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DIRECTOR'S CORNER

JAMS GEC Offers "Rapid Resolution" ADR Training

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

One of the most effective ways to control costs incurred in pursuit or defense of claims is to understand and take full advantage of the myriad creative approaches to construction ADR. No two claims may warrant the same approach, and "one size" of ADR clearly does not "fit all" disputes. Although the 2007 AIA Contract Documents and the 2007 ConcensusDocs sought to stimulate business and law firm focus on crafting appropriate approaches to dispute resolution short of litigation (the "default option" under both forms), for many in the construction industry the dispute resolution issue still comes into focus only after a dispute has arisen or after litigation or binding arbitration has been commenced. By that time, parties frequently regard themselves as locked into expensive contractually stipulated dispute resolution methods, which inexperienced contract administrators or unskilled lawyers tend to follow in rote.

To provide in-house personnel in government agencies, companies and law

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Why Construction Mediations Fail: Two Views

Ten Common Reasons for Failure in a Mediation

By **DOUGLAS S. OLES, ESQ.**

There are many reasons why a mediation can fail, even if all parties are well represented and generally inclined to participate in good faith. The following are some of the more common reasons for failure, a list that may be helpful to review in preparing for a mediation.

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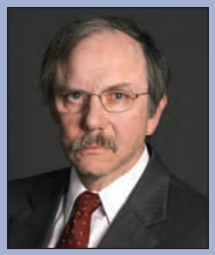
Using Failure Analysis to Design Successful Mediations

By **PAUL M. LURIE, ESQ.**



Mediation is a popular strategy for resolving construction disputes. Standard forms of construction agreements generally contain mediation clauses and many courts now require mediation as a prerequisite to trying construction cases.[1] Not all mediations, however,

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Ten Common Reasons for Failure in a Mediation continued from Page 1

1 **Lack of full accessible settlement authority.** Effective mediation dialogue usually requires each party to have (or have ready access to) broad settlement authority. If persons with authority are not present, they must be readily reachable throughout the mediation.

2 **Premature mediation.** Parties will be cautious about compromising their positions without having a clear understanding of the claims against them and having reasonable opportunity to conduct discovery as to the supporting evidence. The minimal discovery needed for effective mediation will vary according to the complexity of claims and the degree to which parties understand each other when the dispute begins.

3 **Lack of consensus on key issues.** Mediation can easily fail if the parties have differing understandings of the key issues to be resolved. An experienced mediator should attempt to ascertain in advance whether the parties seem to have similar understandings of the issues to be mediated.

4 **Limitations of the mediator.** In the limited time available for mediation, the mediator must be able to grasp legal, technical and inter-personal issues quickly. A person with demonstrated skills as a methodical and dispassionate arbitrator is not necessarily skilled as a mediator. Technical experience in the subject matter in dispute can be helpful, but a mediator's ability to be a "quick study" may be even more important. If mediators have restrictions on their available time, those restrictions should be communicated to the parties at an early stage of mediation.

5 **Counterproductive joint sessions.** Joint sessions (e.g. with PowerPoint slides) are sometimes useful in illustrating complex technical subjects of dispute (e.g., in cases involving construction or design). On the other hand, adversarial presentations can evoke strong negative feelings and disrupt the pursuit of a rational mutually acceptable compromise. Many mediators disfavor joint sessions except in rare cases.

6 **Unwillingness to provide rationale for settlement positions.** At some point in most mediations, discussions of entitlement give way to offers of compromise settlement. Mediators should encourage parties to offer a legal or factual explanation for each such offer (e.g., in terms of assigning percentages of risk to specific claims). Offers that lack such support often lack credibility and lead to frustration of the settlement process.

7 **Hostility or distrust.** Mediation is often most successful when the mediator can convince all parties to approach the issues in a rational manner. Disputes are much more difficult to settle if one party believes that other parties are devious or untrustworthy. Although such beliefs are sometimes justified, they are equally often a product of misinformation or over-reaction. It is often useful for mediators to help explain how an opposing party's position seems to be in good faith and understandable in light of available evidence.

8 **Too many parties & too little time.** When a dispute involves multiple parties or numerous specific issues, a single day may be insufficient to mediate a settlement between them. One alternative is to begin by attempting to mediate initially between two or three key parties. Another obvious alternative is to add more than one day for mediation.

9 **Lack of access to key information.** Parties in mediation should expect to offer documentation in support of their key contentions. If such support has not been included in pre-mediation submissions, it is helpful if parties can bring supporting data with them to the mediation (computer-stored data is particularly handy). It is also helpful

if the place of mediation offers at least limited facilities for making quick copies of documents that address key points raised during the proceeding.

10 Games playing by parties or counsel. In a case where neither party is likely to recover an award of legal fees, it is often unreasonable for a respondent to offer significantly less than the fees it expects to incur to defend the case through trial. There is also too much energy devoted to some of the tactics by which parties deliberately make unreasonable offers in order to prod an opposing party into making the first significant compromise offer. There is no magic formula for leading a mediation to an "optimal" settlement, but much can be gained by making serious thoughtful offers that fairly and reasonably consider the strengths and weaknesses of a party's position. ■

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Using Failure Analysis to Design Successful Mediations

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are successful. And a common reason for failure is that the participants and their lawyers, and poorly trained mediators, don't understand the mediation process. It is much more than just appearing at a "mediation day."

Mediation is a process that should be designed by the mediator based on his or her perception of the risk profiles of the people who will resolve an impasse or have it resolved by third parties. The steps in the process are:

- A genuine agreement to mediate. Sometimes parties lack a real agreement to mediate even when a judge or pre-dispute agreement requires mediation.
- Mediator selection.
- Analysis of the cause of impasse by the mediator. These can be complex in construction cases which typically involve many stakeholders.
- Design of the process to overcome existing impasses and continue with intervention by the mediator in a facilitated negotiation.[2]
- Mediation ends when the neutral is no longer considered useful or there has been a final judgment or arbitration award. Thus, the mediation process can facilitate settlement long after a declaration of impasse at a traditional mediation day.

