Discussion Points on Best Practices of Counsel in Representing Clients in Arbitration

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- **The arbitration difference**: It is important to appreciate the extent to which arbitration is different from litigation. It can be quite instructive reading through the "soft law," the numerous available "Best Practices" reports and protocols of bar and other professional groups, arbitration providers, and the like, when embarking on representing clients in arbitration.
- **Arbitration clauses**: Obviously, it can greatly streamline the administration of a case when the parties' arbitration clause is specific as to the various usual bones of contention in a case, such as discovery, motion practice, schedule and the like.
- **Selection of effective arbitrators**: It is important to select arbitrators who not only have subject matter expertise, management ability, and computer know-how (if e-discovery will be a significant issue), but who also have the ability to work effectively with the other panel members. Care should be given to the make-up of the panel qua panel.
- **Credibility with the arbitrators**: The most fundamental requirement for effective representation in an arbitration is credibility with the arbitrators. Cases that go to hearing are often characterized by hotly contested factual, contractual, and legal issues. Sometimes arbitrators have to really struggle to figure out who is right. Arbitrators expect counsel to represent their clients vigorously, but are also more likely to be persuaded by counsel whose representations as to the facts and law seem to be reliable. Acknowledging and addressing the issues in the case tend to work better and are certainly more helpful to the arbitrators than the two ships passing in the night scenario. Nor is extreme argumentativeness, essentially treating the arbitrators as if they were a jury, helpful.
- **Compliance or waiver of express requirements of arbitration clauses**: The requirements of arbitration clauses as to step clauses, timing and the like have binding effect, making it important that both sides comply with or expressly waive them.
- **Detailed pleadings, with the main supporting documents attached**: Detailed pleadings setting forth the factual and legal bases of a party's claims or defenses, along with supporting documents, can be quite helpful in educating arbitrators early on as to a party's view of the world, although there will be situations where one would prefer, or need to take, a more bare-bones approach, at least initially.
- **Pleadings that tell a clear and consistent story**: Pleadings that present a clear and consistent story are often more effective with arbitrators than pleadings that set forth multiple positions in the alternative or the like, although, of course, there will be cases when the latter is necessary or will otherwise make sense. The same applies to counsels' arguments generally in an arbitration.

- **Applications for interim relief**: Counsel generally have the option of making such applications before an arbitrator or a judge. The standards may be more open-ended and discretionary before an arbitrator, but an arbitrator does not have enforcement power, so it will generally make sense to proceed in court when time is of the essence, one really needs the relief, and it is uncertain that the other side would comply with an order by the arbitrator. Interim applications, particularly when made to the arbitrator(s), can serve as a way to get a case jump-started – and sometimes to lay a basis for settlement discussions, if that is what one wants in the particular case.
- **Focusing on the overall design of one's arbitration**: There are many considerations that go into the design of any particular arbitration. Different parties, counsel, and arbitrators will inevitably have different views of such matters in any particular case, including with respect to discovery, particularly e-discovery and depositions, if any, motion practice, schedule and the like. It well behooves arbitration counsel to focus on this aspect of the case early on and be prepared to advocate for the type of design of the case that they believe appropriate in the circumstances. Salient issues in this regard include the following:
  - **The preliminary hearing/organizational meeting/scheduling conference/management conference**: This first meeting, usually telephonic, between counsel and the arbitrators, can be a pivotal moment in the case for formulating the design – the very architecture – of the case. Counsel are well advised to put a lot of time into preparing for this conference as comprehensively as possible, given the uncertainties as to what matters may come up in it.
  - **Conferring with one's adversary in advance of the preliminary hearing to work out a schedule and protocol for the case**: It is a real judgment call whether to confer with one's adversary in advance. Relevant considerations include whether one thinks one will do better with one's adversary or with the arbitrators in terms of getting the design of the arbitration that one wants. This deserves a lot of thought and planning.
  - **The possibility of having the preliminary hearing in person with clients present:** While preliminary hearings are typically conducted telephonically, there can be real advantages, in cases that justify the expense, to holding them in person. An in-person session can provide a real opportunity for the parties, counsel, and the arbitrators to size one another up and begin to develop a working relationship. Having clients present can help with keeping the scope of discovery and the like under control, but can also lead to unhelpful showboating.
  - **The scope of the preliminary hearing**: Parties, counsel and arbitrators have different views as to the appropriate scope of a preliminary hearing, both in general and with respect to individual cases. On the one hand, many now believe that a very robust preliminary hearing extending over several hours or more and essentially covering, at least broadly, all the things that one can imagine may come up in the arbitration, makes sense. Others prefer the older practice of having the preliminary hearing serve essentially as a scheduling conference, generally taking an hour or less, leaving more detailed subjects for later discussion as they come up. It well behooves counsel to think in advance about what kind of preliminary hearing they would like in the particular case and to be able to advocate for that level of process.

