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"FEDERAL COURT JUDGE SAYS THAT FEDERAL COURT LAWSUITS CAN RESOLVE PROBLEMS FASTER AND OFTEN MORE CHEAPLY THAN ARBITRATIONS"

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I. INTRODUCTION.

Several years ago I wrote Scribbles Squibs # 13: Thirteen Reasons Not To Agree To An Arbitration Clause In Your Contract. I am not a fan of arbitration. There is almost no chance you will be able to appeal a bad arbitration decision *anywhere.* In addition, there simply are nowhere near the procedural protections that one has in court.

Most everyone has heard the expression: 'Don't make a federal case out of it.' This is understood to mean: 'Don't make a case that is as complicated and/or as expensive as the federal court would make it.' Federal court lawsuits are the most formal of all of the three general, civil trial courts in Massachusetts. And, generally speaking, one has to have a large claim just to meet the jurisdictional requirements of the federal court.[2]

And, many of its procedures are unique to it. For example, almost all filings in the federal court have to be done electronically through the internet. With limited exceptions, the federal court will not *accept* documents anyone tries to submit on paper. Another unique example of federal court practice is that a plaintiff seeking damages is required by rule to make 'automatic disclosures' of the relevant documents involved with the dispute fairly early in the court process completely apart from what documents might be discoverable within formal discovery procedures.

Among non-lawyers and lawyers not familiar with the realities of arbitration, there is a perception that arbitration is the best way to resolve disputes. After all, the majority of AIA contract documents require arbitration as the manner in which disputes are to be resolved.

Yet, just last month, a federal court decision was handed down by Judge William Young in which he stated that many actions in the federal court are resolved more quickly and less expensively than through arbitration.

This is a decision entered in the case of Cellinfo, LLC v. American Tower Corp. (hereinafter American Tower) American Tower LLC, American Tower do Brasil - Cessao De Infraestruturas Ltda, and ATC IP LLC (all of them referenced as Defendants), issued with regard to one of the Defendants' motion to dismiss or, alternatively, to stay the case and compel arbitration.

Normally, when I discuss court decisions, I am interested in the *substantive* law involved with the issues in the case. For example, as a contracts lawyer (and mediator), when I look at a court decision involved with contracts, I am interested in the various principles of contract law that are involved with the case.

In *this* case, I am only interested in the comments made by Judge Young as to *procedure.* And, the procedural aspects of this case that are interesting are the comments Judge Young made as to speed and cost in resolving disputes, comparing federal court actions with arbitrations.

Later in the Squib, I'll briefly discuss the advantages and disadvantages of arbitration. More extensive comments can be found in Squib#13, which one can find on my website. www.sauerconstructionlaw.com.

II. THE DECISION BY JUDGE YOUNG.

CellInfo, a business that works with wireless companies to improve their consumers' cellular coverage, brought this action against American Tower Corporation, American Tower LLC, American Tower do Brasil - Cessao de Infraestruturas Ltda and ATC IP LLC alleging misappropriation of confidential information and trade secrets by the Defendants with claims for breach of contract, unjust enrichment, unfair and deceptive trade practices, conversion, and aiding and abetting misappropriation of trade secrets.

As alleged in the complaint and in the motion to dismiss documents:

American Tower owns, operates, and develops communications and is the parent company of American Towers LLC, ATC IP, and American Tower do Brasil.

CellInfo and American Tower engaged in business that included the purchase of lease options, site acquisition services, and consulting services.

CellInfo and ATC IP entered into a Master Consulting Services Agreement (the "Agreement") on January 23, 2017. The Agreement defines certain professional and legal obligations between CellInfo and ATC IP that govern CellInfo's provision of consulting services to ATC IP. The portion of the Agreement under contention here is the "Dispute Resolution" provision, article seven, which compels arbitration of controversies between the parties. And, also at issue, was whether this section provides an exception to arbitration where the moving party seeks injunctive relief.[3]

In reliance on the Agreement, American Tower filed a motion to dismiss or, in the alternative, to stay this federal court action and compel arbitration. The parties disagree over whether article seven, which compels arbitration of controversies between the parties (section 7.1), provides an exception to arbitration where the moving party seeks injunctive relief.

Because there was an arbitration provision in the contract between the parties, one of the Defendants moved to dismiss the complaint or, alternatively, to stay the case and compel arbitration.

The following are some of the Judge's comments under a section of the decision entitled: "IV. WHATEVER WERE THEY THINKING? MYTHS AND REALITIES CONCERNING COURTS AND ARBITRATION". *(sic)*

The following are direct quotes from the decision:

"It appears that in this "big law" era, the drafters operated under the myth that arbitration is cheaper, faster, and more confidential than litigation (only one of these is true) without talking to trial lawyers who understand the reality that while people may not want trials, what they do want is a firm and reasonably prompt trial date before an impartial fact-finder as the best chance for a fairly negotiated settlement.

