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

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

DIRECTOR'S CORNER

JAMS INTERNATIONAL ADR CENTER

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

The world's large construction projects – on every continent and in every nation – float on the stream of international commerce. Each draws critical resources – raw materials, materials fabrication, skilled labor, equipment, risk insurance, financing capital, and professional design and managerial services – from pools of capability available around the globe. The multitude of cross-border contractual relationships almost universally provide for private dispute resolution arrangements.

JAMS Global Engineering and Construction Group (GEC) is pleased to join JAMS President, Chris Poole, in announcing the creation of JAMS International ADR Center. Through this ADR Center, GEC will provide expert, efficient and cost-effective international mediation,

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Reshaping ADR Strategies for Today's Global Engineering and Construction Market

By MICHAEL TIMPANE, ESQ. & LINDA DEBENE, ESQ.

In its ongoing effort to strive for an understanding of the sources of disputes, as well as for the most current information as to how disputes are being resolved and could, potentially, better be resolved, JAMS has been conducting a series of Global Engineering & Construction (GEC) Roundtables throughout the country designed to find out directly from construction industry leaders where and why disputes are arising, how they are currently being managed, and how the recent stimulus package might play out in the construction industry. A recent GEC Roundtable was conducted in Northern California attended by the authors as GEC neutrals, JAMS staff, and our seven guests, four representatives of large public entities and three prominent attorneys representing various "sides" of construction disputes- private owners, public owners, design professionals and contractors.

A very interactive, open and thoughtful discussion at the Roundtable revealed the

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following thoughts and current issues:

Starting with opinions about sources of construction disputes, incomplete or inadequate design documents were prominent in the discussion. This was not a "dump on the designer" theme, but rather a more nuanced discussion of why this is so. Owners seem to recognize the principle that there is "no set of perfect drawings," and that design budget constraints exist, yet each drawing discrepancy can soon become an "error," each change order request a reason to question the design. Schedule-driven design, in both private and public settings, was also identified as a problem. Finally, rather than being interested in coordination, the contractor and designer are essentially set against each other and usually have very little interaction pre-bid.

Another source of dispute identified by the public entities is the requirement of accepting the low bidder. A Catch-22: the owner thinks all change orders or RFI's are being generated because the low bidder "missed" something, since all the other bids were higher. Conversely, the low bidder must have bid with low or nonexistent margins, and will indeed be "looking for" change orders, convinced the owner skimped on design in order to get low bids. Predictably, the private owner representative is aghast that anything would be built this way.

A common observation among the participants was that disputes have a way of emerging in the latter stages of a project. Two reasons for this were identified. One, close out issues and any deferred payment issues come to the fore, subs get short draws, work slows or stops, all activities become "critical," claims get made. Second, this is in significant part because the parties to the project do not devote enough attention and resources to the management and resolution of disputes. Either nothing is put in the contract, or, if in the contract, it is ignored. Disputes need to be "put off," so "we can get the job done"– a noble thought, but often counterproductive.

After a brief discussion of the pros and cons of the traditional methods used by the participants to resolve disputes, the general consensus was clearly that mediation, and in some cases even litigation, were preferred over arbitration. Most participants have used, and continue to routinely use, mediation, the bottom line view being that mediation "usually works." However, even where successful, mediation was viewed as more of "a process" than a single session understood by all to be a one-time attempt to produce global settlement. To address this concern, one participant noted that in-house negotiations are a contractual prerequisite to mediation, and mediations are therefore only scheduled when they "are down to a few issues, and ready to close a deal." Although not perfect by any means, some institutional parties still viewing mediation as a "baby-splitting" exercise, it was evident from the comments of participants that a determined focus on attendance by the appropriate decision-makers who come to mediation sessions with the ability to make settlement calls on the spot, and on understanding and meeting the requirements of insurance carriers regarding information and proof of liability are ways that ADR neutrals can aid the parties in mediation improve the efficacy of that process.

What appeared to be of clear import to the varied participants was the ability to solve disputes with rapidity while the construction process is ongoing through the use of dispute review board or single project neutrals. The experience of those in attendance with independent DRB's or single neutrals varied. Governmental agencies had more experience than the private sector in past use of DRB's. One agency representative described using DRB's on all projects over $3 million, expressing satisfaction with the process. Another agency used a form of DRB's consisting solely of current employees, its representative reporting "not much success" with this obviously slanted approach. On

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the other hand the private owner representatives were less familiar with using DRB's, but seemed very interested in both concepts of DRB's and/or project neutrals.

In light of a consensus that some type of early, real-time resolution of disputes is going to be a big part of the future of construction dispute resolution, Roundtable participants noted that the concept of DRB's and project neutrals actually goes back 15 years or more, but expressed the view that, until recently, these processes never seemed to "catch on." Early neutral evaluations of either technical or legal issues (useful during construction which can ultimately be reflected in change orders), akin to mock juries prior to litigation, were uniformly viewed as something useful, but, as always, subject to cost concerns.

What all the participants seemed to be looking for was proof that DRB's, project neutrals or any rapid ADR process had actually worked. If shown that up-front costs for DRB's or project neutrals actually lead to post-completion dispute resolution costs, the reluctance of owners and contractors to take on the processes for cost reasons may diminish.

The other "must" is the professional neutrality of the DRB members or the project neutral. In light of past perceptions of DRB's or project neutral panels being "skewed," favoring one side or another, neutrality is seen as crucial, often more critical than construction expertise which was also noted as a key consideration. One government agency participant went so far as to report that "some of the DRB members have expressed their concerns that there may be an appearance of bias if the person comes from either industry or is a former employee of the (agency)." This senior construction manager saw the neutrality of professional ADR neutrals familiar with GEC matters as a benefit, as the professional can "indeed act as a neutral party with no ax to grind."

It was generally noted that some professional ADR neutrals may lack technical expertise in various areas being considered by a DRB or project neutral. Various tools can be employed to overcome this potential shortcoming, keeping in mind that neutrality and general experience in the construction industry practices of a commercial or government project lay the groundwork , and lack of bias is the underlying goal. It is recommended by industry representatives that the project neutral should be a person that is "familiar with our type of work so that none of the discussion is over his/her head. For example, since the transportation engineering world is often broken up into bridge guys and roadway guys, can a person that is a roadway guy determine the validity of a complex claim dealing with bridge construction?" This was discussed as being a problem with a variety of solutions: (a) in the case of a three-person DRB, one of the three should have the technical expertise to determine the validity of the claim and can help the other two understand the issue; (b) providing the professional ADR project neutral with the ability to bring in technical expertise (such as scheduling, concrete or geotechnical experts) is a flexible way to add to the neutral's expertise as needed.

