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DIRECTOR'S COLUMN

Construction Mediation: Pick a Mediator with Experience in Dealing with Construction Industry Participants' Differences in Outlook

Philip L. Bruner, Esq., JAMS Mediator/ Arbitrator; Director, JAMS Global Engineering and Construction Group

BY PHILIP L. BRUNER, ESQ.

Construction industry participants—owners, contractors, and design professionals—long have been recognized as having characteristic group outlooks and attitudes fundamentally different from each other that have contributed to the construction industry's litigiousness.

Contractors characteristically are seen as practical, independent and hardheaded personalities who enjoy getting their hands dirty. Architects frequently are perceived as ethereal "right brain" visionaries in search of aesthetic beauty in architectural design, uncomfortable with the contentiousness of the construction process and willing, in the face of modern complexities and risks of

> See "Construction Mediation: Pick a Mediator..." on Page 2

Confidentiality in the Arbitration of Construction Disputes

BY HARVEY J. KIRSH, ESQ.

If one is concerned about the confidentiality of the arbitration process, then beware!

Harvey J. Kirsh, Esq., JAMS Arbitrator and Mediator

Many parties to an arbitration agreement select that method of resolving their dispute because they assume that the private nature of the process, without public scrutiny, will ensure that the evidence, the proceedings and the Award (as well as the very fact of the dispute) will be kept confidential, and that sensitive records, testimony

> See "Confidentiality in the Arbitration of Construction Disputes" on Page 10

liability, to abdicate their ancient role as "master builder." In contrast to architects, engineers typically are perceived as viewing the world from the "left brain," think of problem solving as a mathematical exercise and have a perceived literal outlook. Owners, usually less experienced in the construction process than the other participants, can be assertive and inflexible in demanding "perfection" and "strict compliance," because they bear the project's substantial financial risks and rely on others to complete a project conforming to their desires. Such personality differences, long commonly recognized, more recently have become subjects of academic interest [see Hynds, "Personality Type Profiling of a Commercial Construction Company and Its Companion Architecture Firm," 26 The Professional Constructor 18 (April 2002); Eberhard, "Architect and the Brain" (2007)] and of participant efforts to soften differences by educating their employees [see Dvorak, "Construction Firm Rebuilds Managers to Make Them Softer," *Wall Street Journal* 1 (May 16, 2006)].

Add to this personality mix lawyers and judges, and the resulting brew can be downright volatile in creating potential misunderstanding and resultant mistrust. Those in the law and judiciary rarely view disputes as all black and white, inevitably identify different shades of gray in their search for fairness and equity, and ponder amid the shifting sands of construction industry practice and customs whether circumstances warrant enforcement of or excuse from contractual obligations willingly assumed. To overcome such risk of mistrust and misunderstanding was the objective of the celebrated 1954 speech of lawyer Max Greenberg, one of the mid-20th-century "deans" of the American construction Bar, to the Municipal Engineers of the City of New York:

> *There is a basic difference in the training and thinking of lawyers and engineers. It is a difference which you must understand, if you want to comprehend how and why lawyers—which includes judges—arrive at conclusions which may appear to you to be entirely contrary to the clear and express provisions of a contract. Engineers deal basically with the immutable laws of nature. You are taught to look a fact in the face and to accept it without equivocation. Steel has certain qualities. It has certain defined stresses and strains, and while you may devise means to employ its qualities for your purposes, you can't change it. You accept it for what it is. It is a fact.*
>
> *Lawyers [and judges], however, deal with vagaries of the human mind. We seek an indefinable, illusive something, called Justice. Justice depends merely on our sense of fairness. It may mean different things in different ages, or different things in the same age under different circumstances; it may mean different things to different people in the same age and circumstances…*
>
> *Now when you, as engineers, read a contract which in plain, understandable English states that the [public owner] shall not be liable for damages for delays, resulting from any cause whatsoever and that the sole remedy of the contractor shall be an extension of time, that, to you, with your type of background and training is a fact; it means what it says. To us, as lawyers, "It ain't necessarily so.*
>
> *The effectiveness of a contract provision excusing the owner from liability for damage for delays…must yield when it conflicts with a basic, though perhaps not express, rule of law which implies that the owner will do its share toward getting the contract completed within the time specified. Every contract imposes obligations on both sides.*[1]

In selecting a mediator, parties to a construction dispute need to consider the mediator's experience and expertise in dealing with the construction industry's differing personality types. It can promote achieving settlement. The mediators of the JAMS Global Engineering and Construction Group have such experience and expertise. ■

[1] Max Greenberg, "It Ain't Necessarily So!," 40 Muni. Eng. J. Paper 263 (2d Quarterly Issue 1954).

