It Looks Sort of Like a Duck, But It's Not a Duck—

Arbitration Is Not Litigation

By Roy L. De Barbieri and Robert Harris

TRIAL LAWYERS FULLY INDOCTRINATED into the nuances of federal and state court sometimes find arbitration to be an alien and uncomfortable venue. No longer are they in a familiar setting with fulsome discovery, multi-year case timelines and a process that is designed to develop a record that will be subject to appellate review. Nonetheless, when a client calls looking for representation in connection with a contractual dispute that mandates arbitration, it is the attorney with litigation skills—the master of the courtroom—who enters the fray.

The discomfort that litigators display in an arbitration setting has been palpable and witnessed by commercial arbitrators, and they, together with arbitration administrative organizations such as the American Arbitration Association and JAMS, have taken many steps to provide educational opportunities to familiarize courtroom litigators with the arbitration process.

The Scene

In commercial arbitration, the attorneys are expected to appear for the preliminary conference fully prepared to discuss arbitration logistics and milestones. Sometimes, however, arbitrators encounter attorneys who have given these matters little, if any, thought, leaving their clients exposed to a scheduling and discovery order that may not accord with their needs. Unlike courtroom litigation, in arbitration the attorney who comes armed with a well thought out case management plan gains the advantage.

Consider the Following: Your new client is a principal in a business venture that has gone sideways. Colleagues have turned into enemies; acrimony has replaced friendship. The saga is complicated, convoluted, and contradicted. As your client exits your office after your first meeting, you reach for the agreement she has left with you. Turning immediately to the Dispute Resolution Section, you discover that it calls for arbitration of the dispute. No matter. It's paying work and you have a job to do. "How different can it be from trying a case at court?"

Fast forward several weeks. The arbitration demand has been filed, the arbitrator has been selected and appointed. You have received notice of a preliminary telephonic conference, scheduled for Monday morning.

After a relaxing weekend, you call in at the appointed hour, looking forward to beginning your work week with the pleasantries of a low key "meet and greet" with the arbitrator and your adversary. Instead, you find yourself on the receiving end of a call with an arbitrator intent on establishing a soup-to-nuts schedule that envisions a substantive arbitration hearing in a few months' time. The arbitrator expresses skepticism about discovery, indicating openness to, at most, a limited document exchange. And the parties should not even think about deposing experts, as the arbitrator firmly believes that expert reports are all that a party will need before examining the expert during the hearing.

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In short, you have run into the buzz-saw known in today's vernacular as "muscular arbitration."

The Context

Historically, as contractual arbitration provisions worked their way into more complex transactional documents, arbitration proceedings often came to resemble litigation. The attorneys addressing the conflict, trained to battle in federal and state courts, understandably brought their litigation toolbox to the arbitration.

Consequently, discovery became expansive and expensive, parties took every imaginable opportunity to file dispositive (and non-dispositive) motions, and the hearings became increasingly prolonged, only to routinely be followed by post-arbitration efforts by the losing party to have the award vacated. In short, arbitration became unmoored from its historical underpinnings as a less formal, more economical and efficient way for parties to resolve a dispute and to move on with their commercial lives.

Not surprisingly, a countervailing industry wide push followed. Arbitration providers such as the American Arbitration Association sought to reinforce arbitration's genesis and purpose. Rules were tweaked, and arbitrators were educated to recognize the inherent distinction between arbitration and litigation. Arbitrators—some more than others—began to "muscularly" assert more control over the arbitration process.

Witness the most recent American Arbitration Association Commercial Rules, published September 1, 2022. The Rules have enlarged the already extensive powers to arbitrators to outline, design, and control the process in every individual arbitration with the goal in mind to achieve a less formal, more economical and efficient dispute resolution path.