The need for rapid, on-the-spot determinations in commercial and governmental construction projects is only to be exacerbated by the possible effects of the federal stimulus package on these matters. All predicted that when there is lots of money to spend quickly, an increase in problems and the potential for costly disputes will rise exponentially to the speed by which the money has to be spent. A lack of time to thoughtfully prepare designs and/or contracts, and little money set aside for real-time dispute resolution, will drive more disputes that long outlive the projects.

The conclusions reached in discussion with construction industry leaders at the Northern California GEC Roundtable have been compiled and conveyed to the JAMS Global Engineering and Construction Group which is diligently preparing for the effects of these economic times. GEC welcomes client and neutral input on procedures that can aid the construction industry and governmental entities in performing their important work under stressful and fiscally constricted demands. ■

Dubai: Changing the Face of Arbitration in the Middle East?

By TY D. LAURIE, ESQ. & DANIEL J. BRENNER, ESQ.
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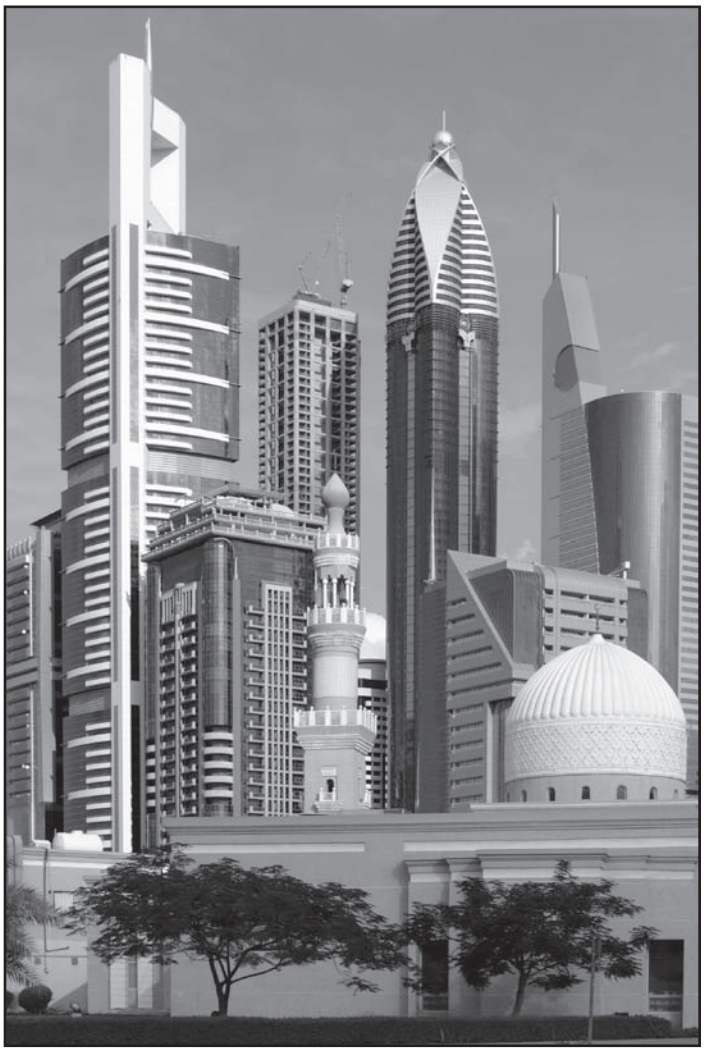

Once booming with fast paced, innovative construction projects, the construction centers of the Middle East are now beginning to feel the effects of the deteriorating market economy. As the economy continues to decline, parties to construction contracts will begin having difficulty fulfilling their obligations, leading them to seek relief through alternative dispute mechanisms such as arbitration. Parties seeking to arbitrate their international construction disputes have many decisions to consider, including selecting the forum in which to seat their arbitration. Despite the fact that an arbitration may arise from construction disputes in the Middle East, many foreign investors will instead choose to select another forum known for its more modern arbitral systems.[1] Although London, New York, and Paris comprise the lead international arbitration venues, a number of countries have begun to compete to attract international arbitration business.

The most recent state to enter the fray is the Emirate of Dubai. Over the last year, Dubai has taken several actions to help solidify its place among the principal venues for international arbitration. This article will focus on Dubai's efforts to become an international center for arbitration and discuss some of the challenges Dubai will face in attaining that status. However, before addressing arbitration in Dubai, this article will analyze the arbitration practices and procedures in other Islamic Middle Eastern nations. By offering a glimpse into the arbitral systems in place in neighboring countries, the reader can more fully understand just how far Dubai has progressed.

Arbitration in the Islamic Middle East

To understand the arbitral systems in place in the Islamic Middle East, one must appreciate the important role religion plays in Middle Eastern society. As one scholar put it: "Islamic law pervades the commercial world, as well as a Muslim's way of life. Islam is a complete way of life: a religion, an ethic, and a legal system all in one."[2] So important is Islamic law, also known as the Shariah, that it constitutes the sole source of law in several Middle Eastern countries.[3] Accordingly, it is not surprising that the Shariah also plays a significant role in the arbitration process in Middle Eastern countries. As a result, foreign investors who are not accustomed to or familiar with the importance of religion in Middle Eastern arbitral rules may be hesitant to seat their arbitrations in the region.[4]

One area where the Shariah influences arbitration in the Middle East is choice of law. Although some arbitral systems strictly adhere to the Shariah, many countries have begun to bifurcate their religious and civil codes. For example, Kuwait and Jordan have attempted to modernize their arbitral rules by requiring arbitrators to apply the law chosen by the parties, thus allowing for the application of non-Shariah law to arbitral disputes

within their borders. On the other hand, those states that have not bifurcated religion from their arbitral rules administer arbitrations in strict adherence with Shariah principles. Such states could rely on the Koran's prohibition against "riba" to refuse to enforce contractual provisions calling for the award of interest or usury.[5]

The Shariah also influences whether an arbitral award is binding on the parties. In those countries whose arbitral regime is based primarily on the Shariah, arbitral awards must contain four distinct parts: "a description of the dispute; the finding of facts under Shariah rules of evidence; the reasoning of the award with reference to Shariah source; and the decision itself."[6] However, in many Middle Eastern countries, even fulfilling these requirements may be insufficient. In Bahrain, Egypt, Jordan, Kuwait, Morocco, Oman, Saudi Arabia, and Syria, awards will not have a *res judicata* effect until registered and approved with the state court.[7] This system of court registration has led one commentator to observe that arbitrators in Islamic Middle Eastern countries do not "necessarily bring finality to a dispute between parties. Sufficient room is left, procedurally, for either expeditious judicial management or judicial meddling, procrastination, and delay."[8] This requirement that arbitral awards be based on sound Shariah reasoning, in addition to the uncertainty involved in the court registration requirement, may deter some foreign investors from seating an arbitration in the Middle East.[9]

Another problem inherent in many Middle Eastern arbitral regimes relates to the enforcement of foreign arbitral awards. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the "New York Convention," requires signatories to recognize and enforce awards made in other nations. Despite the fact that 16 Middle Eastern countries have become signatories to the New York Convention to date, foreign arbitral awards are often refused enforcement in the Middle East. Many Middle Eastern countries rely on the public policy exception in the New York Convention to deny enforcement of foreign arbitral awards that do not comply with Shariah principles.[10] Despite the fact that the International Law Association Committee on International Arbitration strongly suggests that the public policy exception be limited to norms of *international* public policy, as opposed to domestic policy, many Middle Eastern states have been accused of interpreting the exception otherwise.[11] For example, in Saudi Arabia, any award made abroad or using foreign law is denied enforcement if the award is deemed contrary to the Shariah. As mentioned earlier, this could mean denying enforcement of an entire arbitral award if any portion of the award constitutes interest.[12]

> Foreign investors and contracting parties should feel assured that should a court be needed to provide interim measures of protection, rule on challenges to arbitrators, or assist with the taking of evidence, the judges at the DIFC Court have the requisite skill and experience to do so.

