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An Approach To Preventing Conflict: Unpacking The Standing Neutral

Dan Bumblauskas,
University of Northern Iowa, daniel.bumblauskas@uni.edu

Kate Vitasek
University of Tennessee Knoxville

See next page for additional authors

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Authors

Dan Bumblauskas, Kate Vitasek, and Jim Groton

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An approach to preventing conflict: unpacking the standing neutral

Dan Bumblauskas, Ph.D.
University of Northern Iowa
Email: daniel.bumblauskas@uni.edu

Kate Vitasek
University of Tennessee Knoxville
Email: kvitasek@utk.edu

Jim Groton
Eversheds Sutherland (Retired)
Email: jimgroton@eversheds-sutherland.com

ABSTRACT

Contractual relationships are vulnerable to the damage caused by friction in relationships, particularly when this turns into a formal dispute. If negotiations fail, the next step is calling in a mediator, and perhaps ending up in arbitration or the court system. This paper argues for the proactive use of a “Standing Neutral” – a trusted, independent expert advisor (or a panel of three advisors) chosen by the contracting parties to help during their contractual relationship. Rather than being reactive to disputes, an organization can be proactive by a standing neutral as chosen by the contracting parties to help during their engagement.

Keywords: Standing Neutral, Third Parties (e.g., ADR, arbitration, mediation), Group Bargaining and Negotiation (i.e., multiparty), Negotiation Process & Outcomes (e.g., psychological, economic, relational)

INTRODUCTION

Contracts are inherently incomplete. No lawyer has yet crafted the perfect contract that will anticipate every eventuality. Problems and unexpected events are always around the corner. Long-term contractual relationships are especially vulnerable to the damage caused by friction in relationships, particularly when this friction turns into a formal dispute. For far too many organizations, the need to engage in conventional conflict resolution does not begin until the parties have experienced real pain. By that time, they have blamed each other for their troubles. Unfortunately, this usually means that internal escalations have failed and the parties' relationship has reached a breaking point which can lead to calling on their respective lawyers who are not typically incentivized or instinctively inclined to resolve conflicts constructively in the way best suited to the preservation of the relationship. And if typical negotiations fail, the next step is calling in a mediator, and perhaps eventually ending up in arbitration or the court system.

The fact is that most disputes start small, typically stemming from misaligned or unclear expectations. This article argues for the proactive use of a “Standing Neutral” – a trusted,

independent expert advisor (or a panel of three advisors) chosen by the contracting parties to help parties during their contract relationship. A classic Standing Neutral process can best be described as a quick, informal, flexible, adaptable, non-adversarial, neutral, expert, and preferably nonbinding process for preventing and achieving the earliest possible solution to problems and potential disputes. The modern Standing Neutral is even more proactive, putting even more focus on avoiding problems to prevent disputes.

This article will help you understand the why, what and how of using a Standing Neutral for preventing and managing conflicts. The bottom line? It is your bottom line. Using a Standing Neutral is more effective and efficient for governing today's modern commercial relationships.

RESEARCH MOTIVATION FOR A STANDING NEUTRAL

Contracts can be similar to buying a new pair of shoes; it is often great at first - but sometimes friction occurs. Small misalignments are like the rub from that brand-new pair of shoes which can be unpleasant and turn into a blister. Left unchecked what starts as friction or misaligned interests can turn into a full-blown dispute – or worse – end up in court. While the vast majority of conflicts avoid litigation, the time and cost associated with traditional negotiation, mediation and arbitration can be protracted and expensive. Even if the issue does not go to a formal dispute, the friction causes lost opportunity, value leakage and transaction costs: what Oliver Williamson calls Transaction Cost Economics.

The simple fact is that friction should be expected in any complex contract. Why? In the words of Nobel Laureate Oliver Williamson: “all complex contracts will be incomplete. There will be errors, omissions, and the like (Williamson, 2008).” The very nature of complex contracts means it is impossible to predict every ‘what if’ scenario given today's global and dynamic business environment.

Another Nobel Laureate – Oliver Hart – echoes Williamson's sentiments regarding incomplete contracts. Hart's research with John Moore suggests you really should not blame ‘the other guy’ for what may seem like opportunistic behaviors, rather it stems from what Hart calls *shading* (Hart and Moore, 2008). Shading is not opportunistic behavior, but *retaliating behavior* in which a party stops cooperating, ceases to be proactive, or makes countermoves because of disappointment. Shading happens when a party doesn't get the outcome they expect from the deal and feels the other party is to blame for it or does not act reasonably by helping to mitigate the losses.

