



# JAMS Global Construction Solutions

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

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# The Complexities of Construction Dispute Resolution, Part I: Statutory Adjudication

By Tony Cole, FCI Arb

While disputes can occur in any type of commercial transaction, construction contains a unique mix of “ingredients” that increase the likelihood that disputes will arise. Whereas most commercial transactions involve only a few parties, construction projects involve many participants, each with its own needs and priorities, and each engaged in a separate part of the project so that the standard dispute resolution approach of one party surrendering a benefit in one area to gain a corresponding benefit from its opponent in another is often unavailable.

In addition, even when two participants in a construction project have no direct connection, completion of the contract for one party may be dependent on completion of another contract in which it is not involved, either directly (e.g., “pay when paid” clauses) or indirectly (e.g., an electrician being unable to perform because work on a wall has not been completed).

The interrelatedness of the elements of a construction project puts a premium on disputes being resolved quickly. When a claimant is merely one part in a constantly evolving larger project, with other participants waiting on payment from that claimant or waiting for contested work to be finalized before more work can be performed, the speedy resolution of disputes is essential.

The complexities of construction dispute resolution are magnified because many participants in construction projects are small companies or sole traders, for whom nonpayment because of a dispute may be the difference between continued operation and insolvency.

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## Arbitrating With Nonsignatories: Celebrity Edition

By Leslie King O’Neal

Kim Kardashian and Tiger Woods are international celebrities, and they have something else in common. Both have been involved in disputes regarding arbitrating with nonsignatories to an arbitration agreement.



The idea of arbitrating with someone who did not sign an arbitration agreement is counter intuitive to many lawyers (and parties). Commercial arbitration is a creature of contract; consequently, without a written arbitration agreement, a party cannot be required to arbitrate a dispute. The U.S. Supreme Court stated: “[A]rbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.”<sup>1</sup> As with many legal rules, there are exceptions.

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# Getting the Most Out of Mediation: 7 Tips From a Master

Notes from an interview session with JAMS neutral Ken Gibbs

By **Laura C. Abrahamson, Esq., FCI Arb**

In the construction and engineering field, few mediators have the skill or reputation of Kenneth C. Gibbs, Esq., who has successfully mediated more than 2,500 cases and is ranked by Chambers USA as “one of the best construction ADR professionals in the United States” and referred to as “the dean of construction dispute mediation.” While I was global head of litigation for AECOM, we regularly turned to Ken to mediate our most difficult matters. I recently had the opportunity to talk to him about how parties can achieve the best possible results in mediation. Here are his top seven tips for getting the most out of mediation.

## 1. Proper prior preparation

The adage “Proper prior preparation prevents poor performance” holds true for mediation as well. To properly prepare, analyze with your counsel your best-case, worst-case and most likely outcomes, and what it will cost to get there. Your counsel is your advocate before courts and tribunals, but before a mediation, your counsel should be your “counselor” and discuss their evaluation of your position.

## 2. Being transparent with the mediator

This is the single most effective step you can take to maximize success. I can’t emphasize this enough, as it is seemingly counterintuitive. Many people believe that the first rule of negotiation is to never ever tell someone what you are really thinking. However, over my 25 years as a mediator, I’ve found that the parties that do the best in mediation are the ones that “level” with the mediator and tell them what they are really thinking regarding settlement. If the mediator, based on their expertise, agrees that a party is taking a reasonable position, they can work with that party to achieve its desired outcome. If the mediator believes your position is unreasonable, transparency gives them the opportunity to give you their honest evaluation.

## 3. Focus on quantum, not just entitlement

Many times, parties and their counsel put extensive focus on entitlement and then gloss over quantum. Damages drive settlements. Analyze and understand what your damages are and how you can prove them. Parties need to be able to convince the mediator (and the other side) that they can prove the damages they are seeking.

## 4. Don’t fixate on pingpong negotiations

Be careful not to let the traditional offer/counteroffer process freeze or harden your position. All too often, I see parties “insulted” by using traditional offers and counteroffers, which I call pingpong. Be flexible in your approach to negotiations, and let the mediator guide you with respect to the best manner to proceed. Don’t be in too much of a hurry to get into an offer/counteroffer scenario.

