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## DIRECTOR'S CORNER

# JAMS Issues Recommended Arbitration Discovery Protocols

**By PHILIP L. BRUNER, ESQ.** ***Director, JAMS Global Engineering & Construction Group***

On September 8, 2009, JAMS issued "recommended Arbitration Discovery Protocols" (www.jamsadr.com/arbitration-discovery-protocols/) to address specifically a number of arbitration discovery issues that frequently arise but are inadequately treated in construction industry arbitration rules. At the heart of those issues is recognition by arbitrators and parties of a need to maintain better control over (1) deposition discovery; (2) E-Discovery; (3) hearing continuances; and, (4) discovery and dispositive motions. Those concerns are widely regarded as major causes of inefficiency and loss of cost-effectiveness of the arbitration process, and enhancement of unwarranted "judicialization" of arbitration. The Protocols thus propose:

***See "Discovery Protocols" on Page 6***

# Judging the "Vanishing Trial" in the Construction Industry

**By RIGHT HONOURABLE BEVERLEY McLACHLIN, P.C., Chief Justice of Canada**

Construction law is more than just sawdust, nails and cement. To quote Philip Bruner, an eminent American construction lawyer:

> *[a] 'capstone' subject, a towering legal edifice built out of modern statutes, 'contextual' common law principles of and foundational legal concepts sustaining and binding the multitude of parties — architects, engineers, contractors, subcontractors, material suppliers, material manufacturers, sureties, insurers, code officials, and tradesmen.*[1]

Not only is the field of construction law broad; it is ever-changing. New laws, new techniques, new disputes, and occasion-

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# "Vanishing Trial"

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ally new judicial decisions — more of which later — are constantly transforming the legal landscape. When Lord Sankey developed the "living tree" doctrine in 1930, and declared that "[t]he British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits,"[2] he was speaking about a tool of constitutional interpretation. But all areas of law — construction law included — are living, constantly evolving, trees. Some branches sprout and grow; others crack and need trimming. Thus the law develops and remains responsive to changes in society.

Which brings me to the future of the role of the courts — and by extension, the rule of law — in construction law. Let me explain by returning to the tree analogy. The Construction Law tree looks different than it used to. It may not be dead, but new branches are not appearing as often as they once did. And old branches that need pruning are being neglected.

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 alternate dispute resolution. Why is this happening? Will the courts of the future play an important role in the area of Construction Law as they have in the past? And if not, should we care, and if so why?

First, let's look at why the construction law tree, while still alive, has not experienced the growth that has occurred in other areas of law over the past decades. Construction is one of Canada's largest industries. In 2007, the construction industry generated 6.3% of Canada's GDP, and employed more than one million people.[3] Among these, we count many construction lawyers, whose numbers have not diminished. What has diminished is the use of the courts to resolve construction law disputes.

With only mild hyperbole, University of Wisconsin law professor Marc Galanter — speaking of litigation generally — describes this development as the "vanishing trial." This trend is particularly apparent in construction law: while construction disputes are abundant, and lawsuits not uncommon, it is increasingly rare for them to go to trial.

In the United States, the number of civil trials in all federal district courts, after peaking at just over 12,000 in 1984, reached a new low of 3,555 in 2006.[4] That's almost half the number of federal trials that took place 40 years ago, despite the fact that the number of suits filed during the same period soared from 66,144 to 259,541.[5] The same trend has played out in state courts, where the number of civil trials fell 40% from 1976 to 2004.[6] Although similar statistics are not available for Canada, one recent report noted that 95 percent of civil matters in Ontario settle before trial. A Canadian commercial litigator, David Elliott, opines "[t]he 'vanishing trial' concept is certainly the case."[7] If this is so for litigation in general, it most certainly is true for construction litigation.

Why are fewer construction law cases coming to the courts? The Honourable Warren Winkler, the Chief Justice of Ontario, blames the general decline in litigation on cost and delay.

> *First, our civil justice system often fails to meet the needs of ordinary Ontarians who require at once the fair, timely and affordable resolution of their legal problems. Second, an increasing number of litigants are transferring their cases from the traditional justice system into private arbitration. That is, trials are vanishing for two distinct, but related, reasons. Ordinary litigants simply can't afford to take their cases all the way through trial, and "well-heeled" litigants are heading for the exits.*[8]

Chief Justice Winkler's views are not unique. In a 1998 survey of chief counsels and senior litigators of Fortune 1000 companies, time and cost savings were the top two reasons for choosing mediation and arbitration.[9] The extensive use of telephonic or video conference in place of motion practice, reduced discovery, and streamlined rules of evidence are just some of the aspects of arbitration that help reduce costs.

But there are other reasons for choosing mediation and arbitration over litigation — reasons that apply with particular force to construction disputes.

The first is complexity. Our world is increasingly complex, and so are the disputes it generates. Construction is no exception.

The second reason for preferring ADR to the courts is the need to move projects on to completion without costly delays. Construction companies, like other commercial actors, want to get the job done and move on; setting the law on an arcane issue is far down on their list of priorities, if it figures at all.

A third factor may be the desire to preserve business relationships between players in the construction business. The adversarial system of litigation, if not carefully managed, can lead to acrimony that impairs future business dealings.

A fourth factor, related to complexity, is expertise. Parties in ADR may choose specialized adjudicators who they are confident will understand the factual issues.

A fifth factor is flexibility. ADR permits the utilization of creative solutions that the all or nothing nature of litigation precludes.

Sixth and finally, mediation and arbitration allow parties to resolve their disputes in a confidential setting. Indeed, one general counsel has opined that the "biggest benefit of arbitration is that it is non-public."[10]

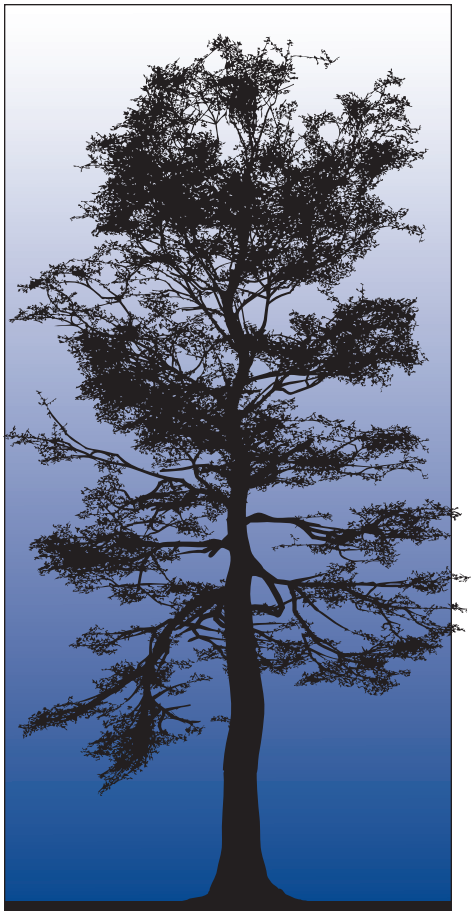
Let me focus for a moment on just one of the factors driving ADR in Construction Law — complexity. Projects are increasingly complex. As Cushman and Myers in an American text on construction law state:

> *Hundreds, even thousands, of detailed drawings are required. Hundreds of thousands of technical specifications, requests of information, and other documents are needed. Complex calculations are used to produce the design.*[11]

Increasingly complex too is the legal and regulatory framework that governs them: licensing laws, safety regulations, and building codes, and a vast assortment of laws enacted to protect owners and unpaid construction trades against the risk of contract default, to mention only a few.

