Is Arbitration Falling Out of Favor In the Business Community?

I. Summary.

For decades the construction industry has embraced arbitration as its preferred binding dispute resolution procedure. The virtual partnership between the American Institute of Architects (AIA) and the American Arbitration Association (AAA) has undoubtedly been a major influence on the perpetuation of this practice. The AIA is beginning to re-align its relationship with the process of arbitration, no longer designating it as its sole binding dispute resolution procedure.

The purpose of this memo is to explore the causes and impact of this re-alignment vis-a-vis the construction industry and the ripple effect it, and comparable trends, may create in the larger business community. Research methods will be suggested to gather empirical data that may be used by leaders in the worlds of commerce and alternative dispute resolution as they consider the future of arbitration in the construction industry specifically and the general world of business and commerce.

II. Description of the Problem.

A. Arbitration: History and Evolution.

1. Arbitration in Antiquity. Archaeological finds trace arbitration as far back as 2800 B.C., and arbitration closely resembling current arbitration procedures had almost universal acceptance among the Greek states by 500 B.C.[1] In fact, an early arbitration ruling by Solon, a famous Athenian law maker, is cited as a pivotal event which led to the establishment of democratic government.[2] Aristotle described arbitration as preferred over litigation because Aan arbitrator goes by the equity of a case, a judge by law.@[3] Thus, one can conclude that arbitration, from its earliest origins, developed as an

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[1] Henry T. King, Jr., Marc A. Leforestier, *Arbitration In Ancient Greece,* 49 Disp. Resol. J. 38 (September, 1994).

[2] Id at 39. He arbitrated an exacerbating crisis between debtor peasants and creditor landholders by maintaining the existing land distribution, but ending the securing of debt with land or personal freedom, and the freed peasant majority became the seed of Athenian democracy.

[3] Id at 37 citing *2 Aristotle, The Complete Works of Aristotle 2188-89* (Jonathan Barnes ed., 1991).

alternative to litigation and came into existence because of the need for a better, or at least different, method of resolving disputes.

Further, the assertion that arbitration was with us in Biblical times[4] does not appear to engender dispute. One author (who also identifies clay tablets in ancient Babylon referring to the arbitration of commercial disputes) offers as an example of one of the earliest Judaic arbitrations the account cited in 1 Kings 3:16-28; that of King Solomon wisely decreeing that a baby be cut in two and one-half given to each of two harlots claiming the child as her own in order to identify the real mother.[5] This story is certainly associated with arbitration because Solomon=s famous Ajudgment@ forms the basis for one of the most pervasive complaints about modern-day arbitration awards: Asplitting the baby.@[6]

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[4] See Matthews, *supra* note 12 at 22.

[5] James E. Beckley, *Equity And Arbitration,* 949 PLI/Corp 3l, 35 (July-August, 1996).

[6] John A. Sherrill, AEffectively Resolving Business Disputes Through Arbitration,@ Inside the Minds: Alternative Dispute ResolutionBLeading Lawyers On The Art & Science Of Arbitration, Mediation & More, Aspatore Books (2004). See also discussion of compromise awards by arbitrators beginning at page 11 *infra*.

2. Modern Arbitration. The origins and development of modern arbitration is illustrated in the following story:

Once upon a time, people sought to avoid the courts and turned to an alternative to litigation....The commercial community, who found the courts to be inefficient and inattentive to their specific needs, began to adopt and adapt this alternative. Before too long, the courts got involved and began using the process to divert cases it couldn=t or didn=t want to handle. The alternative thrived in its newfound role as an efficient means to resolve commercial disputes and as a legitimate institutionalized partner of the legal system, but there was trouble on the horizon. Observers began to question the fairness of its use. Some lawyers found the alternative threatening because it seemed antithetical to the accepted role of the adversarial system...Courts and policy makers began exercising more oversight and control over the process. Eventually, disputants found that the alternative was growing more and more similar to, if not sometimes indistinguishable from, the adjudication for which it was meant to substitute. While its use had become pervasive in society, the alternative was dead as an alternative. Disputants had lost control over the process, which no longer seemed as effective in reducing hostility, reconciling adversaries, promoting community, and producing efficient outcomes as it was once upon a time.[7]

