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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

The Financial Crisis, the Risk of Litigation, and the Value of ADR

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

Frozen financial markets and collapsed housing and real estate developments have created what many now call an "historic crisis." According to a November 3, 2008 article in *The National Law Journal*, this crisis has caused the unraveling of building projects across the United States and has resulted in construction litigation jumping to levels unseen in a generation. But is litigation the best answer? The number and magnitude of wrong decisions in choosing to litigate rather than to settle also are climbing. A 40-year empirical study of "erroneous" decision making in unsuccessful settlement negotiations, published recently in *5 J. Empirical L. Studies 551* (Sept. 2008), reports that both the rate of erroneous decision

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A treasure trove of evidence, project documents help assess liability and suggest remedial solutions.

The Paper Trail

BY HARVEY J. KIRSH, ESQ.

Large construction projects generate thousands of pages of documents. Some of those documents create the legal relationships between the parties who were actively involved in the construction process. Others vividly demonstrate how the parties dealt with issues as they came up during the course of construction. Just consider the spectrum of project documents:

- contract documents (including general conditions, supplementary general conditions, specifications, drawings, soils reports, bonds, etc.)
- drawings (including tender set, issued-for-construction set, as-built set, shop drawings, erection drawings,

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The Paper Trail

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coordination drawings, etc.)

- bar chart and electronic schedules (including original construction schedule and all subsequent generations showing changes/revisions)
- contemplated change notices, site instructions, price quotations, and change orders
- applications for payment, and payment certificates
- inspection reports, testing reports
- minutes of site meetings, and the handwritten notes of those present
- deficiency lists
- correspondence, inter-office memos, and e-mails
- handwritten notes of telephone conversations
- site superintendent reports (e.g., daily reports, diaries, logs)

For an attorney, this is a treasure trove of evidence that will assist in the prosecution or defense of a construction claim.

These documents, for better or worse, complete or deficient, accurate or self-serving, comprise the complete written history of the project. They tell us who did what on the project; they tell us about design issues and how they were handled; they tell us about construction problems, and how they were addressed (or not addressed); they tell us about delays, and often state outright, or hint or allege, who was responsible; they tell us about disputes, and how they were resolved (or not resolved); they tell us about delivery problems, labor problems, the number of men on the site every day, whether it was sunny on a particular day, and whether propane heaters were used to heat the site during winter work. But one thing is very clear – the importance of these documents should never be underrated.

In "The Case of the Leaking Office Building," it was not clear whether it was a design or a construction or a materials problem.

The archive boxes filled with project documents, which are typically delivered by clients to their attorneys for use in an arbitration, mediation or litigation proceeding, are not always organized. But if one were to arrange them in chronological order, they would tell a story in a comprehensible and revealing manner. That story, which tends to unfold during and after construction, often traces the history of construction problems which may ultimately mature into one or more construction claims. The way that story is told may very well determine whether the construction claim will be successful or defeated.

Handling and Organizing the Mass of Project Documents

In today's world, we see that information on a construction project is generated in both paper and electronic formats. The early stage of project design, for example, is facilitated by the use of computer-aided design and drafting (CAD and CADD); and Building Information Modeling (BIM) uses three-dimensional, real-time, dynamic building modeling software to increase productivity in building design and construction. Furthermore, during the construction phase, e-mails are becoming an important and widespread method of communication, even on smaller projects. However, we still continue to see the more traditional collection and transmission of information in paper format. In the litigation context, the rules of civil procedure in most jurisdictions now provide for the retention, preservation, discovery, production, and exchange of electronic documents. Parties involved in construction arbitrations and other ADR processes of course benefit from the guidance provided by these rules.

Depending on whether the documents are in paper or electronic format will likely be the most important factor with respect to cost. In order to keep cost in check, and to facilitate the performance of accurate searches, the paper documents are typically converted to electronic format and made searchable through the Optical Character Recognition (OCR) process.

By converting the "hard" data to electronic format, one has the ability to retrieve information through the use of computer software tools which categorize and put the data into a more modular format. Keyword searches, for example, which are used to collect and cross-reference specific items which relate to each other, could in some instances

reveal evidence of a "smoking gun." The conversion of data to electronic format reduces its size to a more manageable and relevant set, thereby reducing costs and time.

The Case of the Leaking Office Building

The case of the leaking office building is a good example of the value of following the paper trail. During construction, it was not apparent that there was a problem. It was not until after the building became occupied that one of the tenants noted a number of puddles on the floor of his office after a heavy rainfall. More tenants in other offices had the same experience, and within a short period of time, the problem became widespread and serious. The point of entry of the water could not be discerned. It was not clear whether the water was penetrating the masonry, or coming through the window gaskets, or from the roof, or from some other point of entry; and it was not clear whether it was a design or a construction or a materials problem.

So the owner asserted a claim against a number of parties involved in the project (the "shotgun" approach), and hoped that the dispute resolution process would sort things out. The targeted parties were the general contractor, the general contractor's bonding company (under the performance bond), the masonry subcontractor, the window supplier, the roofing subcontractor, the structural steel subcontractor, the architect, the structural engineer, and others. As you might expect, each of these parties said they did nothing wrong, and blamed others. All parties hired attorneys; some were represented by their insurers; some had retained expert witnesses (with varying degrees of expertise); and the show got underway.

In the dispute resolution process, each of these parties had an obligation to produce all documents in his/her possession which were relevant to the issues in dispute. In turn, each party had the right to review the documents produced by the opposing parties. In doing so, each party was looking for a "smoking gun" in the opposing parties' documents. A "smoking gun" consists of one or more documents which may serve to implicate another party, or to shift the blame or focus away from themselves.

In the case of the leaky building, the owner's attorney, during the dispositions, was able to uncover numerous letters – which had never been seen before – between the contractor and the masonry subcontractor, in which the contractor had warned about the masonry work. In particular, there were allegations of poor grouting, which might have allowed water penetration through the building envelope.

But for the detailed and thorough paper trail ... the dispute resolution process might have been protracted and considerably more expensive.

Additionally, the comprehensive daily site reports indicated that the masonry subcontractor employed crews of mostly apprentice masons. Furthermore, there were letters, notes, and other documents which indicated that there were disputes between the architect and the structural engineer, in which the architect warned that certain alleged design deficiencies could lead to a "twisting" of the structure, a separation of the masonry, and the consequent water penetration. The detailed minutes of site meetings also made reference to problems with the steel erection which, in retrospect, were seen to have been caused by a deficiency in the structural design.