The construction industry is familiar with the use of engineering failure analysis to determine process failure in order to prevent recurrences of such failures.[3] But most mediation training for both neutrals and advocates concentrates on mediation success stories. Understanding the causes of mediation failure can also be useful in achieving successful settlement through mediation. Using the lessons learned from engineering failure analysis shows us the common reasons mediation fails:

Mediation is not treated as a client-centric process

A well-designed mediation should be client-centric and not mediator nor lawyer-centric. In unsuccessful mediations, lawyers often play the key role, presenting the client's story, both legally and factually, analyzing the risks for the client of not achieving settlement[4] and determining what offers and demands may be acceptable. In other words, the lawyer treats the process like a judicial settlement process. The client's minimal role in this process may result in rejection of a proposed settlement that appears reasonable to the lawyers and the mediator.

Mediators can similarly impede settlements by treating the process like a judicial settlement conference. In a typical mediation, the mediator listens to the advocates and then opines, publicly or privately, on the likely outcome -- the classic evaluation. While the mediator's opinions may have a role when the parties are truly at impasse after extensive negotiations, those evaluations have a negative effect when they are shared early in the process. People who believe the numbers are wrong quickly lose trust in the mediator and impasse is likely.

To achieve settlement, the cli-

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Using Failure Analysis to Design Successful Mediations continued from Page 3

ent-decision makers involved in the dispute must want to settle. This often means more than just agreeing on dollars and avoiding future costs. Some mediations fail because the emotional needs of clients are ignored by the mediator. Examples include situations where there are needs for apologies, perceptions of unfairness, and interpersonal problems among the decision makers, for example, with family owned construction companies or a public or corporate entity without clear lines of decision making for dispute resolution.

Dollar amounts are discussed too early

Lawyers and mediators frequently want to learn the other party's settlement dollar number as soon as possible. As a result, mediators sometimes ask early in the mediation process, "So what is your number?" If the parties do not have sufficient information to evaluate their true position early in the process, they can perceive the other side's number as a sign of bad faith. The party's offering, especially if it comes from a corporate or public body, may create "face saving" problems if the party subsequently backs away from an early number. Experienced mediators know that the right number provided at the wrong time is the wrong number.

The wrong mediator is chosen

Choosing an appropriate mediator can be a very important factor affecting the outcome of the mediation. Unfortunately that selection is often based only on superficial information gathered through inquiries to colleagues and acquaintances or on the same resumes that would be used to hire an arbitrator. Typically, lawyers ask their colleagues only: "Is anyone familiar with Mediator X?" The answer is often the equally general, "Yes, s/he is good." Often mediators are selected because they have served as a judge or arbitrator but may not have any special developed people-oriented mediation skills. Others are chosen based on an assumption that they are more evaluative than facilitative or vice versa.

A better inquiry would probe the following factors:

- What is the mediator's track record? Is the mediator an authority on the business and technical construction situation in dispute? In some situations, expertise in the subject matter of the dispute can give the mediator credibility and create trust.
- What is the mediator's style? What kind of investigation does s/he do before mediation begins? Does s/he encourage the exchange of information before a formal mediation session?
- What are the mediator's interpersonal skills? Is he or she good at "reading" people? At understanding risk appetites? Can the mediator understand any cultural or gender differences at play? Is s/he a "closer?"
- Is the mediator optimistic and hard working? Optimistic mediators set the tone of mediation toward a successful resolution.
- Is the mediator creative? Often cases settle because the mediator sheds a new light on the facts and risks. Innovative mediators are constantly on the lookout for ideas to break impasses.

The dispute is mediated too late

The best time to mediate is as soon as possible after the breakdown in settlement negotiations. Settlements achieved at that time can avoid or reduce expensive legal and expert fees, preserve business relationships that can be a vehicle for non-cash settlements, and avoid the deterioration in interpersonal relationships that affect a party's willingness to settle.

However, many lawyers view mediation as a process that should be used mostly to avoid the risk of a binding trial or arbitration decision and therefore schedule a mediation close to the trial or hearing date after a lot of money has been spent and positions, especially those based on experts, have so hardened that they cannot be overcome. Some lawyers may say that it is inevitable that mediations occur late in the process because of the need for discovery. These advocates do not understand that good mediators facilitate the informal exchange of the information necessary for the parties to evaluate their positions. Mediation can take place even without a pending lawsuit or arbitration and can enlist experts into the process.

The mediator fails to make a proper diagnosis of factors creating the impasse

All mediations begin with a failed negotiation - an impasse. The mediation process must overcome that impasse and pave the way toward a settlement. A successful mediation process requires a confidentially conducted investigation into the causes of the impasse and the development of a mediation plan to overcome those factors. Often the investigation incorrectly consists solely of exchange of mediation "briefs" that are carefully prepared by the lawyers and that seldom provide much information about the true reasons for the impasse. Experienced mediators require much more information to explore the legal and factual issues and the risk profile of the decision makers. The lawyers for all parties will help identify to the mediator the stakeholders who must be part of the process. They may include insurance company representatives, experts whose opinions are influential in determining positions, family members, and corporate officers and directors. In some situations, it may be useful for the mediator to meet with the parties before the mediation day.

Based on his or her findings about the reasons for impasse, the mediator should design the mediation process for approval by the attorneys. Mediators should consider factors including whether there should be public sessions, how a travel-resistant insurance representative or stakeholder should be brought into the process and whether public information exchange sessions should be conducted before a mediation day. Mediators should also consider the role of the lawyer vis-a-vis the client, particularly the lawyer's level of control over the client and the lawyer's specific needs.

