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Defending a Construction Arbitration

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A Practice Note outlining key procedural and strategic considerations for a party defending a construction arbitration. This Note addresses the crucial initial steps a respondent should take on receiving a demand for arbitration, including reviewing the arbitration agreement for potential jurisdictional challenges and assessing the procedural framework established by the relevant institutional rules, such as those of the American Arbitration Association (AAA), JAMS, the International Chamber of Commerce (ICC), or the International Centre for Dispute Resolution (ICDR). It explores important tactical decisions, such as whether to file a detailed answering statement, assert counterclaims, or seek joinder of third parties or consolidation with other proceedings. This Note also provides guidance on developing defenses, managing pre-hearing procedures like disclosure and dispositive motions, and evaluating the use of expedited arbitration. It examines various hearing strategies designed to streamline proceedings and effectively present a defense, including the use of a chess clock, witness conferencing (hot tubbing), and different approaches to expert testimony.

Each construction arbitration raises its own unique legal and factual issues. A party's approach in mounting a defense in these proceedings depends on a wide array of factors, including the nature and timing of the construction project, the specific claims asserted, and the number of parties involved in the case. Even with these variables, however, there are several procedural and strategic considerations generally applicable to the defense of most construction arbitrations. This Note outlines the basic considerations for parties defending a construction arbitration from start to finish.

Initial Procedural Considerations for Defending a Construction Arbitration

Each construction arbitration raises its own unique legal and factual issues, and a party's best approach to mounting a defense depends on a wide array of factors. Most parties faced with claims in a construction arbitration should anticipate several basic procedural and strategic considerations.

Reviewing the Arbitration Agreement

When the respondent receives notice of a pending arbitration, one of the respondent's first tasks is to review the applicable dispute resolution provisions of the parties' contract to determine whether there is a potential jurisdictional challenge the respondent may raise to stop the arbitration from proceeding. These jurisdictional challenges may include, for example, that:

- No arbitration agreement exists between the parties.
- The arbitration agreement is unenforceable.
- The dispute does not fall within the scope of the arbitration agreement.
- There are unsatisfied conditions precedent to arbitration.

If there is no arbitration agreement or it is defective, the respondent may be able to challenge the arbitrators' jurisdiction to hear the dispute by filing:

- A motion to stay the arbitration in a court of the supervising jurisdiction.
- A jurisdictional objection before the arbitrators.

The precise approach for challenging the arbitrators' jurisdiction depends on the terms of the arbitration agreement. For example, some arbitration agreements contain delegation provisions that would prevent the court from ruling on the arbitrators' jurisdiction (see Practice Note, Arbitrability Issues in US Arbitration: Determination by a Court or Arbitrator). The respondent should identify any jurisdictional issue at the outset and act on it promptly to avoid the risk of waiving the right to challenge the arbitrators' jurisdiction.

The respondent should also identify and consider any logistical points on which the parties agreed in the arbitration agreement, such as:

- The locale or place of arbitration, the laws of which may govern any court proceedings concerning the arbitration.
- The arbitration institution and rules, for example:
  - the Construction Industry Arbitration Rules and Mediation Procedures of the American Arbitration Association (AAA Construction Rules);
  - the JAMS Construction Arbitration Rules and Procedures (JAMS Construction Rules);
  - the International Chamber of Commerce Arbitration Rules (ICC Articles); and
  - the International Centre for Dispute Resolution Dispute Resolution Procedures (ICDR Rules).
- The language for the arbitration proceedings, especially when the arbitration is international.
- Other procedural issues, such as any agreement on:
  - limiting disclosure (discovery);
  - an arbitrator selection method;
  - arbitrator qualifications; and
  - time limits for asserting claims.

Answering and Asserting Counterclaims

Once the respondent receives the claimant's demand for arbitration, the respondent may respond with an answering statement, counterclaims, and any jurisdictional objections (such as challenging the existence of any arbitration agreement or applicable rules). The arbitration rules or arbitration agreement typically fix the precise timeline for a respondent to submit its answer (for example, AAA Construction Rule R-4(c)(i), (ii) (allowing a respondent to file an answering statement or a counterclaim within 14 calendar days after the AAA sends notice of the demand)).

