



Dispute Resolution

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Customizing Arbitration

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At its best, arbitration is a flexible, streamlined and efficient dispute resolution process that results in lower costs, quicker determinations and more predictable results.

Unfortunately, such benefits are not always realized. When misused, arbitration can become cumbersome, aimless and costly. These issues have discouraged the selection of arbitration.

The negotiation of arbitration clauses is generally not viewed as an opportunity to create a project-specific approach to handling disputes. Unfortunately, most standard form construction contracts reinforce this attitude by effectively reducing the analysis of dispute resolution to merely checking the box next to “litigation” or “arbitration,” which typically results in the default application of the rules promulgated by the American Arbitration Association (AAA).

The better approach is recognizing that arbitration does not need to be a one-size-fits-all process, and that the general arbitration rules will not address the project-specific concerns and interests of the parties if a dispute arises. Arbitrators and the AAA generally respect that the arbitration process belongs to the parties and that the parameters set forth in the contract govern. The parties should consider a broad menu of options for creating a customized arbitration process will before any dispute arises. Such options include, but are not limited to, the following:

- limiting the scope of arbitration to only include certain types of disputes;
- setting the number and qualifications of arbitrators;
- specifying the hearing locale;
- requiring the hearing to commence within certain time periods and to proceed on continuous days until complete;
- requiring mediation and other conditions precedent to filing a demand for arbitration;
- allowing or barring motions practice and requests for injunctive relief;
- providing for or limiting document discovery, including electronic discovery;
- allowing, limiting or prohibiting depositions;
- setting limits of remedies and/or structured remedies;
- providing for the award of attorneys’ fees to prevailing parties; and
- setting a tiered approach to various items listed above based on the amount in controversy.



The range of options available to customize the arbitration process is limited only by the foresight and creativity of the contracting parties and their counsel. The arbitration process is not always preferable to litigation, and frequently clients who have had a bad arbitration experience want no part of the process in the future. However, for many parties involved in construction, arbitration is a valuable process. Those parties should consider modifying the process to meet their concerns, rather than abandoning it altogether.

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