

**Selecting Arbitrators in Construction & Surety Cases**

---

**Practical Considerations in the Selection of Arbitrators in Construction and Surety Cases**

---



*"Industry Insight" articles like this one below are submitted to NASBP by those knowledgeable of important industry topics who are providing their insight for the benefit of NASBP members, affiliates, and associates.*

**Practical Considerations in the Selection of Arbitrators in Construction and Surety Cases**

Many construction contracts call for arbitration as the method of dispute resolution. Sureties subject to claims on performance bonds are typically bound by the resolution of the claims against their principals (typically contractors or subcontractors) for performance defaults. In some case, the dispute resolution process in the contract is specifically incorporated into the bond. Furthermore, once a surety is forced to pay a claim on a bond it is subrogated to the claims of the principal against those who may have caused or contributed to the loss, including, subcontractors or vendors to the principal. Since many of those sub-tier contracts also call for arbitration of disputes, the surety is for all intents and purposes an interested party in the entire arbitration process and outcome.

One of the primary advantages of arbitration is the ability of the participants to choose a decision maker (arbitrator) with expertise in the nature of the dispute. Careful consideration and due diligence in the selection process is therefore critical to the quality and outcome of the proceeding.

**I. The Contract Should Set Forth the Appointment Process and Options**

The principal's contract will typically govern the neutral selection process and procedure. If possible, the surety should work with the principal in developing and negotiating the arbitration clause in the contract. Factors to consider in drafting the clause are the number, qualifications and experience of arbitrators, the organization (if any) to administer the process, the rules to be followed for discovery and the hearing, the hearing locale, and the form of the award. A single arbitrator is frequently chosen for anticipated small and mid-size cases, while for larger, more complex matters, parties may prefer a panel of three arbitrators to mitigate the prospects of an aberrant decision. Lawyers, CPAs, former judges, and construction industry professionals with substantial experience in a given field or industry, or the combination of three individuals with diverse backgrounds, may alter how a

## **National Association of Surety Bond Producers Pipeline e-newsletter January / February 2012 article**

hearing is conducted and affect how a dispute is administered and analyzed. However, three arbitrators may lead to a loss of efficiency and economy of the process, and depending on the nature of the case it is often difficult for parties, their counsel and the arbitrators to agree on mutually convenient dates for the hearings.

The American Arbitration Association (AAA) is often identified in construction contracts as the organization to administer the arbitration process. The rules for commercial and construction cases are available at <http://www.adr.org/> When parties cannot agree on the selection of the arbitrator, they may opt for the strike and rank method outlined in the rules. This method begins with the parties providing the case manager with the qualifications they are seeking in an arbitrator. The case manager then develops a list that meets the parties' expectations. If the parties cannot agree on an arbitrator from the list, they must choose who they want to eliminate, and rank those remaining in order of preference. The AAA then tallies the results and appoints the arbitrator ranked highest by the parties.

Another selection process that can be set by the contract is the party-appointed method. This system allows each party to pick its own arbitrator, and those two select a third individual, who generally serves as the chairperson. Historically, it was thought that the benefit of this selection process was having someone on the panel to act as each party's own advocate during the arbitration and deliberation process.

This method is often disfavored for a number of reasons. Party-appointed arbitrators must meet the standards for impartiality and independence, unless the parties specifically agree that they are to be non-neutral. Absent such an agreement, the party-appointed arbitrators may simply cancel each other out, leaving the ultimate decision with the chair, while adding a needless layer of expenses. In our view, it is more effective to use a process to select three neutral, qualified arbitrators rather than using a party-appointed process.

### **II. Factors to Consider in Selecting and Vetting Arbitrator Candidates**

It is said that the ideal arbitrator has the requisite legal and technical expertise and experience for the case at hand, is independent, unbiased, has the time and disposition to consider all of the questions of law and fact thoroughly, is efficient, and is trusted by the parties. This description of the 'ideal arbitrator' suggests in itself a list of criteria for selecting the arbitrator.

In many instances where the AAA administers a case involving claims between an owner and a contractor/principal, the surety will typically be bound by the findings in the arbitration due to the legal principle of issue preclusion. The surety therefore should participate with its principal in the selection of the arbitrator from the list of potential arbitrators provided by the AAA. The candidates should be vetted by counsel and respected peers. Many sureties also have a stable of construction managers, bond counsel and industry experts that are routinely retained on troubled projects before litigation or arbitration. These industry professionals can recommend qualified arbitrators, or can, at a minimum, provide valuable insights into the candidates provided by the AAA.

