A Preliminary Hearing Is Not Enough: Tips for a Well-Managed Arbitration

Guidance for arbitrators, attorneys and parties on how to conduct an orderly arbitration.

By Michael Chambers

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A preliminary hearing is a required first step in most arbitrations to ensure that the process is orderly and efficient. This hearing, however, is not enough to ensure a timely arbitration that will meet the goal of holding the final hearing within one year of the filing of the demand. This article provides insights and tips on critical issues that help meet this goal: hands-on management by the arbitrator, a comprehensive scheduling order, and a pre-hearing conference one week before the final hearing to resolve any remaining problems. Although this article is written for arbitrators, it should hold as much interest for attorneys and parties in the process.

1. Issue a Comprehensive Scheduling Order

The arbitrator must issue a scheduling order setting deadlines for the completion of all the critical steps in the pre-hearing phase of the arbitration. There are several issues in this phase that affect the hearing on the merits. These include the identification of claims, defenses and counterclaims; the calculation of damages; arbitrability and jurisdiction of the arbitrator; the exchange of relevant documents; the deposition of key witnesses, if allowed or agreed; and the retention of experts, the taking of their depositions, if needed and permitted by the arbitrator, and the exchange of expert reports. If any one of these issues is not handled in a timely way because of missed deadlines, the entire schedule can fall apart because most of these issues are linked. Once there is even one missed deadline, the agreed date for the final hearing may not work. Then, the arbitrator has not helped deliver on the promise that arbitration will be faster and less expensive than litigation.

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Reasonable deadlines in the scheduling order are not enough. Success in keeping to the schedule requires getting into more detail at the first preliminary hearing so that a detailed scheduling order can be prepared. You must make sure that counsel and the parties meet them. No arbitrator wants to be accused of turning a preliminary hearing into a federal pre-trial conference. But, no arbitrator wants to receive a request for a continuance weeks before the evidentiary hearing because deadlines for document production did not occur, which in turn delayed the depositions, which then side-tracked the timing and choice of experts. You know the problem.

2. Nail Down the Claims, Damages, Counterclaims and Defenses

Here are a few suggestions for the preliminary hearing to help address some of these potential problems. For example, start by asking each side if the claims, counterclaims, defenses and damages have been sufficiently outlined in the Demand and Answer. If not, give each side a short period of time to confirm the claims or counterclaims and then answer consistent with the applicable rule governing responses. A short period of time could be 10 days or even less, depending on the complexity of the case. The goal is to make sure everyone has notice of the issues before the document exchange, the depositions, the selection of experts and the hearing on the merits. For these reasons, you want the attorneys and their clients to decide early what the case is about and stick to it, unless some new claims legitimately arise from new information.

3. Establish Reasonable Limits on Discovery

Most parties agree to some level of discovery even if, as in the current American Arbitration Association Commercial Arbitration Rules, none is specifically permitted, apart from the document exchange. But, even if the attorneys agree on how much discovery, the arbitrator has the responsibility to ensure that it does not get out of control. As a result, the arbitrator should specifically ask how much discovery is really needed and on what topics. You must establish reasonable limits. If the parties want to serve document requests to facilitate the document exchange, then ask about the type of information and the scope of the requests. For example, you can determine whether electronically stored information can be produced in electronic format, or whether a hard copy of everything must be produced. You can ask at this point if there are any anticipated areas in which a discovery dispute is expected. If there are, you may be able to decide these issues or give the parties guidance before valuable time is lost. Establish firm dates for submitting document requests and responses. Then, in your order, direct the parties to immediately contact the arbitration provider's case manager to set up a conference call with you in the event of a dispute.

4. Identify Depositions and Calendar Them

Next, if the rules permit depositions, or if the parties agree to take them, during the preliminary hearing, ask each side how many they need, the names of the persons to be deposed, how long each deposition should take, where the depositions will be taken and in what order. Asking all these questions may be overkill in simple cases where the attorneys appear to work well together, but it is absolutely necessary in hard fought and acrimonious cases. Once these points are discussed, you are in a position to set reasonable limits on discovery in the scheduling order. This can head off any fights before they start. Then, calendar the deposition dates. These dates will naturally follow deadlines for filing production requests and responding to them.

