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JAMS, The Resolution Experts, is the largest private provider of ADR services in the United States, with Resolution Centers in major cities throughout the country.

The JAMS Global Engineering and Construction Group provides expert mediation, arbitration, project neutral, and other services to the global construction industry to resolve disputes in a timely and efficient manner.

DIRECTOR'S CORNER

JAMS "RAPID RESOLUTION" PROCESS

The New Construction Industry Paradigm

By PHILIP L. BRUNER, ESQ. ***Director, JAMS Global Engineering & Construction Group***

The U.S. construction industry for decades has demanded swift resolution of its problems, disputes and claims. Its demand frequently has gone unmet due to the absence of an effective, on-site, real time dispute resolution process offering immediate resolution of

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An Arbitrator's Tips on Experts to Avoid

By JESSE B. (BARRY) GROVE III, ESQ.

I once encountered an arbitrator who was downright hostile to expert witnesses (on both sides fortunately). Since becoming an arbitrator myself, I have noticed that most arbitrators harbor skepticism towards expert testimony, if for no other reason because it is purchased. Yet experts are necessary in construction cases because technical and scientific issues beyond the ken of most arbitrators frequently arise. The trick is to engage an expert who is both knowledgeable and persuasive, and not like those described below.

The Skeleton in the Closet Expert

Believe it or not, there are experts who continue to obtain business and testify despite some significant skeletons in the closet. This might include having been caught with a falsified resume (I know of four such cases) or using falsified data (I know of one). In one memorable case, the expert had suffered infliction of a published court

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NOTICES

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SOCIETY OF ILLINOIS CONSTRUCTION ATTORNEYS (SOICA)

Resolving Construction Law Issues Across the 49th Parallel

Thurs., May 28, 2009 • 8 AM to 3 PM at the JAMS Chicago Resolution Center. ***5.5 hours of CLE credit; details below***

8:00 - 8:50 AM: *Continental Breakfast*

8:50 - 9:00 AM: **Welcome/Opening Comments**

Philip L. Bruner, *Director, JAMS Global Engineering & Construction Group (GEC); Past President, The American College of Construction Lawyers (ACCL), Chicago*

Harvey J. Kirsh, *JAMS GEC; Past President, The Canadian College of Construction Lawyers (CCCL); Partner, Osler, Hoskin & Harcourt LLP, Toronto*

Lorence H. Slutzky, *President, Society of Illinois Construction Law Attorneys (SOICA); ACCL Fellow; Partner, Robbins Schwartz Nicholas Lifton & Taylor Ltd, Chicago*

9:00 - 11:30 AM *(with 15-min break)* ***2.25 hours CLE***

US/Canadian Cross Border Issues in Construction Law

Moderator: **Lorence H. Slutzky**, *President, SOICA, Chicago*

Panel: **Ross J. Altman**, *Partner, DLA Piper US LLP; ACCL Fellow, Chicago*

Katherine Hope Gurun, *JAMS GEC; former General Counsel, Bechtel; ACCL Fellow and Board of Governors member, London, New York, San Francisco*

Helmut Johannsen, *Past President, CCCL; Partner, Fasken Martineau DuMoulin LLP, Vancouver*

Richard W. Pearse, *Partner, Vedder Price, Kaufman & Kammholz PC, Chicago*

Kenneth M. Roberts, *Partner, Schiff Hardin LLP, Chicago*

Douglas R. Stollery, QC, *General Counsel, PCL Construction Co.; CCCL Fellow, Edmonton*

11:30 AM - 12:30 PM: *Lunch & Presentation* ***1 hour CLE***

Economic Stimulus & Procurement: Canada-US Legal Issues under NAFTA & WTO Agreement

Speaker: **Lawrence L. Herman,** *International Trade Counsel, Cassels Brock, Toronto, ON*

12:30 - 3:00 PM *(with 15-min break)* ***2.25 hours CLE***

Meeting the Construction Industry's Demand for Rapid Dispute Resolution: International Arbitration and Other Effective Methods

Moderator: **Philip L. Bruner**, *Director, JAMS GEC, Chicago*

Panel: **Duncan Glaholt**, *Past President, CCCL; Partner, Glaholt LLP, Toronto, ON*

John W. Hinchey, *JAMS GEC; Past President, ACCL; Partner, King & Spalding, Atlanta*

Harvey J. Kirsh, *JAMS GEC, Toronto*

His Honour Humphrey LLoyd, QC, *JAMS GEC; former Judge of the High Court of England and Wales (Technology and Construction Court); Honorary ACCL and CCCL Fellow, London*

Paul M. Lurie, *SOICA; ACCL Fellow; Partner, Schiff Harden LLP, Chicago*

Seating is limited at this complimentary event. RSVP by May 21, 2009 to Stephanie House at 312.655.0555 or shouse@jamsadr.com.

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An Arbitrator's Tips on Experts to Avoid

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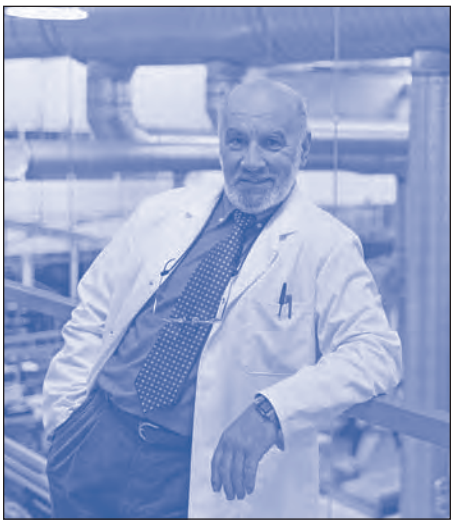
opinion harshly rejecting his testimony as entirely contrived. If you are considering using an expert not well-known to you, ask the question: "Any skeletons in the closet?" If the answer is yes, then there had better be a convincing prepared response for use when cross examination inevitably opens the closet door.