#### ***Arbitrator's Experience in Investigating and Litigating Relevant Cases***

## **National Association of Surety Bond Producers Pipeline e-newsletter January / February 2012 article**

Sureties are typically aligned with their principals, who are contractors and/or subcontractors, and not the obligees, which are the project owners or public entities that by law require payment and performance bonds on public projects. Therefore, sureties have a strong interest in selecting an arbitrator with experience in working with or representing entities that are constructors rather than public entities or owners.

Experience in the industry is a key trait when choosing an arbitrator. From the surety's perspective, business and contract disputes are best handled by industry professionals or lawyers who have represented construction companies, sureties and insurance companies. Those parties typically have a practical appreciation and knowledge of standard industry practices, construction law, the construction process, and they may also have engineering backgrounds.

The AAA will provide to the parties basic biographical information of potential arbitrators, including the background, professional and other experiences of the candidate, and the candidate's age, education, and arbitration experience. The AAA's National Roster of Arbitrators and Panel of Construction Arbitrators are both good guides in setting standards for an arbitrator as those panels consist of accomplished and respected experts from the legal and business communities.

Sureties on larger projects should insist on selecting arbitrators with a minimum of 10 years of senior-level business or professional experience or legal practice and an educational degree(s) and/or professional license(s) appropriate to the field of expertise. Other factors to consider are the honors and citations awarded to or earned by the candidate, the level of training or experience in arbitration and/or other forms of dispute resolution, membership in a professional association(s), and other relevant experience or accomplishments (e.g. published articles).

Of course, the prospect's information should be checked and explored further by visiting his or her website, and conducting Internet searches. Most professional firms have extensive biographical sketches of the candidate listing his or her education, the industries of clients, major cases handled, publications and speeches, etc. These should be explored to determine if they show a tendency to advocate one particular type of client, case, industry, or profession, or if there is any particular view or legal theory expressed or advanced by the candidate that might be relevant to the case.

### ***Use of the Enhanced Neutral Selection Process Through the AAA***

Once that basic research is done, sureties should consider using the AAA's Enhanced Neutral Selection Process (ENSP). The ENSP provides parties under the Procedures for Large, Complex Cases (claims in excess of \$500,000) with information on the special screening and selection methods and options available to the parties.

Specifically, the AAA's ENSP offers parties the option of developing an interview protocol in order for the parties to present questions to potential arbitrator candidates, either through a telephone conference or in writing, to explore the arbitrator's procedural handling practices and any other questions that the parties would find helpful. The AAA will also obtain additional information about an arbitrator's experience in the field of the dispute as requested by the parties. This may also include a request for references. However, this process must be by agreement of the parties, and

## **National Association of Surety Bond Producers Pipeline e-newsletter January / February 2012 article**

absent such an agreement, the AAA will administer the case in accordance with the standard arbitrator selection process outlined in the rules.

### ***Require Full Disclosures From the Candidates, Including Possible "Issue Conflicts"***

An arbitrator is bound to serve justice fairly and equally. The AAA has a standardized Arbitrator Development Program that is designed to ensure that every individual admitted to the AAA's Roster of Neutrals receives fundamental, advanced and continuing education and training in AAA rules, case management procedures, the arbitrator's role and authority, and legal and statutory developments affecting arbitration.

To fully vet potential conflicts or biases, the names of the parties, their counsel, and the major project participants, witnesses and potential experts should be supplied so that the candidate can disclose any potential conflicts of interest in representing or being adverse to the named entities. The surety can also use this process to explore if the candidate has any "issue conflicts" such that, for example, the candidate routinely only represents carriers of design professionals, is a member of or sits on boards of public entities, has articles or even case decisions published in which significant legal issues were advanced that are adverse to the principal's claims or defenses. Although these may not be true conflicts of interests, they create concerns that need to be further explored.

### ***Match Your Arbitrator to Your Case and the Principal's Duties***

The arbitrator is both the judge and jury so it is critical to assess the facts and law in your case. Is the case weak on the law but with compelling facts? Are the facts and law complicated, including whether the principal is just a constructor or does it also have design responsibilities under a design/build contract such that a higher level of industry, design or legal expertise is required? Attempt to match the arbitrator's expertise and skills to the needs of your case. Also, verify that the arbitrator has the time and willingness to participate fully in the process.

### ***Consider the Candidate's Association Memberships, Publications and Reputation***

A simple web search of the candidate's name or firm name may reveal interesting information. Also, the candidate may have a high enough news profile to have been mentioned in the professional or general press. A search of a computer-accessible database of news reports or the Internet is simple and is always justified.

