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Caught between Arbitrators and the Courts: Interim Measures in U.S. International Arbitration

Hon. J. Edgar Sexton, Retired Justice of Canada's Federal Court of Appeal, Arbitrator and Mediator, JAMS

BY HON. J. EDGAR SEXTON, RETIRED JUSTICE OF CANADA'S FEDERAL COURT OF APPEAL, ARBITRATOR AND MEDIATOR, JAMS AND ADAM LAZIER, BLAKE, CASSELS & GRAYDON LLP, TORONTO

Though the Channel Tunnel connecting Britain and France was one of the great construction and engineering accomplishments of the late twentieth century, in the fall of 1991 its construction was mired in a legal dispute. Work on the tunnel had by that time been underway for more than three-and-a-half years. A dispute arose between Eurotunnel, the owners and future operators of the tunnel, and Trans-Manche Link (TML), the consortium of French and British companies building the tunnel. TML claimed that Eurotunnel was shortchanging it on payments related to the construction of the tunnel's cooling system. In October 1991, TML threatened to suspend all work on the cooling system if its demands were not met. Despite the fact that the contract between Eurotunnel and TML contained a clause requiring the parties to resolve any disputes by arbitration in Brussels, Eurotunnel sought an injunction from an English court

> *See "Caught between Arbitrators and the Courts" on Page 2*

Muscular Arbitration

Harvey J. Kirsh, Arbitrator and Mediator, JAMS

BY HARVEY J. KIRSH, ARBITRATOR AND MEDIATOR, JAMS

U.S. Supreme Court Justice Anthony Kennedy recently told reporters at a legal conference that the Supreme Court's docket is more heavily oriented towards criminal and First Amendment cases, and that "a lot of big civil cases are going to arbitration." And in Canada, the Chief Justice of the Supreme Court of Canada, Rt. Hon. Beverley McLachlin, has written that "the trend is clear: Fewer and fewer construction cases are reaching the courts where the law is developed. Increasingly, instead of being resolved by judges, construction disputes are being sent to mediation, arbitration, or other forms of alternative dispute resolution."

> *See "Muscular Arbitration" on Page 5*

requiring TML to continue its work until the dispute was resolved by arbitration. TML responded that the English court had no jurisdiction because the parties had agreed to use arbitration. The case, known as *Channel Tunnel Group v. Balfour Beatty Construction*,[1] eventually reached the House of Lords, which refused to grant the injunction.

Considering that the issue reached the House of Lords in England, it is perhaps surprising that it has not reached the Supreme Court of the United States. This leaves American litigants in an uncertain position. When faced with a situation like the *Channel Tunnel Group* case, should they seek relief from an arbitrator or the courts? Would the case be resolved the same way in the United States today?

The *Channel Tunnel Group* case

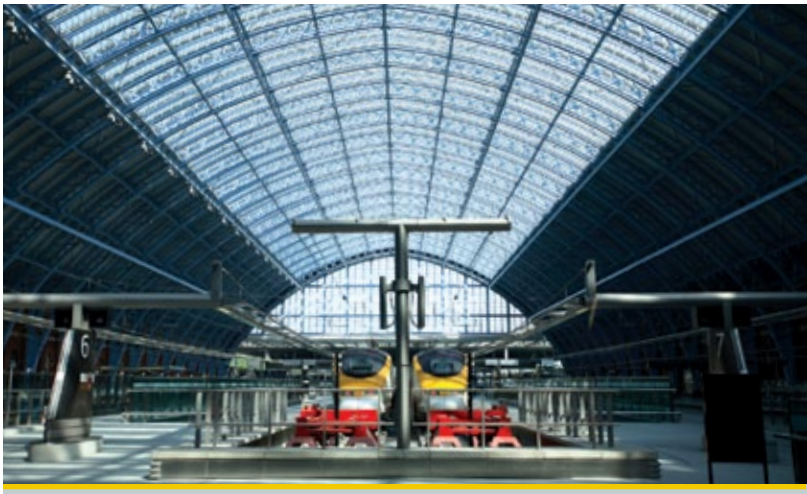
The judge at first instance would have granted the injunction sought by Eurotunnel, although he declined to do so when TML undertook not to suspend work without notice. The Court of Appeal reversed that decision. While an English court had jurisdiction to grant an injunction in support of a domestic arbitration between English companies, according to the Court of Appeal, it had no jurisdiction to issue an injunction relating to a dispute that was the subject of a foreign arbitration.

The House of Lords affirmed the decision of the Court of Appeal, but for different reasons. Lord Mustill held that the court did have the jurisdiction to grant an injunction in support of a foreign arbitration. However, he wrote that an injunction would be inappropriate in this case. Because Eurotunnel also sought a permanent injunction from the arbitrators, by granting an injunction the court would effectively preempt the arbitrators' decision and usurp the role that the parties had agreed to give the arbitrators alone. He concluded that granting an injunction "would be to act contrary both to the general tenor of the construction contract and to the spirit of international arbitration."

