ARBITRATION PRACTICE & PROCEDURE

The following material was prepared for an in-house law firm CLE in the fall of 2008. While arbitrations and court cases share many common traits, an arbitration is generally less formal procedurally than a court case, the discovery available in arbitration is a good deal less expansive than that available in litigation, and the decision-maker is either one or three arbitrators – not a jury – usually experienced in the substance/subject matter of the dispute being arbitrated. These materials address some of those differences. They have not been updated since preparation in 2008.

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Arbitration – Motions Practice, Getting the Evidence, Getting it in . . . and Persuading the Arbitrator

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Basic References

Statutes –

- Federal Arbitration Act (FAA): 9 U.S.C. §§ 1-16
- State law:
  - Uniform Arbitration Act (UAA), adopted 1955: www.nccusl.org (adopted in 35 states, adopted in substantially similar form in 14 states)
  - Revised Uniform Arbitration Act (RUAA), adopted 2000: www.nccusl.org (adopted in 13 jurisdictions [including Alaska, District of Columbia, Nevada, New Jersey, Oregon, Utah and Washington], legislation pending in 3 states [Connecticut, Massachusetts and New York])
    - Washington Uniform Arbitration Act (WUAA): RCW Chapter 7.04A (practically verbatim from the RUAA)

Rules –

Commercial, construction, employment disputes

- AAA, Commercial Rules, including Optional Procedures for Large Complex Commercial Disputes, Construction Rules, Employment Rules: www.adr.org (current and historical)
- JAMS Rules: www.jamsadr.com
- JDR Rules: www.jdrllc.com
- NAF Rules: www.adrforum.com
- WAMS Rules: www.usamwa.com

Securities disputes

- NASD Code of Arbitration Procedure: www.finra.org (current and historical) – slightly different rules for consumer cases and industry cases; both follow the same general format and numbering

Other useful references –

- *The 2005 Washington Uniform Arbitration Act – A Comparison With RCW Chapter 7.04 and the NCCUSL Final RUAA Draft (December 2000)*, Phil Cutler and Don Logerwell (prepared for the 2005 Annual CLE of the WSBA Dispute Resolution Section) (available from WSBA CLE)

- *I am your arbitrator: Here is what to expect from me...and what I expect from you*, Phil Cutler (2012) (available on the author's firm's website: www.cnhlaw.com/adr-services)

- *The College of Commercial Arbitrators Guide to Best Practices in Commercial Arbitration*, 2nd Ed. 2010, Curtis E. von Kann, James M. Gaitis (eds.) (Juris Publishing)

Fundamental Principles

Benefits of arbitration –

- opportunity to choose the decision-maker (who is most often versed in the commercial realities of business disputes)
- confidentiality

- reduced legal expenses
- an early opportunity to present evidence
- an expeditious decision
- finality (award not subject to general appellate review)

Drawbacks to arbitration –

- Filing/administrative fees based on amount of the claim/counterclaim and vary by forum
- Decision-maker is paid by the parties
- Limited discovery and motions practice, arbitrator generally has wide latitude to regulate within the context of the applicable forum rules and state law
- No general appellate review (review generally limited to whether the arbitrator engaged in serious misconduct; legal/factual "errors" not generally reviewable[1])

Arbitration is a creature of contract –

- Pre-dispute arbitration clause in contract
  - Important for contract-drafter to consider types of disputes that may arise post-contracting and craft an enforceable agreement tailored to meet parties' needs; unthinkingly incorporating a dispute resolution clause from "another" contract is a BAD idea.
- Post-dispute "submission" agreement

For arbitrator powers/authority, look to –

- Parties' arbitration agreement
- Federal law (FAA), where contract involves interstate commerce
- State law, applies as long as not in conflict with FAA
- Forum rules

Motions Practice

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[1] But, in Washington, *see Boyd v. Davis*, 127 Wn.2d 257, 897 P.2d 1239 (1995), especially Justice Utter's concurring opinion (at 266-270) for an historical examination of the "error of law, face of the award" doctrine. The continued vitality of the rule in light of Washington's adoption of the RUAA is unknown. The vitality of the "manifest disregard of the law" ground for *vacatur* of an arbitration award, recognized in many federal courts (but not yet in Washington), is in question following the U.S. Supreme Court's decision in *Hall Street Associates LLC v. Mattel, Inc.*, – U.S. –, 128 S. Ct. 1396 (2008).

