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HOW COURTROOM ATTORNEYS CAN FLOURISH IN ARBITRATION

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The age of commercial arbitration has come. "We have become an arbitration nation," said the U.S. Court of Appeals for the ninth Circuit just last year; "an increasing number of private disputes are resolved not by courts, but by arbitrators."

Like it or not, those confirmed and diehard litigators in the state and federal court systems have to reconcile doubts about the arbitration process and embrace it. The American Arbitration Association (AAA) administers over 150,000 commercial arbitrations nationwide. There are other providers, including JAMS, CPR International Institute for Conflict Prevention & Resolution, and various state organized administration providers who add to this number annually.

From law school on, we as litigators have spent our careers learning how to excel in preparing our cases, utilizing the matrix of procedural rules to our advantage, and how to persuade a jury or overburdened judge of our client's position. Having handled many different matters in various courts, lawyers believe their skills are easily transferrable to any situation, including commercial arbitration. This is not so easily done. One must appreciate the different approaches that most commercial arbitrators expect to effectively "sell" a case.

Arbitration should not be treated as a "private" version of civil litigation. The same rules and procedures do not apply and the opportunities to adjust the process to your benefit are much greater.

Also, the use of arbitration has grown as it has been continually designed to be better, quicker, and cheaper than litigation in the courts. Lawyers trying to handle their case the same way as they would in state or federal court are adding unnecessary time and expense to the arbitration process.

Following are ten suggestions that should be considered in preparing for and trying a commercial arbitration based on observations collected from well-seasoned and experienced commercial arbitrators.

1 KNOW YOUR DOCUMENTS

Arbitration is a contractual process between the parties. The scope of issues to be resolved, the law to be applied, the lo-

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cation of the arbitration, the procedural rules to follow, the parties subject to the arbitration, the limitations on damages or other relief are controlled by the parties' agreement. Obviously, one must look to the arbitration clause first—but don't stop there. Review the whole contract to check on controlling substantive law; requirements for pre-arbitration settlement talks; limitations on the award of compensatory; or punitive damages, interest, or attorney fees. Review all exhibits and affiliated contracts to see if there are related issues or parties that should be consolidated into the underlying arbitration. Are there issues that must be tried separately in court or in another arbitration process? Remember these agreed upon rules and principles are not written in stone. As commercial arbitration is a party driven process, the contractual directions can usually be modified if both parties agree to the changes.

2 KNOW THE RULES

While the substantive law is probably set in the contract, the procedural rules are usually set by the arbitrable institution mentioned in the contract (AAA, ICDR, JAMS, CPR).[1] While they all slightly differ to an extent, each of these institutions have created rules to encourage a fair, efficient, and economical resolution of the dispute. To accomplish this, the rules discourage the pleadings and motion battles so common to court litigation. Arbitration does not require extensive, detailed, fact-based pleadings. AAA commercial Rule R-4(e) iv requires nothing more than a Claimant setting out "a statement setting for the nature of the claim including the relief sought and the amount involved."[2] There is no need to engage in pleading in court style pleading practice.

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A statement of claim (or counterclaim) can be a narrative of a few pages setting forth, clearly and concisely, what was the agreement, what happened, what went wrong, and what the redress should be. This gives you the opportunity to tell your story clearly to the arbitrator and not have the arbitrator get bogged down in hundreds of paragraphs of allegations and numerous legal theories. An experienced arbitrator will be able to work with the parties to identify and refine, by the time of the hearing, the legal theories underlying the claims, answers, and counterclaims. This simplified standard dissuades the pleading practice (e.g., motions to dismiss, motions to strike, request to revise) common to courts.

AAA Commercial Rule R-33 mandates that "the arbitrator may allow the filing of and make rulings upon a dispositive motion only if the arbitrator determines that the motion is likely to success and disposes of or narrows the issues in the case." In practice, arbitrators are disinclined to grant the filing of these motions. One of the few bases for their award being set aside ("vacated") is for them to be found preventing a party from fully putting on their case (*see* 9 U.S.C. § 10, C.G.S. § 52-407 ww). So unless it is clear that no factual issues are involved and the issue can be resolved solely on a matter of law, arbitrators will wait until the evidentiary hearing to address the issues. Arbitrators also want the parties to expeditiously focus on discovery and not delay the hearing through motion practice.

3 KNOW YOUR ARBITRATOR

In many instances, the arbitration clause or rules of the arbitral institution allows the parties significant input in choosing their arbitrators. The parties often have the opportunity to decide the fact finder. This is especially important as there is usually no substantive appeal of their award. There are four basic areas parties should consider in choosing the arbitrator: (1) experience as an arbitrator and as a judge or lawyer; (2) expertise with a specific area of law, industry, or technical area; (3) temperament and ability to organize and supervise the process; and (4) time to commit to properly work on the case. Remember, this is the person or people who will not just render an award, but can work with you to both design and implement the arbitral process.