To provide another example, think about the highly contentious scope-creep debate. A supplier does a business case based on the information shared during a competitive bid process. They estimate they will make 15% profit margin. If demand is lower than expected or there is extra work not anticipated (e.g., scope-creep), the supplier will have lower than expected profit. This disappointment will cause the supplier to justify asking for scope changes. And if the buying organization makes it difficult to get a contract changes through, the supplier may be tempted to reduce service levels or replace the expensive A-team with the less costly C-team. In short – each party's action leads to the other party's reaction, creating the negative tit-for-tat cycle. One disappointment leads to another and the vicious cycle begins. The problem is so systemic in large and complex deals it is sometimes called the *death spiral* because once the cycle starts it often ends with an incumbent supplier losing the work to a competitor during the next bid cycle.

Sadly, the root cause is often not opportunism, but disappointment based on the expectations that the parties have.

The concept of shading makes sense, especially with complex deals. In complex deals, a contract will always be incomplete with gaps, errors or omissions opening the door for shading behavior after the contract is signed. Traditional contracts rarely contain proactive alignment mechanisms to avoid disappointments.

In far too many situations, the need to begin a process for dealing with disputes isn't recognized until after those disappointments have led to real pain and frustration. The reality is many issues do not resolve themselves easily and they drag on. However, most issues can be prevented, or at least resolved, while they are still small. This paper argues using the more preventive and proactive approach of a Standing Neutral to collaboratively resolve any differences in "real time" when any issues or misalignment is still small. Figure 1 provides an overview of the standing neutral definition.

Figure 1. What is a Standing Neutral?

A Standing Neutral is an innovative and promising improvement on traditional Alternative Dispute Resolution (ADR) techniques. A Standing Neutral process uses a highly qualified and respected expert, pre-selected - or "standing" - neutral who helps parties resolve issues throughout the life of a relationship. The classic Standing Neutral plays a facilitation role to help the parties see each other's perspectives and, when appropriate, provides a non-binding recommendation. Some companies use variations such as a Standing Mediator or even a Standing Arbitrator. Others have found including a Standing Neutral upfront in the actual design and creation of contract can lead to significant value and a more fair, balanced, "win-win" contract (Vitasek and Manrodt, 2012). A modern approach to the Standing Neutral concept is to engage the neutral early on, facilitating proactive and constructive dialogues and day-to-day discussions, with the aim to provide continuous alignment and prevent issues altogether.

Organizations adopting Standing Neutrals proactively acknowledge the reality that no relationship is perfect, and no contract can cover every eventuality. Errors, omissions and ambiguities can result in misinterpretation. Small things such as "does this idea count for gainsharing?" or interpretation of performance data "did the supplier score 3 or 4 on the scorecard?" cause frustration – especially for suppliers who may feel they do not have a voice. In addition, complex contracts operating in dynamic environments require frequent adjustments.

The time is ripe for commercial relationships to benefit from demonstrated successful experience with the Standing Neutral method. While there are many Alternative Dispute Resolution (ADR) techniques, the focus of this article is on the Standing Neutral because it is probably the least widely understood, yet most useful, of all the ADR techniques. It is also geared to not just the legal community, which traditionally focuses on court proceedings and ADR, but also to a broader business community that includes business professionals in joint ventures, long-term business arrangements, and outsourcing arrangements.

LITERATURE REVIEW

Alternative dispute resolution techniques, and use of third parties in relationships, are not new. But what is new is the emerging emphasis on shifting away from dispute resolution to dispute prevention processes – especially as they are related to using what is known as a Standing Neutral.

The Rise of Alternative Dispute Resolution for Solving Conflicts

Judicial (court) systems for resolving disputes have been in effect throughout civilized history. And almost as long as courts have been used, individuals and organizations have sought simpler, more efficient and more cost-effective means to deal with disputes – processes known today as Alternative Dispute Resolution (ADR) techniques. While modern ADR methods have only been in place for 40 years, one could argue the roots of ADR date all the way back to a decree issued by the Chinese emperor, Kang-Hsi (1654-1722).

Michael McManus and Briana Silverstein (2011) document the history of ADR in “Brief History of Alternative Dispute Resolution in the United States.” Their research revealed formal ADR techniques date as far back as the Norman Conquest which allowed for a local and highly respected layperson to conduct informal, quasi-adjudicatory settings in their communities rather than use a more formal King’s court.

The concept of using alternatives to a King’s court was expanded more formally in the early trade guilds that sought to enforce standards of quality, performance and marketplace behavior. Many of those systems continue today in commercial markets such as the diamond market and the textile industry (Wolaver, 1934).

Pilgrims brought the concept of ADR to the United States “preferring to use their own mediation process to deal with community conflicts.” When disagreements occurred, members of the community would hear claims, determine fault, assess damages, and ensure that the parties reconciled with one another (McManus and Silverstein, 2011). Mediation was formally institutionalized in the U.S. in 1898 when Congress, following initiatives begun a few years earlier in Massachusetts and New York, authorized mediation for collective bargaining disputes (Ibid). In 1925 Congress passed the Federal Arbitration Act, which included express authorization for courts to enforce arbitration awards (Ibid).