Uncovering these documents helped the parties to identify the causes of the leakage problem, and suggested certain remedial strategies. The documents also helped to establish which parties were responsible for, or may have contributed to, the problem.

The owner's claim was resolved shortly thereafter. But for the detailed and thorough paper trail leading to the masonry subcontractor and the structural engineer, and leading away from the roofing subcontractor and the steel supplier, the dispute resolution process might have been protracted and considerably more expensive.

In baseball, the rule is that a tie goes to the runner. In a construction claim scenario, a tie goes to the person with the best paper trail. ■

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Electronic Discovery Issues in Construction Arbitrations

BY JOHN W. HINCHEY, ESQ.

Scope

This article identifies the issues associated with electronically stored information (ESI) as potential documentary evidence in domestic and international construction arbitrations. Next, it briefly surveys how arbitral organizations either have or have not recognized and treated ESI issues in their rules, guidelines, and protocols. Finally, the article concludes by suggesting how ESI can best be managed and controlled in the context of construction arbitrations.

Electronically Stored Evidence

Anyone not residing in a Himalayan cave over the past 10 years will know that the vast bulk of communications, information, documents, and data used in business and commercial transactions are now transmitted and stored in electronic form. Some have suggested that over 90% of commercial communications, documents, and information are now either exclusively created and maintained in electronic form or reside concurrently with "hard copies" of the same information. Particularly is this true in the construction industry. The now antiquated use of computer assisted design (CAD) is being overtaken by the use of building information modeling (BIM) in which traditional two dimensional design information becomes three dimensional and constitutes only a small part of the total universe of construction-related data creation and collection for a modern project. With integrated project delivery (IPD), "interoperability" and "lean contracting" entering on the scene to enhance construction project delivery methods, virtually all of the key project participants will now be linked electronically as well as contractually. Thus, ESI is no longer just a part of, it is the playing field!

To paraphrase Humphrey Bogart as the character Rick Blaine in *Casablanca*, electronic documents are just like other documents, only more so. Put more prosaically, the creation, communication, and collection of ESI add different dimensions to the creation, communication, and collection of traditional "hard copy" material, such that different treatment is called for. Yet, some have suggested otherwise in the context of arbitration, i.e., that issues concerning the disclosure, discovery, and exchange of ESI are fundamentally no different than with paper documents. These conservative viewpoints notwithstanding, even a brief overview of the differences should close the argument in favor of at least some different treatment of ESI in the context of arbitration.

So, what are the distinctions that justify differences in treatment between ESI and hard copy material? The sheer volume of ESI is of several magnitudes greater than with hard copy materials. Why? Because electronic information is so much easier to create, duplicate, and disburse than with the traditional copy machines. As one cogent example of how volume alone adds complexity and risk to e-disclosure, think of the greater effort required to review gigabytes, if not terabytes, of data for privileged or confidential material.

The "locations" of ESI will not be in the traditional file drawer, "file room," or storage warehouse. Instead, duplicate or modified copies of ESI may reside in hundreds of electronic files, including individual desktops, laptops, and personal data instruments such as Blackberries and even cell phones – not to mention the network servers, backup tapes, or hard storage drives that may be located anywhere in the world. Hence, there are multiple more "places" and persons to identify when it becomes necessary to determine who received or will be charged with notice of having received electronic material.

It should be obvious to anyone dealing with electronic data that it is ephemeral, meaning that it can be easily lost, whether by the intentional click of a delete button or the intentional or unintentional overwriting of previous text. Most businesses today preserve ESI for only limited periods of time. Then, there is the ephemeral metadata or "hidden" information that can reveal potentially important

items such as the date the document was created, modified, or transmitted – none of which is apparent on the "face" of the document, but which can be disclosed or retrieved with the right software.

Similarly, data which was intentionally and appropriately deleted because of privilege or confidentiality reasons may be recovered and viewed by experts with the right equipment and software. And, of course, there are different varieties of software and hardware, some of which can "communicate" with other types of hardware and software, and some varieties which cannot communicate or interact, thus making it more difficult to retrieve, transmit and search for particular information in ESI.

The relevance of all of these and other intrinsic characteristics, making ESI dimensionally and materially different from hard copy material, is simply that the retrieval, transmission, disclosure, and use of ESI is demonstrably more difficult and costly. Moreover, the physical characteristics of ESI raise procedural issues which should alert those who are engaged in the process of resolving disputes by arbitration to find efficient, economical, and fair ways to manage ESI in the context of arbitration.

ESI Procedural Issues

The likely procedural issues raised by the distinctive characteristics of ESI include the following:

- Will the parties have an obligation to preserve potentially relevant and material ESI either before or after the arbitration commences? If so, in what format and for how long?
- What is to be the scope of disclosure or discovery of ESI, particularly when one or more parties do not want to voluntarily produce the material?
- In what form or format will ESI be produced or exchanged? Will metadata be required?
- What tools and techniques are available to reduce the burden and cost of e-disclosure, e.g., limited date ranges, agreed search terms, data sampling, and special software?
- How will privileged and confidential information be protected, especially when with ESI there is a greater likelihood of inadvertent production?
- What considerations are to be taken into account by the tribunal in the effort to balance burdens, cost, and need?
- Will independent expert assistance in ESI be helpful or required?
- How will the cost of preserving, collecting, producing, and exchanging ESI be allocated?

ESI -Related Rules, Guidelines and Protocols

While the U.S. Federal Rules of Civil Procedure were expanded in December 2006 to deal with the discovery, production, and exchange of ESI in federal court proceedings, most American arbitral institutions, including the American Arbitration Association, have not yet developed specific rules or guidelines concerning ESI in domestic arbitrations.

On the international scene, however, there is an ongoing, sometimes heated, debate, first as to whether there should be specific rules or guidelines regarding ESI in international arbitration; and, if so, what those rules or guidelines should be. The primary argument put against having ESI rules or guidelines is that because discovery or disclosure of documentary information is quite limited in the context of international arbitration, to focus attention on ESI might encourage the use of "American-style discovery" in international arbitration – a most unwelcome prospect. Moreover, it is argued, the existing international arbitral rules concerning disclosure and exchange of documentary evidence are perfectly adequate to deal with ESI, so why create a solution for a problem that doesn't exist?

