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Keeping Arbitration Easy, Efficient, Economical and User Friendly

BY LOUIS L. C. CHANG

Arbitration of large, complex conflicts, often with multople parties, requires good management to obtain the well-known time and costsaving advantages of the process. This article presents a collection of ideas thea uthor gathered from experienced arbitrators, advocates and users of arbitration that are geared to preserving those advantages and keeping arbitration informal and user-friendly.

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Arbitration is used in a broad range of circumstances and it enjoys exceptionally strong support by American courts. A general goal of arbitration is to achieve fair and appropriate resolutions of disputes with efficiency and economy. Some of the most important characteristics of arbitration are

- the decision maker is selected by the parties,
- the proceedings and award are private,
- the process is less formal than litigation,
- legal rules of procedure and evidence do not apply, and
- the process can be understood without formal legal training.

Arbitration is a consensual process that can be customized to suit specific circumstances and relationships. Whether governed by the Federal Arbitration Act, the 1955 version of the Uniform Arbitration Act, which has been adopted by most states, or the revised version (RUAA), which has been adopted by a handful of states (12 as of August 31, 2005), there are opportunities to shape the process to the parties' needs. Although one party can take advantage of the other through process design, that is not advisable since it invites legislatures to act to impose constraints on certain types of arbitration, particularly those involving parties with little or no bargaining power, such as consumers and employees.

Thus, supporters of arbitration should promote the fairest possible process as well as one that is efficient, cost-effective and user-friendly. To do this the following elements must be present.

Resolving gateway issues early can save the parties work and reduce the scope of (or necessity for) further proceedings.

Establish an Overall Spirit of Cooperation for the Arbitration

Arbitrators can set the tone for the arbitration by stating that they expect civility and cooperation from the parties and their attorneys. They should emphasize the differences between litigation and arbitration and urge parties to avoid importing judicial procedures into the arbitration if they want a swift but fair process. Arbitration honors substance over form so that parties can obtain the process that they bargained for. If the arbitration is overly adversarial and legalistic, it will probably take longer to resolve. The goal should be to keep moving forward so that the arbitrator can resolve all arbitrable issues in a timely, user friendly and efficient manner.

Arbitrators Should Be Accessible

Arbitrators should be easily accessible to the parties. Telephone conference calls between the party representatives and the arbitrators should be promptly and easily scheduled. Working with the parties or their advocates, arbitrators can encourage parties to simplify administrative and scheduling matters. Parties can agree that direct telephone or email communication to the arbitrator's office can be made where it is limited to requesting and coordinating an immediate or prompt conference call including all parties or their representatives.

Shape and Organize the Arbitration Process

Arbitrators must be flexible and willing to tailor the process to fit the parties' needs. As stated by Prof. Frank Sanders, the challenge is to work together to "fit the forum to the fuss." Invite discussions at preliminary conferences of ways to simplify and streamline the arbitration process and to keep the proceeding on schedule. Arbitrators should encourage counsel to bring up all procedural and substantive issues and their ideas to accelerate the process during preliminary conferences. This can foster a more efficient and economical arbitration process.

Focus on the Issues in the Case

It is essential to define the issues for resolution in arbitration as early as possible. During an early preliminary conference, the arbitrator should determine whether all claims, counterclaims and defenses have been communicated and are clear between the parties. If not, the arbitrator can set a schedule for the clarification or supplementation of claims, counterclaims and defenses. Frequently, a case will turn upon a few specific crucial issues. If the critical issues can be identified during pre-arbitration conferences, the parties can then focus their discovery needs and witness presentations based on those critical issues. Hearings can then be shorter, more focused and more efficient.

Before the hearing, review with the parties the facts and issues in contention so that they can identify evidence and witnesses who have information pertinent to resolving these matters. Facts and issues not in contention can be the subject of stipulation. Review with the parties the facts and issues in contention so that they can identify evidence and witnesses who have information pertinent to resolving these matters. Facts and issues not in contention can be the subject of stipulation.

Identifying facts not in dispute and those remaining in dispute will also help the parties to focus their preparation and presentation to the arbitrator upon what is legitimately at issue. Parties can be encouraged and asked to prepare and submit uncontested facts, by stipulation to the extent possible. An alternative is that parties can submit a statement of proposed uncontested facts that the other party can respond to. If no objection is noted to a proposed fact, the case can proceed with the understanding that the uncontested facts are accepted as established for the

purposes of the case. The goal is to only spend valuable time and resources developing and presenting information pertinent to matters in dispute to the arbitrator. In this way, the hearing can again be limited and focused only upon the key matters and issues in dispute.

