



JAMS Global Construction Solutions

FALL 2021

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

Value Engineering Construction Arbitration

Designing a Better Process and Techniques Arbitrators Can Use to Help Parties Reach a Faster, More Cost-Effective Resolution



By Laura C. Abrahamson, Esq., FCIArb

The rapid growth of construction arbitration over the last 20 years is a testament to its advantages over traditional litigation: speed, cost and flexibility. But as parties submit larger and more sophisticated disputes, they are looking for ways to ensure the process can still provide those advantages. Before joining JAMS, over the course of almost 25 years working in-house in large, publicly held companies, I was constantly asked two questions by clients: “Should we still arbitrate disputes?” and “Can’t you make it less expensive?” Clients are primarily concerned with time and cost.

The good news is that there are several levers arbitrators and counsel can employ to “value engineer” their construction arbitrations. First, sophisticated counsel can design a better, more efficient process at the front end of a project to suit complex construction cases. But what if the parties’ arbitration agreement contains just a generic or barebones dispute resolution clause? Arbitrators and counsel can still employ a number of techniques to minimize concerns about time and cost.

(Continued on page 7)

Conducting Construction ADR Proceedings During the Pandemic

A Conversation Between Two Experienced JAMS GEC Panelists



Kenneth C. Gibbs, Esq., and Andrew Ness, Esq., FCIArb, 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

(Continued on page 9)

ALSO
IN THIS
ISSUE

- Good News from Brazil on the ADR Front [Page 2](#)
- Arbitration Appeals [Page 3](#)
- JAMS GEC Honors, Recent Matters & Other News [Page 6](#)



Good News From Brazil on the ADR Front

By *Leonardo Toledo da Silva*
and *Ricardo Medina Salla*



Over the past six years, Brazil has been facing an unprecedented political and economic crisis. Bad news has been hitting our country more often than we Brazilians would like to admit. And to add insult to injury, Brazil is still suffering the effects of the global pandemic and is currently experiencing a shortage of vaccines. In the middle of all this, however, there is good news coming from the construction industry that should be celebrated: The age of dispute boards seems to have finally arrived in Brazil.

Brazil has a big, strong economy. Investments in infrastructure and construction were and still are crucial to our development. But there is also an adversarial culture that usually accompanies the complex construction practice. Although the concept of dispute boards has been known by the Brazilian construction industry for a long time, only in the last couple of years have managers and legal counsel shown less reluctance to the idea of adopting this alternative dispute resolution (ADR) method. This greater acceptance is being seen as a significant victory for project management. There were some events that pushed this movement toward wider acceptance.

The first event that had a major impact on strengthening the position of dispute boards in Brazil was the enactment of the São Paulo Dispute Board Act (Law No. 16,873) on February 22, 2018. This legislation led the municipality of São Paulo to allow the use of dispute boards in its major contracts. Although public adminis-

trators have never been forbidden to use dispute boards in their contracts, the act has been a game changer for the acceptance of the use of dispute boards in public projects all over Brazil. Public authorities finally began to feel more comfortable with using dispute boards.

After the adoption of the São Paulo Dispute Board Act, as word started to spread, many other legislative initiatives were introduced in several cities and states, and even on the federal level. In addition to the new public procurement law, which expressly allowed the use of dispute boards, there are at least two bills, specifically created to regulate the procedure, currently being debated by the National Congress of Brazil.

Another event that played an important role in promoting dispute boards for public projects was the recent decision issued by a Brazilian state court on a case brought by the São Paulo Metro against a civil contractor consortium. Our firm, Toledo Marchetti Advogados, represented the consortium in the case. Not only was the decision the correct one, as the tribunal grasped the essential idea behind the concept of dispute boards, but it also now makes this precedential case law, which will aid the reliability and effectiveness of the whole system.

In its decision, the court dismissed a preliminary injunction that was granted in favor of the São Paulo Metro, which entitled it to disregard

a dispute advisory board's (DAB) decision until a final arbitral or judicial award was issued. If this preliminary injunction would have been allowed to stand, it would have endangered the mechanism of dispute boards, as the results obtained from a DAB would always be disputed and judicially decided.

