



A JAMS neutral based in Boston, MA, Judge Holtz has handled a wide range of complex, multi-million-dollar construction cases.

The 39 Steps: Is Your ADR Clause as Frightening as an Alfred Hitchcock Thriller?

By Hon. Nancy Holtz (Ret.)

Whether your ADR multistep clause contains one step or 39, if a dispute arises as a result of your construction project, it's best not to leave it to a judge to solve the mystery of how and where the dispute will be resolved.

Creating a protocol by which the parties to a contract must first try to resolve any disputes prior to resorting to arbitration—known as a multistep, tiered or escalation clause—is a good idea. Disputes arising from complex, sprawling construction projects are not uncommon. Early and amicable resolution of a dispute through informal discus-

sions or mediation can save time and money, and preserve business relationships between the parties to a contract. Rather than racing toward arbitration, a multistep clause creates a pathway for resolution without either side fearing that it will lose bargaining power or look weak by being the first one to suggest settlement talks or mediation.

Don't be left in suspense as to the enforceability of the multistep clause

In the event of a dispute, disagreements can arise regarding enforceability of the multistep clause.

[> See "The 39 Steps" on Page 5](#)



Settle Now, Argue Later: Expedited Construction Adjudication Is Coming to North America

By Philip L. Bruner, Esq.

Construction adjudication, the dispute resolution method credited with reducing construction litigation by more than 80 percent in the United Kingdom, is coming to North America. The adjudication method, which has its origins in the U.K.'s Housing, Grants, Construction and Regeneration Act of 1996, requires disputes arising during construction to be submitted to an adjudicator for

a prompt initial decision that is binding on the disputants until completion of the contract and is subject to challenge in arbitration or litigation only thereafter. Construction participants wryly refer to it as the "settle now, argue later" approach to final dispute resolution. Adjudicators expert in construction and selected by the parties seek to make their

[> See "Settle Now, Argue Later" on Page 6](#)

How to Reduce the Peril of “Double Jeopardy” by Consolidation, Joinder and Appellate Arbitration

By Philip L. Bruner, Esq. and Barbara Reeves, Esq.



*Mr. Bruner is Director of JAMS Global Engineering and Construction Group, and Ms. Reeves is a member of the panel. Both are arbitrators and mediators, and Fellows of the College of Commercial Arbitrators. This article is Ms. Reeves' summary of Mr. Bruner's more extensive article published in the Fall 2014 issue of *International Construction Law Review*.*

Major construction disputes generate major litigation. For centuries, the construction industry has followed the practice of merchants of resolving disputes by consensual binding arbitration rather than by courtroom litigation. Increasingly, however, as projects have become more complex, this complexity has led to significant expansion in both the number of specialized parties involved in projects and the number and complexity of their disputes, as well as variations in contract dispute resolution clauses among parties working on the same project. When disputes among multiple parties now arise, all too often all parties are not amenable to the jurisdiction of the same forum because some parties have agreed contractually to arbitrate with different parties in separate arbitrations, while others have no contractual obligation to arbitrate at all and look to litigation for recourse. As a consequence, disputes factually and legally intertwined may be thrown into separate arbitrations and litigation, and resolved piecemeal, with the resulting—and sometimes inconsistent—awards

and judgments invariably subject to different scopes of appellate review.

What can counsel do to avoid or at least minimize the “double jeopardy” risk of inconsistent outcomes in arbitration and litigation, and to eliminate or control the cost of these dual-track proceedings?

This article will examine the arbitration tools of consolidation, joinder of claims and of non-signatory parties, and appellate arbitration, as techniques for avoiding “double jeopardy” and double expense.

