

# **WHEN IS AN AGREEMENT TO ARBITRATE NOT AN AGREEMENT TO ARBITRATE?**

**By David Kuehn**

Whether two parties actually agreed to arbitrate their dispute can be a difficult question to answer, particularly within the context of a complex construction project. Even experienced judges – reading the exact same contract language – do not always agree on the answer to this question. Therefore, it is always preferable to make sure the agreement itself removes any doubt as to the parties’ intent.

Recently, Goetz Fitzpatrick LLP represented two project owners who entered into separate contracts with the same general contractor for similar construction projects. Pursuant to each contract, the general contractor procured separate payment and performance bonds for each project. Each owner subsequently terminated the general contractor for poor performance and served an arbitration demand against it and its surety.<sup>1</sup> The broad arbitration provision in paragraph 4.6.1 of the General Conditions of each contract stated:

Any claim arising out of or related to the Contract, except Claims relating to aesthetic effect and except those waived as provided for in Sections 4.3.10, 9.10.4 and 9.10.5 shall, after initial decision by the Architect or 30 days after submission of the Claim to the Architect, be subject to arbitration.

The surety refused to arbitrate and petitioned Bronx Supreme Court for an order vacating each respective arbitration demand and precluding arbitration, relying on paragraph 1.5.1 of the

---

<sup>1</sup> Each performance bond included the same provision incorporating the terms of the corresponding contract between the owner and the general contractor: “The Contractor and the Surety, jointly and severally, bind themselves, their heirs, executors, administrators, successors and assigns to the Owner for the performance of the Construction Contract, which is incorporated herein by reference.”

Supplemental General Conditions in the contracts, which stated:

Add to Article 4.4, 4.5 and 4.6 of the General Conditions of the Contract: Any dispute hereunder shall be brought in the appropriate court of law pursuant to the rules of court of the State of New York with venue in Bronx County.

Each petition was assigned to a different judge and, predictably, inconsistent decisions followed.

“Judge A” granted the surety’s petition and vacated the arbitration demand. Judge A rejected the Owner’s argument that paragraph 1.5.1 the Supplemental General Conditions did not delete the arbitration provision, but was added to make it clear that all disputes involving the arbitration (*i.e.*, a challenge to or motion to confirm any arbitration award) must be brought in the Bronx Supreme Court. Rather, the judge concluded that paragraph 1.5.1 superseded paragraph 4.6.1 of the General Conditions and eliminated any agreement to arbitrate.

In contrast, “Judge B” denied the surety’s petition and directed the parties to arbitration. In reaching its decision, Judge B noted that (i) New York policy favors and encourages arbitration<sup>2</sup>, (ii) because the Surety was domiciled outside of New York (and, therefore, the Contract had an effect on interstate commerce), Section 2 of the Federal Arbitration Act applied, mandating arbitration<sup>3</sup>, and (iii) to accept the Surety’s argument would render paragraph 4.6.1 meaningless and would thwart the intent of the contract, which called for arbitration of the dispute.

While the latter decision appears to be well-reasoned and the correct result, clearly one of the judges reached an erroneous conclusion. These conflicting decisions, which are based on

---

<sup>2</sup> Citing *Matter of Nationwide Gen. Ins. Co. v. Investors Ins. Co. of America*, 37 N.Y.2d, 91, 95-96, 371 N.Y.S.2d 463, 332 N.E.2d 333 (1975).

<sup>3</sup> Citing *Diamond Waterproofing Systems, Inc. v. 55 Liberty Owners Corp.*, 4 N.Y.3d 247, 793 N.Y.S.2d 831, 826 N.E.2d 802 (2006).

identical contractual language, demonstrate the need to make dispute resolution provisions in contracts crystal clear to avoid the possibility that a court will incorrectly interpret them. In this particular situation, if the phrase ‘disputes hereunder’ in paragraph 1.5.1 of the Supplemental General Conditions contained language to limit the provision to disputes involving the arbitration proceedings between the parties pursuant Article 4.6, the two judges invariably would have reached the same conclusion regarding the paragraph’s scope.

Prudent owners (and contractors) avoid situations like this by consulting a construction law attorney to review and/or draft its agreements to ensure they accurately and clearly reflect the parties’ intent.