Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Construction Arbitration & Litigation: Picking The Right Path

By **John Kennedy**

Law360 (July 26, 2018, 4:31 PM EDT) -- Arbitration and litigation are two well-trodden paths for those navigating construction disputes, but each is better suited for a different type of traveler. To be a good guide, lawyers need to know which to choose, as the wrong choice can spell disaster.

Those seeking privacy, wielding highly technical issues and looking to save some time and money will likely find arbitration to be the ideal route. But if a client wants to ensure their right to appeal or possibly end a dispute early, they may prefer to head to the courthouse.

That guidance begins at the outset of a project, experts said, explaining that plans made early on can make for a smoother ride over bumpy roads.

If arbitration looks favorable, it's important to ensure all parties can be added to one proceeding, or any cost or time saved in the process may be quickly lost, according to Clifford J. Shapiro, a partner at Barnes & Thornburg LLP.

On the flip side, if litigation looks to be the way to go, lawyers should ensure their clients don't agree to arbitrate disputes with some parties but not others, he added.

If It's Complicated, Get It Arbitrated

Juries, and to a lesser extent judges, aren't always going to understand how a construction project comes together, but arbitrators are more likely to have specialized experience in the matters they oversee.

"In a construction case, you have a fairly technical, specialized subject matter," said Mark A. Voigtmann, a partner at Faegre Baker Daniels who also serves as an arbitrator on the American Arbitration Association's national construction panel. "When you go into a courtroom, a typical judge will not necessarily have a background in any construction concepts or terminologies, and you have to, at times, bring it down to a much more basic level."

It helps that parties involved in arbitration usually select the people who will be handling the case, though Voigtmann noted that not all contracts that call for arbitration will require a specialized decision maker. When parties have a hand in picking a decider, that person tends to understand the issues better and isn't likely to be swayed or confused like a jury might be.

"That's an opportunity you don't get in litigation," said Michael W. Winfield, a principal at Post & Schell PC who is also a member of the AAA's panel of construction and commercial arbitrators. "You get the judge that's assigned to your case or you get to select a jury, most of which won't have any particular industry experience."

Some selection methods aren't created equal, though, according to Jeffrey R. Appelbaum, a partner at Thompson Hine LLP. He's not a fan of tripartite arbitration, where one side chooses one arbitrator, the other side picks the second, and those two agree on a third, or a neutral. In such situations, it can be unclear whether each side's chosen arbitrator is neutral or an advocate, he said.

In his opinion, it's better to choose from vetted panels, where the arbitrators' qualifications are well-known.

Staying Out of Court Could Keep the Fight Short

Arbitration is generally thought to be faster and cheaper than litigation, and according to AAA rules, construction cases involving claims lower than $100,000 can be fast-tracked for a decision in weeks, while litigation can take years.

"The intention of going with the arbitration process was to make it more cost-effective and faster so people weren't embroiled in the extensive litigation process," said Jonathan Bondy of Chiesa Shahinian & Giantomasi PC.

That's still mostly the case, but many lawyers have seen arbitrations approach the length and cost of going to court. Much of that can be attributed to parties trying to arbitrate the way they litigate, undertaking extensive fact-finding, or to lawyers who are worried their clients will question their efforts if they don't turn over every rock, experts said.

Voigtmann said lawyers and inexperienced arbitrators unnecessarily bring discovery principles and federal litigation rules into arbitration, but that the AAA appears to be changing the makeup of its panels to include people who will cut down on discovery proceedings and hew closer to arbitration's original intent. When it's done right, he said, arbitration is definitely faster and less costly.

Arbitration Avoids Publication

Public courtroom proceedings are open to everyone, and while that's widely considered good for society, it's not always good for companies that want to keep proprietary information secret or are concerned that they might not be sympathetic enough to win over a jury.

"If you're a plaintiff, or somebody who wants to use the pressure of a public proceeding as a means to drive an outcome, then there's nothing better than being in a courtroom where reporters are sitting and the general public is sitting," Voigtmann said. "If you're a developer of a high-rise building that has lots of problems in it, you don't want all the condo owners dragging you into court publicly."

Anne L. Blume, a partner at Cozen O'Connor, said she likes arbitration for issues a jury might not relate well to, such as a dispute over the design or construction of a high-end home. Even if the complaining party didn't do anything wrong, the nature of the matter might simply rub a jury the wrong way, she said.

"'There's something wrong with your wine cellar?'" she imagined a jury member thinking, before providing her own analysis. "Most people don't have a wine cellar."

But publicity can also work in one side's favor. For example, lawyers representing a public utility in a dispute over the construction of a power plant may want to go before a local jury, especially if the utility employees a lot of people, said Michael D. Hunt, a partner at Phelps Dunbar LLP.

If You Want to Appeal, Litigate With Zeal

A main drawback to arbitration and, conversely, a primary benefit of litigation is the ability to appeal a final decision. Even the best cases can go poorly, and arbitrators can mess up, so company- or reputation-destroying cases are best handled in court, experts said.

"If the arbitrator had a bad day and really made a big mistake, it's very difficult to get that changed," said W. Matthew Bryant, a partner at Saul Ewing Arnstein & Lehr LLP.

Under the Federal Arbitration Act, awards can only be thrown out if they were procured via corruption or fraud, if the arbitrators were clearly biased, if the panel refused to hear important evidence, or if the arbitrators exceeded their powers or used them so inappropriately that a well-reasoned award wasn't made.

"That's a herculean burden of proof," Blume said. "You're really challenged to do that. So you really have to be trusting of the arbitrators and very careful how you present your case."

With such a limited right of appeal, an arbitration award can be factually and legally wrong and still be upheld, according to Adrian L. Bastianelli III, a partner at Peckar & Abramson PC.

Litigation Is In If You Want a Quick Win

Lawyers who believe they've got "a real dead-bang winner," on a matter of law, such as a contractual provision, may find that their best option is to go before a judge and file a motion to dismiss or for summary judgment, experts said.

"You're more likely, if you've got a winner on an issue of law, to get a court to dismiss it," Bastianelli said, adding that courts like to end cases quickly if they can.

Such dispositive motions can be filed in arbitration, but Blume said that in her experience, panels tend to not want to grant them because an arbitrator's job is to hear all the evidence and then make a decision. Appelbaum echoed that observation.

"Many times, parties like to be in court if they think they have a knockout punch they can deliver in a court action," he said.

While judges often rule on these types of motions as part of their jobs and are accustomed to handling them, arbitrators are more likely to try to ensure the proceedings are as fair and appeal-proof as possible, according to Kenneth M. Roberts, a partner at Schiff Hardin LLP.

In rare cases, arbitrators do grant such motions, but it's hard to make that happen.

"It's pulling teeth out of a lizard to get a panel to actually do it," Roberts said.

--Editing by Brian Baresch and Katherine Rautenberg.
