

Building Knowledge

The newsletter of the Illinois State Bar Association's Section on Construction Law

From the Editor

BY SAMUEL H. LEVINE

WHY BE AFRAID OF ARBITRATION?

Arbitration has become a popular way of resolving disputes instead of litigation in State or Federal Courts. Public policy favors arbitration. Hon. Lisa R. Curcio (RET.) explains how to overcome the fear of arbitration. Judge Curcio (Ret.) is a senior arbitrator with ADR Systems. Prior to becoming an arbitrator, she was a judge in the mechanics lien and mortgage foreclosure section in the Chancery Division of the Circuit Court of Cook County. She is a member of the ISBA Construction Law Section Council.

In order to understand construction law, one must understand suretyship law. Frank Swanson writes about a surety's rights upon declaration of a contractor's default. Frank is an associate with Downey & Lenkov. He concentrates his practice in commercial and construction litigation and is also experienced in insurance coverage and

contract issues. This article first appeared in the August Edition of the Downey & Lenkov Construction Newsletter.

Mark Grzymala explains the complexities and challenges of bid mistakes. Mark focuses his practice in the areas of commercial litigation, construction law, mechanics liens, and collection. He is vice chair of the ISBA Construction Law Section Council.

The Section Council has drafted proposed legislation amending the Home Repair and Remodeling Act to provide for mutuality with respect to attorney fees. The proposal provides that if a home repair and remodeling contract contains a provision allowing attorney fees to be awarded to a party to the contract, then, notwithstanding any terms in the contract to the contrary, that provision shall be deemed and construed to permit the award of reasonable attorney fees to all parties to the contract. ■

From the Editor

1

Overcoming the Fear of Arbitration

1

Bid Mistakes, Bid Withdrawals, and What to Do Next

4

"That Can't Be Right": Illinois Contractors Must Be Aware of Sureties' Rights Upon Default Under Payment and Performance Bonds

5

Overcoming the Fear of Arbitration

BY HON. LISA R. CURCIO, (RET.)

THERE IS NO PERFECT METHOD

to adjudicate construction disputes. Proponents of litigation cite the right to appeal and the ability to consolidate actions, but arbitration can be faster, more private, and less costly than litigation if managed well. Parties can exert more control over arbitration proceedings than they can in court. As stated in *Royal Indemnity Co. v. Chicago Hospital Risk*

Pooling Program, 372 Ill.App.3d 104,110 (1st Dist. 2007), public policy favors arbitration because it is an effective, expeditious, and cost-efficient method of dispute resolution. So, why do many construction lawyers fear arbitration?

Parties avoid arbitration because of several common fears. Besides the limited right to appeal, parties fear an arbitrator

Continued on next page

Fear of Arbitration

CONTINUED FROM PAGE 1

who will “split the baby” or treat the arbitration like litigation, increasing the cost of resolving the dispute, or an arbitrator who does not know the law or ignores the law. Yet there are concrete ways that parties can take advantage of the benefits of arbitration while overcoming these fears.

Choose the Right Arbitrator in the Right Way

The parties choose the arbitrator or arbitrators who will decide the case. When drafting an arbitration clause in a construction contract, provide the means to choose the right arbitrator(s) in the right way. Thinking about this in advance of a dispute helps you shape the format of its resolution later.

Will you appoint one arbitrator or three? One arbitrator will be less expensive and nimble. A panel of three will cost more but minimize the risk of a single arbitrator who does not know the law or who might ignore the law.

Decide if the arbitrator(s) should have particular legal and/or technical knowledge and experience. Construction disputes are complex matters involving layers of issues, stacks of documents, and terminology that can bog down the uninitiated. Requiring that the arbitrator(s) have construction law experience assures both parties that their dispute will be resolved by someone who understands the nuances of the case.

When the demand for arbitration is filed, form a list of potential, qualified arbitrators and do your homework. Ask colleagues about their experience with the arbitrator(s). Review the arbitrators’ background. Check for articles and social media posts by and about the arbitrator.

Choosing the right arbitrator(s) is the first step toward an effective, expeditious, and cost-efficient arbitration.

Select Arbitration Rules That Fit Your Case

The right rules governing the arbitration contribute to quick and fair

resolution of the dispute. Careful and mindful analysis of the types of disputes likely to arise out of the project should be your guide when drafting the arbitration clause.

Most dispute resolution providers have written arbitration rules. Before blindly stating that a certain set of rules will apply to any arbitration, contract drafters should understand the contents of those rules and how they would apply to the client’s likely disputes. Is the contract a simple construction agreement between two parties? Most providers have expedited rules. On the other hand, a multi-phase, multi-party agreement can generate complicated disputes involving non-payment, defective work, and delay. It can also require expert witnesses and extensive documentation. Choose arbitration rules that are designed for complex cases.

Do not succumb to the temptation to require the application of court rules to arbitration proceedings. Arbitration allows flexibility. There is seldom a need to “leave no stone unturned.” Rules of evidence will cause longer hearings. Use the flexibility of arbitration to use only rules necessary for an effective, expeditious, and cost-efficient resolution.

When the arbitrator(s) enforce the rules agreed to by the parties, and the rules make sense for the matter, fear of arbitration will be greatly reduced.

Manage the Time and Cost of Arbitration

Parties often fear that arbitration costs will be almost as high as or higher than litigation costs. This can certainly occur if the parties do not use the contract and rules to streamline discovery and the hearing process. If the arbitration is conducted as if it were a case in court, and the parties have to pay an arbitrator or arbitrators, they will not reap the benefits of an efficient, expeditious, and cost-effective process.

