



# JAMS Global Construction Solutions

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THE LATEST NEWS IN CONSTRUCTION ADR FROM THE WORLD'S LEADING NEUTRALS

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## Mixing and Matching International Legal Systems and Dispute Resolution Methods

*By Roy S. Mitchell, Esq.*

Much has been written recently about the various dispute resolution methods used throughout the world in terms of their similarities and differences, the hybridization of different approaches and the possible harmonization of best practices. I was recently involved in a matter involving two very large international companies, common law and civil code legal systems, and distinctly different approaches to dispute resolution, which illustrate the advantages and practical utility of such experimentation.

This matter involved a \$1.2 billion fast-track engineering, procurement and construction (EPC) contract to design, construct, commission and test a very complex urea ammonium nitrate

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## Mediation of Complex Construction Disputes: Breaking an Impasse

*By Kenneth C. Gibbs, Esq. and Lexi W. Myer, Esq.*

In the context of mediation, if there is one word that counsel and mediators dread the most, it is “impasse.” Consider the following scenario: In one room, there is a contractor making allegations of delay, disruption and/or acceleration based on differing site conditions, changed character of a project or constructive changes. In separate rooms, there are a public entity owner and an insurance carrier for a design professional earnestly contending that while the contractor experienced

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# ICC Issues New Guidelines for Arbitrating International Construction Disputes

By *John W. Hinchey, Esq.*  
and *Troy L. Harris, Esq.\**

## Overview

The International Chamber of Commerce (ICC) first published guidelines for arbitrating international construction disputes in 2001 (“Final Report on Construction Industry Arbitration”). It provided guidance on a range of best practices for managing ICC and ad hoc construction arbitrations all over the world. In the spring of 2019, the ICC issued an updated set of tools, techniques and guidelines titled “ICC Commission Report: Construction Industry Arbitrations: Recommended Tools and Techniques for Effective Management.”<sup>1</sup>

The 2019 report, like the 2001 report, recognized that construction arbitrations are in many respects no different from other commercial arbitrations, but noted that construction cases typically raise more complex factual, technical and legal issues. For example, it is not unusual for construction arbitrations to involve multiple parties that may require joinder of additional parties or the consolidation of separate arbitrations. And it is a rare construction case that does not produce huge quantities of documentary evidence requiring careful and efficient management in order to save time and cost. The report also recognizes the importance of appointing arbitrators with experience handling the ever-evolving methods for procuring construction services and equipment, including shifts in management approaches and advances in design systems such as building information modeling (BIM), modularization and global and lean procurement systems—all

of which can profoundly affect allocation of risk among the parties. Hence, an arbitral tribunal should have familiarity with such systems, including the computerized scheduling systems often used on construction projects.

The report’s 27 pages of recommended practices read like a practice guidebook and focus on the spectrum of typical ICC construction arbitration cases from start to finish. Its recommended tools and techniques were suggested by experienced construction arbitrators and scholars from a variety of countries, all in an effort to accommodate and harmonize the approaches of different national jurisdictions.

Sprinkled throughout are references to widely used guides and protocols in both international arbitration and the construction industry. Among the former are the IBA Rules on the Taking of Evidence in International Arbitration (2010) (paras. 7.1, 8.2, 16.4, 16.7, 17.2 and 18.2) and the International Arbitration Practice Guideline on Interviews for Prospective Arbitrators promulgated by the Chartered Institute of Arbitrators (para. 2.1). Among the latter are the U.K. Society of Construction Law’s Delay and Disruption Protocol (2017) and the American Society of Civil Engineers’ (ASCE) Schedule Delay Analysis, Standard ANSI/ASCE/CI (2017) (para. 13.1). Hence, the report provides a helpful introduction to some of the basic norms in international construction arbitration and is another good example of how international arbitration procedures from common and civil law jurisdictions have converged in recent decades.

