THE RESOLUTION EXPERTS®

JAMS GLOBAL CONSTRUCTION SOLUTIONS

Leading ADR Developments from The Resolution Experts

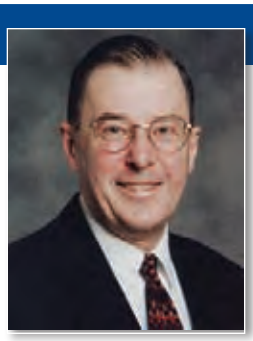
Volume 1, No. 1 • Fall 2008

ALSO IN THIS ISSUE . . .

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' Vision for Construction ADR

BY PHILIP L. BRUNER, ESQ.
Director, JAMS Global Engineering and Construction Group

Engineering and construction projects have mushroomed in number and complexity in the past century – and so has the need for improved construction industry dispute resolution processes. More than 100 years ago, the increasing complexity of construction caused the construction industry to favor arbitration by peers, who applied the "law of the shop" as much as the "law of the courts," rather than by judges or juries with minimal knowledge about or experience in construction issues.

In recent decades, the industry has maintained a relentless search for new and innovative processes that enhance dispute resolution efficiency. This search has produced a variety of new approaches, such as partnering commitments, information exchange and structured "stepped" negotiation clauses, mediation and conciliation, expert determination, independent decision makers, standing

See "Director's Corner" on Page 5

Selecting Qualified Arbitrators is the Key to Success in International Construction Cases

BY JOHN W. HINCHEY, ESQ.

International commercial and construction arbitrators, acting under typical arbitration agreements and arbitral institutional rules, have broad power and authority to decide not only the disputes put before them, but also the scope of their own jurisdiction to decide those disputes.[1] Moreover, international arbitrators are granted extensive discretion by most arbitration agreements and institutional rules to determine the procedures by which disputes will be decided.[2] Once a dispute is decided and the final award is rendered, the grounds on which the award can be challenged, particularly for errors of law and mistakes in deciding issues of fact, are limited to nil.[3] When these stark realities are fully appreciated, it appears quite obvious that nothing is more important to achieving a fair, efficient, and economical international arbitration than the selec-

See "Selecting Qualified Arbitrators" on Page 10

Five Tips on Educating Your Clients About Project Neutrals

BY KENNETH C. GIBBS, ESQ.

Many people find it difficult to accept change, even if for no other reason than they are used to doing things "the old way." But in the construction world, which for years has been at the cutting edge of the ADR process, lawyers, clients and professional neutrals are always trying to improve and change the dispute resolution system so we can resolve matters quicker, more efficiently and better than before.

One example is the concept of the "project neutral." Project neutrals are trained ADR specialists who are designated in the contract documents to literally join the construction team and follow the process from ground breaking to completion. That doesn't mean that you have a mediator on the project everyday – there have been several projects in which I have been designated the project neutral and was never called upon – but it does mean that you have a dedicated neutral who is ready to help resolve matters "on a moment's notice" and who, unlike any other player on the construction team, has only one client: the project.

Although a project neutral can be designated at any time, it is clearly the best practice to designate a project neutral in the contract documents. To do so, a lawyer may need to explain to a client, whether they be the owner, design professional, or contractor, why it is in their best interest to have a project neutral provision in the contract documents. Here are some tips on what you might tell your client:

1. Choosing an Effective ADR Process while Everyone is Still Friends is a Good Idea

By putting a provision for a project neutral in place in the contract documents and by, in fact, selecting the individual who will be the project neutral, you eliminate arguments of who will eventually serve and which side they may theoretically favor. Selecting a mediator/project neutral at the time of the contract that all parties trust is a step forward on the dispute avoidance road.

2. A Project Neutral Takes Any Perceived Bias Out of the Dispute Evaluation Process

Traditionally the architect/engineer, as the "master-builder," has been the initial evaluator of disputes between the owner and contractor. But as more of those disputes have centered on the preparation and coordination of plans and specifications, decisions by design professionals have been questioned by various

parties, and architect/engineers have been put in the difficult situation of rendering opinions that could affect their own liability. Selection of a "disinterested" project neutral eliminates the perception of bias and allows the architect/engineer to remain involved in the design and aesthetic aspects of the project without having to be the "dispute resolver."

3. A Project Neutral Moves Dispute Resolution to the Front End of the Project

On many projects, significant problems are encountered shortly after commencement relating to site access, subsurface conditions, government regulations, etc. These problems should not wait until project completion for resolution. I was recently an arbitrator on a major construction project where a subsurface condition – which the parties became aware of within 60 days of the Notice to Proceed – was never resolved which led to confusion over the project schedule, which led to arguments over acceleration/delay, which led to a major dispute, which required an arbitration to resolve. Having an ADR process in place at the outset, with a project neutral on board, allows for the resolution of these front end disputes and may well prevent costly and protracted litigation or arbitration.

