

HOW TO HANDLE DISCOVERY IN ARBITRATION

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I. Background and Challenges

The Federal Arbitration Act (“FAA”), 9 USC §§1-14 (1925) was passed in order to place an arbitration agreement “upon the same footing as other contracts, where it belongs,” H.R. Rep. No. 96, 68th Cong., 1st Sess., 1 (1924). Before that time, courts were overtly hostile to arbitration agreements. Congress acted to change this and made this finding:

It is practically appropriate that the [FAA should be passed] at this time when there is so much agitation against the costliness and delays of litigation. These matters can be largely eliminated by agreements for arbitration, if arbitration agreements are made valid and enforceable.

Id. at 2. Arbitration has been billed as the cost-effective, expeditious alternative to commercial litigation. The FAA created a broad national policy favoring arbitration when parties, choose it; “[B]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute, it only submits to their resolution in an arbitral, rather than judicial forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.” *Mitsubishi Motors Corp. vs. Soler Chrysler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

That is how it is supposed to work, but according to many “in the know”, arbitration is “broken” and will fall into disuse unless repaired.

I recently attended the annual meeting of the International Institute for Conflict Prevention and Resolution ("CPR") in New York City. Several of the speakers were general counsel for large corporations and they spoke about both domestic and international alternative dispute resolution.

Judith Miller, Senior Vice-President and General Counsel for the Bechtel Group, Inc., listed these problems which Bechtel has encountered with arbitration:

- the arbitrations drag on for years;
- the arbitrators tend to bifurcate the hearings instead of hearing all issues on consecutive days, thus leading to increased cost and delay;
- the arbitrators tend to work short work weeks;
- the arbitrators prolong the hearing by letting all evidence, relevant and irrelevant and/or cumulative into evidence;
- there is too much "American style" discovery, ie "turning over every rock on the beach."
- sometimes arbitrators have a good knowledge of business but do not decide the cases on the basis of law.
- arbitrators tend to "split the baby."

Clyde Lea, Deputy General Counsel-Litigation and Environment, Conoco Phillips, was also on the panel. He said that the business objectives of dispute resolution are:

- a fair and acceptable outcome;
- limiting the cost of the dispute resolution process;
- timely resolution of disputes;
- minimal "collateral damage" to business relationships;
- obtaining an enforceable award.

Mr. Lea stated that arbitration "has a bad reputation in the corporate world" for meeting these objectives. It has become too expensive and too time

consuming, he said. It has become just another form of litigation. He pointed out that a general counsel must maintain his or her credibility with the company for which they work and can do so only by recommending alternative dispute resolution procedures that meet the business objectives outline above. Arbitration is not meeting those objective in many instances, he said.

The panel suggested these ways in which arbitration can be improved:

- the arbitrator must be committed to moving the proceedings along;
- arbitrators should be worried less about having their awards being vacated and more about efficiency of the process;
- arbitrators should use pre-hearing conferences to set up limited and expedited discovery plans;
- arbitrators should suggest that clients or representatives of clients attend the pre-hearing conferences so as to avoid situations in which outside counsel are not concerned about moving the case along;
- arbitrators should set definite time limits for closing discovery; and
- there should be careful drafting of arbitration clauses in contracts.

Emblematic of this problem with arbitration as many practice it today is the fact that the latest edition of the American Institute of Architects construction forms eliminates the default binding arbitration provision. The AIA contract, as you probably know, is the most widely used template for building contracts in this country. And so now, parties to an AIA construction contract must henceforth elect to go to arbitration or go to court. AIA DOCUMENT A201-207, GENERAL CONDITIONS OF THE CONTRACT FOR CONSTRUCTION, art. 15

(2007); AIA DOCUMENT B101-2007, STANDARD FORM OF AGREEMENT BETWEEN OWNER AND ARCHITECT, art. 8 (2007).

As arbitration has become just another form of litigation in many instances, mediation has grown in popularity. Mediation is less costly, is speedier and allows the party to remain in control of the outcome. There has been an 84% decrease in the percentage of federal cases resolved by trial between 1962 and 2002 and a parallel decline in state courts. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 461 (2004).

Undoubtedly, mediation and increased cost have contributed to the decline in the numbers of trials and arbitrations. Another factor adding to the decline of arbitration in popularity is the bad publicity surrounding pre-dispute adhesion contracts in areas like employment law, nursing home admission agreements and consumer transactions. It is beyond the scope of this paper to discuss the enforceability of such contracts, but they are noted because they have given arbitration a "bad name" in certain circles.

Arbitrators are likely to bristle when they are blamed for not controlling cost and delay in arbitration. Most arbitrators will lay most of the blame on client's failure to rein in outside counsel, and the obfuscation and delay tactics of outside lawyers. Kathy A. Bryan and Helena Tavares Erickson, *Business Arbitration Can and Should be Improved in the United States*, DISPUTE RESOLUTION MAGAZINE, 20 (Spring and Summer 2008). Not to be left out, law

firms blame their clients for wanting the law firms to prolong the process and wear out the opponent. They also blame the arbitrators for not making the tough decisions which would control the other side. Id.

Those of us in the legal profession know that it is axiomatic that settlement will very rarely be reached unless there is the ultimate threat that a decision will be imposed on the parties by strangers, ie a judge, a jury or an arbitrator. Someone aptly called it “bargaining in the shadow of the law.” And so for better or for worse, the threat of litigation or binding arbitration must be there for many disputes to get resolved.

And so, how do we get back to basics with arbitration? That is, how do we restore its relatively low cost, simplicity, informality and expedition? See, Mitsubishi Motor Corp., 473 U.S. at 628.