Consider: Cheaper? Arbitration is expensive. . . . ("In addition to the filing fee of $1,900 for each demand, there is a $750 case management fee per case and the arbitrator's compensation.")[4] Arbitration which, as here, contemplates pre-hearing discovery is markedly more expensive. See MCSA 13 (authorizing discovery conducted with "reference [to] the rules of evidence of the Federal Rules of Civil Procedure"). Arbitration before a panel of three arbitrators is more expensive still. Indeed, it's as expensive as the full panoply of federal court litigation. . . . Expense comparisons are, of course, tricky. Since the federal courts are supported by the public, the incidental costs of actual hearings are less expensive to the litigants than a comparable hearing before arbitrators (where the parties bear all the incidental costs). Federal court discovery, on the other hand, is especially expensive. . . .

More to the point, the initial costs of finding, selecting, and launching a three-person arbitration panel outstrip the costs of filing a complaint in the federal district court. So, even before accounting for the real costs -- discovery -- which comes later, parties have already spent more by choosing arbitration. . . .

Genuine trial lawyers know all this. Doubtless, that's why no party here actually has had recourse to arbitration though five months have now passed. Federal Court litigation is expensive as well -- too expensive. Coupled with other factors, arbitration may be more desirable, yet it is a myth to think it cheaper than a focused, well-conducted federal trial.

Faster? On this factor, the federal courts in Massachusetts win hands down. Again, the trial lawyers know it. . . . Indeed, had the parties genuinely wanted court adjudication they could have agreed to it, and this case would have been resolved before arbitration could get off the ground. This is not an isolated phenomenon. It is applicable to all types of federal civil litigation. . . . . So long as at least one party wants speed, federal courts in Massachusetts clearly outpace arbitration.

Confidentiality? Here, arbitration comes into its own. While this Court will assiduously protect the parties' trade secrets, see Protective Order, ECF Nos. 54-55, now that the parties are headed for settlement or arbitration their affairs will disappear entirely from public view. Secret, private tribunals carry with them a host of other societal ills . . . but on these policy issues the Congressional mandate in the Federal Arbitration Act is crystal clear -- corporate secrecy is preferable to public transparency. Doubtless CellInfo and

America Tower have many business reasons for wishing to shield their inter-corporate squabble from the eyes of competitors and present and potential clients.

What may be most troubling about secret proceedings is the lack of any oversight of the process itself. Who is to know if the arbitrators themselves commit improprieties, see, e.g., Crow Constr. Co. v. Jeffrey M. Brown Assoc. Inc., 264 F.Supp.2d 217, 224-26 (E.D. Pa. 2003) (vacating arbitration award where arbitrators failed to disclose potential biases), or counsel are lax, make missteps, or are frankly incompetent? Instead, corporations console themselves when paying their legal bills with the myths that they have chosen a cheaper and faster means of dispute resolution -- although neither is true.

Which is the better approach to adjudication? I am not so self-regarding (or confident) to stake a claim. The honest answer -- it depends. As regards this case, the facts are these:

The litigation costs will be roughly equivalent, though the start-up costs of arbitration are greater. So long as one party wants speed, the Massachusetts federal courts are markedly faster, 5-8 months start to finish. In arbitration, CellInfo and American Tower can cloak themselves in secrecy; in federal court they cannot. At the conclusion of arbitration, the parties will receive an award but no explanation and will have virtually no appellate rights. At the end of a federal trial the parties will get a thorough written decision and award. Each will have full rights to appeal to one of the finest appellate courts in America.

Which course is better?

You be the judge."

III. THE ADVANTAGES AND DISADVANTAGES OF ARBITRATION AS COMPARED WITH LITIGATION.

The first thing to say about this is that if there is an arbitration clause in your contract, you can be compelled to go to arbitration. Massachusetts has a version of the Uniform Arbitration Act as part of its law and this law is crystal clear on this point. Subcontractors have to make sure that there is no arbitration clause in the bid book/general contract because, more likely than not, such a clause would be incorporated by reference into their subcontracts.

I am not a fan of arbitration, generally, for a variety of reasons. First of all, arbitration can be fairly expensive for a plaintiff (referred to as a claimant), a bit less so for a responding party (defendants being referred to in arbitration as respondents.) The filing fees at the American Arbitration Association (AAA) are *much* higher than filing fees in court and vary depending on the size of the claim. For a fifty thousand dollar claim, the filing fee is $1500.00 (including the 'Final Fee') as compared with $275.00 in the superior court**.** For the vast majority of civil cases in court, this is the one and only time one pays the court, such payment to be made by the initiating party, the plaintiff. Defendants, ordinarily, to not pay *any* filing fees to participate in a litigation with the plaintiff.

With the AAA, this just starts the printing of the checks. (One better have a lot of ink or toner.) Each party pays the AAA a room fee for each day of the hearings. Also, the parties pay the arbitrator his compensation. Therefore, each party pays one half of the arbitrator's hourly wage, which is seldom less than $400 per hour. This includes hours for preparation and 'deliberation'. In addition to these fees, the AAA has on its fee schedule: **"**Fees for Additional Services: The AAA reserves the right to assess additional administrative fees for services performed by the AAA that go beyond those provided for in the AAA's rules, but which are required as a result of the parties' agreement or stipulation."

