

LEGAL HAMMER

Arbitration may be compelled in construction contracts

A recent Missouri Court of Appeals case has shed new light on the fact that construction contracts with arbitration clauses may compel parties to settle their legal disputes before an arbitrator rather than a judge.

Many contracts for the construction of a residence or commercial property state that arbitration shall be the sole means for settling any controversy, especially with reference to the limited warranty provided by the builder.

Contractor case study

In *Amanda Mackey and Greg Mackey v. Schooler's Construction LLC* – first filed in Boone County Circuit Court and ruled on earlier this year – the Western District appellate court reviewed the decision of the trial court to allow the Mackeys' claims to go forward in Circuit Court rather than requiring arbitration. The contractor filed a motion to compel arbitration, claiming that the arbitration clause in their contract covered the issue that had arisen and that litigation was therefore barred. When the trial court denied its motion, the contractor filed an appeal with the Western District Court of Appeals.

The facts of the case are instructive. The Mackeys entered into an agreement with Schooler's Construction, the contractor,



Stephen F. Aton

for construction of a personal residence. At closing, the contractor provided a one-year, limited warranty that the residence would be free from latent defects from defective workmanship or materials. The contractor also warranted against substantial defects in the foundation and concrete slab affecting the structural soundness of the residence.

The arbitration clause stated that any controversy or claim arising out of or relating to the limited warranty must be handled by arbitration in Boone County. The clause went on to state that no legal actions could be commenced by any of the parties.

More than one year after closing, the Mackeys sued the contractor in Circuit Court alleging the house had settled, and the trial court, without stating a reason, refused to enforce the arbitration provision

in the construction contract.

Limited warranty and arbitration

The Court of Appeals reviewed the decision and considered the contractor's arguments that the claims were in fact related to the limited warranty, and that the arbitration clause was neither a contract of adhesion nor unconscionable.

The court held that a valid arbitration agreement was contained in the contract, and that the claims fell under the limited warranty clause requiring arbitration.

In reaching its decision, the court noted that prior Missouri cases held that all doubts as to arbitrability should be resolved in favor of finding the arbitration provision applies to the claims.

The court also referred to the Missouri Uniform Arbitration Act, which provides that contracts which warrant new homes are not contracts of adhesion just because they contain an arbitration clause.

The Mackeys' case demonstrates that mandatory arbitration provisions in construction contracts will be upheld unless the owner's claims clearly fall outside the scope of the provision. The law will favor enforcing the arbitration provision if there is any reasonable interpretation that it should apply.

As a result of these decisions, you should

carefully consider any arbitration clauses during contract negotiation.

If arbitration is not desired for certain claims, the contract should expressly state which claims will not be subject to the requirement. Otherwise, arbitration will likely be the only remedy available.

While many construction agreements include the arbitration clause, there are certain advantages in using arbitration over litigation. First, arbitration is often far less costly than litigation. There is usually limited discovery, fewer hearings and limited expert witnesses to hire. Second, arbitration is quicker than litigation. There is no jury to select and fewer delays to accommodate the attorneys' schedules and court's trial docket. You may wait up to a year or more to actually get a trial date in many circuit courts. Finally, decision by arbitration is usually final, with no lengthy appeals process. Many corporations favor arbitration because of its speed, economy and finality.

While you have a right to a jury trial, you may wish to consider whether your goals would be better met by the arbitration process.

Stephen F. Aton is a Springfield attorney at Aton Law Firm, practicing corporate law, real estate and estate planning. He can be reached at steve@atonlaw.com.