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Volume 4, No. 3 · Fall 2011

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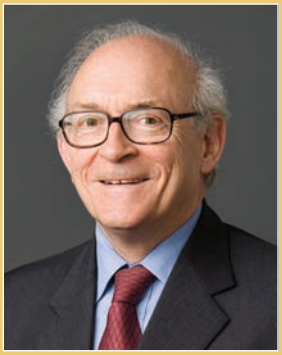

Costs in International Construction Arbitration

BY HIS HONOUR HUMPHREY LLOYD QC

Are we going to win? If we win, will we recover the fees and expenses that we paid to our lawyers and others? If we lose, what will it cost us? These are familiar and legitimate questions that clients ask. At the outset of any construction arbitration, a party wants to know not only what it may have to pay, but whether it will get back any of the costs spent on the case should it be successful. Pessimists and realists also wish to know the costs that might be due if the outcome was unsuccessful.

Predicting the outcome of any arbitration is never easy, and in international construction arbitration, the uncertainties are heightened. International arbitration is only occasionally played on a "home ground," i.e., where the tribunal and the parties' lawyers share the same legal background, so the arbitration is in all

See "Costs" on Page 2

JAMS Goes International—and U.K. Adjudication Comes to the U.S. and JAMS

By PHILIP L. BRUNER, ESQ.

Arbitrator, Mediator, Dispute Resolver and Director of the JAMS Global Engineering & Construction Group

In a development significant to the U.S. engineering and construction industry, some major U.S. players are beginning to write U.K. "adjudication" into their contracts as the initial dispute resolution method of choice and are calling for administration of the process by JAMS. Originating in the United Kingdom's Housing Grants, Construction and Regeneration Act of 1996, "adjudication" seeks to minimize the impact on project completion of disputes arising during construction by requiring contracting parties to submit their disputes promptly to an adjudicator for an initial decision, typically issued within 30 days, that binds the parties until project completion and is subject to challenge and appeal only thereafter. The objective of the adjudica-

See "U.K. Adjudication" on Page 11

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Costs continued from Page 1

but name indistinguishable from a domestic arbitration. More usually, some or all of the tribunal and the lawyers will be from other countries and will see things differently. Their approach to, and assessment of, the facts and their interpretation of the contract create imponderables. Moreover, in arbitration there is a dearth of precedent. Although in domestic arbitration the "track record" of some arbitrators may be known, that is rare in international arbitration. Just as it can be difficult to predict the final result, so too is it not easy to forecast where the costs will go. Home practice is not a reliable guide in international cases.

Decisions on costs are in the complete discretion of the tribunal. But some indication can be given as to how the arbitrators might jump. I take as my base the point of view of users of the major institutional body for international arbitrations, the International Court of Arbitration of the International Chamber of Commerce (ICC Court). It has annually over 1,500 international arbitration cases, about 20 percent of which concern engineering and construction.

There is more discussion about practice under the ICC Rules than any other rules. For international construction, the ICC Rules are used more than any other. However, the rules and practice of others are similar, such as the London Court of International Arbitration (LCIA), the International Dispute Resolution Centre (IDRC) and the UNCITRAL Rules. Article 34 of JAMS International Arbitration Rules follows international practice.

There is much debate about why the costs of arbitration are high. Even major users complain vociferously (but seemingly do little to control cost). The Centre for Commercial Law Studies at Queen Mary, University of London, recently published a survey of major users' reactions. The Chartered Institute of Arbitrators has conducted a survey into the actual costs of international commercial arbitration as so little is known about them. What is clear is that the bulk of the costs in complex cases, such as construction, are incurred by the parties themselves—usually 80 percent or more of the total costs. Administrative costs and arbitrators' fees and expenses account for the balance, typically, around 2 to 5 percent and 15 to 18 percent, respectively.

So how does money come to be spent?

Advance or Deposit

At the outset of the proceedings, the institution or the arbitrators will be titled to require money paid upfront to guarantee payment for their services. The amount required is generally based on the value of the claimant's claims, as presented by it. The ICC requires a nominal sum on lodging the request and then assesses the substantive advance once the value of the claim is clear (see Article 37 of the 2011 Rules, formerly Article 30).

The ICC Rules and other institutional rules (such as the JAMS International Rules) contain scales to determine the amounts due. The ICC Court keeps an eye on value since, if it changes or the case becomes more complex, more may be required for the tribunal (see Article 37.2). This can be done right up to the award, although generally there are no further changes by the time of the hearing. In construction cases, the initial deposit is commonly increased because of the amount of work required of the tribunal. Parties should, therefore, try to see that the points in dispute are identified and simplified as early as possible.

Each party is expected to pay half the advance. If the respondent does not pay (or the claimant if the respondent is the dominant party), the claimant will be required to make up the shortfall; otherwise the case is liable to be suspended. If there is a counterclaim, a separate advance may be required in respect of it. Separate advances may also be required in multi-party cases or where there are distinct claims or cross-claims. Advances are paid in U.S. dollars (in cash, although bank guarantees may be accepted in lieu). A party that pays more than its share will hope to recover it from the other party at the end of the case.

What then happens at the end? Who may be paid what? The costs of an arbitration fall under two main heads:

1. The arbitrators' fees and expenses; the expenses of any administering institution; and, if incurred, the fees and expenses of any expert appointed by the tribunal; and
2. The reasonable legal and other legal costs incurred by the parties for the arbitration.

Allocation

The ICC Rules require the tribunal to fix the costs of the arbitration in the final award in which it will "decide which of the parties shall bear them or in what proportion they shall be borne by the parties" (Article 37.4). The new ICC Rules now follow other rules and permit the tribunal to make decisions prior to the final award about costs that are not fixed by the Court and to order payment (Article 37.3).

So at the end of the last hearing, the tribunal will direct the parties to make their written submissions on allocation and amount and will give each party the right to make

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reply submissions before it closes the proceedings (see Article 27, formerly Article 22). As the tribunal has virtually unlimited discretion, its decisions on costs (as on the merits) are essentially unchallengeable unless arrived at without having had representations from the parties. Submissions are normally in writing. A hearing about costs only is unlikely, although sometimes the tribunal may be addressed orally at the end of the hearing. Submissions about costs have thus to be presented "in the dark." As the outcome of the case will not be known, submissions may have to be made on alternative bases. But, if the range of hypotheses is wide, the parties may agree that the tribunal should make an interim award on all issues other than costs and then, once that award is published, may present their submissions on costs. This will delay the final award, so claimants may not agree to it. An opposed application for an award on all issues other than costs is not normally granted. Tribunals tend to wish to wrap up the whole case in a single and final award.

