Arbitration – In Trouble Again?

by Kent Scott

Arbitration, long a preferred method for resolving commercial disputes, is in trouble – again! I emphasize "again" because, two decades ago, arbitration experienced a great deal of criticism from the legal profession.

What it was like

In the 1980s, arbitrators were not exercising adequate control over the process. They were viewed as powerless referees who routinely granted postponements, refused to deal with dispositive motions and, my favorite, issued awards without providing a reasonable explanation.

Discovery was limited. Sanctions for failure to produce discovery were nonexistent. The enforcement of a subpoena ranged from the cumbersome to the impossible. Many arbitrations became trial by ambush. In short, arbitration was on its way to becoming a dinosaur.

The Federal Arbitration Act ("FAA") had not changed since its enactment in 1925. In 1985, Utah adopted the Uniform Arbitration Act ("UAA"), which was originally created in 1954. The Utah Judiciary's support of the arbitration process was not as evident as it is today. In the early eighties, lawyers were dealing with issues such as the constitutionality of including a pre-dispute arbitration provision in a contract. *Lindon City v. Engineers Construction Co.,* 636 P.2d 1070 (Utah 1981). In addition, both the Commercial and Construction Rules of the American Arbitration Association ("AAA") were long overdue for a major, if not a complete, overhaul.

What happened?

In response to the growing concerns over the integrity of the arbitration process, the AAA enacted a new set of arbitration rules that established a three-track system: fast track, regular track and large complex track. The rules, depending on the track used, expanded the power of the arbitrator over the management of the arbitration process.

In August of 2000, the National Conference of Commissioners on Uniform State Laws ("NCCUSL") adopted the Revised Uniform Arbitration Act ("RUAA"). Utah was one of the first states to adopt the RUAA, which became effective May 15, 2003, as Utah Code sections 78-31a-101 through 131. The provisions of the RUAA were designed to bring arbitration law in line with judicial decisions interpreting and applying the principals of the old Uniform Arbitration Act. The provisions of the RUAA expanded the arbitrator's power to issue and enforce subpoenas, order discovery, apply discovery sanctions, handle dispositive motions, streamline the presentation of evidence, and award punitive damages and attorneys' fees.

Where are we today?

What does today's lawyer think about the arbitration process? Lawyers are increasing in their concern that arbitration has lost its luster for being fast, efficient and economical. Most of them will tell you that arbitration has become the mirror image of the "scorched earth" methods too commonly associated with traditional litigation. Is arbitration no longer relevant as an alternative dispute resolution mechanism? The consensus among lawyers today: arbitration is in trouble.

Lawyers and the judiciary – the foundation of our dispute resolution process

Our courts and the lawyers who serve as officers thereof, and as advocates of their clients' interests, remain the central focus of the way we as a society resolve disputes. That's the way it has been and will continue to be for the foreseeable future.

Without our current constitutional system of justice, there are no alternate dispute mechanisms. There is no mediation or arbitration; there is only social chaos. We are left with the "law of the jungle" where might becomes right. Let us always keep our respect and recognition of federal and state judiciaries foremost. They are the bedrock upon which our system of alternative dispute resolution rests.

The golden age of mediation – lawyers can make a difference

While arbitration is becoming less popular, mediation has enjoyed increased acceptance. The golden age of mediation has arrived,

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much to the credit of the lawyers who have demonstrated the courage and creativity to make mediation work.

And who couldn't be happy with mediation? Insurance companies promote it. Large companies and institutional contract committees write it into their contract documents. The Utah Legislature requires it in domestic and other matters. Courts have the power to order mandatory mediation, and they are doing so in increasing numbers.

Arbitration – let's not throw the baby out with the bathwater

The goal of arbitration as an alternative method for resolving disputes is to achieve a fair and just resolution with efficiency and economy. We lawyers no longer look upon arbitration as efficient and economical. And we know what we are talking about. We created Frankenstein, the arbitration monster. Now we want to kill our creation.

Arbitration is a creature of contract. Consequently, lawyers have options to design the process they will use to determine their dispute. Lawyers made arbitration what it was and is. Why do we feel compelled to make arbitration more complex and more like the litigation process? Are we, as a profession, addicted to rules and procedures (we just can't get enough of that which ails us)? It appears as though arbitration has caught the Over-Lawyering Virus Syndrome – "OLVS".

We took the newly adopted AAA Rules, the Federal Arbitration Act and the Revised Uniform Arbitration Act and created a mirror form of litigation. We want to take depositions, fact and expert, of everyone. We engage in discovery debates and file motions for sanctions. We file all kinds of dispositive motions accompanied with briefs that exceed what a judge would allow under the applicable rules of procedure. Most of all, we conduct long and laborious examinations of witnesses. Cross examination becomes just another discovery tool.

The courage to change the things we can – a few suggestions

The prevailing opinion among a growing number of practitioners is that the traditional complex commercial litigation process drains clients of both their resources and energy. The clients are required to pay a substantial sum of their capital resources to get to and through a trial. More important, our clients are not able to devote their time to what they do best, *i.e.,* provide services and products to their customers. Should not lawyers have a professional responsibility to be open-minded about using new and creative methods to solve problems?

