The Pre-Hearing Conference in Arbitration – A Step by Step Guide

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FINRA (Financial Industry Regulatory Authority) calls it the *Initial Pre-Hearing Conference* in its securities arbitrations, and *AAA* (American Arbitration Association) the *Preliminary Hearing*, but despite the subtle differences in nomenclature this pre-trial conference with counsel, the arbitration panel and the case manager, usually by phone and usually without the parties present, is a critical part of the process because it lays the foundation for all that will follow. It is not just about setting dates, and if that is all that is accomplished an opportunity has been wasted to establish the proper tone for the subsequent proceedings and for the arbitrators to take control of and begin to manage the process. This article will describe the customary procedures in what I will call the Pre-Hearing Conference herein, and some do's and don'ts for counsel and arbitrators to help ensure an arbitration that respects party choice and is fair and attentive to conserving time and money where possible.

Who Should Attend

Especially in larger commercial cases, General Counsel or senior in-house counsel for each of the parties should be present at the Pre-Hearing conference. This is so because many decisions will be made that affect the costs to be incurred and the speed with which the matter will proceed and the parties have a real interest in those subjects. The presence of in-house counsel also commits the client more directly to the philosophy to be discussed and hopefully subscribed to by everyone present that arbitration is *not* litigation, and the objectives of cost and time efficiencies as well as fairness and party choice are to be respected. At best, again for the larger cases, this should done in person because developing agreement and cooperation to the extent possible among counsel and the parties and getting a commitment to achieving the shared objectives that should be articulated at the Pre-Hearing Conference is much better accomplished face to face than by phone.

The *Protocols for Expeditious, Cost-Effective Commercial Arbitration* published by the College of Commercial Arbitrators in 2011 (*CCA Protocols* herein) devote eight pages to recommended choices for business users and in-house counsel to ensure cost and time saving in dispute resolution. They note, "Sophisticated in-house counsel know that it is absolutely essential for business principals and senior in-house counsel to stay actively involved throughout the dispute resolution process … In-house counsel should attend the first case management conference as well as all important subsequent conferences and hearings during the arbitration process in person or by telephone, should require periodic status reports from outside counsel, and should partner in the management of the arbitration rather than relinquishing such control to outside counsel … In-house counsel are a vital part of the effort to distinguish the tone of an arbitration process from that of litigation." (At pages 29-30).

Introductions and Preliminaries

After roll call has been taken and the parties have introduced themselves it is appropriate for the chair to ask the panel if there are any disclosures they have to make in addition to those previously made on any Oath and written disclosures that may have been filed. After that the FINRA script has the chair ask if counsel accepts the composition of the panel, and I believe that is good practice in all cases, namely to get an affirmative representation on the record from counsel that they have no problem with the designated arbitrators proceeding, notwithstanding any disclosures made.

In FINRA cases the panel will usually have the pleadings and often other documents to review prior to the Pre-Hearing Conference so it will have some idea what the controversy is all about. That is usually not the case with AAA and private matters where the panel might have only a Demand for Arbitration, if anything at all. In those cases it is always a good idea to ask counsel for the moving party (Claimant herein) to briefly review the cause of action that has been asserted (what the AAA calls *Statements of Claims and Issues*) , and to ask the Respondent to answer. The FINRA outline then has the arbitrators confirm the

documents they have received, and I think this is also good practice. Occasionally it turns out that the panelists do not all have the same materials and this is a good time to find out and get everyone on the same page.

Dates

The AAA *Preliminary Hearing Checklist* then proceeds directly to establishing dates for the hearing. The FINRA check list does the same, but after having the chair remind the parties of its highly successful, voluntary mediation program. My practice at this juncture is to ask counsel if they have had a discussion about dates in preparation for the call. Often they have, about trial dates and/or discovery dates, and in that case I hear them out. It is always best for counsel to confer privately before the call and to agree where possible on how they would like the arbitration to be conducted. Asking if they did that, and maybe saying a few words to encourage that kind of dialogue between and among counsel as we proceed, is always useful. The best way for them to protect themselves against arbitral rulings they might not like is to work it out themselves if they can. If they have not talked I ask if they want to discuss dates for exchanging information first, and then trial dates, or the other way around.

