MOTION PRACTICE IN ARBITRATION

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The general complaint about construction and commercial arbitration is that it has become too much like litigation. It takes too long and costs too much. Arbitration still has advantages over the litigation process, such as confidentiality, finality and decision makers with expertise. Still, there are challenging issues in arbitration that can drive up costs and delay resolution. Is motion practice part of the problem or part of the solution? How should motions be handled to improve the arbitration process? What do the applicable law and rules provide in this regard? These questions are considered below for various types of motions commonly encountered in arbitration.

1. Jurisdiction and Arbitrability Motions.

"Arbitrability" refers to the threshold issue of who has the primary power to determine whether the parties agreed to arbitrate the merits of a dispute -- the arbitrator or the court. The issue may be raised in court by a party to an arbitration filing a Motion to Compel Arbitration, a Motion to Stay Arbitration or a Petition for Declaratory Judgment and Injunctive Relief.

In Georgia and most jurisdictions, if a contract has a broad arbitration clause, the court will likely determine that the issue of arbitrability is to be decided by the arbitrator(s). Where a broad arbitration clause is in effect, even the question of whether the controversy relates to the agreement containing the clause is subject to

arbitration. *See Pickle v. Rayonier Forest Resources, L.P.*, 282 Ga. App. 295, 297 (2006). Thus, if there is a broad arbitration provision, such provision includes having the issue of arbitrability decided by the arbitrators. Georgia courts recognize that parties to a contract can agree to arbitrate gateway issues of arbitrability, such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy. *See Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772, 2777 (2010).

This principle also applies to motions on jurisdiction, i.e., if the contract has a broad arbitration provision then issues of jurisdiction are decided by the arbitrators. It is therefore important for a party drafting an arbitration clause in a contract to draft a broad provision, providing for all claims to be resolved by arbitration, as opposed to drafting a provision that applies only to certain types of disputes.

The AAA Construction Industry Rules (R-9), as well as the JAMS Comprehensive Arbitration Rules (Rule 11), provide that questions of jurisdiction and arbitrability are reserved for the arbitrators. Rule R-9 of the Construction Industry Rules, titled "Jurisdiction", provides as follows:

> (a) 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.
>
> (b) 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.

> (c) 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.

Additionally, both the Georgia Arbitration Code and Federal Arbitration Act intend for arbitration provisions to be broadly enforced, and both provide that arbitrators should determine issues of arbitrability and contract interpretation. The FAA applies when a transaction involves interstate commerce. *See Wise v. Tidal Construction Co., Inc.*, 261 Ga. App. 670, 673 (2003). Construction generally involves interstate commerce because most building materials pass in interstate commerce. *See Id.* Under the FAA, the federal policy is to enforce arbitration agreements. *See Ceco Concrete Constr. v. J.T. Schrimsher Constr. Co.*, 792 F. Supp. 109, 110 (N.D. Ga. 1992) (punctuation and citations omitted) ("In deciding the question of arbitrability, the federal policy is to construe liberally arbitration clauses to find that they cover disputes reasonably contemplated by their language, and to resolve disputes in favor of arbitration"); *Collins v. Int'l Dairy Queen*, 2 F. Supp. 2d 1473, 1477 (M.D. Ga. 1998) (There is a "presumption ... in favor of arbitrability with respect to the question of whether a particular issue is within the scope of a valid arbitration agreement.").

Like the FAA, the GAC incorporates a policy favoring the enforcement of arbitration provisions. *See* O.C.G.A. § 9-9-3 ("a provision in a written contract to submit any controversy thereafter arising to arbitration is enforceable"). *See City of College Park v. Batson-Cook Co.*, 196 Ga. App. 138, 140 (1990) ("The dispute between the parties involved the meaning, interpretation and application of certain terms of

the contract and these were matters for the arbitrators to determine."); *Atlanta Gas Light Co. v. Trinity Christian Methodist Episcopal Church*, 231 Ga. App. 617, 619 (1998) ("[The] interpretation, meaning or intent of the agreement [is] a matter clearly within the scope of the arbitrators' authority.") (citation omitted); *Amerispec Franchise v. Cross*, 215 Ga. App. 669, 670 (1994) (Disputes involving the meaning, interpretation and application of certain contract terms are for the arbitrator to decide).