On the other side are those who believe that, indeed, there are fundamental differences between traditional documentary material and ESI, and, if these differences are ignored, parties and arbitrators will be left to flounder without common expectations as to how the issues should be treated. It appears that this debate is resolving on the side of the "positivists" who advocate for the development of specific rules and guidelines, as evidenced by the recent publications on ESI by the ICDR and the Chartered Institute of Arbitrators. Also, in June 2008, the ICC formed a working group to examine electronic disclosure issues, and the IBA has also launched a review of its 1999 Rules on the Taking of Evidence in International Commercial Arbitration (IBA Rules) with much of the discussion focused on the use and abuse of ESI and e-disclosure.

Article 1 of the 1999 IBA Rules, rather presciently, did define a Document as "a writing of any kind, whether recorded on paper, electronic means, audio or visual recordings or any other mechanical or electronic means of storing or recording information." However, there is nothing beyond this definition of a "Document" to require or suggest that ESI be treated differently than other forms of documentary evidence. As

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mentioned, some have suggested that the IBA Rules are perfectly adequate to deal with ESI issues in the context of international arbitration. The AAA's international affiliate, the ICDR, took the treatment of ESI a step or two further when it recently promulgated their "Guidelines for Arbitrators Concerning Exchanges of Information" (ICDR Guidelines) (effective May 31, 2008). However, it has only this to say specifically about the exchange of ESI:

"When documents to be exchanged are maintained in electronic form, the party in possession of such documents may make them available in the form (which may be paper copies) most convenient and economical for it, unless the tribunal determines, on application and for good cause, that there is a compelling need for access to the documents in a different form. Requests for documents maintained in electronic form should be narrowly focused and structured to make searching for them as economical as possible. The tribunal may direct testing or other means of focusing and limiting any search." (ICDR Guidelines, ¶ 4)

While the ICDR Guidelines are a helpful starting point, they do not deal with many other issues that can arise with ESI in commercial or construction arbitrations.

On October 2, 2008, the Chartered Institute of Arbitrators (CIArb) published a "Protocol for E-Disclosure in Arbitration" (CIArb Protocol). As stated in its introduction, the CIArb Protocol "is for use in those cases (not all) in which potentially disclosable documents are in electronic form and in which the time and cost for giving disclosure may be an issue." The CIArb Protocol, therefore, is intended to focus the parties and tribunal on "issues for consideration" and on allowing the parties to adopt the protocol as part of an agreement to arbitrate a potential or existing dispute. To date, the CIArb Protocol is probably the best and most comprehensive guide to both identification and treatment of the issues associated with e-disclosure in commercial arbitrations, whether domestic or international. The CIArb Protocol begins with listing those issues that should be considered by the parties and panel at the "earliest opportunity," typically the preliminary conference:

- The types of electronic documents within each party's power or control, and what the computer systems, devices, and media are on which they are held;
- What steps or measures may be appropriate for the retention or preservation of ESI;
- What rules and practice may apply to the scope of disclosure of ESI;
- Whether the parties can and want to agree to limit the scope of disclosure;
- What tools, software, methods, or techniques may be available to reduce the burden and cost of e-disclosure, such as using more limited date ranges, agreed search terms, and data sampling;
- How inadvertent disclosure of privileged material may be protected;
- Whether the parties and tribunal may benefit from professional expertise in ESI management and disclosure. (CIArb Protocol, Art. 3).

A request for disclosure of ESI or electronically stored documents, similar to the IBA Rules, must be specific as to the document or "category of documents" and must further specify how the documents requested are "relevant and material to the outcome of the case" (CIArb Protocol, Art. 4). In making any order or giving any direction for e-disclosure or for the retention or preservation of ESI, the tribunal must have regard for "the appropriate scope and extent of disclosure" under the existing agreement or applicable arbitration rules or law, and in addition must take into account:

- reasonableness and proportionality;
- fairness and equality of treatment of the parties; and
- insuring that each party has a reasonable opportunity to present its case by reference to the relative costs and burdens of complying with the order or direction. This exercise "shall include balancing considerations of the amount and nature of the dispute and the likely relevance and materiality of the documents requested against the cost and burden of giving e-disclosure." (CIArb Protocol, Art. 6).

The CIArb Protocol goes on to deal with the form and format of producing the ESI to the other party, such as "native format" or otherwise; whether metadata shall be disclosed, all the while requiring a showing of the relevance and materiality of the requested materials and a balancing of the relative costs and burdens involved. (CIArb Protocol, Arts. 8-9). Finally, the tribunal is authorized to "consider the appropriate alloca-

tion of costs in making an order or direction for e-disclosure" and, if necessary, drawing "such inferences as may be appropriate when determining the substance of the dispute or any award of costs or other relief." (CIArb Protocol, Arts. 10-14).

Conclusions

It is fair to say that ESI is, in several respects, "different" from traditional hard copy material, which differences can result in significant additional burdens and costs to the parties when disclosure of ESI is appropriate or required in a commercial arbitration, and especially in a construction arbitration where greater quantities of ESI may be expected. Because of the potential for additional burdens and costs associated with e-disclosure, it is appropriate for various arbitral institutions to develop rules, guidelines, and protocols to assist the parties and tribunals – first, to identify the issues involved and second, to appropriately manage and control e-disclosure.

The best and most comprehensive protocol created to date is the "Protocol for E-Disclosure in Arbitration" developed and published by the Chartered Institute of Arbitrators in October, 2008. However, whether or not rules, guidelines or protocols exist, if ESI is going to be the subject of exchange or disclosure and use in a commercial or construction arbitration, the best time to deal with those matters is the earliest time possible, which will normally be during the preliminary conference. ■

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making and the cost of such errors are growing. Since 1999, depending on the type of case, plaintiffs erroneously proceeded to litigation up to 63% of the time, while the added cost to defendants who erroneously rejected settlement exceeded 200%. Tort litigation has the highest error and added cost rates.

Amid the wreckage of 2008's "perfect storm," parties and their counsel must consider carefully improved options for resolving disputes innovatively and efficiently short of litigation. As England's Lord Chief Justice, Lord Phillips, remarked a a few months ago: "It is madness to incur the considerable expense of litigation…without making a determined attempt to reach an amicable settlement [through mediation]." Twenty-three years ago, Warren E. Burger, then Chief Justice of the United States Supreme Court, strongly recommended arbitration rather than litigation:

> "My overview of the work of the courts from a dozen years on the court of Appeal and now sixteen in my present position, added to twenty years of private practice, has given me some new perspectives on the problems of arbitration. One thing an appellate judge learns very quickly is that a ***large part of all litigation in the courts is an exercise in futility and frustration***. A large proportion of civil disputes in the courts could be disposed of more satisfactorily in some other way…. My own experience persuades me that in terms of cost, time, and human wear and tear, arbitration is vastly better than conventional litigation for many kinds of cases. In mentioning these factors, I intend no disparagement of the skills and broad experience of judges. I emphasize this because ***to find precisely the judge whose talents and experience fit a particular case of great complexity is a fortuitous circumstance***. This can be made more likely if two intelligent litigants agree to pick their own private triers of the issues." The Honorable Warren E. Burger, *Using Arbitration to Achieve Justice*, 40 Arb. J. 3, 6 (1985) (emphasis added).

