THE RESOLUTION EXPERTS JAMS®

JAMS GLOBAL CONSTRUCTION SOLUTIONS

Leading ADR Developments from The Resolution Experts

WHAT'S INSIDE

Fall 2013

WHO'S IN CHARGE OF THIS ARBITRATION ANYWAY?
By Barbara A. Reeves Neal, Esq. **2**

NOTICES & EVENTS **11**

ECO-FRIENDLY EMAIL EDITION

JAMS Global Construction Solutions **is moving to an environmentally friendly electronic format. Future issues will be delivered via email. If you want to stay apprised of the latest developments in construction ADR, please be sure we have your email address.**

REGISTER AT ***www.jamsadr.info*** OR EMAIL ***constructionsolutions@jamsadr.com*** OR SCAN THIS CODE.

JAMS GLOBAL ENGINEERING AND CONSTRUCTION GROUP

JAMS is the largest private alternative dispute resolution (ADR) provider in the world. With its prestigious panel of neutrals, JAMS specializes in resolving complex, multi-party, business/commercial cases—those in which the choice of neutral is crucial. **The JAMS Global Engineering and Construction Group** provides expert mediation, arbitration, project neutral and other services to the global construction industry to resolve disputes in a timely manner. To learn more about the JAMS Global Engineering and Construction Group, go to ***www.jamsadr.com/construction***.

Q&A with the JAMS Global Engineering and Construction Group

A colloquium on a broad range of issues featuring 10 of the industry's most respected engineering and construction ADR experts.

Q. To what extent can an arbitration clause (well drafted, poorly drafted or otherwise) impact on the arbitration process?

A. PHILIP L. BRUNER, ESQ.: The arbitration clause is extraordinarily important because it establishes the scope of disputes to be submitted to arbitration, the powers of the arbitrators to grant relief and typically the rules governing the arbitration proceeding.

JOHN W. HINCHEY, ESQ.: Careful drafting of arbitration agreements can avoid many strategic mistakes and will provide opportunities to save time and money. The key is to try to anticipate what might go wrong and what issues may arise and, second, to draft a provision where the client is best positioned to control or manage those conditions.

> *See "Q&A" on Page 4*

Engineering Mediations for Success

Rosemary Jackson, Q.C. is a UK mediator, barrister, adjudicator and arbitrator.

BY ROSEMARY JACKSON, Q.C.

The Fall 2010 edition of this newsletter contained two thought-provoking articles debating why construction mediations fail—a subject on which I have also written. This article, however, seeks to challenge the proposition that construction mediations "fail" and to propose methods by which they can be engineered to have the best chance of "success."

Parties approach mediation with varied expectations. Some arrive full of optimism, knowing that 80-85 percent of

> *See "Engineering..." on Page 8*

Who's in Charge of This Arbitration Anyway?

BY BARBARA A. REEVES NEAL, ESQ.

Barbara A. Reeves Neal, Esq., JAMS Mediator/Arbitrator available nationwide

There comes a time in many arbitrations when a tension develops between the parties and the arbitrator. While it is common, of course, for tensions to exist between the parties to the arbitration, most arbitrators strive to work with the parties and keep the arbitration running smoothly, rather than getting crosswise with them.

When such tensions develop, should the arbitrator bow before what the parties want, or may the arbitrator invoke some higher authority and impose something different? Who's in charge of this arbitration anyway?

Consider a few examples:

- The arbitrator wants to set a hearing sooner than the parties would like.
- There is a disagreement about whether preliminary hearings will be held by telephone or in person and, if so, where.
- The parties want litigation-style discovery of documents, witness depositions and voluminous e-discovery; the arbitrator wants limited discovery.
- The parties want to explore an issue regarding an arbitrator's disclosures and potential bias; the arbitrator feels it has been sufficiently disclosed.
- The parties have repeatedly requested that the arbitration hearing be continued; the arbitrator has stated that deadlines will be strictly observed.
- The parties want the arbitrator to stay the action while they seek a court ruling in a related matter; the arbitrator wants to proceed unless stayed by a court.
- The parties feel that a need for adjournment has arisen in the middle of a hearing due to the unavailability of witnesses; the arbitrator has schedule constraints and wants to finish the hearing.

Who's in charge of this arbitration anyway?

A. Assumptions and Framework

In analyzing these situations, most arbitrators and parties would agree on a few basic principles:

1. Arbitration is a delegated and defined power to make certain types of decisions in certain prescribed ways.
2. Arbitral jurisdiction is entirely consensual, and arbitration is a creature of contract.
3. The arbitrator's powers are derived from the parties' contract.
4. The arbitrator is not entitled to do anything unauthorized by the parties.
5. The arbitrator has an obligation to accord the parties due process.
6. The arbitrator has an obligation to the process of arbitration itself and must preserve the integrity and fairness of the process.
7. The arbitrator has the obligation to conduct the arbitration process to advance the fair and efficient resolution of the matters submitted for decision.
8. The arbitrator has a responsibility to be diligent, to act expeditiously and efficiently and to move the case forward to an orderly and timely conclusion.

