Resolving Construction Disputes through Baseball Arbitration

Lochlin B. Samples

Professional baseball has successfully implemented a dispute-resolution procedure that has both decreased the costs of arbitration and expedited resolution of disputes. The construction industry would benefit from the incorporation and adaptation of the “baseball arbitration” procedure in construction disputes. This article is not theoretical; it is based on experience adapting baseball arbitration concepts to construction disputes.

General Overview of Baseball Arbitration

Baseball arbitration arose as an alternative to free agency for professional baseball players. Instead of free agency, players and teams could request salary arbitration utilizing a three-member panel. Both parties would put on evidence supporting the requested salary amount, which would depend on factors such as overall team record, player performance, fan appeal, past compensation, mental or physical defects, and comparative salaries. Both parties then submit their own proposed salary numbers.

While the procedure up to the presentation of evidence is virtually identical to standard arbitration, baseball arbitration imposes strict limits on the panel’s ability to make an award. The panel is only empowered to do one of two actions: accept the player’s proposed salary or accept the team’s proposed salary. The panel is not empowered to split the baby or award a salary other than the amount requested by the player or the team. The award is final and is issued without explanation.

Benefits of Baseball Arbitration for Construction Disputes

Utilizing the all-or-nothing approach of baseball arbitration along with the issuance of a final decision without explanation both present useful options for incorporation into the construction industry. The all-or-nothing approach—i.e., the panel is only empowered to award what the petitioner or the respondent requests—forces both parties to perform a realistic assessment of the claimed damages. By forcing the parties to examine, in detail, the claim amounts, wise parties will consider the risks and benefits of claiming certain amounts. Simply put, it rewards parties for approaching disputes with a degree of reasonableness.

By rewarding the parties for reasonable claims, while also penalizing parties for unreasonable positions, the process helps eliminate inflated or bogus claims. Today, it is far too common to see inflated claims in construction arbitration. Whether this stems from concerns over arbitrators “splitting the baby,” poor claim management, or other causes, the inflated claims and meritless assertions only serve to delay the proceedings, causing all parties to incur additional expenses that could easily be avoided through the use of reasoned claims. Although some parties will inevitably choose to continue to “swing for the fence” by asserting riskier and less supported claims, the baseball arbitration system will be more apt to reward parties that take a more
reasonable approach. A side benefit of the all-or-nothing baseball style is that it also eliminates concerns that arbitrators simply “split the baby,” because the arbitrators only have authority to award the amount requested by the prevailing party.

Baseball arbitration also encourages party decision-makers to take an in-depth look at the claim earlier, rather than later. Too often, party decision-makers are not fully briefed on the relative risks and merits of the claims until the dispute is well underway and both parties have incurred significant costs. Inclusion of baseball arbitration requires the parties to take an early and in-depth look at the relative claims as part of the initial submissions. Ultimately, this results in a significant closing of the gap between the parties, which encourages settlement.

No Reasoned Decision or Explanation
Forgoing a reasoned decision is the second element worth incorporating for some construction disputes. This is particularly appealing for projects where the dispute only relates to the amount of a payment—not whether the party is entitled to a claim—and where the work is ongoing. Bypassing any reasoned decision allows the panel to quickly enter an award for either the full amount requested by the petitioner or for the full amount presented by the respondent. This elimination further assists in a speedy resolution by encouraging the parties to stick to the issues at hand. It also helps limit bad feelings on the job, as the panel simply adopts either the petitioner’s or respondent’s amount, without any explanation. The decision, which simply adopts a number, does not indicate whether the panel agrees with the arguments of the parties or not; instead, the decision indicates only that the number presented by one party was more reasonable than the number presented by the opposing party.

