

THE DISPUTE RESOLVER

The Membership Newsletter
of Division 1 of the ABA Forum on the
Construction Industry

<http://apps.americanbar.org/dch/committee.cfm?com=CI101000&edit=1&new=1>

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DIVISION 1 OF
THE FORUM:
DEVOTED TO
IMPROVING
DISPUTE
AVOIDANCE
AND
RESOLUTION

INSIDE THIS ISSUE:

| | |
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| Arbitration: | 2-4 |
| Basic Considerations from Drafting the Agreement to Choosing an Arbitrator | |
| Breakfast in Houston | 4 |
| Member Spotlight | 5 |
| Recent Developments In Construction Law | 6 |
| Division 1's New Website | 7 |
| Save the date! Forum Trial Academy | 7 |
| Dinner at Philippe Restaurant in Houston | 8 |

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NOTE FROM THE CHAIR:

Dear Members:

One of the recurring issues for Division 1 (and to some degree for all of the divisions within the Forum) has been communication with its members. For a number of years, the primary mechanism for communication was an email list. The problem with this email list is that it is not always kept up to date in a manner which reflects the current membership of the Division. Additionally, all of us get so many emails in a given day that it is often difficult to distinguish between those which need to be read, and those which are better left ignored. The Division 1 Steering Committee, and in particular the Technical Subcommittee of the Steering Committee, has worked hard to try to solve the communication problem. I am happy to report that Division 1 has a new and improved website. We also have a QR Reader that will help you reach our website.

All the information you need to know about Division 1's new website is found in the article on this subject in this month's issue of the "Dispute Resolver." Please take a look at it and you will see the future of how to stay in touch with Division 1!

Thanks so much to all of those who participated in the Technical Subcommittee's work on this subject and please contact me with your comments and ideas on how to make the website-based communication system work even better.

-John "Buzz" Tarlow
jtarlow@lawmt.com

ARBITRATION: BASIC CONSIDERATIONS FROM DRAFTING THE AGREEMENT TO CHOOSING AN ARBITRATOR

In the following article, Carl F. Ingwolson Jr. analyzes the steps behind developing an arbitration agreement as a whole

Drafting Proper drafting is not for the faint of heart. As Mark Twain said, “the difference between the right word and the almost right word is the difference between lightning and the lightning bug.” Drafters often give too little thought to drafting (merely “cutting and pasting” an arbitration something-or-other from one form to another) or give too much thought to drafting (devising unworkable, unintelligible, ambiguous multi-page monstrosities that try to micro-manage the entire process). Too often they omit necessary fail-safe clauses. Too often they provide for unending “litigation style” discovery. Too often they impose well-intentioned but ambiguous and unworkable terms and conditions. As one court said:

“A cautionary note – we spend too much time trying to make sense out of arbitration agreements precisely because litigants spend too little time in drafting them. Increasingly, we have been presented with incoherent hybrids and bizarre mutations of supposed agreements for judicial or contractual arbitration. Oftentimes the ‘remedy’ is worse than the disease. We can only warn: Read the label before applying.”

(*National Union v. Nationwide Insurance*, 69 Cal. App. 4th 709, 716 (1999)).

When articles are written, they usually contain a laundry list of twenty or thirty issues “drafters should consider.” Except for the truly gifted, my personal recommendation is to keep it simple. Specify administration by a good provider, incorporate established provider rules and select an experienced Arbitrator. And because the law concerning third-party discovery under the FAA is in flux, avoid restricting the entire arbitration to a single venue. The rest will take care of itself without expensive protracted battles over a dysfunctional arbitration provision. For discussion purposes, the following are clauses, some standard and some not, that are worth considering; whether to use them is up to the reader.

1. **Mediation** If a dispute arises out of or relates to this contract, or the breach thereof, whether in contract, tort or otherwise, the parties shall first try in good faith to resolve the dispute by mediation under the Construction industry Mediation Rules of

the American Arbitration Association, before resorting to arbitration.

