

LEGAL PERSPECTIVE

ARBITRATION VERSUS LITIGATION: CHOOSING THE BEST OPTION

BY JAMES R. MALL

Contractors entering into a legal agreement with either an owner or subcontractor are typically focused on staffing needs, work schedules and profit margins. The parties view the formal contract as the first of what each side hopes will be a continuing series of future transactions.

Mistakenly, the dispute resolution provisions of the contract are seen as “boiler plate” and are often overlooked, presumably because the parties view litigation as an unlikely outcome. Frequently, only one party to the contract selects the resolution forum, and, when no objection is raised, the dispute forum is selected without any negotiations taking place.

Many companies also seek to save time and costs when drafting contracts and avoid seeking legal counsel when finalizing construction contracts. In larger companies, in-house counsel may be involved in drafting contracts, including dispute resolution provisions, but frequently they are not experienced litigators familiar with arbitration or litigation proceedings and are focused more on transactional matters within the company. A complicating factor is that the decision to select a dispute resolution forum is made during the negotiation stage – before any disputes arise.

In theory every case should be decided on the merits according to facts and the law, no matter if the decision

maker is a judge, jury or arbitrator. In practice, the dispute resolution selection made by the parties at the outset of their dealings can make a significant difference in the outcome of disputes, which arise with projects of any complexity. Depending on whether the case is filed in court or arbitration, factors such as the amount of discovery allowed, the nature of the evidence which can be introduced, opportunities to join non-parties to the contract, and opportunities to challenge a decision once it is rendered are different. While litigants are looking for the fastest and least expensive method to resolve their disputes, there are many factors that mitigate in favor of one forum over another. Unfortunately, it is impossible to say if there will be a faster and more cost effective outcome when choosing arbitration as opposed to litigation in court. Many case-specific factors enter into the selection of a forum that is likely to result in the optimal resolution of a particular dispute. In some cases, the preferred choice will be to litigate in court, and in others it will be an alternate dispute resolution process culminating in arbitration.

In the early 1980s, arbitration was not nearly as popular as it is today. There was very little discovery permitted in arbitration, fewer depositions were taken and less case management was involved. Ultimately, the case would be presented to one or three arbitrators who typically would conduct a short informal evidentiary hearing with relaxed

evidentiary rules. But parties today are increasingly resorting to arbitration on the assumption that it will be less costly, more efficient and final, while at the same time being able to benefit from the customary litigation procedures necessary to prove one’s case. In reality, arbitrations are becoming just as lengthy and expensive as court trials. Arbitrators are now confronted with preliminary and dispositive motions, complex discovery issues and conducting many pretrial conferences before the actual hearing is scheduled. To ensure a speedier and less costly proceeding, the arbitration provision of a contract should limit discovery in a manner that is consistent with client goals.

Several key factors should be considered by the contractor and its counsel before selecting a forum of dispute resolution:



1. Cost.

The most commonly cited benefit for arbitration is that the cost will be less than litigation. This is based on the perception that the arbitration will be more streamlined, especially by eliminating or reducing the number of discovery requests, interrogatories, and depositions, which are prevalent in construction litigation cases tried in civil court. One must consider filing fees and costs involved in arbitration, which can easily run in the thousands or tens of thousands of dollars. Filing fees in a court case only amount to several hundred dollars – the judge's salary, as well as that of court staff and courtroom facilities, are taxpayer funded. Compare these fees with the American Arbitration Association's filing fee, which is based upon the amount of the claim. In a million dollar claim the initial filing fee alone is \$7,000 in addition to a final fee of \$7,700. Add the costs of paying the hourly or daily rates of one to three arbitrators selected by the parties and the upfront cost of arbitration is far more expensive than traditional litigation.

2. Time of Disposition.

Even with reduced civil trial calendars in most state and federal courts, a dispute taken to arbitration can be resolved much faster than in court litigation. Arbitrators usually have the time to prioritize a particular case whereas judges are often burdened with other judicial and administrative duties and have to balance a case docket often consisting of criminal cases which are given priority. With fewer pre-hearing motions and hopefully a more streamlined discovery process, arbitrations are typically resolved much faster than court cases.

3. Arbitrator/Judge Decision Maker.

The strongest argument for selecting arbitration over litigation is that the parties are able to select qualified arbitrator(s) from a panel of professionals with expertise in the construction industry, whether they be attorneys, architects, engineers or construction managers. While some of the larger counties have implemented a Commerce Court for complex cases which are then assigned to a particular judge with expertise in resolving those types of cases, in most court cases, judges are randomly assigned to handle a case without any input from the parties. Oftentimes, especially in the smaller counties, the background of the judge assigned to hear a complex construction case may be in family law or criminal law with little or no construction-related experience. Additionally, in the more complex large dollar cases, arbitrations provide the benefit of having three arbitrators reviewing the case which avoids the possibility that a single arbitrator misses a key fact or point of law in rendering a decision.

4. Flexibility.

Court litigation is a more formal and structured

process than arbitration, and judges are constrained by a series of rules and procedures, resulting in less flexibility as far as what evidence can be considered. Rules of evidence are strictly enforced in a court proceeding. However, in arbitrations, the arbitrator has some freedom in entertaining evidence that is relevant and probative but that might otherwise be excluded by a judge. Judges must follow precedent established in prior cases, but arbitrators can substitute their opinions of what is fair and just. Arbitrators also have flexibility in scheduling and adjourning hearings to suit the convenience of counsel and parties who may be involved with other projects. There is also some flexibility in arbitration for presenting evidence from witnesses who are outside the jurisdiction.

5. Privacy.

Courtroom disputes are conducted in a public forum and sometimes generate media attention and bad publicity. Arbitration is a private proceeding where results are frequently confidential. There may be reasons why a particular firm desires to not have its dispute aired in public such as harm to reputation, as well as the protection of proprietary financial, scientific, or confidential business information, which is disclosed in discovery and may become part of a public record.

6. Finality.

Arbitration awards are meant to be final and binding. While the law does permit challenges to an arbitrator's decision in limited circumstances, such as "fraud, misconduct or corruption," these allegations are difficult to prove and rarely succeed. In contrast, a verdict rendered by a judge or jury is subject to post-trial motions and subsequent appeals to higher courts which could take years to resolve and, if successful, could result in a new trial. The fact that arbitration awards are final can be good or bad, depending upon the result obtained, and the parties' perception of the fairness of the outcome. It is frustrating to a party who is unable to challenge an award when an arbitrator misinterprets a key fact, or even misapplies the applicable law, in rendering his or her decision because no improprieties can be established.

Parties need to carefully analyze where they wish to have a dispute resolved and at least be aware of the risks/rewards of litigation versus arbitration. Depending on the type of construction project at issue, the contractor needs to anticipate what legal or factual issues might arise during contract performance. Consult with counsel experienced in litigation and arbitration to determine what forum is appropriate to resolve any potential disputes. **BG**

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