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Spring 2012

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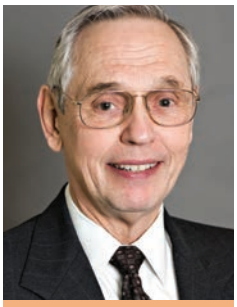
Must Arbitrators Follow The Law?

BY ROY S. MITCHELL, ESQ.

A shocking string of emails circulated within a very credible LISTSERV disclosed that a number of full-time arbitrators took the position that arbitrators need not follow the law in drafting awards. The author strongly disagrees.



Roy S. Mitchell, Esq., JAMS Arbitrator/ Mediator

International Rules

International arbitration rules are clear that arbitrators are required to follow the law and the terms of the contract in issuing awards. Articles 18.1 and 18.3 of the JAMS International Arbitration Rules (JAMS) effective August 1, 2011, for example, state that:

> *"18.1 The Tribunal will decide the merits of the dispute on the basis of rules of law agreed upon by the parties.*
>
> *18.3 In all cases the Tribunal will take account of the provisions of the contract and the relevant trade usages."*

American Arbitration Association International Arbitration Rules (AAA) Articles 28.1 and 28.2 effective June 1, 2009, International Chamber of Commerce Rules of Arbitration (ICC) Articles 17.1 and 17.2 effective January 1, 1998, the United Nations

> *See "Must Arbitrators Follow the Law?" on Page 2*

Philip L. Bruner, Esq., Director, JAMS Global Engineering and Construction Group; JAMS Arbitrator/Mediator

DIRECTORS COLUMN

Critical Qualifications for Construction Industry Arbitrators

BY PHILIP L. BRUNER, ESQ.

Our Winter 2012 newsletter reported a revealing survey of 200 construction industry participants (comprising experienced owners, contractors, subcontractors, suppliers and design professionals) regarding arbitrator qualities desired by the industry for resolution of complex construction disputes. The survey identifies arbitrator qualities most desired of those entrusted to decide complex construction disputes,

> *See "Critical Qualifications" on Page 10*

Must Arbitrators Follow the Law?

continued from Page 1

Commission on International Trade Law (UNCITRAL) Rules 35.1 and 35.3 effective June 25, 2010, and the London Court of International Arbitration (LCIA) Rule 22.3 effective January 1, 1998, are virtually identical.

Most international rules go one additional step further. For example, ICC Rule 17.3 states that:

> *"The Arbitrable Tribunal shall assume the powers of amiable compositeur or decide* ex aequo et bono *only if the parties have agreed to give it such powers."*

AAA Rule 28.3, UNCITRAL Rule 35.2 and LCIA Rule 22.4 are substantially similar. For attorneys unfamiliar with these concepts, the former essentially means that a tribunal need not apply the rules of law if to do so would produce an unfair result, and the latter that the tribunal may apply its own sense of justice. In effect, this rule allows the tribunal to follow neither the law selected by the parties nor the terms of the contract. Such a rule is rarely agreed to by the parties for obvious reasons.

Concluding this brief review of international arbitration, the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (The New York Convention) requires that international arbitration awards be enforced by the courts of all treaty member nations (146 as of July 7, 2011) unless they are in violation of one or more of the five exceptions listed in Article V. 1 of the Convention, i.e., meeting certain procedural requirements, awards exceeding the scope of the agreed submission or in violation of the applicable laws of the agreement selected by the parties; or of the two exceptions listed in Article V.2, i.e., an award that violates the law or public policy of the enforcement forum.

United States Rules

Commercial Arbitration Rules in the United States are less specific. JAMS Engineering and Construction Arbitration Rules & Procedures effective July 15, 2009, and JAMS Comprehensive Arbitration Rules and Procedures effective October 1, 2010, contain the following identical provisions.

> *"24(c) – In determining the merits of the dispute, the Arbitrator shall be guided by the rules of law agreed upon by the parties.*
>
> *25 – Proceedings to enforce, confirm, modify or vacate an Award will be controlled by and conducted in conformity with the Federal Arbitration Act, 9 U.S.C. Sec. 1 et seq.or applicable state law."*

AAA Construction Industry Rule R-45(a) and Commercial Rule R-43(a) each state as follows:

> *"The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement by the parties…."*

"Rules of law agreed upon by the parties" (JAMS) and *"within the scope of the agreement by the parties"* (AAA) require, in the author's opinion, that arbitrators follow the law specified by the parties in their contract. This is the law the parties bargained for when they negotiated the contract. A problem arises, however, as to whether an adequate remedy exists if the arbitrator does not do so, i.e., whether or not an award can be overturned if it is in *"manifest disregard of the law"* or due to *"complete irrationality."* As noted in JAMS Rule 25, above, vacatur law is ordinarily determined by application of the Federal Arbitration Act (FAA), most particularly Section 10 (a) (4), which provides for vacatur:

> *"where the arbitrators exceeded their powers or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made."*

It is beyond the scope of this article to try to analyze the legislative history of the FAA, the relevant recent United States Supreme Court decisions *(Stolte-Nielsen S.A. v. AnimalFeeds International Corp. and Certain Underwriters at Lloyds, London v. Lagstein),* the current split of authority between various Circuit Courts of Appeal on various issues or the myriad cases and articles in learned journals. Legal theoreticians and parties contemplating vacatur applications will continue to parse applicable decisions, and future case law will undoubtedly clarify many of the current questions. However, in the author's opinion, arbitration authority is conferred by the parties, the parties expect proper adherence to the law as we understand it and professional arbitrators should do no less. ■

Assessing the Risks of the Use of Interim and Partial Final Awards

BY JAMES M. GAITIS, ESQ.

