global construction solutions

JAMS

THE LATEST NEWS IN CONSTRUCTION ADR FROM THE WORLD'S LEADING NEUTRALS

Construction Lawyering in the U.K. and U.S.: Contrasts and Similarities

By Wendy Kennedy Venoit and John W. Hinchey, Esq.

Introduction

There are important differences between the American and British styles of lawyering, but there is also much common ground. In fact, there is probably more common ground than most American and English practitioners would admit. This article will address some of those differences and similarities, as well as how representatives from the two systems might better understand and benefit from each other.

Unified vs. "Split" Bar

A lawyer in the United States, after attending and graduating from an accredited law school and having passed the bar exam in at least one of the various states, is considered fit and qualified to handle both transactional and contentious matters.

However, the U.K. has a "split" system, whereby some lawyers train and qualify as solicitors, while others train and qualify as barristers. In simple terms, solicitors are the transactional attorneys, but this grouping includes the attorneys who assist in preparing cases for trial yet do not actually serve as advocates during the hearings. Solicitors within British law firms may also be distinguished internally as focusing on either the contentious or non-contentious side of the law. There can be overlap, particularly such as with construction practitioners, who often deal with construction contracts and construction-related claims and lawsuits. Solicitors can practice on their own, similar to solo practitioners in the U.S., or they can be part of a firm, similar to the law firm concept in the United States.

Barristers, in contrast, are trained to serve as advocates in hearings or in arbitration. They are the lawyers that appear in court on behalf of their clients and present their case to the trier of fact. Barristers can also serve as specialists in the law and will provide instruction

> See "Contrasts and Similarities" on Page 5

Dealing with Disputes in the Rio 2016 Olympic Games

By Júlio César Bueno

Cost overruns: a rule, not an exception

A construction project is usually considered successful if it is completed within its time, budget and quality targets. In the past two decades, many articles have been written about construction cost worldwide, but despite this amount of research within the field of construction planning, execution and management, limited progress has been made to prevent

> See "Olympics" on Page 7

Also in our Summer 2015 Newsletter:

A Primer on Dispute Resolution Boards

By Deborah Mastin, Esq.

Dispute boards are imbedded into many large public and private projects. More than 35 state Departments of Transportation routinely include dispute boards as part of their contract requirements. The World Bank requires dispute boards on projects it finances. Dispute boards are found in university capital development projects, airport improvement contracts, large public transit projects and other long-term projects that are "too big to fail." While dispute boards are used in industries outside the construction industry, including mining, energy distribution, manufacturing and real estate development and finance, at present, dispute boards are primarily found in large, complex construction projects.

Dispute boards facilitate communications among the various participants in the project, typically the owner, designer and contractor, so they can collaboratively address unplanned events before someone makes an expensive move. In fact, there is a growing trend in Australia, New Zealand and the United States to call dispute boards "dispute avoidance boards" or "dispute avoidance panels."

How do dispute boards work? A dispute board may look superficially like an arbitration panel; the dispute board consists of three industry professionals selected by the parties (typically the owner and the contractor) for their experience, independence, commitment to the project (not to any party to the contract) and their training as mediators, arbitrators and dispute board members, who have disclosed their prior relationships to both parties. But first impressions can be deceiving. A well-run dispute board operates in real time to motivate the parties to work collaboratively to mitigate the adverse impacts of unplanned events that occur during the progress of the project, before an unplanned event derails the project schedule or budget and before the parties react to an unplanned event without coordinating their efforts.

If the dispute board is unsuccessful in its efforts to assist the parties in mitigating the impact, the dispute board will then convene as a nonbinding arbitral body to recommend an allocation of liability and costs arising from the unplanned event.

Well-implemented dispute boards (aka dispute resolution boards, dispute review boards, dispute avoidance boards or DRBs) offer a genuine opportunity to minimize disputes by mitigating or avoiding potential adverse impacts to projects. Dispute boards provide a facilitated forum where the parties can jointly agree how to modify future anticipated activities while a project is still underway. In this respect, dispute boards differ from other dispute resolution mechanisms, like mediation and arbitration, which are intended to look backwards to allocate costs that were previously expended or committed earlier in the project's history.

