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Conducting Construction ADR Proceedings During the Pandemic

A Conversation Between Two Experienced JAMS GEC Panelists

***Kenneth C. Gibbs, Esq., and Andrew Ness, Esq., FCI Arb,** talk about their impressions from managing and conducting their entire caseload virtually for the last 16 months.*

KEN: From March 2020 until about June 2021, all of our proceedings, because of the pandemic, were conducted virtually using Zoom or some other platform. It's my opinion that all types of arbitrations and mediations are not created equally, and it's my view that construction claims—i.e. disputes regarding delays and cost overruns on major projects—have some unique qualities. These qualities include large dollar amounts in dispute; substantive legal issues; number of parties; participation of insurers, particularly professional liability carriers; participation of CEOs because of high stakes; and participation of experts with respect to delay and quantum issues.

I only preside at mediations, so I'll let Andy comment on his experience in arbitrations. While I've had success at virtual mediations, I believe that in the arena of construction claim disputes, we are much better served by—and I am much more effective in—in-person mediations. I recognize that my conclusion may contradict what I've heard from others—that virtual mediations are the greatest thing since sliced bread—but I believe that the unique characteristics of construction claim disputes make the in-person format significantly more effective. I can't tell you how many mediations I've successfully concluded by having one-on-one sessions with decision-makers over a cup

of coffee. While you can try to have one-on-ones in virtual sessions, they just aren't the same.

So my initial thoughts are that while virtual mediations were all we had to work with for the last year—and they were successful—live, in-person mediations of large construction claims are more effective. That is not to say we won't be using Zoom anymore; clearly, hybrid mediations—ones in which some participants appear via Zoom while others attend in person—are here to stay.

ANDY: As our JAMS colleague Tom Stipano has written about, the evolution of dispute resolution over recent decades has been all about the development of different “lanes,” or different ways of resolving disputes that best fit different contexts and types of disputes. Litigation, arbitration and mediation are the major thoroughfares, but there are also lots of byways that have been developed, like mediation with neutral evaluation and various styles of baseball arbitration. I expect that



when we look back on pandemic-era ADR, we will likely view it as forcing the rapid development of useful variations on existing dispute resolution methods that will continue to be with us going forward.

When the pandemic started in March 2020, we all scrambled to adapt and learn how to use Zoom, viewing it as a make-do workaround to allow our work to continue. But with time and experience, we realized there were some distinct advantages to virtual proceedings. The savings in travel costs were immediately obvious, but it took a bit longer to appreciate

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that insurance adjusters were more likely to participate in a mediation when the need to travel and the associated expense were eliminated. Similarly, a lot of JAMS mediators have commented that it is easier to “read the room” in a caucus with a sizable contingent of party representatives when you can quickly scan everyone’s face and body language, using the “Brady Bunch” view on Zoom, without even having to move your head. Witnesses in an arbitration, and part-time participants in a mediation, can come and go as needed without counsel and client having to decide whether it is worthwhile to bring them to the proceeding in person. There is no doubt that something important is lost when you take away the intimacy of a quiet hallway conversation and the personal contact of being in the same room together, but something is gained by being on Zoom as well.

A lot of credit for the success of virtual ADR during the pandemic has to go to the Zoom platform, which most neutrals seem to prefer over the several alternatives. It effectively replicates all the tools you use in an in-person mediation, not just in allowing joint sessions and separate caucuses, but in providing the ability to create new caucus rooms on the fly with just the participants you want. Its user-friendliness means that the you can set up a new caucus group in roughly the same time it takes in person to walk down the hall from one caucus room to another. I often say that if you had set out to create a videoconferencing platform precisely suited for mediation, Zoom is what you would have come up with. It’s not quite as well suited to arbitrations, but it’s still quite acceptable. I often think about how much more difficult our virtual neutral practices would have been if we had to use the platforms available just five years ago, and our blind luck that Zoom was there, ready and waiting, when the pandemic hit.

KEN: Andy, I agree with you that it is clear that the pivot we made to virtual proceedings through Zoom “saved” the ADR process during the pandemic just as it “saved” the legal industry in general, as major law firms recorded record revenues and profits per partner during the pandemic. And there is also no doubt that while we all entered the virtual world with trepidation, we soon discovered the advantag-

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es that you outline above. And finally, I agree that the business world in general and the ADR world that we live in have been forever changed by what occurred during the pandemic with regard to virtual proceedings. Just last week, I had a mediation in Seattle where each party had attorneys and others present in person but where various principals and insurance company representatives participated from around the country via Zoom. Certainly this hybrid model is here to stay.

My only point—and I know that I’m perhaps swimming upstream on this one—is that I don’t agree that you can “read the room” better in the Zoom format than in an in-person format. And I think that this is particularly true in the context of mediations on major construction claims. We all do things differently, and I would be the first to admit that I proceed with mediations using an instinctual process. And I have found that my instincts are better served when I can actually look people in the eye rather than trying to do it on a computer screen. For instance, in one major construction mediation I conducted via Zoom during the pandemic, I could never, despite many attempts, get the principal decision-maker to engage. She looked away—she was obviously working on other things—and in general acted in a way that she never would have if we had been sitting at the same table.