Again, arbitration is a creature of contract. It is a consensual process that furnishes lawyers with the opportunity to design the management of a dispute and the presentation of the case. The

process can be custom made to fit the needs of the parties. The process is private. The parties choose the arbitrator, presumably someone with the expertise to understand the evidence and law that will be presented. The parties, together with the arbitrator, determine:

- the governing rules of procedure and evidence
- hearing locale and site
- the scope of discovery
- motion practice
- exchange of information dealing with witnesses and exhibits
- means and methods of presenting evidence at the hearing
- scope of submitting briefs and stipulated matters

Cooperation does not cost time or money

Civility and cooperation comes from the lawyers. Counsel should be accessible to one another. The parties deserve to receive the best from the process they bargained for. Arbitration emphasizes substance over form. It should not be overly adversarial or legalistic.

Priority should be given to keeping the process moving forward. Establish a means of communication that involves the parties and the arbitrator. Use e-mail on all communications, motions, and briefs.

Minimize the need for subpoenas. Voluntarily produce all relevant documents and witnesses under your control with discoverable information. The early production of documents and disclosure of witnesses is the key in allowing the parties to more capably assess the merits of their case. Openness and cooperation will also serve the parties in getting some or all of the issues resolved at an early date.

It works if you work on it

Counsel for the parties, together with the arbitrator, have the opportunity to shape and organize the arbitration process. "Fit the forum to the fuss." Use preliminary and scheduling conferences with the arbitrator to define and streamline the process. Create a case management schedule that, at a minimum, addresses the following:

- claims and claim amounts
- arbitration hearing time and place
- discovery plan
- schedule for briefing and arguing dispositive motions
- disclosure of witnesses
- handling of exhibits
- exchange of expert reports
- pre-hearing briefs
- procedures for the presentation of the evidence
- form of the award

Define the issues

Work with the arbitrator in the initial scheduling conference to define the issues in dispute and those matters of fact and law to which the parties can agree. Define in writing the nature and amounts of all claims and defenses. Make an early disclosure of witnesses. Before the hearing, discuss with the arbitrator which witnesses have information that will be pertinent to the process. Work on a stipulated set of facts and law that defines where the parties are in agreement and where they differ.

Address preliminary and dispositive issues

Work with the arbitrator to identify issues that need to be addressed to streamline the arbitration process. Where there is a statute of limitation or significant contract interpretation issue, get it handled right away. Does the contract prohibit consequential damages or limit damages? Are there conditions precedent that have not been met?

Group and bifurcate the issues

The arbitrator has the authority to hear the case in any particular order that would promote the fair, efficient and economical interests of the parties. The arbitrator may bifurcate the issues of liability and damages into two or more phases. For example, in a construction case, the arbitrator may group the case by issues or by parties according to the interests of their particular subcontracts or purchase orders.

Neutral fact finders

A neutral fact finder or special master may be appointed in complex matters where there are a lot of fact details or technical issues involved. The parties can jointly hire the neutral and share the expenses equally. The neutral fact finder would be an expert in the area for which he or she is hired. The neutral's findings would not be binding but would be subject to cross examination and rebuttal. Accordingly, the findings should be presented to the arbitrator and parties well in advance of the hearing.

The neutral fact finder would save the parties from each hiring their own expert, which arbitrators usually regard as another

layer of advocacy and enormous expense. Remember, you hired the arbitrator for his or her expertise. Your arbitrator should already have the background to cut through a lot of material for which you would take days in educating the judge and jury with your high priced expert.

Handling exhibits

The use and handling of exhibits can work wonders in saving time and costs in the preparation and presentation of your case. Work with the arbitrator and opposing counsel early on in the preliminary scheduling conference to determine how you will handle your exhibits.

The parties should exchange exhibit lists and work toward eliminating duplication of exhibits. A joint set of exhibits, indexed, tabbed, and contained in three ringed binders is preferred. Each panel member, yourself, opposing counsel and the witness should be provided with their own set of exhibits.

If you prefer, the lawyers can arrange so that the exhibits pertinent to each issue are grouped together. For example, the Claimant's exhibits on the issue of damages for a differing site condition could be numbered C1.A – C1.Z. This permits the addition of related exhibits and also helps the arbitrator locate information when preparing the award.

Consider providing documents on compact discs and having computer screens set up so everyone can avoid the time it takes to handle and refer to exhibits in notebook form. In cases in which a reporter is used, have the "real time" feature hooked into the screens of each arbitrator.

All objections to the exhibits should be handled prior to or at the beginning of the arbitration hearing. As a general rule, the arbitrator should rule that all exhibits not otherwise objected to will be admitted. Again, your arbitrator should have the knowledge and expertise to determine the evidentiary weight to be given to exhibits.

Expedite the presentation of evidence – fact witness panels

Make every effort to avoid serving a subpoena on every witness. Give advance notice of which witnesses will testify on which day so as to give opposing counsel an opportunity to prepare for cross examination.

