

# Construction Arbitration: *A Survey of Arbitrator's Award Consistency*

## ABSTRACT

Binding arbitration is relied upon as a dispute resolution mechanism for the construction industry. A hypothetical scenario describing a construction management dispute was distributed to more than 2,000 construction industry practitioners, each was asked to act as the binding arbitrator of the three-party construction dispute by responding to a questionnaire accompanying the scenario. This paper reports a few of the various data compilations and summarizes conclusions drawn from the 429 responses received (additional compilations will be reported in the Thesis reporting the complete study). The survey results found award consistency on one disputed point and inconsistency in the awards for the remaining issues in dispute. The individual responses suggest that construction industry arbitrators do seriously consider and evaluate disputes with the hope of determining an equitable resolution even though different arbitrators will find dramatically different resolutions to the same dispute.

## SUMMARY

A scenario describing a hypothetical construction contract dispute and a questionnaire were presented to survey participants (the scenario and the questionnaire are Appendix A). The survey requested the participant assume the role of a respected arbitrator appointed at the request of the three disputing parties. The participants were instructed to assume that their reading of the dispute scenario summarized their understanding of the facts, testimony, and information presented at the arbitration hearing. Using the questionnaire accompanying the scenario, the respondent-arbitrator then issued their award.

The questionnaire did not limit the amount or scope of the award and included open-ended questions allowing for comment and explanation. The respondents were also requested to answer a number of questions about their own industry experience and background. The survey found award consistency for one disputed issue but widely varying awards for the remaining issues in dispute.

The 430 survey responses to the approximately 2,000 surveys distributed were consistent in their award with respect to one identified issue, but inconsistent with respect to all other aspects of the award. For the purposes of the study, arbitration is defined as a binding adjudication, not subject to appeal, with a single independent arbitrator issuing an award based upon the evidence offered and presentations made at an arbitration hearing.

The survey results show that an arbitration decision requiring subjective and judgmental evaluation will find different arbitrators making different awards, even though they were

presented with the same set of facts. While consensus of opinion was lacking, most of the individual arbitrator's awards appeared to have received serious consideration and were returned with well-reasoned comments. Thus, while arbitration results may appear arbitrary, arbitrators appear not.

The survey asked the arbitrator to decide on damages for a delay dispute involving a General Contractor, Owner, and Subcontractor. The parties asked the arbitrator to determine if the Subcontractor should be compensated \$60,000 for damages incurred during a 30-day delay to a project's critical path, noting that all three parties had agreed the Subcontractor was not at fault for the delay and all had agreed the Subcontractor had incurred daily delay damages of \$2,000.

If the arbitrator found the Subcontractor was due compensation, the arbitrator was asked to decide who was ultimately responsible for payment of the Subcontractor's damages. The Arbitrator was also asked to decide if the Owner was due liquidated damages or if the General Contractor was due delay damages, both of contractually provided daily amounts, and, if so, how much.

More than four-fifths of the survey responses included at least three written lines of explanation or comment about their award. Many included much more. Of the entire group:

- 94% determined the Subcontractor should receive \$60,000.
- 34% determined the Owner and General Contractor should each pay the Subcontractor \$30,000, with no further exchange of funds between the Owner and General Contractor.
- 35% determined that the Owner was liable for at least \$60,000.
- 18% determined the General Contractor was liable for at least \$60,000.

With the 34%, 35%, and 18% spread (the other 13% found a variety of intermediate awards), the arbitrator's awards of payment responsibility appear to have no consensus. However, each arbitrator's award appeared to be well thought, each arbitrator appeared to have taken their assignment seriously and provided their own best evaluation of a resolution.

Neither the questionnaire nor the scenario included the phrase "splitting the baby." Yet, many of the responses specifically addressed that topic. Even many of the 34% of the awards where the Owner and General Contractor were assessed \$30,000 each for payment to the Subcontractor included commentary about "splitting the baby." For a wide variety of well thought explanations, those arbitrators did not consider their award to "split the baby" but rather to be an equitable resolution of a difficult fact situation.

