Cost effective construction arbitration agreements

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No subject is more critical to experienced construction lawyers than the choice of a dispute resolution forum. Experience has taught industry professionals that courts and juries are sometimes not a welcoming environment for construction disputes, given their factual complexity and the extensive written records generated by most construction projects. While arbitration offers a potential for decision-making by individuals who are more familiar with construction issues, it also involves important tradeoffsâ€”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 trying to settle construction disputes, but the success or failure of mediation often hinges on the nature of the battlefield which lies ahead for cases not settled. This, again, places a premium on establishing an effective and efficient arbitration process in the construction contract.

The central point to bear in mind in drafting dispute resolution provisions for construction contracts 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 which are covered by binding arbitration agreements, but the parties can strongly influence the arbitration process by establishing guidelines beforehand in the arbitration clause. While it is, of course, difficult to anticipate at the drafting stage all potential disputes which 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." On the other hand, parties who oppose such limitations on the arbitrators' authority should press for arbitration language reflecting the legal principles they believe should govern (e.g., "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 at the time this contract was entered into, and the arbitrator(s) are expressly authorized to do so.")

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. Needless to say, this impulse often prolongs the parties' disputes and leads to excessive arbitrators' fees and attorneys' fees. Again, however, the problem can be addressed by including provisions in the arbitration agreement expressly authorizing arbitrators to grant dispositive motions, limit the number or duration of hearings, and so forth. 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 establishing the scope of authorized discovery, an agreed time frame for completing ESI exchange, how the costs of electronic discovery will be shared, the number of custodians from whom electronic records can be sought, and so forth.

Parties should also evaluate whether to include a provision authorizing arbitrators to award costs and attorneys' fees to the prevailing party. An arbitration clause which 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' authorityâ€”thereby providing the arbitrators with useful guidelines and hopefully preventing the time and cost pitfalls which have become all too common in arbitration.

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