When all of the issues in a court action are compelled to arbitration, including the issue of arbitrability, and there is nothing left for the trial court to resolve, it is not error for the trial court to dismiss the suit with prejudice rather than grant a stay. *See Simmons Co. v. Deutsche Financial Svcs. Corp.*, 243 Ga. App. 85, 90 (2000); *Moore & Moore Plumbing, Inc. v. Tri-South Contractors, Inc.*, 256 Ga. App. 58, 62 (2002).

2. Consolidation and Joinder Motions.

Consolidation and joinder are challenging issues for arbitrators and advocates alike. Consolidation involves combining separate arbitration proceedings, while joinder involves adding parties to one arbitration proceeding. Arbitration is a consensual process and a creature of contract, which imposes limits on joinder of parties depending on what those parties have agreed.

There are several reasons to join or consolidate proceedings. Joinder and consolidation can simplify the dispute resolution process, avoid duplication of effort, reduce party and witness inconvenience and expense and reduce the risk of conflicting rulings.

A party requesting joinder or consolidation typically argues that common issues of fact or law exist, a probability of conflicting rulings would result if the cases were arbitrated separately, and consolidation obviates the necessity to try the same case twice. Parties opposing typically argue that there are no common issues of law or fact, the consolidated proceeding will become unwieldy, and that arbitrating Case "A" first will limit the issues to be tried in Case "B" and thereby make the trial of Case "B" cheaper and more efficient.

For arbitrators, these decisions can be a delicate balancing act. The arbitrator must take into consideration fairness to the parties as well as the degree of efficiency that will be reached.

The issue of joinder is common to construction arbitration, for example, because a general contractor may wish to join subcontractors in its dispute with an owner and an owner may want to join an architect in its dispute with a general contractor. Conversely, an owner may wish to prevent a general contractor's joinder of multiple subcontractors, since it complicates the proceedings and increases the time and expense involved.

O.C.G.A. § 9-9-6 of the Georgia Arbitration Code authorizes a court to consolidate separate arbitration proceedings where there are common parties, the disputes arise from the same transactions, and there are common issues of law or fact creating the possibility of conflicting rulings. The AAA Construction Industry Arbitration Rules (2015) include an updated Rule R-7 on consolidation and joinder, which provides that the AAA can appoint a special arbitrator to decide whether

related arbitrations should be consolidated or parties joined. If the special arbitrator determines that separate arbitrations should be consolidated or additional parties joined, that arbitrator can also establish a process for selecting or approving which arbitrators will ultimately decide the newly constituted case, since newly joined parties to an existing arbitration likely did not participate in the appointment of arbitrators.

Construction contracts have taken differing approaches over the years to the issue of consolidation and joinder. For example, the AIA Document A201 has evolved to the current approach under Article 15 of the 2007 version. It now provides that either party may consolidate an arbitration with any other arbitration to which it is a party if the agreement governing the other arbitration permits consolidation, the proceedings involve common questions of law or fact, and the arbitrations employ similar rules and procedures. It also provides that either party may include by joinder persons or entities substantially involved in common questions of law or fact whose presence is required for complete relief, provided that the party consents to joinder. This evolution represents a trend in favor of consolidation and joinder when necessary for efficiency and complete relief. Many subcontracts incorporate by reference the provisions of the owner-contractor agreement regarding dispute resolution, thereby authorizing consolidation or joinder on the same grounds.

While most joinder issues arise among parties who are signatories to written arbitration agreements, there are a few instances in which non-signatories have been successfully joined. Examples include trade and professional associations (*Drayer v. Krasner*, 572 F.2d 348 (2nd Cir. 1978)); undisclosed principals (*Estate of Jerome*

Garcia v. Stonehenge, Ltd., 1998 U.S. Dist. LEXIS 23565 (N.D. Cal. 1998)); and assignees and sublessees (*Sunkist Softdrinks v. Sunkist Growers*, 10 F.3d 753 (11th Cir. 1993), cert. denied 313 U.S. 869). Federal courts proceeding under the FAA apply state law principles to the question of joinder of non-signatories, and have found grounds for joinder under Florida law and New York law. *Kong v. Allied Professional Ins. Co.*, 750 F.3d 1295, 1302 (11th Cir. 2014); *American Personality Photos, LLC v. Mason*, 589 F. Supp. 2d 1325, 1330 (S.D. Fla. 2008).