The complexity of engineering and construction disputes has caused the industry to pursue settlement of disputes by private methods for more than a century – modern, innovative methods include structured negotiations, evaluative mediation, dispute review boards, project neutrals, and expedited arbitration. Critical to the process are the people under the dispute resolution process of choice as private mediators or triers of issues. This mandates selection of the most skilled, knowledgeable, and ethical neutrals, mediators, and arbitrators in the world.

JAMS' Global Engineering and Construction Group comprises many of the world's finest neutrals, with exceptional industry and legal knowledge and with the highest ethical standards. They are committed to providing unsurpassed dispute resolution services – whether consulting on the design of effective dispute resolution procedures, serving as evaluative project neutrals or mediators aiding parties efficiently to settle their disputes, or sitting as arbitrators. ■

Respectfully yours, Phil Bruner

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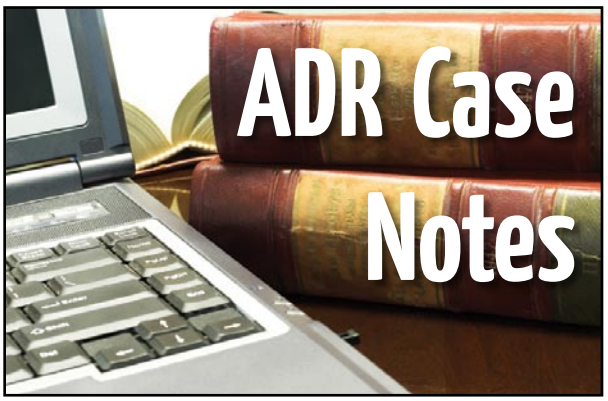

• "Intertwined Contracts" and Arbitration Rights: *3M Co. v Amtex Sec. Inc.*, 542 F. 3d 1193 (8th Cir., September 16, 2008), *Sourcing Unlimited, Inc. v. Asimco International, Inc.*, 526 F. 3d 38 (1st Cir., May 22, 2008), and *Aliron International, Inc. v. Cherokee Nation Industries*, 531 F. 3d 863(D. C. Cir., July 8, 2008) and *International Underwriters AG v. Triple I International*, 533 F. 3d 1342 (11th Cir., July 14, 2008).

Complex business arrangements frequently are expressed in multiple "intertwined" contractual documents that sometimes contain conflicting dispute resolution provisions – such as calling for arbitration under one contract and litigation under others. Courts then may be obliged to resolve the conflict by construing the reach of the arbitration clause in one contract across the other "intertwined" contracts.

"Intertwined" contracts, in the context of arbitrability disputes, are those so closely related in fact or law as to create common dispute resolution obligations. Such obligations are expressed under many guises: estoppel to deny a duty to arbitrate, implied contract duty, agency, subrogation, alter ego, "vouching in," third-party beneficiary, and other legal theories. The general rule applicable to both single and "intertwined" contracts is enunciated in the *3M* case by the U.S. Court of Appeals for the 8th Circuit as follows:

"Although a party may not be compelled to arbitrate a dispute unless it has agreed to do so, the 'liberal federal policy favoring arbitration agreements' requires that a district court send a claim to arbitration when presented with a broad arbitration clause…as long as the underlying factual allegations simply 'touch matters covered by' the arbitration provision."

Just how this rule is applied in practice is apparent in four "intertwined" contract cases decided in 2008 by Federal courts of appeal – three compelling and one denying arbitration:

1. *3M Company v. Amtex Security:* In creating an "integrated service provider" relationship, the parties entered into a "master agreement" covering general terms and a "subagreement" covering specific terms for services at a particular plant. The "subagreement" contained an arbitration clause requiring arbitration in Minnesota, while the "master agreement" included a general clause granting each party the right to pursue "any legal remedy" for any claim "arising out of or attributable to the interpretation of the agreement." When a dispute arose over payment, the service provider brought suit in Texas, the plant owner then demanded arbitration in Minnesota, and the provider countered by amending its Texas suit to allege fraud, tortuous interference and other non-contract claims. In upholding a lower court order compelling arbitration of all claims, the U.S. Court of Appeals for the 8th Circuit ruled:

"Our task is to look past the labels the parties attach to their claims to the underlying factual allegations and determine whether they fall within the scope of the arbitration clause.… Given the broad scope of the arbitration clause and our insistence upon clarity before concluding that the parties did not want to arbitrate a related matter, we conclude that it cannot be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers [the provider's] claims.… When the parties have agreed on an arbitration clause that appears to cover their dispute, it should be upheld."

2. *Aliron International v. Cherokee Nation Industries.* The U.S. Army awarded a contractor a "prime contract" to render services in Germany. The contractor then awarded a "subcontract," which provided for arbitration, to a labor services firm to furnish staffing to perform 49% of the prime contract. When the "subcontract" was found to violate the Status of Forces Agreement between the U.S. and Germany, the contractor and subcontractor entered into an "Agreement for Administrative Support," which did not contain an arbitration clause, and which transferred the subcontractor's employees to the contractor in exchange for 49% of the prime contract revenue. When the contractor stopped making payments, the subcontractor commenced suit under the "Agreement," and the contractor moved to compel arbitration under the subcontract. The trial court granted the motion to compel. On appeal, the

U.S. Court of Appeals for the District of Columbia Circuit affirmed the trial court based upon the principle that "where two contracts, not executed at the same time, refer to the same subject matter and show on their face that one was executed to carry out the intent of the other, it is proper to construe them together as if they were one contract."

