediation is here to stay and it is here to grow. Attorneys will be doing more mediations than trials. The art of mediation advocacy should be one of the sharpest tools in the toolbox. Here are some of the questions being asked by the contractors and clients involved with a mediation of a dispute:

**Mediation Defined**

Mediation is a procedure where two or more parties attempt to resolve their dispute with a neutral party ("mediator"). The mediator remains neutral throughout the meeting. The process is confidential and no resolution can be reached without the consent of the parties. If an agreement is reached, the agreement will be binding and can be enforced by the courts.

**Anatomy of a Successful Mediation**

The success of a mediation is controlled mainly by the parties. Some of the critical components of a successful mediation involve:

- The background and capabilities of the mediator.
- The attendance of people with the knowledge and authority to settle.
- The needs and interests of the parties.
- Whether a trial or arbitration has been scheduled.
- Commitment of the parties and their attorneys to participate.
- The extent to which information has been exchanged.
- The amount of time and money expended or to be expended.

The following is a brief outline of the events involved in a mediation:

- The attorneys prepare a short brief for the mediator.
- The parties sign a confidentiality statement.
- The parties summarize their positions in a joint session.
- The parties go into separate confidential meetings with the mediator to discuss objectives, needs and settlement options.
- The mediator shuttles between the parties in an effort to find common ground.
- If a settlement is reached, a written agreement is created that outlines the general terms of the resolution. The agreement may provide for more detailed documentation to be drafted and signed by the parties.
- If a settlement is not achieved another session may be scheduled or the mediator may offer some suggestions to consider that may assist the parties in future negotiations or other settlement efforts.

**When and Where to Mediate**

There is no set formula for assuring that a mediation will succeed. Mediation can be effective at any stage of the dispute: pre-litigation, during litigation, on appeal. Most mediations occur after a claim has been filed and some exchange of information has taken place. The decision as to whether or when to mediate will vary with each case. However, the statistics from the major institutional mediation services indicate that mediation is most successful when the dispute is in its early stages before the parties have expended their resources on combat. It is important to realize that successful mediation involves a good faith exchange of information between the parties.

The mediation should take place at a neutral site. For mediations

involving out of state participants, a value judgment will need to be made concerning the time and expenses that will be incurred. Consideration should be given to use telephonic or video conferencing. On-line mediation is becoming more popular to resolve both commercial contract and mass tort claims that involve defective construction materials. Also, most mediators are available to travel to a neutral site to conduct the mediation.

**Who Should Come to the Mediation**

The following is a brief summary of those who would be expected to attend the mediation:

- Legal counsel: yes, if the party is represented.
- Client: the person with authority to settle, and others with knowledge of the facts.
- Experts: avoid having experts involved. They are hired to support your position and often complicate the process where settlement options are being discussed. Experts, however, may be helpful to describe and understand technical information.
- Documents: less is better. Summaries, graphs and charts are useful.
- Others: associates, secretaries or assistants are discouraged. If there is a need, make advanced arrangements so all parties approve and understand their respective roles.
- Other information specifically requested by the mediator.

**Making the First Move**

There is no advantage for one party or the other to move the process forward. The mediator will take the time and make the effort to understand the position and interests of each party. The mediator will know when to start the process of making offers. Usually the mediator will seek a consensus on the easy issues and work toward an agreement on more difficult matters thereafter. Trust the mediator.

**How Long Will the Mediation Last?**

It is common to schedule mediations for either a half or one full day. More time should be scheduled for mediations that require extensive travel, the presence of many parties or involve complex fact or legal issues. It is best to build in a margin of "float" time for the mediation session. Multiple day mediations have their own built-in challenges. Often the parties recess after the first day and go home to re-think their case in a light that supports their original position. Consequently, the parties begin the next day needing to be "warmed up" and put back into the solution / settlement mode.

**In General**

The expanded acceptance and use of mediation in the construction industry is evidenced by the inclusion of the mediation process in the AIA's most recent edition of the Conditions of the Contract for Construction (15th Ed. 1997). It reads:

> Any claims arising out of or relating to the contract … shall … be subject to mediation as a condition precedent to arbitration and the institution of legal or equitable proceedings by either party.

Mediation provides an opportunity for people to have their input into how the process is designed and conducted. The parties are given an opportunity to confidentially express their interests and values without compromising their positions while in the presence of other parties. It provides the parties a sense of involvement and control over the dispute resolution process and the terms of a settlement.

