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The Evolution of Expert Witness Law under U.K. and U.S. Jurisdiction

Steve Huyghe is Head of Asia Pacific, Construction Solutions, FTI Consulting.

BY STEVE HUYGHE AND ADRIAN CHAN

The Need for Expert Witnesses

The use of expert testimony in construction disputes is not new, but as the technical and logistical complexity of construction projects has increased, so has the need for expert testimony to assist the court to understand and resolve the issues of the dispute. Expert witnesses were being appointed in England as long ago as 1784, when the well-known British civil engineer John Smeaton appeared before an English court on a case relating to the silting-up of the harbor at Wells-next-the-Sea in Norfolk, England.[1] Today, a brief exploration of the Internet will identify many companies and individuals offering expert witness services in

> *See "Expert Witness Law" on Page 6*

DIRECTOR'S COLUMN

ConsensusDocs Lists JAMS as One of Two Named Arbitration Providers

Philip L. Bruner, Esq. is Director of the JAMS Global Engineering and Construction Group.

BY PHILIP L. BRUNER, ESQ.

ConsensusDocs, one of the most widely used sets of standard form construction contract documents in the United States, has honored JAMS, and the JAMS Engineering and Construction Arbitration Rules and Procedures, by selecting JAMS for formal listing in its contract forms as one of only two named American providers of construction arbitration services. Under ConsensusDocs' Binding Dispute Resolution clauses, contracting parties now may select JAMS to administer arbitrations pursuant to the

> *See "ConsensusDocs" on Page 10*

Using Attorneys' Fees to Promote a Better Result

BY CHARLES M. SINK, ESQ.

Charles M. Sink, Esq. is a partner at Farella Braun + Martel LLP (San Francisco).

Rule 24(g) of the JAMS Engineering and Construction Arbitration Rules & Procedures allows the arbitrator "to allocate attorneys' fees and expenses…if provided by the Parties or allowed by applicable law." In the absence of a clause requiring a fee award to the prevailing party, the so-called "American Rule" generally requires each party to bear its own attorneys' fees and costs. Rule 24(g) offers any drafter of an agreement a golden opportunity to improve the arbitration experience and to give the parties locked in a dispute an extra incentive to act reasonably in formulating their offers and counteroffers to settle their claims. What the contract requires is a thoughtful "prevailing party" clause, one designed to discourage extreme behavior and brinkmanship, while rewarding a reasonable negotiation attitude. In short, the drafter should encourage the future disputants to try to occupy the middle ground of negotiations, thereby improving the odds of an early settlement on terms that will not ruin the business relationship.

It may come as a surprise, but many arbitrators want to "do the right thing" and to promote a process that really is faster, better and cheaper than litigation. Those same arbitrators often must work with lawyers (and some parties) who are convinced that the future award simply will reflect a "cut the baby in half" attitude; therefore, they have adopted a series of extreme positions designed to move the theoretical midpoint more toward their actual goal or expectation. To these participants in arbitrations, reasonable demands or offers are for the naïve. Really sophisticated counsel and parties, like these cynics, always demand "more" or offer "less" so as to set the parameters of the rival damage calculations submitted at a hearing where they can best leverage their intransigence to influence the arbitrator's perceived middle ground, and thus the award. While I submit that most experienced arbitrators of construction disputes are not driven to please both sides, at the expense of a result that they believe in, I also acknowledge that extreme positions taken all the way through to the conclusion of a hearing leave the arbitrator with a thickened skin and a dubious attitude toward any submitted damage calculations. What the conscientious arbitrator wants is a mechanism to counteract the posturing. A thoughtful attorneys' fees and expenses clause can be just the necessary device for correcting such extreme posturing.

In drafting an attorneys' fees clause, one should assume that the future arbitrator will not be looking for some middle ground on which to base an award, but rather will be wondering why the dispute was not settled and who is being so unreasonable that negotiations broke down. Cases going to hearing generally mean that one (or more) of the parties has seriously misestimated its chances. If the arbitrator really is not looking for a compromise number, but rather wants to do equity and not by halves, then the actual award probably will come as quite a shock to someone. Your prevailing party language can greatly assist the arbitrator once he/she has figured out which side is being unreasonable. The right clause should work both for a claimant that has had to fight through obstacle after obstacle to get paid what was owed all along and for a respondent that recognized that it owed something but who had to deal with one outrageous demand after another (accompanied by threats of "You'll pay my attorneys' fees too!").