The Pseudo Expert

Some experts are not expert. I have twice encountered detailed criticism of contractor schedules by experts who did not know how to interpret what they were looking at. One even admitted that he had to hire a Primavera "trainer" to help him examine the electronic scheduling data obtained through discovery. A tip off is when the scheduling expert starts talking about "loose ends" and "artificial constraints." Frequently, these are not deficiencies at all which becomes obvious upon close examination. Another tip off is when the expert relies solely on scientific theory to maintain that a physical event could not happen (or happen in the way it apparently did).

The Magistrate Expert

Too often in construction cases, an expert, usually from a claims consulting firm, will testify that he has read the entire file (all the evidence and depositions), interviewed everyone available to him, toured the site, studied the plans and specifications, evaluated the expert opinions, consulted his colleagues, studied the literature, and on that basis he has concluded that his side should prevail. The expert will identify the relevant facts, instruct on the analytical methodology he has chosen, calculate damages, and effectively say to the arbitrators: "Sign here." The arbitrators are unlikely to welcome usurpation of their own role. Worse than that, the entire value of this testimony is lost if the arbitrators disagree in any particular with the underpinnings of the expert's findings.

The Every Day Life Expert

There seems to be an increase in the use of "management" experts. These fellows have seen it all during their long careers as project managers then executives for highly reputable construction or engineering firms. Their experience and standing in the industry is said to enable them to opine that their opponent simply mismanaged the work. Maybe so, but hindsight, especially when aided by selective use of the evidence and partisan evaluation, is not terribly persuasive. Arbitrators frequently consider that they are better at this type of work than a hired gun can be.

The Vulnerable Assumption Expert

All expert testimony is to some extent based on underlying assumptions. Counsel, knowing this, will use all their discovery rights trying to get underneath the opinion to identify each assumption and sub-assumption made. One wrong assumption destroys the opinion just as surely as removal of the cornerstone will collapse the building. Needless to say, critical path analysis is especially prone to this type of error. I have seen some very elaborate, and expensive, cpm presentations collapse upon identification of an erroneous assumption. Worse yet, the expert might have to admit that correction of the flaw proves the case for the opponent.

The Bad Methodology Expert

Delay and inefficiency are notoriously hard to analyze and quantify, so various methodologies have been developed over the years to cope with the inherent uncertainties. While

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An Arbitrator's Tips

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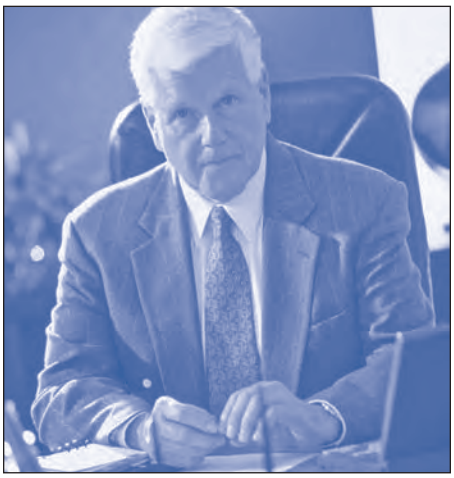
seductive, these methodologies may in fact be meaningless. When an arbitrator hears an expert start to talk about "as planned impacted" or "as built collapsed" or the "MCA factors" or the like, he closes his ears.



The Testifying Expert

To be effective an expert must not only know his trade, he must have testifying skills (and writing skills). Consequently the testifying expert is often the senior man in the outfit, frequently the founder who made the reputation of the firm. But this fellow may be so engaged in marketing and managing that he has little time to actually do the work, instead delegating it to his juniors. The result can be that the Testifying Expert is insufficiently knowledgeable about the details of the studies upon which his opinion is grounded, to his ultimate embarrassment.

The Generalist Expert

There is an old story about the medical expert who, after many cross examinations, decided to respond to questions about his expertise by saying that he was an expert in "the skin and its contents." And there are some experts who believe that their broad experience in the construction industry qualifies them to opine, for example, on nuclear decommissioning issues without benefit of ever having done that type of work. The cross examination of a Generalist Expert will be lengthy and devoted primarily to what the witness must admit that he does not know.

The Advocate Expert

There is a line that needs to be drawn between stating an opinion on an issue that is beyond the ken of the arbitrators and drawing conclusions from that. For example, it is one thing to say that the contractor's schedule contains errors, and quite another to conclude from that that the contractor was deliberately trying to mislead the owner. The Advocate Expert will cross the line and earn the deserved irritation of the arbitrators.

These are oversimplified caricatures, but the reader will get the point, and avoid expert testimony that is really not helpful or even harmful to the case. ■

Mr. Grove is a JAMS mediator, arbitrator, and project neutral based in Washington, DC. Email him at bgrove@jamsadr.com or view his Engineering & Construction bio at http://www.jamsadr.com/neutrals/ExpResumes.asp?id=2371.

Why is an Expert's Evolving Role Important in the Construction Arbitration Process?

BY BARRY BROWER, PAUL FICCA AND NEIL GAUDION
(FTI Consulting, Inc.)

In an arbitration proceeding, an expert's role is to assist the panel to understand various facets of technical expertise, and based upon its comprehensive review of the project records and expertise, to express its unbiased and independent opinions as to its findings. All too frequently, testifying experts misunderstand these roles and fail to take the necessary procedures to fill that role.

First, when a party or its counsel to an arbitration proceeding retains a consulting firm to perform the above expert related functions, the retained firm should not take the immediate position that its client is accurate in its representations as to the events that transpired. Thus, the client should consider retaining the firm as a consulting expert and not immediately as a testifying expert and the consulting firm should maintain its independence. The consulting expert should initially examine the record to provide the client with

an independent view as to the preliminary findings. The client can then evaluate how the findings may affect their case strategy. It is the consulting expert's duty to render its findings in an independent manner and to not immediately take to its client's position.

It is also very important that the potential testifying expert stay within its expertise (commonly known as "staying within your sandbox"). Daubert motions to exclude an expert's testimony on the grounds that the testimony is not reliable or relevant are common in light of the current Federal Rules of Evidence now in place. Many state courts have adopted similar rules. Deviation from a testifying expert's area of expertise may cause the entire testimony to be excluded and leave counsel with potentially no expert testimony at all.