While records of prior awards are very limited and arbitrators cannot discuss their awards, there are other avenues to get a good idea of your candidates. You can always ask colleagues for experiences with suggested candidates. Most arbitrators have a website that will discuss their experiences, set out their approaches to arbitration, and list their ADR organizations and publications. In some instances, you are entitled to request a non-substantive interview with candidates.

4 THE PRELIMINARY CONFERENCE

The initial prehearing conference is one of the most important events in the arbitration. Unlike court cases that are controlled by a myriad of rules and court ordered schedules set down by overburdened judges, the arbitration process can be customized to the parties' needs. Prepare for it! Before this initial conference, the arbitrators will provide the parties with a checklist of matters to be discussed. These will cover discovery, scheduling, issues about arbitrability of the dispute, parties involved, interim relief, issues with the authority and acceptance of the panel and numerous other issues. It is important to review these with your client and decide how you want to proceed. It is also expected that you will confer with opposing counsel to see what you both can agree upon. Arbitrators will usually adopt the attorney's suggestions if they do not unnecessarily delay the process or increase the expense. Arbitrators will often suggest parties attend the hearing or at least have them sign off on the process. Many arbitrators will also be very flexible in setting up the process if they believe it will aid in the presentation of the evidence and the fairness of the hearing.

Once the conference is over, arbitrators will issue an order setting out the schedule for the hearing, document exchange, and other prehearing activities. While they will often allow amendments to this order for good cause, they will be very reluctant to allow changes that will delay the hearing as it might take months to establish new dates for a hearing that will accommodate all of the parties and arbitrators' schedules. Unlike many courts, postponements are sparingly granted and almost never because of the arbitrator.

5 KNOW YOUR OPTIONS FOR INTERIM RELIEF

Remember that arbitrators are available for emergency or interim relief, but do not have marshals or sheriffs to carry out their orders. As the parties have contracted to settle their dispute by arbitration, the arbitration process should be used for such interim needs. The rules generally provided for application to the arbitrator in such instances. Federal and state courts have procedures set to enter orders in aid of arbitration. Save applications to a court for true "time sensitive" emergencies (e.g. before the arbitrators are chosen) or matters involving third parties outside the scope of the arbitrators jurisdiction. Too many times arbitrators are bypassed and practitioners go to court unnecessarily delaying their time for hearing.

6 PRIVACY/CONFIDENTIALITY ARE NOT THE SAME

Lawyers always say that one of the advantages of arbitration is that it is private and not subject to the public scrutiny found in most civil litigation. To an extent this is true. Most arbitrable institutions mandate that the hearing should be private.[3] Also, awards, with a few exceptions, are not filed in a public forum and arbitrable institutions will keep them private. It must be remembered, though, that if either party moves in court to enforce or vacate the award, that party can file the award and other relevant papers with the court and thus they become available to

the public. While the process may be private, it does not mean all documents produced or exchanged in the proceeding will be kept confidential, nor are the parties bound to secrecy without an agreement. The arbitrator is also empowered to order at the prehearing exchange of information, or admission of evidence at the hearing, that such information will be treated as confidential (AAA Commercial Rule R-23).

Each attorney must focus on how to protect their clients' document and any sensitive personal or business information. This should start at the initial prehearing conference where the issue of confidentiality should be addressed. This review should go beyond the identification of and designation of confidential information, the redaction of personal information, and the entry by the arbitrator of a confidentiality order. The Connecticut Rules of Professional Conduct require all of us to make reasonable efforts to prevent the inadvertent or unauthorized disclosure of client information (RPC Rule 1.6) and to maintain our competence in using relevant technology (RPC Rule 1.1 official commentary). Transmission or storage of documents, pursuant to discovery or evidence at the hearing, should be protected from cyber-attack. Attorneys and their clients must work with the arbitrator to create a procedure to provide reasonable cyber security to protect the confidentiality of information used in the arbitration.

7 DISCOVERY WILL BE LIMITED

For many years, Connecticut arbitrators would say that the Connecticut Rule on arbitral discovery was: "Each lawyer should exchange whatever they have in their file with the other lawyer and proceed to hearing."

While that was rather simplistic, it certainly expressed the desire of commercial arbitrators to reduce and eliminate the excessive costs of time and treasure experienced in litigation style preparation for hearing. Many providers have now instituted basic guidelines for clear, concise, and effective demands for disclosure of documents and exchange of the same. The New York State Bar Association has instituted a very fair and equitable set of protocols to limit the expense and time consuming process created by request to produce "any and all" and "each and every," etc.

Time consuming and expensive exploration depositions have no place in commercial arbitration. Commercial arbitrators have been trained to administer the arbitration process and eliminate unnecessary time consuming and expensive processes that are not necessarily useful to the decision maker. That being said, arbitrators will support and direct, by order, the necessary exchange of significant documents not available to parties who need them. No one expects counsel to arbitrate in the blind, but the limitations imposed are meaningful and significant since arbitration is a dispositive process that is supposed to be expedited. If you really need to take a deposition, be prepared to explain and justify it to the panel.

