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GARDEN STATE CLE LESSON PLAN

A 1.5 credit course

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LESSON PLAN AND EVALUATION**

COMMERCIAL ARBITRATION – THE WHOLE TRUTH

Featuring

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Commercial Arbitrator

Program description

Successful representation of business clients involves an intimate knowledge of Commercial Arbitration options and procedures. This 1.5 CLE seminar will take you through all the steps between selection of the arbitrator, the hearings, and the awards.

I. The Qualities of Commercial Arbitration

- **Consensual**
 - **A party cannot be required to arbitrate something at the unilateral existence of the other party**
 - **Often have a lot of situations wherein there are contracts of adhesion that indicate any disputes will be arbitrated; so because of this the arbitration clause is not negotiable**
 - **Contracts of adhesion will generally be enforced by the court**
- **Expeditious – achieved in some cases but not all the time; sometimes a panel of arbitrators hears a case and then there can be scheduling issues with the parties and witnesses; arbitrator cannot order that the case be heard on a particular date**
- **Cost Effective – achieved in some cases but not all the time**
- **Private – exists in all cases**
 - **Public not invited**
 - **Only people in room are those that arbitrator allows in**
 - **Different from court that is open to the public**

II. Getting the case to arbitration

- **Arbitration is mutually agreed by the parties**
- **If one party demands arbitration and the other argues that never agreed to arbitration**
 - **NJSA 2A:23B-6 validity of agreement to arbitrate – the court shall decide whether arbitration agreement exists**
 - **Arbitrator decides whether condition precedent to arbitrability has been fulfilled and whether contract with valid agreement is enforceable**
 - **Whether enforceable – sometimes the agreement is very onerous; costs involved in arbitration are disproportionate to the amount in controversy – these situations may result in the arbitrator determining that the agreement is not enforceable**
- **For consumer agreement – contracts do attempt to spell out the arbitration requirement for disputes and will**

often say that arbitration means that you are giving up the right to bring your case to court, etc.

- **Court decisions have said that without these provisions in a contract the agreement to arbitrate is not consensual**
- **If there is a dispute whether the matter is arbitrable**
- **Party claiming no arbitration can go to court and ask for a stay of arbitration**
- **Party claiming arbitration was agreed can go to court and ask for an order compelling arbitration**
- **These issues are offered to the court and are decided as “summary actions”**
- **Summary actions are determined by NJ Court Rule 4:67**
Summary Actions
 - **Quick [proceeding**
 - **File order to show cause and return date on OTSC is usually very quick (possibly in 4-6 weeks)**
 - **On return date the judge may issue a final ruling**
 - **Limited discovery in this type of case**
 - **Quick decision so that objective of speed in the minds of the parties for arbitration can get a disposition reasonably quick**
- **A party who claims that there was no agreement to arbitration can also go to court and file a complaint as if no arbitration clause existed in the contract**
- **That action can be stayed until the court decides on the summary action**
- **If court decides on summary action that it is not arbitrable then original court proceeding will continue**
- **If court determines arbitrable then proceeding can be dismissed or stayed until conclusion of arbitration**
- **Federal Arbitration Act – 9 USC sec. 1, et seq.**
- **NJ Arbitration Act – NJSA 2A:23B-1 et seq.**
- **When two parties agree to arbitrate, there is nothing in the statute or common law that the parties go through arbitration organization**

III. The Arbitrator and his/her responsibilities

- **Parties can have an organization do the arbitration – there are 3 well known organizations commonly used in US**

- **America Arbitration Association (AAA)**
- **Judicial Arbitration and Mediation Services (JAMS)**
- **National Arbitration Forum (NAF)**
- **If not going through an organization you can select the arbitrator by mutual agreement**
- **Anybody can be an arbitrator – does not have to be a lawyer – often they are not lawyers**
- **One advantage of arbitration is that they involved very narrow, specialized areas therefore someone with that narrow field of specialty may be better suited to preside over the arbitration, i.e. labor officials, engineers, architects, etc.**
- **In the course of arbitration hearing parties make objections – this is not an issue because rules of evidence do not apply**
- **Objections only sustained on narrow grounds, i.e. privileged information, blatantly leading questions, harassing questioning**
- **Sometimes advise that objections for hearsay still be made to bring it to the arbitrators attention – even though hearsay is admissible, the arbitrator can then consider what weight to give the hearsay testimony**
- **If parties go through an organization for arbitration, i.e. AAA, that organization will have rules for determining how an arbitrator is selected**
 - **This may also be part of the arbitration agreement**
 - **If rules in agreement differ from rules from arbitration organization, agreement governs unless the organization rules say this is a rule that the organization will enforce**
 - **Sometimes organization may have a rule that they will appoint an arbitrator or may have an agreement that each side will have a list of possible arbitrators and have the ability to strike one or more names on the list and then organization selects from list that remains**
 - **Parties can each appoint one arbitrator and then those 2 select the third arbitrator**
 - **If in ability to select arbitrators, recourse available is for a party to go to court to file an action asking judge to appoint arbitrator**