- Generally limited, quite unlike civil court proceedings; arbitrator exercises considerable control/discretion in permitting/deciding motions

- Most common motions are ones for *interim relief*, concerning *discovery disputes*, for *summary judgment*; less frequent are motions *in limine*

- Discuss anticipated motions (what, when and why) with arbitrator at initial preliminary hearing; arbitrators almost always hold one – always ask for one

Interim Relief –

- AAA Commercial Rule R-34: specifically contemplates a party's request for "interim relief" – including "injunctive relief and measures for the protection and conservation and disposition of perishable goods" – and gives the arbitrator the authority to take whatever interim measures she deems necessary.

- RUAA Section 8 (RCW 7.04A.080), which also permits application to a court with jurisdiction if the arbitrator is unable to act timely or cannot provide an adequate remedy, is to the same effect.[2]

Discovery Disputes –

- Parties in arbitration have very limited discovery "rights" – see discussion below.

- RUAA Sections 15 and 17 (RCW 7.04A.150 and .170), AAA Commercial Rules (Rule R-21(c), AAA's Optional Procedures for Large Complex Commercial Disputes (Rule L-4(g)), and NASD Code of Arbitration Procedure (Rule 12509) all give the arbitrator the power to decide discovery disputes.

- Sanctions for discovery abuse...

    - RUAA Section 17 (RCW 7.04A.170(4)) specifically gives the arbitrator authority to sanction a party who violates the arbitrator's

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[2] Note that RCW 7.04A.080 is considerably narrower than its predecessor, RCW 7.04.130, which permitted the court (not the arbitrator) to "make such order or decree...as it may deem necessary for the preservation of property or *for securing satisfaction of the award*." (emphasis added)

discovery orders or otherwise engages in discovery abuse "to the extent permitted by law as if the controversy were the subject of a civil action in this state."

- AAA Commercial Rules are silent on this point, but the Massachusetts Supreme Court relied on a combination of rule provisions [Rules R-45(a) ("arbitrator may grant any remedy or relief that the arbitrator deems just and equitable") and 23(c) ("arbitrator is authorized to resolve any disputes concerning the exchange of information")] in determining that an arbitrator in a case under AAA's Commercial Rules give the arbitrator that authority. *Superadio Limited Partnership v. Winstar Radio Productions Inc.,* 844 N.E.2d 246, at 251-254 (Mass. 2006). The point may be moot in those jurisdictions that have adopted the RUAA (Massachusetts had not adopted the RUAA at the time of the *Superadio* case).

- Arbitrators in FINRA securities arbitrations have the explicit authority to sanction an uncooperative party (NASD Code of Arbitration Procedure, Rules 12212 and 12511).

Dispositive Motions –

- Dispositive motions – *e.g.*, motions to dismiss for failure to state a claim, motions for summary judgment or partial summary judgment – are not specifically permitted either by the FAA or the AAA Commercial Rules, though they are referenced in RUAA Section 15 (see RCW 7.04A.150) and, for a variety of reasons, have historically been disfavored in arbitration.[3]

- In order to balance the interests of all parties, many arbitrators will permit a party to file a dispositive motion only when:

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[3] Two reasons are most often cited by arbitrators for their disfavor of dispositive motions: the cost to the parties of preparing and responding to them, and of the arbitrator's consideration of them, and the inherent conflict of such a motion with the parties' presumptive right to a full hearing on the merits, which combined could lead a court to vacate an award. The latter basis for arbitrator antipathy is arguably less persuasive in those states that have adopted the RUAA, where the arbitrator is explicitly given the power to decide dispositive motions under RUAA Section 15. *See also* NASD Code of Arbitration Procedure, Rules 12600(a) and 12602, which claimants frequently argue gives them an absolute right to a full hearing on the merits. FINRA and NASD are in the process of revising the rules to make it clear that dispositive motions may be granted in the appropriate case.