4. A Project Neutral Helps to Prevent Small Problems from Festering into Big Ones

One of the biggest mistakes contractors, owners and design professionals make is to defer resolution of problems and disputes to the end of the project. While, on occasion it is necessary to do so, all too often relatively small issues, which could have been resolved, are carried forward, deferred and then grouped into a "cumulative" claim. It is a much better practice to resolve claims and issues on an ongoing basis. Often a "bubble up" system is used – try to resolve disputes at the project level, if that is unsuccessful bring in senior project management, if that is unsuccessful bring in senior executives. The project neutral can be used to help facilitate the process with the senior project management or executive teams, much as a mediator would do at the end of a project.

5. The Project Neutral Can Work with the Parties to Proactively Prevent Disputes

By demonstrating true impartiality and gaining the trust of all members of the construction team, the project neutral can have private, confidential meetings with each member and determine their concerns and the threats to the project not being completed on-time and within budget. The project neutral can then carefully use that information to facilitate group meetings to address and prevent disputes. On several projects, after having worked with the participants for some time, I conducted regular meetings to discuss the "top ten threats" to successful project completion and to determine what needed to be done to make sure the threats did not materialize ■

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 online.

See a sample Project Neutral Clause on Page 12 of this newsletter or on the JAMS website at: http://www.jamsadr.com/construction-practice/

Efficient Case Management Makes the Difference

One of the most important parts of administering a large construction case is efficient case management. Here is an interview with two JAMS Case Managers in Santa Monica, CA.

- **MOJGAN BINDER**
  Title: Senior Case Manager
  GEC Neutral: Jerry Kurland
  Years with JAMS: 13
- **JOSELYN ALEXANDER**
  Title: Case Manager
  GEC Neutrals: Ken Gibbs, Viggo Boserup
  Years with JAMS: 5

JAMS Case Managers Mojgan Binder and Joselyn Alexander

Q. *How is administering large construction cases different than administering other types of cases? What makes them unique?*

Joselyn: The clientele is sophisticated. We enjoy working with seasoned construction attorneys.

Mojgan: There are usually multiple parties in these cases. Keeping things organized and moving quickly is important. We are very responsive to all our clients, and this is especially important with these construction cases.

Joselyn: We see a range of issues from projects going over budget to delays to mechanic liens.

Q. *What is your role in scheduling and managing these cases?*

Mojgan: Parties will call us – most of the time they have a specific neutral in mind, although not always. Sometimes attorneys call me to tell me about their case and ask for a recommendation about which neutral I think would be most appropriate. We gather as much information about the case as possible – what is the nature of the dispute, how many parties, where do they need to meet. We check neutral availability, and we sometimes help coordinate calendars with all parties. We really handle all of the administrative aspects of these cases, which have a lot of moving parts.

Joselyn: We sometimes call parties on the service list and ask them to agree to mediate. We coordinate with the party who originally contacted us after we have had contact with all sides.

Mojgan: The majority of the time attorneys wait to agree among themselves before they call us, but as Jos said, that's not always the case. The attorneys use us to get the ball rolling sometimes.

Joselyn: On occasion, a client will call and will have to do a mediation on a certain date or within a certain timeframe. If the neutral they are requesting cannot be available, then we help the attorney select another mediator or arbitrator who is a good fit for their case.

Q. *How do you work with the parties and the neutral?*

Joselyn: I would say our relationships with all of our clients and neutrals is professional, and yet relaxed. One of my most important jobs is to keep everyone, neutrals and attorneys, updated on the status of the case and its various elements. If there are issues that I can't take care of, I immediately notify the mediator or arbitrator, so he can step in and help the parties.

Mojgan: We work with our neutrals as team players. We really think of ourselves as a team. Our relationships with our clients are very important. The key for me is trust. The clients trust us and they count on us. I try to be as responsive as possible to all of our clients. Quick response helps them do their jobs better. If an attorney is expecting a document from us, I get it to him or her as soon as possible. We try to meet their needs in every aspect of the case.

Q. *Is there something unique that you personally do, or that JAMS does, that you think clients especially like?*

Joselyn: Follow up. Clients have

told me that they appreciate the level of follow up they receive from us.

Mojgan: I try to avoid getting voicemail as much as possible. I do my best to pick up the phone when a client is calling. It's more efficient for the attorney because he or she can get an immediate response. If I do get voicemails, I answer them right away. This goes not only for partners, but associates, secretaries, and legal assistants. I talk with sitting judges and their clerks. I work with people at all levels and give them the same type of quick response.

Q. *What do you think is the key to the case management system at JAMS?*

Mojgan: JAMSware, which is our software database, allows us to keep organized. It's really an advanced case management system. We keep all of our case notes there with dates and reminders or "recalls" as we say. It is all real time so we can access the most up to date information when we have an attorney on the phone. We keep track of everything through JAMSware.

Joselyn: JAMSware is a safety net – it doesn't let things fall through the cracks. It's really the best.

Q. *Do you ever work with other ADR providers, or non-JAMS neutrals on cases, or do you ever get cases with contracts which have other providers written into them?*

Joselyn: Yes to all of those questions. We work with AAA, the OAH Administrator (Office of Administrative Hearings for the State of California). We work with outside arbitrators. This happens with tripartite arbitration panels.

Mojgan: We do get contracts with AAA written into them. The parties stipulate to use Ken or Jerry or JAMS and as long as everyone agrees, it's not a problem.

