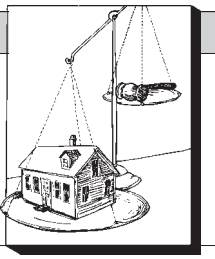
Arbitration: Benefits and Strategies



By Timothy Fisher, Esq.

Last month, we discussed the basics of arbitration law and procedure. But why would you want to go the arbitration route? And what are the pitfalls? The great advantage of arbitration is speed. The case reaches a hearing sooner, and the hearings go faster in the absence of court formalities. The result is that the injured party gets paid sooner, and also suffers a lower cost in attorneys' fees. Thus, arbitration tends to favor those who are making the claim, in other words, those whoa re victims in the breach of a contract. This tends to make arbitration clauses more important for someone who does not trust the other party, or someone who does not trust the other party to abide by the terms of the contract. So, if you are a small contractor or subcontractor entering into a contract with a larger company, or with someone whose reputation is not perfectly clean, arbitration is more attractive.

There is a perception that arbitrators tend to "split the difference" on disputes rather than squarely saying who was right or wrong. This may or may not be true, but it is not my perception. To the extent it is true, this factor would again favor claimants, since they might be more likely to get something on a claim even if the claim is not fully justified.

Arbitration loses its advantages in multi-party disputes. In a big case, such as a building collapse, numerous parties to the construction are implicated. Such disputes can be resolved fairly only if the entire case is decided by one "trier of the facts" (judge, jury, or arbitration panel). But standard arbitration clauses only allow for two-party hearings. This means that, for example, the owner of a collapsed building might arbitrate against the general contractor, but lose on the theory that design error caused the collapse. Then in an arbitration with the architect, the decision could again go against the owner, on the theory that it was workmanship errors that caused the collapse. This unfair situation can be avoided only if all sides to the dispute are decided together. Yet arbitration clauses generally forbid that. And, even if the arbitration clause allowed combining claims, the arbitration hearing procedures are not set up to handle multi-party disputes, and the benefits of speed are lost.

For this reason, parties to very large contracts often choose not to use arbitration clauses. In light construction however, arbitration is usually favorable.

Should You Change the Arbitration Clause?

There are two main changes a party, especially a small contractor, might want to make to a standard arbitration clause. The first would be to delete the provision against combining the arbitration with my other parties ("joinder"), or even go so far as to urge joinder in the case of a multi-party dispute. This provision will be effective, however, only if the other parties to the dispute have similar clauses. If that cannot be counted upon, an alternative is to provide that the matter will be resolved in court rather than arbitration if it is fundamentally a multi-party dispute. Keep in mind, however, that such an exception to the arbitration clause invites court challenges to what might otherwise be a fair arbitration decision.

Another change is that the standard arbitration clause can be "beefed up" by language instructing the arbitrator to award attorneys' fees to the victorious party. Arbitrators already have the power to give that award, but often do not. Adding such language will tend to give extra bargaining power to the person who is the victim of the breach of contract. This is because the defendant cannot just sit back with the attitude that the worse that can happen will be that he pays the claimant what he already owes. An attorneys' fees clause means that the defendant's costs increase the longer he drags the proceedings out.

Alternative Dispute Resolution

Apart from arbitration, parties can always voluntarily find any neutral person to help resolve their dispute. In recent years a number of organizations have appeared that provide dispute resolution services. They differ from traditional arbitration in several ways.

Most importantly, they custom-design the process to the needs of the parties and the nature of the dispute. For example, a procedure may be designed to move very quickly. This is particularly helpful when a dispute arises in the midst of a project: It allows the parties to resolve it then and avoid compounding it throughout the remainder of the job. Or, they can design a process to save attorneys' fees, where the amount at issue is relatively small. They choose a "third-party neutral" who has the best skills for the type of dispute, whether that means technical expertise, legal knowledge, or effectiveness as a mediator. They also can design a process that follows several stages from mediation to binding results, sometimes using the mediator as the arbitrator.

While arbitration clauses are generally written into contracts at the start of the jobs, alternative dispute resolution is often first explored after the dispute arises. Whatever the procedure, it is started only when acceptable to both parties, since the entire process is voluntary. The best way to start the process, in the experience of Dispute Resolution, Inc., of Hartford, Connecticut, is for one party to contact that firm, which then "sells" the other parties on dispute resolution. Thus, there is no need for opposing parties to reach any agreement on dispute resolution in order to get the process moving.

Alternative dispute resolution in construction cases typically involves multiple parties, thus filling a need in complex cases where arbitration may come up short. Alternative dispute resolution can also be conducted simultaneously with traditional arbitration.

Apart from Dispute Resolution, Inc. (which operates throughout the northeastern states), two firms in Boston provide these services: ADR, Inc., and U.S. Arbitration Services of New England.

Conclusion

Arbitration is the answer for most light construction contracts. Arbitration clauses can be strengthened by adding language mandating attorneys' fees to the victorious party. But one must beware of the complex case where arbitration is not sufficient to get a fair resolution of a multi-party dispute. In those cases court proceedings may be preferable, unless a specialized alternative dispute resolution method can be arranged, to bring all parties in to one case. ■

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