CREATING AN ECONOMICAL *and* EFFICIENT ARBITRATION PROCESS IS EVERYONE'S BUSINESS

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ARBITRATION IS THOUSANDS OF YEARS OLD. FROM ARISTOTLE TO THE ELIZABETHAN ERA, PEOPLE HAVE RECOGNIZED THAT DISPUTES ARE OFTEN BEST RESOLVED OUTSIDE OF THE COURTS. AND UNTIL VERY RECENTLY, ARBITRATION WAS THE PREFERRED DISPUTE RESOLUTION METHOD IN THE UNITED STATES FOR THE CONSTRUCTION INDUSTRY. OTHER INDUSTRIES ALSO HAVE CHOSEN TO ARBITRATE INSTEAD OF USING THE COURTS TO RESOLVE DISPUTES, AND COMPANIES OF ALL KINDS HAVE CHOSEN TO USE IT FOR EMPLOYMENT DISPUTES.

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ALL STAKEHOLDERS

INVOLVED IN ARBITRATION HAVE A ROLE TO PLAY IN MAKING ARBITRATION MORE EFFICIENT AND LESS COSTLY. THE AUTHORS DISCUSS WHAT EACH STAKEHOLDER CAN DO TO MAKE THIS HAPPEN.

Within the last few decades, however, arbitration has been criticized for evolving into a process that mirrors litigation. The causes most likely were advocates who were unfamiliar with arbitration and did not understand that it differed from litigation, as well as arbitrators who failed to exercise adequate control over the process. In fact, many arbitrators viewed themselves as powerless referees and so they routinely granted requests for postponements, allowed long drawn-out proceedings, and refused to hear dispositive motions that could bring the case to an early conclusion. On the other hand, arbitrators who would exercise authority had little ability to sanction a party for failure to comply with an arbitral order.

The process clearly needed change. For decades, the American Arbitration Association (AAA) has been at the forefront of improving and streamlining the process through its rule revisions. In 1999, the AAA released significantly revised commercial arbitration rules that, among other things, encouraged the use of preliminary hearings, clarified the discretion and authority of the arbitrator, addressed the issue of arbitral interim relief, created Optional Rules for Emergency Measures of Protection (i.e., relief needed before the arbitrator is appointed), added Optional Procedures for Large, Complex Cases, and amended the Expedited Procedures for small cases to make them more efficient.

It is essential to have an enforceable arbitration clause. Efficiency and cost effectiveness cannot be achieved if the parties must spend time and money litigating enforceability.

The AAA Construction Rules underwent a similarly significant revision in 2009. One major improvement was the creation of a three-track system for small, regular and large construction cases. The rules also expanded the powers of the arbitrator in regular and large cases and provided a more efficient process keyed to the size and complexity of the dispute.

Meanwhile, the National Conference of Commissioners on Uniform State Laws (NCCUSL) formed a committee to draft a new Uniform Arbitration Act to replace the 1955 version (enacted in many states) and bring arbitration law in line with judicial arbitration decisions. In August of 2000, the NCCUSL and the American Bar Association approved the Revised Uniform Arbitration Act 2000 (RUAA) and the ABA agreed to promote it to the states for enactment. So far 14 states and the District of Columbia have done so. The RUAA contains vastly expanded arbitrator powers, including the power to issue provisional remedies, determine the appropriate amount of discovery, impose sanctions, issue and enforce third-party subpoenas, hear and decide dispositive motions, streamline the presentation of evidence, and award punitive damages and attorney fees in specified circumstances. In many other states the original UAA remains in effect, while a few states have unique arbitration statutes, including New York and California.

Notwithstanding these reforms, parties and lawyers remained concerned that arbitration is no longer efficient and economical. Some say it has become the mirror image of "scorched earth" litigation and some call it an "arbi-trial" or "arbrigation."

