SATISFACTION WITH ARBITRATION:

A SURVEY OF PARTICIPANTS

A Special Research Problem

Presented to

The Faculty of the School of Civil Engineering
Georgia Institute of Technology

by

Robert Eugene Schenk

In Partial Fulfillment
of the Requirements for the Degree of
Master of Science in Civil Engineering

GEORGIA INSTITUTE OF TECHNOLOGY
A UNIT OF THE UNIVERSITY SYSTEM OF GEORGIA
SCHOOL OF CIVIL ENGINEERING
ATLANTA, GEORGIA 30332

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Robert E. Schenk

ABSTRACT

The objective of this paper is to attempt to determine whether participants in the arbitration process are satisfied with arbitration, as it is practiced today, as a means for resolving their disputes. A questionnaire was developed and distributed to those parties who had arbitrated a case to settlement over the last two and one-half years as recorded in the offices of the Atlanta, GA office of the American Arbitration Association.

Chapter One of the paper provides an introduction to arbitration and summarizes some of the historical events in the field. Particular emphasis is placed on the history of construction arbitration in the United States.

Chapter Two discusses the American Arbitration Association and its importance in the field of commercial arbitration. This chapter also discusses the wide range of services provided by the American Arbitration Association.

In Chapter Three, definitions of some of the terminology used in arbitration is presented to aid the reader in understanding what has been written. In addition, some of the applications of arbitration, as they relate to the construction industry, have been provided. The situations described are similar to those the parties who are responding to the survey found themselves in and which led to arbitration of their disputes.

The results of the survey are presented in Chapters Four and Five. Chapter Four introduces the survey, describes its

development, and presents the results in the category of Arbitrator Qualifications and Performance and the topic of Administrative Procedures. Chapter Five presents the remaining results covering the Cost of Arbitration and the reported Advantages and Disadvantages of Arbitration.

Chapter Six presents the conclusions and recommendations which were obtained and derived from the results of the survey. Overall, the participants were fairly well satisfied with arbitration. The comments they offered were intended as constructive critiques to supplement a working process.

Finally, in Chapter Seven, recommendations for further study are presented. These were generated from questions which arose as the data was gathered and analyzed for this paper.

CHAPTER ONE

THE ARBITRATION PROCESS

INTRODUCTION

Arbitration, as an alternative to litigation, has been used extensively throughout history in many countries of the world. The use of arbitration as a means of dispute resolution continues to expand into new areas in today' business practices. Although it would seem reasonable to assume that the continued use of arbitration in itself would indicate that the process was satisfactory, there has been very little information published which specifically examines the parties' satisfaction with arbitration.

The purpose of this paper is to examine the question of user satisfaction with the arbitration process. Although arbitration is employed in such diverse situations as labor disputes, insurance settlements, medical malpractice claims, and divorce proceedings, the paper's primary focus will center on commercial disputes, especially those arising in the construction industry.

HISTORY OF ARBITRATION

In his opening address before the American Arbitration Association on May 17, 1984, Governor Mario M. Cuomo of the State of New York reported the remarks made by the Rabbi Israel Mowshowitz (of his staff), who had stated that "Moses was the first arbitrator. He undertook the first public sector bargaining in history. He was patient,' the Rabbi said, 'just the way an arbitrator should be. He granted all sorts of

adjournments. And he put up with the doubts of both sides, the occasional skepticism of labor and the cynicism of management. But Moses had the most wonderful way of prodding the parties to settlement ... with arguments first ... then swarms of flies and boils and hail and frogs and locusts. These,' the Rabbi concluded, 'have been the envy of arbitrators ever since" [Cuomo84].

Whether one agrees with Moses as the selection for the first arbitrator or not, there is little doubt that the arbitration process is not a product of the twentieth century, even though it was probably not called arbitration in Moses' day. International arbitration has been utilized since the days of the city-states of the ancient Greece. In the latter part of the Middle Ages, the Pope often served as an arbitrator [Americana87]. The foundations, therefore, were well laid for the continuance of arbitration as a form of dispute resolution.

ARBITRATION HISTORY IN ENGLAND

Since many of the practices in the United States have their origins in English customs, a brief review of the arbitration history of England would seem to be appropriate. Among the earliest recorded forms of arbitration were the two kinds which were taking place at the end of the sixteenth century. One form was adjudication through the form of tribunals to which the parties in a dispute had agreed. The second form was a referral to arbitrators by the King's court. This occurred on those occasions where the court decided that the matter was more

suitable for hearing by arbitrators. The former method was not under the direct control of the courts and, as such, was not easily enforced. The latter method was enforceable through contempt of court proceedings [Steyn80].

At the beginning of the eighteenth century, the process of arbitration was not favored at the court. Any settlement which was reached to "...exclude the jurisdiction of the King's courts was void as subversive of public policy" [Hill-Hollister46]. The award, therefore, was questioned as to error of law. Since the courts could not legally modify the award, they set these agreements aside, thus requiring the parties to begin again to settle their dispute, this time at the King's court. Steyn reports that "Traces of judicial hostility to arbitration are evident in judgments up to the end of the nineteenth century" [Steyn80].

The Civil Procedure Act of 1833 allowed the court to require the presence of witnesses and order that documents be produced. The Common Law Procedure Act of 1854 granted the courts the power to stay legal proceedings where the parties had agreed that their disputes should be referred to arbitration. The Arbitration Act of 1889 allowed the arbitrator to present to the court, in the form of a special case and if so directed by the court or a judge, any question of law which arose during the proceedings for the court's opinion.

A Commercial Court was created in 1895 to hear only commercial cases. The supervision of arbitration constitutes a

large part of its workload. Through their becoming a part of the arbitration process, judges began to view arbitration in a more favorable light. They did employ their supervisory powers under the special case procedure rather extensively until the Arbitration Act 1979 was passed and became effective on August 1 of that year.

Courts in England had remained entrenched in the belief that "... legal certainty in commercial relationships is of paramount importance" [Steyn80]. The requirement for arbitrators to routinely submit special cases to the judges ensured that strict legality was enforced and that the concept of equity in arbitration was not the motivating factor in a settlement. The strict legality concept also allowed several avenues of appeal, similar to any other legal process. The Arbitration Act of 1979 abolished the special case procedure and instituted limited rights of appeal. This was a compromise between those factions who wanted arbitrations to be final and those who wished to see strict legality maintained.

ARBITRATION HISTORY IN THE UNITED STATES

As in England, arbitration has been recorded as having been used for a long period in the United States. The term "arbitration" was initially used to describe the process of two parties bargaining with each other about the terms of employment, a process better known today as collective bargaining [LaRue87]. The more commonly accepted meaning of the term arbitration today is "... a means of promptly, economically, and fairly settling

many of the disputes that arise in the daily course of business. It is a procedure by which parties voluntarily refer their disputes to an impartial third party, an arbitrator, for a final decision based on the evidence and arguments to be presented in a hearing before the arbitration tribunal" [Domke65].

The New York Chamber of Commerce, founded in 1768, established the settlement of disputes among its members as one of its principal purposes. The following resolution set up the first commercial tribunal: "That the following gentlemen are appointed a committee, until the first Tuesday in June next, for adjusting any differences between parties agreeing to leave such disputes to this Chamber, and that they do attend on every Tuesday, or oftener, if business require, at such places as they may agree upon, giving notice thereof to the President: James Jauncey, Jacob Walton, Robert Murray, Samuel Ver Plank, Theopy Bache, and Miles Sherbrook" [Domke65].

In addition to the commercial tribunal described above, there are several other situations where arbitration of one form or another was used in the early history of the United States. One such situation is the arbitration proceedings at the copper mines in Connecticut which were recorded in the eighteenth century. Another example may be seen in the board of industrial arbitration which was established at Lyon, Massachusetts in 1870, a location known for the manufacturing of shoes in the United States. Arbitration was also used to settle conditions of employment and industry's terms in 1871 between the Pennsylvania

coal industry's Anthracite Board of Trade and the miners' Workingmen's Benevolent Association. A final use of general arbitration in the United States is observed in the coal fields in Ohio where there were arbitration agreements in 1874 similar to those in Pennsylvania [LaRue87].

Of particular interest for this paper, and similar to the cases just described, arbitration in the construction industry has also been in use for a long time. The American Arbitration Association, in their review of construction industry arbitration, indicate that "Arbitration has been used to resolve construction industry claims in the United States since the 1880's" [AAA86]. Builders had begun to realize, in the 1800's, that the courts were both overcrowded and not very knowledgeable about the technicalities of construction projects and their problems [CE82]. This led to their increasing desire to find alternative ways to resolve their disputes.

In the United States, as was the case in England, the courts were "... reluctant to lend their authority to the enforcement of arbitration clauses to arbitrate future disputes" [Domke68]. The early reasoning, again parallel to the reasons listed in the King's court of England, was that the court's jurisdiction was circumvented by the use of arbitration. The courts did not wish to appear to be encouraging parties with a dispute to bypass the legal remedies offered through the courts to resolve the dispute. This concept persisted for a long period in American history and was a factor leading to the passage of the

United States Arbitration Act in 1925. In Robert Lawrence v. Devonshire[1] it was said: "For a considerable time prior to the passage of the Arbitration Act in 1925, the Congress had come to the conclusion that an effort should be made to legislate on the subject of arbitration in such fashion as to remove the hostility of the judiciary and make the benefits of arbitration generally available to the business world" [Domke68].

The United States Arbitration Act in 1925 was patterned on the New York Arbitration Act of 1920 and similar acts adopted by New Jersey and California. It provided for the enforcement of arbitration agreements, and awards resulting from arbitration, in federal court. The Act, however, was limited to those contracts which involved maritime transactions or contracts involving interstate or foreign commerce [Domke68]. Each of the state laws were challenged on their constitutionality through charges of depriving parties of their rights without the due process of law. These challenges were unsuccessful [Domke65].

The passage of the Arbitration Act led to a greater use of Arbitration as a means to resolve disputes. It also led to a movement for uniform laws on commercial arbitration in each of the states. The Commissioners on Uniform State Laws drafted the Uniform Arbitration Act, as amended August 24, 1956, to promote the use of arbitration for the settlement of disputes. The essential aspects of modern arbitration statutes were reported to

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[1] 271 F2d 402 (CA 2nd, 1959), cert granted 362 US 909, 4 L Ed2d 618, 80S Ct 682, dismissed pursuant to stipulation, 364 US 801, 5 L Ed2d 37, 81 S Ct 27 (1960).

be: [Domke65]

1. the irrevocability of any agreement to submit future disputes to arbitration;

2. the power of a party, pursuant to a court directive, to compel a recalcitrant party to proceed to arbitration;

3. the provision that any court action instituted in violation of an arbitration agreement may be stayed until arbitration in the agreed manner has taken place;

4. the authority of the court to appoint arbitrators and fill vacancies when the parties do not make the designation, or when the arbitrators withdraw or become unable to serve during the arbitration;

5. the restrictions on the court's freedom to review the findings of fact by the arbitrator and his application of the law;

6. the specification of the grounds on which awards may be attacked for procedural defects and of time limits for such challenges.

Until 1966, the majority of construction industry arbitration cases under the American Institute of Architects' (AIA) were arbitrated either informally, or they were arbitrated under the administration of the American Arbitration Association's Commercial Arbitration Rules. The informal process usually consisted of each party selecting one arbitrator and the two arbitrators selecting a third, neutral arbitrator. Still striving to create a more uniform, nationwide system of

arbitration, a joint committee of engineers and architects studied the existing arbitration process in the construction industry. As a result of this study, the Construction Industry Arbitration Rules were adopted, to be administered by the American Arbitration Association [AAA86]. (A copy of the current Rules is included as Appendix A.) In the first year of the Construction Industry Arbitration Rules, 460 construction arbitrations were administered by the American Arbitration Association. The caseload grew to over 2,800 cases by 1980 and has continued to grow ever since [CE82].

A copy of the United States Arbitration Act, as amended September 3, 1954, and with Chapter 2 (added July 31, 1970), is included as Appendix B.

A listing of the states' modern arbitration statutes is included as Appendix C.

CHAPTER TWO

THE AMERICAN ARBITRATION ASSOCIATION

INTRODUCTION

The American Arbitration Association (AAA) is a private, nonprofit organization founded in 1926 through a merger of the Arbitration Society of America and the Arbitration Foundation. It was organized under the New York Membership Corporation Law and dedicated to "... fostering the study of arbitration, perfecting the techniques of this method of dispute settlement, and administering arbitration proceedings" [Domke65].

THE AMERICAN ARBITRATION ASSOCIATION

The services of the AAA have been referred to over the years by many parties who have cited the rules of the AAA in agreements to arbitrate. In the entertainment field, the Motion Picture Arbitration System, established in 1949 under an antitrust decree between the major motion picture corporations and the film distributors, was administered by the AAA. Standard form contracts in the textile industry refer to the General Arbitration Council of the Textile Industry which became a division of the AAA in 1964 with amended rules in effect May 1, 1964. The trading rules of various trade associations, such as the National Institute of Oilseed Products, the American Seed Trade Association, the Imported Hardwood Plywood Association in San Francisco, and the National Association of Small Business Investment Companies in Washington, D.C. have referred to AAA procedures [Domke68].

In many other fields of industry and commerce, the standard contract forms used by these parties refer to such rules as the Construction Industry Arbitration Rules which have been endorsed by the American Institute of Architects, the Associated General Contractors, the American Consulting Engineers Council (formerly the Consulting Engineer's Council), the Associated Specialty Contractors, Inc. (formerly the Council of Mechanical Specialty Contracting Industries), the American Society of Civil Engineers, the Construction Specifications Institute, and the National Society of Professional Engineers, to name but a few [Domke68], [CE82].

Since its inception, the AAA has grown to the point that it now has 33 regional offices (located as shown in Appendix D) to handle the increased workload, now over 50,000 cases per year and involving billions of dollars. The Association headquarters is in New York.

There were 4,379 construction disputes filed for arbitration under the Construction Industry Arbitration Rules from July 1986 through June 1987, with the claims totaling $751,787,007 which is more than a proportionate share of the total dollars from all disputes. The claims ranged in size from less than $10,000 (1,400 of the claims) to over $1,000,000 (105 claims) [AAA87].

Historically, large, complicated disputes make up about fifteen percent of the caseload of the AAA. These disputes usually involve large sums of money, many claims and counterclaims, and often issues of great technical complexity.

Based on this historical workload, the Construction Industry Arbitration Rules now contain special provisions for expediting these types of cases (see Appendix A).

ADMINISTRATIVE DUTIES OF THE AAA

The AAA maintains a National Panel of Arbitrators, persons whose qualifications in their respective fields allow them to hear and settle disputes administered under the Construction Industry Arbitration Rules. Before being placed on the panel, a potential arbitrator is asked by the AAA to answer a questionnaire which asks detailed questions about current duties, types and sizes of projects, size of firm, professional licenses and registration, prior arbitration experience and training, and requests any other information relating to experience which would aid in evaluating the person's qualifications to serve as an arbitrator. Local advisory councils assist the AAA offices in recruiting and evaluating arbitrators. If the person is determined to meet the minimum standards set by the AAA, that person is added to the panel. The AAA's construction panel now has more than 32,000 arbitrators with backgrounds from all areas of the construction industry, including attorneys with a construction practice. It is the policy of the AAA to annually update the qualifications of the arbitrators [AAA87]. The AAA also conducts twenty-five to thirty arbitrator training workshops annually for both beginning and advanced arbitrators.

When a demand for arbitration (intention to arbitrate under provisions of a contract or by mutual consent) is filed with the

AAA, they will notify the other party involved of such a filing.

For a dispute administered by the AAA, a list of possible arbitrators is provided by the AAA to the parties, along with a brief background description and the qualifications of each person listed. The parties strike from the list any potential arbitrators they do not wish to consider. They are then asked to rank the remaining persons on the list in their order of preference. The AAA will consolidate the parties' lists, select the arbitrator acceptable to each party, and make the proper notifications. In larger cases, if there were no candidates acceptable to all parties, a second list of potential arbitrators is prepared and the process is repeated one more time. If a mutually acceptable selection can not be made, after either one or two lists have been examined, the AAA will appoint the arbitrator.