3. *Sourcing Unlimited, Inc v. Asimco Int'l.* A corporation with operations in the U.S. and China entered into a written partnership agreement with another multinational firm to promote its business in China. The partnership agreement required international arbitration of commercial disputes. When payment disputes arose, the corporation filed a U.S. suit against the signatory firm, and also joined as parties the firm's non-signatory subsidiary and its chief executive officer who had signed the agreement on behalf of the firm and had allegedly breached an oral agreement. The defendants moved to compel arbitration with the signatory corporation in China, and sought dismissal of the non-signatory parties. In reversing the trial court's denial of arbitration, the U.S. Court of Appeals for the 2d Circuit compelled all parties to arbitrate their disputes under the New York Convention and Chapter 2 of the Federal Arbitration Act because:

"Federal courts have been willing to estop a signatory from avoiding arbitration with a nonsignatory when the issues the nonsignatory is seeking to resolve in arbitration are intertwined with the agreement that the estopped party has signed."

4. *International Underwriters AG v. Triple I: International Investments, Inc.* An owner of a Nigerian cement plant project that fell apart after a Japanese lender refused to fund the project loan sued a surety for fraud in failing to return a $5.2 million premium paid for delivery of a financial guarantee bond required by the loan escrow agreement. The escrow agreement contained an arbitration clause, but the surety's "principal agreement" under which it promised to issue the bond did not. The trial court denied the surety's motion to compel arbitration and the U.S. Court of Appeals for the 11th Circuit affirmed the denial as follows:

"The principal agreement between [the owner] and [the surety] was for the issuance of a financial guarantee bond in exchange for a fee. The agreement did not include an arbitration clause…. The terms and logical import of [the arbitration clause in the escrow agreement] did not extend to disputes arising not from any failure to perform the escrow agreement but only from the failure to perform – and fraudulent enticement into – the agreement for issuance of the bond."

• Arbitrator Disclosures, Which Are Not Required by Law, Create No Basis to Remove Arbitrator or Vacate Award: *Luce, Forward, Hamilton and Scripps v. Paul Koch,* 162 Cal. App. 4th 720 (Cal. App. Dist. 4, April 30, 2008)

An arbitrator, who was a former judge, disclosed that one of the lawyers in a pending arbitration had appeared before him while he was on the bench and had "won some and lost some," and also disclosed that a potential witness at one time had served with him on the board of a trial lawyers' association. The court upheld the Arbitral Administrator's refusal to disqualify the arbitrator, ruling that the disclosures were not legally required because the disclosed relationships did not involve a business relationship, a personal relationship, or a close friendship with either the lawyer or potential witness. The Court's opinion concluded: "Judge Haden's candor was commendable, and arbitrators should, of course be encouraged to err on the side of disclosure. We conclude, however, that substantial evidence supports the trial court's finding that Judge Haden was not legally required to make any disclosures pertaining to [the lawyer or witness]."

• European Union Mediation Directive Promotes Mediation of Cross-Border Disputes

The European Union Mediation Directive (IP/08/628, April 23, 2008) requires member states, by 2011, to give formal recognition to mediation as a key part of their justice systems. The Directive is sure to encourage mediated settlement of disputes, and follows the European Union's promulgation in July 2004 of the European Code of Conduct for Mediators.

The broad acceptance of mediation throughout the judiciaries of Europe also was apparent in the March 29, 2008, remarks of England's Lord Chief Justice, Lord Phillips:

"It is madness to incur the considerable expense of litigation…without making a determined attempt to reach an amicable settlement. The idea that there is only one just result of every dispute, which only the court can deliver is, I believe, often illusory…. Parties should be given strong encouragement to attempt mediation before resorting to litigation." ■

Identifying the Best ADR Methods for Global Construction Disputes

BY ROY S. MITCHELL, ESQ.

The current economic downturn is an ideal impetus to expand your arsenal by getting up to speed on how some ADR procedures can work on your behalf.

International litigation has long been known to be expensive, time consuming, complex, and subject to legal variables that make it unwise for use in global construction disputes. In response, international arbitration was developed as an alternative dispute resolution process shortly after World War I. Unfortunately, over time, international arbitration has succumbed to many of the same maladies that typically accompany litigation. As a result, the global construction industry sought newer, better, faster, cheaper, and more efficient dispute resolution procedures, and we now have a panoply of ADR approaches from which those engaged in global construction dispute resolution can select.

Amid the current economic crisis and all its related repercussions, now is the perfect time to review whether you are using the ADR tools that are best suited – and most cost effective – for your needs. Selecting the right method for the right situation saves both sides in a dispute time and money, two commodities that are always worth conserving.

Alternative Dispute Resolution – A Brief Primer

As seasoned construction law attorneys appreciate, the best features of Alternative Dispute Resolution (ADR) techniques are their ability to reduce the time and cost of settling claims. Beyond arbitration, mediation, mini-trials, and fact finding are ADR tools that can also be tailored in any way the parties agree to fit the special circumstances of their individual disputes.

Whether they constitute minor variations of more formal arbitration procedures or pre-agreed settlement discussion techniques, ADR procedures tend to be equally appealing to all parties – be it employer, engineer, contractor, or construction manager. Because of the factual nature of most construction claims, disputes typically concern the allocation of money between the parties rather than legal or moral principals. Questions of how much money is allocable to the actions of either party, rather than assigning fault or establishing legal precedent, allow use of ADR procedures that encourage parties to find a middle ground. These techniques represent an attractive alternative to the costly and cumbersome procedures of traditional international litigation or arbitration, and as a result have gained substantial support from both private and public employers in reconciling construction disputes.

Factors to Weigh in Choosing An ADR Method

A party evaluating the option of utilizing ADR should consider the related strategic and tactical implications. For example, one party may consider its case so clear-cut it is unwilling to engage in a process designed to promote compromise. This perspective should be carefully considered, however, as most clear-cut cases tend to become less clear as arbitration proceeds. The availability of legal defenses may also influence the decision. Statutes of limitation or other legal defenses may not be as strong in ADR as in an arbitral forum. Similarly, one party may wish to have an Arbitral Panel hear the dispute where the issues are particularly appealing to that forum. These factors may make it difficult for the parties to agree to use ADR techniques, but nonetheless the advantages of employing an ADR procedure after a dispute arises should remain a strong consideration.

Because the parties themselves define the method of dispute resolution, it is possible to tailor the ADR procedure to fit the particular dispute. Nevertheless, there is a impressive variety offered by the basic ADR models, including mediation, mini-trial, fact-finding, or use of a Project Neutral. One of the key advantages with ADR is that the contract doesn't need to contain a clause specifying

its use. Because it is wholly voluntary and consensual on both sides, the parties may initiate an ADR process whenever they jointly decide to.