Identify and Arrange for Needed Information

To minimize the need for subpoenas, encourage parties to voluntarily produce relevant documents and employee witnesses. In some cases, parties need records from persons who are not a party to the arbitration proceeding. The arbitrator has authority to issue document subpoenas to third parties for production at the hearing. See under § 7 of the Federal Arbitration Act and § 17 of the RUAA. There is also case law authority confirming the arbitrator's authority to subpoena documents during the "discovery" phase of a case (i.e., prior to the hearing). Early production of documents can help the parties to more accurately assess their positions and lead them to resolve some or all issues prior to the hearing on the merits.

Establish Communication Protocols

Encourage the parties to agree to communicate using the most efficient technology. Ask whether counsel would be comfortable using e-mail communications in lieu of faxes, U.S. mail, or hand delivery. If so, clarify whether e-mail is to be limited to administrative and scheduling matters or be used only to transmit memoranda and motions. Encourage the parties to limit their communications to the arbitrator to those matters that relate to the arbitrator's role or seek responsive action from the arbitrator. All communications sent to the arbitrator must be simultaneously provided to the other parties. If e-mail is to be used in a limited way, encourage the parties and counsel to use faxes to transmit other documents.

Dispose of Preliminary and Dispositive Issues

The arbitrator should identify and address all preliminary and dispositive legal issues for early disposition at a pre-arbitration hearing, where appropriate. Resolving these gateway issues early can save the parties work and reduce the scope of (or necessity for) further proceedings.

Group and Bifurcate When Appropriate

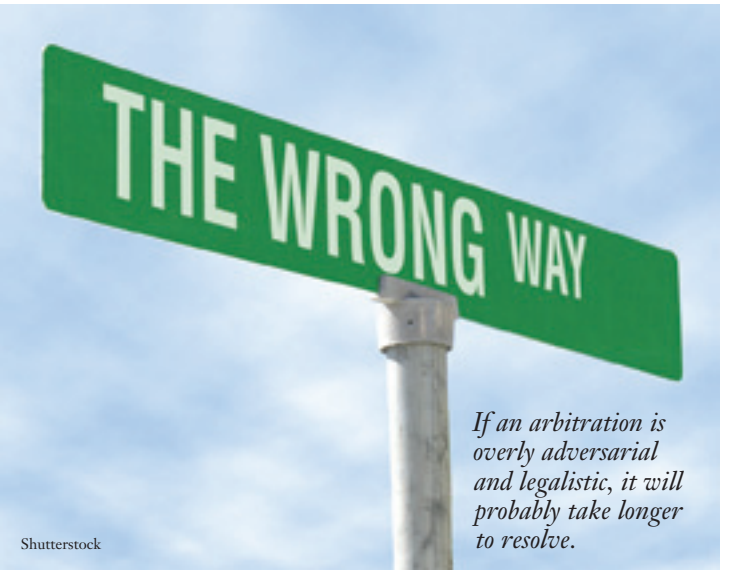
The arbitrator can bifurcate issues for hearing in a logical or efficient manner. For example, in a construction defect case, the arbitrator could address causation and liability in the first phase, then the appropriate remedy and damages in a second phase. It might also be appropriate to bifurcate issues by the parties or the contracts involved (i.e., claims against design professionals or subcontractors might be more efficiently handled in separate hearings).

Consider Using a Neutral Fact Finder

Where there are lots of disputed and/or detailed facts, the arbitrator could ask the parties if they want to consider jointly retaining a neutral fact finder who will investigate and determine the facts. To make the fact finder's findings more credible, the person so appointed should be an appropriate expert. If a neutral fact-finder is to be used, the scope of his or her review should be clear. The fact-finder's report and conclusions should be provided to the parties in advance of any hearing. Using a neutral fact finder can remove factual issues that would be laborious and time-consuming to establish in an arbitration hearing (and usually involve questioning of multiple witnesses), thereby saving costs and reducing the number of issues to be decided at the hearing. It also avoids the need for each party to retain its own expert for purposes of factual review.