The complexity of many construction disputes is linked to problems in the court process. The technical and specialized nature of construction projects translates into technical and specialized evidence. Litigation of construction disputes relies heavily for proof of causation upon opinion testimony of experts — something that can be both frustrating and daunting to judges, who typically lack training in the technical aspects of construction. A few years ago, an American federal judge, on a pretrial conference advised the parties in the following way:

> *Being trained in this field, you are in a far better position to adjust your differences than those untrained in these related fields. As an illustration, I, who have no training whatsoever in engineering, have to determine whether or not the emergency generator system proposed to be furnished . . . met the specifications, when experts couldn't agree. This is a strange bit of logic.*[12]



But all areas of law — construction law included — are living, constantly evolving, trees. Some branches sprout and grow; others crack and need trimming. Thus the law develops and remains responsive to changes in society.

ADR in the resolution of construction disputes takes many forms, from simple mediation between home-owner and contractor on a house renovation, to sophisticated on-going dispute resolution processes, such as those adopted in conjunction with the construction of the new Toronto Air Terminal, by the Vancouver Port Authority and by B.C. Hydro and Power Authority. Built-in ADR facilitation mechanisms, pre-construction "partnering" to deal in advance with potential disputes, and "standing neutrals" to resolve disputes when they develop, are but some of the imaginative uses of ADR that are in common use. ADR, for a variety of reasons, has proven effective and economical. We should not be surprised, nor indeed dismayed, to learn that as a result, recourse to the courts is diminishing.

Judges often concur. Former U.S. Supreme Court Chief Justice Warren E. Burger, in a 1985 speech to

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# "Vanishing Trial"

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the Minnesota Bar Association, said this:

> *The obligation of the legal profession is, or has long been thought to be, to serve as healers of human conflicts. To fulfill that traditional obligation means that there should be mechanisms that can produce an acceptable result in the shortest possible time, with the least possible expense and with a minimum of stress. That is what justice is all about…. One thing an appellate judge learns very quickly is that a large part of all the litigation in the courts is an exercise in futility and frustration. A large proportion of civil disputes in the courts could be disposed of more satisfactorily in some other way…. My own experience persuades me that in terms of cost, time, and human wear and tear, arbitration is vastly better than conventional litigation for many kinds of cases. In mentioning these factors, I intend no disparagement of the skills and broad experience of judges. I emphasize this because to find precisely the judge whose talent and experience fit a particular case of great complexity is a fortuitous circumstance. This can be made more likely if two intelligent litigants agree to pick their own private triers of the issues.*[13]

Or, as John Lande points out,

> *[c]ourts now provide dispute resolution services in a competitive market. The courts used to be the "only game in town" for people who needed a formal dispute resolution process that would provide a legitimate and enforceable resolution. … [Now, p]arties can choose binding arbitration or private judging and largely keep their cases out of the court system.*

So this, in brief compass, is the picture. The construction industry, for a host of complex and intertwined reasons, is increasingly eschewing the road to the courthouse and relying on alternative dispute resolution, with and without the concurrence of the courts. ADR is here to stay, and that is a good thing.

However, the success of ADR in resolving construction disputes is only one part of the picture. Prompt and economic settlement of disputes is undoubtedly of prime importance. But it is too easy to overlook the fact that there are other dimensions to dispute resolution that can be served only by the courts.

Resolution of disputes through the courts provides many collateral benefits. Professor David Luban has cataloged a variety of public goods that the court system produces, including opportunities for intervention by persons not party to lawsuits, discovery and publication of important facts, and structural transformation of public and private institutions.[14] Trials also can satisfy the public interest by providing checks on government power, and catharsis in dealing with events of public importance; and more generally, simply by demonstrating that the justice system works. Most importantly, court decisions, over the years, build up a settled legal framework against which contracts can be drawn and disputes settled, whatever the forum.

If one accepts these propositions, one must also accept that the vanishing trial — should it disappear altogether — would not be without negative consequences. One must accept, that, without displacing ADR, courts should continue to be involved in construction law issues.

Let me try to explain by focusing on the need for courts to continue to play a role in providing the legal framework in which the industry operates. I think we would all agree that the just resolution of disputes depends on agreement on basic principles of law. In the area of construction law, the operative legal principles are not set out in any Code. Rather, they have been developed, and must continue to develop, through the common law as applied by the courts. It thus emerges that even in a world dominated by ADR, the courts are essential. They, and they alone, can discharge the task of norm-setting.[15] Courts not only resolve disputes; they also play a vital role in interpreting laws so that societal standards for behavior are set, known and enforced.[16] They provide rules and precedents, furnishing the parameters by which conduct is judged. This, in turn, contributes to the settlement of disputes by setting the standards and rules that guide bargaining and dispute resolution outside the courts.

When a case is resolved through ADR, it reflects terms that are agreeable to its parties. But those terms are not available to the law or to the public. Instead of reasoned and transparent law, we are left — provided the settlement is not secret, which it often is — with little more than an announcement of how much money changed hands. The living tree of the law finds little nourishment in such arid soil. The age-old fruits of the law — helping people predict the prob-

