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Winter 2013

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Using Integrated Project Delivery to Avoid Construction Conflict and Disputes

BY JOHN W. HINCHEY, ESQ.

John W. Hinchey, Esq., JAMS Arbitrator/ Mediator

Relationships in construction contracting are often characterized by divergent interests, compounded by uncertainty. These conditions often lead to conflict and disputes. However, conflict on construction projects is not inevitable. With the use of Integrated Project Delivery techniques, conflict can be reduced or managed and at best can be avoided altogether.

Traditional Models of Contracting

Reduced to fundamentals, the traditional construction industry contractual arrangement for project delivery has been the Design-Bid-Build model, where the Design Professionals enter into a separate contract with the Owner, who in turn separately contracts with the General Contractor, who in turn contracts separately with the various Trade Contractors, Suppliers and

> *See "Using Integrated Project Delivery..." on Page 5*

Admissibility of Nonbinding Written Dispute Board Recommendations

Deborah Bovarnick Mastin, Esq., Asst. County Attorney, Broward County, FL

BY DEBORAH BOVARNICK MASTIN, ESQ.

In the United States, the trend towards use of Dispute Boards currently favors informal Dispute Board proceedings and is moving away from formal dispute hearings. It is a rare Dispute Board that even holds formal dispute hearings, because the Dispute Board's members are able to create a context of cooperation and collegiality and to encourage the parties to jointly arrive at solutions for unexpected events that may arise during the progress of the work. The University of Washington was an early adopter of Dispute Boards in its capital projects on its three college campuses within the State of Washington. Over the past 20 years, UW has implemented more than 60 Dis-

> *See "Admissibility of Nonbinding..." on Page 8*

Be an Expert With Experts

BY HON. JUDITH M. RYAN (RET.)

Hon. Judith M. Ryan (Ret.), JAMS Arbitrator/Mediator

There is nothing certain in arbitration or litigation. However, if anything can be stated with certainty, particularly with construction cases, it is that it will be a rare case that will not involve an expert for a successful resolution.

Because of the importance of experts, and specifically that experts can and do impact the success of a case, it is surprising how often the process of selecting an expert is not as "expertly" handled as might be expected. It is equally surprising how often an expert, otherwise qualified and competent to offer an expert opinion, is not used to his or her full potential during the arbitration/litigation process. Another situation in the expert scenario that can arise is the qualified expert who is "misused" during the process.

The Expert at the Project Level

The use of an expert in a construction matter usually begins at the project level. Many matters that end up at the dispute resolution stage are often the result of the failure to anticipate the need for an expert, or to select the right expert, during the early stages of the project.

Assume a construction project that includes a contract for mass grading and blasting. It is not unusual to have consultants' reports prepared and made part of such contract regarding subsurface soil conditions with a provision that the owner is not responsible for any interpretations or conclusions that the contractor draws from the information provided. It is also not unusual to have contract provisions that make the contractor responsible for subsurface conditions at the construction site, including provisions that the contractor is responsible for verifying the subsurface conditions.

The contractor bidding on such project will need to decide whether to utilize a staff person such as the in-house estimator to do the analysis of the existing reports, or whether to retain an outside expert such as a soils engineer or geologist to either review the existing reports or conduct their own tests. The choice initially may be dictated by economic factors and a determination as to whether it is necessary to incur the expense of retaining an outside expert when there is someone in-house with background and experience making the required determinations and has done so in the past.

However, consideration should be given as to the type of expertise that is actually required and whether the in-house person responsible for the task—in this example, verifying the subsurface conditions—has the requisite qualifications in the event that unanticipated problems arise during the course of the project, such as differing site conditions on the property. In this illustration, the question is whether the project estimator has the requisite expertise to verify subsurface conditions and whether he could qualify in the event of a later dispute that required expert analysis, opinion and ultimately testimony. Thus, the potential issues that might arise and the expertise needed to address those issues are important considerations. The choice of a particular expert at the project level could have a large impact during the arbitration/litigation stage.

In sum, it is not too early to start at the project level to consider the implications regarding expert selection, including the qualifications required based upon the potential issues that could be involved and the actual qualifications of the expert who is being considered.

Choosing and Using the Arbitration/ Litigation Expert

Choosing the right expert is critical for success in expert-driven arbitration or litigation. The following considerations are critical in selecting the right expert.

1. *Identifying the Issues for Expert Opinion*

The most important initial decision will be to identify the primary issues that will be the subject of the arbitration/litigation, as this will determine the expert opinion that will be necessary. Once the areas of controversy have been determined, then the number of experts and the areas of expertise required can be reviewed and determined.

