Presenting Complex Cases In Arbitration

The American Arbitration Association ("AAA") and its International Centre for Dispute Resolution ("ICDR") recently created an aerospace, aviation and national security panel of arbitrators to handle complex, high-value aerospace, aviation, defense, cyber and security-related disputes. Similarly, AAA has a special panel of arbitrators to handle technology-related disputes. But what should companies involved in these types of arbitration cases expect? Here are some tips for presenting complex cases in arbitration from the perspective of a trial lawyer and an arbitrator.

1. Select the right arbitrator(s).

Arbitration provides counsel and parties with the ability to select an arbitrator or panel of arbitrators with a background in the subject matter of the dispute. Selecting an arbitrator with background in aerospace, aviation and/or national security enables counsel to present their cases to fact finders who have an understanding of the scientific, engineering and legal issues, and have familiarity with the language that will be involved in the matter. That makes for a more efficient and less costly process. The AAA and ICDR have lists of specially qualified arbitrators. Both organizations have the website facility to allow counsel to search for keywords in the entire database of arbitrators to find the one or ones best suited. Counsel can also interview the potential arbitrators to inquire as to their backgrounds, experience and proclivities as to case management.

2. Don't expect extensive court-like pretrial discovery.

Prehearing discovery in arbitrations is very limited. Under both the AAA Commercial Arbitration Rules and the ICDR International Dispute Resolution Procedures, parties are required to produce the documents they will use to support their claims and defenses at the hearing. Under the AAA rules, parties may also request an opposing party to produce documents and electronic records that are relevant and material to the dispute, not readily available to the requesting party, and not unduly costly or burdensome for the responding party to produce. Under the ICDR rules, a party has to first obtain the arbitrator's permission to seek such discovery and must explain the relevance and materiality of the requested documents to the outcome of the case before being granted permission to request such discovery.

Arbitrators are trained by the AAA, ICDR and CPR to work with the parties to help them save costs and promote efficiency in the process by agreeing upon limited and necessary discovery. Consequently, if you are subject to the AAA or CPR rules, you may also expect to discuss with the arbitrator the exchange of witness lists, the subject matter of their anticipated testimonies, written witness statements, expert reports, written expert witness statements, and whether the statements will replace direct testimony at the hearing. If you are subject to the ICDR rules, you may only expect to discuss witness lists, the subjects of the witnesses' testimony, and whether witnesses and experts will testify by written statements or at the hearing in person or by other means, such as telephonic or video conferencing.

Parties should not expect to obtain discovery by interrogatories, requests for admission, or depositions (absent agreement by the parties, and then only a limited number with a showing of actual need). The AAA rules for large, complex commercial disputes provide for the taking of

depositions over a party's objection, but that is only allowed in exceptional cases, upon a showing of good cause, and at the discretion of the arbitrator. Interrogatories are not provided for in the rules and are not likely to be allowed unless they ask for very specific information that is not available in the documents produced by an opposing party, e.g., the identity and last known contact information for a particular witness. Requests for admission are not provided for in the rules and are generally not allowed.

3. Prehearing motions may be permitted, but only if they are likely to be granted and narrow the issues of the case.

Prehearing motion practice is even more limited than prehearing discovery. Under the AAA Commercial Arbitration Rules, an arbitrator may allow the filing and make rulings on dispositive motions only if the arbitrator determines that the moving party shows that the motion is likely to succeed and dispose of or narrow the issues in the case. The ICDR rules have no similar rule, but the practice is similar. Arbitrators will only allow parties to file pretrial motions that are laser-focused and can dispose of a claim or defense based on the parties' contract or governing law, e.g., one of the respondents is not a party to the arbitration agreement and the arbitrator has no jurisdiction; relief is sought for a business transaction under a limited consumer protection statute, and some or all of the relief or damages sought are barred by the contract. Where fewer than all the claims are the subject of the proposed motion, and the arbitrator(s) determine that having the issue briefed for a motion would be the same effort as having it briefed for the hearing, it is unlikely that the motion would be entertained.

4. Keep your briefs short and directed to the point.

As with your oral presentations and questioning, keep your briefs short and directed to the evidence and the law. Avoid filing your briefs with lengthy prose or creative adjectives and adverbs. This is not an English literature paper. There are no style points. The arbitrators work very hard to "get it right" and only want helpful information in the briefs. They do not want invectives against the other parties or opposing counsel. They will simply skip over lengthy repetitive arguments that add nothing and do not help them in their decisional process.

