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Sometimes Less Is More (and Vice Versa): A Primer on Pleading Practice in Arbitration

By Theodore K. Cheng

Arbitration is intended as an alternative to court litigation to resolve disputes. At least in the commercial arena, its objective is to achieve a final, binding resolution of a dispute in a fair, expeditious, and cost-effective manner. Because of its inherent flexibility and customizability, arbitration is meant to be faster and less expensive than court litigation. This objective is often (but not always) accomplished through the parties' negotiations and drafting over a dispute resolution clause or provision in their contract. Thus, arbitration is often referred to as a "creature of contract," in that the right to an arbitral forum for dispute resolution arises from the parties' written agreement to arbitrate. Consistent with this objective are the existence of procedural rules that are quite different from civil court procedural rules.

Arbitration procedural rules are meant to streamline the proceedings by eliminating much of the formalism found in court rules. There are essentially two types: administered rules and non-administered (or self-administered) rules. As the name suggests, the former are promulgated by an administrator or provider of arbitration services, such as the American Arbitration Association (AAA), JAMS, the International Institute for Conflict Prevention and Resolution (CPR Institute), Resolute Systems, or the Financial Industry Regulatory Association (FINRA).¹ The latter are used by the arbitrator or panel, the parties, and their counsel on a stand-alone or ad hoc basis without the involvement of an administrator.² This article will take a closer look at how the rules pertaining to pleading practice in domestic commercial arbitration cases impact how those matters should be handled.

Commencing an Arbitration Proceeding

Generally, it is far easier to commence an arbitration than a lawsuit, particularly when a provider is involved, and the rules usually set forth the necessary steps.³ For example, under the AAA Commercial Arbitration Rules, the initiating party (called the "claimant") files a "Demand for Arbitration" (more simply referred to as the "demand") with the AAA, along with an administrative filing fee, and a copy of the applicable arbitration agreement from the parties' contract that provides for arbitration.⁴ The filing with the AAA should include (a) the name of each party; (b) the address for each party, including telephone and fax numbers and e-mail addresses; (c) if applicable, the names, addresses, telephone and fax numbers, and email addresses of any known representative for each party; (d) a statement setting forth the nature of the claim including the relief sought and the amount involved; and (e) the locale requested, if the arbitration agreement does not specify one.⁵ All of the foregoing information is required on the AAA's standard Commercial Demand Form (avail-

able on its website at www.adr.org), but a claimant is not required to use this form.

No specific format is required so long as the above information is provided, and, in that regard, the "notice pleading" required in an arbitration proceeding is far more perfunctory than in court, thereby making it rather easy to commence an arbitration. However, advocates often submit an additional document, typically styled as a "Statement of Claim," to accompany the demand. These documents contain factual averments, usually pleaded upon information and belief, set forth in consecutively numbered paragraphs and conclude with a prayer for relief. Thus, as in commercial matters filed in court and/or when experienced/sophisticated advocates are involved, commencement documents often look very much like a lawsuit complaint. Filing a statement of claim along with the formal demand is a strategic opportunity for the claimant to persuade the trier of fact (in this case, the arbitrator or panel) well in advance of the evidentiary hearing because it is one of the few documents provided to the arbitrator or panel even before the preliminary hearing conference (or initial arbitration case management conference) in the proceeding. Like a complaint, a statement of claim could include a section setting forth an "introduction," "nature of case," or "relevant background" that permits the advocate to frame the issues and serve in the role of a storyteller akin to giving an opening statement to a judge or jury. Additionally, in the absence of formal pleading rules like in court, an advocate has a lot of flexibility and leeway in crafting the statement of claim, and, hence, can take a fair amount of liberties with the text without the fear of having to later defend the equivalent of a motion to strike for having pled "redundant, immaterial, impertinent, or scandalous matter."⁶

Of course, preparing such a document entails incurring some additional legal fees, and, thus, increases the cost to file the matter in the first instance. But if the stakes or the amount in controversy are high enough, the additional cost may be warranted. Moreover, the filing fees involved in commencing an arbitration may be (but are not

