INCREASE THE ODDS IN YOUR FAVOR:
HOW TO IMPROVE YOUR CHANCES FOR SUCCESS IN ARBITRATION

by

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How to Improve Your Chances for Success in Arbitration

Arbitration is not the same as traditional litigation. Recognizing key differences and adjusting your presentation accordingly can greatly enhance your chances for success. Obviously, the goal is to present your client's position in the clearest, strongest light possible, remaining focused on your central theme or themes. This much would be true in either traditional litigation or arbitration. However, perhaps more so in arbitration than any other form of dispute resolution, confusion is the enemy of success. You need to be concise, precise and clear. If you have a persuasive position, you must figure out what it is and how to present it in a strong, consistent yet simple way that the arbitrator will understand, keeping in mind that the arbitrator may be an expert in the field and thus extremely knowledgeable about the subject matter of your dispute.

Here is a checklist of points to consider as you go through the arbitration process, from initial dispute through final outcome:

Initial Dispute

In some instances lawyers are fortunate enough to become involved early in a dispute. If this is your circumstance, do not rush in as the lawyer to fire off a letter protecting your client's interest. Rather, assess the situation and determine if far greater gains can be accomplished by remaining in the background and having your clients continue to take the lead in an effort to enhance or shore up your client's position for later dispute resolution in the eyes of an arbitrator.

Read the arbitration provision and understand precisely what the parties have agreed to regarding dispute resolution. This provision may surprise you either in terms of items that are covered unexpectedly or in the dearth of information, which allows you to proceed much more with a blank slate as you formulate your plan for how to arbitrate the dispute. It is surprising how often lawyers do not read the arbitration provision until much later in the dispute process or decide to ignore agreements set out in the arbitration provision. Arbitrators will not ignore an arbitration provision and when selected as an arbitrator will focus immediately on what the parties have already agreed regarding how the dispute is to be resolved.

It is not infrequent that lawyers for both sides in a dispute will find a provision or maybe multiple provisions in an arbitration agreement to be unacceptable or inapplicable to their particular dispute. If this is your situation, do not hesitate to contact the lawyer for the other side and see if the two of you can work out an agreement either to remove offensive provisions or

to rewrite the agreement in a manner that is mutually acceptable. For example, the agreement may call for a panel of three arbitrators when the magnitude of the dispute does not merit the expense. While agreeing to have one arbitrator resolve the matter instead of three does not by itself enhance your chances of a final victory, it does reduce cost and perhaps provide other efficiencies which your client will appreciate regardless of the ultimate outcome. Your client will consider reduced costs to be a success, especially if you lose.

Arbitrator Selection

While we talk about voir dire or jury selection in a traditional case, I tend to think of it more as a process of deselection. In other words, you are looking for those jurors who are least suitable to serve on that particular panel and who therefore should be struck. The jury that you have assembled does not necessarily represent the people you found to be most appropriate to hear the case, but rather by default they were not the least desirable. In the case of a bench tried dispute, unless you seek a change of judge, the judge who will hear and decide your case is mostly a matter of fate and whatever rotation plan is put in place by that particular court for the next judge to draw the assignment. Once again, you have little or no input in what judge will hear your case.

Uniquely, by contrast arbitration can allow complete input by the lawyers and their clients in who will be the arbitrator or who will be the panel of three arbitrators. The goal should not be to find an arbitrator who is your buddy and who will rule in your favor no matter what. First of all, if he or she is your buddy, that will have to be disclosed and that particular arbitrator may not be mutually agreeable to serve. Secondly, just because you have an acquaintance with an arbitrator does not mean that arbitrator in any regard is going to favor you or your case. Arbitrators by and large always do the right thing no matter what the consequences of the outcome. Thus, do not expend needless energy trying to secure an advantage in your selection of an arbitrator based on who you shared drinks with last week. Rather, you want to pick an arbitrator who is honest and fair and will keep an open mind until he or she has heard all the evidence. You may want to emphasize a certain type of arbitrator by background or experience depending upon your particular dispute. This is your opportunity to do homework and to find that person best suited from your client's point of view to hear and understand your client's position. That is all you can or should hope for when selecting an arbitrator, but it is a huge distinction from either jury selection or a bench trial and is worth the effort to do the homework to secure the arbitrator best suited to hear your particular dispute.