It is no wonder why some Middle Eastern countries have begun to reform their arbitral systems in order to attract more foreign investors and contracting parties. Unfamiliarity with the region's religious practices combined with the important role religion plays in Middle Eastern arbitral practices may encourage a foreign investor to seat his arbitration in a more familiar venue such as New York, Paris, or London. One scholar has gone so far as to note that "as a general rule, the practice of international arbitration in these states is still in its infancy . . . the experience and training of most lawyers and judges in the Middle East on international arbitration issues lags far behind what is in such commercial centers as New York, London and Paris."[13]

The Arbitral Regime in Dubai

In an attempt to establish itself as a center for regional and international arbitration, the Emirate of Dubai has taken several actions to address the problems found in many of the Middle Eastern arbitral systems. The Emirate hopes to create an arbitration system which inspires confidence in foreign investors and contracting parties by taking away the uncertainty inherent in Shariah-based arbitration rules.[14] The plan to establish Dubai as a principle forum for arbitration includes three distinct, well-planned actions. First, the government of Dubai has created the Dubai International Financial Centre (the "DIFC"). The DIFC is a 110-acre "free zone" with its own jurisdiction, separate and apart from the laws of

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Dubai and the United Arab Emirates. Second, in 2008, the DIFC amended its 2004 Arbitration Law to provide foreign parties the ability to refer their dispute to arbitration in the DIFC. Third, the DIFC partnered with the London Court of International Arbitration to create a new arbitration center in the DIFC. However, even with these achievements, some believe that the new DIFC arbitral regime will be unable to compete with the already established regional and international arbitration forums.

The Dubai International Financial Centre Free Zone

The DIFC was established in September 2004 as an international financial center subject to its own civil and commercial laws. Located in the heart of Dubai's financial district, the DIFC is one of many "economic free zones" which caters to financial service sector companies.[15] However, unlike other free zones, the DIFC has jurisdiction to pass its own commercial laws. This legislative discretion has not only allowed the DIFC to establish a dispute resolution regime within its confines, but also has allowed the DIFC to create investor-friendly laws in an effort to attract more foreign investment. For example, the DIFC allows 100 percent foreign ownership, does not tax income and permits the repatriation of profits.[16]

Another fact which may be of interest to foreign investors is that the DIFC is governed by English common law rather than the civil code that applies in the rest of the Gulf States.[17] Furthermore, the DIFC has its own court (the DIFC Court) and its own judges which apply procedural rules based on the English Commercial Court rules; and those judges have great experience in international commercial arbitration. The DIFC Court judges consist of Chief Justice Anthony Evans, a former Commercial Court and Court of Appeals judge in England, and several other experienced commercial judges and arbitrators. This level of sophistication and experience will help facilitate the arbitral system in the DIFC should the DIFC Court ever be called upon to support an arbitration. Foreign investors and contracting parties should feel assured that should a court be needed to provide interim measures of protection, rule on challenges to arbitrators, or assist with the taking of evidence, the judges at the DIFC Court have the requisite skill and experience to do so.

The DIFC's investor-friendly laws and English-based legislative and judicial regime will surely help attract foreign investment within the DIFC. Foreign investors who are unfamiliar with the Shariah-based civil laws in other Middle Eastern countries will feel more comfortable investing in a system based on more familiar laws and practices. The end product is "a business-friendly environment that is regulated by a legal system which is both accessible and familiar to common-law lawyers."[18]

The DIFC Arbitration Law

Having established a financial-free zone dedicated to attracting foreign investment, the next stage of Dubai's plan to become a center for international arbitrations was to amend its arbitration law. Until recently, the DIFC Arbitration Law only applied to disputes and transactions having some connection with the DIFC. On September 2, 2008, however, the DIFC Arbitration Law was amended to remove these jurisdictional limitations. The new DIFC Arbitration Law allows parties to seat their arbitration in the DIFC regardless of whether they have any connection to the DIFC. In addressing the implications of this amendment, Dr. Omar Bin Sulaiman, the Governor of the DIFC commented: "By offering arbitration to companies throughout the world, the DIFC is reaffirming its commitment to creating a legal and regulatory environment of the highest standard that surpasses the requirements of leading financial institutions."

The new law is also based on the United Nations Commission on International Trade Law ("UNCITRAL"), a model law universally recognized "as the accepted international legislative standard for a modern arbitration law."[19] The combination of a law based on an internationally accepted model with the removal of the arbitration law's jurisdictional limitations allows foreign businesses to use arbitral procedures with which they are familiar while also allowing Middle Eastern businesses to have their disputes resolved within the region.

Another key feature of the new DIFC Arbitration Law relates to enforceability. Unlike the process for enforcing and finalizing arbitral awards in other Middle Eastern forums, the DIFC Arbitration Law streamlines this

process. Absent the applicability of one of the enforcement exceptions in the New York Convention, a foreign arbitral award will be recognized as binding within the DIFC upon the production of the original arbitral award or a certified copy.

The DIFC Arbitration Law has also simplified the recognition of arbitral awards rendered in the DIFC. First, the award must be ratified by the DIFC Court which, as has been discussed, contains judges who are very supportive of the arbitral process. Next, a Dubai-based court, which has no authority to review the merits of the DIFC award, conducts a cursory review of the award to confirm that it is appropriate for enforcement and has been translated into Arabic. Once this is confirmed, the award may be enforced in Dubai and the greater United Arab Emirates. Moreover, because the United Arab Emirates became a signatory to the New York Convention in 2006, a confirmed DIFC arbitral award automatically becomes enforceable in more than 140 other countries around the world.[20] However, it should be noted that the problems inherent in enforcing awards in other Middle Eastern countries largely remain. Therefore, although parties selecting the DIFC as their arbitral forum can rest assured that their award will be enforceable throughout most of the world, some Middle Eastern countries may rely on Shariah principles to deny enforcement.

