

**American Bar Association
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**The Future of International Construction
Dispute Resolution**

by

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International Construction Dispute Resolution- Overview

Arbitration is still the dominant means of dispute resolution for all international construction disputes, and for good reasons. In the case of large infrastructure projects, especially in developing countries, few of the foreign participants involved in the construction project would be willing to submit disputes that may arise to the determination of the local courts. Also, there are positive reasons for choosing arbitration to resolve international construction disputes--reasons that are even more pronounced in international cases than in domestic cases. These pros and cons, combined with predictions for the future of international construction disputes, are briefly discussed in the following sections.

Enforceability of awards - Advantage

Because of the widespread adoption of the New York Convention, international arbitration awards are generally recognized and enforced throughout most of the world. The same cannot be said of state court judgments. Particularly in the case of construction projects, where co-obligors (*e.g.*, joint venture partners and guarantors) are common, there is an obvious advantage to having an award that can be enforced in multiple jurisdictions, depending on where the award-debtor has assets.

Party autonomy and control - Advantage

The greater degree of autonomy and control over the dispute resolution proceedings that parties enjoy in domestic arbitration, as compared with state court litigation, is of even greater value in international construction arbitration. Subject only to

such requirements as may be imposed by the applicable legal regimes, the parties are free to agree on virtually any aspect of how their dispute will be resolved, including the governing law, the juridical “seat” of the arbitration, the number and qualifications of arbitrators, language of the arbitration, procedures to be followed, the schedules for exchange of information and hearings, and the admissibility of evidence. As noted by one experienced international arbitrator:

International arbitration also offers more flexibility than court procedures and permits parties to use their own counsel. International arbitration's relative familiarity is related to its flexibility: the rigidities of a judicial system impose its foreignness on litigants; the relative flexibility of international arbitration permits parties to avoid the procedures that they consider most foreign.¹

This flexibility permits tailoring the process to suit the dispute and is of great logistical value when the parties, witnesses, and arbitrators necessary to participate in conferences and hearings are in several different locations, as is common in large construction disputes.

Decision-maker expertise - Advantage

An oft-cited advantage of arbitration over court litigation is the opportunity arbitration presents for the parties to select their own decision-maker. This flexibility is particularly important in construction cases--domestic as well as international--which very often turn on complex technical questions of engineering, accounting, and scheduling that are outside the normal workfare of state court judges. The importance of being able to choose one's decision-maker is particularly important in international construction

arbitration, where the parties and witnesses may be of very different cultural backgrounds. Being able to choose the arbitrators, who are not only knowledgeable about technical and legal issues presented but also experienced in dealing with a variety of cultural backgrounds, is a significant potential benefit over state court litigation.

Time efficiency - Debatable

The time required for an international arbitration, from the time of filing to the award, has been at the top of concerns expressed by corporate users.² Compared with litigation in American courts, international construction arbitration can be very efficient because the amount of prehearing discovery is extremely limited. In fact, both the ICC and the AAA/ICDR claim that, in the majority of their cases, an award is rendered within 18 months from filing a request for arbitration.³ On the other hand, unlike a judge who may have limited time and no inclination to grant parties' requests for extensions of time, arbitrators and counsel, perhaps having no incentive to move things along, can, if not pressed by the parties themselves, drag out proceedings and thereby create inefficiencies. Construction cases tend to be fact-specific, involving multiple issues; and, quite obviously, the more issues to be resolved and the greater the quantum of proof required, the longer the proceedings will be. Yet, in the final analysis, the optimum time required for an arbitration will depend on arbitrators who are good process managers, and parties and counsel who are committed to moving the process along without unnecessary delay.

Convenience - Advantage

Particularly in complex international construction cases where parties, counsel, and

witnesses are often in different locations, the convenience associated with the flexible procedures of arbitration can hardly be overstated. Prior to the hearing on the merits, most communications can be accomplished via telephone or video conferences, electronic mail, and overnight express. Arbitration offers the opportunity to hold hearings at any agreed or convenient location, notwithstanding that the “seat” or designated “place” of arbitration may be otherwise specified in the construction contract. The parties and arbitrators can also choose the dates and times of the hearings, and the order of witnesses, so as to best accommodate their individual schedules and diaries. Compared with the inconvenience of required physical attendance at routine status conferences with state courts, the relative conveniences associated with arbitration is self-evident.

Cost - Debatable

Arbitration can be more expensive or less expensive than traditional state court litigation. It can be more expensive in that choosing one's decision-maker comes at a price. Whereas state court judges, their clerks, and officers and the courtrooms are publicly supported, with arbitration, the tribunal members, the institution (if any) administering the arbitration such as the ICC or ICDR, and the hearing facilities do not come without significant fees. On the other hand, having a panel of experienced and expert decision-makers, limited prehearing discovery, flexible procedures, and limited opportunity to challenge an arbitration award can easily compensate for the added expense of a private proceeding and will generally be less expensive than litigation. Nevertheless, the expense of international arbitration is of great concern to users of the arbitral process and is generally stated as the greatest disadvantage.⁴ The ICC has been particularly proactive in bringing cost considerations and curative measures in international and domestic

arbitrations to the attention of parties, counsel, and arbitrators. In 2006, the ICC Court of Arbitration issued a special report on Techniques for Controlling Time and Costs in Arbitration.⁵ This ICC Report on Time and Costs presented statistics provided by the ICC Court of Arbitration, based on ICC cases that went to a final award in 2003 and 2004. The Report indicated that the costs incurred by the parties in presenting their cases constituted the lion's share of the total arbitration costs. The Report noted that, on average, the costs of arbitration broke down as follows:

- Costs incurred by the parties to prepare and present their case--82%
- Arbitrators' fees and expenses--16%
- Administrative fees and expenses--2%