(1) the parties' arbitration agreement expressly gives the parties the right to present dispositive motions;
(2) all parties agree that the motion should be heard and are agreed on the stage of the proceeding when it should be heard; or
(3) the arbitrator concludes, after hearing from all interested parties, that considering such a motion at a particular stage of the proceeding is appropriate.

Factors important to the arbitrator's determination include:

(a) the factual and legal basis for the motion;
(b) the facial likelihood of the motion succeeding;
(c) the ability of the opposing party to respond at that point in time (*i.e.*, the opposing party's need for time to develop its case or obtain discovery); and
(d) the relative burden on the parties in filing and responding to a dispositive motion versus the burden of proceeding through the hearing-on-the-merits.

- Some arbitrators require the party desiring to file a dispositive motion to demonstrate good cause by addressing the foregoing factors.

- Legal standards: generally FRCP 56 and its state law equivalent – no genuine issue of material fact, moving party entitled to an award in its favor as a matter of law.

Discovery – Getting the Evidence

General discovery principles –

- Very limited "of right" discovery, through any discovery vehicle. Unless the parties' arbitration clause expressly provides for (or restricts) discovery, litigants in arbitration are left with their own agreement, the rules of the arbitration forum, state law governing arbitration practice and procedure (the FAA is largely silent on discovery), and the discretion of the arbitrator. Panoply of discovery vehicles lawyers are used to in judicial proceedings is generally not available.

- Parties' arbitration clause (or submission agreement) can import state or federal discovery rules – or the parties can agree post-dispute to incorporate some or all of them – BUT doing so transforms the case into "just another lawsuit" and will ratchet up the cost to the clients and delay resolution.

- Arbitrators will "take into account applicable principles of legal privilege." AAA Commercial Rule R-31(c); applies to both discovery issues and hearing issues.

Rules –

- AAA's Commercial Rules provide for very basic "of right" discovery (*see, e.g.*, Rule R-21(b) – production of hearing exhibits 5 days prior to the hearing).

- Rule R-21(a) gives the arbitrator discretion to authorize broader discovery to meet the legitimate needs of the parties:

> At the request of any party or at the direction of the arbitrator, consistent with the expedited nature of arbitration, the arbitrator may direct (I) the production of documents and other information, and (ii) the identification of any witnesses to be called.

See also Rule R-31(a): "the parties . . . shall produce such evidence as the arbitrator may deem necessary to an understanding and determination of the dispute."

- While AAA Commercial Rules do not give parties a right to specific discovery vehicles, Rule R-21 gives the arbitrator the authority to permit a party to use whatever discovery vehicles (including interrogatories and depositions) may be legitimately called for.

- AAA's Optional Procedures for Large Complex Commercial Disputes, Rules L-1 through L-4, which expand on discovery and case-management issues (*see, e.g.*, Rules L-3 and L-4) , automatically apply in disputes where the amount in controversy (as measured by the arbitration demand or counterclaim) is at least $500,000, exclusive of claims for interest and arbitration fees and costs. Rule R-1(c), Commercial Rules. Parties may also agree to incorporate Rules L-1 through L-4 in smaller value cases. While they do not automatically afford the parties a right to broader discovery, the LCCD rules provide a basis for requesting the arbitrator to order it and wise counsel will seriously consider requesting that her opponent agree to incorporate those rules if the parties' arbitration clause does not specify inclusion of them.