These principles can be found in the rules of arbitral providers, the canons of ethics for arbitrators in jurisdictions around the world and in guidelines promulgated by professional arbitrator organizations. They are straightforward enough, but there are no rules or guidelines that tell arbitrators and advocates what to do when two or more of the principles come into conflict.

B. Shared Responsibility and Controls

As with any system of restricted delegation of power (here, from the parties to the arbitrator), there needs to be some system of control. The courts have some control, but usually not until after an award is rendered. Meanwhile, who determines whether the arbitrator is acting within the appropriate delegation of power? What if one of the parties goes off track, or both parties ask the arbitrator to do something that calls into question the integrity of the process? What controls exist in arbitration?

The answer seems to be that at different stages of arbitration, as different issues arise, responsibility shifts between the parties and the arbitrator. The parties define the terms of the arbitration, and the arbitrator is responsible for ensuring the integrity of the process and the result. Analogous to a road trip, the parties decide where they are going, the parties and arbitrator together try to develop the best route and the arbitrator is responsible for making sure that the rules are followed en route.

Judicial control is there for serious violations, but most of the time, it really doesn't get to that level and is resolved between the arbitrator and the parties. Like a joint venture or a family or business relationship, the shared expectations of the parties are always present and governing the framework within which the arbitrator is working. This contractual understanding of the parties is an indispensable control mechanism in this scheme. Without it, the arbitrator would become a decision-maker with virtually absolute discretion. Similarly, without respect for the arbitrator's obligation to preserve the integrity of the process, the parties could diverge from an efficient and effective arbitration.

The Preliminary Hearing is an excellent opportunity to organize the proceeding in a manner that will maximize efficiency and economy, and to establish the rules and procedures that the arbitrator and parties will follow. Held shortly after the arbitration is commenced, either in person or telephonically, it provides an opportunity to raise and agree upon procedural rules and practical approaches to controlling the arbitration from beginning to end.

Turning back to the examples above, regarding scheduling disputes, while the arbitrator should not reject a joint application of all parties to schedule the hearing at a different time than the arbitrator desires, to continue the hearing even more than once or to adjourn the hearing, such delays and adjournments can cause inordinate disruption and delay, and can substantially detract from the cost-effectiveness of the arbitration. The arbitrator should ensure that the counsel and the parties understand the time and cost implications of the delays or adjournment they seek. The arbitrators can use persuasion in an attempt to keep the case on a more expeditious schedule, but unless the delay is so severe as to threaten the integrity of the arbitration, the parties' joint decisions about the scheduling are entitled to deference.

If one party seeks a continuance and another opposes it, then the arbitrator has discretion to grant or deny the request. The arbitrator has the responsibility to consider the legitimate needs of the parties, as well as the proximity of the request to the scheduled hearing and whether any earlier requests for adjournments have been made.

When counsel seek overly broad pre-hearing disclosure/discovery, they threaten to turn arbitration into U.S.-style litigation. Where all participants desire unlimited discovery and where the arbitrator has not been able to persuade them that they are seeking disclosure that is beyond what is needed, the arbitrator should respect that decision, as arbitration is governed by the agreement of the parties. However, if only one side is pressing for broad pre-hearing disclosure and the other wants narrow pre-hearing disclosure, the arbitrator should set

Analogous to a road trip, the parties decide where they are going, the parties and arbitrator together try to develop the best route and the arbitrator is responsible for making sure that the rules are followed en route.

meaningful limitations in order to preserve the efficiency and integrity of the arbitration process.

Regarding conduct of the hearing, most arbitral institution rules provide that, subject to their rules, the arbitrator or tribunal may conduct the arbitration in whatever manner it considers appropriate and should conduct the proceedings with a view to expediting the resolution of the dispute. As such, the arbitrator/tribunal has the authority to direct the order of proof, bifurcate proceedings, exclude cumulative or irrelevant testimony or other evidence and direct the parties to focus their presentations on issues of concern to the arbitrator and/or issues most likely to be dispositive. "The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute."

C. Conclusion

So, who's in charge of this arbitration? The answer is it's a team effort, with the parties designing and being responsible for the initial framework of the process, and the arbitrator controlling the process, within that framework, in accordance with applicable arbitration rules and arbitration principles. ■

Q&A *continued from Page 1*

HON. CURTIS E. VON KANN (RET.): Impact can be big (and harmful) if the clause contains unrealistic provisions (e.g., hearing must be held, or award issued, within 20 days) or provides little or no guidance regarding the extent of discovery, what issues are subject to arbitration, etc. A well-drafted clause can avoid procedural skirmishes.

HARVEY J. KIRSH, ESQ.: An ill-considered arbitration clause could have a significant impact on the ensuing dispute resolution process. For example, I am currently involved in an arbitration where the claims and counterclaims are complex and are well in excess of $50 million. However, the arbitration clause calls for the use of a "simplified," or expedited, arbitration procedure, and that is simply not appropriate for a case of this complexity and magnitude. Several other important considerations in the drafting of an arbitration clause include whether there should be one or three arbitrators (which would impact cost and scheduling); whether the clause contemplates joinder, intervention or consolidation in multi-party, multi-contract circumstances; whether there would be any right of appeal and whether the arbitration clause should cover claims by or against the parents or subsidiaries of the contracting corporate parties.

