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ISSUES TO BE CONSIDERED
by the
PERSUASIVE ADVOCATE IN ARBITRATION

(A Presentation by John Fleming Kelly)

What if mediation isn't successful?

The preceding presentation on mediation practices has undoubtedly convinced you of the value and importance of mediation as a dispute resolution procedure. As you have seen, mediation is in essence a process by which the parties themselves reach a mutually acceptable solution to the dispute that has existed between or among them.

While on average a substantial majority of mediations result in such a resolution, that is not always the case. Or, perhaps the parties have been able to reach agreement through mediation on most of the issues involved in the dispute. The parties may be willing to sign off with respect to those issues, and move on to another process for dealing with the remaining issues.

We must therefore consider what options are available to an advocate in the event of an unsuccessful mediation.

Consider arbitration as the next step.

The aim of this presentation is to demonstrate that the appropriate process after mediation is arbitration, and that the advocate has an opportunity, either before or after a dispute arises, to shape the arbitration so that the process will proceed smoothly and without untoward delay.

Advantages and disadvantages of arbitration.

Although there may be some disadvantages to arbitration, those disadvantages are outweighed by the advantages. As we look at these advantages and disadvantages we will want to compare them to the other alternative, trial in a court of law.

If the parties have not been able themselves to resolve all or some issues by negotiation or mediation, then an impartial, neutral decision maker is essential. While judges presiding in trial courts, or juries, are such neutral third persons, court dockets are crowded, and long delays in getting a case to trial very often occur. Arbitration usually can go forward more rapidly.

The issues involved in the dispute may be very sensitive ones which the parties do not want presented in open court, with the likelihood of unwanted publicity. In arbitration, the proceedings, related discovery and the decision of the arbitrators can be, with few exceptions,

confidential.

In many disputes counsel want a resolution mechanism which not only protects confidentiality but which avoids setting a precedent that would control the outcome of similar disputes. Arbitration awards are not binding judicial precedents.

The wait for a case to reach the top of a long trial docket is not the only cause of delay. Often a civil case will be bumped back because of the constitutional or statutory requirements affecting the docket. In addition, a skilled advocate will develop several grounds for reversal of the trial court on appeal, so that the outcome of the dispute remains uncertain during the appellate process for a further extended length of time. In arbitration, the grounds for setting aside an arbitration award are few and difficult to establish to the satisfaction of a court. We will discuss these grounds later in this presentation.

From a trial advocate's perspective, a possible disadvantage of arbitration involves limitations on discovery prior to evidentiary hearings. The Federal Arbitration Act and most state statutes do not contain provisions directly addressing the subject of discovery or the powers of the arbitrator(s) with respect to controlling discovery. This possible disadvantage can be overcome or at least substantially diminished by provisions in the underlying agreement to arbitrate.

<u>The importance of the agreement to arbitrate.</u>

The fundamental concept to bear in mind is that arbitration is a creature of contract. It follows, then, that the parties are free to negotiate and agree upon all of the procedural steps which will govern the course of the arbitration. Parties can of course proceed to devote time to negotiating and drafting an entire custom-made agreement regarding the arbitration. Or, they may rely, either entirely or with certain exceptions spelled out in their agreement, on the rules of a specific organization, such as American Arbitration Association or CPR Institute for Dispute Resolution. These two organizations will hereinafter be referred to as "AAA" or "American Arbitration" and "CPR", respectively.

Counsel need not wait until a dispute has arisen before considering the terms of an agreement to arbitrate. Indeed, thorough transactional lawyers frequently include dispute resolution provisions in the underlying transactional agreement. Such provisions often are multi-step in nature, calling first for negotiations between executives of the parties who have not been involved in the details of the transaction, then, if necessary, mediation, and finally, if mediation is not successful, binding arbitration. More recently such multi-step provisions may also contain the mechanism for a private appellate process that goes beyond the statutory grounds of Section 10 of the Federal Arbitration Act. 9 USC Sec.10.

