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GETTING THE ARBITRATION YOU WANT

PORTER HEDGES CONSTRUCTION PRACTICE GROUP CLIENT BREAKFAST

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WHY DO CLIENTS COMPLAIN ABOUT ARBITRATION?

- Lack of Understanding / Misinformation / Bad Experience
- Common Complaints
  - Expensive & Time Consuming
  - Arbitration is “Litigation-Like”
  - Arbitrators are Not Qualified
  - Arbitration is Arbitrary

WHAT ABOUT STANDARD RULES?

- Default Position - Adopt Standard Provider Rules
- Why this is problematic?
  - Lawyers and clients are unfamiliar with the rules
  - Lawyers have not evaluated client's concerns
  - Lawyers have not educated clients
- Why should you "customize"?
- Problems with Ad Hoc Arbitration

WHAT CAN YOU DO TO HELP?

- Use a knowledgeable construction lawyer
- Don't specify standard rules you don't know
- Help counsel understand your business
- Educate your company representatives about the options
- Customize an appropriate clause
  - Modify a "standard" clause
  - Evaluate pros and cons of standard rules

INITIAL DRAFTING CONSIDERATIONS

RULES AND ADMINISTRATION

- Which rules?
- Who administers the case?
- Ad Hoc with rules / without rules

Locale

- Provider decides if not in contract
- Cost impact

DRAFTING ISSUES RELATING TO ORGANIZATIONAL MATTERS

WHAT CLAIMS ARE ARBITRABLE?

Any claim **arising out of or related to the Contract**, . . . Not resolved by mediation shall be decided by arbitration which, unless the parties mutually agree otherwise, shall be in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association . . .

vs.

Any dispute, claim or controversy **arising out of or relating to this Agreement, or the breach, termination, enforcement, interpretation or validity thereof**, shall be determined by arbitration. In addition, any dispute, claim or controversy **arising out of the relationship between the parties** shall be determined by arbitration.

Who Decides The Issue?

Borrower and Lender intend for this Agreement to cover the broadest range of disputes and legal issues that may be arbitrated under federal law. **Borrower and Lender agree that any questions as to the scope of this Agreement shall be determined by the arbitrator** (including, without limitation all issued of formation, consideration, capacity, fairness, unconscionability, mutuality, duress, fraud, adhesions, arbitrability, revocability, and waiver).

POWERS OF THE ARBITRATOR

Arbitrator Powers

- Rules
  - "Notwithstanding any provision to the contrary in the Rules referred to herein, **the Arbitrator shall have no power to afford interim relief of any sort, or to enjoin or require any action** other than in the final award resolving all claims in arbitration."
  - "In any arbitration arising out of or related to this Agreement, **the arbitrator(s) are not empowered to award punitive or exemplary damages**, except where permitted by statute, and the parties waive any right to recover any such damages.
  - *or*
  - **The arbitrator(s) shall have no authority to award punitive or other damages not measured by the prevailing party's actual damages,** except as may be required by statute."

PANEL COMPOSITION

- Number of Arbitrators (1 or 3)
- Rules Differ
- Qualifications

Sample clauses:

- The sole arbitrator selected shall be (a retired judge from a particular court) **(a lawyer with ten years of active practice in a specified area, such as construction)** (an accountant) (a licensed engineer trained in the specialty of ______ engineering).
- The panel of arbitrators shall be composed as follows: (The Chair shall be an **attorney with at least 20 years of active litigation experience**, or shall be a retired judge from a particular court) (One of the wind arbitrators shall be an expert in an area such as construction) (**The Chair** must previously have served as Chair **or sole arbitrator in at least 5 arbitrations** where an award was entered following a hearing on the merits).

- The arbitrator shall be (a civil engineer) (a practicing attorney specializing in construction law).
- In the event any claim exceeds ________, exclusive of interest and costs, the dispute shall be heard and determined by three arbitrators consisting of persons qualified in (civil engineering) (construction management) (construction law) (mechanical engineering, etc.) or (one contractor, one design professional and one construction attorney).

PARTIES—WHO WILL BE AT THE TABLE?