International Arbitral Bodies, Contracts Terms and National Legislation

The International Chamber of Commerce (ICC) has long had a series of alternative approaches such as Conciliation (similar to Mediation); Technical Expertise (similar to Fact-Finding by an expert); Pre-Arbitral Referee, a bit like a Dispute Review Board in that it provides for rapid intervention in urgent matters in which legal interpretation beyond the scope of technical expertise is required; and Amiable Compositeur, where fairness and equity are viewed as the guidelines rather than the precise contract terms or the law. The latter is also allowed under United Nations Commission International Trade Law rules, but parties rarely use it under either because at least one of the parties always wishes to have the other abide by the terms of the contract and the law.

Similarly, the most well known standard form construction contracts used in the Middle East and Asia were adapted by the World Bank and a number of Regional Banks for their international projects. Over the years, the Federation Internationale des Ingenieurs Conseils (FIDIC) has utilized Contract Adjustment Boards and other methods for dispute resolution.

In 1996 the United Kingdom (UK) passed the "Housing Grants, Construction and Regeneration Act 1996" (HGCRA) which, in Section 108, established a procedure called "Adjudication" whereby a party to a construction contract can refer a dispute to adjudication and the Adjudicator is required to render a decision within 28 days of the referral. The decision is temporarily binding subject to ultimate dispute resolution by arbitration or by agreement of the parties.

The HGCRA and its related regulations under the "Scheme for Construction Contracts (England and Wales) Regulations 1998" revolutionized dispute resolution in the UK because most contracts are now covered by this provision and the time limitation is so short. Claimants – often in the form of a subcontractor in a dispute with a prime contractor – can take however long they desire to prepare their case before referring the dispute to adjudication, and the Adjudicator must hold a hearing and render his decision within the aforementioned 28 days. The end result of this process is often extremely favorable to Claimants and unfavorable to Respondents who have virtually no time to prepare their defense or present their case. Some may consider this an ADR process, but it clearly lacks the essential elements of being a voluntary, non-binding, informal, and confidential action, which generally characterize ADR as it is presently understood. Harvey J. Kirsh, Esq. wrote an excellent article on this topic in the previous edition of this publication.

Dispute Review Boards

The use of a Dispute Review Board (DRB), although not traditionally considered ADR, is probably the single most effective approach to resolving disputes on construction contracts, with a success ratio of approximately 98%. Sometimes referred to as Dispute Resolution Boards or Dispute Adjudication Boards, they are particularly popular with employers and public agencies.

Procedures vary widely, but typically a contract will contain a clause establishing a DRB consisting of three people, one chosen by each side and the third by the other two members. Each side ordinarily pays its own selectee and the parties share the costs of the third person. In construction contracts there is a strong tendency for each party to select an engineer because of the technical nature of the work, and for the two engineers to select an attorney as the third member, since attorneys bring a different discipline for issues which may involve contract interpretation and

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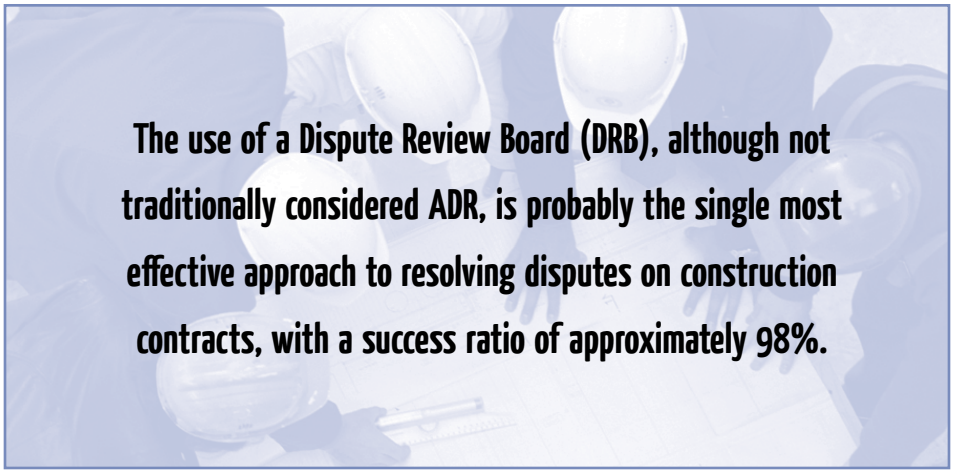

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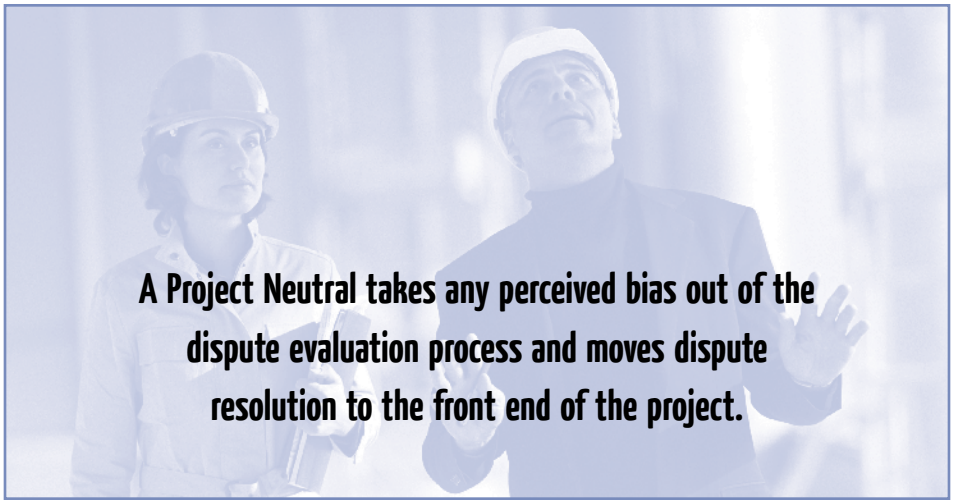


legal issues, and are more likely to be knowledgeable in managing any necessary hearings. Another notable aspect of the selection process is that each party must approve the selection of the other party as well as the neutral. As a result, the DRB has the full confidence of both parties.

