Arbitration—
Promises Made, Promises Broken

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One of the current truisms is that the resolution of disputes in arbitration is both faster and less expensive than litigation in court. Arbitration also is commonly described as simpler, fairer, and less onerous than a lawsuit. My recent experience with arbitration makes clear that this truism is nonsense. Arbitration can be an expensive, unending kangaroo court in which the concepts of justice and fairness are trampled and neither the arbitrators nor the arbitration association seems to have any interest in anything other than maximizing the fees paid to them by the parties.

Beacon's Experience

My visit through the looking glass to the surreal world of arbitration began innocently enough. The city for which I am administrator was undertaking a large construction project that was to be a centerpiece for the community. A great deal of planning was done to make sure that the construction would go smoothly. Part of that planning involved the preparation of contract documents to be used by the various contractors who had succeeded in bidding for the work.

During that preparation of contract documents, the issue arose of whether to include a provision in the contract that

would require the resolution of all disputes by arbitration. The city's attorney advised that arbitration should not be used because resolution of disputes in court would give the city clear advantages. In retrospect, this was outstanding advice.

We chose, however, to include an arbitration provision. After all, arbitration was supposed to be faster and less expensive. It also was supposed to result in rough justice without all of the complicated procedures followed in a court. We thought that by choosing arbitration, we were assuring a fair hearing both for the city and for its contractors. We later found out that we had been acting on the basis of a delusion.

Unfortunately, we were forced to make use of the arbitration provision of the construction contracts. After the construction project began, serious problems arose that affected the cost and schedule of that work. The city had to pay costs for extra work amounting to about 15 percent of the contract price and had to give lengthy extensions of time for completion of the work.

Despite these payments and time extensions, the city's contractor quickly started filing claims and continued this conduct throughout the job until there were more than 100 claims awaiting resolution. In fact, in late 1995, about 10 months into the project, the contractor demanded arbitration of its claims and filed the necessary papers with the American Arbitration Association.

The commencement of arbitration required Beacon to hire lawyers to deal with the claims in that proceeding. It also cast a pall over the entire construction project because everything now was seen in the context of the arbitration. As a result, I hoped that arbitration would quickly resolve the disputes. Unfortunately, this did not happen. Instead, the contractor kept adding and removing claims to arbitration as the job continued, and the resulting problems on the construction project went on unabated.

Process Problems

In the meantime, the city and the contractor chose arbitrators under the supervision of the American Arbitration Association. This selection process continued for more than a year and resulted in the arbitration association's naming a panel of three arbitrators who were supposedly knowledgeable about the construction industry in general and municipal construction in particular.

I expected to see contractors or owners/developers on the panel but found that no such people had been chosen. Instead, two lawyers had been appointed, together with an architect who said he had never been involved with a municipal construction project. The true impact of the selection of these arbitrators was not clear until the hearings had actually begun.

At the preliminary conference, which was our first meeting with the arbitrators, both the city and the contractor agreed that the arbitration would take at most eight days of hearings and told the arbitrators of this estimated duration. The chief arbitrator chuckled at this news and said that the hearings sometimes went on longer than expected. I did not realize at that time what he meant, but it quickly became painfully obvious.

Nothing that took place at the hearings went quickly; everything was stretched out. It almost seemed as if the arbitrators wanted the hearings to go on forever. Instead of eight hearings, there were 35, with the contractor's first witness alone taking more than seven days. Witnesses who were expected to take 20 minutes took half a day, and witnesses who should have testified for an hour lasted two or three days.

The arbitrators principally caused this stretchout. They interrupted the questioning of every witness to conduct their own interrogations. These interruptions went on at great length. One witness was called by the city just to identify a video that he had shot; he had no other involvement with the disputes. We expected that he would be on and off in at most 20 minutes. Instead, the arbitrators interrupted and questioned him for half a day. Amazingly, the transcript of the hearing shows that, during that morning, more than 95 percent of the time was spent with the witness being questioned by the arbitrators. And this was a witness who had no knowledge of the issues in the arbitration.

The arbitrators also required the parties to add witnesses to their presentations. This continued until we realized that there was no real need for these extra witnesses to appear and refused to produce some of them. For example, one of the contractor's claims involved $4,000 in extra costs paid to a structural engineer. The arbitrators asked repeatedly that the structural engineer be compelled to testify at the hearings. Of course, the testimony of that engineer would have resulted in costs and legal fees of more than $10,000 for the parties. It would have been ridiculous for either party to call this engineer, but the arbitrators kept on asking.