Construction disputes often involve the differing interests of owners, lenders, general contractors, trade contractors, design professionals and insurers. The mediator should consider these varying interests when designing the process. In particular, the mediator should think about the role of the public session and the parties who should participate in the caucuses. Without a proper diagnosis of the reasons for impasse, the mediator cannot design an appropriate process.

There are unrealistic expectations to achieve settlement on mediation day

Lawyers and mediators often expect that settlements should occur on the mediation day. When the parties and their lawyers do not see progress, they can become frustrated and may view themselves at impasse. However, the mediator may know things that the parties and lawyers do not and that require more time and possibly even an adjournment. A skilled mediator can allow an adjournment that does not cause a irretrievable impasse.

The parties' frustration can be aggravated by lawyers who do not adequately prepare their clients for what to expect on the mediation day. For example, sometimes lawyers do not discuss with their client the best and worse alternatives if the dispute does not settle. Mediators can be at fault for not adequately insisting on such client preparation.

The settlement is not documented contemporaneously

After a long mediation day, there is a tendency for the lawyers and parties to want to go home and leave the preparation of a settlement agreement to the lawyers at a later date. However, the failure to memorialize a settlement agreement can lead to mediation failure because the lawyers may later discover new issues and disagree on the precise terms of the agreement. Under most state confidentiality laws, the oral terms of an unexecuted settlement agreement may not be enforceable.

Participants should not leave a successful mediation without documentation of the terms of the settlement. The lawyers -- not the mediator – should draft the document to avoid a later argument that the mediator breached a duty to anticipate an issue that had not arisen during the mediation. If a binding agreement is not reached at the mediation, it is important that the mediator stay in contact with the parties to avoid the possibility that the process of negotiating the details of the agreement causes a collapse of the settlement.

CONCLUSION

Mediation is perceived by many as a standardized process in which haggling with the help of a neutral will cause clients to settle construction disputes. To the contrary, mediation is a sophisticated process based on the

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JAMS Expands in Atlanta, Minneapolis

JAMS Atlanta, GA location has moved to One Atlantic Center (left) with an expanded panel to resolve disputes of all sizes. Our new Resolution Center is three times the size of our previous space and offers a business center and wireless internet access.

JAMS has also opened a new Resolution Center in the beautiful Accenture Tower (right) in **Minneapolis, MN**, featuring eight conference rooms and an environment conducive to resolution of all types of disputes.

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mediator's and parties' understandings not only of the probabilities of outcomes, but also the psychological and risk profiles of the parties who must consent to settlement. Most successful mediations of complex cases demonstrate that cases are settled when the mediator understands these principles and designs a process that addresses all the factors leading to impasse. ■

1. Mediation is a condition precedent to arbitration or litigation in all current forms published by the American Institute of Architects, the Engineers Joint Documents Committee, the Associated General Contractors and the Design Build Institute of America.
2. In 1991, Tom Stipanowich led an American Bar Association survey of dispute resolution procedures. An analysis of the data concluded that attention to procedure was the most significant factor in determining the successful outcome of mediations. See Paul M. Lurie, *The Importance of Process Design to a Successful Mediation*, 19:4 PUNCH LIST 1 (1997) citing D. Henderson, Mediation Success: An Empirical Analysis, 11 OHIO STATE J. ON DISPUTE RESOLUTION 105 (1996).
3. Petroski, Henry, *To Engineer Is Human: The Role of Failure in Successful Design* (Vintage Books, 1992)
4. Peter Toll Hoffman, *Valuation of Cases for Settlement: Theory and Practice*, 1991 J. DISP. RESOL. 1 (1991). This article describes the social science research supporting the proposition that advocates often are poor predictors of the outcomes of litigation.
5. For an excellent discussion of the confusion caused by the terms evaluative and facilitative see Stempel, W Jeffrey, *Inevitability Of The Eclectic: Liberating ADR From Ideology,* 2000 J. DISP. RESOL. 247.

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JAMS GEC Offers "Rapid Resolution" ADR Training continued from Page 1

firms with training in ADR cost control and nuances of construction ADR methods, JAMS GEC offers half-day and full day in-house training sessions on the effective use of ADR methods to promote early settlement and "Rapid Resolution" of disputes on the job. These sessions cover effective use of stepped negotiations, project neutral facilitation, expert determinations, the "initial decision maker," mediation, adjudication, advisory dispute review boards, non-binding "mini-trials," and other creative ADR methods. As for binding arbitration, the sessions also will address ways to expedite and control costs through detailed statements of claims, discovery limited to relevant issues, pre-hearing motions, control of hearing time through the "chess clock" and written witness testimony subject to live cross-exam, and other highly cost effective considerations.

All sessions are taught by JAMS GEC panelists who have decades of experience in construction law, construction ADR and teaching. To schedule a training session and obtain further information, call 866-956-8104. ■

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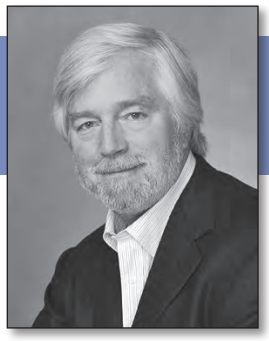

Reviewing Dispute Review Boards

By **DUNCAN GLAHOLT, ESQ.**

Oscar Wilde is reported to have said of George Bernard Shaw that he hadn't an enemy in the world, but none of his friends liked him either. The same could be said of dispute review boards ("DRBs"). They hardly have an enemy in the world; in fact in construction circles the idea of including a dispute review board as part of the client's dispute avoidance and resolution risk management program is usually accepted uncritically. Most people view DRBs as an extraordinarily successful ADR process. If you speak with people who have actually used dispute review boards, however, you sometimes get a different point of view from some who seem not to like them based on previous poor experience. Positive and negative views about the efficacy of DRBs seem to be generated out of the differing ways in which DRBs are constituted and administered.

