



An Indispensable Resource for Construction Arbitration: The College of Commercial Arbitrators Guide to Best Practices in Commercial Arbitration (4th ed. 2018)

By: Patricia H. Thompson, Esq.

Arbitration can be a perilous journey if undertaken without experienced guides, updated roadmaps, and current rules of the road, leaving some pilgrims with less than happy memories of their adventures. Consequently, many wise advocates and neutrals have learned not to venture into the wilds of this increasingly complex type of dispute resolution without the sure-footed navigational assistance of the latest edition of *The College of Commercial Arbitrators Guide to Best Practices in Commercial Arbitration* (4th ed. 2018) (the “Guide”).

Every few years, beginning in 2006 and continuing through the just issued 4th Edition, highly respected experts generously have shared their priceless insights for neutrals, advocates, and in-house counsel on how to effectively resolve business disputes according to the highest possible standards of professionalism, economy, and fairness. Each new edition has contained an updated and thorough analysis of every aspect of domestic, international, and class action arbitrations, from initial stages of appointment of arbitrators and determinations of arbitrability, through motion practice, discovery, evidentiary hearing, and post-award issues.

Even the most experienced arbitration professionals agree that the Guide has been indispensable to their practice. As seasoned arbitrator and popular lecturer on arbitration techniques, the Hon. Susan S.

Soussan (Ret.), attests, this Guide has been her “go to” resource for years; she likens it to “the Bible” of arbitration practice. Indeed, she often loans her copy to advocates who have asked her for assistance in solving arbitration challenges.

One reason each of the latest editions of this publication has proven to be so useful is that the editors and authors not only update existing topics addressed by the Guide, but continually update the publication to address newly emerging issues in arbitration practice. Thus, prior editions added chapters addressing discovery of electronically stored information (“ESI”), international arbitration, intra-tribunal relations, hybrid arbitration processes, and myriad changes in arbitral protocols and rules.

So, it is no surprise that the current edition of the Guide, edited by James M. Gaitis, A. Holt Gwynn, Laura A. Kaster and John J. McCauley, adds several new chapters while also updating the rest of the volume. The new chapter that should be of particular interest to Forum members is “Unique Issues in Construction Arbitration”.

This addition to the Guide is valuable on several levels. This chapter examines why and how construction arbitration can be very different from and much more complicated than other types of commercial arbitration. At the same time, for the benefit of experienced construction arbitration practitioners, the authors present a sophisticated summary of the

unique “arbitral tools that have been developed to more fairly and efficiently manage construction arbitration”.¹ Thus, the chapter explains how to better manage the number and complexity of the issues in dispute, beginning at the prehearing conference and consistently thereafter through discovery, site visits, admission of evidence and management of testimony. The chapter also discusses procedures for pass-through claims, drafting arbitration awards that comprehensively cover a theoretical multitude of disparate issues and damages claims, and the tension between related judicial and arbitral proceedings, including those to enforce mechanics liens.

This construction arbitration discussion is an unusual approach for the Guide, which, until now, had not addressed the unique considerations that apply to arbitrations involving other specific substantive areas of law, such as employment or securities arbitration. In large part, this is because the Guide is intended, as the title makes clear, to be a guide to best practices, not a legal treatise in substantive law. However, the chapter makes clear that construction arbitration is sufficiently nuanced and challenging to deserve a separate analysis.

Past Forum Chair, Deborah Ballati (now serving as a neutral with JAMS) agrees: “I was delighted to learn that the 4th edition of the...Guide [would] include a new, separate chapter on construction arbitrations. The unique aspects of most complex construction disputes, including disputes over cost and schedule impact claims, design and construction defects, and specialized construction contract provisions and laws, make construction arbitrations different from the other kinds of commercial disputes with which arbitrators are often more familiar. The guidance provided in this new chapter will help both those who are faced with their first construction arbitration and those who have handled such cases as a practitioner or arbitrator before. I welcome this new and useful tool to guide and refine my arbitration practice.”

Similarly, veteran construction arbitrator Zela Claiborne, also a neutral with JAMS, enthused that she was pleased to see that the new edition of

the Guide would have a chapter on construction arbitration, as that would make the resource even more helpful to her: “As a busy arbitrator, I use this book as my go-to reference for reliable perspectives on dealing with thorny problems.”

Construction arbitration is not the only new topic addressed in the 4th edition of the Guide. It also contains a new chapter analyzing motions for emergency relief, including newly adopted rules allowing for such proceedings and legal issues such as jurisdiction, authority, insuring a fundamentally fair hearing process, and enforceability of emergency awards. This chapter also identifies the managerial challenges of appointing emergency arbitrators, their status once they have entered their decisions, and post-emergency considerations subsequent to constitution of the arbitral tribunal.

Another new chapter, “Summoning Nonparty Witnesses”, more than pays for the price of the book, given its analysis of changing federal and state law on discovery from third-party witnesses. This topic is increasingly timely, given recent federal decisions invalidating arbitrator subpoenas under the Federal Arbitration Act.

Additionally, this new edition features appendices relating to the use of social media by arbitrators and maintaining the security of arbitrators’ ESI.

In summary, this new edition of the Guide again proves the wisdom of the advice offered by the Hon. Bruce E. Meyerson (Ret.), a Guide author and arbitrator with the American Arbitration Association: “The College of Commercial Arbitrators’ manual is an indispensable resource for arbitrators and advocates. Don’t think of doing an arbitration without it!”

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Endnotes

¹ James M. Gaitis et al., *The College of Commercial Arbitrators Guide to Best Practices in Commercial Arbitration* 467 (4th ed. 2018).