



# JAMS Global Construction Solutions

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

## THE CHOICE IS YOURS: Navigating the Multilane Highway of Construction Dispute Resolution

By Thomas J. Stipanowich, Esq.

Using a deliberate and thoughtful approach to managing and resolving conflicts can reap great dividends. Have you considered all options in order to best serve your client's interests? Not doing so could lead to missed opportunities and unnecessary costs and delays.

When it comes to construction disputes, contractors, design professionals and project owners know four sobering truths: (1) these conflicts tend to mount and intensify; (2) related costs skyrocket; (3) finding solutions becomes more difficult and complicated as things move into "litigation mode"; and (4) as a result, job progress



may be delayed or disrupted, relationships stressed and business goals undermined.

In light of these realities, construction parties seek to resolve conflicts more quickly and cost-effectively, instead of going down the long and costly road of litigation. A recent poll by leading construction law firm Smith, Currie & Hancock<sup>1</sup> of corporate counsel representing contractors, design professionals and owners indicated that "an efficient, cost-effective dispute resolu-

tion process" topped the list of business priorities in dispute resolution. Depending on the circumstances, parties may prioritize other goals, including getting on with business, maintaining control over dispute resolution, ensuring a fundamentally fair process and outcome (as measured by the law or other standards), maintaining privacy and confidentiality and preserving business relationships, among other things.

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# Contracts in Context

In construction industry contract disputes, the debate over **text** versus **context** takes center stage

*By Professor Carl J. Circo*

For more than a century, U.S. contract law has become increasingly contextual. By this, I mean that our legal institutions, in establishing and enforcing contract rights and obligations, place significant weight on the overall circumstances in which transactions occur, rather than merely relying on express contract terms and abstract rules of law. The ascendancy of contextual contract concerns not only judges and legal scholars, but also arbitrators, mediators and other neutrals dealing with contract disputes and the management of contractual relationships.

While our instincts may suggest the obvious importance of context in every contractual relationship, such was not always the case as a matter of law. In comparison to many other branches of law, such as those governing property interests, crimes and the duties that everyone has to avoid harming others (the subject of tort law), an organized body of law governing contractual relationships barely existed in the United States until after the mid-19th century. When contract law finally emerged, it embraced relatively rigid principles intended to govern all kinds of transactions. Variations in customs, practices and circumstances specific to one industry or one type of exchange relationship—that is, context—were largely ignored in favor of fixed, consistent rules. Only during



the 20th century did contract law broadly adapt its fundamental principles to account for contextual differences. Today, however, the totality of the circumstances in which bargains and transactions occur plays a central role in contract law.

We see this phenomenon in every aspect of commerce and industry. A contextual perspective influences how we structure, conduct and interpret contracts differently for distinct industries and transactions. Context also leads legislatures to enact specific laws to govern certain types of contractual relationships, from legislation affording special protection to consumers, to complex codes or targeted statutes for different commercial areas, such as the sale of goods, construction industry activities, labor relations, financial transactions and intellectual property rights.

My own experience derives from negotiating contracts and settling disputes in the construction and real estate industries over the course of two decades as a practicing lawyer and, more recently, from analyzing the judicial opinions and legislation I cover as a law professor in courses on construction law and real estate transactions. In my recently published book, *Contract Law in the Construction Industry Context*, I use the history of construction industry cases in our courts to chronicle the gradual transition from the relatively formalistic understanding of contract law prevailing through the mid-20th century to today's far more flexible one.

Although this transition is undeniable, it has been surrounded by controversy. The debate involves far more than the clashing theoretical perspectives of the legal scholars, economists and social scientists who incessantly engage one another in the academic journals. The competing arguments concern the very role of contract law as an instrument of society.