Some key highlights from the report are summarized below.<sup>2</sup>

## Selection of Arbitrators

One of the first questions that a typical party faces in any international or domestic construction arbitration is whom should it nominate as its party-appointed arbitrator. For example, should it be someone with substantial expertise in the construction industry or someone who is eminent in the field of commercial international arbitrations? In making these decisions, the report commends the following qualities:

- Familiarity with the industry, construction contracts (and their interpretation) and cultural nuances
- Familiarity with relevant law
- Strong case management skills, knowledge of how an international construction arbitration is conducted from start to finish and enough familiarity with computers to be able to handle case files that are stored and accessed electronically
- Availability
- Willingness to serve on a “balanced” and possibly diverse tribunal (para. 2.1)

## Terms of Reference

A unique feature of ICC arbitrations is the requirement, under Article 23(1) of the ICC’s Arbitration Rules, that “[a]s soon as it has received the file from the Secretariat, the arbitral tribunal shall draw up, on the basis of documents or in the presence of the parties and in the light of their most recent submissions, a document defining

its Terms of Reference.” Essentially, the terms of reference (ToR) is a compilation or a summary of the parties’ claims and defenses, a list of issues to be decided and specification of the damages claimed. But this requirement may raise questions. For example, how detailed should the statement of claims and defenses be? Who should prepare the first draft: the parties or the tribunal members? Can the stated damages be later modified? The report provides guidance on these questions (paras. 4.1 – 4.4).

Regarding the amount of detail in the ToR, the summary of each party’s claims should be set out accurately but need not be too precise, given Article 23(4). Consideration can also be given to allowing each party to include the claims it may wish to submit in the future—for example, claims that may be pending before a dispute adjudication board or a dispute review board—along with a time limit for the submission of such additional claims (para. 5.1).

Recognizing that the parties may have difficulty in agreeing on the issues to be decided, the report suggests that it may be helpful for the tribunal at the outset of an arbitration to invite each party to submit a provisional list of issues so that the tribunal may consider whether it is appropriate to include such a list in the ToR for the purpose of Article 23(1)(d). The issues list might then be refined at the case management conference under Article 24 or perhaps later at a follow-up conference (para. 6.1).

## Case Management Conference

In U.S. domestic arbitrations, an initial procedural step is convening a preliminary hearing to develop the procedures and schedule governing the arbitration. The ICC analogue to the preliminary hearing is the case management conference



*“The report also recognizes the importance of appointing arbitrators with experience handling the ever-evolving methods for procuring construction services and equipment....”*

(CMC). As the report recognizes, “there is still an appreciable divergence between those used to the common law or ‘adversarial’ approach and those used to other approaches” (para. 10.1). Proactive management of the proceedings by the tribunal, therefore, is particularly important in international construction arbitrations, where counsel may have widely different ideas about what amount of information exchange is appropriate, for example. The report notes that, ideally, the CMC should follow immediately after the meeting at which the ToR is completed and signed (para. 8.1). The report then recommends that the following subjects be taken up at the first or perhaps a subsequent CMC:

- “[D]esirability (or not) for each party

to present submissions accompanied by the evidence it considers necessary to establish its case (in light of what is then known about the opposing case), both documentary and in the form of verified and signed statements from witnesses” (para. 10.5)

- “[N]arrowing the issues”
- “[D]efining need for further evidence”
- “[I]solating preliminary issues” or potentially dispositive issues
- “[D]ealing with pre-hearing issues” (para. 8.3)
- “[N]eed for expert evidence” (paras. 18.1 and 18.2)
- “[N]eed, if any, to split the case and the possibility of resolving certain issues by way of partial awards or procedural

*“[T]he tribunal should consider reminding the parties that they are... free to settle all or part of their dispute at any time, either through direct negotiations or...any form of ADR proceedings.”*



decisions” (para. 15.4)

- “[N]eed, if any, for tests and a site visit” (paras. 8.2 and 12.1)
- “[D]ocument management” (paras. 16.1 and 16.2)
- “[T]ranslation and interpretation issues” (para. 22.1)
- “[S]ettlement discussions and sealed offer procedures, if applicable” (paras. 8.2 and 21.1)

## Development of Working Documents

Two of the early challenges that arbitrators face in a complex construction dispute are developing a clear understanding of the key issues separating the parties and gaining an accurate understanding of the technical aspects of the subject matter. To aid in this process, the report suggests the tribunal require the parties accompany their pleadings or case statements with:

- “a list of key persons involved in the project;
- a chronology of relevant events; and
- a glossary of terms” (para. 11.1).

