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Timing is Everything: Balance Risk and Opportunity to Decide When to Mediate

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BY ELEISSA C. LAVELLE, ESQ.

More than 90 percent of litigated cases settle before trial. The value of mediation is so well established that many contracts require that parties mediate as a condition to initiating litigation or arbitration. Mediation may be required by statute or ordered by courts, as well as agreed upon by the parties. Good settlement opportunities can be lost by waiting until most of the available information concerning claims and defenses has been discovered, but mediating too soon may reduce the mediation to a perfunctory step on the road to trial. Therefore, among the critical activities essential to a successful mediation is selecting the

> *See "When to Mediate" on Page 5*

Critical Issues for Parties to Consider When Selecting an Arbitrator

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BY JOHN W. HINCHEY, ESQ.

What is the most important thing a party does in an arbitration proceeding? Most would say selecting the arbitrators. Why is that so? Arbitrators have tremendous procedural authority and power. In fact, arbitrators have greater procedural power than judges in litigation. Generally, arbitrators have authority to determine the scope of their authority and jurisdiction—the commonly cited German term for that broad authority is *kompetenz-kompetenz*. Arbitrators usually determine what the pleading and discovery procedures will be, whether a party can even have discovery, and how

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Obtaining Testimony and Documents from Non-Parties in Arbitration

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Construction disputes may involve numerous parties: owners, contractors, sub-contractors, architects, financiers, consultants, accountants, permitting officials, etc. Once arbitration begins, some of these people and entities may be parties in a particular arbitration, while others are not. More often than not, in order to get a full record regarding the project and the alleged problems, defects and delays, the parties may seek to obtain testimony and documents from non-parties. Routinely, they prepare subpoenas for the arbitrator to sign and issue, and proceed exactly as if they were in state or federal court. However the law may not be clear whether arbitrators have the authority to issue pre-arbitration subpoenas to non-parties, depending on applicable arbitration law.

Arguments for and against non-party discovery in arbitration will be familiar to those who routinely practice in the arbitral forum. On the one hand, extensive discovery, as allowed in civil litigation, impacts one of the advantages of arbitration in terms of cost, speed and efficiency. On the other hand, allowing the parties access to third-party documents and testimony prior to the arbitration hearing will enable the arbitrator to make a full and fair determination, may streamline the final arbitration hearing and may eliminate the need for multiple arbitrations arising out of one project.

This article will set forth a number of cases under the Federal Arbitration Act ("FAA") for the purpose of exploring the various rationales for and against non-party discovery in arbitration, and will address the non-party discovery permitted under the Revised Uniform Arbitration Act ("RUAA") and the California Arbitration Act, as well as a recent case from New York addressing the issue under both state and federal law. As these cases make clear, in the absence of clear authorization from the language of an arbitration clause or an applicable state law, there are persuasive reasons to argue both for and against non-party discovery in arbitration. Creative lawyers may draw from the reasoning in existing precedents to craft alternative procedures to accomplish their goal.

Statutes

1. Federal Arbitration Act §7, 9. U.S.C. §7

The arbitrators…may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case… Said summons…shall be served in the same manner as subpoenas to appear and testify before the court….

2. Federal Rule of Civil Procedure 45

F.R.Civ.P. 45 was amended in 2013 to provide that document subpoenas may be served on any person (including non-parties) anywhere within the United States. Under FAA §7, this revision will be applicable (to the extent courts allow non-party discovery subpoenas for documents) in arbitrations governed by the FAA.

3. Revised Uniform Arbitration Act, ("RUAA") 17 (d), (g)

(d) If an arbitrator permits discovery under subsection (c), the arbitrator may…issue subpoenas for the attendance of a witness and for the production of records and other evidence at a discovery proceeding....

(g) The court may enforce a subpoena or discovery-related order for the attendance of a witness within this State and for the production of records and other evidence issued by an arbitrator in connection with an arbitration proceeding in another State upon conditions determined by the court so as to make the arbitration proceeding fair, expeditious, and cost-effective. A subpoena or discovery-related order issued by an arbitrator in another State must be served in the manner provided by law for service of subpoenas in a civil action in this State and, upon [motion] to the court by a party to the arbitration proceeding or the arbitrator, enforced in the manner provided by law for enforcement of subpoenas in a civil action in this State.