Chief elements of the arbitration agreement

Regardless of whether an agreement to arbitrate is part of the transactional agreement or entered into after the dispute has arisen, the agreement should always contain essential elements that affect the course and conduct of the arbitration. The persuasive advocate will consider these elements when the arbitration agreement, or arbitration provisions of the pre-dispute agreement, are being negotiated, and be certain that the arbitration agreement adequately addresses each of them. If the procedural aspects of the arbitration agreement address each of these concerns, then the arbitration itself can proceed smoothly on the merits without diversionary skirmishes regarding the process.

The arbitration agreement should address each of these topics:

How is the arbitration commenced?

What response is required from the Respondent? Is such a response essential to going forward?

How many arbitrators will comprise the Tribunal? What qualifications must they possess? How shall they be selected?

What discovery will be permitted? What will the role of the arbitrators be with respect to that discovery? Will there be a time limit on discovery?

Within what period after commencement of the arbitration must the hearing on the merits take place? Will there be a limit on the number of days for such hearing? Where will the hearing take place?

What sort of an award are the arbitrators required to issue? Is there a time limit on issuing that award? Should there be provisions for possible correction of an award? What about provisions for enforcement of the award? Do the parties want to provide for an appeal procedure beyond that provided in the FAA?

Does the agreement adequately address issues of confidentiality?

As we discuss each of these topics, bear in mind the choice which the advocate has, either to draft an agreement from scratch or to incorporate by reference at least parts of procedures which have been tested over time. For that reason, reference will be made during the discussion to both the CPR and the AAA Rules. The CPR Rules are those for Non-Administered Arbitration (USA, Rev. 2000). The AAA reference is to “Commercial Arbitration Rules and Mediation Procedures, Amended and Effective July 1, 2003.” AAA has also additional Rules for large complex commercial disputes exceeding $500,000 in controversy and for expedited procedures where the amount in controversy does not exceed $75,000.

Initiating Arbitration

Both the AAA and CPR Rules require the claimant to give the respondent written notice of intent to arbitrate. The notice is to contain a demand for arbitration, the text of the underlying contractual provision for arbitration, a statement of the nature of the claim and the nature and amount, if appropriate, of the remedy sought. AAA Rule R-4 (a) (I), CPR Rule 3.3. CPR has an additional Rule dealing with the details of service and computation of time periods. CPR Rule 2.

AAA requires that copies of the demand be filed with any AAA office. AAA Rule R-4 (a) (ii). This follows from the provisions of another AAA Rule that, when an arbitration is initiated under the AAA Rules, the parties thereby authorize AAA to administer the arbitration. AAA Rule R-2. This authorization to administer results in certain fees being applicable, namely a filing fee ranging from $500 to $10,000, and a case service fee, which is incurred when a case proceeds to a first hearing, and which ranges from $200 to $4000. The amount of each fee depends on the amount of the claim, and the ranges just mentioned apply to claims up to and including $10,000,000. Where the claim exceeds that amount one is instructed to contact the local AAA office. A preliminary hearing under AAA Rule R-20, after the administrative conference under AAA Rule R-9, apparently will trigger application of the case service fee.

CPR has no requirement that it receive a copy of the demand or notice of arbitration in every instance. CPR proceeds on the assumption that, as stated in the Introduction to its Rules, "Arbitration proceedings often can be conducted efficiently by the Arbitral Tribunal without administration by a neutral organization, or limiting the role of such organization to assistance in arbitrator selection or ruling on challenges to arbitrators, if necessary." So a fee to CPR is payable only when selection assistance is sought. Depending on the level of assistance, that fee currently ranges from $750 to $4500, initially allocable among the parties.

The fees just mentioned are administrative fees. Fees of arbitrators are another matter.

Both Rules set forth the time for filing a notice of defense. Under both Rules the failure to deliver a notice of defense does not delay the arbitration, and all claims set forth in the demand for arbitration are deemed denied. If the respondent fails to participate, the arbitration Tribunal may enter such an award on default as it deems appropriate, but only after taking evidence and supporting legal argument. AAA Rule R-29, CPR Rule 15.

