What Happens When You Go to Arbitration?

by Robert Mann

Your construction company does excellent work, you try hard to please customers, and when there's a problem, you always find a way to work things out. But this time it's different: You find yourself in a dispute over a remodeling project. You followed the advice of your attorney and put a clause in your contract that requires arbitration in the event of a dispute. What happens now?

Arbitration is a way to settle disputes without filing a civil lawsuit. It's less expensive than going to court because it takes less time. Lawsuits can drag on for years; most arbitrations are completed in nine months or less. In a lawsuit, a judge or jury decides the case. In arbitration, a professional arbitrator listens to evidence and arguments before issuing an "award" in favor of the winning party. In a lawsuit, either party can appeal the decision, but the decision of the arbitrator is final and there is normally no appeal.

Arbitration is not required by law; it's something the parties agree to, usually in advance and as part of the contract between them. The parties decide for themselves what kind of arbitration they want and what kind of arbitrator should hear the dispute. For example, the parties could agree to place time limits on the length of the arbitration, to limit the size of the award, or to have a person with substantial construction experience act as the arbitrator.

Arbitration Service Providers

Arbitrations are usually conducted by private dispute-resolution services. Some of these companies have offices all over the country, while others operate locally. Two of the better known national services are the American Arbitration Association (AAA; 800/778-7879; www.adr.org) and the Judicial Arbitration and Mediation Service (JAMS; 949/224-1810; www.jamsadr.com). I'm associated with AAA and a California group, Action Dispute Resolution Services (ADR; 310/201-0010; www.adrservices.org). These and similar organizations have established arbitration procedures and can provide experienced arbitrators and administrators to handle cases from start to finish.

Arbitration service providers charge a fee to administer the case, and most arbitrators charge an hourly fee to hear and decide it. Fees vary but are usually based on the amount of the claim. For example, if the claim is between $10,000 and $75,000, the AAA charges an initial filing fee of $750 and a case service fee of $300 for cases that proceed to the first hearing. The hourly rate for an experienced arbitrator is usually about $350 per hour. Arbitration is not cheap, but it's almost always less expensive than going to court.

One reason arbitration is less expensive than litigation is that arbitrations do not include formal "discovery." Discovery is a process where the parties take depositions, send written questions called interrogatories, and exchange demands to produce documents before trial. While discovery helps each party learn about the claims and defenses in the case, it's also very expensive. In arbitration, no discovery is permitted unless the parties agree otherwise, either in their contract or during the time before the hearing starts.

Contract provisions. Each party can agree to pay half, or you can include a clause in your contract that allows the arbitrator to award the "prevailing party" all or part of the fees. There is some risk in doing this because if the homeowner wins even a small award, you might have to pay the legal expenses for both sides. Most construction disputes involve the use of expert witnesses, so the contract could also require the loser to pay the expert witness fees.

Initiating an arbitration. The arbitration starts with a "demand for arbitration" from the person who is filing the claim. This involves filing certain paperwork with the arbitration service that the parties agreed to use. The person who files the claim is the "Claimant," and the person it's filed against is the "Respondent." Let's say the claim was filed by the homeowner. If the contractor thinks the homeowner actually owes him, he can file a counterclaim that will be heard in the same arbitration as the original claim by the homeowner.

The arbitration service will provide a list of proposed arbitrators, and each party is allowed to disapprove a certain number of them until an arbitrator is selected by mutual agreement. If the parties can't agree, the arbitration service picks the arbitrator.

The Arbitration Hearing

An arbitration hearing is similar to a trial, but more informal. The parties are usually represented by lawyers. The arbitration takes place at the arbitration service provider, the office of one of the lawyers, or at a place agreed to by the parties. (Sometimes it takes place at the construction site.) There may be a room fee.

Before the hearing, the parties are required to exchange documents ("exhibits") that support their claims, disclose the names of their witnesses, and submit legal briefs to the arbitrator

that explain their positions. The hearing itself resembles a court case in that evidence is presented, witnesses testify under oath, and the parties or their lawyers make statements. Unlike a court case, the parties are allowed to cross-examine witnesses, and the arbitrator can ask questions too. The hearing could last for part of a day or stretch out over several weeks with sessions every few days.

