

## **ARBITRATION TIPS FOR ADVOCATES AND ATTORNEYS**

Arbitration is an increasingly popular method for the resolution of a wide range of disputes. When cases involve complex legal, technical, professional and insurance issues, multiple parties and valuable ongoing and sensitive relationships, the resolution of such disputes through the judicial system can be complicated, costly and slow. Often, the cost of adjudicating disputes can exceed the value of the issues involved.

Generally, the longer it takes to resolve and conclude a dispute, the costlier it is in dollar, relationship and opportunity costs. The information and suggestions presented here are offered to help you determine whether and how the arbitration process can be most effectively utilized to resolve disputes in a fast, economical and efficient manner. Considerations are presented in three sections: 1) During contract review; 2) Before the hearing and 3) During the hearing.

### **DURING CONTRACT REVIEW.**

Hawaii was one of the first states of the nation to adopt the Revised Uniform Arbitration Act (RUAA). Under the RUAA, H.R.S. CHAPTER 658A, all agreements to arbitrate made on or after July 1, 2002 are subject to its provisions. Starting July 1, 2004, the Act will govern any agreement to arbitrate, whenever made. (Section 3).

The new Arbitration Act resolves and answers many issues that existed under the old Arbitration statute. But, the new Act makes the arbitration process more like litigation with potentially costly full discovery and additional appeal opportunities and expanded appeal grounds. **Clients contemplating submission of a dispute to arbitration under the new Act or who are considering including an arbitration provision in their contracts and agreements should be urged to consult counsel. Careful consideration should be given to customizing an arbitration agreement to suit the special needs and circumstances of the client.**

Many, but not all, of the provisions of the RUAA may be modified or waived. (Section 4). Thus, **arbitration agreements may be customized to a great extent, presenting a drafting opportunity and challenge.** Some key provisions that one may wish to customize include limiting discovery to preserve the efficiency, speed and cost efficiency of arbitration (Section 17).

[ Sample suggested language: Discovery shall be limited to the disclosure and identification of witnesses and the production and exchange of documents and records pertinent and material to the issues involved.], **defining the arbitration hearing and evidentiary process (i.e. fast track arbitration, chess clock time limits, last best offer arbitration)** [Sample suggested language: All hearings and submissions shall be scheduled, concluded and submitted within five months of the initial demand for arbitration and the Arbitrator shall render an award within six months of the initial demand for arbitration.], **limiting punitive damages (Section 21)** [Sample suggested language: Damages shall be limited to reasonable actual and compensatory damages incurred and punitive damages shall not be awardable.], **empowering the arbitrator to consolidate arbitrations (Section 10), changing and defining notice requirements (Section 2), selecting venue (Section 27) and providing for the arbitrator's retention of jurisdiction (not addressed in the RUAA).** [Suggested sample language: The Arbitrator may retain jurisdiction for a reasonable period of time not exceeding 180 days to address issues or disputes with regard to specific performance, implementation and/or interpretation of the Arbitrator's award.]

### Key Provisions changing prior law:

1. Arbitrator must disclose any facts that a reasonable person would consider likely to affect impartiality. The duty to disclose is a continuing duty. Lack of disclosure may be grounds for vacating an arbitration award. (Section 12).
2. The Court decides whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate. The Arbitrator decides whether condition precedents to arbitration have been fulfilled and enforceability of contract containing a valid arbitration agreement. (Section 6)
3. Consolidation of separate arbitration matters may be ordered by the Court unless the agreement prohibits consolidation. (Section 10).
4. Interim relief and provisional remedies may be ordered by the court prior to appointment of an arbitrator and by the arbitrator after appointment. (Section 8).