In addition, with filed arbitrations, sometimes there is also an associated legal action to deal with the type of claims an arbitrator cannot consider. As one example only, if a subcontractor on a public job wishes to make a claim against the general contractor's payment bond pursuant to MGL C. 149, s. 29, this has to be brought in court because such is a statutory requirement. Then, if there is an arbitration clause, the subcontractor has to file for arbitration. Two of the ideas underlying arbitration is that it is supposed to be cheaper and simpler. But, here, two legal actions are required. In the absence of an arbitration clause, only one legal action would be required.

With regard to this particular kind of claim, potential claimants should understand that if an action under C. 149, s. 29 remains in court, successful claimants are awarded their attorneys' fees. However, if the claimant is required to go to arbitration, it can recover none of its attorneys' fees and costs incurred in arbitration even when it is successful which, generally, will be the vast majority of the legal fees that will be incurred.

Defendant general contractors are likely to evaluate cases differently that are submitted under C. 149, s. 29 because: (a) if they lose, they'll be paying two attorneys; (b) the surety might exert pressure on the general contractor to settle because sureties treat awards of attorneys' fees against them as the same thing as paying for unfair and deceptive trade practices. I can recall vividly a situation where I represented the general contractor (and its surety) and there was a payment bond claim on a public job against them for about $100k. The surety directly settled this claim against the general contractor's expressed wishes, paying an exorbitant amount of attorneys' fees just because the claims manager was fearful that an attorney's fee ultimately might be awarded on his watch. So much for the rights of bond principals! It has been my experience that payment bond suits settle earlier for these types of claims because of the concern of the general contractor (and surety) in not wanting to have to pay two attorneys.

Once a matter goes to arbitration, this is no longer an issue because neither the general contractor nor its surety will be required to pay attorneys' fees and costs incurred in arbitration to even a successful claimant, this by reason of a certain Massachusetts appellate case. What is very unfair about this is that the whole idea behind the attorneys' fee provision of C. 149, s. 29 is to even the playing field with the general contractor, which may be holding onto the money and which, generally speaking and for a variety of reasons, be in a better position to afford a litigation. Without an attorneys' fee award, many subcontractor plaintiffs would simply be unable to try to sue and collect their money under a bond that was executed specifically to

protect their interests. Numerous Massachusetts court cases have held that this particular statute is remedial legislation and that it should be broadly and liberally interpreted to accomplish its purpose of getting unpaid subcontractors paid, which purpose is thwarted by compelling a subcontractor to arbitrate with no possibility of obtaining an attorneys' fee award if successful which is specifically granted it by statute. A further irony of this is that the subcontractor may be forced to arbitrate even where there is no arbitration provision in its subcontract.

Also, if a party refuses to pay an arbitration award, a court action has to be commenced to convert the award into a judgment. (Sheriffs do not have the authority to enforce the payment of 'awards': only with 'judgments'). Typically, this is a relatively quick thing: file a complaint and then a motion to confirm the arbitrator's award. At the same time, this is additional time and additional expense.

Apart from this, an arbitrator's award is not appealable for pretty much any reason other than clear bias in favor of or against a party or for a failure to give a party a continuance for hearing, if it had a good reason for the request.

It is very difficult – almost impossible - to prove bias.

There are numerous Massachusetts appellate cases holding that even if the arbitrator made gross errors in handling the evidence - including, but not limited to, not understanding it - or made gross errors in the application of the applicable principles of law, there is no jurisdiction in the courts to reverse that decision because of the philosophy behind arbitration and the Uniform Arbitration Act, which Massachusetts follows. Courts say that this is so because both parties 'chose' to have their dispute decided this way (even though the subcontractor may not have had much choice in the matter and there was no provision in the subcontract requiring it.)

Another difficulty with arbitration is the widely held belief (but not always true) that there is a tendency for an arbitrator to give a claimant 'half a loaf' so that neither party walks away with nothing. There is a school of thought which says that this is so because the arbitrator doesn't want a lawyer or a party to cross off the arbitrator's name from any future list of possible arbitrators for a future dispute. Therefore, where a claimant has a weak case or has failed to comply with a contract provision or is partially wrong, arbitration is a better forum than litigation, where things are more black and white. Or, at least, less gray.

At the same time, arbitration does have *some* advantages.

First of all, there is very little discovery that is allowed as a matter of course, typically only being an exchange of documents. There is essentially no motion practice and practically no pleadings. There is usually less legal briefing that is required. Ordinarily, there are no depositions and no interrogatories. Also, the matter goes to hearing within three or four months of filing, which means that the case does not languish for months or years, as is typical with state court actions. A construction case in the superior court does not go to trial for about five years whereas it is only a matter of months in arbitration.

