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Top 10 Mistakes Litigators Make in Construction Arbitrations

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INTRODUCTION

Construction arbitrators experience many mistakes made by counsel. Some are large – some are small. Some negatively affect the schedule of the hearing or the cost of the process. Some are serious enough to affect the outcome. I have described 10 common mistakes in an effort to help all of us improve our advocacy skills in arbitration.

I.

THE FAILURE TO SPECIFY DAMAGES EARLY AND CLEARLY

Arbitrators often see counsel failing to itemize damages and link those damages to the causes of action being pled. It is common to see attorneys file arbitration demands that do not set forth the nature of the damages or the dollar amounts involved in their client's claims or counterclaims. The parties and the arbitrator benefit from an initial specification of claims that sets forth all damage claims clearly and concisely. It is understandable that some damage claims in some cases may not be fully known in the beginning and those claims will have to be more fully set forth in a later pleading. However, when the claims are ambiguous or vague or tend to hide the legal theories applicable and the calculation of the damages pertaining to each theory, it puts the Arbitrator and the parties at a disadvantage.

The form of pleading is not that important - - but the pleading, whether formal or informal, needs to set forth the theory of recovery, the elements of that cause of action, the types of damages sought for each theory and any other relief that is sought, legal or equitable, as well as the specific dollar amount of each claim. It is not unusual to see evidence of negligence put on during testimony when the only claim described in the pleadings is for breach of contract. Since arbitration is a more informal process, some attorneys tend to be lackadaisical about linking their story, their causes of action, causation and their damages. Listing all the theories of recovery and the relief sought early on in your case also helps the Arbitrator determine the nature of the case, the complexity of the case, the length of the time the parties will need to prepare the case, which pre-hearing procedures may be utilized and what types of discovery the parties will need. Failure to pay attention to damages early also robs you of the chance to acquaint the Arbitrator with a crucial part of your case in the beginning.

The same principals apply to amended pleadings filed later throughout the case. Just prior to the hearing on the merits, many Arbitrators will prepare for the arbitration hearing by reviewing the latest live pleadings. Usually the Arbitrator will not yet have received or read the exhibits. When the Arbitrator does his preparation before the hearing, he will include a careful review of the pleadings so it is important that the last live pleading is thorough in its review of the claims and damages associated with each claim.

II.

THE FAILURE TO PREPARE FOR THE PRE-HEARING CONFERENCE

Many attorneys do not adequately prepare for the pre-hearing conference and do not create an outline or an agenda for themselves and their clients. They rely on the Arbitrator to conduct the proceeding and do not think much about their case prior to the time that they dial into the phone call. It is the responsibility of counsel to prepare in advance for the hearing and to have met with or conferred with their client and perhaps their expert before the preliminary hearing. Oftentimes opposing counsel have not yet talked about the basics of the schedule, such as when they can exchange discovery, when they want to exchange expert reports, when they want to cut off discovery and when they want to hold the hearing on the merits.

Attorneys should be prepared to answer these questions and others about their case. They should have thought through the questions of what discovery they need, how long they need for discovery, whether they are going to have experts, when they want to produce expert reports and whether a site visit for the Arbitrator and/or the experts would be useful. How long does their expert need before his or her report can be produced? How long will it take the client to prepare for production of documents to the other side? Are there legal issues that make it likely that dispositive motions will be useful or desired? What are the scheduling issues that need to be considered? What form of award do you want? Do you want a court reporter? All of these questions should be thought through, considered, and discussed with the client before you pick up the phone to dial in.

Since Arbitrators are generally somewhat lenient with initial requests for continuances, parties' counsel tend to schedule hearings thinking that they can be easily continued. The rules require the parties to show good cause to continue a hearing and the Arbitrator has great discretion. After one or maybe two continuances, in most cases there will be very little opportunity to continue a case. Arbitrators prefer that the parties attempt to try the case on the first setting and Arbitrators take seriously the scheduling of the hearing. Once the case is set, the Arbitrator does not plan on a continuance. The parties need to select dates that they and their experts really intend to stick to.

Counsel also tend to underestimate the amount of time needed for the hearing. It is much better for the Arbitrator to block more time and then give time back to the parties rather than not have enough time for the proceeding and have to reschedule the end of the hearing. Prior to the preliminary hearing, counsel should have talked to their main witnesses and their experts (if experts have been retained by this time) to determine their schedules during the period of time for which counsel is anticipating setting the hearing. Arbitrators assume that when a party commits to a date, they have adequately consulted with their client and their experts prior to committing to that date. Doing this in the reverse is not advisable.