Lord Mustill characterized the interaction between arbitrators and the courts in broad terms:

> The purpose of interim measures of protection…is not to encroach on the procedural powers of the arbitrators but to reinforce them, and to render more effective the decision at which the arbitrators will ultimately arrive on the substance of the dispute. Provided that this and no more is what such measures aim to do, there is nothing in them contrary to the spirit of international arbitration.

When assessing whether an American court is likely to follow the House of Lords' decision, it is important not to overlook one factual quirk in the *Channel Tunnel Group* case. Despite threatening to suspend work on the tunnel's cooling system,



St. Pancras Channel Tunnel Train Station

TML never actually did so. In some sense, then, the House of Lords was faced with an abstract legal issue. One wonders whether the result would have been the same had construction actually been suspended and an injunction really been necessary to keep such an important construction project going.

The applicable rules

Arbitrations are governed by two sets of rules: the terms of the contract between the parties and the relevant legislation. Where the arbitration clause between the parties specifically addresses the role of courts in providing interlocutory relief, the court need only hold the parties to their agreement. Often the arbitration clause in the contract will not address this issue, but instead incorporate a set of arbitration rules, which may offer some assistance dividing jurisdiction between arbitrators and courts. This may not settle the issue, however. The JAMS *International Arbitration Rules*, for instance, empower the arbitral tribunal to grant "whatever interim measures it deems necessary, including injunctive relief,"[2] but also note that requesting such measures from a court "will not be deemed incompatible with the agreement to arbitrate."[3] This type of provision does not establish when it is appropriate for a court to grant such relief.

Where the terms of the arbitration agreement are not clear, courts look at the relevant legislation. The United States has not implemented the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Commercial Arbitration, which explicitly gives courts and arbitrators concurrent jurisdiction over interim measures.[4] However, it has ratified and implemented the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, better known as the New York Convention.[5]

[1] Channel Tunnel Group v. Balfour Beatty Construction, [1993] A.C. 334 (Eng. H.L.)
[2] *JAMS International Arbitration Rules* (April 2005), article 26.1.
[3] *Id.*, article 26.3.
[4] *See* articles 17 and 17J.
[5] June 10, 1958, 31 U.S.T. 2517, 330 U.N.T.S. 3. The New York Convention was implemented by Chapter 2 of the Federal Arbitration Act, 9 U.S.C. §§201-208.

Though international arbitrations can also fall under other treaties and legislation, such as the *Inter-American Convention on International Commercial Arbitration* (also known as the Panama Convention), the North American Free Trade Agreement or bilateral investment treaties, most international arbitrations fall within the auspices of the New York Convention.

§203 of the *Federal Arbitration Act* gives federal courts original jurisdiction over "an action or proceeding falling under the New York Convention."[6] The Convention does not explicitly discuss the question of interim relief because it is primarily concerned with the recognition of enforcement of arbitral awards on the merits. In this absence, courts have focussed on Article II(3):

> The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Courts are divided as to whether this language implicitly addresses their power to issue interim measures in support of international arbitrations. Similar language in §3 of the *Federal Arbitration Act* has given rise to a parallel debate.

The law of preliminary injunctions

The Supreme Court has established a four-part test for granting a preliminary injunction. The party seeking the injunction must satisfy the court that: (a) it is likely to succeed on the merits; (b) in the absence of relief, it is likely to suffer irreparable harm; (c) the balance of equities favors granting the injunction; and (d) the injunction is in the public interest.[7]

One issue in the *Channel Tunnel Group* case was whether an English court could issue an interlocutory injunction in support of an arbitration to be held abroad. The House of Lords reversed the Court of Appeal on this issue and held the English court could do so. American courts have reached similar conclusions. Where courts have accepted that they have jurisdiction to grant injunctive relief, they have not been troubled by the fact that the arbitration is to take place abroad.[8]

Although neither the New York Convention nor the *Federal Arbitration Act* grants arbitrators the right to order injunctions or other interim relief, courts have held that they have the inherent authority to do so unless the parties agree to the contrary. The parties' agreement to arbitrate would lose meaning unless they also intended to grant the arbitral tribunal the power to preserve the status quo until it can decide the case on its merits.

The overlap between courts and arbitrators

Except where the jurisdiction of the court has explicitly been ousted by the parties, judges are loath to deprive litigants of access to the courts. However, the parties should be held to their bargain, especially in light of the compromise represented by the arbitration agreement.

Faced with the uneasy interaction between these two principles, courts have taken at least three different approaches to applications for injunctions in the face of an arbitration clause. Under the first approach, courts simply deny that they have any jurisdiction to grant interim relief. This approach appears to be based on two things: a broad reading of Article II(3) of the New York Convention as prohibiting courts faced with an arbitration clause from doing anything other than referring the parties to arbitration, and policy concerns that the party seeking judicial relief was seeking to bypass the agreed-upon method of settling disputes.