The Tribunal

Number of arbitrators

AAA Rules provide that the if the arbitration agreement does not specify the number of arbitrators the dispute shall be heard by one arbitrator, unless the AAA in its discretion directs that three arbitrators be appointed. AAA Rule R-15. A party may request three arbitrators in the demand or answer, but AAA, while required to consider such a request, still may exercise its

discretion as to the number of arbitrators to be appointed. Id. Under the CPR Rules, unless the parties have otherwise agreed on one arbitrator or three arbitrators not appointed by the parties, the Tribunal shall consist of two arbitrators, one appointed by each of the parties and a third arbitrator, who shall chair the Tribunal, and who is selected by the party-appointed arbitrators. CPR Rules 5.1, 5.2.

A formula for determining the number of arbitrators based on the amount in controversy is sometimes set forth in the arbitration agreement. Counsel may wish to consider the formula set forth in the NASD Code of Arbitration Procedure, wherein the number of arbitrators is determined by the amount of the claim, with $50,000 generally being the dividing line between one and three arbitrators. NASD Rule 10202 (b).

Appointment

The Rules of both AAA and CPR give the parties the first opportunity to select the panel of arbitrators. If the parties want to avail themselves of this opportunity the arbitration agreement should be detailed in this regard. Unless the arbitration agreement otherwise provides, any arbitrator not appointed by a party must be a member of the AAA or CPR Panel, whichever organization is involved. AAA Rule R-11, CPR Rule 5.1.

Probably the greatest difficulties encountered in a selection process arise when the parties provide for just a single arbitrator and the parties do not ask for a slate of candidates from a provider organization. If each side can nominate candidates from which both sides must select the same one, questions or doubts about the candidates are bound to arise. The candidates tend to be separately grouped into "ours" and "theirs". Foreseeing this difficulty, both AAA and CPR have each developed a detailed mechanism for presenting "its" neutral slate of candidates and requiring the parties either to agree on a candidate from that proposed slate or separately to rank the candidates in order of preference. AAA Rule 11 (b), CPR Rule 6.4 b. The principal difference between the Rules and process on this point is that CPR presents a slate of candidates whom it has contacted regarding the particular dispute for assurances of availability and freedom from disqualifying conflicts. AAA's process does not appear to involve such a pre-screening prior to furnishing names. If there is no pre-screening of candidates before a party is asked to rank them, counsel may later learn to their disappointment that a preferred candidate is not available because of prior commitments or conflicts of interest.

The opportunity to raise the question of pre-screening of AAA candidates can perhaps occur in the administrative conference which AAA Rule 9 provides to be conducted at the request of any party or at AAA's own initiative. With CPR, such an initial pre-selection conference takes place as a matter of course if CPR is to provide assistance in the arbitrator selection process. CPR Rule 6.4 a.

Where the Tribunal is to consist of three arbitrators, the Rules of both AAA and CPR recognize the right of the parties each to appoint an arbitrator, and for those two arbitrators to

appoint the chairperson. AAA Rule R-12, CPR Rule 5.1. Both Rules also contain provisions for

appointment by the organization if the parties or the party-appointed arbitrators do not act within specified time periods. CPR Rules also set forth a method for the "screened" appointment of party-nominated arbitrators. CPR Rule 5.4. Under this process CPR makes all contacts with a party-nominated candidate and neither CPR nor the parties may advise or otherwise provide any information or indication to any candidate or arbitrator as to which party selected either of the party-designated arbitrators.

The arbitration agreement should provide how the chairperson is to be appointed, whether by the two party-appointed or designated arbitrators or by the parties themselves.

Both sets of selection Rules contain deadlines and default provisions so that lack of timely action on candidates by one party will not prevent the Tribunal from being constituted. AAA Rules R-12, R-13; CPR Rule 6.4b.

As part of the process of selecting an arbitrator, counsel may wish to consider the fee which the candidate proposes to charge. The hourly fee of an arbitrator on the AAA Panel is included in his or her profile. When a CPR Panelist is contacted regarding interest in being considered for selection, the proposed hourly fee is included in his or her affirmative response.