III.

FAILURE TO LIMIT DISCOVERY

One of the hallmarks of arbitration is participating in a process which is managed efficiently. One aspect of that efficiency is limited discovery.

Counsel has a duty to help make the process efficient. Litigators do not like creating limits for themselves and rarely do so voluntarily. Arbitrators are told time and again to implement reasonable limitations on discovery, yet counsel do little more than lay low and hope the Arbitrator does not discuss the need for these limitations. Instead, counsel should plan for this event. Know the key discovery you need. Prepare to do without some discovery. Be ready to propose limitations. If you find that the three fact witness depositions you were given just are not sufficient, a timely motion showing good cause will likely be granted. Take responsibility for making the process efficient yourself. The Arbitrator will recognize it and most probably your client will as well.

IV.

THE FAILURE TO TIMELY DISCLOSE DEMONSTRATIVE EXHIBITS, CHARTS AND SUMMARIES - - THE FAILURE TO USE CHARTS AND SUMMARIES

Arbitrators need as much help as any judge or jury synthesizing the evidence and assembling it into a form that is meaningful within the context of the dispute. Charts, graphs and summaries are extremely helpful and should be used early and often. They must also be accurate. Creating a chart or summary that does not accurately reflect the underlying exhibits can be disastrous and can destroy the client's credibility. However, a good summary or a good chart will be relied upon by the panel throughout the hearing and throughout deliberations. However, in order to use the chart or summary, it must be timely disclosed to the other side.

Often times, counsel assume that because the underlying documents have been produced, there is no need to produce the chart, summary or compilation of the underlying material. Failing to disclose that exhibit creates another dispute just before or during the hearing, and can appear to the Arbitrator to be one side playing games. If the Arbitrator does decide to allow the document into evidence, he or she may delay the hearing while the other side is given a chance to review it, respond to it or conduct more discovery. More importantly, there is a possibility that the Arbitrator will not allow the document into evidence if it is offered too late. There are some types of summaries that are prepared for closing argument and summarize the evidence throughout the case. Obviously, those cannot be prepared and submitted pre-hearing, but models, scales, and summaries of existing evidence should always be provided to the other side pre hearing.

It is not unheard of for an expensive model which took great time to make to be excluded from the evidence because it was not produced ahead of time and the opposing side had no opportunity to check the model for accuracy. In another example, a sample window frame assembly was excluded from evidence because the other party objected that the model was not accurate based on the circumstances at the site of the project. Had this proffer been made ahead

of time, the objection and any concern about accuracy could have been resolved ahead of time. The objection could have been overcome and the model could have been used.

V.

THE FAILURE TO USE MODELS, MOCK-UPS, CHARTS, GRAPHS AND SUMMARIES

In construction cases, it is common for Arbitrators to hear evidence about a technically complex system, process or procedure. While most Arbitrators are experienced and have dealt with hundreds if not thousands of technical issues at a site, systems and components are different from job to job and the way that a roof deck was put together on a previous project may not be the way that the roof deck is assembled on your project. The Arbitrator may have experienced an altogether different assembly on a different project. For example, if the dispute revolves around an EIFS system or a roof deck assembly or a window assembly, it is imperative that the parties provide a mock-up, model, photograph, drawing or some other 3D depiction to make sure that the Arbitrator understands fully how the component parts are put together. Many times, Arbitrators will hear days of testimony before either of the parties bring forth a mock-up or even a photograph of the issue. This can result in wasted hours and an arbitrator who fails to understand key testimony.

VI.

THE FAILURE TO DETERMINE THE FORM OF THE AWARD TIMELY

At the beginning of the case, Counsel should discuss with their clients whether they want a standard award or a reasoned award. If the parties believe they want a reasoned award they need to determine what type. Reasoned awards mean different things to different people and can include: (1) detailed findings of fact and conclusions of law, (2) a legal opinion in narrative form, much like an opinion issued by a court or a Board of Contract Appeals; or (3) a brief explanation of the reasons for the Arbitrator's decision on each claim. Before the preliminary hearing, counsel needs to explore this topic with the client and decide whether they prefer a standard award or a reasoned award and what type of a reasoned award. Then counsel should discuss this topic with opposing counsel so that they can discuss the form of the award with the Arbitrator at the preliminary hearing. Under most sets of arbitration rules, the parties need to agree to the type of award at the preliminary hearing. While many Arbitrators will allow some additional time to make this decision, some will not and insist on an immediate decision.