While there are no hard and fast rules on the number of arbitrators required to hear a case, the usual practice is to let the size of the case determine the number of arbitrators, unless the parties' contract provisions specify otherwise. It is not unusual for there to be only one arbitrator when the amount of the claim is under $100,000. The parties to the dispute, however, may specify that more than one arbitrator be selected. In this case, there would normally be three arbitrators to hear the case.

Upon notification by the AAA of having been selected, the potential arbitrator will file a disclosure statement indicating

any previous dealings with either party which might influence impartiality. Any disclosure revealed by the arbitrator will be transmitted to each party by the AAA. The parties may then decide to proceed with the arbitration or either party may challenge the arbitrator based on the disclosure. If the parties disagree on the continued service of the arbitrator, the AAA will rule on the matter. The test used to determine whether an arbitrator should be removed is whether he has a "substantial, continuing, recent, or direct" interest in the case which could affect its outcome. Potential arbitrators are sometimes removed without any real interest in the case but perhaps because of an appearance of an interest.

From a practical standpoint, because there are 32,000 arbitrators on the construction panel, there is usually no problem seating an arbitrator without an interest in the case being heard.

The Construction Industry Arbitration Rules establish two mechanisms for the exchange of information prior to an arbitration hearing: (1) a conference with an experienced administrator from the AAA which will arrange the scheduled exchange of information, will establish the uncontested facts of the dispute, and will try to schedule mediation to resolve collateral issues; and (2) a preliminary hearing with the arbitrator to produce relevant documents, exchange other pertinent information, schedule additional hearings, and identify those witnesses to be called. The AAA will attempt to arrange

either a conference or a hearing when convenient for all parties, if the parties wish to avail themselves of this opportunity.

In addition to maintaining a panel of arbitrators to hear cases, the AAA is also called upon occasion to resolve the issue of the location of the arbitration. If two parties to a dispute are not located in the same geographical area, they are often at odds over where to hold the arbitration hearing(s). The travel expenses for the parties, their witnesses, and their legal representation, if any, usually cause each party to want to hold the hearing at its home location. The best option, of course, is for the parties to discuss any proposed locations and decide among themselves where to have the hearings. If they can not decide, however, the Construction Industry Arbitration Rules provide that the AAA shall have the authority to determine the location for the hearing. This decision shall also be final and binding.

One of the important functions of the AAA is to provide a communications link between the parties in a dispute. In their administrative oversight capacity, the AAA will ensure that timely notifications are provided to each party regarding such items as dates and locations for hearings, notices of a need for postponement by either party, any additional requirements of the arbitrator, or any other matter which may arise. The AAA will also transmit to each party the decision of the arbitrator after the hearing(s) have been held. Due to its impartiality, the AAA ensures that each party in a dispute receives the same

information and receives it on time.

Maintaining files of both ongoing and completed cases is another one of the important administrative functions of the AAA. The retention of completed files is necessary in case of appeals of the award. The Construction Industry Arbitration Rules allow for the release of certified copies of any documents in the AAA's files to the parties to the arbitration for use in judicial proceedings.

There are additional functions of the AAA which will not be addressed specifically in the remainder of this paper but are provided here for the information of the reader.

The AAA also administers fact-finding, conciliation, and mediation proceedings either in conjunction with arbitration or as separate services, each with its own established fee schedule.

The AAA has numerous publications which summarize labor arbitration awards, report on recent arbitration court cases, and provide authoritative articles on arbitration. In addition, they produce books, pamphlets, and films for educational use [AAA88].

CHAPTER THREE

ARBITRATION AND CONSTRUCTION

INTRODUCTION

This chapter has two purposes. The first of these is to acquaint the reader, who may not be familiar with the process of arbitration, with some of the terminology used throughout this paper. The second purpose is to present some general scenarios in the construction industry where arbitration has been used in the past and, perhaps, will be used again in the future. The situations described are derived from the files of the AAA, although no names of actual participants will be used in order to protect their right to privacy.

TERMINOLOGY USED IN ARBITRATION

When two or more parties have a disagreement, one of the first things they have to do is determine if their differences are subject to settlement by arbitration. Some of the factors which help determine the arbitrability of the issue include whether the parties have a contract; whether the contract, if they do have one, requires them to arbitrate this type of dispute; and whether any other settlement or grievance procedures specified by the contract have been exhausted.

The party who initiates the arbitration process is called the claimant. The claimant gives notice to the other party, the respondent, of his intention to arbitrate the dispute under the arbitration clause in their contract. As previously mentioned, this notice of intentions is known as a demand for arbitration.

The demand for arbitration is a written document (a standard form available from the AAA may be used) which contains the following minimum information: (1) the nature of the dispute; (2) the names and addresses of the parties involved;. (3) the contract clause which provides for arbitration to settle disputes or an agreement to arbitrate; and (4) the relief or remedy being sought by the claimant.

In his answer to the demand for arbitration, the respondent may make a counterclaim. This is an opposing claim and has the effect of putting the claimant on notice that the respondent has another side of the issue to present. The counterclaim, if any, should provide all of the information required in a demand for arbitration as listed above.

Once the arbitration action is initiated, an arbitrator will be selected, either under the terms and conditions of the contract between the parties or as described in Chapter Two. The arbitrator, an impartial individual selected to hear the case, will listen to the witnesses, see the evidence, and deliver a final and binding decision as the determination of the dispute. The arbitrator's authority is derived from law, as discussed in Chapter One, and from the will of the parties as evidenced by their contract. If the parties have a separate arbitration agreement, the arbitrator should examine this document for the extent and limitations of his authority.

If a preliminary hearing or conference, as discussed in Chapter Two, is desired by the parties, it will be scheduled by

the arbitrator prior to the actual arbitration hearing. In addition to items previously mentioned, the arbitrator may wish to establish procedural rules as to evidence at a preliminary hearing. The topic of discovery is usually thought of when rules of evidence are discussed. Discovery is "A legal procedure invoked before a trial to inform both parties of the facts in a dispute in order to narrow the issues and save time and expense" [Seide70]. While the actual use of discovery can not be mandated under the Construction Industry Arbitration Rules, the same principles are often invoked by the arbitrator at a preliminary hearing. The arbitrator will attempt to have the parties discuss all of the issues and occasionally, these frank discussions allow the parties to settle their dispute.

The hearing is the oral presentation of the case in the arbitration proceedings. In order to be a valid hearing, the party whose rights are affected must be notified of the hearing, the arbitrator(s) must be present, and the parties are entitled to present their evidence and to cross examine witnesses who appear at the hearing. With a written agreement, the parties may waive an oral hearing. In this case, they would simply submit all of their documentary evidence to the arbitrator for his decision. If the parties disagree on the procedure, the AAA shall specify the procedure to be followed.

After the hearing, the arbitrator issues the award, his final and binding decision. The award is a written document and must be signed by the arbitrator or by a majority of arbitrators if

there are more than one. The arbitrator, in the award, may grant " ...any remedy or relief that is just, equitable, and within the terms of the agreement of the parties" [CIAR88]. The Construction Industry Arbitration Rules do not require that the arbitrator write findings of fact, or in other words, state his reasons for his decision. The award is to be made within thirty days from the closing of the hearing, unless otherwise specified by law or agreed upon by the parties.

The fact that an award is final and binding allows little room for challenge. The parties have agreed to accept the arbitrator's decision prior to the hearing. There are very few grounds on which to challenge the decision. Two examples of successful challenges include showing that the arbitrator failed to disclose a "substantial interest" in the case which affected his impartiality or producing evidence of fraud in the decision.

Although the award may distribute the costs of the arbitration, attorney's fees are not usually included as costs. Each party normally pays their own attorney unless some other provision has been made in their contract.

ARBITRATION IN CONSTRUCTION

In the remaining part of this chapter, several situations will be described, in general terms, detailing disputes where arbitration has been employed as the means of resolving the dispute. These situations are intended to be representative of the types of disputes which are found in the construction industry and do not describe specific cases from the files of the

American Arbitration Association.

Case I. The first type of case deals with work that is performed under a change order to the original contract. Since there is no such thing as a "perfect design", as a construction job progresses, changes to the original design will often have to be made. These changes will normally clarify the original design, add something which was omitted from the original plans, or delete a part of the original project. Once the necessity for a change arises, the plans are revised and the contractor submits a cost estimate to the owner. This cost estimate may be the cause of a dispute. This is especially true if the contract is a unit price type contract. The contractor may claim that the price for the change needs to be higher than the price in the original contract.

Since the owner is not always a construction expert, he may not know what is required of the contractor in order for the change to be performed. Work that was already performed may have to be removed. It could be that the new material for the change is not readily available or, if the change requires additional material of a type already ordered, it may have gone up in price since the beginning of the project. The end result is a cost estimate which sometimes seems excessively high to the owner. If the owner and the contractor can not negotiate a final cost of the change order, arbitration could be used to settle the dispute.

Case II. Another area in which a dispute may arise is in the interpretation of contract documents. When the architect or engineer (A/E) prepares the specifications, they set the standard of performance for the contractor. Since these specifications make up a portion of the bidding documents, the contractor has prepared his bid based on his reading and interpretation of the specifications. Specifications have been prepared which demand a level of performance which exceeds the normal industry standards and, occasionally, which exceed the state-of-the-art capability of contractors to perform. A prudent contractor will question this type of specification during his bid preparation and adjust his bid accordingly.

The conflicts arise when the contractor did not question the specifications and is then held to the level of performance demanded by the specifications. At this point in time, when the contractor states that the performance demanded can not be met, for whatever reason, the dispute arises. The owner's position is that the contractor had an opportunity to read the specifications and his bid should have been based on the specifications. As may be imagined, this is not an easy issue to settle, especially when technological capabilities are also an issue. Accordingly, arbitration may be used to resolve this dispute.

Case III. There is no doubt that delays in construction are expensive. The only questions that are often debated are: "Who caused the delay?", and "What was the actual cost of the delay?"

Sometimes the cause of the delay is clearly attributable to either the owner or to the contractor. More often, however, it is a case of one party asking the other party to do something without realizing that there will be a delay in achieving the change. If, for example, the contractor asks that a design change be made to allow for a different type of construction, the A/E may have to re-examine the plans prior to approving or disapproving the requested change. This could take several days if the change is extensive. If the contractor can not perform any additional work until a decision is reached, he may want to claim damages for delay.

Some owners request changes to be made during construction. Again, the contractor may be delayed while he locates the required material and arranges for its delivery to the construction site. Who should pay for the cost of this type of delay?

The questions posed above have no easy answer and often lead to each party pointing fingers at the other. An arbitrator may be called to resolve this type of dispute.

Case IV. There are some sets of plans and specifications prepared which tell the contractor not only what is to be done, in terms of a finished product, but which also tell him how to perform the work. If the directions are sufficiently explicit, there may not be a problem. If, however, something has been omitted from the specifications, and the finished product does

not perform as intended by the owner and the drafter of the specifications, who is at fault?

All the owner knows at this point is that he has paid for a finished product that does not work. He is looking to both the A/E and the contractor to fix it at no additional cost to him. The contractor knows that he constructed the item in question "exactly" as the specifications directed. The A/E only knows that this is the same set of specifications that he used on his last job where the finished product worked as it was intended to work.

The issue is very confused at this point and tempers tend to flair, complicating the move toward settling the problem. This type of problem may be settled by arbitration since the issues tend to be highly technical in nature. An arbitrator who is experienced with the type of construction being performed may be called to hear the case.

Case V. What is covered by the warranty the contractor was required to give the owner on this project? This question often comes into play when the project was not used in the manner envisioned by the A/E or the contractor.

As an example, suppose that a contractor built a new doctor's office in accordance with the A/E's design. As part of the landscaping, a four inch (4") thick sidewalk was placed leading to the front entrance of the office. When the local moving company delivered all of the doctor's furniture, they drove their

truck over the sidewalk and parked it in front of the door. In doing this, the sidewalk was broken.

The doctor, understandably, is upset and wants his sidewalk replaced by either the contractor under the warranty clause or by the moving company. The moving company states that was the only way to get the reception room furniture where it belonged. The contractor declares that anyone should know that a four inch thick sidewalk will not support the weight of a furniture delivery truck and that it would not be covered under the warranty clause of the contract.

Once again, there is a dispute between parties which could be resolved through arbitration if simple negotiation did not produce a solution.

Case VI. The final case to be described in this chapter deals with substitution of "equal" material for that specified in the contract documents. There are some types of specifications, most notably those prepared by government institutions, which can not specify a particular name brand of equipment or material. Instead, the plans and specifications list the necessary features to ensure a functional product. A few products may be mentioned by name which do meet the requirements with the contract stating that one of these products or an "approved equal" shall be used. In most cases, either the A/E or the contract administrator will be the approving authority.

The intent of this type of specification is to allow the

contractor to provide the product specified at the lowest possible cost, consistent with the quality and the features specified. The question often arises as to the true "equality" of a proposed substitute. The contractor may propose a brand that is relatively new because the distributor is willing to offer a lower price in an attempt to enter the market. If the specifications require a history of satisfactory performance, how will this be proven when the product is new? The other side of the issue is that there is no record of poor performance.

If a product, say a pump, is equal in all ways to a type of pump specified except for the type of metal of which the casing is made, is it still considered an "equal" product if the manufacturer provides the necessary guarantee?

Since this type of problem also deals almost exclusively with technical issues, it is a problem that is suitable for settlement through arbitration.

The brief description of several possible cases is not intended to be all inclusive. The list of all of the types of cases which have been settled by arbitration is far too long to include here. The cases listed are intended, therefore, to be representative of the problems which might be encountered in the course of a construction project.

CHAPTER FOUR

SURVEY OF PARTICIPANTS - PART ONE

INTRODUCTION

This chapter and the next will attempt to assess whether parties who have used arbitration to settle their dispute have been satisfied with the process. A questionnaire was distributed to those persons who had arbitrated their dispute through to a settlement, identified through the records of the AAA, over a time span of the last two and one half years. The questionnaire has been included as Appendix E. The next two chapters present the results of the survey of participants in the arbitration process.

SURVEY DESCRIPTION

The questionnaire used for the survey was developed through input from many sources. These sources included the AAA, a similar survey (of lawyers) performed by the American Bar Association (ABA), the faculty of the Georgia Institute of Technology, and the many references listed in the bibliography.

It was believed the questions could be readily answered in about ten minutes by the person reviewing it, if there were not a lot of comments to be made. This was done in an attempt to maximize the number of questionnaires returned. Space was made available on the questionnaire, however, for those persons wishing to make comments and many of the questionnaires which were returned did contain valuable comments.

A total of fifty-eight questionnaires were distributed and

twenty were returned. This response rate of thirty-four percent was approximately what was expected, due to the structuring of the questionnaire. Within this chapter, the response percentages are solely a function of the twenty questionnaires which were returned. The conclusions and recommendations in Chapter Six will include a brief statistical analysis to relate the confidence in these percentages, obtained from a small sample, to those which might be expected from a larger sample.

The analysis of the responses may be broken into several broad categories as follows:

I. Arbitrator qualifications and performance.

II. Administrative procedures.

III. Cost of arbitration.

IV. Advantages and disadvantages of arbitration.

Categories I and II will be evaluated in this chapter and categories III and IV will be discussed in Chapter Five.

SURVEY RESPONSE:

ARBITRATOR QUALIFICATIONS AND PERFORMANCE

As described in detail in Chapter 2, the AAA maintains a listing of all potential arbitrators who have submitted detailed biographical information and have met the qualification criteria of the AAA for placement on their national panel of arbitrators. A summary of this information is made available to the parties in a dispute when they are in the process of selecting an arbitrator. The questionnaire asked the parties whether they were satisfied with the method by which the AAA described the

qualifications of the arbitrators. As may be observed in Figure 4.1, eighty-five percent of the persons responding to this question indicated that they were satisfied.