James M. Gaitis, Esq., Independent ADR Neutral and Editor-in-Chief, *The CCA Guide to Best Practices in Commercial Arbitration* (2d ed.)

Construction arbitrations, which often involve a multiplicity of parties, unique exigencies and substantial numbers of independent claims, require arbitral tribunals to be both creative and cost conscious in managing the arbitration process. One of the main tools available to arbitral tribunals in managing complex arbitrations is the potential issuance of interim and partial final awards that adjudicate, on either a preliminary or final basis, the issues in a particular case.

To be sure, occasions frequently arise in which the issuance of an early, final determination on certain issues is imperative. One easy example is the circumstance in which a party seeks interim measures designed to preserve the status quo. Another equally apropos example involves the improper joinder of parties, such as sureties or subcontractors, who may be entitled to an early dismissal from the proceeding.

The Risks of Granting Interlocutory Relief That Is Final in Nature

Courts often maintain differing views as to when interlocutory substantive and jurisdictional arbitral awards, orders, and directives are final and subject to immediate vacatur and confirmation proceedings. And frequently used institutional arbitration rules fail to fully define those instruments and describe whether and, if so, when finality attaches to them. The resulting confusion as to when finality occurs can result in unanticipated interruptions in the arbitral process that sometimes can last for many months or even years. The decisional law is replete with examples of cases in which arbitration proceedings are protracted due to the sudden advent of vacatur proceedings pertaining to interim or partial awards or in which arbitrators are mistaken as to the impact of the issuance of such awards on their continuing authority.

For parties, the issuance of an interim or partial final award might trigger the time period within which that award may be vacated. Some courts thus have held that a party *must* seek vacatur of such an award within the limited time allowed by statute—usually three months, or 90 days, in domestic U.S. cases—or be deemed to have waived the right to seek vacatur.[1] Just as important, some jurisdictions consider the one-year period within which to seek confirmation of an award under the FAA to be a mandatory period that cannot be extended by agreement or equitable considerations, a rule that might have significant implications for a party obtaining interlocutory relief in a protracted arbitration.[2] To the extent these principles apply, the issuance of an interlocutory award might catalyze the immediate commencement of district court proceedings while the arbitration is pending and give rise to a cascade of unintended consequences for counsel who frequently seek the issuance of interim awards without taking into account the consequences of a grant of that request. That fact is no less true with respect to the vacatur or confirmation of interlocutory "nondomestic" U.S. awards (i.e., interlocutory international awards resulting from an international arbitration conducted on U.S. soil) and the recognition and enforcement by U.S. courts of interlocutory foreign awards (i.e., interlocutory international awards resulting from an international arbitration conducted in another nation) with respect to which a variety of U.S. courts have applied different standards and provisions of the FAA in determining both the scope of relief available and the time within which such relief must be sought.

The risks for arbitrators in this context are significant because the limited grounds for vacating an award focus primarily on arbitral misconduct, including instances in which arbitrators (a) act in excess of their authority, (b) fail to consider material evidence in connection with the issuance of an award or (c) allegedly fail to make required disclosures or act in a partial or biased manner. In some jurisdictions, inquiries into alleged partiality are intensive and involve discovery of the arbitrator that can result in a determination of partiality as a matter of law based solely on a failure to disclose nontrivial matters.[3] In other jurisdictions, a failure to strictly comply with statutorily imposed disclosure obligations might result in immediate vacatur.[4] Partiality or nondisclosure determinations such as these clearly would vitiate the arbitrator's ability to continue to serve in the ongoing arbitration. Similarly, some courts have held that other forms of arbitral misconduct—e.g., the failure to address arguments made by a party or the denial of the opportunity to make closing argument permitted by applicable rule—are sufficiently the equivalent of bias to warrant remanding the arbitration to a new tribunal.[5] In other words, when arbitrators grant interlocutory relief or issue partial awards that are final in nature in a bifurcated proceeding, they must anticipate the possibility that such awards will be

1 See, e.g., *Hart Surgical, Inc. v. Ultracision,* Inc.,244 F.3d 231, 235 (1st Cir. 2001); *Yonir Technologies, Inc. v. Duration Sys.* (1992) Ltd., 244 F.Supp.2d 195, 206-08 (S.D.N.Y. 2002).

