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JAMS Global Construction Solutions

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

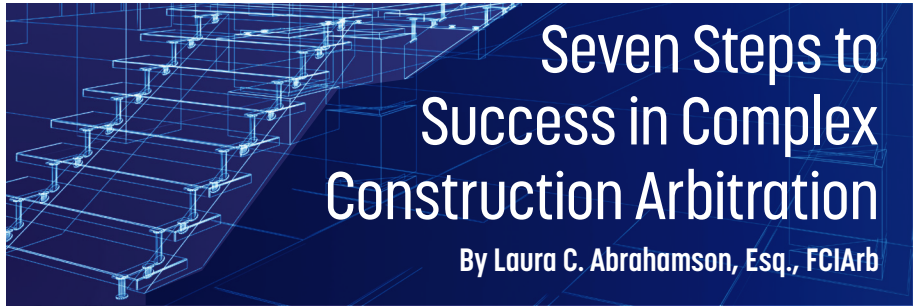
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INSIGHTS FROM THE GENERAL COUNSEL'S OFFICE



Seven Steps to Success in Complex Construction Arbitration

By Laura C. Abrahamson, Esq., FCI Arb

In business and especially the engineering and construction industry, time is money. My conversations this year with general counsel from engineering and construction companies of all sizes consistently reinforced the ongoing need to improve the construction arbitration experience for these users. GCs are looking for arbitrators and advocates who understand business realities and will streamline the process and make it more cost-effective. The following advice will help construction arbitrators and counsel provide GCs the dispute resolution results they expect.

1. Thinking outside the box: Is there a streamlined alternative to arbitrating all issues?

Many construction disputes involve competing claims. **Consider whether there is an issue (or issues) that needs to be adjudicated in order to permit the rest of the claims to be resolved without going through a full-blown arbitration.** If the parties have a tiered dispute resolution clause and have gone through mediation or executive negotiations before filing arbitration, they may be able to identify such an issue.

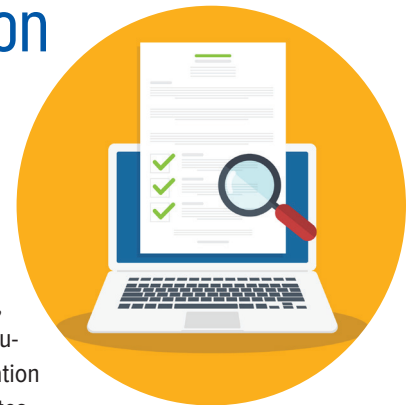
If a preliminary determination can resolve a roadblock to settlement, see if the parties can agree to resolve that issue first. Even better: See if the preliminary determination can be made on a streamlined basis with limited briefing and a one-day hearing.

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JAMS and ConsensusDocs: A Natural Collaboration

By Andrew D. Ness, Esq., FCI Arb and Brian Perlberg, Esq., CM-Lean

ConsensusDocs, a family of standard form construction contracts promulgated by a long list of participating construction industry associations, has been focused, from its founding in 2007, on providing form contracts that foster open communication pathways among the parties, clear allocation of risks, and avoidance or early mitigation of disputes.



The neutrals within JAMS Global Engineering and Construction (GEC) Group share a similar focus in promoting efficient and cost-effective arbitration, mediation and related dispute resolution services for mitigation and resolution of disputes that arise on construction projects. Consistent with these common goals, ConsensusDocs forms include JAMS among the mediation and arbitration options that parties may choose for resolution or mitigation of disputes on projects governed by those forms.

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Harnessing Innovation to Improve the Quality of Arbitrator Decision-Making

A neutral's perspective on the evolution of resolving construction disputes

By Hon. Nancy Wieben Stock (Ret.)

For several years, the shuttering effects of a global pandemic have severely hampered the ability of arbitrators and advocates to use direct techniques to try complex commercial arbitration cases. Forced closures, tempered by the need to timely resolve construction disputes, fostered a survivor's mentality within that industry in particular. As a result, arbitrators, attorneys and clients have collaborated in spectacular fashion, under particularly challenging circumstances, to achieve the goal of timely and complete resolution of bet-the-company conflicts.