The modern terms “Alternative Dispute Resolution,” and “ADR,” were coined as a result of the

first Pound conference in 1976, which promoted the use of mediation and arbitration as adjuncts to the traditional legal system. The Pound Conference marked the beginning of a formal movement which encouraged the business world to actively embrace out-of-court processes for managing conflict. The movement attempted to move the dispute resolution process farther “upstream,” closer to the origins and sources of disputes. The Global Pound Conference series was inspired by Harvard law professor Roscoe Pound and the name of a 1976 conference named for him; it was an impetus for the growth in the popularity of arbitration and mediation in the USA.

The 1980’s were a decade of increased interest and use of ADR. In 1983 the Center for Public Resources (now more aptly named the International Institute for Conflict Prevention and Resolution, or CPR) was established as a think tank for the improvement of ADR processes. In a 1984 address to the American Bar Association, then–Supreme Court Chief Justice Warren Burger advocated for lawyers to increase their use of ADR. He acknowledged that while trials are the only way to resolve some disputes, the legal system is adversarial, too costly, painful, destructive, and inefficient to effectively manage all disputes (Dunnewold, 2009).

The Advent of Proactive Prevention Practices

Even before ADR was taking hold, the business attorney Louis M. Brown (1950) argued that new ideas and innovative processes for the *anticipation of conflict* and *dispute prevention* were needed. He called this “preventive law.” Brown’s work sparked an interest in the formal study of preventive conflict approaches – most notably in the construction industry, which is notorious for costly disputes that can have dire consequences on the timeliness and success of a project. Brown famously argued, “It usually costs less to avoid getting into trouble than to pay for getting out of trouble.”

One of the earliest known preventive practices dates back the early 1900s when the American Institute of Architects established a system for resolving construction project disputes between project owners and contractors that designated the architect as the initial judge of the contractor’s performance. In case of a dispute over the architect’s decision, the process called for a prompt appeal to an *ad hoc*, one-issue arbitration before an expert construction industry arbitrator. Typically, there was usually no shortage of qualified individuals who could serve as arbitrators on short notice.

The American Institute of Architects system emphasized timeliness – which was crucial for fast-moving construction projects where delays can be costly and have significant negative impact. Further, the easy availability of an immediate decision in arbitration encouraged architects to act fairly and with integrity, usually resulting in mutual acceptance of architect’s decision without an appeal, thus avoiding and preventing any dispute.

The practice of using preventive techniques in the construction industry was expanded in 1975 when a group of innovative construction practitioners conceived of the idea of a “dispute review board” of geological engineers to immediately solve difficult rock and soil problems on a major tunneling construction project (Mathews et al., 1996, p. 10). By the mid-1980s owners and contractors on major industrial projects further expanded on the concept by developing long-term “trusting” alliances to achieve greater efficiency and cost savings, processes which they called “strategic partnering,” which evolved into “project specific partnering (Ibid).” During the same period other advances also emerged such as using “financial incentives to encourage

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cooperation (Construction Industry Institute, 1986),” and the concept of realistically allocating risks on construction projects, to achieve maximum efficiency (Construction Industry Institute (1988).

A common characteristic of these contractual preventive processes – in contrast to conventional ADR “resolution” processes – is that they proactively address problems and potential disputes before they morph into intractable disputes, rather than reactively deal with disputes after they have occurred.

The 1990’s began more formal study into preventive techniques. The Construction Industry Institute (CII) led the pack with significant research between 1991 and 1994 that validated the utility of prevention processes being piloted. The CII added to the body of knowledge by suggesting the use of a “disputes potential index” to identify potential sources of trouble on construction projects (Diekmann, 1994). CII also demonstrated that the dispute review board concept could be expanded to multi-disciplinary projects such as high-rise office buildings and not just projects involving single technical disciplines (Vorster, 1993).

A key part of the CII’s research contribution was the formal recognition of a critical distinction between “preventive” techniques and “resolution” techniques in the dispute resolution. This distinction was known as the “continental divide of dispute resolution” and is the point where parties lose control, and the process moves from proactive *prevention* to reactive *resolution* which “is neither timely nor cheap and is seldom satisfactory (Vorster, 1993, p. 10).” The terms are defined as:

- “Preventive” techniques: processes that enable the parties (and persons in privity with the parties) to keep control of their disagreement and avoid conventional dispute resolution
 - “Resolution” techniques: processes through which “outsiders” or “strangers” to the disagreement seek to resolve a dispute
- During the same timeframe the American Arbitration Association (Groton, 1990) and the

Center for Public Resources (1991) also advanced the understanding of preventive approaches when they classified these approaches into a spectrum or continuum of progressive dispute prevention processes which could be combined into graduated processes or “systems” to provide contracting parties a full range of dispute prevention and resolution alternatives (Costantino and Sickles Merchant, 1996).