To efficiently develop a summary of the issues to be decided, the report suggests that the tribunal either prepare or direct the parties to prepare a schedule that records the essential elements of each party’s case. These “schedules” are sometimes referred to as “Redfern schedules,”<sup>3</sup> which are typically used for document disclosure issues, for claims for variations or changes, for disputes about the value of work and for claims for work done improperly or not at all. Such schedules have the advantage of being able to be created by computer and conveyed on disk or by email. They can also identify points that are not in dispute or are irrelevant, which do not require decision. Schedules are particularly useful in mapping out delay, or prolongation, and disruption disputes (paras. 11.3 to 11.6).

## Fact Witness Panels

The report recognizes that construction cases may involve situations where several fact witnesses have information on the same subject. In such cases, fact witness panels may permit more effective use of hearing time. Use of fact witness panels may also facilitate better focus on key facts and documents, thus reducing repetitive evidence by a single-witness-at-a-time approach (para. 17.2).

## Settlement Discussions and Sealed Offers

A somewhat controversial issue is whether a tribunal should have any role in encouraging settlement among the parties. The report notes that the tribunal should consider reminding the parties that they are, of course, free to settle all or part of their dispute at any time, either through direct negotiations or through any form of ADR proceedings. The arbitral tribunal should also consider consulting the parties at an



early stage (for instance, at the first CMC) and inviting them to agree on a procedure for the possible use of sealed offer(s) in the arbitration (para. 21.1). The use of sealed offers (sometimes referred to as an “offer of judgment” in litigation) is gaining a foothold in arbitration, whereby a party makes a confidential private offer of a settlement amount to the opposing party, which may accept or reject the offer. If the offer is rejected and the offering party obtains an award or judgment bettering the offer, the offering party may recover the costs of litigation from the time of the offer.<sup>4</sup>

## Testifying Experts

The report recognizes that parties in most construction cases will want to hire their own experts to gather and provide evidence, which can significantly increase the cost of an arbitration. To assist in managing the use and resultant costs of experts, the report makes a number of suggestions, including:

- holding a discussion at the first CM to determine whether experts are really needed, and, if so, trying to narrow and focus the subjects on which they will offer evidence;
- requiring a declaration of independence and impartiality from the expert;
- developing terms of reference or otherwise agreeing on the topics that an expert will address;

- encouraging the experts to discuss their views with each other before preparing their reports, noting that they should eventually agree about most things if truly independent; and
- requiring the experts to meet and confer prior to giving testimony and to produce a joint report detailing the issues on which they agree and disagree.

## Interim Measures

The report reminds readers that the ICC Arbitration Rules permit the tribunal to order interim or conservatory measures (para. 20.1). While the purpose of such interim measures is often to preserve the status quo in some respect, they may also be appropriate where one party seeks relief from an adjudication decision. As adjudication, whether contractual or statutory, becomes more widespread, this power may take on greater importance.

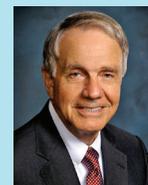
## Summary

The 2019 report is a useful contemporary guide for any arbitrator, party or counsel preparing for an ICC-administered international construction arbitration—or any construction arbitration. The report describes certain preferred practices and the factors that arbitrators and parties should bear in mind, although the report notes in the preface that there is no “single ‘right’ way in which a construction arbitration should

be conducted.” Although there are common patterns to construction disputes, every case is different; therefore, nothing in the report should be used to override the wishes of the parties. As stated in the preface, “Party autonomy is the kernel of international commercial arbitration.”

*\*The authors were contributors to the ICC report discussed in this article.*

1. The 2019 guidelines may be accessed at <https://iccwbo.org/publication/construction-industry-arbitrations-report-icc-commission-arbitration-adr/>.
2. The references to paragraph numbers in this article correspond to the sections in the report.
3. The report includes examples of such “schedules” in the annex.
4. For further information on the sealed offer procedure, see ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Arbitration Rules (1 January 2019, paras. 227-230), available at <https://www.whitecase.com/publications/alert/how-more-international-arbitrations-can-be-amicably-settled>. See also C. Seppälä, P. Brumpton and M. Coulet-Diaz, Diaz, “The New Assistance ICC Provides to Protect the Confidentiality of a ‘Sealed Offer,’” ICC Dispute Resolution Bulletin 2017 (issue 1), p. 84, which describes the sealed offer procedure and its use in ICC arbitrations and includes as an appendix a model form of sealed offer letter.



