ARBITRATION TIPS AND POTENTIAL DRAWBACKS

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Decide if arbitration is right for your client before having them use arbitration agreements with clients/customers

-What is the venue where you would litigate if there was no arbitration agreement?

-How does the informality of an arbitration process suit your client compared to the formality of court? This includes probable loss of appeal rights.

-There are very different timelines associated with arbitration.

-Need to stay consistent with enforcement of arbitration agreements (don’t pick some agreements to enforce and not others).

-Understand that arbitration does not necessarily save money.

-Even though we usually talk about pre-event arbitration agreements, don’t overlook that the parties can agree to arbitration after an event has occurred.

Circumstances where arbitration agreements commonly occur

-Medical arena (doctor/patient, nursing home)

-Consumer goods/services

-Construction contracts

-Securities transactions (FINRA)

Review Arbitration Agreements that have been upheld before drafting an arbitration agreement for your client

Cleveland v. Mann, 942 So.2d 108 (Miss. 2006)

-Procedural unconscionability – lack of knowledge

-Procedural unconscionability – lack of voluntariness

-Substantive unconscionability

Be sure the agreement is enforceable

-Who is bound by the agreement? *Terminix Intern., Inc. v. Rice,* 904 So.2d 1051 (Miss. 2004).

-Under what circumstances can the agreement be signed?

-Is the plaintiff/claimant allowed to seek and recover the very same type of damages that could be recovered in a court of law?

Look over the costs associated with Arbitration

-The arbitration agreement probably needs to state all arbitration costs will be incurred by the defendant/respondent in order to be enforceable. (In at least one agreement that has been found to be enforceable, claimant only has to pay the first $125.)

-Are there any expenses on the claimant that don't exist in court? If so, a court may not enforce the agreement.

-Arbitrators traditionally reject a claimant's attempts to have respondents cover the costs of expert fees or attorney's fees.

-What additional costs will your client have to incur?

-Hourly fees for an arbitrator often range up to $575/hour for a former judge on the JAMS panel of arbitrators.

-Arbitrators may require the parties to travel to their location rather than the location of either party (such as the JAMS office in Atlanta or Dallas).

-Don’t forget that costs covered by a court may fall on the parties in arbitration (location, court reporter, etc.).

-JAMS Rule 21 – “(k) Any Party may arrange for a stenographic or other record to be made of the Hearing and shall inform the other Parties in advance of the Hearing. (i) The requesting Party shall bear the cost of such stenographic records. If all other Parties agree to share the cost of the stenographic record, it shall be made available to the Arbitrator and may be used in the proceeding.”

Learn as much as possible about the potential Arbitrator who will handle your case

-JAMS will provide a list of five neutrals and the parties each strike two and rank the others.

-FINRA will provide a longer list, depending on if it is one arbitrator or a panel of three people.

-Look up their prior law firms, any decisions on Westlaw, social media or even attorneys who have had cases with them.

-Consider recording the conference calls with the Arbitrator in case questions of fairness/bias arise later in the case.

-During the hearing, try to get to know the Arbitrator as a person. This is helpful in how to present your arguments, examples to use, etc. Understand who your Arbitrator is, i.e., attorney, industry member, or layperson.

File a Motion to Compel Arbitration if suit is filed in court.

-A judge may find that you have waived the right to arbitration if you do not immediately raise the issue. *Pass Termite and Pest Control, Inc. v. Walker*, 904 So.2d 1030 (Miss. 2004).

-The denial of a motion to compel arbitration is an immediately appealable order, even though it is really an interlocutory ruling. *Tupelo Auto Sales, Ltd. v. Scott*, 844 So.2d 1167 (Miss. 2003).

Decide at the *beginning* of the process whether the parties will retain appeal rights, if allowed.

-Some arbitration groups only allow an appeal if both parties agree to the appeal process prior to the arbitration itself.

-JAMS Rules 34 – "The parties may agree at any time to the JAMS Optional Arbitration Appeal Procedure. All Parties must agree in writing for such procedure to be effective. Once a Party has agreed to the Optional Arbitration Appeal Procedure, it cannot unilaterally withdraw from it, unless it withdraws, pursuant to Rule 13, from the Arbitration."

Prepare your case as if you were having a bench trial, but don't assume the Arbitrator knows anything about Mississippi law

-Former judges often reference what would/would not be admissible in their home state and that may vary greatly from Mississippi.

-Make sure to have copies of rules/statutes/case law available for the Arbitrator to review, even if is something that is commonly known in Mississippi (such as the standard of care for physicians in Mississippi).

