PITFALLS, PERCEPTIONS, AND PROCESSES IN CONSTRUCTION ARBITRATION[1]

by Harvey J. Kirsh[2]

> *"Arbitration is essentially civilized warfare, except we do it in dark suits, and generally there is no blood"*[3]

OUTLINE Page

---

[1] This paper was delivered at the 2012 Annual Conference of the Canadian College of Construction Lawyers (May 31 – June 3, 2012, San Francisco, California)

[2] B.A. (Tor.), LL.B. (Osg.), LL.M. (Harv.), C.Arb., C.S. Counsel to Glaholt LLP, and Arbitrator and Mediator with JAMS' Global Engineering and Construction Group (Toronto and New York Resolution Centres)

[3] Quote is attributed to John W. Hinchey, Esq., as reported in *April 18, 2012 issue of Fulton County Daily Report*

Page

A SURVEY OF SURVEYS

The Protocols

In 2010, the College of Commercial Arbitrators ("CCA") published its landmark booklet entitled "*Protocols for Expeditious, Cost-Effective Commercial Arbitration*"[4]. Essentially, the *Protocols* observed that trial practices were being imported into the arbitration process and that arbitration was beginning to look just like litigation.

The Editors of the *Protocols* ultimately concluded that lengthy discovery, excessive claims for document production, multiple depositions of witnesses, and numerous motions contribute to greater expense and delays in the arbitration process. The primary recommendation was that "[a]*rbitrators must aggressively manage the process from day one of their appointment*". The notion of "control", particularly over the discovery process and the schedule, was paramount among their recommendations. And at its 2011 annual meeting, the CCA characterized the controlled case management technique as "*muscular arbitration*".

The White and Case Survey

2010 was also the year that White & Case, in conjunction with the University of London, undertook an empirical survey of international

[4] See http://www.thecca.net/CCA_Protocols.pdf

arbitration[5]. The survey was based on questionnaires and in-depth face-to-face interviews with in-house counsel, who were found by the survey to have made most of the important strategic decisions. The respondents were asked their views as to the cause of delays and who was responsible. Most of them answered that it was the *parties* who contributed most to the length of the proceedings. Delays, they responded, were caused by excessive discovery of documents, by the initial constitution of the panel, and by the arbitration hearings. The respondents also stated, interestingly, that *the arbitral tribunal should exert control over the parties to keep the process moving quickly*. The survey respondents wanted a disciplined, "muscular" process.

The RAND Corporation Survey

The RAND Corporation's survey[6] (conducted by the Corporation's Institute for Civil Justice, and published in 2011) was intended to explore why corporate counsel do not include arbitration more often in domestic business-to-business contracts. A majority of respondents believed that arbitration can save time and money, as compared to litigation. However, the conclusion of the study trumpeted the same refrain as the others – namely, that arbitration is becoming essentially like private litigation in terms of efficiency.

---

[5] See http://choices.whitecase.com/

[6] http://www.rand.org/pubs/technical_reports/TR781.html

The Tarullo Survey

Another survey of a broad spectrum of construction project stakeholders, described in a 2012 article[7] by U.S. attorney Michael Tarullo, appears to confirm that, although arbitration is not without its faults, the majority of the respondents expressed the view that it is considerably more cost-effective than litigation in resolving construction claims. They also stated that the process would be more appealing if it were managed more effectively, with limited motions and discovery, and with a reasonable but abbreviated timeline.

Where Do We Go From Here?

"*If we want things to stay as they are, things will have to change*"[8]

Given the results of these surveys, and the obvious pitfalls in the arbitration process which they describe and which must be addressed and overcome, solutions become somewhat clear. Arbitrators must be trained and encouraged to deliver an enhanced level of involvement and control over, and an active management of, the discovery process and the schedule. Individual solutions would include the imposition of limits on the length and extent of discovery; the possible use of the "chess clock" or other time-allocation procedure at the hearing; and the use of fast track arbitration for some types of disputes.

---

[7] Michael Tarullo, "*If a Frog Had Wings: Expectations and Realities of Construction Dispute Resolution*", JAMS Global Construction Solutions (Winter 2012), at page 7

[8] Giuseppe di Lampedusa, *The Leopard*

Most ADR service providers offer some form of expedited or "Rapid Resolution" ADR, which consists of a distinct and separate set of streamlined procedures for the arbitration of certain types and sizes of disputes. JAMS, for example, promulgated the current version of its "*Streamlined Arbitration Rules and Procedures*"[9] in March of 2007. Additionally, JAMS' Global Engineering and Construction Group created a "Rapid Resolution" paradigm, involving one or more neutrals experienced in the resolution of major construction disputes. Upon receipt of a call on its national 1-800 telephone line, JAMS swiftly dispatches a neutral (a "Friend of the Project") to design, recommend, marshal, and facilitate dispute resolution processes tailored to the specific issues in dispute, and to the specific construction project[10].

Similarly, in April of 2009, the American Arbitration Association ("AAA") developed streamlined *Non-Binding Arbitration Rules For Consumer Disputes And Business Disputes*[11]; and in June of 2009, AAA also established expedited procedures under its Commercial Arbitration Rules[12].

ADR Chambers in Toronto launched its *Expedited Arbitration Rules*[13] several years ago. These Rules promise a fixed daily fee for everything – arbitrator's

---

[9] see: http://www.jamsadr.com/rules-streamlined-arbitration/

[10] See Philip L. Bruner, "*Rapid Resolution ADR*", The Construction Lawyer (a publication of the American Bar Association's Forum Committee on the Construction Industry) (Spring 2011), at page 6

[11] see: http://www.adr.org/sp.asp?id=35917

[12] http://www.adr.org/sp.asp?id=22440#A8

[13] http://adrchambers.com/ca/arbitration/expedited-arbitration/

fees, room rental fees and administration fees – and that the arbitration will be completed from beginning to end in less than three months. Obviously, this approach is not appropriate for every case, and perhaps is more suitable for much smaller and less complex claims. Although most of the institutional service providers offer this type of streamlined/expedited option to their clients, for whatever reason it is rarely used.

Overall, though, it seems that "*muscular arbitration*", with a reasonable but abbreviated timeline, appears to be one of the keys to making arbitration different than litigation[14].

PITFALLS IN DRAFTING ARBITRATION CLAUSES

Most construction lawyers who specialize in transaction work will acknowledge that they do not spend much time considering or negotiating arbitration clauses. Should an arbitration clause be just a boilerplate provision, taken "off the shelf", or should it be specifically negotiated and crafted for the particular construction project and the parties' requirements?

---

[14] For a more diluted view of "*the growing calls for arbitrators to assert control*", see J. William Rowley and Robert Wisner, "*Party Autonomy and its Discontents: The Limits Imposed by Arbitrators and Mandatory Laws*", (2011) World Arbitration & Mediation Review (Vol. 5, No. 3 at 321, where the authors conclude that "(u)*ltimately arbitrators should remain servants of the parties, but should work hard with the parties to achieve an approach to procedural and substantive matters which is consistent with best practice and acceptable to both the parties and the arbitral tribunal. . . .* (T)*he issue is searching for the parties' true intent. Do they really mean to adopt inefficient and costly procedures? Presumably, they do not and they will reconsider when presented with better alternatives. If they insist on their chosen procedures, then maybe they have good reasons for doing so.*"

Furthermore:

- should arbitration be mandatory or permissive?;

- should there be one or three arbitrators?;

- should the arbitration clause reference the Rules of a particular ADR institutional service provider, or should it be *ad hoc*?;

- should the clause cover claims by or against the parents or subsidiaries of the contracting corporate parties?;

- should the clause contemplate joinder, intervention, and/or consolidation in multi-party or multi-contract circumstances (e.g., involving a web of claims involving, say, design professionals and subcontractors who may possibly have exposure to liability)?;

- should the clause simply provide that all disputes will be arbitrated, or should it set out a detailed regime for the mechanics of the process?;

- should the clause address the scope of documentary and oral discovery?

