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Ten Effective Strategies For Commercial Arbitration

It's crucial to pick the right person to hear your case

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Advantages of arbitration over litigation (less expensive, more efficient) are enhanced by using effective strategies to obtain an award favorable to your client. In using these strategies, take advantage of the flexibility available in arbitration, unconstrained by state and federal court rules.

Your creativity is limited only by the authority of the arbitrator and applicable arbitration rules. This article assumes that the Commercial Arbitration Rules of the American Arbitration Association apply (referred to as R-__). The rules in effect when filing the demand for arbitration govern (R-1(a)). Go to adr.org for the latest version, and for the new optional fee schedule effective June 1. Note that these rules provide that, by written agreement, the parties can vary them (R-1(a)).

1) Does filing a Demand for Arbitration satisfy the statute of limitations?

No. Our statutes of limitations provide that *a civil action* must be commenced within the statutory period – commencement of an arbitration proceeding is not sufficient. How would you like to be hit with a motion to dismiss well into the arbitration process, based on your opponent's contention that your claims are all now time-barred by operation of the statute of limitations?

How do you avoid this problem? First, be aware of what statutes of limitations may apply. Second, if a statutory deadline is looming, either work out the terms of a tolling agreement, or commence a court action, and then move to stay it until the arbitration proceedings are completed.

2) How can you secure any arbitration award you may obtain?

When you bring a civil action, you can apply for a pre-judgment remedy to secure your judgment, but what about in arbitration? You can apply for a pre-judgment remedy in arbitration. See Connecticut General Statutes Sec. 52-422, which provides that, before an arbitration award, a court order may issue "as may be necessary to protect the rights of the parties pending the rendering of the award and to secure the satisfaction thereof when rendered and confirmed," and R-34(a).

3) How can you select the right arbitrator for your claim or defense?

The selection of the right arbitrator is crucial. The AAA will send you a list of proposed arbitrators, with their résumés. You can choose among them or you can agree with opposing counsel to arbitrate before someone not on that list – even someone who is not certified by the AAA (R-11(a) and R-12).

Before selecting an arbitrator, make sure you learn everything you need to know about each candidate. You can do a web search, and ask colleagues what they know about each candidate. Consider submitting written questions to potential arbitrators, or calling them to learn about their arbitration practices, within two constraints: 1) no *ex parte* communications with potential arbitrators (arbitrators cannot have *ex parte* communications with counsel, without the consent of all counsel; see R-18), and 2) no questions about the specific case to be arbitrated. You must, however, disclose to the proposed arbitrator the names of everyone and every entity involved in the arbitration, including principals of entities and all witnesses, to avoid disqualification of the arbitrator. See R-16 and R-17.


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4) How should you prepare for the preliminary hearing?

Discuss with opposing counsel all the issues you can expect will be raised at the preliminary hearing, which is a case management conference, typically conducted by phone. For the scope of that conference, see R-20. Be prepared to answer these questions: Have counsel informed the arbitrator of all names necessary for a conflicts check? What agreement, if any, have the parties reached about pre-hearing discovery, including depositions? (See R-21.) What

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have the parties agreed to about e-discovery? Do the parties anticipate a bifurcated hearing and, if so, on what basis (see R30-(b))? Does the respondent expect to file a motion to dismiss? Does either party expect to seek an interim award? (See R-34.) In a complex matter, what are the issues the parties need the arbitrator to decide? What about scheduling? Does either party want a stenographer? (See R-26.)

It is advisable to agree at this preliminary hearing on the dates for the arbitration hearing. Once you lock those days in as immutable, you can discuss with the arbitrator other deadlines, such as the dates for the respondent to file the answering statement (R-4(b)), termination of discovery, filing of pre-arbitration motions, and filing of pre-arbitration briefs.

Finally, at this conference, confirm the form of the award: bare (one sentence stating who wins and what relief is granted, if any); reasoned (like a memorandum of decision); and reasoned with findings of fact and conclusions of law. A bare award is more difficult to vacate, because it does not include the arbitrator's reasoning, but it is less satisfying for the clients.

