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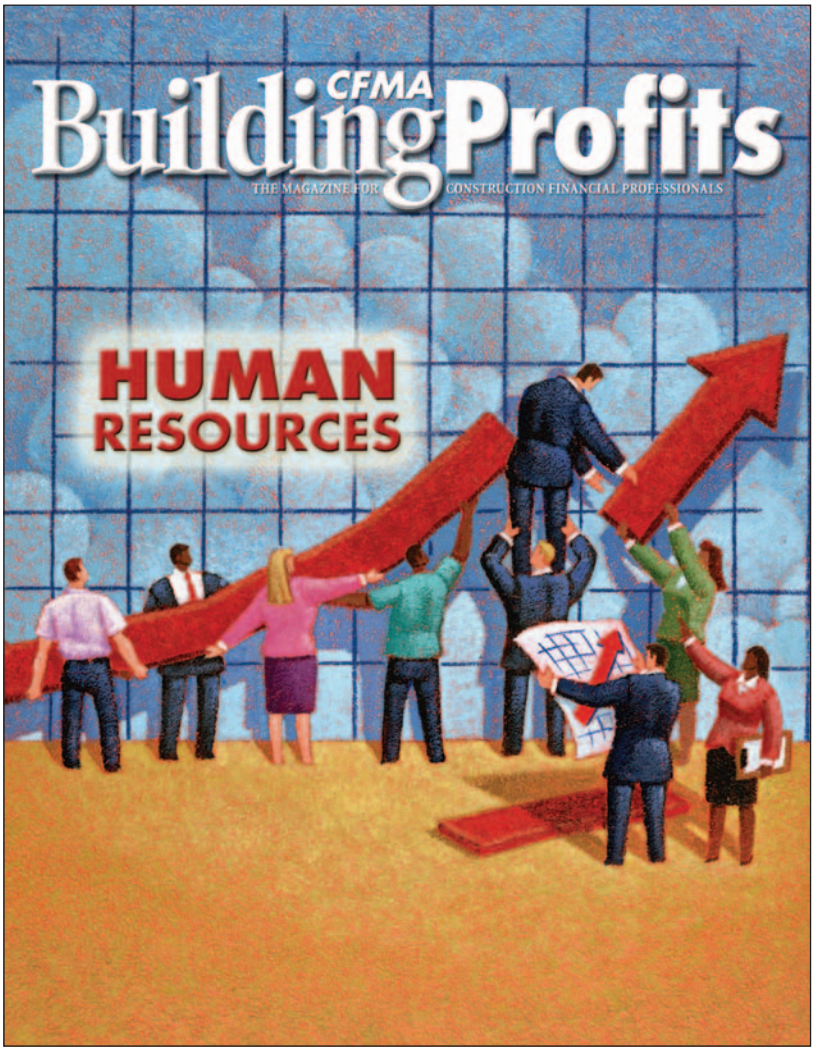

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BY ALAN S. PRALGEVER

To Arbitrate or Litigate? One Lawyer's Surprising Answer

For some time, there has been a great debate among counsel about whether arbitration or litigation is a more economical, logical, and efficient way to proceed. In the early years, arbitration had the cachet of being theoretically less expensive, quicker, and more equitable. It also had three additional advantages: **1)** it was private and confidential, **2)** decisions were final, and **3)** arbitrators often had some familiarity with the field.

But, as many in the legal profession have learned, the contrary is often true. For a number of reasons, arbitration is frequently more expensive, time-consuming, and less desirable. Certainly, there are a variety of issues to consider. However, I believe that litigation is often a better approach to dispute resolution.

The Cost of Arbitration vs. Litigation

Depending on the circumstances of the case and complexity of the issues, arbitration is often not the most cost-effective solution.

First, depending on the size of the claim, initial filing fees can be several thousand dollars. By contrast, court filing fees are relatively modest.