The following presents the findings in more detail, reviews the scenario, presents the intent of the questionnaire, and offers some food for thought, further study, and CMAA meeting discussions. The survey and research were done for a Thesis as part of the Master of Dispute Resolution Degree at Pepperdine University's Straus Institute for Dispute Resolution. Additional data and conclusions may be requested of the author.

## INTRODUCTION

### **Previous Studies**

There are a number of useful and informative studies analyzing the attributes, problems, and perceptions of construction arbitration and commercial arbitration.<sup>1</sup> However, the literature survey did not find any studies polling various awards to the same construction industry dispute scenario.

A similar study (1989) of labor arbitrations found similar, inconsistent results without correlation to the arbitrator's age, experience, or gender.<sup>2</sup> A study (1998) of juries found "all of the award distributions are characterized by high variance and skew. ... Our attempt to trace the sources of this variation to individual differences in the background and attitudes of jurors met with little success."<sup>3</sup>

### **Hypothesis**

In 1997, an arbitrator training program including 20 of the leading construction industry arbitrators in the Southern California construction market used a construction dispute scenario as the focus for the day's lesson. At the end of the day, the class broke into three-person panels to practice writing and issuing awards. The issues to be decided were primarily of judgment of the propriety of each party's performance on the project and the costs, if any, which should be awarded based upon that judgment.

The awards were not consistent. One panel found entirely for the contractor, another panel found entirely for the Owner. The panel finding for the contractor was made up entirely of contractors, similarly the Owner decision was found by three folks with owner experience. While those two panels' results seemed intuitively obvious, there was also a spread of awards among the other five panels – there were significant differences between the awards of seemingly balanced panels.<sup>4</sup>

The research for a Master's Thesis examining construction arbitration allowed further exploration of these findings. The Thesis hypothesis proposed a correlation between an arbitrator's background and that arbitrator's award in a construction dispute. While the hypothesis was soundly renounced, the survey results suggest an interesting assessment of arbitration for the potential arbitration user and arbitrator.

### **The Survey**

The Survey Scenario (Appendix A) draws upon industry experience, though the situation is hypothetical. There were a significant number of questionnaire comments noting that the scenario was a familiar situation to many of the respondents. One commented: "This scenario appears to be more realistic in that not all parties think completely nor see the entire picture in real life."

The affirmations far outnumbered the very few comments noting, as an example: "More simple than any real world dispute I have ever tried." Or, another who simply wrote: "Too simplistic."

The positive and complimentary responses outnumbered the "unrealistic" responses approximately 20 to 1. This however, is likely a self-fulfilling prophecy. Those who answered were likely those who were intrigued. Those who found the scenario unbelievable, over-simplistic, or poorly presented may have so indicated by their non-response.

### **Who Was Polled?**

The survey was distributed by fax and email. Respondents were also kind enough to forward the survey to some of their own contact lists.

The respondents were promised confidentiality, and responses were separated from the respondent's identity. Membership directories of various trade associations were used to randomly select recipients. Associations included:

- The Construction Management Association of America – randomly selecting names from rosters of several different chapters.
- The Coalition for Adequate School Housing - a California association of entities interested in better school construction - randomly selecting names titled as Facilities Manager, Business Superintendent, and those known to be involved in the construction of school facilities or responsible for the construction of school facilities. Most of the survey's architects came from the associate section of the directory.
- The Associated Builders and Contractors – random selections from their directory.
- The Associated General Contractors of America – random selection of members provided by other Association members.
- The American Bar Association's Construction Industry Forum - random selections from their directory.

### **The Quantity and Quality of Responses**

Approximately 2,000 surveys were distributed and 429 responses were received. No effort at a follow-up response request was made to non-responses. Included in the survey are 43 respondents claiming zero years of construction industry experience, serving as a control group of professionals from outside the construction industry.

The questionnaire requested the respondent identify "the **one role** providing the bulk of your experience" (question 6). The responses:

Role:	Architect	Attorney	Const. Mngr.	Gen. Contr.	Owner	Subc.	Other
Qty:	12	162	39	54	75	18	69

Question 8 asked, "Have you ever served as an arbitrator?"

No = 281, Yes = 142, no response = 6

More than 80% of the survey responses not only answered the questions, but volunteered three or more lines of explanation or comment. Most of the responses also included an explanation of the respondent's decision.

