The Continuing Benefits of Arbitration in the Ongoing Era of COVID-19

In May 2020, I wrote about the advantages of arbitration in the pandemic. Though not that long ago, much has changed, including the introduction of vaccines and the continual evolution of tension between and often-changing and conflicting orders by state and local officials. With the rise of the Delta variant, much has also stayed the same. Many courts are effectively closed. Trials, and especially in-person jury trials, are a rarity in many jurisdictions. Many cases continue to languish in judicial purgatory. As I wrote previously, "When some form of normalcy returns, courts will inevitably be grappling with a significant backlog of hearings, trials, and related matters, not to mention the challenges likely stemming from requirements or recommendations to continue to implement health and safety measures such as limited attendance in confined spaces and social distancing. The likely outcome is delay." For many courts, this is exactly what has happened.

For parties involved in a construction dispute, another avenue offers relief when seeking a binding decision. Arbitration is essentially a private trial before an arbitrator, who issues a final award that determines who prevails. It is a function of an agreement—only required when the parties contractually agree to participate. Often the parties agree to have an arbitral body, such as the American Arbitration Association, administer the arbitration, which is then generally subject to governing arbitral rules, as may be modified by the parties. Thus, arbitration is a flexible process that can be tailored to the needs of the parties.

As I noted the limits of litigation in the era of a global pandemic, I also predicted that arbitration would not suffer from the same affliction:

> Arbitration is poised to offer a very different story. Even before the COVID-19 pandemic, aspects of the arbitration process were already conducted remotely. Most communications with the arbitrator and any case manager, in the case of an administered arbitration, were and are handled via email. The critical preliminary hearing, where various procedural matters are addressed and a final hearing date may be identified, was and remains generally conducted by telephone conference. Hearings on interim matters were generally conducted by telephone conference as well. While the final hearing is typically conducted in-person, arbitral rules often permitted and encouraged flexibility. For example, Rule R-33 of the American Arbitration Association's Construction Industry Arbitration Rules provides that "[w]hen deemed appropriate, the arbitrator may

> also allow for the presentation of evidence by alternative means including video conferencing, internet communication, telephonic conferences and means other than an in-person presentation," provided that "[s]uch alternative means must still afford a full opportunity for all parties to present any evidence that the arbitrator deems material and relevant to the resolution of the dispute and when involving witnesses, provide an opportunity for cross-examination." The parties themselves are empowered to dispense with either an in-person or remote hearing as "[t]he parties may agree to waive oral hearings in any case."

This has proven to be true as well. While certainly not universal, over the past one and a half years, many attorneys and their clients have embraced the concept of a virtual arbitral hearing conducted online. This has allowed hearings to proceed un-encumbered by concerns regarding social distancing, masking, and other procedures while simultaneously allowing the parties a meaningful opportunity to be heard and present their respective cases. For many disputes, there is also a cost savings when parties, counsel, and witnesses might otherwise have to travel and incur those related costs. Of course, there are disadvantages, including that a technological failure will have a greater impact on a virtual arbitration than one not fundamentally relying on technological tools. Some parties and counsel will likely never trade the ability to look directly at a witness or arbitrator for an image on a computer screen. When the alternative might involve simply waiting for a court to open its doors to hear a construction case (after prioritizing any number of other cases, such as criminal cases, family cases, and preferentially set cases), the disadvantages might be outweighed by the advantages.

There is no universal answer to the frequent concern of "How long does arbitration take?" Many factors are relevant to any answer. The American Arbitration Association has published a "AAA Arbitration Road Map" describing the process for a typical case lasting 258 to 288 days from inception to conclusion. Litigation often far exceeds these time periods. In fact, the Texas Rules of Judicial Administration provide that courts should "so far as reasonably possible" ensure that civil jury cases are heard within 18 months and civil non-jury cases are heard within 12 months. These timeframes are often exceeded, particularly in the modern era.

For those with already-existing arbitration agreements, the decision as to which forum applies has already been made (though they could waive arbitration and proceed to litigation). As I noted previously, parties without an arbitration agreement may find relief in the submission process:

> [P]arties can agree to submit a claim to arbitration at any time, with administering bodies providing specifically for such a process. For example, Rule R-5 of the American Arbitration Association's Construction Industry Arbitration Rules provides that "[p]arties to any existing dispute, who have not previously agreed to use these Rules, may commence arbitration under these Rules by either filing online through AAA WebFile or by filing at any office of the AAA a written submission to arbitrate under these Rules, signed by the parties," with the submission including specific information accompanied by the appropriate filing fee.

Ultimately, parties in a construction dispute who have agreed to arbitrate are presented with many options in determining how to proceed to a final hearing, factoring in—as they desire—health and safety considerations for an in-person hearing or proceeding in a remote manner. For those who have not previously agreed to arbitrate, the advantages of arbitration can still be captured through the submission process, which merely involves agreeing to arbitration as to an existing dispute.

For more information, please contact Carson Fisk.