

Effectively Managing a Complex Commercial Arbitration

Although I have been a commercial litigator for my entire career, over the last twenty years I have acted as an arbitrator and represented parties in numerous arbitrations, and I have reached the conclusion that arbitration can serve as a viable cheaper and quicker alternative to litigation in complex commercial cases if the arbitration process is properly structured and managed. Through working with and learning from many highly capable arbitrators, advocates and other experts in arbitration, I have developed my own philosophy of how I think an arbitration process can most effectively and efficiently be managed, and this paper will describe some of those “best practices” that I have adopted and now use in arbitrations in which I am involved.

I. The Role of the Arbitration Panel

Unlike court processes, which are open to all citizens as the public process for the resolution of disputes, arbitration is clearly a creature of contract in that it must be agreed to by the parties. As such, it is often said that the arbitration process “belongs to the parties” who have chosen it. Arbitrators who completely accept this proposition merely implement agreements of counsel for the parties as to scope of discovery, time extensions, hearing delays and other procedural issues. However, I personally feel arbitrators must recognize that the process belongs not just to the parties, but that the concept of arbitration itself must be honored. Arbitrators must assume responsibility for keeping the process on track so that the efficiencies inherent in arbitration can be realized and arbitration can retain its value as a viable alternative to litigation. As discussed in more detail below, this means that the arbitrators must work with counsel and the parties to appropriately limit discovery and the filing of unnecessary motions,

and to prevent continuances, delays and other tactics that tend to defer completion of the arbitration and add to the expense and complexity of the process.

Initially, it is critically important as soon as the arbitrators have been selected for the arbitrators to ensure that they have no conflicts, real or perceived, by conducting a thorough conflict check. Potential or alleged bias that is uncovered after the decision is rendered is one of the most common grounds for challenging an arbitration award. For this reason all questions of potential bias must be addressed in advance, and the selected arbitrators must conduct a thorough and exhaustive conflict check of the parties, their counsel and their law firms and all expected factual and expert witnesses to disclose any prior contacts or relationships that should be disclosed.

After the arbitration panel has been finalized, the panel will ordinarily hold a preliminary conference with counsel for the parties, usually by conference call, to establish the procedures that will result in the final hearing and decision. Before that preliminary conference is held, counsel for the parties should be encouraged to confer directly so that they are on the same wavelength on as many issues as possible going into the conference, or so they will at least know what preliminary disputes exist that must be initially resolved by the arbitrators.

At the preliminary conference, the arbitrators should describe for the parties their general philosophy that will be followed for administering the case to keep it moving smoothly toward a final resolution. Also normally discussed at this conference are summaries by counsel of claims, damages and defenses, the scope of the discovery to be engaged in by the parties (depositions, interrogatories, document production, etc.), and special problems or legal issues that counsel feel will be present in the dispute.

Arbitrators, of course, have the power to make interim rulings to preserve the status quo pending the final hearing and/or to address and rule on motions concerning other legal issues that either side contends would be dispositive of any part or all of the case, and these issues should be raised by counsel at the preliminary conference if they are anticipated. It is my opinion that a dispositive motion should normally not be granted by arbitrators unless it is meritorious beyond dispute and/or based upon a clear legal issue, because the granting of such a motion greatly increases the chance that a court might later reverse the arbitration award. I feel that the better practice in most cases is for the arbitrators to hold their ruling on all issues until after presentation of the evidence at the hearing unless an immediate ruling is clearly demanded by the law and/or a grant of the motion would obviate a need for the entire hearing or at least a substantial number of hearing days. Of course, if the issue involved is narrower, a grant of partial summary judgment removing that issue from consideration might be appropriate, which could then result in a shorter and less extensive hearing.

It is also best practice at the preliminary conference for the arbitrators, counsel, and parties to schedule the date for the arbitration hearing itself after discussing what preparation time will be needed before the hearing and the length of time the parties expect the hearing to last. This is important so that all concerned can reserve on their calendars the period of time required for the hearing well in advance of the hearing date.