-Arbitrators will likely not know anything about tort reform in Mississippi, including any damages caps.

Be aware that evidentiary rules may not be used by the Arbitrator

-JAMS Rule 22(d) – "Strict conformity to the rules of evidence is not required, except that the Arbitrator shall apply applicable law relating to privileges and work product."

-JAMS Rule 22(e) – "The Arbitrator shall receive and consider relevant deposition testimony recorded by transcript or videotape, provided that the other Parties have had the opportunity to attend and cross-examine. The Arbitrator may in his or her discretion consider witness affidavits or other recorded testimony even if the other Parties have not had the opportunity to cross-examine, but will give the evidence only such weight as he or she deems appropriate."

Prepare Briefs and Proposed Findings of Facts, even when the scheduling order does not require them

-Arbitrators will have very little information about the case before the actual hearing, so a pre-hearing brief will educate them about the facts of the case as well as the applicable law.

-A post-hearing brief will allow you the opportunity to provide that last overview of your case.

-Proposed Findings of Facts and Conclusions of Law can accompany your post-hearing brief and make it easy for the Arbitrator in preparing his opinion.

Arbitration decisions do not come quickly

-JAMS Rule 24(a) – "Arbitrator shall render a Final Award of a Partial Final Award within thirty (30) calendar days after the date of the close of the Hearing . . .".

-An Arbitrator does not necessarily "close the hearing" at the conclusion of the evidence presented at the hearing. Some arbitrators have allowed the parties to send additional materials to be considered even after all the testimony has concluded.

You can have the Arbitration award confirmed in state court

-JAMS Rule 24(h) – "The Award shall consist of a written statement signed by the Arbitrator regarding the deposition of each claim and the relief, if any, as to each claim. Unless all Parties agree otherwise, the Award shall also contain a concise written statement of the reasons for the Award.

-Arbitration awards *shall be confirmed* by the stated court. This is *mandatory, not discretionary*. Miss. Code Ann. Section 11-15-21; *Johnson Land Co. v. C.E. Frazier Construction Co., Inc.*, 925 So.2d 80 (Miss. 2006).

-Arbitration awards are usually confirmed without the necessity of a hearing.

-The winning party may file a motion to confirm within one year of the award being rendered. Miss. Code Ann. Section 11-15-21. (Mississippi's timing on this is consistent with the Federal Arbitration Act, which states that a party applying to confirm an award has one year to make its application. 9 USC Section 9).

-However, based on the time in which a party must file its motion to vacate, modify or correct an arbitration award (90 days), it may not be necessary to even file a motion to confirm the award.

-To confirm an arbitration award, certain documents are necessary. These include (1) a motion or suit which establishes the identity of the parties, a description of the arbitration agreement, a reference to the arbitration award, and a statement of relief sought; (2) the arbitration agreement; (3) the arbitration award; and (4) a proposed order.

-Consider the effects of an *unconfirmed* award compared to a *confirmed* award (admissibility, *res judicata*, etc.).

There are limited circumstances under Mississippi statutory law when an arbitration award may be vacated

-Section 11-15-23 provides an award can only be vacated for the following reasons:

(a) when such award was procured by corruption, fraud, or undue means;

(b) when there was evident partiality or corruption on the part of the arbitrators, or any one of them;

(c) when the arbitrators were guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown, or in refusing to hear evidence pertinent or material to the controversy, or other misbehavior by which the rights of the party shall have been prejudiced; and

(d) when the arbitrators exceeded their powers, or that they so imperfectly executed them that a mutual, final, and definite award on the subject matter was not made.

-Some things to note about these criteria:

It's not easy for a party to claim the Arbitrator was biased for the purposes of setting aside an award-

"[T]he mere appearance of bias that might disqualify a judge will not disqualify an arbitrator." Herrin v. Milton M. Stewart, Inc., 558 So.2d 863, 865 (Miss. 1990) *(citations omitted). Further, "the partiality 'must be direct, definite and capable of demonstration rather than remote, uncertain, or speculative.'" Id.*

There is a strong preference in Mississippi for upholding arbitration decisions.

> "it is not legitimate… to inquire into the original merits in favor of one party over the other, or to show that in the evidence the award ought to have been different or that the law of the case was misconceived or misapplied, or that the decision, in view of all of the facts and circumstances was unjust…"

Wells Fargo Advisors, LLC v. Runnels, 126 So.3d 137, 140 (Miss. App. 2013).