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Session: "Changing the Cost and Time Dynamic in International Arbitration"

Innovations in Reducing the Time and Cost of Resolving Construction Disputes

by

John W. Hinchey
Retired Partner
King & Spalding LLP
1180 Peachtree Street, NE
Atlanta, Georgia 30309-3512
U.S.A.
E-mail: jhinchey@kslaw.com
Direct Phone: 001-404-572-4922
Mobile Phone: 001-404-933-0821

Full-time Arbitrator and Mediator
JAMS Global Engineering & Construction Group
Website: www.jamsadr.com
E-mail: jhinchey@jamsadr.com

Reducing and Managing Conflict in Dispute Resolution

- **Tiered and 'Real Time' Dispute Resolution**
- **Collaborative Settlement Agreements**
- **College of Commercial Arbitrators Protocols**
- **Fast-Track Construction Arbitration**
- **Cost-Benefit Analysis**

I. Tiered and "Real Time" Dispute Resolution

Because of the preference of the construction industry for mediation and conciliation, at least as a prelude to arbitration, the industry is likely to see more construction contracts and dispute resolution clauses that require a "tiered" or "filtered" succession of mandatory negotiation, then mediation or conciliation, as conditions to proceeding with arbitration.[1] Because increased cost and time are still current complaints,[2] the future of international construction dispute resolution will likely see more "real-time" decision-making as exemplified by standing neutrals, DRBs, DABs and variations on the themes of Statutory Adjudication in the United Kingdom. As predicted by Professor Stipanowich:

> *There will be growing emphasis ... on what have been called 'real-time' processes such as DRBs, statutory adjudication and the like. In the construction industry we have long understood the dangers of unresolved conflict. It drains attention and energy from business and other pursuits*

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[1] *See* PriceWaterhouseCoopers survey, International Arbitration: Corporate Attitudes and Practices--2006, §1.3 noting that: "In most cases, international arbitration is not used in isolation"; its use in combination with ADR mechanisms is the most common option. *See also* R. Hunt, Cost-Effective Resolution of Construction Disputes: Wishful Thinking or Emerging Reality (Part 2), [2001] Asian Dispute Resolution on multi-tiered processes for construction disputes in Australia. In the United States, Professor Tom Stipanowich has predicted that "multi-step 'filtering systems' for managing conflict, many emphasizing mediation, will become the norm in many public and private contracts." Professor Stipanowich explains that "[i]n common law countries such as the UK, the United States, Australia, and Canada, mediation as we know it is being utilized fairly heavily. Throughout the rest of the world there is a lot of talk about mediation, but it has not yet reached the critical tipping point among users, including construction users. There are in these countries, however, many, many people who have been trained to be mediators as well as national or regional mediation institutions that have been established and are looking for business. These organizations, including academic institutions, are in some cases setting very high standards for mediators, establishing much more elaborate criteria for mediator training and education than what we generally see in [the U.S.]. In short, the world is gearing up for a global expansion in the use of mediation." *See* T. Stipanowich, Conflict Management in Evolution: Three Predictions, ACCL/Princeton Building the Future Symposium (Nov. 2-3, 2006), published in ACCL, Journal of the American College of Construction Lawyers (Special Ed., May 2007) pp. 156 to 168. For a discussion of these processes as practiced in the United States, *see* §§1:9 to 1:10. *See also* Fulbright & Jaworski 2004 U.S. Corporate Counsel Litigation Trends Survey Results, pp. 18-19; Radhi, Public Interest and Arbitration In Construction Contracts in Middle Eastern Arab Countries, [2007] Int'l. Const. L. Rev. pp. 424, 429. For an excellent analysis of the pros and cons of "tiered" dispute resolution processes on international construction projects, *see* Baker, "Is It All Necessary? Who Benefits? Provision for Multi-Tier Dispute Resolution in International Construction Contracts," a paper presented to a joint meeting of the Society of Construction Law and the Society of Construction Arbitrators in London on 1st July 2008, published by the Society of Construction Law (SCL) (January 2009).