By understanding that such preliminary injunction was a threat to the existence of DABs, the higher court issued a formidable decision correcting the basis of the procedure and paving the way for the continued development of dispute boards in Brazil. The tribunal inverted the situation and compelled the São Paulo Metro to respect and immediately adhere to the DAB's decision, which is still in force today while it continues to be discussed within the proper jurisdiction.

The federal government has noticed the growing acceptance of dispute boards, as it expressed its opinion in favor of them by stating that considering the amount of money involved in partnership contracts, the costs related to the use of dispute boards are reasonable for the parties. The government also said that the greatest benefit of dispute boards is in their ability to serve the contract by mitigating the risks that threaten its continued functioning.

In a task force promoted by the Investment Partnership Program (PPI), the government published several ADR model clauses that are intended to be applicable in infrastructure

contracts, and it requested multiple market players to make wording improvement suggestions. Among the clauses, the government strongly recommends the use of dispute boards, referring to a dispute board as a *comitê de prevenção e resolução de divergências*, which appears to be in line with the International Federation of Consulting Engineers' most recent adaptations. The name has the noun "prevention" in it because the idea is to apply dispute-prevention tools.

The clauses submitted for public suggestions still require further consideration and adjustment, and the PPI task force understands this. In fact, the government, along with various experts, has already received comments and is currently working on the necessary changes. It is a major accomplishment that the government took the initiative to propose the inclusion of such clauses and, generally, make them an ordinary provision for infrastructure contracts entered into by the public administration.

Brazil's Ministry of Infrastructure intends to deliver 44 infrastructure projects this year—44 of them including civil works—which will be bid on by national and foreign investors. It is very likely that many, if not all, of the contracts will contain dispute board provisions, and it is almost certain that all of them will include arbitration clauses.

"The government also said that the greatest benefit of dispute boards is in their ability to serve the contract by mitigating the risks that threaten its continued functioning."



São Paulo, a pioneer in legalizing the use of dispute boards, has already published a few concession contracts comprising DAB provisions. And it's not only the public administration that is seeking to implement this mechanism. Here in our firm, we have been inserting dispute board clauses in private construction contracts and, most important, installing new boards and working with already installed panels.

The use of DAB provisions in Brazil is definitely good news. ■



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Ricardo Medina Salla, Head Partner of Toledo Marchetti Advogados' Arbitration and ADR team

ARBITRATION APPEALS

A Safety Valve That Is Fast, Fair, Cost-Effective and Final

By Patricia H. Thompson, Esq., FCI Arb

Arbitration provides a toolbox of dispute resolution options that are quicker, more targeted and less expensive than litigation. However, formal and informal surveys reveal that one important component of this toolbox is unknown or misunderstood by corporate and outside counsel: the parties' contractual right to appeal the final award, "on the merits," to a panel of seasoned and knowledgeable appellate arbitrators.¹ In fact, the cumulative experience of JAMS' appellate neutrals proves that appellate

arbitration is a fast, fair, final and cost-effective dispute resolution option that provides parties with the reassurance that they can have "another set of eyes and ears"² review their arbitration awards.³

Contracting for the Private Right of Appeal

A widespread but mistaken belief that there is no appellate remedy for erroneous arbitration awards is often cited as one of the chief

negatives of arbitration.⁴ This misunderstanding likely stems from the fact that the Federal Arbitration Act (FAA) and many state arbitration statutes provide few grounds for judicial relief from a final arbitration award.⁵ Indeed, the FAA does not allow for any judicial appellate review of an award, even by agreement of the parties.⁶

