



CONSTRUCTION
SUPERCONFERENCE
2021

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How did you like your last construction litigation? Why is arbitration different than litigation?

Presenters/Faculty:

- **John P. Carpenter, Chief Legal Officer**
– BALFOUR BEATTY US CIVILS, FAIRFIELD, CA
- **L. Tyrone Holt,**
– THE HOLT GROUP LLC, DENVER, CO
- **Stephen M. Seeger,**
– COZEN O'CONNOR, WASHINGTON, DC
- **Wendy Kennedy Venoit,**
– HINKLEY ALLEN, BOSTON, MA

Moderator:

- **Michael A. Marra, Vice President Construction Division**
– AMERICAN ARBITRATION ASSOCIATION, PHILADELPHIA, PA

How did you like your last construction litigation? Why is arbitration different than litigation?

Outline of Issues for Discussion:

- What are the Key Criticisms that Litigants and Parties make regarding Arbitration? Are they valid or just “sour grapes”?
- Issues and challenges that are common to Litigation and Arbitration
- Key considerations of the Parties with respect to the dispute resolution process in construction disputes
- Key drawbacks to Litigation of construction disputes
- Characteristics of Arbitration that make it more effective and efficient than litigation for construction disputes

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What are the Key Criticisms that Litigants and Parties make regarding Arbitration? Are they valid or just “sour grapes”?

- It was too Expensive
- It took too Long; Too many hearing days (contiguous or non-contiguous)
- Too much or Too Little Discovery permitted
- Unfavorable opinions of the Arbitrators:
 - Arbitrators appeared biased / unfair / not receptive (or appearing to be non-receptive) to arguments
 - Arbitrators didn't exercise enough control over the process and the parties; or exercised too much control
- Inadequate / too much Administrative Oversight
- Bad Outcome/Result

How did you like your last construction litigation? Why is arbitration different than litigation?

Issues and challenges that are common to Litigation and Arbitration:

- No guaranteed outcome – risks/exposure
- Must fight to prove/disprove liability
- Motion practice
- Discovery / exchange of documents
- Unless properly managed, can be unreasonably expensive
- Unique legal issues and doctrines may apply

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Issues and challenges that are common to Litigation and Arbitration:

- Hearing on the merits before a unbiased, neutral trier of fact
- Due process and fairness guarantees / concerns
- Award of attorneys' fees and costs is possible based upon the contract, the law and the facts
- Consultants and expert witnesses typically required

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Key considerations of the Parties with respect to the dispute resolution process in construction disputes:

- Fair, just and equitable process and decision, with adherence to due process
- Application of the law and the controlling contract documents
- Expeditious decision at a reasonable costs, minimizing inconvenience

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Key considerations of the Parties with respect to the dispute resolution process in construction disputes:

- Privacy/confidentiality (embarrassing / unfavorable information not disclosed)
- Result that is consistent with the customs, practices and procedures that govern the day-to-day relationships in the industry
- Maintenance of a business-like process

How did you like your last construction litigation? Why is arbitration different than litigation?

Key drawbacks to Litigation of construction disputes:

- Trier of fact that may not be familiar with the unique terms, customs, standards, practices, procedures and law that applies to construction disputes (if jury, total unfamiliarity)
- Reduced ability to limit costs to amount in controversy
- Unnecessary and wasteful discovery, motion practice and hearing time
- Trier of fact may not be familiar with or understand the unique analytical tools that are used, e.g., schedule analyses, proficiency claims evaluations, etc.
- Time to trial – Particularly in era of COVID 19 (and post), courts particularly back-logged

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Key drawbacks to Litigation of construction disputes:

- Strict adherence to rules of evidence
- Over-expensive ESI protocols that may be unfit for document intensive construction disputes
- Lack of confidentiality & privacy from public
- Lack of control and unpredictability of the time required to resolve the dispute and lack of significant input into the time, process and procedures that will be used to resolve your dispute.

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Characteristics of Arbitration that make it more effective and efficient than Litigation for construction disputes:

- Parties can structure and customize the dispute resolution process in the arbitration agreement
- Decision makers that are thoroughly familiar with the law, customs, practices, conventions, contracts and contractual relationships that govern the parties, the industry and involved professions
- Ability to customize the process and devote less time devoted to slavish adherence to formal procedures without reason

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Characteristics of Arbitration that make it more effective and efficient than Litigation for construction disputes:

- Rules and procedures that can be tailored to make the process more expeditious and cost effective without sacrificing due process or fairness
- Arbitrator with construction expertise able to structure process based on the facts and nature of the construction dispute for efficiency and cost-savings
- Rigid and inapplicable rules of evidence not mindlessly applied

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Characteristics of Arbitration that make it more effective and efficient than Litigation for construction disputes:

- Privacy and confidentiality can be preserved except with respect to enforcement of the Award
- Sophisticated parties and their counsel can customize the process to their needs and schedule.
- Provider rules can be more efficient

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Characteristics of Arbitration that make it less effective and efficient than Litigation for construction disputes:

- Limitations on joinder of third parties
- Limitations on third-party discovery
- Limitations on appeal of award

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How Can you Make Your Next Arbitration Experience Better?:

- Select the best administrative body and rules for your particular needs
- Carefully select your Advocates – important qualifications and considerations
- Carefully select your Arbitrators – important qualifications and considerations
- Ask for what you want – but be careful what you ask for (you just might get it!)
- Clearly and concisely present your case – “scorched earth” generally has no place in arbitration
- Don't forget about the damages

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Important Factors to Include in Your Carefully Drafted Arbitration Provision:

- Applicable arbitration rules and the organization to administer the arbitration
- Number of arbitrators and minimum qualifications (or identity of arbitrators)
- Minimum discovery (and flow-down consent to honor arbitral subpoenas)

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Important Factors to Include in Your Carefully Drafted Arbitration Provision:

- Ability to join parties (and flow-down consent)
- Preconditions to arbitration (e.g. “initial decision maker, mediation)

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Matters to Omit from Your Carefully Drafted Arbitration Provision:

- Unilateral arbitration provisions
- Unreasonable limitations on discovery
- Unreasonable time limits

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Questions?



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