[2] In early 2011 The Chartered Institute of Arbitrators (CIArb) launched a survey into the costs of international commercial arbitration, in hopes that the survey will assist in uncovering ways in which arbitration costs may be reduced and procedures streamlined to become more cost-effective and efficient. The results of the survey are anticipated to be presented in London on 27-28 September 2011 (CIArb Survey website: http://www.shape-the-future.com/costssurvey).

and, often escalates as parties become more and more committed to fight. Delay in resolving conflict on a construction site can divert attention from the project, adversely affect relationships, delay or disrupt the job, and lead to escalation and protraction of conflict, ... Although there are legitimate concerns about the limitations of such abbreviated processes in conflict management, the fact that they have been so willingly embraced by the industry (especially in the case of adjudication) bespeaks a genuine desire on the part of business people to 'get it done' with less fuss and bother.[3]

In summary, and for the foreseeable future, arbitration will likely continue to be the preferred process for the final resolution of international construction disputes. Even so, mediation and conciliation have proven to be demonstrably effective in resolving construction disputes; and, as the international communities outside the U.S. and U.K. become more familiar with these nonbinding ADR processes, the use of such procedures will continue to grow in use and popularity. Still, it should be recognized that mediation, conciliation, and related ADR procedures are not "either-or" alternatives to arbitration; instead, these structured negotiation procedures are most effectively employed as a prelude, first steps, or "filters" to arbitration or litigation--as demonstrated by the growing use of standing neutrals, including DRBs, DABs, and other project adjudicators who decide disputes in "real time" while the work is progressing.[4] For example, one significant change made by the American Institute of Architects in its A201-2007 General Conditions of the Contract for Construction was to allow parties to remove the architect of record from its historic role as the professional peace keeper and initial decider of disputes between the owner and contractor, and to authorize the parties to appoint their own "Initial Decision Maker" to whom disputes

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[3] T. Stipanowich, Conflict Management in Evolution: Three Predictions, presented at the ACCL/Princeton "Building the Future" Symposium, Nov. 2-3, 2006, Prediction Two, published in the Journal of the American College of Construction Lawyers, Special Edition--May, 2007, pp. 156 et seq. Professor Stipanowich observed that "[a]s practitioners, we need to temper our tendency to worship exclusively at the altar of zealous advocacy. Too often, we are too obsesses with the need to achieve 'perfect information'. Like General Montgomery at El Alamein, who insisted on having every gun in place before the battle, we are conditioned by the American litigation discovery model to insist on looking under every stone before trial. Maybe Montgomery needed every gun, but many of our business clients understand that in many situations getting the last 20% of information involves 80% of the case--and it may simply no be worth it. No due process is perfect, but trying to achieve perfection usually involves a very high price." Stipanowich, "Conflict Management in Evolution: Three Predictions," presented at the ACCL/Princeton "Building the Future" Symposium, Nov. 2-3, 2006, Prediction Two, published in the Journal of the American College of Construction Lawyers, Special Edition--May, 2007, pp. 156 et seq.

[4] See "Project Neutrals to the Rescue! A New Tool for Avoiding and Resolving Disputes on Construction Projects," Vol. 12, No. 3, Under Construction, a newsletter of the ABA Forum on the Construction Industry, p. 1 (August, 2010). For an excellent discussion of 'real time' dispute resolution, and referring to popular author, Malcolm Gladwell's use of the related term, 'thin slicing', see T. Stipanowich, "Arbitration, The New Litigation," 2010, U. Ill. L Rev. pp. 1, 27 – 39; and Groton and Lawrence, "Real-Time Prevention and Resolution of Disputes: Varities of Standing Neutrals and What They Do," Vol. 13, No. 4, Dispute Resolution Journal, pp. 101,112.

initially are to be submitted. Giving the parties the right to appoint a third party to act in the architect's stead was an extraordinary alteration in traditional construction industry relationships, which had existed for 120 years under standard construction industry contract documents.[5] Also, as reflected in the latest FIDIC contract forms, the ICC Dispute Board procedures, and, as amply demonstrated by the successful use of Statutory Adjudication in the U.K. and elsewhere, the use of these categories of "real-time" procedures to produce binding decisions on an interim basis, with arbitration or litigation as a final option, will surely grow in use for international construction projects. All of these processes seek the same ends, the timely, creative and flexible responsiveness to conflicts within construction contractual relationships. Hence, many international construction contracts , now and in the foreseeable future, will require mandatory negotiation, on-the-job dispute adjudication, and mediation or conciliation as conditions to proceeding with final arbitration or litigation. The probable and desirable consequence of this "tiered" approach to dispute resolution is that only the most intractable and difficult disputes will go to the more elaborate, costly, time-consuming, and trial-like arbitration procedures as a "last resort."

