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Arbitration vs. Litigation

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ARBITRATION vs. LITIGATION

Most owners and contractors want to build jobs, not argue about them. But, as most owners and contractors know, disputes are often inevitable in the complex world of construction.

Contractors, subcontractors, suppliers, engineers, architects and owners are bound to disagree over their respective rights and responsibilities no matter how carefully their contracts have been drafted. Disputes lead to delays, bad feelings, and misunderstandings. Sometimes, even with the best of intentions, parties to the contract often deliver less than they promised.

Often, controversies on the projects do not involve great legal issues, just simple disputes of fact. Additionally, it is becoming more and more difficult to litigate construction disputes in an economical fashion.

Arbitration offers litigation-weary contractors and project owners an alternative forum for prompt, less expensive, and non-reviewable resolutions of their disputes. The purpose of this article will be to compare arbitration and litigation as methods for finding remedies for changes and/or disputes.

1. Arbitration

In Mississippi, parties to construction contracts have had the right to include arbitration as a contracted for remedy for disputes. The Mississippi Construction Arbitration Act, M.C.A. §§ 11-15-101 to 11-15-143, enacted in 1981, gives binding

effect to arbitration provisions in construction contracts and agreements related to the construction process.

The Federal Arbitration Act, 9 USC §§ 1-14, as amended, also enforces written arbitration agreements in transactions or contracts involving interstate commerce. Presumably, construction contracts are involved in interstate commerce more often than not.

Whether covered by the Mississippi or the Federal Arbitration Acts, the agreement to arbitrate must be writing. Such an agreement may be in the form of a separate document, or it may be included as a provision in the construction contract. Most standard contract forms, such as the American Institute of Architects (AIA) documents, provide for arbitration.

In Mississippi, the Courts are obligated to enforce arbitration agreements in construction contracts. If one of the parties refuses to arbitrate a dispute, then the other party can compel arbitration by submitting a request to the Circuit Court directing the parties to arbitrate. M.C.A. § 11-15-105.

In some cases, if there appears to be a substantial issue as to whether or not an arbitration agreement has been made, the Court can summarily determine whether a valid agreement to arbitrate exists and can either grant or deny the application to order arbitration based upon the Court's findings. M.C.A. § 11-15-105(1) provides:

> (1) Any party to an agreement or provision for arbitration subject to sections 11-15-101 through 11-15-143 claiming the neglect or refusal of another party thereto to comply therewith may make application to the court as described in sections 11-15-133 and 11-15-135 for an order directing the parties to proceed with arbitration in accordance with the terms of such agreement or provision. If the court finds that no substantial

> issue exists as to the making of the agreement or provision, it shall grant the application. **If the court shall find that a substantial issue is raised as to the making of the agreement or provision, it shall summarily hear and determine such issue and shall, consistent with such determination, grant or deny the application.**

M.C.A. § 11-15-105(1) (emphasis added).

The Court may not, however, refuse to order arbitration based upon the merits of the dispute. M.C.A. § 11-15-105(4).

With respect to contracts with the Mississippi Department of Transportation, it is interesting to note the following little used statute. M.C.A. § 65-1-89 provides:

> Every formal contract made by or on behalf of the Mississippi State Highway Department for the construction of any building, highway, or work, or the doing of any repairs shall contain and include a provision for settlement by arbitration, if requested by either party to the contract, of all claims and disputes and other matters arising out of such contract, or the failure or refusal to perform the whole or any part thereof.

The following statute may be the reason for the little use of the preceding arbitration statute. M.C.A. § 65-1-91 provides:

> Upon demand by any party to a contract with the Mississippi State Highway Department for arbitration, such arbitration shall proceed in all respects and shall have the same effect as authorized and provided by Sections 11-15-1 through 11-15-37, Mississippi Code of 1972. Any arbitration decision shall be binding unless set aside by the commission. (emphasis added).

2. The Agreement to Arbitrate.

The Mississippi Act allows the parties great latitude in drafting arbitration agreements. Indeed, an arbitration clause can be as simple as that suggested by the American Arbitration Association (AAA):

> Any controversy or claim arising out of or relating to this contract, or the breach hereof, shall be settled by arbitration administered by the American Arbitration Association under its Construction Industry Arbitration rules, and judgment on the award rendered by the arbitrator(s) may be entered in any Court having jurisdiction thereof.