Second, construction disputes are replete with information and the old adage that the "devil is in the details" is certainly true in these cases. Moreover, some project records may be contradictory as the parties to an arbitration take positions that are favorable and biased to their own company, and these records may not disclose the client's own problems. The consulting expert should therefore attempt to corroborate conflicting events with all other documentation available. Notwithstanding conflicting information, the consulting expert should attempt to acquire all records relevant to its review to provide the most relevant and reliable testimony. The consulting expert should examine all related records to ensure that it has considered all of the facts commensurate with its area of expertise and potential testimony. At this point, the consulting expert may revert to one of a testifying expert.

Third, the testifying expert then should prepare and present testimony in a succinct communicative manner to ensure that the arbitration panel easily and fully comprehends the testimony. It is appropriate to present its testimony using summary demonstrative evidence using graphs, summary schedules and models and make reference to both general documentation on which the testifying expert relies and upon selective specific documentation as a means to bridge its findings to the record. Accordingly, the testifying expert relies upon the project documentation and utilizes its particular expertise to essentially translate and at times educate highly technically complex issues for the arbitration panel.

Steps for a Consultant Reviewing the Record Prior to Potentially Being Named as a Testifying Expert

Frequently, clients who are striving to minimize the costs of the arbitration proceeding will seek to limit the role of the consulting expert. In order for a consultant to conduct its proper level of due diligence and form an independent opinion, the consulting expert should communicate a realistic budget to the client so that the consulting expert could conduct a proper level of project record review.

The consulting expert should also seek to review the adversarial party's documentation that it may have provided in the discovery process. The consulting expert should work collaboratively with its client and legal counsel to identify the records that both parties should produce that may be relevant to the consultant's area of expertise. There may also be significant time restrictions for the consultant to perform its work. If a consulting expert employs shortcuts or stretches its findings to fit within the client's case strategy, it may sway the client or counsel to misconceptions on the true strengths of its case.

It should also be understood that the consulting expert's review of the documentation may or may not be subject to discovery once counsel identifies the consulting expert as a testifying expert, depending on the local rules and or agreements between the parties when the arbitration proceedings are established. Consequently, it is imperative that the client, client's counsel and the expert fully understand the disclosure process before work proceeds. It is important that the expert does not alter its findings to conflict with its findings as a consulting expert. A primary reason why a testifying expert may refine its opinions would be

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Why Is An Expert's Evolving Role Important?

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as a result of considering additional information which it obtained later or if it reconsidered some of the documentation since its initial review of the documentation and findings were of a preliminary nature.

Steps for a Testifying Expert Formulating Opinions

There are several facets of expertise in a construction arbitration case. In general, these facets include design, actual construction means and methods, scheduling and cost analysis.

Regardless of the area of expertise, a testifying expert's review of the project records should include design related records such as drawings and specifications, or in more limited roles, the expert should at a minimum gain an understanding of the project's scope. It is also recommended that the expert perform a physical tour of the project. This review will acquaint and orientate the expert with the project. Moreover, depending upon the expertise to which the consultant may ultimately offer expert testimony, it would also consequently examine construction related documents that a contractor may have prepared contemporaneously such as schedules, cost accounting records or daily exchanges of documents between the parties. To perform these functions, the testifying expert must possess sufficient experience to deliver credible testimony.

While it is advisable to review the entire record related to its area of testimony, a testifying expert may place additional weight on certain documents it deems to be most relevant. This is common since numerous documents, although related to the testifying expert's area of expertise, may not alter its opinion either way. Accordingly, it is appropriate for a testifying expert to consider all documents but to identify the documents it finds to be of a key nature. It is also important for a testifying expert to simply review the documentation and offer its opinions on what the document conveys, not what the expert believes the writer tried to say. While it is important to rely in part on fact witnesses, it should only rely upon the facts it presents, not the opinions of others.

Steps for a Testifying Expert Presenting its Testimony to an Arbitration Panel

After a review of the records allows for the testifying expert to satisfy itself that it has adequately viewed the documentation to formulate its opinions, it should make an independent presentation to its client. Typically, the client's counsel will agree with opposing counsel whether expert reports will be exchanged and the extent of other work product to be exchanged by the experts. It is important to understand these agreements before conducting the expert's work. It is also important to express an accurate representation of findings because that could also assist the client in its decision- making process to when evaluating the possibility of settling the matter prior to the arbitration proceeding.

It is also appropriate for the testifying expert to present to the arbitration panel the steps it employed to arrive at it findings, opinions and conclusions. In this respect, the testifying expert should explain the procedures employed to review the records without the preconception that it could support a positive assessment favorable to the client. In this manner, the testifying expert enhances its credibility. The testifying expert should also explain its education, qualifications, and relevant experience to satisfy the arbitration panel that the expert is qualified to testify and has the requisite expertise to prevent disqualification by opposing counsel.

With all of the above steps employed, the testifying expert can then help to convince the arbitrators that its findings are based on comprehensive and sound review and analysis of the documentation. Moreover, given the soundness of its assessment, a panel may indeed be more amenable to accepting the expert's testimony, given the above sound and methodical assessment.

Conclusion

In summary, the effectiveness of an expert's role in arbitration will be greatly enhanced, when the testimony is independent and thoroughly grounded in the project documentation. Moreover, if the testifying expert explains the steps it employed to persuade itself that the findings are favorable to the client before counsel names it as a testifying expert, credibility is further enhanced. ■

Barry Brower and Paul Ficca are Senior Managing Directors in the Rockville, MD and Seattle, WA offices, respectively, and Neil Gaudion is a Managing Director in the Atlanta, GA office. More information is available at their website: http://www.fticonsulting.com.

Green Building: New Benefits for Society, New Challenges in Risk Management

BY KENNETH C. GIBBS, ESQ.

As society becomes more environmentally conscious, as energy prices continue to soar, and as government laws and regulations mandate it, green building promises to become the rule, rather than the exception, in the construction and renovation of buildings and facilities. But while green construction has the "feel good" aspect of reducing the impact of a building on the environment and gives the owners and builders the personal satisfaction of being "part of the solution rather than part of the problem," the advent of green building brings with it new challenges, particularly with regard to risk management.