Nevertheless, neither the FAA nor state arbitration codes prohibit parties from contracting for the right to appellate review of an arbitration

award via a private panel of appellate arbitrators. Parties may agree to this option in their original arbitration agreement or by written stipulation at any time after a dispute arises.⁷ JAMS suggests the following model contract provision: “The Parties adopt and agree to implement the JAMS Optional Arbitration Appeal Procedure” with respect to any arbitration award “arising out of or related to this [arbitration] agreement.”⁸ JAMS’ arbitration rules also allow parties to “agree at any time” during an arbitration to adopt the JAMS optional appellate procedures as an optional remedy in that proceeding.⁹ Including such an option in an arbitration does not mean that it will be used, but given humankind’s undeniable proclivity to err, parties approaching an arbitration hearing may be comforted by the existence of a contractual backstop to guard against the risk of arbitrator mistakes.¹⁰

A Fast and Final Appellate Process

Some speculate that allowing appellate scrutiny of arbitration awards would “frustrate the purpose of having an arbitration at all — the quick resolution of disputes and the avoidance of the expense and delay associated with litigation.”¹¹ The experience of JAMS’ appellate arbitrators proves otherwise: Parties may enjoy the peace of mind provided by appellate review, as well as receive a quick and final arbitral award, free of the delays caused by the lengthy appeals and retrials that plague litigation.¹² In a JAMS appeal, there are no crowded appellate dockets, motion practice or many months of delay for briefing, oral argument and waiting for an appellate decision.¹³ Brevity is baked into the JAMS appeals procedure. An appeal must be filed within 14 days of a final award; any cross-appeal must be filed seven days thereafter. The arbitrators are selected promptly, and the parties are required to provide the record on appeal. The parties must agree on, or JAMS will establish, a reasonably abbreviated schedule for briefing and possibly oral argument. Finally, the panel must issue its decision 21 days after the receipt of the record and all briefs or oral argument, whichever occurs later, unless the parties agree otherwise.¹⁴

In addition, the finality of JAMS’ appellate review may surprise those used to remand as the

reward for reversal of judgment on appeal, or those who lament that statutory award vacatur may result in an arbitration rehearing or referral to *de novo* litigation.¹⁵ Instead, JAMS’ procedures prohibit remand for further hearing or “retrial” and limit the appellate panel’s authority to either affirming, reversing or modifying an award.¹⁶ Even if a panel reopens the record to receive evidence excluded in error, at most, the panel will issue a new final award.

Cost Savings

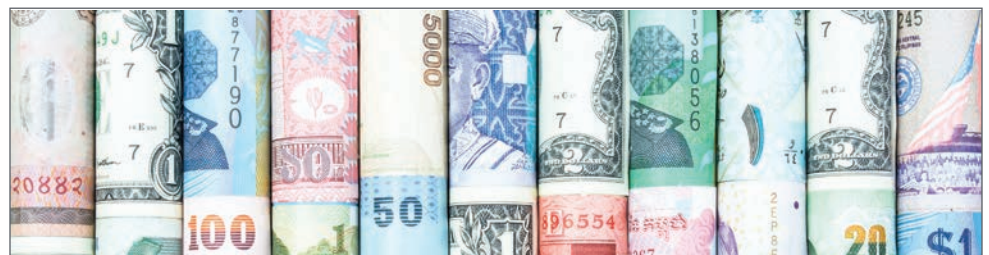
Parties may avoid arbitration appellate review to save money.¹⁷ That is unfortunate, as parties can preserve their appellate option in arbitration and still achieve significant cost savings, especially compared to litigation appeals. First, time is money, especially in an industry like construction, where any delay can escalate the cost of a project.¹⁸ So correcting an error on the expedited timetable of a JAMS appeal can save parties money, both directly and indirectly.¹⁹ Second, the activities necessary for this appellate process can be abbreviated by agreement of the parties or at the direction of the panel, with limited briefing and waiving oral argument.²⁰

Third, in the right kind of case, the parties can agree to an interlocutory appeal of a key issue, such as insurance coverage or whether the parties have liability to one another, before incurring any further costs associated with proving the amount of loss or damages.²¹

Finally, even more cost savings can be realized before the parties reach the point of appeal, as their knowledge that any award will be reviewed by highly experienced appellate arbitrators has been used to justify using one arbitrator—rather than the three called for by contract—to decide the underlying case.²² Obviously, using one arbitrator to manage and hear a dispute will save roughly two-thirds of the panel cost of the underlying arbitration. These savings should exceed the relatively limited cost of the appellate panel. Because appeals are optional, it is possible a party will not appeal and thus not incur any additional costs.