So long as the arbitration agreement is not so one sided as to be unconscionable, the Courts will generally enforce the arbitration agreement as written by the parties. More often than not, parties to construction contracts do not give enough consideration to what is included in the arbitration provisions of their contracts. Under the statutes, the parties can dictate what matters will be arbitrated and what matters will not. The parties can also agree on the number or arbitrators, the types and limits of discovery, and the place of arbitration. Attached as an appendix to this article are several different samples of how arbitration provisions may be written.

The initiation of arbitration follows the agreement of the parties. If the parties utilize the American Arbitration Association, its rules govern the initiation procedure. Otherwise, the Mississippi Construction Arbitration Act provides for an initiation procedure. M.C.A. § 11-15-107 provides:

> If an agreement or provision for arbitration provides a method for the initiation of arbitration, such method shall be followed. In the absence thereof, the party desiring to initiate the arbitration shall, within the time specified by the contract, if any, file with the other party a notice of an intention to arbitrate which notice shall contain a statement setting forth the nature of the dispute, the amount involved, and the remedy sought. A party upon whom the demand for arbitration is made may file an answering statement to the other party within twenty (20) days after receipt of the initial demand. If no answer is filed within the stated time, it will be treated as a denial of the claim. Failure to file an answer shall not operate to delay the arbitration.

M.C.A. § 11-15-107.

The parties can also provide for the method of the appointment of arbitrators. M.C.A. § 11-15-109. Parties can also decide whether their disputes will be resolved by one arbitrator or more than one, and the parties can dictate how the arbitrators will be selected.

M.C.A. § 11-15-133(1)(b) provides that an arbitration award can be reversed upon a showing of the "evident partiality by an arbitrator appointed as a neutral." The implication of this statement is that not all arbitrators have to be neutral. In fact, some arbitration agreements provide that each party appoints one arbitrator of his own choosing. Those two partial appointees will then select a third arbitrator who would be the neutral arbitrator.

Further, the Mississippi Act allows the parties to determine whether the decision of the arbitrators must be unanimous or whether a decision can be made based upon a majority. M.C.A. § 11-15-111. The Act also provides certain minimum procedures having to do with notification to the parties of the time and place of the hearing and how the hearing is to be conducted. Section 11-15-113 concerning the hearing process is prefaced by the language "unless otherwise provided by the agreement or provision for arbitration."

Thus, the parties can establish their own procedures including limitations of discovery and the locale for any hearings. The Act also entitles each party to be represented by an attorney during any proceedings or hearings that are a part of the arbitration process. M.C.A. § 11-15-115.

The arbitration agreement can also provide how the arbitrators will be compensated. In the event the parties fail to make such a designation, then the Act provides that expenses and fees will be paid as provided by the arbitrator's award. M.C.A. § 11-15-121.

Unless the agreement provides otherwise, the hearing should be conducted by the arbitrators selected by the parties, but only a majority decision is required. Additionally, the arbitrators may grant any relief which is within the scope of the agreement of the parties whether or not such relief could be granted by a court. M.C.A. § 11-15-133 (1); Hutto v Jordan, 36 So.2d 809, 812 (Miss. 1948).

The arbitrators are required to make their decision within such time as specified by the contract or within the time ordered by the Court. Any such award must be in writing, signed by the arbitrators, and delivered to the parties unless the arbitration agreement provides otherwise.

After the award has been rendered, either party may request that the award be modified or corrected within 20 days after receiving the award or by application to the Circuit Court within 90 days of the award. Under the Act, however, a modification or correction can only be granted where:

1. There is an evident miscalculation of figures or an evident mistake in the description of any person, thing, or property referred to in the award;
2. The arbitrators have awarded a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or

3. The award is imperfect in matter of form, not affecting the merits of the controversy.

M.C.A. § 11-15-135(1)

If a party is not satisfied with the award, it may apply to the Circuit Court to set aside or avoid the award and to order a new hearing. The grounds for granting such a request are exceptionally limited. By law, an arbitration award can only be vacated if:

1. The award was procured by corruption, fraud, or other undue means; or
2. There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party.

M.C.A. § 11-15-133(1).

The requirements for proving "evident partiality" are strict. In order to prevail on that point, the party must show a direct monetary interest in the proceedings or some form of actual relationship with one of the parties. See Herrin v Milton M. Stuart, Inc., 558 So.2d 863, 865 (Miss. 1990).

