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Meaningful conferences prevent 'arbigation' in commercial cases

A few years ago, I was at a Continuing Legal Education program and as the speaker was concluding her remarks, she glanced at the next topic on the program (which was my talk on arbitration) and blurted out to the audience, "I hate arbitration." Arbitration, particularly in commercial cases, has become so mired in pretrial motions, discovery and extra procedural steps that it can seem indistinguishable from litigation — but without the benefit of the rules of civil procedure or evidence.

This trend has left many lawyers and their clients wondering just how exactly arbitration lives up to the claim of being more efficient and economical than going to trial. As professor Thomas Stipanowich noted in his 2010 law review article, even the American Institute of Architects (AIA) stopped listing arbitration as the default dispute resolution process in its popular form construction contract.

Arbitration, however, does not have to be "arbigation," as some cynics have dubbed it. In recent years, institutions, arbitrators and academics have been actively promoting arbitration reforms, the most important of which is the use of a thorough preliminary conference run by an arbitrator with strong managerial skills. Such a conference, and the resulting prehearing order, can streamline the process while retaining the major benefit of arbitration — the ability to create a process tailored to the parties' needs.

The College of Commercial Arbitrators Protocols for Expeditions, Cost-Effective Commercial Arbitration, published in 2010 and available at thecca.net, describes the preliminary conference as "the single greatest tool for achieving a fair and efficient commercial arbitration." The protocols in the book recommend that the following matters be addressed at the conference: identity of all parties; the specific claims, defenses and counterclaims; the arbitration agreement under

which the arbitration is being conducted; and jurisdiction of the arbitrator over the parties and claims; governing law (substantive law, procedural law and applicable arbitration law).

Other matters include: applicable arbitration rules; arbitrability of any claim or defense; identity of witnesses and key actors to assist the arbitrator in disclosing any conflicts; joinder of additional parties; consolidation with another arbitration; discovery to be permitted; motions to be permitted and procedures and time frames for motions; and need for any arbitrator "tutorials" on specialized technical matters and possible agreement on treatises.

Still other matters include: appointment of neutral experts; manner of service of arbitration documents; location of hearing; hearing date (setting a hearing within a year and working backward for all other dates can be helpful); need and authority for witness subpoenas; hearing procedures; nature of the award (whether it will include reasoning or just dispose of all claims); and due date of the award.

For the preliminary conference to be truly effective and prevent a protracted proceeding, the attorneys and arbitrator(s) need to devote substantial preparation time and in complex cases senior client representatives should attend in person along with lead counsel. This is particularly important because a "managerial" arbitrator will define the scope of discovery at the preliminary conference, including depositions and e-discovery.

As pointed out in a recent article by attorney James Schurz of Morrison & Foerster LLP in San Francisco, counsel must now be prepared not only to discuss a proposed discovery plan but also the rationale for seeking specific discovery. This means knowing the key players, whether third parties may have documents and whether documents are located outside of the jurisdiction.

In cases involving substantial e-mail productions, the arbitrator may address e-discovery at a separate conference, though counsel



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should still be prepared to discuss electronically stored information (ESI) as any limits on the scope of discovery set by the arbitrator will impact e-discovery.

Whether at the preliminary conference or a separate conference, the arbitrator may also limit the number of custodians and the number of search terms or require the use of predictive coding or an e-discovery consultant.

As described by attorneys Neal Eiseman, John Bulman and R. Thomas Dunn in their recent law review article, the preliminary conference is also the opportunity for counsel to make suggestions for creative procedures to streamline the hearing including: direct examination by affidavit or witness statement; examination by conference of two or more witnesses; examination of both sides' expert witnesses at the same time; dispositive motions on legal issues such as releases and

statutes of limitation; and bifurcation of liability and damages.

The method of presenting exhibits to the arbitrator, including stipulated exhibits and a protocol for premarking exhibits, may also be addressed. It can also be useful to determine whether a stenographer will be present and how costs will be allocated. (A record is helpful to the arbitrator in writing the award, but can increase the costs substantially if it is a reasoned award, as any lawyer who has ever cited to a transcript can attest.)

Other hearing issues that can be addressed at the preliminary conference include determining the order of proof (issue by issue or threshold issues first instead of traditional), requirements to exchange demonstrative exhibits, expert procedures, such as providing the arbitrator with a list of agreed points; need for videoconferencing or recording of certain witnesses; and use of a "chess clock" that limits the total number of hours available to counsel for presenting evidence and arguments.

While much of this is reminiscent of the case management procedures now common in court rules but often given short shrift, arbitrators — unlike judges burdened with backlogged dockets — typically have the necessary time to address all of these issues at a preliminary meeting.

The primary benefit of arbitration is the flexibility to craft a process that meets the needs of the parties, whether it is a desire to have a dispute decided by an industry expert instead of a judge or jury or to have a truly expedited proceeding with no depositions or right of appeal.

The question of whether arbitration meets the needs of everyone is currently a matter of contention in areas such as consumer and employment law.

But with regards to commercial matters, parties can avoid the aspects of arbitration they have learned to hate by selecting arbitrators willing to actively manage the process and by making full use of the preliminary conference.

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