Of those who did not feel that the description of qualifications was satisfactory, only two offered comments. One stated that the qualifications were too vague and the other stated that he did not receive a description of the arbitrator's qualifications. Since the level of detail provided in a description of this type will not satisfy everyone, and since only one person felt that the description needed to be changed, it would seem that the descriptions provided are adequate.

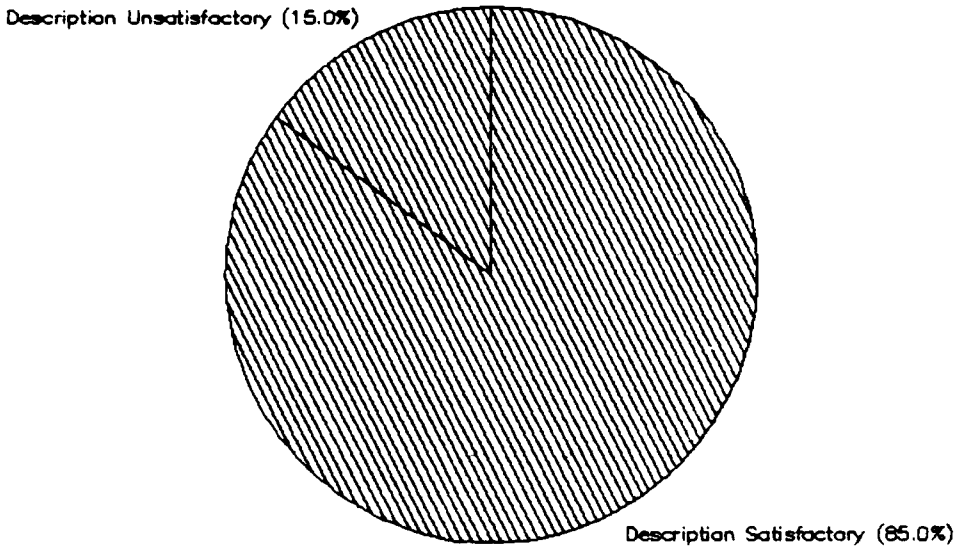

Figure 4.1 - Description of Arbitrator's Qualifications

As for the latter comment, it would appear that there was either an accidental oversight, or perhaps someone else involved with the case received the qualification description and simply did not pass it along. In any event, it is the practice of the AAA to provide the descriptions to the parties.

In addition to asking about the description of qualifications, the persons responding to the survey were asked to evaluate the arbitrator's qualifications based on first, their observation and perception of the arbitrator during the proceedings and secondly, a numerical scale ranging from very poor (a value of 1) to excellent (a value of 5). The responses to this question are shown in Figure 4.2 with the average value being 3.95. This seems to indicate that the qualifications of the arbitrators are generally perceived as good.

Two questions dealt with the issue of the arbitrator's performance. The first question asked whether it was felt that the arbitrator unjustly rendered a compromise decision. From Figure 4.3, it may be seen that fifty-six percent of those responding did feel that the arbitrator's decision was a compromise. There were very few comments, however, as to why the parties felt that there was a compromise decision. The comments received indicated that the person responding had felt that the evidence was in their favor but that was not reflected in the award. One issue not addressed by this paper is the magnitude of the claims or counterclaims. No attempt has been made to correlate how the dollar amounts claimed with actual damages.

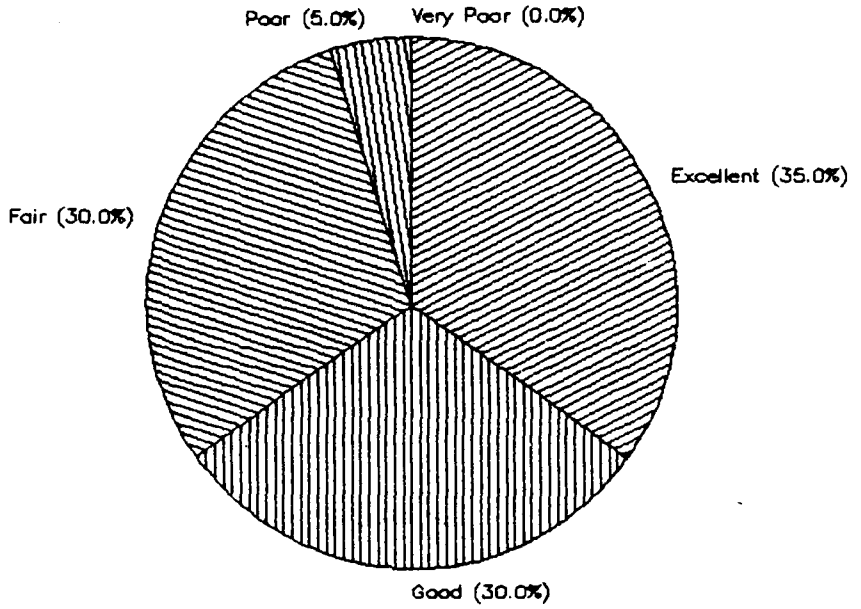

Figure 4.2 - Qualifications of Arbitrators

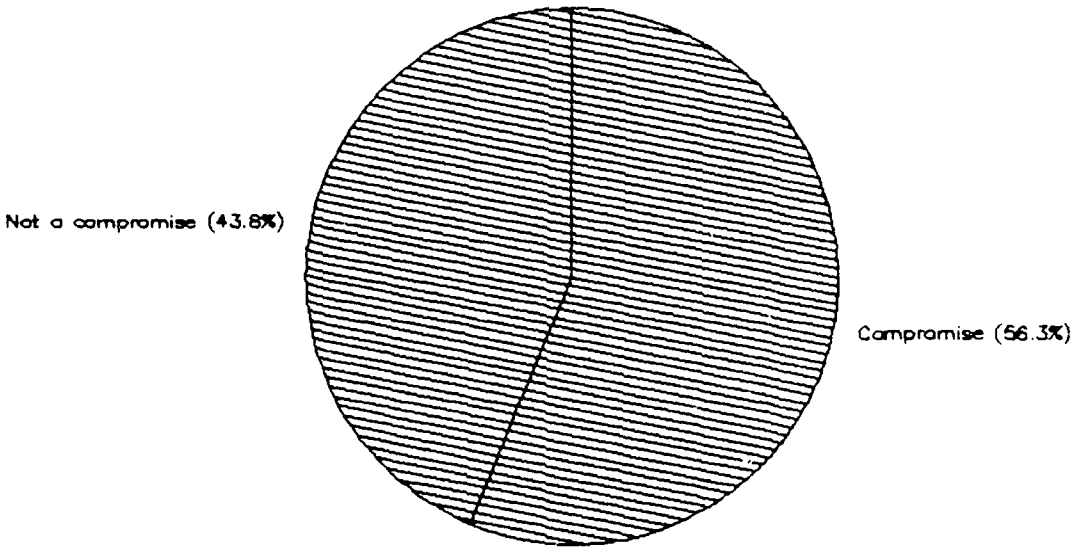

Figure 4.3 - Arbitrator's Decision:

Compromise vs. Not a Compromise

What is very evident from the comments is that the parties would like to know how the arbitrator arrived at the dollar value or the "final number" of the award. This topic is closely linked with the question which asks whether findings of fact should be required and will be examined in more detail later in this paper.

The second measure of the arbitrator's performance is displayed in Table 4.1 where the persons answering the questionnaire were asked to evaluate the "fairness" of the decision on a scale of 1 (very poor) to 5 (excellent). The average response to this question was 3.3 (a value of 3 was fair). It must be recognized that each party's perception of fair will be biased by their experiences, but that fact also holds for other aspects of the survey.

Table 4.1 - Fairness of Decision

Value	Number Responding
5	3
4	8
3	3
2	4
1	2

Although the majority (55%) of the people rated the fairness of the decision as either excellent (5) or good (4), there was a wide spread in the responses to this question.

ADMINISTRATIVE PROCEDURES

After the decision has been made to arbitrate a dispute, one

of the first administrative matters to be determined is whether to hold a preliminary hearing. It was surprising to note that only five (25%) of the persons responding to the survey indicated that they had participated in a preliminary hearing. All five, however, indicated that the preliminary hearing was helpful.

Although the questionnaire was only distributed to those parties who arbitrated their case to a settlement, it was noted during the review of the records of the AAA that the majority of the cases which were settled prior to the formal arbitration hearing had held a preliminary hearing. No statistics were obtained on these cases since the participants were not to be surveyed.

The above statement coincides with the comment made by one of the parties who had participated in a preliminary hearing. He stated that the "... preliminary hearing offers the prospect of reconciling the matter before arbitration." This is consistent with the observation concerning the cases which were settled prior to the formal hearing.

Other comments noted in favor of preliminary hearings included it would enable parties to prepare better, it would lay down ground rules, and it would speed up the actual hearing.

While not many of those responding to the survey had participated in a preliminary hearing, those who had were unanimous in their support of the practice. It would appear that the use of a preliminary hearing should be encouraged of parties to a dispute.

The questionnaire contained several questions regarding the issue of time schedules for resolving the dispute. The first of these was whether there should be a time schedule imposed on the arbitration procedures. Eighty-five percent of those responding to the survey felt that there should be specific time schedules. The next question, which asked if the proceedings should be continuous (held over consecutive days), received unanimous support, although thirty-five percent of those answering affirmatively qualified their answer by stating that presentation time should not be limited in order to meet such a continuous schedule. As the Construction Industry Arbitration Rules now stand, each party in the dispute may take as long as they wish to present their case, although the arbitrators do frequently allocate a set number of days to each side. This issue will be discussed further in the chapter on recommendations. A summary of the answers to these questions is shown in Table 4.2 below.

Table 4.2 - Questions on Timing

Question	Yes	No
Should specific time schedules be imposed on proceedings?	85%	15%
Should proceedings be continuous?	100%	
Should presentation time be limited to meet schedule?	65%	35%

For the next series of questions regarding the speed of the

proceedings, the persons responding to the survey were asked to evaluate the following aspects of the case on a scale of 1 (very poor) to 5 (excellent):

Time in which the case was first scheduled for a hearing;

The speed of the actual hearing; and

The speed of the arbitrator's decision.

The responses to these questions are presented in Figures 4.4 through 4.6. In terms of average ratings, the speed of the actual hearing received the highest average (3.85) followed by the speed of the arbitrator's decision (3.75). The time in which the case was first scheduled for hearing received an average

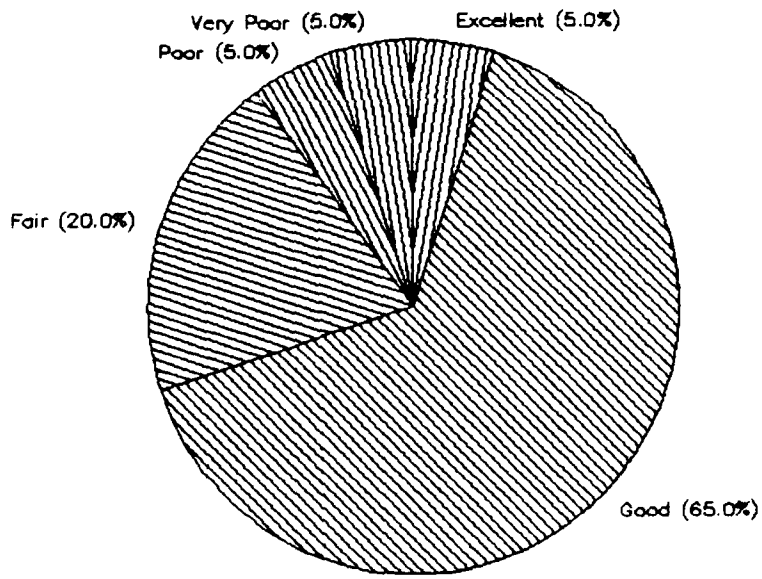

Figure 4.4 - Time First Scheduled for Hearing

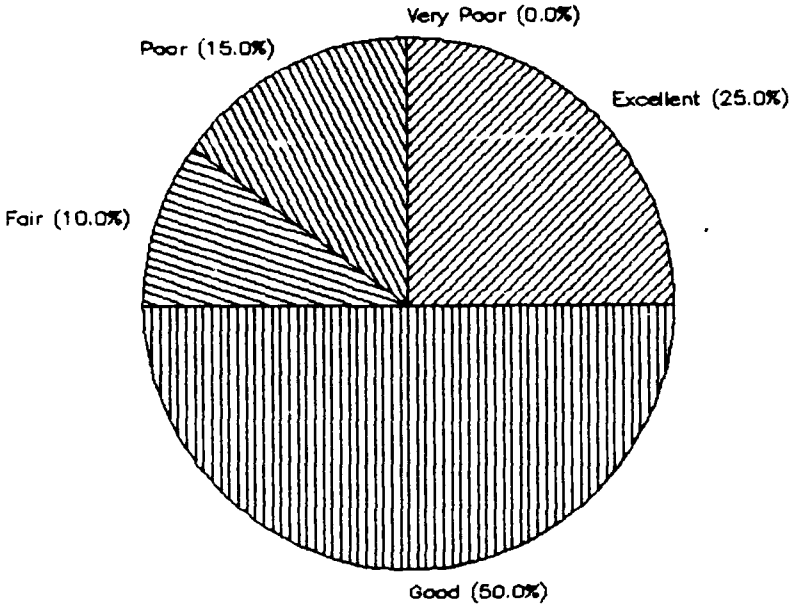

Figure 4.5 - Speed of Hearing

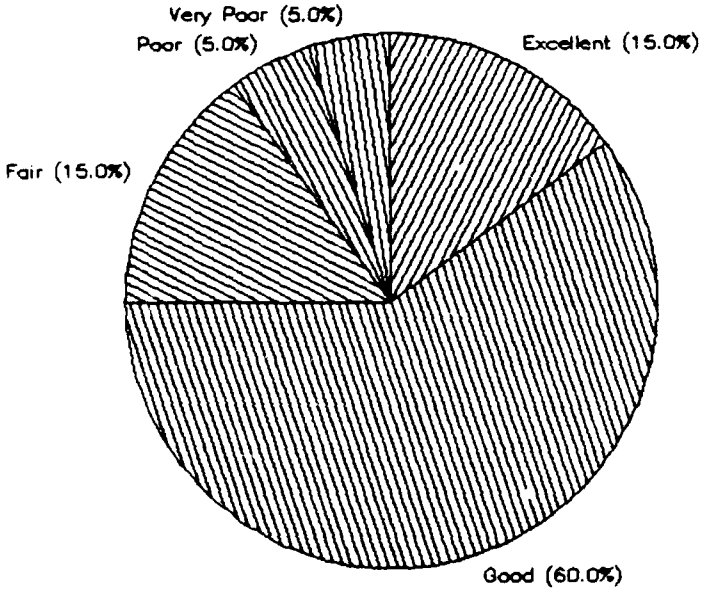

Figure 4.6 - Speed of Arbitrator's Decision

The persons answering the questionnaire were also asked how

rating of 3.6.

The only comment received for these questions was that there was "Too much lawyering on both sides". This comment was directed at the question regarding the speed of the actual hearing.

The persons answering the questionnaire were also asked how long it took from the filing for arbitration until the final award. The median range of time was 61 to 120 days (42%) with the durations organized into intervals of sixty days.

The last three questions to be addressed in this section were thought to be perhaps the most controversial when the questionnaire was developed. As it turned out, only one of the three was as controversial as expected.

The first of these three questions deals with the topic of discovery. The question asked whether discovery should be required prior to the arbitration hearing. The responses were evenly split. From the fifty percent that were in favor of requiring discovery only one reason, "This seems like it could save money", was offered. Similarly, only one of the dissenters offered a comment that discovery "... should be allowed if requested by one party". This party was not in favor of requiring discovery, however.

Since the responses were exactly split on this issue, it would appear that the rules should not be changed at this time. This does suggest, however, that the use of a preliminary hearing to provide for the exchange of information prior to the actual

hearing could be of some benefit.

