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A Macro Look at Commercial Disputes Among Businesses Within the Aviation Industry and Proposed Processes To Effect Positive Change

A Project Through the
Dispute Systems Design Workshop
at
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A MACRO LOOK AT COMMERCIAL DISPUTES AMONG BUSINESSES WITHIN THE AVIATION INDUSTRY AND PROPOSED PROCESSES TO EFFECT POSITIVE CHANGE

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THROUGH THE MORITZ COLLEGE OF LAW DISPUTE SYSTEM DESIGN WORKSHOP[*]

ABSTRACT

One size does not necessarily fit all, and we know square pegs just don't seem to fit in round holes. But on the quest to find the *perfect fitting* dispute resolution process, frustrations may abound and time constraints can often lead to parties selecting the *quickest* process, not necessarily the *most effective* process. What started out as an examination of commercial arbitration in the aviation industry evolved, over the course of just one semester, into a survey of the current and potential uses in the international aviation industry for a broader spectrum of dispute resolution processes for use in commercial disputes within the industry. With the guidance, vision, and vast networks of Gary Doernhoefer and Professor Nancy Rogers, our group was able to interview over a dozen key industry stakeholders, attend the 2014 IATA Legal Symposium in San Francisco, and give a presentation at an Airlines for America Meeting (A4A). These experiences and subsequent interviews, combined with extensive research, allowed our group to develop creative dispute systems tailored to the aviation industry and its unique needs.

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[*] The Moritz College of Law Dispute Systems Design Workshop, in collaboration with Gary Doernhoefer, launched this research project in January 2014. Guided by Professor and Faculty Advisor Nancy Rogers, this group of five students—Brodi Conover, Michael Dallaire, Meaghan FitzGerald, Mariam Keramati, and Lauren Madonia—sought to use the international aviation industry as a broad case study for early-intervention dispute resolution processes. The Dispute System Design Workshop offers research and ideas for improving the processes used to prevent and manage disputes. Taken as a class by upper class law students, the Workshop's past clients include the Supreme Court of Ohio and the U.S. Air Force War College. Some Workshop reports are confidential, but several of its student-authored reports have been published, including a desk book for judges on starting mediation programs that garnered the CPR Award for student writing.

Section 1 summarizes the research methods utilized and the industry needs uncovered during this discovery process. While our findings by no means represent a comprehensive survey of the industry and its participants, our research enabled us to refocus the project and uncover needs within the industry that we hope will ultimately effect positive change.

Within this seemingly dispute-free industry, several key interests became evident: (1) relationships matter, (2) most disputes are resolved informally, (3) industry buy-in is *imperative*, (4) the process needs to promote discussions rather than battles, (5) cost and time efficiency are central considerations, and (6) when asked about current options for their-party dispute resolution processes, most industry participants prefer non-binding decisions. These interests, each uniquely vital to the success of an industry-wide dispute resolution process, may be met in a variety of ways. As such, we wanted to give stakeholders and potential disputants *options* and *flexibility* in selecting a process.

From our research was born the Toolkit: a collection of dispute resolution "tools" or processes designed to both preempt disputes (pre-contract tools) and nip disputes in the bud once they have begun (tools used once disputes arise). Section 2 of this paper will introduce each tool and elaborate on its projected efficacy. The Toolkit has five main "tools": (1) ADR Step-Clauses, (2) In-House Chief ADR Officer, (3) Third-Party Neutrals in Settlement, (4) Mediation, and (5) Arbitration. Each tool aims to satisfy several key interests and may be implemented through a variety of dispute resolution mechanisms.

But our quest to develop the ideal aviation industry-wide dispute resolution process cannot end here. Section 3 discusses steps that must be taken to implement the Toolkit and ideas for larger-scale, long-term dispute system implementation. Though we were able to interview key stakeholders from airlines and airports, there are still unrepresented interests that need to be

uncovered and incorporated before presenting this idea to the industry as a whole. It may also be worthwhile to narrow the scope of follow-up research and focus on capturing the interests of a given industry (e.g., cargo, vendors, etc.). This could lead to the development of a sector-specific pilot program, which could provide helpful feedback and improvements prior to a larger-scale launch.

The research, analysis, and proposals herein claim to be neither final nor representative of *every single* stakeholder interest. Rather, they serve more as a springboard for continuing research. At the end of the day, we hope these researching findings and creative proposals can assist the aviation industry in achieving positive change, while staying true to our mantra: “Do no harm.”

Every law student expects to meet a “celebrity” or two while in law school – professors who have authored casebooks and clerked for Supreme Court Justices, who are generally regarded as experts in their respective fields. Most law students, however, do not expect to have a videoconference with the General Counsel of an international trade association, or sit down for coffee flanked by a founding member of Orbitz and the General Counsel for Qantas Airlines. These—and more—were the opportunities presented to our workshop this semester. From these opportunities grew a solid foundation for continuing research.

SECTION 1: RESEARCH FINDINGS

A. Means of Transportation: Research Methods

Just as the focus of this project evolved over the course of the semester, so too did the research methods used. At the outset of the semester, we recognized the fundamental need for a big-picture understanding of both the aviation industry and dispute resolution processes. Professor Rogers, an expert in the field of Dispute Resolution, guided us down the path of theory-based research. We focused first on arbitration, looking at best practices promulgated by arbitration associations, deciphering which types of disputes are usually well-suited for arbitration, and uncovering variations of the standard arbitration process in terms of both what currently exists and what could be designed to put in place.[2] As our interviews shed light on an industry aversion to arbitration, our focus began to shift toward earlier-stage processes such as negotiation and mediation.

Establishing a solid foundation in theory was crucial for the application of our research; but in order to acquire this data and research we needed connections within the industry. Lucky for us, Gary Doernhoefer was willing to both paint a foundational picture and connect us with his vast network of industry participants. Through several in-person interviews and email communications, Gary explained the basics: the industry collegiality, the long-term contracts and relationships, and the highly technical nature of the work.

Though his experiences in the aviation industry were overwhelmingly positive, he also expressed growing disillusionment with the effectiveness and efficiency of pre-litigation

[2] For example, we looked at the International Institute for Conflict Prevention & Resolution's "Rules for Expedited Arbitration of Construction Disputes," which shed light on novel arbitration rules that can be implemented to create cost and time efficiencies. *See also* "Webinar: Tips on Achieving Cost-Effective Arbitration – For Lawyers and Neutrals," ABA: Section of Dispute Resolution (21 Jan. 2014) (also commenting on methods that can cut back on costs and time needed in arbitrations).

processes such as arbitration. Gary was chosen to be an arbitrator for a high-profile aviation dispute several years ago. He proposed a cap on his fee, but the other two other arbitrators were paid by the hour without a cap. Despite deadlines set in the parties' arbitration provisions, the matter dragged on for months. Separately, as a party to arbitration, Gary was surprised to discover a tribunal had selected a four-star resort on the North Sea as the venue for hearings. Not only were the parties forced to pay these exorbitant travel, lodging, and arbitrator rates, but also the arbitration hearing was a veritable circus. Without a document winnowing process such as discovery or a disciplined pre-trial preparation, parties spent costly time at the hearing sifting through documents, only to use their witness examination time authenticating documents and verifying signatures.

In the hopes of encouraging a more cost- and time-effective process, Gary began compiling a list of names—names of key stakeholders and knowledgeable industry participants alike who were willing to help us in our research. Our first step prior to conducting interviews in the field was to assess potential stakeholders and interests. This step, sometimes termed "stakeholder analysis," allowed us to identify and better understand the following:

- The parties who are affected by alternative dispute resolution in the aviation industry,
- Their goals and interests, and
- The relationships among these affected parties.[3]

Opportunities arose to attend the A4A meeting in Washington, DC and IATA Legal Symposium in San Francisco, both of which were crucial to our assessment of (1) aviation industry needs, and (2) key stakeholders. It became apparent that, here, stakeholders have short- and long-term

[3] ROGERS, NANCY ET AL., DESIGNING SYSTEMS AND PROCESSES FOR MANAGING DISPUTES 69–70 (Wolters Kluwer 2013).

interests that must be met by their dispute resolution process in order to maintain party satisfaction. These and other interests will be discussed more fully below in Section 1.II.

Once we completed the general survey of the industry—"stakeholder analysis"—we began contacting those within the industry for interviews. In Appendix A, you can find a list of the interviews we conducted. Prior to these interviews, we compiled a general list of probing questions that we hoped would trigger commentary on a company's or organization's experiences with dispute resolution.[4] But these questions were merely suggestive and, in fact, most interviews covered a broader swath of information than the questions could have anticipated.

B. Key Takeaways: Research Findings & Stakeholders' Interests

These interviews confirmed and further supplemented Gary's initial picture; they filled in gaps between practice and theory; and they allowed us to construct a more accurate relationship map of the aviation industry as a whole. A trend began to emerge in our feedback – *formal* disputes between businesses within the aviation industry seem to be few and far between. Parties rarely litigate, and arbitration is viewed with more displeasure than one might initially expect. Throughout the industry as a whole, we observed a set of six key takeaways, or "interests," that most parties considered when selecting and carrying out dispute resolution: (1) relationships matter, (2) most disputes are resolved informally, (3) industry buy-in is *imperative*, (4) the process needs to promote discussions rather than battles, (5) cost and time efficiency are central considerations, and (6) most industry participants prefer non-binding decisions, though this preference is based on current options. We will explore each of these

1. Relationships Matter

[4] *See* Appendix B.

The aviation industry is a close-knit, collegial community, both due to its size and the specialized nature of its subject matter. As such, parties tend to shy away from (or use as a last resort) more litigious or adversarial forms of dispute resolution. Further, many sectors of the aviation industry are comprised of relatively few companies. This reality creates an environment where relationships are valued because options are limited. Nearly every airline and parts manufacturer we spoke to expressed this sentiment, particularly regarding long-term manufacturing contracts. Where parties have agreed to work together throughout the life of a fleet of commercial aircraft, for example, neither party wants to sour the relationship with aggressive contract enforcement. Moreover, parties seemed less inclined to pursue more aggressive dispute resolution such as arbitration or litigation against a party with whom they shared trust and had an established relationship.

2. Most Disputes Are Resolved Informally

Knowing that parties must deal with each other over long periods of time and in close quarters, many disputes are resolved through face-to-face negotiations. Also, due to the highly technical nature of many industry disputes, parties tend not to trust outside, general practice attorneys who may not have the technical expertise required to fully assess the situation. Many of those interviewed said that after a dispute arises, parties will often sit down together and analyze the problem, the facts (as each side perceives them), and the costs. The final consideration, costs, will generally incentivize a quick and creative solution, even if that means one party concedes more ground than she might otherwise like to.

3. Industry Buy-In Is Imperative

For any product to sell, consumers must believe in its usefulness and effectiveness. In an interview with a prominent attorney who specializes in aviation industry dispute resolution, he

emphasized the importance of industry buy-in. If certain stakeholders feel ostracized or disadvantaged, or, if stakeholders lack trust in the legitimacy of the process, the process is destined to fail. In Section 3 below, we propose long-term avenues for building process legitimacy and standardization in aviation dispute resolution.

4. The Process Needs to Promote Discussions Over Battles

True to our animal instincts, when humans feel threatened they assume either attack or defense positions, neither of which is conducive to effective and expedient dispute resolution. When processes incentivize open and honest discussions, parties act as their own judges or arbitrators, eliminating the need for costly and time consuming processes. This takeaway, when viewed in light of the established industry collegiality, may seem easily accommodated. A given dispute resolution process, however, may not incentivize collegiality and speedy resolution. Scott Casey from UPS highlighted the importance of maintaining a discussion-oriented tone during dispute resolution. Battles can often be avoided if parties have clearly laid out contract terms and dispute resolution processes prior to signing the contract. He noted that form contracts with enumerated dispute processes could complement the flexibility that companies' desire (read: non-binding) while also setting a positive tone for the business relationship and spirit surrounding the deal.

5. Cost and Time Efficiency Are Central Considerations

As Gary's North Sea arbitration experience detailed above illustrates, time and money are of the essence. Not only do these inefficiencies degrade trust in a process, but also they negatively impact business timetables and bottom lines. After all, a majority of the stakeholders at issue here are service providers. Be they ground handlers, airports, vendors, or airlines, each

stakeholder has customers who rely on their goods and services. Cumbersome and expensive dispute resolution serves little purpose other than to interfere with "business as usual."

6. Most Industry Participants Prefer Non-Binding Decisions

Unpredictability drives this key takeaway. By and large, most stakeholders with whom we spoke expressed mistrust in more binding dispute resolution processes such as arbitration. Without an appeals process, reliable precedent, and consistent enforcement, many companies avoid the judgment of the arbitrator when possible. In fact, one major airline told us that it has a strict policy *against* arbitration for these very reasons – arbitration's unpredictability (based on current models of arbitration) breeds a lack of accountability among arbitrators and a subsequent lack of trust among parties.

II. AVIATION INDUSTRY DISPUTE RESOLUTION TOOLKIT

A. Introduction

In an industry as vast and complex as global aviation, one size does not fit all. For that reason, the following two Sections blueprint a Toolkit intended to provide in-house counsel and business personnel in the aviation industry a concise encapsulation of mechanisms and processes that may enhance efficiency and predictability in resolving business-to-business disputes. The Toolkit is organized by the phase in a dispute's lifecycle in which each collection of tools should be contemplated and implemented. Section B proposes pre-dispute tools, which companies may consider before, or at the outset of, a contractual relationship. Section C examines several processes that can be employed after a dispute has arisen. It also highlights mechanics, necessary components, and improvements of each process for successful deployment in the aviation industry.

B. Pre-Dispute Tools

Far-sightedness and proactivity are essential to developing any efficient, effective dispute resolution system. In an industry as networked as aviation, advance planning for business-to-business disputes not only facilitates efficiency during the dispute resolution process, but also helps preserve ongoing commercial relationships between contractual partners post-dispute. By implementing at least a framework for resolving future disputes at the outset of a contractual relationship, parties can avoid the inevitable emotion and divisiveness that accompany that same discussion were it to take place after a dispute has arisen.

Two key tools may help companies form a comprehensive, proactive approach to dispute resolution that will allow them to cut directly to the crux of a dispute, saving time, money, and relationships: (1) thoughtfully drafting a "step-clause" in each contract that provides the framework for how future disputes will be handled, and (2) training in-house counsel or another employee as a "Chief ADR Officer" to champion frequent and efficient use of ADR processes.

1. Step-Clauses

A "step-clause" requires parties to participate in negotiation, mediation, or some other form of non-binding ADR before resorting to an adjudicatory process like arbitration or litigation. Many in the aviation industry are hesitant to submit disputes to binding arbitration due to its rigidity, among other shortcomings. Other industry participants, however, recounted disputes in which a lack of any formalized process led disputants to entrench themselves in their respective positions, allowing emotion and bias to stall productive negotiation.[5] Utilizing step clauses in all contracts may help ameliorate both concerns by allowing some flexibility in

[5] Interview with senior airport official (lamenting emotion-driven negotiation sessions without a third-party neutral).

determining how to resolve a dispute while holding parties accountable to come to the table early to try to reach a fast, efficient settlement.