To begin, arbitrators have been known to consider legal costs in their calculations of lump-sum awards. The best way to avoid uncertainty in this area is to instruct the arbitrator on the awardability of fees and costs. For example, and to be fair, by offering both points of view, *i.e.,* to actively discourage any *sua sponte* inclusion of fees:

> *The arbitrator shall have no authority to award any attorneys' fees or costs, or expert witness fees and costs.*
>
> *or*
>
> *In the event any dispute between the parties should result in arbitration (whether based on contract, tort or other cause of action), the arbitrators shall award reasonable attorneys' fees, costs and reasonable expert witness fees and costs to the prevailing party.*

A middle ground might be:

> *In the event of any arbitration relating to _____________ under this contract, the prevailing party shall be entitled to costs and attorneys' fees relating to that subject matter. In all other issues, each side shall bear its own costs and attorneys' fees. Each party acknowledges that it has been represented by counsel in the negotiation and execution of this contract.*

In some states, it is possible to limit attorneys' fees to certain aspects of a contract, provided that each party has been represented by counsel and the contract so reflects. For instance, you may wish to allow attorneys' fees only in proceedings to collect unpaid invoices. If a party attempts to impose a completely one-sided attorneys' fees clause, however, it may discover that applicable statutes or case law can interpret such clauses as applying reciprocally between the parties.

Thinking ahead, you also may wish to provide a prevailing party's recovery to include reasonable fees incurred to collect on a judgment. For example:

> *Any attorneys' fees and other costs incurred in enforcing a judgment obtained pursuant to an arbitration award shall be recoverable separately from and in addition to any other amount included in such judgment, and such attorneys' fees obligation is intended to be severable from the other provisions of the contract and to survive and not be merged in any such judgment.*

The point of this language is to address some cases that have held that a prevailing party cannot recover its attorneys' fees for further collection efforts once a judgment is entered because the prior contractual rights are merged into the judgment.

A surprising number of contracts make no attempt to define "prevailing party," which can lead to needless arguments when there are counterclaims or the claimant prevails only on some issues. Better to define the term, especially because construction disputes frequently involve a host of different claims. One rather basic approach:

> *Prevailing party means that party that obtains a net recovery compared to the other party.*

If this seems to disregard unduly the party prevailing on discrete issues or claims, an alternative definition might leave greater discretion with the arbitrator:

> *The prevailing party shall be determined by the arbitrator based upon an assessment of which party's arguments or positions taken in the proceeding could fairly be said to have prevailed over the other party's arguments or positions on major, disputed issues in the arbitration.*

Alternatively, a prevailing party clause can be tied to stated settlement positions (which may be revealed after the arbitrator's preliminary award and before they reach the attorneys' fees and costs element of recovery). Certainly, if your client believes that it might be subjected to an inflated claim or may be dealing with a potentially unreasonable opponent, your counsel should consider the following language:

> *In determining if either party prevailed, the arbitrator shall compare the award amount, with interest (if any is awarded) and any fees or costs of arbitration, to the last written settlement position of the respective parties. Only a party bettering its last settlement position may be the prevailing party.*

The extra drafting required to include such terms should help produce a more predictable award, and one that plainly encourages reasonable settlement positions. It is often relatively easy to "sell" such a clause at the time of initial contract negotiations, when each party expects itself to be reasonable in any future offer of settlement. ■

[E]xtreme positions taken all the way through to the conclusion of a hearing leave the arbitrator with a thickened skin and a dubious attitude toward any submitted damage calculations. What the conscientious arbitrator wants is a mechanism to counteract the posturing. A thoughtful attorneys' fees and expenses clause can be just the necessary device for correcting such extreme posturing.

Using Affidavits in Lieu of *Viva Voce* Evidence at an Arbitration

BY ADRIAN L. BASTIANELLI III, ESQ.

Adrian L. Bastianelli III, Esq. is a partner at Peckar & Abramson, P.C. (Washington, DC).

The typical affidavit is drafted by an attorney for the litigation or arbitration in an effort to prove facts without producing the witness at the hearing. The affidavit often contains summary conclusions of the ultimate facts and issues rather than setting forth a detailed statement of individual facts based on personal knowledge. Since the witness does not appear before the arbitration panel, a question arises as to the usefulness of such affidavits. There are many reasons why an affidavit should not be admitted into evidence in lieu of live testimony, or why, if admitted, the affidavit should be given very limited weight. While the witness affirms under oath and the penalty of perjury that the statements in the affidavit are true and accurate, he/she is not required to stand before the judge, jury or arbitrator, which by itself puts pressure on him/her to tell the truth. The arbitrator does not have the opportunity to observe the witness and judge his/her demeanor and truthfulness. Further, the other party does not have the right to confront the witness and test his/her credibility through cross-examination. Affidavits simply have far less probative value than live testimony.