The second question asked whether the Construction Industry Arbitration Rules should permit the arbitrators to award attorney's fees. A majority of the persons responding to this question were in favor of the issue as may be seen in Figure 4.7. The only comment for awarding of attorney's fees was that it might make the process more efficient. Conversely, the only comment against awarding the fees was that the ability to recover attorney's fees could encourage more claims, some of which might not be valid. There is no one solution to this problem which will satisfy everyone. To prove a case was not

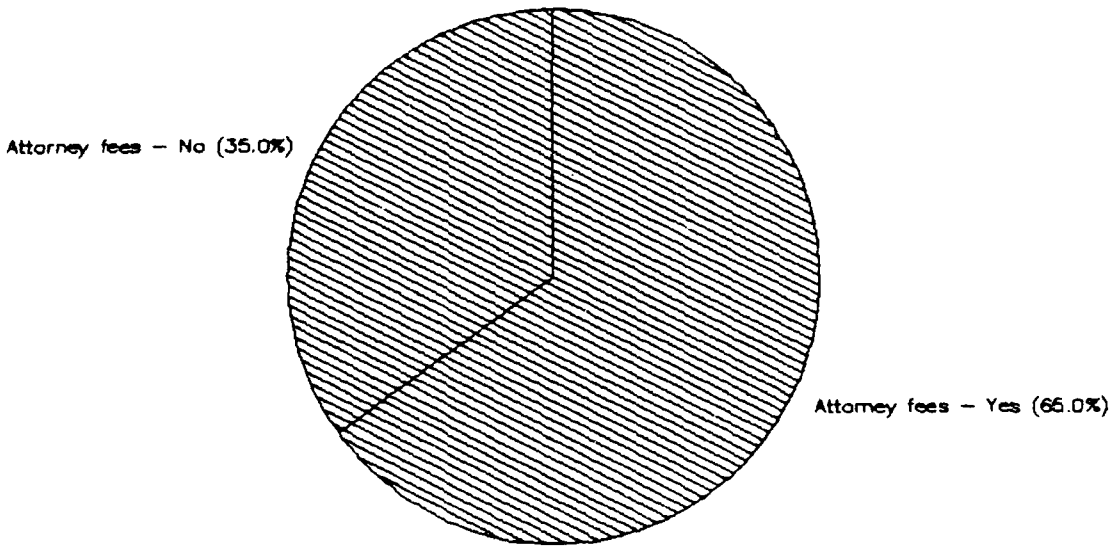

Figure 4.7 - Arbitrators Awarding Attorney's Fees

valid, or frivolous, would require its own hearing, resulting in additional time and money expended.

The last question dealt with the aspect of the arbitrator writing findings of fact when the decision was issued. Far from being controversial, the response was highly in favor of such a practice. Figure 4.8 shows the responses to this question.

This question is related to the question asking the parties whether they thought the arbitrator's decision was a compromise as previously discussed. Three of the returned surveys had comments written on the topic of findings of fact. It was interesting to note that two of the three also indicated that

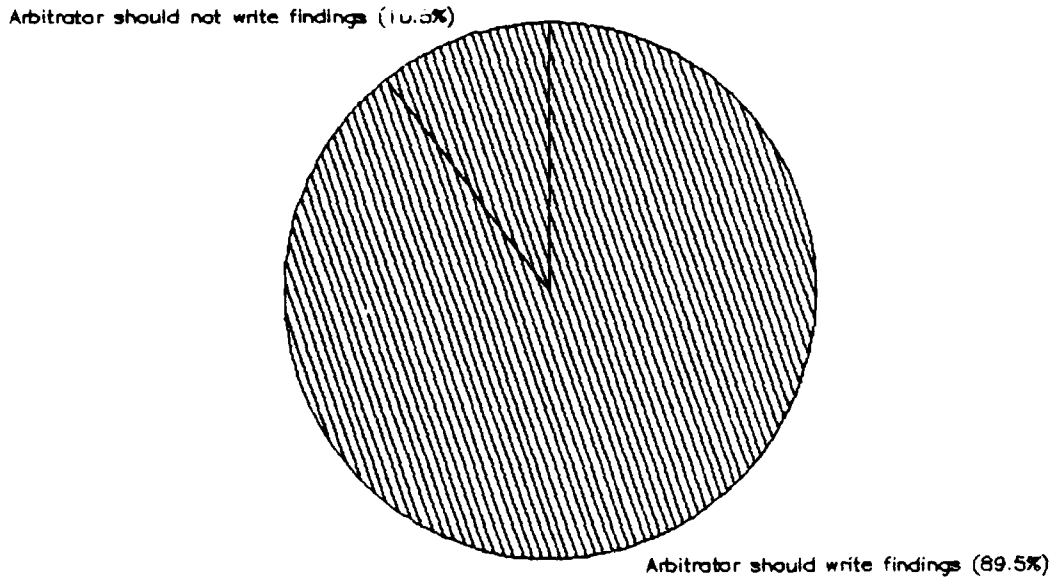

Figure 4.8 - Writing Findings of Fact

they would not use arbitration again, with the lack of findings of fact being a primary reason. Each of the comments implied that the absence of findings of fact made it impossible to understand the decision of the arbitrator.

There are several arguments to be made both for and against requiring an arbitrator to write findings of fact. The primary argument in favor of this position is to enable the parties to understand how the arbitrator arrived at his decision. By reading the findings, one party would be able to see if the arbitrator at least considered their position. They would still not know to what degree the arbitrator weighed their position against that of the other party.

On the opposite side of the argument, there is a concern that written findings of fact would slow the arbitrator's decision and would broaden the appeal process, not to mention that there might be far fewer qualified people who would be willing to serve as arbitrators if they had to write findings of fact. Since an arbitrator does not have to be a lawyer, his decision is made based on bringing an equitable resolution to a dispute and is not based on the most stringent interpretation of the law. If the arbitrator were to write his findings, which may have overlooked a legal technicality, there might be a tendency for a lawyer to try to appeal the decision. Since sixty-five percent of the persons responding to the survey indicated that the Construction Industry Arbitration Rules should provide that the decision of the arbitrators is binding and final, it would seem that they do

not want to open greater avenues of appeal in the arbitration process. Additionally, sixty-one percent of those responding to the survey specifically indicated that they do not want a broader scope of appeal.

There seems to be an impasse over this issue. On the one hand, the parties want to see findings of fact in the arbitrator's decision while one the other hand, they do not want a greater appeal process to result.

CHAPTER FIVE

SURVEY OF PARTICIPANTS - PART TWO

INTRODUCTION

This chapter will continue the presentation of the results of the survey. Various questions concerning the cost of arbitration will be examined. In addition, the advantages and disadvantages, as provided by those persons returning the questionnaire, will be presented.

SURVEY RESPONSE

COST OF ARBITRATION

The parties were asked if the AAA's fee structure influenced their decision to arbitrate their case, as opposed to pursuing some other form of dispute resolution, with answers requested in one of three categories: (1) Yes - affirmatively, (2) Yes-negatively, or (3) No. The responses to this question are graphed in Figure 5.1. It would appear from the responses shown that the fee structure either has no effect or it has a positive effect on the parties' decision to use arbitration as the means to settle their dispute.

The questionnaire also asked those persons responding to evaluate the arbitration process as an economic means of resolving their dispute. Figure 5.2 presents the responses to this question, with the average response being 3.45 (a value of 1 was very poor and a value of 5 was excellent). The question did not attempt to define the term "economic," but left the interpretation to the person answering the question. It was

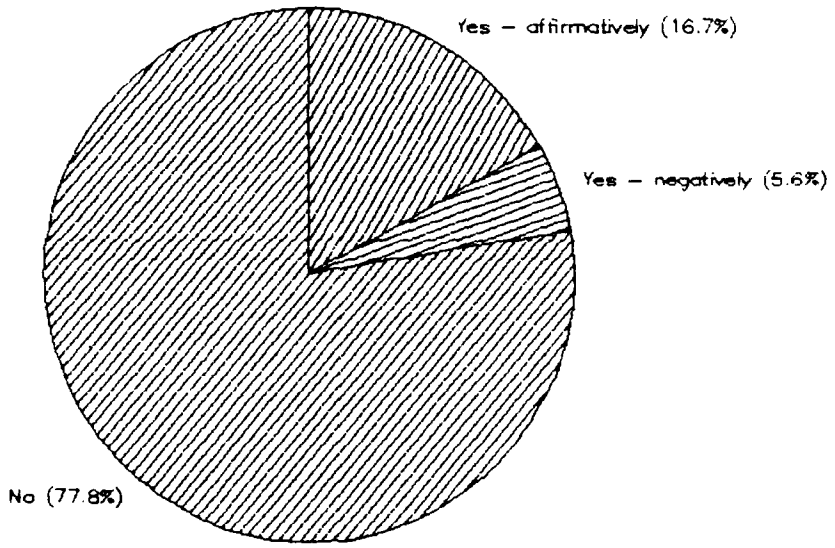

Figure 5.1 - Influence of AAA Fee Structure

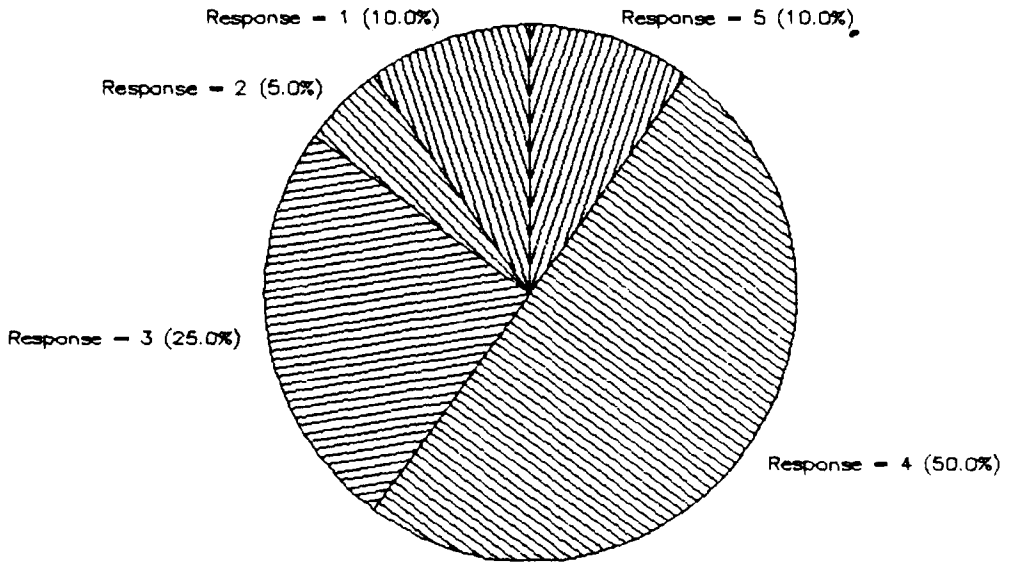

Figure 5.2 - Arbitration: Economic Means of Resolving Dispute?

assumed that one of the major factors in the replies would have been the relationship between the award requested and the actual award.

Figure 5.3 graphs the ratio of the actual award to the amount of the award requested. One of the values reported in the questionnaires has been omitted from the data graphed so as not to skew the data. One contract had a reported value of $18 million with an award requested of $6.9 million. Since this was approximately three times higher than any other contract reported, and since there was no value reported for the amount of the actual award, this contract was omitted.

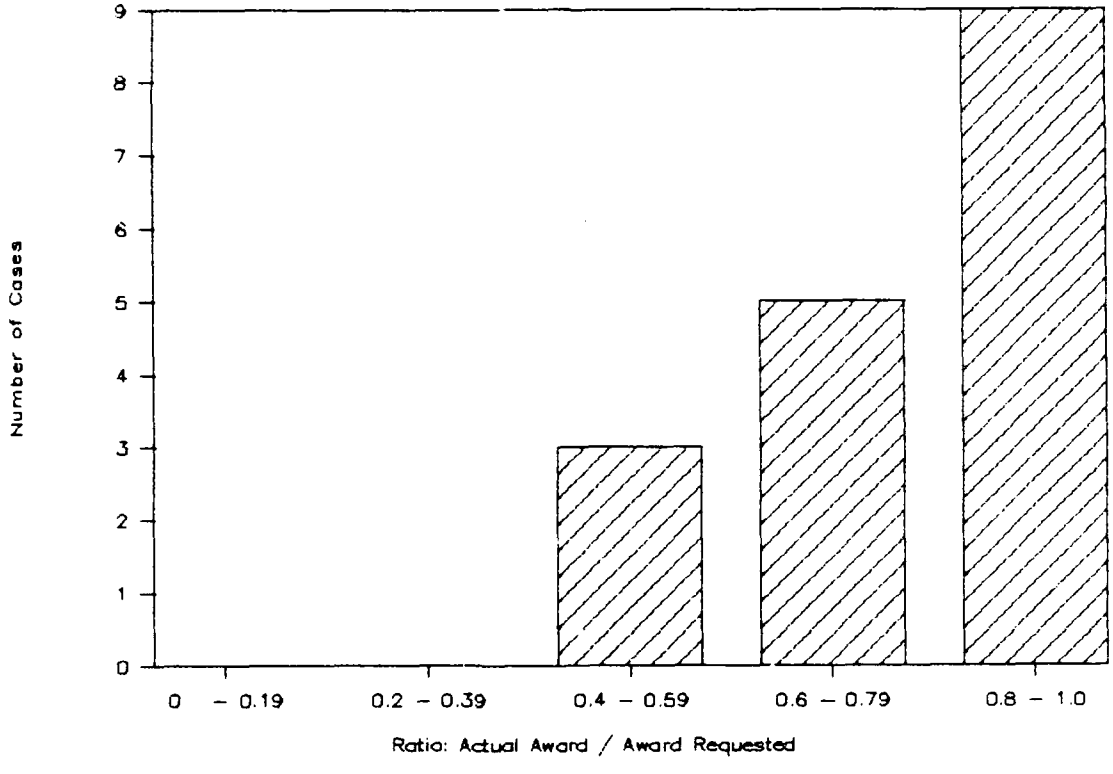

Figure 5.3 - Ratio: Actual Award to Award Requested

The average ratio of actual award to award requested was 0.786 which says that 78.6 cents was awarded for every dollar claimed.

Additional information is provided in Figure 5.4 which graphs the ratio of the award requested to the value of the contract. The average ratio for this data was 0.31. Since the awards requested ranged from $3000 to $1.4 million, a simple dollar value of the average award requested is not as significant as the ratios which were graphed.

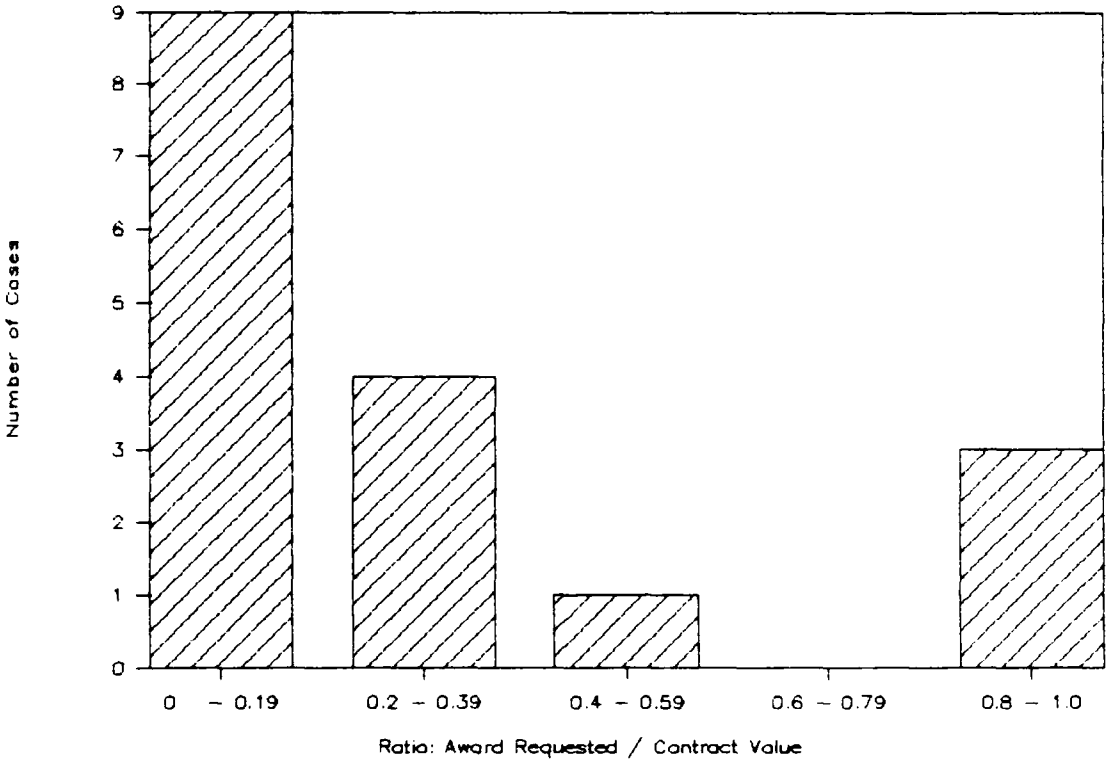

Figure 5.4 - Ratio: Award Requested to Contract Value

Although there is a wide range of ratios, they do not appear to be a factor of the size of the contract. For example, a $110,000 contract had an award requested of $22,000 (a ratio of 0.2), a $6.5 million contract had an award requested of $1.4 million (a ratio of 0.22), and a $700,000 contract had an award requested of $17,000 (a ratio of 0.024).