I suggest there are at least four ways:

1. Restoring confidence in arbitration by prevention of overreaching pre-dispute arbitration clause;
2. Enhanced training for arbitrators;
3. Better arbitration clauses;
4. Controlling discovery in litigation; and
5. Controlling the admission of evidence at arbitration hearing.

The first three ways are beyond the scope of this paper.

II. Discovery in the Arbitration Context:

Discovery accounts for the bulk of litigation costs. According to a 1999 survey, discovery alone accounts for 50% of litigation costs in the average case and 90% in active discovery cases. *Judicial Conference Adopts Rules Chances, Confronts Projected Budget Shortfalls*, THE THIRD BRANCH (Admin. Office, U.S. Courts), October 1, 1999. Now with electronic discovery in the mix, the costs of discovery can go nowhere but up.

American lawyers use the tools with which they are familiar, ie heavy emphasis on motion practice, intensive discovery reinforced by ethics rules requiring zealous advocacy and, somewhere in the back of our minds, concern about malpracticing.

But, efforts are being made to promulgate rules which can be incorporated into arbitration agreements which will reduce the high cost of "American style discovery" as our colleagues overseas call it. For example, CPR has published "Expedited Arbitration of Construction Disputes". (available at www.cpradr.org, select "Rules and Procedures"). Discovery is limited to a 60-day window and the entire arbitration is to take place within 100 days from commencement.

Concurrent with the service of the Notice of Arbitration (which commences the arbitration), the Claimant must serve a Statement of Claim or Respondent, consisting of

- a. A detailed statement of Claimant's claim including all facts to be proved;

- b. The legal authorities relied upon by Claimant;
- c. Copies of all documents that the Claimant intends to rely upon in the arbitration;
- d. The names of the expert witnesses Claimant intends to present together with curricula vitae and a summary of the opinion testimony to be offered;
- e. The names of the percipient witnesses Claimant intends to present together with a summary of the proposed testimony of each.

The Respondent must serve its Response within twenty (20) days of service on it of the Demand of Arbitration and Statement of claim unless the arbitrator allows more time based on good cause shown. The response must respond "in form and substance to all elements of the Statement of claim." The exchange of information in the statement of claim and the Response is designed to reduce the amount of additional discovery which may be allowed.

Discovery under this CPR expedited procedure is handled as follows:

Rule 11: Discovery

11.1 At the request of any party, the Tribunal shall order the exchange of relevant and material documents not included with the Statement of Claim, Statement of Defense, Counterclaim or Reply.

11.2 The Tribunal may require and facilitate such other discovery as it determines is appropriate in the circumstances, taking into account the needs of the parties and the desirability of making discovery expeditious and cost-effective. However, the Tribunal will not ordinarily permit more than a few days of deposition discovery, including one-day depositions of experts, and any deposition permitted shall be brief. Electronic discovery will not

ordinarily be permitted except, in the discretion of the Tribunal, to the extent of narrow, focused requests that are justified in terms of importance and materiality and possible to conduct within the time frames established by these Rules.

The American Arbitration Associations Commercial Dispute Rules (available at www.adr.org) do not have a "discovery" provision; rather it is termed "Exchange of Information."

R-21. Exchange of Information.

- (a) At the request of any party or at the discretion of the arbitrator, consistent with the expedited nature of arbitration, the arbitrator may direct
 - i) the production of documents and other information, and
 - ii) the identification of any witnesses to be called.
- (b) At least five business days prior to the hearing, the parties shall exchange copies of all exhibits they intend to submit at the hearing.
- (c) The arbitrator is authorized to resolve any disputes concerning the exchange of information.

JAMS Streamlined Arbitration Rules and Procedure (available at www.jamsadr.com) likewise call for "Exchange of Information."

Rule 13. Exchange of Information

- (a) The Parties shall cooperate in good faith in the voluntary and informal exchange of all non-privileged documents and information relevant to the dispute or claim, including copies of all documents in their possession or control on which they rely in support of their positions or which they intend to introduce as exhibits at the Arbitration Hearing, the names of all individuals with knowledge about the dispute or claim and the names of all experts who may be called upon to testify or whose report may be introduced at the Arbitration Hearing. The Parties and the

Arbitrator will make every effort to conclude the document and information exchange process within fourteen (14) calendar days after all pleadings or notices of claims have been received. The necessity of additional information exchange shall be determined by the Arbitrator based upon the reasonable need for the requested information, the availability of other discovery options and the burdensomeness of the request on the opposing Parties and the witness.

Note the wide discretion afforded the arbitrator to control the scope of discovery and the emphasis on the policy of expediting the arbitration process. But, in order to effectuate this policy, self-discipline and common sense must be exercised by the arbitrator(s), inside and outside counsel representing the parties, and the parties themselves.

Another method of controlling discovery is being used more and more in both international and domestic arbitrations. This method provides that written statements of each witness are exchanged in advance of the hearing. The statement must contain the entire direct testimony of the witness, to be supplemented only by a brief direct examination of the witness at the hearing which does not go beyond the scope of the written statement. The witness must appear at the hearing and cross examination and redirect examination then proceed.

This procedure has these advantages:

- The statement eliminate surprise;
- They narrow the issues and permit more focused examination of the witnesses;
- They can eliminate the oral testimony of uncontroversial witnesses who do not need to be cross-examined;
- They provide "discovery" because the arbitrator(s) and parties become aware of the material facts before the hearing; and
- This "discovery" may promote settlement.

Finally, it can be seen that the necessary "tools" are present in arbitration procedures to make it less formal, more cost-effective and expeditious than litigation. The key is for the arbitrator(s), inside and outside counsel and the client to shape the arbitration process so as to satisfy this policy beginning at the initial conference and following through until the award is entered and the dispute is resolved.