

# Managing, Expediting Arbitration

BY TOM ARNOLD\*



Complex cases involving arbitrators require well-thought-out, well-drafted provisions that protect client, corporate dollars

**G**ood arbitration practice, particularly in the complex case, is a lot more sophisticated than copying a clause from the top of somebody's rules and letting things happen what will happen.

If in the more complex case, like patent infringement suits tend to be, you copy an arbitration clause from somebody's rule book, you stand a big chance of being highly frustrated by getting a long delayed and very expensive arbitration when you thought you were contracting for a quick and inexpensive procedure.

As an example of practicalities in the complex international commercial dispute, the choice of:

- Three arbitrators,
- A named award, and
- The rules how it existence of any arbitration agency, will almost guarantee you over a year longer in time and over \$100,000 added expense, than the choice of:
  - A single arbitrator
  - A named award without reasons, and
  - An "open-ended" discussed below but not even found in anybody's rules.

Failure of an arbitrator to agree should be just cause for either party to strike that arbitrator whereby the parties or agency helping them will select another.

You may or may not accept the last three conditions. But, when you draft your contract to arbitrate a complex case, you should know the last of those tremendous impact on arbitration efficiency. Adapting them has very little if any debilitating impact on quality of the ar-

bitration. Meeting them is much time and money saved at considerably little loss of value.

## THE PROBLEM

Fundamentally the cost of resolution of any fairly complex dispute is an exact function of the time taken to resolve the dispute, as it is of the number or nature of issues involved. Cut the time involved in half, and very likely you save 40% of the costs.

For changing the name of a forum agrees from "judge" to "arbitrator" does not change the prosecution steps. When he has a big, complex case he wants to carry out a big unit of time to work on it. Whether he is called "judge" or "arbitrator," a steady stream of smaller, easier papers flow across his desk, preempt his time, so that he never gets that big unit of time he wants for this complex case, for the papers sit on the corner of his desk, often filed and sometimes even entered in his docket priority list, if he has one. But they nevertheless make it so time and long after his reticence has reached the level of tears in his eyes.

My office has had a score of court cases take years after close of the evidence — more than seven years in one case — without judgment being entered. I participated in an international arbitration panel by a case in which the three arbitrators did not get an award out within a year of the close of evidence. Inevitable, but common in complex cases. One dilatory arbitrator delays them all. In court cases, there is no control for that, and very little control of control procrastinating an-

other case to handle either on a recorded docket.

Fairness's law, that a project will expand to take up the time available for it, does not respect titles such as court, judge or arbitrator. It claims even the best-intended of powers to procrastinate no matter what the title. What to do about it.

## HOW MANY ARBITRATORS?

There are advantages to having a dispute settled by a panel of arbitrators. For example, a panel of three arbitrators is capable of supplying a better balance of experience than a single arbitrator. In the arbitration of a chemical patent case, for example, the panel could comprise a chemist, a businessman, and a patent lawyer. In a construction controversy, the panel could be chosen to include an architect, a contractor, and a lawyer or profes-

sion. Also it has been argued that the judgment of a panel of arbitrators is of higher quality due to the debate and interaction between the arbitrators. And, the judgment of a panel of three may still accept criteria that might be present in the judgment of an individual neutral.

Another sometime advantage of a three person panel is quickness in the appointment process. Arbitrators may be efficiently designated if each party appoints one arbitrator<sup>1</sup> and the third is appointed by those two or an agency like the CIP or AAR. The extensive studies of possible reasons that parties commonly include in big cases involving a sole arbitrator, are both expensive and time-consuming and to some degree are avoided by this process.

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As a result of these and other factors many parties involved in arbitration, as ignorance of counter-factors, limit the use of three arbitrators. Parties should be aware of the advantages of using one or two arbitrators and the disadvantages of using three.

One reason for using a single arbitrator is cost in time and money which, surprisingly to some, is much more than just twice the arbitrator fees. In simple, one-day-hearing cases, the cost difference between one and three arbitrators is likely to be modest enough. But in a complex international case with a several month, three are much less efficient than one. The total cost with three arbitrators may be 10 times greater in money and 22 or 24 months longer in time than with one arbitrator. Shocking, perhaps, but true. You should know it when making your election.

#### ■ Scheduling ■

One reason for this border in time and money is that scheduling difficulties are reduced markedly greater by three arbitrators than for one. This is especially true when the arbitrators are knowledgeable, desirable and have busy people, and especially in international cases and cases with many unusual oral or paper. Scheduling problems don't merely multiply by three with three arbitrators. Scheduling problems go up exponentially with the number of people involved.

Another reason arbitration proceedings may be unduly prolonged is because any arbitrator is reluctant to limit discovery or to truncate examination for fear that one of his fellow arbitrators may utilize learning from the presentation or otherwise may not choose a cut-off. In contrast, a single arbitrator is prone to expedite the hearing by ending discovery or examination as a

particular point when he is satisfied that fairness has been accomplished as to that point.

Another reason for the disincliny increased time occupied by three-person arbitrators is that three arbitrators are almost never likely to assume the role of case manager and expedite. One typical result of this is that the case is prolonged by the slow pace of needed discovery or by slow deliberational discovery and failure to schedule the case early in the proceeding.