Building "green" in the construction industry focuses primarily on energy conservation and sustainable design. The goal is to build new projects or renovate old ones to minimize the use of resources and expend less energy, while reducing the costs to maintain. Beyond the environmental benefits, advantages of green building include reduced operating costs, enhanced asset value, health and safety benefits, possible grants or tax benefits and public recognition of ecological and environmental leadership.

The United States Green Building Council has developed a standard rating system to measure environmental efforts called LEED (Leadership in Energy and Environmental Design). The LEED rating system is divided into categories including Sustainable Sites, Water Efficiency, Energy and Atmosphere, Materials and Resources, Indoor Environmental Quality and Innovation and Design. When a project is submitted for LEED certification the Council reviews the application based on these categories, analyzes the efforts implemented on the project and determines the specific level achieved: Certified, Silver, Gold or Platinum. While owners can build "green" without going through the LEED certification process, the economic and marketing advantage of having a LEED certified building is obvious.

While "green is good" and the marketing advantages of an environmentally friendly and efficient building are attractive, a new approach, as usual, brings with it new challenges.

While "green is good" and the marketing advantages of an environmentally friendly and efficient building are attractive, a new approach, as usual, brings with it new challenges. One question that all owners will have is price and a cost/benefit analysis. Are there additional "upfront" costs in constructing green, and if so, are they offset by cost savings that will be achieved over time and/or by a higher sales price for the project? This needs to be studied on a case by case basis by owners and the design professionals they are working with.

But there are additional challenges which directly impact risk management and the insurance community, particularly those who work with design professionals. For example, one could easily envision a scenario in which an architect agrees to design an office building to qualify for a Gold or Platinum certification under the LEEDS standards. The owner/developer advertises the planned building as such to attract high-rent tenants. When the architect fails to achieve his "guaranty," the developer sues for professional negligence, breach of contract and breach of warranty. While the architect might defend arguing that the owner's budget constraints prevented the achievement of the certification goal, are we in a situation where the applicable "standard of care" has been potentially violated triggering obligations under the professional liability policy? One would think so.

Theodore L. Senet, a noted Los Angeles construction and insurance attorney, recently listed nine risk management issues dealing with green construction:

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Green Building

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1. Compliance with developing green building codes and local requirements;
2. Compliance with contract requirements related to certification levels;
3. Compliance with contract requirements related to energy savings and operational performance;
4. Obtaining tax incentives or meeting tax credit requirements;
5. Meeting investment criteria and financing requirements;
6. Additional time and costs related to the design, approval and fabrication of new building products and systems;
7. The ability of new green products and systems to perform to traditional performance standards;
8. The sequencing, constructability and commissioning of new systems, products and processes;
9. Compliance with project schedules and the impact on fast track projects.

From a risk management point of view, the risks identified above need to be addressed at the outset of the project. Establishing a clear program and budget is crucial at an early stage – otherwise the age old argument about design being constrained by underfunding will surely arise. Clearly defining and allocating the responsibilities to accomplish the project's goals is a must and unreasonable risk allocations (and conversely unreasonable limitations on liability) may well be counter-productive.

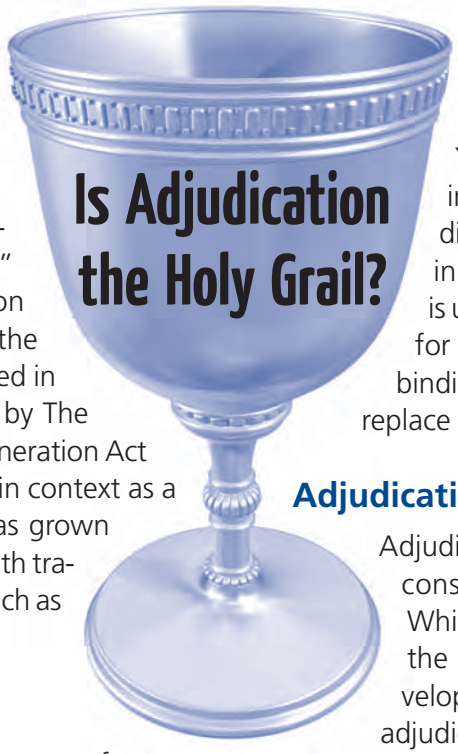
It may be sometime before insurance and related products are developed that cover the risks of green building. While bonding the project will guard against contractor default and failure to comply with the plans and specifications, it will not deal with the design issues involved. The contractor's commercial general liability policy will only provide coverage for property damage and/or personal injury and not for pure economic loss which will occur if the green goals are not accomplished. Professional liability insurance is typically the only type of insurance which will cover economic loss such as a failure to obtain certification levels, delays or increased maintenance and operational costs due to improper design. But professional liability insurance is expensive, often has relatively low limits, and is issued on a restricted claims made basis. The question of what, if any, insurance will cover damages resulting from incorrect use of "green" materials or premature failure of "green" systems is something that insurance professionals, the construction/design industry and developers will have to carefully consider. Developers, contractors and architects should consult with an insurance professional before embarking on a green project to make sure that those risks that can be insured are, in fact, adequately insured.

One final risk management tool that should be considered is alternative dispute resolution. Obviously arbitration clauses are often found in construction contracts and many construction disputes are resolved using mediation. A variation of mediation that is gaining increasing use and popularity is the project neutral. The project neutral is a trained construction dispute resolution specialist whose only client is the project itself. Specified in the contract documents the project neutral becomes part of the construction team from the beginning of the project to the end. I have had the privilege of being a project neutral on a number of large projects such as hotels and hospitals, and often we can diffuse a potentially contentious issue by working with the parties up front, before an issue spirals out of control. With the new challenges of green construction and the new risks for all concerned, it is a concept which should seriously be considered by the parties, their lawyers and their insurance professionals before embarking on construction.

Green construction is here to stay. Make sure your clients are prepared for the risk management challenges they will face in commencing and completing a green project. ■

Mr. Gibbs is a JAMS mediator, arbitrator, and project neutral based in Santa Monica, CA. Email him at kgibbs@jamsadr.com or view his Engineering & Construction bio at http://www.jamsadr.com/neutrals/ExpResumes.asp?id=2334.