This early work in effect moved the dispute resolution process even further “upstream,” embracing proactive processes that anticipate, deal with and prevent problems and potential disputes at the source, before they must be subjected to traditional, expensive, time-consuming and potentially relationship-damaging dispute resolution.

One of the most recent preventative techniques is the use of data analytics to search for early warning” indicators. This idea emerged in 2012 when data analytics experts began to analyze electronic data files (e.g., documents, emails, texts) to detect patterns that might indicate a potential risk. If a risk is detected, the suspected data can be analyzed and addressed before a potential problem develops into a serious concern. For example, if a potentially risky problem appears in yesterday’s emails, inside counsel may decide to conduct an internal investigation today to confirm or deny the “early warning.” If confirmed, and since the text at issue has been

surfaced in near real-time, risks can be addressed internally before they develop into real problems, disputes, or litigation (Brestoff, 2012; Brestoff and Inmon, 2015).

While the construction industry was having early successes with preventing practices, other industries were still stuck in “resolution” – which was growing more complicated and costlier. Carver and Vondra (1994) critiqued ADR in the aptly titled article “Alternative Dispute Resolution: Why It Doesn’t Work and Why It Does” which stated: “The bad news is that ADR as currently practiced too often mutates into a private judicial system that looks and costs like the litigation it’s supposed to prevent.” Cornell Law School reports this has only worsened over the years (Legal Information Institute, 2017).

The good news is there is increased interest from the academic and business communities in expanding “preventive” ADR techniques outside of the construction industry. While arbitration and mediation are still the most well-known and used ADR techniques today, the concept of ADR has grown to mean any method of resolving disputes without resorting to litigation in a courtroom (Legal Information Institute, 2017). In addition, using preventive processes has expanded beyond the construction industry to many other kinds of business relationships (International Institute for Conflict Prevention & Resolution, 2010).

Preventive practices got a boost when the International Mediation Institute (IMI) organized a follow up to the original Pound Conference in 2016/2017 to evaluate the state of dispute resolution 40 years after the first Pound Conference of 1976. The aforementioned series of conferences (known as the Global Pound Conferences) were held in 29 cities around the world and brought together thousands of users, providers and advisors to discuss the future direction of ADR. During the events delegates were asked to vote on which dispute resolution processes should be prioritized to improve dispute resolution. In the overall cumulative voting, the delegates - by a substantial margin - voted for “pre-dispute or pre-escalation processes to prevent disputes,” over all other dispute resolution processes. The title of the conference series was “Shaping the Future of Dispute Resolution & Improving Access to Justice.” After ending, the Global Pound Conference platform changed to become the Global Pound Conversation, a blog and research series covering changes and developments in mediation and alternative dispute resolution around the world (<https://www.globalpound.org>).

Expanded Use of Neutral Third-Parties

Organizations – especially organizations wishing to procure goods and services – have long used outside third-parties such as advisory, consulting and legal service providers to help them select and source suppliers. In the early 1990’s researchers began to explore the concept of using third-parties as “bridge builders” in relationships (Obstfeld, 2005; Long Lingo and Mahoney, 2010). In 1991 L.D. Brown noted third-parties play the role of “central actor among diverse constituencies” who can be an effective conduit for “ideas and innovations, a source of information, a broker of resources, a negotiator of deals, a conceptualizer of strategies, and a mediator of conflict (Brown, 1991).”

Neutral third-parties have been shown to provide value in a variety of capacities, including:

- Research into trust theory suggests that people engage in self-monitoring and demonstrate more trusting behaviors in a relationship when there is a shared link to a third-party (Zucker, 1986)

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- James Coleman (1990) argued that when a mutual third-party is connecting two parties, the neutral third-party could exert sanctions that will restrain the parties from behaving opportunistically towards each other
 - “Bridging organizations” whose role is to facilitate multi-sector partnerships (Westley and Vredenburg, 1991)
 - “Boundary spanners” in networks (Burt, 1992)
 - “Go-betweeners” in alliances (Noteboom, 2004)
 - “Intermediaries” for improving innovation (Howells, 2006)
 - Building and repairing trust (Noteboom, 2004; McEvily and Zaheer, 2004; Mesquita, 2007)
 - Preventing opportunistic behavior (Coleman, 1990) and reducing the negative effect of power disparity (Noteboom, 2004)
 - Henry Adobor and Ronald S. McMullen (2014) found the use of a credible neutral third-party exerts indirect influence by inspiring self-monitoring with no direct sanctions
 - Gillian Hadfield (2017) advocates for a shift to third-party regulation to create lower cost approaches to “ensure that not only poor-country suppliers, but also the global corporations that buy from them, are bound to rules”
- Most recently, research in a *Journal of Purchasing and Supply Management* article titled

“Strategic Purchasing and Supplier Partnerships – The Role of a Third-party Organization” shows a third-party can play a “significant and positive role in the development of interfirm relationships (Adobor and McMullen, 2014).”