The Act specifies that applications to vacate an award must be made within 90 days after the receipt of the award unless the grounds for vacation are corruption, fraud, or other undue means. In that case, the application must be submitted within 90 days after such grounds became known or should have become known. M.C.A. § 11-15-133(2).

In most circumstances, the arbitrators will specify in the award the date on which the award becomes effective. If a party refuses to comply with the award, then the

prevailing party may apply to the Court for a confirmation of the award in order to enforce it. Such an application must be made within 90 days after receiving the award. As a part of that application, a judgment will be entered by the Court and it can be enforced like any other judgment.

Similarly, the Federal Arbitration Act limits the grounds upon which a federal court may disturb an arbitration award. Those grounds are: 1) where the award is procured by corruption, fraud, or undue means; 2) where there was evident partiality or corruption in the arbitrators**,** or either of them; 3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or 4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made. 9 U.S.C.A. § 10(a).

In Brabham v A.G. Edwards & Sons Incorporated, 376 F.3d 377, the Fifth Circuit Court of Appeals recognized manifest disregard of the law as a non-statutory for setting aside arbitration awards. In context, manifest disregard "means more than error or misunderstanding with respect to the law." Prestige Ford, 324 F.3d at 395 (quoting Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker, 808 F.2d 930, 933 (2d Cir.1986)). The arbitrators must have "appreciate[d] the existence of a clearly governing principle but decided to ignore or pay no attention to it." *Id.* Furthermore, "the governing law ignored by the arbitrators must be well defined, explicit, and clearly applicable." *Id.*

The Court in Brabham went on to say that arbitrariness and capriciousness is not an accepted non-statutory ground for vacating arbitration awards, at least in the Fifth Circuit. Other federal jurisdictions, like the Eleventh Circuit have recognized other non-statutory grounds such as 1) arbitrariness and capriciousness, 2) enforcement of the award is contrary to public policy and 3) manifest disregard of the law. B.L. Harbert International, LLC v Hercules Steel Company, ___F.3d___, 2006 WL 462368 (11th Cir. 2006).

To this author's knowledge, the Mississippi state courts have not adopted any non-statutory bases for vacating arbitration awards.

3. Litigation.

Traditionally, construction disputes have been and are often resolved in the civil judicial system. The formalized litigation process involves the filing of a written complaint by one party seeking relief from another party or parties.

The defendants are entitled to respond with any claims or defenses available to them. In Mississippi, whether in state or federal court, the procedural rules allow all parties to have liberal discovery with respect to the facts and matters relating to the claims and defenses in the lawsuit.

Once the parties reach trial, each party is entitled to present evidence in support of its position and all witnesses are subject to cross examination by the opposing party or parties. The facts of the dispute are then decided by either a judge or a jury and a decision is rendered based upon the evidence and the law. The losing party is entitled to appeal to one or more higher courts.

One of the primary criticisms of modern civil litigation is that it is costly due to the liberal discovery rules and that final decisions can often take years depending on the number and length of appeals.

4. <u>Making the Choice – Arbitration or Litigation</u>.

There are several factors which enter into the process of deciding between arbitration or litigation. Once a dispute arises, it should always be remembered that a pre-existing agreement to arbitrate disputes will be enforced. However, if a dispute arises and the parties have not yet decided on a method for resolution, an agreement to arbitrate can also be entered into after the dispute arises. Some of the relevant factors in making a decision between arbitration and litigation are discussed below.

1. <u>Expertise.</u>

In general, arbitration offers a great advantage in the technical expertise and experience of arbitrators. It is always difficult to predict how an arbitration panel might decide a particular claim or defense, but it is generally accepted that most qualified construction arbitrators will have a better understanding of the disputes that arise from the construction process which can often be very complicated.

On the other hand, judges and juries generally lack any experience or expertise in the construction fields.

2. <u>Appeal Rights</u>.

There are basically no appeal rights in arbitration. Under the Mississippi Arbitration Act, a losing party must generally convince a court that fraud or misconduct occurred during the arbitration in order to have an award vacated. M.C.A. §§ 11-15-133

and 11-15-135. Otherwise, the Court can only change awards based upon evident miscalculations or mistakes or where the arbitrators decided an issue which was not submitted to them. The Mississippi Act further restricts courts with the following language:

> The fact that the relief was such that it could not or would not be granted by a court of law or equity is no ground for vacating or refusing to confirm the award. M.C.A. § 11-15-133(1).