As we emerge from the stresses and limitations of the pandemic, it is important that we, as arbitrators, do not take our foot off the pedal. The resolution of highly complex business disputes requires fortitude and innovation. As Albert Einstein said, "Logic will get you from A to B. Imagination will take you everywhere." Whether arbitration hearings take place virtually or in person, we owe it to our clients to continue to adopt the most advanced techniques in evidence-taking and decision-making.

Global settlement is the ultimate goal in most construction disputes. But there are times when settlement cannot be reached. Sometimes a binding decision, after full evidence presentation, serves as a bellwether for similar disputes. At a minimum, an arbitration award will educate parties on future business practices. Because the results are so important, when complex construction disputes, especially those with engineering features, are taken to

arbitration hearing, it is imperative that every such proceeding be conducted to enhance arbitrator comprehension and decision-making.

In my combined 32 years adjudicating and arbitrating cases, I have learned that the job of an arbitrator is to accurately comprehend the law and the facts to address each remedy sought and every defense. This "learning" of the case can be facilitated by a presentation that is cogent and focused. It also helps if the "teaching" of the case allows the arbitrator to build the case piece by piece as each segment is presented. This is not unlike a construction project, from soils and foundation to framing and finish.

Use an "arbitrator's scorecard."

In a recent arbitration concerning a multiunit, single family residential development, the evidence included 198 claimed defect areas, implicating six or seven categories of expert analysis. To catalog the evidence received in each defect area, counsel agreed to the use of an electronic "arbitrator's scorecard." It was agreed the scorecard could be received as evidence. Every defect was assigned a number by type and subtype. The claimant's and respondent's proposed hard costs appeared in side-by-side columns. The next column denoted the arbitrator's decision or whether the parties or experts had agreed on a particular finding mid-hearing. (This happened frequently.) A final column contained the arbitrator's contemporaneous notes. Placing them adjacent to the specific defect group was superior to the usual method making handwritten notes. If opposing experts testified weeks apart, the

arbitrator could add their notes regarding both opinions in the same box on the scorecard. It was helpful to be able to enter immediate, tentative conclusions on some of the simpler defect areas on the scorecard as soon as the second expert finished testifying. The parties stipulated that the scorecard could be prepopulated with notes about the partial resolution of certain defects. As additional settlements on certain defects occurred during the hearing, they were also entered on the scorecard.

Deliver the case on a silver platter.

In a recent arbitration, I convened 32 daily participants in the hearing room. The issue was responsibility for failed deep foundation footings during construction of a high-rise commercial building located in a seismic region. Counsel and I collaborated on innovations to



We owe it to our clients to continue to adopt the most advanced techniques in evidence-taking and decision-making.



ensure that the highly technical evidence and competing insurance provisions were clearly presented. These techniques served to simplify the evidence and facilitated arbitrator comprehension of technical nuances.

- a. Opening statements were presented 30 days before the evidence commenced. This allowed counsel to make final adjustments and make further progress on a robust stipulation of undisputed facts and law. This allowed us to reserve precious hearing time for issues actually in dispute.
- b. PowerPoint presentations, with embedded multimedia re-enactments and color-coded renderings were admitted into evidence. Although they contained matter not normally considered evidence in a courtroom, everyone agreed that the Arbitrator could give such weight as was warranted to each component of these presentations. Confidence in the arbitrator’s ability to perform this weighing allowed for the introduction of visually appealing and creative treatment of dense technical concepts.
- c. The parties submitted a chronology of critical events, annotated with exhibit numbers. Litigants should not overlook the importance of a tightly drawn factual chronology. In construction disputes, the timing of an activity or response thereto can be critical to the arbitrator’s decision. It is particularly helpful when the exhibits are linked to in the chronology. The inclusion of searchable, extractable text in all PDF filings and exhibits ensures the arbitrator need not access a second device or file.
- d. Having experts testify consecutively, and in each other’s presence, allows the common subject of their testimony to be thoroughly “roundtabled” and provides true witness accountability. Some arbitrators prefer a debate format, called “hot-tubbing.” A handwritten side-by-side balance sheet, contrasting the key elements of opposing opinions also serves as a handy checkoff for the arbitrator.
- e. Even though counsel reserved the opportunity for written closing briefs, at the end of the evidence, we set aside time for a

live interaction with the arbitrator, where I posed questions and discussed with counsel the key issues that should be included in their briefs. This type of session is critical. Without it, counsel have no idea where the information gaps lie. It also allows the arbitrator to share which of the additional tools referenced in this article should be included in their briefs, if they have not already been provided.

