



## The Clear Benefits of Arbitration in the Era of COVID-19

Litigation has never been a model of efficiency. Now, due to previous and ongoing closures and limited access to courts due to the COVID-19 pandemic, litigants have been largely unable to proceed with many phases critical to the litigation process, including hearings and trials. When some form of normalcy returns, courts will inevitably be grappling with a significant backlog of hearings, trials, and related matters, not to mention the challenges related to new health and safety measures, such as limited attendance in confined spaces and social distancing. The likely outcome is further delay.

Arbitration is poised to offer a very different story. Even before the COVID-19 pandemic, aspects of the arbitration process were already conducted remotely. Most communications with the arbitrator and any case manager, in the case of an administered arbitration, were and are handled via email. The critical preliminary hearing, where various procedural matters are addressed and a final hearing date may be identified, was and remains largely conducted by telephone conference. Hearings on interim matters were generally conducted by telephone conference as well. While the final hearing is typically conducted in-person, arbitral rules often permitted and encouraged flexibility. For example, Rule R-33 of the American Arbitration Association's Construction Industry Arbitration Rules provides that "[w]hen deemed appropriate, the arbitrator may also allow for the presentation of evidence by alternative means including video conferencing, internet communication, telephonic conferences and means other than an in-person presentation," provided that "[s]uch alternative means must still afford a full opportunity for all parties to present any evidence that the arbitrator deems material and relevant to the resolution of the dispute and when involving witnesses, provide an opportunity for cross-examination." The parties themselves are empowered to dispense with either an in-person or remote hearing as "[t]he parties may agree to waive oral hearings in any case."

While the economic upheaval that has been experienced will no doubt impact the future pipeline of construction projects, development is ongoing and contract terms continue to be negotiated. For those parties, the advantages of arbitration over litigation have been highlighted in this era of pandemic-driven shutdowns and closures and should seriously be considered when deciding what dispute resolution provisions should be included in the contract. And, of course, such provisions can be tailored to fit the specific needs of the project or the parties.

But for those who find themselves in the midst of stagnant litigation or are now evaluating options in the face of pursuing a claim where the applicable contract does not contain an arbitration clause, there are options. Specifically, parties can agree to submit a claim to arbitration at any time, with administering bodies providing specifically for such a process. For example, Rule R-5 of the American Arbitration Association's Construction Industry Arbitration Rules provides that "[p]arties to any existing dispute, who have not previously agreed to use

these Rules, may commence arbitration under these Rules by either filing online through AAA WebFile or by filing at any office of the AAA a written submission to arbitrate under these Rules, signed by the parties,” with the submission including specific information accompanied by the appropriate filing fee. The AAA submission form is available [here](#).

While courts will likely struggle to adjust schedules once they are fully open, arbitration may continue to move forward at a faster pace. Ultimately, arbitration—being nimble and flexible—will offer benefits, including the prospect of more timely resolution, that cannot be matched by litigation. And parties should consider such matters both in the contract negotiations and when deciding whether, and how, to pursue or defend against a claim.

**For more information please contact Carson Fisk at 512.900.3032 or via [email](#).**