Case Management and Cost Control for Commercial Arbitration

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I. Introduction.

Arbitration has successfully provided a forum for resolution of business to business civil disputes for many decades. Arbitrations should ordinarily be faster and less expensive than litigation in the courts, while providing processes and results that are at least as fair. Most of the concerns about modern day arbitration in business to business cases focus on cost and delay generally and, more specifically, on cost and delay incidental to discovery and motion practice. Some of those criticisms are appropriate in some cases, and some are not. So, what's to be done?

Avoiding these problems is the duty of not only arbitrators (and the service providers who write the rules and provide administration), but also parties and counsel. Fortunately, there are workable solutions to issues of cost and delay where arbitrators, parties, and counsel really want to address them.

This paper provides an outline of some case management tools which can assist parties, counsel and arbitrators in achieving a timely, less expensive resolution which is fair both in process and outcome. These approaches are especially focused on business to business arbitration but most apply in other kinds of cases as well. Before getting to those ideas, I will take a few paragraphs to describe two important recent developments related to arbitration practice that provide some potentially significant context to the overall discussion.

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[1] The writer is a full-time arbitrator and mediator affiliated with JAMS. He has arbitrated or otherwise adjudicated over 400 cases and mediated over 1000 cases. This article was submitted at the ABA program, "Seventh Annual Arbitration Training Institute," June, 2012, Philadelphia, where Mr. Thorpe was a faculty member. Earlier versions of this article were submitted by Mr. Thorpe in connection with the ABA program, "Fifth Annual Arbitration Training Institute," July, 2010, Washington, D.C., where Mr. Thorpe was co-chair and a faculty member, the Georgia Corporate Counsel Institute, December 10, 2010, Atlanta (faculty), and the ABA "Sixth Annual Arbitration Training Institute," June, 2011, Los Angeles (faculty).

II. Recent Developments related to Arbitration Practice.

One of the most significant developments in recent years related to commercial arbitration practice is the production of The College of Commercial Arbitrators Protocols for Expeditious, Cost-Effective Commercial Arbitration: *Key Action Steps for Business Users, Counsel, Arbitrators & Arbitration Provider Institutions.* (Hereinafter "the Protocols.") (The writer is a Fellow in CCA.) The Protocols are contained in the materials for the Institute and at http://www.thecca.net/CCA_Protocols.pdf.

The Protocols were produced following a "Summit" held by CCA in Washington, D.C. in October, 2009, to which CCA invited representatives of four arbitration constituencies: users (mainly in-house counsel), outside counsel, arbitrators and providers. The full-day Summit provided for a free exchange of ideas on concerns about current arbitration practice in business to business disputes, focusing heavily on issues related to cost and delay. Subsequently, CCA issued the Protocols in the fall of 2010. The document addresses the concerns presented at the Summit and proposes nearly 50 "protocols" for the four constituencies intended to improve the quality and effectiveness of arbitration among each of the constituencies. The issuance of the Protocols is fairly recent and I anticipate they will gain some traction with these four constituencies in coming months and years.

JAMS has separately and recently addressed issues of cost and delay in commercial arbitration in at least two visible ways. First, in January, 2010, JAMS issued the JAMS Recommended Arbitration Discovery Protocols for Domestic, Commercial Cases. These protocols provide guidance to arbitrators, parties and counsel on managing discovery and motion practice in a way to produce a cost-effective and fair process. The JAMS protocols are contained in the materials for the Institute and at http://www.jamsadr.com/arbitration-discovery-protocols/. Second, effective October 1, 2010, JAMS has provided for Optional Expedited Procedures for parties who agree to follow them. These optional procedures are available for parties who want a reasonably quick hearing with limited discovery and limited use of dispositive motions. JAMS Comprehensive Rules 16.1 and 16.2 can be found in the Institute materials, and at http://www.jamsadr.com/rules-comprehensive-arbitration/.

III. Arbitration Management Practices. With these recent practice developments as background, here are some ideas on how parties, counsel and arbitrators can effectively manage arbitration cases to get them resolved in a fair but cost-effective way.