- should there be any limits on the authority of the arbitrator (e.g., to award punitive damages)?;

- should the arbitration clause contain a so-called "delegation provision" which would state that "(a)*ny issue regarding whether a particular dispute or controversy is . . . subject to arbitration will be decided by the arbitrator*"? The inclusion of such a provision would serve to inhibit applications to the court (with their consequent appeals) as to the twin issues of jurisdiction and arbitrability[15];

- should the Award be final and binding, with no right of appeal or judicial review?;

- should appeals be expressly permitted, and, if so, on what grounds?

One of the delicate balancing acts is between the "sin" of omission (i.e., the draftsperson omits a crucial or useful element from an arbitration clause), and the "sin" of over-specificity (i.e., the draftsperson provides too much detail, which could produce a clause that is extremely difficult to put into practice)[16].

---

[15] See, for example, *In re Checking Account Overdraft Litigation*, No. 11-14282 (11th Cir. March 21, 2012)

[16] See John M. Townsend, "*Drafting Arbitration Clauses: Avoiding the 7 Deadly Sins*", (February-April 2003) ABA Dispute Resolution Journal (Vol. 58, No. 1)

Arbitration clauses may dictate which set of institutional arbitration rules are to be used, and parties are often reluctant to change them, even when they know that they could likely negotiate something different that might be better.

Having said all of this, anecdotal but informative studies and inquiries undertaken by JAMS at many arbitration roundtables across the United States appear to indicate that many clients do not want to pay their transactional lawyers to spend additional time negotiating and drafting arbitration clauses. The prevailing sentiment appears to be that negotiation is not open-ended, and that arbitration clauses are not a priority, particularly since there are often many other more significant business terms and conditions in play.

By way of contrast, some lawyers may leave arbitration clauses entirely out of the contracts which they have drafted in order to retain a measure of flexibility in the decision as to whether to proceed by way of arbitration or litigation, should a dispute arise. In begging the question, one writer rhetorically asked, "*Is it better to make this critical decision in a vacuum, before you have a grasp of what the dynamics of the dispute are going to be? Or is it better to see what shape the dispute takes, who the parties and players are, etc. before committing to one dispute resolution process or set of rules over another?*"[17].

---

[17] John S. Blackman, "*Things to Consider Before Including an Arbitration Clause in Your Contract*", (2012) Findlaw for Legal Professionals (Thomson Reuters)

Ideally, arbitration clauses could and should be used to specify guidelines which would facilitate better and efficient management of the process, a fair but abbreviated timeline, and limitations on discovery and motions, all of which would serve to diminish delays and reduce cost.

PITFALLS TO CONTEMPLATE WHEN LAUNCHING THE ARBITRATION PROCESS

Introduction

In contemplating potential pitfalls, particularly with respect to the pre-hearing and hearing stages of the arbitral process, one would want to consider:

- What could make the process unfair, inefficient or uncertain in terms of the enforcement of the rights and obligations of the parties?
- What could prevent the parties from receiving a full and reasonable hearing?
- What ethical considerations should be observed?

Confidentiality

If one is concerned about the confidentiality of the arbitration process, then beware! Many parties to an arbitration agreement select that method of resolving their dispute because they assume that the private nature of the process, without public scrutiny, will ensure that the evidence, the proceedings, and the Award (as well as the very fact of the dispute) will be

kept confidential, and that sensitive records, testimony and activities will not be disclosed. However, *this assumption is not necessarily valid*.

As observed in a recent article, "*confidentiality*" is generally distinct from "*privacy*":

> "*Privacy generally refers to the process of excluding third parties from the actual arbitration hearing. Confidentiality obligations concern the use that can be made of information and documents produced or generated in an arbitration.*[18]"

The courts in some countries, such as England[19] and France, have generally recognized an implied duty of confidentiality, particularly in order to ensure fairness in the process.

However, that principal of confidentiality is not universal. For example, courts in the U.S.[20], Australia and Sweden have rejected a general implied duty of confidentiality.

In a well-known U.S. case (*United States vs. Panhandle Eastern Corp. et al*[21]), a Federal District Court held that, without an agreement between the parties,

---

[18] Mandy E. Moore, "*Confidentiality in Commercial Arbitration*", Canadian Arbitration and Mediation Journal (Fall 2009), at page 54

[19] See Nick Marsh, "*London Arbitration – Lifting the Cloak of Confidentiality*", DLA Piper News & Insights international arbitration newsletter (May 6, 2008); "*Limits of Confidentiality in Arbitration Proceedings*", Rajah & Tann LLP Client Update international arbitration newsletter (June 2009); and "*Confidentiality Limits in London Arbitration*", Ince & Co. Newsletter (May 2008)

[20] For an excellent survey of both the U.S. legislation and federal and state court jurisprudence dealing with confidentiality, in the context of arbitration proceedings, see Robert C. Reuben, "*Confidentiality in Arbitration: Beyond the Myth*", 54 Kansas Law Review 1255 (2006)

or procedural rules which explicitly guarantee confidentiality, arbitration proceedings will *not* necessarily be considered confidential.

In Sweden, a leading case of the Swedish Court of Appeal (*A. I. Trade Finance Inc. v. Bulgarian Foreign Trade Bank*[22]) held that there is no implied duty in law of confidentiality in arbitration. However, the court stated that there was a duty of loyalty and good faith, which would restrict disclosure of information pertaining to the arbitration.

In Canada, the courts have not decided the issue, and the law is therefore unsettled[23]. From a legislative perspective, Ontario's *Arbitration Act, 1991*[24] contains no guidance, other than providing that the Lieutenant Governor in Council may make regulations to protect the confidentiality of the record of a family arbitration. Also, both Ontario's *International Commercial Arbitration Act*[25] and the federal *Commercial Arbitration Act*[26] contain no reference to confidentiality.

Although the legislation does not appear to address the issue, a number of institutional ADR service providers have created rules dealing with

---

[21] (D. Del. 1988) 118 F.R.D. 346. But see also Patrick Neill, "*Confidentiality in Arbitration*" (1996) Arbitration International, Vol. 12, No. 3, pp. 303-304

[22] 14 Mealey's Int'l Arbitration Rep. 4. A1 (1999)

[23] See Claude R. Thomson and Annie M. K. Finn, "*Confidentiality in Arbitration: A Valid Assumption? A Proposed Solution*" (May-July 2007) AAA Dispute Resolution Journal (Vol. 62, No. 2); also see *supra*, fn. 18, at page 55

[24] S.O. 1991, Chap. 17

[25] R.S.O. 1990, Chap. I.9

[26] R.S.C. 1985, c. 17 (2nd. Supp)

confidentiality. For example, JAMS has a Rule which provides that:

> "*JAMS and the Arbitrator shall maintain the confidential nature of the Arbitration proceeding and the Award, including the Hearing, except as necessary in connection with a judicial challenge to, or enforcement of, an Award, or unless otherwise required by law or judicial decision".*

And aside from the legislation and the Rules of the ADR service providers, there is the Arbitration Agreement. Many standard arbitration agreements contain an entire section dealing with confidentiality. The introductory clause would typically provide that:

> "*The parties undertake and agree that, unless there is a written agreement, court order, or other legal requirement to the contrary, all information disclosed during the course of the arbitration will be held in confidence*".