2. *The Project Expert as the Arbitration/Litigation Expert*

In determining whether the project expert should be used as the arbitration/litigation expert, the following factors need to be considered.

Does the project expert possess the requisite qualifications to testify as an expert on the identified issues?

Other than specific experience on this specific project, it must be determined if the project expert has the qualifications to present expert testimony on the specific issues to be determined in the arbitration or litigation. For example, the project expert may have the requisite background, education and training to be a project estimator and familiar with analyzing contract documents; however, the identified issue may require the expertise of a soils engineer. If the specific issues for determination are not

within the expertise of the project expert, the testimony may not be as credible as that of other experts who have the requisite education, background and experience to offer testimony on the specific issue.

Does the project expert possess the same level of qualifications to testify on the subject matter at issue as other potential experts?

Although the project expert may be qualified on the subject matter, the quality of education, background and experience in the field of expertise will be considered as to the weight to be given the expert opinion. It is important to assess whether the project expert will be given the same weight as an outside expert based upon the above considerations.

Finally, the project expert will be testifying about decisions and determinations that were made during the project. The project expert will necessarily be in the position of supporting or defending those decisions that are now at issue. This could create potential issues of bias, or the perception of bias, and impact the overall credibility of the expert. The project expert should not be put in a position that could impact the quality of testimony because of involvement with the project.

In this illustration, the question is whether the project estimator has the requisite expertise to verify subsurface conditions and whether he could qualify in the event of a later dispute that required expert analysis, opinion and ultimately testimony.

3. Assessing Expert Qualifications

In assessing the qualifications necessary to give a credible expert opinion, the following factors are given great weight by the trier of fact and should be considered when selecting any specific expert.

The first consideration is whether the potential expert has the background, training and experience in the actual subject matter upon which the expert will be called upon to give testimony. Although the potential expert may have expertise in a particular subject matter, it must be determined whether that is the subject matter upon which testimony will be necessary for the determination of the issues in dispute.

Further, to the extent educational degrees in the subject matter are necessary, the quality of the educational background and any advanced degrees are important considerations. The expert's standing in his or her professional community, as evidenced by membership in and recognition by professional societies and certifications given by professional societies, should also be considered.

Finally, the experience of the expert in rendering expert opinions, specifically if the expert has qualified in the past as an expert in the subject matter, is important. However, equally important to consider is whether the expert is perceived as having become aligned with a particular position. The opinion of an expert perceived to always support a particular position will usually be given less weight.

After choosing the right expert, it is important to use the expert properly and "expertly."

1. Preparation of the Expert

The preparation of the expert to render expert opinion testimony is the final and critical step. The expert first should clearly understand the subject matter upon which an expert opinion is being sought. The basis of the expert assignment should clearly be spelled out, the issues in the case should be clearly outlined and the area upon which the expert is specifically being requested to render an opinion should be clearly defined.

Second, the ultimate expert opinion will only be as competent and credible as the factual basis of that opinion. If the expert is not given the right background and information upon which to formulate an opinion, then the opinion will have little weight. Typically, the expert is or should be

given all of the relevant project files, specifically all of the information necessary upon which an expert opinion has been requested.

Occasionally, an expert is called to give an opinion on a matter but has not been given the information necessary to formulate an opinion. These situations usually come to light during cross-examination. The expert who has otherwise sounded authoritative and credible during direct examination may sound at best uninformed and at worst not expert during cross-examination when not given the proper information, or even given misinformation. An opinion in this circumstance carries very little weight, and an otherwise qualified expert has added little value to the case.

Finally, an expert opinion will only be as credible and effective as the subject matter upon which the expert has been requested to give an opinion. An expert with all of the required qualifications cannot be effective if not requested to render an opinion on the matter in dispute. For example, if an expert has been called to give an opinion as to whether a party has been damaged based upon delays during the course of the project but has not been given information upon which to do such analysis or has not been requested to do a delay damages analysis, the expert would not be in a position to offer a credible opinion.

2. *Expert v. Advocate*

The expert should be an expert and not an advocate. Once the expert becomes an advocate, any value the expert can contribute is drastically diminished.

