Talking Points on Best Practices of Arbitrators in Conducting Effective Arbitrations

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- **The arbitration difference**: Subject to the needs of the particular case, it is good practice generally for arbitrators to communicate to counsel early on their expectations as to how arbitration differs from litigation, particularly as to discovery, motion practice, and the conduct of the hearing.
- **Requirements of arbitration clauses**: Arbitrators should generally be alert to any issues as to compliance by the parties and the arbitrators with the requirements of the arbitration clause in a case and address the situation as necessary so as to protect the award.
- **Relations with other arbitrators**: It is important early on panel members to establish a good working relationship among themselves.
- **Listening and Hearing**: It is obviously important for arbitrators to listen to and understand the parties' arguments before ruling. It is generally best to "mediate" a ruling on intermediate disputes between the parties, such as discovery disputes, to the extent possible, rather than simply ruling on them off the top. This is particularly important in the early phases of the case when the lawyers know the case much better than the arbitrators.
- **Detailed pleadings, with the main supporting documents attached**: Where the parties present bare-bones pleadings, it will often make sense for the arbitrators to require that the parties interpose detailed pleadings, perhaps with supporting documents attached. This can sometimes lessen the scope of discovery/disclosure needed in the case. Doing this also advances the goal of giving each side reasonable notice of the other side's factual and legal assertions. This also applies to the need in some cases for the early particularization of a party's claimed damages, subject to any experts' reports on the subject that may be submitted later in the case.
- **Applications for interim relief**: Where parties press applications for interim relief, arbitrators should hear them on an expedited basis, conducting fact hearings as necessary. However, one should be very careful to limit one's rulings on such applications to matters that need to be decided at the time, and to make it clear, as a general matter, that the interim rulings are only that and do not necessarily reflect how the subject matters will be decided on the merits.
- **Focusing on the overall design of the case**: Arbitrators should see as their central role at the outset of a case figuring out the appropriate process for the case, the type of proceeding most suited to the needs of the case. This involves familiarizing oneself with the file and giving counsel a reasonable opportunity at the preliminary hearing to describe their views as to the case – most essentially, their sense of the appropriate scope of

process for the case, including with respect to discovery, particularly e-discovery and depositions (if any), motion practice, schedule and the like. Salient issues in this regard include the following:

- **The preliminary hearing/organizational meeting/scheduling conference/management conference**: This first meeting, usually telephonic, between counsel and the arbitrators can be a pivotal moment in the case for formulating the design – the very architecture – of the case. It generally makes sense for arbitrators to conduct a robust preliminary hearing, essentially covering, at least broadly, everything that can be anticipated that may come up in the case
- **Whether to ask counsel in advance of the preliminary hearing to try to work out a schedule and protocol for the case**: It is a judgment call in each case whether to ask parties to do this. Requiring this pre-hearing coordination among counsel can be efficient, and counsel tend to like it, but it can lead to counsels' agreeing to a litigation-style process, making it harder at the preliminary hearing to get buy-in from counsel on a scope of discovery that is appropriate for arbitration. However, it generally makes sense for arbitrators to at least figure out their mutual days of availability for the hearing and be prepared to present them to counsel on a unified basis. Where the arbitrators know from the papers or the case manager the general timeframe in which the parties would like to conduct the hearing (and when that timeframe makes sense to the arbitrators), it can be helpful for the arbitrators to advise counsel of their mutually available dates in advance of the preliminary hearing, so counsel can figure out which of those dates are most convenient for the parties. It will sometimes make sense for the arbitrators to send a detailed agenda to counsel several weeks in advance of the preliminary hearing. However, this has the disadvantage that it may be too cookie-cutter, in that the arbitrators may not yet know enough to really adapt the agenda to the particular needs of the case. As a result, sometimes it's best to just go into the preliminary hearing without a pre-fixed agenda and move forward as the needs of the case unfold.
- **The possibility of having the preliminary hearing in person with clients present:** Everyone seems to agree that this is a good idea when the scope of the case and the location of the parties, counsel, and arbitrators make it convenient. Nonetheless, preliminary hearings are still largely conducted telephonically. Perhaps, as arbitrators, we should be pushing harder for in-person preliminary hearings when the scope of the case and complexity of the issues justify it.
- **The scope of the preliminary hearing**: My sense is that it is now recognized as a Best Practice that arbitrators should conduct a robust preliminary hearing extending over several hours or more, when necessary, essentially covering, at least broadly, all the things that one can anticipate may come up in the arbitration. Nonetheless, there still appear to be some experienced arbitrators who prefer conducting the preliminary hearing essentially as a scheduling conference, generally taking an hour or less, without getting into any real discussion of the case. Perhaps this is a topic we might want to talk about in some detail. It is important to remember, if one intends to conduct a robust preliminary hearing, to give the parties advance notice, so they can allow sufficient time.