Qualifications

Obviously, disputants want neutrals who are experienced arbitrators. Such a requirement in the arbitration agreement can rather easily be met. Experience in a particular substantive area of the law may also be desirable. CPR's practice of furnishing bios for each nominee on a slate of candidates may provide that information. Where a more precise area of expertise is desired, CPR's practice has been to invite prospective candidates for selection to provide a short summary of that experience, either as neutral or advocate.

The capability of an arbitrator to be neutral and impartial is usually another desired qualification. The modifier "usually" has been inserted because until very recently it has been the commonly held view in the US that a party-appointed arbitrator is intended to play the role of an advocate for the appointing party. To the contrary, CPR Rules have and do provide without exception that each arbitrator shall be independent and impartial. CPR Rule 7. The 2000 Revision of the CPR Rules added provisions for a process of challenging an arbitrator's independence and impartiality. To preserve such neutrality the CPR Rule specifically limits *ex parte* communications with a party-appointed arbitrator to discussions prior to appointment as to "the general nature of the case, the candidate's qualifications, availability and *independence and impartiality with respect to the parties". (*emphasis added) Rule 7.4. A party may also confer to a limited extent with its party-appointed arbitrator regarding the selection of the chair of the Tribunal. Id
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While AAA, has a similar general requirement that any arbitrator shall be impartial and independent (AAA Rule 17) and limits *ex parte* communications to those regarding the suitability of a party-appointed candidate and to discussions with party-appointed arbitrators regarding candidates for selection as the third arbitrator, AAA Rules provide an exception to this neutrality where the parties agree in writing that the arbitrators directly appointed by a party shall be non-neutral. AAA Rule 18. CPR has no similar exception. The AAA Rule does, however, state that as an administrative practice it will suggest to the parties that they agree further that the limitations on *ex parte* communications should apply prospectively. AAA Rule R-18 (b).

The Code of Ethics for Arbitrators in Commercial Disputes prepared by AAA and ABA and effective March 1, 2004 states in a Note that these organizations "believe that it is preferable for all arbitrators - including any party-appointed arbitrators - to be neutral, that is, and impartial..." This 2004 Code recognizes that parties in certain domestic arbitrations in the US may prefer that party-appointed arbitrators be non-neutral. Acting on that premise, the Code sets forth special ethical considerations for such circumstances in Canon X of the Code.

Case Management

CPR devotes a rather lengthy rule to the conduct of the arbitral proceedings. CPR Rule 9. The Rule is, of course, trumped by any contractual provision. The Rule provides that, under the responsibility of the chair, the Tribunal may conduct the arbitration in such manner as it deems appropriate. CPR Rule 9.1. The Tribunal may impose reasonable time limits on each phase of the proceeding. In setting time limits the Tribunal is required to bear in mind its obligation to manage the proceedings firmly in order to complete proceedings economically and expeditiously. Rule 9.2. The Tribunal is required by the Rule to hold an initial pre-hearing conference promptly after the constitution of the Tribunal for the planning and scheduling of the proceeding The Rule suggests matters to be considered at the pre-hearing conference, including further scheduling, the need for transcripts, the need for expert witnesses and the necessity for any on-site inspection. Rule 9.3. The Rule also suggests for consideration at the pre-hearing conference the early identification and narrowing of the issues, the possibility of stipulations of fact and admissions solely for the purposes of the arbitration, the possible appointment of a neutral expert by the Tribunal, and the possibility of settlement negotiations with or without the assistance of a mediator. Id.

AAA Rules also speak to most if not all of these issues in a number of different rules, such as R-20, Preliminary Hearing, and R-26, Stenographic Record.

Discovery

CPR's Rules address discovery issues in a broad way which gives the Tribunal a great deal of latitude. The Rule provides that the Tribunal "may require and facilitate such discovery as it shall determine is appropriate in the circumstances, taking into account the needs of the parties and the desirability of making discovery expeditious and cost-effective." CPR Rule 11.

The AAA Rule speaks of exchange of documents at the request of any party or at the discretion of the arbitrator, with the arbitrator having the authority to resolve any disputes concerning the exchange of information. AAA Rule R-21.

