Motion Practice Under AAA Rules
What You Need to Know

May 17, 2017 – 1:00 pm to 2:00 pm ET

PROGRAM SUMMARY

Speakers: J. Timothy Eaton and Stanley P. Sklar

During this 60-minute free webinar, attorney/arbitrators J. Timothy Eaton and Stanley P. Sklar examine how arbitrators and advocates might address motion practice under AAA Rules, including how their effective use may improve the timeliness and cost of reaching an award. With a special focus on how motions are addressed across the full spectrum of AAA Rules.

AGENDA

1:00 p.m. Welcome and Introduction of Speakers (5 minutes)

1:05 p.m. Motion Practice Under AAA Rules (45 minutes)
- arbitrator authority to hear motions;
- pre-arbitration motions;
- consolidation and joinder;
- interim relief;
- dispositive motions;
- summary judgment;
- writing interim awards to address motions;
- post-arbitration motions;

1:50 p.m. Conclusion and Questions (10 minutes)

2:00 p.m. Evaluation (5 minutes)

2:05 p.m. Adjourn

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QUESTIONs FROM THE WEBINAR

Q: Are dispositive motions overused? If so, what can be done about it? Some parties may be of the view that they should file a dispositive motion in every case (in the extreme view, thinking that to not do so would be less than complete representation).

A: Dispositive motions are an important tool available to Counsel. As indicated in the presentation, dispositive motions can be substantive or tactical. Tactical may be used to call the Arbitrators attention to a specific issue such as a “challenge” to the expert witness forcing the arbitrator to pay attention to that testimony even though moving party knows the motion will be overruled. Motions can be restricted to written motions without oral argument to be more efficient. As Arbitrators we have to be careful about a parties’ case. Remember, it is the arbitrator’s function to manage not to take over the case. One tactic would be to limit the number of pages of such a motion. Dispositive motions are generally helpful because they can narrow issues and they also allow the arbitrator to better understand the case earlier which is helpful in deciding discovery issues and preparing for the hearing.

Q: What are the P-1 and P-2 Checklists?


Q: There is no authority in Section 3 or 4 of the FAA for a federal court to stay an arbitration. Only state courts have that authority. Please confirm.

A: The speakers believe that is correct because their experience with stays has only been with state courts.

Q: Why not let the discovery proceed so that if the arbitration is precluded the discovery results may then be used in court litigation?

A: It all depends on the extent of the discovery. There is an issue that arbitration is confidential and could be raised as defense in litigation (this defense is a possibility, but court discovery rules require more formality so it may not always work).

Q: You mentioned entertaining a motion to appoint a receiver. You should be aware in some states (including New York and New Jersey) arbitrators may not appoint a receiver as a provisional remedy. Only a court can.

A: Thanks for that insight. We know in Illinois arbitrators have that power.
Q: Do you envision any circumstances when a hearing may be needed before an interim order is issued?

A: Often ask Counsel if they wish to have a “hearing” – it is their case to try. However, consider limiting the length of the hearing. We would assume if the interim measure involves something as material as a receiver, that a hearing would be required.

Q: You stated that the panel loses jurisdiction until the fees or deposits are paid. Where in the rules is this?

A: See Rule 6 re Changes of Claim and Rule 57 Remedies for Non Payment of the Commercial Rules (2013) and Rule 6 re Changes of Claim and Rule 59 re Remedies for Non Payment of the Construction Rules. This is more of an administrative procedure but for ultimately reviewing subject matter jurisdiction we do not believe it would apply.

Q: What about bifurcation where that consists of agreeing to make an interim ruling (say on liability) mid-hearing?

A: Always a tactic to be considered where liability is heard first and damages after an award on liability is made. It can be efficient particularly an accounting is being sought.

Q: How do I pose a question to the panel re Motion to Amend? When can new parties be brought in?

A: File a motion to amend under Rule R6 of Commercial Rules and Rule 6 of the Construction Rules. New parties may be added but would require a Motion and explain why the new parties have to brought in and be sure to show the contractual basis for adding them.

Q: Motions in limine are a waste of time when the arbitrator or panel is the finder of fact and has the expertise to parse out the evidence. Such motions are more appropriate for keeping evidence from a jury.

A: We agree. They may be helpful where relevance is being raised and it may expedite the hearing if certain testimony or topics are excluded.

Q: Curious if the panelists think in a consumer case the arbitrator should wait until the consumer rests before entertaining a motion to dismiss.

A: Yes.

Q: If a party files a motion for leave to file a dispositive motion, what type of order should arbitrator do (detailed as to why or why not granted or do you ask parties if they want reasoned)?

