

ARBITRATION

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Motion Practice and Arbitration Proceedings From the Perspective of the Arbitrator

Arbitration is supposed to be a relatively quick, less formal and more efficient way to resolve a dispute, leading many to conclude that in this forum motion practice is out of place.

That supposition is a mistake. That's what this article is about.

The conclusion assumes that all arbitration proceedings are the same, when clearly they are not. And it also assumes that the law and the governing rules of the various arbitration providers are designed to discourage motion practice when without a doubt this is not the case. This said, the practitioner should keep in mind that most arbitrators discourage motion practice for a host of important reasons. Improperly used, motion practice can frustrate the process, create unwarranted delay and impose unnecessary expense. Indeed, with these concerns in mind, the American Arbitration Association (AAA) offers its arbitrators a course of instruction entitled "Dealing with Delay Tactics in Arbitration," designed to sensitize the neutral about the possibilities for the misuse of motion practice.

The time line for most arbitration proceedings is pretty short-lived. Usually it's only weeks from the commencement of a proceeding to the exchange of pleadings and the pre-hearing conference (sometimes called a preliminary hearing). Discovery is more times than not very limited and it isn't unusual for an arbitrator to insist on beginning the hearings within a few months at the most. In theory, the pre-hearing phase should be so condensed and efficient that there shouldn't be

any need for motion practice. But often things just don't turn out like they are supposed to and one or more parties may feel that an intervention by the arbitrator is needed or try to use motion practice as a way to manipulate the process.

Motions are nothing more than a request that an arbitrator do something to assist one of the parties and if a pending matter is complex and the parties are having difficulties, such a request may be appropriate. Indeed, in many situations the goals of arbitration may be undermined or even defeated if the arbitrator isn't brought in to assist. However, what many fail to understand is that, by design, arbitrators aren't judges or referees. Their authority is very limited when it comes to non-cooperation. The challenge for the arbitrator is to balance the obligation to assist with the temptation to take on the role of referee.

Types of Motions

Motion practice tracks the phases of the arbitration process and can be divided as follows: pre-conference motions, pre-hearing motions and post-hearing motions. Motions made during any of these phases involve either housekeeping matters or substantive issues.

Pre-conference motions are rare because of the short time line between the commencement of the proceedings and the pre-hearing conference. Arbitrators use the pre-hearing conference to determine what the discovery needs of the parties will be and to confirm the ground rules for the hearing itself. The most common pre-conference motion is one for interim

relief, usually in the form of an injunction or a restraining order. In addition, motions are sometimes made seeking to either sever or consolidate claims or parties.

Motions made during the pre-hearing conference typically involve requests for an order directing some form or another of discovery, confirmation of deadlines and directions concerning the filing of briefs and other administrative matters. The arbitrator's decisions in this area are final and are for the most part beyond review by a court.

The rules of all the major facilitators, the AAA, International Institute for Conflict Prevention and Resolution (CPR), JAMS and National Arbitration Forum (NAF) give the arbitrator broad discretion and authority to issue orders and directives concerning such applications. The arbitrator has the authority to control the extent and timing of the discovery process. The rules of JAMS are the broadest, with Rule 17 giving in-depth details about the manner and scope of discovery as of right under the rules as well as the scope of the authority the arbitrator has. Rule 21 of the Commercial Rules of the AAA doesn't speak to broad discovery, but instead mentions only the production of documents and other information. However, the rules governing large and complex commercial matters (Rule L-3(c)-(f)) do speak to discovery beyond that provided for in the standard commercial rules.

Motions made in the time span between the pre-hearing conference and the hearing itself are most often about non-compliance. Most common

are demands for enforcement of commitments and obligations involving discovery. In addition, it is commonplace for motions to be made seeking amendment of pleadings, issuance of subpoenas and postponements of the actual hearing.

While motions involving substantive issues – usually seeking dismissal as a matter of law or summary judgment – can be made at any time, such motions are most often made during the first two phases. These motions are rarely granted and are usually held in abeyance pending the completion of the hearing. Most arbitrators fear that an award based on such a motion will be challenged on grounds that the losing party wasn't given a fair opportunity to prove a case.

Post-hearing motions are technical in nature as they usually are directed at the terms of the final award and therefore limited in content to matters provided for by either the applicable arbitration law or the rules of the forum directing the proceedings.