Figures 5.5 and 5.6 also examined the data from another perspective, attempting to correlate the ratio of actual award / award requested to some of the other answers. These figures

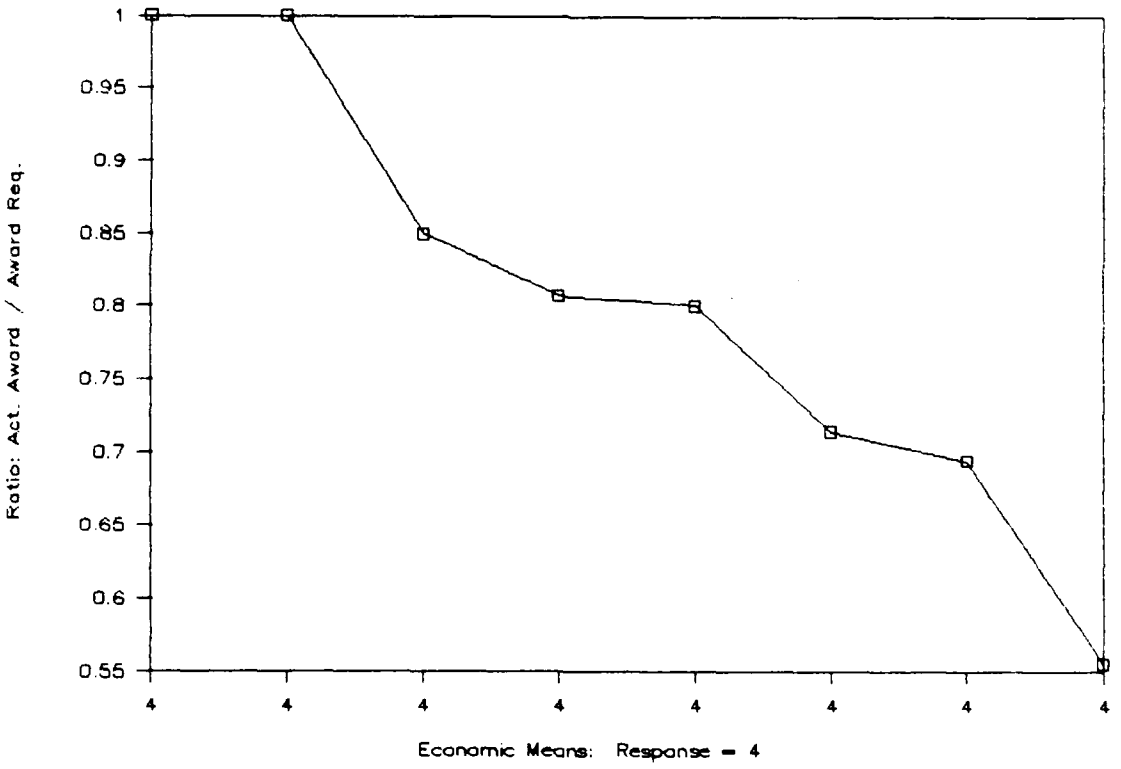

Figure 5.5 - Economic Means (4) vs. Ratio:
Actual Award / Award Requested

graph this ratio against the response to the question which asks if arbitration is an economic means to resolve disputes. Figure 5.5 is graphed for a response to the question of 4 and Figure 5.6 for a response of 3. These values were selected for two reasons. First, they bracket the average response of 3.45. Second, they were the only two response values which had a significant number of ratios to graph. The other values only had one or two data points.

As may be seen from these two graphs, there is a wide

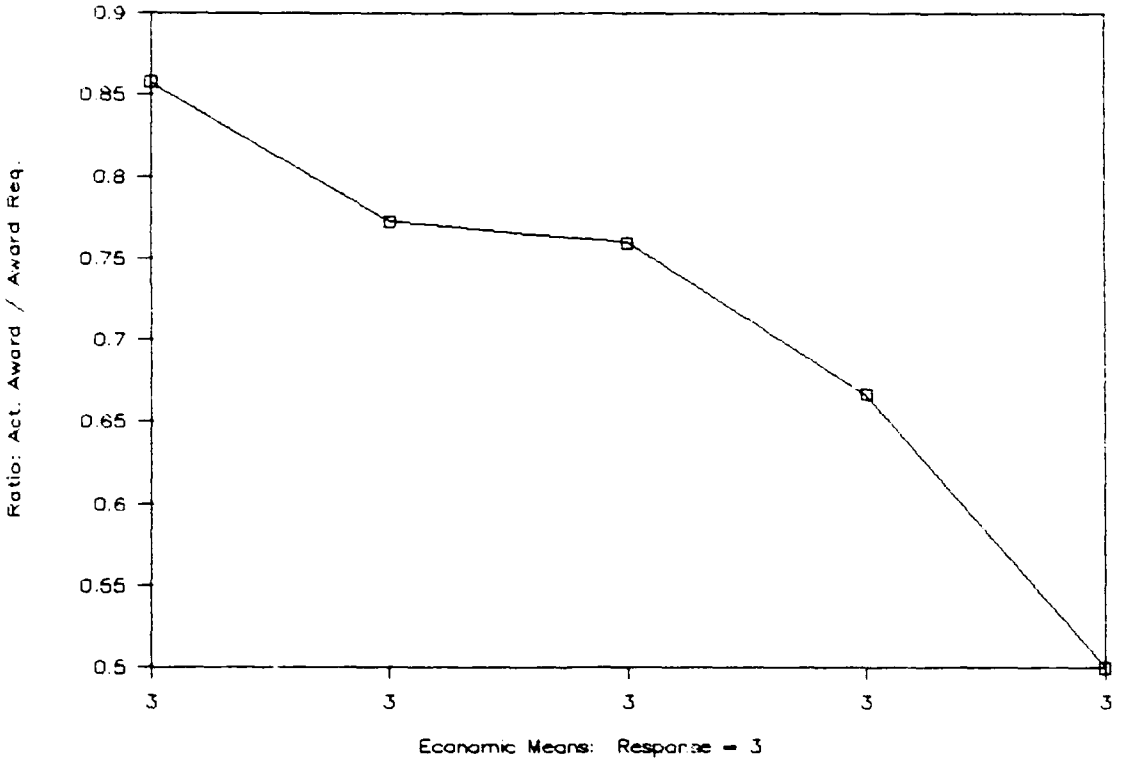

Figure 5.6 - Economic Means (3) vs. Ratio:
Actual Award / Award Requested

variation of the ratio within a given response value. This implies that the persons responding to the questionnaire did not equate their views on the economics of arbitration solely to the ratio of their actual award to the award that they requested.

All of the information gathered and presented above seems to suggest that the parties are relatively satisfied with the costs of arbitration, given that it will have to cost something.

ADVANTAGES AND DISADVANTAGES OF ARBITRATION

The questionnaire invited those responding to share what they believed were the major advantages and disadvantages of arbitration as a means to resolve disputes. The reported advantages will be discussed first.

The most frequently reported advantage was that arbitration was a much quicker process than litigation. Thirty-eight percent of the comments stated that speed was the main advantage of arbitration as a means to resolve disputes.

The next frequently reported advantage, thirty-one percent of the comments, was the experience and qualifications of the arbitrators. The arbitrators were described as experienced, conscientious, and qualified professionals.

There was a tie for third place between arbitration being less costly than litigation and the arbitration hearings being more informal than litigation. It was felt that the informality leads to the resolution of the dispute more rapidly and at less cost than if the case had gone through the judicial process.

With one appearance apiece (six percent), additional

advantages listed by those responding to the survey included both sides getting a fair hearing, being able to present whatever evidence was desired, and, without qualification or other explanation, one individual simply listed that arbitration was better than the judicial system today.

At the top of the list of disadvantages, thirty percent of the comments cited the lack of findings of fact when the decision was rendered.

Twenty percent of the comments dealt with the frustration of having to go to court to enforce the arbitration award. Where this occured, additional costs had to be borne by the parties.

Another twenty percent of the responses commented that the arbitrator was unable to understand all of the facts and legal issues of the case. Without attempting to judge the performance of a particular arbitrator, it seems easy to understand that he or she might not have understood all of the legal issues involved. After all, arbitrators are not required to be lawyers. As for the arbitrator not understanding all of the facts, it is not known to what degree the parties availed themselves of the opportunity to present their case. This may have been a factor in the apparent confusion.

Additional disadvantages listed by those responding to the survey included arbitrators taking into account evidence which might not be relevant to the case and the impact a persuasive lawyer can have on the arbitrators. The person making the latter comment went on to say that lawyers seem to get involved in "one-

up-manship" with precedents which might not be truly or legally applicable.

Finally, one person specifically commented that there were no disadvantages to arbitration.

CHAPTER SIX

CONCLUSIONS AND RECOMMENDATIONS

INTRODUCTION

The general conclusions reached as a result of the survey will be summarized in this chapter. In addition, recommendations for changes to the arbitration process, based on comments made by the persons responding to the survey, will be offered for the consideration of the reader.

Since the sample size of those persons responding to the survey was fairly small, confidence intervals have been constructed below, using well established statistical methods, to show the range of responses within which the answers are believed to hold true ninety-five percent of the time [Hines-Montgomery80]. For those answers which had a yes or no response, the 95% confidence interval was constructed using the formula:

$$\text{Confidence Interval} = p \pm Z_{\alpha/2} \sqrt{(p(1-p)/n)}$$

where: p is the ratio of favorable responses to the total number of responses

n is the total number of responses

Z is a Standard Normal Distribution

α relates to the desired confidence (for 95% confidence, $\alpha = 0.05$)

For those answers which had a numerical average for the response, the 95% confidence interval was constructed using the formula:

$$\text{Confidence Interval} = p \pm t_{\alpha/2}\, S/\sqrt{n}$$

where: p is the ratio of favorable responses to the total number of responses

n is the total number of responses

t is the "t" Distribution

α relates to the desired confidence (for 95% confidence, $\alpha = 0.05$)

S is the standard deviation from the mean

CONCLUSIONS AND RECOMMENDATIONS

ARBITRATORS

The first area to be discussed is the arbitrators themselves. As presented in chapter four, eighty-five percent of the persons responding to the survey were satisfied with the description of the qualifications of the arbitrators. Through statistical analysis, the response rate to this question for a larger population should range from seventy percent to one hundred percent, ninety-five percent of the time. The AAA's policy of updating the qualification descriptions annually [AAA87] appears to be satisfying the majority of the people who select arbitrators.

Since the average response rated the actual qualifications of the arbitrators at 3.95 on a scale of 1 to 5, and since the most frequently stated advantage of using arbitration as a means to resolve disputes was the experience and qualifications of the arbitrators, it appears that the standards set by the AAA for a person to be placed on their National Panel of Arbitrators are

appropriate. The response rate to this question for a larger population should range from 3.52 to 4.38, ninety-five percent of the time. One method of improving the performance of the arbitrators was suggested by other authors in 1984 and bears repeating.

An arbitrator must be totally unbiased and may not freely interact with the parties in a dispute. As a result, he may not learn what they thought of his performance as an arbitrator. An excellent method of improving one's performance at any job is to receive feedback, or a critique, on performance after the job has been performed. It has been previously recommended that the AAA collect this feedback from the parties in the dispute and provide it, perhaps on a quarterly basis, to the arbitrators [Lawson/Rinaldo84]. The AAA currently asks the parties to fill out an evaluation card after each case is closed. Based on the responses, they may use the information to counsel an arbitrator or, after an investigation, may decide to drop an arbitrator. Since many of the arbitrators only serve no more than once a year, this method of data collection is probably sufficient and should be continued.

A disadvantage listed by twenty percent of the comments was the inability of the arbitrator to understand all of the facts and legal issues of the case. While the comments related to the legal issues are not totally surprising, the statements that the arbitrator did not fully understand the facts in the case are disturbing. This is especially surprising in view of the fact

that the parties themselves controlled the presentation of their case, including all evidence, witnesses, and any other relevant matters, during the hearing.

Since every opportunity is afforded the parties to explain their case, these remarks seem to be the comments more of a losing side than comments of a substantive nature. An alternative explanation is that this is the type of comment that leads a party to want arbitrators to write findings of fact into their decisions. The only change recommended, partially as a result of these comments, is under the category of FINDINGS OF FACT later in this chapter.

PRELIMINARY HEARING

Turning our attention next to administrative matters, the usage of a preliminary hearing needs to be explored. While a relatively low percentage of those persons responding to the survey had participated in a preliminary hearing (25%), all of those who had taken advantage of it reported that it had been helpful. As previously mentioned, while researching the records of the AAA to identify those parties who had participated in arbitration case, a number of the cases which had settled prior to an actual hearing had held a preliminary hearing. Many of these cases seemed to be the larger cases, although no statistics were recorded. On the surface, it would seem that the preliminary hearing may have helped the parties reach an amicable agreement which, after all, is the goal in the resolution of a dispute.

In terms of a recommendation, perhaps the arbitrators need to press more strongly for a preliminary hearing which is attended by the parties as well as their lawyers. Often when a preliminary hearing is now held, only the opposing counsels attend. While it is recognized that this involves extra time and effort on everyone's part, it appears that the benefits may outweigh the costs.

HEARING TIMES

Sixty-five percent of the persons responding to the survey indicated that presentations of cases should be continuous, even if it meant that the presentation times should be limited to meet a schedule. Through statistical analysis, the response rate for a larger population should range from forty-four percent to eighty-six percent for this question, ninety-five percent of the time. There were also comments made that the proceedings were, at times, too lengthy. These comments were supported by the rating of 3.85 (on a scale of 1 to 5) given to the speed of the hearing by the persons who responded to the survey. For this question, the response rate for a larger population should range from 3.40 to 4.30, ninety-five percent of the time.

The Construction Industry Arbitration Rules now provide that the hearing and presentations under expedited rules shall generally be completed in one day [CIAR88]. It is recommended that formal time limits should be considered for the presentations of other arbitration cases, similar to those now frequently established by the arbitrators. The specific limits

could be variable, similar to the fee schedule, based on the dollar value of the dispute, since it is intuitively obvious that a larger, more complex case would need more time to present than a smaller case. If the system works for expedited cases, there is no reason, in principle, that it could not work for the larger cases, although it would be harder to predict the time required for a large number of witnesses than for the one or two witnesses who may normally be heard in a small case.

DISCOVERY

As reported in Chapter Four, the persons responding to the survey were evenly divided in their opinions regarding the issue of requiring discovery. Through statistical analysis, the response rate on this question for a larger population should range from twenty-eight percent to seventy-two percent, ninety-five percent of the time. Since there was no majority on the issue, it appears that the Construction Industry Arbitration Rules should not be changed.