An affidavit almost always is an out-of-court statement offered to prove the truth of the matter for which it is asserted. It therefore constitutes hearsay, which is inadmissible in a court of law under state and federal rules of evidence unless it fits within an exception to the hearsay rule. As a result, an affidavit seldom is admitted into evidence in court in lieu of live testimony from the witness. In addition, the affidavit itself often contains additional hearsay and other objectionable material.

In contrast to the rules of evidence applied by courts of law, most arbitration rules specifically allow the arbitrator to consider admitting affidavits into evidence in lieu of live testimony, giving the affidavits the weight the arbitrator deems appropriate. For example, Rule 22(e) of the JAMS Engineering and Construction Rules and Procedures states as follows:

> *The Arbitrator may in his or her discretion consider witness affidavits or other recorded testimony even if the other Parties have not had the opportunity to cross-examine, but will give that evidence only such weight as the Arbitrator deems appropriate.*

Arbitrators seldom exclude affidavits, admitting them with the admonition that the affidavits will be given the weight they deserve. This action complies with the rules of the arbitration provider and prevents the award from being attacked on appeal on the grounds that the arbitrator improperly excluded evidence. While affidavits may be admitted into evidence in an arbitration proceeding, the question remains how much weight the affidavit should be given by the arbitrator and whether the affidavit can be effective, in lieu of live testimony, in convincing the arbitrator of the truth of the assertions in the affidavit.

Affidavits have a clear value and are effective to present evidence to the arbitrator in limited circumstances, including the following: (1) the evidence is not critical to the outcome of the arbitration, (2) the evidence addresses a minor or peripheral point or (3) the evidence is inherently trustworthy. This is particularly true if the cost and inconvenience to bring the witness to the arbitration is significant. For example, testimony (1) authenticating documents or records such as dates of employment, accounting records or daily reports, (2) that is confirmed by documents in the record or testimony of other witnesses who have been subjected to cross-examination or (3) addressing undisputed or insignificant facts (such as explaining the normal change order, shop drawing or payment process) can be handled economically and efficiently through an affidavit rather than live testimony, particularly if it comes from a witness who has no interest in the outcome of the arbitration or has no reason to lie or fail to tell the entire truth. In contrast, an affidavit offered to prove a critical or decisive fact or issue, from a witness who has a vested interest in the outcome, likely will be given little or no weight by an arbitrator because it deserves none.

If counsel has a question about how much weight the arbitrator will give the affidavit, he/she should inquire of the arbitrator. Counsel should not assume that, just because an affidavit is admitted into evidence and not rebutted, the statements in the affidavit have been established as true and will be accepted by the arbitrator. That often is not the case. An affidavit is no different from any other evidence. If the affidavit is not credible, it will be given no value even if it is not rebutted by the opposing party.

If a party must use an affidavit in lieu of live testimony, what can counsel do to increase the value of the affidavit and make it more likely that the arbitrator will accept the statements in the affidavit? Counsel should try to find an exception to the hearsay rule that permits introduction of the affidavit into evidence in a court. While the affidavit may be admitted in an arbitration hearing even if it is hearsay, the fact that it fits within a hearsay exception may lend credibility to the statements in the affidavit. Even if the affidavit fits within an exception to the hearsay rule, the arbitrator still may not give the affidavit much weight if it is not credible. There are, however, additional steps counsel can take to increase the likelihood that the arbitrator will accept the statements in the affidavit.

First, counsel should offer to present the testimony through a more credible format. For example, counsel should propose to have the witness appear live at the hearing by video conference or telephone. If live testimony is not possible, counsel should offer to provide the testimony through a deposition, so that the other party has the opportunity to cross-examine the witness. If a deposition is not possible, counsel should try to convince the witness to speak to the opposing counsel. If counsel for the opposing party declines or opposes any of these options, it will defeat or diminish that party's ability to argue prejudice. In any event, counsel should subpoena the witness so he/she can argue that he/she has done everything possible to obtain the testimony through a more viable method.

In the event that none of these alternatives is viable, counsel should offer evidence to show why the witness cannot be made available to testify in person, by videoconference or telephone, or by deposition, and demonstrate that the failure to appear is not due to the lack of effort on the part of the party to require the witness' attendance at the hearing. The typical reasons for non-attendance at a hearing or deposition are health, distance from the site of the hearing or deposition, employment restrictions, fear or a simple unwillingness to cooperate. Counsel needs to convince the arbitrator that counsel is not trying to avoid live testimony and cross-examination through presentation of the affidavit, but has done everything possible to produce the witness to no avail.