Section 17(d) of the RUAA, which may be adopted in your state, confirms that the arbitrator has the authority to issue subpoenas for a deposition or document production. The Notes to section 17(d) state that the intent is to follow the present approach of courts to "safeguard the rights of third parties while insuring that there is sufficient disclosure of information to provide for a full and fair hearing."

The Notes to Section 17(g) confirm that it is intended to allow a court in State A (the State adopting the RUAA) to give effect to a subpoena or any discovery-related order issued by an arbitrator in an arbitration proceeding in State B without the need for the party who has issued the subpoena first to go to a court in State B to receive an enforceable order.

4. California Arbitration Act, Cal. Code Civ. Proc. §1283

Cal. Code Civ. Proc. §1283 provides that the arbitrator also has power to order depositions of a witness for use as evidence—not for discovery purposes—if that witness cannot be compelled to testify in person or other "exceptional circumstances" exist.

Cal. Code Civ. Proc. §1283.1 provides that the provisions of §1283.05, authorizing discovery, including deposition and document production, are applicable to the same extent as if in court in personal injury or wrongful death actions. That section also provides that if the parties by their agreement so provide, the provisions of Section 1283.05 may be made applicable to any other arbitration agreement. (California has not adopted the RUAA.)

Cases

1. *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404 (3rd Cir. 2004)

The Third Circuit in *Hay Group* took a very restrictive approach to third-party discovery, holding that "[b]y its own terms, the FAA's subpoena authority is defined as the power of the arbitration panel to compel non-parties to appear 'before them'; that is, to compel testimony by non-parties at the arbitration hearing." Its rationale is that arbitration is meant to be a limited discovery process, and by requiring that document production be made at the actual hearing, it may "discourage the issuance of large-scale subpoenas upon non-parties."

Significantly, the concurring opinion noted that arbitrators are not "powerless to require advance production of documents when necessary to allow fair and efficient proceedings," because Section 7 permits the arbitrators to compel a third-party witness to appear with documents before a single arbitrator, who can then adjourn the proceedings. In practice, once the arbitrator makes clear his or her intention to require such a personal appearance, the witness may agree to deliver the documents without the need for the hearing.

2. *Life Receivables Trust v. Syndicate 102*, 549 F.3d 210 (2d. Cir. 2008)

The Second Circuit adopted the *Hay Group* approach, holding that Section 7 "does not enable arbitrators to issue pre-hearing document subpoenas to entities not parties to the arbitration proceeding." The Second Circuit had previously taken that position in *Stolt-Nielsen Transp. Group, Inc. v. Celanese AG,* 430 F.3d 567 (2d Cir. 2005), a case that went to the United States Supreme Court on another issue.

However, the Second Circuit approved the arbitrators' use of a procedure in which they issued subpoenas for documents and testimony, requiring the non-party recipients to "appear and testify in an arbitration proceeding" and to bring certain documents with them. In *Stolt-Nielsen*, the objecting party claimed that this was but a "ruse" (that may be a bit strong, but it does appear to be a "work-around"), but the court rejected that argument, finding the subpoenas in question did not compel pre-hearing depositions or document discovery from non-parties, but rather "compelled non-parties to appear and provide testimony and documents to the arbitration panel itself at a hearing held in connection with the arbitrators' consideration of the dispute before them." The court held that the plain language of Section 7 authorized this procedure. The court noted that "[n]othing in the language of the FAA limits the point in time in the arbitration process when [the subpoena] power can be invoked or says that the arbitrators may only invoke this power under Section 7 at the time of the trial-like final hearing."

This is an effective "work-around" in that it complies with the letter of the law (a subpoena to appear before an arbitrator for a hearing), but to the extent that the drafters of the FAA did not intend to allow pre-hearing third-party discovery, it is a device that has been created to conform arbitration to the norm to which U.S. litigators are more accustomed. And what is the result of having an arbitrator in attendance while a hearing in the nature of a deposition is being conducted?

3. *Empire State Building v. New York Skyline, Inc.* (N.Y. Supreme Ct., Commercial Div., filed Feb. 11, 2014)

Although this state court decision is not from an appellate court, it is included here because it is recent and because it applies both state and federal law. Citing CPLR 2302, the New York statute that authorizes an arbitrator to issue a subpoena, as well as FAA Section 7, the court held that neither statute is intended to direct non-parties to the

arbitration to engage in pre-arbitration hearing "disclosure nor steps preparatory to the hearing." The court did not discuss, and the parties apparently had not argued, the "pre-hearing hearing" approach approved by *Life Receivables Trust* and *Hay Group*, discussed above.