Introduce innovative techniques.

For those accustomed to the strict procedures demanded in state and federal courtrooms, the more relaxed and collaborative arbitration environment should inspire innovative solutions. Rule 22(a) of the JAMS Construction Arbitration Rules and Procedures allows the arbitrator latitude in conducting the arbitration hearing

It did not have to take a global pandemic to force counsel into forward-thinking trial techniques. These ideas just make sense. After all the effort has been expended on evidence presentation, counsel must still ensure that the arbitrator comprehends and appreciates each piece of evidence. At the close of the evidence, the arbitrator or tripartite tribunal may have only 30 days, after submission of closing briefs, to write the award. (See, e.g., JAMS Rule 24.) Ideally, the case will have been presented to enable the arbitrator to craft a decision tree by the close of the evidence so that the passage of time will not dampen the arbitrator’s grasp of the issues. This ideal result will be more likely if the parties use collaborative and innovative evidentiary approaches suited to the unique needs of a dispute, thereby enhancing the arbitrator’s ability to write



and to “vary [hearing] procedures if it is determined to be reasonable and appropriate to do so.” International arbitration rules follow suit.¹ JAMS Rule 22(b) states, “The Arbitrator shall determine the order of proof” Rule 22(d) allows the Arbitrator to, “consider evidence that he or she finds relevant and material to the dispute, giving the evidence such weight as is appropriate.” “Strict conformity to the rules of evidence is not required” (Id.) International arbitration rules follow suit. These relaxed rules are appropriate for contractual arbitration, where long before a dispute arises, parties have already agreed to cost-saving and expedited resolution. Arbitration rules create the perfect environment for innovation, which, when executed effectively, deliver the high-quality dispute resolution that the clients contract for in their arbitration agreements.

a well-reasoned, timely decision and issue a correct award.

1. *The International Court of Arbitration (ICC) encourages the use of various case management techniques to streamline and simply arbitration hearings. (See ICC Arbitration Rules Appendix IV: Case Management Techniques.) The rules of the United Nations Commission on International Trade Law (UNCITRAL) state, “[t]he arbitral tribunal may conduct the arbitration in such manner as it considers appropriate.” “The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties’ dispute” (UNCITRAL, Section III. Arbitral proceedings, General provisions, Article 171).*

A JAMS neutral since 2014,
Hon. Nancy Wieben Stock (Ret.) is known for efficiently resolving complex, multi-party, civil disputes, including construction matters.





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.

RECENT MATTERS

- [KENNETH C. GIBBS, ESQ.](#) and [LEXI W. MYER-WOLFE, ESQ.](#), have been engaged to perform a neutral evaluation of disputes of nearly \$700M arising from the construction of public transit infrastructure in metropolitan Los Angeles.
- [LESLIE KING O'NEAL](#) received the Cornerstone Award from the American Bar Association Forum on Construction Law at the Annual Meeting on April 13 in Vancouver, BC. The highest honor presented by the American Bar Association Forum on Construction Law, the Cornerstone Award recognizes a Forum member who has rendered long-term exceptional service to the construction industry, to the public, and to the legal profession.
- On Feb. 7, JAMS Chicago hosted the Society of Illinois Construc-

tion Attorneys ADR Committee in a discussion of “Mediation Misconduct by Mediators, Attorneys, and Parties.” JAMS neutral [HON. GERALDINE SOAT BROWN \(RET.\)](#) is the co-chair of the ADR Committee.

ON THE MOVE

- [LESLIE KING O'NEAL](#) joined the JAMS construction panel in Miami, FL.

ADR INSIGHTS

- In “Proposing a New ADR Service: Mediated Evaluation,” [JOHN W. HINCHEY, ESQ.](#) describes a process for parties interested in a deeper merits evaluation than traditional mediation offers.

