PUBLICATION

Tailoring the Disputes Clause for Cost-Effective Dispute Resolution [Ober|Kaler]

Authors: James E. Edwards Jr.
January 2011

As originally conceived, arbitration was intended to be a relatively lower cost and private alternative to otherwise potentially complex and public dispute resolution in court. As such, arbitration was quickly adopted by many participants in the construction industry as the preferred method for dispute resolution.

Over time, however, arbitration has evolved to such an extent that, in many instances, it more closely resembles the litigation process. As a result, while still a private form of dispute resolution, some of the cost efficiency that was to be achieved by agreements to resolve disputes in arbitration rather than litigation has been lost. Nonetheless, some of the efficiencies and cost savings that have been lost can still be realized by adopting more detailed and thoughtful dispute resolution procedures in construction contracts.

Oftentimes, parties simply use or modify forms for construction contracts prepared by one of the leading industry groups – American Institute of Architects or Associated General Contractors – or on forms largely derived from one of the industry standard documents. The dispute resolution clauses in these contracts typically provide that all disputes are to be resolved in arbitrations administered by one of the leading providers of arbitration services: the American Arbitration Association or JAMS. Unless something to the contrary is stated in the contract, the rules and procedures of the specified provider of the arbitration services will control the arbitration proceedings. As applied, these rules and procedures, though well intentioned, sometimes result in both pre and post-hearing activities that substantially increase the cost of the arbitration proceeding.

Whether using an industry form or a contract written specifically for your project, one way to achieve more cost-effective dispute resolution is to include more specific terms in the disputes clause in the contract that will govern how the arbitration proceeding will be handled. Set forth below are some examples of terms that can be of assistance in achieving cost savings:

- **Select Arbitrator in Advance:** For some projects, it may be advisable to select a single arbitrator, and perhaps one or two back-up arbitrators, or a specified method for choosing an arbitrator rather than selecting an entity to provide arbitration services. The filing fees charged by the providers of arbitration services can be rather substantial. In some instances, they are entirely justified, but that is not always the case.
- **Specify a Single Arbitrator:** Even if the contract directs that the arbitration be administered by one of the entities that provide arbitration services, the selection of a single arbitrator, rather than a panel of three arbitrators, can result in significant cost savings. Most experienced arbitrators are perfectly capable of adjudicating disputes on their own, much like a single judge in a court proceeding. The use of a single arbitrator also may result in fewer compromises than those that may be necessary to get a unanimous decision from a panel of arbitrators.
- **Limit Discovery:** The single most significant factor that has increased the cost of arbitration is the incorporation of the full range of discovery available in civil litigation in the arbitration process. Thus, for example, a disputes clause that limits discovery to the exchange of relevant documents, expert witness disclosures, and a limited number of depositions will preclude, absent a subsequent agreement to the contrary, unfettered use of discovery procedures by either party and reduce costs.

- **Permit Consolidation of Related Disputes:** The standard industry disputes clauses tend to prohibit joinder of more than one related dispute among common, but not identical, parties. Thus, speaking hypothetically, the Owner of a Project could find itself in separate, but related, arbitration proceedings with its Architect and its Prime Contractor that cannot be consolidated into a single proceeding, or a Prime Contractor could find itself in separate proceedings with the Owner and one or more Subcontractors. In addition to increasing the cost to one or more of the parties as a result of the need to participate in multiple proceedings, there is risk of inconsistent results in multiple related proceedings.
- **Mediation As A Condition Precedent:** The disputes clauses in the standard forms prepared by the American Institute of Architects now require that parties engage in mediation as a condition precedent to arbitration. If this approach is adopted, and the mediation results in a resolution of the dispute, it certainly will reduce the dispute resolution costs. However, if, for whatever reason, the parties are not ready to reach a settlement of their dispute, then the mandatory mediation adds time and cost to the dispute resolution process. Whether to require mediation as a condition precedent to arbitration is open to debate and something to discuss with counsel during contract preparation.

Parties sometimes overlook the significance of certain terms in contracts for construction, including those relating to the resolution of disputes. When projects go smoothly, the terms of the contracts for construction, and the disputes clause, in particular, tend to mean less. When, as is often the case, however, problems arise, the resolution of those disputes begins with an analysis of the controlling contracts. If the terms of the contracts have been drafted carefully, there is less potential for ambiguity and a greater likelihood that disputes can be avoided or, at a minimum, that a proper result can be reached. Careful attention to the drafting of the disputes clause in contracts for construction also can be an important factor in achieving a just and cost-effective dispute resolution.