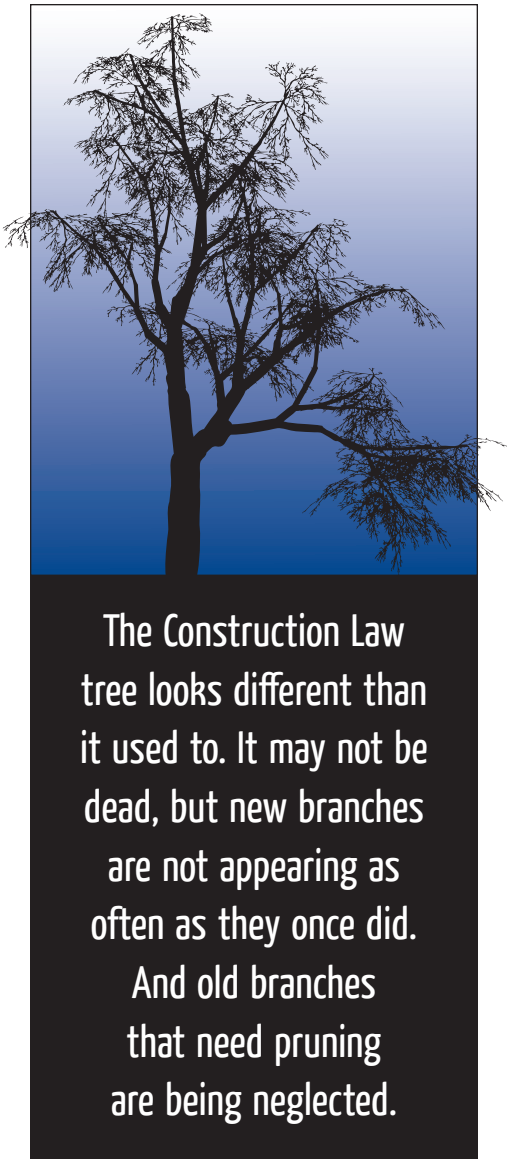
able outcomes of their actions and to modify their behavior intelligently — do not grow.

To quote David Luban once more:

> *[A] world without adjudication would be a world without court-generated rules and legal precedents, without a shadow of the law in which parties could bargain. It would be a world of atrophied advocacy and judicial skills, eroding accuracy in case assessment, and diminishing judicial authority other than the final authority of commands backed by threats. In a world suffused with such legal uncertainty, disputing parties' assessments of both the merit and the magnitude of their case would correspond only coincidentally. As a result, arriving at mutually agreeable settlements would be more difficult.*[17]

Over the past two and one-half decades, the court on which I sit has tackled many legal issues relevant to the construction industry: the duties and obligations applicable to the tendering process;[18] the enforcement of lien rights in the context of labor and material bonds;[19] the liability of municipalities for deficiencies in building inspections;[20] the interpretation of exclusion clauses in insurance contracts;[21] concurrent liability in tort and contract;[22] and unjust enrichment.[23] In resolving these disputes publicly, the Court, along with Provincial Trial and appellate Courts, has helped develop a common understanding of the rules and guidelines of conduct and provided a basis for future conduct and development grounded, not only in expedience, but in the rule of law.

In sum, most disputes can and should be resolved by ADR processes. But where issues arise that require resolution by the courts, that should remain an option. If we believe, as I do, that it is important that the courts continue to play a role in construction law, we must, as members of the judiciary and the bar, ensure that court processes are effective and affordable in those cases where important issues of law arise, and that our court decisions reflect the realities of the construction industry, nourishing those branches of the tree that should be nourished and trimming those that should be trimmed. Revised court rules, including limits on discovery and on expert testimony, are currently under discussion in many parts of the country. It is not for me to state precisely what changes should be made. But this I do say: access to justice is important for everyone — from our neighbor down the block to the largest commercial players. In a society built on the rule of law, every person and every institution must have the ability to access the courts.



The Construction Law tree looks different than it used to. It may not be dead, but new branches are not appearing as often as they once did. And old branches that need pruning are being neglected.

Let me conclude. For millennia, construction has been integrally linked with the advancement of human civilization. The Roman historian Plutarch extolled this connection in praising the Athenian general Pericles:

> *That which gave most pleasure and ornament to the city of Athens, and the greatest admiration and even astonishment to all strangers, and that which now is Greece's only evidence that the power she boasts of and her ancient wealth are no romance or idle story, was [Pericles'] construction of the public and sacred buildings.*[24]

But the construction of "public and sacred buildings," as well as our more modest but vital dwellings, is intertwined with another vital civilization-enhancing activity: the construction and maintenance of the law. Great projects are built not just of bricks and stones, but by human aspirations, creativity and cooperative effort. That effort, in all its diversity, must be protected and supported by the law. ■



***See Endnotes for this article on Page 6.***

## Endnotes/Judging the "Vanishing Trial"

1. Philip L. Bruner, "The Historical Emergence of Construction Law" (2007) 34 Wm. Mitchell L. Rev. 1 at 4.
2. *Edwards v. Canada (Attorney General)*, [1930] A.C. 124.
3. Statistics Canada, *Canada Year Book 2008* (Ottawa: Statistics Canada, 2008), Statistics Canada Catalogue no. 11-402-X at 64.
4. "The Vanishing Trial: As courts battle become more rare, some experts fear the effects on the law" *Business Week* (April 30, 2007).
5. *ibid.*
6. *ibid.*
7. Donalee Moulton, "Vanishing trials: Out-of-court settlements on the rise" *The Lawyers' Weekly* (February 27, 2009).
8. The Honourable Warren K. Winkler, "The Vanishing Trial" (September 2008) *The Advocates' Society Journal* at 3.
9. Cornell/PERC Institute on Conflict Resolution, *The Appropriate Resolution of Corporate Disputes: A Report on the Growing Use of ADR by U.S. Corporations* 17 (1998).
10. Fulbright & Jaworski LLP, *U.S. Corporate Counsel Litigation Trends Survey Findings* (2004) at 10.
11. Robert F. Cushman & James J. Myers, *Construction Law Handbook* (New York: Aspen Law & Business Publishers, 1991) at 32.
12. *E.C. Ernst, Inc. v. Manhattan Constr. Co.*, 387 F. Supp. 1001 at 1006 (S.D. Ala. 1974).
13. Warren E. Burger, "Using Arbitration to Achieve Justice" (Remarks Before the American Arbitration Association and the Minnesota Bar Association, August 21, 1985) in 40 (1985) Arb. J. 3 at 6.
14. David Luban, "Settlements and the Erosion of the Public Realm" (1995) 83 Geo. L. J. 2619 at 2622-26.
15. *ibid,* at 2622.
16. Jack B. Weinstein, "Some Benefits and Risks of Privatization of Justice Through ADR" (1996) 11 Ohio St. J. On Disp. Resol. 241 at 247-51.
17. *supra*, footnote 14, at 2641.
18. *R. (Ont.) v. Ron Engineering*, [1981] 1 S.C.R. 111; *M.J.B. Enterprises Ltd. v. Defence Constructions* (1951) Ltd., [1999] 1 S.C.R. 619; *Martel Building Ltd. v. Canada,* [2000] 2 S.C.R. 860, 2000 SCC 60; *Double N Earthmovers Ltd. v. Edmonton (City),* 2007 SCC 3, [2007] 1 S.C.R. 116; *Design Services Ltd. v. Canada,* 2008 SCC 22; *Tercon Contractors Ltd. v. British Columbia (Ministry of Transportation)* (File No. 32460).
19. *Citadel General Assurance Co. v. Johns-Manville Canada Inc.*, [1983] 1 S.C.R. 513.
20. *Kamloops (City of) v. Nielsen,* [1984] 2 S.C.R. 2; *Ingles v. Tutkaluk Construction Ltd.,* [2000] 1 S.C.R. 298.
21. *Canadian National Railway Co. v. Royal and Sun Alliance Insurance Co. of Canada,* 2008 SCC 66.
22. *B.G. Checo International v. B.C. Hydro and Power Authority,* [1993] 1 S.C.R. 12.
23. *Pacific National Investments Ltd. v. Victoria (City),* [2004] 3 S.C.R. 575, 2004 SCC 75.
24. Plutarch, *Pericles* (75 A.D.), at http://classics.mit.edu/Plutarch/pericles.html.