4. *COMSAT Corp. v. National Science Foundation,* 190 F.3d 269, 276 (4th Cir. 1999)

This case balanced the competing interests for and against non-party depositions and document discovery and concluded that under the FAA, a court may not compel a third party to comply with discovery "absent a showing of special need or hardship."

The National Science Foundation ("NSF") had been subpoenaed in an arbitration to which it was not a party. The subpoenas demanded that the agency produce documents and employee testimony related to a construction contract between COMSAT and an NSF awardee.

The court noted the usual rationale for constraining an arbitrator's subpoena power: "Parties to a private arbitration agreement forego certain procedural rights attendant to formal litigation in return for a more efficient and cost-effective resolution of their disputes." In other words, neither party should reasonably expect to obtain full-blown discovery from third parties in an arbitration.

"There are strong policy arguments supporting integrating non-party discovery into arbitration proceedings in order to enable the parties to get access to information in support of a full and fair arbitration hearing."

However, the court was persuaded that in a complex arbitration, efficiency may be lost if the parties are unable to review and digest relevant evidence prior to the arbitration hearing. True, but have you ever sat through a meandering cross-examination of a witness in an arbitration during which counsel is searching for something to support his case? Accordingly, the court held that non-party discovery would be appropriate "upon a showing of special need or hardship." The court did not define "special need," except to observe that at a minimum, a party must demonstrate that the information it seeks is otherwise unavailable.

5. *Security Life Ins. Co. of America v. Duncanson & Holt, Inc.,* 228 F.3d 865, 870-71 (8th Cir. 2000)

The Eighth Circuit analyzed the interests and permitted non-party discovery, finding that although "the efficient resolution of disputes through arbitration necessarily entails a limited discovery process, we believe this interest in efficiency is furthered by permitting a party to review and digest relevant documentary evidence prior to the arbitration hearing. We thus hold that implicit in an arbitration panel's power to subpoena relevant documents for production at a hearing is the power to order the production of relevant documents for review by a party prior to the hearing" and that this was appropriate regardless of whether reinsurer was party to arbitration.

Under this approach, the argument is that inasmuch as the arbitrator has the authority to order the documents produced at a hearing, there is little if any additional burden placed on a non-party to require that the documents be produced in advance instead.

The Sixth Circuit is in accord (*American Federation of Television & Radio Artists v. WJBK-TV*, 164 F.3d 1004, 1009 (6th Cir. 1999)).

6. *In re National Financial Partners Corp. and William Corry,* 2009 WL 690109 (E.D. Pa. 2009)

In this case, the arbitrators dealt with the issue of territorial limitations by temporarily moving the location of the arbitration hearing to the place where the non-party witness resided. Counsel should review the rules under which

they are arbitrating inasmuch as those rules may contain provisions authorizing the arbitrators to conduct special hearings for document production purposes at other locations (AAA Rule R-11) or issue subpoenas out of officers in other locations, and then follow up with hearings there (JAMS Comprehensive Arbitration Rules & Procedures, Rule 19(c)).

Conclusion

The rules that determine opportunities to obtain discovery from persons that are not party to the arbitration vary from jurisdiction to jurisdiction. There are strong policy arguments supporting integrating non-party discovery into arbitration proceedings in order to enable the parties to get access to information in support of a full and fair arbitration hearing. In addition to the arguments that can be drawn from the statutes, rules and cases, counsel may also stipulate to integrate the right to non-party discovery into their arbitration agreements at the time of drafting their agreements or later once a dispute has arisen.

A major concern that is outside the scope of this article but interesting to consider is how to resolve complex construction disputes more efficiently. At present, it is rare that all the interested and affected players are parties to the same or even similar arbitration agreements, with the result that resolving all of the disputes that may arise in connection with one project may require multiple arbitrations and court proceedings. Finding a way to integrate all of the players into one dispute resolution procedure could resolve problems earlier and at less expense. A first step toward this may involve finding a way to coordinate discovery when multiple disputes arise from one project. Third-party discovery opens avenues for thinking about new approaches to resolving complex construction disputes. ■

When to Mediate *continued from Page 1*

right time to mediate. Thoughtful and intentional timing of mediation will help clients achieve their goals.