Second, it is critical that the affidavit not be limited to summary conclusions. The affidavit should contain a detailed statement of facts and proof of personal knowledge of those facts. The statement of facts should be tied to and reference written documents that will be introduced into the record at the arbitration hearing. For example, in

An affidavit is no different from any other evidence. If the affidavit is not credible, it will be given no value even if it is not rebutted by the opposing party.

a case for professional negligence during the design of a project, a former employee's affidavit should not simply state that he followed normal industry practice and performed all analyses, calculations and tests reasonably required to ensure that the design was adequate. Instead, the affidavit should (1) contain a detailed statement of the witness' education, past experience on other similar projects on which he/she worked, licenses, admittance to professional organizations, honors and awards and instances where courts, boards or arbitration panels have accepted him/her as an expert; (2) identify his/her position on the project, whom he/she worked for and who worked for him/her, the number of hours worked on each phase of the project and dates of performance; (3) contain a detailed description of the research, calculations, analyses and tests performed by him/her or under his/her control with reference to the supporting documents; (4) define normal industry practice and the basis therefor; (5) describe what he/she had done on previous projects; (6) respond to challenges that opposing counsel would raise in cross-examination, if he/she had testified live; and (7) describe why he/she could not appear at the hearing in person or by videoconference, telephone or deposition. The affidavit should contain as much or more information than would be elicited from the witness if he/she appeared at the hearing.

The affidavit also should address credibility issues head on and not avoid or ignore them. Opposing counsel inevitably will raise those credibility issues to the arbitrator when the affidavit is offered and claim prejudice. Counsel should put themselves in the shoes of the arbitrator and attempt to identify the questions and concerns the arbitrator might have with the truthfulness of the affidavit and

> *See "Using Affidavits" on Page 11*

Expert Witness Law *continued from Page 1*

various branches of engineering and construction within individual jurisdictions or internationally, be it programming and delay analysis or costing and valuation. In each case, the expert will usually advertise that he/she has years of experience in his/her chosen field, and the skill, knowledge and expertise gained in that time will be relied upon when forming and presenting opinions on matters that are often key to the resolution of the dispute.

However, there are rules and guidelines within which expert witnesses must operate, and these can differ considerably between one part of the world and another. This article describes some of the similarities and differences between the way expert witnesses should operate under the legal systems of U.K. and U.S., respectively, particularly in relation to court.

Similarities between U.K. and U.S. Expert Witness Law

Before exploring some issues relating to judicial management of expert witnesses, it is important to recognize the similarities between the two jurisdictions. The fundamental principles regarding the admissibility of expert testimony in both the U.K. and the U.S. are shown in the chart below.

It is evident that in both U.K. and U.S. jurisdictions, the fundamental rationale for calling expert assistance is to assist the judge to understand the technical issues at hand. Therefore, in order to qualify as an expert, one must possess sufficient knowledge and expertise, gained by formal study and/or by virtue of experience in a specialist trade, to provide that assistance. In the U.K., this requirement is set out in the Civil Procedure Rules ("CPR"), Practice Direction ("PD") 35,[2] and in the U.S., it is found under the Federal Rules of Evidence ("FRE"), 702.[3]

Irrespective of the standing and experience of the expert witness, the judge must decide the weight and probative value of expert evidence given. Under FRE 703, experts may rely on data published by others. However, in the U.S., three cases that have become known as the "Daubert trilogy"[4] define tests that may be applied to determine whether investigations undertaken by the expert (or by others on his/her behalf) can be relied upon:

1. *Can the theory or method be empirically tested?*
2. *Has the technique been subjected to peer review or publication?*
3. *Can potential error rates (if any) be controlled?*
4. *Are the proposed methods generally accepted with the specific community?*

At present, under U.K. jurisdiction, there is no statutory test for determining the admissibility of expert evidence, but the consequences of permitting unreliable testimony have not gone unnoticed. In April 2009, the Law Commission published a consultation paper titled "The Admissibility of Expert Evidence in Criminal Proceedings," recommending a general standard to

SIMILARITIES:	UNITED KINGDOM	UNITED STATES
The purpose behind the use of expert witnesses	**Expert evidence is to furnish the judge or jury with necessary scientific criteria for testing the accuracy of their conclusions.[21]**	**Expert evidence is admissible on the basis that the knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.[22]**
Qualification of expert witnesses	**An expert witness is qualified to give evidence where the court itself cannot form an opinion and special study, skill or experience is required for the purpose.[23]**	**An expert witness is qualified by knowledge, skill, experience or education.[24]**
Admissibility of evidence	**Expert evidence must be provided in as much detail as possible in order to convince the judge that the expert's opinions are well-founded.[25]**	**Expert testimony must be based on sufficient facts, data or products of a credible source of tested and tried principles and methods.[26]**