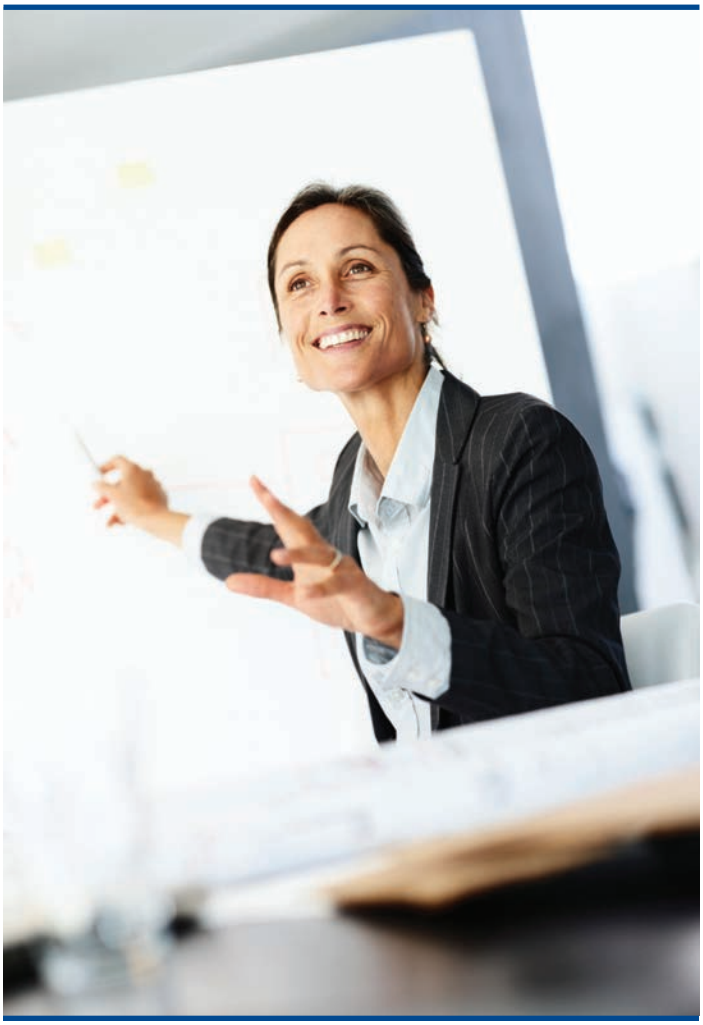
The expert essentially steps outside of the role of giving expert opinion on the subject matter for which he or she was retained when the expert opinion takes on a bias. The best experts maintain their credibility by being able to render their opinion in a neutral manner by carefully explaining the basis of the opinion and admitting, when necessary, where they either cannot give an opinion because they have not considered an issue and/or were not provided certain necessary information necessary to formulate an opinion. The best experts avoid becoming argumentative. The best experts will also admit when they do not know something or have not formulated an opinion on a specific matter for whatever reason. Those experts maintain their credibility with the trier of fact.

The expert also loses credibility when the expert becomes a clear advocate for the client's position as opposed to rendering an opinion based upon the record. An example is the expert who renders an opinion based on facts that are not supported by the evidence in the record or facts that are contradicted by evidence in the record. In either case, the expert who continues to maintain an opinion contrary to the evidence or refuses to reconsider such opinion in light of the evidence has rendered an opinion of little value.

The preparation of the expert to render expert opinion testimony is the final and critical step. The expert first should clearly understand the subject matter upon which an expert opinion is being sought.

Conclusion

Construction cases are often expert driven. Selecting the right expert can be a critical decision to the project, specifically if litigation or arbitration ultimately is involved. The ability to select experts "expertly" and further to utilize the selected experts "expertly" can dramatically impact whether the ultimate resolution is successful. ■



Using Integrated Project Delivery to Avoid Construction Conflict and Disputes

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Vendors. Variations on this basic arrangement have included Contractors taking on the role of a Program or Construction Manager, either with or without contractual risk for the delivery of the project, or, where the Contractor or the Design Professionals take on design, construction and procurement roles in the nature of Design-Build or Engineer-Procure-Construct arrangements. Regardless of the project delivery structure, each of the parties to the traditional arrangement has had fragmented rights and obligations, and most often differing interests, goal and objectives—all of which was a fertile ground for conflict and disputes.

Partnering

Partnering, as conceived and implemented in the United States,[1] was more of an optimistic "mind-set" than a project delivery system.[2] It most often began with one- or two-day facilitated workshops at the beginning of the construction phase, sometimes enhanced by follow-up sessions during the course of construction. In these meetings, representatives of the Owner, Contractor, key Subcontractors and Design Professionals would be led through a series of team-building exercises designed to sharpen their communication and conflict-resolution skills and to enhance their commitment to the project and to each other. The end result of the initial meetings would be a "partnering charter," reflected sometimes in the form of a flip chart that was signed by all those attending the meeting. In the partnering charter, the parties would identify key concerns and determine how issues and problems would be addressed at the earliest opportunity and resolved at the lowest level. However, the charter was never binding on the parties, and, in effect, the parties, having discussed and hopefully aligned their goals and objectives, were simply aspiring to collaborate, cooperate and communicate during the course of the project.