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# Advantageous Features of the JAMS Construction Arbitration Rules

By Andrew D. Ness, Esq.

Because I am new to JAMS and the Global Engineering & Construction (GEC) group, I conducted a careful review of the JAMS Engineering and Construction Arbitration Rules & Procedures. Compared to competing rules, the JAMS Rules contain a number of useful features not found elsewhere that significantly enhance the JAMS objectives of efficient and cost-effective dispute resolution. These advantages, as they apply to construction disputes, are meaningful in arbitration practice. I will highlight a few of them for those considering which arbitration rules to specify in their construction contracts.

## Immediate Commencement of Document Discovery

The most significant and unique feature of the JAMS Rules is found in Rule 17(a):

*“The Parties shall cooperate in good faith in the voluntary and informal exchange of all non-privileged documents and other information (including electronically stored information (“ESI”)) relevant to the dispute or claim immediately after the commencement of the Arbitration.”*

The parties have 21 days following the close of pleadings to conclude an initial exchange of relevant documents and the names of potential witnesses, individuals with knowledge and experts. While there is no stated enforcement mechanism or consequence for noncompliance, these provisions nevertheless set a clear expectation

that the parties should start immediately with meaningful document and information exchange, rather than awaiting the preliminary hearing that takes place after the arbitrators are appointed.

This directly addresses the most significant gap in the typical arbitration timeline; namely, once the initial demand for arbitration is filed, not much happens for a considerable period to advance a resolution. Yes, other necessary pleadings, including answers and counterclaims, are filed, and these help frame the issues in dispute. But they do not particularly advance the day when the dispute is either ready to be heard or the parties have gained enough additional knowledge of the facts to reach an informed settlement. By contrast, document exchange is one of the most important means of increasing the parties’ knowledge and understanding of the strength of their positions and those of the opposing party. Under other rules, document exchange begins at best only after the preliminary hearing, and that typically cannot be scheduled until the full arbitral tribunal is in place. No matter how the different sets of rules attempt to confine the period for appointment of the arbitrators, delays in that process are very common. It is not at all unusual for the arbitrator-appointment process to take two to three months, or longer in international disputes. In terms of advancing the parties’ knowledge of the merits, that is effectively “dead time,” which only the JAMS Rules attempt to make productive. JAMS arbitrators can maximize the effectiveness of these provisions by reminding the parties of them in an initial communication

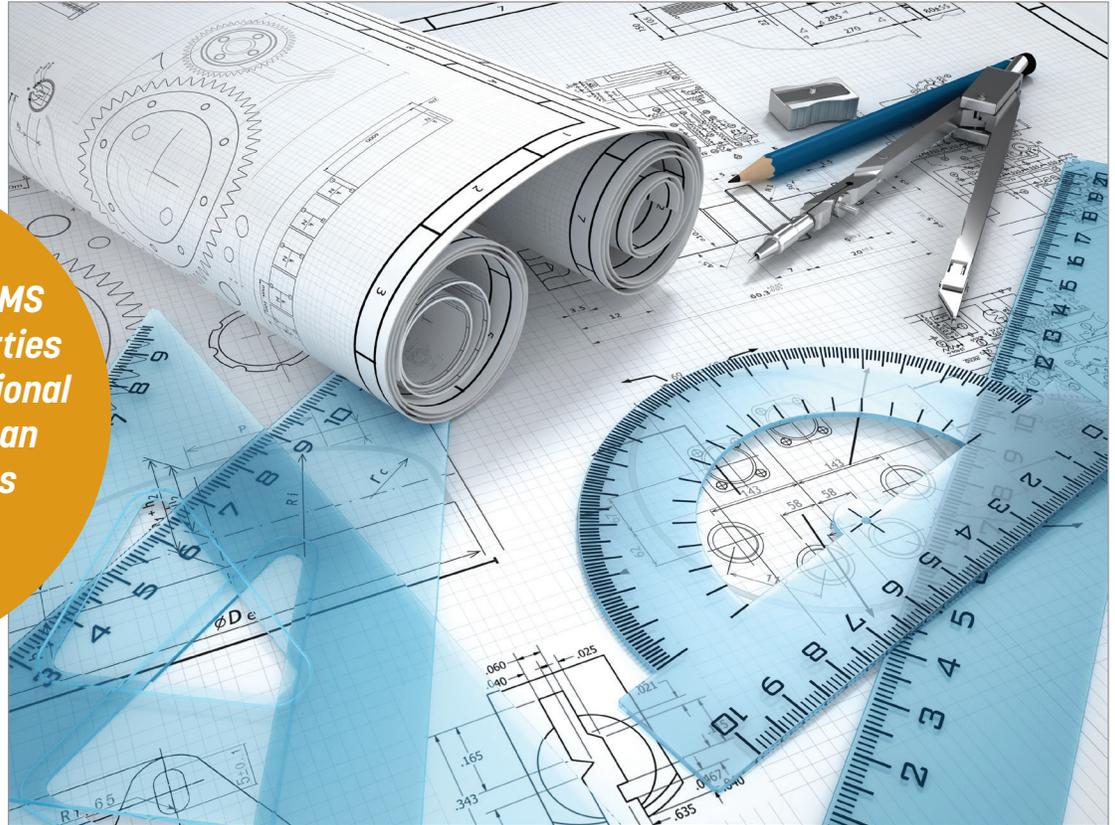
and then inquiring at the preliminary hearing about how much progress the parties have made.