Though this story sounds contemporary and eerily familiar it is, in fact, a description of the evolution of arbitration in England from the tenth to the late nineteenth

[7] Douglas Yarn, *The Death of ADR: A Cautionary Tale of Isomorphism Through Institutionalization*, 108 Penn. St. L. Rev. 929, 930 (Spring 2004).

centuries,[8] a practice which began as a conciliatory process and evolved into an adjudicative procedure.[9]

[8] *Id.* at 930.

[9] Id at 930. (This memo will go on to say that the exact complaints about the English system that arose over a thousand year evolution have arisen in the United States in a significantly shorter history.)

By the twentieth century, arbitration in England had become virtually the same process as litigation which, according to some scholars, resulted in its demise as a form of alternative dispute resolution; the cause of death being Aisomorphism.@[10] While some may dispute that arbitration in England actually Adied,@ history is clear that English arbitration evolved from a process of great popularity into one of great hostility.[11] And, the striking similarities between the criticisms of English arbitration and the criticisms of contemporary American arbitration should not be ignored. AThose who cannot remember the past are condemned to repeat it.@[12]

3. Arbitraion in America. The same hostility that flourished in England developed in America until the passage of the Federal Arbitration Act in 1925 which reversed a long

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[10] See Yarn, *supra* 35 at 1012. AIsomorphism@ is defined as Abeing of identical or similar form or shape or structure,@ Webster=s Ninth New Collegiate Dictionary (1985).

[11] See Beckley, *supra* note 16 at 44.

[12] George Santayana, The Life of Reason, Volume 1 (1905).

period of judicial hostility.[13] However, the Amodern era of American arbitration@ had already begun earlier in the 1920's with the passage of a New York state statute upon which the federal legislation was modeled which codified agreements to arbitrate future contract disputes enforceable.[14] The vast majority of states subsequently enacted similar measures, many adopting versions of The Uniform Arbitration Act,[15]and today the public policy in favor of enforcing arbitration agreements is now nearly uniform across the country.[16] Further, the U.S. Supreme Court has made it clear that judicial favor of arbitration is the law of the land by declaring that arbitration clauses will be enforced even in consumer contracts.[17]

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[13] Id.

[14] See Stipanowich, *supra* note 18 at FN 2.

[15] Id.

[16] See Matthews, *supra* note 12 at 22.

[17] Id at 24 citing Shearson/American Express, Inc. v. McMahon, 482 U.S. 220

B. The Relationship: Arbitration and the Construction Industry.

1. Role of the AIA. Arguably, arbitration has been more closely identified with the construction industry than any other area of commercial enterprise, this identification due in no small part to the AIA. The AIA traces its history to the year 1857.[18] Since 1866 the AIA, responding to what it viewed as an urgent need, has been the leading promulgator of standardized contract documents for the construction industry.[19] And, for more than a century mandatory arbitration, as the sole binding dispute resolution procedure, has been a part of the AIA documents.[20]

2. Role of the AAA. Since before World War II, the AIA has worked in virtual partnership with the American Arbitration Association (AAA) by making the AAA the

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(1987).

[18] See <http://www.aia.org/about_history> (last visited 10/13/04).

[19] Id.

[20] G. William Quatman, FAIA, DBIA, Esq., *The AIA=s New (and Improved) Design-Build Contracts, Good News for the Design-Build Community,* The Construction Lawyer (Spring 2005). ***(Check this citation since it was taken from the AIA website

designated administrator of AIA contractually mandated arbitration.[21] As a result of this exclusivity in AIA contracts, the AAA has been described by at least one author has having a near monopoly on dispute resolution in the construction industry, [22] and the AIA=s contract system has become so commonly known and accepted as to be considered ubiquitous.[23]

3. AIA=s Movement Away From Arbitration Solely. Considering these facts, it is not an understatement for an industry professional to view the AIA=s 2004 move away from arbitration as the *sole* binding method of dispute resolution as a Amajor

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and confirm if it or website should be cited....)