Promptly Exchange Exhibits and Evidence

The information exchange or discovery portion of arbitration has been discussed by many arbitrators. Like those arbitrators, I ask the parties to exchange lists of the document exhibits they intend to introduce at the hearing on the merits. Then, I like the parties to exchange numbered (or lettered in combination with numbers) exhibits in tabbed binders. I like internal pages of voluminous documents to be numbered for ease of reference. In a case with multiple issues, the



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If an arbitration is overly adversarial and legalistic, it will probably take longer to resolve.

parties can group the exhibits pertinent to each issue by assigning a different letter prefix (e.g., Documents A-1 through A-15, B-1 through B-6, and C-1 though C-3 pertain to issues A, B, and C respectively). This organization permits the addition of related exhibits so that all issue-related exhibits are together and will help the arbitrator find the pertinent evidence with relative ease.

I also ask parties to provide me with a binder containing joint exhibits to avoid duplication. This avoids duplicative work and helps to expedite things.

Make sure the parties understand that, except for impeachment and rebuttal purposes, all exhibits intended to be introduced at the hearing on the merits (either in support of a claim or defense) will be provided to the other party and the arbitrator prior to the commencement of hearing.

Pre-qualify experts by having the parties exchange their resumes well before the hearing.

Dispense with the formality of litigation with respect to document exhibits. Propose that the parties accept the protocol that all document exhibits are deemed admitted unless a specific concern or objection is raised to a particular document. At the hearing the parties can focus their arguments upon the merits, applicability and reliability of any piece of evidence.

Decide on Witnesses and Means of Expediting the Introduction of Evidence.

Try to minimize the necessity of subpoenas. Ask the parties to agree to produce the attendance of those witnesses within their employ or control without the necessity of subpoenas. If subpoenas will be needed to summon the attendance of witnesses at the hearing, make sure that the parties follow the rules of notice and service.

Arbitrators should obtain from the parties their anticipated order of witnesses prior to the date they are expected to testify. This permits the other party to prepare for cross-examination of the identified witnesses.

Expediting the introduction of evidence may entail persuading the parties' attorneys to use more informal means of providing witness testimony and to take advantage of new technology.

Consider witness conferencing where fact or expert witnesses can provide testimony on common topics or issues at the same time. There are advantages to this type of evidence presentation. Some people believe that witnesses are more likely to be truthful when giving evidence in the presence of other witnesses. Moreover, one witness may be able to fill in a gap left by another or supplement something that was said. The arbitrator can receive all evidence pertinent to a specific issue at the same time. Witnesses can explain and clarify their areas of agreement and disagreement.

Another means of expediting the introduction of evidence at the hearing is through written witness statements in lieu of direct testimony. Sometimes, parties are willing to have all direct testimony submitted through written witness statements. This can help to focus the direct testimony as well as shorten the hearing time. All written witness statements must be provided to the arbitrator and exchanged by the parties in advance of the hearing. If written witness statements are used, they should refer to the relevant portions of the key exhibits. This is quite helpful to the arbitrator. At the hearing, once everyone has had an opportunity to read the witness statement, the witness is made available in person for cross and redirect examination.

Direct testimony also could be introduced from a deposition in the case (this would be a vital witness, since depositions are not taken as liberally in arbitration as they are in a judicial proceeding) or trial testimony in another proceeding. Parties can consider providing written summaries, but only if it will result in saving time.

Use Graphics to Tell a Story.

A chronology of key events and key documents can be extremely helpful to the parties in identifying the disputed facts and to the arbitrator in understanding the facts. I ask the parties to prepare this jointly.

An organization chart or list of the key individuals referenced in the documentary exhibits, with a brief description of their title, position and role in the dispute also can help the arbitrator more easily understand the case and the role and capacity of the involved players.

Floor plans, diagrams and photos of the scene may also be useful in certain kinds of cases. Sometimes a picture is indeed worth a thousand words.

A site visit can be invaluable in construction and other kinds of cases to acquaint the arbitrator with the pertinent settings and issues.

In a case involving a panel of arbitrators, one arbitrator could be designated to address issues

and motions concerning discovery. Another could be designated to issue subpoenas. The parties can agree that facsimile copies of the arbitrator's signed subpoenas can be used for all purposes to the same extent as the signature on an original signed subpoena.

Use Expert Witness Panels

A recognized weakness of an adversary dispute resolution system is its high cost, some of which may be attributable to the battle of technical experts. If the parties can agree on one acceptable expert who had no involvement in the case, they can eliminate the cost of one expert. (If they can't agree on the expert, they can suggest names to the arbitrator, who will make the choice.) For example, in a partnership accounting dispute, the parties could agree to have a mutually trusted accountant make findings, conclusions or recommendations to the arbitrator. Where technical expertise is needed to persuade the arbitrator how to rule, the parties could consider jointly retaining one technical expert at their shared cost. Using a neutral expert also makes sense where there is a technical interpretation to be decided. The parties can thus avoid a costly "battle of experts" and cut their expert costs by at least half. Also, issues of credibility or bias of expert witnesses who are suspected of being paid advocate witnesses is then minimized.