On October 28-29, 2015, JAMS will hold its first Dispute Board Institute in its offices in Miami, Florida. The Institute will offer a two-day training for neutrals, attorneys and industry professionals interested in learning the best practices for crafting and implementing dispute boards on large, complex projects. The Institute will be interactive and will familiarize the participants with best practices in crafting and managing dispute board processes. It will address ethical practices, model contract provisions and techniques for managing both regular proceedings and dispute hearings. The Institute will provide valuable insights into the dispute board process to professional designers, constructors, project managers, attorneys and other project participants, as well as to neutrals seeking to expand their skills.

The Institute's faculty include Philip L. Bruner, Esq., JAMS; Kenneth M. Roberts, Esq., Schiff Hardin, LLP; and Deborah Bovarnick Mastin, Esq., Law Offices of Deborah Mastin, PLLC. To register for this event, please click **here.**

Deborah Mastin is the principal of the Law Offices of Deborah Mastin, PLLC. She served as an Assistant County Attorney for more than 35 years in Broward County and Miami-Dade County. Ms. Mastin represented public owners in connection with the procurement and construction of infrastructure projects, including Miami-Dade County Hall, courthouses and the $6 billion dollar expansion at Miami International Airport and the $2 billion expansion at Ft Lauderdale-Hollywood International Airport.

Construction Arbitration: Geography Lessons

With anticipated global population growth of 40 percent between 2010 and 2030, the world's interconnected and increasingly urban population is driving unprecedented demand for infrastructure. Delivering the required transport, energy and housing infrastructure in the swiftest and least disruptive manner therefore offers a competitive advantage. Achieving harmony between governments, financiers, developers and subcontractors over the delivery and development of major construction projects requires careful planning, and even then, disputes are inevitable.


Andrew Aglionby

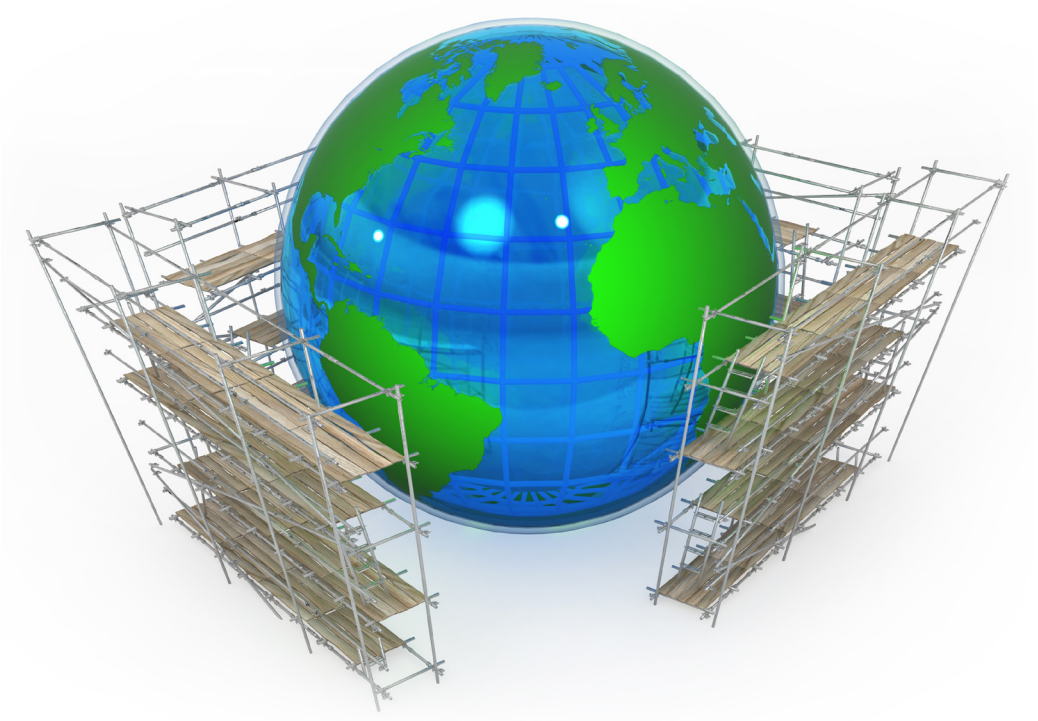
JAMS International panelist Andrew Aglionby says that the main sticking points in construction disputes are quality, costs and time, most often when there are changes to contractual terms. Common examples are projects not being completed to the agreed standards, going over budget or facing very lengthy delays. "These projects involve billions of dollars of investment, and one of the biggest challenges is change: a change in the project specifications, a change in the time frame, a change of mind or sometimes a change of management," he said. "When this occurs, and companies suddenly find themselves exposed or facing financial loss, the main question is who should be held responsible."

