EMPOWER YOUR ARBITRATOR TO ALLOCATE OR AWARD ATTORNEYS’ FEES

By Eugene J. Heady, © Smith, Currie & Hancock LLP

Claims and disputes involving construction projects tend to be technically complex and factually intensive. As a result, the resolution of construction claims and disputes can be time consuming and costly. In prosecuting or defending claims, one question that always arises is “Can I recover my attorneys’ fees if I win?” The traditional “American Rule” is that the winning party—referred to as the “prevailing party”—may not recover attorneys’ fees unless recovery is statutorily or contractually authorized via a “fee-shifting” or “prevailing party” attorneys’ fees provision. Under the American Rule, each litigant must pay its own attorneys’ fees. If there is a statutory or contractual fee-shifting provision in play in a lawsuit then the judge will sort out the respective rights of the litigants. Another question that arises is “Who sorts out the attorneys’ fees issue if I arbitrate my construction claim rather than litigating the claim in a court proceeding?”

Absent specific statutory authorization or agreement by the parties, the law is unsettled regarding whether arbitrators have the authority to award attorneys’ fees. While there is no such prohibition in the Federal Arbitration Act, some states forbid arbitrators to award attorneys’ fees unless specifically empowered to do so by the parties’ agreement. Accordingly, if your contract contains a prevailing party attorneys’ fees provision, which requires the loser to pay fees, then make sure that within the four corners of the arbitration clause itself you expressly authorize the arbitrator to include in the final arbitration an allocation or award of attorneys’ fees. Absent such express authority, the arbitrator may leave each party with the responsibility to pay its own attorneys’ fees.

Some institutional arbitration rules allow the arbitrators to award attorneys’ fees to a prevailing party and some do not. Most institutional arbitration rules, however, permit the parties to provide for an award of attorneys’ fees in their arbitration agreement. The American Arbitration Association’s Construction Industry Arbitration Rules & Mediation Procedures, for example, expressly addresses the award of attorneys’ fees. AAA Rule R-45 provides for “an award of attorneys’ fees if all parties have requested such an award or it is authorized by law or their arbitration agreement.” Thus, in an arbitration proceeding under the AAA’s Construction Industry Rules, the issue of whether claims for attorneys’ fees exist will typically be addressed up front by the arbitrator at the initial Preliminary Management Hearing. The Preliminary Management Hearing is typically conducted by telephone and will be the first time that the parties and/or their attorneys appear before the arbitrator. The arbitrator will want to know (1) whether one or both parties is seeking an award of attorneys’ fees, (2) whether the parties’ contractual agreement provides for the award of attorneys’ fees, and (3) whether either party contends that an award of attorneys’ fees is authorized by the law governing the parties’ contractual agreement.
It is important to note that under AAA Rule R-45 there are three ways that a possible award of attorneys’ fees can be triggered: (1) if all parties have requested an award of attorneys’ fees; (2) if an award of attorneys’ fees is authorized by the parties’ arbitration agreement; or (3) if an award of attorneys’ fees is authorized by law. Consider the issues that are raised by AAA Rule R-45.

- **Have the pleadings triggered a possible award of attorneys’ fees?** What if the Claimant (the party filing the Demand for Arbitration) requests an award for attorneys’ fees where an award of attorneys’ fees is not authorized by law and is not expressly authorized by the parties’ contractual agreement? If the Respondent (the party answering the Demand for Arbitration) also requests an award of attorneys’ fees, the Respondent has effectively empowered the arbitrator to consider and award attorneys’ fees. If under this scenario the Respondent does not want to be exposed to an award of attorneys’ fees in favor of the Claimant then the Respondent must deliberately avoid requesting an award of attorneys’ fees.

- **Has a statute triggered a possible award of attorneys’ fees?** Make sure that you are intimately familiar with what law governs the underlying contract. Does the law of the state where the project is located govern? Does the contract contain a choice of law provision designating that the law of some other state shall govern the contract? Does the governing law provide for the recovery of attorneys’ fees for all claims that could be brought or just certain types of claims? If there is statutory authority for an award of attorneys’ fees then you should be prepared to raise this issue with the arbitrator as early as possible in the proceeding. The arbitrator may ask the parties to provide a memorandum of law outlining the statutory authority for an award of attorneys’ fees and the legal basis for the arbitrator’s power to award attorneys’ fees.

- **Has the contract triggered a possible award of attorneys’ fees?** If the underlying contract contains a fee-shifting or prevailing party attorneys’ fees provision, consider where in your contract such provision or provisions appear. If the fee-shifting provision is not contained within the four corners of the “arbitration agreement” then you may be faced with an argument that the arbitrator has not been expressly empowered to award attorneys’ fees absent some other basis, such as authorization by law or by the competing demands of the Claimant and the Respondent. Thus, if you include a fee-shifting or prevailing party attorneys’ fees provision within your contract, it is good practice to include the provision within the body of the arbitration agreement itself or, at a minimum, include within the arbitration agreement a cross-reference to all fee-shifting or prevailing party attorneys’ fees provisions that are contained in other sections of the contract.

There are many ways to draft a contract provision that may empower the arbitrator to award or allocate attorneys’ fees. The AAA, for example, provides the following typical language as a drafting guide: The arbitrator shall award to the prevailing party, if any, as determined by the arbitrator, all of its costs and fees. “Costs and fees” mean all reasonable pre-award expenses of the arbitration, including the arbitrator’s fees, travel expenses, out-of-pocket expenses such as copying and telephone, court costs, witness fees, and attorneys’ fees. Before simply inserting such language into your contracts without further thought, however, it is advisable to consult with a seasoned construction lawyer. State law may define “prevailing party” and such definition will likely guide the parties’ respective positions regarding how the arbitrator should decide who wins and who recovers attorneys’ fees. Absent any statutory guidance, you should consider providing the arbitrator with a detailed definition of “prevailing party” within the four corners of your arbitration provision. Again, a seasoned construction lawyer will be able to assist you in drafting such language.
Having the ability to shift responsibility for attorneys’ fees to the losing party, whether by statute or contract, can be a powerful motivator in getting the parties to the negotiating table. Thus, one way to help encourage the early settlement of claims is to include a fee-shifting or prevailing party attorneys’ fees provision in your construction contracts, subcontracts and purchase orders.

For additional thoughts on what can be done to improve on a standard boilerplate arbitration clause, I suggest that you read the article: Strategies for Drafting an Effective Arbitration Clause. Send me an email, and I will send you a copy. For additional thoughts on hiring a seasoned construction lawyer, I suggest that you read the article: Does Your Lawyer Know the Difference Between Cement and Concrete? Points to Consider When Selecting and Hiring a Construction Lawyer. Send me an email, and I will send you a copy. In the meantime, you should review your standard form contracts, subcontracts, and purchase orders and think about whether a fee-shifting or prevailing party attorneys’ fees provision is desirable. If so, make sure that the provision is contained within the “arbitration agreement” itself and that the arbitrator is expressly empowered to make an award of attorneys’ fees. You should consult with your construction lawyer to help craft a provision that will be enforceable under the prevailing law and that will meet your unique objectives.

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