# Discovery Protocols

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***1. Factors to be considered by arbitrators in determining the appropriate scope of deposition discovery.*** Categories of factors include the nature of the dispute, the agreement of the parties, relevance and reasonable need for requested discovery, privilege and confidentiality, and characteristics and needs of the parties, and joint written preferences of the parties. Rule 17 (b) of the JAMS Engineering and Construction Arbitration Rules provides:

> *Each Party may take two depositions of either an opposing Party or individuals under the control of the opposing Party. …The necessity of additional depositions shall be determined by the Arbitrator based upon the reasonable need for the requested information, the availability of other discovery options and the burdensomeness of the request on the opposing Parties and the witness.*

The Protocols offer further guidance to the Parties in making requests to the Arbitrator for additional depositions, and in designing their own arbitration clauses. Efficient management of complex engineering and construction cases require careful consideration of the number of depositions to be taken.

***2. E-Discovery Considerations.*** Suggested limitations on E-Discovery include production "only from sources used in the ordinary course of business," following a showing of "compelling need," and, where costs and burdens of E-Discovery are disproportionate, requiring the requesting party to "advance the reasonable cost of production to the other side subject to the allocation of costs in the final award."

***3. Hearing Adjournments.*** Good practice suggests making the parties aware of "the implications" of certain adjournment requests. Although a joint application of all parties to adjourn a hearing will not be rejected, where the request is "based on a perceived need for further discovery (as opposed to personal considerations), a JAMS arbitrator ensures that the parties understand the implications in time and cost of the adjournment they seek."

***4. Discovery and Dispositive Motions.*** Neither discovery nor dispositive motions should be allowed to delay or prolong significantly the discovery period. To avoid the time and cost of lengthy motion briefing, parties would be required to state their positions preliminarily in a "brief letter (not exceeding five pages) explaining why the motion has merit and why it would speed up the proceeding and make it more cost-effective." Rulings would be based on the letters unless the arbitrator determines that more detailed briefing on specific issues would be helpful.

For counsel who are crafting arbitration clauses, the new JAMS Protocols offer sound ideas for assuring an innovative, efficient and cost-effective process for controlling and limiting extensive discovery and motion practice prior to the arbitration hearing. ■

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# Arbitration: The Choice Is Yours[1]

**BY THOMAS J. STIPANOWICH, ESQ.**

Today one hears many complaints about binding arbitration. Much of the criticism stems from the fact that arbitration under standard procedures has taken on the trappings of litigation: extensive discovery and motion practice, highly contentious lawyering, long cycle time and high cost. Parties to engineering and construction contracts may still prefer arbitration to court trial because of other important procedural advantages including expert decision makers, flexibility and privacy, but cost and time concerns loom large in both settings.

A just-released study of court trial co-sponsored by the American College of Trial Lawyers calls for sweeping reforms in discovery, motion practice and other contributors to the expense and delay that have crippled the U.S. legal system.[2] Their solution: move beyond the one-size-fits-all model of litigation and tailor procedures to the size and scope of the dispute. In particular, they call for choices that reduce the sweeping, costly discovery contemplated by the federal and state procedural rules. Ironically, this is precisely the kind of choice that is the primary potential advantage of arbitration.

The most important difference between arbitration and litigation — and the fundamental value of arbitration — is the ability of users to tailor processes to serve particular needs. Business users, guided by knowledgeable and experienced counsel, are in the best position to determine how and when arbitration will be brought to bear on business disputes, and the kind of arbitration process to be employed. In order to make the most of the promise of arbitration, business users must do a better job of making choices before and during arbitration. For a number of reasons business persons and their lawyers tend to devote little time and attention to arbitration and dispute resolution provisions in construction contracts. By unreflectively falling back on standard "boilerplate" terms, they may fail to serve key business goals and priorities; often, the result is an arbitration experience that is similar in many respects to litigation, with attendant costs and delays.

Business users also miss key opportunities when they fail to exercise care in choosing the service providers who will play key roles in the arbitration experience, including institutions providing arbitration and dispute resolution support services, legal advocates and arbitrators. Finally, business principals must remain involved in key decisions during the course of arbitration, including judgments about the scope and course of discovery, motions, the nature of the hearing and award.

Let's consider several basic choices available to business users and counsel, each of which may have a big impact on the arbitration experience.

## 1. Include time limits on arbitration; employ expedited or streamlined procedures.

Many users of arbitration express strong concerns about the perceived expense and "start-to-finish cycle time" of arbitration. While selecting appropriate advocates and arbitrators is very important in this regard, those desiring to promote efficiency and economy in arbitration should first address the matter through procedures they choose to govern arbitration.

One straightforward approach is to place time limits on arbitration. National provider organizations publish a variety of streamlined or expedited arbitration rules placing heavy emphasis on reduced cycle time. Those adopting such rules should consider:

- whether expedited rules should be used for all disputes or only for cases involving claims below a certain dollar threshold;
- what time frame is most suitable to the circumstances;
- whether to use a single arbitrator or a multi-member panel;
- whether to require submission of detailed information from the parties "up front;"

*See "The Choice Is Yours" on Page 8*

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# The Choice Is Yours

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- whether to limit discovery (see below);
- whether to limit remedies or bound arbitrator discretion in making awards.

JAMS publishes Expedited Arbitration Rules & Procedures for Engineering & Construction.[3] The JAMS Rules establish relatively short time periods for each step in the arbitration process. For example, the rules call for JAMS to arrange a preliminary telephonic conference within five days of the arbitrator's appointment, and for hearings to begin within four months of that conference.[4] A single arbitrator will be employed unless the parties agree to a panel. Requests for discovery must be "focused on material issues in dispute and as narrow as reasonably possible;" no depositions are permitted without a showing of exceptional need.[5]

The JAMS Expedited Rules might be adopted for use in all kinds of contract-related disputes, or in a more limited way. One logical approach would be to incorporate the rules so they would be applicable to claims and controversies which total less than a certain amount, perhaps $250,000 or $500,000, with the regular JAMS Rules coming into play in cases involving larger amounts.