This line of cases has been roundly criticized by academics and courts. It relies on a strained interpretation of the text of the New York Convention that is inconsistent with the Convention's history and *travaux préparatoires*. Its sense of policy is also flawed. While it is true that parties should be held to their agreement, this position ignores the fact that there are many situations where parties cannot get important relief from the arbitrators, either because the arbitral panel has not been formed or because it lacks jurisdiction. If interim relief is unavailable, the dispute may be moot by the time it can be decided by the arbitrators, making the arbitration agreement hollow. Finally, it is telling that this interpretation has found no support from foreign courts interpreting the New York Convention.

The second approach goes to the other extreme, holding that the presence of an arbitration clause does not in any way limit the court's authority to order interim relief. We believe this approach is also flawed. Where parties have agreed to resolve their dispute by arbitration, it is illogical to assume this agreement includes final remedies but somehow excludes provisional remedies. The essence of an arbitration clause is the parties' decision to stay out of court, often for reasons relating to confidentiality or cost. Where the dispute is between parties in different jurisdictions, the decision to arbitrate also often represents a considered choice to avoid giving either side a "home field advantage" in domestic courts. Going to one of those same courts to receive interlocutory relief may violate the spirit of the parties' agreement and give one side an unfair advantage. Because they are immersed in the facts and procedural history of the

[6] 9 U.S.C. §§203.
[7] See Winter v. Natural Resources Defense Council, 555 U.S. 7, 20 (2008).
[8] Sauer-Getriebe KG v. White Hydraulics, Inc., 715 F.2d 348 (7th Cir. 1983) (arbitration to be held in London); Bahrain Telecommunications Co. v. Discoverytel, 476 F. Supp. 2d 176, 180-87 (D. Conn. 2007); Rogers, Burgun, Shahine & Deschler v. Dongsan Constr. Co., 598 F. Supp. 754, 758 (S.D.N.Y. 1984).

case, arbitrators are generally better placed than courts to determine whether an application for provisional measures is truly needed or whether the legal process is being used as a delaying tactic or as a means of gaining an advantage in settlement discussions. By undermining the effectiveness and predictability of the arbitration agreement, this approach actually diminishes the parties' autonomy.

This approach also relies on the premise that there is little connection between a court's decision on interlocutory relief and the final decision on the merits, which is reserved for the arbitrator. The reality is not so simple. A court faced with an application for an interlocutory injunction must consider the merits of the case at the first stage of the test, and its findings could influence the parties' arguments and the arbitrator's decision. The court's decision whether to grant the injunction will also shape the facts on the ground facing the arbitrator, which can and do affect the arbitrator's final decision and choice of remedy. These concerns must be balanced against the fact that an interlocutory injunction may be often necessary to ensure a dispute is not rendered moot by the parties' actions before it can be decided by the arbitrator.

If parties do wish to retain unrestricted access to the courts, they are of course always free to include this in the arbitration agreement.

A third approach, which views arbitrators as the primary source for interim relief without entirely blocking parties' access to the courts, avoids these problems.

New York City Courthouse

Even where granting the interim relief would not directly preempt the arbitrator's decision on the merits, under this approach courts only assume jurisdiction in cases where the arbitrator cannot grant the relief sought.[9]

This may be the case for a number of reasons. The parties may not yet have appointed an arbitrator, a process that can take months. Even if an arbitrator has been appointed, he or she may not be able to deal with a motion quickly enough.[10] Courts, which are available 24 hours a day if necessary, may be able to offer more urgent relief. Though arbitrators generally do have the authority to grant interim relief, the remedy sought may be outside the limits of the arbitrator's jurisdiction, either generally or under a specific arbitration clause. An arbitrator, for instance, has no power to issue relief binding third parties.[11]

Some courts have taken this further and suggested that a court should deny interim relief where it is theoretically available from the arbitrators, even if getting that relief is practically impossible. In one case, for instance, the party seeking a writ of attachment sought judicial relief because it knew that provisional relief would not be available under the arbitral rules due to a jurisdiction quirk. The court nonetheless denied relief, holding that as long as the arbitral rules allow for provisional relief, the practical question of whether that relief is actually available on the facts of a given case was "irrelevant."[12] We think this goes too far. Courts should approach the question of whether relief is available from the arbitrator in a pragmatic way, never losing sight of whether their intervention would help or hinder the arbitration. Judicial intervention is often appropriate where for whatever reason the arbitrator cannot even consider a claim for interim relief on its merits.

Conclusions: some practical advice

Though we believe courts should exercise restraint when faced with an application for an interlocutory injunction in support of a dispute governed by an arbitration agreement, not all American courts have done so. Still other courts, however, have denied that they can consider such applications at all.

One hopes that in time the Supreme Court will resolve this uncertainty. In the meantime, however, the prudent course of action is to seek interlocutory relief from the arbitrator whenever possible. This avoids the possibility that a court will decline jurisdiction, wasting time and money. ■

[9] *See* Simula, Inc. v. Autoliv, Inc., 175 F.3d 716, 725-26 (9th Cir. 1999). *See also* Bahrain Telecommunications Co. v. Discoverytel, 476 F. Supp. 2d 176, 186-87 (D. Conn. 2007) (holding that availability of provisional relief from the arbitrator is a relevant consideration to the court, though it is not necessarily determinative); Merril Lynch, Pierce, Fenner & Smith v. Salvano, 999 F.2d 211, 215-16 (In domestic context, District Court had jurisdiction to grant temporary restraining order, but erred by extending it after the arbitral panel had been constituted). This approach is also advocated by Wauk, *supra* note 16.

