

Arbitration is a One-Shot Deal

by Perry Safran and Brannon Burroughs



A recent decision of the Connecticut Court of Appeals illustrates that including an arbitration clause in a construction contract has serious consequences. The case of *Carabetta Builders, Inc. v. Hotz Corp.* arose from a contract for Hotz to supply structural steel and other components to Carabetta, who was constructing a high-rise condominium building. Using standard language in their contract, the parties agreed to arbitrate "all claims, disputes, and other matters in question arising out of, or relating to, this subcontract, or the breach thereof." So when Carabetta failed to tender payment, Hotz filed a demand for arbitration. As is common, Carabetta also made charges of its own.

A Deal's A Deal

The arbitration hearing was completed within two months. The arbitrator, after hearing extensive evidence, denied Carabetta's claims and awarded \$2,470,701 to Hotz. Reeling from the arbitrator's large award, Carabetta turned to the courts for relief. Carabetta argued that the arbitrator's award was not supported by the evidence presented, and that the court should either modify or vacate (throw out) the award.

When the Superior Court of New Haven, Conn., declined to uproot the arbitrator's decision, Carabetta appealed to the Connecticut Court of Appeals, where its fortunes were cast in stone. The Court noted that an arbitrator's authority is limited only by "express language restricting the breadth of issues, reserving explicit rights, or conditioning the award on court review." Since no such language appeared in the parties' broadly worded arbitration agreement, the Court refused to infer any limitations.

Exceptions to the Rule

The Court of Appeals did, however, identify four noncontractual limita-

tions on arbitration awards. The Court said awards may be vacated when the arbitrator:

- determines the constitutionality of a statute
- produces a decision that violates public policy
- demonstrates "manifest disregard for the law"
- engages in some sort of misconduct

The first two situations are unlikely to occur. Arbitrators rarely venture so far into legal theory and interpretation as to declare a statute unconstitutional. And an arbitrator's concern for fairness and lack of concern for legal technicalities also discourages decisions that might be contrary to public policy.

Since the arbitrator in *Carabetta* had not engaged in fraud, corruption, partiality, or other serious misconduct, Carabetta was left with trying to argue that the arbitrator had shown disregard for the law. The Court did not accept this argument, however, finding instead that Carabetta was simply challenging the arbitrator's weighing of the evidence. Since courts will not second-guess an arbitrator's evaluation of the evidence, Carabetta lost its case, and the arbitrator's award was affirmed and enforced by the courts.

One Chance Only

At the heart of the *Carabetta* decision is the judiciary system's attitude toward the enforcement of contracts. Entering a contract may offer the possibility of great rewards, but it also presents the risk of significant penalties. Courts are extremely reluctant to "rewrite" a contract so that either party can revoke the deal that it voluntarily struck. In *Carabetta*, the parties' agreement to arbitrate any dispute promised to produce a speedy and accurate result. The parties also assumed a risk, however, that the arbitrator's decision might not be in their favor. Carabetta's actions in this case are analogous to a

person who agrees to make a decision with a coin toss and upon losing screams, "Two out of three!" The judicial system is generally not willing to force another toss.

As a matter of policy, the *Carabetta* decision makes good sense. If courts were to undertake extensive review of arbitration decisions, arbitration hearings would become more like pretrial hearings or the nonbinding airing of complaints practiced in mediation. Rather than speeding up the process, arbitration would simply add another tier to the already slow-moving judicial system.

Carabetta also promotes the reliability of an arbitrator's decision. Most arbitrators are knowledgeable construction professionals with the ability to properly analyze the dispute before them. Judges, on the other hand, are legal experts, not experts in construction, and are less capable of understanding the facts and their significance in the dispute. Except in cases of favoritism and other misconduct, arbitrators are usually better equipped to resolve disputes.

Since the courts will not overrule the arbitrator's evaluation of the weight of the evidence, it is important to select an arbitrator who will understand and properly analyze the evidence. Choosing a good arbitrator may require extensive investigation into the experience and loyalties of the persons listed as potential arbitrators. If one party chooses a candidate who is unacceptable to the other, it is crucial that objections to that person's selection be made early. Once the arbitrator makes a decision, it's too late.

Finally, the *Carabetta* decision highlights the importance of presenting forceful arguments to the arbitrator. How the "weight of the evidence" is perceived depends on how convincingly the evidence is presented. An arbitrating party should spend the time and money required to present its case in a strong and understandable manner. When you only get one shot at your target, it makes sense to aim carefully. ■

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