In the absence of fraud and as long as the award was within the subject matter of the arbitration agreement between the parties, the courts are not able to provide any relief to a losing party. On the other hand, a party has a right to appeal any decision by a court or any verdict by a jury whether state or federal. Often times, decisions to arbitrate or litigate are based upon economic resources and evaluations of the risks of relatively quick arbitration decisions or lengthy trials and expensive appeals in the litigation setting.

3. Discovery.

In arbitration, discovery is generally limited. Unless the parties agree otherwise in the arbitration clause, the arbitrators can restrict and limit the number of interrogatories, document requests and depositions. In litigation, discovery is a matter of right. As an example, the rules of the American Arbitration Association provide that the arbitrators have great discretion in limiting discovery and expediting the arbitration proceedings. As discussed elsewhere, the parties may also limit the amount of discovery available in arbitration by their written agreement.

The Mississippi Act authorizes arbitrators to permit depositions but grants the arbitrators wide discretion in providing for the manner and timing of depositions.

M.C.A. § 11-15-117(2). Further, the Act provides that no other pre-hearing discovery is permitted unless agreed to by both parties. M.C.A. § 11-15-117(3).

4. Formality or Informality.

Arbitration proceedings are, by and large, informal. Litigation proceedings are very formal.

5. Privacy.

Arbitration proceedings are private. Litigation is public.

6. Cost.

Lawyers involved in arbitration and litigation probably have different opinions about which is most costly. With the liberal discovery rules and appeal rights of litigation, lawsuits can become very expensive propositions.

On the other hand, arbitration can also be expensive even if less so than litigation. Arbitrations before the American Arbitration Association require filing fees based on the size of the claim or counterclaim. The AAA fee schedule for construction cases currently reads as follows:

Fees

> An initial filing fee is payable in full by a filing party when a claim, counterclaim or additional claim is filed. A case service fee will be incurred for all cases that proceed to their first hearing. This fee will be payable in advance at the time that the first hearing is scheduled. This fee will be refunded at the conclusion of the case if no hearings have occurred.
>
> However, if the Association is not notified at least 24 hours before the time of the scheduled hearing, the case service fee will remain due and will not be refunded.
>
> These fees will be billed in accordance with the following schedule:

Amount of Claim	Initial Filing Fee	Case Service Fee
Above $0 to $10,000	$750	$200
Above $10,000 to $75,000	$950	$300
Above $75,000 to $150,000	$1,800	$750
Above $150,000 to $300,000	$2,750	$1,250
Above $300,000 to $500,000	$4,250	$1,750
Above $500,000 to $1,000,000	$6,000	$2,500
Above $1,000,000 to $5,000,000	$8,000	$3,250
Above $5,000,000 to $10,000,000	$10,000	$4,000
Above $10,000,000	*	*
Nonmonetary Claims**	$3,250	$1,250

Fee Schedule for Claims in Excess of $10 Million .

The following is the fee schedule for use in disputes involving claims in excess of $10 million. If you have any questions, please consult your local AAA office or case management center.

Claim Size	***Fee***	Case Service Fee
$10 million and above	Base fee of $ 12,500 plus .01% of the amount of claim above $ 10 million.	$6,000
	Filing fees capped at $65,000	

Also, a panel of three construction experts charging hourly rates can also amass a fairly large bill for arbitration proceedings. Those costs and filing fees may be assessed to either party in whatever amounts the arbitrators determine.

Sometimes arbitrations can be broken down into a series of hearing dates over a period of weeks or even months. Conversely, most litigation matters proceed to a conclusion at the trial date, unless the matter is being tried by the Court without a jury.

7. Speed.

Arbitration hearings are generally scheduled sooner than trial dates. However, some parties are not interested in speed, in which case litigation may be a preferable arena for a particular dispute.

8. Evidence.

Evidentiary rules generally do not apply in arbitration proceedings. Therefore, if a case involves an essential fact which can only be proved by hearsay or some other method not favored by evidentiary rules in litigation, then arbitration is the preferable place to be. In Court, such testimony is likely to be excluded.

