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Techniques to Avoid Turning Arbitration into Litigation

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I. There is a growing discontent among users of arbitration that the process has become more like the litigation process that parties were trying to avoid in agreeing to arbitration.

A. If not properly structured, arbitration can be time-consuming and expensive, precisely the ills of the court system that most parties in arbitration are seeking to avoid. See Odfjell ASA v. Celanese AG, 328 F. Supp. 2d 505, 507 (S.D.N.Y. 2004) ("Arbitration, which began as a quick and cheap alternative to litigation, is increasingly becoming slower and more expensive than the system it was designed to displace, and permitting pre-hearing discovery of non-parties would only make it more so.")

B. There is increasing tension between ensuring fairness of the arbitration process and remaining true to the goal of a speedy and effective resolution.

C. The key to a successful arbitration is careful structuring to make sure that the parties' objectives are served and that there is both proper selection of and oversight by the arbitrators.

II. Origins of arbitration discovery – "exchange of information."

A. Traditionally, discovery in arbitration was viewed as an alternative to cumbersome subpoena practice and was often handled consensually.

B. As a result, discovery was limited to documents. See UNCITRAL Art. 24(3) (authorizing the tribunal to order production of documents).

C. Depositions were seen as a litigation tool, only appropriate in arbitration when an important witness would be unavailable at the hearing.

III. Expansion of arbitration brings more conventional "discovery."

A. As arbitration has grown beyond specialty areas and into mainstream commercial disputes, traditional commercial litigators have more frequently had to become accustomed to arbitration procedures.

B. As a result, there has been a growing uneasiness of commercial litigators with the traditional format of limited exchange of information in arbitration and many litigators have been seeking expanded discovery in arbitration.

C. There is also lingering judicial skepticism about the fairness of an abbreviated arbitral process

D. There are competing visions or arbitration: (1) when the parties in their arbitration agreement adopt a set of arbitral rules, they elect an established process, vs. (2) arbitration is a creature of contact so that parties should be able to shape the process any way they want, not just at the time of agreeing to arbitration, but during the arbitration as well.

IV. Approaches to Document Requests.

A. Most arbitration forums provide for some type of document discovery. E.g., AAA Commercial Arbitration Rules R-21; NASD Code of Arbitration Rule 10321; CPR Non-Administered Arbitration Rules Rule 11.

B. Each ADR organization trains its arbitrators in a basic approach to discovery, but much depends on the professional and cultural background of the arbitrator.

C. Even the most litigation-oriented arbitrator seeks to find practical solutions that limit the cost and burden of discovery; the arbitrator's effectiveness depends in large part on their ability to manage the process effectively which in turn depends on how well they control the lawyers and the extent to which the advocates can be convinced to dispense with the sort of gamesmanship that has become common in litigation.

D. Contested discovery requests are more or less likely to be granted, depending on whether the requests can be presented to the arbitrator as practical and problem-solving, as opposed to appearing to be just tactical and burdensome.

E. Opposition to a discovery request, especially documents, should be based on relevance and burden.

V. Approaches to Deposition Discovery.

A. In U.S. arbitrations, depositions are no longer verboten, especially in complex or high-stakes cases, although many arbitrators still insist on a showing of special circumstances.

B. The key questions for the arbitrators are: (i) whether the parties agree to depositions, in which case the arbitrator may place some time limits, but will go along, and (ii) whether there are objections to the requested depositions, in which case the arbitrator will seek to determine whether they are necessary to a fair hearing or likely to produce a net cost-savings to the process. Even in the latter case, if the arbitrators are willing to grant depositions, they are likely to limit them in terms of number and duration.

C. The party seeking depositions is well advised to propose reasonable limits in those depositions, or if such limits will be imposed by the arbitrators unilaterally.

VI. Practical Suggestions for Limiting Discovery in Arbitration.

A. Use the pleadings to lay the groundwork to establish both the need and the limits for discovery requests.

B. Plan your discovery needs when you prepare the Statement of Claim or Answer; determine in advance what you need to prove your case, and have a strategy for getting there prior to the preliminary conference.

C. Hold a meet-and-confer session with opposing counsel before the preliminary conference; they to resolve discovery issues consensually as much as possible, and thereby demonstrate to the arbitrators a good faith effort to narrow the discovery issues in dispute.

D. Prepare a joint letter to the arbitrators in advance of the first conference, setting forth areas in which agreement on discovery was reached and explaining the remaining disputed items and each side's position regarding each item in dispute.

E. At the preliminary conference or beforehand, submit an agreed discovery plan, including proposed scheduling for exchange of documents, any agreed depositions, and post-discovery preparation for the hearings.

F. Come to the preliminary conference not just with your calendars, but with a joint proposal for a discovery cut-off and the time period in which the parties agree that the evidentiary hearings can be held, subject to the arbitrators' schedules.

G. Avoid discovery disputes with your adversary except over those matters where there is a serious issue on relevance or burden.

VII. Dispositive motions in arbitration.

A. Many parties believe that cases which would be disposed on motion in the court system are likely to proceed to a full evidentiary hearing before arbitrators.

B. Arbitrators are often reluctant to grant dispositive motions.

C. AAA Commercial Arbitration Rule 30(b), for example, provides that the arbitrator "shall conduct the proceedings with a view to expediting the resolution of the dispute and may direct the order of proof, . . . and direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the case."

