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ARBITRATION: FAIR FORUM FOR CONSTRUCTION DISPUTES

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Introduction

Approximately one of every five major arbitration proceedings is concerned with a dispute arising out of a construction project.

There is a certain inevitability to disputes in construction, usually arising in one or more of three categories:

1) the unexpected or different site condition, usually subsurface, and typically concerned with the quality, location or volume of soil, rock or water;
2) a change in the work - sometimes directed by the owner belatedly (for financial or other serious reasons, or for fickle reasons), sometimes directed by the engineer, and sometimes not formally directed at all but realistic in effect arising from an act construed as a change, now routinely termed a "constructive change"; and
3) the time-sensitive unexpected event which can include the various delay, scheduling and coordination problems, ranging (chronologically speaking) from initial site access blockage, through stalled shop-drawing approval, to the issuance of changes after an original completion date.

Parenthetically we can say to the reluctant users of arbitration that disputes might be minimized in these three areas by 1) careful contract drafting, extensive geotechnical work, and

a fully coordinated design, before contract execution; and 2) a closely managed contract administration and scheduling effort, during construction.

For the most part in construction dispute resolution, issues involve mixed questions of law and fact. The fact portion is the major portion of the mix. Where can the analysis of facts, records and scheduling data and the effective presentation thereof most effectively occur?

The Dispute Resolution Forum: Court or Arbitration?

Even if the courts were presided over by brilliant jurists, it is obvious that the courts in many countries are inundated by their caseload, civil and criminal. And if they were not, it is also obvious that the background experience in construction needed to understand the complex case would not be found.

With all of the discussion of the new formats for dispute resolution - some with very catchy titles such as "mini-trials," "endispute," and "rent-a-judge" - arbitration remains the leading alternative dispute resolution ("ADR") technique in the industry.

It could be suggested that this is inertia since certain standard industry forms in wide use have long provided for arbitration as the dispute resolution mechanism (e.g., the General Conditions established by FIDIC (Fédération Internationale des Ingénieurs Conseils[1])).

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[1] This is the form of conditions generally used by the World Bank and by the United States Agency for International Development.

But there are significant reasons for the continued, and even increasing, use of arbitration and the retention of arbitration clauses in recognized standard documents. The key to arbitration is that it is both flexible and binding. By flexible is meant that since arbitration is consensual, by agreement of the parties usually as part of their construction contract, the process can be tailored by the parties to fit their needs. By binding is meant that, unlike some other forms of ADR, the process comes to a definitive and judgmental end, with a decision which is as enforceable as a court judgment. (That the decision in arbitration parlance is referred to as an "award" is definitely not to imply that the claimant always comes away with something.)

Arbitration is thus a sort of sensible middle way between the rigidity of the judicial structure on the one hand and the looseness and possible inconclusiveness of some other forms of alternative dispute resolution.

Party Autonomy

The consensual nature of the way in which arbitration works is expressed in the term **"party autonomy."** This is a core concept in the new arbitration law of Egypt, effective as of May 1994, is a core concept of the model law of UNCITRAL, and is essential to the goals of international commercial arbitration. This works in several ways:

1) The parties, in their arbitration agreement, can select not only a set of rules for their potential

arbitration, but the institution to administer the rules.

2) The parties can change the rules, if they choose. By agreement, for example, they can provide for:

   a. discovery of documents and pre-hearing depositions of witnesses - features which some lawyers feel are essential to a complex construction case;

   b. consolidation of arbitration proceedings among more than two parties, to avoid the possibility of inconsistent results emanating from different panels examining the same issues;

   c. an award which sets forth the reasoning of the arbitrators in making their decision.

3) The parties, most importantly, can select the arbitrators or a method for selecting the arbitrators when needed. Importantly, as now embodied in Egyptian law, the parties may enable an arbitral institution to select the arbitral panel; this eliminates what had been a problem area in Egyptian law in the past and had made Cairo a less desirable arbitration venue. This statutorily-endorsed autonomy not only avoids the uncertainty of the judicial process (where the judge, at best, will have slight familiarity with the industry), it

> assures that the forum will have the expertise not only to decide the case with a better understanding of the factual background but will also be able to hear it considerably more quickly. The selection of arbitrators is a critical step in the arbitration process over which the parties have some control and where their attorneys have an opportunity and, indeed, an obligation to investigate potential arbitrators' qualifications.

Party autonomy therefore means that "going to arbitration" does not put into motion a rigid process in which an international arbitral institution is substituted for a local court. Apart from the adaptability described above (not to mention that hearing dates can be scheduled by agreement), the decision in arbitration is made by arbitrators in whose selection the parties have actually participated, thereby increasing their confidence in the objectivity of the result.