In 2009, many professional arbitrators turned their attention to the problem of the increasing time and cost of arbitration. This took place at a summit convened in the nation's capital by the College of Commercial Arbitrators (CCA). The summit had the backing of major sponsors.[1] Participants included arbitrators, attorneys (both in-house and outside counsel) and representatives of ADR providers. The purpose of the summit was to gather data about the causes of the problem and develop solutions. In 2010, the CCA published its findings and recommendations in a report called "Protocols for Expeditious, Cost Effective Commercial Arbitration."[2]

The report contained four protocols, one for each stakeholder in the process. Each protocol contains valuable recommendations to control cost and time in arbitration. In combination, the protocols make clear that the responsibility for designing an efficient and less costly arbitration process rests with all stakeholders. Parties, counsel, arbitrators and providers all must recognize this responsibility. To carry it out, arbitration providers should offer the parties a wide variety of streamlined arbitration programs. When parties enter into new contracts or renegotiate old ones, they should customize the arbitration provisions to achieve their goals for efficiency and economy. After a dispute arises, when the arbitra-

tion provisions are implemented, the parties, their advocates and the arbitrator should cooperate with each other in order to reach an agreement on cost-effective and efficient procedures.

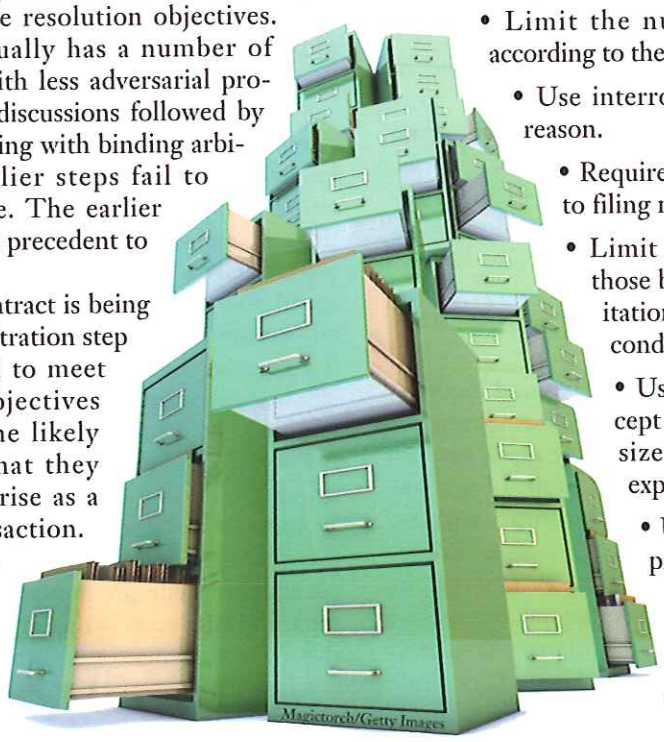
Having a wide choice of arbitration programs, and customizing the arbitration process so that it is appropriate for the size and type of anticipated disputes, along with cooperation are central to achieving fair, yet expeditious proceedings.

What Parties Can Do

Designing an efficient and cost-effective dispute resolution process should begin well before a dispute arises, preferably before a company intends to enter into a large contract. This will enable it to be ready to propose this process when that big contract negotiation approaches. Unfortunately, businesses too often give little or no thought to the dispute resolution provisions they put in their contracts. These provisions are often considered to be mere boilerplate and, as a result, they are copied from one agreement and pasted at the end of another. And that copy-and-paste job could end up being a defective clause that has enforceability problems, or a "one size fits all clause" that, as described in the CCA Protocol for Business Users and In-House Counsel (User Protocol), "creates many opportunities for counsel to expand, often excessively, the dimensions and density of the arbitration." These opportunities can result in lawyers trying to turn arbitration into litigation.

The arbitration clause should be a part of a dispute resolution system that reflects the company's overall dispute resolution objectives. Such a system usually has a number of steps, beginning with less adversarial processes (e.g., direct discussions followed by mediation) and ending with binding arbitration if the earlier steps fail to resolve the dispute. The earlier steps are conditions precedent to arbitration.

At the time a contract is being negotiated, the arbitration step should be tailored to meet the company's objectives with respect to the likely future disputes that they anticipate could arise as a result of the transaction. Is it likely that future disputes will be large or small, complex or small? Will they involve multiple parties? Will they involve precedent-setting issues? Anticipating the nature, size and complexity of future disputes can help determine whether all or just some disputes should be arbitrated (i.e., the scope of arbitrability).