- **Standards as to discovery**: Whether counsel in a particular case want expansive or narrow discovery, it can be quite helpful to frame one's arguments in either direction based on the wide array of "soft law" that is out there, in terms of reports and studies by bar associations and other professional organizations and the like. It is also important to be able to frame one's arguments based upon the standards expressed or implicit in the applicable provider rules, although they tend to be of a general nature.
- **Reliance documents**: The production by the parties of reliance documents early on can often serve, at least to some extent, as a substitute for a more expansive document production approach, particularly in international cases, but also in domestic ones. Building in an approach for the early exchange of reliance documents can be efficient in some cases.
- **E-discovery**: It is broadly recognized that many arbitrations will succeed or fail in terms of efficiency and economy based on whether e-discovery is conducted in an efficient and proportionate way. Everyone has stories as to cases where e-discovery has gotten out of hand. It accordingly becomes important for counsel to be conversant with their clients' electronic systems and the underlying technical issues involved in e-discovery or to have a technical expert ready and available for discussions with the arbitrators concerning such matters and the overall administration of e-discovery. Whether one wants expansive or narrow e-discovery, the issue must be addressed, and the earlier the better. There are also emerging technologies that offer efficiencies in this regard, with which one should be aware, whether personally or through a technical expert.
- **Depositions**: Obviously attitudes towards depositions in arbitration differ and depositions are particularly disfavored in international arbitration. Whether counsel in any particular case want several or many depositions or to avoid them entirely, it is essential to be aware of the applicable standards emanating from the soft law as well as from the applicable rules to be able to advocate effectively for whatever scope of depositions, if any, one thinks appropriate in the particular case.
- **Using a discovery master**: This practice can be efficient, but sometimes, where important conceptual issues will be developed in connection with the discussion of discovery matters, it may make sense to have all three panel members be part of this issue. It well behooves counsel to think about this in advance. It is also worth remembering that, even when the chair is designated to serve as discovery master, any party may request the involvement of the entire panel on any particular issue. There may be issues of such broad potential impact that it will make sense to do this at times.
- **Cooperation or not as to non-party witnesses**: In many cases there will be non-party witnesses whose documents and testimony are potentially important in the case. A big threshold question will be whether parties are expected to cooperate in making non-party witnesses over whom they have influence available to produce documents and testify, whether on a pre-hearing or hearing basis, and whether the failure of a party to cooperate in this regard may serve as a basis for an adverse inference. There are arguments on both sides of this issue. It well

behooves counsel to think about it in advance of the preliminary hearing, since the issue may well (and should) come up there.

- **Subpoenas**: Issues as to non-party subpoenas in arbitration in the United States and in other jurisdictions can be quite complicated. It well behooves counsel to be think about this issue in advance and be prepared on it.
- **Substantive motions**: Whether substantive motions will be permitted is an important issue in some cases. There will be cases where such motions will be potentially successful and also cases where making such a motion will be productive in terms of providing useful discovery and also potentially leading to a posture of the case where productive settlement discussions can take place. It well behooves counsel to focus on this issue in advance.
- **Witness statements**: The use of sworn witness statements is a normal practice in international arbitration and increasingly used in domestic arbitration, as well as in many bench trials in court. If witness statements are presented early in a case, they can potentially obviate a fair amount of discovery. On other hand, where there are important issue of credibility, it may be more helpful to the arbitrators to hear the direct testimony live. Overall, it is by no means whether witness statements save much time or money, although opinions differ on the matter. It well behooves counsel to think this out in advance and to have support for whichever approach they think appropriate for the particular case.

- **Confidentiality**: Parties sometimes assume that arbitration proceedings are necessarily more confidential than they actually are. This area deserves real attention and planning by counsel so that they will be in a position to seek to obtain a broad confidentiality order when they think it appropriate for the particular case and to avoid such an order when they don't think it appropriate.
- **Sanctions**: If one's adversary is acting in a sanctionable way, it is important to maintain a detailed log of contemporaneous examples of such conduct, as such details tend to get lost with the passage of time. There is no reason for counsel to be shy about raising the issue of sanctions when there is a significant basis for such relief.
- **Timing and length of the hearing**: It is important to assure that the hearing is scheduled at a realistic time and that enough time is reserved for the hearing. Extreme delays can result, given the schedules of sometimes numerous busy counsel and arbitrators, when established hearing dates need to be rescheduled or when more time is needed than had been reserved for the case.
- **Evidentiary nature of designated hearing exhibits**: There are various approaches that arbitrators typically take as to the admission of documents, including the approach that all previously identified exhibits that had not been specifically objected to are deemed in evidence as of the opening of the hearing or the alternate approach that all previously marked exhibits that were actually used in the hearing are deemed in evidence as of the time of their use or as of the end of the close of the hearing. The issue also arises as to whether documents relating solely to credibility need to be identified and marked in advance. It well behooves counsel to think these through and be prepared to advocate for whatever approach they think appropriate in a particular case.
- **Briefing as much of one's case on a pre-hearing basis as possible**: While there are obviously cases where extensive post-hearing briefing is needed, it can often be efficient to have the parties brief as much of their case on a pre-haring basis as possible, making it

possible to thereafter have a limited number of fairly expedited post-hearing memoranda, if any, submitted, and/or possibly closing statements a week or two after the close of the hearing. The advantage of having as much as possible of the parties' briefing done on a pre-hearing basis is that this can make it possible to get the case to the arbitrators for decision faster, sometimes several months faster, when the case is fresher in their memory.

