THE ADVANTAGES OF ARBITRATION IN CONSTRUCTION CONTRACTS

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INTRODUCTION

The universal need to satisfy human wants has led nations of the modern world to increase production and resort to international trade.

Without doubt, the movement of goods and services across traditional boundaries is based upon contracts entered into by parties coming from different countries, speaking different languages, and living under different economic and political conditions. The contracts are normally entered into with the hope that the parties will comply with their respective obligations. More often than not, the expectations are probably well-founded. Unfortunately, the realities of the modern world do not preclude causes for disputes arising in the process of compliance with such agreements.

When a controversy arises, it is possible, of course, for either or both of the parties, to bring the proper action in court. The crucial question that must, however, be resolved in such an eventuality is whether the case should be filed in the court of the country of the complainant or of the respondent.

The obvious solution in such situation is for the parties to avail themselves of international arbitration.

ADVANTAGES OF INTERNATIONAL ARBITRATION

In the resolution of conflicts arising from international trade and investments, there are certain inherent advantages of international arbitration over solutions and remedies available on a national level.[1]

Evidently, international arbitration offers international solutions to problems arising on an international scale. Decision-makers sitting in national tribunals are naturally bound to apply the provisions of their country's laws to disputes brought before them. International arbitrators are not so obliged, unless the parties agree to the application of the laws of a particular jurisdiction.

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[1] *See* generally, ICC ARBITRATION: THE INTERNATIONAL SOLUTION TO INTERNATIONAL BUSINESS DISPUTES, 6-7 (1977).

The general character of proceedings in international arbitration is conducive to the reaching of amicable settlements. Parties do so frequently because of the knowledge that there are duly ratified international conventions intended to assure compliance with decisions of international arbitrators or arbitral tribunals.

As a practical matter, the parties involved in international arbitration remain anonymous to the general public. The reason is that hearings are usually held in private, and only the parties to the disputes are furnished with copies of the decisions of the arbitrators.

The basis of international arbitration is consent of the parties. It is obvious that at the moment, there are no international tribunals with power and authority to decide disputes of a private nature among individuals and entities in the same manner that a national court or tribunal can. Because of such circumstance, parties are free to agree on the manner by which their disputes may be settled by international arbitrators. Hence, there is flexibility in the conduct of the proceedings.

Finally, the conduct of international arbitration is often characterized as being neutral. This aspect of neutrality may be found in the neutrality of the place of arbitration, of the language used, and of the nationality of the arbitrator, or arbitrators should there be more than one.

ADVANTAGES OF ARBITRATION IN CONSTRUCTION CONTRACTS

Construction plays such a significant role not only in the development of the economies of nations but in the growth of international business transactions as well that decision-makers, both public and private, have had to contend with the problem of whether to litigate or arbitrate in cases of disputes arising from, or connected with, contracts entered into by parties involved in such constructions.

Practice indicates that countries have different traditions in the resolution of construction disputes. In the United States, for instance, litigation has been the historical method although arbitration has made tremendous progress.[2] British businessmen, on the other hand, have for centuries preferred to resolved their disagreements by arbitration rather than by recourse to the courts and none more than those connected with the construction industry.[3]

In making comparisons between the two methods for the settlement of disputes, certain advantages of arbitration over court litigation may be considered.

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[2] *See* Jerome Reiss, Construction Industry Disputes, appearing as chapter 3 of the book edited by ALAN I. WIDISS entitled ARBITRATION: COMMERCIAL DISPUTES, INSURANCE, AND TORT CLAIMS. Practising Law Institute, New York City, 1979, p. 71.

[3] *See* JOHN PARRIS, THE LAW AND PRACTICE OF ARBITRATIONS, George Godwin Limited, London, 1974, 1st page of Preface.

Technical expertise.—Since disputes in the construction industry invariably involve technical matters, an arbitrator with the requisite qualifications may be chosen on account of his expert knowledge. A judge, with only legal training to rely on, seldom possesses practical experience in commerce or finance, let alone the technicalities of the construction industry.[4]

Very often, disputes arise on account of the failure to specify in the contract the obligations of the parties. An example that may be given is when, according to the terms of a building contract, a house is to be erected, yet a house, garage or stables are shown on the architect's drawings and specifications.[5]

Arbitration in such and similar cases may be conducted in a manner indicative of the high level of technical knowledge of the participants so that education need not be given. Being knowledgeable in the field, the arbitrator can receive evidence, hear arguments, and make the award as efficiently and equitably as possible.[6]

Expeditious.—Resort to arbitration frequently results in the termination of the controversy between the parties much faster than it would take for them to go to court. In many countries, court proceedings are lenghty and prolonged over a period of time. It is not unusual or criminal, civil, and other cases to crowed out of the court calendar those involving arbitration.

Arbitrators and arbitral tribunals, on the other hand, can set their hearings and other proceedings at the convenience of the parties concerned without having to take into consideration other cases and incidents that may delay the solution of the disputes.

Final determination.—Since arbitration is contractual in nature, a party that participates in a proceeding is considered to have vested the arbitrator or arbitral tribunal with authority or jurisdiction to make a final determination of all issues of facts and of law related to the controversy. Unless municipal law or international convention should provide otherwise, no appeal may be taken from an award or decision handed down by the arbitrator.

Eases court calendars.—To the extent that the facilities of arbitration are employed for the settlement of disputes, the workload of the courts correspondingly decreases. As a result, the public budget for the maintenance of the judicial system becomes less heavy to sustain.

Elements of judicial process.—Because international arbitration is generally conducted in accordance with Conventions adopted and agreed

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[4] *Ibid.*, p. 8.