5. Arbitrators are afforded immunity from civil liability to the same extent as a judge of a court. An arbitrator or arbitration organization representative may not be compelled to testify or produce records except with regard to vacature of an award for fraud, corruption, evident partiality or prejudicial misconduct. (Section 14).
6. Full discovery, depositions, subpoenas may be authorized by the arbitrator. In deciding whether or not to permit discovery, the arbitrator is to take into account the needs of the parties and the desirability of making the proceeding fair, expeditious, and cost-effective. (Section 17).
7. Punitive damages, awardable if authorized by law in a civil action. Similarly, reasonable attorney's fees, expenses, arbitration fees and expenses may be awarded. Arbitrator empowered to award such remedies as are just and appropriate. (Section 21).
8. Broader grounds to vacate arbitration awards. In addition to the pre-existing grounds for vacature (corruption, fraud, evident partiality, exceeding authority, failing to consider all material evidence, etc.), an arbitrator's misconduct "prejudicing the rights of a party" has been added as grounds for vacature. (Section 23).
9. Expanded grounds for appeals provided. (Section 28). (This increases the potential for abuse and delay in the arbitration process).

Including the necessary parties for efficient resolution.

Review of the specific circumstances should include the determination and identification of all involved parties necessary for an efficient and speedy resolution of any dispute that may arise. Where appropriate to the needs of the client, the contracts of other involved parties such as subcontractors, design professionals and purchase orders for major material suppliers should be reviewed and revised as appropriate to include such parties, if needed and desirable, in the mediation and/or arbitration of disputes.

## **Can parties opt out of the RUAA?**

Hawaii's new RUAA has caused significant concern among many Hawaii attorneys to the point that some are looking for ways to avoid the RUAA. For those interested in the argument that the Federal Arbitration Act (FAA) preempts the state arbitration statute, you may find the following case helpful: Blanton v. Stathos, 351 S.C. 534 (App. 2002). It involved an architect who was terminated before the plans were finished. The appellate court stated that the Court would need to ascertain from the contract, the complaint and the surrounding facts whether the case dealt with interstate commerce and whether the FAA pre-empted the state arbitration law. The Court found that because the architect's plans involved consultation with out of state consultants and contemplated the use of goods and subcontractors from interstate sources, the architect's contract dealt with interstate commerce and thus was governed by the FAA which trumped contrary state arbitration law provisions.

Another excellent discussion on this possibility can be found in Housh v. Dinovo Investments, Inc., 2003 WL 1119526 (D.Kan., Mar 07, 2003) (NO. CIV.A. 02-2562-KHV).

For a contrary court view, see the following California case discussion. Reflecting an apparent split between different districts of the California Court of Appeals, the Court of Appeals for the Second Appellate Division ruled recently that the FAA does not preempt California's civil procedure section 1281.2 (c). Section 1281.2(c) grants the trial court discretion to refuse to enforce an arbitration agreement or to stay an arbitration if a pending court action or proceeding involves a third party (not a party to an arbitration agreement) arising out of the same or related transaction and there is a possibility of conflicting rulings on a common issue of law or fact.

The case involved claims arising under six contracts between related parties where only four contracts contained agreements to arbitrate under AAA rules. Although arbitration was demanded, related litigation was commenced which involved nonsignatory parties. In a case where it was unrebutted that the contracts involved transactions affecting interstate commerce, the trial court found that the litigation case involved some claims that were not subject to arbitration and some litigation parties were not parties to contracts

with arbitration clauses and thus denied a petition to compel arbitration and to stay litigation. Arbitration was stayed pending resolution of the litigation.

In the case, the contract which contained the primary arbitration agreement contained a choice of California law provision and designated the situs for arbitration to be Los Angeles. The contract contains specific language that said "The designation of a situs or specifically a governing law for this agreement or the arbitration shall not be deemed an election to preclude application of the Federal Arbitration Act, if it would be applicable." After a detailed discussion of the state of the law in California regarding preemption by the FAA, the Court of Appeals declined to follow the decisions of two other Court of Appeals that had found preemption declaring them to be "wrongly decided".

