

Large, Complex Commercial Disputes Procedures with Commentary

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LARGE, COMPLEX COMMERCIAL DISPUTES PROCEDURES WITH COMMENTARY

L-1. Administrative Conference

Prior to the dissemination of a list of potential arbitrators, the AAA shall, unless the parties agree otherwise, conduct an administrative conference with the parties and/or their attorneys or other representatives by conference call. The conference will take place within 14 days after the commencement of the arbitration. In the event the parties are unable to agree on a mutually acceptable time for the conference, the AAA may contact the parties individually to discuss the issues contemplated herein. Such administrative conference shall be conducted for the following purposes and for such additional purposes as the parties or the AAA may deem appropriate:

- (a) to obtain additional information about the nature and magnitude of the dispute and the anticipated length of hearing and scheduling;
- (b) to discuss the views of the parties about the technical and other qualifications of the arbitrators;
- (c) to obtain conflicts statements from the parties; and
- (d) to consider, with the parties, whether mediation or other non-adjudicative methods of dispute resolution might be appropriate.

Commentary

The AAA attempts to conduct administrative conferences on every large, complex case prior to the arbitrator's appointment. These conferences are conducted over the telephone and are arranged by the case manager. Administrative conferences usually involve only the parties' representatives and the case manager or other AAA representative. In order to expedite large, complex cases, the conference will be held within 14 days of the commencement of the arbitration. If the parties are unable to agree upon a mutually acceptable time for the conference, the AAA can contact the parties individually to discuss administrative issues. In this way, the large, complex case administrative issues are dealt with early in the process, allowing the arbitration to proceed quickly and efficiently.

The administrative conference is the best place for the parties to address any administrative issues with both the other party or parties and the AAA. Below are some examples of typical issues addressed during

an administrative conference. Parties should not feel constrained by these examples and the parties are encouraged to raise any other administrative issues that will improve the AAA's administration of their case. Typical issues include:

- status of any settlement discussions;
- specifications of claims and counterclaims;
- estimated number of hearing days;
- date(s), time(s), and place for hearing;
- number and qualifications of arbitrators;
- exchange of information;
- stenographic record;
- the possibility of mediation.

L-2. Arbitrators

(a) Large, Complex Commercial Cases shall be heard and determined by either one or three arbitrators, as may be agreed upon by the parties. If the parties are unable to agree upon the number of arbitrators and a claim or counterclaim involves at least \$1,000,000, then three arbitrator(s) shall hear and determine the case. If the parties are unable to agree on the number of arbitrators and each claim and counterclaim is less than \$1,000,000, then one arbitrator shall hear and determine the case.

(b) The AAA shall appoint arbitrator(s) as agreed by the parties. If they are unable to agree on a method of appointment, the AAA shall appoint arbitrators from the Large, Complex Commercial Case Panel, in the manner provided in the Regular Commercial Arbitration Rules. Absent agreement of the parties, the arbitrator(s) shall not have served as the mediator in the mediation phase of the instant proceeding.

Commentary

If the parties' arbitration agreement does not specify the number of arbitrators, and the amount of each claim or counterclaim less than \$1,000,000, one arbitrator is appointed to hear the case. If the parties' arbitration agreement does not specify the number of arbitrators, and the amount of the claim or counterclaim is at least \$1,000,000, three arbitrators are appointed to hear the case. Of course, the parties are always free to agree on the number of arbitrators after the case is filed, even if the agreement does not specify the number of arbitrators

Parties may appoint as arbitrator anyone to whom they mutually agree. The arbitrator need not come from the AAA's Large, Complex Case Panel. If the arbitration provision of the parties' contract specifies the method for arbitrator selection and/or the qualifications the arbitrator must have, the AAA follows that method unless the parties subsequently agree otherwise.

When arbitrators are to be selected from the AAA's Large, Complex Case Panel, the AAA compiles the list from members of the panel who are knowledgeable in the subject matter of the dispute. The list is accompanied by the resumes of each proposed arbitrator.

L-3. Preliminary Hearing

As promptly as practicable after the selection of the arbitrator(s), a preliminary hearing shall be held among the parties and/or their attorneys or other representatives and the arbitrator(s). Unless the parties agree otherwise, the preliminary hearing will be conducted by telephone conference call rather than in person. At the preliminary hearing the matters to be considered shall include, without limitation:

- (a) service of a detailed statement of claims, damages and defenses, a statement of the issues asserted by each party and positions with respect thereto, and any legal authorities the parties may wish to bring to the attention of the arbitrator(s);
- (b) stipulations to uncontested facts;
- (c) the extent to which discovery shall be conducted;
- (d) exchange and premarking of those documents which each party believes may be offered at the hearing;
- (e) the identification and availability of witnesses, including experts, and such matters with respect to witnesses including their biographies and expected testimony as may be appropriate;
- (f) whether, and the extent to which, any sworn statements and/or depositions may be introduced;
- (g) the extent to which hearings will proceed on consecutive days;
- (h) whether a stenographic or other official record of the proceedings shall be maintained;
- (i) the possibility of utilizing mediation or other non-adjudicative methods of dispute resolution; and
- (j) the procedure for the issuance of subpoenas.