One response included a cover letter addressing the problems of time to answer versus the time responsibilities of the person's career:

"...I'm afraid I had to do it rather quickly, ...At first, I was worried that I might not be giving it sufficient time, but then I realized that is a real life situation with arbitrators, as the arbitrator will sandwich this case between many other responsibilities, and very often not get into the nuances that one thinks exist. Good luck."

A few responses worried that the inability to include conclusions from the party's physical presence during the arbitration prevented the scenario from being fully explored. One respondent wrote: "Credibility. Without testimony, (I) can't make good/any credibility determinations. While research says body language not a good indicator, substance and consistency can be." However, most of the respondents appeared to realize they were to accept the scenario as their perception of the facts and evidence presented at the arbitration hearing.

The responses also evaluated the construction management skills of the parties. There were sufficient numbers of detailed assessments of construction management skills to support a paper analyzing the industry's opinion of the situation leading to the dispute. A large majority of respondents berated the Owner and the General Contractor for being such "pathetic" project participants. "Lack of communication" was a very common theme through those responses.

## THE RESULTS

### ***Award Calculation and Compilation***

To simplify the award and the analysis, all of the awards were "netted" to attribute final payment to original payee. For example, many responses directed the General Contractor to pay the Subcontractor \$60,000, and the Owner to pay the General Contractor \$30,000. The net result, as reported herein, is the General Contractor and the Owner were to each pay the Subcontractor \$30,000. (This was described by many as the "split the baby" award.)

According to the damages identified per the contract terms, a finding entirely against the Owner and for the General Contractor and the Subcontractor would have the Owner pay the Subcontractor \$60,000 and pay the General Contractor an additional

\$90,000 in damages plus \$3,600 in markup on the Subcontractor's payment. Thus the "largest" finding against the Owner would be a total payment of \$153,600.

A finding entirely against the General Contractor and for the Owner and the Subcontractor would have the General Contractor pay the Owner Liquidated Damages of \$150,000 and additionally pay the Subcontractor's delay damages of \$60,000. Thus the "largest" finding against the General Contractor would be a total payment of \$210,000.

The arbitrator was not bound to an "either-or" decision. The award amount, the delay assessment, and the delay duration were left to the arbitrator's evaluation of an equitable decision. Very few awards found for either extreme.

After netting the payments, the results and quantitative question responses were entered into a spreadsheet database, allowing sorting of the database by any or multiple criteria. Only a few of the potential "sorts" are reported here.

### **Survey Says**

Of the 429 responses:

94% determined the Subcontractor should receive exactly \$60,000.

34% determined the Owner and General Contractor should each pay the Subcontractor \$30,000, with no further exchange of funds between the Owner and General Contractor.

35% determined that the Owner was responsible to pay the Subcontractor \$60,000. Of that 35%, 13% found the Owner responsible only to pay the \$60,000, another 22% found the Owner paying the Subcontractor's \$60,000 plus some amount of additional delay compensation to the General Contractor.

18% determined the General Contractor was responsible to pay the Subcontractor \$60,000. Of that 18%, 12% found the General Contractor responsible only to pay the \$60,000, another 6% found the General Contractor paying the Subcontractor's \$60,000 plus some amount of liquidated damages to the Owner.

17 of the 429 responses, or 4%, decided the Owner should pay at least \$150,000, \$60,000 to the Subcontractor and another \$90,000 or more to the General Contractor. Only 2 of the 429 responses decided the General Contractor should pay the maximum assessment of \$210,000: \$150,000 to the Owner and \$60,000 to the Subcontractor.

### **Familiarity Breeds Contempt**

Does the arbitrator's background create a bias skewing the award in favor of the party with the same background as the arbitrator?

16 of the 18 responding subcontractors (88%) found that the Subcontractor should receive \$60,000. (94% of the total pool found that the Subcontractor should receive \$60,000.) One subcontractor awarded the Subcontractor \$40,000: \$20,000 each from the Owner and General Contractor. Another subcontractor awarded the Subcontractor more than \$60,000.