## 5. Effective use of experts makes a difference

Use your experts to explain the critical path of the project to the mediator and other party, and show how the actions of the other side translated to critical path delay. It will also be very helpful to have an expert who can justify claims, defenses and your quantum analysis.

## 6. Count coverage counsel in

If insurance coverage is in play, having a coverage attorney on your side can make a real difference.

## 7. When all else fails, consider neutral evaluation

Complex or mega cases in which the parties have come to a seemingly unshakable impasse during traditional mediation—such as a construction dispute in which each party charges the other with a material breach of contract, resulting in respective damage calculations millions of dollars apart—may benefit from moving to a neutral evaluation process. To be effective, the mediator should be experienced and respected in the area of law at issue and knowledgeable about how to conduct this method of dispute resolution. Rather than declare an impasse, the neutral continues as mediator but assumes responsibility to “hear” and analyze the facts of the case and provide an informed, nonbinding evaluation and settlement recommendation as to the issues defined by the parties. This evaluation can be oral or in writing.

Ken also shared with me his suggestions for how to structure a neutral evaluation. Based on his many years of experience, this process works best when the mediator is provided with each party’s evidentiary presentation in an informal, mini-trial format, over a one- to two-day hearing, structured by the parties however each side thinks will best present the essence of its case in the time allotted. Experts may be hot-tubbed; evidence may be provided via summaries, narratives or power point presentations; and post-hearing argument may be oral or written. At the close of the mini-trial, the parties decide whether to go back to mediation or confirm that the mediator issue a written analysis and settlement recommendation. If the parties opt for a neutral assessment, the mediator issues a nonbinding, confidential analysis of the issues submitted for evaluation and a settlement recommendation based on that analysis. This assessment not only provides the other side (and its carriers) with cover, but the opinion will be sent up the chain for many purposes and often, ultimately results in a settled dispute.

...the mediator should be experienced and respected in the area of law at issue...

JAMS neutral [Kenneth C. Gibbs, Esq.](#), is known worldwide for mediating and conducting neutral evaluations on construction, engineering, real estate, energy, surety, insurance coverage, insurance subrogation and business disputes.



[Laura C. Abrahamson, Esq.](#), FCIArb, has experience as an arbitrator, advocate and client in more than 100 arbitrations and major litigation matters and more than 50 mediations within the U.S. and significant jurisdictions around the world.



Be flexible in your approach to negotiations, and let the mediator guide you with respect to the best manner to proceed.



# The Complexities of Construction Dispute Resolution, Part I: Statutory Adjudication

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Therefore, it is unsurprising that the history of construction dispute resolution is a constantly evolving attempt to identify and implement more effective mechanisms for the speedy and effective resolution of disputes. This article is the first in a series that will look at different methods to address the complications of dispute resolution in construction in the U.S. and internationally, from statutory adjudication to dispute resolution boards to specialized courts. The goal of these articles is not to argue that any one approach is superior, but to examine the origins, strengths and weaknesses of each option to foster a greater understanding of them.

## Statutory Adjudication

Arguably the highest-profile approach to construction dispute resolution was the introduction of statutory adjudication in the United Kingdom by the 1996 Housing Grants, Construction and Regeneration Act, which, along with related legislation, implemented adjudication across the U.K. Under this system, any party to a construction contract has the right to refer a dispute to adjudication, regardless of any contrary contractual provisions for dispute resolution. What then follows is a very tightly regulated process, in which an adjudicator must issue a decision within 28 days; an additional 14 days can be granted by the party commencing the adjudication, but any further extension requires the agreement of both parties. The

adjudicator's decision is temporarily binding on the parties; that is, they must act in accordance with it, such as paying any amounts ordered. Thereafter, either party may seek a "final" decision on the dispute, either in court or arbitration, or via any other agreed mechanism.

While adjudication processes existed as contractual options for dispute resolution before the 1996 Act, the fact that the U.K.'s adjudication process is based upon a statute has been essential to its success. The Act permits any party to a construction contract access to a predesigned high-speed process of decision-making, and limits court review of decisions once they have been delivered. As a result, even parties who have never previously heard of adjudication have a fast and effective mechanism available to them when a dispute arises.

However, this comes with a cost. Understanding the costs of government involvement is essential in evaluating statutory adjudication.