So how do we decide when to mediate? Mediation is most effective when the disputing parties are committed to preserving or restoring business relationships, maintaining privacy and confidentiality and resolving disputes quickly and economically. Balanced against these objectives is the parties' need for sufficient understanding of the underlying facts and legal positions, which will enable them to develop informed goals for resolution. There are several golden opportunities in the life of a dispute when risk and opportunity balance in such a way that mediation will have the best chance of success. The first job, then, is to picture what success looks like for the client and how that vision influences the best time to mediate.

Mediating Before Filing the Lawsuit

Much has been written on the merits of planning for early resolution of the disputes that are endemic on construction projects. Mediating before project completion is particularly effective when the parties share an interest in restoring or preserving productive working relationships, promoting future business dealings, and resolving problems on the project to achieve the most timely and cost-effective outcome, regardless of previous conflict. Mediation before litigation may avert potential adverse effects on insurance and bonding capacity, as well as unfavorable publicity. At a minimum, mediating disputes during construction might limit the range of issues that may need to be litigated in the future.

Frequently, the parties prepare for the win/lose potential of litigation before the ink is dry on the contract, while at the same time hoping that expensive disputes and litigation can be avoided. A contractual requirement that the parties mediate as a precondition of filing a lawsuit or demand for arbitration provides an even-handed and objective method of compelling disputing parties to confront the risks inherent in litigation before positions have hardened and relationships are irreparably broken. Mediation compelled by contract will circumvent parties' reluctance to propose settlement discussions too soon for fear of showing weakness. On the other hand, parties may be legitimately concerned that what looks like a good settlement while construction is ongoing may end up being a disaster by the time the project is completed. Mediating before a reasonable amount of information is exchanged may result in missed opportunities for clients and potential claims of imprudence by their lawyers.

The parties must balance the potential benefits of early settlement discussions against their concern that all potential damages and outcomes can't be known until after project completion when deciding when and what to mediate. Preserving business relationships, privacy and efficient resolution of disputes may have greater value to a client than squeezing every last dime out of

an opponent. Within the structure and confidentiality of the mediation process, concern about generating or preserving evidence during the course of construction to develop tactical advantage for eventual adversary proceedings is not necessarily incompatible with designing conflict-avoidance and -management processes, rebuilding and restoring relationships or resolving some or all of the disputes among the parties.

Mediating After Filing the Lawsuit

Choosing the right time to mediate after the lawsuit has been filed requires the parties to evaluate and balance the answers to three critical factors: (1) whether the parties have conducted enough investigation and research to realistically enable them to assess their likelihood of success and risk of exposure; (2) the availability and adequacy of the opponent's resources, which can be used to complete the job or satisfy a judgment or settlement; and (3) whether the parties are able to acknowledge that the time has come to end hostilities and move on. As the case progresses, counsel must continually evaluate how each of these factors may be shifting and the effect of those adjustments on the negotiating leverage of the parties.

• *Before the Majority of Information Exchange Has Been Completed*

Mediation may be ordered by a court or suggested by a party early in the life of a contentious case that is clearly destined to be financially and emotionally costly before one or more of the three conditions are satisfied. Existence of even one of the criteria may nevertheless justify and promote a successful mediation. For example, cases involving few parties and limited issues may foster an early grasp of possible outcomes sufficient for parties to evaluate their likelihood of success at trial. Yet the parties may continue to litigate because they are not yet ready to give up the fight. Mediation provides the process that will permit the parties the ability to vent and to explore the benefits of resolving the conflict, thereby allowing them to put the dispute behind them and get back to business.

Mediating soon after litigation commences can facilitate resolution of insurance coverage and contribution disputes. Identifying and clarifying the obligations of those who hold the purse strings does not require completion of discovery in the underlying case. Resolving insurance disputes will not demand that either the parties or their insurance carriers make any commitments toward resolution of the underlying case.

Mediating insurance issues that cannot be resolved otherwise will facilitate early participation by those who will have a say in the eventual outcome and promote future settlement.

An opportune time to mediate is when disputing parties perceive that the risk of continuing litigation or arbitration, regardless of the relative merits of the parties' positions, is so significant that it trumps everything else. Cases involving a "burning limits" insurance policy, where available proceeds from which to pay claims will be eroded by payment of defense costs, or where protracted litigation may result in bankruptcy or insolvency, are prime examples. Mediation may motivate parties to resolve their disputes in order to maximize the available settlement resources even before substantial discovery has been completed. Where the risk of unfavorable publicity has greater potential of harming the disputants than losing or winning the case, early mediation may be effective in mitigating that risk by crafting creative resolution of the issues as well as preserving confidentiality.