Drawbacks and Limitations of Baseball Arbitration in Construction Disputes
There are differences in the nature of the disputes between the construction industry and MLB salary negotiations that provide some limits on the use of baseball arbitration in construction disputes. The primary limitation is that construction disputes often involve multiple claims from numerous entities that may or may not be parties to the arbitration. Pass-through claims are particularly problematic because the presenting party in the arbitration might have limited abilities to reduce or modify the claim. For instance, consider a dispute between a general contractor and an owner related to added electrical scope work. The general contractor is passing through its electrical subcontractor’s claim against the owner in arbitration. If the arbitration is governed by baseball rules, the general contractor must choose between passing along the full amount of the claim, including elements that the general contractor may find objectionable, or reducing the claim in the arbitration, thereby exposing the general contractor to additional liability from the electrical subcontractor as well as causing harm to the subcontractor relationship. While there are ways to reduce this risk, such as requiring subcontractors to participate in the arbitration with the owner, these risks must be considered and managed at the time an agreement to arbitrate is reached.

A second drawback relates to the attorneys. To succeed in a baseball-style arbitration, the party must submit a more reasonable claim than the opponent. Depending on the nature of the claim, attorneys may be required to inform clients that the risk of asserting unsupported claim amounts outweighs the reward of asserting the claim. This can lead to hard conversations between the attorney and client about the right amount to put forward.

Recommendations for Use of Baseball Arbitration
Baseball arbitration works best in the construction industry when the dispute is between two parties and the claims do not involve any significant third-party amounts or interference. For instance, scope claims between a general contractor and subcontractor are good candidates for baseball arbitration, as are payment claims between general contractors and subcontractors. For owners, baseball arbitration is often difficult with a general contractor due to the prevalence of subcontractor claims; however, the owner may benefit from baseball arbitration with its designers or design team. While the process can work with multi-party claims, including pass-through claims from subcontractors, additional steps must be taken, particularly for the general contractor, in order to encourage overall fairness.

Additional Considerations
Every project and dispute presents its own unique challenges and requires an independent evaluation. What follows are some general considerations attorneys should consider when determining whether to use baseball arbitration as well as when drafting the arbitration agreement:

When do the parties have to submit their claim numbers, and can the numbers be subsequently amended? The parties should decide both when the claim amounts have to be submitted as well as a deadline for revising the numbers, if any. Allowing revisions encourages the parties to make adjustments for additional information; however, it can also add to the cost of the arbitration. The parties should also decide whether the revisions allow new claims to be added or simply current claim amounts to be revised.

Are there multiple claims from each party? If so,
is the panel empowered to go claim by claim, or must the panel award the final number of either the petitioner or respondent?

Are there subcontractor claims or pass-through claims? If so, what rights, if any, do the parties have to adjust the claim amount? Is the award binding on the subcontractor with the pass-through claim?

Conclusion
The construction industry could benefit from the selective incorporation of baseball arbitration concepts. Particularly in simple two-party disputes, the all-or-nothing approach encourages the parties to present reasonable offers. By encouraging the removal of less-supported components, the parties are able to focus on the core claim elements. Parties often realize that their positions are not as far apart as they initially seemed.

CONSTRUCTION LAW 101

Thank you to our law student and newly admitted attorney members! At Under Construction, we will publish articles on one or more fundamental construction law topics to get you up to speed. In this edition, we tackle the insurance tender letter and international arbitration.

Alex Chazen, Kahana & Feld LLP, in his article The Tender Letter – How to Make Sure that You Properly Trigger Coverage, lays out the five W’s (Who, What, Where, When, and Why) of the insurance tender letter. Tender early and often!

Daniel B. Swaja, Kilpatrick Townsend & Stockton LLP, in his article Global Construction Disputes – Basics on U.S. Domestic Versus International Arbitration, describes how international arbitration is different from arbitration in the United States.

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ON CORPORATE COUNSEL’S DESK

The active involvement of in-house counsel within the Forum is a fantastic benefit of being a member of the Forum. Our corporate counsel members consistently deliver first-rate articles for Under Construction. In this edition, we have three articles On Corporate Counsel’s Desk:

Preparing for Disaster: The Importance of a Business Continuity Plan, By Jennifer M. Kanady, Senior Counsel, FAC Services, LLC, Madison, WI (Division 11, Corporate Counsel). Ms. Kanady provides a checklist that you can follow to see if your client is ready for the next disaster.