Q. *Practice Tips – if you could give attorneys advice on how to best use the service of a Case Manager, what would be the top one or two things you would advise? Any tips or tricks you want to share that you've seen successful attorneys use?*

Joselyn: If it's possible, I would tell attorneys to be forthcoming and as detailed as possible at the onset of the case. The more information we have on the front end, the more we can help them expedite the case or anticipate challenges. It will help avoid bumps along the way.

Also, we act as "neutrals." JAMS' service as a neutral provider is extended to case managers. If parties don't get along, we can contact the other side. That's what we are here for and we are happy to do it.

Mojgan: Communication is key, and they should keep the case manager updated, so we can keep everyone involved at every stage of the process. In my many years here, I've found that to be very important. ■

DIRECTOR'S CORNER continued from Page 1

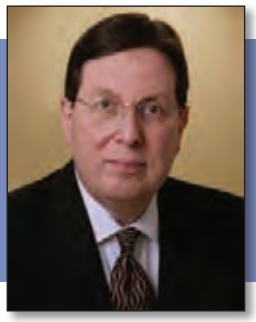
project neutrals, dispute review boards, adjudication, mini-arbitration/trial proceedings and expedited arbitration. With the plethora of new processes have come increasing industry demands for expertise, innovation, impartiality and efficiency of neutrals, and competent case administration.

In response to these historic industry trends and modern demands, JAMS – America's largest private provider of dispute resolution services – formed the Global Engineering and Construction (GEC) group on January 1, 2008. The GEC panel of neutrals comprises lawyers and judges recognized among the world's most highly regarded construction experts from within and outside the U.S. Each panel member is supported personally by a highly competent case manager and staff in JAMS Resolution Centers throughout the U.S. – offices uniformly designed to provide ample, well-appointed hearing and consultation spaces in which to resolve disputes.

JAMS' vision is to provide to the global construction industry the finest, most expert, ethical, innovative and efficient level of dispute resolution services in the world. Through this quarterly newsletter, we look forward to keeping you informed of our quest and of important developments that will shape the future of construction ADR. Our goal is to make this a valuable part of the ongoing dialog within the industry about best practices in dispute resolution. We encourage your feedback and ideas, and more importantly, we would like to receive articles from you about cutting edge issues (see **Editorial Guidelines** on Page 12). It is with this spirit of collaboration and learning that we hope you enjoy the inaugural issue.

Respectfully yours, Phil Bruner

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 online. JAMS Global Engineering and Construction Group may be reached at its Rapid Resolution "one call" national number: 866-956-8104.



"Adjudication" as a Method of Resolving Construction Disputes

BY HARVEY J. KIRSH, ESQ.

The Latham Report Of 1994

In 1993, Sir Michael Anthony Latham, a retired British Conservative Member of Parliament, was commissioned to lead an investigation into concerns expressed in the United Kingdom's construction industry about the significant expenses and unreasonable delays required to resolve construction claims, and the shortcomings of the existing dispute resolution methods. Latham's inquiry ultimately led to the July 1994 publication of his joint government and industry report, *"Constructing the Team"* (which came to be known as the **"Latham Report"**).

The Latham Report's identification and critical evaluation of the inefficiencies in the processes and procedures in the construction industry set the agenda for reform. One of its major recommendations was that "adjudication" should be the standard form of dispute resolution. This became the driving force for legislative reform which followed.

Legislative Amendment Introduces Adjudication

The Housing Grants, Construction and Regeneration Act 1996[1] (also known as **"The Construction Act"**), which received Royal Assent on July 24, 1996, was responsible for introducing a new form of **"adjudication"** for construction disputes.

As Sir Michael Latham wrote:

"The coming into force of the Construction Act on May 1, 1998, nearly two years after it received Royal Assent, was a seminal event for the construction process throughout Britain. One of the most significant parts of the Act was the statutory right of adjudication, intended to provide speedy and relatively inexpensive settlements of construction disputes throughout an industry which had been plagued by them."[2]

A set of imposing regulations followed in 1998, entitled *"Scheme for Construction Contracts (England and Wales) Regulations 1998,"* and included by default in contracts to which the *Construction Act* applies, if the contract does not meet the minimum procedural requirements for compliance with the *Act*. Section 108 of the *Act* provides that:

(a) A party to a written[3] construction contract (as broadly defined) has the right to give notice at any time of his intention to refer a "dispute" to adjudication. "Dispute" is defined to include "any difference;"

(b) An impartial adjudicator is to be appointed, and the dispute is to be referred to him/her within 7 days of such notice;

(c) The adjudicator is required to reach a decision within 28 days of the referral (subject to a specified 14-day time extension, with the agreement of the referring party, or to a further time extension by agreement of both parties);

(d) The construction contract is to provide that the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for it) or by agreement; and

(e) The construction contract is also to provide that the adjudicator is immune from liability, provided that he/she has acted in good faith.

The Adjudication Process

Once the adjudicator receives the referral notice, he/she will set the procedure for the adjudication; will take the initiative in reviewing the facts and the applicable law; may seek advice from others, with the consent of the parties; and will render a decision (with reasons, if requested) within the four corners of the referral notice, and within the allotted time (28 days, 42 days, or longer, depending upon the agreement of the parties). Once the decision has been rendered, the parties must comply with it (until it is finally resolved by arbitration, litigation or agreement).