Judicial Arbitration and Mediation Services, Inc., ("JAMS"), the largest private ADR provider in the world, describes step-clauses as "by far the most cost-effective means of resolving a dispute" because "they often lead to a cost-effective, early settlement."[6] Further, and acutely relevant to the aviation industry, step-clauses "are particularly appropriate where the parties have a long-standing and ongoing commercial relationship."[7] Step-clauses' balance between efficiency and post-dispute preservation of commercial relationships seems to make them a logical fit in the heavily networked aviation industry.

a. Shortcomings of Current Use of ADR Clauses in the Aviation Industry

Contractual mechanisms contemplating future disputes seem to be used only sporadically and without uniformity in the aviation industry. For example, many ground service handlers use standard form agreements that include arbitration clauses.[8] However, older versions of the agreements do not specify which arbitration rules will govern a future dispute or any other term of arbitration, leaving those decisions to the parties at the time the dispute arises.[9] Leaving the terms of arbitration to be settled by parties down the road may not raise problems in the United States, but it does in countries like China. In China, courts "expect parties to have reached an

[6] JAMS CLAUSE WORKBOOK, *A Guide to Drafting Dispute Resolution Clauses for Commercial Contracts*, (January 1, 2011), http://www.jamsadr.com/clauses/#Resolution.
[7] International Centre for Dispute Resolution, *Guide to Drafting International Dispute Resolution Clauses*, 2, https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_002539.
[8] Peter Coles, *China: Ground Handling in China—Investors Beware*, MONDAQ, (December 9, 2003), http://www.mondaq.com/x/23645/Insurance/Ground+Handling+in+China+Investors+Beware.
[9] *Id.*

agreement on the rules that should be followed in the arbitration at the time the contract was entered into."[10]

Even when an ADR clause is enforceable, it appears some in the aviation industry rarely modify boilerplate language, failing to consider ways to increase time and cost efficiency in resolving future disputes.[11] Additionally, many aviation industry participants have expressed either reluctance to, or a firm policy against using mandatory arbitration clauses.[12] That reluctance stems from one of two sources: (1) distaste for the rigidity of arbitration,[13] or (2) concerns regarding the time and money spent on arbitrations that often produce an unsatisfactory, "split-the-baby" approach to resolving a dispute.[14]

b. Step-Clause Components[15]

A step-clause can serve as a vehicle for implementing any non-binding dispute resolution processes[16] as a precursor to proceeding to adjudication. The three primary forms of step-clauses are (1) negotiation-arbitration/litigation, (2) mediation-arbitration/litigation, and (3) negotiation-mediation-arbitration/litigation. These could be further modified by including a dispute review board, discussed in Section II.C.2. Evident in the title of each is the process or processes in which parties much engage before resorting to adjudication. The following sections analyze important components to consider when drafting various types of step-clause and the

[10] *Id.*
[11] Interviews with two aviation industry in-house counsel (noting arbitration clauses in standard form agreements utilized by ground service handlers are rarely modified and no well-thought out).
[12] *Id.* (indicating the counsel's airline has a strict policy against agreeing to arbitration unless there is no other option available).
[13] *Id.* (noting arbitration is used infrequently in the aviation industry).
[14] *Id.*
[15] While this subsection will highlight a few major types of step-clauses and analyze their general components, a step-clause should also be drafted with a company's unique needs and interests in mind.
[16] Note that "arbitration/litigation" is used as the final step in the process for all the step-clauses analyzed by this Paper due to the hesitancy of companies in the aviation industry to resort to binding arbitration. However, the sample step-clauses relied upon herein contemplate only arbitration as the final step. *See supra* Note 7 at 3–4; *see supra* Note 8.

way those components may address concerns voiced by interviewees and shortcomings of ADR clauses currently in use in the industry.[17]

i. Detailed Descriptions of Each Process

A properly drafted step-clause should spell out the detailed mechanics of each process it contemplates. The entire purpose of utilizing a step-clause is to set clear ground rules at the beginning of a contractual relationship for resolving a future dispute in order to circumvent unnecessary "mini-disputes" over those ground rules once a dispute arises. Detailed descriptions and definitions have elevated importance in cross-border agreements.[18] A step-clause that merely requires parties to "consult and negotiate with each other and . . . attempt to reach a satisfactory solution"[19] prior to moving to litigation opens the door to disputes over what constitutes satisfactory consultation and negotiation. Conversely, consider the following approach to the same clause:

> The parties shall attempt in good faith to resolve any dispute arising out of or relating to this Agreement promptly by negotiation between executives who have authority to settle the controversy and who are at a higher level of management than the persons with direct responsibility for administration of this Agreement. Any party may give the other party written notice of any dispute not resolved in the normal course of business. Within 15 days after delivery of the notice, the receiving party shall submit to the other a written response. The notice and response shall include with reasonable particularity (a) a statement of each party's position and a summary of arguments supporting that position, and (b) the name and title of the executive who will represent that party and of any other person who will accompany the executive. Within 30 days after delivery of the notice, the executives of both parties shall meet at a mutually acceptable time and place.

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[17] While the following sections highlight some specific, important considerations to be addressed in step-clauses, the beauty of them (and contract law in general) is that they can be tailored in innumerable ways to meet the unique needs of any business. In addition to the concerns highlighted in this Paper, general counsel and business personnel in any company should think critically about what aspects of the dispute resolution process (e.g., expediency, cost-efficiency, relationship-maintenance) matter most to their firm, and attempt to address those concerns on the front-end of their contractual relationships.

[18] *See* Talibah Peugh, *Alternative Dispute Resolution: A Study of the History and Function of ADR Techniques as Mechanisms for International Peacekeeping*, 25 T. MARSHALL L. REV. 139, 143 (1999) ("Where a language barrier exists between disputants, the parties should take care in clearly defining the terms in an ADR agreement in order to prevent confusion and further conflict.").

[19] *See* Note 7 at 3–4.

> Unless otherwise agreed in writing by the negotiating parties, the above-described negotiation shall end at the close of the first meeting of executives described above ("First Meeting"). Such closure shall not preclude continuing or later negotiations, if desired.[20]

The clarity and structure evidenced by the latter approach has much less potential to devolve into a "mini-dispute" and is more likely to positively propel the process forward.

Step-clauses requiring a third-party neutral process should include in their detailed description of the process any requirements as to the qualifications or duties of the third-party neutral. For example, several individuals involved in aviation industry disputes have voiced a preference for third-party neutrals with experience and expertise in the aviation industry. To avoid a "mini-dispute" over what constitutes an industry expert, a step-clause could be drafted to include specific qualifications,[21] or the clause could refer to a finite list of individuals.[22]

When money will have to be spent to facilitate a process—to pay a third-party neutral, for example—parties should address the division of that cost in the step-clause. Another common concern voiced by interviewees was the hourly-rate fee structure of arbitrators and mediators, which they believed gave no incentive to timely dispute resolution. The step-clause provides an opportunity to modify or cap the fees an arbitrator or mediator would be able to receive. Parties could even build in incentives for third-party neutrals who help bring about an expedient and agreeable settlement, though in the United States, Standard VII.B.1. of the Model Standards of Conduct for Mediators states that mediators "should not enter into a fee agreement which is contingent upon the result of the mediation or the amount of the settlement." Section II.C.3. below discusses another concern expressed in interviews – that some mediators create an

[20] *See supra* Note 7.
[21] E.g., years of experience, type of experience, etc.
[22] *See infra* Section 3 (discussing assembling a cadre of aviation industry experts to facilitate efficient dispute resolution within the industry).

unnecessarily adversarial environment – and suggests drafting approaches to resolving that concern.

Industry participants wary of binding arbitration can ameliorate many of their concerns by thoughtful, detailed drafting of a step-clause. Including arbitration in a step-clause instead of a free-standing, standardized arbitration clause, should inherently address some concerns about rigidity because the precursory processes lend flexibility to the mode of dispute resolution. If one type of process proves unfruitful, the parties are able to move on to another. In fact, absent settlement, the mediator might prepare for the next process, perhaps by helping parties to identify -- and limit -- the facts or law genuinely in dispute. Further, thoughtfully drafting the arbitration portion of a step-clause will allow companies to select default arbitration rules[23] or clearly address issues of extreme concern regarding lavish locations, arbitrators' hourly rates, or scope of appeals, among others. Ultimately, the terms of a step-clause or other ADR clause set the ground rules for resolving a dispute. Forethought and precision in crafting the provision is of utmost importance.

ii. Deadlines and Requirements for Moving from Process to Process

Setting strict deadlines in step-clauses is essential to their effectiveness. Interviewees repeatedly lamented the time and money wasted on marathon arbitrations and trials.[24] Without deadlines for concluding each requisite process, a step-clause "can be a vehicle for delay and can result in required but empty negotiations where one or all parties have no intention of moving toward a settlement."[25]

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[23] *See infra* Section 3 (discussing the future development of aviation industry-specific arbitration panel along with specific arbitration rules tailored to the needs of the industry).
[24] *See, e.g.*, Interview with former aviation industry general counsel.
[25] *See supra* Note 7.

Based on interviewees' nearly universal agreement that third-party neutrals are most effective when involved early-on in a dispute, strict time limits in a step-clause in which negotiation precedes mediation may be especially useful. There, a time limit on the negotiation portion is imperative to minimizing the potential for parties to spend negotiating sessions widening the gap in their positions so substantially that a third-party neutral can be of no help. The same concept applies to moving from mediation to arbitration. Additionally, in a negotiation-mediation step-clause, the periodic tolling of mediators' fees should encourage parties to contractually ensure that mediation does not continue beyond a productive period (e.g., four hours unless the parties agree to continue the mediation).

In addition to clear, fixed time limits for each process, a step-clause should also explicitly describe conditions that must be met before moving on to the next step in resolving the dispute. This aspect is tied to the careful descriptions of each process. If the mechanics of each process are explicitly laid out, there should not be much difficulty in determining whether the parties have satisfied the conditions for moving forward to the next step in the process. One interviewee even suggested couching a precondition for moving on to arbitration into the arbitration rules themselves. In other words, if industry-specific arbitration rules or an aviation arbitration panel are developed, the arbitration rules themselves could require the use of a step-clause and exhaustion of non-binding processes before parties could utilize the forum for binding arbitration.[26] Incorporating the step-clause concept into industry-specific arbitration rules may be an important tool for garnering industry buy-in and uniformity in seeking more efficient dispute resolution

[26] Obviously the effectiveness of this type of back-end pressure would depend on the utility of the panel and the rules themselves. However, if the step-clause inclusion and exhaustion requirement is incorporated into industry-tailored arbitration rules that address the concerns voiced by interviewees, industry participants may be more open to arbitration, and thereby compelled to utilize step-clauses.

iii. Non-Judicial Enforcement Mechanisms

Two main enforcement mechanisms may help ensure parties who have agreed to a step-clause abide by its requirements. The first mechanism, the duty of good faith, is implicit. The second mechanism, a liquidated damages clause, must be explicitly included in the ADR portion of the contract.

Both the Uniform Commercial Code and the Restatement (Second) of Contracts recognize a duty of good faith and fair dealing in performing a contract.[27] A nonbinding ADR process's purpose is arguably undermined by seeking court enforcement of the duty of good faith in participating in the process. However, the duty's omnipresence in all dispute resolution steps a contract contemplates has the potential to promote productive participation by all parties.

A liquidated damages clause provides a more concrete, financially-implicative enforcement mechanism. Generally, an enforceable liquidated damages clause must: (1) address a breach for which damages are difficult to estimate, (2) not be intended as a penalty, and (3) provide an amount that bears a reasonable relationship to the anticipated loss.[28] To increase the likelihood of enforceability, a step-clause drafter should explicitly include each of the above points in the contract language.[29] Including a liquidated damages clause will not preclude a party from seeking specific performance, unless explicitly stated in a contract.[30] By taking the questions of the type and amount of remedy out of the hands of a court, a liquidated damages clause is another tool to increase certainty and expediency in dispute resolution.

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[27] U.C.C. § 1-203 (2000); *id*. § 2-103(1)(b) (defining "good faith" as "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade"); Restatement (Second) of Contracts § 205 cmt. c (1981) (stating "[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement").
[28] Lucy V. Katz, *Enforcing an ADR Clause—Are Good Intentions All You Have*, 26 AM. BUS. L.J. 575, 598 (1988).
[29] *Id.*
[30] *Id.*

Third-party neutrals have varying amounts of power to enforce good faith participation and liquidated damages clauses. An arbitrator has the power to sanction a party or attorney for abusing the process, unless the participants have limited the arbitrator's ability to do so.[31] In mediation, the third-party neutral cannot impose sanctions or conduct requirements on the parties, unless the parties have explicitly authorized.[32] Accordingly, parties must determine the amount of enforcement power to cede to a third-party neutral when crafting a step-clause. Allowing the third-party neutral to make the enforcement decision is almost surely the most efficient route.[33] However, because many interviewees expressed displeasure with equivocation in third-parties' neutral decision making, leaving enforcement decisions to judges may provide parties with a sense of comfort regarding the equity of the process.

iv. Judicial Enforcement

Enforceability of step-clauses will depend on the location of the court ruling on them. American courts appear increasingly willing to enforce step-clauses. In enforcing ADR clauses requiring participation in non-binding dispute resolution, "[r]elief has ranged from stays of litigation and corresponding orders compelling participation, to . . . precluding enforcement of an arbitration clause, vacatur of an arbitral award, denial of attorney fees, and dismissal of a claim with prejudice."[34] In addition to enforcing step-clauses generally, American courts have also taken a favorable view of enforcing specific remedial mechanisms included in the contract.[35]

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[31] *See* Maureen A. Weston, *Checks on Participant Conduct in Compulsory ADR: Reconciling the Tension in the Need for Good-Faith Participation, Autonomy, and Confidentiality*, 76 IND. L.J. 591, 631 (2001).
[32] *Id.*
[33] *See id.*
[34] Kathleen M. Scanlon, CPR Institute for Dispute Resolution, *Multi-Step Dispute Resolution Clauses in Business-to-Business Agreements*, SJ034 ALI-ABA 1, 11 (2003). *But see id.* (noting "despite this clear trend toward towards (sic), on rare instances a limited number of courts have not enforced parties' agreement to participate in nonbinding ADR processes").
[35] *See id.*

Step-clause enforcement outside the United States is (as with most international issues) less certain. Chinese courts, in addition to their hesitancy to enforce arbitration clauses failing to specify a specific set of arbitration rules, may also be unwilling to enforce arbitration not taking place in a "recognized permanent arbitral institution." [36] Because most aviation-industry participants indicated their arbitration experiences had been with arbitration organizations, as opposed to arbitral tribunals, China's enforcement approach would prove problematic.

Contrasting China's demand for specificity and the narrow scope of acceptable arbitral procedures, England has taken a broad view of enforcing ADR clauses. In a 2002 decision, the High Court of Justice Queens Bench Division "issued a ruling that provides sweeping support for the use of Alternative Dispute Resolution (ADR) in private pre-dispute contract clauses."[37] Under the step clause[38] at issue, the parties were first required to engage in good faith negotiations.[39] Then, before resorting to litigation, "the parties were required to attempt resolution through an unspecified ADR process."[40] Upholding the clause, and issuing a stay on further proceedings, the court noted that "to hold otherwise would undermine the general public policy of supporting contractual references to ADR."[41] However, the court did imply that a step-clause requiring just good faith negotiation prior to initiating court proceedings is probably too vague to enforce.[42]

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[36] *See* Coles, *supra* note 8.
[37] Alyson Carrel, *An ADR Clause by Any Other Name Might Smell as Sweet: England's High Court of Justice Queens Bench Attempts and Fails to Define What Is Not an Enforceable ADR Clause—Cable 7 & Wireless Plc. v. IBM United Kingdom Ltd.,* 2003 J. DISP. RESOL. 547, 547 (2003).
[38] Note the article uses the synonym "escalation clause."
[39] *See* Carrel, *supra* note 37 at 548.
[40] *Id.* The clause required generally that the parties engage in "an Alternative Dispute Resolution (ADR) procedure as recommended to the Parties by the Centre for Dispute Resolution." *Id.* at 548 n.9.
[41] *Id.* at 549.
[42] *See id.* at 548–49. However, based on the court's holding and reasoning, a negotiation clause that explicitly described the procedures for negotiation in detail, might be specific enough to be enforced. The court appeared to focus more on structure of the contemplated ADR process rather than its label.