**C. Arbitration**

Arbitration has long been favored as a means of resolving construction disputes. Many standard construction contract documents provide for a mandatory binding arbitration of all disputes arising under or related to the contract.

**Arbitration Statutes**

Both federal and Utah law, like the law in virtually every other state, favor arbitration as a cost-effective and timely means of resolving disputes. Consistent with these policy considerations, both statutory law and case law support judicial orders compelling arbitration when required by statute or contract.

The Federal law is found in Title 9 U.S.C. §1, et seq., and is known as the Federal Arbitration Act, enacted in 1925. Current Utah law is set out in the Utah Uniform Arbitration Act, Utah Code §78-31a-101 through 131, and is patterned after the Revised Uniform Arbitration Act, and applies to all contracts entered into after May 6, 2002. Disputes arising under contracts entered into prior to May 6, 2002 will be governed by the arbitration act in force on the date the agreement was signed. (Utah Code §78-31a-131).

The Utah Uniform Arbitration Act replaced the old Utah Arbitration Act (Title 78, Chapter 31, repealed) for the purpose of serving as a comprehensive codification of arbitration practice and procedure. The new Utah law deals with such matters as arbitrability, provisional remedies, consolidation of proceedings, arbitrator disclosure, arbitrator immunity, discovery, subpoenas, pre-hearing conferences, dispositive motions, punitive damages, attorneys' fees and other remedies which could be the subject of an arbitration award.

**Commencement of Arbitration and Selection of Arbitrator(s)**

Arbitration is initiated by a demand for arbitration. The most common arbitration clause found in construction contract documents requires arbitration to proceed in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association ("AAA"). A demand for arbitration pursuant to the AAA's rules is a very simple document, requiring only a general and brief statement outlining the identity of the parties and their counsel, if known, the nature of the claim and the amount of the damages sought.

The method for the selection of arbitrators is found in the AAA's Construction Industry Rules, or in the applicable federal or state statutes. The method of selection can also be defined in the parties' Agreement or, if needed, the Court will appoint the arbitrator.

**Case Management**

The arbitrator will generally schedule a preliminary hearing wherein the arbitrator and parties' counsel will discuss:

- the parties in interest
- claims of the parties
- scheduling of discovery
- scheduling of motions
- disclosure of witnesses
- handling exhibits
- exchange of expert reports
- procedures governing the evidentiary hearing
- the form the award will take.

**Discovery and Motions**

In most instances, the type, amount and time frame for discovery are left to the arbitrator's discretion. Most arbitrators try to get the parties to agree on reasonable limits on discovery, especially depositions, but will impose such limits where the parties fail to agree.

The arbitrator has the authority to issue subpoenas and subpoenas duces tecum upon third parties as allowed by the Utah and Federal Rules of Civil Procedure.

In theory, arbitrators have always had authority to summarily dispose of all or portions of the claims submitted for arbitration. Dispositive and summary motions may be filed resulting in a final or interim award. Because of the limited avenues of appeal available in arbitration, the summary disposition of claims is carefully considered by the arbitrator or arbitration panel.

**The Arbitration Hearing**

At the evidentiary hearing, the procedure is in form very similar to that encountered in litigation. It is, however, considerably less formal, particularly as to evidentiary matters. Simply stated,

the rules of evidence are "relaxed" in arbitration. Rule 31(b) of the AAA Construction Industry Rules provides:

> The arbitrator, exercising his or her discretion, shall conduct the proceedings with a view to expediting the resolution of the dispute and may direct the order of proof, bifurcate proceedings and direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the case.

Responses to questions are answered in a more narrative manner. AAA Construction Industry Rule 32(a) states that "the parties may offer such evidence as is relevant and material to the dispute and shall produce such evidence as the arbitrator may deem necessary to understanding and determination of the dispute. Conformity to the legal rules of evidence shall not be necessary." Most arbitration acts contain similar provisions. In short, the test by which evidence is judged in arbitration is materiality, not admissibility. The arbitrator has the authority to weigh the evidence received.

**The Award**

Once the arbitrator is satisfied that all evidence is in, he or she will close the hearing and begin deliberations that lead to the award. Historically, arbitration awards have been extremely brief, consisting essentially of a net award of damages in favor of one of the disputants and perhaps an award of attorney's fees and/or arbitration costs. Currently, many arbitrators, as well as organizations such as the American Arbitration Association will provide either a detailed or reasoned award upon request by the parties.

