THE BENCH TRIAL – AN ALTERNATIVE TO ARBITRATION

Over the course of the last decade, arbitration clauses have become quite common, if not the norm, in residential construction contracts. The rise in popularity of arbitration can be directly attributed to the perception that arbitration is a less expensive and less risky alternative to courtroom litigation and, specifically, jury trials. This perception was borne out of the idea that arbitration would streamline the litigation process, reducing the amount of written discovery and depositions, thus ensuring that the lawsuit would not remain on the courts' overcrowded trial dockets for years while the lawyers continued to "work" the file. The perception was also based on the idea that an arbitrator – usually a lawyer or former judge – would be more predictable and make better decisions than a jury. After more than a decade of experience with the arbitration process as the preferred method of dispute resolution in residential construction cases, some lawyers and their clients are finding that arbitration may *not* be as cost-effective, streamlined and predictable as originally envisioned. In fact, with the courts' recent rulings further restricting the ability of parties to appeal arbitration decisions, even those based upon a gross misapplication of the law, homebuilders may be looking for an alternative to arbitration. This article explores some of the problems inherent in the arbitration process, and suggests a viable alternative to arbitration – the bench trial.

The Authority for Arbitration and its Benefits

To be clear, arbitration is generally a favorable alternative for builders, at least as compared to the jury trial. Arbitration is a process that allows parties to settle their disputes outside of the courtroom. Given its tendency to reduce the number of cases on the courts' overcrowded trial dockets, both federal law and state law strongly favor arbitration as an alternative to litigation. In that regard, both the U.S. Congress and the Texas legislature have enacted statutes regulating the arbitration process: the Federal Arbitration Act and the Texas Arbitration Act. Both statutes compel parties to arbitrate their disputes when they have agreed to do so by contract, and one or both statutes are typically referenced in the parties' arbitration clause. Because arbitration is strongly favored by both Texas and federal courts, an arbitration award has the same force and effect as a judgment in a trial court.[1] Thus, the party that wins an arbitration award can apply to any court with jurisdiction to have the award confirmed in a judgment, and can then employ the same post-judgment collection procedures used to collect on any judgment. Perhaps the most attractive feature of arbitration is the private nature of the proceeding and the finality of the result. Arbitration, however, is not without its shortcomings.

Pitfalls of Arbitration

Because of the complex nature of many construction disputes, some homebuilders are finding that the arbitration process is not as speedy and efficient as popular opinion suggests. In fact, the cost savings between arbitration and traditional litigation is, in many cases, negligible. Parties that submit their disputes to binding arbitration may still have to engage in the same forms of discovery as those employed in traditional litigation, including written discovery, the subpoena of records, and depositions. While some arbitration clauses and arbitration service

[1] *CVN Group, Inc. v. Delgado*, 95 S.W.3d 234, 238 (Tex. 2002).

procedures place restrictions on the amount of written discovery or depositions, many do not. Even in those cases where such restrictions do apply, the complexity of the dispute, the number of parties and documents involved, the need to retain and depose experts along with opposing parties in order to prepare their case for arbitration may necessitate an increased level of discovery. Thus, since the discovery process is one of the more expensive aspects of litigation, arbitration may not be an effective way to significantly reduce those costs.

Although the jury trial has a proven reputation as a costly and unpredictable endeavor, homebuilders are learning that arbitration can be just as costly and unpredictable. Many arbitration services, such as the American Arbitration Association, charge fees for initiating and administering arbitration claims. While there is a nominal initial expense associated with filing a lawsuit, an arbitration service will usually charge many times as much for initiating an arbitration claim. Further, unlike in litigation, the parties to arbitration bear the costs associated with the arbitration process itself, including the fees for a court reporter, if desired. The parties in arbitration must also pay the arbitrator (or panel of arbitrators) to preside over and decide the dispute. By contrast, the party filing suit and paying a nominal jury fee will receive a judge that is paid to preside over the dispute by our tax dollars, not the parties' private funds, as well as a court reporter to make a record of the proceeding.

While the administrative expense associated with arbitration is clearly a negative, there is perhaps no greater downside to arbitration than the lack of any meaningful review of the arbitrator's decision. As referenced above, Texas courts review arbitration awards by indulging "every reasonable presumption in favor of the award and none against it."[2] While finality of an award might sound great to the prevailing party, the other edge of the sword cuts off the losing party's ability to overturn an award even when the arbitrator is mistaken as to the law or the facts.[3] In the past year, federal courts have further restricted a party's ability to appeal an arbitration award governed by the FAA, requiring a party that seeks to overturn an arbitration award to present clear and convincing evidence that the award was procured by corruption, fraud or undue means, or that the arbitrator engaged in some type of misconduct or misbehavior that was so egregious as to require vacation of the award.[4] To make matters worse, the Fifth Circuit Court of Appeals recently made clear that "manifest disregard of the law," which was once one of the key grounds for overturning a poor arbitration decision, is no longer an independent ground for vacating an arbitration award governed by the FAA.[5] Obviously, it is *extremely* difficult for a party to prove corruption, fraud or misconduct on the part of the arbitrator, and, as a result, arbitration awards are very rarely overturned.