So Far Away from Home, It's No Longer an American Tune: Fee Shifting in Construction Disputes

BY ROBERT J. MACPHERSON, ESQ.

Robert J. MacPherson, Esq., Director, Gibbons P.C. Newark, New Jersey

Unlike the law in England and Canada, the "American Rule" in litigation is that each party bears its own attorneys' fees. That rule is fast becoming the exception. Whether by statute or contract, it is now common for prevailing parties in the United States to recover attorneys' fees. This is perhaps best demonstrated by the fact that at least one insurance carrier is now offering what it calls "Contract Litigation Insurance."

The rationale behind fee shifting is simple. Winners should win. After all, the legal fees were incurred only because the other side refused to acknowledge what a court or arbitrator has now found—that they should have paid up long ago or that their claim did not have merit.

History of the American Rule

As recounted by Justice Byron White in *Alyeska Pipeline Service Co. v. Wilderness Society, et al.*[1], at common law costs were not allowed. However, as early as 1278, courts in England had statutory authority to award costs, including attorneys' fees, to successful plaintiffs. Since 1607, the English courts have been able to award fees to defendants as well. That concept was carried over to the United States by an Act of Congress that allowed federal courts to make fee awards if allowed by the practice of the state in which the federal court sat. By 1800, those statutes had either expired or been repealed, but the practice of awarding fees based on state rules continued until 1853, when Congress, concerned with a diversity in practice among the courts and losing litigants having to pay "exorbitant fees for the victor's attorney," limited the fees recoverable by a prevailing party to a maximum of $20, and in most cases less.[2]

While Congress has allowed for recovery of fees by statute in certain circumstances, the intent to do so must be express, not implied. The Supreme Court rejected a Court of Appeals holding that the provision in the *Miller Act* that claimants recover "sums justly due" was intended to provide for an award of attorneys' fees. Instead the Court held that *Miller Act* suits were subject to the American Rule, unless Congress were to declare otherwise.[3]

With the notable exception of Alaska,[4] the law in most states is the same, *i.e.*, the American Rule applies unless an applicable statute or rule provides otherwise.

State Fee Shifting by Law or Court Rule

The primary source of fee-shifting provisions applicable to construction disputes is found in the prompt payment laws enacted by many states. These laws generally establish time frames within which owners must pay contractors and when those downstream must be paid. A 2008 survey of such statutes found that all states with the exception of New Hampshire had some version of a prompt pay law and that 24 of those 49 states' laws provided for fee shifting.[5]

Other examples of fee-shifting provisions are New York's State Finance Law governing payment bonds on public projects[6] allowing recovery of fees if "it appears that either the original claim or the defense interposed to such claim is without substantial basis in fact or law," and Texas' statute allowing recovery of fees in some actions, including those for labor performed or materials furnished.[7]

Fee shifting may also occur under "offer of judgment" rules. According to a survey conducted by the American College of Trial Lawyers,[8] as of 2004 the federal courts and courts in 47 states had some version of a rule that shifted fees and costs in favor of a party whose offer to settle a case was not accepted but whose offer was better than the result ultimately obtained.

Under Federal RCP 68, a party defending against a claim may serve notice that it will allow a judgment to be taken for the amount of the offer. If the offer is not accepted and the judgment obtained is "not more favorable than the unaccepted offer," the offeree must pay the "costs" incurred after the offer was made. Those costs do not include attorneys' fees unless the statute under which the claim is made provides for fees to the prevailing party.[9]

The offer of judgment rules in the states are variations of the federal rule. In New Jersey, any party can offer to take a judgment in its favor or allow a judgment to be taken against it. If the offer of a claimant is not accepted and

> See "So Far Away from Home" on Page 4

 continued from Page 3

the claimant obtains a judgment at least 120% of the offer, the claimant can recover legal fees incurred after the offer is made. If it is a party other than a claimant making the offer that is not accepted, the claimant will be responsible for the offeror's attorneys' fees incurred after the offer is made if the judgment obtained is "favorable" to the offeror, defined as 80% of the offer or less.[10] In Arizona, if the judgment is not more favorable than the offer, the offeree must pay the expert witness fees and double the costs of the offeror, plus prejudgment interest. Attorneys' fees are not included in costs that can be recovered.[11] South Carolina's offer of judgment rule does not provide for attorneys' fees,[12] but in a lien foreclosure action, a reasonable fee may be recovered by the prevailing party, defined as the party whose offer is closer to the verdict.[13] Alaska, which does not follow the American Rule, enhances the attorneys' fee allowable to any prevailing party if the judgment is at least 5% less favorable to the offeree than the offer or, if there are multiple defendants, at least 10% less favorable.[14]

