New Jersey Law Journal
STATEWIDE LEGAL AUTHORITY SINCE 1878
An ALM Publication
OCTOBER 14, 2021 NJLJ.COM

Construction Arbitration: The Pros, the Cons and COVID-19

Two seasoned practitioners in the area of construction law present an insightful dialogue regarding the pros and cons of arbitrating construction cases.

By Daniel R. Guadalupe and Deanna Koestel

Arbitration in construction is common because it involves issues requiring specialized and technical knowledge. This expertise is considered essential to the goal of construction arbitration: a fair, expeditious and cost-efficient resolution. However, some worry that without an experienced, proactive arbitrator, the lack of court and evidentiary rules could result in a more expensive, and not necessarily more efficient, forum to adjudicate their disputes. The COVID-19 pandemic has thrown another consideration into the mix since most courts are so backlogged with cases that it may be difficult to get to trial in a reasonable time frame, leaving plaintiffs in need of a judgment in a construction case. Whether the dispute involves an owner seeking damages for defective construction or a wrongfully terminated contractor seeking payment, litigants are faced with the prospect of waiting for years on end at great risk and expense.

As co-chairs of the Construction Law Practice Group at Pashman Stein Walder Hayden, and as the authors of this article, we present a dialogue regarding the pros and cons of arbitrating construction cases.

Deanna Koestel: With COVID-19, we have seen an increase in construction disputes over delays, force majeure, contracts, payments, and defective construction. But courts have backlogs of cases and pushed off civil trials. Dan, you've been an arbitrator for many years. Can parties who initially filed their cases in court now seek to arbitrate?

Dan Guadalupe: Yes, parties can agree to arbitrate their disputes at any time even if there is no contractual arbitration clause or they are already in court. They can do that by mutual agreement and can choose a forum, venue


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and which arbitration procedural rules and statute applies (e.g., the New Jersey Arbitration Act or the New Jersey Alternative Procedure for Dispute Resolution Act). They can also choose the qualifications of the arbitrator (e.g., someone with 20 years of experience in construction litigation).

Deanna: Why should a party that has already filed a case in court now pivot to arbitration?

Dan: There is such a slowdown in the civil court system due to COVID-19 that cases filed now may not see a trial for a very long time, especially if a party wants a jury trial. For contractors that are owed money or owners dealing with defective construction, waiting years for resolution is simply not an option. Arbitration is not

dependent on the court system or the courthouse being open. Arbitrations can be resolved in months, not years, without significant discovery, and from any location that has an internet connection. And the rules of evidence don't apply although attorneys cannot get carried away with hearsay or untrustworthy evidence. Arbitrations are convenient, for sure. Hearings can be easily scheduled and rescheduled at any time when it's convenient for everyone, including the witnesses (as opposed to the 9:00am-4:30pm limits of a courthouse). It's easier, for example, to have your expert appear on Zoom from out of state than if the expert had to travel and wait to testify in a courthouse.

Deanna: Do you see any other advantages to pursuing arbitration in construction disputes now in light of the COVID-19 pandemic versus filing a litigation in court?

Dan: Yes. Unless the judge was a construction lawyer in private practice, having a construction-experienced arbitrator offers some advantages and even cost-savings in an arbitration where construction lawyers are the advocates. For example, in a case where either the owner or the contractor are seeking damages for a delay in the project, an experienced arbitrator will know the concept of "Critical Path," focusing on the task that was most important (critical) to move the project on a path to on-time completion. That is a well-established term in construction. Aside from saving the time and cost to educate the judge or jury, an arbitrator already familiar with all of the normal tasks and sequences in construction (from demolition to grading to foundations to steel erection … all the way to completion) will know how to question the witnesses to determine if certain tasks indeed were on the critical path. In that example, much time, effort and cost will be saved and the outcome is likely to be fair.

Deanna: What would you tell a client that is wary of pursuing arbitration based on their perception that it will be more expensive than court?