Conflict of Interest and Disclosure

As the late British punk rocker, Sid Vicious, stated, "*Today everything's a conflict of interest*".

The International Bar Association's *Guidelines on Conflicts of Interest in International Arbitration* (2004) were introduced with the editorial comment that "(p)*roblems of conflicts of interest increasingly challenge international arbitration*".

The fundamental issue is that arbitrators are not to have any conflict of interest which would compromise or otherwise affect their neutrality, their integrity or their impartiality such that it might disqualify them from acting. So when a prospective arbitrator is approached, he/she must undertake a conflict search, and must then make full disclosure to the parties. The standard of review is rather rigorous and extensive. For example, disclosure would typically have to include reference not only to the previous professional and personal dealings of both the prospective arbitrator's and his/her law firm's previous professional and personal dealings with either of the disputing parties, but also extends to any previous dealings (i) with their counsel; (ii) with anyone associated with either counsel in the private practice of law, and (iii) with all fact witnesses and expert witnesses. The prospective arbitrator is also required to disclose whether any member of his/her family has had any professional, financial, or personal association with either counsel or either party.

Furthermore, JAMS recently updated its standard disclosure requirements to address its arbitrators' increasing use of networking through social media sites. Now, all JAMS arbitrators must disclose whether they have participated in social networking sites such as Facebook, Twitter, or Linkedin. The purpose is to test whether any prior contact, between the arbitrator and one or both counsel, rises to the level of a "*prior business relationship*" which might create any reasonable apprehension of bias.

Additionally, the disclosure requirement is not a singular, one-time event; rather, it is a continuing obligation, and extends throughout the arbitration process, from the constitution of the Arbitral Tribunal through to the final Award. Disclosure must work to protect the integrity of the ultimate Award, on the basis of one of the arbitrator's undisclosed conflict of interest. Many arbitration Awards have been vacated (particularly on motions by parties who were unsuccessful in the arbitration) on the basis that one of the parties determined (sometimes even after the Award was rendered) that the arbitrator had an undisclosed conflict of interest.

Anecdotally, this is to be contrasted with another very different experience which occurred recently in Canada. A distinguished and well-respected retired judge, who was now affiliated with a Toronto law firm, was approached and asked whether he might be prepared to act as arbitrator with respect to a construction dispute. When he registered his interest and availability, he was asked to undertake a conflict search. He replied that it was not necessary, and that all he required was a waiver from both parties. This was very different from the usual protocol and standard operating procedure. How could the waiver be informed? When pressed on the issue, he indicated that he would perform no conflict search, and that he was no longer interested in taking on the matter. So there appears to be an informal spectrum relating to an arbitrator's possible conflict of interest, from the person at one end who conducts a thorough investigation and makes full

disclosure, to the person at the other end of the spectrum who undertakes no inquiry whatsoever and simply asks for a waiver.

Quaere whether the provision of a waiver by the parties at the outset would be sufficient to maintain the integrity of an Award in circumstances where the arbitrator conducted no due diligence.

Multi-Party/Multi-Contract Arbitration

The construction industry has many different players, and is characterized by a complex and broad web of business and legal relationships. A typical large project could involve one or more owners, design professionals, sub-consultants, lenders, quantity surveyors, project managers, general contractors, subcontractors, material suppliers, insurers, sureties, and others. What this tends to mean is that construction claims and disputes are somewhat unique, and very often involve multiple contracts, subcontracts and service agreements, and multiple parties, some of whom might not be privy to an arbitration clause in a particular construction contract.

In many cases, we hear contractors defensively state that they are not responsible for the owner's claim -- it is not a "construction" issue, they might say, but rather relates strictly to "design"; whereas the engineer might retort that the design and the contract administration were just fine, but it was the contractor who did not perform his work properly.

An anecdote: An arbitrator was selected to arbitrate a dispute between an owner and his architect. The evidence convinced the arbitrator that the problems were construction-related, not design-related, and he therefore ruled for the architect. After rendering his Award, however, he was told that there had been a prior arbitration between the same owner and the contractor on the project, in which the previous arbitrator determined that the problems were design-related, and ruled for the contractor. As a result of these two Awards, the owner recovered nothing. Counsel stated that the evidence presented was somewhat different in the two proceedings and that that may have been the cause of the inconsistent findings in the two Awards. While there is a remote chance that that could also have occurred if all parties had participated in a single proceeding (i.e., the arbitrator could have found that the contractor had not breached the contract, and that the architect had not breached the professional services agreement or the applicable standard of care), there is certainly less of that type of risk for the owner.

This raises the issue as to how a two-party or bilateral dispute resolution provision in a construction contract can reel in and engage the other players, like the subcontractor and the design professional. The issue is further compounded by the fact that subcontractors have their own sub-subcontractors and suppliers, and prime consultants often engage the services of sub-consultants, such as geotechnical, structural and mechanical/electrical engineers.

Most arbitration clauses are drafted with only two parties in mind. There are many circumstances, however, where a dispute concerns numerous parties or arises out of several separate contracts. Multi-party/multi-contract disputes can occur where, for example, several parties have participated in a joint venture (i.e., multiple parties, single contract); or where one party enters into numerous contracts to construct or finance a project (i.e., multiple contracts); or where an owner enters into a general contract with a contractor who subcontracts parts of the work to various subcontractors (i.e., multiple parties and contracts). As evidenced by the anecdote set out above, insofar as arbitration proceedings are concerned, this gives rise to a real risk of concurrent or consecutive proceedings, with their attendant costs and their risk of inconsistent determinations and conflicting results.

This dilemma might be avoided if arbitration clauses were to clearly permit (i) the "*joinder*" of voluntary and consenting non-signatories as additional parties to the arbitration proceeding, and (ii) the "*intervention*" of consenting non-signatories to enter into the single arbitration process. Consent of all parties is pivotal to make these options work.

Alternatively, if there were separate but related arbitration proceedings underway, then the arbitration clauses in both or all related contracts should be have been drafted so as to contemplate the prospect of a "*consolidation*" of the different sets of proceedings.

These suggestions create challenges (e.g., how to nominate a single arbitral tribunal; the compatibility of dispute resolution mechanisms [e.g., same seat, same governing law, same Rules, same scope of discovery] in related contracts), some of which are either addressed by the Rules of the institutional ADR service providers[27], or by the collaboration of the parties (such as by the parties agreeing to incorporate the same arbitration clause by express reference into each individual contract)[28].

In the United States, federal courts recognize no less than five theories -- agency, assumption, estoppel, alter ego and incorporation[29] -- pursuant to which an arbitration clause may be enforced by or against a non-signatory. Some of these involve "incorporation-by-reference" and "flow-down" clauses, which are often found in construction contracts.

In Canada, however, the simple answer is that there may be no simple answer. In the context of an arbitration proceeding, the arbitrator has no authority to add parties who may not be privy to an agreement to submit their disputes to arbitration. So the battle may have to be waged concurrently or consecutively on several different fronts.

