

Mediation Melee

An arbitration case can be costly

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Arbitration can be a bridge over troubled waters. In this crossing, the parties argued over a \$90,000 damages award plus a \$1.3 million award of attorneys fees and costs.

Here, a prime and sub contracted for construction of the new steel arch bridge on I-74 spanning the Mississippi River between Bettendorf, Iowa and Moline, Illinois, for which the sub fabricated approximately 19,000 tons of structural steel. The contract included an arbitration clause. The sub sued the prime for over \$12 million, plus attorneys fees. The prime counterclaimed for about \$600,000, plus attorneys fees.

Sometimes the arbitration-related dispute is whether the parties must even arbitrate, despite a contract clause indicating arbitration. This time, the dispute was whether the arbitrator's decision was enforceable and, in particular, whether the award of attorneys fees and costs were proper.

Here, the "Contract shall be construed under and be governed by Illinois law . . . Any dispute . . . shall be resolved by arbitration . . . [and] the American Arbitration Association Construction Industry Rules, [] will govern all procedural matters not specified above." Importantly, the Contract also provided that only "[sub] shall be entitled to recover all costs, including reasonable attorneys' fees [and that the sub] shall be liable for damages resulting from delays caused solely by [sub]." The AAA Rules provide that the arbitrator may award attorneys fees under certain circumstances.

At arbitration, the sub argued the prime had no right to attorneys fees, since the contractual clause was one-way – only in sub's favor on this point. After 13 days of a Zoom arbitration, the arbitrator ruled the prime had no fault, the sub wrongfully suspended its work, the prime was not entitled to delay costs, but the prime was entitled to reimbursement for repair of the sub's defective work. The arbitrator awarded about \$90,000 for repair damages plus attorneys fees and costs of about \$1.3 million. The arbitrator reasoned that, although the contract clause for attorneys fees was only for the sub, attorneys fees and costs were a procedural matter and, since the AAA rules governed such procedural matters, such an award was proper to the prime.

Arbitration parties sometimes think that they can get a mulligan and try a "do-over" in court. There can be valid grounds for an appeal from arbitration under the Federal Arbitration Act (FAA), but those grounds are very narrow. The U.S. Supreme Court has repeatedly enforced the basis for arbitration – the parties' bargained-for intent that a special(ized) decision-maker, outside of the standard judicial system, evaluate the parties' positions and apply his or her knowledge of and experience with the subject matter to decide which side is more accurate. In litigation, most judges and lawyers are generally, well, generalists not specialists.

"[W]hen an arbitrator strays from interpretation and application of the agreement and effectively dispenses his [or her] own brand of industrial justice, [the] decision may be unenforceable." (Quoting from the U.S. Supreme Court's decision in *Stolt-Nielsen v. Animal Feeds International Corp.*, (2010)). Even a disputed interpretation of a contract is still enforceable because that's exactly what the parties' bargained for – that someone else decide which of the parties' interpretations was the more correct version. Therefore, the "sole question" for the court is "whether the arbitrator (even arguably) interpreted the parties' contract, not whether [the interpretation was] right or wrong."

On appeal by the sub, the U.S. District Court of the Southern District of Iowa overturned the arbitrator's decision. On final appeal to the U.S. Court of Appeals for the Eighth Circuit, the arbitrator's decision was affirmed, in full.

Arbitration can be a wonderfully efficient alternative to traditional court litigation - perhaps the same way that a bridge can be better/faster than a ferry. Both will get you through the dispute and to the other side, but one way may be faster while the other can encounter choppy waters. In arbitration, the parties are (hopefully) getting a process and a decision maker that is more efficient and better attuned to the parties' special circumstances.

