BNA Insights
Arbitration

Commercial Arbitration 2.0: Re-Booting Arbitration to Make it More User-Friendly

BY JAMES SCHURZ

Commercial arbitration is going through a transformation. Faced with broad criticism that it has failed to deliver the speed, efficiency, and flexibility that ADR proponents have long promised, arbitrators are adopting a series of innovations designed to make the procedure faster, more predictable, and more user-friendly. We are experiencing the roll out of Commercial Arbitration 2.0. The new buzz words and phrases include: the ''managerial'' arbitrator, discovery ''tutorials,'' expert ''hot-tubbing,'' and witness Skyping. And all of this is made possible through the broader and more creative use of stipulations.

Commercial arbitration today is a different creature than its historical ancestor. And it presents new opportunities and risks for lawyers and clients. One thing is clear: our collective satisfaction with the new process will hinge on our ability to use these new tools effectively.

Before turning to some of the innovations currently being employed by arbitrators, it is helpful to review briefly the problem these tools were designed to remedy.

The Judicialization of Arbitration

As more complex commercial disputes are resolved through arbitration, the procedures associated with high-stakes litigation have followed. Formal pleadings, counterclaims, broad written discovery, requests for provisional relief, pre-hearing dispositive motions, and stricter application of the rules of evidence have become increasingly common in arbitration.[1] This has led to a chorus of complaints that commercial arbitration has become ''judicialized,'' or even worse, ''Americanized.'' At the same time, arbitration has been subject to the criticism that it is less likely to lead to decisions on the merits, but rather is driven by an arbitrator's unchecked sense of fair play. To these critics, arbitration is still too unpredictable and needs further constraints. This often leads to grafting more elaborate procedural safeguards on top of the rules of the administering organization. The result is a process that is often bloated, expensive, inefficient, and ill-suited to meet the parties' expectations.

The principal culprit for the increased cost in arbitration (as in litigation) is discovery.

The principal culprit for the increased cost in arbitration (as in litigation) is discovery. And driving the cost curve is the increasing quantity of electronically stored information (ESI). Just as e-discovery has perplexed our courts, it has posed a significant challenge for arbitrators. The problem of e-discovery has prompted a flurry of protocols from the International Chamber of Commerce (ICC), the American Arbitration Association (AAA), the International Institute for Conflict Prevention and Resolution (CPR), and the Chartered Institute of Arbitrators. While there is much to be learned from these protocols and guidelines, they are poor predictors for the range of problems confronted with ESI. The obstacle for an arbitrator is determining the right balance between reasonableness and proportionality. This obstacle is further complicated by the fact that it is often difficult to assess the costs associated with pulling out and filtering electronic information from data systems. Invariably, the challenge of e-discovery looks simpler in a hearing room than at the implementation stage.

The second major offender in the ballooning costs of commercial arbitration is the profusion of pre-hearing motions. There are battles over the jurisdiction of the arbitrator; whether certain condition precedents to arbitration have been satisfied; whether and how depositions will be allowed; as well as requests for bifurcation, consolidation, and the full range of dispositive motions. Historically, pre-hearing motions were rare. Now, they are common.

The third exacerbator of costs has been the hearing itself. Hearings in complex commercial arbitration have grown longer. Part of this is attributable to evidentiary issues, but the prime contributor is the increase of expert testimony. The range of expert opinions offered by parties has become more complicated and diverse in arbitration. Historically, you could count on a damages expert. Now, you often have an industry expert, one or more experts skilled in the underlying technology or science, forensic accountants, economists, as well as damages experts. And because the underlying contracts often involve sophisticated, highly-specialized technology, tutorials for the arbitrator are increasingly common. The result is a hearing that is longer, more

(continued on page 158)

[1] Stipanowich, *Arbitration: The ''New Litigation,''* 2010 U. ILL. L. REV. 1 (2010); Chernick and Claiborne, *Reimagining Arbitration*, 57 LITIG. 4 (ABA Summer 2011).

James Schurz is a partner in the San Francisco office of Morrison & Foerster LLP, where he is the co-chair of the firm's Commercial Litigation Group.

CCW ISSN 0886-0475

(continued from back page)

complicated, and more expensive.

These developments prompted a period of robust introspection and soul searching in the arbitration community.[2] Should arbitration return to its informal ''roots?'' Did the future of arbitration rest on our ability to rekindle the past? Ultimately, the ADR community rejected the reactionary path. The future of arbitration was in innovation and experimentation. And we are now at a stage where we can begin to evaluate the effectiveness of these efforts.

Innovation in Commercial Arbitration

The ''Managerial'' Arbitrator. The new premium in the arbitration marketplace is identifying arbitrators who possess well-developed managerial skills. What exactly does this mean? It means from the moment the arbitrator is appointed she will manage the process to achieve the parties' overarching goal of a fair and efficient proceeding. Parties and their lawyers experience this right away.