The DIFC-LCIA Arbitration Centre

The culmination of Dubai's strategy to become a lead forum for arbitral disputes is the DIFC's partnership with the London Court of International Arbitration (the "LCIA") in launching the DIFC-LCIA Arbitration Centre. The LCIA is one of the most respected and longest established commercial arbitration and mediation administrative institutions in the world. Both parties hope that the combination of the DIFC's business friendly legislative regime and the LCIA's international reputation will act to attract foreign arbitrations to the new centre. This sentiment was shared by Mohammed bin Rashid al Maktoum, Prime Minister of the United Arab Emirates, at the opening of the arbitration centre: "[t]he establishment of the DIFC LCIA Arbitration Centre is part of a strategy to position Dubai as an international arbitration jurisdiction. This is a landmark step for Dubai, reaffirming its status as one of the world's leading business hubs and creating an efficient working environment for local and international companies to prosper."

The new Arbitration Centre will supervise arbitrations in accordance with a modified version of the LCIA rules and procedures. The DIFC-LCIA rules are said to be "universally applicable and compatible with both civil and common law systems, offering the international community, international lawyers and arbitrators a comprehensive and modern set of rules and procedures."[21] Another attraction of the Arbitration Centre is the ability of parties to access the LCIA's vast database of leading arbitrators and experienced staff. Furthermore, of additional significance to some parties is that the LCIA, unlike the International Chamber of Commerce and other arbitral institutions, charges administrative and arbitrators' fees on a time-basis rather than as a percentage of the value of the claim. Thus, parties with large claims can rest assured that their arbitral fees will be based on the time expended by the arbitrators rather than as a percentage of the overall claim in dispute.

As a result of the creation of the DIFC, the amendment to the DIFC Arbitration Law and the creation of the DIFC-LCIA Arbitration Centre, international parties now have another choice when selecting their arbitral seat. Because of these three achievements, international parties can now take advantage of "international arbitration conducted within the Middle East under the supervision of internationally renowned judges and within one of the most modern, user-friendly and technically sophisticated court systems in the world."[22] Furthermore, the new arbitration centre will administer arbitrations under a law based on the UNCITRAL, an internationally recognized and accepted arbitration law, and conducted pursuant to LCIA arbitral rules. Dubai is hoping these attractive features will draw those parties who would have otherwise never considered arbitrating their disputes in the Middle East to choose the DIFC as the seat of their next arbitration.

Challenges to the DIFC Arbitral Regime

Despite its best efforts, the DIFC's status as a top arbitral forum is not guaranteed. Standing in its way is a long list of competitors, both regional and international. The DIFC-LCIA Arbitration Centre faces competition not only from the lead international arbitral forums in New York, London, and Paris, but also from within the Middle East itself. For example, the Abu Dhabi Commercial Conciliation

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and Arbitration Center and the Qatar International Centre for Reconciliation also seek to attract international investors and contracting parties. Some believe that Abu Dhabi may have an edge over the DIFC due to its first-rate infrastructure and the location of the UAE Central Bank and other organizations within its borders.[23]

In addition to the international and regional arbitration forums, the DIFC-LCIA Arbitration Centre must also compete with another Dubai-based arbitration center: the Dubai International Arbitration Centre (the "DIAC"). In an attempt to keep up with the developments within the DIFC, the DIAC has recently released new arbitration rules based on UNCITRAL, International Chamber of Commerce, and American Arbitration Association rules. The DIAC's new rules appear to incorporate some of the best provisions of each of these institutional rules in an attempt to provide a straightforward yet comprehensive arbitral framework.[24] However, because the DIAC is located outside the DIFC, it cannot offer the same business-friendly and pro-arbitration environment as the DIFC-LCIA Arbitration Centre. In the end, only time will tell whether the DIFC-LCIA Arbitration Centre will be able to compete with these other established arbitral seats.

Conclusion

"The creation of the DIFC-LCIA Arbitration Centre achieves DIFC's aim to be the key source, and sole body, in providing unique and efficient arbitration services as an alternative way of dispute resolution for the business and commercial community in the DIFC, Dubai, the region and internationally."[25] Although it is still too early to tell, the DIFC possesses all of the tools necessary to become the next international arbitration center. With the number of Middle Eastern construction projects currently at risk due to loss of financing, parties breaching their contracts or otherwise, the DIFC-LCIA Arbitration Centre should draw plenty of contractual disputes. Contracting parties will undoubtedly be attracted to the DIFC's pro-business environment and sophisticated judiciary, the newly amended DIFC Arbitration Law and the DIFC's partnership with one of the foremost arbitral institutions in the world. That aside, whether the DIFC can compete with arbitration powerhouses in New York, London and Paris remains to be determined. ■

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2. Id. at 170 (quotation and citation omitted).
3. Id. at 171.
4. Id. at 169-170.
5. Abdullah Kh. Al-Ayoub, *International Commercial Arbitration in the Middle East*, American Bar Association Section on International Law, at 6-7 (Spring Meeting, 2006), available at http://www.abanet.org/intlaw/calendar/spring2006materials.html.
6. Arthur J. Gemmell, *Commercial Arbitration in the Islamic Middle East*, 5 Santa Clara J. Int'l L. 169, 184 (2006).
7. Id. at 185.
8. Id.
9. Id. at 169-170; Tom Canning, *Unique Arbitral Regime to be Established in Middle East*, DLA Piper Int'l Arb. Newsl. (DLA Piper LLP (US)), Feb. 11, 2008.
10. Arthur J. Gemmell, *Commercial Arbitration in the Islamic Middle East*, 5 Santa Clara J. Int'l L. 169, 188-89 (2006).
11. Abdullah Kh. Al-Ayoub, *International Commercial Arbitration in the Middle East*, American Bar Association Section on International Law, at 6 (Spring Meeting, 2006), available at http://www.abanet.org/intlaw/calendar/spring2006materials.html.
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14. Tom Canning, *Unique Arbitral Regime to be Established in Middle East*, DLA Piper Int'l Arb. Newsl. (DLA Piper LLP (US)), Feb. 11, 2008.
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18. Id.
19. Arbitration in DIFC: *Recent Developments*, Gulf Construction Worldwide, Dec. 1, 2008, available at 2008 WLNR 23095366.
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23. Jonathon Ames, *Dubai: The World's Next Great Arbitration Centre?*, Times Online, Apr. 7, 2008, available at http://business.timesonline.co.uk/tol/business/law/article3698046.ece.
24. Philip Chong & Tom Canning, *Dubai: The Next Big Thing*, DLA Piper Int'l Arb. Newsl. (DLA Piper LLP (US)), Summer, 2007.
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BOOK REVIEW

International Construction Arbitration Handbook

Written by John W. Hinchey and Troy L. Harris • St. Paul, MN: Thomson/West, 2008

Reviewed by HARVEY J. KIRSH, ESQ. and DUNCAN W. GLAHOLT, ESQ.