In his speech to the House of Lords, Lord Ackner stated:

"What I have always understood to be required by the adjudication process was a quick, enforceable interim decision which lasted until practical completion when, if not acceptable, it would be the subject matter of arbitration or litigation. This was a highly satisfactory process.

It came under the rubric, 'pay now, argue later' which was a sensible way of dealing expeditiously and relatively inexpensively with disputes which might hold up the completion of important contracts." [4]

Enforceability Of An Adjudication Decision

As indicated above, the adjudicator's decision is provisionally binding on the parties, unless and until it is challenged and finally resolved by arbitration, litigation or agreement. Until then, and subject to a possible defense by the unsuccessful party that the adjudicator exceeded his/her jurisdiction, the adjudicator's decision may be enforced by the court.

The issue of enforceability of the adjudicator's decision was confirmed, shortly after the promulgation of the *Construction Act*, in *Macob Civil Engineering Ltd. v. Morrison Construction Ltd.*,[5] a 1999 decision of the Technology and Construction Court (High Court of Justice, Queen's Bench Division). In that case, Hon. Mr. Justice Dyson held that "(c)*rucially,* [Parliament] *has made it clear that decisions of adjudicators are binding and are to be complied with until the dispute is finally resolved."*[6]

The Costs Of Adjudication

Although construction contracts usually provide that both parties are jointly and severally liable for payment of the adjudicator's fees, the adjudicator is often given the authority and discretion to apportion them between the parties. Typically, they are to be paid by the unsuccessful party. As for the parties' own costs (e.g., for lawyers, experts, etc.), they are usually not recoverable from the opposing party, although the adjudicator may be given the authority to award or apportion them as well.

Epilogue On Adjudication

In an extended lament about the unacceptable delays and high expense inherent in construction arbitrations in the U.S., JAMS GEC neutral Barry Grove, after reviewing some of the processes being used by the American Arbitration Association (e.g., Fast Track Rules) and the International Chamber of Commerce, concluded that "(a)*rbitration avoidance is the panacea. This is done through better, fairer contracts and schemes like partnering, alliancing, dispute review boards and mediation."*[7] Then, turning his critical sights on "adjudication," he continued:

"The response in England is draconian. Most construction disputes that arise from projects within the geographical reach of Parliament must now, by statute, be heard and resolved within 28-42 days by an 'adjudicator' who will be appointed if the parties cannot select one by agreement. The adjudicator's decision is immediately binding but not final since the dispute is subject to de novo rehearing in subsequent arbitration or litigation. ***It is doubtful that this process can do justice to a significant or complex dispute.***[8] ***And anyway it is open to either party to go on with an unacceptably long and expensive arbitration or litigation. What adjudication has really achieved is rough justice on an interim basis."***[9] [emphasis added]

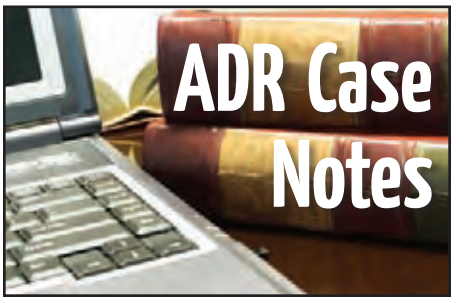
Having said that, legal writers, who have advocated the adoption of the adjudication model for use in Canadian construction contracts, have also observed that versions of the U.K. scheme have already been promulgated in other Commonwealth countries such as Singapore, New Zealand and Australia.[10]

Similarly, John Hinchey (of JAMS' GEC Group) and Troy Harris, in their recently published text "International Construction Arbitration Handbook," concluded that: *". . . the English experiences with Adjudication, both good and bad, will undoubtedly be drawn upon by other countries, particularly the United States, in deciding whether or what aspects of Statutory Adjudication can or could be transplanted, either into domestic contracts or legislation."*[11] ■

Mr. Kirsh is a mediator, arbitrator, and project neutral with the JAMS New York Resolution Center, and a partner at Osler, Hoskin & Harcourt LLP in Toronto, Canada. Email him at hkirsh@jamsadr.com or view his Engineering & Construction bio online.

1. Acts of the UK Parliament, 1996, Chapter 53
2. Sir Michael Latham, in his Foreword to Richard Anderson's "A Practical Guide to Adjudication in Construction Matters" (W. Green/ Sweet & Maxwell, 2000)
3. There is speculation that anticipated amendments to the Act, which will form part of the Government's legislative program for 2008-2009, will provide that construction contracts will no longer have to be in writing for the right to adjudicate to apply.
4. Speech of Lord Ackner, reported in Hansard, House of Lords Volume 571, Columns 989-990, as referenced in John W. Hinchey and Troy L. Harris, "International Construction Arbitration Handbook" (Thomson/West, 2008) (hereinafter called "Hinchey and Harris"), at fn. 12 of para. 1:17
5. [1999] B.L.R. 93
6. *ibid*, at 98
7. Jesse B. Grove III, "New Rules for Expedited Construction Arbitration in the United States," [2007] The International Construction Law Review 136, at 137
8. But see Hinchey and Harris, para. 1:17, at page 58, where the authors contend that, despite the suggestion that the truncated process is not suitable for complex construction cases," the Act has been increasingly used for more complex cases being referred to adjudication."
9. *ibid*
10. Duncan Glaholt, "The Adjudication Option: Time for Uniform Security of Payment Legislation in Canada," paper presented at The Canadian Institute's 15th Annual Construction Superconference (November 21-22, 2005, Toronto)
11. Hinchey and Harris, para. 1:17, at page 53