These Rules seem sufficient to permit the Tribunal to manage discovery with a view toward achieving the goal of speedy resolution attributed to arbitration. However, the drafters of some arbitration agreements have been more precise by setting time limits for discovery requests and production, and for motions to compel, responses thereto and hearings regarding them.

Setting the Hearing

Absent some contractual parameters regarding the period of time for the hearing, delays favorable to one side or the other are apt to occur. AAA provides that the arbitrator shall set the date, time and place of hearing. AAA Rule R-22. CPR speaks more generally of the Tribunal determining the manner in which parties shall present their case, allows for a pre-hearing memorandum, and includes the possibility of a hearing for presentation of evidence and oral argument. CPR Rule 9.3b. Many drafters of arbitration agreements will set a time frame for evidentiary hearings in terms of days or months from the Tribunal's being constituted.

Some arbitration agreements will set a specific locale for the hearing. Such a requirement can tend to limit the field of arbitrator candidates, unless travel expenses of the Tribunal are not a consideration. It therefore seems wise to add, after naming such a specific locale in the agreement, the proviso "unless the parties mutually otherwise agree." Then further consideration to the location can be given after the Tribunal is constituted and the home bases of the arbitrators known.

Some agreements limit evidentiary hearings to a maximum number of hours of presentation by each side. CPR provides that a dispute should in most circumstances be submitted to the Tribunal for decision within six months after the initial pre-hearing conference. CPR Rule 14.7. AAA provides that the parties shall be cooperative in scheduling the hearing for the earliest practicable date. AAA Rule R-22.

The Award

Drafters of an arbitration agreement should give consideration to provisions concerning several aspects of the award, including timing, form, and scope.

As to when the award is to be issued, AAA provides for it to be made within 30 days from the closing of the hearing. AAA Rule R-17. CPR sets a deadline of one month from submitting the dispute to the Tribunal for decision. CPR Rule 14.7.

Regarding the content of the award, AAA does not require a reasoned award unless the

parties request one or unless the arbitrator determines that a reasoned award is appropriate. AAA Rule R-42. CPR takes the opposite approach, and requires that, unless the parties agree otherwise, the award shall state the reasoning on which the award rests. CPR Rule 14.2.

Where there are three arbitrators, both organizations require at least majority decisions. AAA Rule R-40, CPR Rule 14.2. Where all three members of the Tribunal do not join in the award, AAA does not appear to deal with possible dissenting opinions, but CPR states that such an opinion shall not constitute part of the award, but copies of such opinion shall be distributed to the parties along with copies of the award. CPR Rules 14.3, 14.4.

An unreasoned award may be viewed by one or both sides as an unacceptable compromise by the Tribunal. The fact that an unreasoned award may appear to be a splitting of the baby is not sufficient grounds for a court to vacate the award under the Federal Arbitration Act and similar statutes which have been enacted in may states, including Florida. We will discuss those grounds later in this presentation.

There are ways other than the reasoned award to control and limit the discretion of the Tribunal. One that is rather common is for each side to present at the conclusion of hearings proposed findings on each of the issues involved, with the requirement in the arbitration agreement that the Tribunal pick between each of the opposing findings. More imprecise methods of controlling the result where monetary damages are requested include so-called "baseball arbitration", where the Tribunal must decide between amounts proposed by each side. Another possibility where mediation has preceded arbitration is the "MEDALOA", where the mediator becomes the arbitrator, and, after summations of positions, chooses between the last offers of the parties.

As to scope of the award, AAA provides that the arbitrator may grant any just and equitable relief that is within the scope of the agreement, including specific performance of a contract. AAA Rule R-43. Both AAA and CPR Rules include provisions regarding costs. The CPR Rule provides that the Tribunal shall fix the costs of arbitration, and includes in an enumeration of costs legal fees and fees of expert witnesses. CPR Rule 16.2. The Rule also provides that subject to any agreement between the parties to the contrary, the Tribunal may apportion the costs between the parties in such manner as it deems reasonable. CPR Rule 16.3. The AAA rule is less precise, but does provide for assessment and apportionment of fees, expenses and compensation as the arbitrator deems appropriate. AAA Rule 43(c).