Advent of the Standing Neutral

As noted previously, the first Dispute Review Board (DRB) was invented in 1975. The DRB was a trusted three-party panel of independent expert advisors chosen by contracting parties to be immediately available to help resolve disputes that arise between them during their contract relationship. By 1991 the process had been used successfully on over 100 projects requiring expertise in only a single technology, such as tunnels (geotechnical engineering), dams (civil engineering), other massive civil engineering projects, and a few commercial projects. By that time the DRB and was recognized as a superior process for keeping the peace on a construction project. The first use of the term “Standing Neutral” to characterize a Dispute Review Board, and its likely applicability to multi-disciplinary types of construction, appears to have been in a 1991 CPR Publication “Preventing and Resolving Construction Disputes (Groton, 1991).”

Unlike a neutral used on an *ad hoc* basis for dispute resolution in mediation or arbitration, a Standing Neutral is a readily-available “fast response” technique, designed to prevent any issues from escalating into adversarial disputes that might otherwise go to mediation, arbitration or litigation. A key feature is that the neutral is “standing.” - meaning that it is integrated into the parties’ continuing governance structure. Another key concept is that the standing neutral supports the relationship itself and both parties equally; the goal is to ensure the success of the relationship.

The classic Standing Neutral process can best be described as “a quick, informal, flexible, adaptable, non-adversarial, neutral, fact-based, expert, preferably nonbinding, process for proactively achieving the earliest possible solution to problems and potential disputes.” The modern Standing Neutral process takes it a step further and is a mechanism for avoiding

problems and disputes in the first place. There is little formal research into the use of Standing Neutrals outside of the construction industry. This is a major reason this article is so imperative.

DEVELOPING A STANDING NEUTRAL

The Role of the Classic Standing Neutral

The role of a “classic” Standing Neutral is to serve as a “real time” dispute-resolver throughout a relationship (Groton, 2009). Because they are “standing” they can act immediately to resolve any potential or actual disputes which the parties cannot resolve themselves. There are several variations of a classic Standing Neutral, but almost all involve these common steps:

1. At the outset of their relationship, parties select one or three persons in whom they have trust and confidence to serve as their dispute resolver (the Standing Neutral) throughout their relationship.
2. A single Standing Neutral should always be entirely independent. In most cases where there is a multi-member Standing Neutral, each party nominates one member, and the two nominated neutrals will select a third member; in such cases, it is typically required that every panel member be acceptable to both parties, and that all panel members be independent and impartial, without any special allegiance to the nominating party.
3. Depending on the wishes of the parties, the Standing Neutral is given authority to act on issues and disputes by rendering either a nonbinding evaluation or recommendation, or a binding decision. If the Standing Neutral is empowered to only make a recommendation, either party may challenge the Standing Neutral’s recommendation. However, the recommendation will typically be admissible as evidence in any subsequent arbitration or litigation.
4. The Standing Neutral is briefed by the parties regarding the nature, scope and purpose of the relationship or venture. It is usually equipped with a basic set of contract materials and supporting documents.
5. The Standing Neutral is usually part of ongoing governance, to be available on short notice and meet regularly with the parties for a basic review of the progress of the relationship, even if there are no issues. Sometimes the Standing Neutral is merely available on an ad hoc basis, with the contracting parties calling in the Standing Neutral, whenever necessary, for advice, a prompt recommendation, or decision.
6. The parties equally absorb the cost and expenses of the Standing Neutral.

The role of a Standing Neutral has also been referred to as a “Dispute Review Board”, “Referee”, or “Wise Person”.

Three Critical Elements of the Standing Neutral Process

There are three critical elements essential to the success of the Standing Neutral technique:

- Early mutual selection
- Continuous involvement by the neutral

- Prompt action on any issues.

EARLY MUTUAL SELECTION

Using a Standing Neutral begins when the parties mutually agree and designate a single neutral (or a board of three neutrals such as a Dispute Board in the construction industry). The parties should mutually select a Standing Neutral where they have high confidence in the neutral's integrity and expertise. As such, a Standing Neutral is typically an expert in the subject industry the parties are involved in (e.g., construction, facilities management, IT services).

The Standing Neutral should be jointly selected by the parties *early* in the relationship. If the Standing Neutral will play a role as a deal architect, they should be selected *prior* to the parties starting their contracting process. If the Standing Neutral will be used primarily as a cost-effective issue resolution process as part of ongoing governance, the Standing Neutral should be selected *during* the contracting process before the contract is signed. This allows for the Standing Neutral to be embedded as part of the ongoing governance mechanisms.