- In securities cases, certain party-held documents are presumptively discoverable through a request for production (*see* NASD Code of Arbitration Procedure, Rule 12506 and the "Discovery Guide" for consumer cases (customer/broker disputes)). Although parties may request "information" (litigators would call them interrogatories), the rules do not contemplate the wide-ranging interrogatories common in litigation. NASD Code of Arbitration Procedure, Rule 12507(a)(1). Depositions are not available in FINRA securities arbitrations except in extraordinary cases where the arbitrators authorize them. Parties to a FINRA case are obligated to identify their witnesses and turn over their proposed hearing exhibits 20 days prior to the hearing. NASD Code of Arbitration Procedure, Rule 12514.

Statutory Provisions –

- FAA is largely silent on discovery matters. 9 U.S.C. §7 does address arbitrators' subpoena power for witnesses and documents, but federal courts are split as to whether this power applies to pre-hearing discovery. Probably a moot point in light of state arbitration law and most forum rules.

- RUAA Section 15 (RCW 7.04A.150(1)) – arbitrator has broad power to "conduct the arbitration in such manner as the arbitrator considers appropriate so as to aid in the fair and expeditious disposition of the proceeding."

- RUAA Section 17 (RCW 7.04A.170) – arbitrator has the power to: (1) issue subpoenas, including subpoenas for depositions; (2) define and set parameters for discovery, including sanctions for violation of his discovery orders; and (3) issue protective orders to prevent the disclosure of privileged, confidential and trade secret information.

When to Raise Discovery Needs –

- As early as possible. AAA arbitrators almost always hold an initial preliminary hearing shortly after their appointment is confirmed; if your arbitrator (or case manager) doesn't schedule one, ask for one. Rule R-20, AAA Commercial Rules. In FINRA securities cases, a similar hearing is required unless waived by all parties. NASD Code of Arbitration Procedure, Rule 12500.

- It is critical that counsel give serious thought to her discovery needs – and discuss those needs with opposing counsel – before the initial preliminary hearing and raise discovery issues with the arbitrator. Most arbitrators prefer to let counsel propose an agreed-upon discovery plan, which they will almost always approve.

- In AAA cases, the arbitrator commonly enters a pre-hearing/scheduling order following the initial preliminary hearing that covers discovery parameters (or a protocol for resolving discovery issues) and sets a schedule for pre-hearing exchange of exhibits and witnesses.

Discovery Vehicles –

Depositions: Not generally available as "of right" but most commercial case arbitrators will permit "appropriate" deposition discovery. Amount in controversy, number/length of depositions desired, availability of information from other sources, complexity of case, etc. will all be considered by the arbitrator. Very unusual for depositions to be permitted in FINRA securities cases.

Interrogatories: Not generally available as "of right"; most commercial case arbitrators discourage the use of interrogatories except as a means of discovering the whereabouts of relevant documents and the identity of persons with knowledge or information about the issues in dispute. Wise counsel will dispense with interrogatories altogether, or limit them to these matters. Of course, interrogatories are answered by counsel, so answers are commonly carefully crafted and of limited use anyway. Limited "requests for information" (interrogatories) are available in FINRA securities cases.

Requests for Production: Carefully tailored requests for production are almost always permitted by arbitrators. They are essential in almost all cases. Consult the "Discovery Guide" in FINRA securities disputes.

Requests for Inspection – Request for a site-visit or inspection of other "things" is uncommon in most commercial cases, but counsel should consider making such a request in the appropriate case. Providing the request is legitimate and not burdensome, an arbitrator is likely to permit it even over the objection of the other party. AAA Commercial Rule R-33 expressly authorizes the arbitrator to direct a site-visit or inspection for her own benefit.

e-Discovery: Available either by agreement or by order of the arbitrator under the rules and statutory provisions previously cited. Arbitrators will consider appropriateness and burden. Refer to case law for factors courts consider in permitting such discovery.

