What Will the Arbitrator’s Final Award Look Like?

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Claims and disputes involving construction projects tend to be technically complex, factually intensive and costly to resolve through litigation. As a result, contracting parties frequently agree to resolve their disputes by using alternative dispute resolution processes such as negotiation, mediation and arbitration. If approached right, arbitration can be a much better way than litigation to resolve complex construction claims and disputes quickly and efficiently. See Strategies for Drafting an Effective Arbitration Clause. Send me an email, and I will send you a copy. Generally, an arbitration proceeding concludes with the publication and transmittal of the arbitrator’s final award. The arbitrator’s final award may direct one or more parties to pay another party a monetary amount, or the award may direct the parties to take some other specific action based on the issues presented to and decided by the arbitrator. While most parties will voluntarily comply with the arbitrator’s final award, a court having the appropriate jurisdiction can enter a judgment on the award if one party fails or refuses to comply with the award. For those involved in an arbitration proceeding for the first time, a frequent question is “What will the arbitrator’s final award look like?”

The form of the arbitrator’s final award may vary depending on the rules governing your arbitration. If your arbitration is being administered by the American Arbitration Association (“AAA”) under the Construction Arbitration Rules & Mediation Procedures (“Construction Industry Rules”), there are three types of award: (1) standard award, (2) reasoned award, and (3) findings of fact and conclusions of law. For each type of award, the arbitrator is required to provide a concise written financial breakdown of any monetary award and a line item disposition of any non-monetary claims or counterclaims. The exact form of the award will depend on whether you are proceeding under the AAA’s Fast Track Procedures, Regular Track Procedures, or the Procedures for Large, Complex Commercial Disputes.

**Fast Track.** Fast Track Procedures apply to all two party cases where no party’s disclosed claim or counterclaim exceeds $75,000. For Fast Track cases, the AAA Rules require that the final award be rendered within 14 days after the hearings have been closed.

Under the Fast Track Procedures, the arbitrator will provide a standard award. The standard award, as with other forms of award, will contain a concise written financial breakdown of any monetary award. If there are non-monetary components of the claims or counterclaims, the arbitrator will provide a line item disposition of each non-monetary claim or counterclaim. A standard award is conclusory and typically does not provide any insight into how the arbitrator viewed the evidence, arguments and other presentations.

**Regular Track.** Regular Track Procedures apply to all cases where any party’s disclosed claim or counterclaim exceeds $75,000 but is less than $1,000,000. For Regular Track cases, the AAA Rules require that the final award be rendered within 30 days after the hearings have been closed.

Under the Regular Track Procedures, the arbitrator will provide a
standard award unless a specific form of award is requested by the parties. The parties can request an award with a reasoned opinion or an award containing specific findings of fact and conclusions of law, if desired. In a reasoned award, the arbitrator explains the basis for the award rather than simply providing a breakdown of the monetary and non-monetary components of the award without explanation. A typical reasoned award will contain five elements: (1) an opening, (2) a summary of issues, questions, claims and defenses, (3) a statement of facts, (4) a discussion, analysis and application of relevant facts and law if necessary, and (5) a disposition of the issues, questions, claims and defenses.

The upside of asking the arbitrator to provide the basis for an award is that it will enable the parties to better understand the award. Having a better understanding of the award increases the parties’ faith and trust in the arbitration process. Parties typically believe that if an arbitrator is asked to render a reasoned award, the arbitrator will be more likely to base the award on the evidence presented, coupled with applicable legal principles, and less likely to ignore evidence, arguments and presentations. The same beliefs are widely held regarding findings of fact and conclusions of law, which are discussed below. The downside of requesting a reasoned award is that the arbitrator must spend more time drafting a reasoned award. There is also a risk that having a reasoned award may invite a later court challenge of the award by the losing party. Consequently, a reasoned award may delay a final determination of the claims and counterclaims, will increase the fees of the arbitrator, and may provide the basis for embroiling the parties in post-award court proceedings.

Once an arbitrator is selected or appointed, the arbitrator will conduct a Preliminary Management Hearing, usually by telephone, where several procedural issues will be discussed with the parties and/or their attorneys including the desired form of the final award. The Preliminary Management Hearing is typically the parties’ first appearance before the arbitrator. Under the Regular Track Procedures, the arbitrator must provide a reasoned award or findings of fact and conclusions of law only if the parties timely agree on either form of the award. Such agreement must be reached by the conclusion of the first Preliminary Management Hearing and the agreement cannot later be changed by the parties without the arbitrator’s express consent. Absent an agreement among the parties, the arbitrator will determine the form of award that will be issued and will usually choose to render a standard award.

Other than satisfying a predictable and reasonable desire to understand the basis of the anticipated award, why would a party request anything other than a standard award? Parties will sometime request a reasoned award or an award that contains specific findings of fact and conclusions of law if they fear that they will be disappointed by the award. If the losing party is unhappy with the award, the detailed summations contained in a reasoned award or in findings of fact and conclusions of law may be used in a later court proceeding attempting to vacate the award. Thus, by agreeing to have the arbitrator render a reasoned award or an award that contains specific findings of fact and conclusions of law, you may be setting the stage for a later court challenge of the award. You should understand, however, that the courts will usually uphold and enforce an arbitration award given that there are very limited grounds for vacating an arbitration award. Although it may be very unlikely that a reasoned award will lead to vacatur, a subsequent
attempt to vacate the award adds time and significant cost to the arbitration process and threatens the finality of the process. Parties should carefully consider this before agreeing to something other than issuance of a standard award.

**Large, Complex Commercial Track.** Unless the parties agree otherwise, the Procedures for Large, Complex Commercial Disputes ("LCC Procedures") apply to all cases where any party's disclosed claim or counterclaim is at least $1,000,000. For LCC Track cases, the AAA Rules require that the final award be rendered within 30 days after the hearings have been closed. LCC Track cases are heard and determined by one or three arbitrators, as may be agreed upon by the parties. Absent agreement, LCC cases are heard and determined by a three arbitrator panel.

Under the LCC Procedures, the arbitrators will issue a reasoned award unless the parties agree otherwise. As with a Regular Track proceeding, the parties can also request an award containing specific findings of fact and conclusions of law, which essentially is a much more detailed version of a reasoned award. Findings of fact and conclusions of law are familiar terms in legal parlance with reasonably plain meanings. The findings of fact and conclusions of law simply set forth the key facts that the arbitrators found to be true together with the conclusions of law that the arbitrators reached after considering such facts.

Requesting the arbitrators to provide findings of fact and conclusions of law can significantly increase costs to the parties and can delay rendering of the final award. Particularly in large, complex cases, drafting findings of fact and conclusions of law can be very time-consuming. When faced with this requirement, the arbitrators will typically request that each party submit individually their proposed findings of fact and conclusions of law for the arbitrators’ consideration. The arbitrators will then use these submissions as a guide in their deliberations and in drafting their findings of fact and conclusions of law. If the submission is made after the conclusion of the evidentiary hearing, the arbitrators will not officially close the hearing until after the submissions are made. If so, this will delay rendering and publication of the final arbitration award given that the publication deadline will run from the date that the hearing is officially closed.

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