• May parties enlarge by agreement statutory grounds for judicial vacatur and modification of an arbitration award: "No" under the Federal Arbitration Act *(Hall Street Associates LLC v. Mattel, Inc.,* 552 U. S. __, 128 S. Ct. 1396, 170 L. Ed. 2d 254 (March 25, 2008)) and "Yes" under the California Arbitration Act *(Cable Connection, Inc. v. DIRECTV, Inc.* __Cal. Rptr. 3d __ , 2008 WL 3891556 (Cal. August 25, 2008)).



1. The FAA. Since enactment of the Federal Arbitration Act in 1925 parties desirous of binding arbitration, but uncomfortable with the limited statutory grounds for judicial vacatur or modification of an arbitration award, have questioned whether the statutory grounds could be expanded by the agreement to arbitrate. Over the years a split of authority had arisen among the federal circuits over the exclusiveness of the statutory grounds. The U.S. Courts of Appeals for the Ninth and Tenth Circuits ruled that parties could not contract for expanded judicial review. See, *Kyocera Corp. v. Prudential-Bache Trade Services, Inc,* 341 F. 3d 987, 1000 (9th Cir 2003); *Bowen v. Amoco Pipeline Co.*, 254 F. 3d 925, 936 (10th Cir. 2001). The First, Fifth and Sixth Circuits had held that parties may so contract. See, *Puerto Rico Tel. Co. v. U. S. Phone Mfg. Corp.*, 427 F. 3d 21, 31 (1st Cir. 2005); *Jacada (Europe), Ltd. v. International Marketing Strategies, Inc.*, 401 F. 3d 701, 710 (6th Cir. 2005); *Roadway Package System, Inc. v. Kayser,* 257 F. 3d 287,288 (3d Cir. 2001).

The U.S. Supreme Court now resoundingly has rejected the consensual modification of the FAA's statutory grounds for judicial review, and has held that FAA Sections 10 and 11 provide the exclusive grounds for award vacatur and modification. In *Hall*, the Court refused to enforce the parties' arbitration agreement, which provided that the award could be vacated judicially upon a finding either that it was not supported by substantial evidence or that the arbitrator's conclusions were erroneous as a matter of law. In so doing, the Court also ruled that *Wilko v. Swan*, 346 U.S. 427 (1953), which has been viewed as creating an additional ground for judicial review based on an arbitrator's "manifest disregard of law," did not create a new review standard but merely referred to the Section 10 grounds "collectively."

2. The California Rule. Five months to the day after the *Hall* decision was announced, the Supreme Court of California, in a 6-2 decision issued August 25, 2008, ruled that parties arbitrating under the California Arbitration Act may enlarge by consensual agreement the limited grounds for vacation of an arbitration award provided by Cal. Code Civ. Proc. Section 1286. In *Cable Connection*, the arbitration agreement said that "the arbitrators shall not have the power to commit errors of law or legal reasoning, and the award may be vacated or corrected on appeal to a court of competent jurisdiction for any such error." In enforcing this language, the Court reaffirmed its decision in *Moncharsh v. Heily & Blase*, 3 Cal. 4th 1 (Cal. 1992), which held that the California Legislature had adopted the position taken in prior case law that "in the absence of some limiting clause in the arbitration agreement, the merits of the award, either on questions of fact or of law, may not be reviewed except as provided by statute." The *Cable Connection* Court majority ruled that the language in the arbitration agreement constituted such an enforceable "limiting clause."

The *Cable Connection* decision *is* limited to California state law, and thus its application should be limited to California contracts not involving "interstate commerce." The FAA applies to all contracts in "interstate commerce" – an exceptionally broad reach in the modern business environment – and preempts contrary state arbitration law. See generally 6 *Bruner & O'Connor on Construction Law* §20:10 *et. seq*. Courts, however, have been known to confuse "state arbitration law" with "state general contract law." Such confusion could arise under "interstate" contracts in which the parties expressly agree that the contract is governed by California law. The Supreme Court of California itself interpreted the U.S. Supreme Court's language in *Hall*, which stated that federal law does not preclude "more searching review based on authority outside the [federal] statute" including "state statutory or common law," as consistent with its decision in *Cable Connection*. Such substantive "state contract law," however, should be limited in application in "interstate" contracts to substantive arbitrability issues going to the validity of an arbitration agreement itself, and should not be construed to enlarge statutory grounds for vacatur or modification of an arbitration award governed by the FAA. The Supreme Court of California also noted that "the United States Supreme Court does not read the FAA's procedural provisions to apply to state court proceedings," does not "address whether the FAA provision for vacatur 'where the arbitrators exceeded their powers'…is applicable when the agreement specifically limits the arbitrators' powers by providing for an award governed by law and reviewable for legal error," and despite its "strict reading of the FAA [the court] left the door ajar for alternate routes to an expanded scope of review." ■