II. Collaborative Settlement Agreements

An innovative pre-arbitration/litigation process was recently used and put forward by two prominent Canadian construction lawyers, referred to by them as a "Collaborative Settlement Process"(CSP).[6] The parties were seeking an effective, merits-based settlement process for a complex dispute between two well-resourced clients, without the steps of pleadings, formal productions, mediation, arbitration or trial. There was no model, so they made up one. The basic structure that they developed was as follows:

- Stage 1 – Mutual disclosure of relevant, non-privileged documents, including e-mail, and including both the documents helpful to the disclosing party and the documents helpful to the opposing party;
- Stage 2 – Counsel-to-Counsel meetings (excluding clients) in which each side presented their theory of the case, and the other party questioned the presenter's theory;
- Stage 3 – Confidential memoranda from the Counsel to their respective clients, reviewing the strengths and weaknesses of the case and recommending a sensible settlement range; and

[5] P. Bruner, "Rapid Resolution – ADR", The Construction Lawyer, a publication of the American Bar Association, Forum on the Construction Industry (Spring, 2011).

[6] Duncan W. Glaholt and R. Bruce Reynolds, "The Collaborative Settlement Process and its Application to Construction Disputes," to be published in the JAMS Global Engineering and Construction newsletter, Fall, 2011.

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

Experience taught them that it was a rare construction case where the immense investment in the pre-trial discovery process was in any way proportional to the improvement in the provable merits of the case. Yes, there is the occasional "smoking gun" out there that some would argue justifies the expense of an elaborate trial process, but these cases are few and far between when sophisticated construction industry stakeholders are involved. Their general proposition was that if an issue in a case between two sophisticated construction industry stakeholders looks "50/50" or "90/10" after a good, hard, joint look at the facts and law, and after consideration of any necessary input by experts, then, in all probability, it will still look pretty much the same after pleadings, productions, pre-hearing examinations and much of the eventual trial or arbitration. In a business environment where clients are often seeking the 80% solution and the resistance to significant expenditures on legal fees is intensifying across the market, it seems that the clients could very well consider it commercially unwarranted to spend millions of dollars and years of effort to fight for that last 20% of the "real" case. In other words, the work product would be a reasonably reliable "snap shot" of a *likely* end result on the merits, based upon the facts as (admittedly) partially known and the law as commonly understood.

The CSP is distinguishable from mediation in two obvious ways: first, there is no mediator; and, second, "interests" play no part in the CSP up until the client-to-client meeting, the CSP is purely positional and merits-based until the clients get together without the lawyers involved. Interests are left to the wisdom of the senior client negotiators at their business-to-business meetings following the lawyer-to-lawyer meetings and briefings by counsel. No mediator is required because true collaboration requires exactly the kind of "active listening" that so often is only possible with the interposition of a trained mediator.

III. The College of Commercial Arbitrators Protocols

The College of Commercial Arbitrators[7] decided in 2008 to comprehensively address the causes and possible cures for excessive cost and time in arbitration. In October, 2009, the College convened a National Summit on Business-to-Business Arbitration in Washington D.C. Five of the principal organizations involved in commercial arbitration, namely, the American Bar Association Section of Dispute Resolution, the American Arbitration Association, JAMS, the International Institute for Conflict Prevention and Resolution ("CPR"), The

[7] To access the CCA website, see http://www.thecca.net.

Chartered Institute of Arbitrators, the Straus Institute for Dispute Resolution of Pepperdine University School of Law and seventy-two CCA Fellows, all leading U.S. and international arbitrators, joined the College as co-sponsors of the Summit. The goals were to identify the chief causes of arbitration delay and cost and explore concrete, practical remedial steps. Based on discussions among representatives of these groups, the College developed and published in the fall of 2010 a significant white paper entitled, "*Protocols for Expeditious, Cost-Effective Commercial Arbitration - Key Action Steps for Business Users, Counsel, Arbitrators and Arbitration-Provider Institutions"*[8] which lays out the full spectrum of procedures and techniques for insuring that the arbitral process is not only cost-effective, expeditious and economical, but also satisfies the particular needs of the participants.