Contract Clauses

A recent informal survey of construction lawyers found that 80% of the respondents have handled matters where the contract contained a prevailing party clause, suggesting use of such clauses is widespread. The AIA forms have never included such a clause, but they were found in many of the AGC contract documents. The substance of the AGC fee-shifting concept, carried over to the ConsensusDOCS forms when they were introduced in 2007, provides:

> *The costs of any binding dispute resolution procedures shall be borne by the non-prevailing Party, as determined by the adjudicator of the dispute.*

The ConsensusDOCS drafters included this provision "for the purpose of dissuading frivolous claims" and encouraging settlement. They recognized the language gave considerable discretion to the adjudicator, such as deciding whether attorneys' fees are to be considered "costs."[15]

The drafters of the 2010 edition of the ConsensusDOCS made a significant change to the clause:

> *The costs of any binding dispute resolution procedures* ***and reasonable attorneys' fees*** *shall be borne by the non-prevailing Party, as determined by the adjudicator of the dispute.*

Determining the "non-prevailing" party is still left to the discretion of the adjudicator.

The Informal Survey

In an informal survey, a cross-section of construction lawyers was asked about their experiences with fee-shifting provisions:

80%
had handled matters where the contract at issue had a prevailing party clause

48%
of those matters resulted in an award or judgment

52%
of those matters resulted in a fee award

13%
of the fee awards were equal to the amount requested

50%
of the fee awards were less than the amount requested

53%
felt arbitrators were likely to award fees where the contract allowed it

51%
felt judges were likely to award fees where the contract allowed it

48%
felt prevailing party clauses are becoming more prevalent

45%
felt prevailing party clauses encourage settlement

13%
felt prevailing party clauses discourage settlement

Who Is the Prevailing Party?

Several arbitrators who answered the survey commented on what makes a "prevailing party." Some approached determining a prevailing party strictly on a mathematical basis, for example, awarding a percentage of the fees sought, based on the percentage of the original claim actually awarded. Others looked at the merits and the difficulty of making out the proofs. Inflated claims or defenses will almost always have a negative effect on a fee claim request, even if the party asserting them is the prevailing party on all other issues. One arbitrator suggested that in a bona fide dispute it is likely there will be no prevailing party.

Many suggested incorporating procedures, found in offer of judgment statutes, into contract clauses. The thought is that an offer to accept or pay a sum certain creates a more realistic benchmark from which the prevailing party can be determined. There is a divergence of opinion on whether the offer should be within a certain percentage of the award or whether it should be whichever is closer. The percentage approach would seem to lead to the best results.

Insurance Coverage for Fee Awards

Owners who insist on fee-shifting clauses in contracts with their design professionals may not be getting what they think they bargained for. Some carriers writing professional liability insurance are telling insureds that fee awards under contract clauses may not be covered. The argument is that the fee award does not arise out of the professional's negligence but rather their contractual obligations. For those concerned about an exposure to a contractual fee-shifting provision, insurance coverage is now available to cover that risk.[16]

Do Prevailing Party Clauses Encourage Settlement?

Forty-five percent of the survey respondents said fee-shifting provisions promote settlement, while 13% said they did not. All who commented agreed that to be effective as a settlement incentive, both sides must have the ability to recover fees. An attorney who regularly represents owners includes such clauses to "even the field." Contractors are entitled to fee shifting under their state's lien law, and they find giving their owner clients the right to collect fees makes settlement easier.[17]

Conclusion

The fact that ConsensusDOCS had included a clause allowing for the recovery of attorneys' fees in its forms may be interpreted as being contrary to ConsensusDOCS' collaborative approach to risk allocation. Having both parties responsible for their own attorneys' fees would discourage litigation and foster mutual problem solving. If the parties know they will not recover their legal fees, they may be more willing to invest what they would have spent on lawyers in a settlement. Rewarding a party who pursues litigation instead of resolution seems contrary to the philosophy behind ConsensusDOCS. However, after researching and writing this article, I am not sure I still think that way. Former Justice Robert Clifford of the New Jersey Supreme Court once stated when he found himself switching sides on an issue:

> *Much as I would prefer to announce that my change of position is attributable to some epiphany, to some deeply moving event that produced a sudden startling cerebral awakening, to some lightning bolt of cognitive awareness and intellectual enrichment, the plain truth of the matter is that I have thought more about it and have changed my mind.*[18]

I am not far behind. ■

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1 421 U.S. 240 (1975).