Regardless of the jurisdiction interpreting a step-clause, specificity appears to be a key to enforceability. Because every jurisdiction has the potential to interpret a certain clause, or even a single word, in a multitude of ways, there can only be one absolute rule: be specific. Time spent at the outset of a contractual relationship analyzing potential issues in the dispute resolution process and drafting a detailed step-clause around those issues may both expedite settlement and increase the chances of the clause holding up in court.

2. Designating and Training a "Chief ADR Officer"

Another pre-dispute tool companies in the aviation industry may want to consider deploying is the designation and training of an in-house "Chief ADR Officer." While implementing step-clauses aims to increase efficiency on a micro-level, a Chief ADR Officer's general responsibilities would be to help develop and maintain an overarching, cohesive dispute resolution strategy focused on efficiency. To limit costs, companies may consider designating someone like a deputy general counsel with the title of Chief ADR Officer. If the role seems useful—and the work plentiful—the position may evolve into one that is fulltime.

Cognate to Chief Compliance Officer

The recent proliferation in the field of compliance, especially in the financial sector,[43] offers a model for developing a Chief ADR Officer role. Large corporations are hiring compliance officers by the droves to navigate around "[h]efty fines and other penalties" imposed on violators of ever-complex business laws and regulations.[44] This role seems easily adaptable to the dispute resolution context. As compliance officers help mitigate the costs of violating laws and government regulations, Chief ADR Officers can help avoid the increasingly staggering

[43] Gregory J. Millman & Samuel Rubenfeld, *Compliance Officer: Dream Career?*, N.Y. TIMES (Jan. 15, 2014, 8:13 PM) http://online.wsj.com/news/articles/SB10001424052702303330204579250722114538750 (noting HSBC Holdings hired roughly 1,600 employees to its compliance department in 2013).
[44] *Id.*

amount of time and money companies spend on resolving disputes via litigation.[45] Companies open to the idea of designating a Chief ADR Officer may want to analyze compliance officers' interaction with and training of employees within their own organizations or in companies in other industries.

a. ADR Officer Duties

The details of a Chief ADR Officer's specific duties would be contingent on the size and nature of the company. But as a general starting point, the responsibilities would be fourfold: (1) intimate involvement in the drafting of step-clauses and other contractual ADR mechanisms, (2) constant monitoring of contractual relationships via periodic status conferences with business personnel, (3) training business personnel in how to effectively implement the company's ADR strategy, and (4) remaining abreast of developments in the field of ADR generally and of in-house personnel's experiences in various disputes. Many disputes would benefit from the involvement and perspective of almost any internal third party – a fellow manager, lawyer, or other colleague who is not emotionally connected to the dispute. The ADR Officer could institutionalize this role.

Charging the Chief ADR Officer with focusing on the drafting of step-clauses will help ensure adequate time and attention is spent proactively contemplating dispute resolution mechanisms. Perhaps detailed dispute resolution clauses are often omitted from commercial contracts because the general counsel was simply too busy focusing on the substantive business terms of the deal. Delegating the task of crafting a step-clause or other ADR mechanism for all

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[45] LAWYERS FOR CIVIL JUSTICE ET AL., LITIGATION COST SURVEY OF MAJOR COMPANIES 2 (2010), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/Litigation%20Cost%20Survey%20of%20Major%20Companies.pdf.

contracts to a Chief ADR Officer may allow proper attention to be given to future disputes without neglecting any other substantive provisions.

Because interviewees nearly universally voiced early communication between parties as paramount to successful dispute resolution, constantly monitoring a company's contractual relationships for budding disputes may be a Chief ADR Officer's most important duty. As the first point of contact for business personnel who believe that a dispute is materializing, a Chief ADR Officer can help ensure that contractual deadlines and requisite processes are followed from the outset of a dispute. Along with coordinating communication with the other side, a Chief ADR Officer could also be the person charged with reaching out to third-party neutrals should the contract call for mediation or a similar process. Building a network of third-parties neutral and keeping track of who has expertise in precisely which area of the industry could be an important role.

Training in-house attorneys and business personnel in everything from effective negotiation techniques to evidentiary and confidentiality rules of arbitration would be an important aspect of a Chief ADR Officer's duties. As the lead drafter of the company's ADR clause, the Chief ADR Officer would likely be best able to communicate the precise steps business personnel should take at the outset of a dispute. Based on interviewee responses, this role should be undertaken with an emphasis on early communication and adhering to the terms of the process spelled out in the contract.

Lastly, a Chief ADR Officer would be charged with remaining current on both trends in dispute resolution generally and on the specific experiences of company personnel who participated in a dispute. Important to this role would be gathering anecdotal information from employees as part of a "feedback loop" on the back-end of a dispute. By listening to the pros

and cons of a particular process as described by someone who actually participated, the Chief ADR Officer can look to improve internal dispute resolution processes, suggest changes to others in the industry, and help to improve industry-specific arbitration rules.

C. Post-Dispute Tools

Despite diligent contract drafting and adoption of pre-dispute mechanisms, business-to-business disputes inevitably arise between aviation parties. To avoid a halt in business, or damage to an integral relationship, many aviation parties choose to resolve disputes by informally negotiating. [46] Informal negotiations can drive down costs associated with resolving a dispute by avoiding discovery, and prolonged arbitration or litigation. Informal negotiation is an attractive option to many in the aviation industry, due to its cost and time efficiency. At the same time, informal negotiations can breed inconsistency in how disputes are resolved, culminating in unfair resolutions, as a product of the relative power dynamics between parties.

This Section provides tools to create a systematic, cost-effective, and fair process to resolve disputes within the heavily networked aviation industry. Any change to the dispute resolution system should be gradual and measured to increase buy-in from key aviation stakeholders. Taking into consideration the need for gradual change in an industry as large as aviation, this Section of the Toolkit proposes short-term and long-term tools to be adopted by the aviation industry, to use in the more informal negotiation stage. Part 1 proposes developing a database of third-party neutrals, as a resource and incentive for aviation insiders to resolve disputes earlier. Next, Part 2 recommends the use of Dispute Review Boards as part of standard form contracts, to formalize the negotiation phase of resolving disputes, and to encourage proactivity when

[46] *See* Telephone Interview by Lauren Madonia with an assistant airline counsel (Mar. 21, 2014) (stating that this counsel's airline uses an informal business approach to resolving disputes); Interview with an assistant airline counsel (Feb. 24, 2014) (discussing that this counsel's airline makes rare use of formalized dispute resolution. It uses informal negotiation to resolve disputes).

resolving disputes, as an alternative or addition to the step clauses discussed in Section II.B.1. Part 3 proposes a training and certification program for third-party neutrals to increase consistency of decisions within the aviation industry, and to increase confidence in the skills of third-party neutrals. Parts 4 and 5 discuss how mediation and arbitration might be tailored to fit the aviation industry.

1. Database of Third-Party Neutrals

Aviation interviewees consistently mentioned using informal negotiations to resolve business-to-business disputes.[47] While informal negotiations allow parties to maintain their relationship, and amicably resolve a dispute;[48] use of an effective, neutral third-party, mutually agreed upon by the parties, may drive costs down further, and resolve disputes more effectively.[49] Third-party neutrals can be utilized in numerous processes: dispute review boards,[50] mediation,[51] and arbitration.[52] To encourage parties to include the use of third-party neutrals earlier in the dispute resolution process, it is advisable to create a database of third-party neutrals for interested aviation parties to choose from.

In the short-term, the database is a resource that can be produced relatively easily. The existence of a database may encourage aviation parties to adopt alternative dispute resolution methods earlier in the dispute resolution phase. Specifically, a database of third-party neutrals

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[47] *See* Telephone Interview by Michael Dallaire with assistant counsel for a manufacturer in the aviation industry; Telephone Interview by Lauren Madonia with an assistant airlines counsel (Mar. 21, 2014); Interview with an assistant airlines counsel (Feb. 24, 2014).
[48] In some cases, aviation parties delay the resolution of a dispute for years, and simply offer a "discount" years later for a breach of a previous agreement. *See* interview with counsel for an airlines manufacturer (Feb. 24, 2014).
[49] *See* Joseph T. McLaughlin, *Alternative Dispute Resolution in the Corporate Sector*, SF42 ALI-ABA 877, at 881 (2001) (Mentioning that the use of third-party neutrals to resolve corporate disputes usually results in a faster decision respected by both parties).
[50] *See infra* Part C-2.
[51] *See infra* Part C.4..
[52] *See infra* Part C.5.

may encourage aviation members to adopt step-clause[53] contracts, because they have a bank of third-party neutrals to aid in the informal negotiation process. It is essential that the database provide a comprehensive list of third-party neutrals. The database should include lawyers, non-lawyers, aviation experts, and alternative dispute resolution experts, to give parties a myriad of options to meet their dispute resolution needs. These may need to be broken down by sub-specialties such as cargo, airports, ground services, aircraft warranty-maintenance, for example.

The purpose of the database is to serve as a resource for aviation parties to use third-party neutrals their dispute resolution processes. Since the needs of industry participants are varied, the database should include parties with different experiences. Specifically, the database should include lawyer and non-lawyer third-party neutrals. Lawyers provide legal expertise; however, lawyers may not possess the business acumen necessary to resolve complex business disputes. Non-lawyers with extensive industry knowledge may be able to determine the long-term implications of a specific business decision that a lawyer may not foresee. If the database includes both lawyers and non-lawyers, parties can decide what background they would like the third-party neutral to possess, and choose accordingly.

The database should also include individuals with extensive aviation industry knowledge, and individuals without aviation industry knowledge, but who may be alternative dispute resolution experts.[54] Some aviation parties may seek a third-party neutral who does not possess industry knowledge as a strategy decision, or simply because the dispute does not require industry knowledge. Contracting aviation parties should be able to negotiate the credentials of

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[53] *See supra* Part B.

[54] Alternative Dispute Resolution in North America and Asia: A Comparative Examination Panel, at the IATA Legal Symposium (Feb 25, 2014) (Panel members mentioning that sometimes it is to a company's benefit to use a third-party neutral who does not have industry knowledge. This is a strategic decision that may be left to the parties to decide.)

the third-party neutrals they use; therefore, the database should provide a wide array of individuals for parties to choose from.

Ideally, an independent, neutral organization will take on the task of compiling the database. If an independent, neutral organization is not interested in developing a database, any interested industry participant can create the database. Industry participants may start the database by keeping a list of third-party neutrals who their organization has contacted before. Once a list of third-party neutrals has been developed, establishing a feedback or evaluation system where aviation parties can rate third-party neutrals is imperative. To ensure the evaluative criteria is fair, the criteria should not focus on the outcome of the dispute resolution process. Instead, the criteria for evaluating third-party neutrals should focus on efficiency of decisions, costs, process, and party neutrality. Parties who choose to use the database can examine the feedback, and may negotiate with one another when deciding which third-party neutral to use when resolving disputes.

2. **Dispute Review Board**

Aviation parties may choose to use third-party neutrals in mediation or arbitration; however, another effective dispute resolution process third-party neutrals may be used for is a Dispute Review Board. The use of Dispute Review Boards was adopted successfully by the construction industry in the 1970's to resolve disputes between contractors and other parties in the construction industry. [55] Dispute Review Boards undoubtedly require more foresight and planning between contracting aviation parties; therefore, it may be difficult to encourage parties to adopt Dispute Review Boards if they have not done so in the past, without any evidence of its

[55] *See* Thomas H. Oemke, & Joan M. Brovins, *Construction Dispute Resolution Arbitration and Beyond*, 100 Am. Jur. Trials 45, at §12 (2006) (stating that parties in the construction industry have settled 1,200 disputes through the use of dispute review boards, and only 30 cases have gone to litigation).

success within the aviation industry. Adoption of Dispute Review Boards may be more appropriate as a longer-term goal for the aviation industry. It is advisable to conduct a pilot program to document the effect of dispute review boards within the aviation industry.

a. Functions of the Dispute Review Board

Dispute Review Boards are a function of contract and planning between parties. At the onset of a project, parties agree to select a panel of third-party neutrals who then become part of the project team. Typically, parties will adopt a tripartite panel; however, since Dispute Review Boards are objects of contract, parties can opt to utilize a one-person Dispute Review Board.[56] The duties of the Dispute Review Board can vary—some typical duties of a Dispute Review Board include: review all contract documents to determine if there are potential issues that may arise; engage in periodic review of relevant documents between parties; and examine progress of the parties' relationship.[57] As the relationship ensues, either party can bring a dispute to the Dispute Review Board, and the Board will engage in an informal, yet comprehensive hearing. At the end of this hearing, the Dispute Review Board will issue a non-binding advisory opinion, including recommendations.[58]

b. Drafting a Dispute Review Board Agreement

Setting the scope of the Dispute Review Board's duties is an essential task for contracting parties.[59] The use of a Dispute Review Board can be included as a specific provision of a step-clause agreement, or its own separate agreement between parties. Since Dispute Review Boards have not been utilized regularly between aviation parties, it is imperative that parties develop a

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[56] *See id.*
[57] *See id.*
[58] *See id.*
[59] *See* Appendix E and Appendix F for example of Dispute Review Board Agreement and Dispute Review Board Guidelines, respectively. This Agreement has been modified from a construction industry example. *See* Thomas H. Oemke, & Joan M. Brovins, *Construction Dispute Resolution Arbitration and Beyond*, 100 Am. Jur. Trials 45, at §15 (2006).

thorough agreement to address their unique relationship. Some key sections of Dispute Review Board agreements that have been adopted by other industries include: guidelines outlining the neutrality required from Board members chosen; the extent of the Review Board's periodic review of the contracting relationship; number of Board members; and tenure of the Board. Furthermore, parties may create guidelines to address their own sharing process with the Dispute Review Board. Parties may wish to also formalize the use of Dispute Review Boards before pursuing other methods to resolve a dispute by explicitly requiring submission of a dispute to the Board before pursuing another avenue.

c. Addressing the needs of the Aviation Industry

Since use of a Dispute Review Board is the result of a contract, the contracting parties can modify many of the terms surrounding the use of a Dispute Review Board. The flexibility Dispute Review Boards offer addresses many of the concerns aviation industry members mentioned when they evaluate what dispute resolution process to pursue. First, aviation participants consistently mentioned cost as a primary concern when resolving disputes.[60] Furthermore, parties may be hesitant to arbitrate because of expensive forum selection concerns. They can, however, reduce these costs by specifying where hearings will be held. Aviation parties can also cut costs by electing to use a one-member dispute review board instead of a three-person board. Also, parties can agree to rates of pay for the Dispute Review Board at the contract formation stage. Because parties share all expenses when utilizing Dispute Review

[60] *See* Telephone Interview by Michael Dallaire with assistant counsel for an airlines manufacturer (avoiding cost and ensuring decisiveness are priorities when resolving disputes); Telephone Interview by Lauren Madonia with an assistant counsel for an airlines (Mar. 21, 2014) (mentioning time and cost as major concerns when resolving disputes); Interview with counsel for an aviation company (Mar. 5, 2014) (ensuring financial security for the company is essential when resolving disputes).

