Arbitration – Getting the Evidence, Getting it in . . . and Persuading the Arbitrator

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Arbitration has long been a recognized form of adjudicative dispute resolution. While court proceedings and arbitration share certain characteristics, there are major differences. After setting the stage with the framework for arbitration, this article will focus on three of them.

Arbitration Framework. Arbitration is governed by (1) two statutes, the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16 (for cases in which interstate commerce is involved), and state law, here the Washington Uniform Arbitration Act, RCW Chapter 7.04A;[1] (2) the parties' arbitration agreement; and (3) the rules of any arbitration-provider organization under which the arbitration is conducted. Most commercial, construction and employment disputes are arbitrated under the auspices of the American Arbitration Association, another service-provider such as JAMS, JDR or WAMS, or a private lawyer serving as arbitrator; securities disputes are generally arbitrated through FINRA Dispute Resolution (formerly NASD Dispute Resolution). Each organization has its own rules. The MARs govern arbitration of superior court cases.[2]

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[1] The 2005 Washington Legislature adopted the Revised Uniform Arbitration Act (promulgated by the National Conference of Commissioners on Uniform State Laws in 2000; available on-line, including the drafters' commentary, at www.uniformlaws.org). As of September 2014, sixteen jurisdictions have adopted the RUAA; legislation is pending in three other jurisdictions. The RUAA's section-numbering sequence was followed in the codification of the WUAA (*e.g.*, RCW 7.04A.170 comports with RUAA Section 17).

[2] This article will deal primarily with the AAA's Commercial Rules, available in hard-copy from any AAA office or on-line at www.adr.org. The AAA's *Construction* and *Employment* rules are generally consistent with the Commercial Rules and are similarly available on-line and in hard-copy. JAMS's rules are available on-line at www.jamsadr.com; JDR's rules are available on-line at www.jdrllc.com; WAMS's rules are available on-line at www.usamwa.com. FINRA's rules for securities disputes (NASD Code of Arbitration Procedure) are available on-line at www.finra.org or from FINRA Dispute Resolution (closest regional office is Los Angeles). There are two sets of FINRA rules, one for cases filed prior to April 2007, the other for cases filed after that date; be sure to use the correct set of rules. References here to "NASD Code" are to the post-April 2007 rules.

Before drafting a pre-dispute contractual arbitration clause or selecting, post-dispute, to submit a claim to arbitration, familiarize yourself with both the statutes and rules. Remember that, unlike court proceedings, where the judge is paid by the government, the arbitrator is paid by the parties, normally on a per-hour or per-diem basis. While total legal fees are normally less than in traditional court litigation, costs can mount rapidly when considering arbitrator compensation. Some commercial arbitration-provider organizations have a sliding scale of filing and case administration fees based on the amount of the parties' claims.

Discovery – Getting the Evidence

Historically, discovery in arbitration has been limited, with very little "of right" discovery. Unless the parties' arbitration clause expressly provides for (or restricts) discovery, litigants in arbitration are left with the rules of the arbitration forum, state law (the Federal Arbitration Act is largely silent on discovery), and the discretion of the arbitrator. The panoply of discovery vehicles lawyers are used to in judicial proceedings is generally not available. While the parties' arbitration clause (or submission agreement) can import state or federal discovery rules – or the parties can agree post-dispute to incorporate some or all of them – doing so transforms the case into "just another lawsuit" and will ratchet up the cost to the clients and delay resolution.

The AAA's Commercial Rules provide for very basic "of right" discovery (*see, e.g.*, Rule R-22 – production of documents and "other information") but give the arbitrator discretion to authorize broader discovery to meet the legitimate needs of the parties.[3] Also, RCW 7.04A.150(1) gives the arbitrator the authority to permit a party to use whatever discovery vehicles may be legitimately called for. The AAA's Optional Procedures for Large Complex Commercial Disputes (LCCD Rules), Rules L-1 through L-3, which expand on discovery and case-management issues (*see* Rule L-3) , automatically apply in disputes where the amount in controversy (as measured by the arbitration demand or counterclaim) is at least $1 million, exclusive of claims for interest and arbitration fees and costs (Rule L-2). Parties may also agree to incorporate Rules L-1 through L-3 in smaller value cases.

In securities cases, certain party-held documents are presumptively discoverable through a request for production (*see* NASD Code, Rule 12506 and the "Discovery

[3] Arbitrators commonly discourage interrogatories, limit the number of depositions and permit requests for admission only when it is apparent that their use will make for a more efficient hearing; they are more lenient with respect to document requests and requests for a site visit. E-discovery will be permitted but not with the same breadth as in a judicial proceeding.

Guide" for consumer cases (customer/broker disputes)). Although parties may request "information" (litigators would call them interrogatories), the rules do not contemplate the wide-ranging interrogatories common in litigation. Rule 12507(a)(1). Depositions are not available in FINRA securities arbitrations except in extraordinary cases where the arbitrators authorize them. Parties to a FINRA case are obligated to identify their witnesses and turn over their proposed hearing exhibits 20 days prior to the hearing. Rule 12514.

Wise counsel will discuss discovery needs with opposing counsel prior to the initial preliminary conference[4] with the arbitrator and raise discovery issues with the arbitrator at that conference. Arbitrators have the authority to decide discovery parameters and resolve discovery disputes[5] and to levy sanctions[6] against a party who disobeys the arbitrator's discovery orders, engages in discovery abuse, or otherwise fails to cooperate in discovery.