A: The Order should include the basis for the motion and the rationale for granting or denying same. One tactic would be for the arbitrator to ask each side to submit their proposed Order granting or denying the motion including the rationale for the decision. Generally the arbitrator would give a very short explanation as to why he/she denied the motion to file a dispositive motion. On the merits of the dispositive motion itself, give a short explanation of why the arbitrator denied all or part of it but a longer explanation as to why the arbitrator granted all or part of it.
Q: What about motions in limine which serve as sanctions?

A: If I am going to exclude evidence as a sanction I assume that would have to be a fully briefed motion with oral argument and preferably with a court reporter present. It could be a basis for vacating the award if a good record is not made.

Q: Do the panelists think decisions on motions should come with an explanation?

A: Yes, the parties are entitled to know the basis of the ruling. An exception would be with more routine motions such as continuing discovery deadlines etc.

Q: This scenario often arises: at the preliminary conference, the parties agree to a hearing on the merits three months from the conference. A week before the hearing is to begin, the parties notify me that they have agreed to postpone the hearing to ten months from the original date. I don't want to impede counsel's need to prepare, but I don't want to countenance the attorneys' putting their needs ahead of their clients' needs. Any suggestions?

A: Not continuing the hearing could be a basis for vacating the award if you force the parties to proceed. If it is the first time I would allow it but be clear in the order that absent compelling circumstances it should not happen again.

Q: Can an arbitrator put a limit on the number of motions that the parties can make?

A: Not a good idea. By doing so, you are really restricting a on how the parties present their case.

Q: As an arbitrator I have seen 2 ways attorneys attempt to withdraw from a case: (1) Motion to Withdraw (2) Notice of Withdrawal. Is withdrawing from an arbitration by an attorney a matter that requires an order from the arbitrator authorizing the withdrawal OR is it a matter that is accomplished by a Notice filed by an attorney? If an authorization to withdraw is needed, what should the arbitrator do if presented with a Notice of Withdrawal?

A: We think it depends on the timing of the motion to withdraw. If it is to continue the hearing then it should be scrutinized more carefully. Not sure there is any formality required in how you do it.

Q: Please provide the language quoted at the end from CPR on interim awards.

A: See CPR Rule 15.1 which states “The Tribunal may make final, interim and interlocutory and partial awards. With respect to any interim , interlocutory or partial award, the Tribunal may state in its Award whether or not it views the award as final for purposes of any judicial proceedings in connection therewith,. There is nothing we are aware of that precludes using such language in a AAA Commercial Arbitration.
The AAA provides arbitrators to parties on cases administered by the AAA under its various Rules, which delegate authority to the AAA on various issues, including arbitrator appointment and challenges, general oversight, and billing. Arbitrations that proceed without AAA administration are not considered "AAA arbitrations," even if the parties were to select an arbitrator who is on the AAA’s Roster.
* A public transportation company in the Illinois Supreme Court involving a pension-related issue;
* A plaintiffs' class in the Seventh Circuit Court of Appeals on a forum issue in a class action products liability case in federal court;
* A major oil company in the Illinois Supreme Court involving an environmental cleanup issue;
* A major bank in the Illinois Supreme Court in an alleged fraudulent tax shelter scheme;
* An association of school districts in an insurance coverage dispute regarding allocation of loss among multiple insurance carriers in the Illinois Appellate Court and Seventh Circuit Court of Appeals;
* A major gas company in a claim involving mercury contamination in an appeal before the Illinois Supreme Court;
* A major railroad company in an appeal from a Surface Transportation Board in the Seventh Circuit Court of Appeals;
* All Illinois law schools in the Illinois Supreme Court on the issue of a cy pres award in class action litigation;
* A semiconductor company in a patent license dispute in an appeal before the Supreme Court of Delaware;
* A major state university in the Seventh Circuit in cases involving employment-related claims under Title 7 and Section 1983;

Professional Licenses Admitted to the Bar: Illinois, 1977; U.S. District Court: Central, Southern, and Northern Districts of Illinois; U.S. Court of Appeals: Seventh Circuit; U.S. Supreme Court.

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Served as advocate in more than 100 arbitrations involving construction disputes and real estate related disputes since appointment as a AAA Neutral

Served as an arbitrator and mediator in numerous construction disputes with claims valued up to $63,000,000.

Served on panel of three neutral arbitrators in a $300,000,000 construction related dispute regarding the defective construction of a power plant in Panama. Among the issues raised were delay, owner interference, defective design and design changes impacting scheduling and mutual breaches of fiduciary duty. The hearing process included the use of the Chess Clock and the use of computer monitors for Live Note testimony and exhibits.