To avoid becoming enmeshed in a future "arbi-trial," the drafter of arbitration provisions should be wary of including procedures that mirror traditional rules of civil procedure or evidence, or providing for awards that contain detailed findings of fact and conclusions of law. Doing so will defeat the goal of having efficient, cost-effective arbitration proceedings. To achieve that goal, the arbitration provisions could state that the parties agree to:

- Use "fast-track" rules or "expedited procedures" for disputes below a certain size or of a certain type.
- Place a time limit on the arbitration (i.e., from filing to issuance of award), or on different phases of the arbitration (e.g., the evidentiary hearing).
- Consolidate related arbitrations that involve common facts and legal issues and join related parties to avoid multiple proceedings (very costly) and worse, inconsistent results.
- Limit the document and information exchanges to that which is relevant or even essential to the project or transaction.
- Use the International Centre for Dispute Resolution (ICDR) Guidelines for Arbitrators Concerning Exchanges of Information.
- Limit the number of depositions according to the size or type of disputes.
- Use interrogatories only for good reason.
- Require the arbitrator's consent to filing motions and/or briefs.
- Limit dispositive motions to those based on a statute of limitations or failure to satisfy all conditions precedent.
- Use a single arbitrator, except in cases above a certain size that require technical expertise.
- Use expeditious evidence presentation techniques.
- Require an award with a brief explanation of the outcome. This costs less and takes

less time to prepare than an award with extensive reasoning.

Staying Out of Court

An obvious goal of having an arbitration clause is staying out of court. Therefore, it is essential to have an enforceable arbitration clause. Efficiency and cost effectiveness cannot be achieved if the parties must spend time and money litigating enforceability. Contract drafters who are unfamiliar with dispute resolution must become familiar with the requirements of an enforceable arbitration clause, which include all of the following:

(1) An unequivocal obligation to arbitrate.[3]

(2) A statement of the scope of disputes to be arbitrated (e.g., only contract claims or all disputes relating to the transaction including tort claims).

(3) Designation of:

(a) an administering institution and the rules that will govern arbitration (e.g., the American Arbitration Association and the AAA Commercial Arbitration Rules),

(b) the venue of the arbitration, and

(c) the governing procedural and substantive law.

(4) A statement that judgment may be entered on the award in a court that has jurisdiction.

Equally important, the drafter must make sure that the arbitration agreement would not be revocable under state contract law, such as on the ground of unconscionability.[4]

Care must also be taken not to make the terms of the arbitration provisions unrealistic, unnecessarily restrictive, or contradictory. If that happens, the parties could become involved in collateral litigation.

Use Administered Arbitration Under Well-Tested Arbitration Rules

Agreeing to AAA administration and incorporating AAA rules into the arbitration agreement can advance the parties' efficiency goals because the AAA offers many different kinds of arbitration rules, including industry arbitration rules; fast-track construction rules; Expedited Procedures and Large, Complex Case Procedures, as well as regular rules for commercial cases. The AAA has Optional Rules for Interim Relief, and the ICDR has Guidelines for Arbitrators Concerning Exchanges of Information, both of which parties can elect to use regardless of the type of dispute.

In general, AAA rules are drafted by committees made up of individuals who have substantial knowledge of the field and experience with arbitration and mediation. In the case of industry arbitration rules, relevant trade associations are involved in the drafting process. In addition, the rules have enjoyed decades of use and are familiar to most attorneys, arbitrators and courts, which have interpreted them.[5] Another advantage of AAA administration is access to the AAA roster of neutrals. Other arbitration providers may offer similar types of options.

The benefit of having efficient arbitration procedures in the parties' agreement is that it puts all stakeholders, not just the parties, on notice of the desire for an efficient, less costly arbitration process. If a dispute later arises that requires different treatment, the parties, with input from the case manager, the arbitrator, and outside counsel, could agree to a different arrangement for that dispute.

Suggestions from the CCA User Protocol

Next we turn to some suggestions from the User Protocol. An important suggestion is that companies first decide on their corporate dispute resolution objectives, and then make a case assessment whenever a claim arises. This is when a decision can be made about the importance of the case, the budget for resolution and the dispute resolution process believed to be most effective. These decisions should be communicated to outside counsel. Without knowing the client's dispute resolution objectives for the case, outside counsel cannot commit to carrying them out.