9. Facts.

As a general rule, most lawyers experienced in arbitration and litigation will tell you that if a case is stronger on the facts then the party will want to be in arbitration. On the other hand, if the party's position is based on technical defenses or legal points, the party is probably better off in Court.

10. Law.

If the claim is based primarily on legal points or legal issues, litigation is probably preferable since judges are trained to resolve such legal issues by summary judgment. Many times, arbitrators are not well equipped to handle legal issues and generally try to hear all facts and arguments before rendering a decision.

11. Complexity.

Arbitration tends to work best when the disputes involve complicated or technical factual issues in the construction setting. If the facts, on the other hand, are simple, then litigation may be as good as or better than arbitration.

12. Consolidation.

Many standard arbitration agreements, particularly those drafted by the American Institute of Architects, prohibit the joinder of an architect in any arbitrations between the Owner and Contractor or between the Contractor and Subcontractors. As a result, in some settings it may be necessary to have multiple arbitrations before a final resolution can be reached. In litigation, a party may assert all claims against all other parties who have an interest in the same subject matter.

Conclusion.

Fortunately or unfortunately, the decision to arbitrate or litigate in most construction settings is made in advance of any dispute. If the parties include an arbitration provision in their contract, then the dispute in all probability will be resolved by arbitration.

Even if the parties do not provide for arbitration and expressly provide for litigation of disputes, they may still enter into an agreement to arbitrate a particular

dispute after it arises. Once a dispute has arisen, it may be difficult to obtain the agreement of the other party to arbitrate.

As a general rule, parties involved in the construction industry should review the above factors with respect to arbitration or litigation and make an advance evaluation of whether they prefer one or the other. If arbitration is the preferred method, then provisions for arbitration should be drafted and included in all form contracts. In Mississippi, particularly in dealing with public bodies, those forms are often dictated by the Owner with little or no input by contractors.

APPENDIX
SAMPLE ARBITRATION CLAUSES

Sample 1

Arbitration: In the event of a dispute arising out of or related to the work performed under this Contract, or the interpretation thereof, the dispute will be settled by arbitration under the Construction Industry Rules of the American Arbitration Association, and judgment will be entered on the award. All parties to the construction process, including the architect, the architect's consultants, subcontractors, sub-subcontractors, suppliers, and construction lender are bound by the arbitration agreement if they have signed any document that refers to or incorporates this arbitration agreement. The arbitrator will award reasonable attorney's fees to the prevailing party or parties. If a party after due notice fails to appear at and participate in the proceedings, the arbitrator will make an award based on evidence introduced by the party or parties who do participate. The arbitrator may issue interlocutory awards granting provisional remedies, such as restraining orders, injunctions, writs, and attachments, and the parties may apply to the courts to confirm and enforce such orders without waiving the right to have the dispute determined by arbitration. All parties will make their job records available to all other parties for examination and copying. The arbitrator shall enforce this right to inspect job records.

Sample 2

Arbitration: Any dispute between the parties to this Contract arising out of or related to the performance of the work or the interpretation of the Contract will be decided by arbitration, and judgment will be entered on the award. A party demanding arbitration shall name its arbitrator, and, the other party will name its arbitrator within 10 days thereafter. The two arbitrators will select a neutral arbitrator within 10 days. If the party-appointed arbitrators do not select a neutral arbitrator within 10 days, or if the arbitrator so selected fails to assume the duties of an arbitrator, a neutral arbitrator will be appointed by the court. The award will be effective when it is signed by any two arbitrators. The arbitrators will award reasonable attorney's fees to the prevailing party or parties. This arbitration clause will be binding on the parents, subsidiaries, and principals of the parties. If either party should merge or consolidate, the arbitration clause will bind the surviving corporation.

Sample 3

Arbitration: Any controversy arising out of this Contract or the performance thereof shall be decided by arbitration in accordance with the Construction Industry Rules of the American Arbitration Association, and judgment may be entered on the award. The arbitration proceeding will include subcontractors, material suppliers, equipment renters, construction lender, architect, designer, engineer, and all other parties to the construction process who have signed any document incorporating or referring to this arbitration

agreement. Should any party refuse or neglect to appear at and participate in arbitration proceedings after due notice, the arbitration will make an, award based on evidence introduced by the parties who do appear and participate. The arbitrator shall award the prevailing party or parties reasonable compensation for the time, expenses and trouble of arbitration, including arbitration fees, attorney's fees, and executive and, administrative fees. Without waiving its right to demand arbitration under this Contract, any party may apply to the court for attachment, injunction, declaratory relief, or other provisional or summary remedy that may not be available in arbitration. Each party will permit all other parties to examine and copy its records that are relevant to the dispute, and the arbitrator is empowered to enforce this agreement for inspection and copying of records.