After the preliminary conference, the arbitrators will normally issue a scheduling and procedure order incorporating the timetable of events that will lead to the final hearing, including discovery. I recommend that the arbitrators obtain the agreement of the parties at the preliminary conference to insert a provision in the scheduling and

procedure order that the parties recognize that the arbitrators have been properly appointed and are qualified to serve and that the arbitration panel has jurisdiction over the dispute. This will avoid any later objections to the proper constitution of the panel or its jurisdiction to render a final award fully resolving the dispute.

Once the discovery schedule is established at the preliminary conference, the parties will proceed with document exchange, depositions (if ordered), and other discovery in preparation for presentation of the case at the hearing. If disputes arise during the discovery process, counsel for the parties should come back to the arbitrators to resolve those disputes so that discovery can proceed and the case will be ready for hearing at the designated time. Ordinarily, if the arbitration panel is composed of three arbitrators, the panel chair will, by agreement, handle discovery disputes, usually by telephone, so that it will not be necessary to convene the entire arbitration panel for relatively minor disputes. In fact, in most cases, regular up-dates should be required from counsel to ensure that the case is progressing timely and efficiently toward the scheduled hearing date.

How much discovery is appropriate and necessary between the parties before a case can be effectively heard is, of course, one of the issues that is hotly debated by those involved in arbitration. It is my experience that if there is economic disparity between the parties, the party with fewer resources will usually request and demand less discovery, while the party with more resources will generally feel that it is more important to nail down every contested fact with depositions, interrogatories, document production, and so on. However, I feel that it is the duty of the arbitrators to tightly control the scope of discovery in a manner equitable to both parties, but compatible with

the governing arbitration rules and consistent with the goal of arbitration to keep the process shorter, cheaper, and less cumbersome.

One technique that I have found effective for dealing with the scope of discovery (as well as scheduling problems, presentation of evidence at the hearing, and other procedural issues) is to brainstorm with the parties concerning their desired goals and requirements to adequately prepare for the hearing, then define for the parties the general parameters that the panel would like to follow for the issue in question, and direct the parties to come back with a game plan within those parameters. Only if the parties cannot agree will the panel dictate the specific procedure to be followed. I have found that, with such guidance from the panel, counsel would prefer and will generally be able to agree to a process that will meet the panel's general requirements.

One issue that is problematic in arbitrations is the power of arbitrators to issue subpoenas to third parties either for depositions, production of documents, or for appearance at the hearing. Of course, arbitrators, unlike judges, have no inherent, independent power to order enforcement of these subpoenas. Although the Georgia Arbitration Act specifically allows subpoenas to third parties, the Federal Arbitration Act (FAA) is less clear, and there are inconsistent federal court cases in the various circuits dealing with the breadth of arbitrators' subpoena powers. My usual practice as an arbitrator is to ensure that the opposing side is advised before I sign a subpoena to give them a chance to raise an objection, but then, unless some defect is apparent on the face of the subpoena, to sign the subpoena and leave it up to the subpoenaing party to fight the battle of serving and enforcing the subpoena.

Prior to the hearing, the arbitrators should hold at least one additional preliminary conference, either in person or by telephone, to determine if additional issues have arisen that must be resolved before the hearing and to allow counsel and the parties to advise the arbitrators of any evidentiary or other issues that they expect to arise during the course of the hearing. While it is obviously advantageous to hold these preliminary conferences in person where possible, complex business disputes often involve arbitrators, parties, and counsel from different parts of the country; therefore, these conferences are often by necessity held by conference call, and sometimes the parties do not even meet face-to-face with the arbitrators until the arbitration hearing actually begins.

Although the hearing itself should proceed very much like a trial, with direct examination and cross-examination of witnesses, one of arbitration's advantages is that arbitrators are generally not bound by the strict rules of evidence and can accept hearsay testimony, affidavit testimony, and other less formal means of presentation of evidence than in court – the theory, of course, being that the arbitrators are capable of weighing the evidence presented, disregarding any evidence that they do not feel should be properly relied upon. I will generally err on the side of admissibility, often crafting a way to hear the evidence so as to minimize prejudice, but accepting most evidence offered by the parties and refusing to admit only that evidence that is clearly irrelevant or otherwise improper.