Arbitration Rules, Consolidation and Joinder

The first step is the implementation of arbitration rules that are flexible enough to handle complex construction projects and the need for consolidation of related arbitrations and joinder of claims and interested non-parties. In the *JAMS Engineering and Construction Arbitration Rules and Procedures* (2014), Rule 11(b) (available at www.jamsadr.com) provides for that flexibility: “Jurisdictional and arbitrability disputes, including disputes over the formation, existence, validity, interpretation or scope of the agreement under which Arbitration is sought, and who are proper Parties to the Arbitration, shall be submitted to and ruled on by the Arbitrator. The Arbitrator has the authority to determine jurisdiction and arbitrability issues as a preliminary matter.”

The problem of having multiple proceedings—litigation and arbitration, in multiple forums each—is not just the added time and expense that it takes to reach resolution, but also the very real risk that economically inconsistent deci-

sions will be rendered by different deciders of fact and law, who sit in different arbitral tribunals or courts and whose decisions on appeal will be constrained by different standards and scopes of appellate review. We refer to this issue as “double jeopardy,” which is the way it appears to the parties caught in such a situation. All too frequently, factually and legally intertwined multi-party disputes and claims arising out of the same intertwined facts (1) are decided by different arbitrators or judges in separate arbitration or litigation trial forums and (2) are reviewed and enforced by different appellate courts under different scopes of judicial review.

In construction, the “jeopardy” problem typically begins with contract drafters who fail to tie the many parties participating in a project to a common dispute resolution process that compels all parties to resolve their disputes and claims against each other in the same manner and in the same forum. Some drafters favor arbitration, some favor litigation and everyone has his or her favorite arbitral provider or judicial venue. As an important note, a number of standard construction industry contract forms recognize the benefit of consolidating all related claims arising out of a project, and they offer guidance.

Minimization of “double jeopardy” in construction projects begins with careful drafting of arbitration clauses, thoughtful designation of arbitration rules and thorough review of governing arbitration statutes and legal principles. The clauses and rules should confirm the authority of the arbitral tribunal or the arbitral administrator (1) to decide challenges



to the tribunal’s jurisdiction regarding any issues arising out of or related to the arbitration; (2) to consolidate multiple arbitrations before a single tribunal; (3) to join necessary non-signatories in the arbitration proceeding (or otherwise bind such non-signatories by findings and conclusions in the arbitral tribunal’s award); (4) to decide all claims, counter-claims and cross-claims arising out of or related directly or indirectly to the same factual and legal issues in dispute—whether asserted as claims in contract, tort, equity or statute—in one binding award; and (5) to permit any party to appeal an award to an appellate arbitration panel before confirmation of the award.

The ability to consolidate parties and claims into a single forum is the biggest issue. Generally, the law allows the arbitrator to resolve the issue of joinder, although some parties will try to get a court to decide that issue. Practice pointer: The law of some jurisdictions allows a court or arbitrator to order consolidation without the express consent of all parties or other contractual or statutory authorization. But other jurisdictions still interpose a major impediment to efficient dispute resolution by refusing to consolidate related arbitrations, where

The ability to consolidate parties and claims into a single forum is the biggest issue. Generally, the law allows the arbitrator to resolve the issue of joinder, although some parties will try to get a court to decide that issue.

arbitration clauses require the written consent of all parties to consolidation of arbitrations and the agreed arbitration rules do not address consolidation.

The broadest consolidation rights appear in Rules 6(e) and 11 of the *JAMS Engineering and Construction Arbitration Rules and Procedures* (2014), which empower JAMS as tribunal administrator to consolidate separately commenced arbitrations involving claims of different parties that have the same “common issues of fact or law” and to designate administratively which selected tribunal will hear the consolidated matters. Once consolidated, parties in both arbitrations are treated for all purposes as parties in one arbitration, and they may assert claims and cross-claims against any and all consolidated parties. The JAMS Rules also empower the arbitrators “to resolve all disputes regarding the interpretation and applicability of these Rules.”

Consolidation rights under international arbitration rules are less definitive. See ICC Arbitration Rules, Article 10; UNCITRAL Arbitration Rules, Articles 23 and 17.5; and LCIA Arbitration Rules, Articles 23 and 22.1(h), which grant broad authority to the arbitrators but do not expressly mention consolidation.