I do it this way to see what the parties have in mind and to let them steer the discussion based on what is most important to them. Some start talking about the need for prompt trial dates and may suggest a number of weeks or months out; others are more concerned with getting on with discovery and setting dates for the filing of requests, subpoenas, and Motions to Compel. This is the parties' process, after all, and letting them direct the discussion at the Pre-Hearing Conference does not at all mean the arbitrators are giving up control but, rather, that they are listening to the concerns of counsel to help them structure a calendar that will accomplish their objectives.

Discovery

"The expansion of discovery stands out as the primary contributor to greater expense and longer cycle time (in arbitration)" concluded a poll of participants in the 2010 National Summit on Business to Business Arbitration (*CCA Protocols*, at

page 6). Historically discovery in arbitration was not an entitlement beyond the exchange of the most basic documents between the parties. As years have gone by and arbitration is increasingly used for larger commercial cases, discovery has increased accordingly, and institutional rules have developed to include required or optional Information exchanges (e.g. see *AAA Large and Complex case Procedures*; *JAMS Comprehensive Rules*; *FINRA Discovery Guides*). The FINRA Initial Pre-Hearing Conference script calls for discovery cut-off dates, responses, and a hearing date to handle discovery disputes, with dates to be specified for submissions in connection with that hearing. The AAA Preliminary Hearing Outline specifies "Exchange of Information" and in one sentence discusses resolving issues and establishing a method and schedule for exchanges and production, including reports from experts if needed. AAA Commercial Rule R-21, says the arbitrator may direct the production of documents and other information "consistent with the expedited nature of arbitration."

Managing the discovery process is absolutely essential for a just, expeditious and comparatively inexpensive arbitration. The panel has to control the process to stop the increasing "litigitization" of arbitration and to make sure proportionality is achieved so the parties get what they need and no more, and at a reasonable cost in terms of money and delay. The *CCA Protocols* note, "Discovery is the chief culprit of current complaints about arbitration morphing into litigation." (At page 22). Discovery in arbitration is generally much more limited than under the Federal Rules of Civil Procedure or state discovery rules, and an out of control discovery process is certain to derail any arbitration. Limits need to be discussed and agreed to at the Pre-Hearing Conference.

If it is a large case the parties can be encouraged to meet and confer on limits themselves and come back with recommendations to the panel. If subpoenas have to be used there must be a limitation on how many for both sides; if depositions need to be conducted to save time at trial they also should be limited in both number and in the time allotted for each (or overall). For example, JAMS Rule 17, "Exchange of Information," calls for each party to take only one deposition with additional depositions determined by the arbitrator based upon "reasonable need." The JAMS *Discovery Protocols for Domestic, Commercial*

Cases (herein *JAMS Protocols*) says each side may take only 3 depositions which shall consume no more than a total of 15 hours; there are to be no speaking objections at depositions except to preserve privilege; and the total period for taking depositions shall not exceed 6 weeks, with discretion for the arbitrator to change the numbers as circumstances dictate. In a recent AAA commercial case I chaired the parties agreed at the Preliminary Hearing to a limitation of no more than five depositions and a total of fifteen hours of total deposition time, with all of them to be completed by a date certain. Similarly, the New York State Bar Association *Guidelines for the Arbitrator's Conduct of the Pre-Hearing Phase of Domestic Commercial Arbitrations (NY State Guidelines* herein*)* calls for soliciting agreement on language such as the following:

> Each side may take *** discovery depositions. Each side's depositions are to consume no more than a total of *** hours. There are to be no speaking objections at the depositions except to preserve privilege. The total period for the taking of depositions shall not exceed *** weeks. (At page 14)

It is usual for the Chair to handle any discovery disputes and to rule on Motions to Compel, and for a date to be fixed at the Pre-Hearing Conference for that to be done. It is important that a careful balance be struck and that concerns about cost and time do not unfairly restrict a party's ability to get relevant and material information that will be essential to its case. Moreover, there are no hard and fast rules applicable to all cases, and one size does not fit all. The panel must consider the unique circumstances of the case before them and work with the parties to tailor the discovery limitations in a manner that is fair and equitable and achieves the cost and time objectives that are appropriate. (See *NY State Guidelines*, Exhibit A on *Relevant Factors in Determining Appropriate Scope of Arbitration Discovery*, pages 19 – 21).