The conclusion drawn by the Report was that:

*"If the overall cost of the arbitral proceedings is to be minimized, special emphasis needs to be placed on steps aimed at reducing the costs connected with the parties' presentation of their cases. Such costs are often caused by unnecessarily long and complicated proceedings with unfocused requests for disclosure of documents and unnecessary witness and expert evidence. Costs can also be unnecessarily increased when counsel from different legal backgrounds use procedures familiar to them in a manner than leads to needless duplication."*⁶

Privacy and confidentiality - Advantage

The usual expectation is that arbitral proceedings will be private (*i.e.*, closed to third

parties), and this concept is a hallmark of most arbitral institutions and institutional rules. Privacy and confidentiality are factors ranked highly by users of international arbitration and is considered as an effective way to keep business practices, certainly the arbitration proceedings, out of the public scrutiny.⁷ While parties may have a general expectation that arbitration proceedings will be private, ensuring that the proceedings, materials prepared for the arbitration, and any ensuing award will be treated as confidential is more complicated. Some arbitral institutional rules, such as Article 22(3) of the ICC Rules and Article 30 of the LCIA Rules, address confidentiality, but the question is an open one in many jurisdictions, and parties should not automatically assume that proceedings will be treated as confidential in the absence of an express agreement among the parties, tribunal, and institution that the evidence, the proceedings, and the record of the arbitration are to be confidential as well as private.

Discovery and procedural challenges – Disadvantage or Debatable

International arbitration, unlike United States domestic arbitration, provides limited to no opportunities for discovery of evidence from opposing and third parties. While exchanges of documents are generally encouraged and sometimes required, the scope of the document exchange is typically limited to those documents that are intended to be introduced as evidence and are clearly relevant and material to the dispute. The attitudes and cultural orientations of the arbitrators will bear to a great degree on the scope of permitted discovery. For example, arbitrators from common law jurisdictions will be inclined toward a broader scope of discovery than those from civil law jurisdictions, although the divide between common and civil law procedures is becoming less pronounced in the context of international construction arbitration. This being the case, the

parties and their counsel must be much more focused in requesting information from the arbitrators and must depend on their own devices for obtaining evidence and should be prepared to go forward with less than complete information. This is not such a bad development when the cost-benefits of “full discovery” are taken into account. United States advocates would be well advised to consider the observations of Professor Stipanowich on the relative benefits of ultimate discovery:

As practitioners, we need to temper our tendency to worship exclusively at the altar of zealous advocacy. Too often, we are too obsessed with the need to achieve ‘perfect information’. Like General Montgomery at El Alamein, who insisted on having every gun in place before the battle, we are conditioned by the American litigation discovery model to insist on looking under every stone before trial. Maybe Montgomery needed every gun, but many of our business clients understand that in many situations getting the last 20% of the information involved 80% of the cost--and it may simply not be worth it. No due process is perfect, but trying to achieve perfection usually involves a very high price.⁸

Another challenge for parties in construction arbitrations is the fact that arbitration is typically structured as “bipolar,” meaning that only the direct parties to an arbitration agreement can be required to arbitrate a dispute arising out of the underlying contract. However, many construction disputes will necessarily involve more than the parties to the same contract; quite often such disputes will implicate third party design professionals and trade contractors, who, because they are not typically parties to the same arbitration agreement, cannot normally be compelled to join in the same arbitral proceedings, which presents the attendant risk of additional proceedings, greater cost, and the risk of

inconsistent results. While this challenge can perhaps be addressed with attention to the arbitration agreement, or applicable arbitration rules, the opportunities to do so may not be present or overlooked.

Construction Dispute Resolution in “Interesting Times” – A Forecast

International construction in the second decade of the 21st century is, like the Chinese curse, experiencing “interesting times”. On the positive side, there have been advances in communication, fitful trends toward democratization of national governments, heightened financial and economic interdependence, and the rise and development of large multinational design and construction companies. However, while China continues to achieve phenomenal growth rates in construction, much of the rest of the world is in a global financial crisis, which, to put a positive spin on it, can only be described as “interesting times”. Taking a more positive view, Patrick O'Connor, coauthor of *Bruner & O'Connor on Construction Law*, has explained why he believes that “*the next ten years will be the most exciting time for the construction industry in a generation,*”⁹ by listing the following “transformational trends” in the global construction industry:

- Sustainability--The design profession is beginning to embrace the concept that design must take into account broader interests so as to reduce global warming and conserve scarce resources;
- Integrated Project Delivery--Design and construction is too fragmented. Delivery approaches that reduce or eliminate separate responsibility in favor of cross-disciplinary cooperation promise greater efficiency and the potential for reducing the number of construction disputes.

- Building Information Modeling (BIM)--This technological innovation is an enabler to greater collaboration among the design and construction disciplines. Virtually building a structure before actually building it reduces design conflicts, RFIs (requests for information), and disputes;

- Modularization--Technologies like BIM permit greater reliance on dimensioning information, which, in turn, allows for more construction to occur off-site where greater efficiencies can be achieved;

- Globalization--The flattening of world economics presents immense challenges for the construction industry. The rise of China as a major global presence, together with the growth of Chinese construction companies, creates competitive challenges for domestic players and further burdens already constrained resources;

- Organic Dispute Resolution--The construction industry continues to be plagued by disputes and inefficient mechanisms for resolving controversy. While mediation has proven somewhat effective, it usually occurs after the parties have expended considerable resources. Arbitration has become more cumbersome, and litigation is often worse. In general, disputes arise too often and are often resolved too late. A more organic process is needed, where most disputes are resolved close in time to their origin by persons most knowledgeable about the circumstances;

- Lean Construction Techniques--Applying proven manufacturing efficiency principles of 'just-in-time' delivery and Toyota-style management practices to cut waste and redundancy in the construction process holds great promise for enhanced efficiencies;

- Alliance Arrangements--While a form of integrated project delivery, the alliance

contracting model is sufficiently novel to merit separate mention. By closely aligning all major project participants' interests in shared outcomes rather than individual gains, greater collaboration is achieved resulting in a reduction of disputes and better project outcomes;

- Rational Risk Allocation--The industry has grappled with fashioning coherent risk allocation models. Contract forms developed by industry organizations have helped, but dislocations still exist. There is a growing awareness that risk and reward must balance.