The Call to Action for Arbitration Attorneys

"Muscular arbitration" need not undermine the fundamental reality that, as a "creature of contract," arbitration remains the parties' process, enabling them to fashion the contours of the proceeding in a manner to their liking. However, snoozing may mean losing. Attorneys bear the responsibility to proactively present the arbitrators with their clients' needs and expectations for the arbitration. Failure to provide direction creates a vacuum that an arbitrator readily will fill. (See AAA Commercial Rules P-1 and P-2 for a detailed list of issues to consider.)

Counsel for the parties should be seeking to adopt a more cooperative process rather than a contentiously argumentative, delay-oriented, stance. An analogy can be found in the now accepted process of cooperative family law practice where counsel shed their litigious characteristics and collaborate together to find

a process that serves both parties interest and leads to an appropriate resolution path.

Definitive matters will be addressed as early as the initial preliminary conference between the arbitrator and the attorneys. For example, the AAA Practice Guide for preliminary hearings explains that "decisions will be made that will affect the course, scope, and cost of the arbitration. Expectations will be set. This is an opportunity for the tribunal to be sure that client expectations (typically for efficiency and speed) are in line with those of their advocates (who may believe more time is needed for discovery)." Accordingly, attorneys should be prepared to set forth their requirements for discovery and document exchange, expert reports and testimony, dispositive motions, the time and place of the hearing, and pre- and post-hearing submissions.

The prehearing conference phase of arbitration lends itself to a negotiation between the parties' counsel before the preliminary hearing. This is part and parcel of the underlying principle that arbitration is a creature of contract and "contracting" can be done post-dispute in terms of the process. The initial scheduling conference in court proceedings is very different from the prehearing conference in arbitration. In an arbitration "best case" scenario, counsel meet in advance of the hearing and either submit a joint report or separate statements on a list of common/to-be-anticipated topics. And, to the extent that counsel for the parties are able to agree on scheduling, dispositive motion procedures, voluntary exchange parameters, scheduling of the evidentiary hearing, etc., those agreements will be respected and accommodated to the extent that they are reasonable.

At the preliminary hearing, counsel should come prepared to set dates for the evidentiary hearing and a roadmap for getting there—identifying the common tasks to be discussed/worked through with opposing counsel and the arbitrator.

Optimally, attorneys for the competing parties will confer in advance of the conference and reach agreement on many of these issues. Arbitrators typically will encourage such arrangements, with a confirming order, so long as the agreement reasonably conforms to the goals of arbitration. In the absence of agreement, attorneys should be prepared to provide the arbitrator with their respective clients' specific requests and their reasons for them, confirming the relief each party is seeking, using more summary presentations than the expensive law and motion practice from the courts.

Another tip: while arbitration is promoted as providing confidentiality that is unavailable in courts, the more accurate description is privacy. Attorneys should remember that privacy of arbitration is not the same thing as confidentiality. Nothing in arbitration inherently precludes a party or its counsel from discussing what transpires in the arbitration room or submissions. If confidentiality is desired, counsel should introduce the need for a protective order. Protective orders are not limited to that which is eligible for protection under "general legal principles" in the courts; parties can bargain for something broader, leading to an order which operates akin to an NDA. Arbitration, more so than litigation, provides the parties with an opportunity to shape the process. Those who squander this opportunity by not adequately preparing run the risk of an arbitrator deciding for them.

There are very many advantages in arbitration that counsel can design into the process that would not be permitted in litigation. Modern arbitrators are seeking to receive the evidence in expeditious and concise methods, which may include(in contrast to traditional litigation) utilizing witness statements and expert opinions as direct testimony, and moving on quickly to cross.

In closing, legal counsel can expect and look forward to a fair, expeditious, and complete process in arbitration that will serve their clients' needs. However, it remains counsel's obligation to engage early on in the process of design and implementation of

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the arbitration program, specifically tailored to that client's present needs. Cooperation and understanding of the process is essential in representing one's client in arbitration. Attorneys who have not had extensive experience in this area should seek assistance and advice in preparation. ■