A detailed award must specifically list the arbitrator's award as to each component of each party's claims and culminate in a net award as to damages, attorney's fees (where applicable), arbitration costs and interest. A reasoned award takes the process one step further, requiring the arbitrator to provide at least a minimal written explanation for each component of their award. Findings of fact and conclusions of law are frequently not submitted unless requested by the parties and agreed upon by the arbitrator.

Under the rules of the American Arbitration Association, an arbitrator must issue the award within 30 days from the date the hearing is closed. Neither the Utah Uniform Arbitration Act nor the United States Arbitration Act has established any such time frame.

**Modification of Award**

Under the Utah Uniform Arbitration Act and the American Arbitration Association's rules, a party has twenty days from the date the award is received to seek modification of the award to correct any clerical, typographical, technical or computational errors. The arbitrator has no authority to re-determine the merits of the award but may correct calculations or descriptions of persons or property. This provision is an exception to the common law *functus officio* doctrine that states when arbitrators finalize an award and deliver it to the parties, they no longer have the power to act on any matter.

The Federal Arbitration Act has no such exception. Parties under the Federal Arbitration Act must, however, bring a new proceeding in the U.S. District Court to clarify an arbitrator's decision. Under the Federal Arbitration Act a motion to modify may be filed with the court at any time within three months after the award has been filed or delivered.

**Motion to Vacate Award**

There is no authority to vacate an award under the American Arbitration Association's rules. A motion to vacate the award under the Utah Uniform Arbitration Act must be filed within ninety days from the receipt of the award. Under the Federal Arbitration Act, a motion to vacate may be filed at any time within three months after the award has been filed or delivered.

Once an award has been issued, it may become subject to efforts to vacate by a dissatisfied party. Reversal of an arbitrator's award can only be done by a court. Under the federal and Utah statutes, an arbitrator's award will be vacated if it appears that:

- The award was procured by corruption or fraud;
- The arbitrator is guilty of bias or other misconduct;
- The arbitrator exceeded his or her powers;
- There was no arbitration agreement;
- The arbitrator failed to postpone a hearing;
- The arbitrator refused to hear material evidence; or
- The arbitration was conducted without proper notice.

Courts have traditionally deferred to arbitrator's awards and have been reluctant to revisit them when challenged by a dissatisfied party. However, the Utah Supreme Court in the case of *Buzas Baseball, Inc. v. Salt Lake Trappers, Inc.*, 925 P.2d 941 (Utah 1996), stated that a court may explore further the propriety and basis for an arbitrator's award and that an award could be vacated if it violates public policy.

**Summary**

The arbitration of construction disputes is governed by the terms of the Federal Arbitration Act, the Utah Uniform Arbitration Act, or the rules agreed upon by the parties such as the Construction Industry Rules of Arbitration authored by the American Arbitration Association.

In choosing to arbitrate a dispute, the parties waive their rights to have a court or jury determine the outcome of their dispute. The parties can agree to arbitrate either an existing dispute or a dispute that may arise in the future. In such an event, they need to consider the rules under which the arbitration will be conducted. The arbitration award is final and may not be overturned except on limited grounds.

**D. Dispute Review Boards**

A dispute review board is a neutral group of persons usually selected by the owner and contractor at the beginning of the construction project to resolve future disputes as they arise on the job. The persons on the board have the technical background and experience to understand and help resolve construction disputes. They visit the job regularly during the construction process and become familiar with the project's design and construction requirements.

The purpose of dispute review boards is to hear disputes in an informal, non-adversarial atmosphere, and to provide technical recommendations for timely resolution of disputes. The role of the dispute review board is to provide an independent assessment of both parties' positions, and to resolve the dispute before the parties adopt rigid positions leading to a breakdown in communication on the job. In summary, a dispute review board is a process where the parties invest time and money in seeking a technical solution as distinguished from arbitration where the parties present evidence in support of their position in order to obtain an award.

**Creating the Dispute Review Board**

A dispute review board should initially be established by the contract documents. The suggested language by the American Arbitration Association for incorporation into the contract documents is:

> The parties shall impanel a Dispute Review Board (DRB) of three members in accordance with the Dispute Review Board Procedures of the American Arbitration Association. The DRB, in close consultation with all interested parties, will assist and recommend the resolution of any disputes, claims, and other controversies that might arise among the parties.

