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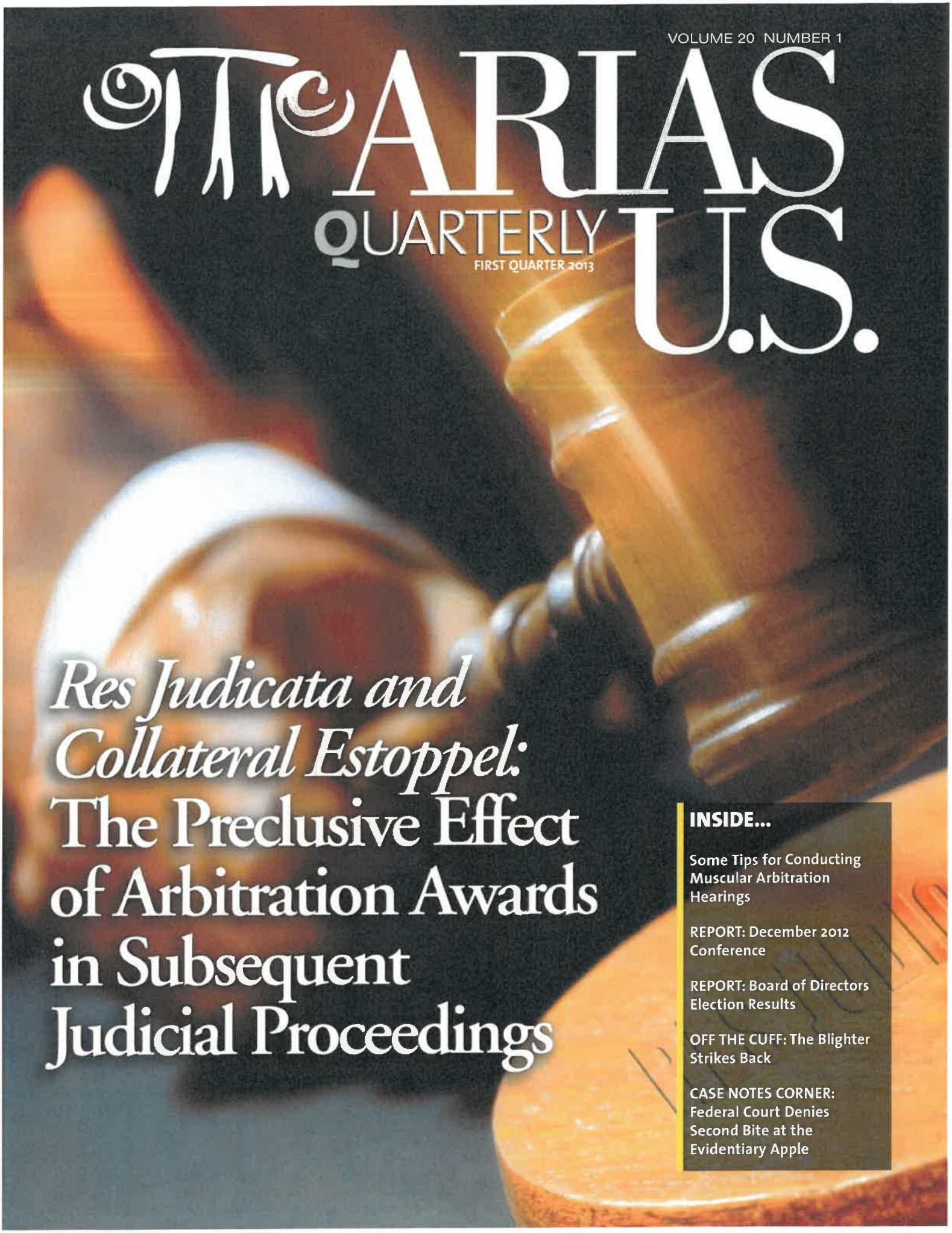

Res Judicata and Collateral Estoppel: The Preclusive Effect of Arbitration Awards in Subsequent Judicial Proceedings

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feature

Some Tips for Conducting Muscular Arbitration Hearings

This article is based on a paper presented at the ARIAS•U.S. December 2012 Conference.