Boards, parties (although not necessarily outside counsel) are disincentivized from raising frivolous disputes.

The parties may set the extent of the Dispute Review Board's tasks. For relationships that are dispute prone, the Dispute Review Board may be used more frequently. While parties may incur more up-front costs, it is likely they will not have to pursue an even more expensive dispute resolution process, such as litigation or arbitration. Other aviation parties may choose to keep the Dispute Review Board on a stand-by basis. The Dispute Review Board can review all relevant documents to determine if any issues may arise. When the Dispute Review Board is used on a stand-by basis its members function to foresee any disputes that may arise, and prevent them from damaging the working relationship.

Since parties mutually agree to use a Dispute Review Board at the outset of their agreement, there is no need to select a forum to hear the disputes. Many aviation relationships are international in nature, and parties can elect to choose panel members who reside where the contracting aviation relationship takes place. In instances where a relationship spans continents, parties may elect to allow the Board to meet electronically, or choose a location that is convenient for both parties to use. Since the Dispute Review Board examines disputes in a comprehensive, yet informal manner, there is no need for lengthy hearings in exotic locations. It is most important that the Dispute Review Board has the opportunity to examine the dispute at the location in which it occurred, especially since the Dispute Review Board examines disputes in their early stages.

In arbitration, each party is typically allowed to choose one third-party neutral, and then the two third-party neutrals mutually select the third member of the panel. Aviation parties mentioned concern that each third-party neutral selected serves as an advocate for the side that

chose him or her.[61] Typically, Dispute Review Boards avoid the issue of partiality by requiring parties to mutually agree to all three third-party neutrals. Unlike arbitration, parties must select the members for the Dispute Review Board at the onset of the contract, which is also the time when the relationship between contracting parties is at its best. Since parties must agree on all third-party neutrals, the Board members are disincentivized from favoring one side over the other.

Dispute Review Boards also promote time efficiency, which is a major concern for many of the aviation industry participants interviewed.[62] One fundamental benefit of the Dispute Review Board's function is that parties may continue business while the Dispute Review Board studies the dispute and issues an advisory opinion. Since Dispute Review Boards take proactive measures to resolve disputes by periodically reviewing the business relationship, disputes are resolved earlier, and parties can avoid escalation of process. It is the task of the Dispute Review Board to carry on its investigations while business continues.

Typically, a Dispute Review Board's opinion will be considered advisory. Aviation industry participants expressed hesitation towards dispute resolution processes that issue binding decisions; in particular, this was a major reason noted for wanting to avoid arbitration.[63] On the other hand, some parties may seek more certainty than advisory recommendations would provide. To pressure acceptance, they might provide that the Review Board's findings and opinions can be introduced in a more formal process such as litigation or arbitration. If the

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[61] Alternative Dispute Resolution in North America and Asia: A Comparative Examination Panel, at the IATA Legal Symposium (Feb 25, 2014) (Audience members mentioning concern that a three-member panel is ineffective). This is much more of a concern with U.S. domestic arbitration, where the ethical rules have not supported as strong a tradition of independent and impartial arbitrators as in the international arbitration context.

[62] *See e.g.,* Telephone Interview by Lauren Madonia with an assistant counsel for an airlines (Mar. 21, 2014) Interview with legal counsel for an aviation company (Mar. 5, 2014).

[63] Interview with legal counsel for an aviation company (Mar. 5, 2014) (Mentioning that company's recent loss during arbitration, and their hesitation to use arbitration in the future because of its binding nature).

dispute resolution process is escalated to litigation or arbitration, it is likely that the Dispute Review Board's opinion will carry extensive weight during proceedings, because the Dispute Review Board has extensive knowledge of the parties' history and experience working together. Furthermore, if parties develop a great deal of mutual trust in the Dispute Review Board's process, they may decide to make the Board's opinions binding in nature, and include consequences for not following the Board's opinion in their contract. This elevates the Board's authority to that of an arbitrator (and enforcement issues would have to be examined in international contracts). This latter option seems an unlikely one in the aviation industry, where counsel expressed a desire for more, rather than fewer, procedural protections in the arbitration process.

3. **Training and Certification Program for Third-Party Neutrals**

As mentioned in Section 3, adoption of alternative dispute resolution mechanisms industry-wide should be measured and gradual. A few invested stakeholders are key to developing new processes and adopting new dispute resolution methods when contracting, such as step-clause contracts or the use of dispute review boards. If parties experience success using these methods, then others in the industry may be more inclined to alter their current dispute resolution practices. Industry participants are more likely to adopt alternative dispute resolution methods that have a proven track record amongst other aviation businesses. To develop a truly comprehensive and consistent industry-wide approach to dispute resolution, the aviation industry should develop a training and certification program for third-party neutrals in the long-term.

In the construction industry, the American Arbitration Association (AAA) developed a comprehensive training and certification program for third-party neutrals, which focuses solely on construction-related disputes. In the short-term, aviation parties who are contracting together

may decide to provide internal training and certification of the third-party neutrals who are used as part of the Dispute Review Board. Parties may train Dispute Review Board members by requiring each member to spend time studying the business practices of both contracting parties, and attend specific Continuing Legal Education events that are tailored to the aviation industry, or to alternative dispute resolution methods. While the process of training third-party neutrals may create more work for contracting parties who use Dispute Review Boards, training ensures the third-party neutrals are competent to handle disputes efficiently and in a cost-effective manner.

In the long-term, once key aviation stakeholders are invested in the use of third-party neutrals, the industry should develop a training and certification program. It is important to identify an organization within the aviation industry to take on the task of providing training and certification, similar to the AAA's role within the construction industry. The organization should be neutral and have experience working in various sectors of the aviation industry. In regards to the specific training that third-party neutrals receive, the training should focus on industry-specific issues as well as effective dispute resolution tactics. Ideally, third-party neutrals will have experience in the aviation industry, but their experience may be in one particular sector. To avoid partiality, the training program should offer breadth and coverage of the complex working relationships within the industry.

Conclusion

Use of third-party neutrals in earlier stages of a dispute can save aviation parties time and money resources. Specifically, third-party neutrals as part of Dispute Review Boards' provide a proactive means to combat disputes, and develop positive working relationships between

industry members. To encourage parties to utilize the many advantages third-party neutrals can offer, third-party neutrals should have industry-specific training, experience, and certification.

4. Mediation

a. Views of Mediation in the Aviation Industry

Based on the interviews conducted, we discovered that disputing parties in the aviation industry do not typically use mediation unless it is court-mandated. Many interviewees relayed stories of failed mediation sessions and expressed the opinion that disputes that could be mediated successfully are typically settled before mediation becomes necessary. However, once disputes reached the court system, we were told that it was common for the court to mandate mediation, though the parties questioned the efficacy of this type of mediation as well. Some parties believed the mandatory mediation session was helpful only in determining the merits of their case, but almost universally, interviewees did not find mediation particularly effective in resolving their disputes.

Major concerns about mediation that were expressed during interviews included: binding mediation agreements, the lack of a clear winner in a mediation agreement,[64] the unfamiliarity of mediators with the aviation industry resulting in a loss of credibility with the parties, and the potential high cost of mediation that does not produce a mutually acceptable agreement. For

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[64] One of the most commonly heard complaints about any dispute resolution process that had been utilized by interviewees was that they never resulted in a clearly favorable or unfavorable outcome. Instead of choosing a "winning" side and giving that party a favorable resolution, there appears to be a tendency to compromise: the third-party neutral gives both parties something that they want, but not everything they want, even if they have a better legal basis for their argument than the other party. Many interviewees expressed frustration at never being a clear winner or loser; they felt the neutral would split the award in a way that would give both parties at least *something* that they wanted, no matter what the legal merits of the case were. Conversely, if the matter were taken to court, there would be a clear winner and a clear loser. Though interviewees included both mediation and arbitration in this complaint, only arbitrators typically have the authority to issue any award. When the parties provide for mediation, they can stipulate that the parties maintain the decision as to any settlement, thus avoiding any such concern.

example, if the parties hire a mediator and do not reach a settlement in mediation, this would unnecessarily add to the high cost of litigation.

Ironically, most of the people we interviewed agreed with the theory behind mediation—that a third-party neutral, involved early enough in the process, could facilitate interaction between the disputing parties and help reach a mutually acceptable resolution. However, they seemed to think that third-party neutrals were not being involved in the process early enough to make a difference. One person that we interviewed told us that he preferred to conduct mediation without lawyers present, when the dispute was still basically a business negotiation. He felt that the presence of lawyers during the mediation session forced the mediator to use a more evaluative style and reduced the likelihood of the dispute being settled amicably. This statement was similar to what we heard during other interviews. Most of the interviewees relayed mediation experiences that were conducted by a mediator using an evaluative style, which escalated the litigation mentality. For example, when lawyers are required to submit pre-mediation briefs to a mediator, this may increase contentiousness during the mediation because the lawyers on both sides have already cemented their stance and are afraid to back down out of fear of losing credibility with the party they are representing.

Almost all of the people we interviewed suggested that it would be beneficial to use a mediator who was familiar with the aviation industry because they were more likely to understand the technicalities of the dispute and would know more about industry relationships. Parties said that they would feel more comfortable with an expert mediator, who also had credibility in the aviation industry. Despite the fact that many parties felt this way, research demonstrates that parties seem to settle just as often whether or not their mediator is an expert in the field of law at issue and that parties are equally satisfied with their results post-mediation,

regardless of the expertise of the mediator.[65] Based on these views, perhaps a more facilitative style of mediation by a non-expert in the field would be most effective. One of our interviewees told us that the most effective mediations he had experienced were ones that occurred prior to the involvement of the lawyer, with a mediator who a managed to "take the emotion out of the dispute."

Overall, commercial disputants in the aviation industry seem very reluctant to use mediation. Interviewees think that voluntary mediation escalates litigation mentalities, and think of court mandated mediation as a tool for helping evaluate the merits of their cases. In order to make mediation more effective in the industry, interviewees felt that it needed to be utilized earlier in the dispute and that it needed to be conducted by an aviation expert.

b. Tailoring Mediation to the Aviation Industry

For mediation to be a useful tool for disputing parties in the aviation industry, the following three major changes to mediation practice would need to be implemented: a mediator or other third-party neutral would have to be brought into the dispute prior to the dispute becoming too contentious, pre-mediation briefs would have to be dispensed with, and the mediator or neutral would need a working knowledge of the aviation industry generally and must understand the working relationship between the disputing parties in order to be considered credible by the parties.

Many of the parties we interviewed believed that mediation would have been more effective if the third-party neutral had been brought in to help facilitate communications between the parties earlier in the dispute. We were told that the vast majority of disputes are worked out between business people without the involvement of legal counsel or any formal dispute

[65] NANCY H. ROGERS, ET. AL, DESIGNING SYSTEMS AND PROCESSES FOR MANAGING DISPUTES 158 (2013).

resolution mechanism and were told that early mediation might help resolve these disputes more efficiently. Most parties seemed to think that once legal counsel became involved in the dispute, the likelihood of the dispute being resolved without a formalized dispute resolution mechanism was greatly diminished. Therefore, mediation may be more useful to disputing parties in the industry if the mediator were brought into the dispute while it was still considered an issue between the two businesses, prior to the involvement of an attorney. This would likely cut down on costs associated with mediation, as well as shortening the timeline of the dispute. Furthermore, even if an agreement is not reached during the mediation session, it may be beneficial for the parties to help narrow down or identify the issues that still need resolution.

It is important to note, however, that there are downsides to conducting mediation early in the dispute. Typically, parties do not necessarily know as much about the dispute at an early stage than they do at a later stage. Parties may therefore be making an agreement without all of the information that they need to ensure that their interests are met. If one of the parties to a dispute cannot effectively address the issues of the mediation without obtaining information from the other party, because there is no formal discovery process in mediation, that information cannot be compelled. The party may simply be forced to mediate without it and may not be able to reach an effective agreement based on the imperfect information they have at that stage of the dispute.

To decrease the litigation mentality that seems to be associated with evaluative mediation, parties could not submit pre-mediation briefs or could attempt to find a mediator with a more facilitative style or a proactive mediator. Not preparing the pre-mediation briefs would mean that the parties would not have already “dug-in” to a position prior to the mediation, and

they would likely feel less compulsion to defend that position. Compromising during the mediation session would therefore not be associated with "losing face."

Additionally, bringing in a mediator who adopts a more facilitative style could decrease the litigation mentality that seems to be associated with mediation in the aviation industry. Instead of choosing a mediation that would tell the parties the merits and demerits of their case, the mediator would focus on "getting the emotion out of the dispute" and helping the parties reach an agreement that meets their interest, regardless of who has the better case.

Having a proactive mediator could also benefit parties in the aviation industry and decrease the litigation mentality that seems to escalate in most mediations. Instead of waiting for a dispute to be brought to his or her desk, a proactive mediator would contact the parties periodically and inquire if there were any disputes in which he or she should intervene. The parties would therefore not wait until the dispute had escalated and one party would not be charged with having suggested the mediation. If a proactive mediator were employed, the industry would have to build in financial disincentives for a mediator not to hold mediations that would be a waste of time. For example, if the mediator is on-staff, he or she could be required to mediate one of every four disputes in which the parties request intervention. Because the mediator has a limited amount of time, he or she would be incentivized to pick only those disputes in which mediation might be most beneficial.

In order to make mediation more effective for the aviation industry, the mediator would need to be someone with experience in the aviation industry, as well as someone who is familiar with the relationship between the two disputants. Although research demonstrates that the expertise of the mediator has no impact on settlement rates or post-mediation satisfaction in disputes, we were told repeatedly that one of the largest problems faced by parties in mediation

was that the mediator did not understand the technical aspects of the dispute and was therefore ineffective in helping the parties reach agreement. A reoccurring theme in our interviews was that the relationships within the aviation industry are long-term and complex. A mediator with a working knowledge of the relationship between the two parties would have a better understanding of how certain terms in a mediation agreement might affect the relationship between the parties within the industry in the future. Furthermore, the parties to mediation may be more likely to reach an agreement in a mediation conducted by someone they think is "credible" because of their familiarity with the industry, instead of someone who is not.

Also beneficial to the process would be to build in a feedback loop, allowing the parties to mediation to reflect on their experience afterward and articulate the techniques and practices that were effective and those that were not. This feedback loop would give the industry insight into how to improve their dispute resolution practice in the future. It could involve either a periodic survey or questionnaire, asking questions that would determine how the parties' interests were met (or not) by the mediation. For example, asking the parties if the mediator entered the dispute at the most effective time or when it might have been more beneficial for communication to be facilitated could help parties in the future understand when the involvement of a mediator will be most effective.

In implementing the feedback loop, an organization would process all feedback from parties involved in disputes and redact identifiable information, in order to ensure the confidentiality of the parties. An advisory group could periodically analyze the data collected and release an industry-wide report, highlight common experiences and suggesting recommendations for improving mediation processes. The organization's release of an annual

report based on annual survey results may increase the likelihood that busy lawyers enter their reactions and suggestions for improvements based on the disputes they've conducted.