2 See generally *Photopaint Technologies, LLC v. Smartlens Corp.,* 335 F.3d 152, 156 (2d Cir. 2003).

3 See, e.g., *Burlington N.R.R. v. Tuco,* 960 S.W.2d 629, 632 (Tex. 1997).

4 See *Ovitz v. Schulman,* 35 Cal. Rptr.3d 117, 126-27 (Ct. App. 2005).

5 See *Feldspar Corp. v. UMW, Local 140,* 2005 WL 2137738 (W.D.N.C. 2005); *In re A. H. Robbins Co., Inc.,* 238 B.R. 300, 319 (E.D.Va. 1999).

challenged in district court proceedings while the arbitration remains pending and that their ability to continue to serve in the arbitration might be jeopardized.

Arbitrators further must be aware that the doctrine of *functus officio* can apply directly to interlocutory forms of substantive arbitral relief. When arbitrators bifurcate hearings and finally adjudicate issues of liability, most courts recognize that the arbitrators are *functus officio* as pertains to those issues and may not reconsider their decisions at some later point in the proceeding.[6] The same logically should be true when a tribunal issues a partial final award on the entire merits and yet reserves jurisdiction to determine issues regarding attorney's fees, costs or interest.

In contrast, *functus officio* cannot be said to necessarily apply when a tribunal grants interim measures generally in the form of injunctive relief. Many forms of interim relief are inherently preliminary or tentative. And relief in the form of a preliminary injunction often is based either on the tribunal's then-assessment of the "likelihood" that one of the parties will prevail on the merits or on the perception that the status quo must be maintained in order for the tribunal's ultimate award to have meaning.

Just as important, when a tribunal bifurcates proceedings and issues an interim award that is not meant to be final, the tribunal is not *functus officio* and remains obligated, for good cause shown, to reopen the hearing with regard to issues preliminarily determined in a non-final award. The fact that the tribunal purports to arrive at a decision on liability or damages in a bifurcated proceeding, and thus issues a non-final interim award reflecting that decision, does not relieve the tribunal of its obligation to continue to ensure a fair and full hearing. If material evidence that could not have been previously discovered by a party comes to light, it may be that the only fair and reasonable thing for the tribunal to do is to reopen the record and consider that evidence.[7] In a similar manner, if the tribunal discovers after it has issued a non-final award that it erred in the application of the law in that award, the parties' expectations and the governing choice of law provision arguably dictate that the tribunal revise its award accordingly or face the prospect of having the award vacated either on the basis of manifest disregard of the law or arbitral acts in excess of authority.

What Types of Interlocutory Relief May Be Deemed Final and Thus Subject to Immediate Judicial Review?

Ambiguities also exist with respect to the question whether a court might treat any particular award, order or directive as being final and therefore subject to immediate judicial review. Certain forms of arbitral interlocutory relief are virtually always immediately reviewable by courts. Courts have long recognized that, in order for relief in the form of interim measures to be efficacious, it must be subject to immediate enforcement by the courts.[8] Over the past 30 years, however, the courts have expanded the types of interim or partial relief that are subject to immediate confirmation and vacatur proceedings to variously include awards that dispose of (a) "separate independent claims,"[9] (b) liability or damages issues[10] or (c) merely "part of the dispute."[11] Some courts require that the arbitrator expressly state that the partial award is intended to be "final."[12] Others generally require that the parties and arbitrator intended the partial award to be final but then judicially determine whether finality has occurred based on an evaluation of the award and underlying circumstances.[13] Other courts not only have not required that the arbitrator expressly state that the award is "final," but also have emphasized that the label attached to the award does not determine its finality. As a result, awards labeled as "interim awards" have been deemed to be final,[14] as have "orders" dismissing a party from the proceeding[15] and "directives" issued by arbitral tribunals.[16]

An analysis of when interlocutory arbitral awards or orders may be sufficiently final to be subject to immediate judicial review, however, now can no longer simply rely on statutes and traditional arbitration law principles. Rather, the United States Supreme Court's recent decision in *Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp.*[17] further confused the issue. Specifically, in the context of the Court's review of an arbitral tribunal's determination that an arbitration clause permitted arbitration of class-wide claims, the Court held that the "finality" issue was subsumed by broader constitutional questions involving "ripeness" and that the only considerations for the court in determining ripeness were (a) "the fitness of the issues for judicial decision" and (b) "the hardship of withholding court consideration."[18] At least one federal court of appeals has now acknowledged the applicability of these

6 See *Trade & Transport, Inc. v. Natural Petroleum Charterers, Inc.*,931 F.2d 191 (2d Cir. 1991).

7 See *Texaco Panama, Inc. v. Duke Petroleum Transport Corp.*,1996 WL 502437 (S.D.N.Y. 1996).

8 See *Island Creek Coal Sales v. City of Gainesville*, 729 F.2d 1046 (6th Cir. 1984).

9 *Id.*

10 *McGregor Van de Moere, Inc. v. Paychex, Inc.*, 927 F.Supp. 616, 617-20 (W.D.N.Y. 1996).

11 *Trade & Transport, supra,* note 6, at 195.

12 *Bosack v. Soward,* 573 F.3d 891 (9th Cir. 2009).

13 *Trade & Transport, supra,* note 6, at 195.