In sum, the global construction industry has entered a new era of transformational changes in the manner and mode of delivering projects, combined with a global credit crunch creating capital raising challenges, currency fluctuations and regulatory constraints, all to be tested by the traditional risks and uncertainties that attend building projects. How will the inevitable disputes arising from this new era best be resolved, and what is the future of international construction arbitration?

While international commercial arbitration is under increasing criticism as taking too long and costing too much, it is still alive and well. Surveys of the attitudes of major corporate counsel toward the existing and future use of international arbitration to resolve commercial disputes revealed the following conclusions:¹⁰

- 73% of respondents prefer to use international arbitration, either alone (29%) or in combination with Alternative Dispute Resolution (ADR) mechanisms in a multitiered dispute resolution process (44%);

- The top reasons for choosing international arbitration are the ability to choose the

governing law and the seat of arbitration; flexibility of procedure; the enforceability of awards, the privacy and confidentiality afforded by the process, and the ability of the parties to select the arbitrators;

- Expense and the length of time to resolve disputes are the two most commonly cited disadvantages of international arbitration. Other concerns include the risk of court intervention in the arbitration process and the difficulty of joining third parties to proceedings;

- 95% of corporations expect to continue using international arbitration and an increase in cases is expected;

- Corporations appear confident that arbitration law and practices will generate the solutions required to meet future challenges.

Thus, for now and in the foreseeable future, all indications are that international arbitration is and will continue to be the dispute resolution procedure of choice for parties engaged in international construction, if, for no other reason, because local courts are simply not an acceptable alternative for most participants. As so elegantly put by Horacio Naon:

“Despite its real or imaginary shortcomings, there is no substitute today for international commercial arbitration from the perspective of those looking for justice in the resolution of international business disputes, a form of justice largely oriented toward respecting ‘otherness’ and at the same time facilitating cultural blends. So long as such need shall exist--and there is nothing in the near or foreseeable future that would indicate otherwise--international commercial arbitration is likely to survive an independent,

distinct and useful private dispute resolution option. Thus, it does not appear to serve any constructive purpose to sound prematurely its death knell.¹¹

Nevertheless, international construction arbitration will have to adapt, and significantly so, to the needs of the industry, and the traditional ways of conducting an arbitration must be reconciled to the oft-expressed concerns by business users about increasing costs and time.¹² In response to these concerns about inefficiency and increasing cost, a number of U.S. domestic and international arbitration provider institutions have undertaken surveys and promulgated various protocols, guidelines and rules, combined with a recent profusion of commentary--all with the goals of reducing time and cost and making arbitration more efficient.¹³

Because of the preference of corporate counsel for mediation and conciliation, at least as a prelude to arbitration, the industry is likely to see construction contracts and dispute resolution clauses that require a “tiered” or “filtered” succession of mandatory negotiation, then mediation or conciliation, as conditions to proceeding with arbitration. Because increased cost and time are common complaints, the future of international construction dispute resolution will likely see more “real-time” decision-making as exemplified by standing neutrals, DRBs, DABs and variations on the themes of Statutory Adjudication in the United Kingdom. As predicted by Professor Stipanowich:

There will be growing emphasis ... on what have been called ‘real-time’ processes such as DRBs, statutory adjudication and the like. In the construction industry we have long understood the dangers of unresolved conflict. It drains attention and energy from

business and other pursuits and, often escalates as parties become more and more committed to fight. Delay in resolving conflict on a construction site can divert attention from the project, adversely affect relationships, delay or disrupt the job, and lead to escalation and protraction of conflict Although there are legitimate concerns about the limitations of such abbreviated processes in conflict management, the fact that they have been so willingly embraced by the industry (especially in the case of adjudication) bespeaks a genuine desire on the part of business people to 'get it done' with less fuss and bother.¹⁴

Over the past 10 - 15 years, construction industry concerns about the time and cost of resolving disputes have prompted industry and arbitral organizations to develop faster, more efficient, and possibly cheaper adjudication processes for deciding construction disputes. The procedures which have had the most success in reducing the time and cost of construction adjudication have been the accelerated or "fast-track" procedures which are designed to significantly reduce the time from the initiation of the dispute resolution process to a binding determination, whether that determination is final or for an interim time. The progenitor for modern accelerated construction arbitration, and the process that has had the most profound impact on traditional construction dispute resolution is Statutory Adjudication, which was first enacted in the United Kingdom in the mid-90s and took effect on May 1, 1998.¹⁵ In the last five years, a number of arbitral institutions have adopted new rules for "expedited," "streamlined," "accelerated" or "fast-track" arbitrations, some of which pertain especially to disputes arising out of construction projects.¹⁶ For example, The anticipated timetable and benchmarks of the CPR Expedited Construction Rules are as follows:

[Calculated by business days]:

- Day 1: Submission of the Notice of Arbitration, Statement of Claim and Nomination of Arbitrator by Claimant;
- Day 10: Nomination of Arbitrator by Respondent;
- Day 15: Third Arbitrator Agreed and Named;
- Day 20: Statement of Defense and any Counterclaim or Respondent's Motion to Expand Time and Arbitrator appointment by CPR, if necessary;
- Day 25: Prehearing conference of parties with tribunal, determination of time to commence the 100-day procedure; interim deadlines are established.