A Concrete Law: The Implications of the New OSHA Silica Standards in the Construction Field, By Matthew Arvin, Lee Industrial Contracting, Nashville, TN (Division 6, Labor & Employment). A helpful overview of these standards with interesting demonstratives. Safety first!

Some In-House Views on Mediation Involving Professional Engineering Firms, By Beverly M. Tompkins, Simpson Gumpertz & Heger Inc., Waltham, MA (Division 11, Corporate Counsel). Practical tips on mediating with professional design firms.

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Jean M. Terry

Member Spotlight: Ava J. Abramowitz

This year’s Annual Meeting will feature an advocacy practicum that is sure to enhance your practice. On Wednesday, April 24, 2019, Forum member and construction-law legend Ava J. Abramowitz will present “Today’s Strategies for Negotiation Success.” In advance of the practicum, I sat down with Ava to discuss her interest in negotiations and construction law.

Ava began her legal career as an Assistant United States Attorney. Her foray into construction law came when she served as in-house counsel to the American Institute of Architects during the insurance conflict of the 1980s. It was in this role that Ava realized there was a huge disconnect between the intentions of the law and the realities of the people working in the construction industry. “It became clear that architects, engineers, and contractors didn’t know how to use the law and were feeling truly victimized by it,” she says. “I began writing to explain, as much as possible, how the law worked for them.” As Ava would say, the law “is not something to be afraid of. You can put it to work for you whenever a problem arises, whenever you negotiate.”

In so doing, Ava learned that architects and engineers often would not negotiate the negotiable, mostly because they were never taught how. “Designers and constructors in the real world are surrounded by owners, MBAs, and lawyers well-trained in negotiation. Not knowing what to do at the negotiation table puts the A/E and contractor at a distinct disadvantage even though they are the ones responsible for implementing the design and construction contracts. Furthermore, they are often surrounded by lawyers who think that, as soon as the contract is signed, they have served their client well. But excellent legal service is not defined by the lawyer, but by the client. And the measure most clients use is not how well the contract worked for any one client; what matters, what gets measured, and indeed what counts to them is how well a contract worked for them and the project.”

Realizing this disconnect in the industry, Ava wrote a book for architects and engineers on negotiation. “I wanted them to start to understand that creating and achieving great design was a collective process. What kept it going was as much their ability to negotiate and communicate as their skills at design and construction. It was their ability to noodle through problems as they arose that led to project success. No one player could do anything alone.”

These concepts of mutual respect and well-founded interdependence are central tenets in Ava’s current role as a private mediator. Mediation “doesn’t have to be mini-court; it doesn’t have to be just a stepping stone [to get a trial date], or an obstacle to a solution.” Rather, Ava encourages both sides to “flip their brain and come out of their own corner” in order to understand how they got into the dispute in the first place and discover ways to resolve it. “Many people in the construction industry want a quasi-judicial process. The reality with construction is that 80 percent of the time you are going to be working with that person again, or someone that knows you and that person, so your reputation is critical. It is in your business interest to maintain a reputation of being easy to work with. Not easy—just easy to work with. Negotiation skills are what make that possible.”

Part of that “brain flip” is understanding that a problem is an opportunity for participants to show their true worth on the project: “Money can either be spent on lawyers or it can be spent on the building.” Ava’s approach to negotiation encourages spending on the latter. “You really have to understand that people are complicated, and you’ve got to figure out where they are so that you can meet them there and help them to the next step. And to me that is the role of the mediator—not transferring offers and counteroffers from one room to the other, but helping people work through their problems so that they can move in a direction that serves their interests and needs.”