Use the arbitration clause and the chosen arbitration rules to set realistic

Building Knowledge

This is the newsletter of the ISBA’s Section on Construction Law. Section newsletters are free to section members and published at least four times per year. Section membership dues are \$35 per year.

To subscribe, visit www.isba.org/sections or call 217-525-1760.

OFFICE

ILLINOIS BAR CENTER
424 S. SECOND STREET
SPRINGFIELD, IL 62701
PHONES: 217-525-1760 OR 800-252-8908
WWW.ISBA.ORG

EDITOR

Samuel H. Levine

COMMUNICATIONS MANAGER

Celeste Niemann

✉ cniemann@isba.org

ART DIRECTOR

Ticara Turley

✉ tturley@isba.org

CONSTRUCTION LAW SECTION COUNCIL

Brian D. Mooty, Chair
Mark B. Grzymala, Vice-Chair
Jonathan Scott Safron, Secretary
Adam B. Whiteman, Ex-Officio
Bradley D. Birge
Geoffrey A. Bryce
Hon. Lisa R. Curcio, Ret.
Christopher Darby
James M. Dash
Shawn M. Doorhy
Marissa L. Downs
Howard W. Feldman
Mazyar M. Hedayat, Esq
Samuel H. Levine, Newsletter Editor
Margaret A. Manetti
Margery Newman
Paul LS Peterson
Randall S. Rapp
Cornelius F. Riordan
Robert A. Shipley
Stanley N. Wasser
Justin L. Weisberg
Larry N. Woodard
Kristin Irene Olson, Board Liaison
Alonzo Alexander, Staff Liaison
Kelly L. Garrett-Hicks, CLE Committee Liaison

DISCLAIMER: This newsletter is for subscribers’ personal use only; redistribution is prohibited. Copyright Illinois State Bar Association. Statements or expressions of opinion appearing herein are those of the authors and not necessarily those of the Association or Editors, and likewise the publication of any advertisement is not to be construed as an endorsement of the product or service offered unless it is specifically stated in the ad that there is such approval or endorsement.

Articles are prepared as an educational service to members of ISBA. They should not be relied upon as a substitute for individual legal research.

The articles in this newsletter are not intended to be used and may not be relied on for penalty avoidance.

Postmaster: Please send address changes to the Illinois State Bar Association, 424 S. 2nd St., Springfield, IL 62701-1779.

time limits. From the time of arbitration demand to hearing, a simple construction dispute may realistically be resolved in three to six months. However, complex construction disputes will likely require significant—albeit streamlined—document production and targeted depositions. There will be expert witnesses. Set a time limit that allows the parties to develop the issues and prepare for the hearing without the process dragging unnecessarily. A time limit such as one year from the date of the demand for arbitration will keep parties focused and on track. By choosing the right arbitrator(s), setting reasonable time limits and choosing the right rules, the cost of resolving the dispute will be far less than that of litigation.

Manage Multi-Track Dispute Resolution and Third-Party Discovery and Testimony

A significant fear parties in construction disputes face is having to arbitrate some claims while litigating other claims on the same project. Construction disputes are seldom only between two parties who have an agreement to arbitrate. More often, when there is one dispute,

there are many, and the parties will invariably not all have arbitration clauses in their contracts. Parties fear duplicating work because the same evidence and testimony is required in multiple cases, and they also fear different results on the same issues.

Again, contract drafting is the first step to eliminate litigating the same disputes in multiple forums. Contracts between the owner and general contractor can include consolidation and joinder requirements and require that the contractor include arbitration clauses in its subcontracts. The subcontracts can be written to bind the subcontractors to the terms of the general contract. Absent contracts that bring the parties to the same forum, parties can work to agree that all claims will be brought before the same tribunal.

Third-party discovery and testimony can be crucial to proving and defending claims in construction disputes. The Federal Arbitration Act and the Illinois Uniform Arbitration Act control the authority arbitrators have to issue and enforce third-party discovery and to require attendance of third parties at an arbitration hearing. As arbitrators

lack contempt power, parties can only enforce arbitration subpoenas in court. Cases in the Federal Circuits are not in agreement as to the arbitrator's authority, and there is little case law in Illinois. An agreement in the contract that parties will allow discovery and testimony from other cases as evidence in the arbitration can mitigate the problem. If there is no agreement in the contract, the best way to mitigate this problem is attempting to obtain third-party cooperation. Long-standing relationships can help. Offers to compensate the third party for time and costs can be part of the solution. Creativity in this arena is a plus.

Ultimately, no method of dispute resolution is perfect. Parties and their attorneys must assess their objectives and decide which method best meets their needs. Armed with the right planning and information, and by using all the tools at their disposal, parties need not fear arbitration. They may, in fact, find it a highly superior forum for resolving construction disputes. ■

Hon. Lisa R. Curcio, (Ret.) is a Senior Mediator & Arbitrator at ADR Systems.

ILLINOIS LAWYER NOW

Presented by the Illinois State Bar Association

CALLING ALL LEGAL BLOGGERS!

Are you an ISBA member with a legal blog? The ISBA wants to help elevate your content and make it available to a wider audience through Illinois Lawyer Now.

Be a part of one of the **FIRST** state bar-sponsored legal blog aggregation sites!

Joining is easy and **FREE**, simply fill out the quick form at IllinoisLawyerNow.com/join