5. Don't expect the arbitrator to apply the rules of evidence strictly.

The AAA rules expressly state that "[c]onformity with the rules of evidence shall not be necessary." The ICDR rules provide for even less formality than the AAA rules. This is where experienced counsel and trained arbitrators may make a difference. For example, an objection to witness testimony on the grounds of hearsay may not carry much weight. However, experienced counsel may be able to give the "wrong witness" speech to show how the admission of such testimony is unfair and prejudicial. That is, "The witness's testimony is hearsay. I cannot cross-examine the right witness, the absent declarant, on the truthfulness of the out-of-court or out-of-hearing statements. If the opposing party thought the absent declarant's testimony was so important, it could have provided for the declarant to testify by alternative means."

The most frequent variance from the rules of evidence is the admission of writings without formal authentication. Knowing that government contracting officers and other representatives will not

testify, a party should document all of its correspondence with such persons in order to try to have such information admitted into evidence. Likewise, parties opposing such self-serving statements might consider responding to such correspondence when they have the opportunity to do so. In addition, often expert and fact witnesses are allowed to present their direct testimony by written sworn witness statements with the witness only appearing for cross-examination and possibly redirect.

6. Remember, the rules cut both ways.

The flipside of the last four tips is that the arbitration rules cut both ways. You will have to give in order to take. You can quickly shoot down an opposing party's interrogatories, requests for admissions, and deposition notices by pointing out that such discovery is not allowed under the applicable rules. If, however, you would like to agree to limited or even broad discovery, the arbitrator will likely accommodate your request. For example, both parties might agree to no more than five depositions of fact witnesses and for the exchange of expert reports. Rebuttal reports are rarely permitted. Often if expert reports are exchanged, expert depositions are not permitted.

7. Keep your presentation simple, straightforward and professional, keeping in mind the background of the arbitrator(s).

Your goal should be to present a simple and straightforward case-in-chief, keeping in mind that the carefully selected arbitrator is a sophisticated lawyer with, at least, a basic understanding of the underlying subject matter and law. That is, you will need to present the rules and context of the parties' agreement, how did the opposing party violate the parties' agreement, and what damages, if any, result from the breach. The strength of your best claim or defense becomes diluted with the more alternative theories and arguments you present. If your claim or defense depends on a hyper-technical argument, be prepared to have your client and possibly an expert explain in simple and straightforward language why the hyper-technicality is fair or justifies the results you seek.

With an experienced arbitrator with an appropriate background, don't dumb down your presentation. You may well not need to and often should not make the same type of presentation that you would make to a judge without subject matter background or a jury. You should also avoid jury theatrics. It is both irritating and insulting to a sophisticated arbitrator.

In addition, the trial lawyer should treat the opposing party's representatives and witnesses professionally. The parties often have an ongoing contractual relationship or may team up together on another project down the road. Cross-examination is not the time to be cross or to unnecessarily humiliate or embarrass an opposing party or its witnesses. This is especially true if the parties are still interacting on a day-to-day basis.

8. Consider using creative means to present your evidence.

Arbitration allows flexibility in presenting evidence. For example, experts could be presented through "hot-tubbing." In that procedure the experts from both sides are in the room together and when each presents his or her testimony, they can be asked questions by the opposing expert,

counsel and the arbitrators. The process is more akin to a seminar on the subject matter, which can be particularly valuable and efficient in engineering and other technical scientific disputes.9. Make sure that the arbitrator(s) know exactly what issues they are to resolve and what relief is requested.

While it is helpful to clearly state the issues to be decided and relief requested early on, it is imperative that, before the hearing is closed, the arbitrators and counsel agree on exactly what issues are to be decided and what specific relief is being requested. The final award will state the rulings on these issues and will also state that it resolves all outstanding submitted issues. Make sure that you get the issues decided that you want decided and do not get any surprises as to issues that you did not think were in the case.

10. From a strategic standpoint, consider filing for arbitration sooner rather than later.

Parties should consider arbitration as a means to quickly resolve disputes and keep a project on track, acting sooner rather than later. We often see parties file for arbitration near the end of a contract. In those cases, the dispute that gave rise to the arbitration may have been festering for years. Imagine if one of the parties had filed for arbitration soon after the dispute arose. They could have presented their case and obtained a ruling that could have fostered a professional relationship for years to come rather than the harboring of ill will that often accompanies disputes. It should also be noted that the AAA commercial rules provide for the appointment of a mediator to assist the parties in settling their dispute without the need for incurring the expense of arbitration, unless one or both parties object.

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