The questions at the heart of the matter are of fundamental importance in the commercial arena. Why does the law enforce some promises but not others? Should the primary objective of contract law be to respect the sanctity of promises made with the appropriate formalities, such as a written agreement signed by the parties affected? Alternatively, is freedom of contract the organizing principle behind contract law? If so, does freedom of contract call for legal rules that maximize the ability of individuals in the strongest bargaining position to negotiate whatever advantages they believe will best serve their interests? Or is the essential purpose of contract law to promote the general welfare by protecting the reasonable expectations of those who transact business with one another? Should a promise be legally enforceable only to the extent that it is part of a deliberate and mutual exchange, or should the law enforce any promise or representation that predictably induces reliance by the person to whom the promise or representation has been made? To what extent should contract law incorpo-

rate commonly shared societal values by employing indeterminate standards, such as reasonableness and good faith? How important is it that contract law establish clear rules that promote predictability and certainty in commerce? To what extent should the law aim to balance the costs and benefits of contractual risks most efficiently? If efficiency is a key consideration, should the law focus on achieving results that are most efficient for the parties to a specific contractual dispute on an ad hoc basis under the circumstances of that case, or should contract law establish principles that tend to advance the net gain for the common good of society in the majority of situations?

Such philosophical questions lead to more practical ones when actual disputes arise between contracting parties. What values should guide decisions about how to understand a written agreement when the contracting parties argue for conflicting interpretations? How should the law address unanticipated circumstances that arise during the performance of a contract? When, if ever, should it matter that enforcing an agreement strictly in accordance with its express terms yields results

that seem unfair or simply irrational when applied to a particular dispute? Should it matter that a contracting party made the agreement based on a mistaken assumption? These and similar questions inevitably arise in complex and extended transactional relationships, in part because of the inherent ambiguity of language and in part because of the unpredictability of future events.

In our courts, the unique circumstances surrounding contractual relationships in the construction industry have played an especially important role in the transition to a more contextual conception of contract. Because alternative dispute resolution processes play such a prominent role in resolving construction industry disputes, arbitrators, mediators and other

neutrals must also grapple with the distinction between the traditionally formalistic understanding of contract and a more flexible, situationally attentive one. As a few examples will show, the movement in our courts toward the more contextual concept in construction industry cases emerged gradually, and it continues to the present time.

By the early 20th century, judges began to appreciate that contract law should acknowledge certain circumstances inherent in the construction process that affect the reasonable expectations of industry participants. One of contract law's most important contextual principles was solidified during that period in cases involving refusals by project owners to pay builders due to imperfect performance. When builders sued to collect payment under those circumstances, they faced a high hurdle under an established contract law rule that reflected the legal formalism of the time: The owner's obligation to pay was dependent on the builder's performance strictly in accordance with the terms of the written agreement. Taking into account the special circumstances of building projects, courts crafted a new and far more flexi-

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ble principle that recognized the right of a contracting party to receive equitable payment for imperfect performance if, under all the circumstances, the other party would still receive the essential economic benefits the contract contemplated. The reasoning in these cases recognized the impracticality of conditioning a builder's right to payment on perfect performance even though the contractual specifications were unambiguous. This rationale eventually became recognized as the "substantial performance" doctrine, which courts now routinely use to determine whether a breach of contract should be considered, under the totality of the circumstances of a case, so material as to prevent the breaching party from having any remaining rights under the contract. This concept of materiality vests the decision-maker with a degree of discretion antithetical to legal formalism.

Also during the era in which a highly formalistic approach to contract law still prevailed, judges began to recognize the importance of taking into account customs and trade practices when dealing with construction industry disputes. Thus, in

another line of early-20th-century cases, courts began to imply terms into written contracts based on the interdependent relationships common between industry participants. Implying terms into contracts involves much more than inferring from the express terms of a written agreement what the contracting parties actually intended; rather, it often reflects a policy decision that particular circumstances call for the law to impose on one party an obligation relating to circumstances the parties did not adequately address in their written agreement. A leading example is the doctrine holding that a project owner impliedly warrants the sufficiency of the plans and specifications it provides to a builder. In a similar way, decisions in other industry cases imposed on a party to a construction contract a duty to share certain information within that party's special knowledge when a failure to disclose that information would materially and adversely impact the other party's ability to perform under the contract.

As contract law further evolved during the second half of the 20th century, judges became more and more willing to imply

terms into agreements based on the totality of the circumstances surrounding a contractual relationship. In construction cases, some of the most important factors that influenced courts to imply obligations derived from customs and trade practices of the industry in general, as well from evidence of a course of dealing or performance between the specific contracting parties. Thus, in deciding disputes over construction contracts, courts often consider evidence that a word or phrase used in the contract has special meaning within the industry. Similarly, they may consider what the parties' behavior during performance of the contract suggests about how to interpret the written terms of the agreement. In effect, in applying contract law, courts regularly engage in a delicate balance between respect for the text of a contract and regard for the implications of the context of a specific relationship or situation.