Dispute review boards originated in the United States. In the 1960s a "Joint Consulting Board" was established for the Boundary Dam in Washington. The idea was to keep the board in place throughout the project to make quick decisions the moment conflicts arose.[1] This is the essence of dispute boards even today. The idea quickly took root.[2] When the Colorado Department of Highways built the Eisenhower Tunnel in the early 1970s, it required the establishment of a board to make non-binding recommendations to the parties in case of a contract dispute. Between 1975 and 1985, five further tunnel projects and four other heavy construction projects were subject to reviews by DRBs.[3] Between 1986 and 1994, another 349 projects used DRBs.[4]

DRBs have become a runaway success. It is claimed by its adherents that in the U.S. and elsewhere from 1988 to 2002 DRBs were used on over $79.4 billion of major civil works contracts, and that 97.9% of disputes on these projects were settled without litigation.[5] It is claimed by advocates of dispute review boards that they can result in lower bids, because contractors reduce their bids in view of anticipated reduced litigation and delayed cash flow costs, but the writer is unaware of any data set that supports this assertion.[6]

Most DRBs now follow the guidelines established by the ASCE in its 1991 specification entitled *Avoiding and Resolving Disputes During Construction*.[7] The idea is to create a panel of neutral experts *before* the project commences to work alongside the contracting parties and become expert in resolving their disputes on that particular project.[8] The contracting parties agree up front to establish a dispute review board and provide the board with non-binding, interim jurisdiction over their disputes. The parties enter into a separate agreement with their dispute review board members to formally constitute the board. Dispute review boards may be comprised of one, two, three or more members, as required. Three-member boards are most common on large projects. In a three-member board, the owner generally selects one member, to be approved by the contractor, and the contractor selects one member, to be approved by the owner. Those two party-approved members then select the third member as chair. They key to selection is subject matter expertise. On a large hospital project, for example, board members would be elected for their expertise in medicine, engineering, contracting, public health, etc., and the chair would call upon this expertise as required. Presently, and unfortunately in the author's view, there is no room for lawyers on dispute review boards. Only rarely are highly experienced construction lawyers chosen as panelists.[9] Most rules governing dispute boards also provide that the parties may jointly terminate board members with or without cause.[10] In the absence of contractual provisions to the contrary, which the writer has not encountered in practice, there is no way for one party to remove a member from the board unilaterally.[11]

Dispute review board appointments require active participation by the board members. The board meets regularly (monthly, or at least quarterly on a large project), tours the project every now and then, and often hears a number of claims and disputes over an extended period of

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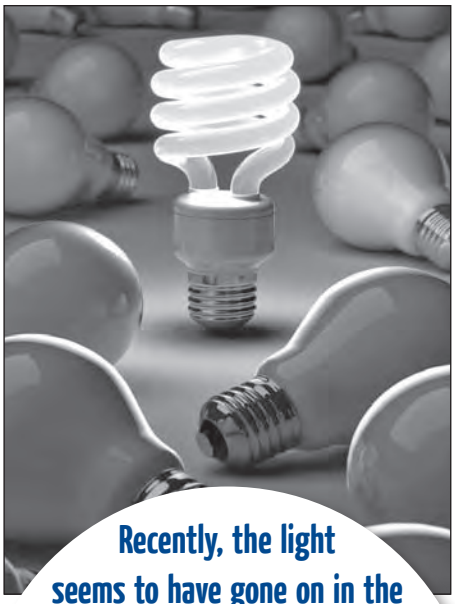
Reviewing Dispute Review Boards continued from Page 7

time. Appointment to a DRB is not for the inexpert dilettante. Dispute review boards have now reached a level of sophistication where the need for canons of ethics has emerged as an issue.[12] The common thread in the discourse over DRB canons of ethics is this: there must be mandatory disclosure of any interest or relationship that could possibly be viewed by a reasonable person as affecting impartiality or that might create even an appearance of partiality or bias, throughout the life of the DRB; even the appearance of conflict of interest must be assiduously avoided; there must be no informal communication between the DRB and the parties; nothing a board member learns as a DRB member can be used for personal advantage (except, it seems, promotion of oneself as a DRB member); efficiency and impartiality are key to everything the board does; and DRB recommendations are to be based solely on the provisions of the contract documents and the facts of the dispute.[13] This last point is the most elusive one for non-judicial board members in practice. Dispute review board members who are not judicially trained or legally experienced (and at present, almost by definition, that means *all* dispute review board members) seem to find writing reasoned recommendations that adhere strictly to the contract documents and the facts of the dispute challenging.

The mechanics of a functioning DRB are very simple, conceptually and in practice. The Board is provided with the parties' contract documents at the very outset of the project. The DRB members familiarize themselves with the project and the key participants, and are regularly updated with regard to progress. Regular site visits are scheduled, attended by the designated party representative and the members of the DRB. Senior party representatives often make pertinent presentations to the board.[14] Construction contracts can provide that *both* parties may jointly refer an issue to the board before it becomes a formal "dispute."[15] Once a formal dispute has arisen, however, most construction contracts provide that *either party* may refer the matter to the board, usually by letter to the chair copied to the other board members and the opposite party.[16] Some contracts go further and provide that the board may intervene on its own, without the parties' consent, but, in the writer's limited experience, this is rare.[17]



Recently, the light seems to have gone on in the construction industry that the credibility of the process is dependent upon the board's expertise and credibility, and its principled decisions, just like any other system of justice.