3. Discovery Motions.

Arbitrators play a key role in reasonably containing discovery, which is where a lot of time and money can be spent and where arbitration can start to look like litigation. Arbitral rules contemplate limited discovery and give arbitrators authority to manage the process. For example, R-24 of the AAA Construction Rules provides that the arbitrator shall manage any necessary exchange of information, and focuses on document exchange as the contemplated extent of discovery. R-25 authorizes the arbitrator to make any orders necessary to manage and enforce discovery. R-22 and R-23 of the AAA Commercial Rules are similar. Rule 17(d) of the JAMS Comprehensive Rules provides for exchange of information, permits each party to take one deposition, and provides that discovery disputes will be decided by conference with the arbitrator.

Discovery disputes are common in larger construction and commercial arbitrations and can involve delay in production of documents, delay in scheduling depositions, arguments about the order of depositions, arguments about

identification and deposition of experts, withheld documents and privilege logs. One tool for minimizing discovery disputes is a comprehensive preliminary scheduling conference between the arbitrators and the parties that addresses specification of claims, schedule for exchange of documents, and regular follow-up to address issues promptly as they arise. The professionalism and experience of the parties' attorneys is also a major factor in managing this aspect of arbitration. Availability of the arbitrator or chair of the panel to deal with issues as they arise can help expedite the process.

Discovery disputes can obviously drive up the parties' expenses. When one party submits a motion and supporting brief with exhibits, it is likely that other parties will respond in kind. The parties end up paying for their attorneys' time to prepare these pleadings, as well as the arbitrators' time reviewing them. A contentious case can result in repeated disputes and multiple filings. One option to reduce some of this expense is to require a phone conference before motions and briefs are filed, to see if the issues can be resolved more quickly and directly with less expense. Another option is to impose page limits or other restraints on the motion and brief writing process.

Non-party discovery can also be a challenge. The Federal Arbitration Act (9 U.S.C. §§ 1, *et seq*.) applies to contracts involving interstate commerce, which is often found in construction and commercial disputes. 9 U.S.C. § 7 addresses an arbitrator's power to subpoena witnesses and documents. It provides that arbitrators may summon a person to attend before them as a witness and bring documents deemed material as evidence in the case, in the same manner as a subpoena to testify in federal court. However, it does not expressly authorize pre-hearing discovery from

non-parties. The federal courts have differed in their interpretation of the statute, some authorizing discovery subpoenas and some not. *In re Security Life Ins. Co. of America*, 228 F.3d 865 (8th Cir. 2000); *Life Receivables Trust v. Syndicate 102 at Lloyd's of London*, 549 F.3d 210 (2d Cir. 2008). The ability to enforce arbitration subpoenas to non-parties may depend on the jurisdiction. O.C.G.A. § 9-9-9 of the Georgia Arbitration Code provides that arbitrators may issue subpoenas for the attendance of witnesses or for the production of books, records, documents and other evidence. It provides that these subpoenas may be enforced in the same manner provided by law for enforcement of subpoenas in a civil action.

4. Dispositive Motions.

There is some debate about the propriety of dispositive motions, such as motions to dismiss or for summary judgment, in arbitrations. On the one hand, limited discovery and an expedited hearing can minimize the advantage of dispositive motions in shortening the dispute resolution process. On the other hand, a targeted motion in a complex case can help narrow the issues and reduce the time and cost involved. And in some cases, the claim may be so clearly valid, or clearly barred, as a matter of law that proceeding with discovery and hearing is a waste of time and money.

Many construction and commercial disputes are fact-intensive and involve disputed facts that likely preclude summary judgment, especially when the arbitrators want to avoid denying a party the opportunity to develop all relevant facts at the hearing. Nevertheless, some discreet issues may be amenable to summary

disposition. Therefore, there seems to be a place for dispositive motions in arbitration.

The Federal Arbitration Act (9 U.S.C. §§ 1, *et seq*.) and the Georgia Arbitration Code (O.C.G.A. §§ 9-9-1, *et seq*.) do not specifically address dispositive motions. However, as noted by other commentators, the courts have found that arbitrators have authority to grant dispositive motions even where such authority is not expressly granted by the applicable arbitral rules. *See Sherrock Brothers, Inc. v. Daimler Chrysler Motors Co., LLC*, 260 Fed. Appx. 497, 502 (3rd Cir. 2008).

