

# The Advantages and Disadvantages of Arbitration vs. Court Litigation

Articles February 13, 2015

Many business owners and construction industry entities prefer, as a matter of course, that construction disputes be submitted to binding arbitration. Others maintain that, because arbitration lacks facets of the procedural and legal structure of court litigation, only traditional litigation will ensure an outcome that is truly premised on the facts and law. These opinions often are influenced by favorable, or more likely, unfavorable, experiences in either forum.

There are potential advantages and disadvantages to either forum, depending upon the nature of the dispute. The following factors are suggested for consideration in determining whether to proceed in either arbitration or court or to include a mandatory arbitration clause in an agreement.

1. **Time.** Arbitration typically provides a speedier resolution than proceeding in court. The limited right to appeal arbitration awards typically eliminates an appeal process that can delay finality of the adjudication.
2. **Flexibility.** Court litigation is largely controlled by statutory and procedural rules. Through provisions set forth in a construction agreement or upon mutual agreement of the parties once arbitration has commenced, the parties have the opportunity to establish rules and limits for pre-hearing exchange of documents or interrogation of witnesses, the manner in which an arbitration hearing will be conducted and the level of detail to be included in an arbitration award.
2. **Cost.** Arbitration often is less costly than court litigation, primarily due to the compressed schedule for the completion of discovery and trial. In court litigation, significant expenses are devoted to pre-trial discovery processes, such as written interrogatories and depositions of witnesses. However, the discovery process that is prevalent in litigation increasingly has become a regular part of arbitration as well, thus increasing costs.
3. **Arbitrator / Judge.** The soundness of any adjudication is largely dependent upon the quality of the arbitrator or trial judge. In the arbitration process, the parties select the arbitrator(s). Any pre-hearing disputes between the parties are decided by the same arbitrator(s) that ultimately decide the case. In contrast, in many courts, no individual judge is assigned to a case and, therefore, multiple judges may be involved in adjudicating pre-trial disputes. The judge is assigned by the court without input from the parties. Thus, arbitration affords the parties the ability to select the decider, whereas court litigation does not.
4. **Expertise.** Arbitrators are selected from a pool of professionals, typically with experience in the construction industry and, therefore, may provide a greater level of expertise than a judge. Such persons should have a greater capability to comprehend project issues and documents and to scrutinize liability and damages claims common to the construction industry than most trial judges.
5. **Rules of Law and Evidence.** When in court, judge's decisions are constrained by statutory and case law and the conduct of the trial is governed by established rules of evidence. In contrast, an arbitrator has considerable flexibility to consider any evidence he/she deems relevant and may issue an award based upon perceptions of fairness or equity and not necessarily on the evidence or rules of law.

6. Joinder of Parties. Parties may be compelled to participate in arbitration proceedings only by agreement. Thus, if any additional parties are necessary for complete relief, those other parties either must have agreements requiring such participation or otherwise must consent to their joinder in the proceedings. In contrast, in court proceedings, all persons and entities involved in a dispute typically can be joined as parties.

7. Appeal Rights. An arbitration award is final and binding and, in many jurisdictions, there is a limited right of appeal, even if the arbitrator makes a mistake of fact or law. Although trial court verdicts are not easily reversed, judges sometime make mistakes and the ability to request a review of a decision by an appellate panel is an important procedural safeguard.

For additional information please contact Matt Hoffman