Sometimes, however, this speed can be unfair to one of the parties. For example, if the claimant has defaulted on a contract, the defendant (respondent) may not have realized or incurred all of its damages by the time an answer is required, making it more difficult for the respondent to file its own claim (called a counterclaim). This can favor a party which has breached the contract. Adding to this unfairness, in arbitration it is very difficult for a party to amend its claim (to change the amount of the claim or the number of claims in the counterclaim) once it has been stated for a certain amount or indicated as being as to only certain issues. With court actions, the amendment of pleadings is liberally allowed, even for a period of years after the answer and counterclaim was filed.

If the matter does not take too long to prepare and try - in other words, the hearings are not going to be days and days - arbitration has the advantage of getting a dispute over with fairly quickly and reasonably economically (in avoiding the prolonged discovery with associated expense that can happen with court actions.) Most court cases settle at some point *because* of the imminence of trial or *during* trial. Since arbitration gets a party to trial (hearing) quicker, the chance to get to real settlement talks potentially exists earlier - at least theoretically - because of the fact that a hearing comes earlier.

However, my experience has been that parties are much more likely to arbitrate a case than they are to subject themselves to a trial in court. Arbitration is seen as less threatening, less scary. Yet, arbitration awards have a finality that a court judgment generally doesn't have because of the rights of appeal and because of a greater series of procedural and substantive rights and remedies built into the court process. In my view, while contractors might be more comfortable with arbitration *as an idea,* they should be terrified having such a clause in a complex case.

Another factor is that arbitrators are probably not as smart/talented as the average judge. Some say that some contractors, design professionals or attorneys want to arbitrate cases as an arbitrator because they do not have enough work in their chosen field. Also, since most cases only allow for one arbitrator, a party always has to make a choice. Do I pick as an arbitrator a lawyer because s/he will understand the law (but is less likely to understand the technical aspects of the case)? Or, do I pick an architect, engineer or contractor because they will understand the technical aspects of the case (but not, necessarily, the legal aspects of the case?) Now, a contractor might be more comfortable picking a contractor as an arbitrator. My experience has been in both litigation and arbitration that technical knowledge is only a small aspect of most cases. Larger items of concern are what does the contract say and what was the behavior of either or both parties? To determine the consequences of these requires legal knowledge. Granted, your average judge will not understand the construction aspects of the case, either. But, if s/he gets it wrong, a dissatisfied litigant has appellate rights. The arbitration system provides for *no* appeals within it.

I tried a seven-figure construction case with complicated legal issues with a general contractor as the arbitrator. When the need for legal rulings came up, he'd essentially look at the

parties as if to say 'how can you expect me to understand this'? I can call one specific discussion of a legal issue where the arbitrator literally threw up his hands and shrugged his shoulders, as if to say 'I don't know what any of this means' referencing legal arguments in briefs.

How is that fair to the parties? It is hardly comforting to entrust a legal dispute to an individual who doesn't understand the law. In such a situation, how can a party have its rights protected if that party is forced by contract to undergo arbitration and there are no rights of appeal from faulty decisions?

In one particular large case I arbitrated, we had a stenographer. Yet, when the arbitrator wanted to have a discussion of legal or procedural issues with just the attorneys, he would have these discussions in a separate room. At the time, I thought he did this so that such discussions would not take place in front of the witnesses, who generally were in the hearing room. But, it occurred to me later that this may have been done this way so that there would be no stenographic record of what was said and done in these very important meetings, even though we had a stenographer in the next room. Rightly or wrongly, I drew the inference that the arbitrator did not want to have any record of what was said or done. In court, nearly *everything* that is said in court is recorded for the record.

During one lengthy arbitration, issues would come up where the American Arbitration Association would say to the lawyers 'you have one day to prepare and submit a legal brief'. In most court situations - except during the middle of a trial - this wouldn't *ever* happen. What if the lawyer was out straight busy with another case on that one day? Court litigations will protect parties' legal rights to a greater extent than arbitrations will.

Arbitrators are taught how to 'appeal-proof' their decisions. They are encouraged to limit their awards to as few words as possible. For example, 'I find for the claimant in the amount of X dollars'. The reasons underlying such decisions are not usually given, making it much harder to challenge them.

In addition to this, a potential arbitrator's predilections - which is not necessarily the same thing as *bias* - might not be something one can't ascertain at the time early in the matter when the parties pick the arbitrator. So, if you pick a lawyer, is this a lawyer who typically represents owners or architects or general contractors or subcontractors? Many trial lawyers consider this to be a very real problem. (Any number of war stories to be told on that score!) It is not hard to imagine that an architect or an engineer can be presumed to be anti-change order, particularly where those change orders are necessitated due to the inadequacy of the design.

Also, I have found some arbitrators to be quite arrogant. They *know* there is almost nothing you can do about their rulings - no place to go and appeal and have someone review their decisions. With any kind of court judgment – or issue – there is at least one possible appeal to higher authority. My experience has been that most judges I have been in front of are fairly competent and try to do a good job. If for no other reason than they don't wish to be publicly

embarrassed by a higher court's critical decision against a judge's actions or decisions, I think there is more fairness in court than in arbitration.