2 421 U.S. at 247-254.

3 Rich 417 US 116,131 (1974).

4 See Alaska R. Civ. P 68. This provision limits the fees recovered to a fixed percentage of the judgment awarded on a sliding scale. A court has the power to vary a fee award based on several factors set forth in the Rule.

5 Tricker, George and Gerdes, "Survey of Prompt Pay Statues," *Journal of the ACCL*, Winter 2009.

6 NY State Fin Law §137.

7 Tex. Civ. Prac. & Rem. Code § 38.001.

8 Survey of State Offer of Judgment Provisions, American College of Trial Lawyers, Federal Civil Procedure Committee, October 2004. In the introduction to the survey, the ACTL asks why, if provided with more than one forum in which to bring an action, is it considered evil to shop for the forum that best advances the client's interest. For those that don't believe forum shopping is evil, they offer the survey "as a tool for helping to decide where to shop."

9 See *Marek v. Chesny*, 473 U.S. 1, 9 (1985).

10 NJ Court Rule 4:58-3, et seq.

11 Ariz. Rule Civ. Proc 68.

12 S.C. Rule Civ. Proc. 68.

13 S.C. Code Ann 29-5-10.

14 Alaska Statues, Title 9, Chap. 30, Sec. 9.

15 McCallum, "Getting Directly To The Point of The Contested Matter: Dispute Mitigation & Resolution In The ConsensusDOCS Construction Forms," Forum on the Construction Industry Fall 2008 paper.

16 See footnote 1.

17 Recall that in only 16 states can the offer of judgment rules (see footnotes 9 and 10) be invoked by either party.

18 In The Matter of the Arbitration Between Tretina Printing, Inc., and Hi-Tech Properties, 135 N.J. 349, 366-7 (1994).

Expedited Arbitration Rules

BY JENNIFER FLETCHER, ESQ.

Complaints About Arbitration

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A constant complaint among companies and counsel is that arbitration is becoming too much like litigation. Claim disputants and some statistical evidence support the contention that arbitration is not faster and cheaper.

American Arbitration Association ("AAA") statistics reveal that it takes approximately 10 months from initiation to final result to arbitrate construction matters valued between $75,000 and $500,000.[1] Cases with values in excess of $1,000,000 averaged 19 months from filing to award.[2] These comparisons are true for the construction sector. Based on these statistics, arbitration's long-held promise of offering more expedient justice than traditional litigation has been questioned by some practitioners and arbitral organizations.

Similarly, arbitration's cost-effectiveness has been debated. The costs associated with lengthy arbitration can be substantial. Not only do parties in arbitration incur attorneys' fees and expert costs, but the parties are also responsible for paying the fees of arbitrators as well as other administrative fees. These fees typically increase as the amount in controversy rises.[3] Additionally, the expenses of the arbitrator(s) are paid by the parties. Most complex disputes involve a panel of three arbitrators. In large cases, these costs will be substantial. While there may be significant cost savings in arbitration if the parties do not push for extensive discovery, the substantial discrepancy in fees and administrative costs can quickly eviscerate savings.

Many reforms have been implemented to improve arbitration, in addition to expedited procedures. *The College of Commercial Arbitrators Guide to Best Practices in Commercial Arbitration* (Juris Pub. 2006) and *Protocols for Expeditious, Cost-Effective Commercial Arbitration* (2010 www.thecca.net) are major efforts in that regard, offering advice and best practices on appointment and disclosure, conduct of neutral and non-neutral arbitration, arbitrability, class procedures, pre-hearing procedures, motions, discovery, hearings, awards and an overview of international arbitration. These reforms depend largely on arbitrator training and administrative expertise, and have been embraced by arbitrators and tribunals. Establishing procedural rules to mandate expedited arbitration has also been a major initiative among tribunals, but it has not to date gained widespread acceptance in the contracting process.

Available Expedited Arbitration Procedures

In response to criticisms about arbitration, prominent arbitration tribunals enacted rules for expedited arbitration. Two sets of arbitration rules were promulgated in 2006 by the International Institute for Conflict Prevention & Resolution (CPR) and by Swiss Chambers Arbitration/Swiss Rules of International Arbitration (SCA) with the intent of expediting arbitration procedures. On October 1, 2010, JAMS enacted Optional Expedited Arbitration Procedures, whereby parties can choose a process that limits depositions, document requests and e-discovery. Each of these sets of rules has the objective of allowing parties to select an expedited resolution process, either during the contracting process or during the arbitration itself.