The arbitrator listens to the testimony, reads the exhibits, and listens to arguments from both sides. When all the evidence has been presented, the arbitrator will close the hearing or ask the parties to submit additional legal briefs. Once the hearing is closed, the arbitrator must issue an award within 30 days. The award is in writing and may be as simple as "The Arbitrator awards the Claimant the sum of X dollars." It may also contain an explanation of the arbitrator's reasoning.

Unlike a judge who presides over litigation, the arbitrator does not have to follow the strict rule of law and is entitled to render an award that is fair to the parties. If you believe that fundamental fairness is on your side, you will probably do better in arbitration than in court. Another difference is that the rules of evidence do not apply in arbitration unless the parties agree otherwise. This means that hearsay and other forms of evidence that could not be heard in court are perfectly permissible in arbitration, with the arbitrator deciding what weight to give to the evidence.

AMERICAN ARBITRATION ASSOCIATION
Construction Arbitration Tribunal

In the Matter of the Arbitration between:
Re: Harrison Homeowner (hereinafter named "Claimant")
VS
Best Remodeling, Inc. (hereinafter named "Respondent")

AWARD OF ARBITRATOR

I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the arbitration agreement entered into by the above-named parties and dated {May 13, 2003}, and having been duly sworn, and oral hearings having been waived in accordance with the Rules, and having fully reviewed and considered the written documents submitted to me, do hereby, FIND, as follows:

1. The arbitrator finds that the parties entered into an agreement under the terms of which Claimant retained Respondent to perform certain remodeling services as Claimant's residence (hereinafter the Remodeling Work);

2. Claimant contended that Respondent failed to complete the Remodeling Work on time and within the stated price, and further that certain aspects of the work were defective or otherwise deficient. Claimant terminated the Respondent's services prior to the completion of the Remodeling Work;

3. The parties presented evidence, including testimony of experts with regard to the cost, timing, and quality of the work;

4. The Arbitrator finds that the although the work was not completed on time and on budget, the Respondent should not bear the responsibility for this fact because: (1) Claimant made numerous changes to the design and scope of the project, each of which increased the time and expense of the project; (2) Claimant ran short of funds and was not able to make timely payments to Respondent;

5. With respect to the claim of construction defects, the Arbitrator finds that many of the items claimed as construction defects were in fact "punch list" type items that would, in the ordinary course of events, be completed or repaired had Respondent finished the Remodeling Work. In this regard, because the Arbitrator has found that Respondent was not at fault with respect to the timing of completion or cost increases, the Arbitrator finds that Claimant did not have cause to terminate the contract. Accordingly, the Arbitrator finds that the Respondent should have been given the opportunity to have completed or repaired the various claimed defects.

Accordingly, I, hereby render this AWARD, as follows:

1. The Claimant shall recover nothing on its claim; and

2. The Claimant shall pay Respondent's attorneys fees and costs plus costs of the arbitration.

3. The administrative fees of the American Arbitration Association ("the Association") totaling Four Thousand Dollars and Zero Cents ($4,000.00) shall be borne by the Claimant, and the compensation of the Arbitrator totaling Two Thousand Nine Hundred Dollars ($2,900) shall be borne by Claimant.

_____ Dated: _____
Robert S. Mann, Esq.,
Arbitrator

Confirming the award. After the award is issued, either party can ask the court to "confirm" the award, which has the effect of turning the award into a court judgment. If the other party objects, he can ask the court to "vacate," or nullify, the award. This rarely succeeds, because the only grounds for vacating an award are if the arbitrator has an undisclosed conflict of interest or if he fails to admit relevant and material evidence during the proceedings.

How to Develop a Winning Strategy

There are a few simple things to remember about arbitration. Arbitrators are impressed by professionalism and reasonableness. This means you will do better if you and your lawyer are organized and well prepared. Arbitrators are more interested in fairness than in legal technicalities, so it's better to concentrate on what's fair than to argue and nitpick about peripheral issues. Arbitrators are always interested in the truth. If you and your lawyer are truthful and forthright, if you admit what must be admitted, even if you think that it is "bad" for your case, and you demonstrate that the other side has not been honest, you will do better. Arbitrators have an easier time understanding a case that's presented logically and sticks to the facts. You're more likely to prevail if you can be brief, focus on the important issues, and leave out what is not essential to proving your point.

Robert Mann, *Esq., is principal of the Mann Law Firm and a member of the National Panel of Construction Neutral Arbitrators and Mediators. He arbitrates and mediates construction disputes in Los Angeles, Calif.*