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JAMS Global Construction Solutions

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

ALSO IN THIS ISSUE

INVESTOR-STATE MEDIATION

A New Way to Deal with Old Problems?

BY JOE TIRADO

In common with commercial arbitration, a large proportion of treaty-based Investor-State disputes involve construction issues. In the Annual Report of 2021 for the International Centre for the Settlement of Investment Disputes (ICSID), construction was the second largest economic sector involved in ICSID proceedings, accounting for 16% of ICSID´s new caseload. Historically, the extractives and energy sectors have accounted for the largest share of cases, and this trend continued in FY2021. Twenty-nine percent of new cases involved the oil, gas and mining industry, and 14% related to electric power and other energy sources. Given the frequent overlap between these sectors and construction, it is fair to assume that construction related disputes form an even bigger proportion of ICSID cases.

The overall cost of an Investor-State arbitration can be considerably more expensive than an equivalent commercial arbitration, with average party costs for respondent States of ap-

CONTINUED ON PAGE 5

Collaborative Construction Contracts for Large and International Projects

BY PETER KAMMINGA, ESQ., PH.D.

Where there is construction, there are contracts. Typically, these contracts are "competitive hard-bid" models, often criticized for causing adversarial relationships and driving continuous change orders and disputes. In response, collaborative project delivery models have been developed to optimize owner-contractor collaboration and focus on dispute prevention and early resolution.

Once considered niche products, more recently, market forces and global trends have increased the demand for collaborative contracting models in the US and internationally. Mega projects require close collaboration. Major contractors are growing more reluctant to enter hard-bid contract environments and prefer to participate in procurements with owners and stakeholders with whom they have established relationships.

Because collaborative contracting differs substantially from traditional contracting, questions frequently arise concerning its use.

CONTINUED ON PAGE 6

When Mediation Conduct Goes *Wrong*

BY DEBORAH BALLATI, FCIARB AND PATRICIA H. THOMPSON, FCIARB

While most mediation participants act professionally, with courtesy and decorum appropriate to the dispute resolution process, some do not. Perhaps unprofessional conduct occurs behind the mediation curtain because the ethical rules of mediation are shrouded in mystery, forgotten in the heat of advocacy or simply ignored.

What can be done about abusive or otherwise unethical conduct by mediators or other mediation participants? The answer to this question begins with acknowledging that all participants in the mediation process have the right to expect a fair and peaceful dispute resolution process and that all participants are responsible for avoiding and quickly addressing any conduct that jeopardizes the success of that process.

The American Bar Association's (ABA) guidelines for litigation conduct apply equally to mediation:

> *"... [A]ll participants in a legal proceeding [are owed] respect, diligence, punctuality, and protection against unjust and improper criticism or attack. Conduct that may be characterized as uncivil, abrasive, abusive, hostile, or obstructive impedes the fundamental goal of resolving disputes rationally, peacefully, and efficiently.* ***Such conduct tends to delay and often to deny justice.***"[1] (Emphasis added.)

How to deal with the offending conduct may differ if the conduct is that of the mediator rather than of a lawyer or a party. But dealing with it is essential.

Mediators Who Deviate From Their Ethical Obligations

- ***There are rules governing mediator conduct.***

JAMS trains and requires its mediators to abide by specific codes of ethics. Similar model standards of conduct for mediators have been adopted by the American Arbitration Association, ABA and Association for Conflict Resolution. Many states, state bar associations and court systems also have ethical standards for mediators practicing within their jurisdictions. These rules invariably require mediators to act with patience, courtesy and impartiality toward all participants, and to maintain a process that ensures confidential and autonomous party decision-making.[2] Mediation participants have a right to expect and require mediator compliance with these rules.