We have been working with this book for a number of months now and each of us has been back and forth through it a number of times. We can honestly say that we have our fingerprints all over John Hinchey's and Troy Harris' superior guide to international construction arbitration. From both practical and intellectual perspectives, this is a well-written, reader-friendly, and thoroughly researched book. It offers practical guidelines and authoritative commentary, and is one of those books that you want to keep on the corner of your desk for constant reference.

In the early 1980's, there were only a few available books on the practice of international commercial arbitration, let alone international construction arbitration. In these early years, books focused exclusively on construction arbitration (see, for example, Stuart Farber's "Arbitration Handbook" (1982), Arnold M. Zack's "Arbitration in Practice" (1984), and James Acret's "Construction Arbitration Handbook" (1986)). In 1986 Alan Redfern and Martin Hunter first published their "Law and Practice of International Commercial Arbitration," now widely regarded as the locus classicus in the area. A year later, the first edition of what is now the two-volume "Bernstein's Handbook of Arbitration and Dispute Resolution Practice" was published, dealing with the more practical aspects of international commercial arbitration. This book has also gone through at least one reprinting and four editions, most recently in conjunction with The Chartered Institute of Arbitrators, edited by John Tackaberry Q.C. and Arthur Marriott Q.C. It is another classic work, but still a work with a much broader focus. None of these books focused on international construction arbitration.

The 1990's saw the publication of Berthold H. Hoeniger's "Commercial Arbitration Handbook" (1990); Karl Mackie's "A Handbook of Dispute Resolution: ADR in Action" (1991); Mark Huleatt-James' and Nicholas Gould's "International Commercial Arbitration Handbook" (1996); and the "Handbook of Arbitration Practice" (1997), a collaborative effort by Ronald Bernstein, John Tackaberry, Arthur Marriott and Arnold M. Zack. The new millennium opened appropriately in January of 2000 with the publication of a third edition of Craig, Park and Paulsson's "International Chamber of Commerce Arbitration," updating their already classic work to accommodate the 1998 ICC Rules of Arbitration. In 2004, Hark Huleatt-James and Phillip Capper entered the field with their "International Arbitration: A Handbook," followed in 2006 by Thomas Carbonneau with "AAA Handbook on International Arbitration and ADR" and in 2007 by Rufus Rhoades, Daniel M. Kolkey, and Richard Chernick's "Practitioner's Handbook on International Arbitration and Mediation." Most recently, the "Handbook of ICC Arbitration" was published by Michael W. Buhler and Thomas H. Webster in 2008, but none of these books focused on international construction arbitration.

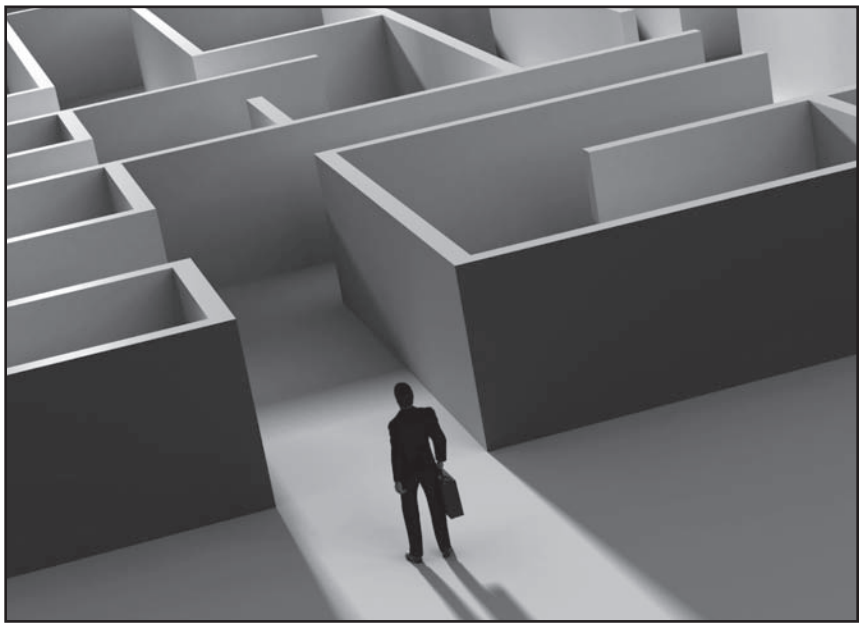
To find something on international construction arbitration one had to know their way around construction law textbooks. For example, noted engineer, arbitrator, mediator and conciliator Professor Nael Bunni first published his "The FIDIC Forms of Contract" in 1991 (now in its third printing) containing an expert's view of construction arbitration. It was Professor Bunni who coined the term "disputology" to describe this area, a term that authors Hinchey and Harris adopt in their work. A decade later in the United States, Philip L. Bruner and Patrick J. O'Connor Jr. published their magisterial seven-volume treatise "Bruner & O'Connor on Construction Law" devoting two full chapters to arbitration and international construction law as discrete subjects of inquiry.

The problem for construction lawyers, therefore, was that during this period of intense intellectual activity in the area of international arbitration, the more practical aspects of actually conducting an international construction arbitration were not directly addressed. This problem was compounded by the fact that during the three decades described, there was an abundant overlay of directly applicable official and quasi-official rules, protocols, commentaries and other similar materials but nowhere

See "Book Review" on Page 10

Book Review

continued from Page 9



were they collected and rationalized. The most current versions of these official publications are now bound into the Hinchey/Harris Handbook.

Authors John Hinchey and Troy Harris have distilled this mass of information into a single volume reference work containing all of the material necessary to the conduct of an international construction arbitration. The core principle of the Handbook is to make this complex area accessible. The authors make the point in their preface that the Handbook is a "guide to the subjects, issues and considerations applicable to international construction arbitration" and that their intention was to "attempt to be comprehensive in [identifying] those topics and issues, beginning with the role of construction and construction arbitration in the world marketplace of today" that arise in the field occupied by international construction activities. The authors have achieved their goal.

The deep research and reading of the authors is evident throughout. The Handbook does not advance or defend any particular critical point of view, with the one possible exception of their recognition that private domestic dispute resolution in the construction industry is being challenged both on grounds of what one might call "legitimacy" and "efficiency" principles. Instead of dwelling on such esoteric subjects, however, the

The core principle of the International Construction Arbitration Handbook is to make this complex area accessible . . . . The authors have achieved their goal.

Handbook simply moves forward and synthesizes a tremendous amount of primary and secondary material into a well-organized expository text. There is also strength and value in the footnotes. The book is well worth its price merely as a stand-alone bibliography in this narrow area. As befits a book entitled "International Construction Arbitration Handbook," the sources quoted are wide ranging and international with frequent recourse to Canadian, U.K. and Asian resources.