---

[27] For example, Article 4(6) of the ICC Rules addresses the consolidation issue; and the Japan Commercial Arbitration Association Rules 43 and 44 provide for joinder, intervention and consolidation

[28] For a good discussion of joinder, intervention and consolidation, see "*Avoiding the Pitfalls of Multi-Party and Multi Contract Arbitration*", in Herbert Smith Japan Dispute Avoidance newsletter (No. 105, June 2011)

[29] See Carl F. Ingwalson, Jr., Adam T. Mow, and Elysian Kurnik, "*Arbitration and Nonsignatories: Bound or Not Bound*" (Winter 2012) Journal of the American College of Construction Lawyers (Vol. 6, No. 1) at p. 1 for a comprehensive discussion of circumstances in which nonsignatories to an arbitration agreement may nonetheless be compelled to arbitrate

Sunny Corner Enterprises Inc. v. Dustex Corporation et al[30] is a May 6, 2011 decision of Chief Justice Kennedy of the Supreme Court of Nova Scotia. In that case, the arbitration clause in the general contract required that any dispute between the owner and the contractor be resolved by arbitration. A subcontractor's purchase order stated that the scope of the subcontract work was to be as defined in the general contract. At trial, the contractor submitted that the purchase order sufficiently incorporated all of the terms of the general contract by reference, and that therefore the subcontractor was similarly bound by the arbitration clause. The subcontractor conceded that the terms of the general contract were "integral" to the purchase order, but pointed out that the arbitration clause in particular was not specifically incorporated into the purchase order. The court accepted the subcontractor's argument, holding that an arbitration clause in a general contract will only be incorporated into a subcontract if it is *specifically* so incorporated. The court also referred to *Dynatec Mining Ltd. v. PCL Civil Constructors (Canada) Inc.*[31]., a 1996 decision of Madam Justice Chapnik of the Supreme Court of Ontario (as it then was), in which she held that "[i]*ncorporation of an arbitration clause can only be accomplished by distinct and specific words . . .*"[32].

[30] 2011 NSSC 172
[31] (1996), 25 C.L.R. (2d) 259, 1996 CarswellOnt 16 (Ont. C.J. (Gen. Div.))
[32] *ibid*, at para. 11

As one writer commented:

> "*There is logic and a lesson to be learned from this case. The parties to a subcontract may well intend to be bound by the conditions in the main contract relating to the actual nature and performance of the work. After all, they need a common road map to get the project built that is consistent with the main contract. But it is quite another thing for them to agree to be bound by consequential, remedial and procedural matters found in the main contract. There is no inherent reason why the parties to the subcontract cannot agree to a different regime for those matters. For a court to find that they made an agreement to be bound by the main contract about those matters, there should be specific provisions in the subcontract to that effect.*"[33]

Ad Hoc vs. Institutional Arbitrations

Arbitrations either can be administered by an arbitration institution, which has its own rules for managing arbitrations, or they can be "*ad hoc* ".

Examples of arbitration institutions include an alphabet soup of names such as JAMS (originally "*Judicial Arbitration and Mediation Services*"), ICC ("*International Chamber of Commerce*"), LCIA ("*London Court of International Arbitration*"), and ICDR ("*International Centre of Dispute Resolution*" – the foreign arm of the AAA ["*American Arbitration Association*"])[34].

---

[33] Thomas G. Heintzman, "*Is a Subcontractor Bound By The Arbitration Clause in the Main Contract?*" (May 15, 2012 blog on author's personal website)

[34] For an excellent survey of the role of institutional ADR service providers, see Thomas J. Stipanowich, "*Behind the Neutral: The Critical Role of Provider Institutions*", AAA Handbook on Commercial Arbitration (2nd ed. 2010, Juris Publishing)

Arbitration clauses in construction contracts may dictate which set of institutional arbitration rules are to be used (and most of them can easily be found on the internet). Each institution's rules are different, as is their involvement in managing the arbitration process.

Some institutions will assist the parties in managing the arbitration process:

- by being involved in the appointment of arbitrators,
- by coordinating the disclosure requirements mandated by conflict of interest guidelines,
- by ensuring that the institution's rules are used,
- by determining the seat or venue of the arbitration hearing,
- by fixing time limits and the timeline,
- by determining fees for both the arbitration and the arbitrators, and
- by scrutinizing arbitration Awards.

JAMS, for example, which is a private company established in 1979, has Resolution Centres in about 30 cities throughout the world, and recently opened a new Resolution Centre in Toronto. JAMS charges a relatively

modest fee of a few hundred dollars per party per hearing day, for the costs of the room rental, and for all of the administrative duties undertaken by dedicated Case Managers in managing the process from beginning to end (e.g., organizing pre-hearing conference calls and meetings, organizing any interim motions, facilitating the exchange of pleadings, Arbitration Briefs and Motion Briefs, facilitating the exchange of documentary productions, assisting the parties with their requirements during the course of the actual hearing, and facilitating the release of the Award to the parties).

The ICC, however, which was established in 1919 as a neutral and independent non-governmental organization, has a very different model. Unlike JAMS, the ICC does not yet have offices or an arbitration venue in Canada, so the parties have to make their own arrangements for securing boardroom space, for catering, and for other such aspects of managing the process. ICC does generally oversee the management of the process remotely, though, from its offices in Paris.

Another factor which distinguishes ICC from other institutional ADR service providers is that the ICC has unique financial terms relating to deposits and fees which are mandatory to any ICC arbitration. In particular, before any arbitration is permitted to proceed, the ICC usually requires the parties to post a very significant upfront deposit, based on a formula which in turn is based on the dollar amount in dispute.

The use of institutional Rules is sometimes a two-edged sword, in that a lack of experience, understanding or consensus can sometimes lead to delays and procedural logjams, where, for example, the parties have to go to court over a dispute as to what is arbitrable, and what is not[35].

By way of contrast to institutional arbitration, "*ad hoc*" arbitrations are *not* administered by an arbitral institution.

Some contracts provide that, although the arbitration is not to be managed by any particular institution, a certain set of Rules may be specified in the arbitration agreement as being applicable to the process. And even though a particular institution's Rules are mandated, the arbitration would still be considered to be *ad hoc*.

In these types of circumstances, the parties may want to have a close look at the applicable Rules, to see if it meets their needs. For example, some of the standard form Canadian construction contracts, such as those promulgated by the Canadian Construction Documents Committee (CCDC), provide that the "CCDC-40" Rules (i.e., "*Rules for Mediation and Arbitration of Construction Disputes* ") are to be used in the event of a dispute. When asking the contracting parties whether they have read those rules, the answer is usually in the negative. So they are typically unaware of one surprise in those Rules: namely, if the amount in dispute is more than $250,000.00, then the arbitration *must* be conducted before three arbitrators. What is the magic

[35] See, for example, *In re Checking Account Overdraft Litigation*, *supra*, fn. 15

of $250,000.00? Parties are often content to use a single arbitrator for some multi-million dollar disputes, particularly where the selected neutral has experience, expertise, and credibility; but this choice is taken away by the Rule. The mandated requirement of three arbitrators may sometimes be cumbersome and expensive, unnecessarily involving three sets of fees to pay and three schedules to accommodate (in addition to the schedules of the parties and their counsel). As one commentator observed, "*a reference to an arbitration* [under CCDC-40] *. . . consists of a one to three person panel, depending upon what the party has requested, and whether the amount in dispute exceeds $250,000.00. If not chosen ahead of time, there can be a lengthy delay often while there are competing applications to the court as to whose proposed arbitrator should be appointed*".[36]

Arbitration Legislation in Canada

Each of the common law provinces and territories in Canada has both a domestic and an international commercial arbitration statute.

The domestic legislation in Ontario is the *Arbitration Act, 1991*[37]. That *Act* generally applies, with some exceptions, to arbitrations conducted under private arbitration agreements.

---

[36] Andrew J. Heal, "*As Disputes Arise, Consider Construction Arbitration as an Effective Dispute Resolution Tool*", Ontario Bar Association (Construction Law Section) Nuts & Bolts newsletter, Vol. 22, No. 4, at p.9

[37] S.O. 1991, Chap. 17

The legislation deals with the appointment and the duties of arbitrators, conflicts of interest and disclosure, the authority and jurisdiction of the arbitration tribunal, the conduct of the arbitration proceeding, the limited role of the courts, the enforcement of the Arbitration Award, and appeals (with leave) of the arbitration Award on questions of law.