I’m not a dinosaur, and I know that ADR world has been forever changed because of the adjustments we made using the virtual process during the pandemic. Heck, everything has changed: My wife and I used to venture out to the supermarket, and now we order everything using Instacart. I just believe—and this is purely personal and anecdotal—that major construction claims mediations are more effective in the in-person format.

Andy, do you have any lessons learned during the pandemic regarding the arbitration of construction claims?

ANDY: Doing an arbitration virtually works reasonably well, but it’s frankly a lot more complicated than a virtual mediation. We all know that almost any substantial construction dispute is very document intensive, often with



a lot of technical documents like design drawings, shop drawings and lengthy technical procedures and specifications. The screen-sharing function on Zoom and other platforms is not great for a document-heavy case. The main drawback is that everyone is limited to looking only at what the presenting counsel wants to show you; there is no ability to look at the rest of the page—much less the preceding or following page—in order to get a bit more context. And in a complicated construction case, arbitrators generally prefer to have a real-time transcript to refer to, which Zoom does not support.

These shortcomings can be overcome, but it requires a lot more technology. In the virtual hearing that worked best in my experience, the arbitrators and counsel each had three separate streams coming at them: the Zoom video and audio stream; a stream from the exhibit database, which allowed us to “flip through the pages” of the current exhibit as well as go back to any prior exhibit at will; and the transcript stream from the court reporter. This required a very robust internet connection and at least two laptop or tablet screens active at all times—or three if you wanted to take notes. To keep three streams working at all times for six separate locations (including the court reporter), and provide access to exhibits as introduced, a technical concierge was used. Were there technical glitches? Sure. Several per day. But that is where the concierge demonstrated her worth, fixing most problems within a minute or two. The concierge also worked with witnesses appearing remotely, to deal with their frequently less than optimal Zoom setups in terms of lighting, audio, internet connections and so forth.

In short, there are significant cost savings in eliminating travel costs, especially when the main participants and witnesses are scattered, but the costs of the additional technology and concierge are non-trivial offsets to these sav-

ings. As we regain the option to choose between virtual and in-person hearings, their relative advantages and disadvantages need to be weighed with respect to each specific case.

It has become cliché to say that virtual mediations and arbitrations are here to stay. Perhaps a more useful assessment is that the pandemic has force-marched the entire ADR community—both users and neutrals—to a position where the participants in every mediation or arbitration can and should decide at the initial conference whether to conduct the proceeding virtually, in person or as a hybrid. Many participants—and essentially all JAMS GEC neutrals—now have generally informed viewpoints on the subject due to our individual experiences since March 2020. The “right” answer will depend on the magnitude and complexity of the dispute; the relative locations of counsel, mediator/arbitrators and other participants; the expected reliance on documents; and, especially in arbitrations, the anticipated length of the proceedings. We have developed a new “lane” for virtual ADR proceedings, offering options that will fit some, but by no means all, situations.

That is somewhat idealistic, of course, since the reality is that lawyers—because they are lawyers—will argue for the setting that they perceive most favors their case and client. I already have one recently filed arbitration where the likely advantages of a virtual hearing are readily apparent—a modest-sized, basically one-issue dispute requiring at most three days of hearings, with scattered witnesses and counsel. Yet one side is insisting on an in-person hearing at the contractually stipulated location, which happens to be a remote small town where only one witness—and neither counsel—resides. This position is conceivably driven more by perceived settlement or other leverage it provides than procedural efficiency or client preference.

There are some recent court decisions enforcing an arbitral order to conduct proceedings virtually, even over party objections, but it is unclear whether these are more premised on the exigencies of a pandemic than the inherent power of the arbitrator. So it is worth noting that JAMS—as is so often the case—is ahead of the curve on this. The recently updated JAMS Engineering and Construction Arbitration Rules and Procedures clarify the authority of the arbitrator to order a virtual hearing in Rule 22(g), which states: “The Arbitrator has full authority to determine that the Hearing, or any portion thereof, be conducted in person or virtually by conference call, videoconference or using other communications technology with participants in one or more geographical places, or in a combined form.” In sum, JAMS arbitrators now have the authority to insist on conducting a hearing virtually where the balance of relevant factors tilts in that direction. It will be interesting to see how often that authority is used.



Kenneth C. Gibbs, Esq.,
a JAMS mediator and arbitrator based in Los Angeles, has resolved thousands of construction and engineering cases in 25 states and is known as one of the world's leading construction ADR practitioners.



Andrew D. Ness, Esq.,
FCI Arb, *a JAMS neutral based in Washington, DC, has arbitrated and mediated major, highly complex domestic and global construction cases across a variety of diverse jurisdictions and arbitral rules.*

Both Mr. Gibbs and Mr. Ness have received the highest-level ranking (Band 1) in construction mediation by Chambers USA each year since the publication's inception.