Basis of Allocation

It is customary in international arbitrations for a party that wins—sometimes called "the prevailing party"—to recover its reasonable costs. Article 40(1) of the UNCITRAL Rules says, "The costs of the arbitration shall in principle be borne by the unsuccessful party." Success is judged by the outcome. The party that makes a monetary claim that succeeds (even if not fully) will be the winner. Normally, the test is that of overall success. However, the tribunal may take into account all circumstances that it considers relevant. These include whether a party has conducted the arbitration in an expeditious and cost-effective manner (new Article 37.4). In construction disputes, a claimant may well get less or nothing for some claims. Some hearings may have been about individual claims. However, the tribunal would have to be given material about the costs and to be satisfied the claim was severable before it could assess costs on an individual basis. Thus, the respondent might be given its costs of successfully defending a claim or would not be ordered to pay some or all of the claimant's costs where the claim had succeeded only partially.

On the other hand, arbitrators from certain jurisdictions (e.g., some European civil law countries) regularly apportion costs on the basis of how much was claimed, how much was recovered. A claimant that recovered only 60 percent of its total claim might find itself being ordered to pay 40 percent of the administrative and tribunal fees and expenses, with the respondent being liable for 60 percent. If the claimant recovered only 60 percent of its legal and other costs, the apparent victory might be Pyrrhic. As indicated, allocation may also be based on conduct. A party thought to be unreasonable may get a meager award, even if successful on the merits, or, if unsuccessful, may find that it is ordered to pay the other party's costs in full. Arbitration is notorious for being "gray"—with tribunals fudging the issues. Some tribunals feel that it would be "kind" to an unsuccessful party not to require it to pay all (or even any) of the costs of the prevailing party.

Arbitrators' Fees and Administrative and Other Expenses

In ICC and similar institutional arbitration, the institution fixes the fees and expenses of the tribunal payable by the parties (subject, in the case of most non-ICC arbitration, to any prior agreement about fees or expenses). Unless agreed by the parties, the arbitrators will have to pay VAT or other taxes due on the amounts they receive.

Under the ICC Rules, the amount payable is determined by the ICC Court when the draft award is approved. That amount, together with the administrative fees and expenses,[1] is taken from the advance or deposit. Any balance is paid or repaid in accordance with the tribunal's allocation. In the final award, the tribunal will direct, following its allocation, how much of a winning party's deposit is to be paid by the losing party. The ICC Court does not give much guidance about how it decides remuneration. However, ICC practice is "performance-related," as the fee is a sum and not based on

See "Costs" on Page 4

Costs continued from Page 3

hourly rates. The Court takes account of a range of factors: "the diligence of the arbitrator, the time spent, the rapidity of the proceedings, and the complexity of the dispute." From the point of view of the arbitral tribunal, diligence and rapidity may be important. If the proceedings are not conducted reasonably quickly or if submission of the award is delayed, then the amount payable to the arbitral tribunal may not be reduced. If the arbitration goes the full distance and results in an award, the amount payable to the arbitrators may well be less than they would have got if remunerated on the basis of time, as would ordinarily happen in a non-institutional ("ad hoc") arbitration. That is one of the reasons why arbitration under the ICC rules is usually less expensive than such an arbitration.

Under the LCIA Rules, the hourly rate is set at the outset. The LCIA caps its rate (which for many arbitrators may be below market rate). Cynical arbitrators thus observe that in an ICC arbitration, it can be better for them if the case settles at an early stage, since the amount then payable will usually be adequate compensation for the time spent. Interim payments on account are normally only made, if requested, and are mainly linked to certain "concrete" non-repeatable steps in the arbitration.

In ad hoc arbitrations, the arbitrators must make their own arrangements with the parties for the payment of their fees and expenses—so the same rates may not be paid for all, although such inequality is to be avoided.

Parties' Costs

In the absence of agreement, the tribunal decides on the amount recoverable by the prevailing or successful party for the costs of its legal representation and other costs incurred in the arbitration.

What costs are recoverable? First, the ICC Rules and the LCIA Rules refer to the costs "incurred" by the parties. Tribunals frequently require proof of payment because that tests both whether the costs claimed have actually been paid and whether they are reasonable, since in business people do not pay costs that are not acceptable (especially states and commercial organizations used to arbitration). However, a party that has agreed that its lawyers or other advisers should be remunerated only by reference to the amount recovered may recover nothing if the tribunal takes the view that "incurred" means "paid," as that amount will not be known until the award is made, quite apart from the consideration that contingent or conditional fee agreements that may confer more than the normal fee are not reasonable. "No win, no fee" arrangements may not be treated as reasonable in international arbitration.

Second, under ICC rules and other rules, the costs must have been incurred "for the arbitration." Costs of ancillary judicial proceedings would normally not be allowed. Costs incurred for the purposes of earlier dispute resolution procedures, such as to obtain decisions of contract administrators, or for dispute board proceedings or for mediations prior to the start of the arbitration, are unlikely to be recovered, even if the results (e.g., of investigations) are used in the arbitration. In most instances, such costs would have been incurred to avoid arbitration, not for it. Only in retrospect might the costs be said to be for the arbitration, but that may not be enough. However, the commencement of the arbitration is not the starting point, since preparatory work is always required for the arbitration.

Third, the presentation of a claim for costs will involve some waiver of lawyer–client privilege, as it will not be possible to present a convincing case and to show how and when the costs were incurred without providing some detail. A tribunal will award costs only if it is satisfied that they were reasonable, and reasonably incurred, for work done directly and necessarily related to the arbitration. What is reasonable will depend on the tribunal's background. Some arbitrators are surprised at the amounts claimed—not always because they appear high.

How much detail has to be provided? When asked, I usually say: "The amount of substantiation that you would expect to receive from the other party." Detail is needed since the tribunal may have to decide on items or amounts to which objection is taken. In many cases where the parties are similarly represented, there may be little in issue since each presentation will reveal comparability in hours and rates, etc. In some countries, published tariffs are available to support reasonableness of rates. Lawyers' charges that cannot be shown to be the product of specific time and rates are unlikely to be recovered, as their reasonableness will not have been established. Since billing records are now computerized, printouts showing the time spent can be produced. The rates for each fee-earner must be given with, if necessary, some justification to show that they are in line with "market rates." It should also be clear what the rates do and do not include, as practice about incidental and overhead costs varies (e.g., communication costs).