[10] This exception is recognized in s. 8(2)(b) of the Revised Uniform Arbitration Act (2000).

[11] United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581 (1960); Nationwide Mut. Ins. Co. v. Home Ins. Co., 330 F.3d 843, 846 (6th Cir. 2003).

[12] China Nat'l Metal Products Import/Export Co. v. Apex Digital, 155 F. Supp. 2d 1174, 1182 (C. D. Cal. 2001). In that case, the arbitral rules allowed the Chinese arbitrators to apply for a writ of attachment from the Chinese People's Court in the domicile of the party against who the measure is sought. Because the writ was sought against property belonging to a foreign party, no People's Court had jurisdiction and the arbitrators were powerless.

However, despite what appears to be a trend, much has also been written about the shortcomings of arbitration. In 2010, the College of Commercial Arbitrators (CCA) undertook a study of arbitration and produced its landmark booklet, "Protocols for Expeditious, Cost-Effective Commercial Arbitration." Essentially, the Protocols observed that trial practices were being imported into the arbitration process and that arbitration was beginning to look just like litigation.

The Editors of the Protocols ultimately concluded that lengthy discovery, excessive claims for document production, multiple depositions of witnesses and numerous motions contribute to greater expense and delays in the arbitration process. The primary recommendation was that "arbitrators must aggressively manage the process from day one of their appointment." The notion of "control," particularly over the discovery process and the schedule, was paramount among their recommendations.

At its recent Annual Meeting, the CCA characterized the controlled case management technique as "muscular arbitration". By way of contrast, however, a colleague recently gave an account of an arbitration where both he and the opposing counsel, as well as the arbitral panel, were content to proceed at a leisurely pace. In response to my comment about muscular arbitration, he humorously coined the countervailing term "flaccid arbitration," stating that if that is what the parties want, then the arbitrators should respect and accommodate that approach. I leave it to the reader to decide, but the weight of all recent literature seems to support the view that in order to really make arbitration different than litigation, it is necessary for the arbitrators to manage the process efficiently and to move it forward.

The White & Case Survey

2010 was also the year that White & Case, in conjunction with the University of London, undertook an empirical survey of international arbitration. The survey was based on questionnaires and in-depth face-to-face interviews of in-house counsel, who were found by the survey to have made most of the important strategic decisions. The following were two of the interesting findings of the survey:

1. **The respondents were asked their views about the cause of delays and who was responsible. Most of them answered that it was the *parties* who contributed most to the length of the proceedings. Delays, they responded, were caused by excessive discovery of documents, by the initial constitution of the panel and by the arbitration hearings. The respondents also stated, interestingly, that the arbitral tribunal should exert control over the parties to keep the process moving quickly. The survey respondents wanted a disciplined, "muscular" process; and**

2. **A section of the survey dealt with the selection of arbitrators, and found that the most important factors were open-mindedness and fairness, as well as prior experience, availability, knowledge of the applicable law and reputation. But 50% of those surveyed stated that they were disappointed with arbitrator performance.**

University of London

The Tarullo Survey

Another recent survey of a broad spectrum of construction project stakeholders, described in Michael Tarullo's article in this issue, appears to confirm that, although arbitration is not without its faults, the majority of the respondents expressed the view that it is considerably more cost-effective than litigation in resolving construction claims. They also stated that the process would be more appealing if it were managed more effectively, with limited motions and discovery, and with a reasonable but abbreviated timeline.

"Muscular arbitration" may be an acquired taste, but it clearly appears that a "flaccid arbitration" process is not the preferred route to follow. ■

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Med-Arb, Why Not ?

BY ANDRÉ SIMARD, GILBERT SIMARD TREMBLAY, MONTREAL, QUÉBEC

André Simard, Gilbert Simard Tremblay

To say that construction remains fertile ground for disputes of all sorts is to state the obvious. The owner's cost controls and unrealistic schedules conflict with the contractor's profit-oriented business. And the contractor, who is often confronted with conditions that differ substantially from those described or anticipated, may seek compensation for the delay and extra costs incurred.

Construction legal battles are complex, long and costly. Lawyers' and expert fees are compounded by the time required for preparation and the loss in staff availability and other financial resources. The courts, with their limited resources, have become reluctant to grant weeks and months of trial time, causing long delays and backlogs. And construction claims lasting over ten years are not uncommon.

A number of criticisms have been leveled at conventional arbitrations as well, for having become private trials generating similar costs, extensive discoveries, interlocutory motions and prolonged hearings.

