Construction Arbitrator Selection: a/k/a "I Have an Arbitration Provision in My Construction Contract—Now What Do I Do?"

A Practical Guidance® Practice Note by Edward Gentilcore, Blank Rome, LLP

Edward Gentilcore
Blank Rome LLP

This practice note discusses strategies for selecting an arbitrator for a construction dispute. Arbitrator selection for a construction dispute, whether for a panel or as a single arbitrator, is a critical decision with a seemingly infinitesimal number of considerations and possible approaches. Nevertheless, this process can and should be approached with a reasoned, well-considered plan. This practice note offers practical advice for developing this plan. It addresses the pros and cons of selecting different types of arbitrators and offers strategies for the final selection process.

For additional information on the use arbitration in construction disputes, see Arbitration of Construction Disputes under the Rules of American Arbitration Association and Arbitration of Construction Disputes under JAMS.

Setting the Scene

So you have either negotiated strenuously with your counterpart or adversary to include an arbitration provision in your construction contract or that of your client's, or you have picked up a form contract that as a matter of course and default selects arbitration as the universal method of dispute resolution and, perhaps, even goes so far as selecting the American Arbitration Association (AAA) as the entity who will administer and provide structure to your arbitration, if dispute resolution is needed on the contract. Alternatively, you may have focused on the arbitration clause to even a higher degree, selecting not only the structure of the arbitration panel, but also the discovery permitted, the discretion of the arbitrator(s), and even whether there will be some method of appeal of the decision (which could be construed by many arbitration purists to be the antithesis of the whole purpose of arbitration, a final and conclusive resolution to the dispute(s) at issue).

Regardless of the circumstances, when the time and need for arbitration arises, the question remains, who will be the arbitrator(s) charged with the fate of my dispute, my client, my company, and/or my project? As much as any of the facts and the law at issue in the matter, this decision is a critical one, but it has considerable variables, many of which will be addressed here, but due to almost an infinitesimal number of combinations and alternatives, cannot be exhaustively explored here or in any writing that is short of a treatise volume.

However, despite this unique and special opportunity that has been negotiated and/or agreed to, do the parties adequately and completely consider the selection with as fulsome the effort or attention that is given to the balance of the dispute and its presentation? What due diligence can or should be considered and pursued as a part of the arbitrator selection process and to what extent are those boundaries defined by the method of arbitration selected by the parties at the time of contracting, the period of time where the project is generally enjoying its honeymoon phase of bliss?

Additionally, and if that were not enough to consider already, the added dimension of your opponent's simultaneous participation in this selection process adds yet another variable to the arbitrator empanelment equation.

Think of it as a form of Texas Hold 'Em where you have a few cards, the other players have dark shades on, and you have no idea what might be lurking in the next cards the dealer holds and will be turning over while both you and your adversary sit there waiting for the impact of those next reveals that will guide and determine your destiny perhaps forever.

Welcome to the arbitrator selection process. A craft, a science, experience-driven, with a heavy dose of instincts and perception, a great deal of it based on your experience as an advocate and a counselor. And with that, and with many analogies to movie production—and an occasional movie quote tossed in here and there—let us begin.

The Cast List

As noted above, the variables of this arbitration selection process are myriad. So many decisions to be made, some of them very dependent on the actual arbitration pathway chosen. Still, when it comes down to it, there is still very much a human component to be considered. You are picking one or more people to literally sit in judgment on you, your client, your witnesses, and your case.

All of these people come to the arbitration panel with their own experiences, views, and perhaps unconscious biases (notwithstanding the outstanding professionalism that exists within the general ranks of the construction bar and among the construction arbitrator community). So, keeping in mind that while there is no intended disparagement of any, there are individual strengths to be considered with each of these options, and perhaps some things to be mindful of that fall more in the cautionary scale.

The Retired or Former Judge

This may appear, at first blush, the easiest choice of all. After all, who could be a better choice to preside over your dispute than someone who has decided hundreds if not even thousands of motions, disputes, challenges, and cases? In fact, there may even be published decisions out there that will give you an insight as to their viewpoints, perceptions, and perhaps even predilections. It is like being able to look at their past performances as a means to gauge how they will assess your presentation and desired outcome. Plus, there is that gravitas factor. Now, keep in mind there are no robes present in these proceedings, and more often than not, no gavel to be seen or heard. Still, the fact that this person has donned the robe in the past and wielded the hammer of judicial decorum allows this arbitrator to ascend to a level higher than the parties themselves, even with no wooden or marble bench towering over the remainder of the participants. In fact, even the advocates find themselves addressing this arbitrator as "your Honor" without even thinking of it twice. It is in our advocacy DNA after all. As an aside, and as a matter of practice, no matter your arbitrator, inquire of them how they prefer to be addressed. It is a sign of respect and one they deserve, retired or former judge or not.