What other costs may a tribunal award to the prevailing or otherwise successful party? The costs of assembling and copying documents (which can be large in construction cases), the cost of the hearing and all other

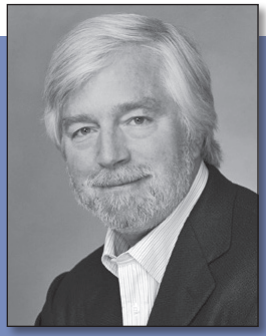
such costs should be recoverable. The ordinary expenses of witnesses called for the hearing are recoverable. The reasonable costs paid to a witness to attend who is no longer with a company should be recoverable. However, the time of a witness still employed is not normally recoverable in a construction case, unless untoward. Disputes and dispute resolution are part of construction, and their costs are part of the overheads or home office costs of most. Only in exceptional circumstances would the time of employees be recoverable (and then only with substantiation of the time actually spent and the reasonableness of the rate claimed).

Similarly, it should not be assumed that the costs of in–house counsel will be awarded, unless they made an unusual contribution to the presentation or success of the case.

Difficulties can arise in relation to experts. The fees and expenses paid to experts for the evidence that they actually gave to the tribunal are, of course, recoverable in principle. A party is unlikely to be awarded anything for any other expert (unless the other party had accepted the proposed evidence). Obviously, the fees paid for an expert whose evidence was not admissible are not likely to be awarded but fees paid to experts whose opinions were not accepted or which did not assist the tribunal may well be disallowed, as they would be regarded as not cost-effective or unreasonable. It can be prudent for a party at the preliminary meeting to obtain the sanction of the tribunal for an expert and for the work undertaken. The amounts paid to experts are usually scrutinized with care. They can be at least as great as, and sometimes even greater than, the legal costs. Justification, not just the bill, will have to be provided. ■

1. They may also include the fees and expenses of an expert appointed by the arbitral tribunal.

Based in London, His Honour Humphrey LLoyd QC is a JAMS arbitrator and mediator and a member of the JAMS GEC Group Advisory Board. Email him at hlloyd@jamsadr.com or view his Engineering & Construction bio online.



The Collaborative Settlement Process and Its Application in Construction Disputes

By DUNCAN W. GLAHOLT and R. BRUCE REYNOLDS

The idea of collaborating to settle a construction dispute occurred to the authors approximately three years ago, shortly after we were hired by opposite sides in a dispute over a small hydro-electric dam that was already two years late and not yet finished, at a cost to the design/builder of over three times the original contract price.

We knew each other well professionally and personally and had worked on the same and opposite sides of files for over 25 years. We shared a common understanding of our roles as lawyers. We were advocates in an adversarial system, whose role was to bring all of our professional skill to bear in advancing our client's best case. Initially the path forward seemed clear. The design/builder would sue. The owner would defend and counterclaim. As counsel in an adversarial system, we would proceed cooperatively but competitively toward a resolution on the merits. At the same time, there was a probability approaching a certainty that, like the vast majority of construction claims, the dispute would ultimately settle.

This well-worn path forward was the problem. We both recognized that working competitively was, in a sense, wasting a good deal of our common experience and skill, and therefore wasting a good deal of what the client thought that they were paying for—our knowledge and our judgment. We decided to try to find a way to deliver our clients their best, merits-based settlement without the in-between steps of pleadings, productions, mediation, arbitration or trial. Unfortunately, conventional construction industry ADR offered us no models for such a process. We had to make one up ourselves, and we did. It worked. We were fortunate to have sophisticated, well-resourced clients who were willing to experiment with a new model of dispute resolution. This was particularly risky for the public utility involved because its rates were set by a public body that would eventually

See "Collaborative" on Page 6

Collaborative continued from Page 5

audit the whole process to determine if it was sufficiently robust to justify passing the settlement and its attendant costs on to the consumer. The process was eventually audited over two days of hearings and passed such scrutiny.

As counsel in a collaborative—as opposed to a competitive—environment, we ended up working together, daily for the most part, with teams within each firm and within each client organization, toward a common goal: an early, merits-based settlement.

Although we did not realize it at the outset, we came to realize that what we were doing was "collaborating" in the true sense of that term: working jointly on a common project, in our case, the early, merits-based settlement of a complex construction industry dispute. At the same time, it must be acknowledged that we were somewhat concerned about the less savory secondary definition of "collaboration," which carries with it an ominously cautionary message to lawyers in an adversarial legal system: cooperating with the enemy.

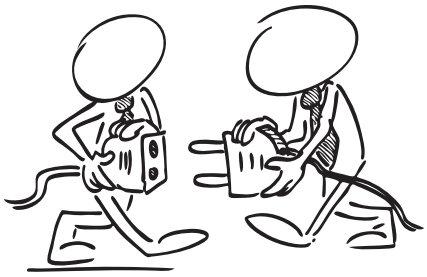
In the result, however, we realized that the best way to conceptualize the collaborative settlement process was—for the purpose of the process—to obtain instructions to treat the "merits-based settlement" as a kind of common client for both firms involved. In a sense, we served the interests of our clients by serving the interests of a merits-based settlement. The basic structure that we developed was as follows:

a. Stage 1 – Disclosure of relevant non-privileged documents, including emails and documents helpful to both the disclosing party and the opposing party;

b. Stage 2 – Counsel-to-counsel meetings (excluding clients) in which each side presented the theory of its case and the other party questioned the presenters' theory;

c. Stage 3 – Confidential memoranda from the counsel to their respective clients reviewing the strengths and weaknesses of the case and recommending a sensible settlement range; and

d. Stage 4 – A one-on-one client-to-client meeting between two senior decision makers, in which the client representatives would attempt to settle the case.



Importantly, both of our clients operated in a highly regulated environment, and they knew that they would have to work together in the future.

The CSP Conceptually

a. The Collaborative Settlement Process (CSP)

Experience had taught us that it was the rare construction industry case indeed where the immense investment in pre-trial process was in any way proportional to an improvement in the provable merits of the case. Yes, there is the occasional smoking gun out there that some would argue justifies the expense of an elaborate trial process, but these cases are few and far between when sophisticated construction industry stakeholders are involved. Our general, inductive proposition was (and is) that if an issue in a case between two sophisticated construction industry stakeholders looks "50/50" or "90/10" after a good, hard, joint look at the facts and law, and after consideration of any necessary input by experts, then, in all probability, it will still look "50/50" or "90/10" after pleadings, productions, prehearing examinations and much of the eventual trial or arbitration. In a business environment where clients are often seeking the 80 percent solution and the resistance to significant expenditures on legal fees is intensifying across the market, it seemed to us that the clients could very well consider it commercially unwarranted to spend millions of dollars and years of effort to fight for that last 20 percent of the "real" case.

Importantly, both of our clients operated in a highly regulated environment, and they knew that they would have to work together in the future. Neither client was heavily invested in being proven "right" by an arbitrator or judge years down the line. While both clients valued early settlement, neither could agree to anything that was not strictly merits-based. We concluded that we could do more for the clients by pooling our experience and resources and by working together with a single goal in mind: attempting to achieve a merits-based settlement.

