

*New Mexico needs arbitration legislation . . .*

Not long ago, New York City newspapers reported that a school building under construction had to be torn down and rebuilt because the concrete was defective. Experts had ruled that the structure was not safe; the concrete had been improperly cured. City officials, contractors and architects had red faces, and taxpayers to whom concrete is concrete were surprised. But those in the construction field know that any number of controversies have centered around the quality of the concrete used in a building.

Some of these costly controversies have been aired in the hearing rooms of the American Arbitration Association, as specific recourse to AAA arbitration is provided under many contracts involving architects, builders, owners and tenants. Numerous contracts contain a clause such as this:

*Any controversy or claim arising out of or relating to this contract or the breach thereof shall be settled by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association and judgment upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.*

A recent case heard at the AAA concerned alleged defects in the ready-mixed concrete which had been delivered to a building site. The buyer contended that the concrete did not meet specifications. As a result, he charged, defects had developed in columns and structural elements in the building under construction. These columns had to be torn down and replaced.

The buyer cancelled the agreement for sale of the concrete, accused the seller of breach of contract and filed a demand for arbitration with the regional office of the AAA. He demanded compensation for the costs of tearing down and replacing the columns and consequential damages for the delay in completing the building.

The seller answered that, if the structure were defective, the flaws resulted from negligence on the buyer's part. Denying any liability, the seller filed a counterclaim seeking payment for the concrete already sold and delivered and damages for rescission of the contract.

Both parties agreed upon a single arbitrator to decide their dispute. From AAA lists they chose a prominent engineer of considerable experience and acknowledged competence.

At the hearing, the buyer introduced into evidence a report from an independent testing laboratory on the quality of the cement. Witnesses for both sides testified to delivery schedules, procedures at the construction site and practices in the industry.

The testing laboratory had reported that the concrete sample had failed one test. However, it devel-

oped that this test was not relevant. Moreover, the sample subjected to analysis had not been taken from construction at the site during the period of the controversy. Further testimony revealed that the buyer's employees had added an excessive amount of water to the concrete at the site.

In his written award, the arbitrator disallowed the buyer's claim in its entirety. He ruled that the curing of the concrete had been erratic and inefficient. The arbitrator found no breach of warranty by the seller and held that the latter was entitled to payment for the concrete. In addition, he awarded the seller damages for the contract rescission. This is just one example of how arbitration works.

*There are seven good reasons for using arbitration in construction disputes.*

1. *Expert "Lay Judges"*—In construction disputes, especially, the expertise of the arbitrator is a distinct advantage to the parties. For many cases involve not only a question of law, but also a question of fact. Was the construction work defective? Were the substituted materials equal in quality to those specified? Did the completed structure meet the specifications of the architect? Were costs excessive? Who was responsible for defects or failures in the structure: the architect, the contractor or the owner?

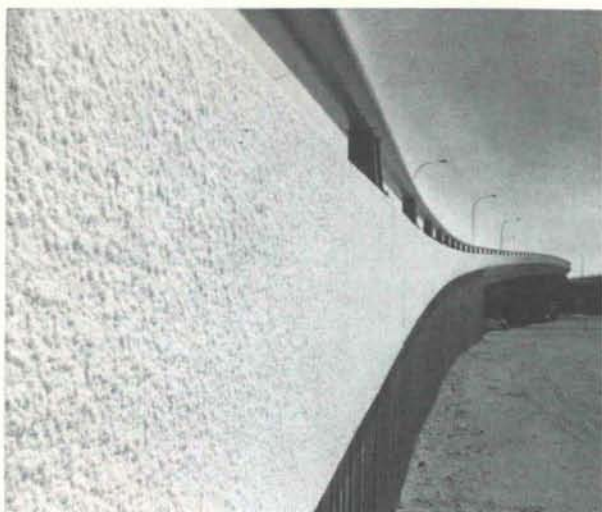
The architects, engineers, construction men and attorneys on the Construction Industry Panel of the American Arbitration Association are fully qualified to hear and resolve disputes over construction. Nominated to the Panel by their own business and professional associations or by other experienced arbitrators, they have the insider's knowledge of the trade and its customs, a reassuring feature to the parties in a case.

In these controversies, the expert "lay judge" can assess evidence and weigh testimony. There is no need to explain to him what technical terms mean, to interpret complex reports for him and to hope that he has grasped the essentials of a complicated situation. Further, with an arbitration panel composed of knowledgeable professionals, expert witnesses are not often required.

The American Arbitration Association reports that architects have been especially generous in contributing their experience and talents to the settlement of disputes. AAA, which takes pride in the high caliber of its commercial arbitrators, believes that because of these public-spirited men, the business world can adjust its inevitable differences without interference or hindrance by any agency outside that sphere. Solutions arrived at by professional men who understand the exigencies of business life are apt to be closely attuned to practical realities.

There is no reason why a professional man should think that, because he does not have legal training, he is not qualified to become an arbitrator. The qualities





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that a lay judge needs—integrity, sound judgment and specialized knowledge—are basic to any reputable architect. Furthermore, a man who is new to the arbitral procedure ordinarily begins by serving as a member of a board headed by a more experienced colleague. In addition, AAA furnishes each arbitrator with a manual explaining its procedures and the standards that should govern his conduct; the Association's staff stands ready to provide guidance.

In addition to the expert knowledge of the man in the construction field, the participants in an arbitration occasionally want the broader view of an executive from another industry. In supplying the names of prospective arbitrators, the American Arbitration Association is guided by the wishes of the parties. This ease in obtaining lists of qualified arbitrators is one of the advantages of arbitrating under AAA rules and standards. The Association sends both sides a list of prospective arbitrators. Each party crosses off the names of the men to whom it objects and numbers the remainder in the order of preference. Should the parties be unable to agree on arbitrators, AAA has procedures for making administrative appointments.