By agreement of the parties and/or order of the arbitrator(s), the pre-hearing activities and the hearing procedures that will govern the arbitration will be memorialized in a Scheduling and Procedure Order.

Commentary

A preliminary hearing is extremely beneficial for getting a case on the right course at an early stage in the arbitration process. Unless the parties request an in-person hearing, the preliminary hearing is conducted via conference call arranged by the AAA case manager. The case manager assigned to the case will likely participate to offer procedural guidance. Based on information provided by the arbitrator, the case manager prepares and distributes a written confirmation of all arrangements agreed to during the preliminary hearing.

If any party feels it has serious discovery needs, a preliminary hearing is usually the best forum in the arbitration process for seeking relief. Typical issues addressed in a preliminary hearing are:

- specification of claims and counterclaims;
- identification of any affiliated, related, or successor persons or entities;
- stipulation of uncontested facts;
- information to be exchanged and a schedule for the exchange (including reports from experts);

- lists of witnesses with outlines of testimony (including biographies and reports of expert witnesses);
- advance filing and advance identification of exhibits (schedules for filing of affidavits or conducting depositions);
- estimated length of case (i.e., number of hearing days);
- schedule of evidentiary hearings;
- number of copies of exhibits to be made;
- whether or not briefs (post- or pre-hearing) will be necessary;
- form of the award (e.g., reasoned award);
- whether or not the parties are interested in utilizing mediation or other non-binding dispute resolution mechanisms;
- procedures for the issuance of subpoenas.

At the beginning of the preliminary hearing, the arbitrator will most likely explain to the parties the purpose of the hearing and clearly indicate what they expect to accomplish during the preliminary hearing.

Below is a list of items arbitrators will generally go over with the parties:

1. *Statement of Claims and Issues:* Arbitrators may give the parties an opportunity to describe the subject of the dispute briefly, which issues are expected to be resolved, and other brief comments that will educate them about the issues to be decided.

2. *Specification of Claims and Counterclaims:* Arbitrators will encourage the parties to specify their claims and counterclaims, quantify the amount of damages associated with each segment of their respective claims, and provide such information about their claims to the AAA. A firm date should be set for exchanging the specifications and filing them with the AAA.

3. *Estimated Length of the Case and the Scheduled Hearings:* At the preliminary hearing, the parties should be prepared to give a realistic estimate as to the number of hearing days needed to present their respective cases, and they should be ready to agree to a schedule for the evidentiary hearings as soon as feasible. Keeping in mind that a prompt award is an important part of the arbitration process, arbitrators will encourage the scheduling of consecutive hearing days, including evenings or weekends if necessary (where permitted by law).

This is also the point at which arbitrators will want to speak about how the evidentiary hearing will be conducted. Arbitrators may want to advise the parties that documents and/or pictures should be self-identifying wherever possible and that the presentation of repetitious testimony and evidence will not be viewed favorably. Whatever other timesaving devices arbitrators think will expedite the arbitration are indicated at this time. Finally, full hearing days will be scheduled with minimal lapses for lunch and breaks. Arbitrators will make it clear that requests to postpone scheduled hearings will be granted only for good cause.

4. *Exchanging of Information and a Schedule for the Exchange (Including Reports from Experts):* Arbitrators will inform the parties that they are required to cooperate in committing to, conducting

and completing an exchange of information concerning their documents and witnesses. If parties do not agree to exchange particular information, arbitrators will hear their disagreement and make a ruling on the issue. When the information to be exchanged has been specified, arbitrators will set the date and method for the exchange.

5. *Advanced Filing and Advanced Identification of Exhibits:* Arbitrators may inform the parties that they will be required, pursuant to Section L-4 (e) of the rules, to identify and exchange exhibits in advance of the evidentiary hearing. A firm date will be set for the filing and exchange, normally ten business days prior to the hearing. It will save time and effort if the parties know how many copies of exhibits and other evidence to provide (enough for each arbitrator and each party). Arbitrators may encourage the parties to submit their exhibits in tabbed "exhibit notebooks" for easy reference.