The case is CRONUS INVESTMENTS, INC. v. CONCIERGE SERVS., No B159591 (Cal. 2d App.Dist. April 21, 2003)

To read the full text of this opinion, go to:[PDF File]

<http://caselaw.lp.findlaw.com/data2/californiastatecases/b159591.pdf>

In a recently decided case, **THE CITIZENS BANK v ALAFABCO**, No. **02-1295 (June 2, 2003)** the U.S. Supreme Court, has provided clear support for an expanded interpretation of when transactions “involve commerce” and thus come under the coverage of the FAA.

The facts of the case involved a Bank and Contractor engaged in a series of transactions, loans and agreements over several years. One relevant agreement provided for arbitration and said that the FAA "*shall apply to [its] construction, interpretation and enforcement.*" The Contractor sued and the Bank sought arbitration. The Alabama Supreme Court held the relevant transactions had no "*substantial effect on interstate commerce*" since there was no showing that:

- 1) any part of the restructured debt was attributable to interstate transactions;
- 2) the funds comprising the debt originated out-of-state; or
- 3) that the restructured debt was inseparable from any out-of-state projects.

With an insufficient nexus to interstate commerce to establish FAA coverage of the dispute, arbitration was denied.

The U.S. Supreme Court reversed. The FAA relates to contracts evidencing a transaction "*involving commerce*," a phrase the state court had interpreted too narrowly. It is the functional equivalent of "*affecting commerce*," the FAA encompasses a wider range of transactions than those actually "*in commerce*" or "*within the flow of interstate commerce*" and application of the FAA isn't defeated just because there isn't a "*substantial effect*" on interstate commerce.

Instead, the commerce clause's power "*may be exercised in individual cases without showing any specific effect upon interstate commerce*" if, in the aggregate, the activity in question would represent a "*general practice . . . subject to federal control.*"

Although the agreements were executed in Alabama by Alabama residents, they involved interstate commerce since:

- 1) Contractor engaged in business in multiple states using loans from Bank that were negotiated and renegotiated;
- 2) The debt was secured by Contractor's assets including inventory assembled from out-of-state parts and raw materials;
- 3) A consideration of the "*general practice*" of the transactions makes clear the "*broad impact of commercial lending on the national economy.*"

Since the lower court opinion rested on "*an improperly cramped view*" of the commerce clause, the court granted Bank's petition for a writ of certiorari and, having done so, issued an unsigned Order remanding the case for further proceedings not inconsistent with the Order.

### **Sample Drafting Language to elect FAA jurisdiction.**

An example of a clause that can be included in a contract or submission agreement is the following:

The Parties agree that this Agreement evidences a transaction involving interstate commerce and that the enforcement of this arbitration provision and the confirmation of any award issued to either party by reason of an arbitration conducted pursuant to this arbitration provision is governed by the Federal Arbitration Act, 9 U.S.C. § 1 et, seq.

### Obtain an insurance review.

Determining whether a party has the proper type and amounts of insurance is also important. Have the insurance and indemnity requirements of the contracts reviewed by experienced insurance consultants to make sure coverages and available defense rights are provided.

## **BEFORE THE HEARING:**

**Being proactive, developing focus early and streamlining the arbitration process will greatly help parties to achieve a more efficient, fair, economical and successful process.**

### **Identify and focus on key issues.**

In preparing for arbitration, one of the most important and helpful things that can be done is to develop clarity and clear focus on the issues which are key to determination of the controversy. The earlier this can be done, the better. When issues and claims are muddled, preparation, discovery and testimony tends to be muddled. When critical issues are clear, preparation, discovery and testimony can be more focused and clear. Documents, information and testimony that is not pertinent to the key issues can thereby be minimized or avoided altogether.