Because there are usually no interrogatories or depositions allowed in arbitration, a party's/person's 'story' will be largely unknown until hearing, which minimizes the opportunities for impeachment or rebuttal. Frankly, the lack of discovery can make lying easier but harder to detect and protect against. Yes, Virginia. People frequently lie when afforded the opportunity to do so. While individuals might confess the truth on television when it is pointed out to them by Columbo or Perry Mason, that's not what happens with real trials.

IV. FASTER, CHEAPER AND CONFIDENTIALITY

These were the issues that Judge Young discussed in the case being reported on.

FASTER. He said that federal court was faster than arbitration. Arbitration would be faster than both state district court (trials in about two years) and superior court (trials in about five years). One of the criteria that a client might consider in selecting an attorney, however, is his/her skill in resolving matters sooner, rather than later.

My experience is that few cases actually go through a complete trial and are usually resolved well before a trial begins.

Mediation is growing very quickly and becoming more and more frequent and undertaken earlier in the dispute. There is no prejudice to any other legal right a party might have by undergoing mediation, this guaranteed by statute.

One of the reasons that I have received training from three different mediation schools – the state only requires one - is that I see mediations occurring much earlier in the litigation process in recent years than previously and I want to be as well-trained and as competent as possible to handle such as a mediator. Years ago, it seemed to me that mediations occurred, if at all, at around the time of the pretrial conference, which would be far along in the process. No so today.

Today, in the state district court small claims sections (claims under $7,000) many courts offer the parties mediations on the same day the parties appear in court for the first time for their trial. I have been involved with several of these and will continue to do so.

CHEAPER. The Judge said that arbitrations are not cheaper than federal court with the possible exception of discovery. 'Discovery', a usual part of most court cases, can get expensive if a lot of depositions are taken. On the other hand, arbitrating a larger claim for a lot of days will have much higher filing fees than court, a 'final fee' (does not exist in court), arbitrator compensation fees (does not exist in court) and room fees (does not exist in court). As I referenced above, the AAA has on its fee schedule the following: **"**Fees for Additional Services: The AAA reserves the right to assess additional administrative fees for services performed by the

AAA that go beyond those provided for in the AAA's rules, but which are required as a result of the parties' agreement or stipulation."

CONFIDENTIALITY. Here Judge Young gives the nod to arbitration. I would only say three things about this.

First, I don't see much of what is involved with regular construction litigation as involving anything that is 'confidential', which I would define as, for example, including proprietary information/processes. The only way any outsider is going to find out what the testimony is in a case would be to actually be in court on the day of the trial or order a transcript of the trial testimony. (I am not sure whether this is allowed or not allowed, when such requests are made by non-parties.) If a transcript is requested, the party requesting it will have to pay for it and they can be pricey.

Secondly, under a variety of circumstances, a party can seek a 'protective order', which can limit the use of information/documents obtained through discovery or in court testimony and protect against their disclosure.

Thirdly, actual discovery - where one party finds out/obtains information or documents from the other party prior to trial - is not actually filed in court. Some of this *used* to be filed in superior court, such as responses to requests for production of documents and answers to interrogatories. These things are no longer filed in superior court actions by court rule, which means that someone reading the court file in the clerk's office won't see much of a confidential nature contained within it.

V. WHAT CAN BE DONE TO LIMIT DISCOVERY COSTS WITH REGARD TO LITIGATIONS, WHICH MIGHT MAKE LITIGATIONS MORE FEASIBLE.

In my mind, the biggest differentiating factor between litigation and arbitration is that for arbitration, discovery is generally limited to document requests where litigation adds to that interrogatories and, the most expensive discovery of them all, depositions.

Trying arbitration cases with very little discovery in advance of the hearings is very much akin to the litigation version of the Wild West as compared with litigation because no one has as clear an idea of what the other side will say in the arbitration hearings. Keeping in mind that there are virtually no appeals from an adverse arbitration award, arbitration hearings can be as serious as a heart attack, especially with regard to larger claims. Not knowing what the other party is going to say at hearing is a serious deficiency of the arbitration process.

During one very long arbitration between a general contractor and a town, my client, several actions between subcontractors and the general contractor were consolidated with the principal action. In most part, judgments by the subcontractors against the general contractor would ultimately go against the town. The arbitrator directed the subcontractors to make their documents available to the town prior to the hearing. When one particular subcontractor failed to do so, the arbitrator neither punished the subcontractor nor allowed me time to review (and

think about) the documents, when they were first produced on the day of their hearing. I literally had to try to listen to the testimony while I was reviewing, for the first time, the documents associated with the testimony as it was being given. What part of that was *fair?* Arbitration does not have any mechanism within it to appeal *to*.

