CPR International Institute for Conflict Prevention & Resolution

Alternatives

TO THE HIGH COST OF LITIGATION

INTERNATIONAL INSTITUTE FOR CONFLICT PREVENTION & RESOLUTION VOL. 26 NO. 9 OCTOBER 2008

CPR International Institute for Conflict Prevention & Resolution

Alternatives TO THE HIGH COST OF LITIGATION

Publishers:
Kathleen A. Bryan
International Institute for Conflict Prevention and Resolution

Susan E. Lewis
John Wiley & Sons, Inc.

Editor:
Russ Bleemer

Jossey-Bass Editor:
David Famiano

Production Editor:
Ross Horowitz

JOSSEY-BASS™ An Imprint of WILEY

Alternatives to the High Cost of Litigation (Print ISSN 1549-4373, Online ISSN 1549-4381) is a newsletter published 11 times a year by the International Institute for Conflict Prevention & Resolution and Wiley Periodicals, Inc., a Wiley Company, at Jossey-Bass. Jossey-Bass is a registered trademark of John Wiley & Sons, Inc.

Editorial correspondence should be addressed to *Alternatives,* International Institute for Conflict Prevention & Resolution, 575 Lexington Avenue, 21st Floor, New York, NY 10022; E-mail: *alternatives*@cpradr.org.

The annual subscription price is $190.00 for individuals and $253.00 for institutions. International Institute for Conflict Prevention & Resolution members receive *Alternatives to the High Cost of Litigation* as a benefit of membership. Members' changes in address should be sent to Membership and Administration, International Institute for Conflict Prevention & Resolution, 575 Lexington Avenue, 21st Floor, New York, NY 10022. Tel: 212.949.6490, fax: 212.949.8859; e-mail: info@cpradr.org. To order, please contact Customer Service at the address below, tel: 888.378.2537, or fax: 888.481.2665; E-mail: jbsubs@josseybass.com. POSTMASTER: Send address changes to *Alternatives to the High Cost of Litigation*, Jossey-Bass, 989 Market Street, 5th Floor, San Francisco, CA 94103-1741.

Visit the Jossey-Bass Web site at www.josseybass.com. Visit the International Institute for Conflict Prevention & Resolution Web site at www.cpradr.org.

Strategies for Achieving An Arbitration Advantage Require Early Analysis, Pre-Hearing Strategies, and Awards Scrutiny

BY KEVIN R. CASEY AND MARISSA PARKER

Advocates and clients alike recognize the value of taking nonlitigation paths to resolution. In analyzing and developing strategies to achieve client goals, counsel and client may determine that arbitration, as opposed to another ADR technique, is the best framework to resolve a particular dispute.

This article presents considerations, strategies, and suggestions to maximize the use of, preparation for, and engagement in arbitration.

I. PRE-ARBITRATION CONSIDERATIONS.

An initial step in deciding whether to arbitrate is deciding how to arbitrate. Although the format may be at least partially predetermined by agreement or by judicial rules where arbitration is court-annexed, the parties often can tailor the process to satisfy their needs.

Parties may arrive at arbitration by pre-dispute agreements, generally incorporated in commercial contracts, or by an agreement to arbitrate a concrete dispute that already has arisen.

When a contract contains an arbitration clause, act promptly to demand arbitration or file a motion to compel, if necessary. If compelling arbitration is to the client's advantage, do it in federal court when possible. Federal cases routinely affirm that any dispute over the scope of arbitrable issues should be resolved in favor of arbitration.

To commence the process, the parties must first convey on an arbitrator or panel of arbitrators authority or jurisdiction. This jurisdiction arises from the parties' agreement to arbitrate, as arbitration is an inherently consensual process.

Two typical challenges are that the arbitration may (i) impinge on the interests of a third party not bound by the arbitration agreement, or (ii) interfere with the jurisdiction of another tribunal, such as a court, administrative agency, or government unit.