DRB members are usually required to be selected within the first 30-90 days of the contract, before construction actually begins. First, members are provided with copies of the project plans and specifications. Next, they visit the jobsite and meet with employer, engineer, and contractor representatives regularly throughout the construction process so potential problems can be discussed and actual problems resolved by the Board during the course of the construction. When problems arise, the DRB receives relevant oral and written information, meets and issues a prompt and reasoned decision, which is usually required within 30 days, and which may be advisory or binding. If the Board's decision is binding, it is typically binding only on an interim basis spanning the period of construction, and then subject to challenge via the normal dispute clause procedures.

This process offers the advantage of addressing disputes in real time by experts approved by the parties who have become familiar with the construction as it was performed. It has also been discovered that the mere establishment of a DRB tends to discourage the submission of frivolous claims and to encourage the parties to work out their disputes without the necessity of taking them to the DRB.

Project Neutrals

A variation on the DRB process is the use of a Project Neutral. My colleague, Kenneth C. Gibbs, Esq., has noted the advantages to using a Project Neutral:

- choosing an effective ADR process while the parties are still on good terms is a smart idea;
- a Project Neutral takes any perceived bias out of the dispute evaluation process and moves dispute resolution to the front end of the project;
- a Project Neutral helps to prevent small problems from festering into big ones and can work with the parties to proactively prevent disputes.

Fact Finding

Fact finding is yet another variation on the DRB/Project Neutral theme in which fact finders are identified either in the contract, or later after a dispute has arisen. Typically, they are experts in the type of construction involved and their sole authority is to determine the facts surrounding a dispute. They have no decision making authority and simply report the results of their findings to the parties. The parties may or may not accept their findings and may or may not settle their dispute as a result of the exercise. As previously noted, the ICC has provided a similar service under the heading of Technical Expertise for some time. Although this process has been rarely used to date, it appears to be gaining favor in some global construction contracts.

Mediation

Mediation is a voluntary, non-binding, informal, and confidential procedure designed to assist the parties in negotiating a settlement between themselves via a third party neutral. By employing a neutral party, the two sides can be encouraged to assume a conciliatory posture that will result in a fair compromise. The mediator typically has no authority to make any decision or to bind the parties to any settlement. The role of the mediator is not to decide the case, but to encourage the parties to reach their own agreement. This process works well not just between two

parties but where multiple parties are involved as primary participants, such as employers, engineers, prime contractors, subcontractors, sureties, or insurance carriers.

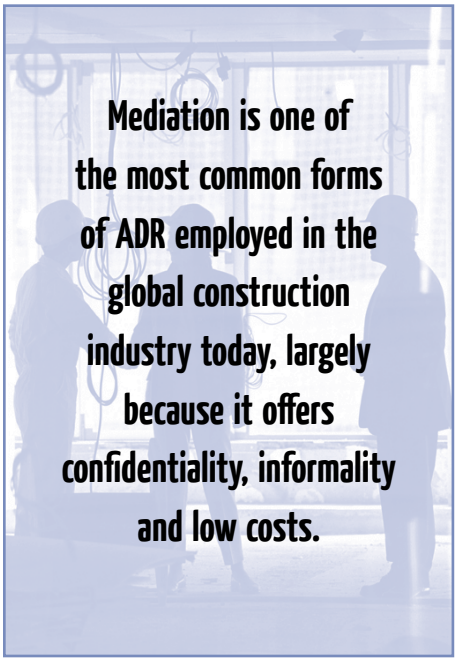
As noted, mediation normally is a voluntary procedure whereby the parties agree to engage a neutral individual to serve as a facilitator in meetings seeking to resolve their disputes. Typically, the parties briefly present their cases to the mediator without a formal hearing or presentation of witnesses. This initial part of the mediation is usually face-to-face, but thereafter it resembles shuttle diplomacy with each party being in a separate room and the mediator acting as a diplomatic go-between.

Mediation is one of the most common forms of ADR employed in the global construction industry today, largely because it offers confidentiality, informality, and low costs. It is a process based on the integrity of the mediator, and as such, the parties are often willing to disclose confidential information to the mediator that might otherwise be withheld in a more formal proceeding. This makes mediation a quick and cost effective dispute resolution procedure that tends to maintain a good future working relationship between the parties. Studies indicate a success rate of approximately 85% in settling a case when mediation is employed.

Mediation is often a contractual pre-obligation to other forms of dispute resolution. The mediator acts as a facilitator, and frequently, in a construction setting, as an evaluator. It's notable that all presentations, conversations, documents prepared for the mediation, offers and counter-offers are confidential and may not be disclosed or used in subsequent dispute proceedings. The mediator proceeds by asking probing questions and expressing skepticism of positions. He or she assists the parties in evaluating the risks of the case, transmits offers, and seeks to help the parties voluntarily resolve the dispute.

During mediation, it is important that fully authorized decision makers be present on both sides, and that careful preparation be undertaken by the parties. Short Statements of Position – about 15-20 pages long – are usually submitted to the mediator and swapped between opposing parties 10 days before the scheduled mediation, and some mediators encourage the parties to meet with him or her individually during that period. Opening sessions where the parties make their initial presentations to each other and to the mediator are usually limited to one hour each. No argument, cross examination, questioning, or transcripts are allowed during this period.

A major dispute typically requires two to three days to resolve but many mediations are accomplished in only one day. Any party or the mediator may declare an impasse and discontinue the proceedings, but this is rarely done. Even if the parties fail to reach a resolution during the initial session, the mediator often stays in touch with them and may convene a second meeting to resolve the dispute. Alternatively, the parties may request that the mediator propose a confidential settlement number to both sides in a double blind setting which both sides are free to accept or reject. Obviously, the mediation process requires good faith and a willingness to reach a settlement by both sides. If successful, most mediators require that the parties execute a Heads of Agreement to memorialize their agreement before concluding the proceedings in order to avoid later disputes.



In some cases, the parties may agree to a so-called Med-Arb proceeding. Essentially the Med-Arb approach starts out as mediation, but if no settlement is reached, the mediator switches hats and makes a final and binding award. This approach is fraught with legal, technical, and ethical difficulties for all of the parties involved, including the mediator. However, in one case in which the author served, the parties were able to reach a mediated settlement on the major delays and changes that were in dispute, but there were still a series of open Change Requests (CR), which had not been the subject of the mediation. At the request of both parties, he was then asked to hold a separate hearing attended solely by the parties, without their attorneys, to render final and binding written decisions on the open CRs. The process worked with the particular parties and attorneys involved, but it

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was highly unusual and is not generally recommended.