The challenges and risks are diverse and substantial. Construction projects will see a multitude of contracts between private and public sector entities, often from different geographies. There have been Middle East investors—usually deploying Islamic finance mechanisms—constructing projects in London, Chinese companies going into Africa and Spanish developers taking on schemes in the U.S. and Latin America. Companies such as Vinci, Flour, Grupo ACS, Hochtief and Skanska, meanwhile, have created global portfolios of projects.

Having the correct dispute resolution mechanism becomes critical...

As such, establishing minimally disruptive dispute resolution processes for cross-border projects—including where cases should be heard—is now high on the agenda for all parties. Aglionby, who practiced in Hong Kong for 17 years, notes a trend toward resolving infrastructure disputes locally, but exceptions, particularly on smaller projects, remain. "Asian-related disputes now gravitate more towards Hong Kong or Singapore, while cases in the Americas may go to New York or Miami," he says, pointing out that contracts governed by the industry standards of the International Federation of Consulting Engineers (also known as FIDIC) have tended to focus on the U.K.

In such situations, having the correct dispute resolution mechanism becomes critical. There are a great many factors companies need to consider when entering arbitration, including what happens before then (dispute adjudication boards, for example), the independence and attitude of the judiciary at the seat of the arbitration and the varied influences of the business and legal cultures behind the process. Few companies will agree to local court litigation of international agreements, and arbitration is often a common solution, although there are still factors that can be overlooked.



"Asian companies, for instance, may wish to hear their cases in Singapore or Hong Kong, but one or more of the parties may come from countries with a civil law system," Aglionby continues. "That may involve them in aspects of the process which may not be familiar, for example, disclosure of documents, which might well be a usual feature of arbitration at the chosen seat. That is not necessarily a bad thing but should not come as a surprise on the day. The situation is made more intricate by the global nature and diversity of the players in the construction industry."

Aglionby thinks there is a move toward regional seats to gather more of the disputes that have closer geographical connections. There is a big and continuing push for establishing pan-regional arbitration hubs, such as Hong Kong or Singapore in Asia and New York or Miami for the Americas, while Mauritius has been attempting to attract African disputes, and Dubai, Qatar and Riyadh are vying to be first choice for Middle East–related disputes.

Aglionby recommends close scrutiny of arbitration clauses in regard to geographical factors, including who will chair an arbitration panel, as that can be influenced by the chosen place for arbitration. He believes that the seat of an arbitration should be considered quite carefully during the contracting stages, with the geographical aspects—as well as the perceptions or even misconceptions about certain markets—being addressed.

There is a balance to be struck between the cost and time benefits of local proceedings and proven seats with "a long history of dealing with relevant subject matter, or where there is good depth in the appropriate pool of lawyers, arbitrators, experts and support services all sufficiently versed in arbitration." Other factors include the relevant cultural aspects of the businesses involved. "Standard forms of contracts also have a role to play and can be adopted but sometimes could or should adapt to send disputes to the most acceptable places," Aglionby said.

The issue of where and how a case should be heard tends to be thought through in the very biggest contracts, but many of the smaller to medium-sized ones often overlook such nuances, Aglionby believes.

"Many of the contracts will often have an arbitration clause from an earlier contract, cut and pasted, without anticipating all the ramifications of where a case might be held. If an Asian company working on a project in Africa has a standard arbitration clause without project-specific amendments, it might, if it thought about it, have preferred a case to be heard in Hong Kong or Singapore—and both parties might have been willing to agree to seat an arbitration in Mauritius," he said.

The issue of where and how a case should be heard tends to be thought through in the very biggest contracts, but many of the smaller to medium-sized ones often overlook such nuances.