The success of fast-track arbitration, especially for substantial construction disputes, will depend on parties who are willing to, perhaps, compromise their positional or circumstantial status in the process, even when it may hurt. Success will also depend on arbitrators who can commit to the process. In major construction cases, arbitrators will have to devote close to their full-time to the task of fast tracking arbitrations, and they must be prepared to resist the inevitable motions for continuance and extensions of time. At the same time, the tribunal must balance speed against the need for fairness and a reasonable opportunity for each party to prepare. Similarly, counsel must commit to prepare and so move the case forward consistent with the accelerated procedures. This time commitment will likely put larger law firms at an advantage over solo practitioners and smaller firms who must attend to other matters.

In summary, and for the foreseeable future, arbitration will continue to be the preferred process for the final resolution of international construction disputes. Even so, mediation and conciliation have proven to be demonstrably effective in resolving construction disputes, and, as the international communities outside the U.S. and U.K. become more familiar with these nonbinding ADR processes, the use of such procedures will continue to grow in use and popularity. Still, it should be recognized that mediation,

conciliation, and related ADR procedures are not “either-or” alternatives to arbitration; instead, these structured negotiation procedures are most effectively employed as a prelude, first steps, or “filters” to arbitration or litigation. Hence, many international construction contracts now and in the foreseeable future will require mandatory negotiation, mediation, or conciliation as conditions to proceeding with final arbitration or litigation. The probable and desirable consequence of this “tiered” approach to dispute resolution is that only the most intractable and difficult disputes will go to the more elaborate, costly, time-consuming, and trial-like arbitration procedures as a “last resort.”

The inherent shortcomings of any pre-dispute resolution provisions are that, in most instances, the procedures are decided upon and incorporated into the contract long before the nature and quality of the claims and controversies are known. The reality is that the entire array of dispute resolution tools should be available or adapted for use in resolving a dispute, but only insofar as the dispute requires, after it has come into full bloom. While mediation or conciliation is generally favored by the construction industry, these procedures may not be ideal to resolve a case presenting a recurring or pivotal issue of law. Mediation also requires some time to prepare for and execute. Perhaps, an interim binding award, subject to de novo review by an arbitration panel, would provide a more timely and just result. While DRBs and DABs are effective, they are expensive to put in place and maintain, so perhaps an expert determination on a discrete issue would serve as well. In certain construction cases heavily laden with complex fact patterns and contract interpretation issues, the full panoply of litigation-like processes may be more appropriate, whether in the context of an arbitral or judicial forum. Whereas, in other cases raising merely quantum or quality issues, “due process” has little or nothing to add to the

traditional role of arbitrators acting essentially as appraisers. Some forward thinkers in the construction industry have envisioned the creative design of dispute resolution processes, *after* the dispute arises, in an effort to more perfectly tailor the process to the problem. Mr. Robert Hunt of Australia has proposed a multifaceted approach to construction industry dispute resolution:

“It is similarly open to parties that have agreed on a particular dispute resolution procedure in their contract, to subsequently agree on some modification of that procedure after the dispute arises, so as to achieve a mechanism which is better suited to efficient resolution of that particular dispute. The multi-faceted approach involves the arbitrator or mediator being pro-active in identifying where some modification of the agreed procedure would be beneficial for the prompt and cost-effective resolution of the particular dispute, and then endeavoring to persuade the parties and their legal advisors to adopt that course. Success will, of course, partly depend on the knowledge and professionalism of the parties' respective legal advisors in agreeing on a proposal which should be to the mutual advantage of their clients.”¹⁷

This post-dispute design of optimal resolution procedures is partially reflected in the ICC Dispute Board Rules, whereby a Combined Dispute Board (CDB) can determine, after the dispute is known, whether the Board will function as a DRB, with a nonbinding recommendation, or it can function as a DAB, authorized to make an interim binding determination. Thus, the construction industry should continue to feature, not a single method, but rather a smorgasbord of dispute resolution processes and procedures for resolution of both domestic and international disputes. This is a good development because

parties to construction disputes come with a variety of appetites and needs. The focus of attention should not be so much on a search for the “best” or “preferred” dispute resolution process in a generic sense, but having a willingness to select the best process for the particular problem at hand.

Another success story in the construction industry has been “real time” or “on-the-job” dispute resolution by neutral persons--other than the owner/employer's design professional--as demonstrated by the growing use of standing neutrals, including DRBs, DABs, and other project adjudicators. Therefore, as reflected in the latest FIDIC contract forms and the ICC Dispute Board procedures, and, as amply demonstrated by the successful use of Statutory Adjudication in the U.K. and elsewhere, the use of these categories of “real-time” procedures to produce binding decisions on an interim basis, with arbitration or litigation as a final option, will surely grow in use for international construction projects. All of these processes seek the same ends, the creative and flexible responsiveness to conflicts within construction contractual relationships. For example, a promising remedy for decreasing cost and time in resolving construction disputes may be real-time dispute resolution by “rapid responders” who are capable, experienced construction professionals who would be prepared to meet with the parties within a period of a few days.¹⁸ They would then gather the pertinent information and recommend a specifically tailored process to best suit the problem. Most ADR and arbitral institutional providers still offer only the traditional panels of mediators and arbitrators who are prepared to follow only traditional methods, usually requiring many weeks and months to put a process into place and bring the dispute to a conclusion. In contrast, a “rapid response team” would be prepared to:

- Make an early assessment of disputes and recommend either creative or

traditional methods (or a combination of both) to resolve disputes. For example, if a dispute was keyed to an engineering or accounting issue, the neutral might recommend an engineering expert or accountant to make an “expert determination” that would be either binding or nonbinding. A similar approach could be adapted to legal issues; and, perhaps, a “mini-trial” might assist in resolving factual disputes;

- When traditional processes are appropriate, for example, mediation, conciliation or arbitration, the neutral would be prepared to put those processes in place and move the process forward as rapidly and efficiently as the parties would permit;

- Provide a panel of capable experienced construction experts to provide either nonbinding recommendations or binding decisions;

- If arbitration is appropriate, the tribunal would be prepared to act decisively and courageously to move the process along--if possible, on a “fast track” basis by limiting discovery of documents, and, if necessary and appropriate, the taking of depositions to what is demonstrably relevant and material to the outcome of the dispute; deal effectively and economically with electronically stored information; to take evidence by written statements; to encourage the disposition of issues by motion, rather than full hearings; and to issue awards promptly.