Correction of the Award

Both the CPR and the AAA Rules allow any party to request correction of any clerical, typographical or computation errors in the award. Although AAA Rule R-46 is entitled

"Modification of Award", the Rule states that the arbitrator is not empowered to redetermine the merits of any claim already decided. The AAA Rule does not provide, but CPR does, for the Tribunal to make an additional award as to claims or counterclaims presented in the arbitration but not determined in the award as presented. CPR Rule 14.5. This CPR Rule also allows the Tribunal to make such corrections and such additional awards on its own initiative. Both sets of Rules contain time limits for requesting and acting on such corrections.

Enforcement of the Award

CPR, but not AAA, states that the award shall be binding on the parties, and the parties will undertake to carry out the award without delay. CPR Rule 14.7. Under the Federal Arbitration Act, and similar statutes enacted by many states, an award may be confirmed by a court and a order confirming, modifying or correcting the award may be enforced as if it had been entered in the court. 9 USC Sec. 9.

Appeal of the Award

Mention has already been made of the limited grounds for appeal of an award as provided in the Federal Arbitration Act and similar state statutes. The Federal Act (9 USC Sec. 10) set forth these:

> Where the award was procured by corruption, fraud or undue means;
> Evident partiality or corruption in the arbitrators
> Refusal of the arbitrators to postpone the hearing upon sufficient cause shown
> Refusal to hear pertinent and material evidence;
> Any other behavior of the arbitrators which prejudiced the rights of a party;
> Where the arbitrators exceeded their powers, and
> Where a mutual, final and definite award was not made.

Note that these grounds do not address possible incorrect interpretation of the law, or wrong conclusions from the evidence. New Jersey, for one state, has addressed this issue and in 1999 provided that where an arbitration is to be governed by the New Jersey Alternative Procedure for Dispute Resolution, an arbitration award is subject to judicial review and potential vacatur for, among other things, committing prejudicial error by erroneously applying law to the issues and the facts. NJ Stat. Ann. 2A Sec. 23A-13c.(5) 1999.

Elsewhere parties may seek another avenue for review of an arbitration award by a private appellate mechanism. CPR has provide one choice, its Arbitration Appeal Procedure, added in 2002. Discussion of the details of that Procedure must await another opportunity.

Confidentiality

Neither the Federal Arbitration Act nor most, if any, state statutes contain provisions regarding the confidentiality of arbitration proceedings or the protection in arbitration of proprietary or privileged information. Thus, assuming that confidentiality is a desired element of arbitration, the draftsman of the arbitration agreement must be careful to provide for it. Again, the AAA and CPR Rules can be referenced. AAA speaks of confidentiality in its Rule regarding attendance at hearings, and provides that the arbitrator and the AAA shall maintain the privacy of the hearing unless the law provides to the contrary. AAA Rule R-23. The CPR Rule proceeds from the presumption that, unless the parties agree otherwise, the parties, the arbitrators and CPR shall treat the proceedings, any related discovery and the decisions of the Tribunal as confidential. CPR Rule 17. CPR specifically recognizes an exception in connection with judicial proceedings ancillary to the arbitration, such as a judicial challenge to, or enforcement of an award. Id.

As a component of confidentiality both sets of Rules also provide for the exclusion of witnesses during the testimony of other witnesses. AAA Rule R-23, CPR Rule 12.4. This AAA Rule further gives the arbitrator the discretion to determine the propriety of the attendance of any other person other than a party and its representatives . Id.

Conclusion

The aim of this presentation has been to explain that the procedural details of arbitration are issues which a careful advocate will consider and address in an agreement for the arbitration of a dispute, whether that agreement is entered into before or after the dispute arises. The advocate will want to consider the arbitration rules of at least two of the leading organizations which advocate the use of arbitration, especially arbitration after mediation that has not been entirely successful. Both sets of Rules lend themselves to being incorporated by reference into the agreement to arbitrate, and both provide that modifications to those Rules spelled out in the arbitration agreement will be controlling. The advocate who disposes of the procedural issues in the arbitration agreement will be able to concentrate entirely on the merits of the case at the time when arbitration occurs.