The 30/30 split: Those that found the Owner and General Contractor each paying the Subcontractor \$30,000, with no further exchange of funds:

The group as a whole:	34%
Owners:	20 of 75, 27%
General Contractors:	15 of 54, 28%

The GC Pays: Those that found the net payment of all damages to be the General Contractor paying \$60,000 or more:

The group as a whole:	18%
Owners:	14 of 75, 19%
General Contractors:	10 of 54, 19%

The Owner Pays: Those that found the net payment of all damages to be the Owner paying \$60,000 or more:

The group as a whole:	35%
Owners:	31 of 75, 41%
General Contractors:	23 of 54, 43%

The Owner / General Contractor results do not appear to greatly differ from the results of the whole. There does not appear to be a "like-kind" bias. However, commentary and award explanations in the questionnaires suggest that many like-kinds were "harder" on their own.

**Are Arbitrators Different From the Masses?**

The 142 respondents answering "Yes" to question 8, "Have you ever served as an arbitrator?" allows a comparison of those who consider themselves as having served as arbitrator versus the pool as a whole:

The 30/30 split: Those that found the Owner and General Contractor each paying the Subcontractor \$30,000, with no further exchange of funds:

The group as a whole:	34%
Previous Arbitrators:	55 of 142, 39%

The GC Pays: Those that found the net payment of all damages to be the General Contractor paying \$60,000 or more:

The group as a whole:	18%
Previous Arbitrators:	26 of 142, 18%

The Owner Pays: Those that found the net payment of all damages to be the Owner paying \$60,000 or more:

The group as a whole: 35%  
Previous Arbitrators: 50 of 142, 35%

**What About Attorneys?**

The 30/30 split: Those that found the Owner and General Contractor each paying the Subcontractor \$30,000, with no further exchange of funds:

The group as a whole: 34%  
Attorneys: 69 of 162, 43%

The GC Pays: Those that found the net payment of all damages to be the General Contractor paying \$60,000 or more:

The group as a whole: 18%  
Attorneys: 31 of 162, 19%

The Owner Pays: Those that found the net payment of all damages to be the Owner paying \$60,000 or more:

The group as a whole: 35%  
Attorneys: 45 of 162, 28%

**Splitting the Baby**

Other construction industry and commercial evaluations of arbitration include the complaint that arbitrators “split the baby”.<sup>5</sup> Arbitration critics claim that the arbitrator will split an award, offering a partial award to each party, rather than determining “true equity / justice / fair result” and making an award entirely to the arbitrator’s assessment of the entitled party.

In 1991-1992 Christian Buhring-Uhle surveyed international commercial arbitrators with respect to their use and experiences. He received 59 responses to his survey, which included a question about splitting the baby: “Arbitrators are sometimes criticized for a tendency to favor awards that split the difference between the parties’ positions (“splitting the baby”) rather than deciding the dispute. How often is this phenomenon observed?”

Of his 57 responses:  
Almost Always: 1; Often 11; Sometimes 22; Rarely 10; Practically Never 13 <sup>6</sup>

The scenario award did allow the arbitrator to decide that two parties should equally pay the third party, and 34% of the respondents so decided. Even though “splitting the

baby" was not mentioned in the questionnaire or in the scenario many of the responses included commentary about "splitting the baby." Some of the comments:

"One usually valid criticism of the arbitration process is that awards all too frequently split the baby. ... Single arbitrator decisions suffer somewhat less in that sole arbitrator decisions, while subject to the bias of the arbitrator, avoid the dilution of principle which comes with consensus in multi-person panels."

"Arbitrators are babysplitters - they need to be if they want to stay in business. It's unfortunate, because 'justice' takes a backseat to economic self-interest."

"I really didn't want to split the baby, but felt legally both were responsible and neither should benefit." - This sentiment summarized many similar comments.

"I wanted to demonstrate that not all arbitrators 'split the baby'. The problem offers a number of 'split the baby' opportunities, but I believe they are false paths." The arbitrator providing this comment found wholly against the General Contractor, one of the few responses finding the General Contractor liable for the Subcontractor's \$60,000 and the \$150,000 liquidated damages to the Owner.