Notices & Calendar of Events

New JAMS Arbitrator Based in London: His Honour Humphrey LLoyd QC

The newest JAMS GEC neutral and Advisory Board Member is **His Honour Humphrey LLoyd**, a former judge of the High Court of Justice of England and Wales. He brings tremendous experience as an arbitrator on major matters involving business commercial and construction contracts. Since 2005, he resumed his career as an arbitrator in international and domestic matters, practicing from Atkin Chambers, in Gray's Inn, London. His Honour Humphrey LLoyd served for 12 years on the bench of the Technology and Construction Court in London, a division of the High Court of Justice of England and Wales. His work there included supervision over numerous major arbitrations and adjudications involving construction disputes. Prior to his service on the bench, he was for 30 years a barrister and arbitrator, specializing in UK and international construction matters. He was appointed Queen's Counsel in 1979.

SEPT. 10-12, 2008: JAMS Sponsors ABA Fall Meeting

American Bar Association Forum on The Construction Fall Meeting, "Winds of Change? The Consensus Docs"
The Fairmont Hotel • Chicago, IL • **http://www.abanet.org/forums/construction/**

SEPT. 22-23, 2008: John Hinchey Speaks at Associated Owners and Developers

2008 National Conference East – "Finishing on Time, Within Budget, and Without Lawsuits"
Four Seasons Hotel Midtown • Atlanta, GA • **http://www.constructionchannel.net/2008AOD_CCIC_EAST_atlanta.html**

Sept. 22 • 10 - 11 AM: Effectively Resolving Local and Global Disputes Through Mediation, Arbitration or Litigation
Panelists include **John W. Hinchey, Esq.,** Partner, King & Spalding LLP & JAMS GEC Neutral

OCT. 5-8, 2008: JAMS Neutrals Speak at International Construction Law Conference

Presented by the American College of Construction Lawyers Program In Conjunction With The Society of Construction Law
London, UK • For additional information and to register, visit **http://www.sclinternational.org/accl.**

Oct. 5 • Guoman Tower Hotel • London: International Construction Law Fundamentals (a U.S. Perspective)
JAMS GEC Neutrals **John W. Hinchey, Esq.** (ACCL president), **Philip L. Bruner, Esq.**, **Jesse B. (Barry) Grove, III, Esq.**, **Katherine Hope Gurun, Esq.,** and **HH Humphrey LLoyd QC** will speak.

OCT. 12-14, 2008: Ken Gibbs Speaks at CMAA National Construction Conference

Construction Management Association of America National Conference & Trade Show: "Ahead of the Curve – On Top of the Trends" • Hyatt Regency Embarcadero Hotel • San Francisco, CA • **http://cmaanet.org/nationalconference08.php.**

Oct. 14 • 10:15 AM: "Are You Ready for Dispute Resolutions in the 21st Century - Alternative Forums and Contracting Strategies" – Panelists include JAMS GEC Neutral **Kenneth C. Gibbs, Esq.**

DEC. 10-12, 2008: "ADR in Cross Border Disputes" at 23rd Construction SuperConference

The Palace Hotel • San Francisco • **http://www.constructionsuperconference.com/ME2/Default.asp**

The SuperConference, now in its 23rd year, is recognized as one of the preeminent legal construction conferences. The program will provide insight into some of the most complex legal and business issues facing the construction industry.

Dec. 11 • 2:15 - 3:30 PM: ADR in Cross Border Disputes
Featured JAMS GEC Neutrals include **Philip L. Bruner, Esq.** (moderator), **Thomas J. Stipanowich, Esq.** (Professor of Law at Pepperdine University and Academic Director of the Straus Institute for Dispute Resolution), and **Katherine Hope Gurun, Esq.**

Selecting Qualified Arbitrators Is the Key To Success

Continued from Page 1

tion and appointment of qualified arbitrators in whom the parties can repose their trust.

Because arbitration is a creature of contract, the parties have it within their power to agree concerning arbitrators on how many to have, having what qualifications, and, in rare cases, who shall sit as their judges. If and to the extent that the parties have agreed on these matters, their agreement will be controlling. Therefore, the first stop in determining the number, qualifications, and the manner and method of selecting the tribunal is the arbitration agreement. Most arbitration agreements contained in construction contracts will either spell out or incorporate arbitral institutional rules stating the selection procedures and criteria for the appointment of arbitrators to decide disputes arising out of that contract.[4]

If the arbitration agreement does not provide explicitly for selection of arbitrators but does incorporate arbitral institutional rules, those rules will most likely contain detailed procedures for confirmation or selection of arbitrators.[5] Most international arbitral institutions maintain panels or "lists" of distinguished arbitrators, many with construction backgrounds or expertise,[6] from whom the parties may select their tribunal.

If the arbitration agreement makes no provision for selection of arbitrators and fails to name an arbitral institution or otherwise incorporate procedures for selection of arbitrators, then the parties will likely be required to look to the applicable laws and courts. The UNCITRAL

Most commentators agree that at least one or more of the arbitrators on a construction case should have a background in the construction industry, and in many international arbitrations there should be an appropriate mix of nationalities so as to create "international neutrality" on the tribunal.