- **When you have an arbitrator panel, similar to having a jury**
 - **Panel is better because you have the collective minds of 3 people instead of 1 person**
 - **When you have 1 arbitrator, as opposed to a panel, it is more time consuming and going to be more expensive to the parties – arbitrators get compensated and if extended situation then can get expensive**
 - **Arbitrator compensation ranges from \$750 for a day of arbitration to \$2-3000/day – this expense is something to consider based on the amount in dispute**
- **Interrogatories and depositions**
 - **Personally allows interrogatories but not depositions – depositions make it to close to the judicial model that parties are trying to get away from**
 - **Sometimes the parties themselves may agree to depositions while arbitrator says no, arbitrator is conducting the proceedings with parties and attorneys in mind – arbitrator has a great deal of power to regulate this behavior – focused not just on running up fees**
- **Most states welcome a case being shifted to arbitration because it relieves the court docket**
- **No specific requirements for becoming an arbitrator but there are qualities that can disqualify someone from being an arbitrator**
 - **Conflict of interest/stake in the case – this cannot be waived**
 - **Arbitrator can have a relationship with the parties but the relationship must be disclosed – litigants can have opportunity to consider and then make an objection about impartiality**
 - **Exception – sometimes the agreement calls for the parties to select an arbitrator and those 2 arbitrators select a third neutral – rule says that arbitrator selected by party is subject to same restrictions if they have a stake in the outcome of the case – these arbitrators can be predisposed to one side – just must disclose relationship**
- **AAA has rigorous selection process**

- **Person should have some kind of background that makes them appropriate**
- **Requires ongoing training – required to take at least 1 ADR related course per year**
- **Whether a matter is arbitrable has to comport with the law, including the Constitution (due process), NJ statutes, arbitration organization**
 - **ADR.org website**
 - **www.JAMSADR.com**
 - **Arbitration value limitations**
 - **Under \$10K does not mean not arbitrable but you may not get an in person hearing, may be decided on the papers**
 - **Consumer related dispute guidelines**
- **If one side does not show up or does not present any evidence, the other side still needs to prove its case**
- **Job of arbitrator to make proceedings fair**
- **Rules of evidence do not apply**
- **Job of arbitrator to keep parties and attorneys in line**
- **Most attorneys respect authority of the arbitrator – arbitrator has final decision on outcome of dispute**
- **No ex parte communications with the arbitrator**
- **When an arbitrator issues an order as to preliminary procedures, the order indicates no ex parte communication – communications go through arbitration organization who then send communication to both parties and arbitrator**
- **Mediation is different from arbitration**
 - **Mediator can meet privately because mediator does not have authority to issue final order that parties must comply with**
 - **Parties meet with mediator separately in confidence**

IV. The Arbitration Proceeding

- **Normal arbitration proceeding – preliminary hearing**
 - **Between arbitrator and attorneys, no parties present/participating**
 - **For the purpose of resolving preliminary issues so that it clears the way for the final hearing**
 - **Discovery allowed (depositions, interrogatories, how many interrogatories)**

- **Where is final arbitration to be held – look to agreement if it states because that will govern in most situations – if arbitrator not willing to travel, then arbitrator can select location and then parties can consider whether to select that arbitrator or not**
- **When is arbitration going to be held – date, dates, time of day**
- **Pre-hearing memoranda allowed – parties’ agreement may not necessarily govern – try to keep fees low depending on value of dispute – arbitrator may not allow attorneys to run up fees that are close to or over amount in dispute**
- **Some situations where there are issues in dispute that arbitrator’s experience is lacking and then allow memoranda to bring the arbitrator up to speed on issues**
- **Demand for arbitration**
 - **In judicial model, plaintiff must file a complaint and specify what the matter is about**
 - **Federal requirements for complaints have become quite stringent as a result of recent caselaw:**
 - **Ashcroft v. Iqbal, 556 US 662 (2009)**
 - **Bell Atlantic Corp. v. Twombly, 550 US 544 (2007)**
 - **In arbitration, there is an agreement and other party has breached agreement and demand arbitration**
 - **Defendant is not required to file any responding documentation, if defendant does not file anything then allegations are deemed denied (no default, etc., as in litigation)**
 - **If no response, then parties move to a hearing on the proofs**
 - **No hearing by ambush – parties deserve certain amount of education of claims by other parties – therefore allow for discovery to allow for disclosure**
- **In arbitration, preparation is key**
 - **Redundancy, repeating a fact over again, minutia that is irrelevant to the dispute**
 - **Arbitrator must glean what proofs are and what are relevant facts and credibility findings**