The preliminary conference has become a major, defining event. Once limited to informal scheduling matters often accomplished on the phone, the preliminary conference has developed into something far more substantial—something akin to preparing the Terms of Reference in an ICC arbitration.[3] It is common in a complex arbitration to address a broad range of threshold issues, including: the jurisdiction of the arbitrator (as to the parties and issues); enforceability of any provision in the agreement to arbitrate; existence of additional parties with an interest in the dispute; existence of parallel court proceedings that could impact the arbitration; governing law (substantive law, procedural law, and applicable arbitration law); and motions on summary disposition or interim relief.

The preliminary conference is also the time the arbitrators will define the scope of available discovery. Counsel must now be prepared not only to discuss a proposed discovery plan but also the rationale for seeking specific discovery. This means knowing, among other things, the identity or group of individuals from whom documents will be sought. This is a tall order at this stage of the proceeding—particularly for defendants who may have done very little work preparing their defense. The discovery plan should also highlight the need for third-party discovery, the existence of former employees, and the location of documents outside the jurisdiction. The managerial arbitrator will also tackle the issue of e-discovery and ask for proposals as to the scope, timeframe, and nature of production of ESI. If parties expect that there will be any significant e-mail production, the better course is to schedule a separate hearing where the parties can submit proposals. But parties are wise to be prepared at the preliminary conference to discuss ESI as an order will come out of the preliminary conference that will impact the scope of the exchange of information. Finally, it is virtually certain the arbitrator will raise the issue of depositions—do the parties want them; if so, how many, where, when, and under what time limits?

The new commercial arbitration feels a lot like the rocket docket.

The third major area addressed in the preliminary conference is the schedule leading up to the hearings. This will generally include identification of witnesses, including expert witnesses, and use of witness statements; identification of exhibits and format in which such exhibits will be presented (hard copy, digital, ''live'' databases); presentation of witness testimony including special arrangements for video conferencing or use of videotaped testimony; pre-hearing briefing; submission of stipulations (more on that below); and exchange of demonstratives.

Fourth, the preliminary conference will address the logistics of the hearing itself: the applicability of the rules of evidence, hearing times, number of days, venue, the need for transcripts, designation of the ''official arbitration record,'' and the need for final argument. Expect the managerial arbitrator to suggest the use of a ''chess clock''—usually in the form of an iPhone—to allocate time between the parties. You can further expect that the arbitrator will maintain the clock as a means of disciplining the lawyers.

Finally, the preliminary conference will explore the parties' agreement as to the form of the award, available remedies, and any potential appellate procedure.

At the conclusion of the preliminary conference, the arbitrator memorializes the parties' agreement in a detailed procedural order. The order can run up to ten pages. It guides the parties' behavior throughout the proceeding. And the managerial arbitrator will stick to the schedule. Often it is the principal tool the arbitrator has to ensure that the parties receive the promise of a speedy resolution to their dispute.

One further observation can be made about the managerial arbitrator: expect a hearing date within one year of the filing of the demand for arbitration. This general rule can change where it takes a long time to get the arbitrator(s) appointed. In those cases, it is generally a year from the formation of the tribunal. This presumption generally rules even where the parties are amenable to a more drawn out proceeding.

The new commercial arbitration feels a lot like the rocket docket.

Discovery ''tutorials.'' The consequence of an accelerated schedule together with the parties' perceived need for the broad exchange of documents and ESI has created a quandary. If you allow a large volume of documents to be exchanged, how do you increase the efficiency in the review of such information? One answer is the emergence of discovery ''tutorials''—the process by which counsel (and, in some instances, parties) provide an explanation and overview of their document production. Gone is the data dump—the impenetrable, disorganized production of voluminous materials to the other side who is forced to decipher what exactly they are looking at. In its place, arbitrators have tasked counsel with informing opposing parties as to what it is they have produced, the source of the production, its relationship to other documents (e.g., draft or final), and other information to enhance the understandability of the document or material produced. This is generally communicated both in writing and orally in the form of a ''tutorial.'' In the case of specialized data or technical information, experts can attend the session to ask clarifying questions. In certain instances,

[2] *See, e.g.,* College of Commercial Arbitrators, *Protocols for Expeditious, Cost-Effective Commercial Arbitration* (2010).

[3] Bender, *Critical Steps in Complex Commercial Arbitration*, 64 DISPUTE RESOLUTION JOURNAL 1 (Feb.–April 2009); Chernick and Claiborne, *Reimagining Arbitration*, 57 LITIG. 4 (ABA Summer 2011).

  CCW ISSN 0886-0475

client representatives attend the tutorial to provide additional context and explanation. The tutorials can be a single meeting accomplished in an hour or multiple meetings extending over several weeks.

The savings in terms of attorney time and expert time can be enormous, reducing the time necessary to reconstruct the drafting history of a contract provision or deciphering the meaning of columns in an Excel spreadsheet. Discovery tutorials have the salutary effect of providing something like a 30(b)(6) deposition at the time the documents are produced.

The procedure is not without its tensions. There is the risk that one side is more forthcoming than the other. There is the separate concern that one side's understanding of their own production is more reliable. But, on balance, the procedure allows for a more expedited and efficient review of the document production.

