BY DAVID M. MCLAIN

Why builders should reconsider arbitration clauses in construction contracts

Arbitration is preferable to jury trials, but regulatory challenges have given rise to a third option

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MY ADVICE TO home builders has long been to arbitrate construction defect claims instead of litigating them in front of juries. Based on my experience and watching others litigate claims, I have learned that home builders usually fare better in arbitration than in jury trials, both in terms of what they have to pay the homeowners or HOAs, and also in what they recover from subcontractors and design professionals. Because of these dynamics, conventional wisdom has been that builders should arbitrate construction defect claims. For several reasons, I am now questioning whether the time is right to consider a third option.

First, plaintiffs' attorneys dislike arbitration and will continue their attempts to do away with it for construction defect claims. In 2018, the Colorado Legislature considered HB18-1261 and HB18-1262. While both bills were ultimately killed, they showed the plaintiffs' attorneys disdain for arbitration, and serve as a warning that attempts to prevent arbitration legislatively will continue. If the legislature does away with the ability to arbitrate construction defect claims, and that is the only means of dispute resolution contained in a builder's contracts, that builder may find itself in front of a jury.

Second, in rare instances, builders may disagree with an arbitration order to the extent that they want to appeal the decision. Under American Arbitration Association rules, once an arbitrator issues an award on the merits, it can only correct clerical, typographical, technical or computational errors, and has no ability to reconsider the merits. Pursuant to Colorado's Uniform Arbitration Act, a dissatisfied builder can only challenge an arbitration award in extreme circumstances, for example, if it was procured by corruption, fraud or other undue means, or because of evident partiality, corruption or misconduct on the part of the arbitrator. For better or worse, binding arbitration is just that—it is binding, and builders may regret that they have no appellate rights if they find themselves holding the short end of the stick.

For these reasons, I believe that builders should start looking beyond arbitration clauses in their purchase and sale agreements and subcontracts. At the very least, builders should add language to protect against the legislature making arbitration clauses void as against public policy or otherwise impeding arbitration rights. This language would say something to the effect that should the arbitration clause be unenforceable, the parties agree to waive a jury trial and to have their case decided by a judge after a bench trial. A builder could also simply remove references to arbitration and require a bench trial from the outset.

Regardless of the language used, builders should ensure that the language in the purchase and sale agreement and the subcontracts call for the same dispute resolution forum: either arbitration or a bench trial. In no case do you want to litigate the same issue twice, in two different forums.

Please feel free to reach out to me at (303) 987-9813 or by email at mclain@hhmlaw.com if you would like to explore revamping your building practices in order to make yourself a hardened target.