Second, arbitrator fees can range from $800-$1,500 a day per arbitration session. And, three arbitrators may be required, depending on many factors including the contract's arbitration clause, the claim's dollar amount, the complexity of the claim, and the involved parties' preferences.

Third, the arbitrating parties have to pay for a court reporter and transcripts. Litigants do not generally incur this expense in a trial unless the decision is appealed. Moreover, the cost for a daily videotape in court is often just dollars per day on an as-needed basis.

Fourth, the parties involved in the arbitration often pay for the rental of a hall or hotel suite, which is not the case in court.

Fifth, it is often difficult to coordinate the schedules of the three arbitrators and the parties involved to secure dates for arbitration hearings, while court dates are set once discovery is complete.

Sixth, the administrative overhead fees for an arbitration association can be considerable, while the cost of using the court system is minimal.

Arbitration Scheduling: A Cumbersome Process

Hearing dates are scheduled at the arbitrators' convenience, usually with consideration accorded to the schedules of the parties and their attorneys. If an arbitration requires two weeks of hearings, those hearing dates may be spread out over a six-month period or longer.

It is very difficult to work out a schedule for arbitration sessions that involve three arbitrators plus one or more adversaries. As a consequence, it often takes months, sometimes years, to arbitrate a dispute that might represent, at most, a two- or three-week trial in court following the discovery period.

Further, the selection process for arbitrators is often protracted, and requires a fair amount of time and consideration. The parties generally need a lawyer on the panel to keep order and direct traffic between the other professionals; otherwise, the arbitration can spin out of control.

Also, relaxed rules and an informal atmosphere may result in delays because the opposing lawyers will continually argue about discovery, evidence, and the pace and depth of the issues.

Rules of Evidence & Procedure

The typical arbitration hearing is far more informal than a trial. Generally, the Rules of Evidence and Procedure are relaxed in arbitration. This relaxation of the Rules was initially viewed as positive. However, experience indicates that arbitrators often apply the Rules of Evidence casually.

Ultimately, that does not benefit either party. Unlike courts, arbitration tribunals are not required to apply court-established procedural or evidentiary rules, unless the parties specifically agree otherwise or the arbitrators choose to adhere to such rules. Thus, because the evidentiary rules are randomly applied, documents or testimony containing hearsay or incompetent, irrelevant, or prejudicial testimony may be admitted.

Supposedly, this evidence is given less weight – but, once heard, it's part of the "collective conscience" and reality of the arbitration panel. Evidentiary rules are important in any proceeding because they protect the reliability of the decision-making. Further, the Rules of Procedure are designed to assure fairness, prevent surprises, and compel disclosure of critical information.

However, in arbitration there is no tried-and-true, consistent mechanism to keep the parties on track. Also, because arbitrators are not usually bound by the intricate and exhaustive legal rules that govern procedural and evidentiary matters, arbitration may lack the legitimacy associated with judicial forums.

Discovery

One of the greatest drawbacks of arbitration is the lack of strict rules concerning discovery. In a lawsuit, the court rules provide for the exchange of documents, taking of depositions, parameters for expert opinions, and other discovery issues to avoid surprises at trial. In arbitration, on the other hand, the arbitrators typically determine the breadth and depth of discovery, and this can vary widely from panel to panel.

In court, there are a multitude of cases concerning what is discoverable and what is not; what is confidential and what is not; what is relevant and what is not; what is privileged and what is not; what needs to be exchanged and what does not.

Moreover, the parties also have a "trier of fact" who decides when discovery is overly broad and burdensome, and will eventually call a halt to unreasonable requests for information.

That simply does not occur in arbitration, where discovery can be arbitrary and capricious because arbitrators either grant too much or too little discovery. Also, discovery continues throughout the arbitration, and there are no consistent rules concerning what discovery the parties must exchange.

It's not unknown for arbitrators to order the exchange of major pieces of discovery right in the middle of the process, making strategy (and either prosecution or defense of the claims) more difficult.