Ava’s upcoming practicum will provide an advanced course on improving negotiation skills based on research on communication and persuasion. “Lawyers are brought up to give information. That’s how you get an A. You stand up in class and you tell what the case is about, who was involved in the case, what the court had to say, and you tell and tell. Unfortunately for well-trained lawyers, outside of the jury setting, most people are not persuaded by telling. Expert negotiators know this. They persuade by asking—by helping the person figure the problem out for themselves.”

This “collective learning” approach is especially useful in the construction industry, where parties frequently work with the same people and where negotiation happens throughout the life of the project. “An expert negotiator is perceived as an expert because they routinely develop deals, the deals are routinely implemented successfully, and the parties are willing to deal with that negotiator again.” As Ava explains, “You want your client’s agreements to be implemented successfully. That is what’s critical: implementation of the deal, not mere achievement of the deal.”

Make plans to attend this special practicum today and learn how to become an expert negotiator. Tap into Ava’s insight on negotiation and revolutionize the way you negotiate, mediate, and even the way you handle day-to-day operations on your construction projects.
The Self-Critical Analysis Privilege: Under Construction or Built on Shaky Ground?

Kelly J. Bundy

Where recognized, the self-critical analysis privilege—also referred to as the self-evaluative privilege or peer-review privilege—serves as a qualified privilege to protect certain self-critical, evaluative analyses from discovery. The privilege seeks to “protect the opinions and recommendations of corporate employees engaged in the process of critical self-evaluation of the company’s policies for the purpose of improving health and safety.” In re Block Island Fishing, Inc., 323 F. Supp. 3d 158 (D. Mass. 2018). Jurisdictions that recognize the self-critical analysis privilege do so because it encourages thorough and candid self-evaluation and compliance with the law. Id. at 160 (citations omitted). Presumably, companies and individuals are more likely to reflect candidly on their own practices if the risk of such evaluations becoming discoverable or being used against them does not exist. Id. at 160–61 (citations omitted). A review and analysis of the cases recognizing and applying this privilege raises interesting questions regarding the potential applicability of the privilege in construction cases.

I. Recent Treatment of the Self-Critical Analysis Privilege.

In June 2018, the United States District Court for the District of Massachusetts addressed the applicability of the self-critical analysis privilege in Block Island Fishing. Following the collision of a fishing vessel and tanker, the owner of the fishing vessel filed suit seeking a determination limiting its liability. Block Island Fishing, 323 F. Supp. 3d at 160. The owner of the tanker later sought to limit the scope of depositions to exclude the post-accident investigation it performed by asserting the self-critical analysis privilege. Id.

Adopting the four-part test outlined in O’Connor v. Chrysler Corp., 86 F.R.D. 211, 217 (D. Mass. 1980), the District of Massachusetts found that the owner prepared the accident investigation report pursuant to an international treaty, after the accident, and in an effort to identify the root cause of the accident, possible corrective actions and preventative measures to avoid future accidents. Id. at 162 (citing O’Connor and articulating the following four “potential guideposts” for application of the privilege: “(1) materials protected have generally been those prepared for mandatory governmental reports; (2) only subjective, evaluative materials have been protected; (3) objective data in those same reports have not been protected; and (4) in sensitivity to plaintiffs’ need for such materials, courts have denied discovery only where the policy favoring exclusion has clearly outweighed plaintiffs’ need.”). The court ultimately granted the owner’s request for a protective order, subject to the following conditions: (1) the owner demonstrating it performed the post-accident investigation and prepared its report based on the expectation that the information would be kept confidential and (2) the owner divulging the objective facts obtained during the investigation and contained within the accident report. Block Island Fishing, 323 F. Supp. 3d at 163–64.