14 See, e.g., *National Mut. Ins. Co. v. FirstState Ins. Co.*, 213 F.Supp.2d 10, 16-17 (D Mass. 2002); *The Home Ins. Co. v. RHA/Pennsylvania Nursing Homes, Inc.*, 127 F.Supp.2d 482, 483, 490 (S.D.N.Y. 2001).

15 See *Olson v. Wexford Clearing Services Corp.*, 397 F.3d 488, 489-93 (7th Cir. 2005).

16 See *Yonir Technologies, supra,* note 1.

17 130 S.Ct. 1758 (2010).

18 *Id.* at 1767.

principles to interim awards.[19] Arbitrators and parties alike therefore must be aware that arbitral awards and orders granting interlocutory relief might be deemed final and therefore subject to vacatur or confirmation proceedings for reasons other than those that emanate directly from the controlling arbitration statute or traditional arbitration law.

The Implications for International Arbitrations

U.S. case law pertaining to the finality of interlocutory arbitral relief has direct ramifications with respect to international arbitrations that either are conducted in the United States or result in foreign arbitral orders and awards for which a party might seek recognition and enforcement in the United States. Judicial proceedings to vacate or confirm international arbitration awards normally take place in the national courts of the place of arbitration. In that regard, most international arbitrations conducted in the United States are governed by both the FAA and one or more arbitration treaties. As a result, most nondomestic international awards issued in the United States are subject to vacatur under Section 11 of the FAA on the same grounds, and based on the same case law, as pertains to domestic arbitrations. Although U.S. courts therefore routinely entertain judicial proceedings to vacate or confirm nondomestic interlocutory awards that are final in nature, their decisions in those cases are no more uniform than in domestic cases. Moreover, as is the case with respect to domestic arbitration rules, international institutional rules do little to clarify issues regarding when interim or partial awards are final and whether such awards are intended to be subject to immediate judicial review.

The law is significantly different as pertains to foreign awards. Under the New York and Panama Conventions as incorporated into the FAA, U.S. courts must grant "recognition and enforcement" of most foreign awards except under the very limited grounds set forth under the applicable convention. Despite the above controlling principles, when confronted with recognition and enforcement proceedings relating to foreign interim and partial final awards, some U.S. courts have ignored the foreign *lexarbitri* and have relied on domestic U.S. case law in determining whether such an award is final.[20]

The fact that the tribunal purports to arrive at a decision on liability or damages in a bifurcated proceeding, and thus issues a non-final interim award reflecting that decision, does not relieve the tribunal of its obligation to continue to ensure a fair and full hearing.

Conclusions

In their role as managers of the arbitration process, arbitrators must be willing to make hard choices that are sometimes contrary to common practice or the experience of panel members. The risks of issuing either preliminary or final interlocutory relief must be balanced against the interests and needs of the disputing parties, who should be engaged in informed discussions regarding the available options and their potential consequences. The intent of the arbitrators and parties regarding both finality and *functus officio* should be set forth in writing with clarity and specificity. Most important, arbitrators must be familiar with arbitration law pertaining to finality and to the implications of the doctrine of *functus officio* such that they may insulate their arbitral awards and orders from premature vacatur proceedings or vacaturs based on acts in excess of arbitral authority. ■

19 See *Dealer Computer Services, Inc. v. Dubb Herring Ford,* 623 F.3d 348 (6th Cir. 2010).

20 See, e.g., *Publicis Communication v. True North Communication, Inc.,* 206 F.3d 725 (7th Cir. 2000).

Book Review: *International Construction Arbitration Handbook*

EDITED BY JOHN W. HINCHEY AND TROY L. HARRIS (WEST, 2011) REVIEWED BY JOEL RICHLER, FCIArb

Joel Richler, FCIArb, Senior Partner, Blake Cassels & Graydon LLP (Toronto)

When I started to practice law in Toronto 30 years ago, there were a handful of litigation lawyers who styled themselves as specialists in construction litigation, but there were many litigators who handled construction cases as part of their general practices. Over time, many lawyers have come to devote almost all of their professional time to construction disputes and to describe themselves as construction lawyers. Similarly, in the early years of my practice, the prevalent process for the resolution of construction disputes, as for most commercial disputes, was litigation, often before judges to whom a construction case was an anathema, to be avoided at all costs. At that time, arbitration was relatively uncommon. Now, the situation is quite the opposite: Arbitration, for resolving construction disputes, is fast becoming the norm, and resort to the court system has become the exception.

The facts that underlie construction disputes are far more complex than those that typify even the most complicated of other types of contract disputes. There are typically a myriad of parties with multiple and overlapping claims, issues, and interests that have to be resolved. Construction projects are often incomprehensible to the lay judge; they extend for lengthy periods of time from project conception through execution; they generate an enormous amount of information contained in complex documents and correspondence; and they invoke a host of governmental and other regulatory requirements that have to be addressed and resolved. Focused expertise is required not only of counsel, but also of the decision-maker.