Be proactive. Enlist the early assistance of the arbitrator. Request an early pre-arbitration conference. Use the power of the arbitrator to accelerate, streamline and position your case for settlement and efficient resolution. Meet early with your arbitrator. Discuss whether all potential and necessary parties have been identified and are participating. Assess whether the arbitrator can assist in accelerating discovery and exchange of pertinent information. Determine if identification, review and tenders have been made for all potentially applicable policies of insurance and/or surety bonds. With assistance from the arbitrator, you can:

1. Obtain disclosure from all parties detailed statements of the claims, counterclaims and defenses. Identify the legal elements required to establish the claims and/or defenses. Break down elements required to establish liability, damages and defenses.
2. For each element of liability or damages, identify the facts,

documents and testimony in support or anticipated to support or establish each element. Concentrate on getting and presenting the kind of information and evidence that the arbitrator will find meaningful to establish facts in everyday business context.

3. Determine as much consensus as possible regarding issues, facts and documents that are not disputed. Offer and invite stipulations to all uncontested facts and issues.

4. Determine the feasibility of bifurcation and whether there are threshold matters or priority issues that can be addressed or resolved, especially if the early resolution of such threshold or priority matters will facilitate resolution and reduce litigation time and expense.

Example: A threshold state of the art defense or legal issue whether there exists a legal duty under the case circumstances can be heard first or submitted to a limited arbitration or an advisory scientific or medical opinion to resolve that critical threshold issue.

Example: A factual issue such as establishing a date of loss or occurrence can, if determined early, help to resolve a coverage dispute between insurers or between parties and their carrier.

Example: In multi-party cases, can the case be structured in phases so that parties involved in only certain portions of the case need to participate only in the portions of the case pertinent to them. Liability of a group of jointly responsible defendants to the claimant can be determined in one phase of the case. Then the allocation of liability between the defendants can be determined in a following phase of the case. Claimants need not sit through the fighting between the multiple defendants and defendants need not cut each other up in front of the claimant.

5. Neutral factfinder. Consider whether the use of a neutral factfinder, appointed by the arbitrator and preferably with consent of all parties, can be an efficient way to address fact intensive and time consuming matters. Use of a neutral factfinder may minimize or possibly avoid the need for each party to engage separate consultants or experts to review the same body of voluminous records.

For example, in a partnership accounting dispute, a single neutral and mutually trusted accountant can review the partnership accounting records to make findings, conclusions or recommendations. If a technical interpretation is at issue in the case (such as what are the applicable requirements of Generally Accepted Accounting Principles (GAAP)), the neutral factfinder can provide the evaluation. The parties can thus avoid a costly "battle of experts" in the case.

Example: In a construction deficiency case, a single architect,

engineer or construction manager serving as a neutral factfinder can review the pertinent records to determine the pertinent construction history, a critical construction sequence, a difficult delay damages claim or evaluate adequacy of manloading for specific scope of work.

The factfinder should be permitted access to all pertinent records. The scope of the factfinder's review should be clear and focused. The goal is to take issues or subjects that would be laborious or time consuming to establish and present in a traditional adversarial arbitration hearing process and eliminate the contentious formality of questioning multiple witnesses. The factfinder's report and conclusions should be provided to the parties in advance of any hearing. Use of a neutral factfinder will eliminate issues and uncertainties concerning bias. The need for each party to retain and pay for separate expert witnesses is hopefully eliminated. Also, issues of credibility or bias of expert witnesses who are suspected of being paid advocate witnesses is then minimized.

**Establish a consensual information exchange. Organize documents and the presentation of documents.**

1. Establish schedules for the request and production of documents within the care, custody and control of the parties. Consider breaking down discovery efforts into separate phases. The first phase can address providing such information necessary to allow all parties to develop a realistic and meaningful understanding and assessment of the strengths and weaknesses of the case and options for settlement or successful mediation. Then provide that if negotiations or mediation do not lead to complete resolution, later discovery can address the additional documents and information needed to prepare and present an efficient hearing on only those issues remaining.