THEODORE K. CHENG is an independent, full-time arbitrator and mediator, focusing on commercial/business, intellectual property, technology, entertainment, and labor/employment disputes. He has been appointed to the rosters of the AAA, the CPR Institute, FINRA, Resolute Systems, the Silicon Valley Arbitration and Mediation Center's List of the World's Leading Technology Neutrals, and several federal and state courts. Mr. Cheng also has over 20 years of experience as an intellectual property and commercial litigator. More information is available at www.linkedin.com/in/theocheng, and he can be reached at tcheng@theocheng.com.

always) greater than the filing fees required to commence a court litigation. For some parties, that can be a deterrent in selecting the arbitral forum, at least as an *ex-ante* matter when the dispute resolution clause is being negotiated. This requires careful consideration of the advantages and disadvantages of utilizing arbitration versus litigation to resolve both anticipated and unanticipated future disputes between the parties, which is beyond the scope of this article.⁷

The claimant must also provide a copy of the demand and any supporting documents to the opposing party(ies).⁸ No formal process server needs to be engaged. In turn, the AAA provides notice to the parties (or their representatives if so named) of the receipt of a demand when the administrative filing requirements have been satisfied.⁹

Answering a Demand/Statement of Claim

In responding to the demand, one issue that arises with respect to how matters are commenced in an arbitration proceeding is to what extent a claimant, who chooses to file a detailed statement of claim instead of simply submitting a demand form, should be held to any deficiencies in that document, as might be the case for a deficient complaint. Although a respondent might be tempted to file a motion akin to one to dismiss under Federal Rule of Civil Procedure 12(b)(6) or CPLR 3211, motions to address the sufficiency of a statement of claim are generally discouraged in arbitration proceedings. The reason is that undertaking such a procedure, in most cases, is at odds with the expeditiousness of the arbitration mechanism for resolving disputes, lengthening the duration of the case, increasing the costs, and reducing efficiency. That said, if there is a clear basis for a motion that would significantly dispose of the entire case and/or narrow the issues in the case, thereby resulting in savings to the parties in terms of time and cost, such a motion may be appropriate.¹⁰ For example, if the claimant should plead factual averments in the statement of claim that, even if taken as true, do not rise to the level of a legally cognizable claim, those circumstances might justify an early dismissal by the arbitrator or panel upon the respondent's motion. To be clear, however, a deficiency that can easily be cured through repleading probably counsels for foregoing such a motion because all that would be accomplished is increased cost and delay in the proceedings.

This issue should be raised by the respondent during the preliminary hearing conference. The arbitrator or panel should then read the statement of claim as broadly as possible and discuss the alleged deficiencies with the parties so as to ensure that the bases for the claims truly exist and perhaps explore ways to test any threshold issues on the merits, such as bifurcating the proceedings between issues. If the respondent is insistent on filing a motion to test the sufficiency of the claims, one way to handle the matter is for the respondent to submit a letter application seeking leave to file the motion, followed by a response

from the claimant, and then have the arbitrator or panel entertain whether to permit the motion to be filed. Undertaking this process, which does not add significantly to the cost of the proceeding, may have the benefit of causing the claimant to withdraw patently deficient claims and/or properly replead the claims in question. During this process, the parties should be encouraged to meet and confer in hopes of finding some agreement as to the precise ruling on which they would like the arbitrator or panel to issue. After all, it is ultimately the arbitrator's or the panel's responsibility to clarify the claims and issues in the case.