Other methods of dispute resolution have been developed, such as Partnering, Independent Neutral and Dispute Resolution Boards, that are set in place at the start of a project and deal with problems and actual or potential disputes as they arise, during the progress of the construction. These resolution methods remain cumbersome and require substantial amounts of documentation that govern the formation, scope and powers of the Boards and the functioning procedure. They have proven to be more suitable for large industrial or government projects and public private partnerships of long duration.

Mediation has not gone without criticism either. Many counsel consider it a loss of time and energy, and remain reluctant to engage in a process that can be aborted at will and may not provide a final implementable solution. Experience has also shown that some litigants will agree to mediation, without a sincere intent to resolve the dispute. In extreme cases, we have seen litigants considering mediation as just another way to cause additional expense and delay for the opponent or to discover the strengths and weaknesses of the opposing positions and adjust accordingly.

Generally, the parties to a dispute have an undeniable common interest: They want a final solution that is economical in time, resources and cost. There will always remain that type of litigant with a resolve to destroy or bankrupt the opponent by any means. No efficient dispute resolution method can satisfy this type; long costly judicial battles will therefore remain a common strategy.

Experimentation has been attempted with a Med-Arb procedure, where the mediator is given by the parties the power to act as both mediator and arbitrator. The rationale for this resolution technique is that the parties would make a serious and sincere attempt to find a consensual solution to their dispute in order to keep the control toward the desired outcome and avoid a final resolution by the third party they have chosen. The mission of the mediator/arbitrator is to provide the parties with the solution they should have agreed to themselves on the basis of both law and equity, while not being confined within the substantial or procedural rules of law.

Quebec jurisprudence reports one decision that declared invalid a contractual agreement where the parties had agreed to submit to Med-Arb before a mediator with the power to arbitrate should the mediation fail.

In 1999, the Quebec Superior Court concluded that a mediator who receives privileged or confidential information during the mediation cannot maintain the neutrality and independence required to decide as an arbitrator, on the basis of admissible evidence only and in accordance with the law.[13] Even though the decision has not been confirmed in appeal, that criticism is easily shared by litigants and their counsel.

One could argue *a contrario* that judges and arbitrators are often faced with inadmissible factual and technical evidence, whether objected to or not. They have to determine credibility or lack thereof. The mediator becoming arbitrator, upon failure of the parties to come to a final agreement, will have to analyze the evidence, determine credibility and base his award on what he deems admissible in accordance with the law, in an independent and unbiased manner, which is not an easy task under any circumstances. No system is perfect or without shortcomings.

The *Centre de Médiation et d'Arbitrage de Paris* (CMAP) proposes, in its rules and bylaws, an original method that seems to avoid the shortcomings of the previously mentioned techniques. It is called *Med-Arb simultanés* (Simultaneous Med-Arb).

Its stated objective is to provide the guaranteed double benefit of an expeditious and final solution of disputes. It consists in setting in motion two procedures that occur simultaneously but independently of each other. The dispute is submitted to a mediator and one or three arbitrators; the mediator will not communicate with the arbitrator(s) about the matter, and vice versa.

The arbitrator(s) will be called upon to render a decision eight days following the expiry of a fixed delay (three months save written agreement otherwise) and only on the issues remaining unresolved by the mediation. If the

> See "Med-Arb" on Page 10

[13] *T.S.Mfg Co. vs Les Entreprises Ribeyron,* C.S. Hull, 17-1-99, EYB 1999-10724

If A Frog Had Wings: Expectations and Realities of Construction Dispute Resolution

BY MICHAEL TARULLO, ICE MILLER LLP

Michael Tarullo,
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Expectations and reality are often found to be inconsistent in life. One continuously finds that there are disconnects between dispute resolution processes and stakeholder expectations. Searching for solutions requires communication. Sometimes solutions are illusory, but the challenges of construction disputes mandate continuing review and refinement of dispute resolution processes.

Resolving construction disputes often seems analogous to a search for the impossible. Expectations of those parties involved in disputes can be easily frustrated without hope for satisfaction. Such frustration brings to mind an old saying often proffered when one would ask why a simple solution could not be reached. "If a frog had wings, it wouldn't bump it's a__ all the time."

The search for understanding from the stakeholders' view prompted the survey that is the foundation of this article. The responses to the survey questions provide a glimpse into the priorities of those most impacted by the dispute resolution process in the construction industry.

The Survey

In an effort to gain insight into stakeholder expectations, a survey was conducted of 200 individual entities involved in the construction process. The participants consisted of a broad spectrum of stakeholders from a variety of jurisdictions.

The following represents the demographic of those responding:

11%	Owners or Developers
34%	General Contractors or Construction Managers at Risk
9%	Agency CM or Owner's Representatives
14%	Subcontractors
17%	Suppliers/Vendors
15%	Design Professionals

The survey intended to identify whether the respondents' expectations were met, show what users of the various processes believed characterized the process best (and its possible shortcomings) and provide an opportunity to indicate suggested improvements.

In brief, the survey highlights the continuing and growing use of mediation, as well as the concern with other methods of dispute resolution.

