

## WHY CONTRACTORS ARE CHOOSING ARBITRATION OVER LITIGATION

» PETER G. MERRILL

It is virtually impossible to complete a construction project of any size without a few disputes developing. Most are minor but some may be of more importance involving greater amounts of money. How well you are prepared to handle disputes may very well determine whether or not you will make a profit.

The U.S. Constitution guarantees all of us the right to our day in court and to sue each other. The problem with using the court system is that it has become so costly and takes so long, that in many cases, it doesn't pay to even go to court. Contractors are beginning to simply accept that it is less costly and more time efficient to go along with the project owners' wishes regardless of whether they were right or wrong. With proper contract language that specifies the proper dispute resolution process to follow if there is a dispute, both you and your clients can arrive at a more "fair and equitable" resolution to a dispute through the use of Alternative Dispute Resolution. ADR is basically defined as dispute resolution through any means other than through the court system. ADR has proven to be far less costly and much faster than conventional litigation. Although the use of the courts is a constitutional right, it is a right that individuals may waive in favor of another dispute resolution process that would prove to be a more efficient, less costly and better overall process.

### ADR IN CONSTRUCTION

There are several ADR processes regularly utilized by the construction industry. Some, like mediation, offer the opportunity for the parties in a dispute to work together

through a discussion process to reach a mutually agreeable solution to the dispute, however, without a guaranty of reaching a final and binding resolution for the parties. The most popular ADR process used today by the construction industry that renders a final and binding resolution is Binding Arbitration. There are several reasons why parties are opting to specify arbitration over litigation to settle their disputes. Let's look at the many advantages of arbitration over litigation.

### SIMPLICITY AND COST OF PROCESS

To utilize the court system, you must follow many specific rules and procedures, including the need to hire an attorney to represent you in your suit. Although many litigations allow for the "reasonable attorney's fees and related expenses" to be awarded to the prevailing party, each party must first come up with the finances to pay their attorney and other costs. This includes the high costs of obtaining experts to testify in your favor to try to convince the judge and/or jury that you are correct in your position. Those costs may far exceed the amount in dispute. If you should lose the case, you would not only lose the dispute but you will be responsible to pay all of your expenses and may also be responsible for the expenses of the other (prevailing) party including their reasonable attorney's fees, the costs for their experts and other related costs.

What about the cost of your time and your associates in not only preparing for the litigation but in having to be present in court during the entire court hearing



process? Due to the rigid court procedures, most litigations are lengthy and involve many lost days of business time to all of the parties and their employees who might be in some way involved in the dispute. In addition, one of the most important differences between arbitration and litigation is that in litigation, the judge and/or jury issues a verdict. That verdict may be appealed several times, each involving a new trial along with new presentations. Arbitration may be appealed only on very limited procedural grounds. If you do not like the decision, it is final and binding in almost every case.

### CONSTRUCTION KNOWLEDGE

This fact leads us to probably the most important difference between litigation and arbitration is being able to be involved in selecting the arbitrator. In litigation, the parties do not have any involvement in the selection of the judge. The judge is usually determined by the jurisdiction in which the trial will be conducted. In arbitration, both parties are involved in the selection of the arbitrator. Why is this the most important benefit of arbitration over litigation?

**HOW WELL YOU ARE PREPARED TO HANDLE DISPUTES MAY VERY WELL DETERMINE WHETHER OR NOT YOU WILL MAKE A PROFIT.**

If you were sick, had an illness or injury, you would most likely go to see a doctor. Your expectation is that the doctor has the training, experience and knowledge to be able to diagnose what is wrong with you and most importantly has the expertise to be able to recommend a course of action to correct, remedy or cure your medical problem. If the doctor did not feel that he/she had the knowledge necessary to handle your medical problem, he/she would most likely refer you to a specialist. If you have a problem with your construction project, wouldn't you want to have a decision rendered by someone who has comparable construction training, experience and

## ...THE AVERAGE MAJOR LITIGATION CASE TAKES ABOUT 2 ½ YEARS

knowledge? A judge will readily admit that when they have the responsibility to render a verdict on a construction case or any other case where there are technical issues to be decided, if they do not have any knowledge related to the issues, their decision will be made entirely on which party makes the best and most convincing presentation. The credentials of experts and manner of their presentations will greatly affect the decisions of the judge. As I just mentioned above, the party with the best and most convincing presentation will most likely be the prevailing party, not necessarily the party that was right. That is why it usually pays for you to hire an experienced trial attorney to represent you in court. Good trial attorneys generally are expensive. However, they probably are worth the price. Like the doctor who

will refer you to a specialist if he/she does not have the knowledge necessary to treat your medical problem, construction specialists should be similarly utilized. If the construction dispute is an HVAC dispute, the arbitrator should have HVAC knowledge and experience.

Another reason why contractors are opting for arbitration over litigation is that it is not required to have an attorney represent you in an arbitration hearing but is required in litigation. Our firm, CDRS, provides arbitration services for several home warranty companies. We typically conduct those warranty arbitrations in the kitchen or dining room of the policyholder's residence without any attorneys present. In most smaller arbitrations, both the owner and the contractor are well-enough versed on the dispute to be able to represent themselves and to make their presentation to the arbitrator. If a party doesn't feel that they can make a proper presentation to the arbitrator, they are free to retain an attorney to represent them and to make their case to the arbitrator. Many parties use attorneys when there are multiple


issues being covered, there are legal issues such as breach of contract, when there are large dollars at issue, and for other reasons such as having an experienced attorney who is familiar with making that convincing presentation referred to earlier. Attorneys can add greatly to the cost of your presentation or defense but can be worth the cost in certain circumstances.

### TIME SAVINGS

The time factor is also a major consideration in choosing arbitration over litigation. The arbitration process is far less formal than the litigation process. As an example, the presentation of evidence in litigation is governed strictly by the Federal Rules of Evidence which is not required in arbitration. According to the Rand Corporation, the average major (construction) litigation case takes about two and a half years from beginning to end including appeals. Although there is no standard time to complete a residential arbitration, the total time spent is usually within six months but can be faster if the parties all cooperate. Remember that an arbitration award is subject to appeal only on very limited procedural grounds. At CDRS we have had arbitrations that were conducted and completed within 14 days. I have seen many contractors and subcontractors go out of business while waiting for a case to come to trial utilizing the court system: Time is money.

### APPEALS

Another small difference between litigation and arbitration is that in litigation, the verdict is final and binding (unless they appeal). In arbitration, if one of the parties does not comply with the terms of the award, the prevailing party can seek an "enforcement order." This is an informal process hearing and is just a formality that might be required to enforce the award.

*NOTE: Mr. Merrill's column will continue in our June issue. Stay tuned to learn the importance of including arbitration, as well as when to opt for mediation. *



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