Conduct that shows bias (e.g., acting condescendingly, ignoring a position, gaslighting someone's concerns, treating one person or side with more respect than another) frustrates that expectation. Similarly, if a mediator appears to exercise control or influence over the proceeding to steer it in favor of one of the participants, the mediator's effectiveness may be compromised. Conduct that implies the mediator will violate confidentiality by "telling the judge" a party is not participating fully or fairly, acting unduly friendly to one side, providing legal advice to one party or offering unsolicited evaluative opinions of a party's arguments is evidence of partiality and imperils the mediation process. Moreover, all such conduct violates a mediator's ethical duties to treat the parties respectfully, remain impartial and safeguard the parties' rights of self-determination.

- ***There are remedies for improper mediator conduct.***

What can a participant do if a mediator is abusive, rude or overbearing, or otherwise engages in inappropriate conduct? Depending on the circumstances, a stepped approach may work best, beginning with a respectful, private discussion with the mediator to explain how the mediator's conduct may—unintentionally—be creating an environment that is making the process less effective. If this approach does not result in immediate correction, a more direct discussion with the mediator may be needed, outlining the ethical ramifications of the problematic conduct and the concerns it has caused counsel and client.

In more extreme circumstances, where the mediator's conduct is such that counsel and client believe it is counterproductive to continue, they have the right to and should unilaterally adjourn the mediation. Counsel also should report the mediator's offensive conduct to the mediator's administrative organization, if any, as private providers want their mediators to be—and to be viewed as—fair and impartial. Additionally, in some states, especially egregious behavior may be reported to official organizations vested with regulatory authority, including sanctioning power, over mediators.[3]

Offending Conduct by Counsel or the Parties

- ***The rules require mediators to address unethical conduct.***

Unfortunately, sometimes parties or counsel engage in various levels of aggression; belittling, disrespectful or disparaging comments and argument; or even active misrepresentation. Such conduct may violate ethical rules governing the practice of law by the implicated counsel; it also triggers the mediator's obligation to safeguard the fairness of the mediation process and its integrity and impartiality. As a typical example, Standard VI of the ABA Model Standards of Conduct for Mediators requires that "[a] mediator shall conduct a mediation … in a manner that promotes … safety … party participation, procedural fairness … and mutual respect among all participants."

- ***Mediator best practices safeguard the parties' rights.***

Adherence to these principles begins before the parties' joint mediation session. The mediator should inquire (and the parties should volunteer) in pre-session conferences about the history of the parties and counsel. Pre-session conversations can provide the mediator insight concerning counsel's style or negotiation strategy; this may be useful in planning how to forestall or address any abusive or problematic conduct that surfaces later.

The mediator should establish, and the parties should expect, ground rules for the mediation. Even in situations where the parties do not want to have extensive opening statements, the mediator should conduct a brief opening session, in part to address the importance of everyone participating respectfully and professionally.

As the mediation proceeds, the mediator should remain alert to any potentially offending conduct and its impact on the proceedings. Responses to the conduct should be tailored to the nature of such conduct.

Counsel also need to remember their obligation to protect the process and their clients. Thus, they should promptly bring offending conduct to the attention of the mediator.

Usually, the right of party autonomy allows participants to adopt different styles and strategies, free from mediator control. However, if the mediator observes or learns of offensive or disruptive conduct, the mediator should step in. Pointing out that abusive language is a poor substitute for a strong case and unethical may be effective.

> Allowing offending conduct by a mediation participant does no one a favor. It damages the process, frustrates resolution of the case and—in the case of sufficiently coercive conduct—may serve as grounds to set aside a settlement.

Addressing such conduct in separate caucuses can be the most appropriate approach. If the objectionable conduct is coming from a party, the mediator may meet privately with counsel to handle the issue. If this does not solve the problem, the mediator may consider discussing it in joint session. If necessary, the mediator always has the authority to terminate any mediation. Similarly, consistent with the parties' right to end a mediation that is not proceeding in a productive way, any participant concerned that another's abusive behavior has become intolerable may request that the mediator terminate the session.