The Survey Results

1. **Without consideration to the results, were you satisfied that the process met your expectations?**

		YES
a.	Initial Decision Maker (IDM)	37.5%
b.	Dispute Review Board	41.7%
c.	Mediation	75.8%
d.	Arbitration	40.0%
e.	Litigation	62.0%

The response to this question suggests that, subject to the comments below, of the two most often advocated dispute resolution processes, arbitration has a less than acceptable level of meeting the expectations of the users. Mediation seems to be successful, at least for these parties, but these results were expected to be higher.

2. **Was/were the "neutral(s)" effective in managing the process?**

		YES
a.	IDM	40.0%
b.	Dispute Review Board	38.5%
c.	Mediation	80.0%
d.	Arbitration	61.0%
e.	Litigation	58.0%

One complaint that seemed to resonate with stakeholders was that the process was not managed and it seemed to have a life of its own. The exception to this frustration was mediation. Because it is a party-driven process, it would be reasonable to expect that mediation would score higher in the "effectiveness" category. One might consider whether the stakeholders' expectations relate more to the neutrals being more "evaluative" than merely "facilitative" in their efforts.

3. **Have you utilized an Initial Decision Maker (IDM) (other than the Architect) to attempt resolution of a dispute?**

YES 15.0%

It seems that even though one of the major complaints with dispute evaluation by the designer has been the lack of objectivity, very few are taking advantage of the third-party neutral to act as the first line of evaluation.

4. Check all that apply as most characteristic of the identified process:

		GOOD	FAST	ECONOMIC
a.	IDM	25.0%	12.5%	62.5%
b.	Dispute Review Board	55.6%	22.2%	22.2%
c.	Mediation	31.0%	10.0%	59.0%
d.	Arbitration	70.0%	20.0%	10.0%
e.	Litigation	100.0%	0.0%	0.0%

The unique subject matter often considered by the Dispute Review Boards likely impacted these results. Mediation surprisingly was not considered "fast." This may well be driven by the amount of discovery that seems to precede the mediation. Although only 40% of those that have participated in an arbitration proceeding viewed it as meeting their expectations, 70% believed that it was a "good" process.

5. Do you believe a neutral should explain the rationale of his/her decision?

YES 94.0%

This result reinforces the often-articulated expectation that the parties wanted to know the "why" for the results they are given, even if it is "bad news."

6. Do you believe disclosure of "reasoned" arbitration awards would be (check all that apply):

62.0%	Helpful to resolving other disputes
26.0%	Not helpful because each case is different
41.0%	Helpful because consistency in awards is needed
0.0%	Not helpful

The unique aspects of each construction case would seem to make virtually every case distinguishable. However, the response to this question suggests that insight into the reasoning of arbitrators would be a helpful guide to stakeholders, just as case law guides counsel.

7. As arbitration is defined as an equitable process, do you think neutrals must follow the letter of the law?

YES	NO	SOMETIMES
53.0%	29.0%	18.0%

Although some have taken issue with the definition of the arbitration process, it seems that the majority of respondents want arbitrators to follow the law.

8. As arbitration is defined as an equitable process, do you think the neutrals must follow the exact requirements of the contract?

YES	NO	SOMETIMES
74.0%	15.0%	11.0%

Even though there appears some recognition that following the law could produce an unfair result, clearly following the exact requirements of the contract is expected. Given the prevalence of "notice" mandates with "irrevocable waiver" clauses, it would seem that similar harsh results could be found. It seems that the construction user feels strongly that the "deal is the deal" and everyone should have to abide by the "rules."

9. Rank the following in order of importance 1 – 9 with "1" being most important as to the characteristics of a neutral?

2	Knowledge of construction
3	Knowledge of construction law
5	Knowledge of the law
7	Knowledge of the process selected
6	Years of experience
9	Education
8	Cost of the Neutral
1	True neutrality
4	Communication skills

Although expense seems to be the focal point of many complaints regarding construction dispute resolution, the cost of the neutral appears of low concern. As would be expected, the responses to this question confirm the importance of neutrality and knowledge of construction as high priority.

10. For those disputes in which you were involved, who do you believe caused the most delays?

44.0%	Lawyers
23.0%	Other party
24.0%	Neutral
9.0%	No one

This question was premised on the common complaint that dispute resolution processes take much longer than they should. Interestingly, parties believe that lawyers and the neutral contribute most to delays in the process. Responses to other questions in the survey indicate that neutrals need to be more assertive in managing the dispute resolution processes.

11. Which of the following do you believe are critical considerations in determining a dispute resolution process? (check each that is applicable)

82.0%	Time
85.0%	Fairness
70.0%	Cost
18.0%	Done without Lawyers
56.0%	Done so you can preserve business relationships
3.0%	Other

Reinforcing many of the other responses, timeliness is critical to the expectations of the parties. What seems somewhat inconsistent in these responses is the high consideration of cost. Business relationships are not unexpected as a priority expectation, but interestingly it was not at the top of the list. Although some complain that lawyers are a cause for delays in the dispute resolution process, proceeding without lawyers was very low on the priority list.