This does provide one more argument, however, in favor of a preliminary hearing. Therefore, in addition to the reasons stated earlier, the administrator or the arbitrator should encourage the parties in a dispute to attend a preliminary hearing to clarify the presentation of evidence for the hearing. This might also help to speed up the actual hearing.

COST OF ARBITRATION

One of the widely reported advantages of arbitration over the years has been that it is supposedly a cost effective means of

resolving a dispute when compared with litigation [Domke65], [Domke68], [Mittenthal81]. The survey appeared to support this conclusion.

The parties were asked to evaluate arbitration as a economic means of resolving their disputes. The average response to this question was 3.45 (on a scale of 1 to 5). Through statistical analysis, the response rate on this question for a larger population should range from 2.95 to 3.95, ninety-five percent of the time. From the comments received, it appears that the evaluation was not higher since the parties did not always understand the arbitrator's decision, again largely because they did not understand how the dollar figure for the award was determined. This is directly related to the majority opinion which supports the concept of arbitrators being required to write findings of fact into their decision.

A vast majority of the parties reported that the AAA fee schedule had no effect on their decision to arbitrate their case. This appears to support the fee schedule of the AAA, since the fees are designed to recover the costs of administering the caseload and not to make a profit. If the fees were too low, they might have strongly influenced the parties to arbitrate while if they were too high, parties might have avoided arbitration as the means to resolve their dispute. At this time, therefore, no changes would be recommended to the fee schedule of the AAA.

Additional comments concerning the cost of arbitration have

been left to Chapter Seven under Recommendations for Further Study.

FINDINGS OF FACT

Several of the arguments, pro and con, for providing findings of fact in the arbitrator's decision were presented in Chapter Four and will not be repeated here. Suffice it to say, due to the support in favor of having the arbitrators provide some sort of explanation of their decision, this should possibly be considered for inclusion in the Construction Industry Arbitration Rules. Through statistical analysis, the response rate on this question for a larger population should range from seventy-six percent to one hundred percent, ninety-five percent of the time.

There is no disagreement that arbitrators should not be required to be experts on legal technicalities. There are some letters in the AAA's files, however, from parties who would like a simple explanation of how the arbitrator arrived at his decision of the dollar figure to be awarded. Many seem to be seeking reassurance that the arbitrator heard and understood their side of the issue. Since twenty percent of the comments on the disadvantages of arbitration stated that the arbitrator did not fully understand all of the issues, the parties are concerned about this topic.

It is recommended that arbitrators consider writing, on a trial basis, a summary of the evidence considered, as opposed to the legal "findings of fact," when making their decision. This would be a major change in the way of doing business but it

appears that it is a change whose time is fast approaching. It is a change which will most likely be resisted, with another argument being that the parties would not get all of this information if they had gone to court. While that is a true statement, the parties did not go to court. They chose arbitration to settle their dispute because of its perceived advantages.

It is also true that additional time and expense would be involved for the arbitrator to write such a decision. If there were more than one arbitrator, they might have to meet more than once in order to prepare such a decision and these meetings would be compensable. Again on a trial basis, a separate fee schedule might be developed to be used when such a detailed decision was desired by the parties.

The question of who would pay for this would arise. This type of fee could possibly be apportioned in the same manner as the other fees of the case. It might be more appropriate for the requesting party to bear the expense. The rules could provide for payment of the expenses in the same manner as other administrative fees, subject to the award specifying that one party should bear a disproportionate share of the cost. Other methods of specifying payment for this service could probably be developed through polling the parties who would like this service.

Under the majority of the states' modern arbitration laws, arbitration decisions may only be appealed on relatively narrow

grounds and the majority of the decisions which are appealed are being upheld by the courts. To this non-lawyer, it would seem that the majority of the decisions would still be upheld, even with the summary information provided, unless there was a flagrant disregard for the law or abuse of the arbitrator's authority. Since these are already valid grounds upon which to appeal a decision, it does not seem likely that providing the summary information would dramatically increase the number of appeals of an arbitrator's decision.

Perhaps, however, judges would be tempted to decide whether they agree or disagree with the summary information in the decision. The arbitration laws are also very clear that awards do not have to meet any legal tests or that they must be what the courts would have awarded.

At least one other study previously performed, which concentrated on selected administrative features of binding arbitration, reported similar conclusions and recommended that "... increased emphasis be placed on the development of a comprehensive written summary of issues considered in the settlement" [Thomas87].

Since the objective of this paper was to report on the parties' satisfaction with arbitration, and the parties did desire to have additional information included in the decision, this has been presented as a result of the study, although in limited scope as to the problems such a practice might create. The reader's attention is invited to the recommendations for

further study in Chapter Seven for additional information.

SPEED OF ARBITRATION

As with the advantage of cost, the speed of the arbitration process has supposedly been another of its primary advantages over other forms of dispute resolution [Domke65], [Domke68], [Mittenthal81]. The survey results support this position through both the numerical evaluations and the comments regarding the major advantages of arbitration. Except as mentioned above for the hearing times, no changes or modifications are recommended to an overall arbitration time schedule.

SUMMARY

Overall, perhaps the best measure of the parties' satisfaction with arbitration would be their response to the question "Would you use arbitration again?" Figure 6.1 shows

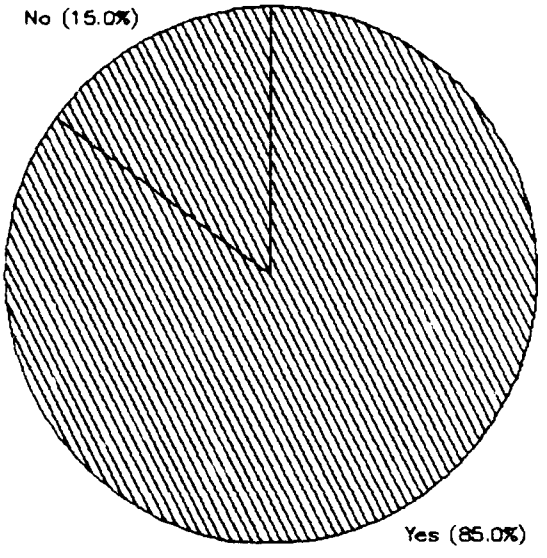

Figure 6.1 - Would you use arbitration again?

that the answers to this question were very positive.

Through statistical analysis, the response rate on this question for a larger population should range from seventy percent to one hundred percent, ninety-five percent of the time.

This speaks well for the arbitration process as it is now practiced. To sum up the comments, one party wrote that "Despite some shortcomings, I believe arbitration to be superior to a court trial."

CHAPTER SEVEN

RECOMMENDATIONS FOR FURTHER STUDY

INTRODUCTION

There were many interesting findings from the survey that was distributed. As a result of some of the answers to the survey questions, and some of the comments which were made, additional research topics and areas requiring further study were identified. Recommendations for further study in these areas are presented below, in no particular order other than order of generation.

RECOMMENDATIONS FOR FURTHER STUDY

It is recommended that the following areas be considered for further study:

A. The benefits of a preliminary hearing in arbitration. The study would determine if the preliminary hearing did actually help the parties to settle their case and perhaps lead to some insight on the amount of time and costs that were avoided during the actual hearing as a result of holding the preliminary hearing.

B. Establishment of specific time limits for case presentation. Historical records could be researched and data collected which would relate the size and complexity of arbitration cases to the length of time required for the hearing. In addition, the success of limiting the presentations and the hearing to a single day for expedited cases could be analyzed. From these findings, it might be possible to develop a proposed

schedule of time limits for arbitration cases.

C. The effect of an arbitrator writing findings of fact. As discussed in the last chapter, a trial period of having the arbitrators write a summary of information considered in their decision would allow data to be gathered on the additional time and expense required, as well as information on the increase in appeals of the arbitrator's decision. From this data, the practice could be continued, with an appropriate adjustment in fee schedule, or the practice could be discontinued, with the necessary data in hand to support that decision, i.e. it was tried and it did not work.

D. The size of the award in arbitration compared with other forms of dispute resolution. There was some data gathered from this survey on the ratios of the award requested and the actual award under arbitration. A study of this type of information for all types of dispute resolution methods (arbitration, mediation, negotiation, litigation, mini-trials, etc.) might produce some interesting results. It might possible show which resolution method would yield the highest return for a particular type of case. This information would be of interest to the parties, and their lawyers, as they selected the forum under which to settle their dispute.

E. A comparison of claims to contract values. The information gathered under the survey for this paper failed to show any apparent relationship between the size of the contract and the size of the claim. It may be that there is no

relationship. A large study, however, involving data from all types of dispute resolution methods, may show that there is a pattern in the size of the contract and the size of resulting claims. This information would be of significant value to owners as they financed a project and to contractors as they prepared to bid new work.

F. How did the parties select the method used to resolve their dispute? While eighty-five percent of the persons responding to this survey indicated that they would use arbitration again, only fifty percent of all those who answered the questionnaire replied that they had recommended arbitration to others. Knowing how parties select the forum to be used to resolve their dispute might enable more owners, architects, engineers, and contractors to be reached and notified of the methods available for dispute resolution (other than litigation).

G. Did an adverse arbitration hearing contribute to business failure? Four of the fifty-eight firms (7%) that were to be contacted for this survey are no longer at their last known address. It is well known that the construction business has a high rate of failure. Information is continually being collected about these firms which go out of business in an attempt to determine the predominant causes of failure. It is possible that an adverse arbitration hearing contributed to the failure of the business. It is also possible that the business was going to fail anyway and the arbitration simply accelerated the end result. On the other hand, it may be that the arbitration hearing

had nothing to do with the firm no longer being in business. Since data about businesses which fail is hard to collect, this may be an additional lead for new information.

H. A survey of arbitrators. There have been surveys of the lawyers and now the parties (although a small number). The arbitrators themselves should now be surveyed. One of the topics which should be addressed in such a survey is the issue of writing summary information into a decision and the effect that such a requirement, if imposed, would have on the willingness of the arbitrator to serve.

I. Should findings of fact or summary information be written? This topic alone could be the subject of a detailed study. The presentation in this paper has been oversimplified, perhaps, since the objective was to present the results of a survey of parties who had used arbitration. After a survey of arbitrators, all of the players external to the AAA will have provided their thoughts on this issue. This information, along with input from the AAA, could be collected and analyzed in detail.

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Construction Industry Arbitration Rules

AMERICAN CONSULTING ENGINEERS COUNCIL

AMERICAN INSTITUTE OF ARCHITECTS

AMERICAN SOCIETY OF CIVIL ENGINEERS

AMERICAN SOCIETY OF INTERIOR DESIGNERS

AMERICAN SOCIETY OF LANDSCAPE ARCHITECTS

AMERICAN SUBCONTRACTORS ASSOCIATION

ASSOCIATED BUILDERS AND CONTRACTORS, INC.

ASSOCIATED GENERAL CONTRACTORS

ASSOCIATED SPECIALTY CONTRACTORS, INC.

CONSTRUCTION SPECIFICATIONS INSTITUTE

NATIONAL ASSOCIATION OF HOME BUILDERS

NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS

NATIONAL UTILITY CONTRACTORS ASSOCIATION

As amended and in effect January 1, 1988

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Introduction

Arbitration is the voluntary submission of a dispute to a disinterested person or persons for final determination. The American Arbitration Association (AAA) does not act as arbitrator. Its function is to administer arbitrations in accordance with the agreement of the parties and to maintain panels from which arbitrators may be chosen by the parties. Once designated, the arbitrator decides the issues and renders a final and binding award.

The American Arbitration Association shall establish and maintain as members of its National Panel of Arbitrators individuals competent to hear and determine disputes administered under the Construction Industry Arbitration Rules. The AAA shall consider for appointment to the Construction Industry Panel persons recommended by the National Construction Industry Arbitration Committee as qualified to serve by virtue of their experience in the construction field.

When an agreement to arbitrate is included in a construction contract, it may expedite peaceful settlement without the necessity of going to arbitration at all. Thus, the arbitration clause is a form of insurance against loss of good will.

Mediation

In appropriate cases, the parties may wish to submit their dispute to mediation. In mediation, the neutral mediator assists the parties in reaching a settlement but does not have the authority to make a binding decision or award. Mediation is administered by the AAA in accordance with the Construction Industry Mediation Rules. Copies of those rules are available through all of the AAA's regional offices.

For the Submission of existing disputes:

We, the undersigned parties, hereby agree to submit to arbitration under the Construction Industry Arbitration Rules of the American Arbitration Association the following controversy: (cite briefly). We further agree that the above controversy be submitted to (one) (three) arbitrator(s) selected from the panels of arbitrators of the American Arbitration Association. We further agree that we will faithfully observe this agreement and the rules and that we will abide by and perform any award rendered by the arbitrator(s) and that a judgment of the court having jurisdiction may be entered upon the award.

Standard Arbitration Clause

Parties may refer to these rules in their contracts. For this purpose, the following clause may be used:

Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association, and judgment upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

Construction Industry Arbitration Rules

1. Agreement of Parties
The parties shall be deemed to have made these rules a part of their arbitration agreement whenever they have provided for arbitration under the Construction Industry Arbitration Rules. These rules and any amendment thereof shall apply in the form obtaining at the time the arbitration is initiated.

2. Name of Tribunal
Any tribunal constituted by the parties for the settlement of their dispute under these rules shall be called the Construction Industry Arbitration Tribunal, hereinafter called the Tribunal.

3. Administrator
When parties agree to arbitrate under these rules, or when they provide for arbitration by the American Arbitration Association, hereinafter called the AAA, and an arbitration is initiated thereunder, they thereby constitute the AAA the administrator of the arbitration. The authority and obligations of the administrator are prescribed in the agreement of the parties and in these rules.

4. Delegation of Duties
The duties of the AAA under these rules may be carried out through tribunal administrators or such other officers or committees as the AAA may direct.

5. National Panel of Arbitrators
In cooperation with the National Construction Industry Arbitration Committee, the AAA shall establish and maintain a National Panel of Construction Industry Arbitrators, hereinafter called the Panel, and shall appoint an arbitrator or arbitrators therefrom as hereinafter provided. A neutral arbitrator selected by mutual choice of both parties or their appointees, or appointed by the AAA, is hereinafter called the arbitrator, whereas an arbitrator selected unilaterally by one party is hereinafter called the party-appointed arbitrator. The term arbitrator may hereinafter be used to refer to one arbitrator or to a Tribunal of multiple arbitrators.

6. Office of Tribunal

The general office of a Tribunal is the headquarters of the AAA, which may, however, assign the administration of an arbitration to any of its regional offices.

7. Initiation under an Arbitration Provision in a Contract

Arbitration under an arbitration provision in a contract shall be initiated in the following manner:

The initiating party shall, within the time specified by the contract, if any, file with the other party a notice of its intention to arbitrate (Demand), which notice shall contain a statement setting forth the nature of the dispute, the amount involved, and the remedy sought; and shall file at any regional office of the AAA three copies of said notice, together with three copies of the arbitration provisions of the contract and the appropriate filing fee as provided in Section 48 hereunder.

The AAA shall give notice of such filing to the other party. A party upon whom the Demand for arbitration is made may file an answering statement in duplicate with the AAA within seven days after notice from the AAA, simultaneously sending a copy to the other party. If a monetary claim is made in the answer, the appropriate filing fee provided in Section 48 shall be forwarded to the AAA with the answer. If no answer is filed within the stated time, it will be assumed that the claim is denied. Failure to file an answer shall not operate to delay the arbitration.

Unless the AAA in its discretion determines otherwise, the Expedited Procedures of Construction Industry Arbitration shall be applied in any case where the total claim of any party does not exceed $15,000, exclusive of interest and arbitration costs. Parties may also agree to the Expedited Procedures in cases involving claims in excess of $15,000. The Expedited Procedures shall be applied as described in Sections 54 through 58 of these rules.