Aside from a preliminary motion to test the sufficiency of the statement of claim, unlike in court, no formal answer or response (referred to as the "answering statement") to a demand is generally required. In such a situation, the answering party (called the "respondent") is deemed to have denied all the claims in the demand.¹¹ For example, under the AAA Commercial Arbitration Rules, a respondent may file an answering statement within 14 calendar days after notice of the filing of the demand is sent by the AAA and must also send a copy of the document to the claimant and all other parties to the arbitration.¹² If no answering statement is filed, the respondent will be deemed to deny the claim.¹³

A respondent may file a counterclaim at any time after the AAA sends notice of the filing of the demand (subject to certain limitations set forth in Rule R-6) and send a copy of the counterclaim to the claimant and all other parties to the arbitration. If a counterclaim is asserted, it should include a statement setting forth the nature of the counterclaim including the relief sought and the amount involved. An additional filing fee must also be paid.¹⁴ The information required in an answering statement or counterclaim is again set forth in the AAA's standard Commercial Answer Form (also available on its website at www.adr.org), but, again, a respondent is not required to use this form.

No specific format is required so long as the above information is provided. However, as a practical matter, because an answering statement is also one of the few documents provided to the arbitrator or panel before the preliminary in the proceeding, preparing one—much like preparing a detailed statement of claim—can be an opportunity to persuade the arbitrator or panel. Like an answer or responsive pleading in court, these more detailed answering statements will usually contain general and specific denials; perhaps include some additional factual averments, again pleaded upon information and belief; utilize consecutively numbered paragraphs; interpose affirmative defenses; and conclude with a prayer for relief. Consequently, whether to submit an answering statement should also be viewed as a strategic decision to be considered by both the advocate and the client.

An issue that arises at this stage of the proceeding if the respondent chooses not to file an answering statement is whether it nonetheless has some obligation to apprise

the claimant of the defenses it intends to pursue in the proceeding. Conversely, if the respondent does file an answering statement and interposes affirmative defenses, another issue that arises is whether the respondent is now somehow limited to those articulated defenses, even though it had no obligation to file an answering statement in the first instance. If handled poorly, either situation could inject confusion, a degree of uncertainty, and perhaps unfairness into the proceeding.

Both situations can be properly addressed at a well-conducted preliminary hearing where the defenses can be explored and an appropriate information exchange set forth in the scheduling order. Additionally, status conferences along the way can address the bases for new defenses that arise during the course of the proceeding. The arbitrator or panel could also set forth a deadline by which the respondent must disclose its defenses so as to avoid surprise to the claimant and to ensure an orderly information exchange. Doing so would later permit the arbitrator or panel to issue an order barring the respondent from pursuing a defense it had not timely disclosed.¹⁵ At the very least, the final pre-hearing conference would be the last opportunity before the evidentiary hearing for the arbitrator or panel to clarify the defenses that are anticipated to be presented and pursued during the hearing so that all parties and the arbitrator or panel can properly prepare themselves. Of course, the foregoing discussion could apply equally to any new claims that a claimant seeks to pursue that arise during the course of the proceeding.

Amending Claims and Counterclaims

Consistent with streamlining procedural matters in the arbitral forum, amending a claim or counterclaim is easily accomplished.¹⁶ For example, under the AAA Commercial Arbitration Rules, a party may, at any time before the close of the hearing (or a date set by the arbitrator or panel), increase or decrease the amount of its claim or counterclaim by providing written notice to the AAA.¹⁷ Any new or different claim or counterclaim must be filed with the AAA and a copy provided to the other parties, who will have 14 calendar days to file an answering statement to the proposed change of claim or counterclaim.¹⁸ However, after the appointment of the arbitrator or panel, no new or different claim may be submitted absent consent from the arbitrator or panel.¹⁹

Some Final Practice Notes

Here are some final practice notes regarding pleading practice in an arbitration proceeding. First, in drafting either the demand/statement of claim or answering statement, it is very common for the parties to insert, almost as boilerplate, a request that the arbitrator or panel award reasonable attorneys' fees in the prayer for relief. Doing so can have unintended consequences. Although an arbitrator or panel is not permitted to award attorneys' fees absent the parties having contractually authorized such an award in the arbitration clause or if the

governing substantive law provides for such an award,²⁰ if the parties independently request an award of attorneys' fees in their arbitration pleadings, at least under the AAA's rules (which appear to be unique in this regard), those requests can operate to provide authority to the arbitrator or panel to render such an award.²¹