The foregoing is true for construction dispute resolution that does not transcend national boundaries. It is all the more true where disputants are from different states and where projects that require adjudication are beyond the state of the parties in dispute. Just as international commercial arbitration is a beast quite different from domestic arbitration, so too is international construction arbitration far different from domestic construction arbitration. In an international context, counsel and arbitrators have to wrestle many further issues, including cultural differences, political issues, competing principles of law and procedure, the dynamics of having arbitrators from variant states and complicated issues of recognition and enforcement.

The foregoing points are made, far more completely, in the opening chapter of the 2011 edition of the ***International Construction Arbitration Handbook,*** edited by John Hinchey, a highly regarded former senior partner at King & Spalding, now a full-time arbitrator and mediator with JAMS, and Troy Harris, an authority on international commercial arbitration and construction law and an assistant professor at the University of Detroit Mercy School of Law. That 89-page chapter, titled "International Construction Arbitration – An Overview," could stand alone as an extraordinarily detailed and informative survey of the topic. It covers a myriad of topics that one would find in several of the existing high-quality international commercial arbitration treatises, but imbues its discussion on every topic with a sharp focus on the impacts that construction disputes have on the arbitration process and, in reverse, on the impacts that the arbitration process has on the determination of construction disputes. Thus, in summary, the overview chapter starts with discussions of the concepts and definitions of "arbitration" and "international arbitration"; it follows this with a review of the history of the use of arbitration and several other forms of alternative dispute resolution procedures to resolve international construction disputes; and it then provides a critical assessment of the ultimate value and utility of arbitration in the international construction community.

The Handbook is presented in two volumes. The first, comprising approximately 720 pages, is the text itself. The second is an extremely valuable compendium of resource materials, including, as a rough count, six conventions and treaties, six arbitration laws (including the UNCITRAL Model Law, the United States Federal Arbitrations Act and the English Arbitrations Act), 21 sets of arbitration rules (including those of the ICC, the AAA/ICDR, the IBA, the CPR and JAMS), 12 sets of arbitration guides and protocols (including the extremely "must be read" UNCITRAL Notes on Organizing Arbitral Proceedings and the CCA's Protocols for Expeditious, Cost-Effective Commercial Arbitration) and finally six practice materials, including the AAA's Guide to Drafting Alternative Dispute Resolution Clauses for Construction Contracts, an action list, a protocol for early disclosure and discovery and references to many useful construction and arbitration websites.

Of course, the far more interesting and useful volume of the Handbook is the first, the objective of which is to inform even those who are well familiar with the intricacies of international commercial arbitration with the issues and challenges that present themselves in construction disputes. The writers aptly state that "those who choose to ignore or are not aware of these differences will find themselves at a significant disadvantage when dealing with those who are."

With that premise and objective in mind, the Handbook follows an orderly and logical format, taking the process from inception to enforcement of awards. The Handbook starts at the contract stage and provides almost 200 pages devoted to drafting considerations and institutional and form agreements. This chapter is introduced with reference to relevant research references and trial strategy publications. The reader will then find a very detailed discussion of the subject, with particular focus on construction requirements, supported by the writers' own critical analysis and heavily footnoted with references to many topical journal articles and similar publications, arbitral institution forms and precedents and, of course, relevant case law from multiple states. Where the institutional forms are presented, the writers also give their own views as to the strengths and weaknesses of those clauses. The chapters that follow have a similar format, are extremely well-organized with many topical and easy-to-identify subject headings and are supported by many references that the reader may well turn to for more detailed treatment. At the same time, every part of the book is highly readable and very interesting.

A minor quibble: The book is published as a Handbook. It is that, to be sure, but it is far more. Any student or arbitration practitioner will find in its pages more than what usually passes as a handbook reference. The first volume of the Handbook is, in reality, a very comprehensive arbitration text that will fully inform the reader as to all of the principles that apply to international construction arbitration.

In an international context, counsel and arbitrators have to wrestle many further issues, including cultural differences, political issues, competing principles of law and procedure, the dynamics of having arbitrators from variant states and complicated issues of recognition and enforcement.

This Handbook will undoubtedly find a wide and appreciative audience. Arbitration practitioners with deep experience in the construction industry will value it as an accessible desk reference. Experienced arbitrators and arbitration counsel new to construction disputes will find the work useful as a means for applying known principles to construction disputes. Students and newcomers to arbitration will benefit not only from its comprehensive review of substantive and procedural arbitration law, but also from its practical application to the construction industry and the host of very difficult issues that present themselves in that sector.

I could not recommend this work more highly. ■

The Advantages of a "Civil" Approach to Arbitration in Quebec

BY OLIVIER F. KOTT, ESQ.

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There was a time when arbitration was perceived to be an expeditious, efficient and economical dispute resolution process. Today, many users of arbitration complain that the process has become frustrating, inefficient, time-consuming and even more expensive than litigation.

Many surveys have been conducted in an attempt to identify the principal reasons why this is so. There appears to be a general consensus that the three principal factors that increase the cost and reduce the efficiency of arbitration are highly contentious advocacy, extensive discoveries and motion practice.

It is interesting to note that these three factors are under the control of the parties and their lawyers. Certain lawyers consider that they must treat their opponent as a mortal enemy in order not to be perceived as being weak. Others are under the impression that it is their professional obligation to make certain that in the pursuit of the relevant evidence, no stone must be left unturned. The attitude adopted by the lawyers during the dispute resolution process will have a significant impact on the cost and the efficiency of arbitration.

