Cogent reasons for business law counsel handling certain arbitration cases

There are very cogent reasons why the parties' lead commercial-corporate counsel ("Counsel") should continue, whether solely or at least principally, to represent their clients in certain business arbitrations. While litigation counsel may well be needed at various points, Counsel need not always delegate a commercial-corporate matter to her/his law firm's, or another law firm's, litigation department, whether initially or at all.

The most salient reason is that Counsel usually has mastery of the facts, issues and main documents, having negotiated, drafted and/or reviewed these documents and "lived" the transaction or matter together with the client. Examples include a construction project, a shareholder agreement, the acquisition of a company, the purchase/ sale of shares or assets, a license of technology, or a terminated franchise agreement.

In tandem with this mastery, Counsel often also has the requisite expertise of the sector in which the client conducts business. The litigator(s) may not have such expertise, and would have to be educated, probably at least somewhat by Counsel, at the client's cost, although some firm time may not be chargeable. Counsel could thus very effectively lead the preparation of witness affidavits, examination of witnesses at discovery, the production of material documents and make the arguments establishing the client's case, thereby fulfilling arbitration's objectives of limited, if any, discovery, as well as a faster and more focused resolution process at a cost which is clearly controlled, or at least infinitely more controllable. Litigation counsel can always assist with legal briefs and oral arguments in law, where needed.

Counsel frequently has had a relatively long and/or regular working relationship with the entrepreneur-owner client, his/her officers and key employees. Counsel may serve as the client's trusted business advisor and confidant. Counsel generally well-knows the client's goals, positions and sensitivities, including the terms upon, and manner in which, the arbitration should

be conducted, as well as what settlement would be acceptable at propitious junctures of the arbitration.

As such, Counsel is very well-suited to negotiate and draft any requisite additions to the arbitration clause, or, if need be, construct, negotiate and draft the detailed arbitration agreement itself, establishing the detailed process for that particular arbitration. Counsel would then drive the pre-hearing/case management conference(s): trying to limit any attempted exhaustive and unnecessary personal, physical and e-discovery; fixing the requisite witnesses, and how they testify; and setting other scheduling order matters.

Billable and non-billable time will be spent by Counsel, possibly by other business lawyers in the firm, as well as by a litigation partner and/or litigation associate(s), depending upon the nature and complexity of the arbitration. Even after the litigators may have assumed carriage of the arbitration, they may still consult Counsel, and the client may expect Counsel to supervise the litigators and report regularly to the client. How much of such chargeable time can Counsel justify to the client, while simultaneously respecting his/her advice to the client about arbitration's cost savings as opposed to the costs of recourse to the courts? Counsel knows that a client may nevertheless hold them accountable for the arbitrator's unacceptable, yet unchallengeable, award, although the litigators did the utmost in the circumstances.

Who would know more than Counsel about the myriad intricacies of a long-term commercial lease, a new business joint venture, a single or multi-party financing, a very senior executive's employment contract or a shareholders agreement with a brutal restrictive covenant, a sales or distribution agreement with a client's key client, each of which took months to negotiate and draft? Counsel would have been extensively involved in the negotiation and drafting of such deal points as their respective gross and net rent, net profit/royalty/dividend definitions and calculations, and any applicable industry custom and practices. As such, not having Counsel stay principally charged with carriage of the arbitration, unless truly necessary in the circumstances, could be detrimental to the arbitration and the client.

Given Counsel's knowledge of the transaction, its documentation and players, the business sector in which the transaction occurred, the client and the client's business, there is certainly a class of business arbitrations with respect to which Counsel is perfectly placed to maximize the timing and efficiency of the arbitration, minimize its risk and costs, and protect its confidentiality by controlling the number of people involved and the documents submitted. Counsel, working in conjunction with the appropriate arbitrator and opposing Counsel, will maximize arbitration's benefits for the client, notably, a private, client-designed, cost and risk-controlled, appropriate dispute resolution process before an expert arbitrator chosen by the parties. Counsel's contribution will expeditiously get the arbitrator that which she/he needs in order to render an award that gives the parties that to which they are entitled, albeit not necessarily that which they may claim.

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