Another key example of the movement toward a more contextual understanding of contractual relationships in the construction industry involves how courts deal with circumstances in which an in-



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dustry participant takes action or makes a commitment based on an offer of performance that falls short of the technical requirements for an enforceable contract. One of the most common situations in this category arises when a general contractor submits a binding bid on a project based in part on a trade contractor's erroneous price proposal for a significant part of the work. The formal rules of contract offer and acceptance allow the trade contractor to withdraw the proposal up to the time the general contractor formally accepts it. The contextual approach, however, permits the general contractor to treat the proposal as a binding commitment if the contractor reasonably relied on the proposal as part of its winning bid for the project. In what amounts to a contextual mirror image of this principle, a court may relieve a party from the obligation to perform under a construction contract where that party's pricing decision was based on a mistaken calculation if the court concludes that enforcing the contract against the mistaken party would be unconscionable and that allowing the defense of mistake would not be unduly prejudicial to the other party under the circumstances. Indeterminate standards such as "reasonable reliance," "unconscionability" and "undue prejudice," while anathema to a formalistic perspective, are characteristic of a contextual one.

Today, the most burning text-versus-context questions involve matters of contract interpretation, especially when circumstances arise that the parties failed to anticipate in their written agreement. Contractual relationships in the construction industry present particularly difficult problems of unanticipated circumstances because building projects routinely involve complex webs of interdependent and dynamic relationships calling for performance under conditions of high risk and great uncertainty as developments occur over an extended project duration. Legal

commentators often call this the gap-filling dilemma: Should contract law provide a framework for filling in reasonable terms to deal with a situation the parties did not anticipate? If so, should the objective be to discern what terms the parties most likely would have included in their agreement had they thought of the specific situation, or should it be to impose on the parties the result that the decision-maker deems most efficient under the circumstances?

Gap-filling questions often come up in contemporary cases under certain contractual provisions common in construction industry contracts. Should a pay-if-paid or pay-when-paid term be enforced literally as an absolute condition to the right to payment, or do the specific circumstances of the project or the relationship between the contracting parties show that the parties intended the provision merely as a basis for delaying the right to payment for a reasonable time? May an owner use a termination for convenience clause as an opportunity to engage in bid shopping? Does a no-damage-for-delay clause insulate an owner from liability for a delay attributable to the owner's activities that unnecessarily interfere with the contractor's performance of the work?

In these and similar situations involving contract interpretation, the debate over text versus context takes center stage, and it rages on. Even within the judicial decisions from a single jurisdiction, we find many opinions firmly adhering to the formalist approach that considers only the words the parties used to express their agreement, while we see many others taking context into account to a greater or lesser extent. While to some commentators these seemingly conflicting approaches show that contract law is in disarray when it comes to the most difficult matters of contract interpretation, I see something different. A close analysis of the cases suggests that in deciding wheth-

er to interpret a written agreement strictly by reference to its text or to give weight to context, courts regularly consider the totality of the circumstances of the specific situation. If the circumstances provide no stimulus for looking beyond the written agreement, the judicial inquiry stops there. But the trend in contemporary cases also evidences a willingness of courts to weigh such factors as trade custom, course of dealing, course of performance or other situational considerations when doing so tends to honor the transactional relationship. In other words, to repeat a conclusion from my recent book on contract law in the construction industry, with respect to the text-versus-context puzzle, "I offer a seemingly tautological response: the context of the dispute guides courts in identifying those cases calling for contextual interpretation."

A contextual conception of contract law requires decision-makers to have a well-founded understanding of the contractual circumstances and transactional relationships involved in specific situations. Arbitrators, mediators and designated neutrals, whether handling construction industry cases or other types of contract disputes, often have an advantage over courts in this regard because an organization such as JAMS provides neutral experts who are as impartial as the judges in our court system but who have far greater industry-specific experience. At the same time, as the story of the contextual contract demonstrates, the evolution of contract law will occur gradually as courts adapt their decisions to experience.



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

## HONORS & SPEAKING ENGAGEMENTS

**Hon. Carol Park-Conroy (Ret.)** (Washington, DC) moderated, for the sixth consecutive year, the key case review panel at the Boards of Contract Appeals Bar Association's Annual Program on October 22, 2019. Additionally, Park-Conroy will speak at Financial Executives International's Conference on Government Business on February 4, 2020.

