Arbitration Tips and Traps for Corporate Counsel

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Arbitration is a field of study worthy of Hermann Rorschach. Parties who bring to it a preference for the formality and forensic opportunities of litigation see arbitration as the Wild West. Others, who prefer to resolve all business disputes quickly and informally, see it as just another form of litigation. Businesspeople who want to submit disputes to a business-oriented, neutral third party bound by rules that ensure basic fairness, but do not want all the bells and whistles of litigation, see arbitration as a happy medium.

In practice, the parties to a large extent create their own arbitration reality, starting from the time they choose the applicable rules and otherwise construct their arbitration clause, to the time the arbitrators close the hearing.

The following, admittedly partial list of "tips" and "traps" is offered to suggest practical ways to make arbitration work better for companies that rely on it as a more efficient and business-like way to resolve disputes than litigation in court.

The Arbitration Clause

Businesspeople in the throes of negotiating an agreement rarely want to spend time, energy or negotiating capital on the arbitration clause. Inside counsel can count on second-guessing, however, if a dispute goes to arbitration and it takes too long, costs too much and is decided by arbitrators who seem like aliens to the businesspeople.

The company that has a well-considered, consistent approach to arbitration clauses has a better chance of shaping the clause in any given contract, and is more likely to be satisfied with the arbitration process.

Tip: *Develop a standard arbitration clause and fallback positions in advance of negotiations.*

Trap: *Assuming all provider rules and arbitrator panels are the same.* Arbitration rules and panels can vary greatly, even within the same provider organization.

Tip: *Select the place of arbitration based on its law regulating the arbitration process and the quality of its arbitrator community.* Your corporate home might seem best, but its courts could interfere excessively in arbitration, or it might lack a deep bench of arbitrators suited to your dispute or industry.

Trap: *Selecting the place of arbitration for local advantage or proximity to your litigators.* A "home court" advantage is unlikely in arbitration. Good litigators are more easily found than good arbitrators.

Tip: *Think about the ideal number of arbitrators and consider the new appeal-within-arbitration options.* The trend is toward sole arbitrators in all but the highest-stakes cases. Leading providers now allow parties to opt-

in to a well-defined, expedited appeal process within the arbitration itself. The appeal process addresses concerns that some companies may have about the risk of a "runaway" sole arbitrator.

Trap: *Assuming the need for three arbitrators in all cases.* It is more difficult to schedule hearings with three arbitrators, resulting in an increased time lapse from filing to award. A full hearing with one arbitrator followed by an appeal within arbitration may involve much less time and expense than a three-arbitrator panel without any appeal.

Arbitrator Selection

As in jury selection, cases can be won or lost during arbitrator selection. Unlike jury selection, arbitrator selection happens at the beginning of a case. A party and its counsel should invest substantial time and effort in the selection process, and should understand the case as deeply as possible before selecting arbitrators.

Tip: *Front-load the planning of your case.* Having a strategy lets you select arbitrators who are more likely to be open and receptive to your arguments.

Trap: *Filing quickly and developing the case over time.* This approach results not only in less-effective arbitrator selection, but less-effective advocacy in those crucial early conferences.

Tip: *Select counsel familiar with the arbitrator pool and selection process.* An arbitrator's prior awards rarely are available to the public, and this hampers the evaluation of potential arbitrators. If counsel does not know or have access to those who know arbitrator candidates well, consider engaging specialized counsel to assist in arbitrator selection.

Trap: *Relying entirely on official arbitrator resumes.* Arbitrator bios tend to be designed to trigger keyword search hits; they rarely convey a sense of the individual.

Discovery

Discovery is the most debated and misunderstood phase of arbitration. Some parties complain that too much discovery is allowed, making arbitration time-consuming and expensive and too similar to litigation. Others complain that too little discovery is allowed, making it difficult to develop claims or defenses.

Arbitration providers train arbitrators to limit discovery so that the process keeps its promise of offering a faster and cheaper alternative to litigation. Parties may influence these ground rules to some degree by adding specific language about discovery to their arbitration clause or by presenting agreed discovery plans, but arbitrators retain discretion to limit discovery to what is proportional. Counsel needs to be ready to present a limited-stakes case with little document exchange beyond what each side plans to rely on at the hearing, and to proceed to hearing with limited or no discovery depositions, especially in international cases.

Tip: *Locate and preserve all relevant company documents early, and develop the facts from those documents and company witnesses*. In a high-stakes case, a party also should consider authorizing an ethically conducted investigation to supplement internally available information.

Trap: *Planning to build your case out of the other side's files.* Many factors work against this approach in arbitration.

Tip: *Identify and disclose your witnesses early in the case.* Arbitrators need this information to conduct effective conflicts checks.

Trap: *Holding back names to achieve surprise at the hearing.* The party who holds back witness names risks disruptive midstream replacement of an arbitrator, continued service of an arbitrator who might not have been selected or preclusion of a key witness.

Motions, Papers and Objections

Arbitration traditionally is a more hearing-driven and less paper-driven process than litigation. Thanks to a generational shift and to recent changes in provider rules, arbitrators are becoming more comfortable with dispositive motions and other complex written submissions. There remains, however, a strong emphasis in arbitration on looking carefully at whether a proposed motion would result in net savings of time and expense to the parties. Similarly, evidentiary objections work differently in arbitration than in litigation. Attorneys need to understand and use these differences to be effective advocates in arbitration.

Tip: *Be skeptical if your counsel wants to engage in extensive motions practice.* Arbitrators really need to be convinced not just that a motion likely has merit but that, if granted, the motion will save hearing time and net expense to the parties.

Trap: *Asking arbitrators to decide motions with little practical effect on case complexity.* Arbitrators might conclude that your side is playing for time or intentionally running up expenses, or that counsel just does not understand arbitration.

Tip: *Encourage counsel to keep memos of law short and focused on essentials.* Be sure counsel briefs clearly and succinctly all the law on which your side principally relies. Arbitrators are expected to work without associate or law clerk support in most cases and cannot be faulted for not finding the law themselves. Very few commercial arbitrators like to read learned treatises, however, so a memo of law needs to get quickly to the point.

Trap: *Repeating points for emphasis in papers.* Arbitrators generally read everything submitted and do not appreciate repetitive papers, especially repetitive rhetoric.

Tip: *Encourage counsel to make evidentiary objections briefly and only if focused on the most significant matters.* Arbitrators rarely sustain evidentiary objections. However, if an objection shows an important document to be unreliable, it can be effective even if overruled.

Trap: *Using objections to disrupt rhythm and flow.* Arbitrators recognize this tactic and can overcompensate when they help the witness get back on track.

Demeanor and Etiquette

Litigation sometimes resembles the combat of gladiators, but arbitration is more like chess and requires different approaches and skills.

Tip: *Encourage counsel to offer reasonable solutions to disputes with opposing counsel.* Arbitrators respect the problem-solver more than the die-hard.

Trap: *Expecting arbitrators to figure it out.* Opposing counsel may offer a solution, and your side may not like it.

Tip: *Insist that your counsel be courteous and cooperative in dealing with arbitrators, case managers, opposing counsel, staff and witnesses.* Arbitrators tend to pay more attention to the adults in the room.

Trap: *Encouraging counsel to be aggressive.* If you lose, you'll quickly forget how good it felt to hear your trial lawyer roar.

Tip: *Make sure that your lead counsel thanks the arbitrators for their service, attention and patience.*Most arbitrators are human. They tend to like it when others appreciate them.

Trap: *Appearing ungracious with opposing counsel.* Graciousness is particularly impressive when opposing counsel has done little to deserve it.

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