ADR SKILLS

As a matter of strategy, a dispositive motion to challenge a particular claim typically will stand a better chance of succeeding if it can be styled as a challenge to arbitrability rather than to its merits. For example, objections to a request to take third-party depositions usually will have greater impact if presented as an issue of arbitrator authority to issue the subpoenas, rather than as an issue of the arbitrator's general discretion as to how much discovery is reasonable.

The parties must also decide the procedural framework of their arbitration, chiefly beginning with whether the arbitration will be binding. Court-annexed arbitration is generally binding, but it also permits an automatic right to seek a trial de novo following the arbitration. Binding arbitration decides the case for the parties and can be administered by one of the independent ADR provider institutions. Alternatively, the parties may proceed "ad hoc"—on their own, without outside assistance.

Nonbinding arbitration can be purely advisory, designed to encourage voluntary settlement, where the arbitrator focuses on objectively explaining the strengths and weaknesses of the parties' cases.

Whether binding or not, parties may want more tailored arbitrations suited to their interests, selecting from choices such as "Final Offer" or "Baseball," "Night Baseball," "Bounded" or "High-Low," and "Incentive" arbitration.

"Final Offer" or "Baseball" arbitration allows each party to submit a proposed monetary award to the arbitrator, and after the hearing, the arbitrator chooses one award without modification. This procedure limits the arbitrator's discretion and gives each party an incentive to offer a reasonable proposal for selection by the arbitrator.

In a related variation, called "Night Baseball" arbitration, the arbitrator makes a decision without reviewing the parties' proposals, and then makes an award to the party whose proposal is closest to that of the arbitrator.

"Bounded" or "High-Low" arbitration allows the parties to privately agree, without informing the arbitrator, that the award will be adjusted to fit within an agreed-upon bounded range.

In "Incentive" arbitration, the parties agree to a nonbinding procedure but also agree to a penalty if one of them rejects the arbitrator's decision, resorts to litigation, and fails to improve its position by some specified percentage or formula. The penalties may include payment of attorneys' fees incurred in the litigation.

Selecting an arbitrator or arbitrators is a major advantage and should be given due consideration. The qualities most parties look for in an arbitrator are (i) fairness, (ii) experience, and if possible (iii) subject-matter expertise.

Consider the candidates' legal and technical backgrounds, and always ask for and check references. In checking references, be alert to ex parte communications and arbitrator confidentiality: make the reference checks jointly, copy inquiries to opposing counsel, and limit discussion to appropriate pre-appoint-

(continued on next page)

Casey chairs the Intellectual Property Group and co-chairs the Alternative Dispute Group at the Philadelphia-based Meritas firm, Stradley Ronon Stevens & Young, LLP. Parker is an associate in the firm's Litigation Group and member of the firm's Alternative Dispute Resolution Group.

Published online in Wiley InterScience (www.interscience.wiley.com).
Alternatives DOI: 10.1002/alt

Arbitration Strategies

(continued from page 167)

ment topics (i.e., inquiries regarding training, discovery preferences, whether previous awards were challenged).

Most of the major provider organizations, such as the American Arbitration Association, JAMS, the CPR Institute (which publishes this newsletter), and the International Chamber of Commerce, will assist in suggesting or providing lists of experienced arbitrators suitable for a particular dispute.

Finally, unless specified in the predispute agreement, parties should negotiate the arbitration procedures. The parties generally are free to stipulate to the procedures that will apply, and are encouraged to look toward established bodies of procedural rules, such as those constructed by many of the ADR providers. A vital item to be predetermined is the length of the arbitration; fix the length of time of the arbitration hearing by agreement, in advance.

II. PRE-HEARING STRATEGIES.

Preliminarily, note that the matters to be arbitrated, encompassing both claims and counterclaims, must be within the scope of the subject matter that the parties agreed to submit to arbitration. After an arbitration panel is formed, typically no new or different claim or counterclaim may be submitted without the panel's consent or the adverse party's agreement.

The procedures used for discovery highlight an important difference between arbitration and litigation. Arbitrators typically consider three discovery issues: (i) how much discovery to permit, (ii) the form(s) of discovery, and (iii) the scope and breadth of discovery allowable from third parties.