While Partnering had some successes, quite a few strong supporters and cheerleaders, and is still used sporadically, it has not stood the test of time. Hard evidence is scant that Partnering techniques alone really reduced conflict in the absence of strong financial incentives. And the informal commitments to openly cooperate, collaborate, communicate and generally align one's interests with other parties were in implicit, if not explicit, tension with the strict contractual obligations of the parties. Today, except for historical mention, one hears or reads little about the current use of the Partnering process. In fact, when the *Engineering News-Record*, the leading U.S. construction weekly periodical, published an assessment of Integrated Project Delivery in May 2010, a prominent engineer was quoted as saying that IPD "may go the way of total quality control [TQM] and partnering."[3]

Oil drilling platform under construction on the North Sea

Project Alliancing

Project Alliancing, first developed by British Petroleum in the early 1990s for North Sea off-shore oil drilling projects and implemented later in that same decade in Australia on similar oil drilling, pipeline and other large infrastructure projects, is generally considered a successful means of delivering large projects with a minimum of conflict. Essentially, Project Alliancing is a true project delivery system, embodied in one or more contracts, whereby the key project participants, including the Owner, Design Professionals, Prime Contractor and major Subcontractors, mutually contract to develop, finance, design, engineer, procure materials and construct the project under the following principles:

- Creation of a true contractual relationship whereby each party shares to a greater or lesser degree in the economic success or failure of the project, so that it is in all parties' economic and commercial interests to cooperate, collaborate and communicate openly to resolve problems on the job.
- Each major party has a primary role in the governance and management of the project.
- The Owner agrees generally to pay all costs of design and construction, including some overhead costs, regardless of whether there are cost overruns over and above a "Target Cost."

In summary, the American approach to collaborative construction contracting has taken a more conservative and tentative approach to risk-sharing by allocating at least some of the traditional construction risks in traditional ways and placing those risks on the responsible parties.

- The Non-Owner parties usually put only their anticipated profit at risk in the event that the cost of the project exceeds the Target Cost.
- There are built-in incentives to encourage and reward the Non-Owner parties to meet certain project objectives other than budget and schedule, such as safety, diversity participation, environmental and performance or operating standards.
- Provisions are contemplated for "no blame," no disputes, no arbitration, no litigation and no internal claims by any party against another party, except for willful default or possible insolvency. Damage claims for defective work, schedule misses, negligence, inefficiencies and other typical shortcomings are mutually waived.

For the most part, Project Alliancing has had an excellent track record in reducing conflict among the participants. The apparent reasons for less conflict and fewer disputes with Project Alliancing arrangements appear to be (1) the structuring of the contractual relationships such that the parties have a common economic interest in completing the project on time and within or less than the Target Cost; (2) the risk of economic disaster is greatly reduced for the Non-Owner participants, who stand to lose only their anticipated profit; (3) the no-blame, no claims, reduced liability and no arbitration or litigation provisions further reduce the liability exposure of the parties. In short, the root causes of conflict—divergent interests, compounded by risk and uncertainty—are taken out of the Project Alliancing equation, and instead, the participating parties' interests are truly aligned, and the uncertainty and risk of loss for failure are drastically reduced.

Integrated Project Delivery Systems

Integrated Project Delivery (IPD) is essentially the United States' version of Project Alliancing, incorporating similar contracting concepts, such as the following:

- Active involvement of all key project participants from inception to completion of the project under a singular contractual arrangement, inclusive of at least the Owner, Design Professionals and Prime Contractor;
- Shared risk and reward, based on project outcomes;
- Mutual development of the project cost, completion dates, performance specifications and other target goals;
- Collaborative control of the management of the project and decision-making by the key participants; and
- Reduced liability of the parties for failure of performance.

IPD was clearly inspired by the successes of Project Alliancing but did not make an appearance on the U.S. scene until about six years ago. A year or so later, in 2007 and 2008, two U.S. construction industry organizations published IPD contracting forms for the U.S. domestic market. The American Institute of Architects (AIA) published two separate families of documents: the so-called transitional IPD documents, which were built on the Construction Management model, and the Single Purpose Entity (SPE) model, which was developed as the contract embodiment of the principles stated in the AIA document "Integrated Project Delivery: A Guide." Another set of IPD documents was published by a conglomerate of organizations known as ConsensusDOCS in their ConsensusDOCS 300 Series, first published in 2007.[4]

Integrated Project Delivery differs from Project Alliancing in the following particulars:

- IPD is often used with Building Information Modeling (BIM)[5] and Lean Contracting[6] techniques and principles, which provide electronic platforms for instant design development and coordination and response times between the key project participants.