Apart from being particularly appropriate for construction disputes, arbitration is most desirable when we speak of international construction. In short, businessmen and developers, already looking to the flexibility, expertise and speed that arbitration can provide in a domestic context, also look for an impartial, international tribunal to resolve disputes rather than being subjected to the uncertainties and delays of a local court. This thought could lead to a discussion as to whether there is, or should be, a sort of lex mercatoria for construction. Without

taking an excursion into that interesting area, what are the immediate and practical steps to be taken to run an arbitration efficiently in construction?

The Arbitration Panel's Two Roles: Managing A Construction Arbitration And Deciding The Case

Construction disputes are complicated. Can the flexibility of arbitration meet this challenging fact? In response to the critics of arbitration, who in some countries now say that arbitration is as slow and expensive as litigation, the answer has to be a constructive one.

This is, admittedly, an area where there are differing views. Let us consider three, perhaps slightly exaggerated, viewpoints:

1) The Passive Arbitrator - Weighty With Judicial Demeanor

Some commentators would say that the arbitrators, with their important decision-making power, which is greater than that of judges in certain respects, must act with restraint, a restraint which treats that power with intellectual humility and a desire to impart justice. They would say further that the system, in court or in arbitration, is basically an adversarial one - i.e., out of the combat of argument and analysis (and sometimes of the combat of factual assertions, but not often in construction) will come truth and a correct decision. This is the adversarial system or, if you will, the common law approach and that approach means that each adversary must be allowed to organize and fully present his own case without interference from a judge or arbitration panel. In

effect, this is the sporting theory which calls for a passive arbitration panel, exaggerates the hearing role or the showmanship part of the lawyer's function, and, in the worst situation, would reward the party with the attorney having better forensic skills.

2) The Cautious Arbitrator - Tolerating Attorney Antics

Other observers who have some reservations about the ultimate efficacy of this confrontational, sporting system, might nevertheless say: Well, yes, the system can be abused, a respondent can delay, a poor attorney can harm his own client's case, and so forth, but you interfere at the risk of exposing the hearing to a charge of denial of "due process." Better to be tolerant, they say, than to be guilty of what is called, perhaps pejoratively, "arbitrator misconduct" and bring down the criticism of arbitrariness to the arbitration system and cause an award to be overturned in a court. In fact, this has more or less been the counsel, up to now, of the American Arbitration Association in its arbitrator training. One of its texts for arbitrators says:

> Arbitration awards can be subject to attack when arbitrators refuse to hear material testimony, or accept relevant evidence. Therefore, arbitrators often accept doubtful material but give it little weight. (AAA, A Guide for Construction Industry Arbitrators, 1989, p. 19.)

The next sentence from the AAA Guide is better, indeed, but understated:

> However, indiscriminate acceptance of irrelevant, repetitive, or immaterial evidence can be costly and delay the arbitration process" (Ibid).

In most, but certainly not all, arbitration proceedings there is a party seeking damages and a party resisting making payment. The respondent, or defendant, has the motive to delay the process; defending by delaying is usually more easily effected than moving forward. But the truism that justice delayed is justice denied must be recognized by modern arbitrators.

This brings us to a third view.

3) The Activist Arbitrator - Expediting Arbitration

Responding to the challenge of criticism of the process is the view that an arbitration panel has to be much more than a passive, Sphinx-like observer of a procedure dominated by contesting adversaries where the panel's only role is to come to life at the end of hearings to render an award. This third view might be denominated an endorsement of the activist arbitrator.

Modern arbitration cases are often record-intensive. This is especially so in construction where the owner (or "Employer" in the terminology of the FIDIC Contract Conditions), and the Engineer and the Contractor all keep reports, logs, drawings, minutes and correspondence detailing the minutiae of contract performance events. The era of copying machines has added to the paper inundation. In the first instance, it is the duty of parties' counsel to sort through this mélange, find the core of the case, and organize it for presentation. If counsel stumble or stall, the task falls to the arbitrator. The "activist arbitrator" is not

simply a fidget who interrupts counsel to ask questions at hearings. (Arbitrator questions usually follow those of counsel.) The activist or, better, the "arbitrator-manager" is willing to push the process along by means of hearing preparation suited to the issues, maximizing stipulations, focused limitation of issues, and persistent pressure on counsel.