Information of a different character may be revealed by a search for writings by the candidate. The fact that the candidate has written books or articles is of some importance as a matter of objective biographical fact, and it is also a likely source of information as to his or her views on matters. A review of these writings may reveal the candidate's understanding of the adjudicative and arbitral processes, his or her level of expertise, and his or her approach to, and views upon, the proper role of the arbitrator and how arbitration proceedings should be conducted.

It is also imperative that the arbitrator is reputable and has a recognized level of earned respect. For example, if there is a member of the judiciary who retires and becomes an arbitrator, and he or

## **National Association of Surety Bond Producers Pipeline e-newsletter January / February 2012 article**

she was not widely respected while on the bench, it is unlikely that you will be satisfied with the individual sitting as an arbitrator.

The ABA's Forum on the Construction Industry publishes professional directories of qualified professionals, and contains more biographical detail than does the standard AAA biography. Membership in the Forum also shows a level of interest and experience in the field.

The surety should also consult Martindale-Hubbell to ascertain the candidate's Martindale-Hubbell® PEER REVIEW RATING. This is an objective indicator of a lawyer's high ethical standards and professional ability, generated from evaluations of lawyers by other members of the bar and the judiciary in the United States and Canada. Legal ability ratings are based on performance in five key areas, rated on a scale of 1 to 5 (with 1 being the lowest and 5 being the highest), including legal knowledge, analytical capabilities, judgment, communication ability, and legal experience.

The numeric ratings range may coincide with the appropriate Certification Mark, and the highest rating is AV Preeminent (4.5-5.0), which signifies a significant rating accomplishment and a testament to the fact that a lawyer's peers rank him or her at the highest level of professional excellence.

### ***Contacting Attorneys in the Field***

A high premium should be placed upon anecdotal information from third parties based on real world experiences with the candidate in an arbitrator's role. It is appropriate to place calls to acquaintances in local firms likely to have had some contact with the candidate. Referrals are a vital part of networking. One should also investigate whether there are any records of personal conflicts, such as when two arbitrators have served together previously, and should consider whether known, conflicting opinions as to subjects outside the arbitration itself, for example, political views, might make it difficult for certain individuals to work together productively.

Another important criterion is how the arbitrator typically processes cases. Some arbitrators are liberal in applying rules, preferring to give both parties every opportunity to make their case. Other arbitrators are stricter about procedures and discovery, preferring to keep processing costs low and orchestrate a final resolution in an abbreviated amount of time.

Finally, costs and availability are a factor. Higher profile arbitrators with full schedules may be more costly than some of their equally qualified counterparts.

The best arbitrator is the one that will give your case a fair, honest, thoughtful and experienced review and analysis, free of undue bias and preconceptions. In practice, there is no perfect arbitrator. However, a carefully drafted arbitration clause and a thorough screening process can get you as close to that ideal arbitrator as possible.

*This article is provided to NASBP members, affiliates, and associates solely for educational and informational purposes. It is not to be considered the rendering of legal advice in specific cases or to*

## National Association of Surety Bond Producers Pipeline e-newsletter January / February 2012 article

*create a lawyer-client relationship. Readers are responsible for obtaining legal advice from their own counsels, and should not act upon any information contained in this article without such advice.*

The co-authors of this article are below.



*Michael R. Libor is senior counsel in Morgan Lewis Bockius' Litigation Practice with a focus on complex construction law, product liability, and insurance recovery. Libor has published and spoken extensively on construction-related legal topics for industry, professional, and legal societies. With respect to his construction practice, Libor has represented construction entities in construction projects and claims throughout the world. In addition, Libor has represented parties in multimillion-dollar claims in federal and state trials (bench and jury), arbitrations, and mediations throughout the nation. These have included claims of design or construction defects in various fields, late or delayed performance, catastrophic failures, mechanics' liens, construction and bid bonds, and product failures. Libor can be reached in the Philadelphia office of the firm at [mlibor@morganlewis.com](mailto:mlibor@morganlewis.com) or (215) 963-4936.*



*David Evans is a shareholder in the law firm of Murphy & King, P.C. in Boston, MA, where he represents large public corporations, closely held companies, and individuals in the resolution of complex business problems and intellectual property disputes. Evans also maintains an active practice as a certified neutral arbitrator and mediator, presiding over more than 300 cases. He serves on a number of mediation and arbitration panels, including the Commercial and Large, Complex Case Panels of the American Arbitration Association, and the Panel of Distinguished Neutrals of the International Institute for Conflict Prevention and Resolution (CPR). Evans was selected as a MA or New England Super Lawyer in every year since inception of the award (2006-2011) and maintains an "AV" rating (the highest ethical and competency rating available) from Martindale-Hubbell. Evans can be reached at [dle@murphyking.com](mailto:dle@murphyking.com) or (617) 226-3445.*