Under most arbitration rules, the respondent is not required to submit an answering statement. If the respondent chooses not to answer, the claimant's claims are deemed denied (for example, AAA Construction Rule R-4(c)(i); JAMS Construction Rule 9(e)). The respondent should submit any counterclaim or jurisdictional objection with its answering statement. If the respondent files a counterclaim, that filing may also trigger an additional filing fee that the respondent must pay.

The precise format of an answering statement differs from the practice in state and federal courts and varies widely depending on the rules and practitioners. Unless the respondent needs to raise a counterclaim or jurisdictional objection, many practitioners elect not to submit an answering statement because:

- The answer may have little effect on the outcome of the dispute.
- Preparing an answer may cause the respondent to take positions in writing before fully understanding the issues in the case.

In some cases, the respondent may decide to submit a detailed answer setting out their own separate version of events, because:

- The arbitration demand and answer are often the two principal documents the arbitrators review when first appointed.
- The answer is the respondent's first opportunity to present its competing narrative to the arbitrators.
- The respondent's failure to submit an answer may risk the arbitrators forming impressions of the case based solely on the claimant's demand, without the respondent's feedback.

Joinder and Consolidation

The respondent should consider whether it can or should join a third party to the arbitration proceedings through any joinder or consolidation provisions of the applicable arbitration rules. Joinder and consolidation can be particularly important tools for respondents in construction arbitrations where numerous third

parties (for example, subcontractors, developers, and financing entities) often play a significant role in the underlying dispute.

Best practice is for a party to request joinder or consolidation before the appointment of the panel. When a respondent asks permission to join a third party to the case after the panel has been appointed, the rules often require the respondent to demonstrate good cause.

The respondent should also consider that a party's efforts to join a third party or consolidate proceedings can be contentious, adding cost and delay to the proceedings. For example, when a party seeks joinder or consolidation under the AAA Construction Arbitration Rules, the AAA appoints a single, special purpose arbitrator (often referred to as a Rule 7 Arbitrator) to decide this request only. When considering whether to make an application for joinder or consolidation in an AAA construction arbitration, the respondent must consider whether the delay and cost of Rule 7 Arbitrator proceedings are worth the potential advantage of joining the new party or consolidating cases.

Joinder

Joinder occurs when the respondent seeks to add a third party to an existing arbitration. Respondents often seek to join a third party that is ultimately responsible for the claimant's damages. For example, a respondent-contractor may seek to join a third-party subcontractor who performed allegedly defective work. Although the applicable standards may vary slightly, the rules of most arbitral institutions permit respondents to add third parties who are not named as a party in the original arbitration demand (for example, JAMS Construction Rule 6(f); AAA Construction Rule R-7(b); ICDR Article 8; ICC Article 7).

The respondent should carefully consider the consequences of joining any third parties. Factors the respondent should consider include:

- Whether the arbitration agreements or applicable arbitration rules permit joinder of additional parties.
- The contractual relationship between the third party and the respondent, such as whether the third party owes a contractual indemnity to the respondent.
- Whether joining the third party may increase the cost and complexity of the arbitration.
- The potential for the arbitration panel to view the third party as substantially on either the claimant's side or on the respondent's side.
- Whether to pursue a separate action against the third party rather than joining the third party into the arbitration (and whether the respondent risks inconsistent outcomes if it does).
- Whether the third party may assert counterclaims against the respondent in the arbitration, potentially forcing the respondent to defend against two separate claims in the same case.
- Whether the third party may provide testimony and evidence that supports (or undercuts) the respondent's position against the claimant.

Consolidation

Consolidation involves the process of combining two or more separate arbitration proceedings into a single arbitration. Consolidation may become appropriate if two or more parallel proceedings exist that implicate the same or similar issues in dispute. Parties often seek consolidation when different parties on the same construction project have disputes regarding related issues on a project.

The rules of most arbitral institutions permit consolidation (for example, JAMS Construction Rule 6(e); AAA Construction Rule R-7(a); ICDR Article 8; ICC Article 10).