2. **Arbitration** Thereafter, any remaining unresolved dispute, that arises out of or relates to this contract, or the breach thereof, whether in contract, tort or otherwise, including issues relating to arbitrability, shall be resolved by binding arbitration administered by the American Arbitration Association under its Construction Industry Arbitration Rules, pursuant to the Federal Arbitration Act, and judgment on any award rendered by the Arbitrator(s) shall be final and non-appealable and shall be entered in any court having jurisdiction thereof. Copies of the Association’s rules may be viewed on its website at www.ADR.org.
3. **Venue** Any such mediation or arbitration shall be at San Diego, California, provided, however, that the Arbitrator, in the Arbitrator’s sole discretion, may conduct special hearings for document production purposes or otherwise at other locations if reasonably necessary and beneficial to the process.
4. **Court Fees** If a court grants a motion to compel arbitration over the objection of any party, that court is authorized to make an interim award of attorney fees relating to the motion. Thereafter, any fees relating to the arbitration proceeding shall be an issue for decision by the Arbitrator.
5. **Arbitration Fees** If any party fails or refuses to timely deposit its share of administrative or Arbitrator fees, the non-refusing party or parties may advance those fees and the non-paying party will be deemed to have waived its right to participate, and shall be precluded from participating, in the arbitration unless and until the non-paying party has reimbursed the paying party or parties which reimbursement shall be at least fourteen days before the evidentiary hearing.

Provider Some will argue there’s no need for an intermediary provider organization – an *ad hoc* proceeding with the Arbitrator handling everything works just as well. I disagree. I’ve handled numerous arbitrations on an *ad hoc* basis when contracts did not mention a provider and have seen the benefits providers bring to the process. They can answer many questions and handle many issues between the parties, schedule hearings, facilitate telephone conferences and an exchange of pleadings, motions and other documents, and handle a myriad of problems at no charge (things an *ad hoc* Arbitrator is likely to bill for) and without risking a claim that one party or the other had an improper communication with the Arbitrator and thereby created possible grounds for vacatur.

Some are concerned, and should be concerned, about provider fees, but they should consider the benefits received.

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All providers have overhead costs for rent, salaries and other expenses that must be covered and, one way or another, they collect those costs from users of the process. Users of arbitration should consider not only (1) the provider's administrative fees, but also (2) the hourly cost of the provider's neutrals, (3) the provider's *Billing Guidelines* (available on request) for its neutrals, and (4) the provider's and its neutrals' policies and fees if a hearing is cancelled, which is an important consideration since most arbitrations are settled and result in cancellation of the evidentiary hearing.

Those who charge the higher initial fee and lower subsequent fees provide one other benefit to parties – higher initial fees tend to discourage frivolous claims. Totally specious claims can be made in litigation, and with some *ad hoc* Arbitrators or providers, by paying only a nominal filing fee, but a party will have to “pay to play” if it wants to make those same claims in an arbitral forum where the filing fees are based on the claim amount. Minimizing such claims also minimizes discovery costs, expert costs, attorney fees and other expenses and results in a significant cost benefit to parties. Parties don't have to pay to defend the absurd.

Rules Most, if not all, major providers have established rules that are available online. These rules have evolved over many years and are the result of much thought and input from people familiar with the process. They handle a plethora of potential problems. Incorporating such rules in a contract, and providing for administration by the provider who disseminated those rules, rather than trying to micro-manage the process by writing custom provisions in a contract, will save the parties significant time and expense.

Arbitrators One benefit of arbitration is the ability to select the neutrals. Too much time – and time means money for the parties – is wasted in court trying to explain words of art or industry concepts or expert opinions to judges or juries not familiar with the subject matter at hand. In Arbitration, parties can read Arbitrator resumes, they can specify desired qualities (e.g., not just construction but “plumbing;” not just intellectual property but “web hosting”), they can read how much training an Arbitrator has received and programs the Arbitrator has attended, they can see how much training an Arbitrator has conducted and how many programs the Arbitrator has presented, and they can view organizational memberships (e.g., bar association ADR sections, the College of Commercial Arbitrators, and current and former organizations bearing on the subject matter such as employment, construction, patents, etc.). As indicated above, when circumstances justify or questions exist, Case Managers can even arrange for parties or counsel to directly interview Arbitrators.

Experienced Arbitrators are also well versed in writing sustainable awards, knowing what issues are for Arbitrators and what issues are for courts, knowing what motions and discovery might benefit the process and which might cause nothing but added expense for the parties, what stipulations can expedite the process, what issues should be covered in preliminary hearings, how to minimize parties' costs and expedite the arbitration to give them what they bargained for when they chose arbitration to resolve their dispute, what orders will benefit the process and which may cause problems, the importance of early identification of potential witnesses, the effectiveness of using tandem experts, what potential conflicts much be disclosed, and other issues.

There is also a large body of “arbitration law” applicable to the process. About ten years ago, several construction advocates decided it made sense to select other construction lawyers to arbitrate their cases, rather than going through an arbitration provider. It took little time before they realized the people they were selecting as neutrals were, although well versed in construction law, not well versed in arbitration law, and that led to problems. The attorney who related the story to me not only went back to using a provider but became a construction panelist with the AAA. My own database of arbitration cases runs hundreds of pages and includes every California and 9th Circuit case, as well as many from other jurisdictions, decided in the past seventeen years, and many from long prior to that.