Model Law, for example, states that the parties are free to agree on a procedure for appointing arbitrators, and, failing such agreement:

> *Each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within thirty days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the appointment shall be made, upon request of a party, by the court or other authority specified in article 6.*[7]

In cases involving the rules of an arbitral institution and the dispute is to be decided by three arbitrators, the most common method of appointment is for each party to nominate or select one arbitrator, with the third arbitrator to be selected either by the two nominees or the institution.[8]

If, on the other hand, a party is unable or unwilling to designate their arbitrator within a specified time, the institutional rules frequently contain a default provision by which the arbitral institution itself will select an arbitrator on a party's behalf, and, in some cases, will select a sole arbitrator or the entire tribunal.[9]

If the parties have not agreed to use a particular arbitral institution in their arbitration agreement and have reached an impasse with respect to any stipulated method for selection of arbitrators, one or more parties may have to revert to the applicable laws to determine an "appointing authority," which, in turn, will typically designate an arbitral institution to proceed with the selection of arbitrators according to its rules.[10] Such a default process should be avoided, if possible, as the procedure is likely to be time-consuming, tedious, and expensive for all the parties.

The vast majority of international arbitrations are composed of tribunals of either a sole arbitrator or a panel of three arbitrators. There are advantages and disadvantages to either number. Generally, the tradeoff is between cost savings on the one hand and, on the other, having more

diverse perspectives and a greater likelihood of a thoroughly considered award. If the parties cannot agree on the number, the arbitral institutions typically apply their standard criteria in determining whether the arbitration shall proceed with one or three arbitrators.[11]

The desirable nationality, qualifications, and experience of international construction arbitrators, or the most desirable "mix" of backgrounds and expertise on a construction arbitral tribunal, are an oft-discussed topic in the literature of international commercial arbitration.[12] Most commentators agree that at least one or more of the arbitrators on a construction case should have a background in the construction industry,[13] and in many international arbitrations there should be an appropriate mix of nationalities so as to create "international neutrality" on the tribunal.

Perhaps the most important time that can be spent before initiating an international construction arbitration is for the parties and their representatives to obtain and gather as much pertinent information as possible about prospective arbitrators before making an appointment. In some cases, it is desirable to interview prospective arbitrators, keeping in mind the applicable ethical rules and guidelines.[14] However, once the tribunal is appointed, *ex parte* communications between parties and arbitrators is either prohibited or extremely limited.[15]

It is fundamental that all arbitrators in international cases are required to be "independent," "impartial," and "neutral."[16] To better ensure that arbitrators meet these criteria, the treaties, conventions, applicable laws, institutional rules, and generally accepted ethical guidelines applicable to international arbitrations require extensive disclosure by arbitrators of their business and professional relationships and interests to the parties, both before appointment and thereafter during the course of the arbitration.[17]

In summary, the selection of qualified arbitrators is probably the most important determinant of a successful international construction arbitration. ■

Mr. Hinchey is a JAMS mediator, arbitrator, and project neutral based in Atlanta, GA. Email him at jhinchey@jamsadr.com or view his Engineering & Construction bio online.