From the arbitrators' perspective, the arbitration process is, in a certain sense, like tennis. The quality of a player's game is definitely affected by the quality of the game of his opponent because, although vigorously competing on opposite sides of the net, there is a reciprocal pace in moving the ball. It is often said that an arbitration depends upon having good arbitrators. But there is a limit if the parties' counsel are difficult or not competent. If a judge's quality decision is reflective of quality briefing by counsel, an expeditious arbitration proceeding reflects skill and cooperation on the procedural aspects by counsel.

Counsel can be simultaneously efficient and persuasive. Arbitrators must be simultaneously managerial and judicial.

The key event for an effective arbitration is the preliminary hearing. It is analogous in function to the Terms of Reference procedure of the ICC rules or to a scheduling conference in some court rules. This is the essential start up point, where the case is organized for presentation at evidentiary and other hearings on the issues. In a complex case, there may well be more than one such preliminary conference. If the attorneys for the parties are experienced, and reasonably civil and cooperative with each other,

they may well take the initiative in organizing that conference. One side may be reluctant, or even inept. Then the arbitrators must take charge and issue directions.

The leading arbitration institution in the United States, the American Arbitration Association, deserves credit for its programs, its recommended rules and its case administration. These are well known. Less known but quite important has been the Association's wise resistance to pressure from attorneys to make the rules more elaborate and to spell out more pre-hearing procedures. Briefly put, the push from some quarters has been to make arbitration more like litigation.

The AAA view has been that, arbitration being consensual, the parties are always free to agree upon special procedures for complex cases. In fact, after a multi-year study, the AAA launched a program in 1993 for large complex cases with the goal of cost-effective arbitration by means of a special panel of arbitrators and the fostering of procedures aimed at that goal. The sticky issue of discovery procedures, not normally a part of arbitration, is covered via two mechanisms: an administrative conference with AAA staff and a preliminary hearing with the arbitrator or panel. These meetings arrange for the extent and schedule of the production of relevant documents and other information such as stipulated facts, testimony outlines, and briefing schedules.[2]

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[2] Cf. AAA text: Guidelines for Expediting Larger, Complex Construction Arbitrations, 1992.

In short, the AAA has moved further forward toward encouraging arbitrators[3], in large and complex cases, to conduct proceedings with a firm hand. This is an approach which a federal circuit court endorsed following a major construction arbitration, in which the arbitration award was upheld. The court there said, speaking of the conduct of the arbitration:

> The arbitrators faced a complex factual dispute involving substantial money. The parties hotly contested the case. Because of the potential award, the parties prepared massive evidence for consideration by the arbitrators. It was clear from the beginning that a tight rein was necessary to keep the proceedings from getting out of hand. The panel was strict, often abrupt, with the parties. The proceedings were pushed along; evidence was trimmed and testimony condensed. Such streamlining of procedures notwithstanding, extensive pretrial conferences were held and a nine-day hearing was conducted yielding 2,756 pages of testimony with additional depositions and 179 exhibits. On this evidence and with this background, an award was made. We have carefully examined the record and conclude the award was fairly reached without the appearance of bias. (Parsons & Whittemore Ala. Mach. & Servs. Corp. v. Yeargin Constr. Co., No. 80-7909, slip op. at 16-17 (11th Cir. Aug. 5, 1982).[4])

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[3] Earlier the AAA had published, "The Arbitrator's Role in Expediting the Large and Complex Commercial Case" by A. Poppleton, in 36 Arbitration Journal, No. 4 (1981).

[4] Ironically, the party resisting an arbitration award in this domestic case (1982) was the same company which, in an international context, had resisted an award relating to a project in Egypt years earlier (Parsons & Whittemore Overseas Co. v. RAKTA, 508 F.2d 969 (2d Cir. 1974)). In both cases, U.S. federal circuit courts upheld the arbitration awards.

The Objectives Of The Model Arbitration Law

Effectively, the U.S. Arbitration Act and the laws of the various state jurisdictions of the United States have largely recognized the principles found in the UNCITRAL model law. The old hostility of the courts toward the arbitration process, which did vigorously exist a half century ago, has evaporated. Not only has this hostility and skepticism disappeared but, in effect, there has been a reversal in policy, a volte-face, such that courts are now actually pushing parties <u>toward</u> alternative dispute resolution procedures, including arbitration.

As a result, there is now a substantial body of case law, in the federal and state courts, which supports the arbitration process in various ways.

Dispute Resolution Certainty Fosters Investment

One evident effect of the new Egyptian arbitration law will be the confidence which the statute will suggest to international businessmen as to the efficacy of a contractual arbitration clause. The uncertainty as to arbitration in Egypt is gone. Doubts as to support for arbitration in the local courts are now moot. As a result, businessmen in general, and engineers and constructors in particular, will feel more secure in contracting with Egyptian entities.