A. Solutions to cost and delay issues in arbitration cases can be addressed by agreement of the parties; either an *ad hoc* agreement to arbitrate an existing dispute or a pre-dispute arbitration clause found in a transactional document can provide similar solutions. In any of these agreement parties can, for example, address limits on how much and what kind of discovery can be taken, on how soon an arbitration hearing must occur, and/or on how long an arbitration hearing can last or how many hours each party may use for direct and cross examination of witnesses. An arbitrator should take those guidelines as very nearly written in stone. On the other hand, if the parties or their counsel come to an arbitrator with an agreed hearing date 18 months away, following a leisurely exchange of some interrogatories, document discovery and a handful of depositions, the arbitrator will also take that agreement very seriously too. In recent cases, I have found myself more and more pushing back when parties start out in a case looking to have a hearing more than 6 to 9 months out (depending , of course, upon the genuine complexity of the case and other needs of parties and counsel.)

There are at least two important governing "truths" here:

- First, "It is the parties' case," and their fundamental agreements about how to manage the case (either in an arbitration agreement or in a less formal agreement during the actual arbitration itself) will ordinarily be respected by the arbitrator.
- Second, as goes your home construction project, so goes your litigated dispute (whether in arbitration or the courts): ***the longer it takes the more it costs.***

B. In virtually all arbitration cases, **one of the key tools for managing the case is an initial scheduling conference or case management conference**. *E.g.*, JAMS Comprehensive Rule 16 ("Preliminary Conference"); AAA Commercial Rule R-20 ("Preliminary Hearing.") Interests of economy and convenience often require that these meetings occur by telephone, but when feasible it is worth considering an in-person meeting, and one where parties participate (at least by telephone.) It is worthwhile for the Arbitrator to emphasize to counsel and parties the potential significance of this event (and an in-person meeting with party participation tends to help make this point.) The Preliminary Conference is an area of arbitration practice in which superficially it seemingly makes sense to save time and money by emphasizing speed and efficiency and typically doing as much by telephone as possible; in fact, the long run efficiency and effectiveness of the entire case may benefit from devoting some extra time and attention to this part of the process including an in-person hearing.

C. The Preliminary Conference should cover everything that reasonably bears on the appropriate conduct of the case, including the scheduling of a final hearing, a plan for

discovery, any issue about arbitrability/jurisdiction, any issue about the identity of parties or the status of pleadings and amendments, and exchange of exhibits and witness lists. Every scheduling conference should be followed by a written scheduling order memorializing rulings. Most such rulings are based upon agreement and the order should so reflect. A final hearing in the case should almost always be set at this first scheduling conference. If the initial scheduling order does not set a final hearing in the case, I suggest that everyone involved needs to have a very clear understanding why not, and it may be worthwhile to state the reason in the initial scheduling order.

D. One of the keys to effective management of an arbitration by the arbitrator and everyone else is to get an early understanding of how the parties come to be in the arbitration, i.e., **under what arbitration agreement and/or court order does the case proceed**. The answer to that question should be spelled out in the initial scheduling order, along **with identification of the applicable arbitration rules**. If there are disputes about these issues, the dispute ordinarily should be resolved before much else occurs in the case. (The need to resolve arbitrability/jurisdiction issues actually is one of the few legitimate reasons, not to schedule a final hearing at the Preliminary Conference.)

One reoccurring question that may arise as to arbitrability is this: in this arbitration case pending in the forum of Provider A, does the arbitrator have jurisdiction over a claim calling for application of the rules of Provider B? Answer: it depends. Many arbitration clauses call only for application of certain rules and not necessarily for filing in a particular forum. Under certain clauses this may allow for the parties to bring a case with a "AAA clause" before JAMS, or vice versa. This concept might also help to sort out confusing arbitrability questions in multi-party, multi-claim cases, involving multiple arbitration clauses applying differing arbitration rules.

E. Similarly, in the Preliminary Conference the **arbitrator should identify and establish a mechanism to resolve any issues about parties and pleadings**. Often the issues related to parties and arbitrability are related: someone may complain that a party to the case is not a proper party under the applicable arbitration agreement, OR, a party or non-party may want someone added to the case who is not a party to the arbitration agreement. Case law recognizes a number of bases upon which a non-party to an arbitration agreement may be made a party to an arbitration. *E.g., Arthur Anderson, LLP v. Carlisle*, 129 S.Ct. 1896, 1902 (May 4, 2009) ("traditional principles of state law allow a contract to be enforced by or against nonparties to the contract through assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel.") (Quote marks and citations omitted.)

Moreover, under *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), and many dozens of cases following it, where parties have agreed to the application of arbitration rules which allow the arbitrator to decide arbitrability and jurisdiction issues (such as JAMS Comprehensive Rule 11 and AAA Commercial Rule R-7), those agreements will be enforced.