One suggestion regarding outside counsel is to retain an advocate who is a good negotiator and has substantial case management skills and experience using time-saving techniques in arbitration. It is also suggested that this advocate be committed to carrying out the client's goals for speed and economy. Advocates who meet these criteria are more likely to cooperate with opposing counsel and the arbitrator in designing an efficient case management plan.

The User Protocol also recommends continuing involvement of company representatives (from the legal and business side) in, and management of, arbitration proceedings. Presumably this includes having a senior in-house attorney participate in the preliminary management hearings. Practitioners who favor this idea believe that, with the client in the room, outside counsel are less likely to seek postponements for their convenience, or make proposals that would

unnecessarily delay the arbitration (unless that happens to be the company's strategy).

The CCA Protocol for Outside Counsel

Outside counsel have a great deal of influence over the cost and length of arbitration proceedings because they are involved in every aspect of the process, except that they do not decide the dispute and issue awards. That is the arbitrator's job.

Participants in the CCA summit were asked if outside counsel could do more to improve the economy, efficiency and fairness of the arbitration process. Eighty-nine percent of those responding said that attorneys could do more to help clients realize their expectations for arbitration.

But first, they need to know what the client's expectations are. If in-house counsel has not conveyed the company's expectations regarding the dispute to be arbitrated, outside counsel should ask the client to provide this information. Even if the client's goals have been communicated to outside counsel, it would be prudent for counsel to confirm them with in-house counsel prior to the initial preliminary management conference.

Second, in order to help realize the client's goals for arbitration, outside counsel must understand the difference between arbitration and litigation. The CCA Protocol for Outside Counsel (OC Protocol) recognizes the importance of understanding these differences when it says that outside counsel "exploit the differences between arbitration and litigation" when representing the client in arbitration.

Outside counsel must be able to work in harmony with everyone involved in the arbitration, including the case manager (if AAA arbitration is used), opposing counsel, the party representatives and the arbitrator. Cooperation is often essential in arbitration, particularly if the goal is an expeditious process. For example, cooperation among counsel is essential in order to efficiently appoint the arbitrator. This involves determining the arbitrator's qualifications, one of which should definitely be strong case management skills.[6]

In selecting the arbitrator, we recommend inquiring into the arbitrator's philosophy of case management to ensure that it is consistent with the client's goals for an expeditious process.

Cooperation among outside counsel and other stakeholders is also needed to develop an efficient case management plan that will set out the prehearing activities that must be completed, the dates for completing these activities, and the dates for the evidentiary hearing.

We would like to mention three suggestions from the OC Protocol that are especially noteworthy. They would have outside counsel agree to limit discovery consistent with client goals, discuss settlement opportunities with the client and, after the arbitration ends, make changes to the dispute resolution provisions based on lessons learned.

What Arbitrators Can Do

Arbitrators should always manage the arbitration as economically, efficiently, and fairly as possible. To begin this process, the arbitrator must promptly set a date for the initial preliminary management hearing. Arbitrators should never lead this hearing without being thoroughly prepared. Thorough preparation includes becoming familiar with the pleadings, the arbitration clause and other relevant provisions of the parties' contract (e.g., loss limitation provisions and statute of limitations). By the day of this hearing, the arbitrator should know the scope of arbitral jurisdiction, the venue of the proceeding, the governing procedural law (e.g., the Federal Arbitration Act or a state arbitration law), the applicable arbitration rules, and any limitations stated in the parties' agreement on the scope of arbitrability, arbitration procedures (e.g., discovery limits), or arbitral remedies. The arbitrator should prepare an agenda in advance of the preliminary hearing that includes any questions the arbitrator may have concerning these matter and send it to the parties and their counsel with instructions to be ready to discuss all agenda items.

The initial preliminary management hearing is vitally important. The Arbitrator Protocol stress-

Care must be taken not to make the terms of the arbitration provisions unrealistic, unnecessarily restrictive, or contradictory. If that happens, the parties could become involved in collateral litigation.

es the importance of conducting a meaningful hearing and then issuing a detailed case management order memorializing what occurred and what was decided.[7]

It is at the initial preliminary hearing that the arbitrator works with counsel and the party representatives to clarify the issues submitted to arbitration and establish the pre-hearing activities that need to be completed (e.g., the exchange of documents, other information and witness lists, and other types of discovery in an appropriate case), and the dates for completion of these activities (as well as the dates for the evidentiary hearings and related matters). If speed and economy are to be achieved, the arbitrator and counsel must work together to streamline the pre-hearing activities lest they drag on, leading to increased cost and time to conclusion of the dispute. The initial preliminary hearing is an opportune time to remind counsel and the party representatives that arbitration is not litigation in a private forum. It is supposed to be faster and more efficient than arbitration and, to make that happen, the cooperation of all parties and counsel is expected.

