July, 2000

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Developing Construction Claims for Arbitration: Two Arbitrators’ Viewpoint

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Abstract: This article provides two arbitrators’ viewpoints of construction claims development in the hope that the information will be useful to those needing to resolve construction claims by arbitration. It also may help to reduce the volume of costly and unnecessary documentation. Because of arbitration’s relative formality, attorneys representing construction contractors and owners tend to prepare their cases in the same way as they would for litigation. This leads to potential “informational overkill,” which threatens the arbitration panel’s ability to easily sort through and understand the issues in its quest for a fair and equitable decision.

Key Words: claims, arbitration, damages, alternative dispute resolution (ADR)

Alternative dispute resolution (ADR) has gained popularity throughout the construction industry as a way to settle disputes without resorting to litigation. Within the broad category of ADR, arbitration is probably the most formal method and represents a dispute resolution method with a strong history of case law governing its form and format. Because of arbitration’s relative formality, attorneys representing construction contractors and owners tend to prepare their cases in the same way as they prepare for litigation. This leads to potential “informational overkill,” which threatens the arbitration panel’s ability to easily sort through and understand the issues in its quest for a fair and equitable decision. This overkill also leads to needless expenditure of time and unnecessarily drives up the cost of claims resolution. This article provides two arbitrators’ viewpoints of construction claims development in the hope that the information will be useful to those needing to resolve construction claims by arbitration. It also may help to reduce the volume of costly and unnecessary documentation.

Fundamental Considerations in Claims Development

The development of documentation to support or refute the issues in question generally should be guided by two fundamental considerations: the contract and the makeup of the panel members. It goes without saying that absolutely everything that is furnished to the panel must be tied to the contract in some form. The instructor of a government contracting class succeed in claims contract administration:

- read the contract;
- do exactly what the contract says to do; and
- do not do what the contract says not to do [2].

These rules also apply to the development and analysis of claims in arbitration. The American Arbitration Association’s Guide for Construction Industry Arbitration states “The arbitrator’s authority is created by the contract, subject to the applicable arbitration law [1].” First, if the issue at point cannot be tied specifically to a contract clause, it will be difficult, if not impossible, to prove the merit of the claim. Thus, to ease the arbitration panel’s job of interpreting the claim and to ensure that the members truly understand each issue, every new point should be started with a reference to a specific contract clause. Additionally, as secondary and tertiary supporting evidence is introduced, it too should be referenced to specific contract language. This not only ties down the issues in question, but also provides a basis to which the panel can refer to decide both merit and quantum.

The second fundamental consideration is the panel itself. The legal profession trains its practitioners to develop arguments that can be understood by the average juror. Arbitration panels are made up of people with specific sets of education and experience that qualify them to understand and decide difficult technical issues. Thus, a single piece of testimony or evidence is generally sufficient to prove a specific fact for a panel. Furnishing multiple experts to testify to the same fact is not only unnecessary, but prolongs the process and may work to the detriment of the argument by forming an appearance of inflating the cost of the arbitration process.

Second, arbitration panels can be formed from a multitude of disciplines. In construction, we tend to build the panels from those people most familiar with the industry: construction attorneys, engineers, and contractors. Each discipline brings its own set of skills and experiences to the panel. Consequently, panels tend to rely on each individual member’s expertise to reach a collective decision. Lawyers will rely on engineers to interpret the technical evidence, and an engineer will rely on the lawyers to interpret points of law and contract language. Identifying areas that are central to a specific claim for which the panel has no corresponding expertise will help in deciding the level of detail that must be provided to ensure that the panel thoroughly understands the issues. A panel composed entirely of attorneys will need more technical detail and “instruction” on germane technical issues than a panel that includes engineers or contractors. Conversely, a panel with no legal expertise will need specific guidance with regard to matters of contract interpretation. The formula for the required level of detail is simple: provide the salient facts...
and supporting information, making maximum use of the panel's expertise.

ESTABLISHING MERIT

As previously stated, merit must spring from the contract. The ability to cite specific contract language that supports the claim greatly enhances the chance that the claim will be recognized as meritorious. On the other hand, as the connection between the issue in question and the contract becomes less clear, the chances of successfully promulgating the claim go down. To establish merit, the plaintiff should be able to directly tie events on the project to pieces of the contract. By separating each individual argument, the basis for the claim becomes more understandable to the panel. Additionally, restricting the arguments to merit greatly enhances their strength. Including facts about the monetary magnitude of the issue in question only serves to obscure the merit arguments. One must remember that without merit, there are no damages, and the arbitrators may construe the mixing of evidence about damages in arguments about merit as deliberate obfuscation. This may be a good tactic in a jury trial, but a sophisticated arbitration panel will quickly identify it, to the detriment of its author.

Determining merit based on ambiguity is perhaps one of the more contentious issues faced by an arbitration panel. Ambiguity is essentially defined as a situation in which two equally competent and reasonable persons looking at the same portion of the contract draw two different logical conclusions. When present, ambiguity is construed against the author of the contract [3]. It can be expected that both sides will produce experts to testify to their own interpretation of the issue in question. If a contract ambiguity is the basis for the claim, it is incumbent on the contractor's counsel to furnish the panel with the necessary case law to ensure that the panel both recognizes that an ambiguity is present and that it must be construed against the author. Additionally, a very clear chain of events that occurred as a result of the ambiguity must be illustrated to ensure that merit on this basis is properly established.