The year 2012 still finds the construction market in a global financial crisis which has spawned a new acronym - “GFC”.¹⁹ Credit is tight or unobtainable. Development deals are stalled or stopped. The money flow from lenders- to owners- to contractors is slower than normal. Based on past history, these conditions lead to more claims, more disputes, a greater likelihood of insolvency, and more costly and time-consuming arbitration and litigation--not a pretty outlook for the industry. As the global construction economy

worsens, more disputes have developed on troubled projects which is apparently resulting in more international arbitrations. However, other reports indicate that with a money-strapped industry, the parties with ongoing work do not want to make waves and upset precarious cash flows. In any event, construction disputes in international arbitration will now more often clash with insolvency and bankruptcy laws which will create difficult issues as to whether and under what circumstance the arbitration process may proceed. For example, insolvency proceedings may impact the validity of the arbitration agreement, the conduct of the arbitration proceedings, the scope and content of the award and the subsequent recognition and enforcement of the award by national courts. Consequently, construction lawyers and arbitrators will need to become more familiar with bankruptcy and insolvency laws and processes.

The construction industry is legitimately concerned that the traditional ways of resolving construction disputes are taking too long and costing too much. At the same time, it must be remembered that processes that lead to cost and time savings may derogate from the quality of arbitration as a means of reaching a fair and just result. For example, costs can be saved by having a sole arbitrator rather than three; by not having an arbitral institution administer the proceedings; by dispensing with terms of reference or award scrutiny; by imposing strict limits on written submissions, the number of witnesses or rounds of witness statements; or by issuing a truncated award without reasons. However, each of these cost savings measures will not necessarily contribute to and may derogate

from the quality of the process. Time can be saved by implementing an accelerated or fast-track timetable for the arbitration, but cutting time may result in an injustice to one or both parties. Thus, a cost-benefit analysis should be done for virtually all procedural choices that are made in the context of arbitration. Concerns about excessive time and cost for international arbitrations are legitimate, but there is no easy or quick fix. Perhaps the most that can be achieved is a patient pursuit of the good rather than the perfect. One very thoughtful article²⁰ proposed the following suggestions, among others:

- (1) The growing direct involvement of the 'client', notably sophisticated in-house counsel from major multinational companies who must ultimately accept that they, rather than the outside professionals, must accept responsibility for what is intended to be a party-driven process;
- (2) Recognition that there can be no simplification of arbitral procedures without significant trade-offs. What is "streamlining" and "efficient" for one party is likely to be viewed by the opposing party as cutting an essential procedure;
- (3) Willingness on the part of the arbitrators to make earlier, but judicious, dispositive decisions in the form of granting motions or applications on substantive issues
- (4) Facing the fact that very large, complex and high-value disputes which formerly were resolved in the courts, with much expenditure of time and expense because the stakes were significant are now being arbitrated; thus, there is little reason to expect that less time or less expense will be incurred when the same type of disputes are in arbitration.

The author concluded with these observations:

“Whatever the past, the reality is that arbitration is and will continue to be inevitable, and that the effort to keep it true and cost-effective is a constant trial of innovation and, sometimes, error. There will be no revolution that will convert (or return) international arbitration to some warm and ancestral south where its procedures were largely consensual, cost-effective and quick. This is not to say that nothing can be done, but it is to say that, in my view, the most that realistically can be hoped for is what George Eliot termed ‘a slow contagion of the good’.”²¹

In the end, it may be said that the intrinsic values of arbitration are not speed or economy or even efficiency. Rather, it is party autonomy that transcends all of these values, worthy though they may be. If the parties so choose, they can have speed and a quick end to their dispute. On the other hand, the parties can exercise their autonomy to engage in a protracted and thorough grinding out of the issues. In either event, the choice should not be seen as reflecting the core values of arbitration, but rather the core values of the parties making the choice.

Another developing topic, raising correspondingly difficult issues, is to what extent, if at all, should arbitrators facilitate settlement or otherwise assist the parties in trying to resolve a dispute, while that dispute is pending before them. From a German perspective, arbitrators are expected to assist in amicable settlement of a dispute.²²The Center for Effective Dispute Resolution (CEDR) has recently issued their “Rules for the Facilitation of Settlement in International Arbitration,” designed “to increase the prospects of Parties in international arbitration proceedings being able to settle their dispute without the need to

proceed through to the conclusion of the proceedings.”²³ The CEDR Settlement Rules can be incorporated on an ad hoc basis by agreement of the parties, as part of an arbitral institution's rules, or within a contract clause providing for arbitration. The CEDR Settlement Rules provide for a “proactive” role by an international tribunal to facilitate resolution of a dispute, including giving preliminary views on the merits, providing preliminary nonbinding findings on law or fact, offering suggested terms of settlement or, where requested by the parties, chairing settlement conferences. In contrast, the AAA/ICDR has concluded that arbitrators should not play an active role in settlement talks or mediation, but has issued clauses that call for the mediation process to run in parallel tracks with the arbitration.²⁴ A third approach was put forward by JAMS in November 2009, whereby a “Mediator-in-Reserve” will be appointed in international cases to “streamline the transition to mediation for parties involved in arbitration.”²⁵ Under the JAMS policy, within one week of the commencement of an international arbitration at JAMS, a suggested list of mediators will be sent to the parties, who will be encouraged to select a mediator from the list; the mediator so selected will essentially stand by and be available to the parties in the event that at any time during the arbitration, the parties want that assistance. However, the arbitrators in the proceeding will have no knowledge of the identity of the mediator-in-reserve or whether the parties may have elected to engage the services of the mediator-in-reserve.

