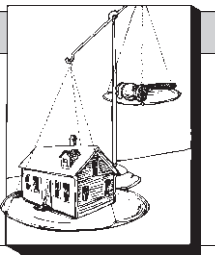
Do You Really Want to Arbitrate?



By Timothy Fisher

Usually yes; but not always.

An arbitration clause is a standard feature of every AIA contract and most other construction contracts, as well. It generally is a good idea, and usually helps the "good guy" in any dispute. This is because construction disputes are typically resolved faster and cheaper through arbitration than in court. But arbitration is not always the best route.

To decide whether you want an arbitration clause in your contract, and whether you want the one that AIA uses, you have to understand the law and procedure of arbitration. This article will outline basic arbitration law, and typical arbitration procedure. In the next issue, we'll discuss advantages and disadvantages of arbitration, and the strategic decisions you can make when deciding on an arbitration clause.

Basic Law

Any party to a contract can choose arbitration as an alternative to court proceedings. It is almost always the result of a clause in the contract, calling for arbitration "of any dispute arising out of this contract" or words to that effect. On rare occasions, parties without an arbitration clause in their contract will decide voluntarily to submit their dispute to arbitration after it arises, but no one can be forced to arbitrate unless they have promised to do so in their contract.

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If there is an arbitration clause in the contract, the courts will enforce it, and will dismiss any lawsuit that falls within that clause. Sometimes a question arises as to whether the particular dispute falls within the clause. Courts favor arbitration, however, and will often stretch to include the dispute within the clause. Errichetti Associates v. Boutin, 183 Conn. 481, 489, 439 A.2d 416 (1981). For example, a claim that misrepresentations by the defendant fraudulently induced the plaintiff to enter into the contract has been held to be a dispute "arising out of the contract" and therefore must be arbitrated. Two Sisters, Inc. v. Gosch & Co., 171 Conn. 493, 497, 370 A.2d 1020 (1976).

AAA Procedures

The American Arbitration Association has regional offices around the country. Contact the national office at 1730 Rhode Island Avenue, NE, Suite 509, Washington, DC 20036; 202/296-8510. You start an arbitration by filing at one of their offices a "Demand for Arbitration" which is a simple statement of the amount and nature of your claim. The demand must include a copy of the arbitration clause. The AAA charges a filing fee that increases with the amount of the claim.

If the case lasts more than one day, the arbitrators may sit straight through on successive days until it is concluded, but more likely will schedule the matter on and off over a series of weeks.

The AAA then opens a file on the matter and notifies the defendant or "respondent," who may file a written response or even make a counter demand. Next the AAA starts the process of selecting arbitrators. Most disputes will have three arbitrators; smaller ones will only have one. The arbitrators are selected from lists the AAA has on file, and typically include experienced people from the construction field including contractors, developers, design professionals, and attorneys. Each party is allowed to reject names and express preferences for names on the list. If the parties cannot agree on a name, however, the AAA becomes stricter in allowing rejections on subsequent lists.

After the arbitrators are selected, the AAA staff holds a scheduling conference with the parties. Sometimes the parties agree to exchange documents and allow depositions of witnesses, and make those arrangements at the scheduling conference. The AAA schedules the hearing for the arbitration.

Arbitration hearings are much more informal than court proceedings. They are often held around a conference table. The hearing proceeds by questioning of witnesses ("direct examination" of your own witness to tell your story, followed by the other side's "cross examination" of your witness). The rules of evidence apply to some extent, but are much more relaxed than in court.

If the case lasts more than one day, the arbitrators may sit straight through on successive days until it is concluded, but most likely will schedule the matter on and off over a series of weeks. The parties pay a daily fee to the arbitrators in addition to the filing fee paid to start the case.

The arbitrators must make their decisions shortly after the hearing closes (30 days in Connecticut). The arbitrators should follow the law in reaching their decision, but are not strictly required to. The losing party cannot go to court to challenge the reasoning followed by the arbitrators. Indeed, the arbitrators often do not even issue a decision with any explanation at all, so it is hard to know what their reasoning is. The only bases for a court challenge to an arbitration decision are: procurement of the decision by fraud or corruption; partiality or corruption by an arbitrator; misconduct by an arbitrator in refusing to postpone a hearing or to hear pertinent evidence; and where arbitrators exceed their powers. Conn. Gen. Stat. Sec. 52-418(a); see also O&G/O'Connell Joint Venture v. Chase Family Ltd. Partnership No. 3, 203 Conn. 133, 523 A.2d 1271 (1987). Courts are reluctant to overturn arbitration decisions at all, especially in response to claims of fraud. ■

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