LARRY R. LEIBY, ESQ.: Many lawyers will not use arbitration because an award cannot be overturned for an error of law or a lack of competent evidence. Yet this finality-without-review issue can be addressed by providing a clause for appellate arbitration or specifying the special master or private trial resolution judge procedures found in some jurisdictions.

ROY S. MITCHELL, ESQ.: A poorly drafted arbitration clause almost always has a negative impact on the arbitration process. The most common error in domestic arbitration is to pattern it after litigation. In international arbitration, it is a failure to recognize the importance of selecting appropriate rules and the nuances of venue selection for the proceedings.

"The arbitration clause is extraordinarily important because it establishes the scope of disputes…the powers of the arbitrators to grant relief and typically the rules governing the arbitration proceeding."

—Philip L. Bruner, Esq.

"The disputing parties 'own' the arbitration process. But that does not necessarily entitle them to make interim motions."

—Robert B. Davidson, Esq.

DOUGLAS S. OLES, ESQ.: A well-drafted arbitration clause can make arbitration much simpler, leaving fewer gaps to be filled in by the arbitrator. Although missing details generally fall to the arbitrator, parties often react negatively when the arbitrator supplies details on which they had not previously agreed.

HON. JUDITH M. RYAN (Ret.): A well-drafted arbitration clause can definitely make the administration of the arbitration go more smoothly. However, if there is a poorly drafted clause, the initial preliminary conference provides an excellent opportunity to construct a process that will result in an efficient arbitration.

Q. As arbitrator, what guidelines do you typically observe in conducting the initial pre-hearing conference?

A. HINCHEY: Two weeks prior to the pre-hearing conference, I will have provided counsel with a detailed procedural template. In addition to basic information about the parties and the dispute, the template includes provisions for (1) disclosure and exchange of relevant documentation; (2) additional discovery; (3) listing of potential fact and expert witnesses; (4) site views or inspections; (5) submission of motions, briefs and procedural applications; and, of course, (6) the dates and places for the hearing. My experience has been that when counsel have had an advance opportunity to discuss the procedure and timetable for the arbitration, they will come to the pre-hearing conference having agreed to at least 90 percent of the procedural matters to be established. Usually, I will conduct the pre-hearing conference in person, and I will encourage the client representatives to be present.

VON KANN: Have it in person in a big case or any case where counsel are in the same city. This enhances civility and cooperation and lets counsel and arbitrators get acquainted. Prepare for the conference by sending out an order that encourages counsel to agree on as many matters as possible. Set a tone of professionalism, mutual respect and coopera-

tion with counsel and make clear that you expect counsel to interact with each other in the same way.

KIRSH: Most arbitrators use checklists or prescribed agendas for the pre-hearing conference. Other points for consideration include whether the initial conference should be restricted to counsel or whether client representatives (such as the client's General Counsel) should be invited to attend (the latter approach representing the better approach), as well as the allocation of time set aside for the initial conference (noting that, according to anecdotal studies and inquiries, many initial conferences are rushed and are limited to 15 minutes). These conferences, which launch the arbitration process, represent an important opportunity for the arbitrator to set the stage, to establish protocols and to define and shape the entire process.

LEIBY: My checklist includes the extent to which the parties wish to use expedited or cost-saving procedures (e.g., use of affidavit evidence and video-conferencing, hot-tubbing of experts, etc.); the exchange of information and documents; the need for a reporter or an interpreter; the format and organization of exhibits (hard copy or electronic); procedure for motions; how to address possible objections and underlying attacks on the veracity of the evidence; early disclosure of witnesses; form of award; how and when to address claims for attorneys fees; and the need for further pre-hearing conferences. I try to get as much buy-in from the lawyers/parties as possible in order to increase their level of comfort with the process.

MITCHELL: To my mind, the arbitrator's most important function at this initial conference is to firmly establish control of the proceedings and to make clear to the parties the need for efficient and effective proceedings.

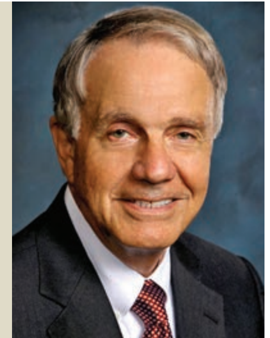
RYAN: I usually start by attempting to establish arbitration hearing dates so that all other matters, whether discovery or potential dispositive motions, can be geared toward the end dates.

"One of the keys to success [in a construction mediation] is to be able to have the experience and 'gravitas' to walk into a private caucus and advise a party as to the strengths and weaknesses of their position."

—Kenneth C. Gibbs, Esq.

"The common presumption of contracting parties is the expectation that those principles of law and equity will be applied to their disputes."

—John W. Hinchey, Esq.



Q. In general terms, what strategies do you generally employ in attempting to streamline, and to control the costs of, the arbitration process? Have those strategies worked?

A. HINCHEY: Requiring up-front, detailed statements of claims and defenses; being prompt to respond to procedural issues as soon as they arise; setting up conference calls or meetings as soon as possible to resolve those issues, and making a quick ruling; establishing frequent, but timely, conference calls during the discovery process to inquire about the status of case preparation; and encouraging the parties to present documentary evidence in electronic form at the hearing.