Another approach would be to incorporate key additional time limits in the regular JAMS Engineering and Construction Arbitration Rules[6] — including, most importantly, the length of the pre-hearing period. It should be noted that these general Rules also place emphasis on efficiency and cycle time; they require, for example, exchange of a great deal of information upon which the parties rely within 21 calendar days of receipt of all pleadings or notice of claims.[7]

### 2. Get a grip on discovery.

Parties who choose to arbitrate presumably do so with the expectation of attenuated discovery. The comments to one set of arbitration rules state:

> *[a]rbitration is not for the litigator who will 'leave no stone unturned.' Unlimited discovery is incompatible with the goals of efficiency and economy. The Federal Rules of Civil Procedure are not applicable. Discovery should be limited to those items for which a party has a substantial, demonstrable need.*[8]

Yet such admonitions, relegated to commentary, may not be enough to persuade arbitrators to rigorously supervise and limit discovery. In cases of any size or complexity, cogent arguments may be framed in support of extensive document discovery and for a number of depositions.

In arbitration as in litigation, discovery (including e-discovery) has become the single greatest source of expense and time consumption, and some of standard arbitration rules give arbitrators — and parties — considerable "wiggle room" regarding information exchange and discovery. Recently, however, there are moves afoot to develop new rules or protocols aimed at enabling parties to give greater guidance to lawyers and arbitrators in the handling of discovery, including different kinds of specific limits on securing documents and information from prospective witnesses.

Parties desiring different or more explicit guidelines for information exchange and discovery in arbitration, including those who are concerned about the impact of discovery on the cost and duration of arbitration, now have a variety of templates to consider. For example, some parties and arbitrators in American arbitrations are now relying on the leading international standard on the subject, the IBA Rules on the Taking of Evidence in International Commercial Arbitration.[9] This standard, a compromise in which U.S.-style discovery is tempered by the influence of prevailing practices in civil law countries, initially requires each party only to submit "all documents available to it on which it relies."[10] It also establishes a procedure for arbitral resolution of disputes over further document production that requires parties to describe requested documents with specificity, explain their relevance and materiality, assure the tribunal that they do not have the documents and make clear why they believe the other party has possession or control of the documents.

Another source of model language on document discovery is the new CPR Protocol on Disclosure,[11] which offers parties a choice of four discrete "modes" for document disclosure. These include: (Mode A) No disclosure save for documents to be presented at the hearing; (Mode B) Disclosure as provided for in Mode A together with "[p]re-hearing production only of documents essential to a matter of import in the proceeding for which a party has demonstrated a substantial need;" (Mode C) Disclosure provided for in Mode B together with disclosure, prior to the hearing, "of documents relating to issues in the case that are in the possession of persons who are noticed as witnesses by the party requested to

provide disclosure;" and (Mode D) Pre-hearing disclosure of documents regarding non-privileged matters that are relevant to any party's claim or defense, subject to limitations of reasonableness, duplication and undue burden.[12] Although the CPR Protocol is admirable in intent, it is not an exhaustive list of creative approaches to discovery in arbitration. For example, some arbitrators limit each party to a certain number of document requests, including subparts.[13]

In the interest of economy or certainty, some parties may want to provide that no depositions, or a specific, limited number of depositions, will be conducted in anticipation of arbitration. Such limitations may be tempered by giving arbitrators discretion to allow depositions in exceptional circumstances where justice requires. A useful example of a clear limit coupled with narrowly cabined arbitrator discretion is contained in Rule 17 of the JAMS Engineering and Construction Arbitration Rules, which permits each party to take two depositions;

> *[t]he necessity of additional depositions shall be determined by the Arbitrator based upon the reasonable need for the requested information, the availability of other discovery options and the burdensomeness of the request on the opposing Parties and the witness.*[14]

Depending on the circumstances, parties may consider it appropriate to include other provisions, such as a term giving arbitrators explicit authority to weigh the burdens and benefits of a discovery request, or the ability to condition disclosure on the requesting party paying reasonable costs of production. It may serve efficiency to provide that the chair of the tribunal serve as discovery master; in cases in which confidentiality of sensitive information is of prime concern, there might be a provision for the use of a special master to supervise certain aspects of discovery.[15]

E-discovery, the elephant in the room of U.S. discovery practice, raises special concerns (including the scope of and limits on discovery of electronic information, and the weighing of burdens and benefits; the handling of the costs of retrieval and review for privilege; the duty to preserve electronic information, spoliation issues and related sanctions). Concerns regarding the relative burdens associated with e-discovery may lead parties to consider adopting language similar to that contained in one set of new guidelines which permit a party to make documents maintained in electronic form "available in the form . . . most convenient and economical for it, unless the Tribunal determines, on application . . . that there is a compelling need for access to the documents in a different form."[16] Moreover, requests for such documents "should be narrowly focused and structured to make searching for them as economical as possible." The guidelines conclude by permitting arbitrators to "direct testing or other means of focusing and limiting any search."[17] The use of "test batch production" is emerging as a critical way of identifying areas that require special attention in advance of major production.

Parties may be able to avoid many of the costs — if not all the risks — of the revelation of privileged material in electronic data by agreeing to have the arbitrators issue a pre-arbitral order relieving the parties of the obligation to conduct a pre-production review of all electronic documents for privilege, and ordering that the attorney-client and work product privileges are not waived by production of documents that have not been thus reviewed. Parties may also wish to consider identifying likely informational needs and agreeing on what information needs to be preserved, in what format, and for how long.[18]

A prototypical, multi-faceted template addressing various aspects of pre-hearing disclosure of electronic information is contained in the CPR Protocol on Disclosure. The Protocol presents parties with four discrete alternatives regarding pre-hearing disclosure of electronic documents. The alternatives range from no-pre-hearing disclosure, except with respect to copies of printouts of electronic documents to be presented in the hearing, to full disclosures "as required/permitted under the Federal Rules of Civil Procedure." The intermediate options permit parties to limit production to documents maintained by a specific number of designated custodians, to limit the time period for which documents will be produced, to identify the sources (primary storage, back-up servers, back-up tapes, cell phones, voicemails, etc.) from which production will be made, and to determine whether or not information may be obtained by forensic means.[19]

## 3. Pick arbitration counsel with pertinent expertise.

Business clients often rely heavily on outside counsel to represent their interests in the management of conflict, including arbitration.

*See "The Choice Is Yours" on Page 10*

# The Choice Is Yours

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These advocates have as much to do with realization of a client's goals and expectations as procedures, administrative framework or neutrals. The wide variation in approaches to conflict makes it inevitable some law firms — and lawyers — will be more suitable for particular clients — and particular circumstances — than others. Selection of a law firm or lawyer that lacks the willingness or capability to align itself with the client's goals may undermine the most careful contract planning.

