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Blueprint for success in a commercial arbitration

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The first step in a commercial arbitration, after the arbitrators are selected, is the preliminary conference. Counsel and their clients meet with the arbitrators to discuss how the case will be handled. The preliminary conference offers a unique opportunity to work with the arbitrators to design a process tailored to the case. Keeping your client's business goals in mind, this is the time to work with all participants to create a blueprint for a fair and efficient process, including the following:

Governing Rules and Law

Carefully review the arbitration provision which usually specifies which law governs the merits and whether the Federal Arbitration Act applies. Be sure there is agreement on the applicable arbitration rules, and consider selecting expedited procedures in an effort to cut costs. Avoid treating the arbitration process as full-blown litigation and take advantage of the flexibility and cost savings that good management provides.

Statements of Claims

Agree on a date for submission of any pleadings still outstanding. Pleadings in arbitration need not adopt the formulaic structure of litigation pleadings, but should clearly set forth the facts of the case as well as claims and defenses.

Exchange of Information

Discovery is the most expensive part of any arbitration. Plan for the efficient and informal exchange of all relevant, non-privileged documents. Consider reasonable limits on electronically stored documents because the exchange of electronically stored information can be voluminous and expensive. If your provider has electronic document storage, consider using it. The cost is minimal and it allows access to all of the arbitration documents with ease.

Limit the number of depositions. Some provider's rules allow one deposition per side and give the arbitrators discretion to determine the reasonable necessity of additional depositions, considering other available discovery options and the burdensomeness of the request. Further, most participants avoid written discovery, including interrogatories and requests for admission, because they are time-consuming and usually do not yield significant information.

Sometimes counsel specify the Federal Rules or state discovery rules in their arbitration provisions in the belief that discovery under most arbitration rules is insufficient. However, one of the benefits of arbitration is speedy and efficient resolution. Counsel should work to prepare a reasonable discovery plan, keeping the exchange of information in proportion to the size of the dispute.

Arbitrators' Managerial Role

Ask the arbitrators to take a managerial role in handling disputes, including those involving discovery. No formal briefing should be necessary and the process should be straightforward. Simply send an email to the arbitrators with a copy to opposing counsel outlining the dispute, schedule a call to discuss it, and then the arbitrators can decide the matter promptly.

Witnesses

Set a time to exchange witness lists, including both percipient and expert witnesses as well as expert reports. If the case involves issues of accounting, engineering, or other technical matters, there may be percipient witnesses who will offer expert testimony. Flag that issue in advance so that a dispute does not arise and consume valuable hearing time. And alert everyone to any witness who may need to appear by video so that the exhibits to be used with that witness can be timely exchanged and other arrangements made.

Motions

Motion practice is limited under most arbitration rules. Some rules require counsel to request the arbitrators' permission to file a motion, showing that the motion is likely to succeed and narrow the issues of the case. Motions regarding dispositive issues of law may be successful but, too often, motions raise issues of fact better handled at the hearings.

Schedule

Set hearing dates and do everything possible to stay on schedule. Continuances cause delay and extra expense.

Exhibits

Most exhibits are presented electronically now. Set a date to exchange all documentary evidence to be offered at the hearing except for documents to be offered solely for impeachment. Work with opposing counsel to prepare and pre-mark a single exhibit list. Each side should identify any exhibits to which objection will be made and the others will be deemed admitted. If demonstratives will be used, they should be exchanged a week or so in advance of the hearings.

Hearings

Set the time and place for hearings and a date for submission of pre-hearing briefs. Consider how to handle hearing time efficiently and effectively. You may want to request bifurcation of issues or, in a complex case, handling the issues in phases. Counsel may agree to split hearing time using the chess clock approach, a move that encourages focus. You might discuss time limits on opening statements. There should be agreement in advance when parties want to use a court reporter or translator. Most arbitration rules do not require strict adherence to the rules of evidence, except for work product and the privileges, so it is a good idea to include a reminder in order to avoid excessive objections at the hearings.

Form of Award

Consider the form of the award to be issued. Arbitrators issue interim, final, and partial final awards and it is important to understand what is appropriate for your case. The best practice is to request that the Final Award be a reasoned award that outlines the facts, the issues, and determinations on the claims. The older practice of requesting findings of fact and conclusions of law is time-consuming and expensive. Also, discuss whether there will be claims for attorneys' fees and costs.

Conclusion

The preliminary conference, whether in person or by phone, is the first time all counsel have a chance to speak with the arbitrators to discuss the best handling of the case. The arbitrators' subsequent scheduling order will serve as a blueprint to be followed as the case proceeds. Be prepared to make the most of your initial opportunity to project a professional, businesslike tone and influence important decisions about case management.

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