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Here are some tips that have occurred to me in presiding over many arbitrations, as to how arbitrators might begin to become the vaunted "Muscular Arbitrator"...

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The Overriding Imperative That We Become "Muscular Arbitrators" and Choose "Muscular Arbitrators" for Our Cases

We have all known for some time that we need to up our games as arbitrators and advocates if arbitration is to achieve its fundamental objective of providing a better alternative to litigation, delivering a process that is more flexible, quicker, and less expensive than litigation while providing the same fairness of process and result.

Here are some tips that have occurred to me in presiding over many arbitrations, as to how arbitrators might begin to become the vaunted "Muscular Arbitrator" and as to how litigators in arbitration can improve the prospects of their receiving a "Muscular Arbitration."

The Muscular Arbitrator

- The Muscular Arbitrator will proactively manage the hearing from the beginning.
- The Message: Both sides will get a full and fair opportunity to present their case/defense, but we will move it along.
- Limit opening statements where appropriate and enforce the limits.
- Give guidance to counsel, at the first provocation, not to engage in repetitive or cumulative testimony or argumentative behavior and advise that redirect and recross will be limited.

Opening Statements: Tip to Counsel

- A colorful and engaging PowerPoint can add wonders to an opening statement—and, with a good one, the arbitrators may refer to it throughout the hearing.

All the Exhibits Are In

- Arbitrators should be very clear (unless there is a reason to do it differently in a particular case) that all previously marked exhibits, except ones that have been objected to, are fully in evidence as of the beginning of the hearing.
- And further — that objections to objected-to documents will be heard when the documents are offered.
- This should be in the context of making the parties understand that, generally speaking, all exhibits come in, subject to issues as to authenticity, privilege, extreme irrelevance/prejudice, or prior failure to designate the documents in advance.

Study the Witness Statements and Experts' Reports in a Timely Way

- The Muscular Arbitrator will study the Witness Statements/Expert Reports and related exhibits in advance — and will review them closely the night before, in order to be as familiar with them as she would have been had their substance been presented by live testimony.
- The Muscular Arbitrator will tell the parties at the opening of the hearing that she will be doing this and that they can count on it.
- The same applies to reviewing the Key Exhibits in advance.
- Tips to Counsel:
  - Remember that Arbitrators do not have a staff or junior attorneys and paralegals working with them on the arbitration.
  - Facilitate the arbitrators' access to Witness Statements, Expert Reports for

upcoming witnesses, and the like, and keep them advised of changes in the order of witnesses.

- It is generally a good idea for counsel to provide the arbitrators with *dramatis personae*, summaries, copies of earlier papers — whatever counsel would like the arbitrators to be looking at or thinking about at any given time.

Having the Necessary Papers

- The Muscular Arbitrator will have copies of the pleadings and other important papers at ready access.

Paper Exhibits

- It is a very nice touch when the exhibits are in binders that are small enough to be opened and closed without it being a back-breaking job.
- Two-sided copies save a lot of trees and are easy on arbitrators' backs.
- It also can be a wonderful if the documents are organized in some sensible way, whether by chronology or by topic or the like.
- Another very handy device is for counsel to Bates stamp the individual pages of all the exhibits consecutively before having the copies made, so that any page of any exhibit can be located by its unique page number.
- Further Tip to Counsel: Some arbitrators aren't in firms and have no real support staff. Helping the arbitrators with the set-up of the Exhibits and the shipping and/or storage of them between hearing days, when there are gaps, can be a nice touch.

The Electronic Hearing

- The Muscular Arbitrator will increasingly be ready for the fully electronic hearing.
- Tips for Counsel:
  - Providing a thumb drive or the like containing all of the pleadings, Witness Statements, Expert Reports, briefs, transcripts (if any), exhibits, copies of cases, *etc.* can be very helpful to arbitrators in evaluating the case and writing the award. Particularly helpful are briefs that are hyperlinked to the exhibits and authorities cited.
  - It can also be helpful, with the permission of the arbitrators, to mark up the important parts of exhibits and cases, etc.