**Hon. Geraldine Soat Brown (Ret.)** (Chicago) gave remarks about arbitrator subpoenas and evidence from non-parties in the context of an American Bar Association panel titled *What Litigators Need to Do Differently When Acting as Advocates in Arbitration* at the annual meeting of the Women in Litigation Section on November 15, 2019. Judge Brown also made a presentation to the Society of Illinois Construction Attorneys on December 17, 2019, titled *ADR Headlines: Recent News About Arbitration and Mediation*.

**Philip L. Bruner, Esq.** (Minneapolis) presented the keynote address to open the Society of Construction Law – India's 2019 Conference on Construction Law and Arbitration held in December 2019 in New Delhi, India, and attended by more than 250 delegates from around the world.

**John W. Hinchey, Esq.** (Washington, DC) has contributed an article, "Rethinking of Construction Disputes," to a forthcom-

ing edition of *Construction Law International*, the magazine of the International Bar Association's International Construction Projects Committee. In the article, Mr. Hinchey surveys the spectrum of techniques and processes used to avoid and resolve disputes and concludes that the goal should not be to discover some ideal or optimum process, but rather to determine which technique or process best suits the values and objectives of the affected parties.

## ON THE MOVE

**Paul A. Bruno, Esq.** (Dallas) has been named programme chair of the International Academy of Construction Lawyers' Annual Meeting, which will be held March 26–28, 2020, in Stellenbosch, South Africa.

**Hon. Carol Park-Conroy (Ret.)** has been elected as an honorary fellow of the American College of Construction Lawyers.

**Fred G. Bennett, Esq.** (Los Angeles), **Ross W. Feinberg, Esq.** (Orange County), and **Thomas J. Stipanowich, Esq.** (Los Angeles) joined the JAMS Global Engineering and Construction Group. JAMS' nationwide panel now includes more than 40 construction dispute resolution professionals.

## RECENT MATTERS

**Kenneth C. Gibbs, Esq.** (Los Angeles) has been engaged to mediate disputes arising out of construction projects at LaGuardia Airport; Los Angeles International Airport; the Tappan Zee Bridge; and interstate highways in Ohio, Utah, Arizona and South Carolina.

**Patricia H. Thompson, Esq.** (Miami) recently completed her service as chair of a Florida-based arbitration arising out of the allegedly wrongful termination of a subcontractor on a project involving marine and land-side construction. The disputes involved multi-million-dollar counterclaims of defective work, project delay and material design change, which the panel resolved following a three-week-long hearing. Thompson also successfully mediated—pre-litigation—a threatened multistate employment class and collective action asserted against a marine contractor and, in another matter, assisted the parties to a commercial crime policy by issuing an opinion as to whether there was coverage for losses caused by a decade of fraud by a senior officer of the corporate insured.



# Building Diversity in ADR

## JAMS offers an inclusion rider for arbitration contracts

**JAMS Chief Marketing Officer Mark Smalls** offered his perspective in a recent blog post titled “**Making the Case for Greater Diversity in ADR.**” Smalls notes that it’s time for all stakeholders to take bold steps to make diversity and inclusion a priority.

JAMS is committed to recruiting and promoting an inclusive panel of ADR professionals. Nearly half of the neutrals who have joined us over the past five years are women and/or diverse. An early supporter

of the **Equal Representation in Arbitration Pledge**, JAMS is the first private ADR provider to offer a diversity and inclusion rider for arbitration contracts. This model contract language recognizes the benefits of considering diversity in the arbitrator selection process. Learn more at [jamsadr.com/clauses/#Diversity](https://jamsadr.com/clauses/#Diversity).

In the fall, JAMS became the first ADR provider to hire a diversity program manager, **Joanne Saint Louis**, to help steer its diversity initiatives. As noted by a *Law 360*



**article** after the announcement, “Saint Louis is tasked with helping to further the organization’s diversity and inclusion goals, which include improving

the diversity of its panel of neutrals and facilitating the selection of more diverse mediators and arbitrators.” Read more at [jamsadr.com/news/2019/jams-welcomes-diversity-program-manager](https://jamsadr.com/news/2019/jams-welcomes-diversity-program-manager).