Dispute review boards can and do conduct formal hearings. If one strength of dispute review boards is their demonstrated ability to nip disputes in the bud, a weakness of DRBs is revealed in the way their hearings are conducted when a dispute is not nipped in the bud. It is hard to shake the feeling that in some cases that had an inexpert DRB panel with inadequate skill in conducting proceedings and insufficient expertise in the subject of the dispute – it is "equities" that drive recommendations, not the contract provisions or the facts of the dispute. This is particularly so where legal skills are unavailable to interpret the contract and harsh results would ensue if the contract was enforced in accordance with its terms. Whether this perception is right or wrong, it is a discussion that the dispute review board industry and ADR providers continue to have with each other.

Hearings are held as soon as possible after receipt of the referral, at a location agreed upon by the parties, often the job site itself or a local hotel boardroom. The claimant usually presents its case first, followed by the respondent and one or more cycles of rebuttals. The process can quickly become a symposium more than a hearing. The dispute review board chair always has and often exercises full control over the hearing and decides what "evidence" (the term is really not appropriate to dispute review boards) is presented, how it is presented and in what order it is presented.[18] Rules of legal procedure do not apply and there is usually no

cross-examination, although DRB members often like to believe that their questioning functions as a simulacrum of cross-examination.[19] Unlike courts, dispute boards are not based on the principle of fairness in the presentation of evidence and can obtain "evidence" in any way they please, including inquisitorially.[20] Experts may be called by the parties if necessary, but this is seldom necessary, because the board members themselves were selected for their subject matter expertise. The dispute review board is usually obliged to issue written reasoned recommendations within a matter of weeks after receiving the request for board review, but can do so earlier, even in hours.[21]

The board's "recommendations" should explain the board's evaluation of the facts, contract provisions and the reasoning which led to its conclusion. They are not always successful in doing this. Instead, the moral authority of recommendations seems to lie in the parties' confidence in their dispute review board members' technical expertise, first-hand understanding of the project conditions, practical judgment, and the overall transparency of the dispute review board process. Recommendations are not binding if either party objects. If no party objects within a prescribed period of time, recommendations can become contractually binding. If a party refuses to accept a recommendation, the contract usually provides for recourse to some further dispute resolution process to occur *after* substantial performance or, in some cases, total completion of the project. FIDIC, for example, sends the dispute to arbitration if the board's recommendations are not accepted as final and binding.[22] A party's failure to accept a dispute review board's recommendation does not in itself entitle the other party to stop performance.[23]

In summary, dispute review boards are highly specialized, co-operative processes; they have their strengths and can have weaknesses (the more complex the dispute is legally, the more legal expertise is required in the dispute review board process). What is happening to dispute review boards is a "coming of age" process. Recently, the light seems to have gone on in the construction industry that the credibility of the process is dependent upon the board's expertise and credibility, and its principled decisions, just like any other system of justice. Principled outcomes mandate procedural fairness. In their maturity we can expect dispute review boards to accept a further measure of due process as part of a principled outcome. Early in its history the philosophy of dispute review boards seems to have been proprietary and exclusionary: keep lawyers out and let the engineers alone decide! It is now well recognized that in its maturity, the dispute review board process depends ultimately upon the quality, credibility, expertise substantive knowledge and integrity of the persons appointed to the board. ■

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1. C. Chern, *Chern on Dispute Review Boards* (Oxford: Blackwell Publishing, 2008) at 8.
2. See R.M. Matyas, A.A. Mathews, R.J. Smith and P.E. Sperry, *Construction Dispute Review Board Manual* (New York: McGraw-Hill, 1996) at 10.
3. Ibid.
4. Ibid., 10-1.
5. See Dispute Review Board Foundation, www.drb.org.
6. F.E.A. Sander, C.M. Thorne, "Dispute Resolution in the Construction Industry: The Role of Dispute Review Boards" (1995), 19 C.L.R. (2d) 194 at 200-1.
7. Reprinted in R.M. Matyas, A.A. Mathews, R.J. Smith and P.E. Sperry, *supra*, note 1 at 121-140.
8. The following paragraphs are based on the Dispute Review Board Foundation's description of the general concept of DRBs. See www.drb.org.
9. See R.M. Matyas, A.A. Mathews, R.J. Smith and P.E. Sperry, *supra*, note 1 at 47; J.P. Groton, R.A. Rubin and B. Quintas, "A Comparison of Dispute Review Boards and Adjudication" [2001] I.C.L.R. 1, available @ http://www.postner.com/iclr0103.pdf.
10. See, for example, ICC Dispute Board Rules, article 10(2); FIDIC Conditions of Contract for Construction (Red Book), Appendix – General Conditions of Dispute Adjudication Agreement, clause 7.
11. C. Chern, Chern on Dispute Review Boards (Oxford: Blackwell Publishing, 2008) at 240-241.
12. See www.dbfederation.org. The Code of Ethics is reprinted in its entirety in C. Chern, Chern on Dispute Review Boards (Oxford: Blackwell Publishing, 2008) at 229 et seq.
13. http://www.drb.org/manual/3.2_final_12-06LD.pdf.
14. F.E.A. Sander, C.M. Thorne, "Dispute Resolution in the Construction Industry: The Role of Dispute Review Boards" (1995), 19 C.L.R. (2d) 194 at 201.
15. See, for example, FIDIC Conditions of Contract for Construction (Red Book), clause 20.2.
16. R.M. Matyas, A.A. Mathews, R.J. Smith and P.E. Sperry, *supra*, note 1 at 55.
17. See, for example, ICC Dispute Board Rules, article 16.
18. C. Chern, *Chern on Dispute Review Boards* (Oxford: Blackwell Publishing, 2008) at 188.
19. R.M. Matyas, A.A. Mathews, R.J. Smith and P.E. Sperry, *supra*, note 1 at 58.
20. C. Chern, *Chern on Dispute Review Boards* (Oxford: Blackwell Publishing, 2008) at 192.
21. F.E.A. Sander, C.M. Thorne, "Dispute Resolution in the Construction Industry: The Role of Dispute Review Boards" (1995), 19 C.L.R. (2d) 194 at 202.
22. FIDIC Conditions of Contract for Construction (Red Book), clause 20.6.
23. C. Chern, *Chern on Dispute Review Boards* (Oxford: Blackwell Publishing, 2008) at 220.