Mediation Overview

Mediation is a method of nonbinding dispute resolution involving a neutral third party or parties who try to help the disputing parties reach a mutually agreeable solution.[66] During mediation, a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement to end their dispute.[67] There are numerous reasons that parties may choose to mediate a dispute instead of litigate, including: time and cost savings, voluntariness, the potential for self-determination and creativity, the ability to express emotion, the opportunity for preserving relationships, and the flexibility and informality of the process.[68] Conversely, parties may be reluctant to mediate their dispute, fearing the cost of the mediation will add to the cost of litigation or arbitration if a settlement is not reached, that it may cause strategic damage to their case if it does go to litigation, that they will not be able to negotiate as favorable an outcome as they could achieve in court or arbitration, or that the mediator can avoid favorable legal precedent.[69]

Although mediation is typically thought to be voluntary, within the last twenty years there has been an increase in court-mandated mediation.[70] As opposed to voluntary mediation, where parties agree to hire a mediator to help them resolve their dispute, court-mandated mediation involves a court order often requiring the parties to attend mediation.[71] While parties

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[66] BLACK'S LAW DICTIONARY (9th ed. 2009), "mediation."
[67] Uniform Mediation Act (2001), §1 Definitions, "Mediation."
[68] Mediation Developments and Trends, SL081 ALI-ABA, 1695, 1698.
[69] *Id*.
[70] Holly A. Streeter-Schaefer, *A Look at Court Mandated Civil Mediation*, 49 DRAKE L. REV. 367, 369 (2001).
[71] *Id.* at 371.

to court-mandated mediation are required to attend the mediation session and mediate in good faith, they are not required to reach an agreement and can still litigate the case if the mediation session does not produce an agreement.[72]

Traditionally, there are thought to be four styles of mediation: facilitative, evaluative, transformative, and eclectic, each of which has its own unique advantages and disadvantages.[73] In facilitative mediation, the mediator's goal is to use questions to encourage the parties to discover underlying interests, examine options, and shape outcomes.[74] The mediator will likely not give advice or provide a legal opinion to the parties involved.[75] In evaluative mediation, the mediator will attempt to focus on the strengths and weaknesses of each side's case, and may suggest potential terms of settlement.[76] Evaluative mediations are much more likely to be accompanied by attorneys presenting their client's case to the mediator, including written mediation briefs being submitted prior to the mediation.[77] Most attorneys prefer evaluative mediation to the other styles because it tends to be the most similar to litigation.[78] Transformative mediation attempts to help the parties see the dispute from the other party's point to view and endeavors to change the understanding of the relationship between the involved parties.[79] Eclectic mediation typically involves a combination of the other three types of mediation; the mediator combines the different styles to meet the needs of the individual mediations.

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[72] *Id.* In a few jurisdictions, the court penalizes parties who reject a mediator's proposed settlement, but in most the mediator has no power concerning the result of mediation. SARAH COLE, ET. AL, 1 MEDIATION: LAW, POLICY, AND PRACTICE § 1:1 (2013).
[73] SARAH COLE, ET. AL, 1 MEDIATION: LAW, POLICY, AND PRACTICE §3.3 (2013).
[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Id*.

Unlike arbitration, which is uniformly regulated in the United States by the Federal Arbitration Act, there is no universally adopted or enforced law regarding mediation. The Uniform Mediation Act ("UMA") was finalized in 2001, but has since been adopted by only 11 states and the District of Columbia.[80] Because the UMA is not universally adopted, different jurisdictions have chosen to adopt various legal standards governing mediation rules, mediator behavior, and mediator qualifications.[81] In the international context, the United Nations Committee on International Trade Law ("UNCITRAL") has provided a comprehensive set of procedural rules for Conciliation.[82] As defined in the UNCITRAL rules, conciliation is the same as mediation in the United States. Not all nations have adopted these rules. The United States has not adopted them, but some states have, individually. The UMA incorporates the UNCITRAL Model Law on International Commercial Conciliation by reference, but some states have elected not to do so when enacting the UMA. The inconsistencies in mediation regulation from jurisdiction to jurisdiction require that parties to mediation familiarize themselves with new mediation standards every time they mediate in a new jurisdiction.

5. Arbitration

a. Views of Arbitration in the Aviation Industry

Although arbitration seems to be a fairly common practice in the aviation industry, most people we interviewed expressed dissatisfaction with the current arbitration practices. For example, we were told that most of the purported benefits of arbitration—simplicity, expediency,

[80] The National Conference of Commissioners on Uniform State Laws, *Uniform Law Commission*, http://www.uniformlaws.org/Act.aspx?title=Mediation+Act (last visited April 19, 2014). In 2014, however, the UMA was introduced for consideration into the state legislatures of Massachusetts and New York.
[81] SARAH COLE, ET. AL, 1 MEDIATION: LAW, POLICY, AND PRACTICE §11:1 (2013)
[82] See United Nations Commission on International Trade Law, UNCITRAL Conciliation Rules (1980).

and cost-effectiveness do not exist in current arbitrations. We were told numerous stories of arbitrators who had chosen four-star resorts in exotic location and seemingly had no consideration for the length of the trial because hourly-based rates offer no incentive for arbitrators to end the dispute. In instances such as this, our interviewees told us that litigation would be preferable.

Another common theme among interview participants was a concern about the arbitrator's application of the law and the limited appeals process typically provided by arbitration. Multiple interviewees claimed that, in their experience, the arbitrators would use a "split the baby" approach in an attempt to please both parties with the hope of being invited back to arbitrate future disputes. Even those interviewees who believed that the arbitrator's motives in creating the award were not self-interested agreed that arbitrators almost never clearly adjudicate a winner and a loser in the proceeding and both parties walk away without everything they want. Many of the interviewees compared the arbitration process to litigation, where everyone knew the "rules of the game" and what to expect; in arbitration, everything depends on the arbitration agreement and the arbitrator chosen.

Additionally, interviewees expressed concern regarding the very limited appellate process associated with arbitration. Because arbitrators interpret the law themselves and are not required to explain to the parties the reasoning or facts behind the arbitral award,[83] parties in the aviation industry are particularly concerned about the misapplication of law by an arbitrator and the relative inability to appeal an arbitration award.

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[83] While this is the norm for U.S. domestic arbitrations, reasoned opinions are expected in international arbitrations, and can be required by the parties in any context.

The unfamiliarity of most arbitrators with the aviation industry was another concern expressed in a majority of our interviews. We were told that one of the reasons arbitrations are so lengthy and part of the reason the parties are concerned about the arbitrator's application of law to the facts of the dispute are because the vast majority of arbitrators are unfamiliar with the aviation industry. If an industry expert were an arbitrator, parties would be able to spend less time explaining details or technicalities to the arbitrators, and presumably the arbitration would be shorter.

Finally, parties also expressed a degree of concern about the neutrality of arbitrators, particularly when a panel of three arbitrators conducted the hearing. Traditionally, each party selects one arbitrator and the two arbitrators select a third. There was a great deal of confusion among the interviewees regarding the role of the arbitrators chosen by the parties; the interviewees were generally unsure whether the arbitrators chosen by the parties were supposed to act as third-party neutrals or as advocates on behalf of the party that selected them. The confusion may result from the different ethical rules that apply domestically and internationally. The current U.S. rules do allow party-appointed arbitrators to depart from neutrality, but only if the parties authorize it by selecting section X. of the rules to apply to their arbitration. But as noted above, the tradition of independence of party-appointed arbitrators is not as strong in the United States as internationally.

b. Tailoring Arbitration to the Aviation Industry

Despite the issues with the current system of arbitration in the aviation industry, there are certain alterations that could increase the effectiveness of the system and would, based on our research, increase its usage. Some suggestions for a more effective arbitration system in the aviation industry include: only allowing those familiar with the aviation industry to act as arbitrators, maintaining a database of qualified arbitrators, developing a comprehensive forum or counsel that deals only with international business to business aviation disputes, implementing a limited scope appeals process, and creating an industry wide "feedback loop" to help educate the industry on what approaches are most effective when arbitrating a dispute.

By allowing only those arbitrators who are familiar with the aviation industry to arbitrate disputes, the arbitration process would be much more streamlined. Parties would not have to spend as much time educating the arbitrator on the intricacies of the aviation industry; it would be much easier for arbitrators that are familiar with the industry to understand the nuances of a dispute without additional information from the parties than it would for an arbitrator with no background in the area. In addition, doing so would address the "credibility" concerns that were expressed about unqualified arbitrators during our interviews.

An organization that is currently in place in the industry, such as a trade association, could screen and maintain a database of arbitrators familiar with the industry. Parties could either choose their arbitrator from the list of arbitrators certified by the organization, or the organization could keep the arbitrators in rotation or assign them randomly, so there would be no concerns about the neutrality of the arbitrator. From this database, parties could choose the type of arbitrator and style that they prefer. For example, parties may feel more comfortable choosing a retired judge as an arbitrator, believing that this will cut down on efficiency concerns, that there

is less likelihood of a "split the baby" award, and that the judge will be more likely to make a law-based decision. Once the database is implemented, reputation will go a long way toward screening out those arbitrators who are ineffective in the context of the aviation industry or are too cost-prohibitive.

This database could likely cut down on costs associated with arbitration. If arbitrators on the list have a reputation for picking four-star resorts in exotic locations (though this also can be controlled by prior contract provision) and conducting the arbitration with no time constraints, parties are less likely to choose them. Alternatively, in order to receive a place in the database, arbitrators could agree to work for a certain flat fee or hourly rate and in a set location, so that parties would know up front the costs associated with choosing a particular arbitrator.

Another potential solution to the current gaps in the aviation industry's arbitration system would be to create an aviation-specific arbitration forum or counsel. For example, if the aviation industry chose to create an aviation specific forum, it could be housed at a neutral location that is fairly equally accessible to parties who are attempting to resolve international disputes. This forum would develop a set of arbitration rules that would apply to all disputes arbitrated under its auspices. The entire arbitration system would be tailored to the aviation industry and could ensure that all arbitrators were well versed in common disputes in the aviation industry and that they understand the implications of the dispute on the relationship between the parties in the long term.

Conversely, the aviation industry could create an arbitration system tailored to the needs of the aviation industry. Unlike the forum, this system would not need to be headquartered or administered in one place, specifically. The aviation industry could name an organization, such as the American Arbitration Association ("AAA") or an international organization that would

work closely with the industry to develop a set of arbitration rules tailored to the aviation industry.[84] Both the aviation specific forum and counsel would be further developed and implemented by a cadre of experienced aviation professionals and could help create the right financial incentives for arbitrators. They are discussed further in detail below.

In order to alleviate some of the concern expressed regarding the finality of arbitration when parties do not agree with the arbitrator's decision, parties could build a limited-scope appeals process into their arbitration agreement. Arbitration administrations offer appellate arbitration to which parties can agree.[85] If an appeals process is agreed upon beforehand, parties may feel more comfortable arbitrating their dispute because they know that there is a mechanism by which to correct a potentially erroneous arbitration award. Building in a limited-scope appeals process cuts back on the finality of arbitration only slightly: although the arbitration award would not be as final as it would be if there were no appeals process, because the process would be limited in scope the parties would still be constrained by the decision made in the appeal. Based on our research, parties would be significantly more likely to engage in arbitration if there were an opportunity to appeal.

Whatever process the aviation industry chooses to implement, many interviewees have expressed interest in an industry-wide feedback loop, similar to the feedback loop discussed in the Mediation section. This would allow parties to arbitration to reflect upon their arbitration

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[84] The American Arbitration Association already administers a similar program for the construction industry. AAA has worked with the National Construction Dispute Resolution Committee to create the Construction Industry Arbitration Rules and Mediation Procedures and other project specific approaches to prevent and manage disputes. AAA provides a plethora of services to the construction industry, including: mediation, arbitration, partnering, dispute resolution board, project neutrals, early neutral evaluation, and initial decision maker. For additional information, see the Construction, Real Estate & Environmental section of AAA's website, located at: https://www.adr.org/aaa/faces/aoe/cre/construction?_afrLoop=382406826659574&_afrWindowMode=0&_afrWindowId=null#%40%3F_afrWindowId%3Dnull%26_afrLoop%3D382406826659574%26_afrWindowMode%3D0%26_adf.ctrl-state%3D7cwfxusai_4 (last visited April 20, 2014).

[85] One should first investigate the effectiveness of these appellate clauses as they have been criticized in the investment context.

experience and let others know what worked well and what did not. The feedback loop would be based on anonymous surveys that the parties agree to fill out in the initial agreement to arbitrate. The results from the feedback loop would be periodically published, and would give the industry aggregate data about processes that worked well for parties and those that did not, and could provide recommendations for parties to improve their experience with arbitration. The periodic publication may act as an incentive to get busy lawyers to fill out surveys or questionnaires.

Arbitration Overview

Arbitration involves a private system of adjudication similar to litigation, but is typically chosen by parties who wish to resolve their dispute outside of any judicial system.[86] Unlike many other forms of dispute resolution, arbitration typically results in a final and binding decision that ends the dispute between the parties.[87] It is thought to be faster than litigation because it may dispense with many of the procedural and evidentiary structures that characterize litigation.[88] Furthermore, arbitration provides a more neutral forum for international disputes than litigation.[89] However, some parties may disfavor arbitration because the arbitrator determines the correct application and there is only a very limited right to judicial review of the arbitral award.[90]

The parties to arbitration agree on one or a panel of three third-party neutrals to act as a judge in the arbitral proceeding.[91] The arbitrator or panel of arbitrators has a great deal of

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[86] MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 1 (2d ed. 2012).
[87] THOMAS H. OEHMKE & JOAN M. BROVINS, 1 COMMERCIAL ARBITRATION §1:2 (2013).
[88] *Id.*
[89] Moses, *supra* note 86, at 1.
[90] Oehmke *supra* note 87.
[91] *Id.*

discretion in determining the procedure of the arbitration and the final outcome of the dispute.[92] Typically, arbitration determines liability in much the same way as a court would, in an adversarial hearing setting, during the course of which evidence is presented and parties present arguments in order to help the arbitrator to come to a final decision.[93]

Procedurally, here are a number of differences between international and domestic arbitration. Procedures from international arbitration are influenced by procedures from civil law, and to increasing extent, Islamic law, blended with common law. Document review and discovery is much more limited in international arbitration than it is in the United States—a party's request for documents from the other is not excluded from international arbitration, but it is not encouraged.[94] Oral hearings tend to be shorter than in United States arbitration[95] and opinions by the arbitrators are more likely to be written in international arbitration than in domestic arbitration.

For international commercial arbitration, parties often find it beneficial to use one of many organizations that specialize in the resolution of international disputes. There are many more options for institutions to administer international arbitrations and many more sets of rules to choose from. These organizations typically provide two different services: they administer arbitrations, and they establish and publish procedural rules for use in individual arbitrations.[96] International arbitration also poses the difficult question as to which country to select as the seat of arbitration. It is important to remember that arbitration is an extremely flexible process, and

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[92] *Id.*
[93] THOMAS H. OEHMKE & JOAN M. BROVINS, 1 COMMERCIAL ARBITRATION §1:1 (2013).
[94] Lucy Reed & Jonathan Sutcliffe, *The 'Americanization' of International Arbitration?* in 16 MEALEY'S INTERNATIONAL ARBITRATION REPORT, No. 4, 39 (2001).
[95] Id. at 44.
[96] FEDERAL JUDICIAL CENTER, INTERNATIONAL LITIGATION GUIDE, INTERNATIONAL COMMERCIAL ARBITRATION: A GUIDE FOR U.S. JUDGES. Available at http://www.fjc.gov/public/pdf.nsf/lookup/strongarbit.pdf/$file/strongarbit.pdf (last visited May 5, 2014).

parties can negotiate and agree on the terms of the arbitration process that will best meet their interests.