Governmental resources are scarce; as such, government actors must be convinced that there is an issue of general interest that needs to be resolved. What led to the adoption of statutory adjudication in the U.K., and how can the government's motive for supporting adjudication be seen in the way the U.K.'s adjudication process operates?

### The History and Development of Statutory Adjudication

The movement toward statutory adjudication began in 1971 with the decision by the Court of Appeal (the second-highest court in England and Wales) in *Dawneys Ltd v F.G. Minter Ltd.*, [1971] 2 All ER 1389. In this case, a lead contractor refused to make an interim payment to a subcontractor on the ground that a larger counterclaim existed for delay. The court concluded that the form contract used by the parties should be interpreted to mean that deductions were allowed only for established or uncontested counterclaims. Other counterclaims needed to be brought by the lead contractor in

separate proceedings. While the contract had no such express restriction, the court found that its approach was "in accord with the needs of business. There must be a 'cash flow' in the building trade. It is the very lifeblood of the enterprise." The court observed that the subcontractor must expend money on materials and labor. It cannot stay in business unless paid contemporaneously for work performed. The main contractor is in a similar position; it needs cash so it can pay workers, suppliers and subcontractors. As the court summed up, "The employer must pay the main contractor; the main contractor must pay the subcontractor, and so forth. Cross-claims must be settled later."

In 1973, however, the House of Lords (the highest court in the U.K., now the Supreme Court), in *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd*, [1974] AC 689 (HL), rejected the Court of Appeal's approach, arguing that interpreting an otherwise silent contract to require resolution of payment claims separate from counterclaims impermissibly prioritized the interests of one of the parties over the other, contrary to applicable contractual language or prior case law.

On its face, the House of Lords' decision was entirely reasonable. After all, if the parties had wanted a restriction of this type, they could have included it in their contract.

Nonetheless, the decision of the House of Lords in *Gilbert-Ash* had precisely the adverse effect during the following two decades that the Court of Appeal had foreseen. It created a legal structure in which the paying party in a construction contract could avoid making payments merely by raising a counterclaim. While the counterclaim technically needed to have a real prospect of success and to be at least of equal value as the plaintiff's claim, in reality, courts were loath to decide either claim without a full trial, with its delays and costs. So, a weak counterclaim could avoid summary judgment on the subcontractor's payment claim, giving the paying party substantial power to use the threat of delay and substantial costs to negotiate a lower payment than was genuinely owed.

### Statutory Adjudication's Motivating Rationale

There is more to the history of U.K. statutory adjudication, but this underlines a central point of this article: that governmental involvement requires a justification. Statutory adjudication in the U.K. was not designed to be a neutral dispute resolution mechanism. It was designed to alleviate a problem faced by one sector of the industry—smaller contractors requiring payment—in a way that didn't unfairly bias the process against the paying party.

This balance is demonstrated by “smash and grab” adjudications, the most common type of adjudication across the U.K. The 1996 Act didn't just introduce adjudication; it also included substantive provisions, including a timetable in which payments were to be made in construction contracts, subject to agreement of the parties. A “smash and grab” adjudication occurs when one party requests payment for work and the paying party does not make payment or formally challenge the amount by the applicable deadline. The claimant can then commence an adjudication demanding full payment, which the paying party will usually be required to pay without being permitted to raise any counterclaim, such as that the work was performed poorly or was incomplete. To be clear, the paying party doesn't lose these defenses entirely, but they cannot be raised in the “smash and grab” adjudication. Instead, the paying party must pay the amount awarded by the adjudicator and then commence a second adjudication to reclaim amounts it believes are not owed.

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This may appear to result in the perplexing and unjust practice of requiring an adjudicator to award payments that even the adjudicator believes are not genuinely owed. However, it becomes comprehensible when considering

the government's motivation for adopting the Act. The Act was designed to address problems related to cash flow, removing the power of paying parties to refuse payment based on weak counterclaims. To do this, the Act created a system in which the paying party had to respond quickly to any payment claim made, expressly clarifying how much it agreed was owed and why. If it didn't, the entire amount would, at least temporarily, be owed, and the claimant would receive the money it required to continue operating. Further, even if the paying party timely objects to a claim, the claimant could commence an adjudication and receive a decision within 28 to 42 days, thereby depriving paying parties of any leverage to negotiate reduced payments with threats of delays and expensive litigation or arbitration.