### **Equity vs. the Law**

A few responses berated the survey instruction "to base (the) decision on equity, not contract or law." One response noted:

"The instruction to the arbitrator 'you are not bound to follow any law, president (sic) or contract clause' is not a good instruction. Arbitration already suffers from a reputation for disregarding law and contracts (the law between the parties). If the person who decides a dispute can disregard the contract, what is the point of having a contract? Without this contract/law, the arbitrator has no basis on which to make a decision. Ultimately, neither of the parties will feel fairly treated, and they will not come back."

For comparison to several industry instructions:

The American Arbitration Association's Construction Industry Dispute Resolution Procedures, Rule R-43, states:

"The arbitrator may grant any remedy or relief, including equitable relief, that the arbitrator deems just and equitable and within the scope of the agreement of the parties. ..."<sup>7</sup>

The JAMS instructions to arbitrator's states:

"Unless the Parties specify a different standard, in determining the Award the Arbitrator will be guided by principles of law and equity as applied to the facts found at the Arbitration Hearing, including those facts relating to custom and agreement between the Parties."<sup>8</sup>

Conversely, the National Arbitration Forum's marketing brochure states:

“Arbitration that is not arbitrary.” And “The Forum is the only national arbitration provider whose arbitrators take an oath to render legal decisions according to the law, rather than undefined ‘equity’.”<sup>9</sup>

The Korean Commercial Arbitration Board defines its arbitrators as “individual(s) who can render ‘virtuous judgment’ in an arbitration.”<sup>10</sup> The KCAB “arbitral tribunal shall decide the dispute in accordance with such rules as are chosen by the parties as applicable to the substance of the dispute.”<sup>11</sup>

Nonetheless, several respondents noted that contract language or expectations of likely contract language served as guidance in their award.

### Observations

Like most real-life situations, the survey did not offer an either/or selection. We tend to view many of our disputes as a simple entitlement versus no entitlement, and then, how much. But, we frequently find that during the arbitration, more issues are raised and the simple yes/no develops many shades of gray.

We may try, and some have suggested that human nature tends to force us, to simplify to a minimal number of issues. However, reality is simply more complex. Different arbitrators (and different people) will have different perceptions of the same situation and different arbitrators will go to different fundamentals to help them evaluate, resulting in different awards for the same set of facts.

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<sup>1</sup> Stipanowich, Thomas J. “Beyond Arbitration: Innovation and Evolution in the United States Construction Industry” *Wake Forest Law Review* 31(1) 1996.

Thomson, Dean B. “Arbitration Theory and Practice: A Survey of AAA Construction Arbitrators” *Hofstra Law Review*, Vol 23: 137, 1994.

<sup>2</sup> Thornton, Robert; Zirkel, Perry; The Consistency and Predictability of Grievance Arbitration Awards 43(2) *Industrial and Labor Relations Review* 294 (1990)

<sup>3</sup> Diamond, Shari S.; Saks, Michael J.; Landsman, Stephan; Juror Judgments About Liability and Damages: Sources of Variability and Ways to Increase Consistency 48 *DePaul Law Review* 301 (1998)

<sup>4</sup> I wondered if the panels were not taking the exercise seriously, it was late on Friday afternoon. But these were the cream of the crop professionals, and, they were presenting to a room full of potential clients.

<sup>5</sup> See endnotes 1, 2, and 6 and also: *Notes Predictability of Result in Commercial Arbitration*, 61 *Harvard Law Review* 1022 (1948).

<sup>6</sup> Buhring-Uhle, Christian, *Arbitration and Mediation in International Business*, Kluwer Law International, The Hague, 1996, P. 398.

<sup>7</sup> *Construction Industry Dispute Resolution Procedures*, American Arbitration Association, September 1, 2000, P. 31.

<sup>8</sup> JAMS Streamlined Arbitration Rules and Procedures, JAMS [www.jamsadr.com](http://www.jamsadr.com), revised Jun 2000, Rule 19(b), P. 8.

<sup>9</sup> Marketing Brochure, National Arbitration Forum, Minneapolis, MN.

<sup>10</sup> Website: [www.kcab.or.kr/kcaBen/A\\_arbitrators.htm](http://www.kcab.or.kr/kcaBen/A_arbitrators.htm).