A Fair and Just Review

The standard of review is an important issue to consider when contracting for the right of appeal. While it is possible for parties to contractually define the standard of review, ab-



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sent such a stipulation, JAMS' appellate procedures provide: "The Appeal Panel will apply the same standard of review that the first-level appellate court in the jurisdiction would apply to an appeal from the trial court decision."²³ JAMS' appellate panels are comprised of highly experienced former jurists and appellate practitioners. Thus, any appeal will be accorded the same standard of review and quality of scrutiny as a judicial appeal.

In addition, the parties may participate in selecting each member of their appellate panel and may require neutrals who "speak the language" and have the legal and substantive knowledge best suited to their dispute.²⁴ This advantage over litigation is particularly important in complex or technical arbitrations.

The right to customize the appellate process itself is another plus. JAMS' appellate arbitrators agree that arbitration appeals need not follow any hard-and-fast rules. If the parties and panel need several hours of oral argument, they may so agree.²⁵ If the panel needs additional

information after initial briefing or argument, it may request it. If the panel needs clarifying evidence to supplement the record, it may obtain it. If the parties want the results of the appeal to remain confidential, they may so agree.

Fairness is more than procedural flexibility or a broad standard of review. Fairness requires a consideration of the underlying award free from constraint or prejudice, even if an award was issued by a JAMS colleague. On this point, JAMS' appellate neutrals are adamant and in agreement. Regardless of whether the members of a panel know the arbitrator whose award they are reviewing,²⁶ they will not hesitate to reverse or disagree with that neutral's decisions, when the evidence and law so require.²⁷ Many, as former appellate judges, have learned from experience to set aside any temptation to be less than rigorous in reviewing decisions of fellow JAMS neutrals.²⁸ As one stated, it is their ethical obligation and ingrained into their character to "never be afraid to do what is right."²⁹

One of the most important tools provided by JAMS' arbitration rules and guidelines is the optional remedy of a prompt, private right of appeal to experienced, personally selected appellate specialists. Parties may rightly decide that arbitration of certain disputes would be too risky to undertake without such an option. In summary, by assuring review of awards finally, quickly, inexpensively and fairly, "appellate arbitration enhances the benefits of arbitration itself."³⁰ ■



Patricia H. Thompson, Esq., FCI Arb., is a JAMS neutral based in Miami who brings 46 years of trial, arbitration and appellate experience to her construction ADR practice. Regularly listed in *The Best Lawyers in America*, *Chambers USA Guide to America's Leading Business Lawyers*, *The International Who's Who of Construction and Business Lawyers*, she is a fellow of both the *American College of Construction Lawyers* and the *Chartered Institute of Arbitrators*.