From the Perspective of the Arbitrator

Discovery motions can serve to underscore the tensions between the needs of the parties and the powers of the arbitrator. These motions typically involve complaints about non-compliance. While the authority of the arbitrator to order discovery and to place limitations on the scope of discovery is broad, the ability of the arbitrator to enforce his or her orders and directives is quite limited. The arbitrator's greatest power is the authority to exclude or preclude. Once made, such an order self-executes, requiring nothing further from the arbitrator.

But what about the power to punish for non-compliance? Unless the parties agree otherwise, governing statutes deny arbitrators any authority to punish. Neither the Federal Arbitration Act (FAA) nor CPLR Article 75 grant authority to an arbitrator to impose a fine or penalty or to hold a party in contempt. However, the arbitrator is not totally without disciplinary author-

ity. If the proceeding is governed by the FAA, there is no prohibition against an arbitrator awarding attorney fees and/or punitive damages. Such is not the case if the CPLR governs, unless the parties agree otherwise. Here there is authority for the arbitrator to apportion fees and expenses subject only to the terms of the arbitration agreement and judicial review pursuant to CPLR 7513.¹ Moreover, arbitrators have the authority to make negative inferences from the failure of a party to comply with an order or commitment to produce documents or other evidence,² without running the risk of exceeding his or her powers.³

The rules of the AAA are silent as to the authority of an arbitrator to impose sanctions for non-cooperation. CPR Rule 15 authorizes the arbitrator to impose a "remedy it deems just including an award on default." JAMS Rule 29 permits the arbitrator to impose an "appropriate" sanction. NAF Rule 31(c) gives the arbitrator the power to exclude witnesses, testimony or documents if a party fails to exchange information as required by Rule 31(a) and (b). However, these rules notwithstanding, the practitioner needs to be mindful that they are subordinate to applicable statutes and are always reviewable by courts.

Dispositive motions present a unique challenge for the arbitrator. Many arbitrators refuse to consider, much less rule on, these motions because of the possibility that a resulting award will be vacated on the grounds that the arbitrator refused "to hear evidence pertinent and material to the controversy."⁴ The rules of the AAA, CPR and NAF are silent as to the authority of an arbitrator to entertain dispositive motions; only JAMS has a rule that specifically addresses the issue.⁵ Moreover, if the contract and/or arbitration clause fail to require interpretation by application of law, under the rules at least of the AAA, there is no obligation for the arbitrator to do so.

Finally, post-award motions are limited in scope. CPLR 7509 and 7511 give the arbitrator authority to consider and

rule on applications to correct errors, with the proviso that the resulting modification doesn't affect the merits of the decision upon the issues submitted. This authority isn't found in the FAA. The rules of the various facilitators generally allow for post-award applications to an arbitrator for the reasons specified in the CPLR. However, the CPR Rule 14.5 allows a motion addressed to an arbitrator for clarification of the provisions of an award. Rules 42 and 43 of NAF provide the broadest authority to apply to an arbitrator. Rule 42 allows the arbitrator to correct clerical and administrative errors and Rule 43 goes so far as to permit the arbitrator to re-open the hearing and reconsider an award, most notably on the grounds that an issue submitted was not decided and provided for in the award.

Conclusion

There is a place in an arbitration proceeding for motion practice. But the scope of the practice is very limited. Arbitration is a function of an agreement by the parties to take any dispute out of the court system and, in the process, to strip from any dispute strategic manipulations designed to delay and frustrate. Arbitrators are not judges. An arbitrator's role is to facilitate the parties in accordance with the terms of their contractual obligations. Arbitrators are not referees. Motions, when made, should be structured to insure that the arbitrator isn't called upon to do something that is beyond his or her scope of authority. ■

1. See *Schwab, Katz & Dwyer v. Yukevich*, 167 Misc.2d 1004, 641 N.Y.S.2d 505 (Sup. Ct., N.Y. Co. 1996).

2. *Schwartz v. N.Y. City Dep't of Educ.*, 22 A.D.3d 672, 802 N.Y.S.2d 726 (2d Dep't 2005); *Better Health Med. PLLC v. Empire/Allcity Ins. Co.*, 11 Misc. 3d 1075(A), 816 N.Y.S.2d 693 (Civ. Ct., N.Y. Co. 2006).

3. CPLR 7511(b)(1)(iii).

4. 9 U.S.C. § 10(a)(3); or failed "to follow the procedure of" CPLR art. 75 (CPLR 7511(b)(1)(iv)).

5. See Rule 18, "Summary Disposition of a Claim or Issue."