There is also that judicial temperament factor that comes into play. Even without the robe or for that matter a striped referee's shirt, the judge is used to navigating and controlling the tensions that can and will spill over at times during the proceedings, especially late in the day, the week, or even the case. This is where that gavel sometime come in very handy, but a skilled jurist can deliver the same crack of order metaphorically.

The judge has assessed credibility, read, and interpreted difficult legal principles, sorted out and balanced the costs versus the needs of in-depth discovery and electronically stored information (ESI) complexities. The judge has also synthesized the morass of evidence and presentation skills into a reasoned determination that generally can withstand further scrutiny by those on the other end of the determination, albeit with vastly different reactions to the outcome of the award.

So, what possibly could go wrong with this selection? Pick the retired or former judge, research their decisions on the pertinent points of your case and move on to the next phase, right? Simple, done, over and out. Full stop.

Not so fast. Keep in mind that being in arbitration in the first place was likely a conscious decision. There were things about being in the court system that were not appealing or desired. Maybe it was the congested court calendar or the uncertainty of who you would draw as a judge for your case. Another consideration could have been the availability of more open-ended discovery, including ESI, the corresponding cost and time, and, of course, the availability of an appeal. It also might have been because you preferred having your case heard (and decided) by someone who has construction knowledge and experience. Do they have familiarity with differing site condition principles? Have they heard and assessed claims involving detailed and complicated delays, the concept of who owns the float in a schedule, or whether early completion was within the rights of a claimant who incorporated it into their liability and damages presentation?

These days, more and more jurisdictions have a dedicated construction law judge or a complex commerce panel of jurists who are vastly more conversant in the issues and precepts construction lawyers may take for granted as

being widely known and appreciated. However, it is still likely that many courts do not have that resource available, and the parties to a construction dispute might be left with the luck of the draw when it comes to finding out who will be sitting in the robe, on that bench, and with that actual gavel in hand.

And that brings us back to the question, why not the retired or former judge as the ultimate choice? The answer is not as simple as it initially seemed.

First, does the judge have real construction law experience? Not to confess or show biases on this point, but having someone who knows construction is an advantage. There is something different about the sphere in which we practice, the issues we address, the knowledge we are required to possess as a baseline, and an appreciation of the various players and technologies involved. Is this going to be important to your case? If so, is a judge with an intellectual property, antitrust, or other non-construction-based background really going to be the best option?

Second, does the judge's approach to case presentation suggest that you might find yourself in a more formal and rigid setting regarding points like statutes of limitation, rules of evidence, expert voir dire, and *Daubert* motions, to name just a few items? Does that suit you, your case, your evidence and your strategy? If so, then the jurist's shine might become just a bit more patinaed.

Finally, and in a panel scenario, where there are multiple arbitrators, will the judge ride herd and essentially diffuse or neutralize the impact of the other panel members? Remember that gravitas factor. This has consequences, layered with its impact. Having all panel members on an even plane might be to your advantage, especially if you made the effort to have three arbitrators deciding your case in the first place.

The Construction Manager / Contractor / Design Professional

Admittedly, each of these is probably deserving of its own dedicated heading for purposes of discussion, but for the sake of brevity, this potential pool of arbitrators is discussed collectively, as many of the categorizations are more universal in nature. Clearly, having someone familiar with the details of air entrainment of concrete might be of an advantage if your case turns on the reasons why an entire loading dock or floor system was showing signs of premature cracking, scaling or worse, right? Then again, maybe not, if the facts of the case are murky and someone with this detailed knowledge might not be the best decision maker for your client or company.

This is just one example of the benefit and downside of the construction industry professional being your arbitrator. But it is an important microcosm of a potentially larger point of consideration. Do you want an arbitrator or an expert? Is your viewpoint altered if this person will be on a single arbitrator panel or a panel of three? Again, like onions, and ogres, this selection process has many layers.

Consider initially the issues in the case to be decided. In light of your client's position and your preferred case outcome, will these considerations benefit from review by someone with particular technical expertise? Also, does the potential arbitrator's background suggest that this would not be their first time conducting a proceeding and weighing the evidence properly presented? In other words, are they experienced enough that you feel assure they will not let the process become a no-holds-barred and bare-knuckled metaphorical brawl? Most, if not all, professional arbitrators now have some requisite training before they sit as an arbitrator, but nothing begets experience like experience. Especially if you have a one-person panel, this analysis is crucial. You may not want all the formality of a court (or for that matter a jury) trial. Still, you want some dependable structure. You also want someone who will be listening to your case, your arguments, your witnesses and your experts, as well as those of the other side, as opposed to someone simply making the decision based on their own views of the technical information, and their own and exclusive interpretation. On a multi-person panel (with all three sitting as true neutrals—more on that below), having this person could be essential regardless of their actual ADR experience. The other panel members, and likely the chair of the panel—usually, but not always a lawyer—will drive the proceeding and control the prehearing, the hearing, and possibly even the deliberations. On this last point, that drive will not mean dictating the result, but rather the process on what is presented, what is heard, what it all means, and how it should translate to an outcome and the award.