Proceeding with Expedited Arbitration

The respondent should consider whether to proceed with the case under any expedited arbitration rules the arbitral institution may have and how expediting the case may affect the respondent's overarching objectives. The rules of most arbitral institutions provide expedited arbitration procedures that apply by default when the amount in controversy is less than a certain value. For example, the threshold amount in controversy for application of the expedited arbitration rules under:

- The JAMS Expedited Construction Rules is $5 million.
- The AAA Commercial Arbitration Rules is $100,000.
- The AAA Construction Rules (two party cases only) is $150,000.
- The ICDR Rules is $500,000.
- The ICC Expedited Procedure Provisions is $3 million.

Arbitral institutions typically inform the parties when the institutional expedited procedures apply, and parties may opt-in or opt-out depending on the applicable rules and the terms of the parties' arbitration agreement.

The specific rules regarding expedited procedures vary by institution but share many common features, such as:

- Shorter time limits for the stages of the arbitration process, including:
  - constituting the tribunal;
  - holding a case management conference; and
  - issuing a final award.
- Appointing a sole arbitrator.
- Restricting the number of submissions by each party.
- Restricting the length of the hearing and, in some cases, mandating document-only arbitration.
- Restricting the amount of discovery and number of documents the parties exchange.

Before opting in or agreeing to an expedited procedure, the respondent should consider the likely consequences, such as:

- Achieving a swift resolution of the dispute. This feature of expedited proceedings may be particularly valuable during an ongoing construction project, where protracted disputes can cause relational problems between project participants and increase project delays.
- The expedited procedure will likely reduce discovery.
- The expedited time limits will put pressure on everyone involved in the case, including expert and fact witnesses, the party principals, and counsel.

For more on expedited procedures, see Practice Notes, Arbitration Under the AAA Expedited Procedures and Expedited procedures in international arbitration.

Developing Defenses and Counterclaims in a Construction Arbitration

After receiving an arbitration demand, the respondent must prepare to defend the case. Each case is different but every respondent should take certain steps when developing a defensive road map for the case.

Identifying the Claims and Issues

When it receives a claimant's demand, the respondent must identify the specific claims and issues that the claimant has asked to be resolved through arbitration. This step is both elementary and fundamental: early identification of the claims and dispositive issues in the case helps the respondent focus its attention on gathering the most critical pieces of evidence required to mount a defense. Claims commonly asserted in a construction arbitration include:

- Time-related claims, which include:
  - liquidated damages;
  - delay damages claims; and
  - acceleration claims.
- Defect claims.
- Change order claims.
- Loss of efficiency or disruption claims.
- Wrongful contract termination claims.
- Nonpayment and prompt payment violations.

For more on the typical claims asserted in a construction arbitration, see Practice Note, Construction Arbitration in the US: Common Construction Arbitration Disputes.

Collecting Documents

Counsel should communicate with the client regarding available project documents as soon as possible. Complex construction projects can involve millions of documents. However, the scope of document exchange in arbitration is typically limited compared to traditional litigation. Therefore, the respondent should be prepared to rely as much as possible on its own documents, rather than discovery from the claimant.

The practitioner should work closely with the client's project team to identify which documents support the respondent's defenses and any counterclaims, the location of those documents, and how to obtain them. The categories of documents counsel should collect for review include:

- Formal written correspondence between the respondent, the claimant, and any other relevant parties. Communications between the parties may

summarize the key issues regarding the dispute and serve as important evidence regarding any claims.

- Emails, which construction project participants often use for both internal and external communication.
- The project file, which is typically stored in an electronic location where project participants save and share project documents.
- Internal team documents.
- Training materials and toolbox talks (if not included in the project file).
- Photographs or other visual depictions.
- Unapproved submittals.
- Competing bids submitted.
- Material spec sheets from manufacturers.

For more on document collection in a construction arbitration, see Practice Note, Discovery (Disclosure) in US Construction Arbitration: Managing the Production of Email and Other ESI.

Identifying Fact Witnesses

Counsel should work with the client to identify individuals with knowledge of the facts relevant to the dispute. Counsel should seek to schedule and conduct interviews with those people to gather as much information as possible concerning the underlying facts of the case. Counsel should also determine which individuals appear well-suited to serve as fact witnesses during an arbitration hearing.