On projects where a dispute resolution board is specified, contractors should inform all subcontractors that a dispute resolution board has been established and require them to participate in the process when their work or materials are involved with or may be affected by the dispute. The expenses of establishing and maintaining the dispute review board should be the responsibility of the parties involved with the dispute.

Once the contract is signed, the owner and general contractor will select a group of one to three persons to act as the dispute review board. In some cases, the persons will be selected in a completely neutral fashion with the aid of an organization such as the American Arbitration Association. In other cases, the owner and general contractor may each nominate one member to the board and each member will then select a third member to serve on the board.

The board member is usually a professional with technical expertise (architectural, engineering, legal, accounting, scheduling, etc.) to offer counsel and assistance in working on a technical solution to the problem at hand. Once the board is established, each board member is given a set of contract documents in order to enable them to become familiar with the project and the scope of work involved. The board members should meet periodically at the project site with both parties to review the construction progress, even when there are no disputes in existence.

Whenever the parties are unable to resolve a dispute, the dispute should be immediately referred to the dispute review board for a prompt recommendation or decision. Depending on the agreement of the parties, the decisions of the dispute review boards may be merely non-binding recommendations or may be binding decisions.

The notice of a dispute to the board should be in writing, and notice should be given to all interested parties. The notice should state in full detail the issues of the dispute to be considered by the board.

When a dispute is presented to the board, the contractor and the owner will be given an opportunity to present their views and supporting evidence at a hearing. Normally the hearing is held at the job site in an informal manner, without the presence of attorneys. The board will establish the procedure for the hearings. The board may ask questions of the parties or witnesses but should express no opinions concerning the merits of the case during the hearing.

After the hearing is concluded, the board meets in private to deliberate and reach a conclusion. The board's recommendation or decision should then be submitted to both parties in a written report.

If the board's function is to provide a non-binding recommendation, the parties may accept or reject the board's recommendation. The parties should notify each other and the board within a certain time period as to whether they accept or reject the recommendation. Failure to file such notice within the time specified will constitute an acceptance of the recommendation. If the recommendation is rejected, the parties may appeal back to the board, offer other methods of settlement, or proceed toward the next step in the dispute resolution process. The board's recommendations may be presented as evidence in any future dispute-resolution forum.

**Summary**

Dispute review boards offer a cheaper and time-saving method of resolving disputes as they occur. They also allow the parties to retain a cooperative relationship on a project. This cooperative relationship allows the construction project to progress more rapidly and prevents time wasted in preparing documentation in anticipation of some future litigation battle. Any costs incurred in establishing a dispute review board should be recouped from the savings of avoiding such litigation.

### E. Dispute Resolution Contract Clauses

**Prime Contract Dispute Resolution**

Article 4 of the AIA A-201 General Conditions of the Construction Contract (15th Ed. 1997) provides a dispute resolution system that is used for most commercial projects. The resolution of disputes is handled through a procedure beginning with the architect's review (4.4.1 – 4.4.8). All claims not resolved by the architect are handled by mediation (4.5.1 – 4.5.3). Claims not resolved by the architect or through mediation are resolved by arbitration (4.6.1 – 4.6.6). The award of the arbitrator is final and binding.

The following is a simplified version of a dispute resolution clause that may be used in a contract between the owner and prime contractor.

**1. Disputes:** Claims, disputes or other matters in question between the parties arising out of or relating to this contract shall be subject to the Dispute Resolution Procedures set forth in this Article.

**2. Notices of Claim:** If a dispute arises out of or relates to this contract, or the breach thereof, the claimant shall first advise the other party of the details of the claim within ten days from the time the facts underlying the claim became known to the claimant. The notice shall be in writing with sufficient detail and backup information to permit the other party to evaluate the claim.

**3. Negotiations:** Within ten days after notification of a claim in writing, a representative(s) of the Owner and the Contractor shall meet and endeavor to negotiate a resolution. Representatives of both parties shall attend with authority to settle any claim.

**4. Dispute Review Board:** If a dispute arises out of or relates to this contract, or the breach thereof, and if the dispute cannot be settled through negotiation, the parties, within ten days from the termination of the negotiations, shall impanel a Dispute Review Board (DRB) of three members in accordance with the Dispute Review Board Procedures of the American Arbitration Association. The DRB, in close consultation with all interested parties, will assist and recommend the resolution of any disputes between the Parties. The decision of the DRB is (is not) binding.

