BY GARY L. RUBIN

Cost-Effective Dispute Resolution

To prevent pitfalls that cost time and money, arbitration provisions should be reviewed before contracts are signed

No subject is more critical to experienced construction lawyers than the choice of a dispute resolution forum. Experience has taught industry professionals that courtrooms are not the most welcoming environment for construction disputes, given the extensive written records generated by most projects and the factual complexity of the disputes themselves.

Alternatively, arbitration allows for decision-making by individuals who are more familiar with construction issues, but can involve important trade-offs as well—particularly the threat of protracted hearings, uncertain rules on information exchange and limited judicial review.

Mediation is an increasingly important adjunct to arbitration as a means of settling construction disputes, but the success or failure of mediation often hinges on the nature of the battlefield that lies ahead for unsettled cases. This places a premium on establishing an effective and efficient dispute resolution clause in the construction contract.

The central point to remember when drafting these provisions is that the terms of an arbitration clause (including limits on the arbitrators' authority) are generally strictly enforced. The courts are happy to wash their hands of construction disputes that are covered by binding arbitration agreements, but the involved parties can strongly influence the arbitration process by establishing guidelines in the arbitration clause beforehand. While it is difficult to anticipate during the drafting stage any potential disputes that may arise during a construction project, limiting arbitrators' authority through the terms of an arbitration agreement can be an effective strategy for controlling the potential scope, duration and cost of arbitration.

For example, if the parties wish to impose limitations on the arbitrators' authority to award damages due to delay (or similar factors), the arbitration agreement might include a provision stating, "Nothing in this arbitration agreement shall authorize the arbitrator(s) to make an award of monetary damages in favor of contractor on account of delays to project performance resulting from changes to contractor's scope of work, untimely access to the project site, unanticipated subsurface conditions or other any cause whatsoever, and the arbitrator(s) are expressly prohibited from doing so. No request for such award shall be deemed submitted to the arbitrator(s) under the terms of this arbitration agreement."

Parties who oppose such limitations on the arbitrators' authority should press for arbitration language that reflects the legal principles they believe should govern the process. For example, "Nothing in this arbitration agreement shall preclude the arbitrator(s) from making an award of monetary damages in favor of contractor on account of delays to project performance resulting from changes to contractor's scope of work, untimely access to the project site, unanticipated subsurface conditions or other events not reasonably contemplated by the parties

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Construction arbitrations frequently extend for inordinate lengths of time because arbitrators feel obliged to listen to evidence offered by the parties and are concerned that granting dispositive motions or limiting testimony could trigger claims of "evident partiality" or otherwise jeopardize the enforceability of their arbitration awards. This impulse often prolongs the parties' disputes and leads to excessive arbitrators' and attorneys' fees. This problem can be addressed by including provisions in the arbitration agreement that authorize arbitrators to grant dispositive motions or limit the number or duration of hearings. For example, "Presentation of each party's case shall be limited to 100 hours of hearing time, and cross-examination by the opposing party shall be limited to 50 hours of hearing time." Or, "Arbitration hearings shall be conducted and completed within six months after the first evidentiary hearing is held, and all document exchange and other discovery shall be scheduled accordingly." Or, "The arbitrator(s) shall be authorized in their discretion to grant dispositive motions and/or limit the scope or duration of testimony and other evidence offered by any party, and the reasonable exercise of such discretion shall not serve as a basis to challenge the arbitration award or assert misconduct by the arbitrator(s)."

Similarly, the challenges posed by electronically stored information (ESI) can be addressed by specific provisions in the arbitration agreement that establish the scope of authorized discovery, an agreed time frame for completing ESI exchange, how the costs of electronic discovery will be shared, or the number of custodians from whom electronic records can be sought. Whether depositions will be permitted is another issue that can be addressed in the arbitration agreement. Such issues are often much easier to negotiate during the contract drafting phase than later in the project, after disputes have already arisen.

If mediation provisions are properly coordinated with arbitration provisions to clearly establish whether any mediation-related conditions precedent to arbitration have been satisfied, limiting a mediator's authority, even where arbitrators' authority is limited by the arbitration clause, should be unnecessary. Such limitations on a mediator's authority are generally counterproductive because a mediator needs a free hand to explore settlement options without preconceived restrictions.

Counsel and their clients may wish to examine "baseball arbitration" procedures that require submission of a final offer by each party and direct the arbitrator(s) to select the final offer that appears most reasonable, based on presentations at the arbitration hearings. If the arbitration agreement also requires that arbitration costs and/or attorneys' fees incurred by the prevailing party be reimbursed by the non-prevailing party (i.e., by the party whose final offer is found less reasonable than the prevailing party's final offer), the underlying dynamics and incentives can be substantially changed.

Even without baseball arbitration, parties should evaluate whether to include a provision that authorizes arbitrators to award costs and attorneys' fees to the prevailing party. Under the American judicial system, each party typically must bear its own legal fees unless a contract or statute expressly provides otherwise. An arbitration clause that authorizes award of attorneys' fees can have an important bearing on whether disputes are settled sooner rather than later.

In short, construction counsel should consider replacing the traditional "all disputes" arbitration clause with legal provisions expressly tailored as limitations upon the arbitrators' authority. This will provide the arbitrators with useful guidelines and hopefully prevent the time and cost pitfalls that have become all too common in arbitration. CBO

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