Some lawyers probably believe that there is nothing wrong with highly contentious advocacy, extensive discoveries and motion practice. This may be true from the lawyers' point of view and possibly even from the point of view of certain arbitrators, but from a client's point of view, such practices usually only serve to increase the cost of arbitration and make the process inefficient.

The adversarial nature of arbitration often gives rise to inherent suspicions that the other party is hiding the incriminating smoking gun, which will only be discovered after a protracted and exhaustive oral and document discovery process involving extensive undertakings in addition to thorough e-discovery.

Under the civil law of Quebec, the duty to cooperate has been recognized by the courts as an implicit contractual obligation in circumstances where the cooperation of the parties is required in order to ensure that the legitimate and reasonable objectives of each party are met.

The "Civil Approach"

In order to conduct an arbitration efficiently, economically and diligently, without compromising the parties' rights or the fairness of the process, the parties and their lawyers need to adopt a cooperative approach in respect of all procedural and evidentiary matters.

The excellent report titled "Protocols for Expeditious, Cost-Effective Commercial Arbitration"[1] contains the following insightful comments concerning the benefits of such a cooperative approach:

> *Psychologists tell us that, when people have a dispute, there is a natural tendency ("reactive devaluation") to view with suspicion anything proposed by the other side. This phenomenon, coupled with the hostility often accompanying commercial conflict and the ego satisfaction of trouncing one's opponent, frequently impels counsel in arbitration and litigation to fight with their opposite number on every substantive and procedural aspect of the case. The most sophisticated outside counsel realize, however, that zealous advocacy on the merits does not preclude cooperation on procedure, which is typically in the best interest of both parties, especially if they wish to reduce cost and delay. Arbitration being entirely a creature of party agreement, arbitrators normally solicit agreement on procedural matters more aggressively than judges and will not take kindly to counsel who refuse to agree to sensible process arrangements. In most cases, if counsel pursue a professional and cooperative relationship with each other concerning the scope of discovery and motions, the length and location of the hearing, stipulations on facts not genuinely in dispute, and similar matters, it is possible to achieve substantial savings of time and money without compromising the client's substantive position.*

Arbitration agreements usually focus on the procedural aspects of the process rather than the substantive obligations of the parties. One way to ensure that the parties and their lawyers cooperate on procedural and evidentiary matters is to include the duty to cooperate as a contractual obligation under the arbitration agreement.

Under the civil law of Quebec, the duty to cooperate has been recognized by the courts as an implicit contractual obligation in circumstances where the cooperation of the parties is required in order to ensure that the legitimate and reasonable objectives of each party are met.

The duty to cooperate under Quebec civil law flows from the more general duty to act in good faith. Indeed, the Civil Code of Quebec contains provisions that oblige the parties to a contract to act in good faith, not only at the time the contract is concluded, but also during its execution and even its termination.

The Supreme Court of Canada has emphasized, in the following terms, the importance of the adherence by contracting parties to the principle of good faith in their mutual relations:

> *The development of Quebec's law of obligations has been marked by efforts to strike a proper balance between, on the one hand, the individual's freedom of contract and, on the other, adherence by contracting parties to the principle of good faith in their mutual relations. This trend in the law of obligations has had a profound influence on the choices made by the Quebec legislature and on the decisions of our courts.*[2]

1 Thomas J. Stipanowich, Curtis E. von Kann and Deborah Rothman, "Protocols for Expeditious, Cost-Effective Commercial Arbitration," College of Commercial Arbitrators, 2010.

2 *ABB, Inc. v. Domtar Inc.*, [2007] 3 S.C.R. 461, 2007 SCC 50.

Subject to the specific terms of the arbitration agreement, the obligation to act in good faith has been interpreted to include the duty by each party to share with the other party all information in its possession that is relevant for the other party in the context of their contractual relationship.

This duty to inform encompasses not only the obligation to provide relevant information, but also the obligation to refrain from misleading the other party, and furnishing erroneous, incomplete, ambiguous or contradictory information.

The duty to inform has generally been enforced in circumstances where one party has an informational advantage over the other either because of its expertise in a particular field or the access it has to information that is not available to the other party. The duty to inform does not, however, relieve a party from its obligation to inform itself to the extent information is equally available to both parties.

If the duty to inform is stipulated as a contractual obligation, then the failure to respect the obligation to inform the other party of the relevant evidence in its possession would constitute a breach of the terms of the arbitration agreement. In addition to the obvious adverse impact of such a breach on the credibility of the defaulting party's case, such a breach could entail consequences such as an order for the payment of costs.