F. Increasingly, parties and counsel are coming to realize that **full-blown, Federal Rules discovery is not always workable** even in the courts, let alone in arbitration. Parties are sometimes said to pursue every possible avenue of investigation and discovery due to a variety of motivations. Cynics will say counsel do so because it is in their financial interest to do. A realistic and less cynical view is that parties and counsel take this approach to discovery in arbitration for at least a couple other reasons: a. they want to win and they want to do whatever is needed to accomplish that goal (just like they are accustomed to doing in traditional litigation in the courts); and, b. this is the way they have learned to do things through decades of practice, tradition and law under the Federal Rules of Civil Procedure and similar state rules. Everyone involved in an arbitration (the arbitrator, counsel and parties) needs to step back, take a deep breath, and plan for discovery in a sensible, cost effective way -- which may or may not be in accord with the way they would pursue the case in court. Where parties legitimately want to pursue extensive discovery because of the nature of the dispute (complex set of facts with documents or testimony needed from numerous witnesses, significant financial consequences, major principle at stake, etc.), an arbitrator usually will and should permit them to do so. Remember: "It is the parties' case." But an arbitrator also may act as a voice of reason in any case by questioning the extent of discovery needed and assisting the parties and counsel in planning for discovery to take place in a sensible, effective, and economical manner.

It is also worth pointing out an important tension here surrounding how to conduct discovery in an arbitration: although it is important to limit discovery in a way to make the arbitration hearing cost-effective—in the end the most important goal is to have a fair hearing, and the achievement of that goal often requires some discovery tailored to the particular case. And, further, even from a pure management perspective, it is not productive to eliminate all discovery, and then double or triple the length of the final hearing while counsel inefficiently bumble through deposition-like questioning of witnesses they have never seen or heard from before. (I have seen that movie, and trust me, it did not win any awards.)

G. Discovery disputes in arbitrations should not be allowed to fester. An arbitrator should adopt a procedure for parties to raise, and for the arbitrator to resolve, discovery disputes as soon as the parties find they cannot resolve them on their own. A brief letter from each side and/or a short telephone hearing with counsel can often resolve in a few days issues that might take

several weeks or even months of motion practice in courts. *See* the form scheduling order attached at Attachment E. Arbitrators often can in effect "mediate" many difficult issues relating to discovery if they are given an opportunity to intervene before the issues spin out of control.

H. Sometimes it is useful to "stage" discovery. Every case is unique, but as an example, in some cases it can be useful to exchange significant documents, perhaps answer a few interrogatories and take one or two party depositions—and then STOP, take another deep breath, and then evaluate carefully what remains to be done. An arbitrator can assist in this approach by simply ordering this limited discovery in a Preliminary Conference, followed by a further scheduling conference two or three months later to schedule additional discovery if any is needed.

I. Sometimes it can be useful to "stage" not only discovery but also decision-making in a case. In some cases there are threshold issues which need to be decided but which perhaps cannot be decided as a matter of law on a motion to dismiss or summary judgment standard; these include issues like statutes of limitations and construction/scope of an arbitration agreement. These issues sometimes raise fact questions to be decided by the arbitrator, but it may be a disservice to both sides to let the parties take all of their discovery, prepare for and put on a week-long hearing, and only in an interim or final award, find that all or a substantial portion of the case has been thrown out based on a fact finding which could have been made months earlier and before many tens or hundreds of thousands of dollars were invested in the case.

J. Motion practice in arbitration is certainly not unimportant—BUT it **should be different from motion practice in courts**. Dispositive motions in a court case can eliminate claims or defenses which should not get to a jury, with resulting savings in time, expense, and prejudice, plus added clarity in the trial. In an arbitration the arbitrator will decide all claims and defenses –AND decide which claims and defenses if any do not pass legal muster. And, the arbitrator will have to evaluate a claim or defense thoroughly before disposing of it whether on the evidence or as a matter of law. Unless a dispositive motion is aimed at eliminating the entire case or a claim or defense that will consume substantial added time in a hearing, it may not be a good use of resources to file it. Arbitrators should **consider requiring parties to provide a brief written explanation of any motion they expect to file including especially a dispositive motion, and in effect require the parties to get permission to file the motion**. This mechanism can enable parties to avoid the expense involved in filing and responding to motions which the arbitrator may resolve in a brief phone call or which the arbitrator does not believe will be worthwhile.