Like the issues of consolidation and joinder of claims, the issue of joinder of non-signatory parties is controlled by state statutes, by the arbitration clause and arbitration rules accepted by the signatory parties and by common law principles of law. At the heart of the issue is the arbitrators’ jurisdiction to decide this joinder issue. U.S. and state courts favoring arbitration endorse the jurisdiction of arbitrators to decide the procedural issue of joinder of non-signatory parties under recognized principles of law and accepted arbitration rules. Illustrative of such a rule is Rule 6(f) of the *JAMS Engineer-*

ing and Construction Arbitration Rules and Procedures (2014), which provides the following: “Where a third party seeks to participate in an Arbitration already pending under these Rules or where a Party to an Arbitration under these Rules seeks to compel a third party to participate in a pending Arbitration, the Arbitrator will decide on such request, taking into account all circumstances the Arbitrator deems relevant and applicable.”

Where joinder of interested non-signatory parties is not controlled by statute or arbitration rules and is not barred by contract, there are many common law doctrines that may be applicable to justify a joinder decision by the arbitrators. These doctrines include agency, equitable estoppel, inextricable nexus, third-party beneficiary, incorporation by reference, assignment, assumption, successor in interest, alter ego (or “piercing the veil”), implied consent and good faith.

Even where non-signatories cannot be compelled to participate as a party in arbitration, those non-signatories who are “alter egos” of an arbitrating party or have third-party indemnification obligations to an arbitrating party may still be bound to and estopped from challenging liability or damages awarded in arbitration under the ancient common law doctrine known as “vouching-in.” “Vouching-in” often is employed in situations where a non-signatory third-party indemnitor is not subject to the personal jurisdiction of the arbitral tribunal and cannot be joined in the arbitration. In U.S. courts, modern impleader practice in litigation was intended to supplement, not supplant, the older device of “vouching-in.” The same can be said for arbitration. “Vouching-in” is a common law procedural device by which an arbitrating party may bind a non-signatory third-party indemnitor to an arbitration award by providing the indemnitor with proper notice and opportunity to defend against asserted

claims. Different states have different laws as to whether the third-party indemnitor is bound by the finding in the arbitral award. Again, check your jurisdiction for the applicable law. This concept of “vouching-in” remains an important concept in construction arbitration, where construction contracts invariably contain express indemnity, insurance, guaranty and surety payment and performance obligations owed by non-signatory parties, and where arbitrating signatory parties routinely seek to join non-signatory parties to recover claims against them for contractual non-performance, indemnity and contribution.

Finally, there is the issue of appellate review. Different scopes of judicial review govern arbitration awards and court judgments. While statutes and courts have limited the scope of judicial review of arbitral awards to further arbitration’s role as an efficient dispute resolution mechanism, judicial review of court judgments are *de novo* on issues of law. Parties are beginning to recognize the wisdom of using appellate arbitration, implemented by agreement and/or arbitral rules, to enlarge the scope of arbitral award review by a private appellate arbitration panel. Appellate arbitration allows the parties to maintain control over the scope of review and to select appellate arbitrators with recognized expertise in construction law, customs and practices. Pursuant to the parties’ agreement, the arbitral tribunal reviews the appealed arbitral award promptly and efficiently under an agreed scope of review. Rule 34 of the *JAMS Construction Arbitration Rules and Procedures* (2014) provides that the parties may agree at any time to adopt the JAMS Optional Arbitration Appeal Procedure. That procedure provides for a scope of arbitral review identical to that of appellate courts in the same jurisdiction at the seat of the arbitration. Such a standard of review affords *de novo* review of issues of law, rather

than more limited statutory grounds for vacating an arbitral award. Instead of an appeal process dragging on for years, the appellate award is rendered promptly on such record as the parties present. With the added oversight of the appellate arbitrators, all parties can have confidence that the reviewed award has “gotten it right.” The reviewed award is much more likely to be confirmed and not vacated by a court.