LEIBY: Use of the chess clock and affidavit evidence for direct examination (with *viva voce* evidence for cross-examination) have worked to save time and costs.

OLES: Limiting each side to the same amount of hearing time is helpful.

RYAN: One of the major ways to streamline the process and control costs is to control both the scope of the discovery process and the way discovery disputes are handled. I also streamline the hearing by allowing the testimony of foundational witnesses to be presented in writing or telephonically.

Q. One party's counsel requests the right to conduct numerous depositions of witnesses, whereas the opposing party's counsel has requested that you impose strict limits on both the number of witnesses to be examined and on the time permitted for each examination. What are your considerations for dealing with this? Do you draw any distinction between percipient and expert witnesses?

A. BRUNER: Typically, the party should be authorized to depose initially the most important witnesses and then come

"[Pre-hearing] conferences, which launch the arbitration process, represent an important opportunity for the arbitrator to set the stage, to establish protocols and to define and shape the entire process."

—Harvey J. Kirsh, Esq.

back to the arbitrator and justify why additional depositions must be taken. In technically complex cases, expert witnesses typically may be deposed on their written expert reports and, if no report is issued, then on their expert opinions.

ROBERT B. DAVIDSON, ESQ.: Re: percipient witnesses: Take two deponents each (if warranted). Then schedule another pre-hearing conference to discuss whether more are needed. All depositions limited to one day (or less). Re: expert witnesses: All experts must submit a written report. Usually (not always), experts can be deposed (again, a one-day limit).

VON KANN: I usually begin with permitting 3 to 5 depositions and 20 document requests. I would not permit every rock to be turned over to see if something more might be found. That is not what arbitration is about. Sometimes, where each side wants to depose a goodly number of the opposing party's employees, all of whom work at the same location, I would permit each side up to seven hours on one day to depose as many of the opposing party's employees as it wishes.

MITCHELL: Wide-ranging depositions as used by American counsel almost always expand the time and costs required, and such counsel are invariably surprised and shocked when they first become involved in international arbitration under a civil law system. Use of fact-based memorials at both an early stage and a later stage of preparation can significantly reduce the number of depositions required. One must always draw distinctions between percipient and expert witnesses due to their different functions in the process.

OLES: I often impose limits on depositions, and I prefer limits on total deposition hours rather than limits on the numbers of deponents. I think that each party should be entitled to take depositions of all opposing experts, and limits on depositions typically distinguish between fact and expert witnesses.

Q. Who "owns" the arbitration process—the disputing parties or the arbitral panel? If it is the former, how might the panel accommodate a request by one of the parties to take a step (e.g., an interim motion) that the panel may feel is unnecessary and may compromise the forward momentum of the process in terms of both time and expense?

A. DAVIDSON: The disputing parties, but that does not necessarily entitle them to make interim motions.

BRUNER: The arbitrator "owns" the arbitration process after appointment, subject to any limitations on his or her powers in the arbitration agreement and subject further to the right of the parties to modify those powers by further agreement after the arbitrator's appointment. Where the parties are not in agreement on how the arbitration is to proceed (e.g., number of depositions, alleged reasons for hearing delays), the arbitrator typically has jurisdiction to resolve such disputes.

VON KANN: It is ultimately the parties' process. Sometimes arbitrators need to involve the parties, who may well want to scale down very expensive discovery even if it increases the risk of going to hearing without knowing 100% of the universe of facts. We continually hear that parties want more "muscular" arbitrators, who will rein in excesses and scale the process to what is reasonable for each particular case.

LEIBY: If I am on a panel where the interim motion is not well taken, I will not vote to grant it (or may limit the requested interim relief). The parties own the process, but the arbitrator is duty bound to control the process. As an arbitrator, you may want to strongly suggest some alternatives to an agreement on an issue or process to be sure that the parties/counsel have thought through the consequences of their agreement, but in the end this is a voluntary process that needs some parameters.

MITCHELL: At the end of the day, I believe the disputing parties "own" the arbitration process but that the arbitrator has an obligation to assure that the proceedings are managed in an efficient and cost-controlled environment and that the parties are accorded essential due process. A well-drafted Procedural Order immediately after the initial pre-hearing confer-

"Use of the chess clock and affidavit evidence for direct examination (with *viva voce* evidence for cross-examination) have worked to save time and costs [in arbitration]."

—Larry R. Leiby, Esq.

"In international arbitration, [the most common error] is a failure to recognize the importance of selecting appropriate rules and the nuances of venue selection for the proceedings."

—Roy S. Mitchell, Esq.

ence will help control such tendencies, as will a requirement by the arbitrator that a senior party representative attend all key conferences and have an opportunity for input from the client's point of view.

RYAN: I think it requires a balance. The parties have the right to design the process that they feel allows them to present their case in the best interests of their respective clients. However, the arbitrators have the obligation to make sure that the process is consistent with the overall goals of arbitration and further to make sure the process is balanced as to all of the parties.

Q. As arbitrator, you have been retained to deal with a construction dispute between an owner and a contractor. As the facts unfold, you learn that there are other players (such as a subcontractor or a design consultant) who are not privy to the arbitration agreement but who may have a measure of responsibility/liability. The parties to the arbitration, however, have not sought to join those other players. How, if at all, do you deal with this?