Important provisions include:

(a) Section 6, which provides that, except for limited purposes, such as ensuring fairness and equity or the enforcement of an arbitration Award, the court will generally not intervene in the arbitration process;

(b) Section 7, which provides that, if a party commences a law suit in respect of a matter which is supposed to be decided by arbitration, the court, with some exceptions, may stay the litigation proceeding;

(c) Sections 8(1) and 31, which provide that the arbitral tribunal has the same power as the court with respect to ordering specific performance, and injunctions, and other equitable remedies (such as the appointment of a receiver);

(d) Section 3 allows the parties limited and specific circumstances to vary or contract out of some, but not all, of the provisions of the *Act*.

The other provincial statute in Ontario is the *International Commercial Arbitration Act*[38], which incorporates and is based upon the 1985 UNCITRAL (United Nations Commission on International Trade Law) Model Law.

The Model Law applies to international commercial arbitration agreements and Awards. Essentially, the legislation deals with arbitration agreements between Canada and any other country, to the extent that those agreements may be in force in Ontario. It also deals with the enforcement of Arbitral Awards which are issued outside of Canada, but which are intended to be enforced in Ontario.

The *International Commercial Arbitration Act* itself is only 13 paragraphs, but it has annexed to it, as a Schedule, the 36-paragraph Model Law, which generally deals with international commercial arbitration.

The Model Law contains provisions dealing with the Arbitration Agreement, the composition and jurisdiction of the Arbitral Tribunal, the conduct of arbitration proceedings, the issuance of Awards, and the methods of both challenging and enforcing Awards.

And the third piece of Canadian legislation under discussion is federal, the "*Commercial Arbitration Act*"[39]. That Act provides that the "*Commercial Arbitration Code*", which is also based on the 1985 UNCITRAL Model Law, applies in relation to matters where at least one of the parties to the

[38] R.S.O. 1990, Chapter I.9
[39] R.S.C. 1985, c. 17 (2nd Supp)

arbitration proceeding is either the federal government, or a federal departmental corporation, or a federal Crown corporation; or where the issues in dispute are in relation to maritime or admiralty matters.

The Act also provides that the expression "*commercial arbitration*" includes claims under specified sections of NAFTA; and the several free trade agreements between Canada, on the one part, and either Chile, Peru or Colombia, on the other.

Again, the Act itself is short (only 11 paragraphs), but it has annexed to it, as a Schedule, the 36-paragraph *Commercial Arbitration Code*, which generally deals with commercial arbitration between Canada and any other State, where the seat or venue of the arbitration is to be in Canada.

The *Commercial Arbitration Code* contains provisions dealing with the Arbitration Agreement, the composition and jurisdiction of the Arbitral Tribunal, the conduct of arbitration proceedings, the issuance of Awards, and the methods of both challenging and enforcing Awards.

SELECTED PRE-HEARING PITFALLS IN THE ARBITRATION PROCESS

Initial Pre-Hearing Conference Call or Meeting

The initial pre-hearing conference, which launches the arbitration proceeding, is an important opportunity for the arbitrator to set the stage, to establish protocols, and to define and shape the entire process.

One preliminary issue is whether the initial conference should be **in person or by telephone conference call**. The better view is for the first conference to be live and face-to-face. The parties must make a commitment to carve out part of their schedule for this important preliminary event, and they would all be in the same room at the same time, with limited opportunity for distraction. Sometimes, that meeting is the first time the parties have the opportunity to meet both each other and the arbitrator.

A second preliminary issue is whether the initial conference should be restricted to counsel, or whether **clients** should be invited to attend. The more popular view is that clients should attend. With clients (particularly general counsel) in attendance, there is a greater opportunity for them to have input into the cost, duration and nature of the process. Experience dictates that, for example, counsel who have requested leave of the arbitral tribunal to depose, say, 25 fact witnesses over the course of six months, are sometimes overruled by clients who are looking to streamline the process and reduce cost.

The agenda for the initial pre-hearing in-person conference will often begin with a discussion about the scheduling of the actual arbitration hearing. Production, discovery and other interlocutory proceedings would then be slotted along the continuum of the timeline, which would be completed by, and culminate in, the hearing date. Additionally, the conference should include a discussion of:

- whether any **motions** are immediately contemplated at an early date, and, if so, the scheduling of the hearing and the exchange of motion materials and Briefs;

- the nature and delivery schedule for the **exchange of pleadings**. Pleadings should not consist of a skeletal overview, as one might expect to find used in litigation, but rather should be more detailed and thorough, possibly referencing evidence, and possibly having select important project documents attached;

- the nature and extent of the parties' **documentary production**, including the parties' plan for the organization and exchange of document lists, and the parties' intentions regarding scanning, coding, and electronic production. The parties are also encouraged to collaborate on the preparation of an electronic **Book of Joint Exhibits** (using a USB flashdrive or other such memory data storage device containing images of all such exhibits), properly indexed and consecutively numbered, for use at the arbitration hearing;

- the intent of the parties with respect to the scheduling and extent of the **oral examinations for discovery**. Procedural rules of many provinces now dictate that such examinations, in a litigation context, should be limited to one representative of each party, and should not exceed

seven hours in duration; and that restriction should inspire the parties to the arbitration to streamline their examinations in the same manner;

- the disclosure of a **preliminary list of witnesses** by an early deadline date, followed in due course by the disclosure of the **final list of witnesses**. Aside from the obvious benefit to the parties of early disclosure of witnesses, this also assists the arbitral tribunal in revisiting their conflict of interest due diligence;

- the intent of the parties with respect to the scheduling and extent of the **oral depositions of fact witnesses** (if this is to be undertaken);

- the scheduling for (i) the designation of **expert witnesses**; (ii) the exchange of **experts' reports**; and (iii) the intent of the parties with respect to the scheduling and extent of the **oral depositions of expert witnesses**(if this is to be undertaken);

- the scheduling for the exchange and filing of the parties' pre-hearing (and possibly post-hearing) **Arbitration Briefs**, as well as the electronic **Book of Joint Exhibits** and the USB flashdrive (or other such memory data storage device) which are to be used at the hearing;

- the issuance of subpoenas for third party witnesses[40]; and

- the time required for the hearing itself, and the details of the parties' requirements (e.g., size of boardroom? court reporter ? audiovisual equipment?)

Given the number and extent of these inquiries, the discussion at the initial pre-hearing meeting will often extend to a full day. Anecdotal studies and inquiries undertaken by JAMS at many arbitration roundtables across the United States indicate that, according to clients, many pre-hearing arbitration conference calls and meetings are rushed, and unfortunately are usually limited to approximately fifteen minutes. The view was that these meetings should be taken more seriously by both the parties and the arbitrators, in order for the process to be managed more efficiently.

Additionally, the JAMS roundtable discussions indicate that clients are of the view that, at the initial pre-hearing conference, the arbitrator should canvass ways for the parties to limit discovery. Clients expressed concern about the arbitrator "*opening the floodgates for unnecessary discovery*".

After the initial pre-hearing conference, the arbitrator will usually issue a **Procedural and Scheduling Order**, which will generally serve to define the process and the timeline from that date forward until the hearing.

---

[40] See Harvey J. Kirsh, "*Uncertain Power of Arbitrator's Subpoena*", The Lawyers Weekly (December 9, 2011) at p. 112

More on Documentary Production and E-Discovery

Construction claims are often "paper wars", usually involving the gathering, reviewing, organizing, and production of thousands or tens of thousands of project documents, and the process also includes all forms of electronic documents, such as e-mails, construction schedules, construction drawings, and so on.

