EXPEDITING ARBITRATION

By Richard Chernick, Esq. and Barbara Reeves Neal, Esq.

Commercial arbitration has grown in popularity over the past three decades largely because the United States Supreme Court has embraced the arbitration process and rejected legal doctrines that attempt to limit its effective use.[1] These decisions interpreting the Federal Arbitration Act have made arbitration more accessible and enforcement of agreements to arbitrate more predictable. Arbitrators and providers have promoted arbitration as an effective alternative to the court system, and business users have been encouraged to consider arbitration for many of their larger and more important disputes.

As counsel have become more sophisticated in dispute process design, arbitrations now often incorporate many elements of a court trial, complicating the management and conduct of those proceedings. Legalistic pleadings, broad-based discovery, requests for provisional relief and dispositive motions and formal rules of evidence are now commonplace, as is the review of arbitration orders and awards on the merits as well as for procedural error. Arbitration is often now referred to as the "new litigation" or by such portmanteau terms as "Litarbigation," as featured in a recent advertisement for the JAMS arbitration practice.

These changes have occasioned expense and delay in the process. The more elaborate the process, the slower and more expensive the arbitration. In these circumstances, where there is no effective right to appeal arbitral awards, parties may opt for the litigation choice.

Arbitrators and institutional providers have reacted to these developments by proposing more streamlined processes which promote speed and economy. The key principle driving these reforms is that the process should be proportionate to the complexity of the dispute and the needs of the parties to be able effectively to present their claims and defenses.

The following checklist will assist you in preparing for an effective, efficient and streamlined arbitration.

DRAFTING THE ARBITRATION CLAUSE. Parties and their counsel have the first opportunity to avoid undue cost and delay in the negotiation and drafting of the clause. Thoughtful dispute assessment and design can assure an effective process, or at least avoid dysfunctional choices. Key issues are a clear definition of arbitrability, reasonable limits on the scope of discovery and the designation of one rather than three arbitrators whenever possible. It is also usually prudent to require a non-binding pre-arbitration process.

EXPEDITED PROCEDURES. Many of the institutions, including JAMS, AAA and CPR,[2] provide for an expedited procedure in their rules which counsel can incorporate into their arbitration clause to streamline the arbitration. For example, JAMS Rule 16.1 of the Comprehnesive Arbitration Rules, dealing with Expedited Procedures, specifies a cutoff for percipient discovery of 75 days after the preliminary conference, and a hearing date within 60 days thereafter. Counsel may also choose to provide specific time frames and discovery procedures tailored to the disputes likely to arise. The New York State Bar Association has issued *Guidelines for the Arbitrator's Conduct of the Pre-Hearing Phase of Domestic*

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Commercial Arbitrations and International Arbitrations (the Guidelines")[3] which counsel may wish to consider incorporating to control the arbitration. These sources provide for many of the steps discussed below to streamline the proceedings.

Expedited procedures can be appropriate for even the largest cases and establish time lines whose goal is to commence the evidentiary hearing within a limited period of time. If the use of expedited procedures is not specified in the parties' arbitration agreement, either party can request them. If the opposing party does not agree, the arbitrator may ask the lawyers to bring their clients to a preliminary conference. At that meeting, there is an opportunity for all participants to discuss how the arbitration should be handled.

The practices discussed are applicable not only to arbitrations in which the parties have specifically provided for expedition and resolution within a set time frame but to all arbitrations since all arbitrations should be handled as expeditiously and cost effectively as possible.

INITIAL EXCHANGE OF INFORMATION. The arbitrator may require the parties to engage in a voluntary and informal exchange of all non-privileged documents and other information relevant to the dispute, including electronically stored information ("ESI"), as well as a provisional exchange of witness lists by the time of the preliminary conference. Before the parties meet with the arbitrators, counsel may be required to confirm in writing compliance with this information exchange or explain why full compliance could not be achieved.

E-DISCOVERY. Limitations on e-discovery are essential and the arbitrator should limit document requests to those directly relevant to the dispute and, absent compelling circumstances, to sources used in the ordinary course of business. Requests should be further restricted in terms of subject matter, time frame, and persons or entities to which the requests pertain; and the requests should not include broad phraseology such as "all documents directly or indirectly related to…." The arbitrators may use their power to deny requests or to shift costs in situations where the costs and burdens of e-discovery are disproportionate to the nature of the dispute or the amount in controversy.

DEPOSITIONS. While in some cases the best exercise of an arbitrator's judgment is to direct no depositions, in light of the amounts now frequently in controversy, one or more depositions may be warranted. However, the number of depositions to be allowed should be carefully weighed in light of the complexity of the case, the amount in controversy, and so forth.[4]

DISPOSITIVE MOTIONS. Careful consideration should be given by the arbitrators before permission to submit a motion is given and procedures should be followed to assure that motion practice does not inappropriately drive up costs and delay the proceedings.[5]

DISCOVERY CUTOFF. Arbitrators should set a firm discovery cutoff that expedites the process for both percipient discovery and expert discovery.

HEARING. The hearing should proceed on consecutive days and commence within a limited period of time after the cutoff for discovery.