The benefit of having efficient arbitration procedures in the parties' agreement is that it puts all stakeholders, not just the parties, on notice of the desire for an expeditious, less costly arbitration.

To create an efficient process, the arbitrator should address the following subjects and issues at the initial preliminary management hearing:

Confirmation Issues. It is important to confirm that there are no issues concerning the venue of the arbitration, the governing law, the applicable arbitration rules, nonparties who need to be joined in the arbitration, the arbitrator's jurisdiction to hear the matter, or the scope of arbitrable issues.

Ground Rules. The arbitrator should advise the participants that the following ground rules must be followed.

- Incivility will not be tolerated. Everyone is expected to treat each other with respect. (The arbitrator could consider making compliance with applicable professional conduct rules and ethics codes or standards part of the case management order.)
- *Ex parte* communications are prohibited. All communications to the arbitrator should be sent to the case manager and all parties simultaneously.
- The arbitrator's consent must be obtained prior to submitting any motions or briefs.
- The parties are obligated to preserve all relevant documents and electronically stored information (ESI) and should be prepared to exchange such documents and information during the pre-hearing period. Spoliation of ESI is prohibited and may lead to sanctions.
- "Fishing expeditions" seeking broad discovery will not be permitted.

Stipulation of Facts. At the beginning of the initial preliminary hearing, the arbitrator should encourage the parties' counsel to work together to prepare, as part of the Arbitration Record: (1) a statement of facts and issues not in dispute and (2) a statement of issues that are in dispute. The latter statement will provide a road map that all arbitration participants can use throughout the proceeding. The stipulation of issues in dispute can also be used as a checklist to help the arbitrator make sure that the award covers all issues to be decided in the arbitration.

Preliminary and Dispositive Issues. The arbitrator should work with counsel to identify all preliminary and dispositive issues that need to be addressed at the initial preliminary hearing. These issues could include, for example, challenges to venue or arbitral jurisdiction (such as by reason of the expiration of the statute of limitations or the claimant's failure to satisfy all conditions precedent, or for other reasons), joinder or consolidation issues, or other matters that are troubling counsel.

The arbitrator should emphasize the ground rule that the filing of motions is not discretionary with the parties. Counsel must request permission from the arbitrator to submit a motion.

Briefs are generally not necessary when the parties have entered into a comprehensive stipulation of facts and there are no novel issues of law to be determined. Conversely, briefs may be helpful when there are disputed issues of both fact and law to be decided.

If the arbitrator consents to a request to file a brief, the arbitrator should work with counsel to identify the issues to be briefed and then set a reasonable length limitation on the briefs. The arbitrator may request that counsel use the form of a "letter brief" consistent with a more informal process.

If there are any issues still troubling counsel, the arbitrator should invite counsel to prepare a letter describing the issue and promptly e-mail it to the case manager.

Expedite Communications. In an AAA-administered proceeding, the arbitrator can allow the parties to use the AAA Accelerated Exchange Program. This program allows the parties to e-mail and fax each other (with a copy to the case manager) documents, motions and briefs. This provides more expedited communication than sending these materials to the case manager, who then distributes them to the parties.

Fact Discovery in General. The arbitrator should direct counsel to agree to a prompt exchange of relevant documents and other information, as agreed by the parties in their arbitration agreement, or if there is no agreement, in accordance with the applicable arbitration rules. Early production helps the parties assess the merits of their case. The arbitrator should also direct counsel to bring any disputes concerning this exchange to the arbitrator's attention in an e-mail addressed to the case manager.

ESI can present a problem because it is pervasive and expensive to gather and produce. The scope of ESI is generally determined on a case-

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The College of Commercial Arbitrators Protocol for Business Users and In-House Counsel suggests that companies make a case assessment whenever a claim arises. This is when they can decide how important the case is, the budget for resolution and the dispute resolution process it believes would be most effective.