## Other Administrative and Discovery-Related Provisions

The JAMS Rules also include several other provisions that address common issues in construction arbitrations that other rules barely mention, if at all.

1. The JAMS Rules do not just mention the potential for electronic filing, as other rules do; they go into detail. Rule 8 sets out clear guidelines governing electronic filing, including when a filing is deemed complete, when an electronically filed document is deemed served, when an electronic document is deemed to be duly signed and how transmission problems and other technical glitches are to be handled. These provisions address most potential arguments relating to electronic filing and smooth the process for all parties, which other sets of rules do not do.
2. The JAMS Rules include an expedited process and standards for determining whether consolidation of related arbitrations will be permitted: JAMS makes the decision (Rule 6(e)). Compare this to the American Arbitration Association’s (AAA) Construction Industry Arbitration Rules and Mediation Procedures, which require the appointment of a special, separate arbitrator to hear and decide consol-

*Four separate provisions in the JAMS Rules provide the parties with significant additional flexibility to design an arbitration process that best meets their needs.*



idation issues, which almost certainly will result in more delay.

3. The AAA's Regular Track Procedures do not mention depositions at all. The Procedures for Large, Complex Construction Disputes provide for the possibility of depositions in limited circumstances in L-4(f): "In exceptional cases, at the discretion of the arbitrator, upon good cause shown and consistent with the expedited nature of arbitration, the arbitrator may order depositions." The JAMS Rules instead put a default stake in the ground, allowing two fact witness depositions per side, with additional depositions requiring permission of the arbitrator (Rule 17 (b)). Without question, depositions are the most expensive form of discovery and, unless tightly controlled, can significantly increase the costs of arbitration. But at the same time, a deposition in which a

key witness can be asked under oath about the facts of the dispute often is the most direct and effective way to advance resolution. JAMS Rule 17(b) demonstrates that a couple key depositions in complicated construction cases are worth the expense. It effectively eliminates any argument over whether there should be any depositions at all by establishing a presumption of two depositions per side. These depositions, of course, are not mandatory.

### **Built-In Arbitration Process Flexibility**

Four separate provisions in the JAMS Rules provide the parties with significant additional flexibility to design an arbitration process that best meets their needs. Adding these options to the JAMS Rules clarifies their availability; others do not offer similar provisions.

First, Rule 28 (b) states: "The Parties may agree to seek the assistance of the Arbitrator in reaching settlement," and continues that where this is agreed in writing, it will not disqualify the arbitrator from continuing to serve in the arbitrator role if settlement is not reached. Parties (and arbitrators) often believe that if the arbitrator could just step out of the arbitrator role a bit, he or she could be instrumental in helping the parties reach settlement. This obviously entails some risks and thus must be approached carefully, but this JAMS Rule, not seen in any other set of rules, allows flexibility for the arbitrator to assist settlement in a manner that does not compromise his or her ability to continue as arbitrator if need be.