Because of the flexibility inherent in arbitration, many innovative and more efficient means of presenting the evidence can be employed and should be encouraged

(and even required) by arbitrators to save time and expedite the hearing. These techniques can include:

1. The presentation of direct testimony of witnesses in writing, with the witness being subject only to live cross examination.
2. Using “panels” of witnesses from each side to simultaneously testify regarding broad issues, rather than putting each witness on the stand separately.
3. Direct confrontations between opposing experts, with each expert given the opportunity to question the opposing expert, and allowing the arbitrators to ask questions as appropriate.
4. Encouraging or requiring counsel to agree to specified time limitations for presentation of their portion of the case.
5. Submission of the testimony of secondary witnesses by deposition or affidavit.
6. Submission of jointly compiled binders of exhibits wherever possible, with admissibility of the exhibits being stipulated between the parties.
7. Extensive use of computer graphics and other high tech evidence presentations.
8. Bifurcation of the proceedings to hear only the portion of the case dealing with liability before accepting any evidence concerning damages. Of course, a preliminary finding of no liability would obviate the need for any evidence of damages, sometimes saving significant hearing time. However, this procedure would only be more efficient if the proof of damages can be completely separated from evidence concerning liability, which is often not the case.

In most cases, the arbitration award will be issued within thirty days of the close of the record unless the applicable rules or the parties' agreement is to the contrary. However, the record is often held open for submission of post-hearing briefs and/or other submissions, with the 30-day decision period running from that submission date. Arbitrators' decisions normally do not contain extensive explanations for or citations in support of the amount awarded unless a "reasoned award" is called for in the agreement of the parties, or unless the parties request an explanatory ruling and the arbitrators agree that more explanation is appropriate. The theory is that the more detailed the award, the more fodder that presents for counsel to fashion an appeal. However, I do feel that the parties deserve sufficient detail in the award that they can clearly understand how the arbitrators ruled on all of the issues that have been raised in the case.

In general, a valid arbitration award constitutes a full and final decision on the controversy and has all the force and effect of an adjudication and effectively precludes the parties from again litigating the same subject, and it has generally been held that an arbitrator may not be subpoenaed to testify after issuing a decision as to the meaning and construction of the written award.

II. Suggestions to Advocates Representing Parties in Arbitration From an Arbitrator's Perspective

From my perspective as an arbitrator, attorneys who are most successful representing clients in arbitrations are litigators who know the rules intimately, but who are also able to utilize the informality and flexibility of arbitration to their client's advantage. At the hearing, arbitrators do not want to hear repetitive or irrelevant evidence, so I encourage counsel to keep witnesses on issue and on task so that their

knowledge of the evidence can be presented as efficiently as possible and not delay the hearing. Counsel should be advised that it is appropriate to alert the arbitrators when proceeding to another issue with a witness, with statements to the effect of, “Now let’s move on to the issue of...” The arbitrators appreciate this use of the flexibility of the process to keep the hearing moving so that they can follow the presentation of the evidence more effectively.

It is important that counsel warn the client representatives and witnesses that their overall demeanor, knowledge, credibility, and other attributes will be closely evaluated by the arbitrators throughout the arbitration process, and that they will actually be much more visible because of the informality of arbitration, rather than being simply “on alert” when a jury is in the room and not sequestered. Of course, credibility of witnesses is just as important in arbitration and can be just as big an issue as in litigation, and the members of the arbitration panel will be weighing the knowledge and credibility of all the witnesses throughout. It is also important to encourage counsel and their clients to avoid the histrionics and unnecessary confrontation that is too often present in litigation today. Speaking from experience, arbitrators do not appreciate the distractions from their evaluation process that are created by constant belligerence or bickering between counsel or the parties themselves.

I like to emphasize to counsel that innovation in the effective and efficient presentation of the case as set forth above will be appreciated by the arbitrators so that the maximum advantages of the process can be realized. In short, I have become convinced that arbitration requires a different way of thinking about dispute resolution by everyone involved, including, importantly, counsel for the parties, if it is to fulfill its

role as an effective, quicker and lower cost alternative to litigation. The following are general tips that I think are important for effective representation of clients in arbitrations:

1. Design and state the claim and response (and any counterclaim) within the scope and limits of the arbitrators' power based upon the parameters of the arbitration clause, the governing rules, and the applicable statutes and case law.

2. Carefully choose your arbitration panel to ensure unbiased, qualified and experienced arbitrators who are familiar with and best suited to handle the type of dispute involved.