One of the most important things to remember is that when it comes to preparing contracts and what language and clauses can be included within them, provided they don't violate any law, the sky's the limit and contract content is only limited by the intelligence and creativity of those drafting the contracts. So, *rather* than accept arbitration as the method of dispute resolution just to keep discovery costs down, different things might be tried to reduce these costs in litigations (court cases) by inserting various contract provisions into contracts which are designed to limit discovery costs. So, for example, a party drafting a contract might try to insert something such as the following into the contract:

> "The parties to this contract agree that for any contract disputes that arise which need formal dispute resolution (a trial), the following terms shall apply. Within 30 days of the occurrence of the last event necessary to formalize the dispute, there shall be a meeting of senior officials of both parties with settlement authority to discuss the pending claim. If this does not resolve the dispute, within 45 days of the occurrence of the last event necessary to formalize the dispute, the party making a claim shall be required to proceed with mediation prior to filing any arbitration or litigation, the methods of which shall be as agreed to by each party's lawyers and, failing agreement, the mediation will be in accordance with the rules of the American Arbitration Association. If this does not resolve the dispute, within 60 days of the occurrence of the last event necessary to formalize the dispute, prior to the filing of any arbitration or litigation, each side will identify for the other in writing with specificity: (a) the name and address of the fact witnesses each party plans on calling as witnesses at any trial, including a detailed statement of what will be the expected testimony of each witness; (b) the factual and legal basis for each party's positions that will be taken in litigation. During this same time period, each party will identify and produce for the other side every document it has which it will claim supports its position, both in terms of liability and in terms of damage. No later than ninety days before any trial or hearing commences, each party will identify for the other that party's expert witnesses, providing for each: (a) a comprehensive statement of what the expert witness is expected to testify to; (b) a comprehensive CV for each expert witness; (c) a complete and comprehensive report from that expert as to his/her anticipated testimony; (d) a list of all court cases or arbitrations the expert witness has testified in. The parties further agree that each side will be limited to the taking of only two depositions of witnesses prior to trial/hearing, including any expert witness(es) . The failure of either party to comply with the requirements of this paragraph shall be deemed to be a material breach of contract for which damages/sanctions can be awarded. In the event that one party feels that the other party has not substantially complied with the requirements of this paragraph and who feels it necessary to invoke legal proceedings to obtain proper discovery, it will be entitled to be fully reimbursed for its legal fees and any associated costs in pursuing such action if it is successful. Any party against whom such action is taken will be entitled to be fully reimbursed for its legal fees and associated

costs in defending against such action if it is successful. To the extent there is any conflict between this paragraph and any applicable tracking order issued by a court or arbitration authority, the terms of this paragraph will control as between the parties."

Are you likely to get your contracting party to agree to inserting this paragraph in its entirety in your contract? To the extent your contracting party is in a lower tier, maybe. To the extent that your contracting party is in an upper tier, probably not. At the same time, preparing for and trying cases can take a lot of a contractor's own time and a lot of a lawyer's time with associated expense. Requiring several preliminary steps before a hearing or trial, such as are set forth above, can benefit *both* sides. This provides opportunities for the principals to talk and for the lawyers to talk and for each party to educate itself as to the various strengths and weaknesses of the other side's case.

I am currently involved with the handling of various district court small claims mediations. This is the real 'People's Court'. In general, these are cases where the claims are seven thousand dollars or less. But, in such cases, this is about *real* money for individuals and they are a big deal to the parties. This amount of money might make the difference in someone's having their car repossessed or in being evicted from their apartment. The longer people discuss their dispute, the better the chance of its being settled. The American Arbitration Association, whose intense/intensive mediation course I have taken, claims that 90% of the settlements during mediation occur during the last 10% of the time set aside for the mediation.

If both sides to the dispute are represented by counsel, having such a clause might have one or two beneficial effects. First, most (many?) lawyers detest something this fussy and detailed. Like many people in many situations, lawyers have their moments of being lazy. A colorful early legal boss of mine used to say: "Draw the writ and try the case."[5] In other words, prepare your complaint and go to trial on the basis of what's in the complaint. Such detailed procedures will test a party's will and commitment to proceeding with litigation.

In addition, I am finding, as I suspect many of my readers are finding, that people (lawyers? claimants? parties?) are more and more sending each other texts and emails with fewer and fewer actual telephone calls and in person meetings. It's easier to be braver and more aggressive with the other side when that other side is on the other end of the telephone or computer. Requiring the parties to actually *talk* with each other and *meet* with each other helps break down these artificial walls.

The type of contract language suggested above certainly is not perfect. It will not necessarily apply, as written, to every contract. But, parts of it can be tailored to specific contractual situations. And, let's face it. In many situations (most situations), when a party tries to add such language to a contract, it will meet with some resistance from the other contracting party. But, the *idea* of having such language in one's contract is there and available for those with the strength of will/courage to fight for their rights with their upstream/downstream contracting parties. Wherever one finds oneself in the stream, brass balls don't rust.