JAMS

Effective July 15, 2009, JAMS issued a revised set of Engineering Construction Arbitration Rules & Procedures for Expedited Arbitration (JAMS Expedited Construction Rules). The JAMS Expedited Construction Rules are intended to govern binding arbitrations of disputes administered by JAMS and related to or arising out of contracts pertaining to the built environment (including, without limitation, claims involving architecture, engineering, construction, surety bonds, surety indemnity, building materials, lending, insurance, equipment and trade practice and usage), where the Parties have agreed to expedited arbitration. The JAMS Expedited Construction Rules include:

- Detailed provisions for electronic filing and exchange of pleadings, submissions and other documents;
- Interim measures;
- Consolidation of related arbitrations;
- Third-party intervention or participation;
- Default appointment of one sole arbitrator, unless otherwise agreed by the parties;
- Telephonic conferences;
- Document disclosure and exchanges of summaries of anticipated fact and expert witness testimony, noting further that "...depositions will not be taken except upon a showing of exceptional need...";

- Summary disposition of claims, either by agreement of the parties or at the request of one party;
- Hearings scheduled "no later than four (4) months from the date of the Preliminary Conference";
- Written witness statements in the discretion of the arbitrator;
- Hearings based on written submissions with agreement of the parties;
- Telephonic hearings with the agreement of the parties " or in the discretion of the Arbitrator";
- Final awards within 20 days after the date of the close of the hearing;
- Provisions for sanctions against a party failing to comply with obligations under the rules; and
- Optional "bracketed" (high-low) or final offer (baseball) arbitration.

The complete rules can be found online at *www.jamsadr.com/construction-practice*.

International Institute for Conflict Prevention & Resolution (CPR)

CPR developed an expedited arbitration procedure, effective June 2006, modeled on the United Kingdom's construction adjudication process.

- A 100-day hearing window follows the pre-hearing conference (60 days for discovery, 30 days for hearing and 10 days for the award).
- Three arbitrators (one selected by each party, the third selected by both), with the option to opt for one or three arbitrators all appointed by CPR; if the parties do not select arbitrators in time, CPR appoints them.
- Statement of Claim and Statement of Defense must include copies of all documents that the party intends to use and summaries of all witness testimonies.
- Arbitrator(s) may appoint a neutral expert.
- Parties may have a mediator sit in on arbitration to conduct simultaneous mediation.
- Parties may use a list of non-lawyer CPR arbitrators whose calendars are less congested.
- Discovery rules include aspiration that arbitrator(s) ensures depositions are "brief" and e-discovery is "narrow"—within a strict 60-day time frame.

Swiss Chambers Arbitration/Swiss Rules of International Arbitration (SCA)

The Swiss Rules (Section V) are generally modeled on the UNCITRAL rules, discussed below.

- Referral to a single arbitrator unless the arbitration agreement provides otherwise.
- Award within six months of transmitting file to arbitral tribunal.
- Single hearing for examination of witnesses and experts, as well as oral argument, unless case submitted entirely on documentary evidence.

> *See "Expedited Arbitration Rules" on Page 8*

UNCITRAL

The UNCITRAL Arbitration Rules were revised effective August 15, 2010 following a lengthy report issued by Jan Paulsson and Georgios Petrochilos in April 2006 listing recommendations for revising the 1976 arbitration rules.[4] The 2010 rules were intended to update the 1976 rules and reflect advancements in arbitration processes in the 30 years since their enactment. Some aspects of the rules that enhance expedited resolution include:

- Empowerment of the tribunal to "avoid unnecessary delay and expense" and "provide a fair and efficient process."[5]
- Requirement of a detailed statement of claim, including, insofar as possible, attachment of evidence relied upon and citations to evidence[6] and similar requirements for the statement of defense.[7]
- Limiting time for submission of statements to 45 days absent a determination by the tribunal that more time is warranted.[8]
- Empowering the tribunal to consider witness testimony remotely[9] and to appoint neutral experts if warranted.[10]
- Providing that "in principle" the costs of the arbitration will be paid by the unsuccessful party or parties, with the tribunal having authority to apportion costs.[11]

Although the UNCITRAL rules leave much to the discretion of the arbitral tribunal, the framework permits expected and efficient resolution if the arbitrators perform their function well. Other arbitration tribunals throughout the world have joined the expedited rules groundswell, including ADR Chambers Canada,[12] Swedish Arbitration Institute of the Stockholm Chamber of Commerce,[13] Arbitration Institute Finland[14] and the Arbitration Foundation of Southern Africa.[15]

Facilitating Rules

Many international arbitration institutions have rules that promote the efficiency of arbitration. However, these rules are more discretionary and do not aggressively push for greater efficiency. The following are methods promoted by some institutions to encourage efficiency.

