PositivelyNeutral

Arbitration and Mediation for Attorneys and Their Business Clients

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A rookie business litigator once was asked by a real estate partner to cover the closing of a sale of a condominium. Knowing nothing about real estate transactions and sheepishly asking what to do, the neophyte was told that, since the firm's client was the seller, the only way to commit malpractice would be to leave the closing without the check. I am pleased to report that I overcame that low bar with flying colors.

What does that have to do with arbitration? Arbitrators, like litigators pretending to be real estate attorneys, want to "get it right" by issuing awards that are consistent with the facts and the law. However, as far as the substance of an award is concerned, it's exceedingly difficult to issue a decision that will not withstand judicial scrutiny. The bar is low.

The United States Supreme Court has held that, "[u]nder the FAA [Federal Arbitration Act], courts may vacate an arbitrator's decision 'only in very unusual circumstances.' … The potential for…mistakes is the price of agreeing to arbitration." *Oxford Health Plans LLC v. Sutter*, 569 US 564 (2013). Similarly, the Southern District of New York recently explained that "a court 'will uphold an arbitration award…so long as the arbitrator has provided even a barely colorable justification for his or her interpretation of the contract." *Risen Energy Col, Ltd. V. Focus Futura Holding Participacoes S.A.,* 23 Civ. 10993 (LGS) (June 11, 2024). State arbitration laws generally are equally protective of the decisions that arbitrators issue.

While an arbitrator largely will escape judicial second guessing of his decision, arbitrators must do more than decide; they must oversee the proceeding and do so fairly. Legislatures, and therefore courts, are less protective of arbitrators who fail to ensure a fair process. The FAA and state statutes impose requirements that have teeth. The FAA, for example, provides that a court may vacate an arbitration award

> where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

The safe way out for arbitrators is to permit open-ended discovery; to allow the parties to file motions, no matter how spurious; to liberally grant postponements; and to admit all evidence the parties seek to introduce. Arbitrators understand that accommodating all parties' procedural requests is likelier to render the award bullet proof.

However, that's not how arbitration is supposed to work. Arbitration is intended to be faster, more cost effective and more efficient than litigation. Rules of tribunals such as the American Arbitration Association—while designed to ensure parties will receive a full and fair hearing—encourage the arbitrator to control the process. For example:

- *Discovery*. The AAA commercial rules set forth a procedure for the exchange of documents, but do not specifically reference interrogatories or depositions. Instead, the rules provide that "[t]he arbitrator shall manage any necessary exchange of information among the parties with a view to achieving an efficient and economical resolution of the dispute…."

- *Summary Judgment*. The AAA rules do not openly authorize a party to seek summary judgment, but rather require a party to seek permission to file a dispositive motion, with permission to be granted "only if the arbitrator determines the moving party has shown that the motion is likely to succeed and to dispose of or narrow the issues in the case." AAA instructs the arbitrator to "consider the time and cost associated with the briefing of a dispositive motion in deciding whether to allow any such motion."

- *Hearing Date.* Under AAA rules, the arbitrator sets the date for the hearing, and the parties are directed to "be cooperative in scheduling the earliest practicable date" and to "adhere to the established hearing schedule." Absent agreement of the parties, the arbitrator may postpone the hearing upon the request of a party "for good cause shown."

- *Evidence.* AAA rules provide that "[t]he arbitrator, exercising his or her discretion, shall conduct the proceedings with a view to expediting the resolution of the dispute…and may direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the case."

An arbitrator's fidelity to the goals of arbitration—speed, economy and efficiency—militate against an open ended and unbounded proceeding.

The challenge for an arbitrator is to strike the appropriate balance.

Sometimes this is easy. Even in contentious matters, counsel sometimes cooperate. Either at the invitation of the arbitrator or on their own, counsel may collectively propose scheduling milestones regarding discovery, motions, witnesses, exhibits and hearing dates. In those instances, a party is unlikely to challenge the ultimate award by arguing that it was unfairly rushed to a hearing or not afforded the opportunity to fully and fairly present its case.

In other instances, however, counsel are less collaborative, leaving the arbitrator to determine scheduling, discovery and hearing dynamics. An experienced arbitrator makes these determinations aware of the competing admonitions:

First, the arbitrator strives to get to the heart of the dispute efficiently and expeditiously without unnecessary frolics and detours.

Second, the arbitrator considers whether rulings limiting a party's desire for open ended discovery, unbounded motions, delay, etc. will invite judicial challenges to the award. An arbitrator understands that judicial challenges, even if unlikely to succeed, can substantially delay the confirmation of the award—and thus create the very delay and complication that arbitration is intended to avoid. To prevent this, an arbitrator may be inclined to provide more latitude.

Counsel interested in ensuring an arbitration that is ***both efficient and minimizes the risk of judicial challenges*** to the fairness of the process should consider the following:

1. Endeavor to agree with your adversary upon arbitration milestones and procedures. An experienced arbitrator often will invite the parties to propose a schedule; if the arbitrator does not extend this invitation, take it upon yourself to raise it with the arbitrator and/or your adversary.

2. Consider the big picture when your adversary seeks a hearing postponement, or permission to file a dispositive motion or introduce testimony from an expert. Even if your inclination is to object because you view these as unmeritorious, assess whether consenting will result in a faster proceeding with an award that cannot be judicially challenged.

3. When objecting to an adversary's attempts to embroil the arbitration with delay and unmeritorious motions, be sure to articulate well-founded reasons for your objections that will prove persuasive to the arbitrator and can be incorporated into a ruling that will withstand subsequent judicial review.

Rob Harris is a full time arbitrator and mediator of commercial and employment disputes, often involving business entities and their owners, senior employees, investors and service providers. He is a long time panelist for the American Arbitration Association, including participation on its Commercial, Employment, Construction and Consumer panels, and its specialty panels for Large Complex Cases, Mergers and Acquisitions and Joint Ventures.