JOINDER AND CONSOLIDATION

- Practical Considerations
- Does your client want complete joinder?
- Drafting Considerations for Joinder and/or Consolidation

An arbitration clause should address the issues of joinder and consolidation. Below are sample clauses that provide for consolidation:

- "All claims, disputes and other matters in controversy arising out of or relating to the Project, the Subcontract, or the breach thereof, shall be decided by arbitration, conducted in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then in effect. All other claims, disputes and other matters in controversy, if any, then in controversy between Contractor and Subcontractor, regardless of whether related to the Project or Subcontract, shall at the Contractor's option, be consolidated with and determined in any such arbitration proceeding. Subcontractor agrees that in the event Owner and Contractor are involved in an arbitration arising out of or relating to the Project or the Contract Documents which

pertains in whole or in part to the Subcontract or Work performed by Subcontractor, Subcontractor's claims, disputes and other matters in controversy, if any, shall at Contractor's option, be consolidated with the arbitration between Owner and Contractor, and any such claims, disputes and other matters in controversy shall then be determined in the consolidated arbitration proceeding. The arbitration proceeding between Contractor and Subcontractor shall, at Contractor's option, be held in Harris County, Texas.

- The owner, the contractor, and all subcontractors, specialty contractors, material suppliers, engineers, designers, architects, construction lenders, bonding companies, and other parties

concerned with the construction of the structure are bound, each to each other, by this arbitration clause, provided that they have signed this contract or a contract that incorporates this contract by reference or signed any other agreement to be bound by this arbitration clause. Each such party agrees that it may be joined as an additional party to an arbitration involving other parties under any such agreement. If more than one arbitration is begun under any such agreement and any party contends that two or more arbitrations are substantially related and that the issues should be heard in one proceeding, the arbitrator(s) selected in the first-filed of such proceedings shall determine whether, in the interest of justice and efficiency, the proceedings should be consolidated before that (those) arbitrator(s)."

This clause, by contrast, provides for joinder of a third party into the arbitration and effectively for consolidation of separate disputes:

- "The parties agree that to the extent permitted by the Subcontract Document all parties necessary to resolve a claim shall be parties to the same dispute resolution proceeding. To the extent disputes between the Contractor and Subcontractor involve, in whole or in part, disputes between the Contractor and the Owner, disputes between the Subcontractor and the Contractor shall be decided by the same tribunal and in the same forum as disputes between the Contractor and the Owner.

PRE-HEARING PROCEDURES

- Impact of Standard Rules on Discovery
  - Fast Track
  - Supplemental Rules for Fixed Time & Costs
- Factors Impacting Choice on Discovery Limits
  - Likely claim sizes/types of claims
  - Need for information controlled by other parties
  - Balancing efficiency with prejudicial effect: how much is “just right”?
- Drafting Options

The balance between efficiency and the need for information is evident in these discovery-limiting clauses:

- "At the request of a party, the arbitrator(s) shall have the discretion to order examination by deposition of witnesses to the extent the arbitrator deems such additional discovery relevant and appropriate. **Depositions shall be limited to a maximum of [three] [insert number] per party and shall be held within 30 days of the making of a request**. Additional depositions may be scheduled only with the permission of the [arbitrator(s)] [chair of the arbitration panel], and **for good cause shown. Each deposition shall be limited to a maximum of [three hours] [six hours] [one day's] duration**. All objections are reserved for the arbitration hearing except for objections based on privilege and proprietary or confidential information.

- **Discovery will be strictly limited**: (1) each Party will promptly produce to the other **all relevant and non-privileged documents** and electronic data for inspection and copying; and (2) each party will promptly **submit written reports of its testifying expert witnesses to the other Party**, and permit the other Parties reasonable opportunity to **depose such expert witnesses**. The Parties **shall not conduct any further discovery** unless permitted by the arbitrator(s) for good cause shown. The arbitrator(s) shall not conduct any independent discovery procure experts, or subpoena witnesses without the prior consent of the Parties.

- **Each party shall be limited to written requests for production** (no more than 50) **and no more than [33] hours of fact witness depositions, per party**. The time restriction on fact witness depositions applies to depositions noticed by either party.

EXPERTS

- Importance of Experts
  - Not matched by treatment in arbitral rules
- Key to Efficiency in Arbitration
  - Require expert reports and depositions
- Dangers of Incorporating Federal Rules
  - *Daubert* challenges
  - *Rules of Evidence not applicable*

- The Pendulum is Swinging
  - New AAA and JAMS rules
- Arbitrator and Litigant Training is Needed
- Importance of the Pre-arbitration Hearing
  - Similarity to Rule 26 Disclosures
  - Example: Seventh Circuit Pilot Program
- Can “justice” be accorded without e-discovery?