2. *No Publicity*—The privacy of arbitration appeals to professional men. In some disputes, the charge is made that the architect was deficient in carrying out his responsibilities—that structural flaws, inefficient facilities and unsatisfactory materials were the fault of the architect. When made public, charges such as these can damage the reputation of an architect or his organization, even if later proved untrue. Arbitration is a private proceeding. Hearings are closed and awards not publicized. Thus allegations of poor professional performance are not aired publicly, and the possibility of injury to reputation is minimized.

3. *Economy*—AAA rules provide that in prolonged or special cases the parties may agree to pay the arbitrators a fee. Ordinarily, arbitrators contribute their services without charge. They believe that this is in fulfillment of their obligation to their profession, much the same as doctors donate their time to clinics.

In an AAA administered arbitration, fees are based on a sliding scale, in proportion to the amount of the claim. According to AAA rules, the arbitrator allocates these fees in equal shares or in any proportion he considers fair. Where the claim is nonmonetary, as for specific performance of a contract, the fee for each party is \$100.

4. *Legal Representation*—The parties to an arbitration usually are represented by counsel. Although the arbitrators are not legally bound to follow established rules of the law of contract interpretation, they are virtually certain to do so. Representation by their attorneys assures the parties that legal principles and precedents will not be overlooked.

Lawyers with a knowledge of the construction industry serve on many panels hearing disputes over the design or construction of a building. This can be invaluable to the participants; even when a dispute is

a technical one, a question of law may also be involved. Parties sign contracts containing language they expect will be interpreted in accordance with principles already established through years of litigation. The attorney-arbitrator will give full weight to the judicial meaning of words in a contract.

5. *AAA Administration*—The American Arbitration Association, from whose files the cases in this article have been drawn, has administered all kinds of arbitrations—labor, accident claims and commercial—for more than 44 years. The Association brings to case administration the facility born of experience. Its procedures are designed to protect the parties against undue delay and needless expense. For example, questions as to locale of an arbitration can be decided by AAA; disagreement over arbitrators can be resolved by administrative appointments. Convenience is provided by the Association's Regional Offices, which are located throughout the United States, and by the National Panel of 26,000 arbitrators in more than 2,000 communities.

Not the least advantage of AAA administration is the orderly procedure. Although arbitration is informal, it is by no means haphazard. AAA rules provide for impartial procedures along every step of the arbitration route from the filing of the demand to the issuance of the written award. The Association's rules and standards are intended to assure regularity in case administration and to result in awards that can be enforced, if necessary, through the courts.

Safeguards as well as positive encouragement of arbitration are provided by law in the 26 states that now have modern arbitration statutes. New Mexico is not one of the 26 states with modern arbitration statutes. In all states, awards may be enforced under common law whenever the parties have participated in the arbitration. The arbitration statutes, however, provide an expeditious method for enforcing awards. They also stipulate that agreements to arbitrate future disputes are enforceable.

These modern laws are a further guarantee of "due process." The courts can intervene on those rare occasions when an arbitrator exceeds his authority, when there has been evident misconduct or fraud on the part of an arbitrator, or when a party has been forced into an arbitration to which he never consented. The statutes then prescribe the corrective action to be taken by the courts.

6. *Speed*—The Association's facility in administering arbitrations makes it possible for parties to obtain speedy resolution of their differences. This is especially important where large sums of money are in dispute.

A contracting organization that planned to branch out from low-cost home building into large-scale cooperative apartment house construction appreciated the speed with which AAA administered its case. A group of home owners had charged the builders with faulty workmanship in the houses in a suburban development. They instigated a suit for \$100,000. Although the builders were sure they could defend



themselves successfully, a suit tying up that much money would delay the apartment house project and perhaps terminate it entirely. The home owners also were interested in speed, so that when the attorneys for both sides proposed arbitration, they readily accepted the suggestion.

With the assistance of the AAA, a three-man arbitration panel was chosen, and, only a few weeks after the submission to arbitration was filed with the AAA, the first hearing was held. After the hearings and a visit to the development, the arbitrators were prepared to render their award. They found that the contracting organization was at fault in some instances. They directed the company to finish the specified repair work with a set time limit or to refund money to the home owners who could then call in outside contractors to do the work. Although the builders lost the arbitration, they gained the use of funds that otherwise would have been tied up indefinitely and so were able to continue their plans to expand operations.

**7. Other uses for arbitration**—The advantages of AAA arbitration—speed, economy, privacy, convenience, also applies to other kinds of controversy, such as those arising from partnership agreements and individual employment contracts.

Not long ago the American Bar Association distributed a handbook advising attorneys on procedures to follow and cautions to observe in setting up law firms. The handbook contains a recommendation that partnership agreements contain a clause providing for arbitration, under AAA rules, of certain kinds of disputes that may arise. Architects may also find it practical to include arbitration provisions in their partnership agreements.

As evidenced by the examples stated in this article, arbitration can be beneficial to everyone involved in the construction industry, as well as to those who rely on the construction industry to build buildings for them. Even though arbitration is an acceptable procedure in New Mexico, it would behoove us to work to have modern arbitration statutes adopted in New Mexico, and to use arbitration whenever required.

American Arbitration Services, formerly provided in New Mexico from the Dallas regional office, have been transferred to the Phoenix office. The address of the Phoenix office is: American Arbitration Association, 132 South Central Avenue, Phoenix, Arizona 85004. The Regional Director is Paul A. Newnham.

—Joe Boehning, AIA.

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