The Lawyer as Arbitrator

So, that brings us to the last and likely the most common choice: selecting a lawyer as your arbitrator. While often to the point of being ubiquitous, the decision is again (and should be) a complex and thoughtful one. What is the lawyer's background? Do they have a construction, design, or engineering background in addition to and or prior to their time as a lawyer that might be of a benefit to the case, or a potential drawback as discussed in the section immediately above? Are they an in-house lawyer, which brings with that experience yet another layer of lawyer as business strategist perspective? Is the potential arbitrator

a litigator by trade or predominantly a contract lawyer? Again, and despite the excellent and detailed training given and undertaken by these arbitrators, having actually tried a case or cases before a judge, a jury, or arbitrators, gives that ADR professional a background on the structure of the process, the importance of evidentiary principles, and the overall flow of the hearing from beginning to end. Given that the lawyer-advocates will follow the more traditional case presentation pathway, prehearing brief or memorandum, openings, claimant's case-in-chief presentation, respondent's case-in-chief presentation, claimant's rebuttal, closing arguments, and posthearing briefs and summary submissions, having a lawyer as the sole arbitrator or the likely chair on a multiparty panel will oftentimes make the feel of the arbitration more akin to the process with which the advocates are most familiar.

Drilling down a bit further, evaluating that lawyer's background experience becomes essential. Have they typically represented owners, contractors, subcontractors, or design professionals? Will that produce a subconscious bias in favor of you or your opponent? Do you want that or would you prefer someone with a broad spectrum of clientele and case experiences? Do they have reported cases available where penchants on their arguments are showcased or where they have taken positions directly in line with the theme you are planning to pitch in your own case? With the internet, Westlaw, Lexis, and other similar sites at your ready disposal, you can spend as much or as little on this as you desire, all the while being confident that whatever the cost, it is a cost-effective means of getting into the mind of the person who will be sitting in judgment on your case and that of your client.

Likewise, how seasoned are they as a lawyer and as an ADR professional? This is a delicate analysis and judgment call. It is where your own instincts must be most acutely deployed. One size does not fit all. Too much of their own experience might give way to preperceptions that you do not want or need. Too little background and you might find yourself pushing the evidentiary boulder up the hill or drilling to the needed depth of case understanding to split open the dispute in ways that are as challenging as they might be in a courtroom where the judge or jury does not have the fingertip appreciation of your construction project or how the disputes came to pass, much less how what you showcase will establish that your position is the correct one.

Finally, on this particular selection, and related to the point of experience, consider the locale of the attorney in relation to your case and the dispute. Let us face the facts, there are, at times, six or less degrees of separation among us all in a general sense in our lives, and those degrees of separation drop significantly within the construction industry and construction community. The more we practice in this field, the more people we get to know, and the more companies we encounter. Again, we are not talking about improperly wielded prejudice, but rather those little nuances of perception that influence what we hear, what we see, and how we process that all to a conclusion. It cannot be said enough that this decision process is a complex one and is deserving of as much deliberation as any other part of the case, and perhaps even more.

Final Casting Selections

So, you have done all your research, your due diligence (beyond sending out the night-before-the-pick email to your colleagues asking whether anyone has heard of or worked with these potential cast members before), considered the best selection for your particular matter, and created your short list. All set, right?

Again, not so fast. Consider that likelihood that your opponent has made all the right moves as well, and has assembled their own list that meets their requirements and the needs of their case presentation. As such, you find yourself wondering how to reach an agreement on the arbitrator(s) for the case, possibly in an environment where you, your opponent, and the parties themselves may not be able to agree on anything (and emotions may be running high to boot).

Still, there is an advantage to putting all those issues aside and working to agreement on who will be the person or people in the director's chair when the production gets underway. Both parties have an equal advantage and disadvantage here. Get along on this decision and you will both at least have confidence that you have done your best for your respective client. Continue to disagree and the process may break down and become even more costly (not to mention uncertain).