Counsel must also discuss with their client the fact that a reasoned award will be more costly both in terms of Arbitrator time and counsel time. If a reasoned award is agreed to, in most instances, the arbitration panel will ask for a proposed form of award from the parties and counsel should be prepared to prepare a reasoned award that will reflect his client's claims, clauses of action, damages, and the findings supporting same.

The proposed award should address each cause of action sought and the damages for each claim. The award should also address any offsets and counterclaims on an item by item basis as well as any additional relief sought, whether legal or equitable, such as foreclosure of a lien,

specific performance, etc. In addition, in a construction defect case, counsel should determine whether the client is willing to provide repairs to the project, and if so, that offer should be made known to the Arbitrator and be made a part of any proposed award. The Arbitrator can then order a party to perform repair work, or, in the alternative, pay X amount of dollars to the other party for someone else to perform their repairs.

Under the circumstances of any given case, it may be important to the parties that an itemized award be made. If a separate proceeding against an insurer is to take place then the specific breakdown of the award may be meaningful, or even critical. If a general contractor is going to pursue subcontractors or suppliers, then a specific breakdown of damages against the general contractor will be necessary. If the parties need that type of breakdown for one of the reasons mentioned above, they should alert the Arbitrator to that issue prior to the hearing and again in the proposed award.

VII.

THE FAILURE TO PROVIDE A SPECIFIC CALCULATION OF DAMAGES DURING THE HEARING AND A SPECIFIC REBUTTAL OF THE OPPONENT'S DAMAGES

Counsel often focus so much effort on liability that they forget about or minimize the presentation of their damage case. The liability story is always more interesting than the damages testimony and is generally easier to understand for most people. It is for precisely this reason that the parties need to focus on how to present their damages in a clear and concise way. Part of that task must be to focus on the other parties' damages as well. Without regard to when you plead your damages as discussed in Point I above, it is important to use clear, accurate exhibit summaries to display your damages and where the other side has offsets or counterclaims, it is important to summarize your attack on those damages in a summary or chart form. On more than one occasion, I have seen arbitrators retire to deliberate where the panel discussed damages for hours because the panel members disagreed on both what the damage testimony had been and what the damage claims were. The presentations had been scattered and disorganized. It is too easy for an arbitrator not to award damages if they don't understand the damages testimony. It is imperative that counsel understands the damages and understands how to present them clearly.

VIII.

THE FAILURE TO ASK FOR ALL THE RELIEF THAT YOU SEEK

Since arbitration pleadings are notice pleadings at best, parties often fail to request and brief their entitlement to various forms of relief other than money damages. If you are asking for relief such as declaratory relief, specific performance, or special interest on the award, it is critical that you clearly request it in the pleadings, and that you present evidence to the Arbitrators on your request. Be sure to include these points in your closing argument and in your post-hearing brief and provide authority for the request. If you are asking to be awarded a contractual interest rate or a special rate (such as a prompt pay act interest), you have a duty to plead it, prove it and argue it.

Often times attorneys fees and interest get short shrift during a proceeding. Parties calculate interest in an award without providing the arbitrator the information on how the interest was calculated and what the authority is relied on for the interest rate used. In addition, if a statute and the contract provides for attorneys fees, each of those grounds needs to be set forth clearly for the Arbitration Panel to consider.

It is also important to remember the basics of your claim. Sometimes the parties get so caught up in the disputed items of their claim that they forget to put on evidence of the undisputed part of the claim. If all the parties agree that retainage of X amount is due and owing, counsel will normally focus their energies on the disputed change orders. Do not forget to remind the Arbitrator that retainage in the amount of X is undisputed and should be granted as the first item of an award.

IX.

FAILURE TO PRODUCE ALL EXHIBITS PRIOR TO THE HEARING

Typically, a scheduling order will have a date by which all documents must be produced, a general discovery cut off and another date by which all exhibits are to be exchanged. It is quite common for a party to attempt to introduce a document in evidence at the hearing without having produced that document before any of the three cut-offs mentioned above. While arbitrators strive to be careful to not exclude material evidence from the hearing, they also have a strong propensity for enforcing document control orders. When these two interests collide, oftentimes an exhibit will be allowed in, even if produced after these deadlines. However, many arbitrators are becoming more convinced of their ability to exclude the document "safely." There are several of court decisions in Texas and elsewhere that uphold an arbitrator's ruling in that regard.