A. DAVIDSON: I will not suggest that, e.g., the contractor join the subcontractors. I may ask whether the contractor takes responsibility for negligent work by subcontractors, and I would discuss whether the award should deal in detail with all this.

LEIBY: I would ask if they have considered asking the other players to join, which typically leads to a discussion of the contractual relationship and whether there is an argument that the parties may be bound to arbitrate due to incorporation by reference of an agreement to arbitrate, or possible third-party beneficiary status, estoppel, indemnity obligation or other grounds to compel arbitration from a non-signatory (after which consolidation may be sought if they do not agree to join the pending proceeding).

MITCHELL: A series of well-crafted questions to the parties may cause them to consider the desirability of having other players involved in the process. However, I believe it is ordinarily improper to make specific suggestions of this nature to the parties since it is ultimately their case to try.

Q. In your view, are arbitrators more influenced by the law or the equities?

A. BRUNER: Arbitrators should decide issues based on the law, rather than on "subjective equities" that all too often lead arbitrators unknowledgeable in law to "split the baby."

DAVIDSON: The law.

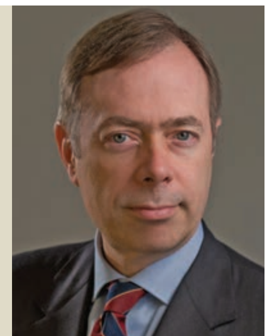
HINCHEY: The first responsibility of an arbitrator is to implement the parties' agreement and the applicable law. But there is no inherent inconsistency as between applicable law and equitable principles. The common presumption of contracting parties is the expectation that those principles of law and equity will be applied to their disputes. On the other hand, the parties could agree that the arbitrators will decide the case ex aequo et bono, meaning that the arbitrators are free to decide the dispute according to what they conceive as just and good. The limit beyond which the arbitrator cannot go is the agreement and intent of the parties.

KIRSH: The law of equity was developed almost 500 years ago to fill a void in the common law, particularly where the rigorous application of strict rules of law would generate results that were unfair, harsh and unjust. While I agree that arbitrators have a generally strict obligation to "follow and apply the law," an arbitrator's authority is wide enough to permit consideration of both legal and equitable arguments and principles. Some arbitration legislation and institutional rules also provide that, unless otherwise constrained, the jurisdiction of an arbitrator extends to injunctive relief, and orders for rectification, specific performance and other equitable remedies.

OLES: I think arbitrators tend to give greater weight to law than to "equities," but both are considered.

"I think that each party [in an arbitration] should be entitled to take depositions of all opposing experts, and limits on depositions typically distinguish between fact and expert witnesses."

—Douglas S. Oles, Esq.



“I also streamline the [arbitration] hearing by allowing the testimony of foundational witnesses to be presented in writing or telephonically.”

—Hon. Judith M. Ryan (Ret.)

Q. Insofar as the mediation of a complex construction dispute is concerned, should a mediator necessarily have background, experience and expertise in the field of construction law?

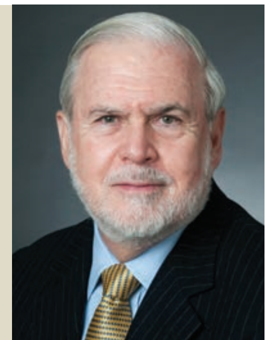
A. BRUNER: Mediation with an evaluative mediator achieves the best settlement results. Effectiveness as an evaluative mediator requires experience with industry practices and customs, expertise in construction law and skills in bringing parties together.

KENNETH C. GIBBS, ESQ.: My answer is absolutely yes. Resolving a complex construction dispute takes more than simply shuttling offers and counter-offers back and forth. Parties need and expect an evaluative process. One of the keys to success is to be able to have the experience and “gravitas” to walk into a private caucus and advise a party as to the strengths and weaknesses of their position. Most often, if the attorneys and experts are properly doing their jobs, they will have already recognized their weaknesses (although they might not admit them to the neutral and certainly not to the opposition). Having a neutral who “doesn’t care” about the case immediately identify such weakness tells both the attorneys and their clients that there is some predictability in the outcome that they should take into account in their evaluation of the settlement value of the case.

KIRSH: A large percentage of construction disputes relate to scope-of-work issues, to negligent design or construction and to claims for damages for delay, loss of productivity and acceleration. While a typical mediator may have the facilitative skill-set necessary to deal generally with commercial disputes, he/she would not necessarily have any familiarity with the construction process—the roles and responsibilities of the various players on the construction pyramid and construction contract terminology and interpretation. Blending experience in construction claims with mediation training and skills will produce the best person to mediate the dispute. ■

“We continually hear that parties want more ‘muscular’ arbitrators, who will rein in excesses and scale the process to what is reasonable for each particular case.”

—Hon Curtis E. von Kann (Ret.)



Engineering Mediations for Success *continued from Page 1*

mediations result in settlement on the same day or shortly afterwards. Others arrive deeply pessimistic, convinced that their dispute is not settleable despite the statistics. A few show up with no real expectation of a meaningful negotiation, attending cynically to prevent adverse comment and penalization in costs if the dispute ends up in court and the judge finds that they unreasonably refused to mediate. Yet others turn up with no idea what mediation is or what to expect, frequently betraying their lack of understanding by asking when the mediator’s decision will be delivered.