Arrange to have witnesses testify via telephone. If necessary, arrange for a video of the deposition to be used so long as opposing counsel has adequate opportunity to cross-examine. Written statements or affidavits where the witness is not available for cross examination, as a general rule, will not be considered.

In lieu of direct examination, consider preparing written statements

summarizing the testimony of fact witnesses. All written statements are provided to the arbitrator and opposing counsel in advance of the hearing and must refer to the relevant portions of the exhibits cited. The statements are entered into evidence. The witness who authored the written statement (usually under the pen of the attorney calling the witness) will then be present at the hearing and subject to cross examination. Re-direct examination would follow.

Graphs, summaries and site visits – tell the story

A picture is worth a thousand words. Graphs and summaries that visually tell the story can be worth thousands of dollars. A project chronology of key events, documents and damages can assist the arbitrator in more effectively understanding the case. Organizational charts setting out key individuals, positions and titles are also helpful in understanding the case.

A site visit may also be helpful. Floor plans, diagrams, photos and three-dimensional digital productions serve as useful tools.

Expert witness presentation and panels

The adversarial system has come to depend on the use of experts. The cost of using an expert can be staggering. Consider using the services of a jointly appointed expert on technical or mathematical issues. For example, where accounting expertise will be necessary, consider hiring one independent accountant. The parties would each equally share in the costs of the joint expert. Where a technical issue is at hand, the same process can be used. This avoids the necessity of retaining two "hired guns," which usually serves only to add an expensive second layer of advocacy to the process.

Where each party is going to rely on its own expert, make your disclosures as soon as possible. Get any qualification, gateway or *"Daubert"* issues resolved up front. All experts should be pre-qualified early in the process so as not to spend valuable hearing time. Work with the arbitrator to determine deadlines for reports, depositions and all motions in limine. Clarify that the expert will not be allowed to testify outside of matters addressed in his report.

Consider presenting to counsel and the arbitrator in advance of the hearing a written summary of your expert's testimony, including all theories, opinions and the basis thereof. The summary and report would be entered into evidence and the opposing lawyer could proceed to cross-examine the expert at the hearing with re-direct to follow.

Where more than one expert is going to testify on the same topic, arrange to have them testify at the same time. All resumes, summaries and reports are exchanged ahead of time. The experts are first questioned by the arbitrator. The parties are informed about what the arbitrator is hearing.

After the arbitrator is finished with questioning all the experts, the attorney calling the experts will be allowed to question the experts. The experts are then cross-examined by opposing counsel. Thereafter, the experts can question one another and engage in an exchange of information.

The use of expert panels is an efficient and effective way to collect and track technical information on an issue by issue basis from multiple witnesses. It helps to clarify differences and forces the parties to be realistic in setting out their respective positions and the basis thereof. It also reduces the study time the arbitrator will later undertake in preparing the award and trying to make sense out of conflicting expert opinions.

The arbitration panel

Some cases have a panel of three arbitrators. In such case, one of the members will be appointed as the chair, usually the one with the most legal training and arbitration experience. The chair may also be appointed by the two party-selected arbitrators.

In either event, the parties and panel members should agree on a protocol where the panel chair handles matters such as issuing subpoenas, conducting administrative and scheduling conferences, hearing and ruling on all discovery disputes and

determining all non-dispositive motions. The parties may wish to provide an appeal procedure to the whole panel where they disagree with the chair's ruling.

"Chess clock" arbitration

At times it is necessary to monitor the time taken in the presentation of the case by both the claimant and respondent. When counsel or the arbitrator suspect that the case should be structured along these lines, a technique known as the "chess clock" is used to manage the hearing process. This method should be used only by consent of the parties, unless one or both parties are being unreasonable in the presentation of their case or where counsel is going beyond the bounds or propriety and needs to be "reeled in."

Conclusion: the wisdom to create a better way – do we have it in us?

Lawyers of the Utah Bar: We did it with mediation and we can do it with arbitration. We can do better than treat arbitration as a mirror image of litigation. Let us keep traditional litigation intact, but let us not create a mirror image of our judicial system and call it "arbitration, an alternative dispute mechanism."

Arbitration remains a valued asset in the pantheon of methods and means of resolving civil disputes. If arbitration is to survive, we need to think about how to better create an effective dispute resolution process and how to more efficiently present our cases. We need to make arbitration a user-friendly, efficient and effective process.

The AAA Rules, the Federal Arbitration Act and Utah's Revised Uniform Arbitration Act provide the legal profession with an opportunity to create more effective and cost efficient ways to resolve our clients' problems. We do not need more rules. We have the legislation we need in place. We have a good body of common law, much of which has been codified in the provisions of the Revised Uniform Arbitration Act. More will be developed down the road. What is currently needed is our willingness to think outside the box and the courage to do something other than accept arbitration as a mirror form of litigation.

Let us create an arbitration process that will live and grow to meet the needs of our clients. Let us accept the challenge to build an arbitration process that is known for its integrity, its efficiency and its economy. It is now time for a new beginning. May we, as members of the legal profession, have the wisdom and courage to meet the needs of our clients to find an alternate dispute resolution process that is fair, fast and efficient.