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To Arbitrate, Or Not To Arbitrate

As is so often the case in the construction industry, an issue that appears fairly straightforward on its surface, such as whether your organization prefers private arbitration over the courts as a forum for dispute resolution, is not so simple after all. It seems the more you dig into this question of whether to arbitrate or litigate, the more problems you begin to notice. Ultimately, it appears that there is no one correct answer to this question and often a company should review its position on this question periodically and adjust its contract forms accordingly. This article considers some of the questions you should be asking concerning this issue in order to reach your own opinion. After you have decided whether you prefer private arbitration or the public courts as your company's forum for dispute resolution, be sure to include a forum selection provision in all your contracts.

Speed vs. Predictability of Process

Arbitration in most instances offers the benefit of a speedier process and, at least when compared with most lawsuits, will yield a result much faster. Currently, it is not uncommon to wait between 2-3 years to get a lawsuit to trial in the Superior Court of New Jersey. Whereas, most arbitrations can be concluded within about 3 to 9 months depending on the number of parties and the complexity of the subject matter in dispute.

On the other hand, arbitration is still a relatively new

forum for resolving disputes and so the arbitration as a procedural process lacks much of the procedural predictability to be found in the Courts with its many long-standing rules and interpretive cases that provide parties greater notice as to their procedural rights.

Full Discovery vs. Limited Discovery

One controversial aspect of 20th century law is the rise and growth of the discovery process. In the last century there was no pretrial discovery such as interrogatories, exchange of documents or depositions. Many feel the delays and expense of the discovery process outweigh the benefits of full disclosure. Arbitration is in part a return to an earlier attitude toward this question. Most arbitrations take place with little or no discovery before the hearings, usually only an exchange of lists of documents to be relied upon.

However, many parties feel unfairly cheated out of a fair hearing when an arbitration hearing seems to turn into one surprise after another that might have been avoided if basic discovery had been available in arbitration. To guard against this, many contracts provide for a limited basic discovery process in arbitration. This keeps costs down but permits enough discovery in advance of hearing to avoid unfair surprises.

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Juries, Judges and Arbitrators

Another issue in this area is: Who will be resolving my company's disputes? In litigation the choice is whether to have a jury trial or a "bench" trial where a single Superior Court Judge will decide your case. Many companies fear that juries tend to identify with lay people against the contractor.

In arbitration, there are usually construction industry people available at a fee to serve as arbitrators. There can be a single arbitrator deciding your arbitration or a panel of three arbitrators. Very often some private arbitration services can offer the parties retired Superior Court judges who are available to decide arbitrations. These matters can be decided in advance in the construction contract. For example, in the case of disputes involving large sums in controversy, a company can specify in its contract that disputes in excess of a certain sum must be decided by a panel of three arbitrators.

The Day After: Your Right To Appeal

One of the drawbacks of arbitration is the very limited grounds upon which an appeal can be based. While many companies prefer the "finality" of the arbitration process, in cases where there are large sums at stake, the specter of having no appeal from a poor outcome can be devastating. In litigation, appeals from trial verdicts can be filed as of right in the Appellate Division and the court must consider your arguments on appeal. If denied, there is also the Supreme Court of New Jersey, but your request for appeal must first be granted by the Supreme Court.

In addition, during litigation there is always a court reporter present paid for by the State in the event a transcript is needed on appeal. Costs of transcripts of trial are paid by the appealing party.

In arbitration, many parties decide not to arrange a court reporter to be present in order to keep costs of arbitration low. However, parties often regret

this decision later when they find themselves with no record of what occurred at the arbitration and therefore are hindered from bringing an effective appeal of the arbitration decision.

Enforcing Arbitration Awards

Enforcement of an arbitration award requires that the award be entered in the Superior Court as a judgment. This involves filing a lawsuit. So if your company prevails but the losing side fails to pay the award voluntarily, there will be the expense, effort and delay of a lawsuit to enforce the arbitration award. After a judgment has been entered upon an award, then the typical collection remedies such as wage garnishment and seizure of assets also require use of the courts. Therefore, arbitration lacks any independent means of enforcement for a prevailing party outside the courts.

The issues discussed above should be considered periodically with your attorney to insure your contracts include the right method of dispute resolution for your company as based upon your preferences, needs and past experiences.



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