Expert ''hot-tubbing.'' The emerging practice of expert witness ''conferencing,'' also referred to as the ''Australian approach'' or ''hot-tubbing'' of experts, is gaining new currency in American commercial arbitration. The procedure involves experts from each side engaging, under oath, in a conversation with each other, the judge, and counsel from both sides of the case. The procedure was developed in the Australian Competition Tribunal (hence its less colorful name the ''Australian approach'') as a way of reducing the partisanship and inefficiencies of adversarial experts.[4]

The Chartered Institute of Arbitrators built on the Australian foundation and included a number of additional features that can be employed in arbitration to expedite the hearing and streamline the presentation of expert testimony:

- Meeting of party-appointed experts prior to submission of expert reports to reach agreement and streamline the presentation of issues.
- Exchange draft outlines where appropriate.
- Empower the arbitrator(s) to direct the experts to confer further and to provide further written reports to the Arbitral Tribunal either jointly or separately.

Arbitrators in domestic proceedings are increasingly using these procedures in discussions with counsel as a way of focusing the presentation of expert testimony and highlighting the disputed factual issues. The advantages of such a procedure in terms of reduced hearing time are potentially significant. But there are pitfalls as well. For example, assuming experts are to meet outside the presence of counsel, the conferencing of experts raises issues of work-product privilege, attorney-client privilege and a fundamental re-structuring of the relationship with experts. It is further clear that expert hot-tubbing requires a very different skill set for experts—experts who are capable of acting as expert advocates as well as expert witnesses.

Witness Skyping: Videoconferencing. Improvements in technology have made the ability to secure the testimony of willing witnesses in remote locations far easier. It is now common to have witnesses appear by videoconference. Particularly where a party has previously appeared live and may be called a second time to offer rebuttal testimony, the availability of videoconferencing is a distinct advantage for parties. We can expect to see greater use of videoconferencing for securing witness testimony when the witness is in the United States.

In the international setting, the use of videoconferencing is more problematic. For example, detailed procedural rules govern the taking of testimony in China, Japan, Singapore, and Taiwan for use in a foreign proceeding. None of these countries allow for the administering of an oath and securing of testimony by simply showing up at a lawyer's office. China and Singapore are signatories to the Hague Evidence Convention. Japan is a party to the Vienna Convention of Consular Relations. The taking of evidence in Taiwan is governed by the Taiwan Relations Act, 22 U.S.C. § 3309(a). While these authorities are most frequently applied in civil discovery proceedings, they are also used in international arbitrations.[5] The consequence of these international conventions is that they set the local standards for securing testimony in these countries. So counsel are well-advised to analyze whether a host country allows the taking of testimony before agreeing to a videoconferencing arrangement.

Stipulations. The principal mechanism by which arbitrators are securing the cooperation of the parties in expediting proceedings and creating greater efficiencies is through the expanded use of stipulations. Expect the arbitrator(s) to ask for a joint collection of core exhibits in chronological order that the parties will stipulate to. Counsel can further expect to exchange and stipulate to demonstratives, charts, and a case chronology prior to the hearing. The parties will also be asked to come to some agreement as to how voluminous quantities of data may be summarized and provided to the arbitrator(s). Parties may be asked to stipulate in a case involving specialized scientific or technical matters to a treatise or other publication for the arbitrator(s) to read.

One thing is certain: parties in the new era of commercial arbitration will be asked to cooperate to a degree that was not required of them in the past.

* * *

Commercial arbitration is entering an exciting new era. We can expect our arbitrations to go faster, with hearings generally completed within one year of filing the demand. This accelerated pace places new pressures on parties, particularly on defendants who will be forced to mobilize resources quickly. Preliminary conferences are defining events that require careful planning and the development of detailed discovery plans. Representing clients in this new era will also require employing new skills—navigating discovery ''tutorials,'' preparing experts for joint meetings/''hot-tubbing'' with their counterparts, and negotiating stipulations that advance our clients' interests in securing a fair and efficient proceeding. Our collective success in this new environment will hinge, in large measure, on our ability to master these innovations.

[4] Comment, *Dueling Scientific Experts: Is Australia's Hot Tub Method a Viable Solution for the American Judiciary*, 88 OR. L. REV. 311 (2009).

[5] *See, e.g.,* J. Poudret and S. Besson, COMPARATIVE LAW OF INTERNATIONAL ARBITRATION, at 567, n.429 (''the [Hague Evidence] Convention is not confined to judicial proceedings and can also apply to arbitration, but the arbitrators themselves do not have standing to request court assistance''); Special Commission of the Hague Conference on Private International Law, *Summary of Responses to the Questionnaire of May 2008 Relating to the Evidence Convention, with Analytical Comments* (Permanent Bureau HCCH, 2009) at 32 (''a request for the taking of evidence under the Evidence Convention in the context of arbitration proceedings would have to be presented to the relevant judicial authority of the State where those proceedings were taking place'').