Rule R-33 of the AAA Commercial Arbitration Rules (2013) allows for dispositive motions but counsels a cautious approach: "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." Rule R-34 of the AAA Construction Industry Arbitration Rules (2015) is similar: "Upon prior written application, the arbitrator may permit motions that dispose of all or part of a claim, or narrow the issues in a case." Both rules envision a party first seeking leave to file a dispositive motion rather than simply filing one. This is a change from the prior Construction Rule R-32(c) that simply recognized an arbitrator's authority to entertain motions that dispose of all or part of a claim or expedite proceedings. Rule 18 of the JAMS Comprehensive Rules provides that the arbitrator "may" permit a party to file a motion for summary disposition, implying that a party must seek leave to do so. Having a preview of the grounds for summary disposition is advisable before incurring the time and expense of briefs, exhibits, affidavits and hearings.

There are several reasons for this cautious approach and why arbitrators tend to proceed cautiously on dispositive motions. First, a summary judgment ruling by a trial judge in a court case can be appealed as a matter of right and is subject to *de novo* review by the appellate court. In arbitration, the grounds for appeal are limited and an award is given deference by the courts to the point of allowing an arbitrator to make errors of law and still be affirmed. *See Johnson Real Estate Inv., LLC v. Aqua Industries, Inc.*, 282 Ga. App. 638 (2006). Thus, an arbitrator is properly hesitant to cut the process short and deprive a party of the chance to present its case in an evidentiary hearing.

Similarly, depriving a party of the opportunity to fully develop the facts of the case can leave an award vulnerable to challenge. The Federal Arbitration Act (9 U.S.C. § 10(a)(3)) provides that a federal court may vacate an award where the arbitrators were guilty of misconduct "in refusing to hear evidence pertinent and material to the controversy". A summary disposition that opens the award to being challenged and vacated does not benefit the parties or save time or expense.

Additionally, as mentioned above, limited discovery and an expedited hearing are hallmarks of the arbitration process. Summary disposition is less necessary and to some extent inconsistent with the nature of arbitration. These considerations support a cautious and limited use of dispositive motions.

Despite these concerns, there is still a place for dispositive motions in arbitration. They can avoid unnecessary time and expense in those cases where there are no material factual disputes and a claim is clearly barred as a matter of law.

Examples could include claims barred by res judicata or collateral estoppel, waiver, statute of limitations, lack of standing, and plain meaning of the contract. The courts tend to uphold arbitrator decisions granting dispositive motions. *See Sherrock Bros. v. DaimlerChrysler Motors Co. LLC*, 465 F. Supp. 2d 384 (M.D. Pa. 2006) (evidentiary hearing unnecessary where claims barred by res judicata, collateral estoppel and waiver); *Campbell v. American Family Life Assur. Co.*, 613 F. Supp. 2d 1114 (D. Minn. 2009) (summary disposition appropriate where plain meaning of contract barred claim); *Tucker v. Ernst & Young, LLP*, 159 So.3d 1263 (Ala. 2014) (affirming grant of dispositive motion at close of claimant's case in chief). Even in cases where a dispositive motion is not granted, the process has the advantage of educating the arbitrators and focusing the parties on key issues that will surely appear at the final hearing.

A dispositive motion can also narrow the issues for hearing, which can be a benefit in complex cases with multiple claims and parties. However, it is undeniable that dispositive motions increase the cost of arbitration with research, brief writing and oral argument, as well as compensation to arbitrators to review briefs and hear oral arguments. Nevertheless, if the parties are pursuing settlement discussion or mediation simultaneously with arbitration, rulings on targeted issues by motion may promote settlement prospects by narrowing issues or by telling the parties that all issues are going to the hearing. Therefore, the use of dispositive motions becomes a balancing act, in which the positives and negatives must be weighed for the particular case.

5. Motions to Exclude Evidence.

Motions in limine are common in lawsuits to exclude evidence that is irrelevant, inadmissible or unfairly prejudicial. *Daubert* motions are also fairly common to exclude expert testimony in court trials. In arbitration, however, legal rules of evidence are not strictly followed and the arbitrator is more of a "factfinder" than "gatekeeper". Therefore, motions to exclude evidence are less important.