While an arbitrator may not have a track record that is as accessible as a judge because arbitration proceedings are confidential, an arbitrator with experience will have a reputation known around the community. Check with

your peers and find out about the arbitrator you are considering. Lawyers are good about providing candid assessments of arbitrators and generally willing to share that information with fellow lawyers. Of course, we are all jaded by the outcome of an arbitration, but surprisingly many lawyers will tell you they lost in arbitration but they found the arbitrator to be fair and good. Sometimes you just know your client's position is not as strong as you had hoped and that the outcome, although disappointing, may correctly reflect that assessment.

If a judge has a conflict, he or she typically will recuse himself and you will move on to the next judge, often not knowing the reason why. If a judge takes a case, it is rare for him or her to make a disclosure and usually it relates to something that might actually constitute a real conflict for which the court seeks express consent and waiver from counsel. By contrast, arbitrators are taught to disclose everything that is a conflict, may appear to be a conflict, or may even suggest the possibility of impropriety. Arbitrators are taught to err on the side of disclosure. This includes not only information involving them, but also their spouses, and in many instances other relatives as well and of course for lawyers, information involving their fellow partners and associates. It is not unusual, accordingly, for written disclosures by the arbitrator to run several pages in length. These disclosures offer a unique opportunity for counsel to consider which arbitrator is best suited for that particular arbitration. If in doubt, a lawyer should follow up with a disclosure and ask for additional detail or information. Just because arbitrators have disclosures in no way means that that arbitrator is biased or prejudiced.

In addition to disclosures discussed above, as lawyers ask prospective jurors probing questions in voir dire to learn about that prospective juror's background and beliefs, in recent years savvy lawyers have been getting together and preparing their own lists of questionnaires to be submitted to and answered by prospective arbitrators. These are sometimes called pre-screening disclosures. The lawyers typically work up questions and agree on them and the arbitrator, if he or she wishes to be considered further, will need to answer the questions. I have seen some pretty probing questions that arguably are even questionable in terms of whether the lawyers are trying to get an arbitrator to vouch for a particular position, but when not carried to an extreme, prescreening disclosures can be extremely helpful in determining who is the appropriate arbitrator. While debatable as to whether certain questions go too far, here are some real life examples of pre-screening disclosure questions asked to me in various prospective arbitrations:

"Do you believe it is appropriate to consider the intent of the parties when interpreting a contract? Please explain."

"Do you believe there are distinctions in the manner in which an arbitrator must apply the law versus how a judge would have to apply the law? Please explain."

"Please describe any articles, speeches or presentations not already listed on your biographical materials dealing with construction or surety law."

"Do you have a primary area of construction industry focus (i.e., representing owners, contractors, specialty suppliers and/or subcontractors)?"

Rules

It sounds obvious, but is often overlooked. Knowing the rules places you on at least an even playing field and perhaps at a distinct advantage. First of all, establish what rules apply, such as the rules of the American Arbitration Association ("AAA"). Many arbitration provisions do not set out any specific rules, leaving it up to the parties and the arbitrator ultimately to determine what rules will apply. Unlike court where the rules are established and everyone knows or should know going into the dispute what rules will apply, arbitration frequently requires some consideration and discussion about what rules will be in play. Once the rules are established, take advantage of them wherever possible. For example, Rule 32 of the Commercial Arbitration Rules and Mediation Procedures of the American Arbitration Association, effective June 1, 2010, provides: "The arbitrator may receive and consider the evidence of witnesses by declaration or affidavit, but shall give it only such weight as the arbitrator deems it entitled to after consideration of any objection made to its admission." Obviously, in a traditional court of law affidavits have limited uses, such as for a TRO, and are almost never admitted in a hearing on the merits. By contrast, since an arbitration is designed to be quicker and less expensive, affidavits are permissible in many instances, even encouraged. Determine whether affidavits are appropriate in your case, particularly where you have multiple witnesses who are saying essentially the same thing and you want to show the arbitrator that there is substantial support for your position. By submitting several affidavits on an issue, you can be expedient yet be forceful in proving your point.