The process was designed to test the factual narratives and counter-narratives and the legal strengths and weaknesses of each side's case in a short, intense period of joint activity. Our work product would be a reasonably reliable "snapshot" of a likely end result on the merits, based upon the facts as (admittedly) partially known and the law as commonly understood. This quick, jointly

prepared "snapshot" was intended to provide the client's senior business people with the tools they needed to settle on the merits, confident that not much would likely change if they saw the whole process through to the bitter end. If the process we developed was sufficiently robust, it would also meet the needs of regulators and the respective boards of directors of the clients.

The result of our discussions was the collaborative settlement process described above, or "CSP."

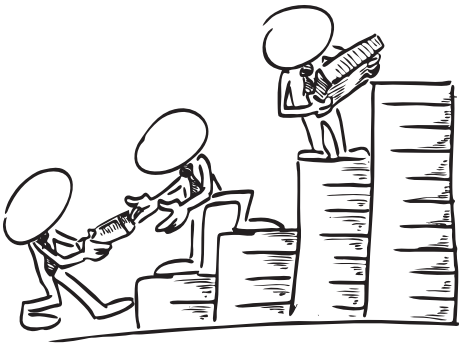
The CSPs we have implemented to date have had the following common elements:

i. Instructions: Obtaining clear and informed instructions to engage in the CSP was, of course, essential to proceeding.

ii. Candor: Safeguards were put in place to permit us and our clients to deal with each other in complete candor. As a settlement process, of course, everything said or done by the firms involved, or the clients assisting them, was protected by settlement privilege and we asserted this as part of our CSP agreement. The only other privilege we respected in exchanging documents during the CSP was solicitor/client privilege. Otherwise, the parties and counsel dealt with each other with candor. This meant acknowledging factual and legal weaknesses in our respective cases. We would argue the factual and legal issues with each other, daily at times, to generate lists of further information or case law we needed to inform our debate. We would then locate and exchange this information or case law and repeat the cycle, beginning with a fresh debate until we had gone as far as we could go on a given issue. We both knew that, sooner or later, all of the non-privileged documents, good or bad, and all the evidence of the witnesses, good or bad, would likely come out; we were just working together every day to accelerate the process. All contractual time periods and notice periods were expressly waived, tolled or deemed to have been satisfied as long as the CSP was underway. The obstacles to candor were removed.

iii. Transparency: Legal and factual strengths and weaknesses were to be revealed, explored, tested and resolved as far as possible. We reserved a day or two for the claimant's lawyers to make their best case to the respondent's lawyers, without the clients present (so as to eliminate any temptation to posture), and to be challenged vigorously on that case. We then had a second day where the respondent presented its best case to the claimant's lawyers, without the clients present, and was challenged vigorously on that case. Each counsel then summarized the lawyer-to-lawyer exchange in a confidential memorandum to their own client, who then met their counterpart, without counsel present, at a business-to-business, one-on-one meeting to attempt to settle the case. Transparency in revealing the strengths and weaknesses of our own cases was, without a doubt, the most counterintuitive part of the CSP. It would have been impossible to accomplish this had we not had complete confidence in each other's commitment to the success of the process.

iv. Immediacy: Our first experiment with a CSP happened in "real time," as the relevant project was nearing completion and turnover. This was burdensome to the clients. The CSP drew heavily and intensively on scarce resources within our clients' organizations. When we needed access to witnesses or documents, the client had to make the witnesses or documents available right then, no exceptions. We could not wait weeks, or even days in some cases, for answers to important factual questions; we had to act immediately. People had to be flown places. Statements had to be prepared and signed. Documents had to be located, sometimes overnight. This meant expense. Overtime had to be paid. The client had to commit to this level of participation in the CSP up-front to permit it to happen. Each client paid its own expenses of the CSP.



We both knew that, sooner or later, all of the non-privileged documents, good or bad, and all of the evidence of the witnesses, good or bad, would likely come out; we were just working together every day to accelerate the process.

We agreed that our work product to our clients arising out of the CSP would address the merits, such as they were known at that point, and we would leave all interests-based discussions to the clients at their business-to-business meeting.

b. CSP and Mediation

The CSP is distinguishable from mediation in two obvious ways: First, there is no mediator; and, second, "interests" play no part in the CSP

See "Collaborative" on Page 8

Collaborative continued from Page 7

up until the client-to-client meeting. The CSP is purely positional and merits-based until the clients get together without the lawyers involved. Interests are left to the wisdom of the senior client negotiators at their business-to-business meetings following the lawyer-to-lawyer meetings and briefings by counsel. No mediator is required because true collaboration requires exactly the kind of "active listening" that so often is only possible with the interposition of a trained mediator.

c. CSP and Cooperation

Experienced counsel routinely cooperate in bringing construction industry disputes to a conclusion. They agree on schedules. They resolve issues of disclosure as far as possible. They make admissions to abbreviate trials and hearings where admissions are appropriate. How then does this kind of routine cooperation differ from a CSP? In some ways it does not differ. Collaboration is simply cooperation taken to the next level, where the common goal of counsel is not merely the facilitation of the determination of a dispute by a court or tribunal on its merits (traditional cooperation), but rather early merits-based settlement (CSP) without determination by a court or tribunal.

d. CSP, Arbitration and Litigation

Whether or not the CSP is backstopped by arbitration or litigation, the important point is that nothing is decided by a CSP. A CSP generates no interim or finally binding ruling or finding of any kind. If the CSP does not precipitate a settlement, it puts the parties in a better position to choose the issues and the procedures that they must send forward for determination. All of the digging done during the CSP is digging that would have to be done sooner or later in the adversarial arbitration or litigation process, and, subject to agreement, the documents produced in the CSP can be used in adversarial proceedings if the CSP fails.

The CSP in Practice

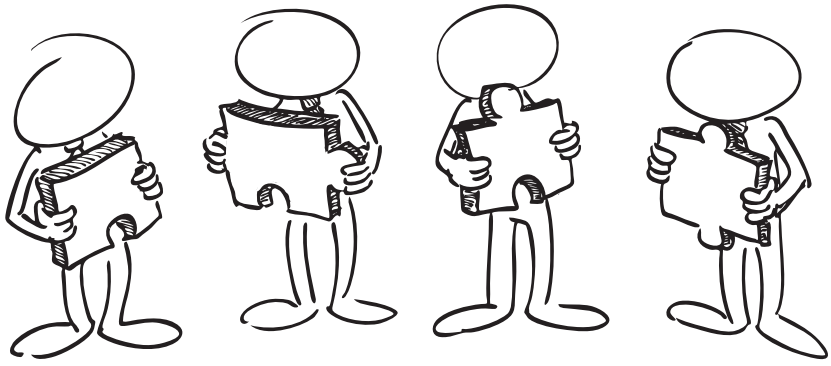
The story of our first CSP is simply told. As indicated above, the case involved the claim of a design/build contractor against a public utility arising out of the construction of a small hydro-electric project that was significantly out of time and budget. The CSP was implemented before the case was pleaded; in fact, no pleadings were ever exchanged. After a brief period of negotiation over terms, we put the CSP in place and commenced our joint efforts. The principles noted above were observed carefully. In particular, we and our clients conducted ourselves with candor, transparency and immediacy in pursuit of a common goal: a merits-based settlement.