In the final analysis, the central lesson of the National Summit is that the core value of arbitration is not necessarily cheapness or speed, but *choice*. The business users and in-house counsel who draft the deal start with the greatest range of choice in what procedures and limitations they place in the arbitration agreement - because arbitration is a creature of contract. Of course, the business users and in-house counsel can be greatly aided by arbitration providers and institutions who offer a range of draft agreement clauses, rules and guidelines. The outside counsel who play a key role as expert advisors to the users should be certain that they are fully aware of and advise their clients of the costs, benefits and potential risks of all of the procedural options available to them, so that fully informed choices can be made. Finally, the arbitrators must be good arbitration process managers, and fully committed to an optimal balancing of efficiency, economy and fairness. Court litigation, by contrast, does not offer this range of choice. The unique and inherent value of the *Protocols* is that they are perhaps, to date, the most succinct and comprehensive analysis of the causes, cures and remedies for cost and delay in commercial arbitration.

IV. Fast-Track Construction Arbitration

Over the past 10 - 15 years, construction industry concerns about the time and cost of resolving disputes have prompted industry and arbitral organizations to develop faster, more efficient and possibly cheaper adjudication processes for deciding construction disputes. The procedures which have had the most success in reducing the time and cost of construction adjudication have been the accelerated or "fast-track" procedures which are designed to significantly reduce the time from the initiation of the dispute resolution process to a binding determination, whether that determination is interim or final. The progenitor for modern accelerated construction arbitration, and the process that has had the most

[8] The Protocols may be downloaded from the College of Commercial Arbitrators website: http://www.thecca.net/CCA_Protocols.pdf.

profound impact on traditional construction dispute resolution is Statutory Adjudication, which was first enacted in the United Kingdom in the mid-90s and took effect on May 1, 1998.[9] In the last five years, a number of arbitral institutions have adopted new rules for "expedited," "streamlined," "accelerated" or "fast-track" arbitrations, some of which pertain especially to disputes arising out of construction projects.[10] For example, The anticipated timetable and benchmarks of the CPR Expedited Construction Rules are as follows:

[Calculated by business days]:
• Day 1: Submission of the Notice of Arbitration, Statement of Claim and Nomination of Arbitrator by Claimant;
• Day 10: Nomination of Arbitrator by Respondent;
• Day 15: Third Arbitrator Agreed and Named;
• Day 20: Statement of Defense and any Counterclaim or Respondent's Motion to Expand Time and Arbitrator appointment by CPR, if necessary;
• Day 25: Prehearing conference of parties with tribunal, determination of time to commence the 100-day procedure; interim deadlines are established.

[Calculated by calendar days, except where noted]:
• Within 60 days: Discovery and exchanges of documents and evidence complete;
• Within 90 days: Hearing completed;
• Within 100 days: Award rendered (business days apply to award time period).[11]

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[9] Housing Grants, Construction and Regeneration Act 1996. Legislatively required adjudication schemes have also been introduced to Hong Kong, New Zealand and Australia; *see* Environmental, Transport and Works Bureau of the Hong Kong Special Administrative Region (HKSAR) promulgated revised public works contract conditions in August 2004 that incorporated voluntary adjudication; Construction Contracts Act (CCA) 2002, No. 46 (NZ); Building and Construction Industry Security of Payment Act, 1999 (NSW, Australia), amended 2002. Adjudication legislation has also been introduced in Ireland; see Hussy, "Statutory Adjudication for Ireland,"76 Arbitration 4, pp. 613-619 (2010).

[10] *See, e.g.,* Joint Contracts Tribunal, Construction Industry Model Arbitration Rules; CPR International Institute for Conflict Prevention & Resolution, Rules for Expedited Arbitration of Construction Disputes; CPR Global Rules For Accelerated Commercial Arbitration (August 20, 2009); Society of Construction Arbitrators 100 Day Arbitration Procedure; JAMS Engineering and Construction Arbitration Rules and Procedures for Expedited Arbitration (July 15, 2009); German Institution of Arbitration, Supplementary Rules for Expedited Proceedings (April, 2008); The Swiss Chamber of Commerce; and the China International Economic Trade Association (CIETAC); the Stockholm Chamber of Commerce. See generally Morton, "Can a World Exist Where Expedited Arbitration Becomes the Default Procedure," 26 Arbitration International 1, pp. 103 to 114 (2010); Abraham, "Fast-track Arbitration: An Idea Whose Time Has Come?", International Bar Association, Arbitration Newsletter, pp. 22 to 23 (March, 2010).

[11] CPR Expedited Construction Rules, Rule 1 Schedule.