Common to most, if not all, of these participants, however, is the expectation and understanding that, if the process is successful, it will result in a settlement of their dispute. And in the vast majority of mediations, that is exactly what happens. But some parties, inevitably, will not reach a concluded settlement. Is that a failure?

Although settlement is the holy grail of mediation, my experience of mediations that fail to result in settlement is that the parties rarely regret having tried. The process is invariably of value to parties in one or more of the following ways:

- The mediation may have yielded important documents and evidence, as well as insights into the way the other party views its case, its strengths and its weaknesses;
- Information has been gathered, questions answered, uncertainties resolved;
- The real gap between the parties has been identified;
- The other party’s resolve will have been tested, and their stomach for a fight revealed;
- Although everything said and done in mediation is without prejudice and cannot be repeated, useful intelligence about people’s attitudes and beliefs may be gained, which will inform later decisions or cross-examination of witnesses;

- Knowledge that the dispute isn't likely to settle is useful in planning and resourcing the next steps;
- Having tested out the possibilities, parties may have a better understanding of whether the dispute is just about money and whether there is any value in (or prospect of) apologies or ongoing and future business relationships;
- Valuable lessons may have been learned about the strengths and weaknesses of a party's own case, what gaps exist in the evidence and what further work is needed. Convictions may as a result be shaken or reinforced;
- Even without any evaluation by the mediator, important lessons may be learned from the way arguments ran with a neutral. Mediation can be a good dummy run;
- It may be possible to identify further information or discussions that may unlock the dispute in the future, leading to the possibility of settlement further down the line;
- The mediation can be kept open, with a structure put in place for further meetings to address and narrow issues, and perhaps to achieve settlement later on; and
- Once an impasse arises, parties have the opportunity to agree to ask the mediator to make a non-binding (or binding, should they wish) evaluation or settlement recommendation.

Sometimes, of course, parties will be driven apart by the behavior of one or others at the mediation. Despite the best efforts of the mediator, a party will sometimes insist on putting forward a position (or refusing to put forward any offer or counteroffer) that blows the negotiation out of the water so that mistrust grows and further negotiation is impossible. Even then, parties are arguably better off for having tried, and they now know that the legal costs that lie ahead are unavoidable.

Mediation, then, is seldom a complete failure. But it has still failed to result in the desired outcome. How can the process be engineered to improve the chances of settlement? I suggest the following essentials should be considered.

Timing

It is sometimes suggested that mediation should be attempted as soon as a dispute crystallizes, and it is increasingly written into construction contracts as a precursor to other ADR procedures. In many disputes, speedy resolution is key to the continuation of a project or the survival of a business relationship (or even a business). Where friendly enemies want to resolve a problem without souring their relationship by going to litigation, where the settlement may involve remediation of defects or where the imperative is to reach a commercial resolution without the need to explore the merits of the dispute, there is every reason to mediate early.

In my experience, a settlement is usually reached where both parties have subsequently crossed their lines in the sand.

At the other end of the spectrum, however, is the multi-party dispute where several defendants are represented by insurers. Unless settleable on economic grounds by the payment of a nuisance sum representing irrecoverable costs, insurers will generally need a full appreciation of the merits of the dispute in order to assess the risks sufficiently to be able to compromise.

This is the tension between mediating early, on incomplete knowledge of the facts, and mediating late, with the benefit of detailed knowledge but massive costs and bills, which serve only to widen the gap and make settlement harder to achieve. I would encourage parties to discuss timing with each other and, if necessary, with the mediator so that the mediation can take place at the best moment.

Preparation

After the parties have chosen the optimal time to mediate, one of the first questions to consider is who will attend the mediation. This is often a matter of great importance to parties, with negotiations being hindered by the presence or absence of someone whose participation may not appear to the mediator to be important. One person's presence may be hugely symbolic (positively or negatively), while conspiracy theories surface due to the absence of a particular person who was involved in the project. Insurers may be reluctant to attend for fear of sending the wrong message. It can be a problem to move parties beyond the issue of personnel, to consider the dispute dispassionately.

The best arrangement is generally for each party to be represented by a decision-maker who has no baggage and someone who has the facts at hand. The latter may struggle

to see the merits dispassionately but is counterbalanced by the former, who can take a view untainted by pride, personal animosity or back-covering. Care in choosing attendees is always repaid. I would suggest cooperation between the parties to obtain matched pairs of negotiators for a collaborative mediation.

Advisers and representatives can make or break a mediation. Beware the well-prepared assistant lawyer with great knowledge of the dispute and the merits, manacled by his senior partner, who attends for PR reasons to impress and support an important client but who knows too little. The partner is dangerous, as his sketchy knowledge enables him to reinforce strengths without appreciating weaknesses.

What of the role of expert witnesses at a mediation? Don't bring them along automatically. Will all parties have experts present? If not, is there any point in any of them attending? Could the experts helpfully meet during the mediation? Could they do that in advance and just be available on the end of the phone on the day, having prepared a joint memorandum?