Seven Steps to Success in Complex Construction Arbitration

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A success story inspired this tip. It comes from my in-house experience and concerns a construction dispute between an owner and a contractor. At mediation, the parties were able to negotiate a value for the contractor’s \$40 million primary claim but could not agree on the validity or value of the owner’s \$20 million counterclaims. Instead of proceeding with a full arbitration of that counterclaim, the parties agreed to a settlement that provided for an adjustment to the payment due the contractor, an amount between \$0 and \$8 million, based on how an agreed-upon neutral valued the counterclaims. We chose a neutral and agreed to limited (in time and length) briefing and a one-day hearing. The neutral, who was not informed about the settlement, was simply tasked with assessing the validity of the counterclaims and providing a dollar value for those found valid. The award was due within a week of the hearing, with no supporting ex-

planation or reasoning. The settlement agreement provided that a \$20 million valuation would add nothing to the settlement amount and a \$0 valuation would add \$8 million to the settlement amount. The percentage of \$20 million of anything in between would add a like percentage of \$8 million to the award. The case was resolved in three months, and the clients were thrilled.

2. Streamline hearings and reduce discovery costs by using written witness statements.

In complex construction arbitrations, particularly in multiparty disputes, attorneys’ fees can approach—and sometimes exceed—the amount at issue. The last thing GCs, on any side of a dispute, want is for attorneys’ fees to dwarf the actual award. Depositions, particularly in multiparty construction disputes,

can send discovery costs soaring. Parties are reluctant in arbitration to limit depositions because lawyers understandably hate to be unprepared.

At the preliminary case management conference, arbitrators and counsel should encourage the use of written witness statements in lieu of direct testimony. **The beauty of written witness statements is that they often eliminate the need for depositions of those witnesses.** All counsel will know what the direct testimony of a witness will be. They will be able to cost-effectively plan their cross-examination without incurring the expense of deposing the witness and without any of the other parties incurring the expense of attending. At the evidentiary hearing, the witness can quickly affirm the contents of their witness statement and then be turned over for cross-examination. In my experience as in-house counsel, which

was confirmed by the GCs I interviewed this year, **using written witness statements can save as much as 30% of the time and cost of an evidentiary hearing.**

3. Encourage the effective use of experts through presentations and joint examination of experts.

Expert testimony, while crucial, can be incredibly costly in complex construction arbitrations. To help GCs value-engineer the use and extent of expert evidence, I offer the following suggestions:

- a. At the preliminary management conference, **arbitrators should encourage the experts to provide their opinions through PowerPoint or another type of visual presentation instead of in a written report.** Because such presentations can be more effective at persuasively conveying the experts' opinions to the tribunal, experts may be asked to prepare such presentations in addition to the usual lengthy, written reports. Although some written appendices may be needed, suggesting at the beginning that as much of an expert's testimony as possible come in a more persuasive, digestible (shorter) format will increase its effectiveness and hold down costs.
- b. **Have the experts from the same discipline/on the same topic meet and confer without counsel and prepare a joint report** setting out what they agree upon and where they differ, instead of creating individual reports. Then the hearing can be streamlined and focus on how and why they disagree. To increase efficiency even more, **the experts should be present and examined together at the hearing.** GCs are fans of this practice, which is often known as "hot-boxing" or "hot-tubbing." Such an approach is common in international arbitrations, and GCs would like to see it used more in domestic construction arbitrations. Now that we're used to hybrid and virtual hearings, this should be easy to achieve.



4. Be prepared.

Remember that companies choose arbitration in large part because they want to make sure that their disputes are decided by someone with the expertise and the ability to understand the issues. While understanding the issues requires an investment of time that state and federal trial court judges don't have, there should be no such excuse for arbitrators. Yet the GCs I interviewed expressed frustration at attending an evidentiary hearing and discovering their arbitrators were not familiar with the record or had not read all the documents and exhibits that had been submitted. **To deliver what GCs expect from arbitration, practitioners and arbitrators should make sure they understand the record and the issues.**

5. Remind the parties to focus on damages.

The lion's share of the parties' submissions and hearing time often is spent on liability issues. To help GCs get what they want from the process, **prioritize discussing damages.** Making sure that the parties devote enough time to damages will improve the quality of awards, regardless of the decision.