Some Nice Touches with Respect to Individual Witnesses

- In a long case, it can be a nice touch for counsel to provide photos of individual witnesses.
- It is often a good idea to provide a CV of each witness, where applicable, in advance of the testimony, and to hand a copy of the CV to the arbitrators as the witness starts to testify, thereby making it possible to save time on foundations.
- Tip to Counsel: It's not unreasonable for counsel in such circumstances to make a nice summary statement of what the CV shows.

Organizational Charts as to the Positions and Responsibility of Witnesses and other Such Guides Can Be Helpful

- Tips to Counsel:
  - Basic chronologies can be helpful.
  - A *dramatis personae* can be helpful where there are many witnesses.
  - Again, counsel are well advised to recall that the arbitrators do not have a team of junior lawyers and paralegals to assist them in organizing materials for the arbitration.
  - In addition, arbitrators don't necessarily live with the case during the breaks, so it can be helpful to provide copies of materials like these to the arbitrators when the hearings resume to bring the arbitrators back into the picture (though the Muscular Arbitrator will obviously have done this on her own).
  - Accordingly, it is always a good idea for counsel to make available to the arbitrators whatever they would like the arbitrators to be looking at or thinking about at the time.

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Argumentative Counsel

- It not infrequently happens that counsel are inclined to engage in heavy and sometimes vituperative colloquy among themselves.
- While parties have a right to make any objections they want and to be heard with respect to objections, there is no room for vituperation (not to mention that it is counter-productive), nor is extended colloquy helpful.
- These practices must be squelched when they first appear.
- Approaches:
    - Direct counsel, when they are too disputatious with each other, to direct everything to the arbitrators; and
    - Don't be afraid to limit argument once the point has been made.

Reviewing Upcoming Witnesses and Areas of Testimony at the End of the Day

- The Muscular Arbitrator will review upcoming witnesses and their anticipated areas of testimony with counsel at the end of each day.
- Particularly after the matter has gone on for a while and the arbitrator has heard enough testimony to have a sense of the matter, she will advise counsel as the case proceeds as to what witnesses and which areas of testimony seem potentially helpful, and which do not.
- The Muscular Arbitrator will provide for extended days when necessary to get the job done on time —- and will remember that the court reporter (if there is one) has to be on board for extended days to be an option.

Limiting Direct Testimony When the Witness's Direct Testimony

- Has Been Presented by Witness Statement, Expert Report or the Like

A lot of time can be saved by avoiding extensive repetition of direct testimony when that testimony has already been provided by a Witness Statement, Expert Report, or the like.

Offers of Proof and Unnecessary Testimony

- The situation will arise where a party is going to put a witness on to testify to something that the party needs to establish but that the other side is not really going to be in a position to dispute anyhow, although they would not necessarily stipulate to it.
- In this situation, a quick compromise can be to have an Offer of Proof put on the record by offering counsel — and have that offer be stipulated to as testimony, i. e., not that the matter is true, but that this is what the witness would have testified to.

Hearing Expert Witnesses on a Particular Topic at the Same Time

- It can save time to have expert witnesses on a particular topic testify at the same time, with all such witnesses being present when each testifies.

Arbitrator's Stream of Consciousness Notes at the End of Each Day

- A practice that some arbitrators follow — and that can be quite helpful in terms of assisting the arbitrator to understand a case and organize her thoughts on it, and also to get back into it promptly again after a break — is to dictate a stream of consciousness memorandum at the end of each day's hearing, setting forth in some detail the arbitrator's impressions and tentative conclusions based on the day's testimony and her overall analysis of the issues in the case, as they appear in the hearing to date, along with any questions the arbitrator has going forward.
- These dictated notes can be much more helpful than the notes arbitrators take on yellow pads or laptops during the hearing, since they typically provide more of an overview and analysis.
- Arbitrators who follow this practice find that it increases their understanding of the case and their sense of what will be most helpful in the case going forward.

