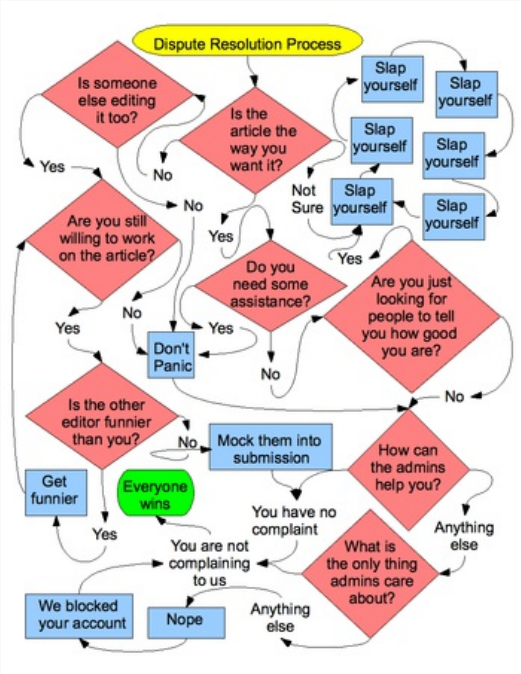
To Require Arbitration or Not To Require Arbitration

Many, if not most, construction contracts that I review during the course of my practice day include a mandatory arbitration clause. Most of these refer in a blanket manner to AAA Construction Industry Rules. The topic for this post is not whether such clauses are enforceable or whether they are one tool in the contracting tool box in a state where the contract is king. I picked the title of this post carefully because I wanted to discuss whether such clauses *should* be *required* as a routine part of all construction contracts and, if so, how those clauses can and should be written.



Uncyclopedia dispute resolution (Photo credit: Wikipedia)

I have previously shared my thoughts on mandatory arbitration and its desirability in numerous spots here at Construction Law Musings (you can search arbitration or check out the ADR page for more). In short, my opinion is that arbitration was initially conceived with the purpose of streamlining the dispute resolution process and to correspondingly lower the costs associated with such dispute resolution. Arbitration, when used correctly, can, in certain very industry specific cases, help by using an arbitrator or panel of arbitrators that have some expertise in the particular area of the construction industry or the particular specialized issue that will turn the case one way or the other. All of these goals are good and I applaud them.

However, if arbitration does not meet those goals then it simply becomes private litigation in which the parties pay a judge or judges to do what the judicial system has been doing for years. If arbitration is just as expensive, just as time consuming and does not help the parties to reach a better resolution, then making it mandatory simply moves the parties from one expensive dispute resolution venue to another without any real gain in efficiency. This additional expense is set out most starkly in smaller cases where many states have a streamlined process through the court system. In this latter case, arbitration is almost always more expensive.

Furthermore, simply referring to a certain set of rules (whether AAA or otherwise) does not necessarily solve the problem. Certain sets of rules and administrative set ups of various ADR groups often preclude the parties' ability to achieve the goals sought. Because of this, the general boiler plate reference to a certain set of rules that may or may not fit the particular facts of your construction dispute can lead to greater as opposed to lesser expense and headaches.

Does all of this mean that arbitration clauses in construction contracts are universally bad in my opinion? Not if these clauses are drafted with the goals outlined above in mind. Should you insist on mandatory arbitration, always keep the reasons you wanted to stay out of court in mind.

What types of items can be included to better conform the use of arbitration to these goals?

1. Discovery limitations that limit or eliminate the use of interrogatories and requests for admissions and limit the scope, duration and number of depositions.

2. Limiting the number of arbitrators to one to lower the arbitrator related expense.
3. Time limits on the presentation of evidence at the hearing.

These are just a few possibilities among many that a creative and experienced construction lawyer can help you draft.

Another option is to either explicitly set forth the mechanism for the *choice* (as opposed to the requirement) to enter into arbitration. This can be something as simple as a clause stating that one party has to demand arbitration and the other has "x" amount of time to agree or the matter goes to court. Of course, even where no arbitration provision exists, the parties can always agree to the time, manner and method of resolving their dispute, whether through my favorite, mediation, or arbitration at any point regardless of the contractual terms.

Remember, the contract is the law of your construction project (at least in Virginia) and the parties can and should act accordingly in drafting the arbitration provisions to achieve their efficiency goals.

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