Is Adjudication the Holy Grail?



By PROFESSOR DOUG JONES, AM

This article seeks to build upon a contribution by Harvey J. Kirsh Esq. in the Fall 2008 issue of JAMS Global Construction Solutions entitled "Adjudication" as a Method of Resolving Construction Disputes. In that article, Kirsh details the statutory adjudication process introduced in the United Kingdom in the mid 1990s by The Housing Grants, Construction and Regeneration Act 1996. Here, we will place adjudication in context as a method of resolving disputes which has grown and developed out of a dissatisfaction with traditional methods of dispute resolution such as litigation and, increasingly, arbitration.

The evolution of adjudication

The rise of adjudication can be seen as part of an evolutionary process. It has not burst onto the scene unannounced, but has its roots in various practices which have been around for many years.

Expert determination, also known as contractual adjudication, is a relatively recent development in the ongoing quest by commercial parties for faster, cheaper and more efficient dispute resolution.

Most will be familiar with the way that arbitration developed as a reaction to the excessive cost and delay associated with litigation. However, with its establishment came an increasing tendency to mimic court procedure, so that arbitration ceased to be perceived as a cheaper, more efficient alternative to litigation.

In reaction to this, expert determination has developed. It entails submitting a dispute to an independent third party for determination outside the auspices of arbitration legislation. In one respect, it was not a new idea, because for a great many years commercial parties had been agreeing to submit issues to third parties for determination. However, these had traditionally been narrow in scope, typically involving the third party only in a process of valuation (of real estate or shares, for example). The novel aspect was to submit entire disputes rather than narrowly defined issues of that kind.

In some cases, the adjudication was set up as a precursor to arbitration, while in other cases the adjudication was meant as a final dispute resolution procedure instead of arbitration or litigation. The FIDIC standard forms are an example of the former approach. FIDIC's Red, Yellow and Silver Books incorporate an independent and impartial Dispute Adjudication Board (DAB), made up of experts in their respective fields. Here, adjudication is used as a contractually agreed mechanism for "on the run" dispute resolution, which is binding in the interim but does not necessarily replace final arbitration or litigation.

Adjudication now a core technique

Adjudication, in its various forms, has taken construction dispute resolution by storm. While there is no hard statistical evidence of the increased use of adjudication, the development by institutions of formal rules for adjudication is a good indication of its growth and popularity. Indeed, adjudication is becoming a core dispute resolution technique at both domestic and international levels.

If adjudication could be shown to have distinct benefits over arbitration then this could go some way in explaining its increased use in the place of arbitration. Accordingly, what follows is a comparison of these methods of dispute resolution, with the objective of identifying some central procedural and substantive differences.

Expert determination is predominantly criticized on the basis of enforcement issues. It is suggested that parties cannot confidently predict that their "final and binding" expert determination agreement will be enforced in the face of court proceedings commenced in respect of its subject matter. Essentially, the substantive obstacle to enforcement of such an agreement is the courts' lack of statutory basis for staying concurrent court proceedings to allow the unfettered operation of the expert determination procedure. In contrast, the court does have the statutory power to stay its proceedings in favor of arbitration. However, the tendency of courts to give weight to the freedom of parties to contract has meant generally that courts have restrained from interfering with expert determination agreements unless the expert has acted outside his or her terms of reference as set out in the contract.

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Holy Grail

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While parties to an arbitration may rely on assistance from the courts, pursuant to arbitration legislation, in the event of procedural difficulties, parties to an expert determination do not have such support. If the expert determination process breaks down because, for example, the parties cannot decide upon the appointment of an expert, or if the agreement between the parties is incomplete as to a procedure necessary for the expert determination to be effective, then the agreement to use expert determination may be unenforceable and therefore void. In an effort to avoid these difficulties, parties usually incorporate into the expert determination agreement a set of standard rules promulgated by a professional body.

There is no legislative basis upon which the expert determination itself may be enforced. Any avenue of enforcement of an expert determination is therefore dependant on the terms of the contract between the parties. For agreements with an international dimension, the purely contractual nature of expert determination presents particular difficulties as parties must rely on the various conventions, treaties and national laws governing the enforcement of foreign judgments. Launching such an action would incur considerable expense in terms of time and money. In this respect, arbitration would appear to have a distinct advantage over expert determination in light of the New York Convention, which is widely observed, simple and effective. The formalities require a party to simply produce to the relevant court the original or a certified copy of the arbitral award and the original arbitration agreement and the court will grant recognition and enforcement provided none of the grounds for refusal are satisfied.

Legislative redress

There have been attempts at the legislative level to redress the problems inherent in expert determination. Legislative support of adjudication goes some way to filling the lacuna in the general law and better allows adjudication to proceed and be enforced. However, while the statutes go some measure towards rectifying deficiencies in contractual expert determination, the statutory regimes themselves are not without problems.

Statutory adjudication

It was Lord Denning who said that cashflow is the "lifeblood" of the construction industry. However, it is well known to all that in the "chain of contracts" typically used to deliver a construction project, the arteries are frequently blocked. Contractors, and to a greater extent subcontractors and those further down the contractual chain, often face great difficulty in obtaining expeditious payment for the work they have carried out.

In Australia, England and many other jurisdictions, various pieces of legislation have been introduced in an effort to provide a measure of protection to contractors and subcontractors against such payment risk. In Australia, such legislation began with the relatively unsuccessful Contractors' Debts Act 1897 (NSW), with the recent introduction of statutory adjudication in several Australian states, under Security of Payment legislation, representing the latest legislative attempt of this kind.

In introducing its security of payment legislation, the Queensland Parliament noted that while earlier legislative measures improved subcontractors' chances of being paid, they did "not necessarily result in improved cash flow." Such legislation offered some protection to subcontractors against head contractor insolvency, but did not necessarily speed up the money getting to the subcontractor. All it did was to ensure that money was not dissipated by the contractor while any dispute was being resolved. In contrast, the new security of payment legislation focuses on trying to ease the contractor's difficulty in getting paid by providing a quick enforcement process in the form of adjudication. Because the matter being adjudicated upon is the subcontractor's right to progress payments, not final liabilities, any injustice done in the adjudication can theoretically be corrected in the determination of those final liabilities in arbitration or litigation. Arguably, all that really happens is that payment risk gets transferred to the upstream party until such time as the courts or arbitrators render a final determination. The interim nature of the process frees up the adjudicator from feeling the need to go into exhaustive detail to get the matter exactly correct.