8. Change of Claim or Counterclaim

After filing of the claim or counterclaim, if either party desires to make any new or different claim or counterclaim, the same shall be made in writing and filed with the AAA, and a copy thereof shall be mailed to the other party, who shall have a period of seven days from the date of such mailing within which to file an answer with the AAA. After the arbitrator is appointed, however, no new or different claim or counterclaim may be submitted without the arbitrator's consent.

9. Initiation under a Submission

Parties to any existing dispute may commence an arbitration under these rules by filing at any regional office two copies of a written agreement to arbitrate under these rules (Submission), signed by the parties. It shall contain a statement of the matter in dispute, the amount of money involved, and the remedy sought, together with the appropriate filing fee as provided in Section 48.

10. Administrative Conference and Preliminary Hearing

At the request of the parties or at the discretion of the AAA, an administrative conference with the administrator and the parties or their counsel will be scheduled in appropriate cases to arrange for an exchange of information and the stipulation of uncontested facts to expedite the arbitration proceedings.

In large or complex cases, unless the parties agree otherwise, the AAA may schedule a preliminary hearing with the arbitrator(s) and the parties to establish the extent of and schedule for the production of relevant documents and other information, the identification of any witnesses to be called, and the scheduling of further hearings to resolve the dispute.

11. Fixing of Locale

The parties may mutually agree on the locale where the arbitration is to be held. If any party requests that the hearing be held in a specific locale and the other party files no objection thereto within seven days after notice of the request has been mailed to it, the locale shall be the one requested. If a party objects to the locale requested by the other party, the AAA shall have the power to determine the locale and its decision shall be final and binding.

12. Qualifications of Arbitrators

Any arbitrator appointed pursuant to Section 13 or Section 15 shall be neutral, subject to disquali-

fication for the reasons specified in Section 19. If the agreement of the parties names an arbitrator or specifies any other method of appointing an arbitrator, or if the parties specifically so agree in writing, such arbitrator shall not be subject to disqualification for said reasons.

13. Appointment from Panel

If the parties have not appointed an arbitrator and have not provided any other method of appointment, the arbitrator shall be appointed in the following manner: Immediately after the filing of the Demand or Submission, the AAA shall submit simultaneously to each party to the dispute an identical list of names of persons chosen from the Panel. Each party to the dispute shall have seven days from the mailing date in which to cross off any names to which it objects, number the remaining names to indicate the order of preference, and return the list to the AAA. If a party does not return the list within the time specified, all persons named therein shall be deemed acceptable. From among the persons who have been approved on both lists, and in accordance with the designated order of mutual preference, the AAA shall invite the acceptance of an arbitrator to serve. If the parties fail to agree on any of the persons named, if acceptable arbitrators are unable to act, or if, for any other reason, the appointment cannot be made from the submitted lists, the AAA shall have the power to make the appointment from among other members of the Panel without the submission of any additional list.

14. Direct Appointment by Parties

If the agreement of the parties names an arbitrator or specifies a method of appointing an arbitrator, that designation or method shall be followed. The notice of appointment, with the name and address of such arbitrator, shall be filed with the AAA by the appointing party. Upon the request of any such appointing party, the AAA shall submit a list of members of the Panel from which that party may make the appointment.

If the agreement specifies a period of time within which an arbitrator shall be appointed and any party fails to make such appointment within that period, the AAA shall make the appointment.

If no period of time is specified in the agreement, the AAA shall notify the parties to make the appointment and if, within seven days after mailing of such notice, such arbitrator has not been so appointed, the AAA shall make the appointment.

15. Appointment of Arbitrator by Party-Appointed Arbitrators

If the parties have appointed their party-appointed arbitrators or if either or both of them have been appointed as provided in Section 14, and have authorized such arbitrators to appoint an arbitrator within a specified time and no appointment is made within that time or any agreed extension thereof, the AAA shall appoint the arbitrator who shall act as chairperson.

If no period of time is specified for appointment of the third arbitrator and the party-appointed arbitrators do not make the appointment within seven days from the date of the appointment of the last party-appointed arbitrator, the AAA shall appoint the arbitrator who shall act as chairperson.

If the parties have agreed that their party-appointed arbitrators shall appoint the arbitrator from the Panel, the AAA shall furnish to the party-appointed arbitrators, in the manner prescribed in Section 13, a list selected from the Panel, and the appointment of the arbitrator shall be made as prescribed in that section.

16. Nationality of Arbitrator in International Arbitration

If one of the parties is a national or resident of a country other than the United States, the arbitrator shall, upon the request of either party, be appointed from among the nationals of a country other than that of any of the parties.

17. Number of Arbitrators

If the arbitration agreement does not specify the number of arbitrators, the dispute shall be heard and determined by one arbitrator, unless the AAA, in its discretion, directs that a greater number of arbitrators be appointed.

18. Notice to Arbitrator of Appointment

Notice of the appointment of the arbitrator, whether appointed by the parties or by the AAA, shall be mailed to the arbitrator by the AAA, together with a copy of these rules, and

the signed acceptance of the arbitrator shall be filed prior to the opening of the first hearing.

19. Disclosure and Challenge Procedure

A person appointed as neutral arbitrator shall disclose to the AAA any circumstance likely to affect his or her impartiality, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their counsel. Upon receipt of such information from such arbitrator or other source, the AAA shall communicate such information to the parties and, if it deems it appropriate to do so, to the arbitrator and others. Thereafter, the AAA shall determine whether the arbitrator should be disqualified and shall inform the parties of its decision, which shall be conclusive.

20. Vacancies

If any arbitrator should resign, die, withdraw, refuse, be disqualified, or be unable to perform the duties of the office, the AAA shall, on proof satisfactory to it, declare the office vacant. Vacancies shall be filled in accordance with the applicable provisions of these rules. In the event of a vacancy in a panel of arbitrators, the remaining arbitrator or arbitrators may continue with the hearing and determination of the controversy, unless the parties agree otherwise.

21. Time and Place

The arbitrator shall fix the time and place for each hearing. The AAA shall mail to each party notice thereof at least five days in advance, unless the parties by mutual agreement waive such notice or modify the terms thereof.

22. Representation by Counsel

Any party may be represented by counsel. A party intending to be so represented shall notify the other party and the AAA of the name and address of counsel at least three days prior to the date set for the hearing at which counsel is first to appear. When an arbitration is initiated by counsel, or when an attorney replies for the other party, such notice is deemed to have been given.

23. Stenographic Record

Any party wishing a stenographic record shall make the arrangements directly with a stenographer and shall notify the other parties of such arrangements in advance of the hearing. The requesting party or parties shall pay the cost of such record.

24. Interpreters

Any party wishing an interpreter shall make all arrangements directly with the interpreter and shall assume the costs of such service.

25. Attendance at Hearings

Any person having a direct interest in the arbitration is entitled to attend hearings. The arbitrator shall otherwise have the power to require the exclusion of any witness, other than a party or other essential person, during the testimony of any other witness. It shall be discretionary with the arbitrator to determine the propriety of the attendance of any other person.

26. Adjournments

The arbitrator may adjourn the hearing, and shall take such adjournment when all of the parties agree thereto.

27. Oaths

Before proceeding with the first hearing or with the examination of the file, each arbitrator may take an oath of office and, if required by law, shall do so. The arbitrator has discretion to require witnesses to testify under oath administered by any duly qualified person and, if required by law or demanded by either party, shall do so.

28. Majority Decision

Whenever there is more than one arbitrator, all decisions of the arbitrators must be by at least a majority. The award must also be made by at least a majority unless the concurrence of all is expressly required by the arbitration agreement or by law.

29. Order of Proceedings

A hearing shall be opened by the filing of the oath of the arbitrator, where required; by the recording of the place, time, and date of the hearing and the presence of the arbitrator, the parties, and counsel, if any; and by the receipt by the arbitrator of the statement of the claim and the answer, if any.

The arbitrator may, at the beginning of the hearing, ask for statements clarifying the issues involved. In some cases, part or all of the above will have

been accomplished at the preliminary hearing conducted by the arbitrator(s) pursuant to Section 10.

The complaining party shall then present its claims, proofs, and witnesses, who shall submit to questions or other examination. The defending party shall then present its defenses, proofs, and witnesses, who shall submit to questions or other examination. The arbitrator has the discretion to vary this procedure but shall afford full and equal opportunity to the parties for the presentation of any material or relevant proofs.

Exhibits, when offered by either party, may be received in evidence by the arbitrator.

The names and addresses of all witnesses and the exhibits in the order received shall be made a part of the record.

30. Arbitration in the Absence of a Party or Counsel

Unless the law provides to the contrary, the arbitration may proceed in the absence of any party or counsel who, after due notice, fails to be present or fails to obtain an adjournment. An award shall not be made solely on the default of a party. The arbitrator shall require the party who is present to submit such evidence as is deemed necessary for the making of an award.

31. Evidence

The parties may offer such evidence as is relevant and material to the dispute and shall produce such additional evidence as the arbitrator may deem necessary to an understanding and determination of the dispute. An arbitrator authorized by law to subpoena witnesses or documents may do so upon the request of any party or independently.

The arbitrator shall be the judge of the relevance and materiality of the evidence offered, and conformity to legal rules of evidence shall not be necessary. All evidence shall be taken in the presence of all of the arbitrators and all of the parties, except where any of the parties is absent in default or has waived the right to be present.

32. Evidence by Affidavit and Filing of Documents

The arbitrator may receive and consider the evidence of witnesses by affidavit, giving it such weight as seems appropriate after consideration of any objection made to its admission.

All documents not filed with the arbitrator at the hearing, but arranged for at the hearing or subsequently by agreement of the parties, shall be filed with the AAA for transmission to the arbitrator. All parties shall be afforded an opportunity to examine such documents.

33. Inspection or Investigation

An arbitrator finding it necessary to make an inspection or investigation in connection with the arbitration shall direct the AAA to so advise the parties. The arbitrator shall set the time and the AAA shall notify the parties thereof. Any party who so desires may be present at such inspection or investigation. In the event that one or both parties are not present at the inspection or investigation, the arbitrator shall make a verbal or written report to the parties and afford them an opportunity to comment.

34. Conservation of Property

The arbitrator may issue such orders as may be deemed necessary to safeguard the property that is the subject matter of the arbitration without prejudice to the rights of the parties or to the final determination of the dispute.

35. Closing of Hearings

The arbitrator shall specifically inquire of the parties whether they have any further proofs to offer or witnesses to be heard. Upon receiving negative replies, the arbitrator shall declare the hearings closed and a minute thereof shall be recorded. If briefs are to be filed, the hearings shall be declared closed as of the final date set by the arbitrator for the receipt of briefs. If documents are to be filed as provided for in Section 32 and the date set for their receipt is later than that set for the receipt of briefs, the later date shall be the date of closing the hearings. The time limit within which the arbitrator is required to make the award shall commence to run, in the absence of other agreements by the parties, upon the closing of the hearings.

36. Reopening of Hearings

The hearings may be reopened by the arbitrator at will or upon application of a party at any time before the award is made. If reopening the

hearings would prevent the making of the award within the specific time agreed on by the parties in the contract out of which the controversy has arisen, the matter may not be reopened, unless the parties agree upon the extension of such time. When no specific date is fixed in the contract, the arbitrator may reopen the hearings, and the arbitrator shall have thirty days from the closing of the reopened hearings within which to make an award.

37. Waiver of Oral Hearings

The parties may, by written agreement, provide for the waiver of oral hearings. If the parties are unable to agree as to the procedure, the AAA shall specify a fair and equitable procedure.

38. Waiver of Rules

Any party who proceeds with the arbitration after knowledge that any provision or requirement of these rules has not been complied with and who fails to state an objection thereto in writing shall be deemed to have waived the right to object.

39. Extensions of Time

The parties may modify any period of time by mutual agreement. The AAA may for good cause extend any period of time established by these rules, except the time for making the award. The AAA shall notify the parties of any such extension and its reason therefor.

40. Communication with Arbitrator and Serving of Notice

There shall be no communication between the parties and an arbitrator other than at oral hearings. Any other oral or written communication from the parties to the arbitrator shall be directed to the AAA for transmittal to the arbitrator.

Each party to an agreement that provides for arbitration under these rules shall be deemed to have consented that any papers, notices, or process necessary or proper for the initiation or continuation of an arbitration under these rules, for any court action in connection therewith, or for the entry of judgment on any award made thereunder may be served upon such party by mail addressed to such party or its attorney at the last known address or by personal service, within or without the state wherein the arbitration is to be held (whether such party be within or without the United States of America), provided that reasonable opportunity to be heard with regard thereto has been granted to such party.

41. Time of Award

The award shall be made promptly by the arbitrator and, unless otherwise agreed by the parties or specified by law, no later than thirty days from the date of closing the hearings, or, if oral hearings have been waived, from the date of transmitting the final statements and proofs to the arbitrator.

42. Form of Award

The award shall be in writing and shall be signed either by the sole arbitrator or by at least a majority if there be more than one. It shall be executed in the manner required by law.

43. Scope of Award

The arbitrator may grant any remedy or relief that is just, equitable, and within the terms of the agreement of the parties. The arbitrator shall, in the award, assess arbitration fees and expenses as provided in Sections 48 and 50 equally or in favor of any party and, in the event any administrative fees or expenses are due the AAA, in favor of the AAA.

44. Award upon Settlement

If the parties settle their dispute during the course of the arbitration, the arbitrator may, upon their request, set forth the terms of the agreed settlement in an award.

45. Delivery of Award to Parties

Parties shall accept as legal delivery of the award the placing of the award or a true copy thereof in the mail by the AAA, addressed to such party at its last known address or to its attorney; personal service of the award; or the filing of the award in any other manner that may be prescribed by law.

46. Release of Documents for Judicial Proceedings

The AAA shall, upon the written request of a party, furnish to such party, at its expense, certified facsimiles of any papers in the AAA's possession that may be required in judicial proceedings relating to the arbitration.

47. Applications to Court and Exclusion of Liability

(a) No judicial proceeding by a party relating to the subject matter of the arbitration shall be deemed a waiver of the party's right to arbitrate.

(b) Neither the AAA nor any arbitrator in a proceeding under these rules is a necessary party in judicial proceedings relating to the arbitration.

(c) Parties to these rules shall be deemed to have consented that judgment upon the award rendered by the arbitrator(s) may be entered in any federal or state court having jurisdiction thereof.

(d) Neither the AAA nor any arbitrator shall be liable to any party for any act or omission in connection with any arbitration conducted under these rules.

48. Administrative Fees

As a not-for-profit organization, the AAA shall prescribe an Administrative Fee Schedule and a Refund Schedule to compensate it for the cost of providing administrative services. The schedule in effect at the time of filing or the time of refund shall be applicable.

The administrative fees shall be advanced by the initiating party or parties in accordance with the Administrative Fee Schedule, subject to final apportionment by the arbitrator in the award.

When a matter is withdrawn or settled, the refund shall be made in accordance with the Refund Schedule.

The AAA may, in the event of extreme hardship on the part of any party, defer or reduce the administrative fee.

49. Fees when Oral Hearings Are Waived

Where all oral hearings are waived under Section 37, the Administrative Fee Schedule shall apply.

50. Expenses

The expenses of witnesses for either side shall be paid by the party producing such witnesses.

The cost of the stenographic record, if any is made, and all transcripts thereof shall be prorated equally between the parties ordering copies unless they shall otherwise agree, and shall be paid for by the responsible parties directly to the reporting agency.

All other expenses of the arbitration, including required traveling and other expenses of the arbitrator and of AAA representatives and the expenses of any witness and the cost of any proof produced at the direct request of the arbitrator, shall be borne equally by the parties unless they agree otherwise or unless the arbitrator in the award assesses such expenses or any part thereof against any specified party or parties.

51. Arbitrator's Fee

Unless the parties agree to terms of compensation, members of the National Panel of Construction Industry Arbitrators will serve without compensation for the first day of service.

Thereafter, compensation shall be based upon the amount of service involved and the number of hearings. An appropriate daily rate and other arrangements will be discussed by the administrator with the parties and the arbitrator(s). If the parties fail to agree to the terms of compensation, an appropriate rate shall be established by the AAA and communicated in writing to the parties.