- Provisional timetables ensure that the arbitrator will be available sooner and discipline the parties to keep the arbitration moving.[16]
- Settlements are encouraged by rules that give consent awards the same force as final awards.[17]
- Written direct testimony limits hearing time to cross-examination.[18] (However, written direct testimony may not be appropriate where there are complex facts or significant details, or where credibility is at issue.)
- Confrontation testimony, the simultaneous questioning of multiple witnesses on the same issues.[19]
- Pre-hearing expert conferences, where opposing experts (without counsel) meet and confer with the arbitrator to identify the narrow set of issues on which there is disagreement.[20]
- When parties on the same side are unable to appoint an arbitrator, an external Appointing Authority will appoint the entire tribunal.[21] (This was a recommendation in the Paulsson UNCITRAL report, but it has already been adopted by other institutions).

Response of Contracting Parties

Contract drafters have not yet widely incorporated the expedited rules into their arbitration agreements, and contracting parties do not seem to be insisting on their use. By contrast, step process negotiation and mediation as conditions to arbitration flourish, indicating a willingness of parties to extend the time frame for dispute resolution if a negotiated settlement can be obtained. Seemingly, parties are less concerned about a few months' delay in dispute resolution when the promise of settlement exists than they are when the fight has quickened into arbitration.

Once the formal arbitration is commenced, disputants purport to want a speedy resolution, but many countervailing needs may combine to extend the process. First, absent specific election of an expedited process or a contractual limitation on the number of arbitrators, larger disputes will default to a three-arbitrator panel. As noted above, the time required to constitute the panel, the time required to schedule a hearing of any length and the cost of panel compensation and expenses all add to the complaint that arbitration is not faster and cheaper than court. Many disputants believe these costs are justified, because a panel of qualified (and industry specific) arbitrators is viewed as one of the principal advantages of arbitration over a court or jury trial.

In addition, most counsel in larger disputes agree that some discovery is warranted. At a minimum, a document exchange is customary in most arbitrations. In larger complex cases, this exchange and related reviews can be costly—just as it would be in litigation. Electronic discovery

and exchange of massive amounts of data are perceived as important to ensure that complex cases are fully discovered and evaluated. In U.S. arbitrations, discovery often goes farther; parties in complex cases frequently agree on deposition discovery. In this regard, disputants are showing that they prefer knowledge about the case, claims and defenses to speed and cost savings. The market forces in complex cases therefore tend to show that perceived "economy" results from spending more money and time on the resolution process in the hope of receiving a better or more predictable award.

Of course, contracting parties in the heat of a dispute may not agree on steps or "best practices" that will expedite the arbitration process. Arbitrators will inevitably try to be fair to both parties, which results in compromise that would not be permitted if the contract mandated the use of expedited rules. Knowing this, it would seem that contract drafters would favor the use of expedited rules, perhaps customized to account for very large disputes to which they may be less favorable. Thus far, and notwithstanding the continued complaints about arbitration becoming more like litigation, the expedited rules remain a tool infrequently used at the contract drafting stage and infrequently adopted during the dispute in major complex matters. The task of ensuring that arbitration is an efficient remedy is therefore often left to the arbitrators, underscoring the importance of selecting experienced and qualified arbitrators to preside over disputes. ■

[1] See http://www.adr.org/sp.asp?id=28701 (AAA White Paper July 31, 2006) (but note that AAA concludes that court is not faster or cheaper).

[2] http://www.adr.org/check_the_box.com (January 14, 2008 article citing statistics from 2006).

[3] See, *e.g.*, AAA Construction Industry Arbitration Rules and Mediation Procedures fee structure, http://www.adr.org/sp.asp?id=22004#Fees (last accessed February 9, 2007).

[4] http://www.uncitral.org/uncitral/en/index.html is the UNCITRAL home page with a link to the report. The direct link is: http://www.uncitral.org/pdf/english/news/arbrules_report.pdf.

[5] Id. at Article 17 (1).

[6] Id. at Article 20.

[7] Id. at Article 21.

[8] Id. at Article 25.

[9] Id. at Article 28(4).

[10] Id. at Article 29.

[11] Id. at Article 42.

[12] http://adrchambers.com/ca/arbitration/expedited-arbitration/expedited-arbitration-rules/.