2. Develop a joint exhibit list of pertinent documents to eliminate duplication.

3. Exhibits can be tabbed and bound in 3 ring binders.

4. Folio exhibits (diaries, entire files or batch files of invoices, repetitive or voluminous records) can be assigned a single exhibit number. All pages within a folio exhibit should be numbered or Bates stamped sequentially for ease of reference and access.

5. Consider feasibility of digital scanning of documents onto discs to reduce the physical volume of records.

6. Consider stipulations regarding documents to simplify and speed up the arbitration process.

a. All documents are deemed authentic and accurate copies

- of the originals.
- b. Establishing foundation elements such as records are business records regularly maintained or that signatures are those of the persons reflected is unnecessary.
  - c. All exhibits are deemed admitted unless specific objections or reservations regarding specific exhibits are noted. No formal offering or request that a document be admitted is necessary except for those documents for which specific objections or reservations have been noted.
  - d. Except for impeachment and rebuttal purposes, all exhibits that a party anticipates or intends to use in support or defense of a claim will be submitted prior to the commencement of the arbitration hearing.
  - e. Hearing exhibits will be identified and submitted to the arbitrator by an agreed time prior to the hearing sufficient to allow parties adequate time to be aware of the anticipated exhibits planned for the hearing.

**Expert Witnesses.**

- a) Establish agreed ground rules for identification and disclosure of experts and their field of expertise and for designation of counter-experts.
- b) Provide for exchange of resumes of experts and address qualification of expert issues before the hearing to preserve expensive hearing time for other substantive matters.
- c) Establish if written expert reports will be prepared or required. Provide for early exchange of reports and establish clear ground rules requiring that expert reports contain all opinions and the bases for such opinions intended to be presented in the case. Establish that the reports must reflect the theories and opinions of the witness after all investigation and testing has been done so that there will be no surprise opinions and last minute tests and investigations. Establish whether experts will then be limited only to the opinions contained in the reports.

**AT THE HEARING:**

**Respect the seriousness of the arbitration process.**

Prepare & remind your client and witnesses to appreciate the seriousness of the arbitration process. The arbitration is their final opportunity to present themselves and the merits of the case which will lead to a final and binding

decision and award. Although arbitration hearings tend to be more informal and at times very relaxed, clients and witnesses should be made aware and sensitive to conduct themselves with courtesy, respect and dignity at all times before and during the entire arbitration hearing process, including the informal breaks and recesses. Arbitrators do observe and can be affected by the statements, conduct, professionalism and decorum of the parties, their advocates and representatives throughout these times.

**Establish the pertinent chronology of critical events and milestones.  
Focus the arbitrator's attention to the critical issues and information.**

1. Provide the arbitrator with an overall chronology of the key events and milestones to help focus the arbitrator's attention and awareness. A written chart or exhibit works well and is constantly available for reference.
2. Identify as much of the chronology that is undisputed.
3. Identify and focus on issues or areas of disagreement relating to the chronology.
4. A party can then focus upon the witnesses and information needed concerning the disputed issues.
5. Ask the arbitrator to make interim decisions if that will help to narrow the focus of the case and focus the witnesses and further evidence upon the remaining issues. This can save presenting unnecessary or cumulative witnesses and documents.

**The neutral factfinder's report.**

Where the parties have agreed to the use of a neutral factfinder, the factfinder's report can provide a quick and efficient presentation of factual findings and conclusions. Hopefully, the need for multiple percipient witnesses can thereby be avoided.

**The experts roundtable.**

Where multiple expert witnesses are involved and will be testifying, consider whether a tandem or roundtable discussion or presentation of the experts' opinions would be more efficient than the traditional question and answer, examination and cross-examination format. The tandem or expert roundtable works as follows.