Unless a legal dispute is inevitably destined for the courtroom, something beyond litigation experience is essential in outside counsel. Litigation experience is not in itself sufficient to qualify one as arbitration counsel — the legal and practical differences are simply too great. Moreover, as our discussion of varied client goals reveals, arbitration and court trial are very often appropriately relegated to a secondary or tertiary role, forming a backdrop or backstop for efforts at informal dispute resolution. With that in mind, an effort should be made to ensure that counsel is capable of understanding and fulfilling a client's specific goals and priorities in addressing disputes. With that in mind, consider the following list of questions that might be asked before retaining counsel to resolve a dispute.

- Do you have experience helping clients consider the appropriateness of options for early resolution of disputes? What options do you discuss?
- What methods do you use to analyze options?
- What professional service models do you employ other than hourly fees? Are you willing to explore incentives for early settlement or some level of success in resolution?
- Do you undertake such analyses prior to commencing discovery?
- What is your experience with and attitude toward negotiated resolution of disputes? With mediated negotiation?
- Have you had formal training in negotiation or mediation theory and practice?
- What is your experience with commercial arbitration, including arbitration under the relevant procedures and administrative framework? Are you familiar with the case managers or case administrators for this matter?
- Are you familiar with the provider institution's list of arbitrators?
- Are you familiar with applicable ethics rules, if any?
- How does your arbitration advocacy differ from your advocacy in litigation?
- What techniques have you found to be most effective in promoting efficiency and economy in commercial arbitration?
- What experience have you had negotiating, arbitrating or litigating with opposing counsel? What is the nature of your relationship?

### 4. Select arbitrators with qualifications that are likely to further business goals.

It has been said that "the arbitrator is the process." This is not mere hyperbole: while the appropriate institutional and procedural frameworks are often critical to crafting better solutions for business parties in arbitration, the selection of an appropriate arbitrator or arbitration tribunal is nearly always the single most important choice confronting parties in arbitration; a misstep in the choice of arbitrator(s) may undermine many other good choices.

One should never choose an arbitral institution without doing due diligence regarding the institution's panel or list of neutrals and ascertaining whether or not the requisite experience, abilities and skills are represented. In order to inform and channel the eventual selection process, moreover, it may be appropriate to prepare reasonable guidelines for the choice of neutral(s) for particular kinds of disputes. In considering candidates, some or all of the following may be relevant: legal, professional, commercial or technical background; notability; hearing management experience and skills, attitudes about arbitration; current schedule and availability.

Again, the relevant questions depend on goals and priorities. If those priorities include low cost, efficiencies, and the avoidance of undue delay, the following queries may be helpful:

- Should a single arbitrator be sufficient for selected classes or kinds of disputes?
- Does the prospective arbitrator (or chair of the arbitration tribunal) have experience in process management, and does that experience reflect well on his or her ability to supervise an efficient, economical process?
- Is the prospective arbitrator committed to the concept of promoting economies and efficiencies throughout the process?
- Is the prospect available for expedited hearings, or for hearings

over the coming months?

It is reasonable for parties to expect arbitrators to give them what they bargained for. While arbitrators should always seek appropriate ways of promoting efficiency and economy in the absence of contrary agreement, clear contractual language emphasizing the primacy of such expectations should give rise to special effort on their part. There are many ways that arbitrators may promote economy and efficiency in arbitration, including:

- making expectations about speed and cost-saving clear at the outset; emphasizing the firmness of the schedule and granting continuances only for good cause;
- functioning as role models (cooperating with other arbitrators, including party-arbitrators; avoiding scheduling conflicts wherever possible);
- actively managing the process, beginning with a pre-hearing conference resulting in an initial procedural order and timetable for the entire arbitration;
- simplifying arrangements for communication, including the elimination of unnecessary communications through case administrators or third parties;
- simplifying, clarifying, and prioritizing issues;
- addressing jurisdictional issues and reasonable requests for interim relief as soon as practicable;
- facilitating and actively monitoring information exchange/discovery;
- employing electronic means of communication and document management as appropriate;
- scheduling hearings with as few interruptions as possible;
- planning and actively managing the hearings (beginning and ending each hearing day with housekeeping sessions);
- anticipating potential problems (such as the unavailability of witnesses, unanticipated circumstances) and seeking creative solutions to minimize delay.

### 5. Don't "turn over the keys to the lawyers" and abdicate responsibility for the process. Stay involved throughout the arbitration process. Participate in key process decisions.

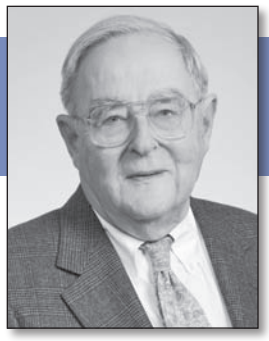
All too often, a company's failure to take charge and establish guideposts for the arbitration process leads to laments like the following by the general counsel of a major corporation:

> *Arbitration is often unsatisfactory because litigators have been given the keys . . . and they run it exactly like a piece of litigation. It's the corporate counsel's fault [for] simply turning over the keys to a matter.*

If business parties want arbitration to be a truly expeditious and efficient alternative to court, then they have to assume control of the process and not abdicate the responsibility to outside counsel—in other words, principals, and not agents, should act as principals. Even after vouchsafing day-to-day responsibilities for dispute resolution to counsel, therefore, a prudent client or inside counsel will continue to be involved in the process. This means being present at key decision points before and during arbitration, including pre-hearing conferences at which the timetable and format for the arbitration are discussed and established. ■