By establishing a Standing Neutral from the inception of the relationship, the Standing Neutral becomes part of the team and helps to create a collaborative atmosphere. As such, Standing Neutrals are often thought of in a different fashion, which creates an atmosphere far more collaborative than when selecting a mediator or arbitrator after a dispute arises. Many view a Standing Neutral as a "mutual friend," "referee," or "sensible sounding board" because their advice is respected and accepted more readily than if the parties brought in a third-party stranger (mediator or arbitrator) after there is a formal dispute.

Pre-selecting a Standing Neutral at the onset of a contract avoids many problems associated with adversarial jockeying and delays associated with trying to find a suitable mediator or arbitrator after controversy arises. The ready availability of the Standing Neutral and the neutral's familiarity with the relationship make it possible to obtain a prompt resolution of any disputes.

CONTINUOUS INVOLVEMENT

Once the Standing Neutral is selected, he or she is briefed on the relationship and furnished with the basic documents describing the relationship. The role of a Standing Neutral will vary based their entry point into the relationship. For example, the University of Tennessee's popular Vested outsourcing methodology for developing highly collaborative win-win outsourcing relationships embeds a neutral third-party "deal architect" as a coach as part of the contract development (Vitasek and Manrodt, 2012). The Standing Neutral provides an objective view on facts and issues and helps the parties ensure they get to a fair and balanced contract.

Organizations that embed a Standing Neutral as part of ongoing governance (e.g., such as in the construction industry's Dispute Review Board) will rely on the Standing Neutral to help the parties immediately address and resolve issues and concerns that arise in the relationship and to prevent issues from escalating into full-fledged disputes. This early and swift involvement ensures issues are resolved while they are small, preventing the need for more costly mediation, arbitration or litigation.

One of the key differences between a Standing Neutral and a mediator or arbitrator is the fact

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the Standing Neutral has ongoing involvement with the parties during the life of the contract (or project, as in the construction industry). The parties routinely provide the Standing Neutral with periodic progress reports as the relationship progresses and, when possible, invite the Standing Neutral to meet occasionally with the parties absent any immediate dispute. For example, in construction projects Dispute Boards are often part of the project administration. Likewise, in an outsourcing relationship a Standing Neutral can be embedded into formal governance mechanisms such as Quarterly Business Reviews (Groton and Dettman, 2011).

Because a Standing Neutral has more of a "hands-on" approach, they can almost always earn trust quickly as being fair and impartial. In addition, the continuous involvement of the Standing Neutral enables them to maintain a feel for the dynamics and progress of the relationship. Also, they can coach each party about the potential opportunistic behaviors that can easily start a downward spiral of tit-for-tat negative actions.

A key benefit of having a Standing Neutral embedded in the relationship is that it significantly increases the speed with which he/she can offer advice and render decisions if needed. In addition, the Standing Neutral will hear every dispute that occurs during the history of the relationship, which promotes more candid discussions. This enables the Standing Neutral to shift the focus from that of a "judge" to one of a "coach."

Last, the ongoing nature of the relationship with the Standing Neutral becomes a powerful inherent incentive for the parties to "self-monitor" behaviors and avoid opportunism and shading (Hart and Moore, 2008) behavior much the way a referee works in a sport to curb bad behaviors. Thus, the Standing Neutral can influence, during the contract period, positive behaviors that improves contract performance. The concept of shading was developed by Nobel Laureate Oliver Hart. Shading is not opportunistic behavior, but rather retaliating behavior in which a party stops cooperating, ceases to be proactive, or makes countermoves because of disappointment. Shading happens when a party does not get the outcome they expect from the deal and feels the other party is to blame for it or does not act reasonably by helping to mitigate the losses. In short – each party's action leads to the other party's reaction, creating the negative vicious cycle. One disappointment leads to another and the cycle begins. The concept of shading makes sense, especially with complex deals. In complex deals, a contract will always be incomplete with gaps, errors or omissions opening the door for shading behavior after the contract is signed. Traditional contracts simply do not contain mechanisms to avoid disappointments.

REAL-TIME AND PROMPT ACTION ON ISSUES/CONCERNS/DISPUTES

A key objective of a Standing Neutral process is to preserve cooperative relationships between the contracting parties. The classic Standing Neutral emphasizes "keeping the peace" in a relationship while modern Standing Neutrals focus on a more proactive continual alignment of interests. A good Standing Neutral process is a "fast response/dose of reality" technique emphasizing "real-time" resolution which can be deployed during the contracting process and after the contract is signed (Groton, 2009).