Form of Award

- Reasoned awards are expensive and time-consuming.
- The Muscular Arbitrator will challenge the parties, as with discovery and motion practice, as to why they want a reasoned award, and will point out that, given the limited scope of review, in many instances a standard award may be sufficient.
- Where the parties want a reasoned award, the question becomes what level of reasoning they want.
- Different arbitrators and counsel have markedly different views of what is meant by a "reasoned award."
- This should be a matter of explicit discussion: The Muscular Arbitrator will discuss with counsel what level of reasoning they want, conducting this discussion with reference to the potential costs of different levels of reasoned awards.
- The Muscular Arbitrator will also remember that at times, when counsel advise that they want a standard, non-reasoned award, this means not only that they do not want to incur the expense of a reasoned award, but also that they affirmatively want to avoid having a reasoned award. When this is the case, obviously the arbitrator will want to respect this.

Avoiding Post-Hearing Briefs When It Makes Sense/The Closing Statement Alternative

- Post-hearing briefing adds a considerable level of expense to arbitrations and results not only in substantial delay, but also in the arbitrators' not addressing the matter and writing their awards until weeks, or more typically months, after the close of the hearing.
- Often — although counsel may have a hard time letting go — the arbitrators will know the case as well as counsel by the end of the hearing, so that post-hearing argument and briefing will not really be all that helpful to the arbitrators. This is worth discussing with counsel. Nonetheless, if, as often happens, counsel nonetheless want to

brief the matter and/or have closing statements a week or two subsequent to the closing statements, that should generally be permitted.

- Closing statements can be an efficient alternative to post-hearing memoranda when counsel are satisfied with them.
- Where the parties and counsel are local, it is often convenient for them to come back a week or two after the hearing to provide their closing statements, in some instances after the transcripts (if any) are received.
- While this takes some time, it is generally more efficient and quicker than post-hearing briefs and, in many cases, may be more helpful to arbitrators because of the dialogue the closing statements make possible.
- Tips to Counsel:
  - A good closing PowerPoint presentation, annotated to the record, can be helpful in an appropriate case (if counsel don't then just read it).
  - Also quite helpful and handy is a small binder of the key documents from the hearing, marked up to highlight the points counsel like (it can be particularly handy if the documents are somewhat reduced in size and two-sided).

Attorneys' Fees and Costs

- In cases in which the arbitrators will be awarding attorneys' fees and costs, it becomes very important how this process is administered.
- Many arbitrators believe that the best practice is to ask both sides to submit their statement of their fees with their final briefs and to agree that the arbitrators may decide attorneys' fees on the basis of those submissions.
- If this approach is adopted, substantial potential delay in the future can be avoided. However, in the unusual case where either side objects and reserves the right to have a hearing as to fees, allowance will have to be made at a later time for such a hearing, since factual questions will presumably be presented.
- While this approach results in the winning party's having had to submit its fees as well, this should not be a significant burden because lawyers in most cases will have recorded their time on a regular basis anyhow. Moreover, having the two submissions to review can be helpful as to reasonableness.
- The alternative — the submission of fees applications after the award — can take up much more time, as the losing party may, by that time, be quite uncooperative.

Dealing with Those Last Minute Troublesome Issues That Come Up

- It often happens that issues come up late — sometimes quite late in the arbitration — that are really a nuisance.
- The Muscular Arbitrator, to protect the record of the case and avoid the risk of issuing an award that is unclear or in some way subject to challenge, will give fair consideration to such matters and, as appropriate, create a record as to that consideration, rather than simply brushing such matters aside.

Important Words to Add at the Very End

- Nothing can more derail the efficiency and economy of arbitration than to have the award be subject to challenge in court.
- Running a good hearing is obviously a way to decrease the likelihood that any such court challenge will have merit.
- One important stopgap is to very carefully and comprehensively inquire of counsel at the end of the hearing questions along these lines: Have you had an opportunity to offer whatever proof you feel you're entitled to offer and to say whatever you feel you need to say? Do you feel you've had a full and fair hearing? Is there anything further you need in order to feel that you have a full and fair hearing?
- While this may seem like looking for trouble, it can save a lot of time in the long run.▼

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