Assisted Solutions by Neutrals to Common Project Challenges

By **LINDA DEBENE, ESQ.**

As many of the 2009 Recovery and Reinvestment Act ("stimulus") funds begin to give way to ground breaking, tunnel boring, and/or other industrial projects throughout the country, many developers, public entities, and others associated with the construction industry are being caught off guard by the reporting requirements and other limitations imposed in those contracts. Most are expected to prepare and submit bids in order to be granted these potentially significant work opportunities and many do so without considering the regular status and budget reports or other obligations tied to these funds. JAMS GEC Neutrals can aid companies who, while ready and qualified to bid the proposed projects, may likely find themselves hampered through the course of actual construction work by the speed needed to prepare and submit bids, contracts and other documentation (bid requirements, plans, engineering) for those projects.

With that thought as an impetus, two things stand out: 1) contractual insertions, relating to the various processes which JAMS GEC Neutrals can provide, need to be backed up to the bid or even pre-bid phases in order to have those processes "front of mind" so all contracting players are immediately aware of their requirements; and 2) for these entities which are working at warp speed to meet governmental requirements, as well as for others in the public or private sector doing any large construction project, JAMS has developed a working tool to add to industry education on the work of JAMS GEC specialists. The table on the next page provides a concise handout for meetings or other communications with project architects, developers, owners, and industry leaders. ■

Ms. DeBene is a full-time mediator, arbitrator, special master, and project neutral with JAMS in Northern California. Email her at ldebene@jamsadr.com or view her Engineering & Construction bio online.

GEC Neutrals Resolve An Array of Construction Disputes

Harvey J. Kirsh, Esq. has been selected by NJ Transit and the Port Authority of New York and New Jersey to act as Chair of a Dispute Review Board, for both subsurface and surface contracts, relating to construction of the $8.7 billion Mass Transit Tunnel from the suburbs of New Jersey to central Manhattan. Harvey also recently acted as sole arbitrator in a construction dispute between a general contractor and a consulting engineering firm arising out of the refurbishment and upgrades to the water and sewer systems in New York City.

Michael J. Timpane, Esq. was retained to mediate and provide an expert neutral evaluation regarding claims arising from Hurricane Katrina clean-up work in New Orleans' 9th Ward. He recently mediated completion cost and delay claims related to construction of an Army base in South Helmand Province, Afghanistan, as well as a $10 million dispute involving a Southern California golf course. He continues to serve on a Dispute Review Board appointed in connection with the construction of a $60 million police station in Northern California.

John W. Hinchey, Esq. has been appointed Presiding Arbitrator on a tribunal to arbitrate a significant international case involving an oil refinery in India. He is Chair of an arbitration panel in a complex dispute involving a national railway company; a co-panelist in an international arbitration involving a hotel resort in Mexico; and a member of a panel hearing a dispute between an alternative fuels developer and a contractor in Atlanta.

James F. Nagle, Esq. conducted a mini-trial in New Mexico arising out of an energy contract dispute relating to the fabrication of duplex stainless steel transuranic radioactive waste transportation containers.

Common Construction Project Challenges

Risk Assessment, Apportionment, Allocation, and Management of issues regarding: design, specific performance, time delay, sole-sourcing, and dealing with impact of force majeure events.

Insurance Review and Management, including: understanding multiple layers of coverage ranging from commercial general liability, builder's risk coverage, contractor's liability, bonds and sureties, and even Worker's Compensation.

Quality Control of Project Docs and Regular Inspections: "as built" information such as daily work logs, reports, diaries and timelines to keep project on schedule; supplemental and/or change orders which effect project scope, timeline, or compensation, particularly disputed change orders.

Construction Claims and Disputes, including: design errors or omissions, defective construction, delay and disruption, quality control, cost overruns and overcharges, payments, and poor project management generally caused by unclear contract language.

Project Neutrals/ Individual Decision Maker (IDM) Solutions

While most construction contracts provide for dispute resolution procedures after claims have arisen, Project Neutrals or Individual Decision Makers are involved from the inception of projects to provide real time resolution of conflicts and challenges, oftentimes resulting in dispute avoidance.

Dedicated exclusively to the successful, timely, and on-budget completion of the project, JAMS Project Neutrals bring independent and objective oversight to large, multifaceted, and often times complex construction projects. As Project Neutrals, Individual Decision Makers, or part of Rapid Resolution Teams, JAMS neutrals supplement their legal and dispute resolution expertise by marshalling the knowledge and strengths of a variety of specialists (accounting, architectural, engineering, scheduling, etc.) to provide services such as:

- third party review of project documentation and records;
- neutral investigations and analysis of claims;
- impartial verification of as-bid quantities and prices; and
- unbiased schedule analyses to minimize and resolve disputes and claims which can lead to voluminous litigation, cost overruns, and delays to project completion.

Additionally, Project Neutrals/IDMs can provide support by assisting in negotiations, mediating settlements, and/or adjudicating of all types of construction claims. Early dispute assessment and resolution, which have proved to be both time and cost effective, are keys to the successful use of Project Neutrals/IDMs.

The European Mediation Directive

By **JOE TIRADO, ESQ.**

What is it?

The European Mediation Directive is basically an attempt by the European Parliament to encourage the use of mediation as a cost-effective and speedy alternative to civil litigation in cross-border commercial disputes.

It came about as a result of the various Member States recognizing the merits of alternative dispute resolution, mediation in particular, and their desire to create alternative, extrajudicial procedures for dispute resolution in order to improve access to justice in Europe. This led to a Green Paper in 2002, followed by a broad consultation and finally a proposal which formed the basis of the Mediation Directive.