[13] http://www.sccinstitute.com/forenklade-regler-2.aspx.

[14] http://www.arbitration.fi/FCCC_Expedited_Rules.pdf.

[15] http://www.arbitration.co.za/downloads/expedited_rules.pdf.

[16] See, *e.g.*, ICC Rules of Arbitration Article 14, Swiss Rules of International Arbitration Article 15(3), Arbitration Rules of the Chamber of National and International Arbitration of Milan Article 24(3) and Arbitration Rules of the Netherlands Arbitration Institute Articles 23(2) and 23(3).

[17] See, *e.g.*, UNCITRAL Model Law Article 30, ICC Rules Article 26, UNCITRAL Rules Article 34(1), LCIA Rules Article 26.8, AAA International Arbitration Rules Article 29(1), WIPO Rules Article 65(b) and DIS Rules Section 32.

[18] See, *e.g.*, International Arbitration Rules of the International Centre for Dispute Resolution of the American Arbitration Association Article 20(5), IBA Rules of Evidence Articles 4.7-4.9.

[19] See, *e.g.*, IBA Rules of Evidence Article 8.1.

[20] See, *e.g.*, IBA Rules of Evidence Article 5.3.

[21] See, *e.g.*, English Arbitration Act 1996 Sections 16 and 18, ICC Rules Article 10, LCIA Rules Article 8.1, WIPO Rules Article 18.

 continued from Page 1

and activities will not be disclosed. However, *this assumption is not necessarily valid.*

As observed in a recent article, "confidentiality" is generally distinct from "privacy":

> *Privacy generally refers to the process of excluding third parties from the actual arbitration hearing. Confidentiality obligations concern the use that can be made of information and documents produced or generated in an arbitration.*[1]

The courts in some countries, such as England and France, have generally recognized an implied duty of confidentiality, particularly in order to ensure fairness in the process.

However, that principle of confidentiality is not universal. For example, courts in the U.S., Australia and Sweden have rejected a general implied duty of confidentiality.

In a well-known U.S. case (*United States v. Panhandle Eastern Corp., et al.*[2]), a Federal District Court held that, without an agreement between the parties, or procedural rules that explicitly guarantee confidentiality, arbitration proceedings will *not* necessarily be considered confidential.

In Sweden, a leading case of the Swedish Court of Appeal (*A. I. Trade Finance Inc. v. Bulgarian Foreign Trade Bank*[3]) held that there is no implied duty in law of confidentiality in arbitration. However, the court stated that there was a duty of loyalty and good faith, which would restrict disclosure of information pertaining to the arbitration.

In Canada, the courts have not decided the issue, and the law is therefore unsettled. From a legislative perspective, for example, Ontario's Arbitration Act, 1991 contains no guidance; and both Ontario's *International Commercial Arbitration Act* and Canada's federal *Commercial Arbitration Act* contain no reference to confidentiality.

Although legislation does not always address the issue, a number of institutional ADR service providers have created rules dealing with confidentiality. For example, JAMS has a rule that provides that:

> *JAMS and the Arbitrator shall maintain the confidential nature of the Arbitration proceeding and the Award, including the Hearing, except as necessary in connection with a judicial challenge to, or enforcement of, an Award, or unless otherwise required by law or judicial decision.*

However, the JAMS Rule imposes an obligation of confidentiality only upon JAMS and the arbitrator, but *not* upon the parties.

Aside from the legislation and the rules of the ADR service providers, there is the Arbitration Agreement, which typically contains an entire section dealing with confidentiality. The introductory clause might provide that:

> *The parties undertake and agree that, unless there is a written agreement, court order, or other legal requirement to the contrary, all information disclosed during the course of the arbitration will be held in confidence.*

Although privacy may be incidental to the arbitration process, confidentiality is not; and if confidentiality is important to parties, they will have to ensure that such protection is included in the Arbitration Agreement. ■

[1] Mandy E. Moore, "Confidentiality in Commercial Arbitration," *Canadian Arbitration and Mediation Journal* (Fall 2009), page 54.
[2] (D. Del. 1988) 118 F.R.D. 346. See also Patrick Neill, "Confidentiality in Arbitration" (1996) *Arbitration International*, Vol. 12, No. 3, pp. 303-304.
[3] 14 Mealey's Int'l Arbitration Rep. 4. A1 (1999).

JAMS NEUTRALS RESOLVE AN ARRAY OF CONSTRUCTION DISPUTES

PHILIP L. BRUNER, ESQ., has been selected to chair a London Court of International Arbitration panel to hear disputes arising out of a series of concession contracts involving work in Iraq. Phil has also been retained to mediate construction disputes arising out of the National September 11 Memorial and Museum project in New York City.