Arbitrators generally will attempt to honor any approach to which the parties have agreed, but will bear in mind that most parties often select arbitration to avoid the burden and expenses traditionally associated with litigation. Thus, arbitrators tend to enforce more limited discovery.

In light of restricted discovery and the absence of appellate review, dispositive motions usually are disfavored. Arbitrators have a vested interest in hearing a dispute in its full context. One of the few statutory grounds for judicially setting aside an arbitration award arises when an arbitrator has not given each side a fair opportunity to present its case. Summary judgment motions are occasionally made and rarely granted. Consider whether making a dispositive motion is worth the cost, both monetarily and strategically.

In line with the underlying goals of limited discovery, continuances also should be avoided. Successful arbitrators are almost always busy people. Aside from being inconsistent with the efficiency parties seek by arbitrating, requests for continuances can wreak havoc with the arbitrator's calendar.

Back to the Basics

The issue: Are you ready for arbitration?

You say you've done this before? Even veterans need to go through these steps to plan their strategies. The completists' approach works.

The payoff: Confidence through anticipation leading to better outcomes.

In preparation for the hearing, especially in complex cases, parties should consider not only exchanging exhibits, but meeting to make objections and stipulate in advance as to the admissibility, authenticity, and even relevancy of the documents. Ideally, parties will create a joint volume of exhibits, or at least separate volumes for each party that can be offered at the beginning of the arbitration.

Also consider providing a joint chronology or organizational chart summarizing the exhibits to facilitate use of the exhibit volumes and familiarity with the facts of the case. Along the same lines, parties should submit a joint stipulation of uncontested facts.

Pre-arbitration briefs are exceptionally helpful in laying the framework for what is to come. Describe the subject of the dispute, identify which issues are expected to be resolved, and provide brief comments that will educate the arbitration panel about the issues to be decided. In highly complex or technical cases, where an arbitrator may not possess specialized expertise, consider jointly preparing a tutorial to give the arbitrator before testimony is taken.

III. CONDUCT OF THE HEARING.

As everyone waits for the hearing to begin, maintain a level of formality with the arbitrator and do not talk about the case. Even if you know the arbitrator personally, avoid the urge to address him or her by first name. It is acceptable to talk about benign subjects like sports or weather, but do not bring up anything remotely connected to the pending case.

Effective arbitration advocacy is remarkably similar to model advocacy in court. Opening statements are just as important in arbitration as in litigation. Use the opening as an opportunity to introduce witnesses and representatives, set up your story or theme, and neutralize bad facts. Do not read the statement; try to build a rapport with the panel to set the tone for the remainder of the hearing.

When preparing and examining witnesses, instruct them to face and speak to the panel rather than opposing counsel. Do not coach the witness. But where clarification is required or there is a nonresponsive answer, seek correction accordingly. As recommended above, exhibits should be organized in binders, with sufficient copies for each party, the arbitrator(s), and the witness. Be as prepared as possible for cross-examination, and limit requests for time to prepare after direct to the necessary minimum.

Evidentiary issues are treated differently in arbitration than in litigation. Unless the parties stipulate to the contrary, strict rules of evidence do not apply. This offers the parties advantages otherwise foreclosed at trial, such as using summary notebooks to collect and present evidence.

Recognize that evidence is rarely excluded. Arbitrators want to grasp all

WILEY InterScience® DISCOVER SOMETHING GREAT
Published online in Wiley InterScience (www.interscience.wiley.com).
Alternatives DOI: 10.1002/alt

facets of a dispute, and often will overrule evidentiary objections in favor of letting in evidence "for whatever weight it may have." Accordingly, relevancy and hearsay objections are frequently overruled, but arbitrators do tend to sustain objections where attorney-client privilege or settlement discussions are implicated.