5) How should you prepare for the arbitration hearing?

Assume that you have already completed your pre-arbitration discovery (including the required pre-hearing exchange of all exhibits – see R-21(b)), and that you have prepared your witnesses for the hearing. What else should you do before the hearing starts? Here are several suggestions to streamline the hearing.

Agree, to the extent possible, on which facts are not dispute, so you can file a stipulation of facts, and which exhibits can be entered into the record by stipulation. Prepare a chronology to give the arbitrator. Arrange for the experts to exchange reports, and consider implementing procedures to expedite the hearing, discussed in Section 7. See R-30 for the flexibility the arbitrator has in the conduct of the hearing.

6) At the arbitration hearing, since the rules of evidence do not apply, what is admissible?

The arbitrator has broad discretion in deciding what is admissible at the hearing (R-31). Because Conn. Gen. Stat. Sec. 52-418(a)(3) provides that an arbitration award can be vacated for an arbitrator's "refusing to hear evidence pertinent and material to the controversy" or for taking "any other action by which the rights of any party have been prejudiced," and because the parties have agreed, by arbitrating rather than litigating, that the constraints of the evidentiary rules do not apply, arbitrators are generally very liberal in what is admissible at the hearing. Assume that everything will come into the record, unless it is clearly not relevant or material, or obviously cumulative. Prepare yourself – and your witnesses – accordingly. And know in advance your arbitrator's preferences in this regard.

7) What can you do at the hearing to make a more persuasive presentation?

Have all your witnesses available when needed; be prepared for direct and cross of witnesses in this setting, in which the rules of evidence do not apply (R-31(a)); know your exhibits and opposing counsel's exhibits; prepare an exhibit book for the arbitrator with stipulated exhibits and exhibits you want in the record; and know the basis to get each contested exhibit into the record. Also, consider preparing a bullet point sheet to give the arbitrator as you put on each witness, to give the arbitrator a road map of where you are going with each witness.

Also, consider reaching agreement with opposing counsel for the direct examination of witnesses by affidavit, in which event they only answer questions on cross (a time-saver, but possible strategic disadvantage). Your might also reach an agreement that opposing experts testify consecutively, each being given the opportunity to ask questions of the other.

8) What should you submit to the arbitrator after the hearing?

In addition to your post-hearing brief, you should consider submitting copies of all cases, statutes, and other authorities on which you rely; arbitration hearing transcripts, highlighting key testimony; an index of hearing exhibits; highlighted key exhibits; a list of all claims, and the relief you seek as to each; and even a proposed award. Put yourself in the shoes of the arbitrator, and ask yourself: What would make

it easier for the arbitrator to review the record, and for your contentions to be persuaded in your client's favor? Keep in mind that everything you submit to the arbitrator you must also submit to opposing counsel.

9) What remedies can you seek in arbitration?

Depending on the authority vested in the arbitrator in the arbitration agreement, you can seek any remedy a judge is empowered to order, and additional remedies (R-34 and R-43). For example, a judge cannot award legal fees on the merits (as opposed to legal fees as a sanction) unless authorized by statute, contract, or in connection with recovery for an intentional tort, such as fraud. An arbitrator can award legal fees if all parties request such an award, even if not authorized by law or by their arbitration agreement (R-43(d)).

Arbitrators can award more than just monetary damages, and frequently award equitable and other forms of relief, including specific performance, injunctive relief, consequential damages, liquidated damages, and punitive damages, as well as attorney's fees, if within their authority. You have an opportunity to be creative in your requested relief. See R-43.

10) How do you protect the confidentiality of arbitration?

One advantage of arbitration is that is confidential – right? Even though the ethical rules governing arbitrators require that the *arbitrator* keep confidential all matters relating to the arbitration proceedings and decision (R-23 and Canon VI(B)), no rule of the American Arbitration Association requires that the *parties* maintain such confidentiality. If you want to preserve confidentiality, enter into a confidentiality agreement at the outset, unless provided for in the arbitration agreement. ■