Pre-mediation meetings go some way to counteract this problem. Parties have an opportunity

- To have the process explained so that they turn up at the mediation with the confidence that they are not walking into the unknown.
- To consider whether they want a facilitative or evaluative mediation.
- To think about how the mediator can help. They are mediating because they are unable to settle on their own. What will improve the chances of settlement?

Appropriate exchange of information and documentation prior to the mediation is essential. It is always worth getting parties to think what information they need to disclose and what information they wish to obtain from the other parties in advance. Absence of information can be damaging to the process, particularly where it exists but simply wasn't volunteered or asked for. Producing the document on the day of the mediation seldom helps because the receiving party cannot process it in time. Ambush is similarly a frequent cause of failure to settle, as a party faced with new information cannot absorb it and thus feels unable to take a commercial view. Addressing these issues before the mediation is vital in order to avoid having to abandon the mediation or adjourn it with a timetable for dealing with, and responding to, the new information.

The final, essential preparation is the drafting of a blank settlement agreement. Nothing is worse than drafting a settlement agreement by committee when everyone is tired and, perhaps, a little touchy at the end of a long and difficult day. The preparation and, ideally, agreement in advance of a document into which the fine details of the settlement can be inserted is always beneficial. Not only does it save the many hours often spent in drafting late into the night, but the very act of drafting may reveal issues that need to be considered during the negotiations.

The Avoidance of Preconditions

Preconditions imposed at or during the mediation are a constant problem. The most common are these two:

- One or both parties arriving at the mediation and announcing that they are not going to improve on the offer they made in the past. "If the other side doesn't understand this, we might as well all go home." In my experience, a settlement is usually reached where both parties have subsequently crossed their lines in the sand. Extreme care is needed in negotiating a way to commence the mediation without the preconditions being insisted upon.
- Multi-party mediations where each party wants the others to reach a consensus before asking them for their contribution, e.g., "when X and Y have agreed how much Y will settle for, X can come to us to see if we are prepared to chip in." This is understandable, but someone has to make the first move if the day is not to be wasted. Getting all parties to work together in examining some factual or expert issues can have a team-building effect, which may generate some momentum and produce an offer.

Willingness to Try Different Ways to Bridge the Gap

There is always a seemingly unbridgeable gap at some point. The smaller the gap, the harder it may be to bridge, the parties having already moved so far that even another $1 is unthinkable.

Usually, the gap is bridged. Assuming that the usual encouragements (apology, payment by installments, confidentiality, donation to charity) have failed, the impasse can often be overcome by ingenuity on the part of the mediator through the use of the following techniques:

- Identification of a range within which the mediator believes settlement is achievable;
- Mediator suggesting a compromise figure; and
- Sealed envelopes (otherwise known as Russian roulette—only to be undertaken with a great deal of thought and clear ground rules).

Frequently, though, the most effective technique is the most obvious: recognizing that mediation is the decision-makers' day and allowing them the space and time to sit together and work out a solution. Often the mediation is their first opportunity to do so. And it works. ■

NOTICES AND EVENTS

ARTICLES AND SPEAKING ENGAGEMENTS

HON. CURTIS E. VON KANN (RET.) recently made a presentation on “The Preliminary Conference & Discovery” at a “Managing a Successful Arbitration” conference sponsored by JAMS, the American Arbitration Association, the D.C. Bar Litigation Section and the College of Commercial Arbitrators.

HARVEY J. KIRSH, ESQ.’S paper, ”Where Dispute Resolution Boards Do Not Work,” will be published in the upcoming issue of the *Canadian Arbitration and Mediation Journal*.

PHILIP L. BRUNER, ESQ. will participate in seminars sponsored by the Montana Bar Association in Bozeman on October 18, 2013 and the Utah Bar Association in Salt Lake City on October 25, 2013. On October 23, 2013, he will discuss “Arbitration under FIDIC Contracts” at a conference in Washington, D.C., sponsored by IBC Legal Conferences and FIDIC. Philip also recently participated in a Federal Publications Seminar in Las Vegas, Nevada, entitled “Bruner & O’Connor on Construction,” dealing with construction performance and claims issues.

At the October 24-25, 2013 joint ADR Institute of Canada Annual National Conference and the ICC Canada International Arbitration Conference in Toronto, **HARVEY J. KIRSH, ESQ.** will participate in a panel discussion dealing with “Construction Disputes.” **GORDON E. KAISER, ESQ.** and **HON. CURTIS E. VON KANN (RET.)** will participate in another panel discussion dealing with “Class Action Arbitration.”

On December 11, 2013, **LARRY R. LEIBY, ESQ.** will participate in a panel discussion on “Recent Construction Law Case Blitz” at the pre-conference workshop at the Construction SuperConference 2013 in San Francisco.

On December 13, 2013, **PHILIP L. BRUNER, ESQ.** and **JOHN W. HINCHEY, ESQ.** will participate in a panel discussion of “What Arbitrating Parties Perceive About Arbitration, and What Neutrals are Doing to Improve the Process” at the Construction SuperConference 2013 in San Francisco. John also recently spoke on “Developing the Ideal Arbitration Clause for Real Property Commercial Disputes” to the Real Estate Practice Group of an international law firm.