Rule R-34 of the AAA Commercial Rules recognizes that conformity to legal rules of evidence is not necessary, and that the arbitrator shall determine admissibility, relevance and materiality of evidence and may exclude evidence deemed cumulative or irrelevant. Rule R-35 of the AAA Construction Rules is similar. Privilege, such as attorney-client privilege, is to be taken into account. Rule 22(d) of the JAMS Comprehensive Rules is similar.

Arbitrators generally tend to admit evidence and exercise judgment as to what weight (if any) to give it. Objections can be helpful to alert the arbitrator to a party's concern, but evidentiary objections are typically denied. The tendency to admit evidence "for what it's worth" has a legitimate basis. The Federal Arbitration Act (9 U.S.C. § 10(a)(3)) provides that refusal to hear pertinent and material evidence can be grounds to vacate an arbitration award. Thus, excluding evidence can jeopardize an award or create possible challenges, thereby undermining the efficiency and finality of the arbitration process. Nevertheless, arbitrators have the discretion to exclude evidence that is cumulative or irrelevant, and the obligation to safeguard protections such as attorney-client privilege.

Under the GAC, FAA and AAA Rules, arbitrators can hear and determine motions to exclude evidence. This is an area where the benefits of arbitration can shine. Parties in arbitration may submit written motions in limine prior to a hearing, but it is just as effective in arbitration to raise such motions orally because the arbitrators are sophisticated enough to recognize matters that should not be admitted. A party in arbitration can also raise objectionable matters in a pre-hearing brief with the same effectiveness as filing a separate motion in limine. A party, however, should consider filing a separate motion in limine if the evidentiary dispute is complicated and/or a major point that could significantly affect the outcome of the arbitration.

A party who presents a motion in limine in arbitration should not fret if the arbitrator does not rule on the motion. That is because arbitrators often take the matters raised under advisement and rule on them at the time the disputed evidence is attempted to be introduced.

6. Motions for Sanctions.

The ability of an arbitrator to sanction a party for improper behavior has been a somewhat murky issue. Some courts have held that power lies in a broad, "all disputes" arbitration clause. *Superadio Ltd. Partnership v. Winstar Radio Productions, LLC*, 844 N.E.2d 246, 446 Mass. 330 (2006). Other courts have held that a party may be sanctioned by an arbitrator but that an individual attorney may not be. *Interchem Asia 2000 PTE, Ltd. v. Oceana Petrochemicals AG*, 373 F. Supp. 2d 340 (S.D.N.Y. 2005).

In an attempt to clear up this issue somewhat, the AAA has issued new rules regarding the authority of an arbitrator to issue sanctions. These provisions are found at R-58 of the AAA Commercial Rules and R-60 of the AAA Construction Rules. The terms of the two rules are the same.

The arbitrator is empowered, upon the request of a party, to order "appropriate sanctions" where a party fails to comply with its obligations under the Rules or with an order of the arbitrator. If the arbitrator enters a sanction that limits the ability of a party to participate in the arbitration or results in an adverse determination of an issue or issues, the arbitrator must explain that order in writing and shall require the submission of evidence and legal argument **before** making an award. The Rules specifically provide that an arbitrator **may not** enter a default award as a sanction.

Further, in the interest of ensuring due process, an arbitrator must provide the party against whom sanctions are being sought an opportunity to respond to the request for sanctions before making any determination regarding the sanction's application. These rules are very new, and it is yet to be determined how often and how strictly they will be applied in practice.

Rule 29 of the JAMS Comprehensive Rules also authorizes the arbitrator to order appropriate sanctions for failure of a party to comply with its obligations under the Rules or an order. Sanctions may include assessment of fees, exclusion of evidence, drawing adverse inferences, or in extreme cases determining an issue adversely to the noncomplying party.

7. Motions for Continuance.

Continuance or postponement of an evidentiary hearing is frustrating to arbitrators and parties and can undermine the goal of efficiency in the arbitration process. In complex multi-party arbitrations, it can become a scheduling nightmare. To minimize the problem, the hearing date should be set at the initial preliminary hearing and scheduling conference and be confirmed and agreed by the parties and their counsel. The arbitrator can emphasize that the hearing date will not be changed except for good cause. Nevertheless, unforeseen events can sometimes interfere with the best planning and scheduling and result in a motion for continuance.

