

Clause and Effect

A few helpful tips on scope, rules of evidence, and other things you should know about arbitration.

BY JOSEPH M. COX

Most businesses in the United States have an arbitration clause in their contracts with customers, suppliers, and anyone else they do business with on a daily basis. While many business owners adopt the premise that arbitration is the best way to handle disputes, they may not know that there is very little chance of having an adverse arbitration overturned in court. Thousands and thousands of arbitration awards have been entered throughout the years but only a scant percentage of these are vacated. This article attempts to provide insight into the arbitration process and guidance on how you and your counsel can better prepare for arbitration.

DRAFT THE ARBITRATION CLAUSE YOU WANT

Businesses have sole control of the arbitration clauses they put in their contracts. Having an arbitration clause that is specific in scope is key to having an arbitration that runs efficiently and more affordably. Clients should consult their lawyers about the best language to use. Further, it would be wise for clients to hire attorneys who have conducted numerous arbitrations to learn how to best draft the practical aspects of an arbitration clause, such as controlling the time of the proceeding, the process, and its costs.

IT'S YOUR ARBITRATION CLAUSE, SO KNOW WHAT'S IN IT

The first thing businesses should do is come to an understanding of what is in the arbitration clause of the contract at issue and convey this understanding to their lawyers. Knowing what the arbitration clause says is important for a variety of reasons. For example, your arbitration clause may state that all claims shall be arbitrated between the parties but that extraordinary relief, such as an injunction, may be obtained at the courthouse; other arbitration clauses may not have this and may have an arbitration clause for all causes of action between the parties. In the latter

situation, you may have to seek immediate relief from an arbitration panel or go to court and then move to compel the matter to arbitration. Also, the arbitration clause at issue may have limitations on discovery, time limits, attorneys' fees, the number of persons on a panel, deadlines, and many other details. Clients and lawyers need to know the terms of the arbitration clause.

THE SCOPE OF YOUR ARBITRATION CLAUSE IS IMPORTANT

There are two ways that a party can find itself in arbitration. One, the aggrieved party can file an arbitration action against the other party in the forum that is selected in the arbitration clause. Alternately, a judge can order arbitration. If you are unsure whether a matter is subject to arbitration, a trial court will make this decision. But, once the trial court decides that the case belongs in arbitration, the arbitrator will decide the scope of the arbitration agreement.

The claims to be arbitrated depend almost entirely on the arbitration clause at issue and the claims that are being asserted. Because the parties can expand the scope of the arbitration clause by agreement or waiver, the client and the lawyer must be diligent in keeping the arbitration in line with the terms

of the arbitration clause. The law is replete with numerous cases that address the scope of waiver. You should be kicking your lawyer under the table when you believe testimony or issues being discussed are outside the scope of the arbitration clause. Have your counsel object early and often to any expansion of the clause's scope, and, if necessary, seek court intervention to preserve this issue for the appellate system.

FAA? TAA? OTHERS?

Numerous bodies of law govern arbitrations; knowing the distinction between these laws should be considered when drafting an arbitration clause. Further, knowing the rules that relate to your arbitration will help you and your counsel understand the process and procedure. There are significant differences between the Federal Arbitration Act and the Texas Arbitration Act.

IT IS GOOD TO KNOW THE ARBITRATOR

The selection of an arbitrator is important, and the client should have significant input on this decision and ultimately choose the arbitrator. Knowing the arbitrator is not meant in the sense of knowing him or her personally (which would be grounds for disqualifying a potential arbitrator), but in the sense of knowing what

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philosophy the arbitrator has on a particular issue or area of law or how the arbitrator will handle the final hearing or a difficult witness. You should rely on your counsel to research a particular arbitrator being considered. Further, your counsel should find out if any other lawyer in his or her firm has a business or social relationship with the proposed arbitrator and whether they have had any arbitrations with him or her. In most cases, the arbitrator will disclose what he or she knows about the parties, witnesses, and lawyers. But, the arbitrator may have forgotten about a case with one of the parties, witnesses, or a member of your counsel's firm. Clients should ask their lawyers whether they have searched for and disclosed any relationships with the arbitrator.

LAWYERS NEED TO BE PREPARED

Clients need to be engaged in their representation and make sure their lawyers have the evidence they need to persuade the arbitrator to rule in their favor. One good way to help your counsel is to ask them to prepare for the arbitration like it is a trial before a jury of one (or three if there is a three-person arbitration panel). Oftentimes I have seen parties, witnesses, and lawyers taking a looser, somewhat lackadaisical, approach to the arbitration process and final hearing. Maybe this stems from the lack of a person in robe or a court reporter. Clients need to realize that the burden of proof at the courthouse is the same burden of proof at arbitration. Once clients understand this, they can assist their counsel in preparing the case for a final hearing. Make sure your counsel has prepared trial briefs, exhibits and witnesses, findings of fact and conclusions of law, and a closing brief. In simple words, be ready for arbitration just like you would be for a jury trial, but without the voir dire.

RULES OF EVIDENCE AND PROCEDURE

The layperson loves to throw around the word *hearsay*. At the courthouse, hearsay may be a valid objection. But, in arbitration, there may not be such a thing as hearsay. If the arbitration clause does not provide for rules of evidence, then no rules of evidence apply to a final hearing or any matters taken prior to a final hearing, such as summary judgments. This is why it is so important to know what is in your arbitration clause. It is up to the clients to change their arbitration clause to build in rules of evidence. Clients need to be proactive in having an arbitration clause that will protect them from common issues that result from no rules of evidence.

Further, clients should consider whether any rules of procedure will govern the proceedings. For example, parties often want to file summary judgments in arbitrations. If the Texas Rules of Procedure apply, then there is a framework for how the motion for summary judgment is handled, including a briefing schedule. While not essential like the rules of evidence, rules of procedure can be helpful in moving an arbitration proceeding along and may help your counsel focus on the arbitration as if it were a case pending at the courthouse.

THE COSTS OF ARBITRATION

The common thought of the business community is that arbitration is faster and cheaper. But, this may not always be the case. Arbitration can be as expensive as a normal lawsuit at the courthouse. The one advantage to arbitration is that it can be a quicker path to a final resolution (mostly due to the lack of appellate rights and the difficult task of overturning an arbitration award). Clients should discuss the costs of arbitration with their counsel and understand that—unless the arbitration clause limits the amount of discovery—the arbitration may have the same amount of discovery as it would in the

court system along with the added cost of the one- or three-person panel.

The biggest question facing arbitrators today is whether the lawyers or the arbitrator should reign in discovery. There is no easy answer to this question, but a practical tip for limiting discovery would be for the clients to ask their lawyers to work out an agreement with the opposing counsel. Clients should be proactive in helping to limit the amount of discovery (hence the key nature of drafting the arbitration clause and that the arbitrator should enforce any limitations on discovery featured in the arbitration clause).

VACATING A FINAL AWARD

Trying to overturn an arbitration award is a daunting task. Put simply, your chance of overturning an adverse award is exceptionally slim. You should know this at the outset and discuss this with your counsel. Each jurisdiction has case law on what avenues are available to overturn an award. Further, the law varies depending on what state you are in, whether you are in state court or federal court, and whether the FAA is the governing law or another law.

CONCLUSION

If you know your arbitration clause and your forum and prepare your arbitration case just like you would a case tried before a judge or jury, you will be in the best position to obtain a favorable ruling. Have your attorney draft the arbitration clause you want, implement the clause, and then finish strong with a well-prepared presentation. Remember, as in a courtroom, the arbitrator will not appreciate and should not tolerate unprofessional behavior. **TBJ**



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