6. Cue the chess clock.

Encourage shorter hearings and more efficient use of hearing time by using a chess clock. The use of a chess clock and the amount of time each party will be allotted should be discussed and decided at the preliminary conference. The hearing time does not have to be evenly divided and should depend on the number of witnesses and particular issues for each party. Charging the time each party

spends asking questions against its predetermined and limited time allocation encourages all parties to take a more concise approach to the introduction of evidence.

7. Keep the endgame in mind.

Limit and define post-hearing briefing. Discuss early on what will happen at the end of the evidentiary hearing. Pre-hearing briefs laying out the facts and legal issues can be very helpful to the arbitrator's preparation. But after the evidence has come in, repeating the arguments in post-hearing briefs can be a high-cost, low-value exercise. Under such circumstances, if the parties want post-hearing briefs, consider limiting submissions to a list of issues on which the arbitrator says they need more information or analysis, after they have heard the evidence. This will better focus post-hearing briefing, consistent with clients' goal of cost-effectiveness.

Consider discussing the operative rules on attorneys' fees awards at the preliminary conference. If there is no contractual or statutory basis for an attorneys' fees award, GCs and their clients may want to know the arbitrator's views on whether fee shifting is available under the applicable rules. Particularly in multi-party, complex construction cases, it is not always obvious how the arbitrator should determine when someone is a prevailing party.

JAMS neutral, **Laura C. Abrahamson, Esq., FCI Arb** has extensive in-house counsel and ADR experience handling global construction and other complex disputes.



JAMS and ConsensusDocs: A Natural Collaboration

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The ConsensusDocs family of construction contract documents utilize a flexible, multi-step dispute avoidance/mitigation/resolution structure that starts with direct discussions between the parties to avoid disputes, first at the project level and then between senior executives. If these discussions do not resolve the dispute, the next step is non-binding mitigation, involving either mediation, use of a Dispute Review Board (DRB) or a project neutral. JAMS GEC neutrals are especially suited for the resolution processes prescribed by the ConsensusDocs forms. Many serve frequently on DRBs and accept project neutral appointments, aided by their decades of firsthand experience with the resolution of complex construction contract issues. JAMS' website also has suggested language describing the appointment and duties of project neutrals, just as ConsensusDocs produces a standard form DRB specification and DRB agreement, in ConsensusDocs 200.4 and 200.5.

If a DRB or project neutral is not selected, the multistep ConsensusDocs process mandates mediation in advance of binding dispute resolution. The parties are asked to select either JAMS or American Arbitration Association (AAA) mediation rules. The mediation rules themselves are rarely significant to the mediation process. Far more important are the qualifications and experience of the selected mediator and his or her familiarity with emerging alternative mediation formats that have proven effective for particular types of con-

The JAMS Construction Arbitration Rules approach of requiring the parties to share information immediately can potentially shave months off the time to resolution.

struction disputes. For example, should the parties utilize some of the mediation time to make presentations regarding the key facts and legal issues involved? In concept, this is an opportunity for each side to demonstrate the strength of their arguments to the other side's decision-makers. In practice, however, it may be a waste of time or, worse, generate an emotional response (in one or both parties) that makes settlement more difficult. In situations where the level of pre-mediation information exchange and knowledge of the other party's positions is minimal, such presentations can be highly effective. But in other cases, valuable mediation time is better spent in private caucuses with the mediator exploring resolution alternatives.

Similarly, there are emerging mediation variants with particular applicability to certain construction disputes, such as guided choice mediation, where the mediator's role is more extensive. In this process, the mediator leads the parties through efficient, limited information exchanges that are designed to provide all parties with the specific information they need



to evaluate the strengths and weakness of their arguments, assess their respective risks and formulate constructive settlement proposals, before settlement offers get exchanged. ConsensusDocs publishes a ConsensusDocs Guidebook for users who embrace or want to learn more about guided choice mediation.

A variant of guided choice mediation, often referred to as mediated case management, is designed for disputes already in litigation. In this method, the mediator again guides the parties away from broad and expensive pre-trial discovery and toward focused information exchanges that get to the heart of what the parties must focus on to resolve their dispute. Yet another alternative is mediation followed (when needed) by a neutral evaluation, which provides the parties with independent, confidential input from a neutral on the likely outcome if their dispute is taken to hearing or trial, before resuming mediation.