After the arbitration hearing, the arbitrator(s) issue an arbitral award.[97] The arbitrator may or may not disclose the facts or reasoning behind their award.[98] Once the award is rendered, the losing party may voluntarily comply with the award.[99] If the losing party chooses not to comply with the award, the winning party will likely attempt to have the award recognized by a court in a jurisdiction in which the losing party has assets.[100] In the international commercial arbitral setting, this recognition is governed by an international treaty, the New York Convention, which means that, unlike foreign court judgments, foreign arbitral awards are very likely to be recognized and enforced. If the court affirms the arbitral award, it has the same legal effect as a court judgment and can be enforced in the same way that a court's judgment in that jurisdiction could be enforced.[101]

Parties may choose to arbitrate instead of litigate for multiple reasons, including: in the international context, the treaty provisions regarding judicial enforcement of arbitration awards; arbitration being more convenient and informal than litigation; its confidentiality; discovery limits (typically); that arbitration is more expeditious than litigation; that the parties can choose arbitrators who are experts in the subject matter of the dispute; cost saving potential; and because arbitration may aid in preservation of a working business relationship between the disputing parties.[102] Depending on the perspective of the parties, many of these advantages may also be considered disadvantages—for example, if arbitration involves very limited discovery, there may

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[97] Oehmke, *supra* note 87.
[98] *Id.*
[99] Moses, *supra* note 86, at 3.
[100] *Id.*
[101] *Id.*
[102] *Id.*

be less of a chance that the claimant will meet their burden of proof.[103] Other potential disadvantages include the lack of appeals process, the inability of the arbitrator to compel parties to act or to join additional parties to the dispute, and the lack of gender and ethnic diversity of experienced international arbitrators.[104]

Each arbitration is governed by an arbitration agreement that is reached by the parties prior to the arbitration.[105] In the arbitration agreement, the parties agree on the set of rules that they want to govern the arbitration.[106] Although there are a number of different default arbitration rules promulgated by organizations such as the American Arbitration Association ("AAA"), the parties can agree to these rules generally and alter specifically rules by written agreement in the arbitration agreement.[107] National laws also govern arbitration agreements, particularly the arbitration and substantive laws of the location of the arbitration.[108] Additionally, many countries have adopted as their arbitration law the United Nation's Commission on International Trade Law ("UNCITRAL") Model Law on International Commercial Arbitration, which is mostly default provisions that were intended to work in conjunction with various arbitration rules.[109]

[103] *Id*. at 4.
[104] *Id.* at 4–5.
[105] *Id*. at 6.
[106] *Id.*
[107] *Id.*
[108] *Id.*
[109] *Id.*

SECTION III. WHAT'S NEXT? MOVING FORWARD

The Ohio State University Aviation Design Team has laid the groundwork for what can—and should—be a successful program to revolutionize the way that business is conducted within the aviation industry. Specifically, the team has—through research, interviews and presentations—created a framework to create a more efficient and effective resolution process. While the previous sections of this paper have discussed that framework and toolkit, this section will explore what steps remain. These include steps of implementation and also exploration of possible implementation devices. For example, the team recommends that an advisory committee or board be created to serve as the driving force behind the introduction and implementation of these processes. Additionally, an aviation specific arbitration panel may be useful in moving this process forward. Ultimately, it is the team's hope that the end of this semester will not be the end of this project; rather, we hope that these steps will prove to be the beginning of a successful program that alleviates and resolves disputes in a relationship-driven industry.

A. **Steps to Implement the Toolkit**

Though the semester has been very productive in gathering information, interest and prospective remedies for this project, certain areas need to be strengthened through exploring additional stakeholder interests and more focused research. Specifically, while the team had success gathering information on interests in dispute resolution processes from several key groups—notably, the airlines and manufacturers—there are other perspectives on interests within the aviation industry that still need to be explored. Additionally, while the research the team conducted had great breadth and depth, certain elements of the research could be more focused to

explore, engage and excite implementation of any type of process moving forward. These immediate "next steps" can help ensure success of the project.

1. Gathering of Other Key Interests

As has been noted, this project has led to comprehensive information. Dozens of interviews of have been conducted with insiders in different aspects of the industry. The team has had more success—primarily because of time spent at the IATA Symposium in San Francisco and the Airlines for America meeting in Washington, DC—with individuals with the airline side of the industry. Representatives from the major airlines—Delta, United, Qantas and American—have been helpful in the team's outlook moving forward.[110] Further, several manufacturers have been interviewed.[111] In interviewing representatives of these two primary players within the industry, the team was able to ascertain the key interests of perhaps the two largest and most visible parties.

That said, key interests are still in play and largely unknown. While the team was persistent in reaching out to non-airline and manufacturer parties, success in gathering those interests was limited. For example, private air providers and services (i.e. NetJets and FedEx) were interviewed to ascertain their interests.[112] Additionally, interests of airports and port authorities (i.e. Cincinnati/Northern Kentucky International Airport and Metropolitan Washington Airport Authority) have been discovered.[113] Yet, one key demographic and their corresponding interests is lacking: service providers.

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[110] *See, e.g.*, Telephone Interview with legal counsel for an aviation company (Mar. 21, 2014); Interview with legal counsel for an aviation company (Feb. 23, 2014); Telephone Interview with an airlines executive (Mar. 25, 2014).
[111] *See, e.g.*, Interview with counsel of an aviation manufacturer (Feb. 20, 2014); Telephone Interview with counsel of an aviation manufacturer (Mar. 25, 2014).
[112] *See, e.g.*, Interview with assistant counsel for an aviation company (Mar. 5, 2014); Interview with an executive for an aviation company (Mar. 5, 2014); Interview with counsel for a freight forwarder (Feb. 23, 2014).
[113] *See, e.g.*, Interview with assistant counsel for an airport (Feb. 20, 2014); Interview with an airport executive (Mar. 5, 2014); Interview with an airport executive (Mar. 27, 2014).

At the outset of this project, the team hoped to discover, explore and cultivate the interests of service providers in the industry. Within the service-providing arena, the team felt that both freight-forwarding providers and ground service providers would be appropriate for pilot programs -- primarily because it seemed that both parties were receptive to the creation of a new or revamped dispute resolution system. Unfortunately, attempts to connect with both freight forwarders and ground service providers proved lacking. Freight forwarders and ground service providers, however, are not the only service providers available. To complete a robust account of interests, other providers—such as in-flight entertainment, catering, etc.—should be consulted to offer insight into their interests. In the further development of this project and process, gathering additional, and thorough, information on interests is imperative in creating a useful, efficient system that can realistically be utilized by parties within the industry. Failing to account for all interests involved will prevent legitimacy and confidence in the process. Consistently throughout the process of interviews and research, the team heard that buy-in would be critical to success.[114]

2. Focus Scope of Research

Through the many discussions that the team had with aviation industry parties, a constant theme was to focus our efforts to make the task more manageable and realistic. With this in mind, it was imperative that the team—and anyone assuming the mantle moving forward—narrow and focus the scope. We have identified three primary candidates as for this focus: a regional focus, a sector of the industry focus and a dispute-type focus. In narrowing the scope of the research and project, the team's hope is that the process will become more manageable. Additionally, narrowing the project to a particular focus—regional, sectors of the industry or

[114] *See, e.g.*, Telephone Interview with a law firm partner (Mar. 22, 2014).

type of dispute—will create a system that should, at the very least, indicate the successes of the system while also highlighting its deficiencies without widespread displeasure through the industry. This will enable greater buy-in from parties, easier implementation, superior efficiency and consistent results in resolution.

a. Regional

Focusing research on regional perspectives involves two distinctive approaches. First, the research must consider whether certain regions around the world currently require or prohibit any dispute resolution provisions. Second, the research should explore potential regions and venues for where the pre-litigation dispute resolution process might rest. In determining answers to both questions, the key is to understand the different intended uses of the research. In discovering regions of the world that currently require or prohibit dispute resolution already, information regarding structure, success and systems will be found. On the other hand, in exploring potential regions ripe to hose a future dispute resolution process, the project could secure a steady, consistent known quantity that could—hopefully—solve disputes within the industry in perpetuity. The focus on regions in future research, then, is imperative to ensuring the success of the project.

Presently, few regions of the world require mandatory alternative dispute resolution before a litigation complaint may be filed. One area where such a requirement is found is in Latin America. Specifically, Argentina has a "very mandatory" form of mediation.[115] Argentina requires that for most civil and commercial matters, mandatory mediation processes be engaged

[115] *See* Giuseppe de Palo, *A False "Prince Charming" Keeps "Sleeping Beauty" in a Coma: Voluntary Mediation Being the True Oxymoron of Dispute Resolution Policy*, MEDIATE (Mar. 2014), *available at* http://www.mediate.com/articles/PaloResponse.cfm. De Palo makes clear that generally lawyers are reluctant to use mediation; but, that in the context of these mandatory mediation forums, lawyers have become very supportive of the process. *Id.*

in before the filing of the complaint.[116] In fact, in Argentina, judges possess great power—though it is rarely exercised—over instructing, or forcing, the parties to continue to resolve their dispute through alternative resolution processes.[117] Other countries that possess mandatory dispute resolution processes in Latin American include Chile, Columbia, Ecuador and Peru.[118] In addition to Latin America, Italy is also another country that requires this mandatory mediation.[119] In these mandatory mediation forums nations, there is no way to easily opt out of the mediation before the filing of the complaint.[120] These programs, however, have largely been successful and have been found to save money because higher rates of settlement and lower costs.[121] While these are countries or regions—rather than industries—that require dispute resolution, the application to this project is slightly different. Regardless of this difference, the success of the mandatory alternative dispute resolution is instructive. If it is decided that mandatory dispute resolution is a path the industry would go down, drafting the step clauses discussed in Section 2.B.1 would be the most appropriate time to introduce clauses necessitating the mandatory alternative dispute resolution. This decision, then, would necessitate a requirement to look at different venues that could handle this mandatory process.

The next step of focusing the regional scope of the project would be to look at venues appropriate for the mandatory dispute resolution. It would seem that the venues would need to

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[116] Argentina, LATIN LAWYER (last accessed on May 5, 2014), *available at*, http://latinlawyer.com/reference/topics/60/jurisdictions/4/argentina/

[117] *Id.* (“[A] judge may at any time attempt to conciliate the parties or propose that they submit their dispute to any alternative dispute resolution process.”).

[118] Don Peters, *Can We Talk? Overcoming Barriers to Mediating Private Transborder Commercial Disputes in the Americas*, 41 VAND. J. TRANSNAT’L L. 1251, 1293, note 283 (2008). While ostensibly different systems, mediation and conciliation—which some of the countries utilize instead of mediation—act as mandatory dispute resolution systems. *Id.*

[119] de Palo, *supra* note 115.

[120] *Id.* de Palo recognizes that “there are still opponents to the current model of mandatory mediation with easy opt-out, but the majority of lawyers are now in favor, and they actually began creating the busiest mediation centers when ‘very mandatory mediation’ was the law.” *Id.*

[121] Timothy Kuhner, *Court-Connected Mediation Compared: The Cases of Argentina and the United States*, 11 ILSA J. INT’L & COMP. L. 519, 520 (2005).

be region-specific. As discussed, one of the greatest faults with the current arbitration system is the high costs associated with the process. Thus, rather than have a single venue—that may not cost parties in a certain region very much, but could cost other parties a great deal—a more logical and suitable path would be region-specific venues. At the IATA Symposium in San Francisco, it was clear that in Asia, Singapore and Hong Kong are the most respected forums to host this sort of neutral, dispute resolution process.[122] When narrowing the research to look at regions and forums ripe for housing these types of forums, it is crucial to consider venues that are respected for their neutrality and also provide easy access to their venue. Thus, as the research and investigation of this project continues, it is important to consider the reach and effect that the selection of a venue might have on the industry.

b. Sectors of the Industry

Alternative to narrowing the scope of the project to different regions, another way to narrow the scope is to focus on specific sectors of the industry. This would primarily involve focusing on specific parties (i.e. ground service providers, forward freight providers). The purpose in narrowing the project to these parties is three-fold: first, ground service providers and forward freight providers seem to be interested in the creation or modification of the aviation's dispute resolution process; second, focus on a small subset of the industry would create a more manageable system; and third, the smaller subset would enable neutrals to become more accustomed with the intricacies of the industry and the system. The creation of these pilot programs of sort would offer actual feedback of the pros, cons, successes and failures of the

[122] The Hong Kong International Arbitration Center is routinely recognized as a forum of consistency, neutrality and success. Similarly, the Singapore International Arbitration Center is thought equally as high of in the realm of dispute resolution.

project. Additionally, it would involve parties that actually want to be involved in a dispute resolution system like this project.

The primary concern that the team heard in their interviews and research was the concern over the size of the project and the buy-in of the parties when a system was created. Narrowing the scope of the project in this way would eliminate both of those concerns. Both ground service providers and freight forwarders have, at the very least, expressed interest in pursuing a new system of settling disputes in which the parties are involved. This inherent buy-in by the parties before a finalized system has been created is important—and imperative—to getting the project moving in the first place. Similarly, by narrowing the focus of the project to the ground service providers or the freight forwarders, the scale of the project would be decreased. In doing this, the scale of the project changes from attempting to revolutionize the entire aviation industry to altering how one party within the industry does business—much more manageable. By narrowing the project in this way, the same principles apply. Additionally, the pilot program established, if successful, could then be utilized throughout the broader aviation industry to implement a dispute resolution process.

c. Type of Dispute

Because the aviation industry is so broad and its disputes so diverse, a potential problem for the project is whether a single system or process can be created to encompass and manage the admittedly wide-ranging disputes that occur within the industry. Moving forward, it may behoove the research and scope of the project to focus specifically on one type of dispute within the industry (i.e. service contracts, OEM contract disputes, failure to perform contracts, warranty disputes). In narrowing the scope of the research and project, it may be found that certain disputes may not be suitable for the system being created. Alternatively, the system may manage

and resolve disputes in multiple different settings—thus suggesting that it could be successful on a larger scale. Regardless, the purpose of narrowing the scope by dispute would enable those continuing the project to determine—quite quickly—whether the system works within the context of that type of dispute. Ultimately, the scope of the project likely has to be narrowed in some capacity. Limiting the research and, initially, the implementation to a specific type of dispute will enable the team to uncover the strengths and weaknesses of the system in a controlled context.

3. Gather Alternative Dispute Resolution Experts

As discussed, moving forward, the creation of a database of alternative dispute resolution experts to serve as third-party neutrals is critical to the success of the project. The necessity to create this inventory of experts is four-fold: first, the accumulation of experts in a single database will ensure ease of use and access; second, the database will be comprised of individuals who have expertise in the aviation industry; third, the structure of the database will enable reviews of experts to be maintained; and, fourth, that database will be enabled by a neutral, but legitimizing Aviation Dispute Resolution Committee. The gathering of these alternative dispute resolution experts will also enable updates—within the industry, within dispute resolution, etc—to be easily and efficiently broadcast and disseminated among the dispute resolution neutrals utilized. In order to ensure neutrals that are effective—in essence, to ensure the success of this project—a thorough, efficient and accomplished database of alternative dispute resolution experts is necessary. Ultimately, it will help lead to the success of this project.