The civil law principles mentioned above have also influenced the drafting of new proposed rules applicable to the resolution of disputes in Quebec. The proposed amendments to the Code of Civil Procedure outline the following objectives:

- *to ensure accessibility to an expeditious and high-quality civil justice system;*
- *to ensure the application of just, simple, proportionate and economical procedures; and,*
- *to ensure the exercise of the rights of the parties in a spirit of cooperation and balance.*

The rules that are proposed in order to achieve these objectives include the obligation to respect the principle of proportionality. This rule, which applies to arbitrations, already exists in Article 4.2 of the Code of Civil Procedure presently in force in Quebec:

> ***4.2.*** *In any proceeding, the parties must ensure that the proceedings they choose are proportionate, in terms of the costs and time required, to the nature and ultimate purpose of the action or application and to the complexity of the dispute; the same applies to proceedings authorized or ordered by the judge.*

The proposed rules would oblige the parties to be open in the communication of the evidence and to mutually inform themselves. They also provide for restrictions on the length and number of examinations on discovery and sanctions for abusive procedures.

The rules also promote the use of alternative dispute resolution methods such as arbitration and mediation. They stipulate that the parties engaged in a procedure to prevent or settle disputes do so voluntarily and that they are obliged to do so in good faith, to be transparent towards each other in respect of the information that they possess and to actively cooperate in the search for a solution. They, as well as third parties from whom they have sought assistance, must ensure that the steps that they take remain proportionate in respect of their costs and the time required, to the nature and the complexity of the dispute.

The provisions of the draft bill amending the Code of Civil Procedure have been inspired by, and are in harmony with, the principles of good faith, cooperation and the duty to inform applied by the courts in all civil matters in Quebec. These principles are relevant not only in the context of the performance of contracts, but also in the administration of the process chosen to resolve disputes, including litigation, arbitration and mediation.

Conclusion

Many of the complaints regarding the high cost and the inefficiencies of arbitration could be avoided or at least minimized through better cooperation by the parties and their lawyers. The "civil" approach mentioned in the title of this article is based on the civil law principles of good faith and cooperation under the Civil Code of Quebec and the principles of open communication and proportionality incorporated in the proposed amendments to the Code of Civil Procedure.

By adopting these principles, and incorporating them as contractual obligations in their arbitration agreement, the parties should improve their chances of resolving their disputes diligently, efficiently and in a cost-effective manner.

Old habits are difficult to change, as is reflected by the fact that cooperation in the administration of arbitration proceedings in the civil law jurisdiction of Quebec is still a work in progress. Is the situation in Quebec today any better than it is in common law jurisdictions? Perhaps not always, but at least a template exists in the substantive civil law of contracts to require parties to act in good faith and to cooperate with each other in the arbitration context. ■

JAMS Opens New Resolution Centers in Toronto and Miami

JAMS is pleased to announce the opening of new Resolution Centers in Toronto, Ontario, Canada, and Miami, Florida.

The Toronto Resolution Center is located in the Toronto Dominion Towers, a six-acre complex in Canada's financial capital. "As more Canadian courts and organizations embrace ADR, it's an exciting time to provide our high-quality mediation and arbitration services to a market that has not been fully serviced until now," said Chris Poole, JAMS president and CEO. "We're seeing an increasing trend in international arbitrations, and we know Toronto will play a major role in that arena." The Toronto panel includes JAMS Global Engineering and Construction (GEC) neutral **Harvey J. Kirsh, Esq.**

The Miami office at Brickell World Center, similarly located in Miami's Financial District, expands the presence of JAMS in the Southeast and signifies its commitment to Florida, which is also a gateway to delivering ADR services in Latin countries in South America. "Miami is also an important international business community with a lot of opportunity," said Poole. "We look forward to making an impact in the legal market with our talented and respected panel." The Miami panel also includes a new JAMS GEC neutral, **Larry R. Leiby, Esq.**

JAMS Toronto at Toronto Dominion Towers

JAMS Miami at Brickell World Center

Designed with client privacy and technology needs in mind, each of these spacious JAMS Resolution Centers features 10 or more conference and breakout rooms, a business center for clients, a sound buffering system for complete privacy between rooms and the signature JAMS Café with refreshments and snacks.

Critical Qualifications *continued from Page 1*

and emphasizes the critical importance of selecting full-time, experienced arbitrators with demonstrated expertise in both substantive law and management of the arbitration process.[1]

Asked to rank the importance of nine listed characteristics of a neutral, survey participants selected the top four as:

1. ***true neutrality***
2. ***knowledge of construction***
3. ***knowledge of construction law***
4. ***communication skills***

Ranked at the bottom were general education and cost of the neutral. Seventy-four percent of those surveyed expected neutrals to follow the "exact requirements of the contract." Fifty-three percent expected neutrals to follow the law and ranked the "biggest problem" with arbitration as the "failure of the arbitrator to follow the law." Only 61 percent believed that neutrals were "effective in managing the process," and 62 percent said that arbitration is more appealing where neutrals effectively "manage the process to reduce time to award."

