Making Employment Arbitration Work: An Example

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I recently heard a seven-figure breach of contract case in Tampa, Florida. There was nothing startling about the facts involved, but the arbitration agreement that governed this case was impressive. It illustrates the remarkable speed and economy that can be achieved with a well-designed post-dispute arbitration agreement, and parties who are committed to an economical resolution of their dispute. Since the case is over and the parties agreed to allow me to write about their arbitration process, we can look at the genesis of the arbitration agreement, how it provided the elements essential to a successful arbitration, and how it actually worked.

The parties were an individual and a state entity. Each had the resources to engage in protracted litigation, and the amount at issue was large enough to warrant a large legal investment. But counsel for the parties had also worked together as the problem developed. Each had a sense that the other was reliable and willing to work out a cost effective way of resolving his client's dispute. As further lawyers became involved (each side ultimately used two firms and an individual lawyer) they would have to be willing to work within the framework of an arbitration agreement. Counsel's first challenge was convincing their clients that arbitration was the right process.

The lawyers who began the process both had long term relationships with their clients. Counsel for the individual (I will call him Mr. Smith for convenience), felt it was imperative that he understand that he was giving up his right to a jury trial and an appeal. Counsel wanted Mr. Smith's "informed consent" to a single opportunity to have his case heard and decided, and his full appreciation that he had to live with the results of the arbitration. Mr. Smith, a highly educated and successful man, was nevertheless hesitant about engaging in a process about which he had little knowledge. Ultimately, he had sufficient faith in his counsel to be guided by their legal judgment as to the advantages of arbitrating this case.

Counsel for the state entity (I will call it "the Institute" for convenience) had an entirely different problem. While he thought arbitration would be a fast, cost effective way of resolving the dispute, there were both policy and sovereign immunity issues that had to be resolved. He wound up having to get an opinion from the State Attorney General and approval from the Board of the Institute.

Once they had agreed to arbitrate the dispute, counsel had to design an arbitration process. There are four areas that must be addressed in a post-dispute arbitration agreement where no lawsuit has been filed:

- Selection of the Arbitrator,
- Pre-hearing Activities,

- Conduct of the Hearing, and
- Standards for the Award.

The parties must agree on both the substance of the procedure and the timetable for achieving it.

The parties chose a single arbitrator format and defined both the qualifications – and the disqualifications – of the arbitrator they wanted. The arbitrator had to have a law degree and "substantial legal experience," which they defined as practicing law or acting as a judge (or a combination of both) for a minimum of fifteen years. The disqualifications were far more extensive. In addition to eliminating anyone with a relationship to any of the firms, they eliminated anyone who was a Florida resident, had attended the Institute, had been a fellow employee of Mr. Smith, or who had a business or personal relationship "beyond a simple acquaintance" with any employee or Board member of the Institute. This last disqualification recognizes that some of the potential arbitrators – by virtue of their other qualifications – may be acquainted with someone associated with the Institute, but that a higher level of involvement with that person is necessary to disqualify the arbitrator. This language solves the problem arbitrators frequently have of knowing where to draw the line on disclosure. The arbitrator can disclose anyone she knows who is associated with the Institute, regardless of how remote the association, and note that the person is a "simple acquaintance." This enables the arbitrator to make exhaustive disclosure without fear of conveying a mistaken impression, and it allows the parties to inquire further into the nature of any relationship, if they desire.

The parties had twenty days from the signing of the arbitration agreement to identify an arbitrator. If they were unable to agree on an arbitrator, they would jointly contact the Center for Public Resources. Rather than just request a list, the parties agreed to let CPR know the qualifications and disqualifications they had agreed upon, the nature of the dispute, and the time within which the arbitration would be conducted. They also defined, for themselves, the method for ranking the arbitrators, how they would select one, how communication with the arbitrator would occur, and how the arbitrator would be paid.

The parties recognized that pre-hearing activities would be extensive, since they had not begun litigation and did not have the benefit of otherwise applicable rules of civil procedure. They agreed to the contents of a Statement of Claim that would be filed by Mr. Smith, and an Answer and Statement of defenses to be filed by the Institute. Since they wanted a rapid decision, they also agreed upon trial briefs of a limited length.

Rather than re-invent discovery, the parties adopted certain provisions of Florida law, which regulate the scope of discovery, use of depositions, and define terms. They agreed to the production of documents, to a time limit for discovery (which the arbitrator could extend only "for good cause shown") and a method for having the arbitrator resolve discovery disputes. They agreed to witness lists, and that any objection to exhibits (other than relevance) would be made to the arbitrator ten days prior to the hearing, or would be waived. Although the parties originally agreed to Florida rules of evidence, when I told them that I am completely unfamiliar with those rules they agreed I could use the Federal rules.

The hearing procedures that the parties adopted covered scheduling, a pre-hearing conference (which could be done by telephone), attendance at the hearing, sequestration of witnesses, stenographic record, and questioning of witnesses by the arbitrator. One unusual aspect of the Agreement is that the parties permitted the press and public to attend the hearing. It is likely that this provision reflects the fact that the Institute is a public entity.

In addressing the rules, standards, and burdens of proof in the hearing the parties made explicit matters that are often taken for granted, but which may cause substantial disagreement at the hearing. The parties adopted the common law of Florida as modified by its statutes and limited by the U.S. Constitution. They chose the normal arbitral standard of a preponderance of the evidence, and placed the burden of proof on Mr. Smith, except for the Institute's affirmative defenses.

The parties decided they did not want a written opinion. Instead, the arbitrator was required to issue a single line Award, in which he is to state the amount Mr. Smith is entitled to "under the law," from zero (if he finds against Smith) to an amount which includes "actual damages, nominal damages, and prejudgment interest."

The agreement had a strict timetable, which was written into each section of the document and supplied as an Appendix. Times were calculated both from date of execution of the agreement, and the happening of specific events contemplated in the agreement. For example, the hearing was to take place 90 days from close of pleadings and 115 days from execution of the agreement. The parties also planned on having different activities proceed simultaneously. For instance, the Statement of Claim, Statement of Defenses, and Reply were all to be served during the time allotted for arbitrator selection. Thereafter, document production and discovery could begin, with an arbitrator available to resolve disputes.

As it happened, in putting together the arbitration agreement the parties had begun a process of cooperation. Even before it was signed, they had each produced documents to the other, and were well on their way to agreeing on discovery. They were able to agree upon dates for depositions, in different parts of the country, without any significant disputes. The process for having the arbitrator resolve discovery disputes was never invoked. In discussing the process with the parties, I found that both agreed that one of the major advantages they found in a cooperative process was that there was no need to constantly file motions and expend client resources. Instead, they were both committed to accommodating one another, partly – I suspect – so that neither would be obliged to defend some delay before the same arbitrator who would be hearing the case.

Did the parties get what they wanted out of the arbitration agreement? At the end of the hearing they both expressed great satisfaction with how the process had worked. And they had their Award 140 days from the day they signed their agreement. Just as they had agreed.

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