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The Alternative-to-Alternative Dispute Resolution-Arbitration in Construction Matters and Beyond?

I. The Arbitration Process and how it differs from Judicial Proceedings and Mediation

Specific instances when arbitration can be used

Arbitration is a method of resolving disputes outside of court and that is also separate and apart from mediation. Parties refer their disputes to an arbitrator who reviews the evidence, listens to the parties, and then decides. The arbitration process is less formal than a courtroom hearing or trial (it is theoretically supposed to be less expensive), but more formal than mediation or negotiation.

Most arbitrations arise out of an arbitration clause contained in a contract, in which the parties have agreed to resolve any disputes arising out of the contract through arbitration.

As such the first thing a professional must explore when determining whether a case can be submitted for arbitration is the contract and if there is an arbitration clause. The clause will also dictate which forum the arbitration will take place in. Many times, a mediation is a condition precedent to arbitration, so professionals should also keep that in mind. Once these items are explored a professional should discuss and think about the pros and cons of arbitration.

The Differences between Judicial Proceedings and Arbitration

As mentioned above and will be expanded on below, there are several differences between arbitration and litigation. The most significant difference is that litigation is handled in the court and must adhere to the strict laws and statutes that govern court proceedings.

Arbitration is handled outside of the courts and can be a much speedier and informal process. However, arbitration can only take place if it is provided for in a contract or agreed upon by the parties, as mentioned above.

Additional differences between judicial proceedings and arbitration, are the neutrals who will be used, the limitation of parties involved, the ability to conduct proceedings virtually and the finality involved as most arbitrations are not appealable.

The Differences between Mediation and Arbitration

Arbitration and mediation are the two types of alternate dispute resolution processes, used as alternatives to civil litigation.

Mediation is an informal voluntary process where the two parties get together with a trained mediator to see if they can work out their differences. The mediator can be selected by the parties or by a judge, and this person doesn't impose an agreement on the parties. Any agreement between the two parties isn't binding, and the dispute can continue to court if the parties can't agree.

Arbitration is a more formal process, in which the two sides agree to take their dispute to a trained arbitration professional as an alternative to litigation. As with litigation, the two parties present their cases, and the arbitrator decides, which is usually binding on the parties.

Also as discussed, the parties in an arbitration are typically limited to those involved in the contract that the arbitration clause arises out of, which is a consideration that industry professionals must take into consideration. Many times, in the construction arena projects involve several entities, some of which may not be known at the time claim comes in. In an arbitration you could be forfeiting the right to seek contribution from certain players who could and should be a part of the process. As such, careful consideration should be given when determining to move forward with arbitration.

II. Advantages of Arbitration and why it may make sense in certain construction claims

Speed of the Process

It is not an industry secret that litigation takes years. Construction claims specifically tend to be complex and it is not unheard of for a claim to take at least five (5) years to get to trial (especially in tougher jurisdictions). Most professionals like to think that the litigation process will be wrapped up in eighteen (18) to thirty-six (36) months, however this is not the norm, especially post Covid.

Arbitration tends to move faster than litigation. For many arbitrations, the parties need to wait only a few months between commencing the process and attending the main hearing. Because there is typically less formalized procedure throughout an arbitration, there is less potential for competitiveness to slow down the process.

Typically, in an arbitration, the parties working with an arbitrator, will agree to a scheduling order that sets forth the deadlines, process, and rules for conducting the arbitration. This order will typically include provisions for how long the discovery period will last, where and when the evidentiary hearing will occur, the content of the arbitrator's final award, and the amount and type of discovery that will be allowed. This tends to take less than one (1) year.

This is a major factor to think about when deciding whether to evoke an arbitration clause. Further if a claim can be wrapped up in one (1) year this certainly has cost benefits. Common sense dictates that claim professionals would love to wrap up a complex claim in one (1) year as opposed to multiple years.

However, this means that the claims professional, the attorneys, and the experts must all be on the same page. Without going through the process of formal discovery you are forfeiting the ability to uncover facts that are not known at the time the claim comes in. Given the high stakes involved in construction litigation it is paramount that the team work together and remain on the same page.

Evidence to be used in Arbitration

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.

This alone can make the use of arbitration very appealing. In terms of presenting visual and demonstrative exhibits an arbitrator may allow evidence to help them understand a claim that a judge could bar on the grounds of relevance or other rules of evidence. The claims professionals and attorney can really pick a narrative they want to present and push to get that in front of an arbitrator which could lead to a favorable result.

Once again this is something to consider when utilizing experts. Experts may like the freedom to present something to an arbitrator that may would not come in before a jury. Animations are one (1) of many tools that an expert can use effectively to sway an arbitrator.

Virtual Hearings

The COVID-19 pandemic and the restrictions put in place to prevent the spread of the virus have presented challenges to the litigation process. Even prior to covid, arbitration was going more and more virtual. As we come out of the pandemic, arbitration (which really is tailor made for a virtual platform), will become the prevailing method in conducting arbitrations.

The virtual process has benefits from both a carrier and attorney perspective. Obviously the most important benefit is COST. When engaging in a virtual arbitration we are saving on travel costs, which can be substantial. This rings true when you factor in the benefit of having the necessary parties present.

Further with the saved costs, claims professional could devote further resources to its experts or possibly present additional witnesses that could be cost prohibitive in a court setting.

The whole concept of arbitration is to streamline the litigation process, and this is yet another example of why it can be appealing. Further unlike a trial, there is no *voir dire* or jury concerns, that seems to be the biggest hang ups on conducting jury trials virtually (among other considerations). As such, arbitration really is nicely suited for the virtual forum.

Expertise of the Arbitrator

One area that arbitration is viewed as more attractive than the judicial process is ability of the parties to select an arbitrator qualified to hear a construction dispute. (Although agreeing to the arbitrator can be a war and careful consideration should be given prior to discussing possibilities with adversaries).

Arbitration allows the parties to find an arbitrator who has experience in the construction industry and who will bring construction knowledge to the decision-making process. This critical construction knowledge is not always known by judges. Likewise, jurors can get lost in the mechanisms of breaking down a construction claim dispute, the mechanisms involved and how to come to the best decisions.

A construction arbitration will likely have a construction lawyer or someone with extensive construction experience serve as the arbitrator. By using a construction arbitrator, claims professionals greatly increase the chances of getting a more informed resolution. This tends to make the hearings more succinct as an experienced arbitrator will likely want to get to the heart of the matter to make an informed decision.

There are lots of arbitrators out there so the claims professional, attorney and expert should all discuss what arbitrators make sense.

Privacy

Unlike a trial, arbitration is a private procedure for the most part. If the parties desire privacy, they can enter into a confidentiality agreement which will keep the proceedings and results out of the public realm.

As such when determining whether to utilize an arbitration clause, considerations as to privacy should be given.

Finality

There is typically no appeal from an arbitrator's decision. This is primarily because appeals create time constraints and immense costs which is exactly what arbitration is intended to avoid. If a party believes that an arbitrator made a mistake of law or determine facts incorrectly, it is very difficult for that party to appeal an arbitrator's award. The only real bases for asking a court (once again what arbitration looks to avoid) to overturn an arbitration decision is: a) fraud, bias, or that the arbitrator decided issues that were not within the scope of arbitration. These bases rarely exist and even more rarely provable.

As such when deciding to move forward with arbitration claim professionals know that they will likely have a final decision within one (1) year and the decision will not be subject to appeal.