6. *Lists of Witnesses with Outlines of Testimony (Including Biographies of Expert Witnesses):* Arbitrators will inform the parties that they will be required to provide each other with lists of intended witnesses, arranged in the order in which they will be called. Among other things, this helps arbitrators identify potential disclosures prior to the hearing. A summary, by name, for each witness, with the subject matter of the anticipated testimony of each, should also be submitted. A firm date will be set for the exchange.

7. *Supplemental Issues: Stipulation of Uncontested Facts* - Any facts to which the parties can stipulate should be reduced to writing. The arbitrator(s) may set a procedure for developing such a stipulation with a deadline established for the preparation, execution, and filing of same with the AAA. Briefs Arbitrators may discuss whether briefs will be required. This applies to both pre-hearing and post-hearing briefs. Pre-hearing briefs are usually a luxury and may only be needed on extremely complex cases. Some arbitrators find concise (five pages or less) position papers useful. Post-hearing briefs are often beneficial for summary and final identification of issues. They will also often provide arbitrators with the opportunity to see if the parties made any increases in their claims or counterclaims. When such changes are indicated in a party's brief, arbitrators will notify the case manager immediately as it will likely impact the administrative fee the party must pay. When briefs are to be filed, arbitrators will set a firm date for their filing and exchange. Briefs are to be filed with the AAA for transmittal to the arbitrator. Also, if arbitrators think it appropriate, they may set a page limit on the length of the briefs.

8. *Form of Award:* Arbitrators are not required to provide a reasoned award *unless* all parties have made such a request, in writing, prior to their appointment or unless arbitrators determine that a reasoned award is appropriate.

9. *Concluding Remarks:* At the conclusion of the preliminary hearing, arbitrators will likely reiterate their intention to move the arbitration to a fair and speedy conclusion.

10. *Scheduling and Procedure Order:* Arbitrators will advise the parties that the AAA case manager will provide them with a confirmation of all arrangements made at the preliminary hearing.

L-4. Management of Proceedings

(a) Arbitrator(s) shall take such steps as they may deem necessary or desirable to avoid delay and to achieve a just, speedy and cost-effective resolution of Large, Complex Commercial Cases.

(b) Parties shall cooperate in the exchange of documents, exhibits and information within such party's control if the arbitrator(s) consider such production to be consistent with the goal of achieving a just, speedy and cost-effective resolution of a Large, Complex Commercial Case.

(c) The parties may conduct such discovery as may be agreed to by all the parties provided, however, that the arbitrator(s) may place such limitations on the conduct of such discovery as the arbitrator(s) shall deem appropriate. If the parties cannot agree on production of documents and other information, the arbitrator(s), consistent with the expedited nature of arbitration, may establish the extent of the discovery.

(d) At the discretion of the arbitrator(s), upon good cause shown and consistent with the expedited nature of arbitration, the arbitrator(s) may order depositions of, or the propounding of interrogatories to, such persons who may possess information determined by the arbitrator(s) to be necessary to determination of the matter.

(e) The parties shall exchange copies of all exhibits they intend to submit at the hearing ten business days prior to the hearing unless the arbitrator(s) determine otherwise.

(f) The exchange of information pursuant to this rule, as agreed by the parties and/or directed by the arbitrator(s), shall be included within the Scheduling and Procedure Order.

(g) The arbitrator is authorized to resolve any disputes concerning the exchange of information.

(h) Generally hearings will be scheduled on consecutive days or in blocks of consecutive days in order to maximize efficiency and minimize costs.

Commentary

To effectively present one's case, parties sometimes need documentary or other evidence in the opposing party's possession. Under this section of the rules, arbitrators have the explicit authority to control the production of documents and discovery requests of the parties. Arbitrators at all times retain the power to resolve any disputes concerning the exchange of information. Arbitrators will typically follow the below "general rules" listed below in managing this aspect of the arbitration process:

' Limit information requests only to information relevant to the dispute, and

' Limit the time frame within which the information exchange must be conducted and concluded. For example, "all information must be exchanged within two weeks from today," or "all information must be exchanged 21 days prior to the start of the hearing," etc.

Under this section, the parties must also exchange, at least ten business days before the hearing, copies of all exhibits they intend to submit at the hearing.

Upon good cause shown, the arbitrator(s) are also authorized to order depositions of, or the propounding of interrogatories to, such persons who may possess information determined by the arbitrator(s) to be necessary to determination of the matter.

All of the arbitrator(s) determinations and/or parties' agreements regarding the exchange of information shall also be included within the Scheduling and Procedure Order.

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