There is always a tension between the requirement to produce absolutely everything which might have a hint of relevance, as opposed to only producing a much more limited range of documents which counsel, essentially using their own discretion, feel are generally relevant. Experience dictates that, in an arbitration proceeding, the latter approach is less expensive, more expedient, much preferred and usually mandated.

As indicated above, with the collaboration of counsel, they can create an agreed-upon body of electronic, consecutively-numbered exhibits, for which there is a minimum of dispute as to admissibility. One should be mindful of the fact that arbitrators tend to let in most evidence, on the premise that its evidentiary value is subject to weight. This serves to eliminate many disputes about admissibility.

With the collaborative approach to the electronic production of exhibits, all parties, as well as the arbitral tribunal, can walk into the arbitration hearing room with only a laptop and a flashdrive of exhibits.

The biggest issue currently is **e-discovery**, and it is propelled by the explosive growth of e-mail. It is generally considered to be the number one factor contributing to rising costs, and parties typically appeal to the arbitrator to manage the issue, and possibly to set limits. Here are some of the concerns of counsel:

- How extensive must the search be for electronically stored information? In the courts, the alternatives have ranged from relatively straightforward and limited searches of particular witnesses' computers or servers for relevant documents and e-mails, to wide-ranging, expansive, and expensive searches covering huge swaths of both primary and secondary data;

- If production of electronically stored data is limited by the arbitral tribunal, will this cause one or both of the parties to feel that they have *not* been given a full and fair opportunity to prosecute their claim or defend against the opponent's claim?; and

- If electronically stored information is to be produced, should it be produced in electronic format or in hard copy ? This is affected by cost, and could possibly be used as an intimidation strategy by one party.

An article in a recent issue of the Engineering News Record commented on the enormous cost of e-discovery, and went so far as to make the

controversial suggestion that there ought to be an agreement between counsel, or a decision by the arbitrator, that rules out e-mails as discoverable evidence.

Interim Motions for Summary Disposition

There are opposing views about interim motions for summary disposition.

One view is that dispositive motions can cause significant delay and unduly prolong the discovery period. Such motions are typically based on lengthy Briefs and recitals of facts, and, after much time, labour and expense, are often denied on the ground that they raise issues of fact and are inconsistent with the spirit of arbitration.

On the other hand, 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 may have made some sort of admission. Another example is where a party may seek interim measures designed to preserve the *status quo*. A further example involves the improper joinder of parties, such as a bonding company or a subcontractor, who may have not submitted to the arbitration process, and who may be entitled to an early dismissal of the proceeding as it relates to them.

Once again, anecdotal inquiries undertaken by JAMS appear to indicate that clients want the right to bring interim motions, because there is a view that they will help to enhance the efficiency of the arbitration and will generally

shorten the process. Many clients have also expressed the view that they want the arbitration clause in their agreements to include a provision that allows summary adjudication.

Subpoenas or Summonses for Non-Party Witnesses

A prominent American arbitrator was known to tell counsel that, if they wanted him to issue a subpoena to a witness, "*all they have to do is ask*". Aside from issues as to the relevance and scope of the subpoena, what was not contemplated in his gratuitous commitment was how to enforce non-compliance. Is a non-party witness compellable to produce documents, to attend at a pre-hearing deposition or discovery, and to attend at an arbitration hearing ? And what steps are available to enforce compliance, or to penalize non-compliance ?

In the United States, section 7 of the *Federal Arbitration Act* provides an arbitrator with subpoena authority to compel both the attendance of non-party witnesses and the production of their documents *at an arbitration hearing*. However, despite differing interpretations of the legislation (creating what one judge described as a "*virtual minefield*"), most American courts have concluded that *pre-hearing discovery* of non-party witnesses is not compellable by subpoena. This is consistent with the view that extensive and protracted discovery, as permitted in litigation, eliminates the main advantages of arbitration in terms of cost, speed and efficiency.

If any person refuses to obey a subpoena, the United States District Court has authority to compel such person to attend the arbitration hearing, and may also impose penal sanctions for contempt. However, this authority is circumscribed by the limits imposed on District Courts to enforce their process outside of their own territorial jurisdiction.

Some arbitrators in the U.S. will sign any and all subpoenas that are provided to them in blank form by counsel without objection, and then leave enforcement to the parties, while other arbitrators, feeling that they may have no powers of enforcement, and disapproving of creating the impression that they do, are concerned that issuing an unenforceable subpoena would diminish the credibility and standing of the arbitration process.

Typically, in Canada, the question of whether an arbitrator has the authority to issue a subpoena to a non-party witness is governed by the applicable statute governing the dispute, by the arbitration agreement between the parties, and by the governing rules of the sponsoring institutional ADR service provider under whose auspices the arbitration has been constituted.

In terms of institutional rules, it may be noted that Rule 21 of the JAMS Comprehensive Arbitration Rules provides that an arbitrator may issue subpoenas for the attendance of witnesses or the production of documents either prior to or at the hearing. However, neither the ICC Rules of Arbitration, nor the National Arbitration Rules of the ADR Institute of Canada, nor the UNCITRAL Arbitration Rules (2010), nor the LCIA

Arbitration Rules, nor the ADR Chambers Arbitration Rules contain any express provision authorizing an arbitrator to issue a subpoena, notice or summons to a non-party witness for evidence.

As observed above, each of the common law provinces and territories in Canada has both a domestic and an international arbitration statute. Each province's domestic arbitration legislation (such as Ontario's *Arbitration Act*) provides that an arbitrator may issue a "*notice*" to a non-party witness to produce documents and to attend and give evidence at an arbitration hearing. Either a party or the arbitrator may apply to the court for an order with respect to the taking of evidence, thus permitting the examination of a witness from another province.

Furthermore, section 19.4 of Ontario's *Evidence Act* provides that a "*court*" (which is defined to include an "*arbitrator*") may issue a subpoena compelling the testimony of, and the production of documents by, a non-party witness "*wherever he or she may be in Canada*".

In the context of an "international" commercial arbitration, it is to be noted that legislation (such as Ontario's *International Commercial Arbitration Act*), which incorporates and is based upon the UNCITRAL (United Nations Commission on International Trade Law) Model Law, provides that the court's assistance may be sought in the taking of evidence. *Jardine Lloyd Thompson Canada Inc. v. Western Oil Sands Inc.*[41], a 2005 decision of the Alberta

[41] [2005] A.J. No. 943 (Alta. Q.B.)

Court of Queen's Bench, specifically considered the issue of "*whether an arbitration panel, free to develop its own procedure, has the jurisdiction or authority to order non-parties to the arbitration to submit to pre-hearing examination for discovery or, for that matter, production of documents*", and determined that it did not. However, one year later, the Alberta Court of Appeal overturned this decision and confirmed that Article 27 of the UNCITRAL Model Law gave an arbitrator the authority to obtain third-party evidence, in accordance with the practice of the court[42]. The court further clarified that Article 27 was intended to include the taking of evidence through discovery, and was not limited to evidence at a hearing.

Finally, in general terms, unless the governing arbitration statute provides otherwise, either by an express prohibition or a mandatory provision, the parties are free to determine their own procedures through an arbitration agreement. The scope of the arbitrator's authority, particularly with respect to requiring the attendance of non-party witnesses, is dictated by how broadly or narrowly the arbitration provisions in the agreement are drafted.

Tribunal-Appointed Experts

An informal survey, initiated by the International Bar Association in 2011, inquired about its members' experiences in using tribunal-appointed experts.

Some IBA members from different parts of the world registered concern about this process. A member from England commented that he had heard

[42] [2006] A.J. No. 32

of a tribunal-appointed expert visiting both the parties' counsel and the party-appointed experts individually and separately, before reporting to the arbitral tribunal. This raised concerns about "natural justice" and proper due process, and about the possibility of jeopardizing the Award and compromising the neutrality of the expert, even if the parties were to consent.

