



NATIONAL CONSTRUCTION DEFECT CONFERENCE



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Litigation vs. Arbitration



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ARBITRATION VS. LITIGATION: WHICH FORUM IS PREFERABLE?

(Well, it depends ...)

Perspectives from Litigators, Claims Professionals, and Arbitrators

JURISDICTIONAL ISSUES

- ARBITRATION
 - Controlled by the Arbitration Provisions of the Operative Contract
 - Arbitrators Vested with Determining their Own Jurisdiction
 - Submission Agreements
- STATE/FEDERAL COURT
 - Controlled by:
 - Subject Matter
 - Personal Jurisdiction (Diversity Jurisdiction)
 - Amount in Controversy
 - Plaintiff Choice/Removal Issues

PROCEDURAL ISSUES

- ARBITRATION
 - Preliminary Hearing
 - Joinder of Necessary Parties
 - Case Management Order
 - Limited Discovery?
 - Discovery Referee
- STATE/FEDERAL COURT
 - Pre-Trial Conference
 - Scheduling Order
 - Rules-Based Discovery

THIRD-PARTY PRACTICE

- ARBITRATION
 - Subcontractors (Is there an Arbitration Provision in the Subcontract Agreement?)
- STATE/FEDERAL COURT
 - Rules-Based Third-Party Practice
- WHAT IF SUBCONTRACT DOES NOT ALLOW FOR JOINDER IN ARBITRATION
 - Separate Tracks?
 - Subcontractor Opposition to Inclusion in Arbitration?

MOTION PRACTICE (DISPOSITIVE MOTIONS)

- ARBITRATION
 - Arbitrator as Gatekeeper for Dispositive Motions
 - Party Must Request to File Dispositive Motion
 - Timing
- STATE/FEDERAL COURT
 - Rules-Based Dispositive Motion Practice
 - Timing (Is Trial Setting Contingent on Dispositive Motion Deadline of the Scheduling Order?)

TRIAL VS. EVIDENTIARY HEARING

- ARBITRATION
 - Admissibility of Evidence
 - Is it a Free-for-All?
- STATE/FEDERAL COURT
 - Rules of Evidence

ARBITRATION AWARDS VS. VERDICTS

- ARBITRATION
 - Form of Award (Partial Award? Reasoned?)
 - Use of Preliminary Awards
 - Cannot be Appealed
- STATE/FEDERAL COURT
 - Verdict
 - Verdict Forms (Special Verdict Forms)
 - May be Appealed
- SOLE ARBITRATOR vs. JURY (SOLE FACT FINDER vs. CONSENSUS)

COST ISSUES

- ARBITRATION
 - Fee Schedule
 - Arbitrator Compensation Deposits
 - Out of Pocket Expenses Upfront
- STATE/FEDERAL COURT
 - Filing Fee
- DOES LIMITED DISCOVERY TRULY LOWER COSTS IN ARBITRATION?
- WHICH FORUM IS MORE EXPENSIVE?

CONCLUSION

- WHICH FORUM IS MORE EFFICIENT?
- WHICH FORUM IS MORE EFFECTIVE?
- WHICH FORUM IS MORE EQUITABLE?