Analysis&Perspective

Arbitration is the ''wave of the future'' in class actions, large product liability cases and in some toxic tort litigation, says alternative dispute resolution expert John Wilkinson. The author also responds to criticism that arbitration has become too much like litigation—with motions, interrogatories, depositions—and offers practical suggestions on how to strike a fair balance between the need for quick justice and fair resolution of complex claims.

The Future of Arbitration: Striking a Balance Between Quick Justice and Fair Resolution of Complex Claims

BY JOHN WILKINSON

In order to meaningfully assess the future of arbitration, it is first necessary to focus briefly on the remarkable developments in the field over the last 10 to 15 years. This can almost be done through use of a single word—bigger, bigger, bigger! Yes, the growth has been spectacular, and it is largely attributable to the fact that general counsel have been putting more and more huge cases into arbitration, and they have been doing so in ever accelerating fashion. I recently chaired an arbitration panel, for example, where $20 billion was legitimately in dispute, and arbitrations in the $10 million to $100 million range have come to be commonplace.

An important aspect of arbitration's exponential growth is its increasing expansion into areas of big case litigation which had traditionally been reserved for the courts. In *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444, 123 S. Ct. 2402, 156 L. Ed. 2d 414 (2003), for example, the Supreme Court opened the way for arbitration of class actions and, since then, the arbitration of class claims has increased at an accelerating rate. So too, many believe that arbitration is the wave of the future in large product liability cases and even in certain categories of toxic tort litigation. And the courts have already authorized arbitration of many other categories of large disputes, including antitrust, securities and patents.

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The dramatic increase in the size and types of arbitrations has led to other significant changes in the overall arbitration process. Thus, for example:

- As arbitrations get bigger and bigger, parties have increasingly been trying to inject into them what had traditionally been reserved for litigation—things like dispositive motions, interrogatories, depositions and the like.
- Along with bigger and bigger have come better and better panels of arbitrators. The days when an arbitrator goes to sleep in an important case are long gone.
- As awards involve more and more money, it is certainly not surprising that there is vastly more activity in the courts in trying to overturn them.
- All of this has been accompanied by much longer and more detailed reasoned awards to accommodate the added complexity, and
- The increased size has also led to a striking upturn in the level of arbitration advocacy. Again, this is not surprising—as arbitrations get bigger and bigger, the large firms are of course jumping in and putting themselves in position to represent that they are accomplished experts in the field.

Addressing the Most Common Criticism

All this growth has brought us to a real crossroads in the life of large case arbitration. In my view, what lies in arbitration's future is completely dependent on how well we deal with a highly significant result of this growth, *i.e.*, the ever increasing complaint that arbitration is becoming too much like litigation. If there is significant and continuing validity to this commonly voiced criticism, then why would anyone arbitrate? The simple answer is that, in large part, they wouldn't—arbitration would make little if any sense in such circumstances.

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The arbitration community has two fundamental expectations that bear on this problem and, in a sense, they are light years apart:

FIRST, There are expectations based on the notion that the purpose of arbitration has historically been to dispense quick and dirty rough justice that is over and done with in a blink, and

SECOND, There are the expectations of those who perceive that cases in arbitration are getting larger and more complex every year and that such cases cannot be fairly resolved without a comprehensive, sometimes rather extended pre-hearing and hearing process.

It is easy in the pre-hearing and hearing phases of a complex arbitration to accommodate one of the foregoing expectations, while ignoring the other. More particularly, for example, it is easy for an arbitrator to slash the discovery, refuse to allow inquiry into large segments of proof and, basically, shorten the case significantly by being invasive and peremptory. The problem with this, however, is threefold:

■ It isn't fair.

■ The case might well be reversed because one of the few grounds for vacatur under the Federal Arbitration Act is a refusal ''to hear evidence pertinent and material to the controversy,'' and,

■ We are left with two general counsel who will probably never use arbitration again.

At the other end of the spectrum, it is similarly easy for an arbitrator just to open the floodgates and permit mountains of pointless discovery and evidence—all in the interest of following the safe approach and permitting a full hearing. The problem with this, of course, is that such an arbitration may very well be as expensive and time-consuming or even more expensive and time-consuming than if the case had simply been litigated in court. And again, there would be two General Counsel who would likely never use arbitration again.

While it is certainly much easier said than done, the fact is that an arbitrator can and must strike a balance between the foregoing two extremes in a complex case. More particularly:

1) The arbitrator must be sufficiently assertive to ensure that the case will be resolved much less expensively and in much less time than if it had been litigated in court and ***at the same time***,

2) The arbitrator must be sufficiently patient and restrained to ensure that there is enough discovery and evidence to permit a fair result.

Available Tools

Fortunately, the arbitrator has many tools which are unique to arbitration and which can be used to facilitate an efficient and fair result in a complex case. Set forth below are a few of many examples:

■ Time-consuming objections to admissibility of documents can be kept to a minimum in arbitration because few such objections will be sustained. Rather than excluding a document for lack of admissibility, an arbitrator will generally take the document into evidence and, then, consider any factors detracting from its reliability when ultimately deciding how much weight it should be accorded. This is far more efficient than engaging in endless arguments about admissibility and, given the fact the case is not being presented to a jury, it is eminently fair.

■ Unlike a court, an arbitrator need not strictly apply the rules of evidence. This greatly enhances arbitration's informality, flexibility and efficiency and, again, is fair to the parties since there is no need for strict rules of evidence when the proof is being presented to an arbitrator, as opposed to a jury.