The appellate arbitration procedure thus allows the parties to agree upon a broader award review standard than accorded by statute and to select appellate arbitrators with expertise in construction law and expeditious management of the appellate review process. This process undercuts objections to arbitration by maintaining party control over the scope and procedure for review to be conducted by experts of their choice charged with enforcing the contract in accordance with applicable law. This is the wave of the future.

Conclusion

Parties’ concerns about dual-track “double jeopardy” on major, multi-party construction projects are justified but can be allayed by ample forethought about the breadth of the arbitration clause, arrangements to maximize arbitration joinder and consolidation, selection of the best arbitration providers with arbitration rules most favorable to joinder and consolidation, selection of the best arbitrators with ample expertise and experience and specification of appellate arbitration unconstrained by statutory review limitations. Careful pre-project planning for dispute resolution, thoughtful post-dispute analysis of issues, detailed attention to consolidation and joinder of claims and parties in arbitration and invocation of appellate arbitration can reduce significantly the peril of “double jeopardy.” ●

The 39 Steps Continued from Page 1

Parties have successfully avoided the preliminary steps by claiming that the language is too vague (“the parties are to engage in good-faith discussions”), that the process is undefined and unclear (there is no reference to what dispute resolution provider will be utilized, what to do in the event of a failure to agree on a mediator, etc.) or there is no timetable as to when the discussions or mediation must occur. Challenges are also made claiming that negotiations or mediation would be futile.

In ruling on enforceability, a judge will consider factors such as the certainty of the procedure set forth, the existence of time periods for the steps and whether or not the steps are mandatory for creating a clear condition precedent to arbitration.

How a judge will rule is extremely fact-driven. While some courts have held that simply an agreement to negotiate in good faith was too amorphous and nebulous to be enforceable, the trend is toward enforcement of these clauses.

In a recent decision, the English High Court broke with earlier precedent in *Emirates Trading Agency LLC v. Prime Mineral Exports Private Limited* [2014] EWHC 2104 (Comm.). The judge upheld a clause that required that the parties to a contract first try to resolve their dispute by “friendly discussion.” Despite earlier cases in which this type of language was deemed to lack an identifiable standard for compliance, in *Emirates*, the judge ruled that the requirement that the parties engage in “friendly discussions” before proceeding to arbitration contained sufficient contractual certainty to support its enforcement. The judge noted that the dispute resolution language contained a defined period of time within

which to engage in the friendly discussions—a small but significant fact.

Where the language calling for discussions or mediation is mandatory—thus constituting a condition precedent to arbitration—the courts are more likely to enforce the clause.

Despite a growing willingness by the courts to uphold these multistep clauses—which memorialize the wishes of the parties to the contract—judges have refused to enforce a requirement to participate in negotiations or mediation. This can happen, for example, where there is evidence that it is being invoked as a purely dilatory tactic.

A chilling plot twist

Your intention was to ensure that these steps would help resolve a dispute amicably. But if those negotiations or mediation failed, you certainly intended to have the right to proceed to arbitration and not be forced into costly and time-consuming litigation. But events can take a shocking turn depending on how either or both sides to the contract handle the steps outlined in the dispute resolution clause.

One or both parties may view the requirement of discussions, negotiation or even mediation as futile or otherwise undesirable. But while both parties may agree that they do not want to follow the contractually mandated pre-arbitration steps, they do not always agree as to what comes next. One party may see this as simply the time to move to arbitration. However, the other side may seek to avoid arbitration and push the entire matter into litigation, claiming failure to comply with a condition precedent. Failure to meet a contractually mandated condition precedent raises an issue

of arbitral jurisdiction and may result in forfeiture of the right to arbitration. Even where parties have an arbitral decision, a losing party may move to vacate an award for failure to comply with a condition precedent. Courts have found that the specific contractual wishes of the parties, mandating negotiation or mediation, will trump the general preference of the courts toward enforcing arbitration clauses. Even if the result is the polar opposite of what the parties wanted—to stay out of court—a judge may refuse to enforce a motion to compel arbitration on this ground.