The Importance of Case Management and Scheduling Orders

A Case Management and Scheduling Order should be prepared immediately after each preliminary hearing. This order documents all the topics that were addressed, the agreements that were reached, and all arbitral decisions and orders that were made. Ideally, the Initial Case Management and Scheduling Order should reflect agreements concerning the following:

- Stipulations of (1) facts not in dispute and (2) issues in dispute.
- Applicable procedural and substantive laws and arbitration rules.
- Cut-off date for filing amended claims, counterclaims and defenses.
- Date to submit and exchange statements of claims, counterclaims, defenses and remedies with supporting facts and damages calculations.
- Scope of (and dates for) exchanges of documents and ESI. Ideally, scope should be "essential" documents and ESI.
- Form of ESI. Ideally, form should be easy to produce, e.g., hard copy or DVD. No metadata.
- Date of exchange of "may call" witness lists.
- Date of site visit, if helpful.
- Expert testimony. Date for exchange of expert witness reports. Use of experts to narrow disputed technical issues.
- Dates for, and length of, depositions and/or interrogatories, if beneficial to resolve the case.
- Date to submit pre-hearing briefs, if arbitrator decides they would be helpful.
- Requirements for hearing exhibits.
- Issues relating to scheduling the evidentiary hearing and techniques to expedite its completion.

This is not a comprehensive list. The parties' attorneys should be prepared to address all the issues on the arbitrator's agenda for a preliminary conference.

by-case basis, unless the parties have reached an agreement concerning ESI in their arbitration agreement.

In order to address ESI, counsel for each party needs to learn about the client's ESI. This generally involves a consultation with the client's IT personnel to discuss what kind of ESI the client has, how and where it is stored, and how it can be retrieved. The parties' attorneys should then meet to establish a protocol for producing material, non-privileged ESI. The protocols agreed upon by counsel, if reasonable and expeditious, should be incorporated into the arbitrator's case management order. If the protocol is not reasonable, the arbitrator may ask the requesting party to justify its expansive request. The allocation of costs involved in satisfying an expansive ESI request also may have to be discussed.

If the parties have not already agreed to use the ICDR Guidelines for Arbitrators Concerning Exchanges of Information, the arbitrator could suggest that they do so now to facilitate the exchange of ESI.

When it comes to written discovery, such as interrogatories and requests to admit, the arbitrator must be willing to exercise his or her managerial authority to discourage their use unless expressly authorized by the arbitration rules, or good cause can be shown and the information cannot be obtained through the information exchange or a deposition. If allowed, interrogatories should be severely limited in number, including subparts.

Depositions should be allowed only when authorized by the arbitration rules or the arbitrator concludes that they would be beneficial to the resolution of the case. Thus, counsel should be asked to explain why a proposed deposition is relevant, beneficial and appropriate. If the arbitrator allows a deposition, its length should be limited.

In some cases counsel may seek an inspection, a site visit by the arbitrator, a specific test, or third-party discovery. In some construction defect cases, a site visit can be very helpful to the arbitrator in deciding the case or, depending on what the site visit shows, in moving the parties to decide on their own that it might be prudent to consider a settlement. It is up to the arbitrator to determine if allowing any of these kinds of discovery would be helpful to resolving the dispute.

Expert Discovery. Expert testimony can be the linchpin of a party's case, but it can also be expensive. Accordingly, the arbitrator should ask the attorneys if they each intend to engage an expert to testify and why. If they both say yes, and there are many technical issues to be decided, the arbitrator could suggest that the experts be asked to confer to narrow the issues and agree on those remaining in dispute. The arbitrator could also ask the parties to agree on the scope of the expert's anticipated testimony. Such agreements serve to control experts' fees because they limit the scope of the expert's work.

The arbitrator should not allow an expert who

will testify at the hearing on the merits to be deposed if the expert provides a written expert report. There is no unfair surprise since the expert's opinions are in the report and the report is exchanged by the parties prior to the merits hearing.

Since legal privileges are respected by arbitrators, an arbitrator should not permit an expert who will neither testify nor provide a written report to be deposed, since the expert's communications with counsel would likely be considered attorney work product.

