

# Checklist for Drafting Arbitration Clauses in Construction Contracts

**Presented By: Christi Underwood**

**Fellow, College of Commercial Arbitrators**

Who, what, when, where and how parties are to arbitrate disputes must be addressed in the arbitration clause to avoid costly and time consuming legal determinations on these issues. There are numerous examples of parties taking years to resolve threshold arbitrability issues by litigation in state and federal courts. These types of disputes can easily be avoided by a well drafted arbitration clause. The following topics should be considered for inclusion, depending on the size and complexity of the parties' contract.

- ☐ Is the clause broad enough to cover all disputes that could arise from the contract on this project; including torts, statutory causes of action, latent defects?
- ☐ Do your contract documents contain consistent ADR provisions to allow consolidation and joinder if desired? Examples: Horizontally (Contractor-Surety; Subcontractor-Surety; Owner-Architect-Engineer) and Vertically (Owner-Contractor-Subcontractor-Supplier)
- ☐ Are there advance steps before arbitration to maximize opportunity to resolve disputes economically and efficiently? Examples: key executive negotiations; mediation; non-binding project neutral or Dispute Review Board
- ☐ Is the locale or site of arbitration identified?
- ☐ Are the governing rules identified?
- ☐ Number of arbitrators identified? Parties can save time and money if they increase the threshold for one arbitrator to serve; AAA defaults to three if \$1 million or more in controversy, exclusive of attorneys fees.
- ☐ Arbitrator qualifications – background. Do you want an experienced construction lawyer? Is the project residential or commercial? Do you want an Architect, Engineer or Contractor – or a combination of these?
- ☐ Attorneys fees – does the prevailing party receive attorneys' fees? Is the arbitrator or a court to determine the amount awarded? If arbitrator determines, what is the standard? Governed by guidelines of the Courts in which the matter is pending?
- ☐ Governing law for disputes arising under the contract (what if supplier Purchase Order is different or a subcontractor's proposal is different?) Provide the Arbitration shall be governed by the law of \_\_\_\_\_ (and make this consistent for all participants)

- ☐ Discovery – do you allow depositions? Not allow? Parties may agree to allow a minimum number or limit to a maximum if dispute becomes a large complex case. Alternatively, provide for the arbitrator’s sole discretion.
- ☐ If residential construction – the AAA Home Construction Arbitration Rules must be specifically named if they are the desired governing rules.
- ☐ Address award enforcement – include “entry of judgment” language.
- ☐ State arbitration code vs. the Federal Arbitration Act– Unless provided otherwise, the FAA applies to construction projects because building materials are transported across state lines thus triggering interstate commerce.
- ☐ Consolidation or joinder – is it allowed?
- ☐ Electronic discovery – how to handle costs of production?
- ☐ Statutes of Limitations – identify what state’s law controls; acknowledge the arbitrator is to determine issues related to the statute of limitations issues
- ☐ Limitation of Damages – does the contract specifically prohibit the award of consequential and punitive damages?
- ☐ Reasoned award? Findings of fact and conclusions of law?
- ☐ Confidentiality of award.
- ☐ Appeal to private appellate arbitrator? What is the standard for review?