1. Bryan Cave Leighton Paisner LLP conducted a survey of corporate counsel, advocates, arbitrators and academics in 2020 (BCLP Survey) concerning arbitration appeals. See <https://www.bclplaw.com/images/content/1/8/v2/186066/BCLP-Annual-Arbitration-Survey-2020.pdf>. Survey participants admitted they were concerned about the risk of erroneous arbitration awards, but they also believed that appellate relief was either unavailable or would impair finality and cause delays or increase the cost of arbitration. They also raised concerns about the fairness of possible review processes.
2. Per JAMS appellate arbitrator J. Gail Andler, Ret. (J. Andler): In the right kind of case, parties welcome the option of "another set of eyes and ears" as a "safety net" in arbitration.
3. Indeed, the ability to appeal an arbitration award may enhance the fairness of the arbitral process, providing an answer, among others, to concerns that a particular contractual arbitration clause appears unjust, per JAMS appellate arbitrator J. Stuart Palmer, Ret. (J. Palmer).
4. According to the BCLP Survey, "Some believe that the finality of arbitration undermines the legitimacy of the process, as there is no relief from error."
5. See, e.g., *Patton v. Signature Insurance Agency, Inc.*, 441 F.3d 230, 234 (4th Cir. 2006). In *Hall Street Associates, LLC v. Mat-tel Inc.*, 552 U.S. 576 (2008), the U.S. Supreme Court limited vacation of an award to statutory grounds such as "evident impartiality," "fraud," "corruption," refusing to hear "pertinent and material" evidence and acts exceeding the powers of the arbitrator.
6. *Hall Street Associates, supra*.
7. For a scholarly discussion of the legal bases for contractual, legislative and other ways of overcoming concerns about the limited standards of review allowed for most arbitration awards, see Philip L. Bruner, *The Appeal of Appellate Arbitration*, in 35 INTERNATIONAL LAW REVIEW, Pt. 4, 436, 444 et seq. (2018) (Bruner).
8. CPR and the AAA have their own, slightly different model contract language and rules.
9. See, e.g., Rule 34 of the JAMS Comprehensive Arbitration Rules and Procedures.
10. Per J. Palmer.
11. *Apex Plumbing Supply, Inc. v. U.S. Supply Co., Inc.*, 142 F.3d 188, 193 (4th Cir. 1998). Finality of an arbitration award is cited in the BCLP Survey as an important reason parties favor arbitration.
12. Per JAMS appellate arbitrator J. Ronald Cox, Ret. (J. Cox).
13. Per JAMS appellate arbitrator J. Ignazio Ruvolo, Ret. (J. Ruvolo).
14. J. Andler describes these rules as a "fast-track process."
15. See *Enforcement of the Arbitration Award and Limited Rights of Appeal*, in ARBITRATION AND THE SURETY, 79, 80 (A. Belleau, et al., eds. Am. Bar Ass'n 2020) (after vacatur of an arbitration award, the remedy is often no better than a costly "do over").
16. Per J. Andler.
17. See, e.g., *MACTEC, Inc. v. Gorelick*, 427 F.3d 821, 829-30 (10th Cir. 2005).
18. Per J. Cox.
19. For example, as JAMS neutral Philip L. Bruner explained, "Having served as chair of a JAMS appellate arbitration tribunal reviewing an award issued by a non-JAMS arbitrator, my tribunal was able to correct an important error of law on the record and issue the final award within three weeks after receiving the record and counsel briefs." Bruner, pp. 447-48.
20. Per J. Andler.
21. Per JAMS appellate arbitrator J. Nancy Wieben Stock, Ret. (J. Stock).
22. Per J. Stock. The idea of having one arbitrator decide the case with the right of appeal to a tripartite panel is also a formula adopted by the European Court of Arbitration. See *Attempts to Set Aside an Award*, in THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION, 216, 217 (Margaret L. Moses, 3rd ed. 2017).
23. JAMS, CPR and AAA have slightly different standards of review.
24. Per J. Cox.
25. Per J. Andler.
26. Parties can require that the appellate panel member do not work with or come from the same part of the country as the underlying arbitrator as part of the panel selection process.
27. Per J. Palmer.
28. Per Ruvolo, "Any appellate arbitrators who might have a concern about how their ruling may affect a colleague below need to recuse themselves, as the parties are entitled to have the appellate panel consider the case completely independent of the underlying arbitrator(s)."
29. JAMS appellate arbitrator J. Richard Suarez, Ret.
30. Per J. Stock.



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.

ON THE MOVE

- [LAURA C. ABRAHAMSON, ESQ., FCIArb](#), joins JAMS in Los Angeles
- [TONY COLE, FCIArb](#), joins JAMS in London and New York
- [HON. RUSSELL LLOYD \(RET.\)](#) joins JAMS in Houston
- [DR. PETER KAMMINGA, ESQ., Ph.D.](#), joins JAMS in New York
- [KEITH D. KOELLER, ESQ.](#), joins JAMS in Orange County

RECENT MATTERS

- [KENNETH C. GIBBS, ESQ.](#) has been engaged as the mediator to resolve disputes regarding construction at LaGuardia (LGA), Seattle-Tacoma (SEA), Salt Lake City (SLC) and Los Angeles International (LAX) airports.
- [ZELA “ZEE” G. CLAIBORNE, ESQ.](#) has successfully mediated a matter brought by multiple Pacific Northwest municipalities and their engineering firm with respect to the design of wastewater treatment facilities. She convened a 50+ person mediation in a hybrid format using a video conferencing platform, as well as in-person meetings.