Lead counsel spoke by telephone virtually every day and met formally and informally. Witness statements were obtained from key witnesses, but not from corroborating or secondary witnesses. There was no expert evidence. Notwithstanding everyone's best efforts, by the time the case settled there were still gray areas in the factual narrative and in the counter-narrative. There was a delay claim, but no formally prepared delay claim document. The period of delay was obvious, and the real issues, as is so often the case, were causation, notice and concurrency.

Counsel then met at the lawyer-to-lawyer meetings (without clients present). The claimant's counsel made their best case. There was a question period. PowerPoint presentations were used but not distributed. Evidentiary aids were prepared and used, but not distributed. Nothing left the room except counsel's own notes. Later in the same week, the respondent's counsel were given a similar opportunity on similar terms.

Each counsel then prepared a confidential memorandum to their own client, taking into account fairly the strengths and weaknesses in their factual and legal case as revealed by the CSP. This briefing process took approximately two weeks following the lawyer-to-lawyer meetings. The business-to-business meetings occurred shortly after the legal briefings. The case settled.

We and our clients conducted ourselves with candor, transparency and immediacy in pursuit of a common goal: a merits-based settlement.



Ten months later, the public rate-setting agency audited the CSP process over two full days of in-camera hearings. The public rate-setting agency approved the CSP process.

Lessons Learned

a. Role of counsel in recommending and implementing a CSP

In our case, we were working with sophisticated clients with strong in-house legal departments, so independent legal advice on the CSP was not necessary, although it could well be necessary with different clients or in a different situation. Both clients understood the legal nature of the proposed CSP.

We were also working as trusted counsel. The two firms involved had a 25-year history of confident interaction. Without this element of trust, the non-competitive, collaborative process would have been more difficult and risky, and perhaps not possible at all. It occurs to us that collegial institutions like the American College of Construction Lawyers, the Canadian Colleges of Construction Lawyers and the Society for Construction Law may be sources of counsel who could work successfully together in a non-competitive, CSP environment.

We see the CSP as having potential complications. What if a document is disclosed in the collaborative process that proves embarrassing in the eventual arbitration or litigation? What about the insincere participant, who participates in bad faith? How does a lawyer draw the line between their role as counsel in an adversarial system and as a collaborating lawyer in a CSP? If counsel have agreed to "collaborate," to whom do they owe solicitor/client duties of care; does counsel's participation in the CSP open an avenue of contractual obligation, this time to the opposite party, if a key document, for example, is suppressed or overlooked?

b. Limits of collaboration

i. Type of dispute: It seems to us that the CSP is a useful tool when other ADR methodologies require significant investments of time and money before they could reasonably be expected to succeed. In our case, the overwhelming burden of documentary disclosure, examinations and legal issues mandated a different approach. In the cases where we have used the CSP, there were apparently millions of "core"documents, substantial delay claims and a number of highly technical issues requiring expert evidence. In our view, nothing other than a CSP could have quickly and efficiently penetrated this gloom, so as to put the parties in a position to make a merits-based settlement early in the life of the dispute.

ii. Number of parties: In our case, we were working in a two-party environment. While it is not inconceivable that the CSP would work in a multiple party environment, it seems that the involvement of additional parties would increase the risks inherent in the CSP and render it more difficult. If, for example, each party contracted for the right to opt out of the CSP without cause, at any time, this could be a powerful disincentive to the others to invest substantially in the process, and the right to terminate the CSP would potentially empower the least committed of these parties.

Potential Role of the Institutional Dispute Resolution Provider

There is no third-party neutral involved in the CSP as we have conceived of it; however, that is not to say that there may not be such a role. The idea of the CSP will be counter-intuitive to most lawyers trained in the adversarial process, and this makes the process fragile. It could be easy for counsel without a firm commitment to the CSP's principles to begin collaborating but revert to their adversarial roles intentionally or unintentionally during the process. One role for the institutional dispute resolution provider could be to provide CSP coaching to keep parties and counsel on message and truly collaborating.

Conclusion

With all of its limitations, the CSP has proven successful in practical application. We are developing some of the theoretical underpinnings for the CSP in a monograph to be published shortly. We believe that CSP presents an interesting alternative for a business community increasingly frustrated with the cost of conventional ADR and litigation. Importantly, the business community has been calling on our profession for "out-of-the-box" solutions to the cost and time issues involved in ADR, and in this regard, the CSP idea may be worth considering. In our view, we need to attempt to move to the point where the boast is "We settled that case in three months!" not "We tried that case in three years!" The authors would welcome readers' thoughts on the ideas presented here. ■

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JAMS International Arrives in Europe

JAMS has a new wing: JAMS International, headquartered in London. Will it fly?

GEC spoke to Managing Director **Lorraine M. Brennan** as she geared up for the September 2011 launch. Sitting at a circular conference table at JAMS International's new offices at 70 Fleet Street, Brennan was clear about the challenges and opportunities ahead: "Right now, JAMS isn't very well known in most of Europe, but we're confident that we're well positioned to change that. We have a stable, successful and growing business in the U.S. to emulate, and we're fast learning how to fine-tune that model to work in Europe."

The timing of JAMS' move into Europe appears auspicious. "We've opened our doors at a pivotal time," says Brennan. "The May 2011 deadline for implementation of the 2008 EU Mediation Directive was swiftly followed by a UN resolution in June encouraging member states to develop mediation capacities and calling upon parties to any dispute to seek a solution through mediation. If you add to the mix the economic pressures on companies to seek more cost-effective means of managing disputes, you've got a perfect storm," says Brennan. "There's a momentum behind ADR now in Europe, which practitioners here agree is unprecedented."

JAMS International is the first ADR provider to make complex international and cross-border disputes the main thrust of its business. Fielding a panel of mediators and arbitrators, JI's footprint covers most European jurisdictions. Although the take up of ADR in these countries is uneven, Brennan is confident about meeting the challenges: "Anyone who has worked in the legal market in the U.S. knows quite well that it is far from the homogenous market many Europeans think it is; the legal markets in New York, California and, say, Texas are markedly different. We're sensitive to different legal cultures and will craft our offerings in each jurisdiction around the needs of the local market."

