Arbitration Has Been Around For Some Time, But Construction is Now Discovering Its Value

A workable technique for problems

Arbitration has been around for some time, but its arrival on the construction scene is rather recent. Even so, the expansion has been noteworthy.

For the construction industry, the use of arbitration represents a reshaping and modification of a technique in order to meet today’s more pressing demands on cost cutting and scheduling.

Enough has already been done that a wall and ceiling contractor will find that many of the problems he encounters now and which consume an inexcusably large amount of time, money, and effort can be resolved in lesser time — and by someone who knows and understands construction.

Arbitration isn’t solely for union relations problems. As a matter of fact the preponderance of filings have involved subcontractor and contractor complaints against the owner. Of 1,789 cases in 1977, some 722 were in this category, and another 267 involved disputes between general contractors and subcontractors.

Many contractors who have used arbitration insist that a contract provision for arbitration is a form of insurance policy against having to go to court.

Under Webster’s Dictionary, arbitration is defined as “the hearing and determination of a case in controversy by a person chosen by the parties or appointed under statutory authority.”

The organization most often used by the construction industry is the American Arbitration Association (AAA). This is no doubt due to the fact that the 100-year-old AAA, in 1966, established the National Construction Industry Arbitration Committee.

Thomas J. McGlone, former iaWCC/GDCI President and head of his own firm in New Jersey, serves as chairman of the NCIA Committee which recommends revisions to the arbitration rules for the construction industry.

This helps keep pace with industry developments and assures all parties that decisions are being made that reflect the needs and unique situations so characteristic of the industry.

According to McGlone the committee is considering such diverse areas as multiple party claims, the use of pre-hearing conferences and reducing the use of three-member arbitration panels.

The last mentioned item would be a valuable innovation. There is no valid assurance that a three-man panel will make a wiser decision than a single arbitrator who is acceptable to both sides in a dispute. The use of the three-man panel also tends to inflate the cost of a hearing.

Should the NCIA endorse these changes and/or recommendations for revision, the endorsement would carry enormous weight. The panel is composed of representatives of nine industry associations which represent subcontractors, general contractors, architects and engineers.

The Construction Industry Arbitration Rules are the standard contract provision and the set of rules which govern arbitration. Under these rules, the parties to the contract agree beforehand to submit any “future disputes arising out of the contract” to arbitration in accordance with AAA rules.

The American Institute of Architects and the National Society of Pro-
fessional Engineers have both incorp-
orated the provision in their standard
contracts. Wall and ceiling contrac-
tors may take advantage of this pro-
vision by use of the A-401 Standard
Subcontract Agreement. The Arbit-
ration article is Article 13.

Either Party
May File

Either party to a dispute may file
for arbitration. Michael F. Hoellering,
AAA vice president of case adminis-
tration, explained that AAA then
sends both parties a list of proposed
arbitrators who are technically quali-
ﬁed to resolve the dispute.

AAA will appoint the arbitrator
or arbitrators from among those most
preferred by the disputing parties who
have ranked the proposed names in
order of preference.

A mutually convenient time and
place for the hearing is scheduled by
the AAA. Within 30 days following
the hearing, an award will be issued
by the arbitrator.

In most industry settlements and
especially in construction the key to
acceptable decisions rests with the
presence of technical knowledge.
Judges often do not possess the re-
quired specialized knowledge with
the result that courtroom proceed-
ings are protracted as competing
lawyers work to educate the judge
about construction.

This is not the case in arbitration.
“You don’t need to educate the arbi-
trator about the technicalities in the
issue because that is his profession.”
By using an arbitrator who has tech-ni-
cal expertise on the issue, the pro-
ceeding can move much more swiftly
with less chance of a miscue.

Results show that the construction
industry pretty much agrees with the
key advantage that arbitration allows.
The AAA last year handled 1,789
construction cases — all involving
contract claims — in 39 areas.

The total value of the claims ex-
ceeded $134 million.

From AAA’s viewpoint, the unique
sequential problems of construction
scheduling find the speed of arbi-
tration an advantage. For this reason
the construction industry is involved
more extensively in commercial arbi-
tration than almost any other in-
dustry.

Explains AAA’s Hoellering: “It’s
not that builders, owners, architects
and subcontractors are more litigious
than others, but rather that construc-
tion suits must be resolved quickly if
one craft is to follow another without
costly delays.”

There’s no doubt that arbitra-
tion can speed up the resolution
of management-union conﬂicts.
But there’s an even faster way
and it’s spread to more than
500 companies and unions.
It’s called Expedited Arbitra-
tion. That’s a nice way of describ-
ing a quicker, shorter version of
regular arbitration.

The advantage of this system is
its contribution in cutting the back-
log of arbitration cases and thus
speeding up the grievance system.

Expedited arbitration usually
takes place at the workplace, a
plant or ofﬁce where the griev-
ance is ﬁled. Filing is generally
within 60 days of ﬁling.

In most cases, neither party uses
legal representation and the in-
volved worker and a management
representative give each version
of the grievance with minimal
involvement of upper manage-
ment. The arbitrator usually is a
young lawyer recruited from the
local area who receives less than
the highly favored and very busy
arbitrators.

In expedited arbitration, the
decision is brief (usually one or
two pages), and is quick (decided
by the next day).

This form of arbitration was
started in 1971 in the steel industry.
While it has spread, though, there
are some distinct disadvantages
and areas where caution is recom-
ended. Complex legal issues,
such as involvements of contract
language interpretation, may re-
quire lengthier, regular arbitration
by construction specialists.

Arbitration Avoids
Procedural Barriers

A number of factors are respon-
sible for the increasing use by con-
tractors of arbitration. Hollering
traces the popularity this way: “First,
it doesn’t have the built-in delays that
hamper the legal system.”

With arbitration there are few de-
lays and fewer procedural barriers.
This puts an effective hamper on the
lawyers’ usual tactic of dragging mat-
ters out. Continued on page 28
Also, there are a large number of arbitrators available . . . actually more than 50,000 across the country.

According to Tom McGlone this makes available some 5,000 arbitrators with construction know-how to represent contractors, suppliers, architects, and engineers.

It is little wonder that AAA can hold a hearing and issue a judgment in a fraction of the time that it takes a courtroom proceeding.

With such manpower strength to carry out a prompt program, AAA expects to increase its construction caseload, and it is working now through its construction committee to accommodate the demands.

Even so, the results that AAA can display are impressive. In 200 recent construction cases it surveyed, the time to move from the filing of the complaint to the issuance of a judgment was an average 107.4 days.

Of the 200 cases, AAA found that 103 were settled with only 76 days.