- **The same kinds of factors that are likely to influence are jury apply in arbitration**
- **How effective the presentation is made, corroboration regarding facts in dispute**
- **Expert witnesses are allowed depending on qualifications of witness and then weight to be given that expert**
- **Dealing with attorneys**
 - **Most attorneys are not overbearing**
- **If agreement to arbitrate specifies what kind of discovery is allowed then arbitrator is bound by that agreement**
 - **Not allowing for broad based discovery that court rules provide for**
 - **Discovery should be streamlined and fair to all parties**
 - **Amount of discovery allowed is effected by comprehensiveness of pleadings and what needs to be provided to avoid trial by ambush**
 - **Discovery is allowed when parties have information that is called for by an interrogatory and that information is not provided that information is subject to preclusion at the time of the hearing**
 - **Discovery in arbitration v. discovery in litigation**
 - **If parties are vague in their responses to interrogatories, then that is at their peril in arbitration – subject to preclusion vs. interrogatories treated as a joke in civil litigation**
 - **Expert testimony is limited to what is in the report, limit redirect to scope of cross examination**
 - **Limiting discovery requires parties to be responsive and avoid the need for depositions**
- **In consumer arbitrations – automobile is at issue**
 - **A party will want inspection of automobile and that is allowed by arbitrator**
 - **If the car is safely drivable arbitrator can order owner to bring car to shop at reasonable time for inspection**
- **Motions**
 - **Mostly discovery**
 - **For inspection**
 - **To preserve evidence**
 - **Summary judgment**

- **Reluctant to grant this motion because a party can move to set aside the arbitrator's award because the arbitrator would not hear competent evidence**
 - **Opens the door to future attack on the award**
 - **More motions the closer you get to the judicial model – arbitration is supposed to avoid getting bogged down in such procedures**
- **Subpoenas**
 - **Attorneys authorized to issue subpoenas**
 - **NJSA 2A:23B-17 Witnesses, subpoenas, depositions, discovery**
 - **Arbitrator can issue a subpoena but does not preclude litigants from issuing their own subpoena**
 - **Will not sign a subpoena asking a third party to bring materials to their office prior to hearing**
- **Parties to arbitration**
 - **Claimant and respondent**
 - **If claimant fails to appear at the hearing, makes the situation difficult**
 - **Determine why did not appear**
 - **If respondent does not appear, then claimant has to still prove the case**
 - **This does happen on occasion**
 - **Arbitrator must grant reasonable adjournment of hearing – if not then this can be considered misconduct**
 - **Best practice to make phone calls to see where parties may be if they do not appear**
 - **If a party does not respond to preliminary hearing, then it is a good indicator that party will not appear to hearing**
 - **No rule that deals with adjournments so it is based on judgment of arbitrator**
 - **By absenting themselves from arbitration hearing, arbitrator cannot observe demeanor in order to make a decision but it is up to the party to make that decision**
 - **Participant can “attend” hearing by phone – up to arbitrator to provide a fair hearing and not run up costs, i.e. if one party is out of state from hearing location**
- **Court reporters**

- **Parties can have stenographers present – parties pay for reporter**
- **Reporters and the exception and not the rule, except when the money damages are high**
- **Record in the case without a reporter is arbitrator's recollection and notes**
- **Case in chief**
- **Defense**
- **Rebuttal**
- **Sur-rebuttal**
- **Offers of exhibits**
- **Openings and closings**
- **Closing of the hearings**
 - **No further evidence is allowed unless hearing is reopened**
 - **Can allow for post hearing submissions, including written summations**
 - **Closing of hearing will be held in abeyance for post hearing submissions**
 - **Closing of hearing triggers time requirement for arbitrator to issue the arbitration award**

V. Post arbitration proceedings/arbitration award

- **Arbitration award**
 - **Bench trial – judge makes findings of fact and conclusions of law**
 - **Arbitration – usually this does not happen, arbitrator can give a one sentence award – no need for reasoning – considered “net award” – these are completely enforceable**
 - **Unlike court judgment which sheriff can levy, arbitration award is just a piece of paper without legal effect except that party that wants that award enforce can file a summary action under R. 4:67 and request court judgment on basis of the award – “confirm this award”**
 - **The party that does not prevail can move to vacate the award – based on arbitrator misconduct**
- **Arbitrator misconduct (enumerated in the statute)**
 - **Refusal to grant reasonable adjournment**

- **Refusal to hear competent evidence**
- **Refusal to make disclosures**
- **Making an award in excess of authority of arbitrator, i.e. cannot award outside scope of the agreement**
- **Court will issue an order confirming or vacating the award**
 - **If vacated then parties must either go back to arbitrator (with or without new arbitrator) or offer other relief**
 - **Can use same arbitrator depending on situation why the award was vacated, i.e. refused to hear certain evidence**
 - **Courts give great deference to arbitrator**
 - **Statutory grounds for vacating arbitration award is limited**
 - **Finality of arbitrator decisions**
- **Parties favor arbitration**
 - **Parties pay for expenses v. tax payers for court cases**
 - **Parties can decide to waive arbitration clause and go to court anyway**
 - **If there is no pre existing agreement, the parties can agree to take the case to arbitration anyway “an arbitration by submission” vs. “arbitration by agreement”**
- **Role of arbitrator after award issued**
 - **Arbitrator is not a party to proceeding to vacate or confirm the award**
 - **arbitrator’s role is over after award is issued**
 - **no motion for reconsideration in arbitration – no authority after issuing award**
 - **typographical error or calculation error is another issue but no further authority to change award**