What is its objective?

Its stated objective as per Article 1 is to facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings. Put simply, the Directive recognizes the advantages that ADR and mediation in particular has to offer and wants to see greater use of it as a dispute resolution tool in Europe.

What is its scope?

The Directive establishes rules on civil procedure to ensure a sound relationship between mediation and judicial proceedings. It applies where two or more parties to a cross border dispute of a civil or commercial nature attempt by themselves, on a voluntary basis, to reach an amicable settlement with the assistance of a mediator. A cross-border dispute is defined here as being a dispute where one party is domiciled in a Member State other than that of any other party. However, Member States can if they want apply the provisions of the Directive to internal mediation processes. It should be noted that Denmark is not included.

It does not regulate all issues relating to mediation and notably does not include provisions concerning the mediation process or the appointment or accreditation of mediators. The Commission excluded these provisions and instead invited a group of experts to develop a self-regulatory instrument to deal with such matters. The European Code of Conduct for Mediators was launched in July 2004.

It also does not apply to pre-contractual negotiations or to processes of an adjudicatory nature, such as consumer complaint schemes, arbitration and expert determination.

How does it intend to achieve its objective?

It basically intends to encourage the use of ADR via five key rules.

The first, Article 4, aims to increase confidence in the mediation process by ensuring the quality of mediation. It therefore obliges Member States to encourage the training of mediators and the development of, and adherence to, voluntary codes of conduct and other effective quality control mechanisms concerning the provision of mediation services.

Article 5 then encourages greater use of mediation by giving every court in the Community, at any stage of the procedure, the right to invite the parties to have recourse to mediation if it considers it appropriate in the circumstances.

The third rule, Article 6 deals with the enforcement issue - recognizing that parties will not regard mediation as being a viable alternative to litigation if any settlement reached cannot easily be enforced in the same way that a judgment is. It therefore obliges Member States to set up a

mechanism by which agreements resulting from mediation can be rendered enforceable if both parties so request. The choice of mechanism is left to the Member States.

Article 7 protects confidentiality by providing that neither mediators nor those involved in the administration of the mediation process can be compelled to give evidence in subsequent judicial proceedings or arbitration. This provision is essential to give parties confidence in, and to encourage them to make use of, mediation and also allows parties to discuss settlement in as open a manner as possible, thereby ensuring a greater chance of success.

Finally, Article 8 contains a rule on limitation and prescription periods which ensures that, when the parties engage in mediation, any such period will be suspended or interrupted in order to guarantee that they will not be prevented from going to court as a result of the time spent on mediation. This provision indirectly promotes the use of mediation by ensuring that parties' access to justice is preserved should mediation not succeed.

What are the next steps?

The European Mediation Directive entered into force on Wednesday 11 June 2008. Member States have three years to incorporate it into their national laws. When they do this, they will have to decide whether they want to limit their implementing legislation to cross-border cases or whether they also want to apply the provisions of the Directive to internal cases. The Commission has stated that it will closely monitor the implementation of the Directive by the Member States and ensure that the requirements of the Directive are met.

What are the practical implications?

Given that mediation is well established and widely used in the UK, it is unlikely that the Directive will have a huge impact on companies operating in the UK. We are already seeing extensive use of mediation or stepped clauses as they are known in English law documents and the English courts are currently hot on mediation and encouraging parties to use ADR.

That is not the case for the rest of Europe though, and that is where the Directive is going to have most impact. ADR can no longer be ignored. Although Member States have 3 years to implement the Directive we will see both lawyers and businesses gearing up for its introduction.

In the short term there will be a need for training and education on the benefits of mediation. More importantly, clients will be looking to their lawyers for advice and training on how to handle themselves in mediation and get the most out of the process. Mediation requires different skill sets to simple negotiation and those that know what they are doing will have the upper hand.

In the long term we'll see a change of attitude and wider acceptance of ADR throughout Europe and the Directive will go a long way to speeding that up.

Although excluded from its ambit the Directive will have a positive impact on the use of mediation where arbitration is the chosen forum for dispute resolution. Although there are mechanisms in place for dealing with settlement reached after arbitration has been commenced, there is currently no mechanism available to settlements reached as a result of mediations carried out pre-arbitration. Under the Directive, these should have the same status as any pre-action mediated settlement and be enforceable by whatever mechanisms the Member State has put in place. ■

Mr. Tirado is a dispute resolution lawyer based in London, where he is the head of the international arbitration practice at Norton Rose. Email him at joseph.tirado@nortonrose.com.

Notices & Calendar of Events

UPCOMING EVENTS

OCTOBER 8, 2010: State Bar of Montana 6th Annual Construction Law CLE

Hilton Garden Inn • Bozeman, MT • **https://m360.montanabar.org/event.aspx?eventID=19371**

PHILIP L. BRUNER, ESQ. will address the Construction Law Section of the Montana Bar Association on "The Burgeoning Use of ADR in Resolving Disputes in Public Sector Construction." **JAMES F. NAGLE, ESQ.** will also be speaking on "Federal Contracts: A Roadmap through the Minefields."

OCTOBER 20-21, 2010: Federal Publications Seminar

Washington, DC • **http://www.fedpubseminars.com/**

ROY S. MITCHELL, ESQ. will speak on "Preparing and Defending Government Contract Claims."

OCTOBER 29-31, 2010: 10th Annual Meeting of Fellows of the College of Commercial Arbitrators

Ritz-Carlton Laguna Niguel Resort • Dana Point, CA • **http://www.thecca.net/**

HON. CURTIS E. VON KANN (RET.), THOMAS J. STIPANOWICH, ESQ., ZELA "ZEE" G. CLAIBORNE, ESQ. and **JOHN W. HINCHEY, ESQ.** will participate in panel discussions.