Requests for Admission: Requests for admission are likewise unusual in the ordinary commercial arbitration, but should be considered, especially where opposing counsel balks at particular factual stipulations that, if adopted, would narrow the issues or streamline the hearing.

Discovery from Third Parties –

- Available by subpoena, authorized by the arbitrator, in the appropriate case. *See* RUAA Section 17 (RCW 7.04A.170). Arbitrators commonly scrutinize an application for a subpoena to a third-party subpoena so as to minimize the intrusive effect on the third-party and the burden on that party.

- Arbitrators will commonly entertain an application (some even invite such an application) by the third-party if that party objects to the subpoena.

- Ask the arbitrator to summarize the reasons for her permitting the third-party discovery; will assist if the third-party recipient balks at compliance. Subpoena enforceable by the court where the subpoena recipient is located, even if the arbitration is pending in another state. RUAA Section 17 (RCW 7.04A.170). Arbitrator generally has no power to enforce his own subpoena, unless to a party.

Getting the Evidence in

- The arbitrator has broad power to "conduct the arbitration in such manner as the arbitrator considers appropriate so as to aid in the fair and expeditious disposition of the proceeding." RUAA Section 15 (RCW 7.04A.150).

- Legal rules of evidence do not apply at the hearing; the parties may offer such evidence as is relevant and material to the dispute. Rule R-31(a), AAA Commercial Rules. Arbitrator determines the admissibility, relevance and materiality of the evidence offered and may exclude evidence deemed by her to be cumulative or irrelevant. Rule R-31(b), AAA Commercial Rules. In FINRA securities cases: NASD Code of Arbitration Procedure, Rule 12604(a).

➜ Arbitrators generally use legal rules of evidence as a useful guide to admissibility, but frequently depart from their strict application.

- Hearsay? Commonly admissible in arbitration, but only to the extent the arbitrator considers it something that a reasonable and prudent business-person would rely on (*i.e.*, reliable by some measure). 3rd and 4th hand hearsay? Almost certainly not.

- Document authentication: generally required, but standards are laxer than in court; parties most often do not object on this ground.

- In FINRA securities cases: production of documents in discovery does not create a presumption of admissibility. NASD Code of Arbitration Procedure, Rule 12604(b). No similar explicit provision in AAA Commercial Rules.

- Evidence may be given by affidavit or declaration; such evidence shall be given "such weight as the arbitrator deems it entitled to after consideration of any objection made to its admission." Rule R-32(a), AAA Commercial Rules.

- Under their general authority to conduct the arbitration hearing in such manner as they deem most appropriate, most arbitrators will permit witnesses to testify by telephone. When using this, however, remember that the witness needs to have a set of all hearing exhibits that are relevant to his testimony. Consider asking the arbitrator to order a witness testifying by affidavit or declaration be available for cross-examination by telephone.

Effective Advocacy – Persuading the Arbitrator

Your goal in arbitration is to convince the arbitrator(s) of the merit of your client's claim. Conduct yourself and organize your case (exhibits and witnesses) with that goal in mind.

- *Know your arbitrator(s)*: their case- and hearing-management philosophy, their legal and/or business background, their familiarity with issues that will arise. Information is commonly anecdotal, but that doesn't mean it's not helpful.

- *Remember that your client is paying for the arbitrator's time*: don't waste it, or make the arbitrator spend time divining what you're talking about. Arbitrator compensation for hearing time can run $4,000 per day or more;

triple that for a 3-arbitrator panel.

- *Be civil and professional* to opposing counsel, parties and witnesses – and the arbitrator. Counsel your client to do the same. Displaying animosity or resorting to snide comments or ad hominem attacks is counterproductive and will prejudice your case. Don't engage in gamesmanship, either in discovery or at the hearing. Arbitrators see through such conduct, to the detriment of the party engaging in it.