One IBA member observed that this process would give the parties an opportunity to make submissions to the tribunal-appointed expert, outside of the hearing room setting, with no opportunity given to the opposing party or its counsel to hear, cross-examine on, or reply to, those submissions. And *quaere* as to the impact of this procedure on whatever rules of evidence are applicable to the arbitration itself.

Another member stated that the interviews by tribunal-appointed experts could be unjust and unfair if new relevant facts emerge from what might be considered to be a one-sided inquiry. Furthermore, how could an Award be set aside or challenged if the opposing party were not permitted to attend the interview?

Another member expressed his considered opinion that "*the practice is a shame*", setting out many of the foregoing reasons.

Suffice it to say that, as demonstrated by this informal IBA survey, the use of tribunal-appointed experts has not been universally accepted.

SELECTED PITFALLS AND CONSIDERATIONS FOR THE ARBITRATION HEARING

Both presentation strategies, for counsel, and management tactics, for arbitrators, are keys to a successful arbitration hearing.

The parties, in consultation with the arbitrators, will want to address some or all of these topics:

- To what extent will the arbitrator and the parties be relying upon the **rules of evidence**? And which jurisdiction's or court's evidentiary rules will be applicable?;

- Will a **court reporter and a transcript** be required? This decision will depend, in part, on whether the parties contemplate the possibility of an appeal or other form of judicial review;

- How will the evidence be presented, particularly for the benefit of the arbitral tribunal and the witnesses? Often, the combination of a laptop computer, a projector, a screen, and a flashdrive of exhibits will facilitate the viewing of all documentary evidence which is to be put before the witnesses;

- In cases where there are a large number of individual claims, will the arbitrators require the parties to prepare a "Scott Schedule"[43]?

- How will the parties deal with the presentation of **demonstrative evidence**, such as, for example, large pieces of rigging for steel erection, or borehole samples, or videos of aspects of the construction project;

- Although the parties will typically expect that each witness will be exposed to an examination-in-chief, a cross-examination and a re-examination, what is the prospect that the arbitral tribunal will permit further examination arising out of those examinations? As observed elsewhere, some U.S. arbitral tribunals have permitted further cross-examination arising out of the re-examination, and further re-examination arising out of that further cross-examination[44]. In some

---

[43] A "Scott Schedule" is a special form of pleading that was originally devised by George Alexander Scott, an Official Referee in England, for use in construction disputes. The current form of Schedule usually takes the form of a spreadsheet, which passes between the parties to enable one side to set out their arguments and then the other side to respond. If the case then goes to court or to an arbitrator, the final column in the Schedule is used by the judge or arbitrator to set out the decision reached on each item.

[44] See Harvey J. Kirsh, "*Construction Arbitration in the U.S.: One Canadian's Perspective*", Canadian Arbitration and Mediation Journal (a publication of the ADR Institute of Canada, Vol. 19, No. 2, Winter 2010), at p. 35

cases, the tribunal "*bent over backwards to ensure that no question remained un-asked*"[45];

- Will the arbitral tribunal want to use a "***chess clock***", as a time management technique, to allocate a specific amount of time to each party during the arbitration hearing? This technique could possibly have a positive impact on cost, although its use has been criticized on the basis that the arbitration process belongs to the parties, and not to the arbitrators or arbitral institutions.

Arbitrators have reasonable expectations of counsel with respect to their presentation strategies. For example, in more complex cases, arbitrators might expect counsel to prepare and submit both a **glossary of technical terms** as well as a **chronology of significant events**. If they are unable to agree on the latter, then each counsel could conceivably submit his/her own chronology.

Furthermore, a **list of personnel**, setting out the names, job titles and dates of employment of the persons who had a higher level of involvement in both the project and the dispute, would also assist the arbitral tribunal in keeping track of the players and the evidence.

As for **expert witnesses**, the arbitral tribunal will expect counsel to submit a detailed curriculum vitae as soon as (or before) the expert takes the

[45] *ibid*, at p. 38

witness stand. That c.v. should of course contain details of the expert's educational, employment and professional history, as well an indication as to whether he/she has ever testified before, and whether his/her credentials have been accepted by by any court or arbitration tribunal.

It would be helpful, as well, to the arbitral tribunal if the c.v. were to include a **photo** of the expert witness, particularly in circumstances where there are a number of experts testifying.

Unless previously stipulated by counsel, the expert witnesses would then have to be properly qualified before being permitted to give evidence. Sometimes this qualification process is in the form of a *voir dire*, where the expert's experience, expertise and credentials are reviewed. Expert witnesses are known to have been challenged and even disqualified (before testifying).

SELECTED PITFALLS AFTER THE ARBITRATION HEARING

A Reasoned Final Award

Given that many arbitration Awards are final and binding, with no right of appeal, those Awards should be clear and "reasoned". Even if appeals are permitted, reasoned Awards would be helpful to the appellate tribunal or to the court.

Section 38(1) of Ontario's *Arbitration Act, 1991* provides that "(a)*n award shall be made in writing and, except in the case of an award made on consent, shall state the reasons on which it is based*".

A "reasoned" Final Award will typically follow a particular format:

- There should a statement indicating where the arbitrator gets his/her authority and jurisdiction;

- As with Reasons for Judgment issued by a court, there should be a recitation of the relevant facts;

- There should be an analysis and evaluation of both the evidence and the testimony of fact witnesses;

- There should be an evaluation of the Report and the testimony and evidence of expert witnesses;

- There should be a review and analysis of damages;

- There should be a review and analysis of the legal issues;

- There should be an actual "Award", which clearly says who wins, and, if the claimant is the successful party, the amount of damages being awarded;

- There should be a reference to interest and to costs;

- And the Award should be dated and signed by the arbitrator.

Circulating Draft Awards

Arbitrators, who want to ensure that they fully understand the issues and that nothing is omitted in their Award, will often require the parties to prepare and submit, at the opening of the hearing, written statements as to the relief requested, broken down on a claim-by-claim basis. In some complex construction claims, there may easily be a multitude of individual claim line items, and there is a possible risk that something might be inadvertently missed.

An opportunity to submit an amended version of that claim breakdown, as well as the parties' specific and detailed requests for interest (*what principal amount? what rate of interest? what per diem? what commencement date? what statutory or contractual authority?),* costs (*what backup? what lawyers' fees? what hourly rates? What number of hours spent? what disbursements? what statutory or contractual authority? what did unsuccessful party spend on lawyers' fees [as a consideration of proportionality]*), and other relief, might also be welcomed by

the arbitrator immediately prior to oral argument, and/or as a post-hearing submission. The intent would be to ensure that the arbitrator will be in a position to render a clear and complete Award on each issue.

A logical adjunct to this process would be for an arbitrator to circulate a draft, unsigned Award, for the parties' comments. Some arbitrators, who feel sufficiently apprised of the issues, and the parties' positions on them, may not feel that that step is necessary. Circulating a draft Award should only be done with the consent of all parties, so as to avoid any argument down the road which might form a basis for challenging the ultimate Award.

Some counsel have expressed the view that, since it is the successful or prevailing party who will be seeking to enforce the Award, that party's counsel should at least be given a preview, or should have some input into the drafting, of the Award.

Other counsel, whose practice does not favour circulating draft Awards, have observed that counsel use it as an opportunity to argue and appeal the findings and conclusions.

Is An Arbitrator Required to Follow the Law?

A current "hot-button" issue which is stimulating animated discussion in the arbitration community is **whether or not an arbitrator is required to follow the law**. In the dramatic introduction to his recent article on the topic, Roy S.