HONORS & SPEAKING ENGAGEMENTS

- [PHILIP L. BRUNER, ESQ.](#) (Minneapolis, MN) has authored an article entitled Joinder in International Arbitration which will be published in the fall issue of the International Construction Law Review. Phil will also speak about dispute resolution at the annual meeting of the International Construction Law Association in December.
- [HON. CAROL PARK-CONROY \(RET.\)](#) will speak at the 2nd Annual Federal Contracts Symposium sponsored by Fox Rothschild. The event takes place October 26, 2021, at the Mayflower Hotel in Washington, D.C.
- [TONY COLE, FCIArb](#) (London/New York) presented The New Localism of International Commercial Arbitration to The Honourable Society of Gray’s Inn on July 21st, 2021. The presentation focused on how the field of International Arbitration is structured, how it has been changed by the growth in arbitration over the past two decades, and the way local considerations affect how careers in arbitration are developed and how Commercial Arbitrators do their job to resolve legal disputes.
- [PATRICIA H. THOMPSON, ESQ., FCIArb](#) (Miami, FL) moderated a panel on Mediation of High Profile Construction Disputes at the 29th UIA (International Association of Lawyers) World Forum of Mediation Centres on June 24th. Co-panelists included Steven Nelson,

Esq. of Dallas, Prof. Stefan Leupertz of Koln, and Christopher Miers of London. The 90-minute program covered special challenges in mediation where the projects are complicated by factors like publicity, governmental involvement, project size, the large number of parties and the serious nature of the damage issues.

- What are the lessons learned from the past 18 months, and how do they influence the handling of construction and energy disputes going forward? [LAURA C. ABRAHAMSON, ESQ., FCIArb](#), and [JOE TIRADO](#) of JAMS, Roberta Downey of Hogan Lovells, and Navneet Juty, Assistant GC of AECOM, discussed the future of ADR in September, live in London. [Watch the recording and access program materials.](#)



[DAVID S. LEE, ESQ.](#), has again been nominated for the Jerrold S. Oliver Award of Excellence. The award was named for retired judge Jerrold S. Oliver, who was a “founding father” in the ADR process for construction defect claims and litigation. This award, affectionately nicknamed the “Ollie

Award,” 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. [Read the press release.](#)

- [14 JAMS neutrals were ranked by Chambers USA](#) including nine members of the Global Engineering and Construction practice group. We congratulate:
 - Deborah S. Ballati, Esq.** (San Francisco)
 - George D. Calkins II, Esq.** (Los Angeles)
 - Gerald Kurland, Esq.** (San Francisco)
 - Kenneth C. Gibbs, Esq.** (Los Angeles)
 - Andrew D. Ness, Esq.** (Washington, D.C.)
 - Robert B. Davidson, Esq.** (New York)
 - Barbara Reeves, Esq.** (Los Angeles)
 - Michael Young, Esq.** (New York)
 - Hon. William Cahill (Ret.)** (San Francisco)
- [JAMS Announces Updated Construction Arbitration Rules](#) (June 2021)

VALUE ENGINEERING CONSTRUCTION ARBITRATION

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The best way, of course, to maximize efficiency is at the beginning, before disputes (inevitably) arise, making agreement on anything more difficult to reach. Drafting the dispute resolution clause is often left to the end of negotiations. This is where both inside and outside counsel can add value. Having the right model clause prepared in advance can dramatically reduce the time and cost to resolve disputes down the road.