Three-man case management is a problem compounded when each arbitrator has a different view and the three meet for the first time over the telephone after they were appointed. They need to get along. Each needs to be viewed as fair and open minded by his fellow panel members. This group dynamic discourages collectively making the tough decisions required for responsible case management that any one of them likely would make alone.

One way three arbitrators can be more effectively employed is to assign case management, committee, expedite duties solely to a chairman. His fellow arbitrators must know that he alone issues case management orders.

Another idea is to specify two, rather than three, arbitrators, in any example, possibly the largest arbitrator in history, the billion-dollar IBM vs. Fujitsu software case, was handled by two arbitrators. You get the balance of a second brain and the group dynamic remains much more efficient. Of course, you worry about the two disagreeing, but there is good reason to suspect that two worry about that excessively. One-on-one, the two essentially alone, will get together by compromising their differences.

Finally, how much better justice do you really get from three in comparison with one qualified neutral? It is impossible to achieve perfect justice. In the closer cases, the decisions can be a matter of hair. The predictability of odds of improving odds reflects are not materially improved for either side by an election to carry the often-errant business and pay the many hidden costs of having three arbitrators rather than one.

#### THE EXPERIENCE AND MANAGEMENT CLAIMS IN THE CONTRACT TO ARBITRATE

Recall that Time is important to the Parties.

A contract recitation that time is important to the parties is valuable in its own right as a modest hint for timely resolution of the dispute. But it is more than that.

The recitation is important in terms of foundation for other provisions to be mentioned later, and in terms of giving the anxious party and the arbitrator a goal to aim on the other participants when they become dilatory in almost automatically they will. Something like:

*Prompt disposal of the dispute is important to the parties. Therefore, the parties agree that the resolution of this dispute shall be conducted expeditiously, in the end that final disposal of it shall be accomplished in 30 days or less.\**

#### Get the Arbitrators to Commit

Requires the arbitrators to agree:

1. I agree that available for the timely handling of this dispute to final disposal in 30 days.
2. I agree to give adequate priority of claims on my time to this dispute by which to get it disposed of in 30 days.
3. Any motion now submitted to me shall be determined expeditiously as is feasible, normally within seven working days.
4. The final award shall be rendered as expeditiously as is feasible, but in all events within 30 working days after the close of evidence and any oral evidence briefing and arguments that may be agreed upon.

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\* The phrase "in 30 days" may be placed in a similar phrase in a demand, always stating clearly the desired manner when modification of one or more contractual provisions of the arbitration clause obliges arbitrator participation later.

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times three in your case, that is, quarterly, always enough to be disruptive. And the time and cost it may save is potentially great — months of time and tens of thousands of dollars.

#### Motivating Incentives for a Timely Award

In most arbitrations there is no pressure or incentive pushing the arbitrator to prompt preparation of their award, initiated or not. Parkinson's law works. The arbitrator gets involved in other work and procrastinates. The longer the award becomes, the longer they procrastinate. The arbitrator need to be pressured. How do I know? I've been there.

Consider offering the arbitrator a \$1,000 bonus (or their fee if their award (prepared or not) is rendered within 30 days of the close of evidence or any agreed to post-evidence trials, and/or consider demanding \$1,000 reduction in their fee if the award is not rendered within 30 days<sup>11</sup> of the close of evidence or any agreed to post-evidence trials.

And/or perhaps an explicit reduction in the arbitration fee by 10%

each month in fraction of a week over 30 days, that the award rendition is delayed after close of evidence or post-evidence trials. But in the big, complex case, be wary. If the arbitrator should fail to meet the deadline, and lose most or all their fee, what is their incentive? Do you need, after loss of all fees, a \$1,000-week fine per week until the award is rendered to be paid by such arbitrator? For some cases such a clause.

In the case of arbitrations administered by some agency such as the ILC or AAA,<sup>12</sup> the award may be reviewed by the agency and remanded for reconsideration or revision, or revised by the agency to include costs due the agency and then reviewed by the New York office. This run-way procedure almost always takes weeks, often months in the case of the ICC. This delay is non-sense-imprisoned people may have ad hoc arbitration over administered arbitration.

In any event your drafting award accommodate the time for the administrative review of those agencies that perform such a service.

Also, if you seek such penalty clauses, you will experience some arbitrators from agency presented to whom such clauses are stronger beyond their authority. You may

have to use ad hoc arbitration if you want such clauses.

#### Selection of Arbitrator

Not infrequently it takes six months to get a panel of arbitrators selected. It doesn't seem that it should, but it does. You must plan your attack to keep it from happening in your case.

A court recently stated it stayed a court action pending the arbitration because the ICC was set up to get the award out within six months. The three arbitrators were not empanelled until the 100th day.

So in exploring ways to save time, cross-examine the experience being the time of the administrative agency that is helping you and of the method of selection that preoccupies

#### Agency Incentive to Time

Some otherwise excellent arbitration agencies were irresponsibly insensitive to time consumption all along the way. The International Chamber of Commerce and the London International Chamber of Commerce Court of Arbitration are among those accused of not being harsh on those who delay.

So, take note.

If you realize the proportions of the problem of delay (and address it, your imagination will suggest still other sources of delay and how to inhibit delay from that source.

<sup>11</sup> I added to "Time Shapers"  
<sup>12</sup> American Arbitration Association.