We learned many years ago from representatives of four major construction organizations (AIA, AGC, ASA and EGCA) that their members' biggest complaint with the duration of arbitrations related to frequent continuances. There are, of course, techniques available to minimize continuances just as there are numerous ways to receive evidence. Experienced Arbitrators are familiar with these techniques and others that help parties achieve the process they expected.

Advocates It is a pleasure to work with counsel who are familiar with the process and know how to work together among themselves and with the Arbitrator to assure an efficient, cost-effective arbitration.

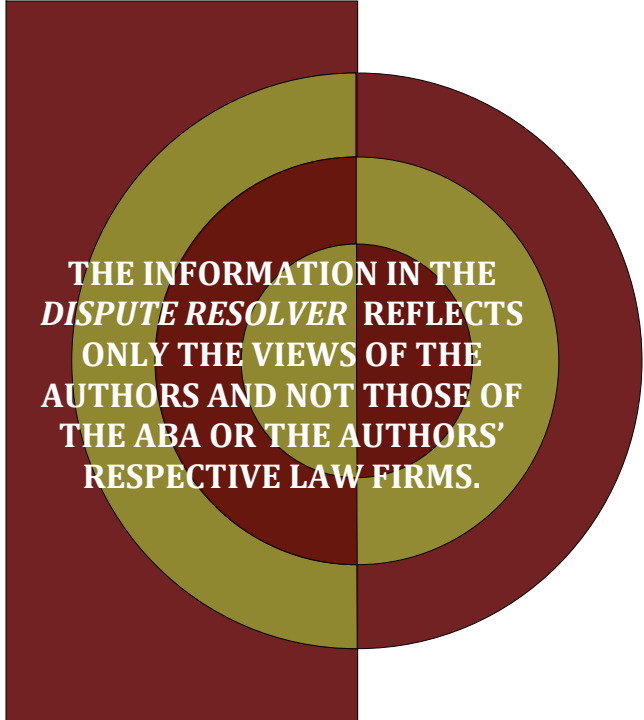
Litigation and arbitration are different processes bound by different statutes, different rules and different legal precedents. Counsel should accept an advocacy role only if they fully understand the client's goals and the applicable arbitration rules and procedures and legal authority in the involved jurisdiction.

One of the key benefits of arbitration is the ability to select the trier-of-fact. As indicated above, counsel should be diligent in selecting Arbitrators whose resumes reflect significant training and involvement in arbitration activities, Arbitrators with subject matter expertise, and Arbitrators with a demonstrated record of completed arbitrations.

Advocates will also greatly assist their clients by cooperating with each other to minimize procedural disputes, reach realistic stipulations, schedule witnesses, exchange documents and achieve a fair and expeditious process.

Parties Users of arbitration should, with the assistance of counsel experienced with the process, draft clear and unambiguous arbitration provisions, incorporating rules of a recognized provider and not trying to micro-manage the process. Incorporating deadlines for completing the arbitration can be beneficial, but must be realistic.

It is highly recommended that parties stay actively involved throughout the arbitration, communicating with counsel, participating in preliminary hearings and conference calls rather than letting advocates agree and the Arbitrator order what may prove to be unworkable and unchangeable orders, participating in the Arbitrator selection, helping to control motion and discovery practice, considering a realistic and beneficial form for an award, and being attuned to settlement possibilities. ■



**THE INFORMATION IN THE
DISPUTE RESOLVER REFLECTS
ONLY THE VIEWS OF THE
AUTHORS AND NOT THOSE OF
THE ABA OR THE AUTHORS'
RESPECTIVE LAW FIRMS.**



BREAKFAST IN HOUSTON

TOPIC: SPECIAL DISCOVERY TECHNIQUES

Four local speakers are lined up to discuss certain issues such as third-party discovery, depositions by written question, and various technologies that are not otherwise used. The Breakfast will be held February 3, 2012 from 7:30 to 8:45 a.m.
Location TBD.

MEMBER SPOTLIGHT



Catherine E. Shanks

As many of you know, Catherine “Cathy” Shanks is a recent chair of Division 1. She has been part of the construction ADR community for over twenty years. What you might not know about Cathy, however, and what might impress you most, is the path she took along the way.

Cathy grew up in Simsbury, Connecticut, a small town in which her mother was the first selectman (which is akin to a mayor or town manager). Through her mother’s 10+ years as first selectman, Cathy “got a taste for building” at an early age because a significant aspect of her mother’s employment involved construction matters.

