The Section of Dispute Resolution of the American Bar Association held its Third Annual Arbitration Training Institute-A Comprehensive Training in Commercial Arbitration, over three full, consecutive days in New York this February. It was an intensive “best practices” and guidance programme led by outstanding instructors, many of the trainees themselves being wise, experienced arbitrators. The binder contains approximately 1,000 pages of checklists, precedents, USA jurisprudence and articles.

This article is a summary of the programme’s main topics which I believe would interest Canadian arbitrators, since certain topics themselves, and the detail of some topics, dealt strictly with USA statutes (the Federal Arbitration Act – “FAA”, states’ Uniform Arbitration Act – “UAA” and Revised Uniform Arbitration Act _”RUAA”), jurisprudence and rules of such administrative agencies (“providers”) as the American Arbitration Association (“AAA”), JAMS (Judicial and Mediation Services) and the National Arbitration Forum.

DISCLOSURE

Like the securities law shibboleth, “when in doubt, disclose”, the magic words for arbitrators are “Disclose, Disclose, Disclose” any interest likely to affect impartiality or likely to create the impression of impartiality, as required by Canon II of the Code of Ethics of the ABA-AAA, or any “evident partiality”, as required by the FAA, UAA and RUAA. Failure to fully, continuously and timely so disclose is the leading ground for the overturning of arbitral awards by the courts in the USA, called “vacatur”. Arbitrators have a continuing duty to investigate disclosure issues.

The indiscernibly different plurality decisions of Mr. Justice Hugo Black and Mr. Justice Byron White of the US Supreme Court in *Commonwealth Coatings Corp. v. Continental Casualty Co.* were examined in order to establish the “bright line” for the disclosure duty. Mr. Justice Black requires disclosure of dealings that might create an impression of possible bias, while Mr. Justice White opined that an arbitrator need not disclose remote commercial relations or merely trivial interests. California has substantially expanded the disclosure requirement, enveloping even grandparents and partners in international law firms. In *Coty v.Anchor Construction,* the arbitrator`s award was vacated because the arbitrator had raised the non-payment of his fees during a pre-hearing conference, which was held to constitute actual bias.

CASE MANAGEMENT & ORDERS

The initial Pre-Hearing or Case Management Conference should deal with your jurisdiction and any issues of arbitrability, and yield a Scheduling Order which fixes the time schedule and parameters for: motions; provisional relief; objections; discovery (depositions, production of documents); protective-confidentiality orders; amendments; witness and expert witness lists; subpoenas; hearsay and the parole evidence rules; pre–and post–hearing briefs; the hearing; the format of the award; and lawyer and arbitration costs.

Arbitrators are cautioned to take control of the process, or lose it. Have the parties and their counsel bring their agendas to the initial case management conference, whether in person or by conference call, so all dates can be fixed and no one can cause delay with the excuse “I don’t have my agenda with me”. Consider a stipulation of agreed facts, a limited number of depositions, possibly by video-conference, page number, double-spacing and font limitations for briefs, a joint binder of common exhibits, “chess clock” timing of each party’s case at the

hearing, and fixing Friday rather than Monday deadlines, since Monday gives lawyers all week-end to create paper, problems and costs.
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The major issue in discovery concerns digital evidence, known as electronically stored information ("ESI"), which includes cell phones and "Blackberries"). So much of the documentation sought and tendered consists not only of emails, but increasingly of vast amounts of computer-stored information, both on and off-site, confidential, privileged, and classes thereof which are automatically deleted on a fixed schedule in the ordinary course of a company's business.

Arbitrators may use cost-shifting to settle ESI discovery disputes, ordering the party required to produce and which object to producing hard copies of voluminous ESI, to share some of the cost of its collection and production. The leading case of *Zubulake v. UBS Warburg LLC.* established cost sharing criteria and awarded $9.1million plus $20 million in punitive damages pursuant to an adverse inference having been drawn by the judge. Other methods include establishing search terms, providing "mirror images" of sections of a computer, reference to the Sedona Principles for Electronic Document Production, and use of hybrid ADR methods such as "baseball –last best offer arbitration" (see the author's article in Issue # ● dated ● 2007). USA companies have been fined millions of dollars for breaching their duty to preserve evidence, such as the assessment of $1.45 billion of punitive damages against Morgan Stanley, largely due to an adverse inference.