In the troublesome area of electronics documents (ESI) there should be agreement that absent compelling reasons, production will be limited to sources in the ordinary course of business, not back-up information; that only generally available technology will be used; and that where the cost and burden of production is great the arbitrator will consider cost shifting to the requesting

party, subject to the allocation of costs in the final award (see generally JAMS *Protocols for E Discovery,* and *NY State Protocols* at pages 9-11). Here too the concept of proportionality is critical. "The burdens and costs for preservation of potentially relevant information should be weighed against the potential value and uniqueness of the information." (See *The Neutral Corner*, FINRA, Volume 2-2011 on *Electronic Discovery)*.

Motions

Sixty five percent of those polled at the National Arbitration Summit by CCA concluded that excessive, inappropriate or mismanaged motion practice was "moderately" to "very much" responsible for failing to meet their desires for arbitration efficiency and economy (*CCA Protocols*, at page 8). Like discovery, motion practice must be managed and controlled by the panel.

Some motions, such as those based upon statutes of limitation, release, contractual limits on damages, statutory remedies and other legal limitations on causes of action may be entirely in order early on if there are no major questions of fact to be decided. They would potentially save time and money by limiting the scope of the litigation and disposing of matters that advance the case to resolution more quickly. However, if there are factual issues which require extensive discovery or testimony, and which would require the arbitrators to reserve decision perhaps until the end of the trial, such motions should not be permitted.

Under the Revised Uniform Arbitration Act (RUAA) it is clear the arbitrators have the power to manage the process including the ability to dispose of claims by motion as long as they give the opposing party notice and a reasonable opportunity to respond, either by legal argument or by showing there are material issues of fact in dispute.. Most institutional rules also either expressly or by implication confer that power on the panel (See generally *AAA Handbook on Arbitration Practices*, Chapter 15, *The Use of Dispositive Motions in Arbitration* – herein *AAA Handbook* - pages 192-4; and *CCA Guide to Best Practices in*

Commercial Arbitration, Second Edition, 2010 – herein *CCA Guide* – Chapter 7, *Motions*).

It has been suggested in the *CCA Guide* that if motions are to be considered they should be fleshed out at the Pre-Hearing Conference, and not be presented without advance permission from the arbitrators. Oral argument without written submissions is preferred, as well as requiring counsel to confer about whether the motion is really necessary. *JAMS Protocols and NY State Protocols* require any party wishing to make a dispositive motion to first submit a brief letter, not to exceed five pages, explaining why, with the other side having five days to respond. Then the panel decides, and if they go forward with the motion they would place page limits on the briefs and set an accelerated schedule for argument, if any, and disposition. Some common types of motions include those for preliminary relief or interim measures; discovery; bifurcation; motions in limine (not favored under most circumstances); for sanctions, or continuance. In most cases the criterion is whether considering them will reduce costs and streamline the process.

FINRA rules on dispositive motions have been very restrictive since early 2009 when the SEC approved new rules significantly limiting their use. For dispositive motions filed before the conclusion of a party's case in chief the rule, among other things, limits the grounds to: 1. the non-moving party has signed a settlement and release; 2. the moving party was not associated with the account, security or conduct at issue; 3. the claim does not meet the criteria of the eligibility rules. (See FINRA Rule 12504. Motions to Dismiss, and 12206. Six Year Eligibility Rule). Not surprisingly, the filing of such motions has decreased dramatically (66% in the first eighteen months) but, interestingly, has not decreased the percentage of dispositive motions ultimately granted. FINRA speculates that the provision of sanctions in the rule against those who engage in abusive motion practice may have had something to do with the decrease (See Course Materials for PLI (NY) *Securities Arbitration 2011*, pages 74-75).