1. All experts testifying on a subject or issue are gathered together at the hearing.
2. Prior to gathering all experts together at the hearing, resumes and information concerning the experience of the expert witness with similar

work or issues is exchanged and provided to the arbitrator. Determine if parties are willing to submit to the arbitrator the evaluation of the experts' experience and credibility based upon this exchange and presentation of information without having to utilize hearing time to go through what can be lengthy voir dire.

3. If voir dire is desired, arrangements can be made to have voir dire of individual expert witnesses done by conference telephone interview before the hearing. Oftentimes, expert witnesses must travel significant distances to be available to testify. Where multiple expert witnesses are involved, their attendance at hearings involves great expense. The goal is to take care of any and all matters before the hearing that do not require the presence or attention of all of the expert witnesses involved. Use of the formal hearing time should be limited and concentrated on matters that go to the issues at controversy in the case.

4. The key issues and elements of claims or defenses should be identified and listed. The purpose and need for the expert opinion testimony should be clear. Written expert reports should be submitted and exchanged in advance to permit review by the other parties, their experts and the arbitrator prior to the hearing and /or roundtable discussion.

5. At the hearing with all involved expert witnesses present and sworn, it is suggested that the arbitrator(s) begin the interviewing of the experts. Where the arbitrator takes the lead in asking questions and interviewing the witnesses, it is often quicker and more focused than the traditional adversarial examination and cross-examination format. The parties and their advocates have less need to guess what the arbitrator is thinking or what the arbitrator wants to know. The parties can concentrate on supplementing the inquiry with additional information or examination that the party believes is desirable and necessary for presentation to the arbitrator. One of the principal advantages of the roundtable interview format is that the opinions of all of the experts can be expressed at one time. All pertinent opinions can be presented and focused on an issue by issue basis. It is helpful to have a chart of questions and issues prepared beforehand. As the experts provide their opinions, their testimony can be captured and compared in context. Experts can respond immediately to the contentions and opinions expressed. Opinions can be tested and clarified. Hypotheticals can be framed and revised quickly. The arbitrator(s) can gain the benefit of the expertise of all the experts in framing and clarifying issues. Many times there are significant areas of consensus among the experts. Those can be identified and noted. The inquiry can then move on to areas or issues where the experts disagree. Having a prepared chart of issues permits

the arbitrator to capture the pertinent testimony, highlight the areas of contention and collect in one place the reasons and rationale of the different witnesses.

6. After the arbitrator's questions have been asked, parties should have the opportunity to ask questions as appropriate. The expert witnesses can be encouraged to comment upon and to ask questions of each other and be afforded an opportunity to provide additional information they believe to be helpful or pertinent.

7. Consider bifurcation of experts testimony on causation and liability, leaving opinions on the scope and propriety of proposed fixes and solutions for a separate session. Often expert professionals can develop more consensus on fixes and solutions. The use of an experts roundtable can be especially useful and helpful to collect the testimonies of multiple witnesses pertinent to a subject and to test and understand the critical differences that may exist. It also significantly reduces the study time needed by the arbitrator to review, relate and make sense of divergent technical and complicated testimony.

#### **Written direct testimony with cross examination.**

Consider whether it would be time efficient to submit all direct testimony in writing to the arbitrator(s) and other parties before the hearing. At the hearing, witnesses can be offered for purposes of cross-examination and redirect examination. This can directly and clearly present the direct testimony and shorten the hearing time.

#### **Deposition excerpts.**

Where parties have taken depositions of witnesses, it may be acceptable for some witness testimony to be submitted by use of portions of their deposition transcripts. Parties can designate and counter-designate only pertinent portions of deposition testimony focused upon the critical issues in the case and focus the arbitrator.

#### **Documents Depository.**

For the large multi-party case with potential third-parties being added over time, consider establishing a documents depository to hold and duplicate all documents produced with appropriate controls systems.

**Provide a summary or checklist.**

Take the opportunity to help your arbitrator identify and focus on all pending claims and issues. Provide a summary or checklist of all claims and issues and set forth clearly what you are seeking with respect to each.

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