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ARBITRATION

This is Part Three of a four-part series by Williams & Connolly's Nick Boyle and Richard Olderman on how arbitration clauses, if properly drafted, may save companies huge amounts of time and money if disputes were to arise (137 CARE, 7/18/16; 138 CARE, 7/19/16).

Securing the Benefits of Arbitration: Thoughtful Drafting of Arbitration Clauses

By Nicholas J. Boyle and Richard A. Olderman

Nicholas Boyle is a partner with Williams & Connolly in Washington, D.C., where he co-chairs the firm's Unfair Competition and Trade Secrets practice group. His experience spans federal and state courts around the U.S.; various arbitral fora—including AAA/ICDR, FINRA, JAMS—and ad hoc arbitrations; and, acting as coordinating counsel, courts around the world.

Richard Olderman is counsel with Williams & Connolly in Washington, D.C. He has previously served as an attorney at the Federal Trade Commission and the U.S. Justice Department where he represented the U.S. on issues ranging from the constitutionality of various acts of Congress to regulatory challenges to government programs, and represented all the Executive Branch agencies and departments before the federal courts of appeals.

PART THREE

Limiting motion practice and discovery in commercial arbitrations, which is discussed in this installment of the four-part series on the importance of drafting a thoughtful arbitration clause, will yield cost and time-saving benefits for the parties.

7. Limits on Motion Practice.

AAA advises the parties to limit arbitration motion practice, instructing that ''motions must be scrutinized, as they are time-consuming and may not have any practical significance.'' *See* AAA, David L. Evans and India Johnson, *The Top 10 Ways To Make Arbitration Faster and More Cost Effective*, at 5, https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_025844 (last visited June 2, 2016).

a. Dispositive Motions.

Arbitration rules typically contain provisions requiring parties to specify in detail their claims and defenses. *See, e.g.*, AAA Rules, R-4(e) & R-5(a). Not infrequently, the arbitration demand contains more detail than would be set forth in a comparable litigation pleading, prompting the respondent to follow suit with a lengthy answer to the demand. To the extent the pleadings mimic motions to dismiss in litigation, they are virtually guaranteed to fail. Indeed, some—but not all—arbitral rules expressly and strictly limit the bases upon which a motion to dismiss may be brought. For example, under the FINRA Rules, motions to dismiss are ''discouraged'' and will be granted only if the claims at issue were released in writing or in a case of mistaken identity—where the movant was not in fact ''associated with the account(s), security(ies), or conduct at issue.'' FINRA Rule 13504. An unsuccessful motion can lead to a fee penalty or more drastic sanctions. *Id.*

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The same concerns are relevant to motions for summary disposition. Such motions, commonly based on lengthy briefs and recitals of facts are, after much time, labor and expense, almost always denied on the grounds that they demonstrate disputed issues of fact and are inconsistent with the spirit of arbitration. Nonetheless, motions for summary disposition ''can sometimes enhance the efficiency of the arbitration process if directed to discrete legal issues, such as statute of limitations or defenses based on clear contractual provisions.'' JAMS, *supra*, at 8. AAA Rule 33 expressly authorizes the arbitrator to hear and decide dispositive motions ''if the arbitrator determines that the moving party has shown that the motion is likely to succeed and dispose of or narrow the issues in the case.'' AAA Rules, R-33. JAMS Rule 18 gives the arbitrator authority to permit any party to file a Motion for Summary Disposition of a particular claim or issue. (Neither the FAA nor the UAA expressly provide for dispositive motions, but courts have found that arbitrators have authority to grant such motions even when the arbitral rules do not expressly provide for them. *See Sherrock Bros., Inc. v. DaimlerChrysler Motors Co.*, 260 F. App'x 497, 502 (3d Cir. 2008)).

To ensure that such motions address legal issues that could, if decided favorably to the moving party, shorten or end the arbitration, JAMS recommends the following provision:

> In any arbitration arising out of or related to this Agreement:
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> 1. Any party wishing to make a dispositive motion shall first submit a brief letter (not exceeding five pages) explaining why the motion has merit and why it would speed the proceeding and make it more cost-effective. The other side shall have a brief period within which to respond.
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> 2. Based on the letters, the arbitrator will decide whether to proceed with more comprehensive briefing and argument on the proposed motion.
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> 3. If the arbitrator decides to go forward with the motion, he/she will place page limits on the briefs and set an accelerated schedule for the disposition of the motion.
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> 4. Under ordinary circumstances, the pendency of such a motion will not serve to stay any aspect of the arbitration or adjourn any pending deadlines.

JAMS, *supra*, at 8 (italics omitted).

b. Motions *in Limine*.