A former judge’s takeaway

To maximize the efficacy of these multistep clauses, yet preserve the right to arbitrate the dispute, there are some important features that should be included: certainty of the time within which to engage in the negotiations or mediation and the procedure to be followed. You may want to include exceptions where the condition precedent may collide with a statute of limitations issue or otherwise have a negative collateral impact on some other part of the construction project. Lastly, to ensure that the dispute stays out of court, you may want empower the arbitrator to resolve all disputes, including whether a condition precedent has been met.

If the multistep clause calls for mediation, it is helpful to reference a specific set of recognized rules or a specific dispute resolution provider to ensure a high-quality neutral to decide the dispute. Properly drafted and implemented, a multistep clause can ensure your dispute does not come to a chilling end. ●

Settle Now, Argue Later *Continued from Page 1*

decisions within 30 days of submission of the disputes. Adjudication thus offers a more structured process than the neutral evaluation or expert determination dispute resolution methods. Although parties may challenge the adjudicator's decision after the contract is completed, British experience is that parties accept the adjudicator's decision in nearly 85 percent of the cases and thus avoid later litigation altogether.

Here in the United States, adjudication has been introduced on large, public-private partnership (P3) projects through surety performance bonds, which guarantee contract completion and provide for adjudication of disputes as to whether contractors are in default. Prior to initiation of the concept, the primary performance security on such P3 projects has been demand letters of credit, which tie up contractors' bank credit lines and which can be drawn down by owners without any showing of default on the underlying construction contract by the contractors or even upon review by neutral third parties.

At the forefront of offering adjudication in its performance bonds on P3 projects is Travelers. The credit rating agency Standard & Poor's determined that Travelers' P3 adjudication bond had the same creditworthiness as a bank letter of credit on two recent projects in the U.S. One of the reasons for this assessment is the performance bond's specification of expedited JAMS adjudication to provide prompt resolution of disputes in order to keep jobs moving.

The focus of the adjudication process in the P3 performance bond is obtaining prompt review of and final decisions on the critical issue of the performance bond obligation—has a contractor default occurred that triggers the surety's performance under the bond? The adjudication process thus offers both the contractor and surety some semblance of



The construction adjudication process offers both the contractor and surety some semblance of due process not offered by a demand letter of credit.

due process not offered by a demand letter of credit. In turn, it provides the owner (or obligee) of the construction project time certainty for prompt resolution of disputes.

The Travelers P3 bond designates JAMS as the adjudication administrator. JAMS has developed rules for adjudication of surety bond disputes. Adjudicators will be selected by parties from the neutral panel of the JAMS Global Engineering and Construction Group. The JAMS website (www.jamsadr.com) will offer a secure portal for the electronic filing of the adjudication demand and other dispute-related documents. Under the P3 bond and the JAMS rules, the selected adjudicator is accorded full authority to investigate the disputed issues surrounding the contractor's alleged default and can require parties to produce documents, to present employees for interviews or possibly depositions and to cooperate in ferreting out the relevant facts. The adjudicator then will present a decision on the dispute within 30 days of the commencement of the adjudication.

The Travelers P3 bond will be issued throughout North America. Travelers already has agreed to issue its P3 bond on two major P3 projects in Indiana and Pennsylvania. Travelers (and perhaps other surety companies) expects to issue its P3 bond on many projects in the years ahead. Stan Halliday, Travelers' Chief Underwriting Officer for National Accounts in Travelers' Bond Construction Services Group, indicates that this innovative product should allow many qualified U.S. construction firms to participate in the growing U.S. P3 marketplace. He does not think the P3 performance bond would have gotten as favorable a review from Standard & Poor's without JAMS' involvement, which provides the time certainty obligees were seeking.