- **Standards as to discovery**: It still happens fairly often that counsel approach arbitration with a litigation mindset as to the scope of discovery and the like. This makes it important for arbitrators early on to discuss with counsel the arbitrators' expectations, subject to the needs of the particular case, as to the scope of discovery/disclosure in the case, perhaps even going so far, when it seems warranted, as to advise counsel of the robust body of "soft law" that exists in reports and studies by bar associations and other professional groups and the like and of the standards that can be found in the arbitration rules applicable to the case at hand.
- **Reliance documents**: The production by parties of their reliance documents is a normal expectation in international cases. However, this approach can also be helpful in domestic cases, sometimes serving as a substitute for the more expansive document production approach more typically used in arbitration in the United States, or at least for limiting the scope of the document production phase of the case. On the other hand, if, in a domestic case, the parties are going to want, in any event, to conduct more traditional discovery as to documents, with document requests, objections, and the like, requiring the production of reliance documents can be redundant, depending of the facts of the particular case. It is important to discuss this matter with counsel in the preliminary hearing and to review the advantages and disadvantages of the various approaches.
- **E-discovery**: It is broadly recognized that many arbitrations will succeed or fail in terms of efficiency and economy based on whether e-discovery is conducted in an efficient and proportionate way. Not so long ago, most of us tended not to address the subject until a dispute concerning e-discovery was presented for decision. However, I think it is now a clear Best Practice to raise the issue of the appropriate scope of e-discovery in the preliminary hearing (or in a follow-up conference on the scope of discovery), and to suggest that the parties meet and confer on the subject within a reasonable timeframe, addressing such potential issues as the following: search terms and the possible testing thereof, time periods, custodians, hit counts, format in which documents will be produced, predictive coding as a possible option, metadata and other points relating to electronic discovery that may arise. It is probably worth telling the parties in the first procedural order that something along the lines of the following will apply to e-discovery in the case:
    - There shall be production of electronic documents only from sources used in the ordinary course of business. Absent a showing of compelling need, electronic documents are not required to be produced from back-up servers, tapes or other media.
    - Absent a showing of compelling need, the production of electronic documents shall normally be made on the basis of generally available technology in a searchable format which is usable by the party receiving the e-documents and convenient and economical for the producing party. Absent a showing of compelling need, the parties need not produce metadata, with the exception of header fields for email correspondence.
    - Where the costs and burdens of e-discovery are disproportionate to the nature and/or gravity of the dispute or to the relevance of the materials requested, the Arbitrators will consider either denying such request or

ordering disclosure on the condition that the requesting party advance the reasonable costs of production to the other side, subject to further allocation of costs in the final award.