Folks, I know that many of you – possibly *most* of you – feel you are paying too much in terms of legal fees and costs with regard to the handling of your contractual disputes. But, you

need to understand that *contracts* lawyers brought in to handle *contract* disputes of one kind or another, first and foremost, can only deal with the contract *you* have created and signed. If you made and/or signed a crappy contract, then it's a crappy contract your lawyer will have to deal with. This is because, by and large, courts can only enforce the contract that the parties have entered into. In ordinary circumstances, a court does not have the right or ability or even *interest* in revising a contract that was improvidently entered into or which is far from fair.

The best lawyer in the world cannot redo or revise a contract entered into improvidently. The key thing to keep in mind is that unless you involve your attorney with negotiating the terms of your contract up front before any work has been done, your attorney will in most situations only be able to enforce the contract *you* entered into, whether done well or done not so well. Putting it another way, in the vast majority of circumstances, courts will only enforce/can only enforce the contracts that *you* have entered into. Whether such terms are fair or not fair is, unfortunately, irrelevant for court purposes.

This is why God created (or, at least, has tolerated!) contracts lawyers. I have seen any number of situations where lawyers made cases more expensive unnecessarily, sometimes *greatly* more expensive than was necessary. At the same time, parties to a contract cannot blame their lawyer that because of deficiencies in contracts the parties themselves negotiated or signed, trying to get them justice becomes a much more lengthy and expensive process.

Getting legal assistance from a competent construction lawyer *before* entering into a contractual arrangement may be one of the best investments you can make. Spending a little now seems to make more sense than spending a lot later.

VI. CONCLUSION.

I do not believe arbitration should be mandatory, particularly with regard to subcontractors, who may have had no say in the matter because such requirements are included in upstream contract documents. I think that arbitration should be optional and the choice of *both* parties to a dispute *after* the dispute has arisen. My experience is that court cases result in more pretrial settlements than do arbitration cases. I have inferred that the reason for this is that people are afraid to go to court for a trial – and I have lots of experience that says that they are – but have a lot less fear with proceeding with an arbitration.

Perhaps, this lesser degree of fear is that arbitrations take place in lawyers' conference rooms and not in a courtroom. There are no court officers with badges and uniforms. There is no one in a black robe sitting above where the litigants and attorneys sit.

Courthouses and courtrooms are not designed to be pleasant places and they demonstrate the power, including the police power, of the state.

I believe that anyone who signs contracts for any significantly sized contract should at least understand the potential pitfalls of arbitration. Some of these – but not *all* of these – are listed above.

It may be that you are presented with a contract with an arbitration clause that you can't get rid of through negotiation. Having a clever lawyer might help you at least water that clause down. Possibly, you could negotiate with your contracting party a provision that would award the prevailing party in arbitration its reasonable attorneys' fees. Possibly, you might be able to add a provision to the contract that provides for mandatory mediation before the institution of arbitration. You might negotiate with your contracting party that before anyone can even request mediation, there must be a mandatory meeting of principals with settlement authority. Since one of the shortcomings of arbitration is the very minimal discovery that is allowed – usually, only requests for document production – you might try to negotiate a provision that each party to an arbitration has the right to take at least the deposition of the other side before the arbitration commences with hearings. (This can minimize the 'blind-side' aspect of arbitration caused by the very minimal discovery arbitration generally allows.) Other clauses that lessen the effect of arbitrations – or, at least, make them fairer - might be negotiated.

I am a fan of mediation and have taken twice the amount of training required in Massachusetts for one to be a mediator, soon to be three times that number. I want to effectively serve parties as a mediator to the best of my ability.

I have handled, as an attorney, at least a dozen mediations, some of which were for significant amounts of money. The vast majority of these settled. I *believe* in mediation. And, I am currently involved with mediating disputes in the state district court, getting experience to help me with mediating construction disputes. I am currently available for the handling of contract and construction mediations as a mediator and would be honored if you would consider me for such.

Arbitration has several complicated issues. The AAA, for better or worse, seems here to stay. Most AIA documents require arbitration - at least in the basic forms. (Many contract documents/bid documents delete such provisions in their 'Additions and Deletions' pages or in supplementary general conditions.) Subcontractors may have little to say about this when the arbitration provision is in the general contract or bid document.

At the same time, subcontractors may be able to *somewhat* lessen the negative aspects of arbitrations, if they understand what the issues are with arbitration and are willing to fight for fairness in their contracts before they sign them.

In certain circumstances and for some companies, arbitration will be preferable. In my view, in most situations, litigation is preferable.

What is best for you and for your company? Arbitration or litigation?

I'll respond to that question in the same way that Judge Young concluded his opinion:

"Which course is better?

You be the judge."