KENNETH C. GIBBS, ESQ., and **JOHN W. HINCHEY, ESQ.,** have been appointed to arbitrate a significant dispute concerning a water intake line from a major reservoir in the United States. John was appointed to serve as chair of the panel.

HARVEY J. KIRSH, ESQ., has been appointed to mediate a multi-party dispute involving a custom "dream home" residential project that was allegedly not constructed in accordance with the plans, specifications or building code.

ZELA "ZEE" G. CLAIBORNE, ESQ., is mediator for a $200-million dispute arising out of tunneling work performed in connection with the construction of a wastewater treatment plant in the Northwest United States.

RECENT HONORS AND APPOINTMENTS

LARRY LEIBY, ESQ., has been appointed by the Dispute Resolution Board Foundation to a committee whose mandate is to draft a DRB Addendum to the ConsensusDocs standard form contract documents.

GEORGE D. CALKINS II, ESQ.; ROBERT B. DAVIDSON, ESQ.; and **KENNETH C. GIBBS, ESQ.,** were recognized in the 2012 edition of Chambers USA – *America's Leading Lawyers for Business*.

HARVEY J. KIRSH, ESQ., has been appointed Co-Chair of the Construction Law Practice Group of The Advocates' Society.

RICHARD CHERNICK, ESQ.; ROBERT B. DAVIDSON, ESQ.; BRUCE A. EDWARDS, ESQ.; KENNETH C. GIBBS, ESQ.; HARVEY J. KIRSH, ESQ.; ALEXANDER S. POLSKY, ESQ.; and **MICHAEL D. YOUNG, ESQ.,** have been listed as leading International Mediators in the 2012 edition of *The International Who's Who of Commercial Mediation Lawyers*. **HARVEY J. KIRSH, ESQ.,** has also been listed in both the Commercial Mediation and the Construction Law sections of the 2012 edition of *Who's Who Legal: Canada*.

John W. Hinchey, Douglas S. Oles, James F. Nagle, and Philip L. Bruner made presentations in conjunction with the Fourth Annual International Construction Law Conference held in Melbourne Australia

JAMS Panelists at the 2012 Annual Conference of the Canadian College of Construction Lawyers, John W. Hinchey, Harvey J. Kirsh, Douglas S. Oles, Hon. Humphrey Lloyd Q.C., Katherine H. Gurun, and Philip L. Bruner

EVENTS

HARVEY J. KIRSH, ESQ., and **HON. J. EDGAR SEXTON, Q.C.,** led an ADR workshop, "The Spectrum of ADR Alternatives and Techniques," in Toronto for the Law Division of Ontario Power Generation Inc. on Friday, September 21, 2012.

At the 2012 Meeting of the ABA Forum on the Construction Industry in Boston on October 18-19, 2012, **JOHN W. HINCHEY, ESQ.,** will be presenting on "Cutting Through International Waters: Cross Border Dispute Resolution."

LARRY R. LEIBY, ESQ., will be participating as a faculty member at the 25th Ralph E. Boyer Institute on Real Property Law held at the Biltmore Hotel in Coral Gables, Florida, on October 24, 2012. His topic will be "Construction Lien Update – Case Law and Legislation." Larry also spoke at the September 21, 2012, continuing legal education program of the Real Property, Probate and Trust Law Section of the Florida Bar, dealing with "Effective Advocacy in Arbitration." On October 5, 2012, he will also be participating in a panel discussion on "How to Effectively Represent a Client in Mediation," which is being co-sponsored by JAMS and the ADR Committee of the Broward County Bar Association.

JAMS will host a seminar and reception at its Toronto Resolution Center on Thursday, October 25, 2012. Seminar Chair **HARVEY J. KIRSH, ESQ.,** will present his paper on "The Pitfalls of Arbitration," and guest speakers Master David Sandler and Duncan W. Glaholt, Esq., will make presentations on "Judicial Mediation" and "Collaborative Dispute Resolution." The event is being co-sponsored by the Toronto Commercial Arbitration Society, the Ontario General Contractors' Association and The Advocates' Society.

On November 8, 2012, **HARVEY J. KIRSH, ESQ.** will be participating in a panel discussion on "Construction ADR: Strategies for Structuring an Effective Process," sponsored by the Construction Sector In-House Counsel Forum, and hosted at the JAMS Toronto Resolution Center.

JAMS GLOBAL CONSTRUCTION SOLUTIONS
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