[5] WILLIAM H. GILL, THE LAW OF ARBITRATION, Sweet and Maxwell, 2nd Ed., p. 6.

[6] CAMERON K. WEHRINGER, ARBITRATION: PRECEPTS AND PRINCIPLES, Oceana Publication, New York, 1969, p. 10.

upon by the community of nations, arbitral proceedings have acquired elements akin to judicial processes. Adherence to procedural requirements similar to those followed in national courts has become more compelling due to the participation of lawyers in such arbitration proceedings.

Choice of counsel.—License to practice law is not required for counsel to appear before an international arbitral tribunal. The parties, consequently, are not limited in the choice of those that will represent them in the conduct of arbitration. Counsel may come from any profession or nation.

Simplicity.—Litigation before national courts involves the application of substantive and procedural rules that may not easily be comprehensible to the parties. Arbitration, on the other hand, is characterized by simplicity of proceedings. No special form is required for presenting a demand for arbitration or of responding thereto. Pre-hearing and other kinds of conferences between the parties or other counsel may be held to arrive at some legal or equitable solution to the controversy.

Single forum for all parties.—One feature of arbitration that makes it attractive as a means of settling disputes is the possibility of bringing together in one proceeding all the parties that may be involved. In order to do so, it is essential, however, that the contract should so specify.

The importance of consolidation of causes of action is heightened in construction disputes because of the close inter-relationship of many of the parties. The owner hires the architect independently of the general contractor. In turn, the general contractor hires the various subcontractors and suppliers. The architect generally hires the structural and mechanical engineers. A construction dispute frequently involves many of these parties, but privity of contract flows only between the party hiring and the party being hired.[7]

Efficient method.—The efficiency of any method for the settlement of disputes hinges on the manner by which the qualifications of the decision-makers.

Since the parties are given the opportunity to choose the arbitrators in both *ad hoc* and institutional arbitration, they can designate those whom they deem to be qualified to conduct the proceedings. More often than not, arbitration proves to be a more efficient means of resolving controversies than litigation.

Convenience.—Arbitration being contractual in character, the parties can specify the time and place for the conduct of the proceedings. Naturally, their choices will be such as will be convenient to them, their witnesses and their counsel.

The conduct of litigation, on the other hand, is designed to suit the convenience primarily of the court, and then of counsel; the interests if

[7] REISS, *op. cit. supra,* note 2 at 77.

litigants and witnesses are the last to be considered.[8] Because hearings of cases are scheduled one after another, the parties and their witnesses waste considerable time waiting in courtrooms and corridors for their cases to be called and heard.

Less expensive.—Because court calendars are normally filled with other cases to be heard, litigation generally lasts longer than arbitration. Needless to point out, this adds up to the cost of the proceedings.

Likewise to be considered is the fact that the decision of a trial court may be elevated to a layer of appellate courts. These factors together seem to indicate that arbitration is less expensive than litigation.

Courtesy.—While arbitrators do decide cases and hand down awards, they generally do not behave like judges in national courts. Since they are chosen by the parties, they treat the latter and their witnesses with more consideration and greater respect.

Confidentiality.—Litigation is conducted in open court with the public and the press being permitted to observe the proceedings. Adverse publicity to either or both of the parties could be the result.

In contrast, arbitration is conducted in private, and no one need know of its existence. Pleadings or their contents are, therefore, not disseminated except to the parties themselves. Even awards and decisions are not published.

Suitable for questions of facts.—Where the issues between the parties are primarily factual in nature, arbitration can be the suitable method for settlement. This is particularly true if the dispute involves quality of materials or degree of performance.

In large construction projects, the parties may stipulate in the contract that claims and counterclaims for arbitration may be filed only with a detailed presentation of the facts. This procedure may not be permissible in a regular court of justice.

Develops uniform systems.—As arbitration becomes more acceptable as the preferred mode for the settlement of disputes, parties tend to use certain forms for the drafting of their contracts and other documents. The terms used therein acquire certain meanings for purposes of interpretation.

Standardizes trade practices.—Although arbitrators do not rely upon precedents and arbitration does not result in the establishment of jurisprudence since decisions and awards are kept confidential, industry tends to develop trade practices and standardize business transactions as a result of disputes submitted for resolution. Corollarily, the business ethics of the participants are apt to be kept at a high level, since the arbitrators

[8] PARRIS, *op. cit. supra,* note 3 at 9.

are their peers in the industry. In turn, knowledge of trade practices and customs help in facilitating the termination of arbitration proceedings.

Flexibility.—One advantage or arbitration is that the parties to the contract may specify the scope or nature of the dispute that may be submitted for decision. They can stipulate for either broad or limited arbitration, and the terms under which the proceedings shall be conducted. It is thus evident that flexibility is one of its inherent features.

Preserves relationships.—Prolonged litigation tends to destroy friendly relationships between disputants. Where it is desirable, as in the case of construction contracts, to preserve such relationships, arbitration may serve as the appropriate remedy.

Continuance of work.—In view of the size of some construction projects involving the expenditure of huge sums of money and the employment of thousands of people, it is often necessary to insert in the contract a provision that work shall continue while arbitration goes on. Such stipulation may not effectively be enforced where resort to municipal courts is made by either of the parties.

Defense not absolute.—As a matter of strategy, where the defense of a party to a claim of the other is not absolute, arbitration may be a better remedy. The reason is that he may be able to obtain a compromise, or other form of resolution favorable to him.

CONCLUSION

The procedure for the conduct of arbitration follows a general pattern, regardless of the subject matter involved.

There are many advantages of arbitration over litigation, and they are applicable to construction industry disputes.