Mechanics of Construction Law: Arbitration of Construction Disputes

February 28, 2019

Vol 1, Issue 2

The construction industry has increasingly been willing to resolve disputes via **alternate dispute resolution** proceedings rather than the judicial system. In fact, many construction contracts, including the AIA Document A201 – General Conditions to the Contract for Construction, include both mediation and arbitration clauses. Project owners, contractors, and subcontractors should be familiar with the advantages and disadvantages of alternative dispute resolution options at the time of contracting. A key distinction between mediation and arbitration is that **mediation is a nonbinding negotiation between the parties, while arbitration is binding**, like litigation.

Importantly, if the parties agree to arbitrate disputes, then arbitration can be required even if a party files a lawsuit. This practice is commonly known as staying litigation pending arbitration. In arbitration, the parties agree to have a neutral arbitrator (or panel of arbitrators) who hears evidence and resolves the dispute by issuing a binding decision. This decision can then be enforced by a court if the losing party does not comply with it. While typically less formal than the judicial process, the parties can agree to a process and formalities that they desire.

Advantages of Arbitration

Speed: Disputes can generally be resolved by arbitration much faster than through the judicial system. This is due to a more limited exchange of discovery, less motion practice, and not being subject to a court's docket.

Knowledgeable Decision Makers: In arbitration, the parties select the arbitrator, or panel of arbitrators, instead of having a judge randomly assigned. This process allows the parties to select a decision maker with particular knowledge of the issue in dispute, making the decision maker better suited to effectively consider and resolve the dispute.

Finality: Once a decision is entered, the right to appeal is limited to very narrow circumstances, which allows for finality more quickly and without the additional cost and time for years of appeals.

Costs: Arbitration can be less expensive. This, however, is not always the case. In large complex cases where discovery is allowed and experts are relied upon by the parties, the process can be very expensive. The division of responsibility for arbitration costs and attorneys' fees can all be addressed in the contract.

Privacy: Unlike judicial proceedings and judgments, which are generally deemed to be public record, arbitral proceedings and decisions are confidential.

Potential Disadvantages of Arbitration

Difficulty of pre-hearing motions: It is more difficult to have a claim dismissed before a full hearing in arbitration than in litigation. This is because arbitration favors presentation of all evidence before a decision is made. It is therefore harder to dismiss a frivolous claim in arbitration than in litigation.

Difficulty of subpoenaing witnesses: In arbitration, the process for issuing subpoenas to third parties is cumbersome and may require judicial intervention if enforcement of a subpoena is necessary.

Lack of evidentiary rules: Standard rules of evidence do not apply in arbitration which allows parties to present and rely upon evidence that might otherwise be excluded or inadmissible in court. Also, if the parties rely largely upon documentary evidence, then the party is unable to cross examine the testimony of that witness.

Lack of appeal: While finality may be a good thing for the successful party, lack of appeal rights is not an advantage for the party receiving an unfavorable decision.

Arbitration can be an effective tool to resolve construction disputes, but prior to agreeing this process, parties should have a comprehensive appreciation of its pros and cons.

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