RECENT HONORS AND APPOINTMENTS

HARVEY J. KIRSH, ESQ. has been appointed by the Ministry of Transportation of Ontario as Chair of an Independent Expert Review Committee to evaluate safety, durability, performance and code compliance concerns regarding the manufacture and supply of precast concrete girders for the Rt. Hon. Herb Gray Parkway. The Parkway project will include Canadian and U.S. inspection plazas, a new international bridge and a number of tunnels, and an interchange which will link Windsor to Detroit and connect Highway 401 to the U.S. Interstate system for the first time.

PHILIP L. BRUNER, ESQ. has been designated as a Fellow of the Chartered Institute of Arbitrators (FCIArb).

ZELA “ZEE” G. CLAIBORNE, ESQ. was listed under the heading “Alternative Dispute Resolution” in both the *Best Lawyers in America* directory and *Super Lawyers Magazine* (San Francisco).

JAMS GEC NEUTRALS RESOLVE AN ARRAY OF CONSTRUCTION DISPUTES

HON. HUMPHREY LLOYD, Q.C. is currently chairing arbitral tribunals, or acting as sole arbitrator, with respect to claims relating to a road in East Africa, a multi-use development in Dubai, a mining project in Russia, a sports stadium in the United Arab Emirates, and an oil production facility in West Africa. Also, as co-arbitrator, he has been dealing with disputes arising out of a mining project in East Africa, a road in Qatar, petro-chemical plants in Saudi Arabia, a dismantling in Italy, and a power generation facility in India.

HARVEY J. KIRSH, ESQ. is acting as sole arbitrator in connection with claims for engineering deficiencies arising out of the construction of a $200 million biomass cogeneration facility in Canada.

KENNETH C. GIBBS, ESQ. recently successfully mediated and resolved claims relating to the design and construction of a major performing arts venue in Las Vegas.

PHILIP L. BRUNER, ESQ. has mediated settlements of disputes arising out of the construction of a major professional sports and entertainment arena in Brooklyn New York, and the construction of U. S. Army facilities at Fort Sill, Oklahoma. He has also recently mediated disputes among multiple claimants arising out of the construction of a hospital addition in New York City.

JAMS GLOBAL CONSTRUCTION SOLUTIONS
Leading ADR Developments from The Resolution Experts

NEWSLETTER BOARD OF EDITORS

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

Harvey J. Kirsh, Esq.
JAMS Global Engineering and Construction Group

John J. Welsh, Esq.
JAMS Executive Vice President and General Counsel

Brian Parmelee
JAMS Vice President - Corporate Development/Panel Relations

Laura Jennett
JAMS General Manager, Client Relations

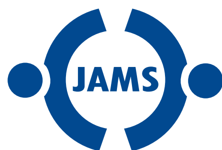
JAMS Global Construction Solutions seeks to provide information and commentary on current developments relating to dispute resolution in the construction industry. The authors are not engaged in rendering legal advice or other professional services by publication of this newsletter, and information contained herein should not be used as a substitute for independent legal research appropriate to a particular case or legal issue.

JAMS Global Construction Solutions is published by JAMS, Inc. Copyright 2013 JAMS. Photocopying or reproducing in any form in whole or in part is a violation of federal copyright law and is strictly prohibited without the publisher's consent.

JAMS Global Engineering and Construction Group

M. Wayne Blair, Esq.
Viggo Boserup, Esq.
Philip L. Bruner, Esq.*
Hon. William J. Cahill (Ret.)
George D. Calkins II, Esq.
Anthony Canham, FCIArb
Richard Chernick, Esq.*
Zela "Zee" G. Claiborne, Esq.
Robert B. Davidson, Esq.*
Linda DeBene, Esq.
Bruce A. Edwards, Esq.
David Geronemus, Esq.
Kenneth C. Gibbs, Esq.*
Katherine Hope Gurun, Esq.*
William E. Hartgering, Esq.
John W. Hinchey, Esq.*
Gordon E. Kaiser, Esq.
Harvey J. Kirsh, Esq.*
Gerald A. Kurland, Esq.
Eleissa C. Lavelle, Esq.
Larry R. Leiby, Esq.
HH Humphrey LLoyd, Q.C.*
Hon. Clifford L. Meacham (Ret.)
Craig S. Meredith, Esq.
Roy S. Mitchell, Esq.*
James F. Nagle, Esq.
Douglas S. Oles, Esq.*
Hon. Carol Park-Conroy (Ret.)
Donald R. Person, Esq.
Alexander S. Polsky, Esq.
Juan Ramirez, Jr. (Ret. Chief Judge)
Barbara A. Reeves Neal, Esq.
Hon. Judith M. Ryan (Ret.)
Eric E. Van Loon, Esq.
Hon. Curtis E. von Kann (Ret.)
Michael D. Young, Esq.

**GEC Advisory Board Member*



THE RESOLUTION EXPERTS®

JAMS GLOBAL ENGINEERING AND CONSTRUCTION GROUP

1920 Main Street | Suite 300
Irvine, CA 92614

Presorted First Class
U.S. Postage
PAID
Permit No. 510
Santa Ana, CA