Importantly, the Handbook has a strong and useful internal structure. It is fully indexed and extensively cross-referenced. The Handbook lists "Practice Tips" and includes "Case Examples." The publisher has included generous material in the appendices, five of them in total, occupying approximately 750 pages of text, including Appendix I: Conventions and Treaties; Appendix II: Arbitration Laws; Appendix III: Arbitration Rules; Appendix IV: Arbitration Guides and Protocols; and Appendix V: Sample Provisions and Other Practice Materials. As of the date of publication, this is a unique and useful collection of these materials of everyday reference.

When the authors deal with case law, it is treated with precision and care. Hinchey and Harris discuss the mutuality of the right to arbitrate; international treaties and legal systems as sources of jurisdiction (section 4:6); interim relief from the tribunal; decisions involving the selection of experts, including standards of reliability and independence (section 6:30); rules of evidence, burdens of proof, and presumptions (section 9:5); and recognition and enforcement of awards, primary and secondary jurisdictions (section 12:3) in all of which cases reference to domestic case law is appropriate, and in most instances mandatory. Unfortunately the Handbook was at press at the time of the March 25, 2008 U. S. Supreme Court decision in *Hall Street Associates, L.L.C. v. Mattel*, Inc. which is relevant to section 2:37 (Appeals and judicial relief) and section 12:4 (Recognition and enforcement of awards – Actions to set aside). *Hall Street* does appear as a footnote

to section 12:4, but only as being a case on appeal to the U.S. Supreme Court. This is something that the authors and publisher will no doubt want to address in supplementing this volume.

As one would expect from practitioners of the recognized international stature of John Hinchey and Troy Harris, the chapters on the practice of international construction arbitration are particularly strong. Chapter 6, Developing the Case for Arbitration, including section 6:9 Reverse Engineering the Award, section 6:16 Reconstructing the relevant history of the project – Using the rules of probability and coherence, section 6:35 Reconciling effective preparation with case budgets, and Chapter 10 "Fast Track" Construction Arbitrations with section 10:10 Tips and techniques for "fast tracking" are all particularly valuable.

As we said at the outset, this is a book to keep on the corner of your desk as a constant reference. All too often in international construction disputes we see a quality of engagement best described in a quotation attributed to Napoleon: "Je m'engage, et après ça, je vois", "I engage, and after that I see what I do." With John Hinchey and Troy Harris' treatise at your disposal, you will be able to turn this proposition around. ■

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Mr. Glaholt is a partner at the Toronto construction law firm of Glaholt LLP. Email him at dwg@glaholt.com.

JAMS INTERNATIONAL ADR CENTER

continued from Page 1

arbitration and other dispute resolution services to the global engineering and construction industry. The ADR Center will be headquartered in Rome and New York with additional hearing locations in Geneva, London and Brussels.

No existing arbitration center elsewhere in the world rivals The JAMS International ADR Center in depth of engineering and construction expertise. It is home to some of the world's most highly skilled international arbitrators and mediators with exceptional experience on major engineering and construction projects in Europe, the Middle East, Asia and the Western Hemisphere. Combined with extensive experience of GEC members as arbitrators, mediators, project neutrals, DRB members and creative problem solvers, the center offers an unparalleled combination of industry knowledge and ADR skills. ■

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The AIA'S "Initial Decision Maker" Concept and the ConsensusDOCS "Dispute Mitigation and Resolution" Process:

Two ADR Approaches Under the JAMS "Rapid Resolution" Umbrella

By PHILIP L. BRUNER, ESQ.

The year 2007 will be remembered by as the year in which the U.S. construction industry rejected and discarded the century-old dispute resolution process that required claims and disputes to be resolved either by the designers' initial decision or by binding arbitration. In a "shot heard round the construction world," both the American Institute of Architects (AIA) and the Associated General Contractors of America (AGC) issued in 2007 industry contract forms that altered past practices and left litigation as the "court of last resort" unless the parties themselves crafted and agreed upon their own favored dispute resolution procedures.

The construction industry now recognizes that rapid early resolution of claims and disputes is a hallmark of a successful project, that "one size of ADR does not fit all disputes," and that the parties themselves are in the best position to agree upon ADR procedures most suited to their situation. Thus in 2007, both the AIA and AGC ConsensusDOCS contract forms substituted voluntary in lieu of mandatory dispute resolution practices

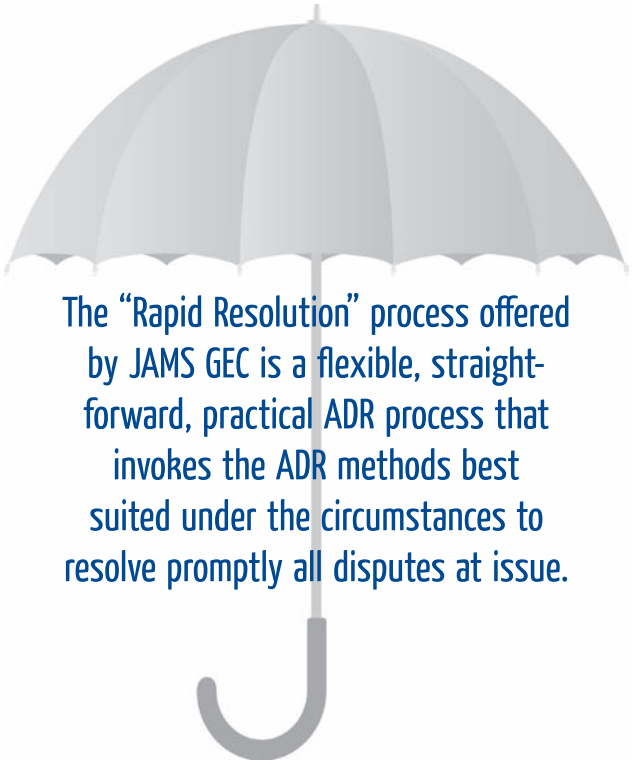
One crucial 2007 change to Article 15 of the AIA A201 General

See "Two ADR Approaches" on Page 12

Two ADR Approaches Under the JAMS "Rapid Resolution" Umbrella continued from Page 11

Conditions of Contract was to allow the parties to select their own independent "Initial Decision Maker" (IDM) – in lieu of the project architect – as the INITIAL decider of disputes and claims between owner and contractor. For over a century, the project architect had been mandated as the initial decider of disputes, and the AIA documents had sanctioned the architect's three (often conflicting) historic roles as the independent design professional of record, the owner's construction agent/observer and the ostensibly neutral initial dispute decider. In recent decades, many have questioned whether any architect can have the independence and background to be a neutral initial decider of disputes between the owner and contractor, and particularly of disputes that implicated the architect's own services or involved legal or factual issues beyond the architect's professional competence. Such questions encouraged parties to by-pass the architect initial decider role and to allow disputes to pile up during the job for resolution by arbitration at the end of the project in one typically long and expensive proceeding. Moreover, many architects candidly admitted to being uncomfortable in taking positions on claims adverse to owners who paid for their services, or in deciding disputes involving critical legal and factual issues (such as the legal propriety and factual materiality of grounds alleged as a basis for contract termination for default) that could create potential liabilities.