II. The Self-Critical Analysis Privilege Is Not Universally Accepted or Consistently Applied.

If the self-critical analysis privilege sounds too good to be true, it may be. Jurisdictions have not universally accepted and jurisdictions adopting the privilege have struggled to define its precise scope and applicability. Reichhold Chems., Inc. v. Textron, Inc., 157 F.R.D. 522, 524–26 (N.D. Fla 1994) (applying the privilege to documents concerning cause and effect of pollution in case arising from the Comprehensive Environmental Response, Compensation and Liability Act); Granger v. Nat’l R.R. Passenger Corp., 116 F.R.D. 507, 508 (E.D. Pa. 1987) (applying the privilege to a portion of a railroad accident report with analysis and recommendations, but not to portions concerning cause and contributing factors, in a personal injury case); In re LTV Secs. Litig., 89 F.R.D. 595, 614 (N.D. Tex. 1981) (applying the privilege to a corporation’s internal investigation in a securities fraud class action lawsuit alleging conspiracy to defraud shareholders); Scott v. City of Peoria, 280 F.R.D. 419, 423 (C.D. Ill. 2011) (acknowledging the existence of the privilege and holding internal investigative reports prepared by a police department were not privileged in a § 1983 action); Bredice v. Doctor’s Hosp., Inc., 50 F.R.D. 249 (D.D.C. 1970) (internal evaluations of patient treatments privileged in a malpractice case); but see, Lewis v. Wells Fargo & Co., 266 F.R.D. 423, 439 (N.D. Cal. 2010) (privilege not available in the 9th Circuit); Roberts v. Hunt, 187 F.R.D. 71, 75 (W.D.N.Y. 1999) (relying upon United States Supreme Court opinion in Univ. of Pa. v. EEOC, 493 U.S. 182, 189 (1990), which rejected a peer review privilege as necessary to effective academic tenure decisions, and stating in dicta that neither the Second Circuit nor any other circuit has adopted the privilege); Syposs v. U.S., 63 F. Supp. 2d 301, 307–09 (W.D.N.Y. 1999) (privilege not available under Federal Tort Claims Act for medical peer review records); Zoom Imaging L.P. v. St. Luke’s Hosp. & Health Network, 513 F. Supp. 2d 411, 413–17 (E.D. Pa. 2007) (questioning existence of the privilege and declining to apply it to documents produced by consultant for organizational study of radiological practice); Witten v. AH Smith & Co., 100 F.R.D. 446 (D. Md. 1984) (affirmative action plans and EEO-1 reports discoverable and not subject to privilege). While some courts apply the four-factor test set forth in O’Connor, other courts recognizing the privilege...
do not adhere to the same requirement that such documents be created pursuant to a government mandate. See e.g., Morgan v. Union Pacific R. Co., 182 F.R.D. 261 (N.D. Ill. 1998) (differentiating between the legal standard applicable in employment cases versus tort cases with the latter not requiring a government mandate for documents to qualify as privileged).

Whether jurisdictions will apply the self-critical analysis privilege in the context of construction cases has yet to be seen. To date, most cases applying the privilege involve tort claims or other statutorily created causes of action. The applicability of the privilege in the context of a breach of contract case seems tenuous at best. Some of the cases applying the privilege raise questions concerning the admissibility of documents in certain cases, such as investigative reports and logs prepared in response to an OSHA investigation or other, statutory or regulatory government mandates. Cases like Block Island Fishing suggest that an argument for applying the privilege may hold water, but any objective data and facts in any such documents would likely have to be disclosed.

IV. Take Care when Attempting to Use the Self-Critical Analysis Privilege to Shield Information and Documents from Discovery.
In the event such a privilege was found to be applicable to construction cases, industry professionals could better evaluate safety and other practices without fear of creating a minefield of discoverable documents. While the future of the self-critical analysis privilege remains unclear, practitioners should pay specific attention to the recognition and treatment of the privilege in their jurisdictions before invoking it to shield documents from discovery. At this time, practitioners are best served relying upon more universally recognized privileges and protections—attorney-client privilege, common-interest privilege or work-product doctrine—where applicable. Notably, as a qualified privilege, a party may overcome the privilege by showing extraordinary circumstances of special need, and, like other privileges, the self-critical analysis privilege may be waived.

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Three Invitations for the New Year

Kristine A. Kubes

Tempus fugit! Time flies – how true, as we welcome 2019. I offer you three invitations as you reflect on how to invest your time in the new year.