Finally, the coming years will include a renewed focus on the development of ethical rules for legal counsel and party representatives in international commercial arbitration proceedings. Currently, there are no universally-accepted rules of conduct that apply to lawyers appearing before international arbitral tribunals. Moreover, the major arbitral

institutions have not adopted or issued ethical rules governing conduct of party representatives. Such a system is now attracting considerable attention among the international arbitral community.²⁶ The focus of such rules will likely be on several categories, including general conduct, communications with and submissions to the tribunal, disclosures, communications with witnesses, and communications with opposing counsel.

Conclusions:

- The best way to reduce the longevity of conflict is to attack the dispute at the earliest possible time, as soon as the dispute develops, and in “real time” while “on the job”. The most effective means of early dispute resolution have been with pre-appointed standing neutrals, such as the American Institute of Architects’ “Initial Decision Maker”, Dispute Review Boards, Dispute Adjudication Boards and Adjudicators.
- If the dispute cannot be resolved on the job, the dispute can be filtered through such “tiered” processes as mediation, conciliation or collaborative settlement agreements which have proven effective in resolving all but the most intractable of disputes.
- If arbitration or litigation becomes inevitable, and, because cost always

increases in proportion to the length of the process, the single-most effective way to decrease the cost of dispute resolution is to use one of the fast-track or accelerated arbitration processes that are now offered by several arbitral organizations. However, time and cost-saving processes have their own potential costs in terms of possible prejudice, unfairness and reduced quality of outcomes.

- While conflict in construction has traditionally been endemic and perhaps inevitable, the parties to construction projects now have the advantage of “choice”--- an array of options at the transactional stage to avoid and manage conflict by contractually aligning the objectives and interests of the parties, and at the stage when conflict develops, to reduce the scope, time and cost of the conflict. However, there is no “free lunch”. For each potential benefit in reduced conflict, there are countervailing costs and risks that are associated with each option; hence, in the end, reducing adversarialism and conflict in construction requires a careful balancing of benefits against cost and risk.

¹ Friedland, *Arbitration Clauses for International Contracts* (2d ed. 2007) p. 11.

² This statement was confirmed in the 2008 PricewaterhouseCoopers survey, *International Arbitration: Corporate Attitudes and Practices, Executive Summary*. *See also* PricewaterhouseCoopers survey, *International Arbitration: Corporate Attitudes and Practices--2006*, §8.1; 2010 White & Case/Queen Mary Survey, “Appointment of Arbitrators”.

³ PricewaterhouseCoopers survey, *International Arbitration: Corporate Attitudes and Practices--2006*, §2.2. *See also* Mistelis, “International Arbitration--Corporate Attitudes and Practices,” 15 *Am. Rev. Int'l Arb.* 525, 583 (2004).

⁴ PricewaterhouseCoopers survey, *International Arbitration: Corporate Attitudes and Practices--2006*, §2.2. 70 out of 80 respondents to the survey cited cost as one of their top three concerns, with 50% of the respondents ranking cost as the top concern. The Fulbright & Jaworski “Fourth Annual Litigation Trends Survey Findings” (2007) commissioned an independent research firm to survey senior corporate counsel in

the U.S. and U.K. on their experiences and opinions regarding various aspects of, inter alia, international litigation and arbitration. The results showed that those corporate counsel believing that there is little difference between the costs of international arbitration and litigation increased from 53% to 75%, from 2006 to 2007; see Fulbright Survey (<http://www.Fulbright.com/litigationtrends>), p. 26. See also Gotanda, "Awarding Costs and Attorney Fees in International Commercial Arbitrations," 21 Mich. J. Int'l L. 1 (1999); O'Reilly, Costs in Arbitration Proceedings (1995); Wilson, "Saving Costs in International Arbitration," 6 Arb. Int'l 151 (1990); Gurry, "Fees and Costs," 6(10) World Arbitration and Mediation Rep. 227 (1995); Smith, "Costs in International Commercial Arbitration," 56(4) Disp. Res. J. 30 (2001); Buhning-Uhle, A Survey on Arbitration and Settlement In International Business Disputes (1996), reprinted in Towards a Science of International Arbitration: Collected Empirical Research 25, 39 to 40 (2005). See, also, 2008 PricewaterhouseCoopers survey, *International Arbitration: Corporate Attitudes and Practices*; however, see also McIlwrath and Schroeder, "The View From an International Arbitration Customer: In Dire Need of Early Resolution," 74 Arbitration 1 (February 2008), and a critique of the 2008 PricewaterhouseCoopers survey by McIlwrath, "Ignoring the Elephant in the Room: International Arbitration--Corporate Attitudes and Practices 2008," 74 Arbitration No. 4, pp. 424 to 428 (November 2008) [the "elephant in the room" being "... if 86% of corporate counsel are genuinely satisfied with arbitration (as concluded from 40 out of 47 counsel interviewed in the survey), why has this not translated into growth in the caseloads of international arbitration institutions?"].