Without attribution to any particular set of rules governing arbitration proceedings or to any particular administrative body or organization running the arbitration, there is always room for the parties to agree on the arbitrator or the panel. Likewise, a commonly accepted permutation is for each party to select one arbitrator and then those arbitrators will collaborate to agree on the third (preferably from the well-vetted listing you have already sweated over for some time in pre-production). A very important caveat here to consider is whether each of the party-selected arbitrators will be neutral or not. If the party-appointed arbitrators are not neutrals, then you have to make sure that you have made your selection with that in mind, especially

when in a clearly identified non-neutral role that party-appointed arbitrator could even be a partner in the same firm as your opposing counsel. If that is the case, you have to approach the core of the selection process in a fashion that really focuses on not only the knowledge and gravitas of your party-appointed, non-neutral arbitrator, as almost an extension of your own advocacy, but also who will be in that truly neutral, chair arbitrator role on the panel.

Returning to the scene setting where any and all of the arbitrators are neutral, and you are trying to come to agreement with opposing counsel, think about each of you picking one as a matter of your own discretion and then working diligently to reach consensus about the final panel member. It may very well become a pathway to cutting through some of the tension to get to yes on the final casting.

Another process that can be followed is a strike/rank/pick approach that is administered by the arbitration organization you have selected. Once the basic and desired qualifications are communicated, a list of potential panel members is then generated. The parties then independently strike any arbitrators that they each consider objectionable (the reason does not need to be stated) and rank from one on who they most prefer from the remaining potential arbitrators. By some rules, the number of strikes is limited, thereby helping to assure that at least a few arbitrators remain and are ranked for consideration and appointment by the administering organization.

Still, there is a possibility that in a listing of potential panel members, between the strikes of the respective parties, not one arbitrator is left for consideration. What would then follow is the issuance of a secondary list, with the same striking and ranking instructions. This should not be viewed as an infinite loop. At some point, the parties may lose all control of the process, with the administrating organization making the picks on its own. This scenario should be avoided if at all possible, as it really is not in keeping with "arbitrator selection." That being said, it does happen and it can more often if more and more counsel pushes it to the limit and are more aggressive in striking than reasonably contemplated by the arbitration rules and procedures to be followed (and hopefully *being* followed).

So that gets us past the striking part of the strike/rank/pick scenario. What about the rank? This is where a lot of card playing poker strategy can come into play. You may want to rate your absolute number one choice just that, number one. On the other hand, your opponent may have ranked that same arbitrator dead last, such that in the administrative black box, your selection may not ultimately stand a chance for final panel selection.

Keeping in mind that the aforementioned black box never quite gets cracked open fully, think about one likely scenario where, after the lists of each party are considered, the arbitrators with the highest collective ranking are chosen. Under this approach, if you have balanced your picks with, say, your favorite at a 3, and your opponent has done something similar, you may end up with at least that arbitrator on your panel. That scenario does assume your opponent is doing something similar with their listing, but that is where a bit of poker playing comes in, with the difference that these picks are not transmitted in person, where each side is able to read the body language of the other.

This brings us back full circle to the power of the agreement on the panel, or at least agreement on a part of the panel. Fortunately, the construction bar as a whole tends to be highly collegial in nature as many of the practitioners in this area already know each other, and may also likely know most if not all of the potential cast members under consideration. Keep in mind as well that the selection process need not await the emergence of a particular dispute. On some projects, particularly more complex ones, a panel is identified at the outset. This might be advantageous as the parties are generally in a consensus-reaching mode as the relationship is just beginning and optimism rules these early days. This approach is not only just mega-projects. It could also be readily justified if the project delivery window is tight and having an arbitrator or a panel of arbitrators waiting in the wings might help get a dispute presented and resolved quickly and with a minimum of disruption to the project as a whole.

It's Show Time Folks!

Regardless of the approach and the method and timing of selection, there is really no excuse in this internet-age to not more fully vet any potential arbitrator you may want to hear your case. As mentioned above, while soliciting the input of your colleagues (and your client, of course) as to whether any of them know (and how well they know) as well as if they have ever presented a matter before or with a particular person as an arbitrator. As an advocate, you have the ability under a variety of budgetary approaches to research and assess whether a particular panelist will be the right choice for your case. Then, with all of that information at your disposal, you will be in much better position to get the arbitrator or panel you want, whether by agreement, partial agreement or through the strike/rank/pick process. After all, the choice is yours—at least in part!

Edward Gentilcore, Of Counsel, Blank Rome LLP

Edward Gentilcore is of counsel at Blank Rome LLP. Ed has expertise in construction litigation, construction contracts, alternative project delivery, green and sustainable building, and mechanics' lien matters. He has counseled companies and clients on a wide variety of projects, including steel mills, power plants, sports facilities, airports, educational buildings, mixed-use developments, water and wastewater infrastructure, transportation, and renewable energy.

Ed also has extensive experience in case management of complex litigation, arbitration, mediation, and appellate proceedings, matters involving corporate oversight, litigation management, contracting, employment and labor, insurance, ethics and compliance, cybersecurity, and property matters.