## Endnotes/Arbitration: The Choice Is Yours

1. Adapted from Thomas J. Stipanowich, *Arbitration and Choice: Taking Charge of the "New Litigation," (Symposium Keynote Presentation)*, 7 DEPAUL BUS. & COM. L.J. 3 (2009), http://ssrn.com/abstract=1372291.
2. See Institute for the Advancement of the American Legal System, Final Report on the Joint Project of the American College of Trial Lawyers Task Force on Democracy and the Institute for the Advancement of the American Legal System (Mar. 11, 2009).
3. JAMS Engineering and Construction Rules & Procedures for Expedited Arbitration (Effective July 15, 2009).
4. *Id.,* Rule 19(a).
5. *Id.,* Rule 17(a).
6. See JAMS Rules, *supra* note 3.
7. *Id.,* Rule 17(a).
8. International Institute for Conflict Prevention and Resolution Rules for Non-Administered Arbitration, Rule 11 (Effective Nov. 1, 2007), Commentary to CPR Rule 11, available at http://www.cpradr.org/ClausesRules/2007CPRRulesforNonAdministeredArbitration/tabid/125/Default.aspx#Commentary.
9. International Bar Association, IBA Rules on the Taking of Evidence in International Commercial Arbitration (June 1, 1999), available at http://www.ibanet.org/images/downloads/IBA%20rules%20on%20the%20taking%20of%20Evidence.pdf.
10. *Id.,* Article 3, Section 1.
11. International Institute for Conflict Prevention & Resolution, CPR Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration (2008) §1.
12. *Id.,* Schedule 1.
13. *See, e.g.,* Wendy Ho, *Discovery in Commercial Arbitration Proceedings*, Comment, 34 HOUS. L. REV. 199, 224-227 (Spring 1997).
14. See JAMS Rules, *supra* note 3, Section 17(b).
15. *See id.,* Rule 17(d).
16. International Center for Dispute Resolution, ICDR Guidelines for Arbitrators Concerning Exchanges of Information (May 2008), Section 4 available at http://www.adr.org/si.asp?id=5288.
17. *Id.*
18. William B. Dodero & Thomas J. Smith, *Creating a Strong Foundation for Your Company's Records Management Practices*, 25 ACC DOCKET 52 (Nov. 2007).
19. CPR Protocol on Disclosure, *supra* note 11, Schedule B, Modes B, C. The Protocol also offers a set of General Principles which may be adopted by themselves or in tandem with a particular "mode" for pre-hearing disclosure of electronic documents.
20. Thomas J. Stipanowich, *ADR and the Vanishing Trial*, 1 Journal of Empirical Studies 843 (Nov. 2004) (quoting Jeffrey W. Carr, Vice President and General Counsel, FMC Technologies, Inc.).



# In With the Initial Decision Maker

**BY CARL M. SAPERS, ESQ.**

When the American Institute of Architects (AIA) introduced the notion of an **"Initial Decision Maker"** into its 2007 edition of the AIA General Conditions of the Contract for Construction, it marked a significant retreat from the role once claimed by architects to be the leader of the construction team. To understand the significance of the change, it is important to remember that since 1888, when the first AIA standard form of construction contract was published, the architect was charged with making interpretations and decisions on disputes between the owner and the contractor.

The architect was expected to interpret fairly what the contract documents require. In doing so, the architect is enjoined to show no partiality to either the owner or the contractor. Messrs. Parker and Adams, in a 1954 treatise, *The AIA Standard Contract Forms and the Law* (Little Brown & Co., 1954), observed that, in following this injunction, the architect faces the delicate position of meeting the requirement of impartiality as between the owner and the contractor. Herein lies the high point of the architect's practice of his profession, when in order to do justice to the contractor, he has to oppose the desire of his employer, the owner.

In the *Rules of Conduct*, published by the National Council of Architectural Registration Boards and adopted by a majority of the registration boards across the United States, the architect's quasi-judicial role is specifically referred to:

> *2.4 When acting as the interpreter of building contract documents and the judge of contract performance, an architect shall render decisions impartially, favoring neither party to the contract.*

The commentary following the rule observes that "(t)he rule governs the customary construction industry relationship where the architect, though paid by the owner and owing the owner his or her loyalty, is nonetheless required, in fulfilling his or her role in the typical construction industry documents, to act with impartiality."

Remarkably, the paradoxical role of the architect seems largely to have worked across a long period of our history. Indeed, in a work published in 1967, examining the role of lawyers in England and the United States, the authors were astonished by the meager role played by lawyers in the construction process:

> *There is a widely used system for deciding conflicts in the construction industry that is largely independent of lawyers and the courts. Falling within this system are most controversies over the meaning of the contract between owner and contractor, compliance with this contract, and adherence to standards of good building practice by the contractor and those for whose work he is responsible, particularly subcontractors….*
>
> *The key figure in this decision-making system is the architect who has been retained by the owner to prepare plans and oversee construction. When owner-contractor disagreements arise, both sides look to the architect as adjudicator of their differences. In addition the architect commonly acts as agent of the owner in examining the contractor's work for evidence of contract or good practice violations. In this latter capacity, the architect may initiate controversies as representative of the owner and then proceed to resolve them within his capacity as adjudicator. As examiner and initiator, he is to a degree an advocate for the owner, performing roughly the same advocate tasks as do lawyers in other fields, although in a less partial way. The remarkable thing is that the architect then performs his adjudicative tasks with a spirit of neutrality and fairness to both sides, and that by and large contractors trust and accept his decisions.*
>
> *These decision-making practices of architects are well-established in the construction industry and the system works so well that lawyers and courts will probably*

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*remain relatively unimportant in this sphere of conflict resolution.*

[Johnstone and Hopson, *Lawyers and Their Work: An Analysis of the Legal Profession in the United States and England* (Bobbs-Merrill, 1967), p. 327]

It is a remarkable fact that this paradoxical role was carried off with nearly complete success, at least until the time that the authors did their research and published their book in 1967. Since 1967, that happy description of the construction industry has been turned on its head. Very few contractors or subcontractors today would put their trust in the disinterestedness of the architect. A number of factors have brought about the change. One factor was certainly the increased complexity of construction projects, which made more convincing any challenge to the architect's judgment. Professor Salvadori of Columbia University observed that architects have come in recent years to know less and less about more and more until the architect is "sometimes said to know nothing about everything." [Mario Salvadori, *Why Buildings Stand Up* (McGraw Hill, 1980). p.24.]. Even short of Professor Salvadori's caricature, the architect is no longer venerated for his or her comprehensive grasp of all aspects of building; in fact, no single person can understand all the complexities which a major building comprises.

Without doubt, the process has become more adversarial in recent years, and the lawyers whose absence was noted in 1967 now seem to play a larger role in enforcing the terms of contracts. Often the party with the strongest bargaining power has forced the other party to accept contract obligations that may burden the other party unfairly. While the architect was inclined to let the

**How can an architect pretend to disinterestedness when, if she ruled in the contractor's favor on a change order, the architect was thereby exposed to the owner's claim that the architect had committed an error or omission?**

language of the contract control his decision, contractors frequently seek recourse to arbitration or litigation as a way to mitigate the effect of those burdensome clauses.

Perhaps the most significant change, however, has been the change in the way professionals now fit into American society. At least until the end of World War II, doctors, lawyers, and architects, as members of the "learned professions," operated with broad independence and with the broad respect of the community. In general, they were recognized as pursuing professional interests rather than personal enrichment. That independence, applied to the construction industry, gave the architect the special standing to resolve disputes in a fashion which both sides accepted as disinterested. But in recent years, these distinctions claimed by professionals have been under strong attack by the consumer movement, by the Justice Department, and by those who considered the special status of professionals downright undemocratic. The special status of the architect has in the past four decades been cast in doubt. Contractors and their lawyers regularly contend that the architect is merely the lackey of the owner and, in any event, that most of the decisions that an architect makes in the field are, in reality, judgments about the adequacy of the architect's own work. How can an architect pretend to disinterestedness when, if she ruled in the contractor's favor on a change order, the architect was thereby exposed to the owner's claim that the architect had committed an error or omission? This problem is compounded by the fact that the standard professional liability insurance for architects prohibits the architect — at the risk of forfeiting coverage — from acknowledging his or her own error.