This indeed represents a revolution in legislation designed to protect contractors and subcontractors.

Enforcement issues

The Australian Security of Payment legislation, like expert determination, suffers from difficulties with regard to enforcement. Recent amendments to the legislation have attempted to limit the number of ways in which an adjudication can be appealed, however, it is apparent that the courts continue to grapple with the interpretation of the legislation.

The NSW Court of Appeal decision in *Brodyn Pty Ltd t/as Time Cost* and *Quality v Davenport* (2004) has significantly narrowed the circumstances in which an adjudication may successfully be challenged. In this case, *Hodgson J* established essential pre-conditions required to prevent a successful challenge to an adjudicator's decision, including:

- The existence of a construction contract between the claimant and respondent, to which the legislation applies.
- The service by the claimant of a payment claim on the respondent.
- The making of an adjudication application by the claimant to an authorised nominating authority.
- The reference of the application to an eligible adjudicator, who accepts the application.
- The determination by the adjudicator of a valid application, by determining the amount of the progress payment, the date on which it becomes or became due and the rate of interest payable, and the issue of a determination in writing.
- A bona fide attempt by the adjudicator to exercise the power afforded to it under the legislation.
- The absence of a "substantial" denial of natural justice.

It should be noted, however, that several issues remain uncertain in respect of a challenge to an adjudication, such as the precise definition of "essential pre-condition", and the specific circumstances in which it will be held that natural justice has been denied or a bona fide attempt by the adjudicator to exercise its powers has not been made.

Given the difference, why adjudication?

It would seem then that the concept of adjudication, although a reaction to the cost and delay of arbitration, is in theory a poor substitute for arbitration as a means of resolving disputes in commercial contracts in a binding way. Adjudication suffers a number of drawbacks, significantly in relation to difficulties with enforcement. Regardless of these difficulties, parties are increasingly preferring adjudication, begging the question: why?

With regard to expert determination, the chief practice is to refer disputes to arbitration by default, that is, when expert determination has failed. This is achieved through a multi-tiered dispute resolution clause allowing adjudication to act as a filtering process for arbitration. With this filtering system only the complex disputes or those disputes requiring more extensive procedures, extra cost and time, will result in arbitration. This system produces a more efficient dispute resolution process, saving the parties both time and money by addressing more basic disputes at a lower level.

In addition, it is increasingly clear that some parties are opting for expert determination instead of arbitration, with time spent on careful drafting of the expert determination clause to ensure that disadvantages in using expert determination over arbitration can be minimized. In order to draft the expert determination clause effectively parties are having to include a mini-set of arbitral rules in their dispute resolution agreements. This means that parties are going to great lengths to develop sophisticated dispute clauses either to avoid using arbitration, or to take advantage of benefits offered by expert determination which arbitration cannot provide.

The two lines of thought are related. In recent years arbitration has achieved a reputation for being costly and time consuming. While some commentators have suggested that this reputation is unfounded, it is undoubtedly responsible, at least in part, for the increased use of expert determination. Expert determination on the other hand, has been praised for its speed and cost-effectiveness, two of the most desirable features of any dispute resolution process.

Another significant feature of expert determination is its informality. Expert determination is an abbreviated, flexible form of issue resolution. Unless otherwise agreed by the parties, there is no need for formal pleadings, discovery or witness statements. There is also no formal hearing, no cross-examination or oral submissions and the expert is given as much power as stipulated in the contract. The fact that expert determination is a creature of contract creates a real sense of control by the parties over the dispute process. This, coupled with a general dissatisfaction with the formal procedures of arbitration, is perhaps one reason why parties are adopting expert determination over arbitration despite such virtues of arbitration as expedited arbitration procedures and the wealth of legislative and curial assistance available to parties involved in arbitration.

Also related to the issue of informality is a perception that there is an increased opportunity to preserve relationships through expert determination than with litigation and arbitration. The perception is that because parties are in a non-confrontational, informal dispute,

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Holy Grail

Continued from Page 11

the parties are more likely to achieve a commercial rather than a legal settlement. In contrast, arbitration is perceived to be more like litigation which requires parties to take an adversarial stance.

In the case of statutory adjudication, it must be remembered that the legislation contemplates only an interim process. The regime is not designed to make irrevocable decisions concerning liability; that is still the job of arbitrators (or the courts). Rather, it transfers the payment risk to the owner until such time as a final decision is rendered by the arbitrator. Transferring payment risk from the contractor to the owner represents a policy decision aimed at ensuring that contractors and sub-contractors can continue to operate in the market without being burdened by the risk of insufficient capital or cash-flow. Only time will tell whether this policy choice is the correct one, and whether the transfer of money from owner to contractor results in a reduction in the number of large disputes that come before the Supreme Court by encouraging the parties to find a commercial solution to the dispute.

The use of statutory adjudication has dramatically increased in recent years, particularly in NSW with the number of adjudications increasing significantly in the year following amendments to the NSW Act. It is apparent that those in the industry are becoming more comfortable with its processes and less threatened by the strict time conditions and prospect of adjudication.

Statutory adjudication offers a fast, inexpensive and informal option for effectively resolving payment disputes and improving cash-flow. Importantly, there is no need for parties to characterise the payment claim as necessarily adversarial. It is simply a procedure, binding in the interim, for securing payment.