Another example is Rule 43(d)(ii) of AAA, which provides that the award of an arbitrator 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." Surprisingly, lawyers are so used to asking for attorney fees in pleadings even when they know they probably are not recoverable, that it is almost a reflex action in arbitration to duplicate this behavior by requesting attorney fees. Unwittingly, when both sides have requested attorney fees, this enjoins pursuant to Rule 43 of the American Arbitration Association's Rules the jurisdiction and authority for an arbitrator to award attorney fees if he or she so desires even if they were not otherwise recoverable by statute or express contractual agreement. This is unique to arbitration and can greatly serve to advantage or disadvantage your client depending upon your knowledge of this rule and how you should apply it. If you have a forceful case, you might want

to consider asking for attorney fees. If the other side has asked for them and you do as well, you then know that you have at least invoked this rule and the arbitrator may consider awarding attorney fees. As we all know, even the threat of an award of attorney fees can be a significant factor in how a case is presented by a plaintiff (claimant in arbitration) or responded to by a defendant (respondent in arbitration).

Preliminary Hearing and Scheduling Conference

Once the arbitrator is selected, he or she will have a preliminary hearing and scheduling conference with counsel to go over all matters from pleadings to discovery to hearing. This can resemble a scheduling conference with a judge in a traditional court of law, but there is greater flexibility on the part of the lawyers in how they want that schedule put together. A template example of a scheduling order that I work from as an arbitrator is attached at the end of these materials. This template is for larger arbitrations with three arbitrators. You might find various items covered to be of use in your next arbitration. Because arbitration is a consensual process, the lawyers often have greater say in when a matter will be heard, how long the hearing will be, exactly how much discovery is needed, what kind of award will be issued, and even where the hearing will take place. If your client has special needs or desires, they can be communicated to the arbitrator and generally factored into developing the schedule. Take advantage of this opportunity to build a schedule that best suits your client's needs as well as yours.

Evidence

Traditional court proceedings have established rules and procedures in place that make it difficult for evidence to be received until properly vetted. A lawyer has to lay a foundation for an exhibit. A lawyer has to establish that a witness has personal knowledge before he or she can testify about a specific event. Obviously, while there are many exceptions to the hearsay rule, as a general rule of thumb, hearsay is not allowed. By contrast, the rule of thumb in arbitration is that everything comes into evidence. This in large part is due to the Federal Arbitration Act and Missouri's Uniform Arbitration Act which allow an unsuccessful litigant to challenge an arbitrator's award on the basis that he or she failed to accept relevant evidence. Therefore, arbitrators "err" on the side of allowing everything in, and then they give it the weight that they feel it deserves. Marshal your facts and evidence accordingly, with the knowledge that everything is going to come in and the stack of materials may be taller than you would see in a traditional court of law.

Knowing that everything is going to come into evidence, a successful lawyer will aid the arbitrator in focusing on the truly important facts that are potentially dispositive. This can be done by highlighting sections of the letter or a contract or other document and providing them in a brief or position paper

in advance of the arbitration. The arbitrator will read this and be alerted to information that that party feels is important. This helps to cut through the clutter of the bulk and focus on the salient facts.