Dispute review boards, construction managers, and project managers are all examples of devices instituted in the construction industry to replace the architect's historic role as the disinterested judge of performance. Design-build and most new

*See "Initial Decision Maker" on Page 14*

# Initial Decision Maker

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forms of project delivery also have the effect of ousting the architect from that role because, in most cases, they make the architect a part of the construction team itself.

With publication of its 2007 edition of contract documents, the American Institute of Architects has acknowledged the growing skepticism in the construction industry about the architect's ability to play a disinterested role. Now, for the first time, if a dispute arises between the owner and the contractor it must be referred to a person whom the owner and contractor designated in their contract as the "Initial Decision Maker." If, however, the parties made no designation, the architect will be deemed to be the Initial Decision Maker and continues to play his historical role of resolving, subject always to an appeal to arbitration or the courts, all owner/contractor disputes.

This 2007 introduction of an Initial Decision Maker does not, however, remove many of the architect's traditional responsibilities to decide issues arising in the course of construction before the issue ripens into a claim. Thus, even if the contractor and the owner have designated a third party as the Initial Decision Maker, the architect continues to play a role in the circumstances described below (references are to AIA Doc. A-201 – 2007):

- In Section 2.4, if the contractor fails to perform satisfactorily, the owner itself may, after notice to the contractor, correct the faulty work of the contractor; but only with the Architect's prior approval;
- In Section 4.2, the Architect, at the request of either the owner or the contractor, interprets and decides matters concerning performance under, and the requirements of, the Contract Documents. When making such interpretations or decisions, the Architect will not show partiality to either the owner or the contractor;
- In Article 7, the architect is given considerable authority to resolve disputes arising out of changes in the work;
- In Article 8, the architect is given the authority to resolve contractor delay claims;
- Section 9.5 sets out the circumstances in which the architect may refuse to certify payment to the contractor, and when the architect does so, the owner may then withhold the payment which the architect has failed to certify; and

In Section 12.2.1.1, the contractor must correct work rejected by the architect.

**Dispute review boards, construction managers, and project managers are all examples of devices instituted in the construction industry to replace the architect's historic role as the disinterested judge of performance.**

But either the contractor or the owner may object to the architect's action respecting each of the foregoing and turn that objection into a claim. Claims that formerly were referred to the architect for an initial decision are now referred to the Initial Decision Maker. Moreover, before an owner can terminate the contract for cause, it formerly required the architect's assent; now the architect plays no role. The Initial Decision Maker must certify that sufficient cause for termination exists and must rule on the adjustment to the contract sum resulting from the termination.

Either party may appeal to mediation, and thereafter to arbitration or litigation, the decision of the Initial Decision Maker as was formerly the case respecting decisions by the architect.

Finally, it should be noted that if the owner and contractor fail to name an Initial Decision Maker, Section 15.2.11 makes the architect the default Initial Decision Maker. ■


# Notices & Calendar of Events

## UPCOMING EVENTS

**JAN. 28, 2010: ABA Forum on the Construction Industry MidWinter Conference: Government Construction Contracting**

Westin St. Francis Hotel • Union Square • San Francisco, CA • **http://www.abanet.org/forums/construction**

**JAMES F. NAGLE, ESQ.,** JAMS, will be a panel member of a session entitled "Hot Issues in Pursuing Claims Against the Federal Government." This session will address the latest developments and law regarding such claims.

**APRIL 8-10, 2010: ABA Section of Dispute Resolution Spring Conference**

Hyatt Regency Embarcadero • San Francisco, CA • **http://www.abanet.org/dispute/**

**HON. CURTIS E. VON KANN (RET.)**, JAMS, will moderate a "mini-plenary" program on April 9, 2010 on reducing cost and delay in commercial arbitration entitled "Let's Get the Lead Out! How Arbitrators, Outside Counsel, Clients and Arbitration Providers Can Make Business-to-Business Arbitration Faster and Less Expensive."

## RECENT ARTICLES AND PAPERS

- **HIS HONOUR HUMPHREY LLOYD QC**, JAMS, on Sept. 9, 2009, gave papers at a conference in Moscow jointly organized by the ICC and the ICC National Committee for Russia on "How Disputes Arise: An Overview of Typical Contracts and Typical Sources of Friction" and on "The Proceedings up to the Hearing: Techniques and Pitfalls; Handling Documents, Witnesses; Experts." On October 7, 2009 at the IBA Conference in Madrid, he organized and chaired the session on "Time and Acceleration Issues Affecting International Construction Contracts."
- **HARVEY J. KIRSH, ESQ.**, JAMS, published an article in the Nov. 27, 2009 issue of *The Lawyers Weekly* entitled "Adjudication in the Construction Industry." **http://www.lawyersweekly.ca/index.php?section=article&volume=29&number=28&article=3**

***For more information or copies of these articles, please contact jherrera@jamsadr.com.***

## RECENT SPEAKING ENGAGEMENTS AND PROGRAMS

- **PHILIP L. BRUNER, ESQ.**, JAMS, made a presentation on "Global Engineering and Construction ADR: Meeting an Industry's Demands for Specialized Expertise, Innovation, Efficiency and Rapid Resolution" to the Construction Law Section of the Montana Bar Association on Sept. 25, 2009 in Bozeman, MT. He spoke on the same topic to the Construction Law Section of the Wisconsin Bar Association on Nov. 10, 2009, in Milwaukee, WI.
- JAMS neutrals **JOHN W. HINCHEY, ESQ., PHILIP L. BRUNER, ESQ.**, and **JESSE B. (BARRY) GROVE, III, ESQ.** were speakers at a Seminar Group program entitled "The Next Wave of Construction Dispute Resolution," held in Atlanta, GA on Oct. 16, 2009.
- **HON. CURTIS E. VON KANN (RET.)**, JAMS, served as program co-chair and a panel moderator for the first ever National Summit on Business-to-Business Arbitration in Washington, DC on Oct. 30, 2009. The Summit was sponsored by the College of Commercial Arbitrators, of which Judge von Kann is now President.
- **MICHAEL J. TIMPANE, ESQ.**, JAMS, spoke on "Construction ADR: New Abilities and Risks Managing Disputes" during a presentation at the Construction Superconference in San Francisco, CA on Dec. 10, 2009.

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