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The Views of Architect and Engineer Attorneys on Arbitration in Commercial Design Cases

Rochanne Keane • February 22, 2023

In 2022, Beazley surveyed 29 lawyers who regularly defend complex architect and engineer ("A&E") professional liability claims involving our insureds to assess whether these lawyers prefer arbitration or litigation for commercial construction disputes and whether views have changed due to COVID-19. The resounding response from 50% of responding attorneys told us they "never" or "rarely" prefer arbitration over litigation in federal or state court, while only 13% say they usually prefer arbitration for cases against A&E firms.

Arbitration was initially marketed as a speedy, inexpensive way to resolve commercial construction disputes. In the 1990s, arbitration proponents argued that parties could obtain a timely, just result from an arbitrator with deep knowledge of commercial construction projects and avoid the expense, time and unpredictable nature of litigation in state or federal courts. The reality of the last 20 years has been quite different, with arbitration being anything but speedy, becoming extremely expensive and often before arbitrators who have no real expertise in the field.

WHY SURVEY RESPONDENTS SAY THEY "NEVER OR RARELY" PREFER ARBITRATION

The lawyers who say they "never" or "rarely" prefer arbitration cited three top reasons for their position.

- Arbitration can be costly. Responding attorneys cited this as the top reason. Based on Beazley's claims experience, arbitrators often charge $500 an hour or more, meaning that a three-arbitrator panel can total $1,500 to $1,800 an hour. Because arbitrators charge for

preparation, preliminary hearings, discovery disputes, motion hearings and final hearings, total fees can easily exceed $50,000 in a complex dispute. In AAA cases, administrative fees can cost another $10,000 to $15,000. By comparison, civil court filing fees are nominal.

- The arbitration panel lists include few A&E experts. Most dispute resolution arbitration provisions in commercial construction contracts default to the AAA. The AAA's Arbitrator Panel Selection Lists includes many lawyers who previously represented or worked for owners, general contractors and subcontractors, but few who represented architects and or engineers.

- Panels might not follow the law or rules of evidence during the final hearing process. Experience shows that arbitration panels are very reluctant to grant dispositive motions and tend to let cases go to final hearings. Some arbitration panels will not even entertain dispositive motions, even those motions based on a lack of a "Certificate of Merit" (an affidavit that is issued by an independent third-party certifying that the claim brought against a design professional is factually and legally supportable) or enforceability of limitation of liability, which is an important defense in Court against frivolous and unsupported claims. Compared to litigation, it is close to impossible to appeal an adverse arbitration outcome, because the right of appeal is very limited in arbitration.

WHY SURVEY RESPONDENTS SAY THEY "SOMETIMES OR RARELY" PREFER ARBITRATION

The attorneys who responded that they "sometimes" or "rarely" prefer arbitration cited four circumstances in which they do prefer arbitration.

- When an architect or engineer wants to keep the proceedings out of the public eye. Unless filed under seal, almost anything filed or said in open court is available to the public.

- When the litigation venue is not good for defendants.

- When taxpayer funded entities are plaintiffs and suing for recovery, such as cities, counties and municipalities. There is strong preference for arbitration where the very jury members making the decision may be ultimately paying the bill if an award is not made against the architect or engineer.
  When the case is smaller, such that amount in dispute only requires one arbitrator and extensive discovery is not needed to defend the claim.

WHY SURVEY RESPONDENTS SAY THEY "USUALLY" PREFER ARBITRATION

13% of respondents "usually" prefer arbitration over litigation. Four reasons they cited were:

- The uncertainty and unpredictability of jury verdicts

- The steep learning curve for judges and juries on complex, technical issues presented in architect and engineer cases

- The list of potential arbitrators provided in their individual states do contain a representative group of design professionals, with significant design experience and expertise, on the Arbitrator Panel

Selection Lists.
In their experience, it can be quicker to get to a final arbitration hearing than a trial date in certain states.

FEW LAWYERS SAY COVID-19 HAS CHANGED THEIR VIEWS REGARDING ARBITRATION

Interestingly, less than 7% of lawyers' preference regarding arbitration or litigation has changed since COVID-19 started. Those responders indicated court delays resulting from the pandemic increased their preference for arbitration.

KEY TAKEAWAYS

The general consensus from our survey respondents was that while arbitration in the US can be advantageous in a few specific scenarios, they still prefer litigation to resolve most professional liability disputes against architects and engineers. COVID-19 has not significantly changed this view. There are several practical takeaways from the survey:

Make an informed decision regarding arbitration, including learning more about the available arbitration forum, governing arbitration rules and potential arbitrators.

Think ahead during contract negotiations. If your firm is going to agree to arbitration, then agree that at least one arbitration panel member has been a licensed, practicing design professional for at least 20 years.
Require that the cost of arbitration be split between the parties. Do not agree that the losing party has to pay more than its proportional share of the costs.

Rochanne Keane

Claims Product Specialist - Architects and Engineers

E. Britton Monroe, Esq., Shareholder, LLOYD, GRAY, WHITEHEAD & MONROE, P.C.

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