Mediation can be employed to efficiently and economically design processes to arrange the exchange of critical information needed to evaluate claims and defenses. The goal of such process development mediation is to reduce discovery costs, promote confidentiality and assist in determining the optimum time to negotiate the ultimate resolution of the case.

• *After Much But Not All Discovery Is Completed*

Meaningful settlement negotiations will be premature until the parties are able to formulate and evaluate reasonable settlement demands. Gathering and reviewing key documents, deposing crucial witnesses and obtaining expert analysis of claims and defenses must sometimes be accomplished before clients or insurers can reach a comfort level with their likely outcome at trial. Nevertheless, well-timed opportunities for mediation will occur at certain pressure points along the continuum of the pre-trial preparation when a party's sense of the potential risk is intensified. A party may be shocked into recognition of the potential cost and complexity of pursuing claims or defenses upon receipt of a massive document request that can disrupt business operations, expose internal deficiencies or be prohibitively expensive.

Mediation should be considered as parties contemplate the anticipated cost and possible shift in negotiating leverage that might result after certain witnesses are deposed. Client representatives may prefer not to commit themselves in sworn testimony or may desire to avoid the inconvenience of preparation and deposition. Mediation may be appropriate when considering the prospect of deposing an unmanageable witness. The period after expert witnesses have conducted their investigations but before they are deposed may provide yet another opportunity for mediation when contemplating the possibility that the expert deposition may reveal potential pitfalls in the case.

The period just before or after dispositive motions have been filed but before the decision by the judge or arbitrator is made offers another well-timed opportunity to mediate. The parties should have now acquired enough knowledge about the dispute from which to measure their chances for success at trial. However, the parties' perception of risk may be enhanced by the uncertainty of the outcome, providing an excellent opportunity to discuss settlement.

Parties may not choose to mediate until after the judge or arbitrator has delivered a ruling on a partial dispositive motion. Some clients may, in fact, require such a finding before they are able to realistically appraise their position or understand that the leverage has shifted sufficiently to justify settlement negotiations. However, timing the mediation after a ruling on a dispositive motion may solidify positions and make settlement more difficult.

- ***Immediately before Trial***

Frequently, mediation is not considered until just before commencement of the trial or arbitration hearing, when parties feel that they well understand that the risk of an adverse judgment gives them their last best chance to settle the case. By this time, virtually all the pretrial work has been completed, so the cost of trial may be less intimidating and provide less justification for settling. Having committed this much time and effort to the cause, the parties may feel they might as well take their chances at trial. Mediation just before trial may still yield positive results. After discovery has been completed and final trial preparation has begun, everyone involved should have the most information that is available, from which they can realistically evaluate their prospects at trial, as well as an understanding of the cost and delay that may ensue in the aftermath if the case is appealed. Such assessment may transform the parties' mind-sets from "pay or die" to a more problem solving or resolution-oriented attitude. They may better appreciate that mediation prior to trial will offer them the best chance to exert some measure of control over the outcome and resolution of the dispute. Once again, counsel must be attentive to balancing the risks and opportunities so that an advantageous time to mediate is not lost.

"There are several golden opportunities in the life of a dispute when risk and opportunity balance in such a way that mediation will have the best chance of success."

Timing Your Mediation Depends on Your Goal

A well-timed mediation can occur at many stages in the life of the dispute. Recognition of such opportunities requires attention to the interests and goals of the disputing parties, appreciation of when the perception of risk is intensified and sufficient understanding of the facts and law underlying the dispute, from which parties can make an informed and justifiable settlement decision. Appropriate timing of mediation will affect the probability of achieving a client's desired goals, and the desired goals should help determine the best time to mediate. ■

Selecting an Arbitrator *continued from Page 1*

much. They determine what the time limits will be and where the hearings will be held. And last but not least, they determine who wins and who loses; who pays whom, how much and when; and with what interest and costs. So it stands to reason that a prudent party should pay a lot of attention to the arbitrator selection process. The first opportunity a party will have to control the selection process is at the agreement stage. Here is where a party has the greatest control over its destiny.

