

NEW YORK CONSTRUCTION LAW UPDATE

This article is written and published by Vincent T. Pallaci, Esq. Mr. Pallaci is a construction attorney with the law firm of Kushnick & Associates, P.C. and he practices construction law in New York State. Mr. Pallaci is also the publisher and author of the New York Construction Law Update blog (<http://newyorkconstructionlawupdate.blogspot.com>) and the New York Mechanic's Liens blog (<http://nymechanicsliens.blogspot.com>)

ARBITRATION IN CONSTRUCTION CONTRACTS: IS IT RIGHT FOR YOU?

There seems to be a common belief amongst the construction community that an arbitration clause in a contract is a "good thing." The majority of the industry seems to believe that in the arbitration vs. litigation discussion arbitration is King. The most common reason - arbitration is cheaper. But is it?

The most common arbitration clause seen in construction contracts in the United States today is the clause that requires arbitration before the American Arbitration Association. Usually, these arbitrations are conducted under the Construction Industry Arbitration Rules and Mediation Procedures. While it is true that the American Arbitration Association recently launched a flex fee schedule, the fees are more or less the same if you are actually forced to proceed with the arbitration. In other words, if you don't settle your dispute within ninety (90) days of filing your initial deposit then you have to pay a "proceed fee" to continue with your arbitration. You basically get nothing from the Arbitration Association in that initial ninety (90) day period except a case number.

So is arbitration cheaper than litigation? The American Arbitration Association's lowest filing fee is \$775.00 and there is also a case service fee for that claim of \$200.00. This is for claims up to \$10,000.00. The fee to file a lawsuit for up to \$10,000.00 in New York is usually \$210.00 (unless you file in federal court where it is a bit more expensive - but not much). So for a \$10,000 arbitration claim you pay \$985.00 to get the ball rolling. You pay \$210.00 for litigation. Not so much of a difference. But how about a \$1,000,000 claim? The arbitration association will charge you an initial filing fee of \$8,200.00 and a case service fee of \$3,250.00. Litigation? \$210.00. That's right. No additional charge for the size of the claim in litigation. Remember, these are just the filing fees. You also have to pay your arbitrator.

Assuming you have 1 reasonably experienced construction arbitrator you can expect to pay about \$400.00 per hour and \$2,500.00 per day of hearings for the arbitrator's services. If we assume 3 days of hearings and 10 hours of study time that gives you an arbitrator's bill of \$11,500.00. Keep in mind that only the most uncomplicated construction disputes can be resolved in 3 days of hearings or less. If you have a complex construction defect dispute figure

you are looking at a minimum of 5 full days. So for your simple construction dispute in arbitration you are looking at a bill of at least \$12,485.00 (up to \$10,000 claim) and possibly in the range of \$22,950.00 (for a claim around \$1,000,000.00). The same case brought through litigation? \$210.00 all inclusive. That's right. No charge for the judge or court's time. Its not so clear cut anymore that arbitration is in fact the cheaper way to go is it? This is assuming there was only 1 arbitrator. Sometimes you have 3 - especially for larger claims. Those fees grow quickly.

Now of course we have to take into consideration the attorneys' fees. Proponents of arbitration say you save thousands (sometimes tens of thousands) in attorneys' fees by going the arbitration route vs. the litigation route. But that is not always the case. More or less you will have the same number of days in arbitration as you will at a trial. A trial may be a bit longer, especially if its a jury trial, but we are looking at round general numbers now. So the attorneys' fees for the arbitration hearings and the trial itself cancel each other out. You are left with what happens before the trial/arbitration. In litigation there is a tremendous amount of attorney time that goes into the case. You have document discovery, depositions, court appearances, motions, etc. All of these things take time and therefore money. There are far too many variables to say what the average is, but it is safe to say that discovery can cost as little as \$7,500 and easily can cost well in excess of \$100,000. It just depends on the complexity of the case. In arbitration you have very limited discovery so these costs are less, but they still exist.

The question is whether less discovery is a good thing? Yes, less discovery saves you money in attorneys' fees. But if you have a complex dispute sometimes you need that discovery (depositions, etc.) to prove your case. In arbitration you may be forced to prove a case without having a chance to fully develop all of the facts.

There is also the issue of the arbitrator's decision being binding with little or no recourse to challenge it. Suppose you get the arbitrator on a bad day and he just isn't paying attention? What if he didn't understand the technical testimony? What if he completely misapplied the law? You can try to overturn the decision but its not easy and it is not a given. In litigation you have an absolute right to appeal the judge or jury's decision. You may not win the appeal but at least you are guaranteed to have a second set of judges look at the decision to determine whether it is proper. There are a very limited number of reasons that you can overturn an arbitrator's award.

The last significant issue is time. Litigation is very time consuming and the court systems do not move quickly. Arbitration on the other hand can move very quickly. So in terms of how long it takes from filing the claim to recovering your money arbitration is almost always the hands down winner.

When you look at all of these factors together its not clear whether arbitration or litigation is better for the construction world. Arbitration is faster. They both cost about the same amount of money when you consider the total costs. Litigation gives you more opportunities to explore your claim and conduct discovery. Litigation gives you a better chance to have a bad award overturned. So is arbitration right for you? It comes down to your specific situation and a business decision. But don't take the generally accepted theories for granted -

sometimes arbitration is not better. Make sure that you understand your arbitration clause and review it with your attorney. It might just be worth striking the arbitration clause from that contract.