

*Houston Construction News*  
**Legal Column**

*“Arbitration of Construction Claims”*

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Arbitration is becoming the favored practice for resolving construction disputes. For example, most residential construction contracts contain arbitration clauses and the use of arbitration provisions in commercial construction contracts is steadily increasing. In the year 2000, approximately 200,000 arbitration claims were filed with the American Arbitration Association. By the year 2002, the number of arbitration claims filed with the AAA increased to 230,255 claims, which is an increase of over fifteen percent.

The most common contract used in commercial construction is the American Institute of Architects (“AIA”) document A201-1997. Section 4.6 concerns arbitration and is divided into six parts. This provision is being enforced with more regularity than at any time in the past. The demand for arbitration must be filed in writing. The award rendered by the arbitrator or arbitrators will be final.

The American Arbitration Association recommends the insertion of the following clause in construction contracts:

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

When a contract does not contain an arbitration provision, the parties may still agree to use arbitration to settle any dispute. In such event, the AAA recommends using the following language in the agreement to arbitrate between the parties:

“We, the undersigned parties, hereby agree to submit to arbitration, administered by the American Arbitration Association under its construction industry arbitration rules the following controversy: (cite briefly). We further agree that the above controversy may be submitted to (one) (three) arbitrator(s). We further agree that we will faithfully observe this agreement and the rules, 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 on the award.”

For more information on rules, procedures, forms, ADR guides, offices, news and events for the American Arbitration Association, you may find them at [www.ADR.ORG](http://www.ADR.ORG).

There are two scenarios under the AAA rules for selecting arbitrators. When it is agreed that one arbitrator will be used, each party provides information about the case to the AAA case manager. Using this information, the case manager will send out a list of proposed arbitrators for you to strike. You will get to strike any arbitrators that you do not believe to be appropriate for your particular case and any arbitrators who remain on the list will be numbered in the order of your preference. Once both lists are returned to the case manager, the case manager will then select the arbitrator in a single arbitration case who has the highest ranking on both strike lists. When the parties agree to use a three member panel, each party picks an arbitrator then those two arbitrators pick a third arbitrator.

**The Initial Conference** -- The arbitrator(s) will outline and discuss with the parties the method and manner of how a case will be handled during the initial conference typically held

by telephone. The arbitrator(s) will establish rules for discovery, deadlines, and a hearing date at this time.

**A Case Presentation** -- The case hearing is the final presentation of all of the evidence. It is the equivalent of a case proceeding to trial before a judge or jury. At the case presentation, the claimant will present evidence to support its position and the respondent will present evidence supporting its defense. The witnesses for each party may also be required to respond to questions from the arbitrator(s) and the adverse party. Evidence, which is ordinarily inadmissible in court, may be used at the Case Presentation. Objections are typically not allowed and arbitrators may also rely on documents that have questionable validity or are hearsay.

**The Award** -- Arbitrators typically are required to prepare an award 30 days from the end of the presentation of evidence. The period allowed for the rendering of a decision can be extended by an agreement between the parties.

In summary, investigation reveals that 75% of arbitration awards have a clear winner for one side and only in 9% of the awards, do the awards range from 41% to 60% of the amounts claimed. This is contrary to the notion that arbitrators tend to “split the baby.” Further, 71% of all counterclaims heard by the AAA in the year 2000 were denied in their totality. The number of disputes being resolved by arbitration is increasing and will likely continue to do so.