⁵ Techniques for Controlling Time and Costs in Arbitration, Report from the ICC Commission of Arbitration, ICC Publication 843 ("ICC Report on Time and Costs"); see Appendix 35. The ICC set up a Task Force on Reducing Time and Costs in Arbitration, cochaired by prominent international arbitrators, Yves Derains and Christopher Newmark. The Task Force consisted of many representatives from countries around the world who produced the ICC Time and Costs Report, setting out "a large number of techniques which can be used for organizing the arbitral proceedings and controlling their duration and cost. This document can provide valuable assistance to the parties and the tribunal in developing appropriate procedures for their arbitration. It is intended to encourage them to create a new dynamic at the outset of an arbitration, whereby the parties can review the suggested techniques and agree upon appropriate procedures, and, if they fail to agree, the tribunal can decide upon such procedures." Preface, ICC Report on Time and Costs, *supra*.

⁶ ICC Report on Time and Costs, Introduction.

⁷ 2010 White & Case/Queen Mary Survey--"Confidentiality"; see also PricewaterhouseCoopers survey, *International Arbitration: Corporate Attitudes and Practices--2006*, §2.2.

⁸ Stipanowich, "Conflict Management in Evolution: Three Predictions," paper presented at the ACCL/Princeton "Building the Future" Symposium (November 2-3, 2006) p. 9.

⁹ O'Connor, Under Construction; The Newsletter of the ABA Forum on the Construction Industry (August 2007).

¹⁰ Fulbright 8th Annual Litigation Trends Survey – Arbitration (2011) [<http://www.fulbright.com/arbitration>]; 2010 White & Case/Queen Mary Survey--"Executive Summary"; PricewaterhouseCoopers survey, *International Arbitration: Corporate Attitudes and Practices--2006*, prepared in conjunction with the Centre for Commercial Law Studies, Queen Mary University of London, Executive Summary; 2008 PricewaterhouseCoopers survey, *International Arbitration: Corporate Attitudes and Practices*; Mistelis, "International Arbitration--Corporate Attitudes and Practices," 15 Am. Rev. Int'l Arb. 525, 586 (2004). For a critique of the PricewaterhouseCoopers Surveys, see McIlwrath and Schroeder, "The View From an

International Arbitration Customer: In Dire Need of Early Resolution,” 74 Arbitration 1 (February 2008), and McIlwrath, “Ignoring the Elephant in the Room: International Arbitration--Corporate Attitudes and Practices 2008,” 74 Arbitration No. 4, pp. 424 to 428 (November 2008) [the “elephant in the room” being “...if 86% of corporate counsel are genuinely satisfied with arbitration (as concluded from 40 out of 47 counsel interviewed in the survey), why has this not translated into growth in the caseloads of international arbitration institutions?”].

¹¹ Naon, “The Role of International Commercial Arbitration,” J. Int'l Arb. (November 1999) pp. 266, 277.

¹² See, e.g., Hentunen, Aro & Ramm-Schmidt, “Time and Cost in Arbitration: A Finnish Perspective,” IBA Arbitration News, Vol. 16, No. 2, pp. 99 to 102 (September, 2011); IBA Arbitration Committee Conference Committee Report from the Buenos Aires meeting, Bourke, “Financial Aspects of Dispute Resolution,” Arbitration Committee Newsletter, pp. 9 to 10 (March 2009) for a wide ranging discussion on the problems with international commercial arbitration and various cost-saving methods that are being used in international arbitrations. See also, McIlwrath & Schroeder, “The View From an International Arbitration Customer; In Dire Need of Early Resolution (Part I)”, The Indian Arbitrator, Vol. 2, Issue 5, pp. 2 to 6 (May 2010); ► (Part II), The Indian Arbitrator, Vol. 2, Issue 6 (June 2010), suggesting a number of methods for reducing time and cost of international commercial arbitration.

¹³ For example, The Chartered Institute of Arbitrators (CI Arb) launched a survey of the costs of international commercial arbitration, in hopes that the survey would assist in uncovering ways in which arbitration costs may be reduced and procedures streamlined to become more cost-effective and efficient. The results of the survey were presented in London on 27-28 September 2011 and revealed some results that proved to be unexpected and controversial; i.e., that claimant costs averaged nearly 10% higher in the rest of Europe as compared with the UK. External legal fees were more than 26% higher, and common costs, such as arbitrator fees were over 18% higher in Europe than in the UK. Party costs were returned as around 13% higher in civil law countries than common law countries. Also, claimants generally spent 12% more than respondents and that the average length of an international arbitration was between 17 and 20 months. See (CI Arb Survey website: <http://www.ciarb.org/s/costs-survey>); “Arbitration Survey Sparks Costs Debate, The Resolver, a newsletter of the Chartered Institute of Arbitrators, p. 4 (November, 2011).

¹⁴ Stipanowich, Conflict Management in Evolution: Three Predictions, presented at the ACCL/Princeton “Building the Future” Symposium, Nov. 2-3, 2006, Prediction Two, published in the Journal of the American College of Construction Lawyers, Special Edition--May, 2007, pp. 156 et seq. Professor Stipanowich observed that “[a]s practitioners, we need to temper our tendency to worship exclusively at the altar of zealous advocacy. Too often, we are too obsessed with the need to achieve ‘perfect information’. Like General Montgomery at El Alamein, who insisted on having every gun in place before the battle, we are conditioned by the American litigation discovery model to insist on looking under every stone before trial. Maybe Montgomery needed every gun, but many of our business clients understand that in many situations getting the last 20% of information involves 80% of the case--and it may simply not be worth it. No due process is perfect, but trying to achieve perfection usually involves a very high price.” Stipanowich, “Conflict Management in Evolution: Three Predictions,” presented at the ACCL/Princeton “Building the Future” Symposium, Nov. 2-3, 2006, Prediction Two, published in the Journal of the American College of Construction Lawyers, Special Edition--May, 2007, pp. 156 et seq

¹⁵ Housing Grants, Construction and Regeneration Act 1996.