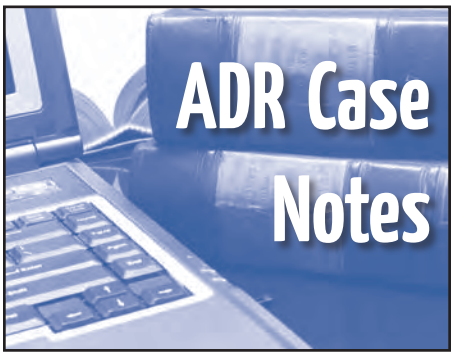
Conclusion

Overall, because there is no real statistical evidence to consider, it could be suggested that the favorable perception of adjudication is the result of literature promoting its use. Without research to quantify adjudication in terms of its effectiveness, it is difficult to displace these attitudes or assess whether they are justified. It is, however, suspected that the continued adherence to the process by government agencies with significant experience of it is not unconnected with some perceived commercial advantage arising from the process.

Even if it is near impossible to ascertain a practical reason for choosing adjudication over arbitration, it is clear that adjudication has struck a chord with business and government, especially in the construction industry. The arbitration process certainly still has a part to play in resolving commercial disputes, however in order to remain useful, it must develop.

Time may emphasize the ability of arbitration to be streamlined while maintaining its unique legislative underpinnings. However, until these improvements are achieved, adjudication represents the best opportunity to ensure an efficient, informal dispute resolution process. ■

Professor Jones is a leading arbitrator in the Asia-Pacific region with an office in Sydney, Australia and Chambers in London. More information is available at his website: http://www.dougjones.info.



The FAA's "Federal Question" Jurisdiction Trap in Compelling Arbitration: *Vaden v. Discover Bank*, 2009 WL 578636 (March 9. 2009).

The U.S. Supreme Court set a federal question jurisdiction "trap for the unwary" in a case involving a motion to compel arbitration under the Federal Arbitration Act. In *Vaden*, a federally regulated bank commenced suit to collect a $10,000 claim (a sum well below the $75,000 threshold required for federal diversity jurisdiction) in Maryland state court. The defendant debtor answered with a class-action counterclaim and an affirmative defense of usury. In reply, the bank alleged preemption of the debtor's allegations by federal banking law and moved to compel arbitration of those claims under the Federal Arbitration Act. Although both parties and the Court itself agreed that the invocation of federal banking law raised a "federal question" sufficient to establish federal court jurisdiction, the Court ruled in a 5-4 decision that it would look only to the bank's complaint and not to the bank's reply to determine whether a "federal question" was raised to invoke federal jurisdiction over a motion to compel arbitration under the FAA, and held that, because the bank's "garden-variety, state-law-based contract action" – as distinct from its reply to

the debtor's counterclaim – raised no "federal question" itself, no basis existed to support federal jurisdiction over the bank's motion to compel arbitration.

In dissent, Chief Justice Roberts argued that the mere order in which the pleadings were filed should not be the linchpin upon which federal jurisdiction depended.

"By focusing on the sequence in which state-court litigation has unfolded, the majority crafts a rule that produces inconsistent results. Because [the bank's] debt- collection claim was filed before [the debtor's] counterclaims, the majority treats the debt-collection dispute as the "originating controversy." But nothing would have prevented the same disagreements between the parties from producing a different sequence of events. [The debtor] could have filed a complaint raising her [Federal Deposit Insurance Act] claims before [the bank] sought to collect any amounts [the debtor] owes.… The majority's rule thus makes [FAA section 4] jurisdiction over the same controversy entirely dependent upon the happenstance of how state-court litigation was unfolded. Nothing in s 4 suggests such a result."

The moral: If your client is a claimant with only a "federal question" basis for federal jurisdiction, that question must be apparent in the complaint in order for federal courts to be able to hear a motion to compel arbitration under the FAA.

The Checkered Survival of "Manifest Disregard" Among Federal Circuits After *Hall Street*: *Citigroup Global Markets, Inc v. Bacon,* 2009 WL 542780 (5th Cir. March 5, 2009), *Ramos-Santiago v. United Parcel Service,* 524 F. 3d 120 (1st Cir. 2008), *Comedy Club Inc. v. Improv West Assocs.,* 553 F. 3d 1277 (9th Cir 2009), *Coffee Beanery, Ltd v. WW, LLC,* 300 Fed. Appx. 415 (6th Cir. 2008), *Stolt-Nielsen SA v. AnimalFeeds Int'l Corp,* 548 F. 3d 85 (2d Cir. 2008).

Since the U.S. Supreme Court issued its landmark opinion in *Hall Street Associates LLC v. Mattel,* 128 S. Ct. 1396 (March 25, 2008), holding that Sections "10 and 11 respectively provide the FAA's exclusive grounds for vacatur and modification" of arbitration awards, and thereby rejecting "manifest disregard" of law as further separate grounds for vacatur or modification, the federal circuit courts of appeal nevertheless have been presented with and have ruled upon appeals continuing to invoke "manifest disregard" as a basis for award vacatur.

Two circuits, the 5th and the 1st, appear to conclude that "manifest disregard" as an independent non-statutory ground for vacatur, is no longer a basis for vacating awards. See *Citigroup Global Markets* at *5, *8 ("The question before us now is whether, under the FAA, manifest disregard of the law remains valid, as an independent ground for vacatur, after *Hall Street*. *Hall Street* unequivocally held that the statutory grounds are the exclusive means for vacatur under the FAA. Our case law defines manifest disregard of the law as a non-statutory ground for vacature. Thus, to the extent that manifest disregard of the law constitutes a nonstatutory ground for vacatur, it is no longer a basis for vacating awards under the FAA.… Thus, from this point forward arbitration awards under the FAA may be vacated only for reasons provided in [section] 10"); *Ramos-Santiago* at 124, n. 3 ("We acknowledge the Supreme Court's ruling in *Hall Street*…that manifest disregard of the law is not a valid ground for vacating or modifying an arbitral award in cases brought under the FAA.")

Three circuits, the 2d, 6th and 9th, appear to read *Hall Street* to mean manifest disregard remains a viable basis for vacatur of awards under and within the context of FAA Section 10 (a) (4) (permitting vacatur where arbitrators "exceed" or "imperfectly execute" their powers). Compare *Stolt-Nielsen SA* at 96 ("[P]arties do not agree in advance to submit to arbitration that is carried out in manifest disregard of the law. Put another way, the arbitrators have thereby exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made"); *Comedy Club* at 1289 ("[M]anifest disregard of the law remains a valid ground for vacature because it is a part of {section} 10 (a) (4)"); *Coffee Beanery* at 419 (reading *Hall Street* as suggesting a "hesitation to reject the manifest disregard doctrine").