The JAMS rules were most recently amended in 2021 to outline the procedures for conducting arbitration hearings remotely (via platforms like Zoom or Teams), given the prevalence of virtual hearings during the pandemic and likely continued use of virtual platforms thereafter.



ConsensusDocs has brought a perspective centered on the best interests of the project to the drafting of form contracts and has been responsible for initiating a number of innovative provisions that have advanced the state of the art in construction contracting.

JAMS Global Engineering and Construction (GEC) group members devote their professional efforts to neutral assignments, whether as a mediator, arbitrator, neutral evaluator, DRB member or project neutral. They stay up to date with the current trends and latest developments in construction dispute resolution, including through JAMS’ extensive menu of educational programs and library of resources. These programs include training by JAMS GEC members who pioneered the use of several of the emerging mediation variations described above.

For the final, binding resolution step, form contracts from ConsensusDocs offer the alternatives of arbitration (under the rules of JAMS, AAA or another provider) or litigation in court. The selection of rules in arbitration is more important than in mediation, and JAMS Construction Arbitration Rules and Procedures offer several advantages over the alternatives. For example, the JAMS rules specify that the disclosure of key information should begin as soon as the arbitration is filed, rather than after the initial scheduling conference once the arbitration panel is constituted. Under other arbitration rules, nothing much happens between the filing of the request for arbitration and the initial scheduling conference, which can be a span of three months or more. This is effectively “dead time” in terms of moving the dispute to resolution. The JAMS approach of requiring the parties to share information immediately can potentially shave months off the time to resolution.

The JAMS rules also take a more pragmatic approach to depositions. Alternative arbitration rules tend to disfavor depositions, except in unusual cases, although this limiting approach may be ignored in complex construction disputes. The JAMS rules instead allow each party to take two depositions of fact witnesses employed by the other party and require a showing of need if any more are desired. This eliminates arguing over the need for depositions and sets expectations, which lets the parties plan for depositions from the outset and set an early hearing date, again shortening the time to resolution. If depositions are not needed, the parties are not bound to conduct them.

Additionally, the JAMS rules were most recently amended in 2021 to outline the procedures for conducting arbitration hearings remotely (via platforms like Zoom or Teams), given the prevalence of virtual hearings during the pandemic and likely continued use of virtual platforms thereafter. The JAMS rules aim to make the arbitration process as focused and efficient as practicable, which supports ConsensusDocs objectives by reducing the cost of arbitration and the time needed to obtain an arbitration award, allowing the parties to get back to business.

The ConsensusDocs initiative is 15 years old and includes over 41 construction industry associations as supporting members. It has brought a perspective centered on the best interests of the project to the drafting of form contracts and has been responsible for initiating

a number of innovative provisions that have advanced the state of the art in construction contracting. JAMS is delighted that the ConsensusDocs forms afford its GEC neutrals the opportunity to participate in the efficient and cost effective resolution of construction disputes as part of the future of better and more efficient construction contracting that is the ConsensusDocs goal.

Sample contract documents from ConsensusDocs can be accessed by filling out a [request form](#). Additionally, you can sign up for a free monthly construction law newsletter via a form at the bottom of the [ConsensusDocs](#) homepage.

You can also review sample clauses, all versions of the JAMS rules and a variety of content by visiting www.jamsadr.com.

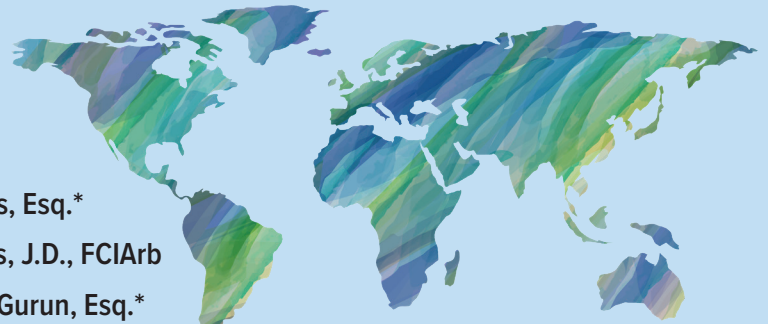
JAMS neutral **Andrew D. Ness, Esq., FCIArb** has arbitrated and mediated highly complex domestic and global construction cases across diverse jurisdictions and rules.



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