- *Be prepared*; know your case; know and understand the rules and statutes which govern arbitration.

- *Don't assume the arbitrator shares your knowledge of the case*. Analyze, distill and organize the evidence – and all of your written and oral statements to the arbitrator.

- *Put yourself in the arbitrator's shoes*: give thought to what will help the arbitrator understand the issues and render a complete decision – in your client's favor – and what will make efficient use of both hearing and post-hearing study time (yes, arbitrators spend a LOT of time post-hearing analyzing the import of the evidence they've received). If you were the decision-maker, what would you want to hear and see? what would help you decide the case? what would be the most efficient and productive use of the decision-maker's time?

- *Is a site visit really critical?* Such a visit may make the evidence more real, but the arbitrator must be compensated for her time; is the added cost worth it? *Photos can be a good substitute for a site visit* – as long as they're clear (and dated) and unmistakably show the point a site visit would make.

- *File a concise and persuasive brief.* Arbitrators appreciate focused briefs applying legal principles to facts. Provide the arbitrator with a copy of key authority; most arbitrators appreciate your highlighting key holdings (but make sure you're citing to a holding, not dicta). String citations are useless; most citations to out-of-jurisdiction cases or difficult to locate authorities are useless unless you supply the arbitrator with a copy.

- *Organize exhibits for convenient reference by the arbitrator.* Use consecutive arabic numbers for all exhibits; eliminate duplicates; put all exhibits in a single binder (or set of binders), don't present the arbitrator with separate binders for the parties' exhibits (*i.e.*, Claimant's #1,

Respondent's #15); arbitrators don't ordinarily care who offered what exhibit; if it's important to you, let the arbitrator know that exhibits 1-50 are claimant's, the balance are respondent's. Include a few extra tabs at the end for the inevitable "additional" exhibits; bring a 3-hole punch to the hearing (or punch all additional exhibits). An exhibit list is a valuable tool for the arbitrator, it's not your work-product.

- *Have your own set of exhibits and another set for use by witnesses*; arbitrators don't like sharing their set with you – or the witness.

- *Don't simply present exhibits and expect the arbitrator to figure out what they mean and how they tie in to your case.* If a witness doesn't say something about an exhibit (what it is, why it's important), the arbitrator isn't likely to pay much attention to it.

- *Use technology and demonstrative aids wisely.* If you use power point presentations, video clips or projected deposition or document excerpts, be sure you know how to use the technology and can use it seamlessly. Consider providing the arbitrator with a paper copy of any computer-generated documents displayed.

- *Know the rules of evidence* – in arbitration, there are few. Most arbitrators will admit any evidence that is relevant and material to the controversy – even hearsay, as long as the "hearsay" is something that reasonable business people ordinarily rely on to make decisions, though they commonly use the rules of evidence as a useful guide. Don't waste your (and the arbitrator's) trying to offer 3rd- and 4th-hand hearsay. Avoid numerous and generally ineffective evidentiary objections.

- *Ask good questions of witnesses*: be concise and direct; avoid leading witnesses on direct examination, particularly on key points; don't ask "questions" that aren't really questions; avoid asking lay witnesses overly-legalistic questions. For cross-examination, before the hearing outline the key points you want to make on cross, don't nit-pick every statement by the witness; use crisp questions and know the answer before you ask it (or know that you don't care what the answer is). Don't rely on cross-examination to prove your case-in-chief. Whether on direct or cross, know when to stop.

- *Don't treat the arbitrator as an unsophisticated rube*; if the arbitrator tells you she "got it", she probably did. Don't insist on offering cumulative

evidence.

- *Tell the arbitrator exactly what you want his or her award to say*; not the legalese, just the meat: identify all components of damage you seek (principal amount for each category; if you're seeking pre-award interest, identify the interest rate and start date, with a total through the date of hearing and a means for the arbitrator to calculate any post-hearing interest). Be careful what you ask for, you just might get it.