The Standing Neutral is expected to be available on relatively short notice to consult with the parties and to discuss issues while misalignment and problems are still new and likely still small. The Standing Neutral has a remarkable ability to help the parties resolve any misalignment because they are a trusted "part of the team." The Standing Neutral reviews an issue while it is in the earliest stage and helps the parties identify ways forward in an informal capacity before

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issues become disputes. The Standing Neutral's early involvement creates valuable opportunities for the parties to avoid disputes through proactive communication. In addition, the participation of lawyers as advocates for parties is discouraged to preserve the informality of the process and to help keep the process as non-adversarial as possible.* This offers a significant advantage over traditional mediation, arbitration or reconciliation techniques.

In most cases, if the parties cannot reach a resolution, the Standing Neutral will render an impartial recommendation (not a compromise proposal) when issues arise (Vorster, 1993; Hafer, 2010). If the Standing Neutral is called on to make a recommendation, recommendations are often only regarding matters of entitlement, leaving discussion of amounts up to the parties after they have received the recommendation. Typically, the recommendations of the Standing Neutral are non-binding and parties can opt for a more formal dispute resolution process such as arbitration or litigation if the Standing Neutral's recommendation is not accepted. However, sometimes the parties give the Standing Neutral the authority to act as an arbitrator to make binding decisions. The downside to asking for a binding decision is that this will likely encourage the participation of lawyers serving in an adversarial capacity, changing somewhat the nature of the process.

Experience has shown that when an issue is referred to the Standing Neutral, the Neutral's decisions have generally been accepted by both parties with no attempt to seek relief from any other tribunal. This result is enhanced where there is a contract stipulation stating that the event of any subsequent arbitration or litigation, the decisions of the Standing Neutral will be admissible in evidence in formal arbitration or litigation.

Why the Standing Neutral Process Works So Well

When parties combine the three elements above into a Standing Neutral process, they are in essence establishing the "rules" of how they will use the Standing Neutral to prevent or resolve issues early. A well-designed Standing Neutral embeds their customized rules as a foundational component of the parties' ongoing governance (Groton and Dettman, 2011).

Standing Neutrals have had a remarkable record of success wherever they have been used. In the large majority of cases, the parties never look to the Standing Neutral to make any recommendations or decisions. And in the small minority of cases where the Standing Neutral actually makes a recommendation, 95% of the recommendations are accepted by the parties without resort to mediation, arbitration or litigation (Mathews et al., 1996).

The establishment of a Standing Neutral—which appears at first to be merely an efficient technique for resolving disputes—creates a dynamic situation in which the participants in the business enterprise change their relationship and their attitudes toward each other. The changes usually are an evolution, rather than a conscious effort. For example, at first it is common for contracting parties to feel they are simply choosing an expert neutral for resolving conflicts between them promptly. However, as the Standing Neutral interacts with the parties during ongoing governance forums, the parties develop a greater sense of confidence in the Standing Neutral's ability to quickly alleviate friction in the relationship. When this happens, the parties shift their view of the Standing Neutral from "dispute resolver" to a view of "mutual friend" or a "sensible sounding board."

* *Lawyers are often Standing Neutrals. However, when acting in the capacity of a Standing Neutral they do not formally represent either party in a formal legal capacity, but rather as a neutral advisory role*

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Simply put, the mere act of appointing a Standing Neutral can be like a magic bullet for reducing or even eliminating friction between parties to a contract. Research supporting this dates to 1933 when Elton Mayo (Mayo 1933; Shafritz et al., 2016) conducted research into the “Hawthorne Effect,” which states the mere act of watching can affect behaviors. Since then several researchers have shown the impact of using outsiders. For example, Adobor and McMullen (2014) found “the sheer presence of a third-party fosters ‘self-monitoring’ of behaviors” and Dan Ariely has shown that the presence of others causes people to behave more honestly and reign in unethical behavior such as cheating (Ayal et al., 2015). These effects are amplified when the third-party observer is knowledgeable in the subject matter of the agreement and in the nature of the agreement. Table 1 illustrates how each of the examples is being used in practice.

TABLE 1. The timeline for adding a Standing Neutral to a contract

Pre-Contract Signing	Post-Contract Signing				
Problem Prevention Techniques	Problem Solving Techniques	De-Escalation Techniques	Dispute Control Techniques	Formal Dispute Resolution Methods	
Branding & Licensing Example					
			Franchise Wise Persons Committee		
		Outsource Agreement Embedded Governance			
			Real Estate Development Standing Arbitrators		

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Labor Services Deal Architect					
		Non-Profit NGO Wise Persons Committee			
					Toyota Standing Arbitrator
		South Korea Ombudsman Office			
		Outside Director Role			
Telia/Veolia Deal Architect					

[Detailed information and reference citation removed for blind peer review]