Arbitrators tend to be lineal and focused and generally like to go from Point A to Point B to Point C. Understanding that this is how they think, providing exhibits in organized 3-ring binders and often in chronologic order aids the arbitrator's ability to analyze the evidence and retain it. Arbitrators are not worried about who marks what exhibit and whether Exhibit 5 is referenced in testimony before Exhibit 6. Lists of exhibits and a memory stick or thumb drive of all materials helps too. By contrast, since basically everything is going to come in evidence, the successful litigant needs to focus on which of those exhibits is really important and put them in a sequence or order through witness testimony that tells the story succinctly and persuasively. If there are 10 exhibits out of 1,000 that are supportive of a particular point, they can be marshaled together into a package.

We have all been taught in law school that witness testimony is presented through direct and cross-examination. It has a rather mechanical procedure. By contrast, arbitration is much more flexible and since hearsay is going to be allowed, by definition evidence can be received in more creative manners. For example, it is not unusual in larger arbitrations involving a panel of three arbitrators for witnesses to testify in a panel format where several of them may be sworn in at one time and provide evidence on a particular subject as opposed to allowing each witness to testify about all of his or her knowledge on all the subjects in dispute. This allows the fact finder to focus on information in a subject format. If your case is strengthened by this approach, consider suggesting to the arbitrator or panel that witness panels or even expert panels be used instead of the traditional one witness at a time with direct and cross-examination.

Just because an exhibit is in evidence does not mean that an arbitrator is going to read or focus on that exhibit. Lawyers need to emphasize through their witnesses and through their presentations which exhibits are important and which parts of exhibits are important. An arbitrator only has so much time to receive the evidence and make a decision. Make his or her job as easy as possible by pointing them directly to what you want them to consider.

Surprises and late disclosures by lawyers do not benefit anyone and generally lead to potentially distracting disagreements between counsel. Therefore, a successful litigant should prepare summaries, charts and other demonstrative evidence early, disclose it as part of the exchange of exhibits and provide them to the arbitrator or panel at or before the start of the hearing with all other evidence. Lawyers often seem to have last minute demonstrative exhibits that do not provide the other side sufficient time to carefully review or prepare counter demonstrative evidence. This approach generally backfires.

First of all, if a party has not seen a demonstrative, the arbitrator will give that party sufficient time to review it and understand it and probably discuss it with his or her clients, other witnesses and experts. Depending upon the nature of the demonstrative, the arbitrator may give that party sufficient time to prepare his or her own demonstrative in rebuttal. All this does is slow down the process. By providing this information up front to the other side, you not only look organized, but you look confident, and these subliminal messages are not lost on an arbitrator. In addition, by preparing these materials early, it forces you to reconsider your presentation of evidence so that you focus on those items of evidence that are really important and helpful to presenting your client's position in the best light possible.

Arbitrator Questions

During a trial, jurors do not ask questions. Judges sometimes ask questions, but often they are not familiar with the subject matter of the dispute. By contrast, arbitrators typically are familiar with the subject matter of the dispute and based upon their knowledge and experience, frequently ask questions of the lawyers and of witnesses, sometimes from the beginning of the hearing all the way through the hearing, and even in post-hearing proceedings. Successful litigants should welcome arbitrator questions provided they are not overly intrusive. Listen carefully to what is on the mind of the arbitrator. Arbitrators are not asking questions to trick or deceive, but rather to learn and to clarify. You may pick up on a trend or line of thought from arbitrator questions that prompts you to adjust your presentation going forward to address specific issues or items on the mind of the arbitrator. Prepare your witnesses in advance that the arbitrators may ask questions. Lawyers sometimes are frustrated that arbitrators appear to be preempting their case and presentation. Granted, there is a fine line between an arbitrator asking questions to understand and move the matter along versus an arbitrator who is intervening (interfering?) with the presentation by a lawyer. If you see the latter occurring, which would be a very rare instance, a lawyer may be able to address the situation by suggesting to the arbitrator that his presentation is going to cover those questions or points in the next few minutes and then actually do address them. Again, by having a concise story and theme or themes, the lawyer can help to keep the focus of the decision maker on those items that you have already predetermined best position your client for a successful result.

