Courts Favor Arbitration in Two Recent Construction Dispute Cases

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Recent court decisions have signaled the courts' proclivity to prefer arbitration over full-fledged litigation when provisions in construction contracts are called into question. While the courts recognize a party's constitutional right to a jury trial, the courts also lean strongly towards resolving disputes via arbitration as a matter of public policy, especially if a construction contract carves out arbitration as an alternative to litigation.

In *Avr Davis Raleigh v. Triangle Constr. Co.*, 818 S.E.2d 184 (N.C. App. 2018), the North Carolina Appeals Court reviewed the issue of whether the contracting parties selected binding arbitration as an alternative to litigation. The contract at issue was an AIA A201-2007 form document. Under the terms of the contract, the parties elected to arbitrate claims under $500,000 but to litigate claims over this amount. However, if there were several claims under $500,000 but the aggregate of all claims exceeded $500,000, then the contract implied that all claims would be arbitrated. Since the claims involved were an amalgamation of the two, the contracting parties disagreed about whether the arbitration provision would apply. The plaintiff interpreted this provision to mean litigation was mandatory when at least one claim exceeded $500,000 and that arbitration was mandatory when no single claim exceeded this amount. In contrast, the defendant interpreted this provision as meaning that when there were several claims worth less than $500,000 individually, but more than $500,000 aggregately, then all claims must be arbitrated. The trial court agreed with the plaintiff's interpretation.

In overruling the trial court, the North Carolina Court of Appeals deferred to North Carolina's strong public policy in favor of resolving disputes via arbitration. The Court of Appeals recognized there were several reasonable interpretations of the provision at issue, including both interpretations articulated by the plaintiff and defendant. However, when faced with "doubts concerning the scope of arbitrable issues," the Court of Appeals held that the trial court should have deferred to arbitrating the claims rather than litigating them since the interpretation favoring arbitration falls more squarely within North Carolina's public policy on the subject.

The United States District Court for the Southern District of Maryland also addressed the interpretation of an arbitration provision in a construction contract in *Matrix N. Am. Constr., Inc. v. SNC Lavalin Construction, Inc.*, 2018 U.S. Dist. LEXIS 130434 (D. Md.). Here, the parties disagreed over whether the contract's "dispute resolution section" mandated arbitration when all attempts at resolution failed or whether arbitration was merely permissive under these circumstances. The plaintiff argued that the terms of the contract set forth a three-step dispute resolution process, with the first step being negotiation, the second step being mediation and the third step being litigation. According to the plaintiff, once the parties satisfied steps one and two, litigation was the only remaining option.

In reviewing the contract, the District Court noted that the contract did not define the terms "dispute mitigation" or "dispute resolution procedures." However, once submitted to dispute resolution, the contract stated that the dispute may be settled by a single arbitrator whose decision would be binding on the parties. This section of the contract did not provide for any alternate methods of resolution, such as mediation. The plaintiff argued that arbitration was permissive because the contract's language noted that all disputes not settled "may be referred to arbitration." The District Court disagreed and held that arbitration was mandatory under the contract and not at all permissive.

In determining that arbitration was obligatory and not permissive under these circumstances, the *Matrix* court looked to the Fourth Circuit's interpretation of the word "may" in this context. The Fourth Circuit saw the word "may" as used here as implying that the aggrieved party could either choose to arbitrate or choose to abandon its claim. If courts were to adopt the plaintiff's permissive view of arbitration, then doing so would render the contract provision as being meaningless and would always make the decision to arbitrate a voluntary one. In other words, there would be no need to include a mandatory arbitration provision in a contract if the choice to arbitrate was always voluntary and not required. Using this analysis, the *Matrix* court held that the decision to arbitrate was mandatory; the only other alternative would be the plaintiff's abandonment of its claim.

What these cases highlight is the courts' proclivity to have parties arbitrate a claim when a construction contract's language is ambiguous, in doubt, or open to multiple interpretations. From a subrogation perspective, practitioners always need to be aware of a construction contract's language and how that language will impact how claims advance and what remedies are available. Litigation may not always be the first and best option.