Federal district courts, as might be expected, have issued decisions "all over the map," but most frequently have read *Hall Street* as precluding "manifest disregard" as a ground for vacatur. The rationales expressed by the federal circuits to date, however, suggest that "manifest disregard" of law may survive as a ground for vacatur within the context of the statutory grounds for vacatur under the FAA where arbitrators' "exceed" or "imperfectly execute" their powers. ■

JAMS RAPID RESOLUTION PROCESS: The New Construction Industry Paradigm

Director's Corner *Continued from Page 1*

disputed issues through independent neutrals. Too often unresolved issues have been allowed to metastasize into contentious disputes that end up post-completion in a lengthy "judicialized" arbitration process.

The construction industry's most recent efforts to redress the perceived inadequacies in its dispute resolution processes were the issuance in November 2007 of the new CONSENSUS DOCS and the revised AIA A201-2007 General Conditions of Contract. Among the fundamental changes advanced by those standard form documents were those that encouraged the industry proactively to design and negotiate dispute resolution processes best suited for their projects. Those changes included:

- The AIA A201 gives the parties the freedom to agree upon the appointment of an "independent decision maker" (IDM) – in lieu of the design professional of record – with the role of issuing termination "certificates of just cause" and initially deciding disputes and claims (subject to appeal). Absent the parties' appointment of an IDM, the design professional of record retained that role.
- The ConsensusDocs directs the parties to engage in stepped negotiations and an agreed "dispute mitigation procedure" for early settlement of disputes as a precondition to submission of disputes to binding arbitration or court litigation.
- Both forms invite the parties to consider carefully and reach agreement upon a dispute resolution forum of "last resort" rather than being forced to participate in mandated binding arbitration administered by the American Arbitration Association. Making conscious decisions regarding a resolution process of choice was encouraged. But when that right of choice is not exercised, litigation rather than arbitration becomes the sole process by default.

Since November 2007, while the industry has continued to search for suitable dispute resolution processes short of litigation, and also has begun to consider an overhaul of contractor and surety obligations under the AIA 312 Performance Bond and related bond forms, these fundamental facts have become apparent:

- Too many contracting parties are overlooking thoughtful crafting of and agreement upon "real time" dispute resolution processes tailored to early resolution of contentious issues, and continue to "default" blindly to court litigation controlled by inexpert judges and juries at exorbitant expense and inconsistent results; and
- Too many large contracts continue to be declared in default and wrongfully terminated for cause, notwithstanding the "meeting" requirement in Section 3 of the AIA 312 bond and the "just cause" certification requirement by the "independent decision maker" under section 14.2 of the AIA A201-2007 General Conditions.

The best solution remains the swift resolution of all issues. This requires having available at all times a capability to provide a multi-talented rapid resolution that swiftly resolves issues in dispute as they arise on site during the project. This multi-talented capability invokes the full range of ADR methods – from facilitation of negotiation and evaluative mediation to recommendations or binding decisions – to swiftly resolve issues likely to devolve into claims or disputes.

JAMS "Rapid Resolution" para-

digm is a disciplined "one call" process involving one or more "neutrals" experienced in construction law and in resolution of major disputes on construction projects. JAMS "Rapid Resolution" paradigm swiftly provides a neutral – a "Friend of the Project" – to design, recommend, marshal and facilitate dispute resolution processes tailored to the specific issues in dispute, such as: structured negotiations, expert determinations of fact, evaluative mediation, dispute review board recommendations, independent project neutral/fact-finding/conciliation, non-binding "adjudication" pending contract completion, and expeditious binding arbitration before an arbitrator selected by the parties. This neutral process works to resolve issues swiftly before they get out of control, and thus would commence even earlier than the services of the traditional "independent decision maker" who operates as a "post-dispute decider" rather than as a "pending dispute resolver."

Should negotiations or mediation fail to resolve the dispute, JAMS provides separate neutrals to offer expeditious "adjudication" rulings binding only for the duration of the project, or non-binding or binding arbitration before one or more skilled and experienced arbitrators. Arbitration, when properly and fairly administered, remains preferable to litigation. And JAMS has overcome the perceived detriment to arbitration inherent in the traditional lack of broad appeal rights by creating an arbitration appellate review process that parties may invoke.

JAMS Global Engineering and Construction Group swiftly provides upon call the "Rapid Resolution" neutral services paradigm:

1. **meeting with the parties to craft a tailored dispute resolution approach best suited to the resolution of the types and scopes of issues in dispute,**
2. **facilitating and moderating structured negotiations between the parties,**
3. **selecting technical experts, as necessary, acceptable to the parties to furnish recommendations or decisions on technical architectural, engineering and construction issues in dispute,**
4. **offering "evaluative" mediation and conciliation,**
5. **offering through another JAMS neutral non-binding "adjudication" pending completion of the project, or other recommendations or decisions,**
6. **offering an independent expert construction arbitrator or panel of party-appointed construction arbitrators to render expeditiously binding arbitration awards, and**
7. **offering an independent appellate review process for binding arbitration awards.**

Expedited binding arbitration, when properly administered, remains far superior to litigation as the resolution process of "last resort." The problems with arbitration in the last quarter century have been its "judicialization" by lawyers and arbitrators unwilling to control the process, and its frustration of purpose due to poor case administration. Skilled JAMS neutrals and arbitrators, together with its arbitration appellate review, can overcome those deficiencies perceived to infect the binding arbitration process.

When confronted with the initial resolution question of "Who you gonna call?" begin with JAMS Global Engineering and Construction Group at its **Rapid Resolution "one call" national number: 866-956-8104**.

Mr. Bruner is a JAMS mediator, arbitrator, and project neutral based in Minnesota. Email him at pbruner@jamsadr.com or view his Engineering & Construction bio at http://www.jamsadr.com/neutrals/ExpResumes.asp?id=2370.

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Leading ADR Developments from The Resolution Experts

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