Additionally, advocates should be mindful that, unlike court pleadings, the demand/statement of claim and answering statement are almost always reflexively marked as exhibits at or before the evidentiary hearing by the parties and/or the arbitrator or panel and are often deemed admitted as part of the evidentiary record. Thus, any statements made in these pleadings that end up being inconsistent with the actual evidence adduced at the hearing may create certain evidentiary difficulties at the end of the proceeding. That said, it is still ultimately up to the arbitrator or panel to determine the evidentiary weight to be accorded the pleadings.²²

The foregoing practice notes serve to highlight how important it is for advocates to know, understand, and appreciate the impact of the applicable procedural rules governing the arbitration proceeding. (Incidentally, they also underscore the importance for transactional counsel to appreciate these rules, or at least coordinate with litigation counsel, so that a dispute resolution clause customized to the parties and any anticipated circumstances or preferences is negotiated and drafted in the underlying contract.) Beyond simply knowing and appreciating the applicable procedural rules, because arbitration best practices and the law governing arbitration proceedings are constantly changing, attending timely continuing legal education programs and hearing from and/or speaking with arbitrators about their views on the current state of pleading practice in arbitration proceedings can be highly illuminative. Finally, consulting authoritative and helpful resources will be of enormous assistance in navigating this field.²³

Endnotes

1. See, e.g., AAA (American Arbitration Association) Commercial Arbitration Rules (October 1, 2013); CPR (International Institute for Conflict Prevention & Resolution) Administered Arbitration Rules (July 1, 2013); Resolute Systems Commercial Arbitration Rules; JAMS Comprehensive Arbitration Rules and Procedures (July 2014); FINRA Code of Arbitration Procedure for Industry Disputes (2017).
2. See, e.g., CPR Rules for Non-Administered Arbitration (November 1, 2007); UNCITRAL (United Nations Commission on International Trade Law) Arbitration Rules (2013).
3. See, e.g., AAA Commercial Arbitration Rules, Rule R-4; CPR Administered Rules, Rules 3.1-3.5; Resolute Systems Commercial Arbitration Rules, Rule 2; JAMS Comprehensive Arbitration Rules, Rules 5 and 9; CPR Non-Administered Rules, Rules 3.1-3.3; UNCITRAL Arbitration Rules, Articles 3 and 20; FINRA Code of Arbitration Procedure for Industry Disputes, Rules 13300 and 13302.
4. See AAA Commercial Arbitration Rules, Rule R-4(a).
5. See *id.*, Rule R-4(e).
6. Fed. R. Civ. P. 12(f); accord N.Y. C.P.L.R. 3024(b) ("A party may move to strike any scandalous or prejudicial matter unnecessarily inserted in a pleading.").