The fact of passage of the Egyptian law is, of course, complementary to and quite consistent with the prompt recognition by Egypt of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral awards.

Conclusion

For Egypt in particular and for the developing world, truly international arbitration facilitates international development and business investment. We need to concentrate our attention in a positive way, on development, and not in a negative way. We can look to the successful examples of population-dense Hong Kong and Taiwan. When investors can see that the legal system is clear and reliable, and that property rights and the sanctity of contracts will be upheld (pacta sunt servanda), investment will follow. The arbitration process is part of that legal system and the Egyptian legislature is to be congratulated on enacting its new law and enhancing commercial arbitration.

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OVERVIEW

Of Counsel in the Washington, D.C., and Vienna, Virginia, offices of Wickwire Gavin, P.C.

Concentrates on construction and engineering law. Represents contractors, engineers, and owners in questions relating to international, federal, local government, and private projects. Relevant experience includes:

- Appearing in federal and state courts, and before arbitration and federal contract appeals boards for twenty years;
- Participating as arbitrator in construction and other commercial arbitration cases, both *ad hoc* and under UNCITRAL and AAA in the United States and abroad;
- Service as consultant to United Nations and World Bank on contract issues;
- Co-author of special report to Associated General Contractors of America on negotiated procurement;
- Lecturer for International Federation of Consulting Engineers (FIDIC) on contract conditions, performance security, and risk allocation.

Principal in WG International, Ltd., a consulting firm specializing in international construction claims review and risk management.

Associate, Chartered Institute of Arbitrators.

Former General Counsel of Perini Corporation, a major international construction contractor.

REPRESENTATIVE CLIENT EXPERIENCE

- Represented contractors on civil works projects (Bureau of Reclamation and Corps of Engineers, heavy construction).
- Represented owners in building and water supply projects.
- Defended engineers and construction manager on building projects in New York and New Jersey.
- Prepared and negotiated international claims concerning infrastructure projects in Egypt.
- Represented public authority on infrastructure claims in Southeast Asia.

EDUCATION

J.D., St. John's University School of Law
B.S.F.S., Georgetown University School of Foreign Service

ASSOCIATIONS

American Bar Association: former Regional Chairman and member of Council of Public Contract Law Section; former Vice-Chairman, Engineering and Construction Services Committee, Model Procurement Code Project
Fellow, American Bar Foundation
Member, American Arbitration Association Construction ADR Task Force
International Bar Association
American Society of Civil Engineers
Executive Committee of The Moles
World Arbitration & Mediation Report, Transnational Juris Publications, Advisory Board Member

PUBLICATIONS

"Alternative Dispute Resolution in the Construction Industry," *Construction Arbitration Under the AAA*, Wiley, 1990.

"Changes Resulting from Interference with Methods of Performance," Ch. 7, *Construction Change Order Claims*, Wiley, 1994.

"An American Perspective on Aspects of the New F.I.D.I.C. Conditions," *5 International Construction Law Review 232*, London, 1988.

"The New (Fourth Edition) FIDIC Civil Works Contract," *Construction Briefings*, Federal Publications, Inc., 1988.

SPEAKING AND TEACHING ENGAGEMENTS

Presents programs on construction and legal issues to a variety of trade and professional organizations. Conducts training in arbitration for the International Law Institute, the Cairo Arbitration Centre, the Quebec Arbitration Centre, the Asian and Pacific Centre for Transfer of Technology of the United Nations,and the American Arbitration Association. Representative speaking engagements include:

"Who Pays for the Unexpected? The Law, the Courts, and ADR," American Society of Civil Engineers Congress, Cambridge, MA, 1991.

"Construction Disputes: How to Prevent Them -- Effective Contract Administration," American Arbitration Association, Boston, MA, 1982.

"Differing Site Conditions: How to Deal with the Unknown," Engineering News-Record, Advanced Course on Construction Claims, Washington, D.C., 1979.

"International Construction Claims," Engineering News-Record, Boca Raton, FL, 1977.

"The Construction Arbitrator: Powers, Duties, and Responsibilities," American Arbitration Association, New York, NY, 1979.

"The Expected and Unexpected in Construction," American Bar Association National Institute, Denver, CO, 1978.

"The Subsurface: Wellspring of Hydrous Legal Problems," Association of Engineering Geologists - ASCE Geotechnical Group, Joint Symposium, Baltimore, MD, 1975.