Second, Rule 32 allows the parties at any time to agree to a bracketed award, meaning the award will not be less than the agreed minimum or more than the agreed

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The JAMS Global Engineering and Construction Group provides expert mediation, arbitration, project neutral and other services to the global construction industry to resolve disputes in a timely manner. Learn more at [jamsadr.com/construction](http://jamsadr.com/construction).



**David S. Lee, Esq.** has been nominated for the **Jerrold S. Oliver Award of Excellence**, named for retired judge Jerrold S. Oliver, a JAMS neutral and the “founding father” of using ADR to resolve construction defect claims and litigation.

Affectionately nicknamed the “Ollie Award,” this honor is presented to a person who has invoked the spirit of commitment, contribution, loyalty and trust for the betterment of the entire construction defect community. Mr. Lee was nominated by many of the 25,000 members of that community.

## RECENT MATTERS

**Hon. Curtis E. von Kann (Ret.)** was appointed as arbitrator on a construction defects matter in which condo owners alleged over 300 claims against the developer of a luxury condo building.

**Kenneth C. Gibbs, Esq.** has been engaged to mediate disputes involving construction of transit and stadium projects in New York City and airport facilities in Los Angeles.

## HONORS & SPEAKING ENGAGEMENTS

**Hon. Geraldine Soat Brown (Ret.)** has been elected to the Society of Illinois Construction Attorneys.

**John W. Hinchey, Esq.** was inducted into the International Academy of Construction Lawyers in Cologne, Germany on April 6. The Academy is a global organization of preeminent domestic and international practitioners, scholars and jurists focused on construction law and has fewer than 60 fellows worldwide.

**Thomas I. Elkind, Esq.** chaired a program on *How to Avoid Construction Disputes and Resolve Them Quickly* for the Massachusetts Bar Association on April 30.

**Andrew D. Ness, Esq.** spoke on *The Future of Delay Claims and Construction Dispute Resolution* at the Project Management College of Scheduling Annual Conference in Philadelphia on April 8.

## ON THE MOVE

**Paul A. Bruno, Esq.** joined JAMS in the Bay Area and Dallas

**Lexi W. Myer, Esq.** joined the JAMS Global Engineering & Construction Practice Group

**Andrew D. Ness, Esq.** joined JAMS in Washington, D.C.

## JAMS CELEBRATES 40 YEARS OF DISPUTE RESOLUTION

Founded by retired judge **H. Warren Knight** in 1979, JAMS is marking its 40th anniversary with the move of our flagship facility to a larger, more convenient location. Our new **Orange County Resolution Center** in Irvine, CA, offers enhanced technology, prestigious local neutrals and seasoned case managers.



We’ve also expanded our Midwest presence with the recent opening of our **St. Louis Resolution Center**, featuring three distinguished local ADR professionals.



# Launching in May 2019: JAMS International Arbitration Centers in New York and Los Angeles



We're pleased to announce that our new **JAMS International Arbitration Centers in New York and Los Angeles** will launch in May to meet the demand for accessible, comfortable venues for international arbitration proceedings. These custom facilities will provide attorneys with the latest technology and amenities, including:

- Spacious, secure hearing rooms with modular tables for flexible setups, breakout rooms and arbitrator lounges for tripartite proceedings
- Large LCD monitors and high-quality videoconferencing for remote participants and witness cross-examination
- Complimentary, high-speed wireless and cabled internet
- Translation booths and translation capabilities
- Dedicated phone lines for case intake across time zones



## Mediation of Complex Construction Disputes *(Continued from Page 1)*

increased costs, such costs were due to an underbid or self-inflicted inefficiencies. Moreover, the carrier for the design professional is asserting that there is no breach of the standard of care. The parties are millions of dollars apart and are convinced of the righteousness of their respective positions.

Often in this scenario, counsel for the public entity and/or the insurance carrier are put in a position of having to report to a third-party government agency, legisla-

tive body or internal "chain of command." Counsel typically arrive at mediation with a range of settlement authority, based on an initial review of the case. As the mediation progresses, counsel for the public entity or insurer may recognize that the contractor's arguments have more merit than they originally calculated and that there are greater litigation risks than they previously evaluated. Conversely, counsel and principals for the contractor may get a "wake-up call" at the mediation that certain of their positions have less merit than

they thought. However, without more solid evidence or support, counsel may be hesitant or unable to effectuate a change in the settlement position of the parties that they represent.