On June 1, 2007, the Institute of Arbitrators and Mediators Australia (IAMA) published a new set of rules with the goal of reducing the costs associated with arbitrations and providing the parties with quick determinations.[12] The stated objective of the IAMA Fast Track Rules is to enable an arbitrator to produce an award, excepting only costs, within 150 days after appointment. In general, the IAMA Fast Track Rules follow the same patterns as the CPR Expedited Arbitration Rules.

The various efforts to accelerate arbitration procedures and to reduce the time and cost of construction arbitration must take into account certain inherent tensions and even contradictory attitudes of parties to commercial disputes. Ask almost any business person who is not then engaged in a serious commercial dispute, and you will likely hear strong complaints about delays associated with arbitration. Yet, when that same business person's substantial assets are at risk, or if the company's very existence is on the line, procedural efficiency will likely be of lesser concern than preservation of assets. Thus, one may conclude that when serious interests are at risk, "getting it right" often trumps "getting it done."

A potential status that often leads to positional tension in construction arbitrations is "who wants the money?" and "who will have to pay"? The party with claims and seeking to recover substantial sums will likely press for speed and efficiency of process; whereas, the party who ultimately will write the cheque typically wants more time for case preparation and careful deliberation. Typically, also, the complaining party seeking recovery will be better, if not fully, prepared to present their case and will, most likely, resist efforts to engage in discovery. On the other hand, the responding party is often heard to claim "surprise" or "ambush," with pleas for more time for full disclosure of the claimant's evidence. Thus, claimants will almost always insist on speedy resolution; whereas respondents will not.

Added to positional tensions, circumstantial tensions can be found in the nature of the dispute. If the issue has to do with quality of workmanship or conformance to specification, the case may require less time, because technical experts can usually observe and test the physical condition at issue and reach resolution relatively quickly. On the other hand, if the issue is "legal" in nature or "contractual," *i.e.*, issues concerning wrongful termination or claims for delay, more complex questions can arise, thus requiring procedural time and energy.

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[12] *See* IAMA Arbitration Rules (Incorporating the IAMA Fast Track Arbitration Rules), The Institute of Arbitrators & Mediators Australia (amended, June 1, 2007).

Finally, in the rush to reform, one cannot ignore a more subtle and not-often-discussed dynamic, which is that counsel tend to shy away from the day of reckoning. No advocate likes to lose cases. No matter how strong one believes one's position is, there is always a substantial risk that the tribunal will see it differently. If counsel have advised their client that the case is strong or that recovery is likely, they will be most disappointed to be determined wrong. Therefore, there is a natural tendency for counsel to want as much time as possible to prepare the case in the interest of avoiding or putting off the risk of loss.

The success of fast-track arbitration, especially for substantial construction disputes, will depend on parties who are willing to find common ground and, perhaps, compromise their "positional" or "circumstantial" status in the process, even when it may hurt.[13] Success will also depend on arbitrators who can commit to the process. In major construction cases, arbitrators may have to devote close to their full-time to the task of fast tracking arbitrations, and they must be prepared to resist the inevitable motions for continuance and extensions of time. At the same time, the tribunal must balance speed against the need for fairness and a reasonable opportunity for each party to prepare. Similarly, counsel must mutually commit to prepare and so move the case forward consistent with the accelerated procedures. This time commitment will likely put larger law firms at an advantage over solo practitioners and smaller firms who must attend to other matters.

V. Cost-Benefit Analysis

The construction industry is legitimately concerned that the traditional ways of resolving construction disputes are taking too long and costing too much. At the same time, it must be remembered that processes that lead to cost and time savings may derogate from the quality of arbitration as a means of reaching a fair and just result. For example, costs can be saved by having a sole arbitrator rather than three; perhaps, by not having an arbitral institution administer the proceedings; by dispensing with terms of reference or institutional scrutiny of awards; by imposing strict limits on written submissions, the number of witnesses or rounds of witness statements; or by issuing a truncated award without reasons. However, each of these cost-savings measures will not necessarily contribute to and may derogate from the quality of the process. Time can be saved by implementing an accelerated or fast-track timetable for the arbitration, but cutting time may result in an injustice to one or both parties. Hence, a cost-benefit analysis should be done for virtually all procedural choices that are made in the context of arbitration.

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[13] See generally Morton, "Can a World Exist Where Expedited Arbitration Becomes the Default Procedure," 26 Arbitration International 1, pp. 103 to 114 (2010; Abraham, "Fast-track Arbitration: An Idea Whose Time Has Come?", International Bar Association, Arbitration Newsletter, pp. 22 to 23 (March, 2010).