Witnesses. The arbitrator should require the parties' attorneys to agree to an early date for disclosing the names of "may call" witnesses. Early disclosure permits the arbitrator to determine if he or she has any possible conflicts of interest and, if so, promptly disclose them. It also enables the parties to better prepare for the evidentiary hearing. Disclosure of the names of "will call" witnesses—those who will definitely be called to present evidence—is usually made closer to the evidentiary hearing.

Delegating Authority to the Chair. If there is a panel of three arbitrators (although only one is needed unless the case is large and complex and requires special expertise), it is more efficient if one arbitrator (usually the chair of the panel) decides all procedural and non-dispositive matters (such as discovery disputes and requests for a third-party subpoena) without having to consult with the wing arbitrators. The parties should be asked to approve this arrangement.

Scheduling the Hearing. The arbitrator should work with the parties to identify consecutive dates for the evidentiary hearing. When the dates are not consecutive, the cost of arbitration goes up each time the arbitrator and counsel need to re-prepare. The number of days should be kept to a minimum. In accordance with Parkinson's law, attorneys will fill all the days scheduled for the hearing.

The arbitrator also should determine the duration of the hearing after asking the attorneys how much time they will need to present their case. It is a good idea to add one or two days extra at the end in the event of unexpected problems (e.g., a witness, counsel, or the arbitrator has a serious but transient illness).

Another decision that has to be made concerns the length of each hearing day. The arbitrator should not agree to banker's hours or even 10 a.m. to four p.m. A too-leisurely proceeding conveys the message that time and cost are not important.

Detailing Claims and Defenses. The arbitrator should set a date for the parties to exchange and submit to the arbitrator detailed statements of their claims, counterclaims and defenses, along with the facts supporting each one, the remedy sought for each claim, and their method of calculating damages.

The arbitrator also should set cut-off dates for filing new or amended claims, defenses and motions related to discovery, joinder of additional parties, and/or consolidation with other proceedings, where permitted by the arbitrator.

It is also important to determine whether any party is seeking attorney fees and if so, the basis for this claim (e.g., a contract or a statute).

Exhibits. The subject of exhibits may be addressed at the initial preliminary hearing or at a later scheduled hearing. Some arbitrators require the parties' attorneys to combine their exhibits in a single exhibit binder or set of binders. This is a time-consuming procedure that generates counsel fees. As a result, it should not be used in regular cases. Arbitrators should be willing to work with more than one set of exhibit binders.

It can save time at the hearing if the exhibit binders are not crowded with documents that the attorneys have no plan to introduce at the hearing on the merits. So it is a good idea for the arbitrator to instruct counsel to use the binders only for exhibits that will actually be introduced in evidence. The arbitrator could also obtain counsel's agreement that all exhibits are deemed admitted into evidence absent a timely objection when the document is first offered or discussed during the merits hearing. The arbitrator could also require counsel to give the arbitrator a core set of exhibits to review prior to the evidentiary hearing.

Pre-Arbitration Hearing Matters

It is useful to spend time at the initial preliminary hearing (or a later one) discussing efficient methods of presenting evidence at the hearing. One method often used in international arbitration has witnesses testify on direct via a written affidavit as long as they will be available for live cross-examination. The written witness statement may not be a cost-effective or efficient way of presenting evidence for a key witness.

Another option is to present evidence on an issue-by-issue basis when doing so would make it easier for the arbitrator to understand the evidence. For example, in a construction case, it might make sense to present all of the evidence relating to the plumbing and electrical issues together. Similarly, in a construction case with many subcontractors, evidence could be grouped according to the parties and their subcontracts.

Another efficient way of presenting testimony

is the "witness panel." This involves having the witnesses (percipient and expert) testify on a specific issue at the same time. Counsel can question the witnesses on the panel in any order. Suppose Witness 1 states, "When the pipe burst, Witness 2 and Witness 3 were there with me." Counsel could then ask Witness 2, "Is that correct?" If he says yes, counsel could then ask Witness 3, "Is that correct?" If she says, "No, I got there a few minutes later," counsel could go back to Witness 1 or 2, asking, "Was Witness 3 correct?" and so forth. Testimony obtained in this fashion can produce more accurate evidence. It may also be easier for the arbitrator to understand the evidence.