12. Do you believe that the project delivery system being utilized can impact the ability to resolve disputes on a construction project?

YES	NO	SOMETIMES
74.0%	20.0%	6.0%

As is seen with the development of integrated delivery systems, stakeholders expect that choosing the proper delivery system can lead to more effective resolution of disputes. In the same sense, choosing a delivery system that does not lead to cooperation can be equally frustrating to the resolution of disputes.

13. Do you believe that clauses that require the "losing" party to pay the "prevailing" party's legal fees:

Encourages settlement	74.0%
Discourages settlement	26.0%

The parties believe that additional risk of a "losing" party clause would encourage rather than discourage settlement discussions. For the experienced responder to the survey, the high cost of dispute resolution is a significant motivating factor to dispute resolution. Experience suggests that defining quantitatively who would be considered the prevailing party is very important to making such clauses readily enforceable.

14. What are the biggest problems with arbitration?

35.0%	Cost of arbitrators
30.0%	Time to award
12.0%	Limited discovery
44.0%	Too much discovery
32.0%	Failure of the arbitrator to dismiss motions
53.0%	Failure of the arbitrator to follow the law
15.0%	Lack of discovery
32.0%	Limited appealability
24.0%	Lack of published awards
9.0%	Other

Again, cost factors are of concern in arbitration, but the most telling response is the complaint that arbitrators do not follow the law. Confirming process management issues was the response that there is too much discovery in arbitrations. Several responses reinforce the concern that arbitration is not as timely a process as is expected.

15. What would make arbitration more appealing to you?

38.0%	Limit discovery
62.0%	Manage process to reduce time to award
32.0%	Increase appeal rights

Reinforcing other responses regarding the management of the arbitration process in order to meet the expectation of a "speedy" process remains the highest priority.

16. Do you believe discovery in arbitration is out of control?

YES	NO
53.0%	47.0%

Notwithstanding many of the complaints regarding arbitration, it seems arbitration is still a viable dispute resolution process, but with some specific issues to be addressed in order to meet the expectations of stakeholders.

17. Do you believe arbitrators grant too many time extensions or fail to set reasonable deadlines?

YES	NO
60.0%	40.0%

Stakeholders point to the arbitrators as contributing to delays in the arbitration process, further reinforcing the concerns with management of the arbitration process.

18. Should the arbitrators require the participation of a principal for the party on all conference calls and scheduling sessions?

YES	NO
60.0%	40.0%

It appears that having the parties participate in scheduling conferences would press the more timely administration of the arbitration process. Keeping the parties engaged in the process will address a host of stakeholder expectations.

19. Is litigation or arbitration more cost-effective for resolving a construction dispute?

Litigation	38.0%
Arbitration	62.0%

Even with the failed expectations for many, arbitration is believed by these stakeholders to be more cost-effective than litigation.

20. Is the limited ability to force other parties (such as the design professional or subcontractor) into arbitration a significant problem?

YES	NO
56.0%	44.0%

The inability to join other parties was historically a concern for many. The modifications to standard contract documents to allow joining of third parties may well have impacted the response to this question.

Conclusions

The responses to the survey reinforce the priorities of stakeholders to find cost-effective and efficient dispute resolution processes. Stakeholders expect to have an understanding of the end result and do not want to suffer through delays in getting to those results.

Although the tried-and-true process of mediation and arbitration remains the favorite of most stakeholders that responded, there are concerns and criticisms about delays and management of the process. Emphasis needs to be put on neutral management of dispute resolution. It is important that each party is given fair opportunity to articulate its position, but there needs to be a balance between "litigation-mode discovery" and timely resolution.

There may also need to be a cultural shift in the construction industry as it relates to publication of arbitration awards. Consistent with the view of construction of most stakeholders, surprise is not what is wanted, although maybe it should be expected. Guidance from other cases is believed by the respondents to be essential for efficient dispute resolution in the construction industry. There need to be continuing efforts to improve the communication between stakeholders about dispute resolution and how creative approaches can bring effectiveness and understanding to the process. A simple solution may remain elusive, but we continue to look for that "frog with wings." ■

Med-Arb *continued from Page 6*

mediation provides a complete solution, the mediated agreement puts an end to the arbitration. Partial agreements will be communicated to the arbitrators, and only the unresolved issues will be pursued in arbitration.

Simultaneous Med-Arb thus offers to the litigating parties full control of the delay and cost, while guaranteeing a solution in *fine,* be it amiable or imposed.

The procedure is initiated by a joint request to the CMAP for the setting up of simultaneous Med-Arb. If stipulated in a contract, the request may be joint or by one of the parties to the agreement. The CMAP issues the procedural documentation and an estimate of the costs based on a preset tariff.

Unless otherwise agreed to in writing, the total duration is three months from the notification that the arbitrator, or board of arbitrators, has been seized of the dispute and that the mediator has been designated by the CMAP. The mediator and the arbitrator(s) determine the procedure to be followed. The final arbitration award will be issued no fewer than eight days after the stipulation end of the mediation and only on the issues remaining unresolved by the parties.