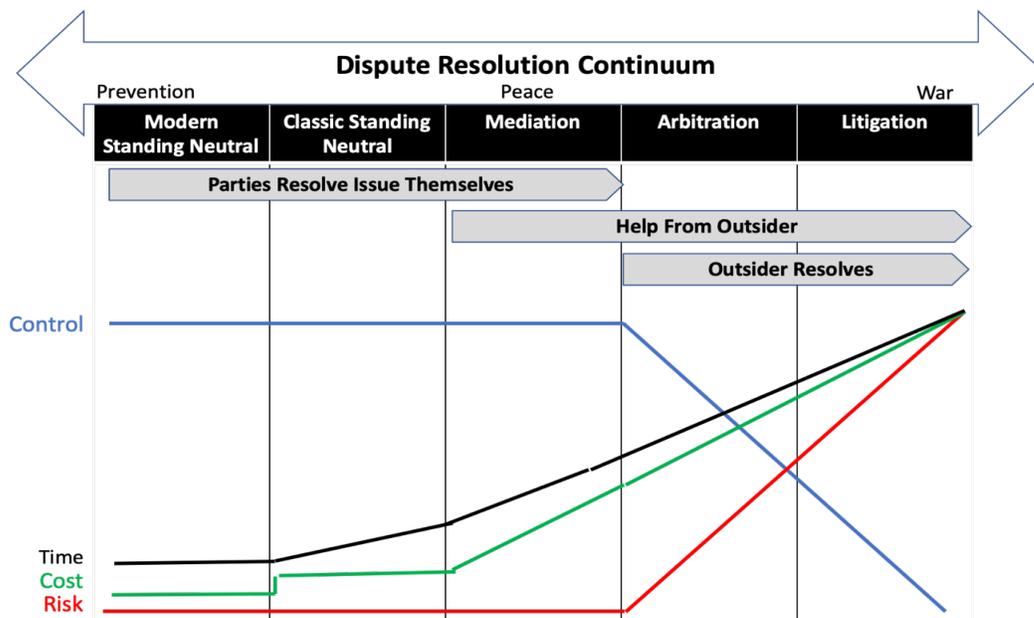
While the cost of mediation in and of itself is not expensive the largest cost is one of lost time, lost trust, and legal and consulting fees that add up over the protracted period. Figure 2 illustrates the relative cost differences of different methods of dispute resolution.

FIGURE 2. Relative Transaction Costs of Different Methods of Dispute Resolution

Judicial Proceedings	\$
Arbitration	\$
Mini-Trial	\$\$\$\$\$\$\$\$\$\$\$\$\$\$\$\$
Mediation	\$\$\$\$\$\$
Expert Advisory Opinion	\$\$\$
Standing Neutral	\$

Figure 3 expands on the notion of the continuum of cost, risk and control of dispute resolution originally developed by Kelsey to include a Standing Neutral and the aspect of time.

FIGURE 3. Dispute Resolution Continuum



CONCLUSION

While Louis M. Brown is credited as the founding father of “preventive law,” his early work inspired a growing cadre of followers who have researched and expanded on every facet of the concept of preventing disputes. Today there is a clear and unmistakable evolving trend toward incorporating proactive approaches for preventing and managing disputes into all business relationships. This recent trend is aptly termed “the Prevention Movement.”

The use of a Standing Neutral in business relationships – especially a modern Standing Neutral who focuses helping the parties stay in continual alignment - proves the adage “An ounce of prevention is worth a pound of cure.”

While there are skeptics, the Prevention Movement is taking hold as evidenced at the 2017-2018 Global Pound Conferences held worldwide. During the conference major stakeholders in the dispute resolution field (users of dispute resolution services, their advisors and lawyers,

providers of both adjudicatory and non-adjudicatory services, and the researchers and educators who influence the users of dispute resolution services) revealed the following consensus:

- Dispute resolution should be conceived and practiced earlier in the trajectory of risks that can develop into conflict, escalating from differences of opinion to arguments, aggression, and finally disputes that have to be dealt with through formal dispute resolution efforts.
- Pre-dispute or pre-escalation techniques are the most promising and valuable methods for improving the future of dispute resolution and should prevent disputes
- Where possible, risks should be understood and addressed in advance so problems never arise.
- Where efforts to prevent problems fail, steps should be initiated to de-escalated, contain, or provide “real time” resolution of conflicts so the costs, hostilities and delays of formal dispute resolution can be avoided.

The conclusions from the Global Pound Conferences demonstrate that the Prevention Movement is no longer just an aspiration of a few visionaries – but one that is seen as needed in today’s modern economy.

This article provides a framework for use of a Standing Neutral and how a Standing Neutral can be incorporated into all facets of a business relationships – ranging from pre-contract signing all the way through formal dispute resolution techniques that are much more effective than traditional mediation and arbitration.

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