- While the Owner bears virtually all of the cost in Project Alliancing, some IPD agreements provide for partial or total cost-shifting to the Contractor parties in the case of cost overruns; and some commentators have recommended a guaranteed maximum price arrangement.

- While claims for delay and consequential damages as between the project participants are generally waived, other claims are not. For example, defective work and warranty claims may still be allowed; similarly, third-party claims against one or more of the key participants may not be waived or are transferred to builders' risk insurance.

- Generally, only key Subcontractors (e.g., structural, mechanical, electrical and plumbing trades) are included within the project IPD team; all other subcontracts and vendor supplier agreements are independent of the IPD system.

In summary, the American approach to collaborative construction contracting has taken a more conservative and tentative approach to risk-sharing by allocating at least some of the traditional construction risks in traditional ways and placing those risks on the responsible parties. The IPD model is more flexible than Project Alliancing in that under the current contracting forms, the parties are given more options to adjust risk allocation to the particular interests of the Owner, the project participants and the project conditions. If this more limited risk allocation model is successful, it may be an antidote to the problems with cost overruns as experienced with Project Alliancing. Yet the IPD process is still at the toddler stage of development in the United States, with questions still being raised by construction industry leaders as to its future.[7]

Conclusions

1. Traditional project delivery systems, including Design-Bid-Build, Construction Management, Design-Build and Engineer-Procure-Construct, have generally allocated risk on adversarial or arm's-length principles. Construction risk was typically shifted whenever possible and placed on parties having the least economic leverage to avoid it. Hence, the fundamental interests and objectives of the parties were divergent. This form of risk allocation has great potential for conflict and disputes.

2. Aspirational efforts, such as Partnering, non-contractual collaborative and similar arrangements, which simply encourage parties to establish a "team attitude" and to collaborate, cooperate, communicate and align their interests, have not proven to be consistently effective in reducing conflict on construction projects. Hence, Partnering and similar aspirational arrangements today are primarily of historical interest and are not a promising trend for reducing conflict on construction projects.

3. Because (a) the potential for conflict on construction projects is directly or nearly directly proportional to the divergent interests and objectives of the parties and (b) conflict can be successfully avoided and managed in project delivery systems if and to the extent that the interests of the parties can be made concurrent, these two principles are clearly demonstrated with Project Alliancing and Integrated Project Delivery systems. When the key parties' interests are truly aligned in an enforceable contractual arrangement and when uncertainty and the risk of economic loss is reduced, conflict and disputes are demonstrably reduced or avoided altogether. By way of contrast, in the traditional project delivery systems, when the parties' interests and objectives are not truly aligned and when those divergent interests are compounded by the uncertainty of economic loss, conflict and disputes abound.

4. The American version of Project Alliancing is Integrated Project Delivery. While similar to Project Alliancing in many respects, IPD has taken a somewhat different approach to the allocation of risk. At least some of the risk of cost overruns is typically placed on the Non-Owner parties, and a greater degree of potential liability for project defects and failures is placed on the responsible parties. However, there is not enough experience with IPD and its variations to determine whether this method will be consistently successful in reducing the cost-overrun risk and become a significant form of project delivery in the United States. ■

1 "Partnering" was said to have been conceived by Charles Cowen, then General Counsel of the U.S. Corps of Engineers. See Ronco & Ronco, *Partnering Manual for Design and Construction* (McGraw-Hill, 1996).

2 Construction Industry Institute (CII), *The Partnering Process—Its Benefits, Implementation and Measurement*, Clemson University, Research Report, pp. 102-111 (September 1996).

3 *Engineering News-Record*, p. 23 (McGraw-Hill Publications, May 10, 2010).

4 ConsensusDOCS consists of 21 member organizations, including the Associated General Contractors of America (AGC), the Construction Owners Association of America (COAA), the Construction Users Roundtable (CURT), Lean Construction Institute (LCI) and a large number of subcontractor organizations; see **http://www.consensusdocs.org**.

5 The AIA California Council describes the BIM technology as follows: "A building information model is a digital representation of physical and functional characteristics of a facility. As such it serves as a shared knowledge resource for information about a facility forming a reliable basis for decisions during its lifecycle from inception onward. A basic premise of BIM is collaboration by different stakeholders at different phases of the life cycle of a facility to insert, extract, update or modify information in the BIM to support and reflect the roles of that stakeholder. The BIM is a shared digital representation founded on open standards for interoperability." *AIA California, Integrated Project Delivery: A Working Definition, Version I*, Updated May 15, 2007.

6 For general information on "Lean Construction," see the Lean Construction Institute website: **http://www.leanconstruction.org**.