Identifying Expert Witnesses

The respondent must review the claimant's claims and identify the experts the respondent must retain to successfully defend against those claims and to pursue any counterclaims. The specific expert best suited for the respondent's case will vary depending on the specific facts and circumstances, but will typically fall into one of three types of experts in construction cases:

- **Technical experts.** Technical experts are often architects, engineers, or construction professionals. These experts provide opinions on technical components of the construction project and may be particularly valuable on claims involving defects.
- **Delay experts.** Delay experts conduct a forensic examination of the project record to determine how different events impacted the project schedule and final completion dates. If the claimant raises any claims involving delay (such as that the project was delayed or that the claimant was entitled to additional time), the respondent should identify a delay expert to testify.
- **Damages experts.** Damages experts (also known as quantum experts) practice in the field of project accounting or cost management. Parties typically rely on them to quantify the value of the parties' claims and counterclaims. Due to the complicated nature of construction project accounting, an expert is often required to analyze the alleged costs. The respondent should therefore be prepared to retain a cost expert to support its counterclaims and challenge the amount of the claimant's alleged damages.

Prehearing Considerations for Defending a Construction Arbitration

The respondent should develop a framework for the pre-hearing proceedings to ensure the most efficient development of the facts and presentation of the claims and defenses. Pre-hearing arbitration procedures vary widely depending on the number of parties, number of claims, number of arbitrators, complexity of the case, and applicable rules.

Developing a Procedural Schedule

The arbitrators and parties often identify a hearing date and then develop a schedule of procedural deadlines leading up to the hearing. This approach allows the parties to plan for and gather the evidence necessary to present their case by the scheduled hearings. When developing a procedural schedule, a respondent should consider:

- The respondent's preferred approach to written submissions in the case.
- The amount of anticipated discovery (also called disclosure) or document exchange that the respondent needs to prepare and prove its defense or any counterclaims.
- Whether the respondent's defense or any counterclaims require depositions, and if so, the number and any time limitations.

- Whether the respondent's case is best presented through written or oral witness testimony.
- Whether it benefits the respondent to bifurcate the case into separate phases (such as liability and damages).
- Whether the schedule should expressly include opportunities for the parties to engage in settlement or mediation efforts.
- Whether the respondent believes the scheduled hearing dates allow enough time to prepare the respondent's defenses and any counterclaims.

Written Submissions

The approach to written submissions in arbitration proceedings can vary greatly depending on the preferred practices of the arbitrators, counsel, and the parties. The nature and substance of written submissions can profoundly impact the way the parties present the evidence in a case.

The typical approach in international arbitration proceedings relies on a robust series of pre-hearing submissions known as statements of claim and statements of defense, which counsel also refer to as memorials and countermemorials. Practices vary between arbitrators, counsel, and parties, but a statement of claim or memorial typically serves as a party's prima facie case for its affirmative claims. It usually includes supporting exhibits, witness testimony, and expert reports. The claimant submits a statement of claim for its claims, and if the respondent chooses to assert any affirmative counterclaims, the respondent files a statement of claim for those counterclaims.

After receiving the claimant's statement of claim, the respondent submits a statement of defense, which serves as the respondent's prima facie case for its defenses. The statement of defense usually includes the same categories of supporting documents as the statement of claim, including supporting exhibits, witness testimony, and expert reports.

In traditional US domestic construction arbitrations, robust memorial-styled written submissions are uncommon. Instead, parties typically rely on the arbitration hearing, coupled with pre-hearing and post-hearing submissions, as the principal means of conveying information to the arbitrators.

Respondents are free to advocate for either style or a hybrid approach, depending on the needs of the client and the case.

Discovery/Disclosure

The respondent's discovery efforts generally involves seeking documents and information that may:

- Undermine the claimant's claims.
- Support any counterclaim the respondent asserts.

Generally, arbitration panels defer to the parties if the parties agree on the scope of discovery. However, if the parties cannot reach an agreement and the arbitrators must decide the extent of prehearing discovery, the arbitrators typically permit a narrower scope of fact disclosure than federal and state courts allow.

The forms of discovery available to the parties may include:

- Depositions, subject to limits.
- Requests for production (RFP) of documents.
- Third-party discovery, often through the use of subpoenas, if permitted by the applicable rules or the panel.

For more on discovery in domestic US construction arbitration, see Practice Note, Discovery (Disclosure) in US Construction Arbitration and Conducting Discovery (Disclosure) in US Construction Arbitration Checklist.

