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## New Jersey Appeals Courts Enforce AIA Arbitration Provision

By Karen A. Denys

Two recent decisions are sure to provide comfort to those who utilize the construction contract forms published by the American Institute of Architects (AIA). Both the New Jersey Appellate Division and the District Court for the District of New Jersey have upheld the arbitration provision contained in many of the AIA's standard forms. *Columbus Circle N.J., LLC v. Island Constr. Co., LLC*, A-1907-15T1 (N.J. App. Div. Mar. 13, 2017) and *Tedeschi v. D.N. Simone Constr. Inc.*, (Civil No. 15-8484, May 8, 2017). Both cases involved construction contracts for multimillion-dollar beach homes in which the owners sought to avoid a contractually designated arbitration mechanism.

In *Columbus Circle*, the Owner's representative sent Contractor a draft agreement using the AIA A101-2007 Standard Form of Agreement Between Owner and Contractor (AIA A101), supplemented with the AIA A201-2007 General Conditions of the Contract for Construction (AIA A201) (collectively, "the Agreement"). Section 6.2 of the form AIA A101 gave the parties the choice of checking a box to select the dispute resolution mechanism to be used for any claims not resolved by mediation—"Arbitration pursuant to Section 15.4 of AIA Document A201-2007," "Litigation in a court of competent jurisdiction" or "Other (*Specify*)." Section 6.2 also advised that, if the parties failed to select or agree on "a binding dispute resolution method other than litigation, Claims will be resolved by litigation in a court of competent jurisdiction." Owner's representative placed an "X" to select the box "Arbitration pursuant to Section 15.4 of AIA Document A201-2007," rather than the choice "Litigation in a court of competent jurisdiction." Section 15.4.1 of the AIA A201 further stated that "unless the parties mutually agree otherwise, [the arbitration] shall be administered by the American Arbitration Association [AAA] in accordance with its Construction Industry Arbitration Rules." The provision also made clear that any arbitration award would be final and enforceable in any court having jurisdiction.

Upon receiving the draft agreement, Contractor's attorney reviewed it and returned a revised draft with his changes. Owner and his representative reviewed those changes, accepted them and both parties executed the agreement. Apparently neither side changed the dispute resolution provision or the arbitration selection.

After a dispute arose and could not be resolved through mediation, Contractor filed a demand for arbitration. Owner responded by filing a complaint in the Law Division, arguing that he did not believe he had waived his right to litigation because the contract "did not 'indicate [ ] that [he] was waiving [his] right to file suit against the Defendants in Court' and that it was his understanding that 'both parties would have to agree to mediation or arbitration in order for that method to be used.'" The trial court granted Contractor's motion to dismiss and compel arbitration, and Owner appealed.

The Appellate Division rejected Owner's arguments, finding that the parties had clearly agreed upon arbitration as the exclusive means of resolving disputes. The court found that Owner was a sophisticated party that negotiated the terms of an agreement and chose the "arbitration" option with full knowledge that it was a substitute for the right to sue in court. The court distinguished Owner's claims from those at issue in *Atalese v. U.S. Legal Servs. Grp., L.P.*, 219 N.J. 430 (2014), in which the court declined to enforce an arbitration provision in a debt-adjustment services contract with a consumer. In contrast to the transaction in *Atalese*, the court found that the \$2 million construction agreement at issue was not a contract of adhesion nor was it the result of unequal bargaining power. Moreover, unlike *Atalese*, the contract in this case advised that there was a distinction between resolving the dispute through a court action and resolving it through arbitration, and Owner chose arbitration.

The appeals court next addressed Owner's argument that *Atalese* required any arbitration agreement to advise specifically that arbitration entailed the loss of the right to a jury trial. The Appellate Division disagreed, reading *Atalese* more narrowly to hold that "an arbitration clause was sufficient if it advised the parties they were waiving the fundamental right to seek relief in court, without requiring it advise them of all the component rights encompassed in that waiver." The right to a jury trial, the court said, was but one of many components of a court action and it was not necessary or practical to itemize each component before an arbitration agreement would be upheld. Besides, the court noted that Owner did not profess ignorance that arbitration entailed the loss of a right to a jury. If there were any question, the AIA provisions clearly

referenced the AAA Construction Industry Arbitration Rules, which Owner could easily have reviewed.

*Tedeschi* relied on *Columbus Circle* in enforcing the identical arbitration provision, despite the Owners' claims they never saw the General Conditions and thus did not know that arbitration meant the loss of their right to a jury trial. Accepting these claims as true, the federal court nevertheless upheld the arbitration provision and granted summary judgment to the Contractor, reasoning that: (1) the Standard Form referenced the General Conditions throughout the Agreement and the Owners could easily have

requested them from the Contractor; (2) the Owners signed the Agreement and were therefore presumed to have seen the selection of "Arbitration" rather than "Litigation in a court of competent jurisdiction"; and (3) the contract language was sufficiently clear to satisfy *Atalese*, especially given that the Owners were a doctor and successful business owner and not unsophisticated consumers.

*Columbus Circle* and *Tedeschi* confirm that parties to standard AIA construction contracts can rely on the arbitration selection provisions, eliminating uncertainty over the enforceability of those clauses.

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