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A Periodic Legal Update from the
Construction & Surety Law Practice Group

October 22, 2013

2 Birds, 1 ADR Pro, 0 Time

The Dawn of Fast-Track Med-Arb Construction ADR

By Matthew C. Bouchard | (919) 719-8565 | mattbouchard@lewis-roberts.com | @MattBouchardEsq

One of the oft-cited advantages of arbitration is that it is simpler, cheaper and faster than litigation. Recent figures from the American Arbitration Association ("AAA") suggest that while a commercial case may take up to two years to run its course through the judicial system, commercial cases can be resolved via arbitration between six months and a year.

Two-headed dragons are fictional, mythical creatures. Any resemblance to actual mediator/arbitrator hybrids is wholly coincidental.

Still not fast enough for you?

Then perhaps you might be interested in the following fast-track mediation-arbitration hybrid procedure ("med-arb"):

(1) A written demand for mediation is made to the AAA.

(2) The mediation must be completed within 60 days of the demand.

(3) No later than 14 days prior to mediation, the parties must serve upon the mediator and each other a written position statement, with exhibits, outlining their respective claims and defenses.

(4) No later than 3 days prior to mediation, the parties must serve upon the mediator and each other a written reply to the other party's position statement.

(5) Mediation is limited to 8 hours in a single day.

(6) At the expiration of the 8 hours, if the case is not settled, the mediator is immediately converted into an arbitrator.

(7) At the time of the mediator's conversion to an arbitrator, each party must make one last, best and final demand in writing to the arbitrator, who will disclose the terms of the demand to the other party.

(8) The arbitrator must issue a final, binding award no more than 5 days after having received the last and final demands, but no fewer than 3 days after receiving such demands (to allow the parties an additional 72 hours within which to settle after the demands are exchanged).

(9) In making the award, the arbitrator must adopt one — and only one — of the last demands, without any modifications or amendments.

(10) The arbitrator is limited to considering only the parties' respective position statements, replies and other evidence presented during the course of the mediation in rendering a final arbitration award.

Soup-to-nuts construction claim resolution within 65 days, no muss, no fuss.

There you have it: soup-to-nuts construction dispute resolution within 65 days, no muss, no fuss. The fast-track med-arb procedure outlined above features one neutral, serving as both the mediator and the arbitrator, with virtually no time at all transpiring between the end of the mediation and final resolution of the arbitration.

Sound too good (or bad, depending on your point of view) to be true?

Think again.

This very procedure, appearing in a subcontract agreement, was recently enforced by the U.S. District Court for the Eastern District of North Carolina in the unpublished September 23, 2013 decision in *U.S. ex rel. TGK Enterprises, Inc. v. Clayco, Inc*. [Full disclosure: attorneys in my law firm served as local counsel for the general contractor in *Clayco*].

The subcontractor argued, unsuccessfully, that the fast-track med-arb provision was both procedurally and substantively unconscionable, in that it allowed the general contractor the

exclusive right to invoke the procedure and because it forbade formal discovery, curtailed the evidentiary presentation and limited the arbitrator's discretion in rendering an award.

The court rejected the subcontractor's arguments. It concluded that the subcontractor was a sophisticated business entity, free to contract in its own business interest, such that the subcontractor could not make a showing of unfair surprise, lack of meaningful choice or unequal bargaining power, all required to establish procedural unconscionability under North Carolina law. It also concluded that the streamlined med-arb procedure could provide benefits to both parties in resolving disputes as expeditiously as possible, noting that the AAA's Construction Industry Arbitration Rules (specifically, Rule R-10(a)), specifically contemplate the possibility that the parties will allow their mediator to subsequently serve as arbitrator.

The court's enforcement of the fast-track med-arb provision has me wondering whether we might start seeing such a procedure popping up in construction contracts with more frequency. While the prospect of resolving even the most complicated disputes in a couple of months would seem tantalizing for many participants in the construction industry, the procedure does raise a number of difficult practical questions that may limit its attractiveness and usage, such as the following:

- Where expert testimony is required to establish or rebut claims for delay, defective construction, etc., does 60 days really permit a sufficient amount of time to retain experts, get them up-to-speed on the facts of the case and obtain opinions and demonstrative exhibits from them? That strikes me as a very real challenge, knowing how busy the best construction experts are.

Can experts realistically be retained, investigate claims, formulate opinions, provide exhibits & prepare for mediation in only 60 days?

- Given that mediators frequently spend a significant portion of mediation meeting privately with each party, is it troubling that the mediator/arbitrator will receive some of the evidence without rebuttal, let alone cross-examination, from the other side? It's not hard to envision these private meetings becoming less about trying to settle the case and more about airing dirty laundry in an effort to color the mediator/arbitrator's opinion of the other side.

- Does it make sense to limit the arbitrator to an award that reflects one of the two last and final demands? On the one hand, such a provision removes a fair amount of discretion from the arbitrator's decision-making, which is one of the strengths of construction

arbitration in the first place. Then again, reducing the arbitrator's decision-making authority to a zero-sum game between two alternatives forces the parties to focus intently on the potential risks of presenting an unreasonable last and final demand, which in turn might improve the chances of a negotiated resolution during the 3-day post-mediation period within which the arbitrator is not allowed to issue the final award.

What do you think? Is the fast-track mediator/arbitrator hybrid procedure featured in the *Clayco* decision a good idea or bad idea? The wave of the future or a passing fancy? As always, we welcome your feedback.

This article is adapted from a post originally published on Matt Bouchard's blog, "N.C. Construction Law, Policy & News," which can be found at www.nc-construction-law.com.