Final Outcome: The Award

An arbitrator will issue his or her decision in writing. There are basically three types of decisions. The first one is often referred to as a standard decision or award and is basically an up or down as to who wins and how much money. An interim version of an award is often referred to as a reasoned award in which the arbitrator provides at least some reasoning or basis for his

or her decision. This gives the parties some idea as to what the arbitrator considered to be the persuasive evidence that supports how he or she decided the case. Many parties indicate they benefit from at least some reasoning, and if your client needs peace of mind as to why an arbitrator ruled in a certain manner, you may want to consider requesting a reasoned award. The longest and most complicated form of an award calls for findings of fact and conclusions of law much like what you would see from a trial judge in a bench trial. Awards of this sort are more time-consuming and expensive to the parties since the parties have to pay for the arbitrator's time. They generally do not serve much purpose since appeal rights are extremely limited. Ordinarily, in a court of law parties might like to see findings of fact and conclusions of law such that there is a basis for a challenge to an appellate court if they lost. Such challenges do not exist in arbitration and generally serve only to frustrate the losing litigant without providing him or her any viable outlet for further dispute resolution. Rather than focus on requesting detailed findings of fact and conclusions of law, most successful litigants channel their energies into presenting the best case they can and taking their one shot with that arbitrator. One of the advantages of arbitration is finality is reached much sooner.

# # #

[For a Panel of Three Arbitrators]

IN THE MATTER OF ARBITRATION BETWEEN

_____	)
	)
Claimant,	)
	)
and	) Case No. _____
	)
_____	)
	)
Respondent.	)

REPORT OF PRELIMINARY HEARING - SCHEDULING ORDER NO. 1

By direction of the Panel, this will confirm the arrangements made at the preliminary hearing held on _____, in the above-referenced matter before Panel Arbitrators James R. Keller (Chair), _____, and _____. Appearing at the hearing were _____ representing Claimant and _____ representing Respondent. Also participating in the telephone conference was _____.

By agreement of the parties and Order of the Panel, the following is now in effect.

1. Additional Preliminary Hearing: A preliminary hearing/status conference has been set for _____ _**.m. Central Time,** _____. Counsel should be prepared to discuss in general the status of this arbitration, and in particular, whether any dispositive motions may be filed and if so, the scheduling for them.

2. Itemization of Claim: Claimant shall provide additional detail and itemization of its claim by _____.

3. Preliminary Witness List: By _____, the parties shall mutually exchange and provide to the Panel a list of all persons by name and place of employment, if applicable, who they may call as a witness in this arbitration. A one to two sentence abstract of testimony shall be provided for each witness in this exchange.

4. Preliminary Motions: Neither party anticipates filing any preliminary motions other than a potential dispositive motion to be discussed at the status conference on _____. Should any party decide to file any

preliminary motion, this should be brought at the earliest opportunity possible to the attention of opposing counsel and the Panel.

5. Discovery:

   a. Exchange of Documents: The parties have agreed to continue their informal exchange of documents, and if necessary, formal exchange of documents without direct imposition of a scheduling order. This includes a formalized written agreement between counsel for the clawback of any documents inadvertently produced to which privilege applies.

   b. Depositions: The parties have agreed that they may take depositions. No set number of depositions or time limit for them has been established at this point.

   c. Discovery Cut-Off: All discovery shall conclude by _____.

6. Retained Experts: Claimant shall disclose in writing its expert(s) by _____, and Respondent shall disclose in writing its expert(s) by _____. The disclosures shall include the name and address of all persons retained as experts or specially employed to provide expert testimony in this case along with a written summary from such expert containing all the opinions to be expressed and the basis and reasons therefore, or a like statement from counsel containing such information, and when available a curriculum vitae including the qualifications and background of such expert as well as a list of publications authored by the witness within the last five years, the compensation to be paid for such expert and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years. All experts shall make themselves available for deposition consistent with the deposition schedule otherwise set out in this Order.