## JAMS GEC neutral Deborah S. Ballati, Esq. on the benefits of experiencing diverse perspectives

Being part of a diverse organization provides everyone the opportunity to experience different perspectives, which is important to understanding the goals, motivations and concerns of those with whom we work and to whom we provide our services. I began practicing law at a time when there were very few female attorneys and businesswomen, and I feel this was actually beneficial to me because I was able to learn from, and appreciate the differences of, those who, at least outwardly, didn’t look or act like me or seem to have the same perspective. I learned how to listen in order to understand the motivations and perspectives of others.

It’s also true that, at least initially, people are usually more comfortable discussing their lives with those who seem to be like them or have had similar life experiences. Both lawyers and neutrals know that comfort leads to trust, and gaining trust is essential to effectively representing clients and facilitating settlements through mediation. Similarly, arbitrators are more effective when they are trusted, which results from their understanding the various perspectives and predispositions of litigants. Thus, it is critical for all alternative dispute resolution (ADR) services to enlist a diverse panel of neutrals, both to mentor each other and to provide trusted care and service to clients.

# Navigating the Multilane Highway of Construction Dispute Resolution

*(Continued from Page 1)*

In order to achieve their individual business goals, parties can choose from many options for managing and resolving conflicts during or after a construction project. In the course of resolving disputes on this multilane highway of process options, parties often make multiple lane changes. “Litigotiation”<sup>2</sup>—the practice of seizing opportunities to negotiate at appropriate times before, during and after adjudication—has always been a common practice. Today, however, there are other options, including arbitration, mediation and advisory evaluation, as well as options within these rubrics.

Which processes you choose, and when, is critical. The poll of in-house counsel highlighted the relationship between process choices and achieving business goals. Here are several key considerations for construction parties and counsel.

## Should we employ a multi-step dispute resolution ladder?

Standard construction contracts routinely include some form of a multistep dispute

resolution ladder, commencing with a provision for direct negotiations and/or third-party intervention in real time. Further steps often include mediation and binding arbitration. By placing the initial emphasis on negotiated settlement, stepped arrangements prioritize maximal party control, informality, economy and efficiency. If early-stage negotiation fails, stepped processes envisage increasingly robust intervention by third parties culminating in binding arbitration (or litigation). Given the emphasis parties tend to place on efficient, low-cost resolution and the fact that most disputes are ultimately resolved by informal settlement rather than through the decision of a third party, stepped “channeling” of disputes is a logical approach.

However, lawyers have different opinions regarding stepped processes. Many feel that the potential benefits of such provisions outweigh the costs. Others believe

that even without contractual provisions, parties will negotiate or mediate if and when it is in their best interest to do so, and that settlement-focused preliminaries may prove to be a waste of time and delay the eventual bargaining. Whatever one’s perspective, a closer look can be beneficial.

## Should there be a provision for early negotiations?

Because it avoids the rancor that is sometimes a byproduct of adjudication, negotiating an early settlement may produce more satisfactory results while enabling parties to maintain or even restore their relationships. A negotiated settlement may permit parties to promote their business interests through integrative terms and in-kind trade-offs that could not otherwise be obtained through litigation or arbitration. Early settlement gives parties the opportunity to work through their differences and explore solutions in private, thus allowing them to avoid the publicity and visibility that is part of litigation (and sometimes arbitration). Finally, research has shown that negotiated or mediated settlements

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*“Parties may appreciate tenacious mediators who stay involved pending the commencement of arbitration or litigation and remain ready to facilitate settlement discussions.”*

are more likely to be more sustainable and to be complied with voluntarily than decisions issued by third-party arbitrators or judges.

The poll of in-house counsel indicated that one of the more popular ways of accomplishing a company’s goals in dispute resolution is through project-level negotiations, or by negotiation between senior executives. Respondents favored providing for such arrangements in their contracts. In order to make the most of such provisions, their precise contours should be tested and shaped by the parties themselves.

### When is mediation most effective, and what provisions should be made in the contract?

The potential benefits of mediation for construction parties are generally understood, including the ability of parties and counsel to exercise considerable control over the process and the outcome. While the latter usually involves a financial settlement, parties may be able to craft creative solutions and preserve or improve

business relationships. Mediation is relatively inexpensive, which helps parties to limit or avoid the unpredictability and expense of arbitration or litigation.