8 KNOW YOUR AUDIENCE

Advocates should be careful not to use courtroom like examinations techniques for cross and direct. Direct testimony can easily be presented by written statements of fact and evidence signed and presented to the arbitrator before the hearing. It saves time and money for the parties and allows the arbitrator to probe and set up for a hearing. Cross examination of direct witness testimony can be the first order of business and begins your hearing by being halfway there. Sure we know that witness statements on direct testimony are always prepared and vetted by lawyers, but so is oral direct testimony. There is no need to take hours and days with direct testimony when an arbitrator can hear it all prior in writing. Also, remember evidentiary rules are relaxed in arbitration. Almost all documents will be admitted by the arbitrator "for whatever they are worth." Limit your evidentiary objections to those of relevance or privilege.

Also, the arbitration room is a small room. There is no place for innuendo, abrasive conduct, or aggressive language towards the opposite parties or their counsel. This is not a jury trial. This is not even a bench trial. Court-like demeanor should be observed, witnesses and parties should be addressed by their surnames. The arbitrator should never be called your honor, but Ms. or Mr. Arbitrator. Snide remarks and attacks on parties or witnesses are no

way to impress the arbitrator. In fact, it could add to a disrespect for your client's position. During the hearing, listen to the arbitrators' comments or questions to you or the witness. Arbitrators usually are more open in their statements during a hearing than a judge in open court. Their comments or questions are usually made to help them understand testimony or a party's position. Understanding their limited interjections will help you more effectively present your case.

9 FOCUS ON DAMAGES

It is surprising how often attorneys will focus 90 percent or more of their presentation at the hearing on liability and then quickly mention damages with little explanation as to how they have arrived at or computed their figures. They often fail to identify all of the evidence needed to support their damages claim, or they forget to discuss how interest should be awarded. This leaves the arbitrator ploughing through the record trying to arrive at a correct amount. While the law and rules allow an arbitrator significant flexibility in determining damages, they are extremely motivated to get it correct. Make sure you help them as there will be no appeal if they mistakenly award an incorrect amount. It is often helpful at the hearing or before post hearing briefs to start a dialogue with the arbitrator about how they would prefer damage presentations be made.

10 PREPARE FOR NO APPEAL

When the client is drafting or agreeing to an arbitration clause they almost never focus on the fact that there will be no appeal. The Federal Arbitration Act 9 U.S.C. § 10(a)[4] provides for only four limited reasons to set aside an award, none of which deal with the arbitrator factual findings or incorrect application of the law. When on the eve of the hearing the potential exposure of a negative award becomes clearer, or when the award is rendered, the client becomes very frustrated that they have very limited ability to challenge the award. At this juncture, the time and expense saved in the arbitration becomes less important. As a result, prepare for this eventuality early. It is important to remind the client early of the lack of an appeal so they can take it into account in helping you prepare for the case and possibly consider mediation. Keep in mind that mediation is always available during the arbitration process. AAA Commercial Rule R-9 strongly urges the parties to mediate during the arbitration and arbitrators have a duty to suggest this option. Lastly, remember that some arbitration agreements provide for an appeal of a decision to a special panel of appeal arbitrators. The standard of review in these appeals is not quite as broad as from a court's judgment. It is usually limited to errors of law that are material and prejudicial or a determination of facts that are clearly erroneous. Many arbitral institutions have promulgated rules for such a process (*See* AAA Optional Appellate Arbitration Rules). In "bet the company" situations, these rules can be agreed upon by the parties in the original agreement.

CONCLUSION

We have tried here to point out some of the practitioner pitfalls and issues that we often see in the process of administering commercial arbitration cases. Statistics tell us that 90 percent of today's litigators have not been trained in arbitration or dispute resolution. One would be well advised to take a more focused look at the nuances of commercial arbitration and commence a new approach to a very valuable resolution process that has become mainstream and no longer alternative. The American Arbitration Association, JAMS, CPR, and bar associations all provide very interesting and significantly valuable courses for litigation practitioners to adjust to the arbitration style of case hearings. We encourage you to take advantage of these, and to begin to more fully appreciate commercial arbitration and consider its benefits, and dispose of the myths and Shibboleths that have grown over the years. Interesting statistics from the American Arbitration Association indicate that 80 percent of all commercial arbitrations are awarded as requested and 20 percent or less have mixed results, which illustrates the value of embracing commercial arbitration as a key aspect of your practice. ■

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NOTES

1. "Any controversy or dispute arising out of or relating to this contract, or the breach thereof, shall be settled by arbitrations administered by the American Arbitration Association under its Commercial Arbitration Rules …" Commercial Arbitration Association Commercial Arbitration Rules, Introduction.
2. The same standard applies to counterclaims, AAA Commercial Rules R-5.
3. AAA Commercial Rule R-25. "The Arbitrator and AAA shall maintain the privacy of the hearing unless the law requires to the contrary."
4. § 10(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration:
   (1) where the award was procured by corruption, fraud, or undue means;
   (2) where there was evident partiality or corruption in the arbitrators, or either of them;
   (3) where the arbitrators where guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by the rights of any party have been prejudiced; or
   (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.