[21] Stephen K. Huber, *Arbitration And Contracts: What Are The Law Schools Teaching?,* 2 J. Am. Arb. 209, 216 (2003).

[22] Lisa B. Bingham, *Control over Dispute -System Design and Mandatory Commercial Arbitration,* 67 Law & Contemp. Probs. 221, 226 (Winter/Spring 2004).

[23] Thomas J. Stipanowich, *The Multi-Door Contract And Other Possibilities,* 13 Ohio St. J. on Disp. Resol. 303, 307(1998); see also, Webster=s Ninth New Collegiate Dictionary (1985), which defines Aubiquitous@ as, Aexisting or being everywhere at the same time; widespread.@

philosophical and formatting change.@[24] AIA=s 2004 design-build contract forms allow the parties to designate whether they will arbitrate, litigate, or resolve the dispute by some third method of their choosing.[25] This Amajor philosophical change@ by AIA is not limited to its design-build contract forms. The proposed drafts of the 2007 *A201 General Conditions of the Contract for Construction* (AIA=s most recognizable and most used form) contains the same dispute resolution provisions: arbitrate, litigate, or resolve the dispute by some third method of their choosing.[26]

4. Significance of the Change. Major philosophical changes which result in a departure from century old procedures do not occur in a vacuum. The motivating factors

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[24] See Quatman, *supra* note 3, at _____.

[25] See Exhibit A, ATerms and Conditions,@ section 6.2, AIA A141.

[26] Telephone interview, Suzanne Harness, Managing Director of Documents and Counsel, AIA, Washington, D.C. (October 12, 2005). It should be noted that Ms. Harness emphasized that the 2007 documents are only drafts and could change. However, the drafts were developed after input from industry representatives of several construction disciplines and deliberative consideration by the AIA document committee which is comprised of architects representing different specialities and geographic regions and who serve 10 year terms.

of such a significant shift may be the result of discrete nuances within the construction industry or, more particularly, the construction dispute resolution industry. This shift may also be an indication of trends that will be observed not only within the construction industry, but eventually across the entire commercial/business community--hence, the purpose of this memo.

5. Possibility of Trends. Is the AIA=s change in philosophy the result of factors unique to the construction industry, or does it indicate a larger trend? It does not seem merely coincidental that the AIA has departed from arbitration as the sole dispute resolution procedure at the same time that a leading commercial arbitration scholar and expert noted that Aarbitration is under unprecedented pressure.@[27] And, it would appear to be an equally unlikely coincidence that other dispute resolution scholars have been particularly critical of arbitration in employment cases[28] as well as in consumer

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[27] Telephone interview, Thomas J. Stipanowich, President & CEO, International Institute for Conflict Prevention & Resolution (CPR Institute) (October 7, 2005).

[28] Jean R. Sternlight, *In Search Of The Best Procedure For Enforcing Employment Discrimination Laws: A Comparative Analysis,* 78 Tul. L. Rev. 1401, 1426,1427 (May

cases,[29]decrying its unfairness as a process that is forced by employers on legally weaker employees which denies them certain fundamental rights, or as a process which cannot be fundamentally fair to consumers and at the same time economically feasible.

6. Major Changes Raise Major Questions. This memo suggests that such events, beliefs and commentary beg several questions:

$ What are the reasons for simultaneously occurring change and criticism?

$ What are the specific events or circumstances which are the cause of criticism of arbitration?

$ To what degree is there a causal relationship between the criticisms and the movement away from exclusive reliance on arbitration by the AIA or other key players?

2004).

[29] Joseph M. Matthews, *Consumer Arbitration: Is It Working Now and Will It Work in the Future?,* 79-APR Fla. B.J. 22, 28 (April 2005).