As a result of this extremely limited review, arbitrators are more prone to decide cases on principles rather than the applicable law, sometimes being said to "split the baby" or rule in favor of the equities or sympathy. Perhaps such decisions are a marketing effort for the arbitrator who hopes to be selected again by one (or both) of the opposing counsel. Such reasoning is rarely a benefit to the homebuilder. Another subtle, but practical, concern is the financial disincentive

[2] *Barsness v. Scott*, 126 S.W.3d 232, 241 (Tex.App.—San Antonio 2003, pet. denied).
[3] *Pheng Invs. v. Rodriquez*, 196 S.W.3d 322, 328-29 (Tex.App.—Fort Worth 2006, no pet.).
[4] 9 U.S.C. §10(a)
[5] *Citigroup Global Markets, Inc. v. Bacon*, 562 F.3d 349, 355 (5th Cir. 2009).

for the arbitrator to dispose of cases or claims early. Not only is the use of summary judgment proceedings less effective in residential construction arbitrations without any meaningful appeal, the motivations of a private arbitrator are, frankly, not quite the same as those of a judge. Putting aside the issue of an elected judiciary (a topic for another day), an arbitrator may not be as inclined to grant summary judgment or partial disposition as a judge. Judges will be paid the same regardless of the outcome and are typically concerned with managing their docket. Private arbitrators are typically paid by the hour and are not constrained by docket management concerns. This is by no means intended as a smear on arbitrators or arbitration as a process, but merely an observation of human nature. As with judges, there are certainly good and bad arbitrators, and the ability to participate in the selection of the decision-maker is another important advantage of arbitration over trial.

The Bench Trial – A Viable Alternative

As arbitration continues to lose some of its early luster, homebuilders may want to consider the bench trial as an alternative method of dispute resolution. The bench trial is similar to the arbitration process in the sense that an individual with legal training and experience – in this case a trial judge – is responsible for deciding the merits of the case. Most lawyers would agree this eliminates much of the unpredictability of a jury, and greatly reduces the chance of "runaway" jury verdicts since judges will tend to exercise more discretion, be guided less by emotion and be cautioned by the prospect of appeal. Unlike in arbitration, however, the parties do not have to shoulder the significant expense associated with arbitration, including filing fees, paying for a court reporter and paying for an arbitrator to preside over the dispute. Moreover, unlike in arbitration, the potential for appellate review of a trial court's judgment is real. In that respect, judges are actually guided by the law, if not constrained to apply it, and are less prone to decide cases on mere equitable principles. This is a real benefit for homebuilders, and perhaps the only benefit of arbitration not afforded by bench trial is privacy.[6] Not only will the bench trial provide a slightly more predictable outcome than an arbitration, the real value for homebuilders may be the cost savings and availability of appeal in the event of a poor decision.

Enforcement of the Jury Waiver

In order to install the bench trial as a procedure for resolving construction disputes in lieu of arbitration, or even as an alternative to arbitration, parties must still include valid jury waiver clauses in their contracts. Such clauses must state, in essence, that the parties have waived all right to a trial by jury in any legal action to enforce their rights under the contract. As long as the waiver clause is sufficiently conspicuous, then it is deemed enforceable against the parties that knowingly and voluntarily signed the contract, absent any evidence of fraud or imposition.[7] Further, the Texas Supreme Court recently held that parties objecting to such waiver clauses bear

[6] It should be noted that privacy does not equal confidentiality in the absence of such an agreement. While arbitration proceedings are private, the parties and witnesses are, unless otherwise agreed, not restrained from discussing the dispute with others.

[7] *In re Bank of America, N.A.*, 278 S.W. 3d 342, 343-44 (Tex. 2009).

the burden of proving that the waiver clause was not signed voluntarily and knowingly.[8] Thus, as long as the jury waiver clause is conspicuous, such as in bold-face print or underlined in at least 10-point type, and the parties have voluntarily and knowingly signed the contract, the jury waiver clause will be enforceable against the signing party. The inclusion of a sub-heading calling attention to the "Waiver of Jury Trial," and an additional blank for the signator's initials immediately below this provision in the contract is also advisable.

Arbitration is still the preferred method of resolving residential construction disputes, including contract, DTPA and construction defect claims. The bench trial, however, appears to effectively combine most of the positive features of arbitration and the civil court system, without the inherent risk associated with a jury. Given its relative advantages and disadvantages, there is every likelihood that the bench trial will become a frequently used, if not the preferred alternative, to arbitration.

Thomas R. Stauch and Brandon L. Starling are attorneys at the law firm of Nowak & Stauch, LLP. The firm's website is www.ns-law.net. Please contact Tom or Brandon if you have any questions on this topic or other issues related to residential construction.

[8] *Id.*

COMPARATIVE ANALYSIS

+ (advantage) **- (disadvantage)** **= (no advantage)**

Considerations	***Arbitration v. Jury Trial***	***Bench Trial v. Jury Trial***	***Bench Trial v. Arbitration***
Filing or administrative fees	-	=	+
Reduced or eliminated discovery	+	=	-
Court reporter provided	-	=	+
Payment for the decision-maker	-	=	+
Selection of the decision-maker	+	=	-
Speed and efficiency of resolution	+	+	-
Privacy of proceedings	+	=	-
Application of law (predictability)	+	+	+
Incentive of the decision-maker (objectivity)	-	=	+
Availability of appellate remedies	-	=	+
Finality of decision (judgment or award)	+	=	-
TOTALS	**+1**	**+2**	**+1**