■ Arbitration dispenses with the laborious process of authenticating every document that is offered into evidence. In arbitration, documents are presumed to be authentic, and arbitrators will only entertain argument about authenticity in extreme circumstances involving things such as a possible forgery. While this shortcut in no way reduces the likelihood of a fair result, it greatly speeds the arbitration process in relation to what one encounters in court.

■ In arbitration, exhibits are typically arranged in tabbed binders, and everyone can simply fly from tab to tab, saving huge amounts of time. In a trial in court, on the other hand, documents are generally trotted out one by one, with each document being separately marked, distributed and pored over by counsel before it might ever be accepted in evidence.

■ Serious scheduling and jurisdictional problems can sometimes be averted in arbitration by taking video testimony outside the presence of the arbitrators on the understanding that the arbitrators will review the entirety of the testimony before rendering their award.

■ There is generally no need to even offer a document in evidence in arbitration. If a questioning attorney begins to use a tabbed document and if opposing counsel does not promptly object, the document is deemed to be in evidence, without more, in most arbitrations.

■ Arbitration witnesses can be taken out of order to facilitate efficient and expeditious scheduling. Thus, for example, it is not at all unusual in arbitration to have a key witness for respondent testify in the middle of claimant's case. While this time-saving device in no way detracts from the fairness of presentations to an arbitrator, it would be literally unthinkable in a case being tried to a jury.

■ In arbitration, there is typically no need to qualify a witness as an expert. This eliminates the endless argument and voir dire which one so often encounters in court on that subject. This is not to say that lack of expert qualifications is ignored in arbitration but, rather, it is explored in orderly fashion on cross examination and is ultimately considered by the arbitrator in determining how much weight to accord the expert's testimony.

■ Testimony of both sides' experts is often taken in a single phase of an arbitration so that the arbitrator has one side's experts well in mind when hearing the expert testimony from the other side. So too, arbitration testimony of experts is often taken simultaneously in a kind of town meeting setting where the experts are seriatim responding to the same questions and where they even get to question each other. This can be highly effective and save a lot of time for the reason, among others, that experts' areas of disagreement really do narrow in this kind of face-to-face format.

■ The direct testimony of some if not all witnesses in an arbitration is often introduced in written form with the live testimony being limited to that which is adduced on cross examination. When used appropriately, this has time and again been proven to vastly increase the efficiency and cost-effectiveness of an arbitration, in relation to a trial in court, and,

■ Finally, there is great flexibility in scheduling arbitrations, with hearings not being unusual on Saturdays, Sundays and holidays, as well as during evenings. While this can often be a most effective tool for moving the process forward to a prompt conclusion, it is almost never an option in a trial in court.

The foregoing are just a few of many examples of tools that are available in arbitration, but not in court. An arbitrator who makes good use of the full array of such tools and who is intent on carefully balancing the need for efficiency, on the one hand, and the need for a fair hearing, on the other, is going to be a critically important factor in continuing the dramatic growth of arbitration in complex cases.

A Recent Important Trend

Many general counsel have come to understand that it can sometimes be difficult for an arbitrator to effectively balance efficiency and fairness in a complex arbitration and, as a result, general counsel have recently been injecting themselves into the process and have been taking some of the judgment calls out of the hands of the arbitrators. These general counsel have primarily been doing this by adding to their large, commercial contracts a variety of highly aggressive, detailed arbitration clauses which, for example, might:

■ Provide for a very limited scope of discovery in any upcoming dispute, with the totality of such discovery to be completed within 60 days of appointment of the arbitrator;

■ Require that the hearing will commence not more than 90 days from appointment of the arbitrator;

■ Mandate that a reasoned award will be rendered within 30 days of receipt of post-hearing briefs; and,

■ Provide that an arbitrator must agree to all of this before he or she accepts appointment

While it is sometimes necessary to further negotiate and refine such arbitration clauses in the context of the particular dispute that arises, the fact remains that these clauses really do work—they really do get the job done. And while they place a most difficult burden on both parties and arbitrators, they may nonetheless be commonplace in the not too distant future.[1]

A Recent, Important Decision

In *Hall Street Associates LLC v. Mattel Inc.* (No. 06-989, Slip Opinion, March 25, 2008), the Supreme Court cut back markedly on any trend toward arbitration's assuming the trappings of litigation.

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There, the issue was whether parties could contract to expand the standards of review of arbitration awards, as set forth in Sections 9-11 of the Federal Arbitration Act (FAA). More particularly, the question was whether parties could contract to inject traditional grounds for appeal into FAA arbitrations or whether they were limited to what was already provided in Sections 9-11 of the FAA, *e.g.*, ''corruption,'' ''fraud,'' ''evident partiality,'' refusal to hear ''pertinent and material'' evidence, and acts exceeding the powers of the arbitrator. In holding that parties could not contract to introduce customary grounds of appeal into an FAA case, the court struck a telling blow in favor of efficient, cost-effective arbitration. As the court stated:

> Instead of fighting the text [of Sections 9-11], it makes more sense to see the three provisions . . . as substantiating a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway. Any other reading opens the door to the full-bore legal and evidentiary appeals that can ''rende[r] informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process,'' . . . and bring arbitration theory to grief in [the] post-arbitration process. (Citations omitted.)

In the author's view, the criticism that arbitration has become too much like litigation in no way marks the beginning of the end of complex arbitration, as so many obliquely predict. Rather, the criticism presents a challenge to which the arbitration community can and must respond with understanding, imagination and resolve and if it does (and I fully expect it will), then complex case arbitration will be very healthy indeed for many years to come.

[1] There is still a need to clarify the legal consequences of missing one or more of the deadlines in one of these clauses. In this regard, however, it should be noted that the author has been involved in implementing a number of these clauses and has never encountered the missing of a deadline which led to a dispute among the parties.

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