Arbitrator Problems

Another request by the arbitrators was that the city produce the mayor and certain members of the council to testify. These people had essentially no involvement in the construction work that was the subject of the disputes; nevertheless, the arbitrators kept asking for them.

The arbitrators also went off into areas of inquiry that had nothing to do with the subject of the disputes between the parties. For example, the arbitrators spent the better part of a morning questioning the city finance director about how the records of liens are kept. While this line of inquiry may seem unremarkable, it is important to know that the finance director does not keep the lien records. It is even more important to know that there were no issues in the arbitration with regard to the validity of liens that had been filed. In short, all of this testimony came from a witness who was unfamiliar with the subject and

about a subject that was completely irrelevant to the proceedings.

As if the other problems with the arbitrators were not enough, they also started late almost every day, announced five-minute breaks that generally lasted at least 20 minutes, came back late from lunch, and otherwise acted so that as little as possible seemed to get done at the hearings. Not surprisingly, these arbitrators all were paid by the day. In fact, they were paid approximately $80,000 in total. Had the hearings lasted only for the expected eight days, their total bill would have been less than $20,000.

The American Arbitration Association seemed not to care at all that the hearings were being stretched out to such a great extent. In fact, the only real contact we had with the American Arbitration Association during the hearings took the form of bills for administrative expenses and arbitrators' compensation. These bills arrived with regularity, and the tribunal administrator (the AAA's person in charge of the hearings) devoted her efforts principally to making sure that all bills were paid. At many points during the hearings, the tribunal administrator threatened that the arbitration would be halted if the outstanding bills of both sides were not paid immediately. She once threatened to stop the arbitration for nonpayment reasons only one day after sending the bill in question.

Both the extra expense of arbitration and the lack of concern shown by the AAA would have been bearable had there been a fair and rational hearing of the issues. This, however, did not happen. For instance, during the closing arguments at the end of the arbitration, the contractor added a new claim for $200,000 and presented it to the arbitrators over the city's objection. The arbitrators allowed this new claim to be submitted without its ever having been asserted in writing as part of the demand for arbitration, without there ever having been any testimony or other evidence offered in support of the claim, and without the city being given any chance to present evidence against it.

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Indeed, the only point that the arbitrators seemed concerned about in regard to this new claim was whether or not an additional fee had to be paid by the contractor to the AAA for asserting that claim. This kind of conduct is about as far as possible from a fair hearing.

The arbitrators also refused during the hearings to accept evidence about one of the city's claims, only to reverse their position the next day and then to reverse it again as the hearing proceeded. This made orderly presentation of evidence extremely difficult.

It Gets Worse

The worst actions by the arbitrators, however, were their interruptions to the questioning of witnesses—interruptions that turned out to be invaluable to the contractor. The chairman of the panel in particular interjected himself frequently into the questioning, providing a much-needed lifeline for certain of the contractor's witnesses, who had made admissions harmful to the contractor's case.

From the beginning of the hearings, it was apparent to me that the chairman of the panel was doing all that he could to help the contractor. I had expected neutrality from the arbitrators; what I saw was advocacy.

So, to put it mildly, the city had the worst of all worlds. The process lasted close to three years from start to finish. The costs of the arbitration were astronomical. The fees to the arbitrators and the arbitration association were huge. The time required of city personnel seemed endless. And, finally, I was left with the conviction that the supposed experts who were hearing the dispute appeared to be confused, dilatory, or worse. The arbitration was not quicker, less expensive, or fairer than a lawsuit would have been.

The final indignity was a significant one: there was no one to review the handiwork of the arbitrators in a meaningful way. Had all of this happened in court, there could have been an appeal. In arbitration, however, there is no meaningful appeal. Beacon was dragged through the crazy-quilt arbitration proceedings and was stuck with the resulting costs and outcome.

Consider the Outcome

These experiences should be a warning to all other governmental bodies—stay away from arbitration. It is not faster and certainly not less expensive than litigation. All of the safeguards that are present in a courtroom go out the window in arbitration. The arbitrators who are chosen may not be experts in the field of the arbitration but rather may be lawyers looking for a way to earn a few extra dollars. If the arbitrators who are appointed are off-base, a local government can be stuck with a terrible result from which there is no appeal. While proceedings in court are far from perfect, they cannot be worse than arbitration. PM

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