Can Arbitration Fulfill Its Obligation to the Construction Industry?

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By Richard Fullerton

Dick Fullerton was with Saunders Construction Inc. for more than 22 years as executive vice president in charge of operations and also served as president of the AGC Colorado in 1991. Since 1998, he has offered dispute resolution options to the construction industry, specializing in mediation, arbitration and consulting.

A 2003 study of dispute resolution revealed that a number of AGC/C members question whether arbitration provides the "faster and cheaper" resolutions they had anticipated.

Their concerns arose from an increasing number of depositions and expert testimony in arbitration. Some saw arbitrators exerting little control over the process and hearings expanding at the discretion of the participants.

To investigate this question of arbitration efficiency, several leading Colorado construction attorneys agreed to participate in a survey to determine whether arbitration provides an efficient alternative to litigation (see related sidebar for list of participants).

Each participant has significant experience in construction law, with practices averaging 29 years mainly in Colorado and the western United States. They deal primarily with construction and construction-related cases, representing all segments of the industry. Ten of the 13 attorneys also serve as construction arbitrators.

Preferences

The majority of attorneys prefer arbitration for construction cases. Five expressed outright support; three favor arbitration but allow the contract and case details to determine the resolution method, and five offered no preference. None prefers litigation.

The majority believes that construction cases are highly dependent on industry knowledge, and that arbitration best serves the client by allowing the selection of an arbitrator with specific experience.

But in response to the critical question of whether arbitration has begun to mimic litigation by incorporating more courtroom procedures, the attorneys responded unanimously, saying that the practice has grown to include numerous depositions, more experts and extended schedules.

Most considered such "legalization" of arbitration a serious problem because of the added expense to the client. One attorney said: "The cost of arbitration should be half the cost of litigation, but it is not."

Three participants, however, prefer that arbitration be allowed unlimited legal procedures, arguing that some cases benefit from an unrestrained pursuit of evidence. They prefer full flexibility, holding arbitration as a private form of litigation with freedoms not allowed in the courtroom rather than as an abbreviated alternative to litigation. They agreed that many cases benefit from a limited process but prefer to maintain control rather than having it imposed.

Responsibility

There were mixed responses about responsibility for the legal aspects of arbitration, including some possible motives.

- Attorneys - Four respondents said that the legal profession was solely responsible, acting out of fear of malpractice claims, an inability to respond without all of the facts or discomfort with an abbreviated process.
- Arbitrators - Two attorneys held the arbitrators responsible; one said that arbitrators - many of whom are attorneys themselves - are hesitant to hold their colleagues accountable.
- Arbitrators and attorneys -Two respondents said that both arbitrators and attorneys share responsibility for enforcing tighter restrictions.
- Arbitrators and clients - One attorney said that arbitrators, arbitration organizations and clients should control the process.

The remaining attorneys, including the same group who support greater flexibility, believed that arbitration is not acting uncharacteristically and should be allowed to follow any reasonable consensus of the parties.

Limits

If arbitration were to be abbreviated, what limits would be most effective? The respondents showed surprising consistency, offering three distinct suggestions - limit discovery, control the arbitration schedule and assure comprehension of the participants.

- Limiting discovery - The most significant expense of the arbitration process comes from the costs of depositions and experts. None of the attorneys is in favor of predetermined limits, preferring an agreement between the parties and the arbitrator. Once such an agreement is reached, only a few attorneys believe that the arbitrator should exert strict enforcement, the majority prefers the use of persuasion to maintain limits.

An interesting observation emerged from this question. Most of the lawyers see the arbitrator as quite effective in limiting discovery, using efforts ranging from persuasion to "arm wrestling" with counsel to establish an acceptable balance.

Others, however - particularly those who never act in the arbitrator role - expressed an opposite perspective, reporting that they rarely see arbitrators making any effort to limit discovery, allowing counsel to control the discovery process. No explanation emerged for this disparity.

• Controlling the schedule - The timing and duration of hearings directly influences the cost and the perceived effectiveness of a case. Several attorneys depict the abuse of the arbitration schedule as rampant. While still an improvement over courtroom procedures, hearings mimic litigation in allowing motions, repetitious testimony and continuations, all of which extend the process at the clients' expense.