Allowing offending conduct by a mediation participant does no one a favor. It damages the process, frustrates resolution of the case and—in the case of sufficiently coercive conduct—may serve as grounds to set aside a settlement.[4] Thus, it is important for counsel to prepare for each mediation, forearmed with knowledge of all applicable public and private rules of ethical conduct to which the mediator, counsel and parties must adhere, and to assist the mediator in assuring that those rules are followed by all involved. ■

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.

1. "Behind the Curtain: Ethics for Mediators," 26 *The Prof. Lawyer 10-11* (ABA 2019).
2. For example, Florida has established disciplinary rules, and committees responsible for reviewing, investigating and adjudicating complaints about mediator conduct in violation of those rules. *See* Supreme Court Rules for Certified and Court Appointed Mediators, 762 So.2d 441 (Fla. 2000). Also, the Alabama Code of Ethics allows the Center for Dispute Resolution to remove mediators from their list of approved mediators for violation of ethical standards.
3. Preamble of the ABA Guidelines for Litigation Conduct.
4. *See e.g., Vitakis-Valchine v. Valchine,* 793 So.2d 1094 (Fla. 4th DCA 2001) (vacating a settlement due to abusive mediator conduct); *see also,* "Preserving the Integrity of Mediation Through the Adoption of Ethical Rules for Lawyer-Mediators," *14 Notre Dame Journal of Law, Ethics and Public Policy 200* (2014) (Virginia's rules of professional conduct for lawyers as neutrals provides that a court may vacate a settlement due to attorney misconduct.)

JAMS San Francisco neutral ***Deborah S. Ballati, Esq., FCIArb*** *is nationally recognized for handling complex construction, insurance coverage and related matters for 42 years.*

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RECENT MATTERS

- **PHILIP L. BRUNER, ESQ.** served as Tribunal Chair and Arbitrator appointed under UNCITRAL Rules to decide claims aggregating over US$400M asserted by multiple international parties arising out of the engineering, procurement, and construction of a US$8.5B South American bi-national gold and silver mine.
- **ZELA ''ZEE'' G. CLAIBORNE, ESQ.** mediated a matter involving claims by a contractor against a structural engineering firm alleging inadequate design of a pedestrian bridge positioned over a highway between offices of a Silicon Valley tech company. She also mediated a dispute between the owner of two biomass power generation facilities and a large utility company arising out of long-term power purchase agreements (PPAs). Claims include design deficiencies of the facilities.
- **KENNETH C. GIBBS, ESQ.** has been engaged to be the mediator of disputes arising from construction of the East Side Access Project connecting the Long Island Railroad to Grand Central Station. Mr. Gibbs and **LEXI W. MYER, ESQ.** have also been engaged to perform a neutral evaluation of disputes arising from the construction of the Crenshaw-LAX Transit Project in Los Angeles.

HONORS & SPEAKING ENGAGEMENTS

- **PHILIP L. BRUNER, ESQ.** presented *Construction Law: It's Historical Origins and Twentieth Century Emergence as a Major Field of Modern American and International Legal Practice,* 75:2 Ark. L. Rev. 207 (2022), as the opening keynote address at The University of Arkansas **Law Review Symposium on Construction Law** in the Legal Academy in Fayetteville (March 2022).
- **TONY COLE, FCIArb** is the author of several recent articles focusing on international commercial arbitration in Europe, including *Notes from Interviews with Irish Arbitration Practitioners* (Oct. 2022) and *Notes from Interviews with German Arbitration Practitioners* (July 2022).
- **GILL S. FREEMAN**, Retired Judge, 11th Judicial Circuit (Miami) is a 2022 Jurisprudence Honoree of the Anti-Defamation League of Florida. Since 1913, the Anti-Defamation League has led the fight against racism, bigotry, intolerance, and antisemitism. For 30 years, the Florida Region of ADL has recognized leaders in the legal community who have fought for civil rights across the state.
- **PATRICIA H. THOMPSON, ESQ., FCIArb** participated a panel discussion on *Construction Arbitration: Fact vs. Fallacy—A Debate* and co-authored conference program materials for *To Arbitrate or Not to Arbitrate—That is the Question* for the Pearlman Association's annual surety conference in Woodinville, Washington September 8-9. The Florida Bar Association's Alternative Dispute Resolution Section appointed Ms. Thompson as Chairwoman of its Arbitration Committee.