DIFFERENCES:	UNITED KINGDOM	UNITED STATES
Conduct of expert witness	**Expert's duty "overrides any obligation to the person from whom experts have received instructions or by whom they are paid."[27]**	**Expert's duty is not formally defined under the Federal Rules of Civil Procedure /Evidence.**
Depositions	**Expert evidence is examined before the judge.**	**Expert evidence can be compelled to deposition.**
Ultimate issues	**Expert opinion on ultimate issue is not admissible.**	**Expert opinion on ultimate issue is admissible.**

ensure there is sufficient reliability of expert testimony. The proposed three-stage process is as follows:

1. *The evidence must be predicated on sound principles, techniques and assumptions;*
2. *The principles, techniques and assumptions must have been properly applied to the facts of the case; and*
3. *The evidence should be supported by those principles, techniques and assumptions as applied to the facts of the case.*

Furthermore, in January 2013, the U.K. Ministry of Justice published "Report on the implementation of Law Commission proposals," stating that there should be a new statutory reliability test of expert evidence in criminal proceedings.[5] Though there is no mention of introducing statutory tests in civil proceedings, it can be speculated that such tests could also be introduced, if they prove to be successful in criminal cases.

Differences between U.K. and U.S. Expert Witness Law

Notwithstanding the similarities, there are three notable differences between U.K. and U.S. practice in relation to expert witness evidence, as set out in the chart above.

Independence and Impartiality of Expert Witnesses

The development of rules governing the conduct of experts seems to be greater in the U.K. than in the U.S. and has increased over the years. As an example, in U.K. cases such as "The Ikarian Refeer"[6] and *Davies v. Magistrates of Edinburgh*,[7] the duties of the expert are set out clearly. Not only does the appointed expert have an overriding duty to the court, but he/she must remain independent and impartial, and identify in his/her testimony any opinions held that do not support the case put forward by the party who appointed him/her. Also, under the CPR PD 35.10(2), at the end of an expert's report, he/she must include a statement that he/she is aware of his/her duties and has fulfilled them and will continue to do so.

By comparison, the law in the U.S. is often perceived to be less prescriptive, and persons directly involved in the independent analysis of the project are allowed to give expert evidence, whereas in the U.K., this is usually not allowed. The FRE does not formally define the duties of an expert witness, nor does it contain any specific written obligation for the expert to be independent. This distinction between the U.K. and U.S. jurisdictions has prompted views of greater expert partisanship in the U.S. Nevertheless, there appears to be little enthusiasm for any change in the FRE to deal with this, and the U.S. appears to be content with the current governance of experts.

Depositions

Under the U.S. Federal Rules of Civil Procedure ("FRCP"), r 29, any party may take the testimony of any person by the form of oral[8] or written[9] deposition unless the court orders otherwise. If the deponent fails to attend, he/she could be compelled to do so by subpoena.[10] The use of deposition is considered to be an important component of discovery (the right to compel an opposing party to disclose material facts and documents supporting its contentions) in the U.S. legal system, as it enables lawyers to determine the strength

of the other side's evidence, which may lead to early settlement or determine trial tactics.

By comparison, the use of depositions in civil proceedings is uncommon in the courts of the U.K. (although possible under certain circumstances). Unlike the U.S. system, any cross-examination of an expert must be conducted under oath (or affirmation) in front of a judge. The expert must attend at the agreed trial date, preferably voluntarily but under subpoena if necessary. Any ambiguity or obfuscation within the expert's report will be highlighted by the legal counsel during cross-examination and may prompt the judge to place less weight on that evidence.

Ultimate Issue

The U.S. and U.K. jurisdictions have adopted different stances on whether the expert can or cannot opine on issues that the judge is ultimately required to decide. Under FRE 704(a), the expert is permitted to opine on the "ultimate issue," and it explicitly states that "an expert's testimony is not objectionable just because it embraces an ultimate issue."

In contrast, experts who operate under the U.K. jurisdiction are strictly forbidden from opining on the ultimate issue. Experts must follow the code of conduct and not stray from the instructions given by their instructing lawyers. In the event of digression, the expert could face possible costs sanctions.[11] In the words of Lord Cooper (a former head of the judiciary in Scotland), "Expert witnesses, however skilled or eminent, can give no more than evidence. They cannot usurp the functions of the jury or the judge sitting as a jury."[12]

Expert Witness or Expert Advocate?