MANAGING THE PARTIES & THEIR COUNSEL

There are both actual process aspects and ethical considerations at play here. What to do about an absent party or counsel, a pro se party, a party terminating counsel, requests to postpone, ill-prepared counsel, surprise witness or evidence, or the misbehaviour of a party or counsel? Should, or may, the arbitrator be a pro-active and questioning arbitrator who risks the allegation of bias, or strictly one who leaves the parties and counsel to make their beds and lie in it? Sanctions via cost awards may be effective for counsel misconduct, delays and failure to respect Case Management Orders or Stipulations, while some incidences justify the arbitrator advising that he/she may draw an adverse inference as a consequence thereof.

CONDUCTING THE HEARING

The logistics of, the order of, and any special needs for, the hearing itself should have been decided at the initial Case Management Conference. Often, a pre-hearing Case Management Conference must be held closer to the hearing date in order to deal with forgotten or new issues, such as sequestration of witnesses other than expert witnesses, video testimony of a non-appearing witness, a site visit, motions or purely administrative matters.

INTERIM & FINAL AWARDS

Is the award to be a bare award, a reasoned award or an award with reasons? Various approaches to crafting an award were presented. Several hours were devoted to team deliberation and writing of an award based on an hypothetical disputed sale of a business involving misleading financial statements, termination of the employee-selling shareholder and his son, non-competition clauses and an arbitration clause. Beware of issuing an interim award

which does not reserve your jurisdiction to render a final award, such as when a subsequent hearing and award are required with respect to attorneys' fees. Conversely, do not reserve jurisdiction, such as for costs that may be taxed at court, without the consent of the parties, as you would thus not be *functus officio*, when you should be. Consider framing the issues in your award as those raised by the party against which your award will be rendered, so that said party should not be able to allege that you did not deal with its arguments. The length and detail of the award should reflect the parties' expectations.

FEATURED SPEAKER

Kenneth R. Feinberg, a distinguished mediator, arbitrator and law professor, spoke about, and urged us to consider, the creative application of ADR. Ken was appointed by the US Attorney General as Special Master, 9-11 Victims' Compensation Fund, which he designed, structured, administered and enforced. In this capacity, he brought his legal, mediation and arbitration skills to a "once in a lifetime" endeavour. Such creativity could be similarly extended to reparation and restitution funds. Another creative ADR application was Ken's acting as one of the three arbitrators who determined the fair value of the famous Zapruder film of President John F. Kennedy's assassination.

Ken silenced the room of over one hundred with poignant stories of hearing the claims of family of 9-11 victims, such as his ethical and moral dilemma as a result of hearing the claim of the young wife of a fireman, mother of his three small children, who had tearfully extolled his virtues as a father, husband and fireman, then only to hear the claim of that fireman's girlfriend on behalf of their infant, out-of-wedlock children, all unknown to the wife. Ken spoke with humility, thanking the ABA and the Institute's sponsors for the honour of being invited to address us all. He had asked his wife that morning: "In your wildest dreams, would you ever think that I would be invited to speak to the ABA?". She replied: "Ken, in my wildest dreams, I never think about you, or the ABA".

CONCLUSION

We were repeatedly reminded of our "awesome power", because awards are subject to vacatur, but generally not to appeal, because courts prefer not to review and vacate awards, and because of the power conferred by the arbitration agreement and/or the provider rules, such as the power to grant provisional relief. We were similarly reminded of the many risks and challenges which arbitrators encounter. Before answering a question, deciding an issue or when reflecting upon a problem, always consider the arbitration clause-agreement, any provider rules, and the law.

Albeit that much of the training reflected USA law and practice, it nevertheless provided leading-edge, sophisticated ideas and tools which we can consider, use and adapt in Canada.