Success in keeping to the scheduling order requires the arbitrator to go into more detail at the first preliminary hearing so that a detailed scheduling order can be prepared.

In the scheduling order, direct the parties to contact the case manager or you immediately in the event that any deadline is not met. If the parties comply, you will have the ability to resolve the problem and keep everyone on track.

5. Plan for Experts Even If the Parties Say They Don't Need Them

During the preliminary hearing, ask if there will be experts. Even if the attorneys say that experts are not anticipated, plan for them anyway. Set a date for identifying experts, since an expert disclosed late in the process can wreak havoc. No attorney or client likes to be ambushed by a new opinion. Also, set the date for the filing of an expert report by each one. The dates should be

well in advance of the final hearing. Make sure the scheduling order requires the report to state the expert's background, the specific opinions to be offered at the hearing and the facts upon which those opinions are based.

6. Schedule the Completion of Key Activities Well Before the Hearing on the Merits

There are still a few things to plan for in the scheduling order that left undone can torpedo the final hearing. Do not ask counsel how much time is needed to hear the case. If you do, they will tell you how much time it should take. Instead, ask each attorney how much time he or she needs to present the client's case and cross-examine the other side's witnesses. When you total each side's response you may have a better idea of the truth. Hold the attorneys to that number and put their conclusions in the scheduling order. But just in case, add an additional day. There are two good reasons to do this. First, you do not want to run out of time and have to schedule more hearing days in the future. It could be another four months before everyone is available again. Second, if you have a three-person panel, the additional day can be used for deliberations and to write a preliminary draft of the final award.

Here are my recommended due dates for some other critical items, including subpoenas and exhibit exchanges. Setting the dates sufficiently in advance of the hearing on the merits allows for a more orderly hearing. For sending subpoenas to the arbitrator for signature, I recommend 30 calendar days before the final hearing; for the physical exchange of exhibits, exhibit lists, and witness lists in the anticipated order of call, I suggest 21 calendar days before the hearing; and for written objections to exhibits and service of subpoenas, I recommend 14 calendar days before the hearing. The early completion of these activities should be routine. If any one of them is not completed before the hearing, you will hear about it at the beginning of the final hearing and have to spend the first couple of hours trying to resolve the problem. Using hearing time to resolve pre-hearing matters could make you run out of time before both sides have completed their presentations.

7. Schedule a Final Pre-Hearing Conference Before the Hearing on the Merits

During the preliminary hearing, schedule a final pre-hearing conference call. I find it works best to schedule this conference roughly one week before the commencement of the final hearing. Include this conference in the initial scheduling order, along with the purpose of the call, which will address, and hopefully resolve, any remaining issue concerning exhibits, witnesses or subpoenas.

In my opinion there is no better way to invest your time after you have issued the scheduling order than in the final pre-hearing conference call. It is similar to the pre-trial conference held in federal court, but without all the homework.

When the final pre-hearing conference call is held, all of the items to be exchanged or served will be completed if the parties adhered to the due dates in the scheduling order. But if there is a problem, you have one week to resolve it. Then, one week later when the final hearing starts, you can immediately begin to hear opening statements or the first witness, not a litany of complaints.

Recommended Due Dates for Routine Activities in Arbitration

- Exhibits and exhibit lists: physically exchange them 21 days before final hearing.
- Witness lists in the anticipated order of call: exchange them 21 days before final hearing.
- Witness subpoenas: send to panel for signature 30 days before final hearing; serve them 14 days before the final hearing.
- Written objections to exhibits: submit them 14 days before final hearing.

Conclusion

A well-managed, orderly process is critical to ensure that arbitration is faster and less expensive than litigation. This can be accomplished with a thorough preliminary hearing conference that includes hands-on management by the arbitrator, a comprehensive scheduling order, and a pre-hearing conference one week before the final hearing to resolve any remaining problems. Many steps in the pre-hearing phase of arbitration are interdependent. If one is delayed, the others can be as well. This can delay the final hearing. By using these recommendations, the final hearing should take place as scheduled and be completed in an orderly manner within the allotted time. ■