$ To what degree is there a shared criticism of various arbitration methodologies, policies and procedures?

$ To what degree is there a commonality of criticism of arbitrations conducted over a range of subject matter or industry?

$ Is there a trend away from arbitration in certain segments of the commercial arena[30] or are there merely trends towards having more options?

$ Are any such trends discrete and independent of other segments of the commercial world or are such trends connected by some common theme?

$ Is arbitration under unprecedented pressure and criticism?

$ To what degree is arbitration in danger of being found in general disfavor by the commercial community?

The AAA, though its relationship with the AIA remains strong and vibrant, is concerned that the change in the AIA contracts may be more than a mere Aoption@ to

[30] While many ADR practioners, providers and scholars do not include consumer and labor/employment arbitration in the category of Acommercial@ arbitration, this memo

resolve disputes by contracting parties. The AAA questions whether such changes portend a growing dissatisfaction with arbitration as a desirable method of dispute resolution.[31]

The list of questions is potentially unending. Answers to these and other questions are temporally and critically important. The answers, or the ability to suggest answers, requires mining data through quantitative and qualitative research methods. Hence, this memo suggests that the need for study and research is compelling. **C. Criticisms and Implications.**

One question that is critical to the future of arbitration, and to which history provides significant instruction, is whether arbitration continues to be a process separate and distinct from litigation or whether its evolution has resulted in an erosion of its distinctiveness. The juxtaposition of arbitration to litigation is one of the significant

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includes them in that category for the purposes of this discussion.

[31] Personal Communication, Brian Winn, Regional Vice President, American Arbitration Association, Atlanta, Georgia (May 2005).

challenges facing contemporary arbitration and is one of the compelling reasons for new study and research on the use and popularity of this long standing method of dispute resolution.

1. Creeping Legalism or Malleability? Experienced professionals in the field of arbitration readily agree that there is growing criticism that arbitration is becoming too much like litigation, but there is significant disagreement over whether that is a bad thing.[32] Indeed, many criticisms of traditional arbitration (i.e., lack of discovery, lack of appeal, lack of motion practice, etc) are basically complaints that arbitration is not enough

[32] Telephone interview, John W. Hinchey, Partner, King & Spalding, LLP (October 5, 2005); Telephone interview, Thomas J. Stipanowich, *supra* at n.10; Thomas J. Stipanowich, *Beyond Arbitration: Innovation and Evolution in the United States Construction Industry,* 31 Wake Forest L. Rev. 65, FN 64 citing John W. Hinchey, *Yes, We Do Need Special Rules for Complex Construction Cases,* Construction Law., Aug. 1991, at 1; Luther P. House & Brian G. Corgan, *No, Don=t Inhibit Arbitration with Courtroom ADue Process,@* Construction Law., Aug. 1991, at 1; Telephone interview, Wearen Hughes, Partner, Bass, Berry & Sims, Nashville, Tennessee, experienced commercial arbitrator and lecturer (October 11, 2005); Gerald F. Phillips, *Is Creeping Legalism Infecting Arbitration?*, 58-APR Disp. Resol. J. 37, 39 (February-April, 2003).

like litigation and that its purported attributes are in reality serious deficiencies.[33] In fact, past research indicates that some practitioners would like to remake arbitration in the image of civil litigation.[34]

[33] See Sherrill, *supra* note 17; see Stipanowich, *supra* note 18 at 441; personal communications with attorneys in Nashville, Tennessee and Atlanta, Georgia, and personal experience as an arbitrator having hundreds of attorneys appear before me.

[34] See Stipanowich, *supra* note 18 at 477, referring to findings of an ABA survey of attitudes toward commercial arbitration directed to practicing attorneys in 1985 and 1986. The survey was sponsored by the Forum Committee on the Construction Industry and the Construction Litigation Division of the American Bar Association Litigation Section. This survey was the first such major independent undertaking since the early 1960's.