The two procedures move simultaneously and separately from each other. The CMAP does not reveal the name of the mediator to the arbitrator(s), and vice versa, and they are forbidden to discuss or talk about the dispute should they get to know about one another.

The mediator and the arbitrator(s) are to remain independent, impartial and unbiased; are held to full disclosure both before and during the process; and are subject to recusation (under Civil Law, a plea or exception by which a defendant requires that the decision-maker having jurisdiction of the cause should abstain from deciding upon the ground of interest). A replacement procedure is also provided in case of incapacity, death or recusation.

The mission of the mediator is to assist the parties, by any means deemed appropriate, in finding a negotiated solution to their dispute. He can terminate the procedure at any time if he comes to the conclusion that pursuing it further would be a futile exercise. The agreement of the parties, whether partial or total, can be confirmed by the final arbitration award.

The arbitration award is to be rendered in conformity with the law unless the parties have, in writing, given the arbitrator(s) the power to act as "amiable compositeur" (permitting the arbitrator(s) to decide the dispute according to the legal principles they believe to be just, without being limited to any particular national law). In Quebec, that seems to mean that the award could be based on equity and not in strict compliance with the rules of law.[14]

Time will tell if the French have come up with a novel and efficient dispute resolution method. ■

[14] *Antaki, N., L'amiable composition,* dans Antaki, N. Prujiner, A. (dir.), *Actes du 1er Colloque sur l'arbitrage commercial international, Montréal, éd. Wilson & Lafleur 1986, p. 151.*

GEC NEUTRALS RESOLVE AN ARRAY OF CONSTRUCTION DISPUTES

ROY S. MITCHELL, ESQ., recently successfully mediated a number of disputes, one arising out of a large U.S. government design-build contract at a military installation, another relating to a rehabilitation and upgrade project for a historic structure in the Mid-Atlantic area and the third involving fire protection, precast and exterior insulation and finishing system disputes on four related contracts.

JOHN W. HINCHEY, ESQ., was selected as a party-appointed arbitrator to resolve a dispute between the prime contractor and a public owner of a wind energy project in West Virginia. John was also appointed as Chair of a Dispute Advisory Board for a $5B project relating to the construction of five hotels in the Bahamas.

PHILIP L. BRUNER, ESQ., recently mediated a six-party dispute regarding a construction project in Oak Ridge, Tennessee.

RECENT HONOURS / APPOINTMENTS

PHILIP L. BRUNER, ESQ., was recently elected to become a Fellow of the Chartered Institute of Arbitrators (FCIArb.). He is also the recipient of the Norman Royce Prize, which was recently awarded by the British Society of Construction Arbitrators, for his article "Rapid Resolution ADR."

In the recent Special Edition of LEXPERT magazine, **HARVEY J. KIRSH, ESQ.,** has been named one of "Canada's Leading Infrastructure Lawyers."

ZELA "ZEE" G. CLAIRBORNE, ESQ., has been reinstated as a Fellow of the American College of Construction Lawyers.

According to the Los Angeles and San Francisco "Daily Journal" legal newspapers, the list of the "Top Neutrals of 2011" for California includes JAMS GEC neutrals **KENNETH C. GIBBS, ESQ.; RICHARD CHERNICK, ESQ.; HON. WILLIAM CAHILL, ESQ.; BRUCE A. EDWARDS, ESQ.;** and **GERALD A. KURLAND, ESQ.**

EVENTS

On May 2, 2012, **HARVEY J. KIRSH, ESQ.,** and new JAMS panelist **HON. J. EDGAR SEXTON, Q.C.,** will be jointly leading an arbitration workshop for civil litigators working with Canada's Department of Justice, Defence Construction Canada and other Crown corporations and agencies in Ottawa.

In March, **JOHN W. HINCHEY, ESQ.,** will be participating as a judge in the Ninth Annual William C. Vis (East) International Commercial Arbitration Moot in Hong Kong. And on April 26-27, 2012, John has been invited to speak at the Seventh Annual Fordham Conference on International Arbitration and Mediation, which is scheduled to take place in the Great Hall at King's College, Strand Campus, London, England.

On May 3-6, 2012, **PHILIP L. BRUNER, ESQ.; KATHERINE HOPE GURUN, ESQ.; JOHN W. HINCHEY, ESQ.; JAMES F. NAGLE, ESQ.; DOUGLAS S. OLES, ESQ.;** and **THOMAS J. STIPANOWICH, ESQ.** will be speakers at the Fourth Annual International Construction Law Conference, organized by the Australian and New Zealand Society of Construction Law and the American and Canadian Colleges of Construction Lawyers in Melbourne, Australia.

On June 1-3, 2012, **THOMAS J. STIPANOWICH, ESQ.; HARVEY J. KIRSH, ESQ.; PHILIP L. BRUNER, ESQ.;** and **JOHN W. HINCHEY, ESQ.,** will participate in an arbitration panel at the 2012 Annual Conference of the Canadian College of Construction Lawyers in San Francisco.

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