"There's a momentum behind ADR now in Europe, which practitioners here agree is unprecedented."

— Managing Director Lorraine Brennan, seen here welcoming attendees at the JAMS International launch

JAMS International has a partner—the ADR Center in Italy—and is developing a network of leading service provider licensees across the continent. Brennan describes the relationship with ADR Center as "an inspired move." The Italian authorities chose to implement the 2008 EU Mediation Directive in May 2011 in such a way as to make mediation mandatory in the overwhelming majority of civil and commercial disputes. Thus mediation in Italy has been transformed from an academic idea on the periphery of commercial dispute resolution to an essential mainstream activity. As a result, ADR Center has been able to open more than 10 new offices in Italy in the first six months of 2011. "And other European countries are taking a look at the Italian model and considering similar legislation," says Brennan.

While 30 percent of JAMS' revenue comes from arbitration, JAMS International will aim first to establish its name in Europe as a mediation provider. "It's important to play to our strengths," says Brennan. "The arbitration market in Europe is already very mature, and despite the fact that many of our neutrals are already doing international arbitration, not only under the JAMS rules, but with the ICC, ICDR and other institutions, it will take a while to establish JAMS as an international arbitration institution. That said, there are tremendous opportunities for JAMS. Some parties balk at paying in advance for arbitration—as they do for the ICC—and want less bureaucracy and a less heavy-handed administration. The JAMS Arbitration Rules provide for that."

The mediation market, largely in the U.K., is also mature and very competitive. Nevertheless, Brennan is confident JAMS can distinguish its offering from others in the marketplace. "The U.K. market is fragmented and over the last decade has evolved away from using service providers. This isn't surprising: As lawyers become more familiar with the process, they have less need for the kind of hand-holding and guidance service providers have traditionally offered. Our emphasis is very much on defining and promoting the talents of our panelists as individuals. Receiving calls for specific, named individuals will be a measure of our success. And we're certain that a well-resourced institution with 30 years' experience in marketing ADR talent can accomplish this more effectively, across a wider geographic area, than sole practitioners whose primary focus is mediation and not marketing."

The U.K. market has also become one of generalist

mediators, and again, JAMS International aims to distinguish its offering by marketing its panelists with specific expertise. "There's a lively debate in the ADR community about whether practice area expertise helps or hinders mediators. Although it's the case that a good mediator should be able to mediate anything, our job is to listen and respond to the needs of the market. And in areas like construction, insurance and financial services, the market wants mediators who speak their language. It helps the mediator inspire confidence early on and gives them a platform from which to use their skills as a mediator. We will be looking to meet that need wherever possible."

The size of the JAMS International panel at launch time will be in the region of 40 and will be composed of a range of barristers, solicitors, academics, judges and lawyers with both civil and common law backgrounds. Brennan is keen to downplay expectation of overnight success, however: "We're not guaranteeing anyone work. It's a two-way process, and experience in the U.S. tells us that those mediators who are prepared to pitch in and market themselves in tandem with JAMS' efforts tend to be those who do best. It's going to take a while for us to

get known as an institution, and it's going to take a while to establish the practices of some of the newer players we'll be putting on the panel. But in three to five years, JAMS International and the European market in general are going to look very different."

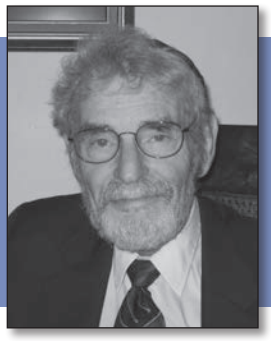
Will JAMS International take off? "Fasten your seatbelts," says Brennan. ■

U.K. Adjudication continued from Page 1

tion process is to keep the parties working and monies flowing without interruption through to project completion. Adjudication thus has been described as the "pay now, argue later" approach. The U.K. experience with adjudication has been highly satisfactory and has been credited with reducing significantly the number of disputes that proceed to arbitration or litigation. Adjudication's success is attributed to its relative economy and efficiency in reducing the disruptive impact of disputes upon project completion, and to the high frequency of parties' acceptance of initial decisions rendered by respected adjudicators. JAMS Global Engineering and Construction Group (GEC) panel members serve as adjudicators.

September 22, 2011 marked the formal opening of the new headquarters of JAMS International on Fleet Street in London under the direction of respected international ADR administrator Lorraine Brennan. The opening reception was held in St. Paul's Cathedral. The International Panel of JAMS GEC includes many of the finest construction arbitrators and mediators from the U.S., the U.K. and around the world. Many U.S. members of the JAMS GEC panel have wide experience on international projects, have spoken frequently on construction and dispute resolution subjects outside the U.S. and have served on international arbitration panels. Illustrative of the breadth of GEC panelist international recognition are its recent speaking engagements, international arbitrator selections and professional involvement. Last December, five JAMS GEC panelists spoke by invitation to the Society of Construction Law Hong Kong; this spring, one panelist taught dispute resolution at a London law school; in August, five panelists addressed the American Bar Association Section on Dispute Resolution in Toronto; in August, one panelist spoke to the Society of Construction Law Australia in Brisbane; and, in late September, five panelists will speak to the Chartered Institute of Arbitrator conference in London on cost-effective international arbitration. Panelists have been selected as arbitrators in recent proceedings held in India, the Philippines, Canada, Barbados, the U.K. and some European countries. Finally, a JAMS GEC panelist is Editor-in-Chief of the highly regarded *International Construction Law Review* published in London with a global circulation, and three panelists serve on its Editorial Advisory Board. JAMS GEC is proud to have on its panel international leaders in resolution of global engineering and construction disputes. ■

Mr. Bruner is a JAMS arbitrator, mediator and project neutral based in Chicago. Email him at pbruner@jamsadr.com or view his Engineering & Construction bio online.



Dispute Resolution: Reasons for Construction Disputes

BY PROFESSOR JUSTIN SWEET

Construction projects are built by many participants connected to each other by complex contracts. In addition to the active players, surety bond companies and insurers play significant roles in the construction process. The network of participants and complex contracts can generate disputes.

Those who commission the projects, called owners or employers, vary greatly in the experience they bring to the project. Some are "one-time" players. Others are routine players that have engaged in many engineering or construction projects. This imbalance of experience can cause many honest misunderstandings.

Often owners are public entities. They are regulated by extensive statutes and regulations. This can lead to complex contracts that are difficult to master let alone understand.

Participants need a constant flow of funds. Any disruption of the money flow can stop work. Work stoppages often create a dispute as to who was responsible. Work stoppages can be generated by powerful trade unions over issues of safety or jurisdiction over work.

Drastic weather conditions can stop or slow down the work. Again, disputes may result from disagreement over who bears specific weather risks. The site itself may cause difficulties. Even if every reasonable effort is made to determine what lies beneath the surface, surprises can be common and costly.