ON THE MOVE

- **HON. NANCY WIEBEN STOCK (RET.)** joined the JAMS construction panel in Irvine, CA.

PODCAST

- **BRUCE A. EDWARDS, ESQ.** and **PATRICIA H. THOMPSON, ESQ., FCIArb** discuss ***Demystifying Mediation and Arbitration Myths in the Construction Industry*** in this JAMS podcast.

CHAMBERS USA RANKINGS

Seventeen JAMS neutrals were ranked by Chambers USA, including nine members of the Global Engineering and Construction practice group. We congratulate:

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INVESTOR-STATE MEDIATION

CONTINUED FROM PAGE 1

proximately US$4.7M and US$6.4M for investors, and tribunal costs in the region of US$1M. These average costs are further increased if annulment proceedings are pursued: US$1.3M for an applicant and US$1.4M for a respondent State.[1]

It also may take longer to conclude an Investor-State dispute. ICSID proceedings last approximately four years and eight months. Generally, the higher the amount in dispute, the longer the proceedings. Indeed, claims in excess of US$1BN on average last almost eight years.[2]

Considering the cost and time to resolve Investor-State disputes and the fact that most tribunals continue to significantly reduce the amount of damages claimed by investors, it is no wonder that investors are becoming increasingly open to Investor-State mediation as an effective and timely alternative dispute resolution mechanism to address Investor-State issues.

During the last 10 years, leading international dispute organizations including the ICSID, the United Nations Commission on International Trade Law (UNCITRAL) and the Energy Charter Conference (ECT) have focused on the Investor-State dispute settlement needs of the global community. These organizations have responded with a host of Investor-State mediation initiatives. For example, ICSID recently published new mediation rules and the ICSID Background Paper on Investment Mediation.

Why Mediate?

Key reasons for considering mediation for the resolution of Investor-State disputes include:

- **Internal and external cost savings—**External cost estimate for a mediation is a fraction of the US$13-15M for an average Investor-State arbitration, in addition to the internal costs for the State and the investor including lost opportunity costs and potential loss in Foreign Direct Investment (FDI).

Where the key issue in dispute is quantum, mediation serves parties by expanding the perspective beyond sums and allowing the identification of a quantum range and similarly valued non-monetary remedies.

- **The opportunity to reach a relatively quick, and early settlement—**Estimated duration of mediation is six to nine months, based on the experience of similar international commercial mediations. Mediation could be an early part of the parties' investment grievance resolution process, before disagreements harden into disputes.
- **The chance to reach an amicable settlement preserving the parties' ongoing relationship—**Mediation is particularly well-suited to cases where both the Investor and the State have an interest in maintaining an ongoing relationship and a general willingness to engage in negotiations.
- **The value of independent, impartial third-party mediator feedback** on party claims, roadblocks to settlement and possible avenues for resolution.
- **When utilized early, mediation provides a more flexible avenue** for exploring critical relationship management issues such as working with a particular sub-contractor.
- **Confidentiality—**Mediation as a confidential and private process provides a safe opportunity to discuss extra-contractual issues impacting the investment relationship (for example, changes in economic, environmental or socio-political climate) and negotiate acceptable solutions.
- **Mediation can be good for FDI initiatives being established by States** as it demonstrates a proactive conflict management environment to investors, thereby reducing dispute risks.
- **Helping to provide greater clarity on each party´s view on the issues in dispute—**This provides a better basis for seeing the pathway to a negotiated settlement.
- **Maintaining parties´ control—**Mediation is helpful where there is a desire to keep control of the process and the outcome, in particular if possible solutions extend beyond purely monetary relief.