While arbitrators attempt to protect third parties from abusive discovery sought from them, they have the authority to issue subpoenas for documents and depositions.[7] Although Rule R-31(d) ostensibly permits any "person authorized by law to subpoena witnesses or documents," most arbitrators prefer to exercise some control over subpoenas to third parties.

Getting the Evidence into the Record

The arbitrator has broad power to "conduct the arbitration in such manner as the arbitrator considers appropriate so as to aid in the fair and expeditious disposition of the proceeding," RCW 7.04A.150, and the parties may offer such evidence as the arbitrator

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[4] Such a conference is almost always held (Rules R-21 and P-1 and P-2, AAA Commercial Rules; NASD Code of Arbitration Procedure, Rule 12500). If a conference is not scheduled, ask for one.

[5] RCW 7.04A.150 and .170; AAA Commercial Rule R-23; NASD Code of Arbitration Procedure, Rule 12509.

[6] RCW 7.04A.170(4); AAA Commercial Rules R-23 and R-47; *Superadio Limited Partnership v. Winstar Radio Productions Inc.*, 844 N.E.2d 246, at 251-254 (Mass. 2006). The same is true in securities arbitrations. NASD Code of Arbitration Procedure, Rules 12212 and 12511.

[7] RCW 7.04A.170; AAA Commercial Rule R-34(d); NASD Code of Arbitration Procedure, Rule 12512. There is currently a split in the circuits as to whether, under the FAA, arbitrators may order prehearing discovery (documents or depositions) from non-parties.

determines is relevant and material to the dispute. Rule R-34(a), AAA Commercial Rules. The arbitrator determines the admissibility, relevance and materiality of the evidence offered and may exclude evidence deemed by her to be cumulative or irrelevant. Rule R-34(b), AAA Commercial Rules; NASD Code, Rule 12604(a). Legal rules of evidence do not apply (Rule R-34(a)); arbitrators generally use legal rules of evidence as a useful guide to admissibility, but frequently depart from their strict application. Hearsay is commonly admissible in arbitration, but only to the extent the arbitrator considers it something that a reasonable and prudent business-person would rely on. Note that in FINRA arbitrations, a parties' production of documents in discovery does not create a presumption of admissibility. *See* NASD Code, Rule 12604(b).

Unlike at trial, arbitration evidence may be given by affidavit or declaration, provided that the arbitrator may order such a witness to appear (in person or by telephone) for cross-examination. Rule R-35. Under their general authority to conduct the arbitration hearing in such manner as they deem most appropriate, most arbitrators will permit witnesses to testify by telephone or video conference. When using either option, however, remember that the witness needs to have a set of all hearing exhibits that are relevant to his testimony.

Effective Advocacy – Persuading the Arbitrator

Your goal in arbitration is to convince the arbitrator(s) of the merit of your client's claim. Conduct yourself and organize your case (exhibits and witnesses) with that goal in mind. Some tips:

Know your arbitrator(s): their case- and hearing-management philosophy, their legal and/or business background, their familiarity with issues that will arise. Information is commonly anecdotal, but that does not mean it is not helpful.

Remember that your client is paying for the arbitrator's time: don't waste it, or make the arbitrator spend time divining what you're talking about.

Be civil and professional to opposing counsel and their staff, parties and witnesses – and the arbitrator. Counsel your client to do the same.

Be prepared; know your case; know and understand the rules and statutes which govern arbitration.

Don't assume the arbitrator shares your knowledge of the case. Analyze, distill and organize the evidence – and all of your written and oral statements to the arbitrator.

Put yourself in the arbitrator's shoes: give thought to what will help her understand the issues and render a complete decision – in your client's favor – and what will make efficient use of both hearing and post-hearing study time (yes, arbitrators spend a LOT of time post-hearing analyzing the import of the evidence they've received). If you were the decision-maker, what would you want to hear and see? what would help you decide the case? what would be the most efficient and productive use of the decision-maker's time?

Photos can be a good (and economical) substitute for a site visit – as long as they're clear (and dated) and unmistakably show the point a site visit would make.

File a concise and persuasive brief. Yours should be focused and cogently apply legal principles to facts. Provide the arbitrator with a copy of key authority; most arbitrators appreciate your highlighting key holdings.

Organize exhibits for convenient reference by the arbitrator. Use consecutive arabic numbers (or number sequences) for all exhibits; eliminate duplicates; put all exhibits in a single binder (or set of binders); have your own set of exhibits and another set for use by witnesses (arbitrators don't like sharing their set with you – or the witness). Consider having a separate binder of "core exhibits" – ones that will be referred to frequently.

Don't simply present exhibits and expect the arbitrator to figure out what they mean and how they tie in to your case. If a witness doesn't say something about an exhibit (what it is, why it's important), the arbitrator isn't likely to pay much attention to it.

Use technology and demonstrative aids knowledgeably and wisely.

Ask good questions of witnesses: be concise and direct; avoid leading your witnesses on direct examination. For cross-examination, before the hearing outline the key points you want to make on cross; when you have made them, stop; do not use cross to nit-pick every statement by the witness.

Don't treat the arbitrator as an unsophisticated rube; if the arbitrator tells you she "got it", she probably did. Don't belabor the point or insist on offering cumulative evidence.

Tell the arbitrator exactly what you want his or her award to say; not the legalese, just the meat: identify all components of damage you seek (principal amount for each category; if you're seeking pre-award interest, identify the interest rate and start date, with

a total through the date of hearing and a means for the arbitrator to calculate any post-hearing interest). Be careful what you ask for, you just might get it.

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