7 See *N.M. Post*, "Integrated Project Delivery Boosters Ignore Many 'Flashing Red Lights,'" *Engineering News-Record*, pp. 22-23 (May 10, 2010).

Admissibility of Nonbinding Written Dispute Board Recommendations

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pute Boards on its various capital projects, which projects had an aggregate value of over $6 billion. During that time, the various Dispute Boards on UW projects convened only two formal hearings and four informal hearings, for a lifetime average of one formal hearing per decade. The major distinctions between "formal" and "informal" proceedings are (i) that the outcome of a formal hearing is a written recommendation and the outcome of an informal hearing is a verbal recommendation and (ii) the parties' presentations at a formal hearing are much more articulated than at informal hearings. The Dispute Board model utilized by the University of Washington was a proactive, involved Board, integrated into the project progress, meeting regularly with the project staff prior to any identified "disputes" arising. The prophylactic effect of Dispute Boards on projects has been noted.[1]

Generally in the United States, the contract language that creates the Dispute Board provides that the determinations of the Board will be non-binding recommendations, even when the Board has held a formal hearing and renders a formal written determination. Accordingly, when a Dispute Board does render a formal written recommendation to the parties, one of the parties may reject the recommendation and pursue its position in a subsequent arbitration or litigation.

Under what circumstances will, or should, the Dispute Board's recommendation be admissible in that subsequent litigation or arbitration? Surveys of users of Dispute Boards indicate that lawyers are more inclined to favor exclusion of the Dispute Board's recommendation and that non-lawyers who participate in Dispute Board proceedings favor admissibility.

In the United States, the admissibility or exclusion of a non-binding recommendation of a Dispute Board will be evaluated in light of the contractual language that establishes the Dispute Board and its operations, as well as in accordance with the applicable federal (or state) rules of evidence. In federal courts, relevant evidence is admissible unless otherwise precluded by the Federal Rules of Evidence or by statute.[2] However, relevant evidence may be excluded if it is confusing or prejudicial.[3]

In general, the various state and federal rules of evidence consistently provide that hearsay evidence is not admissible in a judicial proceeding.[4] Hearsay is often described as a statement made out of court that is repeated in court to establish the truth of the matter stated.[5] Hearsay evidence is considered to be generally inadmissible because its credibility is inherently dubious and because it is not subject to cross-examination during the judicial proceeding. However, there are numerous exceptions to the rule against the admission of hearsay in a judicial proceeding.

One exception that could be applicable to a non-binding determination of a Dispute Board is the "business records" exception,[6] which provides that records created or received in the normal course of business are admissible. If the owner is a public agency, another possible exception to the rule against admission of hearsay evidence that could apply to a written recommendation of a Dispute Board is the "public records" exception.[7] Records created in the normal conduct of business are generally understood to be more reliably credible than other forms of hearsay evidence. Expert opinions are also generally admissible when the use of the expert opinion will clarify a technical point,[8] and in rendering their opinions, experts are not limited to their personal knowledge but may rely on information furnished by others.[9] The contract may provide that the Board's recommendation will be admissible to the same extent as an expert report. In these circumstances, the recommendation would not be admitted for the purpose of establishing a dispositive determination, but as information to guide the trier of fact in the subsequent proceeding.

The determination of admissibility of evidence is within the province of the trier of fact. If the contract states whether and to what extent or for what purpose the recommendation is to be admissible, the court may choose to end its inquiry with the contract language, but the court may also choose, notwithstanding the contract language, to render its own determination as to the admissibility of the Board's recommendation.

The drafter of the Dispute Board's contract provisions should establish the parties' intentions with regard to the admissibility of the Board's recommendations. The decision as to whether the Board's recommendations should be admissible should be based upon evaluation of competing considerations. Owners who favor efficiency will want the Dispute Board's determinations to be admissible, while owners who are loath to give up control of the matter to third parties will want to retain a second opportunity to present their position uncolored by any presumptions.

A. Considerations supporting admissibility

1. It is what it is. Three individuals, selected for their relevant training and experience in similar matters, have determined the merits of the matter;

2. It is inefficient, expensive and wasteful of resources to relitigate matters already considered by competent, neutral and informed evaluators;

3. The expertise and training of the Dispute Board's members, as well as their personal involvement and familiarity with the conditions of the project, renders them more qualified to evaluate the matter than a jurist or even an arbitration panel of construction specialists;

4. The qualifications and the knowledge accrued by the Dispute Board's members could justify classifying their recommendations as a form of expert opinions, which may, under the rules of evidence, be presented to a judge, jury or arbitration panel to explain technical considerations;

5. The underlying project documents and professional analyses that were presented to the Dispute Board and formed the basis of the Dispute Board's recommendations were all admissible records;