Practical Considerations

The practical considerations in Investor-State mediations require a balanced approach to the following issues:

- **Authority to negotiate and recommend settlement—**Authority issues are particularly important in Investor-State mediation. Multiple agencies may be involved and having persons with authority to negotiate is critical to eventual ratification. There also should be a representative present with authority to recommend any settlement to the ratification body.
- **Multiple disputes with similar issues—**The potential impact of any negotiated

settlement on other existing or potential claims should be considered.

- **Stakeholder mapping and inclusion—** Mediation presents an opportunity to engage parties critical to reaching a sustainable settlement; these might include community, environmental, labor or other non-contractual interests.
- **Selection of Co-Mediators—**Given the complexity of Investor-State disputes, it is usual for co-mediators to be appointed, by agreement of the parties, to work together as a team to mediate the dispute.
- **Information disclosure vs confidentiality—**Needs and statutory requirements for public access/information should be addressed, even while maintaining the confidentiality essential to mediation and effective negotiation.
- **Recognition of settlement agreements—** Early consideration should be given to the availability of various enforcement mechanisms, including applicability and requirements of the local jurisdiction and the relatively new United Nations Convention on the Enforcement of International Settlement Agreements Resulting from Mediation (Singapore Convention). It should be noted that as a settlement agreement is the product of an agreement between the parties, enforcement proceedings are invariably not required in practice.

Concluding Thoughts

There appears to be a growing momentum led by both investors and States alike to find a better way to resolve Investor-State disputes. The desire to adopt a different approach to dispute resolution is being driven by a change in the global investment climate, particularly after the pandemic. The tools are increasingly available to facilitate the use of investment mediation. As knowledge, awareness and use of these tools increases, it is to be hoped that the advantages and benefits that investment mediation can give to the parties will lead to its further uptake in the near future. ■

1. Source: British Institute of International and Comparative Law and Allen & Overy 2021 Empirical Study: Cost, Damages and Duration in Investor-State Arbitration.
2. *Ibid.*

*Arbitrator and mediator **Joe Tirado** is an accredited Investor-State Mediator and a member of the JAMS international panel of neutrals based in New York and London.*

COLLABORATIVE CONSTRUCTION CONTRACTS CONTINUED FROM PAGE 1

1. What is it?

Collaborative contracting requires mutual trust and cooperation throughout a project's contracting life cycle, especially for complex construction projects or long-term development programs that demand close collaboration. Frequently, a single contract may offer incentives for various cooperative practices and behaviors, rewarding the unique strengths and capabilities that owners and contractors each bring to a successful project. Collaborative models can be placed on a continuum between full-on project-alliancing and Integrated Project Delivery (IPD) on the one end and traditional contracts with specific collaboration elements on the other.

2. How did this model develop?

Collaborative approaches were first used in the offshore oil and gas industry to expedite construction and avoid delay. Similar forms appeared in retail, healthcare, and the financial sector. The model began to be used on other construction projects in the nineties after reports were published in the UK concluding that prevailing adversarial models, which prioritized individual company gain, were undermining the industry.

3. Why is this model experiencing increased and wider adoption?

Increased discontent with adversarial models and the greater need for collaboration in many fields have caused new experimentation with collaborative contracts. For example:

- **Projects are larger and more complex.** The size, growth, and associated financial risks of the fixed-price design-build and public-private-partnership (P3) contracting models are exponential.
- **Good contractors are hard to find.** Some contractors are increasingly unwilling to participate in procurement using hard-bid models, while others drop out of the procurement process early.
- **Greater financial and reputational risk.** Project failures bring reputational risk and, due to their size, may cause potential bankruptcy for contractors and their supply chain.
- **The benefit of long-term relationships.** Increasingly new programmatic project types can result in decade-long projects that require future-oriented, relationship-centered approaches.

4. Who uses this approach?

Collaborative models are becoming the dominant choice for many large private construction markets in North America, notably commercial real estate and oil and gas. Australia, Netherlands, and the UK also recognize the strategic advantage of this model in the development of complex road, rail, dike renewal, water way and LPG infrastructure.