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Arbitration can be managed to be fair as well as efficient, cost-effective and user-friendly.

Whether one or more experts will testify about a particular disputed issue or fact, establish ground rules for their qualifications. Also determine whether written reports will be produced and, if so, require the expert report to (1) contain the bases for the expert opinions stated in the report, (2) reflect the theories and opinions of the expert after all investigation and testing has been done, and (3) be disclosed to the adversary prior to the hearing. To avoid unfair surprise, clarify with the parties a mutual understanding that unless good cause is shown to the arbitrator, all expert opinions of the experts must be included in their report as their testimony will be limited only to the opinions contained and disclosed in their reports.

If expert reports are not going to be produced, suggest having both experts' direct testimony submitted in writing and exchanged in advance of the hearing. As in the case of ordinary witnesses, the experts will be available in person for cross-examination.

Pre-qualify experts by having the parties exchange the experts' resumes well before the hearing. If there are no objections, the parties can be asked to stipulate that their respective experts may testify as experts in the relevant field. If needed, the parties can utilize a formal *voir dire* process to examine their expert qualifications. This can be done by telephone conference in advance of the hearing. If done in person, it can involve considerable travel expense, especially when there are multiple experts involved. Resolving the expert qualifications issue before the hearing is necessary so that the hearing itself is used only to deal with the disputed issues in the case.

If multiple experts will be testifying on the same issue, consider having them all testify at the same time. This works as follows (assuming that prior to the hearing, their resumes were exchanged and provided to the arbitrator and the parties did not object to their testifying, and their written reports were also exchanged in advance of the hearing):

The expert witnesses are sworn in together. The arbitrator questions the experts first. This is more productive than having the attorneys question them first because the arbitrator will ask what he or she wants to know. This way the parties' advocates won't have to guess what the arbitrator is thinking or what issues are on the arbitrator's mind.

After the arbitrator finishes questioning all the experts, the parties' attorneys ask their questions, brining out information they believes is desirable and necessary for the arbitrator to resolve the dispute. In addition, the experts can be invited to ask questions of each other and provide additional information they believe to be helpful or pertinent.

The principal advantage of the expert panel format is that the opinions of all of the experts can be expressed at one time, one issue at a time. Moreover, the experts have the opportunity to offer information, not only respond to questions.

Many times there is a consensus among the

experts on significant areas. These can be identified and noted. The inquiry can then move on to areas or issues where the experts disagree.

In the panel format, experts can respond immediately to each other's opinions. Opinions can be tested and clarified. The arbitrator gains the benefit of the expertise of all the experts as they clarify the issues.

Arbitrators should have a chart of questions and issues prepared beforehand on which to capture the experts' opinions and rationales, and identify the areas of contention. The panel questioning can be divided into phases based on the issues to be addressed: for example, causation, liability, damages.

The expert panel is a useful way of collecting the testimony of multiple witnesses on a single subject and learning about the critical differences that exist between them. It also reduces the study time the arbitrator needs to make sense of divergent technical testimony.

"Chess Clock" Arbitration

Sometimes, the parties may be willing to agree to present their case and cross-examine witnesses within a specified amount of time. Called the "chess clock" technique, this hearing management tool focuses the parties on what they need to accomplish at the hearing. However, this process should not be forced on the parties. Some experienced arbitrators caution that the chess clock technique should only be used by agreement of the parties and that agreement should be adequately documented and confirmed by the lawyers as well as the parties because it is a modification of their arbitration agreement.

Tallying the time used can be done by the arbitrator, a court reporter, or another person. I recommend that the arbitrator announce the time used and remaining at least twice a day, first at the beginning of the hearing day and second at the end of that day. This way, if there are any problems with timekeeping, they can be addressed promptly.

Some of the available time for each side should be allotted to cover unexpected events and delays. Some arbitrators recommend giving the arbitrator discretion to grant additional time if necessary for a party to fully and fairly present its case.

Conclusion

Arbitration remains a very valuable, useful and flexible dispute resolution process. Thoughtful use and adaptation of the arbitration process can preserve and protect arbitration as an efficient, cost-effective and user-friendly private procedure for the fair and prompt resolution of a wide range of civil and commercial disputes. ■