6. The DRBF Manual recommends that the recommendations be admissible as a best practice.[10] The manual was compiled and peer reviewed by experienced Dispute Board panelists who participated in hundreds of projects having Dispute Boards;

7. The admission of a Dispute Board's determination into evidence is not dispositive of the issue (otherwise, the Board's determination would be binding); it merely informs the ultimate decision of the judge or arbitrator; and

8. Courts have granted binding decisions of Dispute Boards the same deference as arbitration awards, subject to review only if arbitrary, capricious, or lacking a rational basis.[11]

On the other hand, particularly for those who are skeptical of the Dispute Board process, there are competing reasons to exclude consideration of the Dispute Board's determination from a subsequent proceeding.

B. Considerations supporting exclusion

1. The quasi-judicial decision of the Dispute Board was rendered without benefit of safeguards for due process. No procedural rules are in place, no rules of evidence prevent the introduction of incompetent information and no cross-examination allowed a party to expose the flaws in the information introduced by the other side. Witnesses do not swear to the truth, and documentary evidence is unauthenticated. No lawyers were present to monitor, object to, challenge or rebut incompetent evidence;

2. The Dispute Board proceeding can be considered a form of mediation; the results of mediation proceedings are, by statute, deemed confidential and non-admissible;

3. Alternatively, the Dispute Board proceeding can be considered analogous to a non-binding arbitration; the results of non-binding arbitrations are typically inadmissible and are used solely to establish entitlement to recovery of attorneys' fees and costs;

4. Alternatively, the Dispute Board proceeding could be considered analogous to settlement negotiations, or the Dispute Board's determinations may contain references to settlement negotiations. Offers to compromise or settle a matter are not admissible[12]; and

5. The essential purpose of classifying the Dispute Board's decision as "non-binding" rather than "binding" is to give the parties a "second bite at the apple." That second bite will present information in a different light than was shown to the Dispute Board. Proceedings in court and in arbitrations are choreographed, and information is filtered, by advocates on both sides. Certain information that is inconsistent with a party's position may be omitted; other information that was initially ignored may be brought into focus by cross-examination. Admitting the decision of the

Owners who favor efficiency will want the Dispute Board's determinations to be admissible, while owners who are loath to give up control of the matter to third parties will want to retain a second opportunity to present their position uncolored by any presumptions.

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Dispute Board to the judge or arbitrator could irreparably prejudice the outcome and could prevent the dissatisfied party from receiving fair and impartial consideration of its claims.[13]

When the contract is silent as to the admissibility of the Dispute Board's determination, then the judge or arbitrator will be compelled to weigh these considerations unaided by any information about the parties' intentions. The intentions of the parties with regard to admissibility should be resolved by the parties prior to the commencement of the project, and the contract should clearly reflect the extent to which the Board's non-binding recommendations will be subsequently admissible. Not every issue needs to be addressed in an identical manner. The contract may specify that some Board decisions (often, decisions below a monetary threshold) are binding, while other decisions are non-binding. Similarly, the contract may specify that some decisions are admissible, while others are not.

The parties' expectations with regard to the admissibility of the Dispute Board's recommendations may well color their attitude towards the Dispute Board process and may impact their willingness to accept the recommendations that result from the process. ■

1 See, e.g., James P. Groton, "The Standing Neutral: A 'real time' resolution procedure that also can prevent disputes," *Alternatives to the High Cost of Litigation*, Volume 27, Issue 11 December 2009, pages 177-185.

2 Rule 402, Fed. R. Ev.

3 Rule 403, Fed. R. Ev.

4 Rule 802, Fed. R. Ev.

5 See Rule 801, Fed. R. Ev.

6 Rule 803(6), Fed. R. Ev.

7 Rule 803(8), Fed. R. Ev.

8 Expert testimony is admissible when "(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case." Rule 702, Fed. R. Ev.

9 "An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed." Rule 703, Fed. R. Ev.

10 Section 2.8.3 Subsequent Dispute Resolution Activity, User Guide, *DRBF Practices and Procedures*, revised January 2007, **www.drb.org/manual_access.htm.**

11 See, e.g., *Excel Group, Inc. v New York City Tr. Auth.*, 28 A.D.3d 708, 814 N.Y.S.2d 220 (N.Y.A.D. 2 Dept. 2006), *Massachusetts Highway Dept. v. Perini Corp.,* 79 Mass. App. Ct. 430, 947 N.E.2d 62 (Mass. App. Ct. 2011).