### Conclusion

Any discussion of the desirability of government-supported remedies for the complexities inherent in construction dispute resolution must acknowledge that while mechanisms supported by statute are effective, they are always imbued with the goals the government adopted when deciding to take action. Those mechanisms are unavoidably less likely to match the particular needs of the parties in a dispute than a process that has been negotiated between two parties of equivalent negotiating strength.

This leaves the question, though, of whether this disparity really matters. Would parties in the U.K. be better off without statutory adjudication, either negotiating their own dispute resolution clauses or using standard form contracts?

The evidence suggests that this disparity matters less than proponents of “party autonomy” might argue. As part of a larger research project focused on commercial arbitration in Europe, funded by the U.K.'s Economic and Social Research Council, I interviewed a number of construction adjudication practitioners across the U.K. I was not surprised that the most enthusiasm for the adjudication process was expressed by those who represented smaller subcontractors, the group adjudication was designed to assist. From their perspective, adjudication worked well. More notable was that practitioners who usually represented paying parties expressed no desire to eliminate

or substantively change the system, despite their concerns that the short deadlines in the adjudication process affected the reliability and quality of adjudication decisions. Adjudication was originally designed as a form of “rough justice,” and that was what it delivered: a good-enough decision, provided quickly, that both parties could live with. Consequently, practitioners I interviewed agreed it was extremely rare for parties to bring a claim in arbitration or litigation after compliance with the adjudication decision.

Statutory adjudication in the U.K., then, demonstrates the strengths and weaknesses of government intervention to create a specialized mechanism of construction dispute resolution. The process is seen as effective and, despite grumblings about poor-quality, rushed decision-making, has become the norm, largely replacing both arbitration and litigation. Moreover, it would not be as effective were adjudication not government-backed, guaranteeing parties the right to adjudicate even if adjudication had not even been contemplated at the time of contracting, and granting courts only limited grounds for review of an adjudication decision. Nonetheless, that effectiveness comes at a price, with the adjudication process consciously biased toward resolving an issue the government sees as important, rather than focused only on providing a fair and effective dispute resolution process. Proponents of government intervention in construction dispute resolution, therefore, might be well advised to “be careful what you wish for.” Although the U.K. experience is that if it is done well, the benefits outweigh the drawbacks, government intervention is not always done well.

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## Arbitrating With Nonsignatories: Celebrity Edition

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The Federal Arbitration Act (FAA)<sup>2</sup> requires arbitration agreements to be in writing but does not require a party to sign the arbitration agreement to be bound. As stated in *Fisser v. International Bank*, “It does not follow ... [that] an obligation to arbitrate attaches only to one who has personally signed the written arbitration provision.”<sup>3</sup> State contract law principles apply to determine whether a contract can be enforced by or against nonparties.<sup>4</sup>

Kim Kardashian and her sisters Khloe and Kourtney were sued in federal court in Florida in a trademark dispute regarding their Khroma Beauty cosmetics brand. Although not a party to the arbitration agreement, they moved to compel arbitration, alleging equitable estoppel. Florida law, which applied here, permits non-signatories to compel arbitration using equitable estoppel if they can show that (1) the signatory relies on the agreement to assert claims against the nonsignatory and (2) the arbitration provision covers the dispute.<sup>5</sup> The court denied the motion to compel because the arbitration clause was explicitly limited to “disputes arising between”

the contracting parties.<sup>6</sup> Since the arbitration agreement did not cover the Kardashians’ dispute, they could not compel arbitration using equitable estoppel.

In the Tiger Woods case, a nonsignatory trust successfully used equitable estoppel to compel arbitration (at the trial court level). Woods’ former girlfriend Erica Herman filed a complaint<sup>7</sup> against the Jupiter Island Irrevocable Homestead Trust, the owner of Woods’ residence in Florida, seeking damages under the Florida residential landlord/tenant law for alleged breach of an oral tenancy agreement for the residence. The trust moved to compel arbitration based on a nondisclosure agreement (NDA) between Woods and Herman to which the trust was not a party. The NDA’s arbitration clause provided that “the exclusive manner of resolution of any and all disputes, claims or controversies arising between [Herman and Woods] of any nature whatsoever ... shall be resolved by mandatory binding confidential Arbitration to the greatest extent permitted by law.”<sup>8</sup>

