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# Making Construction Arbitration More Efficient With a Good Arbitration Clause

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Arbitration remains a sound choice for resolving construction disputes, offering confidentiality, a decision by a knowledgeable arbitrator or panel, and frequently, speedier and more efficient resolution. That said, how the arbitration clause is drafted can significantly improve the efficiency of the arbitration, or hamstring the process and invite unnecessary and costly procedural disputes.

Counsel often use a bare-bones arbitration clause covering only the basic necessities, such as the JAMS form clause:

"Any dispute, claim or controversy arising out of or relating to this Agreement or the breach, termination, enforcement, interpretation or validity thereof … shall be determined by arbitration in (the desired place), before (one) (three) arbitrator(s). The arbitration shall be administered by JAMS pursuant to its Engineering and Construction Arbitration Rules & Procedures … Judgment on the Award may be entered in any court having jurisdiction."

This provision is enforceable and sufficient to get the dispute into arbitration and keep it there, but there is plenty of room for improvement. Some helpful additions (along with some pitfalls to avoid) are:

- **A tiered dispute resolution ladder:** For large construction contracts, provide some steps that serve as potential off-ramps for resolution prior to a binding arbitration. These steps can include a required meeting of each party's senior on-site personnel to discuss the issue, followed by a required meeting of senior executives, and mandatory mediation as a condition precedent to arbitration. Drafting appropriate tiers is a balancing act: A process that is too elaborate just delays resolution of an intractable dispute and add to costs, but providing opportunities for each side to take a more considered look at whether arbitration is justified considering the size of the dispute, cost of resolution and potential range of outcomes is a sound idea. The size and complexity of the project should dictate the complexity of the multi-tier process.


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- **Place of the arbitration:** Construction arbitration hearings can require multiple large conference rooms, video technology and court reporters. It's good practice to specify a convenient city with a choice of adequate facilities, avoiding possible disputes and delay when the contract is silent or specifies the construction project's (remote or inconvenient) location.

- **Single arbitrator or panel of three:** Yes, there is some cost savings with using a single arbitrator, but for larger-dollar disputes, the savings are minor compared to the increased assurance of a sound, well-reasoned award. If desired, the added cost can also be minimized by specifying that the panel chair can rule on non-dispositive issues like discovery disputes without involving other panel members. Alternatively, specify a single arbitrator for smaller disputes and a panel of three for those exceeding a certain dollar threshold.
- **Panel selection method:** Most arbitration rules utilize the "list and strike" method of arbitrator selection, where a proposed list is distributed to both parties and each can strike unacceptable candidates and rank the rest. Many prefer instead for each party to appoint one arbitrator, and then those two will select the panel chair (with or without first consulting the parties).
- **Consolidation and joinder rights:** Arbitration rules generally provide some limited ability to consolidate related arbitrations or add additional parties, but they leave a lot of uncertainty. The better practice is either to prohibit consolidation/joinder or provide specifically for adding parties like subcontractors or design professionals. The latter course can reduce the potential for inconsistent rulings among multiple proceedings.
- **Specifying permitted discovery:** Arbitration rules limit available discovery methods, especially depositions, and parties frequently expand or restrict the scope of permitted discovery. This can be fraught with peril, as the complexity of the arbitrated dispute can vary widely and is hard to predict in advance. Greatly restricting discovery for cost savings reasons can lead to a situation where you badly need information from the other side but cannot get it. On the other hand, broadly opening up discovery, such as by allowing any discovery permitted under the Federal Rules of Civil Procedure, is a near guarantee of a more protracted and expensive arbitration, and is rarely warranted.

The key is assessing the likely range of potential disputes under the prospective contract and tailoring the arbitration provision accordingly. A substantial construction dispute can easily involve 25% to 50% of the contract's total price or more. Attempts to control costs by specifying a single arbitrator, very limited discovery, and imposing a mandatory time limit might be suitable for smaller disputes, but will likely create serious procedural tangles in a $25 million dispute. A bit of forethought can go a long way when drafting a construction contract arbitration provision that aids rather than complicates any resulting arbitration.

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