None of the attorneys supports an arbitrary limit, but many said that counsel should agree to a schedule beforehand to be enforced by the arbitrator. Again, most prefer that the arbitrator remind the parties of this commitment as opposed to exerting strict controls.

• Comprehension by the participants - Because of the complexity of construction cases, the attorneys felt strongly that participants must be fully prepared for their roles in the arbitration hearing with varying levels of responsibility.

• The arbitrator -A key to a more streamlined process rests in the selection of an arbitrator who is thoroughly familiar with construction cases. The attorneys responded unanimously that the arbitrator's experience is crucial. Without a strong background in construction, an arbitrator may delay testimony in order to understand the issues or may become lost in the details.

• Attorneys- Industry knowledge and case preparation by counsel were also critical components for a successful arbitration. Several participants told stories of opposing counsel unfamiliar with construction law and arbitration procedures. Lawyers with limited experience tend to delay hearings, asking for more discovery and more time to strategize their cases at the clients' expense.

• Parties - Few attorneys rely on client knowledge of the arbitration process. Those parties with courtroom experience may understand and demand the benefits of an abbreviated arbitration, but most clients relinquish authority to counsel. Some lawyers said that the process belongs to the client and would prefer they take a larger role.

Choices

Another question addressed by the attorneys was what factors they consider in selecting the arbitrator. It came as no surprise that they prefer arbitrators who effectively achieve agreements. Many are selected because of their specialized construction knowledge. Respondents also said that intelligence, a strong work ethic and the ability to follow the case were critically important.

The attorneys also discussed their preference in choosing between private practitioners and arbitration organizations. Three such organizations are prominent in Colorado - AAA (American Arbitration Association), JAG (Judicial Arbiter Group Inc.) and JAMS (Judicial Arbitration & Mediation Service).

The response was divided. Eight respondents prefer private arbitrators, because of:

- the avoidance of administrative fees,
- a greater range of selection, and
- greater flexibility in structuring arbitration panels.

The rest prefer organizations because of:

- ongoing arbitrator training,
- case administration, and
- the perception of greater impartiality to parties unfamiliar with the private arbitrators.

Accountability

Offering greater flexibility than its litigation counterpart, arbitration is still embraced by attorneys and contractors alike because of the unique process it allows, offering parties the selection of the fact-finder and relaxed rules not available in the judicial model.

Attorneys may disagree over specific techniques to employ, but they agree that many cases benefit from an abbreviated process that limits costly legal techniques. While the industry strongly supports arbitration, the influx of costly procedures threatens to overshadow the inherent advantages of arbitration.

The survey revealed little interest from the attorneys in exerting specific control over the arbitration process. Most attorneys oppose the current trend, yet resist restrictions, allowing that arbitrators already have sufficient authority to manage effectively.

Despite such authority, the trend toward legalization continues. If arbitration does not enact self-regulation, the final determinant of a more efficient process may rest with the parties themselves. While cases still "belong to the client," few clients recognize the benefits or responsibilities of assuming a greater role.

The price to be paid for standing on the sidelines will be greater incorporation of courtroom procedures into arbitration and the increasing expense and frustration that it will demand. <<

Arbitration Study Participants

The following survey participants were recommended by their peers and construction professionals for their legal expertise in the Colorado construction market:

David Arkell	Faegre & Benson LLP
Robert Benson	Holland & Hart LLP
Alvin Cohen	Cage Williams Abelman and Leyden PC
Eugene Commander	Shughart Thomson & Kilroy PC
Michael Cook	Sherman & Howard LLC
Jeffrey D'Agosta	Hensel Phelps Construction Co.
Hubert Farbes, Jr.	Brownstein Hyatt & Farber
Daniel Gross	Oviatt Clark & Gross LLP
Tyrone Holt	Holt & Stalder LLC
William Knapp	Montgomery Little & McGrew PC
Robert Meer	Meer & Meer PC
Robert (Rick) Miller	Lichtenfels Pansing & Miller
David Wells	Wells, Love and Scoby (retired)