In 1987, Cathy graduated from Skidmore College in Saratoga Springs, New York; she received an English degree from this typical, small college in the Northeast. Shortly thereafter, she responded to an advertisement in the Boston Globe and accepted an entry-level job as an AAA case manager. Little did Cathy know, her career was about to take flight.

Cathy progressed through the ranks at AAA, working at the administrative/operations level with respect to various matters, eventually gravitating towards construction disputes. Having gravitated toward the construction ADR caseload, in 1991, she decided to attend law school, and planned to subsequently seek employment with a construction law firm. In 1995, she received her J.D. from the New England School of Law, a degree she earned while being fully-employed at AAA.

Cathy continued to work her way through the AAA ranks. In 2001, she was named vice president for the AAA’s Northeast Case Management Center and oversaw its start up and led its operations for over seven years. in East Providence, Rhode Island. She managed a staff consisting of up to seven different case management teams, administering commercial, construction, class action, employment, real estate and a number of other types of ADR cases.

In 2008 Cathy took her vast operations experience to a different role within the AAA to become a Vice President for business development in the Construction Division. In addition, Cathy worked with the construction industry on a national level through AAA's National Construction Dispute Resolution Committee, which is comprised of liaisons to over 25 construction industry professional and trade organizations. She has served as a member of the AAA's arbitrator training faculty and has contributed to the development of arbitrator training materials as well as AAA rules, guides and procedures. In recent years she worked on the revision to the AAA’s Construction Arbitration Rules and the AAA’s New Jersey Residential Lien Arbitration Rules. .

This fall, to strengthen the breadth of her dispute resolution knowledge, she completed the Dispute Resolution Board Foundation Administrative and Practices and Advanced DRB training. Additionally, she started teaching a conflict resolution course in Wentworth Institute of Technology’s Masters of Construction Management program.

Having moved on from the AAA, Cathy is currently pursuing both ADR and advanced educational opportunities. In her spare time, Cathy enjoys cooking and gardening. Next time you see Cathy, you might ask her to share one of her chili recipes!

Recent Developments in Construction Law

Two Georgia cases from 2011 are highlighted in this month's edition of Recent Developments. If you have a case you would like to submit, please contact a member of the newsletter editorial board.

Coverage of Georgia's Anti-Indemnity Statute Extended to Assignment

Like many states, Georgia has enacted an anti-indemnification statute which invalidates agreements that purport to indemnify a party to a construction contract for claims which arise out of that party's *sole* negligence. O.C.G.A. §13-8-2(b). Unlike other states, however, Georgia courts have construed this code section broadly, applying the statute to commercial leases, *see May Dep't Store v. Center Developers, Inc.*, 266 Ga. 806 (1996), and residential leases. *See Country Club Apartments, Inc. v. Scott*, 246 Ga. 443 (1980).

With this background, the Georgia Supreme Court weighed in recently regarding an indemnity agreement contained within an assignment of rights from an original developer to a homeowner's association of a newly developed subdivision in *Kennedy Development Co. v. Camp*, No. S11G0274 (Ga. Nov. 21, 2011). In *Kennedy Development*, the Camps owed twelve acres of land near a subdivision developed by Kennedy. *Id.*, slip op. at 2. Excess runoff from a detention pond at the subdivision flowed across the Camps' property in a creek; after Kennedy developed the property, however, the amount and velocity of the runoff had increased significantly. *Id.* As a result, the Camps sued Kennedy for negligence, nuisance, and continuing trespass. *Id.*

After the suit was filed, Kennedy assigned its rights for maintaining the common areas of the subdivision, including the detention pond, to the subdivision's homeowners association (the "HOA"). *Id.* at 3. The assignment contained a broad indemnity provision which required the HOA to hold Kennedy harmless for any costs related to the construction, maintenance, repair, or operation of the subdivision. *Id.* The HOA succeeded at both the trial court level and in the Georgia Court of Appeals in invalidating the indemnity provision. *Id.* at 1.

The Georgia Supreme Court set forth its test for the Anti-Indemnity Statute to apply to invalidate the agreement and held that two factors must be satisfied. *Id.* at 5. First, the contract must relate in some way to a contract for the construction, alteration, repair, or maintenance of certain property. *Id.* In addition, the agreement must be a promise to indemnify a party for its own sole negligence. *Id.* Because the indemnity provision satisfied both factors, the court held that the provision was invalid.

