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CONSTRUCTION

ALERT

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NEW RULES MAKE CONSTRUCTION ARBITRATION MORE ATTRACTIVE

By Gordon S. Woodward

The American Arbitration Association (AAA) implemented new Construction Industry Arbitration Rules this past summer. The changes eliminate certain gaps or ambiguities in the old rules, create some additional tools with which arbitrators can manage claims, and on balance, should make arbitration a more attractive forum for the resolution of construction disputes. Some of the more significant changes include the following:

- R-7 – Consolidation or Joinder: The new joinder rule imposes a time frame within which requests for joinder must, absent good cause for delay, be submitted. This should reduce delay and costs associated with untimely joinder requests.
- R-10 – Mediation: This new rule requires mediation in "all cases where a claim or counter-claim exceeds $100,000[.]" Ideally this change will facilitate earlier resolutions, although parties may opt out of this requirement, assuming their underlying contract does not require mediation.
- R-23 – Preliminary Management Hearing: The old Rule 23 was prescriptive in terms of the necessity of a case management hearing and the issues to be addressed at this hearing. The rewritten Rule 23 introduces greater flexibility into the preliminary hearing. The new rule provides that the hearing will be held at "the discretion of the arbitrator[,]" which he or she may choose to exercise "depending on the size and complexity of the arbitration." The rule further stresses that the parties should establish a schedule that is designed to be "fair, efficient, and economical" and, while it does not mandate the topics to be discussed, it refers to new rules P-1 and P-2 for topics to be considered. In short, the Preliminary Management Hearing concept is not new, but flexibility has been introduced in a way that may allow for a more efficient and cost effective process in some cases.
- R-24 – Pre-Hearing Exchange and Production of Information: As revised, this rule now makes clear that the arbitrator can, on his or her "own initiative," impose discovery requirements on the parties. Moreover, section (b)(iv) of the rule specifically addresses documents maintained in electronic form. As a result, the Construction Arbitration rules now better reflect the reality of contemporary business recordkeeping. Notably, this rule provides that the arbitrator may require that electronic material be made "available in the form most convenient and economical for the party in possession of such documents[,]" and that the arbitrator may determine "reasonable search parameters to

balance the need for production of electronically stored documents . . . against the cost of locating and producing them."

- R-25 - Enforcement Powers of the Arbitrator: This rule provides explicit enforcement mechanisms to facilitate the arbitrator's ability to act effectively with regard to the two preceding rules (R-23 and R-24). As indicated, the "arbitrator shall have the authority to issue any orders necessary to enforce the provisions of rules R-23 and R-24[,]" this authority includes: a) the right to enter confidentiality orders; b) the right to establish "reasonable search parameters for electronic and other documents;" and c) the allocation of costs for the production of documents and electronically stored material.
- R-34 – Dispositive Motions: This rule is new and specifically allows the arbitrator to entertain motions that "dispose of all or part of a claim," or otherwise "narrow issues in a case." The lack of an effective motion practice has long been considered a downside to arbitration, especially among defense attorneys. The degree to which arbitrators will be willing to utilize this rule to narrow or dismiss claims remains to be seen. Nevertheless, this is an important step toward a more efficient process.
- R-39 – Emergency Measures of Protection: This may be the most significant change imposed by the new rules. Under this rule, a party can request an arbitrator on an emergency basis. An arbitrator will be appointed within one business day of the request and is empowered to issue interim relief. This rule change addresses what was arguably a major short-coming of arbitrations – the inability to obtain an immediate emergency order. Moreover, the rule provides that any necessary hearings can be accomplished by way of telephone or videoconference. As a result, this change is not only an upgrade to existing arbitration procedures but provides a potentially significant advantage in terms of cost savings over the standard judicial process.

The foregoing discussion does not, of course, reflect the entirety of the revisions but rather addresses some of the more interesting and potentially impactful changes. The new rules can be accessed on the AAA's website at https://www.adr.org/aaa/faces/rules and should be given a fresh look in the context of upcoming agreements that may involve a decision as to whether to select arbitration over litigation. Given the current rule changes, it is likely that the use of arbitration just got a little more attractive. ◆

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