

Arbitration Beats Going to Court — in Most Cases

by Quenda Behler Story

A contractor once said to me, “You’re always pushing arbitration. I listened to you and instead of suing, I went to arbitration. It cost me thousands of dollars and took months to get a decision. What kind of crummy advice was that?”

Similar Trappings

I admit it: In recent years arbitration has become more like a regular lawsuit and less like mediation. Today the process is quite complicated and includes many of the trappings of litigation — lawyers, expert witnesses, discovery, competing motions, and so forth.

I advise clients to stick to arbitration for two reasons: The judge and jury may not have the expertise to understand the dispute, and litigation takes more time.

Even so, writing an arbitration clause into your contract is still better than falling back on the standard legal process of a lawsuit, where you hire your lawyer and the other guy hires his lawyer, and then they fight it out in court in front of a judge.

But think about it: What’s so wrong about going to court? People may whine about abusive lawsuits and innocent losers, yet in most cases justice eventually prevails. In fact, our courts are so fair that it was almost inevitable that arbitration would become more like a regular lawsuit.

Discovery

Take the discovery process, which didn’t used to be common in arbitration but is beginning to be so. Discovery takes place before trial: It’s when the lawyer for one side wants to read the business records of the guy on the other side. Naturally the other guy’s lawyer attempts to limit access.

Is it fair to go waltzing through your opponent’s business records looking for proof against him? Of course it is. This isn’t some sports game — it’s about who’s right and who’s wrong. Often a significant amount of money is involved; sometimes the outcome determines whether someone stays in business.

For example, you won’t have records showing how the architect came to give you the wrong electrical specs. But the architect probably will. If you sue him because he was wrong — or worse yet, if someone sues *you* because he was wrong — you’ll probably need his records to prove your case. And that will be true whether the matter is handled through arbitration or litigation.

So if I think this country’s judicial system is the fairest in the world, why do I advise people to stick to arbitration? For two reasons: The judge and jury may not have the necessary expertise to understand the dispute, and litigation takes more time.

Expertise

Let’s start with expertise. The construction industry requires a lot of knowledge and experience. When you go into arbitration, the parties — you and your opponent — get to choose the arbitrator. The process will go faster if you pick one who’s familiar with the industry, because he or she will already understand things like building codes and who is responsible for what on the job site.

But if you’re in litigation in front of a judge and a jury, you’ll spend many hours and huge amounts of money putting experts on the witness stand to explain what an electrical subcontractor does and what a building inspector looks at during an electrical wiring inspection and the like. Maybe the judge and jury will understand your expert testimony; maybe they won’t. You could be talking to people who have never seen what is under a cover plate.

In addition to all that, by the time you get to the real issue of what kind of electrical service the architect should have specified, the jury members have been

listening to expert witnesses for so long their eyes have glazed over and they're half-asleep.

Speed and Flexibility

Then there's the question of time. The guy whose comment inspired this tirade was complaining because his arbitration process took almost seven months. Believe me, when it comes to litigation, that's nothing.

Sure, a very complicated case can take a long time even in arbitration, but that same case would almost certainly take longer in litigation. Arbitrators have the power to frame issues, direct cases, and

trators can ask questions — freely — and as many as they want. If there's something they like to see brought into evidence, or something they'd like the lawyers to explain further, they can just ask. Of course, there's a process that allows judges and juries to ask questions, too, but it's ponderous, complicated, and inefficient, so mostly they don't do it.

Making a Choice

For all of these reasons, I stand by my original "crummy" advice and strongly recommend including an arbitration clause in building contracts. I like to write the clause so that my client, who-

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limit pointless activity in a way that judges do not. Throw in the appeals process that's available in litigation, and we could be talking about spending years on a case that in arbitration could have been wrapped up in a few months.

Furthermore, when it comes to taking evidence, arbitration is less structured and more open to innovation. I've even heard of witness examinations conducted by telephone. I was astounded, but I suppose such an approach is better than serving a witness with a subpoena that requires sitting in a courtroom and waiting an indefinite amount of time to be called. You'd certainly wind up with a friendlier witness.

An arbitrator also can put limits on witnesses that a judge never could. He can require a witness to summarize, or he can put a witness on a clock. That would never happen in a regular courtroom — or if it did, the next stop would be the appeals court.

Here's another big advantage: Arbi-

trators can choose between arbitration and litigation.

For example, a simple clause of this kind could read, "Disputes may be resolved by arbitration, if the contractor demands arbitration, by giving written notice of intent to arbitrate to the property owner no less than 60 days after the dispute arises." This doesn't mean that the contractor *must* arbitrate the dispute, only that he can if he chooses to.

But if arbitration is so great, you might reasonably ask, why would anyone in the building industry ever choose to litigate? And the answer is that in certain circumstances litigation makes sense.

Here's my advice about which legal avenue to pursue: If it's a question of fact, go for arbitration. If it's merely a matter of collecting money — and there's no issue about whether that money is actually owed — choose litigation.

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