The Aarbitration should be an alternative vs. arbitration should be like litigation@ debate intensified in the 1990's as arbitration has been called upon to take on the burden of almost the entire spectrum of civil rights and remedies.[35] The debate varies in intensity among different types of arbitration[36] and this is why some experts believe that the debate is misplaced altogether, that arbitration cannot be monolithic in character and that the flexibility of arbitration which allows it to be responsive to both simple and complex cases is what should be focused on.[37]

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[35] See Stipanowich, *supra* note 6 at 341, 342.

[36] Id at 342.

[37] See Stipanowich, *supra* note 25 at 78 and FN 66 quoting one experienced lawyer and arbitrator observing that the ability in arbitration to tailor the dispute resolution procedure for the particular transaction cannot be underestimated. See also Hinchey interview, *supra at note* 25. Mr. Hinchey believes that the primary point is being missed. He believes some cases call for quick, no discovery, inexpensive arbitration and other, more complex, cases should be more like litigation, but with the convenience in scheduling that arbitration affords (i.e., not having to work around a judge=s criminal docket). It is Mr. Hinchey=s position that criticisms of arbitration need to considered in light of the type of case from which the criticism arises and that participants, due to the flexibility of the process, need to realize they should put in place the things necessary to eliminate that criticism. In other words, Aarbitration doesn=t come in just one flavor.@ He

also points out that comparisons like, AI like mediation, but I don=t like arbitration,@ are like comparing apples and oranges and indicate a lack of understanding of the entire dispute resolution process. Mr. Hinchey would agree with Helder and Dinwoodie that, AUnder the paramount arbitral principle of party autonomy, the parties have virtually unfettered discretion to choose the structure under which their disputes will be decided.@, see Laurence R. Helfer, Graeme B. Dinwoodie, *Designing Non-National Systems: The Case of the Uniform Domain Name Dispute Resolution Policy,* 43 Wm. & Mary L. Rev. 141, 193 (2001).

Some scholars have expressed analogous thoughts about ADR in general, positing that such procedures are Aincredibly malleable and can yield better or worse effects depending on many things, especially how people use them.@[38] Nevertheless, the debate is important, and its resolution could significantly affect the future of arbitration in this country. The Adebaters@ include arbitrators, dispute resolution services providers, lawyers and business people. Business people are increasingly striving to find opportunities to avoid using lawyers and, in fact, the long standing battle between attorneys and businesspeople has been portrayed as a struggle for the Asoul of arbitration.@[39] Some say lawyers are guilty of Ahijacking the arbitration process@ and are the ones at fault for turning an alternative to litigation into just another part of the problem;[40] others blame

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[38] John Lande, *Shifting the Focus From the Myth of AThe Vanishing Trial@ to Complex Conflict Management Systems, or I Learned >Almost= Everything I Need to Know About Conflict Resolution From Marc Galanter,* to be published in the Cardozo Journal of Conflict Resolution, (DraftBJune 16, 2005).

[39] See Stipanowich, *supra* note 6 at FN 142.

[40] Id at FN 187.

arbitrators and lawyers equally.[41] Regardless, commercial arbitration, especially in complex, high-stakes disputes, has taken on more and more of the characteristics of a court trial and has been referred to as the Anew litigation.@[42]

[41] See Phillips, *supra* note 25 at 39.

[42] Thomas J. Stipanowich, *ADR and the Vanishing Trial: The Growth and Impact of Alternative Dispute Resolution,* Journal of Empirical Legal Studies, Volume 1, Issue 3, 843-912, November 2004 at 894.

This Acreeping legalism@[43] is viewed as a disturbing trend to many experienced arbitrators and advocates who believe it threatens to undermine arbitration as a low cost, speedy and efficient alternative to litigation.[44] The view that arbitration has Abegun to look, smell and feel like the litigation process it was designed to remedy@[45] is neither novel or fairly debated. A natural by-product of arbitration becoming more like litigation is that it becomes just as expensive and time consuming as a court trial,[46] and, Alike the color change in a chameleon, has become more like the court system to which it was touted as a rescuing alternative.@[47]

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[43] See Phillips, *supra* note 25.