A motion *in limine* is a request for the arbitrators to rule on the admissibility of evidence in advance of the hearing. As a practical matter, arbitrators are often reluctant to exclude evidence for fear of creating grounds for having an award set aside or vacated; such motions, therefore, are relatively rare. Nonetheless, if the parties have agreed that some rules of evidence will apply in the arbitration, a carefully drafted arbitration clause might provide that pre-trial discovery motions, including motions to compel as well as motions *in limine*, should be subject to page limits; put on an accelerated timetable; and limited in number (*e.g.*, one discovery motion/motion to compel on an accelerated timetable within the discovery period, and a deadline and page limit for motions *in limine*).

8. Limits on Discovery.

The reality of arbitration, observed by the arbitration bodies themselves, is that ''[a]rbitration hearings are now often preceded by extensive discovery, including requests for voluminous document production and depositions. Since discovery has traditionally accounted for the bulk of litigation-related costs, the importation of discovery into arbitration (which traditionally operated with little or no discovery) is particularly noteworthy.'' CCA, *supra*, at 6 (footnote omitted).

This phenomenon is at least in part due to the fact that arbitration clauses regulating discovery or hearing procedures appear in less than 5 percent of contractual arbitration provisions. *See* W. Mark C. Weidemaier, *Customized Procedure in Theory and Reality*, 72 Wash. & Lee L. Rev. 1865, 1941 n.390 (2015). While arbitrators have considerable discretion under the governing rules with respect to discovery, they often are hesitant to impose significant restraints for fear of creating due process arguments for vacating an award. That makes it all the more important for the parties to agree to discovery limits in advance. Moreover, arbitrator fees are perhaps the second most expensive factor in the arbitration process, and are linked directly to an increase in discovery and longer hearings. Parties can reduce these costs by limits on discovery and hearings (as well as by pre-arbitration mediation before an independent mediator).

a. Document Production.

The AAA's guide to dispute resolution cautions that the parties ''should be mindful of what scope of document production they desire. . . . If the parties address discovery in the clause, they might include time limitations as to when all discovery should be completed and might specify that the arbitrator shall resolve outstanding discovery issues.'' AAA, *supra*, at 26 (alterations in original).

The AAA suggests the following clause:

> Consistent with the expedited nature of arbitration, each party will, upon the written request of the other party, promptly provide the other with copies of documents [relevant to the issues raised by any claim or counterclaim] [on which the producing party may rely in support of or in opposition to any claim or defense]. Any dispute regarding discovery, or the relevance or scope thereof, shall be determined by the [arbitrator(s)] [chair of the arbitration panel], which determination shall be conclusive. All discovery shall be completed within [45] [60] days following the appointment of the arbitrator(s).

Id. Alternatively, the *CPR Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration* presents various ''modes'' of disclosure. These modes range from minimal to extensive disclosure, ''so that the parties to an agreement to arbitrate may choose, at the time of entering into their agreement or thereafter, the general way in which their arbitration proceedings will be conducted in the important areas of document disclosure and witness presentation.'' Document production has the following four modes:

> **Mode A**. No disclosure of documents other than the disclosure, prior to the hearing, of documents that each side will present in support of its case.
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> **Mode B**. Disclosure provided for under Mode A together with pre-hearing disclosure of documents essential to a matter of import in the proceeding for which a party has demonstrated a substantial need.

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> **Mode C**. Disclosure provided for under Mode B together with disclosure, prior to the hearing, of documents relating to issues in the case that are in the possession of persons who are noticed as witnesses by the party requested to provide disclosure.
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> **Mode D**. Pre-hearing disclosure of documents regarding non-privileged matters that are relevant to any party's claim or defense, subject to limitations of reasonableness, duplication and undue burden.

International Institute for Conflict Prevention & Resolution, *CPR Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration* at 3 (2009). If the parties agree to one of these modes, then ''the tribunal shall issue orders for disclosure of documents pursuant to a time schedule and other reasonable conditions that are consistent with the parties' agreement. Any mode of disclosure so chosen by the parties shall be binding upon the parties and the tribunal and shall govern the proceedings, unless all parties thereafter agree on a different form of disclosure.'' *Id.* at 6.

To adopt one of these modes, CPR suggests the following arbitration clause:

> The parties agree that disclosure of documents shall be implemented by the tribunal consistently with Mode [ ] in Schedule 1 to the CPR Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration.

Id.

b. Depositions.

The AAA Commercial Arbitration Rules do not mention depositions, but simply allow the arbitrator to ''manage any necessary exchange of information among the parties with a view to achieving an efficient and economical resolution of the dispute.'' AAA Rules, R-22. Parties are free to tailor the discovery program in their arbitration clause. The AAA suggests limiting the number and duration of depositions, as follows:

> At the request of a party, the arbitrator(s) shall have the discretion to order examination by deposition of witnesses to the extent the arbitrator deems such additional discovery relevant and appropriate. Depositions shall be limited to a maximum of [three] [insert number] per party and shall be held within 30 days of the making of a request. Additional depositions may be scheduled only with the permission of the [arbitrator(s)] [chair of the arbitration panel], and for good cause shown. Each deposition shall be limited to a maximum of [three hours] [six hours] [one day's] duration. All objections are reserved for the arbitration hearing except for objections based on privilege and proprietary or confidential information.