Sample 4

Arbitration

The parties agree to submit disputes between them relating to this Agreement and its formation, breach, performance, interpretation and application to arbitration under the following terms and conditions:

(i.) Location. Arbitration will be in _____.

(ii) Rules; Discovery. Arbitration will be under the Commercial Arbitration Rules of the American Arbitration Association. Each party will be entitled to discovery by requests for admission, by requests for production of documents and by depositions of no more than ten (10) individuals, but not by other means.

(iii) Arbitrators. There will be one (1) arbitrator, mutually selected by the parties, who will have knowledge of an experience in dealing with the _____. If the parties are unable to agree on an arbitrator, the arbitrator shall be designated by the America Arbitration Association or another suitable organization acceptable to both parties.

(iv) Time Limits. All discovery will be completed, and the arbitration hearing will commence, within ninety (90) days after appointment of the arbitrator. Unless the arbitrator finds that exceptional circumstances justify delay, the hearing will be completed, and an award will be rendered in writing, within one-hundred twenty (120) days after commencement of the hearing.

(v) Binding Effect. The award rendered in arbitration will be final and binding and may be enforced in any court of competent jurisdiction.

(vi) Costs and Attorneys' Fees. Unless the arbitrator finds that exceptional circumstances require otherwise, the arbitrator will include in the award the prevailing Party's cost of arbitration and reasonable attorneys' fees.

(vii) Exceptions. Nothing contained in this" Article shall prevent either Party hereto from seeking injunctive relief through the courts where such relief is allowed under this Agreement.

Sample-5 AGC #600

ARTICLE 14

ARBITRATION

14.1 AGREEMENT TO ARBITRATE. All claims, disputes and matters .in question. arising out of, or relating to, this Agreement or the breach thereof, except for claims which have been waived by the making or acceptance of final payment, and the claims described in Article 14.7, shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then in effect unless the parties mutually agree otherwise. This agreement to arbitrate shall be specifically enforceable under the prevailing arbitration law.

14.2 NOTICE OF DEMAND. Notice of the demand for arbitration shall be filed in writing with the other party to this Agreement and with the American Arbitration Association. The demand for arbitration shall be made within a reasonable time after written notice of the claim, dispute or other matter in question has been given, and in no event shall it be made after the date of final acceptance of the Work by the Owner or when institution of legal or equitable proceedings based on such claim, dispute or other matter in question would be barred by the applicable statute of limitations, whichever shall first occur. The location of the arbitration proceedings shall be the city of the Contractor's headquarters or_____.

14.3 AWARD. The award rendered by the arbitrator(s) shall be final and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction.

14.4 WORK CONTINUATION AND PAYMENT. Unless otherwise agreed in writing, the Subcontractor shall carry on the Work and maintain the Schedule of Work pending arbitration, and, if so, the Contractor shall continue to make payments in accordance with this Agreement.

14.5 NO LIMITATION OF RIGHTS OR REMEDIES. Nothing in this Article shall limit any rights or remedies not expressly waived by the Subcontractor which the Subcontractor may have under lien laws or payment bonds.

14.6 BANE ARBITRATORS. To the extent not prohibited by their contracts with others, the claims and disputes of the Owner, Contractor, Subcontractor and other subcontractors involving a common question of fact or law shall be heard by the same arbitrator(s) in a single proceeding.

14.7 EXCEPTIONS. This agreement to arbitrate shall not apply to any claim:

(a) of contribution or indemnity asserted by one party to this Agreement against the other party and arising out of an action brought in a state or federal court or in arbitration by a person who is under no obligation to arbitrate the subject matter of such action with either. of the parties hereto; or does not consent to such arbitration; or

(b) asserted by the Subcontractor against the Contractor if the Contractor asserts said claim, either in whole or part, against the Owner and the contract between the Contractor and Owner does not provide for binding arbitration, or does so. provide but the two arbitration proceedings are not consolidated, or the Contractor and Owner have not subsequently agreed to arbitrate said claim, in either case of which the parties hereto shall so notify each other either before or after demand for arbitration is made.