Although the decision to make an oral closing or file a brief will vary depending on the type of case, closing arguments can be crucial. Organize the closing to help the arbitrator highlight the key issues, assimilate the relevant evidence, understand the applicable law, and prepare the award. Be sure to address the opposition's arguments and deal with bad facts. Also, provide the arbitrator with copies of cited cases.

Counsel should make it a practice to prepare and deliver the proposed award's relief language at the time the hearing is closed. This requires advance discussions between client and counsel regarding the nature and type of award sought (i.e., monetary, injunctive, attorneys fees, costs, punitive damages). The types of recovery may be limited by the terms of a pre-dispute agreement. Requesting punitive damages is questionable, because they can negatively affect the chances of settlement and introduce a larger element of risk in the arbitrator's calculations.

IV. POST-ARBITRATION MATTERS.

The award is the focal point for post-arbitration matters.

Counsel may ask the arbitrator to render the arbitration award in a specific form. Common forms are (i) a bare award that states the result only, with no display of the arbitrator's reasoning or how the result was reached; (ii) a narrative award that states the result as well as the arbitrator's reasoning and rationale; and (iii) findings of fact and conclusions of law, detailing the facts as determined by the arbitrator, the law relied upon, and the result. The time needed to prepare the award is generally proportional to the selected form. Bare awards are usually preferable because detailed awards open more to challenge.

Where the proceeding involves only one arbitrator, however, parties may consider requesting a brief statement of the award. This request is meant to prompt the arbitrator to fully consider his or her resolution and dissuade the arbitrator from taking a "split-the-baby" approach.

Unlike three-arbitrator panels where deliberation naturally tests each arbitrator's position, single arbitrators have less external motivation to play devil's advocate. By putting pen to paper, even to offer a short paragraph explaining the award, the sole arbitrator may engage in a more thorough self-examination and present the parties with a more reasoned award. A brief statement also restricts the amount of explanation to a minimum, avoiding lengthy explanations that can provide fertile grounds for challenge or appeal.

Bare awards are usually preferable because detailed awards open more to challenge.

Once the award is issued, both sides may seek judicial assistance. The prevailing party can move to confirm the arbitration award in any court having jurisdiction, but must do so within the time specified by the relevant arbitration statute—typically one year. A losing party may file with the court a motion to vacate, modify, or correct an award. This time is typically shorter (usually three months).

The grounds for vacating an arbitration award, as specified in most state statutes, are: (i) the award was procured by corruption, fraud, or other undue means; (ii) there was evident partiality or corruption in the arbitrator; (iii) the arbitrator was guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown, in refusing to hear pertinent and material evidence, or by any other misbehavior by which the rights of any party have been prejudiced; or (iv) the arbitrator exceeded powers or executed them so imperfectly that a final and definite award was not made.

In addition, most jurisdictions have a catchall doctrine for vacating an award: manifest disregard of the law. Aside from vacatur provisions and the catchall doctrine, there is no appeal.

On a final note, avoid seeking an explanation of the decision after the award is issued. It is a poor idea to talk with the arbitrator. The award could still be subject to enforcement proceedings in court, and a party might try to impeach the award by getting the arbitrator to divulge his or her reasoning or thought processes.

Occasionally, all or part of a case is returned to the arbitrator for further consideration, and any ex-parte communications would taint the arbitrator, highly complicating reconsideration. Pursuant to the Code of Ethics for Arbitrators in Commercial Disputes, an arbitrator is required to wait a "reasonable" period following the conclusion of the case before entering into any relationship with individuals involved in the arbitration.

* * *

In conclusion, parties can enhance their chances to achieve a better arbitration outcome by taking an active and thoughtful role in the planning and preparation for arbitration from the outset. Whether drafting arbitration procedures into a pre-dispute agreement or evaluating arbitration as a possible route to dispute resolution, the considerations laid out in this article can help counsel and clients more confidently anticipate and navigate the arbitration process.

***

Next month, San Francisco neutral Zela G. Claiborne has more on preparatory arbitration measures, including ideas for limiting discovery and getting decisive arbitrators.

DOI 10.1002/alt.20245