<sup>11</sup> Website: [www.kcab.or.kr/kcaben/arbitration/a\\_award.htm](http://www.kcab.or.kr/kcaben/arbitration/a_award.htm).

**Master's Thesis Research:****CONSTRUCTION ARBITRATION**

**Thank You:** Your participation in this survey is sincerely appreciated. The survey results will be held confidentially with only the compilation being released as part of the Thesis or to participants who request a copy. The Thesis is in fulfillment of the Master of Dispute Resolution Degree requirements at Pepperdine University's Straus Institute for Dispute Resolution.

**About Your Role:** This survey requests your participation as the "arbitrator" of the dispute described in the following scenario. The three disputing parties have accepted you as their binding arbitrator; they will abide by your award. Please assume that the pertinent facts, evidence, and testimony presented in the arbitration proceedings are summarized below.

The parties have requested that you apply your own industry knowledge and experience, and that you not consult anyone else. You are not bound to follow any law, precedent, or contract clause. The parties have selected you out of respect for your knowledge and want your decision to be based upon your determination of an equitable resolution of their dispute.

**The Scenario:** A construction contract for a one year project to install and connect manufacturing equipment at a privately owned industrial facility was completed 30 calendar days later than originally contracted. Three project participants, the owner (Owner), the general contractor (GC), and the GC's equipment installation subcontractor (Subc), have a dispute regarding the responsibility for the extra 30 days and for costs claimed as caused by the delay. The three parties agree that the critical 30 days of delay started Monday, August 1 and ended Wednesday, August 31. The project began January 1.

At the end of the arbitration proceedings, you, the arbitrator, find the dispute distills to the following:

**The Crane Broke:** On Monday morning, August 1, the GC's construction crane broke. All parties agreed the crane controlled the project's critical path, and the project could not progress without a functioning crane. The crane is of foreign manufacture, 15 years old, maintenance records are sketchy, and the testimony is not conclusive as to the GC's continuing proper maintenance of the crane. The GC procured the necessary parts and repaired the crane, completing the repairs August 30.

The GC's testimony showed that the needed crane parts were proprietary and had to be custom machined by the overseas manufacturer. The GC expedited the crane parts incurring air freight costs of \$15,000. Immediately upon receipt of the parts the GC worked to complete the crane repair on Monday and Tuesday, August 29 and 30, so that project work could resume Wednesday, August 31.

**The Design Changed:** Also on Monday morning, August 1, the Owner advised the GC that a design change was being prepared revising the piping and electrical work to be installed by the GC at the connections to the next piece of equipment planned for installation. The Owner directed that all work should stop pending receipt of the design change. The change was optional - the project could have completed without the change. The Owner could have made the piping and electrical changes at a later date using the Owner's in-plant maintenance crew.

During testimony, all parties agreed that the Owner's design change and the direction on August 1 to stop work prevented the contract work from proceeding until the design change was received. All testimony and evidence indicate that the design work for the change was completed Friday, August 26. Materials to implement the Owner's change were ordered August 26<sup>th</sup>. Delivery was expedited, and the materials were received on August 30 allowing project work to resume on Wednesday, August 31. The

changed work did not increase nor decrease the remaining time of construction. All parties have reached agreement on the cost of the changed work, only the delay costs and responsibility remain in dispute.

**Subcontractor Costs:** On Monday, August 1, Subc was in the process of installing equipment which had to be maintained by Subc on a daily basis until the equipment was turned over to the project owner. Subc's daily cost for maintenance was presented as \$2,000 per calendar day. In testimony, all three parties agreed the \$2,000 per day was reasonable and concurred with the calculation.

As a result of the 30 calendar day delay Subc requests compensation of 30 days x \$2,000 = \$60,000. In testimony all parties agreed that Subc was not responsible for the 30 days of delay.

**Timely Notice:** You found through your assessment of the testimony and evidence that on Tuesday, August 2, each party informed the other of their dilemma. The GC advised the Owner of the costs to repair the crane and that the GC would airfreight the repair parts at extra cost. The Owner advised that a design change was being issued and all work should stop on the equipment installation. Subc, after learning that something was delaying its work, advised the GC that Subc would incur \$2,000 per day to maintain the equipment during the delay. The GC immediately forwarded that information to the Owner.

