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ALTERNATIVE DISPUTE RESOLUTION
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Choosing Arbitration in Construction Cases

By Neal M. Eiseman

Much has been written about the pros and cons of having a construction dispute decided in court instead of arbitration or vice versa. In situations where parties at odds with one another previously entered into a written agreement containing a broad arbitration clause, they proceed to arbitration. However, if there is no preexisting agreement to arbitrate and a dispute arises, in the vast majority of cases, one party's offer to arbitrate is almost always automatically rejected by the other, and the parties end up litigating their dispute. This is especially the case when a party is being defended by its insurance company, because most carriers disdain arbitration. If a claimant in a construction case suggests that the dispute be submitted to binding arbitration, the insurance claim manager's boilerplate responses include: (1) "We don't want to waive our broad appeal rights by proceeding to arbitration"; (2) "Arbitrators disregard the rules of evidence and don't always follow the law"; (3) "Arbitrators frequently 'split the baby'"; and (4) "Discovery is limited in arbitration and defendants need to know as much as possible prior to trial." Sound familiar?

While all of these responses possess varying degrees of merit, they all overlook the one overwhelming advantage of arbitration over litigation in complex or specialized areas such as construction, namely, that the dispute will be decided not by lay people or a judge with no real experience in the subject matter of the dispute, but, rather, by one or three experts in the field. Depending upon the nature of the dispute, this may trump all of the perceived negatives. Ask yourself, if your client's defense hinges upon the proper interpretation of a plan, detail, or specification in a construction case, who would you rather make the call—a judge, a jury, or an experienced construction arbitrator? Also, if a jury decides the case based primarily upon a witness's credibility rather than a true understanding of the underlying issues, will your client's broad appellate rights ultimately do him or her any good? Granted, your analysis on how best to proceed may very well depend upon the strength and merit of your defense(s). If it is likely that an insured's defense will be viewed as weak or transparent by an experienced arbitrator, then perhaps it makes sense to roll the dice before a jury (who may not necessarily perceive how weak it really is). All things being equal, however, from the perspective of an insured and its carrier, it is better to have a judge, jury, or construction professional determine (1) if certain work constitutes part of the original contract sum or additional work; (2) whether the contractor performed as required by the contract documents; or (3) if the design professional's plans are defective. In many circumstances, a convincing argument can be made that your client and its carrier face a far greater risk by proceeding to litigation over arbitration.

Typically, when garden-variety construction cases are tried in court, expert testimony is available to assist the trier of fact. This is no less true in arbitration where the same expert testimony will be offered albeit with one important distinguishing factor: The arbitrator will be able to (1) identify and hone in on the relevant issues thanks to his or her expertise, and (2) ask probing, critical, and detailed questions a judge and/or jury may simply lack the construction expertise to be able to pose. Even with the assistance of expert testimony, without the ability to read plans and interpret specifications along with the hands-on experience to understand how construction really works, a judge or jury may make the wrong call. When an experienced arbitrator is involved, however, he or she should promote a sentient analysis of the issues. The aim is to reach the correct result rather than make a decision based on which witness "seems" more correct or who hired the more persuasive lawyer.

Sound arguments exist debunking a number of the "truisms" insurance carriers ordinarily assert to justify their resistance to arbitration. Today experienced arbitrators are trained not to "split the baby," but to "call it as they see it." As a result, one side usually wins and the other loses. There is no guarantee that a judge or jury will not "split the baby," especially if there is any uncertainty on their part. Also, since an arbitrator understands the construction

industry and the practical aspects of how it operates and all of its nuances, the arbitrator should be better able than a judge or jury to sift through the parties' competing arguments and render a fair and just award.

While the right to vacate or appeal an arbitration award is indeed severely limited under state and federal law, unless there was a clear misapplication of law involving a substantive issue at the trial level, realistically, what are the chances an appellate court will overturn the decision of a judge or the verdict of a jury?

In addition, while it is true that depositions, interrogatories, and requests for admissions are frowned upon in arbitration, when a party is properly defended, there is ample opportunity to learn about the claimant's case prior to the arbitration hearings. For example, the American Arbitration Association (AAA) Construction Industry Rules provide for the production of documents, identification of witnesses, and exchange of exhibits. In addition, arbitrators (and often attorneys) have subpoena power to require the attendance of third-parties and their documents at evidentiary hearings. It is also commonplace that, upon the request of a party, the arbitrator will order a particularization of claims, defenses, and damages in addition to appropriate expert disclosure. In large complex cases, AAA arbitrators have the discretion to order depositions if, by doing so, it will expedite the hearings and/or result in cost-savings to the parties. Since carriers are required to pay for defense costs under their broad "duty to defend," a procedure where the defense costs are held in check and do not necessarily run amok should be attractive to them.

The majority of construction cases are fact-sensitive and not susceptible of being resolved by the type of motion practice that frequently consumes a lot of time and expense in litigation. So, literally, why go through the motions?

Each construction dispute is *sui generis* and it will take some courage by a claims manager—and one who has the confidence (and job security) to deal with the possibility of getting "second-guessed" if things go wrong in arbitration—to choose arbitration over litigation. However, if a carrier has both the desire and ability to take the time to investigate and analyze the dispute upfront, it may conclude that blindly proceeding to court may not necessarily be the right move.

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