Mini-Trial

The mini-trial form of dispute resolution utilizes a more structured mechanism for resolving a dispute but without resorting to an arbitral forum. In a mini-trial, representatives of each party present their case to a Panel selected from previously uninvolved senior management of each party who have authority to settle the case, plus a neutral party.

Originally popular in the settlement of construction contract disputes in the United States, mini-trials are now used far less than mediation. Because the procedure focuses the dispute on the primary issues of the case without resorting to time consuming and expensive arbitration procedures, mini-trials can be well suited to complex factual disputes common in global construction contracts. By countering the tendency that closely involved individuals have to focus on peripheral issues, and by avoiding the more formal issues that may complicate a case in an arbitral forum, the decision makers of each party are able to engage in a constructive dialogue that promotes the likelihood of an amicable resolution.

Procedures governing mini-trials are normally set forth in an agreement entered into by the parties. That agreement usually provides for a short timeframe, eliminates discovery, and sets time limitations on each stage of the process. Most mini-trials can be concluded within one to three months from when the process is agreed upon, and the hearing itself is typically limited to two to five days. A post-hearing discussion follows, where the two senior management representatives and the neutral meet to resolve the issues. While participating at this phase, the neutral party is solely a facilitator, has no authority to provide more than an advisory opinion, and does not act to bind the parties to the dispute.

Mini-trials may be binding or non-binding. They are more formal than mediation, but the procedures are still flexible and determined by the parties. Typically opening statements and fact and expert witnesses are used, but the length of the presentations is limited. After the presentations, most attendees depart and leave the Panel to deliberate. If the two senior executives on the Panel are unable to reach agreement, the third party neutral often provides an independent opinion to help the parties avoid a stalemate.

To the extent the mini-trial approach is still in use, it is now often combined with mediation to form a hybrid type of ADR in which the Panel hears the presentations of the parties and the mediator then mediates between the two executives. While seldom used, this is another example of a major advantage to virtually all types of ADR: the parties themselves determine the procedures to be used and whether or not they will be binding.

While there is no one magic ADR method that can be successfully used in all circumstances, this much is clear:

1. ADR is a very desirable alternative to the costs, delays, and disruptions of international litigation.
2. The ADR process allows the parties to jointly select, or create, whatever process they believe will best suit their own unique circumstances.
3. It helps preserve the working relationships between the parties.
4. It allows the parties to manage their disputes just as they manage other problems.
5. It typically allows the selection of industry knowledgeable people to assist the parties in resolving the dispute.
6. It can be utilized with any number of parties.
7. It typically results in savings of 90-95% of arbitration time and costs.

By becoming familiar with the wide variety of ADR procedures available, parties to a construction dispute can increase their options in resolving their issue. Increased ADR tools, in turn, result in better odds for an outcome with which each party is satisfied, and enables them to return their primary attention to the project itself and to the relationships at hand, leaving behind the distractions of what might otherwise become a bitter, divisive and expensive proceeding. The current economic downturn is an ideal impetus to expand your arsenal by getting up to speed on how these ADR procedures can work on your behalf. ■

Roy S. Mitchell, Esq. has been involved in domestic and international dispute resolution for decades and is currently resolving disputes related to underground construction post-9/11 in New York. He joins JAMS in January and will be based in Washington, DC.

Notices & Calendar of Events

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 Construction SuperConference, now in its 23rd year, is recognized as a preeminent legal construction conference. This year the conference has been organized into four tracks: (1) Legal and Institutional, (2) Business-Related Issues, (3) Contracts and Management, and (4) Industry Specific. JAMS is sponsoring the Contract and Management Track's Session E11 on ADR in Cross Border Disputes.

Thursday, December 11 • 2:15 - 3:30 PM: Contract and Management Track, Session E11

From the Other Side of the Bench: Views of Cross Border Construction Mediators and Arbitrators about "Do's and Don'ts" of Case Presentation and Cost Control

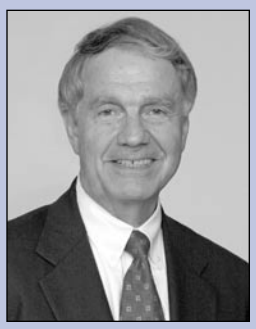
The Construction Industry's search for ADR's "holy grail" of effective, inexpensive, expedited, and fair dispute resolution processes has led it to consider at least 10 processes short of litigation – with varying results in various contexts. Arbitration, the oldest of the processes, is viewed by many as little better than litigation. The Panel will discuss what works and doesn't work in ADR and in case presentation. They will also impart their thoughts on how arbitration can be "fixed" and answer any questions about the new JAMS arbitration rules. Discussion will include the views of construction industry general counsel who partook in a recent JAMS survey regarding "controlling the rising costs of arbitration." The presentation will be interactive so that you can share your views as well.

Participating JAMS GLOBAL ENGINEERING AND CONSTRUCTION GROUP (GEC) NEUTRALS include:

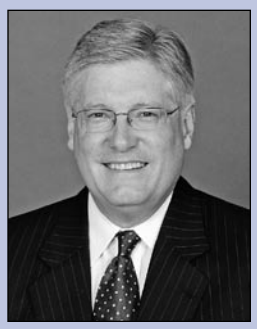
Philip L. Bruner, Esq.
Moderator;
JAMS GEC Director

Jesse B. (Barry) Grove III, Esq.
JAMS GEC
Advisory Board

Katherine Hope Gurun, Esq.
JAMS GEC
Advisory Board



John W. Hinchey, Esq.
JAMS GEC
Advisory Board



Thomas J. Stipanowich, Esq.
JAMS GEC
Advisory Board

FEB. 19-21, 2009: The American College of Construction Lawyers

JAMS GEC Neutral **Thomas J. Stipanowich, Esq.** moderates a panel on **"Construction Conflict Resolution in China"**
Amelia Island, Florida • **http://www.accl.org**

APRIL 24, 2009: Construction Management Association of America, Southern California Chapter

JAMS GEC Neutral **Kenneth Gibbs, Esq.** presents a legal seminar on "**Alternative Dispute Resolution: What CM's Need to Know"**
8:00 AM to 10:30 PM • The Grand Conference Center • Long Beach, CA • **http://www.cmaasc.org/**

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DECEMBER 2008

JAMS GEC Advisory Board Member HARVEY J. KIRSH'S article on "The Dispute Resolution Provisions (Part 8) of the New Canadian Standard Construction Contract (CCDC 2-2008)" will appear in the December 2008 issue of *Construction Law International,* the magazine of the International Bar Association's International Construction Projects Committee.

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.**

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