**5. Mediation:** If a dispute arises out of or relates to this contract, or the breach thereof, and if the dispute cannot be settled through negotiation or the Dispute Resolution Board, the parties agree to try in good faith to settle the dispute by mediation administered by the American Arbitration Association under its Construction Industry Mediation Rules before resorting to arbitration, litigation, or some other dispute resolution procedure.

**6. Arbitration of Disputes:** If a dispute arises out of or relates to this contract, or the breach thereof, and if the dispute cannot be settled through negotiation, the Dispute Resolution Board, or mediation, then any controversy or claim shall be settled by arbitration administered by the American Arbitration Association under its Construction Industry Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof. Any arbitration may include by consolidation or joinder any other additional party who is or may be involved in the claim. The arbitrator(s) shall have the power to award to the prevailing party reasonable costs and attorneys' fees in addition to the costs of arbitration.

**7. Venue:** The location of any dispute review board, mediation or arbitration shall be held in Salt Lake City, Utah.

**Subcontract Dispute Resolution**

The following is a sample of a dispute resolution clause that may be used in the prime contractor's subcontract.

1. In case of any dispute involving Contractor and Owner which arises from or relates to Subcontractor's Work, Subcontractor agrees to settle such dispute in the manner provided by the Contract Documents between Contractor and Owner. Subcontractor consents to be joined, at Contractor's option, in any arbitration, mediation, dispute review board or other dispute resolution proceeding that involves Subcontractor's Work. Subcontractor also agrees to be bound to the Contractor to the same extent the Contractor is bound to the Owner on all matters pertaining to Subcontractor's Work. Subcontractor agrees to pay a proportionate share of the fees and costs incurred by Contractor in any dispute resolution proceeding involving the performance or non-performance of Subcontractor's Work. Fees shall include but not be limited to design, expert, consulting and attorneys' fees.

2. All other claims and disputes involving Contractor and Subcontractor shall be resolved in the following manner: (a) All Subcontractor claims are subject to the notice provisions of this contract. (b) the Parties agree to try in good faith to settle the dispute by mediation administered by the American Arbitration Association under its Construction Industry Mediation Rules before resorting to arbitration, litigation, or some other dispute resolution procedure. (c) The parties agree that all claims not resolved by mediation may, at Contractor's option, be settled by arbitration administered by the American Arbitration Association under its Construction Industry Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof. Any arbitration may include by consolidation or joinder any additional parties who is or may be involved in the claim. The arbitrator(s) shall have the power to award to the prevailing party reasonable costs and attorneys' fees in addition to the costs of arbitration. (d) The parties agree that the location of any mediation or arbitration shall, at Contractor's option, be held in Salt Lake City, Utah.

**CONCLUSION**

The resolution of construction claims can be built with various tools using one or more in conjunction with the other. The attorney is both the author of the process and the craftsman who uses these tools to bring about a desired result for the client. Legal counsel can use negotiation, mediation, arbitration, dispute review boards or other devices of their own creation to hammer and chisel their way to resolution.

Negotiation, even though failed, can be the foundation upon which a successful mediation is accomplished. Likewise, a failed mediation can focus the parties on further negotiation or a second mediation. There is no authoritative study on the success rate of mediation. However, one source, the American Arbitration Association, has reported that eighty-five percent of the mediations conducted under their administration have resulted in a settled resolution.

The number of arbitrations in the construction industry continues to grow. The Utah Uniform Arbitration Act (based on the Revised Uniform Arbitration Act) is a culmination of arbitration practice and procedure that has evolved under both the Federal Arbitration Act and Utah's old Arbitration Act. For a more defined discussion on the Utah Uniform Arbitration Act see the article entitled *Utah's Revised Uniform Arbitration Act: a Makeover for the Face of Arbitration* published in the December 2003 edition of the *Utah Bar Journal* (Vol 16 No. 9).

Dispute review boards represent a process where time and money are expended on the solution rather than building and supporting positions adverse to others. In addition, the construction industry has long embraced other dispute preventive methods such as "partnering" which is an informal method of meeting together and defining how to best implement the contract requirements and meet contract expectations.

Basic to the dispute resolution systems, however used, is our established system of justice with the courts, both trial and appellate, as an institution open to the public at large. Without this system of justice, the processes of negotiation, mediation, arbitration and dispute review boards would be given little meaning. To the extent our courts continue to recognize and acknowledge the valuable alternate forms of dispute resolution, the parties to a dispute and their legal counsel will be able to find faster, less expensive and more efficient ways of resolving construction disputes.