¹⁶ See, e.g., Joint Contracts Tribunal, Construction Industry Model Arbitration Rules; CPR International Institute for Conflict Prevention & Resolution, Rules for Expedited Arbitration of Construction Disputes; CPR Global Rules For Accelerated Commercial Arbitration (August 20, 2009); Society of Construction Arbitrators 100 Day Arbitration Procedure; JAMS Engineering and Construction Arbitration Rules and Procedures for

Expedited Arbitration (July 15, 2009); German Institution of Arbitration, Supplementary Rules for Expedited Proceedings (April, 2008); The Swiss Chamber of Commerce; and the China International Economic Trade Association (CIETAC); the Stockholm Chamber of Commerce. See generally Morton, "Can a World Exist Where Expedited Arbitration Becomes the Default Procedure," 26 *Arbitration International* 1, pp. 103 to 114 (2010); Abraham, "Fast-track Arbitration: An Idea Whose Time Has Come?," *International Bar Association, Arbitration Newsletter*, pp. 22 to 23 (March, 2010).

¹⁷ Hunt, *Cost-Effective Resolution of Construction Disputes: Wishful Thinking or Emerging Reality?*, *International Construction* (June 2001), pp. 17, 20-21, published by the IBA Section on Business Law. Professor Tom Stipanowich has proposed a similar approach in Stipanowich, "Beyond Arbitration: Innovation and Evolution in the United States Construction Industry," 31 *Wake Forest L. Rev.*, 65, 179 n. 4 (1996). David Rivkin has advocated the use of a "zero-based budgeting method" for international commercial arbitrations, i.e., whereby the tribunal would implement only those processes that are appropriate for the particular dispute. These zero-based processes could include early selection of arbitrators, the use of dispositive motions, bifurcation of issues and appropriate intervention by arbitrators where settlement is possible. See Rivkin, "Towards a New Paradigm in International Arbitration: The Town Elder Model Revisited," Vol. 24, No. 3, *Arbitration International*, pp. 375 to 385 (2008).

¹⁸ See Bruner, "The Financial Crisis, the Risk of Litigation, and the Value of ADR," *JAMS Global Construction Solutions Newsletter*, pp. 1, 7 (Winter 2008); Bruner, "JAMS GEC Offers 'Rapid Resolution' ADR Training," *JAMS Global Construction Solutions*, Vol. 3, No. 3, pp. 1, 6 (Fall 2010).

¹⁹ "Global Financial Crisis"; see, e.g., Reynolds, "The Impact of the Global Financial Crisis on the Construction Sector and the Construction Bar," *Journal of the Canadian College of Construction Lawyers*, (2011) 1 *J.C.C.L.* pp. 1 to 27; *International Bar News*, pp. 53 to 57 (December 2009), article by Anthony Notaras on the state of the construction industry and construction bar in Dubai; Eijsbouts, Frick, Gustafson, et al., "A Perfect Storm in Gathering," *Viewpoint*, Vol. 1, Issue 4, *The Indian Arbitrator* (May 2009).

²⁰ Ulmer, "The Cost Conundrum," *Arbitration International*, Vol. 26, Issue 2, pp. 221 to 250 (2010); for a similar analysis, see Beerbower, "International Arbitration: Can We Realize the Potential?," *Arbitration International*, Vol. 27, No. 1, pp. 75 to 90 (2011).

²¹ *Id.*, Ulmer, "The Cost Conundrum," *Arbitration International*, Vol. 26, Issue 2, pp. 221 to 250 (2010).

²² Section 32.1 DIS Rules provide: "At every stage of the proceedings, the arbitral tribunal should seek to encourage an amicable settlement of the dispute or of individual issues in dispute." See commentary in Kreindler, "Arbitrating with Different Legal Traditions: Civil Law," *Arbitration*, Vol. 75, No. 2, pp. 199, 204 (May 2009).

²³ CEDR Rules for the Facilitation of Settlement in International Arbitration (CEDR Settlement Rules); <http://www.cedr.com>

²⁴ ADR News, *ICDR Offers Concurrent Mediation/Arbitration Clause*, *Dispute Resolution Journal*, pp. 15 to 17 (November 2008/January 2009). The new CPR Global Rules For Accelerated Commercial Arbitration (August 20, 2009) provide that "[t]he Arbitral Tribunal may suggest that the parties explore settlement of one or more issues that are involved in the arbitration proceeding," and with the consent of the parties, "the Arbitral Tribunal at any stage of the proceeding may arrange for mediation of the claims asserted in the arbitration by a mediator acceptable to the parties who may be a member of the Arbitral Tribunal." *Id.*, CPR Global Accelerated Rules 19.1 to 19.5

²⁵ See “JAMS Proposes First-Ever International Mediator-in-Reserve Policy,” (November 23, 2009) [<http://www.jamsadr.com/jams-proposes-first-ever-international-mediator-in-reserve-policy>].

²⁶ See, e.g., Sussman, “All’s Fair in Love and War – Or Is It? – The Call for Ethical Standards for Counsel in International Arbitration,” *Transnational Dispute Management*, Vol. 7, Issue 2, pp. 1 to 15 (November 2010). Also, the Arbitration Committee of the International Bar Association (IBA) has established a Task Force on Counsel Ethics, the goal of which is to examine whether ethical guidance is required, and, if so, what form it should take. See Walker, “Ethics in Arbitration for Counsel and Arbitrators,” *IBA Arbitration Committee Newsletter*, pp. 10 to 11 (March 2009). See Benson, “Can Professional Ethics Wait? The Need for Transparency in International Arbitration,” Vol. 3, No. 1, *Dispute Resolution International*, pp. 78 to 94 (March 2009) (Note that this article includes a proposed “checklist” of proposed ethical rules for counsel on pp. 89 to 94).