- **Depositions**: Arbitrators should generally make an effort to limit depositions in domestic cases (U.S.) and avoid them in international cases, subject to special need or other good cause shown. One will need to make the "deposition speech" in most preliminary hearings and to try to walk counsel back from the out-size deposition programs that they will often be proposing. Even in cases where the parties are in agreement on extensive depositions, arbitrators still have the option of trying to "jawbone" them down to something more reasonable and to requiring that in-house party representatives be present for a discussion of the time and expense factors attendant to depositions (although this is very rarely done). In many cases, it will be possible to get counsel to agree to a limited number of depositions per side and a limited total number of hours for all depositions taken by each side. However, the depositions issue is no longer as important a threshold issue as it used to me, given the emergence of e-discovery as the worst offender in imposing extraordinary costs and delay on the arbitration process. Paradoxically, there may now be cases where it will be efficient to permit a limited number of depositions as a way to limit e-discovery.
- **Using a discovery master**: This practice is efficient and to be recommended.
- **Parties' cooperation in making non-party witnesses available**: In contemporary arbitration there will often be non-party witnesses whose documents or testimony will be needed in the case. Quite often, such non-party witnesses are associated with one of the parties, often as a consultant, accountant, valuation expert, banker or the like. In probably most such instances, the party will not control such non-parties in a formal or legal sense, but will have influence over them and the *de facto* ability to get them to cooperate in providing the needed documents or testimony, subject, perhaps, to a pro forma subpoena. It is appropriate – and, I would argue, a Best Practice – for arbitrators to advise the parties early in the case that the arbitrators expect parties to exert best efforts to secure the cooperation of such non-parties, subject to the risk of an adverse inference if they fail to do so and it turns out at the hearing that they could have done it. This is a matter worth discussing.
- **Non-Party Subpoenas**: Issues as to non-party subpoenas in arbitration in the United States can be quite complicated. This is such an area of specialized knowledge and there are so many pitfalls in obtaining enforcement of subpoenas in the US courts that I think this area deserves special attention. Specifically, I think it appropriate for arbitrators to advise counsel as to the range of issues that may come up as to non-party subpoenas and give them some guidance as to the form of such subpoenas that may be most effective or at least point them in the direction of bar reports or the like providing wisdom on the subject. I think arbitrators should also exercise some kind of gateway function in terms of making sure that the scope of subpoenas that they sign is reasonably limited to what is necessary in the case and appropriate in the context of arbitration.
- **Substantive motions**: This is a tricky area. The bottom line as to arbitrators' Best Practices in this area comes down essentially to the following: that

arbitrators should permit substantive motions that appear likely to foster the efficient administration of the case and not permit substantive motions that fail to meet that test.

- **Witness statements**: This is an area that deserves attention by arbitrators early on in a case and that should be discussed with counsel at the preliminary hearing. The use of sworn witness statements is a normal practice in international arbitration and increasingly used in domestic arbitration. If witness statements are presented early in a case, they can potentially obviate a fair amount of discovery. On other hand, where there are important issue of credibility, it may be more helpful to the arbitrators to hear the direct testimony live. Overall, it is by no means clear that witness statements save much time or money, although opinions differ on the matter. Arbitrators should encourage sworn witness statements where this approach seems effective and efficient in a particular case and discourage it when it does not.

- **Confidentiality**: This area is a trap for the unwary in that counsel often assume that arbitration proceedings are necessarily more confidential than they typically are. I would suggest that it is now a Best Practice to alert counsel to the limits of the confidentiality that may exist in a case and invite them to stipulate to a broader scope of confidentiality if they so desire.
- **Sanctions**: It used to be extraordinarily rare that there was any need to consider sanctions in arbitration. However, the issue does occasionally arise in contemporary arbitration practice. The important thing is for arbitrators to be alert to recognize it when it does happen and stop it promptly and definitively, failing which, a detailed record should be kept of the matter so it can be dealt with at an appropriate time.
- **Timing and length of the hearing**: It is important to assure that the hearing is scheduled at a realistic time and that enough time is reserved for the hearing. Extreme delays can result, given the schedules of busy counsel and arbitrators, when established hearing dates need to be rescheduled or when more time is needed than had been reserved for the case. The last thing we want to do is schedule too many days and create a self-fulfilling prophecy. On the other hand, given the disadvantages of having to schedule additional days, it will often make sense, after a candid and substantive discussion with counsel as to the likely requirements of the hearing, to build in a little cushion, perhaps an extra day or two, or the like, in the schedule.
- **Evidentiary nature of designated hearing exhibits**: There are various approaches here that make sense. The important thing is to establish a clear rule for each particular case. Perhaps the most usual approach in contemporary arbitration is to establish the procedure whereby all previously identified exhibits that have not been specifically objected to by the opening of the hearing are deemed in evidence as of the opening of the hearing. There is also the alternate approach whereby all exhibits actually used in the hearing are deemed in evidence as of the time of their use or as of the close of the hearing. It also makes sense to be clear early on, after consulting with counsel, as to whether documents relating solely to credibility need to be identified and marked in advance.
- **Having as much of the case briefed on a pre-hearing basis as possible**: While there are obviously cases where extensive post-hearing briefing is necessary and helpful, it can often be efficient to have the parties brief as much of their case on a pre-haring basis as possible, making it possible after the hearing to have only limited and relatively quick