B. Aviation Dispute Resolution Committee

Despite the end of this semester, we hope that the work that has been done by the OSU Aviation Design team is continued. Because no single forum or association exists to continue

such a project on their own, the team believes that an appropriate avenue to ensure its future development success is for the project to be led by an advisory committee. This Aviation Dispute Resolution Committee would serve as a tool to continue the project in the future. Its duties would include selecting alternative dispute resolution experts to serve as neutrals in the settling of disputes, advising the industry of updates and developments in the alternative dispute resolution field and serving as an authoritative committee to give legitimacy to the system created. The result, then, of having the Aviation Dispute Resolution Committee would be a source of legitimate, standardized dispute resolution within the aviation industry. The implementation of the system would lead to reduced costs for parties throughout the industry.

The credibility and insights of the Aviation Dispute Resolution Committee will increase if individuals are selected from across the spectrum of the industry and not seemingly weighted or biased toward one section of the industry (i.e. airlines or manufacturers). The committee might include, for example, individuals from airlines, manufacturers, service providers, outside counsel and airports. The variety, then, will give further legitimacy to the process. As noted, the key to creating a successful system is for the industry to buy-in. With representatives from a plethora of parties, buy-in will hopefully be inherent in their involvement and participation in the committee.

While not in the aviation industry specifically, a model for the Aviation Dispute Resolution Committee already exists. The National Construction Dispute Resolution Committee was created as part of the American Arbitration Association and includes representatives from 30 different organizations. These organizations range from the American Association of Airport Executives to the Associated General Contractors of America to the Women Construction

Owners & Executives, USA.[123] Its purpose is to "serve as an advisory body to the American Arbitration Association concerning construction dispute resolution services."[124] Among its duties, the Committee is responsible for identifying and selected the most qualified individuals to mediate disputes.[125] The AAA—with the help of the Committee—maintains a database of mediators from which parties may be selected.[126] The National Construction Dispute Resolution Committee is instructive of a model for the creation, selection and execution of the Aviation Dispute Resolution Committee.

C. Aviation Specific Arbitration Panel

The culmination of the prior steps described ultimately leads to the creation of an aviation specific arbitration panel. That is, the final step moving forward should be the creation of a dedicated aviation arbitration panel in a dedicated forum. This would provide consistency in decisions and resolutions, it would establish trust in the resolution process and it would launch an efficient and streamlined system. As the culminating step of the project, the previous steps and actions will all lead toward this aviation specific arbitration panel. For example, the insertion of step clauses into contracts could, naturally, allow for different dispute resolution steps, with the final step vesting resolution in such a panel. Additionally, the narrowed focus of the project going forward—especially if regional—could result in an effective, trustworthy forum being found and established (e.g. Hong Kong or Singapore). With a process and a forum, the database of alternative dispute resolution experts with knowledge of the aviation industry would be available to act as neutrals in the resolution of the dispute. Ultimately, a dedicated aviation

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[123] For an exhaustive list, see *Construction: Arbitration Rules & Mediation Procedures*, American Arbitration Association, *available at* adr.org/construction, at 7.
[124] *Id.*
[125] *Id.* at 9.
[126] *Id.*

specific arbitration panel would become embedded in the process of dispute resolution within the context of the aviation industry henceforth.

At the IATA Symposium in San Francisco, the team heard many rumblings about the creation of an aviation specific arbitration panel. These thoughts were especially considered and discussed at the dispute resolution breakout session. While in the team's research nothing regarding the possibility of an aviation specific arbitration panel came up, implicitly there were suggestions of a desire for such a system. In interviews, the team routinely heard that the use of third-party neutrals with knowledge of the aviation industry would be beneficial. Between these interviews and the discussion at the IATA Symposium, the advantages for such a dedicated system in a dedicated forum were clear. The consistency in decisions and outcomes was attractive because currently, there is little consistency decision to decision. Presently, an airline may get one resolution in Hong Kong for a dispute and then, in Europe on a similarly placed dispute, receive a different resolution. The creation of an aviation specific arbitration panel would eliminate this concern. In turn, the consistency in decisions and resolutions would inherently establish greater trust in the resolution process. This trust is essential to the project and any resulting processes. With consistency and trust, parties should utilize the system and approach to settle disputes. This will, over time, lead to an efficient and streamlined process of settling disputes. An efficient process will enable cost-saving measures to occur for parties utilizing the system. Ultimately, the creation of the system should create an effective system for the industry to exploit.

This is not to say, of course, that the creation of such a system would be a perfect end to the current project. The IATA Symposium made clear—and the team further found in their interviews—that problems with an aviation specific arbitration panel could exist. Most

poignantly is the concern—that is always a reason for pause—that arbitrators will insert their own experience into the decision-making and resolution process. This could be especially true if arbitrators had aviation specific knowledge. To calm any concerns, however, the aviation specific arbitration panel could consist of the selection of one arbitrator by each party and then an additional arbitrator that is neutrally chosen. Thus, the insider knowledge of the arbitrators would be useful in the resolution process but not overly persuasive in their decision-making. The creation of this panel, then, would allow disputants to come together in a dedicated aviation specific forum to air their dispute to dedicated aviation specific arbitrators.

APPENDIX A

List of Interviewees & Organizations

Airlines

Abby Bried, Assistant General Counsel, United Airlines

Gary Bunce, Assistant General Counsel *Delta Air Lines*

Scott Casey, Vice President, Air Group Legal *UPS*

Katrina Manning, Former Vice President of Procurement *United Airlines*

Wes Nobelius, Deputy General Counsel *Qantas*

Rush O'Keefe, General Counsel *FEDEX*

Airports

Rod Borden, Senior Vice President, COO *Columbus Regional Airport Authority*

Monica Hargrove, Deputy General Counsel *Metropolitan Washington Airport Authority*

Candace McGraw, CEO of CVG Airport *CVG Airport*

Private Aviation

Ron Brower, Associate General Counsel *NetJets, Inc.*

Bob Tanner, Vice President of Corporate and Government Affairs *NetJets, Inc.*

Law Firms

Barry Alexander, Partner *Schnader Harrison Segal & Lewis LLP*

Evelyn Sahr, Partner *Eckert Seamans*

Matt Smith, Of Counsel to CVG Airport *Ziegler & Schneider*

OEM and Parts Manufacturers

Renee Martin-Nagle, Former General Counsel *Airbus North America*

Joe Pallot, General Counsel *Heico*

F. Scott Wilson, Legal *Pratt & Whitney*

Trade Associations

Gary Doernhoefer, Independent Consultant, Former IATA General Counsel

Greeley Koch, Executive Director for the *Association of Corporate Travel Executives*

Carlos Tornero, Senior Legal Counsel *IATA*

APPENDIX B

Standard Interview Questions

1. What is the most commonly occurring business-to-business dispute that your organization faces?

2. What parties are most commonly on the other side of the dispute?

3. When a dispute arises, what are the first steps your organization takes to resolve a dispute?

4. What are some barriers that your organization faces to resolving business disputes?

5. How often does your organization utilize any of the following processes:
   a. negotiation
   b. mediation
   c. arbitration
   d. litigation
   e. other (please explain)

6. Does the process you select depend on whether you are facing a domestic or international dispute?

7. If your organization uses one or more of the above processes, do you find one process to be the most effective?

8. Is there a particular process that you organization is hesitant to use when resolving a business dispute?

9. What are your organization's priorities when resolving a dispute?

10. If your organization uses arbitration, which arbitration rules do you tend to use? (e.g., AAA, IATA, ICC, etc.)

11. How does your organization determine which arbitration rules to utilize?

12. If you could change one aspect of arbitration, what would that be?

APPENDIX C

Sample Three Party Contract

I. Parties

This Three-Party Agreement is between:

A. Party A *[Name]*;

B. Party B *[Name]*;

C. Dispute Review Board Members:

1. *[Name]*;
2. *[Name]*; and
3. *[Name]*

II. Contract

A. Party A and Party B are engaging in a transaction under a contract entitled *[contract name]* dated *[contract date]*.

B. A certain contract *[contract name]* establishes the operation of a Dispute Review Board (Board or DRB) to assist in resolving Disputes as defined therein.

III. Purpose

A. The purpose of the Board is to consider, in a timely and impartial fashion, the disputes referred to it, and to provide written, nonbinding recommendations to Party A and Party B to resolve those disputes.

IV. Scope of Work

The scope of the Board's work includes, but is not limited to, the following:

A. *Periodic Meetings*

1. The Board members will meet at least [monthly/quarterly] (or more frequently, upon mutual agreement of the Board, Party A, and Party B) to become familiar with the working relationship between the parties.

2. In case of an actual or potential dispute, it maybe advantageous for the Board to personally review any relevant conditions on a real-time basis. If a viewing by the Board would delay the project, then videos, photographs and descriptions of these conditions, collected by either or both parties, may be utilized instead.

B. *Establish Procedures*

1. The Dispute Review Board shall adopt or develop operating procedures and hearing procedures

C. *Board Recommendations for Resolution of Disputes*

1. Upon receipt by the Board of a written Request for Board Review, the Board shall convene a hearing and, thereafter, issue a written recommendation to Party A and Party B.

2. All Board members must act impartially and independently in considering the facts and conditions surrounding any dispute.

3. The Board shall make an effort to reach a unanimous recommendation. If this proves impossible, the dissenting member may prepare a minority report.

4. The Board's recommendation, together with explanations of its reasoning, shall be submitted as a written report to both parties. In arriving at its recommendation, the Board shall consider pertinent provisions of the Contract, applicable laws and regulations, and the facts and circumstances involved in the dispute.

D. *Other*

1. The Board members shall become familiar with the Contract Documents, review periodic reports and maintain a current file.

2. Except for providing the services required in this Agreement, the Board and its individual members shall refrain from giving any advice to either party concerning conduct of the work or the resolution of problems which might compromise the Board's integrity.

3. The Board shall perform services not specifically listed herein to the extent necessary to achieve the purpose of this Agreement.

V. Party A Responsibilities

A. Party A shall furnish each Board member with pertinent Contractor-prepared documents to supplement the documents provided by Party B.

B. Except for its participation in the Board's activities as provided in the Contract Documents and in this Agreement, Party A shall not solicit advice or consultation from the Board or its members on matters dealing with the conduct of the work or resolution of problems which might compromise the Board's integrity.

VI. Party B Responsibilities

A. Party B shall furnish each Board member with one copy of all contract documents pertinent to the performance of the contract and necessary to the Board's work.

B. In cooperation with Party A, coordinate the operations of the Board.

C. Furnish conference facilities at or near the site and provide copying services.

D. Except for its participation in the Board's activities as provided in the Contract Documents and in this Agreement, Party B shall not solicit advice or consultation from the Board or its members on matters dealing with the conduct of the work or resolution of problems which might compromise the Board's integrity.

VII. Time for Beginning and Completion

A. The Board shall be active throughout the duration of the Contract. It begins operation upon notice of appointment by the Parties and following execution of this Agreement and shall terminate its activities as of the date of (*date to be filled in by parties*); however, should any disputes be pending as of that date, 30 days beyond the date on which the Board issues its recommendations regarding those disputes (unless earlier terminated or dissolved by mutual agreement of Party A and Party B). The Board's jurisdiction will continue for 30 days beyond the date of its recommendations for the limited purpose of responding to a request for clarification or in the event that Party A or Party B introduces new evidence.

VIII. Payment

A. Payment for services of the Board members shall be at the rates agreed to by the Parties and Board prior to Board member service.

B. The first two members will be reimbursed for the time and expense associated with choosing the third member.

C. Direct, non-salary expenses will be reimbursed at the actual cost to the Board (including, but not limited to, air, train, bus fare or automobile mileage, parking and travel expenses from the Board member's point of departure to the initial point of arrival, automobile rental, food and lodging, printing, long-distance telephone, postage and courier delivery). Billing for these expenses shall include an itemized listing supported by copies of the original bills, invoices and expense accounts.

D. Invoices of the Board members shall be paid by Party A and Party B, equally. Payments shall constitute full compensation for work performed and services rendered, and for all materials, supplies and incidentals necessary to serve on the Board.

E. The cost records and accounts pertaining to this Agreement shall be kept available for inspection by representatives of Party A or Party B for one year after final payment.

IX. Termination of Agreement

A. This Agreement may be terminated by mutual agreement of Party A and Party B at any time within 28 days written notice to the other parties.

B. Board members may withdraw from the Board upon 28 days written notice to Party A and Party B.

X. Immunity and Indemnification

A. Each Board member, in performing their Board duties, acts as independent contractor and not as an employee of either Party A or Party B.

B. Party A and Party B expressly acknowledge that each Board member shall act in a capacity intended to facilitate resolution of disputes. To the fullest extent permitted by law, each Board member shall be accorded quasi-judicial immunity for any actions or decisions associated with the consideration, hearing and recommendation of resolution for disputes referred to the Board.

C. Each Board member shall be held harmless for any personal or professional liability arising from or related to Board Activities. To the fullest extent permitted by law, Party A and Party B shall indemnify all Board members claims, losses, demands, costs and damages (including reasonable attorney's fees and costs) for bodily injury, property damage, or economic loss arising out of or related to Board members carrying out Board functions. The foregoing indemnity is a joint and several obligation.

XI. Disputes Regarding This Three-Party Agreement

A. Any controversy or claim arising out of or relating to this agreement, or the breach thereof, shall be settled by (*process to be selected by parties*).

XII. Effective Date

A. This Agreement is effective as of *[Date]*.

Board Member	Board Member	Board Member
....	....	....
Party A	Party B	
....	....	
By: *[Name, Title]*	By: *[Name, Title]*	

*As adapted from AAA Sample Form Agreement for the Construction Industry

APPENDIX D

JAMS Sample Step-Clauses[127]

1. *Clause Providing for Negotiation in Advance of Arbitration:*

   The parties shall attempt in good faith to resolve any dispute arising out of or relating to this Agreement promptly by negotiation between executives who have authority to settle the controversy and who are at a higher level of management than the persons with direct responsibility for administration of this Agreement. Any party may give the other party written notice of any dispute not resolved in the normal course of business. Within 15 days after delivery of the notice, the receiving party shall submit to the other a written response. The notice and response shall include with reasonable particularity (a) a statement of each party's position and a summary of arguments supporting that position, and (b) the name and title of the executive who will represent that party and of any other person who will accompany the executive. Within 30 days after delivery of the notice, the executives of both parties shall meet at a mutually acceptable time and place. Unless otherwise agreed in writing by the negotiating parties, the above-described negotiation shall end at the close of the first meeting of executives described above ("First Meeting"). Such closure shall not preclude continuing or later negotiations, if desired.
   All offers, promises, conduct and statements, whether oral or written, made in the course of the negotiation by any of the parties, their agents, employees, experts and attorneys are confidential, privileged and inadmissible for any purpose, including impeachment, in arbitration or other proceeding involving the parties, provided that evidence that is otherwise admissible or discoverable shall not be rendered inadmissible or non-discoverable as a result of its use in the negotiation. At no time prior to the First Meeting shall either side initiate an arbitration or litigation related to this Agreement except to pursue a provisional remedy that is authorized by law or by JAMS Rules or by agreement of the parties. However, this limitation is inapplicable to a party if the other party refuses to comply with the requirements of Paragraph 1 above.
   All applicable statutes of limitation and defenses based upon the passage of time shall be tolled while the procedures specified in Paragraphs 1 and 2 above are pending and for 15 calendar days thereafter. The parties will take such action, if any, required to effectuate such tolling.

2. *Clause Providing for Mediation in Advance of Arbitration*

   If the matter is not resolved by negotiation pursuant to paragraphs___above, then the matter will proceed to mediation as set forth below.
   Or in the Alternative

[127] JAMS CLAUSE WORKBOOK, *A Guide to Drafting Dispute Resolution Clauses for Commercial Contracts*, (January 1, 2011), http://www.jamsadr.com/clauses/#Resolution.