Contrasts and Similarities *Continued from Page 1*

to solicitors in the interpretation of complex legal issues and principles. Barristers are essentially solo practitioners even though they may be a member of chambers. Chambers are not law firms and should not be confused with the law firm concept. Barristers who are members of the same chambers are considered to be independent practitioners who share office space and administrative staff. Conflicts are not imputed as between members of the same chambers, and it is not unheard of for a barrister to appear as an advocate against another member of the same chambers or before an arbitrator who is a member of that chambers. Although there have been instances of opposing parties objecting to this perceived conflict of interest, historically, the sharing of chambers alone will not create an actual conflict of interest.

In the U.K. legal system, solicitors do not and typically cannot act as barristers, and vice versa. There are, of course, exceptions to the rule, such as where barristers are actually employed by solicitor firms and are designated as employed barristers, meaning that they have qualified as a barrister but are employed by the solicitor firm. Similarly, there are now solicitor advocates who are permitted to present cases in arbitration and in certain lower courts, which had traditionally been limited solely to qualified barristers.

Discovery vs. Disclosure

Some level of discovery is usually permitted in the U.K. and most foreign jurisdictions, although it is usually referred to as disclosure rather than discovery. Disclosure generally entails the exchange of documents relevant to the claims and defenses asserted in the proceeding. Depending on the type, nature and amount in controversy, such disclosures can be significant in scope and quantity, and might even exceed American standards in terms of scope and quantity.

In most international arbitration proceedings, discovery is limited to the exchange of documents and witness statements. Such discovery is generally governed by the IBA Rules on the Taking of Evidence in International Arbitration or similar rules of the designated arbitral institution, which require the requesting party to explain how the documents requested are relevant to the claims and defenses at issue in the proceeding. This requirement forces the requesting party to focus on the relevance and materiality of the documents and generally limits abusive requests that seek "any and all" documents relating to a transaction or issue. It is also necessary for the requesting party to assert that the documents are not in that party's possession and are reasonably believed to be in the possession of the responding party.

Witness Preparation

In the United States, lawyers would likely consider it malpractice not to prepare a witness for giving evidence. In England, a strict distinction is drawn between properly educating a witness about the proceedings and improperly coaching, rehearsing or practicing for the giving of testimony. Yet, in civil law systems, lawyers have been generally prohibited from interviewing or preparing witnesses to testify in court proceedings, although the prohibitions are growing less strict in the Germanic countries.

It was because of the differing practices among common and civil law traditions that the IBA Rules on the Taking of Evidence in International Commercial Arbitration were first promulgated in 1999 and later amended in 2010. With respect to witness interviews, Article 4(3) of the IBA Rules state that "[i]t shall not be improper for a Party, its officers, employees, legal advisors or other representatives to interview its witnesses or potential witnesses and to discuss their prospective testimony with them." In 2013, the IBA reinforced the concept of allowing witness preparation by promulgating the IBA Party Representation Guidelines. Under the IBA Guidelines, a party representative may assist witnesses in the preparation of witness statements and experts in the preparation of expert reports. This assistance may include a discussion of the witness' or expert's prospective testimony, a review of the procedures through which testimony will be elicited, assistance with the preparation of a witness statement or expert report and preparation for cross-examination. Even so, it should be remembered that the IBA Rules and Guidelines are not binding on the parties unless agreed to or required by the arbitral tribunal. And, in any event, the IBA Rules and Guidelines may or may not override any inconsistent restrictions otherwise applicable to legal representatives by their home jurisdictions.

Expert Evidence

Construction disputes frequently involve the services of other professionals such as engineers and accountants as expert witnesses, and those professionals often have ethical obligations of their own with which to comply. All participants in international construction arbitrations—whether arbitrators, counsel or expert witnesses—should be mindful of those obligations to help ensure the credibility of international arbitration as a dispute resolution process. The mind-set of an expert in preparing to investigate a cause-and-effect technical

issue, with a view to giving evidence in an international construction arbitration, should be objective and neutral as to the potential results of the investigation, but at the same time, with full knowledge of the client's arguments and with a view to testing the client's arguments against the anticipated opposing positions. Even though experts in the United States are commonly considered to be advocates of their client's positions, the Federal Rules of Civil Procedure in subsection 26(a)(2)(B) partially mitigate this advocacy by requiring substantial disclosure of the expert's opinions, information, exhibits, qualifications, background and compensation. But it should be noted that these broad disclosure obligations apply only to experts who have been nominated as testifying experts. It is relatively common for U.S. lawyers to retain what are known as consulting experts to provide confidential advice and expertise on the client's case, which advice is generally protected from discovery. At a later point in time, the so-called consulting expert may be converted to a testifying expert, but if so, all information and communications previously exchanged must be disclosed.