These discovery and schedule limitations are crucial. The parties may, in their arbitration clause, add restrictions or additions to rules-based discovery and scheduling deadlines, but the institutional rules and the Guidelines set the tone for the parties' expectations as well as a baseline for discussions in the course of the arbitration about what discovery then appears to be reasonable and necessary for the parties' proper preparation for the hearing. The objective is to achieve a scope of discovery and a schedule for the arbitration that is proportionate to the magnitude of the dispute.

NUMBER OF ARBITRATORS. Other issues ought to be considered in order to achieve the most efficient process. Use a single arbitrator in appropriate circumstances. It is often difficult for the parties to admit that their case does not warrant the added expense of a tripartite panel, but in fact most commercial cases are more efficiently handled by a sole arbitrator. Pre-dispute clauses that require three arbitrators (drafted at a time when the magnitude of the dispute is necessarily unknown) often put the parties in a process that is too expensive for the dispute that arises. It is a better practice to provide for a sole arbitrator in most clauses and then agree on

a tripartite panel in those relatively rare cases where the magnitude of the dispute appears to warrant a panel.

FORM OF THE AWARD. Most commercial arbitration awards are reasoned because parties want to understand the basis of the decision. Avoid the temptation to require that the arbitrator adhere to specific judicial rules or procedures.

SCOPE OF REVIEW. Some arbitration clauses seek to authorize courts to review arbitration awards for errors of fact or law. These provisions are usually not enforceable under the FAA[6] but even where they are,[7] they usually entail significant additional process costs and delays without commensurate benefits. Most business users should accept the limited judicial review provided in the statutory grounds for vacatur set forth in the FAA. A tripartite panel does provide some protection against aberrational awards of a sole arbitrator, albeit sometimes an expensive "insurance policy"; and some providers (such as JAMS and CPR) offer a well-designed appellate arbitration procedure.

THE IMPORTANCE OF THE RIGHT ARBITRATOR. The arbitrator is the key actor in making these principles work in practice. You should select arbitration rules that give the arbitrator broad discretion as to many aspects of the process. The underlying principle is to allow the arbitrator to be "managerial" – the arbitrator's duty is to partner with counsel and the parties in designing and defining the "perfect" process for that case.[8] This includes anticipating issues that may arise that have the potential to derail the designated schedule and to find solutions before any harm can occur. The skills required of the arbitrator as manager of the process are threefold: an understanding of the process elements of arbitration, a willingness to work with the parties and counsel to design a process well suited to the particular case, and the ability to manage the chosen process through the hearing. Arbitrators who possess these skills are referred to as "managerial arbitrators." A managerial arbitrator assumes the primary responsibility for managing the chosen process in order to achieve the parties' goal of an effective and efficient proceeding and to strike a balance between efficiency and fairness. Sophisticated parties understand the importance of these skills and regard their opportunity to choose the arbitrator as perhaps their most important "process" choice.

The use of expedited procedures can enable you to design an effective, efficient and streamlined arbitration that will serve the needs of counsel and client in arbitrating disputes both large and small. ■

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1 E.g., *Compucredit Corp. v. Greenwood,* __ U.S. __ , 132 S. Ct. 665 (2012); *AT&T Mobility LLC v. Concepcion,* __ U.S. __, 131 S. Ct. 1740 (2011); *Circuit City Stores, Inc. v. Adams,* 532 U.S. 105 (2001); *Doctor's Associates, Inc. v. Casarotto,* 517 U.S. 681 (1996); *Allied Bruce-Terminix Companies, Inc. v. Dobson,* 513 U.S. 265 (1995); *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.,* 460 U.S. 1 (1983).

2 JAMS Comprehensive Arbitration Rules and Procedures, Rules 16.1 - 16.2; AAA Arbitration Rules, Rules E-1-E-10; CPR Global Rules for Accelerated Commercial Arbitration.

3 Available at http://www.nysba.org/ArbitrationGuidelinesBooklet.

4 Factors to be considered include, but are not limited to, the amount in controversy; the complexity of the factual issues; the number of parties and the diversity of their interests, and whether any or all of the claims appear, on the basis of the pleadings, to have sufficient merit to justify the time and expense associated with the requested discovery; agreement of the parties with respect to discovery; reasonable need for the discovery (alternative sources, relevance, criticality, time and expense); privilege issues; the characteristics and needs of the parties; whether injunctive relief is sought. Guidelines, Exhibit A.

5 The Guidelines provide: "The arbitrator should consider the following procedure with regard to dispositive motions:

- Any party wishing to make a dispositive motion must first submit a brief letter (not exceeding five pages) explaining why the motion has merit and why it would speed the proceeding and make it more cost-effective. The other side would have a brief period within which to respond.
- Based on the letters, the arbitrator would decide whether to proceed with more comprehensive briefing and argument on the proposed motion.
- If the arbitrator decides to go forward with the motion, he/she would place page limits on the briefs and set an accelerated schedule for the disposition of the motion.
- Under ordinary circumstances, the pendency of such a motion should not serve to stay any aspect of the arbitration or adjourn any pending deadlines."

6 *Hall Street Associates v. Mattel, Inc.,* 552 U.S. 576 (2008)

7 *Cable Connection, Inc. v. DIRECTV, Inc.,* 44 Cal. 4th 1334 (2008)

8 R. Chernick and Z. Claiborne, "Reimagining Arbitration," *Litigation Magazine 32* (Summer, 2011); R. Chernick, "Arbitral Power: Confessions of a Managerial Arbitrator," *Dispute Resolution Magazine* (2009).