QUANTIFYING DAMAGES

Developing the quantitative portion of a construction claim for arbitration should follow four basic guidelines. First, all damages claimed must have a basis in a provable fact that warrants their inclusion in the claim. Next, the damages must be directly related to the project and preferably be tied to a specific contract clause, specification, or drawing. Third, supporting documentation should be available to prove the amount claimed. Finally, both the type and amount of damages claimed must be completely credible. To fail to observe these simple guidelines is to risk certain reduction in the amount of damages awarded or to have damages disallowed on a piecemeal basis.


. . . the three tests of a good award. An arbitration award should have three chief characteristics: it should be clear and definite, leaving no doubt as to what the parties must do to comply; it should decide every issue put to the arbitrators; and it should not rule on anything outside the scope of the arbitrators' authority [1].

Keeping these tests in mind during claims preparation not only makes the arbitration panel's job easier, but also speeds up the process by eliminating marginal elements in the dispute.

The first guideline should go without saying. It seems so fundamental. However, it is our experience that once a project has reached a point where a dispute is referred to arbitration, there seems to be an unavoidable temptation to get even for any and all problems that may have occurred, without regard to their specific relationship to the issue in question. When developing cost, time, and impact damages, the claimant should ask if a given damage is directly related to the issue in dispute before including it in the claim. Claiming a time extension for rain in a dispute over the interpretation of a detail on the contract drawings is inappropriate and needlessly complicates the arbitration process.

The Guide for Construction Industry Arbitration states that "The award must be consistent with the agreement of the parties [1]." The "agreement of the parties" is the contract. Therefore, the submission of claims for damages that are secondary to the contract is very difficult to justify and may in fact exceed the panel's authority to award. Claiming that the owner's refusal to make payment on items in dispute so adversely affected the contractor's cash flow that the company was unable to properly execute other projects is an example of this type of damage. The arbitration panel can award damages only for those actions that occurred on the project whose contract grants them authority. Therefore, the panel has no authority to act on problems elsewhere. In this case, arbitration is not appropriate, and remedy should be sought elsewhere in the legal system.

The third guideline concerns available supporting documentation. The strongest evidence is actual records and invoices related to the dispute. When preparing a claim, the claimant should assemble factual records such as payrolls, invoices, time sheets, diaries, photographs, and tax returns, and base the damages on what actually can be calculated from the records. This is what the arbitration panel will do. If essential records are not available, the claimant's organization merely calls its managerial abilities into question by including estimates based on memory. If no supporting documentation is on hand, it would be difficult, if not impossible, for a panel to award damages that are "clear and definite," as defined by the American Arbitration Association.

This leads to the question of the claim's overall credibility. One rule-of-thumb seems to be that if you don't ask for it, you won't get it. This leads to including almost anything, without regard to whether it can be properly supported by the available evidence. Succumbing to this temptation is dangerous. All it takes is finding one item that is either untrue or frivolous, and the entire credibility of the claim is questioned. Even if the panel has found that the claim is meritorious, this will negatively affect the type and amount of damages awarded. It should be remembered that the panel will use a test that the award should be the amount a reasonable and prudent entity would have deserved. In calculating that amount, they can either use the logic developed in the claim or rely on their own experience. If the
basic honesty of the claim is in question, the panel is more likely to use its own method to arrive at a fair and equitable award.

**TREATING ARBITRATION LIKE LITIGATION**

ADR is meant to expedite the solution of construction contract issues before they erupt into full-blown litigation. It is supposed to be timely and less costly than litigation. When binding arbitration clauses are included in contracts, the intent of both parties is to resolve unforeseen disputes out of court, so treating arbitration like it is a lower form of litigation is both counterproductive and inconsistent with the agreement formed by the parties to the contract. Owners and contractors alike must guard against allowing their legal counsel to develop claims for arbitration in the same manner as claims for litigation. They must remove themselves emotionally from the dispute and use their years of experience to guide their actions as they prepare for arbitration.

Both parties have a number of key factors working for them in arbitration. First, the panel is a group of experts who not only understand the dispute resolution process but also have been involved personally with the construction industry. They are not a randomly selected group of citizens whose ability to understand complex technical and legal questions is unknown. Next, the panel members value their reputations as fair and impartial judges, and as a result will not be prone to issuing awards that cannot be supported by the evidence provided. Finally, the panels are formed of people with other means of livelihood who are committed to the expeditious resolution of the issues. They are under an obligation to hear all relevant testimony and review all relevant evidence. The operating word here is relevant. The presentation of redundant testimony, or worse, the inclusion of evidence that is later found to be untrue, inevitably works against the party who includes it in its presentation.

In conclusion, it must be stated in the strongest terms that preparing a claim for arbitration is fundamentally different than preparing the same claim for litigation. Alternative dispute resolution is intended to provide a resolution at lower cost and in less time than litigation. Treating arbitration like litigation fails to achieve either objective and may in fact work against the party who does so. To successfully promulgate a claim in arbitration, the claimant must make sure that the claim is both clear and well-supported by documentary evidence, directly related to the agreement, and within the arbitration panel's authority as provided by the contract.

**REFERENCES**


**RECOMMENDED READING**


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