7. On that subject, there are a number of good resources. *See, e.g.,* Steven M. Greenspan and Conna A. Weiner, *Reassessing Commercial Arbitration: Making It Work for Your Company*, ACC Docket (Mar. 2017), available at <https://svamc.org/wp-content/uploads/Reassessing-Commercial-Arbitration-Making-it-Work-for-Your-Company.pdf>.
8. *See* AAA Commercial Arbitration Rules, Rule R-4(g).
9. *See id.*, Rule R-4(h).
10. *See, e.g., id.*, Rule R-33 (“The arbitrator may allow the filing of and make rulings upon a dispositive motion only if the arbitrator determines that the moving party has shown that the motion is likely to succeed and dispose of or narrow the issues in the case.”).
11. *See, e.g., id.*, Rule 5; CPR Administered Rules, Rules 3.6 through 3.9; Resolute Systems Commercial Arbitration Rules, Rule 2; JAMS Comprehensive Arbitration Rules, Rule 9(c) through 9(e); CPR Non-Administered Rules, Rules 3.4 through 3.7; UNCITRAL Arbitration Rules, Articles 4 and 21. *But see* FINRA Code of Arbitration Procedure for Industry Disputes, Rules 13303(a) (mandating that an answering statement be filed and providing that “[p]arties that fail to answer in the time provided may be subject to default proceedings under Rule 13801”). *See also* Fed. R. Civ. P. 8(b)(6) (“An allegation—other than one relating to the amount of damages—is admitted if a responsive pleading is required and the allegation is not denied. If a responsive pleading is not required, an allegation is considered denied or avoided.”); CPLR 3018(a) (“A party shall deny those statements known or believed by him to be untrue. He shall specify those statements as to the truth of which he lacks knowledge or information sufficient to form a belief and this shall have the effect of a denial. All other statements of a pleading are deemed admitted, except that where no responsive pleading is permitted they are deemed denied or avoided.”).
12. *See* AAA Commercial Arbitration Rules, Rule R-5(a).
13. *See id.*
14. *See id.*, Rule R-5(b).
15. Rule 13308(b) of the FINRA Code of Arbitration for Industry Disputes also provides that “[i]f a party answers a claim that alleges specific facts and contentions with a general denial, or fails to include defenses or relevant facts in its answer that were known to it at the time the answer was filed, the panel may bar that party from presenting the omitted defenses or facts at the hearing.”
16. *See, e.g.,* AAA Commercial Arbitration Rules, Rule 6; CPR Administered Rules, Rule 3.10; JAMS Comprehensive Arbitration Rules, Rule 10; FINRA Code of Arbitration for Industry Disputes, Rules 13309-13311; CPR Non-Administered Rules, Rule 3.8; UNCITRAL Arbitration Rules, Article 22.
17. *See* AAA Commercial Arbitration Rules, Rule R-6(a).
18. *See id.*, Rule R-6(b).
19. *See id.*
20. *See, e.g.,* 17 U.S.C. § 517 (authorizing award of attorneys’ fees in copyright infringement cases); 42 U.S.C. § 1988 (authorizing award of attorneys’ fees to prevailing party in civil rights cases).
21. *See* AAA Commercial Arbitration Rules, Rule R-47(d)(ii) (“The award of the arbitrator(s) may include: . . . an award of attorneys’ fees if all parties have requested such an award or it is authorized by law or their arbitration agreement.”). *See also* *Wells Fargo Bank, N.A. v. WMR e-PIN, LLC*, 653 F.3d 702, 713-14 (8th Cir. 2011) (affirming Wells Fargo’s contention that, because both parties had requested attorneys’ fees in their pleadings, the applicable AAA rule permitted the award of such fees); *B/E Aerospace, Inc. v. Jet Aviation St. Louis, Inc.*, No. 11 Civ. 8563 (SAS), 2012 WL 1577497, at *4 (S.D.N.Y. May 3, 2012) (holding that the fact that both parties sought attorneys’ fees in their pleadings made the award of such fees permissible under the applicable AAA rule); *Lasco Inc. v. Inman Constr. Corp.*, 467 S.W.3d 467, 471-75 (Tenn. Ct. App. 2015) (holding that, because both parties had requested their respective attorneys’ fees during the proceedings, such an award was proper under the applicable AAA rule, even though the parties’ agreement did not expressly authorize such an award).
22. *See, e.g.,* AAA Commercial Arbitration Rules, Rule R-34(b) (“The arbitrator shall determine the admissibility, relevant, and materiality of the evidence offered and may exclude evidence deemed by the arbitrator to be cumulative or irrelevant.”).
23. *See, e.g.,* Stephen K. Huber and James E. Lawrence, eds., *AAA Yearbook on Arbitration & the Law* (JurisNet, LLC 29th ed. 2018); James M. Gaitis, A. Holt Gwyn, Laura A. Kaster, John J. McCauley, eds., *College of Commercial Arbitrators Guide to Best Practices in Commercial Arbitration* (JurisNet, LLC 4th ed. 2017).

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