



The Plans Aren't Drawn as You May Think:

Debunking 6 Myths about Construction Arbitration

The construction industry is projected to grow 6% in 2016, with construction starts reaching approximately \$712 billion.⁽¹⁾ With increased business comes the potential for complex and contentious disputes that involve significant dollars.

Although alternative dispute resolution (ADR) has long been the preferred conflict-management process in the construction industry, misinformation and misperceptions about the costs and risks of arbitration vs. litigation persist.

The stakes are high in the selection of a dispute management process, and the real cost of a conflict-resolution mix of more litigation and less arbitration can be measured in added risk, increased legal expenses, damaged relationships, and lost executive time.

Read on to see how arbitration's time-tested proven effectiveness and value for the construction industry contradict six common myths.

MYTH: Arbitration Takes as Long as Litigation.

Arbitration cases are resolved faster than litigation cases. Federal court statistics—the best available measure of the time frame to resolve litigation cases—indicates that the median length of a jury or bench trial in civil cases is 27.2 months, or over two years.⁽²⁾ In comparison, the median time frame from filing to award for 2015 construction arbitration cases administered by the AAA® was 232 days—less than eight months.⁽³⁾

Some further statistics:

The median time from filing to award for 2015 construction arbitration cases⁽⁴⁾

- With claims or counterclaims less than \$100,000 was 146 days—less than five months.
- With claims or counterclaims in excess of \$500,000 was 482 days, or 16 months.
- With claims or counterclaims of \$1 million+ was 509 days, or 17 months.
- With claims or counterclaims of \$5 million+ was 642 days, or 21.4 months.
- With claims or counterclaims of \$10 million+ was 657 days, or 21.9 months.

The median time to settlement through mediation for cases that first were filed as arbitrations was 146 days, or just shy of five months.⁽⁵⁾

Also, if saving on time and cost is a priority, the new **AAA Supplementary Rules for Fixed Time and Cost Construction Arbitration** limit the cost and duration of arbitration proceedings and allow parties to calculate the maximum time to complete the arbitration, the number of hearing days, and the arbitrator costs.



MYTH: Arbitration is as Costly as Litigation.

"The primary reason many in the construction industry prefer arbitration is the perception of problems with the existing legal system. Any business, even if resolved in its favor, does not wish to go through the [litigation] process again."⁽⁶⁾ Even when cases settle, the attorneys' fees incurred all the way up until settlement can be substantially more in a litigation than in an arbitration.

Unlimited discovery and other judicial procedures can consume considerable time and increase the legal costs associated with a litigation case. In arbitral proceedings, discovery often is limited to document exchanges and a relatively small number of depositions if any at all.

As the *Supplementary Rules for Fixed Time and Cost Construction Arbitration* noted above offer time and cost solutions, the **revised AAA's Construction Arbitration Rules and Mediation Procedures** include a mediation step and consolidation and joinder time frames and filing requirements to streamline these increasingly involved issues in construction arbitrations.

MYTH: It's Cheaper to Arbitrate Directly, with No Need to Pay Fees to a Third Party

Ad hoc arbitration—the process of working directly with the arbitrator(s), with attorneys responsible for ensuring that the process moves along—is seen as a cost savings by parties. It is, however, often difficult to appreciate the hidden costs of taking this approach.

Eliminating the third-party administrative organization can be penny wise and pound foolish, with the end result a substantially more expensive and time-consuming arbitration.

A few of the important points that may be overlooked in taking the *ad hoc* approach:

- Administrators like the AAA add value to the dispute resolution process even before an arbitrator is appointed, expediting the resolution of issues such as disagreements over joinder/consolidation or locale or refusal to appoint an arbitrator.
- Administrators are duty bound to ensure that the industry arbitration rules are strictly adhered to and that the process does not stall in any party's attorney's office, allowing parties to get back to business as quickly as possible.
- Without a third-party administrator, any questions or issues must be addressed by the parties themselves. And in those situations, the parties' sole forum for recourse is the judicial system, with suits and potential countersuits.
- Confidential documents may not be as securely stored as compared with an arbitral organization with specific safeguards in place. Given the recent hacks of law firm data, this is a major concern.⁽⁷⁾ The AAA's standards for technology protection are audited annually to check for vulnerabilities.
- There is a necessary administrative component to managing any case, such as payment collection. Without a third-party administrative organization, which routinely handles these tasks as part of the filing fee, arbitrators must do so, and at their prevailing—and much higher—rate.

MYTH: The AAA Does Not Handle Large Construction Cases.

In 2015, the AAA administered 551 construction industry cases with initial claims of \$500,000 or more. The largest mediated construction case was for \$2.6 billion; the largest arbitration case was for \$96 million. The aggregate dollar value of claims and counterclaims during this period was \$5.5 billion.⁽⁸⁾



The AAA has well-established protocols designed for handling large cases and a panel of arbitrators with expertise in managing these types of cases. In addition, the *Construction Mega Project Panel* (see below) was created specifically to handle cases arising out of large infrastructure or “mega” projects. For these mega project cases, the AAA also provides administration by one of four construction division vice presidents and their directors.

MYTH: The AAA's Construction Panel Isn't Distinctive.

The AAA *Construction Industry Panel* offers highly qualified construction attorneys and industry professionals from all areas of the construction industry.

The *Construction Mega Project Panel* is comprised of the top construction arbitrators specializing in construction mega projects, as rated by a committee of attorneys and in-house counsel experienced in representing owners, contractors, design professionals, and insurers in disputes arising out of major construction and infrastructure projects.

MYTH: The AAA Provides Only Arbitration Services.

The AAA has long offered a full range of dispute resolution services to the construction industry for fast and efficient resolution of cases. These include mediation, dispute resolution boards (DRB), partnering, early neutral evaluation (ENE), fact-finding, and initial decision maker (IDM).

Through its *National Construction Dispute Resolution Committee (NCDRC)*, the AAA has worked closely with the construction industry to develop the Construction Rules and other project-specific approaches to prevent and manage conflict.

The AIA (American Institute of Architects) has named the AAA as a provider of mediation and arbitration services in its standard contracts for almost 50 years. The AAA also is included in *ConsensusDOCS* and other construction industry form contracts as a provider of ADR services.

Footnotes

- (1) “2016 Dodge Construction Outlook,” Dodge Data & Analytics, <http://www.construction.com>.
- (2) Federal Court Management Statistics, www.uscourts.gov.
- (3) Based on construction arbitration cases awarded in 2015.
- (4) *Ibid*.
- (5) Based on construction disputes filed for arbitration and settled in 2015 that had an AAA mediator mediate the dispute.
- (6) David Taylor, “Arbitration vs Litigation: The Great Debate,” www.jdsupra.com, (April 13, 2016).
- (7) Sue Reisinger, “Experts: GCs Are Aghast over Hacks at Top Law Firms,” <http://www.corpcounsel.com>, (March 31, 2016)
- (8) Based on 2015 construction disputes filing amounts.