Engineering and construction disputes handled by GEC neutrals commonly have complex factual and legal issues that often require experts in scheduling, estimating and financial analysis to resolve them. As a result, these cases usually require in-depth and extensive discovery to pre-

pare for arbitration or trial. At the mediation stage, which hopefully occurs before substantial cost is incurred, the evidence may not be fully developed or presented in a way that allows counsel for the public entity or insurance carrier to persuade decision-makers that increased settlement authority is warranted. Therefore, even if there is a recognition that settlement talks should continue, in practicality, without a further assessment of the merits of the case, the mediation often fails and can be resumed only after expensive discovery has taken place.

This need not always be the outcome. We have developed a method of alternative dispute resolution that allows parties to vet their cases and assists in the ability to alter settlement authority *during* the mediation process. We call this technique mediation-evaluation.

Mediation-evaluation is not early neutral evaluation as you may recognize it from federal court. The goal is not to identify and clarify the central issues for trial or to assist with discovery and motion planning or with an informal exchange of key information. Nor is it similar to a dispute review board, which is a panel appointed to recommend resolution of disputes while the project is still ongoing. Additionally, it is not a neutral analysis, which provides one side with an advisory opinion on strategy, answering the question of whether it should proceed to trial or consider settlement. Finally, it is not a mediator's proposal, in which a mediator makes a settlement recommendation based only upon the limited facts discussed during the mediation and the offers that have been made.

Instead, mediation-evaluation is a hybrid technique that combines the concepts of neutral analysis and a mediator's proposal. It is specifically designed to break an impasse during the course of a mediation. In other words, the mediator-evaluator



will at once mediate, hear and analyze the facts of the case, and provide an informed nonbinding evaluation and settlement recommendation.

We use the process when the parties have reached an impasse in a traditional mediation. We, together with counsel, determine what issues must be opined on in an attempt to reach a resolution. We then assume the role of an evaluator, to become more familiar with the issues that are acting as impediments to settlement. In order to do so, we invite the parties to make presentations, a “mini-trial” of sorts. However, this mini-trial is informal. The rules of evidence are not followed, and the proceeding can be designed by counsel. Counsel may wish to make PowerPoint presentations and demonstrative exhibits, have lay witnesses discuss what they experienced at the project or have expert witnesses give narratives—whatever is necessary for each side to fully express the essence of their case in one day. Following the one-day presentations, we usually reserve a day for rebuttal presentations. At any point, we may choose to “hot-tub” the experts or pose specific questions to counsel or lay witnesses.

Mediation-evaluation can take many forms, depending on the protocols set by the parties. The authors have used medi-

ation-evaluation as follows: (1) Both sides made presentations of the evidence and requested that the mediator-evaluator provide a written analysis and settlement recommendation; (2) both sides made presentations of the evidence and requested an oral confidential settlement recommendation be made separately to the parties; 3) both sides made presentations of the evidence, immediately resumed mediation, negotiated a settlement based on the settlement recommendation and then used the mediator-evaluator's written analysis to obtain approval for the negotiated settlement; and 4) both sides used the process to resolve particular issues that caused a divide in the settlement valuation, allowing the parties to come together and resolve the case. Like mediation itself, “one size does not fit all,” and there is no one way to perform mediation-evaluations. The process should be flexible and adaptable to the parties' settlement goals and needs.

In short, mediation-evaluation is a tool that allows the parties to obtain a nonbinding independent assessment of the case in a mediation setting. The neutral's evaluation and ultimate settlement recommendation are more informed than a mediator's proposal because the neutral has heard a robust presentation of the evidence. A

written analysis of this evidence, coupled with a settlement recommendation, can be extremely effective in cases where the parties are far apart in monetary and/or ideological terms, because the parties can rely on a quasi-judicial opinion. Further, mediation-evaluation is helpful in situations involving public entities or insurers, where third-party or upper management approval of a settlement is needed and must be based upon strong evidentiary support.

We believe using mediation-evaluation provides the parties with cost-effective dispute resolution. By using this technique, the parties can plan one single presenta-

tion of the evidence as opposed to participating in multiple mediation sessions or engaging a separate neutral to perform a neutral analysis. Mediation-evaluation can also be used early in the litigation process, saving the parties both time and money.