Under the adversarial litigation systems in both the U.K. and U.S., parties are entitled to choose the expert they hire. This gives parties the opportunity to appoint not necessarily the most experienced expert in their field of practice, but an expert who may be willing to best support the party's view. Since experts are appointed and paid on the basis of a contractual relationship, some unfortunately may adopt the position of a "hired gun," advocating on behalf of the party that appointed them in an attempt to advance that party's contentions.

Misapprehension concerning the integrity and independence of experts is not a recent phenomenon and has become somewhat widespread. In 1996, Lord Woolf, then the Lord Chief Justice of England and Wales, published the "Access to Justice" report,[13] noting that the civil justice system was slow and expensive, with the prolific use of expert witnesses as one of the contributing factors. In addition, the conduct of expert witnesses was further scrutinized in the landmark case of *Jones v. Kaney*, which resulted in the expert's immunity from being abolished by the Supreme Court of the U.K.[14]

Similarly, in the U.S., there is also no shortage of cases in which the usefulness of expert witness testimony has been questioned. For instance, in the case of *Finkelstein v. Liberty Digital Inc.,*[15] the judge highlighted, "These starkly contrasting presentations have, given the duties required of this court, imposed upon trial judges the responsibility to forge a responsible valuation from what is often ridiculously biased 'expert' input."

The Way Forward—Concurrent Evidence

In 2010, Lord Justice Jackson ("LJ Jackson") (a member of the Appellate Court of England and Wales) produced a report[16] concluding that the cost of appointing experts was becoming disproportionate.[17] The report highlighted the need for greater control of judicial case management, and one of the methods recommended was concurrent expert evidence (also known as hot-tubbing). This method was developed in Australia in 1980, where experts are sworn in at the same time before the judge, who will then put forward a series of questions to the experts in order to identify the issues and arrive, where possible, at a common resolution. As the "hot-tubbing" method had encountered a mixture of response, it was proposed by LJ Jackson that such method should be tried and tested in cases where the experts, the lawyers and the judge all consent.

A pilot scheme, also known as Concurrent Expert Evidence Direction ("CEDD"), was introduced in the Mercantile Court and Technology and Construction Court of Manchester under the leadership of Justice Waksman. From interim reports[18] the response to the pilot scheme was promising, and the evaluations have shown no significant signs of disadvantages. In the words of Professor Dame Hazel Genn, "As a procedure for enhancing the quality of judicial decision-making, there seem to be significant benefits." Furthermore, as of April 1, 2013, amendments were made to CPR

PD 35 (para 11.1-11.4) so that "[a]t any stage in the proceedings, the court may direct some or all of the experts from like disciplines to give evidence concurrently."[19]

In contrast, there are some lawyers in both the U.K. and the U.S. that have expressed their resistance to hot-tubbing. The primary reason conveyed is they believe the method diminishes the control of legal counsel, since the expert's testimony will be tested by the judge and the other expert rather than by counsel. Currently, I do not know of any reports of the U.S. judiciary examining the compatibility of concurrent evidence with the FRE or CPR. However, the consensus amongst the U.S. judges who have used the method is that the technique is helpful. For example, Judge Woodlock (a federal judge in the U.S. District Court of Massachusetts) stated, "The parties and the court found this 'hot tub' approach extremely valuable and enlightening."[20]

Concurrent expert evidence, also known as "hot-tubbing," was developed in Australia in 1980, where experts are sworn in at the same time before the judge, who will then put forward a series of questions to the experts in order to identify the issues and arrive, where possible, at a common resolution.

Conclusion

The use of expert evidence in legal proceedings has been a long-standing tradition and will remain an important part of the litigation process. It can be seen that under the U.K. jurisdiction, measures have been enforced by reassuring that integrity and independence are upheld and, secondly, reminding the experts that their primary mandate is to serve the courts, not their fee payers. The recent legislative amendment of permitting concurrent evidence in the courts may help the judges to act as better gatekeepers to examine any fallacious expert testimony. Even though U.S. courts may appear to be more relaxed in relation to the conduct of the experts, my experience in providing expert testimony in U.S. and U.K. jurisdictions has proved this theory to be incorrect. I find little difference between the professional conduct of the expert witness, lawyers and judges who participate in the legal proceedings.

It should be emphasized that whether providing expert testimony in the U.K. or U.S., the expert should at all times ensure his/her purported evidence is supported by relevant validation and must pay special attention to the methodology and facts upon which he/she is relying. ■

Co-author Adrian Chan is Consultant at FTI Consulting - Construction Solutions in Hong Kong.