In England, the legal and ethical responsibilities of an expert witness in a civil case are now embodied in the English Civil Procedure Rules, Part 35. These guidelines and requirements for expert testimony in the U.K. require that the expert should be independent of the party proffering his testimony, should provide independent assistance to the court and the parties, should be uninfluenced as to form or content by the exigencies of the litigation and should never assume the role of an advocate.

The rules and custom and practice in international construction arbitration proceedings will be far more flexible than in national judicial systems such as the U.S. and U.K. However, the important point to note is that the particular requirements of the applicable arbitration procedures, including the legal cultural values, expectations and mind-sets of the tribunal members, should obviously be taken into account in determining what approach the expert should take in an international construction arbitration.

The particular requirements of the applicable arbitration procedures should be taken into account in determining what approach the expert should take in an international construction arbitration.

The most effective and credible approach is a somewhat middle ground; i.e., the expert should be instructed on a confidential basis to approach the issues and dispute objectively, with an open mind and with a view to determine whether, and the extent to which, the client's desired opinions can be squared with the findings of the expert. If they cannot, then the client should consider whether a second opinion might be different, whether to proceed with another look, whether to accept the expert's conclusions and proceed with other arguments or, perhaps, to settle the dispute on the most favorable terms possible. On the other hand, if the expert's opinion is supportive of the client's position, then the expert can, with much greater force and credibility, advocate the client's position.

Conclusion

Notwithstanding certain differences in approach, and especially when considering construction disputes, it is fair to say that there are more similarities than differences in the presentation of cases by U.S. and English lawyers. Perhaps the reasons for the similarities are that construction advocates on both sides of the Atlantic typically represent the same companies doing the same type of work all over the globe; they are members of bar associations specializing in construction law; they are reading the same treatises and attending the same seminars. More to the point, U.S. and U.K. construction lawyers generally deal with the same issues and the same types of disputes. All of this is to say that the necessary skills of the effective advocate in managing a complex construction case will be found in more or less equal measure in the U.K. and the U.S.

Wendy Kennedy Venoit is Vice President & General Counsel of Suffolk Construction Company, Inc., in Boston, MA. Ms. Venoit has extensive experience serving as a both an advocate and arbitrator in large construction and insurance coverage disputes.

John W. Hinchey, Esq. is a JAMS neutral based in Washington, D.C. He is recognized as an international leader in construction law and has extensive experience in resolving significant construction and infrastructure disputes as a mediator and arbitrator with JAMS and JAMS International.

Olympics

Continued from Page 1

the increase of cost overruns in larger infrastructure projects. Cost overruns raise the capital-output ratio and bring down the efficacy of any investment. Therefore, understanding why cost overruns happen and how to prevent and/or mitigate them is pivotal to the project finance industry.