Communication is required to express what needs to be done. Tools of communication to do this are imprecise. This can generate misunderstandings and disagreements. New computer-generated methods, such as Building Information Management (BIM), amplify this.

Other examples can be given. Unfortunately, claims have become so routine that some contractors include an amount for claims overhead in their bids. Planning for disputes is crucial. Planners must be aware of the methods available, their advantages and disadvantages and their appropriateness for the project.

Relevance of Legal System

Domestic disputes are those between parties subject to the same legal system. If such disputes can no longer be resolved by the parties, either party can choose to take the dispute to court. Planners must be able to evaluate the appropriate legal system in order to compare it to a private system, such as arbitration. It may be better to choose a legal system that is cheaper than the private system, is quicker or just as quick and one that will deliver an outcome at least as just as arbitration would give. This comparison is much less likely to be made in an international transaction. In such transactions, it is likely that neither party will trust or respect the legal system of the other. If so, arbitration will be chosen.

Terminology: What Is ADR?

Originally, Alternative Dispute Resolution (ADR) sought to avoid litigation. As formal arbitration tends to resemble litigation, ADR can seek to avoid arbitration and to look for methods to prevent disputes

The reason users give to avoid arbitration is that it will cost at least as much and perhaps more (the state pays for the courtroom and the judge), and it will take at least as much time, especially in an international arbitration, even if the arbitrators will be more knowledgeable than the judge or jury.

Some question the impartiality of the arbitrators, especially if one party is a repeat player or connected in some way with the commercial interests of one party. These attacks have borne some fruit. The American Institute of Architects (AIA) issues the leading American standard construction contract. In 2007, its Document A101-2007, Sec.6.2 deleted the arbitration clause used in earlier contracts and requires an affirmative choice by one of the parties.

Yet arbitration continues to receive favored treatment by the law. But in recent years arbitration has come under attack in the U.S., particularly in disputes between investors and their advisors. It remains to be seen whether, at least in the U.S., arbitration will be challenged in transactions between consumers and those who sell them goods and services. It is not likely that this will

affect transactions such as those that affect engineering services and construction.

Arbitration Providers: Competition

As a rule, arbitration is organized and administered by organizations, some for profit and some not for profit. In the U.S., the main providers are the American Association of Arbitration (AAA) and JAMS. While the basic methods are similar, there are differences. For example, JAMS allows the parties to select a method of appealing the award, while AAA does not. The remedies given the arbitrator vary in the two systems.

In the international arena, the main provider is the International Chamber of Commerce in Paris and various other groups that provide these services in Stockholm, Zurich, Hong Kong and Singapore. Potential users can compare the experience and reputations of arbitrators, the fees, the time spent in hearings, the location of the hearing, time deadlines in the process, the power to make an interim award, the nature of the award and its enforceability. Other differences will be shown in the following section.

Some Drafting Choices in Arbitration

The clause can be a general arbitration clause, one that covers most any dispute that may arise between parties. An alternative is to specify only particular technical issues. There can be choices between a three-party panel and a single arbitrator, or between a three-party panel of all neutrals and one where each party appoints one arbitrator and they appoint the third as a neutral. Fees and other expenses such as travel can be capped, a method used commonly in international arbitration.

Today most arbitral systems allow interim remedies, such as orders to restrain disposal of assets before the award. The right to demand the other's documents and the right to examine the other party's witnesses, known in the U.S. as discovery, can be given or restricted or denied. Where allowed, some international contracts appoint a fourth arbitrator to manage it. Some arbitrations employ strict time controls on every aspect of the procedure, using the chess clock as an example. Some allow multiple arbitrations to be consolidated into a single arbitration, an important feature in multi-party construction disputes.

Domestic and international arbitration have their differences. International arbitration emphasizes written documents. American domestic arbitrations, as do American courts, prefer live testimony. Many witnesses in international arbitrations are expert witnesses. Some international arbitrators employ an independent assessor to manage expert testimony. While arbitrators need not follow the technical rules of evidence, international arbitrators tend to be stricter in evidentiary matters.

Also, as foreign nationals use international arbitrations, language can become an issue. What will be the language of the hearing? (Most are in English.) Such hearings can require interpreters. Sometimes, though rarely, there is simultaneous translation.

The language of the award is likely to be English. The hearings are, as a rule, private. The hearing may be public if it involves a public entity and politics become involved.

While arbitration is still valued highly and encouraged, there has been some criticism. As noted, some believe it has become too much like litigation. As noted earlier, there is a move in the U.S. to bar arbitration in consumer transactions. Some English critics complain that the courts push ADR in order to save money but this downgrades civil justice. Some lawyers and scholars complain that construction law is not being developed, as few disputes go to court. Most are settled or arbitrated.

ADR as Dispute Avoidance

Today planners emphasize dispute avoidance. ADR seeks to do this. There are many mechanisms to do this. A few will be noted.

a. Mediation

Currently, mediation is a favorite mechanism. The AIA has given it prominence in its A201-2007, Sec. 15.3. It should assist negotiation, not be a method of resolving the dispute. It can, if done properly, bridge the gap in communication. It can help each party look at the problem through the eyes of the other. A good mediator can suggest creative solutions not available in court or arbitration. But it can be useless if forced on a party that does not want it.

b. Dispute review boards (DRBs) and their variants

These were first developed in the U.S. in tunneling contracts. The boards usually consist of three members, one appointed by each main party, who select the third. They are chosen when the contract is made and before actual physical work begins. They meet regularly, usually "walk the job," attend site meetings, deal with problems that come to their attention and give their opinions if asked. Their opinions need not be

See "Reasons" on Page 14

Reasons continued from Page 13

followed. Creation of a DRB can be complex and costly with a new set of contracts involved.

One variant used by the ICC in Paris is the Dispute Adjudication Board (DAB). It makes recommendations that must be followed unless reversed by a court or arbitration.

c. Design professional

In common law countries, traditionally the role of interpreting the contract and making an initial decision in the event of disputes was given to the architect or engineer. Because of charges that design professionals were not neutral as they were selected and paid by the owner (employer), they are slowly being supplanted. In the U.K., certain contracts require that the parties agree to use an adjudicator. In 2007, AIA Document A201- 2007, Sec.15.2 created the Initial Decision Maker (IDM). The IDM replaces the architect as the person who makes the initial decision. Failure to designate an IDM gives that responsibility to the architect.

d. Other mechanisms to avoid disputes

To help the parties negotiate, some contracts designate a negotiation facilitator. Some use a Project Neutral that functions much as a DRB. Some use a group of technical experts to deal with fact issues.