In any dispute arising over the application of this Article 14.7, the question of arbitrability shall be decided by the appropriate court and not by arbitrators.

Sample 6 - AIA 201 (1987 ed.)

4.5 ARBITRATION

4.5.1 Controversies and Claims Subject to Arbitration. Any controversy or. Claim arising out of or related to the Contract, or breach thereof shall be. settled by arbitration in accordance with the Construction Industry Rules of the American Arbitration Association, and judgment upon the award rendered by the arbitrator or arbitrators may be entered in any court having jurisdiction thereof except controversies of claims relating to aesthetic effect ,and except whose waived as provided for in Subparagraph 4.3.5. Such controversies or Claims upon which the Architect has given notice and rendered a decision as provided in Subparagraph 4.4.4 shall be subject to arbitration upon written demand of either party. Arbitration may be commenced when 45 days have passed after a Claim has been referred to the Architect as provided in Paragraph 4.3 and no decision has been rendered.

4.5.2 Rules and Notices for Arbitration. Claims between the Owner and Contractor not resolved under Paragraph 4.4 shall, if subject to arbitration under Subparagraph 4.5.1, be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association currently in effect, unless the parties mutually agree otherwise. Notice of demand for arbitration shall be filed in writing with the other party to the Agreement between the Owner and Contractor and with the American Arbitration Association, and a copy shall be filed with the Architect.

4.5.3 Contract Performance During Arbitration. During arbitration proceedings, the Owner and Contractor shall comply with Subparagraph 4.3.4.

4.5.4 When Arbitration May Be Demanded. Demand for arbitration of any claim may not be made until the earlier of (1) the date on which the Architect has rendered a final written decision on the Claim, (2) the tenth day after the parties have presented evidence to the Architect or have been given reasonable opportunity to do so, if the Architect has not rendered a final written decision by the date, or (3) any of the five events described in Subparagraph 4.3.2.

4.5.4.1 When a written decision of the Architect states that (1) the decision is final but subject to arbitration and (2) a demand for arbitration of a Claim covered by such decision must be made within 30 days after the date on which the party making the demand receives the final written decision, then failure to demand arbitration within said 30 days period shall result in the Architect's decision becoming final and binding upon the Owner and Contractor. If the Architect renders a decision after arbitration proceedings have been initiated, such decision may be entered as evidence, but shall not supersede arbitration proceedings unless the decision is acceptable to all parties.

4.5.4.2 A demand for arbitration shall be made within the time limits specified in Subparagraphs 4.5.1 and 4.5.4 and Clause 4.5.4.1 as applicable, and in other cases within a reasonable time after the Claim has arisen, and in no event shall it be made after the date

when institution of legal or equitable proceedings based on such Claim would be barred by the applicable statute of limitations as determined pursuant to Paragraph 13.7.

4.5.5 Limitation on Consolidation or Joinder. No arbitration arising out of or relating to the Contract Documents shall include, by consolidation or joinder or any other manner, the Architect, the Architect's employees or consultants, except by written consent containing specific reference to the Agreement and signed by the Architect, Owner, Contractor and any other person or entity sought to be joined. No arbitration shall include, by consolidation or joinder or in any other manner, parties other then the Owner, Contractor, a separate contractor as described in Article 6 and other persons substantially involved in a common question of fact or law whose presence is required if complete relief is to be accorded in arbitration. No person or entity other than the Owner, Contractor or a separate contractor as described in Article 6 shall be included as an original third party or additional third party to an arbitration whose interest or responsibility is insubstantial. Consent to arbitration involving an additional person or entity shall not constitute consent to arbitration of a dispute not described therein or with a person or entity not named or described therein. The foregoing agreement to arbitrate and other agreements to arbitrate with an additional person or entity duly consented to by parties to the Agreement shall be specifically enforceable under applicable law in any court having jurisdiction thereof.

4.5.6 Claims and Timely Assertion of Claims. A party who files a notice of demand for arbitration must assert in the demand all claims then known to that party on which arbitration is permitted to be demanded. When a party fails to include a Claim through oversight, inadvertence or excusable neglect, or when a Claim has matured or been acquired subsequently, the arbitrator or arbitrators may permit amendment.

4.5.7 Judgment On Final Award. The award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon in accordance with applicable law in any court having jurisdiction thereof.