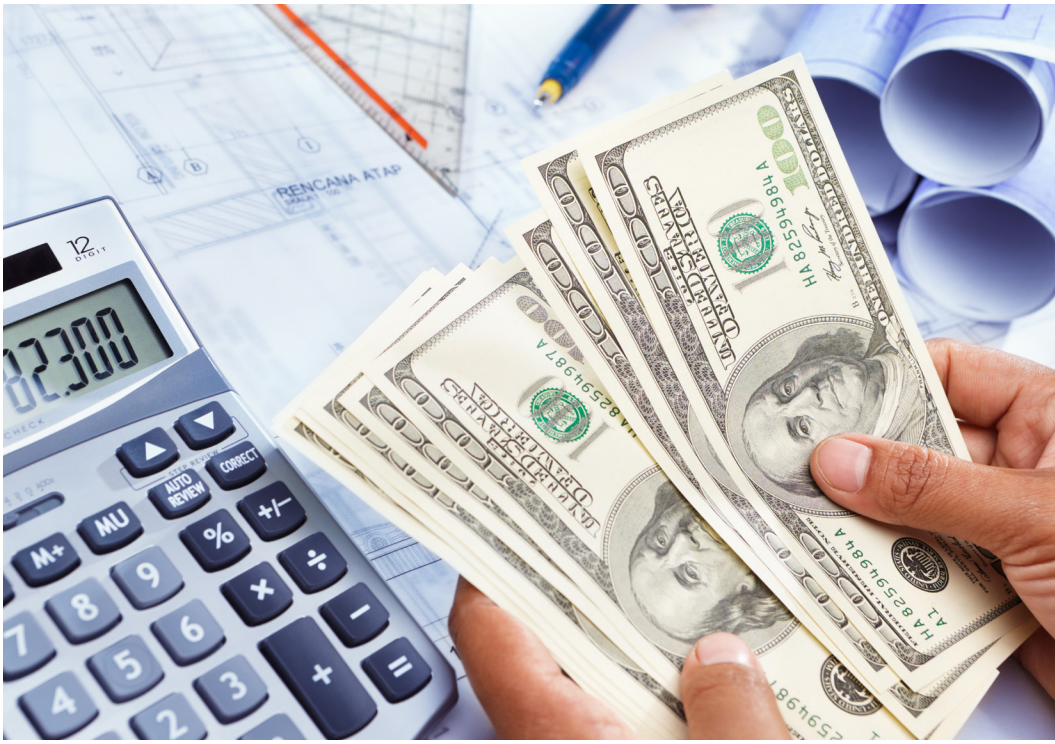
Statistics reveal that the likelihood of actual costs running higher than estimated costs is 86 percent and that actual costs are on average 28 percent higher than estimated costs. Specifically, for rail projects, the average cost overrun is 45 percent; for fixed links (bridges and tunnels), 34 percent; and for roads, 20 percent. As indicated by Professor Michael C. Vorster from the Virginia Polytechnic Institute and State University in Blacksburg, Virginia, "Construction costs are currently being boosted by up to 30 percent as key personnel struggle with the claims-ridden nature of the modern construction industry."

Cost estimates are made at different stages of the process: project planning, decision to build, tendering, contracting and later renegotiations. Cost estimates at each successive stage typically progress toward a smaller number of options, greater detail of designs, greater accuracy of quantities and better information about unit prices. Thus, cost estimates become more accurate over time, and the cost estimate at the time of making the decision to execute is far from the final actual costs.

Underestimation of costs in the appraisal phase is the rule rather than the exception for infrastructure projects. Cost overruns have become an integral part of construction projects worldwide. The question is no longer whether there will be cost overruns, but how serious will they be.

Biases in forecasts may be explained by psychological tendencies among project promoters, but recent studies identify the following important contributing factors to cost overruns:

- **poor project planning;**
- **poor definition of scope;**
- **incomplete design at the time of tender;**
- **unbalanced distribution of risk between owner and contractor;**
- **lack of proper management skills;**
- **unrealistic expectation in relation to the challenges of the project and/or complexity of works;**
- **inadequate and/or insufficient information on subsurface conditions;**
- **unexpected cash flow and financial difficulties faced by owners, contractors and subcontractors;**
- **poor site management and supervision;**
- **lack of skilled workforce;**
- **lack of synchronization of individual responsibilities between the parties;**
- **poor communication between the parties;**
- **culture of conflicts and lack of trust; and**
- **fraud and/or corruption**



Rio 2016 Olympic and Paralympic Games: mediation and dispute boards

The Rio 2016 Olympic and Paralympic Games and the Dispute Resolution Board Foundation (DRBF) are implementing dispute avoidance and resolution provisions, including mediation and dispute boards, in order to prevent disputes, regroup the parties and lead them to a joint approach toward what is best for the project.

Brazilian congress enacted Law N. 13,140 (known as the Brazilian Mediation Law), which provides for mediation involving individuals and private entities, as well as the settlement of disputes involving public entities. The new law regulates extrajudicial and judicial mediation. The provisions on judicial mediation must be interpreted together with the new Brazilian Civil Procedure Code. Effective March 2016, the Code provides for a mediation or a conciliation hearing in the early stages of most lawsuits. The Code also regulates the activities of mediators in judicial proceedings.