Drafting the Selection Process

The first question a party faces in drafting an arbitration agreement is how specific should they be in providing for selection of arbitrators. Should they specify a solo arbitrator or a panel of three? Obviously, one will cost less; it will be easier to schedule hearings, and the process may move along a lot faster. But what are the disadvantages? It may be difficult for the parties to agree on a single arbitrator, particularly one with relevant experience and qualifications. In the event that the parties cannot agree, the arbitration administrator will pick the solo arbitrator. Also, at the contract drafting stage, one can almost never predict whether the case is going to be sufficiently important to justify a panel of three rather than a single arbitrator.

And then there is the quality control factor. Anyone who is honest recognizes reality, and anyone who has served on a tribunal knows that arbitrators can make mistakes. They can miss points—sometimes important ones. Even though arbitrators can be completely independent and impartial as to the outcome of the dispute, every arbitrator comes to the table with certain biases, particularly procedural biases, such as how much or little discovery is appropriate. Also, a panel of three makes for a more rigorous decision-making process and minimizes the risk of significant mistakes. Finally, it is easier for parties to accept an adverse award when three independent and neutral arbitrators have agreed on the result.

What to Look for in a Neutral, Party-Appointed Arbitrator

Some years ago, it was not unusual for parties to appoint arbitrators who were not neutral. That approach was problematic in at least two respects: First, the non-neutral arbitrator essentially played the role of an advocate for the appointing party, which was somewhat redundant to the role of the appointing party's own counsel. Even more problematic was the fact that the other party-appointed arbitrator was equally biased, leaving only the neutral arbitrator as the chair to decide the case, essentially as a solo arbitrator. Today, it is highly unusual for appointed arbitrators to be non-neutral, and most arbitration agreements and arbitral institutions require the appointment of arbitrators who are independent and impartial, i.e., neutral. But even though the arbitration agreement or applicable rules require the appointment of a neutral arbitrator, the question arises whether the party-appointed arbitrator's role in an arbitration is different in any respect from that of the presiding arbitrator or the chair of the panel.

A neutral, party-appointed arbitrator is usually required to be independent and impartial, but beyond that, what qualifications does an appointing party want? They want someone to have reasonable experience and competence in the nature of the case and issues to be decided—not so much exact experience (e.g., "I'm looking for an arbitrator who has arbitrated at least three matters involving silver mines in Peru"), but rather someone who is generally familiar with the construction subject matter issues that are in dispute in your case. The appointing party will also want someone who has some gravitas, sufficient to command respect with the opposing parties' counsel, and with the chair, so that the party-appointed arbitrator's views will be seriously considered. It is also desirable to choose someone who is sufficiently familiar with the construction arbitration community to be able to pick an appropriate chair or presiding arbitrator, if that is what the agreement or rules provide. While the party-appointed arbitrator will seek to hear and fairly judge the positions of both parties, it is also important that the party-appointed arbitrator be sufficiently versed in the subject matter so that he or she can help explain and clarify to the tribunal, as necessary, the positions being taken by the appointing party—but, again, without acting as an advocate. And finally, the party-appointed arbitrator must be prepared to do what can be done to make sure that both or all of the parties are given a fair and reasonable opportunity to present their evidence to the tribunal.

Neutrality of Party-Appointed Arbitrators

How can arbitrators maintain their neutrality when they are appointed by either side? Based on anecdotal experience rather than empirical data, it is probably

fair to say that the vast majority of construction arbitration awards are unanimous, even with party-appointed arbitrators. Why is that so? Yes, a construction arbitrator may have some sympathy for one side or another, but to be successful in the practice of construction law, in construction consulting, in the construction industry or as a independent arbitrator, one must be seen as fair and willing to call "balls and strikes," "a spade a spade," "a rose a rose" or "a turkey a turkey" when the chips are on the table and the evidence is there.

What to Look for in a Presiding Arbitrator

Typically, the two party-appointed arbitrators will select the chair or presiding arbitrator. So what are the desired criteria for the ideal candidate? They will want someone who has the following qualities:

- Can be immediately responsive to the parties when an issue or problem arises and, if the chair cannot be available, will immediately appoint a wing arbitrator to deal with the issue;
- Is prepared to schedule hearings as soon as possible and keep the process moving;
- Has knowledge of dispute resolution process;
- Will issue procedural rulings as soon as possible, especially on discovery issues;
- Can work with the wing arbitrators to achieve as much unanimity as possible on decisions and awards;
- Has the ability to draft directions, orders and awards;
- Is computer and tech savvy and can deal with electronic documents, including downloading documents from websites and using hyperlinks for references to documents and authorities; and
- Has the highest integrity and reputation for fairness, but who can be firm enough to make tough decisions.