Professional Malpractice Versus Simple Negligence

In *Hamilton-King v. HNTB Georgia, Inc.*, 715 S.E.2d 476 (Ga. Ct. App. 2011), the Georgia Court of Appeals considered whether claims of simple negligence remained for a jury's determination after the plaintiffs' experts were excluded. The experts had been excluded by the trial court. The Court of Appeals initially reversed that decision, but the Georgia Supreme Court disagreed and excluded the experts. *Id.* at 477-478.

The plaintiffs were seeking damages for what they believed was a defective roadway design. *Id.* at 478. They alleged that their injuries were caused at least in part by a lack of proper lighting and signage in and leading up to a bridge construction area. *Id.* As a result, the plaintiffs sued both HNTB (the engineer) and Plant Improvement (the road contractor) for their alleged failures to ensure that the lighting and signage was sufficient. *Id.*

To make the determination as to whether any claims remained for a jury to decide, the Georgia Court of Appeals considered whether the claims against either HNTB or Plant alleged claims sounding in simple or ordinary negligence or if the claim sounded in professional negligence. *Id.* at 479. This issue, the court stated, is an issue of law for the court to decide. *Id.* To differentiate between simple and professional negligence, the court drew a bright line: if the claim goes to the propriety of a professional decision, then the claim is professional malpractice; if the claim relates to performing an administrative, clerical, or routine act, then the claim is one for simple negligence. *Id.* Because the claims in this lawsuit all hinged on whether the engineer or contractor performed professional duties properly consistent with professional standards, the claims sounded in malpractice and were dismissed due to the failure to have supporting expert testimony. *Id.*

DIVISION 1'S NEW WEBSITE

Find out what's going on at Division 1 - Read our Monthly Newsletter - Get Hot Tips, News, & Articles on Dispute Avoidance & Resolution

4 EASY WAYS TO CHECK IT OUT!

1. QR Reader



2. <http://apps.americanbar.org/dch/committee.cfm?com=CI101000&edit=1&new=1>

3. From The Forum's Webpage

1. Go to http://www.americanbar.org/groups/construction_industry.html
2. Click "Divisions" (on left side)
3. Click "Division 1 Dispute Avoidance & Resolution"

4. From ABA's Webpage

1. Go to <http://www.americanbar.org/aba.html>
2. Scroll over "ABA Groups" (on top)
3. Click "Forums"
4. Click "Construction Industry"
5. Click "Divisions" (on left side)
6. Click "Division 1 Dispute Avoidance & Resolution"



June 2012



SAVE THE DATE

Forum Trial Academy Program June 2012, Washington, D.C.

The inaugural session of the Forum Trial Academy Program will be held at the United States District Court in Washington, DC from June 27, 2012 through June 30, 2012. This intensive three day program will focus on the trial skills necessary to successfully present a construction case. The program will emphasize skills unique to construction litigation, such as the direct and cross-examination of technical experts. Students will have multiple daily opportunities to get "on their feet" trial experience, culminating in a mock trial on the final day.

Enrollment will be limited to 24 participants to ensure a high quality experience. Twelve experienced construction litigators have been selected to serve as the faculty, and experienced construction experts are being recruited to serve as witnesses. Further details will be presented during the opening remarks at the mid-winter meeting in Houston and will be posted on the Division 1 website.

Division 1 Steering Committee member Nick Holmes is involved in the planning of this program. Please contact him if you have any questions.

ABA DIVISION 1

DINNER AT PHILIPPE RESTAURANT IN HOUSTON



WHEN:

February 2, 2012 at 7:30 p.m.

WHERE:

Paris Room at Philippe Restaurant and Lounge

WHO:

First 25 Division 1 members who sign up

WHAT:

Although this is not an official meeting, current projects and future endeavors of Division 1 will be discussed

RSVP:

Carla Dillon (225) 248-2108 or

cdillon@joneswalker.com

Lisa Heard (713) 626-2525 or

lshheard@interface-consulting.com

No Later than Monday, January 30, 2012

PHILIPPE RESTAURANT AND LOUNGE—THREE-COURSE DINNER MENU

STARTERS

The Garden Salad

Lobster Bisque

ENTREES

Grilled Trout

Chicken All-Natural

Steak and Fries

Spinach Cannelloni

DESSERTS

Tonka Bean Crème Brulee

PLEASE NOTE:

Division 1 does not have budget for this event, so each attendee pays for their own dinner and drink bill.

Three-Course dinner menu at \$55 per person, also includes the Chef's Fresh Bread, Soda, Coffee, and Tea Service (Alcoholic beverages are not included)

If you have read this far you deserve an award—but only if you are the first person to contact Tony Lehman! You will receive a \$25 gift card! (Only one gift card available.)