This can be particularly problematic for expert witnesses whose opinions should generally be derived from facts after all discovery has taken place. The lack of consistent rules and timelines for discovery means that experts are often shooting at a moving target, confronted with facts they could not anticipate.

By contrast, in court, discovery is monitored, managed, and often limited in time frame, breadth, and depth because the triers of fact have a better handle on what evidence is required.

Further, the lack of discovery may impede the ability to properly evaluate early settlement of cases. In addition, unexpected results during arbitration can occur because of an inability to procure and/or introduce third-party witnesses or expert testimony.

Also, it may be difficult to subpoena evidence from third parties who are not primary parties to the dispute. And, it may be virtually impossible to compel uncooperative third parties to furnish the arbitration panel with testimonial evidence.

The Arbitrator's Experience

Many in construction believe that arbitrators familiar with construction disputes are the best people to hear these specialized cases. However, familiarity with industry standards does not insulate a party from erroneous decisions.

Further, the right to appeal is an important one; the trier of fact is aware that a higher authority could overturn an unreasonable decision.

Though often governed by The Code of Ethics for Arbitrators in Commercial Disputes, arbitrators are essentially totally independent. It is very rare for a court to refuse to confirm an arbitration award; in fact, confirmation is almost automatic.

Expert Opinions

In court, the use of experts is regulated, and experts are constrained to express their opinions about issues in a particular way. If their opinions are not based on fact and/or law, then a court can strike all or a portion of their opinion or testimony. Courts exert a tremendous amount of control over experts, a situation that simply does not exist in arbitration.

Generally, arbitration panels permit experts greater latitude in expressing their opinions, which are often not based strictly on the facts. Moreover, when the arbitration panelists believe they have a special expertise in a given area, they may be more prone to listen to expert opinions based on hearsay if the experts substantiate the panelists' predilections.

Summary Judgment Motions

In litigation, one can make a pretrial motion, such as a motion for summary judgment or partial summary judgment or a motion to dismiss frivolous or unmeritorious claims. This presents a definite strategic advantage. Cases often settle once a motion for summary judgment is made because weaknesses in the opponent's case are amplified.

Even if the summary judgment motion is unsuccessful, a settlement may result from the pressure of making such a motion. Why? Because litigants often settle before summary judgment motions are heard to avoid the risk of loss.

Although this option theoretically exists in arbitration, it is rarely, if ever, used because arbitration panelists generally do not like motions for summary judgment. Accordingly, valid legal defenses that would likely be successful in litigation may be unsuccessful in arbitration if they go against the arbitrators' opinion.

As such, arbitration can be frustrating if the respondent has strong legal defenses for having the case dismissed at an early stage. An arbitrator will rarely dismiss a case before the arbitration hearing because a losing plaintiff may challenge such a premature dismissal as a denial of a fair arbitral hearing.

So, it may be better to retain the option for a motion for summary judgment in court.

Arbitrator Decisions

Arbitrators are given tremendous latitude in their procedures and judgments – and absent outrageous conduct, the courts will not review their actions. In civil courts, the judges are held to strict application of the law, as well as the Rules of Evidence and Procedure.

Certainly, there are a **VARIETY** of **ISSUES** to consider. **HOWEVER,** I believe that **LITIGATION** is **OFTEN** a better approach to **DISPUTE RESOLUTION.**

However, such strict compliance is not required of arbitrators. Arbitration awards need not be "reasoned" in the legal sense of the word, and they need not contain findings of fact or conclusions of law, unless both parties so request. They may use any and all equitable procedures or common sense and fairness to determine how they will hear a matter.

This gives the typical arbitrator far more power than the average judge. Once a panel is selected, the arbitration association has very little control or oversight over the panel.

Therefore, it is imperative that the parties carefully select the arbitrators who will hear the case. A potential arbitrator's background and reputation must be carefully checked – because once chosen, arbitrators are nearly impossible to remove.

