

# Should I stay or should I go: Court vs. Arbitration in North Carolina

By [Melissa Dewey Brumback](#)

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**Should I stay or should I go now?  
If I go there will be trouble  
And if I stay it will be double  
So come on and let me know!**

Are you wondering whether Court or Arbitration should be made a standard part of your construction contracts? With apologies in advance to The Clash, there is "trouble" to be found in either venue.

Some companies, and their lawyers, insist that [American Arbitration Association \(AAA\)](#) Arbitration is the only way to go. Others prefer to take their chances in a local state court. Who is right? Neither, and both. As with anything, there is a cost-benefit analysis that you should go through prior to making either a standard part of your construction contract.



## ***Pluses and Minuses of Going to Court***

If a dispute is brought in court, there is a standard, fully vetted set of statutes, case law, court rules, and procedures already in place. A judge, unlike the typical arbitration panel, is generally more willing to consider defenses based on statute, such as the [statute of limitations](#) or the [statute of repose](#). Summary Judgment, in which a judge will (on occasion) grant a judgment for or against a party without the necessity of the full

blown jury trial, is possible. Such dispositive, procedural rulings are extremely unlikely to be granted by an arbitration panel.

On the other hand, a court trial means a jury verdict. Unless the parties agree to waive their right to a jury trial, your case will be decided by true laymen who may have never set foot on a construction site before, and who will not understand the RFI, change order, and pay app process. Terms like "substantial completion," "critical path," and "[standard of care](#)" will be foreign to them.

I've seen some juries get it right, and I've seen some get it wrong. Most jurors take their responsibilities extremely seriously and will try to apply the law as the judge instructs them. But at the end of the day, you have people unfamiliar with industry standards determining your case.

### ***Pluses and Minuses of Arbitration***

Many standard construction contracts contain arbitration provisions, generally AAA Arbitration. The typical arbitration includes a three member panel of experts (construction professionals, designers, construction attorneys) who hear the evidence and make a ruling. That ruling has the full force of law. The reasoning behind such arbitration clauses is that industry professionals better understand the construction process, standards of care, and interrelationships on a complex construction project. Theoretically, therefore, they are better able to determine the true root cause of damages or delay.

Arbitration is sometimes considered to be less expensive and less time consuming than a court trial. The arbitration panel generally sets fairly loose procedural and evidentiary boundaries, and tends to allow into evidence things that might not meet the strict Rules of Evidence that a court would apply. Some of these generalities, however, have not proven to be true in practice. AAA Arbitration can be costly-- the filing of a claim alone is costlier than typical court fees. Case managers add a layer of bureaucracy to the process.

In my perception, Arbitration panels also generally are more prone to "split the baby" in a close case. However, the "split the baby" argument is greatly debated, at least with respect to AAA arbitration. The AAA told me that their internal studies actually show that is not, in fact, the case. The [summary of their findings](#) is worth reading. [I don't know the particulars of their study protocol, and AAA is certainly not a disinterested party, but the numbers are impressive. Perhaps AAA arbitration panels, at least, are not King Solomon.]

### ***Which is Better?***

The answer to that question is a clear and concise, "it depends." It depends on the facts of your particular case, the jurisdiction you are in, the type of panel you may get, and

numerous other things completely out of your control. Consult with [a lawyer](#) in your jurisdiction to discuss the pros and cons of each, and which may be right for your particular situation.

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