ARBITRATION EXPRESS

Some Strategies for Accelerating Arbitration

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Arbitration Express: Practical Strategies for
Accelerating the Arbitration Process

BEFORE THE HEARING:

Setting the tone, developing focus and managing the information exchange.

Identify and focus on key issues.

One of the most helpful things that can be done in seeking efficient presentation of evidence and testimony at the arbitration hearing is to assist in developing clarity and identification of the issues which are key to determination of the controversy. Try to do this earlier rather than just before the hearing. Often parties need help and encouragement to identify the key issues and elements of the claims submitted. When issues and claim are muddled, testimony tends to be muddled. When critical issues are clear, testimony will be more focused. Documents, information and testimony that is not pertinent to the key issues can thereby be minimized or avoided altogether.

1. Obtain from the parties detailed statements of claims and defenses. Identify the legal elements required to establish the claims and/or defenses. Break down elements required to establish liability, damages and defenses.
2. For each element of liability or damages, identify the facts, documents and testimony in support or anticipated to support or establish each element.
3. Determine as much consensus as possible regarding issues, facts and documents that are not disputed. Invite stipulations, preferably in writing as to all uncontested facts and issues.
4. Check whether there are threshold matters or priority issues that can be addressed or resolved, especially if the early resolution of such threshold or priority matters will facilitate resolution and reduce litigation time and expense.

Example: A threshold state of the art defense or legal issue whether there exists a legal duty under the case circumstances can be heard first or submitted to a limited arbitration or an advisory scientific or medical opinion to resolve that critical threshold issue.
Example: A factual issue such as establishing a date of loss or occurrence can, if determined early, help to resolve a coverage dispute between insurers or between parties and their carrier.
Example: In multi-party cases, can the case be structured in phases so that parties involved in only certain portions of the case need to participate only in the portions of the case pertinent to them. Liability of a group of jointly responsible defendants to the claimant can be determined in one phase of the case. Then the allocation of liability between the defendants can be determined in a following phase of the case. Claimants need not sit through the fighting between the multiple defendants and defendants need not cut each other up in front of the claimant.

5. Neutral factfinder. Consider whether parties are willing to appoint someone to be a neutral factfinder. Use of a neutral factfinder may minimize or possibly avoid need for each party to engage separate consultants or experts to review the same body of voluminous records. For example, in a partnership accounting dispute, a single neutral and mutually trusted accountant can review the partnership accounting records to make findings, conclusions or recommendations. If a technical interpretation is at issue in the case (such as what are the applicable requirements of Generally Accepted Accounting Principles (GAAP)), the neutral factfinder can provide the evaluation. The parties can thus avoid a costly "battle of experts" in the case.
Example: In a construction deficiency case, a single architect, engineer or construction manager serving as a neutral factfinder can review the pertinent records to recreate the history or critical construction sequence or evaluate adequacy of manloading for specific scope of work.
The factfinder should be permitted access to all pertinent records. The scope of the factfinder's review should be clear and focused. The goal is to take issues or subjects that would be laborious or time consuming to establish and present in a traditional arbitration hearing process and eliminate the contentious formality of questioning multiple witnesses.

The factfinder's report and conclusions should be provided to the parties in advance of any hearing. Use of a neutral factfinder will eliminate issues and uncertainties concerning bias. The need for each party to retain and pay for separate expert witnesses is hopefully eliminated. Also, issues of credibility or bias of expert witnesses who are suspected of being paid advocate witnesses is then minimized.

Help to define a consensual information exchange. Organize documents and the presentation of documents.

1. Encourage and establish schedules for the request and production of documents within the care, custody and control of the parties.
2. Develop a joint exhibit list of pertinent documents to eliminate duplication.
3. Exhibits can be tabbed and bound in 3 ring binders.
4. Folio exhibits (examples are diaries, entire files or batch files of invoices, repetitive or voluminous records) can be assigned a single exhibit number. All pages within a folio exhibit should be numbered or Bates stamped sequentially for ease of reference and access.
5. Consider feasibility of digital scanning of documents onto discs to reduce the physical volume of records.
6. Invite stipulations regarding documents.

a. All documents are deemed authentic and accurate copies of the originals.
b. Establishing foundation elements such as records are business records regularly maintained or that signatures are those of the persons reflected is unnecessary.
c. All exhibits are deemed admitted unless specific objections or reservations regarding specific exhibits are noted. No formal offering or request that a document be admitted is necessary except for those documents for which specific objections or reservations have been noted.
d. Except for impeachment and rebuttal purposes, all exhibits that a party anticipates or intends to use in support or defense of a claim will be submitted prior to the commencement of the arbitration hearing.
e. Hearing exhibits will be identified and submitted to the arbitrator by an agreed time prior to the hearing sufficient to allow parties adequate time to be aware of the anticipated exhibits planned for the

hearing.