But while many lawyers and dispute resolution professionals agree that mediation is frequently effective, there is sharp debate over how and when mediation should be undertaken. The conventional stepped process establishes mediation as a preliminary step before adjudication, sometimes as a contractual condition precedent to the obligation to arbitrate or litigate. However, some advocates and dispute resolution professionals argue that mediation undertaken before the commencement of adjudication often occurs before disputes are ripe for settlement, and that a better approach is to let the parties mediate at some stage of adjudication, when they have more information and are more emotionally ready to negotiate.

But some lawyers and mediators do see value in early mediation, which can produce a resolution without the delays, costs and risks of litigation. They recognize that some mediators, particularly those with a track record of settling disputes early, have the skills and determination to move

a matter forward even before formal discovery by working with parties to facilitate the exchange of key information. If mediation is not initially successful, a mediator may be able to help the parties agree on a process that will produce a resolution, such as an advisory evaluation or a customized form of arbitration (such as final-offer arbitration). In any case, parties may appreciate tenacious mediators who stay involved pending the commencement of arbitration or litigation and remain ready to facilitate settlement discussions. Usually, the costs of early mediation are negligible compared to the opportunities presented.

Therefore, it may be helpful to include a contractual provision for preliminary mediation to overcome “in-the-box” thinking favoring late-stage mediation. This is especially true because many lawyers are reluctant to engage in any negotiations without the involvement of a mediator.<sup>3</sup>

### Should provisions for negotiation or mediation give a nudge or a mandate?

Assuming parties want contractual provisions for negotiation at the job or senior



*“Having extensive professional construction expertise and conflict resolution training or experience...the [project] neutral earns the trust of key members of the construction team.”*

level, and/or for mediation, should participation be a requirement that is enforceable by a court? If so, should negotiation or mediation be a condition precedent to further steps such as arbitration or litigation? Again, opinions vary.

Parties may include contractual provisions for negotiation or mediation without much concern for their legal enforceability. After all, in many cases parties pursue negotiation and/or mediation (with or without contractual requirements) and reach a settlement without resorting to adjudication or, alternatively, moving to the final (adjudication) stage without bickering over procedures. Nevertheless, parties are advised to consider enforcement issues if they are concerned that they may require judicial assistance in compelling an involved party to come to the negotiating table. At the same time, they should be aware that provisions to negotiate or mediate disputes prior to adjudication are a double-edged sword, as a claimant’s failure to formally comply with such provisions may be used by the defendant to postpone or even derail adjudication.<sup>4</sup>

### What kind of arbitration is appropriate?

Before the advent of mediation, arbitration was the sole alternative dispute res-

olution process, a true alternative to going to court. Arbitration offered decision-making by industry experts (with a strong emphasis on multidisciplinary panels) and an escape from the procedural formalities associated with litigation. Pre-hearing discovery and motion practice, if any, was minimal. Resultant “justice” was often measured in non-legal terms.

Today, much has changed. While arbitration is still a valuable alternative featuring subject-matter experts as decision-makers; relative brevity and finality; and a cost-effective, efficient process (thanks, among other things, to limited discovery), it has gradually become more like litigation. This litigation-like model may—or may not—be the most effective solution for construction disputes. The challenge for parties and counsel is reflected in responses to the survey of in-house counsel: On the one hand, parties tend to prioritize having an efficient, cost-effective approach to resolving disputes in order to get on with business; on the other hand,

lawyers have abiding concerns regarding procedural due process and an outcome consistent with legal standards. It is up to the parties to take advantage of the procedural choices inherent in contract-based arbitration to achieve the proper balance among these priorities; however, they do not always avail themselves of the opportunities.

Some years ago, the College of Commercial Arbitrators Protocols for Expedious, Cost-Effective Commercial Arbitration<sup>5</sup> offered guidance for business parties, counsel and other stakeholders in arbitration that led some organizations to offer expedited, or fast-track, arbitration procedures. For example, in addition to including Expedited Procedures (including limitations on discovery) for use in conjunction with its Comprehensive Arbitration Rules and Procedures, JAMS publishes Streamlined Arbitration Rules designed for use with respect to controversies in which no disputed claim exceeds \$250,000.<sup>6</sup> The Rules contemplate hearings before a single arbitrator; expedited schedules for each stage of the process; early, voluntary, informal exchange of “all non-privileged documents and information . . . relevant to the dispute or claim,” including anticipated exhibits and names of prospective witnesses; and other special elements.