The trust asserted that, under Florida law, such broad language could include claims against nonsignatories<sup>9</sup> and that Herman was estopped to avoid arbitration with the trust because the issues to be arbitrated were intertwined with the NDA and its arbitration clause.<sup>10</sup> The court granted the motion to compel arbitration in this case and a related case; the order is on appeal.<sup>11</sup>

Nonsignatories’ rights to compel arbitration also arise in international contracts. In *GE*

*Energy Power Conversion France SAS v. Outokumpu Stainless USA, LLC*,<sup>12</sup> Outokumpu, the owner of a manufacturing plant, sued GE, a subcontractor that provided motors to the plant, for damages related to the motors’ nonperformance. GE moved to compel arbitration under the owner-general contractor agreement. GE was not a party to that contract but was included in the definition of a “party.” The 11th Circuit held that under the New York Convention,<sup>13</sup> GE could not compel arbitration because it was not a signatory. Overruling the 11th Circuit, the U.S. Supreme Court held the New York Convention does not conflict with nonsignatories’ enforcement of arbitration agreements under domestic-law equitable estoppel doctrines. On remand, the 11th Circuit upheld GE’s right to compel arbitration.<sup>14</sup>

These cases highlight the importance of carefully drafting arbitration clauses, whether for international celebrities, global corporations or others, to state clearly who and what types of disputes are subject to arbitration.

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**Leslie King O’Neal** has 40+ years of experience handling construction and complex commercial litigation matters in private practice, as in house counsel for an ENR top 25 commercial general contractor, and as an ADR professional.



1. *AT&T Technologies, Inc. v. CWA*, 475 U.S. 643, 648 (1986).

2. 9 U.S.C. § 1-14.

3. 282 F.2d 231 (2d Cir.1960).

4. *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 631, (2009). These principles are assumption, agency, piercing the corporate veil/alter ego, incorporation by reference, third party beneficiary, and waiver and estoppel. For further discussion see: Michael P. Daly, *Come One, Come All: The New and Developing World of Nonsignatory Arbitration and Class Arbitration*, 62 U. MIAMI L. REV. 95 (2007); <https://repository.law.miami.edu/umlr/vol62/iss1/4>.

5. *Kroma Makeup EU, LLC v. Boldface Licensing + Branding, Inc.*, 845 F.3d 1351 (11th Cir. 2017).

6. *Id.*

7. Case No.: 2022-928CA, In the Circuit Court of the Nineteenth Judicial Circuit in and for Martin County, Florida.

8. *Id.* Defendant’s Motion to Compel Arbitration and to Stay the Claims Against the Defendant filed 12/20/22 at p. 7.

9. *Id.* Citing *Kratos Invs. LLC v. ABS Healthcare Servs., LLC*, 319 So. 3d 97, 102 (Fla. 3d DCA 2021).

10. *Id.* At p. 8. Also, there was a pending arbitration between Mr. Woods and Ms. Herman.

11. *Herman v. Woods*, Case No: 2023-175, In the Circuit Court of the Nineteenth Judicial Circuit in and for Martin County, Florida. Ms. Herman voluntarily dismissed her prior lawsuit without prejudice pending the appeal.

12. 140 S. Ct. 1637 (2020).

13. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U. S. T. 2517, T. I. A. S. No. 6997.

14. *Outokumpu Stainless USA, LLC v. GE Energy Power Conversion France SAS* (11th Cir. Case No: 17-10944) (July 8, 2022) unpublished opinion: <https://media.ca11.uscourts.gov/opinions/unpub/files/201710944.rem.pdf>.

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## RECENT MATTERS

- [Philip L. Bruner, Esq.](#), and [Andrew D. Ness, Esq., FCI Arb](#), served on an arbitration tribunal hearing disputes arising out of a power plant project during three plus weeks of hearings in Chicago in June.

## ON THE MOVE

- [Philip L. Bruner, Esq.](#), presented the opening keynote address at the [11th International Congress of the Brazilian Institute of Construction Law](#), which was attended by 350 people in Sao Paulo on Aug. 30. He also was one of two lecturers for the three-day segment on international construction arbitration presented for the [University of Stuttgart's Master's Degree Program on International Construction Practice and Law](#) in Stuttgart, Germany, from Sept. 21 to 23.
- [Patricia H. Thompson, Esq., FCI Arb](#), facilitated a panel on construction law developments at the Oct. 2 meeting of The Seminar Group's [12th Annual Florida Construction Law Conference](#).