Any arrangement for the compensation of an arbitrator shall be made through the AAA and not directly between the parties and the arbitrator. The terms of compensation of neutral arbitrators on a Tribunal shall be identical.

52. Deposits

The AAA may require the parties to deposit in advance such sums of money as it deems necessary to defray the expense of the arbitration, including the arbitrator's fee, if any, and shall render an accounting to the parties and return any unexpended balance.

53. Interpretation and Application of Rules

The arbitrator shall interpret and apply these rules insofar as they relate to the arbitrator's powers and duties. When there is more than one arbitrator and a difference arises among them concerning the meaning or application of any such rule, it shall be decided by a majority vote. If that is unobtainable, either an arbitrator or a party may refer the question to the AAA for final decision. All other rules shall be interpreted and applied by the AAA.

EXPEDITED PROCEDURES

54. Notice by Telephone

The parties shall accept all notices from the AAA by telephone. Such notices by the AAA shall subsequently be confirmed in writing to the parties. Notwithstanding the failure to confirm in writing any notice or objection hereunder, the proceeding shall nonetheless be valid if notice has, in fact, been given by telephone.

55. Appointment and Qualifications of Arbitrators

The AAA shall submit simultaneously to each party to the dispute an identical list of five members of the Panel, from which one arbitrator shall be appointed. Each party shall have the right to strike two names from the list on a peremptory basis. The list is returnable to the AAA within ten days from the date of mailing. If, for any reason, the appointment cannot be made from the list, the AAA shall have the authority to make the appointment from among other members of the Panel without the submission of additional lists. Such appointment shall be subject to disqualification for the reasons specified in Section 19. The parties shall be given notice by telephone by the AAA of the appointment of the arbitrator. The parties shall notify the AAA, by telephone and within seven days, of any objection to the arbitrator appointed. Any objection by a party to such arbitrator shall be confirmed in writing to the AAA with a copy to the other party(ies).

56. Time and Place of Hearing

The arbitrator shall fix the date, time, and place of the hearing. The AAA will notify the parties by telephone, seven days in advance of the hearing date. Formal Notice of Hearing will be sent by the AAA to the parties.

57. The Hearing

Generally, the hearing and presentations of the parties shall be completed within one day. The arbitrator may, for good cause shown, schedule an additional hearing to be held within five days.

58. Time of Award

Unless otherwise agreed to by the parties, the award shall be rendered no later than five business days from the date of the closing of the hearing.

ADMINISTRATIVE FEE SCHEDULE

A filing fee of $300 will be paid at the time a case is filed. The balance of the administrative fee is based on the amount of each claim and counterclaim as disclosed when the claim or counterclaim is filed. This balance is due and payable ninety days after the AAA's commencement of administration, or prior to the date of the first hearing, whichever occurs first. If a case is settled or withdrawn, the Refund Schedule shall apply. When oral hearings are waived under Section 37, the Administrative Fee Schedule shall still apply.

Amount of Claim	Fee
$1 to $25,000	3% ($300 minimum)
$25,000 to $50,000	$750, plus 2% of excess over $25,000
$50,000 to $100,000	$1,250, plus 1% of excess over $50,000
$100,000 to $200,000	$1,750, plus .5% of excess over $100,000
$200,000 to $5,000,000	$2,250, plus .1% of excess over $200,000
$5,000,000 to $50,000,000	$14,250, plus .1% of excess over $5,000,000

Where the claim or counterclaim exceeds $50 million, there is no additional administrative fee.

When no amount can be stated at the time of filing, the administrative fee is $750, subject to adjustment in accordance with the above schedule as soon as an amount can be disclosed.

In those claims and counterclaims which are not for a monetary amount, an appropriate administrative fee will be determined by the AAA.

If there are more than two parties represented in the arbitration, an additional 10% of the administrative fee will be due for each additional represented party.

ADJOURNMENT FEES

Sole-Arbitrator Cases

$50 is payable by a party first causing an adjournment of any scheduled hearing.

$100 is payable by a party causing its second or subsequent adjournment of any scheduled hearing.

Three-Arbitrator Cases

$75 is payable by a party first causing an adjournment of any scheduled hearing.

$150 is payable by a party causing its second or subsequent adjournment of any scheduled hearing.

ADDITIONAL HEARING FEES

$75 is payable by each party for each hearing after the first hearing that is either clerked by the AAA or held in a hearing room provided by the AAA.

REFUND SCHEDULE

The Refund Schedule is based on the administrative fee due on a claim or counterclaim asserted by a party.

If the AAA is notified that a case has been settled or withdrawn before a list of arbitrators has been sent out, all of the fee in excess of $300 will be refunded.

If the AAA is notified that a case has been settled or withdrawn before the original due date for the return of the first list, two thirds of the fee in excess of $300 will be refunded.

If the AAA is notified that a case has been settled or withdrawn during or following an administrative conference or at least two business days before the initial date and time set for the first hearing, one third of the fee in excess of $300 will be refunded.

There will be no refund after a preliminary hearing or mediation conference has been held; where a claim or counterclaim was filed as an undetermined claim and remained so at the time of settlement or withdrawal; or where a consent award was issued by the arbitrators.

THE UNITED STATES ARBITRATION ACT

Title 9, U.S. Code §§1-14, first enacted February 12, 1925 (43 Stat. 883), codified July 30, 1947 (61 Stat. 669), and amended September 3, 1954 (68 Stat. 1233). Chapter 2 added July 31, 1970 (84 Stat. 692).

ARBITRATION

Chapter 1.—GENERAL PROVISIONS

Chapter 2.—CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

CHAPTER 1.—GENERAL PROVISIONS

§1. "Maritime Transactions," and "Commerce" Defined; Exceptions to Operation of Title

"Maritime transactions," as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs of vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce," as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

§2. Validity, Irrevocability, and Enforcement of Agreements to Arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

§3. Stay of Proceedings Where Issue Therein Referable to Arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is

referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

§4. Failure to Arbitrate Under Agreement; Petition to United States Court Having Jurisdiction for Order to Compel Arbitration; Notice and Service Thereof; Hearing and Determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

§5. Appointment of Arbitrators or Umpire

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

§6. Application Heard as Motion

Any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided.

§7. Witnesses Before Arbitrators; Fees; Compelling Attendance

The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name

of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States court in and for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided on February 12, 1925, for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

§8. Proceedings Begun by Libel in Admiralty and Seizure of Vessel or Property

If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award.

§9. Award of Arbitrators; Confirmation; Jurisdiction; Procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

§10. Same; Vacation; Grounds; Rehearing

In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion direct a rehearing by the arbitrators.

§11. Same; Modification or Correction; Grounds; Order

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration—

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

§12. Notice of Motions to Vacate or Modify; Service; Stay of Proceedings

Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court. For the purposes of the motion any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award.

§13. Papers Filed with Order on Motions; Judgment; Docketing; Force and Effect; Enforcement

The party moving for an order confirming, modifying, or correcting an award shall, at the time such order is filed with the clerk for the entry of judgment thereon, also file the following papers with the clerk:

(a) The agreement; the selection or appointment, if any, of an additional arbitrator or umpire; and each written extension of the time, if any, within which to make the award.

(b) The award.

(c) Each notice, affidavit, or other paper used upon an application to confirm, modify, or correct the award, and a copy of each order of the court upon such an application.

The judgment shall be docketed as if it was rendered in an action.

The judgment so entered shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered.

§14. Contracts Not Affected

This title shall not apply to contracts made prior to January 1, 1926.

CHAPTER 2.—CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

§201. Enforcement of Convention

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter.

§202. Agreement or Award Falling Under the Convention

An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose

of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States.

§203. Jurisdiction; Amount in Controversy

An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States (including the courts enumerated in section 460 of title 28) shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy.

§204. Venue

An action or proceeding over which the district courts have jurisdiction pursuant to section 203 of this title may be brought in any such court in which save for the arbitration agreement an action or proceeding with respect to the controversy between the parties could be brought, or in such court for the district and division which embraces the place designated in the agreement as the place of arbitration if such place is within the United States.

§205. Removal of Cases from State Courts

Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention, the defendant or the defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States for the district and division embracing the place where the action or proceeding is pending. The procedure for removal of causes otherwise provided by law shall apply, except that the ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal. For the purposes of Chapter 1 of this title any action or proceeding removed under this section shall be deemed to have been brought in the district court to which it is removed.

§206. Order to Compel Arbitration; Appointment of Arbitrators

A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States. Such court may also appoint arbitrators in accordance with the provisions of the agreement.

§207. Award of Arbitrators; Confirmation: Jurisdiction; Proceeding

Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration. The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.

§208. *Chapter 1; Residual Application*

Chapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States.

Appendix C

Modern Arbitration Statutes in the United States

United States Arbitration Act, 9 USC, § 1 *et seq.*

Alaska Stat., § 09.43.010 *et seq.**
Arizona Rev. Stat., § 12-1501 *et seq.**
Arkansas Stat. Ann., § 34-511 *et seq.**
California Code Civ. Proc., § 1280 *et seq.*
Colorado Rev. Stat., § 13-22-201 *et seq.**
Connecticut Gen. Stat. Ann., § 52-408 *et seq.*
Delaware Code Ann., Title 10, § 5701 *et seq.**
District of Columbia Code, Title 16, § 16-4301 *et seq.**
Florida Stat. Ann., § 682.01 *et seq.*
Georgia Code, § 9-9-80 *et seq.*†
Hawaii Rev. Stat., § 658-1 *et seq.**
Idaho Code, § 7-901 *et seq.**
Illinois Rev. Stat., Chapter 10, § 101 *et seq.**
Indiana Code Ann., § 34-4-2-1 *et seq.**
Iowa Code, § 679A.1 *et seq.**
Kansas Stat., § 5-401 *et seq.**
Kentucky Rev. Stat., § 417.045 *et seq.**
Louisiana Rev. Stat., § 9:4201 *et seq.**
Maine Rev. Stat. Ann., Title 14, § 5927 *et seq.**
Maryland Cts. & Jud. Proc. Code Ann., § 3-201 *et seq.**
Massachusetts Ann. Laws, Chapter 251, § 1 *et seq.**
Michigan Comp. Laws, § 600.5001 *et seq.*
Minnesota Stat. Ann., § 572.08 *et seq.**
Mississippi Code Ann., § 11-15-1 *et seq.**†
Missouri Ann. Stat., § 435.350 *et seq.**
Rev. Montana Code Ann., § 27-5-111 *et seq.**
Nebraska Rev. Stat., § 25-2601 *et seq.**
Nevada Rev. Stat., § 38.015 *et seq.**
New Hampshire Rev. Stat. Ann., § 542:1 *et seq.**
New Jersey Stat. Ann., § 2A:24-1 *et seq.*
New Mexico Stat. Ann., § 44-7-1 *et seq.**
New York Civ. Prac. Law, § 7501 *et seq.*
North Carolina Gen. Stat., § 1-567.1 *et seq.**
North Dakota Cent. Code, § 32-29.2-01 *et seq.**
Ohio Rev. Code Ann., § 2711.01 *et seq.*
Oklahoma Stat. Ann., Title 15, § 801 *et seq.**
Oregon Rev. Stat., § 33.210 *et seq.*
Pennsylvania Stat. Ann., Title 42, § 7301 *et seq.**
Puerto Rico Laws Ann., Title 32, § 3201 *et seq.*
Rhode Island Gen. Laws, § 10-3-1 *et seq.*
South Carolina Code, § 15-48-10 *et seq.**
South Dakota Codified Laws Ann., § 21-25A-1 *et seq.**
Tennessee Code Ann., § 29-5-302 *et seq.**
Texas Rev. Civ. Stat. Ann., Title 10, Article 224 *et seq.**
Utah Code Ann., § 78-31a-1 *et seq.*
Vermont Stat. Ann., Title 12, § 5651 *et seq.**
Virginia Code Ann., § 8.01-577 *et seq.**
Washington Rev. Code Ann., § 7.04.010 *et seq.*
Wisconsin Stat. Ann., § 788.01 *et seq.*
Wyoming Stat., § 1-36-101 *et seq.**

Modern statutes are those enforcing agreements to arbitrate existing controversies and any arising in the future. The other state arbitration statutes (those of Alabama and West Virginia) apply to existing controversies only (the Code of Alabama, § 6, and the Code of West Virginia, § 55).
* Referred to as the Uniform Arbitration Act.
† Applicable to construction disputes only.

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Appendix E

The following questionnaire concerning arbitration has been developed jointly with the American Arbitration Association (AAA) in support of research being conducted to ascertain the degree of support for arbitration held by the owners, contractors, and architects/engineers who have used the process.

1. How many times have you participated in a construction arbitration as:

a. the respondent? _____

Were these administered by the AAA? Yes ____ No ____

b. the claimant? _____

Were these administered by the AAA? Yes ____ No ____

2. Was a provision for arbitration provided in the contract documents? Yes ____ No ____

3. Were you represented by an attorney? Yes ____ No ____

4. How were the arbitrators selected or appointed?

5. Is the method by which the AAA describes the qualifications of potential arbitrators satisfactory?

Yes ____ No ____

Comments:

6. Have you or your attorney ever participated in a preliminary hearing before the panel of arbitrators? Yes ____ No ____

If yes, was it helpful? Yes ____ No ____

Comments:

7. Should specific time schedules or rules be imposed on the arbitration procedures to promptly resolve disputes?

Yes ____ No ____

Comments:

8. Should arbitration proceedings be continuous (consecutive days)?

Yes ____ No ____

Even if presentation time is limited to meet schedule?

Yes ____ No ____

9. a. Should the arbitration rules provide that the decision of the arbitrators is final, binding, and conclusive except in cases of fraud, arbitrariness, and capriciousness of the arbitrators?
Yes ____ No ____

b. Or, should the arbitration rules provide for a broader scope of appeal? Yes ____ No ____

Comments:

10. Has the fee structure of the AAA influenced your decision to pursue arbitration?

Yes - affirmatively _____

Yes - negatively _____

No _____

11. Value of contract, including change orders: _____

12. a. Level of award requested: _____

b. Level of actual award: _____

13. Would punitive damages have been sought if the case had gone to trial? Yes ____ No ____

14. Has it been your experience that arbitrators unjustly render a compromise decision? Yes ____ No ____

Comments:

15. Should the arbitration rules provide that arbitrators are permitted to award attorney's fees? Yes ____ No ____

16. Please rank each factor with the description which best characterizes your overall experience with the arbitration process.

Excellent - 5; Good - 4; Fair - 3; Poor - 2; Very Poor - 1

a. Speed

____ i. Time in which the case was first scheduled for hearing

____ ii. Speed of actual hearing

____ iii. Speed of arbitrators' decision

b. ____ As an economic means of resolving disputes

c. ____ Qualifications of arbitrators

d. ____ Fairness of decision

17. How long did it take from the filing for arbitration until the final award? _____

18. If there was an abnormal delay in the arbitration proceedings, was it primarily due to:

a. arbitrators Yes ____ No ____

b. attorneys Yes ____ No ____

c. claimant or respondent Yes ____ No ____

d. collateral litigation Yes ____ No ____

e. type of problem being arbitrated Yes ____ No ____

f. administrative problems Yes ____ No ____

19. Should the arbitration rules require discovery prior to the arbitration hearing? Yes ____ No ____

20. Should the arbitration rules give the arbitrators the specific power to impose sanctions for failure to comply with the arbitration rules with respect to arbitration matters?

Yes ____ No ____

21. Should arbitrators be required to write findings of fact? Yes ____ No ____

22. In your opinion, what is the major advantage of arbitration as a means to resolve disputes?

23. In your opinion, what is the major disadvantage of arbitration as a means to resolve disputes?

24. Would you use arbitration again? Yes ____ No ____

If no, why not?

25. Have you ever recommended arbitration to others?

Yes ____ No ____

Comments:

26. Are there any other general comments you wish to make?