In the absence of appropriate contractual arrangements, achieving cost-effectiveness and efficiency in arbitration may depend on how effectively arbitrators can manage parties and process, and the willingness of counsel to forego court-like discovery, motion practice, evidentiary objections and the like.

### Might a real-time approach involving third-party facilitation or evaluation help to avoid, minimize and manage jobsite conflict?

There is another very important but frequently overlooked set of choices involving opportunities for promoting early resolution of disputes on the jobsite in real time. Having touched on the benefits of early negotiation above, we will now consider ways in which third-party evaluation or facilitation may come into play.

Historically, real-time jobsite conflict management involved early decision-making by project architects and/or engineers. Given the potential conflicts of interest on the part of project design professionals, however, new forms of expert evaluation involving independent third parties have been developed—the most prominent being dispute boards composed of construction experts who offer nonbinding decisions on infrastructure projects as a

way of promoting informal settlements of claims and controversies.

Less well known is the work of other kinds of project neutrals, including standing mediators, who routinely facilitate discussion and the resolution of issues as they develop. By resolving conflicts before parties lawyer up and move into litigation mode, real-time mediation can maximize the efficiency and cost-effectiveness of dispute resolution.<sup>7</sup>

A model for effective real-time conflict management on construction projects is currently being pioneered by Intel Corporation. Responding to concerns about the duration, cost and unpredictability of litigation and the limitations of lawyer-driven mediation, Intel augmented the company's traditional stepped dispute resolution system for construction disputes with a custom program for dispute prevention.<sup>8</sup> At the heart of Intel's program is a third-party neutral who is engaged by the owner and general contractor at the beginning of a construction project. Having extensive professional construction expertise and conflict resolution training or experience, as well as communication soft skills, the neutral earns the trust of key members of the construction team. During monthly visits to the jobsite, the neutral assesses job progress and risks, and meets with a senior risk management team appointed by the owner and contractor to survey and

evaluate project risks. The team consults with the neutral on appropriate options for addressing developing concerns, including coaching or advisory efforts aimed at dispute prevention as well as more formal dispute resolution roles. Thus far, Intel's conflict management program has been successful in avoiding formal legal disputes on the projects where it has been employed, which represent more than \$5 billion in construction!

### Thoughtful planning can make a big difference.

Never before have there been so many useful options for preventing, managing and resolving construction conflicts. Construction parties and counsel have the opportunity to make thoughtful, deliberate process choices in order to meet their particular business priorities. Will you seize the opportunity?



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1. Smith, Currie & Hancock Survey of Corporate Counsel (2016).
2. The term was first employed in Marc Galanter, "...A Settlement Judge, Not a Trial Judge": *Judicial Mediation in the United States*, 12 J. LAW & SOC. 1, 1 (Spring 1985).
3. See JAMS Clause Workbook: A Guide for Drafting Effective Dispute Resolution Clauses for Commercial Contracts (Effective June 1, 2018), at [jamsadr.com/clauses](http://jamsadr.com/clauses).
4. See, e.g., *Sor Tech, LLC v. MWR Life, LLC*, 2019 U.S. Dist. LEXIS 146817, 2019 WL 4060350, \*13 (S.D. Cal. 2019).
5. College of Commercial Arbitrators Protocols for Expedious, Cost-Effective Commercial Arbitration (2010).
6. See JAMS Streamlined Arbitration Rules and Procedures (Effective July 1, 2014) at [jamsadr.com/rules-streamlined-arbitration](http://jamsadr.com/rules-streamlined-arbitration).
7. See Thomas J. Stipanowich, *Beyond Getting to Yes: Using Mediator Insights to Facilitate Long-Term Business Relationships*, 34 *Alternatives to the High Cost of Litigation* 97 (July/August 2016). See also JAMS Sample Project Neutral Clause at [jamsadr.com/construction-clauses/ProjectNeutral](http://jamsadr.com/construction-clauses/ProjectNeutral).
8. The program was spearheaded by Howard Carsman, manager of construction claims and contracts for Intel Corporation.



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