1. See *International Construction Arbitration Handbook* (ThomsonWest, 2008) (*ICA Handbook*) §7:2. This article is based on Chap. 5, §5.19, from the *ICA Handbook*, published here with the permission of Thomson Reuters. Information about the *ICA Handbook* may be located and previewed online at http://west.thomson.com/productdetail/147028/40552299/productdetail.aspx.
2. For example, the ICC Rules permit the Arbitral Tribunal "to establish the facts of the case by all appropriate means." See Art. 20(1).
3. See *ICA Handbook*, §§12:4 to 12:12.
4. See, *e.g.,* FIDIC, Conditions of Contract for Construction, for Building and Engineering Works Designed by the Employer, General Conditions (1st ed. 1999) Subclause, 20.6 "Arbitration; AIA Document, A201-2007 General Conditions of the Contract for Construction, §15.4.1.
5. See, *e.g.,* JAMS International Arbitration Rules, Art. 7.
6. For example, the JAMS Global Engineering and Construction Group, led by Philip L. Bruner and other highly distinguished construction experts, provides mediation, arbitration, project neutral, and other services to the global construction industry to resolve disputes in a timely and efficient manner. See http://www.jamsadr.com/practices/construction.asp.
7. UNCITRAL Model Law, Art. 11(3). Article 6 states that these functions shall be performed by a court designated by the enacting State. In the United States, these are the United States District Courts or the courts of the several constituent states.
8. See*, e.g.,* ICC Rules, Art. 8(4); JAMS International Arbitration Rules, Art. 7.4.
9. See, *e.g.,* LCIA Rules, Art. 7.2; AAA/ICDR Rules, Art. 6; JAMS International Arbitration Rules, Art. 7.5. The rules of appointment of arbitral institutions are generally straightforward and easy to follow, but parties and their representatives should pay close attention to the procedural requirements and deadlines.
10. See discussion in *ICA Handbook*, §5:22. The Secretary-General of the Permanent Court of Arbitration at The Hague is available to serve as a neutral agency to designate an "appointing authority;" See http://www.pca-cpa.org.
11. The ICC notes on its website that "[t]he parties are free to decide upon the number of arbitrators, either in the arbitration agreement or later. Failing agreement by the parties, the Court appoints a sole arbitrator, save where it appears that the dispute is such as to warrant the appointment of three arbitrators. If the dispute is small, and the parties have chosen three arbitrators, the Secretariat draws the attention of the parties to the possible consequences of their choice, including the tripling of arbitrators' fees and expenses and the longer time generally required for three arbitrators rather than one arbitrator." ICC website, "Setting in motion of the arbitration; number of arbitrators (http://www.iccwbo.org). See, also, JAMS International Arbitration Rules, Art. 7.1.
12. See §5:25. See, generally, Redfern and Hunter, *Law and Practice of International Commercial Arbitration* (4th ed. 2004) §§4-39 to 4-50; Bunni, The FIDIC Forms of Contract (3d edition, 2005) §19.7; Buchman, "How to Select an Arbitrator," *The Arbitration Process; Comparative Law Yearbook of International Business* (2001) p. 89; Maeijer, et al., "Party-Appointed vs. List-Appointed Arbitrators," *The Arbitration Process*, supra, p. 95; Peter, "Lawyers vs. Non-Lawyers and One vs. Three Arbitrators," *The Arbitration Process*, supra, p. 109.
13. See ICC Final Report on Construction Industry Arbitrations (Summary), ¶¶15 to 17.
14. See AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes (March 2004); CIArb, Practice Guideline 16; The Interviewing of Prospective Arbitrators.
15. See, *e.g.*, AAA/ICDR Rules, Art. 7(2); JAMS International Arbitration Rules, Art. 12.
16. See UNCITRAL Model Law, Art. 12(2) ("An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence . . . ."); Redfern and Hunter, *Law and Practice of International Commercial Arbitration* (4th ed. 2004) §4-52; Bunni, The FIDIC Forms of Contract (3d ed. 2005) p. 398.
17. See *ICA Handbook*, §5:27.

SAMPLE PROJECT NEUTRAL CONTRACT CLAUSE

ALTERNATIVE DISPUTE RESOLUTION

1. Design and Construction Phase

a. Project Neutral

The Owner, Architect and Contractor (collectively, the "Parties") shall agree to the selection of one or more Project Neutral(s) for the Project. The Project Neutral(s) shall be experienced both in the design and construction of major real estate developments as well as the mediation of design and construction disputes. The Parties shall select the Project Neutral(s) from among the members of the construction panel of JAMS or from other panels as mutually agreed to by the Parties.

The Project Neutral(s), in close consultation with all parties involved in a given dispute (the "Involved Parties"), shall assist in resolving any disputes, claims, or other controversies that might arise from the commencement of design through issuance of the final certificate of occupancy and acceptance of the Project by the Owner. The Project Neutral(s) shall have no adjudicatory authority and, therefore, shall act solely as a mediator in working with the Involved Parties.

If requested in writing by the Involved Parties, the Project Neutral(s) shall attend the regular job meetings at the site of the Project. Also, if requested by the Involved Parties, the Project Neutral(s) shall: (1) attempt to be available to attend any specific job-related meeting, and (2) attempt to be available to confer or meet with any Involved Party or Parties if so requested.

If the services of the Project Neutral(s) are retained, they shall be provided on an hourly basis and the cost shall be borne in equal parts by the Involved Parties which may include the Owner, Architect, Contractor, and any other necessary parties, including, but not limited to, consultants, subcontractors, sub-subcontractors, and suppliers (collectively, "Subcontractors") except as agreed to in writing between any Subcontractor and the parties.

The confidentiality of any discussion involving the Project Neutral(s) shall be protected by all applicable statutes and case law with respect to mediation.

The term of service by the Project Neutral(s) shall end when the design and construction phases of the Project are complete. The Project Neutral(s) may be involved in subsequent dispute resolution negotiations or proceedings under the terms and conditions set forth herein. ■

EDITORIAL GUIDELINES

JAMS Global Construction Solutions invites the submission of articles on topics related to ADR and construction. To find how to submit an article, please go to: **http://www.jamsadr.com/images/PDF/JAMS-Construction-Solutions-Guidelines.htm** or email **constructionsolutions@jamsadr.com.**

RECEIVE THE NEWSLETTER ELECTRONICALLY

To sign up for your complimentary electronic copy of ***JAMS Global Construction Solutions***, please go to **http://www.jamsadr.com/practices/construction.asp** or email **constructionsolutions@jamsadr.com.**

JAMS GLOBAL CONSTRUCTION SOLUTIONS

Board of Editors

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

HARVEY J. KIRSH, ESQ.*
JAMS Global Engineering and Construction Group

JOHN J. WELSH, ESQ.
JAMS Executive Vice President and General Counsel

JAMS Global Construction Solutions seeks to provide information and commentary on current developments relating to dispute resolution in the construction industry. The authors are not engaged in rendering legal advice or other professional services by publication of this newsletter, and information contained herein should not be used as a substitute for independent legal research appropriate to a particular case or legal issue.