[44] Id. The author surveyed 85 leading commercial arbitrators around the country and 72% of the respondents said that arbitration was becoming too much like court litigation. See also Sherrill, *supra* note 17.

[45] Robert N. Dobbins, *The Layered Dispute Resolutions Clause: From Biolerplate to Business Opportunity*, 1 Hastings Bus. L.J. 161, 175 (May 2005).

[46] Id.

[47] Id at 174.

2. ASplitting the Baby.@ Another question laced with criticism is age old, harkening back to Solomon=s famous judgment of Asplitting the baby.@[48] One author has dealt with this complaint and has identified the significance of it as a complaint arising solely from a comparison to litigation, a comparison which may be inherently flawed, and which, in large part, finds its genesis in arbitrators= historical reluctance or inability to award punitive damages.[49]

The issue of arbitrator Acompromise@ is not limited, however, to whether an arbitrator will not or can not award punitive damages. Some have suggested that arbitrator incompetence leads to unjustifiable compromise[50] or that it is the ability or inclination of arbitrators to Adiscover so much equity and justice on both sides which induces them to strike a medium, which is, ironically, a liberty not afforded trial judges

[48] See Sherrill, *supra* note 6.
[49] See Sherrill, *supra* note 6.

[50] Thomas J. Stipanowich, *Rethinking American Arbitration,* 63 Ind. L. J. 425, 450 (Summer 1998).

who must at times take half arguments for whole ones in order to make a decisive ruling one way or the other.[51]

3. A Need for Research is Indicated. Certainly, there is ongoing debate over whether Asplitting the baby@ truly is a significant occurrence in arbitration awards and, if so, whether it has any legitimate place in this form of dispute resolution.[52] However, this debate will add little to the study and practice of arbitration without research of both questions being debated. Moreover, the advice of scholars in terms of how to react to the possible demise of the courtroom trial is equally sound advice in terms of our reaction to changes in arbitrationBbefore becoming horrified at the possible demise of commercial arbitration, Awe should have a clearer picture of the actual changes and their

[51] Id at FN 154 citing David Hume, *A Treatise of Human Nature, Vol. II, Book III, Part II, Section IV,* in THE GREAT LEGAL PHILOSOPHERS: SELECTED READINGS IN JURISPURDENCE 211 (C. Morris ed. 1959).

[52] Telephone interview, John A. Sherrill, Partner, Seyfarth Shaw LLP, Atlanta, Georgia (October 5, 2005); Personal experience as a commercial and construction arbitrator since 1987.

consequences.@[53] Meaningful and contemporary empirical data should help to create this clearer picture.

D. Prior Empirical Research.

1. Data Inherently Lacking in Arbitration. One of the primary characteristics of the arbitral process is that arbitral tribunals, both historically and in modern practice, do not produce or maintain written records of their operation.[54] Many times, even when written records are maintained, they are not willingly shared. Unlike some providers of arbitration services, the AAA has kept limited longitudinal caseload records which it is willing to, and does, make available.[55] Interestingly, the AAA, after a 264 percent increase in its filings between 1993 and 2002, and a steady increase in filings each year, had filings drop to 15,800 in 2003 from 17, 000 in 2002.[56]

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[53] See Lande, *supra* note 38 at _____.

[54] Id.

[55] See Stipanowich, *supra* note 34 at 872.

[56] Id.

So, a fundamental issue, and perhaps a restraint in terms of arbitration research of any kind, is the nature of arbitration itself. Being historically a private, confidential process, and being a process which is not based on precedent, there is, by definition, a dearth of written records from which to develop comprehensive research protocol. In fact, this fundamental characteristic of arbitration is itself an object of criticism by some who oppose such a system because they view it as one where no principles will be established and no one will know why the arbitrators did what they did, meaning cases would be dealt with Ahugger-mugger.@[57] The point is, through no fault of prior researchers, there does not appear to be an abundance of recent research or data on arbitration as a process.[58]

[57] See Stearnlight, *supra* note 11 at 1447.