Some use multi-tiered systems. One multi-tier system is mediation followed by a mini-trial and then arbitration. (A mini-trial is a mock trial before a mock jury in front of officials of the contesting parties with the goal of getting a settlement.) Another multi-tier system uses a Dispute Review Board, then mediation and then arbitration. All these tri-partite methods start with the least expensive and move, if needed, to more costly methods of resolving the dispute.

Finally, some use nonbinding arbitration. This is designed to give the parties an indication of what a real arbitration would award, much like a mini-trial. Yet it avoids binding arbitration, which makes an almost unchallengeable award.

Conclusion

Disputes are common in construction and engineering contracts. Those who make them must anticipate them. They should devise systems that are appropriate for the particular transaction and avoid escalation of disagreements, avoid disputes, and provide for third-party resolution if needed. ■

Justin Sweet is John H. Boalt Professor of Law, Boalt Hall School of Law, University of California at Berkeley. Professor Sweet presented this paper at the Sixth International Structural Engineering and Construction (ISEC) Conference in Zurich (June 21-26, 2011). It is published with the permission of the author and ISEC.

NOTICES & EVENTS

BOOKS, ARTICLES AND SPEAKING ENGAGEMENTS

- The third edition of **HARVEY J. KIRSH, ESQ.'S** book, *Kirsh and Alter: A Guide to Construction Liens in Ontario,* was published by LexisNexis in September. Harvey also co-authored an article titled "The Evolution of Construction Lien Legislation in Ontario from 1873 to 2011," which was published in the June 2011 edition of *The Advocates' Quarterly*; and his article, "The Vanishing Trial," was published in the "Alternative Dispute Resolution" Focus Section of the June 17, 2011, issue of *The Lawyers Weekly*. His article, "Arbitration: Good, Fast and Cheap—Pick Two," will be published in the September/October 2011 issue of the *Construction Law Letter*.

- **JOHN W. HINCHEY, ESQ.,** was the keynote speaker at the August 4, 2011, Annual Meeting of the Society of Construction Law in Brisbane, Australia. The topic of his paper was "Reducing Adversarialism in Construction Law—A North American Perspective." John also made a presentation to the Australian law firm of Clayton Utz on the College of Commercial Arbitrators' "Protocols for Expeditious, Cost-Effective Commercial Arbitration." And on August 19, 2011, John participated in a panel discussion, sponsored by the Arbitration Institute of the Dispute Resolution Section of the State Bar of Georgia in Atlanta, on the subject of "Recent Developments in Arbitration." John's article, "Managing the Arbitration to Reduce Time and Costs," was published in the recent issue of *DR Currents*, a publication of the Dispute Resolution Section of the State Bar of Georgia.

- On June 21-22, 2011, the Straus Institute for Dispute Resolution of Pepperdine University School of Law sponsored "Teaching ADR in Law Schools," an important conference for teachers and scholars from all over the United States. As Academic Director of the Straus Institute, JAMS neutral **THOMAS J. STIPANOWICH, ESQ.,** assisted in the organization of the conference and was among the panelists. And on April 27, 2011, Tom also gave a dinner address at the Annual Meeting of the Chief Litigation Counsel Association in Chicago. His presentation was titled "Abraham Lincoln as a Master of Conflict: Lessons for Litigation Counsel."

- **DOUGLAS S. OLES, ESQ.,** delivered a paper on "Forms and Forums in the United States" at the Annual Conference of the Canadian College of Construction Lawyers, which was held in Ottawa on June 2-5, 2011.

- The 5th Annual East Region's Construction Defect and Insurance Coverage Conference, sponsored by MC Consultants Inc., was held on June 1-3, 2011, in Boca Raton, Florida. **CRAIG S. MEREDITH, ESQ.,** was the Moderator for the panel discussion on "Case Management—Complex Cases." And the 17th Annual West Region's Construction Defect and Insurance Coverage Conference, also sponsored by MC Consultants Inc., was held on September 7-9, 2011, in San Diego, California. **ALEXANDER S. POLSKY, ESQ.,** was the Moderator for the panel discussion on "California Coverage and Current Trends."

- On May 19, 2011, JAMS neutrals **ZELA "ZEE" CLAIBORNE, ESQ.,** and **HON. READ AMBLER (RET.)** spoke at a program titled "Re-Imagining Arbitration," which was presented by the Arbitration Committee of the Bar Association of San Francisco.

- **HIS HONOUR HUMPHREY LLOYD QC** is the Chair of the Organizing Committee for the Chartered Institute of Arbitrators' International Conference on "The Costs of Arbitration," which was held in London, U.K., on September 27-28, 2011. **JOHN W. HINCHEY, ESQ.,** presented a paper at the Conference on "An Overview of the College of Commercial Arbitrators' Protocols for Expeditious, Cost-Effective Commercial Arbitration."

UPCOMING EVENTS

- At the October 13-14, 2011, Fall Meeting of the American Bar Association's Forum on the Construction Industry in Atlanta, **HON. JAMES ROSENBAUM (RET.)** will be participating in a plenary session addressing "The Shifting Sands of Contract Drafting, Interpretation and Application." **DOUGLAS S. OLES, ESQ.,** will also be leading a workshop titled "Strategies for Technical Defenses."

- On November 23, 2011, **HARVEY J. KIRSH, ESQ.,** will be giving the keynote luncheon address on the topic "Mega Projects: Dispute Resolution" in connection with the Construction Law Certificate Course sponsored by Osgoode Hall Law School in Toronto.

RECENT HONORS / APPOINTMENTS

- **LINDA DEBENE, ESQ.** has been selected to join the American College of e-Neutrals as one of its distinguished Fellows. As a recognized neutral third-party referee, she will be called upon to assist in the resolution of discovery disputes involving electronically stored information. For more than 25 years, Linda has demonstrated her case management skills in serving as special master, judicial referee, mediator, arbitrator and judge pro-tem in complex multiple party disputes.

- **ZELA "ZEE" G. CLAIBORNE, ESQ.,** and **HON. WILLIAM J. CAHILL (RET.)** have been named to the 2011 *Northern California Super Lawyer* list in the Alternative Dispute Resolution category.

- In its 2011 edition, the *Chambers USA Directory* has named **KENNETH C. GIBBS, ESQ.** and **GEORGE D. CALKINS II, ESQ.,** to its distinguished list of Construction Mediators in California. The Directory also listed **JOHN W. HINCHEY, ESQ.,** as a "senior statesman" for "Construction" in Georgia.

- At its June 4, 2011, Annual Conference in Ottawa, the Canadian College of Construction Lawyers named **JOHN W. HINCHEY, ESQ.,** as an Honorary Fellow.

- **HARVEY J. KIRSH, ESQ.,** has been named "Arbitrator of the Month" by ASAP Reporting Services Inc.

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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