Depositions should be allowed only when authorized by the arbitration rules or the arbitrator concludes that they would be beneficial to the resolution of the case.

When both counsel agree to use an expert witness panel (also known as "tandem experts"), a party that was planning to hire a marginally qualified expert may decide to retain a more qualified person.

The arbitrator should alert counsel at the preliminary hearing that if any third-party witnesses will need to be subpoenaed to testify, counsel must request the subpoenas sufficiently in advance to avoid delaying the final hearing.

Another evidence presentation technique that the arbitrator can suggest is a chess clock to hold counsel to his or her time estimate for conducting direct and cross-examination. An alternative is to agree to use the chess clock only during direct examination.

An arbitrator should not automatically accept an estimate of how much time counsel says is needed. The arbitrator's experience and familiarity with the issues should be helpful in determining if either counsel has overstated the time needed.

The Case Management and Scheduling Order. At the end of the initial preliminary hearing, the arbitrator should prepare a case management and scheduling order that indicates all agreements of the parties, whether made by stipulation or otherwise, regarding pre-hearing matters (including the document and ESI exchanges, other types of discovery, the witness list exchange, the evidentiary hearings (including their location, length of hearing day, exhibit book requirements, and efficient evidence presentation techniques), along with the schedule for everything that has been agreed upon. (It may also contain other information that would be helpful to the parties.) The arbitrator's order also should state that the parties will be held to the schedule and that requests to change it will not be granted except for good cause as determined by the arbitrator. The arbitrator should also make this clear orally at the initial preliminary hearing.

What Providers Can Do

Every dispute is important and deserves to be treated as such by everyone involved in the arbitration process. The integrity of the process demands nothing less.

There is no "one size fits all" arbitration process. Providers should offer choices to enable the design of economical and efficient dispute resolution processes, teach courses in mediation and arbitration advocacy, train their case managers, arbitrators and mediators in efficient case management, continually improve their arbitration and mediation rules, publish information on the value and effectiveness of their procedures, attract arbitrators with personal and case management skills, and provide other administrative services to meet the needs of users.

The CCA protocol urges providers to:

- Promote "stepped" dispute resolution processes.
- Limit discovery to essential information.
- Promote restrained but effective motion practice.
- Create rules to set presumptive deadlines for each phase of the arbitration.
- Develop a system of evaluation and feedback for users of arbitration.

Notwithstanding these suggestions,

the protocol expresses concern that if providers tinker too much with the process, parties may "feel they did not have their day in court (arbitration)." This places more responsibility on parties and arbitrators to reach agreements that will result in an economical and cost-effective process.

Conclusion

Parties, attorneys, arbitrators and providers can build a better way to resolve disputes if they work together to do so. Parties and their in–house attorneys should identify the company's dispute resolution goals and objectives and communicate them to outside counsel. Attorneys who don't yet have arbitration advocacy training should obtain it so that they can arbitrate cases without "turning over every stone" and bringing every conceivable motion. Arbitrators should wisely exercise their management authority and not be afraid to say no. They should also be teachers as they suggest techniques more appropriate for arbitration. Finally, arbitration providers must train arbitrators to better manage cases and create rules that will expedite the arbitration process. ■

ENDNOTES

[1] Sponsors: the AAA, the American Bar Association, the Chartered Institute of Arbitrators, the CPR Institute for Conflict Prevention and Resolution, JAMS, and the Straus Institute for Dispute Resolution at Pepperdine University.

[2] Protocols for Expeditious, Cost Effective Commercial Arbitration, College of Commercial Arbitrators (2010). A product of the National Summit on Business-to-Business Arbitration (October 2009), as reported by Thomas Stipanowich, Curtis von Kann & Deborah Rothman.

[3] This does not mean that there cannot be conditions precedent to arbitration.

[4] FAA § 3.

[5] All AAA rules can be downloaded from the AAA Web site at www.adr.org.

[6] The CCA Protocol for Business Users and In-House Counsel User Protocol stresses selecting an arbitrator with strong case management skills. However, it is usually the parties' outside counsel who decide on the arbitrator.

[7] The arbitrator should schedule subsequent preliminary hearings to make certain that the parties and counsel are doing what they agreed to do, that there is no slippage in the schedule, and be ready to deal with any other issues that arise.