Be an Ambassador for Civility
As construction lawyers - and as human beings - we often find ourselves interjected into intense and/or hostile situations. At those moments, I invite you to be a resource for civil dialogue and problem-solving. As lawyers, we are uniquely equipped to help people be heard and work out their differences in a civil, respectful, and professional manner. Consider the many opportunities you may have to bring civility into the equation, to support the rule of law and help resolve conflicts, not only on your next case or construction project, but in the civic arena, in your neighborhood, school, volunteer activities, or family.

Think Inclusively
Diversity and inclusion are hot topics in construction, design, and law today, as diverse persons seek to increase their ranks in these professions. For workforce development to succeed in the next century, these environments must be open – and inclusive – to a diverse work force. You might know that bias is one of the biggest foes of inclusion. The Model Rules of Professional Conduct encourage lawyers to work toward eliminating bias in the profession by refraining from conduct that would harass or discriminate. In order to do that effectively, we need to take account of ourselves – and our audience. How well do we know and understand our own biases? How aware are we of the person with whom we are communicating?

Consider your Impact
Lastly, and building on the first two ideas, I invite you to view the bigger picture of how you, as a lawyer, can impact the Forum, the profession, and the world around you in a positive way. In the Forum, we spend considerable time and effort pursuing our mission of “Building the Best Construction Lawyers,” and we do! But each of us, as an officer of the court, has sworn an oath to uphold the Constitution and support the rule of law in our society. How does that oath impact you in your daily life? We carry these responsibilities with us into every situation we encounter, not merely when we are on a construction site, in the office, or in the courtroom. Consider the positive impact that all 6000+ Forum members could have on society if we made a conscious effort to stand for respect, civility, and inclusion every day when helping people work out their differences. The impact for the good would be remarkable. Please join me.


Law Students and YLD’ers – We Want to Hear from YOU!

This is our second edition publishing Construction Law 101 articles. After change orders, tender letters, and international arbitration, we plan to tackle differing site condition claims and other fundamental topics of construction law. I encourage all of the Forum’s law student members and young lawyers to read these articles and share their thoughts and questions on Under Construction’s ABA Connect Page (www.connect.americanbar.org – search for Under Construction). Also, attend an upcoming Forum meeting. We will be in Hollywood, Florida in April and Philadelphia, PA in October. Attending these meetings are an excellent way to receive top class education but also to create important contacts for your legal career. Through various initiatives, the Forum on Construction law wants to engage and hear from our future leaders.

If you are a young lawyer in the Chicago area, attend a complimentary special “Meet to Empower” reception on March 20, 2019 starting at 5:00 P.M. at the American Bar Association, 321 N. Clark, 21st Floor Boardrooms. There will be an ethics CLE and networking reception.

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Be prepared for the worst so you can be at your best if disaster strikes. You need to be prepared to handle the complex array of legal issues and claims that rise from all types of disasters. From risk assessment to insurance claims, labor shortages to FEMA recovery efforts and more, learn how to deal with every type of natural disaster so you can prepare your clients before, during, and after catastrophe hits.

WHO SHOULD ATTEND:

Litigators and Advocates - Gain a broader understanding of the impact disasters have on your clients’ rights, duties, risks, and remedies - whether you represent owners, contractors, subcontractors, subconsultants, or suppliers.

Transactional and In-House Attorneys - Learn more about risk assessment and insurance, contracting pitfalls and negotiation strategies, as well as the ethical considerations that arise when emergency action and internal leadership are needed most.

New Construction Attorneys - Gain a broader understanding of claims avoidance and claims presentation from contract drafting and negotiation to dispute resolution techniques.

Here comes the sun. While you build your professional knowledge and skills while inside the meeting, come ready to enjoy South Florida’s newly renovated Diplomat Beach Resort outside the meeting with its many amenities, including lagoon pools, infinity deck, poolside cabanas, private beach and luxurious spa.