What this survey confirms is that cost-effective arbitration as perceived by the construction industry requires selection of neutral arbitrators: (1) who are expert in construction law, the construction process and application of contractual rights and obligations to factual issues in dispute; (2) who are expert in efficient pre-hearing and hearing management of the arbitration process so as to minimize the time and cost of the proceeding; (3) who are expert in communicating with the parties during the process and in explaining the basis for their rulings and awards; (4) who have the time to hear and resolve the arbitrated disputes through to conclusion with minimal interruption; and (5) who have respected professional leadership and a reputation for fairness. To get the right neutral arbitrators with the right expertise, experience and time availability, parties necessarily must look to the right ADR provider with the strongest panel of neutrals, best case administration and most efficient arbitration rules and protocols. This frequently means that parties must choose to look beyond the terms of any arbitration clause that may have been inserted in the contract by an inexpert drafter who simply pulled a clause from someone else's contract form.

The fundamental value to the construction industry of the JAMS Global Engineering and Construction Group is the critical qualifications of its neutrals—unparalleled expertise in construction law and construction practices, management of the arbitration process and respected professional leadership—which together are critical to the prompt, fair, reasoned and cost-effective disposition of submitted disputes. ■

1 See Michael Tarullo, Esq., "If a Frog Had Wings: Expectations and Realities of Construction Dispute Resolution," *JAMS Global Construction Solutions 7* (Winter 2012).

UPCOMING SPEAKING ENGAGEMENTS

On June 21-23, 2012, **BRUCE A. EDWARDS, ESQ.** and **GEORGE D. CALKINS II, ESQ.** will be participating in the "25th Annual Summer Professional Skills Program in Dispute Resolution," sponsored by the Straus Institute for Dispute Resolution at Pepperdine University. Bruce's presentation will be on "Advanced Mediation: Skills and Techniques," and George will be speaking on "Mediating Complex Construction Disputes."

The "7th Annual Arbitration Training Institute," which will be held in Philadelphia on June 21-23, 2012, will feature GEC neutrals **PHILIP L. BRUNER, ESQ.; RICHARD CHERNICK, ESQ.; ZELA "ZEE" G. CLAIBORNE, ESQ.;** and **JOHN W. HINCHEY, ESQ.** as speakers/presenters. On June 28, 2012, Phil will be speaking on "Appellate Arbitration" at the Surety & Fidelity Claims Institute in Colorado Springs and will also be making a presentation on dispute resolution at the Masters Institute in Construction Contracting at Hilton Head on July 10, 2012. And at the October 18-19, 2012, Fall Meeting of the ABA Forum on the Construction Industry in Boston, John will be a panelist at a workshop titled "Cutting through International Waters: Cross-border Dispute Resolution."

GEORGE D. CALKINS II, ESQ. and **LINDA DeBENE, ESQ.** will be speaking at the inaugural 2012 Construction Defect Symposium, sponsored by LiMa Solutions, in Key West, Florida, on July 26-27, 2012.

HARVEY J. KIRSH, ESQ. will be making a presentation on "The Future of Construction Dispute Resolution" at the 2012 National Construction Conference of the Canadian Bar Association in St. John's, Newfoundland and Labrador, on September 28-29, 2012.

RECENT HONORS, APPOINTMENTS AND PUBLISHED ARTICLES

PHILIP L. BRUNER, ESQ. has been invited to become an Overseas (and sole U.S.) Member of the United Kingdom's Society of Construction Arbitrators.

For the second year in a row, the September 2012 *Lexpert Special Edition on Infrastructure* will again feature **HARVEY J. KIRSH, ESQ.** as one of "Canada's Leading Infrastructure Lawyers" for 2012. An interview with Harvey was published in a recent issue of the *Engineering News Record*, under the title "Rethinking the Arbitration Process with Collaborative, Cooperative Concepts." Harvey has also co-authored an article titled "Liening Airport Lands," which will appear in the upcoming 2012 edition of the *Journal of the Canadian College of Construction Lawyers.*

JAMS NEUTRALS RESOLVE AN ARRAY OF CONSTRUCTION DISPUTES

ROY S. MITCHELL, ESQ. was recently named Chair of a London Court of International Arbitration tribunal involving government contract payment issues arising during the Iraq war.

In the first mediation recently held in the JAMS Toronto Resolution Center, **HARVEY J. KIRSH, ESQ.** successfully facilitated a settlement of a complex dispute arising out of the construction of a new nickel processing facility in Long Harbour, Newfoundland and Labrador. The dispute had generated three separate sets of legal proceedings: one in Newfoundland and Labrador, a second in Ontario and a third in British Columbia, with numerous inter-jurisdictional issues.

PHILIP L BRUNER, ESQ.; KENNETH C. GIBBS, ESQ.; and **KATHERINE H. GURUN, ESQ.** recently completed an arbitration hearing dealing with claims arising out of a power plant conversion project in Pennsylvania. Phil has also been appointed to a tribunal, along with two other JAMS neutrals, to conduct an arbitration of more than $40 million in claims relating to an alleged breach of a power supply contract in Illinois.

In a recent five-day mediation, where there were 31 plaintiffs, five defendants and six insurance companies, **KENNETH C. GIBBS, ESQ.** facilitated the settlement of more than $65 million in claims relating to a major fire that swept Catalina Island in May 2007. Ken also successfully mediated major claims involving a sewer construction project in Cleveland, Ohio, where the claims exceeded $40 million.

JAMS GLOBAL CONSTRUCTION SOLUTIONS
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