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3 Retrieved from http://www.law.cornell.edu/rules/fre

4 Daubert Trilogy: *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* U.S. 579 (1993); *General Electric Co. v. Joiner,* 522 U.S. 136 (1997); and *Kumho Tire. v. Carmichael,* 526 U.S. 137 (1999).

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6 Ikarian Reefer, 1993 2 LILR 68, 81-82.

7 *Davies v. Magistrates of Edinburgh* 1953 SC 34, SLJ 54.

8 FRCP, r30.

9 FRCP, r 31.

10 FRCP, r 45(B).

11 Philips and Others Symes and Others 2 [2004] EWC 2330 (Ch), [2005] 4 ER 519.

12 *Ibid,* 14, P40.

13 Retrieved from http://webarchive.nationalarchives.gov.uk/+/http://www.dca.gov.uk/civil/final/contents.htm

14 *Jones v. Kaney* [2001] UKSC 13.

15 *Harold Finkelstein and Marilyn Finkelstein v. Liberty Digital Inc.* [2005] C.A. No. 19598.

16 Retrieved from http://www.judiciary.gov.uk/NR/rdonlyres/8EB9F3F3-9C4A-4139-8A93-56F09672EB6A/0/jacksonfinalreport140110.pdf

17 *Ibid,* 27, P379, para 3.2.

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21 *R v Turner* [1975] AB834.

22 FRE, 702(a).

23 *Lord Mansfield, Folkes v Chadd* (1782) 3 Doug 157.

24 FRE, r 702.

25 U.K. Register of Expert Witnesses, Factsheet 02: Expert Evidence. Retrieved from http://www.jspubs.com/experts/fs/02.pdf

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27 Civil Procedural Rules 35.3(2).

ConsensusDocs *continued from Page 1*

JAMS Engineering and Construction Arbitration Rules and Procedures by simply "checking the JAMS box" on the contract form at the time of contract signing or by filing a demand for arbitration with JAMS after a dispute has arisen.

JAMS' inclusion by name in ConsensusDocs' Binding Dispute Resolution clauses is significant because ConsensusDocs contracts are written and endorsed by 40 distinguished national member organizations of the ConsensusDocs Coalition:

The Associated General Contractors of America (AGC)

Air Conditioning Contractors of America (ACCA)

American Institute of Constructors (AIC)

American Society of Professional Estimators (ASPE)

American Subcontractors Association, Inc. (ASA)

Architectural Woodwork Institute (AWI)

ASFE/Geoprofessional Business Association (ASFE)

Associated Builders and Contractors, Inc. (ABC)

Associated Specialty Contractors, Inc. (ASC)

Association for Facilities Engineering (AFE)

Association of the Wall and Ceiling Industry (AWCI)

Construction Financial Management Association (CFMA)

Construction Industry Round Table (CIRT)

Construction Owners Association of America CAA)

Construction Specifications Institute (CSI)

The Construction Users Roundtable (CURT)

Dispute Resolution Board Foundation (DRBF)

Door and Hardware Institute (DHI)

Finishing Contractors Association (FCA)

Independent Electrical Contractors (IEC)

Lean Construction Institute (LCI)

Mechanical Contractors Association of America (MCAA)

National Association of Construction Auditors (NACA)

National Association of Electrical Distributors (NAED)

National Association of State Facilities Administrators (NASFA)

National Association of Surety Bond Producers (NASBP)

National Association of Women in Construction (NAWIC)

National Electrical Contractors Association (NECA)

National Ground Water Association (NGWA)

National Hispanic Construction Association (NHCA)

National Insulation Association (NIA)

National Roofing Contractors Association (NRCA)

National Subcontractors Alliance (NSA)

National Utility Contractors Association (NUCA)

Painting and Decorating Contractors of America (PDCA)

Plumbing-Heating-Cooling Contractors Association (PHCC)

Sheet Metal and Air Conditioning Contractors' National Association (SMACNA)

The Surety & Fidelity Association of America (SFAA)

Women Construction Owners & Executives, USA (WCOE)

Water and Wastewater Equipment Manufacturers Association (WWEMA)

These 40 organizations represent a large percentage of the firms engaged in the American construction industry. JAMS is honored to be recognized by the ConsensusDocs Coalition as an arbitration provider worthy of being named in its contract forms.