Investigating Arbitrator Experience and Qualifications

How does a party or counsel go about investigating a potential candidate's qualifications? Most of the surveys say that in-house counsel typically rely on their outside counsel to find qualified candidates.[1] The typical methods used by outside counsel are the following:

- Contacting their peers; i.e., counsel may contact their own partners or colleagues in other firms with such queries as "Who have you used for this kind of case?" and "What was the result?" and "How did the candidate perform?";
- Visiting the websites of organizations such as JAMS (www.jamsadr.com), the American College of Construction Arbitrators (www.accl.org), the Chartered Institute of Arbitrators (www.ciarb.org) and the College of Commercial Arbitrators (www.thecca.net); and
- Looking for publications by the candidate or court cases in which they have been involved.

One very important question to be considered is whether it is desirable to have an arbitrator who is a lawyer or who has a legal background. The answer to that question should be in the context of the types of issues that will likely arise in the case. In most large construction arbitrations, the issues are going to be mixed. There will be legal issues, such as interpretation of a limitation of liability or indemnification clause. And there will be technical issues, such as how to interpret geological data. For these reasons, it is good to have a mix of qualifications, and most appointing parties will want the presiding arbitrator to be legally trained, if for no other reason than to be able to deal with discovery and legal issues.

One of the most effective tools in selecting an arbitrator—certainly in an important case—is to conduct an interview of the candidate. Interviews are permitted by most arbitral institutions, but some countries do not permit interviews. And some arbitrators, particularly those in Western Europe, will not agree to an interview. The interview is typically conducted *ex parte*, but the occurrence and substance of the interview is disclosed to the other party. Interviews for the chair position are usually jointly conducted.

Is an interview ethically appropriate? Yes, if it is conducted under strict guidelines. Probably the best and most detailed guideline for conducting arbitrator interviews was published by the Chartered Institute of Arbitrators in 2007: "Practice Guideline 16: The Interviewing of Prospective Arbitrators."[2] Boiled down to its essentials, CIArb Guideline 16 approves brief discussions with a candidate, but they are limited to the following:

- The identities of the parties, counsel and witnesses, in order to determine independence and impartiality;
- The estimated time and length of the anticipated hearings;
- A description of the general nature of the case, sufficient to determine if the candidate is competent to decide the dispute, has disclosures to make and has the time to devote to the matter;
- The candidate's background, experience, qualifications in and familiarity with the construction industry in general, as well as with the particular dynamics of the construction processes or technical issues involved in the case at hand;
- Any published writings, including books, articles, professional papers, seminar presentations and teaching experience, that are relevant to the construction processes or subject matter involved in the arbitration;
- Previous representation of parties in construction cases, if the prospective arbitrator is a lawyer or has practiced as an advocate or represented parties in construction matters;
- Prior service as an arbitrator, particularly in construction cases, including any published decisions;
- The candidate's general approach to managing arbitral procedures and document disclosure in construction cases;
- Whether the candidate feels competent to determine the parties' dispute, including the extent to which the prospective arbitrator is comfortable with email and communicating and dealing with electronic data, which is the modern and normal way of communicating and storing much of the information on construction projects; and
- The candidate's ability to devote sufficient time and attention to the dispute.

It would be prudent to send the topics or questions to the candidate(s) in advance of the interview so that the candidate may be prepared. It is also prudent to record or document the details of the meeting or conference call in order to address potential questions about the scope of the discussion.

Conclusions

The concluding lessons are these:

1. Nothing is more critical in an arbitration proceeding than selecting the arbitrators, recognizing that arbitrators have greater procedural authority and wider discretion in the conduct of proceedings than do judges in litigation.
2. The first and best opportunity to consider and control the arbitrator selection process is when drafting the arbitration agreement.
3. While parties naturally prefer having a party-appointed arbitrator who will be sympathetic to their case, the proper selection criteria will be choosing someone who is experienced in the subject matter, held in high regard by the arbitration community and capable of clarifying and explaining the positions of all parties, including the appointing party, to the tribunal members.
4. The fact that a party-appointed arbitrator may have sympathy for the appointing party's case does not mean that he or she is biased, as indicated by the fact that most awards in construction cases are unanimous.
5. The presiding arbitrator should be a person who has the time and is prepared to immediately respond to procedural issues when they arise and keep the process moving, will work to achieve consensus among the wing arbitrators and has the substantive and technical capability to write up directions and awards.
6. It is perfectly appropriate and highly effective to interview prospective arbitrators while keeping the content and scope of the interviews within appropriate bounds. ■