DECEMBER 5-7, 2010: International Construction Law Conference of the Society of Construction Law

Hong Kong Convention & Exhibition Center • Hong Kong • **http://www.scl.org.uk/events**

J. BARRY GROVE, ESQ. will make a presentation on "Delay Analysis –Evidence or Advocacy?"

EARLY DECEMBER 2010: American College of Construction Lawyers' Conference

Hong Kong • **http://www.accl.org/**

PHILIP L. BRUNER, ESQ. will speak on the new wave of global anti-corruption legislation.

DECEMBER 15-17, 2010: 2010 Construction SuperConference

The Palace Hotel • San Francisco, CA • **http://www.constructionsuperconference.com/**

PHILIP L. BRUNER, ESQ. will participate in a panel discussion entitled "Does the New 2010 CMAA 'Construction Management Standards of Practice' Impose a Higher Legal Performance Standard on Construction Managers?"

JANUARY 20, 2011: Mid-Winter Meeting of the Aba Forum on the Construction Industry

New York, NY • **http://new.abanet.org/forums/construction/**

PHILIP L. BRUNER, ESQ. will chair a panel discussion dealing with creative ADR options.

RECENT HONORS

- **ROY S. MITCHELL, ESQ.** has been elected a Fellow of the College of Commercial Arbitrators.
- At its recent annual conference in Halifax, Nova Scotia, the Canadian College of Construction Lawyers inducted **PHILIP L. BRUNER, ESQ.** into its ranks as an Honorary Fellow.
- **ROBERT B. DAVIDSON, ESQ.** has been listed in the 2010 edition of Chambers USA for his expertise as an international arbitrator. **JOHN W. HINCHEY, ESQ.** and **KENNETH C. GIBBS, ESQ.** have also been included in the same publication for their expertise in construction law.
- **HARVEY J. KIRSH, ESQ.** has become a Founding Member of the Toronto Commercial Arbitration Society, and serves on its Finance and Membership Committee.
- **MICHAEL J. TIMPANE, ESQ.** was recently appointed co-chair of the ABA Dispute Resolution Section's teleconference committee, and will be responsible for programming and presenting monthly webinars on arbitration, mediation and other ADR issues.

RECENT ARTICLES AND SPEAKING ENGAGEMENTS

- An article entitled "The 'Initial Decision Maker:' The New Independent Dispute Resolver in American Private Building Contracts " was published by **PHILIP L. BRUNER, ESQ.** in the July 2010 issue of the *International Construction Law Review* (27 ICLR 375).
- An article entitled "Construction Arbitration in the U.S.: One Canadian's Perspective" was published by **HARVEY J. KIRSH, ESQ.** in the Fall 2010 issue of *The Canadian Arbitration and Mediation Journal* (the official publication of the ADR Institute of Canada Inc.).
- **ZELA "ZEE" G. CLAIBORNE, ESQ.** served on the faculty of the American Bar Association's Fifth Annual Arbitration Training Institute, which was held in Washington, D.C. on July 1-3, 2010. Other JAMS faculty included **RICHARD CHERNICK, ESQ.** and **HON. CURTIS E. VON KANN (RET.)**. In 2011, Zee will Chair the Institute's Sixth Annual Arbitration Training program, which will be held in Los Angeles.
- **MICHAEL J. TIMPANE, ESQ.** recently addressed the General Counsel staff of major mid-western engineering, procurement and construction (EPC) contractors on "Bringing ADR Forward," which included an overview of the use of Project Neutrals, Initial Decision Makers, and Rapid Resolution concepts.
- At the 4th Annual Arbitration Institute of the Georgia State Bar Dispute Resolution Section on August 20, 2010, **JOHN W. HINCHEY, ESQ.** participated in panel discussions on business-to-business arbitrations, and on the challenges and problems encountered by experienced arbitrators. Mr. Hinchey is also co-author of the second edition of *International Construction Arbitration*, expected to be published by Thomson-West in the Fall of 2010, and is the author of "Dispute Resolution on Global Megaprojects," a chapter in a text to be published by the American Society of Civil Engineers in the Fall of 2010.
- A video webcast of ALI-ABA's June 16, 2010 course, entitled "Top Ten Cost-Effective Ways to Resolve Construction Disputes" and featuring JAMS GEC neutrals **PHILIP L. BRUNER, ESQ; ZELA G. CLAIBORNE, ESQ.; JOHN W. HINCHEY, ESQ.; HARVEY J. KIRSH, ESQ.;** and **THOMAS J. STIPANOWICH,** was re-broadcast by ALI-ABA on September 20, 2010.
- **ROY S. MITCHELL, ESQ.** recently presented a paper on "Examining International Construction Contracts and Various Dispute Resolution Clauses" at the 14th Annual Associated Owners & Developers Annual Construction Industry Conference in Atlanta, GA.

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

PLEASE WELCOME OUR NEW GEC NEUTRAL

Mediator **CRAIG S. MEREDITH, ESQ.** has joined the JAMS San Francisco panel and the Global Engineering and Construction Group. Mr. Meredith has developed a strong and growing ADR practice in conjunction with his insurance coverage law practice. He will focus on insurance coverage with a primary emphasis on general liability coverage issues for commercial construction, construction defect and environmental matters. Mr. Meredith has successfully served as a mediator in more than 100 complex cases, both locally and nationally, involving insurance disputes or issues, including construction defect cases, bodily injury suits, insured-carrier disputes, broker disputes and inter-carrier disputes. Additionally, he has participated in more than 400 settlements of major construction litigation as coverage counsel for the developer or general contractor. Mr. Meredith was a partner in the San Francisco firm of Farella, Braun & Martel until 1991, when he formed his own insurance coverage practice, Meredith, Weinstein & Numbers.

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