HEARING AND POST-HEARING CONSIDERATIONS

TIME LIMITATIONS

- Drafting Clauses that Limit the Time Between Filing and Final Hearing
  - Provider Rules – AAA/JAMS
- Supplemental Rules for Fixed Time & Cost
  - Pros & Cons

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Claim/Counterclaim Amount	Above $75,000 – 250,000	Above $250,000 – 500,000	Above $500,000 – $1M	Above $1M – $5M
AAA Fees	$2,500	$5,000	$7,500	$10,000
Maximum Days from Filing to Award	120	180	270	360
Number of Arbitrators	1	1	1	1
Maximum Number of Hearing Days	3	3	5	10
Arbitrator Hearing/Study Compensation per Hour	Up to $250	Up to $275	Up to $300	Up to $350
Maximum Arbitrator Study Time-Hours	8	12	20	40
Maximum Total Fees	$10,000	$14,900	$25,500	$52,000

PREVAILING PARTY CLAUSES

- Do you want a Prevailing Party Clause?
  - Why?
  - Have the conversation with your counsel
- Arbitrator Discretion
  - Limited Judicial Review
  - Arbitrators and the “American Rule”
  - The American Rule: “The parties agree that each party shall pay its own costs and expenses (including counsel fees) of any such arbitration, ...”

Of course, that provision differs significantly from a “loser pays” clause. Below are a few examples of a prevailing party clause.

Example 1: The expenses of any arbitration pursuant to this section **shall be borne by the losing party**.

Example 2: In any arbitration arising out of or related to this Agreement, **the arbitrator(s) shall award to the prevailing party, if any, the costs and attorneys’ fees reasonably incurred by the prevailing party** in connection with the arbitration.

Example 3: If the arbitrator(s) determine a party to be the prevailing party under circumstances **where the prevailing party won on some but not all of the claims and counterclaims, the arbitrator(s) may award the prevailing party an appropriate percentage of the costs and attorneys’ fees reasonably incurred by the prevailing party** in connection with the arbitration.

Example 4: The prevailing party **shall be entitled to an award of reasonable attorney fees**.

Example 5: The arbitrators **shall award to the prevailing party**, if any, as determined by the arbitrators, **all of its costs and fees**. 'Costs and fees' mean all reasonable pre-award expenses of the arbitration, including the arbitrators' fees, administrative fees, travel expenses, out-of-pocket expenses such as copying and telephone, court costs, witness fees, and attorney's fees.

- Defining Prevailing Party
  - Who is the prevailing party?
  - Know the controlling common law.
  - A net-offset provision could look something like this:

    To be considered a prevailing party for the purpose of awarding attorneys' fees or costs, the party must have a larger net recovery than the opposing party or parties after all claims and counterclaims are considered.

  - A percentage theory provision could look something like this:

    To be considered a prevailing party for the purpose of awarding attorneys' fees or costs, the party must have recovered at least ___ % of its original claim.

  - To be considered a prevailing party for the purpose of awarding attorneys' fees or costs, the party must have recovered at least ___% of its original claim. Additionally the prevailing party must also have a larger net recovery than the opposing party or parties after all claims and counterclaims are considered.

- Expert Fees and Costs
  - Know the governing law

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FORM OF THE AWARD

- Conversation with Your Client
  - Pros & Cons of Each Type of Award
  - Impact on Cost
  - Impact on Schedule
  - Impact on Finality
- Standard Award
  - The award shall be a standard award and shall not include reasoning or findings of fact and conclusions of law.
- Reasoned Award 1:
  - The award of the arbitrators shall be accompanied by a reasoned opinion.
- Reasoned Award 2:
  - The award shall be in writing, shall be signed by a majority of the arbitrators, and shall include a statement setting forth the reasons for the disposition of any claim.

APPEAL

- Appellate Considerations
  - AAA, JAMS and CPR Rules / ICC Rules
  - How appeal relates to form of award
  - How important is finality to you?
  - Do you want the right to appeal or do you want to preclude it?
  - "Notwithstanding any language to the contrary in the contract documents, the parties hereby agree: that the Underlying Award may be appealed pursuant to the AAA's Optional Appellate Arbitration Rules ("Appellate Rules"); that the Underlying Award rendered by the arbitrator(s) shall, at a minimum, be a reasoned award; and that the Underlying Award shall not be considered final until after the time for filing the notice of appeal pursuant to the Appellate Rules has expired. Appeals must be initiated within thirty (30) days of receipt of an Underlying Award, as defined by Rule A-3 of the Appellate Rules, by filing a Notice of Appeal with any AAA office. Following the appeal process, the decision rendered by the appeal tribunal may be entered in any court having jurisdiction thereof."

- Appeal to arbitral panel
- All Rules require:
  - reasoned award
  - record
  - waiver of right to initiate court action
- 3 to 4 months
- cost

QUESTIONS?