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Legal Alert

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Richard K. Mahrle
rmahrle@gblaw.com
602-256-4433

Preventing Arbitration from Becoming Litigation

The goal of arbitration is to provide an expedited, inexpensive, and private method for resolving disputes using an arbitrator who has significant experience in the legal setting in which the dispute arises. However, if the arbitrator selected does not properly manage the arbitration process, then the accelerated and less expensive advantages of arbitration can be lost.

In recent years, users of arbitration services have complained, and rightfully so, that arbitration has started to look more like traditional litigation, with extensive discovery, which substantially increases costs and extends the time for resolving the dispute. These concerns can be addressed by selecting an arbitrator who will mange the arbitration process to prevent the arbitration from taking on all of the characteristics of being in court.

One must start from the proposition that each arbitration is unique. What will work for one dispute will not necessarily work for another.

In order to determine how much and what discovery to allow, the arbitrator needs to look first at the arbitration agreement to determine whether it addresses discovery. Most arbitration agreements are silent on the topic, giving the parties and the arbitrator leeway in fashioning the discovery process.

Absent contractual discovery guidance, the arbitrator needs to obtain an early understanding of what the case is about. Is the case primarily a factual driven dispute, or will legal issues tend to control? What does the witness landscape look like? How much money, or what rights, are in dispute?

There may be a few cases, either because of the accelerated hearing rules of a service organization such as the American Arbitration Association, or just because of the nature of the case, in which there will be no prehearing "discovery" except for the exchange of exhibits to be used at the hearing.

However, in the majority of cases, limited discovery will assist in narrowing the issues and will expedite the hearing process as well. The key word here is limited. Almost all arbitrators require that relevant documents be exchanged and will manage that process effectively if disputes arise. If the contested issues warrant it, limited depositions can be helpful in expediting the hearing. Depositions of the principal protagonists are usually appropriate. If experts are going to testify, depositions of the experts are usually allowed, or as an alternative, the experts could be required to produce detailed reports. Of course, the problem with detailed reports is that disputes may arise over whether the report is detailed enough.

In determining what discovery is appropriate for a given dispute, the arbitrator and the parties need to work together with two goals in mind. 1) What does each side need in order to understand the other side's position and 2) will the discovery allow the hearing to proceed more efficiently and effectively? If those goals are not being satisfied, the proposed discovery is probably unnecessary.

By thinking creatively, arbitration also allows the parties to tailor the hearing process to better present their positions.

To show how this can work, assume the arbitration involves a claim by a general contractor against an owner over 40 unpaid change orders. If the parties were in court, the general contractor would present evidence on all 40 change orders. Then, after everyone has forgotten the details on the first 25 change orders, the owner would present evidence on change orders 1 to 40 about why it does not have to pay for these change orders. The general contractor would then reply several days later.

In an arbitration hearing, the parties could present their positions one change order at a time, or similar change orders could be grouped together. So, for change order 1, or for the related group 5, 7, 11, 14 16, the general contractor could present its position, the owner could respond, and then the contractor would reply. As a result, the arbitrator would have everything needed to resolve the dispute on that change order, or group of change orders, while all of the information is fresh in the arbitrator's mind. The hearing would then be ready to move on to the next change order.

Cases that turn on expert testimony can also be more effectively submitted by having both experts attend the hearing at the same time to discuss with each other, the parties' counsel, and the arbitrator, the issues that need to be resolved.

If modifying the standard method of presentation that one would normally be required to use in court will make it more efficient for the arbitrator to understand the dispute and resolve that dispute in less time, everybody wins.

In closing, allow me to offer several additional suggestions for making arbitration the fast and inexpensive dispute resolution process it is supposed to be.

First, use only one arbitrator, not a panel of three. Using three arbitrators will more than triple the cost for the arbitrators' fees. Scheduling with three arbitrators can also be a nightmare.

Second, pick an arbitrator familiar with the legal context of the dispute. Using an arbitrator who has significant experience in construction or employment disputes, for example, can expedite the hearing process because the arbitrator is familiar with the basics.

Third, select an arbitrator who will take a lead role in managing the arbitration in a way that allows for a fair and reasonable hearing process, but that does not turn the arbitration into nothing more than litigation using a private judge.