If you seek to offer a document you have not produced previously, you need to be prepared for the possibility that the arbitrator will postpone the hearing while a deposition is taken or in some other way allow the surprised party to respond to the new exhibit. The arbitrator will try to minimize the impact or the prejudice to the other party by allowing a deposition or break or some other method of preparing for the new evidence. The evidence may come in, but all parties should expect that any attempt to use a surprise exhibit will result in some type of recess or postponement at a minimum.

X.

THE IMPROPER CROSS-EXAMINATION

A good cross-examination will attempt to cast doubt on the credibility of the witness by showing that the person is lying or misleading the Arbitrator or by showing that the witness does not have knowledge or made a mistake and that the mistake was in the opposing party's favor. All the questions asked on cross-examination should be formulated with one of these goals in mind. Many times cross-examinations tend to be lengthy and lack direction. In some cases, if the witness has not been deposed, the examiner does not really have an idea of what that party will say, in which case the cross-examination is more of a fishing expedition. The counsel who is cross-examining should have a firm idea of what he is going to be able to get the witness to

say and how he will get there. The goal is to get the witness to agree with the examiner's point of view or to get him to make statements that can be contradicted through other evidence. The arbitrator must be able to understand the cross-examination, including what topics are being covered and what points are being achieved on cross-examination.

XI.

THE IMPROPER CARE AND HANDLING OF EXHIBITS AND DEMONSTRATIVE EVIDENCE

When Arbitrators arrive at a hearing, they often find that the three ring binders of exhibits put in front of them are a mess. These problems can take the form of exhibits that are not labeled, exhibits put in an order in the notebooks that make no sense, one page exhibits and bulk exhibits combined together in the same notebook with no attempt to deal with duplicates (*i.e.*, all of the core documents of the case are in both the Claimaint's and Respondent's notebooks), bulk exhibits that are not numbered within an exhibit, and various other associated problems.

There are a few simple rules that will make life a lot easier for the parties and the arbitrators.

(1) The parties should confer prior to the hearing and take all of the documents that both the Plaintiff and Respondent plan to use and combine them into a joint exhibit notebook. The prime contract and the general conditions and supplemental conditions, the plans and specifications, the change orders, RFIs and any other documents that are core exhibits in the dispute should be separated out and put into one joint exhibit notebook;

(2) Each parties' separate notebooks should be put together in some assemblance of order. For example, all key correspondence should be grouped together in chronological order and all bulk exhibits such as pay applications, change orders, RFIs and daily reports should be group together and then put in chronological order; and

(3) The parties should think about how they will present their case and make some attempt to prevent the Arbitrator from having to open and close six or seven notebooks with each witness continually throughout the hearing. Try to put the exhibits that will be used during the bulk of the case in one or two notebooks.

Following these rules can advance the ball in several ways. The Arbitrator does not fall behind and find himself or herself scrambling to keep up with the exhibits instead of listening to the testimony. The Arbitrator does not get as irritated. Good organization of the notebooks will enable the Arbitrator to keep track of his notes more easily.

XII.

FAILURE TO USE THE POST HEARING BRIEF EFFECTIVELY

The post-hearing brief should address the issues that the arbitrator is the most concerned about. Knowledgeable counsel will ask the arbitrator at the close of the hearing if there are specific issues that he or she would like briefed, be they evidentiary or legal considerations. The post-hearing brief should address those issues directly. The brief should restate the causes of action and the elements of those causes of action. Most importantly, list the breakdown of damages that you are seeking, how they are calculated and where the arbitrator can find the support for those calculations in the evidence. Describe the specific testimony that supports each cause of action and the elements of these causes of action. Always cite to specific exhibits. If there is a transcript, cite to the record page of the transcript. If there is no record, then cite to the witness by name and by the date of his testimony.

The post hearing brief is also the time to take your opponent's case apart. If they have failed to prove elements of their causes of action, state that information clearly along with the evidentiary support for that assertion.

CONCLUSION

Since arbitration is a creature of agreement between the parties and the process is one where the parties and the Arbitrator have latitude to create a process that will work in the context of their dispute, the parties and the Arbitrator should both take responsibility for making the process cost effective and efficient. If the parties and the Arbitrator work with each other to avoid the mistakes described in this paper, the parties will obtain a more efficient and fair process by which to resolve their dispute.