Arbitral rules address the arbitrator's authority regarding postponement of hearings. For example, R-30 of the AAA Commercial Arbitration Rules provides that the arbitrator may postpone any hearing upon agreement of the parties, upon request of a party "for good cause shown", or upon the arbitrator's own initiative. R-31 of the AAA Construction Industry Rules is similar, but includes the prerequisite "for good cause shown" for any postponement, whether by agreement of the parties, upon request of a party, or upon the arbitrator's own initiative. The requirement of good cause for any postponement is consistent with the effort to minimize the disruptive effect of continuances.

An arbitrator considering a request for postponement must weigh a number of factors, such as the reason for the request, the number of prior postponements sought, and the prejudice to the opposing party. A refusal to grant a postponement can have serious consequences. The Federal Arbitration Act (9 U.S.C. § 10(a)(3))

provides that an arbitration award may be vacated where the arbitrator was guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown.

The question becomes what constitutes good cause. For example, serious illness of a party or key witness, unavailability of a party or withdrawal of counsel could constitute good cause for a continuance. *See Allendale Nursing Home, Inc. v. Local 1115 Joint Board*, 377 F. Supp.1208 (S.D.N.Y. 1974); *Tube & Steel Corp. v. Chicago Carbon Steel Prods.*, 319 F. Supp. 1302 (S.D.N.Y. 1970); *Chestnut Energy Partners v. Tapia*, 300 S.W.3d 386 (Tex. App. – Dallas 2009). Conversely, a third request for postponement based on partial unavailability of one of a party's lawyers may not constitute good cause. *See Whale Sec. Co. v. Godfrey*, 705 N.Y.S.2d 358 (App. Div. 2000).

While there is recourse for unfair action by an arbitrator, the reported cases indicate few successful challenges to awards based on refusal to postpone a hearing. The complaining party must show there was no reasonable basis for the refusal and that the party was prejudiced as a result. *Schmidt v. Finberg*, 942 F.2d 1571 (11th Cir. 1991). Courts tend to defer to the arbitrator's broad discretion if there is a reasonable basis for the decision. *Ceco Concrete Constr. V. J.T. Schrimsher Constr. Co.*, 792 F. Supp. 109 (N.D. Ga. 1992).

8. Motions to Disqualify Arbitrators or Counsel.

A principal advantage to using an outside provider to administer an arbitration proceeding is the fact that the provider can impartially adjudicate motions to disqualify arbitrators. AAA Commercial Rule R-18 permits the Association to

disqualify an arbitrator for failure to remain impartial, for failure to perform his duties with diligence and good faith, or any other ground provided by law.

A more difficult case is the potential disqualification of an arbitrator where there is no third party service provider involved. In such cases, by having to adjudicate his own potential disqualification, the arbitrator may well find himself in an uncomfortable predicament. If the issue arises early in the proceeding, then it is much easier to grant. Because the lack of impartiality of an arbitrator is grounds for vacatur of an award under the Federal Arbitration Act, generally arbitrators are more inclined to grant such a motion in order to protect the process. If, however, it arises after the hearing has commenced and the parties have expended a significant amount of money and time, the question of disqualification may be, as a practical matter, much more difficult to address.

The law is generally clear that an arbitrator does not have authority to disqualify counsel. *See Dean Witter Reynolds, Inc. v. Clements, O'Neill, Pierce & Nickens, LLP*, Civil Action No. H-99-1882, 2000 EL 36098499 at 5 (S.D. Tex. Sep. 8, 2000). Yet, at least one court has held to the contrary. *See Reuter Recycling of Fla., Inc. v. City of Hallandale*, 993 So.2d 1178 (Fl. Dist. Ct. App. 2008). An exception may exist if both parties agree to submit the question of attorney disqualification to the tribunal. As a general and practical rule, however, any such motion should be brought not in an arbitration proceeding, but in the court having jurisdiction.

CONCLUSION

The foregoing topics present challenges to the expeditious and cost-effective goal of arbitration, as well as presenting challenging legal issues for practitioners. The College of Commercial Arbitrators has published a guide to best practices in commercial arbitration, including protocols for expeditious and cost-effective arbitration, which offer ideas and guidance for dealing with these and other issues with the goal of preventing arbitration from becoming the same as court litigation. The protocols encourage practitioners and participants to be deliberate and proactive in controlling discovery, schedules and motion practice, but to remember that these are tools and not straightjackets. In the end, arbitration is a consensual process and all participants are part of the solution.

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