Expert Witnesses.
a) Establish agreed ground rules for identification and disclosure of experts and their field of expertise and for designation of counter-experts.
b) Provide for exchange of resumes of experts.
c) Establish if written expert reports will be prepared or required. Provide for early exchange of reports. Establish clear ground rules requiring the expert report to contain all opinions and the bases for such opinions intended to be presented in the case. Establish that the reports must reflect the theories and opinions of the witness after all investigation and testing has been done. Establish whether experts will then be limited only to the opinions contained in the reports.

AT THE HEARING:
Establish the pertinent chronology of critical events and milestones. Establish where the parties and arbitrator need to focus their attention and efforts.
1. Have a designated person present the overall chronology of key events and milestones.
2. Identify as much of the chronology that is undisputed.
3. Identify and focus on issues or areas of disagreement relating to the chronology.
4. Determine the witnesses and information needed concerning the disputed issues.

The neutral factfinder's report.
Where the parties have agreed to the use of a neutral factfinder, the factfinder's report can provide a quick and efficient presentation of the findings and conclusions. Hopefully, the need for multiple percipient witnesses can be avoided.

The experts roundtable.
Where multiple expert witnesses are involved and will be testifying, consider whether a roundtable discussion or presentation of the experts' opinions would be more efficient than the traditional question and

answer, examination and cross-examination format. The expert roundtable works as follows.

1. All experts testifying on a subject or issue are gathered together at the hearing.

2. Prior to gathering all experts together at the hearing, resumes and information concerning the experience of the expert witness with similar work or issues is exchanged and provided to the arbitrator. Ask parties if they are willing to submit to the arbitrator the evaluation of the experts' experience and credibility based upon this exchange and presentation of information without having to utilize hearing time to go through what can be lengthy voir dire.

3. If voir dire is desired, arrangements can be made to have voir dire of individual expert witnesses done by conference telephone interview. Oftentimes, expert witnesses must travel significant distances to be available to testify. Where multiple expert witnesses are involved, their attendance at hearings involves great expense. The goal is to take care of any and all matters before the roundtable hearing that do not require the presence or attention of all of the expert witnesses involved. Use of the formal hearing time should be limited and concentrated on matters that go to the issues at controversy in the case.

4. The key issues and elements of claims or defenses should be identified and listed. The purpose and need for the expert opinion testimony should be clear. Written expert reports should be submitted and exchanged in advance to permit review by the other parties, their experts and the arbitrator prior to the hearing and /or roundtable discussion.

5. At the hearing with all involved expert witnesses present and sworn, it is suggested that the arbitrator(s) begin the interviewing of the experts. Where the arbitrator takes the lead in asking questions and interviewing the witnesses, it is often quicker and more focused than the traditional adversarial examination and cross-examination format. The parties and their advocates have less need to guess what the arbitrator is thinking or what the arbitrator wants to know. The parties can concentrate on supplementing the inquiry with additional information or examination that the party believes is desirable and necessary for presentation to the arbitrator. One of the principal advantages of the roundtable interview format is that the opinions of all of the experts can

be expressed at one time. All pertinent opinions can be presented and focused on an issue by issue basis. I find it helpful to have a chart of questions and issues prepared beforehand. As the experts provide their opinions, their testimony can be captured in context. Experts can respond immediately to the contentions and opinions expressed. Opinions can be tested and clarified. Hypotheticals can be framed and revised quickly. The arbitrator(s) can gain the benefit of the expertise of all the experts in framing and clarifying issues. Many times, there are significant areas of consensus among the experts. Those can be identified and noted. The inquiry can then move on to areas or issues where the experts disagree. Having a prepared chart of issues permits the arbitrator to capture the pertinent testimony, highlight the areas of contention and collect in one place the reasons and rationale of the different witnesses.

6. After the arbitrator's questions have been asked, the parties should have the opportunity to ask questions as appropriate. The expert witnesses can be encouraged to comment upon and to ask questions of each other and be afforded an opportunity to provide additional information they believe to be helpful or pertinent.

7. It is helpful to divide the roundtable inquiry into clearly defined phases. For example, discuss causation, then liability followed by damages. Complete the round of inquiry with the arbitrator's questions and party questions on one phase before moving on to the next phase. The use of an experts roundtable can be especially useful and helpful to collect the testimonies of multiple witnesses pertinent to a subject and to test and understand the critical differences that may exist. It also significantly reduces the study time needed by the arbitrator to review, relate and make sense of divergent technical and complicated testimony.

Written direct testimony with cross examination.

Sometimes, parties may be willing to have all direct testimony submitted in writing to the arbitrator(s) and other parties before the hearing. At the hearing, witnesses can be offered for purposes of cross-examination and redirect examination. This can help to focus the presentation of the direct testimony as well as shorten the hearing time.

Deposition excerpts.
Where parties have taken depositions of witnesses, it may be acceptable for some witness testimony to be submitted by use of portions of their deposition transcripts. Parties should designate and counter-designate only portions pertinent to critical issues in the case.