Stanley P. Sklar, Esq.
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Served on a panel of three neutral arbitrators in a $50,000,000 construction dispute regarding the construction of transit tunnels under existing rivers for mass transit rail system adjoining adjacent communities. Among the issues raised were significant cost overruns by the contractor, undue owner interference with the construction process by consortium of owner representatives, design deficiencies and differing site conditions.

Served as sole arbitrator in $8,000,000 dispute between owner, contractor and subcontractors relating to the decontamination of nuclear waste materials and contractors failure to follow appropriate nuclear safety recommendations. I managed the process and the encouraged the use of the Chess Clock which was successful in making the process more efficient and cost effective.

Served as Chair of tri partite panel regarding the acquisition of multiple shopping center construction in Japan involving claims of $10,000,000 and counter claims of $2,500,000 focusing on representations inducing sale and attempts to rescind the contracts. Use of interpreters for certain witnesses.

Serve as party appointed neutral arbitrator on tri partite panel in non administered arbitration. Owner claims of $62,800,000 for defective construction of chemical production facility against Design Builder including claims for contractor failure to meet industry standards and cross claim by contractor for non payment of balances due contractor for work performed.

Chair of Panel regarding $22,000,000 claim by Owner against Design Builder for its failure to properly design, engineer and construct a fully functioning steel mill processing plant pursuant to Turn Key Construction Contract. Counter claim of Design Builder in excess of $3,000,000 for unpaid contract balance.

Chairied panels concerning claims in excess of $25 million on several Large Complex Case panel matters, including AAA International Centre for Dispute Resolution and International Chamber of Commerce panel assignments regarding international construction disputes. Arbitrator and mediator in construction contract disputes, delay claims, and failure claims; breach of energy consulting and management contract regarding fixed/variable energy purchase agreements; design defects; change order disputes; insurance coverage disputes and surety claims; common area maintenance contributions under multiple shopping center leases; underground tunneling project involving trenchless technology; concrete defects in high rise office building; concrete defects in parking deck and garage structures; alkali silica deterioration for commercial pavers in office complex, concrete failures, geotechnical disputes relating to curtain wall water intrusion and dewatering process, structural steel failures; defective construction relating to HUD financed retirement facilities; marine structures including breakwater construction for lake erosion protection; delay claims and defective construction relating to hydro electric processing plant; energy supply contract disputes involving coal mines and public utility; supply contracts for coal forced steam generating plant; energy savings performance contracts; circulating fluidized bed steam generators (coal burning)for power plant, floating casinos, hospital and health center retrofitting and new construction, waste water treatment plant construction disputes.
Alternative Dispute Resolution Training


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Speakers

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Authority of the Arbitrator to Hear Motions and Enforce Orders

Arbitrator Authority

- Jurisdiction
  - AAA Commercial Arbitration Rules – R-7
  - AAA Employment Arbitration Rules – R-6
  - AAA Construction Arbitration Rules – R-9
  - AAA Consumer Arbitration Rules – R-14

- Interpretation and Application of Rules
  - AAA Commercial Arbitration Rules – R-8
  - AAA Construction Arbitration Rules – R-8
  - AAA Employment Arbitration Rules – R-48

- Management of Proceedings
  - AAA Commercial Arbitration Rules L-3(a)
**Arbitrator Authority**

- **Enforcement Powers of the Arbitrator**
  - AAA Commercial Arbitration Rules R-23
  - AAA Consumer Arbitration Rules – R-23
  - AAA Employment Arbitration Rules – R-9
  - AAA Construction Arbitration Rules – R-25

- **Dispositive Motions**
  - AAA Commercial Arbitration Rules – R-33
  - AAA Consumer Arbitration Rules – R-33
  - AAA Construction Arbitration Rules – R-34
  - AAA Employment Arbitration Rules – R-27

- **Emergency Measures of Protection**
  - AAA Commercial Arbitration Rules – R-38

- **Interim Measures**
  - AAA Consumer Arbitration Rules – R-37
  - AAA Construction Arbitration Rules – R-38
  - AAA Employment Arbitration Rules – R-32
  - AAA Commercial Arbitration Rules – R-37

- **Modification of Award**
  - AAA Commercial Arbitration Rules – R-50
  - AAA Construction Arbitration Rules – R-51
  - AAA Consumer Arbitration Rules – R-47
  - AAA Employment Arbitration Rules – R-40

- **Sanctions**
  - AAA Commercial Arbitration Rules – R-58
  - AAA Construction Arbitration Rules – R-60
  - No Provision in Consumer or Employment (Inherent)
Arbitrator Authority

- **But see Rule 24 of Consumer Rules**
  - The arbitrator may consider a party's request to file a written motion except (except for Dispositive Motions—See R-33) only after the parties and the arbitrator conduct a conference call to attempt to resolve the issue that gives rise to the proposed motion. Only after the parties and the arbitrator hold the call may the arbitrator consider a party’s request to file a written motion. The arbitrator has the sole discretion to allow or deny the filing of a written motion and his or her discretion is final.