Here are a few key clauses that can help control arbitration time and cost:

Build in time constraints. As every construction lawyer knows, and as their clients appreciate, delays inevitably increase costs. Drafting deadlines into your dispute resolution clause can help parties avoid unnecessary delays. Time constraints can be built in to the selection of arbitrators, the first procedural hearing, the evidentiary hearing, the hearing itself and the rendering of the award.

Drafting tip:

- **Make sure any arbitrator selected is required to meet the time constraints built into your model clause.** Example: “Any arbitrator nominated must be able to serve within the time frames specified herein before accepting appointment.”
- **Use your clause to limit the length of a hearing and ensure it is heard on consecutive business days to further increase cost efficiency.** Example: “Unless the parties agree otherwise, the tribunal will hold a hearing on the merits within six to nine months of its constitution, which will be set for consecutive days (excluding weekends and holidays) and last for no more than 10 days.”



Drafting tip:

- **Require the parties to attend the procedural conference with counsel, which allows in-house counsel to help establish the most cost-effective arbitration schedule, and push for the earliest hearing on the merits.** Example: “Unless the parties agree otherwise, the tribunal will hold a procedural conference with the parties and their counsel within 30 days of its constitution, either in person or via a videoconferencing platform, to set the schedule for the arbitration, including the date(s) for the hearing on the merits.”

Drive the schedule with a memorial style arbitration process.

Consider requiring a memorial style process that favors getting all the evidence out early. Under this process, which is more common in international arbitration, a claimant files its memorial (legal brief) with its evidentiary support (witness statements, documents and expert reports) within a few months of the arbitration’s commencement. The respondent files its counter-memorial with evidentiary support a few months later. The tribunal can then call for reply submissions, if appropriate, or simply move to a hearing.

Drafting tip:

- **Include a schedule for the service of the memorial and counter-memorials.** Example: “Unless otherwise agreed by the parties, at the first in-person or virtual procedural hearing, the tribunal will set a schedule for conducting the proceeding, which shall include the service by the claimant of a memorial, together with written witness statements, documents and expert reports, within three months; service by the respondent of a counter-memorial, together with witness statements, documents and expert reports, within two months; and service of reply and sur-reply memorials, as appropriate within two weeks.”

Include discovery limits. Discovery, particularly e-discovery, can exponentially increase the cost of arbitration. Well-crafted clauses can eliminate or significantly curtail discovery. Rule 17 of the JAMS Engineering and Construction Arbitration Rules & Procedures can aid parties in that Rule 17(a) requires parties to “exchange...all...non-privileged documents...on which they rely in support of their positions” and identify “names of individuals [with] relevant knowledge or who may be

called” to testify “within 21 calendar days after all pleadings...have been received” and Rule 17(b) limits parties to two depositions. Consider either expressly prohibiting requests for admission and/or interrogatories, or providing that the parties are limited to the discovery contemplated in Rule 17. You may also want to specify no document requests or require parties to apply to the arbitrator for narrowly tailored requests limited to items relevant and material to the outcome.

Drafting tip:

- **Explicitly make cost a factor for the arbitrator to consider before allowing any additional discovery.** Arbitrators will follow specific limits on discovery set out in the parties’ arbitration agreement. Example: “Unless otherwise agreed by the parties, discovery shall be limited to the exchanges of documents and discovery provided for in Rule 17 of the JAMS Engineering and Construction Arbitration Rules & Procedures. Any party seeking additional discovery shall apply to the arbitrator, who shall consider whether the requests are narrowly tailored and limited to items that are relevant and material to the outcome, and the reasonable need for the requested discovery in light of the cost and amount at issue in the case.”

But what if your dispute arises from an arbitration agreement that doesn’t include any of these provisions?

