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Choosing Arbitration Over Trial

Construction industry arbitrators are skilled at getting to the core of the issues

By Robert S. Peckar

For years construction lawyers have been arguing about the respective merits of arbitration conducted pursuant to the American Arbitration Association as compared with litigation. For most of those years the debate, though interesting, was more often than not irrelevant as standard industry contracts, most notably those of the American Institute of Architects (AIA), included AAA arbitration as the mandated dispute resolution mechanism in all its contracts. For the first time in 40 years the AIA has now offered users of its forms a choice between the two dispute resolution processes — and unless

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a party purposefully selects arbitration, the parties will litigate their disputes. Thus, the debate is now alive and well once again. So, which is better?

Construction industry clients express little tolerance for drawn-out and expensive dispute resolution despite the fact that the resolution of their disputes is often exactly that in both categories. Their disputes typically involve extensive documentation and a multitude of complex technical and factual issues. The era of electronic information has done little to reduce the volume of data and, if anything, has only added to the pile of information that must be analyzed by the parties' lawyers and forensic consultants. With critical path method schedules, computer-aided design, virtual projects (where records from all parties can be shared on secure Web sites) and the use of computerized record-keeping, the amount of information has soared, as has the potential of what can be done with that information. It is no surprise, then, that industry members' frustration with the added time and cost of dispute resolution, resulting from all this additional information, begets the typical question to their attorneys: "Which process will be more expeditious and

efficient?"

The AAA, to its credit, has been reactive to all these problems. Based upon input from its industry advisory committees and bar association groups, the AAA has adopted rule changes that accept the reality that the modern disputant needs access to some of the adversary's information and thus, for the appropriate cases, provides for limited discovery. However, at the same time, the AAA has also adopted procedures that allow the parties to select a more expedited process, truly reducing the time of the entire process.

That AAA arbitration can be more expedited than full-fledged litigation in accordance with court rules is clear. However, the true test of the process lies not in only the rules but more importantly in the selection of the arbitrators. Not only can qualified and experienced arbitrators cause the process to be expeditious and efficient, but they also assure a level of quality of process and result that should surpass that available in most courtroom situations. In regard to this critical issue, the AAA has also made very important improvements to assure the availability of an extremely high quality of arbitrator for the construction industry arbitration.

With all due respect for judges, both state and federal, few have in-depth experience with complex con-

struction disputes. In fact, for many, their pre-bench experience with construction law was occasional at best and was often more concerned with land use or residential construction than the sophisticated construction disputes that tend to arise in current times.

For juries, the problem is even worse from the perspective of the lawyers representing parties to such a dispute. The knowledge many jurors bring to the courtroom is limited to personal frustration with a home improvement contractor or with the traffic caused by a lengthy highway improvement project. As a general proposition, the AAA's construction industry arbitrators are either lawyers, who have specialized in construction law for quite some time, engineers, architects, contractors or others who have spent their careers in the construction industry. Thus, it should be intuitive that construction industry arbitrators would be better equipped to understand the nature of the parties and the disputes. They would, therefore, be better able to aid the parties in the resolution of their disputes by getting to the core of the issues and rendering a fair award upon sound reason. Yet the debate has raged on for decades. Why?

Some trial lawyers want to control their case in a way that only can be accomplished in a setting where the Rules of Evidence and the extremely formal process of a trial apply. Thus, their perception that arbitration affords the arbitrators the flexibility to use their industry-specific experience to influence, if not direct, the manner in which the parties' cases are ultimately presented is sufficient reason to resist the selection of arbitration for dispute resolution. It is a fact that construction industry arbitrators can, and this author would argue should, exercise influence on how the case proceeds so that it reaches an efficient and fair resolution. Thus, the essential issue is the choice of the arbitrators. Arbitrators should bring industry experience as arbitrators as well as arbitration experience, providing the parties with predictable quality in terms of process and result.

It is in regard to arbitration selection that the AAA has most advanced the quality of construction industry arbitration in the past decade. In 1995 the AAA responded to customer needs for consistent quality of construction neutrals, improved neutrals' training and experience, and the need for recruitment of the best talent available in the industry and the construction bar. It responded by vetting out its entire list of construction industry arbitrators and removing many who did not have a background or record of performance that would predict a top quality arbitration. They tightened up their arbitrator selection process, requiring nomination from the industry and construction bar and then a formal evaluation process rather than inclusion on the panel simply as a courtesy to the nominator. Arbitrator education and training became a requirement rather than an option. Finally, the AAA created a national panel of arbitrators so that the parties would have the ability to select from the most qualified arbitrators in the country, not just those convenient to the place of arbitration.

The result of these arbitrator improvements has led to true "blue-ribbon" arbitrator panels more often than not. While it was for quite some time easy for critics of AAA arbitration to utter the old tale that the arbitrators would always "split the baby," most lawyers who participate in AAA arbitration since the changes would be very unlikely to make that complaint.

So, with all these favorable changes in the AAA's Construction Industry Arbitration Rules and its national panel of arbitrators, what are the keys to maximizing the success of an AAA Construction Industry arbitration? The following are just a few:

While the AAA Construction Industry Rules create a valuable benchmark for quality, there is no reason why an attorney cannot contractually provide specific requirements of the arbitration that are not provided for in the Rules. For example, depending on the nature of the parties, it might make sense to state that the tribunal shall be comprised of

three arbitrators, one of whom shall be a contractor, one a developer and the third a construction lawyer (either all to be selected from the AAA Panel, or in some other manner as the lawyers might prefer).

The selection of the arbitrators should be handled with the same intensity of research that a lawyer would apply to the selection of a juror. Lawyers know their case; they know if they want a strong personality, a strict constructionist likely to apply a contract literally, or someone with a lot of common sense who will apply his experience to the case. Thus, making inquiries of other lawyers who have had experience with that arbitrator is a crucial effort that all too many attorneys neglect. Arbitrator quality is predictable!

Consider being as flexible as the process itself can be. Thus, for example, consider the possible efficiency of calling for the parties to use sworn witness statements for direct testimony (saving live testimony for cross and re-direct) rather than the customary Q&A that often wastes valuable time. Consider some of the more creative methods of presenting and challenging expert testimony, particularly in areas such as delay analysis by CPM consultants. One that has gained the rather entertaining nickname "dueling experts" has both experts appearing before the arbitrators together where they present and defend their analyses while the arbitrators, having already read their reports, ask questions and the attorneys conduct a hybrid of cross-examination and re-direct with both experts at the same time. Some of these flexible methods are "out of the box" that some lawyers would prefer, however they also have the potential to cut through many hours of unhelpful testimony and provide a higher quality of expert testimony.

Is AAA construction industry arbitration preferable to litigation? Should it be selected as the dispute resolution process of choice? This author submits that with an enlightened understanding of its potential value and how to achieve that value, the answer is yes. ■