Respondents should also be aware that discovery practices in international arbitration proceedings, often referred to as disclosure, are significantly narrower than discovery practices in US domestic arbitration. Although various disclosure tools are potentially available, international rules and arbitrators often limit disclosure to exchanges of a relatively narrow set of specific documents that the parties believe are relevant and material to their case.

Joint Expert Reports

International arbitrations sometimes permit the parties to have their experts jointly prepare expert reports. This process typically requires the experts for the respondent and claimant to meet and confer to determine whether they can identify key areas of dispute and reach agreement on any underlying premises, often outside the presence of counsel. The experts then issue separate reports on issues where their opinions diverge.

The respondent should consider the usefulness of joint reports for the particular case. Because

a joint expert report is intended to crystallize the issues for the arbitrators, it may be an efficient and less expensive way to present information to the arbitrators by decreasing the amount of information the arbitrators must process. However, if the joint reports do not crystallize the issues in an understandable way, they may actually increase the costs while providing little benefit in narrowing areas of disagreement or streamlining the proceedings.

Issues Lists

Issues lists are prominent in international arbitrations, but some domestic US arbitrations also permit the practice. The parties identify the key dispositive issues in the case and submit the lists to the arbitrators before the hearing. This practice can maximize efficiency by helping to keep the hearing focused on the key disputed areas.

If the tribunal requests an issues list, the respondent should consider which issues it believes are key to its position. The respondent should also consider the best way to condense and frame these issues to allow the panel to understand its defenses and any counterclaims.

Early Case and Claim Resolution and Bifurcation

Throughout the procedural stages of preparing the case for hearing, the respondent should be aware of opportunities for the early disposition of either the entire case or of individual claims, which may narrow the issues in dispute at the hearing.

For example, the respondent may wish to engage in parallel mediation with one or more of the other parties in the case. The respondent may facilitate these opportunities by arranging the procedural schedule to allow time for settlement discussions at certain points in the process.

The respondent may also narrow or dispose of claims in the case through dispositive motion practice. Most institutional arbitration rules permit dispositive motions, often requiring the movant to seek the panel's permission before submitting it (for example, AAA Construction Rule R-34; JAMS Construction Rule 18; ICDR Article 18). Like motions to dismiss or summary judgment motions, a dispositive motion asks the arbitrators to rule on questions of law that do not require a full merits hearing. Respondents may also submit a dispositive motion to dismiss claims that are entirely devoid of merit.

The arbitrators or the parties may also bifurcate the proceedings to address various discrete issues in phases rather than all in a single proceeding. For example, the arbitrators may wish to consider any jurisdictional issues in an early phase of the proceeding and reserve judgment on the merits of the parties' claims for a later stage in the process. In other cases, the arbitrators may wish to split the arbitration into a phase for the resolution of issues of liability and a later phase or damages, if necessary.

Respondents may wish to avail themselves of these resolution mechanisms because the early disposition of discrete issues can limit the complexity, time, and costs of a construction arbitration. Respondents should also understand that while most arbitration rules afford the arbitrators the opportunity to entertain early case resolution motions and bifurcation proposals, as a practical matter many arbitrators may be wary of disposing of claims before hearing a party's case in its entirety at the arbitration hearing.

Hearing Considerations When Defending a Construction Arbitration

Arbitration counsel often observe certain practices and procedures that differ from court litigation. For a respondent seeking a quick resolution at the lowest possible cost in attorney and arbitrator time, these practices and procedures may help streamline the arbitration hearing to maximize efficiency.

Chess Clock

Common in both domestic and international arbitrations, the chess clock is a running timer that tracks the amount of time each party uses while presenting their case against a fixed amount of time allotted to each party. The arbitrators usually determine the amount of time allowed to each party well in advance of the hearing. This process ensures the hearing is completed in a set timeframe and forces the parties to use their time efficiently.

The respondent should determine the length of time to request from the panel. To make this determination, the respondent must have a

thorough understanding of its case and the ability to explain to the tribunal the justification for the requested length of time. When the respondent's case includes a counterclaim or crossclaim, the respondent must ensure that its time request focuses not only on the defense case but also includes time for the respondent to present its affirmative claims.

Once the panel determines the length of time allotted to the respondent, the respondent should organize and plan its defense and any affirmative claims with the chess clock in mind, to ensure there is adequate time for the respondent to present all key components of its case.