If the parties do not wish to negotiate in advance of arbitration, but do wish to mediate before proceeding to arbitration, they may accomplish this through use of the following language:
The parties agree that any and all disputes, claims or controversies arising out of or relating to this Agreement shall be submitted to JAMS, or its successor, for mediation, and if the matter is not resolved through mediation, then it shall be submitted to JAMS, or its successor, for final and binding arbitration pursuant to the clause set forth in Paragraph 5 below.
Either party may commence mediation by providing to JAMS and the other party a written request for mediation, setting forth the subject of the dispute and the relief requested.
The parties will cooperate with JAMS and with one another in selecting a mediator from the JAMS panel of neutrals and in scheduling the mediation proceedings. The parties agree that they will participate in the mediation in good faith and that they will share equally in its costs.
All offers, promises, conduct and statements, whether oral or written, made in the course of the mediation by any of the parties, their agents, employees, experts and attorneys, and by the mediator or any JAMS employees, are confidential, privileged and inadmissible for any purpose, including impeachment, in any arbitration or other proceeding involving the parties, provided that evidence that is otherwise admissible or discoverable shall not be rendered inadmissible or non-discoverable as a result of its use in the mediation.
Either party may initiate arbitration with respect to the matters submitted to mediation by filing a written demand for arbitration at any time following the initial mediation session or at any time following 45 days from the date of filing the written request for mediation, whichever occurs first ("Earliest Initiation Date"). The mediation may continue after the commencement of arbitration if the parties so desire.
At no time prior to the Earliest Initiation Date shall either side initiate an arbitration or litigation related to this Agreement except to pursue a provisional remedy that is authorized by law or by JAMS Rules or by agreement of the parties. However, this limitation is inapplicable to a party if the other party refuses to comply with the requirements of Paragraph 3 above.
All applicable statutes of limitation and defenses based upon the passage of time shall be tolled until 15 days after the Earliest Initiation Date. The parties will take such action, if any, required to effectuate such tolling.

ICR Sample Step-Clauses[128]

1. *Negotiation-Arbitration Clause*

In the event of any controversy or claim arising out of or relating to this contract, or a breach thereof, the parties hereto shall consult and negotiate with each other

[128] International Centre for Dispute Resolution, *Guide to Drafting International Dispute Resolution Clauses*, 2, https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_002539.

and, recognizing their mutual interests, attempt to reach a satisfactory solution. If they do not reach settlement within a period of 60 days, then, upon notice by any party to the other(s), any unresolved controversy or claim shall be settled by arbitration administered by the International Centre for Dispute Resolution in accordance with the provisions of its International Arbitration Rules.

2. *Mediation-Arbitration Clause*

In the event of any controversy or claim arising out of or relating to this contract, or a breach thereof, the parties hereto agree first to try and settle the dispute by mediation, administered by the International Centre for Dispute Resolution under its Mediation Rules. If settlement is not reached within 60 days after service of a written demand for mediation, any unresolved controversy or claim arising out of or relating to this contract shall be settled by arbitration in accordance with the International Arbitration Rules of the International Centre for Dispute Resolution.

3. *Negotiation-Mediation-Arbitration*

In the event of any controversy or claim arising out of or relating to this contract, or the breach thereof, the parties hereto shall consult and negotiate with each other and, recognizing their mutual interests, attempt to reach a solution satisfactory to both parties. If they do not reach settlement within a period of 60 days, then either party may, by notice to the other party and the International Centre for Dispute Resolution, demand mediation under the Mediation Rules of the International Centre for Dispute Resolution. If settlement is not reached within 60 days after service of a written demand for mediation, any unresolved controversy or claim arising out of or relating to this contract shall be settled by arbitration administered by the International Centre for Dispute Resolution in accordance with its International Arbitration Rules.

APPENDIX E

Sample Dispute Review Board Guidelines

Dispute Review Board Guidelines

Section 1. General

A. Summary

1. A Dispute Review Board will be established to assist in the resolution of Disputes in connection with, or arising out of, performance of the work of this Contract.

2. Either Party may refer a Dispute to the Board. Such referral should be initiated prior to the initiation of other dispute resolution procedures or filing of litigation by either party.

3. Promptly thereafter, the Board will impartially consider the Dispute(s) referred to it. The Board will provide a non-binding written recommendation for resolution of the Dispute to the Parties.

B. Scope

1. This Specification describes the purpose, procedure, function and features of the Dispute Review Board. A Three-Party Agreement among Party A, Party B, and the three Board members will formalize creation of the Board and establish the scope of its services and the rights and responsibilities of the parties. In the event of a conflict between this Specification and the Three-Party Agreement, the latter governs.

C. Purchase

1. The Board, as an independent third party, will assist in and facilitate the timely resolution of disputes between Party A and Party B.

2. Creation of the Board is not intended to promote Party A or Party B default on the responsibility of making a good-faith effort to settle amicably and fairly their differences by indiscriminate referral to the Board.

D. Three-Party Agreement

1. All three Dispute Review Board members and the authorized representatives of Party A or Party B shall execute the Dispute Review Board Three-Party Agreement within 14 days after the selection of the third member.

E. Continuance of Work

1. Both parties shall proceed diligently with the work and comply with all applicable Contract provisions while the Dispute Review Board considers a Dispute.

G. Tenure of Board

1. The Board will be deemed established on the date of establishment stated in the Three-Party Agreement.

2. The Board will be dissolved as of the date(*date to be decided by parties)* or, should any disputes be pending as of that date, the date on which the Board issues its recommendations regarding those disputes, unless earlier terminated or dissolved by mutual agreement of Party A or Party B. The Board's jurisdiction will continue for 30 days after the date of its recommendations for the limited purpose of responding to a request for clarification or in the event that a party introduces new evidence.

Section 2. Membership

A. General

1. The Dispute Review Board will consist of one member nominated by Party A and approved by Party B, one member nominated by Party B and approved by Party A, and a third member nominated by the first two members and approved by both Party A or Party B. The third member will serve as Chair unless Party A or Party B otherwise agree.

B. Criteria

1. Experience

    a. It is desirable that all Dispute Review Board members be experienced with the aviation relationship involved in the project, interpretation of Contract documents and resolution of aviation disputes.
    b. The goal in selecting the third member is to complement the experience of the first two and to provide leadership of the Board's activities.

2. Neutrality

    a. It is imperative that the Board members be neutral, act impartially and be free of any conflict of interest.
    b. For purposes of this agreement the term "member" also includes the member's current primary or full-time employer, and "involved" means having a Contractual relationship with either party to the Contract
    c. The following are disqualifying relationships for prospective members:

        i. an ownership interest in any entity involved with the Contract, or a financial interest in the Contract, except for payment for services as a member of the Dispute Review Board;

        ii. previous employment by, or financial ties to, any party involved in the Contract, including fee-based consulting services, within 10 years prior to award of the Contract, except with the express written approval of both parties;

        iii. a close business or personal relationship with any key members of any entity involved in the Contract which, in the judgment of either party, could suggest partiality; or
        iv. prior involvement in the project of a nature that could compromise that member's ability to participate impartially in the Board's activities.

C. Selection of the Board

1. Nomination and acceptance of first two members

a. Unless agreed otherwise, Party A and Party B shall each nominate a proposed Board member from the database and convey the nominee's name to the other party within 14 days.
b. Party A and Party B shall have 14 days within which to accept, in writing to the other party, the other party's nominee.
c. No reasons for non-acceptance need be stated. In the event of non-acceptance, the nominating party shall submit another nomination within 14 days of receipt until two mutually acceptable members are named.

2. Nomination and acceptance of third member

a. Upon acceptance of both of the first two members, the Parties will begin selection of the third member. The first two members will endeavor to nominate a third member who meets all the criteria set by the Parties. The third member shall be nominated within 14 days after the first two members are notified to proceed with their selection. The nominee's name will be conveyed to Party A and Party B. Party A and Party B shall have 14 days within which to accept, in writing to the other party, the third nominee. No reasons for non-acceptance need be stated. In the event of non-acceptance, the first two members will be requested to submit another nomination within 14 days of receipt of notice of non-acceptance.

b. In the event of an impasse in selection of the third member from nominees of the first two members, the third member shall be selected by mutual agreement of the Owner and the Contractor within 14 days of the last non-acceptance notice. In so doing, they may, but are not required to, consider nominees offered by the first two members.

D. Alternative Procedure for Selection of Single-member Board

1. General

a. If the Contract specifies, or Party A and Party B agree, a single-member Board will be established.

2. Procedure

a. Proposed Board members shall disclose to Party A and Party B any circumstance likely to affect impartiality, including any bias or any financial or personal interest in the project or any past or present relationship with the parties to the Contract.

E. Post-Appointment Disclosure

Board members have a continuing duty to disclose to Party A and Party B any circumstance likely to affect impartiality, including any bias or any financial or personal interest in the project or any past or present relationship with the parties to the Contract.

F. Board Member Challenge Procedure

To be determined by parties.

G. Vacancies

If for any reason a Board member is unable to perform the duties of the office, Party A and Party B may, on proof satisfactory to it, declare the office vacant. The new Board member(s) shall be selected in the same manner as the original member. In the event of a vacancy after a dispute has been submitted and hearings commenced, the remaining Board members may continue with the hearing and determination of that dispute, unless the parties agree otherwise.

*As adapted from AAA Sample Form Agreement for the Construction Industry

APPENDIX F

Sample Dispute Review Board Agreement

I. Parties

This Three-Party Agreement is between:

A. Party A *[Name]*;

B. Party B *[Name]*;

C. Dispute Review Board Members:

1. *[Name]*;
2. *[Name]*; and
3. *[Name]*

II. Contract

A. Party A and Party B are engaging in a transaction under a contract entitled *[contract name]* dated *[contract date]*.

B. A certain contract *[contract name]* establishes the operation of a Dispute Review Board (Board or DRB) to assist in resolving Disputes as defined therein.

III. Purpose

A. The purpose of the Board is to consider, in a timely and impartial fashion, the disputes referred to it, and to provide written, nonbinding recommendations to Party A and Party B to resolve those disputes.

IV. Scope of Work

The scope of the Board's work includes, but is not limited to, the following:

A. *Periodic Meetings*

1. The Board members will meet at least [monthly/quarterly] (or more frequently, upon mutual agreement of the Board, Party A, and Party B) to become familiar with the working relationship between the parties.

2. In case of an actual or potential dispute, it maybe advantageous for the Board to personally review any relevant conditions on a real-time basis. If a viewing by the Board would delay the project, then videos, photographs and descriptions of these conditions, collected by either or both parties, may be utilized instead.

B. *Establish Procedures*

1. The Dispute Review Board shall adopt or develop operating procedures and hearing procedures

C. *Board Recommendations for Resolution of Disputes*

1. Upon receipt by the Board of a written Request for Board Review, the Board shall convene a hearing and, thereafter, issue a written recommendation to Party A and Party B.

2. All Board members must act impartially and independently in considering the facts and

conditions surrounding any dispute.

3. The Board shall make an effort to reach a unanimous recommendation. If this proves impossible, the dissenting member may prepare a minority report.

4. The Board's recommendation, together with explanations of its reasoning, shall be submitted as a written report to both parties. In arriving at its recommendation, the Board shall consider pertinent provisions of the Contract, applicable laws and regulations, and the facts and circumstances involved in the dispute.

D. *Other*

1. The Board members shall become familiar with the Contract Documents, review periodic reports and maintain a current file.

2. Except for providing the services required in this Agreement, the Board and its individual members shall refrain from giving any advice to either party concerning conduct of the work or the resolution of problems which might compromise the Board's integrity.

3. The Board shall perform services not specifically listed herein to the extent necessary to achieve the purpose of this Agreement.

V. Party A Responsibilities

A. Party A shall furnish each Board member with pertinent Contractor-prepared documents to supplement the documents provided by Party B.

B. Except for its participation in the Board's activities as provided in the Contract Documents and in this Agreement, Party A shall not solicit advice or consultation from the Board or its members on matters dealing with the conduct of the work or resolution of problems which might compromise the Board's integrity.

VI. Party B Responsibilities

A. Party B shall furnish each Board member with one copy of all contract documents pertinent to the performance of the contract and necessary to the Board's work.

B. In cooperation with Party A, coordinate the operations of the Board.

C. Furnish conference facilities at or near the site and provide copying services.

D. Except for its participation in the Board's activities as provided in the Contract Documents and in this Agreement, Party B shall not solicit advice or consultation from the Board or its members on matters dealing with the conduct of the work or resolution of problems which might compromise the Board's integrity.

VII. Time for Beginning and Completion

A. The Board shall be active throughout the duration of the Contract. It begins operation upon notice of appointment by the Parties and following execution of this Agreement and shall terminate its activities as of the date of (*date to be filled in by parties*); however, should any disputes be pending as of that date, 30 days beyond the date on which the Board issues its recommendations regarding those disputes (unless earlier terminated or dissolved by mutual agreement of Party A

and Party B). The Board's jurisdiction will continue for 30 days beyond the date of its recommendations for the limited purpose of responding to a request for clarification or in the event that Party A or Party B introduces new evidence.

VIII. Payment

A. Payment for services of the Board members shall be at the rates agreed to by the Parties and Board prior to Board member service.

B. The first two members will be reimbursed for the time and expense associated with choosing the third member.

C. Direct, non-salary expenses will be reimbursed at the actual cost to the Board (including, but not limited to, air, train, bus fare or automobile mileage, parking and travel expenses from the Board member's point of departure to the initial point of arrival, automobile rental, food and lodging, printing, long-distance telephone, postage and courier delivery). Billing for these expenses shall include an itemized listing supported by copies of the original bills, invoices and expense accounts.

D. Invoices of the Board members shall be paid by Party A and Party B, equally. Payments shall constitute full compensation for work performed and services rendered, and for all materials, supplies and incidentals necessary to serve on the Board.

E. The cost records and accounts pertaining to this Agreement shall be kept available for inspection by representatives of Party A or Party B for one year after final payment.

IX. Termination of Agreement

A. This Agreement may be terminated by mutual agreement of Party A and Party B at any time within 28 days written notice to the other parties.

B. Board members may withdraw from the Board upon 28 days written notice to Party A and Party B.

X. Immunity and Indemnification

A. Each Board member, in performing their Board duties, acts as independent contractor and not as an employee of either Party A or Party B.
B. Party A and Party B expressly acknowledge that each Board member shall act in a capacity intended to facilitate resolution of disputes. To the fullest extent permitted by law, each Board member shall be accorded quasi-judicial immunity for any actions or decisions associated with the consideration, hearing and recommendation of resolution for disputes referred to the Board.

C. Each Board member shall be held harmless for any personal or professional liability arising from or related to Board Activities. To the fullest extent permitted by law, Party A and Party B shall indemnify all Board members claims, losses, demands, costs and damages (including reasonable attorney's fees and costs) for bodily injury, property damage, or economic loss arising out of or related to Board members carrying out Board functions. The foregoing indemnity is a joint and several obligation.

XI. Disputes Regarding This Three-Party Agreement

A. Any controversy or claim arising out of or relating to this agreement, or the breach thereof, shall be settled by (*process to be selected by parties*).

XII. Effective Date

A. This Agreement is effective as of *[Date]*.

Board Member	Board Member	Board Member
....	....	....
Party A	Party B	
....	....	
By: *[Name, Title]*	By: *[Name, Title]*	