Extrajudicial mediation involving individuals and private entities has been already used in some cases, since it does not require a specific law regulating the matter. But it is expected that the new legal framework will boost the adoption of mediation and provide comfort to parties that are not familiar with this method of conflict resolution. The "just in time" approach to mediation by the Rio 2016 Olympic and Paralympic Games can be very important for the development of mediation culture in Brazil.

As for dispute boards, the Rio 2016 Olympic and Paralympic Games and the DRBF are implementing dispute avoidance and resolution provisions in a unique way across 35 contracts for this upcoming international event. Successful delivery for these high-profile projects is critical, since there is no possibility of delay to completion of the contracts and everything is in the public eye. Dispute boards have built up a track record of facilitating successful delivery of major construction projects.

Key features of the Rio 2016 dispute board rules are the following:

- **Each party selects a dispute board member from the DRBF Rio 2016 panel, and the two dispute board members in turn select the dispute board chair from the panel.**
- **In the event of a failure to appoint or agree on the dispute board selection, the President of the DRBF will make the appointment from the DRBF Rio 2016 panel.**
- **Short timetables are in place to align with the short programs for the procurement of these Rio 2016 projects: for appointing the dispute board at the outset of the contract, setting frequent dispute board site visits and requiring rapid delivery of the dispute board's adjudication opinions and decisions.**
- **The dispute board has the power to provide written advisory opinions when jointly requested**
- **A formal referral of a dispute may be made to the dispute board to obtain a binding decision.**
- **Remuneration rates for the dispute board are fixed as a daily rate and monthly retainer.**
- **Special tripartite agreements have also been drafted, for the employer-contractor-dispute board member agreements.**

Júlio César Bueno has been a partner at Pinheiro Neto Advogados since 2001. He is based in São Paulo, Brazil, and has considerable national and international experience focusing on the practice of construction law and engineering contracts (including the use of FIDIC and NEC standard forms), project finance, public procurement and arbitrations, mediations and dispute boards.

The JAMS Global Engineering and Construction Group provides expert mediation, arbitration, project neutral and other services to the global construction industry to resolve disputes in a timely manner. To learn more about the JAMS Global Engineering and Construction Group, go to www.jamsadr.com/construction.

New Additions

JAMS announced the addition of **Andrew Aglionby**. Mr. Aglionby will be based in JAMS New York and London Resolution Centers and serve as a neutral in a variety of disputes, including Business/Commercial, Construction, Energy and Real Estate.

Recent Honors

George D. Calkins II, Esq., Robert B. Davidson, Esq., and Kenneth C. Gibbs, Esq. were recognized in the 2015 edition of *Chambers USA – America's Leading Lawyers for Business.*

Upcoming Events

Hon. Nancy Holtz (Ret.) will speak at the DRI Construction Law Seminar in Las Vegas from Sept. 9-11 on "Blurred Lines: Ethics in Negotiation."

Hon. Nancy Holtz (Ret.) will speak at the ABA Forum on Construction Fall Meeting in Austin, Texas, from Oct. 8-9 on "The Business of Becoming a Neutral."

John W. Hinchey, Esq. will speak at the ABA Forum on Construction Fall Meeting in Austin, Texas, from Oct. 8-9 on "Demystifying International Arbitration."

Hon. Carol Park Conroy (Ret.) will serve as the Moderator of the Court and Board Decisions: Recent Developments Panel for the 2015 Boards of Contract Appeal Bar Association's Annual Program on Oct. 14.

JAMS will hold its first Dispute Board Institute in its Miami office from Oct. 28-29. Registration is open and we invite you to join us. The Institute's faculty includes **Philip L. Bruner, Esq.**, JAMS; Kenneth M. Roberts, Esq., Schiff Hardin, LLP; and Deborah Bovarnick Mastin, Esq., Law Offices of Deborah Mastin, PLLC.

Newsletter Registration

If you want to stay apprised of the latest developments in construction ADR and you are not already receiving this electronic newsletter, please register online or send us your email address. Register at www.jamsadr.info or email constructionsolutions@jamsadr.com or scan the code to the left.