Further, when the parties waive access to the courts, they relinquish important rights, such as the presence of a reviewing court to keep the adjudicator on the straight and narrow. Judges are normally more experienced in being objective and acting in an equitable manner, and are more familiar with the prevailing law.

On the other hand, arbitrators are allowed to exercise much more discretion than a judge or jury, and may be subject to more outside influences and biases.

Experience demonstrates that arbitrators often take into account too much personal knowledge and experience without carefully considering whether or not it applies to the case at hand – none of which is communicated to the litigants.

As previously mentioned, arbitrators are generally not accountable to any supervisory authority. And, unlike judges, arbitrators do not have to follow the law, and are not required to give findings of fact and legal conclusions, unless both parties request it.

Arbitrators may generally make any award that is "just and equitable" and may disregard the law or contract if they believe it is appropriate to do so because of industry standards or otherwise.

Arbitration & Precedent

Arbitration awards are generally not reported, except for some securities and labor arbitrations. Such awards do not bind anyone other than the parties, and arbitrators are not constrained to follow the law and established precedent.

There is really no record on which to rely and no guarantee that the law will be properly applied to the facts. As such, the arbitration process often yields less predictable results, with no uniformity of decisions.

Final & Binding

One of the most compelling reasons to litigate is that parties cannot appeal arbitration decisions. In most situations, arbitrations are "final and binding." While some may view this as an advantage because it ensures finality, it can also be a disadvantage. For example, possible abuses, mistakes of law, and injustices may go unresolved.

Under arbitration, there really is no method of guaranteeing that legal principles are faithfully and correctly decided. And, once a decision is rendered in a binding arbitration, the possibility of appeal is strictly limited in most states.

In short, a seemingly unfair arbitration award is much more difficult to reverse than a court judgment. Without the right to appeal, there is always the risk of being subject to the whims and prejudices of the arbitrator. Further, the lack of post-trial motions and appeal rights in arbitration also affect a party's leverage to resolve a matter for less than the award.

As a consequence, arbitrators have a significant amount of power that they may not exercise properly. In most states, parties cannot appeal an arbitrator's erroneous legal ruling; they are bound by it.

Other Technical Considerations

There are various other technical considerations favoring a judicial forum. In court, you have a right to a jury trial (assuming that you have not waived this right elsewhere in the agreement). Having a dispute resolved by a jury of your peers is a valuable right that should not be underestimated.

Moreover, the remedies and relief in arbitration may be different than in court. Arbitrators may be restricted in the type of relief they are able to grant (for example, injunctions, punitive damages, and specific performance). Thus, the parties may be unable to collect punitive damages and/or attorneys' fees.

Another weakness is that arbitrators tend to award something (if not fully half) to each party. This is known as "splitting the baby," and occurs when arbitrators wish to avoid being seen as too one-sided. The downside to this tendency is that the wrongdoers are not adequately punished for their misdeeds.

An Advantage: Arbitration Is Private

One distinct advantage is that arbitrations are private matters. They do not appear on court dockets and are not part of public records. This may be critical if the arbitration concerns information that your company wants to keep from competitors, or prefers not to reveal in a public forum.

These issues often can be overcome in court through confidentiality agreements, protective orders, and other devices to keep matters private. Ultimately, however, courts are reluctant to seal records, and information concerning trade secrets and intellectual property may be revealed in some form during a trial. As such, arbitration may be a viable alternative if contractors want to keep their business private.

Conclusion

Arbitration is private; however in my experience, it is seldom faster, cheaper, or more effective than litigation. During the arbitration process, arbitrators have free reign to follow their discretion. The fact that arbitration is "final and binding" creates a distinct disadvantage to the losing party if an error of law or fact has occurred. So, higher management (including CFMs) should carefully consider whether or not to accept an arbitration clause during the drafting stage of a construction contract. BP

Editor's Note: For another viewpoint on this topic, see "Curtailing Litigation Costs: Effective Use of Arbitration" by Richard P. Flake in the March/April 2006 issue.

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