3. Develop and emphasize a theory of the case to convey to the arbitrators and attempt to be organized and succinct to keep the arbitrator's focus on the important facets of your case from the preliminary conference all the way through the evidentiary hearing.

4. During the presentation of the case at the hearing itself, be fully prepared and use technology as well as the presentation techniques described above to most efficiently present your case, ensuring at every stage that the arbitrators understand the point you are trying to make, even to the extent of asking for an opportunity to summarize your position during the presentation of evidence if you do not feel that it has been clearly made (of course, with the opportunity for opposing counsel to respond).

5. In a closing statement and/or post-hearing brief (normally the arbitrators will not request both), an attorney should try to be as succinct as possible, not wasting the arbitrators' time with endless case citations and restatement of facts that

they know the arbitrators are intimately familiar with by that time in the process. Tell the arbitrators explicitly what relief you want, why you want it and why you are entitled to it, usually submitting a proposed award for the arbitrators' consideration.

III. Trends in Arbitration

Unfortunately, despite my belief that arbitration is the most appropriate dispute resolution mechanism for many commercial disputes, I think that there are disturbing trends that threaten to undermine arbitration as the low cost, speedy and efficient process that should make it attractive as an alternative to litigation. Specifically, I have seen arbitration become more legalistic in the last five to ten years; that is, arbitration is becoming more and more like litigation and less and less a quick, inexpensive dispute resolution process. As the lawyers for the parties take control of the process, more and more discovery is being demanded, and, as long as all counsel agree, many arbitrators will go along with whatever discovery is agreed to, unfortunately to the detriment of a quick, inexpensive arbitration process. Also, counsel often file extensive pre-hearing motions and seek multiple continuances to complete their discovery, which further extends the arbitration process and makes it exponentially more expensive.

Don't get me wrong; I've been a litigator for over thirty years, and I recognize that lawyers are duty bound to utilize the procedures of whatever dispute resolution process they are involved in to maximize the results to their clients. However, if those of us involved in the arbitration process want to continue to see arbitration grow as a means of dispute resolution we all need to work harder to streamline the process, limit discovery, and ensure that arbitrators are trained to monitor and control the progress of

the case so that hearings can be held within a reasonable period of time and disputes can be brought to a quick and economical resolution.

Obviously, the role of the arbitrators is critical to achieving this goal. It is important for the arbitrators to establish an atmosphere of trust and cooperation and maintain control of the process from the beginning, establishing early on the expectations and understanding of counsel and the parties as to the philosophy and procedures the arbitrators will utilize during the process. In addition to ensuring that I reach a fair and equitable result for the dispute, I consider success in my role as an arbitrator to be the creation of a fair, efficient process in which all parties and counsel feel that they have had a reasonable opportunity to present their case and to be heard, and one in which all participants believe that the process has been completely neutral and transparent to the maximum extent possible.

As previously stated, this process must begin at the preliminary conference, with the arbitrators reminding the parties of the purpose and virtues of arbitration and their plan to keep it an efficient and expedited procedure. When discussing requested discovery, the arbitrators should press the parties to limit their discovery, particularly depositions, asking whether each deposition will actually result in an overall saving of time and expense and/or whether it is necessary to ensure an adequate preparation for the parties' presentation at the hearing. Counsel should be advised that before any motions are filed, a conference with the arbitrators should be held in which the issues involved can be discussed and the arbitrators can determine whether the motion is appropriate, timely, and would result in more efficiency to the process. Also, the time

saving mechanisms discussed above in the presentation of evidence at the hearing can help streamline the process and result in a more efficient and more expedited hearing.

I would also suggest that one way to ensure that arbitration retains its historical character is to involve the parties themselves more throughout the process and to emphasize to them from the inception the arbitrators' intent to utilize the flexibility and other advantages of arbitration to ensure a quicker and cheaper resolution of their dispute. I have found that the parties, if consulted, will normally request that their counsel utilize the more efficient and less costly preparation methodologies because they, of course, are paying the bill. The bottom line is that I think that it is critically important to the future of arbitration that everyone involved--the parties, counsel, and the arbitrators themselves--attempt to reverse this trend toward "legalizing" arbitration so that arbitration can retain the advantages that have historically made it attractive as an alternative to litigation.

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