AAA, *supra*, at 28-29 (emphasis omitted).

JAMS suggests this clause:

> In any arbitration arising out of or relating to this Agreement, each side may take three (3) discovery depositions. Each side's depositions are to consume no more than fifteen (15) hours. There are to be no speaking objections at the depositions, except to preserve privilege. The total period for the taking of depositions shall not exceed six (6) weeks.

JAMS, *supra*, at 8. Under JAMS Rule 17(b), each party is permitted one deposition of an opposing party or of one individual under the opposing party's control. The arbitrator may authorize additional depositions based on reasonable need, the availability of other discovery options and the burdensomeness of the request on the opposing party and the witness. JAMS recognizes, however, ''that the size and complexity of commercial arbitrations have now grown to a point where more than a single deposition can serve a useful purpose in certain instances. Depositions in a complex arbitration, for example, can significantly shorten the cross-examination of key witnesses and shorten the hearing on the merits.'' *See JAMS Recommended Arbitration Discovery Protocols for Domestic, Commercial Cases* at 5-6 (eff. Jan. 6, 2010).

Alternatively, the arbitration clause can state simply that no depositions will be permitted in any circumstances, or that they will not be permitted without good cause shown (for example, in the case of a witness's ill health or inability to travel to the location of the arbitration) and subject to time limits. (There usually are no expert depositions in arbitration, but if permitted, consider whether they should also be strictly limited as to time).

The CPR Protocol on Disclosure gives several alternative ''modes'' of presenting witness testimony, and substitutes sworn witness statements for direct testimony:

> **Mode A**. Submission in advance of the hearing of a written statement from each witness on whose testimony a party relies, sufficient to serve as that witness's entire evidence, supplemented, at the option of the party presenting the witness, by short oral testimony by the witness before being cross-examined on matters not outside the written statement. No depositions of witnesses who have submitted statements.
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> **Mode B**. No witness statements. Direct testimony presented orally at the hearing. No depositions of witnesses.
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> **Mode C**. As in Mode B, except depositions as allowed by the tribunal or as agreed by the parties, but in either event subject to such limitations as the tribunal may deem appropriate.

CPR, *supra*, at 17.

c. Electronically Stored Information.

The more agreement between the parties on ESI issues the better: a 2012 study found that the average costs of collecting, reviewing and then producing ESI was $18,000 per gigabyte. Nicholas M. Pace & Laura Zakaras, Rand Institute for Civil Justice, W*here the Money Goes: Understanding Litigant Expenditures for Producing Electronic Discovery,* 20 (2012). The CPR Protocol on Disclosure presents four ''modes'' regarding pre-hearing disclosure of electronic documents. These range from Mode A (''Disclosure by each party limited to copies of electronic information to be presented in support of that party's case, in print-out or another reasonably usable form''), to Mode D (''Disclosure of electronic information regarding non-privileged matters that are relevant to any party's claim or defense, subject to limitations of reasonableness, duplicativeness and undue burden.''). CPR, *supra*, at 11.

A clause dealing with e-discovery proposed by JAMS is as follows:

> In any arbitration arising out of or related to this Agreement:
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> 1. There shall be production of electronic documents only from sources used in the ordinary course of business. Absent a showing of compelling need, no such documents are required to be produced from backup servers, tapes or other media.

2. Absent a showing of compelling need, the production of electronic documents shall normally be made on the basis of generally available technology in a searchable format which is usable by the party receiving the e-documents and convenient and economical for the producing party. Absent a showing of compelling need, the parties need not produce metadata, with the exception of header fields for email correspondence.

3. The description of custodians from whom electronic documents may be collected shall be narrowly tailored to include only those individuals whose electronic documents may reasonably be expected to contain evidence that is material to the dispute.

4. Where the costs and burdens of e-discovery are disproportionate to the nature of the dispute or to the amount in controversy, or to the relevance of the materials requested, the arbitrator will either deny such requests or order disclosure on condition that the requesting party advance the reasonable cost of production to the other side, subject to the allocation of costs in the final award.

JAMS, *supra*, at 7. In practice, many of these issues may never be reached, for example when the parties have agreed that document discovery in general is to be subject to strict limitations, such as a 45-day or 60-day deadline. That said, expressly addressing electronic discovery, painful as that may be in advance, can pay huge monetary dividends later.

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