D. While this Rule does not specifically grant the arbitrator power to decide dispositive motions, such power is generally considered to be within the inherent discretion of the arbitrators. See InterCarbon Bermuda, Ltd. v. Caltex Trading & Transport Corp., 146 F.R.D. 64, 74 (S.D.N.Y. 1993); Schlessinger v. Rosenfeld, Meyer & Susman, 40 Cal. App. 4th 1096, 47 Cal. Rptr. 2d 650 (Cal. App. 2d 1995) (confirming award of summary judgment in arbitration based on written

submissions prior to any live hearings); see also Revised Uniform Arbitration Act § 15(b) (2000) ("An arbitrator may decide a request for summary disposition of a claim or particular issue . . . upon request of one party to the arbitration proceeding if that party gives notice to all other parties to the arbitration proceeding and the other parties have a reasonable opportunity to respond.").

E. However, at least one court has vacated on fairness grounds an arbitration award which summarily dismissed a securities broker's claim of fraud. Prudential Securities, Inc. v. Dalton, 929 F. Supp. 1411 (N.D. Okla. 1996).

F. Arbitrators are typically more cautious than judges in deciding dispositive motions with a view to making sure that the parties have a fair opportunity to present their case.

G. Because of the need to prune cases back – such as by eliminating non-meritorious claims, dismissing claims that are untimely or dealing with jurisdictional issues – an effective arbitrator should be willing to tackle meritorious dispositive motions.

H. Parties can better effectuate this by providing in their arbitration agreements that the arbitrators have authority to decide dispositive motions and shall be empowered to do so as would a federal or state judge sitting in the case. The benefit of such a provision is increased ability to move the case quickly and narrow the dispute, and providing the assurance that the arbitrator would have full authority to decide such motions.

VIII. Attorneys' role in expediting arbitration.

A. Many attorneys who prosecute or defend arbitrations put on their gladiator hats and treat the arbitration like any other litigation. This is often a mistake.

B. Attorneys need to understand why their clients decided to choose arbitration, which is typically to conserve time and expense, and counsel should be guided accordingly.

C. Attorneys should be cognizant of time demands in discovery and recognize that the flexibility that arbitration provides calls for streamlining the ordinary discovery demands used in court litigation.

D. Attorneys can accomplish this by considering ways of trimming back discovery demands in order to move the case along.

E. Lawyers should understand that the arbitrators tend to try to seek consensus of the parties in resolving discovery disputes as opposed to issuing production orders the way a judge or magistrate typically does.

F. Attorneys should be willing to be flexible in how discovery problems are resolved such as by accepting and even proposing alternative methods of handling

discovery issues like representations of fact and production of schedules as opposed to supporting documents, provided that this is a suitable substitute.

G. Lawyers should use the pre-hearing conference as a pro-active tool to shape the case, define the issues for resolution in the dispute, and determine what process is really necessary in order to prepare for the hearing.

H. Lawyers should make sure that the arbitrators set timetables in the pre-hearing conference which will provide a speedy framework for the case.

I. Attorneys can also assist in moving the process by crafting creative procedural solutions that can help resolve their case, such as bifurcation or decisions on limited issues that may be dispositive of the claim.

J. On the other hand, counsel need to be sensitive to the fact that their clients' rights are being adjudicated in this process so that critical documents needed to present the clients' case must be gathered. The tension between streamlining the process and concerns about achieving fundamental fairness always need to be balanced carefully with the precise balance hinging on the circumstances of the case and what is at stake in the dispute.

K. Typically, depositions should not be taken in arbitration except in extraordinary circumstances or to preserve evidence.

L. Avoiding depositions will save the most expensive cost in typical litigation.

M. Finally, the lawyer should regularly update the client and review the client's objectives in the arbitration to ensure that the arbitration does not escalate beyond the expectations of the parties.

IX. Evidentiary issues.

A. Arbitrators are not bound by the formal rules of evidence. For example, as Rule 31(a) of the AAA Commercial Arbitration Rules provides "conformity to legal rules of evidence shall not be necessary." See also CPR Non-Administered Arbitration Rules Rule 12.1.

B. Although the rules of evidence do not apply, arbitrators do have the power to exclude evidence based on relevance, materiality, privilege or the cumulative nature of the evidence. See AAA Commercial Arbitration Rules R-31; See also CPR Non-Administered Arbitration Rules Rule 12.1.

C. Good counsel in arbitrations should understand the informality of the process and not belabor form objections the way a trial lawyer would in court.

D. Typically, most objections in arbitration are overruled and the arbitrators treat the process as an informal one.

E. Nonetheless, when there is a critical issue – whether involving hearsay, relevance or privilege – counsel should press the evidentiary point since it may help to streamline the arbitration.

F. Counsel are often concerned that arbitrators take all evidence "for whatever it may be worth" so that the parties feel the need to engage in extensive rebuttal of marginal evidence.

G. Attorneys should be cautious about engaging in lengthy rebuttal on marginal evidentiary points but also need to weigh out what impact the evidence they perceive to be marginal actually has had on the arbitrators – which is not always straightforward.

H. Tailor your presentation style to the audience and the setting; bombastic examinations are usually ineffective in the informal setting of an arbitration room.

I. Effective lawyers will use techniques that help communicate complex evidentiary points.

J. Demonstrative aids such as charts, computer graphics or spreadsheets will help convey complicated issues that can be lost in mounds of paper.

K. The effective advocate will simplify their case and keep coming back to their themes, as opposed to getting lost in details of the evidence.

L. Lawyers should consider holding timed hearings in which each side's examinations are limited to a fixed amount of time which is split evenly among the parties. See also CPR Non-Administered Arbitration Rules Rule 9.2 (authorizing arbitrators to impose time limits).

X. Conclusion.

A. If the advocate always keeps in mind the need to achieve their own client's objectives in going into arbitration, they will help accomplish their client's goals and hopefully avoid the overly expensive arbi-trial syndrome.