briefing or oral argument, getting the case to the panel quicker when it is fresh in their minds.

- **Summaries, Chronologies and *Dramatis Personae***: It can be quite helpful to have such materials in complex cases and well-worth asking counsel for them.
- **Stipulated facts**: These can be great if the parties want to embark on the effort, but it is often more efficient to have each side submit its own proposed factual findings or the like.
- **Opening statements using PowerPoint**: These can be quite helpful, but it is important to remember to require parties to exchange them in advance of the hearing, lest disputes about them take up valuable hearing time.
- **Disruptive counsel performance at the hearing**: As noted above, it is important for arbitrators to recognize trial abuses promptly when they are occurring and deal with them promptly.
- **Rules of evidence**: It is sometimes worth reminding counsel that, while the rules of evidence are not generally binding in arbitration, there are reasons for such rules – and that often evidence, such as extreme hearsay or extremely leading questions on key issues, that is problematical under the rules of evidence will also be lacking in credibility.
- **Heuristics**: Arbitrators are now generally familiar with recent psychological studies and popular books about heuristics, mental shortcuts that our minds take in assimilating information and making judgments that can produce distorted thinking. Contemporary arbitrators should be alert to red flags for problematic heuristics and take compensatory steps to correct for them.
- **Mediation window**: If arbitration is to be at least competitive with litigation, if not better, it must offer similar opportunities for settlement as litigation. I think it can be said that it is a contemporary Best Practice for arbitrators to build a time into the schedule for the parties to consider whether they want to engage in mediation. Any such effort by the parties should generally take place independently of the arbitrators, but their fostering this possibility for the parties is a service to the process of arbitration.
- **Motions to disqualify adversary counsel**: In some jurisdictions, including New York, such motions are reserved for decision by courts. This is such an esoteric area of arbitration practice that it is, in my view, appropriate for arbitrators to advise counsel of it when the issue comes up. I think it is appropriate, as a matter of arbitration practice, for arbitrators to entertain such motions, if the parties give their informed consent for the arbitrators to do so.
- **Choosing counsel who will create a conflict with an arbitrator**: This is a current hot issue. If it comes up, the ordinary practice of arbitrators would be to have the parties brief it, whereupon the arbitrators can decide it under the applicable rules and law**.**
- **Posing questions during the hearing**: When testimony is unclear, it is certainly fine for arbitrators to ask questions for clarification, and it will often make sense to do this as the testimony unfolds. However, subject to the needs of the particular case, I think it is generally preferable for arbitrators to refrain from asking extensive questions until counsel have completed their examinations. It is particularly important, it seems to me, for arbitrators, absent special circumstances, generally to refrain from asking questions that are outside the scope of the case as the parties have framed it.
- **Form of award**: It is generally good practice for arbitrators to have an open discussion with counsel as to the advantages and disadvantages of the different kinds of awards and

then, subject to the needs of the particular case, to do the form of award that the parties want when they are in agreement.

- **Presenting one's case as to costs and attorneys' fees sooner rather than later**: There are real efficiencies in having the parties tee this issue up for resolution in their final post-hearing papers, so it can be dealt with by the arbitrators in the final award when they decide the substantive issues in the case. The alternate approach of having the arbitrators only issue an interim award on the merits and thereafter address the attorneys' fees issue runs the risk of having that part of the case take on a life of its own, causing unnecessary delay and expense.