As Travelers acquaints contractors, owners, designers and lenders with its P3 adjudication bond, adjudication is expected to spread beyond P3 projects. Parties desiring quicker resolution of disputes, even on an interim basis, than offered by mediation or neutral evaluation now will also have an expedited JAMS adjudication process available to them. ●

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.

Representative Matters

Kenneth C. Gibbs, Esq. successfully mediated a global resolution of the claims arising out of the construction of the Longview Power Electrical Generating Plant in West Virginia.

Hon. Carol Park-Conroy (Ret.) was selected as the arbitrator in a breach of contract dispute involving a wastewater treatment system.

Judge Nancy Holtz (Ret.) served as sole arbitrator in a breach of contract dispute involving scope of work issues, claimed faulty installation of plumbing, as well as a collateral issue seeking an expansion of the applicability of the Massachusetts Home Improvement Contractor's Statute to a non-primary residential property.

Recent Honors

John W. Hinchey, Esq. was appointed by the Georgia State University International Arbitration Center as co-chair of a committee to develop the City of Atlanta as a preferred venue for international ADR matters.

Upcoming Events

Philip L. Bruner, Esq. will speak in March at the annual meeting of the International Academy of Construction Lawyers in Hong Kong.

John W. Hinchey, Esq. will speak at a program titled "Construction Arbitration – Advanced Presentation and Management" in May 2015 in Atlanta. It's co-sponsored by the College of Commercial Arbitrators and the American Arbitration Association.

John also will speak at the 800th Centenary celebration of the signing of Magna Carta in London in June 2015, in a program titled "A Connecticut Yankee in King Arthur's Court – Do American Lawyers Have Any Place Litigating or Arbitrating in Foreign Jurisdictions?"

Hon. Carol Park-Conroy (Ret.) will moderate the "Judges' Panel" for the third year at the ABA Section of Public Contract Law's Federal Procurement Institute in March.

JAMS Global Engineering and Construction Group

Andrew J. L. Aglionby
 M. Wayne Blair, Esq.
 Viggo Boserup, Esq.
 Philip L. Bruner, Esq.*
 Hon. William J. Cahill (Ret.)
 George D. Calkins II, Esq.
 Richard Chernick, Esq.*
 Zela "Zee" G. Claiborne, Esq.
 Robert B. Davidson, Esq.*
 Linda DeBene, Esq.
 Bruce A. Edwards, Esq.

Kenneth C. Gibbs, Esq.*
 Hon. Nancy Holtz (Ret.)
 Katherine Hope Gurun, Esq.*
 William E. Hartgering, Esq.
 John W. Hinchey, Esq.*
 Gordon E. Kaiser, Esq.
 Gerald A. Kurland, Esq.
 Eleissa C. Lavelle, Esq.
 HH Humphrey LLOYD, Q.C.*
 Craig S. Meredith, Esq.
 Roy S. Mitchell, Esq.*

James F. Nagle, Esq.
 Barbara A. Reeves Neal, Esq.
 Douglas S. Oles, Esq.*
 Hon. Carol Park-Conroy (Ret.)
 Donald R. Person, Esq.
 Alexander S. Polsky, 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

JAMS Global Construction Solutions Board of Editors

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

BARBARA A. REEVES, ESQ. *JAMS Global Engineering and Construction Group*

BRIAN PARMELEE *JAMS Vice President, Corporate Development/Panel Relations*

LAURA JENNETT *JAMS Senior Practice Development Manager*

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 2015 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.



Newsletter Registration

If you want to stay apprised of the latest developments in construction ADR and you are not already receiving this electronic newsletter, please register online or send us your email address.

Register at www.jamsadr.info or email constructionsolutions@jamsadr.com or scan the code to the left.