## HONORS

- Five JAMS neutrals achieved Chambers USA rankings in construction categories. Congratulations to [Deborah S. Ballati, Esq., FCI Arb](#) (San Francisco); [Kenneth C. Gibbs, Esq.](#) (Los Angeles); [Gerald A. Kurland, Esq.](#) (San Francisco); [Andrew D. Ness, Esq., FCI Arb](#) (Washington, D.C.); and [Michael D. Young, Esq.](#) (New York). In addition, Chambers recognized [Robert B. Davidson, Esq., FCI Arb](#), for international arbitration and [Hon. William J. Cahill \(Ret.\)](#) and [Barbara A. Reeves, Esq., CEDS](#), for mediation in their respective USA – Nationwide categories.
- Best Lawyers named [Kenneth C. Gibbs, Esq.](#) (Los Angeles) "Lawyer of the Year for Mediation – Los Angeles."

## Advanced ADR for Sureties

- [Andrew D. Ness, Esq., FCI Arb](#); [Leslie King O'Neal](#); and [Barbara A. Reeves, Esq., CEDS](#), presented a program at the [Pearlman Association](#) Annual Conference in Woodinville, Washington, on Sept. 7 titled "Advanced Alternative Dispute Resolution Ideas for Sureties," in which they discussed the benefits of mediated case management, neutral evaluation and arb-med/med-arb for use in complex construction and surety cases. They contributed to a session titled "Outside the Box: The Things to Think About When Handling a Surety Case in Litigation."

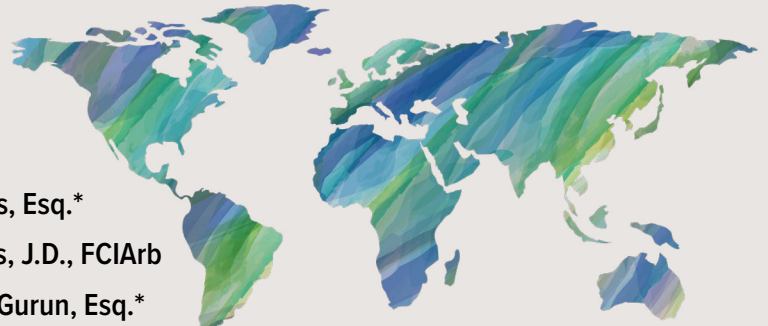
## College of Commercial Arbitrators Appointments

- [JAMS is pleased to announce](#) that the College of Commercial Arbitrators (CCA) will appoint JAMS [Barbara A. Reeves, Esq., CEDS](#), as CCA president at its annual meeting on Oct. 27. Six JAMS neutrals have also become new fellows: [Laura C. Abrahamson, Esq.](#); [Hon. Frank Maas \(Ret.\)](#); [Adrienne Publicover, Esq.](#); [Peter K. Rosen, Esq., FCI Arb](#); [Patricia H. Thompson, Esq., FCI Arb](#); and [Conna A. Weiner, Esq., FCI Arb](#).

## Construction Law Press

- [Andrew D. Ness, Esq., FCI Arb](#) (Washington, D.C.) is co-editor and chapter author of a new guide for advocates preparing to take a complex construction dispute to arbitration. [Construction Arbitration: The Advocate's Practical Guide](#), just released from ABA Publishing, features 250 pages of practical advice from leading practitioners on how to maximize effectiveness in all stages of a construction arbitration.
- [Leslie King O'Neal](#) (Miami) has edited a new book, [Technology in Construction Law: A Legal Guide](#), for the American Bar Association's Forum on Construction Law. The book is a resource and practical reference for construction lawyers who are looking for basic information about the various types of technology now being used in design and construction, or who want guidance on how to gather and manage the vast quantities of data these technologies generate. Written by subject matter experts, it includes discussion of new technologies and how they are used, contract issues, ethical issues, government regulation, cybersecurity, insurance, e-discovery issues, how to use data in presentations and to support expert opinions, and technology tools for construction litigators.

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