Hearing Preparation

The Pre-Hearing Conference must also set dates, location and the first day starting time for the hearing, and for the exchange of information regarding witness and exhibit lists, usually 15 to 20 days before the first day of the hearing. It is good practice to specify whether business or calendar days so everyone knows exactly what is required. As to the hearing dates, it is prudent, after asking counsel how many days they will need and reaching agreement, to consider adding one extra day for safety and/or for the panel to meet and have an initial conference on the case. This is especially important if the panelists are from different cities. You don't want an adjourned hearing if you can avoid it because it is very disruptive to an orderly trial and decision making process. On the other hand, because work often expands to fill the time available, it is important that counsel understand the dates are firm and they will be held to their estimates of time. Moreover, it should be made clear that the trial dates will not be changed unless there is good cause shown, and some arbitrators and providers specify in their agreements that the neutrals will be paid in full for scheduled time if a cancellation is not requested and approved within thirty or more days in advance.

Most Pre-Hearing Checklists specify that witness lists must include the name and title of the witness and a short summary of anticipated testimony, together with a CV if it is an expert. Exhibits have to include everything that is to be offered at the hearing (reports, summaries, diagrams and charts, says the AAA Checklist), pre-marked for identification. The parties should be directed to confer on preparation of joint exhibits as well.

In my experience, though some arbitrators and counsel disagree, I find a Stipulation of Uncontested Facts to be unnecessary and rarely ask for it unless counsel or my fellow panelists think it is desirable. It occasionally leads to contentious disagreements between and among counsel, and in my view has limited value, and often requires a lot of work and time by counsel that can be put to better use. The panel usually learns very quickly what facts are disputed and what are agreed without such a Stipulation.

While FINRA provides for digital recording of hearings, in other fora there must be a discussion of whether any party desires and is prepared to pay for a stenographic record. In many instances the decision on that subject is reserved until closer to trial, and in that case it is good practice is to specify a firm date by which the parties will discuss the subject and advise the panel.

The form of award should be discussed and definitions for each, Standard, Reasoned, or Findings of Fact and Conclusions of Law, should be reviewed by the chair to make sure everyone knows exactly what they will be getting.

FINRA has voluntary direct communication provisions in the Code of Arbitration Procedure permitting written materials to be exchanged between the parties and the arbitrators without going through a case manager. (See Rule 12211). The form of Order specifies the types of documents that may be sent and how it shall be sent, and the procedure can be terminated by any party or arbitrator at any time.

Case Management Order

The Pre-Hearing Conference results in a *Case Management Order* that records the agreements reached. Samples are attached from FINRA and AAA. I think it is good practice for the Chair to circulate a form of order to the co-panelists for review and comments, and when it is agreed it is forwarded to the Case Manager for distribution to the parties (unless it is a FINRA case where direct communication has been selected). If the Order specifies a time line extending out over many months, the panel may want to consider scheduling an additional Pre-Hearing Conference or two if needed to check on progress and make sure things are on track.

Closing Comments

This article and most contemporary commentary on best practices in arbitration emphasize the need for what has been characterized in a number of places as “muscular” management by the arbitrators to make sure the objectives of party

autonomy and choice are balanced by those of fairness, and cost and time control, and that a litigation mind-set does not take control of events. The place to lay the foundation for that is the Pre-Hearing Conference, and then to follow up on it during the hearings themselves. While this article is not about management of the hearing, it is clear that the arbitrator has the ability to assert control if necessary to keep counsel on track regarding deadlines and commitments made during the Pre-Hearing Conference. As noted in the *NY State Guidelines*, "The arbitrator has many tools that can be used both to enforce the fairness of the proceedings and to prevent disruption in the rare case. Those tools may include, for example, the making of adverse factual inferences against a party that has refused to come forward with required evidentiary materials on an important issue, the preclusion of proof, and/or the allocation of costs … it may be possible to award attorneys' fees and in extreme cases other monetary sanctions against an obstructing party … and possibly even against obstructing counsel. Sanctions may even include the resolution of a claim or defense against a party." (At pages 12 and 13).

While at the Pre-Hearing Conference the theme should be one of cooperation and respect between and among counsel and the use of "meet and confer" to resolve issues if they can themselves, they must also be reminded that dates are firm and the agreements reached in the Case Management Order are to be kept unless there is good cause shown. If necessary, and usually it is not this early in the case, they can also be reminded of the possible sanctions they will face if they do not live up to their commitments.

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