- **Summaries, Chronologies and *Dramatis Personae*:** Up to the time of the hearing, counsel are generally living with the case far more than the arbitrators. At times the arbitrators, particularly the wing arbitrators if the chair is handling discovery, will only pick up the file occasionally. In such circumstances, it can be quite helpful for counsel to have provided the arbitrators with summaries, chronologies, *dramatis personae* and the like.
- **Stipulated facts**: While stipulated facts can be helpful, they often take more time than they are worth, except as to the most basic matters. It is often more efficient to have each side present its own chronology or the like.
- **Opening statements using PowerPoint**: These can be very effective, particularly if they are keyed to the documents. The arbitrators may use the PowerPoint printouts as a handy reference throughout the hearing.
- **Counsel performance at the hearing**: Excessive showmanship, harshness, and disruptive objections can harm counsel's credibility with counsel, depending on the facts of the case. Vigorous representation of one's client, which arbitrators expect and respect, does not generally require harsh litigation practices. Arbitrators tend to want to get to the merits and may typically be less than impressed by excessive litigiousness.
- **Rules of evidence**: The rules of evidence are not generally applicable in arbitration. However, this freedom from such rules should not lead counsel to become completely untethered from them. There are reasons for the rules of evidence, such as the hearsay rule. Arbitrators are more likely, for example, to give weight to the testimony of witnesses with personal knowledge.
- **Heuristics**: Recent psychological studies and popular books have identified heuristics, mental shortcuts that our minds take in assimilating information and making judgments. Be familiar with such heuristics and how one can protect one's client from unsound thinking in this regard. Some might add that one may consider how one might advantage one's own client by the exploitation of such heuristics, although ethical issues may be raised by such actions.
- **Mediation window**: While the possibility of building a mediation window into the schedule of a case may generally be something better raised by the arbitrators than by counsel, counsel should be alert to the potential to mediate the case concurrently with the conducting of the arbitration, given the substantial savings of time and money that can result from a successful mediation.
- **Motions to disqualify adversary counsel**: In some jurisdictions, including New York, such motions are reserved for decision by courts. However, agreement by both sides, under conditions of informed consent, may provide an appropriate basis for arbitrators to hear such motions.
- **Choosing counsel who will create a conflict with an arbitrator**: Whether this is permissible is a hot contemporary issue that bears study before one embarks on such a course of conduct.

- **Providing ammunition to an arbitrator who appears to favor one's view of the world**: If one senses that one has made headway with one of the arbitrators, that is no time to let up on nailing the point down, as that arbitrator may need ammunition to use with the other arbitrators in discussing the point.
- **Respond to, value, and catalogue questions from panel**: It's important to not only answer such questions on the spot or asap, but to also be sure to follow up on them in any way that seems potentially helpful.
- **Don't embarrasses the arbitrators by excessive chitchat**: A certain amount of collegiality with the arbitrators is human nature, but be careful not to overdo it to the extent of unnecessarily creating an issue or making the arbitrators feel uncomfortable.
- **If an arbitrator misses a matter that should have been disclosed, disclose it yourself**: It's far better to have a clean record than to have something come out later that could compromise the award.
- **Form of award**: Counsel should put real thought into this. There will be times when clients will prefer *not* to have a reasoned award, so as to avoid precedents on a particular point and, of course, times when just the opposite will be desired. Parties often like reasoned awards because they show the thinking of the arbitrators. On the other hand, the scope of appeal in arbitration is so narrow that at times it may make sense, at least in domestic cases in the United States, to go with a standard award, particularly when one has confidence that one's arbitrators will go through the full necessary analysis of the case even if they are not required to produce a reasoned award. In international cases, reasoned awards are not only the norm, but are required in many jurisdictions for the enforceability of an award.
- **Presenting one's case as to costs and attorneys' fees sooner rather than later**: In cases where parties are seeking the award of costs and attorneys' fees, it can be helpful to tee this issue up for resolution at the latest in the final post-hearing papers, so that it can be dealt with by the panel in the final award when they decide the substantive issues in the case. Taking the other approach of having the arbitrators only issue an interim award on the merits and thereafter address the attorneys' fees issue runs the risk of having the attorneys' fee part of the case take on an importance of its own, causing unnecessary delay and expense.
- **Clarification or Modification of Awards**: The scope of the doctrine of *functus officio* is somewhat fuzzy around the edges. Counsel should not be overly reluctant to go back to arbitrators for clarification of awards when there is a real need for it. This step is potentially available before moving in court for remand to the arbitrators or for vacatur.