[58] For a comprehensive review of the surveys and studies of commercial arbitration from the mid-1950's through the mid-1980's, including studies by the University of Chicago, Mentschikoff, Harvard Business School, Kritzer-Anderson and the ABA Forum Committee on the Construction Industry and the Construction Litigation Division of the ABA Litigation Section, see Stipanowich, *supra* note 18 at 453-487. And, for a comprehensive review of the 1991 ABA Survey on Dispute Resolution (again focusing primarily on the construction industry), and the 1994 Multidisciplinary Survey On Dispute Avoidance And Resolution In The Construction Industry, see Stipanowich, *supra* note 25 (*Beyond Arbitration...).*

2. Age of Past Research. Much of the most recent data on commercial arbitration dates back 10 years or more,[59] and there are calls for more research from commentators in the field.[60] For many years, one leading expert on commercial arbitration has suggested that the lack of meaningful empirical data has hampered efforts to determine how effectively arbitration works.[61] Of the data available, at least in the field of construction arbitration, past research indicates that arbitration is viewed less favorably in terms of being an effective process, while, in contrast, mediation is viewed more favorably and is preferred over arbitration.[62]

3. An Opportunity for Research. No doubt there will always be a need for such carefully crafted and effectively executed research.[63] However, this memo suggests that a

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[59] See Stipanowich, *supra* note 25.

[60] See Bingham, *supra* note 5 at 249, 250; see Stipanowich, *supra* note 18 at 432; see Stipanowich, *supra* note 34 at 909-912; and see Christopher R. Drahozal, *A Behavioral Analysis of Private Judging*, 67 SPG Law & Contemp. Probs. 105, 107.

[61] See Stipanowich, *supra* note 18 at 432.

[62] See Stipanowich, *supra* note _ (Beyond Arbitration...)

[63] Id at 912.

unique opportunity has presented itself to study construction arbitration as a discrete segment of commercial arbitration and, more specifically, to study a dispute resolution system and philosophy which has been based almost exclusively on arbitration. An opportunity exists to craft research which categorizes some of the complaints about arbitration, attempts to determine if the complaints have affected the use of the process and if they are valid, and compares the criticisms to the growth of mediation and other processes to try and determine if any decline in arbitration is the result of other processes working better or as a result of independent dissatisfaction with arbitration

III. Research Method.

This memo proposes research which will be ambitious. The goal Aat the end of the day@ is to have a pool of meaningful and comprehensive research, both qualitative and quantitative, which will provide, in essence, a data base for commercial arbitration. This data base will, by design, be intended and structured to be added to and built upon. Previously conducted research has not provided for the aggregation of data to allow the generalization to a greater population.

A. Description and Justification of Research.

Develop and utilize an interview protocol to identify the independent variables that have caused the significant paradigm shift within the AIA 2004 Design-Build Contract forms as well as the proposed drafts of AIA 2007 A201 General Conditions of the Contract for Construction. Identification of these independent variables is important for several reasons:

1. Identify the cause of these changes and any resulting trends, i.e., whether dissatisfaction with arbitration or merely the availability of other dispute resolution procedures.

2. Once identified, determine if and to what extent these variables can be generalized to the greater commercial arbitration universe.

B. Description of Research Populations and Sampling.

Initially, the construction industry representatives and the AIA document committee (see footnote 26). Conceptually, additional and more specific groups would be identified for follow up or Asecond tier@ interviews, etc.

C. Description of Materials.

Development of a primarily qualitative interview protocol which will form the basis for identifying larger populations and data necessary to design quantitative research protocols.

D. Description of Research Procedures.

1. Interview Suzanne Harness of AIA to identify the construction industry representatives and the criteria utilized in selecting these individuals.

2. Identify members of the AIA document committee and the industry representatives.

3. Interview the persons identified.

4. Analyze the interview data and establish follow up procedures and protocol for broader populations and broader qualitative and quantitative research methods.