

Media Mention: Jason Strickland Shares Construction Law Knowledge with BNC

September 25, 2018



There are several methods for resolving construction disputes.

And recently, construction litigator Jason Strickland explained the pros and cons of one popular form of dispute resolution known as arbitration in an article appearing in Business North Carolina magazine.

From the article:

Many construction projects end in disputes and many of these disputes are resolved through arbitration, a process by which the parties agree to submit their case to a third-party neutral, an “arbitrator,” who acts as a judge and jury.

What is Arbitration?

Arbitration is often confused with mediation and with a lawsuit. Each involves different forms of dispute resolution.

Mediation is a settlement conference in which the parties meet and use a third-party neutral, a “mediator,” as a settlement facilitator. The mediator has no power to force settlement. The parties mediate because of a court or contract requirement, or because they feel the mediator will be able to facilitate an otherwise unobtainable settlement.

A lawsuit is conducted in a court and usually is initiated by a plaintiff filing a complaint, in which the plaintiff will ask for some form of relief from the defendant. The court is a government institution from which the parties are entitled to seek a decision as to their dispute.

Arbitration is a lawsuit without court involvement. The parties agree (typically in a contract before the dispute arises) to submit their dispute to arbitration. The agreement empowers the arbitrator to decide the dispute. Unlike mediation, the arbitrator’s decision is binding. Frequently parties will mediate and, if unsuccessful, then arbitrate.

Arbitration Versus Lawsuits

The following are the major distinctions between arbitration and court litigation:

Decision Process

In a lawsuit, the dispute is decided after a trial before a “finder of fact,” usually a jury. The judge administers the trial and decides questions of law. Although the judge may hear some construction cases, they are a small subset of the total cases he or she hears. Similarly, a typical juror will not be a construction expert.

In arbitration, the arbitration agreement controls the process. There is a private arbitrator (or a panel) who acts as both the judge and the jury. The arbitrator is chosen based on the subject matter of the dispute; e.g., construction arbitration will have a construction lawyer as the arbitrator. This reduces the effort necessary to “educate” the arbitrator and better suits the arbitrator to render a decision.

Rules

Arbitration is less formal than a lawsuit. The rules of evidence and civil procedure are not strictly enforced and an arbitrator has wide latitude to frame the process. Typically, the parties and the arbitrator will agree to a scheduling order setting forth the deadlines, rules for conducting the arbitration, process for discovery, where and when the evidentiary hearing will occur, and the content of the arbitrator’s award.

In a lawsuit, there are a set of rules dictating how the parties will conduct themselves and present their claims. These rules allow the parties less flexibility than in arbitration.

Arbitrations are intended to be a more efficient and economic means of dispute resolution. However, many parties frequently turn arbitration into what attorneys call “arbitigation,” in which just as much discovery is conducted in arbitration as would be the case in litigation. This can make arbitration more expensive than litigation.

Appeals

There is no appeal from an arbitrator’s decision—appeals create costs and delays; the things arbitration is designed to avoid. If a party believes that an arbitrator has made a mistake of law or determined facts incorrectly it will be difficult to pursue an appeal. The bases for asking a court to overturn an arbitrator’s decision are fraud (arbitrator took a bribe), bias (arbitrator evidenced overt favoritism), or the arbitrator decided an issue outside the arbitration scope.

No appeals is good insofar as a final result can be achieved more quickly and less expensively. It’s bad in the sense that a party may be stuck with a result that is both undesirable and erroneous. Another downside: as more construction cases are resolved with arbitration there have been fewer published court decisions on common construction issues, creating little precedent.

In litigation, the parties can appeal the final decision of the trial court to an appeals court. Frequently there are multiple levels of appeals courts creating precedential guidance. [Read more.](#)

For further examination of arbitration in construction, [click here.](#)

Jason's article appeared in the Law Journal section in the September issue, which is a sponsored section.