1 For recent surveys, see, e.g., the 2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process, jointly sponsored by Queen Mary University of London and White & Case LLP (http://annualreview2012.whitecase.com/International_Arbitration_Survey_2012.pdf) (2012), and Trends in International Construction Arbitration, sponsored by Navigant Construction Forum (http://www.navigant.com/insights/library/construction/construction-forum/trendsin_international_construction_arbitration/) (October 2012).

2 See http://www.ciarb.org/information-and-resources/Practice%20Guideline%2016%20April2011.pdf.

SPEAKING ENGAGEMENTS, ARTICLES AND HONORS

KENNETH C. GIBBS, ESQ. and **BARBARA A. REEVES NEAL, ESQ.** will serve as instructors at a seminar titled "Alternative Dispute Resolution: Effective Strategies for Preventing and Resolving Construction Claims" presented by the Construction Management Association of America – Southern California Chapter, on May 29, 2013 in Long Beach, CA.

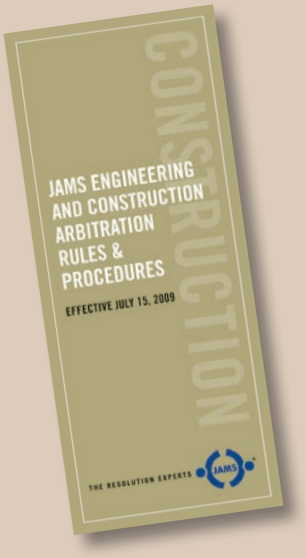
PHILIP L. BRUNER, ESQ. will speak on May 31, 2014, to The Canadian College of Construction Lawyers at its annual meeting in Vancouver BC on the subject of "Dual Track Proceedings in Arbitration and Litigation."

PHILIP L. BRUNER, ESQ., ZELA "ZEE" G. CLAIBORNE, ESQ., RICHARD CHERNICK, ESQ., ROBERT B. DAVIDSON, ESQ. and **JOHN W. HINCHEY, ESQ.** are among the faculty participating in "A Comprehensive Training in Commercial Arbitration" presented by the ABA Section of Dispute Resolution on June 6-7, 2014 in Washington, DC. Zee also has recently published an article titled "Top Five Myths about Commercial Arbitration" on the Law.com network.

JOHN W. HINCHEY, ESQ. and **BARBARA A. REEVES NEAL, ESQ.** have been appointed to the Approved Faculty List of the Chartered Institute of Arbitrators.

HARVEY J. KIRSH, ESQ. and **GORDON E. KAISER, ESQ.** have been listed in the *Chambers Global Guide 2014*. Harvey also has been chosen to be listed in the *International Who's Who of Construction Lawyers*.

PHILIP L. BRUNER, ESQ. and **HH HUMPHREY LLOYD, Q.C.** have been named as Founding Fellows at the inaugural meeting of the International Academy of Construction Lawyers.



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- **JAMS ENGINEERING AND CONSTRUCTION ARBITRATION RULES AND PROCEDURES**
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ROBERT B. DAVIDSON, ESQ. has been appointed as the standby arbitrator to arbitrate, on an expedited basis, any design disputes that may arise out of a major hotel renovation project in New York City.

KENNETH C. GIBBS, ESQ. has been engaged to mediate claims arising from the construction of a major electrical power plant in West Virginia.

VIGGO BOSERUP, ESQ. is the chair of an arbitration tribunal hearing a dispute involving the construction of one of the largest utility construction projects in the history of the state of California.

BARBARA A. REEVES NEAL, ESQ. has been engaged to serve as hearing officer in a public contract dispute arising out of a water district project in California.

JOHN W. HINCHEY, ESQ. has been appointed as a party-appointed arbitrator in an international arbitration involving the owner and contractor of a large chemical manufacturing facility on the Gulf of Mexico.

John Hinchey will also serve as Chairman of a panel to which he and **ROY S. MITCHELL, ESQ.** have been appointed to resolve a dispute arising out of the construction of a major electrical power plant in West Virginia.

JAMS Global Construction Solutions Board of Editors

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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