From the contractors' 2007 perspective, the construction industry's favorable experience with early mediation and dispute review board non-binding decisions (which, according to The Dispute Review Board Foundation, have resulted in the resolution of 98% of the claims submitted) confirmed the wisdom of having the parties engage in early dispute resolution – without any involvement whatsoever of the design professional. In Article 12 of the 2007 ConcensusDOCS 200 General Conditions, contractors opted for a tiered ADR process that begins with structured negotiations between the contractor and owner at increasingly higher levels of managerial authority. Disputes not settled by negotiation are sent to either a "project neutral" or a Dispute Review Board as agreed by the parties for a non-binding decision. The Project Neutral and the DRB thus play a role comparable to the AIA's IDM. Failure of the parties to agree upon selection of a neutral or DRB will result in mandatory mediation under mediation rules agreed by the parties. An unsuccessful mediation leads to court litigation unless the parties agree on binding arbitration.

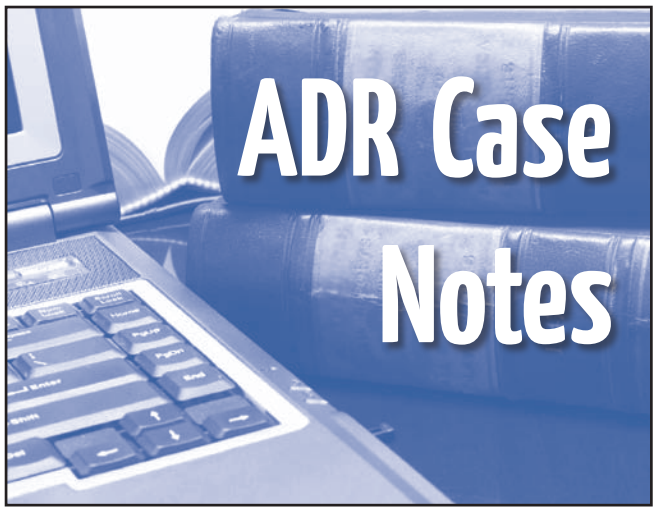


The "Rapid Resolution" process offered by JAMS GEC is a flexible, straightforward, practical ADR process that invokes the ADR methods best suited under the circumstances to resolve promptly all disputes at issue.

Whether called an "initial decision maker" or a "project neutral" or a "mediator," the crucial ingredients of each role are true expertise in the subject matter in dispute and consummate skill in reasoning with and bringing parties' perspectives together. The objective is to get the issues settled rapidly. There is no need to build inflexible "vertical silos" around ADR roles that would impede or increase the cost of achieving settlement. Instead, a flexible, straight-forward, practical ADR process can be crafted that brings the best dispute resolver(s) to bear upon the problem at hand.

The "Rapid Resolution" process offered by JAMS Global Engineering and Construction Group (GEC) is a flexible, straight-forward, practical ADR process that invokes the ADR methods best suited under the circumstances to resolve promptly all disputes at issue. Both the IDM and the "Project Neutral" fall under the JAMS GEC "Rapid Resolution" umbrella. ■

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.



U.S. Supreme Court permits a nonsignatory to an arbitration agreement to enforce arbitration under the FAA against a signatory party where state law so allows: *Arthur Anderson LLP v. Carlisle,* 129 S. Ct. 1896 (May 4, 2009).

Under the law of various states, a non-signatory to a contract nevertheless may be permitted to enforce the contract's arbitration clause under theories such as third-party beneficiary, waiver and estoppel, assumption, agency, subrogation, assignment, alter ego, joint liability, and incorporation by reference or implication. See *6 Bruner & O'Connor on Construction Law* 20:63 – 20:71. Under Section 3 of the Federal Arbitration Act (FAA), a court may stay litigation only of claims "referable to arbitration under an agreement in writing."

In *Arthur Anderson*, the U.S. Supreme Court, in a 6-3 decision, ruled that the rights of non-signatories to enforce written contracts were to be determined under state law, and reversed a holding of the U.S. Court of Appeals for the 6th Circuit that the FAA only authorized a court to stay litigation between actual signatories to a written arbitration agreement. The Court thus broadened considerably opportunities of non-signatories to stay litigation and compel arbitration under the FAA. The decision is consistent with the Court's prior decisions leaving to state law the question of whether a valid arbitration agreement exists. See, e.g., *First Options of Chicago Inc. v. Kaplan*, 514 U.S. 938, 943 (1995)

A non-signatory to an arbitration clause with vicarious liability for the award is deemed bound by the award by participating in the arbitration: *Jadhav v. Ackerman*, 878 NYS 2d 766 (NY App. Div. May 12, 2009).

A vicariously liable non-signatory to an arbitration clause nevertheless was deemed bound by an arbitration award rendered in a proceeding in which the non-signatory participated, albeit only in an alleged corporate capacity. By participating in the proceeding, the non-signatory was deemed to have waived objections as to lack of notice or service of the demand.

A non-signatory surety cannot be compelled to arbitration pre-dispute claims pursuant to an arbitration clause in the bonded contract but can be bound by its post-dispute agreement to an arbitration award against its principal: *Dodson Brothers Construction Co. v. Ratliff*, Inc., 2009 WL 806800 (D. Neb. February 27, 2009).

After a surety's contractor/principal and subcontractor/payment bond claimant were ordered to arbitrate their disputes pursuant to an arbitration clause, the subcontractor then sued the surety in a separate action and moved the court to consolidate the two arbitrations. The surety's payment bond contained no agreement to arbitrate. Finding nothing in the prime contract, subcontract or bonds that expressly required the surety to arbitrate the subcontractor's payment bond claim, the Court ruled that the surety had no obligation to arbitrate pre-dispute claims. But the Court also found that the surety, after the payment bond claim had been asserted, that the surety had agreed informally to be bound by an arbitration award in favor of the bond claimant and against its bond principal, and therefore granted the motion to compel to the extent of the surety's post-dispute consent to be bound. See generally *6 Bruner & O'Connor on Construction Law* 20:71 and *Restatement (Third) of Suretyship & Guaranty* 67(2) (1996). ■

Notices & Calendar of Events

UPCOMING EVENTS

SEPT. 11, 2009: Mediation Seminar at Pearlman 2009

Woodinville, WA • **http://www.thepearlman.net**

MICHAEL J. TIMPANE and **KENNETH C. GIBBS**, JAMS, will present a mediation seminar during this annual event for the Pearlman Association, an association of major sureties and the consultants and attorneys who service them.