Even where parties haven’t written cost-savings mechanisms into their dispute resolution clause at the front end, the arbitrator can still push the parties to agree on, or order on his or her own, a number of procedures to move the dispute forward and to structure the presentation of evidence that both suit complex construction cases and enhance efficiency. Arbitrators know, just as experience construction and engineering lawyers do, that time equals money and delays increase costs. Consider the following:

• **Hybrid Hearings**

After more than a year of conducting virtual hearings, arbitrators have gotten used to them. As we begin to return to in-person hearings, arbitrators can leverage their experience during the pandemic to help parties reduce costs by continuing to conduct procedural and non-evidentiary hearings virtually instead of having parties and their counsel incur the time and expense of traveling to a hearing. Even when it comes to evidentiary hearings, although we all may be eager to return to “normal,” arbitrators can help parties reduce costs by allowing a mixture of in-person and virtual testimony. Arbitrators and parties can value engineer dispute resolution by taking a hard look at which witnesses need to appear in person and which can appear virtually.

• **Party Participation**

Arbitrators can encourage senior party representatives to attend the first procedural conference, particularly if it will take place on Zoom or a similar videoconferencing platform. Party representatives, who have their eye on the bottom line, are often more empowered than outside counsel to agree to procedures that will help set a faster schedule—agreeing to shorter hearings with a chess clock, or to dispense with certain types or areas of discovery. They may also be emboldened to agree to the one of the various techniques arbitrators can employ for reducing the time and cost of presenting witness and expert evidence.

• **Written Witness Statements**

Encouraging counsel to submit direct testimony through written witness statements—a practice common in international arbitration—can dramatically reduce both the time and cost of construction arbitration. It eliminates the need for depositions, since the parties know what testimony the other parties will introduce, and it allows them to prepare better, more targeted cross-examination. It also significantly cuts down the length of the hearing, as time is only spent on cross-examination and redirect. It also allows arbitrators the opportunity to gain a better understanding and appreciation of the parties’ positions in advance of the hearing.

• **Coupling Expert Reports With Hearing Presentations**

Expert evidence can be one of the most costly aspects of construction arbitration. Asking the parties to submit expert reports to the arbitrators in advance as their direct testimony, and then allowing them to make a short (30- to 90-minute) visual presentation (PowerPoint or other format) at the hearing can similarly eliminate the need for expert depositions and significantly improve the efficiency and efficacy of expert testimony.

• **Joint Expert Meetings Without Lawyers**

Arbitrators can, at the request of a party or on their own initiative, order the parties’ respec-



tive experts to meet outside the presence of lawyers to explore where they agree and disagree, and then produce a report listing the agreed-upon and disputed issues. This allows the parties and the arbitrators to understand what area(s) and points of disagreement between the experts exist and to limit the examination to those points, significantly cutting down preparation and hearing time.

• “Hot-Tubbing” of Experts

Either as an alternative to the experts meeting outside the presence of counsel and issuing a joint report, or in addition to them, the parties can agree, or the arbitrator(s) can order, that the parties’ respective experts on any given topic appear together for questioning by the

tribunal. This technique, which is also more common in international arbitration (and often referred to as “hot-tubbing”), can uncover why the experts disagree, thus helping the arbitrator focus his or her questioning and reducing hearing time. This process can be particularly helpful for technical issues.

Arbitration of construction disputes must continue to meet the parties’ needs. If arbitrators and counsel use the tools available to them to value engineer the process of resolving construction arbitration disputes to ensure it remains fast, cost-effective and flexible, it will.

Disclaimer: The content is intended for general informational purposes only and should not be construed as legal advice. If you require legal or professional advice, please contact an attorney. ■



Laura C. Abrahamson, Esq., FCI Arb. is a JAMS neutral based in Los Angeles with a national and international practice. Ms. Abrahamson

currently sits on the boards of the *Chartered Institute of Arbitrators, North American Branch*; the *Institute for Corporate Counsel*; and the *California International Arbitration Council*. She is also on the *California Public Works Contract Arbitration Program’s* panel of arbitrators and the lists of arbitrators for the *LCIA, HKIAC* and *CAS*. Prior to joining JAMS, she was in private practice and held in-house senior leadership roles at Fortune 500 companies.

Conducting Construction ADR Proceedings During the Pandemic

CONTINUED FROM PAGE 1

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.



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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 Stipanovich 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

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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 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 advantages 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 savings. 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-per-

son 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. ■



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