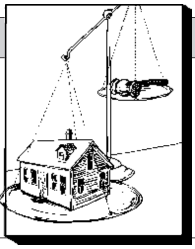
THE LEGAL COLUMN



Don’t Sue, Arbitrate!

by Perry Safran, Esq. and Carolyn Annis

Construction projects begin with contractual agreements and too often, these days, end in courtroom disputes. In the past ten to fifteen years the number of such disputes has multiplied many times over.

The arbitration system was designed to handle this increased load, and to more quickly mediate construction disagreements. This method of third-party intervention offers several advantages. It can be less formal, less expensive, and less time-consuming than the court system. For example, in some large cities it can take seven to ten years just to get into court. This extended wait can cause you to lose at the bank even if you win when you finally get to the courtroom. Arbitration, on the other hand, can take as little as a few months. But before you can make it work for you, you must know the rules.

The rules, in this case, are the Construction Industry Rules of the American Arbitration System which are available in pamphlet form from the American Arbitration Association (Washington, DC; 202/296-8510). They have been simplified so the reading is not tedious, and it is well worth your time.

It’s always better to settle your dispute amicably if possible; but if you must use the system, the following tips should help you avoid the pitfalls.

The Arbitration Clause

First, check your contract document for an arbitration clause. AIA documents and other industry-standard contracts contain these, but don’t assume the provision has been included. Many owners, or their agents, will use these standard contracts, but stack the odds in their favor by adding or subtracting pertinent clauses. (This advice applies not only to arbitration clauses, but also to other important contract clauses such as liquidated damages and interest-bearing clauses).

Make certain you understand the entire arbitration clause, including *all* of its terms and their implications. Consult your attorney about unfamiliar language. You may be in a hurry to sign the contract and begin working, but take the time *before* signing to fully understand how your disputes will be settled if they do occur. No one likes to begin a relationship with a discussion about future arguments. But, it’s much easier to lay the ground rules in the beginning when the association is still rosy.

Filing the Claim

When filing your claim, answer, or counter claim for arbitration, provide as many details as possible and identify any unusual, industry-specific details that could influence your case. For example, an owner may be unhappy with material you used on the job. Provide any product literature, photographs, or other evidence indicating that the item you used is standard and recommended by the industry for the job.

A detailed claim serves a dual purpose: first, it satisfies the technical requirement of sufficiently notifying the other party of your position (Rule 7) and second, it provides the AAA Regional office with an adequate background of the case so that an appropriate list of arbitrators can be selected.

While contractors can competently speak the language of their trades, the climate of the industry today forces them to learn the legal language and communicate in these terms as well.

How well you document the day-to-day events of the job will often be the pivotal point in your case. Develop standard procedures to document change orders, payments, deliveries, etc. If events occur that spell future conflicts, document them profusely: for example, with photographs, measurements, detailed notes. This paperwork is just as important to the job as your tools and equipment.

Many owners use standard contracts, but stack the odds in their favor by adding clauses.

Contractors often feel that they can best represent themselves because of their expertise in the field. But you should consider consulting a lawyer to at least draw up your claim. This will help you to understand the type of information the arbitrators will be looking for. The claim should not be verbose, just clear and concise. Remember, always stick to the facts.

Discuss your List

After filing your claim, the Regional Arbitration Director will provide you with a list of potential arbitrators. When you receive it, call the Director and discuss the list. You need to find out the rationale for each candidate (usually 10 to 15 possible arbitrators are chosen from a list of from 500 to 2500 names). The answer you get can give you valuable insight into how a third party viewed your case. It will also demonstrate whether you provided enough information for a third party to understand the principle issues of your claim.

The Arbitrator

From the list you receive, you will choose three to four names. When making your choices, consider carefully. Although your first reaction might be to choose a panel composed entirely of industry-related individuals, consider having a lawyer on the panel. All arbitrators, whether lawyers or people, are trying to reach an equitable agreement. An attorney/panelist can provide guidance and direction for the lay panelist. He can also be helpful in conducting the hearings and preserving law and order. You may want to avoid choosing panelists within your trade. They tend to be less sympathetic to your predicament than a business owner in another trade who has perhaps been in your shoes in a similar suit. In general, your competitors will tend to judge your work more harshly.

The list of three to four names you choose will be compared to the opposing party’s list. If you’ve both chosen a particular person, that person will arbitrate your case. If no names coincide, the Regional Director will then choose an arbitrator you’ll both have to live with. Usually, only one arbitrator is chosen, but if the case appears complex, the Director may choose more than one.

Cost

The arbitration system is not free. When deciding the issue of payments, you may want to waive the “one-free-day” rule and pay a little extra. A few extra hundred dollars can be money well spent to get the most knowledgeable and intelligent arbitrator(s).

Generally, the person filing the claim is required to make a deposit if the case looks like it will get complicated and run on. In any case, when judgement is finalized, fees are usually split 50/50. But don’t assume, be certain to check out the arbitration clause in your contract. It may specify a different method, and you don’t want to get caught holding the bag because you failed to read the fine print in the arbitration clause.

One way to keep costs down is to keep the process simple. Although some people go to great expense by renting fancy boardrooms, and catering fancy lunches, you needn’t do that. The rationale for arbitration is to avoid courtroom expense. It doesn’t make sense to substitute other types of expenditures. Simple cases can even be held at the job site.

Pre-Arbitration

The pre-arbitration conference is the first opportunity you will have to present your case to your arbitrator(s). If this conference has not been scheduled, request that it is. You will need to prepare an outline of your case to present at this meeting. Construct it as carefully as you did your initial claim. A written copy is not required, but it makes an impressive added touch. Plus, your outline will relieve the arbitrator(s) of burdensome note-taking.

During this session you will discuss and agree on issues such as the guidelines for discovery, which is how each party may get information from the other. Remember, volunteering information is a far more effective tactic than appearing to try to hide it. You will also set the times, dates, and locations of the hearings. The best plan is to use a low-cost central location. Simple cases can be decided in a day, but it is wise to schedule more days than you will need; it is always easier to cancel than to add extra dates. Although you should avoid several back-to-back sessions that will tire out your arbitrator, the Arbitration Association prefers that you schedule all hearings within a 5-day period.

Once your dispute has reached the point of arbitration, you will have become acutely aware of the importance of documentation. All of the facts and information concerning the case will, at this point, be included in a claims/defense book. Your success or failure can ultimately hinge on whether this book is complete and contains the necessary paperwork to support your claims. Keep the need for this information in mind when you begin working on a contracted job. It will take time and effort to maintain this degree of paperwork, but think of it as an investment in legal insurance. Contracting parties never begin their relationship with the expectation of future conflicts. But later when the honeymoon is over, they often wish they had started out with a clearer perspective. ■

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