5. Does this model really improve project success?

Research and project reviews confirm that collaborative practices improve project performance, and anecdotal evidence corroborates the research and project evaluations.

Early experiences with collaborative contracting in the Netherlands reportedly yielded significant cost savings and better relation-

ships. These benefits have increased demands for more collaboration and have influenced the selection of contractors for a major dike reinforcing and a riverbed renovation program. Factors driving project success include:

- Fairer apportionment of responsibilities and benefits;
- Increased transparency;
- Delivery mechanisms centered around trust and partnership;
- Improved working relationships among project stakeholders;
- More efficient, effective construction;
- Fewer disputes;
- More effective conflict resolution; and
- Optimized, enhanced financial returns.

6. What are some tips for successful collaborative contracting?

How can major-project owners successfully bring diverse interests together under the umbrella of collaborative contracts?

- **Success depends on how well the collaborative approach is implemented and maintained.** Collaborative contracting is not simply a label; effectiveness requires particular behaviors. To succeed, parties should jointly engage in the formulation of objectives, and performance management must be done collaboratively and consistently at a systemic level.
- **Owners must incorporate contractors early in the process.** They must share expectations, select the right contractors, clearly articulate potential incentives, and then work collaboratively with selected contractors to develop, apply, and standardize best practices.
- **Everyone on the project—from owners to primary contractors to subcontractors—must articulate a shared vision** as to definitions of success for the project. All decision makers must be on board, not only at the top but also at mid-management levels.

- **Collaborative contracting requires investment in collective benefits.** Contractors must be allowed to earn a reasonable return on the work, and reward mechanisms must be accurately set. Aligning incentives to the actors' common expected outcomes must be part of goal setting.

7. What are the biggest pitfalls and challenges?

Because this model is relatively new, its novelty brings several challenges.

- **Unfamiliarity with the concept.** Project owners, financiers, and contractors may be unsure about how to draft or perform collaborative contracts, or may not be able to find partners who do. Also, local public procurement rules may pose obstacles to such contract models.
- **Bad implementation and old habits.** Calling something a collaborative contract without sufficient input or maintenance—talking the talk but walking the traditional adversarial approach—invites disappointment. Factors that undermine success under this approach occur at startup, so careful implementation and early monitoring is critical. Without it, this non-traditional contracting approach falls victim to bad habits, such as clinging to traditions of maximizing personal profit, which can undermine trust and collaboration.

8. How does cooperative contracting reduce disputes and improve dispute resolution?

Collaborative contracts can improve coordination, prevent miscommunication, encourage early warning, foster a team attitude and trust, and make it likely that frictions are detected and resolved before they evolve into legal disputes. Yet, disputes are not prevented by a contract alone; a collaborative culture must be cultivated and maintained by the parties.

The success of a collaborative approach also depends on carefully crafted dispute resolution provisions, such as a layered system of negotiation, followed by mediation, and if needed, arbitration. Alternatively, for example, on a tunneling project in the Netherlands, the French contractor and Dutch project owner agreed to appoint a Dispute Resolution Board to resolve disputes by mediation, providing expert opinions, or arbitration, depending on the issue.

Conclusions

Collaborative contracting is an effective and profitable approach to overcoming delivery challenges. Owners in Australia, Asia, the US, and Europe increasingly see value in openness and shared risks and costs. Reaping these benefits requires thorough preparation, implementation, and maintenance. As this contractual model outgrows its niche status, the industry should see more usage, particularly internationally. So, attorneys should be prepared to negotiate, draft, and resolve disputes arising in this context, nationally and globally. Similarly, neutrals will play increasingly important roles in implementation, dispute avoidance and conflict resolution under these contractual models.

Peter Kamminga, Esq., Ph.D. *is a JAMS neutral with 20 years of experience resolving, among others, construction disputes as a mediator, arbitrator and dispute board member.*

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