Dan: Counsel should explain to the client how savings will be achieved and importantly, why certain (costly) things that normally happen in regular litigation—such as depositions, numerous subpoenas, motions—need not occur in arbitration. Many lawyers in arbitration try a claim as if it were pending in court, seeking discovery and filing motions, etc., which drives up the expense. However, that can serve to defeat the goal and benefit of arbitration—shorter,

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cost-efficient process, not to litigate as in court. The arbitrator is supposed to be an expert in these types of disputes, and the rules of evidence don't apply, so the need to uncover new evidence is not as strong as in a court case. To some degree, it is a forensic inquiry on what happened. The client should understand that there are several advantages to arbitration, such as an expert arbitrator, confidentiality (no public record), speed and convenience.

Deanna: But isn't there a real concern about not "fully" litigating a case in arbitration, especially because arbitration awards are hard to reverse or vacate? Unless the parties expressly agree to an appeals process, arbitration statutes make it very hard to vacate or modify an award.

Dan: True, but that is what the parties chose in their contract. Arbitration is a creature of contract. Attorneys should remind their clients that this was the bargain they struck and they are bound by it. The investment of time and preparation for the hearing must focus on the cut-to-the-chase issues and facts the

arbitrator will want to address. Litigators should educate their corporate counterparts to draft and negotiate better arbitration clauses. The parties can agree to a full appeals process in lieu of limiting review to confirmation, modification or vacatur of the award under the arbitration statute.

Deanna: Does that mean that "trying" a case in arbitration should be different than in court?

Dan: Absolutely. In court, lawyers must ensure they comply with the rules of evidence, reserve objections, and prove their case in that context. Arbitration is different. As an arbitrator, I want the lawyers to be more efficient with their evidence and questions, rather than be bogged down by evidential objections. Arbitrators also tend to question witnesses directly more than a judge to get to the "heart" of the dispute efficiently. For example, as arbitrator, I want to know: why there was there a delay, who caused it, and whether an extension should have been given. Arbitration should be an exercise in practicality, not in sophistry or trial tactics.

Deanna: If you had to dissuade anyone from pursuing arbitration, hypothetically, as I know you favor arbitration, what would you tell them?

Dan: I would focus on how difficult it is to get an award vacated or modified. It is almost impossible. Other than bias, fraud, etc., the best hope is to argue that the arbitrator exceeded his or her authority, but that is very difficult to prove. Courts encourage and favor arbitration, so before you even start, it's an uphill battle. At least in court you have motions for reconsideration and appeals. There is no doubt that there is a risk in being stuck with the wrong arbitrator. The process of selecting one is therefore important, and due diligence must be done on the proposed arbitrator.

Deanna: The COVID-19 pandemic has raised many force majeure arguments and defenses even in circumstances where there is no force majeure clause in a construction contract. Do you believe that an arbitrator may be more willing than the court to consider COVID-19 impacts on a project and assess overall fairness in a project given the circumstances?

Dan: Yes, but only because experienced arbitrators are familiar with construction project schedules and the impact of certain unforeseeable events, such as materials shortages or delays (e.g., tiles manufactured outside of the U.S.). As to COVID-19, because of vaccinations and ways to mitigate risks, force majeure may no longer be as effective a defense or excuse as it was in mid 2020. It is becoming, shall I say, a tired defense. That being said, an experienced arbitrator will be more sensitive than a court to inquire how pandemic delays could have been mitigated or avoided, given the arbitrator's familiarity with how a construction project is managed and run.

Deanna: What is your sense as to the longevity of lawyers and litigators utilizing virtual platforms such as Zoom for these cases?

Dan: The pandemic's impact on the practice of law has been profound, particularly as lawyers, litigants, arbitrators, mediators and judges have grown comfortable with the use of technology to conduct and manage cases. The availability and acceptance of virtual platforms to conduct hearings seems here to stay in the long term, making arbitration a more reasonable and acceptable option to court litigation.

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