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(This article is not intended to be specific legal advice and should not be taken as such. Rather, it is intended for general educational and discussion purposes only. Questions of your legal rights and obligations under your contracts and under the law are best addressed to legal professionals examining your specific written documents and factual and legal situations. Sauer & Sauer, concentrating its legal practice on only construction and surety law issues, sees as part of its mission the provision of information and education to the material suppliers, subcontractors, general contractors, owners, homeowners and sureties it daily serves, which will hopefully assist them in the more successful practice of their business/lives. Twice a year, in the spring and in the fall, Sauer & Sauer provides free seminars on topics such as: how to file payment bond claims; how to file mechanics' liens; basic construction contract law; claims involving differing site conditions, changes and delays. If you are on our emailing list, you will be notified about when they will be next held. If you are not currently on our email list but would like to be, please send us an email and we will put you on it. Articles and forms are available on a wide number of construction and surety subjects at www.sauerconstructionlaw.com under the 'construction law articles' button. We also send out Squibs, our free monthly newsletter, which contains articles on various construction and surety law subjects. All prior Squibs can be found on our website under the 'Squibs' button. We don't believe that you will find a site on the internet with more information on it. All written by me, Jonathan Sauer, who is someone with an itch to write and a passion for practicing law and assisting those working in the construction industry and those interacting with the construction industry to be treated more fairly and, hopefully, to be more successful with their contracts and disputes.)

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[1]A s*quib* is defined as 'a short humorous or satiric writing or speech'. Wiktionary defines *squib* as "a short article, often published in journals, that introduces empirical data problematic to linguistic theory or discusses an overlooked theoretical problem. In contrast to a typical linguistic article, a squib need not answer the questions that it poses."

[2] To sue in the state district court, one has to have a claim of less than twenty-five thousand dollars. To sue in the state superior court, generally speaking, one has to have a claim in excess of twenty-five thousand dollars with certain statutory exceptions. To sue in the federal court, other than with regard to lawsuits dealing with 'federal questions' or lawsuits placed into the federal court by statute, one has to be suing for in excess of seventy-five thousand dollars.

[3] I am not going to discuss too much the issue as to whether or not an arbitrator has the right to issue a preliminary injunction. The Construction Industry Arbitration Rules and Mediation Procedures (effective July 1, 2015) provides in R-39. Emergency Measures of Protection for an 'emergency arbitrator'. Under section (e) of this Rule: "If after consideration the emergency arbitrator is satisfied that the party seeking the emergency relief has shown that immediate and irreparable loss or damage shall result in the absence of emergency relief, and that such party is entitled to such relief, the emergency arbitrator may enter an interim order or award granting the relief and stating the reason therefore." At the same time, section (h) of the Rule provides that: "A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with this rule, the agreement to arbitrate or a waiver of the right to arbitrate. . ." This emergency arbitrator may be an additional arbitrator to the arbitrator(s) associated with the dispute. Since injunctions are enforced in state court through sheriffs - and sheriffs are not part of the arbitration procedure - one wonders how an emergency arbitrator would enforce whatever his/her decision is. As stated by the Court in its decision: "Arbitrators have no enforceable equitable powers." Injunctions, generally, are issued through a court's exercise of its equitable powers. Further, I'm not sure that all courts in all states would recognize this Rule as depriving them of the jurisdiction to resolve cases, at least in terms of injunctions. Arbitration has no governmental authority/basis. Courts are governmental authorities, whose decisions are enforced by the police powers of the state.

[4] If you wanted to file a construction arbitration for a claim of one million dollars, the filing fee would be $7000 and the 'final fee' would be $7700. So, $14,700 for a total filing fee. This is in addition to 'room fees' and having to pay half of the arbitrator's compensation and there aren't many of them who come in at less than four hundred dollars per hour. On the other hand, I can sue someone in Suffolk Superior Court for one hundred trillion dollars and the filing fee would be $275 and there is ordinarily no further charge for the judges' time, even if a case lasts for ten years. The usual 'track' for construction cases is that the case wouldn't come up for trial for approximately five years in the superior court, two years in state district court, give or take. However, only about 1% of superior court civil cases go through a complete trial. The vast majority of cases are resolved earlier. A criteria that contractors/subcontractors/potential clients might find useful in evaluating the effectiveness of an attorney is whether or not s/he has the desire and ability to bring about earlier resolutions of disputes. To be fair, this is not always possible. It takes two to Tango and usually two to decide whether or not to leave the dance floor. *Some of the time,* however, this is possible.

[5] Lee Iaccoa used to say something to the effect that you should criticize someone orally but praise someone in writing. His name is Vincent Galvin and he is practicing now in that Great Courtroom in the Sky. Colorful to the nth degree, I am told that, at one point, he sued the Catholic Church to try to force it to reinstate Latin as the only language that could be used in the mass. I hold him in very high regard. I have always said that half of what I do as a lawyer is copying what I saw him do. And, half of what I do as a lawyer is doing exactly the *opposite* of what I saw him do! Since the internet is practically everywhere, I suspect he has it available to him in the Courtroom in which he now works. With my hope and expectation and *certainty* as to the life which is to come, I'd like to say, in his honor: "Mr. Galvin, although you were not always the easiest of bosses to work for, I

thank you for all you taught me, which, by far, was not limited to the law. I think we probably have done OK most of the time. Life is far from easy for fatherless boys."