7. Prehearing Disclosures:

   a. Witnesses: On or before _____, both parties shall file directly with the Panel and produce to all other parties a list of all witnesses reasonably expected to be called by that party at the hearing including the full name of the witness and a brief description as to the subject matter(s) on which that witness is expected to testify. Each party shall be responsible for updating its disclosed list of witnesses to provide additional information as it becomes available if not initially available.

   b. Exhibits: On or before _____, the parties shall submit a jointly prepared and comprehensive set of joint exhibits so as to

minimize duplication and potential confusion between several documents that are the same and bear several different identifications, and any additional exhibits to be offered by that party. Each proposed exhibit shall be premarked for identification with the parties using the following format: All joint exhibits shall be marked between numbers 1 and 500. All separately offered Claimant exhibits shall be marked 501 through 1000. All separately offered Respondent exhibits shall be marked 1001 through 1500. If this numbering system does not sufficiently cover exhibits, counsel shall coordinate amongst themselves a similar numbering system to accommodate the actual exhibits used. A set of joint exhibits, Claimant exhibits and Respondent exhibits shall be presented to the Panel both by thumb drive or memory stick and a paper copy for each Panel member at the hearing. If an exhibit does not have page numbers, the parties shall manually number each page for ease of reference during the hearing.

c. Pre-Hearing Brief/Position Paper: The parties shall file a prehearing brief/position paper on or before _____.

8. Stipulation of Uncontested Facts: The parties have agreed that they are not required to file a stipulation of uncontested facts but they are encouraged to meet and to stipulate to facts, if possible.

9. Date and Time of Hearing: The hearing in this matter is scheduled to commence at _____ _.m., _____. The hearing shall take place at the offices of Herzog Crebs LLP, 100 North Broadway, 14th Floor, St. Louis, MO 63102, unless otherwise notified by subsequent Order. Parking is available in the Kiener East Garage on Broadway. The hearing will continue until _____, _____.

The parties shall make arrangements to schedule the attendance of witnesses so that the case may proceed with all due expedition and without any unnecessary delay. Presentation of evidence at the hearing will be in the order set out in the caption of this case unless otherwise agreed to by all parties and the Panel, or as otherwise ordered by the Panel.

10. Form of Award: A standard award shall be issued by the Panel.

11. Stenographic Record: No party at this point has advised the Panel of its intention to have a court reporter present at the hearing. Any party desiring a stenographic record shall make arrangements directly with a stenographer and shall notify the other parties and the Panel of these arrangements in advance of the hearing. The requesting party or parties shall pay the cost of the record unless other arrangements are worked

out between counsel. If a stenographic record is going to be made, counsel should advise the Panel in advance so that the Panel may discuss what arrangements, if any, will be made for the Panel to review the stenographic record.

12. Additional Matters: Any other preliminary matters which may arise and are not addressed in this Order shall be submitted for the Panel's consideration no later than five calendar days before the commencement of the hearing.

13. Effect of Preliminary Order: This order shall continue in effect unless and until amended by subsequent order of the Panel.

14. Filings: All such disclosures and other materials to be filed shall be filed directly with the Panel via e-mail. The offices of the Panel are as follows:

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[insert other addresses for other panel members]

Materials submitted to the Panel can be submitted via their e-mails. As for exhibits, if possible, a set of them on a CD or memory stick along with a hard copy is preferable.

15. Non-Substantive Procedural Matters: The parties have agreed that non-substantive procedural matters may be addressed by the Panel Chair acting on behalf of the Panel. The Panel Chair will continue to endeavor to consult with all Panel members on all matters. The Panel Chair shall have the authority to sign any subpoena, but if he is unavailable, any member of the Panel may do so.

There shall be no verbal contact with the Panel regarding this arbitration, except at oral hearings.

_____
James R. Keller, Panel Chair

Date: _____