SEPT. 14-15, 2009: Surviving and Prospering on Construction Projects Under the New Administration

Atlanta, GA • **http://www.constructionchannel.net**

Associated Owners & Developers 2009 National Conference East • Sponsored by JAMS

JOHN W. HINCHEY, JAMS, is a panel member of Session 7, Day 2, 9 AM, on "Managing the Risks and Obligations of Electronic Discovery: Sanctions, Spiraling Costs and Accessibility."

OCT. 4 – 9, 2009: International Bar Association Annual Conference 2009

Madrid, Spain • **http://www.int-bar.org/conferences/Madrid2009/info_7.cfm**

HIS HONOUR HUMPHREY LLOYD QC, JAMS, will chair a session of the International Construction Projects Committee on "Time and Acceleration Issues Affecting International Construction Projects, Especially Concurrent Delay."

OCT. 16, 2009: The Next Wave of Construction Dispute Resolution

Atlanta, GA • **http://www.theseminargroup.net/seminar.lasso?seminar=09.CDRGA**

The Seminar Group • Program Chair: JOHN W. HINCHEY, JAMS and King & Spalding LLP

Faculty Includes JAMS neutrals **PHILIP L. BRUNER, JESSE B. "BARRY" GROVE III**, and **ROY S. MITCHELL**

OCT. 30, 2009: A National Summit on Business-to-Business Arbitration

Washington, DC • **http://www.thecca.net** or **Deborah.Rothman@aya.yale.edu** or **syusem@morrisclemm.com**

The College of Commercial Arbitrators • Organizer: CCA President-Elect **HON. CURTIS VON KANN, (RET.)**, JAMS

Opening Address: THOMAS J. STIPANOWICH, Pepperdine University School of Law and JAMS

Luncheon Keynote: Hon. Judith S. Kaye, Retired Chief Judge of New York Court of Appeals, Former President of the Conference of Chief Justices, now Of Counsel to Skadden Arps

NOTABLE MENTIONS

- **KENNETH C. GIBBS** was recognized as one of two highlighted in the Construction Mediators – California category in the 2009 edition of *Chambers USA*.
- In the inaugural edition (2009-2010) of "Cross Border Construction and Projects Handbook" (published by PLC Practical Law Company, London), **JOHN W. HINCHEY** was listed as one of the top construction lawyers in Georgia, and **HARVEY J. KIRSH** was tied for the title of top construction lawyer in Canada.
- **HIS HONOUR HUMPHREY LLOYD QC**, JAMS, was awarded an Honorary Doctorate of Laws (LLD) by Leeds Metropolitan University on July 13, 2009 as part of Summer Graduation celebrations.
- **THOMAS J. STIPANOWICH**, JAMS, has been designated the William H. Webster Chair in Dispute Resolution at Pepperdine University School of Law.

RECENT ARTICLES AND PAPERS

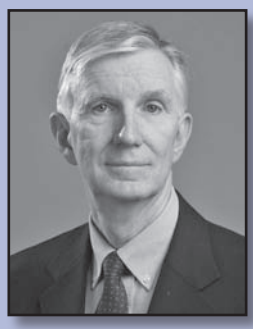
- **"Taming Construction Disputes Through Rapid Resolution"** by **JOHN W. HINCHEY,** JAMS and King & Spalding LLP, was recently published by *Engineering News-Record* in July.
- **"Global Engineering and Construction ADR: Meeting An Industry's Demand for Specialized Expertise, Innovation, and Efficiency"** by **PHILIP L. BRUNER, JAMS**, appeared in the 2009 edition of the *Journal of the Canadian College of Construction Lawyers*.
- **"A Report Card on the Quality of Commercial Arbitration: Assessing and Improving Delivery of the Benefits Customers Seek"** by **HON. CURTIS E. VON KANN (RET.),** JAMS, and **"Arbitration and Choice: Taking Charge of the 'New Litigation'"** by **THOMAS J. STIPANOWICH**, JAMS, will be published in the *DePaul Business & Commercial Law Journal*.
- **"Arbitration: The 'New Litigation'"** by **THOMAS J. STIPANOWICH,** JAMS, will be published in January 2010.

For more information or copies of these articles, please contact jherrera@jamsadr.com.

RECENT SPEAKING ENGAGEMENTS AND PROGRAMS

- **JAMS GLOBAL ENGINEERING AND CONSTRUCTION GROUP** hosted its first seminar - a day-long program on U.S. and Canadian cross-border construction industry ADR in conjunction with the Society of Illinois Construction Attorneys in Chicago, Illinois, on May 28, 2009. The event was held in the JAMS Chicago Resolution Center and was well attended by JAMS and SOICA neutrals and attorneys, as well as members of the Canadian College of Construction Lawyers. A special thank you to **Lorence Slutzky,** the President of SOICA, for helping organize this successful event.
- **PHILIP L. BRUNER**, JAMS, presented on international dispute resolution and the Energy Charter Treaty at the Annual Meeting of the Inter-Pacific Bar Association, in the Manila, Phillippines, on May 2, 2009.
- **HARVEY J. KIRSH**, JAMS, organized a presentation featuring The Right Honourable Beverley McLachlin, Chief Justice of the Supreme Court of Canada, who spoke on "Judging Litigation in the Construction Industry" at Osler, Hoskin & Harcourt LLP in Toronto, Canada on April 30, 2009. Mr. Kirsh spoke on "Alternatives to Litigation in the Construction Industry."
- **THOMAS J. STIPANOWICH,** JAMS, and **HON. CURTIS VON KANN**, JAMS, presented at the DePaul University Law School entitled "Winds of Change: Solutions to Causes of Dissatisfaction with Arbitration" in March 2009.

THE JAMS GLOBAL ENGINEERING & CONSTRUCTION GROUP WELCOMES TWO NEW NEUTRALS



JAMES F. NAGLE, ESQ. *Mediator • Arbitrator • Project Neutral*

Nationally renowned for his expertise in federal contracting, particularly in the area of construction contracts, Mr. Nagle has served as a neutral in many complex, multi-million-dollar domestic and international disputes. He has worked exclusively in government contracts as a partner at Oles Morrison Rinker Baker, LLP since 1990 and for 11 years prior to that in the U.S. Army. He specializes in resolving business/commercial, construction, engineering, and governmental and regulatory matters.

DOUGLAS S. OLES, ESQ. *Mediator • Arbitrator • Project Neutral*

A partner at Oles Morrison Rinker Baker, LLP since 1987, Mr. Oles is recognized as a national leader in the practice of construction law and in various areas of public and private commercial contracts. He has extensive experience in both litigation and transactional work in the U.S. as well as the U.K., China, Brazil, and the Netherlands. Mr. Oles specializes in resolving cases involving business/commercial, construction, engineering, intellectual property, and real estate disputes.

JAMS GLOBAL CONSTRUCTION SOLUTIONS

Leading ADR Developments from The Resolution Experts

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.

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