12 Rule 408, Fed. R. Ev.

13 See, e.g., *El Dorado Irrigation Dist. v. Traylor Bros., Inc.,* Not Reported in F.Supp.2d, 2007 WL 1113547 (U.S.D.C. E.D. Cal. 2007), where the decision of the dispute board was used as evidence of liability. See also this judicial comment on a lawsuit challenging a non-binding Dispute Board determination: "One need only look to the fact that the contract in issue contains provisions for a Disputes Review Board made up of three experts in the kind of construction at issue who themselves have taken months to resolve some of these very same issues, only to be asked to reconsider their initial conclusions and then, because their determinations are not binding, to have the issues raised again in this litigation. Here, a single judge—not a panel of experts in the subject of tunnel construction—is asked to resolve the issues because the parties themselves refuse to accept the decisions of their contractually assembled team of experts." *Kiewit-Atkinson-Kenny v. Massachusetts Water Resources Authority,* Not Reported in N.E.2d, 2002 WL 31187691 (Mass. Super. 2002).

UPCOMING EVENTS

On March 8-9, 2013, in Orlando, Florida, **LARRY R. LEIBY, ESQ.** will be making a presentation, sponsored by the Florida Bar Construction Law Institute, on "Advanced Construction Lien Issues."

HARVEY J. KIRSH, ESQ. has organized a presentation for March 19, 2013, in Toronto, sponsored by the Construction Law Practice Group of Canada's Advocates' Society, dealing with the Charbonneau Commission, a judicial inquiry whose mandate is to investigate corruption in the construction industry in the Province of Quebec. On April 11-12, 2013, he is also scheduled to lead a seminar on "Construction Arbitration: Why Choose it, and The Six Essential Elements for the Mediation of a Construction Claim" at the 8th Annual Symposium of the Ontario General Contractors' Association, which is to be held at the Blue Mountain Resort in Collingwood, Ontario, Canada.

LINDA DEBENE, ESQ., **HARVEY J. KIRSH, ESQ.** and **HON. MERCEDES ARMAS BACH (RET.)** will be participating in a panel discussion on "Getting Arbitration Back on Track" at the 15th Annual Spring Conference of the American Bar Association's Section of Dispute Resolution on April 3-6, 2013, in Chicago, Illinois.

RECENT ARTICLES, HONORS AND APPOINTMENTS

JOHN W. HINCHEY, ESQ. has been admitted as a Fellow, and awarded a Diploma in International Commercial Arbitration, by the Chartered Institute of Arbitrators. John's chapter on "Dispute Resolution," in a new book published by the American Society of Civil Engineers titled *Managing Gigaprojects*, deals with the avoidance and resolution of disputes arising from the largest infrastructure projects in the world.

The 2012-2013 edition of the *Florida Construction Law Manual*, which is authored by GEC neutral **LARRY R. LEIBY, ESQ.**, has been published by Thomson-Reuters-West.

HARVEY J. KIRSH, ESQ. has published "Set the Stage with a Pre-Hearing Conference" (*The Lawyers Weekly*, September 14, 2012); and "Contract Construction: Contemplate Multiparty Disputes in Arbitration Clauses to Avoid Dilemma" (*The Lawyers Weekly*, November 23, 2012).

Thirty-eight JAMS panelists were recently recognized as "2013 Best Lawyers in America." The group included the following members of the Global Engineering and Construction Group:

VIGGO BOSERUP, ESQ.
RICHARD CHERNICK, ESQ.
BRUCE A. EDWARDS, ESQ.
KENNETH C. GIBBS, ESQ.
ALEXANDER S. POLSKY, ESQ.
MICHAEL D. YOUNG, ESQ.
PHILIP L. BRUNER, ESQ.
ZELA G. CLAIBORNE, ESQ.
DAVID GERONEMUS, ESQ.
JOHN W. HINCHEY, ESQ.
ERIC E. VAN LOON, ESQ.

JAMS GEC NEUTRALS RESOLVE AN ARRAY OF CONSTRUCTION DISPUTES

LINDA DEBENE, ESQ. recently successfully mediated, on appeal, a $2.5-million dispute between a subcontractor, a general contractor and a bonding company relating to a parking structure project.

KENNETH C. GIBBS, ESQ. successfully mediated a settlement of a dispute between a major U.S. defense firm and contractors relating to a manufacturing facility where there were issues of sound attenuation, which violated Defense Department standards for top-secret facilities.

ROY S. MITCHELL, ESQ. and **JOHN W. HINCHEY, ESQ.** have been appointed arbitrators in an international multi-million-dollar dispute, administered by the ICDR, arising out of a $2-billion U.S. coal-fired power project. John has also been appointed as Chair of a panel of arbitrators dealing with a dispute, administered by the American Arbitration Association, arising out of a chemical processing plant in Houston, Texas.

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