**Mitigation:** Testimony included discussion of the mobilization of a temporary crane to be used in place of the broken crane; however, the GC elected not to do so since the GC had not received the design change. The Owner stated the design change was not expedited because the Owner recognized that the GC's crane repair would not be complete for approximately 30 days.

Both the Owner and GC claimed that they could have reduced their own delay to 7 calendar days but saw no need to incur the extra expense since the other was causing the delay.

**Contract Language:** All parties agree that the general contract allowed for excused extensions of time and for compensation for those time extensions. The general contract stated that the Owner would receive \$5,000 per calendar day as full compensation for any GC caused project delays. The general contract also stated that the GC would receive \$3,000 per calendar day as full compensation for any Owner caused project delays.

The Owner and GC admitted and accepted the contract terms for delay compensation. However, for the arbitrator's information, both parties presented substantiation of their costs which approximated the contracted amounts. Neither substantiation included consideration of the Subc's \$2,000 per day delay cost. The GC's subcontract with the equipment installer was silent with respect to delays. The subcontract provided that the terms of the general contract were incorporated in the subcontract.

**The Dispute:** At the end of the arbitration proceedings, the dispute has boiled down to:

- a. Subc seeks \$60,000, and requests identification of the party(s) responsible to compensate Subc.
  - b. GC seeks \$90,000 from the Owner (30 days x \$3,000), and denies responsibility for the Subc's \$60,000 request. If the Owner is found responsible for any of the Subc's costs, then the GC seeks compensation from the Owner per the general contract provision for 6% markup on subcontractor costs.
  - c. Owner seeks \$150,000 from the GC (30 days x \$5,000), and denies responsibility for the Subc's \$60,000 request.
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Note: This is a fictitious situation, any resemblance to reality is coincidental.

**Questionnaire**

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Your Award – The Parties request your award provide answers to the following questions:

a) Amount, if any, to the Subcontractor, to be paid by: GC:\$\_\_\_\_\_ Owner:\$\_\_\_\_\_

The following exclude any amount to be paid to the subcontractor:

b) The amount, if any, the Owner is to pay to the General Contractor: \$\_\_\_\_\_

c) The amount, if any, the General Contractor is to pay to the Owner: \$\_\_\_\_\_

1. Your reasoning? *(If you feel so inspired, your comments are appreciated and will be helpful)*

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2. Were there facts omitted that you believe prevented you from making a good decision?

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3. Was there any one particular fact that substantially influenced your decision?

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4. Any thoughts, comments, criticisms about the scenario? *(Again, thank you for your time)*

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5. Your years in the construction industry, circle one:

0 up to 5 6 to 10 11 to 15 16 to 20 20+

6. Your Industry Experience/Background, the **one role** providing the bulk of your experience?

Project Owner or Owner's Rep. General Contractor Subcontractor Construction Mngr.  
Engineer Architect Attorney Judge Other: \_\_\_\_\_

7. Your education (please circle all that apply):

HS Apprentice Bach. Degree Master's Degree Ph.D J.D.

8. Have you ever served as an arbitrator? Yes No

9. Do you think your award conforms with the majority of the other "arbitrators"?

Yes No Don't Know

10. Would your award have been substantially different two years ago? (i.e. Has the last two years of your personal experience changed your view on this fact situation?)

Yes = different No = same

11. Any thoughts you would allow me to quote and attribute to you? *(The above is confidential unless noted here)*

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**ABOUT THE AUTHOR**

George (Chip) Ossman III, as a member of the construction industry for over 25 years offers a unique understanding of the positions, needs, and the ultimate interests of the disputing parties on construction projects. Having worked on large and small construction project sites, for contractors and for owners, having been an active member of the Construction Management Association of America, the Associated Builders & Contractors, holding active neutral membership in the American Arbitration Association, and having earned his Master of Science with concentration in Construction Management and his Bachelor of Mechanical Engineering (both from Ga. Tech) and the Certificate of Dispute Resolution from Pepperdine University's Straus Institute for Dispute Resolution, Mr. Ossman facilitates mediations, serves as arbitrator, and assists parties in better presenting their construction dispute in order to achieve a fair, reasonable, timely, and economic resolution.