Mitchell, a full-time arbitrator and mediator with JAMS' Washington, D.C. office, took the first shot over the bow, stating:

> *"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."*[46]

In point of fact, there is no universal consensus on this issue. A leading U. S. Supreme Court case, *Hall Street Associates, L. L. C. v. Mattel, Inc.*[47], appears to stand for the proposition that, at least under the U.S. *Federal Arbitration Act*, an arbitration Award will stand, and can not be challenged, even where "*the arbitrator's conclusions of law are erroneous*".

Therefore, under U.S. federal law (as opposed to state law), if an arbitrator makes a mistake of law, it can not be set aside by the court. Even if the arbitrator did make legal errors, it was not the place of the courts to review the soundness of the arbitrator's decision.

In his article quoted above, though, Roy S. Mitchell analyzed the international and American arbitration rules of various institutional ADR service providers, as well as the New York Convention, and concluded that the rules are abundantly clear that arbitrators, in issuing their Awards, are required to follow the law and the terms of the contract:

---

[46] JAMS Global Construction Solutions newsletter (Spring 2012), at page 1
[47] 552 U.S. 576 (2008)

> "(I)*n 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*".

The situation in Canada is somewhat different. For example, section 31 of Ontario's *Arbitration Act, 1991* clearly provides that "*An arbitral tribunal shall decide a dispute in accordance with law, including equity*".

However, international arbitrations are more complex. Section 28(1) and (2) of the UNCITRAL Model Law provides:

> "*(1) The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute.*
>
> *(2) Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.*"

Furthermore, section 6 of the Ontario's *International Commercial Arbitration Act* provides that:

> "*if the parties fail to make a designation pursuant to article 28 (1) of the Model Law, the arbitral tribunal shall apply the rules of law it considers to be appropriate given all the circumstances respecting the dispute.*"

Appeals

It is interesting to note that industry surveys dealing with approaches and alternatives to litigation, and with impressions of the arbitration and mediation processes, generate responses to the effect that an unappealing (excuse the pun) characteristic of arbitration is the difficulty of appeal[48]. Also, anecdotal inquiries undertaken by JAMS at many client and counsel roundtables across the United States appear to indicate that the lack of an appeal process was listed as one of the most significant reasons why parties may tend to be reserved about arbitration.

Many arbitration clauses provide that the decision of the arbitral tribunal is final and binding, and may be enforced by a court of competent jurisdiction. That finality may provide justification for the parties to consider a 3-person arbitral tribunal, rather than a sole arbitrator.

Sometimes, however, the arbitration agreement may provide for a limited right of appeal.

From a legislative perspective, s. 45 of Ontario's *Arbitration Act, 1991* provides that, *if the arbitration agreement so provides*, a party may appeal an Award to the court on a question of law or on a question of mixed fact and

[48] See discussion of 2011 Fortune 1,000 Survey, sponsored by Cornell University's Survey Research Institute, Pepperdine University's Straus Institute for Dispute Resolution and the International Institute for Conflict Prevention and Resolution (CPR), in Thomas J. Stipanowich, "*Mediation Holds Steady, Arbitration Usage is Down in a New 2011 Fortune 1,000 Corporate Survey*", Daily Journal (March 19, 2012), and in Liz Kramer, "*Dissonance Between SCOTUS and BUSINESS On Arbitration*", Arbitration Nation – A Blog About Arbitration and the Law (April 23, 2102)

law. So, one must first determine what the Arbitration Agreement says about appeals.

Section 45 of the *Act* also provides that, if the arbitration agreement does *not* deal with appeals on questions of law, a party may appeal an Award to the court on a question of law (with leave), which the court shall grant only if it is satisfied that,

(a) the importance to the parties of the matters at stake in the arbitration justifies an appeal; and

(b) determination of the question of law at issue will significantly affect the rights of the parties.

It is to be noted that, as indicated, the appeal of an arbitration Award, if it is permitted, is to a *court*. By way of comparison, under the JAMS Rules, the appeal is to an *Appeal Tribunal*, but such appeals are extremely rare.

Last year, however, the author was selected, under the JAMS Rules, to be a member of a 3-person Arbitration Appeal Tribunal. The circumstances involved an appeal from an Award which was issued by an arbitrator under the auspices of the American Arbitration Association. The claim had to do with water penetration issues arising out of re-roofing work in connection with several large commercial projects in New Jersey.

The first issue which our arbitration appeal tribunal had to address was its jurisdiction and its standard of review. We were governed by *JAMS'*

Optional Arbitration Appeal Procedure[49], which provided that the Appeal Panel was to apply the same standard of review that the first-level appellate court in the jurisdiction (i.e., New Jersey) would apply to an appeal from the trial court decision.

Our jurisdiction, under the Rules, authorized us to affirm, reverse or modify the original arbitral Award. The standard-of-review directive, set out in the Rules, created the framework for the ultimate appellate Award.

Costs

An arbitrator's jurisdiction to award costs is prescribed by the governing law, the applicable institutional rules, and the arbitration agreement.

If there is no prohibition under the governing law dealing with the award of costs, then the arbitrator would typically have authority and jurisdiction to award arbitration fees, counsel's fees and expenses, the arbitrator's compensation and expenses.

In Ontario, and perhaps other parts of Canada, the litigation rule for the award of costs is that, subject to the discretion of the court, "*costs follow the event*", meaning that the unsuccessful party is obliged to reimburse the successful party for his/her "costs", based usually upon jurisprudence and practice in dealing with hourly rates, and usually guided by some form of court-approved tariff. So, if a plaintiff should sue for $1,000.00 but only

[49] See http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Optional_Appeal_Procedures-2003.pdf)

recover $500.00, then, subject to the discretion of the court (and subject the cost implications of offers to settle), that plaintiff, having been successful, will likely be awarded costs. The concept of costs following the event requires even more judicial discretion when there is both a claim and a counterclaim.

In the U.S., "*prevailing party*" clauses appear to dictate that the unsuccessful party pay the attorneys fees and court costs of the successful party, and, in the absence of such a clause, both parties will usually bear their own costs. However, many U. S. courts are guided by a more nuanced concept of, and rules regarding, the "*prevailing party*" (rather than the "successful party"), which puts a different spin on counsel's costs submissions.

Courts, in exercising their discretion, have been known, for example, to determine who is a "*prevailing party*" by determining who prevailed *on the issues which matter*. As a result, the meaning of "*prevailing party*" has generated much litigation.

As one author inquired:

> "*If the plaintiff voluntarily dismisses its action, has the defendant prevailed? If a party's case has been dismissed for want of jurisdiction, has the other party prevailed? What if both a complaint and a counterclaim have been dismissed? If the plaintiff has recovered on its complaint against the defendant and the defendant has recovered on its counterclaim against the plaintiff, is the prevailing party the party in whose favor a net judgment was entered, or are both parties entitled to recover? Is a decision required, or can*

> *you prevail in a settlement or consent decree? Is a money judgment required, or do equitable remedies qualify? And to be the prevailing party in a dispute, do you have to succeed on all issues, or just some?*[50]

In determining who is the "*prevailing party*", the judge or arbitrator may generally have to take into account the claims pursued by the plaintiff, the claims on which the plaintiff was successful, the amount of damages sought, the amount of damages actually awarded, and the defendant's set-offs or counterclaims (successfully or unsuccessfully).

Discretion appears to rule the day. And as every counsel is known to argue, they want "***Justice, with costs***".

[50] Kenneth A. Adams, "*What Does 'Prevailing Party' Mean*?", The Koncise Drafter newsletter, (January 13, 2011)