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AMERICAN ARBITRATION ASSOCIATION—COMMERCIAL ARBITRATION RULES

R-1. Agreement of Parties*

a) The parties shall be deemed to have made these Rules a part of their arbitration agreement whenever they have provided for arbitration by the American Arbitration Association ("AAA") under its Commercial Arbitration Rules or for arbitration by the AAA of a domestic commercial dispute without specifying particular rules. These Rules and any amendment to them shall apply in the form in effect at the time the administrative requirements are met for a Demand for Arbitration or Submission Agreement received by the AAA. Any disputes regarding which AAA rules shall apply shall be decided by the AAA. The parties, by written agreement, may vary the procedures set forth in these Rules. After appointment of the arbitrator, such modifications may be made only with the consent of the arbitrator.

b) Unless the parties agree or the AAA determines otherwise, the Expedited Procedures shall apply in any case in which no disclosed claim or counterclaim exceeds $100,000, exclusive of interest, attorneys' fees, and arbitration fees and costs. Parties may also agree to use these Procedures in larger cases. Unless the parties agree otherwise, these Procedures will not apply in cases involving more than two parties. The Expedited Procedures shall be applied as described in Procedures E-1 through E-10, in addition to any other portion of these Rules that is not in conflict with the Expedited Procedures.

c) Unless the parties agree otherwise, the Procedures for Large, Complex Commercial Disputes shall apply to all cases in which the disclosed claim or counterclaim of any party is at least $1,000,000, exclusive of claimed interest, attorneys' fees, arbitration fees and costs. Parties may also agree to use the Procedures in cases involving claims or counterclaims under $1,000,000 or in nonmonetary cases. The Procedures for Large, Complex Commercial Disputes shall be applied as described in Procedures L-1 through L-3 in addition to any other portion of these Rules that is not in conflict with the Procedures for Large, Complex Commercial Disputes.

d) Parties may, by agreement, apply the Expedited Procedures; the Procedures for Large, Complex Commercial Disputes; or the Procedures for the Resolution of Disputes Through Document Submission (Procedure E-6) to any dispute.

e) All other cases shall be administered in accordance with Rules R-1 through R-60 of these Rules.

** The AAA will apply the Employment Fee Schedule to any dispute between an individual employee or an independent contractor (working or performing as an individual and not incorporated) and a business or organization and the dispute involves work or work-related claims, including any statutory claims and including work-related claims under independent contractor agreements. A dispute arising out of an employment plan will be administered under the AAA's Employment Arbitration Rules and Mediation Procedures. A dispute arising out of a consumer arbitration agreement will be administered under the AAA's Consumer Arbitration Rules.*

** Beginning June 1, 2021, the AAA will apply the Consumer Arbitration Fee Schedule to any dispute between an online marketplace or platform and an individual user or subscriber (using or subscribed to the service as an individual and not incorporated) and the dispute does not involve work or work-related claims.*

R-2. AAA, Delegation of Duties, Conduct of Parties, Administrative Review Council

a) When parties agree to arbitrate under these Rules, or when they provide for arbitration by the AAA and an arbitration is initiated under these Rules, they thereby authorize the AAA to administer the arbitration.

b) The authority and duties of the AAA are prescribed in the agreement of the parties and in these Rules, and may be carried out through such of the AAA's representatives as it may direct. The AAA may, in its discretion, assign the administration of an arbitration to any of its offices. Arbitrations administered under these Rules shall only be administered by the AAA or by an individual or organization authorized by the AAA to do so.

c) The AAA requires that parties and their representatives conduct themselves in accordance with the AAA's *Standards of Conduct for Parties and Representatives* when utilizing the AAA's services. Failure to do so may result in the AAA's declining to further administer a particular case or caseload.

d) For cases proceeding under the Procedures for Large, Complex Commercial Disputes, and for other cases where the AAA, in its sole discretion, deems it appropriate, the AAA may act through its Administrative Review Council to take the following administrative actions:

i) determine challenges to the appointment or continuing service of an arbitrator;

ii) make an initial determination as to the locale of the arbitration, subject to the power of the arbitrator to make a final determination; or

iii) decide whether a party has met the administrative requirements to file an arbitration under these Rules.