Opening Statements

Most arbitration hearings start with opening statements from the claimant followed by the respondent. The opening statement may be the first opportunity the respondent has to orally summarize its case before the arbitrators. When organizing the material the respondent wants to present in the opening statement, the respondent should consider:

- How much time the respondent should allot for the opening statement.
- Whether the respondent's counsel should divide the presentation among several individuals or just one person.
- Whether to rely on a PowerPoint presentation or some other visual aid.
- Whether it would be useful to present a mock or practice presentation before unaffiliated arbitrators or practitioners.

Order of Witnesses

The order in which the parties present witnesses may depend on the arbitral seat's customs and the arbitrators' wishes. In most domestic US arbitrations and litigation settings, the claimant or plaintiff usually presents all of their fact and expert witnesses first, and then the respondent or defendant presents their witnesses, with all other parties cross examining each witness after the direct examination of that witness. In international arbitration proceedings, however, it is more common for the parties to present their fact witnesses first (claimant's fact witnesses followed by respondent's fact witnesses), and then present by their experts (claimant's experts followed by respondent's experts). Sometimes, the arbitrators decide to pair experts of similar disciplines to appear back-to-back so the arbitrators may directly compare the testimony of the two competing experts.

Because the order may vary depending on the setting and desires of the arbitrators, the respondent is free to suggest whatever order of witnesses makes sense for the respondent's case. The respondent should consider proposing that the panel adopt an alternative order of witness if there is reason to believe a departure from the traditional approach may:

- Be more efficient.
- Assist the arbitrators in understanding the respondent's position.

Direct Oral Examination

For most domestic US arbitrations, live oral direct testimony continues to be the most common approach to direct examination. However, in some instances, parties may wish to opt for written witness statements in lieu of oral direct. The use of written witness statements may generate cost savings by reducing the amount of hearing time and need for depositions (to the extent permitted).

When parties present their fact witnesses' testimony through prehearing witness statements, the witnesses usually must appear at the hearing for cross-examination. While the witness statement stands as a witness's direct examination, the arbitrators often permit the witness to provide an abbreviated direct summarizing their witness statement, although the witness is not be permitted to offer expansive direct testimony. This is especially true in cases where a witness has been unable to address new facts or allegations in the case.

Under these circumstances, respondents should consider:

- Whether to object to any direct testimony by any of the claimant's witnesses who provide witness statements.
- If the panel permits the claimant's witnesses to testify, what parameters the respondent should ask the panel to place on witnesses' direct testimony.

Because the respondent prepares the cross-examination of the claimant's witnesses based on their witness statements, the respondent must pay careful attention to any oral direct testimony the

panel permits the claimant's witnesses to present. Any witness's departure from their witness statement may provide fertile ground for cross-examination.

Expert Presentations

For both domestic US and international construction arbitration hearings, arbitrators frequently permit experts to provide presentations to the tribunal that summarize the opinions contained in their expert reports. Many arbitrators and parties find this practice a helpful way to orient and educate the tribunal on technical expert issues. However, this approach to expert testimony is not required by any particular rule. Respondents should consider whether this practice, rather than traditional questions and answers, will strategically aid the presentation of the respondent's evidence and defense.

If the respondent believes expert presentations would be valuable, the respondent must also consider, among other things:

- The appropriate length of the expert presentations.
- Whether the presentation should be managed by the expert or led by direct questioning from counsel.
- Whether to use any visual aids (such as PowerPoint) during the presentation.

Witness Conferencing

Many arbitration rules grant discretion to the arbitral panel to oversee the manner and scope of witness questioning. Often, the panel follows traditional litigation practice and permits each witness to testify individually. However, a common practice in international arbitration proceedings, and increasingly common in domestic US arbitrations, is to allow both parties to present witnesses on the same topic concurrently, in a method known as witness conferencing (also sometimes referred to as hot tubbing).

Witness conferencing may be useful for both fact and expert witnesses. The witness conference may be led by questions from:

- The panel.
- Counsel.
- The witnesses themselves.

The respondent should review the standard guidelines for witness conferencing (for example, CIArb Guidelines for Witness Conferencing in International Arbitration). The respondent should consider whether to suggest witness conferencing as a method for presenting the parties' evidence on a specific topic in the case and, if so, who should lead the questioning.