Motions

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Pre-Arbitration

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Audience Polling Question

Only a court of competent jurisdiction can determine arbitrability and jurisdiction.

A. True
B. False
Pre-Arbitration

Preliminary Hearing

Contemplated Motions

P-2 Checklist

• Motions Regarding Arbitrability
  – AAA Commercial Arbitration Rules R-7(a) – Jurisdiction
    The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim.

• Motions Regarding Existence or Validity of the Contract
  – AAA Commercial Arbitration Rules R-7(b) – Jurisdiction
    The arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrator that the contract is null and void shall not for that reason alone render invalid the arbitration clause.

• Timing of Ruling on Jurisdiction
  – AAA Commercial Arbitration Rules R-7(c) – Jurisdiction
    A party must object to the jurisdiction of the arbitrator or to the arbitrability of a claim or counterclaim no later than the filing of the answering statement to the claim or counterclaim that gives rise to the objection. The arbitrator may rule on such objections as a preliminary matter or as part of the final award.

  – AAA Construction Arbitration Rules – R-9
  – AAA Employment Arbitration Rules – R-6
  – AAA Consumer Arbitration Rules – R-14
Pre-Arbitration

• Motions to Stay Arbitration
  1. Circuit Court
  2. Arbitration
     A). Other arbitration proceedings
     B). Other Court proceedings
     C). Need Additional Parties

Pre-Arbitration

• Motions for Interim Measures
  – AAA Commercial Arbitration Rules – R-37
  – AAA Construction Arbitration Rules – R-38
  – AAA Employment Arbitration Rules – R-32
  – AAA Consumer Arbitration Rules – R-37
  – AAA Commercial Arbitration Rules R-38 – Emergency Motions for Protection

Motions

During Arbitration
During Arbitration

• Pleadings – Motion to Amend
  – AAA Commercial Arbitration Rules – R-6 – Changes of Claim
  – AAA Consumer Arbitration Rules – R-8 – Changes of Claim
  – AAA Construction Arbitration Rules – R-6 – Changes of Claim or Counterclaim

During Arbitration

• Consolidation and Joinder
  – AAA Commercial Arbitration Rules – R-8
  – AAA Construction Arbitration Rules – R-7

During Arbitration

• Bifurcation
  – AAA Commercial Arbitration Rules – R-8
  – AAA Construction Arbitration Rules – R-7
An arbitrator may not consider motions in limine.

A. True  
B. False
During Arbitration

• Continuances
  – Discovery
  – Hearings

During Arbitration

• Motion in Limine
  – AAA Commercial Arbitration Rules – R-34(b) – Evidence
    The arbitrator shall determine what evidence to be admitted, what evidence is relevant, and what evidence is material to the case. The arbitrator may also exclude evidence that the arbitrator decides is cumulative or not relevant.
  – AAA Consumer Arbitration Rules – R-34

During Arbitration

• Privilege
  – Also Evidence Provision under all Rules

• Disqualification of Arbitrator
  – AAA Consumer Arbitration Rules – R-19
  – AAA Construction Arbitration Rules – R-20
  – AAA Employment Arbitration Rules – R-20
During Arbitration

• Sanctions
  - No Provisions in Employment or Consumer – Inherent Powers

Motions

Post-Arbitration
Post-Arbitration

- Modifications/Clarification of the Award
  - AAA Commercial Arbitration Rules – R-55 - Modification of Award
  - AAA Construction Arbitration Rules – R-51 - Modification of Award
  - AAA Consumer Arbitration Rules – R-47 - Modification of Award
  - AAA Employment Arbitration Rules – R-40 - Modification of Award

Audience Polling Question

Parties should prepare arbitration motions the same way they do litigation motions.

A. Yes
B. No
C. Maybe

Tips on How to Advise Parties to Brief Motions
Briefing Motions

- Letters
- Formal Motion Practice
- Exhibits
- Responses
- Replies

Writing Interim Awards

Addressing Motions

- Simple Grant or Denial
- Ruling with Explanation
  - Discovery Motions
  - Dispositive Motions
    - Doctrine of Functus Officio
    - Interim Award
    - Make Sure it is Clear That It is Not Final Award
Questions

Concluding Remarks

Thank you for attending. Please visit our website at www.aaau.org to see additional program offerings.