The JAMS Global Engineering and Construction group (GEC) comprises neutrals (1) who are experts in construction law and the customs, practices, contract rights and duties commonly governing the American and international construction industry, and (2) who also are highly experienced and skilled in the management of all ADR methods employed in the construction industry, including arbitration, mediation, project neutral evaluations, expert determination, structured negotiation, dispute boards, British-style "adjudication" and mini-trials. Such broad expertise is critical for efficient and cost-effective dispute resolution. The JAMS GEC neutrals include some of the world leaders in construction dispute resolution. Descriptions of the JAMS GEC dispute resolution practice, the backgrounds of its neutrals and the JAMS Engineering and Construction Arbitration Rules and Procedures can be found on the JAMS website at www.jamsadr.com. ■

NOTICES AND EVENTS

ARTICLES AND SPEAKING ENGAGEMENTS

A paper on "International Arbitration" by **JOHN W. HINCHEY, ESQ.** was published as a chapter in *Construction ADR*, a book published in January 2014 by the American Bar Association's Forum on the Construction Industry.

HARVEY J. KIRSH, ESQ. is chairing an Advocates' Society seminar in Toronto on April 8, 2014, featuring Mr. Justice Richard Wagner of the Supreme Court of Canada. Justice Wagner, who had been a construction lawyer in Quebec before his appointment to the court and who is an Honorary Fellow of the Canadian College of Construction Lawyers, will discuss "My Professional and Personal Journey to the Supreme Court of Canada." And at an event being sponsored by the Advocates' Society in Toronto on May 22, 2014, Harvey will be acting as sole arbitrator in a program titled "Mock Arbitration of a Construction Dispute."

LARRY LEIBY, ESQ. is scheduled to make a presentation on "What is the Preferred Methodology for Handling Pre-litigation Defenses Using Expert Consultants and Mediators" at the West Coast Casualty Construction Defect Seminar in Anaheim, California, on May 15-16, 2014.

Previously, **PHILIP L. BRUNER, ESQ.** and **JOHN W. HINCHEY, ESQ.** participated on a panel titled "What Advanced Arbitration Procedures Do In-House Counsel Most Favor, and What Do Neutrals Say About Them?" at the Construction SuperConference in San Francisco on December 13, 2013. **LARRY R. LEIBY, ESQ.** also participated in a Preconference Workshop titled "Recent Construction Case Law Blitz." On October 24, 2013, John participated in a panel discussion in New York, jointly sponsored by JAMS International and the *New York Law Journal*, titled "The Crown versus the Colonies—Things We Would Never Do in the U.K. That You Do in the U.S.: Who Does it Better?" which dealt with a comparison of the mediation styles and techniques in the U.K. and the U.S. On October 25, 2013, Phil made a presentation on "Contract Changes and Extra Work" at the Bi-Annual Construction Law Conference of the Utah Law and Justice Center in Salt Lake City.

GEC NEUTRALS RESOLVE AN ARRAY OF CONSTRUCTION DISPUTES

HARVEY J. KIRSH, ESQ. acted as sole arbitrator of a complex, multi-million-dollar dispute relating to the development and construction of a solar power renewable energy project.

KENNETH C. GIBBS, ESQ. has been engaged to mediate disputes arising out of the construction of City Center in Las Vegas and the expansion and renovation of a major airport in California.

PHILIP L. BRUNER, ESQ. is chair of an international arbitration tribunal hearing multi-party disputes arising out of the construction of a natural gas processing facility in Canada.

RECENT HONORS

JOHN W. HINCHEY, ESQ. has been certified as a Chartered Arbitrator by the Chartered Institute of Arbitrators.

Using Affidavits *continued from Page 5*

then address those potential concerns in the affidavit. For example, the affidavit should identify any personal interest the witness has in the outcome of the proceedings and explain why it does not affect his/her testimony.

The affidavit should be written in the witness' own words and not sound like it was written by the lawyer. This may be accomplished by letting the witness write the affidavit based on questions or points provided by the lawyer, or even by using a court reporter with questions and answers.

Lastly, testimony should be elicited from other witnesses at the hearing to confirm or support the accuracy and reliability of the affidavit. If there are contemporaneous documents that support the veracity of statements in the affidavit, such as letters or emails, those documents should be introduced into evidence.

In summary, counsel must convince the arbitrator that the arbitrator should believe the testimony contained in the affidavit. If the affidavit is submitted solely for the purpose of having evidence in the record to support a point a point or fact, it likely will be of little or no value in achieving the party's goal of prevailing in the arbitration. If counsel is going to offer an affidavit, he/she should do everything possible to overcome the natural reaction of the arbitrator that the affidavit is of very little probative value and should be given very little weight. ■

JAMS GLOBAL CONSTRUCTION SOLUTIONS

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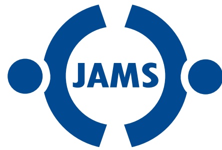

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