In the context of the complex world of GEC disputes, where so much information is required to make an informed settlement recommendation, mediation-evaluation provides parties with a way to find independent and well-versed support for that recommendation. Most important, the mediation-evaluation process helps the parties to break an impasse and reach a resolution.



**Kenneth C. Gibbs, Esq.** is a JAMS neutral based in Los Angeles. He has a “Band 1” ranking for construction from *Chambers USA*, who has recognized him as a “construction law guru” and a leading mediator. Mr. Gibbs is the co-author of *California Construction Law*. Email him at [kgibbs@jamsadr.com](mailto:kgibbs@jamsadr.com).



**Lexi W. Myer, Esq.** handled complex MDL matters and class actions as a litigator and now serves as a JAMS neutral based in Los Angeles. She resolves construction cases involving owners, developers, designers and public entities. Email her at [lmeyer@jamsadr.com](mailto:lmeyer@jamsadr.com).

## Mixing and Matching International Legal Systems (Continued from Page 1)

fertilizer plant in North America for use by its owner/operator. Disputes amounting to \$100 million arose between the parties, resulting in the filing of an International Chamber of Commerce (ICC) arbitration, a mechanic’s lien and a foreclosure. These issues were further complicated by the termination of the original contract and the reissuance of multiple cost-plus sub-contracts to perform the terminated work, as well as the fact that each party had a series of partial ownership interests in the other.

To resolve these disputes, the parties utilized structured negotiations, entered into a settlement agreement to resolve the arbitration and litigation issues for an immediate payment of \$35 million and established a formula for the negotiation and payment of all remaining disputes. As a final fail-safe provision, they provided that in the event a particularly difficult \$26-million series of piping and welding claims could not be settled, an independent expert opinion would be rendered by either of two named individuals or, in the

event of their unavailability, by a member of JAMS designated by its Chicago office. Firm time periods were established for each of the actions involved.

A telephonic pre-hearing conference was held to outline and agree on the procedures, format and timing. Following the typical civil code arbitration approach, extensive initial statements of claim and defense were submitted, responsive submittals were made and a brief oral hearing took place. Notwithstanding that the submittals were approximately six feet high if stacked on top of each other, and a two-day hearing took place, the entire process, from selection of the independent expert to issuance of the expert determination, consumed less than eight weeks.

Because both of the parties were based in civil code countries, they also requested that the hearings follow the usual, European-style inquisitorial approach rather than the common law, adversarial approach. For U.S. lawyers unfamiliar with this approach, it essentially means that the judge

or arbitrator does the questioning rather than the lawyers representing the parties.

The use of written submissions for direct testimony and of oral attorney summary statements in lieu of non-disputed background testimony were used in this matter. Simultaneous testimony and hot tubbing of expert witnesses were also used. I recommend that U.S. lawyers who would like to broaden their practice horizons and become more efficient in international dispute resolution become familiar with these methodologies to better understand how best to hybridize and harmonize their international dispute resolution practices.



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# JAMS Construction Arbitration Rules (Continued from Page 7)

maximum. By eliminating the worst-case scenarios for both parties, the arbitration can often proceed more efficiently, with fewer witnesses and less hearing time needed.

Similarly, Rule 33 allows the parties to agree to convert the arbitration into a final offer, or “baseball,” arbitration, where each party makes a final offer and the arbitration award is selected from those two offers. As with brackets, final offer arbitrations can effectively limit each party’s risks and significantly reduce the duration and cost of the hearing. Note that the default

is different between JAMS Rules 32 and 33. In a bracketed arbitration, the default is that the arbitrators are not told what the bracket is until after an award is rendered. In a baseball arbitration, the default is that they are told of the final offers. Either default position can be changed by agreement.

Finally, Rule 34 allows the parties, upon written agreement, to opt into the JAMS Optional Arbitration Appeal Procedure, in which the award is subject to review by a special JAMS appellate panel before becoming final.

Again, these are just a few of the advantages of using the JAMS Rules, but they are indicative of the thought and care taken by JAMS to design a flexible and efficient arbitration process tailored to construction disputes that goes well beyond any comparable set of rules.



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